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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

RINCON BAND OF LUISENO MISSION INDIANS OF THE RINCON RESERVATION, CALIFORNIA, a federally-recognized Indian tribe; and SANTA YNEZ BAND OF CHUMASH MISSION INDIANS OF THE SANTA YNEZ RESERVATION, CALIFORNIA, a federally recognized Indian tribe,

Plaintiffs,

v.

LARRY FLYNT, individually and as trustee of the LARRY FLYNT REVOCABLE TRUST: CASINO, LLC, a California limited liability company; EL DORADO ENTERPRISES, INC. dba HUSTLER CASINO, a California corporation; CALIFORNIA COMMERCE CLUB, INC. dba COMMERCE CASINO, a California corporation; THE BICYCLE CASINO, L.P., a California limited partnership; HAWAIIAN GARDENS CASINO, a California corporation; HOLLYWOOD PARK CASINO COMPANY, INC., a California corporation; OCEANS 11 CASINO, INC., a California corporation; PLAYERS POKER CLUB, INC., a California corporation; STONES SOUTH BAY CORP., a California corporation; CELEBRITY CASINOS, INC., a California corporation; SAHARA DUNES CASINO, LP, a California limited partnership; JOHN DOES 1-25; GREEN AND RED COMPANIES 1 - XXV,

Defendants.

No. 37-2018-00058170-CU-NP-CTL

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF JOINT DEMURRER

IMAGED FILE

[*Notice of Demurrers and Demurrers to Plaintiffs' Complaint; [Proposed] Order Sustaining Demurrers; Motion to Strike; and Declaration of Michael H. Dore filed concurrently herewith*]

Judge: Hon. Timothy Taylor
Dept: C-72

Hearing Date: April 19, 2019 at 1:30 p.m.
Action Filed: November 16, 2018

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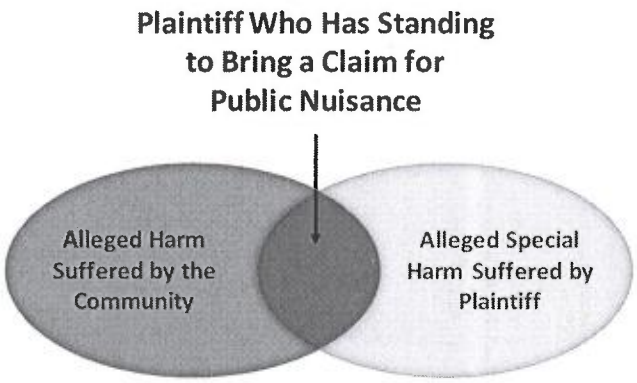
I. INTRODUCTION

This lawsuit is an attempt to rewrite existing law and label as a *crime* the very conduct that State regulators have routinely audited and consistently approved for decades. Cardrooms are an integral and longstanding part of this State's economy, contributing many jobs and bolstering the financial health of their surrounding communities and neighborhoods. The Plaintiff Tribes apparently view these Cardrooms as economic competitors, and their stale causes of action are an attempt to circumvent a regulatory framework that they think lowers their profit margins. But there is no need to address the flawed allegations because the Tribes lack standing to bring their causes of action in the first place, and the nuisance cause of action lacks sufficient factual support.

Both of the Tribes' causes of action—for Unfair Competition under Business and Professions Code section 17200 and for Public Nuisance under Civil Code section 3493—are available only to specified plaintiffs. Those specified plaintiffs are (1) state and local government representatives or (2) "person[s]." (Bus. & Prof. Code, § 17201; Civ. Code, § 3493.) The Tribes are neither. Rather, they allege they are "federally-recognized Indian tribe[s]" with "inherent sovereign authority." (Compl. ¶¶ 1-2, 65.) Thus, the Tribes are barred from bringing causes of action restricted to classes of putative plaintiffs to which the Tribes do not belong. On this basis alone, the Demurrers should be sustained.

The Tribes' public nuisance cause of action suffers from a separate standing defect. To have standing to bring a public nuisance cause of action under California law, the plaintiff must have suffered both (1) a general harm also suffered by a large group of people and (2) a special harm unique to the plaintiff. (See Civ. Code, §§ 3480, 3493.) Put differently, only the plaintiffs that fall within the green zone in the picture below have standing to bring a public nuisance action:



The Tribes here allege no facts to show that they are suffering from the same harm as the purportedly affected public. Rather, the Tribes admit they are "remote"—located dozens, and in some cases hundreds, of miles away from the Cardrooms they have sued. By the logic of the Tribes' Complaint, gambling establishments in Nevada and New Jersey could sue California cardrooms for "public nuisance." The law permits no such thing.

Finally, the Tribes fail to allege any facts showing that the public has suffered any harm at all. They make the conclusory claim that the Defendant Cardrooms have "created a condition that is harmful to the public's health, safety, welfare, and good order." (Compl. ¶ 69.) But the Tribes do not allege any facts indicating ***how*** the Cardrooms' purported operation of banked card games has created such a harm. Indeed, the Tribes admit that they also operate gambling establishments, and thus do not make any effort to allege how communities surrounding the Cardrooms are being "annoyed and disturbed" by the play of games that allegedly "match those played in Indian casinos." (*Id.* ¶¶ 53, 73.) The best the Tribes can do is to cite a statute stating that "unregulated" gambling harms the public, while at the same time conceding that "various statutory schemes . . . regulate gaming in cardrooms." (*Id.* ¶ 40.)

The Tribes thus cannot satisfy core prerequisites that would allow them to proceed. The Demurrers to the UCL and nuisance causes of action should be sustained without leave to amend.

II. BACKGROUND

A. The Parties

Two tribes that operate casinos, one in San Diego County, the Rincon Band of Luiseno Mission Indians, and another in Santa Barbara County, the Santa Ynez Band of Chumash Mission Indians (the "Tribes"), filed this suit on November 16, 2018. The Defendants are eleven Cardrooms spread across Southern California—including ones located in Los Angeles, Ventura, and Riverside counties. (Compl. ¶¶ 3-13.) The Tribes also sued an individual Los Angeles resident and his trust. (*Id.* ¶¶ 3.) Finally, the Tribes sued John Does 1-25 and Green and Red Companies I–XXV, but they have not named them in more than two months since filing suit. (Compl. ¶¶ 14-15.)

B. The Regulation of the Cardrooms

"The State of California has permitted the operation of gambling establishments for more than 100 years." (Bus. & Prof. Code, § 19801, subd. (b); see also Compl. ¶ 37.) Originally, gambling establishments were regulated by the State of California pursuant to legislation enacted in 1984. (Compl. ¶ 37.) In 1997, the Legislature enacted the Gambling Control Act (the "Act"). (Compl. ¶ 41.) The Act specifically acknowledged "[g]ambling establishments are lawful enterprises in the State of California, and are entitled to full protection under the laws of this state." (Bus. & Prof. Code, § 19801, subd. (b).) The Act further set up two separate but coordinated regulatory bodies responsible for the licensing, review, and enforcement of the law as to gambling establishments within the State—the California Gambling Control Commission (the "Commission") and the Division of Gambling Control, under the Office of the Attorney General, which is now known as the Bureau of Gambling Control (the "Bureau"). (Compl. ¶ 41; Bus. & Prof. Code, § 19810 et seq.)

The Act and related regulations set forth statutory and regulatory requirements that "address components of traditional gaming at California cardrooms, including the role of proposition players, player-dealers, dealer rotation, fee collection, and game advertisement." (Compl. ¶ 40.) It is a comprehensive scheme requiring review and licensing of each person and entity involved in the ownership and management of a gambling establishment. (Bus. & Prof. Code, § 19850 et seq.) Every Cardroom Defendant is licensed by the Commission. (See Commission, Active Gambling Establishments in California <http://www.cgcc.ca.gov/?pageID=ActiveGEGE> [as of Feb. 11, 2019] [listing all Defendant Cardrooms]; Bus. & Prof. Code, §19850 et seq.).)

Once licensed, the gambling establishments are also required to obtain approval for each game played in the establishment. Specifically, Section 19826 of the Business and Professions Code requires each cardroom to submit the rules of their games to the Bureau, which (1) "[a]pprove[s] the play of any controlled game," (2) "monitor[s] the conduct of all [gambling] licensees" to ensure that "operations are [not] conducted in a manner that is inimical to the public health, safety, or welfare," (3) "investigate[s] suspected violations" of the Gambling Control Act and Penal Code, (4) "investigate[s] complaints" against gambling establishments, and (5) "initiate[s], where appropriate, disciplinary actions." (Bus. & Prof. Code, § 19826, subds. (b)-(e).) Once the games are

approved, the rules are posted on the Bureau's website, and publicly displayed at each respective cardroom. (*Id.*, subd. (g).)

The Penal Code, at section 330 et seq., provides penalties for establishments that violate the statutory prohibitions on certain games. Penal Code section 330.11 specifies which games are not banked games, explicitly recognizing that cardrooms can play games where the published rules "feature a player-dealer position and provide that this position must be continuously and systematically rotated amongst each of the participants" during 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." (*Ibid.*) The Legislature has also specifically authorized the use of third party providers of proposition player services and dictated the scope of the contracts between licensed gambling enterprises and the use of third parties at the cardrooms. (Bus. & Prof. Code, § 19984.)

In addition to the State regulations, each of the municipalities where the Defendant Cardrooms operate have additional laws set forth in their respective municipal codes that further regulate the Cardrooms. (Bus. & Prof. Code, §§ 19960, 19964.) They require local licensure in addition to the state licensure. (Bus. & Prof. Code, §§ 19960, 19964; see also Bus. & Prof. Code, § 19920 ["[W]illful or persistent use or toleration of methods of operation deemed unsuitable by the commission or by local government shall constitute grounds for license revocation or other disciplinary action."].)

The consequence of this extensive regulation is that cardrooms are immune from suit if they follow the rules approved by the Bureau: "If a gambling enterprise conducts play of a controlled game that has been approved by the department pursuant to Section 19826, and the controlled game is subsequently found to be unlawful, so long as the game was played in the manner approved," the department's approval "shall be an absolute defense to any criminal, administrative, or civil action that may be brought." (Bus. & Prof. Code, § 19943.5; see also Civ. Code, § 3482 ["Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance."].)

C. The Tribes' Allegations

Notwithstanding the State's extensive regulation and enforcement power, the Tribes have brought two civil causes of action here against the Defendant Cardrooms: the first for public nuisance and the second for unfair competition. (Compl. ¶¶ 67-94.) The crux of the Tribes' allegations is that the games offered by the Cardrooms are unauthorized and illegal, either because the games violate Penal Code section 330.11, or alternatively because that law violates the California Constitution. (*Id.* ¶¶ 47-50.)

The specifics of the Tribes' arguments for why the Cardrooms' operations violate section 330.11 or why section 330.11 violates the Constitution are not relevant to these Demurrers. Rather, it is sufficient to note that the fundamental complaint of the Tribes is that the Cardrooms allegedly offer games that "match those played in Indian casinos." (*Id.* ¶ 53; see *id.* ¶ 56.) Specifically, the Tribes take issue with the Cardrooms allegedly offering games similar to traditional blackjack and baccarat. (*Id.* ¶¶ 56-59.) They claim, for example, that the "sole difference" between "Pure 21.5 Blackjack," a cardroom game, and "standard blackjack" is that the "face and ten cards have a value of 10.5 when dealt with an ace, rather than the standard value of 10." (*Id.* ¶ 58.)

The Tribes cite Business and Professions Code section 19801(d) claiming the California Legislature declared "'[u]nregulated gambling enterprises are inimical to the public health, safety, welfare, and good order.'" (Compl. ¶ 68 [quoting the statute].) And they contend the Cardrooms, in playing games—such as blackjack and baccarat—allegedly similar to the ones the Tribes offer, have "created a condition that is harmful to the public's health, safety, welfare, and good order." (*Id.* ¶ 69.) According to the Tribes, this "condition" "affects a substantial number of people at the same time." (*Id.* ¶¶ 70-71, 84.) The Tribes conclude the Defendants' conduct allegedly "constitutes and has created a nuisance" that is "injurious to the enjoyment and the free use of the life and property" of the surrounding citizens and residents. (*Id.* ¶¶ 70-72.) The Complaint, however, does not state how the Cardrooms' actions have adversely affected public health, safety, welfare, and order. And it is likewise silent about how the Cardrooms have impaired the enjoyment and free use of life and property belonging to community residents.

Meanwhile, the Tribes allege they are "suffering harm different from and in addition to the type of harm suffered by the general public." (*Id.* ¶ 76, italics added.) The allegedly different harm is economic: the Tribes claim that competition from the Cardrooms has resulted in lost gaming revenues. (*Id.* ¶¶ 61-65, 93.) How the Tribes have also suffered the same (amorphous) harm as the general public, they do not say. In fact, the Tribes acknowledge that they are distinct from the "surrounding community and neighborhoods" purportedly being harmed by the alleged public nuisance. (*Id.* ¶ 72.) Unlike the Cardrooms, the Tribes concede that they are "in most cases remote and therefore not near the urban centers from which they draw their customers." (*Id.* ¶ 60.)

III. LEGAL STANDARD

A demurrer is proper where "[t]he pleading does not state facts sufficient to constitute a cause of action." (Code Civ. Proc., § 430.10, subd. (e).) Material facts properly pleaded are accepted as true, but a plaintiff's "contentions, deductions or conclusions of fact or law" are not. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6.) Stated differently, "[a] pleading must allege facts and not conclusions." (*Appl v. Lee Swett Livestock Co.* (1987) 192 Cal.App.3d 466, 470 [affirming dismissal on demurrer].) And "[b]ecause a demurrer tests the legal sufficiency of a complaint, the plaintiff must show the complaint alleges facts sufficient to establish every element of each cause of action." (*Price v. Starbucks Corp.* (2011) 192 Cal.App.4th 1136, 1141.)

Over and above these general pleading requirements, statutory causes of action must be pleaded with particularity. (*Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 790.) In other words, "[g]eneral allegations are . . . inadequate" to assert statutory causes of action. (*Mittenhuber v. City of Redondo Beach* (1983) 142 Cal.App.3d 1, 5; see also, e.g., *Worsham v. O'Connor Hosp.* (2014) 226 Cal.App.4th 331, 335, 338.) Because public nuisance is a statutory cause of action, it must be particularly pleaded. (*Orange Cty. Water Dist. v. Sabic Innovative Plastics US, LLC* (2017) 14 Cal.App.5th 343, 402 ["Nuisances are defined by statute."]; see *Venuto v. Owens-Corning Fiberglas Corp.* (1971) 22 Cal.App.3d 116, 131 [holding that the proper "inquiry" is "whether plaintiffs have pleaded *particular* facts" to prove that a nuisance exists under the relevant statutory provisions (italics added)].)

A demurrer should be sustained without leave to amend when the only issues are legal and the court decides against the plaintiff as a matter of law. (*Lawrence v. Bank of Am.* (1985) 163 Cal.App.3d 431, 436.) A court should not grant leave to amend when doing so "would serve no useful purpose." (*Mercury Cas. Co. v. Superior Court* (1986) 179 Cal.App.3d 1027, 1035.)

IV. THE CARDROOMS' DEMURRERS SHOULD BE SUSTAINED.

The Tribes' UCL and public nuisance causes of actions fail as a matter of law because the Tribes lack standing to bring them. (*Boorstein v. CBS Interactive, Inc.* (2013) 222 Cal. App. 4th 456, 465 ["A litigant's standing to sue is a threshold issue to be resolved before the matter can be reached on the merits." (citation and quotation marks omitted)]; *Common Cause v. Bd. of Supervisors* (1989) 49 Cal.3d 432, 438 ["[C]ontentions based on a lack of standing involve jurisdictional challenges."].) Moreover, even if the Tribes had standing, their public nuisance cause of action would still fail because they did not plead the affected public is suffering a "'substantial and unreasonable'" harm, a necessary element of a nuisance cause of action. (*Birke v. Oakwood Worldwide* (2009) 169 Cal.App.4th 1540, 1547, quoting *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1105.)

A. The Tribes Lack Standing to Bring a UCL Cause of Action.

Standing to bring a cause of action for relief under the UCL is limited by statute to "the Attorney General," "a district attorney," "a county counsel," "a city attorney," or a "city prosecutor in the name of the people of the State of California" or "by a *person* who has suffered injury in fact and has lost money or property as a result of the unfair competition." (Bus. & Prof. Code, § 17204, italics added.) The UCL defines "person" to mean "natural persons, corporations, firms, partnerships, joint stock companies, associations and other organizations of persons." (*Id.* § 17201.)

The Tribes do not contend they fall within any of these categories. They do not claim they are persons, a corporation, or an association. Rather, they allege they are "federally-recognized Indian tribe[s]" with "inherent sovereign authority," which aim to provide "strong tribal government." (Compl. ¶¶ 1-2, 65.) And the case law is clear that governmental entities do not have standing and are not "persons" under the UCL. (*Santa Monica Rent Control Bd. v. Bluvshtein* (1991) 230 Cal.App.3d 308, 318 [sustaining demurrer based on plaintiff government agency's lack of standing under section 17204]; *Cty. of Santa Clara v. Astra U.S., Inc.* (N.D.Cal. 2006) 428 F.Supp.2d 1029,

1036 ["[A] county is not within the 'any person' provision of Section 17204 . . . ."]; see also *Cal. Medical Ass'n. v. Regents of Univ. of Cal.* (2000) 79 Cal.App.4th 542, 551 [noting that "the University of California is a 'public entity' (Gov. Code, § 811.2) and, therefore, not a 'person'" under section 17201]; *Janis v. Cal. State Lottery Comm'n* (1998) 68 Cal.App.4th 824, 831 [holding the California state lottery is a government entity and not a "person" under Business and Professions Code section 17201].)

This is not unique to the UCL. The United States Supreme Court held in *Inyo County v. Paiute–Shoshone Indians of Bishop Community of Bishop Colony* (2003) 538 U.S. 701, that a federally recognized tribe is not a "person" who can bring civil rights claims under 42 U.S.C. § 1983. (*Id.* at p. 712.) Likewise, a federally recognized tribe cannot be sued as a "person" under CERCLA or the False Claims Act. (*Pakootas v. Teck Cominco Metals, Ltd.* (E.D.Wash. 2009) 632 F.Supp.2d 1029, 1032 ["CERCLA's definition of 'person' is plain. It does not include 'Indian tribes.'"]; *United States v. Menominee Tribal Enters.* (E.D.Wis. 2009) 601 F.Supp.2d 1061, 1068 ["[T]ribes are not 'persons' under § 3729(a)"].)

Because federally recognized tribes are not listed in section 17204 and are "none of the things included in the definition of person," they have "no standing to bring an action" under the UCL and the Demurrer to the UCL cause of action should be "sustained." (*Bluvshtein*, *supra*, 230 Cal.App.3d at p. 318; see also *Cty. of Fresno v. Shelton* (1998) 66 Cal.App.4th 996, 1009 ["Where, as here, it is alleged that a party lacks standing to sue, the complaint can be challenged by general demurrer for failure to state a cause of action *in this plaintiff*," original italics].)

B. The Tribes Lack Standing to Bring a Public Nuisance Cause of Action.

The Tribes lack standing to bring a public nuisance cause of action for two reasons. *First*, the Tribes cannot bring a nuisance action for the same reason they cannot bring one under the UCL: they are not one of the statutorily proscribed types of plaintiffs allowed to bring a nuisance suit. *Second*, the Tribes have not adequately alleged they suffered from the same harm as the affected public.

1. The Tribes Are Not State or Local Government Representatives or "Persons."

As with the UCL, the Legislature has specified who can bring an action for public nuisance: "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" (Code Civ. Proc., § 731), or by "[a] private person . . . if it is specially injurious to himself, but not otherwise" (Civ. Code, § 3493.)

Again, the Tribes here do not, and cannot, allege they can bring a cause of action "in the name of the people of the State of California" or that they qualify as "private persons." And like in the UCL context, it is well established both in the nuisance context and elsewhere that public entities and government agencies are not "private person[s]." (See, e.g., *City of L.A. v. Shpegel-Dimsey* (1988) 198 Cal.App.3d 1009, 1020 ["Civil Code section 3493 provides no authority for plaintiff, a public entity rather than a private party, to recover damages for a 'specially injurious' public nuisance; neither does any other statute authorize such recovery."]; *Torrance Redevelopment Agency v. Solvent Coating Co.* (C.D.Cal. 1991) 763 F.Supp. 1060, 1065 [same]. As the Supreme Court explained in *Berton v. All Persons* (1917) 176 Cal. 610, "[a] sovereign state is not a person." (*Id.* at p. 617.)

The Demurrer should be sustained as to the first cause of action for public nuisance on this basis alone.

2. The Tribes Fail to Allege They Suffer from the Same Harm as the Public.

The Tribes also lack standing to bring a public nuisance cause of action for a second, independent reason: they have not alleged they suffered the same harm as the affected public. Thus, there is no need to consider whether the Tribes have alleged every element of a public nuisance action. Before even reaching the requisite statutory elements, it is clear that the Tribes are not able to seek a remedy on behalf of neighborhoods and communities to which they concede they do not belong. (*Brown v. Petrolane, Inc.* (1980) 102 Cal.App.3d 720, 726-727 [affirming an order granting a demurrer without leave to amend and holding that "whether or not the essential elements of a public nuisance have been set out in appellants' pleading, a question we do not pass upon, it is yet the case they have not sufficiently alleged those facts necessary to place themselves in a position to abate or otherwise deal with it in their own or others' behalf"].)

Under the Civil Code, a "private person may maintain an action for a public nuisance, if it is ***specially*** injurious to himself, but not otherwise." (Civ. Code, § 3493, emphasis added; see also Merriam-Webster's Collegiate Dict. (11th ed. 2005) p. 1197 [defining "specially" as readily

distinguishable from others "*of the same category*," italics added].) The "specially injurious" requirement means that for a plaintiff to have standing to bring a nuisance action, he must "'show that he had suffered special damage *over and above* the ordinary damage caused to the public at large by the nuisance.'" (*Venuto, supra*, 22 Cal.App.3d at pp. 123-124, emphasis added, quoting Prosser, Prosser on Torts (3d ed.) at p. 608.) Put differently, a private plaintiff must suffer a special injury "as distinguished from that which he *shares* with the rest of the public." (Prosser, *Private Action for Public Nuisance* (1966) 52 Va. L. Rev. 997, 997, italics added.)

This limitation—that the plaintiff must experience a harm "shared by the general public" (*Venuto, supra*, 22 Cal.App.3d at pp. 124-125)—is critical because a suit for public nuisance "'is aimed at the protection and redress of *community* interests'" (*Birke, supra*, 169 Cal.App.4th at p. 1547, original italics, quoting *Gallo, supra,* 14 Cal.4th at p. 1103). Absent such a limitation on who has standing, "the appointed representative of the community" could be someone who is not actually a member of the affected community or someone whose injury is untethered to the neighborhood's interests. (*Venuto*, *supra*, 22 Cal.App.3d at p. 123 [Public nuisance is the "wrong to the community."].)

Indeed, allowing a stranger who has not suffered the same harm as the public to act as a quasi-public prosecutor would fly in the face of the historical origins of the public nuisance cause of action. For centuries after it came into existence, "public nuisance was an offense against the crown, prosecuted as a crime," not a private civil action. (*Gallo*, *supra*, 14 Cal.4th at p. 1103.) That changed when the crime of public nuisance in England also became a tort, but only "where one man has *greater* hurt or inconvenience than any other man had." (Prosser, *supra*, 52 Va. L. Rev. at p. 1005, emphasis added.) Private plaintiffs thus could act as quasi-public prosecutors, vindicating the community's interests, at least when those plaintiffs suffered "damage which was particular to [them]" in addition to the same harm as the community. (*Id.*) But nothing in that progression indicates that a stranger to the affected community could sue as a private plaintiff even if she did not suffer the same harm as the general public.

Allowing strangers to sue for nuisance would also make private plaintiffs far stronger than duly elected and appointed government officials. Code of Civil Procedure section 731 provides that a

civil case may be brought on behalf 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*." (Code Civ. Proc., § 731, emphasis added; *Cty. of Ventura v. City of Moorpark* (2018) 24 Cal.App.5th 377, 388-389 [recognizing that cities have extremely limited extraterritorial powers but noting that they can attempt to abate public nuisances "within [their] city limits"].) As one would expect, a district attorney in Santa Barbara county cannot bring a cause of action for an alleged nuisance in Los Angeles. (See Code Civ. Proc., § 731.)

The Tribes here never allege any facts showing that they are suffering from the same harm as the purportedly affected public. Their conclusory claim that they are "suffering harm different from and *in addition to* the type of harm suffered by the general public" (Compl. ¶ 76, italics added) fails under California's most basic pleading standards, much less the stricter standard applicable here because nuisance is a statutory action. (*Evans*, *supra*, 38 Cal.4th at p. 6 ["[C]ontentions, deductions or conclusions of fact or law" are insufficient.]; *Mittenhuber, supra*, 142 Cal.App.3d at p. 5 ["General allegations are . . . inadequate" for statutory causes of action.].)

Indeed, the Tribes not only have not alleged, *they cannot allege* they suffer from the same harm as the surrounding neighborhoods because they concede they are "remote" and "not near the urban centers from which they draw their customers." (Compl. ¶ 60.) The Tribes are dozens, and in some cases hundreds, of miles from the Cardrooms. (See *id.* ¶¶ 1-13.) Nor do the Tribes attempt to dispute what is obvious from a map. The Tribes' allegations make clear that the Tribes are ***separate*** from the "community and neighborhoods" surrounding the Cardrooms, and they do not—and cannot—suffer the same alleged harms as those communities they are not a part of. (*Id.* ¶ 72.)[1]

As the Tribes will likely argue, and the Cardrooms acknowledge, the cases on standing to bring a nuisance cause of action in California such as *Venuto* and *Birke* focus on whether the plaintiff suffered a sufficiently "special[]" harm, and do not focus on whether the plaintiff suffered the same

[1] Moreover, the Tribes cannot manufacture some relation to the allegedly affected neighborhoods through their procedural maneuver of jointly bringing this case against numerous separately owned and operated Cardrooms. Two plaintiffs cannot "amalgamate" their cases into "a fictional composite." (*Broussard v. Meineke Discount Muffler Shops, Inc.* (4th Cir. 1998) 155 F.3d 331, 340, 345.)

harm as the rest of the community. But that is because in *Venuto* and *Birke*, and in case after case, the private plaintiff has had the same alleged injury as the rest of the community. (*Birke*, *supra*, 169 Cal.App.4th at p. 1544 [plaintiff residing inside defendant apartment complex]; *Venuto*, *supra*, 22 Cal.App.3d at p. 123 [plaintiffs within view of defendant manufacturing plant]; see also, e.g., *Monterey Coastkeeper v. Monterey Cty. Water Res. Auth.* (2017) 18 Cal.App.5th 1, 6 [plaintiff environmental organization operated within defendant water resources agency's area of authority]; *Citizens for Odor Nuisance Abatement v. City of San Diego* (2017) 8 Cal.App.5th 350, 352-353 [plaintiffs lived within area affected by foul odors allegedly resulting from defendant's actions].) There is nothing in these cases to suggest an economic competitor, who is *not* suffering the same harm as the allegedly affected public, can bring a nuisance suit. And a panel of the Ninth Circuit has concluded the exact opposite: "Nuisance law is not designed to benefit disadvantaged competitors." (*Reudy v. Clear Channel Outdoor, Inc.* (9th Cir. 2009) 356 F. App'x 2, 4.)[2]

Because the Tribes have not and cannot allege any facts showing that they suffer from the same harm as the allegedly harmed public, the Demurrer should be sustained as to the nuisance cause of action on this ground too.

C. Even If the Tribes Had Standing to Bring a Public Nuisance Action, They Failed to Adequately Allege Sufficient Public Harm.

The nuisance cause of action also fails for a third, independent reason: the Tribes failed to adequately plead the requisite "significant" harm. A nuisance "is injurious to health . . . or is indecent or offensive to the senses, or an obstruction to the free use of property." (Civ. Code, § 3479.) To bring a nuisance cause of action, plaintiffs must, at the very least, show that a defendant's acts are likely to cause a "*significant* invasion of a public right." (*In re Firearm Cases* (2005) 126 Cal.App.4th 959, 988, italics added.) It is "'an obvious truth that each individual in a community must put up with a certain amount of annoyance, inconvenience and interference and

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[2] (See also *Hydro-Mfg., Inc. v. Kayser-Roth Corp.* (R.I. 1994) 640 A.2d 950, 958 ["[B]ecause [plaintiff's] harm was not suffered in the exercise of a right common to the general public, [plaintiff] lacks standing to pursue a public-nuisance action."]; *Philadelphia Elec. Co. v. Hercules, Inc.* (3d Cir. 1985) 762 F.2d 303 ["[Plaintiff] has been specially harmed only in the exercise of its private [] rights. . . . [Plaintiff] has suffered no 'particular damage' in the exercise of a right common to the general public, and it lacks standing to sue for public nuisance."], cited with approval by *Cadillac Fairview v. Dow Chem. Co.* (C.D.Cal. Jan. 20, 1989) 1989 U.S. Dist. LEXIS 5301, *10.)

must take a certain amount of risk in order that all may get on together.'" (*Birke*, *supra*, 169 Cal.App.4th at p. 1547, italics added, quoting *Gallo*, *supra*, 14 Cal.4th at p. 1105.) Thus, to be "enjoinable," a defendant's "'interference [with collective social interests] must be both ***substantial*** and ***unreasonable***.'" (*Id.*, emphasis added, quoting *Gallo*, *supra*, 14 Cal.4th 1090 at p. 1105.)

Here, the Tribes' allegations fit neither bill. The Tribes largely rest their allegations of harm on a quotation of a state law that prohibits "*unregulated* gambling enterprises [as] inimical to the public health, safety, welfare, and good order." (Compl. ¶ 68, italics added, citing Bus. & Prof. Code, § 19801, subd. (d).) But their own allegations make abundantly clear that Cardrooms are ***heavily*** regulated. (See *id.* ¶¶ 40, 41, 43, 47-48.) Further, the Tribes cannot dispute that each of the Cardrooms is licensed by the California Gambling Control Commission. (See Commission, *supra*, <http://www.cgcc.ca.gov/?pageID=ActiveGEGE>.) Nor can they dispute that the portion of the section 19801 that they tellingly omit from their Complaint states that California "has permitted the operation of gambling establishments for more than 100 years," that they are now "lawful enterprises," that the state has regulated gambling pursuant to legislation for over 30 years, and that regulated gambling establishments—like the Defendant Cardrooms—employ thousands of state residents and "contribute more than one hundred million dollars ($100,000,000) in taxes and fees to California's government." (Bus. & Prof. Code, § 19801, subd. (b).) That the Tribes do not like *how* state authorities have regulated their competitors does not make the cardroom games *un*regulated.

Likewise, declaring that operating games "expressly reserved for tribes" creates conditions harmful to the public "health, safety, welfare, and good order" is just another cut and paste from section 19801. (Compl. ¶ 69; see Bus. & Prof. Code, § 19801, subd. (d) ["Unregulated gambling enterprises are inimical to the public health, safety, welfare, and good order."].) And the suggestion that surrounding neighborhoods "will suffer irreparable injury and damage, in that said conditions will continue to be injurious to the enjoyment and the free use of the life and property of said citizens and residents" includes no supporting facts whatsoever. (*Id.* ¶ 72.)

These vague contentions cannot meet California's basic pleading standards, much less the specificity required for statutory actions. (*Evans*, *supra*, 38 Cal.4th at p. 6 [recognizing that "contentions, deductions or conclusions of fact or law" are insufficient]; *Mittenhuber*, *supra*, 142

Cal.App.3d at p. 5 ["General allegations are . . . inadequate" for statutory causes of action.].) The Tribes therefore failed to adequately allege the general harm that is a necessary element of their public nuisance cause of action, and the Demurrer should be sustained on this independent ground as well.

V. CONCLUSION

Defendant Cardrooms' Demurrers should be sustained without leave to amend. The Tribes are statutorily barred from bringing their two causes of action. The Tribes also lack standing to bring their public nuisance cause of action because the Tribes have not alleged (and cannot allege) they have suffered the same harm as the public allegedly affected by the Cardrooms' activities. Moreover, the public nuisance cause of action fails for the additional reason that the Tribes have failed to allege a substantial and unreasonable general harm to the community.

Dated: February 11, 2019

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