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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 REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**
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**

INTRODUCTION

This case arises from defendant Iipay Nation of Santa Ysabel, also known as the Santa Ysabel Band of Diegueno Mission Indians (Tribe), launching and operating a fully automatic, electronic gaming system, known as "Desert Rose Bingo" (DRB), through the Internet to patrons located in California.

After discovery was closed, the State of California (State) filed its motion for summary judgment (ECF No. 63), supporting memorandum (opening brief) (ECF No. 63-1), statement of undisputed facts (ECF No. 63-6), and other pleadings on April 29, 2016. Defendants filed their opposition (ECF No. 67) and other pleadings on May 27, 2016. The State's motion requests that the Court enter summary judgment and permanently enjoin the Tribe and the other defendants (1) from offering Internet games of chance to residents of, and visitors to, California and (2) from accepting payments or funds in violation of the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA), 31 U.S.C. §§ 5361-5367.

The undisputed facts establish that the Tribe breached the tribal-state class III gaming compact (Compact) between the Tribe and the State. The undisputed facts also establish that the Tribe violated the UIGEA. [1]

ARGUMENT

Defendants' opposition focuses on two overarching arguments: DRB is a class II game; DRB was conducted on the Tribe's Indian lands. For the reasons set forth below and in the opening brief, defendants' arguments fail. DRB is a class III game and was conducted not entirely on the Tribe's Indian lands.

Defendants do not dispute the Compact, its provisions, the State's attempt to meet and confer pursuant to the Compact, the State's investigator's wagering on DRB over the Internet, or the propriety of a permanent injunction for the Compact's breach or an UIGEA violation.

[1] The State joined in the United States' motion for summary judgment and joins in the United States' reply with respect to the UIGEA claims.

I. DEFENDANTS BREACHED THE COMPACT BY OFFERING CLASS III GAMING IN THE FORM OF DRB

The undisputed facts show that the Tribe, through defendant Santa Ysabel Interactive, operated a fully automated, electronic gaming system through the Internet to patrons located in California. That system was DRB. Other than patrons placing wagers through the Internet, no person performed the tasks necessary for DRB's play. After patrons placed wagers, software and hardware components contained in servers measuring approximately nineteen inches wide, thirty inches long, and six inches tall performed every other element, or task, involved in DRB. The State believes the only reasonable conclusion that can be reached is: DRB is class III gaming that the Tribe offered in breach of the Compact.[2]

To counter the undisputed facts and inevitable conclusion of class III gaming, defendants in effect ask the Court to write "facsimile" out of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2721, 18 U.S.C. §§ 1166-1168, and the National Indian Gaming Commission's (NIGC) regulations. Congress, however, has not removed "facsimile" from IGRA: 25 U.S.C. § 2703(7)(B)(ii) (class II gaming does not include "electronic . . . facsimiles of any game of chance"). And the NIGC's regulations still define "facsimile" as:

> Electronic . . . facsimile means a game played in an electronic . . . 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 . . . 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. Thus, a facsimile replicates all characteristics of a game. The

[2] Defendants concede that if DRB is class III gaming, the Compact was breached. *See* Tribal Defendants' Consolidated Mem. of P. & A. in Opp'n to USA and State of California Mot. for Summ. J., p. 1 (ECF No. 67, 10) (Opp'n).

undisputed facts show that DRB undoubtedly does that. As is clear from the undisputed facts, DRB is a fully automated. electronic gaming system that requires no action by any person other than the patron bettor.

Because the Court cannot write facsimile out of IGRA or the NIGC's regulations, defendants assert that the NIGC's definition of facsimile, in effect, does not apply to bingo. They further argue that DRB is simply a series of technological aids. Defendants' arguments fail for four reasons.

First, defendants' arguments fail because the NIGC's definition of facsimile applies to bingo. Nothing in the phrase "except when, for bingo, lotto, and other games similar to bingo, the electronic . . . 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, should be interpreted to mean that a bingo game cannot be a facsimile.

Second, defendants' arguments fail because none of the regulatory examples of technological aids implies that a fully automated, electronic gaming system is a technological aid. The examples that NIGC provides 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." 25 C.F.R. § 502.7(c).

Third and importantly, defendants' arguments fail because of NIGC interpretations.[3] The NIGC Chairman has concluded that a fully automated, electronic game based on bingo is a facsimile of a game of chance, constituting class III gaming. (Letter from Philip N. Hogen, Chairman, NIGC, to Karl S. Cook,

[3] For reasons different than those argued here, the NIGC's general counsel determined DRB is class III gaming. (*See* State of California's Separate Statement of Undisputed Material Facts (hereinafter "State's Undisputed Facts"), Nos. 70 & 71 (ECF No. 63-6, 10).)

Jr., Mayor, Metlakatla Indian Community (Jun. 4, 2008) (Hogen Letter).)[4] In his letter, Chairman Hogen referred to, and analyzed, the definition of facsimile and the examples of technological aids set forth above. Unlike DRB, where a player does nothing, in the system addressed in Chairman Hogen's letter, the player's "only responsibility . . . [was] touching a button once to start the game" and then gaming equipment performed all other functions. (*Id.* at 3.) Chairman Hogen concluded, among other things, that a "wholly electronic, fully automated implementation of the game . . . is a Class III 'facsimile of any game of chance.'" (*Id.* at 7.) He continued: "The point at which a technologically aided Class II game becomes a Class III facsimile . . . is that point at which electronic gaming equipment incorporates all of the characteristics of a game."[5] (*Id.* at 9.)

Finally, in arguing against the inevitable conclusion that DRB is class III gaming, defendants also ask the Court to overlook the realities of their Internet electronic gaming system. Without any factual support whatsoever, defendants write that DRB is played by a "proxy (a tribal employee located on Iipay sovereign lands)" (Opp'n, 4 (ECF No. 67, 13)) or the "patron's proxy," who is aided by auto-daub functionality (*id.*). They also write about a "designated agent proxy (located on Iipay sovereign lands)" (*id.*, 15 (ECF No. 67, 24)), as well as a "proxy player agent" (*id.*, 21 (ECF No. 67, 30)). Defendants further write that a "proxy participant" initiates DRB play (*id.*, 41 (ECF No. 67, 50)) and game play is

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[4] The letter is Exhibit A to the Declaration of William P. Torngren in Support of the State of California's Reply Brief. It also is available on the NIGC's website at http://www.nigc.gov/images/uploads/MetlakatlaDisapprovalletter.pdf. The Court may accord the Hogen Letter respect proportional to its power to persuade. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *see also McMaster v. United States*, 731 F.3d 881, 891-92 (9th Cir. 2013).

[5] Defendants argue that a *proposed* NIGC regulation makes their fully automated, electronic gaming system a class II game. (*See* Opp'n, 2 (ECF No. 67, 11), 26 (ECF No. 67, 25 (citing 78 Fed. Reg. 37998 (Jun. 25, 2013)).) They fail, however, to advise the Court that the proposed regulation never was adopted. Consequently, it has never become effective. In any event, as described by defendants in their pleadings, DRB is a no-touch system.

completed by the "proxy participant"[6] (*id.*, 43 (ECF No. 67, 52)).

Defendants clearly are asking the Court to infer that persons, such as tribal employees, are performing these functions. But, as shown by defendants' own admitted facts, the realities are that no proxies – *i.e.*, persons – ever existed:

- The person holding the title of "Patron's Legally Designated Agent" was responsible for conducting proxy play by ensuring the proper functioning of Proxy Player Aids of the DRB gaming system. (Tribal Defendants' Consolidated Statement of Material Facts in Opp'n to USA and State of California Mot. for Summ. J., 12, ¶ 63 (TD Facts) (ECF No. 67-1, 14).)
- "Proxy Monitors" were responsible for monitoring the execution of the Proxy Player. (TD Facts, 12, ¶ 64 (ECF No. 67-1, 14).)
- References to the Proxy Player Aids and the Proxy Player were references to the computer software of DRB. (TD Facts, 13, ¶ 66 (ECF No. 67-1, 15).)
- The computer software components of the gaming system, not the Patron's Legally Designated Agent or the Proxy Monitors, processed requests submitted by patrons to purchase bingo cards, commence game play, conduct the ball draw, daub the cards, declare a winner, and account for wins and losses. (TD Facts, 13, ¶ 67 (ECF No. 67-1, 15).)[7]

[6] In the actual documents used in connection with DRB, defendants do not use the terms "designated agent proxy," "proxy player agent," or "proxy participant." Rather, Santa Ysabel Interactive's president is denominated as "Patron's Legally Designated Agent," who conducts proxy play by ensuring the system's proxy player aids were performing. (Santa Ysabel Interactive DRB Job Descriptions, ECF No. 61-2, 173.)

[7] The State's Undisputed Facts includes several facts to which David Chelette, Santa Ysabel Interactive's president, testified that further show a fully automated electronic gaming system. (*See* State's Undisputed Facts Nos. 63-67 ((ECF No. 63-6, 9).) Without any factual support at all, defendants simply state that except for what they expressly include in their facts, they "dispute each (continued…)

In sum, the undisputed facts establish that DRB was a fully automated, electronic gaming system in which no person, other than the patron bettor,[8] performed any affirmative act. It thus was a facsimile of bingo. *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535, 541 (9th Cir. 1994); *Cabazon Band of Mission Indians v. National Indian Gaming Comm'n*, 14 F.3d 633, 636-37 (D.C. Cir. 1994); *Spokane Indian Tribe v. United States*, 972 F.2d 1090, 1093 (9th Cir. 1992). It was class III gaming. 25 U.S.C. § 2703(8); *see* Hogen Letter. Defendants concede that if DRB is class III gaming, the Tribe breached the Compact.

II. PATRON BETTORS WERE NOT ON THE TRIBE'S INDIAN LANDS IN VIOLATION OF IGRA

The undisputed facts show that patron bettors were not on the Tribe's Indian lands at any time in connection with opening accounts, placing wagers, or DRB's play. Defendants argue that IGRA does not require patron bettors to be on the Tribe's Indian lands. As set forth below, defendants are mistaken.

First, defendants rely on the Iowa Internet Gaming Arbitration Award (Arbitration Award) as "highly instructive." (Opp'n, 22 (ECF No. 67, 31).) Defendants devote more than three pages of their opposition to that award. The Arbitration Award, however, should carry no weight with this Court. *See Westinghouse Elevators of Puerto Rico, Inc. v. S.I.U. de Puerto Rico*, 583 F.2d 1184, 1186-87 (1st Cir. 1978) (arbitration awards are not accorded the weight of judicial authority). The reason to accord the Arbitration Award no weight is readily

(...continued)
material fact" submitted by the United States and the State. (TD Facts, 1 (ECF No. 67-1, 1.) That bare assertion, however, does not meet defendants' burden. *See* Fed. R. Civ. P. 56(c)(1)(A).

[8] Despite the patron bettor being absolutely essential for DRB play, defendants argue that he or she is a "step removed from any actual 'gaming activity' to be conducted." (Opp'n, 41 (ECF No. 67, 50).) Under this argument, DRB essentially is "untouched by human hands" and should be more accurately characterized as "no-touch bingo."

apparent: nothing was contested in the arbitration. The parties – the State of Oklahoma and an Indian tribe – agreed that their compact permitted Internet gaming conducted from the tribe's lands with bettors located in foreign jurisdictions in which the gaming was legal. (ECF No. 67-8, 87.) The parties agreed that the gaming was class III. (*Id.* at 92.) Importantly, with respect to the issue of where the gaming occurs,[9] the arbitrator relied on the parties' agreements: "The *Bay Mills*[10] Court and IGRA encourage states and tribes to resolve their differences about such issues as the one before me now . . . by negotiating a resolution. That is exactly what the Tribe and State have done in this case." (*Id.* at 96.) In sum, the Arbitration Award provides no instruction regarding where Internet gaming occurs.[11]

Second, in support of their assertion that IGRA does not require patron bettors to be on the Tribe's Indian lands, defendants argue that the Ninth Circuit provided guidance in *AT&T Corporation v. Coeur d'Alene Tribe*, 295 F.3d 899 (9th Cir. 2002). However, as pointed out by the State in its opening brief, the Ninth Circuit expressly did not address legality under IGRA. (*Id.* at 910 n.12; *see* ECF No. 63-1, 26 n.16) And defendants offer nothing to counter *State ex rel. Nixon v. Coeur d'Alene Tribe*, 164 F.3d 1102 (8th Cir. 1999), which is discussed in the State's opening brief. (ECF No. 63-1, 26 to 27.) Thus, defendants offer no case authority for their assertion that IGRA does not require patron bettors to be on the

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[9] This is the very issue for which defendants rely on the Arbitration Award.

[10] The arbitration was referring to *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2014 (2014) (*Bay Mills*).

[11] The Arbitration Award refers to the Compact as permitting Internet gaming if it is lawful in the State. (ECF No. 67-8, 93 n.58.) The only reference in the Compact to Internet gaming is section 4.1, which provides the Tribe is authorized and permitted to operate "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 the use of the Internet unless others in the state are permitted to do so under state and federal law." (State's Undisputed Facts No. 23 (ECF 63-6, 4); TD Facts, 23, ¶ 128 (ECF 67-1, 25).)

Tribe's Indian lands.

In sum, defendants have no statutory or case law to support their argument. IGRA itself undermines their argument. As stated in the State's opening brief, IGRA refers to "gaming activities," "conduct of gaming," and "gaming" on Indian lands. (ECF No. 63-1, 24.) Defendants' argument that IGRA does not require patron bettors on the Tribe's Indian lands is undermined by *Madera v. Picayune Rancheria of Chukchansi Indians*, 467 F. Supp. 2d 993, 1002 (E.D. Cal. 2006) (gaming activity is not limited to an actual class III game) and *Neighbors of Casino San Pablo v. Salazar*, 773 F. Supp. 2d 141, 143 (D.D.C. 2011) (under IGRA, a tribe may conduct gaming only on Indian lands). Moreover, in *Bay Mills Indian Community*, 134 S.Ct. at 2031, Justice Kagan pointed out that "on Indian lands" appears in IGRA "some two dozen times." She also defined gaming activities as "the stuff involved in playing class III games." *Id.* at 2032. Clearly, no class III game can exist without a bettor – *i.e.*, the stuff involved in playing class III games.

For the above reasons, the Court should reject defendants' argument that IGRA does not require patron bettors to be on the Tribe's Indian lands for DRB.

III. DEFERENCE TO A REGULATORY AGENCY IS NOT APPROPRIATE HERE

Defendants repeatedly suggest that the Court should defer to the determinations made by the NIGC and the Tribe. Deference, however, is not appropriate in this case.

As set forth above, the NIGC's Chairman concluded in 2008 that a fully automated, electronic gaming system based on bingo was class III gaming. The Tribe apparently rejected that conclusion when reaching its determinations regarding DRB. (*See* Decl. of David Vialpando, 20-21, ¶ 55(u) (ECF No. 67-8, 20 to 21).)[12] The NIGC also proposed, but never adopted, a regulation that could reject the conclusion reached in the Hogen letter. Obviously, no clear agency

[12] In a separate pleading filed concurrently with this reply, the State objects to, and requests that the Court strike, Mr. Vialpando's declaration.

position exists to which deference is necessary.

Moreover, the undisputed facts show class III gaming and gaming activities that occurred off the Tribe's Indian lands. Deference requires that agencies operate within the bounds of reasonable interpretation. *Utility Air Regulatory Group v. EPA*, 134 S.Ct. 2427, 2442 (2014). Deference "does not license interpretative gerrymanders under which an agency keeps parts of statutory context it likes while throwing away parts it does not." *Michigan v. EPA*, 135 S.Ct. 2699, 2708 (2015).

Under the facts in this case, the Court need not, and should not, defer to agency determinations – albeit made by the NIGC or the Tribe's regulatory agency.

CONCLUSION

For the reasons set forth in this reply, its opening brief, and the United States' pleadings, the State respectfully requests that the Court enter summary judgment and permanently enjoin the Tribe and the other defendants (1) from offering Internet games of chance to residents of, and visitors to, California and (2) from accepting payments or funds in violation of the UIGEA.

Dated: June 3, 2016

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