SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

MINUTE ORDER

DATE: 04/19/2019 TIME: 01:30:00 PM DEPT: C-72

JUDICIAL OFFICER PRESIDING: Timothy Taylor
CLERK: Yvette Terronez
REPORTER/ERM: Michelle Neuenswander CSR# 12508
BAILIFF/COURT ATTENDANT: O. Godoy

CASE NO: **37-2018-00058170-CU-NP-CTL** CASE INIT.DATE: 11/16/2018
CASE TITLE: **Rincon Band of Luiseno Mission Indians of the Rincon Reservation California vs Flynt [E-FILE]**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Non-PI/PD/WD tort - Other

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EVENT TYPE: Demurrer / Motion to Strike
MOVING PARTY: Celebrity Casinos Inc, Casino LLC, Hawaiian Gardens Casino, Sahara Dunes Casino LP, Stones South Bay Corp, Larry Flynt, Players Poker Club Inc, The Bicycle Casino LP, Oceans 11 Casino Inc, El Dorado Enterprises Inc, Hollywood Park Casino Company Inc, California Commerce Club Inc, Larry Flynt Revocable Trust
CAUSAL DOCUMENT/DATE FILED: Demurrer, 02/11/2019

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APPEARANCES
Todd Kartchner, counsel, present for Plaintiff(s).
Richard I Wideman, counsel, present for Plaintiff(s).
Scott Crowell, specially appearing for Santa Ynez Band of Chumash Mission Indians of the Santa Ynez Reservation California, Plaintiff.
Scott Crowell, specially appearing for Rincon Band of Luiseno Mission Indians of the Rincon Reservation California, Plaintiff.
Michael A Attanasio, counsel, present for Defendant(s).
Stephen L Schreiner, counsel, present for Defendant(s).
MAURICE M SUH, counsel, present for Defendant(s).
Patricia P Hollenbeck, counsel, present for Defendant(s).
Maureen Harrington, counsel, present for Defendant(s).
David J Noonan, counsel, present for Defendant(s).

Additional appearances listed on last page.

The Court hears oral argument by counsel and takes this matter under submission.

After taking this matter under submission and considering oral argument by counsel the Court rules as follows:

Rulings on Demurrer and Motion to Strike Complaint

Rincon Band v. Flynt, Case No. 2018-58170

Argued and submitted: April 19, 2019, 1:30 p.m., Dept. 72

1. Overview and Procedural Posture.

This is an action for nuisance, unfair competition, and civil conspiracy brought by two Native American tribes against eleven cardroom defendants operating in Southern California. Plaintiffs, who seek injunctive relief and damages, contend the cardroom defendants are illegally using "TPPs"* to offer "banked card games" which by law only the tribes may offer in California. ROA 1, paragraphs 47-50.**

The complaint was filed in November of 2018. It pleads four counts: (1) count one for public nuisance; (2) count two for unfair competition in violation of Cal. Bus. and Prof. Code section 17200 ("UCL"); and (3) counts three and four for civil conspiracy. Counts one and two are pled against the cardroom defendants. Counts three and four are pled against the fictitiously named "TPPs."***

The cardroom defendants obtained via *ex parte* application an extension of time to plead. ROA 26, 30. They also sought and received a page limit waiver for the pleading challenges discussed below. ROA 49-50. Arizona counsel for plaintiffs, Scott D. Crowell, sought and received leave to appear as counsel *pro hac vice*. ROA 33-37, 64-65.

Presently, the cardroom defendants have filed a consolidated and comprehensive demurrer and motion to strike. ROA 54-63. The demurrer attacks the nuisance count on several grounds, including standing. It also attacks the UCL count on standing grounds. The motion to strike attacks the prayer for damages associated with the UCL count.

Plaintiffs filed opposition. ROA 69-70. The cardroom defendants filed reply. ROA 75-78. The court reviewed the papers, and published a tentative ruling on April 17. ROA 81-82. Literally minutes before the April 19 hearing, the court was handed a document filed by plaintiffs entitled "Notice of Supplemental Authority." It is, in essence, an unauthorized surreply. Defense counsel received it the night before the hearing.

2. Applicable Standards.

A. On November 6, 1984, California's Constitution was amended to add the following: "The Legislature has no power to authorize, and shall prohibit casinos of the type currently operating in Nevada and New Jersey." "Casino Prohibition Amendment," Cal. Const., Art. IV, § 19(e).

B. In 1987, the United States Supreme Court rejected an attempt by California to prohibit tribes from operating bingo halls and card games. *California v. Cabazon Band of Mission Indians* (1987) 480 U.S. 202, 107 S. Ct. 1083.

C. In response to the *California v. Cabazon Band of Mission Indians* decision, Congress enacted the Indian Gaming Regulatory Act in 1988 to delineate the roles of tribes, the federal government, and state governments in regulating Indian gaming.

D. Cal. Penal Code section 330.11 provides:

"Banking game" or "banked game" does not include a controlled game if the published rules of the game feature a player-dealer position and provide that this position must be continuously and systematically rotated amongst each of the participants during the play of the game, ensure that the player-dealer is able to win or lose only a fixed and limited wager during the play of the game, and preclude the house, another entity, a player, or an observer from maintaining or
operating as a bank during the course of the game. For purposes of this section it is not the intent of the Legislature to mandate acceptance of the deal by every player if the division finds that the rules of the game render the maintenance of or operation of a bank impossible by other means. The house shall not occupy the player-dealer position.

E. Cal. Bus. & Prof. Code § 19801 (a) & (d) provides:

State law prohibits commercially operated lotteries, banked or percentage games, and gambling machines, and strictly regulates pari-mutuel wagering on horse racing. To the extent that state law categorically prohibits certain forms of gambling and prohibits gambling devices, nothing herein shall be construed, in any manner, to reflect a legislative intent to relax those prohibitions.

Unregulated gambling enterprises are inimical to the public health, safety, welfare, and good order. Accordingly, no person in this state has a right to operate a gambling enterprise except as may be expressly permitted by the laws of this state and by the ordinances of local governmental bodies.

F. The applicable jury instructions for the public nuisance claim (complaint, count one) start at CACI 2020.

The essential elements of the public nuisance claim are: (1) defendant, by acting, or failing to act, created a condition that was: (a) harmful to health, or (b) obstructed the free use of the property so as to interfere with the comfortable enjoyment of life or property; (2) the condition affected a substantial number of people at the same time; (3) an ordinary person would be reasonably annoyed or disturbed by the condition; (4) the seriousness of the harm outweighs the social utility of the conduct; (5) plaintiff did not consent to the conduct; (6) plaintiff suffered harm that was different from the type of harm suffered by the general public; and (7) defendant's conduct was a substantial factor in causing plaintiff's harm. CACA 2020; *Birke v. Oakwood Worldwide* (2009) 169 Cal.App.4th 1540, 1548.

Cal. Civil Code section 3480 defines a public nuisance as "one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." "General allegations are ... inadequate" for statutory causes of action. *Mitenhuber v. City of Redondo Beach* (1983) 142 Cal.App.3d 1, 5.

G. Count two is brought under the "unlawful," "unfair," and "fraudulent" prongs of the UCL, Cal. Bus. and Prof. Code section 17200. To state a cause of action under the "unlawful" prong, the cause of action must plead a statute, law, or regulation that serves as the predicate for the section 17200 violation. *E.g.*, *Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377, 383 (section 17200 permits a cause of

action under the "unlawful" prong if the practice violates some other law). To state a cause of action under the "unfair" prong, the cause of action must allege conduct by defendant "tethered to any underlying constitutional, statutory or regulatory provision." *E.g.*, *Scripps Clinic v. Superior Court* (2003) 108 Cal.App.4th 917, 940; *Durell v. Sharp Healthcare* (2010) 183 Cal.App.4th 1350, 1366. To state a cause of action under the "fraudulent" prong, the plaintiff must allege that members of the public are likely to be deceived. *E.g.*, *Prata v. Superior Court* (2001) 91 Cal.App.4th 1128, 1144.

H. A claim of civil conspiracy (complaint, counts three and four) is not a separate cause of action, and its only significance is that each member may be held responsible as a joint tortfeasor for torts committed pursuant to the conspiracy, regardless of whether or not he or she directly participated in the act. *See*, *e.g.*, ***Richard B. LeVine, Inc. v. Higashi*** **(2005) 1**31 Cal.App.4th 566, 574. A claim of civil conspiracy requires proof that two or more persons, with actual knowledge that a tort is planned, concurred in the tortious scheme. Thus, even "actual knowledge of the planned tort, without more, is insufficient to serve as the basis for a conspiracy claim. Knowledge of the planned tort must be combined with intent to aid in its commission." ***Kidron v. Movie Acquisition Corp.*** **(1995)** 40 Cal.App.4th 1571, 1582. "The sine qua non of a conspiratorial agreement is the knowledge on the part of the alleged conspirators of its unlawful objective and their intent to aid in achieving that objective." *Schick v. Lerner* (1987) 193 Cal.App.3d 1321, 1328.

Although the requisite knowledge and intent " ' " 'may be inferred from the nature of the acts done, the relation of the parties, the interests of the alleged conspirators, and other circumstances' " ' " (*Wyatt v. Union Mortgage Co.* (1979) 24 Cal.3d 773, 785), " '[c]onspiracies cannot be established by suspicions. There must be some evidence. Mere association does not make a conspiracy. There must be evidence of some participation or interest in the commission of the offense.' " *Davis v. Superior Court* (1959) 175 Cal.App.2d 8, 23.

Whether the knowledge and intent elements of a civil conspiracy claim have been established are quintessential factual questions. *See*, *e.g.*, ***Peterson v. Cruickshank*** **(1956)** 144 Cal.App.2d 148, 163-166. The applicable jury instructions are in the CACI 3600 series.

I. A demurrer may only be sustained if the complaint fails to state a cause of action under any possible legal theory. *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 810; *McCall v. PacifiCare of California, Inc.* (2001) 25 Cal.4th 412, 415; *Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967. Moreover, "[r]egardless of whether a request therefore was made, unless the complaint shows on its face that it is incapable of amendment, denial of leave to amend constitutes an abuse of discretion." *Roman v. County of Los Angeles* (2000) 85 Cal.App.4th 316, 322. The courts of appeal give the complaint a reasonable interpretation, "treat[ing] the demurrer as admitting all material facts properly pleaded," but do not "assume the truth of contentions, deductions or conclusions of law." *Aubry v. Tri-City Hospital Dist.*, *supra*, 2 Cal.4th at 967; *Zelig v. County of Los Angeles* (2000) 27 Cal.4th 1112, 1126. Courts must liberally construe the pleading with a view to substantial justice between the parties. Cal. Code of Civil Procedure §452; *Kotlar v. Hartford Fire Ins. Co.* (2000) 83 Cal.App.4th 1116, 1120.

J. A motion to strike lies either to strike any "irrelevant, false, or improper matter inserted into any pleading" or to strike any pleading or part thereof "not drawn or filed in conformity with the laws of this State, a court rule or order of court." Cal. Code of Civil Procedure § 436. As with demurrers, the grounds for a motion to strike must appear on the face of the pleading under attack, or from matter which the court may judicially notice (e.g. the court's own files or records). Cal. Code of Civil Procedure § 437. As with demurrers, motions to strike are disfavored; the policy of the law is to construe pleadings liberally with a view to substantial justice. Cal. Code of Civil Procedure § 452. When ruling on a motion to

strike, in the absence of contradictory facts that the court is required to take judicial notice of, the factual allegations set forth in a complaint must be construed as true. *Clauson v. Superior Court* (1998) 67 Cal.App.4th 1253, 1255. When granting a motion to strike, a court may allow an amended complaint upon such terms as may be just. Cal. Code of Civil Procedure § 472a(d); *Courtesy Ambulance Service v. Superior Court* (1992) 8 Cal.App.4th 1504, 1519 n. 12.

3. Discussion and Rulings.

A. The demurrer is sustained with 20 days leave to amend.

i. Count one fails as the complaint does not plead standing to bring a public nuisance claim against the cardroom defendants.

Pursuant to Cal. Code of Civil Procedure section 731, "[a] civil action may be brought in the name of the people of the State of California to abate a public nuisance ... by the district attorney or county counsel of any county in which the nuisance exists or by the city attorney of any town or city in which the nuisance exists." Pursuant to Cal. Civil Code section 3493, "[a] private person may maintain an action for a public nuisance, if it is specially injurious to himself, but not otherwise." "A litigant's standing to sue is a 'threshold issue to be resolved before the matter can be reached on the merits." *Borstein v. CBS Interactive, Inc*. (2013) 222 Cal.App.4th 456, 465.

The complaint fails to plead facts that plaintiffs are either a district attorney, or a county counsel, or a city attorney in the locales in which the public nuisance exists. Also, the complaint fails to plead facts that plaintiffs are a "private person" in order to pursue a public nuisance claim. Instead, the complaint pleads plaintiffs are sovereign entities, *i.e*., "federally-recognized Indian" tribes with "inherent sovereign authority" and whose goal is to provide "strong tribal government." ROA 1, complaint, paragraphs 1-2, 65, 67. Further, plaintiffs fail to provide authority, *i.e*., a statute or case law, which holds that tribes are "private persons" for purposes of bringing a public nuisance claim. As such, count one fails to allege standing against the cardroom defendants.

The court considered the tardily presented definitions of "tribe" in the surreply. They do not change the court's analysis. As presently pled, the complaint presents the tribes as governments, not as simply and "organized group or community of [Native Americans].

Next, count one fails as the complaint does not allege the essential element that plaintiffs suffer from the same harm as the public. No facts are alleged that plaintiffs share any of the same alleged harm with the purportedly affected communities. *See* Calif. Civil Code § 3480 (a public nuisance as "one which affects at the same time an entire community or neighborhood, or any considerable number of persons...") Instead, the complaint pleads that plaintiffs are "remote" and "not near the urban centers from which they draw their customers" (*see* complaint, paragraph 60), suggesting plaintiffs do not suffer from the same harm as communities or neighborhoods that surround or are near defendants' cardrooms.

Third, count one fails as the complaint does not allege the essential element of sufficient public harm. In order to maintain a public nuisance claim, plaintiffs must allege that defendants' acts are likely to cause a "significant invasion of a public right." *See In re Firearm Cases* (2005) 126 Cal.App.4th 959, 988. The interference must be both substantial and unreasonable. *Birke v. Oakwood Worldwide, supra,* 169 Cal.App.4th at 1547. No facts are alleged that defendants' acts are likely to cause a "significant invasion of a public right." The allegation that the cardroom defendants "operated banked games expressly

reserved for tribes" which created conditions harmful to the public "health, safety, welfare, and good order" (complaint, paragraph 69) is without support in terms of factual allegations. The plaintiffs' reliance on a Legislative finding regarding unregulated gambling does not alter this analysis.

ii. Count two fails as the complaint does not plead standing to bring a UCL claim against the cardroom defendants.

Standing to bring a claim under the UCL is limited to "the Attorney General," a "district attorney," a "county counsel," a "city attorney," or "by a person who has suffered injury in fact and has lost money or property as a result of the unfair competition." Cal. Bus. and Prof. Code § 17204. The UCL defines "person" to "include natural persons, corporations, firms, partnerships, joint stock companies, associations and other organizations of persons." Cal. Bus. and Prof. Code § 17201. Indian Tribes are not included in this recitation.

The complaint fails to allege standing to bring a claim against the cardroom defendants under the UCL. The complaint does not allege that plaintiffs are "the Attorney General," a "district attorney," a "county counsel," a "city attorney," or a "person" under the UCL. Instead, the complaint pleads plaintiffs are sovereign entities, *i.e.*, "federally-recognized Indian" tribes with "inherent sovereign authority" and whose goal is to provide "strong tribal government". ROA 1, complaint, paragraphs 1-2, 65, 88. Government entities are not included within the definition of "person" under the UCL. *See* Cal. Bus. and Prof. Code § 17201. If the Legislature wanted to include government entities within the definition of "person" under the UCL, it could have done so. *See PETA v. California Milk Producers Advisory* Bd. (2005) 125 Cal.App.4th 871, 878. In addition, plaintiffs fail to provide authority, *i.e.*, a statute or case law, which holds that tribes are a "person" under the UCL definition for purposes of bringing an UCL claim. It must be remembered that the current standing requirements for the UCL were the result of an explicit effort by the People of California to narrow and restrict standing. See generally, *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 320–21, 246 P.3d 877, 884 (2011)("In 2004, the electorate substantially revised the UCL's standing requirement; where once private suits could be brought by 'any person acting for the interests of itself, its members or the general public' (former § 17204, ...now private standing is limited to any 'person who has suffered injury in fact and has lost money or property' as a result of unfair competition.") As such, count two fails since the complaint does not allege standing to bring a UCL claim against the cardroom defendants.

The court considered the Ohio federal cases cited in the surreply. They are, of course, not binding on this court. They confirm the absence of California authority on the question of whether an Indian Tribe has standing under the UCL. They also confirm that, as the claims are presently pled, the tribes in this case (as distinguished from the tribes in the Ohio cases) are acting as governmental entities.

B. To the extent the motion to strike the damages allegations in the complaint is not moot by virtue of the demurrer ruling, it is granted. The request for damages (ROA 1, complaint, paragraph 93) is improper. The prevailing plaintiff on an UCL claim is limited to injunctive relief and restitution; damages are not recoverable. *Korea Supply Co v. Lockheed Martin Corp*. (2003) 29 Cal.4th 1134, 1144.

C. Plaintiffs have expressly requested leave to amend (ROA 69, opposition memorandum, pp. 11:7-19, 18:9-14; ROA 70, opposition memorandum, pp. 4:23-5:6), and it is ordinarily an abuse of discretion to deny such a request unless the inability to state a valid cause of action is clear. In this respect, plaintiffs have the burden to show in what manner they can amend counts one and two in the complaint and how the amendment will change the legal effect of the pleading. *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349. They suggested possible amendments at the hearing. The court grants plaintiffs twenty (20) days

leave to amend counts one and two. Leave to amend is justified by *Connerly v. State of California* (2014) 229 Cal.App.4th 457, holding that a party responding to a demurrer can even wait until the case reaches the Court of Appeal to suggest a theory change justifying leave to amend. Also, this demurrer and motion to strike is the first time the court has considered the pleading sufficiency of plaintiff's claims against the cardroom defendants.

4. CMC.

The parties were in agreement (ROA 73) that the setting of a trial date would be premature. The CMC was continued to July 26, 2019 at 9:00 a.m.

IT IS SO ORDERED.

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*The complaint in paragraphs 14 and 38 attempts to define "TPP." "Proposition players" are described as "an individual paid by the cardroom to sit at the tables and reinvigorate games with dwindling action and thereby stimulate additional revenue for the cardroom in the form of per-hand fees collected from every player, as well as increased food and beverage sales." The selection of the initials "TPP" for these vaguely described fictitiously named parties is unclear; counsel clarified in oral argument that TPP stands for "third party proposition player." This should be clarified in the FAC.

** The complaint in paragraph 23 describes the difference between a "banked" and "nonbanked" card game: "'In banked or percentage card games, players bet against the 'house' or the casino. In 'nonbanked' or 'nonpercentage' card games, the 'house' has no monetary stake in the game itself, and players bet against one another.'"

***The indiscriminate use of the phrase "cause of action" to mean "count" is discussed in section 25 of the Witkin treatise on Pleading (Cal. Procedure, 4th Ed. at p. 87). It is also discussed at pp. 394-395 of the Supreme Court's opinion in *Baral v. Schnitt,* 1 Cal.5th 376 (2016).

Judge Timothy Taylor

ADDITIONAL APPEARANCES:

JONATHAN W BROWN, counsel, present for Defendant(s).
Jeeremy Smith & Michael Dom, specially appearing for The Bicycle Casino LP, Defendant.
Jeremy Smith & Michael Dom, specially appearing for Celebrity Casinos Inc, Defendant.
Jeremy Smith & Michael Dom, specially appearing for Hollywood Park Casino Company Inc, Defendant.

General Information

Court	California Superior Court, San Diego County
Docket Number	2018-00058170

Notes

No Notepad Content Found