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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

The Tohono O'odham Nation,

Plaintiff,

v.

Douglas Ducey, Governor of Arizona; Mark Brnovich, Arizona Attorney General; and Daniel Bergin, Director, Arizona Department of Gaming, in their official capacities,

Defendants.

Daniel Bergin, Director, Arizona Department of Gaming, in his official capacity,

Counterclaimant,

v.

The Tohono O'odham Nation,

Counterdefendant.

No. CV-15-01135-PHX-DGC

DEFENDANT BERGIN'S RESPONSE TO THE TOHONO O'ODHAM NATION'S MOTION TO DISMISS DEFENDANT BERGIN'S AMENDED COUNTERCLAIMS

ORAL ARGUMENT REQUESTED

Defendant Daniel Bergin ("Director Bergin" or "Director"), in his official capacity as Director of the Arizona Department of Gaming ("ADG"), opposes the Tohono O'odham Nation's (the "Nation") motion to dismiss the counterclaims ("Motion"). As its Motion demonstrates, the Nation continues to go to great lengths to prevent a court (or jury) from evaluating the merits of the State's position that the Nation perpetrated a fraud on the State and Arizona voters during the negotiation of the Tribal-State Compact ("Compact") and passage of Proposition 202. Although the Nation has styled its claim as one for preemption to try to assert sovereign immunity and sidestep ADG's counterclaims, the Nation's real claim is that the Director has breached the Compact.[1] Director Bergin respectfully requests that this Court refuse to countenance the Nation's further attempt to avoid any consideration of its fraud and misrepresentations through its procedural machinations.

In any event, the Nation's sovereign immunity does not preclude Director Bergin's counterclaims for at least two reasons. First, the Nation submitted itself to this Court's jurisdiction by filing this action. When a tribe has initiated litigation, the well-recognized doctrine of equitable recoupment permits a party to assert certain counterclaims in litigation against a tribe even in the absence of an express waiver of the tribe's sovereign immunity. Here, the equitable recoupment doctrine allows Director Bergin to pursue counterclaims against the Nation because the relief sought is the mirror image of the tribe's requested relief: whereas the Nation seeks an order compelling Director Bergin to certify the West Valley Casino under the Compact, Director Bergin seeks an order confirming that he is not required to do so. Second, the Nation has waived its sovereign immunity by asserting that ADG's actions violate the Compact, opening the door to related counterclaims. Any preemptive force of IGRA applies only when a state and tribe

[1] If the Nation is not asserting a breach of the Compact, then Director Bergin's decision to withhold approvals of the West Valley Casino is not preempted because the Indian Gaming Regulatory Act ("IGRA") itself does not require certification, license, or any other action by the State. Contrary to the Nation's position, the State is not regulating on-reservation gaming when it refuses to cooperate in the opening of an illegal Class III facility.

have entered into a valid compact concerning gaming on tribal lands. Because the Director disputes that the Compact is valid, the Nation's decision to frame this litigation as involving preemption under IGRA opened the door for the Director to assert counterclaims challenging the Compact's validity.

Director Bergin also is the appropriate party to assert counterclaims. Both the Compact's language and Arizona statutes confirm that Director Bergin is an authorized official of the State for purposes of addressing issues related to the Compact. And beyond those authorities, Director Bergin may assert counterclaims due to the plain fact that the Nation is seeking an order compelling him to act to implement a term of the Compact. It would be inequitable to allow a plaintiff to sue a defendant for specific performance of a contract and then allow that same plaintiff to later claim that the defendant does not have capacity to assert any counterclaims related to the performance of that contract. Further, the Nation should be estopped from denying ADG's capacity to sue and be sued in relation to the Compact given that the Nation has recognized the legal authority of ADG by entering into contracts with ADG.

Finally, counterclaims two (promissory estoppel), three (fraud in the inducement) and four (intentional misrepresentation and omission of material facts) are sufficiently pled for purposes of Rule 12(b)(6). Although the Nation argues that the merger clause in the Compact shields it from the fraud that it perpetrated, it is well-established that a party cannot use an integration clause to avoid claims of fraud and misrepresentation in connection with contract formation issues. Director Bergin respectfully requests that the Court deny the Nation's motion to dismiss in its entirety, or, alternatively, allow Director Bergin leave to amend his counterclaims to correct any deficiencies identified by the Court.

I. BACKGROUND

Given that this Court is well-versed in the procedural history of this matter and the prior litigation between the State and the Nation, Director Bergin will not extensively recount it. Suffice it to say, the Nation's express and implied assertions that this Court

previously decided the merits of Director Bergin's counterclaims are simply incorrect. *See Arizona v. Tohono O'odham Nation*, 944 F. Supp. 2d 748 (D. Ariz. 2013) (*TON I*). The Court has never addressed such claims on the merits, and they are ripe for adjudication. *See* Motion to Dismiss Order, Dkt. 82, at 3:26-4:1, 20 n. 5.

ADG's contention is that the Nation's fraud and misrepresentations in connection with the Compact's negotiation and passage of Proposition 202, along with the pertinent statutes, supports the Director withholding approvals for Class III gaming at the West Valley Casino. Specifically, in negotiations for the seventeen Tribal-State compacts and during the public debate on Proposition 202, the Nation both expressly and impliedly represented to the State, to other tribes, and to the voters of Arizona that the compacts would preclude any tribe, including the Nation, from opening a new gaming facility in the Phoenix metropolitan area. Countercl., Dkt. 96, ¶6. But notwithstanding these representations, the Nation had a secret plan to build a casino in the Phoenix metropolitan area after Proposition 202 was approved by Arizona voters. Countercl., Dkt. 96, ¶51.

Shortly after the Nation commenced construction of the West Valley Casino and indicated that it would commence Class III gaming activities in the Phoenix metropolitan area in December 2015, Director Bergin expressed his concern to the Nation that the fraudulent manner in which the Nation procured the West Valley Casino rendered the project unauthorized and incapable of obtaining state approval. Motion to Dismiss Order, Dkt. 82, at 4. The Nation then commenced the instant action seeking injunctive relief to enjoin the Director "from refusing to grant the Class III certifications[.]" *Id.* at 5:17-18.

II. THE NATION'S SOVEREIGN IMMUNITY DOES NOT BAR ADG'S COUNTERCLAIMS.

A. The Director's counterclaims sound in recoupment and are not barred by the Nation's sovereign immunity.

The Director does not dispute that Indian tribes *generally* enjoy the privilege of common law immunity from suit that is afforded to other sovereign entities. *See* Motion at 10:25-11:8. But when a tribe initiates litigation, it waives its sovereign immunity as to any and all counterclaims that arise in recoupment. *Berrey v. Asarco Inc.*, 439 F.3d 636,

643-45 (10th Cir. 2006); *United States v. Agnew*, 423 F.2d 513, 514 (9th Cir. 1970) ("[A] counterclaim may be asserted against a sovereign by way of set off or recoupment to defeat or diminish the sovereign's recovery, [but] no affirmative relief may be given against a sovereign in the absence of consent").

Waiver of sovereign immunity under the equitable recoupment doctrine "does not require prior waiver by the sovereign" and does not require an independent abrogation of immunity by Congress. *Berrey*, 439 F.3d at 644. Instead, the sovereign's immunity is waived because "recoupment is in the nature of a defense arising out of some feature of the transaction upon which [its] action is grounded." *Bull v. United States*, 295 U.S. 247, 262 (1935). A litigant's counterclaims sound in recoupment—and may proceed against sovereign entities such as the Nation—if they: (1) "arise out of the same transaction or occurrence[;]" (2) "seek the same kind of relief as the plaintiff[;]" and (3) "do not seek relief in excess of that sought by the plaintiff." *Berrey*, 439 F.3d at 643 (citation omitted). In the context of actions seeking equitable relief, the third element of the recoupment test is satisfied if the relief sought by the counterclaimant is the "mirror image" of the relief sought by the tribe such that a determination of the tribe's legal rights will necessarily affect the converse rights (or liabilities) of the counterclaiming defendant. *Oneida Tribe of Indians of Wisconsin v. Village of Hobart*, 500 F. Supp. 2d 1143, 1149 (W.D. Wis. 2007); *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241, 1244 (8th Cir. 1995).[2]

[2] The Nation suggests that the recoupment doctrine is "properly limited to damages actions." *See* Motion at 12 n. 4. This assertion is refuted by the decisions of numerous federal courts applying the recoupment doctrine to counterclaims seeking equitable relief. *See Rupp*, 45 F.3d at 1245 (applying recoupment in action involving quiet title claims and reasoning, "[b]y requesting equitable relief, the Tribe consented to the district court exercising its equitable discretion to resolve the status of the disputed lands"); *Oneida Tribe*, 500 F. Supp. 2d at 1149-50 (applying recoupment doctrine in lawsuit between Indian tribe and village involving, among other things, claims for declaratory relief); *Oneida Nation of New York v. New York*, 194 F. Supp. 2d 104, 137 (N.D.N.Y. 2002) (finding that tribe and United States waived sovereign immunity as to disestablishment counterclaim in lawsuit concerning possessory rights in real property where counterclaim arose from same transaction or occurrence and sought relief similar to that sought by the sovereign entities); *Cayuga Indian Nation of New York v. Village of Union Springs*, 293 F. Supp. 2d 183, 194 (N.D.N.Y. 2003) ("It appears . . . claims in recoupment are not limited to claims for monetary damages, and a claim for declaratory relief may, in fact, be deemed a claim for recoupment as long as it arises out of the same subject as the original cause of action and is based on issues asserted in the complaint.").

Oneida Tribe is instructive. In that case, the Oneida Tribe sued the Village of Hobart seeking an injunction as well as a declaration that property purchased by the tribe was not subject to state laws that authorized the village to impose taxes and special assessments on property within village boundaries. 500 F. Supp. 2d at 1144. In response, the village filed counterclaims seeking injunctive relief and a declaration that the tribe's land was subject to land use regulation, condemnation, assessment, and taxation under state law. The tribe moved to dismiss the village's counterclaims pursuant to Rule 12(b)(1). *Id.* at 1145. Applying the recoupment doctrine, the court denied the tribe's motion to dismiss. In so doing, the court reasoned:

> The relief sought by the Village in its request for declaratory relief is the mirror image of what the Tribe seeks. The Tribe has asked the Court to determine that the land it purchased is not subject to state laws authorizing a municipal government to assess property within its boundaries for taxes and public improvements; the Village asks the Court to determine that the Tribe's property is subject to such laws. The statute under which the Tribe seeks such relief, 28 U.S.C. § 2201, authorizes the court to "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." By invoking the jurisdiction of the Court to "declare the rights and other legal relations of the parties," the Tribe has expressly waived its immunity from suit as to that issue.

Id. at 1149.

The Director's counterclaims satisfy all of the elements for claims "sounding in recoupment" and thus, are permissible despite the Nation's sovereign immunity. First, the Director's Declaratory Relief, Promissory Estoppel, Fraud in the Inducement, and Intentional Misrepresentation causes of action arise from the same "transaction or occurrence" as the Nation's claim for a declaratory judgment that ADG's refusal to certify the West Valley Casino for Class III gaming is impermissible under IGRA. In the Ninth Circuit, a counterclaim arises out of the same transaction or occurrence if it "arises from the same aggregate set of operative facts as the initial claim, in that the same operative facts serve as the basis of both claims or the aggregate core of facts upon which the claim rests activates additional legal rights otherwise dormant in the defendant." *In re Lazar*, 237 F.3d 967, 979 (9th Cir. 2001) (citations omitted). The test is a "flexible" one that

"may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship." *See id.* (quoting *Moore v. New York Cotton Exch.*, 270 U.S. 593, 610 (1926)).

In this litigation, "[t]he Nation . . . asks the Court only to enjoin Defendants from attempting to regulate the West Valley Resort *on any basis not permitted by the Compact*." Motion to Dismiss Order, Dkt. 82, 20:2-3 (emphasis added). The Nation's declaratory judgment claim, thus, presumes the existence of a valid Compact and requires the Court to construe the Compact's terms, which it must do in order to evaluate whether the Director's alleged actions are "not permitted by the Compact." *Id.* The Director's counterclaims are squarely directed at both the Compact's validity and the Compact's terms and are inextricably intertwined with the very operative facts that the Court must evaluate in order to resolve the merits of the Nation's assertion that IGRA preempts ADG's purported attempt to "regulate" Class III gaming in violation of the Compact.

Second, the Director seeks the same type of relief as the Nation. As the parties' pleadings make plain, both the Nation and the Director seek declaratory (and injunctive) relief in this lawsuit. *See* Complaint, Dkt. 1, at 32:9-33:3; *see also* Countercl., Dkt. 96, at 35:21-36:4.

Finally, the Director's counterclaims seek relief that is the "mirror image" of the Nation's requested relief. The Nation seeks injunctive and declaratory relief that, if granted, would require ADG to authorize Class III gaming at the West Valley Resort. By contrast, the Director seeks injunctive and declaratory relief that, if granted, would permit ADG to refrain from authorizing Class III gaming at the West Valley Casino.

The Director's counterclaims sound in recoupment and, therefore, are actionable despite the Nation's sovereign immunity.

B. <u>The Nation asserts a breach of the Compact and, thus, has waived sovereign immunity as to the Director's counterclaims</u>.

Separate and apart from the recoupment doctrine, the Director's counterclaims are permissible because the Nation, as the Plaintiff in this action, asserts that ADG's actions

are impermissible under the Compact. By instituting an action premised upon an alleged breach of the Compact, the Nation has waived its sovereign immunity and opened the door to counterclaims that challenge the enforceability of the Compact's terms.

The Nation's IGRA preemption claim places squarely at issue the Compact's validity. This is necessarily the case because in order for IGRA preemption to apply at all, there must be a validly "entered into" compact. 25 U.S.C. § 2710(d)(1)(C) ("Class III gaming activities shall be lawful on Indian lands only if such activities are . . . conducted in conformance with a Tribal-State compact *entered into* by the Indian tribe and the State . . . that is in effect.") (emphasis added); *see also Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1555 (10th Cir. 1997).

Pueblo of Santa Ana is illustrative. In that case, the plaintiff tribes and related gaming entities sought a judicial declaration affirming the validity of a gaming compact with the State of New Mexico under IGRA. *Id.* at 1548. The tribes argued that under Section 2710(d)(1)(C) of IGRA, approval by the Secretary of Interior, alone, was sufficient to render the compact valid. *Id.* at 1553. The state, on the other hand, argued that the compact's validity was an essential and separate requirement under IGRA and was determined by state law. *Id.*

The Tenth Circuit agreed with the state, finding: "IGRA imposes two requirements for a compact to authorize class III gaming—the compact must be validly entered into by the state and the tribe, and it must be in effect pursuant to . . . [federal] approval." *Id.* at 1557. The court further concluded that the issue of compact validity must be determined "under state law." *Id.* at 1558. Thus, under *Pueblo of Santa Ana*, whatever other matters may be preempted by IGRA, it is plain that the statute does not preempt matters of compact formation and validity. *See also Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 47 (1996) (noting that IGRA "provides that an Indian tribe may conduct certain gaming activities only in conformance with a *valid compact* between the tribe and the State in which the gaming activities are located.") (emphasis added and citation omitted).

The requirement of a valid compact as a prerequisite to IGRA's application is

critical because *all* of the Director's counterclaims challenge the validity of the Compact's formation. *See, e.g.*, Countercl., Dkt. 96, ¶75 ("An actual controversy exists between Director Bergin and the Nation regarding . . . whether the Compact was validly entered into."), ¶84 ("Because of the Nation's fraudulent promises, the Compact was not validly entered into."), ¶93 ("Because of the Nation's fraudulent material misrepresentation, the Compact was not validity entered into."), ¶102 ("The State's assent to the Compact was induced by the Nation's misrepresentations and intentional failure to disclose material facts.").

In an effort to avoid this result, the Nation asserts that it has not alleged a breach of compact claim but, instead, has asserted a claim for preemption under IGRA. *See* Motion at 13:5-14:10. The Nation's argument fails. The Nation's self-serving gloss on the pleadings is inconsistent with its prior representations in this action, and the Court should not countenance such gamesmanship.

The Nation admitted during oral argument that the preemption claim was based on the Compact:

> THE COURT: Your preemption argument, then, as I understand it, is limited to any state regulatory actions that are not authorized by the compact.
>
> MS. SPINELLI: Well, yes. . . .
>
> THE COURT: . . . But the only preemption argument you're making is for efforts to regulate that are not authorized by the compact –
>
> MS. SPINELLI: Correct.
>
> THE COURT: -- right?
>
> MS. SPINELLI: That's correct.

September 10, 2015 Hearing Transcript at 9:20-10:9, which is attached as Exhibit 1. The Court aptly described the Nation's requested relief in its Order denying the Nation's request for a preliminary injunction as relief to "enjoin Defendants from attempting to regulate the West Valley Resort *on any basis not permitted by the Compact*." Motion to Dismiss Order, Dkt. 82, 20:2-3 (emphasis added). Further, as the Court held, "[w]hether

ADG can withhold certifications on the basis of the Nation's alleged fraud depends on whether the State is granted that authority by the Compact . . . ." *Id.* at 21:14-16. Thus, the Court noted that "[t]he Nation's position could be viewed as an allegation that the State has breached the Compact by attempting regulation the Compact does not authorize." *Id.* at 22:17-18. In short, as this Court has already stated, the Nation's request for a determination that ADG's refusal to certify the West Valley Resort for Class III gaming is "not permitted by the Compact" is functionally identical to a breach of compact claim. Having so framed its claim, the Nation should not be permitted to hide behind the cloak of "preemption" as a basis for dismissing the Director's counterclaims.[3]

The Nation's reliance on the master-of-the-complaint doctrine only undermines the Motion and, in fact, supports Director Bergin's contention that this case rises and falls on breach of contract. As the Court recognized, the Nation's preemption claim depends entirely on an assertion that Director Bergin's actions are unauthorized by (*i.e.*, in breach of) the Compact. As pled, the Nation's preemption argument presupposes that the Compact was validly entered into and that the Compact requires the Director to act. Given that the Nation's only remaining claim requires the Court to evaluate the Compact and to determine whether ADG's refusal to certify the West Valley Resort for Class III gaming is impermissible (*i.e.*, whether ADG has breached the Compact), the Nation cannot make this case anything other than what it is substantively – a breach of Compact case. The Nation should not be permitted to claim that the Compact was validly entered into while at the same time asserting that this Court should deny the Director's right to adjudicate his counterclaims concerning the Compact's validity.

[3] To the extent this Court agrees that the Nation's claims rest only on preemption, the Director disputes the Nation's assumption that any failure to comply with a compact term is preempted by federal law, especially when, as here, the Director is not asserting affirmative regulatory authority but rather is simply refusing to authorize an unauthorized Class III facility.

III. DIRECTOR BERGIN HAS CAPACITY TO ASSERT THE COUNTERCLAIMS.

The Nation incorrectly contends that Director Bergin does not have capacity to assert the counterclaims because ADG is a non-jural entity under Arizona law.

First, ADG is a jural entity for disputes related to the Compact. The standard form compact, which has been adopted by Arizona law (*see* A.R.S. § 5-601.02),[4] defines "State" as "the State of Arizona, its authorized officials, agents and representatives." Compact, § 2(gg), attached as Exhibit B to Complaint, Dkt. 1. Although the Governor signed the Compact on the State's behalf, the Compact's definitions confirm that ADG has authority to act on the State's behalf with respect to the Compact given that it defines "State Gaming Agency" as the "agency of the State which the Governor may from time to time designate by written notice to the Tribe as the single State agency which shall act on behalf of the State under this Compact." Compact, § 2(ii), Exhibit B to Complaint, Dkt. 1; *cf. Thomas v. Maricopa Cnty. Bd. of Supervisors*, No. CV 07–0258–PHX–DGC, 2007 WL 2995634, *5 (D. Ariz. Oct. 12, 2007) (concluding that the Board of Supervisors is a jural entity notwithstanding the lack of a statute indicating that the Board could sue or be sued because "an entity that is capable of entering into these types of agreements must also have the ability to judicially enforce the agreements, or have these agreements judicially enforced against the entity.").[5]

Other sections of the Arizona Revised Statutes confirm that the Compact allocates responsibility for acting on the State's behalf to ADG. Section 5-602(C), for example,

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[4] A.R.S. § 5-601.02 reflects the changes reflected in the "new" standard form compact as compared with the "old" standard form compact. The "old" standard form compact contained the definitions referenced herein and, as a result, the definitions are indirectly incorporated into the statute.

[5] The Nation relies on an answer filed on ADG's behalf in an entirely different case to support its contention that ADG is a non-jural entity. In that case, the plaintiffs asserted claims arising under state tort law and 42 U.S.C. § 1983, alleging that the defendants unlawfully seized cash and casino redemption tickets and improperly handcuffed and questioned the plaintiffs. The case did not involve issues related to ADG's obligations under the Compact. ADG does not contend it is a jural entity for any and all lawsuits but rather asserts that it is a jural entity for purposes of the Compact.

states that "[t]he department of gaming shall execute the duties of this state under the tribal-state compacts in a manner that is consistent with this state's desire to have extensive, thorough and fair regulation of Indian gaming permitted under the tribal-state compacts." A.R.S. § 5-602(C); *see also id.* § 5-601(D) ("The department of gaming is authorized to carry out the duties and responsibilities of the state gaming agency in compacts executed by the state and Indian tribes of this state pursuant to the Indian gaming regulatory act."). It is plain that ADG is vested with considerable responsibility with respect to Indian gaming. The Arizona legislature has made clear that ADG "shall seek to promote the public welfare and public safety and shall seek to prevent corrupt influences from infiltrating Indian gaming." A.R.S. § 5-602(A). The broad authority vested in ADG, coupled with the Compact's recognition that an authorized representative such as Director Bergin acts for the State, demonstrate that Director Bergin has capacity to assert the counterclaims on the State's behalf. *See Simms v. Napolitano*, 73 P.3d 631, 634 (Ariz. 2003) (providing an example of ADG as a defendant and noting that ADG's powers derive not only from the Compact but also from the State's police powers and that "[t]he statutes . . . confer broad authority on the Department to accomplish its statutory goals").

The Nation incorrectly contends that the Attorney General's statutory authority to sue to recover penalties imposed by ADG means that ADG is not a jural entity for purposes of the Compact. The relevant statute states that the Attorney General may only initiate such suit "[a]t the director's request." A.R.S. § 5-602.01(C). Thus, the plain language of the statute makes clear that the Attorney General acts in this capacity only when asked by the Director. ADG's ultimate authority is reaffirmed by the legislative history, which explains that the legislature's intent was "to clearly state that the department of gaming has the continuing authority to determine the suitability of individuals and companies to obtain state certification to engage in activities related to Indian gaming." Senate Bill 1364 § 3, Forty-fifth Arizona Legislature, Second Regular Session (2002), *available at* http://apps.azsos.gov/apps/publicservices/LegislativeFilings/

BillSearch.aspx?sid=11 (last accessed Jan. 7, 2016).

Second, Director Bergin has capacity to assert the counterclaims based on the relief sought by the Nation—an order compelling Director Bergin to act consistently with the Compact. *See State ex rel. Montgomery v. Mathis*, 290 P.3d 1226, 1235 (Ariz. App. 2012) ("Assuming *arguendo* that the IRC did not have capacity to bring this type of action, the Commissioners have capacity to sue and have standing because they have a direct interest in seeking declaratory and injunctive relief from the CIDs.") (emphasis in original and citations omitted); *Arizona Indep. Redistricting Comm'n v. Brewer*, 275 P.3d 1267, 1271 (Ariz. 2012) ("Respondents argue that the IRC is not a jural entity and therefore lacks standing to sue except in certain constitutionally specified areas. . . . But Mathis, who was displaced from office, unquestionably has standing to challenge the legality of the Governor's removal action. Therefore, we need not decide whether the IRC also has standing.") (citation omitted). On this basis, Director Bergin must have at least the capacity to assert Counterclaim One, which seeks a declaratory judgment that he does not have a duty to affirmatively authorize Class III gaming at the West Valley Casino.[6]

Finally, Director Bergin also has capacity for the simple reason that the Nation has previously contracted directly with ADG. The Nation and ADG have entered into contracts and memoranda of understanding detailing how various Compact provisions will be implemented. *See, e.g.*, Resolution of the Tohono O'Odham Legislative Council, Resolution No. 09-015 (Jan. 8, 2009), *available at* http://tolc-nsn.org/docs/actions09/

[6] Contrary to the Nation's contention, the fact that the Director may not know all of the details related to the Nation's fraud does not mean he lacks capacity to assert the counterclaims. An *Ex Parte Young* defendant sued on behalf of a state will often not have complete knowledge of the state's actions, much less information within the control of the opposing party. Moreover, as the Director has steadfastly maintained, discovery is necessary with respect to the counterclaims to bring to light the evidence supporting his contention that the Nation intentionally and knowingly defrauded the State and the voters. *See, e.g.*, Joint Case Management Report, Dkt. 97, at 4:21-25, 8:21-9:16; Letter to Chambers, Dkt. 104, at 2. Further, the fact that a second lawsuit now exists in which similar issues are being raised is not the Director's doing but rather is due to the Nation's own actions in filing the instant lawsuit. The Nation should expect the Director to assert counterclaims given that the Nation has tried to cast this lawsuit as about preemption rather than breach of compact (which would open the door for counterclaims). The Court should not countenance the Nation's attempt to portray this action as anything other than what it is—an action to enforce the Compact.

09015.pdf (last accessed Jan. 6, 2016); Resolution of the Tohono O'Odham Legislative Council, Resolution No. 09-014 (Jan. 8, 2009), *available at* http://tolc-nsn.org/docs/actions09/09014.pdf (last accessed Jan. 6, 2016); Resolution of the Tohono O'Odham Legislative Council, Resolution No. 09-245 (May 15, 2009), *available at* http://tolc-nsn.org/docs/Actions09/09245.pdf (last accessed Jan. 6, 2016); *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001) (noting that a court may properly take judicial notice of publicly-filed documents). The Nation should be estopped from denying that ADG does not have the capacity to be sued and to bring suit for issues related to the Compact given that the Nation has contracted with ADG as an entity responsible for implementing the Compact. *See Spurlock v. Santa Fe Pac. R.R. Co.*, 694 P.2d 299, 314 (Ariz. App. 1984) ("Parties who contract with or otherwise deal with an entity as a corporation are estopped from denying the corporate existence of that entity in a subsequent lawsuit.") (citations omitted).

IV. COUNTERCLAIMS TWO, THREE, AND FOUR EACH STATE A CLAIM.

The Nation incorrectly argues that the counterclaims of promissory estoppel, fraud in the inducement, and material misrepresentation fail to state a claim as a matter of law because: (1) there was no reliance by the State on the Nation's representations; and (2) the Court found in *TON I* that the construction of the West Valley Casino would not violate the Compact's terms. To the contrary, the Court did not rule on the merits of any of these claims in *TON I*, and the State and others actually and justifiably relied on the Nation's misrepresentations and promises.

In his counterclaims, Director Bergin is asserting that the Compact, in whole or in part, is *voidable* because of the Nation's fraudulent representations and promises throughout the negotiation of and public vote on the Compact that it would not operate a new casino in the Phoenix metropolitan area. Because the Compact, in whole or in part, is voidable, Director Bergin and ADG are not required to issue state approvals or certifications for vendors, employees, or casino facilities for the West Valley Casino.

A. The Compact's merger clause does not vitiate Director Bergin's actual and justifiable reliance in his promissory estoppel counterclaim.

Promissory estoppel precludes the Nation from operating a Class III gaming facility in the Phoenix metropolitan area where the Nation previously promised not to do so. The Restatement explains: "A promise which the promissor should reasonably expect to induce action or forbearance on the part of the promissee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981); *Chewning v. Palmer*, 650 P.2d 438, 440 (Ariz. 1982) (noting that Arizona law tracks section 90 of the Restatement in applying promissory estoppel).

The Nation asserts that the State could not have justifiably relied on an oral promise that the Nation would not open a gaming facility in the Phoenix metropolitan area because the Compact was fully integrated, and, thus, any reliance on such a promise is, as a matter of law, unjustifiable. Motion at 18:9-20:16. This argument fails.

First, the existence of an integration clause does not shield the Nation from its fraud. *See Hill v. Jones*, 725 P.2d 1115, 1117 (Ariz. App. 1986) (noting that an integration clause does not shield a party from liability if that party has committed fraud).

Second, reliance on an oral promise that is not contained in a fully integrated written contract is unreasonable *only* if "there is an express contract between the parties in reference to the *same subject matter*[.]" *Chanay v. Chittenden*, 563 P.2d 287, 290 (Ariz. 1977) (emphasis added and citations omitted); *Crofton v. CIT Grp., Inc.*, No. CV 09-1999-PHX-FJM, 2011 WL 1211566, at *6 (D. Ariz. Mar. 30, 2011) (denying summary judgment because "Defendant's alleged assurances that plaintiff would receive a bonus do not contradict the language of the Separation Agreement, and therefore plaintiff's reliance on them is not unreasonable as a matter of law."). The cases the Nation cites in support of its argument support this distinction. *See Chanay*, 563 P.2d at 290 (stating that a promissory estoppel claim under Restatement Section 90 survives despite the existence of a written contract "if there were no express agreement *to the contrary*") (emphasis added);

Mann v. GTCR Golder Rauner, L.L.C., 425 F. Supp. 2d 1015, 1032 (D. Ariz. 2006) (citing *Chanay*).

The Nation's promises (to the State, Arizona voters and other tribes) not to develop a casino in the Phoenix metropolitan area do not conflict with the Compact's express terms. In fact, this Court recognized that the evidence developed in *TON I* could support a promissory estoppel claim.[7] *TON I*, 944 F. Supp. 2d at 768-9. The Nation's assertions that the Court held in *TON I* that the Compact expressly permits additional gaming in the Phoenix metropolitan area is false. To the contrary, the Court in *TON I* noted "a provision concerning the location of gaming facilities was included in the Compact, and it says nothing about future facilities in the Phoenix area." *Id.* at 765. Because the Compact does not contain a provision explicitly allowing the Nation to operate a casino in the Phoenix area, no direct conflict exists between the Compact and the Nation's promise, and reliance on the Nation's promise was reasonable.

Finally, justifiable reliance in the promissory estoppel context is not as limited as the Nation suggests. Reliance is only unjustified when the promisee has knowledge contrary to the promise. "Reliance is justified when it is *reasonable*, but is not justified when *knowledge* to the contrary exists." *Higginbottom v. State*, 51 P.3d 972, 977 (Ariz. App. 2002) (emphasis added and citation omitted). In *Higginbottom*, the plaintiff alleging promissory estoppel had actual *knowledge* that the promise he was trying to enforce was not enforceable and had previously acknowledged his understanding in writing. *Id.* Thus, his reliance on such a promise was not justified. *Id.* Here, in contrast, the State had no actual knowledge that the Nation intended to build a casino in the Phoenix metropolitan area because the Nation carefully and intentionally concealed this information during the negotiation of the Compact and campaign for Proposition 202, demonstrating that the State's reliance was reasonable. In any event, whether the State's reliance was reasonable is a question of fact necessitating discovery. *See Lerner v. DMB Realty, LLC*, 322 P.3d

[7] Although the Court held that the Nation's sovereign immunity precluded the claim because promissory estoppel seeks to enforce a promise outside the Compact, the same result does not obtain here for the reasons described above.

909, 914 (Ariz. App. 2014) ("Questions about materiality and reasonable reliance, however, usually are for the jury, not for the court to decide on a motion to dismiss.") (citations omitted).

B. <u>The passage of Proposition 202 and the Compact's merger clause do not render Director Bergin's reliance unjustifiable for the counterclaims of fraud in the inducement and material misrepresentation</u>.

Under Arizona law, fraud and material misrepresentation have similar elements. Nine elements are required to show fraud:

> (1) a representation, (2) its falsity, (3) its materiality, (4) the speaker's knowledge of its falsity or ignorance of its truth, (5) the speaker's intent that it be acted upon by the hearer in a manner reasonably contemplated, (6) the hearer's ignorance of its falsity, (7) the hearer's reliance on its truth, (8) the right to rely on it, and (9) his consequent and proximate injury.

Echols v. Beauty Built Homes, Inc., 647 P.2d 629, 631 (Ariz. 1982) (citation omitted). Material misrepresentation requires these same elements, but it does *not* require that the speaker know of the representation's falsity or be ignorant of its truth. *Lundy v. Airtouch Commc'ns, Inc.*, 81 F. Supp. 2d 962, 968 (D. Ariz. 1999) (referring to non-fraudulent misrepresentation as "innocent" misrepresentation).

The Nation has not argued that its representation that it had no intention to operate a casino in the Phoenix metropolitan area was true, that such a representation would not be material, or that the Nation did not know during the negotiations that such a representation was false. Nor does the Nation argue it did not intend such a representation to induce the State to enter into the Compact, that the State knew such a representation was false, or that the State has not sustained an injury. Instead, the Nation focuses on whether Director Bergin actually and justifiably relied on the Nation's representations.

1. The State actually relied on the Nation's promises.

The Nation argues that the State could not have actually relied on its representation because the State was legally required to enter into the Compact after Proposition 202 passed. Motion at 21:17-23:5. This argument is specious.

The Nation admits that the governor had authority under Proposition 202 to

negotiate and enter into amendments that were consistent with Proposition 202.[8] Motion at 5:5 n.2. Thus, to the extent the voters understood Proposition 202 to prohibit any new casinos in the Phoenix metropolitan area, the statute authorized the governor to negotiate an amendment clarifying that point.[9] The governor did not use this authority because she was relying on the Nation's representations, which she and others relayed from the Nation to the public, that the Nation would not operate a new casino in Phoenix. *See, e.g.*, Countercl., Dkt. 96, ¶30. Additionally, the new compacts were effective only after each tribe with a facility in Maricopa, Pima or Pinal County had signed a new compact. Compact, § 2(vv)(4), attached as Exhibit B to the Complaint, Dkt. 1. Notably, the Salt River Compact was not set to expire until approximately 2008. *See* United States Department of The Interior – Indian Affairs, *September 10, 1998 Approval of Compact Between the Salt River Pima-Maricopa Indian Community and the State of Arizona* at Compact, § 23 (b)(1), *available at* http://www.indianaffairs.gov/cs/groups/xoig/documents/text/idc-038164.pdf (last visited Jan. 6, 2016); *Lee*, 250 F.3d at 688 (noting that courts can take judicial notice of publicly-filed documents). If the Salt River tribe had known that the Nation was secretly planning to open a new gaming facility in the Phoenix metropolitan area, it could have stopped the new compacts from taking effect simply by refusing to enter into a new one. Compact, § 2(vv)(4), attached as Exhibit B to the Complaint, Dkt. 1. Indeed, the fact that the Nation kept silent about its intentions to

[8] A.R.S. § 5-601.02(E) authorizes the governor "to negotiate and enter into amendments to new compacts that are consistent with this chapter and with the policies of the Indian gaming regulatory act." Thus, this authority actually extends to the entirety of A.R.S. Title 5, Chapter 6, which includes all Department of Gaming statutes.

[9] The Nation's argument that the State could not have justifiably relied on its misrepresentation because the State was legally bound to enter into the Compact after the passage of Proposition 202 contradicts its argument that Director Bergin cannot have justifiably (or reasonably) relied because the State was a sophisticated party represented by counsel. Both arguments cannot stand. If the State was bound to enter into the Compact because of Proposition 202, it is the voters' sophistication and access to counsel that is relevant (and although not unsophisticated, the voters were not highly sophisticated parties represented by counsel). It was entirely reasonable for the voters to rely on the Nation's representations (forwarded to them by the State and the coalition of tribes) regarding Proposition 202's content, rather than assuming the voters carefully parsed the words of the Compact. Tellingly, the voters chose the ballot measure that limited gaming based on the communications to the voters from the State and coalition of tribes.

build a casino in the West Valley until after Salt River entered into a new Compact belies any notion that Proposition 202 *required* the State to enter into the Compact. Proposition 202 did not transform the Compact into a legal formality over which the State and other tribes had no control, nor did it vitiate the State's or others' actual reliance on the Nation's misrepresentation.

Director Bergin has sufficiently alleged that the Nation's misrepresentation (whether by non-disclosure or assertion of a present intent not to act) was relevant, material and substantially contributed to the State's, the other tribes', and the voters' decisions to assent to the Compact. *See* RESTATEMENT (SECOND) OF CONTRACTS § 167, cmt. a (1981) ("It is not necessary that this reliance have been the sole or even the predominant factor in influencing his conduct. It is not even necessary that he would not have acted as he did had he not relied on the assertion. It is enough that the manifestation substantially contributed to his decision to make the contract."). A fundamental premise of Proposition 202 that was represented to the voters was the fact that its passage would ensure that no new casinos would be built in the Phoenix metropolitan area. Countercl., Dkt. 96, ¶¶ 6, 30; *see also TON I*, 944 F. Supp. 2d at 762. The Nation, knowing it was in the process of developing a casino in the West Valley, said nothing, allowing the State, voters and other tribes to continue to believe that the representations made during the Compact's negotiation process and the run up to the passage of Proposition 202 were accurate.

2. The merger clause in the Compact does not render the State's reliance on the Nation's representations during the Compact's *formation* unjustifiable.

The Nation argues that ADG could not have justifiably relied on a representation that the Nation would not open a new casino in the Phoenix metropolitan area because the State was a sophisticated party and the Compact contains a merger clause. Motion at 17:1-18:7. Again, these arguments fail.

As an initial matter, the presence of a merger clause in the Compact does not shield the Nation's fraud from judicial review. "[A]ny provision in a contract making it possible

for a party thereto to free himself from the consequences of his own fraud in procuring its execution is invalid and necessarily constitutes no defense." *Hill*, 725 P.2d at 1117 (noting that a merger clause in a real estate contract cannot shield the sellers from a fraud claim by the buyer) (citations omitted); *see also Lutfy v. R. D. Roper & Sons Motor Co.*, 115 P.2d 161, 166 (Ariz. 1941). The same rule applies to a claim alleging negligent misrepresentation. *Formento v. Encanto Bus. Park*, 744 P.2d 22, 25-6 (Ariz. App. 1987) ("[I]t is well-settled that a party 'cannot free himself from fraud by incorporating [an integration clause] in a contract.' . . . a seller should not be allowed to hide behind an integration clause to avoid the consequences of a misrepresentation, whether fraudulent or negligent.") (alteration in original and citations omitted).

For example, in *Star Insurance*, the court distinguished between representations that were essentially collateral agreements within the scope of the contract, and representations that *induced* the other party to enter into the agreement in the first place, stating that a merger clause would foreclose reliance on the first type of representation but not the second. *See Star Ins. Co. v. United Commercial Ins. Agency, Inc.*, 392 F. Supp. 2d 927, 928-29 (E.D. Mich. 2005). Thus, reliance on a misrepresentation that goes to the *formation* of a contract is justifiable and may give rise to a cause of action, even if the written agreement is completely integrated. *Id.* at 929-30; *see also Lerner*, 322 P.3d at 914 (reversing dismissal as to a fraud claim and holding, "[t]he general rule that the jury must resolve questions of materiality and reliance in a fraud claim applies even when, as here, the contract purports to impose on the buyer the duty to investigate and contains a 'warranty' by which the buyer affirms he is not relying on any extra-contractual representations by the seller."). The Nation intended for its misrepresentation to induce the State, the voters, and the other tribes to enter into the Compact, and thus the misrepresentation goes to the Compact's formation. Thus, the merger clause does not render ADG's and others' reliance on the misrepresentation unjustifiable.

The Nation also has suggested that the Compact's merger clause makes any reliance on their false representation unjustifiable. The Nation supports this argument by

quoting an example from the Restatement (Motion at 24:22-25). That example explains a purchaser of a one-eyed horse cannot later recover due to the lack of a second eye if the purchaser could have discovered that fact before the purchase. Notably, this Restatement section concerns obviously false representations and the comment explains "the rule stated in this Section applies only when the recipient of the misrepresentation is capable of appreciating its falsity *at the time by the use of his senses*." RESTATEMENT (SECOND) OF TORTS § 541, cmt. a. (1977) (emphasis added). In other words, the rule that the recipient of a fraudulent misrepresentation is unjustified in relying on an obviously false representation only applies when the recipient can appreciate the falsity *at the time of the misrepresentation*.

Here, the merger clause in the Compact, which came after the false representations that induced the Compact, does not render the reliance (which occurred in connection with the Compact's formation) unjustifiable. *See* RESTATEMENT (SECOND) OF TORTS § 541A, cmt. a (1977) ("In the absence of obvious falsity or reason to know of facts making reliance unreasonable, there is no requirement that the recipient investigate the truth of the statements made to him."); *Dawson v. Withycombe*, 163 P.3d 1034, 1048 (Ariz. App. 2007) ("A person may rightfully rely upon a misrepresentation of fact even when he may have discovered the falsity of the statement by a simple investigation. . . . [O]nce a party requests assurances, the alleged tortfeasor cannot misrepresent such assurances and then contend the alleged victim had no right to rely on such representations. . . . To hold otherwise would be to allow a party to be free from the consequences of his own misrepresentations.") (citations omitted). Even assuming *arguendo* that the State suspected the Nation was misrepresenting its intentions during the negotiations, such suspicion is insufficient to render the State's reliance unjustifiable. *Fectay v. Tahiri*, No. 2 CA-CV 2015-0076, 2015 WL 7710272, at *2 (Ariz. App. Nov. 30, 2015) (unpublished) ("[A] party's suspicion that a person has acted dishonestly does not mean the party cannot rely on that person's statements.") (citations omitted).

Finally, for purposes of this motion to dismiss, it must be accepted that the Nation

led the State and the other tribes to believe that there was no need to include geographic restrictions in the Compact. As a result, the State, relying on the Nation's representations that it would not build a casino in the Phoenix metropolitan area, did not push for explicit language in the Compact. If the Nation had disclosed its true intent, the Compact would not have been accepted by the State or other tribes.

V. CONCLUSION

For the foregoing reasons, Director Bergin respectfully requests that the Court deny the Nation's motion to dismiss. Alternatively, to the extent the Court determines that Director Bergin does not have capacity to assert the counterclaims or concludes there are deficiencies with the counterclaims as pled, Director Bergin respectfully requests that the Court grant him leave to amend pursuant to Rule 15 and/or set a deadline for motions to intervene pursuant to Rule 24.

DATED this 8th day of January, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2016, I electronically transmitted the attached document to the Clerk's Office using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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