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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, CALIFORNIA GAMBLING CONTROL COMMISSION; STATE OF CALIFORNIA DEPARTMENT OF JUSTICE, OFFICE OF THE ATTORNEY GENERAL; DOES 1 THROUGH 10,

Defendants.

3:16-cv-01713-BAS-JMA

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT ON CLAIMS ONE THROUGH TWENTY OF PLAINTIFF'S SECOND AMENDED COMPLAINT

[F.R.C.P. 56(a)]

No Oral Argument Unless Requested by the Court

Courtroom: 4b
Judge: Hon. Cynthia Bashant
Trial Date: N/A
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INTRODUCTION

This case involves class III gaming compact negotiations between the defendants State of California, and Edmund G. Brown Jr., as Governor of the State of California (collectively the State) and 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 (Pauma or Tribe). In claims one through twenty of its Second Amended Complaint (SAC), Pauma alleges that during compact negotiations the State failed to negotiate with the Tribe in good faith under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 - 2721 (IGRA). As a result, Pauma seeks equitable remedies to compel good-faith negotiations under IGRA.

The State now moves for summary judgment because the undisputed record of negotiations shows that it negotiated in good faith. The State sincerely responded to Pauma's request to renegotiate its compact to include lottery games and an on-track horse-racing facility. On numerous occasions, the State requested and encouraged the Tribe to provide information and compact proposals regarding these requests. The State's efforts at moving compact discussions forward included asking for specific compact language regarding lottery games and on-track horse racing, providing Pauma with a sample on-track horse-racing compact, giving the Tribe a sample off-track satellite-wagering facility compact, and finally proposing a draft compact to move on-going discussions forward. Instead of reciprocating with its own proposed compact language or concrete proposals, Pauma commenced litigation. Based on this record of negotiations, the State never violated IGRA.

FACTUAL BACKGROUND

I. COMPACT NEGOTIATIONS BETWEEN PAUMA AND THE STATE

A. Pauma's Renegotiation Request for On-Track Horse Racing and Lottery Games, the State's Response, and the Initial Meeting on January 16, 2015

In November, 2014, Pauma operated a gaming facility under IGRA pursuant to a tribal-state gaming compact with the State. Vol. I, Ex. 1, JR001.[1] This original compact was executed in May, 2000 (1999 Compact). *Id.* In June, 2004, the State and Pauma (collectively parties) entered into an amendment to the 1999 Compact (2004 Amendment) that became the subject of extensive litigation between the parties. *Id.* In a letter by Randall Majel, Chairman of Pauma, dated November 24, 2014, the Tribe requested the State to renegotiate the 1999 Compact and 2004 Amendment pursuant to Section 12.2 of both agreements. *Id.* at 001-02. This provision provides for renegotiation if the Tribe "wishes to engage in forms of Class III gaming other than those games authorized herein . . . ." *Id.* at 001-02. Pursuant to Section 12.2, Chairman Majel's letter described two new forms of class III gaming that the Tribe wanted to offer. *Id.* at 002. The first was "on-track betting at an on-reservation horse track that it plans to construct following the renegotiation of the agreement(s)." *Id.* Second, Pauma wanted to "supplement the lottery games it offers by obtaining the right to conduct any games that are *not* currently authorized under State law to the California State Lottery." *Id.*

In a letter dated December 15, 2014, Joginder Dhillon, Senior Advisor for Tribal Negotiations, responded to Chairman Majel's request for negotiations. Vol. I, Ex. 2, JR005-06. This letter advised that the State was willing to enter into negotiations regarding both forms of gaming identified in Chairman Majel's letter. *Id.* at 005. However, Mr. Dhillon advised that to the extent Pauma was requesting

[1] All references to the record of compact negotiations are to the four-volume Joint Record of Negotiations for Summary Adjudication of Claims One Through Twenty in the Second Amended Complaint that was filed by the parties on July 14, 2017. ECF No. 31.

negotiations for games that were not authorized in California, then such games would not be "appropriate subjects for inclusion in a Compact." *Id.* In letters dated December 23, 2014 (Vol. I, Ex. 3, JR007-08), January 2, 2015 (Vol. I, Ex. 4, JR009-14), and January 6, 2015 (Vol. I, Ex. 5, JR015-16), the parties confirmed an initial meeting date of January 16, 2015.

Following the parties' initial meeting on January 16, 2015, Cheryl Williams, an attorney representing Pauma, sent Mr. Dhillon a letter dated January 20, 2015. Vol. I, Ex. 6, JR017-19. This letter confirmed that Pauma was interested in operating an on-track horse racing facility, and not an off-track satellite wagering facility. *Id.* at 017.[2] The letter also confirmed that, despite being pushed by the State for further details on this proposal, the Tribe deferred because it was "too early in the process . . . ." *Id.* at 018. This letter also described the discussion between the parties regarding the Tribe's request to negotiate for lottery games. *Id.* Both Pauma and the State requested the other side to provide legal authority supporting their respective positions on the Tribe's request to operate lottery games. *Id.* This letter also confirmed that the parties mutually agreed to conduct their next meeting in May, 2015. *Id.*

In a letter to Pauma dated January 30, 2015, Mr. Dhillon provided the State's summary of the January 16, 2015 meeting. Vol. I, Ex. 7, JR020-22. In pertinent part, Mr. Dhillon's letter summarized that the State had entered into several off-track satellite-wagering compacts with other tribes, and that these compacts "might be used as a starting point for Pauma's proposed facility." *Id.* at 021. The State had not previously negotiated an on-track horse racing facility with any tribe. *Id.* Mr. Dhillon suggested that the parties should "reach out to the California Horse Racing Board for guidance in providing a legal framework" for further discussions

[2] A tribal off-track satellite wagering facility allows patrons at a tribal casino to wager on horse races that take place at licensed horse-racing tracks that are located off the tribe's Indian lands. In contrast, an on-track horse-racing facility would authorize horse racing on the tribe's Indian lands.

on this compact issue. *Id.* at 021. In regard to lottery games, during the meeting the "State asked for examples of the types of lottery games Pauma is considering." *Id.* Pauma referred to "'electronic games' and 'punchboards' as possibilities." *Id.* Mr. Dhillon "reiterated the State's need to understand the scope of games that Pauma intends to offer to help identify issues and establish a legal framework for future negotiations." *Id.* at 022. Finally, regarding continued compact negotiations, Mr. Dhillon noted the Tribe's confirmation that it wanted "to focus on the additional games and nothing broader." *Id.*

In May, 2015, Chairman Majel and Mr. Dhillon exchanged further correspondence regarding the January 16, 2015 meeting. In a letter dated May 8, 2015, Chairman Majel addressed the Tribe's concerns about differences in the parties' previous summary letters. Vol. I, Ex. 8, JR023-25. From the Tribe's perspective, the "chief discrepancy" was on "'how and when' the State plans to convey whether or not it even has a duty to negotiate for the lottery games . . . ." *Id.* at 23. Chairman Majel advised that the Tribe was empowered under the California Constitution "to operate *all* types of lottery games and not simply those granted to the State Lottery." *Id.* at 24. In regard to on-track horse racing, Chairman Majel stated the Tribe's desire for the State to meet "with the State Horse Racing Board to formulate the State's position regarding the civil regulations it would like to negotiate for" at future compact meetings. *Id.* at 25. Chairman Majel's letter concluded by proposing that the next meeting take place in "two-plus months . . . ." *Id.* Chairman Majel noted that the reason for this delay was the litigation schedule between Pauma and the State in another case. *Id.*

In a letter dated May 27, 2015, Mr. Dhillon responded to Chairman Majel's May 8th letter. Vol. I, Ex. 9, JR026. In this letter Mr. Dhillon reiterated the previous summary of the January 16, 2015 meeting. *Id.* Further, Mr. Dhillon again stated the State's position that Pauma was not "providing a clear description of the kinds of horse racing or lottery games it sought to conduct." *Id.* Nonetheless, Mr.

Dhillon agreed to hold the next compact meeting in August, 2015, and further agreed to record the meeting via an independent court reporter. *Id.*

B. The September 8, 2015 Compact Meeting

In August, 2015, the parties exchanged letters regarding the upcoming compact meeting. In a letter dated August 5, 2015, Ms. Williams stated Pauma's desire "that the forthcoming meeting should focus on terms" regarding on-track betting and lottery games. Vol. I, Ex. 10, JR027. In response, in a letter dated August 13, 2015, Mr. Dhillon proposed several September dates for the next meeting, and advised that the State would be prepared "to discuss the general legal framework for lottery games and on-track horse racing as may be authorized under" federal and state law. Vol. I, Ex. 11, JR029-30. In a letter dated August 18, 2015, Ms. Williams agreed to a meeting date (Vol. I, Ex. 12, JR031), and through a subsequent series of emails, the parties confirmed the meeting date, time and location. Vol. I, Ex. 13, JR033-37.

This compact meeting took place on September 8, 2015. Vol. II, Ex. 14, JR038. Representing the State were Mr. Dhillon and attorneys Sara Drake, Jennifer Henderson, and Michelle Laird from the California Attorney General's Office. *Id.* at 039. Representing Pauma were attorneys Kevin Cochrane and Ms. Williams. *Id.* at 040. Also in attendance was Pauma's Chairman, Temet Aguilar and Rick Baedeker of the California Horse Racing Board (Board). *Id.* The meeting was transcribed by a court reporter. *Id.* at 038-173.

During the meeting the State attempted to learn more information about Pauma's claimed desire to operate lottery games and on-track horse racing. Mr. Dhillon asked Pauma's attorneys to "draft compact language on those two issues that you feel need to be addressed in the compact." Vol. II, Ex. 14, JR042:12-14. If Pauma provided this draft language, then "we will look at that and we will respond." *Id.* at 042:20-22. This approach would allow the parties to work on language that "hopefully will lead to a compact." *Id.* at 042:24-43:1.

On several occasions during this September 8th meeting, Mr. Dhillon repeated his request for Pauma to commit to providing compact language on both lottery games and on-track horse racing. Mr. Dhillon made clear that he was asking for the Tribe's representatives to "do your best and we will come back with something." Vol. II, Ex. 14, JR044:9-10. Mr. Dhillon stated that this process would be "probably the best way to actually get us focused on what hopefully will result in a compact for Pauma." *Id.* at 044:16-18. He assured that the State's representatives were "certainly going to work with you." *Id.* at 048:10-11. And Mr. Dhillon emphasized his desire for the parties to "get into a more traditional sort of compact negotiation where both sides are trying to draft and having discussions to bridge issues . . . ." *Id.* at 054:18-21.

During the September 8, 2015 negotiation meeting, Mr. Baedeker from the Board was available, and he answered numerous questions from Pauma's representatives regarding the horse racing industry. These topics covered the Board's lack of experience in negotiating on-track compacts with tribes (Vol. II, Ex. 14, JR045:1-8), the Board's interest in this concept (*id.* at 045:9-25), possible challenges for a new track in scheduling racing weeks (*id.* at 059:2-60:13), issues that could impact how well a new track would be received by the existing horse racing industry (*id.* at 65:2-66:12), licensing fees (*id.* at 67:5-69:23), and his own experience in both the business and regulatory side of horse racing (*id.* at 104:2-20). During these discussions Mr. Dhillon emphasized that it was the State's idea to bring Mr. Baedeker to this meeting, and that the State remained willing to hold meetings with experts. *Id.* at 074:8-76:6. In particular, Mr. Dhillon stated that it would be helpful to receive Pauma's horse-racing business plan. *Id.* at 96:9-17.

In regard to lottery games, at the September 8, 2015 meeting the parties discussed the concept of Pauma's proposal to operate video lottery terminals as lottery games. Vol. II, Ex. 14, JR082:9-89:7. The parties disagreed whether Pauma had previously established the type of lottery games it intended to offer under a new

compact. *Id.* at 092:7-15. Mr. Dhillon asked Pauma's attorneys to get him proposed lottery game language. *Id.* at 112:24-113:5. Mr. Dhillon pressed Pauma's attorneys about when they would provide this draft compact language. *Id.* at 139:4-25. When Mr. Dhillon continued to press for an answer, Mr. Cochrane responded in part by saying "I don't know." *Id.* at 140:1-20. After further discussions, Mr. Cochrane stated that Pauma "can get a draft out quick." *Id.* at 143:21-25. Mr. Dhillon responded by asking them to "do whatever you think is best for [the] Tribe and then get that to us and we will go from there." *Id.* at 144:14-16.

C. Pauma's Request for a Dispute Resolution Meeting

Following the September 8, 2015 compact negotiating meeting, Chairman Aguilar sent a letter to Mr. Dhillon dated October 6, 2015. Vol. III, Ex. 15, JR174-78. This letter objected to Mr. Dhillon's request for Pauma to create a first-draft on-track horse-racing compact. *Id.* at 174-75. This letter also reiterated a request made by the Tribe during the September 8th meeting to negotiate terms beyond lottery games and on-track horse racing. *Id.* at 175. Chairman Aguilar claimed that the Tribe's renegotiation request was never limited to those two issues. *Id.*

In a letter dated November 4, 2015, Mr. Dhillon responded to Chairman Aguilar's October 6th letter. Vol. III, Ex. 16, JR182-84. Mr. Dhillon's letter detailed how Pauma's initial request to renegotiate its compact under Section 12.2 of the 1999 Compact was limited to expanding the scope of authorized gaming to include lottery games and on-track horse racing, and the State declined Pauma's request to expand negotiations beyond those two matters. *Id.* at 182-83.

While Mr. Dhillon's November 4th letter declined to expand the scope of renegotiations, he nonetheless reiterated the State's continued willingness to negotiate over lottery games and on-track horse racing. Vol. III, Ex. 16, JR183. Regarding on-track horse racing, Mr. Dhillon's letter enclosed a pari-mutuel horse racing compact between the Sisseton-Wahpeton Sioux Tribe and the State of North

Dakota. *Id.* at 185-205. This letter advised Pauma that this out-of-state compact had been approved by the United States Department of the Interior, and "can serve as a reference to inform our further discussions" regarding on-track horse racing. *Id.* at 183. Mr. Dhillon further advised that "[w]ith regard to lottery games, I look forward to considering Pauma's proposed compact language so we can identify and work to resolve any potential issues." *Id.* The letter concluded by saying that the State "look[s] forward to reviewing Pauma's proposals regarding a framework for final compact language addressing the new forms of gaming that it proposes to offer—horse racing and lottery games." *Id.* at 184.

In a letter dated November 25, 2015, Chairman Aguilar responded to Mr. Dhillon's November 4th letter. Vol. III, Ex. 17, JR206-07. In this letter Pauma triggered "the dispute resolution process of Section 9.1 effective as of the date of this letter." *Id.* at 206. Chairman Aguilar advised that the compact dispute related "to the proper interpretation of Sections 12.2 and 12.3 of the compact," as well as negotiation positions taken by the State. *Id.* Chairman Aguilar's letter, which was emailed to Mr. Dhillon on Wednesday at 8:45 p.m. before the four-day Thanksgiving holiday (ex. 19, JR227), demanded a response if the State required more information within five days. *Id.*

In a letter dated November 30, 2015, Mr. Dhillon responded to Chairman Aguilar's November 25th letter. Vol. III, Ex. 18, JR208-09. While Mr. Dhillon agreed to meet on December 4, 2015 for a meet and confer meeting under Section 9.1 of the compact, he advised Chairman Aguilar that his letter did not meet the Section 9 .1 specificity requirement. *Id.* at 208. Mr. Dhillon's letter also noted the State's ongoing efforts to move on-track wagering discussions forward. *Id.* The State had already (1) contacted the federal Bureau of Indian Affairs' Office of Indian Gaming and found out that "[on-track horse racing] is rare even at the national level[,]" (2) located and provided Pauma with "a compact regarding on-track betting that was previously approved by the Secretary of the Department of

the Interior[,]" and (3) brought into the last negotiation session the executive director of the Board "to help inform our discussions" regarding horse racing. *Id.*

Further, Mr. Dhillon's November 30, 2015 letter referred to the need for Pauma "to describe with clarity and specificity its objectives." Vol. III, Ex. 18, JR208. While Pauma stated that it had a business plan regarding its proposed on-track horse racing, the Tribe "failed to disclose even a generalized description of that plan." *Id.* at 208-09. Mr. Dhillon advised that "it is simply not possible to draft a compact within the [IGRA] framework to authorize gaming unless the Tribe is able to describe with clarity and specificity its objectives." *Id.* at 208. Furthermore, Mr. Dhillon's letter also included for Pauma's consideration an off-track "draft compact addendum that would authorize a satellite wagering facility." *Id.* at 209, 210-21.

Finally, Mr. Dhillon's November 30, 2015 letter reiterated that in "regard to the lottery games, we have asked for draft compact language and received nothing but lengthy letters from you or your lawyers that seek to blame the State for the lack of progress . . . ." Vol. III, Ex. 18, JR209. These letters "fail to do anything to help the parties move forward towards the conclusion of a compact." *Id.* Mr. Dhillon concluded by stating that if Pauma had the goal of negotiating a compact, the Tribe would "find us a willing partner." *Id.*

Working under Pauma's demand to meet shortly after the Thanksgiving holiday weekend, through an exchange of emails the parties arranged a meeting time, location and date of December 4, 2015. Vol. III, Ex. 19, JR222-27. During these email exchanges, Mr. Dhillon reminded Ms. Williams that "[d]espite your many letters and e-mails, the State has yet to receive a single word of proposed compact language from the Tribe." *Id.* at 223.

D. The Dispute Resolution Meeting on December 4, 2015, and Confirmation Regarding the Scope of Continuing Negotiations

On December 4, 2015, the parties met regarding their dispute over "the meaning of compact section 12.2 and the scope of the negotiations agreed to by the parties." Vol. III, Ex. 21, JR234. This meeting was described in a letter from Mr. Dhillon to Chairman Aguilar dated December 9, 2015. *Id.* at 234-35. The State maintained its previous interpretation of compact Section 12.2. *Id.* at 234. However, in an effort to move negotiations forward, Mr. Dhillon advised that the State was willing "pursuant to Section 12.1 of the compact, to enter into negotiations for a new or amended tribal-state gaming compact." *Id.* As a result, "both parties are amenable to considering all aspects of the existing compact and other appropriate provisions to ensure that we are able to achieve" a negotiated compact. *Id.*

Mr. Dhillon's December 9th letter also advised that even though the State was "currently committed to engaging in compact negotiations with a large number of tribes[,]" it still maintained a "commitment and determination to work through the negotiation process" to successfully renegotiate a compact. Vol. III, Ex. 21, JR235. Mr. Dhillon suggested the importance of setting "realistic timeframes" while pursuing this objective. *Id.* Finally, Mr. Dhillon stated his willingness to either meet in Sacramento or at another location more convenient for Pauma, and also to conduct telephonic meetings to avoid unnecessary costs. *Id.*

In a letter dated December 14, 2015, Chairman Aguilar responded to Mr. Dhillon's December 9th letter. Vol. III, Ex. 22, JR236-37. Chairman Aguilar asked whether negotiations under compact Section 12.1 would include "horse racing/on-track betting and lottery games that are not currently authorized to the State Lottery — and off-track betting, the basic terms of which the State began discussing in a draft compact that accompanied its November 30, 2015 letter." *Id.* at 236. Mr. Dhillon responded in a letter dated January 4, 2016. Vol. III, Ex. 23,

JR238. In his letter Mr. Dhillon confirmed that these negotiations would include "horse racing, off-track betting and lottery games, to the extent authorized by the California Constitution . . . ." *Id.*

E. Pauma's Proposed Lottery Game "Fix," and the State's Response

In a letter dated January 27, 2016, Ms. Williams responded to Mr. Dhillon's January 4th letter. Vol. III, Ex. 24, JR239-41. This letter stated that during the September 8, 2015 meeting, the parties discussed a "relatively minor fix that would satisfy Pauma's request with respect to this topic by expanding the scope of lottery games . . . ." *Id.* at 239. Pauma advised that there is a "gap" between the lottery language in the 1999 Compact and the lottery rights that are lawful under California law but not yet authorized to the California State Lottery. *Id.* at 240. According to Ms. Williams, this gap could be cured in Pauma's favor with two compact revisions.

First, Ms. Williams stated that the parties would need to "insert a definition for the term 'Lottery' and/or 'Lotteries' in Section 2 of the 1999 Compact that mirrors the one set forth within Section 319 of the [California] Penal Code:"

> A lottery is any scheme for the disposal or distribution of property by chance, among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property or a portion of it, or for any share or any interest in such property, upon any agreement, understanding, or expectation that it is to be distributed or disposed of by lot or chance, whether called a lottery, raffle, or gift-enterprise, or by whatever name the same may be known.

Id.

Ms. Williams' January 27th letter further stated that following the above language, "[t]he next sentence can then explain that the foregoing definition is identical to the one in Section 319 of the [California] Penal Code, with the terms not only sharing definitions but meanings as well." Vol. III, Ex. 24, JR240. The

second revision would then "amend the scope of lottery games authorized in Section 4.1(c) of the compact." *Id.* Currently, this Section authorizes "[t]he operation of any devices or games that are authorized under state law to the California State Lottery, provided that the Tribe will not offer such games through the use of the Internet unless others in the state are permitted to do so under state or federal law." *Id.* Ms. Williams' letter proposed that the parties remove "that are authorized under state law to the California State Lottery" language and replace it with "that are defined under this compact as a Lottery." *Id.*

Ms. Williams' January 27th letter further advised that the next sentence in the proposed compact could then explain that, under this compact provision, Pauma's authorized compact gaming "shall include, but not be limited to, (1) devices or games that are authorized under State law to the California State Lottery, (2) devices or games that are authorized to the Multi-State Lottery Association, (3) devices or games that are authorized to any other state lottery or any other multi-state lottery association, (4) punchboards, (5) lottery games that use the themes of roulette, dice, baccarat, blackjack, Lucky 7s, draw poker, slot machines, or dog racing, (6) lottery games that are played on video terminals, (7) video lottery games that dispense coins or currency, (8) lottery games that incorporate technologies or mediums that did not exist, were not widely available, or were not commercially feasible in 1984 (save for the restriction on the use of the Internet, *supra*), and (9) any other games or devices that fall within the definition of Lottery." Vol. III, Ex. 24, JR240-41. According to Pauma, this approach would provide the Tribe with its desired "full lottery rights" under a compact. *Id.* at 241.

In a letter dated March 7, 2016, Ms. Williams sent another letter to Mr. Dillion demanding a response to her January 27th letter. Vol. III, Ex. 25, JR242-43.

On March 30, 2016, Mr. Dhillon responded by letter to Ms. William's letters of January 27th and March 7th. Vol. III, Ex. 26, JR244-45. In regard to Pauma's lottery game proposal, Mr. Dhillon advised that the Governor's authority under the

California Constitution to negotiate lottery games with tribes "has always been understood to encompass those games authorized for play by the California State Lottery." *Id.* at 244. Nonetheless, the State was "willing to negotiate to authorize Pauma to offer certain additional lottery games to be enumerated in the compact." *Id.* But Mr. Dhillon's letter made clear the need to specifically describe any agreed-to lottery game to (1) provide "clarity as to the scope of the authorization," (2) avoid "future disputes between the parties" regarding the scope of approved games, and (3) reduce "the risk of running afoul of other prohibitions on how lottery games may be conducted, such as the keno game offered by the California State Lottery that was found to be an illegal banked game by the Supreme Court in *Western Telcon, Inc. v. California State Lottery* (1996) 13 Cal.4th 475." *Id.*

While Mr. Dhillon's March 30th letter stated an intent to further negotiate over some lottery games that were not prohibited under California law, his letter specifically did not concede that the State was under "an obligation to negotiate for all lottery games enumerated in your January 17, 2016 letter (other than those authorized to the California State Lottery)." Vol. III, Ex. 26, JR244. In particular, Mr. Dhillon's letter advised that "the State expressly takes issue with Pauma's ability under IGRA to seek to negotiate 'devices or games that are authorized to any other state lottery or other multi-state lottery association,' 'lottery games that are played on video terminals,' 'tribal lottery systems' or other lottery systems to the extent operated or conducted off tribal lands, and 'video lottery games that dispense coins or currency.'" *Id.* at 244-45.

Finally, with Pauma still not having provided the State with a draft compact, Mr. Dhillon's March 30th letter confirmed that "[t]he State will provide Pauma a complete draft document to guide our future discussions within the next few weeks." Vol. III, Ex. 26, JR245. While Mr. Dhillon observed that the State was currently in compact negotiations with "over forty other California tribes" and that the State remained in litigation with Pauma in another federal court case, the State

nonetheless was "committed to moving these negotiations forward but also understand[s] if the Tribe prefers, as it has previously, to defer some negotiation matters until there is a break in the litigation." *Id.*

F. The State's Proposed Draft Compact for Pauma's Consideration

On April 28, 2016, Ms. Drake sent Pauma's attorneys, via e-mail, "the State's draft compact for [Pauma's] consideration." Vol. IV, Ex. 27, JR246. The bottom of the compact's first page is labeled "State's Draft Compact 4/28/2016." *Id.* at 247. Ms. Drake's email further requested Pauma's attorney's to "[p]lease let us know when you would like to discuss." *Id.* at 246.

The State's proposed draft compact covered several key issues. Vol. IV, Ex. 27, JR247-382. These included sections on the proposed draft compact's purposes and objectives (*id.* at 255-56), the scope of authorized class III gaming (*id.* at 261), the authorized location for Pauma's gaming facility, the number of gaming devices, cost reimbursement and mitigation (*id.* at 261-68), revenue sharing with non-gaming and limited gaming tribes (*id.* at 269-74), gaming operation and facility rules and regulations (*id.* at 309-21), off-reservation environmental and economic impacts (*id.* at 322-329), public and workplace health, safety, and liability obligations (*id.* at 329-45), dispute resolution provisions (*id.* at 345-48), and various miscellaneous provisions (*id.* at 351-53).

While the draft compact provided by Ms. Drake to Pauma on April 28th was comprehensive, it remained a work in progress. Vol. IV, Ex. 27, JR247-382. The proposed draft compact indicated several areas were the State anticipated further input from Pauma. For example, in regard to lottery games, the draft compact included a comment advising that the "[s]tate is open, as indicated in prior correspondence, to discussion regarding the authorization of additional enumerated games." Vol. IV, Ex. 27, JR261. Further in regard to off-track horse racing, another comment in the proposed draft compact stated that the "[s]tate has proposed

OTW [off-track wagering] compact that can be incorporated as an Appendix or negotiated and concluded as a separate class III gaming compact[.]" *Id.*

II. PAUMA COMMENCES CIVIL LITIGATION UNDER IGRA

Pauma did not respond to Ms. Drake's April 28, 2016 communication or engage in further negotiations regarding any topics addressed by the State's initial draft compact. Rather, on July 1, 2016, Pauma filed its IGRA complaint. Compl., ECF No. 1. Pauma filed a First Amended Complaint (FAC) on August 4, 2016 (FAC, ECF No. 12), and after the Court granted in part and denied in part the State's motion to dismiss (Order Granting in Part and Den. in Part Def.'s Mot. to Dismiss, ECF No. 26), Pauma filed a Second Amended Complaint (SAC) on April 19, 2017. SAC, ECF No. 27.[3]

Pauma's SAC alleges twenty causes of action against the State for failure to negotiate in good faith under IGRA.[4] SAC, ECF No. 27, 57-83. These claims can be categorized as follows:

A. Claims Two, Three, Four, Five, Six, Seven, and Eight: Pauma's Lottery Games and On-Track Horse Racing Claims

Pauma's SAC includes six claims that generally allege IGRA violations based upon the State's alleged failure to negotiate in good faith for a compact that would include lottery games. In the fifth claim, Pauma alleges that the State failed to negotiate in good faith because it "would not negotiate for video lottery terminals

[3] In its FAC, in addition to the State, Pauma also named as defendants the California Gambling Control Commission and the State of California Department of Justice, Office of the Attorney General. Pauma dropped both of these defendants when it filed the SAC.

[4] In addition to the twenty IGRA claims, Pauma's SAC also alleges a twenty-first claim for an alleged breach of compact, and a twenty-second claim for an alleged breach of the implied covenant of good faith and fair dealing. The State has filed a motion to dismiss and strike regarding the twenty-first and twenty-second claims (Def.'s Notice of Mot. and Mot. to Dismiss and Strike Pl.'s Second Amended Complaint, ECF No. 30), and this motion remains pending. Pursuant to this case's scheduling order, the Court will first adjudicate the cross-motions for summary judgment regarding Pauma's claims one through twenty in the SAC. Order Granting Joint Mot., ECF No. 29.

without providing any basis for [this] position despite previously being requested to do so by Pauma." SAC, ECF No. 27, Fifth Claim, 61-62. Similar claims are raised regarding the State's alleged failure to negotiate for "video lottery games that dispense coins or currency terminals" (*id.*, Sixth Claim, 63-64), for a tribal lottery system (*id.*, Seventh Claim, 64-65), and for "lottery games authorized to the Multi-State Lottery Association or any other state lottery . . ." *id.*, Eighth Claim, 65-67.

In a related lottery claim, Pauma's second claim alleges that the State failed to negotiate in good faith, because during compact negotiations the State's representatives engaged in a "protectionist strategy" to "protect the revenue stream of the State Lottery." SAC, ECF No. 27, Second Claim, 58-59. Similarly, Pauma's fourth claim alleges that the State failed to negotiate in good faith because it took "an anti-competitive move designed to protect the State Lottery" by taking the position that "'[t]he grant of authority to the Governor to negotiate for lottery games under article IV, section 19, subdivision (f) of the California Constitution has always been understood to encompass those games authorized for play by the California State Lottery." *Id.*, Fourth Claim, 60-61.

In addition to lottery games, Pauma's SAC includes a claim about the State's alleged failure to negotiate in good faith regarding on-track horse racing. This third claim alleges that the State "refused to discuss on-track horse wagering during the second negotiation session and simply instructed Pauma to draft proposed compact terms for the State to consider at some future unspecified point." SAC, ECF No. 27, Third Claim, 59-60.

B. Claims One, Nine, Ten, and Eleven: Pauma's Procedural Violation Claims

Pauma's SAC includes four claims that generally allege IGRA violations based upon different alleged procedural issues surrounding the Tribe's compact negotiations with the State. For example, Pauma's first claim alleges that the State engaged in "'surface bargaining' or 'shadow boxing'" in violation of the duty to

negotiate in good faith by failing to timely provide the State's "position on the 'preliminary' issue of negotiable gaming rights for nearly eighteen months . . . ." SAC, ECF No. 27, First Claim, 57-58. Similarly, in the ninth claim, Pauma alleges that the State also failed, in regard to lottery games, to "'substantiate its position [on the lottery games topic] with supporting evidence.'" *Id.*, Ninth Claim, 67-68.

Pauma's procedural claims continue with its tenth claim, which alleges that the State impermissibly created a procedural barrier by changing "the basis for the discussions from mandatory renegotiation provision Section 12.2 to the voluntary amendment provision of Section 12.1" thereby shifting "the discussion from what the State would *give* to what it would *receive*" in negotiations. SAC, ECF No. 27, Tenth Claim, 68-69. Finally, the eleventh claim alleges a procedural failure regarding the State's negotiations over on-track horse racing and lottery games. *Id.*, Eleventh Claim, 69-70. The Tribe claims that the State failed to negotiate in good faith because "[a]fter feigning that it would negotiate for on-track horse wagering and lottery games not authorized to [the] California State Lottery for nearly eighteen months, [the State] simply threw in the towel and sent Pauma a 'complete draft [compact]'" that the State had negotiated with another tribe. *Id.* at 69-70.

C. Claims Twelve, Fourteen, Fifteen, Seventeen, Eighteen and Twenty: Pauma's Fee Claims

Pauma's SAC includes six claims that allege the State's failure to negotiate in good faith by demanding excessive fees. For example, Pauma's twelfth claim alleges that the State failed to negotiate in good faith because it "offered Pauma a compact" that contained higher fees in retribution against the Tribe "in order to offset any monies the State may have to pay as part of the restitution award in the prior compact litigation." SAC, ECF No. 27, Twelfth Claim, 71-72. Similarly, Pauma's fourteenth claim alleges that the State failed to negotiate in good faith because it offered Pauma "a compact proposal it had negotiated with a different tribe (and which that tribe would sign the following day) that includes more than

twice as much regulation as the 1999 Compact and exponentially more revenue sharing." *Id.*, Fourteenth Claim, 74-75.

Pauma's fifteenth claim alleges that the State failed to negotiate in good faith because it offered Pauma a compact that contained new revenue sharing demands, including higher revenue sharing payments, but failed to offer meaningful concessions in exchange for those demands. SAC, ECF No. 27, Fifteenth Claim, 75-77. Pauma's seventeenth claim alleged that the State failed to negotiate in good faith because it offered the Tribe a compact that asked for payments into the Special Distribution Fund (SDF), while unilaterally providing itself with the ability to determine the amount of these payments. *Id.*, Seventeenth Claim, 78-79. Pauma's eighteenth claim alleges that the State failed to negotiate in good faith because it offered Pauma a compact that asked the Tribe "to pay certain 'regulatory' costs two or three times." *Id.*, Eighteenth Claim, 79-80.

Finally, Pauma's twentieth claim alleges that the State failed to negotiate in good faith because it offered Pauma a compact demanding SDF payments that can be used not only to administer the compacts, but also to negotiate compacts and fund the State's litigation costs when it is sued. SAC, ECF No. 27, Twentieth Claim, 82-83.

D. Claims Thirteen, Sixteen, and Nineteen: Pauma's Miscellaneous Claims

The last category of claims in Pauma's SAC includes a variety of miscellaneous compact provisions that the Tribe alleges violate IGRA. Pauma's thirteenth claim alleges that the State failed to negotiate in good faith because it "inserted provisions into" the offered compact "to make itself judgment proof." SAC, ECF No. 27, Thirteenth Claim, 72-74. As a result, the State allegedly required the Tribe "to contract away statutory and other rights" that protect Pauma. *Id.* at 73.

Pauma's sixteenth claim alleges that the State failed to negotiate in good faith because it offered a compact that contained new regulation demands, including "regulatory authority over such things as roads, parking lots, hotels, utility or waste disposal systems, water supplies, walkways, and any commercial enterprise that it may contend serves the gaming facility." SAC, ECF No. 27, 77-78. In return, "the State did not offer meaningful concessions in exchange for this broad grant of authority to generally regulate the reservation." *Id.* at 78. And finally, Pauma's nineteenth claim alleges that the State failed to negotiate in good faith because it offered Pauma a compact that would require the Tribe "to make significant revenue sharing outlays after the review [of the compact by the Secretary of the Interior] is done." *Id.* at 80-82. According to the Tribe, this conduct constitutes an effort to "evad[e] the Secretarial review process" in violation of IGRA. *Id.* at 81.

LEGAL BACKGROUND

I. THE HISTORY OF IGRA AND THE MEANING OF GOOD FAITH NEGOTIATIONS

In re Indian Gaming Related Cases, 331 F.3d 1094 (9th Cir. 2003) (*Coyote Valley II*) recounts extensively the events leading to IGRA's passage, and the subsequent compact negotiations between California and dozens of Indian tribes resulting in the original 1999 Compact. One of the tribes that signed this compact was Pauma. Some of the key historical facts regarding these original compacts are detailed below.

The need for IGRA became paramount in 1987, when the United States Supreme Court held that California lacked the authority to enforce on Indian reservations its civil-regulatory laws on gambling in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). As a result, gambling on tribal lands was subject only to federal regulation or state criminal prohibitions. *Artichoke Joe's v. Norton*, 216 F.Supp.2d 1084, 1091-92 (E.D. Cal. 2002). To address concerns about unregulated gambling on tribal lands, Congress passed IGRA in 1988 as a

"compromise solution to the difficult questions involving Indian gaming." *Id.* at 1092. IGRA provides "a statutory basis for the operation of gaming by Indian tribes" and is an example of "'cooperative federalism' in that it seeks to balance the competing sovereign interests of the federal government, state governments, and Indian tribes, by giving each a role in the regulatory scheme." *Id.*

IGRA's cooperative federalism role for state governments is found in its compacting requirement. This IGRA provision accords states "the right to negotiate with tribes located within their borders regarding aspects of class III tribal gaming that might affect legitimate State interests." *Coyote Valley II*, 331 F.3d at 1097. Class III gaming "includes the types of high-stakes games usually associated with Nevada-style gambling. Class III gaming is subject to a greater degree of federal-state regulation than either class I [social games] or class II [bingo and certain non-banked card games] gaming." *Id.* at 1097.

This federal statutory scheme makes class III gaming lawful on tribal lands only if such activities are: (1) authorized by an ordinance or resolution adopted by the governing body of the Indian tribe and approved by the Chairman of the National Indian Gaming Commission; (2) located in a state that permits such gaming for any purpose by any person, organization, or entity; and (3) conducted in conformance with a tribal-state compact entered into by the Indian tribe and the state and approved by the Secretary of the United States Department of the Interior (Secretary). 25 U.S.C. § 2710(d)(1) & (d)(3)(B). An Indian tribe is not authorized to operate class III gaming on its lands located in California absent a negotiated compact between the State and the tribe that is approved by the Secretary, or the implementation of "procedures" by the Secretary following a finding of bad-faith negotiating by the State. *Coyote Valley II*, 331 F.3d at 1097-98 (explaining that lawful class III tribal gaming is gaming conducted in conformance with a compact or conditions prescribed by the Secretary); *see* 25 U.S.C. § 2710(d)(7)(B)(vii).

Some of the challenges that can face tribes and a state during IGRA compact negotiations were highlighted in California when, in 1999, Governor Gray Davis commenced compact negotiations with a group of tribes. *Coyote Valley II*, 331 F.3d at 1102. A California Supreme Court decision, released while these negotiations were underway, invalidated a statutory initiative that purported to require the Governor to enter into a model tribal-state gaming compact on the ground that the initiative violated article IV, section 19(e) of the California Constitution. *Hotel Emp. & Rest. Emps. Int'l Union v. Davis*, 21 Cal. 4th 585 (1999); *Coyote Valley II*, 331 F.3d at 1101, 1103. In response, Governor Davis "proposed an amendment to Section 19 of Article IV of the California Constitution that would exempt tribal gaming from the prohibition on Nevada-style casinos, effectively granting tribes a constitutionally protected monopoly on most types of class III games in California." *Coyote Valley II,* 331 F.3d at 1103. During negotiations, Governor Davis offered the tribes the "major concession" of the right "to operate real Las Vegas-style slot machines and house-banked blackjack"—plus the exclusive right to conduct those forms of class III gaming in the state—in exchange for revenue-sharing provisions directed to specified funds. *Id.* at 1104-06, (citing K. Alexa Koenig, *Gambling on Proposition 1A: The California Indian Self-Reliance Amendment*, 36 U.S.F. L. REV. 1033, 1043-44 (2002)).

On April 27, 2000, following Proposition 1A's passage authorizing the governor to negotiate compacts for casino-style gambling on Indian lands in California, Pauma and California entered into the 1999 Compact – a compact materially identical to earlier class III gaming compacts entered into between California and approximately sixty other Indian tribes. Cal. Gov't Code §12012.25(a) & (b); "Notice of Approved Tribal-State Compacts," 65 Fed. Reg. 95, p. 31189 (May 16, 2000). But as described below, the 1999 Compacts were not without controversy, and some tribes argued that the State's negotiation tactics violated IGRA's duty to negotiate in good faith.

II. THE RELEVANT FACTORS FOR DETERMINING GOOD FAITH UNDER IGRA BASED UPON THE RECORD OF NEGOTIATIONS

IGRA provides that any eligible Indian tribe "shall request the State . . . to enter into negotiations for the purpose of entering into a Tribal-State compact . . . ." 25 U.S.C. § 2710(d)(3)(A). The State "shall negotiate with the Indian tribe in good faith to enter into [a tribal-state] compact." *Id.* But negotiations are, of course, a two-way street. A state's ability to negotiate in good faith to reach a mutually acceptable compact assumes that a tribe shares the same goal.

While IGRA requires "good faith" negotiations, the statute does not define this important term. *In re Indian Gaming Related Cases v. State of California,* 147 F.Supp.2d 1011, 1020 (N.D. Cal. 2001) (*Coyote Valley I*); *see* 25 U.S.C. § 2710(d)(3)(A). In making this good-faith determination, the court "may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities," and "shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith." 25 U.S.C. § 2710(d)(7)(B)(iii). Reported cases that have analyzed a State's good faith have typically been decided on motions for summary judgment or motions to dismiss. *Wisconsin Winnebago Nation v. Thompson,* 22 F.3d 719, 723 (7th Cir. 1994) (question of bad faith negotiations under IGRA decided on cross-motions for summary judgment); *Cheyenne River Sioux Tribe v. State of South Dakota,* 830 F.Supp. 523, 527 (D. S.D. 1993) (issue of good faith negotiation under IGRA should be decided on the basis of the transcripts of the negotiations). The reason for such treatment is that negotiation histories between states and tribes is not a subject matter that lends itself to much dispute. The proposals, counter-proposals, letters, and other documents that are part of the negotiations constitute the evidence that courts will consider when determining good faith.

In regard to the 1999 Compacts, after reviewing the record of negotiations between the State and the tribes, both the district court and the Ninth Circuit rejected a tribe's numerous procedural and substantive complaints that the State failed to negotiate in good faith under IGRA. *Coyote Valley II,* 331 F.3d at 1107-17; *Coyote Valley I*, 147 F.Supp.2d at 1021-22. In doing so, the courts identified several relevant factors to consider when determining, based on the record of negotiations, whether a state negotiated in good faith. These factors include the following:

- Did the State remain "willing to meet with the tribe for further" compact negotiations? *Coyote Valley II,* 331 F.3d at 1110 (Ninth Circuit finding that the negotiation history showed that the State "actively negotiated with Indian tribes").

- Did the State have a duty to negotiate with the tribe to engage in the requested class III gaming? *Coyote Valley II,* 331 F.3d at 1110 (citing *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1255 (9th Cir. 1994)) (Ninth Circuit holding that the State remained willing to further negotiate even though it had "no obligation to negotiate with the *Coyote Valley* over the types of class III games covered in the Davis Compact").

- Are the tribe's "challenged provisions" the result of negotiations or "unilateral demands by the State"? *Coyote Valley I*, 147 F. Supp. 2d at 1021 (district court finding that the challenged "Tribal Labor Relations Ordinance" was not a "unilateral" State demand).

- Was it the tribe, and not the State, that "declined to engage in further negotiations"? *Coyote Valley I*, 147 F. Supp. 2d at 1021-22

(district court finding that during negotiations the tribe "apparently [had] not contacted the State to arrange any further IGRA negotiations].

- Are the challenged provisions "categorically forbidden by the terms of IGRA"? *Coyote Valley II,* 331 F.3d at 1110-17 (Ninth Circuit holding that the State did not negotiate in bad faith by refusing to enter into a compact without the Revenue Sharing Trust Fund, the SDF, and the Tribal Labor Relations Ordinance).

STANDARD OF REVIEW

Federal Rule of Civil Procedure 56 authorizes summary judgment where the movant shows there is no genuine dispute as to any material fact and he is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The court must construe the evidence and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party. *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630-31 (9th Cir. 1987). Where the issue before the court involves the proper interpretation of statutes and regulations, and the parties agree on the "material" facts, the matter may be resolved as a matter of law on summary judgment. *See Edwards v. Aguillard*, 482 U.S. 578, 594-95 (1987); *Shishido v. SIU-Pac. Dist.-PMA Pension Plan*, 587 F. Supp. 112, 114 (N.D. Cal. 1983).

SUMMARY OF ARGUMENT

Pursuant to IGRA, the State negotiated in good faith with Pauma. The State positively responded to the Tribe's request to renegotiate over lottery games and on-track horse racing, and entered into bilateral negotiations over these topics. Further, the State actively and repeatedly sought information from Pauma regarding the Tribe's claimed desire to operate lottery games and an on-track horse-racing facility. The State's efforts at moving compact discussions forward on these topics included seeking specific information on the lottery games the Tribe desired to

operate, providing Pauma with a sample on-track horse-racing compact, giving the Tribe a sample off-track horse-racing compact, and finally proposing a draft compact that the State hoped would move the parties' on-going compact discussions in the direction of a final agreement. Unfortunately, rather than reciprocate with its own proposed compact language or concrete proposals, Pauma commenced litigation under IGRA. This record of negotiation shows no bad faith by the State. Instead, the record shows that Pauma failed to fully engage in meaningful negotiations with the State to conclude a renegotiated IGRA compact.

ARGUMENT

I. THIS CASE'S UNDISPUTED RECORD OF NEGOTIATIONS SHOWS THAT THE STATE NEGOTIATED WITH PAUMA IN GOOD FAITH

A tribe that brings an action under 25 U.S.C. § 2710(d)(7)(A)(i), as Pauma has must show that 1) no tribal-state compact has been entered and 2) the state either failed to respond to the tribe's request to negotiate or did not respond to the request in good faith. 25 U.S.C. § 2710(d)(7)(B)(ii)(II). At that point, the burden then shifts to the state to prove that it did in fact negotiate in good faith. *Id.*; *see Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 50 (1996). Based on this case's record of negotiation, the State responded to and negotiated in good faith over Pauma's request to renegotiate a new IGRA compact. The record shows that the State responded positively to Pauma's request to negotiate, and participated in bi-lateral negotiations. However, rather than seriously negotiating through an exchange of proposed compact terms, Pauma appeared more interested in "triggering the tripartite remedial process set forth in Section 2710(d)(7)(B)(i)-(vii) of IGRA" (*see* the last paragraph of each of the first twenty claims for relief in the SAC). In the process, Pauma made it impossible for the State to conclude a tribal-state compact. Even though Pauma was largely "going through the motions" in negotiating with the State, the record of negotiations demonstrates the State's good faith.

A. The State Negotiated in Good Faith Regarding Lottery Games

Pauma's SAC includes six claims regarding its demands for "lottery games."[5] Regardless of these claims' multiple lottery-game labels, none shows any failure by the State to negotiate in good faith under IGRA. In short, the record of negotiations demonstrates that at all times the State was willing to negotiate with Pauma over lottery games.

The State's willingness to negotiate over lottery games was demonstrated at the beginning of the negotiation process. In his December 15, 2014 letter, Mr. Dhillon advised Pauma that the State would enter into negotiations for lottery games to the extent that Pauma's requested games were authorized in California. Vol. I, Ex. 2, JR005. Following the parties' initial meeting in January, 2015, Mr. Dhillon sent Pauma another letter reiterating the State's need for "examples of the types of lottery games Pauma is considering." Vol. I, Ex. 7, JR021. Mr. Dhillon again repeated this need by advising the Tribe it was not providing "a clear description of the kinds of . . . lottery games it sought to conduct." Vol. I, Ex. 9, JR026. But despite Pauma's lack of clarity, the State remained willing to conduct further negotiations. *Id.*

The reasons for the State's need to procure a clear description of Pauma's proposed lottery games were obvious. The State required clear language to accurately describe the scope of the authorized lottery games in order to avoid future disputes. Moreover, the State needed to know that Pauma was proposing lawful lottery games under California law. In an effort to clarify this important issue, Mr. Dhillon repeatedly pressed Pauma's representatives for this information at the September 8, 2015 negotiation session. Mr. Dhillon asked for "draft compact language" regarding lottery games. Vol. II, Ex. 14, JR042:12-14. He stated that

[5] These are Pauma's second, fourth, fifth, sixth, seventh, and eighth claims for relief.

providing this information would allow the parties to work on language that "hopefully will lead to a compact." *Id.* at 42:24-43:1. Mr. Dhillon asked for proposed compact language regarding lottery games (*id.* at 112:24-113:5) and when the Tribe would provide this compact language (*id.* at 139:4-25). Despite Mr. Dhillon's best efforts to obtain more lottery-game information, the Tribe stayed noncommittal on whether it would comply. *Id.* at 140:1-20 (Mr. Cochrane responded to these requests in part by saying "I don't know").

The gap between Pauma's expressed desire to operate new lottery games, and its ability to provide the State with specific lottery-game compact language, narrowed somewhat with Pauma's January 27, 2016 letter. Vol. III, Ex. 24, JR239-41. This letter provided some detail regarding the Tribe's proposed description for authorized lottery games. Under this proposal, Pauma would be authorized to operate lottery games that it claimed were lawful under the constitution, but not yet authorized to the California State Lottery. *Id.* at 240. Pauma advised that this approach would permit the Tribe to operate devices or games that were authorized to other state and multi-state lotteries, lottery games played on video terminals, and video lottery games that dispensed coins or currency. *Id.* at 240-41.

In reality, far from resolving the State's need for lottery-game clarity, Pauma's proposed "fix" raised three significant problems. Mr. Dhillon attempted to explain these problems in his March 30, 2016 letter. Vol. III, Ex. 26, JR244-45. First, Pauma's broad legal-definition approach towards lottery games did not provide the required "clarity as to the scope of the authorization" for Pauma's lottery games. *Id.* at 244. Second, this approach would lead to "future disputes between the parties" regarding the scope of approved lottery games. *Id.* And finally, Pauma's approach ran the risk of inadvertently authorizing games that violated "other prohibitions on how lottery games may be conducted" under California law. *Id.*

The State's final concern, expressed in Mr. Dhillon's March 30, 2016 letter, was far from academic. The letter highlighted the State's concern about

inadvertently authorizing unlawful games by specifically citing to *Western Telcon, Inc. v. California State Lottery* (*Western Telcon*) (1996) 13 Cal. 4th 475. Vol. III, Ex. 26, JR244. That case involved a game operated by the California State Lottery (State Lottery) known as "CSL Keno." Under California law the State Lottery is authorized to operate "lottery games," and the State Lottery took the position that CSL Keno was a lawful lottery game. However, in *Western Telcon*, the California Supreme Court disagreed with the State Lottery's position, and found that CSL Keno was an illegal and unauthorized "banking game" under the California Constitution. *Id.* at 488-89. CSL Keno constituted a banking game because the game paid out wagers to each player based upon "the outcome of the 'draw' of random numbers." *Id.* at 489.

In *Western Telcon*, the State Lottery made several arguments in a failed effort to portray CSL Keno as an authorized lottery game under the California Constitution. The State Lottery argued that (1) the game contained all of the required lottery elements under California Penal Code section 319, (2) that State Lottery's games are not prohibited from offering some fixed prizes, and (3) that the State Lottery's preset prize payout for CSL Keno paid out approximately 50% in draws. *Id.* at 490-91. All of these arguments were rejected by the California Supreme Court, which noted that when the California voters authorized the State Lottery, they "did not establish a state gambling house, but a state *lottery*." *Id.* at 493. Because CSL Keno was not a lottery, and the State Lottery could only operate lotteries, the game was unauthorized under California law. *Id.*

Western Telcon demonstrates how the scope of permitted lottery games under California law is not always clear. Without question, even the State Lottery, the State's most experienced agency regarding lotteries, inadvertently violated the law when it operated CSL Keno. Understandably, the State wanted to avoid repeating a similar mistake during compact negotiations with Pauma over lottery games. To avoid inadvertently authorizing lottery games beyond the permitted scope of the

California Constitution, the State was appropriately asking Pauma for clarity regarding the scope of its proposed lottery games. In light of this valid concern, the State could not give Pauma, and IGRA does not require, a lottery "blank check."

While the State remained willing to negotiate with Pauma for lottery games, and even for lottery games that were not currently authorized to the State Lottery, the State legitimately maintained its need for compact language describing the scope of authorized lottery games desired by the Tribe. As a result, when the State sent Pauma a draft compact on April 28, 2016 for consideration and further discussion, the draft compact invited Pauma to add lottery game language for "the authorization of additional enumerated games." Vol. IV, Ex. 27, JR261. The Tribe's failure to respond is not evidence of a lack of good-faith negotiation by the State. *Coyote Valley I*, 147 F. Supp. 2d at 1021.[6]

B. The State Negotiated in Good Faith Regarding On-Track Horse Racing

Pauma's SAC includes a claim that the State allegedly failed to negotiate in good faith regarding on-track horse racing. In this third claim of relief, Pauma incorrectly alleges that the State did not discuss on-track horse wagering during the September 8, 2015 negotiation session, and instead instructed the Tribe to submit

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[6] In its second and fourth claims for relief, Pauma alleges that the State refused to negotiate for lottery games in an anti-competitive move designed to protect the State Lottery. There is no evidence in the record to support these allegations. Protecting the State Lottery from competition by Pauma was not the State's goal. In determining whether a state has negotiated in good faith, IGRA authorizes a court to "take into account . . . adverse economic impacts on existing gaming activities," (25 U.S.C. § 2710(d)(7)(A)(iii)(I)) and "allows States to consider negative impacts on existing gaming activities." *See* S. REP. NO. 100-446, at 14 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3084. Nonetheless, the State expressly invited Pauma to add lottery-game language to the draft compact. Vol. IV, Ex. 27, JR246, JR261. There is also evidence in the record that prior to the start of negotiations, Pauma had already decided that the State "in an anti-competitive move" would seek to protect the State Lottery. Vol. I, Ex. 1, JR002. However, contrary to its surmise, rather than "dodge the process simply because of bad feelings arising out [of] an unrelated litigation or a desire to protect the State Lottery from tribal competition," as noted below, the State invited Pauma to add lottery-game language to the draft compact. Vol. III, Ex. 15, JR177.

draft proposed compact terms. In fact, the undisputed record of negotiations shows that the State repeatedly attempted to engage Pauma regarding its claimed desire to operate on-track horse racing before, during, and after the September 8th meeting.

The State's efforts to reach an on-track horse-racing compact were extensive. At the beginning of negotiations, Mr. Dhillon indicated the State's willingness to negotiate for both lottery games and on-track horse racing. Vol. I, Ex. 2, JR005. In his January 30, 2015 letter following the parties initial meeting, Mr. Dhillon proposed using the State's previously entered into off-track satellite-wagering compacts "as a starting point for Pauma's proposed facility." Vol. I, Ex. 7, JR021. Mr. Dhillon also proposed seeking guidance form the California Horse Racing Board. *Id.* And in his May 27, 2015 letter, Mr. Dhillon reiterated the need for the Tribe to provide the State with "a clear description of the kinds of horse racing . . . it sought to conduct." Vol. I, Ex. 9, JR026.

The State's efforts at negotiating an on-track horse-racing compact continued at the September 8, 2015 negotiation session. In a key sign of its seriousness, the State brought to this session Mr. Baedeker, the Board's executive director, to discuss issues related to on-track horse racing. Vol. II, Ex. 14, JR040. During the session the executive director discussed several issues with tribal representatives, including the Board's lack of experience in negotiating on-track compacts with tribes (*id.* at 045:1-8), the Board's interest in this concept (*id.* at 045:9-25), possible challenges for a new track in scheduling racing weeks (*id.* at 059:2-60:13), issues that could impact how well a new track would be received by the existing horse-racing industry (*id.* at 065:2-66:12), licensing fees (*id.* at 067:5-69:23), and Mr. Baedeker's experience in both the business and regulatory side of horse racing (*id.* at 104:2-20). During this meeting, Mr. Dhillon repeated his request for Pauma to commit to providing on-track horse-racing compact language. *Id.* at 044:9-10.

The State's attempts to negotiate over horse racing did not end at the September 8, 2015 meeting. In his November 4, 2015 letter, Mr. Dhillon provided

Pauma with an on-track horse-racing compact between another state and tribe that could serve as a reference for further negotiations. Vol. III, Ex. 16, JR183, 185-205. Later, in his November 30, 2015 letter, Mr. Dhillon again asked Pauma to provide the State with a description of its planned on-track horse-racing facility, and further provided Pauma with a draft off-track satellite-wagering facility compact in the event the Tribe had any such interest. Vol. III, Ex. 18, JR208-9, 210-21. In his January 4, 2016 letter, Mr. Dhillon confirmed that the State remained willing to continue negotiations that would include "horse racing [and] off-track betting . . . ." Vol. III, Ex. 23, JR238. And finally, when the State sent Pauma the April 28, 2016 draft compact for consideration and further discussion, it advised that the "[s]tate has proposed OTW compact that can be incorporated as an Appendix or negotiated and concluded as a separate class III gaming compact[.]" Vol. IV, Ex. 27, JR261.

Based on this record of negotiations, the State negotiated in good faith with Pauma over a possible on-track horse racing facility because it remained "willing to meet with the tribe for further" compact negotiations on this subject. *See Coyote Valley II,* 331 F.3d at 1110. In fact, it was Pauma that "declined to engage in further negotiations" by not responding to the State's repeated requests for more specific information about its planned on-track facility, or by conferring with the State regarding the sample out-of-state horse-racing compact that was provided to Pauma. *See Coyote Valley I*, 147 F. Supp. 2d at 1021. While the State remained a willing and engaged partner for an on-track horse-racing compact, Pauma was not.

C. The State Committed No Procedural Violations that Breached the Duty to Negotiate in Good Faith

Pauma's SAC includes four claims regarding alleged procedural violations committed by the State during negotiations. These claims allege that the State engaged in "surface bargaining" or "shadow boxing," failed to substantiate its position regarding lottery games, created a "procedural barrier" regarding continued

negotiations under compact Section 12.1, and committed a "procedural failure" regarding the negotiations over on-track horse racing and lottery games.[7] Even assuming that any of these allegations could state a claim under IGRA for failure to negotiate in good faith, none of them are supported by the record of negotiations.

As outlined in the previous two sections, if any party committed so-called procedural negotiation violations that amount to bad faith under IGRA, it was Pauma. This case's negotiation history is rife with Pauma's repeated failures to provide either proposed compact language or greater detail regarding its alleged desire to operate an on-track horse-racing facility or different lottery games. Probably the best example of Pauma's procedural maneuverings occurred during the September 8, 2015 compact meeting. Mr. Dhillon repeatedly asked Pauma's representatives at this meeting to commit to providing the State with compact language regarding both lottery games and on-track horse racing in order to work towards a compact. Vol. II, Ex. 14, JR044:9-10, 048:10-11, 054:18-21. In regard to on-track horse racing, Mr. Dhillon asked for Pauma to develop and share the Tribe's "business plan." *Id.* at 104:21-105:11. Mr. Cochrane responded by saying "Trust us. We have all that down" and "[w]e have just been reluctant to share it." *Id.* at 105:12-15.

Pauma's lack of willingness to share even basic details at the September 8, 2015 meeting became even more obvious when the Tribe's representatives failed to take seriously the State's questions about the type of horses it wanted to race at an on-track facility. Vol. II, Ex. 14, JR102:6-9. Rather than provide a specific answer to help narrow the scope of any possible tribal horse-racing track, Mr. Cochrane broadly proclaimed that "[w]e want Appaloosas, Arabians, Thoroughbreds, Standardbreds, Quarter Horses, mules, pint horses. Did I leave anything out? We want it all." *Id.* at 102:12-14. When the Board's executive director followed up by

[7] These are Pauma's first, ninth, tenth, and eleventh claims for relief.

asking if Pauma would race all of these animals at the same time, both Mr. Cochrane and Ms. Williams immediately responded by saying "[y]es." *Id.* at 102:15-18. And in apparent mockery of the State's continued efforts to obtain meaningful information on this issue, Mr. Cochrane added that the Tribe would race "[d]ifferent weight classes and everything. Maybe some elephants coming through. Donkeys. It's going to be something else." *Id.* at 102:19-21.

The State does not assume that Pauma seriously desires to operate elephant and donkey races. But the undisputed record of negotiations shows that the State does not know, and has never known, the specifics regarding Pauma's claimed desire to operate an on-track horse-racing facility. Despite providing Pauma with a sample off-track satellite-wagering facility compact (Vol. III, Ex. 18, JR210-21), a sample on-track horse-racing compact (Vol. III, Ex. 16, JR185-205), and a draft compact for further discussion (Vol. IV, Ex. 27, JR247-382), Pauma never provided a proposed business plan, draft compact, or draft compact language for on-track horse racing to the State. Indeed, the Tribe never responded to the State's draft compact for further discussion with anything other than an IGRA lawsuit. On this record, if any party engaged in procedural misconduct that amounted to "shadow boxing," or any other procedural transgressions that amounted to bad faith negotiations, it was Pauma.

D. IGRA Does Not Categorically Forbid Inclusion of the RSTF, SDF and Local Government Provisions in the Draft Compact

Pauma alleges that inclusion of the RSTF (Vol. IV, Ex. 27, JR 271-72, § 5.2), SDF (Vol. IV, Ex. 27, JR262-64, § 4.3) and Cost Reimbursement and Mitigation to Local Governments (Local Government) (Vol. IV, Ex. 27, JR264-65, § 4.4) provisions in the draft compact constitutes bad faith under IGRA.[8] Pauma's

[8] These are Pauma's twelfth, fourteenth, fifteen, seventeenth, and twentieth claims for relief.

application of IGRA's good-faith negotiation requirements to these draft compact proposals is flawed because the State may exercise its authority to offer compact proposals during negotiations. *Coyote Valley II*, 331 F.3d at 1112 (citing S. REP. NO. 100-446, at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3083 (Senate Committee Report) ("describing the compacting process as a 'viable mechanism for setting various matters between two equal sovereigns'")).

When including Sections 5.2, 4.3, and 4.4 in the draft compact proposal, the State was exercising its authority to negotiate when it forwarded the draft compact to Pauma containing the RSTF, SDF and Local Government provisions.[9] Furthermore, these proposals were not outside the scope of topics that what may be included in a compact governing class III gaming, *see* 25 U.S.C. § 2710(d)(3)(C)(i-vii), and factors that courts may consider in determining whether a state negotiated in good faith, *see* 25 U.S.C. § 2710(d)(7)(B)(iii)(I). IGRA specifically authorizes compact provisions relating to:

> (i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;
>
> (ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;
>
> (iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;
>
> (iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;

[9] On November 4, 2016, the Pala Band of Mission Indian's compact, containing the same RSTF, SDF and Local Government provisions as in the draft compact sent to Pauma was published in the Federal Register, after it was ratified in accordance with State law and accepted by the Secretary. *See* Indian Gaming; Tribal-State Class III Gaming Compact Taking Effect in the State of California, 81 Fed. Reg. 76960-01 (Nov. 4, 2016). The compact is available at: http://www.cgcc.ca.gov/documents/compacts/amended_compacts/Pala_Compact_2016.pdf (last visited Sept. 14, 2017).

(v) remedies for breach of contract;

(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

(vii) any other subjects that are directly related to the operation of gaming activities.

25 U.S.C. § 2710(d)(3)(C)(i-vii). In the record of negotiations, the proposed RSTF, SDF and Local Government provisions fall within the scope of these authorized compact provisions for the reasons discussed below.

1. Negotiating Over the RSTF and SDF Provisions Was Not Bad Faith

The Ninth Circuit has considered 25 U.S.C. § 2710(d)(3)(C)(vii) in the context of the State requiring payments by an Indian tribe. That provision was found to permit negotiation over the RSTF and the SDF,[10] which were designed to offset any negative effects of gaming activities. *Coyote Valley II*, 331 F.3d at 1110-12; *cf. Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger* 602 F.3d 1019, 1033-34 (9th Cir. 2010) (a state may not demand revenue sharing payments for deposit into its general fund). The Ninth Circuit has explained that the SDF and RSTF negotiations addressed in *Coyote Valley II* were a "fair distribution of gaming opportunities and compensation for the negative externalities caused by gaming" which the court found to be "subjects directly related to gaming" under 25 U.S.C. § 2710(d)(3)(C)(vii). *Rincon*, 602 F.3d at 1033. The RSTF and SDF, the court explained, were merely "the means" to which the parties agreed for remedying those issues. *Id.*

[10] A court specifically found that the State can negotiate and demand inclusion of the SDF provision as it "involved collecting funds for payment of costs incurred by gaming itself . . . ." *Fort Indep. Indian Cmty. v. California*, 679 F. Supp. 2d 1159, 1175 (E.D. Cal. 2009).

2. Negotiating Over the Local Government Provisions Was Not Bad Faith

Section 4.4 of the draft compact (Vol. IV, Ex. 27, JR264-65), containing the Local Government provisions, also falls within the scope of § 2710(d)(3)(C)(vii) and, under the record of negotiations, the State did not act in bad faith in proposing the draft Local Government provisions for Pauma's consideration. Merely asking about these provisions is not evidence of bad faith. Moreover, even if the State had demanded the inclusion of these provisions in the compact (which it did not), the Court may consider the public interest and the State's concern for the rights of its citizens who may be impacted by a proposed tribal casino when deciding whether the State negotiated in good faith. Negotiating to protect such interests is clearly a matter within the scope of the State's negotiating authority under IGRA. 25 U.S.C. § 2710(d)(7)(B)(iii)(I); see also S. REP. NO. 100-446, at 13 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3083 ("A State's governmental interests with respect to class III gaming on Indian lands include the interplay of such gaming with the State's public policy, safety, law and other interests . . . .").

The Ninth Circuit has already held that RSTF and SDF provisions are not "categorically forbidden by the terms of IGRA." *Coyote Valley II*, 331 F.3d at 1110.[11] Like the RSTF and SDF, the Local Government provisions are "the means" the State has attempted to use as compensation for the negative externalities that may be caused by Pauma's gaming facility. Like the labor relations provision analyzed in *Coyote Valley II*, the Local Government provision is "directly related to the operation of gaming activities" and thus permissible pursuant to 25 U.S.C. § 2710(d)(3)(C)(vii).

[11] All compacts containing RSTF, SDF and Local Government provisions may be viewed on the website of the California Gambling Control Commission. *See* http://www.cgcc.ca.gov/?pageID=compacts (last visited Sept. 15, 2017).

The State has negotiated compacts including the Local Government provision with numerous other Indian tribes to remedy the issues faced by localities and to account for local public interest and public safety in environs where class III gaming facilities are located. An attempt to address such matters is not an indication of a lack of good faith in negotiating a compact. IGRA expressly provides that in making a good-faith determination, the court "may take into account the public interest, [and] public safety." 25 U.S.C. § 2710(d)(7)(B)(iii). IGRA does not categorically forbid the inclusion of a means to address local impacts in gaming compacts. Accordingly, the Court should reject Pauma's argument that the State acted in bad faith when it included the Local Government provision in the draft compact.

3. Negotiating Over Regulatory Costs Was Not Bad Faith

Several of Pauma's claims raise objections to fees included in the State's draft compact. While Pauma's reservations about fee amounts or purposes would have constituted a proper subject for further negotiations, its litigation challenging these draft provisions remains premature. Unlike the negotiating position taken by the State in *Rincon*, this case's undisputed record of negotiations fails to show that the State took a "hard line" position with Pauma, and it certainly did not make a "take it or leave it offer" when it sent the Tribe the draft compact. *See Rincon*, 602 F.3d at 1039. Given that the State was establishing initial discussions about the RSTF, SDF and Local Government provisions, it did not "impose" those provisions, or any other mandatory fees, upon Pauma within the meaning of 25 U.S.C. § 2710(d)(4). As the State advised Pauma, all of the terms in the draft compact were subject to further discussions. The fact that Pauma failed to engage in further negotiations over specific compact provisions constitutes no bad faith by the State.

E. IGRA Expressly Authorizes Compact Provisions Related to Remedies for Breach of Compact, and Sovereign Immunity Waivers

In the thirteenth claim, Pauma alleges that the State failed to negotiate in good faith because it "inserted provisions into" the draft compact presented to Pauma "to make [itself] judgment proof." SAC, ECF No. 27, Thirteenth Claim, 72-74. This allegation fails to show bad faith by the State because IGRA allows the negotiating parties to include "remedies for breach of contract." 25 U.S.C. § 2710(d)(3)(C)(v); *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2035 (2014). Further, IGRA does not preclude the parties from negotiating Eleventh Amendment sovereign immunity waivers in a tribal-state compact to reach desired remedies. In fact, courts routinely analyze sovereign immunity waiver clauses contained in tribal-state compacts. *See California v. Iipay Nation of Santa Ysabel*, 2015 WL 2449527, at *5 (S.D. Cal. May 22, 2015).

Moreover, when deciding whether a state has waived its constitutional immunity under the Eleventh Amendment, courts "will find waiver only where stated by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction." *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (citation, internal quotation marks and alteration omitted). Similarly, it is well settled that "a waiver of [tribal] sovereign immunity 'cannot be implied but must be unequivocally expressed.'" *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (quoting *United States v. Testan*, 424 U.S. 392, 399 1976)). As such, to avoid doubt about the extent of the parties' sovereign immunity waivers, the draft compact contains a limited waiver of sovereign immunity on behalf of both the State and the Tribe. Section 13.4(a) of the draft compact bars claims for restitution and damages. Vol. IV, EX. 27, JR347-48.

From the State's perspective, these draft compact provisions protect both parties to the compact and relate to remedies for breach of compact. The second provision Pauma objects to, Section 13.4(d), makes clear that sovereign immunity

waivers granted are restricted to those contained in the compact. Vol. IV, EX. 27, JR348. This provision also favors both parties to the compact. Even if it were deemed more favorable to the State, IGRA permits the State to negotiate on a sovereign-to-sovereign basis with Pauma, without every provision favorable to the State being labeled bad faith. Congress "did not intend to require that States ignore their economic interests when engaged in compact negotiations." *Coyote Valley II*, 331 F.3d at 1115. Lastly, the State encouraged Pauma to negotiate further over these draft provisions. Having declined to engage in further negotiations over provisions it is objecting to for the first time by way of this litigation, Pauma cannot reasonably assert that the State's failure to alter those terms constitutes a refusal to negotiate in good faith. *See Coyote Valley I*, 147 F.Supp.2d at 1021–22.[12]

F. The State's Draft Compact Did Not Forbid or Evade Secretarial Review

And finally, in Pauma's nineteenth claim, the Tribe alleges that the State failed to negotiate in good faith because it offered Pauma a compact that would require the Tribe "to make significant revenue sharing outlays after the review [of the compact by the Secretary] is done." SAC, ECF No. 27, 80-81. According to the Tribe, this conduct by the State constitutes an effort to "evad[e] the Secretarial review process" in violation of IGRA's requirement to negotiate in good faith. *Id.* at 81. Pauma is wrong for two reasons.

First, the State cannot unilaterally impose the challenged Local Government provision on Pauma, it can only propose terms for a class III gaming compact that will not take effect unless both parties agree to them. In the event Pauma and the State execute a negotiated compact, it cannot take effect unless and until it is approved by the Secretary. *See* 25 U.S.C. § 2710(d)(8). Even if a court were to

[12] For the same reason, Pauma's sixteenth and eighteenth claims are without merit. If the Tribe disagreed with any alleged regulatory costs or other demands in the draft compact, it could have negotiated for their exclusion during continued negotiations.

find that the State could not impose the Local Government provisions' requirements on a tribe absent its agreement, the State's inclusion of the provisions in the draft compact does not demonstrate that the State lacked good faith in negotiating for them.

Second, as previously indicated, the State's draft compact proposal was not a "take it or leave it" offer. Because Pauma withdrew from further negotiations, the State was never given an opportunity to review or consider any counter proposals by the Tribe. Having declined to engage in further negotiations over the objected-to provisions, Pauma cannot reasonably assert that the State's failure to alter those terms constitutes a refusal to negotiate in good faith. *See Coyote Valley I*, 147 F.Supp.2d at 1021–22.

CONCLUSION

For the reasons stated above, the State is entitled to judgment on claims one through twenty in Pauma's SAC.

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