Case No. 09-16942

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Cachil Dehe Band of Wintun Indians of the Colusa Indian Community, a federally recognized Indian Tribe,

Plaintiff-Respondent

-and-

Picayune Rancheria of the Chukchansi Indians, a federally recognized Indian Tribe

Plaintiff in Intervention-Respondent

v.

State of California; California Gambling Control Commission, an agency of the State of California; and Arnold Schwarzenegger, Governor of the State of California

Defendants-Appellants

On Appeal from a Judgment and Order of the United States District Court for the Eastern District of California

SAN PASQUAL'S *AMICUS CURIAE* BRIEF IN SUPPORT OF RESPONDENT-TRIBES AND AFFIRMATION OF THE DISTRICT COURT'S DECISION GRANTING SUMMARY JUDGMENT (Fed. R. App. P. 29(b))

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Other

For years Appellants have unfairly limited the statewide aggregate number of Gaming Device Licenses available under the 1999 Compacts. The State did so in order to force Compact Tribes to renegotiate their compacts and pay far more money to the State for the right to operate Gaming Devices the District Court recognized the Tribes were already authorized to operate. The prejudice to the Compacts Tribes is not the loss of some abstract right but the deprivation of their most significant economic resource to promote "tribal economic development, tribal self sufficiency and strong tribal governments" as intended by Congress when it enacted IGRA in order to end decades of poverty and elevate the standard of living on Native American Reservations.

By enforcing the plain language of Compact §4.3.2.2(a)(1) and affirming the purpose of the 1999 Compacts, the District Court's Decision is a step forward. In filing this Appeal, Appellants seek to step backward to the historically one-sided and dictatorial relationship between the Tribes and the State.

San Pasqual respectfully requests, for all gaming and non-gaming Tribes and all litigating and non-litigating Compact Tribes, the affirmation of the District Court's enforcement of the plain meaning of the statewide aggregate limit on Gaming Device Licenses for all identical 1999 Compacts.

I. SAN PASQUAL'S STATEMENT OF IDENTITY, INTEREST AND SOURCE OF AUTHORITY TO FILE THIS *AMICUS* BRIEF

The San Pasqual Band of Mission Indians is a federally-recognized Indian Tribe that, like the Respondent-Tribes herein, is a signatory to a 1999 Tribal-State Gaming Compact, which also contains the exact same Compact §4.3.2.2(a)(1) that is at issue in this Action. In 1999, the State of California drafted a Model Compact that would enable Tribes in California to become self-sufficient by engaging in lucrative Class III gaming, i.e. slot machines. The State presented this "model" Compact to California Tribes, and eventually 61 Tribes signed separate Compacts with the State in 1999. Ex. E to Houston Declaration.

Each of those 61 Compacts includes a Section wherein each signatory Tribe is limited to 2,000 slot machines (defined as a "Gaming Device" within the Compact). (ER 466) Each Compact Tribe is authorized to operate a base amount of 350 Gaming Devices and a Tribe must obtain a License to operate Gaming Devices in excess of that base amount. (ER 466). The Compact has a separate limitation that creates a cap on the aggregate number of Gaming Device Licenses that all 61 Compact Tribes may obtain. (ER 466).

That aggregate limit set forth in §4.3.2.2(a)(1) of each separate Compact is a mathematical formula that requires the inclusion of information regarding the gaming status of California Tribes in order to arrive at the total aggregate limit. The aggregate limit of Licenses determined by this mathematical formula must apply a statewide maximum number of Licenses that the State may issue to the 61 Tribes that signed the 61 Compacts. Thus that aggregate limit under the 1999 Compacts signed by Colusa and Picayune by its express terms must be the same aggregate number for each of the other 59 separate Compacts after applying the identical mathematical formula in the identical §4.3.2.2(a)(1) in each of those Compacts. By definition, there can be only **one** aggregate number to limit the total aggregate Gaming Device Licenses authorized to be issued statewide to these 61 Tribes.

As San Pasqual, the Respondents in this Action and every other 1999 Compact Tribe are subject to the aggregate number of 42,700 Licenses, the District Court properly granted San Pasqual *Amicus* status when the District Court was considering whether all eligible Compact Tribes could participate in the court-ordered Gaming Device License Draw or just the Plaintiffs in this matter. (ER 8). San Pasqual therein argued that under the express terms of the Compact and based upon the Ninth Circuit's ruling in *Colusa I*, all

eligible Compact Tribes must be permitted to participate in the court-ordered Gaming Device License Draw. Thereafter, the District Court correctly ordered the California Gambling Control Commission (hereinafter the "Commission") to conduct a License Draw wherein all eligible Compact Tribes could participate.

At this License Draw, San Pasqual obtained 428 Gaming Device Licenses and is now operating 428 Gaming Device pursuant to those Licenses. Ex. E to Houston Declaration. Due to the requirement that those 428 Gaming Devices be placed into operation within one year of obtaining the License, San Pasqual expended approximately $8,000,000 in order to timely place those Gaming Devices in operation and thereby vested San Pasqual's right to operate those Gaming Devices. (ER 468).

Because the Appellants continue to assert the District Court should not have ordered that all eligible Compact Tribes could participate in the License Draw, San Pasqual now respectfully requests *amicus* status in order for San Pasqual to provide this Court, as it did with the District Court, with the unique viewpoint of a non-party Gaming Tribe that received a benefit incidental to the District Court's holding that the actual statewide aggregate limit authorizes an additional 10,549 Gaming Device Licenses more than the State's interpretation held to be erroneous by the District Court.

San Pasqual, like other Compact Tribes, has been denied the full benefit of its bargain when the Commission abused its power by unilaterally determining an incorrect aggregate number of available Gaming Device Licenses to be 10,549 Licenses less than the correct number of 42,700 Licenses. Appellant's erroneous determination that an aggregate of only 32,151 Licenses were authorized was part of a calculated effort to issue a lower number of Licenses than the correct number of Licenses under the 1999 Compacts in order to force Compact Tribes to amend their compacts and pay the State of California substantially more money to operate Gaming Devices that were actually authorized by the 1999 Compacts.

Every day that the Compact Tribes did not operate the Gaming Devices authorized by a correct interpretation of the Compact aggregate limit caused the Compact Tribes to lose the opportunity to earn approximately $886,116.[1] This substantial deprivation of earned income forced the Compact Tribes into a position wherein the State could and did attempt to utilize this unlawful leverage to demand higher payments through

[1] This number is supported by the Pullen Declaration previously filed in this Matter concurrently with San Pasqual's Amicus Brief Opposing Appellants Request for a Stay (Doc. 12-3). The Declaration states that Colusa anticipates each additional Gaming Device would earn approximately $84 in "Net Win" per day every day.

an amended compact just to operate the Gaming Devices already authorized by the 1999 Model Compact.

Indeed the State has routinely argued before the courts that the Tribes have no judicial remedy to enforce their Compact and their only remedy is to sign a new Contract. (ER 122). This Court soundly denounced the State's oppressive position when it issued its decision in *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. State of California*, 547 F.3d 962, 972 (9th Cir. 2008) (*Colusa I*). While some Tribes succumbed to the State's pressure and amended their compacts, Appellee-Tribes, as well as San Pasqual and two other tribes, filed suit against the State and asked the courts to enforce the plain language of the Compacts.[2]

As such, San Pasqual has a strong interest in preventing the Appellants from again denying San Pasqual and other Compact Tribes their right to operate the correct number of Gaming Devices authorized by the 1999 Compacts. Therefore, it is respectfully requested that the Court grant San Pasqual Leave to file this *Amicus* Brief.

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[2] San Pasqual currently has a lawsuit pending in the Southern District Court of California wherein San Pasqual requests a judicial determination that §4.3.2.2(a)(1) authorizes the issuance of 42,700 Gaming Device Licenses – the same number held by the District Court in this Action to be authorized by Compact §4.3.2.2(a)(1).

II. INTRODUCTION AND SUMMARY OF ARGUMENT

There is no dispute of material fact as to the meaning of Compact §4.3.2.2(a)(1), and therefore the District Court correctly entered summary judgment holding that as a matter of law Compact §4.3.2.2(a)(1) authorizes the issuance in the aggregate of 42,700 Gaming Device Licenses, and not an aggregate of a mere 32,151 Licenses. The District Court was presented solely with a question of law by the parties when each side submitted its own motion for summary judgment, asserted no dispute of material fact existed and requested the District Court enter judgment in its favor as to the meaning of Compact §4.3.2.2(a)(1) as a matter of law. Although at that time the State conceded there were no material issues of disputed fact, the State now disregards its prior admission in order to obfuscate the analysis by now asserting there are disputed issues of material fact. (ER 242). Yet, as the State earlier conceded and remains true today, none of the facts now thrown desperately against the wall are legally relevant nor material in any way to determine the aggregate limit as set forth in each of the identical Compact sections 4.3.2.2(a)(1).

It is undisputed that Compact §4.3.2.2(a)(1) is a mathematical equation consisting of two Elements that are added together. (ER 466). It is undisputed that each Element is determined by plugging in a number based

upon the gaming status of California Tribes as of September 1, 1999. (ER 465-66). The gaming status of each California Tribe as of September 1, 1999 is undisputed. Therefore, all facts material to allow calculation of the formula set forth in each identical Compact §4.3.2.2(a)(1) are undisputed and the District Court properly entered summary judgment that Compact §4.3.2.2(a)(1) authorizes 42,700 Licenses.

The District Court held that the most reasonable interpretation of Compact §4.3.2.2(a)(1) is that it authorizes 42,700 Gaming Device Licenses, and "an interpretation placed upon a contract by the trial court will be accepted by the appellate court if the interpretation is reasonable." *P.M. Martin v. Town and Country Development, Inc.*, 230 Cal.App.2d 422, 428 (Cal.App.4th 1964). Appellants do not assert that the District Court's holding that Compact §4.3.2.2(a)(1) authorizes 42,700 Gaming Device Licenses is unreasonable, nor is there any tenable reasons to find it is not reasonable, and therefore the District Court's decision must be upheld.

Moreover, Appellants do not assert that a more reasonable interpretation exists and the District Court correctly held that all other interpretations of Compact §4.3.2.2(a)(1) require a "strained reading" of the Compact language. (ER 74). In accordance with applicable law, the District Court properly determined "an interpretation that will make an agreement

lawful, operative, definite, reasonable, and capable of being carried into effect" and that is not "harsh, unjust or inequitable." *Badie v. Bank of America*, (1998) 67 Cal. App. 4th 779, 800. Therefore, it is respectfully requested the Court affirm the lower court's decision and deny the appeal.

As this Court anticipated back in 2008, this Court's holding will determine as a matter of law the meaning of Compact §4.3.2.2(a)(1), and therefore this Court's holding will be applicable throughout this Court's jurisdiction and binding on all Compact Tribes with identical compact language establishing the aggregate limit of Licenses available to 1999 Compact Tribes. *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. State of California*, 547 F.3d 962, 972 fn.12 (9th Cir. 2008) (holding that "[s]hould different district courts reach inconsistent conclusions with respect to the size of the license pool created under the 1999 Compacts, such inconsistencies could be resolved in an appeal to this court."). The express language of Compact §4.3.2.2(a)(1) mandates that one, and only one, interpretation control the aggregate size of the license pool created under the 1999 Compacts. (ER 466). The precise reason that each 1999 Compact contains the exact identical language of Compact §4.3.2.2(a)(1) is to ensure that one, and only one, State Aggregate Limit on

the number of Gaming Device Licenses available under the 1999 Compact exists.

Because there is an aggregate limit on the size of the pool of available Licenses, the Compacts established and the State implemented a Draw system wherein all eligible 1999 Compact Tribes may apply to obtain from the aggregate pool any remaining Licenses. Up until the District Court ruling that established 42,700 as the aggregate number of Licenses, the State incorrectly refused to recognize, and thus offer in a Draw, the additional 10,549 Licenses a correct calculation of the aggregate limit would have yielded. The District Court decision simply made it clear that and 10,549 Licenses were available to be issued in a Draw by the Commission. The District Court then simply ordered the State to continue allowing all eligible Compact Tribes to participate in the Draw for those 10,549 Licenses.

As this Court is aware, on October 5, 2009 that Order was carried out, a Draw was held and those participating Compact Tribes including San Pasqual and other non-litigant Compact Tribes were awarded Licenses. Ex. F to Houston Declaration. It is noteworthy that not all the additional 10,549 Licenses were requested nor awarded, and thus additional Licenses will be available under this correct aggregate limit as other Compact Tribes became more self-sufficient and can afford to pay the fees for more Licenses.

This Court and the District Court anticipated this result when each denied the State's Request for Stay and the District Court's decision became effective. After over 200 years of government oppression and denying Tribes the ability to be self-sufficient and support the people of these sovereign nations it is time to affirm such rights and simply affirm what the Compact clearly sets forth. It is respectfully submitted that this Court should affirm the District Court's decision and deny the appeal.

III. THE DISTRICT COURT CORRECTLY RULED THAT NO MATERIAL ISSUE OF DISPUTED FACT EXISTS AND THAT THE UNDISPUTED FACTS AND THE COMPACT'S EXPRESS LANGUAGE ESTABLISH THAT COMPACT §4.3.2.2(a)(1) AUTHORIZES THE ISSUANCE OF 42,700 GAMING DEVICE LICENSES

The District Court correctly held that no material issue of disputed fact exists and the undisputed facts and express language of the Compact establish that Compact §4.3.2.2(a)(1) authorizes 42,700 Gaming Device Licenses. In signing the Compact, the parties agreed, and therefore a meeting of the minds occurred, that the mathematical equation contained in

Compact §4.3.2.2(a)(1) would control the number of Gaming Device Licenses available in the aggregate to all Compact Tribes.

Relevant case law holds this Court must look to the four corners of the Compact to determine its meaning because "[a]lthough the intent of the parties determines the meaning of the contract, the relevant intent is objective – that is, the objective intent as evidenced by the words of the instrument, not a party's subjective intent." *Shaw v. Regents of University of California*, 58 Cal.App.4th 44, 54 (1997); see *Winet v. Price*, 4 Cal.App. 4th 1159, 1166 (1992) (holding that "[i]t is the outward expression of the agreement, rather than a party's unexpressed intention, which the court will enforce.").

The express language in Compact §4.3.2.2(a)(1) is a mathematical equation consisting of two Elements that must be added together to obtain the aggregate number of Licenses authorized for issuance to all 1999 Compact Tribes and states as follows:

> "The maximum number of machines that all Compact Tribes in the aggregate may license pursuant to this Section shall be a sum equal to **[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." (ER 466) (emphasis added).

As a simplified mathematical equation, the State Aggregate Limit formula appears as:

First Element + Second Element = State Aggregate Limit.

All parties agree that the First Element is equal to 29,400.[3] By substituting **29,400** in the simplified mathematical equation for the First Element, the State Aggregate Limit now appears as follows:

29,400 + Second Element = State Aggregate Limit.

A. THE DISTRICT COURT CORRECTLY HELD THAT THE PLAIN MEANING OF THE SECOND ELEMENT OF THE STATE AGGREGATE LIMIT AUTHORIZES 13,300 GAMING DEVICE LICENSES AND THEREFORE THE STATE AGGREGATE LIMIT AUTHORIZES 42,700 GAMING DEVICES

[3] The First Element is written as "350 multiplied by the number of Non-Compact tribes[3] as of September 1, 1999." On September 1, 1999, there were 84 Non-Compact Tribes. Therefore, the First Element is 350 times 84, which equals **29,400**.

The District Court correctly held as a matter of law that the undisputed facts establish the Second Element of the State Aggregate Limit authorizes **13,300** Gaming Device Licenses. For the Court's ease, the Second Element is recounted below:

> "the difference between 350 and the lesser number authorized under Section 4.3.1."

To determine "the difference between 350 and the lesser number authorized under Section 4.3.1," it is important to first determine "the lesser number authorized under Section 4.3.1." Section 4.3.1 authorizes a Compact Tribe to operate the larger of either:

- the number of slot machines in operation as of September 1, 1999 under subsection (a), or
- 350 slot machines under subsection (b).

For the Court's ease, Compact Section 4.3.1 is stated below:

> **Section 4.3.1**
>
> "The Tribe ***may*** operate no more Gaming Devices than the ***larger*** of the following:
>
> (a) A number of terminals equal to the number of Gaming Devices operated by the Tribe on September 1, 1999; or

(b) Three hundred fifty (350) Gaming Devices."

(ER 465).

Section 4.3.1 creates two categories of Compact Tribes, those authorized by subsection (a) and those authorized by subsection (b). For purposes of the Second Element, it is necessary to determine whether subsection (a) or subsection (b) authorizes a "lesser number."

As to subsection (a), it is undisputed that on September 1, 1999, 23 Compact Tribes were operating more than 350 Gaming Devices and therefore those 23 Compact Tribes fall into the subsection (a) category. (ER 73:7-9). It is undisputed that those 23 Compact Tribes collectively operated 16,156 Gaming Devices in the aggregate. (ER 73:7-9). Therefore, it is undisputed that Compact § 4.3.1(a) authorizes a total of 16,156 Gaming Devices. (ER 73:7-9).

As to subsection (b), it is undisputed that on September 1, 1999, 39 Tribes operated less than 350 Gaming Devices, and therefore those 39 Compact Tribes fall into the subsection (b) category. (ER 73:10-12). It is undisputed that Section 4.3.1 authorizes each of those 39 Compact Tribes to operate 350 Gaming Devices. (ER 465). Therefore, it is undisputed that Compact § 4.3.1(b) authorizes a total of 13,650 Gaming Devices (39 times 350 equals 13,650). (ER 73:7-9).

It is also undisputed that 13,650 is a lesser number than 16,156, and therefore "the lesser number authorized under Section 4.3.1" is 13,650.

As the Second Element requires determination of the difference between 350 and the "lesser number," it is undisputed that the difference between 350 and 13,650 is **13,300**.

By substituting **13,300** in the simplified mathematical equation for the Second Element, the State Aggregate Limit now appears as follows:

29,400 + 13,300 = State Aggregate Limit

or

29,400 + 13,300 = **42,700**

Therefore, the undisputed facts establish that Compact §4.3.2.2(a)(1) authorizes **42,700** Gaming Device Licenses. Because no dispute of material fact exists, San Pasqual respectfully requests this Court affirm the decision of the lower court granting summary judgment that 42,700 Gaming Devices are authorized for issuance by Compact § 4.3.2.2(a)(1). *P.M. Martin*, *supra* at 428 (holding that "an interpretation placed upon a contract by the trial court will be accepted by the appellate court if the interpretation is reasonable.").

IV. THE SUBJECTIVE INTENT OF THE LEGISLATURE, TRIBAL OFFICIALS AND THE ASSISTANT SECRETARY OF THE INTERIOR IS LEGALLY IMMATERIAL

The subjective intent of government officials acting in their official capacity is privileged information that is not discoverable or admissible and therefore is legally immaterial. *United States v. Morgan*, 313 U.S. 409 (1941) (establishing the privilege preventing deposition of high-ranking government officials); *Kyle Engineering Corp. v. Kleppe*, 600 F.2d 226, 231 (9th Cir. 1979) (holding that high-ranking government officials "are not normally subject to deposition.").

The Compacts at issue in this Action, and in fact all Tribal-State Gaming Compacts, must be ratified by the California Legislature, by means of enacting a statute, in order to be fully executed by the State of California. Ca. Government Code §12012.25 *et seq.*. Thus, the ultimate decision on whether to bind the State of California to a Tribal-State Gaming Compact is made by the Legislature when it determines whether to enact a statute ratifying that Compact.

Because the ultimate decision by the State of California is made by the Legislators, it is their intent, and only their intent, that is relevant when determining the intent of the State. It is irrelevant what other State actors,

including the Governor and any negotiator for the State, may or may not have believed the Compact meant as the final and ultimate decision to bind the State of California lay in the hands of the Legislature. However, the intentions of the California Legislators in enacting Government Code §12012.25 are not admissible or discoverable and therefore are legally immaterial. *Morgan*, *supra* at 421-22; *Kyle Engineering Corp*, *supra* at 231.

Similarly, the intentions and mindset of the high-ranking tribal government officials that executed their respective Compacts are legally immaterial. *Id.* Moreover, the Assistant Secretary – Indian Affairs, Department of the Interior was required to approve the 1999 Compacts and the mindset of the Assistant Secretary of the Interior is also privileged and legally immaterial. *Id.* 25 U.S.C. §2710(d)(3)(B).

If the intention of the parties, or at least one of the parties, is legally immaterial, then no dispute of *material* fact can exist concerning the intent of the parties. While Appellants ignore the applicable law that holds that the express language and undisputed facts govern the interpretation of Compact §4.3.2.2(a)(1), Appellants' argument that the matter should be reversed in order to ascertain the intention of the parties is further without merit because the intention of the ultimate decision makers for the parties can never be ascertained and are therefore legally immaterial. *Morgan*, *supra* at 421-22;

Kyle Engineering Corp, *supra* at 231. Therefore, the District Court properly entered summary judgment that 42,700 Licenses are authorized by Compact §4.3.2.2(a)(1) and the appeal should be denied.

V. THE PAROL EVIDENCE OFFERED BY APPELLANTS SUPPORTS AN INTERPRETATION REJECTED BY APPELLANTS AS UNREASONABLE AND THEREFORE THAT PAROL EVIDENCE IS INADMISSIBLE

As parol evidence is only admissible if the interpretation is reasonable, Appellants must first establish that the interpretation supported by its parol evidence is reasonable. *Imbach v. Schultz*, (1962) 58 Cal. 2d 858, 860 (holding that "[a]lthough parol evidence is ordinarily admissible to explain the meaning of an agreement, ***it is not admissible when it is offered, as here, to give the terms of the agreement a meaning to which they are not reasonably susceptible.***") (emphasis added). However, the interpretation supported by the Appellants' parol evidence is not advocated as reasonable by Appellants, and, in fact, was already rejected by the State

of California, by and through the Commission, [4] in 2002 as it "contradicts the express language of Section 4.3.1." (ER 394).

In June 2002, the Commission expressed its final interpretation (hereinafter the "Commission's Interpretation") of Compact §4.3.2.2(a)(1) that erroneously contended that only 32,151 Licenses are authorized and thereafter caused the filing of this Action and other actions including San Pasqual's lawsuit. (ER 394). Prior to expressing its final interpretation, the Commission reviewed several other interpretations including the interpretation supported by the Appellants' parol evidence. Appellants explicitly rejected the interpretation supported by the Appellants' parol evidence (hereinafter the "Rejected Interpretation") stating that the Rejected Interpretation was "not expressed in the Compact language" and therefore unreasonable. (ER 392 fn.5). Appellants continue to recognize the Rejected Interpretation is unreasonable because at no point in their Opening Brief do they ever argue or assert that the Rejected Interpretation is reasonable or how Compact §4.3.2.2(a)(1) could be construed to support the Rejected Interpretation.

[4] Executive Order D-31-01 states that the State of California, by and through Gov. Gray Davis, delegated its rights under the Compact "to enforce the provisions of Section 4.3.2.2(a)(1) through (3) and (e), and all subparagraphs thereunder, of the Tribal-State Gaming Compacts."

Additionally, at the District Court level, Appellants did not argue that the Rejected Interpretation was reasonable. In fact at oral argument, Appellants' counsel stated to the District Court that other than the Commission's Interpretation, "I have yet to hear another interpretation this language is reasonably susceptible to." (ER 202:5-6). Because Appellants did not assert to the District Court that the Rejected Interpretation is reasonable, Appellants waived any argument to this Court that the Rejected Interpretation is reasonable and therefore waived any argument that parol evidence supporting the Rejected Interpretation is admissible. *Ritchie v. U.S.*, 451 F.3d 1019, 1026 fn 12. (holding that an argument is waived if not raised to the district court.").

Moreover, the parol evidence advocated by the Appellants is inadmissible because federal contract law holds that "[t]he terms of the contract control, regardless of the parties' subjective intentions shown by extrinsic evidence." *Tanadgusix Corporation v. Huber*, 404 F.3d 1201, 1205 (2005).

Additionally, Compact §4.3.2.2(a)(1) is unambiguous as it is only susceptible to one reasonable interpretation. *Rosen v. State Farm General Ins. Co.*, 30 Cal.4th 1070, 1075 (holding that a contract is unambiguous when it is only susceptible to one reasonable interpretation.")

Notwithstanding that the parties have argued multiple interpretations of Compact §4.3.2.2(a)(1), the only reasonable interpretation is that the Compacts authorize 42,700 Gaming Device Licenses and that all other interpretations force a "strained reading" of the Compact as held by the District Court. Appellants do not assert that any other interpretation is reasonable. As there is only one reasonable interpretation of Compact §4.3.2.2(a)(1), it is therefore not ambiguous and parol evidence is not admissible. *U.S. v. Johnson*, 43 F.3d 1308, 1310 (9th Cir. 1995) (holding that "[e]xtrinsic evidence of the parties' intent with regard to language in a contract is admissible only if the language is ambiguous.").

Appellants fail to prove, or even assert, that the Rejected Interpretation supported by the parol evidence, or any other interpretation, is a reasonable interpretation of Compact §4.3.2.2(a)(1). Therefore, District Court properly held that as a matter of law that Compact §4.3.2.2(a)(1) authorizes 42,700 Gaming Device Licenses, and it is respectfully requested that this Court affirm the District Court decision and deny the appeal.

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VI. THE EXPRESS LANGUAGE OF COMPACT §4.3.2.2(a)(1) REQUIRES THE DISTRICT COURT'S DECISION TO APPLY TO ALL COMPACT TRIBES

The express language of Compact §4.3.2.2(a)(1) creates a single Gaming Device License pool available to 1999 Compact Tribes that by definition must be the same aggregate number for all 1999 Compact Tribes. Because the pool for one 1999 Compact Tribe is the same pool for all other 1999 Compact Tribes, the District Court properly ordered the Commission to conduct a License Draw that permitted all eligible 1999 Compact Tribes to participate.

The express language of Compact §4.3.2.2(a)(1) creates a single Gaming Device License pool for ***all*** 1999 Compact Tribes as it states:

> "[t]he 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." (Emphasis added). (ER 466).

In prior actions, Appellants recognize the necessity and requirement for a single Gaming Device License pool. In 2002, Appellants adopted a uniform interpretation of Compact §4.3.2.2(a)(1) that created a single Gaming Device License pool for all 1999 Model Compact Tribes – just as the District Court did. Contrary to its meritless arguments to this Court, Appellants did not attempt to decipher the individual intent of each Compact Tribe to determine the number of Gaming Device Licenses authorized by each Compact. Instead, the State simply looked at the language of Compact §4.3.2.2(a)(1) that states "[t]he maximum number of machines that all Compact Tribes in the aggregate may license pursuant to this section shall be …" and correctly understood that due to the identical language in each Compact §4.3.2.2(a)(1), one number would control "[t]he maximum number of machines that all Compact Tribes in the aggregate may license."

As the express language of Compact §4.3.2.2(a)(1) states that a single Gaming Device License pool shall be available to all 1999 Compact Tribes, the District Court did not err in ordering the Gaming Device License Draw applicable to all eligible Compact Tribes.

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VII. SIMILAR TO STANDARD FORM INSURANCE POLICIES, THIS COURT'S JUDICIAL INTERPRETATION OF COMPACT §4.3.2.2(a)(1) WILL APPLY TO ALL 1999 COMPACT TRIBES AND THEREFORE ALL ELIGIBLE COMPACT TRIBES MUST BE PERMITTED TO PARTICIPATE IN A LICENSE DRAW

As this Court correctly stated in *Colusa I*, a decision by this Court as a matter of law will resolve the interpretation of all 1999 Model Compacts. *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. State of California*, 547 F.3d 962, 971-72 (9th Cir. 2008).

Courts in all jurisdictions have consistently held that once a court rules as a matter of law on the meaning of a contract provision, that construction is binding on all other parties with identical provisions. *The Boeing Co. v. Aetna Casualty and Surety Co.*, 784 P.2d 507 (Wash. 1990). In *Boeing*, the Washington Supreme Court held that "once the court construes the standard form coverage clause as a matter of law, the court's construction will bind policyholders throughout the state." *Boeing*, *supra* at 883.

The Washington Supreme Court's acknowledgment of the binding effect its decision would have upon policyholders with identical provisions

within its jurisdiction is similar to this Court's statements in *Colusa I* regarding the binding effect of a Ninth Circuit decision as to size of the license pool created by these standard form 1999 Compacts. In *Colusa I*, this Court held that "[s]hould different district courts reach inconsistent conclusions with respect to the size of the license pool created under the 1999 Compacts, such inconsistencies could be resolved in an appeal to this court." *Colusa I, supra* at 972 fn.12. This Court correctly acknowledged that its holding as to the size of the license pool created by the 1999 Compacts, as a matter of law, would apply to all 1999 Compacts and therefore this Court would bind all Compact Tribes and the State through its decision on the meaning of Compact §4.3.2.2(a)(1). *Id.*

This Court's holding in *Colusa I* of general applicability of its interpretation to all 1999 Compacts is in congruence with prior decisions by this Court in the standard form insurance policy context. In *Wetzel v. Lou Ehlers Cadillac Group Long Term Disability Insurance Program*, 189 F.3d 1160, 1167 (9th Cir. 1999), this Court held that a court will "respect an earlier panel's interpretation of substantially identical contract language." The *Wetzel* emphasized the need to defer to a prior decision especially in instances, such as in this action, wherein "the statutorily-mandated language is designed to ensure that the contracts are interpreted consistently." *Id.*

As the express language of Compact §4.3.2.2(a)(1) establishes that only one license pool is created under the 1999 Compacts, the Legislature statutorily mandated that only one interpretation of Compact §4.3.2.2(a)(1) govern all 1999 Model Compacts by enacting Ca. Government Code §12012.25 that ratified the 1999 Compacts.

Standard form contracts are applied identically, especially when the standard form contract was intended to be interpreted uniformly. As only one license pool may exist for the 1999 Compacts, the District Court properly ordered that the Commission conduct a License Draw, applicable to all eligible Compact Tribes.

VIII. THE NINTH CIRCUIT'S DECISION IN *COLUSA I* RECOGNIZED THAT A DECISION WOULD APPLY TO ALL ELIGIBLE COMPACT TRIBES IF THE NUMBER OF LICENSES AVAILABLE IN THE AGGREGATE STATEWIDE DID INCREASE

In *Colusa I*, this Court explicitly recognized that a decision by this Court in this Action increasing the aggregate number of Gaming Device Licenses would also apply to all 1999 Model Compacts.

A. THIS COURT EXPRESSLY STATED THAT COMPACT TRIBES SEEKING ADDITIONAL LICENSES WOULD "GLADLY ACCEPT" A DECISION IN THIS ACTION INCREASING THE NUMBER OF GAMING DEVICE LICENSES AVAILABLE TO ALL 1999 COMPACT TRIBES

The issue originally presented to this Court was whether all Compact Tribes were necessary parties to this Action, as defined by F.R.C.P. 19, because a determination in this case would affect the terms of all Compact Tribes. In determining whether absent Compact Tribes possessed a "legally protected" interest in Colusa's claim for relief seeking to increase the statewide aggregate limit on Licenses, this Court expressly stated that absent Compact Tribes, such as San Pasqual, would enjoy the benefit of this Court's ruling that additional Licenses are available noting that:

> "those [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, supra* at 971. (emphasis added).

In its Opening Brief, the State misconstrues this Court's decision in *Colusa I* and again evidences its failure to understand F.R.C.P. 19's

distinction between a financial interest and a "legally protected" interest. This Court permitted this Action to go forward without all Compact Tribes because only the financial interests, but no legally protected interest, of absent tribes were at stake and concluded that "the respective advantages that various tribes may enjoy under a more generous or restrictive interpretation of the pool provision are an economic incident of their market positions under a common licensing regime." *Id.* at 971. If a ruling in this Action did not apply to non-party Compact Tribes, then "a more generous interpretation of the pool provision" could never benefit a non-party Compact Tribe as anticipated by this Court. *Id.* Similarly, there would be nothing for non-party Compact Tribes to "gladly accept" if a ruling in this action did not affect all Compact Tribes. Therefore, it is clear that this Court in *Colusa I* expected a ruling in this Action increasing the number of Gaming Device Licenses available statewide to apply to all Compact Tribes. *Id.*

Also establishing the global affect on all Compact Tribes this Action could have was this Court's ruling that "Rule 19 necessarily confines the relief that may be granted on Colusa's claims to remedies that do not invalidate the licenses that have already been issued to the absent Compact Tribes." *Id* at 977. This Court's prior ruling affirmed that this Action could

and would affect other Compact Tribes in that it was concerned about a ruling in this Action invalidating other Compact Tribes' Licenses. Therefore, the District Court did not err in requiring the Commission to conduct a Gaming Device License Draw applicable to all Compact Tribes.

B. THE NINTH CIRCUIT CONTINUOUSLY DESCRIBED COLUSA'S CLAIM FOR RELIEF AS SEEKING A DETERMINATION OF ALL 1999 MODEL COMPACTS

Further establishing that this Court clearly expected this Action to affect all other Compact Tribes is the repeated statements that Colusa's claim for relief as seeking a determination of the State Aggregate Limit under the 1999 Compacts – always using the plural form "Compacts." The very opening sentence to the section in this Court's decision concerning the determination of the State Aggregate Limit declares that "Colusa challenges the Commission's computation of the statewide maximum number of licenses that may be issued under the 1999 Compacts." *Colusa I* at 972.

This Court again used the plural form of "Compacts" when it held that "[T]he absent 1999 Compact tribes thus are not required for litigation of Colusa's claim seeking to raise the aggregate limit on licenses under the 1999 Compacts." *Id.* The Court thereafter holds again that "the absent

tribes have no legally protected interest in the determination of the license pool that may be issued under the 1999 Compacts." *Id.* This Court's repeated use the plural form "Compacts" in defining the claim clearly establishes that this Court expected all Compact Tribes to participate in a License Draw if the District Court's decision increased the number of available Gaming Device Licenses. Therefore, the District Court did not err in requiring the Commission to conduct a Gaming Device License Draw applicable to all Compact Tribes.

C. THIS COURT'S RULINGS ON COLUSA'S OTHER CLAIMS FOR RELIEF ESTABLISHES THAT A RULING IN THIS ACTION APPLIES TO ALL COMPACT TRIBES

That this Court contemplated and expected that a decision in this Action would affect non-party Compact tribes is also evidenced in its discussion of Colusa's other claims for relief besides the increase to the size of the license pool under the 1999 Compacts. The Court forewarned that were the District Court to rule that the Commission did not have the authority to issue Licenses through the Gaming Device License Draw, then as to other Compact Tribes "no existing license may be invalidated at the remedial stage." *Colusa I* at 974 fn. 14. Realizing the global effect of this

Action on all 1999 Compact Tribes, this Court sought to prevent invalidation of other Tribes' Licenses' based upon a possible outcome in this Action. Thus, this Court previously recognized that a ruling in this Action would apply to all 1999 Compact Tribes.

Also in discussing the challenge to the CGCC's authority to conduct License Draws, this Court held that "[m]uch like their counterparts in Makah, the absent tribes 'have an equal interest in an administrative process that is lawful," [citation omitted] – that is, that the Commission not conduct the draw of licenses *ultra vires*." *Id.* at 977. This Court again explicitly stated that a ruling in this Action will apply to absent tribes for if the District Court ruled in this Action that the Commission was without authority, then all other Compact Tribes would have an "equal interest" in that ruling. *Id.*

Moreover, if this Court were to allow the issuance of Licenses strictly to Colusa and Picayune without also permitting other Compact Tribes to participate in the License Draw, then the Court might actually create a Rule 19 issue by depriving Compact Tribes of their bargained-for right to obtain all Licenses available under the 1999 Compacts. Significantly, and in obvious recognition of the inequity that would result from limiting access to additional licenses only to themselves, neither Picayune nor Colusa has sought such limited relief.

Therefore, it is respectfully requested that this Court affirm the decision of the District Court ordering the Commission to conduct a License Draw wherein all eligible Compact Tribes could participate.

IX. APPELLANTS ONLY CONTEST PERMITTING ALL ELIGIBLE COMPACT TRIBES TO PARTICIPATE IN THE LICENSE DRAW IN ORDER TO FORCE TRIBES TO RENEGOTIATE THEIR COMPACTS, AND WHEN NO FINANCIAL INCENTIVE EXISTS, APPELLANTS CHOSE NOT TO CONTEST APPLYING THE DISTRICT COURT'S ORDER TO ALL PARTICIPATING COMPACT TRIBES

In a separate claim for relief not at issue in this Appeal, the District Court ruled the Commission incorrectly interpreted Colusa's Compact regarding which priority tier Colusa should be placed into for purposes of determining its position in a License Draw. (ER 81). Similar to Compact §4.3.2.2(a)(1) that is at issue in this Appeal, the Compact provisions that determine the priority of a Compact Tribe are identical in each 1999 Compact. (ER 467).

However, Appellants did not contest whether the District Court's Order regarding the rearrangement of the priority tiers should apply to all

Compact Tribes. At the recent License Draw for the 10,549 Licenses, the Commission applied the District Court's decision on Colusa's proper priority tier to all participating Compact Tribes.[5] Exhibit 1 RJN. Appellants not only reclassified Colusa into a different priority tier but also rearranged all participating Compact Tribes into priority tiers consistent with the District Court's ruling. By agreeing that the priority system should be applied identically, Appellants contradict their assertion in this Appeal that identical provisions in the 1999 Compacts should not be applied identically.

Appellants' argument that there could be separate understandings between the State and other Compact Tribes is undercut by their failure to contest the rearrangement of all participating Compact Tribes. Appellants did not seek a judicial determination of that provision as to each participating Compact Tribe. Appellants simply applied a judicial determination of a provision in this Action to identical provisions in the Compacts of other 1999 Compact Tribes. *See Wetzel*, 189 F.3d at 1167. Thus, it is clear from Appellants' own actions that the identical statewide

[5] The Commission's August 27, 2009 letter states that "a Tribe will be permitted to remain in a priority tier until it has drawn the maximum number of licenses permitted from that tier" which was the holding of the District Court after it ruled the Commission's previous interpretation was incorrect. The Commission thereafter rearranged all Compact Tribes into priority tiers consistent with the District Court's ruling for the October 5, 2009 License Draw.

aggregate limit on Licenses contained in §4.3.2.2(a)(1) of each 1999 Compact must be applied identically as ordered by the District Court.

It is clear that Appellants' arguments against permitting all eligible 1999 Compact Tribes to participate in the License Draw confirm Appellants' appeal are only made to attempt to preserve its perceived leverage over other Compact Tribes. Appellants continue their calculated effort to force Tribes to renegotiate their compacts and pay more money to the State just to operate the Gaming Devices the District Court already recognized the Compacts Tribes have a right to operate. Thus, when a possible financial incentive did not teeter in the balance, Appellants did not contest whether all participating Compact Tribes should be placed into a priority tier consistent with the District Court's decision despite those Compact Tribes not being parties to this Action. As conceded by Appellants' actions, the District Court did not err when it ordered Appellants to conduct a Gaming Device License Draw in which all eligible Compact Tribes may participate.

X. CONCLUSION

No material issue of disputed fact exists as to the meaning of Compact §4.3.2.2(a)(1) because the undisputed facts and express language of the Compact establish that 42,700 Gaming Device Licenses are authorized for

issuance under the 1999 Compacts. Appellants previously conceded there were no material disputed facts, and their attempt to now assert differently cannot be countenanced. Therefore, the District Court correctly granted summary judgment that Compact §4.3.2.2(a)(1) authorizes 42,700 Gaming Device Licenses.

Additionally, under the terms of the 1999 Compacts, there can be one, and only one, aggregate license pool and a determination of that license pool in this Action is applicable to all Compact Tribes as previously contemplated by this Court in *Colusa I*. Therefore, the District Court did not err when it correctly held that all eligible Compact Tribes may participate in the Gaming Device License Draw for the additional 10,549 Gaming Device Licenses.

DATED: December 23, 2009 SOLOMON, SALTSMAN & JAMIESON

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Federal Rule of Appellate Procedure 32 (a)(7)(c) and 9th Circuit Rule 32-1, the attached opening brief is proportionately spaced, has a typeface of 14 points or more, and contains 6,820 words.

DATED: December 23, 2009 SOLOMON, SALTSMAN & JAMIESON

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CERTIFICATION OF SERVICE

Case Name: **Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. State of California, et al** No. **09-16942**

I hereby certify that on December 23, 2009, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

SAN PASQUAL'S MOTION *AMICUS CURIAE* BRIEF IN SUPPORT OF RESPONDENT-TRIBES AND AFFIRMATION OF THE DISTRICT COURT'S DECISION GRANTING SUMMARY JUDGMENT (Fed. R. App. P.29(b))

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on December 23, 2009 at Los Angeles, California..

s/Stephen Jamieson

STEPHEN A. JAMIESON