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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 REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT ON CLAIMS ONE, TWO, FOUR THROUGH SIXTEEN, AND NINETEEN IN THE SECOND AMENDED COMPLAINT [DKT. NO. 37-1]

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 opposition by the State of California ("State") contains three arguments with fifteen subparts that all put forward varied iterations of one of two points. The first is that the Pauma Band of Mission Indians ("Pauma" or "Tribe") is responsible for the negotiations failing to result in a gaming compact under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq*., "because the Tribe never made specific new lottery game proposals." *See* Dkt. No. 40, 7:28-8:2. The second is that Pauma cannot challenge the propriety of individual terms in the "complete draft [compact]" offered by the State because the Tribe "responded with a premature IGRA lawsuit" rather than object to the exclusion or inclusion of certain language through counterproposals. *See id.* at 8:17-18. This reply will address both of these arguments in turn, first highlighting the misconceptions that plague these positions from a factual standpoint before showing how they are legally flawed as well. One thing to keep in mind throughout this discussion is that both arguments pertain to what *Pauma* supposedly failed to do rather than what *the State* actually did. Shifting the focus enabled the State to eschew presenting *any* evidence as to the objective reasonableness of its own conduct, which was a deliberate strategy arising out of the statutory text that ostensibly says "a tribe must show a prima facie case before the burden will shift to the State to prove that it acted in good faith." *Id.* at 6:20-22.

A critically important piece of information missing from this legal summation is "a prima facie case of what?" The opposition tries to convey that the burden shifting scheme of IGRA requires a tribe to actually prove bad faith before the State must produce evidence to the contrary. The statutory burden placed upon a tribe is not nearly that exacting, however, and simply requires the tribe to "introduce" evidence "suggesting" the state did not respond to a negotiation request in good faith. *See Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019, 1029 (9th Cir. 2010) ("*Rincon II*") (citing 25 U.S.C. § 2710(d)(7)(B)(ii)). Raise a mere suggestion of bad faith behavior and both the statutory text and the legislative materials indicate that the burden then shifts to the state to actually *prove* that it negotiated in good faith with the participa-

ting tribe. *See* 25 U.S.C. § 2710(d)(7)(B)(ii); 134 Cong. Rec. 25377 (1988) ("The subsection requires the State to bargain in good faith with the tribe… and imposes the burden of proof on the State in any court test." (statement of Rep. Mo Udall)). Satisfying this burden requires a state to not just prove its case, but *clearly* prove it due to the Senate Report for IGRA explaining that Congress "trusts that courts will interpret any ambiguities on these issues [of whether a State negotiated in good faith] in a manner that will be most favorable to tribal interests consistent with the legal standard used by courts for over 150 years in deciding cases involving Indian tribes." S. Rep. No. 100-446, at 14-15 (1988).

For whatever reason, the strategy used by the State in this case of not presenting any evidence to counter the suggestion of bad faith let alone prove good faith is simply an extension of its hands-off approach from three prior cases that all resulted in bad faith findings against the State. *See Rincon II*, 602 F.3d at 1037-38 (explaining the State gave "very little upon which to base a finding that [it] has met its burden"); *Estom Yumeka Maidu Tribe of Enter. Rancheria v. California*, 163 F. Supp. 3d 769, 786 (E.D. Cal. 2016) (saying the State presented "no evidence" to rebut the specific bad faith at issue); *Big Lagoon Rancheria v. California*, 759 F. Supp. 2d 1149, 1157 (N.D. Cal. 2010) (indicating "[t]he State ma[de] no effort to [prove that it negotiated in good faith]"). This refusal to defend its own negotiating behavior leaves precious little to discuss aside from correcting misconceptions or engaging in a he-said-she-said debate about the meaning of clear-cut statements in the base record of negotiations. Rather than dabble in the art of self-serving translation, this reply will instead focus on setting forth the facts and law for three dispositive points: (1) the State would not negotiate for lottery games even though it had a legal obligation to do so (*see Northern Arapaho Tribe v. Wyoming*, 389 F.3d 1308 (10th Cir. 2004)); (2) the State would not renegotiate the compact in connection therewith even though it had a legal obligation to do so (*see Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095 (9th Cir. 2006)); and (3) the Court can hear all of the claims challenging specific provisions in the "complete draft [compact]" since the parties reached an impasse on a pivotal issue. *See NLRB v. Tomco Commc'ns, Inc.*, 567 F.2d 871 (9th Cir. 1978).

ARGUMENT

I. *NORTHERN ARAPAHO* AND THE PLAIN TEXT OF IGRA BOTH SHOW THAT THE STATE HAD A LEGAL OBLIGATION TO NEGOTIATE FOR THE ADDITIONAL LOTTERY GAMES THAT PAUMA KEPT REQUESTING OVER AND OVER AGAIN

A. CORRECTING MISCONCEPTIONS

Without question, the main argument running throughout the opposition is that "the State consistently asked Pauma to propose compact language for specific lottery games, and the Tribe repeatedly refused to do so." *See*, *e.g.*, Dkt. No. 40, 13:14-17. The evidentiary support for this argument is a carefully-curated selection of comments by Senior Advisor for Tribal Negotiation Joginder Dhillon arranged in chronological order and presented in a vacuum, trying to create the impression that the State was continually asking for examples of desired lottery games that were never forthcoming. Omitting the responses enables one to paint this picture, but the reality is anything but once the communications from Pauma are added to the mix. For instance, the first entry in the State's list that is dated "January 30, 2015" and explains Mr. Dhillon "asked for examples of the types of lottery games Pauma is considering" actually comes *after* two prior letters from Pauma in which the Tribe explicitly detailed this information:

> [**November 24, 2014 Letter**: Pauma] formally request[ed] 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 [in order to obtain, in part,] punchboards… [and] lottery games that 'use the theme of roulette, dice, baccarat, blackjack, Lucky 7s, draw poker, slot machines, or dog racing' (*see* Cal. Gov't Code § 8880.28); are played on video terminals; are offered by the Multi-State Lottery Association ('MUSL') and not licensed to the State of California; are offered by any other state and not licensed to the State of California; or are part of a unique tribal lottery system. [JR001-JR003]
>
> [**December 23, 2014 Letter**: Pauma tried to stave off any claims of confusion about the subject of the renegotiations by referencing its prior November 24th letter and once again explaining that the] currently-withheld lottery games that Pauma desires to offer include '[p]unchboards… lottery games that 'use the theme of roulette, dice, baccarat, blackjack, Lucky 7s, draw poker, slot machines, or dog racing' (*see* Cal. Gov't Code § 8880.28);

> are played on video terminals; are offered by the Multi-State Lottery Association ('MUSL') and not licensed to the State of California; are offered by any other state and not licensed to the State of California; or are part of a unique tribal lottery system.' [JR008]

These two letters are just part of the picture; bookending the January 30, 2015 letter and its oft-expressed remark that the State somehow still "need[ed] to understand the scope of games Pauma intends to offer" is another letter from the Tribe on May 8, 2015 setting forth the types of lottery games it wanted to negotiate for a third time in writing and fourth time overall:

> [**May 8, 2015 Letter**: Pauma indicated that it wanted to offer *all* lottery games and referenced the non-exhaustive list in the original November 24, 2014 letter that identified] 'punchboards; lottery games that use the themes of roulette, dice, baccarat, blackjack, Lucky 7s, draw poker, slot machines, or dog racing;' those 'played on video terminals;' as well as those offered through the Multi-State Lottery Association, any other state, or a unique tribal lottery system. [JR023-JR024]

Thus, a more complete picture reveals that the first item in the State's list is actually surrounded by three excluded entries from Pauma that clarified time and time again the types of lottery games that were the subject of the renegotiations. The desire for these types of lottery games remained constant and was constantly repeated throughout the process, from Pauma's very first communication on November 24, 2014 to the penultimate letter sent on January 27, 2016 detailing the two minor compact revisions required to expand the permitted lottery games to the limits of State law. As to that, the first revision inserted a definition of "Lottery" into Section 2 of the 1999 Compact that was textually and substantively identical to that in Section 319 of the California Penal Code. [JR240] The second and final revision modified the scope-of-gaming language in Section 4.1(c) of the 1999 Compact to explain that Pauma could "operat[e]… any devices or games that are defined under this compact as a Lottery," such as:

> (1) devices or games that are authorized under State law to the California State Lottery, (2) devices or games that are authorized to the Multi-State Lottery Association, (3) devices or games that are authorized to any other state lottery or any other multi-state lottery association, (4) punchboards, (5)

> 'lottery games that use the themes of roulette, dice, baccarat, blackjack, Lucky 7s, draw poker, slot machines, or dog racing,' (6) lottery games that are played on video terminals, (7) video lottery games that dispense coins or currency, (8) lottery games that incorporate technologies or mediums that did not exist, were not widely available, or were not commercially feasible in 1984 (save for the restriction on the use of the Internet, *supra*), and (9) any other games or devices that fall within the definition of Lottery.

[JR240-JR241] What the substance of this January 27, 2016 letter does is complete a once half-finished picture and show that the notion that Pauma was unable to articulate specific lottery games it desired only has merit in a fantasy world where the State was negotiating with itself.

B. ERRONEOUS DETERMINATIONS [CLAIMS 4 TO 8]

The tack of arguing by omission carries over to the next subsection of the opposition that tries to suggest Mr. Dhillon's conclusion in the March 30, 2016 letter that Article IV, Section 19(f) of the California Constitution "has always been understood to encompass those games authorized for play by the California State Lottery" is really not that big of a deal because he then went on to explain that the State would still consider negotiating "additional lottery games to be enumerated in the compact." Dkt. No. 40, 14:18-24. The omission comes in from the argument not then disclosing that Mr. Dhillon used his interpretation of the Constitutional provision as justification for the State "expressly tak[ing] issue with Pauma's ability under IGRA to seek to negotiate 'devices or games that are authorized to any other state lottery or any other multi-state lottery association,' 'lottery games that are played on video terminals,' 'tribal lottery systems' … and 'video lottery games that dispense coins or currency.'" [JR244-JR245] The true state of affairs, in other words, involved the State outright refusing to negotiate for four subtypes of lottery games and displaying a chronic obliqueness as to whether it would negotiate for additional lottery games more generally. Whether it genuinely would or not is of no significance to the analysis, however, because taking the position that the Constitution does not authorize such games means that the State could not legally conclude a compact cov-

ering such games under IGRA. *See* 25 U.S.C. § 2710(d)(1)(B) (saying a class III game is only legal if a state permits the activity in some fashion). Thus, discussions could have continued forever, but the compact authorizing the new games would have never resulted.

In retrospect, the ultimate outcome of the negotiations on this subject should not have been that surprising seeing that the State had expressed its intent for more than seven months to limit the types of lottery games Pauma could offer to those authorized to the California State Lottery. Despite its contrary statements at the outset of the negotiations, this stance first came to the surface at the September 8, 2015 negotiation session, during which Senior Advisor Dhillon explained that the California State Lottery Act has "some specific policy-based limitations on what the lottery can do," and going beyond those would "present a challenge for us if we are negotiating a compact." [JR081-JR082] In other words, the position advanced by the State from this point on was that its negotiation authority under IGRA was circumscribed by what the California State Lottery could or could not legally do.

Both the statutory text and interpretive case law explain, however, that the pivotal question is not what State law restricts but what it allows. The terms of IGRA make clear that the State has an obligation to negotiate in good faith for a class III game if the activity is "located in a State that permits such gaming for *any* purpose by *any* person." 25 U.S.C. § 2710(d)(1)(B). What this means is that a state must negotiate with a tribe regarding a certain form of gaming if it is not criminally prohibited to *everyone* throughout the state. *See Mashantucket Pequot Tribe v. Connecticut,* 913 F.2d 1024, 1031-32 (2d Cir. 1990). This state of affairs does not exist in California given that the Constitution contains standalone grants of authority for both the California State Lottery and resident tribes to offer such games. *See* Cal. Const. art. IV, §§ 19(d), 19(f). Thus, the ability of either one of these group to offer *some* means that the State has a duty to negotiate for *all*.

This principle might be best articulated in *Northern Arapaho v. Wyoming*, 389 F.3d 1308. This analogous case dealt with a tribe that sought to offer pari-mutuel and calcutta wagering generally because the surrounding state permitted these forms of gaming in

connection with certain events like dog sled racing and rodeos. *Id.* at 1311. The State of Wyoming balked at the desired scope of negotiations and then claimed in federal court that IGRA could not possibly require it to negotiate for certain forms of gaming "without regard to the limitations of Wyoming law." *Id.* at 1311-12. Citing precedent from two outside circuits, the United States Court of Appeals for the Tenth Circuit disagreed with this stance, explaining that the state's argument would turn the compact process of IGRA into a "dead letter" and run afoul of the language and legislative history of the statute that revealed a Congressional intent to "permit a particular [tribal] gaming activity, *even if conducted in a manner inconsistent with state law,* if the state law merely regulated, as opposed to completely barred, that particular gaming activity." *Id.* at 1312 (citing *Mashantucket,* 913 F.2d at 1031; *United States v. Sisseton-Wahpeton Sioux Tribe,* 897 F.2d 358, 365 (8th Cir. 1990)). What this meant for the State of Wyoming is that pari-mutuel and calcutta wagering were both "lawful on Indian land without the restrictions otherwise imposed on off-reservation gaming as a matter of state law," and the state was thus "*clearly* required to conduct negotiations with the Tribe concerning the full gamut of calcutta and pari-mutuel wagering." *Id.* (citing 25 U.S.C. § 2710(d)(1)). The failure of the State of Wyoming to do that meant it "obviously cannot meet its burden of proof to show that it negotiated in good faith." *Id.* at 1313 (citing *Mashantucket,* 913 F.2d at 1032).

The applicable teaching of *Northern Arapaho* and the federal precedent on which it relies is that exhibiting good faith would have required the State to negotiate for all lottery games in general rather than espouse a sentiment to circumscribe the potential tribal games along State policy lines and then carry that into effect eight months later by explaining the authorizing language in the California Constitution "has always been understood to [only] encompass those games authorized for play by the California State Lottery." [JR244] Quite simply, a broad definition of lottery games may have been disagreeable to the State, but it was legally required. Nothing the State raises in the remainder of its argument can remove the taint of bad faith from refusing to negotiate for viable games, not its expressed intention to continue discussions nor its reticence about moving

too quickly in light of the supposedly confusing state of the law post-*Western Telcon, Inc. v. California State Lottery*, 13 Cal. 4th 475 (1996). On the second point, what the State seems to overlook is that the draft lottery game language Pauma provided included a definition of "Lottery" that was identical to – and shared the same meaning with – the one in the California Penal Code, which meant that any lottery games offered under the compact would have to comply with *Western Telcon* and its "neither novel nor unique" principle that a lottery game must disinterestedly put up a prize rather than bet against the participants. *Id.* at 484-85. Though the opposition is rife with comments that the negotiations could have eventually yielded lottery game language if not for the disruptive effect of the present lawsuit, the impasse-cementing final step in the negotiations was the State offering a "complete draft [compact]" that still lacked any language on new lottery games, which under either principal definition of "complete" was a surefire sign that the subject would never be addressed in a voluntarily-negotiated compact. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 465 (2002) (defining "complete" as either "possessing all the necessary parts" or "brought to an end or to a final or intended condition").

C. SURFACE BARGAINING [CLAIM 1]

The theme of Pauma having to singularly carry the burden of the negotiations also appears in regards to the surface bargaining argument, with the State citing the dispositive orders and opinions in the *Coyote Valley* litigation to support its position that "Pauma has no compact authorizing new lottery games today because it never proposed a specific new lottery game to the State." Dkt. No. 40, 16:23-26 & 20:23-24 (citing *In re Indian Gaming*, 147 F. Supp. 2d 1011, 1021-22 (N.D. Cal. 2001) ("*Coyote Valley*")). Putting aside the previously-discussed absurdity of this argument, the dynamics between the parties could not be any more different than those in *Coyote Valley*. In this prior case, the State of California took sole responsibility for authoring an entirely new compact in the span of a few short months in order to ensure an agreement was in place before the end of the annual legislative session – the presumptive deadline by which tribes, including those operating casinos outside of the IGRA scheme like Coyote Valley, would either have to

execute compacts or face federal enforcement actions. *See Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. California*, 629 F. Supp. 2d 1091, 1111, 1115 (E.D. Cal. 2009). Yet, the response from Coyote Valley to the State negotiating this agreement, doing so on a short schedule, and doing so in a manner that would legitimate its illegal gaming operation was to take issue with the labor terms of the agreement and to simply try and "delete[] the challenged provisions entirely" rather than devise a more constructive counter-proposal. *Id.* at 1021. This fact pattern of the State acting expediently in the face of tribal recalcitrance is absent in the present case, as in eighteen months the State was unable to do a fraction of what it accomplished in three months in *Coyote Valley*. Not only that, but the instant situation involves the reversal of roles, as Pauma kept proposing games and compact language while the State just disengaged and showed through its conduct that "the compact should not address at all the subjects encompassed by the challenged [proposals]." *Id.* Surface bargaining ultimately looks at whether a party had a present intention to find a basis for agreement. *See NLRB v. Montgomery Ward & Co.*, 133 F.2d 676, 686 (9th Cir. 1943). Yet, this sort of willingness to make "reasonable effort in some direction to compose… differences with [the other party]" cannot exist when the party simply refuses to make *any* effort at all whether through discussion or counter-proposals. *See NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 134-35 (1st Cir. 1953).

D. FAILURE TO SUBSTANTIATE [CLAIM 9]

The lottery games argument ends with the State claiming it satisfied any substantiation obligation regarding the legality of additional lottery games because it raised a separate point it preferred to discuss and then provided the legal authority to support that. During the first few months of 2016, Pauma sent two negotiation letters to the State, the first detailing the revisions to the 1999 Compact that were required to provide the Tribe with its full lottery rights under Article IV, Section 19 of the California Constitution and the second asking the State to substantiate its legal position on the availability of additional lottery games if it "differ[ed] in any material respect from Pauma's." [JR239-JR243] The easiest obfuscatory response is to say that the California Constitution limits

the tribes to offering only those lottery games authorized to the California State Lottery, and the substantiation requirement aimed to stave this off by putting the State in the untenable position where it would have to prove the Constitution says something other than what it says. Yet, rather than address the issue at hand, the State replied with the rote response that it "need[ed]… more specificity regarding Pauma's stated desire for new lottery games" and then used as its "legal and policy" justification *for this position* the expected argument that "[t]he grant of authority to the Governor to negotiate for lottery games under article IV, section 19, subdivision (f) of the California Constitution has always been understood to encompass those games authorized for play by the California State Lottery." [JR244] In other words, a nonresponsive answer turned the anticipated response into the evidentiary support, subverted the substantiation requirement, and ensured that the State could keep the discussion shrouded in confusion rather than disclose information that could produce actual progress in the negotiations after eighteen months.

II. *SHOSHONE-BANNOCK* SHOWS THAT THE STATE HAD A LEGAL OBLIGATION TO RENEGOTIATE THE 1999 COMPACT WHEN PAUMA COMMENCED RENEGOTIATIONS UNDER SECTION 12.2 OF THE AGREEMENT

The shift to topics other than lottery games involves the State contending that the Tenth Claim for Relief fails because Pauma was not harmed by the State's refusal to renegotiate the 1999 Compact under the mandatory renegotiation provision of Section 12.2 rather than the voluntary amendment provision of Section 12.1. *See* Dkt. No. 40, 23:22-23. As background, the 1999 Compact contains the following two adjacent sections that detail how to alter the contractual relationship during the life of the agreement:

> 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[.]

Dkt. No. 37-29 at P380. A shared understanding of the ground for the discussions seemed to exist at the outset of the process, as Pauma explained that it 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," and the State "agree[d] to commence discussions regarding a Compact which addresses these forms of gaming" and "committed to negotiat[e] in good faith" during the process. [JR002-JR003, JR005] Yet, ten months of narrowly dodging any conversation on the lottery games topic led the State to reverse course and explain it would only *amend* the soon-to-be-expired 1999 Compact to insert certain ill-defined provisions related to "those two [new forms of gaming rights]," and that it never had and never would agree to renegotiate the existing agreement. [JR120, JR183] The inevitable dispute that resulted from the State trying to amend the 1999 Compact under the Section 12.2 renegotiation provision resulted in the ultimately bogus conciliation that holistic renegotiations would instead proceed under the Section 12.1 amendment provision – a change that simply positioned the State to get all the money and regulations it wanted without having to even broach the subject of new gaming rights that instigated the talks. [JR234, JR247-JR382]

Construing compact language in the opposite of the intended manner may be a non-event in the eyes of the State, but it is still the sort of objectively unreasonable act that can and should amount to bad faith conduct under circuit precedent. In *Idaho v. Shoshone-Bannock Tribes*, 465 F.3d at 1099, the Ninth Circuit confronted the reciprocal scenario of a tribe requesting to amend its compact in order to obtain new gaming rights pursuant to a provision that explained the agreement "shall be amended to permit the Tribe to conduct… additional games," and the money-hungry State of Idaho claiming that this language required "renegotiation of the Tribe's Compact in order to arrive at the necessary amendment." *Id.* After stating that compact terms are to "be given their ordinary meaning," the Ninth Circuit went on to reject the State of Idaho's argument by explaining that the "plain language leaves no room for negotiation; it mandates an amendment to permit one thing – the operation of the" additional gaming rights requested by the tribe. *Id.* "If Idaho wanted to condition… amendments on renegotiating the Compact," according to the Ninth Circuit, "it should have bargained for that term." *Id.* at 1100. And yet, that is precisely what happened during the 1999 Compact negotiations when the State

conditioned obtaining new gaming rights on the renegotiation of the agreement, which makes its attempt to amend instead of renegotiate no better and no different than Idaho's attempt to renegotiate instead of amend.

III. *BIG LAGOON* AND NLRA CASE LAW ALLOW A PLAINTIFF TO CHALLENGE SPECIFIC TERMS IN A PROPOSAL SUBJECT TO GOOD FAITH NEGOTIATIONS IF THE PARTIES HAVE REACHED AN IMPASSE ON A CENTRAL PROVISION

A. CORRECTING MISCONCEPTIONS

The use of one overarching argument to challenge a wide swath of bad faith negotiations claims carries over from the opening lottery games section of the opposition to the final one challenging the propriety of any term-specific claims on the basis that Pauma's supposedly "premature[] withdr[a]w[al] from [the] negotiations" meant that "the Record did not develop sufficiently for the Court to determine whether or not" IGRA was satisfied with respect to those provisions. *See* Dkt. No. 40, 25:10-12. "Premature" is a dependent term that derives its meaning from contextual information, however, which means that any inquiry into the ripeness of a claim must take into account the course of the negotiations and the surrounding circumstances. *See NLRB v. Truitt Mfg. Co.,* 351 U.S. 149, 155 (1956). Here, the discussion immediately preceding the transmission of the "complete draft [compact]" involved the State appearing amenable to considering lottery game language for the first time in more than a year and Pauma conveying the requested language in a letter that asked that the parties conduct the negotiations in a piecemeal fashion so the focus could remain on the present discussion. [JR239-JR241] All this bipartite proposal on games and future process did was produce months of silence from the State before it abruptly rejected the concept of piecemeal negotiations and then shifted the discussion away from the lottery games subject altogether by explaining that it was going to transmit the "complete draft [compact]." [JR244-JR245] This letter effectively shut down negotiations on lottery games and the "complete draft [compact]" finished the job with respect to everything else by simply being a tweaked-for-the-worse replica of a compact the State began executing with a neighboring tribe the following day. *See* Dkt.

No. 37-20. In other words, executing the Pala compact provided the State with the necessary justification to stand by the pre-negotiated terms in the "complete draft [compact]," which should now be plainly apparent seeing that the State has cited the terms of this Pala "exemplar" as evidence that it negotiated in good faith with Pauma. *See*, *e.g.*, Dkt. No. 40, 29:10-13. Irrespective of whether or not the State would actually bend on any finely-wrought boilerplate provisions that every negotiating tribe in recent years had to accept, the lottery games issue alone "loom[ed] so large that [the] stalemate as to it… cripple[d] the prospects of any agreement" and thus enabled Pauma to raise that issue and all other perceived instances of bad faith before this Court. *Tomco Commc'ns*, 567 F.2d at 881.

This notion that a bad faith negotiation suit is not limited to just reviewing the main issue causing an impasse has support in the IGRA context as well. To wit, the negotiations between the State and the Big Lagoon Rancheria began with a similar cadence to that in the present case, with the tribe requesting one thing and the State trying to discuss something else. *See Big Lagoon*, 759 F. Supp. 2d at 1155. The one thing Big Lagoon sought was the right to operate a class III gaming facility on its trust lands situated along the shoreline of northern California, and yet all the State would discuss at the outset of the process was locating the future casino on off-reservation lands further inland on account of the environmentally-sensitive area in which the trust lands were located. *See id.* "[P]reserving and protecting… environmentally significant State resources located adjacent to the rancheria" was the State's overriding goal so the proposal it finally sent for an on-reservation casino contained rather stringent "environmental mitigation measures." *Id.* at 1156. It was these environmental mitigation measures that formed the crux of the dispute, and yet Big Lagoon pursued and ultimately prevailed on a separate claim contending that the amount and type of revenue sharing demanded by the State constituted bad faith negotiation. *See Big Lagoon Rancheria v. California*, 789 F.3d 947, 955-56 (9th Cir. 2015) (*en banc*). Thus, an impasse on *one* pivotal issue is all that it takes to bring a full bad faith suit – which is, after all, designed to "process gaming arrangements on an expedited basis" (*see Rincon II*, 602 F.3d at 1041) – rather than expecting a tribe to negotiate

to a mutually-acknowledged impasse on each and every conceivable issue that may come before the federal court.

B. STANDARD FOR SPECIFIC PROVISIONS [CLAIMS 13, 15, 16, 19]

The broad-brush argument above has a counterpart that applies against the merits of the term-based bad faith claims, and that is the State *could* ask for the specific provision at issue because it *can* negotiate on the subject generally under IGRA. *See*, *e.g.*, Dkt. No. 40, 32:6-7. However, as the district court in *Big Lagoon* aptly noted, "that [the State] could have [bargained for a certain subject in good faith] does not mean it actually did so here." *Big Lagoon*, 759 F. Supp. 2d at 1159. An important consideration to keep in mind when gauging the objective reasonableness of a specific term within the 135-page "complete draft [compact]" is that the baseline arrangement between the parties is not de facto State regulation, but *no* State regulation whatsoever. The Congressional record is replete with comments like the following that stress respect for tribal sovereignty and the importance of particularized negotiations:

> [I]t is entirely conceivable that a particular State will have no interest in operating any part of the regulatory system needed for a class III Indian gaming activity, and there will be no jurisdictional transfer recommended by the tribe and the State.

134 Cong. Rec. 24024 (1988). Compact negotiations between the two sovereigns are thus supposed to follow a "reasonable" and "rational" approach where insistence upon a particular term by a state requires a "clear showing that the inclusion of such provision is necessary to avoid… an adverse impact [on the public]." 134 Cong. Rec. 25377 (1988). Yet, all the provisions in the "complete draft [compact]" that truly cross the line could have protected the public interest just as well in a much less invasive way; for instance, the MOU provision *could have* quantified a fair revenue sharing payment up front and certain terms like "gaming facility" and "project" *could have* remained focused on the activity of gambling rather than employing sweeping definitions that have drawn the ire of the last two appointed Assistant Secretaries for Indian Affairs. *See* Dkt. No. 37-32 at P405; Kevin K. Washburn, *Recurring Issues in Indian Gaming Compact Approval,* 20

GAMING L. REV. & ECONS. 388, 395-96 (2016) (discussing an arbitral order striking down a virtually identical definition of "gaming facility" used by the State of Arizona). Sure, while "[i]t is *conceivable*" that the State could have changed its position on these terms through more negotiations, it is simply not *reasonable* to think that in light of the posture of the case and the final terms in contemporaneously-executed compacts.

C. RETRIBUTION-ISM [CLAIM 12]

Before ending, it would be remiss to not address an argument tailored to a specific claim that promises the "State did not single[] out Pauma for differential and detrimental treatment simply because of the prior relations between the parties." Dkt. No. 40, 28:14-16. However, the underlying motion clearly shows that the State *did* single out Pauma for such treatment, whatever the reason may be, by requiring the Tribe to pay a significantly higher percentage of its revenues into the Revenue Sharing Trust Fund ("RSTF"). *See* Dkt. No. 37-1, 36:10-18. Though there is a general perception that "RSTF fees do not go into the pocket of the State" (*see* Dkt. No. 40, 28:24-28), this notion is not necessarily true since the fund "is subject to any conditions imposed by the California Legislature" – the same body that just recently started using Special Distribution Fund ("SDF") monies to cover the State's general administrative expenses, *Rincon II* be damned. *See*, *e.g.*, California Gambling Control Commission, *Minutes of May 29, 2002 Commission Meeting* at pp. 17-18, *available at* http://www.cgcc.ca.gov/documents/minutes/2002/minutes_05_29_2002.pdf (last visited Dec. 16, 2017); California Department of Finance, *California Budget 2017-18 – Fund Condition Statement for the Indian Gaming Special Distribution Fund*, *available at* http://www.ebudget.ca.gov/2017-18/pdf/GovernorsBudget/0010/0855FCS.pdf (last visited Nov. 21, 2017). Thus, any payments Pauma made under the "complete draft [compact]" would likely have been funneled into the General Fund, just like the $30 million the State previously "borrowed" from the SDF. *See*, *e.g.*, *City seeks money from Indian Gaming fund*, SAN DIEGO UNION-TRIBUNE, Oct. 21, 2010, *available at* http://www.sandiegouniontribune.com/sdut-temecula-city-seeks-money-from-indian-gaming-fund-2010oct21-story.html (last visited Nov. 30, 2017).

CONCLUSION

For the foregoing reasons, Pauma respectfully requests that the Court grant the Tribe's motion for summary judgment *en toto*.

RESPECTFULLY SUBMITTED this 22nd day of December, 2017

PAUMA BAND OF MISSION INDIANS

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