No. 19-16384

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellants,

v.

GAVIN NEWSOM; AND THE STATE OF CALIFORNIA

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of California
No. 2:19-cv-00025-JAM-AC
Hon. John A. Mendez

APPELLANTS' REPLY BRIEF

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1. INTRODUCTION

From the State's responding brief, it is difficult to discern that this is an appeal of the District Court's dismissal of the Tribes' complaint.[1] The State's brief hardly mentions the District Court's ruling and does not, even tangentially, address the bases for that ruling or the Tribes' arguments against the dismissal. Instead, the State reverts to some positions it espoused in its original motion to dismiss, adding along the way arguments and evidence that have no place in this appeal.

The State first contends the Tribes' compacts at issue here do not actually say what they say.[2] That is an understandably difficult point to make, leading the State to engage in an incorrect argument about the effect of contract preambles and an irrelevant dissertation about the source of gaming exclusivity. Along the way, the State makes a notable admission directly contradicting the District Court's ruling: That "the exclusivity under the 1999 Compacts and their current Compacts is the same." [Appellee's Answering Brief ("State's Br.") 18.] That is the very point the Tribes tried to convey below.

[1] As in the opening brief, the term "Tribes" refers to the Yocha Dehe Wintun Nation, the Sycuan Band of the Kumeyaay Nation, and the Viejas Band of Kumeyaay Indians, and the term "State" refers to the State of California and the Governor.

[2] Those compacts, which were finalized in 2015 (for the Sycuan Band) and 2016 (for the Viejas Band and Yocha Dehe), are referenced in this brief as the "2015-16 Compacts" or the "Compacts."

The State's next contention – that the Tribes' position means the State "contracted away" its police power – is also incorrect. Contracts are invalid on this ground *only* when the government *surrenders* its right to control a police power. The Compacts require the State to surrender absolutely nothing. To the contrary, the State is simply required to enforce the laws as they currently exist. Moreover, unlike situations where courts found such contracts void, the Compacts in no way hamper the State's ability to change its gaming laws in the future, should it be necessary to do so.

Finally, the State again argues the Compacts provide a remedy only for the loss of exclusivity as to slot machines, but not banked card games. Slot machine exclusivity, however, is irrelevant. The Compacts include specific "Dispute Resolution Provisions" – Section 13.0 in each document – detailing the remedies available to the parties in the event of a breach, which is what we have here. Remarkably, the Tribes highlighted Section 13.0 in their opposition to the motion to dismiss and their opening brief here, but the State has never even mentioned it.

As before, the State does not dispute that the contracts into which it entered with the Tribes promise card game exclusivity or that it benefitted from consideration for that promise. It simply claims the promise was illusory and wants the Court's assistance to avoid it. The Court should not allow that to occur.

2. ARGUMENT

A. THE COMPACTS *DO* PROVIDE CARD GAME EXCLUSIVITY

The District Court had "no doubt" the Tribes' 1999 compacts included exclusivity provisions that "imposed an affirmative obligation on the State," but found those provisions were merged out of existence and lacked consideration in the 2015-16 Compacts. [Excerpts of Record ("E.R.") 10, 12.]

The State's answering brief mentions neither ground on which the District Court dismissed the Tribes' complaint, suggesting the State disagrees with them. The State does, in a footnote, take exception to the District Court's assertion about exclusivity obligations on the State's part, but only because such obligations would improperly impinge on its "police powers." [State's Br. 18.] As noted above, however, the State concedes the "Tribes are [] correct in stating that the exclusivity in the 1999 Compacts and their current Compacts is the same." [*Id.*] Thus, if the District Court's conclusion was incorrect, the State tacitly acknowledges the Tribes should prevail here.

The plain language in the 2015-16 Compacts presents a notable difficulty for the State. The State cannot dispute that the Compacts (1) conferred upon the Tribes the "exclusive rights" to play "banked card games" in an "economic environment free of competition" [E.R. 82, 94, 105], (2) recited consideration for those "exclusive rights" and the "great value" they represented [E.R. 82, 83, 94,

105], and (3) asserted that all terms of the Compacts, including those relating to exclusivity, were "binding and enforceable." [E.R. 83, 95, 106.] To use the State's own words, the Compacts' "'language is clear and explicit'" and thus must govern their interpretation. [State's Br. 13 (citing Civil Code §§ 1636, 1638).]

Eschewing the District Court's approach to avoiding this language, the State first argues a point it did not raise before: That the exclusivity terms upon which the Tribes rely are unenforceable, because they appear in the Compacts' preambles. [State's Br. 14-15.] The State block-quotes two full paragraphs of those preambles claiming they show the "Preamble is merely a set of statements where the parties recognize the value of exclusivity to the Tribes." [State's Br. 15.] The preambles in the Sycuan and Viejas Compacts, however, contain the following closing paragraph (which the State *does not* block quote):

> **WHEREAS**, the State and the Tribe agree that all terms and provisions of this Compact are intended to be *binding and enforceable*. [E.R. 95, 106.] (emphasis added).]

The corresponding paragraph in Yocha Dehe's Compact (which the State also does not quote) is even more explicit, as it makes all Compact terms and provisions "including those in this Preamble" binding and enforceable. [E.R. 83.]

Thus, while the Tribes do not dispute that contract preambles "'may or may not have binding force,'" [State's Br. 14], the State unquestionably agreed when it

entered into the Compacts that those at issue here were of the former variety.

Later in the brief, the State references the "binding and enforceable" language in the Compact preambles, but claims it is only a "high-level agreement" that cannot be transformed into "binding, enforceable obligations unless the terms at issue are susceptible to being read that way." [State's Br. 19.] This, however, is nothing more than unsupported lawyerly assertion, which carries no weight. *See Saldana v. Globe-Weis Systems Co.*, 233 Cal. App. 3d 1505, 1518 (1991) ("It hardly bears mentioning that argument of counsel is neither a declaration nor admissible as evidence in court.") Moreover, the preamble language is not just "susceptible" to being read as an agreement by the State to protect card game exclusivity, it can only be read as such. *See Bank of the West v. Superior Ct.*, 2 Cal. 4th 1254, 1264 (1992) ("The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties."); Civ. Code § 1639 ("When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible").

The cases the State cites do not assist its efforts to distance itself from the clear language in the preambles. *Emeryville Redevelopment Agency v. Harcros Pigments*, 101 Cal. App. 4th 1083 (2002), involved no contract preamble language at all. It stands for the unremarkable proposition referenced above – that the law distinguishes between "covenants" in contracts, which "create legal rights and

obligations," and "mere recitals" which do not. *Id*. at 1101. The *Emeryville Redevelopment* court found the contract language at issue there "was not a contractual undertaking, but a declaratory statement on a matter of no apparent consequence as between the signatories." *Id*. By contrast, the gaming exclusivity in the Compacts is of *absolute* "consequence." Indeed, this Court has concluded that the gaming exclusivity in tribal-state compacts was "*exceptionally valuable*." *Rincon Band v. Schwarzenegger*, 602 F.3d 1019, 1037 (9th Cir. 2010) (emphasis in original).

The State also mistakenly relies on *O'Neill v. United States*, 50 F3d 677 (9th Cir. 1995), for the notion that the Compact preamble recitals it block-quotes do not "create an express obligation." [State's Br. 15.] The contract preamble language in *O'Neill* vaguely stated that water "will be available," a recital which both the lower court and this Court found did not "amount to a warranty of availability." *Id*. at 686. Moreover, the contract contained a separate provision that "explicitly and unambiguously" contradicted the assertion of a guarantee that water would be available in any particular amount. *Id*. Nothing about *O'Neill* applies here.

In the first section of its brief, the State also engages in a multi-page tangent that is both irrelevant and mistaken. According to the State, the Tribes are "incorrect in contending that the compacts themselves were the source of the exclusive rights they enjoy." [State's Br. 15-18.] The State cites page 6 of the

Tribes' opening brief for this purported contention. That page contains no such statement by the Tribes, nor is it clear how such a statement would affect this appeal. Regardless, the Tribes agree that the Constitution is the source of the gaming exclusivity, but the compacts are the sole vehicle by which tribes can avail themselves of the right. *See* Cal. Const. Art. IV, Sec. 19(f) ("the Governor is authorized to negotiate and conclude compacts, subject to ratification by the Legislature, for the [] conduct of [] banking and percentage card games by federally recognized Indian tribes"); *Rincon Band*, 602 F.3d at 1036 ("Just how 'meaningful' the exclusivity provision at issue in *Coyote Valley II* was at the time of the 1999 compacts cannot be overstated.") Moreover, the State does not dispute it is the only entity that can protect the exclusivity it promised in the Compacts.

B. THE EXCLUSIVITY PROMISE LEAVES THE STATE'S POLICE POWERS INTACT

The State repeatedly, almost as a mantra, invokes its "police powers" as a defense to the Tribes' suit. Because the District Court did not reach this argument, the State effectively repeats what appears in its motion to dismiss. As before, the State's argument misses the Tribes' fundamental point: The Compacts do not require enforcement of the State's gaming laws in perpetuity or in any particular manner, just as they exist today and based on the State's own interpretation. Such enforcement *cannot* impinge on the State's police powers.

The cases the State cites prove the fallacy of its argument. As the State explains, the concern in *Stone v. State of Mississippi* was a private lottery's insistence that it was entitled to the benefit of a 25-year charter to operate a lottery even after the state amended its constitution to prohibit lotteries. [State's Br. 20-21.] The Supreme Court understandably concluded the charter was not an affirmative promise to allow lotteries in the state for the next 25 years, but, rather a "permit" subject to "further legislative and constitutional control or withdrawal." [*Id*. 21; 101 U.S. 814, 821 (1879).] The Tribes have no issue with *Stone*, because it does not apply. The Tribes do not dispute the State's entitlement to change its gaming laws, and nothing in the Compacts says otherwise. The Tribes only seek enforcement of *current* gaming laws, which, as the Tribe's complaint alleges, the State is decidedly not doing.

As was the case with the State's motion to dismiss, the State's brief on appeal focuses primarily on *Cotta v. San Francisco*, 157 Cal. App. 4th 1550 (2007). [State's Br. 21-22; *see* E.R. 67.] As the Tribes explained in their opposition to that motion, *Cotta* is inapplicable here: The Compacts' banked card game exclusivity provisions neither "surrendered" nor "impaired" the State's laws or its police powers, unlike the incentive programs in *Cotta*. [E.R. 142.] To the contrary, the Compacts' gaming exclusivity provisions are entirely consistent with California law prohibiting the operation of banked card games on non-Indian

lands. And if, as the State posits, the "gambling-related laws and regulations are likely to develop over the twenty-five-year term of the Compacts," [State's Br. 22], nothing in those documents prevents such developments.[3]

The State claims "[s]imilar cases to *Cotta* abound." [State's Br. 23.] That is true, and the ones the State cites are just as irrelevant to this appeal. For example, *County Mobilehome Positive Action Committee, Inc. v. County of San Diego*, 62 Cal. App. 4th 727 (1998), involved a county's promise to refrain from enacting rent control for 15 years on mobile home owners who entered an agreement with the county. *Id*. at 731-32, 739. The *County Mobilehome* court analyzed the relevant authority and concluded "the controlling consideration in this area appears to be whether a disputed contract amounts to a local entity's 'surrender,' 'abnegation,' 'divestment,' 'abridging,' or 'bargaining away' of its control of a police power or municipal function." *Id*. at 738. That court reasonably concluded the "vice" of the promise there "is that it chills the County's exercise of police power for the specified time, even if there are significantly changed circumstances." *Id*. at 739-40. Here, the Compacts contain no similar vice.

[3] The Tribes note, however, that Penal Code section 330's prohibition on banking games on non-Indian lands – what the Tribes have been asking the State to enforce – has existed unchanged since 1872, and was elevated to a constitutional level in 1984. *Hotel Employees & Rest. Employees Int'l Union v. Davis*, 21 Cal. 4th 585, 605-06 (1999) (1984 amendment to the California Constitution "was designed, precisely, to elevate statutory prohibitions on a set of gambling activities to a constitutional level.")

As the State's own brief demonstrates, *Trancas Property Owners Association. v. City of Malibu*, 138 Cal. App. 4th 172 (2006), presents the same situation as *Cotta* and *County Mobilehome* – a promise to refrain from using police powers, in that case, the power to enact future zoning restrictions. [State's Br. 24-25.]

By contrast, the Compacts in no way require the State to "surrender," "abnegate" or "bargain away" its power relative to its gaming laws. To the contrary, the Compacts are completely silent about changes to the State's gaming laws or how the State enforces them. The State's contractual obligation to honor the Tribes' banked game exclusivity is perfectly consistent with – and actually based on – California law prohibiting the operation of banked card games on non-Indian lands. As such, the Compacts expressly bargain away *no* police power and the Court need not read into them "an abrogation of the potential future exercise of the sovereign police power." *See Professional Engineers v. Department of Transportation*, 13 Cal. App. 4th 585, 591 (1993); *Delucchi v. Cty. of Santa Cruz*, 179 Cal. App. 3d 814, 823, n.9 (1986) (finding the government, in entering a contract to restrict zoning of property to agricultural uses, "did not relinquish its right to exercise the police power, but simply reiterated its obligation to exercise that power in accordance with state law.")

C. THE *MERITS* OF THE CASE ARE NOT AT ISSUE IN THIS APPEAL

The State's brief takes an odd turn in the "police powers" section. After describing the roles and responsibilities of the Gambling Control Commission ("CGCC") and the Bureau of Gambling Control ("BGC"), the brief then tries to argue the *actual merits* of the Tribes' case. [State's Br. 25-26.] According to the State, the Tribes in their opening brief "argue without factual support in the record" that the "'State has refused to act against the cardrooms, and in fact has abetted the illegal conduct.'" [*Id*. 26.] To counter that purported argument, the State asks the Court to take judicial notice of CGCC rosters of administrative decisions to prove that the State, through the CGCC and BGC, has, in fact, acted against cardrooms, including making "findings, or admissions, of unlawful or unsuitable acts or omissions" and promulgating regulations. [*Id*. 27.]

There are several problems with the State's approach. As an initial matter, the Tribes needed no "factual support," because they *did not* raise on appeal the State's refusal to act against, or abetting of, the cardrooms' illegal conduct. The quote the State uses is from the second page – the introduction – of the Tribes' opening brief. That was merely an *introductory statement* to provide the Court context about the action. The Tribes' actual argument addressed only the narrow issue of contract interpretation that the District Court's dismissal order raised.

A further problem with the State's position is that "factual support," that is,

evidence – including what the State requests the Court judicially notice – is improper here in any event. This appeal concerns the ruling on a motion to dismiss under Rule 12(b)(6). [E.R. 8, 63.] It is axiomatic that the only relevant facts for purposes of such a motion are those recited in the complaint, and they are accepted as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Neither the State in its motion to dismiss nor the District Court claimed the Tribes did not adequately plead the State's failure to honor the exclusivity it promised in the Compacts. Indeed, in no prior brief has the State even disputed the Tribes' assertions to that effect. Even if that were not true, however, it would not matter, because on *de novo* review of a motion to dismiss, this Court is "not permitted to weigh evidence and determine whether the explanations proffered by [the Tribes] or [the State] are ultimately more persuasive." *Nat'l Ass'n of African Am.-Owned Media v. Charter Communications, Inc.*, 915 F.3d 617, 627 (9th Cir. 2019).

The novelty of the State's fact-based argument presents an additional bar to it. As this Court recently reiterated, in reviewing the ruling on a 12(b)(6) dismissal, it does not "consider factual assertions made for the first time on appeal, as our review is limited to the contents of the complaint." *Depot, Inc. v. Caring for Montanans, Inc.*, 915 F.3d 643, 653 (9th Cir. 2019) (citing *Allen v. City of Beverly Hills*, 911 F.2d 367, 372 (9th Cir. 1990).)

The State's judicial notice request at this stage of the proceedings is also improper, because the materials it asks this Court to review were never before the District Court. *See Center for Bio-Ethical Reform, Inc. v. City & County of Honolulu*, 455 F.3d 910, 919, n.3 (9th Cir. 2006) ("We deny the Center's request for judicial notice pursuant Federal Rule of Evidence 201 because these documents were not before the district court and their significance, if any, is not factored into the record on appeal."); *Westlands Water Dist. v. U.S. Dept. of Interior*, 376 F. 3d 853, 865 (9th Cir. 2008) ("De novo review means we view the case from the same position as the district court.") (quotations omitted).

Finally, even if this were the proper forum and procedural posture to argue the action's merits, the documents the State attaches for judicial notice and those on the CGCC's website prove nothing relative to the allegations in the complaint. The Tribes do not dispute that the CGCC has over the years held hearings involving cardrooms and taken various actions. As the complaint makes abundantly clear, however, the Tribes assert that those actions have not been directed at stopping the illegal play of banked card games. The District Court will decide these factual issues – the merits of the Tribes' case – if the Tribes prevail on this appeal and the case is remanded.

D. THE STATE IGNORES THE REMEDY PROVIDED BY COMPACT SECTION 13.0

In its motion to dismiss, the State argued the Compacts "contain no remedy for the loss of banked game exclusivity and in no event may a compact remedy require a particular exercise of the State's police powers." [E.R. 67.] The State repeats that argument *in toto*, including citing the same cases, in its answering brief here. This repetition is puzzling. In opposing the motion to dismiss, the Tribes addressed each of the State's arguments and explained why the cases upon which it relied did not apply. [*See* E.R. 139-41.] The State's answering brief mentions exactly none of the Tribes' rebuttals. Similarly, the District Court's opinion touched, if only tangentially, on one aspect of the State's argument – that the slot machine exclusivity provisions in the Compacts somehow affected their rights relative to banked card game exclusivity. [E.R. 10-12.] The Tribes addressed the District Court's conclusion in their opening brief (at pages 15 through 17), but the State's answering brief mentions neither the District Court's opinion nor the Tribes' opening brief on these points.

In light of the *de novo* review standard, the Tribes believe it is neither practical nor necessary to repeat their previous arguments. The Tribes do, however, want to emphasize one point: Neither the State nor the District Court has ever acknowledged the existence of, much less the Tribes' citation to, section 13.0

in the Compacts. This is important because that section provides the remedy the State claims does not exist: A suit for compact-related claims, including "claims of breach of th[e] Compact," which is just what we have here. [Addendum to Tribes' Opening Brief 235, 346, 454]. It thus seems evident why the State has continually ignored section 13.0.

E. THE STATE IGNORES THE TRIBES' (AND THE DISTRICT COURT'S) ARGUMENTS ON THE "BAD FAITH" CLAIM

The bad faith claim presents another example of the State's perplexing approach to this appeal. In its motion to dismiss, the State argued for the dismissal of the Tribes' bad faith claim. [E.R. 70-71.] The Tribes opposed each argument in the motion. [E.R. 143-44.] The District Court then dismissed the claim, though not for the exact reasons the State advocated, and the Tribe addressed the District Court's opinion in its opening brief. [E.R. 13-14; Tribes' Opening Brief 17-20.]

In its answering brief, the State did not even mention the Tribes' opposition to the motion to dismiss, the District Court opinion, or the Tribes' opening brief as to this issue. Rather, the State's entire effort with respect to the bad faith claim was to copy virtually *verbatim* (including the heading) the entire argument from its motion to dismiss. [*Compare* E.R. 70-71 *with* State's Br. 35-36.] The Tribes again prefer not to burden the Court with unnecessary and repetitive briefing and thus, to the extent the Court is interested in the State's arguments on the motion to dismiss,

they refer the Court to the record where they addressed each of those arguments. [E.R. 143-44.]

3. CONCLUSION

The State apparently acknowledges it "receive[d] consideration in exchange for the promise" to protect exclusivity, but prefers not to honor that "promise," so now claims the agreements into which it entered are "invalid." [State's Br. 24.] The State should not be allowed to misuse the judicial system to avoid its contractual obligations.

Date: March 20, 2020

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FILER'S ATTESTATION

I hereby attest that counsel for the Viejas Band of Kumeyaay Indians and the Sycuan Band of the Kumeyaay Nation concur in this filing's content and have authorized the filing on behalf of their respective tribes.

Date: March 20, 2020

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify that:

This response complies with the type-volume limitation of Rule 32(a)(7)(B)(ii) because it contains 3,719 words, excluding the items exempted by Rule 32(f). It complies with the typeface and typestyle requirements of Rules 32(a)(5) and 32(a)(6) because it was prepared in a proportionately spaced typeface using Microsoft Word 2016 Times New Roman 14-point font.

Date: March 20, 2020

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