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UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

State of California,

Plaintiff,

vs.

Iipay Nation of Santa Ysabel, et. al.

Defendants.

CIVIL FILE NO. 3:14-CV-02724-AJB/NLS

DEFENDANTS' REPLY TO STATE OF CALIFORNIA OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Complaint Filed: November 18, 2014
Hearing Date: March 5, 2015
Time: 2:00 pm
Courtroom: 3B
Judge: Hon. Anthony J. Battaglia

I. Introduction

In order to avoid dismissal of this action as required by the *Bay Mills* decision, *Michigan v. Bay Mills Indian Community* ("*Bay Mills*") (572 U.S. __, 134 S.Ct. 2024, 2032 (2014), the State resorts to speaking out of both sides of its mouth. It now seeks to invert its own Complaint allegations and turn the requirements of IGRA inside out. Even as it tries to invent new legal concepts not recognized by IGRA – like its statement that it can assert a breach of compact claim in this action because the Tribe's "gaming activity *straddles the borders* of the Tribe's Indian lands" – it cannot, and does not, retract it's primary contention in this action that the Tribe's disputed gaming activity "is not being conducted *only* on the Tribe's Indian lands." State's Memorandum of Points and Authorities in support of its TRO Motion, Dkt. No. 3, at p. 4 (emphasis added). There is no relevant factual or legal distinction between this action and *Bay Mills* and *Tiger Hobia* that warrants anything but dismissal of this action. *Bay Mills*, 134 S.Ct. 2024; *State of Oklahoma v. Tiger Hobia*, No. 12-5134 Dkt. No. 15-2, at A60, (10th Cir. December 22, 2014).

II. Argument

Try has it might, the State cannot now run from its claim that the Tribe's VPN Aided Class II Gaming "*off* Indian lands is contrary to IGRA," and such gaming occurs "*off* the Tribe's Indian lands." State's Memorandum of Points and Authorities in support of its TRO Motion, Dkt. No. 3, at pp. 7 and 14 (emphasis added). The State is the master of its own action, and if the State's claim is that the not every element of the disputed

gaming activity occurs on Indian lands, then the Court must take the facts as alleged by the State and dismiss this action under *Bay Mills*.

This action falls squarely within the *Bay Mills* rule. The factual predicate for the State's claims – *as alleged by the State* -- is that the disputed gaming activity of the Tribe is "off of Indian lands [and] violates IGRA." Instead of *alleging and ultimately establishing* that the gaming "is located on Indian lands" as is required to bring a federal cause of action pursuant to 25 U.S.C. § 2710(d)(7)(A)(ii) of IGRA to enjoin class III gaming activity,[1] *the State is alleging and trying to prove the very opposite*.

This is evident from a review of the contentions the State asserted in its effort to obtain the temporary injunctive relief it requested from the Court – and upon which the Court relied in granting the injunctive relief:

(1) "[T]he Tribe's Internet gambling *is not restricted to its Indian lands*." State's Memorandum of Points and Authorities in support of its TRO Motion, Dkt. No. 3, at p. 3 (emphasis added).

(2) "The Tribe's gambling is legal only if conducted *entirely* on Indian lands." *Id*. at p. 4 (emphasis added).

(3) "Its Internet gambling is not being conducted *only* on the Tribe's Indian lands." *Id*. (emphasis added).

[1] *See Bay Mills*, 134 S.Ct. at 2032; *Tiger Hobia*, Dkt. No. 15-2, at A62; TRO Order, Dkt. No. 11, at p. 6 (emphasis added).

(4) "Instead, bettors *located off the Tribe's Indian lands* can participate in its Internet gambling." *Id.* (emphasis added).

(5) "IGRA allows gaming only on Indian lands; the *Tribe's Internet gambling off Indian lands* is contrary to IGRA." *Id*. at p. 7 (emphasis added).

(6) [Congress intended] "to limit IGRA to gaming on Indian lands." *Id*. at p. 8 (emphasis added).

(7) "**[T]he *Tribe's Internet gambling does not fall within the purview of IGRA because some of the gaming activity necessarily takes place outside of the Tribe's Indian lands*.** Thus IGRA does not give the Tribe the power to engage in, or license and regulate, the Internet gambling. Instead the state has the power to regulate the Internet gambling." *Id*. at p. 11 (emphasis added).

(8) "[T]he Tribe's Internet gambling *occurs off the Tribe's Indian lands* when bettors – i.e. Internet users – are not physically on the Tribe's Indian lands." (*Id*. at p. 14) (emphasis added).

Again, *unless and until* the State stipulates to the fact that the disputed "gaming activity" is conducted solely and exclusively on the Tribe's Indian lands, the Court cannot proceed to adjudicate the State's claims because the State's action is barred by the doctrine of tribal immunity. The Bay Mills decision does not permit any other result.[2]

[2] The State's contention that the *Bay Mills* and *Tiger Hobia* cases are distinguishable

III. Conclusion

The Court cannot begin to conduct a classification analysis to determine if the disputed gaming activity is legally deemed class II gaming or class III gaming under IGRA until it is stipulated that the gaming activity in question is "conducted *entirely* on Indian lands" so as to fall within the purview of IGRA. The State tries to concede this point, but in the end it simply cannot bring itself to do so because it wants to have its cake and eat it too – meaning that Tribal Defendants' motion to dismiss must be granted under Fed.R.Civ.P. 12(h)(3).[3]

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because the compacts at issue in each case effectively "forbid a suit by 'strictly' limiting the remedies available" is misplaced. Neither case turned on whether a compact waiver for judicial remedies existed. The cases focused exclusively on whether the dispute resolution remedy available under the respective compacts existed in light of the allegations made by Michigan and Oklahoma that the gaming activities at issue were occurring off Indian lands. *Bay Mills*, 134 S.Ct. at 2031-2032 (the premise of the state of Michigan's suit is that the tribe's casino was unlawful because of its location outside Indian lands, but Section 2710(d)(7)(A)(ii) only abrogates tribal immunity with respect to class III gaming located *on* Indian lands); *State of Oklahoma v. Tiger Hobia*, No. 12-5134, at 3-4 (10th Cir. December 22, 2014) ("[i]f, as here, the complaint alleges that the challenged class III gaming activity is occurring somewhere other than on 'Indian lands' as defined in IGRA, the action fails to state a valid claim for relief under 25 U.S.C. 2710(d)(7)(A)(ii) and must be dismissed").

That issue is directly on point here. Under both cases the courts found that if the states alleged that the disputed gaming was not occurring on Indian lands then the compacts at issue were not applicable and neither was a statutory abrogation under 25 U.S.C. § 2710(d)(7)(A)(ii). The compacts simply would not be applicable if the gaming occurred off Indian lands as alleged, even if a remedy of injunctive relief in federal court was contained in those compacts, because they would fall outside the purview of IGRA.

[3] Compacts under IGRA are government-to-government agreements between two equal sovereigns, and as such, as noted by the Tenth Circuit in *Tiger Hobia*, IGRA does not

Dated: January 27, 2015

/s/ Little Fawn Boland

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permit the State to bring an official capacity action alleging a breach of compact claim against individual tribal officers. Furthermore, where, as in this case, the complaint alleges no individual actions by any of the tribal officials named as defendants or that such defendants acted outside their authority, it is plain that the suit is nothing more than a suit against the Tribe, and both the Tribe and tribal officials are immune. *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271-1272 (9th Cir. 1991). In any event, the State did not allege that Santa Ysabel Interactive, Inc., a distinct legal entity established under tribal law, waived its own immunity protection for any claim asserted in the State's action. *See* Declaration of Little Fawn Boland, Ex. Nos. 1 through 3. Neither can the State in good faith, and subject to Rule 11, reasonably contend that office staff of the Tribal Gaming Commission like named defendants Anthony Bucaro and Michelle Maxey are "officers" of the Tribe or have any responsibility for any conduct of the disputed gaming. In sum, the State's present action is barred as to all Tribal Defendants.

PROOF OF SERVICE

I, Little Fawn Boland, hereby declare:

I am employed by Ceiba Legal, LLP in the City of Mill Valley and County of Marin, California. I am a resident in the City of Mill Valley. I am over the age of eighteen years and not a party to the within action. My business address is CEIBA LEGAL, LLP, 35 Madrone Park Circle, Mill Valley, California, 94941. I hereby certify that on January 27, 2015, I electronically filed the foregoing with the Clerk of the Court using the ECF system.

DEFENDANTS' REPLY TO STATE OF CALIFORNIA OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt, described as:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on January 27, 2015 in Mill Valley, California.

By: /s/ Little Fawn Boland
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