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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

YOCHA DEHE WINTUN NATION; VIEJAS BAND OF KUMEYAAY INDIANS; and SYCUAN BAND OF THE KUMEYAAY NATION,

Plaintiffs,

v.

GAVIN NEWSOM, GOVERNOR OF CALIFORNIA; STATE OF CALIFORNIA,

Defendants.

2:19-cv-00025-JAM-AC

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS COMPLAINT OR, IN THE ALTERNATIVE, TO ABSTAIN PENDING FINAL RESOLUTION OF A PENDING STATE COURT ACTION

[Fed. R. Civ. P. 12(b)(6)]

Date:	June 4, 2019
Time:	1:30 p.m.
Courtroom:	6, 14th Floor
Judge:	Hon. John A. Mendez
Trial Date:	None Set
Action Filed:	January 3, 2019

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OTHER AUTHORITIES

Defendants the State of California (State) and Gavin Newsom,[1] Governor of the State of California (collectively, State Defendants), submit this memorandum of points and authorities in support of their motion to dismiss the complaint for equitable, declaratory and injunctive relief (Complaint) filed by plaintiffs the Yocha Dehe Wintun Nation (Yocha Dehe), the Viejas Band of Kumeyaay Indians (Viejas Band), and the Sycuan Band of the Kumeyaay Nations (Sycuan Band) (collectively, Plaintiffs or Tribes). For the reasons set forth below, the State Defendants respectfully seek an order dismissing the action against them. In the alternative, the State Defendants seek an order staying this declaratory relief action pending final resolution of a pending state court suit involving an interpretation of the same state laws at issue in this action.

INTRODUCTION

The Tribes each operate their gaming operations pursuant to class III gaming compacts with the State that contain identical relevant provisions (collectively, Compacts). The main focus of the Tribes' Complaint is the allegation that the State is breaching the Compacts by not utilizing its police powers to protect the Tribes' exclusive right to offer banked card games. The Tribes allege that non-tribal card rooms are operating banked card games in violation of California law and are therefore infringing on the Tribes' exclusive right under the Compacts to offer those games. The Tribes also allege that this infringement on their exclusive right is negatively impacting the Tribes' casinos' revenues. The Tribes allege that by not enforcing the Tribes' interpretation of California law against card rooms, the State is breaching an alleged implied covenant of good faith and fair dealing in the Compacts to protect the Tribes' exclusivity through the use of the State's police powers. The Tribes seek an injunction directing the State to "enforce its laws" prohibiting the play of banked card games in card rooms, a declaration that the State breached the Compacts by failing to file suit against card rooms allegedly operating banked card games, and a court decree requiring specific performance of the State's alleged Compact obligation to exercise its police powers to ensure the Tribes' exclusive right to operate banked card games. (Compl., Prayer, ECF No. 1, 37.)

[1] Pursuant to Federal Rule of Civil Procedure 25(d), Governor Gavin Newsom is substituted as a party in place of former Governor Edmund G. Brown Jr.

As the Ninth Circuit stated when determining a compact-interpretation issue, "this case begins and ends with [three] Tribal-State Compacts[.]" *Cabazon v. Wilson*, 124 F.3d 1050, 1053 (9th Cir. 1997). The terms of the Compacts control, and to the extent that the Compacts specifically require the State to take certain action, the State is bound by the Compacts. *See Confederated Tribes of Siletz Indians of Oregon v. Oregon*, 143 F.3d 481, 485 (9th Cir. 1998). The Complaint does not state the specific requirement or obligation in the Compacts that the State has not fulfilled.

The Compacts contain no express requirement that the State exercise its police powers to ensure or protect the Tribes' exclusive right to operate banked card games. That absence exists because the State is prohibited from contracting away its police powers (its prosecutorial discretion to decide what charges to bring and how to pursue cases). The fact no such obligation exists is exemplified by the fact the Compacts contain no remedy should the State breach this alleged obligation, yet the Compacts do contain a remedy in the event that the Tribes' lose the exclusive right to operate slot machines, while imposing no obligation on the State to protect that right.

Assuming, arguendo, that the State is somehow obligated to exercise its police power, that obligation would exist only if the Tribes' interpretation of California law is correct. That question of California law, however, is currently under consideration in a pending state court action between gaming tribes and card rooms.[2] Thus, this Court should abstain from taking any action on the Complaint, pending final resolution in state court of the correct interpretation of the California laws at issue.

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[2] In San Diego County Superior Court, two other California gaming tribes, the Rincon Band of Luiseno Mission Indians and the Santa Ynez Band of Chumash Mission Indians, have sued eleven large southern California card rooms, an individual card room owner and unnamed third party proposition players for nuisance, unfair competition, and civil conspiracy. *Rincon Band of Luiseno Mission Indians, et al. v. Larry Flynt, et al.*, San Diego County Superior Court, Case No. 37-2018-00058170, filed Nov. 16, 2018. The lawsuit alleges that the card rooms are violating the law regarding the play of banked card games and causing the plaintiff tribes' casinos to lose revenue. The San Diego County Superior Court will hear the defendants' joint demurrer on April 19, 2019. The State Defendants have concurrently filed a request for judicial notice of the existence of this suit. (*See* State's Req. Judicial Not. (RJN) Ex. F).

BACKGROUND OF TRIBAL GAMING IN CALIFORNIA

In 1988, in a case originating in California, the United States Supreme Court held that states lacked regulatory authority over gambling on Indian lands. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 221-22 (1987). In direct response to the holding in *Cabazon*, in 1988, Congress passed the Indian Gaming Regulatory Act (IGRA), 18 U.S.C. §§ 1166-1168, 25 U.S.C. §§ 2701-2721, establishing a federal regulatory structure for tribal gaming, and giving the states a certain role in the regulatory scheme. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 794 (2014). IGRA separates gaming into three categories, and provides for different modes of regulation for each category of gaming. 25 U.S.C. § 2703. Only class III gaming requires state involvement through a compact, negotiated bilaterally by the tribe and the state, subject to federal approval and limited federal oversight. 25 U.S.C. § 2710(d); *Coyote Valley Band of Pomo Indians v. State of California*, 331 F.3d 1094, 1097 (9th Cir. 2003). Class III gaming includes banked card games and the operation of slot machines. 25 U.S.C. § 2703(8).

At the time IGRA was enacted in 1988, California prohibited even the mere possession of all non-antique slot machines and the play of all banked and percentage card games. Cal. Penal Code §§ 330-337z. Furthermore, California's Constitution expressly prohibited all lotteries except for the California State Lottery. Cal. Const. art. IV, § 19(a) & (d). The California Constitution also expressly declared that: "The Legislature has no power to authorize, and shall prohibit casinos of the type currently operating in Nevada and New Jersey." Cal. Const. art. IV, § 19(e).

In 1998, proponents of tribal gaming sought and received voter approval of Proposition 5, which required the State to enter into specified tribal-state compacts. *See* Cal. Gov't Code §§ 98000-98012. However, because Proposition 5 amended state statutory law, and not the state Constitution, the California Supreme Court ruled that Proposition 5 was unconstitutional because it was inconsistent with the constitutional ban on casino-type gambling. *Hotel Employees & Rest. Employees Int'l Union v. Davis*, 21 Cal. 4th 585, 611-12 (1999).

In 1999, the State executed tribal-state class III gaming compacts—the 1999 Compacts—with 57 California tribes. Cal. Gov't Code § 12012.25(a). The 1999 Compacts were conditioned

upon the occurrence of several events, including legislative ratification of the compacts and the passage of Proposition 1A, a ballot initiative to amend the California constitution to allow Indian tribes to operate slot machines and banked and percentage card games. The Legislature ratified the 1999 Compacts, Cal. Gov't Code § 12012.25, and on March 7, 2000, the California voters approved Proposition 1A, which created an exception for tribal gaming to the constitutional ban on casino-type gambling, Cal. Const. art. IV, § 19(f). After the passage of Proposition 1A, the Secretary of the United States Department of the Interior approved the 1999 Compacts, which became effective upon publication in the Federal Register. 65 Fed. Reg. 31,189 (May 16, 2000).

The new constitutional provision also authorized the Governor of California "to negotiate and conclude compacts, subject to ratification by the Legislature, for the operation of slot machines and for the conduct of lottery games and banking and percentage card games by federally recognized Indian tribes on Indian lands in California in accordance with federal law." Cal. Const. art. IV, § 19(f).

The Tribes all originally had 1999 Compacts, but executed their current Compacts in 2015 and 2016. The Tribes' Compacts are individual agreements between each sovereign tribal government and the State. However, the relevant compact provisions at issue here, the Preamble, Purposes and Objectives, Exclusivity, and the Limited Waiver of Sovereign Immunity, contain virtually the same language and therefore it is possible to discuss those Compacts' terms collectively.[3]

LEGAL STANDARD FOR DISMISSAL

This motion is brought under Federal Rule of Civil Procedure 12(b)(6). "A Rule 12(b)(6) dismissal may be based on either a 'lack of a cognizable legal theory' or 'the absence of sufficient facts alleged under a cognizable legal theory.'" *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121-22 (9th Cir. 2008) (quoting *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990)). The court accepts as true all material allegations in the complaint and

[3] The State Defendants have requested judicial notice of these relevant provisions from each Tribes' Compact. (RJN Exs. A, B, & C.) In reviewing a Rule 12(b)(6) motion, a court may consider documents that are referred to in the complaint whose authenticity is not in question. *Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000).

construes those allegations in the light most favorable to the plaintiff. *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008). However, the court need not accept as true legal conclusions, conclusory allegations, unwarranted deductions of fact, or unreasonable inferences. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001), *amended by* 275 F.3d 1187 (9th Cir. 2001); *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981).

In the event the Court finds that the Complaint presents a viable claim, the State Defendants respectfully submit that because the state law issue at the heart of this matter is already under consideration in pending state court litigation, this Court should abstain from hearing this action or stay the proceedings pending the resolution of the state court judicial proceeding.

ARGUMENT

I. THE COMPACTS DO NOT CONTAIN TERMS GUARANTEEING PROTECTION OF TRIBAL EXCLUSIVITY FOR BANKED CARD GAMES.

The Ninth Circuit has held that tribal-state gaming compacts are subject to general principles of contract law. *See State of Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095, 1098 (9th Cir. 2006). "General principles of federal contract law govern the Compacts, which were entered pursuant to IGRA." *Cachil Dehe Band of Wintun Indians v. California*, 618 F.3d 1066, 1073 (9th Cir. 2010) (*Colusa*). A compact is a contract that must "be construed and applied in accordance with its terms." *Texas v. New Mexico*, 482 U.S. 124, 128 (1987). While tribal-state gaming compacts are governed by federal law, California contract law does not differ from federal contract law. *Colusa*, 618 F.3d at 1073. Under California law, the contract must be "'interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful.' Civ. Code, § 1636.)" *The Ratcliff Architects v. Vanir Constr. Mgmt., Inc.*, 88 Cal. App. 4th 595, 602 (2001). The court ascertains the parties' intent from the language of the contract alone, "'if the language is clear and explicit, and does not involve an absurdity.' ([Citation.]; Civ. Code, § 1638.)" *DVD Copy Control Ass'n, Inc. v. Kaleidescape, Inc.*, 176 Cal. App. 4th 697, 712 (2009). The court must explain the contract "'by reference to the circumstances under which it was made, and the matter to which it relates.' (Civ. Code, § 1647.)" (*Id.*)

The Complaint does not and cannot cite to any language in the Compacts that requires the State to enforce or to protect the Tribes' exclusive right to offer banked card games. The only language in the Compacts referencing exclusivity is found in the two sections entitled "Preamble" and "Exclusivity." (Compacts § 4.6 (Viejas Band, Sycuan Band) & § 4.8 (Yocha Dehe); RJN Exs. A, B, & C.) The section entitled "Purposes and Objectives" states that the terms of the Compacts are "designed and intended to: . . . [a]chieve the objectives set forth in the preamble." (Compacts § 1.0 (d).) None of this language, however, describes any affirmative action or duty required of the State in relation to exclusivity. The Preamble[4] contains language that acknowledges the value of exclusivity to the Tribes:

> WHEREAS, the State and the Tribe recognize that the exclusive rights that the Tribe will enjoy under this Tribal-State Compact Between the State of California and the [Tribe] (Compact) create a unique opportunity for the Tribe to operate a Gaming Facility in an economic environment free of competition from the operation of slot machines and banked card games on non-Indian lands in California and that this unique economic environment is of great value to the Tribe; and
>
> WHEREAS, in consideration of the exclusive rights enjoyed by the Tribe to engage in the Gaming Activities and to operate the number of Gaming Devices specified herein, and the other meaningful concessions offered by the State in good faith negotiations, and pursuant to IGRA, the Tribe reaffirms its commitment to provide to the State, on a sovereign-to-sovereign basis, and to local jurisdictions, fair cost reimbursement and mitigation from revenues from the Gaming Devices operated pursuant to this Compact on a payment schedule[.]

(Compacts, Preamble, RJN Exs. A, B & C.)

There is no obligation spelled out in the Preamble to the Compacts; there are merely statements regarding both parties' recognition of the value of exclusivity to the Tribes and reaffirmations of payment commitments in consideration thereof. This preamble language can be traced back to the 1999 Compacts.

The 1999 Compacts were negotiated against the backdrop of an historic change in California law that allowed California tribes an exception to the state prohibition against banked

[4] The differences in the operative paragraphs in the Preamble are limited to the Tribes' names.

card games and the operation of slot machines. The preamble to the 1999 Compact stated that the:

> exclusive rights that Indian tribes in California [. . .] will enjoy under this Compact create a unique opportunity for the Tribe to operate its Gaming Facility in an economic environment free of competition from the Class III gaming referred to in Section 4.0 of this Compact on non-Indian lands in California. The parties are mindful that this unique environment is of great economic value to the Tribe and the fact that income from Gaming Devices represents a substantial portion of the tribes' gaming revenues. In consideration for the exclusive rights enjoyed by the tribes, and in further consideration for the State's willingness to enter into this Compact, the tribes have agreed to provide the State, on a sovereign-to-sovereign basis, a portion of its revenue from Gaming Devices.

In re Indian Gaming Related Cases, 331 F.3d 1094, 1105 (9th Cir. 2003) (*Coyote Valley II*); *see also* RJN Exs. D, E, & F). The Ninth Circuit concluded that because of the numerous concessions, "including the right to exclusive operation of Las Vegas style class III gaming in California" that the State had offered the tribes, it was not bad-faith negotiation under IGRA for the State to seek certain payment provisions in the 1999 Compact. *Id.* at 1116. But seven years later, the Ninth Circuit held that the exclusive right to operate class III gaming in California could not be used as consideration under IGRA for good-faith negotiations for a subsequent compact. *Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019, 1037 (9th Cir. 2010) ("In short, we approved exclusivity as a 'meaningful concession' in *Coyote Valley II* because it was *exceptionally valuable* and *bargained for*. By contrast, in the current legal landscape, 'exclusivity' is not a new consideration the State can offer in negotiations because the tribe already fully enjoys that right as a matter of state constitutional law."(Emphasis in original.).)

The Complaint points to the statements in the Compacts' Preamble that refer to California tribes benefitting from their exclusive right to operate forms of gambling prohibited to others as a source of the State's alleged duty to take action to enforce and protect the Tribes' exclusivity. (Compl. ¶¶ 24-25, 66, 126, 128 & 132.) But the language does not impose any such duty. At most, the language in the Preamble identifies exclusivity as possible consideration provided by the State in exchange for the payments made by the Tribes pursuant to the Compacts. The additional language in the Preamble that the State and the Tribe "agree that all terms of this

Compact are intended to be binding and enforceable" does not function to make the Preamble statements regarding the value of exclusivity express obligations for either party. Neither does the reference in section 1.0 that the parties intend to "achieve the objectives set forth in the preamble" create a State obligation to ensure that exclusivity.

II. THE COMPACTS CONTAIN NO EXPRESS REMEDY FOR THE LOSS OF BANKED CARD GAME EXCLUSIVITY AND IN NO EVENT MAY A COMPACT REMEDY REQUIRE A PARTICULAR EXERCISE OF THE STATE'S POLICE POWER

Unlike the Compacts' remedy for the loss of slot machine exclusivity, the Compacts contain no express remedy for the loss of banked card game exclusivity. Notwithstanding this fact, the Complaint asks this Court to compel enforcement not only of an implied remedy, but one that is barred by public policy.

Implied compact terms, including remedies, are not enforceable. Only a compact's express provisions are enforceable. See *Arizona v. Tohono O'odham Nation*, 818 F.3d 549, 560-62 (9th Cir. 2016) (rejecting claim that compact language "implicitly" barred tribe's actions as a breach of the compact); *Confederated Tribes of Siletz Indians of Oregon v. Oregon*, 143 F.3d at 485; *Cabazon v. Wilson*, 124 F.3d at 1059 (state's regulatory authority limited to that "expressly agreed upon in a compact"). Moreover, even if an implied remedy were permissible, that remedy could not compel an act contrary to public policy, such as compelling an exercise of a state's police powers in the form of its prosecutorial discretion. *Cotta v. City & Cty. of San Francisco*, 157 Cal. App. 4th 1550, 1557-58 (2007) ("It is settled that a government entity may not contract away its right to exercise the police power in the future. [Citations.] A contract that purports to do so is invalid as against public policy. [Citations.]").

Additionally, the State could not agree in the Compacts to ensure that the Tribes would maintain the exclusive right to offer banked card games for the twenty-five-year term of the Compact. Such an agreement would be prohibited because it would have the effect of contracting away the State's police power in the future, should the law regarding banked card games be changed by the Legislature or by voter initiative. *Cotta v. City & Cty. of San Francisco*, 157 Cal. App. 4th at 1557-58.

Even assuming, arguendo, that the Compacts' Preamble or Purposes and Objectives provisions contained an enforceable duty for the State to enforce state laws regarding the play of banked card games (and the duty was to enforce them in the manner the Tribes assert is the correct legal interpretation of state law), this duty would constitute a limit on the State's future police power. Even if this promised limit on the State's future police power was not in violation of public policy, it would still be the case that any remedy for the State's failure to protect banked card game exclusivity must be explicitly contained in the Compacts' provisions. The parties are bound by the explicit terms of the Compacts, and "one cannot specifically perform something that is not a term in the contract." *Pauma Band of Luiseno Mission Indians of Pauma & Yuima Reservation v. California*, 813 F.3d 1155, 1167 (9th Cir. 2015); *see also Cabazon v. Wilson,* 124 F.3d at 1058.

A. The Specific Remedy Contained in the Compacts for Loss of Exclusivity Does Not Address the Loss of Exclusivity for Banked Card Games.

The Compacts expressly provide that, in the event tribal exclusivity to operate *slot machines* is eliminated by a change in the law authorizing anyone other than tribes to operate slot machines, the Tribes can either: 1) terminate their respective Compacts and cease class III gaming (which would include both banked card games and slot machines); or 2) continue gaming under their Compacts after renegotiations with the State over the appropriate regulatory payment rate[5] under the Compacts. (Compacts § 4.6 (Viejas Band, Sycuan Band) & § 4.8 (Yocha Dehe), RJN Exs. A, B & C.) This express Compact provision is limited to tribal remedies that would be available for loss of slot machine exclusivity. By contrast, there is nothing in this section, or anywhere else in the Compacts, that provides a remedy for the loss of the exclusive right to conduct *banked card games*. In the absence of an express remedy for the loss of banked card game exclusivity, the Tribes' Complaint seeks unilaterally to add an "implied" remedy. Compacts, however, must be interpreted by their express language. *See Arizona v. Tohono O'odham Nation*, 818 F.3d at 562;

[5] IGRA provides for the reimbursement of state regulatory costs pursuant to a tribal-state class III gaming compact, irrespective of exclusivity. 25 U.S.C. § 2710(d)(3)(C)(iii).

Cabazon v. Wilson, 124 F.3d at 1060; *Confederated Tribes of Siletz Indians of Oregon v. Oregon,* 143 F.3d at 485 ("In our view, the Compact itself controls.").

Moreover, even were an implied provision permissible, it cannot rest upon a general provision that differs from a specific provision. Here, the Complaint implies the existence of a general injunctive and declaratory relief remedy on the basis of language in the Preamble mentioning exclusivity. However, when specifically discussing a remedy for the loss of exclusivity, the Compacts provide a remedy only for the loss of slot machine exclusivity. When evaluating "two, somewhat differing" compact provisions addressing the same topic, the "specific terms of a contract govern inconsistent, more general terms." *State of Idaho v. Shoshone-Bannock Tribes,* 465 F.3d at 1098-99. Here, the Compacts' remedy for the loss of exclusivity is not only limited to slot machines, but is also limited to instances when such a loss results from the enactment of legislation or a judicial interpretation of the law—not the failure to prosecute existing laws. Thus, if the remedy provision for the loss of slot machine exclusivity is only triggered by a *change* in state law, the State's alleged failure to enforce the current law regarding banked card games cannot be a trigger for any remedy for the loss of banked card game exclusivity.[6]

Further, the Complaint seeks injunctive relief in the form of a court decree "requiring specific performance of the State's obligation with respect to the gaming exclusivity promised" in the Compacts. (Compl. Prayer 37.) An order mandating essentially that the State "enforce its laws" would interfere with the State's prosecutorial discretion to decide under California law what charges to bring and how to pursue individual cases. And of course, there would first need to be a determination of what the state laws are. The remedy provided in the Compacts for the loss of the exclusive right to operate slot machines does not impose an affirmative duty on the State, but instead discusses what steps are available to the Tribe: stop class III gaming, or continue after sitting down with the State to renegotiate regulatory costs. (Compacts § 4.6 (Viejas

[6] The only other provision addressing remedies in the Compacts is section 14.2(b). (RJN Exs. A, B, & C.) Section 14.2(b) allows for termination of the Compacts in the event a federal court determines that there has been a material breach of the Compacts and the breach has not been cured within specified time limit. (*Id.*) The Complaint does not seek a determination of a material breach. (Compl. Prayer 37.)

Band, Sycuan Band) & § 4.8 (Yocha Dehe), RJN Exs. A, B & C.) The remedy provided had to take into account a possible future change in the law that could mean that the tribes in California did not have the exclusive right to operate slot machines.

As detailed in the Complaint, the issue of the Tribes' position regarding the illegality of the card games operated by card rooms was known as early as 2011. (Compl., ¶ 65.) Yet, there is nothing in the Compacts—negotiated and executed after that time—that addresses a remedy for the loss of the exclusive right of the Tribes to offer banked card games.

III. BECAUSE THERE IS NO COMPACT OBLIGATION FOR THE STATE TO ENFORCE OR TO PROTECT THE TRIBES' EXCLUSIVE RIGHT TO OFFER BANKED CARD GAMES, THERE CAN BE NO BREACH OF AN IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

The Complaint's second claim for relief alleges that the State's failure to prevent card rooms from operating banked card games constitutes a breach of the Compacts' implied covenant of good faith and fair dealing. (Compl. ¶¶ 130-135.) However, absent a showing of what express Compact obligation or agreed-upon common purpose of the Compacts that the State has failed to fulfill, there is no breach of the implied covenant of good faith and fair dealing. *Guz v. Bechtel National, Inc.* 24 Cal. 4th 317, 349-50 (2000) ("The covenant of good faith and fair dealing . . . exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the *benefits of the agreement actually made*. [Citations.] The covenant thus cannot "'be endowed with an existence independent of its contractual underpinnings.'" [Citations.] It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." (alterations in original)); *see also Avidity Partners, LLC v. State of California*, 221 Cal. App. 4th 1180, 1206 (2013) ("The implied covenant of good faith and fair dealing cannot be extended to create an obligation not intended by both parties. [Citation.]").

In *Arizona v. Tohono O'odham Nation*, 818 F.3d at 562, Arizona argued that the tribal-state gaming compact "implicitly prohibited" the tribe from gaming on a certain parcel of land and that the tribe's plan to game on that land violated the compact's implied covenant of good faith and fair dealing. But the Ninth Circuit rejected that argument and held that because the compact's

express terms allowed the tribe to game on the land, the tribe's actions did not breach the implied covenant of good faith and fair dealing. *Id.* at 561-62. The Ninth Circuit went on to discuss that while the covenant of fair dealing means each party has a duty to "do everything that the contract presupposes will be done" to accomplish the contract's purpose, the "implied obligation must arise from the language used or it must be indispensable to effectuate the intention of the parties." *Id.* at 562 (internal quotation marks omitted). To the extent the Tribes claim the breach of an implied duty under the Compacts, the Complaint fails to show any express obligation in the Compacts that the State has failed to fulfill or intention that the Tribes would retain their exclusivity. Therefore, there is no breach of the implied covenant of good faith and fair dealing.

IV. THE COMPLAINT FAILS TO STATE A CLAIM FOR RELIEF AGAINST THE GOVERNOR

The Tribes allege that the State is breaching the Tribes' Compacts by not enforcing the Tribes' exclusive right to offer banked card games in California. (Compl. ¶ 128.) However, the Complaint's discussion of the State's alleged failure to enforce the law all specifically refer to the actions or inaction by the California Gambling Control Commission (Commission) and the Department of Justice, Bureau of Gambling Control (Bureau). (Compl. ¶¶ 44-55, 64-119.) The Complaint fails to state facts regarding any actions or inaction on the part of Governor Newsom or the Office of the Governor that constituted a breach of the Compacts. (*Ibid.*) The Complaint states that the "State (through its Bureau and Commission representatives) had to know it was allowing illegal gaming when that gaming began." (Compl. ¶ 64.) However, the Bureau is under the direction of the Attorney General, an independent constitutional officer, publically elected to office, Cal. Const. art. V, § 13, the Commission is an independent state agency, and the Governor's only power as to the Commission pertains to the appointment and removal of Commissioners, Cal. Bus. & Prof. Code § 19813(b) & (c). Therefore, the Complaint fails to state a claim for relief against Governor Newsom.

V. ABSTENTION IS PROPER BECAUSE WHETHER CARD ROOMS ARE VIOLATING STATE LAW IS UNDER CONSIDERATION BY A STATE COURT.

As the Complaint details, the issue of what constitutes a banked card game is a matter of state law and regulation. There is a pending state court action considering this subject between

gaming tribes and card rooms. *See supra*, note 2. Even if the State had an obligation under the Compacts to enforce and protect the Tribes' exclusive right to conduct banked card games, it would still be necessary to determine whether the games played by California card rooms are banked games. The determination of the legal scope of card games played by card rooms can be made only by analyzing state law. California law, including the California Penal Code and the Gambling Control Act, regarding gambling and the regulation of card rooms constitutes a particularized and complex statutory scheme better suited to interpretation and adjudication by appropriate state regulatory agencies[7] and the state courts. This Court should abstain from hearing this action and allow the state court in the pending state court action to evaluate and adjudicate the issue.

The Court has broad discretion in determining whether to entertain a declaratory judgment action under the Declaratory Judgment Act, 28 U.S.C. § 2201. *Wilton v. Seven Falls Co.*, 515 U.S. 277, 287 (1995) (noting that the Declaratory Judgment Act is "an enabling Act, which confers discretion on the courts rather than an absolute right upon the litigant"). The Declaratory Judgment Act states that district courts may declare rights, but this is an authorization, not a command to do so. 28 U.S.C. § 2201; *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491, 494, (1942) (*Brillhart*). Although a district court cannot refuse to entertain such an action as a matter of whim, the exercise of declaratory relief jurisdiction is not automatic or obligatory. "In the declaratory relief context, the normal principle that federal courts should adjudicate claims within their jurisdiction yields to considerations of practicality and wise judicial administration." *Wilton v. Seven Falls Co.*, 515 U.S. at 288. Indeed, "absent a strong countervailing federal interest, the federal court should not elbow its way . . . to render what may be an 'uncertain' and 'ephemeral' interpretation of state law." *Mitcheson v. Harris*, 955 F.2d 235, 238 (4th Cir. 1992).

In *Brillhart,* the Supreme Court identified three factors courts should examine to determine whether abstention is appropriate: 1) avoiding "needless determination of state law issues," 2)

[7] The Bureau is conducting public workshops throughout the State prior to the formal statutory rulemaking process on the player-dealer rotation issue. (*See* Cal. Gov't Code § 11346.45; https://oag.ca.gov/gambling/regulations (last visited March 15, 2019).) The Bureau has received written comments from tribes and card rooms, posted to the Bureau's website.

discouraging "forum shopping," and 3) avoiding "duplicative litigation." *Brillhart*, 316 U.S. at 495; *see Government Employees Ins. Co. v. Dizol*, 133 F.3d 1220, 1224 (9th Cir. 1998) (*Dizol*). In this matter, two of the three *Brillhart* factors weigh in favor of abstention.

- Needless Determination of State Law Issues: The Complaint seeks a declaratory judgment that the State has breached the Compacts by failing to enforce state law regarding banked card games. A determination of what state law requires will be based upon the California Penal Code, the California Gambling Control Act, and the relevant Bureau and Commission regulations. When a sought-after declaratory judgment concerns a state law question, abstention is appropriate. *Nevin v. Ferdon*, 413 F. Supp. 1043, 1049 (N.D. Cal. 1976); *Lexington Ins. Co. v. Silva Trucking, Inc.*, 2014 WL 1839076, at *7 (E.D. Cal. May, 7, 2014) ("even non-technical and general state law issues may call for dismissal or abstention"). This factor weighs strongly in favor of dismissal.

- Forum Shopping: This factor is designed to prevent a party from filing duplicative lawsuits to obtain the most favorable result. The Complaint is currently the only lawsuit filed by the Tribes, so duplicative lawsuits are not an issue. However, where a party could have sought a declaratory judgment in state court, and chose instead to file in federal court, courts have found that "the dispositive question is . . . whether there was a procedural vehicle available . . . in state court to resolve the issues raised in the action filed in federal court." *Polido v. State Farm Mut. Auto. Ins. Co.*, 110 F.3d 1418, 1424 (9th Cir. 1997) (overruled on other grounds by *Dizol*, 133 F.3d at 1227). The Compacts allow for the Tribes to file actions under the Compacts in federal or state court, this factor is neutral.

- Avoiding Duplicative Litigation: The pending state action involves the same facts and applicable laws. The state court is better equipped to resolve the Tribes' declaratory judgment claim regarding the legal scheme of card games in California and therefore this factor weighs in favor of dismissal.

The majority of the *Brillhart* factors weigh in favor of abstention, and accordingly, the Court should decline to exercise jurisdiction over the Complaint's declaratory judgment claim.

CONCLUSION

For all of the reasons and authorities discussed herein, the State respectfully requests an Order dismissing the Plaintiffs' Complaint under Federal Rules of Civil Procedure 12(b)(6) or, in the alternative, an order staying this action in favor of the pending state court litigation.

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Respectfully Submitted,

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