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THE CITY OF RICHMOND

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

THE GUIDIVILLE RANCHERIA OF CALIFORNIA, a federally recognized Indian tribe; and UPSTREAM POINT MOLATE LLC, a California Limited Liability Corporation,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA; SALLY JEWELL, the Secretary of the Department of the Interior; KEVIN WASHBURN, the Assistant Secretary – Indian Affairs; and THE CITY OF RICHMOND, a California Municipality,

Defendants.

Caption continues next page

Case No. CV 12-1326-YGR

THE CITY OF RICHMOND'S REPLY IN SUPPORT OF ITS MOTION FOR JUDGMENT ON THE PLEADINGS

Date: July 9, 2013
Time: 2:00 p.m.
Place: Ronald V. Dellums Federal Building, 1301 Clay Street, Oakland, CA

The Honorable Yvonne González Rogers

THE CITY OF RICHMOND, a California Municipality, Counterclaimant, v. UPSTREAM POINT MOLATE LLC, a California Limited Liability Corporation, Counterclaim Defendant.	

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INTRODUCTION

Plaintiffs' voluminous opposition misses a simple point: The LDA could not, *as a matter of law*, have "contracted away" the City's future authority to approve or deny any particular project, including a Casino Project. A local agency is prohibited from committing to a project before it reviews the project under the California Environmental Quality Act (CEQA), and no such review was completed prior to execution of the LDA and its amendments. Moreover, under California law, a contract must meet the specific statutory criteria for a "development agreement" in order to contract away a City's future decision-making authority. The LDA (unlike the "development agreement" in *Mammoth* on which Plaintiffs stake their claim) did not meet those criteria. Far from promising that the City would "Go-Casino," the LDA *expressly reserved* the City's discretion to proceed with "No-Casino" following CEQA review. LDA § 2.2(a). Indeed, in order to settle the CESP lawsuit, Upstream and the City *confirmed* in the Settlement Agreement that no decision to "Go Casino" had been made. *See* City's Req. for Judicial Notice, Ex. A ¶ 1(a), Dkt No. 114.01 ("Settlement Agreement")

Rather than focusing on the plain terms of the LDA and Settlement Agreement, Plaintiffs offer an avalanche of paper, and ask the Court to sift through it to discern in hindsight the "true" intentions of the contracting parties. Plaintiffs' submissions, which far exceed the scope of what can be considered on this motion, cannot overcome the controlling contractual terms themselves. Plaintiffs make a mighty effort, for example, to show the City Council's shift from "Go-Casino" to "No-Casino." But the LDA did nothing to foreclose this outcome—indeed, to be lawful, the LDA had to reserve the City's full discretion under CEQA. Plaintiffs cannot invoke the covenant of good faith and fair dealing to imply limits on that discretion or collaterally attack the validity of the CEQA determination. Nor can Plaintiffs claim that the LDA was illusory when it required the City to keep Point Molate exclusively available to Plaintiffs for some seven years. And finally, because the LDA is not illusory, Plaintiffs cannot rely on quasi-contractual remedies such as quantum meruit or unjust enrichment to seek relief. In short, Plaintiffs' claims fail as a matter of law. The Court should grant the City's Motion for Judgment on the Pleadings.

ARGUMENT

I. PLAINTIFFS' RELIANCE ON EXTRINSIC FACTUAL ALLEGATIONS AND EVIDENCE IS IMPROPER.

The City is seeking judgment on the pleadings. When deciding a motion for judgment on the pleadings, "a court may consider only allegations made in the complaint and the answer; extrinsic factual material may not be taken into account." *Qwest Commc'ns Corp. v. City of Berkeley*, 208 F.R.D. 288, 291 (N.D. Cal. 2002) (citations omitted). Yet, Plaintiffs' reliance on their own pleadings is sparse to nonexistent. Instead, in an attempt to rewrite the Third Amended Complaint ("TAC"), Dkt No. 91, Upstream seeks judicial notice of hundreds of extrinsic documents. While the Court can take judicial notice of extrinsic documents on a motion for judgment on the pleadings, these materials may not be considered for the truth of the matters asserted therein. *See Lee v. City of L.A. s*, 250 F.3d 668, 688-89 (9th Cir. 2001); (City's Opposition to Request for Judicial Notice).[1]

Even if the documents are judicially noticeable, the time for Plaintiffs to settle on a theory of the case and generally set forth "enough facts to state a claim to relief that is plausible on its face" was in their initial complaint (or their first, second, or third amended one), not in their opposition to the City's motion for judgment on the pleadings. *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 570 (2007); *see Schneider v. Cal. Dep't of Corr.*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998) (holding that the court may not consider additional facts asserted in opposition to a motion to dismiss because they are not part of the pleadings). Furthermore, Plaintiffs' general citations to these exhibits, without any explanation as to their contents, are insufficient to illuminate their

[1] Among the material submitted are excerpts of a memoranda prepared by the City Attorney's office offering an interpretation of the LDA. *See* Ex. 130 to Upstream's RJN. This material is privileged, and the City disputes any assertion that it had authorized any disclosure of this material so as to waive the privilege. *See In re: Grand Jury Proceedings*, 219 F.3d 175, 183-86 (2nd Cir. 2000) (holding that an individual officer's unauthorized disclosure of privileged information does not necessarily waive the entity's privilege). In any case, as the Court well knows, an attorney's opinion is not the law, and opinions as to legal conclusions are generally not admissible. *See, e.g., Nationwide Transp. Fin. v. Cass Info. Sys., Inc.*, 523 F.3d 1051, 1059-60 (9th Cir. 2008) (excluding a report offering legal conclusions because "[r]esolving doubtful questions of law is the distinct and exclusive province of the trial judge" (citations omitted)). The City is not bound to adhere to any particular legal advice and this document, like all of Plaintiffs' materials, is irrelevant to the City's motion.

claims. *See, e.g., Indep. Towers of Wash. v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003) ("[O]ne wonders if [plaintiff], in its own version of the 'spaghetti approach,' has heaved the entire contents of a pot against the wall in hopes that something would stick. We decline, however, to sort through the noodles in search of [plaintiff's] claim."). If the Court does peruse the cited documents, it will find that many of them fall far short of supporting Plaintiffs' assertions.[2] Indeed, throughout Upstream's Opposition, there are repeated factual misrepresentations, but for purposes of this motion, they are not relevant: even assuming they are all true, Plaintiffs have failed to state viable claims. The City's Motion should be granted in its entirety.

II. THE CITY DID NOT BREACH THE LDA AS A MATTER OF LAW.

As explained in the City's Motion, the Settlement Agreement acts as a complete bar to Plaintiffs' claims that the City breached the LDA by denying the Casino Project or Alternative Proposal, or by failing to support any applications Guidiville submitted for federal trust or gaming approvals. Plaintiffs attempt to avoid this bar by claiming that the *Mammoth* case controls (Upstream's Mem. of P.&A. in Opp'n to City's Mtn. for J. on the Pleadings ("Opp'n") at 16-18, Dkt No. 154), that the City is judicially estopped from relying on the Settlement Agreement (Opp'n at 21-22), and that the City's disapproval of the project was not a valid CEQA determination (Opp'n at 19-21). None of these arguments has merit.

A. Plaintiffs Cannot Rely on *Mammoth Lakes* Because the LDA Was Not a "Development Agreement" Under California Law

Plaintiffs' "blueprint" for the legal sufficiency of their breach of contract claims is one case: *Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes*, 191 Cal. App. 4th 435

[2] By way of example, Upstream's Opposition asserts that "[i]t was long the common understanding of CITY Councilmembers that issuing the Statement of Overriding Considerations necessary to choose the 'no project' option would breach 'legal obligations' to the Navy", and cites to the transcript of a City Council meeting for support. (Opp'n at 20 (citing Ex. 158 at 92:10-13)). But the cited provision consists of *one* City Councilmember stating that "as I understand it, we're under legal obligations from the Navy that we have to do substantial economic development or else we would be in default of that contract. So I will be supporting this [extension of the LDA]." Ex. 158 at 92:10-13. This statement in no way reflects any long-held "common understanding" that a Statement of Overriding Considerations was required to disapprove the Casino Project, or that a failure to adopt one would necessarily breach any contractual obligations.

(2010); (Opp'n. at 16-17.) But rather than being "on all fours" with the current case (Opp'n at 17), *Mammoth* is inapposite. At the threshold, the contract in *Mammoth* was a "development agreement" within the meaning of California Government Code—a "statutorily authorized agreement" between a municipal government and a developer for the development of a property. *Mammoth*, 191 Cal. App. 4th at 442 . The LDA was not. This difference, alone, is fatal for Plaintiff's contract claims.

California's Development Agreement Statute sets forth the specific procedure under which a city and a developer may contract to create a "vested right" for the developer to construct a particular project, eliminating a future city government's discretion to disallow it or impose new conditions on its development. *Id.* at 442-44; *see* Cal. Gov't Code § 65864 *et seq.* The California Legislature enacted these provisions in response to the California Supreme Court's decision in *Avco Cmty. Developers v. S. Coast Reg'l Comm'n*, 17 Cal. 3d 785 (1976). In *Avco*, the Court held that an agency may impose new land use regulations, enacted after a developer obtained some approvals, as a proper exercise of its police power, which could not be "contract[ed] away." *Id.* at 800. Therefore, until the government reached the final step in the approval process—building permit issuance—a developer had no remedy if changes in government policies derailed a project, even if the developer had incurred substantial expenses in reliance on earlier approvals. *Id.* at 797; *Mammoth*, 191 Cal. App. 4th at 443.

The workaround provided by California's Development Agreement Statute authorizes an agency and a developer to enter into a "development agreement" that effectively "freezes" applicable land use regulations and policies, to allow developers "to make long-term plans for development without risking future changes" in those policies and rules. Cal. Gov't Code §§ 65865(a), 65866; *Mammoth*, 191 Cal. App. 4th at 442 . However, because it was an exception to the common law rule and committed the agency to a course of action for a project, to be a "development agreement," the Legislature required that the contract between a city and a developer meet certain exacting criteria. For example, the development agreement must be approved by ordinance, creating in effect a piece of negotiated legislation and rendering it subject to referendum "which allows the electorate to overturn approval of the agreement." *Mammoth*,

191 Cal. App. 4th at 443 (citing Cal. Gov't Code § 65867.5(a)); *see also Neighbors in Support of Appropriate Land Use v. Cnty of Tuolumne*, 157 Cal. App. 4th 997, 1011 (2007) (A development agreement is a "legislative enactment, not *merely* a consensual agreement."). It must also specifically describe the planned development, including maximum building densities and heights, and be recorded after execution. Cal. Gov't Code §§ 65865.2, 65867.5. And it must be reviewed under CEQA prior to its approval. *See Save Tara v. City of W. Hollywood*, 45 Cal. 4th 116, 137-38 & n.12 (2008) (noting that the approval of a development agreement triggered CEQA review because it had "contracted away [the city's] power to consider the full range of alternatives and mitigation measures required by CEQA and had precluded consideration of a 'no project' option").

Plaintiffs do not allege that the LDA is a development agreement, nor could they. The LDA did not even identify the "scope and nature" of the project to be considered by the City, much less the specifics required by the Development Agreement Statute. *See* LDA § 2.2(a). The LDA was not approved by ordinance, was not recorded, and was not reviewed under CEQA. Despite the self-serving, inadmissible opinion offered by Mr. Levine,[3] the LDA was not "analogous to the 'Development Agreement' between the Town of Mammoth Lakes and the developer in *Mammoth*." (Opp'n at 7; *see* Decl. of James Levine, Dkt. No. 155). Therefore, unlike the contract in *Mammoth*, the LDA did not override the common law, "contract away" the City's future discretion to regulate land use according to CEQA or any future City policies, or grant Upstream the "vested" rights in the Casino Project that this lawsuit effectively claims. *Cf. Mammoth*, 191 Cal. App. 4th at 440, 442-443; *Avco*, 17 Cal. 3d at 800. Instead, the LDA

[3] The City objects to Mr. Levine's declaration as inadmissible. It cannot be considered on a motion for judgment on the pleadings. *See United States v. Ritchie*, 342 F.3d 903, 908-09 (9th Cir. 2003) (holding that a declaration and exhibits submitted with an opposition to a motion to dismiss were not incorporated by reference into the complaint when the complaint failed to "extensively" reference them)*; see also Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 794 n.3 (N.D. Cal. 2011). In addition, it offers an opinion about a matter as to which Mr. Levine has no personal knowledge, *see* F.R.E. § 602, and it is offered to prove the content of a written contract without the document itself, *see* F.R.E. 1002.

explicitly retained the City's discretion with regard to the Casino Project, as confirmed by the Settlement Agreement.

B. The Settlement Agreement Established the Binding Interpretation of the LDA as Affording the City Discretion to Deny the Project Under CEQA.

Plaintiffs assert that the City is estopped from arguing that the Settlement Agreement "changed" the terms of LDA because it had previously stated that the Settlement Agreement effected no such change. (*See* Opp'n at 21.) This is a mischaracterization of the City's argument.

The City is not arguing and never has argued that the Settlement Agreement *changed* the LDA's terms. Rather, the Settlement Agreement establishes the binding legal *interpretation* of those terms.[4] *See, e.g.*, Settlement Agreement ¶ 1 (stating that the LDA will have the "following legal effect."); ¶ 3 (stating that both parties agree to "abide by the [Settlement] Agreement, which includes the *interpretation* of the LDA as set forth above." [emphasis added]). The City's argument is that the LDA's terms mean exactly what the Settlement Agreement (and the law) says they mean: the City retains full discretion to approve or deny the Casino Project or Alternative Proposal.[5] Rather than "changing" the LDA's terms, this interpretation is wholly in accord with CEQA and the plain meaning of the terms of the LDA. LDA 2.2(a) ("No final determination is made at this time as to the scope and nature of the Project. Such final determination will be made after consideration of the CEQA and NEPA review process, as applicable, and may include 'no project' or 'reduced project' alternatives."). This is why City Council members could properly state that the Settlement Agreement "did not result in any change" to the LDA's terms (*see* Opp'n. at 9, 21, 22). Because the City's current argument is not

[4] Upstream concedes that it is bound by the Settlement Agreement. (Opp'n. at 22).

[5] Plaintiffs attempt to escape this inevitable result by asserting that the Settlement Agreement's effect is to order that "the City will comply with CEQA." (Opp'n. at 8.) This assertion defies language and reason. The sentence "the City will comply with CEQA" appears at subpart (d) of paragraph 1 of the Settlement Agreement, immediately after subparts (a) through (c) regarding the LDA's interpretation. *See* Settlement Agreement ¶ 1(d). No principle of interpretation allows Plaintiffs to decide that only one of these four subparts forms has effect. Even giving Plaintiffs the benefit of this argument does not save their case: by agreeing that the City had to comply with CEQA, the parties necessarily agreed that the City had to refrain from committing to a particular project until after it completed the environmental review process. *See* Cal Pub. Res. Code § 21002; Cal. Code Regs. tit. 14, § 15352(a); *Save Tara*, 45 Cal. 4th at 138.

inconsistent with its previous stance, the doctrine of judicial estoppel is inapplicable to the City. It is applicable only to Upstream, which has continued to argue here that the City's decision to discontinue the Casino Project is a breach of the LDA despite its express representations to the contrary in the Settlement Agreement.

C. The City's Resolution Discontinuing the Casino Project Satisfied Any Obligations Under the LDA to Make a CEQA Determination.

Conceding as they must that the "CITY maintained final discretion to approve or deny any ultimate project subject to environmental review" under section 2.2(a) of the LDA (Opp'n. at 6), Plaintiffs argue that the City breached this obligation by failing to exercise this discretion. Specifically, Plaintiffs assert that the City made no final CEQA determination as to the Project. This allegation is not made in the TAC (*see* TAC ¶ 103), but even if it were, it lacks merit.

The LDA required the City to make a "final determination" as to the Casino Project "after consideration of the CEQA . . . review process." LDA § 2.2(a). The City did so in its April 5, 2011 Resolution discontinuing consideration of the Casino Project, which stated that the EIR had identified significant and unavoidable environmental impacts associated with a casino use, and that the City would not adopt a Statement of Overriding Considerations allowing the Casino Project to proceed. *See* TAC ¶ 103(m); Ex. M to City's Request for Judicial Notice , Dkt. No. 114.14. No more was required.

Plaintiffs appear to argue that it was not enough for the City to deny the Casino Project, and that the City actually had to affirmatively "approve" the "no project" alternative and issue a Statement of Overriding Considerations and Notice of Determination for this "approval." (*See* Opp'n at 16, 20). This contention—like Plaintiffs' assertions that the City improperly considered "socioeconomic effects" as a basis for its denial of a Statement of Overriding Considerations for the Casino Project (Opp'n. at 20 ,)—is an improper collateral attack on the City's compliance with CEQA. As noted in the City's motion, any challenge to the substantive and procedural validity of that CEQA determination must be made through California's administrative mandamus procedure, not collaterally through this suit for damages. *See Mission Oaks Ranch v. Cnty of Santa Barbara*, 65 Cal. App. 4th 713, 722 (1998), *overruled on other grounds by Briggs*

v. Eden Council for Hope & Opportunity, 19 Cal. 4th 1106 (1999). This includes the denial of a project on CEQA grounds. *See Eller Media Co. v. Cmty. Redevelopment Agency*, 108 Cal. App. 4th 25, 45-46 (2003). Such a challenge must be brought within 180 days at most of the City's action under CEQA (Cal. Pub. Res. Code § 21167) and this limitations period is strictly construed. *See Van De Kamps Coal. v. Bd. of Trustees of L.A. Cmty. Coll. Dist.*, 206 Cal. App. 4th 1036, 1051-52 (2012).

Plaintiffs' attempt to distinguish *Mission Oaks* based on the fact that the developer in *Mission Oaks* "had *no contractual relationship* with the county" is unavailing. (Opp'n. at 21.) First of all, in *Mission Oaks*, the developer did indeed claim a contractual relationship with the county, as a third-party creditor beneficiary. *Id.* at 724. More importantly, whether or not a contractual relationship exists is irrelevant to the general holding that a plaintiff "may not sue the County for damages" based on alleged noncompliance with CEQA, under *any* theory, when the CEQA action has not been challenged through administrative mandamus.[6] *Id.*at 722.

Moreover, Plaintiffs' absurd contention that the City made no CEQA determination regarding the Casino Project because it failed to adopt a Statement of Overriding Considerations and Notice of Determination for the "no project" alternative has no basis in law. CEQA requires the preparation of an EIR for a proposed project—here, the Casino Project—that may have a significant effect on the environment. Cal. Pub Res. Code § 21100(a), (b). CEQA regulations provide that, when the EIR shows that the proposed project would cause substantial adverse changes in the environment, the governmental agency can respond to in several ways, including "[*d*]*isapproving the project.*" Cal. Code Regs. tit. 14,[7] § 15002(h) (emphasis added); *see id.* § 15042 ("A public agency may disapprove a project if necessary in order to avoid one or more

[6] Notably, in *Mission Oaks*, the court rejected both the developer's contract claim and its claim (similar to Plaintiffs') that the county "engaged in a conspiracy to commit fraud by predetermining that it would reject the project and thus obtaining an EIR supporting its viewpoint without complying with CEQA and exorbitantly charging Mission Oaks in the process." *Id.* at 722. Both causes of action improperly sought recovery based on noncompliance with CEQA outside the administrative mandate process.

[7] Hereinafter "CEQA Guidelines."

significant effects on the environment that would occur if the project were approved as proposed."). The City also had the option, if the facts warranted, to find the Casino Project's environmental impacts "acceptable," adopt a Statement of Overriding Considerations, and approve the Casino Project. *Id.* §§ 15002(h)(7), 15093. But it was not required to adopt a Statement of Overriding Considerations to effectuate the Casino Project's *disapproval*—that is, to proceed with "no project." *See* CEQA Guidelines § 15126.6(e)(3)(B) (defining the "no project" alternative as "the circumstance under which the project *does not proceed*." [emphasis added]).[8] A Statement of Overriding Considerations is only necessary to *approve* a project. CEQA Guidelines § 15093(b) (noting that the agency shall prepare a Statement of Overriding Considerations "[w]hen the lead agency *approves* a project which will result in the occurrence of significant effects" [emphasis added]). Similarly, a lead agency need not issue a "Notice of Determination" when it disapproves the project. *See* Cal. Pub. Res. Code § 21152(a) (" If a local agency *approves or determines to carry out* a project . . . the local agency shall file notice of the approval or the determination." [emphasis added]).

The City's denial of the Casino Project fulfilled any requirement in the LDA that the City make a final determination under CEQA. To the extent that Plaintiffs' claims are grounded in the alleged substantive and procedural validity of that determination, they constitute an improper collateral attack and must be dismissed.

D. The LDA Did Not Require the City to Support the Tribe's Trust or Gaming Applications.

Plaintiffs continue to claim that the City breached section 2.7 of the LDA, which required the City to support Guidiville's efforts to acquire various approvals related to the trust acquisition of Point Molate and/or the development of gaming there. (Opp'n. at 7). Guidiville asserts for the first time that Guidiville has an application for a "two-part determination" to allow gaming at Point Molate that is "still pending," and that the City's breach of section 2.7 "dooms" this

[8] To the extent that Plaintiffs attempt to foreclose the City's decision to disapprove the Project because the selection of "no project" alternative violated the City's legal obligations to the Navy (Opp'n at 16, 20), the City points out that it is the City's legal obligations to Plaintiffs, not its obligations to the Navy, that are at issue in this case.

application. (Opp'n to City of Richmond's Third Mot. For J. on the Pleadings ("Guidville Opp'n") at 5, Dkt. No. 157.)[9] But Plaintiffs' failure to make this allegation in the TAC dooms this claim. *See Schneider*, 151 F.3d at 1197 n.1.

Even if the TAC had included this allegation, any breach claim based on section 2.7 of the LDA is foreclosed by again the Settlement Agreement, which stated that section 2.7 was not triggered unless and until the City approved the Casino Project. *See* Settlement Agreement ¶ 1(c) ("The provision in the LDA that requires the City to take specified actions to support the application of the Guidiville Band . . . [is] contingent on the City's decision to pursue and/or approve the Project or Alternative Proposal . . . ."). As with the Settlement Agreement's provisions regarding the City's discretion to deny the Casino Project and Alternative Proposal, this provision was necessary to prevent the LDA from prematurely committing to a project in violation of CEQA. *See Cnty of Amador v. City of Plymouth*, 149 Cal. App. 4th 1089, 1099, 1104 (2007) (regarding a city's letter of support of an Indian tribe's fee-to-trust application as an "integral part" of a commitment to a definite course of action for a proposed Indian gaming development). Because the City decided not to pursue or approve the Casino Project or Alternative Proposal, the City's obligation in section 2.7 of the LDA was never triggered and could not have been breached.[10]

E. The TAC Fails to Adequately Allege that the City's Denial of the Alternative Proposal Was Not in Good Faith.

Plaintiffs' allegations as to the City's negotiations with Upstream regarding an alternative non-casino project at Point Molate, pursuant to section 2.8 of the LDA, amount to a single sentence: "The City failed to negotiate in good faith during the 120 days following the City's

[9] Guidiville's Opposition is devoted to a discussion of federal Indian law, Guidiville's status as a federally recognized Indian tribe, and the federal government's determination with regard to Guidiville's restored lands application. This discussion is irrelevant and improper because the City's motion never mentions and in no way turns on any of these issues.

[10] Guidiville's Opposition suggests that a "still pending" application for a "two-part determination" renders the City's decision to discontinue consideration of a casino use at Point Molate improper. (Guidiville Opp'n . at 5.) The City's discontinuance of a Casino Project under the LDA was adequately supported by its CEQA determination. Whether or not Guidiville had an application for a "two-part determination" pending is completely irrelevant to that decision.

Resolution to Discontinue the Project." TAC ¶ 103(o). This conclusory allegation is insufficient to state a claim.

Plaintiffs cannot remedy this deficiency in their TAC by bombarding the Court with hundreds of pages of documents along with their Opposition. *See Schneider*, 151 F.3d at1197 n. 1. Moreover, these documents, which reflect a series of negotiations between the parties over a period of well more than the 120 days required by Section 2.8, are not indicative of bad faith. Based on the materials relied upon by Plaintiffs, the Alternative Proposal offered the City no additional payment for Point Molate and would have in fact required millions of dollars of subsidies. The City's refusal of this "deal" is not grounds for a lawsuit. Such a deal would have represented a windfall for Upstream: Upstream's previous payments were intended not to compensate the City for Point Molate's fair market value, but at least in part to compensate the City for holding Point Molate off the market. *See* LDA § 1.2 ("To compensate the City for granting Developer the right to purchase and lease the Property until January 15, 2006, the Developer shall pay to the City the sum of $1,000,000 . . . The Developer may extend the Closing Date for up to four successive twelve-month periods . . . by payment to the City of additional consideration [totaling an addition $14 million]."). The City held Point Molate off the market for seven years, and it is unreasonable for Upstream to expect it to have done so for free. But that is essentially what its Alternative Proposal requested.

Also without merit is Plaintiffs' argument that the City's initiation of a state court lawsuit for declaratory relief indicates that the City approached the Alternative Proposal negotiations with bad faith. (Opp'n. at 15-16.) This lawsuit reflected a dispute between the parties as to the proper interpretation of the LDA. *See generally* TAC. The City's effort to seek a definitive interpretation of its rights and obligations under the LDA, as the law fully entitles it to do, Cal. Civ. Proc. Code § 1060, cannot be interpreted to reflect any motivation by the City not to perform those obligations. *See Atlas Assurance Co. v. McCombs Co.*, 146 Cal. App. 3d 145, 150 (1983) (noting that the mere filing of action to declare rights and duties relative to a contract cannot form the basis of breach of the duty of good faith). In fact, the City fully performed its obligations under section 2.8 of the LDA, and Plaintiffs claim of breach on this ground should be dismissed.

III. PLAINTIFFS CANNOT MAINTAIN THEIR COVENANT CLAIM WHERE THE EXPRESS TERMS OF A CONTRACT PROVIDE FOR BROAD DISCRETION.

Plaintiffs' Opposition appears to concede that there can be no breach of contract or covenant based on the City's "ultimate discretionary determinations" regarding the Casino Project and Alternative Proposal. (Opp'n. at 19 ("The ultimate determinations . . . are not the acts of breach in themselves.").) But Plaintiffs maintain that the City breached the covenant of good faith and fair dealing because it "abused its discretion" in making those determinations. *Id.* This claim, however, necessarily implies that the City's CEQA determination was based on improper considerations and, thus, is barred by Plaintiffs' failure to seek administrative review under CEQA. *See Rossco Holdings Inc. v. State of Cal.*, 212 Cal. App. 3d 642, 660 (1989) (holding that where the "essential underpinning" of a claim is "the invalidity of the administrative action," a plaintiff's failure to seek a writ of administrative mandate "renders the administrative action immune from collateral attack"); *Mission Oaks*, 65 Cal. App. 4th at 722. This alone is fatal to Plaintiffs' claim.

But it fails for other reasons as well. Where, as here, the express terms of a contract confer unlimited discretion on a party, the covenant cannot be used to limit the exercise of that discretion. See *Carma Developers, Inc. v. Marathon Dev. Cal., Inc.*, 2 Cal. 4th 342, 374 (1992); *Wolf v. Walt Disney Pictures & Television*, 162 Cal. App. 4th 1107, 1120 (2008); *Third Story Music, Inc. v. Waits*, 41 Cal. App. 4th 798, 808 (1995).

Plaintiffs rely on *Pasadena Live, LLC v. City of Pasadena*, 114 Cal. App. 4th 1089 (2004), to suggest that the covenant of good faith and fair dealing can be used to import limits on the exercise of discretion when the contract itself contains no limits (Opp'n. at 19), but *Pasadena Live* itself did not apply the covenant in this way. *Pasadena Live* involved a contract, similar to the LDA, in which the defendant city retained full discretion to approve or deny the plaintiff's proposals. *See id.* at 1093 n.1. But the court never held that the covenant could be applied to assess whether that discretion was exercised "fairly" as to the plaintiff's proposals. *See id.* at 1092-93. It held, rather, that plaintiffs stated a covenant claim when then city had barred the plaintiff from even *submitting* any proposals. *Id.* at 1093. As the court found, the contract

presupposed that the city would at least allow the plaintiff "the opportunity to *submit proposals*," and the city had denied plaintiff even that opportunity. *Id.* Here, in contrast, the City has not denied Upstream to do anything the contract presupposes; it allowed Upstream the opportunity to submit proposals and it considered those proposals. It also denied both projects, as the LDA expressly contemplated it could. LDA §§ 2.2(a); 2.8; Settlement Agreement ¶ 1(a). Plaintiffs cannot attempt to use the covenant to limit that discretion merely because they ultimately disagree with the way in which it was exercised.

Finally, to the extent that Plaintiffs' "bad faith" covenant claim is grounded in the allegation that members of the City Council, including the Mayor, were opposed to the Casino Project and thus could not "fairly consider" Plaintiffs' proposals, they are foreclosed by the Sixth Amendment to the LDA. In this Amendment, executed well after political opposition to a casino was apparent, the parties expressly agreed that "no event has occurred which, with the passage of time or the giving of notice, or both, would constitute an event of default." Sixth Amendment to LDA § 5. This functioned to ratify the very acts of City Officials that Plaintiffs now point to as being indicative of bad faith. *See Carma Developers*, 3 Cal. 4th at 374 ("[T]he parties may, by express provisions of the contract, grant the right to engage in the very acts and conduct which would otherwise have been forbidden by an implied covenant of good faith and fair dealing."). Contrary to Plaintiffs' assertions, there is absolutely nothing in the Sixth Amendment that suggests that this provision was limited to sections 6.2 and 6.3 of the LDA. (Opp'n. at 23.) In fact, section 6.2, entitled "Default of the City," pertains broadly to the City's breach of any "material provision" of the LDA. LDA 6.2 & 6.3. So even if the Sixth Amendment was "limited" to section 6.2, that section imposes no limit in terms the types of alleged breaches to which the Amendment applied.

Plaintiffs have no viable ground on which to claim that the City's exercise of discretion with regard to its CEQA determination, or the actions of City officials, constitute a breach of the covenant. Plaintiffs' covenant claim should be dismissed.

IV. THE LDA WAS NOT AN ILLUSORY CONTRACT.

Plaintiffs' fallback argument is that if the LDA meant what the City (and the Settlement Agreement) says it does—that the City had full discretion to deny the Casino Project or Alternative Project—then "[P]laintiffs got nothing" for the payments of they made, and it must be illusory. (Opp'n at 20, 21, 24.) Not so.

"[A] contract is illusory where one party provides *no legal consideration* whatsoever." *Martin v. World Sav. & Loan Ass'n*, 92 Cal. App. 4th 803, 809 (2001) (emphasis added). But the LDA *expressly indicates* what Upstream got in exchange for its payments: the exclusive right to purchase and lease Point Molate for a specified amount of time. LDA § 1.2 ("To compensate the City for granting Developer the right to purchase and lease the Property . . . the Developer shall pay to the City . . . ."); *see also id.* § 2.10. This right to purchase, as recognized under California law, was not a promise by the City to sell, but only a right of Upstream to purchase *if the City elected to sell*. *See Bill Signs Trucking, LLC v. Signs Family Ltd. P'Ship*, 157 Cal. App. 4th 1515, 1522 (2007) ("A preemptive purchase right is a grant from a landowner that gives the grantee the first opportunity to purchase the property *if the landowner decides to sell*.") (emphasis added); *Hartzheim v. Valley Land & Cattle Co.*, 153 Cal. App. 4th 383, 389 (2007) (recognizing "the conditional right to acquire property, depending on the owner's willingness to sell" (internal quotation marks and alterations omitted)). It is generally not for the parties or a court to decide in hindsight that the consideration initially agreed upon was not fair. *See Third Story Music*, 41 Cal. App. 4th at 808 n.5. The LDA, as interpreted by the Settlement Agreement, is a valid contract, and the City has not breached it.

V. PLAINTIFFS' CLAIMS FOR QUANTUM MERUIT, UNJUST ENRICHMENT, AND SPECIFIC PERFORMANCE ALSO FAIL.

As Plaintiffs concede, their claims for quantum meruit and unjust enrichment only survive if the LDA is illusory (Opp'n at 24:18-19), because these are quasi-contractual remedies that are unavailable where an express contract controls. *Cal. Med. Ass'n, Inc. v. Aetna U.S. Healthcare of Cal., Inc.*, 94 Cal. App. 4th 151, 172 (2001). The TAC did not allege that the LDA was illusory, and as explained above, it is not. But even if the Court allows Plaintiffs to plead these claims in

the alternative, Plaintiffs' opposition fails to address their fatal deficiencies. Plaintiffs continue to rely on *L.A. Unified Sch. Dist. v. Great Am. Ins. Co.*, 49 Cal. 4th 739 (2010), to seek recovery through quantum meruit or unjust enrichment. But *Los Angeles Unified* is inapposite because it requires misrepresentation or concealment. *Id.* at 754-55 (allowing contractor to recover for its full cost of performing a contract when the defendant public entity concealed information relevant to the cost of performance that the contractor could not have discovered by reasonable diligence). Here—even assuming that the LDA is comparable to the type of public works construction contract at issue in *Los Angeles Unified*—Plaintiffs' allegations establish no such concealment by the City of any relevant information regarding the risks associated with the LDA. Upstream continued to extend the LDA despite reasonable notice of the City's opposition, which Mr. Levine acknowledged. (*See* Exs. F-L to City's Request for Judicial Notice, Dkt Nos. 114.06-114.13). Plaintiffs' claims for quantum meruit and unjust enrichment based on *Los Angeles* should therefore be dismissed.

Finally, as to Plaintiffs' claim for specific performance, no such remedy can be granted where, as here, the City has determined that the requested action would not be in the public interest. *See, e.g., Beasley v. Texas & Pac. Ry. Co.*, 191 U.S. 492, 497 (1903).

CONCLUSION

For the above reasons, the City respectfully requests the Court grant Richmond's motion for judgment on the pleadings as to Plaintiffs' Seventh, Eighth, Ninth, Tenth, and Thirteenth causes of action.

Dated: June 25, 2013

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