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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

PAUMA BAND OF LUISENO MISSION INDIANS OF THE PAUMA & YUIMA RESERVATION, a/k/a PAUMA BAND OF MISSION INDIANS, a federally-recognized Indian Tribe, Plaintiff, **v.** **STATE OF CALIFORNIA; and EDMUND G. BROWN, JR., as Governor of the State of California, CALIFORNIA GAMBLING CONTROL COMMISSION; STATE OF CALIFORNIA DEPARTMENT OF JUSTICE, OFFICE OF THE ATTORNEY GENERAL; DOES 1 THROUGH 10,** Defendants.	3:16-cv-01713-BAS-JMA **DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON CLAIMS ONE, TWO, FOUR THROUGH SIXTEEN, AND NINETEEN IN THE SECOND AMENDED COMPLAINT** **[F.R.C.P. 56(a)]** **No Oral Argument Unless Requested by the Court** **Courtroom: 4b** **Judge: Hon. Cynthia Bashant** **Trial Date: N/A** **Action Filed: 7/1/2016**

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INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiff Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation, a/k/a Pauma Band of Mission Indians, a federally-recognized Indian tribe (Pauma or Tribe) has moved for summary judgment on sixteen of its claims against defendants State of California, and Edmund G. Brown Jr., as Governor of the State of California (collectively the State). These claims allege that the State failed to negotiate with the Tribe in good faith under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (IGRA). However, Pauma's arguments not only find no support in, but are actually contradicted by, the previously submitted undisputed Joint Record of Negotiations for Summary Adjudication of Claims One Through Twenty in the Second Amended Complaint (Record).[1] The Record conclusively demonstrates that the State negotiated in good faith and that Pauma's conduct is consistent not with a desire to conclude a tribal-state compact, but rather with an intent to set the stage for a lawsuit over issues of its choice. Indeed, this is shown by the Tribe's failure to propose any counter offer to the State's proposed draft compact or a draft compact of its own.

Rather than rely on facts from the Record, Pauma's motion is largely based on subjective beliefs that the State harbors animus towards it due to prior litigation between these parties. Pauma also relies on exhibits that are outside the Record and, thus, irrelevant. Under IGRA, a tribe must show a prima facie case before the burden will shift to the State to prove that it acted in good faith. S. Rep. No. 100-446 at 14 (1998) *reprinted in* 1988 U.S.C.C.A.N. 3071, 3084. Here, the Tribe has not met its prima facie burden because its claims have no support in the Record. When the Record and all reasonable inferences drawn from it are construed in the light most favorable to the State, it is clear that the Court should deny Pauma's motion in its entirety. Material facts that would preclude entry of summary

[1] All references to the Record are to the four-volume set that was filed by the parties on July 14, 2017. ECF No. 31.

judgment are those that, under applicable substantive law, may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

An application of the Record to Pauma's claims demonstrates why the Tribe's summary judgment motion should be denied. For example, in claims four through eight, Pauma argues for summary judgment on claims related to its alleged desire for new "lottery games" because the State refused to consider any games that were not authorized to the California State Lottery (State Lottery), and unreasonably asked the Tribe to identify the new lottery games it wished to offer. These claims should be rejected for the following reasons. First, the Record demonstrates the State expressed a willingness to consider specified lottery games, including those that exceeded the scope of games authorized to the State Lottery. Second, the Record establishes that the State explained to Pauma that new lottery games needed to be sufficiently identified in order to avoid future disputes regarding the scope of approved games; and to reduce the risk of violating other provisions of California law. The State cited *Western Telcon, Inc. v. California State Lottery* (*Western Telcon*) 13 Cal. 4th 475 (1996), as an example of why specific definitions of the nature of any proposed games would be necessary to avoid violating California law.

Pauma's second claim alleges that the State failed to negotiate in good faith because, during compact negotiations, it engaged in a "protectionist strategy" to protect the State Lottery. However, this protectionism claim is contrary to the Record, which shows that the State did not block new tribal lottery games. Instead, the State actively negotiated with Pauma for new lottery games.

Pauma's first and ninth claims allege procedural violations regarding the Tribe's demand for new lottery games. Pauma's first claim argues that the State engaged in "surface bargaining," and the ninth claim contends that the State violated IGRA by failing to timely provide its legal position regarding lottery games for nearly eighteen months. Once again, the Record does not support Pauma's arguments. First, Pauma did not fail to obtain a compact authorizing new

lottery games because of State intransigence, but rather because the Tribe never made specific new lottery game proposals. While Pauma eventually proposed "lottery games language" to the State, the Tribe's overly general framework failed to provide the specificity required to preclude future disputes and to assure compliance with California law. Second, the State substantiated its request for specificity on the basis of its reference to *Western Telcon*, 13 Cal. 4th 475.

Pauma's tenth claim regarding the dispute over the scope of negotiations similarly fails to show any violation of IGRA because the Record demonstrates that the parties resolved this initial disagreement following a meet and confer conference. Because Pauma was not prejudiced by the State's insistence on defining the scope of negotiations as required by the 1999 Compact, the Record does not support Pauma's tenth claim for summary judgment.

Pauma's eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, and nineteenth claims are all based on provisions that were included in, or excluded from, the draft compact that the State transmitted to Pauma on April 28, 2016. The State sent the draft compact to stimulate negotiations and move the discussions beyond talks over the scope of negotiations. However, the Record shows that rather than continue negotiations, Pauma responded with a premature IGRA lawsuit.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 56 authorizes summary judgment where the movant shows there is no genuine dispute as to any material fact and she is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The court must construe the evidence and all reasonable inferences drawn there from in the light most favorable to the nonmoving party. *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630-31 (9th Cir. 1987). Where the issue before the court involves the proper interpretation of statutes and regulations, and the parties agree on the material facts, the matter may be resolved as a matter of law on summary judgment.

See Edwards v. Aguillard, 482 U.S. 578, 594-95 (1987); *Shishido v. SIU-Pac. Dist.-PMA Pension Plan*, 587 F. Supp. 112, 114 (N.D. Cal. 1983).

ARGUMENT

I. THE RECORD SHOWS THAT THE STATE NEGOTIATED WITH PAUMA IN GOOD FAITH FOR LOTTERY GAMES

Several of Pauma's claims arise from the State's alleged failure to negotiate in good faith for new lottery games. But the Record shows that Pauma—rather than the State—failed to negotiate. Pauma repeatedly failed to respond to the State's request for compact language concerning lottery games, never made any specific lottery-game proposals, and eventually walked away from ongoing negotiations.

A. The Record does not Support Summary Judgment in Pauma's Favor on the Claims that the State Failed to Negotiate for Various New Lottery Games (Claims Four through Eight)

In claims four through eight, Pauma alleges that the State failed to negotiate in good faith because, during compact negotiations, its representatives engaged in an "anti-competitive" negotiation strategy to protect the State Lottery from competition. Second Am. Compl. (SAC), ECF No. 27, Fourth Claim, 60-61. Further, Pauma alleges that the State failed to negotiate over various lottery games, including "video lottery terminals" (*id.*, Fifth Claim, 61-62), "video lottery games that dispense coins or currency terminals" (*id.*, Sixth Claim, 63-64), a tribal lottery system (*id.*, Seventh Claim, 64-65), and for "lottery games authorized to the Multi-State Lottery Association or any other state lottery" (*id.*, Eighth Claim, 65-67). In support of these claims, Pauma relies heavily upon certain statements in a letter dated March 30, 2016 by Joginder Dhillon, Senior Advisor for Tribal Negotiations. Vol. III, Ex. 26, JR244-45. Pauma argues that this letter shows bad faith in violation of IGRA because Mr. Dhillon's letter included, in part, the following:

> The grant of authority to the Governor to negotiate for lottery games under article IV, section 19, subdivision (f) of the California Constitution has always been understood to encompass

> those games authorized for play by the California State Lottery. This was the intent and understanding of the language proposed by tribal negotiators and presented to the voters as they considered the amendment to the California Constitution.

Vol. III, Ex. 26, JR244.

Based largely on these two sentences in the March 30, 2016 letter, Pauma attempts to conceive a Record where the State committed bad faith by dramatically curtailing discussions over new lottery games. Pauma's Mem. of P. & A. in Supp. of Mot. for Summ. J. on Claims One, Two, Four Through Sixteen, and Nineteen in the SAC (Pauma's Mot.), ECF No. 37-1, 11-12. According to Pauma, the State's position constituted a "hidden qualification" that impermissibly limited new tribal lottery games to only those authorized to the State Lottery, and that this limitation was contrary to the scope of permissible lottery games under article IV, section 19(f) of the California Constitution. *Id.* at 12. On this basis, Pauma argues that IGRA's good-faith negotiation requirements compelled the State to negotiate over possible lottery games regardless of whether those games contained features not authorized to the State Lottery. *Id.* at 15-16. Pauma concludes that the State acted in bad faith by "flatly refusing to negotiate for *any* such games." *Id.* at 16:23.

While it is undisputed that Mr. Dhillon sent Pauma the March 30, 2016 letter, this correspondence does not support summary judgment in Pauma's favor. Viewed in context, this March 30th letter, along with the entire Record, demonstrates that Pauma's motion on claims four through eight should be denied. The State encouraged Pauma to propose specific lottery games, and explained its needs for specific lottery game proposals. Nonetheless, Pauma walked away from on-going negotiations after the State proposed a draft compact.

1. Mr. Dhillon's March 30th letter constituted an ongoing attempt to encourage Pauma to propose specific lottery games that would be lawful under California law

Pauma's motion consistently ignores the Record's key components that undercut its arguments. Nowhere is this flaw more obvious than with respect to lottery claims four through eight. Viewed in its entirety, the Record shows that State negotiators never prevented Pauma from proposing new lottery games. To the contrary, following the Tribe's request for new negotiations, the State repeatedly encouraged Pauma to propose specific lottery games. The Record establishes that:

January 30, 2015 Letter: In this letter, Mr. Dhillon provided the State's summary of the meeting that took place between representatives for the State and Pauma on January 16, 2015. Vol. I, Ex. 7, JR020-22. Regarding lottery games Mr. Dhillon wrote that during the meeting the "State asked for examples of the types of lottery games Pauma is considering." *Id.* at JR021. Pauma referred to "'electronic games' and 'punchboards' as possibilities." *Id.* Mr. Dhillon "reiterated the State's need to understand the scope of games that Pauma intends to offer to help identify issues and establish a legal framework for future negotiations." *Id.* at JR022.

May 27, 2015 Letter: Here, Mr. Dhillon responded to a letter from Pauma's Chairman Majel. Vol. I, Ex. 9, JR026. Mr. Dhillon again stated the State's concern that Pauma was not "providing a clear description of the kinds of horse racing or lottery games it sought to conduct." *Id.*

September 8, 2015 Compact Meeting: During this compact negotiation meeting between representatives of the State and Pauma, Mr. Dhillon repeatedly asked the Tribe's representatives for specific compact proposals regarding new lottery games. Mr. Dhillon asked Pauma's attorneys to "draft compact language on those two issues [lottery games and on-track horse

racing[2]] that you feel need to be addressed in the compact." Vol. II, Ex. 14, JR042:12-14. Mr. Dhillon advised Pauma that if it provided such draft language, "we will look at that and we will respond." *Id.* at JR042:21-22. This approach would allow the parties to work on language that "hopefully will lead to a compact." *Id.* at JR042:24-43:1. Later during this meeting, Mr. Dhillon again asked Pauma's attorneys to give the State proposed lottery game language. Vol. II, Ex. 14, JR112:24-113:5. Mr. Dhillon pressed Pauma's attorneys about when they would provide this draft compact language. *Id.* at JR139:4-25. When Mr. Dhillon continued to press for an answer, Mr. Cochrane responded in part by saying "I don't know." *Id.* at JR140:4.

November 4, 2015 Letter: In this letter, Mr. Dhillon advised that, "[w]ith regard to lottery games, I look forward to considering Pauma's proposed compact language so we can identify and work to resolve any potential issues." Vol. III, Ex. 16, JR183. The letter concluded by saying that the State "look[s] forward to reviewing Pauma's proposals regarding a framework for final compact language addressing the new forms of gaming that it proposes to offer—horse racing and lottery games." *Id.* at 184.

November 30, 2015 Letter: Mr. Dhillon reiterated that in "regard to the lottery games, we have asked for draft compact language and received nothing but lengthy letters from you or your lawyers that seek to blame the State for the lack of progress . . . ." Vol. III, Ex. 18, JR209. Mr. Dhillon observed that such letters "fail to do anything to help the parties move forward towards the conclusion of a compact." *Id.*

December 2, 2015 Email: In this email, Mr. Dhillon reminded Pauma's attorney that "[d]espite your many letters and e-mails, the State has yet to

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

receive a single word of proposed compact language from the Tribe." Vol. III, Ex. 19, JR223.

Pauma's motion ignores these significant portions of the Record and, as a result, summary judgment in the Tribe's favor under IGRA would be improper. Contrary to the selective and subjective approach taken in Pauma's motion, the Ninth Circuit has held that IGRA's good-faith standard lends itself to an objective inquiry based on the record of the negotiations. *Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzeneger*, 602 F.3d 1019, 1041 (9th Cir. 2010) (*Rincon*). As the Court explained in *Rincon*, the "structure and content of [25 U.S.C.] § 2710(d) make clear that the function of the good faith requirement and judicial remedy is to permit the tribe to process gaming arrangements on an expedited basis, not to embroil the parties in litigation over their subjective motivations." *Id.*[3]

When examining and applying *Rincon's* objective good-faith standard to the Record, it is clear that throughout the negotiation process, the State consistently asked Pauma to propose compact language for specific lottery games, and the Tribe repeatedly refused to do so. Accordingly, the Record reflects that the State remained willing to negotiate for new lottery games, even though Pauma failed to respond with its own specific lottery game compact proposals. *See In re Indian Gaming Related Cases*, 331 F.3d 1094, 1110 (9th Cir. 2003) (*Coyote Valley II*) (State not found in bad faith under IGRA when the record of negotiations established that it "actively negotiated with Indian tribes"). In this case, the March 30, 2016 letter (vol. III, Ex. 26, JR244-245), and the rest of the Record, shows that

[3] Throughout Pauma's motion the Tribe references 31 exhibits that are attached to a declaration by Pauma's counsel. Decl. of Cheryl A. Williams in Supp. of Pauma's Mot. for Summ. J. on Claims One, Two, Four Through Sixteen, and Nineteen in the SAC, ECF No. 37-2. Because none of these 31 exhibits constitutes records from negotiations between the parties, they are not relevant to the issues of good faith under Pauma's motion, and they should not be considered by the Court. The State's formal objections to these exhibits are filed concurrently with this opposition brief.

the State seriously negotiated with Pauma over new lottery games. Further, the Record demonstrates that it was Pauma, and not the State, that impeded and failed to move the lottery game negotiations forward.

2. Mr. Dhillon's March 30th letter properly explained the State's good faith concerns regarding the need for specific lottery game proposals

The State's correspondence with Pauma demonstrated the State's commitment to negotiating for new lottery games in good faith under IGRA. Pauma attempts to brush the State's efforts aside by focusing, in isolation, on the two sentences in the March 30th letter that are quoted above and below. Pauma's Mot., ECF No. 37-1, 11-13. According to Pauma, this letter constituted an outright refusal to negotiate over tribal lottery games that are not similarly authorized by the California Constitution to the State Lottery. *Id.* at 11-16. Pauma asserts that this position improperly added a substantive limitation on tribal gaming rights that was never intended by Proposition 1A's drafters. *Id.* at 13. But Pauma's representation of the State's negotiation position regarding new lottery games based upon the March 30th letter is misleading because it ignores the most critical portion of the passage, which is italicized below:

> The grant of authority to the Governor to negotiate for lottery games under article IV, section 19, subdivision (f) of the California Constitution has always been understood to encompass those games authorized for play by the California State Lottery. This was the intent and understanding of the language proposed by tribal negotiators and presented to the voters as they considered the amendment to the California Constitution. *However, the State is willing to negotiate to authorize Pauma to offer certain additional lottery games to be enumerated in the compact.*

Vol. III, Ex. 26, JR244, emphasis added.

Clearly, the State was willing to consider new lottery games beyond those authorized to the State Lottery, but the State remained legitimately opposed to Pauma's preference for broadly defining the scope of any authorized tribal lottery

games. The March 30th letter explained the State's good-faith concern to Pauma. The Tribe's approach would not provide the required "clarity as to the scope of the authorization" for new lottery games. Vol. III, Ex. 26, JR244. Pauma's approach would also lead to "future disputes between the parties" regarding the scope of approved lottery games. *Id.* And finally, Pauma's approach would create the risk of inadvertently authorizing games that violated "other prohibitions on how lottery games may be conducted" under California law. *Id.*

The State's good-faith requirement for specificity was necessary to avoid inadvertently authorizing unlawful lottery games through IGRA negotiations. In support of this concern, the March 30th letter cited *Western Telcon,* 13 Cal. 4th 475. Vol. III, Ex. 26, JR244. As discussed in the State's motion for summary judgment, *Western Telcon* involved a game operated by the State Lottery known as "CSL Keno." While the State Lottery considered CSL Keno an authorized "lottery game," the California Supreme Court disagreed and held that it was an illegal and unauthorized "banking game" under the California Constitution. *Id.* at 488-89. *Western Telcon* shows how the scope of permitted lottery games under California law is not always clear.

Not unreasonably, the State wanted to avoid repeating the scenario in *Western Telcon*. With this concern in mind, Mr. Dhillon's March 30th letter concluded that, while the State was not conceding that it was required to negotiate for all the games that Pauma broadly labeled as "lottery games," the State was willing to engage in further lottery negotiations. Vol. III, Ex. 26, JR244-45. The State maintained this approach when it submitted a proposed draft compact to Pauma. Based on this Record, the State's efforts to negotiate for new lottery games constituted neither an outright refusal to negotiate for lottery games beyond those authorized to the State Lottery, nor bad faith under IGRA.

3. Pauma, not the State, walked away from ongoing compact negotiations for new lottery games

The State's March 30th letter was significant for another reason. In addition to advising Pauma that the State remained willing to negotiate for lottery games, and even for lottery games that were not currently authorized to the State Lottery, the letter further advised Pauma that the State would "provide Pauma a complete draft document *to guide our future discussions* within the next few weeks." Vol. III, Ex. 26, JR245 (emphasis added). The State followed through on this promise by emailing Pauma a draft compact on April 28, 2016. Vol. IV, Ex. 27, JR246. With regard to lottery games, this draft proposal included a comment advising that the "[S]tate is open, as indicated in prior correspondence, to discussion regarding the authorization of additional enumerated games." Vol. IV, Ex. 27, JR261. The term "enumerated" was used intentionally to communicate that new lottery games would need to be spelled out in the compact. Accordingly, consistent with the March 30th letter, the State remained willing to negotiate over specified lottery games. But rather than proposing compact language to authorize specific lottery games for inclusion in the draft compact, Pauma instead sued the State for violating the duty to negotiate in good faith. Compl., ECF No. 1.

Pauma's decision to litigate rather than negotiate casts a pall over its motion for summary judgment regarding games. When adjudicating a bad-faith negotiation claim under IGRA, it is well established that a court may consider a tribe's decision to decline further negotiations as evidence that the State was not the party that engaged in bad faith negotiations. *See In re Indian Gaming Related Cases v. State of California,* 147 F. Supp. 2d 1011, 1021-22 (N.D. Cal. 2001) (*Coyote Valley I*) (district court finding that during negotiations the tribe "apparently [had] not contacted the State to arrange any further IGRA negotiations"). Here, the Record shows that Pauma never responded to the State's proposed draft compact of April 28, 2016 (vol. IV, ex. 27, JR246), and instead walked away from the negotiations to

pursue litigation. Compl., ECF No. 1. Pauma never provided the State with proposed compact language for any specific lottery game.

Because Pauma pursued litigation prior to an impasse in negotiations, under this case's unique facts, it may be appropriate for this Court to consider decisional law under the National Labor Relations Act for guidance in construing whether Pauma created an artificial impasse. *See, e.g., NLRB v. Montgomery Ward & Co.*, 133 F.2d 676, 687 (9th Cir.1943) (refusal to submit counter-proposals is some evidence of the employer's lack of good faith negotiations with the union); *NLRB v. George P. Pilling & Son Co.*, 119 F.2d 32, 37 (3d Cir. 1941) ("[A]greement by way of compromise cannot be expected unless the one rejecting a claim or demand is willing to make counter-suggestion or proposal. And, where that is expressly invited but is refused, in such circumstances the refusal may go to support a want of good faith, and, hence, a refusal to bargain.").

Pauma's reliance on submitting numerous adversarial letters, failing to propose specific compact language, and refusing to submit any counter-proposal to the State's draft compact of April 28, 2016, is strong evidence of the Tribe's unwillingness to negotiate in good faith. All of this evidence in the Record shows the pre-textual nature of the Tribe's minimal effort to conclude a compact. Based on this Record, as a matter of law, Pauma's refusal to make a counter offer precludes summary judgment as to lottery game claims.

B. The Record does not Support Summary Judgment in Pauma's Favor Regarding Lottery Games Because the State did not Attempt to Protect the State Lottery from Tribal Competition (Claim Two)

Similar to Pauma's fourth claim, the Tribe's second claim alleges that the State failed to negotiate in good faith because, during compact negotiations, its representatives engaged in a "protectionist strategy" to "protect the revenue stream of the State Lottery." SAC, ECF No. 27, Second Claim, 58. This second claim is based entirely on two pages of transcript from a single meeting on September 8,

2015. Pauma's Mot., ECF No. 37-1, 9. This portion of the transcript recorded a brief exchange, initiated by Pauma's counsel, regarding the State Lottery's generated revenue for educational programs. Vol. II, Ex. 14, JR089. "Mr. Cochrane: I'm just going based on the clear language of the section. That's all. We just want the rights to do lottery games. And I know this is a sensitive area for the State since the lottery makes like $5 billion per year." *Id.* at JR089:11-15. After Mr. Dhillon noted in response that all children in the State benefit from these education funds, Pauma's counsel then suggested a protectionist motivation by the State. "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." *Id.* at JR090:3-6. Counsel for Pauma and the State then discussed whether IGRA permits the State to negotiate over terms to protect its own gaming industry. *Id.* at 90:7-15.

Based solely on the above exchange, Pauma now argues that Mr. Dhillon's comments constituted a "candid admission that the State was acting out of its own self-interest" and that the State was attempting to protect the State Lottery from tribal competition. Pauma's Mot., ECF No. 37-1, 8. Citing *Western Telcon*, Pauma goes on to argue that this protectionism lead the State to "once again block[ ] 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." Pauma's Mot., ECF No. 37-1, 11. Pauma's motion on its second claim is based on conclusory arguments rather than facts and should be denied for three reasons.

First, Pauma's argument that protectionism motivated the State's alleged attempt to block new tribal lottery games directly conflicts with the Record. As previously discussed, the State offered to negotiate over new lottery games, repeatedly asked Pauma to propose specific games that could be enumerated in a compact, and offered the Tribe a draft compact that could include newly enumerated lottery games. Instead of responding with new lottery games proposals,

Pauma abandoned further negotiations and initiated litigation. As a matter of law, this Record does not show the actions of a state government trying to avoid tribal competition with its own lottery. To the contrary, it shows that the State was attempting to engage Pauma in further negotiations concerning new lottery games, and that the Tribe failed to respond in good faith.

Second, in a manner similar to Pauma's mischaracterization of Mr. Dhillon's March 30, 2016 letter (see section I(A)(2)), the Tribe falsely portrays Mr. Dhillon's comments on the State Lottery during the September 8, 2015 meeting. These brief comments did not, as Pauma claims, constitute a "candid admission" that the State was somehow attempting to protect the State Lottery from tribal competition. Far from discouraging Pauma from proposing new lottery games, later during this meeting Mr. Dhillon asked Pauma's attorneys to get him proposed lottery game language. *See* Vol. II, Ex. 14, JR112:24-113:5. And Mr. Dhillon pressed Pauma's attorneys about when they would provide this draft compact language. *Id.* at JR139:4-24. This Record clearly shows that the State was not attempting to block new tribal lottery games.

Finally, Pauma's citation to *Western Telcon* does not support its unfounded protectionism argument. Pauma's cites *Western Telcon* for the position that the CSL Keno game was classified "*not* a lottery game, much to Attorney General Daniel Lungren's pleasure, so as to prevent tribes from offering it on their reservations." Pauma's Mot., ECF No. 37-1, 11. Pauma's reliance on *Western Telcon* to promote its protectionist conspiracy theory is misguided for two reasons. First, contrary to the implication in Pauma's argument, in *Western Telcon,* the State Lottery argued in favor of CSL Keno's classification as a lawful lottery game. *Western Telcon,* 13 Cal. 4th at 490-95. Despite the State Lottery's, and Attorney General Lungren's, defense of CSL Keno, the California Supreme Court held that CSL Keno was an unlawful banked game. *Id.* at 489. Second, the California Supreme Court's decision in *Western Telcon* does not opine any impact the Court's

decision might have on tribal gaming. In conclusion, Pauma's characterization of *Western Telcon* as authority in support of its protectionist argument mischaracterizes both the parties' objectives and the Supreme Court's holding. Pauma's motion for summary judgment as to its second claim should be denied.

C. The Record does not Support Summary Judgment in Pauma's Favor Regarding the Tribe's Procedural Claims Relating to Negotiations for Lottery Games (Claims One and Nine)

Pauma moves for summary judgment on two procedural claims. The first claim alleges that the State engaged in "'surface bargaining' or 'shadow boxing'" in violation of the duty to negotiate in good faith by not timely providing the State's "position on the 'preliminary' issue of negotiable gaming rights . . . ." SAC, ECF No. 27, First Claim, 57. The ninth claim alleges that the State failed to "'substantiate its position [on the lottery games topic] with supporting evidence.'" *Id.*, Ninth Claim, 67. The Record supports neither claim.

1. The record does not support Pauma's argument that the State caused negotiation delays that amounted to bad faith under IGRA (claim one)

Pauma's motion complains at length of the State's alleged avoidance to discuss new lottery games by changing the manner in which it would discuss this topic. Pauma's Mot., ECF No. 37-1, 4-8. The Tribe claims that the Record "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 . . . ." *Id.* at 8. According to the Tribe, this conduct amounted to "surface bargaining" in violation of IGRA. *Id.* This claim should be rejected for two reasons.

First, Pauma has no compact authorizing new lottery games today because it never proposed a specific new lottery game to the State. A state should not be found in bad faith when the Record shows that it "actively negotiated" for a gaming compact under IGRA. *See Coyote Valley II*, 331 F.3d at 1110. In *Coyote Valley II*, the Ninth Circuit examined the record of negotiations and concluded that "the Davis Administration has actively negotiated with Indian tribes," including the

Coyote Valley Band of Pomo Indians, the plaintiff tribe in that case. *Id.* The Ninth Circuit further found that under the negotiation record, "at the time Coyote Valley filed its amended complaint with the district court, alleging bad faith by the Wilson and Davis Administrations, the State remained willing to meet with the tribe for further discussions." *Id.* Based on this record, the Ninth Circuit found that the State committed no procedural or timing actions that amounted to bad faith negotiations under IGRA. *Id.* The same is true under this case's Record, which shows that the State actively negotiated with Pauma, repeatedly asked the Tribe to propose compact language for enumerated lottery games, and remained willing to continue further negotiations up until the Tribe commenced premature litigation.

Second, Pauma's claim that it proposed "lottery games language" to the State (Pauma's Mot., ECF No. 37-1, 7) in a letter dated January 27, 2016 (Vol. III, Ex. 24, JR239-41) disregards the State's need for specificity. Based on that letter, the State reasonably understood that Pauma wanted to operate tribal lottery games to the broadest extent theoretically possible under the California Constitution. However, as Mr. Dhillon made clear, this approach was not acceptable because the State (1) needed clarity with regard to the specifics of the lottery games that would be permitted; (2) wanted to avoid future disputes regarding the scope of approved games; and (3) needed to reduce the risk of violating other provisions of California law similar to what occurred with CSL Keno in *Western Telcon.* Vol. III, Ex, 26, JR244. These were, and remain, legitimate concerns and topics for negotiation. Raising them with Pauma did not constitute bad-faith negotiations, particularly when the State made clear that it remained "willing to negotiate to authorize Pauma to offer certain additional lottery games to be enumerated in the compact." *Id.* Based on this Record, such additional negotiations never took place because Pauma failed to propose compact language for any specific lottery game. Consequently, Pauma's motion for summary judgment as to the first claim should be denied.

2. The record does not support Pauma's argument that the State violated the duty to negotiate in good faith by failing to substantiate its lottery game positions (claim nine)

Pauma's ninth claim alleges that the State committed bad faith during the negotiations because it failed to substantiate its alleged position that "article IV, section 19, subdivision (f) of the California Constitution has always been understood to encompass those games authorized to play by the California State Lottery." Vol. III, Ex, 26, JR244. Pauma argues that the State's failure to substantiate this position left compact negotiations in a "hopeless morass" (Pauma's Mot., ECF No. 37-1, 18:18). This ninth claim should be rejected for two reasons.

First, and most important, Pauma's motion as to the ninth claim should be denied because the failure to conclude a compact did not arise from the State's alleged refusal to substantiate its positions on lottery games. Rather, the Record shows that the State repeatedly asked for, but Pauma repeatedly failed to offer, any compact language for specific lottery games that could be included in the compact. Further, the failure to reach an agreement on lottery games was due to Pauma's refusal to engage in negotiations with the State, including the Tribe's failure to counter the State's April 28, 2016 draft compact proposal. Vol. IV, Ex. 27, JR246. If the negotiations over lottery games were truly in the "hopeless morass" alleged by Pauma, the cause of the "morass" was the Tribe's decision to not communicate any specific lottery game compact proposals to the State.

Second, the Record refutes Pauma's claim that the State failed to substantiate its position regarding lottery games. As previously discussed, after receiving Pauma's very broad legal framework for proposed lottery games in a letter dated January 27, 2016, Vol. III, Ex. 24, JR239-41, Mr. Dhillon responded on March 30, 2016, advising the Tribe why this approach was not acceptable, Vol. III, Ex, 26, JR244-45. This letter provided both the legal and policy reasons behind the State's need for more specificity regarding Pauma's stated desire for new lottery games. *Id.* The State then followed up with a proposed draft compact for the Tribe's

consideration and counterproposals. Vol. IV, Ex. 27, JR246. IGRA cannot reasonably be construed to require a greater degree of "substantiation." The Record fails to support Pauma's motion for summary judgment as to its ninth claim.

II. THE RECORD DOES NOT SUPPORT SUMMARY JUDGMENT IN PAUMA'S FAVOR REGARDING THE SCOPE OF NEGOTIATIONS (CLAIM TEN)

Pauma's tenth claim resurrects a dispute that the parties previously resolved without court intervention through "the process of meeting and conferring in good faith" provided for in section 9.1 of the 1999 Compact. SAC, Ex. 1, ECF No. 27-1, 32. On November 25, 2015, Pauma formally raised the issue of the scope of negotiations with the State. Vol. III, Ex. 17, JR206-JR207. Prior to the dispute's resolution, and based on Pauma's initial letter requesting additional gaming rights, Vol. I, Ex. 1, JR001, the State understood Pauma's renegotiation request to be limited to additional gaming rights. On December 9, 2015, following the parties' meet and confer, the State agreed, "pursuant to section 12.1 of the 1999 Compact, to enter into negotiations for a new or amended tribal-state compact." Vol. III, Ex. 21, JR234. On January 4, 2016, the State again confirmed, for Pauma's benefit, that the scope of the negotiations would include "all aspects of the existing compact and other appropriate provisions to ensure that we are able to achieve our mutual objectives." Vol. III, Ex. 23, JR238. Subsequently, with this dispute behind them, the parties continued to negotiate for a new compact to address all negotiable issues.[4]

Pauma was not prejudiced by the State's insistence on defining the scope of negotiations as required by section 12.0 of the 1999 Compact. *See* SAC, Ex. 1, ECF No. 27-1, 39-40. To the contrary, even after this dispute was resolved, Pauma communicated its desire to "conduct the negotiations in a piecemeal fashion," Vol. III, Ex. 24, JR239, "so the parties' attention would stay on the new gaming rights . .

[4] The practical effect of this agreement was to expand the scope of compact renegotiations to topics beyond new gaming rights.

.," Pauma's Mot., ECF No. 37-1, 22:5. Accordingly, because an impasse regarding the scope of negotiations was avoided when the parties "indicated a willingness to bargain further," it cannot form the basis for a finding of bad faith against the State. *See e.g. LAWI/CSA Consolidators, Inc. v. Wholesale and Retail Food Distribution, Teamsters Local 63* 849 F.2d 1236, 1240 (9th Cir. 1988) (listing relevant factors in determining whether an impasse has been reached). The Record does not support Pauma's motion for summary judgment on its tenth claim because the Record shows that the "scope of negotiations dispute" did not in any way impede the parties' continued negotiations over additional gaming rights, which was Pauma's primary reason for requesting a new compact. Vol. I, Ex. 1, JR001.

III. THE RECORD SHOWS THAT PAUMA'S CLAIM FOR SUMMARY JUDGMENT BASED ON THE STATE'S PROPOSED DRAFT COMPACT IS NOT RIPE BECAUSE THE TRIBE FAILED TO NEGOTIATE OVER THOSE PROVISIONS

Pauma's eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, and nineteenth claims (collectively, Draft Compact Claims) are based on provisions included in, or excluded from, the draft compact transmitted to Pauma by the State on April 28, 2016. Vol. IV, Ex. 27, JR246. It is striking that Pauma initiated this lawsuit after the State sent the Tribe its proposed draft compact. The State sent the draft compact to Pauma hoping to stimulate negotiations and to move the discussions beyond talks regarding the scope of negotiations. As previously discussed, Pauma did not continue negotiations, and instead responded with a lawsuit.

Pauma's response to the State's proposed compact was entirely unjustified because nothing in the Record showed any attempt to impose this proposed draft on the Tribe. As the transmittal email's subject line stated, the draft merely constituted the State's "Draft Proposed Compact." Vol. IV, Ex. 27, JR246. Pauma cited no evidence in the Record showing that the State's transmittal of the draft compact to Pauma constituted bad faith in negotiations.

Nor can Pauma establish that the draft compact's provisions unrelated to additional gaming rights were so incongruous with IGRA's purposes that they amounted to prohibited negotiation topics under IGRA. In fact, every draft compact provision was permissible under to 25 U.S.C. § 2710(d)(3)(C). For example, the State may request draft compact provisions, including revenue sharing provisions, so long as they (1) directly relate to gaming operations or can be considered standards for the operation and maintenance of the Tribe's gaming facility, (2) are consistent with the purposes of IGRA, and (3) with respect to revenue sharing provision, are bargained for in exchange for a meaningful concession. Rincon, 602 F.3d at 1033. Because Pauma prematurely withdrew from negotiations, the Record did not develop sufficiently for the Court to determine whether or not IGRA's third prong was met in this case. As a result, Pauma cannot demonstrate that the State failed to offer a meaningful concession in connection with the draft compact to support summary judgment in the Tribe's favor.

The Record demonstrates that the State responded to Pauma's request to negotiate for the "entire compact" in good faith; the parties' failure to reach agreement on provisions unrelated to additional gaming rights is attributable entirely to Pauma, and not the State. Therefore, under IGRA, the burden of proof should not transfer to the State to prove that it has negotiated for those provisions in good faith. *See* 25 U.S.C. § 2710(d)(7)(B)(ii). Moreover, the Record shows that Pauma's draft compact claims are not ripe for summary judgment in Pauma's favor for the additional reasons discussed below.

A. The Record does not Support Summary Judgment in Pauma's Favor on the Claim that the State Failed to Conduct Individualized Tribal Negotiations (Claim Eleven)

In its eleventh claim, Pauma accuses the State of "wrapping up the negotiations by simply offering a compact designed for another tribe . . . ." Pauma's Mot. 21:12-13. The Record does not support this claim. Rather, the Record shows the State conducted "individualized" negotiations with Pauma.

The State repeatedly asked Pauma to clarify the scope of negotiations and to provide compact language so that the State could engage with Pauma to provide a compact "tailored" to the Tribe's desires. E.g,. Vol. I, Ex. 7, JR020-22; Vol. III, Ex. 23, JR238. Exhausted by Pauma's gamesmanship and delay, and motivated to make progress towards a compact, the State forwarded its own draft of a proposed compact for Pauma's consideration. Vol. IV, Ex. 27, JR246. In doing so, the State hoped Pauma would begin to actively participate in substantive give-and-take negotiations. The e-mail to which the draft compact was attached and the context of negotiations at the time make it clear that the State was not attempting to impose any unilateral demands. Id. Accordingly, unlike in Rincon, the State remained flexible with Pauma and did not make a "take it or leave it" offer on any topic. See Rincon, 602 F.3d at 1038-39.

Moreover, the comment bubbles in the State's proposed draft compact demonstrate that it was committed to an individualized approach with Pauma during the ongoing negotiations. Regarding lottery games, comment "A3" provided that the "State is open, as indicated in prior correspondence, to discussion regarding the authorization of additional enumerated games." Vol. IV, Ex. 27, JR261. Regarding off-track wagering, comment "A4" provided: "State has proposed OTW compact that can be incorporated as an Appendix or negotiated and concluded as a separate class III gaming compact." *Id.* Regarding gaming facility construction, comment "A5" provided: "For Discussion. The State does not intend for the requirements of the compact currently being negotiated to be retroactive. The intent of this section is to clarify that the compact standards in effect at the time a project was constructed remain the relevant standards. However, there may be better ways to address the issue in light of the judicial rescission of the 2004 compact." Vol. IV, Ex. 27, JR277.

All of these comment bubbles in the State's proposed draft compact demonstrate that the State fully expected individualized counter-proposals from

Pauma during continued negotiations. Indeed, the State had previously demonstrated its tailored approach towards Pauma's claimed gaming needs when it sent the Tribe an off-track betting compact for discussion that would authorize a satellite wagering facility, Vol. III, Ex. 18, JR210-JR221, and an on-track compact between another state and tribe that could be used as a starting point for further negotiations, *id.* Ex. 16, JR185-JR205. Because no other tribe in California operates on-track wagering, this negotiation proposal was truly individualized for Pauma only. *Id.* JR183. Thus, the Record clearly fails to support summary judgment for Pauma as to claim eleven.

B. The Record does not Support Summary Judgment in Pauma's Favor Regarding the State's Alleged Animus (Claim Twelve)

Pauma's twelfth claim is based on nothing more than a bald assertion that the State transmitted the draft compact with terms the Tribe did not desire because of the State's alleged "animus for Pauma." Pauma's Mot., ECF No. 37-1, 23:20-21. Interestingly, in prior litigation between the parties wherein Pauma asserted accusations of bad faith against the State, the Ninth Circuit refused to consider Pauma's assertion that "the State knowingly acted in bad faith or with any kind of evil intent." *Pauma Band of Luiseno Mission Indians of Pauma & Yuima Reservation v. California* (9th Cir. 2015) 813 F.3d 1155, 1164, n.6, cert. denied (2016). Pauma's resurrection of these allegations is based on nothing more than conclusory arguments and the claim is unsupported by any cognizable facts in the Record.

Pauma has not cited any objective evidence in the Record that would allow the Court to determine that the State acted in bad faith by transmitting the draft compact "to guide" the parties' "future discussions." Vol. III, Ex. 26, JR245. Instead, Pauma's motion is dominated by references to the State's subjective

motivations.[5] Pauma's approach is contrary to the Ninth Circuit's adjudication of questions of good faith under IGRA. A court's evaluation of good faith is based on an objective analysis of the factors outlined in 25 U.S.C. § 2710(d)(7)(B)(iii) so as "not to embroil the parties in litigation over their subjective motivations." *Rincon,* 602 F.3d at 1041. As another court explained, good faith is "determined by such *objective* factors as conduct and actions, offers and counter-offers, not motives or other subjective factors that leave too much room for misinterpretation and are far too productive of conflict and dissension and much less productive of concord and results." *Fort Independence Indian Community v. California* (E.D. Cal., May 7, 2009), 2009 WL 1283146, at *4 (citations omitted).

The State's transmittal of the proposed draft compact containing provisions relating to the RSTF, Special Distribution Fund (SDF), gambling devices, age restrictions on tobacco sales, minimum wage, durational term, and other regulatory matter do not objectively amount to bad faith. Certainly, the State did not "single[] out Pauma for differential and detrimental treatment simply because of the prior history between the parties" as alleged by Pauma. Pauma's Mot., ECF No. 37-1, 28:2-4. Pauma received the State's first draft of a compact proposal, not a final offer. While Pauma pays lip service to the objective good-faith standard, in reality the Tribe's summary judgment motion urges this Court to consider the record of other negotiations involving different tribes, as well as Pauma's prior litigation against the State, to reach a bad faith determination based on alleged "animus." Because neither the Record in this case, nor the Ninth Circuit's approach to

[5] Just to take one example of Pauma's willingness to make blind assertions, it accuses the State of including the Revenue Sharing Trust Fund (RSTF) provision in the draft compact "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." Pauma's Mot. ECF No. 37-1, 25:11-12. Pauma ignores that the RSTF fees do not go "into the pocket of the State." *In re Indian Gaming Related Cases* (9th Cir. 2003) 331 F.3d 1094, 1113. The RSTF funds are directed to "eligible recipient Indian tribes." Cal. Gov't Code § 12012.75. The RSTF provision in the draft compact is the same. Vol. IV, Ex. 27, JR269-JR274.

adjudicating good faith under IGRA, supports Pauma's argument, summary judgment as to the Tribe's twelfth claim should be denied.

C. The Record does not Support Summary Judgment in Pauma's Favor Regarding the Waiver of Sovereign Immunity Provision (Claim Thirteen)

Under IGRA, a state can, "for the future," propose a new sovereign immunity compact waiver that differs from a previously accepted waiver. See *Michigan v. Bay Mills Indian Community* (2014) 134 S.Ct. 2024, 2035. In this case, when the State transmitted the proposed draft compact with a new sovereign immunity waiver, the State was doing what Pauma desired, which was to open "up the entire compact for renegotiation." Vol. III, Ex. 15, JR177. The proposed sovereign immunity waiver was also similar to one included in a recently approved tribal-state compact (and not dissimilar to the waiver in Pauma's present compact). SAC, ECF No. 27-1, 41:11-16, Ex. 1, 33-34. There is simply no support in the Record for Pauma's argument that the State's inclusion of the modified sovereign immunity provision in the draft compact constituted bad faith under IGRA.

Without question, Pauma was free to either object to, or negotiate, the sovereign immunity waiver proposal during continued negotiations with the State. But because the proposed draft compact was clearly a working draft, and Pauma refused to make any counterproposals, the State cannot be found in bad faith simply because it included a sovereign immunity waiver Pauma now finds objectionable. Since Pauma never communicated to the State its objection over the inclusion of the sovereign immunity waiver, the Record in this case does not support granting Pauma's motion for summary judgment as to its thirteenth claim.

D. The Record does not Support Summary Judgment in Pauma's Favor Regarding the State's Alleged Failure to Offer Pauma Terms Desired by the Tribe (Claim Fourteen)

Pauma's fourteenth claim shows a misguided view of the State's obligations under IGRA. This claim appears to argue that IGRA imposes on the states a "give what you divine is necessary" negotiation requirement. This is clearly a misreading

of IGRA. Indeed, the Ninth Circuit has observed that in adopting IGRA Congress "did not intend to require that States ignore their economic interests when engaged in compact negotiations." *Coyote Valley II*, 331 F.3d at 1115.

Pauma's motion cites no cases attributing bad faith during compact negotiations to a State for its failure to include compact terms that were not requested for by a tribe. And even if such a requirement existed (which it does not), it should not apply to a tribe like Pauma that unilaterally declined to engage in negotiations over a proposed draft compact. Accordingly, neither the Record, nor case law under IGRA, supports Pauma's motion for summary judgment as to Pauma's fourteenth claim.

E. The Record does not Support Summary Judgment in Pauma's Favor Regarding Inclusion of RSTF, SDF and Local Government Provisions in the Draft Compact (Claim Fifteen)

The parties agree that a revenue sharing request by a state may be permissible 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*, 602 F.3d at 1033. Pauma concedes that the "first two prongs of the *Rincon* test are not at issue" in this case. Pauma's Mot., ECF No. 37-1, 28:13-14. However, Pauma contends that the State impermissibly "demanded a disproportionate amount of revenue sharing from Pauma that is on par with what was deemed a bad-faith tax in *Rincon* . . . ." *Id.* at 28:16-18.

Pauma is mistaken in arguing that the inclusion of revenue-sharing provisions in the State's proposed draft compact amounted to bad faith negotiations under IGRA. First, Pauma's reliance on *Rincon* is misplaced because that decision rejected the State's demand for general fund revenue sharing contributions, which are not at issue here. *See Rincon*, 602 F.3d at 1029. Second, *Rincon* is further distinguishable because, unlike the negotiating position taken by the State in *Rincon*, this case's Record demonstrates that the State never took a "hard line"

position with Pauma, and it certainly did not make a "take it or leave it offer" when it sent the Tribe the draft compact. *Id.* at 1039. Given that the State was establishing initial discussions about the RSTF, SDF and Local Government provisions, it did not "impose" those provisions, or any other mandatory fees, within the meaning of 25 U.S.C. § 2710(d)(4). As the State advised Pauma, all of the terms in the draft compact were sent "to guide" the parties' "future discussions." Vol. III, Ex. 26, JR245. The fact that Pauma refused to engage in further negotiations does not constitute bad faith by the State.[6]

Finally, when the State made its initial revenue-sharing proposals in the draft compact, the parties were in the midst of negotiating for additional gaming rights. In *Rincon*, the Ninth Circuit found the State violated IGRA when it sought during compact negotiations to impose terms requiring revenue sharing paid into the State's general fund without offering "meaningful concessions" in return. 602 F.3d. at 1037. *Rincon* did not hold that "no future revenue sharing is permissible." *Id.* Accordingly, the facts in *Rincon* and those presented in this case are far from analogous. Neither IGRA nor *Rincon* renders the fee provisions in the draft compact per se unlawful. They were merely points of discussion for continued negotiations. Accordingly, Pauma's "illegal taxation" claims fail and summary judgment should be denied.

F. The Record does not Support Summary Judgment in Pauma's Favor Regarding Inclusion of Regulatory Provisions in the Draft Compact (Claim Sixteen)

Pauma argues for a bad faith finding against the State for its inclusion of regulatory provisions that provide "the State with the ability to regulate most every

[6] It is worth noting that, similar to RSTF payments, under the draft compact funds received for the SDF would not enrich the State. Rather, section 4.3.1 of the draft compact would require that these funds be "available for appropriation by the Legislature" for specified IGRA-approved purposes, such as the State's costs incurred for regulating tribal gaming. Vol. IV, Ex. 27, JR264. Similarly, section 4.4 of the draft compact would require the Tribe to enter into agreements with local governments to mitigate the impacts of the compact's authorized gaming facility. *Id.* at 264-65.

service provided on the reservation." Pauma's Mot., ECF No. 37-1, 33:24-25. Pauma further criticizes the State for its alleged failure to offer "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." *Id.* at 34:15-17.

The regulatory provisions in the draft compact about which Pauma complains are not prohibited by IGRA. 25 U.S.C. § 2710(d)(3)(C). These proposed terms are permissible so long as the measures are directly related to gaming operations or can be considered standards for the operation and maintenance of the Tribe's gaming facility. *See* 25 U.S.C. § 2710(d)(3)(C)(vi)-(vii). *Coyote Valley II* supports the inclusion of these terms in the draft compact. There, the court held that a labor relations provision was a permissible topic of negotiation and could be included in a gaming compact because it directly related to gaming operations. *Coyote Valley II,* 331 F.3d at 1116. The *Rincon* decision is distinguishable on this issue because it focused primarily on the direct taxation of tribes, which is specifically identified and generally proscribed under IGRA. 25 U.S.C. § 2710(d)(4) & (7)(B)(iii)(II). IGRA does not treat regulatory mitigation measures in the same way. To the contrary, IGRA expressly provides that courts may take into account the "public interest" and "public safety" when deciding whether the State has negotiated in bad faith. 25 U.S.C. § 2710(d)(7)(B)(iii)(I).

Moreover, IGRA's textual support for these terms has added force in this case's unique negotiation context. The Record shows that the State did not demand or seek to impose these terms on Pauma. Rather, these proposed regulatory terms were presented for Pauma's initial consideration, and remained open for further negotiation. And, as previously discussed, the regulatory terms were subject to ongoing negotiations while the parties remained in the midst of negotiations for a new compact, including additional gaming rights. It is conceivable that had negotiations continued, the parties could have come to an agreement on these

provisions. Under this Record, summary judgment in Pauma's favor for the sixteenth claim should be denied.

G. The Record does not Support Summary Judgment in Pauma's Favor Regarding Inclusion of the Local Government Memorandum of Understanding (MOU) Provision in the Draft Compact (Claim Nineteen)

Without citing to a specific IGRA provision, Pauma's nineteenth claim alleges that the State failed to negotiate in good faith because its proposed draft compact allegedly "defer[ed] much of the revenue sharing discussion until after the execution of the agreement . . . and is wholly inconsistent with the contract review process Congress mandated within IGRA." Pauma's Mot., ECF No. 37-1, 38:11-14. Specifically, this claim refers to the proposal that Pauma enter into an MOU with the local governments to mitigate the local impacts from Pauma's gaming facility.

Pauma's motion for summary judgment on the nineteenth claim should be denied because the proposed local government MOU provision in the draft compact remained subject to further negotiations. Because Pauma withdrew from further negotiations, the State was never given an opportunity to review or consider any counter proposals by the Tribe. Now, for the first time, Pauma's motion attempts to articulate "the proper way to handle revenue sharing" under a local government MOU. Pauma's Mot., ECF No. 37-1, 38:7-10. But having declined to engage in further negotiations over the objected-to provision, Pauma cannot now reasonably assert that the State's failure to remove those terms constituted bad faith. *See Coyote Valley I*, 147 F. Supp. 2d at 1021–22.

CONCLUSION

For the reasons stated above, Pauma's motion for summary judgment should be denied in its entirety.

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