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PAUMA BAND OF MISSION INDIANS

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

Defendants.

Case No.: 16-CV-01713 BAS JMA

PAUMA'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON CLAIMS ONE, TWO, FOUR THROUGH SIXTEEN, AND NINETEEN IN THE SECOND AMENDED COMPLAINT

Date: TBD
Time: TBD
Dept: 4B
Judge: The Honorable Cynthia Bashant

NO ORAL ARGUMENT UNLESS REQUESTED BY THE COURT

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INTRODUCTION

The Pauma Band of Mission Indians ("Pauma" or "Tribe") hereby moves for summary judgment on sixteen claims in the Second Amended Complaint that allege the State of California ("State") negotiated in bad faith for a tribal/state gaming compact under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq*. The evidence in this case may be ample, but the fact pattern is actually rather simple and straightforward. In November 2014, Pauma commenced negotiations with the State to obtain new gaming rights – including the ability to operate lottery games not currently "authorized" to the California State Lottery – pursuant to a mandatory renegotiation provision in Section 12.2 of its 1999 Compact that explicitly says, "[t]his Gaming Compact is subject to renegotiation in the event the Tribe wishes to engage in forms of Class III gaming other than those games authorized herein." *See* Ex. 27 at P380. [JR001-JR002] The State's Senior Advisor for Tribal Negotiations Joginder ("Joe") Dhillon responded the following month with a letter explaining "[t]he State agrees to commence discussions regarding a Compact which addresses these forms of gaming and is committed to negotiating in good faith" [JR005], but then spent the next *seventeen* months doing everything in his power to avoid broaching the "preliminary'" issue of whether the State would actually negotiate for such games – from insisting on discussing substance in person when the Tribe would send letters, to demanding the opposite when the Tribe would meet in person, to manufacturing baseless disputes to take the onus off of the subject of new gaming rights altogether.

The five hundred and twenty-two days that elapsed while this cat-and-mouse game unfolded is three to four times the length of time it took to negotiate the entirety of either the 1999 Compact or 2004 Amendment, and yet all this process yielded was an unsubstantiated list of what the State would *not* negotiate and the last-minute conveyance of a "complete draft [compact]" that was just a materially-worse replica of a compact the State would begin executing with a neighboring tribe the following day. *See* Ex. 17. [JR244-JR246] By "materially-worse replica," what Pauma means is that the State simply took this agreement it negotiated with another tribe and then tweaked the principal nu-

merical concessions for the worse – from reducing the machine limit from 2,500 to 2,000; to increasing one form of revenue sharing from 6% to 8%; to raising the gambling age from 18 to 21; to shortening the term of the agreement from twenty-five years to twenty. *See* Ex. 18 at P220, P230-P231, P235, & P309. A redline of the differences between these two compacts is included in the accompanying materials as Exhibit 18, and a quick skim through the pages of the document shows just how flippantly the State treated both the negotiations and Pauma. In fact, what the Court will see when perusing this document is that not a single change in the "complete draft [compact]" is to Pauma's benefit, which makes sense considering the proposal is significantly worse than *every* other compact the State has executed with better-situated tribes in San Diego County over the last two years. *See* Exs. 23-26. Simply put, this "complete draft [compact]" that should have addressed Pauma's needs for new gaming rights became a vehicle for the State to try and recoup an impending $36.3 million judgment and settle a score with a loathsome adversary, which standing alone or viewed alongside the litany of other unreasonable acts by the State during the eighteen-month course of negotiations justifies triggering the remedial scheme in Section 2710(d)(7)(B) of IGRA and ordering the parties into sixty (60) days of renewed negotiations without delay.

LEGAL STANDARDS

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors,* 809 F.2d 626, 630 (9th Cir. 1987). "When the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986). This situation arises when the evidence is "so one-sided" – like where the non-movant's offerings are "merely colorable" or "not significantly probative" – that the moving party must prevail as a matter of law. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249-52 (1986).

During summary judgment, the filing of cross motions indicates a lack of disagreement about the material facts (*see, e.g., Confederated Tribes & Bands of Yakama Nation v. Gregorie,* 680 F. Supp. 2d 1258, 1262 (E.D. Wash. 2010); *Fair Hous. Council of Riverside County, Inc. v. Riverside Two,* 249 F.3d 1132, 1136 (9th Cir. 2001) (equating cross-motions with an acknowledgement by the parties that there are no uncontested issues of material fact)); and "strongly indicates" that the claims at issue are "ripe for resolution." *Wash. State Republican Party v. Wash. State Grange,* 2011 U.S. Dist. LEXIS 2448, *13 n.4 (W.D. Wash. 2011). This shared perception about the current status of the case (or the portion thereof up for summary adjudication) allows a court "to assume that there is no evidence which needs to be considered other than that which has been filed by the parties." *Gregorie,* 680 F. Supp. 2d at 1262-63 (quoting *James Barlow Family Ltd. P'ship v. David M. Munson, Inc.,* 132 F.3d 1316 (10th Cir. 1997)).

As for addressing the merits of the claims, IGRA incorporates a specific burden-shifting process for bad faith negotiation claims. The plaintiff tribe first carries the burden to introduce evidence to show a tribal/state compact has not been entered into and that the state did not respond to the tribe's request to negotiate in good faith. *See Estom Yumeka Maidu Tribe of Enter. Rancheria v. California,* 163 F. Supp. 3d 769, 774 (E.D. Cal. 2016) (citing 25 U.S.C. § 2710(d)(7)(B)(ii)). If a tribe produces such evidence, then the burden shifts to the state to prove that it has in fact negotiated with the tribe in good faith to conclude a compact. *See id.*

The good faith inquiry under IGRA is an objective one that is unconcerned with a state's subjective beliefs about the propriety of its actions. *See Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger,* 602 F.3d 1019, 1041 (9th Cir. 2010) ("*Rincon II*"). Thus, the hallmark of bad faith by a state during compact negotiations is objectively unreasonable conduct, a label that applies if a state does such things as make an improper material demand or reach an unreasonable conclusion about the legality of games that underlie the negotiations. *See id.* (citing *Mashantucket Pequot Tribe v. Connecticut,* 913 F.2d 1024, 1033 (2d Cir. 1990) ("The statutory terms are clear, and

provide no exception for sincere but erroneous legal analyses.")). To help determine the reasonability of certain negotiation conduct, the federal courts often "look[] for guidance to case law interpreting the [analogous good-faith-negotiation requirement under the] National Labor Relations Act." *See In re Indian Gaming,* 147 F. Supp. 2d 1011, 1020-21 (N.D. Cal. 2001), *aff'd*, 331 F.3d 1094 (9th Cir. 2003). Unreasonable conduct amounting to bad faith may be evident from the official record of negotiations. *See Rincon II,* 602 F.3d at 1041. However, a court is not constrained to simply reviewing the back-and-forth negotiation materials, and may go outside the record to consider additional evidence that bears on the "reasonableness of [the State's] bargaining positions." *See Big Lagoon Rancheria v. California,* 2010 U.S. Dist. LEXIS 69144, *16 (N.D. Cal. 2010) (citing S. Rep. No. 100-446 at 14 (1988)); *see Estom Yumeka,* 163 F. Supp. 3d at 784 (looking at the actions of the Legislature in deciding whether the State negotiated in good faith).

If the court finds that the state has failed to negotiate in good faith with the tribe, it issues a finding of bad faith against the state which triggers a potentially tripartite remedial process that begins with sixty days of renewed negotiations between the parties. *See* 25 U.S.C. § 2710(d)(7)(B)(iii). "If no compact is concluded [during this first step], the court appoints a mediator to select from the compacts proposed by the tribe and the state. The state then has 60 additional days to consent to that selected compact. If the state does not consent, the Secretary of the Interior prescribes the procedures under which class III gaming may occur." *Estom Yumeka,* 163 F. Supp. 3d at 775 (citing 25 U.S.C. § 2710(d)(7)(B)(iii)-(iv)).

ARGUMENT

I. [CLAIM 1] FIVE-HUNDRED AND TWENTY-TWO DAYS OF EQUIVOCATION ABOUT PAUMA'S ABILITY TO CONDUCT *ANY* NEW FORMS OF LOTTERY GAMES IS PROOF POSITIVE OF SURFACE BARGAINING THAT IS BAD FAITH UNDER IGRA

Compact negotiations that started out with a rather straightforward request for additional lottery games soon became a tortured and circular affair, as the State did everything in its power to avoid discussing those rights for the next five-hundred-plus days.

The good faith negotiation requirement imposes an obligation on a state "to participate actively in the deliberations so as to indicate a *present* intention to find a basis for agreement, and a sincere effort must be made to reach a common ground." *NLRB v. Montgomery Ward & Co.,* 133 F.2d 676, 686 (9th Cir. 1943). The present intent inquiry tries to distinguish between the two polar approaches where a state either goes "through the motions of negotiation as an elaborate pretense with no sincere desire to reach an agreement if possible," or "bargained in good faith but was unable to arrive at an acceptable agreement with the [tribe]." *NLRB v. Reed & Prince Mfg. Co.,* 205 F.2d 131, 134 (1st Cir. 1953). The former situation is one a state can do with incredible "sophistication and finesse," engaging in an artifice commonly known as "surface bargaining" or "shadow boxing to a draw" in which it "giv[es] the [tribe] a runaround while purporting to be meeting with the [tribe] for purposes of [compacting]." *NLRB. v. Herman Sausage Co.,* 275 F.2d 229, 232 (5th Cir. 1960); *cf. K Mart Corp. v. NLRB,* 626 F.2d 704, 706 (9th Cir. 1980) ("As long as there are unions weak enough to be talked to death, there will be employers who are tempted to engage in the forms of collective bargaining without the substance.").[1]

The compact negotiations in this case commenced on November 24, 2014, when Pauma transmitted a letter to the Office of the Governor invoking the renegotiation provision in Section 12.2 of the 1999 Compact and explaining that the Tribe was "formally request[ing] renegotiation of the 1999 Compact… on the basis that the Tribe wishes to offer… lottery games… that are *not* currently authorized under State law to the California State Lottery," like the six specific subtypes detailed therein. [JR002-JR003] The State's compact negotiator Joe Dhillon was initially receptive to Pauma's request, responding on

[1] As for the validity of a surface-bargaining-based bad faith claim, the Northern District of California entertained such a claim by the Big Lagoon Rancheria in its successful suit against the State. *See Big Lagoon Rancheria,* 2010 U.S. Dist. LEXIS 69144 at *5. Moreover, the State explicitly recognized surface bargaining as a cognizable form of bad faith under IGRA when petitioning the Supreme Court of the United States to review the Ninth Circuit's decision in *Rincon II*. *See* Ex. 1 at P003.

behalf of the State via a December 15, 2014 letter in which he "agree[d] to commence discussions regarding a Compact which addresses these forms of gaming" and explained that he wanted to "discuss preliminary issues, such as… the scope of our negotiations" at the opening meeting. [JR005-JR006] To eliminate any questions about his willingness to discuss these games, Mr. Dhillon followed-up this letter with a second one on January 2, 2015, in which he reiterated that he wanted to "further explore and agree upon the precise scope of the negotiations when we meet" for the first time. [JR010]

Yet, the inaugural negotiation session that took place on January 16, 2015 was remarkable for the lengths the representatives of the State went to in order to avoid discussing the lottery games topic at all, explaining that the legality of a tribe offering *any* additional lottery games was suddenly "murky" and ending the meeting by imparting the impression that it was now going to provide its position on this "preliminary" scope-of-negotiations issue in writing shortly after the meeting. [JR018] However, this too changed a couple of weeks later, as on January 30, 2015 Mr. Dhillon explained in a subsequent letter to Pauma that "[t]he State [only] agreed to research the general legal framework [for lottery games] before our next meeting, not to provide its legal position in writing to the Tribe." [JR022] Further pressing on the issue by Pauma to ensure it was not "simply spinning its wheels" led Mr. Dhillon to send two responses on May 27, 2015 and August 13, 2015 in which he made it clear that the State would not discuss this long-neglected "preliminary" issue in writing because it now conversely had a "preference for discussing substantive matters during in-person meetings." [JR026, JR029-JR030] Despite this positional flip-flop, Mr. Dhillon assured Pauma that "the State will be prepared at our next meeting to discuss the general legal framework for lottery games… as may be authorized under the Indian Gaming Regulatory Act and California law." [JR030]

History would repeat itself again, however, as the second negotiation session began with Mr. Dhillon trying to block *any* conversation on the lottery games subject by immediately telling counsel for Pauma to simply draft compact language for the requested games which the State would "look at… and… respond" to at some unspecified later

date. [JR042] Frustrated at seeing the State reverse its position yet again in a manner that ensured that it would not disclose whether it would actually negotiate for the new gaming rights at issue anytime soon, counsel for Pauma pushed forward and requested that the parties "work on [lottery games] language today" since they could likely craft a simple textual fix to the language of the 1999 Compact that would allow for the conduct of the additional lottery games during that negotiation session. [JR076-JR077] However, the ensuing back-and-forth of Pauma proposing language and the State trying to dodge or break-off the conversation was not just unproductive, but ultimately culminated with the State taking the position that it was not participating in the negotiations to negotiate a compact at all, despite its contrary statement at the outset of the process that it was "agree[ing] to commence discussions regarding a Compact which addresses the[] [new] forms of gaming" that Pauma requested. [JR120-JR124]

With the past ten months of back and forth exhausting the credibility of the State's ploy to repeatedly change the manner in which it would discuss the lottery games topic, the artifice of a dispute provided the State with a new and novel way of belaboring the negotiations and buying more time before lottery games once again became the focus of the discussions. Nevertheless, the apparent resolution of the dispute a few months later brought with it a reiterated request from Mr. Dhillon that Pauma simply draft "proposed language regarding authorized lottery games" that the State would consider at some point in the future even though it had yet to definitively explain whether it would even negotiate for such games. [JR238] After Pauma followed through on this request and transmitted the requested lottery games language on January 27, 2016 [JR239], Mr. Dhillon simply ignored the suggested language and instead focused his attention on the underlying and "preliminary" scope-of-negotiation issue in his March 30, 2016 response – one that came about more than sixteen months into the negotiations and would only tell Pauma what new lottery games the State would *not* negotiate, not what it would. [JR244-JR245]

Identifying the games that were off limits was all the State would do on the subject, though, as it then shifted the focus of the negotiations altogether by sending Pauma a

"complete draft [compact]" on April 28, 2016 that mirrored an agreement the State would execute with a neighboring tribe over the coming week (save for having worse material terms) and which lacked *any* new gaming rights. *See* Ex. 18. Thus, the outcome of five-hundred and twenty-two days of negotiations was that the State's original promise to negotiate "regarding a Compact which addresses the[] [new] forms of gaming" requested by Pauma had simply morphed into a last-ditch decision to offer the Tribe a worse version of an impending compact that did not contain any new gaming rights whatsoever. What this record of negotiations that is marred with reversals of positions, obstructions to meaningful discussions, and a total inability to find even *a single* new lottery game Pauma could offer shows is that the State was simply engaging in a very elaborate form of surface bargaining, with its present intention focused solely upon creating the outward appearance of good faith rather than actually working with a tribe to secure gaming rights that are lawfully available to it under the State Constitution.

II. [CLAIM 2] OBJECTING TO THE NEGOTIATION OF ANY NEW LOTTERY GAMES TEN MONTHS INTO THE DISCUSSIONS BECAUSE THE CALIFORNIA STATE LOTTERY PROVIDES MONEY FOR "ALL OF OUR KIDS' EDUCATIONS" IS THE SORT OF IMPROPER PROTECTIONISM THAT IGRA CONDEMNS

The real reason for the State's evasiveness on discussing the "preliminary" scope of negotiations issue crept to the surface during the September 8, 2015 negotiation session, at which time Mr. Dhillon made a candid admission that the State was acting out of its own self-interest before being corrected by his legal counsel. The legislative history for IGRA makes it clear that Congress "did not intend to allow States to invoke their economic interests 'as a justification… for excluding Indian tribes from' class III gaming; nor did Congress intend to permit States to use the compact requirement 'as a justification… for the protection of other State-licensed gaming enterprises from free market competition with Indian tribes.'" *In re Indian Gaming,* 331 F.3d 1094, 1115 (9th Cir. 2003) (citing S. Rep. No. 100-446 at 13 (1988)); *accord, e.g., Crosby Lodge, Inc. v. Nat'l Indian Gaming Comm'n,* 803 F. Supp. 2d 1198, 1206 (D. Nev. 2011).

The discussion at the September 8th negotiation session started out mirroring the

cat-and-mouse game of the first ten months, but an hour or two of recursive attempts to discuss new gaming rights by counsel for Pauma caused the State to relent and engage in the following dialogue concerning what providing the Tribe with additional lottery games could mean for the State:

> Mr. Cochrane: So we have lottery games that are also permitted under the Constitution.
>
> Ms. Drake: Okay. We are getting into the argument thing which we were hoping to avoid. So I'm done.
>
> Mr. Cochrane: I'm just going based on the clear language of the section. That's all. We just want the right[] to do lottery games. And I know this is a sensitive area for the State since the lottery makes like $5 billion per year.
>
> Mr. Dhillon: Right. And it goes to all of our kids' education, right? I mean –
>
> Mr. Cochrane: I know. And our kids can't even get [an] education. And that's why we are trying to fix this, Joe.
>
> Mr. Dhillon: Right.
>
> Mr. Cochrane: So –
>
> Mr. Dhillon: I mean, actually, to make the point, it does go to schools statewide, right?
>
> Mr. Cochrane: I – I totally –
>
> Mr. Dhillon: And it benefits all of our kids, right?
>
> Mr. Cochrane: I get it. But you – I don't know if protectionism is, like, a valid concern under IGRA, though. You know, there is a way to provide tribes with equal rights.
>
> Ms. Drake: Actually, it is valid under IGRA. If you look at IGRA, one of the things that the State is entitled to negotiate over is to protect its own gambling industry. I'm not suggesting we would do that. But that's expressed in IGRA.
>
> Mr. Cochrane. That's a – that's a colorful interpretation. I would – I –
>
> Ms. Drake: It's straight language. It's not colorful interpretation.

[JR089-JR090] What the aforementioned case law shows, though, is that it *is* a colorful interpretation to read IGRA as allowing a state to outright deny a tribe the ability to offer legally-available games simply because it wants to protect the revenue stream of its own

business. Assuming this argument had even a modicum of merit, the State would still need to come forward with some sort of evidence that would provide it with a reasonable basis for refusing to meaningfully discuss the tribe's ability to offer such new gaming rights. That sort of conversation never took place in this case, nor could it since the California State Lottery's entire revenue stream is derived from games that are already available to tribes, and history shows that the success of the State Lottery goes hand in hand with that of its tribal counterparts.

To explain, the California State Lottery generated a total of $6.3 billion during fiscal year 2016, all from ten types of lottery games that the tribes can already conduct pursuant to the terms of the various compacts. *See* Ex. 2 at P007. The overwhelming majority of this revenue came from three games, with Scratchers providing $4.4 billion and Mega Millions and Powerball (*i.e.*, progressive draw games that are played nearly nationwide) accounting for another $1.06 billion. *See* Ex. 2 at P007. Thus, the lion's share of revenue comes from games that are offered mutually by both the State and the tribes, with the two draw games posting such massive jackpots that no new or novel lottery game Pauma began to offer could conceivably divert any revenues away from the aforementioned games.

Not to mention, gambling in California is not a zero-sum game where any benefit to a tribe naturally comes at the expense of the State. Rather, what history shows is that the California State Lottery and the tribes tend to prosper together. As to that, the California State Lottery was essentially the only game in town as of 1999, a year in which its revenues amounted to $2.498 billion. *See* Ex. 3 at P009. One may think that the introduction of serious tribal competition following the ratification of the 1999 Compact during the spring of 2000 would have put a sizeable dent in the revenues of the California State Lottery, but the Lottery's own audited financial reports show that its revenues increased by more than $100 million that fiscal year. *See* Ex. 3 at P011. This increase was not an aberration, as the annual revenues of the California State Lottery continued to rise over the past sixteen years – reaching $3.3 billion in 2007, $4.3 billion in 2012, and $6.3

billion in 2016. *See* Ex. 4 at P015-P016. This revenue trajectory clearly shows that the California State Lottery is flourishing in an era of unprecedented growth where it is "one of the fastest growing lotteries in the United States" with annual sales increasing at a rate of 13% and expected to continue rising for at least the foreseeable future. *See* Ex. 4 at P013-P014. The takeaway from all of this is that tribal competition is really not competition at all for the California State Lottery. If the State was truly concerned about any sort of *de minimis* impact that new lottery games on the Pauma reservation may have on the California State Lottery, it could have simply asked the Tribe to offset any such impact by making a reasonable revenue sharing contribution to the California Department of Education. Yet, rather than do that, the State once again blocked a tribe from trying to offer a new type of lottery game simply because it may have some speculative negative impact on its own gambling operation. *See Western Telcon, Inc. v. Cal. State Lottery,* 13 Cal. 4th 475 (1996) (classifying Keno as *not* a lottery game, much to Attorney General Daniel Lungren's pleasure, so as to prevent tribes from offering it on their reservations).

III. [CLAIMS 4 THROUGH 8] THE STATE'S DECISION TO RENEGE ON NEGOTIATING FOR VARIOUS LOTTERY GAMES NOT CURRENTLY AUTHORIZED TO THE CALIFORNIA STATE LOTTERY (INCLUDING VIDEO LOTTERY TERMINALS, VIDEO GAMES THAT DISPENSE COINS OR CURRENCY, A TRIBAL LOTTERY SYSTEM, AND LOTTERY GAMES AUTHORIZED TO THE MULTI-STATE LOTTERY ASSOCIATION OR ANY OTHER STATE) CONSTITUTES FIVE DISCRETE AND *PER SE* BAD FAITH ACTS UNDER IGRA

The final shift away from discussing lottery games occurred in the March 30, 2016 letter from Mr. Dhillon in which he refused to conduct the negotiations piecemeal so the parties could focus in on crafting lottery-game language for the ultimate compact, incorrectly telling Pauma that the tribes could only operate under the State Constitution those games "authorized for play by the California State Lottery," which presumably did not include four types of lottery games with which the State "expressly [took] issue." [JR244-JR245] The good faith negotiation requirement of IGRA demands objectively reasonable conduct from a state, as "[t]he statutory terms are clear, and provide no exception for sincere but erroneous legal analyses." *Rincon II,* 602 F.3d at 1041 (quoting *Mashantucket*

Pequot Tribe, 913 F.2d at 1033 (finding the State of Connecticut acted in bad faith by refusing to negotiate with a tribe regarding class III games it assumed were illegal)); *see NLRB v. Bardhal Oil Co.,* 399 F.2d 365, 368 (8th Cir. 1968) (similarly explaining that a company's mistaken refusal to bargain with a union, even if done on the basis of a sincere belief, is not a defense to an unfair labor practice charge).

In connection with the execution of the 1999 Compact during the fall of 1999, the California State Senate passed a bill (*i.e.*, Senate Constitutional Amendment 11) that placed a proposition on the ballot for the March 7, 2000 election (*i.e.*, Proposition 1A), which in turn ultimately added a new subparagraph (f) to Section 19 of Article IV of the State Constitution containing the following language:

> (f) Notwithstanding subdivisions (a) and (e), and any other provision of state law, the Governor is authorized to negotiate and conclude compacts, subject to ratification by the Legislature, for the operation of slot machines and for the conduct of lottery games and banking and percentage card games by federally recognized Indian tribes on Indian lands in California in accordance with federal law. Accordingly, slot machines, lottery games, and banking and percentage card games are hereby permitted to be conducted and operated on tribal lands subject to those compacts.

Cal. Const. art. IV, § 19(f). The text of this Constitutional provision is clear and explicitly says that tribes can offer lottery games without restriction, but Mr. Dhillon construed that text to include a hidden qualification on the supposed basis that the language at issue "has always been understood to encompass [only] those games authorized for play by the California State Lottery." [JR244] However, the basic rule of Constitutional and statutory interpretation is that the "plain meaning" of the language controls, with extrinsic evidence like the legislative history only coming in to play if the language is patently ambiguous. *See, e.g., Rumsey Indian Rancheria v. Wilson,* 64 F.3d 1250, 1257 (9th Cir. 1994). This principle is simply not debatable, as opposing counsel argued the very same thing with regards to the very same language during a compact case this last year that questioned whether the Governor could execute a compact before a tribe officially had land in trust. *See* Ex. 5 at 020. As part of his argument in support of protecting the Governor's

power to determine when to commence negotiations, opposing counsel warned the court about the danger of adding nonexistent language to the State Constitution, which in that case would have placed a "new substantive temporal limitation into this constitutional provision as follows:"

> the Governor is authorized to negotiate and conclude compacts, subject to ratification by the legislature, for the operation of slot machines and for the conduct of lottery games and banking and percentage card games by federally recognized Indian tribes on Indian lands **in existence before compact negotiations** in California in accordance with federal law.

See Ex. 6 at P031. And yet, Mr. Dhillon tried to do exactly what the State argued against in this other compact case by adding a new substantive rights limitation to the very same Constitutional provision:

> the Governor is authorized to negotiate and conclude compacts, subject to ratification by the legislature, for the operation of slot machines and for the conduct of lottery games **that are authorized to the California State Lottery** and banking and percentage card games by federally recognized Indian tribes on Indian lands in California in accordance with federal law.

Moreover, the notion that the proponents of Proposition 1A intended to restrict the lottery game proviso to only those games authorized to the California State Lottery is simply not supported by any of the underlying initiative or legislative materials. The analysis by the Legislative Analyst contained within the official ballot for Proposition 1A simply reiterates the proposed text, explaining that the measure would "amend[] the State Constitution to permit Indian tribes to conduct and operate slot machines, lottery games, and banked and percentage card games on Indian land." *See* Ex. 7 at P036. To the Legislative Analyst, the inclusion of the lottery games language was simply a non-event due to the fact that "Indian tribes can currently operate lottery games" – *any* lottery games – because the State Constitution opened the door to such games through the creation of the State Lottery. *See* Ex. 7 at P036. This *any* language is significant because a number of analyses prepared by the State legislature when it was considering whether to approve Senate Constitutional Amendment 11 and put Proposition 1A on the next ballot indicate

that the game language of the initiative would "in effect authorize[] Class III gaming on California Indian lands of the type permitted by Proposition 5." *See* Exs. 9-11. This prior proposition that the California Supreme Court struck down in large measure immediately before the introduction of Senate Constitutional Amendment 11 contained a model compact that the Governor would have to execute with any interested tribe, the terms of which would allow for "[t]he operation of *any* lottery game, including, but not limited to, drawings, raffles, match games, and instant lottery tickets." *See* Cal. Gov't Code § 98004 at section 4.1(c). Thus, quite simply, even the legislative proponents of Proposition 1A understood the measure as authorizing *any* lottery game, which is infinitely more giving than the ten games the California State Lottery has "authorized" itself to offer to the public at present.

In fact, focusing in on these ten "authorized" games actually masks the liberality of State law in terms of the lottery games that the California State Lottery can in reality conduct. The only limitations on the State Lottery are in Section 8880.28 of the Government Code, a statutory provision that restricts such game features as "us[ing] the theme of bingo, roulette, dice, baccarat, blackjack, Lucky 7's, draw power, slot machines, or dog racing," and dispensing coins or currency from any lottery games conducted on "computer terminals or other devices." *See Western Telcon,* 13 Cal. 4th at 482-83 (citing Cal. Gov't Code § 8880.28(a)(1), (3)). From the nearly limitless world of possible lottery game variations that lack any such disqualifying features, the California State Lottery has the discretion to pick and choose which games it wants to "authorize," which it does by updating its regulations to detail a specific game and then indicate pursuant to an "authorization" subsection that "[t]he California Lottery may conduct" such game "pursuant to these regulations." *See* Ex. 12 at P053. Thus, all of the possible yet "unauthorized" games are still legal under California law; the State Lottery just has not gotten around to using those gaming rights at the present time.

Putting aside the tribes' subsequently-enacted standalone right to operate lottery-games under Section 19(f) of Article IV of the State Constitution, the strictness with

which the State pretends to regulate this certain form of gaming may be a historically-intentional maneuver to try and prevent tribal competition, but it is of no significance under IGRA. This statutory scheme defines "class III gaming" as "all *forms* of gaming that are not class I gaming or class II gaming" (*see* 25 U.S.C. § 2703(8)), and then goes on to explain that a tribe can conduct a particular form of class III gaming if any "person, organization, or entity" in the state is permitted to engage in such gaming to any extent. *See* 25 U.S.C. § 2710(d)(1)(B). A lottery (and not each and every individual instance of such) is a particular "form" of gaming. This much is verified by the terms of the 1999 Compact, which list the various class III games that a tribe can conduct – such as (a) gaming devices, (b) banking or percentage card games, and (c) "the operation of any devices or games that are authorized under state law to the California State Lottery" – and then repeatedly refers to such games as the "forms of gaming" allowed under the compact. *See* Ex. 27 at Preamble D and §§ 2.3, 4.2, and 12.2. It is further verified by a wealth of case law interpreting IGRA that specifically recognizes a lottery (whether state-run or not) as a particular "form" of gaming. *See, e.g., Wisconsin v. Ho-Chunk Nation,* 784 F.3d 1076, 1083 (7th Cir. 2015); *Mashantucket Pequot Tribe v. Connecticut,* 737 F. Supp. 169, 176 (D. Con. 1990). The reason for this is that lottery bears certain legal attributes, namely that the operator of the game does not bet against any of the participants, but merely puts up a prize that is either of a predetermined, fixed value or equivalent to a certain share of the generated revenues. *See, e.g., Western Telcon,* 13 Cal. 4th at 487-88. Thus, the Legislative Analyst was correct in its analysis of Proposition 1A when it suggested that the creation of the California State Lottery opened the door for tribes to operate lottery games in general irrespective of whether the subsequent measure passed into law. Whatever regulations are in place against the State Lottery under Section 8880.28 of the Government Code do not curtail this right, but merely impose operational restrictions *against the State Lottery* that the Office of the Governor could similarly seek to apply against a tribe during the course of compact negotiations.

Thus, even if Section 19(f) of Article IV of the State Constitution did not exist, the

above principle shows the error with the State taking the position that it had no obligation under IGRA to negotiate for video games that dispense coins or currency. [JR244] A mechanism for distributing winnings to a player – whether it is a coin hopper, ticket dispenser, or an electronic transfer – is unable to fundamentally alter the play of a game and thereby turn one "form" of gaming into another. Given this, complying with the good faith negotiation requirement would have required the State to recognize that lottery games bearing such operational features are legally-available to tribes under IGRA, but that it still had the right during the course of negotiations to try and restrict the tribe from using games with such features by articulating a reasonable justification for its request. As for the three other specific games Mr. Dhillon refused to discuss, the State has historically tried to put lottery games that it does not conduct out of reach from tribes. An example of this is video lottery terminals, which the State has claimed are either a lottery game that is "not authorized to the California State Lottery" or some sort of ill-defined non-"gaming device" device that falls outside of the scope of permitted gaming in the 1999 Compacts. *See* Ex. 13 at P057. Yet, the State negotiated compacts with other tribes before the advent of these 1999 Compacts that permitted the operation of video lottery terminals so long as those machines bore the hallmarks of traditional lottery games – namely that the prize is fixed in advance of the contest and that the tribal operator is not competing with the player. *See* Ex. 14 at P070-P071. Thus, the viability of the contested video lottery terminals, tribal lottery games, and "lottery games authorized to any other state lottery or any other multi-state lottery association" turns upon whether such games meet the legal requirements for a lottery, and Mr. Dhillon acted in bad faith by not recognizing as much and instead flatly refusing to negotiate for *any* such games.

IV. [CLAIM 9] THE STATE'S REFUSAL TO SUBSTANTIATE ITS POSITION ON THE LEGALITY OF LOTTERY GAMES CAUSED AN UNNECESSARY AND IRRECONCILABLE IMPASSE IN THE NEGOTIATIONS AND THUS CONSTITUTES AN ADDITIONAL BAD FAITH ACT

The substantive bad faith acts committed by the State in reneging on the negotiation of lawful lottery games has a procedural foil arising from Mr. Dhillon ignoring

Pauma's request that the State substantiate its position on the legality of the games. Central to any good faith negotiation is the "exchange of a broad range of information" that helps facilitate the contracting process. *See Press Democrat Publ'g Co. v. NLRB,* 629 F.2d 1320, 1325 (9th Cir. 1980). This substantiation requirement inheres in the good faith negotiation obligation because it acts as a deterrent to empty talk and the advancement of arguments that lack any reasonable factual or legal basis. *See id.* After all, "[i]f such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy." *See NLRB v. Truitt Mfg. Co.,* 351 U.S. 149, 152-53 (1956).

Even though the statutory good-faith-negotiation requirement only applies against the State, Pauma still tried to adhere to the obligation to substantiate one's position throughout the course of negotiations, especially when the parties became at loggerheads at the September 8, 2015 negotiation session about whether the Section 12.2 "renegotiations" were meant to renegotiate or simply amend the operative compact. In the wake of this contentious meeting, counsel for Pauma sent Mr. Dhillon a letter on October 6, 2015 explaining amongst other things that the plain meaning of the word "renegotiate" means to "negotiate anew" or "again." [JR175] However, the supporting argument did not end there, as counsel for Pauma then transmitted two negotiation requests the Office of the Governor previously sent to the tribes to show that it is fully aware of the difference between the renegotiation and amendment of a compact. [JR228-JR233] The conveyance of these materials actually accomplished the very purpose of the substantiation requirement articulated in the case law because Mr. Dhillon acknowledged that seeing how the State previously interpreted the negotiation provisions of the 1999 Compact was "helpful" in understanding Pauma's position and reason enough to get the discussions back on track, at least in some opaque capacity that was beneficial to the State. [JR234-JR235]

The resurrection of the talks initially left the State's willingness to negotiate for new lottery games in a shroud of mystery, but it soon became evident that it had no desire whatsoever to comply with the substantiation requirement when it finally came time to

put forward its position on whether or not it would negotiate for such games. As to that, this second and final leg of the negotiations began with the State requesting that Pauma draft "proposed language regarding authorized lottery games." [JR238] The requested language arrived in short order, but along with it Pauma also asked that the State "substantiate its position with supporting evidence" out of a now well-grounded fear that it may come to the sudden conclusion after a year and a half of negotiations that it had no actual legal obligation to negotiate for such games in the first place. [JR242-JR243] This request for evidentiary proof by Pauma went ignored in the State's follow-up March 30, 2016 letter, however, as Mr. Dhillon simply stated that "article IV, section 19, subdivision (f) of the California Constitution has always been understood to encompass [only] those games authorized for play by the California State Lottery." [JR244] As previously indicated, any sort of reasonable adherence to the substantiation requirement would have led the State to jettison this argument that the State Constitution says something other than what it actually says after consulting its own soon-to-be-transmitted records, and finally settle in for a long-overdue and meaningful conversation on the lottery games topic. But, the ability to throw out this baseless claim without any sort of corrective check allowed the State to shut down all discussion on lottery games and leave the negotiations in a hopeless morass. The good faith negotiation requirement under IGRA simply demanded much more from the State from a procedural perspective than it was willing to give in this instance.

V. [CLAIM 10] BY BELATEDLY INSISTING ON NEGOTIATING UNDER THE VOLUNTARY AMENDMENT PROVISION OF SECTION 12.1 RATHER THAN THE MANDATORY RENEGOTIATION PROVISION OF SECTION 12.2, THE STATE ERECTED AN UNREASONABLE PROCEDURAL HURDLE FOR PAUMA AND COMPLETELY CHANGED THE TENOR OF THE NEGOTIATIONS FROM WHAT IT WOULD GIVE TO WHAT IT WOULD RECEIVE

The revival of the negotiations mentioned in the prior section involved the State improperly deciding to shift the basis for talks from the mandatory renegotiation provision of the 1999 Compact that had guided the talks for the prior thirteen months to a vol-

untary amendment provision that empowered the State to control what it would or not discuss going forward. Erecting additional procedural hurdles for a negotiating tribe that are neither required by IGRA nor the governing compact "renders the duty to negotiate in good faith toothless" and thus constitutes an unreasonable act that violates the burden imposed on a state by the statutory scheme. *See, e.g.*, *North Fork Rancheria of Mono Indians v. California,* 2015 U.S. Dist. LEXIS 154729, *42 (E.D. Cal. 2015). The 1999 Compact contains two adjacent provisions in Section 12 that detail how the parties can go about altering their contractual relationship during the term of the agreement:

> Sec. 12.0. AMENDMENTS; RENEGOTIATIONS.
> Sec. 12.1. The terms and conditions of this Gaming Compact may be amended at any time by the mutual and written agreement of both parties.
> Sec. 12.2. This Gaming Compact is subject to renegotiation in the event the Tribe wishes to engage in forms of Class III gaming other than those games authorized herein and requests renegotiation for that purpose, provided that no such renegotiation may be sought for 12 months following the effective date of this Gaming Compact.

See Ex. 27 at P380. The opening letter Pauma sent to the State on November 24, 2014 to "commence formal renegotiations" referenced Section 12.2 above, quoted the compact language in full, and then explicitly stated the Tribe was "formally request[ing] renegotiation of the 1999 Compact… on the basis that the Tribe wishes to offer" lottery games not authorized to the California State Lottery amongst other new gaming rights. [JR001-JR002] Mr. Dhillon was amenable to Pauma's request in his December 15, 2014 response letter, as he clearly indicated that "[t]he State agrees to commence discussions regarding a Compact which addresses these forms of gaming and is committed to negotiating in good faith." [JR005] However, the resolve to create an entirely new compact disappeared over the next ten months, as the State ultimately communicated at the September 8, 2015 negotiation session that it was only engaging in the renegotiations to nonsensically *amend* specific, non-durational portions of the soon-to-be-expired 1999 Compact. [JR121]

However, the terms "renegotiation" and "amendment" are conceptually distinct and possess vastly different meanings under the law. For instance, Black's Law Diction-

ary defines renegotiation as "[t]he act or process of negotiating *again* or on different terms; a second of further negotiation," while it defines an amendment as "[a] formal and usu. minor revision or addition proposed or made to a statute, constitution, pleading, order, or other instrument." BLACK'S LAW DICTIONARY 98 & 1486 (10th ed. 2014). The Ninth Circuit has even recognized this distinction in a controlling case that presents the exact opposite scenario of what occurred in this case. *See Idaho v. Shoshone-Bannock Tribes,* 465 F.3d 1095 (9th Cir. 2006). In *Shoshone-Bannock*, the tribe commenced discussions with the State of Idaho pursuant to a provision of its compact that explained "this Compact shall be *amended* to permit the Tribes to conduct… additional games." *Id.* at 1098. Disheartened at the prospect of making a minor change to a compact that would likely only provide a concrete benefit to the tribe in question, the State of Idaho argued that the above-referenced language required "renegotiation of the Tribe's compact in order to arrive at the necessary amendment." *Id.* at 1099. However, relying on the rule that compact terms are to be given their "ordinary meaning," the Ninth Circuit explained that the "plain language [of the provision at issue] leaves no room for negotiation; it mandates an amendment to permit one thing – the operation of" additional games. *Id.* In the eyes of the Ninth Circuit, "[i]f Idaho wanted to condition... amendments on renegotiating the Compact, it should have bargained for that term as it appears to have done with regard to [another section of the agreement]." *Id.* at 1100.

And this is exactly what California did when it negotiated for Section 12.2 of the 1999 Compact that says the entire agreement is up for renegotiation if a tribe wants to operate games other than those authorized therein. Historical practice with respect to similar provisions shows that the State understands the distinction between amendment and renegotiation, a point that counsel for Pauma made to impress upon Mr. Dhillon during the dispute resolution process. [JR228-JR233] As to that, Section 10.8.3(b) of the 1999 Compact explains that the State may "request negotiations for an *amendment*" to the parent section 10.8 in order to buttress the environmental protections of the agreement, and this is exactly what the State sought in 2003 when it sent the tribes form letters "for

the purposes of amending Section 10.8" to add terms that would better mitigate the off-reservation impacts of tribal casino projects. [JR229] Conversely, Section 4.3.3(b) speaks in terms of renewed "negotiations," and the State invoked this provision to engage in global renegotiations with tribes – including Rincon – that concerned such topics as revenue sharing, the number of gaming devices a tribe could operate, and "*any such other matters as the parties deem appropriate*." *See Rincon II,* 602 F.3d at 1024 (detailing the materials terms of an entirely new compact the State offered Rincon through these negotiations). [JR232] Thus, the State should have respected Pauma's request to renegotiate the 1999 Compact instead of construing it as a request to amend before breaking off talks so the State could then confoundingly try to *renegotiate* the agreement in a manner it desired pursuant to the *amendment* provision of the agreement.

VI. [CLAIM 11] WRAPPING UP THE NEGOTIATIONS BY SIMPLY OFFERING A COMPACT DESIGNED FOR ANOTHER TRIBE IS NOT THE SORT OF INDIVIDUALIZED, GOVERNMENT-TO-GOVERNMENT INTERACTION THAT IGRA DEMANDS

The culmination of sixteen months of negotiation was not the State providing Pauma with a compact that set forth even one of the new gaming rights it requested, but a "complete draft" version of an agreement the State was set to execute with a neighboring tribe in the coming days that had all the main material terms tweaked for the worse. "Each compact," and thus each compacting process, is supposed to be tailored to the individual parties, taking into account "the experiences and expertise of the particular tribe and State with gaming, and the existence of regulatory mechanisms within each government." 134 Cong. Rec. S24024 (1988). This concept of bilateral negotiations means that each party is supposed to actively participate in the give-and-take of the negotiations and avoid imposing any sort of unilateral demands. *See In re Indian Gaming,* 147 F. Supp. 2d at 1021. Hardline stances that can superficially come across as such unilateral demands are permissible on isolated issues if these positions advance legitimate state interests and are consistent with the purposes of IGRA, but taking on a hardline position more globally invites judicial scrutiny to ensure the state is actually negotiating on a one-

on-one basis and not simply throwing out a largely inflexible, take-it-or-leave-it type offer. *See Rincon II,* 603 F.3d at 1038-39.

The requested lottery games language that Pauma sent to the State on January 27, 2016 came with a note that "Pauma.... prefer[red] to conduct the negotiations in a piece-meal fashion" so the parties' attention would stay on the new gaming rights that prompted the negotiations long enough to settle on mutually-agreeable compact language before shifting to other issues that were more desirable to the State. [JR239] This request was anathema to Mr. Dhillon, who explained in his follow-up letter dated March 30, 2016 that such an approach had "no basis in… the Indian Gaming Regulatory Act" and that he instead intended to simply provide Pauma with a "complete draft [compact]" within the coming weeks. [JR244-JR245] Mr. Dhillon followed through on this promise on April 28, 2016, when his legal counsel transmitted a "complete" 135-page draft compact that was devoid of *any* new gaming rights and contained a comment bubble at the very outset explaining that the document was "[t]o be finalized before signing." [JR248]

The very next day following the transmission of this "complete draft [compact]" the chairman of the neighboring Pala Band of Mission Indians would sign a new compact that bears a striking similarity to the one received by Pauma. *See* Ex. 17. In its answer filed with this Court, opposing counsel "admit that [the State] sent an exemplar compact to Pauma," which presumably means that the at-the-time undisclosed Pala compact was an "ideal model" of what the State hoped Pauma would agree to forthwith. *See* Doc. No. 18 at ¶ 5. A review of the terms of these two agreements shows just how true this statement actually is. The redline comparison of the two compacts prepared by counsel for Pauma that is attached as Exhibit 18 reveals that these documents are virtually indistinguishable. The chief areas of difference relate to the State tweaking some of the numerical concessions it gave to the Pala tribe to make them worse for Pauma – such as reducing the machine limit from 2,500 to 2,000; the term of the agreement from twenty-five years to twenty, and increasing the amount of one form of revenue sharing the tribe would have to pay on machine above 350 from 6% to 8%. *See* Ex. 18 at P220, P230, &

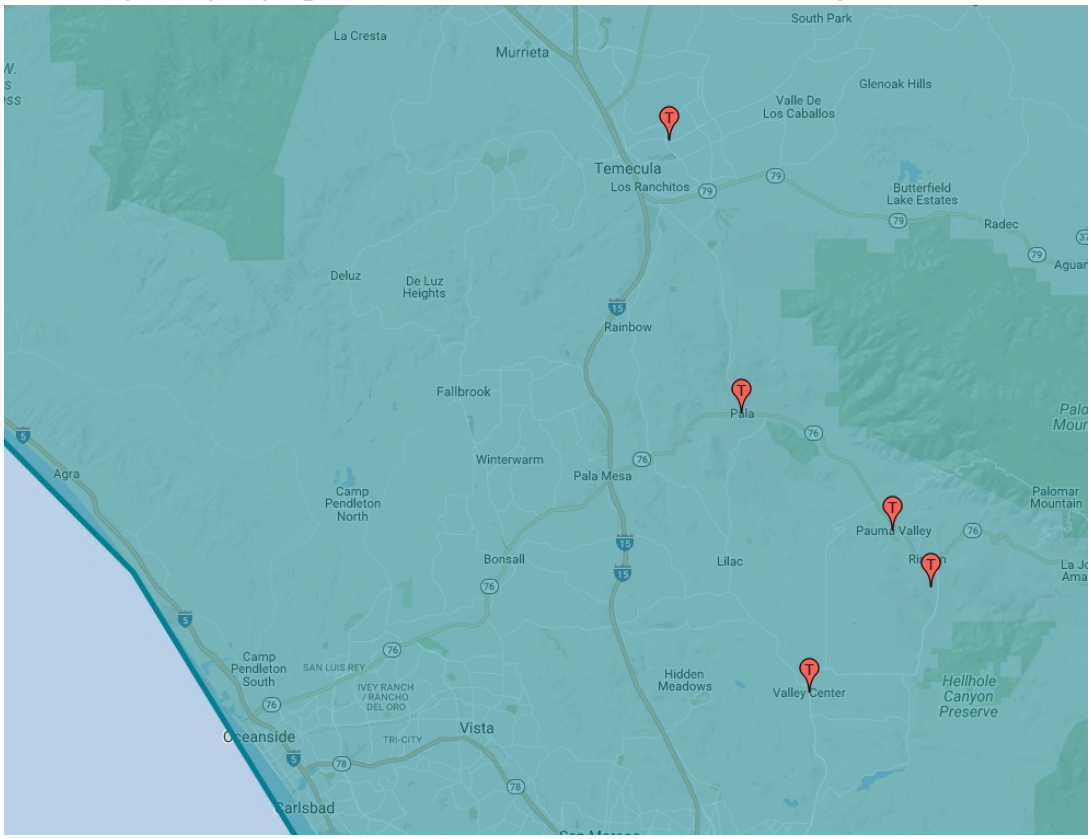
P309.

Thus, negotiations that started out with Pauma asking for something unique ultimately ended with the State handing out a compact that was designed for another tribe. Opposing counsel will invariably try to argue that the transmission of this compact that occurred sixteen months into the course of negotiations was not the ending of the process but just the beginning, interpreting "complete" in the phrase "complete draft [compact]" to mean nothing more than "having all the necessary or appropriate parts." However, the definition of "complete" best suited for this instance is "to the greatest extent or degree; total." In other words, the State provided Pauma with a functionally final draft of the compact – one that gave the State everything it wanted and left Pauma with little if anything to negotiate since lottery games had become a pipe dream and all but a few terms would imminently be accepted by a neighboring and seemingly similarly-situated tribe. Without even accounting for the substantive legality of the "complete draft [compact]," abandoning the discussion of lottery games and trying to cut off any further communication on the subject by relaying a generic compact offer that is essentially a replica of another tribe's agreement shows that the State flouted the good faith requirement of IGRA by utterly failing to engage in negotiations that were even remotely responsive to Pauma's needs and concerns.

VII. [CLAIM 12] THE "COMPLETE DRAFT [COMPACT]" IS A CARBON COPY OF THE PALA AGREEMENT ASIDE FROM THE STATE WORSENING MATERIAL TERMS OUT OF ANIMUS FOR PAUMA AND A DESIRE TO OFFSET THE IMPENDING $36.3 MILLION JUDGMENT IN THE COMPACT LITIGATION BETWEEN THE PARTIES

The procedural problems leading up to the conveyance of the "complete draft [compact]" are one thing, but the ultimate terms the State offered vis-à-vis other better-situated tribes in San Diego County that recently executed new compacts shows bad faith of a much larger magnitude. Materially deviating from custom or "universal practice" during negotiations in a manner prejudicial to the party on the other side of the bargaining table without a reasonable justification can violate the duty to negotiate in good faith. *See Nanakuli Paving & Rock Co. v. Shell Oil Co.,* 664 F.2d 772, 805 (9th Cir. 1981). In

this case, the problem with deviating from custom with regards to Pauma becomes clear when considering the geographic locations of the tribes in the region.



Inset is a screen capture of the various tribes in the northern San Diego County area from the Tribal Leaders Directory map created and maintained by the Bureau of Indian Affairs. *See* Ex. 19. This screen capture shows the close proximity of the Pauma and Pala reservations, with Pala having a significant competitive advantage over Pauma given the fact that it is located about seven miles closer to Interstate 15 along the two-lane, mountainous State Road 76. This advantageous location has translated into considerable success for Pala, a tribe that operates an enormous eleven-story, 2,000-machine resort casino and plans to spend another $170 million to add a third hotel wing and approximately 12,000 more square feet of gaming space to its facility. *See* Exs. 20-21.

A prime location and the consequent ability to generate significantly more in revenues should demand that Pala pay a greater percentage of revenue sharing than Pauma, a tribe that still operates the same modest temporary-tent gaming facility as it did when it first started in the industry some sixteen years ago. However, a review of the redline

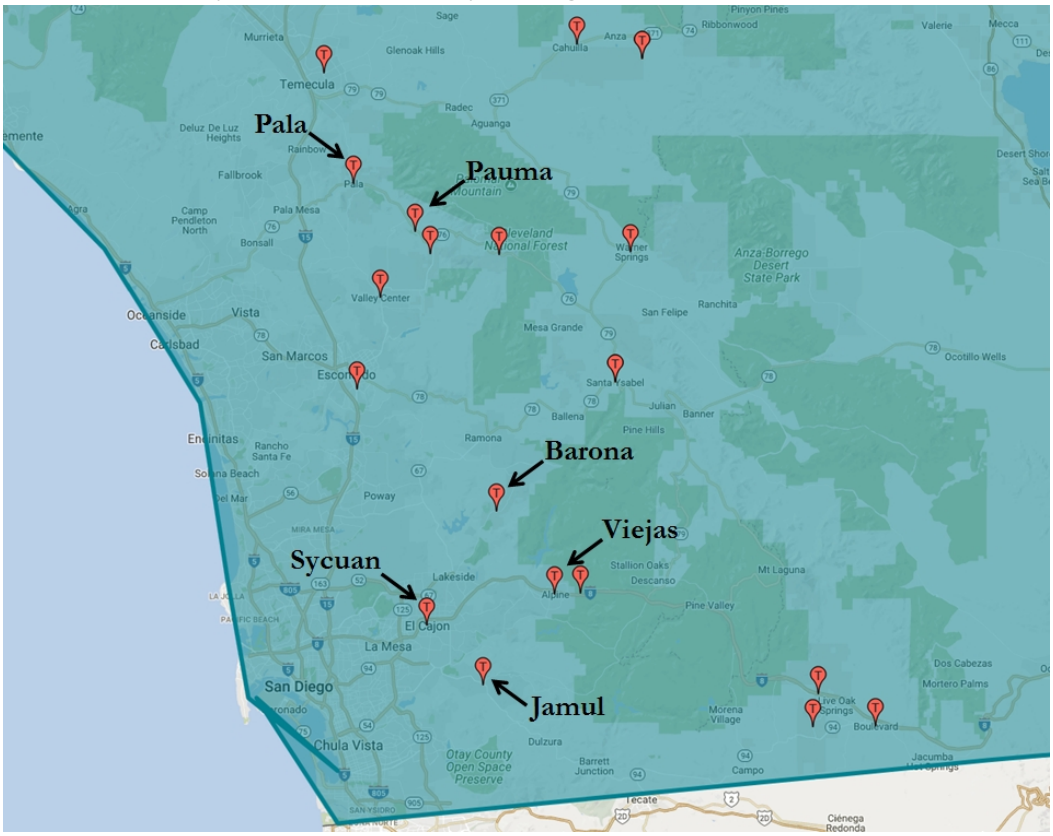
comparison of the Pala and Pauma compacts show that this is not the case. One of the standard forms of revenue sharing the State demands from tribes goes into the RSTF, a fund created to provide largely non-gaming tribes with $1.1 million in annual financial support. *See* Ex. 27 at P372. In keeping with the system under the 1999 Compacts, the first 350 machines that a tribe operates under one of these new compacts are also exempt from incurring any RSTF fees. *See* Ex. 18 at P230. However, each machine above this figure carries with it a certain percentage revenue sharing fee, with the actual and would-be figures for Pala and Pauma being 6% and 8%, respectively. *See* Ex. 18 at P230. Thus, a worse location, much worse revenues, and a much, much worse facility resulted in a fee proposal for Pauma that is 2% higher than a neighboring and better-situated tribe, which is nothing other than the State trying to recoup some if not all of the $36.3 million it had to pay Pauma at the end of the prior compact litigation between the parties.

The RSTF fee is not the only material term in the "complete draft [compact]" that is worse for Pauma than it is for Pala. As previously mentioned, all the State did was take the compact it was about to execute with the Pala tribe and simply make some detrimental changes to the material terms[2] before extending the agreement to Pauma – from reducing the permissible number of machines from 2,500 to 2,000 (*see* Ex. 18 at P220); to eliminating any requirement that Special Distribution Fund ("SDF") payments be used to cover only the "actual and reasonable" costs incurred by the State in regulating Indian gaming (*see* Ex. 18 at P220); to increasing the gambling age from eighteen to twenty-one (*see* Ex. 18 at P235); to applying the State's new minimum wage law to *all* employees and not just non-tipped ones (*see* Ex. 18 at P298); and to reducing the term of the compact from twenty-five years to twenty (*see* Ex. 18 at P309). Amazingly, every change in the "complete draft [compact]" is to Pauma's disadvantage, and yet the State failed to

[2] This much is evident from the Pala and Pauma compacts sharing virtually all the same language, all the way down to idiosyncratic textual errors that are absent from compacts executed immediately before and after – like the missing quotation mark before the definition of Project in Section 2.22. *See* Ex. 18 at P217.

provide a reasonable justification for even a single one of these revisions when it simply rebranded the Pala compact and sent it over to Pauma.

The reality of the situation is that the State cannot come up with a legitimate explanation for making these changes because the material terms in the final compact proposal it offered Pauma are worse than those within *all* the other recent compacts executed by tribes in San Diego County. As to that, the image below is another screen capture from the Tribal Leaders Directory map showing the entire San Diego County area that has been modified to identify certain federally-recognized tribes relevant to this discussion:



See Ex. 22. Over the past two years, each one of the indicated tribes aside from Pauma has entered into a new compact with the State. A standard formula of rights and responsibilities runs through these compacts, with the State giving each signatory tribe the ability to operate a certain number of machines out of so many facilities for so many years in exchange for (1) entering into or maintaining intergovernmental agreements with the County of San Diego to cover local regulatory costs, (2) paying a certain sum into the SDF on each machine, and (3) further paying a certain percentage of net win into the

RSTF on each machine above 350. *See, e.g.,* Ex. 18 at P220, P223, & P230. Given that local "regulatory" costs (at least in San Diego County) have a tendency to balloon out of control, the RSTF provisions of the standard compact also provide the signatory tribe with a credit of a certain percentage so it can redirect some of the money it would otherwise pay into the fund to satisfy its local community obligations or pet projects favored by the Office of the Governor. *See* Ex. 18 at P231. As one may expect with this base arrangement of terms, the actual numbers do not vary much from one tribe to the next… *except when you compare any one of the other better-situated tribes in San Diego County to Pauma:*

Tribe	Number of Devices	RSTF Payment Obligation (on machines)	RSTF Credit (Total)	Term of Agreement
Barona	2,500	4.75% (351-2,500)	60%	25 years
Jamul	2,500	4.75% (351-2,500)	60%	25 years
Pala	2,500	6.00% (351-2,500)	60%	25 years
Sycuan	2,500	4.75% (351-2,500)	60%	25 years
Viejas	3,500	4.75% (351-2,500) 6.00% (2,501-3,000) 7.00% (3,001-3,500)	60%	25 years
Pauma	2,000	8.00% (351-2,000)	50%	20 years

See Exs. 18 at P220, P230-P231 & P309; 23 at P321 & P324-P326; 24 at P329 & P336-P339; 25 at P342 & P349-P352; 26 at P355 & P362-P365. Perhaps the most astonishing aspects of this entire table is that State wanted Pauma to pay a higher percentage of revenue sharing into the RSTF on its entire allotment of eligible machines than Viejas – a tribe located directly off of Interstate 8 due east of San Diego – is paying on machines numbered 3,001 to 3,500. Thus, the financial terms of the "complete draft [compact] show that the State tried to impose a regressive tax where it charges the most to a tribe that is least able to afford it. Unfortunately for the State's position in this lawsuit, the Brown administration has not sought to impose the same sort of fee structure against any other tribes with modest- or small-sized gaming operations during the time period at issue

in this case. Thus, the only explanation for the State's action in demanding the revenue sharing rates that it did in the "complete draft [compact]" is that is singled out Pauma for differential and detrimental treatment simply because of the prior history between the parties.

VIII. [CLAIM 15] THE STATE SOUGHT A 1,000%+ INCREASE IN REVENUE SHARING UNDER THE "COMPLETE DRAFT [COMPACT]" IN EXCHANGE FOR NOTHING OTHER THAN A FIFTEEN-YEAR EXTENSION ON THE TERM OF THE AGREEMENT

The "complete draft [compact]" extended to Pauma simply marks a return to an earlier era of compacting in which the State exacted enormous financial concessions from a tribe without offering anything meaningful in return. A revenue sharing request by a state may pass muster under IGRA if it is "(a) for uses 'directly related to the operation of gaming activities' in § 2710(d)(3)(C)(vii), (b) consistent with the purposes of IGRA, and (c) not 'imposed' because it is bargained for in exchange for a 'meaningful concession.'" *Rincon II,* 602 F.3d at 1033. The first two prongs of the *Rincon II* test are not at issue because the Ninth Circuit previously held that SDF- and RSTF-based revenue sharing is permissible. *See In re Indian Gaming,* 331 F.3d at 1110-15. However, the final prong of the test that looks at the balance of the exchange is in contention since the State demanded a disproportionate amount of revenue sharing from Pauma that is on par with what was deemed a bad-faith tax in *Rincon II,* but simply earmarked those monies for various situses other than the General Fund in the hopes that the new structure for handling tax receipts removed the taint of illegality.

The *Rincon* case concerned a tribe located about five miles southeast of Pauma that operated 1,600 machines out of a Harrah's-run resort casino and contacted the State in 2003 about obtaining 900 additional machines. *See Rincon II,* 602 F.3d at 1024. With the State then facing budget deficits of historic proportions, Governor Schwarzenegger sent the Rincon tribe a proposal that would allow it to increase its machine count by the desired number so long as the tribe agreed to pay an annual General Fund revenue sharing fee of 10% of net win on its existing 1,600 machines and 15% of net win on the addition-

al machines. *Id.* at 1025. With that said, the base 10% revenue sharing fee was not exclusively meant for the General Fund, as the State agreed that Rincon could redirect a portion of those monies to San Diego County to cover any local regulatory costs instead of paying further amounts under an intergovernmental agreement ("MOU") like other tribes. *See id.* at 1024. After Rincon balked at the financial proposal and sought assistance from the federal courts, the Ninth Circuit looked at the new fees in comparison to the three concessions the State offered (*i.e.*, the additional machines, an extension on the term of the compact, and "enhanced" exclusivity from non-tribal competition) and concluded the situation was one where "the State demand[ed] significant taxes and fail[ed] to offer any 'meaningful concession' in return." *Id.* at 1036. Given that, the Ninth Circuit upheld the finding of bad faith issued by the district court, holding in the process that "[t]he State's demand for 10-15% of Rincon's net win, to be paid into the State's general fund, is simply an impermissible demand for the payment of a tax by the tribe." *Id.* at 1042.

This principle articulated by the Ninth Circuit abated much of the illegal taxation that was rife in California compact negotiations during the mid to late aughts, but the State reverted to its prior behavior in this case with an eye on getting around the Rincon rule by simply circling the "to be paid into the State's general fund" catch therein. It is worth remembering that Pauma entered the renegotiations paying a single form of revenue sharing under the 1999 Compact – an annual payment into the RSTF that totals $315,000 for 1,050 machines. *See Pauma Band of Luiseno Mission Indians of Pauma & Yuima Reservation v. California,* 813 F.3d 1155, 1162 (9th Cir. 2015). Conversely, the "complete draft [compact]" turned this single form of revenue sharing into three different ones: (1) an unspecified payment into the SDF on each machine [JR262 at § 4.3]; (2) a payment of 8% of net win into the RSTF on each machine above 350 [JR271 at § 5.2(a)]; and (3) indeterminate payments to San Diego County to cover the local regulatory costs associated with both the existing gaming facility and any future "projects" pursuant to latter-executed MOUs [JR264 & JR327 at §§ 4.4 & 11.7].

While the provisions of the "complete draft [compact]" state that Pauma can use

50% of its RSTF payment to cover some of the regulatory costs incurred under the base MOU pertaining to the existing gaming facility, the true financial impact of the proposed agreement only comes to light after quantifying the various revenue sharing fees. For starters, the State devised the percentage-based RSTF fee while in possession of the historical financial information for Casino Pauma, which the Tribe filed and analyzed in connection with the prior compact suit between the parties. *See* Ex. 28 at P389. This information shows that in the three years preceding the inception of the compact suit, each of the 1,050 or so slot machine operated by Casino Pauma generated between $170.46 and $182.14 per day. *See* Ex. 28 at P389. Thus, using the middle-ground figure of $175 per machine per day reveals that the 8% RSTF fee demanded by the State would translate into an actual payment each year of $3,577,000 on 1,050 machines. The 50% RSTF credit would allow Pauma to use $1,788,500 of this sum annually to satisfy its base MOU obligations with San Diego County, but history indicates that the local regulatory expenditures are likely to far exceed this amount. In terms of outbound payments, the twenty-two year MOU that Pauma executed under the now-defunct 2004 Amendment required amongst other things $38 million in road improvements and annual payments to the County of San Diego of $400,000 for sheriff service, $200,000 for a gambling addiction program, and $40,000 for the prosecution of gaming-related crime. *See* Ex. 29 at §§ A(6)(g)-(i), A(9)(c)-(e), A(11)(c). As for other costs, the MOU also required Pauma to construct and staff an eleven-person and three-engine fire department, build a state-of-the-art wastewater treatment plant, and undertake other infrastructure projects like help construct a park-and-ride facility at the intersection of Interstate 15 and State Road 76. *See* Ex. 29 at §§ A(6)(e), A(7), A(10). Thus, putting aside the costs of any self-funded projects, the monetary transfers to just the County of San Diego alone under the first of what could be many MOUs would likely total at least $2,367,272 each year, which is $578,772 more than the RSTF credit would cover.

In other words, the "complete draft [compact]" offered by the State would have turned an annual revenue sharing fee of $315,000 into (1) an unspecified sum into the

SDF, (2) $3,577,000 into the RSTF, and (3) far more than $578,772 to San Diego County. This base revenue sharing arrangement requiring Pauma to pay $4,115,772 each year to various interests would represent a 1,219% increase from the financial demands of the 1999 Compact. At least in Rincon, the heightened financial demands by the State were offset by the conveyance of 900 additional machines. In this case, the State failed to offer any new gaming rights, whether the lottery games that precipitated the talks or further slot machines. *See* Ex. 27 at §§ 4.1, 4.3.2.2(a). Instead, with the 1999 Compact valid through June 30, 2022 (*see* Ex. 27 at P383), all the State did was offer something less than fifteen additional years of gaming under a compact that greatly favors its special interests and an even-more-watered-down version of the "enhanced" exclusivity that the Ninth Circuit already branded "practically worthless" and of nothing "more than speculative value." *Rincon II,* 602 F.3d at 1038. Thus, the record of negotiations indisputably shows that eighteen months of pleas by Pauma failed to produce a single meaningful concession by the State in the "complete draft [compact]," and the failure to offer just one in exchange for the exorbitant new financial demands is grounds for holding that the State tried to impose a tax against the Tribe in violation of the good-faith-negotiation requirement of IGRA.

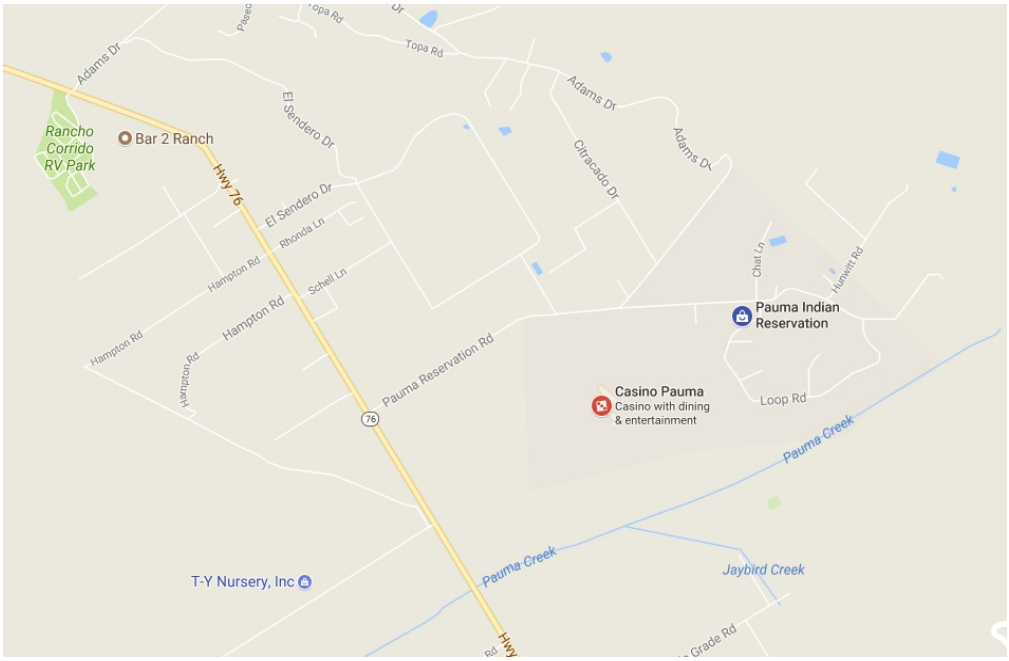
IX. [CLAIM 16] THE NON-REVENUE SHARING TERMS OF THE "COMPLETE DRAFT [COMPACT]" THAT EITHER GO OUTSIDE THE SCOPE OF IGRA OR EXCEED WHAT THE STATE DEMANDED FROM OTHER TRIBES ARE ALSO UNSUPPORTED BY MEANINGFUL CONCESSIONS

The same lack-of-meaningful-concession problem that plagues the revenue sharing terms of the "complete draft [compact]" also affects some of the seventy-seven-plus pages of new non-financial regulations in the offer that are either unrelated to gaming or go above and beyond what the State has demanded from other tribes. Two related principles evolved out of the Ninth Circuit's decision in *Rincon II,* and those are that a state must offer a tribe a meaningful concession if it seeks to impose regulations that are either not directly related to gaming or in excess of what it demanded vis-à-vis similarly-situated tribes. *See Big Lagoon Rancheria v. California,* 759 F. Supp. 2d 1149, 1161-62

(N.D. Cal. 2010).

In regards to the former category, the "complete draft [compact]" seeks to bring a sizeable amount of non-gaming reservation land under State regulation. To explain, the scope of the State's ability to regulate Indian lands under the compacts is set by a number of definitions, including those for the terms "gaming facility" and "project." Under the 1999 Compact, the definition of "project" was tied to just the gaming facility and thus only allowed the State or one of its various political subdivisions to have any say over a tribal undertaking if it was a "significant" activity done in connection with said facility or an associated structure. *See* Ex. 27 at § 10.8.2(c). With time has come an expansion of this definition to the point that the State wants to regulate any activity that could be construed as principally serving a gaming facility, "including, but not limited to, [the construction or expansion of] access roads, parking lots, a hotel, utility or waste disposal systems, or [a] water supply." [JR259 at § 2.22] The former Assistant Secretary for Indian Affairs Larry Echo Hawk commented on this definition of "project" in connection with his statutorily-mandated review of the Upper Lake compact in 2011, noting that this definition "may encompass the most expansive range of activities in any compact approved, or considered to have been approved, by the Department since the adoption of IGRA in 1988." *See* Ex. 30 at P405. The definition was, in fact, so broad that Assistant Secretary Echo Hawk remarked that it "could even be read to apply to tribal activities far removed from the conduct of gaming, and therefore clearly unrelated to the operation of Class III gaming – such as the development of a tribal power utility or road system." *See* Ex. 30 at P406.

This comment by the Assistant Secretary is rather prescient because the infrastructure and services that aid the economic engine of a tribe are often the same as those used by tribal members. For instance, the only thoroughfare for accessing the Pauma Reservation is Pauma Reservation Road, the first half-mile of which leads to the casino before continuing on to connect with the backstreets of the reservation on which tribal members reside.



The expansive definition of "project" under the "complete draft [compact]" would allow the State to regulate any construction to the front portion of this access road whether or not it was done to accommodate the patrons of the casino. On top of which, public services may come under State control to an even greater extent than infrastructure. As evidenced by the MOU with San Diego County (*see* Ex. 29 at P399-P400), Pauma has started public services for its members and surrounding community over the past fifteen years, from a police or "security" force, to a fire department, to a court system that would likely have the first crack at hearing personal injury and employment discrimination claims arising out of the gaming facility. [JR334-JR226, JR340-JR342] And therein lies the problem, as the very moment these institutions that provide general public services have any involvement with assisting the casino, the State can claim under the compact that it has the rightful ability to have a say in how they grow and develop. With the casino being so central to the tribe's well-being, what this means is that the "complete draft [compact]" provides the State with the ability to regulate most every service provided on the reservation.

The scope of the State's regulatory authority is just one problem with the non-revenue sharing regulations of the "complete draft [compact]," with another being that the State included a number of requirements in the seventy-plus new pages of regulations

that are not similarly imposed against the neighboring Pala tribe. As discussed earlier, the central terms in the Pala compact on which the "complete draft [compact]" is based are more generous for Pala, and that trend universally carries over to the lesser regulatory terms as well. For instance, the State set the gambling age for Pala's gaming facility as eighteen but increased that to twenty-one for its direct competitor Pauma in the "complete draft [compact]." *See* Ex. 18 at § 6.3. Similarly, Pala has the right to sell tobacco products to those aged eighteen or older while Pauma would have been stuck complying with "the minimum age specified in state law" (*see* Ex. 18 at § 12.2), which is again currently set at twenty-one years of age. *See* Cal. Bus. & Prof. Code §§ 22956, 22958. Finally, the new minimum wage law in the State of California that will soon hit $15.00 an hour only applies to non-tipped employees for Pala while Pauma would have had to comply with the statutory requirements across the board. *See* Ex. 18 at § 12.3(k). At a minimum, the State should have at least provided a reasonable justification for the differential treatment, but, in order to truly comply with the *Rincon* teachings, it needed to offer Pauma a meaningful concession that would have offset at least some of the lost revenues and increased expenses resulting from complying with the heightened age requirements and strict terms of the State's minimum wage law, respectively.

X. [CLAIM 13] THE ONE HUNDRED AND TWENTY PLUS PAGES OF REGULATIONS IN THE "COMPLETE DRAFT [COMPACT]" ACTUALLY REMOVE PREEXISTING WAIVERS OF SOVEREIGN IMMUNITY THAT PROVIDE SIGNATORY TRIBES WITH RECOURSE IF THE STATE NEGOTIATES IN BAD FAITH OR BREACHES ITS DUTIES UNDER THE COMPACTS

Asking for seventy-plus pages of new regulations was simply not enough for the State, as it actually inserted provisions into the "complete draft [compact]" to *take away* some of the few ancillary rights that benefit the signatory tribes. A regressive term or proposal made without reasonable justification can constitute bad faith negotiation. *See, e.g., NLRB v. Hardesty Co.,* 308 F.3d 859, 868 (8th Cir. 2002); *Unbelievable, Inc.,* 318 N.L.R.B 857, 876 (1995). Waivers of Eleventh Amendment immunity have been vital for tribes to advance or protect their rights under IGRA. California tribes first did this by

convincing the voters of the State to approve Proposition 5, a measure that contains the following waiver of sovereign immunity relating to the negotiation, amendment, or performance of compacts that finally led Governor Gray Davis to sit down with the tribes and negotiate the 1999 Compacts:

> the State of California also 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 refusal to enter into negotiations with that tribe for the purpose of entering into a different Tribal-State compact pursuant to IGRA or to conduct those negotiations in good faith, the state's refusal to enter into negotiations concerning the amendment of a Tribal-State compact to which the state is a party, or to negotiate in good faith concerning that amendment, or the state's violation of the terms of any Tribal-State compact to which the state is or may become a party.

Cal. Gov't Code § 98005. The ultimate agreements that the parties executed also contain a dependent waiver of sovereign immunity that waived whatever "immunity… that [the parties] may have" at the time with respect to claims for restitution and other equitable remedies. *See* Ex. 27 at § 9.4(a)(2). This waiver was obviously instrumental in ensuring that Pauma was able to reacquire the $36.2 million in revenue sharing that the State obtained under the 2004 Amendment through a legally-material but factually-damning misrepresentation. *See Pauma,* 813 F.3d at 1164 n.6.

Seeing the federal courts do the unimaginable and require the repayment of tens of millions of dollars in ill-gotten gains compelled the State to tighten up the waiver of sovereign immunity in all subsequent compacts to explicitly eliminate restitution as a viable remedy. [JR348 at § 13.4(a)] The revisions did not end there, however, as the State also inserted a provision into the limited waiver section of the "complete draft [compact]" to eradicate any other standalone waivers for Pauma, "including but not limited to [the one in] Government Code section 98005." [JR348 at § 13.4(d)] To be clear, this government code waiver is the sole basis that enables a tribe to pursue a bad faith suit against the State of California in light of the Supreme Court of the United States invalidating the statutory waiver within IGRA in *Seminole Tribe of Florida v. Florida,* 517 U.S. 44

(1996). What this one change does then is ensure that any tribe trying to hold the State to its section 15.3 promise to amend the compact or negotiate a new one in good faith can *only* obtain specific performance of this contractual, good-faith requirement. [JR350 at § 15.3] This word "contractual" is key; after all, specific performance is only a *contract* remedy designed to enjoin a party from violating the terms of an agreement, which means the ultimate remedy a court would issue in such a situation is a facile and likely ineffective order instructing the State to go back and negotiate in good faith – one that does not and cannot provide the attendant statutory remedy that should go along with that. In other words, this latest change completely removes the grounds for pursuing a bad faith negotiation claim against the State under IGRA and would once again turn the concept of "good faith" into the most empty and illusory of promises.

XI. [CLAIM 19] A SIGNIFICANT PROPORTION OF REVENUE SHARING FEES UNDER THE "COMPLETE DRAFT [COMPACT]" ARE IMPROPERLY HIDDEN IN LATTER-EXECUTED MOUS THAT NEVER GO BEFORE THE SECRETARY OF THE INTERIOR DURING HIS STATUTORILY-MANDATED REVIEW OF THE COMPACT

The revenue sharing structure of the "complete draft [compact]" has the fees going into different situses and arising at different times so the Secretary of the Interior is unable to make an informed decision about the legality of the arrangement as a whole and potentially strike down any fees that are not "consistent with the provision" of IGRA. A state can only negotiate for seven specific concessions under IGRA, none of which relate to revising or circumventing the statutory processes provided for in IGRA. *See* 25 U.S.C. § 2710(d)(3)(C). The unique relationship between the United States and the Indian tribes has created a situation where the Bureau of Indian Affairs (through the Department of the Interior) holds tribal lands in trust and consequently has a duty to review the legality of any contract related to such lands. *See* William C. Canby, Jr., AMERICAN INDIAN LAW IN A NUTSHELL 53 (5th ed. 2009) (citing 25 U.S.C. § 81). This contract-review requirement carried over to IGRA, putting the Secretary of the Interior in a position where he must analyze the terms of a compact entered into between a tribe and a state and decide whether to approve or disprove the agreement. *See* 25 U.S.C. § 2710(d)(8). A problem with the

compact that amounts to a violation of IGRA is not necessarily fatal, however, as the Secretary of the Interior can approve the compact by silence and then subsequently issue an opinion letter (like he did with Upper Lake) explaining which provisions therein are ineffective because they are not "consistent with the provisions of [IGRA]." 25 U.S.C. § 2710(d)(8)(C).

When the statute went into effect, a review of the financial terms of a compact was rather simple because the only monies a state could originally ask for were "assessment[s]… in such amounts as are necessary to defray the costs of regulating such activeity." 25 U.S.C. § 2710(d)(3)(C)(iii). The advent of revenue sharing complicated the statutory review, and the process has only become more and more intractable as states like California try to craft ways to hide the total amount of outlays that a tribe has to make under an agreement. In this case, the 1999 Compact contains two easily-quantifiable revenue sharing fees, one of which (*i.e.*, the SDF) is responsible for awarding grant monies to "local government[s]… impacted by tribal… gaming." *See* Ex. 27 at § 5.2. However, the trend in recent compacts is to shift these costs away from the SDF and to open-ended MOUs that the signatory tribes execute directly with nearby local communities and potentially other governmental entities like Caltrans. [JR264, JR327-JR328] For instance, the "complete draft [compact]" would first require Pauma "to enter into agreements with local jurisdictions or state agencies, as appropriate, for such undertakings and services that mitigate the impacts of the [existing] Gaming Facility." [JR264] Then, it would further demand that Pauma do the same each and every time it develops a gaming-related "project" on its reservation over the twenty-year term of the agreement, which could be something as minor as simply adding additional gaming devices to its slot floor. [JR327-JR238]

The problem with all of this, of course, is that the agreements do not come about until *after* the execution of the compact and will likely concern transfers of significant amounts of money. As to that, the previously-discussed MOU that Pauma had to execute with San Diego County under the 2004 Amendment required $38 million in road-

improvement expenditures and payments of nearly three-quarters of a million dollars each and every year to cover the costs of various public services. *See* Ex. 29 at §§ A(6)(g)-(i), A(9)(c)-(e), A(11)(c). Imagine being the Secretary of the Interior tasked with reviewing the legality of the financial demands imposed by a tax-happy state like California on a tribe and not having access to the information on this base MOU or any of the other intergovernmental agreements that the tribe has to enter into on top of that. Clearly, the proper way to handle revenue sharing is to quantify the total amount in advance – regardless of how many times the State wants to divide the pie – so the Secretary of the Interior can compare this figure to the value of the concessions the tribe receives in return. The arrangement under the "complete draft [compact]" that simply defers much of the revenue sharing discussion until after the execution of the agreement when opportunistic government agencies can ask for most anything under the sun impinges on the United States' trust duties with respect to Indian tribes and is wholly inconsistent with the contract review process Congress mandated within IGRA.

XII. [CLAIM 14] EXHIBITING ACTUAL GOOD FAITH WOULD HAVE REQUIRED THE STATE TO OFFER PAUMA A COMPACT THAT MADE UP FOR THE EIGHT YEARS OF 1999 COMPACT RIGHTS IT FRUSTRATED DUE TO ITS MISREPRESENTATIONS ABOUT THE SIZE OF THE LICENSE POOL

The revenue sharing and regulation driven "complete draft [compact]" is not only tone deaf to Pauma's needs at the outset of the negotiations, but also its expectations given the State's past conduct that resulted in the impairment of eight years of compact rights. A good faith analysis does not look at the black-and-white terms of a compact offer in a vacuum, and instead reviews them in light of "[t]he previous relations of the parties, antecedent events explaining behavior at the bargaining table, and the course of negotiations." *Truitt Mfg. Co.,* 351 U.S. at 155 (Frankfurter, J., concurring). Keeping in mind the shared history between the parties is vital because, [i]f the parties have dealt with each other on other occasions, the pattern of those earlier negotiations may help to show their expectations in the negotiations in controversy." 1 E. Allen Farnsworth, FARNSWORTH ON CONTRACTS § 3.26c. Meaning of Fair Dealing (3d ed. 2004). And these

expectations, if reasonably based, are what help guide the whole inquiry, as "[t]he boundaries set by the duty of good faith [in negotiations or otherwise] are generally defined by the parties' intent and reasonable expectations." *L-7 Designs, Inc. v. Old Navy, LLC,* 964 F. Supp. 2d 299, 307 (S.D.N.Y. 2013).

The backdrop for the negotiations is the long-running compact dispute between the parties that began with the State unreasonably denying Pauma five hundred gaming device licenses at a license draw in December 2003. *See Pauma,* 813 F.3d at 1161. This single event precipitated the negotiations of the 2004 Amendment and also caused snowballing harms for Pauma, as the process of reacquiring lawfully-available licenses helped torpedo the Tribe's time-sensitive development plans with Caesars, subsequently imposed revenue sharing fees the Tribe could not handle, and ultimately produced mass layoffs at Casino Pauma and severely-diminished governmental services for tribal members. *See Pauma Band of Luiseno Mission Indians of Pauma & Yuima Reservation v. California,* No. 09-01955, Dkt. No. 214 at Exs. 111-12 (S.D. Cal. Aug. 31, 2012) ("*Pauma*") (documenting the layoff of 15% of the casino workforce after the implementation of the 2004 Amendment revenue sharing schedule). The return of the State's ill-gotten gains at the end of the litigation was a big step towards restoring the *status quo ante*, but it by no means made Pauma whole by also returning the eight years of contact rights under the 1999 Compact that were lost as a result of this scheme to resell licenses. Thus, the tail-end of the lawsuit also saw Pauma trying to recapture these lost years, as it went into the court-mandated settlement conference following the issuance of the summary judgment order with the mindset that it would try to negotiate an extension on the term of the 1999 Compact by using the restitution award as a bargaining chip. *See Pauma,* No. 09-01955, Dkt. No. 256-1, ¶¶ 4-8 (S.D. Cal. Jan. 30, 2014).

The settlement conferences ultimately went nowhere, but repeated argument advanced by Pauma throughout the latter part of the case that it had the right to reacquire the eight years of lost contract rights should have imparted the impression on the State that any future negotiations should follow the credo, "what is frustrated under one should

be made up under another." *See, e.g., Pauma,* No 09-01955, Dkt. Nos. 197, 45:13-16 & 249-1, 13:15-21 (S.D. Cal. Aug. 31, 2012 & Dec. 20, 2013). Expecting the first eight years of a compact proposal to mirror at least the financial terms of the 1999 Compact is a completely reasonable negotiation position, and the State has shown the ability in individualized negotiations with other tribes to tailor the compact to meet the particular needs of the party on the other side of the bargaining table. For instance, the Jamul tribe finally got a casino development off the ground after fifteen years of struggles and the State provided the tribe with a compact that wiped out all RSTF-based revenue sharing for the first eight years of the agreement "[i]n recognition of the predevelopment expenses incurred by the Tribe." *See* Ex. 26 at § 5.2(a). Similarly, the Dry Creek Rancheria defaulted on significant commercial loans and contractual obligations to nearby governments after a huge tribal casino complex opened between its location in Sonoma County and the Bay Area, and the State this time around eliminated the RSTF fees altogether so long as the tribe did not exceed a certain machine count. *See* Office of Governor Edmund G. Brown, Jr., *Tribal-State Compact between the State of California and the Dry Creek Rancheria of Pomo Indians* at Recitals & § 5.2 (Aug. 18, 2017), *available at* https://www.gov.ca.gov/docs/Dry_Creek_Rancheria_Band_of_Pomo_Indians_Compact.pdf (last visited Sept. 13, 2017). Thus, simple adherence to its posture in other tribal negotiations would have led the State to at least partly vindicate its duty to negotiate in good faith by extending Pauma a compact that assuaged eight years of denied rights. However, the approach the State ultimately followed was to go to the other extreme and offer Pauma something much worse than the standard deal as a punitive measure for the Tribe even filing the prior compact case in the first place.

CONCLUSION

For the foregoing reasons, Pauma respectfully requests that the Court hold that the State negotiated with the Tribe in bad faith under IGRA, trigger the remedial scheme set forth in Section 2710(d)(7)(B) of the statute, and enter a partial final judgment pursuant to Federal Rule of Civil Procedure 54(b).

RESPECTFULLY SUBMITTED this 15th day of September, 2017

PAUMA BAND OF MISSION INDIANS

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