

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

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

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

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

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

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

---

23  
24 <sup>1</sup> As discussed on page 8 of this Order, IGRA classifies Indian gaming into three  
25 different categories—Class I, Class II, or Class III, with each category subject to a  
different degree of regulation.

26 <sup>2</sup> At the hearing on this matter, the Court discussed the State’s effort to meet and  
27 confer. Defense counsel labeled the State’s assertions regarding meet and confer as  
28 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.

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

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

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

24 \\ \

25 \_\_\_\_\_  
26 <sup>3</sup> Defendants did not include a statement of material facts in their memorandum  
27 but instead directed the Court to examine their voluminous attachments.

28 <sup>4</sup> 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).

## 1 II. LEGAL STANDARD

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

## 12 III. DISCUSSION

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

### 16 A. Sovereign Immunity

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

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

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

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

12 Section 9.0 of the Compact contains the dispute resolutions provisions. (*See* Compact  
 13 § 9.0.) That portion of the Compact provides in part:

14 Sec. 9.4 Limited Waiver of Sovereign Immunity.

15 (a) In the event that a dispute is to be resolved in federal court or a state  
 16 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:

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

18 (2) Neither side makes any claim for monetary damages (that is, only  
 19 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

20 (3) No person or entity other than the Santa Ysabel Tribe and the State  
 21 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  
 22 or the State with respect to any third party.

23 . . . .  
 (c) The waivers and consents provided for under this Section 9.0 shall  
 24 extend to civil actions authorized by this Compact, including, but not limited  
 to, actions to compel arbitration, any arbitration proceeding herein, any action  
 25 to confirm or enforce any judgment or arbitration award as provided herein,  
 and any appellate proceedings emanating from a matter in which an immunity  
 26 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.

27 (*Id.* § 9.4.)

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

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

4 25 U.S.C. § 2710(d)(7)(A)(ii) provides that United States district courts have  
5 jurisdiction over "any cause of action initiated by a State or Indian tribe to enjoin class III  
6 gaming activity located on Indian lands and conducted in violation of any Tribal-State  
7 compact . . . ." A recent United States Supreme Court case held that federal causes of action  
8 brought pursuant to § 2710(d)(7)(A)(ii) of the IGRA to enjoin Class III gaming activity must  
9 allege and ultimately establish that the gaming "is located on Indian lands."<sup>5</sup> 25 U.S.C.  
10 § 2710(d)(7)(A)(ii); *see Bay Mills*, 134 S. Ct. at 2032. The State also invokes 31 U.S.C.  
11 § 5365 of the UIGEA, which provides that, "[i]n addition to any other remedy under current  
12 law, the district courts of the United States shall have original and exclusive jurisdiction to  
13 prevent and restrain restricted transactions" and discusses proceedings instituted by the  
14 federal government, state attorney general, and on Indian lands. *Id.* § 5365(b).

15 After careful consideration of the applicable law on this matter and the circumstances  
16 of this case, the Court is convinced that the action is proper and that Defendants are not  
17 shielded by sovereign immunity in this matter. The Compact specifically provides that the  
18 parties may bring action for "issues arising under [the Compact]." (Compact § 9.4.) The  
19 action presented is exactly that. Moreover, Class III gaming, outside of that expressly  
20 provided in the Compact, is not permitted by the Compact. As discussed further in the next  
21 portion of this Order, at this juncture in the action, it appears that Defendants are engaged  
22 in Class III gaming. As such, the State may move forward with enforcement, as provided  
23

---

24 <sup>5</sup> Here the State alleges the gaming is occurring both on and off Indian lands. The  
25 State notes that "the Tribe's [i]nternet gambling does not fall within the purview of  
26 IGRA because some of the gaming activity necessarily takes place outside of the Indian  
27 Tribe's land." (Pl.'s Mem. ¶1.) Section 2710(d) could only be effectively invoked to the  
28 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."))

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

## 9 **B. Temporary Restraining Order**

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

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

### 21 **1. Likely to Succeed on the Merits**

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

26 Regarding the unlawful internet gambling, the State alleges that the betting initiated  
27 off of Indian lands is illegal under state law. (*Id.* 16-17 (citing Cal. Penal Code §§ 319-322,  
28 337a (discussing unlawful gaming)).) These violations, the State argues, serve as a predicate

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

4 **a. Breach of Compact**

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

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

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



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

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

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

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

3 NIGC federal regulations also discuss aids and facsimiles, with technologic aid  
4 defined as machines or devices that assist the player or the playing of a game, is not an  
5 electronic facsimile, and is operated in accord with federal communications law. 25 C.F.R.  
6 § 502.7. Examples provided are: “pull tab dispensers and/or readers, telephones, cables,  
7 televisions, screens, satellites, bingo blowers, electronic player stations, or electronic cards  
8 for participants in bingo games.” *Id.* Federal regulations also discuss electric or electrome-  
9 chanical facsimiles, defining them as:

10 a game played in an electronic or electromechanical format that replicates a  
11 game of chance by incorporating all of the characteristics of the game, except  
12 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.

13 25 C.F.R. § 502.8.

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

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

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

12 In light of all of the above, the Court is convinced that the internet gaming provided  
13 here is Class III. This was bolstered by the presentation of the game at the hearing, at which  
14 it became apparent that, as the State represented, the player’s participation is limited to  
15 electing the amount to bet and the number of cards to play. (Pl.’s Mem. 3; Dhillon Decl. Ex.  
16 A (“At no time is live bingo game action performed by the user.”); Scott Decl. ¶ 6, Doc. No.  
17 3-4 (“I only placed a bet and selected the number of cards to play. The system then played  
18 the game.”)).

19 At the hearing on the matter, Defendants argued that “proxies” mind the machines,  
20 which are located on the reservation. Accordingly, Defendants liken the system to the Bingo  
21 Nation advisory opinion recently issued by the NIGC general counsel. (Defs.’ App. A.  
22 (“Shepard Ltr.”), Doc. No. 5-1.) A letter from NIGC general counsel is not the same as an  
23 action by the NIGC chairperson or commission, *see Lac Vieux*, 360 F. Supp. 2d at 68, but is  
24 useful to the Court. The weight given to non-binding agency interpretations depends on the  
25 “‘thoroughness evident in its consideration, the validity of its reasoning, its consistency with  
26 earlier and later pronouncements, and all those factors which give it power to persuade, if  
27 lacking power to control.’” *United States v. 162 MegaMania Gambling Devices*, 231 F.3d  
28 713, 719 (10th Cir. 2000) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

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

13 The system presented here is wholly removed from the system presented in the Bingo  
14 Nation opinion and other similar cases. *See 103 Elec. Gambling Devices*, 223 F.3d at 1093  
15 n.2 (determining that the MegaMania terminal is Class II gaming when players played each  
16 other on a single, interlinked electronic game via a network of individual computer terminals  
17 located at tribal gaming facilities and a human managed the blower and keyed numbers into  
18 a computer, which then transmitted the numbers to remote host computers at participating  
19 gaming facilities). Here, an off-site user places a bet and watches the computer "play" the  
20 game. The fact that a player may not play solely against the machine does not save the game  
21 for classification purposes. The Court is fully aware that the games permitted for tribal  
22 gaming are not limited to "church-hall paper and dauber bingo games." (Vialpando Decl. Ex.  
23 4 at 7, Doc. No. 5-4.) But the game presented here pushes well beyond a technological aid  
24 and instead the Court is convinced that the gaming here is an electronic facsimile and Class  
25 III gaming for purposes of the Compact. As such, the Court concludes the State is likely to  
26 succeed on the merits of its breach of compact claim.

#### 27 **b. Unlawful Internet Gambling**

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

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

4 Congress enacted the UIGEA because “traditional law enforcement mechanisms are  
5 often inadequate for enforcing gambling prohibitions or regulations on the Internet,  
6 especially where such gambling crosses State or national borders.” 31 U.S.C. § 5361(a)(4).  
7 The Act defines “unlawful Internet gambling” as “to place, receive, or otherwise knowingly  
8 transmit a bet or wager by any means which involves the use, at least in part, of the Internet  
9 where such bet or wager is unlawful under any applicable Federal or State law in the State  
10 or Tribal lands in which the bet or wager is initiated, received, or otherwise made.” *Id.* §  
11 5362(10)(A). The “unlawful Internet gambling” definition excludes intratribal transactions  
12 in which the bet and wager are expressly authorized by applicable tribal ordinance or  
13 approval from the chairperson of the NIGC, and with respect to Class III gaming, the  
14 applicable tribal-state compact. *Id.* § 5362(10)(C).

15 The Court is persuaded that the law of UIGEA looks to the law where both the bet is  
16 made and the wager is received. *See id.* § 5362(10)(A) (defining unlawful internet gambling  
17 and discussing the use of the internet “where such bet or wager is unlawful under any  
18 applicable Federal or State law in the State or Tribal lands *in which the bet or wager is*  
19 *initiated, received, or otherwise made*” (emphasis added)); *see also Interactive Media Entm’t*  
20 *& Gaming Ass’n Inc. v. Attorney Gen. of U.S.*, 580 F.3d 113, 117 (3d Cir. 2009) (rejecting  
21 a facial challenge to the UIGEA and noting that appellant “does not point to anything in the  
22 language of the Act to suggest that Congress meant anything other than the physical location  
23 of a bettor or gambling business in the definition of ‘unlawful Internet gambling.’”).

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

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

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

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

## 14                   **2.       Likely to Suffer Irreparable Harm**

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

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

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

### 3 **3. Balance of Equities**

4 The Court next considers whether the balance of equities tips in the State's favor. As  
5 discussed, the activity at issue here violates the Compact and relevant law. The Court agrees  
6 that sovereign interests are of utmost importance, but sovereignty is not limitless. *See Nixon*,  
7 164 F.3d at 1108 (“[I]f the State . . . sought an injunction against the Tribe conducting an  
8 internet lottery from [non-tribal lands] . . . , the IGRA should not completely preempt such  
9 a law enforcement action simply because the injunction might ‘interfere with tribal  
10 governance of gaming’”). The Court also considers the revenue Defendants anticipate from  
11 this gaming and the assistance tribal members could receive from that money. Even so, the  
12 State has a strong interest in upholding its agreements and ensuring that it receives the  
13 benefit of agreements in which it has entered, as well as upholding the law. Therefore, the  
14 Court finds that the balance of equities favors the State.

### 15 **4. Public Interest**

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

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

## 23 **IV. CONCLUSION**

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

27 Pursuant to these findings, it is ordered that a TRO is issued without requiring the  
28

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

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

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

11 3. Accepting any electronic fund transfer, or funds transmitted by or through a  
12 money transmitting business, or the proceeds of an electronic fund transfer or money  
13 transmitting service, from or on behalf of any resident of, or visitor to, California, who bets  
14 or wagers over the internet in connection with any gambling, or game of chance, offered, or  
15 conducted, by defendants.

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

20 //

21 //

22 //

23 //

24 //

25 //

26 //

27 //


28



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

6  
7 **IT IS SO ORDERED.**

8  
9 DATED: December 12, 2014

10  
11   
12 Hon. Anthony J. Battaglia  
U.S. District Judge