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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

THE BUENA VISTA RANCHERIA OF ME-WUK INDIANS, a federally recognized Indian Tribe,

Plaintiff,

vs.

AMADOR COUNTY, CALIFORNIA; and THE AMADOR COUNTY BOARD OF SUPERVISORS,

Defendants.

Case No. 2:20-cv-01383-MCE-AC

DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

DATE: April 8, 2021
TIME: 2:00 p.m.
COURTROOM: 7 (14th Floor)
JUDGE: Hon. Morrison England

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NOTICE OF MOTION & MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on Thursday, April 8, 2021, at 2:00 p.m., or as soon thereafter as the parties may be heard, Defendant COUNTY OF AMADOR will move this Court, at the United States Courthouse located at 501 I Street, Sacramento, California, 95814, Courtroom #7 (14th Floor), for an order dismissing the First Amended Complaint on file in this action (ECF No. 5), with prejudice on the grounds that each and every one of the claims contained in the FAC fail to state a claim on which relief can be granted (FRCP 12(b)(6)).

This motion is based on the following documents: this Notice of Motion and the attached Points & Authorities; and all the other papers, documents, or exhibits on file or to be filed in this action, and the argument to be made at any hearing on the motion ordered by the Court.

Respectfully submitted,

Dated: March 8, 2021

NIELSEN MERKSAMER
PARRINELLO GROSS & LEONI LLP

By: /s/ Christopher E. Skinnell
Christopher E. Skinnell

Attorneys for Defendant
COUNTY OF AMADOR

MEMORANDUM OF POINTS & AUTHORITIES

I. INTRODUCTION.

In 2019, Plaintiff Buena Vista Rancheria of Me-Wuk Indians opened a casino in Amador County pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 ("IGRA"). The construction of that casino was only made possible by the existence of an "intergovernmental services agreement" between the Tribe and the County ("ISA"), in which the Tribe committed to various specified payments to local agencies—the County and others—to address the casino's impacts on the local environment and public services. The Tribe's compact with the State of California required the Tribe to "enter into an enforceable written agreement with the County" "before the commencement of a [casino] Project." *See* Defendant's Request for Judicial Notice, filed herewith ("RJN"), Ex. 3, pp. 25-26 (§ 10.8.8).[1]

Now that the casino is built and operational, however, and the Tribe has derived the chief benefit of the agreement, the Tribe cynically seeks, by this action, to avoid its obligations under the ISA, to the detriment of the local community. In pursuit of that goal, it mounts a wide-ranging attack on the ISA and on the County, seeking to invalidate the agreement or to compel the County to otherwise forgo the payments prescribed therein. But the Tribe's challenge must fail because *each and every one* of Plaintiff's eight causes of action fails to state a viable claim as a matter of law. Accordingly, this case should be dismissed with prejudice.

II. FACTUAL BACKGROUND.

In the interests of judicial economy, Defendants incorporate the "Factual Background" section set forth in the Motion to Dismiss for Lack of Subject Matter Jurisdiction, filed concurrently herewith.

III. MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM (12(B)(6))

The FAC also fails to state any claim upon which relief can be granted.

Under Rule 12(b)(6), a motion to dismiss is properly granted if one or more causes of

[1] A true and correct copy of the ISA, referred to throughout the FAC but not attached thereto, is submitted herewith as Exhibit 1 to the RJN. The 1999, 2004, and 2016 Compacts between the State of California and the Tribe are submitted as Exhibits 2-4.

action in the complaint fail to state a claim as a matter of law. *Neitzke v. Williams*, 490 U.S. 319, 327 (1989). While, as a general rule, the court may not consider materials beyond the pleadings when ruling on a 12(b)(6)) motion, it *may* consider matters that are judicially noticeable, *Lee v. City of L.A.*, 250 F.3d 668, 689 (9th Cir. 2001), and documents that are extensively referred to in the complaint or that form the basis of the plaintiff's claim, even if not attached to the complaint. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).[2] And, while the factual allegations of a complaint are generally accepted as true, the court must not "assume the truth of legal conclusions merely because they are cast in the form of factual allegations," *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011) (per curiam), and mere "conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss[.]" *Adams v. Johnson*, 355 F.3d 1179, 1183 (9th Cir. 2004). Likewise, "[t]he court need not accept as true allegations that contradict matters properly subject to judicial notice or by exhibit." *Hartman v. Gilead Scis., Inc. (In re Gilead Scis. Sec. Litig.)*, 536 F.3d 1049, 1055 (9th Cir. 2008).

A. FIRST CAUSE OF ACTION (VIOLATION OF IGRA).

The Tribe's first cause of action alleges that the ISA is void because it violates IGRA. There is no merit to this claim.

1. IGRA Does Not Authorize a Private Right of Action in These Circumstances.

In *Hein v. Capitan Grande Band of Diegueno Mission Indians*, 201 F.3d 1256, 1260 (9th Cir. 2000), the Ninth Circuit held that "where IGRA creates a private cause of action, it does so explicitly…. Where a statute creates a comprehensive regulatory scheme and provides for particular remedies, courts should not expand the coverage of the statute." (citations omitted). Accordingly, the court concluded that "IGRA provides no general private right of action," *id.* at 1260, and that alleged violations of IGRA other than those expressly identified in IGRA itself must be asserted under the Administrative Procedure Act after seeking enforcement by the NIGC. *Id.* at 1260-61; *see also United States ex rel. Saint Regis Mohawk Tribe v. President R.C.-St. Regis*

[2] All of the materials cited in the "Factual Background" section, *supra*, fall within these exceptions.

Mgmt. Co., 451 F.3d 44, 49-51 (2d Cir. 2006) (dismissing a tribe's claim for declaratory relief, seeking to invalidate a contract as an improper "management contract" violating IGRA, because the tribe had not sought intervention by the NIGC first).

The FAC does not allege that the First Cause of Action arises from any of the express remedies in the IGRA, and it does not seek to advance its alleged IGRA violations under the APA. Accordingly, the First Cause of Action fails to state a claim.

2. The Tribe Is Estopped from Asserting the Invalidity of the ISA, Which the Arbitrator Imposed at the Tribe's Urging.

In considering the Tribe's challenge to the fairness and propriety of the ISA, it is significant that the ISA was imposed upon the County *at the Tribe's own request*.

When "a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (quoting *Davis v. Wakelee*, 156 U.S. 680, 689 (1895)); *see also Rissetto v. Plumbers & Steamers Local 343*, 94 F.3d 597, 600-601 (9th Cir. 1996); *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990). This doctrine applies under California law as well. *Gottlieb v. Kest*, 141 Cal. App. 4th 110, 130-31 (2006). It applies to Indian tribes like any party, *see Oneida Indian Nation v. Madison County*, 665 F.3d 408, 425 (2d Cir. 2011), and it applies when the initial proceeding is an arbitration proceeding, just as if it were a proceeding before a court. *PowerAgent Inc. v. Electronic Data Systems Corp*, 358 F.3d 1187, 1192-93 (9th Cir. 2004).

Here, the Tribe agreed to enter the 2004 Amended Compact with the State, which bound the County to arbitration of an ISA, and "[p]ursuant to the procedure outlined in the 2004 Compact Amendment, the Tribe asked the arbitrator to issue an award declaring that the agreement submitted by the Tribe be declared the effective agreement between the Tribe and the County." FAC, ¶ 42. The Tribe proposed the exact terms of the agreement that became the ISA, and it submitted testimony, documentary evidence, and argument to persuade the arbitrator that the proposal "reasonably, fairly and fully addresses the issues identified for negotiation and agreement

with the County by the Compact." RJN, Ex. 1, p. 7. The arbitrator accepted the Tribe's position and adopted the Tribe's proposal without alteration, entering it as an arbitration award. Finally, the Tribe has accepted the benefits of the ISA up to this point—it could not have opened the casino without such an agreement in place. Under such circumstances, the Tribe cannot now reverse course and contend that the award that it unilaterally proposed is inadequate.

3. The Tribe's Challenge to the Validity of the ISA Is Also Barred by *Res Judicata* and/or Collateral Estoppel.

The Tribe's challenges to validity of the ISA are also barred by *res judicata*. As set forth in the factual discussion above, the arbitrator made express findings that the ISA "reasonably, fairly and fully addresses the issues identified for negotiation and agreement with the County by the Compact"; that the parties had sufficient information to assess the sufficiency of the ISA to adequately address those issues; and that the ISA is "fully enforceable, effective immediately upon the issuance of this Award." RJN, Ex. 1, p. 7. *These findings are binding on the Tribe*—"[o]nce a valid award is made by the arbitrator, it is conclusive on matters of fact and law and all matters in the award are thereafter res judicata." *Thibodeau v. Crum*, 4 Cal. App. 4th 749, 759 (1992).[3] The Tribe, therefore, cannot have the ISA invalidated now on the premise that the ISA does not reasonably and fairly address the issues therein—which is the gravamen of Plaintiff's claim, insofar as it alleges a disproportion between the amounts it is to pay under the ISA and the impacts to be mitigated by those payments. It cannot deny the enforceability and effectiveness of the ISA. And it cannot contend that it, or any other interested party, lacked sufficient information to enable it to intelligently participate in the negotiations.

4. The Tribe Expressly Waived Review of the Arbitration Award and Cannot Obtain Collateral Review in this Case.

Section 10.8.8 of the 2004 Amended Compact expressly provided that, upon its entry by the arbitrator, "Review of the resulting arbitration award is waived." Having waived direct review, the

[3] *See also* *Kelly v. Vons Companies, Inc.*, 67 Cal. App. 4th 1329, 1335-36 (1998) (findings made during arbitration given collateral estoppel effect in a subsequent lawsuit); *Clark v. Bear Stearns & Co.*, 966 F.2d 1318, 1321 (9th Cir. 1992) ("An arbitration decision can have res judicata or collateral estoppel effect…").

Tribe cannot now obtain collateral review of the arbitration award by means of this separate action. *See* *Sander v. Weyerhaeuser Co.*, 966 F.2d 501, 503 (9th Cir. 1992) ("This court has been extremely unwilling to upset the streamlined nature of arbitration by permitting the launching of collateral attacks."); *McCabe v. State Farm Mut. Auto. Ins. Co.*, 36 F. Supp. 2d 666, 673 (E.D. Pa. 1999) ("McCabe did not challenge the arbitration through a direct appeal. To allow a collateral challenge would invade the sanctity of arbitration. Dressing up the collateral attack as a breach of contract claim has no effect on this analysis.").

5. Plaintiff's Challenge to the ISA's Validity is Barred by the Statute of Limitations.

Dismissal under Rule 12(b)(6) is proper if the complaint shows on its face that it is time barred by the applicable statute of limitations. *Rivera v. Peri & Sons Farms, Inc.*, 735 F.3d 892, 902 (9th Cir. 2013). Here, California law[4] provides that the time within which the Tribe was permitted to challenge the terms of the arbitrator's award—assuming it hadn't waived the right of review—was within 100 days after its issuance, after which it became binding and conclusive on the parties. *See* Cal. Code Civ. Proc. § 1288. The arbitrator's award was issued on June 11, 2008. The Tribe therefore had until September 19, 2008, at the latest, to challenge its validity.

Alternatively, it was subject to the 60-day statute of limitations contained in the state's "validation proceeding" statutes, Code of Civil Procedure §§ 860 *et seq*. *Cf.* *Cal. Commerce Casino, Inc. v. Schwarzenegger*, 146 Cal. App. 4th 1406 (2007) (action seeking to invalidate gaming compacts under IGRA barred by validation statute).

Either way, the Tribe's claims of invalidity come far, far too late.

6. On the Merits, the First COA Fails to State a Claim.

Paragraph 76 of the FAC purports to identify five bases upon which this cause of action

[4] IGRA "does not expressly provide a statute of limitations period. *See* 25 U.S.C. § 2710(d)(7)," and "when a federal statute does not expressly supply a statute of limitations period, state statutes of limitations generally govern actions in federal courts. *See* *Papa v. United States*, 281 F.3d 1004, 1011-12 (9th Cir. 2002)." *Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation v. California*, 2017 U.S. Dist. LEXIS 47122, at *15 (S.D. Cal. Mar. 29, 2017); *see also* *Stockbridge-Munsee Cmty. v. Wisc.*, 299 F. Supp. 3d 1026, 1030-33 (W.D. Wisc. 2017) (applying Wisconsin state statute of limitations to claim of breach of IGRA compact and dismissing case under Rule 12(c)).

rest. All fail as a matter of law.

a. The ISA does not violate the terms of the compacts. Plaintiff contends that the ISA "violates the terms of the 2004 Compact Amendment and/or the 2016 Compact that prohibit Defendants from imposing taxes upon Plaintiff, especially those that exceed the amount necessary to mitigate the actual impacts of Casino operations[.]" FAC, ¶ 76(a). Those compacts do not contain any such prohibitions. The 2004 compact merely required that the charges be "reasonable," *see*, RJN, Ex. 3, pp. 26-27 (§ 10.8.9), and the arbitrator expressly found that the ISA "*reasonably*, fairly and fully addresses the issues identified for negotiation and agreement with the County by the Compact," RJN, Ex. 1, p. 7 (emphasis added), a finding that is binding on the Tribe as discussed above.

As for the 2016 compact, it too, merely requires that compensation be "reasonable," *see* RJN, Ex. 4, pp. 83-84—which, per the arbitrator, the amounts specified by the ISA are. But even more significantly, the 2016 compact expressly recognized the ISA and left it in place. Effectively, both parties to the latter compact (of which the Tribe was one) ratified the ISA in adopting the 2016 amendment.

b. The payments required by the ISA are not improper "direct taxation" within the meaning of IGRA. While states may not unilaterally *impose* "direct taxation" on tribes as a condition of gaming, a state may *negotiate* for payments from the tribe "in exchange for a quid pro quo conferred in the compact" under 25 U.S.C. § 2710(d)(3)(C)(vii), which authorizes compacts to address "subjects that are directly related to the operation of gaming activities." *Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095, 1101 (9th Cir. 2006); *In re Indian Gaming Related Cases*, 331 F.3d 1094 (9th Cir. 2003) (approving revenue-sharing provision); *Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019 (9th Cir. 2010) ("*Rincon*"). Courts considering proposed compact provisions requiring a tribe to make payments to a state under these provisions have found them lawful if they meet three criteria. First, the payments must be directly related to the operation of gaming activities. *Rincon*, 602 F.3d at 1033. Second, the payments must be "consistent with the purposes of IGRA." *Id*. And finally, the parties must have "*negotiated* a bargain permitting such payments in return for meaningful

concessions from the state (such as a conferred monopoly or other benefits). Although the state [does] not have *authority* to exact such payments, it [can] bargain to receive them in exchange for a quid pro quo conferred in the compact." *Shoshone-Bannock Tribes*, 465 F.3d at 1101-02 (emphases in original; citation omitted). In other words, courts "have interpreted § 2710(d)(4) as precluding state authority to *impose* taxes, fees, or assessments, but not prohibiting states from *negotiating* for such payments where 'meaningful concessions' are offered in return." *Rincon*, 602 F.3d at 1036.

As to the first of these prongs, the various payments prescribed by the ISA—for law enforcement, fire services, road safety improvements, etc., are "compensation for the negative externalities caused by gaming," *i.e.*, the operation of the casino, and therefore "are subjects directly related to gaming." *Id.* at 1033.

As to the second prong, IGRA specifically anticipates that the compact will address the casino's impacts on public services and public safety. 25 U.S.C. § 2710(d)(3)(C) & (d)(7)(B)(iii). It is, therefore, consistent with IGRA's purposes.

As to the third prong, there is no question that the payments prescribed by the ISA were the result of negotiations rather than "imposition" by the State or Amador County. By the Tribe's own admission, "the parties engaged in lengthy negotiations over the terms" of the ISA. *See* FAC, ¶ 40; RJN, Ex. 1, pp. 4-5. And, if anything, the payments were "imposed" by the Tribe, acting through the arbitrator, as it was the Tribe that unilaterally specified the amount of the payments to be made. *See In re Indian Gaming Related Cases*, 465 F.3d at 1113 (compact provision requiring payments into revenue sharing trust fund was not a tax "imposed" by the State because the provision originated as a proposal from the tribes).

In terms of meaningful concessions, the State negotiated for an agreement by the Tribe to make payments under the ISA in exchange for concessions that the State made in the 2004 and 2016 compacts.

Finally, it is significant that the context in which this issue is made relevant under IGRA is a case where an Indian tribe alleges that a State failed to negotiate a compact in good faith; a "demand by the State for direct taxation" is "evidence that the State has not negotiated in good faith." 25 U.S.C. § 2710(d)(7)(B)(iii)(II). That type of case—unlike this one—is one of the specific

cases over which Congress has explicitly created a private right of action and conferred original jurisdiction on the federal district courts. 25 U.S.C. § 2710(d)(7)(A)(i); *see also* Section III.A.1, *supra*.

c. Under Ninth Circuit case law, the "proprietary interest" requirement does not provide a basis for invalidating a tribe's contract with a third party. Plaintiff alleges that the ISA "violates IGRA's requirement that tribes retain the sole proprietary interest in their casino revenues." FAC, ¶ 76(c). However, the "sole proprietary interest" requirement is located in 25 U.S.C. § 2710(b)(2)(A), and the Ninth Circuit has recognized that, "by its express terms, Section 2710 pertains only to tribal ordinances or resolutions—not to a tribe's contract with a third party." *Guidiville Band of Pomo Indians v. NGV Gaming, LTD.*, 531 F.3d 767, 782 (9th Cir. 2008); *see also id.* at 782-83 (because "[t]hat language simply does not speak to *contracts* entered into between a tribe and a third party (as contrasted with tribal legislation or regulations officially enacted by the tribe)," agreement could "not be said to violate Section 2710 either.").

d. The ISA is not a "management contract." Plaintiff alleges that because the ISA restricts the service of alcohol, limits the number of gaming machines, and prohibits Class II gaming, the ISA is a "management contract" that required—but did not receive—approval from the NIGC. FAC, ¶ 73; 25 U.S.C. § 2711(b). But Plaintiff's claim stretches the concept of casino "management" beyond any plausible meaning of that word and fails as a matter of law.[5]

IGRA does not define "management contract," but the term is defined in NIGC regulations as "any contract, subcontract, or collateral agreement between an Indian tribe and a contractor ... [that] provides for the management of all or part of a [tribal] gaming operation." 25 C.F.R. § 502.15. And while the regulations do not define "management," the courts have generally considered the types of terms that 25 U.S.C. § 2711 and in 25 C.F.R. § 531.1 require to be

[5] Again, for the reasons stated above and in *see also Saint Regis Mohawk Tribe*, 451 F.3d at 49-51, IGRA creates no private right of action to raise this claim in the absence of an APA proceeding after seeking the intervention of the NIGC.

articulated in a management contract. *See, e.g.*, *First Am. Kickapoo Operations, L.L.C. v. Multimedia Games, Inc.*, 412 F.3d 1166, 1173 (10th Cir. 2005). Those terms generally relate to the day-to-day running of the casino, encompassing issues like maintenance and improvements to the facility; providing operating capital; establishing operating days and hours; hiring, firing, training, and promoting employees and establishing employment practices; maintaining the operation's books and records and paying bills; preparing the casino's financial statements and reports; advertising; etc. Considered in this light, the relationship between Amador County and the casino cannot reasonably be construed as "management" of the casino. The Tribe's wildly overbroad interpretation of that term would render *any* restriction imposed on a casino "management."

Moreover, the restrictions that the Tribe identifies these are exactly the sorts of subjects that are authorized for negotiation by Section 2710(d)(3)(C)(vi) of IGRA, which permits a compact process to address "standards for the operation of such activity and maintenance of the gaming facility, including licensing," and they are topics that are frequently addressed by compacts—including the Tribe's own compacts. *See, e.g.*, RJN, Ex. 4 (2016 Compact), pp. 30 (§ 6.3(b)) and 101 (§ 12.8) (regulating alcohol service); *id*. at p. 16 (§ 4.1) (limiting the number of slot machines).

e. The ISA is not a violation of tribal "sovereignty." Finally, the FAC alleges the ISA "constitutes an unlawful tax upon an Indian tribe by the County because it infringes on tribal sovereignty." FAC, ¶ 76(d). This allegation has no apparent content independent of the alleged IGRA violation, addressed above.

B. SECOND CAUSE OF ACTION (INVALIDITY UNDER CALIFORNIA LAW).

The gravamen of the Tribe's Second Cause of Action is that the ISA was invalid upon adoption, due to its purported inconsistency with various requirements of state law. This claim also fails as a matter of law, for a host of reasons.

1. The Tribe's State Law Claims Regarding the Invalidity of the ISA Are Barred by Estoppel, *Res Judicata*, and Waiver.

This claim is also barred by the doctrines of estoppel, res judicata, and waiver, for the same reasons discussed in Sections III.A.2 to III.A.4, *supra*.

2. These State Law Claims Are Also Barred by the Statute of Limitations.

California Code of Civil Procedure § 1288, prescribing the time within which the Tribe was permitted to challenge the terms of the arbitrator's award, and/or the 60-day statute of limitations under California's validation statutes also bars the Tribe's claims of invalidity under state law. *See* Section III.A.5, *supra*.

3. To the Extent Plaintiff's State Law Claims Are Based on the County's Pursuit of the D.C. Litigation, Those Claims Are Barred by California's Litigation Privilege.

California Civil Code § 47(b) provides an absolute privilege against state law causes of action that are premised on "any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." *Silberg v. Anderson*, 50 Cal. 3d 205, 212 (1990). The filing and maintenance of litigation have themselves been held to be communications that fall within the privilege. *Asia Investment Co. v. Borowski*, 133 Cal. App. 3d 832, 841 (1982). The privilege applies to state law claims brought in federal court. *See Graham-Sult v. Clainos*, 738 F.3d 1131, 1149 (9th Cir. 2013) (affirming dismissal of state law claims under Civ. Code § 47(b)); *Morales v. Coop. of Am. Physicians, Inc.*, 180 F.3d 1060, 1064 (9th Cir. 1999) (same).

California courts have given this absolute privilege an "expansive reach," *Rubin v. Green*, 4 Cal. 4th 1187, 1193-94 (1993), and any doubt as to whether the privilege applies is resolved in favor of applying it. *See Adams v. Superior Court*, 2 Cal. App. 4th 521, 529 (1992). Though the statute "appears in the code in the chapter on defamation, it applies to virtually all other causes of action, with the exception of an action for malicious prosecution." *Ribas v. Clark*, 38 Cal. 3d 355, 364 (1985). It applies to claims for breach of good faith and fair dealing, *see, e.g.*, *Digerati Holdings, LLC v. Young Money Entm't, LLC*, 194 Cal. App. 4th 873, 889 (2011).

It also applies to contract claims where (1) the contract itself does not "clearly prohibit" the conduct claimed to be privileged and (2) application of the privilege to the conduct in question furthers the policies underlying the privilege. *See Vivian v. Labrucherie*, 214 Cal. App. 4th 267,

276-77 (2013); *McNair v. City & Cty. of S.F.*, 5 Cal. App. 5th 1154, 1170-71 (2016). As to the first prong, nothing in the ISA explicitly barred the County's maintenance of the D.C. litigation. To the contrary, as the arbitrator's award details, the Tribe submitted its last, best offer knowing that the County intended to maintain its lawsuit. *See* RJN, Ex. 1, pp. 5-6. As to the second prong, application of the privilege to Plaintiff's claims herein furthers "[t]he purpose of the privilege[, which] is to secure utmost freedom of access to the courts without fear of retribution." *Nagy v. Nagy*, 210 Cal. App. 3d 1262, 1270 (1989). Consequently, Plaintiff's state law claims are barred by the litigation privilege to the extent that they are premised on the County's maintenance of its D.C. lawsuit.

4. On the Merits, the Second COA Fails to State a Claim.

a. The State Mitigation Fee Act does not apply to the negotiated agreements like the ISA. The State Mitigation Fee Act, Cal. Govt. Code § 66000 *et seq.*, does not provide a basis for challenging the ISA, because a landowner cannot challenge a fee under that Act where—as here—the landowner has specifically agreed to the payments. *See City of San Marcos v. Loma San Marcos, LLC*, 234 Cal. App. 4th 1045, 1059-60 (2015), *rev. denied*, 2015 Cal. LEXIS 4192 (Cal., June 10, 2015) (developer "did not have a right to challenge the fees under the Mitigation Fee Act" that it agreed to pay by contract).

b. The state Constitution's limits on taxes also do not apply. Plaintiff does not specify which of "the California Constitution's prohibition on unauthorized tax assessments" is purportedly violated by the ISA, but the most obvious candidate—Article XIIIC, § 2[6]—is inapplicable to this case, because it contains limits on taxes that are "imposed" by "local governments." That does not describe the ISA. "The phrase 'to impose' is generally defined to mean to establish or apply by authority or force, as in 'to impose a tax.'" *Ponderosa Homes, Inc. v. City of San Ramon*, 23 Cal. App. 4th 1761, 1770 (1994); *Cal. Cannabis Coal. v. City of Upland*, 3 Cal. 5th 924, 944 (2017). In this case, the "local government" in question, Amador County, did not

[6] Because the ISA was adopted prior to 2010, the pre-Proposition 26 version of that constitutional section is the one applicable here. *Cal. Chamber of Commerce v. State Air Res. Bd.*, 10 Cal. App. 5th 604, 633 (2017) ("Proposition 26, passed in 2010, is not generally retrospective in operation.").

"impose" the charges prescribed by the ISA—the arbitrator did, at the request of the Tribe. The ISA was imposed *on* the County, not by it.

c. That the County never signed the ISA does not annul it. Citing § 8(a) of the ISA and California Government Code § 23005, the Tribe contends that the ISA is invalid because the Board of Supervisors never approved it and it was never signed by County officials. There is no merit to this claim.

Section 10.8.9 of the 2004 Compact expressly provided that even if one party declined to participate in the arbitration, the arbitrator could nevertheless conduct the arbitration and impose an enforceable agreement. As the arbitrator recognized, the purpose of that requirement was to ensure "that one party cannot frustrate the other's right to a speedy arbitration and award…" RJN, Ex. 1, p. 6.

The 2004 Compact was adopted by the Legislature and signed by the Governor as a statute of the State of California. *See* Cal. Govt. Code § 12012.45(a)(1). Because it is a more recent, more specific statute it prevails over any contrary requirement that could be read into Government Code § 23005. *David M. v. Beverly Hosp.*, 131 Cal. App. 4th 1272, 1279 (2005); *Woods v. Young*, 53 Cal. 3d 315, 324 (1991).

As to the claim that the ISA is unenforceable because it provided it would become effective "upon execution by both parties," the arbitration award provided that "[t]he attached Final Agreement has been executed by the Arbitrator[7] to reflect approval thereof within the scope of this Arbitration, and shall be, and hereby is declared to be (a) the Agreement between the Tribe and the County, as to those matters within the scope of Section 10.8.8 of the Compact, and (b) fully enforceable, effective immediately upon the issuance of this Award." *See* RJN, Ex. 1, p. 7. Again, this ruling—having not been timely contested by the Tribe (and review having been waived)—is binding upon the Tribe and cannot be challenged now.

d. The ISA is not invalid for lack of mutuality. Plaintiff alleges that

[7] Government Code § 23005 provides that "A county may exercise its powers only through the board of supervisors or through agents and officers acting under authority of the board *or authority conferred by law*." (Emphasis added.) In this case, the arbitrator was an agent "acting under … authority conferred by law"—specifically the 2004 Compact.

the ISA was "illusory" and lacked mutuality—and was therefore invalid—because "at the time the ISA purportedly became effective, Amador County was actively pursuing litigation against the United States (effectively against Plaintiff) to establish that Plaintiff's Indian reservation did not constitute an Indian reservation under federal law, and thus Plaintiff was not even eligible to pursue gaming activities on Plaintiff's lands." FAC, ¶ 2. This does not constitute a lack of mutuality within the meaning of California contract law.

It is true that the County would have been freed from its obligations under the ISA if the Tribe's rancheria were held to be ineligible for gaming under IGRA. But "a contract is not lacking in mutuality of obligation where a contingency, upon the ascertainment or happening of which a party has a right to terminate an agreement, is one over which such party has no means of control." *R. J. Cardinal Co. v. Ritchie*, 218 Cal. App. 2d 124, 143 (1963) (quoting *Pease v. Brown*, 186 Cal. App. 2d 425, 432 (1960)); *see also Vitagraph, Inc. v. Liberty Theatres Co.*, 197 Cal. 694, 701 (1925). In other words, "a contract is lacking in mutuality where one party has the right to terminate it at any time *at his pleasure*." *Id*. at 143 (emphasis added). "In the absence of an express *unilateral* right of *unrestricted* cancellation, the obligations in a contract should be presumed to be real and not illusory (see Civ. Code, §§ 1614, 1615)." *Pasadena Police Officers Ass'n v. City of Pasadena*, 147 Cal. App. 3d 695, 708 (1983) (emphasis added). On the other hand, "the tendency is to interpret even a slight restriction on the exercise of the right of cancellation as constituting such legal detriment as will satisfy the requirement of sufficient consideration; for example, where the reservation of right to cancel is for cause, or by written notice, or after a definite period of notice, or upon the occurrence of some extrinsic event, or is based on some other objective standard." *R. J. Cardinal Co.*, 218 Cal. App. 2d at 143 (quoting 1 Williston, CONTRACTS (1957), § 105, pp. 418-19).

Here, the County did not have unilateral control over the contingency that could have relieved it of its obligations under the ISA; the federal courts in Washington, D.C., did. And the need to obtain a favorable ruling in that case was far more than a "slight restriction" on the ability of the County to avoid be freed of its obligations under the ISA; it proved, in fact, to be an insurmountable restriction. The County is bound by the ISA, and so is the Tribe. There is no lack

of mutuality.

C. THE THIRD CAUSE OF ACTION, FOR AN ACCOUNTING, DOES NOT STATE AN INDEPENDENT CLAIM FOR RELIEF.

Plaintiff's "Third Cause of Action" seeks an accounting, which is not an independent cause of action but rather a type of remedy that depends on the validity of the underlying claims. *Batt v. City & County of San Francisco*, 155 Cal. App. 4th 65, 82 (2007) (citing 5 Witkin, CAL. PROC. (4th ed. 1997), *Pleading* § 775), *disapproved on another ground in McWilliams v. City of Long Beach*, 56 Cal. 4th 613, 626 (2013); *Duggal v. G.E. Capital Communs. Servs., Inc.*, 81 Cal. App. 4th 81, 95 (2000).

D. FOURTH CAUSE OF ACTION (RECISSION).

Plaintiff's Fourth Cause of Action seeks recission of the ISA in the event it is found to be a valid contract (*i.e.*, in the event Plaintiff does not prevail on the First or Second Causes of Action), on the alternative grounds of mistake or fraud. As to the first of these—mistake—the Complaint alleges that (1) "at the time the ISA was declared effective [*i.e.*, in 2008], Plaintiff and the County were both mistaken as to the size and scope of the Casino project—a fact material to Plaintiff's participation and purported formation of the ISA," *see* FAC, ¶ 89, and (2) that the Tribe was mistaken as to the nature and extent of the County's intention to pursue the D.C. litigation, *see* FAC, ¶ 91. Alternatively, the Tribe alleges that the County withheld some entirely unspecified information about the size and scope of the casino project and used that information to induce the Tribe to enter the ISA. *See* FAC, ¶ 90. None of these allegations remotely state a viable claim for relief.

1. The Tribe's Claim for Recission Is Barred by Estoppel, *Res Judicata*, and Waiver.

The gravamen of the Tribe's Fourth Cause of Action is that the Tribe is entitled to rescind the ISA because its agreement to bound was the product of mistake or fraud. This claim is barred by the doctrines of estoppel, res judicata, and waiver, for the same reasons discussed in Sections III.A.2 to III.A.4, *supra*.

2. The Claim for Recission Is Also Barred by the Four-Year Statute of Limitations in Code of Civil Procedure § 337(d).

A cause of action for recission of a contract is subject to the statute of limitations contained in Code of Civil Procedure § 337(c). Such a cause of action must be brought within four years of "discovery, by the aggrieved party, of the facts constituting the fraud or mistake."

Insofar as this Cause of Action is premised on purported mistake or fraud as to the "size and scope of the Casino project," FAC, ¶¶ 89-90, the allegations of the FAC itself make clear that by 2015 *at the latest* (but, in fact, far sooner) the Tribe knew that its casino project would be subject to different terms than those it anticipated in 2008 when the ISA was entered. *See* FAC, ¶ 60 (describing repeated reconfigurations of project due to inability to obtain financing).

Insofar as this claim is premised on the County's maintenance of litigation against the Tribe, the Tribe undoubtedly knew of the County's intention to vigorously pursue the litigation at the time the ISA was entered. Indeed, as the arbitrator's award details, the Tribe submitted its last, best offer knowing that the County intended to maintain its lawsuit. *See* RJN, Ex. 1, pp. 5-6. And five years later, in 2013, the district court in the federal case denied the Tribe's motion to intervene as untimely because "the Tribe could and should have moved for intervention several years ago." *See Amador County*, 312 F.R.D. at 15, *aff'd*, 772 F.3d 901 (D.C. Cir. 2014). In fact, the district court issued its final judgment in the D.C. litigation, and the County had already appealed that decision, more than four years before the Complaint in this action was filed. *See Amador County*, 170 F. Supp. 3d at 135 (D.D.C. Mar. 16, 2016); RJN, Ex. 5 (Docket, *Amador County v. Jewell*, Case No. 1:05-cv-00658-BJR (D.D.C.) (notice of appeal filed Apr. 13, 2016)).

Either way, the Tribe "discovered" the facts purportedly underlying this cause of action more than four years prior to the filing of the complaint. Consequently, Plaintiff's Fourth Cause of Action is barred by the pertinent statute of limitations.

3. The Claim for Recission is Barred by the Litigation Privilege.

For the reasons discussed in Section III.B.3, *supra*, this claim is barred by Civil Code § 47(b)'s litigation privilege, to the extent it is premised on purported mistake or fraud relating to the County's maintenance of the D.C. litigation. *See also Edwards v. Centex Real Estate Corp.*, 53 Cal.

App. 4th 15, 40 (1997) (litigation privilege applies to claims for contract recission).

4. On the Merits, Plaintiff Does Not Allege Facts that Constitute a "Mistake" or Fraud That Would Permit Recission in Any Event.

Finally, Plaintiff's allegations of "mistake" and fraud are legally insufficient to state a claim for recission, as a matter of law.

To warrant rescinding a contract for either unilateral or mutual mistake, the alleged mistake of fact must concern "present" facts (*i.e.*, facts existing at the time the agreement was executed) or facts predating the contract. *Paramount Petroleum Corp. v. Superior Court*, 227 Cal. App. 4th 226, 245 (2014); Cal. Civ. Code § 1577(2). A "failure to predict the future" is not a mistake of fact that justifies recission. *Id*. at 248 n.27; *see also Mosher v. Mayacamas Corp.*, 215 Cal. App. 3d 1, 6 (1989) (an "error in judgment" about the occurrence of future events does not constitute grounds for rescinding an agreement); *YTY Industry SDN. BHD. v. Dow Chemical Co.*, 2009 U.S. Dist. LEXIS 101203, at *63 (C.D. Cal. Oct. 28, 2009) ("Where a belief or assumption under which a contract is made is rendered mistaken by subsequent events, the mistake generally will not support rescission of the contract.").

Here, the facts about which the Tribe (unilaterally) or the parties (mutually) are alleged to have been mistaken when the ISA was entered are the belief or assumption that (1) *in the future* the Tribe would be able to obtain financing for a Casino of the scope and size that it proposed, or (2) the Tribe's alleged belief or assumption that *in the future* the County would choose to abandon its federal lawsuit. These facts, even if accepted as true, do not justify recission.

Insofar as recission is implicitly sought on the basis of fraud, *see* FAC, ¶ 90, Plaintiff has not alleged the facts constituting fraud with sufficient particularity to meet the requirements of Rule 9(b). Indeed, the only fact that the FAC identifies as having been within the County's particular knowledge is its intentions regarding maintenance of the D.C. lawsuit, about which the County was upfront, insisting that a commitment to dismiss the lawsuit be removed from the proposed agreement that eventually became the ISA during negotiations. *See* RJN, Ex. 1, pp. 5-6.

Finally, "[r]escission may be had for mistake of fact if the mistake is material to the contract and was not the result of neglect of a legal duty, *if enforcement of the contract as made would be unconscionable, and if the other party can be placed in statu quo*. [Citations.]" *Donovan*

v. Rrl Corp., 26 Cal. 4th 261, 280 (2001) (quoting *M. F. Kemper Constr. Co. v. Los Angeles*, 37 Cal. 2d 696, 701 (1951)) (emphasis added). With the Tribe's casino now open and operating, *see* FAC, ¶¶ 1, 61, Amador County cannot be returned to the pre-ISA status quo. Recission under these circumstances would necessarily amount to a one-sided windfall to the Tribe. *See* Civ. Code § 3521 ("He who takes the benefit must bear the burden.").

E. FIFTH CAUSE OF ACTION (BREACH OF GOOD FAITH & FAIR DEALING).

1. California's Litigation Privilege Bars This Claim.

Plaintiff alleges that "[b]y taking the actions herein alleged, including without limitation the pursuit of years of litigation that was specifically designed to deprive Plaintiff's reservation of its standing as a federally recognized Indian reservation, Defendants intentionally violated Plaintiff's contractual rights under the ISA and deprived Plaintiff from obtaining the full value of the benefits intended under that agreement, to the extent it is deemed valid." FAC, ¶ 94. But while this allegation is purportedly not limited to the D.C. litigation, the FAC does not identify any other action taken by the County that deprived the Tribe of the benefits of the ISA. For the reasons discussed in Section III.B.3, *supra*, the County cannot be held liable for a claim of breach of good faith and fair dealing based upon its maintenance of litigation. *See also Digerati Holdings, LLC*, 194 Cal. App. 4th at 889.

2. The Fifth Cause of Action is Barred by the Two-Year Statute of Limitations in Code of Civil Procedure § 339(1).

A cause of action for breach of the duty of good faith and fair dealing (Fifth Cause of Action) is subject to the statute of limitations contained in Code of Civil Procedure § 339(1); *Eisenberg v. Insurance Co. of N. Am.*, 815 F.2d 1285, 1292 (9th Cir. 1987); *Smyth v. USAA Property & Casualty Ins. Co.*, 5 Cal. App. 4th 1470, 1477 (1992). Such a cause of action must be brought within two years of the alleged breach. Without admitting that any such breach exists, Defendant notes that the Tribe knew of the County's intention to actively pursue its D.C. litigation more than a decade ago, *see* FAC ¶ 94 (identifying litigation as the source of such breach), and that the litigation ended—and construction on the casino even began—more than two years prior to the filing of the complaint in this action. *See* FAC, ¶ 1. Thus, Plaintiff's Fifth Cause of Action is barred

by the statute of limitations.

F. SIXTH CAUSE OF ACTION (SPECIFIC PERFORMANCE).

Plaintiff seeks "specific performance" of the purported obligation to renegotiate the ISA under Sections 8(a), 5(a) and 5(d) of the ISA itself. FAC, ¶¶ 50-51, 98-99. But none of these provisions imposes the requirement to negotiate that the Tribe seeks to have specifically enforced.

Section 8(a) merely prescribes the term of the ISA: twenty years or until the 2004 compact expires, whichever comes first, except that if the 2004 compact is replaced with an amended compact the ISA would continue in effect unless and until replaced by a new ISA under the new compact. Plaintiff reads this latter provision as compelling replacement of the old ISA with a new one, since the compact was amended in 2016, but the ISA contains no such requirement, and the 2016 amended compact specifically left the ISA in place, only *requiring* a new ISA in the event that the Tribe were to propose an expanded casino project "that is larger in size or scope than the 'proposed project' described in and evaluation by the 2007 TEIR." RJN, Ex. 4, p. 84 (§ 11.7(d)). Indeed, the compact specifically disclaims the need to adopt a new ISA "to the extent an intergovernmental agreement that was negotiated or entered into under terms of a prior compact remains in effect." *Id*.

Section 5(d) requires that every five years following the effective date of the ISA, the parties will meet-and-confer to discuss whether "the terms if this Agreement [the ISA] are still effective to carry out the intent of the parties in entering into this agreement." Under the express language of the ISA, such automatic "re-openers" were to take place in 2013 and 2018. Conspicuously, the FAC does not allege that the parties failed to engage in the process prescribed for those years. The next automatic "re-opener" is not due until 2023.

Section 5(a) provides that:

> Either party may request that the other party renegotiate one or more terms of this Agreement if and only if: (1) there is a significant change that directly or indirectly relates to the party's expectations under this Agreement; (2) that change materially impacts that party; and (3) that change was not anticipated at the time of entering into this Agreement. Such changes may include, but are not limited to, a change in State or federal law that extends gaming to non-Indians or non-Indian lands, a change in the financial obligations of the Tribe to the State under the Amended Compact, a reduction in the scope of gaming on Indian lands mandated by federal or State law, or a change in State law or in the State

> manner of doing business that increases the County's responsibility regarding traffic on public highways either in terms of law enforcement, road surface maintenance, or traffic safety measures.

See RJN, Ex. 1, p. 21.

But the FAC does not allege that the Tribe has complied with the conditions precedent required to trigger such renegotiation. Nor does it allege that the County has refused to negotiate consistent with the terms of Section 5(a).

G. SEVENTH CAUSE OF ACTION: CALIFORNIA BUSINESS & PROFESSIONS CODE § 17200 IS INAPPLICABLE TO PUBLIC ENTITIES LIKE THE COUNTY.

The Seventh Cause of Action purports to state a claim for violation of California's Unfair Competition Law, Bus. & Prof. Code § 17200 *et seq*. However, "[a] public entity [like Amador County] is not a 'person' within the meaning of § 17201 of the Business & Professions Code and may not, therefore, be sued under Section 17200, et. seq." *Amalgamated Transit Union, Local 1756, AFL-CIO v. First Transit, Inc.*, 2004 U.S. Dist. LEXIS 25233, at *7 (C.D. Cal. Nov. 30, 2004); *see also Community Mem. Hosp. v. County of Ventura*, 50 Cal. App. 4th 199, 209-11 (1996); *Cal. Med. Assn. v. Regents of Univ. of Cal.*, 79 Cal. App. 4th 542, 551 (2000).

H. EIGHTH CAUSE OF ACTION: THE COMPACTS DO NOT PROVIDE AN INDEPENDENT BASIS FOR ATTACKING THE COMPENSATION TO THE COUNTY IN THE ISA.

It is questionable whether, as a non-signatory, Amador County can even be sued for breach of the Tribe's compacts with the State of California. *See Pauma Band of Luiseno Mission Indians*, 346 F. Supp. 3d at 1380-81 (expressing doubts on exactly this point). But even if such a claim is theoretically viable in the abstract, Plaintiff has failed to state a viable claim for breach of compact here, for the reasons stated in Section III.A.6.a, *supra*.

IV. CONCLUSION

For the foregoing reasons, the First Amended Complaint should be dismissed.

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Respectfully submitted,

Dated: March 8, 2021

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