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8 IN THE UNITED STATES DISTRICT COURT
 9 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

13 **STATE OF CALIFORNIA,**
 14 Plaintiff,

15 v.

16 **IIPAY NATION OF SANTA**
 17 **YSABEL, also known as SANTA**
 18 **YSABEL BAND OF DIEGUENO**
 19 **MISSION INDIANS, a federally-**
 20 **recognized Indian Tribe, SANTA**
 21 **YSABEL INTERACTIVE, a tribal**
 22 **economic development entity, SANTA**
 23 **YSABEL GAMING COMMISSION,**
 24 **DAVID CHELETTE, DAVID**
 25 **VIALPANDO, ANTHONY**
 26 **BUCARO, MICHELLE MAXCY,**
 27 **VIRGIL PEREZ, and BRANDIE**
 28 **TAYLOR,**

Defendants.

Case No. 3:14-cv-02724-AJB/NLS

**MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT OF
 THE STATE OF CALIFORNIA'S
 APPLICATION FOR A
 TEMPORARY RESTRAINING
 ORDER**

Date: December 4, 2014
 Time: 2:00 p.m.
 Courtroom: 3B
 Judge: Honorable Anthony J. Battaglia
 Trial Date:
 Action Filed: November 18, 2014

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INTRODUCTION

1
2 On November 3, 2014, without any state or federal legislative authority,
3 defendant Iipay Nation of Santa Ysabel, also known as Santa Ysabel Band of
4 Diegueno Mission Indians (Tribe), launched “the nation’s first web browser-based
5 i-Gaming platform,” which is targeted directly at computers, smart phones, and
6 other Internet-accessible devices operated by the State of California’s (State)
7 residents. The Tribe’s Internet gambling platform allows any Californian over the
8 age of eighteen to gamble with the Tribe from anywhere that he or she can browse
9 the Internet, including in the workplace, at school, or at home. No trip to the
10 Tribe’s reservation or casino is required.

11 The Tribe’s self-proclaimed “groundbreaking” efforts to make Internet
12 gambling available to Californians “anytime & anywhere” breach the tribal-state
13 class III gaming compact (Compact) between the Tribe and the State, do not
14 comply with the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2721,
15 18 U.S.C. §§ 1166-1168, and violate the Unlawful Internet Gambling Enforcement
16 Act of 2006 (UIGEA), 31 U.S.C. §§ 5361-5367. Because the Tribe’s Internet
17 gambling has far-reaching and immediate effects on million of Californians,¹ the
18 State seeks a temporary restraining order enjoining the Tribe and the other
19 defendants from offering Internet gambling to residents of, and visitors to,
20 California and accepting payments that violate the UIGEA.² Such an order is

21
22 ¹ The Tribe’s Internet gambling also potentially has far-reaching policy
23 implications for both California and the United States. The legislative bodies of
24 both have considered – and rejected – wholesale Internet gambling. Additionally,
25 legislative staff and tribal representatives have inquired regarding the State’s
26 position concerning Internet gambling and the Tribe’s facsimile of bingo.
(Declaration of Joginder Dhillon, 2, ¶ 5 (Dhillon Dec.).)

26 ² The requested temporary restraining order is limited to residents, and
27 visitors, to California because that appears to be how the Tribe has limited its
28 Internet gambling. The State believes that the Tribe offering Internet gambling
outside of California also breaches the Compact and violates the UIGEA.

1 necessary to protect the public health, safety, welfare, and good order in the State.
2 *See* Cal. Bus. & Prof. Code § 19801(d).

3 **FACTS**

4 The facts are not in serious dispute.³ The Tribe and the State entered into the
5 Compact under which the Tribe agreed to conduct gambling in accordance with
6 law. The Tribe now is offering Internet gambling to California residents ages
7 eighteen and older. Before the Tribe began to offer Internet gambling, the State
8 sought, but the Tribe refused, to meet and confer in accordance with the Compact.
9 (Dhillon Dec., 2-3, ¶¶ 6 & 7.)

10 On September 8, 2003, the Tribe and State entered into the Compact, which is
11 Exhibit 1 to the complaint. (Dhillon Dec., 2, ¶ 3.) The Compact requires that the
12 Tribe operate its gaming activities legally. Specifically, the Compact provides that
13 the Tribe may combine and operate in its gaming facility “any kinds of gaming
14 permitted under law, *except to the extent limited under IGRA . . .*” (Compact, 8, §
15 4.2 (emphasis added).) The Compact further provides that a tribal gaming agency –
16 here, the Santa Ysabel Gaming Commission⁴ – will conduct on-site gaming
17 regulation and control “in order to enforce the terms of this . . . Compact [and]
18 IGRA.” (Compact, 22, § 7.1.) That commission is to ensure enforcement of all
19 relevant laws and prevent illegal activity. (Compact, 25, §§ 8.1.1, 8.1.4.)

20 The Tribe agreed not to engage in class III gaming that is not expressly
21 authorized in the Compact. (Compact, 7, § 3.0.) Under Compact section 4.1, the
22 Tribe is authorized and permitted to operate (a) gaming devices – i.e., slot
23 machines, (b) banking and percentage card games, and (c) “any devices or games
24 that are authorized under state law to the California State Lottery, *provided that the*

25 ³ The facts are set forth in the Declaration of Joginder Dhillon and the
26 Declaration of Micah Scott (Scott Dec.), both of which are filed concurrently with
the State’s motion for a temporary restraining order.

27 ⁴ The Santa Ysabel Gaming Commission, as well as its agents, is a
28 defendant. The Compact specifically provides that the term “Tribe” includes the
Tribe, as well as its officials and agencies. (Compact, 6, § 2.13.1.)

1 [Tribe] will not offer such games through use of the Internet unless others in the
2 state are permitted to do so under state and federal law.” (Compact, 8, § 4.1(c)
3 (emphasis added).) The Tribe is not to permit persons under the age of twenty-one
4 years to be present in any room or area in which class III gaming activities are
5 conducted. (Compact, 11, § 6.3.)

6 Despite the express limitations in the Compact, on November 3, 2014, the
7 Tribe began to offer Internet gambling in the form of a facsimile of bingo. (Scott
8 Dec., 2, ¶ 3.) According to the press release issued on the same day, the Tribe
9 purported to do so pursuant to IGRA and its tribal sovereign authority. (Dhillon
10 Dec., Exh. A.) Also according to that press release, by using any web browser on
11 any computer, mobile device, or tablet, a California resident can purchase bingo
12 cards to be eligible to win cash prizes. (*Id.*) Play is available to California
13 residents over the age of eighteen. (*Id.*)

14 The Tribe’s Internet gambling is not restricted to its Indian lands.⁵ As
15 described in the Declaration of Micah Scott and consistent with the press release,
16 the Tribe’s Internet gambling apparently is accessible to California residents
17 irrespective of their location. Bettors need not travel to the Tribe’s Indian lands to
18 gamble. (Scott Dec., 3, ¶ 7.) Bettors use the Internet and log into the Tribe’s bingo
19 website. (*Id.* at 2-3, ¶ 5.) They place bets by withdrawing money from accounts
20 that they have opened with the Tribe. (*Id.*) Bettors may fund their accounts by
21 credit card or other electronic funds transfer. (*Id.* at 2, ¶ 4.) After the bet is placed,
22 the game system plays the game including covering a facsimile bingo card and
23 determining the winner. (*Id.* at 3, ¶ 6.) The bettor’s participation is limited to
24 electing the amount to bet and how many cards to play in any game. (*Id.*; *see also*

25 ⁵ Under IGRA, “Indian lands” include lands within the limits of an Indian
26 reservation, 25 U.S.C. § 2703(4)(A), and “any lands title to which is either held in
27 trust by the United States for the benefit of any Indian tribe or individual or held by
28 any Indian tribe or individual subject to restriction by the United States against
alienation and over which an Indian tribe exercises governmental power,” *id.* §
2703(4)(B).

1 Dhillon Dec., 2, ¶ 4 & Exh. A (“At no time is live bingo game action performed by
2 the user.”).)

3 Except under certain circumstances, the Compact provides for a meet and
4 confer process when disputes arise under it. The requirement is “without prejudice
5 to the right of either party to seek injunctive relief against the other when
6 circumstances are deemed to require immediate relief.” (Compact, 27, § 9.1.) In
7 July 2014, information appeared in the gaming press and gambling blogs that the
8 Tribe intended to “launch real money online poker” in California within a short
9 time.⁶ On July 14, 2014, the State sent a letter requesting that the parties meet and
10 confer concerning whether the Tribe’s planned Internet gambling materially
11 breached the Compact. (Dhillon Dec., 2-3, ¶ 6, Exh. B.) That letter also referred to
12 Internet bingo. (*Id.*) The Tribe rejected the State’s request to meet and confer.
13 (Dhillon Dec., 3, ¶ 7, Exh. C.)

14 ARGUMENT

15 The Tribe’s Internet gambling breaches the Compact, violates IGRA, and can
16 be enjoined under both the Compact and the UIGEA. The Tribe’s gambling is legal
17 only if conducted entirely on Indian lands. Its class III gaming is legal only if
18 conducted on the Tribe’s Indian lands in compliance with the Compact. Its Internet
19 gambling is not being conducted only on the Tribe’s Indian lands. Instead, bettors
20 located off the Tribe’s Indian lands can participate in its Internet gambling. Its
21 Internet gambling is not being conducted in compliance with the Compact or
22 IGRA. Importantly, the Tribe’s Internet gambling is not expressly authorized by
23 the Compact and, therefore, is prohibited.

24
25 ⁶ The Tribe’s website reports that it has established defendant Santa Ysabel
26 Interactive and launched an I-gaming poker website. (<http://www.iipaynation-nsn.com/gaming.html>.) Gaming blogs report that real money online poker under
27 PrivateTable.com remains part of the Tribe’s plans. (*See, e.g.*,
28 <http://pokerfuse.com/news/law-and-regulation/26019-california-tribe-launches-real-money-bingo-poker-coming/>.)

1 **I. THE COURT HAS ORIGINAL JURISDICTION OVER THE STATE’S ACTION**

2 The Court has jurisdiction over this action under 28 U.S.C. § 1331, IGRA, and
 3 the UIGEA. The State’s complaint invokes the Court’s jurisdiction under 28
 4 U.S.C. § 1331 because the State’s claim arises under federal statutes and the federal
 5 common law. This Court has jurisdiction under section 1331 to enforce a compact.
 6 *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1055-56 (9th Cir.
 7 1997) (*Cabazon II*), *cert. denied sub nom. Wilson v. Cabazon Band of Mission*
 8 *Indians*, 524 U.S. 926 (1998). In *Cabazon II*, the State asserted that the court
 9 lacked jurisdiction because the dispute was purely contractual. *Id.* at 1055. In
 10 rejecting that argument, the Ninth Circuit concluded:

11 The State’s obligation to the Bands thus originates in the
 12 Compacts. The Compacts quite clearly are a creation of
 13 federal law; moreover, IGRA prescribes the permissible
 14 scope of the Compacts. We conclude that the Bands’
 claim to enforce the Compacts arises under federal law
 and thus that we have jurisdiction pursuant to 28 U.S.C.
 §§ 1331

15 *Id.* at 1056. Here, the same analysis applies. The Tribe’s obligation to the State
 16 arises from the Compact, which is a creation of federal law and entered into
 17 pursuant to IGRA. Importantly, the State seeks to enforce the Compact.

18 The Court also has jurisdiction pursuant to 25 U.S.C. § 2710(d)(7)(A)(ii)
 19 because this action is initiated by the State to enjoin conduct related to the Tribe’s
 20 class III gaming activity that violates the Compact.⁷ In *Cabazon II*, the Ninth
 21 Circuit also addressed jurisdiction under IGRA. The court concluded that “IGRA
 22 necessarily confers jurisdiction onto federal courts to enforce Tribal-State compacts
 23 and the agreements contained therein.” *Cabazon II*, 124 F.3d at 1056. This is
 24

25 _____
 26 ⁷ Title 25 U.S.C. § 2710(d)(7)(A)(ii) provides district court jurisdiction over
 27 “any cause of action initiated by a State . . . to enjoin a class III gaming activity
 28 located on Indian lands and conducted in violation of any Tribal-State compact . . .
 .”

1 exactly what the State seeks to do in this case – i.e., enforce the Tribe’s public
2 safety duties under the Compact.

3 Finally, the Court has original and exclusive jurisdiction under the UIGEA to
4 prevent and restrain restricted transactions.⁸ 31 U.S.C. § 5365(a). The State
5 generally may institute proceedings for an injunction. 31 U.S.C. § 5365(b)(2).
6 Here, the Tribe may assert that the restricted transactions are initiated, received, or
7 otherwise made on Indian lands. (*See* Dhillon Dec., Exh. A.) That assertion,
8 however, does not divest the Court of jurisdiction. Under the UIGEA, the State
9 then may pursue remedies provided in the Compact with respect to restricted
10 transactions. 31 U.S.C. § 5365(b)(3)(A)(ii). The State’s second claim for relief
11 arises under the UIGEA, and the Court has jurisdiction.

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

13 The Tribe does not enjoy sovereign immunity with respect to the claims for
14 relief made in the State’s complaint because Compact section 9.4 provides for a
15 limited waiver of sovereign immunity:

16 (a) In the event that a dispute is to be resolved in federal
17 court . . . as provided in this Section 9.0, the State and the
18 Santa Ysabel Tribe expressly consent to be sued therein
and waive any immunity therefrom that they may have
provided that:

19 (1) The dispute is limited solely to
20 issues arising under this Gaming Compact;

21 (2) Neither side makes any claim for
22 monetary damages (that is, only injunctive,
specific performance, . . . or declaratory
relief is sought); and

23 (3) No person or entity other than the
24 Santa Ysabel Tribe and the State is party to
the action

25
26
27 ⁸ Under the UIGEA, a “restricted transaction” means any transaction
28 involving any credit, funds, instrument, or proceeds that the recipient is prohibited
from accepting. 31 U.S.C. § 5362(7).

1 (Compact, 30-31, § 9.4.) Clearly, this action meets those criteria to waive
2 sovereign immunity.⁹

3 Additionally, 25 U.S.C. § 2710(d)(7)(A)(ii) constitutes a congressional waiver
4 of tribal sovereign immunity. That issue was central in the Supreme Court's recent
5 *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2014 (2014), decision. There,
6 the Supreme Court determined that the section's sovereign immunity waiver did not
7 apply when class III gaming was not conducted on Indian lands. The Court
8 observed that IGRA partially abrogates tribal sovereign immunity in section
9 2710(d)(7)(A)(ii). *Id.* at 2032. Here, the Tribe publicly asserts that the gaming
10 activity¹⁰ occurs on its Indian lands. Moreover, the complaint alleges that some
11 equipment integral to the Tribe's Internet gambling is located on the Tribe's Indian
12 lands. (Complaint, 9, ¶ 34.) Therefore, IGRA's sovereign immunity waiver also
13 applies.

14 **III. IGRA ALLOWS GAMING ONLY ON INDIAN LANDS; THE TRIBE'S** 15 **INTERNET GAMBLING OFF INDIAN LANDS IS CONTRARY TO IGRA**

16 IGRA establishes federal standards for gaming on tribal lands. It creates a
17 regulatory framework for tribal gaming intended to balance state, federal, and tribal
18 interests. *Amador County v. Salazar*, 640 F.3d 373, 376 (D.C. Cir. 2011). Under
19 IGRA, a tribe may conduct gaming only on Indian lands. *Neighbors of Casino San*
20 *Pablo v. Salazar*, 773 F.Supp.2d 141, 143 (D.D.C. 2011). "Indian lands" is a
21 defined term and means, among other things, lands within the limits of a
22 reservation and lands held in trust by the United States for a tribe. 25 U.S.C. §
23 2703(4).

24 _____
25 ⁹ This waiver also applies to the State's claim under the UIGEA, which
26 looks to the enforcement authorities under an IGRA tribal-state compact. *See* 31
27 U.S.C. § 5365(b)(3)(A)(ii).

28 ¹⁰ Gaming activity is not limited to an actual class III game. *See County of*
Madera v. Picayune Rancheria of Chukchansi Indians, 467 F.Supp.2d 993, 1002
(E.D. Cal. 2006).

1 Congress manifested its intention to limit IGRA to gaming on Indian lands
2 throughout the act. First, in IGRA's findings section, Congress found that
3 numerous tribes engaged in or licensed "gaming activities on Indian lands," 25
4 U.S.C. § 2701(1), existing federal law did not provide clarity for the "conduct of
5 gaming on Indian lands," *id.* § 2701(3), and tribes have the exclusive right to
6 "regulate gaming activity on Indian lands," *id.* § 2701(5). Second, Congress
7 declared that one of IGRA's purposes is to establish federal regulatory authority
8 and federal standards for "gaming on Indian lands." 25 U.S.C. § 2702(3). Third,
9 Congress generally prohibited gaming on tribal trust lands acquired after October
10 17, 1988. *See* 25 U.S.C. § 2719. Finally and importantly, all of the provisions
11 relating to the licensing and regulation under IGRA apply only to gaming on Indian
12 lands. *See, e.g.*, 25 U.S.C. § 2710(a)(1) (class I gaming), (b)(1) (class II gaming),
13 (d)(1) (class III gaming).

14 Senate Report No. 100-446 (Aug. 3, 1988) (Senate Report) supports the
15 conclusion that IGRA and the gaming that it allows are limited to Indian lands. The
16 report summarizes IGRA as providing "for a system of joint regulation by tribes
17 and the Federal Government of class II gaming on Indian lands and a system for
18 compacts between tribes and States for regulation of class III gaming." *Id.* at 1.
19 The act was the "outgrowth of several years of discussions and negotiations
20 between gaming tribes, States, the gaming industry, the administration, and the
21 Congress, in an attempt to formulate a system for regulating gaming on Indian
22 lands." *Id.* The report characterized *California v. Cabazon Band of Mission*
23 *Indians*, 480 U.S. 202 (1987) (*Cabazon I*), as using a balancing test between
24 federal, state, and tribal interests to find "that tribes . . . have a right to conduct
25 gaming activities on Indian lands unhindered by State regulation." Senate Report,
26 1. The report observed, "in the final analysis, it is the responsibility of Congress,
27 consistent with its plenary power over Indian affairs, to balance competing policy
28

1 interests and to adjust, where appropriate, the jurisdictional framework for
2 *regulation of gaming on Indian lands.*” *Id.* at 2 (emphasis added).

3 Because IGRA and the Senate Report are clear that IGRA gaming is limited to
4 Indian lands, the NIGC concluded that non-electronic bingo played through human
5 proxies offered to patrons over the Internet “is not authorized under IGRA.” (Letter
6 from Kevin Washburn, General Counsel, NIGC, to Robert Rossette, Monteau,
7 Peebles & Crowell, re: Lac Vieux Desert Internet Bingo Operation (Oct. 26,
8 2000));¹¹ *see Lac Vieux Desert Band of Lake Superior Chippewa Indians v.*
9 *Ashcroft*, 360 F. Supp. 2d 64, 65 (D.D.C. 2004) (describing the game).

10 Moreover, the NIGC consistently has concluded that tribes making Internet
11 gambling available to persons not located on Indian lands violate IGRA. (*See, e.g.,*
12 Letter from Montie Deer, Chairman, NIGC, to Ernest L. Stensgar, Chairman, Coeur
13 d’ Alene Tribe, re: National Indian Lottery (Jun. 22, 1999); letter from Penny
14 Coleman, Deputy General Counsel, NIGC, to Terry Barnes, Bingo Networks, re: U-
15 PIK-EM Bingo (Jun. 9, 2000); letter from Kevin Washburn, General Counsel,
16 NIGC, to Joseph Speck, Nic-A-Bob Productions, re: WIN Sports Betting Game
17 (Mar. 13, 2001); *see also* letter from Richard Schiff, Senior Attorney, NIGC, to
18 Don Abney, Principal Chief, Sac and Fox Nation, re: Tele-Bingo (Jun. 21, 1999)
19 (bingo played by telephone off-Indian lands violates IGRA).) In its only known
20 entry into tribal Internet gaming, the United States Department of Justice shared the
21 NIGC’s opinion. *See* Brief of the United States as Amicus Curiae, *Coeur d’Alene*
22 *Tribe v. AT&T Corp.*, 1999 WL 33622333, Case No. 99-35088 (9th Cir. 1999).

23 The State is not aware of any published court decision that expressly
24 authorizes tribal gaming under IGRA off of Indian lands. Rather, the decisions lead
25 to the conclusion – consistent with IGRA’s provisions and the Senate Report – that
26 IGRA gaming is limited to Indian lands. In *AT&T Corporation v. Coeur d’Alene*

27 ¹¹ Each NIGC gaming opinion letter cited herein is contained in Appendix
28 A, filed concurrently with the State’s motion for a temporary order.

1 *Tribe*, 45 F. Supp. 2d 995 (D. Idaho 1998), *rev'd on other grounds*, 295 F.3d 899
2 (9th Cir. 2001), the district court found that, to the extent the tribe's planned
3 National Indian Lottery (NIL) occurred outside the limits of the reservation, IGRA
4 did not preempt state gambling laws.¹² Based upon that finding, the court
5 concluded that notices given by states under the federal Wire Act precluded
6 AT&T's providing toll-free telephone services for the NIL to those states. *Id.* at
7 999-1000. The court observed that under the plain language of IGRA, the gaming
8 activities constituting the NIL had to occur on lands within the limits of the tribe's
9 reservation to be unregulated. *Id.* at 1001. The court found that placing a wager
10 was a gaming activity within the meaning of IGRA. *Id.* ("But for the act of placing
11 the 'lottery wager,' the player could not participate in, and the Tribe could not
12 operate, the [NIL].").¹³

13 In *State ex rel. Nixon v. Coeur d'Alene Tribe*, 164 F.3d 1102 (8th Cir. 1999),
14 the Eighth Circuit addressed Missouri's challenge to the NIL. The state filed
15 actions in state court against the tribe and its contractor to enjoin conducting the
16 NIL with Missouri residents. Defendants removed both cases, which the federal
17 district courts subsequently dismissed. The Eighth Circuit reversed and remanded.
18 The court pointed out that "IGRA established a comprehensive regulatory regime
19 for tribal gaming activities *on Indian lands*. . . . Once a tribe leaves its own lands
20 and conducts gambling activities on state lands, nothing in the IGRA suggests that

21 ¹² In reversing, the Ninth Circuit focused on the NIGC's approval of the
22 management agreement for the NIL and the failure of the states, which issued
23 letters to AT&T under the federal Wire Act, to challenge the NIGC's approval as
24 final agency action. The Ninth Circuit expressly did not address the issue of the
25 NIL's legality: "This Court draws no conclusion as to how the Lottery might fare
26 when properly challenged in federal court and balanced against state laws and
27 interests." *AT&T Corp. v. Coeur d'Alene Tribe*, 295 F.3d at 910 n. 12.

28 ¹³ In *County of Madera v. Picayune Rancheria of Chukchansi Indians*, 467
F.Supp.2d at 1002, the court found that "gaming activity" would be the actual
playing or provision of the games and the necessary conduct associated with
playing or providing the identified games. See also *Michigan v. Bay Mills Indian
Community*, 134 S.Ct. at 2032-33.

1 Congress intended to preempt the State’s historic right to regulate this controversial
2 class of economic activities.” *Id.* at 1108 (emphasis in original). The court
3 concluded that if the NIL was being conducted on Missouri lands, IGRA did not
4 preempt the state law claims or even provide a defense thereto. *Id.* at 1109.¹⁴

5 In sum, the Tribe’s Internet gambling does not fall within the purview of
6 IGRA because some of the gaming activity necessarily takes place outside of the
7 Tribe’s Indian lands. Thus, IGRA does not give the Tribe the power to engage in,
8 or license and regulate, the Internet gambling. Instead, the State has the power to
9 regulate the Tribe’s Internet gambling.

10 **IV. THE TRIBE’S INTERNET GAMBLING OCCURS BOTH WHERE THE** 11 **BETTOR IS LOCATED AND WHERE THE WAGER IS RECEIVED**

12 Although the Tribe may argue that its Internet gambling offerings are lawful
13 because servers or some other equipment is located on its Indian lands, the UIGEA
14 confirms Congress’s recognition that Internet gambling may cross state and
15 national borders:

16 New mechanisms for enforcing gambling laws on the
17 Internet are necessary because traditional law
18 enforcement mechanisms are often inadequate for
19 enforcing gambling prohibitions or regulations on the
Internet, especially where such gambling crosses State
and national borders.

20 31 U.S.C. § 5361(a)(4).

21 This finding apparently leads to the UIGEA’s definition of “bet or wager” as
22 including the movement of funds. Under the UIGEA, bet or wager means staking
23 or risking something of value upon the outcome of a game, subject to chance, upon
24 an agreement or understanding of receipt of something of value in the event of a
25 certain outcome. 31 U.S.C. § 5362(1)(A). Bet or wager includes the purchase of a
26 chance or opportunity to win a lottery, 31 U.S.C. § 5362(1)(B), and any instructions

27 ¹⁴ Even though the cases were remanded for a determination of whether the
28 NIL was being conducted on Missouri lands, no subsequent history is reported.

1 or information pertaining to the establishment or movement of funds by the bettor
2 or customer in, to, or from an account with a business of betting or wagering, *id.* §
3 5362(1)(D).

4 The UIGEA looks to the laws of the places both where the bet or wager are
5 placed and received. Unlawful Internet gambling is defined as “to place, receive, or
6 otherwise knowingly transmit a bet or wager by any means which involves the use,
7 at least in part, of the Internet where such bet or wager is unlawful under any
8 applicable Federal or State law in the State or Tribal lands in which the bet or
9 wager is *initiated, received, or otherwise made.*” 31 U.S.C. § 5362(10)(A)
10 (emphasis added); *see Interactive Media Entertainment & Gaming Assn. Inc. v.*
11 *Attorney General*, 580 F.3d 113, 117 (3d Cir. 2009) (*Interactive*) (nothing in the
12 UIGEA suggests that Congress meant anything other than the physical location of a
13 bettor or gambling business). Congress recognized that routing is an integral part
14 of the Internet and may be used to avoid the UIGEA; therefore, it included the
15 provision that “intermediate routing of electronic data shall not determine the
16 location or locations in which a bet or wager is initiated, received, or otherwise
17 made.” 31 U.S.C. § 5362(10)(E).

18 Further showing Congress’ view that gambling occurs both where the bet or
19 wager is placed and received, the UIGEA excludes from unlawful Internet
20 gambling purely intrastate betting or wagering – i.e., “initiated and received or
21 otherwise made exclusively within a single State” – subject to certain conditions.
22 31 U.S.C. § 5362(10)(B). Similarly, the UIGEA excludes from unlawful Internet
23 gambling certain transactions on Indian lands. *See* 31 U.S.C. § 5362(10)(C). For a
24 single tribe to avoid unlawful Internet gambling, it must meet certain requirements,
25 including all the following:

- 26 a. The bet or wager must be initiated and received exclusively “within the
27 Indian lands” of the tribe as defined under IGRA, 31 U.S.C. §
28 5362(10)(C)(i)(1);

- 1 b. The method by which the bet or wager is initiated and received must be
2 expressly authorized by and comply with a tribal ordinance approved by
3 the NIGC and, if class III gaming, the applicable tribal-state gaming
4 compact, 31 U.S.C § 5362(10)(C)(ii); and
- 5 c. The applicable tribal ordinance or compact must include age and location
6 verification requirements “reasonably designed to block access to minors
7 and persons located out of the applicable Tribal lands,” 31 U.S.C §
8 5362(10)(C)(iii).

9 The UIGEA prohibits gambling businesses from knowingly accepting various
10 forms of financial instruments in connection with another person’s participation in
11 unlawful Internet gambling, including proceeds from credit cards, electronic fund
12 transfers, and checks. *See* 31 U.S.C. § 5363; *United States v. Lyons*, 740 F.3d 702,
13 729 (1st Cir. 2014). For determining whether the gambling is unlawful, the test is
14 whether it is illegal at the location in which the gambling business is located or the
15 location from which the individual initiated the bet or wager. *Interactive*, 580 F.3d
16 at 116. The Third Circuit succinctly summarized the locational aspects of UIGEA:
17 “Simply put, a gambling business cannot knowingly accept the enumerated
18 financial instruments in connection with a bet that is illegal under any Federal or
19 State law applicable in the jurisdiction in which the bet is initiated or received.” *Id.*
20 at 117.

21 The UIGEA’s locational focus is consistent with other authorities that examine
22 betting as occurring in two places – i.e., where the bettor is located and where the
23 wager is received. For example, both the district court in *AT&T Corporation v.*
24 *Coeur d’Alene* and the Eighth Circuit in *State ex rel. Nixon v. Coeur d’Alene Tribe*
25 looked to players’ locations in examining state law applicability or IGRA
26 preemption. Additionally, the federal Wire Act, 18 U.S.C. § 1084, which
27 proscribes transmitting bets or wagers in interstate commerce, contains a safe
28 harbor for the transmission of information assisting in the placing of bets or wagers

1 from a state or foreign country where betting on that sporting event or contest is
 2 legal into a state or foreign country in which such betting is legal. 18 U.S.C. §
 3 1084(b). Thus, the Wire Act looks to the parties' locations. *See, e.g., Martin v.*
 4 *United States*, 389 F.2d 895, 897-98 (5th Cir. 1968).¹⁵

5 In sum, the Tribe's Internet gambling occurs off the Tribe's Indian lands when
 6 bettors – i.e., Internet users – are not physically on the Tribe's Indian lands.

7 **V. THE TRIBE'S INTERNET GAMBLING IS A FACSIMILE OF BINGO AND**
 8 **THUS IS CLASS III GAMING**

9 IGRA divides tribal gaming into three classifications: class I, which involves
 10 traditional forms of tribal gaming and social games solely for minimal prizes; class
 11 II, which is bingo meeting certain criteria and some card games; and class III,
 12 which is all forms of gaming that are not class I or class II. 25 U.S.C. § 2703(6),
 13 (7), (8). Class III gaming includes banking card games, electronic facsimiles of any
 14 game of chance, and slot machines of any kind. 25 U.S.C. § 2703(7)(B).

15 The NIGC defines an electronic facsimile to be “a game played in an
 16 electronic . . . format that replicates a game of chance by incorporating all of the
 17 characteristics of the game, except when, for bingo . . . , the electronic . . . format
 18 broadens participation by allowing multiple players to play with or against each
 19 other rather than with or against a machine.” 25 C.F.R. § 502.8. In discussing what
 20 an electronic facsimile is, the NIGC writes: “If, however, a particular aid . . .
 21 becomes a necessity, or encompasses all the aspects of a particular game, it ceases
 22 to be a technological aid and becomes an electronic facsimile.” (Mem. from Penny
 23

24 ¹⁵ Federal courts are divided as to whether the Wire Act reaches Internet
 25 wagers and bets that do not involve sporting contests. *Compare In re Mastercard*
 26 *Int'l Inc., Internet Gambling Litig.*, 132 F. Supp. 2d 468, 480-81 (E.D. La. 2001),
 27 *aff'd*, 313 F.3d 257 (5th Cir. 2002) (sporting events only), *with United States v.*
 28 *Lombardo*, 639 F. Supp. 2d 1271, 1279-82 (D. Utah 2007) (all forms of betting). In
 December 2011, the United States Department of Justice released a memorandum
 that concluded that the Wire Act's prohibitions relate solely to sports-related
 gambling activities. (Memorandum Opinion for the Assistant Attorney General,
 Criminal Division (Sept. 20, 2011).)

1 Coleman, General Counsel, NIGC, to George Skibine, Chairman, NIGC, re:
2 classification of card games played with technological aids, 8 (Dec. 17, 2009)
3 (available in Appendix A).)

4 An electronic facsimile of bingo is a class III game. Here, the evidence shows
5 that players, who are located off the Tribe's Indian lands, do nothing other than
6 place a bet. (Scott Dec., 3, ¶¶ 6, 7.) The Tribe's electronic system does everything
7 else. If the electronic system is removed, the game disappears. Therefore, the
8 electronic system is a necessity of the game.

9 The Tribe's electronic system selects the numbers, purportedly marks the
10 cards, and determines the winner. (Scott Dec., 3, ¶ 6.) In this way, the Tribe's
11 Internet gambling is no different from the electronic pull-tab dispenser that the
12 Ninth Circuit held to be an electronic facsimile in *Sycuan Band of Mission Indians*
13 *v. Roache*, 54 F.3d 535 (9th Cir. 1994) (*Sycuan*). The pull-tab dispenser there, like
14 the Tribe's Internet game here, produced only an electronic reproduction of a paper
15 ticket on a computer screen. Unlike the Tribe's Internet game here in which every
16 part of the game is played on its electronic system, the player in *Sycuan* actually did
17 something to reveal numbers. *Id.* at 541. The court found, as the Court should
18 here, that the pull-tab machine was a class III facsimile because it was a self-
19 contained computer game played electronically. *Id.* at 542. Here, like the pull-tab
20 game in *Sycuan*, the game is an exact and detailed copy of a bingo game played
21 electronically. *See id*; *see also Cabazon Band of Mission Indians v. National*
22 *Indian Gaming Comm'n*, 14 F.3d 633, 636-37 (D.C. Cir. 1994) (pull-tab game in
23 which multiple players played against each other was class III electronic facsimile);
24 (Scott Dec., 3, ¶ 7).

25 VI. A TEMPORARY RESTRAINING ORDER IS APPROPRIATE IN THIS CASE

26 The requirements for a temporary restraining order are the same as those for a
27 preliminary injunction. A party applying for a preliminary injunction "must
28 establish that he is likely to succeed on the merits, that he is likely to suffer

1 irreparable harm in the absence of preliminary relief, that the balance of equities
2 tips in his favor, and that an injunction is in the public interest.” *Winter v. Natural*
3 *Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008). Here, the evidence
4 establishes all of these factors.

5 **A. Because the Evidence Shows that the Tribe’s Internet Gambling**
6 **Breaches the Compact and Violates the UIGEA, the State Is**
7 **Likely To Succeed on the Merits**

8 The State’s first claim for relief is breach of the Compact. A compact is a
9 contract, and is governed by general federal contract law principles. *Cachil Dehe*
10 *Band of Wintun Indians of the Colusa Indian Comm. v. California Gambling*
11 *Control Comm’n*, 618 F.3d 1066, 1073 (9th Cir. 2010). In determining federal
12 contract law, courts rely upon both “California contract law and Ninth Circuit
13 decisions interpreting California” contract law. *Id.* The elements for a breach of
14 contract claim are the contract, plaintiff’s performance or excuse for
15 nonperformance, defendant’s breach, and resulting damages to plaintiff. *Reichert v.*
16 *General Ins. Co. of America*, 68 Cal.2d 822, 830 (1968).

17 In this case, the Tribe’s breach of the Compact is clear. The Tribe agreed not
18 to engage in class III gaming that is not expressly authorized in the Compact.
19 (Compact, 7, § 3.0.) The only Internet gambling expressly allowed by the Compact
20 is “devices and games that are authorized . . . to the California State Lottery” that
21 others in the State are permitted to offer through the Internet under state and federal
22 law. (Compact, 8, § 4.1(c).) No one is permitted to offer any California State
23 Lottery game through the Internet. (Dhillon Dec., 3, ¶ 8.) Consequently, the
24 Tribe’s offering its class III facsimile of bingo over the Internet breaches its duties
25 under the Compact. The State is likely to succeed on its first claim for relief on the
26 merits.

27 The State’s second claim for relief is under the UIGEA. Under the facts here,
28 the Tribe is engaging in unlawful Internet gambling. The betting, which is initiated
in California off of Indian lands, is illegal under State law. California statutes make

1 setting up and drawing a lottery, selling or furnishing a chance in a lottery, and
2 aiding or assisting those acts, crimes. Cal. Penal Code §§ 320, 321, 322. The
3 Tribe's electronic facsimile of bingo is a form of lottery as it is a game played for a
4 prize determined by chance for consideration. *See* Cal. Penal Code § 319; *see also*
5 *People v. Shira*, 62 Cal.App.3d 442, 462-63 (1976).

6 Additionally, California Penal Code section 337a broadly prohibits keeping a
7 place with devices for the purpose of recording any bets or wagers, receiving
8 anything of value bet or wagered, recording bets or wagers, or offering or accepting
9 any bets or wagers. The Tribe's Internet gambling system violates California Penal
10 Code section 337a, which is a predicate for UIGEA relief.

11 Finally, California law requires that bingo participants be physically present at
12 the time and place where the game is being conducted, Cal. Penal Code § 326.5(m),
13 and prohibits using electronic or video displays in connection with bingo, *id.* §
14 326.5(o). The Tribe's Internet gambling violates these California Penal Code
15 provisions. That too provides a predicate for UIGEA relief.

16 Through its unlawful Internet gambling, the Tribe is engaged in the business
17 of betting or wagering. It provides the electronic system (1) by which customers
18 bet or wager or purchase an opportunity to win a lottery and (2) which includes
19 instructions or information pertaining to moving funds in, to, or from an account
20 with the Tribe. *See* 31 U.S.C. § 5362(1), (2). The Tribe knowingly accepts credit
21 and other transfers in connection with the unlawful Internet gambling. 31 U.S.C. §
22 5363. The State is likely to succeed on its second claim for relief on the merits.

23 **B. Because the Tribe's Internet Gambling Offends the State's**
24 **Public Policies and Potentially Has Far-Reaching Impact, the**
25 **State Is Likely To Suffer Irreparable Harm in the Absence of**
26 **Relief**

26 The State has no adequate remedy at law. Under the Compact, IGRA, and the
27 UIGEA, it can seek only injunctive relief. Moreover, even if damages were
28 recoverable, they could not adequately compensate the State for the harm done to

1 its interests by illegal gambling and the possibility of unregulated Internet gambling
2 by many tribes, both within and outside the State's borders.

3 The State has an interest in ensuring compliance with the Compact. (Dhillon
4 Dec., 3, ¶ 9.) Additionally, the State's public policy against unlawful lotteries is at
5 stake. (*Id.*) That public policy is enunciated in the California Constitution's broad
6 prohibition of lotteries, Cal. Const. art. IV, § 19(a), as well as the California Penal
7 Code. The State's public policy regarding tribal gaming also is set forth in the
8 California Constitution, which allows the negotiation and legislative ratification of
9 tribal-state gaming compacts for the operation of slot machines and for the conduct
10 of lottery games and banking and percentage card games. Cal. Const. art. IV, §
11 19(f). The Compact establishes the perimeters of the Tribe's class III gaming.
12 Otherwise, class III gaming is unlawful in California. *See* Cal. Const. art. IV, §
13 19(e); *Hotel Employees and Restaurant Employees Int'l v. Davis*, 21 Cal. 4th 585
14 (1999). The State's interest in protecting its public policy will be harmed
15 irreparably without the requested order. (*See* Dhillon Dec., 3, ¶ 9.)

16 Additionally, the Tribe's Internet gambling targets California residents age
17 eighteen and older. It allows unlawful gambling anywhere these residents are –
18 albeit at school, work, or home. Even though it targets Californians who are not on
19 its Indian lands, the Tribe seeks to preclude the State from an opportunity to
20 regulate the Internet gambling either through the Compact or otherwise.
21 Unregulated gambling enterprises are inimical to the public health, safety, welfare,
22 and good order. Cal. Bus. & Prof. Code § 19801(d). The State thus will suffer
23 irreparable harm if the Tribe is allowed to continue its Internet gambling.

24 Moreover, the Tribe's Internet gambling presents issues that potentially affect
25 millions of Californians and, possibly, the United States' gambling policies. The
26 gambling press reports the following with attribution to defendant Santa Ysabel
27 Interactive:

1 DesertRoseBingo.com, is an experiment of sorts and if the
 2 site manages to successfully keep online and doesn't run
 3 up against major legal challenges, the move may be a
 4 precursor for an online poker offering shortly. Santa
 5 Ysabel Interactive Director of Marketing Chris Wrieden
 6 explained to the Pokerfuse news source, "Some believe
 7 our promise to bring regulated cash poker games to
 8 California has all been a great big bluff, for any number
 9 of self-serving reasons. I can tell you it hasn't been, it
 10 just takes time to put all of the pieces together. When we
 11 launch it will put our critics' bluff theory to rest and *when*
 12 *we accept our first online bet, we will be on our way to*
 13 *creating change for our industry."*

14 ([http://www.online-casinos.com/news/13007-tribal-interests-california-introduce-](http://www.online-casinos.com/news/13007-tribal-interests-california-introduce-online-gambling)
 15 [online-gambling](http://www.online-casinos.com/news/13007-tribal-interests-california-introduce-online-gambling) (emphasis added).) The absence of injunctive relief not only will
 16 encourage the Tribe to offer additional Internet gambling, but also may encourage
 17 other tribes to begin online gambling in California and elsewhere. (See Dhillon
 18 Dec., 3, ¶ 9.)

19 **C. The Balance of the Equities Tips in the State's Favor**

20 The equities clearly favor the State and its interests in ensuring compliance
 21 with Compact and protecting the public health, safety, welfare, and good order.
 22 The Tribe is reaching out to Californians irrespective of whether they are on its
 23 Indian lands. IGRA does not allow this. The UIGEA does not allow this. The
 24 Compact does not allow this.

25 The Tribe should not be allowed to benefit by breaching the Compact and
 26 violating State and federal law at the expense of Californians and the State's public
 27 policy. Additionally, the State has acted expediently once the Tribe launched its
 28 Internet gambling.¹⁶ In sum, the balance of the equities tips in the State's favor.

29 **D. An Injunction Is in the Public Interest**

30 The State's interest is the public interest. Here, the public interest is to enforce
 31 the Compact, to prevent the Tribe from engaging in unlawful class III gaming that

32 ¹⁶ The State attempted to meet and confer when the Tribe first announced its
 33 intentions in July 2014. The Tribe, however, refused to participate in a meet and
 34 confer. (See Dhillon Dec., 2-3, ¶¶ 6 & 7.)

1 targets the State's residents, to prevent violations of state and federal law, and to
2 protect the State's constitutionally stated public policy with respect to lotteries,
3 gambling, and tribal gaming. For these reasons, an injunction here is in the public
4 interest.

5 **CONCLUSION**

6 In view of the foregoing, the State respectfully requests that the Court enter a
7 temporary restraining order enjoining the Tribe and the other defendants from
8 offering Internet gambling to residents of, and visitors to, California and from
9 accepting payments or funds in violation of the UIGEA.

10
11 Dated: November 18, 2014

Respectfully Submitted,

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