Little Fawn Boland (CA No. 240181)
Ceiba Legal, LLP
35 Madrone Park Circle
Mill Valley, CA 94941
Phone: (415) 684-7670 ext. 101
Fax: (415) 684-7273
littlefawn@ceibalegal.com

In Association With
Pro Hac Vice Application to be Filed
Kevin C. Quigley (MN No. 0182771)
Hamilton Quigley & Twait, PLC
W1450 First National Bank Building
332 Minnesota Street
St. Paul, MN 55101
Phone: (651) 602-6262
Fax: (651) 602-9976
kevinquigley@pacemn.com

Attorneys for Defendants

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

State of California,

Plaintiff,

vs.

Iipay Nation of Santa Ysabel, et. al.

Defendants.

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

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO STATE OF CALIFORNIA'S APPLICATION FOR A TEMPORARY RESTRAINING ORDER

Complaint Filed: November 18, 2014
Hearing Date: December 4, 2014
Time: 2:00 pm
Courtroom: 3B
Judge: Hon. Anthony J. Battaglia

Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

Rules

I. Introduction

Pursuant to its inherent sovereign authority and applicable federal law, specifically, the Indian Gaming Regulatory Act ("IGRA"), P.L. 100-497, 25 U.S.C. §§ 2701, *et seq*., the Iipay Nation of Santa Ysabel ("Tribe"), a federally-recognized Indian tribe, through its tribal economic development company, Santa Ysabel Interactive, Inc. ("SYI"),[1] commenced offering server-based bingo games played on the Tribe's sovereign Indian lands using a "Class II" (as defined at 25 U.S.C. 2703(7)) gaming system known as the "Virtual Private Network Assisted Play System" ("VPNAPS"). The VPNAPS contains several proprietary technologic aids, including a component that facilitates access to SYI's Class II gaming facility through a secure virtual private network connection between individuals who are properly registered account holders with the tribal gaming enterprise and their proxy agent located on the Indian lands. (Chelette Dec. ¶¶ 5-9). This system assists proxy play of bingo games on behalf of the account holders (referred to herein as "VPN Aided Class II Gaming"). *Id*. In sum, the VPNAPS allows the Tribe to offer Class II electronic linked bingo gaming conducted on Indian lands using a proxy system. *Id*. The nature of the games played using the linked bingo system are Class II server-based games requiring peer-to-peer competition in a single game of bingo with a common ball draw. *Id*.

[1] SYI is a tribal corporation established under the laws of the Tribe, and is a wholly-owned subsidiary of Santa Ysabel Tribal Development Corporation ("SYDC"), which is wholly-owned by the Tribe. (Declaration of David Chelette ("Chelette Dec.") ¶ 2).

In a throwback to its unsuccessful mid-1990s efforts to stymie and stifle the progress of IGRA Class II gaming, plaintiff State of California ("State") once again seeks to undermine tribal sovereignty, innovation and economic initiative by seeking injunctive and declaratory relief from the court declaring that the Tribe may not conduct its legal IGRA Class II bingo gaming.

The State does so using a speculative, factually-flawed Complaint that distorts and misleads as to the real nature of the VPN Aided Class II Gaming being conducted by the Tribe. Contrary to the State's claims, the genuine, material facts fully demonstrate that the Tribe is not offering "unlawful Internet gambling" or "Class III gaming activities." Offering legal IGRA Class II bingo gaming is neither a breach of the Tribe's Class III Tribal-State Compact ("Compact") of 2003 with the State nor a violation of the federal Unlawful Internet Gambling Enforcement Act ("UIGEA"). Thus, the State's claims against the Tribe are barred by the tribal sovereign immunity doctrine and are subject to dismissal for lack of jurisdiction.

The Tribe opposes the State's Rule 65 motion and asserts that the court should deny the request for injunctive relief. First, the Tribe has not expressly nor impliedly waived its sovereign immunity from suit and cannot be hailed into this court. Second, the State cannot demonstrate by clear and convincing evidence that it is entitled to such "extraordinary" relief because (a) it is highly unlikely to succeed on the merits of its claims, and (b) it will not suffer immediate irreparable harm if the Tribe continues to

conduct its VPN Aided Class II Gaming pending trial in this action. It is the Tribe who will suffer irreparable injury if it is forced to cease its legal IGRA Class II bingo gaming.

II. Statement of Material Facts

The material facts demonstrating (1) the real nature of the VPN Aided Class II Gaming being offered by SYI, and (2) that the State is not entitled to an order enjoining the Tribe from conducting its VPN Aided Class II Gaming are detailed in the Declarations of David Chelette and David Vialpando and exhibits attached thereto. (Declaration of David Vialpando ("Vialpando Dec."); Chelette Dec.).[2]

III. Argument

A. Legal Standard for Ordering Injunctive Relief.

Fed.R.Civ.P. 65 provides authority to issue either preliminary injunctions or temporary restraining orders. A plaintiff seeking a preliminary injunction must demonstrate that he is "[1] likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Am. Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) (quoting *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008)).

[2] The Tribe expressly incorporates by reference herein the Declarations of David Chelette and David Vialpando and the exhibits thereto including Exhibit Nos. 4 and 5 thereto referred to herein as the "Foley Game Play Opinion" and "Foley Gaming System Opinion" and collectively herein as the "Foley Game Play and Gaming System Opinions."

The requirements for a temporary restraining order are the same. *Stuhlbarg Int'l Slaes Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n. 7 (9th Cir. 2001). However, because a TRO is an emergency measure, intended to preserve the status quo pending the outcome of the litigation, a movant must show that irreparable harm is clearly immediate. Fed. R. Civ. Proc. 65(b)(1).

Only when the threatened harm would impair the court's ability to grant an effective remedy is there a need for such "extraordinary" preliminary relief. The party seeking the TRO must prove it has satisfied the injunction prerequisites by clear and convincing evidence. *Granny Goose Foods, Inc. v. Brotherhood of Teamsters*, 415 U.S. 423, 441 (1974). In the Ninth Circuit, a court may apply a sliding scale test, under which "the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011).

The State's request for temporary restraining order should be denied because the State's claims against the Tribe are barred by the tribal sovereign immunity doctrine. The injunctive relief request should also be denied because the State cannot meet its high burden of demonstrating that it is likely to succeed on the merits, or that it will suffer immediate irreparable harm. The court should also deny the request for extraordinary relief because the balance of circumstances weighs heavily in favor of the Tribe and the public interest would best be served by maintaining the status quo (i.e. allowing the Tribe

to continue with its Class II Indian gaming under federal law) until the merits of the State's claims are decided at a full trial.

B. TRIBAL SOVEREIGN IMMUNITY BARS THE STATE'S CLAIMS.

Among the core aspects of sovereignty that tribes possess is the "common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). The doctrine of sovereign immunity is settled law and, absent congressional authorization or waiver, any suit against a tribe must be dismissed. *See Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 756, 760 (1998) (tribal sovereign immunity applies without distinction between on and off reservation or governmental or commercial activities). The Tribe's sovereign immunity also extends to the SY Gaming Commission as a tribal agency, SYI and SYDC, as arms of the Tribe, and to tribal officials when acting in their official capacities within the scope of their authority. *See e.g. Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269 (9th Cir. 1991); *Linneen v. Gila River Indian Community*, 276 F.3d 489, 492 (9th Cir. 2002); *Allen v. Gold Country Casino*, 464 F.3d 1044 (9th Cir. 2006).

The State claims the Tribe waived its sovereign immunity for the State's "breach of Compact" claim pursuant to Section 9.4 of the Compact and under IGRA pursuant to 25 U.S.C. § 2710(d)(7)(A)(ii). (Complaint at ¶¶ 2, 14, 20, 50). The State alleges that the Tribe's VPN Aided Class II Gaming is unlawful "Class III gaming activities" because it is "accessible" to "persons located outside the Tribe's Indian lands" and is therefore not

"on" Indian lands. (Complaint at ¶¶ 33 - 37). As the Supreme Court recently decided, under such circumstances, IGRA does not authorize the State's suit against the Tribe. *Michigan v. Bay Mills Indian Community*, 572 U.S. ___, 134 S.Ct. 2024, 2032 (2014) (the premise of the state of Michigan's suit is that the tribe's casino is unlawful because it is outside Indian lands, but Section 2710(d)(7)(A)(ii) only abrogates tribal immunity with respect to Class III gaming located *on* Indian lands).

Moreover, as demonstrated herein, the Tribe's VPN Aided Class II Gaming is indeed IGRA Class II bingo with all actual game play conducted on the Tribe's Indian lands. There is no applicable waiver of the Tribe's sovereign immunity from suit because the Compact is inapplicable. The Class II bingo game also does not violate UIGEA. The State cannot proceed with its UIGEA claim against the Tribe in an attempt to usurp the Tribe's sovereignty. UIGEA speaks loud and clear that it is not designed to abrogate lawful tribal gaming activity. Because Congress has not clearly and unequivocally expressed its abrogation of tribal immunity for this purpose, UIGEA cannot be relied upon by the State. *See C & L Enterprises, Inc. v. Citizen Band of Potawatomi Tribe of Oklahoma*, 532 U.S. 411, 418 (2001) (courts will not lightly assume Congress in fact intends to undermine Indian self-government).

C. THE STATE WILL NOT SUCCEED ON THE MERITS OF ITS CLAIMS.

The State cannot meet its high burden of demonstrating that it is likely to prevail on its claims that the Tribe is not permitted pursuant to its sovereign rights and federal

law to conduct Class II bingo gaming on the Tribe's Indian lands via its VPN Aided Class II Gaming. In this respect, the Santa Ysabel Gaming Commission ("SY Gaming Commission") has taken final agency action, in its capacity as the primary regulator of Class II gaming under IGRA, expressly determining that the VPNAPS gaming system may be used as a technologic aid to the play of a Class II game of bingo consistent with tribal gaming regulations and IGRA. (Vialpando Dec. ¶¶ 7-8, Exhibit No. 3 thereto).

The SY Gaming Commission made this regulatory determination pursuant to SYGC Regulation 14-I009, which describes the regulatory requirements for Class II bingo gaming systems and equipment used in connection with bingo games conducted within the boundaries of the Santa Ysabel Indian Reservation, and governs the procedures for approval of such Class II bingo gaming systems. (Vialpando Dec., Exhibit No. 2). Under this tribal regulation, the Classification criteria factors considered by the SY Gaming Commission were whether: (1) the underlying game is a Class II game of bingo; and (2) the equipment used in connection with the game is "an Electronic, Computer or other Technologic Aid." (Vialpando Dec., Exhibit No. 2 at p. 3). Applying applicable legal standards, the SY Gaming Commission specifically found that:

(1) The Offered Games satisfy IGRA's three statutory criteria for bingo and have the attributes for the game of "bingo" required under Regulation SYGC 14-I009; and the Gaming Commission does not consider any Offered Games to be a "house banking game" under IGRA;

(2) The VPNAPS Class II Gaming System components are technologic aids to Class II gaming consistent with tribal gaming regulations and are permitted under IGRA because the components of the gaming system, neither individually nor collectively, incorporate *all* the fundamental characteristics

of a Class III game. Rather the gaming system components all work together in a method that broadens participation levels by allowing many to play against one another. None of the gaming system components allow for an individual to play the Class II game against the "house" (i.e. gaming unit) alone, rather than compete with others. The gaming system used with any Offered Games is functionally the equivalent of an "Electronic Player Station." This is evidenced by the fact that the game is always a bingo-based game played across a linked network of participants – who are competing against each other with different bingo cards against a common ball draw. At no time does the VPNAPS Class II Gaming System allow a single participant to play alone against the ball draw for the game;

(3) The proxy play component of the VPNAPS Class II Gaming System used to conduct the Offered Games is permitted under IGRA, the Tribal Gaming Ordinance and Regulation SYGC 14-1009, and means the gaming is conducted on Indian lands; and

(4) There is no requirement under tribal gaming regulations or IGRA for Account Holders to be physically present on Indian lands at the time they communicate via a secure VPN connection directly with a proxy agent located on Indian lands regarding their service relationship.[3]

---

[3] Contrary to the State's contention concerning the outcome of the *AT&T Corporation v. Coeur d'Alene Tribe* case, the Ninth Circuit provided guidance on this issue in favor of IGRA permitting "off-reservation means of access" to game play conducted on a tribe's Indian lands. In vacating the district court's determination that the tribe's lottery was illegal under IGRA, the Ninth Circuit disagreed for a number of reasons with the district court's conclusion that "IGRA unambiguously requires that a purchaser of a chance in the Lottery be physically present on the reservation in order for the gaming activity to fall within IGRA's preemptive reach." *AT&T Corporation v. Coeur d'Alene Tribe*, 295 F.3d 899, 905 (9th Cir. 2002). The Court first noted that the NIGC considered the lottery's legality as IGRA requires, referencing a letter the NIGC Chairman sent in response to an inquiry about the lottery's legality, in which the NIGC Chairman specifically stated:

> In the opinion of the NIGC, the Tribe's lottery proposal, ***which involves customers purchasing lottery tickets*** with credit cards both in person and ***by telephone from locations both inside and outside the state of Idaho***, is not prohibited by the IGRA.

Id. at 906-908, 902 (emphasis added). Then, in rejecting the argument offered by 37 state attorneys general, the DOJ and even the NIGC under a new Chairman – that the NIGC

Id.

In reaching its final agency action, the SY Gaming Commission stated that it agreed with and adopted the legal analysis and reasoning contained in the Foley Game Play and Gaming System Opinions authored by Tom Foley, former Commissioner and former acting Chairman of the NIGC, which SYI submitted as part of its supporting documentation for the Classification Determination. (Vialpando Dec., Exhibit No. 2 at p. 3).

---

had never interpreted IGRA to allow the lottery's off-reservation features – the Ninth Court found that:

> [T]he NIGC's approval of the tribe's management contract evidences the NIGC's determination that ***IGRA permits operation of the Lottery even though it allows ticket sales via off-Reservation phone calls***.

Id. at 909 (emphasis added).

As noted in the Foley Gaming System Opinion (described below), the NIGC's decision regarding the legality of the Coeur d'Alene Tribe's lottery, which allows the purchase of tickets for the lottery through "the use of telephone and other off-reservation means of access", has never been overturned. In fact, since the Ninth Circuit's decision, the NIGC has again approved the Coeur d'Alene tribal gaming ordinance which expressly permits the use of such "off-reservation means of access" to gaming activities conducted on its Indian lands. *See* February 4, 2010 Approval by NIGC Chairman of Coeur d'Alene Tribal Gaming Ordinance, http://www.nigc.gov/LinkClick.aspx?fileticket=l5U894gPB70%3d&tabid=909 (last visited Nov. 25, 2014).

As the Foley Game Play and Gaming System Opinions highlight, use of a "proxy" play component with Class II gaming does not violate IGRA.[4] Nor does it mean that the game is not Class II bingo because the proxy participant in the game may use an "electronic card minding device" – i.e. a mechanism which tracks the bingo cards being played by the proxy and notifies them if they have achieved a bingo. In fact, both the use of proxy play and the proxy participant's use of devices with hardware and software components that track and cover the card being played have again been recently endorsed by the Bingo Nation Game Advisory Opinion issued by the Acting General Counsel of the National Indian Gaming Commission ("NIGC") on June 27, 2014.[5] As stated in the Bingo Nation Advisory Opinion:

> When the proxy plays the bingo card for the player in Bingo Nation, the act of playing the card is deemed to be the act of the player. ***The legal effect is that the proxy is the player***.

[4] It is noteworthy that nowhere in any of its material submitted in support of its application for injunctive relief does the State inform the court that game play using the VPNAPS is achieved only via "proxy play"; or that the proxy element of the VPNAPS allows the proxy to play the bingo game in real time on behalf of the Account Holder and reveal and report on a time delayed basis to the Account Holder the results of the games previously played on their behalf.

[5] Bingo Nation Advisory Opinion http://www.nigc.gov/LinkClick.aspx?Fileticket=g3tqw7N3jHo%3d&tabid=789 (last visited Nov. 25, 2014). A copy of the advisory is contained in Appendix A, filed concurrently with this Memorandum of Points and Authorities in Opposition. All NIGC "Game Classification Opinions" are available on the NIGC website under the "Reading Room" page.

(Bingo Nation Advisory Opinion at p. 5) (emphasis added). In addition, the Bingo Nation Advisory expressly stated that "the use of bingo minder machines and Reader/Dauber machines [by the proxy player does] not violate the requirement [for meeting the Class II definition of bingo]." (Bingo Nation Advisory Opinion at p. 6). The Bingo Nation Advisory also specifically rejected the contention that "electronic card minding devices" used by a proxy are not technologic aids but rather Class III "electronic or electromechanical facsimiles." (Bingo Nation Advisory Opinion at pp. 7-8).

> The devices satisfy the first element of the definition of [technologic aid] because they assist the player and the proxy player in playing bingo, as well as the operator in the playing of the game. [. . .] [E]ach device assists in the playing of the game or broadens the participation level in Bingo Nation. The devices do not change the fact that players still compete against one another rather than with or against the machine. [. . .] Whether a player wins or loses is determined by the contents of the cards purchased, and whether the numbers on the bingo balls drawn by the bingo blower match the numbers on the bingo card. Therefore, I find that the devices are not electronic or electromechanical facsimiles of bingo.

Id. Consequently, even where a tribe conducts bingo games played by a proxy using an "electric card minding device," all game play is deemed on Indian lands and the game is lawful Class II bingo under IGRA.

Because the SY Gaming Commission has primary authority under IGRA over Class II gaming conducted within the jurisdiction of the Tribe, its final determination that "[c]onducting [VPN Aided Class II Gaming] using the VPNAPS Class II Gaming System **DOES NOT** violate the Tribal Gaming Ordinance, Regulation SYGC 14-1009 or IGRA" must be given great deference under federal law. It is the Tribe and its regulatory agency

– not the State or any of its agents – that have the duty and responsibility to decide how Class II gaming is conducted on its Indian lands. *See* 25 U.S.C. §2701(5) ("Indian tribes have the exclusive right to regulate gaming activity on Indian lands"); 25 U.S.C. §2710(A)(2) ("Any Class II gaming on Indian lands shall continue to be within the jurisdiction of the Indian tribes"); 25 U.S.C. §2710(b)(1) ("An Indian tribe may engage in, or license and regulate, Class II gaming on Indian lands within such tribe's jurisdiction"); 25 U.S.C. §2710(b)(4) (a tribal ordinance may regulate "Class II gaming activities [. . .] on Indian lands").

Consistent with its retention of regulatory authority over tribal gaming activities as provided by IGRA, the Tribe and its gaming regulatory agency adopted a number of legislative and regulatory measures that are expressly applicable to the VPN Aided Class II Gaming and took certain regulatory actions in connection therewith, as described above – none of which are "inconsistent" with IGRA's *unambiguous* provisions[6] or the

[6] Indian law canons of construction have particular relevance when interpreting IGRA to identify the parameters of Indian regulatory authority thereunder. As the Ninth Circuit noted in *Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019 (9th Cir. 2010):

> Mindful of this ignominious legacy [of state governments' antipathy toward tribal interests], Congress enacted IGRA to provide a legal framework within which tribes could engage in gaming—an enterprise that holds out the hope of providing tribes with the economic prosperity that has so long eluded their grasp—while setting boundaries to restrain aggression by powerful states. . . . ***In passing IGRA, Congress assured tribes that the statute would always be construed in their best interests***.

Id. at 1027 (emphasis added).

NIGC's regulations and pronouncements concerning Class II gaming permitted under IGRA.[7] In the end, because the Tribe's VPN Aided Class II Gaming is legal Class II gaming, IGRA completely preempts any state regulation of the VPN Aided Class II Gaming conducted by the Tribe. Therefore, the State's claim that such gaming is unlawful "Class III gaming activities" in violation of the Tribe's Compact will fail.[8]

Likewise, as explained in more detail in the Foley Game Play and Gaming System Opinions, use of the VPNAPS in connection with SYI's VPN Class II Gaming is not prohibited by UIGEA because, among other reasons, such gaming is *lawful* under IGRA. *See generally* Vialpando Dec., Exhibits 4-5. In this respect, the State does not seem to appreciate that UIGEA is only an enforcement act, and did not change the status quo – Indian gaming that is legal under IGRA remains legal after passage of UIGEA. *See* 31 U.S.C. §5361(b) ("[n]o provision of this [Act] shall be construed as ***altering, limiting***, or

---

[7] *See* 25 U.S.C. §2713(d) (Nothing in IGRA precludes an Indian tribe from exercising regulatory authority provided under tribal law over a gaming establishment within the Indian tribe's jurisdiction "***if such regulation is not inconsistent*** with this chapter or any rules or regulations adopted by the Commission") (emphasis added).

[8] If the State believes the Tribe's VPN Aided Class II Gaming is illegal Class III gaming in breach of the Compact it is required to trigger the procedures of the Compact. The State, however, has failed to comply with the procedural requirements of Sections 9.0 and 11.0 of the Compact which pertain to declaratory actions in federal court concerning any alleged dispute over a material breach of the Compact. Specifically, the State was supposed to provide sixty (60) days written notice to cure the alleged breach of the Compact *before* the State could commence a declaratory action. No such notice was ever provided. (Chelette Dec. ¶ 4).

extending any Federal or State law or Tribal-State compact prohibiting, permitting, or regulating gambling within the United States") (emphasis added); *see also* 31 U.S.C. §5365(b)(3)(B) ("No provision of this section shall be construed as altering, superseding, or otherwise affecting the application of the Indian Gaming Regulatory Act").

Based upon the foregoing, it is clear that applicable federal law precludes the State from interfering with the Tribe's VPN Aided Class II gaming or from asserting any civil authority over such gaming. Accordingly, the State cannot, and will not, succeed at trial on the merits of its claims that the Tribe is not permitted pursuant to its sovereign rights and federal law to conduct Class II gaming on the Tribe's Indian lands using VPN Aided Class II Gaming.

D. THE STATE WILL NOT SUFFER IMMEDIATE IRREPARABLE HARM IF THE TRIBE CONTINUES ITS VPN AIDED CLASS II GAMING PENDING TRIAL OF THIS ACTION.

Assuming arguendo that the court was to find it has jurisdiction in this action, it should not find that an "irreparable harm" exists. The State has made no more than a generalized allegation that the Tribe's legal IGRA Class II gaming "offends the State's public policies." The State has not offered any substantive evidence of immediate "irreparable harm" likely to be suffered by the State if the Tribe continues its VPN Aided Class II Gaming while the issues raised by the State in this litigation are decided in the ordinary course. For example, the State claims that it has no adequate remedy at law, but indeed it does have the remedy of a declaratory judgment by the court in the event it can

convince the court at trial – where the parties will have a chance to present factual and expert testimony and other evidence in full – that its claims have merit.

At best, all the State can do is speculate as to possible "immediate" injury, stating that allowing the Tribe to continue with its VPN Aided Class II Gaming during this litigation "may" also "encourage other tribes to begin online gambling in California and elsewhere." (State's Memorandum in Support of Temporary Restraining Order, at p. 19). In this regard, it is best to understand that following *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006) and *Winter v. Natural Resources Defense Council, Inc.* 555 U.S. 7 (2008) any presumptions or categorical rules regarding irreparable harm are disfavored.

In truth, the State's current claim of "irreparable harm" from the Tribe conducting its VPN Aided Class II Gaming rings hollow. It is reminiscent of the unsuccessful claims the State made in the mid-1990's when it sought to delay and derail California tribes from exercising their sovereign authority under IGRA by moving from paper bingo to electronic bingo devices. That technologic advancement in Indian gaming did not "bring down the house" on the State's "good order." Neither will the high-tech leap and innovation represented by the Tribe's VPN Aided Class II Gaming. It simply reflects the natural progression of the continuing technological evolution of Class II gaming, as Congress always intended for the Indian gaming industry.

The State itself has used technologic innovation to its own advantage by authorizing advance deposit wagering for its horseracing industry, which allows a

California resident, without visiting the racetrack, to play the races from anywhere using their computer, tablet or mobile phone. Moreover, a simple online search will reveal that there are multitudes of unregulated non-tribal bingo and gaming sites available to California residents. It appears that the State has directed little, if any, enforcement actions against these unregulated operators. In contrast, the Tribe's VPN Aided Class II Gaming that the State opposes is heavily regulated by tribal law and extensive regulations of the Santa Ysabel Gaming Commission. (Vialpando Dec. ¶¶ 5, 9-10). These tribal regulatory measures fully ensure the integrity of the gaming and protection of the gaming public and are available on the Tribe's website in order to ensure total transparency. The State wants the court to jump to the conclusion that this *regulated* Indian gaming is an automatic "imminent threat" to the State's good order and the "public health, safety and welfare" of its residents while the *unregulated* illegal underground gaming industry in the State continues to proliferate.

In fact, it is the Tribe and its members who will suffer significant immediate irreparable harm if the court issues the quick injunctive relief requested by the State. (Chelette Dec. ¶ 11). SYI will be forced to immediately terminate, eliminate, and/or jeopardize the continued employment of its members, and other nonmembers, whose jobs support the operation of SYI's VPN Aided Class II Gaming. *Id.* The tribal members suffer high levels of unemployment. *Id.* The unemployment rate on the reservation is well above the average for San Diego County. *Id.* The loss of employment will only add to the

Tribe's plight. *Id.* The Tribe, one of the most impoverished in California, with little alternative means of economic development, will immediately lose gaming revenues – which it will never get back. *Id.* The Tribe is counting on the funds from SYI to fund vital Tribal programs, including job training, housing assistance, health care, elder care, senior programs, to improve access to water resources, and to make significant repairs to the Tribe's auditorium and to improve necessary infrastructure. In the first six months alone it is estimated that lost revenues could be in excess of $25,000,000 according to industry projections and forecasts of demand. *Id.* During the time that the Tribe is prohibited from conducting its IGRA gaming it will lose customers it may never get back even if it resumes operation of its VPN Aided Class II Gaming later when the State's claims prove meritless. *Id.*

E. THE BALANCE OF HARDSHIPS WEIGHS DECISIVELY IN FAVOR OF THE TRIBE.

As described above, the State cannot, and will not succeed on the merits of its claims. Under its sovereign authority and IGRA, the Tribe has regulatory authority for Class II gaming. The Tribe's VPN Aided Class II Gaming causes no harm to the State because it is legal IGRA Class II gaming, and the State's intrusion into the Tribe's sovereignty and its right to conduct Class II gaming is considerably greater than any hardship to be suffered by the State without the injunctive relief. Certainly, the State's asserted sovereignty interests are not greater than the sovereignty interests the Tribe has at stake. *See Seneca-Cayuga Tribe of Oklahoma v. Oklahoma*, 874 F.2d 709, 716 (10th

Cir. 1989) (upholding an injunction against the state on grounds that the state's attempted intrusion into the tribe's Class II gaming interests constituted irreparable injury due to the threatened loss of revenues and jobs associated with the "prospect of significant interference with [tribal] self-government").

In light of the harm to be suffered by the Tribe and the impairment of the Tribe's regulatory powers and sovereign rights, the balance of hardships weighs decisively in favor of the Tribe.

F. THE PUBLIC INTEREST SUPPORTS DENYING IMMEDIATE INJUNCTIVE RELIEF.

Granting the requested immediate injunctive relief would not serve the public interest. Quite the opposite, there is a strong public interest in upholding established federal law – the Tribe's sovereign right to conduct Class II bingo games on its Indian lands and pursuant to its regulatory authority for IGRA Class II gaming. At the very least the public interest favors a full examination of the technical and legal issues involved with the Tribe's VPN Aided Class II Gaming without a rush to judgment.

IV. Conclusion

The court should deny in its entirety the State's Rule 65 motion. The facts provide compelling evidence that the Tribe's VPN Aided Class II Gaming is indeed IGRA Class II bingo with all game play conducted on the Tribe's Indian lands. The defendants are immune from this action because no applicable waiver of sovereign immunity from suit exists in this matter. Moreover, if the court were to find it has jurisdiction, immediate injunctive relief is not warranted because the State will not suffer immediate irreparable

harm. The balance of equities tips strongly in favor of the Tribe.

Dated: November 25, 2014

/s/ Little Fawn Boland

Little Fawn Boland (CA No. 240181)
Ceiba Legal, LLP
35 Madrone Park Circle
Mill Valley, CA 94941
Phone: (415) 684-7670 ext. 101
Fax: (415) 684-7273
littlefawn@ceibalegal.com

In Association With
Pro Hac Vice Application to be Filed
Kevin C. Quigley (MN No. 0182771)
Hamilton Quigley & Twait, PLC
W1450 First National Bank Building
332 Minnesota Street
St. Paul, MN 55101
Phone: (651) 602-6262
Fax: (651) 602-9976
kevinquigley@pacemn.com

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 November 25, 2014, I electronically filed the foregoing with the Clerk of the Court using the ECF system.

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO STATE OF CALIFORNIA'S APPLICATION FOR A TEMPORARY RESTRAINING ORDER

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. Torgren
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 November 25, 2014 in Mill Valley, California.

By: /s/ Little Fawn Boland
LITTLE FAWN BOLAND
CEIBA LEGAL, LLP
35 Madrone Park Circle
Mill Valley, California 94941
Telephone: (415) 684-7670 ext. 101
Facsimile: (415) 684-7273