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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, Plaintiff, v. IIPAY NATION OF SANTA YSABEL, *et al.* Defendants.	CASE NO. 3:14-cv-02724-AJB-NLS CASE NO. 3:14-cv-02855-AJB-NLS **STATE OF CALIFORNIA'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT (FED. R. CIV. P. 56 & 65)**
UNITED STATES OF AMERICA, Plaintiff, v. IIPAY NATION OF SANTA YSABEL, *et al.* Defendants.	Date: June 27, 2016 Time: 3:00 p.m. Courtroom 3B Judge: **Hon. Anthony J. Battaglia**

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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 the Santa Ysabel Band of Diegueno Mission Indians (Tribe), launched "the nation's first web browser-based i-Gaming platform," which was targeted directly at the computers, smart phones, and other Internet-accessible devices operated by the State of California's (State) residents. The Tribe's Internet gambling platform was known as Desert Rose Bingo (DRB). It potentially allowed any Californian over eighteen years old to gamble with the Tribe from wherever he or she could browse the Internet and access the Tribe's system. Because no trip to the Tribe's reservation or casino was required,[1] DRB could connect millions of Californians to Internet gambling.

The Tribe's self-proclaimed "groundbreaking" efforts to make Internet gambling available to Californians "anytime & anywhere" breached the tribal-state class III gaming compact (Compact) between the Tribe and the State, did not comply with the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2721, 18 U.S.C. §§ 1166-1168, and violated the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA), 31 U.S.C. §§ 5361-5367. Accordingly, the State filed this action. The State also sought, and obtained, a temporary restraining order enjoining the Tribe and other defendants from offering Internet gambling to residents of, and visitors to, California and accepting payments that violated the UIGEA. (ECF No. 11.)

The State now moves for summary judgment. The undisputed facts establish that the Tribe breached the Compact: Specifically, the Tribe and the State entered into the Compact that, among other things, authorizes use of the Internet only under limited circumstances and requires compliance with IGRA; the Tribe breached the

[1] As set forth below, the Tribe's Internet gambling contemplates that no patron will visit the Tribe's reservation or casino at all for DRB. The Tribe has no terminals or facilities on its reservation for patrons to fund, participate in, or collect winnings arising from DRB.

Compact by offering DRB over the Internet to persons not on its Indian lands; the State performed in accordance with the Compact; and the State was damaged by the Tribe's breach of the Compact.

The undisputed facts also establish that the Tribe and others violated the UIGEA. To conserve its and the Court's resources, the State joins in, and adopts, the United States' motion for summary judgment.[2] (ECF No. 61.)

Because the undisputed facts establish liability under both the Compact and the UIGEA, the State respectfully requests that the Court enter summary judgment and permanently enjoin[3] the Tribe and the other defendants from offering Internet games of chance to residents of, and visitors to, California and from accepting payments or funds in violation of the UIGEA.

UNDISPUTED FACTS

The undisputed facts underlying the Tribe's breach of the Compact, and the State's motion for summary judgment, are straightforward and uncomplicated.

I. THE COMPACT

On September 8, 2003, the Tribe and the State entered into the Compact pursuant to IGRA. (State of California's Separate Statement of Undisputed Material Facts (UF), No. 1.) Exhibit 1 to the Complaint is a true and correct copy of the Compact. (UF No. 2.) On December 22, 2003, the Compact became effective upon its publication in the Federal Register. 68 Fed. Reg. 71131 (Dec. 22, 2003); (UF No. 3).

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[2] The UIGEA gives this Court original and exclusive jurisdiction to prevent and restrain restricted transactions under the UIGEA. 31 U.S.C. § 5365(a). The UIGEA also gives the State standing to initiate proceedings. 31 U.S.C. § 5365(b)(2)(A).

[3] As set forth below, the State cannot recover damages for breach of the Compact. Only equitable remedies are available under the Compact. With respect to the UIGEA, the only remedy available to the State is injunctive relief. 31 U.S.C. § 5365(b)(2)(B).

II. THE DEFENDANTS[4]

The defendants named by the State fall within the Compact's definition of the "Tribe." Section 2.13.1 of the Compact defines the terms "Santa Ysabel Tribe" or "Tribe" to include the Tribe, as well as its authorized officials and agencies. (UF No. 4.) Defendant Virgil Perez currently serves as the Tribe's chairman. (UF No. 5.) Defendant Brandie Taylor formerly served as the Tribe's vice-chairwoman. (UF No. 6.)

Defendant Santa Ysabel Interactive (SYI) is a tribal corporation established under the laws of the Tribe. (UF No. 7.)[5] Defendant David Chelette is SYI's president. (UF No. 12.) SYI was formed for the purpose of proceeding with interactive gaming, including online poker. (UF No. 13.) SYI operated DRB. (UF No. 14.)

Defendant Santa Ysabel Gaming Commission (Gaming Commission) was established under the Tribal Gaming Ordinance to exercise regulatory authority over all gaming activities conducted within the jurisdiction of the Tribe. (UF No. 15.) Defendant David Vialpando serves as chairman of the Gaming Commission. (UF No. 16.) The Gaming Commission exercises regulatory authority over all of the Tribe's gaming activities. Under section 2.20 of the Compact, the Gaming Commission is the Tribe's tribal gaming agency. (UF No. 17.)

III. THE COMPACT'S PROVISIONS FOR GAMING

Section 1.0 of the Compact provides that its purposes and objectives include, among other things, ensuring a fair and honest gaming operation in accordance with

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[4] On March 30, 2016, defendants Anthony Bucaro and Michelle Maxcy were dismissed without prejudice from the State's action. (ECF No. 56.)

[5] The Tribe owns the Santa Ysabel Development Corporation, which in turn owns SYI. (UF No. 8.) SYI is "just another development avenue" for the Tribe. (UF No. 9.) The Tribe has numerous business ventures including, among others, online lending and a construction business. (UF No. 10.) The Tribe has developed a cannabis enterprise regulated by the Santa Ysabel Cannabis Regulatory Agency. (UF No. 11.)

IGRA, promoting ethical practices, and maintaining a high level of integrity in the Tribe's gaming. (UF No. 18.) Section 4.2 of the Compact provides that the Tribe may combine and operate in its "Gaming Facility[6] any forms and kinds of gaming permitted under law, except to the extent limited under IGRA" and the Compact. (UF No. 19.)

Section 3.0 of the Compact provides that the Tribe shall not engage in class III gaming that is not expressly authorized in the Compact. (UF No. 22.) Under section 4.1, the Tribe is authorized and permitted to operate (a) gaming devices – i.e., slot machines, (b) banking and percentage card games, and (c) "any devices or games that are authorized under state law to the California State Lottery, provided that the [Tribe] will not offer such games through use of the Internet unless others in the state are permitted to do so under state and federal law." (UF No. 23.)

The Compact provides that a tribal gaming agency, as designated under tribal law, shall conduct on-site gaming regulation and control "in order to enforce the terms of this . . . Compact [and] IGRA" with respect to the business enterprise that offers and operates class III gaming activities and the facilities that serve that business enterprise. (UF No. 24.) The Compact further provides that the tribal gaming agency is, among other things, to ensure enforcement of all relevant laws and rules and to prevent illegal activity occurring with regard to the business enterprise that offers and operates class III gaming activities and within the facilities that serve that business enterprise. (UF No. 25.)

IV. THE COMPACT'S PROVISIONS FOR DISPUTE RESOLUTION AND REMEDIES

The Compact requires that the parties meet and confer in a good faith attempt to resolve disputes that occur under it. This requirement is "without prejudice to

[6] The Compact defines Gaming Facility to include any building in which class III gaming activities or gaming operations occur . . . ." (UF No. 20.) Under the Compact, Gaming Operation means the business enterprise that offers and operates class III gaming activities. (UF No. 21.)

the right of either party to seek injunctive relief against the other when circumstances are deemed to require immediate relief." (UF No. 26.) The Compact provides for injunctive and declaratory relief, and expressly does not allow monetary damages. (UF No. 27.)

Section 9.4 of the Compact provides for waiver of sovereign immunity as follows:

> (a) In the event that a dispute is to be resolved in federal court . . . as provided in this Section 9, the State and the Santa Ysabel Tribe expressly consent to be sued therein and waive any immunity therefrom that they may have provided that:
>
> (1) The dispute is limited solely to issues arising under this Gaming Compact;
>
> (2) Neither side makes any claim for monetary damages (that is, only injunctive, specific performance, . . . or declaratory relief is sought); and
>
> (3) No person or entity other than the Santa Ysabel Tribe and the State is party to the action . . . .

(UF No. 28.)

V. THE STATE'S ATTEMPT TO MEET AND CONFER

In July 2014, the Tribe announced its intention to engage in real money Internet poker. (UF No. 29.) On July 14, 2014, the State sent a letter requesting that the Tribe meet and confer regarding Internet poker and Internet bingo. (UF No. 30.) On July 17, 2014, the Tribe responded to the State's letter and wrote, among other things:

> While bingo is also defined as a Class II gaming activity on tribal lands, Santa Ysabel does not offer bingo through Santa Ysabel Interactive, or have any plans to do so in the near future. Again, if Santa Ysabel did contemplate offering bingo in an interactive environment, because of the activity's classification as Class II gaming, we do not

> feel that the activity would in any way be covered by or have any relevance to our Tribal-State Gaming Compact.

(UF No. 31.)

The Tribe's July 17, 2014 letter continued:

> We have no intention of discussing any federal statutes, including [IGRA] or the [UIGEA] with any State of California official. We believe that the State is exceeding its scope and authority by requesting a discussion with us concerning the application and relevance of federal law as it pertains to business activity sanctioned by our Tribe, a sovereign nation, conducted on tribal lands.

(UF No. 32.)

VI. DRB

On November 3, 2014, a press release announced that the Tribe, through SYI, was launching DRB. (UF No. 33.) In the announcement, DRB was characterized as "groundbreaking." (UF No. 34.) DRB was described as making browser-based bingo games available in California "*Anytime & Anywhere*™." (UF No. 35.) DRB would allow users in California to access bingo games "from any web browser on any computer, mobile device or tablet." (UF No. 36.)

As set forth below, DRB was a fully automated computer gaming system in which the only non-automated element was the patron or bettor. The Tribe's gaming ordinance did not specifically describe or authorize the method by which bets or wagers are initiated through DRB. (UF No. 37.)

A. DRB's Basic Elements

The basic elements for DRB were (1) account holders or patrons, who (2) used the Internet to access (3) servers housed in the Tribe's casino building.

1. Account Holders or Patrons.

The Tribe's agency, SYI, expected that account holders would be from locations all around California. (UF No. 38.) SYI further expected that DRB

account holders would be physically outside the Tribe's Indian lands when registering, funding, hiring proxies[7] to play, observing game play, and reconciling accounts. (UF No. 39.) Accordingly, none of the persons registered as DRB account holders, other than the National Indian Gaming Commission (NIGC), stepped onto the Tribe's lands for purposes of registering, funding their account, playing, hiring a proxy to play, or to reconcile an account. (UF No. 40.)

Account holders would register, fund accounts, hire proxies to play, observe game play, and reconcile accounts using some sort of web browser-enabled device like a personal computer, iPhone, or tablet. (UF No. 41.) DRB was designed so that patrons off Indian lands could log onto a website, register, fund an account, and engage a proxy to purchase a bingo card and play on their behalf. (UF No. 42.) Patrons could not physically come onto the Tribe's lands and find a terminal to participate in DRB. (UF No. 43.)

In DRB, account holders provided the funds that were wagered from their accounts. (*See* UF No. 44.)

2. Use of the Internet.

An account holder had to go through the Internet to access DRB. (UF No. 45.) That required use of his or her own web browser-enabled device. (UF No. 46.) A valid email address was required for an account holder to activate an account. (UF No. 47.) In addition to communicating with account holders and patrons through the Internet, the DRB servers communicated with servers located off of the Tribe's lands for payment processing (UF No. 48), know-your-customer services (UF No. 49), and geo-location services (UF No. 50). Links on the DRB website redirected patrons to different websites through the Internet. (UF No. 51.) The Internet was considered a component of DRB because the patron was communicating through the DRB website with servers on the Tribe's lands and

[7] As set forth below, proxies were not persons. Instead, proxy play was a software function in the DRB computer system.

indirectly with other servers using the same infrastructure that makes up the Internet. (UF No. 52.)

3. The DRB Servers.

The servers for DRB were approximately nineteen inches wide, thirty inches long, and six inches tall. (UF No. 53.) They were housed in the Tribe's casino building (UF No. 54) and remain there (UF No. 55). DRB's web server interfaced with patrons and was exposed to the Internet, and all data passed through it. (UF No. 56.) The servers performed all functions in the DRB computer system. (*See* UF No. 57 (no affirmative actions taken by employees).)

B. DRB's Proxy Play

DRB provided for play by "proxies." The number of proxies playing a game was the number of account holders who had cards for that game. (UF No. 58.) The proxy player was a software aid built into the DRB computer system. (UF No. 59.)

Proxy play did not involve physical actions by any person; rather SYI employees monitored the systems and ensured that technological aids were functioning. (UF No. 60.) Proxy play meant basically SYI employees observing that the aids in the system were acting as they were designed. (UF No. 61.) Proxy play was fully automated.

DRB did not have any persons designated as "proxies." Instead, it designated Mr. Chelette as a proxy agent.[8] The proxy agent did not take any affirmative action to accept engagement by, or proceed on behalf of, account holders. (UF No. 64.) The proxy agent did not interact physically with the computer as to ball drop, daubing, declaring bingo, or reconciling winnings and losses. (UF No. 65.) The proxy agent did not actuate anything in furtherance of a bingo game. (UF No. 66.)

[8] Irrespective of the volume of play, a single SYI employee – Mr. Chelette or whomever he designated in his absence – served as the "proxy agent." (UF No. 62.) The aids developed in the system allowed one person to perform the services of proxy agent. (UF No. 63.)

When an account holder requested a bingo card, the technological aids built into the system obtained the card without requiring anything active, or any affirmative action, by the proxy agent. (UF No. 67.) The proxy agent did not physically receive directions from patrons and then physically interact to purchase a bingo card; those functions were carried by the software components. (UF No. 68.) An account holder could not telephone a proxy to give instructions. (UF No. 69.)

VII. THE STATE'S INVESTIGATOR WAGERED ON DRB OVER THE INTERNET

In November 2014, Special Agent Micah Scott accessed the DRB website from computers located in Sacramento, California. (Decl. of Micah Scott Supp. State of California's Mot. for TRO (Scott Decl.), p. 2, ¶ 3 [ECF No. 3-4, p. 2].) He caused an account to be opened that was funded by a credit card. (*Id.* ¶ 4.) The account was opened and funded by accessing the DRB website through the Internet from computers located in Sacramento and near Jackson, California. (*Id.*) Special Agent Scott also accessed the DRB website through an iPad. (*Id.*)

After the account was funded and as part of his investigation, Special Agent Scott used the Internet to log into the DRB website and place bets by selecting a "denomination" – amount – to play. (Scott Decl., p. 3, ¶ 5 [ECF No. 3-4, p. 3].) After selecting a denomination, the DRB system offered him the opportunity to select the number of bingo cards to be played. (*Id.*) Once the selections were made, the DRB system advised that the bet had been submitted and accepted; the amount wagered was withdrawn from the account that he had opened. (*Id.*)

After making his wager, Special Agent Scott had no further active participation in the play. (Scott Decl., p. 3, ¶ 6 [ECF No. 3-4, p. 3].) The DRB system played the game. (*Id.*) If his bet won, the game ended by displaying "bingo." If his bet lost, the game ended by displaying: "Proxy of [screen name of the winner] won $[an amount]!" (*Id.*) Special Agent Scott did not go on the Tribe's Indian lands to open an account, place a bet, or participate in a bingo game. (*Id.* pp. 3-4, ¶ 7.)

A video showing Special Agent Scott's logging in, placing a wager, and replaying a game is Exhibit 12 to the Declaration of Glen F. Dorgan, filed in support of the United States' motion for summary judgment.

STANDARD FOR SUMMARY JUDGMENT

A motion for summary judgment or summary adjudication shall be granted when no genuine issue exists as to any material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (*Anderson*). The moving party must show that "under the governing law, there can be but one reasonable conclusion as to the verdict." *Anderson*, 477 U.S. at 250.

Generally, the burden is on the moving party to demonstrate that it is entitled to summary judgment. *Margolis v. Ryan*, 140 F.3d 850, 852 (9th Cir. 1998); *Retail Clerks Union Local 648 v. Hub Pharm., Inc.*, 707 F.2d 1030, 1033 (9th Cir. 1983). The moving party bears the initial burden of identifying the elements of the claim or defense and evidence that it believes demonstrates the absence of an issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A genuine issue of material fact will exist "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson*, 477 U.S. at 248.

ARGUMENT

The Tribe's Internet gambling breaches the Compact and should be permanently enjoined. The undisputed facts show that the Tribe conducted class III gaming that was legal only if conducted on the Tribe's Indian lands in compliance with the Compact. Undoubtedly, its Internet gambling was not being conducted only on the Tribe's Indian lands. Instead, bettors located off the Tribe's Indian lands participated in its Internet gambling, and the Tribe had no expectation that the bettors ever would come on to its Indian lands. The Internet gambling was not being conducted in compliance with the Compact or IGRA. Importantly, the

Tribe's Internet gambling was not expressly authorized by the Compact and, therefore, was prohibited.

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 breach of compact claim arises under federal statutes and the federal common law. This Court has jurisdiction under § 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.[9] 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

[9] 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 . . . ."

and the agreements contained therein." *Cabazon II,* 124 F.3d at 1056. This is exactly what the State seeks to do in this case – i.e., enforce the State's rights under the Compact.

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

In its answer, the Tribe asserts the State's claims are barred by the doctrine of tribal sovereign immunity. (ECF No. 25, p. 19, ¶ 53.) Before answering, the Tribe moved to dismiss for lack of subject matter jurisdiction based, in part, on sovereign immunity. (ECF No. 15.) The Court denied the motion. (ECF No. 24.)

Tribal sovereign immunity protects Indian tribes from suit in the absence of express authorization by Congress or a clear waiver by the tribe. *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 725 (9th Cir. 2008). Here, the Tribe has waived sovereign immunity, and Congress also has authorized suit.

The Tribe does not enjoy sovereign immunity with respect to the claims made by the State because Compact section 9.4, which is quoted above, provides a clear waiver of sovereign immunity. The Court held that this action meets the Compact's criteria to waive sovereign immunity. (ECF No. 24, pp. 7-8.)

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 decision in *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2014 (2014). There, the Supreme Court determined that IGRA'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 § 2710(d)(7)(A)(ii). *Id.* at 2032. Here, the undisputed facts show that the servers in which some of the gaming activity[10] occurs are located on the Tribe's Indian lands. Therefore, IGRA's sovereign immunity waiver also applies.

[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).

III. THE TRIBE BREACHED THE COMPACT

The undisputed facts establish that the Tribe breached the Compact, which is a contract between the Tribe and the State. *Cachil Dehe Band of Wintun Indians of the Colusa Indian Comm. v. California Gambling Control Com'n*, 618 F.3d 1066, 1073 (9th Cir. 2010). The Compact is governed by general federal contract law principles, which in practice means courts rely on California contract law and Ninth Circuit decisions interpreting California law. *Id.* The elements for a breach of contract claim are the contract, plaintiff's performance or excuse for nonperformance, defendant's breach, and resulting damages to plaintiff. *Reichert v. General Ins. Co. of America*, 68 Cal. 2d 822, 830 (1968); *see also Tecza v. Univ. of San Francisco*, 532 F.App'x 667, 668 (9th Cir. 2013) (citing *Walsh v. W. Valley Mission Cmty. Coll. Dist.*, 66 Cal. App. 4th 1532, 1545 (1998)).

A. The State Performed the Compact's Dispute Resolution Provisions

Under the Compact's dispute resolution provisions, the parties were required to meet and confer. Unresolved disagreements may be resolved in federal court. (UF No. 26.) The undisputed facts show that the State requested the Tribe to meet and confer about its plans to provide Internet poker and bingo. (UF No. 30.) The Tribe responded that it "does not offer bingo through Santa Ysabel Interactive, or have any plans to do so in the near future." (UF No. 31.) The Tribe continued that it had "no intention of discussing any federal statutes, including [IGRA or the UIGEA] with" the State. (UF No. 32.) The Tribe also wrote that poker and bingo were class II games over which the State had no jurisdiction. (UF No. 31.) Less than four months later, defendants launched DRB. (*See* UF No. 33.) In sum, the State pursued, and satisfied, the meet and confer requirement.

B. The Tribe's Breach

The undisputed facts establish that the Tribe's offering its DRB over the Internet breached its duties under the Compact. The Tribe agreed not to engage in

class III gaming that is not expressly authorized in the Compact. (UF No. 22.) The only Internet gambling expressly allowed by the Compact is "devices and games that are authorized . . . to the California State Lottery" that others in the State are permitted to offer through the Internet under state and federal law. (UF No. 23.) No one is permitted to offer any California State Lottery game through the Internet. (ECF No. 3-3, p. 3, ¶ 8.) As set forth below, DRB is class III gaming that is not expressly authorized by the Compact.

The Tribe also agreed that its Gaming Commission would enforce the terms of the Compact and IGRA. (UF No. 24.) Additionally, the Tribe agreed that the Gaming Commission would ensure enforcement of all relevant laws and rules and to prevent illegal activity.[11] (UF No. 25.) As set forth below, IGRA requires tribal gaming be on Indian lands only, and the Tribe's DRB is not.

1. DRB Is Class III Gaming

IGRA classifies Indian gaming into three different categories: class I, class II, and class III. 25 U.S.C. § 2703. Each of these categories is subject to different degrees of state and federal regulation.[12] *See Cabazon Band of Mission Indians v. Nat'l Indian Gaming Comm'n*, 827 F. Supp. 26, 27 (D.D.C. 1993) (*Cabazon v. NIGC*). Throughout their answer and as an affirmative defense, defendants assert that DRB is a class II bingo game. (ECF No. 25, p. 19, ¶ 54.) Under the undisputed facts here, DRB is class III gaming.[13]

[11] California statutes make setting up and drawing a lottery, selling or furnishing a chance in a lottery, and aiding or assisting those acts, crimes. Cal. Penal Code §§ 320, 321, 322. DRB is a form of lottery as it is a game played for a prize determined by chance for consideration. *See* Cal. Penal Code § 319; *see also People v. Shira*, 62 Cal. App. 3d 442, 462-63 (1976).

[12] The tribes possess exclusive jurisdiction to regulate class I gaming, which includes social games and traditional forms of Indian gaming connected to tribal ceremonies. 25 U.S.C. §§ 2703(6), 2710(a)(1). This action does not implicate class I gaming.

[13] For reasons different than those argued here, the NIGC's general counsel determined that DRB is class III gaming. (*See* UF Nos. 70 & 71.) A letter from NIGC general counsel is not the same as an action by the NIGC chairperson or (continued...)

IGRA defines class II games to include "the game of chance commonly known as bingo (whether or not electronic, computer or other technologic aids are used in connection therewith) . . . including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo . . ." 25 U.S.C. § 2703(7)(A). Class II games are regulated by the NIGC and can be operated on Indian lands without a tribal-state compact. 25 U.S.C. §§ 2703(7), 2710(b). All gaming activity that is not class I or class II is class III gaming and is allowed only where a tribal-state compact is entered. 25 U.S.C. §§ 2703(8), 2710(d); *see also Lac Vieux*, 360 F. Supp. 2d at 65 n.1.

Class II games may use technological aids, but if the technology is deemed an electronic facsimile, the game is elevated to class III. *United States v. 103 Elec. Gambling Devices*, 223 F.3d 1091, 1095 (9th Cir. 2000) (*103 Elec. Gambling Devices*) ("IGRA, however, explicitly excludes from Class II gaming [electronic or electromechanical facsimiles]"); *Spokane Indian Tribe v. United States*, 972 F.2d 1090, 1093 (9th Cir. 1992) (*Spokane*) ("The . . . game operated by the Tribe is not a Class II gaming device because Class II gaming excludes [electronic or electromechanical facsimiles]"); *Cabazon v. NIGC*, 827 F. Supp. at 31 ("Regarding the use of technology, the distinction between class II and class III, according to IGRA, is that the use of 'aids' is permitted for certain class II games; the use of "facsimiles" is permitted only in class III games and only when the Indians have entered into a Tribal-State compact.").

(…continued)
commission, *see Lac Vieux Desert Band of Lake Superior Chippewa Indians of Michigan v. Ashcroft*, 360 F. Supp. 2d 64, 68(D.D.C. 2004) (*Lac Vieux*), but may be useful to the Court. The weight given to non-binding agency interpretations depends on the "'thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.'" *United States v. 162 MegaMania Gambling Devices*, 231 F.3d 713, 719 (10th Cir. 2000) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

"The distinction between an electronic 'aid' and electronic 'facsimile' is one that has been litigated and decided before." *103 Elec. Gambling Devices*, 223 F.3d at 1099 (discussing *Spokane*, 972 F.2d at 1093). In the 1992 *Spokane* opinion, the Ninth Circuit discussed aids and facsimiles. In doing so, the court reviewed the Senate Report on IGRA and noted that an "electronic aid" "enhance[s] the participation of more than one person in . . . Class II gaming activities." *Spokane*, 972 F.2d at 1093; *see also Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535, 542 (9th Cir. 1994) ("[A]n 'electronic aid' to a class II game can be viewed as a device that offers some sort of communications technology to permit broader participation in the basic game being played, as when a bingo game is televised to several rooms or locations." (citing *Cabazon Band of Mission Indians v. Nat'l Indian Gaming Comm'n*, 14 F.3d 633, 637 (D.C. Cir. 1994) (*Cabazon III*))).

The NIGC's regulations also discuss aids and facsimiles, defining technologic aid as a machine or device that assists the player or the playing of a game, is not an electronic facsimile, and is operated in accord with federal communications law. 25 C.F.R. § 502.7. Examples provided are: "pull tab dispensers and/or readers, telephones, cables, televisions, screens, satellites, bingo blowers, electronic player stations, or electronic cards for participants in bingo games." *Id.* In contrast to aids, federal regulations also discuss electric or electromechanical facsimiles, defining them as:

> a game played in an electronic or electromechanical format that replicates a game of chance by incorporating all of the characteristics of the game, except when, for bingo, lotto, and other games similar to bingo, the electronic or electromechanical format broadens participation by allowing multiple players to play with or against each other rather than with or against a machine.

25 C.F.R. § 502.8.

Here, the undisputed facts show that the DRB computer system performed every aspect of the gaming, except for patrons' deciding how much to wager on

how many cards.[14] Those facts lead to a single conclusion: DRB is class III gaming. In *Cabazon III*, a 1994 D.C. Circuit case, the court examined electronic pull-tab machines that randomly selected a card for the player, electronically pulled the tab off the card at the player's direction, and displayed the results onscreen. 14 F.3d at 635. Because that game "exactly replicate[d]" the game of video pull-tabs in computer form, it was a facsimile and not a class II device. *Id.* at 636. The computers in that case could be interconnected so that each gambler simultaneously played against other gamblers in "pods" or "banks" of as many as forty machines. *Id.* at 635.

In the district court, the plaintiff tribes argued that because five video games were networked with one computer, each gambler played against other gamblers and thus did not play the game against a machine. *See Cabazon v. NIGC*, 827 F. Supp. at 33 (discussion of the game by the district court, which was later affirmed by the circuit court). The district court disagreed, saying that the "narrow reading of the statute obviously circumvents Congress' clear and unambiguous intent as expressed in IGRA and its legislative history: that electronic facsimiles of games of chance – like video pull-tabs – are class III games." *Id.* The appellate court affirmed. *Cabazon III*, 14 F.3d at 637.

In sum, DRB is class III gaming. It is a facsimile that through a computer system exactly replicates the game of bingo. The system performed every aspect of the gaming in servers measuring nineteen inches by thirty inches by six inches.

2. IGRA Requires Gaming Be on the Tribe's Indian Lands

As set forth above, the Tribe agreed to enforce the terms of IGRA. That agreement necessarily includes conducting gaming in accordance with IGRA, which establishes federal standards for gaming on tribal lands. IGRA creates a

[14] Any defense argument that "proxies" mind the machines is belied by the undisputed facts. The undisputed facts show that DRB proxy play is conducted by the system. SYI employees do nothing to actuate, or play, the bingo games.

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).

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

Senate Report No. 100-446 (1988) (Senate Report) supports the conclusion that IGRA and the gaming that it allows are limited to Indian lands. The report summarizes IGRA as providing "for a system of joint regulation by tribes and the Federal Government of class II gaming on Indian lands and a system for compacts between tribes and States for regulation of class III gaming." *Id.* at 1. The act was the "outgrowth of several years of discussions and negotiations between gaming tribes, States, the gaming industry, the administration, and the Congress, in an attempt to formulate a system for regulating gaming on Indian lands." *Id.* The

report characterized *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (*Cabazon I*), as using a balancing test between federal, state, and tribal interests to find "that tribes . . . have a right to conduct gaming activities on Indian lands unhindered by State regulation." Senate Report at 1. The report observed, "in the final analysis, it is the responsibility of Congress, consistent with its plenary power over Indian affairs, to balance competing policy interests and to adjust, where appropriate, the jurisdictional framework for *regulation of gaming on Indian lands*." *Id.* at 2 (emphasis added).

Because IGRA and the Senate Report are clear that IGRA gaming is limited to Indian lands, the NIGC concluded that non-electronic bingo played through human proxies offered to patrons over the Internet "is not authorized under IGRA." (Letter from Kevin Washburn, General Counsel, NIGC, to Robert Rossette, Monteau, Peebles & Crowell, re: Lac Vieux Desert Internet Bingo Operation (Oct. 26, 2000));[15] *see Lac Vieux*, 360 F. Supp. 2d at 65 (describing the game).

Moreover, the NIGC consistently has concluded that tribes making Internet gambling available to persons not located on Indian lands violate IGRA. (*See, e.g.*, Letter from Montie Deer, Chairman, NIGC, to Ernest L. Stensgar, Chairman, Coeur d' Alene Tribe, re: National Indian Lottery (Jun. 22, 1999); letter from Penny Coleman, Deputy General Counsel, NIGC, to Terry Barnes, Bingo Networks, re: U-PIK-EM Bingo (Jun. 9, 2000); letter from Kevin Washburn, General Counsel, NIGC, to Joseph Speck, Nic-A-Bob Productions, re: WIN Sports Betting Game (Mar. 13, 2001); *see also* letter from Richard Schiff, Senior Attorney, NIGC, to Don Abney, Principal Chief, Sac and Fox Nation, re: Tele-Bingo (Jun. 21, 1999) (bingo played by telephone off Indian lands violates IGRA).) In its only known entry into tribal Internet gaming, the United States Department of Justice shared the

[15] Each NIGC gaming opinion letter cited herein is contained in Appendix A, which was filed concurrently with the State's motion for a temporary restraining order. (ECF No. 3-2.)

NIGC's opinion. *See* Brief of the United States as Amicus Curiae, *Coeur d'Alene Tribe v. AT&T Corp.*, 1999 WL 33622333, Case No. 99-35088 (9th Cir. 1999).

The State is not aware of any published court decision that expressly authorizes tribal gaming under IGRA off of Indian lands. Rather, the decisions lead to the conclusion – consistent with IGRA's provisions and the Senate Report – that IGRA gaming is limited to Indian lands. In *AT&T Corporation v. Coeur d'Alene Tribe*, 45 F. Supp. 2d 995 (D. Idaho 1998), *rev'd on other grounds*, 295 F.3d 899 (9th Cir. 2001), the district court found that, to the extent the tribe's planned National Indian Lottery (NIL) occurred outside the limits of the reservation, IGRA did not preempt state gambling laws.[16] Based upon that finding, the court concluded that notices given by states under the federal Wire Act precluded AT&T's providing toll-free telephone services for the NIL to those states. *Id.* at 999-1000. The court observed that under the plain language of IGRA, the gaming activities constituting the NIL had to occur on lands within the limits of the tribe's reservation to be unregulated. *Id.* at 1001. The court found that placing a wager was a gaming activity within the meaning of IGRA. *Id.* ("But for the act of placing the 'lottery wager,' the player could not participate in, and the Tribe could not operate, the [NIL].").[17]

In *State ex rel. Nixon v. Coeur d'Alene Tribe*, 164 F.3d 1102 (8th Cir. 1999), the Eighth Circuit addressed Missouri's challenge to the NIL. The state filed

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[16] In reversing, the Ninth Circuit focused on the NIGC's approval of the management agreement for the NIL and the failure of the states, which issued letters to AT&T under the federal Wire Act, to challenge the NIGC's approval as 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.

[17] In *County of Madera v. Picayune Rancheria of Chukchansi Indians*, 467 F. Supp. 2d at 1002, the court found that "gaming activity" would be the actual 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.

actions in state court against the tribe and its contractor to enjoin conducting the NIL with Missouri residents. Defendants removed both cases, which the federal district courts subsequently dismissed. The Eighth Circuit reversed and remanded. The court pointed out that "IGRA established a comprehensive regulatory regime for tribal gaming activities *on Indian lands*. . . . Once a tribe leaves its own lands and conducts gambling activities on state lands, nothing in the IGRA suggests that Congress intended to preempt the State's historic right to regulate this controversial class of economic activities." *Id.* at 1108 (emphasis in original). The court concluded that if the NIL was being conducted on Missouri lands, IGRA did not preempt the state law claims or even provide a defense thereto. *Id.* at 1109.[18]

In sum, DRB does not fall within the purview of IGRA because some of the gaming activity intentionally, and necessarily, takes place outside of the Tribe's Indian lands. Thus, the Tribe's conducting such gaming breaches the Compact and the Tribe's duty to conduct gaming in accordance with IGRA.

C. The Breach of Compact Harmed the State

The State's interest in legal gambling and protecting its residents, and visitors, from illegal gambling was injured by the Tribe's breach of the Compact. (Decl. of Joginder Dhillon Supp. State of California's Mot. For Summ. J. (Dhillon Decl. II), pp. 2-3, ¶ 5 Additionally, the State was harmed by conduct that violates certain broad gambling prohibitions, including prohibitions against lotteries, set forth in the California Constitution and Penal Code. (*Id.*)

IV. A PERMANENT INJUNCTION IS PROPER

The decision to grant or deny a permanent injunction is an act of equitable discretion by a district court. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2012). A permanent injunction may be entered when a plaintiff shows that: (a) it has suffered irreparable injury; (b) remedies at law are inadequate to

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

compensate for that injury; (c) considering the balance of hardships between plaintiff and defendant, a remedy in equity is warranted; and (d) public interest would not be disserved by the permanent injunction. *Id.* (citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-13 (1982); *Amoco Production Co. v. Gambell*, 480 U.S. 531, 542 (1987)).

Permanent injunctions may be granted on summary judgment, given a proper record. *SEC v. Spence & Green Chemical Co.*, 612 F.2d 896, 903 (5th Cir. 1980). Here, the State has made a showing for a permanent injunction.

A. Irreparable Injury

The evidence establishes that the State has suffered irreparable injury in the form of conduct that breached the Compact and subjected the State's residents and visitors to unlawful gambling. Additionally, defendants threaten to re-engage in the unlawful gambling if not stopped by the Court. (Dhillon Decl. II, p. 3, ¶ 7.) Therefore, the State potentially will suffer more, and irreparable, injury without an injunction.

The State has an interest in ensuring compliance with the Compact. . (Dhillon Decl. II, p. 3, ¶ 6.) Additionally, the State's public policy against unlawful lotteries is at stake. (*Id.* at p. 3, ¶ 5.) That public policy is enunciated in the California Constitution's broad prohibition of lotteries, Cal. Const. art. IV, § 19(a), as well as the California Penal Code. The State's public policy regarding tribal gaming also is set forth in the California Constitution, which allows the negotiation and legislative ratification of tribal-state gaming compacts for the operation of slot machines and for the conduct of lottery games and banking and percentage card games. Cal. Const. art. IV, § 19(f). The Compact establishes the perimeters of the Tribe's class III gaming. Otherwise, tribal class III gaming is unlawful in California. *See* Cal. Const. art. IV, § 19(e); *Hotel Employees and Restaurant Employees Int'l v. Davis*, 21 Cal. 4th 585 (1999).

Additionally, the Tribe's Internet gambling targets California residents age eighteen and older. It allows unlawful gambling anywhere these residents are. Even though it targets Californians who are not on its Indian lands, the Tribe seeks to preclude the State from an opportunity to regulate the Internet gambling either through the Compact or otherwise. Unregulated gambling enterprises are inimical to the public health, safety, welfare, and good order. Cal. Bus. & Prof. Code § 19801(d). The State thus will suffer irreparable harm if the Tribe is allowed to continue its Internet gambling. (*See* Dhillon Decl. II, pp. 3-4, ¶¶ 8 & 9.)

Moreover, the Tribe's Internet gambling presents issues that potentially affect millions of Californians and, possibly, the United States' gambling policies. The gambling press reports the following with attribution to SYI:

> 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 Decl. II, pp. 3-4, ¶ 8.)

B. Inadequate Remedies at Law

No adequate remedy is available at law to compensate the State for its injuries. Under the Compact, the State cannot recover damages. (UF No. 27.) The

Compact remedies are limited to injunctive, specific performance, or declaratory relief. (*Id.*) Moreover, even if damages were recoverable, they could not adequately compensate the State for the harm done to its interests by illegal gambling and the possibility of unregulated Internet gambling by many tribes, both within and outside the State's borders.

C. Balance of the Hardships

The balance of the hardships establishes that a permanent injunction is warranted. The equities clearly favor the State and its interests in ensuring compliance with the Compact and protecting the public health, safety, and welfare from unlawful gambling. The Tribe is reaching out to Californians irrespective of whether they are on its Indian lands. IGRA 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. Moreover, the undisputed facts show that the Tribe has other economic enterprises.

D. Public Interest

The public interest will not be disserved by a permanent injunction. Rather, it will be served. 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 targets the State's residents and visitors, to prevent violations of state and federal law, and to protect the State's constitutionally stated public policy with respect to lotteries, gambling, and tribal gaming. For these reasons, an injunction here is in the public interest.

CONCLUSION

For the reasons set forth above, the State respectfully requests that the Court issue an order granting summary judgment.

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