XAVIER BECERRA
Attorney General of California
SARA J. DRAKE
Senior Assistant Attorney General
JENNIFER T. HENDERSON
State Bar No. 206231
T. MICHELLE LAIRD
State Bar No. 162979
Deputy Attorneys General
600 West Broadway, Suite 1800
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 738-9347
Fax: (619) 645-2271
E-mail: Michelle.Laird@doj.ca.gov
Attorneys for Defendants State of California and Governor Edmund G. Brown Jr.

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.

UNITE HERE INTERNATIONAL UNION; STATE OF CALIFORNIA; and EDMUND G. BROWN, JR., as Governor of the State of California,

Defendants.

3:16-cv-02660-BAS/AGS

DEFENDANTS STATE OF CALIFORNIA AND GOVERNOR EDMUND G. BROWN JR.'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR (1) MOTION TO DISMISS THE SECOND AMENDED COMPLAINT; (2) MOTION TO STRIKE THE SECOND AMENDED COMPLAINT

[F.R.C.P. Rule 12(b)(1), (b)(6), & (f)]

Date: December 11, 2017
NO ORAL ARGUMENT UNLESS REQUESTED BY THE COURT

Courtroom:	4B
Judge:	Hon. Cynthia Bashant
Trial Date:	N/A
Action Filed:	10/27/2016

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INTRODUCTION

Defendants the State of California and Edmund G. Brown Jr., sued in his official capacity as Governor of the State of California (collectively, State Defendants), submit this memorandum in support of their motions to dismiss and to strike pursuant to Federal Rule of Civil Procedure 12(b)(1), (b)(6), and (f).[1] By this motion, State Defendants challenge the claims against them in the Second Amended Complaint (SAC) filed by plaintiff the Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation (Pauma).

The SAC should be dismissed without leave to amend. Pauma's quarrel is with defendant UNITE HERE International Union, not State Defendants. Pauma has included State Defendants as parties to this action in an attempt to invoke the jurisdiction of this Court and to make an end run around National Labor Relations Board (NLRB) determinations under the guise of a contract dispute over Pauma's 1999 Tribal-State Compact (1999 Compact). Pauma raises no legitimate contract dispute under the 1999 Compact or other question arising under the Indian Gaming Regulatory Act, 18 U.S.C. §§ 1166-1168; 25 U.S.C. §§ 2701-2721 (IGRA), sufficient to invoke the federal subject matter jurisdiction of this Court. Furthermore, State Defendants are cloaked with sovereign immunity against the claims against them and they have not waived that immunity. Pauma's claim for beach of the covenant of good faith and fair dealing fails to state a claim for relief because the alleged factual bases underlying the claim rely on substantive duties or limits beyond those incorporated in the terms of the 1999 Compact. Finally, the settlement discussions between the parties in support of the breach claim, and the demands for money damages against State Defendants should be stricken from the SAC.

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

FACTUAL ALLEGATIONS AND CLAIMS FOR RELIEF IN THE SECOND AMENDED COMPLAINT

The SAC covers a wide range of historical events going back approximately sixty years, including a chronicling of the National Labor Relations Act's (NLRA) application to businesses owned by Indian tribes (SAC 8-10, 30-34, ECF No. 33); the birth of Indian gaming in California (*id.* at 13-25); the tribal-state compacting process under IGRA (*id.* at 11-13); accounts of earlier lawsuits relating to Indian gaming in California brought both before and after legislative ratification of the 1999 Compact[2] (*id.* at 14-19, 26-30, 34-41); Pauma's execution of the 1999 Compact with the State of California, which includes a provision requiring Pauma to adopt procedures for addressing the rights of employees at Pauma's gaming enterprise (*id.* at 34-35); Pauma's execution of an amendment to the 1999 Compact in 2004 and the subsequent rescission of that amendment (*id.* at 39-41, 43); and relations between Pauma and defendant UNITE HERE International (the Union) (*id.* at 4-6, 43-46, 49-51).

Fourteen claims for relief emerge from these varied events. The crux of the twelve claims against the Union is an alleged breach of the 1999 Compact based upon the Union filing unfair labor practice charges with the NLRB rather than following procedures in the Tribal Labor Relations Ordinance (TLRO) that Pauma adopted pursuant to the 1999 Compact.

Only the first and fourteenth claims are alleged against State Defendants.

Pauma's first claim is entitled "[Declaration of Procedure Governing the Resolution of Work Related Disputes (1999 Compact, Addendum B at § 13(a) & 9 U.S.C. § 1 *et seq*. versus 29 U.S.C. § 151 *et seq*.)]" (SAC 53, ECF. No. 33). In support of this claim, the SAC alleges that "the express signatories to the 1999 Compact are Pauma and the State," "the State inserted a provision in Section 10.7

[2] Pauma has attached the 1999 Compact to its SAC as Exhibit 1.

of the 1999 Compact requiring the first wave of signatory tribes to sit down with the Union . . . and negotiate an agreement that would apply . . . [labor] protections and create an alternative forum for resolving" labor issues, the Union is "circumvent[ing] the arbitration process in the TLRO" by filing charges directly with the NLRB, and the State is "feigning indifference" about whether the TLRO's dispute resolution procedures or the NLRA govern the resolution of labor disputes between the Union and Pauma. (*Id.* at 53-55.) On this basis, the SAC alleges that "an actual controversy has arisen and now exists between the parties," (*id.* at 55) and seeks a declaration that "the TLRO is valid and enforceable "against all parties to the 1999 Compact (including the Union)." (*Id.* at 80.)

Pauma's fourteenth claim is entitled "[Breach/Violation of the Implied Covenant of Good Faith and Fair Dealing – Inaction Following Notice of Breaches /Attempt to Block Court Action (Restatement (Second) of Contracts and other General Principles of Federal Contract Law)]" (SAC 78, ECF No. 33.) This claim is based upon the alleged failure of State Defendants to direct the Union to comply with the TLRO once Pauma brought the Union's NLRB filings to the State's attention during a September 23, 2016 pre-suit dispute resolution meeting involving Pauma and Joginder Dhillon, Governor Brown's Senior Advisor for Tribal Negotiations. (*Id.* at 46-47, 78-81.) This claim is also based upon communications between State Defendants' and Pauma's counsels of record regarding an offer to compromise made within the context of a December 5, 2016 conference of counsel in compliance with Rule 4.A of Judge Bashant's Standing Order for Civil Cases. (*Id.* at 48-49, 78-81.) Pauma alleges that these events produced breaches of "the implied covenant of good faith and fair dealing underlying the 1999 Compact," and requests damages as a remedy therefor. (*Id.* at 80-81.)

The fundamental dispute upon which this action is based is between the Union and Pauma. Pauma includes the State Defendants as parties to the action in an apparent attempt to invoke the jurisdiction of this Court.

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)). A Rule 12(b)(1) motion to dismiss tests whether a complaint alleges grounds for federal subject matter jurisdiction. *Bruton v. Gerber Prods. Co.*, 961 F. Supp. 2d 1062, 1075 (N.D. Cal. 2013). When a defendant challenges the jurisdiction of the court, the plaintiff bears the burden of establishing jurisdiction. *Scott v. Breeland*, 792 F.2d 925, 927 (9th Cir. 1986).

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." Courts may use Rule 12(f) "to strike allegations from complaints that detail settlement negotiations within the ambit of [Federal Rule of Evidence] 408." *McCrary v. Elations Co., LLC*, No. EDCV 13-0242, 2013 U.S. Dist. LEXIS 173592, at *12 (C.D. Cal. July 12, 2013) (citing *Stewart v. Wachowski*, No. CV03-2873, 2004 U.S. Dist. LEXIS 26607, at *2 (C.D. Cal. Sept. 28, 2004)).

SUMMARY OF ARGUMENT

The SAC should be dismissed without leave to amend for the following reasons:

1. Pauma's SAC fails to plead a proper basis for invoking federal subject matter jurisdiction.

2. State Defendants enjoy sovereign immunity from suit in federal court under the Eleventh Amendment to the United States Constitution, and have not waived that immunity for the claims alleged in the SAC.

3. As to the fourteenth claim for breach of the implied covenant of good faith and fair dealing (hereinafter, implied covenant), Pauma fails to allege facts demonstrating that State Defendants acted or failed to act in a manner causing injury to Pauma's right to receive the benefits of the express terms in the parties' 1999 Compact.

In addition, portions of the SAC should be stricken for the following reasons:

1. The fourteenth claim for relief is based, in part, on communications between the parties relating to a compromise offer, which are inadmissible to prove the claim under Federal Rule of Evidence 408. All references to the compromise offer, and the portions of the claim for breach of the implied covenant based upon such references, should be stricken from the SAC.

2. Under the terms of the 1999 Compact, money damages are not available as a remedy against State Defendants. All requests for, and references to, money damages against State Defendants should be stricken from the SAC.

ARGUMENT IN SUPPORT OF MOTION TO DISMISS

I. THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER PAUMA'S CLAIMS AGAINST STATE DEFENDANTS

A. The Declaratory Relief Claim Fails to Allege the Existence of a Live, Justiciable Case or Controversy Between Pauma and State Defendants

"The judicial power of the federal courts is limited to genuine 'cases' or 'controversies.'" *Westlands v. NRDC*, 276 F. Supp. 2d 1046, 1049 (E.D. Cal. 2003) (*Westlands*) (citing U.S. Const., Art. III, sec. 2). The court's "role is neither to issue advisory opinions nor to declare rights in hypothetical cases, but to adjudicate

live cases or controversies consistent with the powers granted the judiciary in Article III of the Constitution." *Westlands*, 276 F. Supp. 2d at 1050 (citing *Thomas v. Anchorage Equal Rights Comm.*, 220 F.3d 1134 (9th Cir. 2000) (en banc)). "[W]hether the relief sought is monetary, injunctive or declaratory, in order for a case to be more than a request for an advisory opinion, there must be an actual dispute between adverse litigants and a substantial likelihood that a favorable federal court decision will have some effect. *Id.* at 1050. Article III requires that there be a "substantial controversy . . . of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Aydin Corp. v. Union of India*, 940 F.2d 527, 528 (9th Cir. 1991) (quoting *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941)). In the absence of a live dispute, or "an immediate and certain injury to a party," the matter is not ripe for judicial review. *Clinton v. Acequia, Inc.*, 94 F.3d 568, 572 (9th Cir. 1996) (no live case or controversy and therefore no subject matter jurisdiction where the plaintiff alleged breach of contract based on a contingent, future event).

The United States Supreme Court has summarized the "case or controversy" analysis as follows: "Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. at 273.

When there is no case or controversy, a complaint will be dismissed for lack of subject matter jurisdiction under Rule 12(b)(1). *Westlands*, 276 F. Supp. 2d at 1049; *see also Veoh Networks, Inc. v. UMG Recordings, Inc.*, 522 F. Supp. 2d 1265, 1269 (S.D. Cal. 2007) (unspecified threats of litigation and the suggestion in the complaint of a disagreement between the parties were deemed insufficient to survive a motion to dismiss).

Pauma alleges that its action "presents an actual and live controversy as to whether the TLRO obligates the Union to resolve any work related disputes . . . through the binding dispute resolution process" set forth in the TLRO. (SAC 7, ECF No. 33.) To be sure, Pauma describes numerous ongoing disputes between itself and the Union, but it does not say that State Defendants have taken a position adverse to Pauma or threatened action against Pauma in connection with the 1999 Compact. Pauma does not allege that State Defendants have supported or aided the Union in filing unfair labor practice charges with the NLRB. To the contrary, Pauma contends that State Defendants have done no more than "feign[] indifference" on the question dividing Pauma and the Union and, ultimately, admits that State Defendants' actual position is that they have no "official position" on the question whether the TLRO or the NLRA governs and that they would not insert themselves into the dispute involving the Union, Pauma, and the NLRB. (*Id.* at 55, 79.)[3] Pauma's desire to employ the TLRO as a defense to the NLRB's assertion of jurisdiction over labor disputes at Pauma's casino does not create a dispute between Pauma and State Defendants.

The SAC fails to allege the existence of a substantial controversy *between Pauma and State Defendants*, nor does it shed any light on how a decision that Pauma's TLRO displaces the NLRA would affect the legal relations between them. Pauma is in effect seeking an impermissible advisory opinion regarding procedures to resolve labor disputes between itself and the Union stemming from the NLRB's assertion of jurisdiction over Pauma's casino. As Pauma fails to allege the existence of a justiciable case or controversy between it and State Defendants, this Court lacks subject matter jurisdiction to issue the declaratory relief.

[3] The federal circuit courts themselves do not agree about whether the NLRA applies to labor organizing activities of non-tribal member employees of a tribe's commercial gaming enterprise. *See NLRB v. Little River Band of Ottawa Indians Tribal Gov't*, 788 F.3d 537, 556 (6th Cir. 2015) (dissenting opn., McKeague, J.) (discussing circuit court split).

B. Pauma Fails to Plead a Suitable Statutory or Other Basis for the Court's Exercise of Subject Matter Jurisdiction Over This Action

Pauma lists seven sources of federal jurisdiction over this action. None of the cited sources provide a proper basis for federal jurisdiction. The SAC should be dismissed pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction. *See Morongo Band of Mission Indians v. Cal. State Bd. of Equalization*, 858 F.2d 1376, 1380 (9th Cir. 1988).

1. IGRA and Title 28 U.S.C. § 1331 (Federal Question Jurisdiction)

The SAC alleges that this Court has jurisdiction under IGRA and 28 U.S.C. § 1331. (SAC 6-7, ECF No. 33.) Allegations of breach of a gaming compact entered pursuant to IGRA may invoke the jurisdiction of the federal courts. *See Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050 (9th Cir. 1997). Although Pauma alleges breach of the implied covenant in addition to its declaratory relief claim against State Defendants, examination of the core facts underlying both claims reveals that they involve the non-federal and non-IGRA-based issue of the Union choosing to file unfair labor charges in connection with Pauma's gambling business with the NLRB, not any breach of the 1999 Compact or other matter arising under IGRA's compacting process. The Union's choice to forego the TLRO's procedures in favor of pursuing unfair labor claims with the NLRB – over which the agency continues to exercise jurisdiction – and the State's failure to direct the Union to follow the TLRO, are not matters arising under the Constitution, laws, or treaties of the United States. *See e.g.*, *Unite Here v. Pala Band of Mission Indians*, 583 F. Supp. 2d 1190, 1198 (S.D. Cal. 2008) (declining jurisdiction to enforce arbitration award under the same model TLRO involved here, because the core issue was "non-federal" and the TLRO was not a contract subject to extensive federal regulation). As a result, the Court lacks jurisdiction to entertain this action under IGRA and 28 U.S.C. § 1331.

There exists an alternate reason for this Court to decline to assert federal question subject matter jurisdiction over this action. Dismissal of actions is appropriate when the alleged federal claim is "so insubstantial, implausible, foreclosed by prior decisions of [the Supreme] Court, or otherwise completely devoid of merit as not to involve a federal controversy." *Oneida Indian Nation of N.Y. v. County of Oneida*, 414 U.S. 661, 666 (1974); *accord*, *Bell v. Hood*, 327 U.S. 678, 682-83 (1946) (dismissal is appropriate where the alleged claim "appears to be immaterial and made solely for the purpose of obtaining federal jurisdiction or where such claim is wholly insubstantial and frivolous"). Courts are also authorized, under 28 U.S.C. § 1359, to dismiss claims in which a party has been improperly or collusively joined to invoke the jurisdiction of the court.

Here, the original complaint asserted a single declaratory relief claim against State Defendants. That claim was based on the same allegation in the SAC that the State "feign[ed] indifference" to news that the Union was filing NLRB charges rather than utilizing the TLRO's procedures. After being advised during a conference of counsel that the original complaint failed to allege the existence of a dispute between Pauma and State Defendants (SAC 48, ECF No. 33), and in response to State Defendants' expected "no case or controversy" defense to the declaratory relief claim, Pauma added a claim for breach of the implied covenant, which is preserved in the SAC, in an apparent effort to state an IGRA claim so as to keep State Defendants in the action and obtain jurisdiction under IGRA.

To appreciate how "wholly insubstantial and frivolous" the claim for breach of the implied covenant claim is, this Court need only consider that the claim is based exclusively on two interactions between the parties or their counsel during conferences *intended to serve as good faith efforts to resolve disputes* – one instance being the pre-suit dispute resolution conference between the parties under section 9.1 of the 1999 Compact, and the other being the first of two pre-motion conferences convened pursuant to this Court's Standing Order. As explained in

more detail in Argument III below, Pauma's breach of the implied covenant claim relies on substantive duties or limits beyond those incorporated in the 1999 Compact. As the claim for breach of the implied covenant claim is wholly frivolous and clearly added in an attempt to invoke the jurisdiction of this Court, this Court should decline to exercise jurisdiction over the action.

2. Title 28 U.S.C. § 1362 (Indian Tribes Jurisdiction)

Like 28 U.S.C. § 1331, claims brought under 28 U.S.C. § 1362, must arise "under the Constitution, laws, or treaties of the United States." Pauma cites to IGRA as the source of federal law under which its claims allegedly arise. The same reasons for declining to exercise jurisdiction discussed in connection with IGRA and federal question jurisdiction are applicable as a basis for rejecting jurisdiction under 28 U.S.C. § 1362.

3. The Indian Commerce Clause

The Indian Commerce Clause confers power on Congress. U.S. Const., Art. I, § 8, Cl. 3. The SAC does not present any issue relating to Congress's authority under the Indian Commerce Clause.

4. The Declaratory Judgment Act and Federal Arbitration Act

The Declaratory Judgment Act, 28 U.S.C. § 2201, and the Federal Arbitration Act, 9 U.S.C. § 1, are not independent sources of federal jurisdiction. They each only provide authority for a court to impose a remedy where a district court would otherwise have original jurisdiction. *McVey v. McVey*, 26 F. Supp. 3d 980, 993 n.44 (C.D. Cal. 2014) (discussing Declaratory Judgment Act); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp*., 460 U.S. 1, 26 n.32 (1983) (discussing Federal Arbitration Act).

5. Section 9.1, subdivision (d) of the 1999 Compact

Section 9.1, subdivision (d) of the 1999 Compact provides that disagreements between a tribe and the State that are not otherwise resolved by arbitration, "may be

resolved in the United States District Court where the Tribe's Gaming Facility is located, or is to be located, and the Ninth Circuit Court of Appeals . . . ." Parties to a contract "have no power to confer jurisdiction on the district court by agreement or consent." *Morongo Band of Mission Indians v. Cal. State Bd. of Equalization*, 858 F.2d at 1380. Section 9.1, subdivision (d) of the 1999 Compact thus cannot serve to confer jurisdiction on this Court.

II. STATE DEFENDANTS ENJOY SOVEREIGN IMMUNITY FROM SUIT UNDER THE ELEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

A court may grant a motion to dismiss pursuant to Rule 12(b)(1) for failure to state a claim based on the defense of sovereign immunity. *See Mitchell v. Brown*, No. 2:14-cv-2993, 2015 U.S. Dist. LEXIS 85143, at *2 (E.D. Cal. June 30, 2015) (a motion to dismiss on the ground of state sovereign immunity is considered under the standards applicable to Rule 12(b)(6)).

IGRA does not operate to abrogate a state's sovereign immunity from suit under the Eleventh Amendment. *Seminole Tribe v. Florida*, 517 U.S. 44, 47 (1996). Thus, notwithstanding the alleged existence of a class III gaming compact entered under IGRA, a state retains its Eleventh Amendment immunity, and is subject to suit in federal court only to the extent it has expressly and unequivocally consented to be sued. *See Green v. Mansour*, 474 U.S. 64, 68 (1985). Sovereign immunity waivers must be strictly and narrowly construed. *Tongol v. Donovan*, 762 F.2d 727, 730 (9th Cir. 1985).

Pauma alleges that State Defendants waived their sovereign immunity under section 9.4, subdivision (a) of the 1999 Compact and, alternatively, waived their immunity under California Government Code section 98005. (SAC 7, ECF No. 33.) State Defendants will address each alleged waiver of immunity separately.

1. State Defendants Have Not Waived Their Immunity to this Action Pursuant to 1999 Compact Section 9.4, subdivision (a)

Section 9.4, subdivision (a) of the 1999 Compact contains a limited and reciprocal sovereign immunity waiver from suit in federal court. Section 9.4, subdivision (a) states, in pertinent part, that "the State and the Tribe expressly consent to be sued" and "waive any immunity . . . provided that . . . (2) [n]either side makes any claim for monetary damages" and "(3) [n]o person or entity other than the Tribe and the State is a party to the action . . . ." (1999 Compact, § 9.4, subd. (a), ex. 1 to SAC.)

Pauma admits that the Union is a "non-signatory" to the 1999 Compact (SAC 54, 55, ECF No. 33), but nonetheless seeks to hold it liable for breach of the 1999 Compact as a "privy, co-participant, and/or joint promisor" with the State (*id.* at 79, 81). Even taking these allegations as true, as the Court must on a motion to dismiss, these allegations are not sufficient to demonstrate a waiver of State Defendants' sovereign immunity under the express language of 1999 Compact section 9.4, subdivision (a). That provision provides for waiver only when "[n]o person or entity other than the Tribe and the State is a party to the action." (1999 Compact, § 9.4, subd. (a)(3), ex. 1 to SAC.) Under the 1999 Compact, all others not "the Tribe [or] the State" are considered "third part[ies]." (*Id.*) A strict and narrow construction of the express waiver language allows for no exception in the event that persons or entities other than "the Tribe and the State" are alleged to be privies, co-participants, or joint promisors to the 1999 Compact.

The Union is alleged to be "a labor union that represents service and manufacturing employees." (SAC 8, ECF No. 33.) It is neither "the Tribe" nor "the State." It is a third party to this action, and its presence as a third party renders section 9.4, subdivision (a)'s limited sovereign immunity waiver inapplicable to permit Pauma's first and fourteenth claims to proceed against State Defendants.

Additionally, 1999 Compact section 9.4, subdivision (a)'s limited waiver contains an express reservation of sovereign immunity to claims seeking monetary damages. (1999 Compact, § 9.4, subd. (a)(2), ex. 1 to SAC.) In *San Pasqual Band*

of Mission Indians v. State of California, 241 Cal. App. 4th 746, 756, 758 (2015), the Court of Appeal held that 1999 Compact section 9.4, subdivision (a)(2) is, "by its plain terms, a waiver of [money] damages provision" applicable in both state and federal courts. In its SAC, Pauma seeks an award of damages against State Defendants as a remedy for its fourteenth claim alleging violation of the implied covenant. (SAC 80-81, ECF No. 33.) As State Defendants retain their immunity from any and all claims seeking monetary damages, this provides an additional basis for dismissal of Pauma's fourteenth claim for relief in the SAC.

2. California Government Code Section 98005 Does Not Operate to Waive State Defendants' Immunity to this Action

California Government Code section 98005, enacted in 1998, states, in pertinent part:

> The State of California hereby submits to the jurisdiction of the courts of the United States in any action brought against the state by any federally recognized California Indian tribe asserting any cause of action arising from . . . the state's violation of the terms of any Tribal-State compact to which the state is or may become a party.

Cal. Gov. Code § 98005. There are several reasons why California Government Code section 98005 does not provide for a waiver of State Defendants' sovereign immunity from the claims in Pauma's SAC.

First, 1999 Compact section 9.4 places a limit on the operation of California Government Code section 98005 by the following specific language appearing at section 9.4, subdivision (a)(3)(c):

> Except as stated herein or elsewhere in this Compact, no other waivers or consents to be sued, either express or implied, are granted by either party.

Thus, parties to the 1999 Compact, like Pauma, have contractually relinquished their right to establish a waiver of state sovereign immunity by way of California Government Code section 98005. They are constrained by the limited waiver in 1999 Compact section 9.4, subdivision (a), which the parties agreed to in

May, 2000 following the enactment of California Government Code section 98005. (SAC 34-35, ECF No. 33.)

Next, even if California Government Code section 98005 provides 1999 Compact tribes with an alternative basis for establishing waiver of state sovereign immunity under certain circumstances specified therein, and notwithstanding the limitations of 1999 Compact section 9.4, subdivision (a)(3)(c), California Government Code section 98005 does not effect a sovereign immunity waiver so as to allow the first and fourteenth claims to proceed against State Defendants.

Pauma's claim for declaratory relief is alleged to arise from State Defendants "feigning indifference" to the question of whether the TLRO or the NLRA govern the resolution of disputes between Pauma and the Union. (SAC 55, ECF No. 33.) The claim does not arise from any alleged violation of the terms of the 1999 Compact. Applying the stringent test for finding an unequivocal and express sovereign immunity waiver to the limited waiver expressed in California Government Code section 98005, the statute cannot be read to clearly establish a waiver where, as here, the claim is founded upon something other than an alleged violation of a tribal-state compact.[4]

With respect to the fourteenth claim, Pauma alleges that State Defendants breached the implied covenant underlying the 1999 Compact. (SAC 78, 81, ECF No. 33.) Again, assuming arguendo that California Government Code section 98005 could affect a waiver for claims alleging a violation of the 1999 Compact notwithstanding section 9.4, subdivision (a)(3)(c), construing California Government Code section 98005 narrowly and in favor of the sovereign, as this Court must do, section California Government Code 98005 unquestionably does not expressly and unequivocally waive immunity from claims seeking monetary

[4] California Government Code section 98005 provides for a waiver of sovereign immunity in other circumstances not implicated by the facts alleged in the SAC.

damages, which state sovereigns ordinarily receive protection from under the Eleventh Amendment. Thus, California Government Code section 98005 does not affect a waiver of State Defendants' immunity from Pauma's fourteenth claim to the extent it seeks money damages.

III. THE SAC FAILS TO ALLEGE A VIABLE CLAIM FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING AGAINST STATE DEFENDANTS

Pauma's fourteenth claim alleges that State Defendants breached the implied covenant of good faith and fair dealing in connection with the 1999 Compact.[5] (SAC 78, ECF No. 33.) 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)).[6] The implied covenant's application is limited to assuring compliance with the "express terms of the 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 (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 "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

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

[6] General principles of federal contract law govern interpretation of the 1999 Compact. *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. California*, 618 F.3d 1066, 1073 (9th Cir. 2010). From a practical standpoint, this means courts will "rely on California contract law and Ninth Circuit decisions interpreting California law" unless there is a discernable difference between California and federal contract law. *Id.* (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).

at 893 (quoting *Shawmut Bank, N.A. v. Kress Assocs.*, 33 F.3d 1477, 1503 (9th Cir. 1994)).

Pauma asserts two factual bases to support its claim for breach of the implied covenant. First, that State Defendants breached the implied covenant by failing to direct the Union to comply with the TLRO, or to otherwise become involved in the matter, when Pauma brought to State Defendants' attention, during a pre-suit dispute resolution meeting on September 23, 2016, that the Union was filing unfair labor practice charges with the NLRB rather than utilizing the dispute resolution procedures contained in the TLRO. (SAC 47, 80-81, ECF No. 33.)[7] Second, that State Defendants breached the implied covenant when its counsel of record, during and subsequent to a December 5, 2016 conference call to comply with Rule 4.A of Judge Bashant's Standing Order for Civil Cases, discussed a compromise offer from Pauma with Pauma's counsel, and subsequently communicated State Defendants' rejection of the offer – a rejection Pauma characterizes as an "attempt by the State to prevent [Pauma] from obtaining clarity about the terms of the 1999 Compact." (*Id.* at 48-49, 78-81.)

Pauma specifies no contractual obligation in the 1999 Compact requiring State Defendants to take action to ensure the Union follows the TLRO procedures. The labor relations provision, appearing at section 10.7 of the 1999 Compact, provides that Pauma must provide an agreement or procedure "acceptable to the State for addressing organizational and representational rights" of certain employees, but it imposes no duties on State Defendants aside from authorizing them to deem the agreement null and void if Pauma fails to provide such an agreement by a date certain. *See In re Indian Gaming Related Cases*, 331 F.3d 1094, 1116 (9th Cir. 2003) (discussing 1999 Compact section 10.7 as requiring tribes to adopt a stand

[7] Section 9.1 of the 1999 Compact provides a "threshold requirement" that disputes between the parties first be subjected to a process of meeting and conferring in good faith to attempt to resolve their dispute before resort is made to court action. (1999 Compact, § 9.1, ex. 1 to SAC.)

alone procedure in the form of an ordinance (the TLRO) to address organizational and representational rights of gaming employees). The TLRO, attached to the 1999 Compact as Appendix B, imposes no obligation on State Defendants to direct, nor does it give them control or influence over, a union's activities.

The second basis underlying the breach of the implied covenant claim, which is founded upon State Defendants' alleged rejection of an offer to compromise communicated by and between the parties' counsel of record, is frivolous on its face. Pauma does not specify any provision in the 1999 Compact imposing a duty upon State Defendants to accept conditional offers to dismiss litigation filed against them. Nor does Pauma specify any promise by State Defendants not to defend against such actions or to waive defenses available to them. In addition, as discussed below in connection with the motion to strike, the alleged communications surrounding the alleged compromise offer are inadmissible to prove the breach claim under Federal Rule of Evidence 408.

Both of the alleged factual bases underlying Pauma's breach of the implied covenant claim rely on substantive duties or limits beyond those incorporated in the terms of the 1999 Compact. As such, Pauma has failed to state a claim upon which relief can be granted, and the fourteenth claim against State Defendants should be dismissed without leave to amend.

ARGUMENT IN SUPPORT OF MOTION TO STRIKE

I. THE ALLEGATIONS DISCLOSING COMMUNICATIONS RELATING TO AN OFFER TO COMPROMISE SHOULD BE STRICKEN FROM THE SAC, AND FROM ANY CLAIM GROUNDED THEREUPON

Under Rule 12(f), the Court may strike any material that is "redundant, immaterial, impertinent or scandalous." Courts may use Rule 12(f) "to strike allegations from complaints that detail settlement negotiations within the ambit of [Federal Rule of Evidence] 408." *McCrary v. Elations Co., LLC*, No. EDCV 13-0242, 2013 U.S. Dist. LEXIS 173592, at *12 (C.D. Cal. July 12, 2013) (citing *Stewart v. Wachowski*, No. CV03-2873, 2004 U.S. Dist. LEXIS 26607, at *2 (C.D.

Cal. Sept. 28, 2004)). Pauma's SAC includes the alleged details of a discussion among the parties' legal representatives regarding a compromise offer made by Pauma to conditionally dismiss State Defendants from this suit. (SAC 48-49, 78-81, ECF No. 33.) The claim for breach of the implied covenant is partially based on these discussions, and on State Defendants' response to the offer. Under the above authorities, such communications are inadmissible by any party "either to prove or disprove the validity . . . of a disputed claim." Fed. R. Evid. 408(a). Accordingly, to the extent the breach claim survives the motion to dismiss, or if the Court grants the motion to dismiss with leave to amend, State Defendants request this Court to order that all references to the compromise offer made during and immediately following the December 5, 2016 conference of counsel, State Defendants' response to the offer, and all portions of the breach of the implied covenant claim founded on such references, be stricken and/or omitted from the operative complaint.

II. ALL REQUESTS FOR RELIEF IN THE FORM OF MONEY DAMAGES SHOULD BE STRICKEN FROM THE SAC

As discussed in the motion to dismiss portion of this memorandum, *San Pasqual Band of Mission Indians v. State of California*, holds that 1999 Compact section 9.4, subdivision (a)(2) is, by its plain terms, a waiver of money damages provision applicable in both state and federal court. *San Pasqual Band of Mission Indians v. State of California*, 241 Cal. App. 4th at 756, 758. Pauma's SAC seeks money damages against State Defendants in conjunction with its breach of the implied covenant claim. As Pauma may not seek money damages against State Defendants, State Defendants request that, to the extent the SAC survives the motion to dismiss, or if the Court grants the motion with leave to amend, the Court order requests for relief in the form of money damages against State Defendants stricken and/or omitted from the operative pleading.

CONCLUSION

For the foregoing reasons, State Defendants respectfully request that the Court grant their motion to dismiss, without leave to amend, and, if the motion is denied or granted with leave to amend, then to grant their motion to strike.

Dated: October 16, 2017

Respectfully Submitted,

XAVIER BECERRA
Attorney General of California
SARA J. DRAKE
Senior Assistant Attorney General
JENNIFER T. HENDERSON
Deputy Attorney General

s/T. Michelle Laird
T. MICHELLE LAIRD
Deputy Attorney General
Attorneys for Defendant Defendants State of California and Governor Edmund G. Brown Jr.