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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

STATE DEFENDANTS' REPLY TO PAUMA'S OPPOSITION TO STATE DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT ON CLAIMS ONE THROUGH TWENTY OF PLAINTIFF'S SECOND AMENDED COMPLAINT

[Fed.R. Civ. 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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

INTRODUCTION

Defendants the State of California, and Edmund G. Brown Jr., as Governor of the State of California (collectively, the State) submit the following Memorandum of Points and Authorities in Reply to plaintiff Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation's, a/k/a Pauma Band of Mission Indians, a federally-recognized Indian tribe's (Pauma or Tribe) Opposition to the State's Cross-Motion for Summary Judgment.

In claims one through twenty of its Second Amended Complaint (SAC), Pauma alleges that the State failed to negotiate with the Tribe in good faith under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 through 2721 (IGRA). But Pauma's Opposition does not adequately address its own failure to authentically engage in negotiations with the State to conclude a tribal-state compact. The undisputed record of negotiations[1] shows that the State negotiated with Pauma in good faith. In contrast, Pauma repeatedly failed to respond to the State's many requests for specific compact proposals, refused to negotiate to impasse, and now asserts a claimed futility defense to any further compact negotiations that is not supported by the Record. Therefore, the State is entitled to summary judgment on all of Pauma's IGRA claims.

I. THE STATE NEVER VIOLATED ITS DUTY TO NEGOTIATE IN GOOD FAITH REGARDING PAUMA'S NEW LOTTERY GAME AND HORSE RACING CLAIMS

Pauma's new lottery game and horse racing claims are premised on the theory that IGRA imposes on states a duty to submit to one-sided compacts demanded by tribes. This interpretation of IGRA is wrong. IGRA does not impose a duty to compact—IGRA imposes on States a duty to negotiate for a compact in good faith with federally recognized tribes with eligible Indian lands that request compact

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

negotiations. 25 U.S.C. § 2710 (d)(3)(A). IGRA's federal statutory scheme is an example of "cooperative federalism" that establishes a legal framework for the regulation of Indian gaming and "seeks to balance the competing sovereign interests of the federal government, state governments, and Indian tribes, by giving each a role in the regulatory scheme." *Artichoke Joe's v. Norton*, 216 F.Supp.2d 1084, 1092 (E.D. Cal. 2002). This mutually cooperative process provides a potential regulatory role for states by according them "the right to negotiate with tribes located within their borders regarding aspects of class III tribal gaming that might affect legitimate State interests." *In re Indian Gaming Related Cases*, 331 F.3d 1094, 1097 (9th Cir. 2003) (*Coyote Valley II*). When a tribe makes a request for compact negotiations under IGRA, a state "shall negotiate with the Indian tribe in good faith to enter into [a tribal-state] compact." 25 U.S.C. § 2710(d)(3)(A).

But a state's duty under IGRA to negotiate in good faith will not always result in a compact. Even when a state negotiates in good faith, the negotiations might fail because a tribe does not sincerely participate in the negotiation process. In these circumstances, there is no statutory justification under IGRA for a court to find that a state negotiated in bad-faith pursuant to 25 U.S.C. § 2710(d)(7)(B)(iii). As the State discussed in its summary judgment motion (ECF No. 36-1, at 23:1-24:9), when making a good faith determination under 25 U.S.C. § 2710(d)(7)(B)(iii), federal courts in the Ninth Circuit have identified several relevant factors to consider when examining the record of negotiations between the parties. When considering these factors, it is clear that sometimes a state and tribe will not conclude a tribal-state compact due to a tribe's improper negotiation tactics. When conducting a review of the record of negotiations to determine whether a state acted in bad faith, courts can consider (1) whether the State remained "willing to meet with the tribe for further" compact negotiations (*Coyote Valley II,* 331 F.3d at 1110 (Ninth Circuit determined that the record of negotiations showed that the State "actively negotiated with Indian tribes")); (2) whether the

State had a duty to negotiate with the tribe to engage in the requested class III gaming (*id.*, citing *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1255 (9th Cir. 1994) (Ninth Circuit found that the State remained willing to further negotiate even though it had "no obligation to negotiate with the Coyote Valley [tribe] over the types of class III games covered in the Davis Compact")); (3) whether the tribe's "challenged provisions" are the result of negotiations or "unilateral demands by the State" (*In re Indian Gaming Related Cases v. State of California,* 147 F.Supp.2d 1011, 1021 (N.D. Cal. 2001) (*Coyote Valley I*) (district court found that the challenged "Tribal Labor Relations Ordinance" was not a "unilateral" State demand)); and (4) whether it was the tribe, and not the State, that "declined to engage in further negotiations" (*id.* at 1021-22 (district court found that during negotiations the tribe "apparently [had] not contacted the State to arrange any further [IGRA] negotiations")).

When applying this good faith test to the Record, as a matter of law, the State met its obligations under IGRA. The Record shows that the State negotiated in good faith with Pauma for an amended compact to include new lottery games and an agreement for on-track horse-racing. But a compact was not reached because Pauma consistently failed to respond to the State's legitimate requests for compact proposals and failed to negotiate to impasse.

A. The Parties Did Not Conclude An Amended Compact Authorizing New Lottery Games Because Pauma Failed to Respond to the State's Requests for Compact Proposals and Failed to Negotiate to Impasse

In regard to Pauma's claims against the State for failing to negotiate in good faith for new "lottery games," the Tribe's opposition contends that the State's summary judgment motion should be denied because the State's claims for "clarity" were merely attempts to block progress in negotiations. Pauma's Opposition (Pauma's Opp'n) at 7, ECF No. 41. But the Record does not support Pauma's arguments.

First, Pauma's opposition incorrectly implies that during negotiations the State merely asked for lottery game "lists" and that Pauma provided them. Pauma's Opp'n at 7-10. To the contrary, the Record shows that the State repeatedly asked Pauma to propose not just lists of general categories and themes of lottery games, but specific lottery games that could be enumerated in an amended compact. For example, in its January 30, 2015 letter, the State reiterated its "need to understand the scope of games that Pauma intends to offer to help identify issues and establish a legal framework for future negotiations." Vol. I, Ex. 7, JR022. In its May 27, 2015 letter, the State advised that Pauma was not "providing a clear description of the kinds of horse racing or lottery games it sought to conduct." Vol. I, Ex. 9, JR026. And at the September 8, 2015 compact meeting, the State continued to request Pauma to provide specific compact proposals regarding new lottery games. Vol. II Ex. 14, JR042:12-43:1; 112:24-113:5; 139:4-140:8. In its November 30, 2015 letter and December 2, 2015 email, the State continued to call attention to Pauma's failure to provide any proposed draft compact language. Vol. III, Ex. 18, JR209; Vol. III, Ex. 19, JR223. By the end of 2015, the problem with the lottery games negotiations had surpassed providing mere "*lists*" of categories or themes. Instead, lottery game negotiations were not proceeding because Pauma failed to provide the specific new lottery game *proposals* that the State appropriately requested.

Second, when on January 27, 2016, Pauma finally provided the State with a detailed legal proposal to expand new lottery games (Vol. III, Ex. 24, JR239-41), its proposal raised several legitimate concerns that the State discussed in its March 30, 2016 letter. Vol. III, Ex. 26, JR244-45. This letter advised Pauma that the State "is willing to negotiate to authorize Pauma to offer certain additional lottery games to be enumerated in the compact." *Id.* at JR244. But the State required further clarity regarding the scope of Pauma's requested games to avoid future disputes between the parties and to avoid authorizing unlawful lottery games. *Id.* As the State

briefed in both its summary judgment motion (ECF No. 36-1, at 27:18-29:3) and opposition to Pauma's motion for summary judgment (ECF No. 40, at 9:4-10:26), these concerns about avoiding future lottery game disputes and inadvertently authorizing illegal lottery games were raised in good faith. The State reasonably wanted to avoid repeating the situation in which the California State Lottery (State Lottery) authorized a game that it believed met the standard for a lawful lottery game, but was ultimately held to be an unlawful "banking game" under the California Constitution. *Western Telcon, Inc. v. California State Lottery,* 13 Cal.4th 475, 488-89 (Cal. 1996). The State's raising of these concerns demonstrated appropriate prudence, and not bad faith.

Pauma attempts to sidestep its critical failure to present a single new lottery game proposal along with supporting terms that could be enumerated in a compact by claiming that the State "could not identify a single new lottery that Pauma could offer" as a result of negotiations. Pauma's Opp'n at 13:20-22. Pauma's brief identifies two specific lottery games operated by the State Lottery ("Lucky for Life" and "Monopoly Millionaire's Club") that the Tribe now apparently believes the State should have offered to Pauma during compact negotiations. *Id.* at 12:28-14:8. But this argument misconstrues the State's duty under IGRA, which is to negotiate in good faith, not to guess at which specific class III lottery games a tribe may or may not want to offer. And *Northern Arapaho Tribe v. State of Wyoming,* 389 F.3d 1308, 1313 (10th Cir. 2004) does not aid Pauma's lottery-based claims. Unlike Wyoming in *Northern Arapaho*, the State here actively negotiated over lottery games, and specifically asked for a new lottery game proposal with supporting terms that could be detailed in a compact.

In sum, if Pauma wanted to compact for a lottery game beyond what the State Lottery is presently authorized to operate, the Record shows that the State remained open to receiving and negotiating over specified requests and related compact provisions. Vol. III, Ex. 26, JR244-45. Unfortunately, Pauma pursued neither

option, ignored the State's ongoing requests for specified compact proposals regarding new lottery games, and commenced litigation prior to negotiating to impasse. Rather than evidencing the State's bad faith, this Record shows that the parties did not compact because Pauma "declined to engage in further negotiations" with the State. *See Coyote Valley I*, 147 F.Supp.2d at 1021-22; *see also Flandreau Santee Sioux Tribe v. South Dakota,* 2011 U.S. Dist. LEXIS 68531, *11 (D.S.D. 2011), quoting *NLRB v. George P. Pilling & son Co.*, 119 F.2d 32, 37 (3d Cir. 1941) ("Agreement by way of compromise cannot be expected unless the one rejecting a claim or demand is willing to make counter-suggestion or proposal."). Accordingly, the State is entitled to summary judgment on Pauma's lottery claims.

B. Pauma's Preference For Litigation Over Negotiations Resulted in the Parties' Inability to Conclude a Compact For On-Track Horse-Racing

In regard to Pauma's third claim for relief against the State for failing to negotiate in good faith for on-track horse racing, the Tribe's opposition complains that the State attempted to make off-track horse racing the focus of negotiations.[2] Pauma's Opp'n at 15:5-16:9. Pauma also argues that the State inappropriately demanded to understand the Tribe's "business plan" for on-track horse racing as a perquisite to further discussions. *Id.* at 15:9-16:2.

The Record does not support Pauma's arguments. The Record shows that the State met and exceeded its duty to negotiate in good faith regarding on-track horse racing. The Record's undisputed facts include: (1) the State agreed to negotiate over on-track horse racing with Pauma (Vol. I, Ex. 2, JR005); (2) the State proposed to use a previously entered into off-track satellite-wagering compact as a starting point for the Tribe's proposed facility (Vol. I, Ex. 7, JR021); (3) the State brought the Board's executive director to the September 8th negotiation session,

[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 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. Both activities require a compact.

and made him available for questioning at the meeting (Vol. II, Ex. 14, JR045-69); (4) the State encouraged Pauma to identify issues that could be further addressed by the executive director or his staff (*id.* at 109:14-110:18); (5) the State provided Pauma with an on-track horse-racing compact between another state and tribe that could possibly serve as a reference for further negotiations (Vol. III, Ex. 16, JR183, 185-205); and (6) the State requested information about the nature of Pauma's proposed on-track horse-racing facility in order to move the negotiations forward (Vol. I, Ex. 9, JR026; Vol. II, Ex. 14, JR044:9-48:24; Vol. III, Ex. 18, JR208-9).

The Record also shows that Pauma's negotiations tactics and failure to authentically engage in negotiations are the reasons why the parties did not conclude these compact negotiations. For example, Pauma complains about the State providing a previously entered into on-track horse-racing compact from North Dakota as a reference for these negotiations. Pauma's Opp'n at 18:16-19:15. This criticism suffers from the same legal flaw as Pauma's lottery-based claims. If the Tribe believed during negotiations that the North Dakota compact incorporated too many state horse-racing laws or excessive fees, then the Tribe should have proposed an alternate agreement incorporating less state laws and a different fee structure. Simply put, the State never attempted to impose the North Dakota compact as a "take-it-or-leave-it" offer. The Tribe's insistence on mischaracterizing this proposal speaks volumes about its apparent goal to sue the State under IGRA no matter how compact negotiations progressed.

Next, Pauma's arguments regarding the State's offer of an off-track horse-racing compact, and access to the Board's executive director, are without merit. Pauma's Opp'n at 15:5-18:11. The State offered Pauma an off-track wagering compact because other tribes in California interested in offering wagering on horse-racing have entered into off-track wagering compacts. The State's offer of this potential option to Pauma did not foreclose the opportunity to offer on-track horse racing and did not constitute bad-faith bargaining. Similarly, the State having the

Board's executive director present at the September 8, 2015 compact negotiating meeting did not demonstrate bad faith. Instead, this action showed the State's commitment to negotiate over provisions relating to the operation of an on-track horse-racing facility on Pauma's Indian lands. Moreover, the Record clearly documents that the executive director answered questions from Pauma's representatives during that meeting (Vol. II, Ex. 14, JR045-69, JR104), and that the State offered Pauma continued access to such experts at future meetings (*id.* at JR075:22-76:6).

Finally, in regard to both lottery games and on-track horse racing, Pauma has no excuse for failing to respond to the draft compact the State provided on April 28, 2016. Vol. IV, Ex. 27, JR246-382. The Record demonstrates that the State remained open to hearing any counter-proposals from the Tribe. Pauma preferred litigation over negotiation. But Pauma's decision to abandon negotiations prior to reaching impasse cannot result in a finding of bad-faith negotiation by the State.

II. THE RECORD SHOWS THAT THE STATE NEGOTIATED IN GOOD FAITH AND PAUMA FAILED TO NEGOTIATE AT ALL OVER PROVISIONS CONTAINED IN THE PROPOSED DRAFT COMPACT

In opposing the State's Motion for Summary Judgment on claims eleven through twenty (collectively, the Draft Compact Claims)[3], Pauma presents a series of arguments that are not supported by the evidence, are irrelevant, and include misstatements or omissions of facts. Nothing raised in Pauma's Opposition shows that there is a genuine issue of material fact. Even when the Record and all reasonable inferences drawn from it are construed in the light most favorable to Pauma, it is clear that the Court should grant the State's Motion on the Draft Compact Claims. Material facts precluding entry of summary judgment are those that, under the applicable substantive law, may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

[3] By excluding some of the SDF-based claims (claims seventeen, eighteen, and twenty) from its cross-motion for summary judgment, Pauma concedes those claims are not ripe for summary judgment in its favor.

Pauma's Opposition shows that the Draft Compact Claims may be distilled to the following question of law: Can a tribe prevail in an IGRA bad faith negotiations lawsuit against a state when the tribe unilaterally refuses to negotiate at all over terms proposed by a state based on the tribe's subjective belief that further negotiations over those terms would be futile? Based on the Record, IGRA, and settled precedent, the answer to that question is an unequivocal "no." Summary judgment should be granted in favor of the State on Pauma's Draft Compact Claims.

A. The Record Demonstrates that each of the Provisions Included in the Draft Compact Are Consistent with IGRA.

Pauma's Opposition essentially argues that the State's transmittal of the draft compact with terms Pauma viewed as unfavorable demonstrates the State's bad faith and supported the Tribe's decision to cut off negotiations. Pauma's Opp'n at 24:18-27:13. The Tribe's refusal to negotiate over the terms in the draft compact cannot serve as the basis for finding the State in bad faith under IGRA. Nor can Pauma establish that the draft's terms that are unrelated to additional gaming rights were so incongruous with IGRA's purposes that they amounted to prohibited topics of negotiation under IGRA. In fact, every topic addressed in the draft compact is negotiable under 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 provisions, are bargained for, and not imposed, in exchange for a meaningful concession. *Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger,* 602 F.3d 1019, 1033 (9th Cir. 2010) *(Rincon).* Because Pauma prematurely withdrew from negotiations, the Record did not develop sufficiently for this Court to be able to determine whether or not IGRA's meaningful concession requirement was required or met.

As a result, Pauma cannot demonstrate that the State was required to and failed to offer meaningful concessions in connection with any revenue sharing provisions in the draft compact.

At the time the State included 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 that the State violated IGRA when it sought during compact negotiations to impose terms requiring revenue sharing to be 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 the Court should grant the State's Motion on Pauma's Draft Compact Claims.

The Record also shows that the State did not unilaterally impose any of the challenged revenue sharing provisions on Pauma, it only proposed terms for a class III gaming compact that would not take effect unless both parties agreed to them. Ironically, the State has only learned through this litigation the reason why Pauma allegedly would not negotiate over the payment provisions in the draft compact. Pauma argues for the first time here that "there was zero chance the State would have reduced the financial burden of the 'complete draft [compact]' through further negotiation." Pauma's Opp'n at 27:11-13. Pauma further argues that the "State should have come forward with substantive evidence from different compact negotiations showing that tribes other than Pauma have successfully bargained" over payment provisions in a compact. *Id.* at 26:6-8. Not only is Pauma's argument completely speculative, but had Pauma raised this point during negotiations, the State could easily have provided "substantive evidence from

different compacts" demonstrating that negotiating with the State would not have been futile.[4]

B. Pauma's Claim that it Failed to Negotiate Due to its Subjective Futility Concerns Requires the Court to Grant Summary Judgment in the State's Favor

Pauma's Draft Compact Claims are based on provisions either included in, or excluded from, the draft compact provided to Pauma on April 28, 2016. Vol. IV, Ex. 27, JR246-382. *Coyote Valley I* stands for the common sense proposition that when a tribe declines to engage in negotiations over provisions in a tribal-state compact, a state's failure to alter those terms cannot constitute a refusal to negotiate in good faith. 147 F.Supp.2d at 1021–22. In *Coyote Valley I*, the tribe involved "counter-offered with a modified compact that, among other things, deleted the challenged provisions entirely" (*id.* at 1021), yet the court found the state negotiated in good faith because the tribe did not engage in further negotiations. *Id.* In the present case, Pauma did not make any counter-offers after the State transmitted the draft compact, apparently because the Tribe assumed it would be futile. Pauma's Opp'n at 27:11-13. As a result, Pauma contends that it should be relieved from any obligation to negotiate over the provisions in the draft compact that form the bases of the Draft Compact Claims. But there exist both factual and legal reasons why the doctrine of futility cannot excuse Pauma's failure to negotiate.

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[4] Since 2013, the State's genuine efforts and successful compact negotiation process have resulted in thirty successfully-concluded compacts. The compacts include a wide variety of economic provisions tailored to each tribe's unique circumstances, ranging from periods of suspended payments, to credits against payments, to payments above the tribe's pro rata share. Twenty of these compacts are in effect and listed in the Federal Register. 78 Fed. Reg. 44,146-01 (July 23, 2013); 78 Fed. Reg. 54,908-01 (Sept. 6, 2013); 79 Fed. Reg. 3241-01 & 02 (Jan. 17, 2014); 79 Fed. Reg. 68,910-01 (Nov. 19, 2014); 79 Fed. Reg. 72,200-01 (Dec. 5, 2014); 80 Fed. Reg. 64,442-02 (Oct. 23, 2015); 80 Fed. Reg. 79,926-01 (Dec. 23, 2015); 81 Fed. Reg. 75,427-01, 02, & 03, 75,428-02 (Oct. 31, 2016); 81 Fed. Reg. 76,960-01 (Nov. 4, 2016); 81 Fed. Reg. 87,585-01 (Dec. 5, 2016).

This year alone, another ten compacts have been executed, with eight of those ratified by the California legislature and presently under review by the Secretary of the Interior. Cal. Gov't Code §§ 12012.81 – 12012.91.

First, it was at Pauma's request that the State agreed, on December 9, 2015, "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. The practical effect of this agreement was to expand the scope of renegotiations to topics beyond new gaming rights. On January 4, 2016, the State again confirmed, for Pauma's benefit and at its request, 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. Having secured this agreement to negotiate for an entirely new compact, Pauma cannot allege that the State acted in bad faith by simply transmitting a draft compact with terms that extend beyond gaming rights.

Second, nothing in the Record shows any attempt by the State to impose any provision of the proposed draft on the Tribe. As the transmittal email's subject line stated, the draft merely constituted "Pauma State's Draft Proposed Compact." Vol. IV, Ex. 27, JR246. 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. On the issue of futility, allocating the burden on the State to show the lack of futility would contradict IGRA's implied mandate under 25 U.S.C. § 2710(d)(3)(A) that negotiations actually take place.

Third, Pauma bears the burden of demonstrating futility. 30A C.J.S. Equity § 96 ("A party seeking to invoke an equitable doctrine bears the burden of proving the doctrine's applicability.") Here, Pauma has not met its burden because its futility argument is speculative and not supported by the Record. Indeed, the Record shows that Pauma lacked any basis to conclude that negotiating over the provisions in the draft compact would be futile. There is no genuine issue of material fact as to whether Pauma can carry its burden of proving futility. The balance of equities is especially egregious here because Pauma seeks equitable

relief from the Court even though it failed to negotiate after receiving the State's draft compact. *See e.g. Rodriguez v. Airborne Express*, 265 F.3d 890, 901 (9th Cir. 2001) (application of virtually any equitable doctrine requires balancing the equities in the particular case). Accordingly, the Record does not support the application of futility to excuse Pauma's full participation in negotiations to reach agreement on a tribal-state gaming compact.

C. IGRA Requires the Parties to Actually Negotiate Before Its Remedial Scheme is Triggered

Pauma argues that once it made a request under IGRA to negotiate, the State's "role in the regulatory scheme" was to offer a compact fully satisfactory to Pauma. Pauma's Opp'n at 22:14-19. Pauma is mistaken. As to the Draft Compact Claims, Pauma also argues that since a tribe can sue under IGRA to enforce a state's duty to negotiate a compact in good faith, IGRA intends that whenever a tribe determines negotiations would be futile, the tribe can cease negotiating and initiate litigation under IGRA. *Id.* at 30:1-3. IGRA does not countenance such an anomalous result.

Pauma misunderstands the State's position on the Draft Compact Claims. Contrary to Pauma's understanding, the State does not ask the Court to level the bargaining playing field by imposing any duty on Pauma that is not expressed or implied in IGRA. The State seeks only to bargain for compact terms that are permissible under IGRA and to conclude a compact. For example, when the State transmitted the proposed draft compact including a revised sovereign immunity waiver, the State was doing precisely what Pauma had requested, which was to open up "the entire compact for renegotiation." Vol. III, Ex. 15, JR177.

The Draft Compact Claims are ripe for summary judgment in the State's favor because the Record demonstrates that the State responded to Pauma's request to negotiate for the "entire compact" in good faith by transmitting a proposed draft compact. The parties' failure to reach agreement on these provisions is attributable entirely to Pauma, not the State. The State's draft compact proposal was not a "take

it or leave it" offer. Because Pauma withdrew from further negotiations, apparently deeming them futile, the State was never given an opportunity to review or consider any counter proposals by the Tribe. Pauma, having declined to engage in further negotiations over the objected-to provisions, cannot reasonably assert that the State's failure to remove those terms constituted bad faith under IGRA. *Coyote Valley I*, 147 F.Supp.2d at 1021-22.

CONCLUSION

The Record before the Court supports granting summary judgment in the State's favor and against Pauma on claims one through twenty in Pauma's SAC.

Dated: December 22, 2017

Respectfully Submitted,

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