Cheryl A. Williams (Cal. Bar No. 193532)
Kevin M. Cochrane (Cal. Bar No. 255266)
caw@williamscochrane.com
kmc@williamscochrane.com
WILLIAMS & COCHRANE, LLP
525 B Street, Suite 1500
San Diego, CA 92101
Telephone: (619) 793-4809

Attorneys for Plaintiff
PAUMA BAND OF MISSION INDIANS

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

PAUMA BAND OF LUISENO MISSION INDIANS OF THE PAUMA & YUIMA RESERVATION, a/k/a PAUMA LUISENO BAND OF MISSION INDIANS, a/k/a PAUMA BAND OF MISSION INDIANS, a federally recognized Indian Tribe,

Plaintiff,

vs.

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

Defendants.

Case No.: 09CV1955 LAB AJB

NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT PURSUANT TO FED. R. CIV. P. 56

Date: March 21, 2011
Time: 11:15 A.M.
Dept: 9
Judge: The Honorable Larry A. Burns

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

Please take notice that at 11:15 a.m. on March 21, 2011, or as soon thereafter as counsel may be heard, in Courtroom Nine of the Edward J. Schwartz United States Courthouse at 940 Front Street, San Diego, California 92101-8900, the Pauma Band of Mission Indians ("Pauma" or "Tribe") will move for summary judgment pursuant to Fed. R. Civ. P. 56 ("Rule 56") on its federal claims for relief based on mistake, misrepresentation, frustration of purpose, failure of consideration, and illegal taxation. As a final remedy, Pauma will ask the Court to exercise the full extent of its equitable powers by, at least, declaring the size of the license pool under the Tribal-State Compact Between the State of California and the Pauma Band of Mission Indians ("1999 Compact") is consistent with the Ninth Circuit's interpretation; turning the preliminary injunction into a permanent one permitting the operation of 2,000 machines pursuant to the financial terms of the original compact, or, in the alternative, rescinding the Amendment to Tribal-State Compact Between the State of California and the Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation ("2004 Amendment") and extending the 1999 Compact by the duration of time the State denied lawfully-available compact rights; retaining exclusive jurisdiction to determine whether either party has committed a future material breach justifying termination of the particular compact by the allegedly-aggrieved party; and ordering the State to provide restitution for all past amendment payments.

The reason for moving at this juncture is that Pauma believes it has shown actual success on the merits of its claims and is consequently entitled to a pretrial disposition that will best rectify the suffered harms and prevent further unlawful actions by all State defendants. Pauma bases this motion on the accompanying memorandum of points and authorities; the new declarations of Cheryl A. Williams, Linda Bojorquez, Randall Majel, and Jerry Priddy that are attached hereto; and all evidence submitted herewith or contained in a related request for judicial notice, including the prior declarations of Chris Devers, Alan Dinwiddie, Flint Richardson, and Douglas M. Walker.

DATED this 24th day of January, 2011.

THE PAUMA BAND OF MISSION INDIANS

By: */s/ Kevin M. Cochrane*

Cheryl A. Williams
Kevin M. Cochrane
caw@williamscochrane.com
kmc@williamscochrane.com
WILLIAMS & COCHRANE, LLP
525 B Street, Suite 1500
San Diego, California 92101
Telephone: (619) 793-4809

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GLOSSARY OF ABBREVIATIONS

ABBREVIATION	MEANING
1999 Compact	*Tribal State Compact between the State of California and the Pauma Band of Mission Indians*
2004 Amendment	*Amendment to Tribal-State Compact between the State of California and Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation*
BD	*Declaration of Linda Bojorquez*
CGCC	*California Gambling Control Commission*
Ciau	*Terresa A., Executive Director of the California Gambling Control Commission*
Commission	*California Gambling Control Commission*
County	*County of San Diego*
Hoch	*Andrea Lynn, Legal Affairs Secretary for the Office of the Governor*
IGRA	*Indian Gaming Regulatory Act*
MD	*Declaration of Randall Majel*
MOU	*Memorandum of Understanding between the County of San Diego and the Pauma Band of Mission Indians*
Pauma	*Plaintiff, the Pauma Band of Mission Indians*
PD	*Declaration of Jerry Priddy*
Restatement	*Restatement (Second) of Contracts*
State	*Defendants, the State of California, California Gambling Control Commission, and Arnold Schwarzenegger*
Tribe	*Plaintiff, the Pauma Band of Mission Indians*
WD	*Declaration of Cheryl A. Williams*

I. INTRODUCTION

During the summer of 2002, the California Gambling Control Commission, duly appointed by the Governor for the State of California (collectively "State'), released an unreasonable interpretation of the number of slot machine licenses available to tribes with existing gaming compacts for the subsequently self-confessed purpose of inducing renegotiations to increase the State's share of tribal gaming revenues. A cavalcade of different reactions ensued, with some tribes filing suit to challenge the propriety of the law-creating interpretation, and another acquiescing to the renegotiation process until discovering the State would take the lion's share of income generated by the amendment.

Before the brunt of these objections became public, the historically-impoverished Pauma executed an amendment to its compact after the State directly communicated that such an action was the only way the Tribe could increase its device count to the 2,000 machine ceiling of its original agreement. In doing so, the cost of Pauma's preexisting gaming rights increased by 2,460%. As this percentage intimates, the results of the decision have proven to be disastrous, as six-plus years after the fact Pauma still operates at its pre-amendment device count inside the same temporary tent facility despite funneling over $30 million in revenue sharing into the State's coffers. After suffering a mass lay-off totaling fifteen percent of the casino's workforce, Pauma approached the State about obtaining a temporary payment reprieve until finishing construction on a permanent facility that could remain competitive with the surrounding casinos. In a series of increasingly alarming responses, the State first informed Pauma that it would not provide any manner of relief before indicating the remittance of a single untimely revenue sharing payment would result in the termination of the Tribe's compact.

It was against this backdrop that Pauma filed suit and sought preliminary injunctive relief from this Court. With the State attempting to follow through on the threat of compact termination during the pendency of the interlocutory appeal, Pauma now asks this Court to consider the circumstances when fashioning final relief by, at least, adopting the Ninth Circuit's interpretation of the size of the license pool, turning the preliminary injunction into a permanent one permitting the operation of 2,000 machines pursuant to the financial terms of the original compact,[1] retaining exclusive jurisdiction to

[1] Alternatively, Pauma requests rescission of the amendment and an extension on the original compact.

determine whether either party has committed a future material breach justifying compact termination, and ordering the State to provide restitution for all past amendment payments.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

Pauma is a federally-recognized Indian tribe located in northern San Diego County ("County") and flanked on each side by the reservations for the neighboring Pala Band of Mission Indians and the Rincon Band of Luiseno Indians ("Rincon"), two of the larger gaming tribes in the State. Declaration of Cheryl Williams ("WD"), Exs. 3, ¶ 10; 9; 13; 27; 69. Pauma's reservation is bereft of any natural economic resources. *Id.* at Ex. 8. As a result, the Tribal members have historically depended upon subsistence-level agricultural production and federal funding to stave off poverty. *Id.* at Exs. 1, ¶ 12; 89. Yet, despite the presence of these income sources, as of the year 2000, the per capita income on the Pauma reservation was $11,711, and approximately 55% of the Tribal members eligible for inclusion in the labor force were either unemployed or living beneath the poverty line. *Id.* at Exs. 5, 6.

Facing these depressed socioeconomic conditions, Pauma approached the State in the spring of 2000 about entering into a bilateral tribal/State gaming compact so it could conduct Class III gaming under the auspices of the Indian Gaming Regulatory Act ("IGRA"). Declaration of Linda Bojorquez ("BD"), ¶ 2. The State permitted Pauma to execute a substantively identical compact ("1999 Compact") to those entered into the prior fall by approximately sixty-three other tribes, s*ee Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. Cal.,* 536 F.3d 1034, 1037 (9th Cir. 2008) ("*Colusa I*"), an agreement the parties consummated on May 1, 2000 and which became effective on October 6, 2000 when the Bureau of Indian Affairs published its notice of approval in the Federal Register. WD, Ex. 2, ex. A; 12; BD, ¶ 2. As with all the prior agreements, the negotiators for the State drafted the material terms of the 1999 Compact, as Pauma simply accepted the proposal that was offered. WD, Ex. 2, ex. A; BD, ¶¶ 2-3; *see Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. Cal*., 629 F.Supp.2d 1091, 1115 (E.D. Cal. 2009) ("*Colusa II*") ("[I]t is undisputed that the State [ ] actually drafted the language in the Compact."). The execution of the 1999 Compact marked the advent of Class III gaming for Pauma and permitted the Tribe to operate up to 2,000 slot machines in a Constitutionally-protected environment free from non-tribal competition until June 30, 2022. WD, Ex. 2, ex. A; *Rincon Band of*

Luiseno Mission Indians v. Schwarzenegger, 610 F.3d1019, 1022-24 (9th Cir. 2010) ("*Rincon II*").

In respect to the number of available machine licenses, Pauma had a general understanding that it could operate 2,000 machines subject to the compact-guided determination of the administrator of the license pool. WD, Ex. 1, ¶ 3; Declaration of Randall Majel ("MD"), ¶¶ 3-4; Ex. A. According to the terms of the 1999 Compact, the management of the license pool and the handling of all monies connected therewith takes place pursuant to a trusteeship, with the California Gambling Control Commission ("CGCC" or "Commission") acting as the trustee for the Revenue Sharing Trust Fund and an unnamed entity as the trustee for the conjoined license pool. *See* WD, Ex. 2, ex. A, §§ 4.3.2.1.(b), 4.3.2.2(a)(3)(vi) ("Rounds shall continue until tribes cease making draws, at which time draws will be discontinued for one month or until the Trustee is notified that a tribe desires to acquire a license, whichever last occurs."). Shortly after the enactment of the 1999 Compacts, the signatory tribes hired the Sacramento-based certified public accounting firm of Sides Accountancy ("Sides") to act as the independent trustee to oversee the license draw process. *Colusa II,* 629 F.Supp.2d at 1098. Pauma signed a trustee engagement letter with Sides, and subsequently received its first 500 licenses from a Sides-supervised draw to bring its total permissible device count to 850. WD, Exs. 40, 47.

On January 16, 2001, CGCC Chair John Hensley sent a letter to Sides expressing his displeasure with the lack of transparency regarding the administration of the license trust, and reminded Sides as "pool trustee" it owes a "fiduciary responsibility to account for the funds received to [sic] the Gambling Control Commission as trustee of the revenue sharing trust fund" and a general duty to "ensure that the allocation of machines did not exceed the available number of machines as provided in the compacts." WD, Ex. 41. After Sides refused to entertain the request of the non-beneficiary CGCC, the State brought suit to enjoin the draw process and passed Executive Order D-31-01, which gave the CGCC the power to "administer the gaming device license draw process under Section 4.3.2.2(a)(3), and control, collect, and account for all license fees under Section 4.3.2.2(a)(2)." *Id.* at Exs. 42-43.

Following the enactment of D-31-01, on November 8, 2001, Sides mailed a letter to all compact tribes informing them it was "terminating [its] engagement as license trustee… effective 60 days from today." WD, Ex. 44. After obtaining the authority to administer the license pool, the CGCC revealed

that it was not going to fully recognize its trustee duties.[2] Free from this restraint, the CGCC then stated that neither the Indian canon of construction nor the rule that ambiguities are to be construed against the drafter are applicable to the interpretation of the compacts. WD, Ex. 24, pp. 16-17. *Contra Rincon II*, 610 F.3d at 1029 n.9 (holding the Indian canon of construction applies to IGRA); *Colusa I,* 629 F.Supp.2d at 1113 (resolving ambiguity in the compacts against the State drafter). In a separate decision the following month that makes no reference to the nature or scope of its trust duties, the CGCC, the representative of the adverse party to the compacts, unilaterally interpreted the self-admittedly ambiguous license pool provision to provide for 32,151 licenses even though one of the two opinions from the Legislative Analyst's Office still suggested that the pool contains 55,951 licenses. *Id.* at Ex. 25, p. 15. This interpretation resulted in a RSTF shortfall of $50,568,787.99 during fiscal year 2002-03, with each non-compacting tribe receiving only a fraction of its annual $1.1 million distribution from the RSTF and the State making up the difference by draining the local community-benefiting Special Distribution Fund. *Id.* at Exs. 2, ex. A, §§ 4.3.2.1(a), (b); 19. Despite this, the CGCC reaffirmed that "[t]he language of Compact Section 4.3.2.2(a)(1) is sufficiently obscure that, undoubtedly, agreement among all the parties to the Compacts can only be achieved [by] renegotiation." *Id.* at Ex. 25, p. 12.

These sentiments reached Pauma via a March 28, 2003 letter from then-Governor Gray Davis, wherein the State formally requested that the Tribe "enter into negotiations concerning matters encompassed by Compact Section 4.3.2 and 4.3.2" and "other matters as the parties deem appropriate," such as "revenue sharing with the State." MD, ¶ 3 and Ex. B. Notwithstanding this request for renegotiation, the March 28th letter further states "there are several thousand licenses and entitlements that are not being used." *Id.* at Ex. B. On November 20, 2003, CGCC Deputy Director Gary Qualset ("Qualset") sent a letter to Pauma, presumably notifying the Tribe that "at least 750" of these licenses would be available during a draw on or about December 19, 2003. WD, Ex. 45.

During this time, Pauma was in discussions with a development and management company to transform its temporary tent-based facility into a permanent resort casino. WD, Exs. 1, ¶¶ 2, 3; 59-60;

[2] *See id*. at Ex. 24, pp. 17-18. ("[A]lthough the commission is referred to in the Compacts as a trustee, the Compacts are not conventional trust instruments, but rather an implementation under IGRA of the terms of class III gaming by compacted Indian Tribes in California. … The Commission cannot be regarded as a trustee in the traditional sense, but rather as an administrative agency with responsibilities under the Compacts for the administration of a public program in the nature of a quasi trust.").

MD, ¶¶ 2-4. One of the principles conditions of the deal going forward was that Pauma have the ability to operate 2,000 slot machines so the proposed facility could be commercially-viable given the surrounding casinos, all of which were at or just below the same machine mark. WD, Exs. 1, ¶¶ 2-5; 49-55; 59-61; MD, ¶¶ 3-6. After receiving the November 20th letter, Pauma passed a resolution authorizing the execution of a promissory note with its intended developer to secure the financing necessary to pay the $937,500 license fee prepayment on the 750 machine licenses the Tribe planned on acquiring at the December 19th license draw. WD, Exs. 46-47. This desired allotment of machines was the maximum number Pauma could request at one draw given its status as a third tier tribe, and would have brought the Tribe's aggregate total to 1,600. *Id*. at Ex. 2, ex. A. If Pauma had received the licenses, the Tribe would have then moved into the next higher tier and gained the ability to obtain the remaining 400 machines needed to reach the 2,000 cap as early as the following month. *Id.* at Ex. 2, ex. A, § 4.3.2.2(a)(3).

However, by a letter dated December 30, 2003, Qualset informed Pauma that it only received 200 licenses because "[t]he demand for licenses exceeded the available supply and it was therefore not possible to completely fill the Tribe's request for gaming device licenses." WD, Ex. 48. Subsequent discussions between Pauma and the State revealed that authorization to operate any machines above 1,050 and up to 2,000 could only come by way of amendment. *Id.* at Ex. 1, ¶¶ 3, 4; MD, ¶ 5. During the prior fall of 2003 the State executed the first post-1999 compacts with three previously non-gaming tribes; each agreement permitting the operation of up to 350 slot machines in exchange for an annual revenue sharing payment of 5% of the facility's net win (*i.e.*, gaming revenue before the deduction of costs or expenses) into the general fund. WD, Exs. 21-23. The equivalent exchange under the 1999 compacts would not have required any revenue sharing with the State. *Id.* at Ex. 2, ex. A.

Pauma's amendment ("2004 Amendment") turned out to be considerably more expensive than these inaugural general fund agreements. Simply retaining the authorization to operate 1,050 slot machines requires Pauma to annually pay $5.75 million into the State's general fund and $2.0 million into the RSTF. WD, Exs. 2, ex. B; 20. According to the terms of the 2004 Amendment, the general fund fee alone represents "at least 13%" of Pauma's net win for the year preceding amendment. *Id.* at Ex. 2, ex. B, § 4.3.3(a). In actuality, the annual general fund fee consumes 14.86% of Pauma's pre-amendment net win, while the RSTF represents another 5.17%. *Id.* at Exs. 3, ¶ 7; 4, ¶ 26. This financial

arrangement exists even thought the State's corporate *income,* not revenue, tax rate is only 8.84%. *Id.* at Exs. 3, ¶ 13; 4, ¶ 16. Taken together, these revenue sharing payments are 2,460% as much as Pauma's corresponding fee obligation under the 1999 Compact. *Id.* at Ex. 4, ¶ 17.

What's more, the annual general fund revenue sharing fees escalate as the operable machine count increases, ranging from $8,500 per machine for machines 1,051 to 1,500, to $25,000 for those above 4,500. WD, Ex. 2, ex. B. The bookends for this fee range signify 18.7% and 54.9% of Pauma's per machine net win for the year preceding amendment. *Id.* at Ex. 3, ¶ 8 and ex. A. In addition to these fees, Section 10.8.8 of the 2004 Amendment also required Pauma to enter into an intergovernmental agreement with the County to mitigate off-reservation environmental impacts and compensate selected public service providers. *Id.* at Ex. 2, ex. B. The resultant MOU committed Pauma to $38 million in pre-expansion road improvement expenditures, as well as additional financial outlays for sheriff service, the prosecution of casino-related crimes, and gambling-addiction programs. *Id.* at Exs. 1, ¶ 10; 3, ex. B; 73. Standing alone, the cost of the road improvements far exceeds the amount of income generated by Casino Pauma during any year since opening. *Id.* at Exs. 3, ex. A; 4, exs. 1, 2.

After the heightened RSTF payment obligations of the 2004 Amendment triggered in 2008, Pauma laid off 15.1% of its workforce, marking the second such time Casino Pauma had to contract its employee base. WD, Exs. 74, 76; Declaration of Jerry Priddy ("PD"), ¶ 2 and Ex. A. Facing in excess of $7.75 million in annual revenue sharing fees, $38 million in pending road improvement expenditures, and the immediate amounts due and owing in connection with the $77.4 million in costs for constructing and managing Casino Pauma's tent-based structure and preliminarily exploring the development of a permanent facility, Pauma's Tribal Council approached the State about obtaining some temporary relief from its revenue sharing obligations until the expansion of the gaming facility could occur. WD, ¶ 35 and Exs. 1, ¶ 9; 35-36. On April 2, 2009, the Office of the Governor's Legal Affairs Secretary Andrea Hoch ("Hoch") informed Pauma that the State would not provide any manner of assistance and attempted to terminate communication on the subject. *See id.* at ¶ 36 and Ex. 32. ("Unfortunately, the State and the Band remain in dispute concerning the issue presented. Accordingly, it does not appear necessary to schedule further meet and confer sessions."). The Office of the Governor took this stance even though the State had received roughly $21.7 million in 2004 Amendment fees and, at last check,

the unemployment rate for the Pauma membership was stagnating around 67% while the corresponding rates for the State and County were 5.4% and 4.3%, respectively. WD, Exs. 3, ex. A; 7; 29; 30.

In response to the April 2nd letter, Pauma proposed to pay the State $2,000,000 per year (i.e. six times its corresponding 1999 Compact obligations) until such time that the Tribe opened an expanded permanent facility "as contemplated by the 2004 Amendment," at which point the heightened payment obligations of the 2004 Amendment would revive in full. WD, ¶ 37 and Ex. 33. Pauma reaffirmed this offer in writing even after Judge Damrell issued his opinion of the proper size of the license pool under the 1999 compacts in *Colusa II*. *Id.* at ¶ 38 and Ex. 34. Via written reply arriving approximately twelve weeks later ("June 22nd Letter"), Hoch informed Pauma that the Office of the Governor "continues to disagree that the Band's compact with the State is subject to judicial rescission," and does "not believe it would be fruitful to continue the meet and confer process to discuss the matter further." *Id.* at Ex. 35. The June 22nd Letter stressed that the Office of the Governor would not "refrain from prosecuting compact violations" related to the Tribe's inability to timely pay any future revenue sharing obligations, and that seeking judicial relief "could leave [the Tribe] with no compact at all." *Id.* at Ex. 35.

The lack of temporary assistance from the State forced Pauma to decrease its device count to its pre-amendment operating level of 1,050, and, as a subsequent last resort, to file the present suit seeking judicial intervention on the basis of mistake (including the subcategory of mistake induced by misrepresentation), frustration of purpose, failure of consideration, and illegal taxation. WD, ¶ 41 and Exs. 1, ¶ 9; 2, ¶ 7; 3, ¶ 10. Despite these measures, Pauma's troubled financial condition frustrated the timely remittance of a general fund payment and the RSTF payments for the first and second quarters or 2009 until the fall of that year. *Id.* at ¶ 41 and Exs. 37-38. One final attempt at settlement occurred via a September 29, 2010 letter wherein Pauma proposed dismissing the present suit if the State temporarily reduced the Tribe's annual revenue sharing obligations from $7.75 million to $4 million until January 1, 2014 in order to facilitate the construction of a permanent facility. *Id.* at ¶ 41 and Ex. 36. On November 2, 2009, Hoch relayed that the State "rejects the Band's proposal to pay any reduced amounts" and that "if Pauma fails to make the full payment of the amounts plus interest due by November 6, 2009, or fails to make timely payment thereafter in accord with the terms of its Amended Compact, the State will consider the Band in material breach of its Amended Compact." *Id.* at Ex. 39. Section 11.2.1(c) of the

1999 Compact states a material breach enables the allegedly-aggrieved party "to unilaterally terminate [the] Compact upon service of written notice on the other party." *Id.* at Ex. 2, ex. A.

With the specter of compact termination accompanying any future late payment, Pauma moved this Court for a preliminary injunction on February 16, 2010 to replace the fee structure of the 2004 Amendment with that of the 1999 Compact. *Pauma Band of Mission Indians v. Cal.,* Civ. Case No. 09-01955 LAB AJB (S.D. Cal. filed on Sep. 4, 2009) ("*Pauma I*"), Docket Nos. 21-23, 34-36. Viewing the injunction as a compromise between Pauma's clear success on the merits and the State's self-expressed and allegedly sincere need to conduct discovery (*see* WD, Ex. 90, pp. 11:22-12:1, 13:10-14), on April 12, 2010, this Court issued an injunction requiring "only those payments required under the terms of the original compact…." *Pauma I*, Docket Nos. 43, 44. Yet, without submitting a single discovery request, on June 5, 2010, the State appealed the injunction for failing to satisfy the requirements of *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 129 S.Ct. 365 (2008), and moved the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") to issue a stay pending its determination. *Pauma Band of Mission Indians v. Cal.*, No. 10-55713 (9th Cir. 2010) ("*Pauma II*"), Docket Nos. 1, 7. On July 28, 2010, the motions panel for the Ninth Circuit granted the stay without providing any explanation aside from citing to *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987), and *Cal. Pharmacists Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 849-50 (9th Cir. 2009). *Pauma II*, Docket No. 39.

On the morning of August 16, 2010, the Pauma Tribal Council received and reviewed a letter from CGCC Executive Director Terresa Ciau ("Ciau") that the Commission mailed to the Tribe's post office box. WD, Exs. 86; 87, ¶¶ 2-3 and ex. A. Using the Ninth Circuit's stay as justification, Ciau classified all payments forestalled during the life of the injunction as being "overdue" and demanded same day payment of $2.45 million or the CGCC would refer the matter to the "Office of the Governor for further action to enforce the terms of the compact." *Id.* at Ex. 87, ex. A. Section 4.3.3(e) of the 2004 Amendment provides that the "[f]ailure to make timely payment shall be deemed a material breach of this Amended Compact," and, as previously mentioned, Section 11.2.1(c) of the 1999 Compact indicates that a material breach enables the allegedly-aggrieved party "to unilaterally terminate [the] Compact upon service of written notice on the other party." *Id.* at Exs. 2, ex. B, § 4.3.3(e); 2, ex. A, § 11.2.1(c).

Believing the State mischaracterized the legal effect of the stay in order to follow through on

Hoch's threat to prejudice the Tribe's compact rights while the appeal was pending, on the afternoon of August 17, 2010, Pauma filed an emergency motion requesting that the motions panel either clarify or reconsider its prior decision in light of Ciau's letter. WD, Ex. 86. On August 23, 2010, the motions panel granted Pauma's emergency motion in full by retroactively denying the State's motion to stay, and directing the court clerk "to calendar the hearing on the appeal from the preliminary injunction order before the next available panel." *Id.* at Ex. 88.

The hearing for the appeal occurred on November 2, 2010, and the merits panel subsequently released an order preserving the injunction and remanding the case to this Court for "reconsideration of all four of the *Winter* factors… and to re-analyze them in light of our recent decisions in" *Alliance for Wild Rockies v. Cottrell,* 2010 WL 3665149 (9th Cir. 2010) and *Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty v. Cal.,* 618 F.3d 1066 (9th Cir. 2010) ("*Colusa III*"). *Pauma II*, Docket No. 64. Following a conference call with this Court on or about December 15, 2010, Pauma now files this motion for summary judgment requesting a permanent injunction due to the inadequacy of the legal and lesser equitable remedies, or, in the alternative, rescission of the 2004 Amendment and an extension on the 1999 Compact for the duration of unreasonably denied compact rights. Additionally, Pauma also requests restitution for all previously-paid 2004 Amendment fees and, given the attempted actions on appeal, an order declaring that this Court retains exclusive jurisdiction to determine whether either party has committed a "material breach" justifying the termination of the particular agreement.

III. LEGAL STANDARDS FOR SUMMARY JUDGMENT, THE GOVERNING LAW, AND POTENTIAL REMEDIES

According to Rule 56(a), "[s]ummary judgment is proper if, viewing the evidence in the light most favorable to the nonmoving party, there is no genuine issue as to any material fact and the moving party is clearly entitled to judgment as a matter of law." *Munoz v. Mabus*, __ F.3d __, 2010 WL 5263131, *2 (9th Cir. 2010). The "purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 587 (1986) (citation omitted). "Only disputes over facts that may affect the outcome of the suit under the governing law will properly preclude entry of summary judgment." *Cheetham v. Swanson*, 2010 WL 5207588, *1 (D. Mont. 2010) (citing *Anderson v. Liberty*

Lobby, Inc., 477 U.S. 242, 249-50 (1986) ("*Liberty Lobby*")).

In order to demonstrate a genuine triable issue of material fact, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 587. "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is 'no genuine issue for trial.'" *Id*. This situation arises when the documentary evidence is "so one-sided" that the moving party "must prevail as a matter of law." *Liberty Lobby,* 477 U.S. at 251-52. In other words, if the non-moving party's evidence is "merely colorable" or "not significantly probative," the court may grant summary judgment. *Id.* at 249-50.

With respect to the applicable law for reviewing Pauma's claims, after the conclusion of the briefing on the preliminary injunction, the Ninth Circuit announced that "[g]eneral principles of federal contract law govern [tribal-State] [c]ompacts, which were entered pursuant to IGRA." *Colusa III*, 618 F.3d at 1073. "In applying federal contract law, [courts] are guided by general principles of contract law and the Restatement [Second of Contracts]." *First Interstate Bank of Idaho v. Small Bus. Admin.,* 868 F.3d 340, 342 (9th Cir. 1989); *Seagate Tech. LLC v. Dalian China Express Int'l Corp.,* 169 F.Supp.2d 1137, 1142 (N.D. Cal. 2001) ("[F]ederal contract law… places great weight on the Restatement,"… "in that it represents 'generally-recognized common-law principles of the subject matter area involved in the case.'"). However, State law may provide additional grounds for relief where there is no discernable conflict with federal law. *Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095, 1098 (9th Cir. 2006); *First Interstate Bank,* 868 F.3d at 343 n.3 ("We emphasize that our decision in no way limits the applicability of state law to federal contracts when relevant.").

After determining Pauma is entitled to summary judgment, this Court has the authority to rescind the 2004 Compact based on each one of the Tribe's claims, as is set forth in the subsequent sections. *See* Restatement (Second) of Contracts §§ 152, 153, 164, 265-66, and 178 (1981) ("Restatement").[3] Similarly, the Restatement vests the Court with the power to extend the length of the agreement for the seven-plus years of denied license rights, *id.* at ch. 6 int. note and § 158,[4] and to provide restitution for all previously-paid 2004 Compact fees. *Id.* at §§ 158, 376; 376; 272, 377; and 198-99.[5][6]

[3] The State counterparts for these sections are at Cal. Civ. Code §§ 1689(b)(1), (2), (4), (6).
[4] *See also Great Am. Ins. Co. v. Honeywell Int'l Inc.*, 2009 WL 5064478, *5 (W.D. Pa. 2009).
[5] For State counterparts, *see* Cal. Civ. Code § 1692.

However, if this equitable remedy is not fully adequate to compensate Pauma because of the 1999 Compact's bar on monetary damages, the substantial lapse of time that will necessarily accompany the conduct of two separate license draws, the quickly dwindling number of remaining licenses, and the threat of further wrongful actions by the State, this Court may simply modify the preliminary injunction to allow the Tribe to operate up to 2,000 machines pursuant to the financial terms of the 1999 Compact and transform it into a permanent one. The standard for a permanent injunction is essentially the same as that for a preliminary injunction except for the substitution of "actual success on the merits" for a "likelihood of success." *Winter,* 129 S.Ct. at 381. Specifically, the full test for a permanent injunction requires the plaintiff to show actual success on the merits, "that it has suffered an irreparable injury," "that remedies at law, such as monetary damages, are inadequate to compensate for that injury," "that considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted," and "that the public interest would not be disserved by a permanent injunction."[7] *Monsanto Co. v. Geerston Seed Farms*, __ U.S. __, 130 S.Ct. 2743, 2756 (2010).

IV. ARGUMENT

A. Pauma has Shown Actual Success on its Mutual and Unilateral Mistake Claims

The Restatement provides that, "where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of mistake under the rule stated in § 154." Restatement § 152(1). Thus, the three requirements for rescission due to a mutual mistake, whether of fact or law, are that the mistake relates to a "basic assumption on which the contract was made," has a "material effect on the agreed exchange of performances," and is "not one as to which the party seeking relief bears the risk." Restatement § 152 cmt. a.

The term "basic assumptions" means the mistake "must vitally affect the basis upon which the parties contract," 27 Williston § 70:12, such as by erroneously satisfying a condition precedent to one of the primary purposes of the agreement. *U.S. v. Pflueger*, 2007 WL 1876028, *3 (D. Haw. 2007). Here,

[6] *See* 26 Williston on Contracts § 68:4 (4th ed. 2010) ("Williston") ("[W]herever justice requires compensation to be given for property… rendered under a contract, and no remedy is available by an action on the contract, restitution of the value of what has been given must be allowed.").

[7] *Monsanto* subsumes the heightened analysis required by *Tanner Motor Livery, Ltd. v. Avis, Inc.,* 316 F.2d 804 (9th Cir. 1963). *See Dahl v. HEM Pharm. Corp.*, 7 F.3d 1399, 1403 (9th Cir. 1993).

the ability to operate 2,000 slot machines was an essential condition of Pauma's expansion plans with its developer, who fronted the prepayment fees for acquiring the majority of the licenses needed to reach this mark under the 1999 Compact. WD, Exs. 1, ¶¶ 2-6; 46-55; 59-61; MD, ¶¶ 3-6.

In light of the unsuccessful December 19th license draw, a bevy of principals involved in the development discussions identified obtaining the remaining 950 machines that should have been available through the license pool process of the 1999 Compact, and which were a necessary prerequisite for the proposed permanent facility, as the reason for the amendment.[8] During a 2006 deposition in connection with *Pauma v. Caesars Entm't,* Civ. Case No. 847406 (Cal. Sup. Ct. filed on May 13, 2005), then-Pauma Chairman Chris Devers stated the Tribe was "looking at any means that we could get our gaming licenses up to 2,000 to accommodate our project," a figure that the attorneys for the developer refer to in the deposition transcript as the "magic number." WD, Ex. 51. Discussion about the significance of attaining this "magic number" arose repeatedly in the deposition and trial testimony of then-Pauma Vice Chairperson Patricia Dixon, who stated under oath at trial that the negotiations with the development company "were based on the idea of 2,000 machines," and that "it was always understood we needed the 2,000 machines to achieve our goals." *Id*. at Ex. 50. On cross examination, Dixon affirmed that Pauma's former counsel told the Tribe that amending to reach the 2,000 machine mark was a necessary prerequisite for any development plan to proceed, including the one herein discussed, because the Tribe had been "frozen out of more draws from the pool." *Id.* at Ex. 50; *see* WD, Ex. 49 (Pauma's former counsel testifying that the discussions focused on "the maximum of 2,000 machines" and "the only way that you could get additional machines was to negotiate an amended compact with the [State]"). The deposition testimony of current Pauma Chairman Randall Majel, brainchild of the development project, corroborates all these comments, stating "to do a larger facility… we had to secure and know that we were going to have 2,000 machines," and that amending the compact was necessary because "the license pool [was] over." *Id.* at Ex. 53; *see* MD, ¶¶ 3-6.

The parties' uniform focus on attaining 2,000 machines comes not only from this tribal testimony but the testimony of the point person for the developer, provisions in the draft development agreement, the press release announcing the deal, and multiple local news articles pertaining to the

[8] The elicitation dates occurred when *Colusa* was resolved in the State's favor.

status of the partnership. WD, Exs. 52, 55, 59-61. In fact, this oft-repeated reason for amending became such local common knowledge that the Chairman of the neighboring Rincon tribe told the National Indian Gaming Commission in 2006 that Pauma, which still operated around 1,050 machines, "[was] probably going to go to 2,000" irrespective of the provisions in the 2004 Amendment superficially allowing for higher device counts. *Id.* at Ex. 18, p. 47:1-6. Despite receiving the alleged benefit of the unlimited machines under the 2004 Amendment, all of Pauma's post-amendment development plans remained focused on operating a permanent facility with 2,000 machines. *Id.* at Exs. 49-50, 54-58, 61-72. Pauma's adherence to this "magic number" has been so unwavering over the past seven years that even the State's expert witness in *Rincon* forecasted that the Tribe would only increase its device count to 2,000 machines after the successful completion of its most recent expansion plan. *Id.* at Ex. 17.

With this number in mind, after the unsuccessful December 19th license draw, Pauma directly communicated the need to reach the 2,000 machine level to the State, which informed the Tribe that it would need to amend the 1999 Compact if it wished to operate any machines above its then-existing device count of 1,050 because nothing remained within the corpus of the license pool. WD, Exs. 1, ¶¶ 3-4; 49; MD, ¶ 5. Pauma would not have consented to the 2004 Amendment but for this misrepresentation. *Id.* at Ex. 1, ¶ 3-5. Thus, the CGCC's interpretation of the license pool was both the condition precedent inducing renegotiations and the event that "vitally affected" the basis for the amendment, as Pauma would have avoided the entire process if the necessary licenses to reach 2,000 machines were available through the infinitely more economical license pool of the 1999 Compact.

As to this last point, the State's mistaken misrepresentation about the size of the license pool has materially affected the exchange of performances. The Restatement provides that "[t]he materiality of the effect on the agreed exchange will be determined by the overall impact on both parties." Restatement § 152 cmt. c. Thus, a plaintiff should show "that the exchange is not only less desirable to him but is also more advantageous to the other party." *Id.* As latter sections explain more thoroughly, the State benefited greatly from the mistake, receiving in excess of $29 million in new revenue sharing, precipitating $38 million in road improvements, and committing Pauma to a slew of regulations that far exceed those already required by the 1999 Compact. WD, Exs. 3, exs. A and B; 4, ex. 2; 14; 73.

In addition to being on the receiving end of these harms, Pauma also endured a lengthy nine

month waiting period until the ratification date of the 2004 Amendment, during which time the Tribe lost revenue on the 500 wrongfully-withheld licenses and witnessed its pending deal unravel after its developer merged with the management company for the neighboring Rincon tribe. WD, Exs. 1, ¶ 6; 61; 64-65. On top of all this, the financial terms of the 2004 amendment have prevented Pauma from realizing the benefit of either the original or amended bargain, as the Tribe has never exceeded 1,154 machines, or, more fundamentally, been able to continuously enjoy the revenue stream from the 950 additional machines that should have been available under the 1999 Compact. WD, Exs. 3, ex. A; 4, exs. 1, 2. Thus, quantifying the total harms inflicted by the mistake starts with the nearly $30 million in misdirected revenue and includes the seven-plus year deprivation of net win from the unaccounted portions of the wrongfully-denied and subsequently-resold machines numbered from 1,051 to 2,000.

No matter the counterarguments, this is simply not a situation where Pauma shoulders the risk of the State's unreasonable interpretation. A party bears the risk of mistake when: (a) "the risk is allocated to him by the agreement of the parties," (b) "he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient," or (c) "the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so." Restatement § 154. Here, the provisions of the 2004 Amendment make no mention of the propriety of the CGCC's interpretation let alone Pauma's express consent to adhere to the agreement if a federal court (or four) subsequently found the Commission remiss in reasonably interpreting and giving lawful effect to this State-drafted language. WD, Ex. 2, ex. B. Furthermore, the second criterion of "conscious ignorance" is not a factor because the CGCC fully-explained to Pauma its position, which was the law of the State and upon which the Tribe should have been able to reasonably rely given the Commission's special role and compact-imposed trustee duties. WD, Exs. 1, ¶¶ 3-4; 2, ex. A; 42; 48; MD, ¶ 4; *see Palo Alto Town & Country Vill. v. Lufthansa*, 2002 WL 1363868 (N.D. Cal. 2002) (the failure to discover facts only bars relief where it amounts to "gross negligence," *i.e.*, a failure to act in good faith and in accordance with reasonable standards of fair dealing (citing Restatement § 157)). Finally, consistent with the reasoning of its prior decisions, this Court should allocate the risk to the State because the present suit is "a problem of [its] own making," *see Quechan Tribe of Ft. Yuma Indian Reservation v. U.S. Dep't of Interior*, __ F.Supp.2d __, 2010 WL

5113197, *17 (S.D. Cal. 2010) (Burns, J.), that resulted from its unreasonable unilateral interpretation of language it principally, if not exclusively, drafted. *San Pasqual Band of Mission Indians v. Cal.,* Civ. Case No. 06-0988 LAB AJB (S.D. Cal. 2010), Docket No. 97, 13:19-20. *See U.S. v. Talley Def. Sys., Inc.*, 393 F.Supp.2d 964, 972 (D. Ariz. 2005). Therefore, Pauma can obtain relief from the financial terms of the 2004 Compact under federal law because of the existence of a mutual mistake.[9]

Similarly, unilateral mistake also supplies the grounds for relief. The Restatement provides that a contract is voidable by the mistaken party on the basis of unilateral mistake if the requirements of mutual mistake are satisfied and either: (a) "the effect of the mistake is such that enforcement would be unconscionable," or (b) "the other party had reason to know of the mistake or his fault caused the mistake." Restatement § 153. Here, the second requirement clearly exists, as the CGCC indisputably authored and implemented the unreasonable license pool opinion. WD, Exs. 25, 42, 45, 48.

As for the first requirement, unilateral mistake's unconscionability analysis departs from the traditional inquiry under Section 208 by only requiring a showing of substantive unconscionability, as "the unconscionability does not appear at the time the contract is made." Restatement § 153 cmt. c; *compare Donovan v. RRL Corp.*, 26 Cal. 4th 261, 292 (2001) ("In ascertaining whether rescission is warranted for a unilateral mistake… substantive unconscionability often will constitute the determinative factor, because the oppression and surprise [for procedural unconscionability] ordinarily results from the mistake…."). A plaintiff can typically accomplish this by presenting "not only the position he would have been in had the facts been as he believed them to be but also the position in which he finds himself as a result of the mistake." Restatement § 153 cmt. c. As the materiality section explains, the CGCC's misrepresentation of the license pool deprived Pauma of the revenues from 500 licenses; prevented the Tribe from expanding its gaming floor to a level commensurate with those of the surrounding facilities during an era of significant economic vitality; and resulted in the 2004 Amendment, which instituted a $38 million barrier to expansion, increased the annual revenue sharing fees for operating 1,050 machines by 2,460%, and made the machines numbered above 1,050 virtually cost-prohibitive. WD, Exs. 3, ¶¶ 10-11 and ex. A; 4, ¶¶ 17, 26-30 and ex. 2. If the CGCC had

[9] Though incorporating distinct standards, the State counterparts of mutual mistake of fact and law also allow for relief. *See* Cal. Civ. Code §§ 1577-78.

reasonably interpreted the license pool provision, Pauma would likely be operating 2,000 machines inside of a permanent facility. WD, Exs. 1, ¶¶ 2-3, 13; 3, ¶ 15; 4, ¶ 32; MD, ¶¶ 3-5. Instead, seven years after the fact, Pauma still operates 1,050 machines inside of a now-denarian temporary tent structure, has redirected an additional $30 million in revenue to the State, will soon have to commence $38 million in road construction projects, and would be on the hook for at least $148.7 million more in revenue sharing fees over the next twenty years but for the powers of this Court. WD, Exs. 1, ¶ 10; 2, ex. B, § 4.3.3; 3, ¶ 9 and ex. B; 4, ¶ 31; 72. The sheer magnitude of these liabilities proves that the mistake has resulted in an unconscionable fall out warranting relief under federal law for unilateral mistake of fact.[10]

B. Pauma has Shown Actual Success on its Claims Based on Misrepresentation

Inherent within Pauma's generalized claims for mistake of fact and law is a claim for relief based on misrepresentation. 27 Williston § 70:1 ("Indeed, the term mistake may be used to cover all kinds of mental error, *however induced.*"); Restatement ch. 7 int. note ("Because a misrepresentation *induces* the recipient to make a contract while under a mistake, the rules on mistake stated in Chapter 6 also apply to many cases of misrepresentation."); *see Merced County Mut. Fire Ins. Co. v. Cal.*, 233 Cal.App.3d 765, 771-72 (1991); *Crocker-Anglo Nat. Bank v. Kuchman*, 224 Cal.App.2d 490, 496-97 (1964).

According to the Restatement, "[i]f a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient." Restatement § 164(1). This language establishes that the three requirements for voiding a contract based on a non-fraudulent misrepresentation are materiality of the misrepresentation, inducement, and justified reliance. *Lyddon v. Geothermal Props.*, 933 F.2d 1014, 1991 WL 80640, *1 (9th Cir. 1991) (unpublished) (citing Restatement § 164(1)). As for the first requirement, "[a] misrepresentation is material if it would be likely to induce a reasonable person to manifest his assent, or if the maker knows that it would be likely to induce the recipient to do so." *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1137 (9th Cir. 2000) (quoting Restatement § 162(2)). Here, the misrepresentation deprived Pauma of the revenue from five hundred additional machines, which would have totaled $22.76 million per year using the Tribe's per machine net win for 2003 and

[10] Pauma also satisfies the State's unique unconscionability rules. *Donovan,* 26 Cal. 4th at 291; *see Nagrampa v. Mailcoups, Inc.,* 469 F.3d 1257 (9th Cir. 2006); *Dotson v. Amgen, Inc.*, 181 Cal.App.4th 975 (2010) (procedural); *Pokorny v. Quixtar, Inc*., 601 F.3d 987 (9th Cir. 2010) (substantive).

substantially more once the Tribe's expansion plans came to fruition. WD, Exs. 3, ex. A; 4, ex. 2. A reasonable person would have undoubtedly manifested assent to execute an amendment if he knew this route was the only practicable way to recapture these lost revenues as well as the hundreds of millions more for machines 1,601 to 2,000. The materiality is even more evident in this situation because the State had reason to know Pauma was in a pending deal with a developer to expand the size of its gaming operation, as the Tribe's license request indicates the developer was fronting the roughly million dollar prepayment for the December 19th license draw and retained the right to recoup any unused funds. *Id.* at Exs. 47-48, 59-60. Thus, the misrepresentation was both objectively and subjectively material.

In regard to the second factor, "[a] misrepresentation induces a party's manifestation of assent if it substantially contributes to his decision to manifest his assent." *Safeco Ins. Co. of Am. v. Young*, 896 F.2d 555, 1990 WL 16468, *6 (9th Cir. 1990) (unpublished) (quoting Restatement § 167). "The materiality of the misrepresentation is a particularly significant factor in this determination." Restatement § 167 cmt. b. "It is assumed, in the absence of facts showing the contrary, that the recipient attached importance to the truth of a misrepresentation if it was material, but not if it was immaterial." *Id.* Again, three members of Pauma's past and present leadership testified at points in time when the license pool dispute was resolved in the State's favor that the Tribe amended solely to obtain the 950 additional machines required by its developer that were allegedly no longer available through the license pool process. WD, Exs. 49-51; 53; *see* MD, ¶ 5. Therefore, the CGCC's unreasonable interpretation of the license pool was the driving force behind the manifestation of assent to execute the Amendment.

Finally, the requirement of justified reliance "is usually met unless, for example, the fact to which the misrepresentation relates is of only peripheral importance to the transaction or is one as to which the maker's assertion would not be expected to be taken seriously." Restatement § 164 cmt. d. Here, the unreasonable interpretation of the license pool was binding and inflexible State law that the CGCC and Governor admittedly wielded to convince tribes to renegotiate their compacts. WD, Ex. 25; MD, Ex. B. Their admissions indicate the opinion was both the impetus for and the gravamen of the 2004 Amendment, and thus qualifies as a statement the State objectively expected Pauma to have taken seriously. Furthermore, the evidence in the prior sections shows that the misrepresentation was of fundamental importance to Pauma's participation in the renegotiations, which focused solely upon

attaining the means to operate 2,000 machines. WD, Exs. 1, ¶¶ 2-6; 49-55; 59-60; MD, ¶¶ 3-6. The direct causal connection between the CGCC's interpretation and the emergence and consummation of the renegotiations satisfies the reliance requirement, thus allowing this Court to craft appropriate relief.

C. Pauma has Shown Actual Success on its Frustration of Purpose and Failure of Consideration Claims

Federal contract law also provides relief where a "change in circumstances makes one party's performance virtually worthless to the other, frustrating his purpose in making the contract." *De La Motte v. Hilgedick*, 956 F.2d 274, 1992 WL 37366, *5 (9th Cir. 1992) (unpublished) (quoting Restatement § 265). The rules pertaining to existing and supervening frustration of purpose largely parallel one another because it is "sometimes difficult to characterize a situation as involving either existing or changed circumstances, as, for example, where a judicial decision is handed down after the time that the contract was made giving an unanticipated interpretation to a statute enacted before that time." Restatement § 266 cmt. a. If the frustrating event arises after the execution of the contract, the aggrieved party's duty to perform is discharged where his "principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made." Restatement § 265.

One can view the frustrating events in the present matter as the controlling decisions in the *Colusa* litigation, the latest presently-holding that the license pool contains 8,050 more licenses than the CGCC unreasonably claimed. *See Colusa III,* 618 F.3d at 1081. The release of both *Colusa II* and *Colusa III* rendered the 2004 Amendment superfluous by confirming the 1999 Compact should have provided for sufficient licenses to squelch Pauma's primary reason for renegotiating. WD, Exs. 1, ¶¶ 2-6; 49-55; MD, ¶¶ 3-6; *see* Restatement § 265 cmt. a ("[F]rustration must be so severe that it is not fairly to be regarded as within the risks… assumed under the contract.").

While the State may argue the non-occurrence of the license pool decisions was not a basic assumption of the 2004 Amendment because the risk of a *Colusa III*-type opinion was foreseeable, *see U.S. v. Winstar Corp.*, 518 U.S. 839, 905 (1996), only one of the three license pool suits existed as of the June 21, 2004 execution date of the compact, and that suit was filed approximately two weeks earlier and generally known around the Pauma reservation as an anti-competitive measure undertaken by the

neighboring tribe whose management company just jeopardized Pauma's development plans by merging with the Tribe's developer. *Rincon II*, 602 F.3d at 1024 n.6; WD, Ex. 1, ¶¶ 7, 8; 61; 64-65. But, "the mere fact that the event was foreseeable does not compel the conclusion that its non-occurrence was not such a basic assumption." Restatement § 265 cmt. a. "Determining whether the non-occurrence of an event was or was not a basic assumption involves a judgment as to which party assumed the risk of its occurrence." Restatement ch. 11 int. note. As the mistake section explains, the State assumed the risk of a latter contrary interpretation of the license pool because it unilaterally crafted the flawed opinion denying preexisting compact rights that required correction. 30 Williston § 77:111 ("A material failure of performance, including defective performance… operates as the non-occurrence of a condition.").

The alternate way of viewing the frustrating event is the CGCC's interpretation of the license pool. "Where at the time a contract is made, a party's principal purpose is substantially frustrated without his fault by a fact of which he has no reason to know and the non-existence of which is a basic assumption on which the contract is made, no duty of that party to render performance arises, unless the language or circumstances indicate the contrary." Restatement § 266(2). Aside from the temporal distinction, the only unique element for this subtype of frustration is the existence of a "fact of which the aggrieved party has no reason to know." *Id*.

If the pertinent fact is the CGCC's defective interpretation of the license pool, there was no reason for Pauma to know of this fact because the State held the CGCC out as the special regulatory body responsible for unilaterally interpreting imprecise language it drafted that had already produced substantial disagreement among peripheral State actors. WD, Ex. 41; *Colusa II,* 629 F.Supp.2d at 1010-12. Besides, the 1999 Compact safeguards against this sort of unreasonable interpretation. Specifically, Section 4.3.2.2(a)(3) of the 1999 Compact defines the pool administrator as the trustee, a capacity the Sides accountancy assumed and the CGCC inherited through Executive Order D-31-01, a directive stating the Commission would administer "the gaming device license draw under Section 4.3.2.2(a)(3)." WD, Exs. 2, ex. A; 40-44. The language within this Section should provide reasonable assurances that the definitive interpretation of the license pool would give meaningful effect to the beneficiary tribes' license rights and the beneficiary non-compacting tribes' concomitant rights to receive $1.1 million annually from the RSTF, and not a separate fund set aside to assist local communities. WD, Exs. 2, ex.

A; 19. Thus, the presence of this unknowable fact warrants relief on the basis of existing frustration.[11]

D. Pauma has Shown Actual Success on its Illegal Taxation Claims

IGRA restricts a state's receipt of compact-based revenue sharing to fees "that are necessary to defray the costs of regulating such activity" or otherwise "directly related to the operation of gaming activities." 25 U.S.C. § 2710(d)(3)(C)(iii), (vii). Revenue sharing that falls outside the ambit of this language is subject to IGRA's statutory bar preventing a state from imposing any "tax, fee, charge, or other assessment upon an Indian tribe… to engage in a class III activity." 25 U.S.C. § 2710(d)(4). This rule conforms to the time-honored principle that a state's taxing power does not generally reach a tribe's reservation-based enterprises. *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995). The Ninth Circuit recently held that avoiding Section 2710(d)(4)'s prohibition requires that revenue sharing be (a) "for uses directly related to the operation of gaming activities [ ]," (b) "consistent with the purposes of IGRA," and (c) "not 'imposed' because it is bargained for in exchange for a meaningful concession." *Rincon II*, 602 F.3d at 1033. The final prong of this test necessitates an inquiry into "the nature of both the fees demanded and the concessions offered in return" to ensure the deal resulted from good faith negotiations. *In re Indian Gaming Related Cases,* 331 F.3d 1094, 1112 (9th Cir. 2003).

The only other case involving the legality of general fund revenue sharing to have come before the courts of this circuit is *Rincon II*, the facts of which largely parallel the present ones. Following the State's unreasonable constraint of the license pool, the State offered Rincon an amendment admittedly similar to Pauma's. *Rincon v. Schwarzenegger*, 2008 WL 6136699, *3 (S.D. Cal. 2008) ("*Rincon I*"). By its terms, the proposal would have given Rincon the right to operate 900 additional machines (400 of which were unreasonably withheld) on top of its then-existing machine count of 1,600 until 2045 with the added protection of an allegedly "enhanced" form of exclusivity eclipsing the previously-conferred benefits of Proposition 1A. *Rincon I*, 2008 WL 6136699 at *12-14. In exchange, the State's general fund would receive 10% of Rincon's net win for the year preceding the expected amendment plus 15% of the average net win from all the new machines. *Id.* at *14. Analyzing the exchange, the Ninth Circuit held that general fund revenue sharing was neither directly related to gaming nor consistent with the

[11] While Restatement Sections 265-66 only incidentally deal with failure of consideration, State law allows for rescission, here, for failure of consideration. *See* Cal. Civ. Code § 1689(b)(2), (4).

purposes of IGRA because, in part, the federal statutory scheme makes no mention of supporting the State's general economic interests. *Rincon II*, 602 F.3d at 1034. Additionally, when viewed alone or taken together, the State's concession were insufficient to validate the proposed exchange, as the provision of gaming rights like additional time and machines did not justify general fund revenue sharing and "enhanced" exclusivity conferred "no significant additional economic advantages over… the statewide exclusivity [the tribe] already enjoys." *Rincon II*, 602 F.3d at 1038-39.

The present exchange is even more abhorrently one-sided than the proposal in *Rincon*. The 2004 Amendment provides the same form of "enhanced exclusivity," essentially 950 re-conferred machines, and fifteen fewer years in which to use them. WD, Exs. 1, ¶¶ 2-6; 2, ex. B; 49-55; 59-60; MD, ¶¶ 3-6. For this, the State received 20.03% of Pauma's considerably smaller net win for the year preceding amendment into the general fund and RSTF, plus general fund fees on new machines ranging from 18.7 to 54.9% of the per machine net win for 2003, and 13.7 to 40.2% of the corresponding 2009 figure. WD, Exs. 3, ex. A; 20; *see Pauma I*, Docket No. 29. Despite their enormity, these percentages do not reflect each year's proportionate share of the $38 million in amendment-mandated road expenditures. All told, the revenue sharing fees, which represent a 2,460% increase from those of the 1999 Compact and have left the Tribe in little better position than the spring of 2000, qualify as an illegal tax according to the analysis of the *Rincon* Court and the present Assistant Secretary of Indian Affairs, who recently rejected a *new* State compact on the basis of the 15% general fund revenue sharing term. *Id.*, at Ex. 16.

E. Pauma has Shown Irreparable Injury Absent Permanent Injunctive Relief

Accompanying the clear showing of success on the merits is a similar showing of irreparable injury in the absence of permanent injunctive relief. "Typically, monetary harm does not constitute irreparable harm… *because the injury can later be remedied by a damage award*." *Cal. Pharmacists Ass'n*, 563 F.3d at 851-52 (9th Cir. 2009) (emphasis in the original). However, if the Eleventh Amendment immunizes a state from paying damages in a federal court proceeding, the financial harm is irreparable irrespective of the availability of future state court relief. *U.S. v. State of N.Y.*, 708 F.2d 92, 93 (2d Cir. 1983). The reason for this is, "in deciding whether a federal plaintiff has an available remedy that would make injunctive relief unavailable, federal courts may only consider the available federal legal remedies." *Id*. (citing, e.g., *Petroleum Exploration, Inc. v. Comm'r*, 304 U.S. 209, 217 &

n.8 (1938)). Among the multitude of harms inflicted by the State's misconduct is the loss of revenue on the 500 wrongfully-withheld licenses and the subsequent cost-prohibitive machines ranging from 1,051 to 2,000 under the 2004 Amendment, neither of which is compensable through the available federal equitable remedies of rescission and restitution. Moreover, even without the monetary damages-bar of Section 9.4(d) of the 1999 Compact, the prospect of trying to recover these monies from the debt-saddled State is enough for Pauma's damages to remain irreparable. WD, Ex. 31; *Tri-State Generation & Transmission Assoc., Inc. v. Shoshone River Power, Inc.,* 805 F.2d 351, 355 (10th Cir. 1986).

But the full scope of irreparable harms is not limited to these monetary damages. The loss of a "unique or fleeting business opportunity," *Starlight Sugar, Inc. v. Soto*, 112 F.3d 330, 332 (1st Cir. 1997), and other "intangible injuries, such as damage to… goodwill, *Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991), can also constitute irreparable injuries. Here, not only did the State's misrepresentation chill the lawful expansion of an ephemeral quasi-monopoly for at least nine months during an era of considerable economic vitality, *see Tom Doherty Assocs., Inc. v. Saban Entm't, Inc.,* 60 F.3d 27, 37-38 (2d Cir. 1995), but it would soon require the Tribe to expend a substantial portion of the remaining time under the 1999 Compact participating in two separate draws to acquire the necessary licenses to reach the 2,000 machine mark should the Court elect rescission. WD, Exs. 26-27. Not to mention, multitudes of public documents released during the past year raise serious concerns whether sufficient licenses will even remain within the license pool by the time Pauma is legally and financially able to apply for them, as the CGCC has conducted two license draws since the commencement of this suit and numerous 1999 compact tribes recently expressed plans to substantially expand their gaming operations. *Id.* at Exs. 15, 26-28, 77-85 (disclosing projects, in part, by the Big Sandy Rancheria, which initially sought 1,650 licenses from the first post-*Colusa II* draw; the Dry Creek Rancheria; Tule River; and the nearby La Jolla Band of Luiseno Indians). On top of all this, through the first post-*Colusa II* license draw, both the neighboring Rincon and nearby San Pasqual tribes increased their machines counts to the 2,000 cap of the 1999 compacts, which invariably resulted in lost patronage and goodwill at the amendment-strangled Casino Pauma. *Id.* at Exs. 26-27.

About this last point, irreparable injury also arises where the threatened loss of revenue and jobs creates the "prospect of significant interference with [tribal] self-government." *Seneca-Cayuga Tribe of*

Okla. v. Okla., 874 F.2d 709, 716 (10th Cir. 1989). The consequences of the State's misrepresentation include the aforementioned lost revenues, the termination of 15.1% of Casino Pauma's workforce, and Pauma's present reality of operating without a financial safety net and struggling to cover the health insurance costs of the general membership. MD, ¶¶ 7-9; PD, ¶ 2 and Ex. A. These problems will soon exacerbate upon the realization of the replacement cost for the casino's temporary tent structure and the triggering of Pauma's $38 million in MOU obligations. WD, Exs. 1, ¶ 10; 3, ex. B; PD, ¶ 3. All the while, rescission and its consequent multiple license draw requirement would be incapable of swiftly ameliorating the situation. WD, Ex. 2, ex. A; 26-27; 45; MD, ¶ 9. Thus, the State's misrepresentation produced numerous irreparable injuries, none of which the non-injunctive remedies can alone cure.

F. The Remedies at Law are Inadequate

The adequate remedy at law analysis largely parallels that for irreparable harm. *MGM Studios, Inc. v. Grokster, LTD.*, 518 F.Supp.2d 1197, 1219 (C.D. Cal. 2007) (citing *Lewis v. S.S. Baune*, 534 F.2d 1115, 1124 (5th Cir. 1976) ("Often times the concepts of 'irreparable injury' and 'no adequate remedy at law' are indistinguishable in the context of a permanent injunction.")). Explained fully, "[i]t has been well said that the legal remedy must not only be plain, speedy, and adequate, but as adequate to meet the ends of justice as that which the restraining power of equity is competent to grant." *Harris Stanley Coal & Land Co. v. Chesapeake & O. Ry. Co.*, 154 F.2d 450 (6th Cir. 1946); *accord Boyce's Ex'rs. v. Gundy*, 28 U.S. (3 Pet.) 210, 215 (1830).

While a permanent injunction would help recompense Pauma for years of denied compact rights, neither the absent legal remedy nor the lesser equitable remedies could accomplish the same in a speedy or adequate manner. As for the first of these factors, staging two license draws will take considerable time, as each pre-draw period can span months. WD, Exs. 26-27, 45. The administrative process would run substantially longer if the pool contains insufficient licenses and Pauma has to reappear before this Court for alternate relief. In regard to the second factor, there are two situations where a legal remedy is inadequate. The first is where, as here, damages are unavailable in the federal proceeding, and obtaining them would require a "multiplicity of suits," or may be impossible. *MGM Studios*, 518 F.Supp.2d at 1219-20. The second is where "there is the possibility of future wrongful conduct." *Gathright v. City of Portland*, 482 F.Supp.2d 1210, 1214 (D. Or. 2007) (citing *Orantes-Hernandez v. Thornburgh*, 919 F.2d

549, 564 (9th Cir. 1990)). While there is no legal remedy of which to speak, increasing the machine count following the revival of Section 4.3.2.2 of the 1999 Compact would require petitioning the CGCC for additional licenses, the same agency that disavowed its trust duties, released an unreasonable interpretation of the license pool, and, most recently, threatened adverse action against Pauma's compact rights during the interlocutory appeal if the Tribe did not make an illegitimate same-day payment of $2.45 million. WD, Exs. 2, ex. A; 24-25; 86-88. Considering these transgressions, a permanent injunction is a far more adequate than the other available options, including rescission.

G. The Balance of Hardships Tips Decidedly in Pauma's Favor

The principal argument advanced to this point against the issuance of injunctive relief is that doing so would alter a negotiated compact and thereby exacerbate the State's budget woes by removing millions in tribal revenue from the general fund. *See Pauma II,* Docket No. 7, 4:17-19, 18:13-17; *but see* WD, Ex. 31 (enjoined general fund fee represents 0.00634%, i.e. six-thousandths of one percent, of the State's 2010 revenues and transfers); *compare* WD, Exs. 3, ex. A; 4, exs. 1-2 (2009 revenue sharing payment represented 45.68% of Tribal budget). However, a party has no right to earn money by violating the law, *see Storer Commc'ns, Inc. v. Mogel,* 625 F.Supp. 1194, 1203 (S.D. Fla. 1985), such as, here, through the unlawful taxation of a separate sovereign. *See* Cal. Const. art. IV, § 19(f) (establishing that the State can negotiate compacts "with federally recognized Indian tribes on Indian lands in California *in accordance with federal law*"); 25 U.S.C. § 2710(d)(4), *supra* § IV(D).

The State's cries of budgetary harm falter for two additional reasons. The first is that the chronic effects of the 2004 Amendment have left Pauma struggling to provide basic services for its members, including health insurance, and the Ninth Circuit has "repeatedly recognized that individuals' interest in sufficient access to health care trumps the State's interest in balancing its budget." *Dominguez v. Schwarzenegger*, 596 F.3d 1087, 1098 (9th Cir. 2010). *See* WD, Ex. 10 (Indian Health Service data showing Indians have a "life expectancy… 4.6 years less than" other ethnicities and "die at higher rates… from tuberculosis (500% [ ]), alcoholism (519% [ ]), diabetes (195% [ ])… and suicide (72% [ ])"). More fundamentally, the second reason is that the State brought these so-called harms upon itself by misleading Pauma about available contract rights to its considerable advantage. *See Quechan*, 2010 WL 5113197 at *16 ("Defendants held most of the power… While the Court is sympathetic to the

problems Defendants face, the fact that they are now pressed for time and somewhat desperate… is a problem of their own making and does not weigh in their favor." (Burns, J.)). Underscoring the rule in *Storer*, the *Quechan* opinion should go to show that the subsequent deprivation of revenue obtained via a material misrepresentation should qualify as a non-event rather than a legally cognizable harm.

What the State forgets is that the Ninth Circuit recognized IGRA as "possibly the only route open to many tribes to escape a century of poverty." *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1253 (9th Cir. 1995). This is certainly the case for Pauma, which is left to hope it can generate sufficient gaming income to satisfy its remaining operational debts, run its government, and cover the basic needs of a membership with a 67% unemployment rate. WD, Ex. 7; MD, ¶¶ 7-9; PD, ¶¶ 2-3. For the reasons previously discussed, accomplishing these goals will be easier with a permanent injunction than the administratively-fraught 1999 Compact. In terms of this balance of equities analysis, "the injunction promotes the paramount federal policy that Indians develop independent sources of income and strong self-government." *Seneca-Cayuga*, 874 F.2d at 716.

H. The Public Interest Supports Issuing the Injunction

This "Court looks to the statutes enacted by Congress rather than to its own analysis of desirable priorities" when determining the public interest. *Quechan*, 2010 WL 5113197 at *17 (Burns, J.); *see Enyart v. Nat'l Conference of Bar Exam'rs, Inc.,* __ F.3d __, 2011 WL 9735, *12 (9th Cir. 2011). In enacting IGRA, Congress sought to address state regulatory concerns about Indian gaming while simultaneously promoting tribal economic development, self-sufficiency, and strong government, *see* 25 U.S.C. § 2701(4), by enabling tribes to operate gaming facilities on their lands in an environment free from State taxation. 25 U.S.C. § 2710(d)(4). These provisions essentially codify the "strong" public interest in "having more economic opportunities, less unemployment, and higher per capita income [for] members of [tribes]." *Crow Creek Sioux Tribal Farms, Inc. v. I.R.S.*, 684 F.Supp.2d 1152, 1161 (D.S.D. 2010). Yet, due to the State's misrepresentation, ten years of gaming has done little to achieve these ends for Pauma, which relies exclusively on the declining revenues from an aging temporary facility to afford health care for an at risk membership with a 67% unemployment rate. WD, Exs. 1, ¶¶ 6-13; 7; MD, ¶¶ 7-9; PD., ¶ 3. Given this, the public interest supports making amends for the lost years of compact rights by turning the preliminary injunction permanent.

V. CONCLUSION

For the foregoing reasons, Pauma respectfully requests that this Court grant summary judgment and enter an order: (1) declaring that the size of the license pool for the 1999 compacts is consistent with the *Colusa III* Court's determination, and the State is collaterally estopped from arguing otherwise; (2) making the preliminary injunction permanent, or, in the alternative, rescinding the 2004 Amendment and extending the length of the 1999 Compact by the duration of denied license rights; (3) declaring that this Court retains jurisdiction to exclusively determine whether either party has committed a material breach justifying termination of the relevant agreement; (4) declaring that the State must restitute all previous 2004 Amendment revenue sharing payments; and (5) granting such other relief as this Court deems just and proper.

RESPECTFULLY SUBMITTED this 24th day of January, 2011

THE PAUMA BAND OF MISSION INDIANS

By: */s/ Kevin M. Cochrane*

Cheryl A. Williams
Kevin M. Cochrane
caw@williamscochrane.com
kmc@williamscochrane.com
WILLIAMS & COCHRANE, LLP
525 B Street, Suite 1500
San Diego, California 92101
Telephone: (619) 793-4809