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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

REPLY REGARDING 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

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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*
EOD	*Declaration of William R. Eadington in Support of Defendants' Opposition*
Ex. ___	*Evidence attached to the Declaration of Kevin M. Cochrane in Support of Reply*
IGRA	*Indian Gaming Regulatory Act*
LOD	*Declaration of T. Michelle Laird in Support of Defendants' Opposition*
MD	*Declaration of Randall Majel*
MRD	*Declaration of Randall Majel in Support of Reply*
Opposition / Opp.	*State Defendants' Opposition to Plaintiff's Motion for Summary Judgment; Alternate Motion to Continue Proceedings (Fed. R. Civ. P. 56(c) & F))*
Pauma / Tribe	*Plaintiff, the Pauma Band of Mission Indians*
Restatement	*Restatement (Second) of Contracts*
State	*Defendants, the State of California, California Gambling Control Commission ("CGCC"), and Governor Arnold Schwarzenegger and his successors in interest*
SRD	*Declaration of Lawrence R. Stidham in Support of Reply*
WD	*Declaration of Cheryl A. Williams*

I. INTRODUCTION AND RE-EXPLANATION OF APPLICABLE LAW

Every single piece of analysis within the Opposition rests upon a hodgepodge of state cases and federal opinions applying state contract law to purely state matters. The proffered explanation for the structure of the brief is that the Ninth Circuit recently stated that it relies equally on California law and Ninth Circuit decision when deciding compact matters because it "discerns no difference between" the two. Opp., 9:26-28. However, this is a gross misreading of the *Colusa* opinion, which clearly states that "[g]eneral principles of federal contract law govern the Compacts, which were entered pursuant to IGRA." *Colusa,* 618 F.3d 1066, 1073 (9th Cir. 2010). The only reason the *Colusa* court applied state law to the specific issue in question was the State's uncontested argument on appeal that the use of such law is permissible where there is no dissimilarity with federal law. Exs. 1, 33:1-3; 2-3. Yet, even with this premise in place, the *Colusa* court still rendered a decision making it unmistakably clear that federal contract law is the principal tool for resolving compact issues.

Despite the game it is now playing, the State fully understands the impact of this holding, as the same deputy attorney general who litigated the *Colusa* appeal relied on the Restatement when moving to dismiss the complaint in the only post-*Colusa* compact-related litigation. Ex. 4, p. 5. If nothing else, the State could have at least made a nominal effort to explain the congruence of their state cites with federal law to eliminate the concern of trying to fit twenty-five pages of apples-to-apples analysis into a ten page reply. While a meaningful discussion of the merits of each of Pauma's federal claims under state law is presently impossible, the Tribe will attach its pre-*Colusa* briefing from the motion to dismiss and preliminary injunction, offer to file a supplemental brief, and, more importantly, show that state and federal law are entirely different creatures with respect to the claims at issue. Exs. 5-7.

Regarding this last point, federal relief based upon misrepresentation only requires proof of materiality, inducement, and justified reliance.[1] Restatement § 164. Yet, the alleged equivalent under state law incorporates an additional scienter element and thus triggers the heightened pleading standard

[1] Pauma did not waive its right to seek relief based on misrepresentation, which is an integral component of the complaint-alleged mistake claims. *See* 5 Fed. Prac. & Proc. Civ. § 1216 (3d ed. 2010) ("The pleader is entitled to considerable latitude regarding the mode of stating a claim for relief, provided the pleading gives reasonable notice of the claims that are being asserted. The basic aim of the federal rules as expressed in Rule 1 [is] to secure the just, speedy, and inexpensive determination of every lawsuit..."). On top of which, recognizing the claim does not cause any prejudice since the evidence of the misrepresentation is public, judicially noticeable, and within the State's possession.

of Rule 9(b). Opp., 16:1-6. Similarly, the State claims an opinion as to a method of calculation cannot serve as the basis for a mistake of fact. Opp., 11:12-17. But, the Restatement explains that reliance on another's opinion is justified, regardless of the topic, when there is a relationship or trust or confidence between the two or the recipient "reasonably believes that, as compared with himself, the person whose opinion is asserted has special skill, judgment, or objectivity with respect to the subject matter." Restatement § 169. These rules promote the idea that a beneficiary should be able to rely on the opinion of its trustee, who has an independent responsibility to "apply to an appropriate court for instructions" if there is "reasonable doubt… about the proper interpretation of [ ] trust provisions." Restatement (Third) of Trusts §§ 71, 71 cmt. a (2010). These two examples should clearly evidence the tremendous divide between federal and state law, thus rendering the latter inapplicable.[2]

II. THE STATE FAILED TO PRODUCE EVEN A SCINTILLA OF EVIDENCE

The ultimate objective of summary judgment is to determine whether there exist "any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250 (1986). While a court views the proffered evidence in the light most favorable to the non-moving party, "a mere scintilla of evidence or some 'metaphysical doubt as to the material facts' will not suffice to defeat summary judgment." *Scribner v. Worldcom, Inc.*, 249 F.3d 902, 907 (9th Cir. 2001).

After scouring the files of both "negotiations,"[3] the CGCC's financial records, the record of the *Pauma v. Harrah's* litigation, every corner of the internet, and reaching out to former state agents, the sole evidence offered by the State to delay summary judgment is an unsubstantiated comment from one of the actors involved in the renegotiations and a piece of undated and unattributed puffery on the tribal website concerning the post-amendment Foxwoods development plans; a snippet that likely arose years after the fact and happens to conflict with the terms of the actual development plan and the weight of

[2] Additional differences are legion. Regarding the State's claim that Pauma has not shown a mistake about an existing fact under state law, *see* Restatement ch. 6 int. note; *Atlas Corp. v. U.S.,* 895 F.2d 745, 751 (Fed. Cir. 1990) (explaining an existing fact is a "fact whose existence the parties recognized and about which they could reach agreement," like the State's misrepresentation about the license pool). In response to the claim that the mistake was not material under state law because it did not go to the "essence of the object in view," *see* Restatement § 152 cmt. c.

[3] The State's evidence confirms it never communicated the license pool issue to Pauma prior to enacting the 1999 compact despite explaining the meaning of numerous other provisions. LOD, Exs. H-J.

public disclosures concerning the project. MRD, ¶¶ 2-3, 7. Neither of these pieces of evidence creates a genuine factual issue, though. MRD, ¶¶ 2-7; SRD, ¶¶ 3-7. The basic assumption underlying the mistake is still the unavailability of licenses to get to the 2,000 machine count, a subject about which every party involved in the Pauma/Caesars venture has testified. Exs. 52-54; WD, Exs. 49-54; *see* Restatement § 152. The inducement prong of the misrepresentation test still only requires that the offender's actions *substantially* contribute to the manifestation of assent. Restatement § 167. And the failure of consideration doctrine under state law, as there is no precise federal counterpart, entails nothing more than a partial failure when the other party is at fault. Cal. Civ. Code § 1689(b)(2).

In respect to the illegal tax argument, the State has provided remarkably scant counter-evidence. When not speculating about tribal per capita payments or conflating economic and contract law theories, the State's economics expert Bill Eadington argues the revenue sharing fees of the 2004 Amendment are not actually taxes because Pauma voluntarily agreed to pay them just like a television network that purchased a license from the government. EOD, ¶ 21. This is a curious analogy for Eadington to select seeing that his home state of Nevada requires a casino to purchase an operating license in exchange for an annual tax payment of 6.75% of its net win into the state's general fund. Nev. Rev. Stat. §§ 463.0129, 463.160, 463.370. In Eadington's own words, a tax rate significantly higher than 6.75% would both dampen the ability to attract financial capital and raise concerns about survivability. Ex. 8-9. And yet, some of the smallest and presumably most vulnerable casinos on the Strip still make four times as much as Casino Pauma while paying less than half as much in taxes. Exs. 10-11. Considering the half-baked analysis, this Court should afford little if any weight to Eadington's declaration.

And while the *Rincon* court did refrain from expressing its views on any of the amended compacts, the language quoted by the State goes to the very heart of why the parties are here: Pauma's decision to agree to the financial terms of the 2004 Amendment was not an informed choice because the State resold preexisting rights to obtain 20.03% of the Tribe's net win and 76.86% of its net income. WD, Ex. 4, ex. A. A sad day would occasion the federal courts if they could provide relief against a bad faith proposal but lack the capability to cure the executed exemplar simply on the basis of its existence, particularly where the collective business experience of the enacting tribe constituted working a single citrus grove just thirteen months prior to the State's misrepresentation. WD, Ex. 89. Venturing a guess,

the "inconsistent" Assistant Secretary would probably agree with this assessment now that he has rejected two more revenue sharing compacts since the filing of the Motion, making sure to clarify that no number of additional machines warrants a 15% revenue sharing fee in California.[4] Exs. 12-13.

III. CONTRACT REFORMATION IS NOT ONLY PERMISSIBLE BUT ENCOURAGED

The State claims that permanent injunctive relief would impermissibly reform the 2004 Amendment in violation of State common law. However, the vast discretion afforded by the properly-applied federal contract law permits federal courts to "draw" injunctive relief so as to do "complete justice to the extent that it is feasible." Restatement § 358 cmt. a; *Lemon v. Kurtzman,* 411 U.S. 192, 200-01 (1973) ("'The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mold each decree to the necessities of the particular case…' In equity, as nowhere else, courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests." (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329-30 (1944)). While injunctive relief should best effectuate the purposes for which the contract was made, it can be "on such terms as justice requires" and the eventual performance "need not be identical with that due under the contract." Restatement § 358(1); 25 Williston on Contracts § 67:30 (4th ed. 2010) ("[A] court [of equity] may order specific performance on the contract on terms different from those set forth in the contract where the court identifies equitable justifications, … [like] where doing so will remedy a harm caused by the unconscionable or inequitable conduct of one of the parties."). In fact, the Restatement mandates that a court award injunctive relief in spite of the terms of an agreement where the "denial of such relief would be unfair because it would cause unreasonable hardship or loss to the party seeking relief or to third persons." Restatement § 364(2).

Notwithstanding their leniency, these are simply the default rules that apply in the traditional contracting context where market participants voluntarily consummate a deal with the understanding that each retains the full arsenal of judicial remedies should the other party violate the terms of the agreement or falsely induce consent through a material misrepresentation. Obviously, the need for flexible remedial authority becomes even greater when the offending party is a governmental entity that limits the modes of redress by invoking its sovereign immunity from monetary damages.

[4] The Seminole Tribe operates over 12,200 machines at 7 of the 8 Indian casinos in Florida. Exs. 17-42.

This is one of the reasons the courts of the Federal Circuit, arguably the most experienced fora in analyzing contracts pursuant to federal law, promulgated rules for contract reformation against the oftentimes financially-insulated federal government. The first set of rules applies when there is a mutual mistake or a "mistake on one side and misrepresentation, whether willful or accidental, on the other." *Roseburg Lumber Co. v. Madigan*, 978 F.2d 660, 665 (Fed. Cir. 1992); *Nat'l Presto Indus., Inc. v. U.S.*, 338 F.2d 99, 111-12 (Ct. Cl. 1964) ("We are rightly admonished, in the region of mutual mistake, to seek just solutions… Reformation, as a child of equity, can mold its relief to attain any fair result within the broadest perimeters of the charter the parties have established for themselves." (citing 3 Corbin on Contracts § 597, p. 583, esp. n.6; § 605, pp. 640-42, ns. 94-95 (1960 ed.))). Even in cases of pure accident, the right to reformation arises if (1) "the contract did not place the risk of mistake upon the party seeking reformation," and (2) "the party against whom reformation is sought would have agreed to the reformation, had it known the correct facts from the outset." *Id.* at 668. If the appropriate size of the license pool was understood in late 2003, acting lawfully, the State would have undoubtedly consented to receive the benefit of the slew of labor, environmental, consumer protection, and local regulations of the injunction-revised 2004 Amendment in exchange for nothing more than an eight year extension on the existing agreement. Should this Court agree, then such a finding would also comport with the Federal Circuit's belief that any increased financial burden resulting from a mutual mistake should be apportioned according to the respective culpabilities of the parties in causing the mistake. *George Sollitt Constr. Co. v. U.S.*, 64 Fed.Cl. 229, 297-98 (Fed. Cl. 2005); *Nat'l Presto Indus.*, 338 F.2d at 107.

Moreover, the finding would further comport with the rules for the second type of reformation, which allow a court to correct a contract provision that is "written in violation of a law or regulation enacted for the benefit of prospective contractors." *LaBarge Prods., Inc. v. West*, 46 F.3d 1547, 1552 (Fed Cir. 1995) ("In cases in which a breach of law is inherent in the writing of the contract, reformation is available despite the contractor's initial adherence to the contract provision later shown to be illegal."); *Beta Systems, Inc. v. U.S.*, 838 F.2d 1179, 1185 (Fed. Cir. 1988) (holding, if the government violated applicable regulations in setting an economic index incorporated into a contract, "the government cannot, by law, benefit from it" and the contract must be reformed); *see also* Restatement § 178. As has been repeated *ad nauseum*, Section 2710(d)(4) protects hopeful gaming tribes from the

imposition of any "tax, fee, charge, or other assessment" by a state during the compacting process in order to conduct such gaming activities. Yet, the revenue sharing fees of the 2004 Amendment amount to 20.03% of Pauma's net win for the year preceding amendment and 76.86% of the net income for this same period. WD, Ex. 4, ex. A. Seeing the State's material misrepresentation regarding the size of the license pool induced Pauma to mistakenly consent to these financial terms, this Court should exercise its equitable injunctive powers to make the agreement a legal and accurate reflection of the parties' objective pre-amendment expectations in light of the facts as they should have existed.

IV. RESTITUTION AND PRE- AND POST- JUDGMENT INTEREST ARE PERMITTED

While a state generally has sovereign immunity from restitution claims in federal court under the Eleventh Amendment, that immunity is "a personal privilege which it may waive at pleasure." *In re Lazar,* 237 F.3d 967, 976 (9th Cir. 2001); *see Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267 (1997) (stating the Eleventh Amendment "enacts a [waivable] sovereign immunity from suit, rather than a non-waiveable limit on the Federal Judiciary's subject matter jurisdiction"). Any such waiver "must unequivocally evidence the state's intention to subject itself to the jurisdiction of the federal court" with respect to the claim at issue. *Hill v. Blind Indus. & Servs. of Md.*, 179 F.3d 754, 758 (9th Cir. 1999). However, the waiver need not be express and can arise from conduct "that is incompatible with an intent to preserve that immunity." *Indus. Comm'n of Ariz. v. Bliemeister*, 296 F.3d 858, 861 (9th Cir. 2002) (quoting *Hill*, 179 F.3d at 758). This means a waiver can exist in some general act of the state, such as a constitutional or statutory provision. 13 Fed. Prac. & Proc. Juris. § 3524.4 (3d ed. 2010). It also means a waiver can arise during litigation if a state fails to raise the defense "early in the proceedings" so as to provide "fair warning to the plaintiff." *Demshki v. Monteith,* 255 F.3d 986, 989 (9th Cir. 2001) (quoting *Hill,* 179 F.3d at 761); *see Hill,* 179 F.3d 754, 758 (9th Cir. 1999) ("To permit a defendant to litigate the case on the merits, and then belatedly claim Eleventh Amendment immunity to avoid an adverse result, would work a 'virtual fraud on the federal court and opposing litigants." (citation omitted)).

Here, the State waived its sovereign immunity from restitution in at least three different manners. The first is by enacting Government Code § 98005, the effective part of which confers federal courts with the ability to fully remedy a State's failure to negotiate an amendment in good faith by stating:

[T]he State of California also submits to the jurisdiction of the courts of the United States

> in any action brought against the state by any federally recognized California Indian tribe asserting any cause of action arising from … the state's refusal to enter into negotiations concerning the amendment of a Tribal-State compact to which the state is a party, or to negotiate in good faith concerning the amendment….

Cal. Gov. Code § 98005; *Hotel Employees & Rest. Employees Int'l Union v. Davis,* 21 Cal.4th 585, 615 (1999) (recognizing the validity of the above-quoted portion of Section 98005). The meaning of good faith in the statutory text presumably mimics that for the identical term mentioned in Section 2710(d)(3)(A) of IGRA, which the Ninth Circuit interprets as requiring an examination of the exchange of concessions with a watchful if not cynical eye on any State request for general fund revenue sharing. Applying this standard removes any doubt that parlaying a material misrepresentation into a 2,460% increase in one's financial haul without providing anything of meaningful substance in return is not an action undertaken in good faith. Similarly, the State's conduct would be equally as remiss according to the good faith rules of the National Labor Relations Act, which specifically look at "[t]he previous relations of the parties, antecedent events explaining behavior at the bargaining table, and the course of negotiations… ." *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 155 (1956) (Frankfurter, J., concurring).

Moreover, the State also waived its immunity from restitution in Section 9.4(a)(2) of the 1999 Compact, which states the parties "waive any immunity… they may have" so long as neither makes a claim for "any monetary damages." WD, Ex. 2, ex. A. "The plain, common or normal meaning of language will be given to the words of a contract unless the circumstances show that in a particular case a special meaning should be attached to them." 11 Williston on Contracts § 32:3 (4th ed. 2010); *see Idaho v. Shoshone-Bannock Tribes,* 465 F.3d 1095, 1099 (9th Cir. 2006). "The word 'damages' has a commonly understood meaning: it generally connotes payment in money for a plaintiff's losses caused by the defendant's breach of duty, and is something different from equitable restitution." *U.S. v. Balistrieri,* 981 F.2d 916, 928 (7th Cir. 1993); *see, e.g., U.S. v. Minor*, 228 F.3d 352, 355 (4th Cir. 2000) ("In suing for the return of currency, plaintiff seeks restitution of 'the very thing' to which he claims an entitlement, not damages in substitution for a loss…" and "the fact that the government cannot restore to plaintiff the specific currency that was seized does not transform the motion into an action at law."); *U.S. v. Bellecci*, 2008 WL 802367, *7 (E.D. Cal. 2008); 11-55 Corbin on Contracts § 55.6 (2009 rev. ed.) ("There is overwhelming judicial authority for a narrower definition of the terms 'damages' so as to

exclude restitution, and it is here adopted."); Dobbs Hornbook on Remedies § 4.1 (2d ed. 1993) ("As we have seen, restitution is not damages; restitution is a restoration required to prevent unjust enrichment.").

Reading the prohibitory language of Section 9.4(a)(2) so as to exclude equitable restitution would harmonize the text with the recognized meaning of similarly worded provisions in two separate federal statutes: the Administrative Procedures Act ("APA") and the Fair Housing Act ("FHA"). Section 702 of the APA confers federal jurisdiction over final agency actions so long as the appellant does not seek "money damages." 5 U.S.C § 702. Explaining the meaning of this term, the Supreme Court stated that the mere fact that a judicial order requires the payment of money is not enough to classify the relief as "money damages," a compensatory-in-nature phrase that excludes remedies like the receipt of back pay or "the recovery of specific property or monies." *Bowen v. Mass.*, 487 U.S. 879, 893 (1988). Subsequent lower courts have construed *Bowen* to allow plaintiffs to advance declaratory relief claims to receive reimbursement for expenses "the government should have paid all along." *LAN Chile v. Sale*, 865 F.Supp. 971, 997 (E.D.N.Y. 1994); *see MCorp v. Clarke*, 755 F.Supp. 1402, 1411 (N.D. Tex. 1991); *Nat'l Assoc. of Counties v. Baker*, 842 F.2d 369, 373 (D.D.C. 1988). The natural corollary of this rule is that declaratory relief can also require a government to repay monies that it should never have received in the first place.

This prevailing understanding of the meaning of "money damages" under the APA is akin to that for "monetary damages" under the FHA. According to the original version of this latter statute, the Attorney General could recover the full gamut of equitable remedies, including "any items which are appropriately the subject of equitable restitution," even though the statutory text made no mention of such a right. *U.S. v. Long,* 537 F.2d 1151, 1155 (4th Cir. 1975). When Congress amended the FHA to allow the recovery of "monetary damages," the legislative change was of no consequence to the availability of restitution. *U.S. v. Rent Am. Corp.*, 734 F.Supp. 474 (S.D. Fla. 1990). Rather, according to the "common sense" definition of the term, the amendment merely expanded the reach of the statute to permit actions for "actual damages, damages for emotional distress, and punitive damages." *Id.* at 482. As the definitions under the APA and FHA make clear, interpreting "monetary damages" in Section 9.4(a)(2) to exclude restitution would bring the compact into accord with the universally understood meaning of the term throughout federal jurisprudence.

The interpretation would also vindicate the parties' shared meaning of the language, as the State expressed its own belief months before the commencement of this suit that restitution would likely be an available remedy in this proceeding. WD, Ex. 35 ("[A]ssuming Pauma's suit for rescission could overcome the State's sovereign immunity, any financial restoration obligation would not rest solely upon the State, but could require the Band to disgorge all the benefits it has received from the ability to operate class III gaming under its compact.").[5] Additionally, it would further vindicate the State's constitutionally-stated public interest in ensuring the governor negotiate compacts in accordance with federal law, including the no-taxation clause of Section 2710(d)(4) of IGRA. Cal. Const. art. IV, § 19(f); *cf. Cooper v. FAA*, 622 F.3d 1016, 1034 (9th Cir. 2010) (stating the scope of a federal waiver "can be ascertained only by reference to the congressional policy underlying the statute").

But apart from these statutory and contractual waivers, the State also waived its sovereign immunity from restitution by litigating this case for eighteen months without even inferentially raising the defense. Again, the State mentioned the potential availability of restitution more than two months before the filing of this suit. WD, Ex. 35. While Pauma expressly requested restitution in its complaint, the State did not defend on the basis of sovereign immunity even though it received an extension of time in which to answer. Docket Nos. 1, 22:21-22; 6. Only now after filing a motion to dismiss, opposing the preliminary injunction, attending the injunction hearing whereat this Court candidly expressed its views about the merits and the availability of restitution, requesting discovery, conducting a full interlocutory appeal wherein Pauma reemphasized the need for restitution, and failing to move for summary adjudication on the issue upon remand does the State contend that restitution is unavailable. *See In re Bleimeister*, 296 F.3d 858 (9th Cir. 2002) (finding the state waived sovereign immunity after court announced its preliminary leanings on the merits); *Levine v. Fair Political Practices Comm'n*, 222 F.Supp.2d 1182, 1187 (E.D. Cal. 2002) (finding waiver where state actively participated in preliminary injunction briefing). The belated invocation of the defense signifies that the State has made the sort of "tactical decision to delay," *Johnson v. Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d 1011, 1022 (9th

[5] While the State believes it is entitled to counter-restitution for the perceived benefits of the 2004 Amendment, there is simply nothing for Pauma to disgorge since the Tribe has always operated at machine counts that should have been available under the 1999 Compact. *See* Restatement § 370.

Cir. 2010), that "undermines the integrity of the judicial system[,] … wastes judicial resources, burdens jurors and witnesses, and imposes substantial costs upon the litigants." *Hill*, 179 F.3d at 756.

Thus, with restitution remaining a completely viable remedy, Pauma can and should receive pre- and post- judgment interest on the heightened 2004 Amendment revenue sharing fees from their original payment dates forward. 28 U.S.C. § 1961 (providing for post-judgment interest); *Hopi Tribe v. Navajo Tribe*, 46 F.3d 908, 922 (9th Cir. 1995) (stating that "prejudgment interest is plainly a remedy currently available in federal district courts"); *Frank Music Corp. v. MGM, Inc.,* 886 F.2d 1545, 1552 (9th Cir. 1989) ("For the restitutionary purposes of this remedy to be served fully, the defendant generally should be required to turn over to plaintiff not only the profits made from the use of his property, but also the interest on these profits, which can well exceed the profits themselves.").

Succinctly stated, two oft-repeated considerations justify such an award. The first is the undisputed fact that the State authored and implemented the unreasonable interpretation of the license pool that resulted in the deprivation of over $30 million in tribal income. *See Frank Music Corp.,* 886 F.2d at 1550 ("[A] persuasive consideration… is the relative equities between the beneficiaries of the obligation and those upon whom it has been imposed." (quoting *Rodgers v. U.S.*, 332 U.S. 371, 373 (1947)). The second consideration is the express purpose of IGRA, which seeks to promote tribal economic independence through Indian gaming in a manner that will prevent rogue states from stymieing these federal objectives by monetarily hijacking the compacting process. *See Golden State Transit Corp. v. City of L.A.*, 773 F.Supp. 204, 208 (C.D. Cal. 1991) ("Under federal case law, when a federal statute is silent on prejudgment interest, the Court should fashion a federal rule which grants or denies prejudgment interest based on the *congressional purpose* of the particular statute." (citing *Rodgers*, 323 U.S. at 373 (1947) (emphasis in original)). As for the applicable interest rate, this Court should apply the rate strewn throughout the 2004 Amendment (*i.e.,* the local rate), which the State has assessed against Pauma multiple times, rather than the deflated and bordering on non-existent Treasury Bill rate. WD, Ex. 2, ex. B, §§ 4.3.1(d), 4.3.3(d)(iii), 4.3.3(e) (setting the interest rate at "1.0% per month or the maximum permitted by state law… whichever is less"); Ex. 14; *see Blanton v. Anzalone,* 813 F.2d 1574, 1576 (9th Cir. 1987) (stating a district court can depart from the Treasury Bill rate if equity demands, and his decision to do so will not be disturbed if supported by "substantial evidence").

V. CONCLUSSION

For the foregoing reasons, Pauma respectfully requests that this Court grant the Tribe's pending motion for summary judgment and craft appropriate relief.

RESPECTFULLY SUBMITTED this 14th day of March, 2011

THE PAUMA BAND OF MISSION INDIANS

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