SUPERIOR COURT OF CALIFORNIA,

COUNTY OF SAN DIEGO

HALL OF JUSTICE

TENTATIVE RULINGS - December 12, 2019

EVENT DATE: 12/13/2019 EVENT TIME: 01:30:00 PM DEPT.: C-72

JUDICIAL OFFICER: Timothy Taylor

CASE NO.: 37-2018-00058170-CU-NP-CTL

CASE TITLE: RINCON BAND OF LUISENO MISSION INDIANS OF THE RINCON RESERVATION CALIFORNIA VS FLYNT [E-FILE]

CASE CATEGORY: Civil - Unlimited CASE TYPE: Non-PI/PD/WD tort - Other

EVENT TYPE: Demurrer / Motion to Strike

CAUSAL DOCUMENT/DATE FILED: Demurrer, 08/19/2019

Tentative Rulings on Demurrers to First Amended Complaint

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

December 13, 2019, 1:30 p.m., Dept. 72

1. <u>Overview and Procedural Posture</u>.

This action began as one for nuisance, unfair competition, and civil conspiracy; it was initially brought by two Native American tribes against eleven cardroom defendants operating in Southern California. The original plaintiffs, who sought injunctive relief and damages, contend the cardroom defendants are illegally using "TPPs"* to offer "banked card games" which by law only the tribes may offer in California. ROA 1, paragraphs 47-50.**

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

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

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

Plaintiffs filed opposition. ROA 69-70. The cardroom defendants filed reply. ROA 75-78. The court reviewed the papers, and published a tentative ruling on April 17, 2019. ROA 81-82. Literally minutes before the April 19, 2019 hearing, the court was handed a document filed by plaintiffs entitled "Notice of Supplemental Authority." ROA 90. It was, in essence, an unauthorized surreply. Defense counsel received it the night before the hearing.

The court heard argument on April 19, 2019, following which it took the pleading challenges under submission. The court later published a ruling sustaining the demurrer with 20 days leave to amend, and granting the motion to strike. ROA 88.

The first amended complaint ("FAC") was filed May 9, 2019. The differences between the original complaint and the FAC are profound. Four new counts were added, as were 22 additional plaintiffs (*i.e*., 10 tribal entities and 12 tribal members of the plaintiff Rincon Band) and 13 additional defendants, (*i.e*., 13 TPP entities ("TPPP defendants")). ROA 98.

The eight counts pled in the FAC are: (1) public nuisance against cardroom defendants; (2) UCL violation against cardroom defendants; (3) public nuisance against TPPP defendants; (4) UCL violation against TPPP defendants; (5) injunction for constitutional violation against all defendants; (6) declaratory judgment against all defendants; (7) tortious interference with contractual relations against all defendants; and (8) tortious interference with economic advantage against all defendants. Counts 1 through 6 are brought by all plaintiffs. Counts 7 and 8 are brought by the Chumash Band plaintiff.

The parties entered a pair of stipulations whereby responsive pleadings were deferred. ROA 103, 107.**** They also stipulated to expanding the size of their briefs and a briefing schedule. ROA 122, 128. The court granted all these requests.

Presently, the cardroom defendants have filed a consolidated demurrer attacking the FAC (ROA 112-118), and the TPPP defendants have filed a separate consolidated demurrer attacking the FAC (ROA 119-121). Plaintiffs filed opposition. ROA 133-135. Defendants filed reply. ROA 136-138. The court has reviewed the papers.

The case is also set for a continued CMC. ROA 127.

2. <u>Applicable Standards</u>.

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

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

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

D. Cal. Penal Code section 330.11 provides:

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

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

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

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

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

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

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

H. Counts two and four of the FAC are brought under the "unlawful," "unfair," and "fraudulent" prongs of the UCL, Cal. Bus. and Prof. Code section 17200. To state a cause of action under the "unlawful" prong, the cause of action must plead a statute, law, or regulation that serves as the predicate for the section 17200 violation. *E.g.*, *Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377, 383 (section 17200 permits a cause of action under the "unlawful" prong if the practice violates some other law). To state a cause of action under the "unfair" prong, the cause of action must allege conduct by defendant "tethered to any underlying constitutional, statutory or regulatory provision." *E.g.*, *Scripps Clinic v. Superior Court* (2003) 108 Cal.App.4th 917, 940; *Durell v. Sharp Healthcare* (2010) 183 Cal.App.4th 1350, 1366. To state a cause of action under the "fraudulent" prong, the plaintiff must allege that members of the public are likely to be deceived. *E.g.*, *Prata v. Superior Court* (2001) 91 Cal.App.4th 1128, 1144.

I. Count five of the FAC seeks an injunction against a further constitutional violation. The constitutional provision at issue, sometimes referred to as Proposition 1A, was ratified by California voters in March of 2000, and amended the California Constitution as follows:

"Notwithstanding subdivisions (a) and (e), and any other provision of state law, the Governor is authorized 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. Accordingly, slot machines, lottery games, and banking and percentage card games are hereby permitted to be conducted and operated on tribal lands subject to those compacts."

Cal. Const., Art. IV, § 19(f).

J. A claim of civil conspiracy (FAC, starting at paragraph 90) is not a separate cause of action, and its only significance is that each member may be held responsible as a joint tortfeasor for torts committed pursuant to the conspiracy, regardless of whether or not he or she directly participated in the act. *See*, *e.g.*, *Richard B. LeVine, Inc. v. Higashi* (2005) 131 Cal.App.4th 566, 574. A claim of civil conspiracy requires proof that two or more persons, with actual knowledge that a tort is planned, concurred in the tortious scheme. Thus, even "actual knowledge of the planned tort, without more, is insufficient to serve as the basis for a conspiracy claim. Knowledge of the planned tort must be combined with intent to aid in its commission." *Kidron v. Movie Acquisition Corp.* (1995) 40 Cal.App.4th 1571, 1582. "The sine qua non of a conspiratorial agreement is the knowledge on the part of the alleged conspirators of its unlawful objective and their intent to aid in achieving that objective." *Schick v. Lerner* (1987) 193 Cal.App.3d 1321, 1328.

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

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

K. Count six of the FAC seeks declaratory relief. A threshold requirement for declaratory relief is the existence of a justiciable dispute. The declaratory judgment statute expressly provides that declaratory relief is available to parties to contracts or written instruments "*in cases of actual controversy* relating to the legal rights and duties of the respective parties." Code of Civil Procedure § 1060, italics added. Because Code of Civil Procedure section 1060 "makes the presence of an 'actual controversy' a jurisdictional requirement to the grant of declaratory relief ' " (*Environmental Defense Project of Sierra County v. County of Sierra* (2008) 158 Cal.App.4th 877, 885 (*Environmental Defense Project*)), a "court is only empowered to declare and determine the rights and duties of the parties 'in cases of actual controversy' " *Pittenger v. Home Savings & Loan Assn.* (1958) 166 Cal.App.2d 32, 36. For this reason, the existence of an " '*actual, present controversy*' " is " 'fundamental' " to an action for declaratory relief. *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79 (*Cashman*); *In re Claudia E.* (2008) 163 Cal.App.4th 627, 639.

One requirement for a justiciable controversy is ripeness: there must be a dispute between adverse parties on a specific set of facts that has reached the point that an invasion of one party's rights is likely unless the court orders relief and enters a conclusive judgment declaring the parties' rights and obligations. *See*, *e.g.*, *Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 170-171; *Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110, 117; *County of San Diego v. State of California* (2008) 164 Cal.App.4th 8.

There is no basis for declaratory relief where only past wrongs are involved. *Baldwin v. Marina City Properties, Inc.* (1978) 79 Cal.App.3d 393, 407.

L. Turning to counts seven and eight of the FAC: The elements of intentional interference with

contractual relations are set forth in CACI 2201. *See PG&E v. Bear Stearns & Co.,* 50 Cal. 3d 1118, 1126 (1990).

" ' "The tort of intentional . . . interference with prospective economic advantage imposes liability for improper methods of disrupting or diverting the business relationship of another . . . . [Citation.]" [Citation.]' [Citation.] The elements of the tort 'have been stated as follows: "(1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff, (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant." [Citations.]' " *Gemini Aluminum Corp. v. California Custom Shapes, Inc.* (2002) 95 Cal.App.4th 1249, 1255-1256, some capitalization omitted.

In *Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 392-393 (*Della Penna*), the California Supreme Court held that a "plaintiff seeking to recover for alleged interference with prospective economic relations has the burden of pleading and proving that the defendant's interference was wrongful 'by some measure beyond the fact of the interference itself.' " In *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1159-1160 (*Korea Supply*), the court explained: "It is this independent wrongfulness requirement that makes defendants' interference with plaintiff's business expectancy a tortious act. . . . [T]he requirement of pleading that a defendant has engaged in an act that was independently wrong distinguishes lawful competitive behavior from tortious interferences. Such a requirement 'sensibly redresses the balance between providing a remedy for predatory economic behavior and keeping legitimate business competition outside litigative bounds.' "

In *Korea Supply,* the court clarified that "an act is independently wrongful if it is *unlawful*, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." *Korea Supply, supra,* 29 Cal.4th at p. 1159, italics added. "[S]uch an act must be wrongful by some legal measure, rather than merely a product of an improper, but lawful, purpose or motive." *Id.* at p. 1159, fn. 11.

The directions for CACI No. 2202, the instruction for the tort of intentional interference with prospective economic relations, explains that as to the element of independent wrongful conduct "*the court must specifically state for the jury the conduct that the judge has determined as a matter of law would satisfy the 'wrongful conduct' standard*. This conduct must fall outside the privilege of fair competition. [Citations.] The jury must then decide whether the defendant engaged in the conduct *as defined by the judge*." CACI No. 2202 (2009 ed.), Directions for Use, p. 1166, italics added.

3. <u>Judicial Notice</u>.

The cardroom defendants seek judicial notice of certain court documents as well as documents filed with the Secretary of State and other governmental entities, as well as several websites. ROA 115, 117. Plaintiffs filed opposition. ROA 134.

Courts of appeal review a trial court's ruling on a request for judicial notice pursuant to the abuse of discretion standard of review. *In re Social Services Payment Cases* (2008) 166 Cal.App.4th 1249, 1271.

In *People v. Harbolt* (1997) 61 Cal.App.4th 123, 126-127, the court discussed the limited purposes for which a court may take judicial notice of a court record:

"Evidence Code sections 452 and 453 permit the trial court to 'take judicial notice of the *existence* of judicial opinions and court documents, along with the truth of the results reached-in the documents such as orders, statements of decision, and judgments-but cannot take judicial notice of the truth of hearsay statements in decisions or court files, including pleadings, affidavits, testimony, or

statements of fact.' [Citations.]

Judicial notice of matters will be dispositive only in those instances where there is not or cannot be a factual dispute concerning that which is sought to be judicially noticed. *Cruz v. County of Los Angeles* (1985) 173 Cal.App.3d 1131, 1134; accord, *Unruh-Haxton v. Regents of University of California* (2008) 162 Cal.App.4th 343, 364-365.

Judicial notice is a substitute for formal proof. *Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1564. Its consequence is to establish a fact as indisputably true, eliminating the need for further proof. *Ibid*; *see Post v. Prati* (1979) 90 Cal.App.3d 626, 633; *Mozzetti v. City of Brisbane* (1977) 67 Cal.App.3d 565, 578 (purpose of judicial notice is to expedite production and introduction of otherwise admissible evidence). Hence, the general rule dictates that a matter is subject to judicial notice only if it is reasonably beyond dispute. *Fremont Indem. Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 113; *Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 882 (matter being judicially noticed must "not [be] reasonably subject to dispute"); *Post v. Prati*, *supra*, 90 Cal.App.3d at 633 (" 'The fundamental theory of judicial notice is that the matter that is judicially noticed is one of law or fact that cannot reasonably be disputed' "); *see City of Chula Vista v. County of San Diego* (1994) 23 Cal.App.4th 1713, 1719; *Dwan v. Dixon* (1963) 216 Cal.App.2d 260, 265.

Judicial notice is granted as limited by the foregoing precepts.

4. <u>Discussion and Rulings</u>.

The demurrer to counts one through eight in the FAC is sustained.

A. Count one (public nuisance against cardroom defendants) fails, as the FAC does not plead standing to bring a public nuisance claim against the cardroom defendants.

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

Count one fails to plead facts that the tribe plaintiffs and tribal entity plaintiffs are either a district attorney, or a county counsel, or a city attorney in the locales in which the public nuisance exists. Also, count one fails to plead facts that the tribe plaintiffs and tribal entity plaintiffs are a "private person" in order to pursue a public nuisance claim. Rather, the FAC pleads the tribe plaintiffs are sovereign entities, *i.e*., "federally-recognized Indian" tribes with "inherent sovereign authority" that aim to provide "strong tribal government". *See* FAC, paragraphs 2-3, 111. Also, the FAC pleads the tribal entity plaintiffs lost "tribal revenue" (*see* FAC, paragraphs 108-109, 112), suggesting the tribal entity plaintiffs are <u>not</u> a private person. Thus, count one fails to allege standing by the tribe plaintiffs and tribal entity plaintiffs to pursue a public nuisance claim against the cardroom defendants.

Next, count one fails as the FAC does not allege the essential element that all plaintiffs suffer from the same harm as the public. No facts are alleged that plaintiffs share any of the same alleged harm as the public. *See* Cal. Civil Code § 3480 (a public nuisance as "one which affects at the same time an entire community or neighborhood, or any considerable number of persons..."). Also, the FAC concedes the gaming undertaken by the plaintiff tribes is "limited geographically" to "Indian Lands," whereas the cardroom defendants are located "much closer to the residence of many of their customers." ROA 113, opposition memorandum, pp. 5:28-6:2. Further, the tribal plaintiffs cannot share the public harm since the reservations are "remote" and "not near" the locations of defendants' cardrooms. *See* ROA 1, complaint, paragraphs 60, 72. This suggests the tribal plaintiffs do not suffer from the same harm as

communities or neighborhoods that surround or are near defendants' cardrooms. Moreover, although the FAC alleges the cities where the tribal member plaintiffs reside, the locations are throughout California (from San Diego to Santa Barbara), with many of the tribal member plaintiffs residing hundreds of miles from many of the cardrooms. *See* FAC, paragraphs 9-16. Thus, count one fails since it does not allege the essential element that all plaintiffs suffer from the same harm as the public.

Next, count one fails as the FAC does not allege the essential element of sufficient public harm. In order to maintain a public nuisance claim, plaintiffs must allege that defendants' acts are likely to cause a "significant invasion of a public right." *See In re Firearm Cases* (2005) 126 Cal.App.4th 959, 988. The interference must be both substantial and unreasonable. *Birke v. Oakwood Worldwide, supra,* 169 Cal.App.4th at 1547. No facts are alleged of sufficient public harm; only conclusions are alleged. *See* FAC, *e.g*., paragraphs 99-105.

Next, count one fails to allege a special harm. *See* Cal. Civil Code § 3493 ("[a] private person may maintain an action for a public nuisance, if it is specially injurious to himself, but not otherwise"). In this regard, the FAC fails to plead that the tribal entity plaintiffs and the tribal member plaintiffs suffered any special harm. The FAC does not plead direct financial losses suffered by the tribal entity plaintiffs and the tribe member plaintiffs. Rather, the FAC alleges the actions of the cardroom defendants resulted in the loss of "tribal" revenue. FAC, paragraphs 107-112. Count one fails to allege a special harm by the tribal entity plaintiffs and the tribe member plaintiffs.

B. Count two (UCL violation against cardroom defendants) fails as the FAC does not plead standing to bring a UCL claim against the cardroom defendants.

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

Count two does not allege that the tribe plaintiffs and tribal entity plaintiffs are "the Attorney General," a "district attorney," a "county counsel," a "city attorney," or a "person" under the UCL. Instead, the FAC pleads the tribe plaintiffs are sovereign entities, *i.e*., "federally-recognized Indian" tribes with "inherent sovereign authority" that aim to provide "strong tribal government". FAC, paragraphs 2-3, 111. Government entities are not included within the definition of "person" under the UCL. *See* Cal. Bus. and Prof. Code § 17201. If the Legislature wanted to include government entities within the definition of "person" under the UCL, it could have done so. *See PETA v. California Milk Producers Advisory* Bd. (2005) 125 Cal.App.4th 871, 878. In addition, plaintiffs fail to provide binding California authority, *i.e*., a statute or case law, which holds that tribes are a "person" under the UCL definition for purposes of bringing an UCL claim. Moreover, the tribal plaintiffs' (government entities) allegation in the FAC that they are a "separate organized community of persons" (parroting the standing language at paragraphs 2-3) defies common sense. No authority is cited that authorizes a government to cure its standing problem by allowing it to utilize the words of the standing statute (*i.e*., "organization of persons") to cure its standing problem. Thus, count two fails to plead that the tribe plaintiffs and tribal entity plaintiffs have standing to sue under the UCL.

Next, count two fails to plead that the tribal entity plaintiffs and the tribal member plaintiffs have standing to sue under the UCL. Count two does not plead that these plaintiffs "lost money or property as a result of unfair competition." Cal. Bus. and Prof. Code § 17204. Count two does not allege direct financial losses suffered by the tribal entity plaintiffs and the tribal member plaintiffs. Count two does not adequately explain why the tribal entity plaintiffs and the tribe plaintiffs may connect any purported economic injury suffered by the tribal plaintiffs to them. Thus, count two fails to plead that the tribal entity plaintiffs and the tribe member plaintiffs have standing to sue under the UCL.

It must be remembered that the current standing requirements for the UCL were the result of an explicit effort by the People of California to narrow and restrict standing. *See* generally, *Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 320-21 ("In 2004, the electorate substantially revised the UCL's standing requirement; where once private suits could be brought by 'any person acting for the interests of itself, its members or the general public' (former § 17204, ...now private standing is limited to any 'person who has suffered injury in fact and has lost money or property' as a result of unfair competition."). The ballot initiative could very well have included Native American tribal entities; it did not do so.

C. Counts three and four (public nuisance and UCL violation against TPPP defendants) fail against the TPPP defendants for the reasons expressed above pertaining to counts one and two. Also, the civil conspiracy allegations in counts three and four are deficient since the allegations are conclusory. In this respect, counts three and four allege the TPPP defendants and the cardroom defendants had "agreements" to commit public nuisance and unfair competition (FAC, paragraphs 146, 153), yet the FAC fails to allege the nature and scope of the alleged agreements nor which plaintiffs (*i.e.*, there are about 25 named plaintiffs) were allegedly harmed by which agreements. This is conclusory pleading.

D. Count five (injunction for violation of constitutional violation) is based on the proposition that defendants, in offering and/or participating in banked games, violate the California Constitution. *See* FAC, paragraph 159. The California Constitution provision identified in the FAC is Cal. Const., Art. IV, section 19(e). *Id.*, paragraph 56. This constitutional provision provides: "[t]he Legislature has no power to authorize, and shall prohibit, casinos of the type currently operating in Nevada and New Jersey". Plaintiffs concede Art. IV, section 19(e) is not self-executing. *See* ROA 133, opposition memorandum, pp. 19:26-20:10. They do not claim Art. IV, Section 19(e) is directly enforceable via court decree. Instead, they argue that Art. IV, section 19(e) is enforceable through the UCL. (However, as noted, the UCL violation counts fail for lack of standing). As such, count five fails since it is based on a constitutional provision that is not self-executing and is not directly judicially enforceable.

E. Count six (declaratory relief) seeks a declaration of rights related to Article IV, section 19(e) (text quoted above) and Cal. Penal Code section 330.11. *See* FAC, paragraph 165. Cal. Penal Code section 330.11 provides: "'Banking game'" or 'banked game' does not include a controlled game if the published rules of the game feature a player-dealer position and provide that this position must be continuously and systematically rotated amongst each of the participants during the play of the game, ensure that the player-dealer is able to win or lose only a fixed and limited wager during the play of the game, and preclude the house, another entity, a player, or an observer from maintaining or operating as a bank during the course of the game. For purposes of this section it is not the intent of the Legislature to mandate acceptance of the deal by every player if the division finds that the rules of the game render the maintenance of or operation of a bank impossible by other means. The house shall not occupy the player-dealer position."

Count six fails. As indicated, Art. IV, section 19(e) is not self-executing and is not directly judicially enforceable. Also, plaintiffs fail to provide authority that a declaratory relief action may be used by private parties in a civil action to enforce criminal statutes. In addition, count six does not contend it is based on the UCL violation counts (which fail for lack of standing).

F. Counts seven and eight (tortious interference counts brought by plaintiff Chumash Band fails. The counts are premised on a gaming compact that the Chumash Band entered with the State of California. *See* FAC, paragraphs 167-168, 175. The counts fail to allege either a breach or actual disruption of the Chumash Band's compact with the State. The counts fail to allege that the compact has been breached. The counts fail to allege that defendants' activities were designed to induce a disruption of the relationship encompassed in the Chumash Band gaming compact. Counts seven and eight fail as presently pled.

G. Plaintiffs have expressly requested leave to amend (ROA 133, opposition memorandum, p. 20:18-23, and it is ordinarily an abuse of discretion to deny such a request unless the inability to state a

valid cause of action is clear. In this respect, plaintiffs have the burden to show in what manner they can amend counts one through eight in the FAC and how the amendment will change the legal effect of the pleading. *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349. The court grants plaintiffs ten (10) days leave to amend counts one through eight. Leave to amend is justified by *Connerly v. State of California* (2014) 229 Cal.App.4th 457, holding that a party responding to a demurrer can even wait until the case reaches the Court of Appeal to suggest a theory change justifying leave to amend.

5. CMC.

The court has reviewed the detailed joint complex case management statement submitted by the parties. The court notes the case is now over a year old. Understanding the defendants believe they will never be required to file an answer, the court's instinct is to grant plaintiffs' request to set a trial date in April of 2021 (and set the other litigation benchmarks accordingly).

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*The complaint in paragraphs 14 and 38 attempted to define "TPP." "Proposition players" are described as "an individual paid by the cardroom to sit at the tables and reinvigorate games with dwindling action and thereby stimulate additional revenue for the cardroom in the form of per-hand fees collected from every player, as well as increased food and beverage sales." The selection of the initials "TPP" for these vaguely described fictitiously named parties was unclear to the court; counsel clarified during the April 19, 2019 oral argument that TPPP stands for "third party proposition player." This was further clarified in paragraph 39 of the FAC.

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

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

****One signer of the stipulations is attorney Maurice Suh. There are problems with his record address, and that of attorney Buck-Walsh. ROA 105, 130-131.