KAMALA D. HARRIS
Attorney General of California
SARA J. DRAKE
Senior Assistant Attorney General
RANDALL A. PINAL
Supervising Deputy Attorney General
T. MICHELLE LAIRD
Deputy Attorney General
State Bar No. 162979
NEIL D. HOUSTON
Deputy Attorney General
State Bar No. 168058
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 322-5476
Fax: (916) 327-2319
E-mail: Neil.Houston@doj.ca.gov
Attorneys for Defendants State of California, California Gambling Control Commission and Governor Edmund G. Brown Jr.

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, **v.** **STATE OF CALIFORNIA; CALIFORNIA GAMBLING CONTROL COMMISSION, an agency of the State of California; and EDMUND G. BROWN JR., as Governor of the State of California,** Defendants.	3:09-cv-01955-CAB-MDD **STATE DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT [Fed. R. Civ. Proc. 56]** Date: November 30, 2012 Time: 2:00 p.m. Courtroom: 2 Judge: The Honorable Cathy Ann Bencivengo **ORAL ARGUMENT REQUESTED SUBJECT TO COURT APPROVAL** **Action Filed: 9/4/2009** **Trial Date: None**

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INTRODUCTION

Defendants State of California, Governor Edmund G. Brown Jr. and the California Gambling Control Commission (State Defendants) hereby move the Court for an order granting summary judgment in their favor as to the entirety of Plaintiff Pauma Band of Mission Indian's (Pauma) First Amended Complaint (FAC) filed on September 9, 2011 [Doc. No. 130]. This motion is brought pursuant to Federal Rule of Civil Procedure 56,[1] on the ground that State Defendants are entitled to judgment as a matter of law upon undisputed facts stated herein as to Claims for Relief One through Four, Eleven and Twelve, and upon undisputed facts stated in State Defendants' concurrently filed opposition to Pauma's motion for partial summary judgment as to Claims for Relief Five through Ten, and Thirteen through Seventeen.

In 1999 and 2000, approximately 60 California Indian tribes, including Pauma, entered into separate, but identical, bilateral compacts with the State pursuant to the Indian Gaming Regulatory Act,[2] which prescribed the manner in which the signatory tribes could conduct class III gaming[3] on their respective Indian lands in California (these compacts are referred to collectively as the 1999 Compact). One of the State's primary objectives during the negotiation of the 1999 Compact was to regulate the growth of class III gaming in California. (1999 Compact, Preamble ¶ F.) The 1999 Compact specifies the maximum number of slot machines signatory tribes (1999 Compact Tribes) may, both individually and in the aggregate, operate, and provides that, aside from certain baseline allotments, slot machines may only be operated by 1999 Compact Tribes pursuant to licenses obtained through a specified "draw" process from the aggregate number of licenses available. (1999 Compact, § 4.3.2.2.) The number of licenses available under the 1999 Compact is specified in 1999 Compact section 4.3.2.2(a)(1) and is

[1] Unless otherwise indicated, all references to a "Rule" are to the Federal Rules of Civil Procedure.

[2] 18 U.S.C. §§ 1166-1168; 25 U.S.C. §§ 2701-2721 (IGRA).

[3] "Class III gaming" is an IGRA term. The 1999 Compact permits signatory tribes to conduct the following forms of class III gaming: the operation of Gaming Devices (slot machines); any banking or percentage card game; and certain devices and games that are authorized under state law to the California State Lottery. (1999 Compact, § 4.1.)

generally, and in this memorandum, referred to as the License Pool. The size of the License Pool at certain points in time is one of the key issues in this case.

This case is vastly simpler than Pauma would have the Court believe. Fourteen of Pauma's seventeen claims for relief in the FAC are either wholly, or mostly, based on a faulty underlying premise—that the judicial expansion of the License Pool that occurred in 2010[4] operates retroactively to rewrite history. Under Pauma's revisionist view, long past actions by the Gambling Control Commission (Commission) and the State have been made wrongful by this relatively recent judicial decision. But, as will be shown below, Pauma's view is inconsistent with the history of the litigation of the meaning of the terms of the 1999 Compact, and with the law of this circuit. Fourteen of Pauma's seventeen claims are either explicitly or implicitly based upon a retroactive application of the judicial expansion of the License Pool that occurred in 2010. No court has ever applied the judicial expansion of the License Pool retroactively.

In this case, Pauma asserts many legal theories and an overarching and erroneous conspiracy theory in an effort to shift the financial burden of its own risky business decisions and bad luck onto the people of the State of California. State Defendants urge the Court to look beyond Pauma's hyperbolic posturing and speculative conclusions of fact, and to instead consider the theories under which the Ninth Circuit Court of Appeals has permitted litigation regarding the size of the License Pool to go forward, and the limitations that have been imposed on the relief granted in those cases. State Defendants also request that the Court consider the legal and factual defects in Pauma's claims that are addressed in State Defendants' opposition to Pauma's motion for partial summary judgment, filed concurrently herewith.

For the reasons explained below, the district courts faced a unique problem when tribes first began to challenge the Commission's administration of the 1999 Compact, and the Ninth Circuit solved it in a way that, as a matter of law, precludes the retroactive application of the

[4] *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. California*, 618 F.3d 1066 (9th Cir. 2010) (*Colusa II*), in which the appellate court's de novo interpretation of the 1999 Compact yielded a license pool consisting of 40,201 licenses, but otherwise affirmed *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. California*, 629 F.Supp.2d 1091 (E.D. Cal. 2009) (*Colusa*). Pauma erroneously refers to *Colusa* as "*Colusa I*."

judicial expansion of the License Pool. This fact alone is fatal to fourteen of Pauma's seventeen claims in this action. On the basis of the undisputed facts and argument provided below, State Defendants are entitled to summary judgment as to those fourteen claims. For other reasons that are provided in State Defendants' opposition to Pauma's motion for partial summary judgment, State Defendants are entitled to summary judgment as to the entirety of the FAC.

STANDARD FOR GRANTING SUMMARY JUDGMENT

"[T]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. Proc. 56; *see California v. Campbell*, 138 F.3d 772, 780 (9th Cir. 1998). If the nonmoving party has the burden of proof at trial, the moving party only needs to show "that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In this case, Pauma would have the burden at trial of establishing that the License Pool consisted of more than 32,151 licenses at the times of the acts and omissions complained of in the FAC. Those alleged acts and omissions took place in 2002, 2003, and 2004. Accordingly, to prevail on summary judgment, State Defendants need only show that there is an absence of admissible evidence to support Pauma's contentions that the License Pool, as matters of fact and of law, consisted of more than 32,151 licenses at those times.

Pauma appears to contend that a cross-movant necessarily concedes that the case is appropriate for summary disposition. (Pl.'s Mem. Supp. Mot. Summ. J. [Doc. No. 197] at 20.) However, the primary authority Pauma cites, *Fair Housing Council of Riverside County, Inc. v. Riverside Two*, 249 F.3d 1132 (9th Cir. 2001), does not support this assertion and instead confirms the Ninth Circuit principle that the occurrence of cross-motions, with both sides asserting an absence of disputed facts, "does not vitiate the court's responsibility to determine whether disputed issues of material fact are present." *Id.* at 1136. Moreover, State Defendants' cross-motion as to fourteen of Pauma's claims is based on the existence of a fatal flaw in only one of several required elements of each claim, e.g., lack of proof of a mistake or misrepresentation, or the lack of a basis at a proper point in time upon which find a breach of an alleged fiduciary duty. To the extent indicted in State Defendants' opposition to Pauma's motion for partial

summary judgment, disputed issues of material fact do exist as to other elements of Pauma's claims, and preclude granting summary judgment in favor of Pauma in the event the Court denies State Defendants' cross-motion.

STATEMENT OF FACTS

The facts needed to establish that State Defendants are entitled to judgment as a matter of law as to fifteen of Pauma's seventeen claims are simple, few, and not reasonably subject to dispute. These facts are recited below. For the sake of brevity, and because it is not necessary to this cross-motion, State Defendants have not repeated the full factual background of the case here. For a full factual background, State Defendants refer the Court to the statement of facts included in State Defendants' concurrently filed opposition to Pauma's motion for partial summary judgment, and incorporate that statement here by this reference.

In 1999 and 2000, approximately sixty federally recognized Indian tribes in California, including Pauma, entered into the 1999 Compact. *Colusa II*, 618 F.3d at 1070. From the State's perspective, a fundamental objective of the 1999 Compact was to embody the State's sovereign interest "in regulating the growth of Class III[5] gaming activities in California." (1999 Compact Preamble ¶ F, Decl. of Neil D. Houston (Houston Decl.) **Ex. a** at 2.) This reflects the purposes of IGRA, one of which is to permit balancing the legitimate interests of the State with those of tribes wishing to conduct class III gaming. *See In re Indian Gaming Related Cases*, 331 F.3d 1094, 1097 (9th Cir. 2003). The State's interest in regulating the expansion of class III gaming was later reflected in Governor Davis's charge to the Commission in Executive Order D-31-01, which included the duty to "ensure that the allocation of machines among California Indian Tribes does not exceed [the] allowable number of machines as provided in the Compacts, and shall determine whether the machine license draws complies with the limitations of the Tribal-State Gaming Compacts." (Exec. Order No. D-31-01, Houston Decl. **Ex. b** at 2.) Among the terms of the 1999 Compact was a provision that established a cap on the number of Gaming Devices the 1999

[5] Class III gaming under the 1999 Compact consists of Gaming Devices (slot machines), banking and percentage card games, and certain lottery games. (1999 Compact §§ 2.6 & 4.1, Houston Decl. **Ex. a** at 3, 5.)

Compact Tribes could, both individually and in the aggregate, operate within the State. (1999 Compact § 4.3.2.2(a)(1), Houston Decl. Ex. a at 7.)

On June 19, 2002, the Commission adopted an interpretation of section 4.3.2.2(a)(1) of the 1999 Compact that established 32,151 as the size of the License Pool. *Colusa II*, 618 F.3d at 1071. (Commission Minutes (Jun. 19, 2002) & Ex. A, Houston Decl. **Ex. c** at 3, 11-15.) Thereafter, the Commission conducted license draws and issued licenses to applicant 1999 Compact Tribes whenever licenses remained and were thus available from the License Pool. *Colusa*, 629 F.Supp.2d at 1120.

On October 25, 2004, the Cachil Dehe Band of Wintun Indians of the Colusa Indian Community (Colusa), after receiving fewer licenses than it had requested from a license draw, filed an action against the State in the Eastern District of California in which it sought, among other things, a declaration that the License Pool consisted of no less than 62,000 licenses. (Colusa Complaint ¶ 46, Houston Decl. **Ex d** at 14.) On May 16, 2006, the district court dismissed Colusa's complaint on Rule 19 grounds for failure and inability to join all other 1999 Compact Tribes. (Mem. & Order, Houston Decl. **Ex. e** at 19.) Colusa appealed the dismissal. The similar complaint of the San Pasqual Band of Mission Indians (San Pasqual), was also dismissed under Rule 19 for failure and inability to join all the other signatories to the 1999 Compact. (Order Granting Mot. Dismiss 2d Am. Compl., Houston Decl. **Ex. f** at 21.)

On August 8, 2008, the Ninth Circuit reversed and remanded Colusa's case for further proceedings. *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. California*, 547 F.3d 962 (9th Cir. 2008) (*Colusa I*). *San Pasqual* resumed after *Colusa I* was issued, and eventually resulted in a determination that the License Pool consisted of 42,700 licenses. (Order Granting San Pasqual's Req. Decl. Relief, Houston Decl. **Ex. g** at 2.) *San Pasqual* was ultimately dismissed in light of the Ninth Circuit's decision in *Colusa II* in 2010. (Order of Dismissal, Houston Decl. **Ex. j**.)

After remand, on April 21, 2009, the district court in *Colusa* issued an interlocutory order on the parties' dispositive motions. *Colusa*, 629 F. Supp. 2d 1091. In addition to ruling that the License Pool consisted of 42,700 licenses, the district court granted summary judgment in favor

of the State on Colusa's claim that the Commission had breached the 1999 Compact by refusing to conduct license draws when asked to do so by Colusa in 2006 and 2007, stating that:

> Plaintiff [Colusa] has failed to present any evidence that defendants failed to promptly conduct a draw, either sua sponte or by request, when it had available licenses. Rather, the undisputed evidence demonstrates that the Commission held draws promptly after licenses became available. While defendants were mistaken in their belief that no licenses were available, the ambiguities that led to this mistake have been resolved through this order. As such, Colusa's purported injury is both hypothetical and speculative.

Colusa, 629 F. Supp. 2d at 1120. On August 19, 2009, the district court entered a partial final judgment, which incorporated the April 21, 2009 Order. (Untitled (Doc. No. 127), Houston Decl. **Ex. h.**) Neither the August 19, 2009 entry of judgment, nor the April 21, 2009 Order provided any form of retroactive relief. *Id*. The only specific relief granted by Judge Damrell in his August 19, 2009 order entering partial final judgment was an order that: "[w]ithin forty-five (45) days of the entry of judgment pursuant to this Order, defendants shall schedule and conduct a draw of all available gaming device licenses, in accordance with the court's April 22 Order, and in which all eligible Compact Tribes may participate." (*Id.* at 11.) Two weeks after the entry of judgment in *Colusa*, Pauma filed this action on September 9, 2009. [Doc. No. 1.] The State appealed the portion of the *Colusa* judgment that declared that the License Pool consisted of 42,700 licenses, and the portion extending relief to non-party 1999 Compact Tribes. (Notice of Appeal, Houston Decl. **Ex. i**.)

On August 20, 2010, the Ninth Circuit issued its decision on the State's appeal, affirming the district court's ruling, but modifying the size of the License Pool based on its own de novo interpretation of the 1999 Compact that yielded a License Pool consisting of 40,201 licenses. *Colusa II*, 681 F.3d at 1079, 1081. To date, no court has applied a judicial enlargement of the License Pool retroactively to render any prior act or omission by State Defendants wrongful.

I. AS A MATTER OF FACT AND LAW, THE LICENSE POOL CONSISTED OF 32,151 LICENSES FROM JUNE 19, 2002 UNTIL AUGUST 19, 2009, THUS VITIATING ANY CLAIM BASED ON THE EXISTENCE OF A LARGER POOL DURING THAT PERIOD.

The 1999 Compact consists of a number of separate, but materially identical, bilateral compacts between the State and individual Indian tribes. *Colusa II*, 618 F.3d at 1069. In 1999 and 2000, approximately sixty federally recognized Indian tribes in California, including Pauma, entered into the 1999 Compact. *Id.* at 1070. (FAC ¶ 35.) Among the terms of the 1999 Compact was a limitation on the total number of Gaming Devices that the 1999 Compact Tribes may, in the aggregate, operate within the state. (1999 Compact, § 4.3.2.2(a)(1), Houston Decl. **Ex. a** at 7.)

The size of the License Pool under section 4.3.2.2(a)(1) of the 1999 Compact is a term shared by all 1999 Compact Tribes, and to function properly, it must apply equally to all. *Colusa II*, 618 F.3d at 1084. Accordingly, any litigation that may cause a change in the size of the License Pool has the potential to affect all 1999 Compact Tribes. *Colusa I*, 547 F.3d at 971-72.) Prior to the *Colusa I* decision in 2008, this circumstance presented a problem for any tribe wishing to challenge the Commission's adoption, in 2002, of 32,151 as the size of the License Pool—the inability of such a tribe to join all the other 1999 Compact Tribes in the action due to the tribes' sovereign immunity. This resulted in the dismissal, by the district courts on Rule 19 grounds, of the challenges that were brought to the Commission's 32,151 number. Colusa's 2004 complaint was dismissed in the Eastern District (Mem. & Order, Houston Decl. **Ex. e**.) San Pasqual's 2006 complaint was dismissed in the Southern District (Order of Dismissal, Houston Decl. **Ex. f.**) The impasse ended in 2008, when the Ninth Circuit issued the *Colusa I* decision that allowed Colusa's action to go forward. *Colusa I*, 547 F.3d 962. The *Colusa* and *San Pasqual* cases resumed shortly thereafter.

In *Colusa I*, the Ninth Circuit solved the Rule 19 problem, which until then had prevented legal challenges concerning the size of the License Pool, by adopting a two-pronged strategy. First, the court established that the absent 1999 Compact Tribes were not indispensible parties to litigation that might result in an *enlargement* of the license pool because the only legal interest

implicated by such a change would be freedom from increased competition—an interest the court held to be insufficient to require joining all 1999 Compact Tribes in the action. *Colusa I,* 547 F.3d at 971-72. Second, recognizing that the absent tribes had legally cognizable interests in licenses that had already been issued, the court limited the relief the trial court could provide to prospective relief only, thus precluding any possibility of harm to the absent tribes. *Id.* at 974. The court specifically observed, "we emphasize that 'the scope of relief available [to Colusa] . . . is narrow." *Id.* (quoting *Makah Indian Tribe v. Verity*, 910 F.2d 555, 559 (9th Cir. 1990)). It is important to note that the court's analysis of Colusa's License Pool claim focused entirely upon a potential *expansion* of the pool, as that was the injunctive relief Colusa sought, and that the court's consideration of the absent tribes' interests in licenses that had already been issued arose in connection with Colusa's tier ranking claim, which had the potential to divest tribes of licenses. The court's observations concerning the latter are equally applicable to the size of the license pool.

Although the Ninth Circuit at that time had no reason to consider that the size of the License Pool might ultimately be determined by a de novo interpretation of section 4.3.2.2(a)(1) of the 1999 Compact, such an outcome was obviously a possibility, as amply illustrated by the four different de novo interpretations of the size of the License Pool that ensued after *Colusa I* made it possible for Colusa's, Rincon's, and San Pasqual's License Pool cases to go forward.[6] The inherent nature of a de novo interpretation is that it may yield an outcome different from any of the alternatives alleged by the parties. As to the size of the License Pool, a de novo interpretation of section 4.3.2.2(a)(1) of the 1999 Compact was not guaranteed to yield a number greater, or even equal to, 32,151—indeed, the number could have been smaller. In a context not involving consideration of the rights of non-party tribes to licenses that had already been issued, the Ninth Circuit, having reviewed the Eastern District's de novo interpretation of the size of the License Pool and having just issued its own de novo interpretation, observed that an adjudication could have made the License Pool either smaller or larger than the State had previously

[6] The fourth de novo interpretation was that of the Ninth Circuit in *Colusa II*.

maintained. *Colusa II*, 618 F.3d at 1084.

Necessarily predicated upon the principle of prospective relief, the Ninth Circuit remanded the *Colusa* case for further proceedings that eventually led to the district court's August 19, 2009 decision to award prospective relief only. Even in ruling against Colusa on its breach of compact claim, the district court in *Colusa* applied the enlarged License Pool prospectively only, even though a retroactive application in that instance would not have prejudiced any of the absent tribes. *Colusa*, 629 F. Supp. 2d at 1119-20.

On appeal, the Ninth Circuit affirmed the prospective relief the district court had granted in *Colusa*,[7] but with a modification of size of the License Pool based upon the Ninth Circuit's own de novo interpretation of section 4.3.2.2(a)(1) of the 1999 Compact. *Colusa II*, 618. F.3d at 1084-85. The court of appeals determined that the License Pool consists of 40,201 licenses (Colusa Number). *Id.* *Colusa II* now stands as the law of the circuit as to the size of the License Pool, expressly removing "any danger that California will face inconsistent interpretations regarding the size of the license pool . . . ." *Id*. at 1084. As the history of its origin makes clear, the Colusa Number, for good and necessary reasons, applies prospectively only.

Technically, the earliest judicial interpretation of the size of the License Pool occurred when the district court entered partial final judgment in *Colusa* on August 19, 2009. Because the judgment was not stayed pending the appeal, the district court's number (42,700) was in effect from August 19, 2009, until the Ninth Circuit issued the Colusa Number (40,201) on August 20, 2010. As a result of the way in which the judicial enlargement of the License Pool occurred, neither the 42,700, nor the 40,201 number may be applied retroactively, and the distinction between the two numbers is immaterial to this motion and to this case.

With respect to the result Pauma seeks in this action, it is noteworthy that when ruling on Colusa's claim that the Commission had breached the 1999 Compact by failing to conduct license draws in 2006 and 2007 on the ground that the pool had been exhausted and no licenses at that time remained—a claim necessarily requesting a retroactive application of the judicial expansion

[7] Colusa did not appeal the adverse ruling on its breach of compact claim.

of the License Pool, the district court observed:

> Colusa seeks to have this court interpret the Compact to address an injury that it has yet to suffer. Plaintiff has failed to present any evidence that defendants failed to promptly conduct a draw, either sua sponte or by request, when it had available licenses. Rather, the undisputed evidence demonstrates that the Commission held draws promptly after licenses became available. While defendants were mistaken in their belief that no license were available, the ambiguities that led to this mistake have been resolved through this order. As such, Colusa's purported injury is both hypothetical and speculative.

Colusa, 629 F. Supp. 2d at 1120. On appeal, the Ninth Circuit, after observing that the License Pool provisions were ambiguous and reasonably susceptible to more than one interpretation, stated "[t]hat the parties and the district court each, *in good faith*, divine multiple results[8] from the same formula underscores this ambiguity." *Colusa II*, 618 F.3d at 1075 (emphasis added).

Accordingly, as a matter of fact and of law, the Commission's 32,151 number defined the size of the License Pool from June 19, 2002, until the district court in *Colusa* entered judgment on August 19, 2009. Since August 20, 2010, when the Ninth Circuit decided *Colusa II*, the size of the License Pool has been defined by the Colusa Number. At the time of the events Pauma complains of in this action, the size of the License Pool was 32,151, exactly as the Commission represented and maintained.

II. BECAUSE 32,151 WAS THE SIZE OF THE LICENSE POOL FROM 2002 UNTIL 2009, PAUMA'S MISTAKE AND MISREPRESENTATION CLAIMS FAIL AS A MATTER OF LAW.

Pauma's seventeen claims may reasonably be separated into four groups: 1) mistake and misrepresentation; 2) miscellaneous contract claims; 3) fiduciary duty claims; and 4) claims based upon IGRA. This section addresses the mistake and misrepresentation claims.[9]

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[8] Between the district courts and the Ninth Circuit, the ambiguity of section 4.3.2.2(a)(1) of the 1999 Compact has elicited de novo judicial determinations that the License Pool consists of 42,700 (*Colusa and San Pasqual*), 55,952 (*Rincon*), and 40,201 licenses (*Colusa II*).

[9] Pauma's mistake and misrepresentation claims are as follows: First Claim for Relief: Mutual Mistake of Fact – State Law; Second Claim for Relief: Unilateral Mistake of Fact – State Law; Third Claim for Relief: Mutual Mistake of Law – State Law; Fourth Claim for Relief: Unilateral Mistake of Law – State Law; Tenth Claim for Relief: Misrepresentation – Restatement and Federal Contract Law; Eleventh Claim for Relief: Negligent Misrepresentation – State Law; (continued…)

To be entitled to the relief Pauma seeks on the basis of each of the claims for relief identified herein, Pauma must show that the License Pool consisted of more licenses than the 32,151 adopted by the Commission in 2002, either "during the negotiations of the 2004 Amendment" or "at the time of the formation of the 2004 Amendment," as variously alleged in Pauma's mistake and misrepresentation claims. Because the Colusa Number, upon which Pauma must, and for the most part expressly does, rely, is the law of the Ninth Circuit as to the size of the License Pool, did not come into existence for any purpose until August 20, 2010, and does not apply retroactively, Pauma cannot establish this fundamental required element of these claims. As noted in the preceding argument, from 2002 to 2009, the License Pool, as a matter of fact and law, consisted of 32,151 licenses and, as the district court found in *Colusa*, and the Ninth Circuit in *Colusa II*, the Commission in good faith determined the number and represented and administered it as such.

A. There Was No Mistake of Fact or Law.

Under the Restatement (Second) of Contracts, "mistake" is defined as "a belief that is not in accord with the facts." Restatement (Second) of Contracts, § 151 (1981). The comments to the Restatement (Second) of Contracts, section 151, explain that the "facts" referenced in section 151 include "[a] party's erroneous belief with respect to the law." *Id.* cmt. b.

Similarly, the California Civil Code defines a mistake of fact as:

> a mistake . . . consisting in: [¶] 1. [a]n unconscious ignorance or forgetfulness of a fact past or present, material to the contract; or [¶] 2. [b]elief in the present existence of a thing material to the contract, which does not exist, or in the past existence of such a thing, which has not existed.

(Cal. Civ. Code § 1577.) Under California law, cognizable unilateral or mutual mistake occurs when the parties' understanding is not in accord with the real facts at the time the contract was entered into. *Schultz v. County of Contra Costa*, 157 Cal. App. 3d 242, 248 (Cal. Ct. App. 1984). "The kind of mistake that affords relief is one 'of a fact past or present.' (Civ. Code, § 1577.)"

(…continued)
Thirteenth Claim for Relief: Mutual Mistake – Restatement and Federal Law; and Fourteenth Claim for Relief: Unilateral Mistake – Restatement and Federal Law.

Hultin v. Taylor, 6 Cal. App. 3d 802, 806 (Cal. Ct. App. 1970) (plaintiff's mistake was not with respect to a fact, but with respect to a future event). "Where a belief or assumption under which a contract is made is rendered mistaken by subsequent events, the mistake will not support rescission of the contract." *YTY Industry SDN, BHD v. Dow Chemical Co.*, 2009 U.S. Dist. LEXIS 101203, at *63 (C.D. Cal. [date], 2009) (citing *Metropolitan Life Ins. Co. v. Kase*, 718 F.2d 306, 307-08 (9th Cir. 1983)).

There is no practical difference between state law and the Restatement (Second) of Contracts with respect to claims based on mistake, as both recognize that the alleged mistake may be one of fact or law. Similarly, there is no substantive difference between state law and the Restatement (Second) of Contracts relating to unilateral and mutual mistake. Accordingly, Pauma's claims under state law and the Restatement (Second) of Contracts for unilateral or mutual mistake need not be analyzed separately with regard to whether a mistake of the type creating a right to relief occurred.

All of Pauma's mistake claims are either implicitly or explicitly predicated upon the actual existence of the Colusa Number during the negotiation and formation of the 2004 Amendment, activities that necessarily took place before Pauma and the State entered into the 2004 Amendment. Just as the district court found in *Colusa* with regard to the license draws Colusa had requested in 2006 and 2007, and consistent with the principle of prospective relief established by the Ninth Circuit in *Colusa I*, the License Pool consisted of 32,151 licenses at the time of the acts or omissions in or about 2004 complained of by Pauma, and at the time of the acts and omissions in 2006 and 2007 complained of by Colusa. To the extent that the size of the License Pool may be deemed a matter of law rather than fact, "[t]he understanding of the law prevailing at the time of the settlement of the contract, although erroneous, will govern, and the subsequent settlement of a question of law by judicial decision does not create such a mistake of law as courts will rectify." *B.E. Campbell v. Rainey*, 127 Cal. App. 747, 750 (Cal. Ct. App. 1912) (quoting *Cooley v. County of Calaveras*, 121 Cal. 482, 486-87 (Cal. 1901). Further, "no subsequent decision of a court can create a mistake and annul a previous contract which was legal and valid when made." *Cooley v. County of Calaveras*, 121 Cal. 482, 485 (Cal. 1901). Similarly,

with regard to a mistake of fact, "the erroneous belief must relate to the facts as they exist at the time of making the contract." Restatement (Second) of Contracts § 151 cmt. a.

The Colusa Number did not exist at the time the parties negotiated and executed the 2004 Amendment. It cannot be disputed that it did not arise until, at the earliest, August 19, 2009 when the Eastern District held that the License Pool consisted of 42,700 licenses. The Colusa Number itself did not exist until the Ninth Circuit issued the *Colusa II* decision on August 20, 2010. For the reasons stated above, neither decision operates retroactively to change the circumstances that prevailed in and about 2004.

Accordingly, the parties were not mistaken as to the size of the License Pool in or about 2004—it consisted of 32,151 licenses. Whether characterized as a mistake of fact or law, no mistake occurred, and Pauma's First, Second, Third, Fourth, Thirteenth, and Fourteenth Claims for Relief fail as a matter of law. State Defendants are entitled to summary judgment on these six claims.

B. The Commission Made No Misrepresentations.

The first required element of misrepresentation, whether negligent or intentional (Tenth and Eleventh Claims for Relief), and whether under state or federal law, is a misrepresentation of a past or present material fact. The Restatement (Second) of Contracts defines a misrepresentation as "an assertion that is not in accord with the facts." Restatement (Second) of Contracts, § 159. For the reasons stated above, all representations made by the State based upon a License Pool consisting of 32,151 licenses were based on facts that were true at the time, and did not constitute misrepresentations. Accordingly, Pauma's tenth and eleventh claims for relief fail as a matter of law.

III. PAUMA'S MISCELLANEOUS CONTRACT CLAIMS FAIL AS A MATTER OF LAW.

For the reasons stated in State Defendants' concurrently filed opposition to Pauma's motion for partial summary judgment, and, further, because the operative size of the License Pool between June 19, 2002 and August 19, 2009, consisted of 32,151 licenses for the reasons stated above, Pauma's Twelfth Claim for Relief (Contracts Clause), Fifteenth Claim for Relief (Failure of Consideration), and Sixteenth Claim for Relief (Unconscionability), fail as a matter of law.

For the reasons stated above, between the time the Commission adopted 32,151 as the size of the License Pool, and the time Pauma entered into the 2004 Amendment, the License Pool consisted of 32,151 licenses. Because the License Pool at that time *did* consist of 32,151 licenses, the Commission's actions as alleged by Pauma—*e.g.*, not awarding Pauma all of the licenses it requested from the December 19, 2003 license draw because insufficient licenses existed in the pool to permit the Commission to do so—did not constitute an impairment of Pauma's 1999 Compact or 2004 Amendment. Accordingly, Pauma's Twelfth Claim for Relief (Contracts Clause) fails as a matter of law.

As discussed above, the Colusa Number, established by *Colusa II*, did not exist when Pauma negotiated and entered into the 2004 Amendment. When Pauma negotiated the 2004 Amendment, it did not "already have" the right to operate the additional gaming devices it desired. The License Pool consisted of 32,151 licenses, and had at that time been exhausted by prior draws.[10] In 2004, the *only* way Pauma could immediately obtain the right to operate additional Gaming Devices, and obtain the right to ever operate more than 2000 Gaming Devices, was to enter into the 2004 Amendment, and for that reason the expanded ability to operate devices provided by the 2004 Amendment constituted valid consideration. Pauma's Fifteenth Claim For Relief (Failure of Consideration) fails as a matter of law.

For the reasons stated in State Defendants' concurrently filed opposition to Pauma's motion for partial summary judgment, Pauma's Sixteenth Claim for Relief (Unconscionability) fails as a matter of law.

IV. PAUMA'S FIDUCIARY DUTY CLAIMS FAIL AS A MATTER OF LAW.

Pauma's Seventh, Eighth, Ninth, and Seventeenth Claims for Relief, all of which allege claims based on the existence of a fiduciary duty owed by the Commission to Pauma, fail for the reasons stated in State Defendants' concurrently filed opposition to Pauma's motion for partial summary judgment. In addition, all but the Eighth Claim for Relief (duty to apply to a court for a

[10] From time to time, licenses would be returned to the License Pool by tribes, either voluntarily or by a tribe's failure to put licensed Gaming Devices into operation within one year of license issuance. For this reason, license draws were conducted from time to time after the License Pool had initially been exhausted.

declaration of the size of the License Pool), are implicitly based upon a retroactive application of the Colusa Number in order to establish a basis, by way of comparison with the Commission's 32,151 number, for finding that the Commission breached an alleged fiduciary duty to Pauma. For the reasons stated above, from 2002 to 2009, 32,151 was the legally operative number, and no larger number yet existed for any purpose, including the purpose of establishing that the Commission breached any fiduciary duty to Pauma by adopting the 32,151 number. Moreover, the Ninth Circuit has held that 1999 Compact Tribes acquired no "particular degree of likelihood of obtaining licenses" from the terms of the 1999 Compact. *Colusa I*, 547 F.3d at 973. Accordingly, Pauma's Seventh, Eighth, Ninth, and Seventeenth Claims for Relief fail as a matter of law.

V. THE 2004 AMENDMENT DID NOT IMPOSE AN ILLEGAL TAX OR FEES UNDER IGRA.

For the reasons stated in State Defendants' concurrently filed opposition to Pauma's motion for partial summary judgment, the terms of the 2004 Amendment did not impose either a tax or fees that are illegal under IGRA. Pauma's Fifth and Sixth Claims for Relief fail as a matter of law.

CONCLUSION

For the reasons stated above and in State Defendants' concurrently filed opposition to Pauma's motion for partial summary judgment, State Defendants respectfully request that the Court enter an Order granting summary judgment in favor of State Defendants as to the entirety of the FAC.

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Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California
SARA J. DRAKE
Senior Assistant Attorney General
RANDALL A. PINAL
Supervising Deputy Attorney General
T. MICHELLE LAIRD
Deputy Attorney General

s/ NEIL D. HOUSTON

NEIL D. HOUSTON
Deputy Attorney General
Attorneys for Defendants