KAMALA D. HARRIS
Attorney General of California
SARA J. DRAKE
Senior Assistant Attorney General
PARAS HRISHIKESH MODHA
Deputy Attorney General
TIMOTHY M. MUSCAT
Deputy Attorney General
State Bar No. 148944
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 322-5184
Fax: (916) 323-2319
E-mail: Timothy.Muscat@doj.ca.gov
Attorneys for State Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

PAUMA BAND OF LUISENO MISSION INDIANS OF THE PAUMA & YUIMA RESERVATION, a/k/a PAUMA BAND OF MISSION INDIANS, a federally-recognized Indian Tribe, Plaintiff, **v.** **STATE OF CALIFORNIA; et al.** Defendants.	3:16-cv-01713-BAS-JMA **DEFENDANTS' REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS** Date: No Oral Argument Unless Requested by the Court Courtroom: 4B Judge: Hon. Cynthia Bashant Trial Date: N/A Action Filed: 7/1/2016

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INTRODUCTION

Defendants State of California (State), Edmund G. Brown Jr., as Governor of the State of California, the California Gambling Control Commission (Commission), and the State of California Department of Justice, Office of the Attorney General (DOJ) (collectively State Defendants) hereby reply to plaintiff Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation, a/k/a Pauma Band of Mission Indians, a federally-recognized Indian Tribe's (Pauma or Tribe) opposition to State Defendants' motion to dismiss the twenty-first claim for breach of compact (breach claim) set forth in the First Amended Complaint (FAC).

ARGUMENT

I. PAUMA LACKS STANDING TO PURSUE A BREACH CLAIM REGARDING SPECIAL DISTRIBUTION FUND PAYMENTS IT NEVER MADE

Pauma has no standing to litigate its breach claim because prudential concerns under the standing doctrine prevent it from asserting the contract rights of other tribes that actually pay into the Special Distribution Fund (SDF). As a result, Pauma's allegations regarding the alleged misuse of SDF monies that were paid by others amount to nothing more than generalized grievances.

Pauma's opposition attempts to side step this standing defect by raising several arguments. First, Pauma claims that the 1999 Compacts "created one common system wherein the interests of all the signatories and the beneficiaries are linked together." Pauma Opp'n at 7. Pauma also argues that the 1999 Compacts represented a promise by the State to all tribes that signed these compacts, thereby permitting Pauma the right to sue to enforce the contract. *Id.* at 8-10. Pauma further claims that the State Defendants' alleged breach regarding SDF payments had significant consequences on the Tribe. *Id.* at 10-14. And finally, Pauma argues that the State's standing arguments represent an improper attempt to prevent judicial review of the 1999 Compacts. *Id.* at 14-15. These attempts to evade the standing doctrine should be rejected for the following three reasons.

A. Pauma's Generalized Grievances Regarding the California Legislature's Appropriation of SDF Monies Fail to Establish Standing Because the Tribe Was Never Contractually Obligated to Make SDF Payments

Pauma's standing arguments largely ignore this doctrine's prudential concerns. As discussed in the State Defendant's motion to dismiss, prudential limitations have been described as "essentially matters of judicial self-governance." *McMichael v. Napa County*, 709 F. 2d 1268, 1271 (9th Cir. 1983) (*McMichael*) (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (*Warth*)). In their absence, "the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." *Id.* Two prongs in the standing doctrine's prudential limitations are: (1) the plaintiff must assert his or her own rights, rather than relying on the rights or interests of third parties; and (2) the plaintiff must allege an injury that is more than a "generalized grievance." *Id.* at 1270 (citing *Warth*, 422 U.S. at 499; *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 475 (1982) (*Valley Forge*). Federal courts employ standing doctrines to examine whether the correct party is litigating a potential claim, and focus "on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." *Valley Forge*, 454 U.S. at 484 (quoting *Flast v. Cohen*, 392 U.S. 83, 99 (1968)).

In applying the above standard, Pauma's failure to plead that it made SDF payments shows that it lacks standing to pursue its breach claim. The State Defendants are not arguing, as Pauma asserts, that the SDF provision in its 1999 Compact is "somehow missing." Pauma Opp'n at 5. Rather, the State Defendants' position is that Pauma has not, and cannot, plead that its compact required the Tribe to make SDF payments.

This distinction is critical in analyzing Pauma's claimed standing to litigate a breach claim when the Tribe made no SDF payments. Pauma accurately cites the

Ninth Circuit's decision in *Cachil Dehe Band of Wintun Indians of Colusa Indian Community v. California*, 618 F. 3d 1066, 1070 (9th Cir. 2010) (*Colusa*) for the limited proposition that the 1999 Compacts under review in that decision were "substantially identical." Pauma Opp'n at 7. But this substantial similarity in compact language did not result in the same contractual obligations between the State and the separate sovereign tribes that entered into these individual compacts. Significantly, while other tribes agreed to 1999 Compacts obligating them to make SDF payments, Pauma did not.

The standing doctrine's prudential concerns dictate that Pauma must assert its own rights, and not either the rights of third parties or generalized grievances. Pauma cannot merely assert the alleged contract rights or harms of others. In this case, while Pauma signed a 1999 Compact containing an SDF provision, it did not require Pauma to make any SDF payments. Therefore, Pauma's FAC alleges nothing more than generalized grievances regarding the California Legislature's appropriations of SDF monies. The California Legislature remains the appropriate governmental institution to address Pauma's general grievances. Indeed, Pauma's FAC lists the California Legislature's annual appropriations of SDF monies for the last five fiscal years. FAC ¶ 191. Pauma should pursue this appropriations dispute in the political forum where it belongs, and not federal court.

B. Pauma's Claimed "Significant Consequences" Argument Fails to Cure the Tribe's Lack of Standing to Litigate the Breach Claim

Pauma's FAC fails to plead any "significant consequences" that provide it with standing to pursue its breach claim. While Pauma admits that it has not paid any SDF monies, it claims that the alleged misuse of these funds removes dollars that would be "available to local communities to deal with a range of issues." Pauma Opp'n at 11. Pauma argues that it has already been harmed in this manner because the Tribe was required to execute an agreement with the County of San

Diego (San Diego) that obligated Pauma to make significant payments to this local government to off-set the costs for local public services. *Id.*

While the State Defendants do not dispute that Pauma's FAC alleges its agreement with San Diego, these allegations of attenuated harm do not satisfy the standing doctrine's prudential concerns. Similar to the failure to allege any actual payments of SDF monies, it remains undisputed that Pauma's FAC fails to allege a single local program associated with its gaming establishment that was either not funded, or underfunded, as a result of the State's alleged misuse of SDF monies. Moreover, while Pauma's FAC alleges an *obligation* to make payments to San Diego, the Tribe fails to allege that any such payments were *actually made.* Accordingly, these threadbare claims by Pauma allege, at most, a generalized grievance over how the California Legislature appropriates SDF monies. And these allegations fail to establish standing because they seek "relief that no more directly and tangibly benefits [the plaintiff] than it does the public at large . . . ." *Baldwin v. Sebelius*, 654 F. 3d 877, 879 (9th Cir. 2011) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-74 (1992)).

C. The State Defendants' Position on Standing Does Not Insulate Them from Judicial Review of the 1999 Compacts

The State Defendants' narrow standing arguments hardly "insulates" them from judicial review because they focus solely on Pauma's breach claim. That is because the State Defendants' motion to dismiss does not challenge Pauma's standing to pursue its SDF-related claims for failure to negotiate in good faith under the Indian Gaming Regulatory Act (18 U.S.C. §§ 1166-1168; 25 U.S.C. §§ 2701-2721) (IGRA). FAC ¶¶ 278-82, 294-98.

Unlike Pauma's SDF-related IGRA claims, Pauma has no standing to seek SDF contract-related remedies when this Tribe was never contractually obligated to make SDF payments. In particular, Pauma has no standing to seek under its breach claim to recover either the "disgorgement of the previously misused" SDF monies

as "restitution or damages" for the alleged misappropriation of these funds. FAC, Prayer for Relief at ¶ 2. Pauma should not be permitted to adjudicate a claim for contract damages when it never made any contract payments. Under the well-established standing principles, plaintiffs in federal court "must demonstrate standing separately for each form of relief sought." *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 185 (2000) (citing *Los Angeles v. Lyons*, 461 U.S. 59, 109 (1983)).

Finally, the State Defendants' assertions of standing are not, as Pauma claims, "overarching procedural defenses in lieu of addressing the merits" of the SDF provisions in the 1999 Compacts. Pauma Opp'n at 1. Rather, the State Defendants filed their motion because Pauma should not have standing to demand the return of SDF monies that it never paid.

II. PAUMA'S BREACH CLAIM IS TIME BARRED BY THE APPLICABLE FOUR YEAR STATUTE OF LIMITATIONS

Pauma's twenty-first claim for relief runs afoul of the applicable statute of limitations. While IGRA contains no statute of limitations, federal courts addressing claims under federal statutes assume that Congress intended by its silence that the appropriate state law applies. *See Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 147 (1987). And here, the state's four-year statute-of-limitations period on lawsuits for breach of a written contract is appropriate. Cal. Code Civ. Proc. § 337. Claims brought after the limitations period has expired are generally barred. *Norgart v. Upjohn Co.*, 21 Cal. 4th 383, 395 (1999). "Traditionally at common law, a cause of action accrues when [it] is complete with all of its elements—those elements being wrongdoing, harm, and causation. This is the 'last element' accrual rule: ordinarily, the statute of limitations runs from 'the occurrence of the last element essential to the cause of action.'" *Aryeh v. Canon Business Solutions, Inc.*, 55 Cal. 4th 1185, 1191 (2013) (*Aryeh*) (citations omitted).

Here, the State entered into tribal-state compacts in 1999 and the State's Legislature enacted California Government Code section 12012.85 (Section 12012.85) after the compacts were executed. Section 12012.85 has been amended several times.[1] On May 1, 2000, the State and Pauma entered into a tribal-state Compact. Pauma's opposition notes that "every quarter from roughly the end of the first quarter of 2002 to the end of the third quarter of 2016, the State has received a considerable amount of SDF revenue sharing from payor tribes, which it then decides whether to distribute to the express purposes in the 1999 Compact or use for more desirable purposes . . . ." Pauma Opp'n at 19. According to the Tribe, the State has continuously since 2002 allocated and disbursed funds from the SDF for purposes alleged in the FAC. Accordingly, Pauma's breach claim accrued nearly fifteen years ago, when the State first authorized and used funds from the SDF for the purposes alleged in the FAC. Dismissal of the breach is warranted because these alleged breaches accrued "at the time of the breach" under California law. *Perez-Encinas v. AmerUs Life Ins. Co.*, 468 F. Supp. 2d 1127, 1134 (N.D. Cal. 2006).

A. *EL POLLO'S* DISCOVERY RULE DID NOT TOLL THE FOUR-YEAR STATUTE OF LIMITATIONS ON PAUMA'S BREACH CLAIM

Pauma attempts to evade the statute-of-limitations defense by evoking the "discovery rule," and arguing that it tolls the statue of limitations because the Tribe did not discover the State's alleged misuse of the SDF until November 12, 2015. Pauma Opp'n at 16-18. In support thereof, Pauma cites to *El Pollo Loco, Inc. v. Hashim*, 316 F. 3d 1032 (9th Cir. 2003) (*El Pollo*). Although *El Pollo* discusses a tolling of the statue of limitations, the decision is consistent with California law because it holds that the discovery rule generally does not apply to breach-of-

[1] Added by Stats.1999, c. 874, § 3. Amended by Stats.2000, c. 127, § 8, eff. July 10, 2000; Stats.2003, c. 210, § 1, eff. Aug. 11, 2003; Stats.2003, c. 858, § 2; Stats.2007, c. 176, § 52, eff. Aug. 24, 2007; Gov.Reorg.Plan No. 1 of 2011, § 57, eff. Sept. 9, 2011, operative July 1, 2012; Stats.2012, c. 665, § 49.

contract claims, which normally accrue at the time of the breach. 3 Witkin, Cal. Procedure (5th ed. 2008) Actions, § 520, pp. 664-65, § 529, pp. 678-80. Further, *El Pollo* states that the discovery rule may apply to unique breach-of-contract cases only when: 1) "[t]he injury or the act causing the injury, or both, have been difficult for the plaintiff to detect"; 2) "the defendant has been in a far superior position to comprehend the act and the injury"; or 3) "the defendant had reason to believe the plaintiff remained ignorant [that] he had been wronged." *El Pollo*, 316 F. 3d at 1039 (citation omitted). Essentially, this "discovery rule" is applied in breach of contract actions only when the breach "is committed in secret" or is concealed. *William L. Lyon & Assocs., Inc. v. Superior Court*, 204 Cal. App. 4th 1294, 1309 (2012).

Under this discovery rule, Pauma's breach claim remains time barred for three reasons. First, Pauma experienced no breach-of-compact injury or act that was difficult to detect. *El Pollo*, 316 F. 3d at 1039. The California Legislature's decision to appropriate SDF monies to its agencies was sufficient to put Pauma on inquiry notice, thereby triggering accrual of the statute of limitations. A reasonable person would view the use of SDF monies by agencies of the State as sufficient reason to inquire whether the uses were contractually permitted. At the very least, Pauma should have suspected that any injury it sustained by any alleged breach occurred back in 2009 when it commenced IGRA litigation against the State. Accordingly, the applicable four-year statute of limitations on Pauma's breach claim became time barred in or before 2013.

Second, State Defendants have not been "in a far superior position to comprehend the act and the injury" allegedly sustained by Pauma. *El Pollo*, 316 F. 3d at 1039. In fact, Pauma has suffered neither a breach of compact act nor injury because Pauma has never paid any monies into the SDF.

Third, the State Defendants did not have any "reason to believe the plaintiff remained ignorant [that] he had been wronged." *El Pollo*, 316 F. 3d at 1039.

Given that Pauma paid nothing into the SDF, the State Defendants had no reason to believe that Pauma remained ignorant of any possible "wrong" regarding the expenditure of SDF monies. Nor was there any effort to conceal these expenditures. Indeed, Pauma concedes that a simple California Public Records Act request produced the predicate information that it is used to allege the breach claim. Pauma Opp'n at 18. As it did in 2015, Pauma could have discovered, through the exercise of reasonable diligence, all of the facts essential to its breach claim any time after the SDF provision of the 1999 Compacts went into effect. Accordingly, this claim is time barred.

B. THE CONTINUAL ACCRUAL DOCTRINE IS INAPPLICABLE TO A COMPLETED BREACH CLAIM

Pauma's opposition next seeks to invoke the "continual accrual" doctrine. As explained in the leading case, *Aryeh*, because each new breach of an obligation provides all the elements of a claim—wrongdoing, harm, and causation—each may be treated as an independently actionable wrong with its own time limit for recovery." *Aryeh*, 55 Cal. 4th at 1199. The continual accrual doctrine is usually applied when a breach involves the making of periodic payments, since each payment may constitute a new breach of the agreement. *E.g.*, *Tsemetzin v. Coast Fed. Savings & Loan Ass'n.* 57 Cal. App. 4th 1334, 1344 (1997) (lease); *Conway v. Bughouse, Inc.*, 105 Cal. App. 3d 194, 200 (1980) (installment contract). However, continuing injury from a completed breach does not extend accrual of the cause of action. *Vaca v. Wachovia Mortg. Corp.*, 198 Cal. App. 4th 737, 745 (2011).

The continuous-accrual doctrine is inapplicable to Pauma's claim because it has alleged a completed-breach claim. Since the State has continually used the SDF for the same purposes, the breach occurred once—when the State first adopted Section 12012.85 and used the SDF proceeds for the purposes alleged in the FAC—thereby foreclosing invocation of the continuous-accrual doctrine.

III. PAUMA'S BREACH CLAIM FAILS TO STATE A CLAIM AGAINST THE DOJ AND THE COMMISSION BECAUSE THEY WERE NOT PARTIES TO THE COMPACT

The 1999 Compact is a contract between Pauma and the State. *Colusa*, 618 F. 3d at 1073. It is governed by general federal-law principles. Federal law looks to, and relies upon, California contract law. *Id.* "As a general matter, a non-party, or non-signatory, to a contract is not liable for a breach of that contract." *Chan v. Empire Fire & Marine Ins. Co.*, No. C-10-02528 EJD, 2011 WL 3267765, at *5 (N.D. Cal. July 29, 2011) (collecting California cases). Both the FAC and the compact attached to the FAC show unequivocally that the DOJ and the Commission (Agency Defendants) are not a parties to the Compact. Pauma has not, and cannot, allege that the Agency Defendants are parties to the Compact. A breach-of-compact claim cannot lie against non-signatories to the compact. *See, e.g., Henry v. Associated Indem. Corp.*, 217 Cal. App. 3d 1405, 1416-17 (1990) (noting that when there was no direct contractual relationship between the parties a breach of contract action could not "properly spring").

In addition to not being parties or signatories to Pauma's compact, the Agency Defendants Pauma has not pled how the Agency Defendants have breached any contractual promises. The elements for a breach-of-contract claim are the contract, plaintiff's performance or excuse for nonperformance, defendant's breach, and resulting damages to plaintiff. *Reichert v. Gen. Ins. Co. of Am.*, 68 Cal. 2d 822, 830 (1968); see also *Tecza v. Univ. of San Francisco*, 532 F. App'x 667, 668 (9th Cir. 2013) (citing *Walsh v. W. Valley Mission Cmty. Coll. Dist.*, 66 Cal. App. 4th 1532, 1545 (1998)). Pauma also cannot simply overlook the fact that the Agency Defendants have not breached any promise made to Pauma. Certainly, as parties that did not enter any contract with Pauma, the Agency Defendants could not have breached any contractual promises.

Pauma's breach claim against the Agency Defendants is fatally flawed for two additional reasons. First, the allegations in the FAC demonstrate that Pauma cannot

establish that Agency Defendants failed to do something that the Compact required them to do. To recover for breach of contract, a plaintiff must prove that a defendant "failed to do *something that the contract required them to do*." *Ellsworth v. U.S. Bank, N.A.*, 908 F. Supp. 2d 1063, 1084 (N.D. Cal. 2012) (emphasis added). For purposes of fulfilling their duties under the Compact, as it relates to the use of the SDF monies, the Agency Defendants acted only as authorized by applicable laws, and at the direction of the executive branch of the State. Second, because "resulting damages" are an element of Pauma's breach claim, it is required to allege damages caused by the Agency Defendants that raises a right to relief above the speculative level. *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555 (2007)) (citing 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235–236 (3d ed. 2004)). The FAC fails to allege any resulting damages to Pauma caused by Agency Defendants' actions.

CONCLUSION

For all the forgoing reasons, the State Defendants request this Court grant their motion to dismiss Pauma's breach-of-compact claim.

Dated: November 18, 2016

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California
SARA J. DRAKE
Senior Assistant Attorney General
PARAS HRISHIKESH MODHA

/s/ TIMOTHY M. MUSCAT

TIMOTHY M. MUSCAT
Deputy Attorney General
Attorneys for State Defendants

SA2016301319

DECLARATION OF ELECTRONIC SERVICE BY TRUEFILING

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I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. All participants are registered with TrueFiling and are being served electronically.

On November 18, 2016, I electronically served the attached **DEFENDANTS' REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS** by transmitting a true copy via this Court's TrueFiling system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on November 18, 2016, at Sacramento, California.

Timothy M. Muscat	/S/ Timothy M. Muscat
Declarant	Signature