

# CostaLaw | trial business & entertainment attorneys

17383 Sunset Boulevard, Suite A-350, Pacific Palisades, CA 90272

tel 310.394.6611 fax 310.394.6612

A professional corporation operating as the Law Offices of Joseph P. Costa, Inc.

March 12, 2020

Via Overnight Mail and E-mail  
City Council of the City of Napa  
City Hall  
955 School Street  
Napa, CA 94559  
Attention Steve Potter ([spotter@cityofnapa.org](mailto:spotter@cityofnapa.org))

Received by the City  
Clerk's Department

Distributed to:

Mayor + Council, CM, ACM,  
CA, CC, V. Smith, E. Morris,  
M. Allen

2020 MAR 17 AM 8:28

CITY OF NAPA  
CITY CLERK

Re: Application of Polvora Card Room, March 17, 2020

To the Respected City Council:

I represent BVK Gaming, Inc. ("BVK"), who currently is in litigation with Tim Long ("Long") and Polvora, Inc. ("Polvora") regarding the gambling license that Polvora seeks to have the City Council modify on March 17, 2020. As there is ongoing litigation between Polvora, Long, and BVK regarding the entitlement to the underlying license that Polvora seeks to have modified, and such litigation is scheduled to go to trial in the Napa Valley Superior Court on August 3, 2020 (the "Trial"), BVK respectfully requests that the City Council delay taking action on said license until ownership of the entitlement to the license is determined at Trial.

On October 11, 2017, BVK initiated a lawsuit against Long and subsequently added Polvora to said lawsuit. The gravamen of the claims in such lawsuit is that BVK, the current owner of the Napa Valley Casino in American Canyon, has a priority of right to the license for the former Hemphill's Cardroom (the "License"). It is this License that Polvora is asking the City Council to modify. The trial in this case was originally scheduled to commence on April 6, 2020. It was recently continued until August 3, 2020. Attached as Attachment A to this letter is a true and correct copy of an order from Judge Monique Langhorne identifying these dates.

While it is true that the California Gambling Control Commission (the "CGCC") has provided approval of the initial transfer of the License to Polvora, it is clear that such approval was a conditional approval. The condition is the ultimate determination by the Napa Valley Superior Court as to such Licenses' ownership. Specifically, the CGCC

made it absolutely clear to Polvora that the license and entitlements would be undone should BVK prevail at Trial. Significantly, Long recently argued to the Court that since the license was already transferred to Polvora, the relief sought by BVK to receive such license was improper. Long also tried to get the case dismissed on other grounds. The Court disagreed and denied Long the relief he was seeking. In doing so, it unequivocally ruled as follows:

"Long asserts the request for specific performance fails since the license already has been transferred. . . . To the extent Long believes he no longer owns the license, the evidence indicates the CGCC can unwind the approval of the 2017 Polvora Asset Purchase Agreement. The CGCC made it clear its approval of the agreement was not intended to interfere with this Court's proceeding or to interfere with this Court's ability to decide who is entitled to proceed with their respective agreements." A true and correct copy of the Court's order regarding the conditional nature of Polvora's license is attached to this letter as Attachment "B", and highlighted on its page 8.

BVK has different plans for the License than Polvora has. BVK is not interested in operating the cardroom at 505 Lincoln Ave – rather, has other, more suitable, locations in mind. For these reasons, any modification of such license should be delayed until its ownership is judicially determined and clear facts on where and how the License will be implemented are before this City Council. This is obviously the most prudent and conservative path for the City Council to take as it avoids any potential interference in the Napa Court's pending proceedings, and amounts to only a few months delay in taking action. If you have any questions, then please do not hesitate to phone me at the above-number.

Sincerely yours,



Joseph P. Costa

Cc: Mary Luros ([mluros@cityofnapa.org](mailto:mluros@cityofnapa.org))  
Liz Alessio ([lalessio@cityofnapa.org](mailto:lalessio@cityofnapa.org))  
Doris Gentry ([dgentry@cityofnapa.org](mailto:dgentry@cityofnapa.org))  
Scott Sedgley ([ssedgley@cityofnapa.org](mailto:ssedgley@cityofnapa.org))  
Jill Techel ([jtechel@cityofnapa.org](mailto:jtechel@cityofnapa.org))

# Attachment A

Page 4 of 21



PLAINTIFF/PETITIONER: BVK GAMING, INC.

CASE NUMBER:

17CV001155

DEFENDANT/RESPONDENT: TIMOTHY J. LONG, et al.

## PROOF OF SERVICE BY FIRST-CLASS MAIL

## NOTICE OF ENTRY OF JUDGMENT OR ORDER

(NOTE: You cannot serve the Notice of Entry of Judgment or Order if you are a party in the action. The person who served the notice must complete this proof of service.)

1. I am at least 18 years old and not a party to this action. I am a resident of or employed in the county where the mailing took place, and my residence or business address is (specify):  
Buchalter, A Professional Corporation, 500 Capitol Mall, Suite 1900, Sacramento, CA 95814

2. I served a copy of the Notice of Entry of Judgment or Order by enclosing it in a sealed envelope with postage fully prepaid and (check one):

- a. ☐ deposited the sealed envelope with the United States Postal Service.  
b. ☒ placed the sealed envelope for collection and processing for mailing, following this business's usual practices, with which I am readily familiar. On the same day correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service.

3. The Notice of Entry of Judgment or Order was mailed:

- a. on (date): February 18, 2020  
b. from (city and state): Sacramento, CA

4. The envelope was addressed and mailed as follows:

- a. Name of person served: Joseph P. Costa, Esq.,  
Darius Anthony Vosylius, Esq., Costalaw

c. Name of person served:

Street address: 17383 Sunset Boulevard, Suite A-350  
City: Pacific Palisades  
State and zip code: CA 90272

Street address:

City:

State and zip code:

- b. Name of person served: Mark S. Pollock, Esq., C.  
Evangeline James, Esq., POLLOCK AND JAMES, LLP

d. Name of person served:

Street address: 1827 Clay Street, Suite 300  
City: Napa  
State and zip code: CA 94559

Street address:

City:

State and zip code:

☐ Names and addresses of additional persons served are attached. (You may use form POS-030(P).)

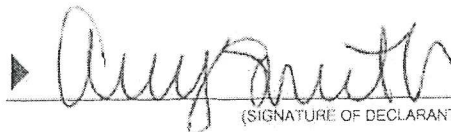
5. Number of pages attached 2.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: February 18, 2020

Amy Smith

(TYPE OR PRINT NAME OF DECLARANT)



(SIGNATURE OF DECLARANT)



**ENDORSED**

FEB 13 2020

Clerk of the Napa Superior Court

By: I. RODRIGUEZ  
Deputy

BUCHALTER  
A Professional Corporation  
ROBERT S. MCWHORTER (SBN: 226186)  
JACQUELINE N. VU (SBN: 287011)  
500 Capitol Mall, Suite 1900  
Sacramento, CA 95814  
Telephone: 916.945.5170  
Facsimile: 213.896.0400  
Email: rmcwhorter@buchalter.com  
jvu@buchalter.com

Attorneys for  
POLVORA, INC., MICHAEL LEBLANC  
and GABRIEL PATTEE

## SUPERIOR COURT OF THE STATE OF CALIFORNIA

## COUNTY OF NAPA

BVK GAMING, INC., a California  
Corporation,

Plaintiff,

vs.

TIMOTHY J. LONG, an Individual;  
GABRIEL PATTEE, an Individual;  
MICHAEL LEBLANC, an Individual;  
POLVORA, INC., a California Corporation;  
and DOES 1 through 50, inclusive,

Defendants.

Case No. 17CV001155

~~PROPOSED~~ <sup>ML</sup> ORDER GRANTING EX  
PARTE APPLICATION, PURSUANT TO  
STIPULATION, TO CONTINUE TRIAL  
AND PRETRIAL DEADLINES,  
INCLUDING DISCOVERY, ORIGINAL  
DATES OF TRIAL, OR IN THE  
ALTERNATIVE, AN ORDER  
SHORTENING TIME SPECIALLY  
SETTING AND ADVANCING THE  
HEARING ON DEFENDANTS' MOTION  
TO CONTINUE THE TRIAL

Date: February 13, 2020

Time: 11:30 a.m.

Dept.: B M. LANGHORNEJudge: Hon. Victoria Wood ML

Complaint Filed: October 11, 2017

Trial Date: April 6, 2020

**BY FAX**

PROPOSED ORDER

On February 13, 2020, this Court heard the foregoing Ex Parte Application to Continue Trial and Pretrial Deadlines, including Discovery, Original Dates of Trial or in the Alternative, Order Shortening Time Specially Setting and Advancing the Hearing on Defendants' Motion to Continue the Trial (the "Ex Parte Application") filed by Defendants Polvora, Inc., Michael LeBlanc, and Gabriel Pattee (the "Polvora Defendants"). After full consideration of the briefs and papers submitted, the hearing, and all other matters presented to the Court:

## IT IS HEREBY ORDERED:

1. The Ex Parte Application is GRANTED.
2. The trial date is continued from April 6, 2020 to 8/3/2020, at 8:30 a.m. (the "Continued Trial Date") in Department A;
3. The mandatory settlement conference is continued from March 5, 2020 to 7/2, 2020 at 8:30am in Department SC Room.
4. The trial management conference shall be continued from April 2, 2020 to 7/30, 2020 at 8:30am in Department A.
5. The Summary Judgment Hearing and Motion to Bifurcate is continued from March 3, 2020 to 4/30, 2020 at 8:30am in Department B.
6. All pretrial deadlines, including, without limitation, all non-expert discovery and expert discovery cut-off dates, motion cut-off dates, shall be continued as though the Continued Trial Date, is the original trial date.

Alternatively, IT IS HERBY ORDERED:

- ~~7. The Ex Parte Application is GRANTED to shorten the time to hear the Polvora Defendants' Motion to Continue Trial.~~
- ~~8. The Motion to Continue Trial shall be heard on \_\_\_\_\_ 2020, at \_\_\_\_\_ in Dept. \_\_\_\_\_.~~

Dated: **FEB 13 2020**

**M. LANGHORNE**

SUPERIOR COURT JUDGE

PROPOSED ORDER GRANTING EX PARTE APPLICATION

# Attachment B



**FILED**

DEC 23 2019

Clerk of the Napa Superior Court  
By: *[Signature]*  
DeputySUPERIOR COURT FOR THE STATE OF CALIFORNIA,  
COUNTY OF NAPA

BVK GAMING, INC.,

Plaintiff,

vs.

TIMOTHY J. LONG,

Defendant.

Case No. 17CV001155

ORDER DENYING MOTION FOR  
SUMMARY JUDGMENT OR, IN THE  
ALTERNATIVE, SUMMARY  
ADJUDICATION

Defendant Timothy J. Long's motion for summary judgment or, in the alternative, summary adjudication came on for hearing on December 20, 2019. The matter having been submitted, the Court orders as follows:

Long moves for summary judgment or, in the alternative summary adjudication as to the first cause of action for breach of contract/specific performance, second cause of action for declaratory relief, and third cause of action for breach of the covenant of good faith and fair dealing in the second amended complaint on the grounds the pleading is time barred, the 2007 Asset Purchase Agreement ("2007 APA") expired by its own terms in 2008, plaintiff BVK Gaming, Inc.'s ("BVK") total breach of the 2007 APA absolves any further performance, the judgment of the previous litigation on the same issues and the APA absolved the parties from further performance, the request for specific performance fails since the license already has been transferred, BVK comes to this litigation with unclean hands, the claim for breach of the implied covenant of good faith and fair dealing is superfluous, and there is no valid basis to award declaratory relief. The motion is DENIED.

### A. Procedural Issues

Long presented his separate statement by listing forty purported undisputed material facts under the title “1. The Cause of Action for Breach of Contract/Specific Performance is Barred by the Statute of Limitations.” (See Sep. St. at p. 2:1-2.) Long then states “please see facts” with a reference to either all or a selection of the forty supposed undisputed material facts for the seven additional issues. It was extremely confusing to the Court when referencing the grounds for the motion with the seven additional issues listed in the separate statement as they do not match. For instance, there are no “please see facts” for the ground based on the judgment from the previous litigation on the same issues. Each issue listed in the separate statement should have presented the specific undisputed material facts being relied on. The separate statement should not have cross-referenced to facts presented in the first issue.

Moreover, considerable care must go into drafting the separate statement. Long failed to do so. By merely using the same forty undisputed material facts for each ground/issue, Long effectively *concedes* the materiality of whatever facts are included. If a triable issue is raised as to any of the facts in the separate statement, the motion may be denied. (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 252.) The Court has endeavored to reach the merits of the motion, when it could, in the hopes of reducing or focusing issues for trial, but review was tedious and extremely difficult.

### B. The 2017 APA

The facts in this section are undisputed. On October 1, 2007, Long, on behalf of the estate of Billy Long, entered into the APA to sell the assets of Hemphill’s cardroom and relinquish Hemphill’s cardroom license in favor of BVK. (UMF No. 1.) Pursuant to the terms of the 2007 APA, BVK paid \$75,000 to Long as a deposit. (*Id.*, No. 2.) Although Long sets forth that the 2007 APA had no provision for refund or return of the initial \$75,000 deposit (UMF No. 5), the agreement states the \$75,000 deposit “shall be fully refundable to [BVK] on demand if this purchase and sale transaction fails to close for any reason other than due solely to an act or omission of [BVK].” (Response to UMF No. 5; Additional UMF No. 16; Ex. 3, ¶ 3(a).)

The 2007 APA provides it must be submitted to the California Gambling Control Commission (“CGCC”) for approval. (BVK’s Index, Ex. 3, ¶ 4(A).) The 2007 APA was submitted to the CGCC on October 23, 2007. (UMF No. 4.)

The APA states BVK “shall have one year from the approval of this Agreement and the transactions contemplated herein by the CGCC in which to obtain the necessary licenses and approvals from the Division of Gambling Control, the CFCC, and the City of Napa. (BVK’s Index, Ex. 3, ¶ 4(A).) “If such licenses and approvals are not obtained within such one-year period (other than due to an act or omission of [Long] or either of them including, without limitation, the failure to fully resolve the dispute set forth in section 5(h) below), [BVK] may elect to extend such one year period for an additional six (6) months by depositing with [Long] the additional sum of \$75,000 which shall be applied to the Cash due at Closing. If [BVK] does not elect to deposit such additional \$75,000 sum or if such deposit is made and the necessary licenses and approvals from the Division of Gambling Control, the CGCC and the City of Napa are not obtained by [BVK] within such additional six (6) month period (other than due to an act or omission of [Long] or either of them including, without limitation, the failure to fully resolve the dispute set forth in section 5(h) below) then the parties shall agree upon a new Closing Date or any party may declare this Agreement null and void in which case the additional \$75,000 deposit shall be fully refundable to [BVK] on demand if the purchase and sale transaction fails to close for any reason other than due solely to an act or omission of [BVK].” (UMF No. 3.)

Long applied to the CGCC in March 2007 for the license to allow him to be Hemphill’s owner, rather than the estate, so he could legally transfer Hemphill’s assets. (*Id.*, No. 6.)

On January 9, 2008, the CGCC informed BVK that the fees submitted with its application to own and operate Hemphill’s were being refunded because the license for Hemphill’s had expired. (*Id.*, No. 8.) The CGCC also notified Long that it was not processing his application to own the Hemphill’s license. (*Id.*) In May 2008, the CGCC reversed their decision about Long’s application. (*Id.*, No. 9.)

By the summer of 2009, Brian Altizer, BVK’s Secretary, had come to the opinion that Hemphill’s license should not be granted to Long. (*Id.*, No. 11.) On May 6, 2010, BVK sent a representative to argue in front of the CGCC that the Hemphill’s license was expired and could not be revived. (*Id.*, No. 12.) In December 2010, Altizer sent a letter to the CGCC opposing Long obtaining a license. (*Id.*, No. 13.) The CGCC denied Long a license on December 9, 2010, on the grounds there were questions about his suitability. (*Id.*, No. 14.)

### C. Statute of Limitations

Long argues summary judgment is appropriate because the claims are time-barred as of August 1, 2015. Code of Civil Procedure section 337 provides for a four-year statute of limitations for breach of contract actions. “The applicable statute of limitations does not begin to run until the cause of action accrues, that is, “until the party owning it is entitled to begin and prosecute an action thereon.”” (*Romano v. Rockwell Int’l, Inc.* (1996) 14 Cal.4th 479, 487, quoting *Spear v. California State Auto. Ass’n* (1992) 2 Cal.4th 1035, 1040.) “While resolution of the statute of limitations issue is normally a question of fact, where the uncontradicted facts established through discovery are susceptible of only one legitimate inference, summary judgment is proper.” (*Id.*, quoting *Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1112.)

“A cause of action for breach of contract does not accrue before the time of breach.” (*Id.* at p. 488.) “There can be no *actual* breach of a contract until the time specified therein for performance has arrived.” (*Id.* at pp. 488-89, quoting *Taylor v. Johnston* (1975) 15 Cal.3d 130, 137.) “Nonetheless, if a party to a contract expressly or by implication repudiates the contract before the time for his or her performance has arrived, an anticipatory breach is said to have occurred.” (*Id.* at p. 489.) “The rationale for this rule is that the promisor has engaged not only to perform under the contract, but also not to repudiate his or her promise.” (*Id.*) “In the event the promisor repudiates the contract before the time for his or her performance has arrived, the plaintiff has an election of remedies--he or she may ‘treat the repudiation as an anticipatory breach and immediately seek damages for breach of contract, thereby terminating the contractual relation between the parties, or he [or she] can treat the repudiation as an empty threat, wait until the time for performance arrives and exercise his [or her] remedies for actual breach if a breach does in fact occur at such time.’” (*Id.*, quoting *Taylor, supra*, 15 Cal.3d at p. 137.) “[I]n the event the plaintiff disregards the repudiation, the statute of limitations does not begin to run until the time set by the contract for performance.” (*Id.*)

Long contends under *Romano* that by filing the cross-complaint on August 1, 2011, against him, BVK elected to treat Long’s purported breaches of the agreement, at that time, as a breach of the contract, thus terminating the contract. According to Long, the four-year statute of limitations began to run at the time BVK filed its prior lawsuit as it elected at that time to claim the contract was breached. BVK opposes on the ground that its cross-complaint was narrowly tailored and asked only for damages for the delay in getting the license – not specific



performance of the 2007 APA – because the 2007 APA could not be specifically performed but for the act of a third party (the CGCC). BVK proffers it has never repudiated the 2007 APA, never elected to treat the contract as terminated but instead asked for “lost profit” damages incurred by Long’s delay, did not seek to adjudicate its rights going forward, did not ask for rescission, and did not ask for adjudication of its rights if Long ever received a license.

The Court turns to the separate statement. The Court notes neither party cited to the separate statement to support their arguments on the statute of limitations. This has made review difficult.

It is undisputed that in 2011, litigation commenced between Long and BVK in connection with the 2007 APA. (UMF, No. 15.) Long sued BVK for failing to follow its obligation under the 2007 APA to help him obtain a license with the CGCC. (*Id.*) According to UMF No. 16, on August 1, 2011, BVK elected to file a cross-complaint against him, alleging “Long had breached the 2007 Agreement because [he] had failed to deliver the gambling license to [BVK], as contemplated in the 2007 Agreement.” BVK counters that the UMF is disputed because Long improperly paraphrased the cross-complaint and the pleading’s provisions are the best evidence. (Response to UMF No. 16.) BVK adds that a more accurate paraphrase is that BVK was: (1) seeking delay damages due to Long’s delays in getting the license transferred to BVK as of the date of the cross-complaint; (2) BVK was seeking as part of the cross-complaint reimbursement for Long’s share of an ADA settlement that BVK funded; (3) BVK was seeking from Long’s roofing company past due rents; (4) BVK loaned \$50,000, which Long failed to repay; and (5) Long had placed a stop payment on a \$10,000 check that was provided to BVK. (*Id.*) Long replies that the UMF remains “[u]ndisputed” because “[t]he \$75,000 deposit is also listed as a claim of the Cross Complaint.” (Reply to UMF No. 16.) No pinpoint citation to the cross-complaint is provided to support this separate statement reply position.

It appears both parties are correct, to an extent, in their recitation of the facts in the separate statement. The cross-complaint alleges Long breached the 2007 APA agreement because he failed to deliver the gambling license. (See Long’s Index, Ex. C, ¶ 13 [“Cross defendants breached [the APA] by allowing their gambling license to expire and go into suspension by their own action.”]; see also *id.*, ¶ 8 [“[Long] breached the contract. Neither Long nor Bros. LONG have delivered a gambling license to Cross complainants.”].) The cross-complaint further alleges Long owes cross-complainants \$50,000 for a loan, Long wrote cross-

complainants a bad check for \$10,000, cross-complainants advanced \$22,000 for an ADA settlement of which Long owes \$11,000, Long owed cross-complainants five months' rent of \$24,000 as landlord to Long's roofing business, and Long owes cross-complainants \$1,100 for damaging Altizer's truck. (*Id.*, Ex. C, ¶¶ 15-19.) The cross-complaint also alleges BVK lost profits in the amount of \$3,000,000 for being unable to use the Hemphill's license to open a second gambling business. (*Id.*, Ex. C, ¶ 20.)

It is unclear, based on the papers, as to why Long believes the \$75,000 deposit was listed as a claim in the cross-complaint. Long clarified the issue at the hearing. The Court, however, disagrees with Long's interpretation of the cross-complaint.<sup>1</sup> The cross-complaint mentions that pursuant to the APA, "Cross complainants in a timely manner paid long \$75,000 as the deposit." (*Id.*, Ex. C, ¶ 14.) But no actual causes of action are pled in the cross-complaint. (Additional UMF No. 54.) The cross-complaint also alleges "Long no longer intended to honor the APA and intended to keep such funds as Cross Complainants had already paid and sell [sic] to others . . . ." (Long's Index., Ex. C, ¶ 21.) The prayer for relief asks "[f]or the sums set and interest on thereon." (*Id.*, Ex. C, Prayer ¶ 1.) Yet the reference to "sums" appears to be for the \$50,000 loan, \$10,000 bad check, \$11,000 ADA settlement, \$1,100 truck damage, and \$3,000,000 in lost profits as alleged in paragraphs 15-20. Not the \$75,000.

Thus, these allegations as set forth in the separate statement, and as clarified at the hearing, do not support Long's position that BVK considered the contract terminated based on the breach allegations. Long has not met his initial burden. The Court cannot decide as a matter of law that BVK unequivocally repudiated the 2007 APA agreement with the filing of the cross-complaint in August 2011. Even if Long met his initial burden, BVK raises a triable issue of material fact on the core issue of whether the 2007 APA was ever repudiated, terminated, abandoned, or rescinded. BVK's additional material facts highlight the factual dispute. (See Additional UMF Nos. 67-70.) For example, the 2007 APA never was repudiated, terminated, abandoned, or rescinded. (*Id.*, No. 67.) Long disputes this additional fact, along with others, by citing to his reply brief (although the reply brief is not evidence). As an additional example, BVK always intended to, and continues to intend to acquire a license to operate Hemphill's and to open a second business, which BVK believes will net \$800,000 per year in profits.

<sup>1</sup> Long's other arguments at the hearing stem from the premise that the cross-complaint involved a claim for the \$75,000. Because the Court does not interpret the contract in the same way as Long, the Court need not address the other arguments.



(Additional UMF No. 24.)<sup>2</sup> This fact supports the conclusion that BVK never terminated the 2007 APA agreement.

**D. Remaining Grounds for Summary Judgment**

Long contends the 2007 APA expired by its own terms in 2008. Long cites to UMF Nos. 3, 22-23, and 26 in his memorandum of points and authorities to support this contention. UMF No. 3 is the 2007 APA provision detailed above. UMF No. 22 states Altizer testified on January 11, 2013, that he believed his obligation under the 2007 APA had ended because the terms of the agreement required completion within one year. UMF No. 23 provides Altizer testified that by 2009 he did not believe the 2007 APA agreement would go forward. Assuming these facts as true, Altizer's personal belief is of no consequence to the issue at hand: whether the 2007 APA expired by *its* own terms in 2008. Long, therefore, has not met his initial burden to show the 2007 APA expired by its own terms in 2008.

Even if Long met his initial burden, there is a triable issue of material fact. The provision before the Court has multiple clauses, one of which specifically states if the licenses and approvals are not obtained within a one-year period, BVK may elect to extend the one-year period for an additional six months by depositing with Long an additional \$75,000, *unless* due to Long's act or omission. (UMF No. 3.) At the time of Altizer's deposition on January 11, 2013, Long had not yet obtained the Hemphill's license. BVK offers evidence Long failed to make payments to keep the license from expiring and his inability to pay his obligations led to a delay in getting licensed and thus being able to transfer the license to BVK. (Additional UMF Nos. 15, 34-35, 39, 95-96.) As a result, there is a factual issue as to whether it was Long's act or omission that caused the agreement to expire or BVK's conduct in front of the CGCC as Long proffers.

Long maintains BVK's total breach of the 2007 APA absolves any further performance. This argument is premised on there being no act or omission from Long interfering with the one-

<sup>2</sup> Long cites to the Pollock reply declaration at Exhibit Z [Altizer deposition from "12:17:2013"], at page 262:6-11 to dispute this additional material fact. The Court has not considered the Pollock reply declaration, but notes the cited deposition testimony is from January 17, 2013, which is attached as Exhibit D to Long's Index. A comparison of the two purported pages of evidence reveal they are identical. Page 262:6-11 reads: "Q. Isn't it true that with the license dead, you control all the gambling in Napa County? A. All the licensed card rooms, yes. There would be one. Q. That would be one. The one you own, correct? A. Correct." (Long Index, Ex. D.) The citation Long raises does not contradict the additional fact because the question is premised on a "dead" license. The citation does not counter the additional fact that BVK intended to, and continues to intend to, acquire a license to open a second business.

year provision noted in UMF No. 3. Long did not meet his initial burden on this issue, and even if he did, a triable issue of material fact remains as noted.

Long avers the judgment of the previous litigation on the same issues and the APA absolved the parties from further performance. It is apparent from the memorandum of points and authorities that Long is raising issue preclusion and claim preclusion. Claim preclusion “bar[s] relitigation of [a] claim altogether” where a second suit involves “(1) the same cause of action (2) between the same parties [or those in privity with them] (3) after a final judgment on the merits in the first suit.” (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 823.) Issue preclusion bars “a party to the first lawsuit, or one in privity with a party” to the first lawsuit, from relitigating issues that were “actually litigated” and “conclusively resolve[d]” in the first lawsuit. (*Id.*) Unlike claim preclusion, issue preclusion (1) “does not bar entire causes of action,” but “prevents relitigation of previously decided issues” and (2) “can be raised by one who was not a party or privy in the first suit.” (*Id.*) The Court was unable to decipher Long’s averments on this issue as the Court did not see any facts presented in the separate statement to support it. Each fact should have been listed in the separate statement to make an argument as to why issue and claim preclusion applied.

Long asserts the request for specific performance fails since the license already has been transferred. This assertion apparently is a request for summary adjudication of the first cause of action for breach of contract/specific performance. Summary adjudication must *completely dispose* of the cause of action to which it is directed. (Code Civ. Proc., § 437c, subd. (f)(1); see *Nieto v. Blue Shield of Cal. Life & Health Ins.* (2010) 181 Cal.App.4th 60, 73 [“the pleadings determine the scope of relevant issues on a summary judgment motion.”].) Whether the remedy of specific performance is available or not, a ruling will not entirely dispose of the cause of action as BVK also seeks damages as a result of Long’s breach of the agreement. (Second Amended Compl., ¶ 62.) To the extent Long believes he no longer owns the license, the evidence indicates the CGCC can unwind the approval of the 2017 Polvora Asset Purchase Agreement. (Additional UMF No. 89.) The CGCC made it clear its approval of the agreement was not intended to interfere with this Court’s proceeding or to interfere with this Court’s ability to decide who is entitled to proceed with their respective agreements. (*Id.*)

Long argues BVK comes to this litigation with unclean hands. This appears to be a defense Long seeks to employ at trial. It is not a basis for summary judgment or a cause of



action appropriate for disposition on summary adjudication. In any event, on the merits, and as noted, there is a factual issue as to whether it was Long's act or omission that caused the agreement to expire or BVK's conduct in front of the CGCC. Whether or not the contract was void depends on this conduct as well.

Long believes the claim for breach of the implied covenant and good faith and fair dealing is superfluous. The belief is premised on Long's claim that the 2007 APA was not an active and enforceable contract in 2012. There is a factual issue as to whether it was Long's act or omission that caused the agreement to expire or BVK's conduct in front of the CGCC.

Long contends there is no valid basis to award declaratory relief. This ground is based on the failed arguments pertaining to the statute of limitations and the sale of the Hemphill's license having already occurred. This ground fails for the same reasons.

#### **E. Requests for Judicial Notice**

Long's request for judicial notice is GRANTED IN PART AND DENIED IN PART. The request is granted as to the pleadings in this case (Exhibits B-1, B-2, and B-3), the complaint (Exhibit K), cross-complaint (Exhibit C), Notice of Entry of Judgment on Verdict (Exhibit G), and Order After Hearing on Motion for Terminating Sanctions (Exhibit H) in *Long v. BVK Gaming, Inc.*, Case No. 26-56249, and the April 22, 2014 Stipulated Settlement between the California Gaming Commission and Long in OAH No. 2012060866 (Exhibit S). For the pleadings, the Court does not take judicial notice of the truth of the matters asserted therein.

The request is denied as to the May 3, 2010 and December 6, 2010 letters from Keith Sharp to the California Gambling Control Commission ("CGCC") (Exhibits E-F), the December 9, 2010, April 22, 2014, and November 27, 2007 CGCC meeting minutes (Exhibits I, O-Q), the May 18, 2018 Gabriel Pattee declaration and attached exhibits (Exhibit L), the 2018 Bureau of Gambling Control Background Report (Exhibit M), the 2016 Bureau of Gambling Control Background Report (Exhibit N), Long's March 17, 2006 gaming license application (exhibit R). Long has not shown why these items are the proper subject of judicial notice.

BVK's request for judicial notice is GRANTED IN PART AND DENIED IN PART. The request is granted as to the January 17, 2018 demurrer order (Exhibit 1), the April 10, 2018 judgment on the pleadings order (Exhibit 2), the November 5, 2012 second amended ruling on submitted matter (Exhibit 28) in Case No. 26-56249, the December 19, 2012 ordering regarding motion for reconsideration of terminating sanctions (Exhibit 29) in Case No. 26-56249, the civil

dockets from Napa County Superior Court regarding Long (Exhibit 30), the March 26, 2013 judgment (Exhibit 31) in *Long v. Pilotti*, Case No. 26-57788, May 24, 2013 ruling on motion for new trial (Exhibit 32) in Case No. 26-56249, July 5, 2013 ruling on motion for attorney's fees (Exhibit 33) in Case No. 26-56249, July 26, 2013 order after hearing on motion to tax costs (Exhibit 34) in Case No. 26-56249, the judgment and abstract of judgment (Exhibit 35) in Case No. 56249, the April 22, 2014 Stipulated Settlement between the California Gaming Commission and Long in OAH No. 2012060866 (Exhibit 36), the July 30, 2015 summary judgment order (Exhibit 40) in Case No. 26-62431, the August 24, 2018 judgment against RLRCO dba Raneri & Long Roofing (Exhibit 56) in Case No. 18CV001700, the December 17, 2018 complaint (Exhibit 57) in *Hussey v. Long*, Case No. 18CV001700, the February 11, 2019 judgment against Long & RLRCO (Exhibit 60) in Case No. 18CV001328, the June 21, 2019 notice of entry of judgment (Exhibit 61) against Long in Case No. 18CV001700, the June 21, 2019 criminal complaint (Exhibit 63) against Long in Case No. 19CR001774, the September 5, 2019 judgment (Exhibit 66) against RLRCO in Case No. 26-62431, and the Contractor's License Detail from the Contractors State License Board for License # 207364 (Exhibit 76). For the pleadings, the Court does not take judicial notice of the truth of the matters asserted therein.

The request is denied as to the November 29, 2007 CGCC meeting minutes (Exhibit 6), the Bureau of Gambling Control's December 1, 2010 supplemental background investigation report (Exhibit 20), CFCC's June 1, 2012 statement of issues brought against Long (Exhibit 23), and the CFCC's May 24, 2018 hearing transcript (Exhibit 55), and state auditor's May 2019 report on the Bureau of Gambling Control and California Gambling Control Commission (Exhibit 62). BVK has not adequately demonstrated why these documents are the proper subject of judicial notice. It does not appear the facts contained within these materials can be immediately and accurately determined.

Long's request for judicial notice submitted with his reply is DENIED as to the May 23, 2018 minute order in this case (Exhibit U), the complaint in *BVK Gaming, Inc. v. Long*, Case No. 26-62431 (Exhibit V), the Order After Hearing on Motion to Strike in Case No. 26-62431 (Exhibit W), and a printout from the State Bar of California website showing attorney Rodney Blonien is deceased. It is improper to introduce new evidence in a reply to a summary judgment motion.

#### F. Motion to Strike

BVK's motion to strike the entire Long declaration under the *D'Amico* rule is DENIED. (*D'Amico v. Bd. of Med. Examiners* (1974) 11 Cal.3d 1, 21 [a party may be bound by admissions made in deposition testimony or discovery responses].) The *D'Amico* rule "is equally applicable to a conflict between the affidavit and the deposition testimony of a single witness." (*Preach v. Monter Rainbow* (1993) 12 Cal.App.4th 1441, 1451 [applying rule to depositions and declarations of non-party witnesses].) BVK asserts the Court should strike the declaration because Long stated approximately 171 times at his deposition, after signing his declaration, that "he did not recall" the circumstances and events relating to the underlying transactions at issue in this action. BVK has not shown with specific citations why the *D'Amico* rule should apply.

BVK's motion to strike three paragraphs to the Long declaration are DENIED. BVK did not cite where in the deposition transcript Long purportedly stated "he did not remember."

#### G. Evidentiary Objections

BVK's objections to Long's request for judicial notice is deemed MOOT as to the May 3, 2010 and December 6, 2010 letters from Keith Sharp to the CGCC (Exhibits E-F), and the May 18, 2018 Gabriel Pattee declaration (Exhibit L). The Court denied the request for judicial notice as to these materials.

BVK's one evidentiary objection to the Pollock declaration is OVERRULED.

Long's eight evidentiary objections to the Altizer declaration are OVERRULED IN PART AND SUSTAINED IN PART. The objections are sustained as to paragraph 10, page 5:1-4, paragraph 36, page 11:7-12, paragraph 47, page 13:20-23, paragraph 82, page 20:24-28, paragraph 83, page 21:1-2, paragraph 94, pages 23:23-24:2. The remaining objections are overruled.

Long's two evidentiary objections to the Sharp declaration are OVERRULED IN PART AND SUSTAINED IN PART. The objection is overruled as to paragraph 11, page 5:13-17. The objection is sustained as to paragraph 16, page 6:15-19.

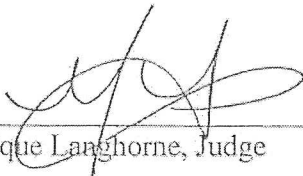
Long's evidentiary objection to the Costa declaration is OVERRULED.

Long's two evidentiary objections to the Maloney declaration is SUSTAINED as to paragraph 3, page 3:11-13, and paragraph 3, pages 3:23-4:1.

BVK's objection to Long's request for judicial notice submitted with his reply is deemed MOOT. The Court denied the request for judicial notice as to these materials.

BVK's objection and request to strike the supplemental Pollock declaration submitted with the reply is SUSTAINED. It generally is improper to introduce new evidence with reply papers.

Dated: 12/20/19

  
\_\_\_\_\_  
Monique Langhorne, Judge



## Superior Court of California

County of Napa  
825 Brown Street  
Napa, CA 94559

Case #: 17CV001155

BVK Gaming, Inc. vs Timothy J. Long et al

\*\* Mark S Pollock

Pollock & James, LLP  
1827 Clay Street, Suite 300  
Napa, CA 94559

Robert Scott McWhorter

500 Capitol Mall STE 1900  
SACRAMENTO, CA 95814

Joseph Peter Costa

17383 Sunset BLVD STE A-350  
PACIFIC PALISADES, CA 90272

Danielle Marie Guard

1121 L ST  
SACRAMENTO, CA 95814

Certificate of Mailing/Service


I hereby certify that I am not a party to this cause and that a copy of the foregoing document was:

- ☒ mailed (first class postage pre-paid) in a sealed envelope  
☐ certified copy faxed to Napa Sheriff's Department at (707) 253-4193  
☐ personal service – personally delivered to the party listed above  
 \*\* ☒ placed in attorney/agency folders in the ☐ Criminal Courthouse ☒ Historic Courthouse

at Napa, California on this date and that this certificate is executed at Napa, California this Date. I am readily familiar with the Court's standard practice for collection and processing of correspondence for mailing within the United States Postal Service and, in the ordinary course of business, the correspondence would be deposited with the United States Postal Service on the day on which it is collected at the Courthouse.

Date: 12/23/2019

Robert E Fleshman, Court Executive Officer



Denise Troxclair, Deputy Court Executive Officer