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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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| **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,**<br><br>Plaintiff,<br><br>**v.**<br><br>**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,**<br><br>Defendants. | 3:09-cv-01955-AJB-MDD<br><br>**STATE DEFENDANTS' REPLY TO PAUMA'S OPPOSITION TO THE STATE'S CROSS-MOTION FOR SUMMARY JUDGMENT**<br><br>**Date: November 30, 2012**<br>**Time: 2:00 P.M.**<br>**Dept: 2**<br><br>**Judge: The Honorable Cathy Ann Bencivengo**<br><br>**Trial Date: TBA**<br><br>**Action Filed: 9/4/2009** |

Defendants State of California, California Gambling Control Commission (Commission), and Edmund G. Brown Jr., Governor of the State of California (collectively referred to as State Defendants), submit the following reply to plaintiff Pauma Band of Mission Indians' (Pauma) opposition to State Defendants' cross-motion for summary judgment.

## INTRODUCTION

State Defendants' primary objective in their cross-motion for summary judgment is to urge the Court to decide this case in a way that is consistent with existing Ninth Circuit precedent concerning the size of the Gaming Device license pool under the 1999 Compact. Pauma's entire case depends upon this authority—in particular the "Colusa Number," which is the size of the license pool (40,201) adjudicated in *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community. v. California*, 618 F.3d 1066 (9th Cir. 2010) (*Colusa II*), and constituted a judicial enlargement of the license pool (32,151) as it had been administered by the Commission between 2002 and the date judgment was entered in the underlying trial court case, *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community. v. California*, No. 04-2265 FCD KJM (E.D. Cal. 2009), on August 19, 2009.[1]

All of Pauma's claims in this case, except those alleging violations of the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, et seq. (IGRA), are based, in one way or another, upon construing the Colusa Number to have existed in 2004. This requires a retroactive application of the Colusa Number, which indisputably was first derived by the Ninth Circuit in 2010. As explained in detail in the State Defendants' cross-motion for summary judgment, the Colusa Number does not operate retroactively—the relief granted by the *Colusa* trial court and affirmed by the Ninth Circuit in *Colusa II* operates prospectively only. The reasons for this arise from the way in which the Ninth Circuit made it possible for the *Colusa* trial court case to go forward without requiring an impossibility—the joinder of all of the 1999 Compact Tribes, each of which

[1] The *Colusa* trial court judgment incorporated the April 22, 2009 Memorandum and Order on the parties' dispositive motions that was reported at *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community. v. California*, 629 F.Supp.2d 1091 (E.D. Cal. 2009) (*Colusa*). *See* untitled document (order) dated Aug. 19, 2009, Doc. 127, Case No. 2:04-cv-02265-FCD-KLM (E.D. Cal.).

enjoyed sovereign immunity and could not be sued without its consent.[2] *See Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. California*, 547 F.3d 962 (9th Cir. 2008) (*Colusa I)*.

Pauma's opposition to State Defendants' cross-motion for summary judgment continues Pauma's effort to mislead this Court and to hide the simplicity of the key flaw in most of Pauma's theories of recovery. Pauma's opposition invents and knocks down inapplicable legal theories that the State has never asserted (issue preclusion and res judicata), misconstrues generic authority concerning the retroactivity of judicial decisions, and asserts inapplicable "law of the case" and judicial estoppel arguments. The simple fact remains that the Colusa Number, which constitutes controlling authority as to the size of the license pool, was not an objective, existing fact at the time of the 2004 Amended Compact and does not operate retroactively, and therefore cannot be construed to have existed in 2002 or 2004 to serve as a basis for Pauma's much later brought claims.

## I. THE STATE DEFENDANTS' CROSS-MOTION IS BASED ON STARE DECISIS.

Pauma's opposition begins with the invention and disposition of legal theories State Defendants have never asserted and upon which they need not rely. State Defendants do not contend that Pauma is precluded—either by defensive collateral estoppel or res judicata—from alleging that the Colusa Number should apply retroactively. State Defendants contend that the Colusa Number constitutes controlling authority as to the size of the Gaming Device license pool, that the Colusa Number did not take effect until the *Colusa II* decision was issued in 2010, and that the Colusa Number does not apply retroactively to generate legal consequences and rights to relief for actions taken prior to that time. This is an application of stare decisis, rather than issue preclusion or res judicata, the latter doctrines in this context merely being straw men.

Neither Pauma nor State Defendants are litigating the size of the license pool here—they cannot. Speaking with specific reference to potential future litigation of the size of the license

[2] At the time the *Colusa* action was filed in 2004, there were approximately fifty-five 1999 Compact Tribes, some original signatories having by then entered into amended compacts that were not subject to the license pool provisions of the 1999 Compact that were at issue in *Colusa*.

pool, the Ninth Circuit stated "[t]hrough this decision, we have indeed removed any danger that California will face inconsistent interpretations regarding the size of the license pool." *Colusa II*, 618 F.3d at 1084. Accordingly, Pauma's case, to the extent it is based on allegations concerning the size of the license pool, must be adjudicated on the basis of *Colusa II*.

In keeping with the Ninth Circuit's decision in *Colusa I*, the *Colusa* trial court, on remand, provided prospective relief only, ordering a future draw (in October 2009) based on its new enlargement of the license pool,[3] and granted summary judgment in favor of State Defendants on the plaintiff's (Colusa[4]) retroactive breach of compact claim arising from the Commission's refusal to conduct license draws in 2006 and 2007.[5] *Colusa*, 629 F. Supp. 2d at 1119-20.

Pauma's contention that no court has until now been asked to provide retroactive relief based on the judicial enlargement of the license pool is false. Contrary to Pauma's representations, Colusa's unsuccessful request for retroactive relief did not arise merely from a "supplemental" complaint—it arose as one of three claims made in an entirely separate action that was filed while the dismissal of Colusa's first complaint was pending on appeal, and that was independently pending in the Eastern District for ten months until State Defendants successfully sought consolidation of Colusa's two cases after Colusa's original case was remanded.[6] Pauma's contentions that Colusa's retroactive breach of compact claim was somehow "subsumed" in its declaratory relief claim concerning the size of the license pool, and that the trial court's ruling on the breach of compact claim was unnecessary to the judgment and therefore merely constitutes dicta, are gross misrepresentations. (*See* Pauma's Opp'n to State's Cross-Mot. Summ. J. (Doc. 220) (Opp'n.) 5-6.) The trial court ruled upon Colusa's retroactive breach of compact claim and

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[3] Untitled document (order) filed Aug. 19, 2008, Doc. 127, Case No. 2:04-cv-02265-FDC-KJM (E.D. Cal.) at 11.

[4] The term "Colusa" (no italics) refers to the tribe itself.

[5] The Commission had declined to conduct license draws when requested by Colusa to do so, on the ground that under its calculation of the size of the license pool (32,151) no licenses were then available for distribution.

[6] *See* Minute Order granting consolidation, filed December 10, 2008, Doc. 50, Case No. 2:04-cv-02265-FCD-KLM (E.D. Cal.).

entered judgment upon it in State Defendants favor. *Colusa*, 629 F. Supp. 2d at 1119-20; *see also* untitled document (order) filed Aug. 19, 2008, Doc. 127, Case No. 2:04-cv-02265-FDC-KJM (E.D. Cal.) at 11.

While the *Colusa* trial court decision is not binding upon this Court, it provides useful guidance because it represents the conclusions of the first court to rule on the size of the license pool and the conclusions of the court first and most directly affected by the Ninth Circuit's *Colusa I* decision that set the parameters of 1999 Compact litigation and guided the trial court to grant prospective relief only.

Colusa did not appeal the adverse ruling on its breach of compact claim, so that issue does not figure in the *Colusa II* decision. In *Colusa II*, the Ninth Circuit affirmed the trial court's provision of prospective relief in the form of a future license draw based on the newly enlarged license pool and other provisions of the trial court judgment.[7] *Colusa II*, 618 F.3d at 1083-84. Pauma's request for retroactive relief based on the Colusa Number is inconsistent with the remedy arising from the judicial enlargement of the license pool that was affirmed by the Ninth Circuit and should be denied by this Court.

## II. THE DOCTRINE OF LAW OF THE CASE IS INAPPLICABLE.

Pauma urges this Court to give dispositive effect to colloquy that occurred during Judge Burns' hearing of Pauma's motion for a preliminary injunction, and to Judge Burns' order granting the preliminary injunction. This Court is not required to, nor should it, do so.

Application of the law of the case doctrine to prior trial court rulings in the same case is discretionary.

> The legal effect of the doctrine of the law of the case depends upon whether the earlier ruling was made by a trial court or an appellate court. *All rulings of a trial court are subject to revision at any time before entry of judgment.*

[7] Relief also included a reformulation of the Commission's method of assigning tribes to priority tiers for the purposes of license draws, to be applied prospectively only, in keeping with *Colusa I*.

*City of Los Angeles v. Santa Monica Baykeeper*, 254 F.3d 882, 888 (9th Cir. 2001) (quoting *United States v. Houser*, 804 F.2d 565, 567 (9th Cir. 1986) (emphasis in original)). Moreover, the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits. *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). Decisions on preliminary injunctions do not constitute the law of the case and the parties are free to litigate the merits. *Golden State Transit Corp. v. City of Los Angeles*, 754 F.2d 830, 833 n.3 (9th Cir. 1985); *see also Horphag Research Ltd. v. Garcia*, 475 F.3d 1029, 1034-35 (9th Cir. 2007). Finally, Judge Burns' grant of a preliminary injunction to Pauma early in this case was not affirmed by the Ninth Circuit on appeal—it was remanded to this Court for reconsideration that has not yet occurred. *See* Order, Doc. 64-1, filed Nov. 30, 2010. Accordingly, the law of the case doctrine does not bind this Court as to whether the Colusa Number operates retroactively to constitute an existing fact at the time of contract, or as to the merits of any of Pauma's claims.

## III. THE COLUSA NUMBER DID NOT EXIST UNTIL 2010.

Pauma asserts that the meaning of the license pool formula contained in section 4.3.2.2(a)(1) of the 1999 Compact has been "static" since the inception of the 1999 Compacts. Pauma also asserts that the size of the license pool has always been an immutable fact comparable to the existence of hazardous waste in particular soil or groundwater, or to the location of surveyed boundary lines, simply awaiting discovery. And Pauma claims that the Commission should have been aware of the true size of the license pool, and should now be held accountable for having represented that it was anything other than the Colusa Number that was calculated by the Ninth Circuit in 2010. Pauma takes many things for granted in this litigation, apparently with the hope that this will induce the Court to do the same. Here, Pauma simply assumes that the Tribe's right to obtain gaming device licenses is a contractual right arising from the 1999 Compact and therefore subject to analysis under the principles of ordinary federal contract law. Pauma also assumes that the size of the license pool under section 4.3.2.2(a)(1) of the 1999 Compact is a fact capable of absolute determination. Neither of these assumptions is accurate.

The evidence in this case clearly establishes that interpretation of section 4.3.2.2(a)(1) of the 1999 Compact is problematic. As the Ninth Circuit observed, "[w]ho knew simple math could be so tricky?" *Colusa II*, 618 F.3d at 1068. And, "[o]n de novo review, we agree with the district court that the License Pool Provisions are ambiguous and reasonably susceptible to more than one interpretation." *Id.* at 1075. Finally, "[t]he License Pool Provisions that California and Colusa included in their Compact . . . are murky at best. The multiple interpretations offered in this litigation underscore this reality." *Id.* at 1084. In *Colusa*, Colusa alleged "greater than 62,000" (Colusa Complaint, Houston Decl. Ex. D at SD XMTN 000043); the Picayune Rancheria of Chukchansi Indians (Picayune) alleged 64,293, 58,450, or "greater than 58,000" (Picayune's Complaint in Intervention, Doc. 72 in *Colusa*, filed January 29, 2009; and the Commission asserted that the license pool consisted of 32,151 licenses.

Many other interpretations have been asserted by interested parties and others over the years, including "approximately 113,000" (Legislative Analyst's Office (LAO) letter to Thompson (Nov. 9, 1999); 61,700 (LAO letter to Burton (Dec. 6, 1999); 55,951 (LAO letter to Thompson/Cohen, Ex. A to Commission Minutes (June 19, 2002), attached to Houston Decl. Ex. C at SD XMTN 000028); and 64,283 (*Id.* (Tribal Alliance of Sovereign Indian Nations). Moreover, four federal courts performing de novo analyses of the 1999 Compact have separately arrived at three different numbers.[8]

The Colusa Number is not a "fact" so much as it is the legally operative judicial interpretation of an ambiguous and much disputed contractual term. On this basis, it differs from facts involved in the various contract cases cited by Pauma. Pauma's generic authority disregards the unique nature of the 1999 Compact, which originally consisted of approximately sixty separate bilateral contracts, all containing substantively identical terms, with parties that enjoyed general sovereign immunity from suit. More importantly, Pauma's contractual argument overlooks the fact that the Ninth Circuit has held with respect to the license pool that "the causal

[8] *Colusa II*, 618 F.3d at 1081 (40,201); *Colusa*, 629 F. Supp. 2d at 1115 (42,700); *Rincon Band of Luiseno Indians v. Schwarzenegger*, No. 04-cv-1151 W (WmC) (S.D. Cal., filed June 4, 2004) (55,952); *San Pasqual Band of Mission Indians v. State of California*, No. 06-cv-0988 LAB AJB (S.D. Cal., filed May 3, 2006) (42,700).

connection between the terms of the 1999 Compacts and [a] . . . tribe's likelihood of obtaining future licenses is attenuated indeed." *Colusa I*, 547 F.3d at 973. Further, "no particular likelihood of obtaining licenses "arises from terms in bargained contracts." *Id.* "[T]he 1999 Compacts do not . . . grant an entitlement to draw any specific license or number of licenses or even a predetermined place in line that may entail a particular likelihood of obtaining new licenses." *Id.* at 974. Accordingly, Pauma's reliance on general contract principles to support a purported contractual entitlement to Gaming Device licenses is tenuous and should be evaluated with care. Moreover, the Ninth Circuit's view of the relationship between the license pool and the rights of a signatory tribe to obtain licenses indicates the grossly overreaching nature of Pauma's assertion that the license pool constituted the corpus of a trust as to which the Commission owed Pauma a fiduciary duty. (*See* Opp'n at 13.)

Pauma's "it is what it always was" argument (Opp'n at 11) simply ignores all of the factors that are unique to the license pool litigation and caused the *Colusa* trial court to provide only prospective relief as to the size of the license pool. These have been stated elsewhere and will not be repeated here.

Pauma's argument that 40,201 licenses were available under the 1999 Compacts from the very outset, and that State Defendants should have known this (Opp'n at 11) has already been rejected by the *Colusa* trial court and by the Ninth Circuit in *Colusa II*. *See Colusa*, 629 F. Supp. 2d at 1119-20; *Colusa II*, 618 F.3d at 1075 ("the parties . . . each, in good faith, divine multiple results from the same formula").

In short, this Court should reject Pauma's "it is what it always was" argument because it mistakenly relies upon cases involving circumstances that are readily distinguishable from the unique circumstances of the size of the license pool litigation under the 1999 Compact, and entirely ignores the logic behind the Ninth Circuit's provision of only prospective relief as to its calculation of the size of the pool in 2010.

## IV. GENERIC RETROACTIVITY PRINCIPLES DO NOT EXPAND THE EFFECT OF PRIOR JUDICIAL DECISIONS.

Pauma's generic retroactivity argument is confused by the fact that the type of retroactivity Pauma seeks (the establishment of the 2010 Colusa Number in 2002 and 2004) is different than the retroactivity that is discussed in the cases Pauma cites, *e.g.*, *Harper v. Virginia Department. of Taxation*, 509 U.S. 86 (1993), and *In re Debbie Reynolds Hotel & Casino, Inc.*, 255 F.3d 1061 (9th Cir. 2001). (*See* Opp'n at 15-16.)

Within the context of Supreme Court authority relating to the retroactivity of judicial decisions, the terms "retroactivity" and "prospectivity" relate to whether a new rule announced by the court will apply to the prior conduct of the parties to that action, or only to the subsequent conduct of the parties and others. The question of whether a rule will be applied to the conduct of other parties predating the issuance of the rule depends upon whether the court applied the rule in that manner to the parties to the case giving rise to the rule.

> Thus, the question is whether it is error to refuse to apply a rule of federal law retroactively after the case announcing the rule *has already done so*. We hold that it is, principles of equality and *stare decisis* here prevailing over any claim based on a *Chevron Oil* analysis.

*James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 540 (1991) (*Beam*), emphasis added. Similarly, "[o]nce retroactive application is chosen for any assertedly new rule, it is chosen for all others who might seek its prospective application." *Id.* at 543. Accordingly, the concept of the retroactivity of judicial decisions does not serve to broaden and expand relief beyond what was afforded to the original parties—which is exactly what Pauma seeks in this action.

*Colusa II* affirmed only prospective relief for the parties to that case, which commenced with the license draw ordered by the trial court and conducted by the Commission in October 2009. Under the principles stated above, a later party—in this case Pauma—should be treated equally and in a manner consistent with that authority, and thus also receive only prospective

relief dating from the issuance of the *Colusa II* decision in 2010.[9] A case affording only prospective relief to the parties before the court remains a case affording only prospective relief when later applied through the general principle of the retroactivity of judicial decisions to subsequent parties. Applying the Colusa Number retroactively to the Commission's conduct in 2002 and 2004, as Pauma urges, would greatly expand the relief that was affirmed and provided by *Colusa II*, and would be inconsistent with the position the Ninth Circuit has taken with regard to the litigation of the terms of the 1999 Compact. It would also be inconsistent with established law that does not support contract rescission for an alleged mistake based on the occurrence of future events. *YTY Industries SDN BHD v. Dow Chemical Co.*, 2009 U.S. Dist. LEXIS 101203, *63 (C.D. Cal. Oct. 28, 2009) (citing Rest. 2d Contracts § 152, com (a)).

## V. PAUMA'S JUDICIAL ESTOPPEL ARGUMENT IS INAPPLICABLE.

As explained below, State Defendants' positions in this action as to the respective nature of the Commission's 2002 license pool calculation (32,151) and the Colusa Number (40,201) are not mutually inconsistent and, therefore, neither is barred by the doctrine of judicial estoppel.

Judicial estoppel "is an equitable doctrine invoked by a court at its discretion." *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (quoting *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990)). Several factors typically inform the decision whether to apply the doctrine of judicial estoppel in a particular case. *Id.* For judicial estoppel to apply, a party's positions must be "clearly inconsistent" with each other. *Id.* Another consideration is whether party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *Id.* Additional considerations may inform the doctrine's application in specific factual contexts. *Id.* For example, in a case in which a recipient of Social Security Disability Insurance (for total disability) claimed that she was able to work for purposes of bringing a claim under the Americans with Disabilities Act, the court held that despite the appearance of conflict between the two types of claims, they did not inherently conflict to the

[9] Pauma was no longer a 1999 Compact Tribe at the time of the October 2009 license draw, and therefore was not eligible for the remedy that was granted by the *Colusa* trial court and affirmed in *Colusa II*. Accordingly, Pauma's reliance on the judicial expansion of the license pool can only be based on the *Colusa II* decision, which was issued in 2010.

point that courts should apply a special presumption that judicial estoppel applies. *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 802-03 (1999). An additional consideration may also be whether a party has provided an adequate reason for its change in position. *Trustees in Bankr. of N. Am. Rubber Thread Co. v. United States*, 593 F.3d 1349, 1356-57 (Fed. Cir. 2010).

In the present case, Pauma has seized upon the semantics of State Defendants' characterization of the Commission's 2002 license pool number (32,151) in two different factual contexts—first with regard to a defense to Pauma's mistake claims, and, second, to argue and explain the consequences of the nonexistence, for all purposes, of the Colusa Number prior to the issuance of the *Colusa II* decision in 2010. Pauma contends that, in the first instance, State Defendants assert that the Commission's 2002 number was not "a fact" upon which a claim of mistake can be based, but was instead an opinion as to an ambiguous and disputed interpretation of section 4.3.2.2(a)(1) of the 1999 Compact—a circumstance that is amply proven by the evidence and is not reasonably in dispute. Pauma contends that, in the second instance, State Defendants assert that between 2002 and 2009, the size of the license pool consisted of 32,151 licenses as a matter of both fact and law. These are simply two ways of describing the same circumstance, the latter being true because there *was* no other number between 2002 and 2009. The Commission's opinion as to the size of the license pool provided the legally operable number up until it was replaced in 2009 by the *Colusa* trial court's 42,700 number, and then by the Colusa Number in 2010, with both numbers operating prospectively only. From 2002 to 2009, the Commission administered the license pool as to all 1999 Compact Tribes on the basis of the Commission's 2002 number—it was, simply, the *only* operable number that existed between those dates. Under the facts of this case, State Defendants' references to the Commission's 2002 number alternatively as an opinion or as "a fact" are not substantively inconsistent, *i.e.*, the number was an operative fact between 2002 and 2009, but is not a legally cognizable fact under the law of mistake because the number adopted in 2002 was one of several acknowledged interpretations of section 4.3.2.2(a)(1) of the 1999 Compact and continued to be a disputed

number at the time of the 2004 Amended Compact. Pauma's judicial estoppel claim is based on a distinction without a difference and should be rejected.

**CONCLUSION**

For the reasons stated above and elsewhere in the papers submitted by State Defendants in support of their cross-motion for summary judgment, Pauma's case is impermissibly based on the retroactive application of authority that, by its own terms, only applies from October 2009 forward, and therefore cannot serve to support Pauma's legal characterizations of conduct that occurred in 2004 when Pauma entered into its Amended Compact, or in 2002 when the Commission established the size of the license pool at 32,151 licenses. For these reasons, and for the additional reasons stated in State Defendants' moving papers and opposition to Pauma's motion for partial summary judgment, State Defendants request that the Court enter an order granting summary judgment in favor of State Defendants as to each and every claim for relief contained in Pauma's first amended complaint herein.

Dated: November 9, 2012

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