09-16942

IN THE UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

CACHIL DEHE BAND AND WINTUN INDIANS OF THE COLUSA INDIAN COMMUNITY, a federally recognized Indian Tribe,

Plaintiff/Appellee,

v.

STATE OF CALIFORNIA; CALIFORNIA GAMBLING CONTROL COMMISSION, An agency, of the State of California; ARNOLD SCHWARZENEGGER, Governor of the State of California,

Defendants/Appellants,

PICAYUNE RANCHERIA OF THE CHUKCHANSI INDIANS, a federally recognized Indian Tribe,

Plaintiff/Intervenor/Appellee.

On Appeal from the United States District Court for the District of California
The Honorable Judge Frank C. Damrell, Jr.
D.C. No. 04-2265 FCD KJM

ANSWERING BRIEF OF PLAINTIFF/INTERVENOR/APPELLEE

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STATEMENT OF JURISDICTION

The district court had jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1362. The district court's August 19, 2009 Order and Judgment (Excerpts of Record ["ER"] 3-14) is final and appealable under Fed. R. Civ. P. 54(b). This court has jurisdiction over the present appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE CASE

This litigation challenges the State of California's interpretation of provisions of the Tribal-State Compacts ("Compacts" or "1999 Compacts") entered into by the Cachil Dehe Band of Wintun Indians of the Colusa Indian Community ("Colusa") and the Picayune Rancheria of the Chukchansi Indians ("Picayune"), two federally recognized Indian tribes (collectively the "Tribes"), with the State of California. Colusa initiated this action in 2004, asserting five claims against the State of California, the California Gambling Control Commission ("Commission" or "CGCC") and Governor Arnold Schwarzenegger (collectively the "State"). The only claim relevant to this appeal is the Tribes' challenge to the State's interpretation of Compact section 4.3.2.2(a)(1), which provides a formula for calculating the size of the license pool; that is, the

maximum number of gaming devices that all tribes in the aggregate may license pursuant to the 1999 Compacts.

In 2006, the district court dismissed Colusa's claim for failure to join all other tribes with 1999 Compacts, whom the court held were necessary and indispensible parties under Fed. R. Civ. P. 19(a). In 2008, this Court reversed the district court's ruling, holding that "the absent tribes' only interest relevant for Rule 19(a) purposes is freedom from competition," which, without more, was "not 'legally protected' for Rule 19 purposes." *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. California*, 547 F.3d 962, 972 (9th Cir. 2008) ("*Colusa I*").

Thereafter, in January 2009, the district court granted Picayune's motion to intervene as a plaintiff . Picayune's sole claim also challenges the Commission's interpretation of the size of the license pool under Compact section 4.3.2.2(a)(1). Specifically, Picayune and Colusa contend that the Compact authorizes more licenses to operate gaming devices than the Commission determined are authorized by the Compact.

The district court on April 22, 2009 granted the Tribes' motion for summary judgment and denied the State's motion for summary judgment on the issue of the number gaming devices that all Compact Tribes in the aggregate may license.

After finding that no triable issue of material fact existed, the district court held that Compact section 4.3.2.2(a)(1) authorized 42,700 licenses to operate Gaming Devices. (ER 75.) This is 10,549 more licenses than the Commission had determined to be available.

On August 19, 2009, following its denial of the State's motion for reconsideration, the district court entered judgment on the Tribes' license pool claim pursuant to Fed. R. Civ. P. 54(b), and ordered that "Within forty five (45) days of the entry of judgment pursuant to this order, defendants shall schedule and conduct a draw of all available gaming device licenses, in accordance with the court's April 22 Order, and in which all eligible Compact Tribes may participate." (ER 11.) The State conducted the court-ordered license draw on October 5, 2009.

STATEMENT OF FACTS

Picayune and Colusa in September of 1999 entered into Compacts with the State of California. (ER 397-456, 457-517.) *See Colusa I*, 547 F.3d at p. 967. Sixty other tribes executed virtually identical Compacts with the State. *See Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 718 (9th Cir. 2003). The Compacts were signed by the Governor, ratified by California's Assembly and Senate (Cal. Gov. Code § 12012.25(a)), approved by the Secretary of the Interior pursuant to the Indian Gaming Regulatory Act (*see* 25 U.S.C. § 2710(d)) and

published in the Federal Register (65 Fed.Reg. 31189-01, May 16, 2000). Each 1999 Compact sets forth identical provisions concerning the tribes' operation of Class III gaming activities. (ER 397-456, 457-517.)

The Compact allows each tribe to operate the number of gaming devices operated on September 1, 1999, or 350 gaming devices, whichever is greater. (Compact § 4.3.1, ER 405, 465.) In addition, the Compact authorizes each Compact tribe to acquire licenses to operate up to 2,000 gaming devices. (Compact § 4.3.2.2(a), ER 406, 466.)

Compact section 4.3.2.2(a) provides: "The Tribe, along with all other Compact Tribes, may acquire licenses to use Gaming Devices" on specified terms and conditions. Section 4.3.2.2(a)(1), the Compact provision at issue in this appeal, supplies the following terms:

> The maximum number of machines that all Compact Tribes in the aggregate may license pursuant to this Section shall be a sum equal to 350 multiplied by the number of Non-Compact tribes as of September 1, 1999, plus the difference between 350 and the lesser number authorized under Section 4.3.1.

(ER 406, 466.)[1]

[1] The term "Non-Compact Tribes" is defined by Compact § 4.3.2(a)(i) as "Federally-recognized tribes that are operating fewer than 350 Gaming Devices." (ER 405, 465.) Compact § 4.3.1 provides: "The Tribe may operate no more Gaming Devices than the larger of the following: (a) A number of terminals equal

Disagreement with the Commission's interpretation of this formula led to the present litigation. Under the Commission's interpretation of the formula (advocated by the State throughout this case), the license pool consists of 32,151 licenses. (ER 36, 391-396, SER 106-107.)

Colusa and Picayune in their summary judgment motion initially urged an interpretation of the formula that yielded 55,951 licenses. In supplemental briefing the Tribes expanded upon an alternate interpretation yielding 42,700 licenses. The San Pasqual Band of Mission Indians ("San Pasqual") had previously advanced this interpretation in its case against the State (*San Pasqual Band v. State of California*, United States District Court, Southern District of California Case No. 3:06-cv-00988-LAB-AJB).

The parties do not dispute the first element of the formula. There were 84 federally-recognized tribes in California operating fewer than 350 gaming devices on September 1, 1999, so "350 multiplied by the number of Non-Compact Tribes as of September 1, 1999" is 29,400. (SER 105.) The second element of the formula – "the difference between 350 and the lesser number authorized under Section 4.3.1" – is the source of disagreement.

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to the number of Gaming Devices operated by the Tribe on September 1, 1999; or (b) Three hundred fifty (350) Gaming Devices." (*Id.*)

Compact negotiations began in April 1999, with William A. Norris ("Norris") acting as the State's lead negotiator. (ER 179.) Shelleyanne W.L. Chang ("Chang") assisted with negotiations for the State. (ER 255.) Picayune and Colusa participated in the negotiations as part of a group known as the United Tribes Compact Steering Committee ("UTCSC"). (ER 176.)

In May 1999, Norris expressed then-Governor Gray Davis's "grave reservations, if not opposition, to a cap in the aggregate" on the number of gaming devices. (SER 40-41.) The State's negotiating team took the position that the Governor was committed to imposing reasonable limits on the expansion of gaming in California, but it was not until early September 1999 that the State proposed a per-tribe and statewide cap on the number of gaming devices. (ER 327.) Norris' declaration[2] submitted to the district court provided that in September 1999, it was his understanding that Governor Davis intended a statewide to limit on the total number of gaming devices, including those already in operation, to 44,798, which would have set the maximum number of licenses as low as 14,992.[3] (ER 182.) Norris asserts that in late August and early September

[2] Colusa joined by Picayune objected to the admission of the Norris declaration. The district court did not specifically rule on these objections and Picayune joins with Colusa in not waiving the objections or conceding the admissibility of the declaration.

[3] On September 1, 1999, 23 tribes were each operating more than 350 gaming devices, with a total for these tribes of 16,156. (SER 106, 220-221.) Thirty-nine

1999, he "repeatedly advised the tribes and their attorneys that the statewide cap of 44,798 could not be exceeded." (ER 182.)

On the final day of negotiations, September 9, 1999, Norris and Chang drafted Compact section 4.3.2.2. (ER 183, 255.) According to Norris' declaration, he and Chang drafted section 4.3.2.2 with the goal of imposing a statewide cap of 44,798 gaming devices. (ER 183.) Norris, according to his declaration, "presented this idea to an informal gathering of tribal attorneys and representatives." (ER 183.) Notably, there is no evidence that this gathering included representatives of Picayune or Colusa. (ER 67, 183, 328.)

The State's negotiating team presented the Compact, including the proposed formula for determining the total number of gaming device licenses to be permitted statewide, to all tribal representatives on the evening of September 9, 1999. (ER 183, 255, 328.) Tribal negotiators were given until 10:00 p.m. that night, later extended until after midnight, to sign letters of intent to execute the Compacts as presented. (ER 328.)

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other tribes signed the Compact, entitling each of these tribes to operate 350 gaming devices (without additional licenses), for a total of 13,650 for these tribes. (SER 220-221.) Therefore the total entitlement under § 4.3.1 for the 62 tribes is 29,806 gaming devices. Subtracting this number from Norris's total limit of 44,798 leaves 14,992 gaming devices that require licenses. Chang's press release (*see infra*) used a different calculation to arrive at 23,450 licenses. (ER 258.)

Norris asserts in his declaration that no questions were asked concerning the number of gaming devices the Compact authorized. (ER 183.) Colusa's Chairman Wayne Mitchum asserts that the State's negotiators were requested to explain the meaning of section 4.3.2.2(a), but they refused to do so. (ER 328.) Chairman Mitchum, through discussions with other tribal leaders, understood that the Compact authorized approximately 56,000 licenses. (ER 329.)

After the Tribes signed letters of intent to execute the Compact on September 9 and the early hours of September 10, 1999, Chang prepared an information sheet for release to the news media describing the purported intent of section 4.3.2.2(a)(1). (ER 256-257.) The Tribes were not requested to concur in the news release, nor is there any evidence that the Tribes had knowledge of the information in the release prior to its publication. (*Id.*) The information sheet stated that the Compact authorized a total of 23,450 licenses to operate gaming devices. (ER 257-258.)

In November and again in December of 1999, Legislative Analyst Elizabeth G. Hill, pursuant to the requests of Assemblyman Bruce Thompson and Senate President pro Tempore John L. Burton, reached two different interpretations of section 4.3.2.2(a)(1), first determining that the Compact authorized 60,000 licenses (for a total in excess of 113,000 gaming devices), and later, using a different set of

assumptions, that the Compact authorized only 61,700 gaming devices. (SER 225-229.)

Soon after the Compacts became effective, the Compact Tribes began to develop a process for administering the license acquisition process. The Tribes hired Sides Accountancy Corporation ("Sides") to administer license draws according to rules developed by the Tribes. (SER 132-196.) Under the tribal rules, no statewide limit was imposed; all applicants for licenses were awarded as many gaming device licenses as they requested. (ER 389.) In May 2000, Norris and Chief Deputy Attorney General Peter Siggins informed Sides that only 15,400 licenses were available under the Compact. (SER 220-222 .) Sides issued a total of 29,398 gaming device licenses to 38 Compact tribes between May 15, 2000 and February 28, 2001. (ER 388.)

On March 13, 2001, Governor Davis issued Executive Order D-31-01 ordering the commission to administer the license draw process, stripping Sides of its authority. Cal. Exec. Order D-31-01 (Mar. 13, 2001). Governor Davis ordered the Commission to "ensure that the allocation of machines among California Indian Tribes does not exceed the allowable number of machines as provided in the Compacts." (*Id.*)

On July 31, 2001, pursuant to the Compact's meet and confer provision, Picayune and other Compact tribes notified Governor Davis, the Commission, and the Attorney General of the need to confirm "that the maximum number of machines that all Compact Tribes in the aggregate may operate pursuant to the licenses issued per the Tribal-State Compact § 4.3.2.2, is in excess of 113,000," or to otherwise determine the number of licenses authorized. (SER 198-203.)

In June 2002, the Commission undertook to interpret section 4.3.2.2. (ER 391-395.) The Commission recognized that "[a]mbiguity in section 4.3.2.2(a)(1) has produced a number of differing interpretations." (ER 391.) The Commission evaluated the various interpretations that had been advanced by the Legislative Analyst, by Norris, and by the Tribal Alliance of Sovereign Indian Nations. (*Id.*) In particular, the Commission rejected Norris's interpretation for two reasons. First, Norris's interpretation substituted the term "non-gaming tribes" for "Non-Compact Tribes," in § 4.3.2.2(a)(1), contrary to the Compact's language. (ER 392.) Second, the Commission found that Norris's interpretation contradicted the express terms of the Compact by construing the license pool as comprised of tribes' foregone entitlements to their initial 350 gaming devices. (ER 394.) The Commission stated:

> This interpretation assumes that uncompacted tribes have permanently waived their right under Compact section 4.3.1 to deploy up to 350 gaming devices following entry into a Compact with the

> State. That assumption contradicts the express language of Section 4.3.1. In addition, this interpretation assumes a mechanism for transferring licenses foregone under Section 4.3.1 into the license pool of Section 4.3.2.2(a)(1). There are no provisions in the Compact that either provide for or recognize such a transfer.
>
> Commission staff is, therefore, of the view that the language of Compact section 4.3.2.2(a)(1) does not support the interpretation that the gaming device license pool consists of foregone entitlements under Compact section 4.3.1.

(ER 394.)

The Commission ultimately determined that section 4.3.2.2(a)(1) authorizes 32,151 licenses to operate gaming devices. (ER 395.) In this litigation before the district court the State asserted that the Commission's interpretation of Compact section 4.3.2.2(a)(1) is reasonable and requested the district court to sustain the interpretation of the Commission. (ER 243-244, SER 106-107.)

Picayune and Colusa assert that the Commission's interpretation is not reasonably susceptible to the meaning of the words in section 4.2.3.2(a)(1) as it does not account for all Compact Tribes' authorized entitlements for purposes of calculating the statewide cap.

SUMMARY OF ARGUMENT

The district court correctly concluded as a matter of law that section 4.3.2.2(a)(1) of the Compact yielded a statewide pool of 42,700 licenses to operate gaming devices. The extrinsic evidence did not aid in discerning the parties' intent

as there was no consensus among the parties regarding the maximum number of gaming devices allowed under the Compact at the time the Compacts were executed. Further, there was no consistent course of conduct between the parties as to the interpretation of section 4.3.2.2(a)(1). Additionally, the extrinsic evidence offered by the State concerned the Norris interpretation of the Compact. However, the State in the district court proceeding requested that the court find the Commission's interpretation of the Compact was reasonable, an interpretation that specifically rejected the Norris interpretation. The State's evidence did not provide a meaning to which the Compact was reasonably susceptible. The evidence therefore raises no genuine issue as to any material fact, and judgment as a matter of law is appropriate.

The Tribes' alternative interpretation of section 4.3.2.2(a)(1) is correct as a matter of law because it provides a lawful, operative, definite and reasonable interpretation of the Compact. The Tribe's alternative interpretation most accurately follows the language of the Compact, giving words their ordinary meaning, and it is consistent with the principle that ambiguities in an agreement are to be construed against the drafter.

Finally, the terms and the nature of the Compact require the court's interpretation of section 4.3.2.2(a)(1) to apply to all 1999 Compacts and Compact Tribes.

STANDARD OF REVIEW

A grant of summary judgment is reviewed de novo. The reviewing court must determine whether there are any material issues of fact in dispute, and whether the district court correctly applied the substantive law. De novo review includes "whether contract language is ambiguous … and '[w]hether the written contract is reasonably susceptible of a proffered meaning.'" *U.S. Cellular Inv. Co. v. GTE Mobilnet, Inc.*, 281 F.3d 929, 934 (9th Cir. 2002) (hereinafter "*U.S. Cellular*"). The district court's exclusion of evidence for purposes of ruling on summary judgment is an evidentiary matter reviewed under an abuse of discretion standard. *Id.* "Discretion is abused when the judicial action is 'arbitrary, fanciful or unreasonable' or 'where no reasonable man [or woman] would take the view adopted by the trial court." *Id.* (citations omitted). Evidentiary matters are reviewed under this abuse of discretion standard "even when the rulings determine the outcome of a motion for summary judgment." *Domingo ex rel. Domingo v. T.K.*, 289 F.3d 600, 605 (9th Cir. 2002).

ARGUMENT[4]

The district court properly granted summary judgment concerning the interpretation of Section 4.3.2.2(a)(1) of the Compact, in holding that 42,700 licenses to operate gaming devices are available in the statewide license pool. The district court was not required to make a finding as to whether an underlying binding agreement existed between the parties, nor did the district court supply a "missing" term to the Compact.[5] The district court also properly applied the doctrine of *contra proferentem* as it is undisputed that the State team actually drafted the Compact language that was first presented to Picayune on the evening of September 9, 1999.

I. The District Court Properly Granted Summary Judgment on the Size of the Statewide License Pool.

The district court properly granted summary judgment concerning the interpretation of section 4.3.2.2(a)(1) of the Compact, in holding that 42,700

[4] Picayune joins and incorporates herein by reference the arguments made in the briefs submitted by Colusa and *amici curiae* San Pasqual Band of Mission Indians and Rincon Band of Luiseno Indians.

[5] As the district court pointed out in its September 11, 2009 Order denying Defendants request to stay ruling, "The parties Agree that Section 4.3.2.2(a)(1) is Ambiguous. (Defs.' Reply to Colusa's Opp'n to Mot. For Summ. J. [Docket #88], filed Feb. 13, 2009)" and that "defendants' submissions and arguments have always focused on which interpretation of the contract, i.e. the Compact, the court should accept." (SER 8.)

licenses to operate gaming devices are available in the statewide license pool. The district court correctly considered the extrinsic evidence presented by the parties and found that it did not aid the court in discerning the parties' intent regarding the maximum number of gaming devices allowed under the compact. (*U.S. Cellular*, 281 F. 3d at 938). The district court properly applied the principles of contract construction finding that section 4.3.2.2(a)(1) of the Compact authorizes 42,700 licenses to operate gaming devices.

The State however asserts that the district court erred in granting summary judgment arguing that a genuine issue of material fact exists therefore requiring a trial. However, the State's arguments fails for two reasons; 1) it does not properly apply the principles of law governing contract interpretation, and 2) the State's purported "conflicting evidence" is not relevant to interpretation of section 4.3.2.2 (a)(1) the State urged the district court to adopt.

The interpretation of an unambiguous contract term is determined as a matter of law. "Contract terms are to be given their ordinary meaning, and when the terms of the contract are clear, the intent of the parties must be ascertained from the contract itself." *Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095, 1089 (9th Cir. 2006). The meaning of a contract is determined by "the objective intent as evidenced by the words of the instrument, not a party's subjective intent." *Badie v. Bank of Am.*, 67 Cal.App.4th 779, 802 n.9 (1998).

The court in *Parsons v. Bristol Development Co.*, 62 Cal.2d 861 (1965), a case upon which the State relies, stated it is "solely a judicial function to interpret a written instrument unless the interpretation turns upon the credibility of extrinsic evidence." *Id.* at 865. Extrinsic evidence, however, "is admissible to interpret the instrument, but not to give it a meaning to which it is not reasonably susceptible …, and it is the instrument itself that must be given effect." *Id.* (citations omitted). As the district court observed, "If the language at issue is not reasonably susceptible to the interpretation urged by the party, extrinsic evidence should not be considered." (ER 58.)

The State's reliance on *Castaneda v. DuraVent Corp.*, 648 F.2d 612 (9th Cir. 1981), is also not persuasive. The *Castaneda* court stated that "summary judgment is appropriate only if the contract provision in question is unambiguous," if the contract is ambiguous, the intent of the parties is a triable issue of fact". *Id.* at 619-620. The rule as stated in *Castaneda* assumes that there is at least some evidentiary support for the competing interpretation of the contract's language. *National Union Fire Ins. Co. v. Argonaut Ins. Co.*, 701 F.2d 95, 97 (9th Cir. 1983). *See Anderson v. Liberty Lobby*, 477 U.S. 242, 249-50 (1986) (noting that "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." (Citations

omitted).) *See also Welles v. Turner Entertainment Co.*, 503 F.3d 728, 738 (9th Cir. 2007) (stating that when a party "does not offer any extrinsic evidence in support of her favored interpretation, the contract's interpretation is a question of law that can be decided by [the] court.")

In this case, the State's extrinsic evidence was irrelevant to its asserted interpretation of section 4.3.2.2(a)(1). *In re Bennett*, 298 F.3d 1059 (9th Cir. 2002) (holding that the bankruptcy court did not err in precluding the introduction of parol evidence that sought to prove a meaning to which the contract was not reasonably susceptible). *See also In re Smith*, 148 Cal.App.4th 1115 (2007) (holding that the trial court was correct not to admit evidence to aid interpretation of the contract where nothing in the language of the agreement would make it reasonably susceptible to the interpretation urged by the extrinsic evidence.) "In the absence of a factual dispute, resolution of ambiguity is a question of law for the court and summary judgment was proper." *Lockwood v. Wolf Corp.*, 629 F.2d 603, 610 (9th Cir. 1980).

A. The District Court Correctly Addressed Issues of Fact and Found as a Matter of Law that Section 4.3.2.2(a)(1) Authorized 42,700 Licenses to Operate Gaming Devices.

Contrary to the State's assertion (see AOB 9-10, fn.7), the State did in fact argue in its summary judgment motion that "no triable issues of material fact remain" with regard to the license pool claim (ER 242), and affirmatively

requested that the district court sustain the Commission's interpretation of section 4.3.2.2(1)(a). (ER 243-249, SER 67-68, 71-73). Now the State reverses its course and argues that the extrinsic evidence "clearly established the existence of genuine issues of fact" (AOB 10) as to whether the parties reached a "meeting of the minds" that "section 4.3.2.2(a)(1) was intended to authorize 44,798 gaming devices statewide" (AOB 26-27), an interpretation the Commission emphatically rejected in 2002 as being contrary to the Compacts' language. Despite the Commission's rejection of this interpretation, the State now requests that this Court remand the matter for a trial to present evidence that the parties intended that section 4.3.2.2(a)(1) authorized the rejected interpretation of 23,450 licenses to operate gaming devices.

The district court reviewed the extrinsic evidence offered by the parties and found "the circumstances under which the Compact was entered into does not aide [*sic*] the court in discerning the parties' intent." (ER 71.) Specifically, the extrinsic evidence revealed "that there was no clear consensus between the parties regarding the maximum number of Gaming Devices allowed under the Compact at the time the agreements were executed and there was no consistent course of conduct between the parties," concerning the meaning of section 4.3.2.2(a)(1) (*Id.*)

The State presented extrinsic evidence as to its subjective intent to limit the total number of gaming devices, including those already in operation at the time

the compact was signed, to 44,798.[6] (ER 182). However, this is not the interpretation that the State urged the district court to adopt. The State throughout this litigation, urged the district court to adopt that Commission's interpretation 32,151 licenses to operate gaming devices were authorized pursuant to section 4.3.2.2(a)(1) in addition to those gaming devices in operation as of September 1, 1999. (ER 207-208, 248-249, SER 67-68, 106-107.) This number was arrived at by the Commission after the State asserted at least 5 different interpretations between September 1999 and June 2002[7]. The Tribes never agreed that any of the interpretations asserted by the State accurately represented the available licenses to operate gaming devices authorized by the Compact, and the State cannot cite to any evidence to the contrary. (ER 72 fn. 22.)

The Compact was ratified by the State legislature and approved by the Secretary of Interior. There is no evidence in the record that the State legislature interpreted the provision at issue as set forth in Norris' declaration to mean that the

[6] Evidentiary declarations are reviewed under an abuse of discretion standard.

[7] Judge Norris allegedly communicated to a small group of tribal representatives that the total statewide cap would be 44,798. (ER 182.) Chang's press release stated that the total statewide cap was 44,448, and that the Compact authorized "approximately 23,450" licenses. (ER 258.) Legislative Analyst Hill first offered a "best estimate" of 113,000 devices total and 60,000 licenses (SER 225-226), then used different assumptions to calculate the total cap as 61,700 (SER 227-229). Later, Norris and Siggins advised Sides that the statewide total was 45,206 and the number of authorized licenses was 15,400. (SER 220-222.) Finally, the Commission effectively ratified all 29,398 licenses issued by Sides. (ER 384, 388.)

Compact authorized 23,450 licenses to operate gaming devices. To the contrary, the legislative office produced two different interpretations of section 4.3.2.2(a)(1) between November 1999 and January 1999, neither interpretation was consistent with the one set forth in Norris' declaration. (SER 225-229.) There is also no evidence in the record as to the meaning that the Secretary of Interior gave to this provision. The evidence does show, however that the Commission flatly rejected Norris' and Chang's interpretation as being in direct conflict with the language of the Compact. (ER 394.)

The State is therefore incorrect in its assertion as to the meaning and value of the extrinsic evidence it claims must be presented at trial. The State completely ignores the fact that the extrinsic evidence it claims is "conflicting" does not support the interpretation of §4.3.2.2(a)(1) that it urges the court to adopt. The extrinsic evidence presented to the district court, if anything, demonstrates that there was no agreement as to the number of licenses to operate gaming devices as set out in §4.3.2.2(a)(1).

The court found that "the alternative formulation provides a lawful, operative, definite, and reasonable interpretation of the Compact." (ER 72.) In addition, the alternative formula "most accurately follows the language of section 4.3.2.2(a)(1), giving the words their ordinary meaning." (*Id.*) Also see *Badie*, 67 Cal.App.4th at 800. As the district court found the alternative formula:

> is supported by the purpose of the latter half of the equation as clarified by defendants' counsel at oral argument. (H'g Tr. at 70-71). Defendants counsel stated that the second part of the equation relates to the 'unused entitlement,' referring to the devices that were authorized that were currently not being used by those tribes ...in order to fully account for these unused authorized devices, the equation should take into account those tribes who signed a compact but were not operating any licenses. The alternative formulation does."

(ER 75 lines 1-12).

The alternative formula provided by section 4.3.2.2(a)(1) as interpreted by the district court adds two elements together. Element 1, "350 multiplied by the number of Non-Compact tribes as of September 1, 1999," plus Element 2, "the difference between 350 and the lesser number authorized under Section 4.3.1." The parties agree that Element 1 is equal to 29,400 (350 x 84 Non-Compact Tribes).

The alternative formulation then looks at "the lesser number authorized" in Element 2 as referring to the smaller of (a) the number authorized under section 4.3.1(a), and (b) the number authorized under section 4.3.1(b). Section 4.3.1(a) authorized the 16,156 gaming devices already in operation. Section 4.3.1(b) authorized 13,650 gaming devices for those tribes not already operating more than 350 devices each. The smaller of these numbers, 13,650, is subtracted from 350 as Element 2 requires, and that result is added to Element 1. The resulting sum is 42,700 licenses to operate gaming devices.

B. The District Court Properly Applied the Doctrine of Contra Proferentem.

The district court properly applied the doctrine of contra proferentem. The State argues the district court improperly applied the contra proferentem doctrine by construing ambiguities in the Compact against the drafter.[8] Significantly, however, application of the contra proferentem doctrine was not the sole basis, or even the primary basis, for the district court's ruling. Indeed, the district court held that the alternative formulation most accurately followed the language of section 4.3.2.2(a)(1) and construed the provisions by the ordinary meaning of the language and the principles of contract interpretation. This construction was also consistent with the Compact's underlying purpose as acknowledged by the State's counsel at oral argument. (ER 207-208.)

It is undisputed that section 4.3.2.2(a)(1) was drafted by the State and presented for signature to the Tribes with only a few hours to accept the proposed compact (ER 66-67, 183-255). Even allowing all justifiable inferences in the State's favor, the extrinsic evidence does not demonstrate that Picayune and Colusa were involved in any negotiations regarding section 4.3.2.2(a)(1). "Ambiguities in a written instrument are resolved against the drafter." *Slottow v.*

[8] In this case it is undisputed that the State drafted the Compact, and that neither Colusa nor Picayune saw the language of the Compact until September 9, 1999. The tribes were given a few hours to review the language and decide whether to agree the terms. (ER 183, 255, 328.)

Am. Cas. Co., 10 F.3d 1355, 1361 (9th Cir. 1993). *See also Buckley v. Terhune*, 441 F.3d 688, 695-96 (9th Cir. 2006) (*en banc*) (If after looking for "objective manifestations of the parties' intent the ambiguity remains, 'the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist.' Cal. Civ. Code § 1654.")

It is undisputed that the State's negotiation team actually drafted section 4.3.2.2(a)(1). Therefore it was proper for the district court to construe the ambiguity against the drafter.

C. The district court was not required to find that a binding agreement existed between the parties.

The State's argument that the district court erred by supplying a "missing" term without first finding that a binding agreement existed between the parties is without merit. The State never raised the issue of a need for a predicate finding, that a binding agreement existed between the parties. The State has waived any such argument by failing to raise it before the district court. *See Canada Life Assur. Co. v. LaPeter*, 563 F.3d 837, 846 (9th Cir. 2009); *Campbell v. Burt*, 141 F. 3d 927, 931 (9th Cir. 1998). "In the absence of [exceptional] circumstances" excusing the State for failing to raise the issue in the district court, "appellants may not upset an adverse summary judgment by raising an issue of fact on appeal that was not plainly disclosed as a genuine issue before the trial court." *Int'l Union of*

Bricklayers & Allied Craftsmen Local Union No. 20 v. Martin Jaska, Inc., 752 F.2d 1401, 1404 (9th Cir. 1985).

Throughout the litigation, all parties premised their arguments and evidence on the understanding that the Compact is a valid agreement. The parties understood that there would be a statewide cap as to the number of licenses for gaming devices and that this cap would be calculated based on the formula set forth in section 4.3.2.2(a)(1). There was (and is) no question that section 4.3.2.2(a)(1) constitutes a binding agreement on this issue and therefore there was no need for an underlying predicate finding by the district court as to the sufficiency of the agreement. (ER 62-64, 242-243, 304-305.)

Additionally, the district court did not supply the Compact with a "missing term" or create a "new contract," as the State suggests. The court merely interpreted an existing ambiguous provision of the Compact, and it did so correctly. As discussed above, the court first determined that the extrinsic evidence was insufficient to raise a triable issue of fact as to the parties' intent. Therefore, the court executed the purely "judicial function" of interpreting the written instrument as a matter of law. *See U.S. Celluar*, 281 F.3d at 939; *In re Smith*, 148 Cal.App.4th at 1123; and *Parsons*, 62 Cal.2d at 865. The court analyzed the language of the Compact to determine the parties' "objective intent as evidence by the words of the instrument." *Badie*, 67 Cal.App.4th at 802 n. 9. The

district court's interpretation of the meaning of an existing term does not amount to supplying a missing term.[9]

II. The State's Obligation to Administer the License Draw Following the Court's Interpretation of the Compact Extends to All Compact Tribes.

This Court previously rejected the State's argument that the non-party 1999 Compact tribes were indispensible parties to this action, holding that non-party compact tribes have no legally protected interest that stands to be harmed in this litigation. *See Colusa I*, 547 F.3d at 971 ("[T]he absent tribes' only interest relevant for Rule 19(a) purposes is freedom from competition. We hold that this interest, without more, is not 'legally protected' for Rule 19 purposes."). Now that the size of the license pool has been determined, the State argues that the non-party compact tribes have improperly been extended "relief" through the district court's order that the State conduct a draw in accordance with the provisions of Picayune's compact. This is not the case. First, the district court's order requiring the State to conduct a draw consistent with the terms of the 1999 Compact is necessary to

[9] The State's assertion that all parties intended the number derived from section 4.3.2.2(a)(1), whatever it was, to be "fixed," is also completely unsupported by the evidence. If in fact the number was intended to be a fixed number (or a number determined by the oxymoronic "variables that were fixed") then section 4.3.2.2(a)(1) would merely have stated the fixed number as the statewide cap on licenses to operate gaming devices.

provide the relief to which Colusa and Picayune are entitled. Second, the relief ordered by the district court is consistent with this Court's ruling in *Colusa I*.

A. In order to grant relief to Colusa and Picayune a draw must be issued in accordance with the terms of the 1999 Compact.

For the proposition that injunctive relief may not extend to parties that are not before the court, the State primarily relies upon *Zepeda v. United States I.N.S.*, 753 F.2d 719 (9th Cir. 1983). This Court, however, has significantly limited the holding of the *Zepeda* case to apply only to preliminary injunctions. *Bresgal v. Brock*, 843 F.2d 1163, 1169 (9th Cir. 1988) ("*Zepeda v. INS* … concerned a preliminary injunction, and is limited to that situation.") The *Bresgal* court further narrowed the *Zepeda* holding to mean only "that an injunction cannot issue *against* an entity that is not a party to the suit," not that non-parties could not benefit from injunctive relief. *Id.* at 1170 (emphasis added). "There is no general requirement that an injunction affect only the parties in the suit." *Id.* at 1169. In the instant case, the district court's order was directed at the State defendants, who are parties to the suit.

This Court noted in *Bresgal*, "an injunction is not necessarily made overbroad by extending benefit or protection to persons other than prevailing parties in the lawsuit – even if it is not a class action – *if such breadth is necessary to give prevailing parties the relief to which they are entitled*." *Id.* at 1170-71,

citing *Gregory v. Litton Systems, Inc.*, 472 F.2d 631, 633-34 (9th Cir. 1972); *Prof'l Ass'n of Coll. Educators v. El Paso County Cmty. Coll. Dist.*, 730 F.2d 258, 274 (5th Cir. 1984). Here it was necessary to allow non-party compact Tribes to participate in the license draw because the terms of the Compact require it. The inclusion of the non-party compact tribes in the court-ordered license draw arises as an inevitable consequence of the nature of the 1999 Compacts, which are individual bilateral compacts, each of which contains provisions that define a common regulatory scheme applicable to all participating tribes.

Each individual 1999 Compact between the State and an Indian tribe contains a provision, section 4.3.2.2, which prescribes how licenses may be acquired and applies to "*all* [1999] Compact Tribes." (ER 406, 466 (emphasis added).) Section 4.3.2.2(a)(1) defines the "maximum number of machines that all Tribes in the aggregate may license." (ER 406, 466.) The terms of each Compact, including Colusa's and Picayune's, require that all Compact Tribes are subject to this common regulatory scheme. To exclude the non-party compact tribes would be contrary to the language and purpose of Colusa and Picayune's Compacts. In order to give Colusa and Picayune the relief to which they are entitled, it is necessary to give effect to section 4.3.2.2, which requires that the opportunity to acquire licenses be open to Colusa and Picayune, "along with all other Compact Tribes." (ER 406, 466.)

B. This Court's decision in *Colusa I* supports opening the expanded license pool to non-party tribes.

The district court's order which provided that all eligible Compact Tribes may participate in the draw from the expanded pool of 42,700 licenses is supported by this Court's decision in *Colusa I*. This Court held that an increase in the size of the license pool arising from a ruling in this case could and would benefit all tribes with a 1999 Compact. The *Colusa I* court observed that the tribes "who intend to expand their gaming operations and compete with the dominant gaming tribes will gladly accept an increase in the size of the license pool created by the 1999 Compacts." *Id.* The *Colusa I* court also alluded to another sense in which the non-party tribes may benefit from the outcome of this litigation: "The absent tribes would not be prejudiced because all of the tribes have an equal interest in an administrative process that is lawful." *Id.*

Picayune does not dispute that the court's decision binds only the parties to this case. That is, the district court's interpretation of section 4.3.2.2(a)(1) applies to the Compact between the State and Picayune, and to the Compact between the State and Colusa. The district court noted as much in its ruling on the Tuolumne Band's motion to intervene: non-party tribes such as Tuolumne are not *direct* beneficiaries of Colusa and Picayune claims with regard to the size of the license

pool – the meaning of the Tuolumne Compact and the Compacts of the other tribes has not been adjudicated in this case. (*See* SER 31.)

This Court acknowledged and foresaw that enforcement of the terms of the Picayune and Colusa Compacts may have an *incidental* effect on other tribes. *See id*., citing *Colusa I* at p. 972. This Court explicitly recognized that a decision in this case that increased the size of the license pool could and would affect all Compact Tribes. Tribes "who intend to expand their gaming operations and compete with the dominant gaming tribes will gladly accept an increase in the size of the license pool created by the 1999 Compacts." *Colusa I* at 971. Colusa and Picayune "seek[] to enforce a provision of [their] own Compact[s] which may affect other tribes only incidentally." *Id.* at 972. Thus, while the court's judgment is not binding on non-parties, it *is* binding on the State. The State is a party to the Colusa and Picayune Compacts, and is required to perform its contractual duties in accordance with the court's interpretation of these Compacts, whether or not such performance incidentally affects non-party compact tribe.

The district court's order is not directed at, and does not bind, the non-party compact tribes. In the judgment of the district court, the Picayune and Colusa Compacts allow for the distribution of 10,549 additional gaming device licenses. The terms of the Picayune and Colusa Compacts provide that these licenses are to be distributed by a draw procedure that may include the participation of any 1999

Compact Tribes operating fewer than 2,000 gaming devices. No tribe is *required* to participate in the draw. No previously-issued licenses will be invalidated as a result of the draw. *See Colusa I*, 547 F.3d at 972.

The only potential harm to a non-party compact tribe is the possibility of increased competition due to other tribes' acquisition of additional licenses. This Court held that in this context, this is not a legally protected interest. *Colusa*, 547 F.3d at 971, 972 ("[T]he absent tribes have no legally protected interest in the determination of the license pool that may be issued under the 1999 Compacts."). The effect of an order requiring the State to comply with the license pool provisions of the Picayune Colusa Compacts is merely incidental, non-prejudicial, and harmless.

The State relies upon the section of *Colusa I* that acknowledges the possibility of the State "adhering to a different interpretation of the Compact in its dealings with some other tribes." *Colusa I*, 547 F.3d at 976; *see* AOB at 59. The court, however, was not positing such a possibility in reference to the license pool provision, but instead to the Compacts' "pre-payment provision," which the Court emphasized is "quintessentially bilateral." *Colusa I*, 547 F.3d at 976. In contrast, section 4.3.2.2 creates a joint obligation on the part of the State toward the tribe that is a party to each individual Compact, and toward all Compact Tribes. Therefore it is necessary to ensure, if possible, that the State does not adhere to

different interpretations of section 4.3.2.2(a)(1) in its dealings with different tribes. The State faces no prejudice here in any way and has had a full opportunity to present its case.

CONCLUSION

The district court was correct to grant summary judgment on the issue of the number of gaming devices licenses authorized by Compact section 4.3.2.2(a)(1). There is no triable issue of material fact. The State's extrinsic evidence was not relevant to prove an interpretation of the Compact that was urged by the State or to which the language of the Compact was reasonably susceptible. Without conflicting evidence to consider, it was proper for the court to rule on the meaning of § 4.3.2.2(a)(1) as a matter of law.

The district court was correct to hold that Compact section 4.3.2.2(a)(1) authorizes 42,700 licenses to operate gaming devices. This construction most accurately follows the language of the Compact, and it is supported by the purpose of the provision as explained by the State.

Finally, because the Compacts, by their explicit terms, provide that all Compact Tribes are to share in a single pool of licenses, the district court was correct to order the Commission to conduct a draw of available licenses in which all eligible Compact Tribes may participate.

For all of the foregoing reasons, this Court should affirm the judgment and order of the district court.

Respectfully submitted this 18th day of December 2009.

/s/ Darcie L. Houck
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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,641 words excluding the parts of the brief that are exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Windows Word 2007 with a 14 point font size in Times New Roman style.

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Attorney for Plaintiff/Intervenor/Appellee

Dated: December 18, 2009

CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2009, I electronically filed the foregoing **ANSWERING BRIEF OF PLAINTIFF/INTERVENOR/APPELLEE** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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I declare under penalty of perjury under the laws of the United State of America that the foregoing is true and correct. Executed on December 18, 2009 at Sacramento, California.

/s/ Alicia Grundman
ALICIA GRUNDMAN