

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

)	Case No. C 13-1537 SC
)	
IBiz, LLC,)	ORDER GRANTING IN PART AND
)	DENYING IN PART PLAINTIFF'S
Plaintiff,)	MOTION FOR PRELIMINARY
)	<u>INJUNCTION</u>
v.)	
)	
City of Hayward,)	
)	
Defendant.)	

I. INTRODUCTION

Now before the Court is Plaintiff IBiz, LLC's ("Plaintiff") motion for a preliminary injunction against Defendant City of Hayward ("Defendant" or "City"). ECF No. 19 ("Mot."). The case is related to No. 13-1212 (the "Net Connection Case"), and the parties often incorporate documents from that case into their papers. ECF Nos. 20 ("Opp'n"), 32 ("Reply"). Concurrently with this Order, the Court issued an order denying Net Connection's motion for a preliminary injunction in the Net Connection Case. Net Connection Case, ECF No. 54 ("Net Connection Order"). The Court incorporates its findings from the Net Connection Order into this one.

The parties also agreed to have this motion determined without

1 oral argument,¹ and the Court finds that decision appropriate per
2 Civil Local Rule 7-1(b). For the reasons explained in this Order,
3 the Court GRANTS Plaintiff's motion for a preliminary injunction
4 and enters an injunction, detailed below.

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6 **II. BACKGROUND**

7 The following facts are taken from the parties' briefs and
8 accompanying declarations and requests for judicial notice, which
9 the Court grants under Federal Rule of Evidence 201. The parties
10 also incorporate some facts from the Net Connection Case, and since
11 the two cases are so similar, the Court often refers to its Order
12 discussing that case's more extensive record.

13 Plaintiff describes itself as an Internet café and business
14 center, located in downtown Hayward. Mot. at 3-4. (The Court
15 refers to Plaintiff's physical location as "IBiz Hayward"). Its
16 business is very much like Net Connection's: it sells computer
17 rental time, which includes Internet access and an array of
18 computer-based programs and services. See Net Connection Order at
19 2-3. Also like Net Connection, Plaintiff uses a promotional
20 sweepstakes program to promote its services. Mot. at 4-5; Net
21 Connection Order at 3-4.

22 While Plaintiff does not fully describe the process through
23 which it obtained a business license from Defendant, the parties
24 agree that Plaintiff somehow obtained one and that the situation is
25 almost identical to Net Connection's. See Mot. at 7-8; Opp'n at
26 19-21; Net Connection Order at 5-7. In other words, Plaintiff

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¹ The Court did hold a two-day hearing on the preliminary
injunction in the Net Connection Case.

1 applied for and obtained a license through the usual channels, as
2 Net Connection did, and the Court presumes that this means
3 Plaintiff's business license was also approved from a land use
4 perspective. See Net Connection Order at 5-7, 18-20.

5 Plaintiff is located in Hayward and is therefore subject to
6 the same zoning laws and regulations as Net Connection. Its case
7 is therefore based on two ordinances that Defendant enacted between
8 February and April 2013. The first is Ordinance No. 13-03, which
9 was an interim urgency ordinance adopted on February 20, 2013 under
10 California Government Code section 65858. See Net Connection Order
11 at 10. The second is Ordinance No. 13-05, which is an extension of
12 Ordinance No. 13-03 that the City Council unanimously adopted on
13 April 2, 2013 after providing notice on March 22 and a hearing on
14 April 2. ECF No. 18 ("Pl.'s RJN") Ex. 2 ("Ordinance No. 13-05");
15 see also Net Connection Order at 10-12.²

16 Ordinance No. 13-05, the extended Ordinance and the operative
17 law at this point, has several relevant parts. First, Ordinance
18 No. 13-05 defines "Computer Gaming and Internet Access Businesses"
19 as follows:

20 . . . [A]n establishment that provides one
21 or more computers or other electronic
22 devices for access to the World Wide Web,
23 Internet, e-mail, video games or computer
24 software programs that operate alone or
25 networked (via LAN, WAN, wireless access or
26 otherwise) or that function as a
client/server program, and which seeks
compensation or reimbursement, in any form,
from users. "Computer Gaming and Internet
Access Business" shall also be synonymous
with a personal computer ("PC") café,

27 ² The parties often refer to the two Ordinances, Nos. 13-03 and 13-
28 05, collectively. The Court occasionally does the same, though the
operative Ordinance here is Ordinance No. 13-05, and the Court
cites that Ordinance specifically when it is important to do so.

1 Internet café, cyber café, sweepstakes
2 gaming facilities, business center, Internet
3 sales business and Internet center with
Internet sweepstakes-type games

4 Ordinance No. 13-05 at 5.

5 The moratorium's scope, as to Computer Gaming and Internet
6 Access Businesses, is set out here:

7 . . . [F]rom and after the effective date of
8 this Ordinance, no permit or any other
9 applicable license or entitlement for use,
10 including but not limited to, the issuance
11 of a business license, business permit,
12 building permit, use permit or zoning text
13 amendment shall be approved or issued for
the establishment or operation of Computer
Gaming and Internet Access Businesses in the
City of Hayward. Additionally, Computer
Gaming and Internet Access Businesses are
hereby expressly prohibited in all areas and
zoning districts in the City.

14 Id.

15 Ordinance No. 13-05 also declares Computer Gaming and Internet
16 Access Businesses to be nuisances:

17 The establishment, maintenance or operation
18 of a Computer Gaming and Internet Access
19 Business as defined herein with[in] the City
20 limits of the City of Hayward is a public
21 nuisance. Violations of this Ordinance may
22 be enforced by any applicable law, including
but not limited to injunctions,
administrative citations or criminal
penalties.

23 Id. at 6.

24 On April 5, 2013, shortly after the Court entered a temporary
25 restraining order for Net Connection, Net Connection Case ECF No.
26 13, Plaintiff sued Defendant, and one week later it amended its
27 complaint. ECF Nos. 1 ("Compl"), 5 ("FAC"). The Court related
28 this case to the Net Connection Case on April 15, 2013, and on May

1 7, 2013, Plaintiff moved for a preliminary injunction.

2 In Plaintiff's FAC, it asserts nine causes of action against
3 Defendant:

- 4 (1) violation of procedural due process;
5 (2) violation of substantive due process;
6 (3) violation of equal protection based on
the Ordinance;
7 (4) violation of equal protection based on
allegedly discriminatory enforcement of the
8 California lottery statute, Cal. Pen. Code §
319;
9 (5) a facial challenge to Ordinance No. 13-
03 based on an alleged violation of the
10 First Amendment and the California
Constitution's free speech provisions;
11 (6) injunctive relief prohibiting
Defendant's enforcement of California's slot
12 machine and lottery statutes, Cal. Pen. Code
§§ 330a, 330b, 330.1 (slot machine
13 statutes), 319 (lottery statute);
14 (7) in the alternative, injunctive relief
prohibiting threatened ex parte mass
15 seizures of Plaintiff's computers;
16 (8) declaratory judgments that Plaintiff's
operation of business is permissible or a
17 legal nonconforming use, and that its
sweepstakes software is legal and
permissible under California law; and
18 (9) petition for a writ of mandate and
stay.

19 Compl. ¶¶ 37-125.

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21 **III. LEGAL STANDARD**

22 A plaintiff seeking a preliminary injunction must establish
23 (1) that it is likely to succeed on the merits, (2) that it is
24 likely to suffer irreparable harm absent preliminary relief, (3)
25 that the balance of equities tips in its favor, and (4) that an
26 injunction is in the public interest. Winter v. Natural Resources
27 Defense Council, Inc., 555 U.S. 7, 20 (2008).

28 The Ninth Circuit has formulated a version of the preliminary

1 injunction test in which "serious questions going to the merits"
2 and a balance of hardships tipping toward the plaintiff can support
3 the issuance of a preliminary injunction, so long as there is a
4 likelihood of irreparable injury and the injunction is in the
5 public interest (that is, so long as the plaintiff makes a showing
6 on all four prongs of the Winter test). See Alliance for the Wild
7 Rockies v. Cottrell, 632 F.3d 1127, 1131-33 (9th Cir. 2011). In
8 other words, under this formulation, a stronger showing under one
9 factor could offset a weaker showing for another, but a plaintiff
10 must still satisfy every Winter factor. Id. at 1135.

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12 **IV. DISCUSSION**

13 **A. Claims 1-4, 8, and 9**

14 Plaintiff's Claims 1-4, 6, 8, and 9 are virtually identical to
15 the claims at issue in the Net Connection Case. The Court will not
16 restate what it explained at length in the Net Connection Order,
17 because the Court finds no material differences in the facts or law
18 that the parties discuss in this case.

19 The Court adopts its findings and reasoning from the Net
20 Connection Order and finds that Plaintiff has failed to show a
21 likelihood of success on Claims 1-4, 8, or 9 in its FAC, since, in
22 summary, (1) Defendant did not act ultra vires, arbitrarily, or
23 unreasonably in enacting the Ordinances or declaring Defendant's
24 business a nuisance; (2) Defendant did not deny Plaintiff
25 procedural due process; (3) Defendant did not violate Plaintiff's
26 right to equal protection; and (4) the Court need not address any
27 of Plaintiff's arguments about the California lottery or slot
28 machine statutes, since a decision on those issues would not

1 resolve any actual controversies and would result in the Court
2 making an impermissible advisory ruling and deciding unnecessary
3 issues of state law. See Net Connection Order at 15-33.

4 **B. Claims 5-7**

5 Plaintiff's Claims 5, 6, and 7 are not addressed in the Net
6 Connection Order. Claim 5 is a First Amendment challenge to the
7 Ordinance. Claims 6 and 7 request that the Court enjoin certain
8 types of ex parte or summary mass seizures of computers from
9 Plaintiff.

10 **i. Plaintiff's First Amendment Claim**

11 Plaintiff alleges that the Ordinance is facially invalid
12 because it violates the First Amendment and California Constitution
13 Article 1, section 2(a). FAC ¶¶ 72-80. Plaintiff argues that the
14 Ordinance imposes an overbroad prohibition on any establishments
15 that provide, in exchange for any form of consideration, Internet
16 access via any type of computer or electronic device. Plaintiff
17 contends that such a ban is as patently unconstitutional as a ban
18 on a bookstore or library, since providing access to the Internet
19 is an expressive activity related to the provision of communication
20 services and information. Mot. at 18-19. Plaintiff seeks to
21 assert its own First Amendment rights as well as those of parties
22 not before the Court, including other business owners and
23 customers. Id.

24 The Court must determine whether Plaintiff is able to bring a
25 facial challenge to the Ordinances before it can decide whether the
26 Ordinances violate the First Amendment. Courts are ordinarily
27 reluctant to entertain facial challenges to laws because of the
28 risks involved with potentially adjudicating the rights of parties

1 not before the court. Brockett v. Spokane Arcades, Inc., 472 U.S.
2 491, 503 (1985). However, this reluctance is somewhat diminished
3 in the First Amendment context because of the concern that "those
4 who desire to engage in legally protected expression . . . may
5 refrain from doing so rather than risk prosecution or undertake to
6 have the law declared partially invalid." Id.; see also, e.g.,
7 Massachusetts v. Oakes, 491 U.S. 576, 381 (1989); Roulette v. City
8 of Seattle, 97 F.3d 300, 303 (9th Cir. 1996); cf. Broadrick v.
9 Oklahoma, 413 U.S. 601, 612-13 (1973)) (holding that facial
10 challenges were narrowly permissible when the challenged laws
11 sought to regulate spoken words or expressive or communicative
12 conduct). This exception to the general rule that a litigant only
13 has standing to vindicate his own constitutional rights is called
14 the overbreadth doctrine. Members of the City Council of L.A. v.
15 Taxpayers for Vincent, 466 U.S. 789, 796-99 (1984).

16 Out of concern for the risk that the overbreadth doctrine
17 might allow a standing exception to swallow the general rule, the
18 Supreme Court has directed courts to weigh "the likelihood that the
19 statute's very existence will inhibit free expression." Id. at
20 799. When conduct rather than speech is involved, a statute's
21 overbreadth "must not only be real, but substantial as well, judged
22 in relation to the statute's plainly legitimate sweep." Id. at 799
23 (quoting Broadrick, 413 U.S. at 615) (internal quotation marks
24 omitted). Under this standard, for a challenge to be permissible
25 under the overbreadth doctrine, the challenged law "must have a
26 close enough nexus to expression, or to conduct commonly associated
27 with expression, to pose a real and substantial threat of the
28 identified censorship risks." City of Lakewood v. Plain Dealer

1 Publ'g Co., 486 U.S. 750, 760 (1988); see also Roulette, 97 F.3d at
2 305.

3 Defendant argues that Plaintiff has not shown a realistic
4 danger that the Ordinance will significantly compromise the First
5 Amendment interests of parties not before the Court, because there
6 is no evidence that Computer Gaming and Internet Access Businesses
7 are the only means for people to engage in First Amendment-
8 protected activity like accessing the Internet. Opp'n at 28.
9 Defendant adds that because Plaintiff charges for its services, the
10 Court should be less inclined to find that Plaintiff's business is
11 protected by the First Amendment. Id. Plaintiff responds that it
12 can bring this challenge because it is seeking both to assert its
13 own rights and to challenge the statute's applicability to other
14 parties. Reply at 3-4. Plaintiff also states that charging for
15 its services is irrelevant under the First Amendment. Id.

16 Ordinance No. 13-05 concerns conduct, not expression itself.
17 By its terms, it concerns any "establishment that provides one or
18 more computers or other electronic devices for access to the World
19 Wide Web, Internet, e-mail, video games or computer software
20 programs that operate alone or networked . . . or that function as
21 a client/server program, and which seeks compensation or
22 reimbursement, in any form, from users." Ordinance No. 13-05 at 5.
23 It states that all such establishments, defined as "Computer Gaming
24 and Internet Access Businesses" in the Ordinance, are summarily
25 prohibited from operating in Hayward, and that all future licenses
26 or permits relating to such businesses are to be denied. Id. It
27 also declares these businesses to be nuisances. Id. at 5-6.
28 Therefore, the conduct in question is -- generally speaking -- the

1 provision of access to computers and electronic devices for just
2 about any reason whatsoever, in exchange for any type of
3 consideration. See id.

4 The Court must consider whether this sort of conduct, the only
5 conduct that the Ordinance is designed to impair, "is commonly
6 associated with expression" such that the Ordinance's existence
7 poses a risk to free expression. City of Lakewood, 486 U.S. at
8 760; Broadrick, 413 U.S. at 615; Roulette, 97 F.3d at 305. The
9 Court finds that it is. The Ordinance is similar to the ordinance
10 addressed in City of Lakewood, 486 U.S. at 760-61, which gave a
11 city's mayor the authority to grant or deny permits for newspaper
12 racks and was found to be directed at expressive conduct. It is
13 less like the ordinance at issue Roulette, 87 F.3d at 305, which
14 banned sitting and lying on public sidewalks under certain
15 conditions and was found not to concern typically expressive
16 conduct. Like the provision of newspaper racks in a city, the
17 provision of access to the Internet and computers is conduct that
18 might not carry a message itself but is nevertheless closely
19 related to expression. The Supreme Court has affirmed that the
20 Internet is subject to the same First Amendment scrutiny as print
21 media, suggesting that providing access to the Internet would be
22 associated with expression:

23 This dynamic, multifaceted category of
24 communication includes not only traditional
25 print and news services, but also audio,
26 video, and still images, as well as
27 interactive, real-time dialogue. Through
28 the use of chat rooms, any person with a
phone line can become a town crier with a
voice that resonates farther than it could
from any soapbox. Through the use of Web
pages, mail exploders, and newsgroups, the
same individual can become a pamphleteer.

1 As the District Court found, "the content on
2 the Internet is as diverse as human
3 thought." We agree with its conclusion that
4 our cases provide no basis for qualifying
5 the level of First Amendment scrutiny that
6 should be applied to this medium.

7 Reno v. ACLU, 521 U.S. 844, 870 (1997); see also Bernstein v. U.S.
8 Dep't of State, 974 F. Supp. 1288, 1305-06, 1308 (N.D. Cal. 1997)
9 (finding encryption software associated with expression).

10 Moreover, Internet access aside, the Ordinance prohibits
11 charging for access to "video games or computer software programs
12 that operate alone or networked," which encompasses a range of
13 activities far beyond the sweepstakes promotions that Plaintiff
14 purports to target here. Many of these computing activities are
15 obviously associated with expression, like word processing programs
16 and slideshow software. See Tr. at 53; Ordinance No. 13-05 at 5.
17 The Ordinance excludes "Public Use or Internet Learning Centers"
18 like schools, libraries, and nonprofits from its coverage, but
19 there are no other exceptions or amortizations in the Ordinances.
20 See Ordinance No. 13-05 at 5-6. The Ordinance therefore sweeps
21 broadly, covering a range of expression-related conduct.

22 Defendant's arguments that the Ordinance was meant to target only
23 sweepstakes providers suggests that it could have been much
24 narrower.

25 Further, operation for profit has no effect on First Amendment
26 protection. Bookstores, movie theaters, and newsstands all operate
27 for profit and are undisputedly protected under the First
28 Amendment. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-02
(1952). Moreover, it makes no difference that the conduct here is
the provision of access to means of expression, as opposed to the

1 expression itself (or even the consumption of it). It is enough
2 that the prohibition targets only conduct commonly associated with
3 expression. City of Lakewood, 486 U.S. at 760; Roulette, 97 F.3d
4 at 305. The Court finds that the Ordinance is subject to First
5 Amendment scrutiny.

6 **a. Content-Neutral Restrictions on Speech**

7 The fact that conduct implicates or is associated with First
8 Amendment interests does not mean that the government cannot
9 regulate it. The question under the First Amendment is whether
10 restrictions on conduct closely associated with expression are
11 justified without reference to the content of the regulated speech,
12 narrowly tailored to serve a significant governmental interest, and
13 leave open ample alternative channels for communicating the
14 information. Ward v. Rock Against Racism, 491 U.S. 781, 790-91
15 (1989). Ordinance No. 13-05 is content-neutral, since it applies
16 regardless of whether (for example) the computer or device in
17 question is used to operate a sweepstakes promotion or to read a
18 news article. See Ordinance No. 13-05 at 5; see also Ward, 491
19 U.S. at 791-92 (content neutrality is evaluated in reference to
20 whether the government is targeting specific content). Therefore
21 the Court must consider (1) what Defendant's interests are, and
22 whether they are significant; (2) whether the Ordinance is narrowly
23 tailored to effect those interests; and (3) whether there are
24 alternative forums for expression in this case. See Ward, 491 U.S.
25 at 791.

26 **1. Defendant's Interests**

27 Defendant adopted the Ordinances to promote the public health,
28 safety, and welfare of Hayward by pausing development of certain

1 types of new businesses, especially those providing sweepstakes,
2 whose legality and effect on Hayward remains undetermined. See
3 Ordinance No. 13-05 at 1-4; Ordinance No. 13-03 at 1-2. Defendant
4 also wanted to avoid inviting problems it observed in other cities
5 from arising in Hayward. Id. Considerations like these are valid,
6 laudable government objectives, and cities have broad police powers
7 to effect these ends. See Heffron v. Int'l Soc'y for Krishna
8 Consciousness, Inc., 452 U.S. 640, 649-51 (1981); see also Thain v.
9 City of Palo Alto, 207 Cal. App. 2d 173, 187 (Cal. Ct. App. 1962).
10 Defendant's interest in ensuring that Hayward is home to safe
11 citizens and lawful businesses is significant, and the Court does
12 not find Defendant's reasons pretextual or unsupported by
13 reasonable considerations.

14 **2. Narrow Tailoring**

15 However, even though Defendant's interest is substantial, the
16 Ordinance is not narrowly tailored. Ward, 491 U.S. at 798. To be
17 "narrowly tailored," an ordinance need not be the least intrusive
18 means of achieving an end. Id. But it may not burden
19 "substantially more speech than necessary" to reach that end, and
20 it may not "regulate expression in such a manner that a substantial
21 portion of the burden on speech does not serve to advance [a
22 municipality's] goals." Id. at 799-800. Further, if there are
23 numerous and obvious less-burdensome alternatives, those options
24 may factor into a court's consideration of whether the fit between
25 ends and means is reasonable. See Cincinnati v. Discovery Network,
26 Inc., 507 U.S. 410, 417 n.13 (1993); Project 80's, Inc. v. City of
27 Pocatello, 942 F.2d 635, 638 (9th Cir. 1991).

28

1 if they expect compensation or reimbursement. Id. This cuts off
2 alternative channels of communication both for businesses that want
3 to provide computer- or Internet-related services for their
4 customers, and for customers who would otherwise have had access to
5 those services.

6 **b. Conclusion as to Plaintiff's First Amendment**
7 **Claim**

8 Largely because of the Ordinances' overbroad scope,
9 Plaintiff's facial challenge to the Ordinances succeeds. The Court
10 finds that Ordinance No. 13-05's "Scope" section, Paragraph 1 of
11 the "Definitions" section, and all of Section 4 are
12 unconstitutional under the First Amendment. There is no reasonable
13 limiting construction to the terms of the Ordinances: this is not a
14 case of statutory interpretation in which one reading of an
15 ordinance could rescue it from unconstitutionality. See Broadrick,
16 413 U.S. at 613.

17 However, as Defendant notes, application of the overbreadth
18 doctrine is "strong medicine," and Ordinance No. 13-05 (again, the
19 operative law in this case since it extended Ordinance No. 13-03)
20 includes a severability clause. Ordinance No. 13-05 at 6 ("If any
21 section, subsection, sentence, clause or phrase of this Ordinance
22 is for any reason held to be invalid or unconstitutional, such
23 decision shall not affect the validity of the remaining portions of
24 this ordinance."). Such a clause could normally rescue a law even
25 absent a narrowing construction. See Brockett, 472 U.S. at 506.
26 The problem is that the invalid portions of the Ordinance leave the
27 Ordinance with no meaning at all. It would cover nothing and do
28 nothing. Redrafting the Ordinance with a narrower scope -- for

1 example, one seeking to govern the specific type of harmful
2 activity that Defendant's findings and arguments seem to address --
3 could rescue the Ordinance, but the Court will not assume the
4 legislature's role here. A clearer and fairer result would be for
5 Defendant to amend the Ordinance.

6 The Court finds, as discussed above, that Plaintiff has shown
7 likelihood of success under its First Amendment claim because it
8 has shown that the Ordinance is overbroad.

9 The Court also finds that Plaintiff would suffer irreparable
10 harm to its First Amendment rights absent a preliminary injunction,
11 since the constitutional claim is tightly connected with the
12 deprivation of rights that Plaintiff fears. Goldies' Bookstore,
13 Inc. v. Super Ct. of Cal., 739 F.2d 466, 472 (9th Cir. 1984) ("An
14 alleged constitutional infringement will often alone constitute
15 irreparable harm.").

16 Accordingly, the balance of equities tips toward Plaintiff
17 here, since Defendant has not shown that it has suffered any harm
18 as a result of Plaintiff's First Amendment-protected activities,
19 while Plaintiff could suffer the loss of its constitutional rights.
20 See id.

21 Finally, the Court finds that issuance of an injunction is in
22 the public interest in this case. The public interest in upholding
23 First Amendment principles is great; the enforcement of an
24 ordinance that violates the First Amendment would infringe the
25 rights of many members of the public not currently before the
26 Court; and Defendant has shown no harm to itself commensurate with
27 the broad prohibition on expression it has imposed. See Sammartano
28 v. First Jud. Ct. for Cnty. of Carson City, 303 F.3d 959, 974 (9th

1 Cir. 2002). Plaintiff has therefore fulfilled all of the Winter
2 factors. 555 U.S. at 20.

3 Therefore the Court GRANTS Plaintiff's motion for a
4 preliminary injunction on First Amendment grounds. This injunction
5 prohibits Defendant from enforcing the Ordinance to Computer Gaming
6 and Internet Access Businesses, as presently written, against any
7 Computer Gaming and Internet Access Business. It does not enjoin
8 the enforcement of other laws or regulations. The Court finds that
9 Plaintiff need not post a bond for this injunction, since
10 maintaining the status quo will not burden Defendant. See
11 Barahona-Gomez v. Reno, 167 F.3d 1228, 1237 (9th Cir. 1999).

12 **c. Plaintiff's Request for Injunctive Relief of**
13 **Threatened Summary or Ex Parte Seizures**

14 Plaintiff also requests that the Court enjoin threatened
15 summary or ex parte mass seizures of Plaintiff's computers. Compl.
16 ¶¶ 76-91. Specifically, Plaintiff asks for injunctions covering
17 both threatened seizures that would violate the First Amendment,
18 per the discussion above, as well as seizures pursuant to the state
19 summary seizure and gambling laws, Penal Code sections 330a, 330b,
20 331.1, 319, and 335a.

21 Plaintiff bases this request on the cease-and-desist letters
22 it received from Defendant, which state that Defendant will take
23 "any and all legal actions necessary" to prevent Plaintiff from
24 operating its business and sweepstakes promotion, including
25 "seizure and sale of all equipment use to aid, abet, or maintain
26 the nuisance," in reference to the Ordinances' nuisance section.
27 Mot. at 19. Defendant responds that it has made no threats under
28 Penal Code section 335a ("Section 335a"), which covers the seizure

1 and destruction of lottery or gambling devices. Opp'n at 29.
2 Defendant specifies that in referring to seizures and sales in its
3 cease-and-desist letters, it meant only the types of remedies a
4 court might impose upon Plaintiff. Id. Defendant does not address
5 Plaintiff's request for an injunction of seizures that would
6 violate the First Amendment, presumably because Defendant contends
7 (as discussed above) that the Ordinance is constitutional. In its
8 reply, Plaintiff asserts that Defendant's focus on Section 335a is
9 duplicitous, since Defendant's cease-and-desist letters promised
10 that Defendant would use all available remedies. Reply at 6.
11 Plaintiff therefore asks for a blanket prohibition on all summary
12 or ex parte mass seizures. Id.

13 First, the Court notes again that in neither this Order nor
14 the Net Connection Order does it make any finding about whether
15 Plaintiff's sweepstakes promotion or any other violates state law.
16 The posture of these cases does not properly raise the issue.
17 However, since Defendant claims that Section 335a is not at issue
18 at this point, the Court will hold it to its word and enjoin
19 Section 335a seizures for the purpose of preserving the status quo
20 until the parties are able to articulate how the Court is to reach
21 the issue of the sweepstakes promotions' legality, or until the
22 parties obtain some other judicial determination of that matter.

23 Second, the Court notes that in accordance with its findings
24 on the First Amendment in Section IV.a-b, supra, the Ordinance is
25 overbroad and cannot be enforced as written. Accordingly, the
26 Court enjoins Defendant from undertaking any mass seizures under
27 the Ordinance, though as Plaintiff notes, carefully limited
28 seizures that do not deprive customers of computer and Internet

1 access might not violate the First Amendment. Compl. ¶ 80. That
2 narrow allowance may be subject to an adversarial hearing on
3 probable cause, which is not yet an issue before the Court.

4 Finally, the Court declines to grant Plaintiff's request that
5 the Court enjoin enforcement of the state lottery and slot machine
6 laws, Cal. Pen. Code §§ 330a, 330b, 331.1, 319. These criminal
7 laws are separate from the Ordinance, and questions of their
8 validity and enforcement are not before the Court at this time.

9

10 **V. CONCLUSION**

11 As explained above, the Court GRANTS Plaintiff IBiz, LLC's
12 motion for a preliminary injunction on First Amendment grounds, and
13 also enters the limited injunctions concerning seizures as
14 described above. Plaintiff's other grounds for a preliminary
15 injunction are insufficient as discussed in the Net Connection
16 Order, and to the extent that Plaintiff's motion is based on those
17 claims, it is DENIED.

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1 Defendant City of Hayward and its agents, servants, employees,
2 and all persons in active concert and participation with them who
3 receive actual notice of this injunction are hereby restrained and
4 enjoined from enforcing City Ordinance No. 13-05, as presently
5 written, against any Computer Gaming and Internet Access Business,
6 and from instituting any summary or ex parte mass seizures of First
7 Amendment-protected material in relation to the Ordinance,
8 including seizures pursuant to California Penal Code section 335a.
9 This injunction does not limit narrow seizures that do not violate
10 the First Amendment, and it does not enjoin the enforcement of
11 state criminal laws, including California Penal Code sections 330a,
12 330b, 331.1, and 319.

13 Plaintiff has the responsibility to serve the injunction in
14 such a manner to make it operative in contempt proceedings.
15

16 IT IS SO ORDERED.

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18 Dated: July 18, 2013



UNITED STATES DISTRICT JUDGE

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