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16 **UNITED STATES DISTRICT COURT**
17 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

18 United States of America,
19 Plaintiff,
20 vs.

21 Iipay Nation of Santa Ysabel, et. al.

Defendants/Counterclaimants/Third
Party Plaintiffs,

CASE NO. 3:14-cv-02724-AJB-NLS

CASE NO. 3:14-cv-02855-AJB-NLS

**TRIBAL DEFENDANTS' ANSWER
TO COMPLAINT FOR
PERMANENT
INJUNCTION/COUNTERCLAIM
FOR DECLARATORY AND
INJUNCTIVE RELIEF AND
THIRD PARTY COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

1 vs.

2 National Indian Gaming Commission,
an independent federal agency,

3 Third Party Defendant.
4

Complaint Filed: December 3, 2014

Hearing Date: N/A

Time: N/A

Courtroom: 3B

Judge: Hon. Anthony J. Battaglia

5
6 The Iipay Nation of Santa Ysabel (“Tribe”) and the other Defendants named in this
7 action (collectively, the “Tribal Defendants”), for their Answer to the Complaint for
8 Permanent Injunction (“Complaint”) filed in this action by Plaintiff, United States of
9 America (referred to herein as the “DOJ”), state and allege as follows.

10 1. Tribal Defendants deny each and every allegation contained in the
11 Complaint, except as hereafter specifically admitted or otherwise answered; and
12 specifically object to and generally deny every compound allegation contained in the
13 Complaint that may amount to “artful pleading.”

14 2. As to the allegations contained in paragraph 1 of the Complaint, Tribal
15 Defendants deny that the class II bingo game play offered by Santa Ysabel Interactive,
16 Inc. (“SYI”) via the class II gaming system known as the “Virtual Private Network
17 Assisted Play System” (“VPNAPS”) is “accessible to the public on the Internet.” As to
18 the rest of the allegations contained in paragraph 6 of the Complaint, Tribal Defendants
19 admit that the DOJ’s action purportedly seeks injunctive relief under the Unlawful
20 Internet Gambling Enforcement Act (“UIGEA”), 31 U.S.C. §§ 5361-5367, and denies
21 that the DOJ is entitled to such relief in connection with the class II bingo game play

1 offered by SYI using the VPNAPS.

2 3. Tribal Defendants state that there is no paragraph 2 of the Complaint and
3 therefore make no answer to same.

4 4. Tribal Defendants admit the allegations contained in paragraph 3 of the
5 Complaint.

6 5. Tribal Defendants admit the allegations contained in paragraph 4 of the
7 Complaint.

8 6. Tribal Defendants admit the allegations contained in paragraph 5 of the
9 Complaint.

10 7. As to the allegations contained in paragraph 6 of the Complaint, Tribal
11 Defendants deny that the Santa Ysabel Gaming Commission “own[s], manage[s] and /or
12 operate[s]” the class II bingo game play offered by SYI using the VPNAPS. Tribal
13 Defendants admit the rest of the allegations contained in paragraph 6 of the Complaint.

14 8. As to the allegations contained in paragraph 7 of the Complaint, Tribal
15 Defendants deny that the class II bingo game play offered by SYI using the VPNAPS is
16 subject to an enforcement action under UIGEA, and therefore deny that the district court
17 has subject-matter jurisdiction for this action.

18 9. As to the allegations contained in paragraph 8 of the Complaint, Tribal
19 Defendants deny that the class II bingo game play offered by SYI using the VPNAPS is
20 subject to an enforcement action under UIGEA, and therefore deny that the district court

1 has personal jurisdiction for this action or that venue in the district court is proper.

2 10. As to the allegations contained in paragraph 9 of the Complaint, Tribal
3 Defendants admit only that the paragraph correctly recites certain portions of 31 U.S.C.
4 § 5361(a)(3)-(4).

5 11. As to the allegations contained in paragraph 10 of the Complaint, Tribal
6 Defendants admit only that the paragraph correctly recites certain portions of 31 U.S.C.
7 § 5363 and § 5362(7).

8 12. As to the allegations contained in paragraph 11 of the Complaint, Tribal
9 Defendants admit only that the paragraph correctly recites certain portions of 12 CFR §
10 233 and 31 U.S.C. § 5362(10).

11 13. As to the allegations contained in paragraph 12 of the Complaint, Tribal
12 Defendants admit only that the paragraph correctly recites certain portions of 31 U.S.C.
13 § 5362(1(A), (B) & (D).

14 14. Tribal Defendants deny the conclusions of law and the allegations contained
15 in paragraph 13 of the Complaint.

16 15. As to the allegations contained in paragraph 14 of the Complaint, Tribal
17 Defendants state that the class II bingo game play offered by SYI using the VPNAPS is
18 legal class II gaming under the Indian Gaming Regulatory Act (“IGRA”), P.L. 100-497,
19 25 U.S.C. §§ 2701, *et seq.*, and therefore is not subject to an UIGEA enforcement action
20 under federal law. Tribal Defendants therefore deny the conclusions of law and the

1 allegations contained in paragraph 14 of the Complaint.

2 16. As to the allegations contained in paragraph 14A of the Complaint, Tribal
3 Defendants state that users of web-browser enabled devices may access and enter the
4 Tribe's Indian lands via a secure private network connection, and, once on the Tribe's
5 Indian lands, may enter the tribal bingo gaming facility operated by SYI using the
6 VPNAPS. Tribal Defendants therefore deny the allegations contained in paragraph 14A
7 of the Complaint that are contrary to or conflict with the foregoing statements of Tribal
8 Defendants.

9 17. As to the allegations contained in paragraph 14B of the Complaint, Tribal
10 Defendants state that once a user of a web-browser enabled devices has been granted
11 access to and entered the Tribe's Indian lands via a secure private network connection,
12 adult residents of the State of California, while they are physically located in the State,
13 may use the VPNAPS to enter the tribal bingo gaming facility operated by SYI and
14 establish an account to become an "Account Holder" with SYI. Tribal Defendants
15 therefore deny the allegations contained in paragraph 14B of the Complaint that are
16 contrary to or conflict with the foregoing statements of Tribal Defendants.

17 18. As to the allegations contained in paragraph 14C of the Complaint, Tribal
18 Defendants admit only that the allegations correctly depict how Account Holders may
19 fund their accounts with the tribal bingo gaming facility operated by SYI, and state that
20 such accounts are located at the tribal bingo gaming facility located on the Tribe's

1 Indian lands.

2 19. As to the allegations contained in paragraph 14D of the Complaint, Tribal
3 Defendants state that, once a user of a web-browser enabled device has been granted
4 access to and entered the Tribe's Indian lands via a secure private network connection,
5 and become an Account Holder with the tribal bingo gaming facility operated by SYI,
6 (a) the Account Holder may use the VPNAPS to communicate with their proxy agent
7 located on the Tribe's Indian lands to assist with proxy play of bingo games on the
8 Account Holder's behalf; (b) game play of the class II bingo game play offered by SYI
9 using the VPNAPS is achieved only by proxy play; and (c) no direct live bingo game
10 action is ever performed by the Account Holder, including the purchase of bingo cards.
11 Tribal Defendants therefore deny the allegations contained in paragraph 14D of the
12 Complaint that are contrary to or conflict with the foregoing statements of Tribal
13 Defendants.

14 20. As to the allegations contained in paragraph 14E of the Complaint, Tribal
15 Defendants state that no live bingo game action is ever performed or even viewed by the
16 Account Holder as part of the class II bingo game play offered by SYI using the
17 VPNAPS; and that after the proxy of the Account Holder has played a bingo game, the
18 game play results are revealed on a time-delayed basis to the Account Holder who can
19 select the theme for watching in "playback mode" the replay display of the game played
20 by their proxy on their behalf. Tribal Defendants admit only that the "playback mode"

1 screen description contained in paragraph 14E of the Complaint is accurately depicted
2 only in connection with the proxy participants of Account Holders.

3 21. As to the allegations contained in paragraph 14F of the Complaint, Tribal
4 Defendants state that (a) no live bingo game action is ever performed or even viewed by
5 the Account Holder as part of the class II bingo game play offered by SYI using the
6 VPNAPS; (b) a minimum of five (5) proxy participants in a common bingo ball draw
7 game is necessary before the bingo game can commence, and (c) all live bingo game
8 play is performed by the proxy participants. Tribal Defendants deny that the “playback
9 mode” screen description contained in paragraph 14F of the Complaint is accurately
10 depicted in connection with the proxy participants of Account Holders.

11 22. As to the allegations contained in paragraph 14G of the Complaint, Tribal
12 Defendants state that debits/credits are made to the accounts of Account Holders based
13 upon the bingo game play results achieved by their proxy participants consistent with
14 tribal gaming regulations and house bingo rules. Tribal Defendants therefore deny the
15 allegations contained in paragraph 14D of the Complaint that are contrary to or conflict
16 with the foregoing statements of Tribal Defendants.

17 23. As to the allegations contained in paragraph 14E of the Complaint, Tribal
18 Defendants admit that as part of the class II bingo game play offered by SYI using the
19 VPNAPS, each bingo game pays out prizes in a pari-mutual format based upon a certain
20 percentage of the pay-in amount of the game cards purchased for that common game,

1 with a certain percentage retained by SYI consistent with house bingo rules.

2 24. Tribal Defendants deny the conclusions of law and the allegations contained
3 in paragraph 15 of the Complaint.

4 25. As to the allegations contained in paragraph 15A of the Complaint, Tribal
5 Defendants deny that the class II bingo game play offered by SYI using the VPNAPS is
6 subject to California state law or California constitutional prohibitions.

7 26. As to the allegations contained in paragraph 15B of the Complaint, Tribal
8 Defendants admit only that the paragraph correctly recites certain portions of California
9 Penal Code §§ 319, 320, 321 and 322.

10 27. As to the allegations contained in paragraph 15C of the Complaint, Tribal
11 Defendants admit only that the paragraph correctly recites certain portions of California
12 Penal Code § 337a(a)(2) through (4).

13 28. Tribal Defendants deny the conclusions of law and the allegations contained
14 in paragraph 15D of the Complaint.

15 **FIRST CAUSE OF ACTION**
16 (Injunctive Relief under UIGEA)

17 29. As to the allegations contained in paragraph 16 of the Complaint, Tribal
18 Defendants reassert their answers to paragraphs 1-15 of the Complaint.

19 30. Tribal Defendants deny the conclusions of law and the allegations contained
20 in paragraph 17 of the Complaint.

21 31. As to the allegations contained in paragraph 18 of the Complaint, Tribal

1 Defendants deny that the class II bingo game play offered by SYI using the VPNAPS is
2 subject to an enforcement action under UIGEA, and therefore deny that the DOJ is
3 entitled to any injunctive relief against Tribal Defendants.

4 32. Tribal Defendants deny the conclusions of law and the allegations contained
5 in paragraph 19 of the Complaint.

6 **AFFIRMATIVE DEFENSES**

7 33. In the alternative, the Complaint fails to state a claim upon which relief can
8 be granted because the class II bingo game play offered by SYI using the VPNAPS is
9 legal class II gaming under the Indian Gaming Regulatory Act (“IGRA”), P.L. 100-497,
10 25 U.S.C. §§ 2701, *et seq.*, and is not subject to an UIGEA enforcement action under
11 federal law.

12 34. In the alternative, the Complaint is barred by the doctrine of primary
13 jurisdiction.

14 35. In the alternative, the Complaint fails to join parties, including the National
15 Indian Gaming Commission, required under Rule 19 for the relief requested.

16 **WHEREFORE**, Tribal Defendants request an Order for Judgment:

17 A. Dismissing with prejudice the Complaint in its entirety;

18 B. Awarding to Tribal Defendants their costs, disbursements and
19 reasonable attorney’s fees incurred herein as allowed by law; and
20

1 C. Awarding such other and further relief as may be available and the
2 Court deems just under the circumstances.

3 COUNTERCLAIM

4 The Iipay Nation of Santa Ysabel (“Tribe”), Santa Ysabel Development
5 Corporation (“SYDC”) and Santa Ysabel Interactive, Inc. (“SYI”) (collectively, the
6 “Tribal Counterclaimants”), for their Counterclaim against Plaintiff United States of
7 America (referred to herein as the “DOJ”), state and allege as follows.

8 1. On or about November 3, 2014, SYI commenced Desert Rose Bingo
9 operations by offering a certain gaming activity for real money play. The gaming offered
10 by Desert Rose Bingo is its “VPN Aided Class II Gaming,” which is server-based bingo
11 games played on the Tribe’s sovereign Indian Lands using a class II gaming system
12 known as the “Virtual Private Network Assisted Play System” (“VPNAPS”). Bingo
13 game play through the VPNAPS is expressly restricted to only adult residents of the State
14 of California while they are located within the State, 2. The gaming offered through
15 Desert Rose Bingo has been determined by final regulatory action of the Santa Ysabel
16 Gaming Commission (“Tribal Gaming Commission”) to be “class II gaming” within the
17 meaning of 25 U.S.C. § 2703(7)(A) of the Indian Gaming Regulatory Act, 25 U.S.C. §§
18 2701 et seq., P.L. 100-497, 102 Stat. 2467 (“IGRA”) because every element of bingo
19 game play occurs on the Tribe’s Indian Lands consistent with IGRA and the VPNAPS
20 serves as a “technologic aid” to the bingo game play.

1 3. All bingo game play using the VPNAPS has been specifically authorized by
2 Tribal law and Tribal regulatory measures, and by Tribal Gaming Commission actions
3 adopted under the Tribe's gaming ordinance approved by the National Indian Gaming
4 Commission ("NIGC") pursuant to IGRA.

5 4. As part of the bingo game play using the VPNAPS, Tribal regulations
6 (SYGC Regulations 14-I009 and 14-I011) expressly permit: (a) "proxy play" (i.e.
7 Account Holders engage an agent located on the Tribe's Indian Lands to assist with the
8 play of the bingo game on behalf of the Account Holders), (b) Account Holders to engage
9 their proxy play agent using a Class II gaming system containing a component that
10 facilitates access through a secure virtual private network connection between Account
11 Holders and their proxy agent located on the Tribe's Indian Lands which assists with
12 proxy play on behalf of the Account Holder, and (c) use of technologic aids to assist the
13 proxy agent playing the bingo games in determining whether a held card has a pre-
14 designated pattern matching the numbers drawn for the bingo game.

15 5. When Desert Rose Bingo is operational, pursuant to Tribal law and Tribal
16 regulatory measures, potential patrons, while located anywhere within the State of
17 California, may use any web-browser-enabled device (such as cell phones, tablets and
18 iPads, laptops or desk computers) to access the Desert Rose Bingo registration site
19 (www.desertrosebingo.com). There individuals can register and establish/fund their
20 account with Desert Rose Bingo. After an individual's registration is reviewed and
21

1 approved pursuant to requirements established by the Tribal Gaming Commission,
2 registered “Account Holders” may then use their web-browser enabled device to access
3 the VPNAPS to establish and fund their account, and then engage their proxy agent.

4 6. Under Tribal law and Tribal regulatory measures, a potential patron of
5 Desert Rose Bingo must be a California resident and at least 18 years of age to become a
6 registered “Account Holder” with the Tribal gaming business.

7 7. As authorized by Tribal law and Tribal regulatory measures, Account
8 Holders can only establish and fund their accounts with Desert Rose Bingo and engage
9 their proxy agent after being granted access to the VPNAPS on the Tribal Lands.
10 Account Holders can only establish and fund their accounts and engage their proxy by
11 accessing the VPNAPS via a virtual private network (VPN) communication link that uses
12 a form of communication that utilizes secured and restricted access connections (i.e. via
13 software and a server that authenticates users, encrypts data, and manages sessions with
14 users) consistent with applicable tribal regulations.

15 8. As required by Tribal law and Tribal regulatory measures, other than the
16 VPN communication link between the Account Holders and their proxy agent and the
17 Tribal gaming operation, all other components of the VPNAPS are physically located on
18 the Tribal Lands, including the computer hardware and software associated with the
19 operation of the VPN Aided Class II Gaming, the accounts of the Account Holders, the
20 administrative personnel and records, and the servers and other technological components

1 and aids that assist the proxy agent to play the bingo games on behalf of the Account
2 Holders.

3 9. In order to be an Account Holder, under Tribal law and Tribal regulatory
4 measures, an individual must first be qualified and establish an account with Desert Rose
5 Bingo and then fund the account through the use of a credit or debit card, electronic fund
6 transfer or check, and may do so either in person or remotely by a number of different
7 means of access to the Tribal gaming operation. These means include using the VPN
8 connection of the VPNAPS. Account Holders may maintain as much as \$5,000 in United
9 States currency on deposit in their account with Desert Rose Bingo.

10 10. Once the Account Holder establishes and funds an account with Desert Rose
11 Bingo, as authorized by Tribal law and Tribal regulatory measures, Account Holders may
12 then use the VPN communication link of the VPNAPS to engage their proxy agent. The
13 VPNAPS is used by the proxy agent to purchase bingo cards from the live game action
14 server to be played on the Account Holder's behalf in order to win several different forms
15 of cash prizes. Bingo cards for bingo games are sold to proxy players in U.S. currency in
16 denominations of a Penny, \$0.05, \$0.10, \$0.25, \$0.50, and \$1.00; with a limit of 500
17 bingo cards per game permitted to be purchased by the proxy agent on behalf of any one
18 Account Holder.

19 11. As permitted by Tribal law and Tribal regulatory measures, all bingo game
20 play is achieved via "proxy play" – a Tribal gaming operations employee (or their
21

1 designee) monitors the proxy functions of the VPNAPS and acts as the legally designated
2 agent of the Account Holder. Assisted by the technologic aid of proxy software elements
3 contained in the VPNAPS, the proxy agent conducts proxy play of the bingo games on
4 the Account Holder's behalf.

5 12. In this respect, as permitted by Tribal law and Tribal regulatory measures,
6 the Account Holder at no time actually plays or has access to view real time participation
7 in the bingo games. Rather, the VPN connection of the VPNAPS is only used to reveal
8 and report the results of the bingo games played on the Tribal Lands by the proxy agent,
9 using the technological aids, on a time delayed basis to the Account Holders.

10 13. In order to view the results of any bingo game play previously made by the
11 proxy agent on their behalf, Account Holders can select the "playback mode" tab on the
12 patron interface screen of the patron registration site to watch the previously played
13 game. In "playback mode," the patron interface screen is divided into three sections.
14 The section on the right of the screen identifies the game "ID" number, the number of
15 cards purchased by each proxy player and the number of proxy players participating in
16 that game on behalf of Account Holders. The section in the middle of the patron
17 interface screen shows the card(s) purchased by the proxy agent for the Account Holder
18 using technological aids. The cards appear in a traditional "bingo" format with twenty-
19 four numbers arranged within a 5-by-5 box grid and a "free space" occupying the middle
20
21

1 box. The section on the left of the patron interface screen identifies the Account Holder's
2 account balance and displays a 15-by-5 box grid containing bingo numbers 1 through 75.

3 14. In "playback mode," the time-delayed video replay representation of the
4 bingo game previously played by the proxy agent proceeds with the depiction of a ball
5 draw. As the depicted numbers are drawn, they are highlighted on the 15-by-5 box grid
6 on the left of the patron interface screen. When a number matching a number on a bingo
7 card purchased by the proxy agent of the Account Holder is drawn, it is highlighted on
8 the card(s) in the middle section of the patron interface screen. The "playback mode"
9 depiction proceeds in this manner until a prize-winning bingo pattern on a bingo card
10 played by the proxy player is achieved. When a prize-winning bingo pattern on a bingo
11 card played by a proxy player is achieved, the playback depiction of that bingo game
12 stops and a message box appears on the patron interface screen identifying the user name
13 of the winning proxy player's Account Holder and the amount won by the proxy player
14 on behalf of that Account Holder.

15 15. As required by Tribal law and Tribal regulatory measures, if a proxy player
16 wins a prize for the Account Holder in the bingo game, the amount of the prize won by
17 the proxy player associated with that game is credited to the Account Holder's account.
18 If a proxy player of the Account Holder does not receive any prize-winnings in the bingo
19 game, the pay-in amount of the bingo card(s) purchased by the proxy player associated
20 with that game is debited from the Account Holder's account held by Desert Rose Bingo.

1 gaming under IGRA, Desert Rose Bingo still constitutes “unlawful Internet gambling”
2 within the meaning of UIGEA and is subject to an enforcement action thereunder.

3 21. Tribal Counterclaimants contend that the gaming conducted by Desert Rose
4 Bingo is legal class II gaming activity conducted on Indian Lands pursuant to IGRA, and
5 UIGEA cannot and does not prohibit legal IGRA bingo gaming activity.

6 22. A dispute exists between DOJ and the Tribal Counterclaimants as to whether
7 the gaming activities offered by Desert Rose Bingo using the VPNAPS constitute legal
8 class II gaming activity conducted on Indian Lands pursuant to IGRA, and whether
9 UIGEA can and does prohibit such legal IGRA bingo gaming activity.

10 23. Accordingly, the Tribal Counterclaimants seek a declaratory judgment
11 against the DOJ pursuant to 28 U.S.C. §2201 and §2201, requesting that, based upon the
12 facts described herein and applicable federal law, the court declare: (a) UIGEA cannot
13 and does not prohibit legal IGRA bingo gaming activity; and (b) the gaming activities
14 offered by Desert Rose Bingo using the VPNAPS (VPN Aided Class II Gaming)
15 constitute legal class II gaming activity conducted on Indian Lands pursuant to IGRA and
16 are not subject to any enforcement action under UIGEA.

17 Count II – Injunctive Relief

18 24. Tribal Counterclaimants reassert their allegations contained in paragraphs 1-
19 17 of their Counterclaim.

20 25. The DOJ has commenced an enforcement action under UIGEA to stop

1 Desert Rose Bingo from offering its VPN Aided Class II Gaming conducted on Indian
2 Lands pursuant to IGRA.

3 26. Under the circumstances described herein, the DOJ has no legal authority to
4 use an enforcement action under UIGEA to stop Desert Rose Bingo from offering its
5 VPN Aided Class II Gaming conducted on Indian Lands pursuant to IGRA.

6 27. Unless the DOJ is enjoined permanently from attempting to use an
7 enforcement action under UIGEA to stop Desert Rose Bingo from offering its legal
8 class II gaming activity conducted on Indian Lands pursuant to IGRA, Tribal Claimants
9 will suffer immediate irreparable harm without adequate remedy at law because its
10 sovereign rights and gaming rights under IGRA to offer its VPN Aided Class II Gaming
11 will be improperly impaired by the DOJ's actions.

12 28. Accordingly, the Tribal Counterclaimants are entitled to have the DOJ
13 permanently enjoined from attempting to use an enforcement action under UIGEA to
14 stop Desert Rose Bingo from offering its VPN Aided Class II Gaming conducted on
15 Indian Lands pursuant to IGRA.

16 **WHEREFORE**, Tribal Counterclaimants request an Order granting the
17 following relief:

18 A. The Court issue a declaratory judgment in favor of the Tribal
19 Counterclaimants declaring: (1) UIGEA cannot and does not prohibit legal IGRA bingo
20 gaming activity; and (2) the gaming activities offered by Desert Rose Bingo using the

1 VPNAPS (VPN Aided Class II Gaming) constitute legal class II gaming activity
2 conducted on Indian Lands pursuant to IGRA and are not subject to any enforcement
3 action under UIGEA.

4 B. The Court issue an order of judgment that the DOJ is permanently enjoined
5 from attempting to use an enforcement action under UIGEA to stop Desert Rose Bingo
6 from offering its VPN Aided Class II Gaming conducted on Indian Lands pursuant to
7 IGRA.

8 C. Awarding to Tribal Counterclaimants their costs, disbursements and
9 reasonable attorney's fees incurred herein as allowed by law; and

10 D. Awarding such other and further relief as may be available and the Court
11 deems just under the circumstances.

12 **THIRD PARTY COMPLAINT**
13 **(against National Indian Gaming Commission)**

14 The Iipay Nation of Santa Ysabel ("Tribe"), SYDC and SYI (collectively, the
15 "Tribal Third Party Plaintiffs"), for their Third Party Complaint against the National
16 Indian Gaming Commission, an independent federal agency established under IGRA,
17 (referred to herein as the "NIGC"), state and allege as follows.

18 1. Tribal Third Party Plaintiffs reassert the allegations contained in paragraphs
19 1-17 of the Counterclaim described above.

20 2. The NIGC is an independent federal agency established under IGRA, and
21 authorized to monitor class II gaming conducted on Indian lands pursuant to IGRA and

1 take certain final agency actions in connection therewith.

2 3. The NIGC has recognized that under IGRA tribal governments, through
3 their tribal gaming regulatory agencies (“TGRA”), are responsible for the day-to-day
4 regulation of gaming activities conducted on Indian lands. In this respect, consistent with
5 25 U.S.C. § 2706(b), the NIGC “monitors” Class II gaming while the TGRAs are
6 assigned as the primary regulators of such gaming under IGRA.

7 4. By final agency action effective October 22, 2012, the NIGC adopted
8 regulations, 25 CFR Parts 543 and 547, which specifically and expressly acknowledged
9 that TGRAs like the Santa Ysabel Tribal Gaming Commission have full responsibility
10 and authority to approve the use of any Class II gaming system as part of the conduct of
11 Class II bingo games on Indian lands, as demonstrated as follows:

- 12 (a) 25 CFR Part 543.1 – establishes NIGC MICS for “conduct [of] class
13 II games on Indian land.”
- 14 (b) 25 CFR Part 543.2 – defines “Class II gaming system.”
- 15 (c) 25 CFR Part 543.3(b) & (h)(1) – requires the **TGRA** [not the NIGC] to
16 establish and implement TICS that equal or exceed Part 543 MICS.
- 17 (d) 25 CFR 543.8 – section generally describes MICS for bingo.
- 18 (e) 25 CFR 543.8(g) *Technologic aids to the play of bingo* – requires the
19 **TGRA** [not the NIGC] to establish procedures to safeguard integrity
20

1 of technologic aids to the play of bingo during installations and
2 operations, *including procedures that require:*

3 (i) The **TGRA** [not the NIGC] to approve “all technologic aids before
4 they are offered for play”; and

5 (ii) The **TGRA** [not the NIGC] to determine that all Class II gaming
6 systems comply with Part 547 standards.

7
8 (f) 25 CFR Part 547.4(a) – to ensure fairness as to game play on a Class
9 II gaming system, a testing lab must calculate math expectations and
10 submit a “report *to the TGRA*” – not to the NIGC.

11 (g) 25 CFR Part 547.4(b) – requires that all components used with a Class
12 II gaming system must be identical to the prototype reviewed by the
13 testing lab “*and approved for use by the TGRA*” [not the NIGC]
14 pursuant to Part 547.5.

15 (h) 25 CFR Part 547.5(c) – requires that *the TGRA* [not the NIGC] “may
16 not permit the use of any Class II gaming system unless:”

17 (i) Following receipt of the testing lab’s report, “the **TGRA** [not the
18 NIGC] makes a finding that the Class II gaming system”
19 conforms to the standards established by Part 547, applicable
20

provisions of Part 543 and those standards further *established by the TGRA* [not the NIGC].

(i) 25 CFR Part 547.5(d) – in connection with modifications to components to Class II gaming systems, “a *TGRA* [not the NIGC], in its discretion” may permit modifications without prior testing lab review under certain circumstances, and “*if a TGRA authorizes* modified software and hardware [to the gaming system] to be made available for play without prior testing laboratory review, the *TGRA* [not the NIGC] must” require the manufacturer to take certain actions.

5 Accordingly, any informal NIGC practices (e.g., advisory opinions) that were being followed as to reviewing *electronic-linked bingo game systems* prior to September 21, 2012 are now simply irrelevant and superseded by Parts 543 and 547; and any attempt by the NIGC to use the old informal NIGC practices to circumvent or undermine a TGRA classification decision made under these regulations as part of the approval of any Class II gaming system would be a violation of NIGC regulations and IGRA.

6. In light of the fact that, pursuant to its NIGC approved gaming ordinance and NIGC regulations (Parts 543 and 547), as well as its Tribal regulatory measures, the

1 Tribal Gaming Commission has made a classification determination as part of its
2 approval of the use of the VPNAPS with VPN Aided Class II Gaming to be offered by
3 Desert Rose Bingo, the NIGC is legally obligated under NIGC regulations and IGRA to
4 defer to, and not act contrary to, the Tribal Gaming Commission's duly adopted
5 classification decision.

6 7. Upon information and belief, in violation of NIGC regulations and IGRA,
7 the NIGC seeks to circumvent its own regulations by refusing to confirm and honor the
8 classification determination made by the Tribal Gaming Commission as part of its
9 approval of the use of the VPNAPS with VPN Aided Class II Gaming to be offered by
10 Desert Rose Bingo.

11 8. Tribal Counterclaimants contend that the NIGC is legally obligated under
12 NIGC regulations and IGRA to confirm, and not act contrary to, the Tribal Gaming
13 Commission's duly adopted classification decision as part of its approval of the use of the
14 VPNAPS with VPN Aided Class II Gaming to be offered by Desert Rose Bingo.

15 9. Upon information and belief, the NIGC asserts that the gaming activities
16 offered by Desert Rose Bingo using the VPNAPS does not constitute class II gaming
17 under IGRA, and is not conducted on Indian Lands in a manner consistent with IGRA.

18 10. Tribal Third Party Plaintiffs contend that the gaming conducted by Desert
19 Rose Bingo is legal class II gaming activity conducted on Indian Lands pursuant to
20 IGRA.

11. A dispute exists between the NIGC and the Tribal Third Party Plaintiffs as to whether (a) the NIGC is violating IGRA and circumventing its own regulations by refusing to confirm and honor the classification determination made by the Tribal Gaming Commission as part of its approval of the use of the VPNAPS with VPN Aided Class II Gaming to be offered by Desert Rose Bingo; and (b) the gaming activities offered by Desert Rose Bingo using the VPNAPS constitute legal class II gaming activity conducted on Indian Lands pursuant to IGRA.

12. Accordingly, the Tribal Third Party Plaintiffs seek a declaratory judgment against the DOJ pursuant to 28 U.S.C. §2201 and §2201, requesting that, based upon the facts described herein and applicable federal law, the court declare: (a) NIGC is legally obligated under NIGC regulations and IGRA to confirm, and not act contrary to, the Tribal Gaming Commission's duly adopted classification decision as part of the Tribal Gaming Commission's approval of the use of the VPNAPS with VPN Aided Class II Gaming to be offered by Desert Rose Bingo; (b) the gaming activities offered by Desert Rose Bingo using the VPNAPS (VPN Aided Class II Gaming) constitute legal class II gaming activity; (c) the gaming activities are conducted on Indian Lands pursuant to IGRA; and (d) the gaming activities are not subject to any enforcement action by the NIGC.

Count II – Injunctive Relief

13. Tribal Third Party Plaintiffs reassert the allegations contained in paragraphs

1-17 of the Counterclaim described above.

14. NIGC seeks to circumvent its own regulations by refusing to confirm and honor the classification determination made by the Tribal Gaming Commission as part of its approval of the use of the VPNAPS with VPN Aided Class II Gaming to be offered by Desert Rose Bingo.

15. The NIGC threatened to use an enforcement action to stop Desert Rose Bingo from offering its VPN Aided Class II Gaming conducted on Indian Lands pursuant to IGRA.

16. Under the circumstances described herein, the NIGC (a) is legally obligated under NIGC regulations and IGRA to confirm, and not act contrary to, the Tribal Gaming Commission's duly adopted classification decision as part of its approval of the use of the VPNAPS with VPN Aided Class II Gaming to be offered by Desert Rose Bingo; and (b) has no legal authority to use an enforcement action to stop Desert Rose Bingo from offering its VPN Aided Class II Gaming conducted on Indian Lands pursuant to IGRA.

17. Unless the NIGC is enjoined permanently from (a) seeking to circumvent its own regulations by refusing to confirm and honor the classification determination made by the Tribal Gaming Commission as part of its approval of the use of the VPNAPS with VPN Aided Class II Gaming to be offered by Desert Rose Bingo; and (b) attempting to use an enforcement action to stop Desert Rose Bingo from offering its legal class II

1 gaming activity conducted on Indian Lands pursuant to IGRA, Tribal Third Party
2 Plaintiffs will suffer immediate irreparable harm without adequate remedy at law because
3 its sovereign rights and gaming rights under IGRA to offer its VPN Aided Class II
4 Gaming will be improperly impaired by the NIGC's actions.

5 18. Accordingly, the Tribal Third Party Plaintiffs are entitled to have the NIGC
6 permanently enjoined from (a) seeking to circumvent its own regulations by refusing to
7 confirm and honor the classification determination made by the Tribal Gaming
8 Commission as part of its approval of the use of the VPNAPS with VPN Aided Class II
9 Gaming to be offered by Desert Rose Bingo; and (b) attempting to use an enforcement
10 action to stop Desert Rose Bingo from offering its VPN Aided Class II Gaming
11 conducted on Indian Lands pursuant to IGRA.

12 **WHEREFORE**, Tribal Third Party Plaintiffs request the following relief be
13 granted to them:

14 A. The Court issue a declaratory judgment in favor of the Tribal Third Party
15 Plaintiffs declaring that (1) NIGC is legally obligated under NIGC regulations and
16 IGRA to confirm, and not act contrary to, the Tribal Gaming Commission's duly
17 adopted classification decision as part of its approval of the use of the VPNAPS with
18 VPN Aided Class II Gaming to be offered by Desert Rose Bingo; (2) the gaming
19 activities offered by Desert Rose Bingo using the VPNAPS (VPN Aided Class II
20
21

1 Gaming) (1) constitute legal class II gaming activity; (3) are conducted on Indian Lands
2 pursuant to IGRA; and (4) are not subject to any enforcement action by the NIGC.

3 B. The Court issue an order of judgment that the NIGC is permanently enjoined
4 from (1) seeking to circumvent its own regulations by refusing to confirm and honor the
5 classification determination made by the Tribal Gaming Commission as part of its
6 approval of the use of the VPNAPS with VPN Aided Class II Gaming to be offered by
7 Desert Rose Bingo; and (2) attempting to use an enforcement action to stop Desert Rose
8 Bingo from offering its VPN Aided Class II Gaming conducted on Indian Lands
9 pursuant to IGRA.

10 C. Awarding to Tribal Third Party Plaintiffs their costs, disbursements and
11 reasonable attorney's fees incurred herein as allowed by law; and

12 D. Awarding such other and further relief as may be available and the Court
13 deems just under the circumstances.

14
15 Dated: August 31, 2015

16 /s/ Little Fawn Boland

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PROOF OF SERVICE

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 August 31, 2015, I electronically filed the foregoing with the Clerk of the Court using the ECF system.

TRIBAL DEFENDANTS' ANSWER TO COMPLAINT FOR PERMANENT INJUNCTION, COUNTERCLAIM FOR DECLARATORY AND INJUNCTIVE RELIEF, AND THIRD PARTY COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

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:

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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 August 31, 2015 in Mill Valley, California.

By: /s/ Little Fawn Boland
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TRIBAL DEFENDANTS' ANSWER TO COMPLAINT FOR PERMANENT INJUNCTION,
COUNTERCLAIM FOR DECLARATORY AND INJUNCTIVE RELIEF
AND THIRD PARTY COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF