UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

NORTH METRO HARNESS INITIATIVE LLC d/b/a RUNNING ACES, Plaintiff, v. KEITH ANDERSON; MICHAEL BEATTIE; CRAIG BEAULIEU; RAYMOND BRENNY; SHELLEY BUCK; CONSTANCE CAMPBELL; MICHAEL CHILDS JR; LORI COLLING; ASHLEY CORNFORTH; REBECCA CROOKS-STRATTON; DON DAMOND; LEANA DEJESUS; LEE DILLARD; ALISON FOGARTY; TIM GENIA; IAN GORRIE; SCOTT HANSON; MICHAEL HEAVNER; ANGELA HEIKES; ROXANNE HEMMING; MICHAEL JANKOVIAK; GRANT JOHNSON; JOHNNY JOHNSON; RONALD JOHNSON; DUSTIN GOSLIN; NOAH HIRSCH; KYLE KOSSOL; RYAN MCGRATH; KEVIN MCNAIR; VALENTINA MGENI; COLE MILLER; JOE NAYQUONABE, JR.; SHAWN O'KEEFE; LON ODONNELL; DAYNA PEARSON; KYLE PETERSON; SAM ROOK; ROBERT SAWYER; LES SCHMOLKE; CHARLES VIG; DENNIS WALKER; RONDA WEIZENEGGER, all in their individual and official capacities, Defendants.	Court File No. 24-cv-1369 (JWB/LIB) **SMSC OFFICIALS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS**

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INTRODUCTION

The Shakopee Mdewakanton Sioux Community ("SMSC") has operated video games of chance pursuant to the Indian Gaming Regulatory Act ("IGRA") since 1989. 18 U.S.C. § 1166-68, 25 U.S.C. § 2701-21. The operation of video games of chance by the SMSC is permitted under IGRA because it is conducted according to a Gaming Ordinance that was approved by the National Indian Gaming Commission ("NIGC"),[1] it is located in a State that permits such gaming,[2] and it is conducted in conformance with the Tribal-State Compact for Control of Class III Video Games of Chance on the Shakopee Mdewakanton Sioux Community Reservation in Minnesota (the "Gaming Compact").[3] 25 U.S.C. § 2710(d)(1).

IGRA provides "a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences…" *Id*. at § 2702(2). The SMSC and its officials have relied on the Gaming Compact, Gaming Ordinance, and Minnesota law to operate video games of chance without incident for nearly 35 years.

Despite no change in law, Running Aces asks the Court to declare that video games of chance are suddenly illegal for tribes to operate and to enjoin the offering of such gaming by the SMSC. Running Aces relies on a single argument, thus far not

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

[2] *See generally* https://www.lrl.mn.gov/edocs/edocs?oclcnumber=37235262.

[3] https://dps.mn.gov/divisions/age/gambling/Pages/tribal-state-gaming-compacts.aspx.

supported by any authority, that Minnesota law categorically prohibits video games of chance for everyone, including Indian tribes, which, in turn violates IGRA and the Racketeer Influenced and Corrupt Organization Act ("RICO"). Running Aces' argument, if accepted, implicates the SMSC by upending longstanding legal principles incorporated in the Gaming Compact and the Gaming Ordinance, both of which received federal approval long before 2020.

The only alleged predicate act is Running Aces' unsupported and belated interpretation that Minnesota law prohibits video games of chance for all. To the contrary, Minnesota law continues to authorize Indian tribes to operate video games of chance pursuant to gaming compacts negotiated in accordance with IGRA. Further, Running Aces' unprecedented effort to invalidate the SMSC's authority to offer video games of chance intentionally excludes the sovereign parties to the Compact and Gaming Ordinance.

The SMSC, other tribes, and Minnesota are the real parties in interest to any challenge to video games of chance authorized by their gaming compacts. Each possesses sovereign immunity from suit. Running Aces asks the Court to circumvent sovereign immunity by litigating the SMSC's sovereign rights under IGRA, the Gaming Compact, and Gaming Ordinance against SMSC officials. But Running Aces admits, repeatedly, that each SMSC official has acted within their employment responsibilities as a leader for the SMSC. The officials' only alleged failure is not complying with Running Aces' erroneous interpretation of Minnesota law governing video games of chance. Ultimately,

the SMSC officials share in the SMSC's sovereign immunity from suit and possess other forms of immunity.

The SMSC's current elected officials (Chairman Cole Miller and Secretary/Treasurer Ashley Cornforth), former elected officials (Chairman Charles Vig, Chairman Keith Anderson, and Secretary/Treasurer Rebecca Crooks-Stratton), current gaming officials (Angela Heikes; Tim Genia; Noah Hirsch; Kyle Peterson; Sam Rook; Lee Dillard; Lori Colling; and Alison Fogarty), and former gaming officials (Don Damond; Kyle Kossol; Dennis Walker) (collectively "SMSC Officials") file this memorandum of law in support of their motion to dismiss Running Aces' Amended Complaint for lack of jurisdiction, for failure to state a claim upon which relief can be granted, and for failure to join a required party whose joinder is not feasible pursuant to Fed. R. Civ. P. 12(b)(1), (b)(6), and (b)(7).

BACKGROUND

Prior to 1989, Minnesota law authorized the possession and operation of video games of chance in bars and restaurants across the state. 1984 Chapter 654, Art. 3. On April 19, 1989, Minnesota enacted legislation that authorized the Governor to negotiate gaming compacts with Indian tribes pursuant to IGRA. 1989 Chapter 44, § 1, Minn. Stat. § 3.9221. On June 2, 1989, the Governor signed a law making it a gross misdemeanor to provide "any compensation for game credits earned on or otherwise rewards players of video games of chance as defined under Section 349.50, Subdivision 8." 1989 Chapter 334, Art. 6, § 9. That same law acknowledged that Indian tribes had already been offering

video games of chance in the state and an exception was created to permit Minnesota to negotiate a gaming compact related to video games of chance.

> Section 9 may not be construed as prohibiting the State from entering into a Tribal-State Compact under the provisions of the federal gaming regulatory act, Public Law No. 100-497, as it relates to video poker or video blackjack gaming of chance currently operated by Indian tribes in this State.

Id. at § 14.

"On July 14, 1989, Governor Perpich appointed a three-member committee to negotiate with the Indian Bands and Communities . . . [and] [t]he Attorney General was appointed legal counsel to the committee." *Report to the Legislature on the Status of Indian Gambling in Minnesota*, Sept. 5, 1991, p. 16.[4] The original negotiating committee "indicated its willingness to negotiate and enter into compacts governing Class III video games of chance and, perhaps at a future date, lotteries." *Id.*

On October 23, 1989, Congress enacted a Public Law that provided, among other things, that electronic or electromechanical facsimiles of any game of chance or slot machines of any kind operated by Minnesota tribes will be deemed a Class II game for a period of one year:

> Notwithstanding any other provision of law, the term 'Class II gaming' in Public Law 100-497, for any Indian tribe located in the State of Minnesota, includes, during the period commencing on the date of enactment of this Act [Oct. 23, 1989] and continuing for 365 days from that date, any gaming described in section 4(7)(B)(ii) of Public Law 100-497 that was legally operated on Indian lands on or before May 1, 1988, if the Indian tribe having jurisdiction over the lands on which such gaming was operated, requested the State of Minnesota, no later than 30 days after the date of enactment of Public Law 100-497 [Oct. 17, 1988], to negotiate a tribal-state compact pursuant to section 11(d)(3) of Public Law 100-497.

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4 https://www.lrl.mn.gov/edocs/edocs?oclcnumber=37235262.

Pub.L. 101-121, Title I, § 118, Oct. 23, 1989, 103 Stat. 722. Congress clearly understood that video games of chance were the proper subject for a Class III gaming compact in Minnesota.

The Gaming Compact was duly executed on December 4, 1989. The Gaming Compact specifically explained each sovereigns' respective position should the Minnesota legislature amend its laws in the future to prohibit the operation of video games of chance for all purposes:

> . . . It is the intent of the state that, if the Minnesota legislature prohibits the operation or use of video games of chance for all purposes as against public policy and as a matter of criminal law, this section shall not be construed to provide for continued operation by the Community of video games of chance pursuant to this compact. It is the intent of the Community that, if the Minnesota Legislature prohibits the use of video games of chance for all purpose as against public policy and as a matter of criminal law, this section shall not be construed to prohibit the continued operation by the Community of video games of chance pursuant to this compact.

§ 2.1, Gaming Compact. Minnesota has not amended its laws to prohibit video games of chance for all purposes by all persons.

In 1990, the Minnesota Legislature repealed the laws that authorized the conduct of video games of chance for non-tribal license holders. Minn. Stat. § 349.61. The law included a savings clause specifying that the repeal did not affect the validity of any Tribal-State Compact:

> Nothing in subdivision 1 [the repeal of video games of chance] is intended to affect the validity of any compact entered into before or after the effective date of this section between the state and the governing body of an Indian tribe that governs the conduct of any form of gambling on Indian lands.

Minn. Stat. § 349.61, subd. 2. Minnesota law also provides that a licensed distributor may "sell, market, rent, lease, or otherwise provide, in whole or in part, a gambling device only to . . . the governing body of a federally recognized Indian tribe that is authorized to operate the gambling device under a tribal state compact." Minn. Stat. § 299L.07, subd. 2a(b). A "Gambling device also includes a video game of chance." Minn. Stat. § 609.75, subd. 4.

Today, Minnesota law continues to permit Indian tribes to operate video games of chance pursuant to a Tribal-State Compact. Running Aces' allegations to the contrary lack due diligence and are frivolous.

ARGUMENT

The claims brought against the SMSC Officials should be dismissed for three reasons. First, the SMSC, Minnesota, and other tribes in Minnesota are required parties who cannot be joined. Second, this Court lacks subject matter jurisdiction due to the SMSC Officials' sovereign immunity. Third, even if this Court had jurisdiction, Running Aces fails to state a claim because the SMSC Officials possess absolute immunity, qualified immunity, and Minnesota law expressly permits Indian tribes to offer video games of chance. Further, IGRA controls and does not provide a private cause of action and RICO cannot be used to circumvent the remedies withheld by IGRA.

I. THE COMPLAINT MUST BE DISMISSED FOR FAILURE TO JOIN REQUIRED PARTIES

Running Aces understands it cannot sue the SMSC and that IGRA does not provide it with a private cause of action. So, Running Aces names the SMSC Officials

and slaps a RICO label on a matter controlled by IGRA. But IGRA, the Gaming Compact, and the Gaming Ordinance demand that the sovereigns are required parties.

A. The SMSC, Minnesota, and other Tribes in Minnesota are Required Parties Under Rule 19(a)

The SMSC, the State of Minnesota, and other Indian tribes in Minnesota (collectively the "Sovereign Parties") are required parties. Dismissal of a lawsuit under Rule 19 is particularly appropriate when the required party is a sovereign entitled to immunity from suit.

"A case may not proceed when a required-entity sovereign is not amenable to suit. These cases instruct us that where sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign." *Pimentel*, 553 U.S. at 867, *see Two Shields*, 790 F.3d at 798. Here, the Sovereign Parties are the real parties in interest to this lawsuit. The Sovereign Parties' interests are significant and include:

- The inherent sovereign right to offer Class III video games of chance under IGRA which has existed for nearly 35 years. 25 U.S.C. § 2701(5), 2710(d)(1), & 2710(d)(2)(C).
- The right to conduct video games of chance pursuant to and in accordance with their respective gaming compacts. Gaming Compact; 25 U.S.C. § 2710(d)(3), 2710(d)(8)(A).
- The federal right, as well as the inherent sovereign right, to exercise "regulatory authority provided under tribal law over a gaming establishment within the Indian tribe's jurisdiction" and the operation and regulation of video games of chance as authorized by their respective gaming ordinances. 25 U.S.C. § 2713(d).
- The concurrent right to regulate gaming on Indian lands in accordance with those "[s]tate laws and regulations made applicable by any Tribal-State compact." 25 U.S.C. § 2710(d)(5).
- The sovereign right to conduct video games of chance as a means of generating

revenue to support their government, their members, and to govern their respective Indian lands as provided by IGRA.

- An overriding interest in protecting their officials and employees from bogus RICO lawsuits contesting the tribes' right to offer video games of chance in accordance with the IGRA.
- The Gaming Compact's application of select state laws to Indian lands and the negotiated authority to regulate with respect to video games of chance on Indian lands. 25 U.S.C. § 2710(d)(3)(C).

The presence of sovereign rights caused the Supreme Court in *Pimentel* to hold that "the action must be dismissed" rather than reverse and remand for further proceedings. *Pimentel*, 553 U.S. at 872. The same outcome of dismissal is required here because significant sovereign interests are implicated.

An Indian tribe is a required party "to actions that might have the result of directly undermining authority they would otherwise exercise." *E.E.O.C. v. Peabody Western Coal Co.*, 400 F.3d 774, 780 (9th Cir. 2005). Running Aces' suit undermines the SMSC's Gaming Compact, which is akin to a contract. *Texas v. New Mexico*, 482 U.S. 124, 128 (1987) ("a Compact is, after all, a contract."); *Pauma Band of Luiseno Mission Indians v. California*, 813 F.3d 1155, 1163 (9th Cir. 2015) ("General principles of federal contract law govern the Compacts, which were entered into pursuant to IGRA."); *United States ex rel. Hall v. Tribal Development Corp.*, 100 F.3d 476, 479 (7th Cir. 1996) ("A judicial declaration as to the validity of a contract necessarily affects, as a practical matter, the interests of both parties to the contract . . . It therefore would appear beyond dispute that the Tribe is a necessary party under Rule 19(a)").

1. In the Sovereign Parties' Absence, Complete Relief is not Possible Among the Existing Parties

The Sovereign Parties are each a required party because providing complete relief is not possible among the existing parties. Fed. R. Civ. P. 19(a)(1)(A). Running Aces seeks a declaration that the "offering of class III video games of chance . . . has been illegal" and also seeks an injunction prohibiting the SMSC Officials from "offering in the future any class III video games of chance." Doc. 12, Prayer for Relief, § (a) & (c).

The SMSC owns and operates video games of chance. 25 U.S.C. §§ 2710(b)(2)(A) & 2710(d)(1)(A)(ii). Naming only a handful of SMSC Officials "would not have complete relief, since judgment against the (officials) would not bind the (sovereign), which could assert its right to" continue to offer video games of chance. *Pit River Home and Agric. Cooperative Assoc. v. United States*, 30 F.3d 1088, 1099 (9th Cir. 1994). "Judgment against [SMSC] officials would not be binding" on the SMSC, "which could continue to assert sovereign powers and management responsibility over the reservation." *Confederated Tribes of Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1498 (9th Cir. 1991); *Dawavendewa v. Salt River Project Agric. Improvement and Power Dist.*, 276 F.3d 1150, 1156 (9th Cir. 2002). Specifically, the grant of declaratory and injunctive relief against the SMSC Officials would "be incomplete unless the [Tribe] is bound by res judicata. The judgment will not bind the [Tribe] in the sense that it will directly order the Nation to perform, or refrain from performing, certain acts." *Peabody Western Coal Co.*, 400 F.3d at 780. "[T]here can be no binding adjudication of a person's rights in the

absence of that person." *Provident Tradesmens Bank & Trust Co. v. Patterson,* 390 U.S. 102, 122 (1968).

For these reasons, the Sovereign Parties are each a required party under Rule 19(a)(1)(A). Running Aces' attempt to challenge the SMSC's offering of video games of chance "cannot be tried behind its back." *Two Shields*, 790 F.3d at 796.

2. After Legally and Successfully Operating Video Games of Chance for Over 34 years, the Sovereign Parties' Claim a Preeminent Interest in this Lawsuit

The Sovereign Parties are also required under Rule 19(a)(1)(B). Consistent with *Pimentel* and *Two Shields*, when the absent party is a sovereign, "Rule 19 excludes only those *claimed* interests that are patently frivolous." *American Greyhound Racing Inc. v. Hull*, 305 F.3d 1015, 1023 (9th Cir. 2002); *see Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 998 (9th Cir. 2001) (the Rule "only requires the movant to show that the absent party *claims an interest* relating to the subject of the action.").

Running Aces characterizes the Sovereign Parties' interests in video games of chance as unlawful, which "inappropriately presupposes Plaintiffs' success on the merits." *Citizen Potawatomi Nation*, 248 F.3d at 998, *quoting*, *Davis v. United States*, 192 F.3d 951, 958 (10th Cir. 1999). "[T]he underlying merits of the litigation are irrelevant under Fed.R.Civ.P. 19(a)." *Davis*, 192 F.3d at 958. "Such an approach is untenable because it would render the Rule 19 analysis an adjudication on the merits." *Id.* Thus, whether a tribe is a required party does "not require a preliminary factual inquiry into the legality of the underlying statute." *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1459 (9th Cir. 1994).

An Indian tribe "undoubtedly has a legal interest in any adjudication of its governing authority over the reservation." *Quileute Indian Tribe*, 18 F.3d at 1458. The relief sought by Running Aces "would prevent the absent tribes from exercising sovereignty over their reservations allotted to them by Congress. It is difficult to imagine a more intolerable burden on government functions." *Shermoen v. United States*, 982 F.2d 1312, 1320 (9th Cir. 1992).

Like Minnesota and its immunity from suit, the SMSC has "an interest in preserving their sovereign immunity, with its concomitant right not to have their legal duties judicially determined without consent." *Shermoen*, 982 F.2d at 1317

a) Disposition of the Lawsuit Without the Sovereign Parties' Participation Will Impair or Impede Their Ability to Protect Their Interests

The Sovereign Parties entered into gaming compacts to govern video games of chance and are each a required party who cannot be joined. The inability to join the absent tribes precludes a decision in this case that state law did not permit such gaming.

> The district court also opined that the tribes could have no legally protected interest in gaming that was not permitted by state law. But it was the district court's decision in this case that determined that casino-type gaming was not permitted by state law, and the tribes were entitled to be heard on that issue. We have rejected this kind of circularity in determining whether a party is necessary.

American Greyhound, 305 F.3d at 1024 (citations omitted). The Sovereign Parties' significant interests in operating video games of chance will be impaired by an adverse decision without an opportunity to be heard on the issue.

Moreover, even though "the tribes are not bound by this ruling under principles of res judicata or collateral estoppel because they are not parties . . . their interests may well

be affected *as a practical matter* by the judgment that its operations are illegal." *American Greyhound*, 305 F.3d at 1024. The "enforcement authorities may consider themselves compelled to act against the tribes," which is not mitigated by the tribes' ability to re-litigate the issue. *Id*. The Sovereign Parties' interest "arises from terms in bargained contracts, and the interest is substantial." *Id.* at 1023.

b) Disposition Of This Lawsuit Without the Sovereign Parties' Participation Will Subject Existing Parties to a Substantial Risk of Incurring Double, Multiple, Or Otherwise Inconsistent Obligations

"Even partial success by the plaintiffs could subject both the [sovereign parties] and the federal government to substantial risk of multiple or inconsistent legal obligations." *Confederated Tribes*, 928 F.2d at 1498. As it currently stands, the Sovereign Parties' operation of video games of chance is viewed as lawful by the NIGC, the Minnesota Department of Public Safety, and the respective tribal gaming commissions (none of whom are parties). Given that such gaming has occurred for nearly 35 years – without incident and without any change in federal, state, or tribal law – the likelihood of multiple and inconsistent obligations is an absolute certainty.

The Sovereign Parties meet each of the factors established by Rule 19(a) and are required parties to the lawsuit.

B. The Sovereign Parties Cannot be Joined and Running Aces' Lawsuit Should be Dismissed

"A necessary person must be joined as a party if joinder is feasible." *Davis ex rel. Davis v. United States*, 343 F.3d 1282, 1289 (10th Cir. 2003). "Indian tribes, however, are sovereign entities and are therefore immune from nonconsensual actions in state or

federal court." *Confederated Tribes*, 928 F.2d at 1499. Sovereign immunity prevents an Indian tribe "from being joined involuntarily unless they waive their immunity. Any waiver must be unequivocal and may not be implied." *Kescoli v. Babbitt*, 101 F.3d 1304, 1310 (9th Cir. 1996). Here, each of the Sovereign Parties is entitled to sovereign immunity from suit.

Running Aces cannot "circumvent the barrier of sovereign immunity by merely substituting tribal officials in lieu of the Indian Tribe." *Dawavendewa*, 276 F.3d at 1160. This "argument strikes us as an attempted end run around tribal sovereign immunity." *Id.*

Because the Sovereign Parties cannot be joined, the court must consider whether "in equity and good conscience, the court should not allow the action to proceed in its absence. To make this determination, we must balance four factors." *Dawavendewa*, 276 F.3d at 1161. The "four factors are not rigid, technical tests, but rather guides to the overarching equity and good conscience determination." *Wichita & Affiliated Tribes of Okla. v. Hodel*, 788 F.2d 765, 774 (D.C. Cir. 1986). Even when the "factors were not clearly in favor of dismissal, the concern for the protection of tribal sovereignty warranted dismissal." *Kescoli*, 101 F.3d at 1311. "We have noted, however, that when the necessary party is immune from suit, there may be very little need for balancing the Rule 19(b) factors because immunity itself may be viewed as the compelling factor." *Quileute Indian Tribe v. Babbitt*, 18 F.3d at 1460; *Confederated Tribes*, 928 F.2d at 1499.

1. A Judgment Rendered in the Sovereign Parties Absence Will Be Prejudicial to Each Sovereign

"The first factor of Rule 19(b) is concerned with whether the nonparty would be adversely affected in a practical sense, and if so, would the prejudice be immediate and serious, or remote and minor." *United States ex rel. Steele v. Turn Key Gaming, Inc.*, 135 F.3d 1249, 1251 (8th Cir. 1998). "The first factor of prejudice, insofar as it focuses on the absent party, largely duplicates the consideration that made a party necessary under Rule 19(a): a protectible interest that will be impaired or impeded by the party's absence." *Wilbur*, 423 F.3d at 1114; *American Greyhound*, 305 F.3d at 1024-25; *see Tribal Development Corp.*, 100 F.3d at 479 (same).

With regard to the first factor, the Supreme Court determined that it is error to "not accord proper weight to the compelling claim of sovereign immunity." *Pimentel*, 553 U.S. at 869. Further, the Sovereign Parties significant interests will "suffer severe prejudice by not being a party to an action which could deplete the (sovereign's) interests or jeopardize their authority to govern the lands in question." *Quileute Indian Tribe*, 18 F.3d at 1460.

2. The Prejudice to the Sovereign Parties Cannot be Lessened or Avoided by Protective Provisions, Shaping Relief, Nor Any Other Measure

Running Aces seeks declaratory and injunctive relief holding that the operation of video games of chance is illegal on Indian lands in Minnesota. The prejudice to the sovereign parties cannot be lessened or avoided:

> There is no middle ground – either the transactions violate statutory requirements and are void . . . or they comply with the law and are valid. The tribes are ultimately involved in these transactions and it would be impossible

> to fashion protective provisions to insulate them from the prejudice an adverse judgment would inflict.

Tribal Development Corp., 100 F.3d at 480 *quoting In re U.S. ex rel. Hall*, 825 F.Supp. 1422, 1429 (D. Minn. 1993) *aff'd* 27 F.3d 572 (1994).

Running Aces seeks a declaration that video games of chance operated by tribes on Indian lands are unlawful and that relief runs directly against the Sovereign Parties' rights under IGRA and the Gaming Compacts, and the tribes' respective Gaming Ordinances.

3. A Judgment Rendered in the Sovereign Parties' Absence Will Not Be Adequate

Rule 19(b)'s test for adequacy considers the "public stake in settling disputes by wholes, whenever possible." *Pimentel*, 553 U.S. at 870 (quotations omitted). "The concern underlying this factor is not the plaintiff's interest but that of the courts and the public in complete, consistent, and efficient settlement of controversies, that is the public stake in settling disputes by wholes, whenever possible." *Davis*, 343 F.3d at 1293. The public's interest "in settling the dispute as a whole" would not be served when the Sovereign Parties "would not be bound by the judgment in an action where they were not parties." *Pimentel*, 553 U.S. at 870. Further, "the ability to accord relief dwindles in importance when compared with the significance of the Tribe's interest in the contracts at issue here." *Tribal Development Corp.*, 100 F.3d at 480.

The Sovereign Parties will not be bound by a judgment and would likely continue to rely on IGRA and their approved Gaming Compacts and Gaming Ordinances, as they have done for nearly 35 years.

4. Running Aces Will Have an Adequate Remedy if the Action is Dismissed for Nonjoinder

Running Aces possesses an adequate remedy with regard to Minnesota's video games of chance laws, which is to present the issue to the Minnesota Legislature. For example, in 2012, the Minnesota legislature increased Running Aces' card table limits from 50 to 80 and increased the wager limit. 2012 Minn. Laws Ch. 279, § 5. In 2015, the Minnesota legislature allowed Running Aces card games to be player banked. 2015 Minn. Laws Ch. 77, Art. 4, § 5. In 2016, the Minnesota legislature enacted legislation authorizing advance deposit wagering. 2016 Minn. Laws Ch. 183, § 1-17.

Running Aces can also report what it believes is a violation of IGRA to a federal, state, or tribal regulator. *Dawavendewa*, 276 F.3d at 1163. NIGC enforcement against the tribes is a potential remedy because an Indian tribe's "[s]overeign immunity does not apply in a suit brought by the United States." *Id.* at 1162.

"Dismissal under Rule 19(b) will mean, in some instances, that plaintiffs will be left without a forum for definitive resolution of their claims. But that result is contemplated under the doctrine of foreign sovereign immunity." *Pimentel*, 553 U.S. at 872. "A plaintiff's inability to seek relief, however, does not automatically preclude dismissal, particularly where that inability results from a tribe's exercise of its right to sovereign immunity." *United States ex rel. Hall*, 100 F.3d at 480-81.

Courts have routinely determined that the Sovereign Parties' immunity from suit outweighs Running Aces' pursuit of an adequate remedy:

> The fourth factor would ordinarily favor the plaintiffs; there is no adequate remedy available to them if this case is dismissed for lack of joinder of

> indispensable parties. But this result is a common consequence of sovereign immunity, and the tribes' interest in maintaining their sovereign immunity outweighs the plaintiffs' interest in litigating their claims.

American Greyhound, 305 F.3d at 1025. "Our prior cases turn not on a disrespect for a plaintiff's right of access to the courts, but on the fact that society has consciously opted to shield Indian tribes from suit without congressional or tribal consent." *Wilbur v. Locke*, 423 F.3d at 1116. Thus, there is a "strong policy favoring dismissal when a court cannot join a tribe because of sovereign immunity." *Citizen Potawatomi Nation*, 248 F.3d at 1001 *see also Kickapoo Tribe v Babbitt*, 43 F.3d 1491, 1500 (D.C. Cir. 1995) (gaming compact makes the State of Kansas a required party, which is immune from suit, "thereby cabining the district court's discretion to consider factors under Rule 19(b).").

Because the Sovereign Parties are required under Rule 19 and cannot be joined due to their immunity to suit, equity and good conscience require dismissal of Running Aces' claims against the SMSC Officials.

II. THIS COURT LACKS SUBJECT MATTER JURISDICTION BECAUSE THE SMSC OFFICIALS ARE IMMUNE FROM SUIT FOR EACH OFFICIAL AND INDIVIDUAL CAPACITY CLAIM

The Court should dismiss this lawsuit because the SMSC Officials are immune from suit. "Among the core aspects of sovereignty that Tribes possess" is "the common-law immunity from suit traditionally enjoyed by sovereign powers." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014).

A motion to dismiss based upon sovereign immunity "is a threshold jurisdictional question," *Amerind Risk Management Corp. v. Malaterre*, 633 F.3d 680, 684 (8th Cir. 2011), which is analyzed under Fed. R. Civ. P. 12(b)(1). *Hagen v. Sisseton-Wahpeton*

Cmty. Coll., 205 F.3d 1040, 1043 (8th Cir. 2000). "It is well settled that the plaintiff bears the burden of establishing subject matter jurisdiction." *Nucor Corp. v. Nebraska Public Power Dist.*, 891 F.2d 1343, 1346 (8th Cir. 1989). "As federal courts are courts of limited jurisdiction, it is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Dakota, Minnesota & Eastern R.R. Corp. v. Schieffer*, 715 F.3d 712 (8th Cir. 2013). "[I]f the Tribe possesses sovereign immunity, then the district court had no jurisdiction." *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241, 1244 (8th Cir. 1995).

A. The SMSC's Sovereign Immunity Extends to its Gaming Enterprise and SMSC Officials

The Eighth Circuit has repeatedly recognized that the SMSC is a federally recognized Indian tribe that possesses immunity from suit. *Smith v. Babbitt*, 100 F.3d 556 (8th Cir. 1996); *Prescott v. Little Six, Inc.*, 387 F.3d 753, 757 (8th Cir. 2004) (recognizing the "sovereign tribal government" of the SMSC). Likewise, it has been determined that the SMSC Gaming Enterprise is "a branch of the sovereign tribal government" *Prescott v. Little Six, Inc.*, 387 F.3d at 757, and is immune from suit, *Charland v. Little Six, Inc.*, 198 F.3d 249 (8th Cir. 1999); *Ferguson v. SMSC Gaming Enterprise*, 475 F. Supp. 2d 929, 931 (D. Minn. 2007).

"Tribes are quasi-sovereign nations, and thus tribal governments and tribal officials acting in their official capacities are entitled to sovereign immunity unless that immunity is waived by the tribe or Congress." *LaRose v. United States Dep't of the Interior*, 659 F. Supp. 3d 996, 1001 (D. Minn. 2023). "A suit against a governmental

officer in his official capacity is the same as a suit against the entity of which the officer is an agent. There is no reason to depart from these general rules in the context of tribal sovereign immunity." *Stanko v. Oglala Sioux Tribe*, 916 F.3d 694, 697 (8th Cir. 2019). Thus, the SMSC Officials share in the SMSC's sovereign immunity because "[a] suit against a governmental actor in his official capacity is treated as a suit against the government itself." *Brokinton v. City of Sherwood, Ark.*, 503 F.3d 667, 674 (8th Cir. 2007).

Running Aces' sole official capacity claim against the SMSC Officials is based on "their participation in the offering of class III video games of chance" and exercising "continuing employment responsibilities" as leaders for the SMSC. Doc. 12, Count 1, ¶¶ 229-232. Running Aces does not plead a viable waiver of tribal sovereign immunity for the official capacity claim and "cannot circumvent tribal immunity by the simple expedient of naming an officer of the Tribe as a defendant, rather than the sovereign entity." *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 714, 727 (9th Cir. 2008); *Miller v. Wright*, 705 F.3d 919, 927–28 (9th Cir. 2013).

B. The Individual Capacity Claims Against the SMSC Officials Must Be Dismissed Because the SMSC Is the Real Party in Interest.

A tribal employee may be sued in their individual capacity when "the employee, not the tribe, is the real party in interest and the tribe's sovereign immunity is not implicated." *Lewis v. Clarke*, 581 U.S. 155 (2017). "Courts should look to whether the sovereign is the real party in interest to determine whether sovereign immunity bars the suit." *Id.* at 161-62. "In making this assessment, courts may not simply rely on the

characterization of the parties in the complaint, but rather must determine in the first instance whether the remedy sought is truly against the sovereign." *Id.* at 162.

"The identity of the real party in interest dictates what immunities may be available." *Lewis*, 581 U.S. at 163. If the suit is an official capacity suit, then the official "may assert sovereign immunity" or if the suit is an individual capacity suit, then the official "may be able to assert personal immunity defenses," such as absolute or qualified immunity. *Id.* As *Lewis* instructs, the Court must look beyond Running Aces' description of the parties because "the distinction between official-capacity suits and personal-capacity suits is more than a mere pleading device." *Hafer v. Melo*, 502 U.S. 21, 27 (1991).

In determining "in the first instance whether the remedy sought is truly against the sovereign," it is telling that Running Aces' primary remedies lie exclusively against the SMSC. *Lewis* 581 U.S. at 162. Running Aces seeks a remedy declaring that video games of chance are operated illegally at SMSC's gaming operations. Doc. 12, Prayer For Relief (a). Running Aces also seeks a remedy enjoining the "offering in the future any class III video games of chance" on the SMSC's Indian lands. *Id.* at (c). The remedy sought by Running Aces makes clear that any judgment would seek to operate against the SMSC.

Running Aces does not contend that the SMSC Officials took "personal actions" causing the deprivation of their alleged rights. *Lewis*, 581 U.S. at 163. Instead, each SMSC Official is repeatedly alleged to be acting within their "employment responsibilities." Amended Complaint, ¶¶ 104-109, 116-121, and 232. When a SMSC

Official follows directives inherent in their employment responsibilities, generally the real party in interest is the SMSC.

> [T]he tribe is the real party in interest because the officers' actions in essence were the tribe's own. In carrying out the Chairman's directive, the officers were acting merely as an arm or instrumentality of the tribe. Any claim based on the decision … from the meeting is essentially a claim against the tribe and therefore barred by its sovereign immunity.

Genskow v. Prevost, 825 F. App'x 388, 391 (7th Cir. 2020). Further, the SMSC Officials, in their individual capacities, do not have the ability to offer video games of chance, nor are they alleged to have done so.

"A victory in a personal-capacity action is a victory against the individual defendant, rather than against the entity that employs him." *Graham*, 473 U.S. at 167-68. The victory sought by Running Aces pertains exclusively to the SMSC's offering of video games of chance on its Indian lands. Contrary to *Lewis*, Running Aces cannot maintain that its remedy "will not require action by the sovereign or disturb the sovereign's property." 581 U.S. at 163. Running Aces seek a judgment that would require action by the sovereign and disturb the SMSC's Indian lands by obtaining a declaration and injunction that its officials cannot offer video games of chance.

The real party in interest is the SMSC and it is well established that Indian tribes are immune from suit, which is also true for gaming activities conducted on Indian lands. *Bay Mills*, 572 U.S. at 788-89. Thus, the purported individual capacity claims should be treated as claims against the SMSC as the real party in interest and the SMSC's Officials are immune from suit.

C. Running Aces Is Not Entitled to Relief Under *Ex Parte Young*

It is possible to plead a narrow exception to the rule that tribal officials cannot be sued in their official capacities under *Ex parte Young,* 209 U.S. 123 (1908). However, *Ex Parte Young* is inapplicable in cases such as this because the SMSC is the real party in interest. The Court "need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 645 (2002); *Ex parte Young*, 209 U.S. 123 (1908). "The doctrine is limited to that precise situation and does not apply when the [Tribe] is the real, substantial party in interest, as when the judgment sought would expend itself on the public treasury or domain, or interfere with public administration." *Virginia Office for Protection and Advocacy v. Stewart*, 563 U.S. 247, 255 (2011). Here, the SMSC is the real party in interest because the IGRA, the Gaming Compact, and its Gaming Ordinance each authorize the SMSC to own and operate video games of chance on its Indian lands.

The effect of the prospective relief requested by Running Aces – to enjoin the SMSC Officials from "offering in the future any class III video games of chance" – is an attempt to compel the SMSC to act in accordance with such a judgment. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 282 (1997). Running Aces seeks to restrain the SMSC from operating video games of chance by undercutting the Gaming Compact and the Gaming Ordinance, both of which received federal approval. Declaring video games of chance illegal and enjoining them from being operated by the SMSC would significantly interfere with the public administration of the SMSC's government by

eliminating its primary source of governmental revenue. *See Chicken Ranch Rancheria of Me-Wuk Indians v. California*, 42 F.4th 1024, 1032 (9th Cir. 2022) ("Class III gaming is not only a source of substantial revenue for tribes, but the lifeblood on which many tribes have come to rely."). Running Aces cannot rely on the *Ex parte Young* doctrine to circumvent the SMSC's sovereign immunity from suit, because the "real interests served by [sovereign immunity] are not to be sacrificed to elementary mechanics of captions and pleading." *Coeur d'Alene Tribe*, 521 U.S. at 270.

Running Aces cannot rely on *Ex parte Young* because IGRA does not provide a private cause of action and "*Ex parte Young* by itself does not create such a cause of action." *Michigan Corr. Org. v. Michigan Dep't of Corr.*, 774 F.3d 895, 905 (6th Cir. 2014). Additionally, the *Ex parte Young* doctrine "rests on the need to promote the vindication of *federal* rights"—not state law. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984).

Running Aces also seeks a declaration that the "offering of class III video games of chance . . . has been illegal," Doc. 12, Prayer for Relief (a). Such relief is prohibited because *Ex parte Young* "does not permit judgments against [tribal] officers declaring that they violated federal law in the past and has no application in suits against [Indian tribes] and their agencies, which are barred regardless of the relief sought." *Puerto Rico Aqueduct and Sewer Authority v. Metcalf*, 506 U.S. 139, 146 (1993) *see Michigan Corr. Org.*, 774 F.3d at 905 ("plaintiffs lose *Ex parte Young* claims . . . because the relief sought, though styled as prospective injunctive relief against a state official, in reality runs against the State or in reality is retroactive and monetary in nature."). Thus, *Ex parte*

Young does not apply to Running Aces' "claims for retrospective relief." *Green v. Mansour*, 474 U.S. 64, 68 (1985).

The *Ex parte Young* exception likewise does not authorize Running Aces' request for monetary relief against the SMSC Officials who are each alleged to be operating within their employment responsibilities as leaders for the SMSC. An official capacity suit is "not a suit against the official personally, for the real party in interest is the entity." *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). "[A] plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself." *Id.* Generally, if the effect of the relief sought "is measured in terms of a monetary loss resulting from a past breach of a legal duty," then it is prohibited as retroactive. *Edelman v. Jordan*, 415 U.S. 651, 668 (1974).

Finally, there is no continuing violation of federal law by the SMSC Officials. Not only is each SMSC Officials' conduct lawful, each SMSC Official lacks the authority under IGRA to independently or collectively offer video games of chance on SMSC's Indian lands. Each cannot disregard the Gaming Compact and Gaming Ordinance, which authorize the SMSC to conduct video games of chance. *See Bay Mills*, 572 U.S. at 785("A tribe may conduct such [Class III] gaming on Indian lands only pursuant to, and in compliance with, a compact it has negotiated with the surrounding State.").

D. Running Aces Lacks Standing Because the SMSC Officials Are Powerless to Prohibit the Operation of Video Games of Chance

Running Aces seeks to enjoin SMSC's operation of the video games of chance, which are conducted on Indian lands in accordance with IGRA and regulated by three

governments. Doc. 12 at 64–65. As a threshold matter, Running Aces must "demonstrate standing for each claim [it] seeks to press and for each form of relief that is sought." *Davis v. Fed. Election Comm'n,* 554 U.S. 724, 734 (2008). Running Aces cannot establish that it has suffered an injury-in-fact that is likely to be redressed by a favorable decision because the SMSC Officials cannot stop the conduct of the SMSC's video games of chance. *Lujan v. Defenders of Wildlife,* 504 U.S.555, 560-61 (1992). The "redressability" element, examines the "causal connection between the alleged injury and the judicial relief requested." *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton,* 422 F.3d 490, 495 (7th Cir. 2005).

Running Aces seeks an injunction against the SMSC Officials and "the causation element of standing requires the named defendants to possess the authority to enforce the complained-of provision." *Digital Recognition Network, Inc. v. Hutchinson,* 803 F.3d 952, 957–58 (8th Cir. 2015). The question of redressability is "[c]ould these Defendants, enjoined as [plaintiff] has requested, remedy [plaintiff's injury]?" *Turner v. McGee*, 681 F.3d 1215, 1218–19 (10th Cir. 2012). Here, the answer is no because Running Aces failed to plead that the SMSC Officials have the authority to enforce an injunction and stop the operation of the SMSC's video games of chance. Without such an allegation, and actual authority on behalf of the SMSC Officials to enforce the injunction (which they do not have), Running Aces' request for injunctive relief must be dismissed.

III. RUNNING ACES HAS FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

Under Rule 12(b)(6), a complaint must contain "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Conclusory statements are not" afforded "the preferential status of assumed truth." *Stadin v. Union Electric Co.*, 309 F.2d 912, 917 (8th Cir. 1962). The Court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286 (1986). The Amended Complaint must be dismissed pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

A. Current And Former Members of The Business Council Are Entitled to Absolute Immunity

The SMSC possesses "powers of self-government" which are exercised by the Business Council pursuant to the IGRA and in accordance with the laws of the SMSC. 25 U.S.C. § 2703(5). The Business Council is comprised of the SMSC's highest ranking elected government officials.

Each current and former Business Council member's "acts of introducing, voting for, and signing an ordinance" constitute legislative activity. *Bogan v. Scott-Harris*, 523 U.S. 44, 46 (1998). Likewise, the Business Council's consideration and enactment of its resolutions "are essentially legislative acts." *Runs After v. United States*, 766 F.2d at 355. "It is well established that federal, state, and regional legislators are entitled to absolute immunity from civil liability for their legislative activities." *Bogan*, 523 U.S. at 46.

Additionally, each current and former Business Council member is entitled to absolute immunity for their quasi-judicial actions. *See Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982) (absolute immunity extended to "executive officers engaged in adjudicative functions."); *Buser v. Raymond*, 476 F.3d 565, 568 (8th Cir. 2007) (Executive "officials performing quasi-judicial actions are entitled to absolute immunity."); *Diva's Inc. v. City of Bangor*, 411 F.3d 30, 40-41 (1st Cir. 2005) (City Council members "enjoy absolute immunity from personal liability because they were acting in a quasi-judicial capacity when they denied the special amusement permit.").

The SMSC's elected leaders must be able to rely on the Gaming Compact and Gaming Ordinance, which were approved in the first instance over 30 years ago pursuant to IGRA. "Regardless of the level of government, the exercise of legislative discretion should not be inhibited by judicial interference or distorted by the fear of personal liability." *Bogan*, 523 U.S. at 52. Yet such interference and liability are precisely what Running Aces asks this Court to sanction.

Running Aces fails to allege specific actions which have been taken by each member of the Business Council, *in their individual capacities*. Regardless, it is well established that each current and former member of the Business Council is entitled to absolute immunity for their legislative and quasi-judicial conduct. *See Runs After v. United States*, 766 F.2d 347, 354 (8th Cir. 1985) ("the individual members of the Tribal Council would enjoy absolute legislative immunity . . . for official actions taken when acting in a legislative capacity.").

B. Each SMSC Official Is Entitled to Qualified Immunity

Qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Qualified immunity allows an officer to make both mistakes of fact and mistakes of law. *Butz v. Economou*, 438 U.S. 478, 507 (1978). "Because qualified immunity shields government actors in all but exceptional cases, courts should think long and hard before stripping defendants of immunity." *Lassiter v. Alabama A&M Univ.*, 28 F.3d 1146, 1149 (11th Cir. 1994)."If the actions of an officer do not conflict with the terms of his valid statutory authority, then they are the actions of the sovereign, whether or not they are tortious under general law." *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 695 (1949) *see Ashcroft v. Iqbal*, 556 U.S. 662, 685 (2009) ("The basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including avoidance of disruptive discovery.")

The SMSC Officials are entitled to qualified immunity because "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Running Aces has not alleged nor can it point to authority, other than its own dubious interpretation of Minnesota law, that supports the contention that the SMSC Officials violated clearly established statutory or Constitutional rights, which requires dismissal. *Pearson v. Callahan*, 555 U.S. 223 (2009). Further, allegations and proof that the SMSC Officials acted outside their authority would be

necessary to convert this action against the sovereign into one against individual tribal officials. *Malone v. Bowdoin*, 369 U.S. 643, 646-48; *Larson*, 337 U.S. at 693-96. Absent sufficient allegation and proof, the suit is one against the sovereign and must be dismissed. *Id.*

C. Running Aces Claims Are Governed Exclusively By IGRA

To the extent Running Aces seeks declaratory and injunctive relief that the SMSC cannot offer a specific Class III game on Indian lands, those claims are controlled by IGRA and only IGRA. "A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies." *Nat'l R. R. Passenger Corp. v. Nat'l Ass'n of R. R. Passengers*, 414 U.S. 453, 458 (1974); *see also Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) ("As always, where there is no *clear* intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.").

IGRA addresses enforcement issues pertaining to Class III gaming through a comprehensive regulatory regime with limited adjudicatory remedies. There is simply no room left for RICO claims when IGRA is involved.

When a valid gaming compact is in place, IGRA "allows a State to sue a tribe not for all class III gaming activity located on Indian lands… but only for such gaming as is conducted in violation of any Tribal–State compact ... that is in effect." *Bay Mills*, 572 U.S. at 795 n. 6. "In fact, a State *cannot* sue to enjoin all gaming in Indian country; that gaming must, in addition, violate an agreement that the State and tribe have mutually

entered." *Id.* Conversely, if "a tribe opens a casino on Indian lands before negotiating a compact, the surrounding State cannot sue; only the Federal Government can enforce the law." *Id. citing* 18 U.S.C. § 1166(d) ("The United States shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country.") *see Alabama v. PCI Gaming Authority*, 801 F.3d 1278 (11th Cir. 2015) (same).

Running Aces repeatedly alleges that the operation of video games of chance does not comply with IGRA but fails to recognize that IGRA "provides no general private right of action." *In re Sac & Fox Tribe of Mississippi In Iowa/Meskwaki Casino Litigation*, 340 F.3d 749, 766 (8th Cir. 2003) *see also Florida v. Seminole Tribe of Florida*, 181 F.3d 1237, 1250 (11th Cir. 1999); *Hartman v. Kickapoo Tribe Gaming Comm'n*, 319 F.3d 1230, 1233 (10th Cir. 2003); *Hein v. Capitan Grande Band of Diegueno Mission Indians*, 201 F.3d 1256, 1260 (9th Cir. 2000).

Running Aces knows that it cannot sue the SMSC to challenge a Class III game under IGRA. Running Aces seeks to circumvent IGRA by suing tribal officials to challenge a Class III game through RICO. However, the "multitude of express remedies" provided by IGRA cannot be circumvented by slapping a RICO label on an IGRA dispute. *Seminole Tribe*, 181 F.3d at 1248.

D. Running Aces' Claims Fail Because the State Laws That Running Aces Relies on Do Not Apply to Gaming on Indian Lands

Running Aces' RICO claims fail because they are entirely predicated on Minn. Stat. § 609.75, 609.755, and 609.76, which do not apply to the SMSC's conduct of

gaming on Indian lands unless agreed upon in a compact. Doc. 12 ¶¶ 59, 156, 165, 167, 170. These Minnesota laws do not restrict video games of chance on Indian lands but even if they did, they would be preempted by IGRA. A purported violation of these Minnesota laws simply cannot be a predicate act supporting a RICO action.

"Examination of the text and structure of IGRA, its legislative history, and its jurisdictional framework likewise indicates that Congress intended it completely preempt state law." *Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536, 544 (8th Cir. 1996); *see also Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Florida*, 63 F.3d 1030, 1032 (11th Cir. 1995) (similar holding). To determine whether a law is preempted by IGRA, the Court asks "whether a particular claim will interfere with tribal governance of gaming" on Indian lands. *Gaming Corp. of America*, 88 F.3d at 549.

"If the Tribe's [game] is being conducted on its lands, then the IGRA completely preempts the State's attempt to regulate or prohibit." *State ex rel. Nixon v. Coeur D'Alene Tribe*, 164 F.3d 1102, 1108 (8th Cir. 1999). State gaming laws that are otherwise preempted can only be enforced on Indian lands if they are adopted through a tribal-state compact - and even then, they can only be enforced by the compacting state. *Bay Mills*, 572 U.S. at 785-86.

Video games of chance are operated by the SMSC on Indian lands pursuant to the Gaming Compact and Running Aces' efforts to regulate those games by applying its interpretation of Minn. Stat. § 609.75, 609.755, and 609.76 are completely preempted by IGRA. *Compare* Doc. 12 ¶¶ 6, 59, 100, 112 (alleging Minnesota law prohibits video games of chance, which makes them illegal under IGRA), *with Coeur D'Alene Tribe*, 164

F.3d at 1109 ("If the Tribe's lottery is being conducted on its lands, then the IGRA completely preempts the State's attempt to regulate or prohibit.").

Running Aces' reliance on Public Law 280 also fails. 18 U.S.C. § 1162's extension of state criminal jurisdiction over individual *Indians* in Indian country does not apply to an Indian tribe nor waive a tribe's sovereign immunity. *Bryan v. Itasca County, Minn.*, 426 U.S. 373, 383 (1976); *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g,* 476 U.S. 877, 892 (1986). As for the relation between IGRA and 18 U.S.C. § 1162, IGRA provides the federal government with exclusive jurisdiction to enforce state law under 18 U.S.C. § 1166(d). "If that exclusivity is incompatible with any provision of Public Law 280, then the Public Law 280 provision has been impliedly repealed by section 1166(d)." *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535, 540 (9th Cir. 1994).

The Minnesota laws relied upon by Running Aces are either preempted because their enforcement against the SMSC would directly interfere with tribal governance of Class III gaming on Indian lands, or the laws do not make the SMSC's (and thereby the SMSC Official's) conduct illegal, which is supported by their natural and long-standing reading. *See e.g.* Minn. Stat. § 299L.07, subd. 2a (limiting the entities to whom a distributor may sell a gambling device, one of which is a tribe with a gaming compact). Either way, Running Aces' state law claims are preempted and no predicate acts exist on which to base its RICO claims.

E. Running Aces' Fails to State a Claim Because Video Games of Chance Are Operated in Full Compliance With IGRA

Running Aces is acutely aware that IGRA controls whether an Indian tribe may operate a Class III game on Indian lands. Doc. 12, ¶¶ 4-8, 66-68, 88, 95, 96, 99, 100, 111, and 112. Running Aces understands that 25 U.S.C. § 2710(d)(1) specifies that "Class III gaming activities shall be lawful on Indian lands only if such activities are:" (1) authorized by an approved Gaming Ordinance; (2) "located in a State that permits such gaming for any purpose by any person, organization, or entity;" and (3) conducted in accordance with a Tribal-State compact. Doc. 12, ¶ 68, 100, 112, and 230. Running Aces concedes that there is an approved Gaming Compact, Doc. 12-7, ¶ 89, as well as an approved Gaming Ordinance, Id. at ¶ 95, 96, and 97, but alleges that Minnesota does not permit video games of chance.

As a matter of law, Running Aces' allegations fail because Minnesota has repeatedly enacted legislation expressly authorizing Indian tribes to operate video games of chance. *Infra* pp. 4-7. The SMSC's operation of video games of chance on its Indian lands is therefore conducted in full compliance with IGRA. Running Aces' creative attempts to slap a RICO label on an IGRA dispute fail as a matter of law and should be dismissed for failure to state a claim.

F. Running Aces Lacks Statutory Standing to Bring a RICO Claim Against the SMSC Officials

Even if Running Aces could utilize RICO to circumvent IGRA, Running Aces lacks statutory standing to bring a RICO claim. Separate from Article III standing, "statutory standing requires the determination that 'Congress . . . has accorded *this*

injured plaintiff the right to sue the defendant to redress [the plaintiff's] injury.'" *Subramanian v. Tata Consultancy Servs. Ltd.*, 352 F. Supp. 3d 908, 916 (D. Minn. 2018) (quoting *Miller v. Redwood Toxicology Lab., Inc.*, 688 F.3d 928, 934 (8th Cir. 2012)).

Running Aces' alleged injury must be real, tangible, and not speculative. *UMB Bank, N.A. v. Guerin*, 89 F.4th 1047, 1053 (8th Cir. 2024). RICO specifically requires that Running Aces must suffer a "concrete financial loss," and "injury to a valuable intangible property interest does not confer standing." *Subramanian*, 352 F. Supp. 3d at 917 (quoting *Gomez v. Wells Fargo Bank, N.A.*, 676 F.3d 655, 660 (8th Cir. 2012)). Running Aces must allege that the relevant injury was proximately caused by reason of a defendant's RICO-violating conduct. *Subramanian*, 352 F. Supp. 3d at 917; *see Anza v. Ideal Steal Supply Corp.*, 547 U.S. 451, 460 (2006) ("A RICO Plaintiff cannot circumvent the proximate cause requirement simply by claiming that the defendant's aim was to increase market share at a competitor's expense.")

Running Aces has failed to adequately allege both injury and causation. First, Running Aces' alleged injuries are speculative and based on a series of unsteady inferences. Doc. 12, ¶ 226. Running Aces alleges two potential forms of injury: (1) lost revenue and profits from patrons that "likely would have patronized Running Aces," and (2) an illegal and unfair competitive advantage against Running Aces. Doc. 12, ¶¶ 225-228. Because neither of Running Aces' alleged injuries are concrete, financial injuries, Running Aces lacks standing to pursue its RICO claims. "Injury to mere expectancy interests or to an intangible property interest is not sufficient to confer RICO standing." *Price v. Pinnacle Brands, Inc.*, 138 F.3d 602, 607 (5th Cir. 1998).

Second, Running Aces must allege both causation and injury from "an act that is independently wrongful under RICO." *Beck v. Prupis*, 529 U.S. 494, 505-06 (2000). The alleged injury must be caused by "the underlying substantive violation [of the RICO statute] the defendant is alleged to have committed." *Id.* at 506; *accord Regions Bank*, 387 F.3d at 728 ("To have standing to bring a civil RICO claim, a plaintiff must have suffered injury 'by reason of' a RICO violation."). Running Aces' claim also fails because Running Aces does not plausibly allege that the purported violations of RICO directly led to their injury. The causal link between Running Aces' alleged injuries and its claims related to video games of chance simply does not exist.

G. Running Aces Has Failed to Plead Sufficient Facts Regarding Specific Actions Taken by the SMSC Officials to Support a RICO Claim

Running Aces fails to allege how any SMSC Official engaged in any prohibited act under RICO. For substantive RICO claims under Section 1962(c), each element of the claim "must be established as to each individual defendant." *Craig Outdoor Adver., Inc. v. Viacom Outdoor, Inc.*, 528 F.3d 1001, 1027–28 (8th Cir. 2008). A RICO claim must allege at least two predicate acts by *each* defendant. *Crest Constr. II, Inc. v. Doe*, 660 F.3d 346, 358 (8th Cir. 2011). It is not enough for a complaint to allege the elements of a RICO claim by lumping several defendants into collective allegations. *Raineri Constr., LLC v. Taylor*, 63 F. Supp. 3d 1017, 1031 (E.D. Mo. 2014).

Running Aces merely lists the job titles and descriptions of each SMSC Official. Doc. 12 ¶¶ 81–83. When alleging the elements of its RICO claim, Running Aces focuses on the actions of the SMSC and SMSC's gaming operation - not the specific conduct of

each SMSC Official. Doc. 12 ¶¶ 98–121. Running Aces lumps the SMSC Officials together based on their job titles and descriptions and provides conclusory allegations about their conduct. Doc. 12, ¶ 104. These allegations are insufficient to establish the elements of a RICO claim for each SMSC Official. *Lima LS PLC v. PHL Variable Ins. Co.*, 2013 WL 3327038, at *11 (D. Conn. July 1, 2013).

Because the Section 1962(c) RICO claims fail as to the SMSC Officials, the conspiracy claims under Section 1962(d) fail as well. *Grubbs v. Sheakley Grp., Inc.*, 807 F.3d 785, 805–06 (6th Cir. 2015) ("To state a claim for RICO conspiracy, one must 'successfully allege all the elements of a RICO violation, as well as . . . the existence of an illicit agreement to violate the substantive RICO provision.'").

Relatedly, the conspiracy claims fail against current and former Business Council members because the "individual members of the Tribal Council, acting in their official capacity as tribal council members, cannot conspire when they act together with other tribal council members in taking official action on behalf of the Tribal Council." *Runs After v. U.S.*, 766 F.3d 347, 354 (8th Cir. 1985).

Finally, the Section 1962(d) claim also fails because Running Aces sets forth conclusory allegations about whether each SMSC Official had the requisite knowledge and agreement for a conspiracy claim. *Abbott Laboratories v. Adelphia Supply USA*, 2017 WL 57802, at *9 (E.D.N.Y. Jan. 4, 2017).

H. The RICO Claims are Time-Barred

The Court should dismiss the RICO claims as untimely because the 4-year limitations period has lapsed. RICO claims accrue "when the plaintiff discovers or should

have discovered the injury." *Schreier v. Drealan Kvilhaug Hoefker & Co. P.A.*, 992 F.3d 674, 681 (8th Cir. 2021); *see Healy v. Fox*, 572 F. Supp. 3d 730, 748–49 (D.S.D. 2021) (same). The SMSC has publicly offered video games of chance since 1989. *See e.g.* Doc. 12-2 (Federal register publication of the approved Gaming Compact between the SMSC and Minnesota.). Running Aces discovered, or should have discovered, their purported injuries in 2008 when it began its operations. *See Healy*, 572 F. Supp. 3d at 748–49.

CONCLUSION

Running Aces' lawsuit should be dismissed with prejudice for failure to join the Sovereign Parties who are required but enjoy immunity from suit. The Court should also dismiss this lawsuit for lack of subject matter jurisdiction due to the SMSC Officials' sovereign immunity from suit. And for all the reasons provided above, Running Aces has failed to state a claim upon which relief can be granted.

August 20, 2024

/s/ Greg S. Paulson

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