UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, Plaintiff, v. IIPAY NATION OF SANTA YSABEL, also known as SANTA YSABEL BAND OF DIGUENO MISSION INDIANS, et al., Defendants.	Case No.14cv2724 AJB (NLS) ORDER GRANTING MOTION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE (Doc. No. 3)

The Court is presented with a motion for a temporary restraining order ("TRO") brought by the State of California ("the State"). The matter was fully briefed by the parties and a hearing was held on December 4, 2014. Having fully and carefully considered the arguments presented, the Court **GRANTS** the motion.

I. BACKGROUND

The State initiated this action against the Iipay Nation of Santa Ysabel ("the Tribe") and other defendants who are agencies or officials of the Tribe. (Compl. ¶ 5, Doc. No. 1.) The complaint alleges (1) breach of compact, and (2) unlawful internet gambling under the Unlawful Internet Gambling Enforcement Act ("UIGEA") (*id.* ¶¶ 40-51), and seeks

injunctive and declaratory relief (*id.* at 13-14). The breach of compact claim relates to the Tribal-State Compact entered into by the parties in 2003. (*See* Compact, Doc. No. 1-2.)

At the heart of the dispute is an electronic bingo-type game, being offered by the Tribe. In July 2014, the State wrote the Tribe about the Tribe's plans to provide internet bingo and poker and requested to meet and confer. (Chelette Decl. Ex.1, Doc. No. 6.) The Tribe responded that it "does not offer bingo through Santa Ysabel Interactive, or have any plans to do so in the near future." (*Id.*) The Tribe also noted that even if it did, however, bingo in an interactive environment would be a Class II game,[1] and thus would not violate the Compact.[2] (*Id.*) Finally, the Tribe asserted that it had "no intention of discussing any federal statutes, including the Indian Gaming Regulatory Act or the Unlawful Internet Gaming Enforcement Act with any State of California government officials" and that the State was "exceeding [its] scope and authority by requesting a discussion with [the Tribe] concerning the application and relevance of federal law . . . ." (*Id.*) As for the state gambling laws, the Tribe said that without citation to specific California statutes, it "would be unable to provide the State with meaningful dialogue with which to resolve potential issues." (*Id.*)

On November 3, 2014, the Tribe began to offer the game using the Virtual Private Network Assisted Play System ("the system"). The game is offered for real-money play and the Tribe contends the play is limited to adult residents of California while they are located within California. (Chelette Decl. ¶ 3, Doc. No. 6.)

Discussing how the game is played is important because it determines whether the game is classified as Class II or Class III, distinctions that carry different legal consequences. The Compact provides that the Tribe will not engage in Class III gaming not

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[1] As discussed on page 8 of this Order, IGRA classifies Indian gaming into three different categories—Class I, Class II, or Class III, with each category subject to a different degree of regulation.

[2] At the hearing on this matter, the Court discussed the State's effort to meet and confer. Defense counsel labeled the State's assertions regarding meet and confer as misrepresentations and attempted to support this assertion by reading the portion of the State's letter that discussed poker. The Court had read the materials and is aware that poker was discussed in the State's letter. Bingo was also discussed, however, and the Tribe understood that bingo was also at issue, as evident from the Tribe's response discussing both poker and bingo.

expressly authorized in the Compact (Compact § 3.0), and that no one under the age of twenty-one years be present in the room where Class III gaming activities are conducted (Compact § 6.3). The State provided a press release issued by the Tribe that contends Californians can play the game "from any web browser on any computer, mobile device, or tablet" and that the bettor's participation is limited to electing the amount to bet and how many cards to play in any game. (Pl.'s Mem. 3, Doc. No. 3-1; Dhillon Decl. Ex. A, Doc. No. 9.) At the hearing on the matter, the State presented the Court with a recording of the game being played, with the State and Defendants providing a narrative and commentary.

Defendants opposition provides a different description of the game.[3] Defendants describe the game as involving "peer-to-peer competition in a single game of bingo with a common ball draw" and at no time does the game permit a single player to play against the gaming unit alone. (Defs.' Mem. 4, 11, Doc. No. 5.) Defendants explain that the tribal gaming commission conducted a regulatory review of the system used for the game to determine whether the system could be used as a technologic aid to the play of bingo. (Vialpando Decl. ¶ 6, Doc. No. 5-2.) The tribal gaming commission determined that the offered games are Class II games of bingo and would not violate the Indian Gaming Regulatory Act ("IGRA") or other relevant law. (*Id.* ¶ 7.) Defendants note that the National Indian Gaming Commission ("NIGC") sent representatives for an on-site inspection meeting on November 6, 2014, with the tribal gaming commission and that the NIGC has not taken any enforcement action with respect to the game. (*Id.* ¶ 12.) At the hearing, Defendants clarified that the NIGC would be conducting a follow-up visit later this month.[4]

Defendants launched the game on November 3, 2014, and the State filed the present action and motion on November 18, 2014. Defendants oppose the motion.

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[3] Defendants did not include a statement of material facts in their memorandum but instead directed the Court is examine their voluminous attachments.

[4] The United States recently filed a related case against the Tribe and some of the Defendants seeking to enjoin the gaming at issue here. *See United States v. Iipay Nation of Santa Ysabel*, No. 14cv2855 AJB (NLS) (S.D. Cal. filed Dec. 3, 2014).

II. LEGAL STANDARD

To obtain a temporary restraining order or preliminary injunction, a movant "must establish that [it] is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 877 (9th Cir. 2009) (quoting *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008)); *see also Sierra Forest Legacy v. Rey*, 577 F.3d 1015, 1021 (9th Cir. 2009). A preliminary injunction is an "extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 555 U.S. at 22. A temporary restraining order requires a likelihood of irreparable injury in every case. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th Cir. 2009).

III. DISCUSSION

There are two primary issues presented here (1) whether the present motion should be denied because tribal sovereignty bars the State's claims, as argued by Defendants (Defs.' Mem. 8), and (2) whether the Court should grant the motion based on the TRO factors.

A. Sovereign Immunity

In bringing this action, the State cites original jurisdiction under 28 U.S.C. §1331 because the complaint invokes questions of federal statutes and federal common law; 25 U.S.C. § 2710(d)(7)(A)(ii) because the action is initiated to enjoin conduct related to Class III gaming; and 31 U.S.C. § 5365(a) because the State seeks to restrain alleged violations of UIGEA. (Compl. ¶ 2; Pl.'s Mem. 5.) Defendants respond that the Tribe has not waived its sovereign immunity and that, because the gaming is Class II, the Compact is inapplicable and the activity does not violate the UIGEA. (Defs.' Mem. 8-9.)

The Tribe, as a federally-recognized tribal government, is a domestic dependent nation. *Michigan v. Bay Mills Indian Cmty*, 134 S. Ct. 2024, 2030 (2014). As domestic dependant nations, Indian tribes "exercise inherent sovereign authority over their members and territories" and therefore are immune to suits against them unless they clearly waive their immunity or Congress abrogates it. *Okla. Tax. Comm'n v. Citizen Band Potawatomi*

Indian Tribe of Okla., 498 U.S. 505, 509, 111 S. Ct. 905, 909 (1991); *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 725 (9th Cir. 2008) ("Tribal sovereign immunity protects Indian tribes from suit absent express authorization by Congress or clear waiver by the tribe.").

Regarding Class III gaming, which is directly at issue here, the Compact provides that the Tribe is "permitted to engage in only the Class III Gaming Activities expressly referred to in Section 4.0 and shall not engage in Class III gaming that is not expressly authorized in that Section." (Compact § 3.0.) In Section 4.0, the Compact discusses permitted Class III gaming and lists gaming devices, any banking or percentage game, and "[a]ny devices or games that are authorized under state law to the California State Lottery, provided that the Santa Ysabel Tribe will not offer such games through use of the Internet unless others in the state are permitted to do so under state and federal law." (*Id.* § 4.1(a)-(c).)

Section 9.0 of the Compact contains the dispute resolutions provisions. (*See* Compact § 9.0.) That portion of the Compact provides in part:

> Sec. 9.4 Limited Waiver of Sovereign Immunity.
> (a) In the event that a dispute is to be resolved in federal court or a state court of competent jurisdiction as provided in this Section 9.0, the State and the Santa Ysabel Tribe Expressly consent to be sued therein and waive any immunity therefrom that they may have provided that:
> (1) The dispute is limited solely to issues arising under this Gaming Compact;
> (2) Neither side makes any claim for monetary damages (that is, only injunctive, specific performance, including enforcement of a provision of this Compact requiring payment of money to one or another of the parties, or declaratory relief is sought); and
> (3) No person or entity other than the Santa Ysabel Tribe and the State is party to the action, unless failure to join a third party would deprive the court of jurisdiction; provided that nothing herein shall be construed to constitute a waiver of the sovereign immunity of either the Santa Ysabel Tribe or the State with respect to any third party.
> . . .
> (c) The waivers and consents provided for under this Section 9.0 shall extend to civil actions authorized by this Compact, including, but not limited to, actions to compel arbitration, any arbitration proceeding herein, any action to confirm or enforce any judgment or arbitration award as provided herein, and any appellate proceedings emanating from a matter in which an immunity waiver has been granted. Except as stated herein or elsewhere in this Compact, no other waivers or consents to be sued, either express or implied, are granted by either party.

(*Id.* § 9.4.)

Defendants do no dispute that the Section 9.4 items are met, but instead argue that the

Compact is inapplicable here because the gaming is Class II gaming, not Class III gaming and that the State may not move forward with an UIEGA claim in an attempt to destroy sovereign immunity. (Defs.' Mem. 9.)

25 U.S.C. § 2710(d)(7)(A)(ii) provides that United States district courts have jurisdiction over "any cause of action initiated by a State or Indian tribe to enjoin class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact . . . ." A recent United States Supreme Court case held that federal causes of action brought pursuant to § 2710(d)(7)(A)(ii) of the IGRA to enjoin Class III gaming activity must allege and ultimately establish that the gaming "is located on Indian lands."[5] 25 U.S.C. § 2710(d)(7)(A)(ii); *see Bay Mills*, 134 S. Ct. at 2032. The State also invokes 31 U.S.C. § 5365 of the UIGEA, which provides that, "[i]n addition to any other remedy under current law, the district courts of the United States shall have original and exclusive jurisdiction to prevent and restrain restricted transactions" and discusses proceedings instituted by the federal government, state attorney general, and on Indian lands. *Id.* § 5365(b).

After careful consideration of the applicable law on this matter and the circumstances of this case, the Court is convinced that the action is proper and that Defendants are not shielded by sovereign immunity in this matter. The Compact specifically provides that the parties may bring action for "issues arising under [the Compact]." (Compact § 9.4.) The action presented is exactly that. Moreover, Class III gaming, outside of that expressly provided in the Compact, is not permitted by the Compact. As discussed further in the next portion of this Order, at this juncture in the action, it appears that Defendants are engaged in Class III gaming. As such, the State may move forward with enforcement, as provided

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[5] Here the State alleges the gaming is occurring both on and off Indian lands. The State notes that "the Tribe's [i]nternet gambling does not fall within the purview of IGRA because some of the gaming activity necessarily takes place outside of the Indian Tribe's land." (Pl.'s Mem. 11.) Section 2710(d) could only be effectively invoked to the extent the State is challenging activities "on Indian lands." Although Defendants dispute waiver of immunity, the gaming system is advertised as "ensur[ing] all game play takes place on Tribal lands, under the jurisdiction of the Tribal government." (Dhillon Decl. Ex. A.) Defendants continue to make this argument in their memorandum. (Defs.' Mem. 4 ("In sum, the [system] allows the Tribe to offer Class II electronic linked bingo gaming conducted on Indian lands using a proxy system.").)

in the Compact. Finally, although the Court is mindful of the long-standing rights of tribes in controlling activities on their tribal lands and that IGRA established a comprehensive scheme for tribal gaming *on Indian lands*, this right and interest is not boundless. *See State ex rel. Nixon v. Coeur D'Alene Tribe*, 164 F.3d 1102, 1104 (8th Cir. 1999) ("Once a tribe leaves its own lands and conducts gambling activities on state lands, nothing in the IGRA suggests that Congress intended to preempt the State's historic right to regulate this controversial class of economic activities."). As such, the Court proceeds with the evaluation of this motion.

B. Temporary Restraining Order

For the State to obtain a TRO, it must establish that it is likely to succeed on the merits, is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in its favor, and that an injunction is in the public interest. *See Marlyn Nutraceuticals*, 571 F.3d at 877.

The State makes numerous arguments before developing its analysis regarding the TRO. Specifically, that (1) IGRA allows gaming only on Indian lands and therefore the Tribe's internet gambling off of Indian lands violates IGRA; (2) the Tribe's internet gambling occurs both where the bettor is located and where the wager is received; and (3) the Tribe's internet gambling is a facsimile of bingo and thus is Class III gaming. (*See* Pl.'s Mem. 7-15.) The Court will address these arguments to the extent they bear on the TRO factors.

1. Likely to Succeed on the Merits

The State brings two causes of action: breach of compact and unlawful internet gambling. In terms of breach of compact, the State argues that the Tribe agreed not to engage in Class III gaming that is not expressly authorized in the Compact, and because it is now offering such gaming, it breached the Compact. (Pl.'s Mem. 16.)

Regarding the unlawful internet gambling, the State alleges that the betting initiated off of Indian lands is illegal under state law. (*Id.* 16-17 (citing Cal. Penal Code §§ 319-322, 337a (discussing unlawful gaming)).) These violations, the State argues, serve as a predicate

for UIGEA relief. (Pl.'s Mem. 17 (citing 31 U.S.C. §§ 5362(1)-(2), 5363 (defining relevant terms and discussing the prohibition on acceptance of any financial instrument for unlawful internet gambling)).)

a. Breach of Compact

Compacts are governed by general principles of federal contract law, which in practice means courts rely on California contract law and Ninth Circuit decisions interpreting California law. *Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. California*, 618 F.3d 1066, 1073 (9th Cir. 2010). To be entitled to damages for breach of contract, a plaintiff must plead and prove (1) a contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) damage to plaintiff. *Tecza v. Univ. of San Francisco*, 532 F. App'x 667, 668 (9th Cir. 2013) (citing *Walsh v. W. Valley Mission Cmty. Coll. Dist.*, 66 Cal. App. 4th 1532, 1545 (1998)).

IGRA classifies Indian gaming into three different categories: Class I, Class II, and Class III. 25 U.S.C. § 2703. Each of these categories is subject to different degrees of state and federal regulation. *See Cabazon Band of Mission Indians v. National Indian Gaming Comm'n*, 827 F.Supp. 26, 27 (D.D.C.1993). The tribes possess exclusive jurisdiction to regulate Class I gaming, which includes social games and traditional forms of Indian gaming connected to tribal ceremonies. 25 U.S.C. §§ 2703(6), 2710(a)(1). Class I gaming is not at issue here.

IGRA defines Class II games to include "the game of chance commonly known as bingo (whether or not electronic, computer or other technologic aids are used in connection therewith) . . . including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo . . . ." 25 U.S.C. § 2703(7)(A). Class II games are regulated by the NIGC and can be operated on Indian lands without a tribal-state compact. *Id.* §§ 2703(7), 2710(b). All other gaming activity is Class III gaming and is allowed only where a tribal-state compact is entered. *Id.* §§ 2703(8), 2710(d); *see also Lac Vieux Desert Band of Lake Superior Chippewa Indians of Michigan v. Ashcroft*, 360 F. Supp. 2d 64, 65 n.1 (D.D.C. 2004).

Determining whether the Compact was breached depends on whether the bingo is considered a Class II or Class III game. Regarding the scope of Class III gaming, the Compact provides that the Tribe is authorized to operate the following gaming activities: (a) gaming devices; (b) any banking or percentage card game, (c) "[a]ny devices or games that are authorized under state law to the California State Lottery, provided that the [Tribe] will not offer such games through use of the Internet unless others in the state are permitted to do so under state and federal law." (Compact § 4.1.) The Compact also provides that the Tribe must not permit anybody under the age of twenty-one years to be present where Class III gaming is occurring, unless the person is en route to another area. (*Id.* § 6.3.)

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

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

several rooms or locations." (citing *Cabazon Band of Mission Indians v. National Indian Gaming Comm'n*, 14 F.3d 633, 637 (D.C. Cir.1994))).

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

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

25 C.F.R. § 502.8.

Numerous cases deal with issues similar to this one but do not address the precise issue presented. *See 103 Elec. Gambling Devices*, 223 F.3d at 1093, 1101 (holding that a game consisting of players competing against each other on a single electronic network via computer terminals located at tribal gaming facilities was a Class II game because it merely broadened the potential participation levels); *Spokane*, 972 F.2d at 1091, 1093 (concluding that electronic pull-tab game in which terminals were linked together to share a jackpot and players played against machine was a Class III electronic facsimile); *see also In AT & T Corp. v. Coeur d'Alene Tribe*, 295 F.3d 899, 901 (9th Cir. 2002) (discussing a dispute related to a Class III lottery that allowed off-reservation participants to purchase tickets by telephone outside of Idaho); *Nixon*, 164 F.3d at 1104 (involving the state of Missouri's attempt to stop an Idaho tribe and its contractor from conducting internet gambling with Missouri residents).

Other cases, however, provide some insight into this dispute. In *Cabazon*, a 1994 D.C. Circuit case, the court examined electronic pull-tab machines which randomly selected a card for the player, electronically pulled the tab off the card at the player's direction, and displayed the results onscreen. 14 F.3d at 635. Because that game "exactly replicate[d]" the

game of video pull-tabs in computer form, it was a facsimile and not a Class II device. *Id.* at 636. The computers in that case could be interconnected so that each gambler simultaneously played against other gamblers in "pods" or "banks" of as many as forty machines. *Id.* at 635. In the district court, the plaintiff-tribes argued that because five video games were networked with one computer, each gambler played against other gamblers and thus did not play the game against a machine. *See Cabazon*, 827 F. Supp. at 33 (discussion of the game by the district court, which was later affirmed by the circuit court). The district court disagreed, saying that the "narrow reading of the statute obviously circumvents Congress' clear and unambiguous intent as expressed in IGRA and its legislative history: that electronic facsimiles of games of chance—like video pull-tabs—are class III games." *Id.* at 33. The appellate court affirmed. 14 F.3d at 637.

In light of all of the above, the Court is convinced that the internet gaming provided here is Class III. This was bolstered by the presentation of the game at the hearing, at which it became apparent that, as the State represented, the player's participation is limited to electing the amount to bet and the number of cards to play. (Pl.'s Mem. 3; Dhillon Decl. Ex. A ("At no time is live bingo game action performed by the user."); Scott Decl. ¶ 6, Doc. No. 3-4 ("I only placed a bet and selected the number of cards to play. The system then played the game.")).

At the hearing on the matter, Defendants argued that "proxies" mind the machines, which are located on the reservation. Accordingly, Defendants liken the system to the Bingo Nation advisory opinion recently issued by the NIGC general counsel. (Defs.' App. A. ("Shepard Ltr."), Doc. No. 5-1.) A letter from NIGC general counsel is not the same as an action by the NIGC chairperson or commission, *see Lac Vieux*, 360 F. Supp. 2d at 68, but is useful to the Court. The weight given to non-binding agency interpretations depends on the "'thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.'" *United States v. 162 MegaMania Gambling Devices*, 231 F.3d 713, 719 (10th Cir. 2000) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

The Court carefully reviewed the Bingo Nation advisory opinion, but is unpersuaded that it supports Defendants' argument. Bingo Nation is a linked bingo game, where the bingo cards are purchased via kiosks located in tribal gaming facilities on Indian lands. (Shepard Ltr. 1.) Players are then able to play in person or appoint a proxy to play the cards at the facility on his or her behalf. (*Id.*) The proxy is located at the tribal gaming facility where the ball draw occurs. (*Id.* at 2.) The ball draw is conducted using a mechanical bingo ball blower and a standard bingo ball set bearing numbers. (*Id.*) Once the game begins, the drawn numbers are entered into the server software, which allows the operator to track the progress of the cards being played. (*Id.* at 3.) The proxy players play the game at the site of the drawing, "daubing" the electronic card minding device when numbers are called, and must claim bingo and notify the operator of a winning pattern. (*Id.* at 2.) A player may only redeem their winning card for a prize at participating tribal gaming facilities on Indian lands. (*Id.*)

The system presented here is wholly removed from the system presented in the Bingo Nation opinion and other similar cases. *See 103 Elec. Gambling Devices*, 223 F.3d at 1093 n.2 (determining that the MegaMania terminal is Class II gaming when players played each other on a single, interlinked electronic game via a network of individual computer terminals located at tribal gaming facilities and a human managed the blower and keyed numbers into a computer, which then transmitted the numbers to remote host computers at participating gaming facilities). Here, an off-site user places a bet and watches the computer "play" the game. The fact that a player may not play solely against the machine does not save the game for classification purposes. The Court is fully aware that the games permitted for tribal gaming are not limited to "church-hall paper and dauber bingo games." (Vialpando Decl. Ex. 4 at 7, Doc. No. 5-4.) But the game presented here pushes well beyond a technological aid and instead the Court is convinced that the gaming here is an electronic facsimile and Class III gaming for purposes of the Compact. As such, the Court concludes the State is likely to succeed on the merits of its breach of compact claim.

b. Unlawful Internet Gambling

Although a likelihood of success on the merits of the breach of compact claim is

sufficient to continue the analysis, the Court will briefly discuss the second claim regarding unlawful internet gambling. The State cites both the UIGEA and California state statutes in support of its claim. *See* 31 U.S.C. §§ 5362(1)-(2), 5363; Cal. Penal Code §§ 319-322, 337a.

Congress enacted the UIGEA because "traditional law enforcement mechanisms are often inadequate for enforcing gambling prohibitions or regulations on the Internet, especially where such gambling crosses State or national borders." 31 U.S.C. § 5361(a)(4). The Act defines "unlawful Internet gambling" as "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." *Id.* § 5362(10)(A). The "unlawful Internet gambling" definition excludes intratribal transactions in which the bet and wager are expressly authorized by applicable tribal ordinance or approval from the chairperson of the NIGC, and with respect to Class III gaming, the applicable tribal-state compact. *Id.* § 5362(10)(C).

The Court is persuaded that the law of UIGEA looks to the law where both the bet is made and the wager is received. *See id.* § 5362(10)(A) (defining unlawful internet gambling and discussing the use 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*" (emphasis added)); *see also Interactive Media Entm't & Gaming Ass'n Inc. v. Attorney Gen. of U.S.*, 580 F.3d 113, 117 (3d Cir. 2009) (rejecting a facial challenge to the UIGEA and noting that appellant "does not point to anything in the language of the Act to suggest that Congress meant anything other than the physical location of a bettor or gambling business in the definition of 'unlawful Internet gambling.'").

The Court again turns to an opinion letter drafted by NIGC general counsel. The State submitted a letter written in 2000 by Kevin Washburn, general counsel of the NIGC. (Pl.'s App. A ("Washburn Ltr.), Doc. No. 3-2.) The topic of the letter was internet bingo, with a tribe asserting that the internet is an aid to Class II bingo, and thus may be offered by tribes pursuant to the IGRA. (*Id.*); *see also Lac Vieux*, 360 F. Supp. 2d at 65 (describing the proxy

play game involved). Washburn acknowledged that internet bingo's purpose was to draw people from a wide area, but noted that IGRA's preemption of state laws that purport to regulate Indian gaming is limited to the reach of IGRA and therefore Indian gaming is only permitted on Indian lands. (Washburn Ltr.) Therefore, Washburn continued, because not all of the gaming occurs on Indian lands, internet bingo lies outside Class II gaming or compacted Class III gaming and could subject the game's operators to state or federal criminal prosecution. (*Id.*) The letter concluded: "In essence, we are confident that Congress did not intend to allow the play of bingo to be extended outside of Indian lands." (*Id.*)

Considering the authority presented, including relevant state law, the Court determines that the gaming offered by Defendants is in violation of the UIGEA and relevant state law. As such, the State has demonstrated a likelihood of success on the merits for this factor.

In sum, because the State is likely to succeed on the merits of its claims, the first factor—a likelihood of success on the merits—favors the State.

2. Likely to Suffer Irreparable Harm

The State contends that it has no adequate remedy at law and instead under the Compact, IGRA, and UIGEA the State can only seek injunctive relief, and that even if damages were available, they could not adequately compensate for the harm done to the State's interests by illegal gambling. (Pl.'s Mem. 17-18.) The Tribe contends that it will suffer irreparable harm, asserting that the loss of revenue for the first six months alone could exceed $25 million according to industry projections and forecasts of demand and that these funds are used to support important tribal programs. (Defs.' Mem. 19-20.) The Tribe further states that it could lose customers that it would never get back. (*Id.*)

The Court agrees that irreparable harm to the State is likely. Defendants' actions are occurring in violation of applicable law and the Compact, which the State undoubtedly has a strong interest in enforcing. Moreover, Defendants' actions are targeting the citizens of California. The Court is aware that funding is important to Defendants and tribal assistance of its members. Even so, the unlawful gaming has been occurring since early November, meaning the harm is occurring at present and the damage occurring is irreparable.

Considering the arguments of the parties, the Court determines that this factor favors the State.

3. Balance of Equities

The Court next considers whether the balance of equities tips in the State's favor. As discussed, the activity at issue here violates the Compact and relevant law. The Court agrees that sovereign interests are of utmost importance, but sovereignty is not limitless. *See Nixon*, 164 F.3d at 1108 ("[I]f the State . . . sought an injunction against the Tribe conducting an internet lottery from [non-tribal lands] . . . , the IGRA should not completely preempt such a law enforcement action simply because the injunction might 'interfere with tribal governance of gaming'"). The Court also considers the revenue Defendants anticipate from this gaming and the assistance tribal members could receive from that money. Even so, the State has a strong interest in upholding its agreements and ensuring that it receives the benefit of agreements in which it has entered, as well as upholding the law. Therefore, the Court finds that the balance of equities favors the State.

4. Public Interest

Finally, the Court addresses whether an injunction is in the public interest. In terms of public interest, the State has a strong public interest in the health, welfare, and safety of its citizens, and in promoting compliance with relevant law affecting its citizenry, as well as in enforcing its agreements with tribes. This factor strongly favors the State.

In considering the four TRO factors, the Court determines that the sum of the factors tips strongly in favor of the State. Accordingly, the Court conclude that a TRO is appropriate here.

IV. CONCLUSION

Having fully and carefully reviewed the arguments of the parties and the materials presented, the Court **GRANTS** the State's motion for a temporary restraining order and order to show cause (Doc. No. 3).

Pursuant to these findings, it is ordered that a TRO is issued without requiring the

State to post security, and that Defendants, and all of their officers, agents, servants, employees, and attorneys, and all persons acting under any Defendant' direction and control, are hereby enjoined and restrained from:

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 Defendants. This includes credit extended through the use of a credit card.

3. Accepting any electronic fund transfer, or 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 defendants.

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 Defendants, and which is drawn on or payable at or through any financial institution.

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The parties are directed to meet and confer regarding a joint expedited scheduling plan for briefing and the setting of an order to show cause hearing why the State's motion for a preliminary injunction should not be granted. If the parties are unable to reach agreement within two weeks from the date of this Order, they are directed to contact Presiding Magistrate Judge Nita L. Stormes to set a Rule 16 hearing for assistance in this regard.

IT IS SO ORDERED.

DATED: December 12, 2014

Hon. Anthony J. Battaglia
U.S. District Judge