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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; and EDMUND G. BROWN, JR., as Governor of the State of California; and DOES 1 THROUGH 10,

Defendants.

3:16-cv-01713-BAS-JMA

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS AND STRIKE PLAINTIFF'S SECOND AMENDED COMPLAINT

[F.R.C.P. 12(b)(6) & (f)]

Date: July 31, 2017

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 the State of California and Edmund G. Brown Jr., Governor of the State of California (collectively, State Defendants), submit this memorandum of points and authorities in support of their motion to dismiss and strike pursuant to Federal Rules of Civil Procedure 12(b)(6) and 12(f).[1] By this motion, State Defendants challenge the twenty-first and twenty-second claims against them in the Second Amended Complaint (SAC) filed by plaintiff the Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation, a/k/a Pauma Band of Mission Indians, a federally-recognized Indian Tribe (Pauma).

On March 29, 2017, this Court entered an order that granted in part and denied in part the State Defendants' motion to dismiss Pauma's First Amended Complaint (FAC). The Court's order provided Pauma with limited relief to file a Second Amended Complaint (SAC) to add allegations regarding two specific defendants. Rather than pursue the Court's provided relief, Pauma's SAC alleged a brand new twenty-second claim. Further, the SAC added additional allegations related to the twenty-first claim in an apparent attempt to re-litigate this Court's previous holding on the discovery rule. These allegations should be stricken because they exceed the scope of the Court's order that provided for limited leave to amend.

In addition to exceeding the scope of the Court's order on leave to amend, Pauma's amendments in the SAC regarding the twenty-first claim should be stricken because, on the merits, they fail to cure the claim's discovery rule defects. And finally, Pauma's new twenty-second claim should be dismissed because it fails to state a claim under federal law.

[1] All subsequent "Rule" references are to the Federal Rules of Civil Procedure.

STANDARD OF REVIEW

A Rule 12(b)(6) dismissal "is proper if there is a 'lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.'" *Conservation Force v. Salazar*, 646 F.3d 1240, 1242 (9th Cir. 2011) (quoting *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990)). For a complaint to survive a motion to dismiss, "the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (citing *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009); *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555-57 (2007)). A court need not accept as true legal conclusions cast in the form of factual allegations. *Ashcroft,* 556 U.S. at 678.

Generally, the Court's analysis is limited to the contents of the complaint. *See Schneider v. Cal. Dept. of Corrections*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998). However, "[w]hen a plaintiff has attached various exhibits to the complaint, those exhibits may be considered in determining whether dismissal [is] proper." *Parks School of Business, Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). This is true whether the challenge is for failure to state a claim or lack of jurisdiction. *See Dichter-Mad Family Partners, LLP v. United States*, 707 F.Supp.2d 1016, 1026 & n.10 (C.D. Cal. 2010).

Under a Rule 12(f) motion to strike, the Court may strike any material that is "redundant, immaterial, impertinent or scandalous." Rule 12(f); *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993), rev'd on other grounds, 510 U.S. 517 (1994). Courts have the authority to strike an amended pleading filed without or in excess of leave of court to amend. *Andrew W. v. Menlo Park City School Dist.*, U.S. Dist. LEXIS 76827 at *6-7 (N.D. Cal. 2010).

ARGUMENT IN SUPPORT OF MOTIONS TO DISMISS AND STRIKE

I. PAUMA'S SAC IMPERMISSIBLY INCLUDES AMENDMENTS IN EXCESS OF THIS COURT'S GRANTED LEAVE

This is the State Defendants' second motion to dismiss in this case. Their first motion to dismiss challenged the twenty-first claim in Pauma's FAC that alleged a breach of compact claim. The State Defendants argued that the twenty-first claim should be rejected because Pauma (1) had no standing to bring a breach claim because it failed to allege for itself that it paid monies into the Special Distribution Fund (SDF); (2) the applicable four-year limitations period ran on Pauma's breach claim; and (3) the breach claim failed to state a cause of action against the California Gambling Control Commission (Commission) and the State of California Department of Justice, Office of the Attorney General (DOJ), because these defendants were not parties to the 1999 tribal-state class III gaming compact between Pauma and the State of California (Pauma Compact).

In its order, the Court denied the State Defendants' motion to dismiss Pauma's twenty-first claim for breach of compact under prudential standing requirements. (EFC 26, 7-11.) While the Court also denied the State Defendants' motion to dismiss based on the statute of limitations, the Court held that under the discovery rule and continuous accrual doctrine, Pauma's twenty-first claim for alleged breach damages was limited to breaches within the allowed four-year statute of limitations. (*Id.* at 11-15.) Finally, the Court granted the motion to dismiss for failure to state a claim for relief against the Commission and DOJ. The Court granted Pauma "leave to amend its pleading because Pauma may be able to add allegations demonstrating that the actions of the [Commission] and the [DOJ] have in some way breached an obligation under the Pauma Compact." (*Id.* at 16.)

Pauma timely filed its SAC on April 19, 2017. The SAC no longer names the Commission and DOJ as defendants. However, the SAC's twenty-first claim for relief for breach of compact continues to seek contract damages beyond the

applicable four-year statute of limitations. Further, the SAC alleges a brand new twenty-second claim for relief for an alleged breach of the implied covenant of good faith and fair dealing. The SAC includes these amendments even though they exceed the limited leave to amend granted by the Court.

The leave provided by this Court was clear. Pursuant to Rule 15(a), the Court granted Pauma leave to file amendments related to new allegations regarding breach by the Commission and DOJ. (ECF No. 26, 16.) This relief was granted pursuant to Rule 15(a)(2), which provides in part:

> a party may amend its pleading response only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

Significantly, this Court did not grant Pauma leave to either add a new cause of action, or to pursue compact breach damage claims beyond the applicable four-year statute of limitations. This limitation is significant because courts may strike an amended pleading filed in excess of the court's leave to amend. *Andrew W.*, U.S. Dist. LEXIS 76827 at *6-7. Moreover, following the Court's order, Pauma did not seek reconsideration of the scope of the Court's permitted leave to amend. Nor did Pauma file a separate motion for leave to amend beyond the order's authorized amendment. Instead, Pauma sought an unauthorized "self-help" remedy by filing the SAC with amendments in excess of those authorized by this Court, in violation of Rule 15(a)(2). For this reason alone, this Court should grant the State Defendants' motion to strike all of the new allegations in Pauma's SAC, because they are not related to the limited issue of whether "Pauma may be able to add allegations demonstrating that the actions of the [Commission] and the [DOJ] have in some way breached an obligation under the Pauma Compact." (EFC 26, 16.)

II. THE AMENDMENTS IN PAUMA'S SAC NEITHER CURE DEFECTS IN THE FAC NOR RAISE ANY NEW VIABLE CLAIM FOR RELIEF

Even if Pauma had properly sought leave to file amendments in excess of those permitted by this Court's order, such a request would have been appropriately

denied because Pauma's amendments neither cure defects in its FAC nor raise a new viable cause of action against the State Defendants.

A. Pauma's amendments fail to cure the twenty-first claim's defects regarding the discovery rule

Pauma's SAC provides no basis for this Court to reconsider its previous holding that under the discovery rule and the continuous accrual doctrine, Pauma's twenty-first claim for alleged breach damages is limited to breaches within the allowed four-year statute of limitations. (ECF No. 26, 11-15.) The Court reached its discovery rule holding because it found that Pauma had "failed to show that it engaged in the kind of due diligence necessary to assert delayed discovery." (*Id.* at 13.) The reasons supporting this holding included Pauma's delay of over ten years after entering into an amendment to the Pauma Compact (2004 Amendment) to determine if the State was complying with Pauma Compact, section 5.2, and because Pauma only took action after "other signatory tribes had inquired about the use of SDF funds, which prompted a disclosure by the State." (*Id.*)

In paragraphs 185 through 209 of the SAC, Pauma adds several new detailed allegations regarding Pauma's complaints about the State Defendants' SDF spending. For example, Pauma provides new allegations regarding additional State agencies that receive these funds. (SAC ¶ 185.) The SAC provides greater detail regarding the allocation of SDF funds per fiscal year. (SAC ¶¶ 198-199, 206-207.) Pauma further alleges that "discovering the actual uses of SDF funding is extremely difficult in light of the information made public." (SAC ¶ 189.) But none of these amendments cure the defects previously identified in the Court's order regarding delayed discovery.

Leave to amend may be denied by a district court when the allegations in the "challenged pleading could not possibly cure the deficiency." *Schreiber Distributing Co. v. Serv-Well Furniture Co., Inc.* 806 F.2d 1393, 1401 (9th Cir. 1986). In this case, even accepting the new allegations in the SAC as true, Pauma

still delayed any action for over ten years after entering into the 2004 Amendment to determine the State's compliance with the 1999 Pauma Compact, section 5.2. Moreover, the SAC's new allegations still show that Pauma's actions to determine the State's compliance only occurred after inquiries were made by other tribes. Accordingly, even if this Court had granted Pauma leave to file the amendments in the SAC regarding the application of the discovery rule, Pauma's twenty-first claim for alleged compact breach damages would still be limited to breaches within the allowed four-year statute of limitations. As a result, Pauma's unauthorized and immaterial amendments to the SAC should be stricken.

B. Pauma's amendments to add a new twenty-second claim relies on no substantive duties or limits beyond those incorporated in the Pauma Compact's specific terms

Pauma's twenty-second claim should be dismissed not only because it was added without leave to amend, but also because it improperly alleges that State Defendants breached the implied covenant of good faith and fair dealing (hereafter, the implied covenant).[2] The implied covenant imposes a burden that requires each party to a contract to "'refrain from doing anything to injure the right of the other to receive the benefits of the agreement.'" *San Jose Prod. Credit Ass'n v. Old Republic Life Ins. Co.*, 723 F.2d 700, 703 (9th Cir. 1984) (quoting *Egan v. Mutual of Omaha Ins. Co.*, 24 Cal. 3d 809, 818 (1979)).[3] The implied covenant's application is limited to assuring compliance with the "express terms of the

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[2] Although not made clear by the SAC, State Defendants assume for purposes of this motion only that Pauma's claim for breach of the implied covenant sounds in contract and not tort.

[3] As this Court previously observed, "general principles of federal contract law govern the gaming compacts, and the Ninth Circuit often looks to the Restatement when deciding questions of federal common law." (ECF No. 26, 11 (citing *Pauma Band of Luiseno Mission Indians of Pauma & Yuima Reservation v. California*, 813 F.3d 1155, 1163 (9th Cir. 2015).) Moreover, "the court 'may also rely on California contract law [when] there is no practical difference between state and federal law in [the] area.'" (*Id.*)

agreement" and "cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." *McClain v. Octagon Plaza, LLC*, 159 Cal. App. 4th 784, 806 (2008); accord, *McKnight v. Torres*, 563 F.3d 890, 893 (9th Cir. 2009) (citing *Spinks v. Equity Residential Briarwood Apartments*, 171 Cal. App. 4th 1004, 1033 (2009)). The implied covenant, if applicable, "neither 'alter[s] specific obligations set forth in the contract' nor 'add[s] duties independent of the contractual relationship.'" *McKnight v. Torres*, 563 F.3d at 893 (quoting *Shawmut Bank, N.A. v. Kress Assocs.*, 33 F.3d 1477, 1503 (9th Cir. 1994)).

In support of its claim for breach of the implied covenant, Pauma asserts that the State Defendants failed to "disclose" and "specify the purposes of SDF funding" to Pauma, and in so doing the State Defendants are "evading the spirit of the bargain." (ECF No. 27, ¶ 318.) But Pauma fails to plead any specific contractual obligation in the Pauma Compact requiring State Defendants to disclose or specify the use of SDF funding to Pauma. This is not surprising, given that Pauma further fails to plead that it has any obligation to make any SDF payments to the State. Accordingly, the factual bases for Pauma's alleged breach of the implied covenant relies on no substantive duties or limits beyond those incorporated in the Pauma Compact's express terms. As such, Pauma has failed to state a claim upon which relief can be granted, and the twenty-second claim against State Defendants should be dismissed without leave to amend.

C. Because Pauma's new claim for breach of the covenant of good faith and fair dealing relies on the same alleged acts, and seeks the same relief, as its twenty-first claim, it should be disregarded as superfluous

Finally, Pauma's new claim for relief for breach of the implied covenant should be dismissed because it is duplicative of Pauma's alleged twenty-first claim for breach of contract. Under California law, "if the plaintiff's allegations of the breach of the covenant of good faith do not go beyond the statement of a mere

contractual breach and, relying on the same alleged acts, simply seek the same damages or other relief already claimed in a companion contract cause of action, they may be disregarded as superfluous as no additional claim is stated." *Chen v. Thomas & Betts Corp.*, 2005 U.S. Dist. LEXIS 16010, *16 (N.D. Cal. 2005) (citing *Bionghi v. MetroWater Dist.*, 70 Cal. App. 4th 1358, 1369 (1999)).

Here, there is no difference between Pauma's claims for breach of contract and breach of the implied covenant. The "breach" alleged in both claims is that State Defendants did not use SDF monies for purposes allowed under Pauma Compact section 5.2 (compare SAC ¶¶ 313, 318). The "harm" alleged in both claims is the same (compare SAC ¶¶ 314, 319). The remedies sought are also the same (compare SAC ¶¶ 315, 320). Although Pauma's twenty-second claim recites the label it gave to the claim ("implied covenant of good faith and fair dealing"), it does not allege any facts other than the same breach alleged as a breach of contract in the twenty-first claim. Thus, the Court should dismiss this duplicative claim.

CONCLUSION

For all the forgoing reasons, the State Defendants respectfully request this Court to grant their motion to dismiss and strike.

Dated: June 2, 2017

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