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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE SOUTHERN DISTRICT OF CALIFORNIA
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11
12

13 **STATE OF CALIFORNIA,**

14 Plaintiff,

15 v.

16 **IIPAY NATION OF SANTA**
17 **YSABEL, also known as SANTA**
18 **YSABEL BAND OF DIEGUENO**
19 **MISSION INDIANS, a federally-**
20 **recognized Indian Tribe, SANTA**
21 **YSABEL INTERACTIVE, a tribal**
22 **economic development entity, SANTA**
23 **YSABEL GAMING COMMISSION,**
24 **DAVID CHELETTE, DAVID**
25 **VIALPANDO, ANTHONY**
26 **BUCARO, MICHELLE MAXCY,**
27 **VIRGIL PEREZ, and BRANDIE**
28 **TAYLOR,**

Defendants.

Case No. 3:14-cv-02724-AJB/NLS

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
THE STATE OF CALIFORNIA'S
APPLICATION FOR A
TEMPORARY RESTRAINING
ORDER**

Date: December 4, 2014
Time: 2:00 p.m.
Courtroom: 3B
Judge: Honorable Anthony J. Battaglia
Trial Date:
Action Filed: November 18, 2014

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INTRODUCTION

On November 3, 2014, without any state or federal legislative authority, defendant Iipay Nation of Santa Ysabel, also known as Santa Ysabel Band of Diegueno Mission Indians (Tribe), launched “the nation’s first web browser-based i-Gaming platform,” which is targeted directly at computers, smart phones, and other Internet-accessible devices operated by the State of California’s (State) residents. The Tribe’s Internet gambling platform allows any Californian over the age of eighteen to gamble with the Tribe from anywhere that he or she can browse the Internet, including in the workplace, at school, or at home. No trip to the Tribe’s reservation or casino is required.

The Tribe’s self-proclaimed “groundbreaking” efforts to make Internet gambling available to Californians “anytime & anywhere” breach the tribal-state class III gaming compact (Compact) between the Tribe and the State, do not comply with the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2721, 18 U.S.C. §§ 1166-1168, and violate the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA), 31 U.S.C. §§ 5361-5367. Because the Tribe’s Internet gambling has far-reaching and immediate effects on million of Californians,¹ the State seeks a temporary restraining order enjoining the Tribe and the other defendants from offering Internet gambling to residents of, and visitors to, California and accepting payments that violate the UIGEA.² Such an order is

¹ The Tribe’s Internet gambling also potentially has far-reaching policy implications for both California and the United States. The legislative bodies of both have considered – and rejected – wholesale Internet gambling. Additionally, legislative staff and tribal representatives have inquired regarding the State’s position concerning Internet gambling and the Tribe’s facsimile of bingo. (Declaration of Joginder Dhillon, 2, ¶ 5 (Dhillon Dec.).)

² The requested temporary restraining order is limited to residents, and visitors, to California because that appears to be how the Tribe has limited its Internet gambling. The State believes that the Tribe offering Internet gambling outside of California also breaches the Compact and violates the UIGEA.

1 necessary to protect the public health, safety, welfare, and good order in the State.
 2 See Cal. Bus. & Prof. Code § 19801(d).

3 FACTS

4 The facts are not in serious dispute.³ The Tribe and the State entered into the
 5 Compact under which the Tribe agreed to conduct gambling in accordance with
 6 law. The Tribe now is offering Internet gambling to California residents ages
 7 eighteen and older. Before the Tribe began to offer Internet gambling, the State
 8 sought, but the Tribe refused, to meet and confer in accordance with the Compact.
 9 (Dhillon Dec., 2-3, ¶¶ 6 & 7.)

10 On September 8, 2003, the Tribe and State entered into the Compact, which is
 11 Exhibit 1 to the complaint. (Dhillon Dec., 2, ¶ 3.) The Compact requires that the
 12 Tribe operate its gaming activities legally. Specifically, the Compact provides that
 13 the Tribe may combine and operate in its gaming facility “any kinds of gaming
 14 permitted under law, *except to the extent limited under IGRA . . .*” (Compact, 8, §
 15 4.2 (emphasis added).) The Compact further provides that a tribal gaming agency –
 16 here, the Santa Ysabel Gaming Commission⁴ – will conduct on-site gaming
 17 regulation and control “in order to enforce the terms of this . . . Compact [and]
 18 IGRA.” (Compact, 22, § 7.1.) That commission is to ensure enforcement of all
 19 relevant laws and prevent illegal activity. (Compact, 25, §§ 8.1.1, 8.1.4.)

20 The Tribe agreed not to engage in class III gaming that is not expressly
 21 authorized in the Compact. (Compact, 7, § 3.0.) Under Compact section 4.1, the
 22 Tribe is authorized and permitted to operate (a) gaming devices – i.e., slot
 23 machines, (b) banking and percentage card games, and (c) “any devices or games
 24 that are authorized under state law to the California State Lottery, *provided that the*

25 ³ The facts are set forth in the Declaration of Joginder Dhillon and the
 26 Declaration of Micah Scott (Scott Dec.), both of which are filed concurrently with
 the State’s motion for a temporary restraining order.

27 ⁴ The Santa Ysabel Gaming Commission, as well as its agents, is a
 28 defendant. The Compact specifically provides that the term “Tribe” includes the
 Tribe, as well as its officials and agencies. (Compact, 6, § 2.13.1.)

1 *[Tribe] will not offer such games through use of the Internet unless others in the*
 2 *state are permitted to do so under state and federal law.”* (Compact, 8, § 4.1(c)
 3 (emphasis added).) The Tribe is not to permit persons under the age of twenty-one
 4 years to be present in any room or area in which class III gaming activities are
 5 conducted. (Compact, 11, § 6.3.)

6 Despite the express limitations in the Compact, on November 3, 2014, the
 7 Tribe began to offer Internet gambling in the form of a facsimile of bingo. (Scott
 8 Dec., 2, ¶ 3.) According to the press release issued on the same day, the Tribe
 9 purported to do so pursuant to IGRA and its tribal sovereign authority. (Dhillon
 10 Dec., Exh. A.) Also according to that press release, by using any web browser on
 11 any computer, mobile device, or tablet, a California resident can purchase bingo
 12 cards to be eligible to win cash prizes. (*Id.*) Play is available to California
 13 residents over the age of eighteen. (*Id.*)

14 The Tribe’s Internet gambling is not restricted to its Indian lands.⁵ As
 15 described in the Declaration of Micah Scott and consistent with the press release,
 16 the Tribe’s Internet gambling apparently is accessible to California residents
 17 irrespective of their location. Bettors need not travel to the Tribe’s Indian lands to
 18 gamble. (Scott Dec., 3, ¶ 7.) Bettors use the Internet and log into the Tribe’s bingo
 19 website. (*Id.* at 2-3, ¶ 5.) They place bets by withdrawing money from accounts
 20 that they have opened with the Tribe. (*Id.*) Bettors may fund their accounts by
 21 credit card or other electronic funds transfer. (*Id.* at 2, ¶ 4.) After the bet is placed,
 22 the game system plays the game including covering a facsimile bingo card and
 23 determining the winner. (*Id.* at 3, ¶ 6.) The bettor’s participation is limited to
 24 electing the amount to bet and how many cards to play in any game. (*Id.*; *see also*

25 ⁵ Under IGRA, “Indian lands” include lands within the limits of an Indian
 26 reservation, 25 U.S.C. § 2703(4)(A), and “any lands title to which is either held in
 27 trust by the United States for the benefit of any Indian tribe or individual or held by
 28 any Indian tribe or individual subject to restriction by the United States against
 alienation and over which an Indian tribe exercises governmental power,” *id.* §
 2703(4)(B).

1 Dhillon Dec., 2, ¶ 4 & Exh. A (“At no time is live bingo game action performed by
2 the user.”).)

3 Except under certain circumstances, the Compact provides for a meet and
4 confer process when disputes arise under it. The requirement is “without prejudice
5 to the right of either party to seek injunctive relief against the other when
6 circumstances are deemed to require immediate relief.” (Compact, 27, § 9.1.) In
7 July 2014, information appeared in the gaming press and gambling blogs that the
8 Tribe intended to “launch real money online poker” in California within a short
9 time.⁶ On July 14, 2014, the State sent a letter requesting that the parties meet and
10 confer concerning whether the Tribe’s planned Internet gambling materially
11 breached the Compact. (Dhillon Dec., 2-3, ¶ 6, Exh. B.) That letter also referred to
12 Internet bingo. (*Id.*) The Tribe rejected the State’s request to meet and confer.
13 (Dhillon Dec., 3, ¶ 7, Exh. C.)

14 ARGUMENT

15 The Tribe’s Internet gambling breaches the Compact, violates IGRA, and can
16 be enjoined under both the Compact and the UIGEA. The Tribe’s gambling is legal
17 only if conducted entirely on Indian lands. Its class III gaming is legal only if
18 conducted on the Tribe’s Indian lands in compliance with the Compact. Its Internet
19 gambling is not being conducted only on the Tribe’s Indian lands. Instead, bettors
20 located off the Tribe’s Indian lands can participate in its Internet gambling. Its
21 Internet gambling is not being conducted in compliance with the Compact or
22 IGRA. Importantly, the Tribe’s Internet gambling is not expressly authorized by
23 the Compact and, therefore, is prohibited.

24
25 ⁶ The Tribe’s website reports that it has established defendant Santa Ysabel
26 Interactive and launched an I-gaming poker website. (<http://www.iipaynation-nsn.com/gaming.html>.) Gaming blogs report that real money online poker under
27 PrivateTable.com remains part of the Tribe’s plans. (*See, e.g.*,
28 <http://pokerfuse.com/news/law-and-regulation/26019-california-tribe-launches-real-money-bingo-poker-coming/>.)

I. THE COURT HAS ORIGINAL JURISDICTION OVER THE STATE'S ACTION

The Court has jurisdiction over this action under 28 U.S.C. § 1331, IGRA, and the UIGEA. The State's complaint invokes the Court's jurisdiction under 28 U.S.C. § 1331 because the State's claim arises under federal statutes and the federal common law. This Court has jurisdiction under section 1331 to enforce a compact. *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1055-56 (9th Cir. 1997) (*Cabazon II*), cert. denied sub nom. *Wilson v. Cabazon Band of Mission Indians*, 524 U.S. 926 (1998). In *Cabazon II*, the State asserted that the court lacked jurisdiction because the dispute was purely contractual. *Id.* at 1055. In rejecting that argument, the Ninth Circuit concluded:

The State's obligation to the Bands thus originates in the Compacts. The Compacts quite clearly are a creation of federal law; moreover, IGRA prescribes the permissible scope of the Compacts. We conclude that the Bands' claim to enforce the Compacts arises under federal law and thus that we have jurisdiction pursuant to 28 U.S.C. §§ 1331

Id. at 1056. Here, the same analysis applies. The Tribe's obligation to the State arises from the Compact, which is a creation of federal law and entered into pursuant to IGRA. Importantly, the State seeks to enforce the Compact.

The Court also has jurisdiction pursuant to 25 U.S.C. § 2710(d)(7)(A)(ii) because this action is initiated by the State to enjoin conduct related to the Tribe's class III gaming activity that violates the Compact.⁷ In *Cabazon II*, the Ninth Circuit also addressed jurisdiction under IGRA. The court concluded that "IGRA necessarily confers jurisdiction onto federal courts to enforce Tribal-State compacts and the agreements contained therein." *Cabazon II*, 124 F.3d at 1056. This is

⁷ Title 25 U.S.C. § 2710(d)(7)(A)(ii) provides district court jurisdiction over "any cause of action initiated by a State . . . to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact"

1 exactly what the State seeks to do in this case – i.e., enforce the Tribe’s public
 2 safety duties under the Compact.

3 Finally, the Court has original and exclusive jurisdiction under the UIGEA to
 4 prevent and restrain restricted transactions.⁸ 31 U.S.C. § 5365(a). The State
 5 generally may institute proceedings for an injunction. 31 U.S.C. § 5365(b)(2).
 6 Here, the Tribe may assert that the restricted transactions are initiated, received, or
 7 otherwise made on Indian lands. (*See* Dhillon Dec., Exh. A.) That assertion,
 8 however, does not divest the Court of jurisdiction. Under the UIGEA, the State
 9 then may pursue remedies provided in the Compact with respect to restricted
 10 transactions. 31 U.S.C. § 5365(b)(3)(A)(ii). The State’s second claim for relief
 11 arises under the UIGEA, and the Court has jurisdiction.

12 **II. THE TRIBE DOES NOT HAVE SOVEREIGN IMMUNITY FROM THIS ACTION**

13 The Tribe does not enjoy sovereign immunity with respect to the claims for
 14 relief made in the State’s complaint because Compact section 9.4 provides for a
 15 limited waiver of sovereign immunity:

16 (a) In the event that a dispute is to be resolved in federal
 17 court . . . as provided in this Section 9.0, the State and the
 18 Santa Ysabel Tribe expressly consent to be sued therein
 and waive any immunity therefrom that they may have
 provided that:

19 (1) The dispute is limited solely to
 20 issues arising under this Gaming Compact;

21 (2) Neither side makes any claim for
 22 monetary damages (that is, only injunctive,
 specific performance, . . . or declaratory
 relief is sought); and

23 (3) No person or entity other than the
 24 Santa Ysabel Tribe and the State is party to
 the action

25
 26
 27 ⁸ Under the UIGEA, a “restricted transaction” means any transaction
 28 involving any credit, funds, instrument, or proceeds that the recipient is prohibited
 from accepting. 31 U.S.C. § 5362(7).

(Compact, 30-31, § 9.4.) Clearly, this action meets those criteria to waive sovereign immunity.⁹

Additionally, 25 U.S.C. § 2710(d)(7)(A)(ii) constitutes a congressional waiver of tribal sovereign immunity. That issue was central in the Supreme Court's recent *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2014 (2014), decision. There, the Supreme Court determined that the section's sovereign immunity waiver did not apply when class III gaming was not conducted on Indian lands. The Court observed that IGRA partially abrogates tribal sovereign immunity in section 2710(d)(7)(A)(ii). *Id.* at 2032. Here, the Tribe publicly asserts that the gaming activity¹⁰ occurs on its Indian lands. Moreover, the complaint alleges that some equipment integral to the Tribe's Internet gambling is located on the Tribe's Indian lands. (Complaint, 9, ¶ 34.) Therefore, IGRA's sovereign immunity waiver also applies.

III. IGRA ALLOWS GAMING ONLY ON INDIAN LANDS; THE TRIBE'S INTERNET GAMBLING ON INDIAN LANDS IS CONTRARY TO IGRA

IGRA establishes federal standards for gaming on tribal lands. It creates a regulatory framework for tribal gaming intended to balance state, federal, and tribal interests. *Amador County v. Salazar*, 640 F.3d 373, 376 (D.C. Cir. 2011). Under IGRA, a tribe may conduct gaming only on Indian lands. *Neighbors of Casino San Pablo v. Salazar*, 773 F.Supp.2d 141, 143 (D.D.C. 2011). "Indian lands" is a defined term and means, among other things, lands within the limits of a reservation and lands held in trust by the United States for a tribe. 25 U.S.C. § 2703(4).

⁹ This waiver also applies to the State's claim under the UIGEA, which looks to the enforcement authorities under an IGRA tribal-state compact. *See* 31 U.S.C. § 5365(b)(3)(A)(ii).

¹⁰ Gaming activity is not limited to an actual class III game. *See County of Madera v. Picayune Rancheria of Chukchansi Indians*, 467 F.Supp.2d 993, 1002 (E.D. Cal. 2006).

1 Congress manifested its intention to limit IGRA to gaming on Indian lands
 2 throughout the act. First, in IGRA's findings section, Congress found that
 3 numerous tribes engaged in or licensed "gaming activities on Indian lands," 25
 4 U.S.C. § 2701(1), existing federal law did not provide clarity for the "conduct of
 5 gaming on Indian lands," *id.* § 2701(3), and tribes have the exclusive right to
 6 "regulate gaming activity on Indian lands," *id.* § 2701(5). Second, Congress
 7 declared that one of IGRA's purposes is to establish federal regulatory authority
 8 and federal standards for "gaming on Indian lands." 25 U.S.C. § 2702(3). Third,
 9 Congress generally prohibited gaming on tribal trust lands acquired after October
 10 17, 1988. *See* 25 U.S.C. § 2719. Finally and importantly, all of the provisions
 11 relating to the licensing and regulation under IGRA apply only to gaming on Indian
 12 lands. *See, e.g.,* 25 U.S.C. § 2710(a)(1) (class I gaming), (b)(1) (class II gaming),
 13 (d)(1) (class III gaming).

14 Senate Report No. 100-446 (Aug. 3, 1988) (Senate Report) supports the
 15 conclusion that IGRA and the gaming that it allows are limited to Indian lands. The
 16 report summarizes IGRA as providing "for a system of joint regulation by tribes
 17 and the Federal Government of class II gaming on Indian lands and a system for
 18 compacts between tribes and States for regulation of class III gaming." *Id.* at 1.
 19 The act was the "outgrowth of several years of discussions and negotiations
 20 between gaming tribes, States, the gaming industry, the administration, and the
 21 Congress, in an attempt to formulate a system for regulating gaming on Indian
 22 lands." *Id.* The report characterized *California v. Cabazon Band of Mission*
 23 *Indians*, 480 U.S. 202 (1987) (*Cabazon I*), as using a balancing test between
 24 federal, state, and tribal interests to find "that tribes . . . have a right to conduct
 25 gaming activities on Indian lands unhindered by State regulation." Senate Report,
 26 1. The report observed, "in the final analysis, it is the responsibility of Congress,
 27 consistent with its plenary power over Indian affairs, to balance competing policy
 28

1 interests and to adjust, where appropriate, the jurisdictional framework for
2 *regulation of gaming on Indian lands.*” *Id.* at 2 (emphasis added).

3 Because IGRA and the Senate Report are clear that IGRA gaming is limited to
4 Indian lands, the NIGC concluded that non-electronic bingo played through human
5 proxies offered to patrons over the Internet “is not authorized under IGRA.” (Letter
6 from Kevin Washburn, General Counsel, NIGC, to Robert Rossette, Monteau,
7 Peebles & Crowell, re: Lac Vieux Desert Internet Bingo Operation (Oct. 26,
8 2000));¹¹ *see Lac Vieux Desert Band of Lake Superior Chippewa Indians v.*
9 *Ashcroft*, 360 F. Supp. 2d 64, 65 (D.D.C. 2004) (describing the game).

10 Moreover, the NIGC consistently has concluded that tribes making Internet
11 gambling available to persons not located on Indian lands violate IGRA. (*See, e.g.,*
12 Letter from Montie Deer, Chairman, NIGC, to Ernest L. Stensgar, Chairman, Coeur
13 d’ Alene Tribe, re: National Indian Lottery (Jun. 22, 1999); letter from Penny
14 Coleman, Deputy General Counsel, NIGC, to Terry Barnes, Bingo Networks, re: U-
15 PIK-EM Bingo (Jun. 9, 2000); letter from Kevin Washburn, General Counsel,
16 NIGC, to Joseph Speck, Nic-A-Bob Productions, re: WIN Sports Betting Game
17 (Mar. 13, 2001); *see also* letter from Richard Schiff, Senior Attorney, NIGC, to
18 Don Abney, Principal Chief, Sac and Fox Nation, re: Tele-Bingo (Jun. 21, 1999)
19 (bingo played by telephone off-Indian lands violates IGRA).) In its only known
20 entry into tribal Internet gaming, the United States Department of Justice shared the
21 NIGC’s opinion. *See* Brief of the United States as Amicus Curiae, *Coeur d’Alene*
22 *Tribe v. AT&T Corp.*, 1999 WL 33622333, Case No. 99-35088 (9th Cir. 1999).

23 The State is not aware of any published court decision that expressly
24 authorizes tribal gaming under IGRA off of Indian lands. Rather, the decisions lead
25 to the conclusion – consistent with IGRA’s provisions and the Senate Report – that
26 IGRA gaming is limited to Indian lands. In *AT&T Corporation v. Coeur d’Alene*

27 ¹¹ Each NIGC gaming opinion letter cited herein is contained in Appendix
28 A, filed concurrently with the State’s motion for a temporary order.

1 *Tribe*, 45 F. Supp. 2d 995 (D. Idaho 1998), *rev'd on other grounds*, 295 F.3d 899
 2 (9th Cir. 2001), the district court found that, to the extent the tribe's planned
 3 National Indian Lottery (NIL) occurred outside the limits of the reservation, IGRA
 4 did not preempt state gambling laws.¹² Based upon that finding, the court
 5 concluded that notices given by states under the federal Wire Act precluded
 6 AT&T's providing toll-free telephone services for the NIL to those states. *Id.* at
 7 999-1000. The court observed that under the plain language of IGRA, the gaming
 8 activities constituting the NIL had to occur on lands within the limits of the tribe's
 9 reservation to be unregulated. *Id.* at 1001. The court found that placing a wager
 10 was a gaming activity within the meaning of IGRA. *Id.* ("But for the act of placing
 11 the 'lottery wager,' the player could not participate in, and the Tribe could not
 12 operate, the [NIL].").¹³

13 In *State ex rel. Nixon v. Coeur d'Alene Tribe*, 164 F.3d 1102 (8th Cir. 1999),
 14 the Eighth Circuit addressed Missouri's challenge to the NIL. The state filed
 15 actions in state court against the tribe and its contractor to enjoin conducting the
 16 NIL with Missouri residents. Defendants removed both cases, which the federal
 17 district courts subsequently dismissed. The Eighth Circuit reversed and remanded.
 18 The court pointed out that "IGRA established a comprehensive regulatory regime
 19 for tribal gaming activities *on Indian lands*. . . . Once a tribe leaves its own lands
 20 and conducts gambling activities on state lands, nothing in the IGRA suggests that

21 ¹² In reversing, the Ninth Circuit focused on the NIGC's approval of the
 22 management agreement for the NIL and the failure of the states, which issued
 23 letters to AT&T under the federal Wire Act, to challenge the NIGC's approval as
 24 final agency action. The Ninth Circuit expressly did not address the issue of the
 NIL's legality: "This Court draws no conclusion as to how the Lottery might fare
 when properly challenged in federal court and balanced against state laws and
 interests." *AT&T Corp. v. Coeur d'Alene Tribe*, 295 F.3d at 910 n. 12.

25 ¹³ In *County of Madera v. Picayune Rancheria of Chukchansi Indians*, 467
 26 F.Supp.2d at 1002, the court found that "gaming activity" would be the actual
 27 playing or provision of the games and the necessary conduct associated with
 playing or providing the identified games. *See also Michigan v. Bay Mills Indian*
Community, 134 S.Ct. at 2032-33.

1 Congress intended to preempt the State's historic right to regulate this controversial
 2 class of economic activities." *Id.* at 1108 (emphasis in original). The court
 3 concluded that if the NIL was being conducted on Missouri lands, IGRA did not
 4 preempt the state law claims or even provide a defense thereto. *Id.* at 1109.¹⁴

5 In sum, the Tribe's Internet gambling does not fall within the purview of
 6 IGRA because some of the gaming activity necessarily takes place outside of the
 7 Tribe's Indian lands. Thus, IGRA does not give the Tribe the power to engage in,
 8 or license and regulate, the Internet gambling. Instead, the State has the power to
 9 regulate the Tribe's Internet gambling.

10 **IV. THE TRIBE'S INTERNET GAMBLING OCCURS BOTH WHERE THE** 11 **BETTOR IS LOCATED AND WHERE THE WAGER IS RECEIVED**

12 Although the Tribe may argue that its Internet gambling offerings are lawful
 13 because servers or some other equipment is located on its Indian lands, the UIGEA
 14 confirms Congress's recognition that Internet gambling may cross state and
 15 national borders:

16 New mechanisms for enforcing gambling laws on the
 17 Internet are necessary because traditional law
 18 enforcement mechanisms are often inadequate for
 19 enforcing gambling prohibitions or regulations on the
 Internet, especially where such gambling crosses State
 and national borders.

20 31 U.S.C. § 5361(a)(4).

21 This finding apparently leads to the UIGEA's definition of "bet or wager" as
 22 including the movement of funds. Under the UIGEA, bet or wager means staking
 23 or risking something of value upon the outcome of a game, subject to chance, upon
 24 an agreement or understanding of receipt of something of value in the event of a
 25 certain outcome. 31 U.S.C. § 5362(1)(A). Bet or wager includes the purchase of a
 26 chance or opportunity to win a lottery, 31 U.S.C. § 5362(1)(B), and any instructions

27 ¹⁴ Even though the cases were remanded for a determination of whether the
 28 NIL was being conducted on Missouri lands, no subsequent history is reported.

1 or information pertaining to the establishment or movement of funds by the bettor
2 or customer in, to, or from an account with a business of betting or wagering, *id.* §
3 5362(1)(D).

4 The UIGEA looks to the laws of the places both where the bet or wager are
5 placed and received. Unlawful Internet gambling is defined as “to place, receive, or
6 otherwise knowingly transmit a bet or wager by any means which involves the use,
7 at least in part, of the Internet where such bet or wager is unlawful under any
8 applicable Federal or State law in the State or Tribal lands in which the bet or
9 wager is *initiated, received, or otherwise made.*” 31 U.S.C. § 5362(10)(A)
10 (emphasis added); *see Interactive Media Entertainment & Gaming Assn. Inc. v.*
11 *Attorney General*, 580 F.3d 113, 117 (3d Cir. 2009) (*Interactive*) (nothing in the
12 UIGEA suggests that Congress meant anything other than the physical location of a
13 bettor or gambling business). Congress recognized that routing is an integral part
14 of the Internet and may be used to avoid the UIGEA; therefore, it included the
15 provision that “intermediate routing of electronic data shall not determine the
16 location or locations in which a bet or wager is initiated, received, or otherwise
17 made.” 31 U.S.C. § 5362(10)(E).

18 Further showing Congress’ view that gambling occurs both where the bet or
19 wager is placed and received, the UIGEA excludes from unlawful Internet
20 gambling purely intrastate betting or wagering – i.e., “initiated and received or
21 otherwise made exclusively within a single State” – subject to certain conditions.
22 31 U.S.C. § 5362(10)(B). Similarly, the UIGEA excludes from unlawful Internet
23 gambling certain transactions on Indian lands. *See* 31 U.S.C. § 5362(10)(C). For a
24 single tribe to avoid unlawful Internet gambling, it must meet certain requirements,
25 including all the following:

- 26 a. The bet or wager must be initiated and received exclusively “within the
27 Indian lands” of the tribe as defined under IGRA, 31 U.S.C. §
28 5362(10)(C)(i)(1);

- 1 b. The method by which the bet or wager is initiated and received must be
- 2 expressly authorized by and comply with a tribal ordinance approved by
- 3 the NIGC and, if class III gaming, the applicable tribal-state gaming
- 4 compact, 31 U.S.C § 5362(10)(C)(ii); and
- 5 c. The applicable tribal ordinance or compact must include age and location
- 6 verification requirements “reasonably designed to block access to minors
- 7 and persons located out of the applicable Tribal lands,” 31 U.S.C §
- 8 5362(10)(C)(iii).

9 The UIGEA prohibits gambling businesses from knowingly accepting various
 10 forms of financial instruments in connection with another person’s participation in
 11 unlawful Internet gambling, including proceeds from credit cards, electronic fund
 12 transfers, and checks. *See* 31 U.S.C. § 5363; *United States v. Lyons*, 740 F.3d 702,
 13 729 (1st Cir. 2014). For determining whether the gambling is unlawful, the test is
 14 whether it is illegal at the location in which the gambling business is located or the
 15 location from which the individual initiated the bet or wager. *Interactive*, 580 F.3d
 16 at 116. The Third Circuit succinctly summarized the locational aspects of UIGEA:
 17 “Simply put, a gambling business cannot knowingly accept the enumerated
 18 financial instruments in connection with a bet that is illegal under any Federal or
 19 State law applicable in the jurisdiction in which the bet is initiated or received.” *Id.*
 20 at 117.

21 The UIGEA’s locational focus is consistent with other authorities that examine
 22 betting as occurring in two places – i.e., where the bettor is located and where the
 23 wager is received. For example, both the district court in *AT&T Corporation v.*
 24 *Coeur d’Alene* and the Eighth Circuit in *State ex rel. Nixon v. Coeur d’Alene Tribe*
 25 looked to players’ locations in examining state law applicability or IGRA
 26 preemption. Additionally, the federal Wire Act, 18 U.S.C. § 1084, which
 27 proscribes transmitting bets or wagers in interstate commerce, contains a safe
 28 harbor for the transmission of information assisting in the placing of bets or wagers

1 from a state or foreign country where betting on that sporting event or contest is
 2 legal into a state or foreign country in which such betting is legal. 18 U.S.C. §
 3 1084(b). Thus, the Wire Act looks to the parties' locations. *See, e.g., Martin v.*
 4 *United States*, 389 F.2d 895, 897-98 (5th Cir. 1968).¹⁵

5 In sum, the Tribe's Internet gambling occurs off the Tribe's Indian lands when
 6 bettors – i.e., Internet users – are not physically on the Tribe's Indian lands.

7 **V. THE TRIBE'S INTERNET GAMBLING IS A FACSIMILE OF BINGO AND**
 8 **THUS IS CLASS III GAMING**

9 IGRA divides tribal gaming into three classifications: class I, which involves
 10 traditional forms of tribal gaming and social games solely for minimal prizes; class
 11 II, which is bingo meeting certain criteria and some card games; and class III,
 12 which is all forms of gaming that are not class I or class II. 25 U.S.C. § 2703(6),
 13 (7), (8). Class III gaming includes banking card games, electronic facsimiles of any
 14 game of chance, and slot machines of any kind. 25 U.S.C. § 2703(7)(B).

15 The NIGC defines an electronic facsimile to be “a game played in an
 16 electronic . . . format that replicates a game of chance by incorporating all of the
 17 characteristics of the game, except when, for bingo . . . , the electronic . . . format
 18 broadens participation by allowing multiple players to play with or against each
 19 other rather than with or against a machine.” 25 C.F.R. § 502.8. In discussing what
 20 an electronic facsimile is, the NIGC writes: “If, however, a particular aid . . .
 21 becomes a necessity, or encompasses all the aspects of a particular game, it ceases
 22 to be a technological aid and becomes an electronic facsimile.” (Mem. from Penny

23
 24 ¹⁵ Federal courts are divided as to whether the Wire Act reaches Internet
 25 wagers and bets that do not involve sporting contests. *Compare In re Mastercard*
 26 *Int'l Inc., Internet Gambling Litig.*, 132 F. Supp. 2d 468, 480-81 (E.D. La. 2001),
 27 *aff'd*, 313 F.3d 257 (5th Cir. 2002) (sporting events only), *with United States v.*
 28 *Lombardo*, 639 F. Supp. 2d 1271, 1279-82 (D. Utah 2007) (all forms of betting). In
 December 2011, the United States Department of Justice released a memorandum
 that concluded that the Wire Act's prohibitions relate solely to sports-related
 gambling activities. (Memorandum Opinion for the Assistant Attorney General,
 Criminal Division (Sept. 20, 2011).)

1 Coleman, General Counsel, NIGC, to George Skibine, Chairman, NIGC, re:
 2 classification of card games played with technological aids, 8 (Dec. 17, 2009)
 3 (available in Appendix A).)

4 An electronic facsimile of bingo is a class III game. Here, the evidence shows
 5 that players, who are located off the Tribe's Indian lands, do nothing other than
 6 place a bet. (Scott Dec., 3, ¶¶ 6, 7.) The Tribe's electronic system does everything
 7 else. If the electronic system is removed, the game disappears. Therefore, the
 8 electronic system is a necessity of the game.

9 The Tribe's electronic system selects the numbers, purportedly marks the
 10 cards, and determines the winner. (Scott Dec., 3, ¶ 6.) In this way, the Tribe's
 11 Internet gambling is no different from the electronic pull-tab dispenser that the
 12 Ninth Circuit held to be an electronic facsimile in *Sycuan Band of Mission Indians*
 13 *v. Roache*, 54 F.3d 535 (9th Cir. 1994) (*Sycuan*). The pull-tab dispenser there, like
 14 the Tribe's Internet game here, produced only an electronic reproduction of a paper
 15 ticket on a computer screen. Unlike the Tribe's Internet game here in which every
 16 part of the game is played on its electronic system, the player in *Sycuan* actually did
 17 something to reveal numbers. *Id.* at 541. The court found, as the Court should
 18 here, that the pull-tab machine was a class III facsimile because it was a self-
 19 contained computer game played electronically. *Id.* at 542. Here, like the pull-tab
 20 game in *Sycuan*, the game is an exact and detailed copy of a bingo game played
 21 electronically. *See id*; *see also Cabazon Band of Mission Indians v. National*
 22 *Indian Gaming Comm'n*, 14 F.3d 633, 636-37 (D.C. Cir. 1994) (pull-tab game in
 23 which multiple players played against each other was class III electronic facsimile);
 24 (Scott Dec., 3, ¶ 7).

25 VI. A TEMPORARY RESTRAINING ORDER IS APPROPRIATE IN THIS CASE

26 The requirements for a temporary restraining order are the same as those for a
 27 preliminary injunction. A party applying for a preliminary injunction "must
 28 establish that he is likely to succeed on the merits, that he is likely to suffer

1 irreparable harm in the absence of preliminary relief, that the balance of equities
 2 tips in his favor, and that an injunction is in the public interest.” *Winter v. Natural*
 3 *Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008). Here, the evidence
 4 establishes all of these factors.

5 **A. Because the Evidence Shows that the Tribe’s Internet Gambling**
 6 **Breaches the Compact and Violates the UIGEA, the State Is**
 7 **Likely To Succeed on the Merits**

8 The State’s first claim for relief is breach of the Compact. A compact is a
 9 contract, and is governed by general federal contract law principles. *Cachil Dehe*
 10 *Band of Wintun Indians of the Colusa Indian Comm. v. California Gambling*
 11 *Control Comm’n*, 618 F.3d 1066, 1073 (9th Cir. 2010). In determining federal
 12 contract law, courts rely upon both “California contract law and Ninth Circuit
 13 decisions interpreting California” contract law. *Id.* The elements for a breach of
 14 contract claim are the contract, plaintiff’s performance or excuse for
 15 nonperformance, defendant’s breach, and resulting damages to plaintiff. *Reichert v.*
General Ins. Co. of America, 68 Cal.2d 822, 830 (1968).

16 In this case, the Tribe’s breach of the Compact is clear. The Tribe agreed not
 17 to engage in class III gaming that is not expressly authorized in the Compact.
 18 (Compact, 7, § 3.0.) The only Internet gambling expressly allowed by the Compact
 19 is “devices and games that are authorized . . . to the California State Lottery” that
 20 others in the State are permitted to offer through the Internet under state and federal
 21 law. (Compact, 8, § 4.1(c).) No one is permitted to offer any California State
 22 Lottery game through the Internet. (Dhillon Dec., 3, ¶ 8.) Consequently, the
 23 Tribe’s offering its class III facsimile of bingo over the Internet breaches its duties
 24 under the Compact. The State is likely to succeed on its first claim for relief on the
 25 merits.

26 The State’s second claim for relief is under the UIGEA. Under the facts here,
 27 the Tribe is engaging in unlawful Internet gambling. The betting, which is initiated
 28 in California off of Indian lands, is illegal under State law. California statutes make

1 setting up and drawing a lottery, selling or furnishing a chance in a lottery, and
 2 aiding or assisting those acts, crimes. Cal. Penal Code §§ 320, 321, 322. The
 3 Tribe's electronic facsimile of bingo is a form of lottery as it is a game played for a
 4 prize determined by chance for consideration. *See* Cal. Penal Code § 319; *see also*
 5 *People v. Shira*, 62 Cal.App.3d 442, 462-63 (1976).

6 Additionally, California Penal Code section 337a broadly prohibits keeping a
 7 place with devices for the purpose of recording any bets or wagers, receiving
 8 anything of value bet or wagered, recording bets or wagers, or offering or accepting
 9 any bets or wagers. The Tribe's Internet gambling system violates California Penal
 10 Code section 337a, which is a predicate for UIGEA relief.

11 Finally, California law requires that bingo participants be physically present at
 12 the time and place where the game is being conducted, Cal. Penal Code § 326.5(m),
 13 and prohibits using electronic or video displays in connection with bingo, *id.* §
 14 326.5(o). The Tribe's Internet gambling violates these California Penal Code
 15 provisions. That too provides a predicate for UIGEA relief.

16 Through its unlawful Internet gambling, the Tribe is engaged in the business
 17 of betting or wagering. It provides the electronic system (1) by which customers
 18 bet or wager or purchase an opportunity to win a lottery and (2) which includes
 19 instructions or information pertaining to moving funds in, to, or from an account
 20 with the Tribe. *See* 31 U.S.C. § 5362(1), (2). The Tribe knowingly accepts credit
 21 and other transfers in connection with the unlawful Internet gambling. 31 U.S.C. §
 22 5363. The State is likely to succeed on its second claim for relief on the merits.

23 **B. Because the Tribe's Internet Gambling Offends the State's**
 24 **Public Policies and Potentially Has Far-Reaching Impact, the**
 25 **State Is Likely To Suffer Irreparable Harm in the Absence of**
 26 **Relief**

26 The State has no adequate remedy at law. Under the Compact, IGRA, and the
 27 UIGEA, it can seek only injunctive relief. Moreover, even if damages were
 28 recoverable, they could not adequately compensate the State for the harm done to

1 its interests by illegal gambling and the possibility of unregulated Internet gambling
2 by many tribes, both within and outside the State's borders.

3 The State has an interest in ensuring compliance with the Compact. (Dhillon
4 Dec., 3, ¶ 9.) Additionally, the State's public policy against unlawful lotteries is at
5 stake. (*Id.*) That public policy is enunciated in the California Constitution's broad
6 prohibition of lotteries, Cal. Const. art. IV, § 19(a), as well as the California Penal
7 Code. The State's public policy regarding tribal gaming also is set forth in the
8 California Constitution, which allows the negotiation and legislative ratification of
9 tribal-state gaming compacts for the operation of slot machines and for the conduct
10 of lottery games and banking and percentage card games. Cal. Const. art. IV, §
11 19(f). The Compact establishes the perimeters of the Tribe's class III gaming.
12 Otherwise, class III gaming is unlawful in California. *See* Cal. Const. art. IV, §
13 19(e); *Hotel Employees and Restaurant Employees Int'l v. Davis*, 21 Cal. 4th 585
14 (1999). The State's interest in protecting its public policy will be harmed
15 irreparably without the requested order. (*See* Dhillon Dec., 3, ¶ 9.)

16 Additionally, the Tribe's Internet gambling targets California residents age
17 eighteen and older. It allows unlawful gambling anywhere these residents are –
18 albeit at school, work, or home. Even though it targets Californians who are not on
19 its Indian lands, the Tribe seeks to preclude the State from an opportunity to
20 regulate the Internet gambling either through the Compact or otherwise.
21 Unregulated gambling enterprises are inimical to the public health, safety, welfare,
22 and good order. Cal. Bus. & Prof. Code § 19801(d). The State thus will suffer
23 irreparable harm if the Tribe is allowed to continue its Internet gambling.

24 Moreover, the Tribe's Internet gambling presents issues that potentially affect
25 millions of Californians and, possibly, the United States' gambling policies. The
26 gambling press reports the following with attribution to defendant Santa Ysabel
27 Interactive:

DesertRoseBingo.com, is an experiment of sorts and if the site manages to successfully keep online and doesn't run up against major legal challenges, the move may be a precursor for an online poker offering shortly. Santa Ysabel Interactive Director of Marketing Chris Wrieden explained to the Pokerfuse news source, "Some believe our promise to bring regulated cash poker games to California has all been a great big bluff, for any number of self-serving reasons. I can tell you it hasn't been, it just takes time to put all of the pieces together. When we launch it will put our critics' bluff theory to rest and *when we accept our first online bet, we will be on our way to creating change for our industry.*"

(<http://www.online-casinos.com/news/13007-tribal-interests-california-introduce-online-gambling> (emphasis added).) The absence of injunctive relief not only will encourage the Tribe to offer additional Internet gambling, but also may encourage other tribes to begin online gambling in California and elsewhere. (See Dhillon Dec., 3, ¶ 9.)

C. The Balance of the Equities Tips in the State's Favor

The equities clearly favor the State and its interests in ensuring compliance with Compact and protecting the public health, safety, welfare, and good order. The Tribe is reaching out to Californians irrespective of whether they are on its Indian lands. IGRA does not allow this. The UIGEA does not allow this. The Compact does not allow this.

The Tribe should not be allowed to benefit by breaching the Compact and violating State and federal law at the expense of Californians and the State's public policy. Additionally, the State has acted expediently once the Tribe launched its Internet gambling.¹⁶ In sum, the balance of the equities tips in the State's favor.

D. An Injunction Is in the Public Interest

The State's interest is the public interest. Here, the public interest is to enforce the Compact, to prevent the Tribe from engaging in unlawful class III gaming that

¹⁶ The State attempted to meet and confer when the Tribe first announced its intentions in July 2014. The Tribe, however, refused to participate in a meet and confer. (See Dhillon Dec., 2-3, ¶¶ 6 & 7.)

1 targets the State's residents, to prevent violations of state and federal law, and to
2 protect the State's constitutionally stated public policy with respect to lotteries,
3 gambling, and tribal gaming. For these reasons, an injunction here is in the public
4 interest.

5 **CONCLUSION**

6 In view of the foregoing, the State respectfully requests that the Court enter a
7 temporary restraining order enjoining the Tribe and the other defendants from
8 offering Internet gambling to residents of, and visitors to, California and from
9 accepting payments or funds in violation of the UIGEA.

10
11 Dated: November 18, 2014

Respectfully Submitted,

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16
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