UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA,

Plaintiff,

v.

IIPAY NATION OF SANTA YSABEL, *et al.*,

Defendants.

UNITED STATES OF AMERICA,

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

ORDER:

(1) DENYING THE STATE OF CALIFORNIA'S MOTION FOR SUMMARY JUDGMENT AS TO THE BREACH OF COMPACT CLAIM;

(2) GRANTING PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT AS TO THE UIGEA CLAIM; AND

(3) GRANTING PLAINTIFFS' REQUEST FOR PERMANENT INJUNCTION

(Doc. Nos. 61, 63)

INTRODUCTION

"Congress enacted [the Indian Gaming Regulatory Act ("IGRA")] to provide a legal framework within which tribes could engage in gaming—an enterprise that holds out the

hope of providing tribes with the economic prosperity that has so long eluded their grasp—while setting boundaries to restrain aggression by powerful states." *Rincon Band of Luiseno Mission Indians v. Schwarzenegger*, 602 F.3d 1019, 1027 (9th Cir. 2010). However, it is beyond dispute that IGRA applies to only that which is conducted on Indian lands. But what of gaming that derives from servers located on Indian lands and utilizes the Internet to reach beyond the borders of Indian country to patrons physically located within states where gambling is unlawful? This is precisely the issue presented by this case, an issue on which the courts have yet to provide a definitive answer.

At the crosshairs of this inquiry is the construction that must be given to the phrase "on Indian lands" as used in IGRA, in light of Congress' later enactment of the Unlawful Internet Gambling Enforcement Act ("UIGEA"), which renders unlawful Internet gambling that is initiated *or* received within a state where such gambling is unlawful. 31 U.S.C. § 5362(10)(A). Bearing in mind that the Court must, absent "'positive repugnancy' between two laws, . . . give effect to both," *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992) (citing *Wood v. United States*, 16 Pet. 342, 363 (1842)), the only conclusion which may follow is that IGRA applies only to gaming activity that occurs *solely* on Indian lands. In other words, patrons must be physically present on Indian lands when a bet is initiated for gaming to comply with both IGRA and UIGEA. Because it is undisputed that patrons of Tribal Defendants' Desert Rose Bingo ("DRB") initiated bets while located off Indian lands but within the State of California, where gambling is unlawful, the Court **GRANTS** Plaintiffs' motions for summary judgment on the UIGEA claim.

Equally clear is the question whether DRB is properly categorized as Class II or Class III gaming. Under IGRA, the National Indian Gaming Commission ("NIGC") and the tribes are granted exclusive authority to regulate Class II gaming. 25 U.S.C. § 2710(b). In order to conduct Class III gaming, tribes are required to enter into a tribal-state compact with the state in which the tribe is located. *Id.* § 2710(d). Here, Tribal Defendants have such a tribal-state class III gaming compact ("Compact") with the State of California ("State"), a Compact which the State claims is violated by DRB's operation. Whether DRB

falls within the Compact's ambit, however, turns on whether the use of the Virtual Private Network Aided Play System ("VPNAPS") constitutes a "technologic aid" or an "electromechanical facsimile." If the former, then Tribal Defendants properly categorized DRB as permissible Class II gaming, and the operation of DRB does not violate the Compact. If the latter, it is undisputed that the Compact is violated. Because VPNAPS is technology that "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; *see id.* § 502.7(b)(1), (3), and because such technology constitutes a "technologic aid," thus rendering DRB Class II gaming, the Court **DENIES** the State's motion for summary judgment as to the breach of Compact claim.

BACKGROUND

This dispute centers on Tribal Defendants' operation of DRB, a server-based gaming venture that utilizes VPNAPS and the Internet. DRB is run by Santa Ysabel Interactive ("SYI"), which is a wholly owned corporation of Santa Ysabel Tribal Development Corporation, which in turn is a wholly owned corporation of the Tribe. (Doc. No. 68-1 ¶¶ 7–8, 13.)[1] [2] SYI owns and operates DRB and manages the resulting gaming revenue for the Tribe's benefit. (*Id.* at ¶ 13.) The servers on which DRB originates are located on the Tribe's Indian reservation—specifically, in its now defunct brick-and-mortar casino—which is located in San Diego County within the State of California. (*Id.* at ¶¶ 2, 33; *see id.* at ¶¶ 25–28.) DRB is offered to all persons over the age of eighteen who are residents

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[1] References to Doc. No. 68-1 are to the paragraph numbers contained in Exhibit A to Glen Dorgan's declaration, not the declaration itself.

[2] Each party submitted a separate statement of undisputed facts. (Doc. Nos. 62, 63-6, 67-1.) The United States helpfully conducted a review of the multiple statements and provided a consolidated statement of undisputed facts. (Doc. No. 68-1.) Having conducted its own independent review of the separate statements, the Court finds the United States' consolidated statement to accurately reflect those facts that are truly undisputed. Accordingly, for simplicity's sake, the Court will refer principally to that document. Where citation to the original separate statement is particularly helpful, the Court includes a citation to the pertinent statement.

of and located within the State of California. (*Id.* ¶¶ 46, 48, 50; *see* Doc. No. 67-6 at 42.)[3] Patrons can participate in DRB only through the use of a web-enabled personal electronic device, such as a cell phone, tablet, or computer; there are no stations located on the Tribe's lands from which a person may physically play. (Doc. No. 68-1 ¶ 15; *see* Doc. No. 67-1 ¶ 57.) As a result, DRB gameplay originates on servers that are located on Indian lands, but participants are located off Indian lands, within the State of California, when they initiate a bet.[4]

Gambling on DRB works as follows: Following registration, a patron logged into the DRB system may add funds to his or her account in an amount not to exceed $9000 using a credit card or similar form of payment. (Doc. No. 68-1 ¶ 53.) To commence gambling, the patron selects a bingo card denomination, ranging from $0.01 to $1.00; selects the number of games, not exceeding five; selects the number of cards to be played per game, not exceeding 500; and clicks "Submit Request!" (*Id.* ¶¶ 54–56.) Upon clicking "Submit," the patron's account is debited the cost of the purchased card(s). (*Id.* ¶ 57.)

Once a wager is submitted, it is queued until a minimum number of patrons purchase cards for the same game. (*See id.* ¶ 62.) It appears with a "Request ID" number under the "Requested" subtab of the "Bingo" page. (*See id.* ¶ 60.) After the requisite number of patrons have joined the game, a timer will commence a sixty-second countdown.[5] (*Id.* ¶ 63.) When the timer reaches zero, the wager is logged by the "Request ID" number under the "Completed Requests" subtab of the "Bingo" page. (*Id.* ¶¶ 64–65.) At that point, the

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[3] Page numbers refer to the CM/ECF-generated page numbers that appear on the top right corner of each page.

[4] "With only one exception, all DRB patrons . . . completed their transactions from locations off Iipay's Indian lands." (Doc. No. 68-1 ¶ 21; *see* Doc. No. 61-2 at 29; Doc. No. 61-4 at 18–66.)

[5] In the event the minimum number of patrons is not reached within the allotted time, "that bingo game will not be permitted to commence" in that the game will be "cancelled and the value of the purchased cards [will be] refunded to the Account Holder's account." (Doc. No. 67-5 at 16.)

patron may click on an icon to watch a short video of the gameplay showing the ball draw, card daubing (or covering of the numbers as they are called), and announcement of the winner. (*Id.* ¶ 66.) Upon completion of gameplay, DRB automatically credits a winning patron's account a prize calculated based on a percentage of the pay-in amount for the game, less a small percentage retained by SYI. (*See id.* ¶¶ 22, 67.)

In addition to the servers, operation of DRB requires, among other personnel, a "Patron's Legally Designated Agent" and one or more "Proxy Monitors." (*Id.* ¶ 40.) David Chelette, SYI's president, holds the title of Patron's Legally Designated Agent when he is present in the SYI office. (*Id.* ¶¶ 11, 41.) This job entails "'conduct[ing] proxy play for the Patron by ensuring' the proper functioning of the 'Proxy Player Aids of DRB Gaming System.'" (Doc. No. 67-1 ¶ 63.) When he is not in the office, he designates a proxy monitor to assume the role of Patron's Legally Designated Agent. (Doc. No. 68-1 ¶ 42.) Fulfilling the responsibilities of Patron's Legally Designated Agent requires only that Chelette or his designee be present in the SYI office, monitor the operation of the DRB hardware and software components, and take remedial action in the event of a system failure. (*Id.* ¶ 45; *see* Doc. No. 67-1 ¶ 68.) SYI also employs approximately six proxy monitors, with at least one monitor present in the SYI office at all times. (Doc. No. 68-1 ¶ 43.) However, it is the computer components, not the Patron's Legally Designated Agent or the proxy monitors, that process 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.[6] (*Id.* ¶ 44; *see* Doc. No. 67-1 ¶¶ 66–69.)

Tribal Defendants commenced DRB operations on November 3, 2014. (Doc. No. 68-1 ¶ 16.) The State initiated this action on November 18, 2014, filing a complaint against Tribal Defendants for (1) breach of the Compact entered into with the State; and (2)

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[6] As Tribal Defendants make clear, "The references within the DRB Job Descriptions to the 'Proxy Player Aids of DRB Gaming System' and the 'Proxy Player' are references to the computer software program operated by the Game Server." (Doc. No. 67-1 ¶ 66.)

unlawful Internet gambling under UIGEA. (Doc. No. 1.) Shortly thereafter, the United States also filed a complaint against Tribal Defendants for violation of UIGEA. (Case No. 14CV2855, Doc. No. 1.) The Court granted the State's motion for a temporary restraining order on December 12, 2014, enjoining Tribal Defendants from operating DRB during the pendency of this litigation. (Doc. No. 11.) The Court subsequently denied Tribal Defendants' motion to dismiss based upon tribal immunity.[7] (Doc. No. 24.)

Plaintiffs filed the instant motions for summary judgment on April 29, 2016. (Doc. Nos. 61, 63.) Tribal Defendants opposed the motions in a single, consolidated opposition, (Doc. No. 67), and Plaintiffs replied, (Doc. Nos. 68, 69). The Court held a hearing on this matter on June 27, 2016. The Court took the matter under submission, and this order follows.

LEGAL STANDARDS

I. Legal Standard Governing Summary Judgment

Summary judgment is appropriate under Federal Rule of Civil Procedure 56 if the moving party demonstrates the absence of a genuine issue of material fact and entitlement to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A fact is material when, under the governing substantive law, it could affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is genuine if a reasonable jury could return a verdict for the nonmoving party. *Id.*

A party seeking summary judgment bears the initial burden of establishing the absence of a genuine issue of material fact. *Celotex Corp.*, 477 U.S. at 323. The moving party can satisfy this burden in two ways: (1) by presenting evidence that negates an essential element of the nonmoving party's case; or (2) by demonstrating the nonmoving party failed to establish an essential element of the nonmoving party's case on which the nonmoving party bears the burden of proving at trial. *Id.* at 322–23. "Disputes over

[7] To the extent Tribal Defendants again seek judgment in their favor based upon their alleged immunity, (*see* Doc. No. 67 at 10 n.1), the Court **DENIES** that request.

irrelevant or unnecessary facts will not preclude a grant of summary judgment." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

Once the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the nonmoving party to set forth facts showing a genuine issue of a disputed fact remains. *Celotex Corp.*, 477 U.S. at 330. When ruling on a summary judgment motion, the court must view all inferences drawn from the underlying facts in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

II. Legal Standard Governing Issuance of a Permanent Injunction

To obtain a permanent injunction, the moving party must demonstrate "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). The considerations with respect to a permanent injunction are substantially similar to those applicable to a preliminary injunction, except that to obtain a permanent injunction, the plaintiff must have actually succeeded on the merits. *Sierra Club v. Penfold*, 857 F.2d 1307, 1318 (9th Cir. 1988). Whether to grant or deny a request for a permanent injunction is within a court's equitable discretion. *eBay*, 547 U.S. at 391. Because "[a]n injunction is a matter of equitable discretion[, its issuance] does not follow from success on the merits as a matter of course." *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 32 (2008).

DISCUSSION

Plaintiffs move for summary judgment, arguing there is no genuine issue of material fact that DRB's operation violates UIGEA. (Doc. No. 61-1; Doc. No. 63-1 at 8.) The State further seeks summary judgment on its breach of Compact claim, arguing there is no genuine issue of material fact that DRB violates the Compact. (Doc. No. 63-1.) Plaintiffs seek the issuance of a permanent injunction enjoining Tribal Defendants from operating

DRB. (Doc. No. 61; Doc. No. 63-1 at 27–30.)

I. Summary Judgment

A. Plaintiffs' Objection and Request to Strike Vialpando's Declaration

As an initial matter, Plaintiffs object to the declaration of David Vialpando on the grounds that Tribal Defendants failed to designate Vialpando as an expert and because Vialpando offers improper legal conclusions. (Doc. No. 68 at 3 n.2; Doc. No. 69-2.) Tribal Defendants respond that Vialpando was identified as the first witness in their Rule 26(a) initial disclosure statement and Rule 26(a)(3) pretrial disclosure statement. (Doc. No. 70 at 4 & n.1.) Tribal Defendants further contend that Vialpando factually describes the tribal laws and regulations pertinent to DRB, the Santa Ysabel Gaming Commission's ("SYGC") understanding of its role as primary regulator under IGRA to license and classify class II bingo games, and the history and circumstances of the SYGC classification of DRB.[8] (*Id.* at 4–5.) Tribal Defendants finally argue that Vialpando's declaration is not offered as expert testimony, but rather is lay witness opinion testimony. (*Id.* at 5–6.)

Federal Rule of Civil Procedure 26(a) requires that parties provide certain initial disclosures. The parties must thereafter supplement or correct discovery responses and disclosures as necessary. Fed. R. Civ. P. 26(e). "If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1); *see also Wong v. Regents of Univ. of Cal.*, 410 F.3d 1052, 1060 (9th Cir. 2005) ("Parties must understand that they will pay a price for failure to comply strictly with scheduling and other orders, and that failure to do so may properly support severe sanctions and exclusions of evidence.").

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[8] SYGC, established by the Tribe's gaming ordinance, is the Tribe's regulatory agency and was established to exercise regulatory authority over all gaming activities conducted within the Tribe's jurisdiction. (Doc. No. 25 ¶ 6; Doc. No. 63-6 ¶ 15.)

The party facing sanctions bears the burden of establishing that the delay was either substantially justified or harmless. *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106–07 (9th Cir. 2001). In determining whether a violation of a discovery deadline was substantially justified or harmless, courts are guided by the following considerations: "(1) prejudice or surprise to the party against whom the evidence is offered; (2) the ability of that party to cure the prejudice; (3) the likelihood of disruption of the trial; and (4) bad faith or willfulness involved in not timely disclosing the evidence." *Lanard Toys, Ltd. v. Novelty, Inc.*, 375 F. App'x 705, 713 (9th Cir. 2010) (citing *David v. Caterpillar, Inc.*, 324 F.3d 851, 857 (7th Cir. 2003)). However, the party seeking exclusion need not demonstrate any prejudice from the failure to disclose before sanctions may be issued. *See Torres v. City of L.A.*, 548 F.3d 1197, 1213 (9th Cir. 2008). The Ninth Circuit affords "particularly wide latitude to the district court's discretion to issue sanctions under Rule 37(c)(1)." *Yeti by Molly*, 259 F.3d at 1106.

Having reviewed Vialpando's declaration, it is evident to the Court that Vialpando offers opinion testimony based on his specialized knowledge as the SYGC's Chairman. As such, he is properly characterized as an expert. *See* Fed. R. Evid. 702; *see also* Fed. R. Evid. 701(c) (limiting opinion testimony of lay witness to testimony "not based on scientific, technical, or other specialized knowledge"). Tribal Defendants offer no defense for their failure to designate Vialpando as an expert, nor did they at the hearing on this matter. However, the Court finds striking Vialpando's declaration in its entirety is inappropriate for two reasons. First, Vialpando was disclosed as a witness during discovery. Second, and more importantly, to the extent Vialpando's declaration lays bare the SYGC's process in classifying DRB as Class II gaming, such evidence is central to whether that determination is entitled to deference. However, to the extent Vialpando offers opinion testimony on subjects not pertinent to the classification, the Court, exercising its discretion, **GRANTS IN PART** Plaintiffs' objections, (Doc. No. 68 at 3 n.2; Doc. No. 69-2), and **STRIKES *paragraphs 56(a)–(k)*** (concerning Vialpando's conclusion that DRB

gaming occurs on Indian lands)[9] and ***paragraphs 62–76*** (concerning Vialpando's analysis of the NIGC's Office of General Counsel ("OGC") advisory letter) of Vialpando's declaration, (Doc. No. 67-8).

B. Tribal-State Class III Gaming Compact

The State argues that summary judgment in its favor on the breach of Compact claim is warranted because DRB is Class III gaming under IGRA and the NIGC's regulations. (Doc. No. 63-1 at 20–23.) The State asserts that because VPNAPS "performed every aspect of the gaming, except for patrons' deciding how much to wager on how many cards[,]" DRB is indisputably a facsimile of bingo and not merely an aid to bingo. (*Id.* at 22–23.) Tribal Defendants counter that the State relies on outdated definitions. (Doc. No. 67 at 26.) When the correct definitions are applied, "only one legal conclusion" can be reached: DRB is permissible Class II gaming because its "key feature" requires that at least two patrons request bingo cards for the same common game.[10] (*Id.* at 24, 28.)

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[9] As the Court explained in its June 23, 2016, order setting discussion points and time limits for hearing on the instant motions, the Court finds that the "on Indian lands" issue is irrelevant to whether DRB constitutes permissible Class II gaming. (Doc. No. 72 at 2 n.1.) The only issue that is relevant to DRB's classification is whether VPNAPS is properly characterized as a "technologic aid" or an "electromechanical facsimile." *See* 25 U.S.C. § 2703(7)(A)–(B). Furthermore, "the ultimate determination of the meaning of a statute is for the courts to resolve." *Benton v. Ashcroft*, 273 F. Supp. 2d 1139, 1144 (S.D. Cal. 2003) (citing *Downey v. Crabtree*, 100 F.3d 662, 666 (9th Cir. 1996)). Because the "on Indian lands" issue turns on the proper construction of IGRA and UIGEA, any deference owed to SYGC's determination does not extend to its conclusion that DRB gaming occurs on Indian lands.

[10] Tribal Defendants also assert that SYGC's classification is entitled to *Chevron* deference. (Doc. No. 67 at 18–20.) The Court disagrees and finds this classification is not entitled to *Chevron* deference. Much like the tariff determinations at issue in *United States v. Mead*, there is no indication in IGRA or otherwise that Congress intended to delegate to the hundreds of tribal gaming regulatory authorities the power to make rules carrying the force of law. 533 U.S. 218, 226–27, 230–33 (2001); *see Chevron, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984) (stating courts must give controlling weight to an agency's reasonable interpretations of a statute where Congress has explicitly or implicitly delegated authority to that agency to do so); *Enforcing the Indian Gaming*

To be entitled to summary judgment on its breach of Compact claim, the State must establish there is no genuine issue of material fact as to the four elements of its claim: "(1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff." *Reichart v. Gen. Ins. Co. of Am.*, 68 Cal. 2d 822, 830 (1968); *see also Cachil Dehe Band of Wintun Indians v. California*, 618 F.3d 1066, 1073 (9th Cir. 2010) ("General principles of federal contract law govern the Compacts, which were entered pursuant to IGRA. In practical terms, we rely on California contract law and Ninth Circuit decisions interpreting California law . . . ." (citations omitted)). The Court need not analyze three of the four elements because as discussed *infra*, the Court determines there is no genuine issue of material fact that Tribal Defendants' operation of DRB did not breach the Compact.

IGRA divides gaming into three classifications. *United States v. 103 Elec. Gambling Devices*, 223 F.3d 1091, 1094 (9th Cir. 2000). Class I gaming "means social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals

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Regulatory Act: The Role of the National Indian Gaming Commission and Tribes as Regulators: Hearing Before the S. Comm. on Indian Affairs, 112th Cong. 112–237 (2011) (statement of Hon. Tracie Stevens, Chairwoman, Nat'l Indian Gaming Comm'n) ("240 federally-recognized Tribes operate a total of 422 Tribal gaming facilities in 28 States. . . . Tribal governments collectively employ approximately 5,900 Tribal gaming regulators . . . .").

The Court also determines that SYGC's classification lacks "power to persuade" and is thus not entitled to *Skidmore* deference. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). This is so because SYGC relied in part on Vialpando's erroneous interpretations of key Ninth Circuit decisions, as well as an unprecedential, unpersuasive arbitration award from Oklahoma. (Doc. No. 67-8 ¶¶ 55(j), 57.) The Court also notes the OGC recently concluded contrarily to the SYGC. (Doc. No. 63-4 at 108–12; Doc. No. 63-5 at 1–13.) Deferring to the SYGC under these circumstances would improperly invert IGRA's hierarchy, allowing SYGC's classification to subvert the OGC's contrary determination. *See In re New Times Secs. Servs., Inc.*, 371 F.3d 68, 80 (2d Cir. 2004) ("we agree with the [Securities & Exchange Commission] that whatever [the Securities Investor Protection Corporation's] expertise in overseeing . . . liquidations, Congress did not intend for the Commission's interpretations of [the Securities Investor Protection Act] to be overruled by deference to the entity that was made subject to the Commission's oversight").

as a part of, or in connection with, tribal ceremonies or celebrations."[11] 25 U.S.C. § 2703(6). Class II gaming is defined, in relevant part, as

> (i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith)—
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> > (I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,
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> > (II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined; and
> >
> > (III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards[.]

Id. § 2703(7)(A); *see* 25 C.F.R. § 502.3(a). Exempted from Class II gaming, however, are "electronic or electromechanical facsimiles of any game of chance or slot machines of any kind." 25 U.S.C. § 2703(7)(B)(ii); *see* 25 C.F.R. §§ 502.4(b), 502.7(a)(2). If a facsimile is used, the gaming activity is rendered Class III gaming, which is defined simply as "all forms of gaming that are not class I gaming or class II gaming." 25 U.S.C. § 2703(8); 25 C.F.R. § 502.4.

The State does not argue that DRB is not bingo. The dispositive inquiry on this issue, then, is whether VPNAPS constitutes a Class II aid or Class III facsimile.[12] IGRA itself

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[11] Class I gaming is not at issue in this case.

[12] "The appropriate threshold for a game classification analysis under IGRA has to be whether or not the game played utilizing a gambling device is class II. If the device is an aid to the play of a class II game, the game remains class II; if the device meets the definition of a facsimile, the game becomes class III." Definitions: Electronic, Computer or Other Technologic Aid; Electronic or Electromechanical Facsimile; Game Similar to Bingo, 67 Fed. Reg. 41,166-02, 41,170 (June 17, 2002) (codified at 25 C.F.R. pt. 502) [hereinafter 2002 Updated Definitions]. Because this is a final rule of the NIGC, and because the Court finds it to be a permissible construction of IGRA, the Court accords this rule *Chevron* deference. *Chevron*, 467 U.S. at 842–44.

Tribal Defendants contend that DRB is Class II gaming because it does not alter the fundamental characteristics of bingo. (Doc. No. 67 at 24–26.) The Court finds it need not address this argument because it goes to the threshold issue of whether DRB gameplay is bingo, an issue the State does not challenge. For the same reason, the OGC's advisory

does not define these terms; however, the NIGC has. An aid is "any machine or device that: (1) Assists a player or the playing of a game; (2) Is not an electronic or electromechanical facsimile; and (3) Is operated in accordance with applicable Federal communications law." 25 C.F.R. § 502.7(a). Factors a court may consider when assessing whether a machine or device meets this three-part definition include whether the machine "(1) Broaden[s] the participation levels in a common game; (2) Facilitate[s] communication between and among gaming sites; or (3) Allow[s] a player to play a game with or against other players rather than with or against a machine." *Id.* § 502.7(b); *see* 2002 Updated Definitions, 67 Fed. Reg. at 41,170 (describing § 502.7(b) as "a set of analytical factors" to be used to "assist in the analysis under" § 502.7(a)). Facsimile is simply defined 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.

Having reviewed the parties' legal arguments and evidence in light of legal authority addressing the issue, and for the following reasons, the Court finds there is no genuine issue of material fact that VPNAPS constitutes a technologic aid to bingo, thus rendering DRB Class II gaming. Significant to the Court's determination is the fact that DRB indisputably broadens participation as opposed to permitting a player to play with or against a machine.

Notwithstanding this fact, the State asserts that DRB is Class III gaming because it "replicates all characteristics of [the] game[,]" pointing to the NIGC's definition of facsimile as support. (Doc. No. 69 at 3.) Yet, that definition does not support the State's

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opinion concerning DRB's classification plays no role in the Court's analysis of the classification issue in this case. (Doc. No. 63-4 at 108–12; Doc. No. 63-5 at 1–13) (finding DRB to be Class III gaming because it "does not satisfy the statutory and regulatory definitions of bingo").)

position. Certainly, it is beyond dispute that if a game "incorporate[es] all of the characteristics of the game," then it is a facsimile for IGRA classification purposes. 25 C.F.R. § 502.8. However, the definition goes on to exempt bingo from this primary definition.[13] The only logical interpretation is that if the game at issue is bingo—and the State does not dispute that DRB is bingo—then the technology is *not* a facsimile if it "broadens participation by allowing multiple players to play with or against each other rather than with or against a machine[,]" even if the wholly electronic format "incorporate[es] all of the characteristics of the game[.]"[14] *Id.*

This interpretation is consistent with the NIGC's admonition that whether technology broadens participation is a "strong indication that the machine or device is a technologic aid." 2002 Updated Definitions, 67 Fed. Reg. at 41,170.[15] It is also consistent with the IGRA-enacting Senate's intent that tribes be permitted "maximum flexibility" to utilize "modern methods of conducting class II games . . . ." S. Rep. No. 100-446 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3079. It likewise comports with a recent NIGC

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[13] Garner's Dictionary of Legal Usage defines "except" as "to exclude, omit." Garner's Dictionary of Legal Usage 337 (3d ed. 2011). When the phrase "except when" is replaced with "unless," facsimile's definition is even clearer: a facsimile of a game is one that "incorporate[es] all of the characteristics of the game, [unless] for bingo . . . the electromechanical format broadens participation . . . ." 25 C.F.R. § 502.8; *see* Garner's Dictionary of Legal Usage 338 (3d ed. 2011) (noting the phrase "except when" is a less preferable synonym for "unless").

[14] The State's only response is that nothing in the definition "should be interpreted to mean that a bingo game cannot be a facsimile." (Doc. No. 69 at 4.) That is true. If, for example, DRB was a wholly electronic technology that incorporated all of bingo's fundamental characteristics and permitted a participant to play against the machine, then the Court agrees DRB would constitute a facsimile. But where, as here, the technology broadens player participation, a plain reading of § 502.8 requires the conclusion that such technology is an aid.

[15] It is also consistent with the Senate's observation that aids to Class II gaming "merely broaden the potential participation levels and is readily distinguishable from the use of electronic facsimiles in which a single participant plays a game with or against a machine rather than with or against other players." S. Rep. No. 100-446 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3079.

proposal that opines electronic one-touch bingo is properly classified as Class II gaming, noting "there is an exception for bingo in the regulatory definition of electronic facsimile, which exempts electronic bingo that broadens player participation by allowing multiple players to play with or against each other rather than with or against a machine."[16] Electronic One Touch Bingo System, 78 Fed. Reg. 37,998-01, 38,000 (June 25, 2013) (to be codified at 25 C.F.R. pt. 502). Finally, this conclusion is consistent with the Ninth Circuit's decision in *United States v. 103 Electronic Gambling Devices*, 223 F.3d 1091 (9th Cir. 2000), where the Court determined the electronic terminals at issue were technologic aids because they "link[ed] participant players . . . [thereby] broaden[ing] the potential participation levels." *Id.* at 1100–01; *see also United States v. 162 MegaMania Gambling Devices*, 231 F.3d 713, 724–25 (10th Cir. 2000) (same). For all these reasons, the Court concludes that VPNAPS constitutes a technologic aid to bingo. Accordingly, DRB is Class II gaming.[17]

The State next argues that even if DRB is Class II gaming, Tribal Defendnats still violated the Compact because they agreed, but failed, to enforce IGRA's terms. (Doc. No. 63-1 at 23–27.) In relevant part, the Compact permits the Tribe to "operate in [a] Gaming Facility any forms and kinds of gaming permitted under law, except to the extent limited under IGRA, this Compact, or the [Tribe's] Gaming Ordinance." (Doc. No. 1-2 at 10, Sec. 4.2.) The Compact also requires "the Tribal Gaming Agency to conduct on-site gaming

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[16] However, the NIGC did not rely on this observation in reaching its conclusion because it concluded one-touch bingo does not incorporate all the characteristics of bingo into the machine, thus rendering reliance on the exception unnecessary. Electronic One Touch Bingo System, 78 Fed. Reg. 37,998-01, 38,000 (June 25, 2013) (to be codified at 25 C.F.R. pt. 502).

[17] The Court is cognizant of the circuit decisions that rely on the "exact replica" standard for assessing whether a particular machine is a Class II aid or Class III facsimile. *See, e.g.*, *Diamond Games Enters., Inc. v. Reno*, 230 F.3d 365, 369–71 (D.C. Cir. 2000) (finding the terminals at issue to be Class II aids to the game of pull-tabs because they were merely "high-tech dealer[s]," not exact replicas of paper pull-tabs). Such decisions, however, were decided prior to the NIGC's 2002 revisions to the definitions of aid and facsimile.

regulation and control in order to enforce the terms of this Gaming Compact, IGRA, and the Tribal Gaming Ordinance with respect to Gaming Operation and Facility compliance[.]" (*Id.* at 24, Sec. 7.1; *see also id.* at 27, Sec. 8.1.1.) Based on these provisions, the State asserts that the operation of DRB off Indian lands breaches the Tribe's duty under the Compact to conduct gaming in accordance with IGRA. (Doc. No. 63-1 at 27.)

Tribal Defendants counter that DRB gaming occurs on Indian lands; accordingly, IGRA is not violated. (Doc. No. 67 at 28–54.) While the Court disagrees and finds there is no genuine issue of material fact that the gaming activity occurs off Indian lands, thus placing DRB outside IGRA's protection, *see infra* Discussion Section I.C, this serves as no basis for the Court to grant summary judgment in the State's favor on the breach of Compact claim. The Compact makes plain that it was intended to regulate only Class III gaming: "The terms of this Compact are designed and intended to: . . . Develop and implement a means of regulating Class III gaming, and *only* Class III gaming[.]" (Doc. No. 1-2 at 6, Sec. 1.0(b) (emphasis added).) The State cannot now seek to hold Tribal Defendants liable for an alleged breach of the Compact's provisions where the gaming at issue is properly classified as Class II, thus bringing DRB outside the Compact's purview. The Court accordingly **DENIES** the State's motion for summary judgment as to the breach of Compact claim. In light of the undisputed facts and the Court's finding that DRB is Class II gaming activity as a matter of law, the State cannot prevail on the breach of Compact. While the Court could consider a *sua sponte* dismissal of the claim, the Court finds it more appropriate to give the State an opportunity to weigh in. An order to show cause ("OSC") hearing will be scheduled in this regard.

C. Unlawful Internet Gambling Enforcement Act

The United States argues summary judgment in its favor is appropriate because there is no genuine dispute concerning the following material facts: (1) patrons place bets or wagers using means involving the Internet; (2) patrons are off tribal lands, but within California—a state where gambling is unlawful—at the time the bets or wagers are placed; (3) Tribal Defendants are "person[s] engaged in the business of betting or wagering" who

accept transactions restricted by UIGEA; (4) Tribal Defendants are engaged in a gambling business and accepted restricted transactions; (5) Tribal Defendants will continue to violate UIGEA absent injunctive relief; and (6) such application of UIGEA will not alter, supersede, or otherwise affect IGRA.[18] (Doc. No. 61-1 at 12.)

1. Uncontested Aspects of the United States' Argument

Tribal Defendants do not respond to the vast majority of the United States' contentions. Rather, they focus their opposition on whether such gambling occurs on Indian lands. (Doc. No. 67 at 28–54.) In other words, they respond only to the United States' final argument that enjoining the operation of DRB pursuant to UIGEA does not alter, supersede, or affect IGRA.

Having reviewed the United States' argument, the undisputed facts, the evidence proffered by both sides, and the applicable law, the Court concludes no genuine issue of material fact exists as to those segments of the United States' argument to which Tribal Defendants do not respond. First, DRB patrons' conduct indisputably constitutes placing a "bet or wager" within the meaning of UIGEA. Specifically, patrons "stak[e] or risk[] . . . something of value upon the outcome of [DRB] upon an agreement or understanding that [they] will receive something of value in the event" their card is a winning card. 31 U.S.C. § 5362(1)(A).[19] Specifically, DRB patrons place bets ranging from $0.01 to $1.00 on each card they play. (Doc. No. 68-1 ¶¶ 54–56.) In return, patrons with winning cards expect their DRB account to be credited a prize calculated on a percentage of the pay-in amount for the game, less a small percentage retained by SYI. (*Id.* ¶¶ 22, 67.)

Second, the Court finds that patrons must use the Internet in order to participate in

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[18] The State joins in the United States' UIGEA argument. (Doc. No. 63-1 at 8.)

[19] UIGEA also defines a "bet or wager" as "the purchase of a chance or opportunity to win a lottery or other prize (which opportunity to win is predominantly subject to chance)" or "any instructions or information pertaining to the establishment or movement of funds by the bettor or customer in, to, or from an account with the business of betting or wagering." 31 U.S.C. § 5362(1)(B), (D). The Court finds DRB patrons' conduct to meet these alternative definitions of "bet or wager" as well.

DRB in violation of California state law. UIGEA defines "unlawful Internet gambling" to mean "to place, receive, or otherwise knowingly transmit a bet or wager by any means which involves the use, at least in part, of the Internet where such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received, or otherwise made." 31 U.S.C. § 5362(10)(A). It is undisputed that patrons must use a web-enabled device to access DRB. (Doc. No. 68-1 ¶ 15; *see also* Doc. No. 67-1 ¶ 163 (stating patrons "engage their designated agent proxy . . . *via a modern communication link (i.e. Internet)*" (emphasis added).) It is further undisputed that patrons are physically located within the state of California, off tribal lands, at the time they initiate or otherwise make their bets. (Doc. No. 68-1 ¶ 21; *see* Doc. No. 61-2 at 29; Doc. No. 61-4 at 18–66.) Finally, it is undisputed that gambling is unlawful under California state law. *See W. Telcon, Inc. v. Cal. State Lottery*, 13 Cal. 4th 475, 481–82 (1996) (stating the California Constitution has "prohibited lotteries since the state's admission" and California's statutes "broadly prohibit the operation of lotteries"); *see also* Cal. Pen. Code § 319 ("A lottery is any scheme for the disposal or distribution of property by chance, among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property or a portion of it, or for any share or any interest in such property, upon any agreement, understanding, or expectation that it is to be distributed or disposed of by lot or chance, whether called a lottery, raffle, or gift enterprise, or by whatever name the same may be known.")[20] Accordingly, the Court finds that no genuine issue of material fact exists as to whether California-located patrons use the Internet to

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[20] Playing or betting in a "percentage game" is also unlawful under California state law. Cal. Penal Code § 330; *see Sullivan v. Fox*, 189 Cal. App. 3d 673, 679 (1987) (defining a "percentage game" as "any game of chance from which the house collects money calculated as a portion of the wagers made or sums won in play, exclusive of fees for use of space and facilities"). The Court finds DRB is unlawful under this provision as well. (Doc. No. 68-1 ¶ 67 ("The value of any prize to be awarded to a patron is based on a certain percentage of the pay-in amount of the game cards purchased for that common game, with a certain percentage retained by SYI.").)

place bets or wagers in violation of California state law.

Third, Tribal Defendants are "person[s]" for purposes of UIGEA. UIGEA states, "No *person* engaged in the business of betting or wagering may knowingly accept, in connection with the participation of another person in unlawful Internet gambling[,]" a bet or wager. 31 U.S.C. § 5363 (emphasis added). Whether a sovereign, like the Tribe here, qualifies as "a 'person' . . . depends not 'upon a bare analysis of the word 'person,''' *Pfizer Inc. v. Gov't of India*, 434 U.S. 308, 317 (1978), but on the 'legislative environment' in which the word appears, *Georgia v. Evans*, 316 U.S. 159, 161 (1942)." *Inyo Cnty., Cal. V. Paiute-Shoshone Indians of the Bishop Cmty.*, 538 U.S. 701, 711 (2003). The Court, however, must start this analysis with the "longstanding interpretive presumption that 'person' does not include the sovereign." *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 780 (2000). This presumption is "not a 'hard and fast rule of exclusion,'" *id.* (quoting *United States v. Cooper Corp.*, 312 U.S. 600, 604–05 (1941)); rather, "[t]he purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute [should be used as] aids to construction which may indicate an intent, by the use of the term, to bring state or nation within the scope of the law," *Cooper Corp.*, 312 U.S. at 605, *overruled on other grounds by statute as stated in U.S. Postal Serv. v. Flamingo Indus. Ltd.*, 540 U.S. 736, 745 (2004).

Here, the Court is satisfied that the term "person" as used in UIGEA was intended to incorporate the Tribe. Notably, a contrary conclusion would render meaningless the provisions of UIGEA dealing with intratribal transactions. UIGEA exempts from its reach bets or wagers that are, among other things, exclusively initiated and received on Indian lands. 31 U.S.C. § 5362(10)(C). If the Tribe was exempted from UIGEA's reach, there would have been no need for Congress to include such an exception. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("In construing a statute [the courts] are obliged to give effect, if possible, to every word Congress used." (citing *United States v. Menasche*, 348 U.S. 528, 538–39 (1955))). Further supporting this conclusion is the fact that UIGEA authorizes only the United States and the state attorneys general to enforce the act's

provisions. *See* 31 U.S.C. § 5365(b); *Vt. Agency of Natural Res.*, 529 U.S. at 780 n.9 (distinguishing *State of California v. United States*, 320 U.S. 577, 585–86 (1944), where the presumption that "person" does not include the sovereign was disregarded because the lawsuit was brought "against a State by the Federal Government (and under a statutory provision authorizing suit *only* by the Federal Government)" (emphasis in original)). For these reasons, the Court concludes Tribal Defendants fall within the meaning of "person" as used in UIGEA.[21]

Fourth, the Court agrees with the United States that the undisputed evidence shows Tribal Defendants are engaged in the business of betting or wagering. Tribal Defendants, through SYI, own and operate DRB, which involves accepting bets or wagers from DRB patrons in the form of credit card or similar transactions. (Doc. No. 68-1 ¶ 53.) Upon completion of gameplay, a prize is credited to the winning patron's account. (*Id.* ¶ 22.) SYI, however, retains a small percentage, the revenue from which it manages for the Tribe's benefit. (*Id.* ¶¶ 13, 67.) It is readily apparent to the Court that one who operates a service for profit is engaged in a business. Black Law's Dictionary 239 (10th ed. 2014) (defining "business" as "[a] commercial enterprise carried on for profit"). And, as noted previously, it is undisputed that DRB patrons place bets or wagers in contravention of California law when participating in DRB; thus, it necessarily follows that Tribal Defendants accept restricted transactions. 31 U.S.C. § 5362(7) (defining "restricted transaction" as "any transaction or transmittal involving any credit, funds, instrument, or proceeds described in any paragraph of section 5363 which the recipient is prohibited from

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[21] The Tribe is certainly a sovereign state. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). It considers TDC and SYI to be "arms" of the Tribe. (Doc. No. 67-1 ¶¶ 20–21.) For this reason, the foregoing analysis applies to TDC and SYI with equal force. If, however, TDC and SYI are not arms of the Tribe, they also fall within the meaning of "person" as used in UIGEA given that the word "person" includes corporations. 1 U.S.C. § 1.

accepting under section 5363").[22]

Finally, there is no dispute that Tribal Defendants will continue to violate UIGEA absent injunctive relief. It is well-documented that Tribal Defendants believe they will prevail in this lawsuit and will reinstitute DRB if they do. (*See, e.g.*, Doc. No. 61-5 at 15; Doc. No. 67-1 ¶ 149 (SYI calling the Court's decision to issue a termporary restraining order "misguided" and stating it looks forward to "vigorously defending" this lawsuit and "resuming the operation of [DRB] in the near future").) *See also Meyer v. Portfolio Recovery Assocs., LLC*, No. 11cv1008 AJB (RBB), 2011 WL 11712610, at *8 (S.D. Cal. Sept. 14, 2011) ("A defendant's persistence in claiming that (and acting as if) his conduct is blameless is an important factor in deciding whether future violations are sufficiently likely to warrant an injunction. From this, the Court infers that [defendant] would continue to violate the [Telephone Consumer Protection Act] if an injunction is not issued.").

2. Whether DRB is Conducted "on Indian Lands"

Turning to the contested issue, Tribal Defendants urge the Court to find that DRB gaming occurs on Indian lands. (Doc. No. 67 at 28–53.) They argue that resolution of this matter "must be made ***only*** through a '*for purposes of IGRA*' focused lens—i.e., considering only those legal precedents and principles applicable to IGRA, *and without regard to any statutory language related to UIGEA or any other federal or state law*." (*Id.* at 11 (emphasis in original).)

As Tribal Defendants assert, the Court is obligated "to construe a statute abrogating tribal rights narrowly and most favorably towards tribal interests." *Rincon*, 602 F.3d at 1028 n.9. That canon of construction, however, bears only on "ambiguities related to the issues covered by IGRA . . . ." *Id.* In other words, the initial inquiry is whether the phrase "on Indian lands" is ambiguous. If it is not, then the canons of statutory construction

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[22] While "the activities of a financial transaction provider, or any interactive computer service or telecommunications service" are exempted from the definition of "business of betting or wagering," 31 U.S.C. § 5362(2), Tribal Defendants admit they do not qualify for the exemption, (Doc. No. 67-1 ¶¶ 138–40).

applicable in the tribal law context play no role. *Cabazon Band of Mission Indians v. Nat'l Indian Gaming Comm'n*, 14 F.3d 633, 637 (D.C. Cir. 1994) ("When the statutory language is clear, . . . the canon may not be employed." (citing *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986))).

Contrary to Tribal Defendants' assertion, the Court is not constrained to answering this threshold inquiry "without regard to any statutory language related to UIGEA or any other federal or state law." (Doc. No. 67 at 11.) The notion that "courts are not at liberty to pick and choose among congressional enactments" is deeply engrained in American jurisprudence. *Morton v. Mancari*, 417 U.S. 535, 551 (1974). As such, "[w]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Id.* Accordingly, pertinent UIGEA provisions are highly relevant to whether "on Indian lands" is ambiguous and thus may properly be considered.[23]

IGRA provides that Indian tribes may operate class II gaming "on Indian lands" without the need to negotiate a compact with the state within with the tribe is located. 25 U.S.C. § 2710(a)(2), (b). Class III gaming is permitted "on Indian lands" pursuant to, *inter alia*, a tribal-state compact. *Id.* § 2710(d). This phrase—"on Indian lands"—works to constrain IGRA's scope. *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2034 (2014). The question, then, is whether DRB gaming occurs on Indian lands. If it does, then IGRA applies, and Tribal Defendants must be afforded summary judgment. If, however, gaming occurs off Indian lands, then DRB is outside IGRA's protections, and Plaintiffs' motions must be granted.

After careful review of the parties' arguments, undisputed facts, evidence, and legal

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[23] The Court notes it is not the first to suss out IGRA's meaning by considering its relationship with other federal statutes. *See, e.g., United States v. Santee Sioux Tribe of Neb.*, 324 F.3d 607, 612 (8th Cir. 2003) ("We find that the IGRA and the Johnson Act can be read together, are not irreconcilable, and *the Tribe must not violate either act if it is to gain relief from the prior order of contempt*." (emphasis added)).

authority, the Court finds that DRB gaming activity occurs off Indian lands at the patron's location when the bet is placed. Justice Kagan's instruction in *Bay Mills* necessitates this conclusion. There, the Supreme Court explained that

> "gaming activity" means just what it sounds like—the stuff involved in playing [] games. . . . [It is] what goes on in a casino—each roll of the dice and spin of the wheel. . . . [T]he gaming activity is the gambling in the poker hall, not the proceedings of the off-site administrative authority.

Id. at 2032–33. Here, the gaming activity is not the software-generated algorithms or the passive observation of the proxy monitors. Rather, it is the patrons' act of selecting the denomination to be wagered, the number of games to be played, and the number of cards to play per game. This off-site activity "is the gambling in the poker hall," not the on-site "administrative authority" of the DRB servers and SYI employees.[24]

This understanding of IGRA is supported by its consistency with UIGEA. UIGEA renders unlawful "plac[ing], receiv[ing], or otherwise knowingly transmit[ting] a bet or wager by any means which involves the use, at least in part, of the Internet where such bet or wager is unlawful *under any applicable Federal or* ***State law in the State*** *or Tribal lands* ***in which the bet or wager is initiated***, received, or otherwise made." 31 U.S.C. § 5362(10)(A) (emphasis added). Congress exempted from this definition intratribal transactions, which are defined as bets or wagers that are "initiated *and* received or otherwise made *exclusively*" within Indian lands. *Id.* § 5362(10)(C) (emphasis added). Furthermore, the United States is granted the authority to "institute proceedings under

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[24] While VPNAPS arguably also conducts some gaming activity, such as daubing the electronic bingo cards, it cannot reasonably be disputed that patrons *also* engage in gaming activity through their initial decisions as to gameplay and clicking "Submit Request!," which, according to the NIGC, is sufficient conduct to satisfy the "cover" element of bingo. Electronic One Touch Bingo System, 78 Fed. Reg. 37,998-01, 37,999 (June 25, 2013) (to be codified at 25 C.F.R. pt. 502) ("[One touch bingo] also satisfies IGRA's second element that 'the holder of the card covers [the] numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined.' In one touch bingo, the player covers the numbers or designations when drawn. That step is achieved by the assistance of a machine via the first, and only, touch of the button.").

[UIGEA] to prevent or restrain a restricted transaction" that "allegedly has been or will be initiated, received, *or* otherwise made on Indian lands . . . ."[25] *Id.* § 5365(b)(1), (3)(A) (emphasis added). However, UIGEA explicitly provides that "[n]o provision of this section shall be construed as altering, superseding, or otherwise affecting the application of the Indian Gaming Regulatory Act." *Id.* § 5365(b)(3)(B).

When IGRA and UIGEA are read together, it is evident that the phrase "on Indian lands" was intended to limit gaming to those patrons who participate in the gaming *activity* while in Indian country. Were the Court to give IGRA the broad construction Tribal Defendants urge, under no circumstances would the United States be able to enforce UIGEA where some portion of the activity originates from servers located on Indian lands. Such a construction would render meaningless multiple provisions of UIGEA, including the exemption for intratribal transactions and the grant of enforcement authority to the United States to enjoin bets received on Indian lands. *See Conn. Nat'l Bank*, 503 U.S. at 253 (mandating that courts, absent "'positive repugnancy' between two laws, . . . give effect to both") (citing *Wood*, 16 Pet. at 363)); *Morton*, 417 U.S. at 551 ("When there are two acts upon the same subject, the rule is to give effect to both if possible . . . ." (quoting *United States v. Borden Co.*, 308 U.S. 188, 198 (1939))).

To support their interpretation of IGRA, Tribal Defendants principally rely upon an arbitration award from Oklahoma and the Ninth Circuit's decision in *AT&T Corp. v. Coeur d'Alene Tribe*, 295 F.3d 899 (9th Cir. 2002). However, neither authority requires a conclusion contrary to the Court's. With respect to the arbitration award, it is a basic tenant of American jurisprudence that "arbitration awards have no precedential value." *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 991 F.2d 141, 147 (4th Cir. 1993); *Smith v. Kerrville Bus. Co.*, 709 F.2d 914, 918 n.2 (5th Cir. 1983) (same); *see also Gonce v.*

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[25] The State also has the power to institute proceedings under UIGEA when "a restricted transaction allegedly has been or will be initiated, received, or otherwise made . . . ." 31 U.S.C. § 5365(b)(2)(A).

Veterans Admin., 872 F.2d 995, 998 (Fed. Cir. 1989) ("Courts should be careful not to 'judicialize' the arbitration process.").

Even if arbitration awards are generally persuasive authority, this particular award is not. The dispute at issue in that case was "whether or not the use of the Internet to conduct a covered game with players physically located in international markets, where such gaming is not unlawful, is authorized" by the parties' state-tribal compact "in light of controlling State and Federal law." (Doc. No. 67-8 at 81.) While the arbitrator concluded the tribe was entitled to do so, the facts underlying this decision differ in significant respects from the instant matter. First, the parties "agree[d]" the tribe was able to "offer and conduct covered games through the use of the Internet using computer servers located on Tribal lands to players located outside the boundaries of Oklahoma and the United States *where such gaming is lawful*." (*Id.* at 87 (emphasis added).) In contrast, DRB patrons are located in California where gambling is *not* lawful.

Second, the parties agreed that "the proposed gaming will be conducted on Indian lands as defined by [IGRA]." (*Id.* at 90 n.42; *see also id.* at 93–94.)[26] The parties further agreed that such gaming "would not be unlawful" under any applicable state or federal law. (*Id.* at 100.) However, where such gaming occurs and whether it is lawful under federal law are squarely at issue in this case. As such, the arbitration award provides the Court with no helpful guidance on the "on Indian lands" issue.

Tribal Defendants' reliance on *AT&T Corp.* is similarly misplaced. Tribal Defendants assert that the Ninth Circuit rejected any requirement that patrons be "physically present" on Indian lands for IGRA to apply. (Doc. No. 67 at 35.) Not so. At

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[26] The arbitrator resolved the issue of Internet gaming's situs in this manner in part because holding Internet gaming as occurring on Indian lands "eliminates complex sovereignty issues that would result from any alternative resolutions; [and] eliminates issues related to the legality of Internet gaming on Tribal lands." (Doc. No. 67-8 at 107; *see also id.* at 96.) Simply reaching a conclusion to sidestep thorny and complex legal issues is not persuasive analysis to the Court.

issue in *AT&T Corp. v. Coeur d'Alene Tribe* was the legality of the Coeur d'Alene Tribe's national lottery, which the tribe sought to conduct pursuant to an NIGC-approved management contract. 295 F.3d 899, 901–02 (9th Cir. 2002). That contract explicitly permitted off-reservation means of access to the lottery, namely, patrons could telephone in purchases for lottery tickets from outside Indian country. *Id.* at 902. AT&T had agreed to provide carrier services in connection with the lottery, but sought declaratory relief with the district court after receiving letters from several state attorneys general threatening prosecution. *Id.* at 902–03. In granting summary judgment in AT&T's favor, the district court concluded IGRA requires a patron to be physically present on tribal lands for the gaming activity to fall within IGRA's protection. *Id.* at 903, 905.

The Ninth Circuit reversed. *Id.* at 910. Specifically, the Ninth Circuit found the district court erred in discounting the NIGC's approval of the management contract that expressly provided for off-reservation ticket purchases. *Id.* at 905. As a final agency action, only a proper party could challenge the lottery, and the Ninth Circuit found AT&T was not such a party. *Id.* 908–09.

In light of this narrow holding, *AT&T Corp.* clearly cannot be given the broad reading Tribal Defendants attribute to it. The Ninth Circuit did not, as Tribal Defendants, "disagree[] for a number of reasons with the district court's conclusion" that patrons must be physically present on Indian lands. (Doc. No. 67 at 35.) Furthermore, such a reading is explicitly at odds with the decision itself, in which the Ninth Circuit noted it "draws no conclusions as to how the Lottery might fare when properly challenged in federal court . . . ." *AT&T Corp.*, 295 F.3d at 910 n.12. Accordingly, *AT&T Corp.* is not instructive.

Finally, the Court notes that while legislative history plays no role in a statutory construction analysis where the words of the statutes are unambiguous,[27] certain

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[27] *See Conn. Nat'l Bank*, 503 U.S. at 253–54 ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the

congressional materials provide further support for the Court's conclusion that patrons must be physically located on Indian lands at the time a bet is initiated or otherwise made—in other words, when gaming activity is conducted—for DRB to fall within IGRA's protection. Principally, the IGRA-enacting Senate provided examples of technologic aids that evidence its understanding that such aids would link patrons located on different tribal reservations, not provide off-reservation means of access to gaming:

> [L]inking participant players at various reservations whether in the same or different States, by means of telephone, cable, television or satellite may be a reasonable approach for tribes to take. Simultaneous games participation between and among reservations can be made practical by use of computers and telecommunications technology as long as the use of such technology does not change the fundamental characteristics of the bingo or lotto games and as long as such games are otherwise operated in accordance with applicable Federal communications law.

S. Rep. No. 100-446 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3079.

The Department of Justice has expressed a similar understanding of IGRA's scope. In 2006, Bruce G. Ohr, then-Chief of the Organized Crime and Racketeering Section of the Department of Justice was asked the following:

> H.R. 4777 would exempt intrastate and intra-tribal Internet gambling, and intrastate lotteries from its prohibitions. Does the Justice Department consider such gambling activity barred under current law, and if so, does the Department believe these exemptions open the door for more gambling over the Internet than would otherwise be legal?

Internet Gambling Prohibition Act of 2006: Hearing on H.R. 4777 Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary, 109th Cong. 109–128 (2006) (Response to Post-Hearing Questions from Bruce G. Ohr, Chief of the Organized Crime & Racketeering Section, United States Dep't of Justice). In response, Mr. Ohr stated, "With respect to inter-tribal gaming, [IGRA] permits the linking of inter-tribal casinos across state lines under certain circumstances. Thus, we would not expect the

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last: 'judicial inquiry is complete.'" (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981))) (citations omitted).

exceptions in H.R. 4777 to open the door for more gambling over the Internet than would otherwise currently be legal." *Id.*[28]

It is evident from Mr. Ohr's statement that the intratribal exemption included in UIGEA merely codified that which was already legal under IGRA. Certainly, if the Justice Department considered it permissible under IGRA for tribes to operate any gaming operations using the Internet so long as the activities originated on servers located on Indian lands, the intratribal exemption would have been drafted far more broadly. This understanding of Mr. Ohr's opinion is supported by the fact that the National Indian Gaming Association "worked with the Committee's of [*sic*] jurisdiction to ensure that UIGEA protected *existing rights under IGRA* and in existing tribal-state compacts. As a result, UIGEA exempts intertribal gaming and other forms of gaming authorized under IGRA from the definition of 'unlawful Internet gaming.'" *The Future of Internet Gaming: What's at Stake for Tribes?: Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. 112–490 (2011) (emphasis added).

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[28] H.R. 4777, the Internet Gambling Prohibition Act ("IGPA"), was ultimately not enacted. However, like UIGEA, IGPA contained an intrastate and intratribal exemption, which exempted from the act's prohibition "the transmission of bets or wagers . . . if—(1) at the time the transmission occurs, the individual or entity placing the bets or wagers . . . , the gambling business, and any facility or support service processing those bets or wagers is physically located in the same State, . . . and for class II or class III gaming under [IGRA], are physically located on Indian lands within that State[.]" Internet Gambling Prohibition Act, H.R. 4777, 109th Cong. § 3(d)(1) (2d Sess. 2006), *available at* https://www.congress.gov/109/bills/hr4777/BILLS-109hr4777rh.pdf (last visited Dec. 8, 2016). While worded differently, these exemptions have the same effect as those contained in UIGEA. *See* 31 U.S.C. § 5362(10)(B) (exempting from "'unlawful Internet gambling' . . . placing, receiving, or otherwise transmitting a bet or wager where—[] the bet or wager is initiated and received or otherwise made exclusively within a single State" that expressly authorizes the method by which the bet or wager is made); *id.* § 5362(10)(C) (exempting from "'unlawful Internet gambling' . . . placing, receiving, or otherwise transmitting a bet or wager where[, *inter alia*,] the bet or wager is initiated and received or otherwise made exclusively [] within the Indian lands of a single Indian tribe [or] between the Indian lands of 2 or more Indian tribes to the extent that intertribal gaming is authorized by [IGRA]").

Finally, in response to Congress' recent consideration of legalizing Internet poker, tribal authorities have voiced tribal leaders' collective "general principles regarding federal legislation that would legalize Internet gaming in the United States." *Id.* Relevant to this case is the second of these resolutions:

> Internet gaming authorized by Indian tribes must be available to customers *in any locale where Internet gaming is not criminally prohibited*.
>
> Internet gaming transcends borders. Thus, Internet gaming legislation must acknowledge that customers may access tribal government operated and regulated Internet gaming sites as long as Internet gaming is *not criminally prohibited where the eligible customer is located. Such acknowledgement would be consistent with current law* and would recognize significant experience on the part of the tribes in using technology to conduct gaming across borders. . . .
>
> Past statements of the U.S. Department of Justice support this position. "[T]o the extent that any legislation would seek to exempt from its prohibition bets and wagers that are authorized by both the state or country in which the bettor and the recipient reside[,] Indian Tribes should be treated as every other sovereign for the purpose of authorizing gaming activity on their lands." *Statement of Kevin V. DiGregory, Deputy Assistant Attorney General, Criminal Division, http://www.justice.gov/criminal/cybercrime/kvd0698.htm*.

Id. (emphasis added). While tribal leaders did not come together to form this collective voice until 2010, this resolution directly contradicts Tribal Defendants' position that the legality of gaming in the state where the patron is located plays no role in the instant inquiry. For all these reasons, the Court finds that the phrase "on Indian lands" unambiguously requires patrons to be physically present within Indian country at the time they engage in gaming activity for IGRA to apply.

Tribal Defendants' assertion that "[t]he proxy play component aids of the VPNAPS gaming system used to conduct the DRB bingo gaming means the gaming is conducted on Indian lands" does not alter the Court's conclusion. (Doc. No. 67 at 48.) Black's Law Dictionary defines "proxy" as "*[s]omeone* who is authorized to act as a substitute for another" or "[t]he grant of authority by which a *person* is so authorized." Black's Law Dictionary 1421 (10th ed. 2014) (emphasis added). Here, it is undisputed that the "proxy

player" is *not* a person, but a facet of VPNAPS.[29] While SYI employs a handful of employees called "proxy monitors," as well as one "Patron's Legally Designated Agent," they do no more than passively observe the automated gaming and ensure the gaming operates smoothly. (Doc. No. 67-1 ¶¶ 63–64, 66–69.) Accordingly, the Court concludes it is the patrons' activities off Indian lands that serve as the appropriate measure for determining the situs of gaming activity for purposes of IGRA and UIGEA. To entertain the fiction of proxy play would permit Tribal Defendants to readily thwart the limits Congress imposed by statute. The Court is disinclined to do so.

For the foregoing reasons, the Court concludes that no genuine issue of material fact exists that the operation of DRB is not protected by IGRA and violates UIGEA. The Court therefore **GRANTS** Plaintiffs' motions for summary judgment as to the UIGEA claim.

II. Permanent Injunction

Having found Plaintiffs are entitled to summary judgment on the UIGEA claim, the Court now turns to their request for injunctive relief. Plaintiffs ask the Court to permanently enjoin Tribal Defendants from operating DRB. (Doc. No. 61; Doc. No. 63-1 at 27–30.) As noted above, Plaintiffs must establish "(1) that [they have] suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff[s] and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay*, 547 U.S. at 391.

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[29] Tribal Defendants themselves make this fact clear. They readily admit that the proxy player is merely a component of DRB's software and not an actual person. (Doc. No. 67-1 ¶ 63 (noting the Patron's Legally Designated Agent "conduct[s] proxy play for the Patron" merely by ensuring "the proper function of the 'Proxy Player Aids of DRB Gaming System"), ¶ 66 (stating that "Proxy Player Aids of DRB Gaming System" and "Proxy Player" refer to "the computer software program operated by the Game Server"), ¶ 67 ("The computer software components of the VPNAPS gaming system used by [DRB], not the Patron's Legally Designated Agent or the Proxy Monitors, process 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."); *see also id.* ¶¶ 64, 68, 69.)

A. Irreparable Injury

This is a case in which an injunction is expressly authorized by statute. 31 U.S.C. § 5365(b)(1)(B), (3)(A)(i). Generally, a party seeking a preliminary injunction must meet the standard requirements for equitable relief; however, the Ninth Circuit does not require a showing of irreparable harm when an injunction is sought to prevent the violation of a federal statute where that statute specifically provides for injunctive relief. *Burlington N. R.R. Co. v. Dep't of Revenue of State of Wash.*, 934 F.2d 1064, 1074 (9th Cir. 1991). The party requesting an injunction must demonstrate that the statutory conditions have been met and must demonstrate a likelihood of future violations before an injunction will issue. *See Meyer*, 2011 WL 11712610, at *7 n.14 ("In an action for a statutory injunction, once a violation has been demonstrated, the moving party need only show that there is a reasonable likelihood of future violations in order to obtain relief." (quoting *S.E.C. v. Holschuh*, 694 F.2d 130, 144 (7th Cir. 1982))).

As discussed at length in the preceding section, the Court finds that Plaintiffs have adequately demonstrated UIGEA's statutory requirements have been met. *See supra* Discussion Section I.C. Furthermore, the State has demonstrated that it has suffered, and will continue to suffer, irreparable injury if Tribal Defendants are not permanently enjoined from operating DRB. The State has a longstanding public policy prohibiting lotteries, *see W. Telcon, Inc.*, 13 Cal. 4th at 481–82, a policy Tribal Defendants can continue to flout if permitted to offer DRB to those located outside Indian country but within the State's boundaries. Furthermore, the failure to permanently enjoin DRB may encourage Tribal Defendants and others to offer additional Internet gambling:

> DesertRoseBingo.com, [*sic*] 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."

Tribal Interests in California Introduce Online Gambling, Online Casinos, http://www.online-casinos.com/news/13007-tribal-interests-california-introduce-online-gambling (last visited Dec. 8, 2016). (*See also* Doc. No. 61-5 at 15; Doc. No. 67-1 ¶ 149 (SYI stating it looks forward to "resuming the operation of [DRB] in the near future").) The Court therefore finds that Plaintiffs have demonstrated irreparable injury in the absence of a permanent injunction.

B. Adequacy of Remedies at Law

The Court is similarly satisfied that any available remedies at law are inadequate. The State is not permitted to recover damages under the Compact. (Doc. No. 1-2 at 33, Sec. 9.4(a)(2).) Though UIGEA permits the United States to seek monetary relief, this cannot adequately compensate the State for the damage to its longstanding public policy prohibiting lotteries. *See supra* Discussion Section II.A.

C. Balance of Hardships

The Court finds the balance of hardships factor also readily satisfied. Here, the balance of hardships clearly favors Plaintiffs because a permanent injunction would "merely require [Tribal Defendants] to comply with" UIGEA. *DFSB Kollective Co. v. Tran*, No. 11-CV-01049-LHK, 2011 WL 6730678, at *9 (N.D. Cal. Dec. 21, 2011); *see also Meyer*, 2011 WL 11712610, at *8 ("[Defendant] argues that an injunction is not appropriate because the harm will fall disproportionately on it, effectively putting it out of business. The plea to remain in business while blatantly violating a federal statute is not persuasive to this Court. . . . Defendants will not be heard to complain that they will be irreparably harmed by enforcement of a valid statute.").

D. Public Interest

Finally, the Court finds that the public interest is best served by the issuance of a permanent injunction. The State—representing the public—has a strong interest in enforcing its prohibition against lotteries and in defining the contours to any exceptions to

this prohibition through carefully negotiated tribal-state compacts.

In sum, the Court finds all four factors favor granting Plaintiffs' request for injunctive relief. Accordingly, the Court **GRANTS** Plaintiffs' request for permanent injunction.

CONCLUSION

Based on the foregoing, the Court **DENIES** the State of California's motion for summary judgment as to the breach of Compact claim, (Doc. No. 63), and **GRANTS** Plaintiffs' motions for summary judgment as to the UIGEA claim, (Doc. Nos. 61, 63). Tribal Defendants and all of their officers, agents, servants, employees, and attorneys, and all persons acting under any Tribal Defendant's direction and control, are hereby **PERMANENTLY ENJOINED AND RESTRAINED** from the following:

1. Offering or conducting any gambling or game of chance played for money or anything of value over the Internet to any resident of or visitor to California who is not physically located on the Tribe's Indian lands;

2. Accepting any credit, or the proceeds of credit, extended to or on behalf of any resident of or visitor to California who bets or wagers over the Internet in connection with any gambling or game of chance offered or conducted by Tribal Defendants. This includes credit extended through the use of a credit card;

3. Accepting any electronic fund transfer, funds transmitted by or through a money transmitting business, or the proceeds of an electronic fund transfer or money transmitting service from or on behalf of any resident of or visitor to California who bets or wagers over the Internet in connection with any gambling or game of chance offered or conducted by Tribal Defendants; and

4. Accepting any check, draft, or similar instrument which is drawn by or on behalf of any resident of or visitor to California who bets or wagers over the Internet in connection with any gambling or game of chance offered or conducted by Tribal Defendants, and which is drawn on or payable at or through any financial institution.

The Clerk is directed to enter judgment for the United States and against Tribal

Defendants in case 14-CV-2855-AJB-NLS consistent with this Order. That will close that case.

As to case 14-CV-2724-AJB-NLS, the Court sets an OSC re: Dismissal Hearing for ***January 3, 2017, at 3:00 P.M. in Courtroom 3B*** for the State to show cause why the breach of Compact claim should not be dismissed. Judgment will be entered thereafter, as appropriate, in that case.

IT IS SO ORDERED.

Dated: December 12, 2016

Hon. Anthony J. Battaglia
United States District Judge