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11 **UNITED STATES DISTRICT COURT**
12 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

13 State of California,
14 **Plaintiff,**
15 vs.
16 Iipay Nation of Santa Ysabel, et. al.
17 **Defendants.**

CIVIL FILE NO. 3:14-CV-02724-
AJB/NLS

**DEFENDANTS' REPLY TO STATE
OF CALIFORNIA OPPOSITION
TO DEFENDANTS' MOTION TO
DISMISS**

Complaint Filed: November 18, 2014
Hearing Date: March 5, 2015
Time: 2:00 pm
Courtroom: 3B
Judge: Hon. Anthony J. Battaglia

I. Introduction

1
2 In order to avoid dismissal of this action as required by the *Bay Mills* decision,
3 *Michigan v. Bay Mills Indian Community* (“*Bay Mills*”) (572 U.S. ___, 134 S.Ct. 2024,
4 2032 (2014)), the State resorts to speaking out of both sides of its mouth. It now seeks to
5 invert its own Complaint allegations and turn the requirements of IGRA inside out. Even
6 as it tries to invent new legal concepts not recognized by IGRA – like its statement that it
7 can assert a breach of compact claim in this action because the Tribe’s “gaming activity
8 *straddles the borders* of the Tribe’s Indian lands” – it cannot, and does not, retract it’s
9 primary contention in this action that the Tribe’s disputed gaming activity “is not being
10 conducted *only* on the Tribe’s Indian lands.” State’s Memorandum of Points and
11 Authorities in support of its TRO Motion, Dkt. No. 3, at p. 4 (emphasis added). There is
12 no relevant factual or legal distinction between this action and *Bay Mills* and *Tiger Hobia*
13 that warrants anything but dismissal of this action. *Bay Mills*, 134 S.Ct. 2024; *State of*
14 *Oklahoma v. Tiger Hobia*, No. 12-5134 Dkt. No. 15-2, at A60, (10th Cir. December 22,
15 2014).

II. Argument

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17 Try has it might, the State cannot now run from its claim that the Tribe’s VPN
18 Aided Class II Gaming “*off* Indian lands is contrary to IGRA,” and such gaming occurs
19 “*off* the Tribe’s Indian lands.” State’s Memorandum of Points and Authorities in support
20 of its TRO Motion, Dkt. No. 3, at pp. 7 and 14 (emphasis added). The State is the master
21 of its own action, and if the State’s claim is that the not every element of the disputed

1 gaming activity occurs on Indian lands, then the Court must take the facts as alleged by
2 the State and dismiss this action under *Bay Mills*.

3 This action falls squarely within the *Bay Mills* rule. The factual predicate for the
4 State's claims – *as alleged by the State* -- is that the disputed gaming activity of the Tribe
5 is “off of Indian lands [and] violates IGRA.” Instead of *alleging and ultimately*
6 *establishing* that the gaming “is located on Indian lands” as is required to bring a federal
7 cause of action pursuant to 25 U.S.C. § 2710(d)(7)(A)(ii) of IGRA to enjoin class III
8 gaming activity,¹ *the State is alleging and trying to prove the very opposite*.

9 This is evident from a review of the contentions the State asserted in its effort to
10 obtain the temporary injunctive relief it requested from the Court – and upon which the
11 Court relied in granting the injunctive relief:

12 (1) “[T]he Tribe’s Internet gambling *is not restricted to its Indian lands.*”

13 State’s Memorandum of Points and Authorities in support of its TRO
14 Motion, Dkt. No. 3, at p. 3 (emphasis added).

15 (2) “The Tribe’s gambling is legal only if conducted *entirely* on Indian lands.”

16 *Id.* at p. 4 (emphasis added).

17 (3) “Its Internet gambling is not being conducted *only* on the Tribe’s Indian
18 lands.” *Id.* (emphasis added).

19
20
21 ¹ See *Bay Mills*, 134 S.Ct. at 2032; *Tiger Hobia*, Dkt. No. 15-2, at A62; TRO Order, Dkt.
No. 11, at p. 6 (emphasis added).

1 (4) “Instead, bettors *located off the Tribe’s Indian lands* can participate in its
2 Internet gambling.” *Id.* (emphasis added).

3 (5) “IGRA allows gaming only on Indian lands; the *Tribe’s Internet gambling*
4 *off Indian lands* is contrary to IGRA.” *Id.* at p. 7 (emphasis added).

5 (6) [Congress intended] “to limit IGRA to gaming on Indian lands.” *Id.* at p. 8
6 (emphasis added).

7 (7) “[T]he *Tribe’s Internet gambling does not fall within the purview of IGRA*
8 *because some of the gaming activity necessarily takes place outside of the*
9 *Tribe’s Indian lands.* Thus IGRA does not give the Tribe the power to
10 engage in, or license and regulate, the Internet gambling. Instead the state
11 has the power to regulate the Internet gambling.” *Id.* at p. 11 (emphasis
12 added).

13 (8) “[T]he Tribe’s Internet gambling *occurs off the Tribe’s Indian lands* when
14 bettors – i.e. Internet users – are not physically on the Tribe’s Indian lands.”
15 (*Id.* at p. 14) (emphasis added).

16 Again, *unless and until* the State stipulates to the fact that the disputed “gaming
17 activity” is conducted solely and exclusively on the Tribe’s Indian lands, the Court
18 cannot proceed to adjudicate the State’s claims because the State’s action is barred by the
19 doctrine of tribal immunity. The Bay Mills decision does not permit any other result.²

21 ² The State’s contention that the *Bay Mills* and *Tiger Hobia* cases are distinguishable

1 III. Conclusion

2 The Court cannot begin to conduct a classification analysis to determine if the
3 disputed gaming activity is legally deemed class II gaming or class III gaming under
4 IGRA until it is stipulated that the gaming activity in question is “conducted *entirely* on
5 Indian lands” so as to fall within the purview of IGRA. The State tries to concede this
6 point, but in the end it simply cannot bring itself to do so because it wants to have its cake
7 and eat it too – meaning that Tribal Defendants’ motion to dismiss must be granted under
8 Fed.R.Civ.P. 12(h)(3).³

9
10 because the compacts at issue in each case effectively “forbid a suit by ‘strictly’ limiting
11 the remedies available” is misplaced. Neither case turned on whether a compact waiver
12 for judicial remedies existed. The cases focused exclusively on whether the dispute
13 resolution remedy available under the respective compacts existed in light of the
14 allegations made by Michigan and Oklahoma that the gaming activities at issue were
15 occurring off Indian lands. *Bay Mills*, 134 S.Ct. at 2031-2032 (the premise of the state of
16 Michigan’s suit is that the tribe’s casino was unlawful because of its location outside
17 Indian lands, but Section 2710(d)(7)(A)(ii) only abrogates tribal immunity with respect to
18 class III gaming located *on* Indian lands); *State of Oklahoma v. Tiger Hobia*, No. 12-
19 5134, at 3-4 (10th Cir. December 22, 2014) (“[i]f, as here, the complaint alleges that the
20 challenged class III gaming activity is occurring somewhere other than on ‘Indian lands’
21 as defined in IGRA, the action fails to state a valid claim for relief under 25 U.S.C.
2710(d)(7)(A)(ii) and must be dismissed”).

17 That issue is directly on point here. Under both cases the courts found that if the states
18 alleged that the disputed gaming was not occurring on Indian lands then the compacts at
19 issue were not applicable and neither was a statutory abrogation under 25 U.S.C.
20 § 2710(d)(7)(A)(ii). The compacts simply would not be applicable if the gaming occurred
21 off Indian lands as alleged, even if a remedy of injunctive relief in federal court was
contained in those compacts, because they would fall outside the purview of IGRA.

³ Compacts under IGRA are government-to-government agreements between two equal
sovereigns, and as such, as noted by the Tenth Circuit in *Tiger Hobia*, IGRA does not

1 Dated: January 27, 2015

/s/ Little Fawn Boland

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14 permit the State to bring an official capacity action alleging a breach of compact claim
15 against individual tribal officers. Furthermore, where, as in this case, the complaint
16 alleges no individual actions by any of the tribal officials named as defendants or that
17 such defendants acted outside their authority, it is plain that the suit is nothing more than
18 a suit against the Tribe, and both the Tribe and tribal officials are immune. *Imperial*
Granite Co. v. Pala Band of Mission Indians, 940 F.2d 1269, 1271-1272 (9th Cir. 1991).
19 In any event, the State did not allege that Santa Ysabel Interactive, Inc., a distinct legal
20 entity established under tribal law, waived its own immunity protection for any claim
21 asserted in the State's action. *See* Declaration of Little Fawn Boland, Ex. Nos. 1 through
3. Neither can the State in good faith, and subject to Rule 11, reasonably contend that
office staff of the Tribal Gaming Commission like named defendants Anthony Bucaro
and Michelle Maxey are "officers" of the Tribe or have any responsibility for any
conduct of the disputed gaming. In sum, the State's present action is barred as to all
Tribal Defendants.

PROOF OF SERVICE

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I, Little Fawn Boland, hereby declare:

I am employed by Ceiba Legal, LLP in the City of Mill Valley and County of Marin, California. I am a resident in the City of Mill Valley. I am over the age of eighteen years and not a party to the within action. My business address is CEIBA LEGAL, LLP, 35 Madrone Park Circle, Mill Valley, California, 94941. I hereby certify that on January 27, 2015, I electronically filed the foregoing with the Clerk of the Court using the ECF system.

**DEFENDANTS’ REPLY TO STATE OF CALIFORNIA OPPOSITION TO
DEFENDANTS’ MOTION TO DISMISS**

Notice of this filing will be sent by operation of the Court’s electronic filing system to all parties indicated on the electronic filing receipt, described as:

Kamala D. Harris
Attorney General of California
Sara J. Drake
Senior Assistant Attorney General
William P. Torngren
Deputy Attorney General
1300 I Street Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on January 27, 2015 in Mill Valley, California.

By: /s/ Little Fawn Boland
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**DECLARATION OF
LITTLE FAWN BOLAND IN
SUPPORT OF DEFENDANTS'
REPLY TO STATE OF
CALIFORNIA OPPOSITION TO
DEFENDANTS' MOTION TO
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1 I, Little Fawn Boland, make this declaration from personal knowledge, except where
2 stated as based upon information and belief. If called, I could and would testify
3 competently as follows:

4 1. I am an attorney licensed to practice in California and counsel of record for
5 all defendants in this matter.

6 2. My legal practice is based in Mill Valley, California.

7 3. The Tribe is a federally-recognized Indian tribe organized under a
8 Constitution approved by the voters of the Iipay Santa Ysabel Nation on November 20,
9 2007 (the "Constitution").

10 4. A true, complete and correct copy of the Constitution is attached as "Exhibit
11 No. 1." The Constitution is in full force and effect, has not been amended or restated, and
12 no action has been taken or is contemplated by the Tribe in connection with any such
13 amendment or restatement.

14 5. The Santa Ysabel Tribal Development Corporation ("TDC") has been
15 established under the laws of the Tribe pursuant to action of the Tribe. A true, complete
16 and correct copy of Tribal Charter of Incorporation issued on September 19, 2012 to the
17 TDC (the "TDC Charter") is attached as "Exhibit No. 2."

18 6. Santa Ysabel Interactive, Inc. ("SYI") was established under the laws of the
19 Tribe pursuant to action of the Tribe. A true, complete and correct copy of the Tribal
20
21

1 Charter of Incorporation issued on July 26, 2013 to SYI (the “SYI Charter”) is attached
2 as “Exhibit No. 3.”

3 7. SYI has the power to waive the sovereign immunity of SYI in business
4 matters, and no action is required of any other person, governmental authority or entity
5 for a valid and effective waiver of the sovereign immunity of SYI.

6 8. No entity including the Tribe has the power to waive SYI’s sovereign
7 immunity from suit.

8 9. SYI is a legal entity cloaked in the Tribe’s sovereign immunity from suit but
9 distinct and separate from the Tribe itself.

10 I declare under penalty of perjury under the laws of the State of California that the
11 foregoing is true and correct. Executed this 27th day of January, 2015.

12 /s/ Little Fawn Boland

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Attorney General of California
- Sara J. Drake
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