

1 XAVIER BECERRA  
Attorney General of California  
2 SARA J. DRAKE  
Senior Assistant Attorney General  
3 PARAS HRISHIKESH MODHA  
Deputy Attorney General  
4 TIMOTHY M. MUSCAT  
Deputy Attorney General  
5 State Bar No. 148944  
1300 I Street, Suite 125  
6 P.O. Box 944255  
Sacramento, CA 94244-2550  
7 Telephone: (916) 322-5184  
Fax: (916) 327-2319  
8 E-mail: Timothy.Muscat@doj.ca.gov  
*Attorneys for State Defendants*

9  
10 IN THE UNITED STATES DISTRICT COURT  
11 FOR THE SOUTHERN DISTRICT OF CALIFORNIA  
12  
13

14 **PAUMA BAND OF LUISENO**  
**MISSION INDIANS OF THE**  
15 **PAUMA & YUIMA**  
**RESERVATION, a/k/a PAUMA**  
16 **BAND OF MISSION INDIANS, a**  
**federally-recognized Indian Tribe,**

17 Plaintiff,  
18

19 v.

20 **STATE OF CALIFORNIA;**  
**EDMUND G. BROWN, JR., as**  
21 **Governor of the State of California;**  
22 **DOES 1 THROUGH 10;**

23 Defendants.  
24  
25  
26  
27  
28

3:16-cv-01713-BAS-JMA

**DEFENDANTS' REPLY TO  
PLAINTIFF'S OPPOSITION TO  
DEFENDANTS' MOTION TO  
DISMISS AND STRIKE  
PLAINTIFF'S SECOND  
AMENDED COMPLAINT**

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

**No Oral Argument Unless Requested  
by the Court**

**Date: July 31, 2017**

**Courtroom: 4b**

**Judge: Hon. Cynthia Bashant**

**Trial Date: N/A**

**Action Filed: 7/1/2016**

## TABLE OF CONTENTS

	<b>Page</b>
Introduction.....	1
Argument .....	1
I.    The Twenty-First Claim in Pauma’s SAC Impermissibly Includes Amendments in Excess of This Court’s Granted Leave to Amend.....	1
A.    Defense Counsel Never Stipulated or Agreed to Permit Pauma to File a SAC in Excess of This Court’s Order On Leave to Amend.....	2
B.    Pauma’s Amendments Regarding Delayed Discovery Fail to Cure Defects in the Twenty-First Claim for Relief.....	3
II.   Pauma Fails to State a Claim for Breach of the Implied Covenant of Good Faith and Fair Dealing.....	5
A.    Pauma’s New Claim for Breach of the Covenant of Good Faith and Fair Dealing is Duplicative of Its Twenty-First Claim.....	6
B.    The Express Grant of Discretion Provided in Section 5.2 of the 1999 Compact Requires Dismissal of the Implied Covenant Claim .....	7
C.    Pauma’s Implied Covenant Claim Impermissibly Seeks the Imposition of Duties on the State that are not “Fairly Inferable” from the Express Terms of the 1999 Compact .....	9
D.    Contrary to Pauma’s Assertions, Implied Covenant Claims .....	10
Conclusion.....	10

# TABLE OF AUTHORITIES

	<u>Page</u>
<b>CASES</b>	
<i>Andrew W. v. Menlo Park City School Dist.</i> U.S. Dist. LEXIS 76827 (N.D. Cal. 2010).....	2
<i>Bissell v. Merrill Lynch &amp; Co.</i> 937 F. Supp. 237 (S.D.N.Y. 1996).....	6
<i>Cachil Dehe Band of Wintun Indians of the Colusa Indian Community</i> <i>v. California</i> 618 F.3d 1066 (9th Cir. 2010) (Colusa).....	5
<i>Careau &amp; Co. v. Security Pacific Business Credit, Inc.</i> 222 Cal. App. 3d 1371 (1990).....	6
<i>Comparetto v. Allstate Ins. Co.</i> 2012 WL 12911045 (C.D. Cal. Aug. 22, 2012).....	7
<i>Concesionaria DHM, S.A. v. International Finance Corp.</i> 307 F. Supp. 2d 553 (S.D.N.Y. 2004).....	7
<i>Fasolino Foods Co. v. Banca Nazionale del Lavoro</i> 961 F.2d 1052 ( <i>Fasolino</i> ) (2d Cir. 1992).....	6
<i>Jordan v. Verizon Corp. (Jordon)</i> No. 08 Civ. 6414 (GEL), 2008 WL 5209989 (S.D.N.Y. Dec. 10, 2008).....	6, 10
<i>Long v. Marubeni Am. Corp.</i> No. 05 Civ. 0639 (GEL), 2006 WL 1716878 (S.D.N.Y. June 20, 2006).....	7
<i>McKnight v. Torres</i> 563 F.3d at 893 .....	9
<i>O'Connor v. Boeing N. Am., Inc.</i> 311 F.3d 1139 (9th Cir. 2002).....	3
<i>San Pasqual Band of Mission Indians v. State of California</i> 241 Cal. App. 4th 746 (2015).....	5

**TABLE OF AUTHORITIES****(continued)****Page**

<i>Schreiber Distributing Co. v. Serv-Well Furniture Co., Inc.</i> 806 F.2d 1393 (9th Cir. 1986.).....	3
<i>Third Story Music, Inc. v. Waits</i> 41 Cal. App. 4th 798 (1995).....	10
<i>Wolf v. Walt Disney Pictures &amp; Television</i> 162 Cal. App. 4th 1107 (2008).....	8

**STATUTES**

California Civil Code § 1614 .....	8
---------------------------------------	---

**OTHER AUTHORITIES**

1 Witkin, Summary of California Law, Contracts § 798 (10th ed.2005). ....	5
§ 801 .....	5



## INTRODUCTION

Defendants State of California (State), and Edmund G. Brown Jr., as Governor of the State of California, (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 (Pauma or Tribe) opposition to State Defendants' motion to dismiss and strike Pauma's Second Amended Complaint (SAC).

## ARGUMENT

### I. THE TWENTY-FIRST CLAIM IN PAUMA'S SAC IMPERMISSIBLY INCLUDES AMENDMENTS IN EXCESS OF THIS COURT'S GRANTED LEAVE TO AMEND

Pauma appears to concede that when this Court granted State Defendants' motion to dismiss Pauma's First Amended Complaint (FAC), 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. ECF No. 26 at 11-15. Pauma also concedes that when this Court granted leave to amend regarding the dismissal of former defendants California Gambling Control Commission (Commission) and the State of California Department of Justice, Office of the Attorney General (DOJ), the Court's order provided some instructions regarding this leave. *Id.* at 16. Specifically, the Court advised that Pauma could amend the FAC "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.*

In spite of these instructions from the Court, Pauma's twenty-first claim for breach of compact in the SAC continues to seek contract damages beyond the applicable four-year statute of limitations. Accordingly, the State Defendants filed their motion to dismiss and strike, arguing that Pauma's continued claims seeking contract damages beyond the applicable limitations period was in excess of the Court's order on leave to amend, and as a result, the Court should exercise its

1 discretion to strike the unauthorized amendments. See *Andrew W. v. Menlo Park*  
 2 *City School Dist., U.S. Dist. LEXIS 76827 at \*6-7 (N.D. Cal. 2010).*

3 Pauma's opposition raises three primary justifications for allowing the SAC's  
 4 twenty-first claim to include allegations for breach of compact beyond the  
 5 applicable statute of limitations. Pauma claims that a defense counsel "hinted"  
 6 during a phone call that the State may agree to permit this claim, and that his  
 7 "impression" was that the Court's order on leave to amend permitted the claim.  
 8 ECF No. 32 at 4-6. Further, Pauma argues that the Court's previous practice in  
 9 other cases permits expansive amendments following an order granting a motion to  
 10 dismiss. *Id.* at 6-9. Finally, the Tribe submits that the new allegations should be  
 11 allowed because they relate to the issue of whether Pauma exercised the necessary  
 12 due diligence in this case to assert delayed discovery under the discovery rule. *Id.*  
 13 at 9-13. For the following reasons, these claims are without merit.

14 **A. Defense Counsel Never Stipulated or Agreed to Permit Pauma to**  
 15 **File a SAC in Excess of This Court's Order On Leave to Amend**

16 Defense counsel recalls speaking with Pauma's counsel twice about the  
 17 Tribe's SAC. In the initial phone call prior to the SAC's filing, counsel discussed  
 18 whether this Court would permit amendments beyond the scope described in the  
 19 order. Muscat Dec. at 2. While defense counsel agreed that the order did not, on its  
 20 face, specifically prohibit such amendments, defense counsel never agreed to either  
 21 allow, or not oppose, any such expansive amendments. *Id.* Further, counsel never,  
 22 either during this phone call or afterwards, entered into any oral agreement, written  
 23 agreement, or stipulation permitting Pauma to file its SAC with claims in excess of  
 24 those permitted by the Court's order on leave to amend. *Id.*

25 The second phone call regarding this issue occurred on May 26, 2017. Muscat  
 26 Dec. at 2-3.<sup>1</sup> During this meet and confer phone call, defense counsel previewed

27 <sup>1</sup> This meet and confer phone call was referenced in the State Defendants'  
 28 notice of motion, filed with the Court on June 2, 2017. ECF No. 30 at 3.



1 for Pauma's counsel all of the legal grounds for the planned motion to dismiss and  
 2 strike the SAC, including the argument that the allegations exceeded the leave  
 3 granted by the Court. *Id.* During the phone call Pauma's counsel never claimed  
 4 that this argument was contrary to any previous representation made by defense  
 5 counsel. *Id.* Nor did Pauma's counsel claim that the argument would violate any  
 6 type of agreement that the parties had previously entered into. *Id.* Pauma's counsel  
 7 made no such claim because there was no agreement. Accordingly, this Court  
 8 should make its determination regarding the scope of leave to amend pursuant to its  
 9 sound discretion, and not upon a purported, but in fact non-existent agreement.

10 **B. Pauma's Amendments Regarding Delayed Discovery Fail to Cure**  
 11 **Defects in The Twenty-First Claim for Relief**

12 Pauma's allegations regarding compact breach damages beyond the four-year  
 13 statute of limitations should be stricken because they do not cure the FAC's defects.  
 14 This motion's central issue is not whether the Court has broad discretion to grant  
 15 leave to amend (it does), or how the Court has applied this discretion in prior cases.  
 16 Rather, the new amendments should be stricken because they fail to cure the  
 17 twenty-first claim's statute of limitations defects. Namely, the accrual of this claim  
 18 should not be deemed delayed by operation of the discovery rule. This is  
 19 significant, because leave to amend may be denied when the allegations in "the  
 20 challenged pleading could not possibly cure the deficiency. *Schreiber Distributing*  
 21 *Co. v. Serv-Well Furniture Co., Inc.* 806 F.2d 1393, 1401 (9th Cir. 1986.)

22 Pauma's opposition argues that the SAC's new allegations allege how the state  
 23 agency administering the Special Distribution Fund (SDF) provided little  
 24 information regarding the use of these funds, and that uncovering this information  
 25 was difficult. ECF No. 32 at 10-11. However, the legal question remains whether  
 26 Pauma exercised due diligence in investigating this alleged breach. See *O'Connor*  
 27 *v. Boeing N. Am., Inc.*, 311 F.3d 1139, 1147 (9th Cir. 2002). In short, the SAC's  
 28 new allegations still fail to plead that Pauma exercised this required due diligence.

1 While Pauma characterizes searching for how public agencies in California  
 2 spent SDF funds as searching for “a needle in a haystack” (ECF No. 32 at 11), the  
 3 SAC’s pled facts demonstrate otherwise. For example, Pauma could have  
 4 submitted its California Public Record Act request to the Office of the Attorney  
 5 General regarding the funds that state agency received and spent from the SDF  
 6 (ECF No. 27 ¶ 197) long before April 1, 2016. As pled in the SAC, the Tribe  
 7 received a response to its request that detailed the SDF appropriations expended by  
 8 the Indian and Gaming Law Section within the Office of the Attorney General from  
 9 fiscal years 2009-10 through 2016-17 (ECF No. 27 ¶¶ 198-199). Accordingly,  
 10 Pauma’s own pleading shows that this information concerning how public agencies  
 11 spent SDF funds appropriated by the California Legislature was always available to  
 12 the Tribe. Pauma was not required to wait for any action by other California tribes  
 13 or the federal government to obtain this information.<sup>2</sup>

14 Moreover, if Pauma had earlier attempted to discover this information and  
 15 encountered any actual resistance from public agencies regarding their SDF  
 16 expenditures, the Tribe could have obtained the same information from the  
 17 California Legislature. After all, SDF monies are public funds appropriated by  
 18 California through the democratic legislative process. For all these reasons,  
 19 Pauma’s twenty-first claim for alleged compact breach damages should remain  
 20 limited to breaches within the permitted four-year statute of limitations, and the  
 21 Tribe’s unauthorized and immaterial amendments in the SAC should be stricken.

22  
 23 <sup>2</sup> Pauma’s is also incorrect in claiming (ECF No. 32 at 12) that the State  
 24 Defendants made an “incriminating admission” regarding the lack of any  
 25 contractual obligation to provide Pauma with information regarding SDF funds.  
 26 This statement in the State Defendant’s motion to dismiss and strike was made in  
 27 the context of Pauma’s claim for breach of the implied covenant. ECF No. 30-1 at  
 28 7. While this statement correctly noted the lack of any contractual duty to provide  
 this information, it never denied the existence of the legal duty to respond to  
 requests under the California Public Records Act regarding SDF funds. Indeed,  
 Pauma’s success in obtaining this information when it belatedly acted (ECF No. 27  
 ¶¶ 197-199) proves the State Defendants’ position.



**II. PAUMA FAILS TO STATE A CLAIM FOR BREACH OF THE IMPLIED  
COVENANT OF GOOD FAITH AND FAIR DEALING**

Pauma's opposition raises two primary justifications for allowing the SAC's twenty-second claim for breach of the implied covenant of good faith and fair dealing (hereafter, the implied covenant). Pauma claims the implied covenant claim is "coextensive with the breach of contract claim" (ECF No. 32 at 16) because the 1999 Compact gives the State discretionary powers to administer the SDF. *Id.* at 13-16. Secondly, Pauma claims the Court should refrain from dismissing the implied covenant claim because of the procedural posture of the case. Neither argument has merit.

State Defendants agree with Pauma that federal contract law generally governs interpretation of the 1999 Compact. However, a court may "rely on California contract law and Ninth Circuit decisions interpreting California law" unless there is a discernable difference between California and federal contract law. *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. California*, 618 F.3d 1066, 1073 (9th Cir. 2010) (Colusa) (citing *Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095, 1098 (9th Cir. 2006)); accord *San Pasqual Band of Mission Indians v. State of California*, 241 Cal. App. 4th 746, 757 (2015).

There is no practical difference between state and federal law in the recognition of the implied covenant. California law also recognizes that every contract contains an implied covenant, "'impos[ing] upon each contracting party the duty to refrain from doing anything which would render performance of the contract impossible by any act of his own, but also the duty to do everything that the contract presupposes that he will do to accomplish its purpose.'" *See* 1 Witkin, Summary of California Law, Contracts § 798 (10th ed.2005). "The essence of the good faith covenant is objectively reasonable conduct." *Id.* § 801. A breach of the implied covenant requires something more than a breach of the contractual duty

1 itself. *Careau & Co. v. Security Pacific Business Credit, Inc.*, 222 Cal. App. 3d  
2 1371, 1394 (1990) (citations omitted).

3 The implied covenant, however, “arises only out of the known reasonable  
4 expectations of the other party which arise out of the agreement entered into. The  
5 covenant does not create duties which are not fairly inferable from the express  
6 terms of that contract.” *Bissell v. Merrill Lynch & Co.*, 937 F. Supp. 237, 246  
7 (S.D.N.Y. 1996) (quoting, *Fasolino Foods Co. v. Banca Nazionale del Lavoro*, 961  
8 F.2d 1052, 1056 (*Fasolino*) (2d Cir. 1992)).

9 Pauma’s implied covenant claim should be dismissed not only because it was  
10 added without leave to amend, but also because it improperly alleges that State  
11 Defendants breached the implied covenant. Specifically, under federal and  
12 California law, the implied covenant claim should be dismissed either because it (1)  
13 is duplicative of Pauma’s alleged twenty-first claim for breach of contract; (2) is  
14 based on actions authorized by the 1999 Compact; or (3) seeks to impose on State  
15 Defendants obligations they do not have under the 1999 Compact’s express terms.

16 **A. Pauma’s New Claim for Breach of the Covenant of Good Faith and**  
17 **Fair Dealing Is Duplicative of Its Twenty-First Claim**

18 Pauma’s new claim for relief for breach of the implied covenant should be  
19 dismissed because it is duplicative of Pauma’s twenty-first claim for breach of  
20 contract. Typically, raising both a breach of contract and implied covenant claim in  
21 a single complaint, as Pauma does here, is redundant, and courts confronted with  
22 such complaints regularly dismiss any freestanding claim for breach of the implied  
23 covenant. The breach of the implied covenant “is merely a breach of the underlying  
24 contract.” *Fasolino*, 961 F.2d at 1056 (citation omitted); see *Jordan v. Verizon*  
25 *Corp. (Jordan)*, No. 08 Civ. 6414 (GEL), 2008 WL 5209989, at \*7 (S.D.N.Y. Dec.  
26 10, 2008) (collecting cases and dismissing claim for breach of implied covenant of  
27  
28



1 good faith and fair dealing without leave to replead).<sup>3</sup> Similarly, Pauma's  
 2 duplicative implied covenant claim should be dismissed because it alleges the same  
 3 type of breach (compare ECF No. 27 ¶¶ 313, 318), harm (compare ECF ¶¶ 314,  
 4 319), and remedies (compare ECF No. 27 ¶¶ 315, 320) as the twenty-first claim.

5 **B. The Express Grant of Discretion Provided in Section 5.2 of the 1999**  
 6 **Compact Requires Dismissal of the Implied Covenant Claim**

7 Pauma argues that the implied covenant claim should not be stricken because  
 8 Section 5.2 of the 1999 Compact's grant of (Section 5.2) "discretionary authority"  
 9 to the State should be limited by the implied covenant.<sup>4</sup> See EFC 26 at 6.  
 10 However, "an implied covenant may not be read into a contract to prohibit a party  
 11 from doing something that is expressly permitted by the contract." *Comparetto v.*  
 12 *Allstate Ins. Co.*, 2012 WL 12911045, at \*4 (C.D. Cal. Aug. 22, 2012) citing  
 13 *Carma Developers (Cal.), Inc. v. Marathon Dev. California, Inc.*, 2 Cal. 4th 342,  
 14 374 (1992). Under California law, courts will interpret a contract to allow a party  
 15 to use its sole discretion—unlimited by the implied covenant—if two conditions are

16 <sup>3</sup> See also *Long v. Marubeni Am. Corp.*, No. 05 Civ. 0639 (GEL), 2006 WL  
 17 1716878, at \*1 (S.D.N.Y. June 20, 2006) (rejecting plaintiffs' assertion that an  
 18 implied covenant claim arose from different facts and sought different damages  
 19 because "to the extent this alleged unlawful conduct constituted a breach of an  
 20 implied contract term, plaintiffs' allegations [were] subsumed under the breach-of-  
 21 contract claim and may not constitute an entirely separate, and duplicative, cause of  
 action."); and *Concesionaria DHM, S.A. v. International Finance Corp.*, 307 F.  
 Supp. 2d 553, 564 (S.D.N.Y. 2004) (dismissing claim for breach of the implied  
 covenant where "[t]he predicate conduct for the claims [was] the same, despite the  
 attempt to emphasize different aspects of the conduct in the implied covenant  
 claim").

22 <sup>4</sup> Section 5.2 provides: Use of [SDF] funds. The State's share of the Gaming  
 23 Device revenue shall be placed in the Special Distribution Fund, available for  
 24 appropriation by the Legislature for the following purposes: (a) grants, including  
 25 any administrative costs, for programs designed to address gambling addiction; (b)  
 26 grants, including any administrative costs, for the support of state and local  
 27 government agencies impacted by tribal government gaming; (c) compensation for  
 28 regulatory costs incurred by the State Gaming Agency and the state Department of  
 Justice in connection with the implementation and administration of the Compact;  
 (d) payment of shortfalls that may occur in the Revenue Sharing Trust Fund; and  
 (e) *any other purposes specified by the Legislature*. It is the intent of the parties  
 that Compact Tribes will be consulted in the process of identifying purposes for  
 grants made to local governments. (ECF. No. 27-1 at 14-15.) (Emphasis added.)



1 met. The express purpose of the contract is to grant unfettered discretion, and the  
2 contract is otherwise supported by adequate consideration. *See Wolf v. Walt Disney*  
3 *Pictures & Television*, 162 Cal. App. 4th 1107, 1121 (2008). Both conditions are  
4 met here for the following two reasons.

5 First, State Defendants contend that the use of SDF monies alleged in the SAC  
6 is permissible under Section 5.2, subdivision (c), as “compensation for regulatory  
7 costs incurred by the State Gaming Agency and the state Department of Justice in  
8 connection with the implementation and administration of the Compact.”

9 Furthermore, Section 5.2, subdivision (e), contains a broad catch-all provision that  
10 authorizes SDF monies to be used for “any other purposes specified by the  
11 Legislature.” Together, subdivisions (c) and (e) of Section 5.2 of the 1999  
12 Compact expressly permit the exercise of discretion by the State regarding the use  
13 of the SDF, and such discretion was clearly within the parties’ reasonable  
14 expectations when the 1999 Compact was executed. The express purpose of  
15 Section 5.2 was to allow the State discretion in its use of the SDF. Pursuant to the  
16 express language of Section 5.2, only grants made to local government are subject  
17 to the requirement that the Compact Tribes be consulted in the process of  
18 identifying purposes of such grants. *See* Section 5.2, subdivision (e).

19 Second, the 1999 Compact is supported by adequate consideration. Being a  
20 written instrument, the 1999 Compact “is presumptive evidence of consideration.”  
21 Cal Civ. Code § 1614. Accordingly, as the express purpose of Section 5.2 is to  
22 grant discretion to the State regarding the use of SDF funds, and the 1999 Compact  
23 is otherwise supported by adequate consideration, the implied covenant is not  
24 implicated. Not dismissing the implied covenant claim would be directly at odds  
25 with the express grant of discretionary power provided to the State in Section 5.2.

**C. Pauma's Implied Covenant Claim Impermissibly Seeks the imposition of duties on the State that are not "fairly inferable" from the express terms of the 1999 Compact**

Pauma's breach of the implied covenant claim is also deficient because it attempts to create duties that are neither stated nor inferable from Section 5.2. Pauma asserts that the implied covenant requires the State to make appropriations from the SDF "in a substantively reasonable manner as well as a procedurally reasonable one – like by providing the signatory tribes with notice if a certain appropriation may be questionable if not downright prohibited under the 1999 Compact." EFC 32 at 15. Pauma fails to provide any support for the broad proposition that the State violates the implied covenant unless it provides these substantive and procedural protections to the signatory tribes. 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)).

Pauma also ignores the reality that the Legislature makes appropriations as authorized by Section 5.2 through a process that provides notice to all signatory tribes. The practical impact of requiring the State to notify the signatory tribes of every purportedly "questionable" SDF appropriation as advocated by Pauma would paralyze the California Legislature's ability to appropriate SDF funds. More importantly, such notice is not required by Section 5.2. The duty to provide substantive and procedural protections that Pauma now seeks to unilaterally impose not only cannot be fairly inferred from the express terms of the 1999 Compact, it is contrary to them. *See* ECF No. 32 at 15.

Pauma pleads the implied covenant in an impermissible effort to rewrite the 1999 Compact and impose additional duties on the State. Pauma negotiated the terms of its 1999 Compact at arms-length and with the advice of counsel. The



1 “courts cannot make better agreements for the parties than they themselves have  
 2 been satisfied to enter into, or rewrite contracts because they operate harshly or  
 3 inequitably.” *Third Story Music, Inc. v. Waits*, 41 Cal. App. 4th 798, 809 (1995).  
 4 As the State Defendants have applied Section 5.2 reasonably, the implied covenant  
 5 claim should be dismissed.

6 **D. Contrary to Pauma’s assertions, implied covenant claims**  
 7 **are routinely dismissed on 12(b)(6) motions**

8 Finally, Pauma’s assertion that the procedural posture of the case should  
 9 preclude striking the implied covenant claim is incorrect. *See* ECF No. 32 at 16.  
 10 Typically, raising both a breach of contract and implied covenant claim in a single  
 11 complaint, as Pauma does here, is redundant and courts confronted with such  
 12 complaints regularly dismiss any claim for breach of the implied covenant. *See*  
 13 *Jordan*, at \*7 (S.D.N.Y. Dec. 10, 2008). Judge Bencivengo’s ruling in Pauma’s  
 14 earlier case has been taken out of context—Judge Bencivengo was not ruling on a  
 15 motion to dismiss an implied covenant claim. *See* ECF No. 32 at 16.

16 **CONCLUSION**

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

19 Dated: July 24, 2017

Respectfully Submitted,

21 XAVIER BECERRA  
 Attorney General of California  
 22 SARA J. DRAKE  
 Senior Assistant Attorney General  
 23 PARAS HRISHIKESH MODHA

24 /s/ TIMOTHY M. MUSCAT

25 TIMOTHY M. MUSCAT  
 26 Deputy Attorney General  
 27 *Attorneys for State Defendants*

28 SA2016301319