STEPHEN WARREN SOLOMON SBN 36189
STEPHEN ALLEN JAMIESON SBN 115805
R. BRUCE EVANS SBN 217098
RYAN M. KROLL SBN 235204
SOLOMON, SALTSMAN & JAMIESON
426 Culver Boulevard
Playa Del Rey, CA 90293
Tel: (310) 822-9848

Attorneys for Plaintiff:
San Pasqual Band of Mission Indians

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SAN PASQUAL BAND OF MISSION INDIANS, a federally recognized Indian Tribe

Plaintiff.

STATE OF CALIFORNIA, CALIFORNIA GAMBLING CONTROL COMMISSION, an agency of the State for California, and ARNOLD SCHWARZENEGGER, as Governor of the State of California

Defendants.

Case Number: 06CV0988 LAB AJB
Judge: Hon. Larry Alan Burns
Courtroom: 9

SAN PASQUAL'S REPLY TO DEFENDANTS' OPPOSITION TO THE MOTION FOR SUMMARY JUDGMENT

[Filed Concurrently with Request for Judicial Notice; Kroll Declaration and Objections to State's Exhibits]

Hearing Date: August 24, 2009
Hearing Time: 11:15 a.m.

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TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Plaintiff, SAN PASQUAL BAND OF MISSION INDIANS (hereinafter "San Pasqual"), hereby submits its Reply to the Opposition to San Pasqual's Motion for Summary Judgment submitted by Defendants, STATE OF CALIFORNIA, CALIFORNIA GAMBLING CONTROL COMMISSION and ARNOLD SCHWARZENEGGER (hereinafter collectively referred to as "the State") as follows:

I. THE LANGUAGE OF THE COMPACT CONTRACT CONTROLS THE MEANING OF THE COMPACT, AND THEREFORE, JUST AS IN THE *COLUSA* MATTER, THE COURT SHOULD HOLD THAT 42,700 GAMING DEVICE LICENSES ARE AUTHORIZED

The most basic principle in contract interpretation is that the language of the contract controls, and the only reasonable interpretation of Compact §4.3.2.2(a)(1) is that it authorizes 42,700 Gaming Device Licenses. *Yount v. Acuff Rose-Opryland*, 103 F.3d 830, 836 (9th Cir. 1996) (holding that "[c]ontract interpretation is governed by the objective intent of the parties as embodied in the words of the contract."). This same issue with the same evidence and arguments came before the Eastern District in the *Colusa* matter, and the *Colusa* court correctly held on April 21, 2009 that Compact §4.3.2.2(a)(1) authorizes 42,700 Gaming Device Licenses. Pl.'s RJN Ex. 1-p. 51, lines 23-24. On August 11, 2009, the *Colusa* court then ***reaffirmed*** its decision that Compact §4.3.2.2(a)(1) authorizes 42,700 Gaming Device Licenses and denied the State's Motion for Reconsideration. Pl.'s RJN Ex. 14: page 257.

The State wrongly contends that San Pasqual believes Compact §4.3.2.2(a)(1) is ambiguous. A provision is ambiguous only if it is susceptible to more than one reasonable interpretation, and the only reasonable interpretation of Compact §4.3.2.2(a)(1) is that it authorizes the issuance of 42,700 Gaming Device Licenses. *Doe 1 v. AOL LLC*, 552 F.3d 1077, 1081 (9th Cir. 2009) (holding that because "the parties dispute a contract's meaning does not render the contract ambiguous."). Even the State concurs San Pasqual's interpretation of 42,700 Gaming Device Licenses is reasonable. Opposition, 12:7-11. Yet, the State fails to put forth a second reasonable interpretation, and therefore the State cannot establish the Compact is ambiguous. *Doe 1*, *supra* at 1081. As such, the State's statements that Compact §4.3.2.2(a)(1) might be severed because of the ambiguity are also without merit.

Conceding it cannot challenge San Pasqual's interpretation, the State shifts its tactic to argue anything but the language of Compact §4.3.2.2(a)(1).[1] However, extrinsic evidence is

[1] In fact, all but one page of the State's twenty-six page memorandum of points and authorities concerns issues other than interpreting the language of the Compact §4.3.2.2(a)(1).

inadmissible when an agreement, such as Compact §4.3.2.2(a)(1), is susceptible to only one interpretation.

The State also incorrectly argues San Pasqual is required to submit evidence of its understanding of the unambiguous language of Compact §4.3.2.2(a)(1) but fails to provide even one citation for that argument. In fact, the State freely admits the interpretation of 32,151 Gaming Device Licenses that it advocates in this matter was not its intent at the time of signing the Compact. Clearly, this argument is a red herring and should be disregarded by the Court.

The simple fact remains that no other reasonable interpretation of Compact §4.3.2.2(a)(1) exists. Not the State's interpretation that was held to be a "strained reading of the Compact language" in the *Colusa* matter. Pl.'s RJN Ex. 1: page 50, lines 3-4. Not the Norris interpretation the State rejected as "not expressed in the Compact language" nor the other interpretations the State rejected when it wrongly concluded its own interpretation. Pl.'s RJN Ex. 10-p.142 fn. 5. As there is no disputed issue of material fact concerning what the language of Compact §4.3.2.2(a)(1) means, San Pasqual respectfully requests the Court grant its Motion for Summary Judgment.

II. THE STATE'S INTERPRETATION IS UNREASONABLE, AND AS IN THE *COLUSA* MATTER, SUMMARY JUDGMENT THAT COMPACT §4.3.2.2(a)(1) AUTHORIZES 42,700 GAMING DEVICE LICENSES IS APPROPRIATE

The State's interpretation that Compact §4.3.2.2(a)(1) authorizes 32,151 Gaming Device Licenses is unsupported by the express language of Compact §4.3.2.2(a)(1). The State's "strained interpretation" unravels as the State cannot explain how "the lesser number authorized under Section 4.3.1" (the Second Element of the State Aggregate Limit formula) could ever mean "the difference between the number of Gaming Devices the sixteen tribes operating less than 350 Gaming Devices were operating on September 1, 1999" as it avers on page 10 of its Opposition. The State's interpretation does not just require additional terms to be added to the Compact Section but requires an entire re-write of Compact §4.3.2.2(a)(1). For this reason, the *Colusa* court held and then reaffirmed that the State's interpretation forced

a "strained reading of the Compact language." Pl.'s RJN Ex. 1-p. 50, lines 3-4.

The lone issue in this Action for a judicial declaration of Compact §4.3.2.2(a)(1) is what is a reasonable interpretation of the language in Compact §4.3.2.2(a)(1). *Yount*, *supra* at 836. There is no dispute that the only reasonable interpretation of Compact §4.3.2.2(a)(1) is that it authorizes 42,700 Gaming Device Licenses and summary judgment is appropriate.[2]

In recognition that its interpretation is based on an unreasonable interpretation of Compact §4.3.2.2(a)(1), the State asserts without legal support that its interpretation should be accepted because it is in "close adherence" to Judge Norris' understanding of the provision. However, the State rejected Judge Norris' interpretation as "not expressed in the Compact language." Pl.'s RJN Ex. 10-p.142 fn. 5. Thus, being in "close adherence" to an interpretation that the State believed to be incorrect is irrelevant, and, if anything, further proof of the unreasonableness of the State's interpretation. Further, upon hearing this same argument, the *Colusa* court held and reaffirmed it was "not persuaded that [the State's] formulation is most reflective of the parties' intent based upon the piecemeal reliance on Norris' interpretations. Pl.'s RJN Ex.1-47, fn. 21; Pl.'s RJN 14:257.

The State is also incorrect that its interpretation is in "close adherence" to the Norris Interpretation. The State's interpretation of the Compact creates 17,159 more Gaming Devices than Judge Norris' assertion that the Compacts authorize only 44,798 Gaming Devices.[3] In fact, Judge Norris stated that only 15,400 Gaming Device Licenses were available for the initial License Draw – not the 29,050 Licenses concocted by the State in its Opposition. Opposition, 11:5-12. It is not surprising that in "explaining" the Norris interpretation in its Opposition, the State does not cite to any factual support for what it deems Norris' interpretation to be despite a declaration of Judge Norris and a letter from Judge Norris being in the record. However, neither the proper Norris interpretation nor the State's purported "close adherence" to the Norris interpretation are material issues of fact in this

[2] In fact, the only interpretation the State expressly states in its Opposition is reasonable is San Pasqual's interpretation. Opposition, 12:7-11.

[3] The State's interpretation permits 61,957 Gaming Devices statewide. Pl.'s RJN Ex. 13-p216. San Pasqual's interpretation would authorize 72,506 Gaming Devices. Judge Norris stated there were only 44,798 Gaming Devices.

Action as the State correctly rejected Judge Norris' interpretation as "not expressed in the Compact language" and therefore unreasonable. Pl.'s RJN Ex. 10-p.142 fn. 5.

As there is no dispute that the only reasonable interpretation of Compact §4.3.2.2(a)(1) is that it authorizes 42,700 Gaming Device Licenses, San Pasqual respectfully requests the Court grant its Motion for Summary Judgment.

III. AS THERE IS ONLY ONE REASONABLE INTERPRETATION OF COMPACT §4.3.2.2(a)(1), NO AMBIGUITY EXISTS AND THE LANGUAGE OF COMPACT §4.3.2.2(a)(1) CONTROLS ITS INTERPRETATION

Because there is only one reasonable interpretation of Compact §4.3.2.2(a)(1), no ambiguity exists and parol evidence is inadmissible. *Shaw v. City of Sacramento*, 250 F.3d 1289, 1293 (9th Cir. 2001) (holding that "[e]xtrinsic evidence is not permitted to add to or detract from the terms of a contract."). However, as the State's Opposition focuses not on interpreting Compact §4.3.2.2(a)(1) but on attempting to distract the Court from the lone true material issue of interpreting Compact §4.3.2.2(a)(1), San Pasqual will address the irrelevance and incorrectness of those arguments.

Throughout its Opposition, the State misrepresents the evidence it purportedly relies upon as the State fails to create a nexus between its arguments and evidence. For this reason, the *Colusa* court held in reviewing the same arguments and evidence that "***the extrinsic evidence does not reveal a plain intent or meaning*** that was either understood by the parties at the time the Compact was executed or followed by the parties in their subsequent actions." Pl.'s RJN Ex.1-p.48, lines 10-14 (emphasis added).

By way of example, on page 15 of the Opposition the State claims that "the concept embodied in section 4.3.2.2(a)(1) was discussed with and approved by representatives of *all* tribes" and then cites to Paragraphs 16 and 17 of Judge Norris' Declaration. (Emphasis added). The State then continues its misrepresentation on page 16; lines 15-16 of its Opposition, where it states that "the evidence suggests the concept that resulted in section 4.3.2.2(a)(1) was discussed with San Pasqual" and then again cites to Paragraphs 16 and 17 of Judge Norris' Declaration. However, at no point do Paragraphs 16 and 17, or any other

Paragraphs in the Declaration, state that Judge Norris discussed with and received approval from "all" tribes or even specifically with San Pasqual. It just vaguely and flippantly states Judge Norris spoke with "tribal attorneys and representatives" with no indication of which ones and certainly does not state it was San Pasqual attorneys and representatives. Exhibit A to Pinal Decl 6:7-8.

The State continues its misrepresentations on Page 18: lines 9-13 of its Opposition whereat it falsely alleges Judge Norris "advised *all* tribes that the Compacts would not permit the operation of more than 44,798 Gaming Devices statewide" and cites to Paragraphs 14 and 15 of Norris' Declaration. (Emphasis added). Again, nowhere in Paragraphs 14 and 15 does not Judge Norris declare he advised "all" tribes.

The Norris Declaration submitted by the State is irrelevant because it states in generalities what it should state in specifics - if it could. The Norris Declaration never mentions Chairman Allen Lawson, or any representative of San Pasqual. In fact, the State submitted same Norris Declaration that was submitted in the *Colusa* matter and was held to be insufficient to establish a "plain intent or meaning" of Compact §4.3.2.2(a)(1) and failed to raise a disputed issue of material fact. Pl.'s RJN Ex. 1-p.48, lines 10-14.

Aware of the previously noted deficiencies in the Norris Declaration, the State of California, surely could have had Judge Norris or any other of its representatives submit a new declaration. However, it did not because it could not. As stated in Chairman Lawson's declaration and unrefuted by any evidence submitted by the State, "[t]he State never stated or in any way communicated to me or any representative of San Pasqual the specific number of Gaming Device Licenses authorized by the State Aggregate Limit" remains uncontroverted. Lawson Declaration ¶15, 4:5-7.

Further, the State's reliance on a September 8, 1999 letter from Scott Crowell and statements by Chairman Richard Milanovich is misplaced. Neither Mr. Crowell nor Chairman Milanovich are members or representatives of San Pasqual and therefore their statements are irrelevant to this Action and clearly hearsay. Additionally, the *Colusa* court correctly held in denying the State's Motion for Reconsideration that the September 8, 1999

Crowell letter "does not further clarify any mutual understanding between plaintiffs and defendants," Pl.'s RJN Ex. 14:p255, lines 19-20, and the same is true of Chairman Milanovich's statements.

While the lack of ambiguity in Compact §4.3.2.2(a)(1) prohibits the admissibility of the extrinsic evidence the State seeks to admit, the "evidence" itself is irrelevant and there is no dispute issue of material fact in this Action. Therefore, San Pasqual respectfully requests the Court grant its Motion for Summary Judgment.

IV. WHILE THE COURT NEED NOT REACH THE ISSUE OF *CONTRA PROFERENTUM* AS ONLY ONE REASONABLE INTERPRETATION OF COMPACT §4.3.2.2(a)(1) EXISTS, IT IS AN "UNDISPUTED FACT THAT DEFENDANTS DRAFTED THE COMPACT"

The Court need not reach the issue of *contra proferentum* as there is only one reasonable interpretation of this Compact Section – regardless of who drafted the Compact Section. However, as the *Colusa* court held, it is an "undisputed fact that defendants drafted the compact." Pl.'s RJN Ex. 14:p.256, lines 14-15.

Even the evidence submitted by the State proves the State drafted Compact §4.3.2.2(a)(1) in that Judge Norris states "Shelleyanne W.L. Chang and I prepared a draft of section 4.3.2.2, including section 4.3.2.2(a)(1)." Pinal Decl. Ex. A 6:10-11. There is no evidence that any representative of San Pasqual participated in any manner in the drafting of Compact §4.3.2.2(a)(1). Again, the State of California certainly has the wherewithal to submit such a declaration stating specifically that San Pasqual participated in drafting Compact §4.3.2.2(a)(1). It did not because it could not.

While it is unnecessary for the Court to reach the issue of *contra proferentum*, it is undisputed the State drafted Compact §4.3.2.2(a)(1). Pl.'s RJN Ex. 14:p.256, lines 14-15. Thus, on a separate and distinct basis on which to enter Judgment in favor of San Pasqual, the Court, if necessary, should construe Compact §4.3.2.2(a)(1) in favor of San Pasqual and declare that 42,700 Gaming Device Licenses are authorized by the Compact.

V. THE STATE INTENTIONALLY DELAYED DISCOVERY IN THIS MATTER AS A STALL TACTIC AND THE COURT SHOULD DENY ITS REQUEST TO DELAY RULING ON THIS MOTION FOR SUMMARY JUDGMENT

On February 23, 2009, the Court ordered Initial Disclosures to be served on or before "March 25, 2009 and that discovery shall proceed forthwith." The Court then ordered all fact discovery to conclude on or before September 30, 2009. San Pasqual filed its Motion for Summary Judgment on June 9, 2009 to be heard on August 24, 2009. The State then waited six weeks after receiving the Motion for Summary Judgment until July 23, 2009 to serve any discovery in this case. Kroll Declaration ¶2. If the State truly believed discovery was necessary or even helpful, the State would have certainly sent discovery requests within those six weeks to ensure it could adequately defend this Motion for Summary Judgment.

Instead, the State served discovery requests on a date that ensured responses were not due until the date of the hearing and thereby the State could make its spurious argument that the Motion for Summary Judgment should be delayed for discovery responses.[4] While the discovery sought by the State is irrelevant and unnecessary as there is only one reasonable interpretation of Compact §4.3.2.2(a)(1), the State's "unclean hands" in refusing to engage in discovery until the last minute is grounds to deny the State's request.

San Pasqual agrees with the State that discovery is unnecessary as the language of the Compact controls its interpretation and the parties stipulated to the language of Compact §4.3.2.2(a)(1). Joint Statement No. 20. In fact, San Pasqual had originally timed its discovery requests to ensure that responses were due prior to the deadline to file this Reply, but, recognizing that discovery is unnecessary, San Pasqual agreed to the State's request to extend the deadline for the State to serve discovery responses until after the hearing date for this Motion. Kroll Declaration ¶3. Therefore, the State's request to delay ruling on this Motion should be denied as the State delayed in discovery and the matters sought are irrelevant and unnecessary as there is only one reasonable interpretation of Compact

[4] Attempting to hide this "gamesmanship," Mr. Pinal's chose to leave out of his declaration the date upon which the State served its discovery requests.

§4.3.2.2(a)(1).

VI. THE STATE'S ARGUMENT CONCERNING SAN PASQUAL'S GOVERNING BODY IS IRRELEVANT, INSULTING, WITHOUT MERIT AND SIMPLY ANOTHER STALL TACTIC

Just a few days before this hearing on August 11, 2009, the Bureau of Indian Affairs published its annual list of federally-recognized Indian tribes that continued to list San Pasqual as a federally-recognized Indian tribe. Pl.'s RJN Ex. 15-p.261. The State's argument challenging San Pasqual's governing body is irrelevant, insulting, without merit and another stall tactic to delay the inevitable conclusion that Compact §4.3.2.2(a)(1) authorizes 42,700 Gaming Device Licenses.[5]

San Pasqual is a sovereign nation that, like every other sovereign nation, chooses its own governing body and, as the State knows, the Bureau of Indian Affairs is without jurisdiction to terminate San Pasqual's status as a federally-recognized Indian tribe - "only an act of Congress" may do so. Public Law 103-454(4). However, even if the Bureau of Indian Affairs could terminate San Pasqual's standing as a federally-recognized tribe, the letters, in addition to the August 11, 2009 Federal Registrar publication, confirm that San Pasqual's standing as a federally-recognized Indian tribe.

Further, it is clear that the State has been conducting its "discovery' into this matter as it was able to produce Exhibit E and F. Thus, the State's true objection is not that it needs more time for discovery but rather that what it did discover did not help their case. That is not grounds to delay the Court's ruling on this Motion for Summary Judgment, and this argument should be treated like the other stall tactic contained in its Opposition.

VII. SUBSEQUENT CONDUCT IS IRRELEVANT TO THIS UNAMBIGUOUS PROVISION AND REGARDLESS SAN PASQUAL NEVER ACTED IN "DIRECT, POSITIVE AND DELIBERATE" MANNER IN ACCEPTANCE OF THE STATE'S ERRONEOUS INTERPRETATION

[5] The letters submitted as Exhibits E and F to the State's Request for Judicial Notice have been objected to as irrelevant hearsay and should excluded on that basis.

"Practical construction has no place in the consideration of an unambiguous agreement." *Petersen v. Ridenour,* 135 Cal.App.2d 720, 725 (1955). As there is only one reasonable interpretation of Compact §4.3.2.2(a)(1), and therefore subsequent conduct by the parties is inadmissible and irrelevant.

However, even if the Court were to admit evidence of the subsequent conduct of the parties, "the evidence demonstrates that there was no consistent course of conduct between the parties and that there continued to be debate about the number of devices authorized under the Compact" as held by the Colusa court in discussing the numerous unreasonable interpretations by the State that occurred after the Compact was executed. Pl.'s RJN Ex.1-p.47 lines 15-18.

Additionally, the return of 500 Gaming Device Licenses in exchange for "a credit against [license] fees charged" does not establish San Pasqual accepted the State's erroneous interpretation of Compact § 4.3.2.2(a)(1). Def's RJN Ex. A-1. With regard to subsequent acts of parties to explain an agreement, courts require that "such acts must be direct, positive, and deliberate, and must show that the acts were done in an attempted compliance with the terms of the contact or agreement." *Barnhart Aircraft, Inc. v. Preston*, 212 Cal. 19, 24 (1931). While the State's Exhibit A is inadmissible because Compact §4.3.2.2(a)(1) is not ambiguous, the letter clearly shows that San Pasqual's intent was to receive a credit on license fees for returning Gaming Device Licenses. San Pasqual's business decision to return Gaming Device Licenses was not a "direct, positive and deliberate" act in agreement with the State's erroneous determination and is therefore irrelevant. *Id.*

Similarly flawed is the State's argument that, in addition to filing this lawsuit, San Pasqual was required to submit evidence of its objection to the Commission's erroneous ruling. San Pasqual timely filed its lawsuit for declaratory relief because an "actual controversy" exists and therefore timely raised its objection as required by law. Further, silence is not a "direct, positive and deliberate" act in agreement with the State's erroneous determination. Additionally, the State provides no evidence that San Pasqual made a statement in concurrence with the State's interpretation so as to constitute a "direct, positive

and deliberate" action by San Pasqual in agreement with the State's erroneous interpretation. Therefore, the Court should treat this argument as just another stall tactic devised to improperly stall the inevitable conclusion that Compact §4.3.2.2(a)(1) authorizes the issuance of 42,700 Gaming Device Licenses.

VIII. DECLARATORY RELIEF ONLY REQUIRES AN "ACTUAL CONTROVERSY" TO EXIST AND DOES NOT REQUIRE EVIDENCE OF DAMAGES OR AN INJURY

The State concocts another spurious argument concerning San Pasqual needing to submit evidence of an "injury" in order to obtain a judicial determination of compact §4.3.2.2(a)(1). To obtain declaratory relief, a plaintiff need only establish an "actual controversy" between the parties and there is no need for a plaintiff to assert or prove "injury" as wrongly asserted by the State. 28 U.S.C. §2201; *Westlands Water Dist. v. U.S.*, 805 f. Supp. 1503, 1506. Further, "[a] party to a written contract may properly seek an interpretation by means of a declaratory judgment." *Westlands*, *supra* at 1506. Thus, this argument is without merit and San Pasqual is entitled to summary judgment on its lone claim for relief for a judicial determination of Compact §4.3.2.2(a)(1).

IX. CONCLUSION

San Pasqual respectfully requests that the Court grant its Motion for Summary Judgment as the plain meaning of the State Aggregate Limit contained in Compact § 4.3.2.2 (a)(1) authorizes 42,700 Gaming Device Licenses as also held and reaffirmed by the *Colusa* court after that court reviewed the same provision at issue herein and the same arguments and evidence of the State.

DATED: August 17, 2009

SOLOMON, SALTSMAN & JAMIESON

s/Stephen Allen Jamieson
By:_____
Stephen Warren Solomon
Stephen Allen Jamieson
Ryan M. Kroll
Attorneys for Plaintiff-San Pasqual Band of Mission Indians