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10 **UNITED STATES DISTRICT COURT**
11 **SOUTHERN DISTRICT OF CALIFORNIA**

12 PAUMA BAND OF LUISENO
13 MISSION INDIANS OF THE
14 PAUMA & YUIMA
RESERVATION,

15 Plaintiff,

16 v.

17 STATE OF CALIFORNIA, *et al.*,

18 Defendants.
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Case No. 16-cv-01713-BAS-JMA

ORDER:

- (1) **DENYING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT (ECF No. 37);**
(2) **GRANTING DEFENDANTS'
CROSS-MOTION FOR
SUMMARY JUDGMENT
(ECF No. 36); AND**
(3) **DIRECTING ENTRY OF
JUDGMENT UNDER RULE
54(b)**

22 **OVERVIEW**

23 This action stems from an effort to negotiate a new tribal-state gaming
24 compact under the Indian Gaming Regulatory Act. The Pauma Band of Luiseno
25 Mission Indians of the Pauma & Yuima Reservation ("Pauma" or "Tribe") seeks to
26 offer new forms of gambling at its casino in Northern San Diego County. To make
27 this possible, the Tribe entered into compact negotiations with the State of California
28 and Governor Edmund G. Brown, Jr. (collectively, "State") to expand its gaming

1 rights. However, Pauma now claims the State has failed to negotiate with the Tribe
2 in good faith. Pauma brings suit to trigger a remedial scheme that is designed to
3 result in a new gaming compact.

4 Presently before the Court are Pauma's and the State's cross-motions for
5 summary judgment on the Tribe's bad faith negotiation claims. (ECF Nos. 36, 37.)
6 The parties have also submitted a joint record of their negotiations. (Joint Record of
7 Negotiations ("JR"), ECF Nos. 32-1 to 32-4.) The Court held oral argument on the
8 motions. (ECF No. 48.)

9 There is no shortage of animosity between the parties. When they commenced
10 negotiations to reach a new gaming compact, Pauma and the State were embroiled
11 in litigation concerning an amendment to the parties' operative compact.
12 Unsurprisingly, the parties' negotiations became contentious and unproductive at
13 times. But the joint record does not demonstrate the State has failed to negotiate in
14 good faith. The State met with Pauma several times and expressed a willingness to
15 agree that the Tribe could offer additional forms of gambling at its casino. The State
16 also reached out to other parties for information and obtained sample agreements to
17 help Pauma and the State negotiate a new compact. In addition, to guide the parties'
18 future discussions, the State transmitted a first draft of a new compact. Although
19 Pauma now takes issue with the terms proposed in this initial draft, the Tribe never
20 objected to these terms or otherwise responded to the State's proposal. Finally, at
21 the time Pauma stopped participating in the negotiations and filed this lawsuit,
22 nothing indicated the State was unwilling to continue to negotiate with the Tribe to
23 reach a compromise.

24 The Court cannot conclude on this record that the State has failed to negotiate
25 in good faith. Consequently, for the following reasons, the Court denies Pauma's
26 motion for summary judgment, grants the State's cross-motion for summary
27 judgment, and directs entry of judgment on the claims at issue under Federal Rule of
28 Civil Procedure 54(b).

BACKGROUND

I. Indian Gaming Regulatory Act

There is a “weathered past between Native American tribes and the State of California” when it comes to tribal gaming, and the story starts well before the turn of the century. *See Pauma Band of Luiseno Mission Indians of Pauma & Yuima Reservation v. California*, 813 F.3d 1155, 1159 (9th Cir. 2015); *see also In re Indian Gaming Related Cases*, 331 F.3d 1094, 1095–1107 (9th Cir. 2003) (“*Coyote Valley II*”).

“In the 1970s, some California tribes began to operate bingo halls on their lands as a way to generate revenue.” *Coyote Valley II*, 331 F.3d at 1095. These operations “were controversial because the tribes generally refused to comply with state gambling laws, a situation that developed into a serious point of contention with [the] state government[.]” *Id.* (alterations in original) (quoting *Flynt v. Cal. Gambling Control Comm’n*, 104 Cal. App. 4th 1125, 1132 (2002)).

California responded by attempting to enforce its “bingo statute” against the tribes. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 206 (1987); *see also* Cal. Penal Code § 326.5. A dispute erupted between the State and two tribes, culminating in the Supreme Court’s decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 206 (1987). The tribes prevailed—the Supreme Court held California lacked the authority to enforce its bingo statute on tribal lands. *Id.* at 221–22.

“After the Court’s decision in *Cabazon*, States sought recourse on Capitol Hill.” *Coyote Valley II*, 331 F.3d at 1096. Within a year, “Congress attempted to strike a delicate balance between the sovereignty of states and federally recognized Native American tribes by passing” the Indian Gaming Regulatory Act (“IGRA” or “Act”), 25 U.S.C. §§ 2701–21. *Pauma*, 813 F.3d at 1160. To summarize the Act:

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1 IGRA was Congress' compromise solution to the difficult questions
 2 involving Indian gaming. The Act was passed in order to provide "a
 3 statutory basis for the operation of gaming by Indian tribes as a means
 4 of promoting tribal economic development, self-sufficiency, and strong
 5 tribal governments" and "to shield [tribal gaming] from organized crime
 6 and other corrupting influences to ensure that the Indian tribe is the
 7 primary beneficiary of the gaming operation." 25 U.S.C. § 2702(1), (2).
 8 IGRA is an example of "cooperative federalism" in that it seeks to
 balance the competing sovereign interests of the federal government,
 state governments, and Indian tribes, by giving each a role in the
 regulatory scheme.

9 *Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084, 1092 (E.D. Cal. 2002) (alteration
 10 in original), *aff'd*, 353 F.3d 712 (9th Cir. 2003).

11 To accomplish its purpose, IGRA "creates a framework for regulating gaming
 12 activity on Indian lands." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2028
 13 (2014) (citing 25 U.S.C. § 2702(3)). "The Act divides gaming on Indian lands into
 14 three classes—I, II, and III." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 48
 15 (1996). IGRA then "assigns authority to regulate gaming to tribal and state
 16 governments depending on the class of gaming involved." *Big Lagoon Rancheria v.*
 17 *California*, 789 F.3d 947, 949 (9th Cir. 2015) (en banc).

18 The final category—Class III gaming—"includes the types of high-stakes
 19 games usually associated with Nevada-style gambling." *Coyote Valley II*, 331 F.3d
 20 at 1097. "As a result, Class III gaming is subjected to the greatest degree of control
 21 under IGRA's regulations." *Pauma*, 813 F.3d at 1060. A tribe may conduct Class
 22 III gaming "only if such activities are conducted pursuant to a Tribal-State Compact
 23 entered into by the tribe and a state that permits such gaming, and the Compact is
 24 approved by the Secretary of the Interior." *Id.* (citing *Coyote Valley II*, 331 F.3d at
 25 1097); *see also* 25 U.S.C. § 2710(d)(1), (3)(B). Thus, IGRA contemplates that a tribe
 26 and the relevant state shall negotiate to enter into a compact that (i) permits Class III
 27 gaming and (ii) may address various regulatory issues related to this type of gaming.
 28 25 U.S.C. § 2710(d)(3)(A), (C).

II. 1999 Gaming Compact

“Despite IGRA’s negotiation and compact framework, several unresolved conflicts . . . developed between the State of California and Indian tribes surrounding class III gaming and, especially, gaming devices in casinos. *See Hotel Emps. & Rest. Emps. Int’l Union v. Davis*, 21 Cal. 4th 585, 596 (1999). In particular, “[s]ome gubernatorial administrations were hostile to tribes conducting Class III gaming because it was then prohibited by California’s Constitution, and so the State refused to negotiate with the tribes to permit it.” *Pauma*, 813 F.3d at 1160.

As a result, a coalition of tribes “went directly to the people of California” and “drafted and put on the November 1998 State ballot Proposition 5.” *Coyote Valley II*, 331 F.3d at 1100. Proposition 5 required the State to enter into a model compact with tribes to allow certain Class III gaming activities. *Id.*; *see also Flynt*, 104 Cal. App. 4th at 1136. Proposition 5 passed, but the tribes’ victory was short-lived. The California Supreme Court held that the gaming rights the proposition conferred on the tribes violated the California Constitution’s “anticasino provision.” *Hotel Emps.*, 21 Cal. 4th at 615. “Undeterred, the voters of California responded by amending the California Constitution on March 7, 2000, to create an exception for certain types of Class III Indian gaming notwithstanding the general prohibition on gambling in the State.” *Pauma*, 813 F.3d at 1161 (citing *Coyote Valley II*, 331 F.3d at 1103 & n.11).

Meanwhile, in 1999, a group of tribes had started negotiating with the State to enter into nearly identical compacts under IGRA. *See Coyote Valley II*, 331 F.3d at 1101–07 (detailing the course of negotiations). “In April 2000, Pauma joined more than sixty other tribes who ultimately signed” a copy of this compact—the “1999 Compact.” *Pauma*, 813 F.3d at 1161.

Central to the 1999 Compact “is a formula to calculate the number of gaming devices California tribes are permitted to license.” *Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. California*, 618 F.3d 1066, 1069 (9th Cir. 2010). “The total number of slot machines allowed was restricted by contract language that

1 authorized the continued operation of existing machines, permitted tribes who were
 2 not yet operating machines to operate up to 350 machines, and provided a formula
 3 for a limited license pool for the remaining machines.” *Id.* at 1069. The agreement
 4 allocates these limited licenses “according to a detailed draw process.” *Id.* at 1071.
 5 “The draw process, which includes tiers of priority for different tribes, was designed
 6 to skew the distribution of the available licenses towards those Compact Tribes that
 7 did not yet conduct large gaming operations.” *Id.* Given that Pauma signed a copy
 8 of the 1999 Compact, the Tribe was subject to the limited license pool and this draw
 9 process.

10 **III. 2004 Amendment and Rescission**

11 Over the next few years, an accounting agency—and then the State itself—
 12 administered various draws from the license pool under the 1999 Compacts. *See*
 13 *Colusa*, 618 F.3d at 1071–72. Yet, by the end of 2003, “the State informed the tribes
 14 that the collective license pool had been exhausted.” *Pauma*, 813 F.3d at 1161. “At
 15 the time, Pauma was set to enter into a contract with Caesars to build a Las Vegas-
 16 style casino in place of Pauma’s tent facility near San Diego, but needed more
 17 gaming licenses to do so.” *Id.* at 1161–62; *see also Pauma Band of Luiseno Mission*
 18 *Indians v. Harrah’s Operating Co.*, No. D050667, 2009 WL 3069578 (Cal. Ct. App.
 19 Sept. 28, 2009) (summarizing Pauma’s plan to contract with Caesars to compete with
 20 the Rincon tribe, which had already associated with Harrah’s to build a Nevada-style
 21 casino near Pauma’s smaller casino). Thus, despite Pauma’s request for 750
 22 additional licenses from the license pool draw, it received only 200 licenses. *Pauma*,
 23 813 F.3d at 1161.

24 To obtain the remaining licenses it needed, the Tribe started negotiating with
 25 the State to amend Pauma’s iteration of the 1999 Compact “to abolish the license
 26 pool provision and gain access to an unlimited number of licenses.” *Pauma*, 813
 27 F.3d at 1161. The State in return “demanded substantially more money per operable
 28 license during negotiations.” *Id.* (citing *Rincon Band of Luiseno Mission Indians v.*

1 *Schwarzenegger*, 602 F.3d 1019, 1025 (9th Cir. 2010)). Pauma succeeded in
2 securing an amendment to the compact—the “2004 Amendment”—and the right to
3 operate more machines, but the Tribe also agreed to pay substantially higher fees.
4 *Id.* Pauma’s annual payment for the 1,050 Class III gaming machines it was currently
5 operating at its casino increased from \$315,000 under the 1999 Compact to \$7.75
6 million under the 2004 Amendment. *Id.*

7 As Pauma sought reprieve from the depleted gaming license pool through an
8 amendment to the 1999 Compact, two other tribes adopted a different approach.
9 They sued the State in federal court to challenge its “interpretation of the formula for
10 the license pool” in the 1999 Compact, arguing the formula authorized more gaming
11 licenses than the State claimed. *Colusa*, 618 F.3d at 1069. By this time, the
12 “opaquely drafted and convoluted” license formula had caused the State and certain
13 tribes to be “mired in disputes for much of the period since the bilateral Compacts
14 were signed.” *Id.* Ultimately, in 2010, after the district court ruled in favor of the
15 tribes, the Ninth Circuit closely examined the murky license pool provisions. *Id.* at
16 1070, 1073–82. The Court of Appeals concluded that “40,201 licenses were
17 authorized for distribution statewide through the license draw process.” *Id.* at 1082.
18 This amount was significantly more than the limit the State had placed on the license
19 pool—approximately 23,500—when informing the tribes the pool was depleted. *See*
20 *id.* at 1078.

21 While the federal court system resolved the other tribes’ challenge to the
22 license pool provision, Pauma’s putative deals to expand its casino with a Las Vegas-
23 style operator were falling through. *Pauma*, 813 F.3d at 1162. “[T]he economic
24 recession of 2008 struck and no deal was ever completed.” *Id.* at 1162 n.4.
25 Consequently, Pauma was still operating its same 1,050 gaming devices at its casino.
26 *Id.* Yet, the Tribe “continued paying California the exorbitantly expensive 2004
27 Amendment prices for the[se] same machines it acquired under the 1999 Compact
28 provisions.” *Id.*

1 Pauma took action: “Shortly after the district court’s decision in the action
2 challenging the license pool formula, Pauma filed a complaint asserting eighteen
3 claims attacking the formation of the 2004 Amendment under various theories,
4 including mistake and misrepresentation.” *Pauma*, 813 F.3d at 1162. This prior
5 litigation centered on whether the State had “misrepresented a material fact as to how
6 many gaming licenses were available when negotiating with Pauma to amend its
7 Compact.” *See id.* at 1059–60. In April 2010, the district court “granted Pauma’s
8 request for injunctive relief from the annual \$7.75 million payments, permitting
9 Pauma to revert to the 1999 Compact rate.” *Id.* at 1162. On interlocutory appeal,
10 the Ninth Circuit “left the injunction in place but remanded to the district court for
11 reconsideration of the preliminary injunction factors in light of recent cases,”
12 including—by then—the Ninth Circuit’s decision interpreting the 1999 Compact’s
13 license pool formula summarized above. *Id.*

14 After several more years of litigation, the district court entered summary
15 judgment in favor of Pauma on its misrepresentation claim against the State. *Pauma*,
16 813 F.3d at 1162. In 2015, the Ninth Circuit affirmed. *Id.* at 1167. The Ninth Circuit
17 reasoned that the State misrepresented the number of licenses available because
18 “[t]he formula for calculating the license pool never changed—it just took over a
19 decade to reach a final judicial interpretation which settled a longstanding dispute
20 over the number of licenses it authorized.” *Id.* at 1166. Further, the State’s
21 representation to Pauma in 2003 that the license pool was depleted was material and
22 induced Pauma to enter into the 2004 Amendment to acquire more gaming devices.
23 *Id.* In light of this material inducement, the Court of Appeals held Pauma was
24 entitled “to rescission of the amendment and restitution” in the amount of \$36.2
25 million, which was the sum of the payments Pauma made under the 2004
26 Amendment in excess of what would have been owed under the original 1999
27 Compact. *Id.* at 1173.

1 Yet, the Tribe had hoped for greater relief. Although the district court's
 2 judgment discharged the 2004 Amendment's onerous obligations and allowed
 3 Pauma to recoup millions of dollars in payments, the Tribe was still left with the
 4 1999 Compact and its limitations. Thus, prior to the appeal, Pauma had asked the
 5 district court to vacate its judgment to allow Pauma to again move for summary
 6 judgment on two claims alleging the State negotiated the 2004 Amendment in bad
 7 faith in violation of IGRA. *Pauma Band of Luiseno Mission Indians of the Pauma*
 8 *& Yuima Reservation v. State of California*, No. 3:09-cv-1955-CAB-MDD, 2014 WL
 9 12570173, at *1–2 (S.D. Cal. June 6, 2014). Through this strategy, Pauma aspired
 10 to obtain an order compelling renegotiation of the agreement “so the Tribe can obtain
 11 a successor to [the 1999 Compact].” *Id.* at *2. The district court denied this
 12 additional relief, concluding:

13 Although [] IGRA may allow a court to reform or rescind an unlawful
 14 agreement (which is what Pauma wanted until now), it does not allow
 15 the Court to turn back the clock and compel re-negotiation of an
 16 agreement actually reached ten years ago, let alone one that has been
 17 rescinded and never would have been negotiated in the first place in
 light of the relief the Court has already granted in this case.

18 *Id.* at *5.

19 Pauma cross-appealed this determination, but the appeal failed. *Pauma*, 813
 20 F.3d at 1171–73. The Ninth Circuit agreed with the district court that IGRA's
 21 remedy for bath faith negotiation was inapplicable because Pauma had “agreed to the
 22 2004 Amendment and did not challenge the negotiation process under IGRA”
 23 beforehand. *Id.*

24 **IV. Successor Compact Negotiations**

25 It is against this backdrop—the 1999 Compact's limited license pool, an
 26 amendment based on unrealized hopes of expansion, and years of litigation to unwind
 27 the 2004 Amendment—that the present dispute emerges. As the parties appealed the
 28 district court's rulings in Pauma's action challenging the 2004 Amendment, the Tribe

1 set the gears in motion to possibly obtain a successor to the 1999 Compact by another
2 avenue—new negotiations. On November 24, 2014, Pauma sent the State a request
3 to “commence formal renegotiations” pursuant to Section 12.2 of the 1999 Compact
4 “and/or” the 2004 Amendment. (JR 1.) This provision states:

5 This Gaming Compact is subject to renegotiation in the event the Tribe
6 wishes to engage in forms of Class III gaming other than those games
7 authorized herein and requests renegotiation for that purpose, provided
8 that no such renegotiations may be sought for 12 months following the
effective date of this Gaming Compact.

9 (1999 Compact § 12.2, ECF No. 1-2.)

10 To trigger this provision, Pauma identified two types of Class III gaming not
11 authorized by the 1999 Compact that it wished to conduct. (*See* JR 2.) First, Pauma
12 formally requested renegotiation “on the basis that the Tribe wishes to offer . . . on-
13 track betting at an on-reservation horse track that it plans to construct following the
14 renegotiation of the agreement(s).” (*Id.*) Second, Pauma stated it was seeking to
15 offer additional types of lottery games at its casino. (*Id.*) The 1999 Compact allows
16 Pauma to operate “any devices or games that are authorized under state law to the
17 California State Lottery.” (1999 Compact § 3(c).) Pauma sought to “supplement the
18 lottery games it offers by obtaining the right to conduct any games that are *not*
19 currently authorized under State law to the California State Lottery.” (*Id.*) Further,
20 Pauma identified in its request examples of unauthorized lottery games, including
21 those games that “use traditional, non-electronic punchboards”; “are played on video
22 terminals”; and “are part of a unique tribal lottery system.” (JR 2–3.)

23 Beyond identifying its desired new gambling rights, Pauma highlighted that
24 the 1999 Compact provides that, following a request for renegotiation, “the ‘parties
25 shall confer promptly and determine a schedule for commencing negotiations within
26 30 days of the request,’ and the renegotiations . . . ‘shall be governed, controlled, and
27 conducted in conformity with the provisions and requirements of IGRA, including
28 those provisions regarding the obligation of the state to negotiate in good faith and

1 the enforcement of that obligation in federal court.’” (JR 3 (quoting 1999 Compact §
2 12.3).) Finally, the Tribe requested that the negotiations be kept strictly confidential.
3 (JR 3–4.)

4 On December 15, 2014, the State responded to Pauma’s request, agreeing to
5 commence negotiations regarding a compact that addresses the additional forms of
6 gaming identified by Pauma, but noted that Class III gaming activities “not
7 authorized in California” fall outside the governor’s “constitutional authority to
8 negotiate” and are “not appropriate subjects for inclusion in a Compact.” (JR 5
9 (citing 25 U.S.C. § 2710(d)(1)(B); Cal. Const. art. IV, § 19, subds. (e) & (f)).) The
10 State suggested an initial meeting on December 24, 2014, at the Governor’s Office
11 in Sacramento, California. (*Id.*; *see also* JR 9 (explaining why this specific date was
12 chosen to comply with the deadline in Pauma’s letter and that the State had tried to
13 discuss any scheduling issues with Pauma).) The State also requested that the parties
14 discuss at their initial meeting “preliminary issues, such as process and
15 confidentiality, with the objective of confirming the scope of the confidentiality
16 agreement, as raised in [Pauma’s] letter, and a timeframe for, and the scope of, our
17 negotiations.” (JR 6.)

18 Through the exchange of additional letters, in which the parties discuss
19 accommodating schedules and who will attend the first meeting, the parties agreed
20 to meet in San Diego, California, on January 16, 2015. (JR 8–16.)

21 **A. First Meeting**

22 At their initial meeting, the parties discussed preliminary matters and Pauma’s
23 potential horse racing venture.¹ Because the State has never entered into an on-track
24 horse racing compact with a tribe, it sought details into Pauma’s operation, which
25 Pauma deferred discussion of as premature because the Tribe was hesitant to
26

27 ¹ There is no contemporaneous record of the parties’ first negotiation meeting. After the
28 meeting, the parties exchanged letters in which they memorialize—and dispute—the content of
their discussions. (JR 17–22.)

1 “substantially invest in the project” before knowing whether it would “have the
2 ability to conduct on track betting at all.” (JR 18; *see also* JR 21.) The State pointed
3 out that it had “entered into off-track wagering compacts and that those might be
4 used as a starting point for Pauma’s proposed facility.” (JR 21.) Further, to facilitate
5 the process, the State “offered to bring in someone from the California Horse Racing
6 Board” to assist the parties with their discussions. (JR 18; *accord* JR 21.)

7 As to Pauma’s request for expanded lottery games, the parties offer differing
8 recollections of their discussions. (*Compare* JR 18, with JR 21–22.) The State’s
9 memorialization provides that it “asked for examples of the types of lottery games
10 Pauma is considering,” and that the Tribe’s counsel “referred the State to the games
11 listed in the Tribe’s November 24, 2014 letter.” (JR 21.) Pauma then referenced a
12 prior Ninth Circuit decision concerning tribal gaming rights in California, to which
13 the State then reiterated its “need to understand the scope of games that Pauma
14 intends to offer to help identify issues and establish a legal framework for future
15 negotiations.” (JR 22.) Last, the State “suggested both sides research the general
16 legal framework for the lottery games further,” prior to the parties’ next meeting.
17 (*Id.*)

18 Pauma, on the other hand, recalls that the State—in addition to asking for legal
19 support for Pauma’s position—also described the expanded lottery games “issue as
20 ‘murky’ and requiring further research.” (JR 18.) Moreover, Pauma contends it
21 asked the State to provide its “position in writing as to the games underlying the
22 negotiations before the next meeting, and [the State] agreed to do so.” (*Id.*) The
23 State disputes this claim. (JR 22.)

24 Beyond the gaming rights issues, the State recalls that, upon being asked if the
25 Tribe sought “further amendments to its compact,” Pauma’s counsel “responded that
26 at this time the Tribe wishes to focus on the additional games and nothing broader.”
27 (JR 22.) Further, according to the State, “Pauma indicated it had prepared to discuss
28 solely confidentiality and scheduling issues at the meeting,” and the State’s follow-

up letter notes that “it is hopeful” the parties “can discuss Pauma’s proposals to operate a live horse racing facility and offer additional lottery games in more detail at [their] next meeting.” (*Id.*)

Finally, the parties discussed scheduling their “next meeting in approximately May 2015, as the parties’ participating attorneys face[d] appellate briefing deadlines over the next few months”—presumably related to the then-ongoing 2004 Amendment litigation. (JR 20; *see also* JR 18.)

B. Second Meeting

1. Prelude

A few months passed before the parties reengaged. By this point, the tenor of the negotiations was quickly deteriorating. On May 8, 2015, Pauma sent the State a letter disputing California’s summary of the parties’ first meeting and reiterating the Tribe’s position on its request for expanded lottery games. (JR 23–25.) Pauma’s Chairman particularly took issue with the State’s contention that it did not agree to provide its position on the expanded lottery games issue in writing before the next meeting:

While sensitive to the fact that the State is resistant to put anything in writing out of fear of creating a coherent record for any future bad faith suit, I am more concerned by the amount of time and money Pauma may expend going through an undefined and seemingly inefficient process in which it may be simply spinning its wheels.

(JR 24.) The Tribe then requested that the State identify “before our next meeting . . . the games over which the State is and is not willing to negotiate.” (*Id.*) Next, Pauma takes issue with the State’s proposed process for formulating an on-track horse racing compact, with the Tribe asking the State to meet with the State Horse Racing Board “to formulate the State’s position regarding the civil regulations it would like to negotiate for during forthcoming meetings.” (JR 25.)

1 Last, after raising these grievances, Pauma asks to postpone the next
2 negotiation meeting to accommodate the parties' appeals in the 2004 Amendment
3 litigation:

4 Although this letter may appear to ask a lot from the State on a relatively
5 short schedule, the recent orders in the pending compact litigation have
6 essentially guaranteed that our attorneys will be largely preoccupied
7 until the oral argument scheduled for July 10, 2015. In light of that, the
8 prudent thing to do would be to delay ou[r] next negotiation session
9 from the May 2015 date we contemplated during our first meeting to
10 some point shortly following the scheduled date for the oral argument.

11 (JR 25.)

12 On May 27, 2015, the State responded to Pauma's communication, agreeing
13 to transcribe the parties' future negotiations "so we can focus our energy on
14 discussing and resolving issues, rather than arguing about statements made at prior
15 meetings." (JR 26.) The State also stood by its prior summary of the first meeting,
16 characterizing "the Tribe's posture at that meeting" as being "primarily oriented
17 towards seeking a legal position from the State without providing a clear description
18 of the kinds of horse racing or lottery games it sought to conduct." (*Id.*) Beyond this
19 back-and-forth, the State requested Pauma's Chairman provide it with "dates in early
20 August that would be convenient for you to meet in Sacramento so we can continue
21 our discussions." (*Id.*)

22 Pauma's counsel replied to the State on August 5, 2015, and provided
23 proposed dates at the end of the month for the parties to continue their negotiations.
24 (JR 27.) The Tribe also, again, conveyed its perception that the State was exhibiting
25 a lack of willingness to negotiate for the expanded gaming rights Pauma requested:

26 Given the lack of a concrete response from the State over the past eight
27 months as to whether or not it is actually willing to negotiate for these
28 rights, Pauma has no choice but to simply construe your silence as a
tacit affirmation that these forms of games are indeed available so the
discussion of terms that both parties seemingly desire can finally take
place.

1 (JR 27.)

2 The parties continue to spar by correspondence as they settle on a date for their
3 second meeting and discuss other miscellaneous matters. (JR 29–37.) Ultimately,
4 the parties would agree to meet in Sacramento at the California Attorney General’s
5 Office on September 8, 2015, for a transcribed and recorded negotiation session. (JR
6 33–37.)

7 **2. Negotiation Session**

8 The parties discussed several topics at their second meeting. That being said,
9 a disagreement is interspersed throughout their negotiations. This debate concerns
10 how the parties should move towards reaching an actual compact. The State’s
11 negotiator, “having reviewed the back and forth,” proposes that “the best way to
12 move forward” is for Pauma to “just draft compact language on those two issues”
13 that the Tribe feels needs “to be addressed in the compact.” (JR 42.) The State
14 justifies this request by stating it “will be the best way to at least move things forward
15 so [the parties] are not just arguing about positions” and “are actually working on
16 language that ultimately hopefully will lead to a compact.” (JR 42–43.) Pauma, on
17 the other hand, wants more input from the State before getting started. (JR 75–76.)

18 **i. Horse Wagering**

19 As to substance, the parties first discussed Pauma’s on-track horse wagering
20 request. (JR 42–76.) Pauma expressed that it is “going to be very difficult for us to
21 come up with what a horse racing compact is supposed to be -- look like.” (JR 43.)
22 Although the State previously entered into compacts providing for off-track
23 wagering, these compacts are “15 or 20 pages” and “[r]elatively simple.” (*Id.*) In
24 contrast, Pauma stated a compact providing for operation of a horse race track
25 potentially implicates a wide range of horse racing regulations that “cover a whole
26 slew of things,” like weeks of operation and charity racings. (JR 43; *see also* JR 50–
27 51.) In response, the State asked Pauma to “do [its] best” and come up with a draft—
28 with placeholders as necessary—to “start[] the ball moving.” (*Id.*) The State also

1 explained that it brought the Executive Director of the California Horse Racing
2 Board to the meeting because of the complexity of a tribe conducting on-track betting
3 in California. (JR 44.)

4 During this discussion, the Executive Director informed Pauma that he
5 believes the Tribe's involvement with the horse racing business "would be very well
6 received" because it is "a declining industry" with "tracks closing." (JR 45.) The
7 State also encouraged Pauma to include "off-track wagering" as part of its plans, and
8 the State informed Pauma that it had worked with the Executive Director and his staff
9 "to update the older provisions" in compacts concerning off-track wagering. (JR
10 46.)

11 After more discussion, the State requested that Pauma put together a "shell of
12 something that lays out what" the Tribe is looking for, and the Tribe pushed back
13 because it believed that creating a first draft would be "a massive undertaking," (JR
14 49), and there are "massive amounts of regulations" that the parties may need to
15 consider, (JR 50). The State then repeats its willingness to work with Pauma, as
16 tribal on-track wagering has not been done in California, and the State wants to "try
17 to figure out the best way to do it." (JR 54–55.) The parties thereafter continued to
18 discuss issues related to on-track wagering with the Executive Director, as well as
19 continue their debate about Pauma needing to make the first attempt at a draft
20 compact. (JR 56–76.)

21 **ii. Supplemental Lottery Games**

22 As for the lottery games issue, Pauma asks to "work on the language today."
23 (JR 39.) Its counsel states that in his view, this issue is "incredibly simple" when
24 compared to the horse racing topic. (JR 76–77.) The State, however, again asks
25 Pauma to "put together something and [the State] will respond," with its preference
26 to "just get the ball rolling with some exchange of documents so we can focus on
27 language." (JR 78.)
28

1 Pauma then shares its position on the lottery issue, including what it believes
 2 is the relevant state law framework. (JR 43–47.) The State admits that “there is a
 3 question there,” and that the parties may need to “go back and research the history”
 4 to determine if the Tribe can engage in lottery games beyond those games authorized
 5 to the California State Lottery. (JR 47.) The parties continue to debate this issue,
 6 until they reach a flashpoint:

7 Pauma’s Counsel: . . . We just want the rights to do lottery games. And
 8 I know this is a sensitive area for the State since the
 9 [State] lottery makes like \$5 billion per year.

10 State’s Negotiator: Right. And it goes to all of our kids’ education, right?
 11 I mean --

12 Pauma’s Counsel: I know. And our kids can’t even get education. And
 13 that’s why we are trying to fix this, Joe.

14

15 State’s Negotiator: I mean, actually, to make the point, it does go to
 16 schools statewide, right?

17

18 State’s Negotiator: And it benefits all of our kids, right?

19 Pauma’s Counsel: I get it. But you -- I don’t know if protectionism is,
 20 like, a valid concern under IGRA, though. You know,
 21 there is a way to provide tribes with equal rights.

22 State’s Counsel: Actually, it is valid under IGRA. If you look at
 23 IGRA, one of the things that the State is entitled to
 24 negotiate over is to protect its own gambling industry.
 25 I’m not suggesting we would do that. But that’s
 26 expressed in IGRA.

27 Pauma’s Counsel: That’s a – that’s a colorful interpretation

28 State’s Counsel: It’s straight language. It’s not colorful interpretation.

1 (JR 52–55.) Pauma presses onward, with the State eventually responding that the
 2 issue is what exact games the state constitution may permit the Tribes to conduct
 3 because the relevant constitutional provision simply states “lottery games.” (JR 56–
 4 57.)

5 The parties take a break and return, but the negotiations quickly break down.
 6 (*See generally* JR 96–109.) Pauma’s counsel starts employing sarcasm. (*See* JR 102
 7 (remarking that Pauma wants to race “some elephants” and “donkeys” at its track,
 8 and it is “going to be something else”). And these comments draw the ire of the
 9 State’s negotiator. (*See* JR 109 (“No. You are being sarcastic. And it’s just
 10 ridiculous.”).) Eventually, the State’s negotiator expresses that he believes the
 11 parties “can make a lot of progress on the horse racing side.” (JR 112.) As to the
 12 lottery issue, the State says, “we will see where that goes too. I mean, let’s get some
 13 language and we will respond. At least we will have a framework of – you know,
 14 we’ll have the issues . . . I mean, just arguing back and forth, with all respect, isn’t
 15 really moving us anywhere.” (JR 113.)

16 **iii. Scope of Negotiations**

17 Toward the end of the parties’ meeting, the State’s negotiator asks to focus
 18 “on the next step” and inquires: “What’s the time line? What do we need to do?”
 19 (JR 114.) These questions prompt Pauma’s counsel to bring up the start date of the
 20 future compact they are negotiating for. (*Id.*) Yet, when Pauma wants to broaden
 21 the topics of discussion, the State resists. (JR 117.) Its negotiator emphasizes that
 22 Pauma was “clear that it” only wanted to negotiate regarding “on-track horse racing
 23 and issues related to lottery games.” (*Id.*; *see also* JR 120.) The debate over this
 24 issue quickly degenerates. More sarcasm is employed by Pauma’s counsel, again
 25 drawing the ire of the State’s negotiator. (*See* JR 86–126.)

26 Needless to say, the parties make limited progress during the rest of the
 27 meeting. At the end, the State’s position is twofold. (JR 140.) First, if Pauma seeks
 28 to broaden the negotiations, the State requests that Pauma adhere to the 1999

1 Compact by sending a letter that clarifies the scope of the negotiations. (*Id.*) Second,
 2 the State asks Pauma to send the State “some compact language” regarding the horse
 3 racing and expanded lottery games issues. (*Id.*)

4 **C. Resolution of Scope of Negotiations Dispute**

5 About a month later, Pauma sends the State a letter criticizing the State’s
 6 conduct at the second meeting. (JR 174–81.) After acknowledging the meeting “had
 7 a promising start,” Pauma characterizes the State as trying “to bring the meeting to
 8 an end” by asking Pauma to “unilaterally draft the horse racing and on-track
 9 wagering regulations for its compact by distilling down the many hundreds of pages
 10 of convoluted State laws that have developed over the past eighty years and now
 11 govern these activities.” (JR 174.) Pauma’s Chairman continues: “And this says
 12 nothing about the State’s abject refusal to discuss the lottery games topic even when
 13 Pauma’s counsel proposed a simple one sentence revision to the language currently
 14 in . . . the 1999 Compact . . . to account for those games that are . . . not ‘authorized’
 15 to the California State Lottery[.]” (JR 175.)

16 In addition, Pauma objects—at length—to the State’s position that the parties’
 17 negotiations are limited to the additional gaming rights Pauma identified in its initial
 18 request. (JR 176–77.) Pauma also suggests the State is dodging the cooperative
 19 negotiation process “simply because of bad feelings arising out [of the prior]
 20 litigation or a desire to protect the State Lottery from tribal competition.” (JR 177.)

21 The State responds several weeks later. (JR 182–84.) It initially focuses on
 22 the parties’ dispute as to the scope of negotiations. (JR 182–83.) After incorporating
 23 excerpts from the parties’ prior letters, the State concludes:

24 Pauma did not previously request to negotiate subjects outside of
 25 section 12.2. Pauma now seeks to expand the scope of the negotiations
 26 to include subjects not encompassed by section 12.2 and that the State
 27 has not agreed to renegotiate since receiving Pauma’s November 24,
 28 2014 letter. Under the terms of the compact, the State is under no
 obligation to renegotiate any matters beyond the scope of those
 identified in, or related to, your initial request and declines to do so.

1 (JR 183.)

2 The State also follows-up on the horse racing issue, noting that since the
3 parties' last meeting, the State has "reached out to the National Indian Gaming
4 Commission to obtain information regarding other tribes that may be conducting on-
5 track betting." (JR 183.) The State shares the fruits of its effort by attaching a
6 "Compact Addendum between the Sisseton-Wahpeton Sioux Tribe and the State of
7 North Dakota addressing pari-mutuel horse racing" to serve as a reference for the
8 parties' further discussions. (JR 183, 185–205.) In closing, the State reports that it
9 is "preparing a draft off-track wagering compact for discussion and will forward it to
10 you soon" and "look[s] forward to reviewing Pauma's proposals regarding a
11 framework for final compact language addressing the new forms of gaming that it
12 proposes to offer—horse racing and lottery games." (JR 184.)

13 Several weeks later, Pauma reacts to the State's steadfast position on the scope
14 of negotiations by triggering the 1999 Compact's dispute resolution process. (JR
15 206.) In identifying the dispute, Pauma notes:

16 The amount of time the parties have spent going in circles about these
17 issues should eliminate any need to reiterate the problems let alone
18 provide gross specificity, but it should go without saying that the
19 prevailing dispute relates to the proper interpretation of Sections 12.2
20 and 12.3 of the compact, the position the State has taken in regards to
such issues over the course of the last year of negotiations, whether the
State has negotiated in good faith during this time, and related issues.

21 (JR 206.) The Tribe also expresses its "hope that the parties will approach the future
22 meeting . . . and any ensuing ones in good faith, thereby eliminating any need for
23 federal court involvement." (JR 207.)

24 Several days later, the State acknowledges Pauma's dispute resolution request
25 and suggests the parties meet on December 4, 2015. (JR 208.) The State also
26 summarizes the steps it has taken to move the parties forward on the horse racing
27 issue and also attaches "for discussion a draft compact addendum that would
28 authorize a satellite wagering facility." (*Id.*; *see also* JR 210–21.) As for the

1 expanded lottery games issue, the State notes that it has “asked for draft compact
2 language and received nothing but lengthy letters from [Pauma] or [its] lawyers that
3 seek to blame the State for the lack of progress, but fail to do anything to help the
4 parties move forward towards the conclusion of a compact.” (JR 209.)

5 In follow-up e-mails, the parties discuss scheduling and the location of the
6 dispute resolution meeting. (JR 222–27.) Pauma presses for an in-person meeting
7 near its reservation, but the State pushes back reportedly due to the short notice and
8 a lack of contract carrier flights to San Diego on the agreed-upon date. (JR 225–27.)
9 Pauma again presses the State, suggesting its representatives fly into Ontario instead.
10 (JR 224.) The State’s negotiator repels Pauma, taking issue with what the State
11 believes is the Tribe’s manipulation of the holiday season:

12 With all due respect, your comments about inconvenience and difficulty
13 of scheduling lack credibility and are difficult to take seriously when
14 you requested this meeting . . . at approximately 9 p.m. on the evening
15 before Thanksgiving It appears that you intentionally waited until
16 the evening before a four day holiday weekend to request a meeting
17 within ten days so you can find some basis to argue that the State is not
18 in compliance with its compact obligations. You appear to be
19 implementing a strategy of obtaining a compact by litigation rather than
20 negotiation. IGRA should not be manipulated by either party to avoid
21 the obligation to negotiate in good faith towards the conclusion of a
22 compact. We have tried, and will continue to try to work with you in
23 good faith. We worked over the holiday to provide a response and
24 present draft compact language on the Monday after the holiday.
Despite your many letters and e-mails, the State has yet to receive a
single word of proposed compact language from the Tribe. I believe
we’d do more to further the interests of the Tribe and the State if we
spent more time on developing a compact, than arguing about
scheduling.

25 (JR 223.)

26 The parties met on December 4, 2015, to discuss their scope of negotiations
27 dispute. (JR 228.) Afterwards, Pauma e-mailed the State two letters to support the
28

1 Tribe's interpretation of the renegotiation provision of the 1999 Compact. (JR 228–
2 33.) The State agreed to provide a response within a week. (*See* JR 228.)

3 The State did. (JR 234–35.) Its response provides that the “exchange of
4 information, as well as the discussion at our meeting of December 4, 2015, was
5 helpful to frame the disputed issue,” but the State concludes its interpretation of the
6 1999 Compact's renegotiation provision, “as consistently applied, is supported by
7 the specific compact language and reflects the intention and understanding of
8 compact parties.” (JR 234.) That said, the State agrees to broaden the scope of
9 negotiations:

10 However, rather than focus additional time and energy on this dispute,
11 the State is amenable and now agrees, pursuant to section 12.1 of the
12 compact, to enter into negotiations for a new or amended tribal-state
13 gaming compact To be clear, this letter reflects the State's
14 understanding that both parties are amenable to considering all aspects
of the existing compact and other appropriate provisions to ensure that
we are able to achieve our mutual objectives.

15 (JR 234.) Next, the State cautions Pauma that it is engaged in “compact negotiations
16 with a large number of tribes,” emphasizing that it is committed to develop a new
17 compact but wants to “be up front with [the Tribe] about the demands on [the State's]
18 time to ensure that we set realistic timeframes.” (JR 235.) Finally, the State requests
19 Pauma provide a date for a future meeting, and the State's negotiator notes that he is
20 “amenable to conducting many of our meetings by phone to avoid cost and
21 inconvenience and to allow us to focus our efforts on productive negotiations.” (*Id.*)

22 Several days later, the Tribe replied to the State's offer “to negotiate under the
23 voluntary negotiation provision of” the 1999 Compact. (JR 236.) The Tribe asks the
24 State to confirm that negotiations under the voluntary provision will include the new
25 forms of gaming Pauma is seeking. (*Id.*) The Tribe's Chairman then informs the
26 State he will contact it “in short order about scheduling the next negotiation session
27 and the issues” to be addressed at that meeting once the scope of the current
28 negotiations are confirmed. (*Id.*)

1 A few weeks later, the State confirms that “the entire compact” is up for
2 negotiation. (JR 238.) The State then reiterates that it “has provided Pauma with
3 draft compact language on the issue of off-track betting and a complete compact
4 previously approved by the Department of the Interior governing tribal horse racing
5 in another state.” (*Id.*) The State’s response next provides: “We have requested, but
6 not received, the Tribe’s plans for on-track betting and proposed language regarding
7 authorized lottery games. We look forward to receiving and reviewing such
8 documentation as part of the next step in our negotiations to ensure they move
9 forward in a constructive manner.” (*Id.*)

10 **D. The State’s Draft Compact**

11 With the parties’ dispute concerning the scope of negotiations resolved,
12 Pauma’s counsel sends the State a letter several weeks later. (JR 239–41.) The letter
13 does not include further negotiation on the horse racing provision; it instead focuses
14 solely on the Tribe’s request for expanded lottery games. (JR 244–45.) Further, the
15 Tribe’s counsel tells the State:

16 Pauma prefers to conduct the negotiations in a piecemeal fashion,
17 focusing on one material issue and then moving on to the next only after
18 the parties have largely agreed on language for the final compact. It is
19 my view that structuring the negotiations in such a manner will foster
20 productivity and allow the parties to seek court guidance regarding a
21 particular issue should an impasse arise while simultaneously remaining
free to negotiate the other issues that come under the ambit of these
negotiations.

22 (JR 241.)

23 As to the lottery games, Pauma’s counsel suggests “two revisions” to the 1999
24 Compact to provide the Tribe with the gaming rights it seeks. (JR 240–41.) These
25 revisions involve inserting a definition for the term “Lottery” and amending the
26 scope of permitted lottery games to broaden it to include at least nine categories of
27 additional lottery games. (*Id.*) In closing, the Tribe informs the State that as it
28 considers Pauma’s letter, the Tribe “will begin to formulate positions on other

1 topics—including the horse racing—so the parties may turn to those once we have
2 reached a consensus on the lottery provisions.” (JR 241.)

3 When the State does not respond to Pauma’s piecemeal negotiation proposal
4 in the next several weeks, Pauma follows-up. (JR 242–43.) The Tribe emphasizes
5 that it has been “four hundred and seventy (470) days since Pauma conveyed its
6 request to commence renegotiations of the 1999 Compact” and “respectfully
7 request[s] that the Office of the Governor expedite its response” to Pauma’s most-
8 recent proposal. (JR 242.)

9 In a response several weeks later, the State declines Pauma’s offer to “conduct
10 negotiations in a piecemeal fashion.” (JR 244.) The State rationalizes:

11 Such an approach has no basis in the dispute resolution framework
12 created within the Indian Gaming Regulatory Act (IGRA) that governs
13 the possibility of an impasse in the negotiations, limits the ability of the
14 parties to achieve consensus by giving and taking on the wide range of
15 issues that are addressed in bilateral compact negotiations, and is
16 remarkably inefficient.

16 (*Id.*)

17 Next, in addressing Pauma’s lottery games proposal, the State argues that the
18 governor’s authority to negotiate for lottery games under the California
19 Constitution’s tribal gaming provision “has always been understood to encompass
20 those games authorized for play by the California State Lottery.” (JR 244.) That
21 said, the State tells Pauma that it “is willing to negotiate to authorize Pauma to offer
22 certain additional lottery games to be enumerated in the compact.” (*Id.*) The State
23 continues:

24 Specifying the games provides clarity as to the scope of the
25 authorization, avoids future disputes between the parties, and mitigates
26 the risk of running afoul of other prohibitions on how lottery games may
27 be conducted, such as the keno game offered by the California State
28 Lottery that was found to be an illegal banked game by the Supreme
Court in *Western Telcon, Inc. v. California State Lottery* (1996) 13 Cal.
4th 475.

(*Id.*) “Furthermore, the State expressly takes issue with Pauma’s ability under IGRA to seek to negotiate ‘devices or games that are authorized to any other state lottery or any other multi-state lottery association,’ ‘lottery games that are played on video terminals,’ ‘tribal lottery systems’ or other lottery systems to the extent operated or conducted off tribal lands, and ‘video lottery games that dispense coins or currency.’” (JR 244–45.) Finally, the State tells Pauma that it will provide the Tribe with “a complete draft document to guide our future discussions within the next few weeks.” (JR 245.)

Several weeks later, the State sends Pauma a “draft compact” by e-mail. (JR 246–382.) In a margin comment to the draft compact’s authorization of Class III gaming, the State notes that it “is open, as indicated in prior correspondence, to discussion regarding the authorization of additional enumerated [lottery] games.” (JR 261.) The State also comments that it “has proposed” an off-track wagering compact “that can be incorporated as an Appendix or negotiated and concluded as a separate class III gaming compact.” (*Id.*) Pauma, however, did not respond to either the State’s letter explaining its position on the additional lottery games or its proposed draft compact.

V. This Action

A few months later, the Tribe filed this action. In its Second Amended Complaint, Pauma brings a torrent of twenty claims against the State for “bad faith negotiation” under IGRA. (Second Am. Compl. (“SAC”) ¶¶ 210–310.) The Tribe requests that this Court “find that the State failed to negotiate in good faith under Section 2710(d)(7)(B)(iii) of IGRA and trigger the statutory remedial scheme set forth in Section 2710(d)(7)(B)(iii)-(vii).” (*Id.* Prayer ¶ 1.) Pauma now moves for summary judgment on sixteen of its bad faith claims. (ECF No. 37.) The State, in turn, moves for summary judgment on all twenty of Pauma’s IGRA claims. (ECF No. 36.)

LEGAL STANDARD

“A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought.” Fed. R. Civ. P. 56(a). Summary judgment is appropriate where the moving party demonstrates the absence of a genuine issue of material fact and entitlement to judgment as a matter of law. *Id.*; see also *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A fact is material when, under the governing substantive law, it could affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute about a material fact is genuine if “the evidence is such that a reasonable [factfinder] could return a verdict for the nonmoving party.” *Id.*

ANALYSIS

I. IGRA’s Good Faith Requirement

IGRA provides that—upon receiving a tribe’s request to negotiate a compact permitting Class III gaming—“the State shall negotiate with the Indian tribe in good faith to enter into such a compact.” 25 U.S.C. § 2710. Provided that 180 days have elapsed since the tribe’s request to negotiate, the tribe “may initiate a cause of action” in federal court “arising from the failure of a State . . . to conduct such negotiations in good faith.”² *Id.* § 2710(d)(7)(A)(i), (B)(i).

² In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), the Supreme Court gutted IGRA’s enforcement mechanism, holding that the Eleventh Amendment bars tribes from suing states in federal court for failing to negotiate in good faith. The State of California, however, has waived its sovereign immunity to Pauma’s IGRA claims. See Cal. Gov. Code § 98005 (providing the State “submits to the jurisdiction of the courts of the United States” for a tribe’s claim “arising from the state’s refusal to enter into negotiations with that tribe for the purpose of entering into a different Tribal-State compact pursuant to IGRA or to conduct those negotiations in good faith, the state’s refusal to enter into negotiations concerning the amendment of a Tribal-State compact to which the state is a party, or to negotiate in good faith concerning that amendment”); see also *Hotel Emps.*, 21 Cal. 4th at 615 (noting the final sentence of California Government Code § 98005 is “obviously intended to restore to California tribes the remedy provided in IGRA” that became ineffective after *Seminole Tribe*).

1 IGRA does not define the term “good faith.” *See* 25 U.S.C. § 2710; *see also*
 2 *id.* § 2703 (listing definitions for the Act). But the statute does provide that in
 3 evaluating whether a state has negotiated in good faith, the court:

4 (I) may take into account the public interest, public safety,
 5 criminality, financial integrity, and adverse economic impacts on
 6 existing gaming activities, and

7 (II) shall consider any demand by the State for direct taxation of the
 8 Indian tribe or of any Indian lands as evidence that the State has
 not negotiated in good faith.

9 *Id.* § 2710(d)(7)(B)(iii). Further, in addition to providing these two criteria for
 10 assessing good faith, IGRA lists seven permissible negotiation topics for tribal-state
 11 compacts. *Id.* § 2710(d)(3)(C). The compact may include “provisions relating to”
 12 any of the following:

13 (i) the application of the criminal and civil laws and regulations of the
 14 Indian tribe or the State that are directly related to, and necessary for,
 15 the licensing and regulation of [gaming] activity;

16 (ii) the allocation of criminal and civil jurisdiction between the State and
 17 the Indian tribe necessary for the enforcement of such laws and
 18 regulations;

19 (iii) the assessment by the State of such activities in such amounts as are
 20 necessary to defray the costs of regulating such activity;

21 (iv) taxation by the Indian tribe of such activity in such amounts
 22 comparable to amounts assessed by the State for comparable activities;

23 (v) remedies for breach of contract;

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

26 (vii) any other subjects that are directly related to the operation of
 27 gaming activities.
 28

1 *Id.* These seven topics, however, are “circumscribed by one key limitation on state
 2 negotiating authority: ‘Except for any assessments that may be agreed to under [§
 3 2710(d)(3)(C)(iii)], nothing in this section shall be interpreted as conferring upon a
 4 State . . . authority to impose any tax, fee, charge, or other assessment upon an Indian
 5 tribe’” *Rincon*, 602 F.3d at 1028 (quoting 25 U.S.C. § 2710(d)(4)). “IGRA
 6 limits permissible subjects of negotiation in order to ensure that tribal-state compacts
 7 cover only those topics that are related to gaming and are consistent with IGRA’s
 8 stated purposes.” *Id.* at 1028–29 (footnotes omitted).

9 Given IGRA’s structure, the Ninth Circuit has reasoned “that the function of
 10 the good faith requirement and judicial remedy is to permit the tribe to process
 11 gaming arrangements on an expedited basis, not to embroil the parties in litigation
 12 over their subjective motivations.” *Rincon*, 602 F.3d at 1041. Consequently, “good
 13 faith should be evaluated objectively based on the record of negotiations, and . . . a
 14 state’s subjective belief in the legality of its requests is not sufficient to rebut the
 15 inference of bad faith created by objectively improper demands.” *Id.*

16 Beyond this guidance, “IGRA’s legislative history also makes clear that the
 17 good faith inquiry is nuanced and fact-specific, and is not amenable to bright-line
 18 rules.” *See Coyote Valley II*, 331 F.3d at 1113; *see also* S. Rep. No. 100–446, at 14
 19 (1988) (“The terms of each compact may vary extensively depending on the type of
 20 gaming, the location, the previous relationship of the tribe and State, etc.”). Further,
 21 a state is not “guilty of bad faith” in compact negotiations simply because “it takes a
 22 ‘hard line’ negotiating position” with the tribe. *See Rincon*, 602 F.3d at 1038. “[A]
 23 ‘hard line’ stance is not inappropriate *so long as* the conditions insisted upon are
 24 related to legitimate state interests regarding gaming and the purposes of IGRA.” *Id.*
 25 at 1039 (emphasis in original). Yet, if the “hard line” position “results in a ‘take it
 26 or leave it offer’ to the tribe to either accept nonbeneficial provisions” outside the
 27 scope of those topics authorized by IGRA or go without a compact, the State acts in
 28 bad faith. *See id.*

1 IGRA also includes a burden-shifting mechanism for bad faith claims. The
 2 initial burden is on the tribe, which must introduce evidence that: (1) “a Tribal-State
 3 compact has not been entered into”; and (2) the State has either failed to respond to
 4 the tribe’s request “in good faith” or has failed to respond to the request altogether.
 5 25 U.S.C. § 2710(d)(7)(B)(ii)(I)–(II). The burden of proof then shifts to “the State
 6 to prove that the State has negotiated with the Indian tribe in good faith to conclude
 7 a Tribal-State compact governing the conduct of gaming activities.”
 8 *Id.* § 2710(d)(7)(B)(ii).

9 If the court concludes the state has failed to negotiate in good faith, IGRA
 10 provides for a multi-step remedy. First, the court shall order the state and tribe to
 11 conclude “a compact within a 60-day period.” 25 U.S.C. § 2710(d)(7)(B)(iii). If,
 12 however, the parties are still unsuccessful in reaching an agreement, they must
 13 “submit to a mediator appointed by the court a proposed compact that represents their
 14 last best offer for a compact.” *Id.* § 2710(d)(7)(B)(iv). The mediator then chooses
 15 the proposed compact that “best comports with the terms of [IGRA] and any other
 16 applicable Federal law and with the findings and order of the court.” *Id.* Finally,
 17 “[i]f the State does not accept the mediator’s chosen compact within 60 days, the
 18 Secretary of the Interior shall prescribe, consistent with the mediator’s chosen
 19 compact and with the terms of IGRA, the conditions upon which the tribe may
 20 engage in class III gaming.” *Coyote Valley II*, 331 F.3d at 1098 (citing 25 U.S.C.
 21 2710(d)(7)(B)(vii)).

22 There are two significant decisions from the Ninth Circuit interpreting the
 23 good faith requirement—both involving the State of California—that further guide
 24 this Court.

25 **A. *Coyote Valley***

26 In *Coyote Valley II*, 331 F.3d 1094 (9th Cir. 2003), the Ninth Circuit applied
 27 IGRA’s good faith standard to consider a challenge to several provisions in the 1999
 28 Compact. There, the court summarized the lengthy background underpinning the

1 1999 Compacts, including California’s negotiations with various tribes to formulate
2 this agreement. *Id.* at 1095–1106. The plaintiff Coyote Valley tribe initially signed
3 a letter of intent to enter into the 1999 Compact, but it then held off over concerns
4 with the agreement. *Id.* at 1106. The tribe ultimately brought suit against California
5 alleging bad faith negotiation, and the district court ruled against the tribe. *Id.* at
6 1107.

7 On appeal, the Ninth Circuit classified Coyote Valley’s bad faith arguments
8 into “two kinds.” *Coyote Valley II*, 333 F.3d at 1109. First, the court considered the
9 tribe’s “procedural” objection “that the State’s conduct during negotiations—
10 specifically its dilatory tactics over the course of a seven-year period—constitutes
11 bad faith.” *Id.* Having reviewed “the history of negotiations,” the Ninth Circuit held
12 it could not “conclude. . . as a procedural matter, the State has refused to negotiate in
13 good faith.” *Id.* It reasoned that the record showed California Governor Gray
14 Davis’s Administration had “actively negotiated” with the tribes, “including Coyote
15 Valley,” despite that the Davis Administration did not have the obligation to do so
16 before the ratification of the state constitutional amendment permitting tribal gaming.
17 *Id.* at 1110. “Moreover, at the time Coyote Valley filed its amended complaint with
18 the district court . . . , the State remained willing to meet with the tribe for further
19 discussions.” *Id.* Thus, the Ninth Circuit concluded that to the extent the tribe had a
20 “valid objection to negotiations by the Davis Administration,” the objection was to
21 the substance of several provisions in the 1999 Compact, not “to the timing and
22 procedures of” the negotiations. *Id.*

23 Turning to the tribe’s substantive objections, the Ninth Circuit analyzed
24 Coyote Valley’s challenges to three provisions contained in the 1999 Compact.
25 *Coyote Valley II*, 333 F.3d at 1109. The first provision was the 1999 Compact’s
26 establishment of a “Revenue Sharing Trust Fund” “that grants a maximum of \$1.1
27 million dollars to each of the State’s non-gaming tribes each year.” *Id.* at 1105 (citing
28 1999 Compact § 4.3.2.1.). This revenue sharing fund is financed by the compacting

1 tribes’ gaming device license fees. *Id.* Coyote Valley argued that because this fund
 2 “requires payments from compacting tribes that go beyond amounts necessary to
 3 defray the costs incurred by the State in regulating class III gaming,” the fund
 4 “provision cannot properly be included in a Tribal-State compact.” *Id.* at 1110. And,
 5 to draw it all together, Coyote Valley argued that California negotiated in bad faith
 6 by “insisting that this forbidden provision be included in the compact.” *Id.*

7 The Ninth Circuit was unconvinced. *Coyote Valley II*, 333 F.3d at 1111. It
 8 reasoned that IGRA provides a compact “may include provisions relating to . . .
 9 subjects that are directly related to the operation of gaming activities,” and the
 10 revenue sharing fund provision “falls within the scope” of this topic. *Id.* Further,
 11 the sharing of gaming revenue with non-gaming tribes advances IGRA’s goal of
 12 promoting tribal economic development and self-sufficiency. *Id.* Finally, the State
 13 had offered meaningful concessions in exchange for this provision by negotiating for
 14 Class III gaming and supporting an amendment to its constitution “to grant a
 15 monopoly to tribal gaming establishments.” *Id.* at 1112.

16 The Ninth Circuit performed a similar analysis for the remaining two
 17 challenged provisions, which concerned labor relations and a fund that the tribes had
 18 to pay into to support “programs designed to address gambling addiction” and “state
 19 and local government agencies impacted by tribal gaming. *Coyote Valley II*, 333
 20 F.3d at 1106–07, 1113–17. The Court concluded these provisions also did not violate
 21 IGRA. *Id.* at 1115–17. Thus, having resolved Coyote Valley’s procedural and
 22 substantive objections in the State’s favor, the Ninth Circuit concluded that the State
 23 did not act in bad faith. *Id.* at 1095, 1117.

24 **B. *Rincon Band of Luiseno Mission Indians v. Schwarzenegger***

25 With a shift in gubernatorial administrations, the landscape changed by the
 26 time the Rincon tribe sought to renegotiate certain provisions of the 1999 Compact
 27 in 2003. *See Rincon*, 602 F.3d at 1024. Rincon, one of Pauma’s competitors in the
 28 gambling industry, had “began to generate significant revenue that enabled it to

1 improve tribal governmental functions and become economically self-sufficient” and
2 wished “to expand its operations beyond what the 1999 compact permitted.” *Id.*
3 However, instead of asking in negotiations for “funds to help defray the costs of
4 gaming, or to benefit Indian tribes, the State demanded that Rincon pay a significant
5 portion of its gaming revenues into the State’s general fund.” *Id.* Rincon countered
6 that it would pay some fees per gaming device, but emphasized that the proceeds
7 “had to be limited to paying for the costs of regulating gaming, building
8 infrastructure needed to support gaming operations, and mitigating adverse impacts
9 caused by gaming operations.” *Id.* at 1025. “The State held firm in its demand that
10 a portion of tribal gaming revenues be paid into the State’s general fund, rather than
11 into an earmarked fund.” *Id.* Rincon re-countered, “offering slightly increased per
12 device fees,” and this back-and-forth continued until the parties “reached an
13 impasse” approximately a year after the State’s initial revenue-sharing demand. *Id.*
14 at 1025–26. The parties then filed cross-motions for summary judgment, and the
15 district court ruled in favor of Rincon. *Id.* at 1026.

16 The State appealed, and the Ninth Circuit applied IGRA’s burden-shifting
17 framework. *See Rincon*, 602 F.3d at 1029. The court initially reasoned that once
18 Rincon offered evidence that the State attempted to “impose taxation” through its
19 demands—over Rincon’s objections—for payments into the State’s general revenue
20 fund, the burden shifted to the State to prove it had negotiated with Rincon in good
21 faith. *See id.* at 1029–32, 1038–39. The Ninth Circuit “conclude[d] that the State
22 failed to meet its burden.” *Id.* at 1029.

23 In reaching this result, the Ninth Circuit distilled its reasoning from *Coyote*
24 *Valley II* and applied it to the State’s expanded general fund revenue request, which
25 exceeded the scope of the revenue requests analyzed in *Coyote Valley II* concerning
26 payments into specialized, gaming-related funds. *Rincon*, 602 F.3d at 1032–40.
27 Then, after concluding “that general fund revenue sharing is neither authorized by
28 IGRA nor reconcilable with its purposes,” the Ninth Circuit rationalized that where

1 “the State demands significant taxes and fails to offer any ‘meaningful concessions’
 2 in return, a finding of bad faith is the only reasonable conclusion.” *Id.* at 1036
 3 (emphasis omitted). Accordingly, the Court of Appeals also examined whether the
 4 State had offered Rincon any meaningful concessions, and found that it did not. *Id.*
 5 at 1036–40. Hence, the State’s hard line position on general fund revenue sharing
 6 forced the tribe to either choose between going without an amended compact or
 7 accepting provisions outside the permissible scope of IGRA’s negotiation topics. *Id.*
 8 at 1039. And forcing this choice on the tribe amounted to bad faith on behalf of the
 9 State. *Id.* at 1042.

10 **II. Pauma’s Bad Faith Negotiation Claims**

11 The Court turns to applying this framework to Pauma’s twenty claims for bad
 12 faith negotiation under IGRA. All of these claims arise from the same course of
 13 negotiations summarized above. For each claim, Pauma highlights either an aspect
 14 or specific part of the negotiations and alleges that the State’s conduct shows a lack
 15 of good faith. The possible relief for all of these claims is the same: compelled
 16 negotiation of a new compact.

17 Pauma’s numerous, individualized claims draw attention to certain portions of
 18 the parties’ negotiations, but the Court is hesitant to take a fragmented approach to
 19 the good faith inquiry—an approach Pauma’s claims occasionally invite. As
 20 mentioned above, this inquiry is “nuanced and fact-specific,” is “not amenable to
 21 bright-line rules,” *see Coyote Valley II*, 331 F.3d at 1113, and requires an objective
 22 evaluation “based on the record of negotiations,” *see Rincon*, 602 F.3d at 1041. Thus,
 23 the Court has considered the entirety of the negotiations in weighing whether:
 24 (1) Pauma demonstrates that the State did not respond to the Tribe’s request to
 25 negotiate a compact “in good faith”; and (2) if so, the State meets its burden to “prove
 26
 27
 28

1 that the State has negotiated with [Pauma] in good faith.”³ See 25 U.S.C. §
2 2710(d)(7)(B)(ii).

3 Having done so, all of Pauma’s claims encounter the same problem: the
4 parties never “reached an impasse” in their negotiations to reach a new compact. See
5 *Rincon*, 602 F.3d at 1026. The joint record reveals not only an incomplete course of
6 negotiations with untested bargaining positions, but also a first draft of a new
7 compact that was never responded to. Consequently, when this case’s circumstances
8 are compared to those encountered in *Coyote Valley II* or *Rincon*, all of Pauma’s
9 claims appear premature. The Tribe implicitly recognizes this problem, and Pauma
10 labors throughout its pleadings and briefing to portray the negotiations as being at a
11 standstill and coming to a close when Pauma filed suit. But the joint record does not
12 substantiate this portrayal. Nothing demonstrates the parties reached an impasse or
13 that the State was unwilling “to meet with the tribe for further discussions.” See
14 *Coyote Valley II*, 331 F.3d at 1110.

15 Ultimately, because the Court “cannot conclude from the history of
16 negotiations recounted above that . . . the State has refused to negotiate in good faith,”
17 the Court grants summary judgment against the Tribe on its bad faith claims. See
18 *Coyote Valley II*, 331 F.3d at 1095, 1109, 1117 (concluding “that the State has
19 negotiated in good faith” and affirming the district court’s decision to “den[y] the
20 [tribe’s] motion and enter[] judgment for the State”). The Court further expands on
21 these claims below.

22
23
24 ³ The State objects to Pauma’s introduction of evidence outside the joint record of
25 negotiations, largely on the grounds that this evidence is irrelevant, unduly prejudicial, or hearsay.
26 (ECF No. 40-1.) “[W]hile a court will consider a party’s evidentiary objections to a motion for
27 summary judgment, ‘[o]bjections such as lack of foundation, speculation, hearsay and relevance
28 are duplicative of the summary judgment standard itself.’” *Obesity Research Inst., LLC v. Fiber
Research Int’l, LLC*, 310 F. Supp. 3d 1089, 1107 (S.D. Cal. 2018) (quoting *All Star Seed v.
Nationwide Agribusiness Ins. Co.*, No. 12CV146 L BLM, 2014 WL 1286561, at *16–17 (S.D. Cal.
Mar. 31, 2014)). On this basis, the Court **DENIES** the State’s objections. See *id.*

1 **A. The Draft Compact Claims**

2 The Court first turns to Pauma’s ten “draft compact” claims. These claims—
3 Counts 11 through 20 of the Tribe’s Second Amended Complaint—are all based on
4 the draft compact the State provided to guide the parties’ future discussions. (SAC
5 ¶¶ 260–310; *see also* JR 245.) On March 30, 2016, the State informed the Tribe that
6 it would provide Pauma with “a complete draft document to guide our future
7 discussions within the next few weeks.” (JR 245.) Several weeks later, the State
8 transmitted a “draft compact” for Pauma’s “consideration” and said, “Please let us
9 know when you would like to discuss.” (JR 246.) This document was the first—and
10 only—draft of a new compact exchanged between the parties. As mentioned, Pauma
11 never responded to the State’s proposal before filing this action. The Tribe now
12 brings ten claims raising procedural and substantive objections to the parties’
13 negotiations predicated on this draft document.

14 **1. Lack of Individualized Negotiations**

15 In Count 11, Pauma raises a procedural objection to the negotiations, arguing
16 the State failed to negotiate in good faith because it “did not conduct any
17 individualized negotiations with Pauma.” (SAC ¶ 263.) The Tribe claims the State
18 “simply threw in the towel and sent Pauma a ‘complete draft [compact]’” that is
19 substantially similar to an agreement the State had negotiated with another tribe, but
20 with material changes made to Pauma’s detriment. (*Id.* (alteration in original).)
21 Thus, Pauma argues that “negotiations that started out with Pauma asking for
22 something unique ultimately ended with the State handing out a compact that was
23 designed for another tribe,” demonstrating a lack of good faith. (Pl.’s Mot. 23:2–3.)

24 Pauma does not show the State failed to respond to the Tribe’s request to
25 negotiate a new compact in good faith on this basis. Initially, as forecasted above,
26 the Court rejects Pauma’s characterization that the State was “wrapping up the
27 negotiations by simply offering a compact designed for another tribe.” (*See* Pl.’s
28 Mot. 21:12–14.) The joint record demonstrates the State was seeking to continue the

1 negotiations and move them forward—not wrap them up. The State’s negotiator
 2 stated the draft compact was to “guide [the parties’] future discussions.” (JR 245.)
 3 In transmitting the draft, the State then asked Pauma to “[p]lease let us know when
 4 you would like to discuss.” (JR 246.) The State did not express that this initial draft
 5 was a final offer or anything but an initial proposal. (*See* JR 245–46.) Rather, it
 6 appears the only reason the negotiations “ended with the State handing out a compact
 7 that was” based on another tribe’s agreement is because Pauma did not respond to
 8 the State’s draft. (*See* Pl.’s Mot. 23:2–3.) Furthermore, the State had invited the
 9 Tribe to “just to take a crack” at a first draft incorporating Pauma’s requests, but it
 10 appears the Tribe never did so in draft format. (*See* JR 48; *see also, e.g.*, JR 54, 72,
 11 143.)

12 The joint record also does not support Pauma’s criticism that the State was
 13 “trying to cut off any further communication on the subject of” lottery games by
 14 “relaying a generic compact offer.” (*See* Pl.’s Mot. 23:14–15.) A comment attached
 15 to the relevant section of the draft compact notes that the “State is open, as indicated
 16 in prior correspondence, to discussion regarding the authorization of additional
 17 enumerated [lottery] games.” (JR 261.) Nothing prevented the Tribe from engaging
 18 in further discussion with the State on the lottery games subject. Nor does State’s
 19 prior letter demonstrate it was “trying to cut off any further communication” on this
 20 subject. (*See* JR 244–45.) Simply put, Pauma’s claim that the “State flouted the
 21 good faith requirement of IGRA by utterly failing to engage in negotiations that were
 22 even remotely responsive to Pauma’s needs and concerns” does not survive scrutiny.
 23 (*See* Pl.’s Mot. 23:16–18.) Hence, the Tribe fails to demonstrate a lack of good faith
 24 on this basis.

25 2. Harshness of Proposed Terms

26 Next, Pauma brings a series of claims challenging the proposed terms of the
 27 draft compact. Briefly summarized, these nine claims allege the State has failed to
 28 negotiate in good faith for the following reasons:

- 1 • Count 12: The State allegedly offered Pauma less-favorable terms in its first
2 proposal than that ultimately given to a neighboring tribe as retribution for
3 Pauma's successful lawsuit against the State concerning the 2004 Amendment.
4 (SAC ¶¶ 265–69; *see also* Pl.'s Mot. 23:19–28:4.)
- 5 • Count 13: The State's draft of a new compact updated the waiver of sovereign
6 immunity in the 1999 Compact to limit the Tribe's ability to obtain court-
7 ordered relief against the State in the future. (SAC ¶¶ 270–74; *see also* Pl.'s
8 Mot. 34:18–36:11.)
- 9 • Count 14: The State allegedly failed to offer more favorable terms in the draft
10 compact that make up for the State "frustrating" Pauma's rights for eight years
11 under the 1999 Compact by unreasonably interpreting the 1999 Compact's
12 license pool formula and inducing Pauma to enter into the now-rescinded 2004
13 Amendment. (SAC ¶¶ 275–79; *see also* Pl.'s Mot. 38:15–40:23.)
- 14 • Count 15: The State "re-conferred the exact same gaming rights under the
15 1999 Compact" in its proposal and did not offer meaningful concessions for
16 new revenue sharing demands. (SAC ¶¶ 280–84; *see also* Pl.'s Mot. 28:5–
17 31:17.)
- 18 • Count 16: The State broadened certain definitions in the draft compact to
19 allegedly allow it to assert regulatory authority over additional tribal activities.
20 (SAC ¶¶ 285–89; *see also* Pl.'s Mot. 31:18–34:17.)
- 21 • Count 17: The draft compact requires Pauma to pay into a gaming-related fund
22 (one of the same funds analyzed in *Coyote Valley*), but the draft does not
23 indicate the amount required, and the State has the authority to unilaterally
24 determine the amount. (SAC ¶¶ 290–94.)
- 25 • Count 18: The draft compact requires the Tribe to not only pay into a revenue
26 sharing fund to compensate for regulatory costs, but also enter into agreements
27 with local jurisdictions for services that mitigate the impacts of Pauma's
28

1 gaming facility, resulting in—according to Pauma—an overpayment of local
2 regulatory costs. (SAC ¶¶ 295–99.)

- 3 • Count 19: The draft compact requires Pauma to enter into memorandums of
4 understanding with local jurisdictions to make significant revenue sharing
5 contributions after the compact would be reviewed by the Secretary of the
6 Interior—thereby allegedly “evading the Secretarial review process.” (SAC
7 ¶¶ 300–05; *see also* Pl.’s Mot. 36:12–38:14.)
- 8 • Count 20: The draft compact’s inclusion of the Special Distribution Fund
9 demands that “Pauma pay into a system whereby a state can fight one tribe
10 with monies provided by another” because the State is allegedly using these
11 funds to defend against tribal litigation. (SAC ¶¶ 306–10.)

12 In moving for summary judgment, the State argues that Pauma’s claims challenging
13 the specific terms of the draft compact are premature because the Tribe never
14 objected to these terms or responded to the State’s proposal. (Defs.’ Mot. 33:20–
15 40:11; Defs.’ Reply 13:7–14:6.)

16 The Court agrees. This Court will not wade into the granular details of a first
17 draft that was never even the subject of discussion between the parties. Pauma fails
18 to demonstrate the State refused to negotiate in good faith simply because it proposed
19 the challenged terms in a draft compact “to guide [the parties’] future discussions.”
20 (*See* JR 245.)

21 In *Coyote Valley* and *Rincon*, the negotiating parties engaged in a back-and-
22 forth about the terms the tribes claimed the State insisted on and refused to alter in
23 bad faith. *See Rincon*, 602 F.3d at 1024–25 (summarizing the State’s demands for
24 general fund revenue sharing, the tribe’s objections to these demands, and the parties’
25 counterproposals that led to “an impasse”); *see also In re Indian Gaming Related*
26 *Cases*, 147 F. Supp. 2d 1011, 1021 (N.D. Cal. 2001) (“*Coyote Valley I*”) (noting that
27 the tribe had “counter-offered with a modified compact that, among other things,
28 deleted the challenged provisions entirely, while . . . enlarging other aspects of the

1 proposed compact favorable to it”). Here, by contrast, Pauma did not even engage
 2 the State on the various terms in the draft compact that the Tribe now challenges are
 3 improper and demonstrate a lack of good faith. And, “[h]aving declined to engage
 4 in . . . negotiations over the challenged provisions,” Pauma “cannot reasonably assert
 5 that the State’s” initial offer of those terms “constitutes a refusal to negotiate in good
 6 faith.” *See Coyote Valley I*, 147 F. Supp. 2d at 1021–22 (rejecting a tribe’s analogous
 7 challenge to the State’s refusal to alter certain terms the tribe objected to).

8 Moreover, the Court is unpersuaded by Pauma’s attempt to fit its draft compact
 9 claims into the “meaningful concessions” framework employed by the Ninth Circuit
 10 in *Coyote Valley II* and *Rincon*. In those cases, the State had either taken a “‘hard
 11 line’ negotiation position” or had tried to “impose” taxation on the Tribe. *See Rincon*,
 12 602 F.3d at 1032–40 (discussing these concepts and citing *Coyote Valley II*, where
 13 the State had “insist[ed] on certain provisions”). The Ninth Circuit explained that in
 14 the context of a demand for taxation, the State “‘impose[s]’ something during
 15 negotiations . . . by insisting, over tribal objections, that the tribe make a given
 16 concession—a concession beyond those specially authorized by [IGRA] and
 17 contrary to the tribe’s sovereign interests—in order to obtain a compact.” *Id.* at 1031
 18 (footnote omitted). Similarly, the Ninth Circuit noted that a “state may not take a
 19 ‘hard line’ position in IGRA negotiations when it results in a ‘take it or leave it offer’
 20 to the tribe to either accept nonbeneficial provisions outside the permissible scope of
 21 [IGRA’s compact topics], or go without a compact.” *Id.* at 1039 (emphasis omitted).

22 Here, where Pauma did not respond or object to the State’s proposed terms, it
 23 cannot claim the State tried to “impose” taxation or revenue sharing “by insisting,
 24 *over tribal objections* . . . that [Pauma] make a given concession . . . to obtain a
 25 compact.” *See Rincon*, 602 F.3d at 1031 (emphasis added). Nor can Pauma
 26 demonstrate the State took a “hard line position” on any of the terms it now
 27 challenges. *See id.* at 1039. And because Pauma does not make this threshold
 28 showing, Pauma fails to demonstrate the State’s proposal was a “take it or leave it

1 offer” to Pauma to accept unfavorable provisions outside the scope of IGRA or go
2 without a compact. *See id.* In sum, in light of the posture of the negotiations in this
3 case, the Court finds the “meaningful concessions” framework from *Coyote Valley*
4 and *Rincon* inapposite.

5 Relatedly, the Court is also unpersuaded by Pauma’s various efforts to
6 characterize the draft compact as a final offer and then compare it to the final
7 agreements entered into between the State and other tribes. For example, Pauma
8 describes the State’s first draft “as the ultimate terms the State offered.” (Pl.’s Mot.
9 23:23.) In another instance, the Tribe labels the proposal as “the seemingly final
10 offer [the State] extended to Pauma.” (*Id.* 23:22–28:4.) Pauma then compares the
11 terms in the State’s proposal to the terms in the final agreement between the State
12 and the nearby Pala tribe (as well as other final tribal-state compacts). (*Id.* 1:21–
13 2:11, 23:22–28:4.) In doing so, the Tribe highlights, for example, that the State’s
14 first proposal to Pauma requires 8% of one form of revenue sharing whereas the
15 executed Pala compact requires only 6%. (*Id.* 1:27–2:3.)

16 These efforts are unconvincing. For one, Pauma’s characterizations are
17 inaccurate. Again, the State’s “draft compact” was transmitted to “guide [the
18 parties’] future discussions,” included comments noting the State was open to further
19 discussion, and was accompanied with an e-mail asking Pauma to “[p]lease let us
20 know when you would like to discuss.” (JR 245–382.) There is no indication that
21 this proposal was the State’s best, “seemingly final,” or “ultimate” offer to Pauma.

22 In addition, the Court will not impute bad faith based on the deal another tribe
23 received when Pauma never negotiated for or requested more favorable terms. At
24 oral argument, the Tribe said it felt “boxed into a corner” and “almost checkmated”
25 by the State’s initial draft. (ECF No. 48.) When pressed to explain why Pauma chose
26 not to respond to the proposal, the Tribe said Pauma felt it would have been a “pretty
27 monumental undertaking” to obtain Pala’s comparably better terms “through the
28 course of negotiations,” and that it was “under the impression that at some point the

1 negotiations have to break off if the parties felt like they had reached an impasse.”
 2 (*Id.*) But an objective evaluation of the joint record does not substantiate these claims
 3 of an impasse or Pauma being “almost checkmated” by an initial proposal sent to
 4 guide the parties’ future discussions. Nor does the evidence substantiate Pauma’s
 5 speculative claim that “there was *zero* chance the State would have reduced the
 6 financial burden of the ‘complete draft [compact] through further negotiation.” (*See*
 7 Pl.’s Opp’n 27:11–13 (alteration and emphasis in original).) The Court is therefore
 8 unmoved by Pauma’s attempts to demonstrate a lack of good faith by comparing a
 9 set of terms that are yet to be discussed with the specifics of final deals struck
 10 between the State and other tribes.⁴ (*See* Pl.’s Mot. 23:22–28:4.)

11 In sum, Pauma’s claims targeting the terms of the draft compact—Counts 12
 12 to 20—do not demonstrate the State has failed to negotiate in good faith.

15 ⁴ Another one of Pauma’s efforts is to repeatedly highlight throughout its briefing and
 16 pleadings that the State’s negotiator described the draft compact as a “complete draft document.”
 17 In numerous instances, Pauma relies on an altered version of this phrase—“complete draft
 18 [compact]”—to support its claims. (*E.g.*, Pl.’s Mot. 23:2–18 (alteration in original).) In doing so,
 19 Pauma argues “complete” means the draft document was “to the greatest extent or degree”
 20 finished—that is, a “functionally final draft of the compact. (*See id.* 23:4–10.) This effort is not
 21 convincing. Nothing prevented the Tribe from seeking to negotiate or modify the terms of the draft
 22 compact. The document itself also shows it is not “to the greatest extent or degree” finished. The
 draft compact includes comments indicating that the State is open to incorporating Pauma’s
 requests to conduct new forms of gambling. (JR 247–381.) More importantly, the State expressed
 that this draft was to “guide [the parties’] future discussions,” stated the draft was for Pauma’s
 “consideration,” and requested that the Tribe “[p]lease let [the State] know when [it] would like to
 discuss” the draft. (JR 245–46.)

23 Even less convincing is Pauma’s reliance on a comment attached to the draft table of
 24 contents in the draft compact. The Tribe argues the draft compact “contained a comment bubble
 25 at the very outset explaining that the document was ‘[t]o be finalized before signing.’” (Pl.’s 22:13–
 26 14 (citing JR 248).) The implication Pauma asks the Court to draw is that the State was suggesting
 27 the document is “complete” and only needs to be “finalized before signing.” (*See id.*) But, as
 28 indicated, the “comment bubble” Pauma relies upon is appended to the draft compact’s “TABLE
 OF CONTENTS” header. (JR 248.) Meaning, the State was commenting that the document’s
 table of contents was “[t]o be finalized before signing.” (*Id.*) If anything, this comment undercuts
 Pauma’s claims. It shows the State was anticipating that there would be changes made to the draft
 compact that would require the document’s table of contents to be updated and “finalized” before
 execution of the compact. (*Id.*)

1 **B. Horse Wagering**

2 Pauma claims in Count 3 that the State failed to negotiate in good faith in light
3 of the State’s response to the Tribe’s request to engage in on-track horse wagering.
4 (SAC ¶¶ 220–24.) The State argues it is entitled to summary judgment because the
5 record of negotiations demonstrates the State “repeatedly attempted to engage
6 Pauma” on this issue and “remained a willing and engaged partner for an on-track
7 horse-racing compact.” (Defs.’ Mot. 29:13–31:22; *see also* Defs.’ Reply 6:11–8:14.)

8 The Court agrees that Pauma fails to demonstrate a lack of good faith on this
9 basis. The State’s dealings with the Tribe concerning horse wagering do not reveal
10 the State failed to respond to Pauma’s request to negotiate a compact “in good faith.”
11 *See* 25 U.S.C. § 2710(d)(7)(B)(ii)(II). Pauma requested the right to conduct on-track
12 wagering, a type of Class III gaming that it cannot presently conduct under the 1999
13 Compact. (JR 2.) Although the State expressed that this type of compact had never
14 been done in California before, the State never told Pauma it would not negotiate for
15 this new gaming right. Instead, the State sought additional information about
16 Pauma’s plans and also offered to reach out to the Executive Director of the
17 California Horse Racing Board to assist the parties. (*See, e.g.*, JR 18, 21, 22, 30.)
18 The State then brought the Executive Director to the parties’ second meeting, where
19 the participants discussed Pauma’s request. (JR 42–76.) The State also encouraged
20 Pauma to include “off-track wagering” as part of its plans, and the State informed
21 Pauma that it had worked with the Executive Director and his staff “to update the
22 older provisions” of an agreement concerning this type of wagering. (JR 46.)

23 Further along in the negotiations, the State “reached out to the National Indian
24 Gaming Commission to obtain information regarding other tribes that may be
25 conducting on-track betting.” (JR 183.) The State shared with Pauma a “Compact
26 Addendum between the Sisseton-Wahpeton Sioux Tribe and the State of North
27 Dakota addressing pari-mutuel horse racing” to serve as a reference for the parties’
28 further discussions. (*Id.*; JR 185–205.) The State also subsequently provided “for

1 discussion a draft compact addendum that would authorize a satellite wagering
 2 facility.” (JR 208; *see also* JR 210–21.) Finally, the State’s draft discussion compact
 3 noted that the State had proposed an “OTW wagering compact that can be
 4 incorporated as an Appendix or negotiated and concluded as a separate class III
 5 gaming compact.” (JR 261.)

6 At the time Pauma filed this lawsuit, the Tribe had not responded to or
 7 commented on the State’s sample compact from North Dakota or draft compact
 8 addendum authorizing a satellite wagering facility. Nothing in the joint record
 9 demonstrates the State, at the time Pauma filed this lawsuit, did not “remain[] willing
 10 to meet with the tribe for further discussions” concerning horse wagering. *See*
 11 *Coyote Valley II*, 331 F.3d at 1110.

12 The Court “cannot conclude from the history of negotiations recounted above
 13 that . . . the State has refused to negotiate in good faith” on this basis. *See Coyote*
 14 *Valley II*, 331 F.3d at 1109. Nor is the Court persuaded by Pauma’s attempts to argue
 15 the State acted in bad faith. Pauma principally complains that the State insisted on
 16 more details about the Tribe’s plans and did not do more to assist the Tribe in
 17 navigating “the legions of horse racing regulations” in California. (See Opp’n 15:3–
 18 20:26.) Having considered Pauma’s arguments in light of the joint record of
 19 negotiations, none of them convincingly identify conduct that amounts to bad faith.
 20 Accordingly, Pauma does not demonstrate a lack of good faith based on the State’s
 21 negotiations concerning horse wagering.

22 C. Additional Lottery Games

23 1. The Tribe’s Request

24 Aside from its draft compact and horse wagering claims, Pauma brings a series
 25 of claims related to its request to conduct additional lottery games. Under the 1999
 26 Compact, Pauma is authorized to operate “any devices or games that are authorized
 27 under state law to the California State Lottery, provided that the Tribe will not offer
 28 such games through use of the Internet unless others in the state are permitted to do

1 so under state and federal law.” (1999 Compact § 4.1(c).) Upon seeking to negotiate
 2 a new compact, Pauma asked for the “right to conduct any [lottery] games that are
 3 not currently authorized under State law to the California State Lottery.” (JR 2.)

4 Lotteries are a type of Class III gaming under IGRA. *Seminole Tribe of Fla.*,
 5 517 U.S. at 48. Class III gaming activities are “lawful on Indian lands only if such
 6 activities are . . . located in a State that permits such gaming for any purpose by any
 7 person, organization, or entity” 25 U.S.C. § 2710(d)(1)(B). “Consequently,
 8 where a state does not ‘permit’ gaming activities sought by a tribe, the tribe has no
 9 right to engage in these activities, and the state thus has no duty to negotiate with
 10 respect to them.” *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d
 11 1250, 1256 (9th Cir. 1994). Stated differently, “a state need only allow Indian tribes
 12 to operate games that others can operate, but need not give tribes what others cannot
 13 have.” *Id.* at 1258.

14 In California, lotteries are generally prohibited. Section 19(a) of the California
 15 Constitution provides: “The Legislature has no power to authorize lotteries, and shall
 16 prohibit the sale of lottery tickets in the State.” Cal. Const. art. IV, § 19; *see also*
 17 Cal. Penal Code §§ 320–26 (broadly prohibiting the operation of lotteries).
 18 Notwithstanding this general prohibition, however, the California Constitution
 19 authorizes “the establishment of a California State Lottery.” *Id.* § 19(d).

20 The State’s corresponding Lottery Act creates the California State Lottery,
 21 with its revenues to be “allocated for public education in California.” Cal. Gov’t
 22 Code § 8880.1. The State Lottery is limited to operating “lottery games.” *See id.* §
 23 8880.12 (defining a “Lottery Game” for purposes of the Lottery Act); *W. Telcon, Inc.*
 24 *v. Cal. State Lottery*, 13 Cal. 4th 475, 483 (1996) (noting the State Lottery “agrees it
 25 is restricted to operating lottery games”). A “‘Lottery Game’ means any procedure
 26 authorized by the [State Lottery Commission] whereby prizes are distributed among
 27 persons who have paid, or who have unconditionally agreed to pay, for tickets or
 28 shares which provide the opportunity to win those prizes.” Cal. Gov’t Code §

1 8880.12. “The Lottery Act’s only express limitations on the types of lottery games
 2 the commission may authorize are contained in [California] Government Code
 3 section 8880.28.” *W. Telcon*, 13 Cal. 4th at 482. These limitations include that “[n]o
 4 lottery game may use the theme of bingo, roulette, dice, baccarat, blackjack, Lucky
 5 7’s, draw poker, slot machines, or dog racing,” and that “[i]n games utilizing
 6 computer terminals or other devices, no coins or currency shall be dispensed as prizes
 7 to players from these computer terminals or devices.” Cal. Gov’t Code §
 8 8880.28(a)(1), (3).

9 The California Constitution’s tribal gaming provision also provides an
 10 exception to the State’s general prohibition on lotteries. This provision states:

11 [T]he Governor is authorized to negotiate and conclude compacts . . .
 12 for the operation of slot machines and for the conduct of lottery games
 13 and banking and percentage card games by federally recognized Indian
 14 tribes on Indian lands in California in accordance with federal law.
 15 Accordingly, slot machines, lottery games, and banking and percentage
 card games are hereby permitted to be conducted and operated on tribal
 lands subject to those compacts.

16 Cal. Const. art. IV, § 19(f). This authorization served as the basis for the 1999
 17 Compact, which allows tribes like Pauma to engage in casino-style gambling.
 18 *Artichoke Joe’s California Grand Casino v. Norton*, 353 F.3d 712, 717–18 (9th Cir.
 19 2003). In *Artichoke Joe’s*, several California card clubs and charities challenged
 20 whether this segment of the California Constitution satisfies IGRA’s requirement
 21 that for Class III gaming to be lawful, the gaming activities must be “located in a
 22 State that permits such gaming for any purpose by any person, organization, or entity
 23” *Id.* at 720; *see also* 25 U.S.C. § 2710(d)(1)(B). Their challenge required the
 24 Ninth Circuit to resolve whether “‘any person, organization, or entity’ should be read
 25 to exclude Indian tribes.” *Artichoke Joe’s*, 353 F.3d at 720. The Ninth Circuit
 26 concluded that a tribe is an “entity,” and therefore the relevant portion of the
 27 California Constitution “‘permits’ class III gaming within the meaning of IGRA by
 28

1 legalizing such gaming operations only when conducted by the ‘entity’ of an Indian
2 tribe.” *Id.* at 731.

3 In light of this background, Pauma argued to the State that it has the right to
4 conduct “lottery games” beyond those authorized to the California State Lottery. (JR
5 2–3.) In the Tribe’s view, because “lottery games . . . are . . . permitted to be
6 conducted and operated on tribal lands subject to [gaming] compacts,” California is
7 required under IGRA to negotiate with Pauma to allow it to conduct all “lottery
8 games,” not just those “lottery games” conducted by the California State Lottery.
9 (*See* JR 18.)

10 **2. Lottery Games Claims**

11 Pauma brings nine interrelated claims based on this request for additional
12 lottery games. (SAC ¶¶ 210–54; *see also* Pl.’s Mot. 4:23–18:20.) In Count 1, the
13 Tribe alleges the State has engaged in “surface bargaining” by employing “dilatory
14 tactics or other forms of ‘sophisticated pretense’ to avoid reaching an agreement on”
15 the lottery games issue. (*See* SAC ¶ 12 (quoting Farnsworth on Contracts § 3.26c –
16 Meaning of Fair Dealing (4th ed. 2003)); *see also* Pl.’s Mot. 4:23–8:13 (focusing on
17 the lottery games issue).) The Tribe argues the joint record shows that after Pauma
18 requested additional lottery games, “the State did everything in its power to avoid
19 discussing those [gaming] rights for the next five-hundred-plus days.” (Pl.’s Mot.
20 4:27–5:1.) Count 2 relatedly alleges the State has failed to negotiate in good faith
21 because it is trying to protect the California State Lottery from increased tribal
22 competition. (SAC ¶¶ 215–19.)

23 Next, in Counts 4 through 8, Pauma alleges the State has negotiated in bad
24 faith because it has refused to negotiate for certain types of lottery games: (i) those
25 games not authorized to the California State Lottery, (Count 4, SAC ¶¶ 225–29); (ii)
26 video lottery terminals, (Count 5, SAC ¶¶ 230–34); (iii) video lottery terminals that
27 dispense coins or currency, (Count 6, SAC ¶¶ 235–39); (iv) games based on a tribal
28 lottery system, (Count 7, SAC ¶¶ 240–44); and (v) games authorized to the Multi-

1 State Lottery Association or any other state, (Count 8, SAC ¶¶ 245–49). (*See also*
 2 Pl.’s Mot. 11:15–16:23.) Finally, in Count 9, Pauma claims the State negotiated in
 3 bad faith by not substantiating its position on whether Pauma can conduct additional
 4 lottery games. (SAC ¶¶ 250–54; *see also* Pl.’s Mot. 16:24–18:20.)

5 The State argues that “[r]egardless of these claims’ multiple lottery-game
 6 labels, none shows any failure by the State to negotiate in good faith under IGRA,”
 7 and “the record of negotiations demonstrates that at all times the State was willing to
 8 negotiate with Pauma over lottery games.” (Defs.’ Mot. 26:4–7; *see also id.* 26:1–
 9 29:12, 31:23–32:4; Defs.’ Reply 3:20–6:10.) Ultimately, the Court agrees. The
 10 parties’ incomplete negotiations over lottery games do not demonstrate the State has
 11 failed to respond “in good faith” to Pauma’s request to negotiate a new compact. *See*
 12 25 U.S.C. § 2710(d)(7)(B)(ii)(II).

13 At the threshold, like with other topics in the parties’ negotiations, the Court
 14 notes the joint record does not demonstrate the parties “reached an impasse” on the
 15 lottery games issue. *See Rincon*, 602 F.3d at 1026; *see also LAWI/CSA*
 16 *Consolidators, Inc. v. Wholesale & Retail Food Distribution, Teamsters Local 63*,
 17 849 F.2d 1236, 1241 (9th Cir. 1988) (“A bargaining impasse occurs when the parties
 18 could well conclude that there was no realistic prospect that continuation of
 19 discussion at that time would have been fruitful.” (citation and quotation marks
 20 omitted).) Pauma claims otherwise in its briefing, (*see* Pl.’s Mot. 16:24–26), and
 21 Pauma advanced a similar claim at oral argument, but the Court is unconvinced.

22 Pauma’s last two communications to the State (1) expressed the Tribe’s
 23 preference “to conduct the negotiations in a piecemeal fashion,” (2) articulated
 24 Pauma’s position on additional lottery games, and (3) communicated that the State
 25 “has not indicated whether it is willing to negotiate for the requested lottery games,
 26 let alone begin to draft compact language.” (JR 239–43.) In response, the State
 27 objected to Pauma’s preference to conduct piecemeal negotiations and provided its
 28 position on additional lottery games:

1 The grant of authority to the Governor to negotiate for lottery games
2 under . . . the California Constitution has always been understood to
3 encompass those games authorized for play by the California State
4 Lottery. This was the intent and understanding of the language
5 proposed by tribal negotiators and presented to the voters as they
6 considered the amendment to the California Constitution.

7 However, the State is willing to negotiate to authorize Pauma to offer
8 certain additional lottery games to be enumerated in the compact.
9 Specifying the games provides clarity as to the scope of the
10 authorization, avoids future disputes between the parties, and mitigates
11 the risk of running afoul of other prohibitions on how lottery games may
12 be conducted, such as the keno game offered by the California State
13 Lottery that was found to be an illegal banked game by the Supreme
14 Court in *Western Telcon, Inc. v. California State Lottery* (1996) 13
15 Cal.4th 45.

16 To be clear, the State is not conceding that it has an obligation to
17 negotiate for all lottery games enumerated in your January 27, 2016
18 letter (other than those authorized to the California State Lottery).
19 Furthermore, the State expressly takes issue with Pauma's ability under
20 IGRA to seek to negotiate "devices or games that are authorized to any
21 other state lottery or any other multi-state lottery association," "lottery
22 games that are played on video terminals," "tribal lottery systems" or
23 other lottery systems to the extent operated or conducted off tribal lands,
24 and "video lottery games that dispense coins or currency."

25 (JR 244–45.) Pauma did not respond to the State's negotiation position. And as
26 mentioned several times, the State's proposed draft compact that was transmitted
27 several weeks later expressed that the "State [was] open, as indicated in prior
28 correspondence, to discussion regarding the authorization of additional enumerated
[lottery] games." (JR 261.) In light of the foregoing, the parties did not reach an
impasse on the lottery games issue. *See Rincon*, 602 F.3d at 1026. Rather, the State's
letter—as well as the notation in its first draft of the parties' new compact provided
to guide their discussions—indicates the State remained willing to continue
negotiating with Pauma on this issue. *See Coyote Valley*, 331 F.3d at 1110. That the

1 State was open to further negotiation on the lottery games issue undercuts Pauma's
2 various claims alleging the State failed to negotiate in good faith on this basis.

3 Moreover, the Court is unpersuaded by Pauma's arguments that the State
4 failed to negotiate in good faith because it engaged in "shadow boxing" and "refused"
5 to negotiate for particular subsets of lottery games. In advancing its "shadow
6 boxing" count, Pauma claims the State engaged in bad faith because the State
7 "simply sen[t] Pauma" a draft compact "that simply omitted any new games" after
8 the parties' back-and-forth on the lottery games topic. (SAC ¶ 218; *see also* SAC ¶¶
9 228, 223, 238, 243, 248, 253 (repeatedly highlighting that the State sent Pauma a
10 draft compact "that simply re-conveys the same gaming rights as the 1999
11 Compact").) The Tribe similarly argues the focus should be "on answering questions
12 like 'why did the State send Pauma a "complete draft [compact]" five hundred and
13 twenty-two days into the negotiations that was mum on both new forms of gaming
14 that instigated the talks?"' (Pl.'s Opp'n 24:6–8 (alteration in original).) But the draft
15 compact provided to guide the parties' further discussions is not silent on the Tribe's
16 request for new lottery games. The relevant portion of the draft has a comment
17 stating that the "State is open, as indicated in prior correspondence, to discussion
18 regarding the authorization of additional enumerated games."⁵ (JR 261.)

19 Similarly unpersuasive is Pauma's repeated emphasis on the "five hundred and
20 twenty-two day[]" length of the negotiations to support its allegations concerning the
21 lottery games issue. (*See, e.g.*, Pl.'s Mot. 4:23–28.) Pauma requested the parties
22 negotiate a new compact shortly before Thanksgiving in 2015, (JR 1), and the final
23 communication in the joint record is dated April 28, 2016, (JR 246). Like in *Coyote*
24 *Valley*, "the record reflects that both parties at times were less than diligent" in
25

26 ⁵ For the same reasons, the record does not validate Pauma's claim that the State "sought to
27 block all new lottery games solely on the conjectural basis that one of them could run afoul of the
28 law at some point in the future." (Pl.'s Opp'n 14:13–15 (emphasis in original).) Again, the State
said it was "willing" and "open" to negotiating certain additional lottery games to be enumerated
in the compact. (JR 244, 261.)

1 seeking to move the negotiations forward, particularly because of the State and
 2 Pauma's ongoing litigation concerning the 2004 Amendment. *See* 147 F. Supp. 2d
 3 at 1015. For example, the State's summary of the parties' January 30, 2015, meeting
 4 reports that the parties "discussed scheduling [their] next meeting in approximately
 5 May 2015, as the parties' participating attorneys [would] face appellate briefing
 6 deadlines over the next few months." (JR 20.) Then, in the next communication
 7 dated May 8, 2015, Pauma requested the negotiations be delayed for another few
 8 months because "the recent orders in the pending compact litigation have essentially
 9 guaranteed that [the parties'] attorneys will be largely preoccupied until the oral
 10 argument scheduled for July 10, 2015." (*See* JR 25.) The parties did not meet until
 11 September 8, 2015—more than six months after their first meeting. (JR 38.)
 12 Similarly, when the State was slow to respond to Pauma's January 27, 2016, letter,
 13 the State noted on March 30, 2016:

14 The State's compact negotiating team is currently in negotiations with
 15 over forty other California tribes and this necessarily impacts our
 16 scheduling of meetings and response time. In addition to compact
 17 negotiations, Pauma and the State continue to actively work on the
 18 litigation currently pending at every level of the federal courts and have
 19 recently filed significant pleadings. We are committed to moving these
 20 negotiations forward but also understand if the Tribe prefers, as it has
 in the litigation.

21 (JR 245.) Hence, Pauma's emphasis on the total length of the negotiations paints an
 22 incomplete picture of the joint record.⁶ Overall, having reviewed the joint record,
 23 "[a]ny delays that may have been caused by the State do not rise to the level of bad
 24

25
 26 ⁶ In the same vein, the Court disapproves of Pauma characterizing the State as "enter[ing]
 27 month ten of its efforts to stall the discussions" at the second negotiation session. (*See* Pl.'s Opp'n
 28 24:15–17.) As recounted above, the parties did not meet for approximately six months between
 the first and second meetings—in part due to Pauma's request to delay the second meeting because
 of the ongoing 2004 Amendment litigation. (JR 25.)

1 faith.” *See Coyote Valley I*, 147 F. Supp. 2d at 1015; *cf. Rincon*, 602 F.3d at 1024–
 2 26 (summarizing a course of negotiations that spanned from 2003 to 2006).

3 Further, Pauma’s claims centered on the State’s “refusal to negotiate for”
 4 certain categories of lottery games do not demonstrate the State failed to negotiate in
 5 good faith. (*See* SAC ¶¶ 225–49.) The State expressed a willingness to negotiate for
 6 additional games, including those not authorized by the California State Lottery.
 7 (*See* JR 244, 261.) And, although the State informed Pauma that it “expressly takes
 8 issue” with certain remaining categories of new lottery games, the Court is not
 9 persuaded that the State’s conduct amounts to a lack of good faith—or that the parties
 10 had even reached an impasse on these other categories of new games. (*See* JR 244–
 11 45.) *Cf. Rumsey*, 64 F.3d at 1255 (noting the State “refused to negotiate with the
 12 tribes” concerning “certain stand-alone electronic gaming devices and live banking
 13 and percentage card games”); *see also Mashantucket Pequot Tribe v. State of Conn.*,
 14 913 F.2d 1024, 1027, 1026 & n.2, 1032 (2d Cir. 1990) (noting the State “wholly
 15 fail[ed] to negotiate” when it “never entered into actual negotiations with the Tribe”
 16 following its request to “expand its gaming activities to include class III games of
 17 chance, such as” blackjack and poker).

18 Nor does the joint record adequately support the conclusion that the State
 19 failed to negotiate in good faith because it employed a “protectionist strategy” aimed
 20 at safeguarding the “revenue stream of the State Lottery.” (*See* SAC ¶ 218.) The
 21 Court is unpersuaded that the parties’ back-and-forth in the second negotiation
 22 session demonstrates the State’s representatives “insinuated that . . . they were
 23 engaging in [protectionism] to protect the revenue stream of the State Lottery.” (*See*
 24 SAC ¶ 218; *see also* JR 89–90 (“I’m not suggesting we would do that.”).) And the
 25 State subsequently said it “is willing to negotiate to authorize Pauma to offer certain
 26 additional lottery games to be enumerated in the compact.” (JR 244; *see also* JR
 27 261.) If agreeing to negotiate to allow Pauma to offer new games beyond that
 28 conducted by the California State Lottery is part of the State’s protectionist strategy,

1 it is a poor one. The Court cannot conclude the State has failed to respond “in good
2 faith” to Pauma’s request to negotiate a new compact on this basis. *See* 25 U.S.C. §
3 2710(d)(7)(B)(ii)(II).

4 The Court reaches the same conclusion for Pauma’s claim concerning the
5 State’s alleged failure to substantiate its position on additional lottery games. Pauma
6 assigns significant weight to the State negotiator’s statement that “[t]he grant of
7 authority to the Governor to negotiate for lottery games under article IV, section 19,
8 subdivision (f) of the California Constitution has always been understood to
9 encompass those games authorized for play by the California State Lottery.” (JR
10 244; *see also* SAC ¶ 253; Pl.’s Mot. 16:24–18:20.) Pauma argues the State’s “ability
11 to throw out this baseless claim without any sort of corrective check allowed the State
12 to shut down all discussion on lottery games and leave the negotiations in a hopeless
13 morass.” (Pl.’s Mot. 18:16–18.) But, as outlined above, the State did not “shut down
14 all discussion on lottery games.” The next sentence of the State’s letter provides:
15 “However, the State is willing to negotiate to authorize Pauma to offer certain
16 additional lottery games to be enumerated in the compact.” (JR 244.) Further, the
17 State’s proposed draft compact, which is attached to the most recent communication
18 in the negotiations, similarly expressed that the “State is open, as indicated in prior
19 correspondence, to discussion regarding the authorization of additional enumerated
20 games.” (JR 261.) In light of the foregoing, Pauma does not demonstrate a lack of
21 good faith on this basis.

22 In sum, Pauma’s lottery games claims based on the parties’ incomplete
23 negotiations are unconvincing. After Pauma pressed the State on this issue, the State
24 agreed to negotiate for certain additional lottery games and took “issue” with several
25 other categories of new games. The Tribe, having received the State’s position on
26 this topic, never responded to it. And Pauma’s efforts to portray the State as seeking
27 to shut down negotiation on this topic are unconvincing. Overall, the Court
28 concludes the evidence concerning lottery games does not show the State has failed

1 to respond to Pauma's request to negotiate a new compact "in good faith." *See* 25
 2 U.S.C. § 2710(d)(7)(B)(ii)(II).

3 **D. Scope of Negotiations**

4 Pauma's remaining claim alleges the State negotiated in bad faith by erecting
 5 procedural barriers to hinder the parties' negotiations. (SAC ¶¶ 255–59.) This claim
 6 centers on the parties' dispute concerning the scope of negotiations that is outlined
 7 above. (*See id.*; *see also* Pl.'s Mot. 18:21–21:11.) To recap, the parties sparred over
 8 whether Pauma's request to offer two new forms of gaming under the 1999
 9 Compact's renegotiation provision—Section 12.1—subjected all of the compact's
 10 terms to renegotiation. The parties resolved their dispute, decided to proceed under
 11 the amendment provision—Section 12.2—and agreed that "the entire compact" is up
 12 for negotiation. (JR 238.) Having secured the State's agreement that the entire
 13 compact is subject to negotiation, Pauma then informed the State that the Tribe
 14 "prefers to conduct the negotiations in a piecemeal fashion, focusing on one material
 15 issue and then moving on to the next only after the parties have largely agreed on
 16 language for the final compact." (JR 239.) The State declined to conduct
 17 negotiations in this fashion, provided its position on Pauma's lottery games request,
 18 and transmitted a draft compact to guide the parties' future discussions. (JR 244–
 19 46.) The negotiations then ended.

20 In Count 10, the Tribe alleges the State's "negotiator used this change in the
 21 basis for the negotiations to shift the discussion from what the State would *give* to
 22 what it would *receive*." (SAC ¶ 258.) "As a consequence," in Pauma's view, the
 23 State's negotiator "simply transmitted a 'complete draft [compact]' to Pauma that the
 24 State had prepared for another tribe that incorporates legions of new regulations
 25 while simply reconveying the same gaming rights of the 1999 Compact (*i.e.*, slot
 26 machines, house banked card games, and only those lottery games that the State
 27 Lottery has authorized itself to offer)." (*Id.* (alteration in original).)

The Court is unpersuaded that this claim demonstrates a lack of good faith. Although the parties’ disagreement concerning the scope of negotiations may have caused a delay in their discussions, the joint record reveals the parties resolved this dispute and pressed onwards—with Pauma then seeking to focus on a single issue, and the State seeking to negotiate the entire compact. (JR 234–38.) The Court also notes that during the parties’ dispute concerning the scope of negotiations, the State continued to engage Pauma on the lottery games and horse wagering issues. (JR 183–84, 208–09.) Overall, “[a]ny delays that may have been caused by the State [regarding this issue] do not rise to the level of bad faith.” *See Coyote Valley I*, 147 F. Supp. 2d at 1015. Accordingly, when considering the balance of the parties’ negotiations, the State’s conduct regarding the scope of negotiations does not demonstrate the State has failed to respond to Pauma’s request to negotiate a new compact “in good faith.” *See* 25 U.S.C. § 2710(d)(7)(B)(ii)(II).

* * *

In sum, having considered all of Pauma’s twenty bad faith negotiation claims, the Court “cannot conclude from the history of negotiations recounted above that . . . the State has refused to negotiate in good faith.” *See Coyote Valley II*, 331 F.3d at 1109; *see also* 25 U.S.C. § 2710(d)(7)(B)(ii)(II). The Court therefore denies Pauma’s motion for summary judgment and grants the State’s cross-motion. *See Coyote Valley II*, 331 F.3d at 1095, 1009, 1117 (concluding “that the State has negotiated in good faith” and affirming the district court’s decision to “den[y] the [tribe’s] motion and enter[] judgment for the State”).

RULE 54(b) DETERMINATION

Having resolved the parties’ cross-motions for summary judgment on Pauma’s bad faith claims, the Court considers their request to enter a final and appealable judgment on these claims. (Joint Mot. 2:19–24, ECF No. 28.) “A district court order is . . . not appealable unless it disposes of all claims as to all parties or unless judgment is entered in compliance with Federal Rule of Civil Procedure 54(b). *Romoland Sch.*

1 *Dist. v. Inland Empire Energy Ctr., LLC*, 548 F.3d 738, 747 (9th Cir. 2008). This
 2 Court’s resolution of the parties’ cross-motions does not dispose of this action in its
 3 entirety—Pauma also brings two claims against the State for breach of the 1999
 4 Compact. (SAC ¶¶ 311–20.) Hence, the Court turns to Rule 54(b). This rule
 5 provides:

6 When an action presents more than one claim for relief . . . , the court
 7 may direct entry of a final judgment as to one or more, but fewer than
 8 all, claims . . . only if the court expressly determines that there is no just
 9 reason for delay. Otherwise, any order or other decision, however
 10 designated, that adjudicates fewer than all the claims . . . does not end
 the action as to any of the claims . . . and may be revised at any time
 before the entry of a judgment adjudicating all the claims[.]

11 Fed. R. Civ. P. 54(b). “Thus, as Rule 54(b) makes plain, “[f]inality is achieved only
 12 if the court takes each of two steps—it must make an ‘express determination that
 13 there is no just reason for delay’ and it also must make ‘an express direction for the
 14 entry of judgment.’” *United States v. Gila Valley Irrigation Dist.*, 859 F.3d 789, 797
 15 (9th Cir. 2017) (quoting 15A Charles Alan Wright, Arthur R. Miller & Edward H.
 16 Cooper, *Federal Practice and Procedure: Jurisdiction and Related Matters* § 3914.7
 17 (2d ed. 1991)).

18 Rule 54(b) “was adopted ‘specifically to avoid the possible injustice of
 19 delay[ing] judgment o[n] a distinctly separate claim [pending] adjudication of the
 20 entire case The Rule thus aimed to augment, not diminish, appeal opportunity.’”
 21 *Jewel v. Nat’l Sec. Agency*, 810 F.3d 622, 628 (9th Cir. 2015) (alterations in original)
 22 (quoting *Gelboim v. Bank of Am. Corp.*, --- U.S. ---, 135 S. Ct. 897, 902–03 (2015)).
 23 Although the Supreme Court “has eschewed setting narrow guidelines for district
 24 courts to follow” when applying Rule 54(b), the Court has discussed “factors that
 25 may inform a judge’s decision.” *Wood v. GCC Bend, LLC*, 422 F.3d 873, 878 n.2
 26 (9th Cir. 2005).

27 Initially, “a district court must take into account judicial administrative
 28 interests” to “assure that application of the Rule effectively ‘preserves the historic

1 federal policy against piecemeal appeals.” *Curtiss-Wright Corp. v. Gen. Elec. Co.*,
2 446 U.S. 1, 8 (1980) (quoting *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 438
3 (1956)). In doing so, the court may consider “whether the claims under review were
4 separable from the others remaining to be adjudicated and whether the nature of the
5 claims already determined was such that no appellate court would have to decide the
6 same issues more than once even if there were subsequent appeals.” *Id.* In addition,
7 the district court should assess the equities of the case to determine whether there is
8 a just reason for delay. *See Wood*, 422 F.3d at 882 n.7; *see also Curtiss-Wright*, 446
9 U.S. at 8, 10 (recognizing the winning party’s financial stake in an early outcome as
10 one of the equities the district court may consider under Rule 54(b)).

11 The Court finds entering a final judgment under Rule 54(b) on Pauma’s bad
12 faith negotiation claims is appropriate. First, in considering the judicial
13 administrative interests, the Court notes that Pauma’s bad faith claims are
14 analytically distinct from the Tribe’s remaining two claims. While the first group of
15 claims addresses the requirement to negotiate in good faith under IGRA, the
16 remaining two claims are essentially breach of contract claims. There is some
17 overlap in the backstory for these two sets of claims, but even if there is a subsequent
18 appeal, an appellate court would not have to decide the same issues. In addition,
19 having assessed the equities, the Court does not discern any just reason for delay.
20 Consequently, the Court will direct entry of final judgment on Pauma’s bad faith
21 negotiation claims. *See Fed. R. Civ. P. 54(b).*

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1 **CONCLUSION**

2 In light of the foregoing, the Court **DENIES** Pauma's motion for summary
3 judgment (ECF No. 37) and **GRANTS** the State's cross-motion for summary
4 judgment (ECF No. 36). Further, the Clerk of the Court shall enter a final judgment
5 under Federal Rule of Civil Procedure 54(b) on Counts 1 through 20 of Pauma's
6 Second Amended Complaint (ECF No. 27) in favor of the State and against Pauma.

7 **IT IS SO ORDERED.**

8
9 **DATED: September 28, 2018**


Hon. Cynthia Bashant
United States District Judge