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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 **EDMUND G. BROWN, JR.**, as Governor of the State of California;

Defendants.

Case No.: 09CV1955 CAB MDD

PAUMA'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON CLAIMS FIVE THROUGH TEN AND THIRTEEN THROUGH SEVENTEEN IN THE FIRST AMENDED COMPLAINT

Date: November 30, 2012
Time: 1:30 PM
Dept: 2
Judge: The Honorable Cathy A. Bencivengo

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TABLE OF AUTHORITIES

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SECONDARY AUTHORITIES

GLOSSARY OF ABBREVIATIONS

ABBREVIATION	MEANING
Parties	
CGCC / Commission	*California Gambling Control Commission, one of the three named defendants in this action and the current trustee of the license pool under the 1999 compacts*
Pauma / Tribe	*Plaintiff, the Pauma Band of Mission Indians*
State	*Defendants, the State of California, California Gambling Control Commission, and Governor Edmund G. Brown, Jr.*
Relevant Materials	
WD1	*"Declaration of Cheryl A. Williams in Support of Pauma's Motion for Summary Judgment on Claims Five Through Ten and Thirteen Through Seventeen in the First Amended Complaint" [Doc. No. 197-4]*
WD2	*"Second Declaration of Cheryl A. Williams in Support of Pauma's Motion for Summary Judgment on Claims Five Through Ten and Thirteen Through Seventeen in the First Amended Complaint, Regarding Discovery Issues with William A. Norris" [Doc No. 197-3]*
WD3	*"Third Declaration of Cheryl A. Williams in Support of Pauma's: (1) Motion for Summary Judgment on Claims Five Through Ten and Thirteen Through Seventeen in the First Amended Complaint; (2) Concurrently Filed Reply in Support Thereof; and (3) Opposition to the State's Cross Motion for Summary Judgment"*
Relevant Law	
Colusa I/II	*The decisions issued by the Eastern District of California and the Ninth Circuit, respectively, that calculate the appropriate size of the license pool under the 1999 compacts*

IGRA	*Indian Gaming Regulatory Act*
Rincon I/II	*The decisions issued by the Southern District of California and the Ninth Circuit, respectively, that concern the State's attempts to illegally tax Rincon after constraining the size of the license pool under the 1999 compacts*
San Pasqual	*Like Colusa, the decision issued by Judge Burns of the Southern District of California that calculated the appropriate size of the license pool under the 1999 compacts*
The 1999 Compact and its Successor	
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"*
Revenue Sharing Trust Fund / RSTF	*A trust fund set forth in Section 4.3.2.1 of the 1999 compacts that is designed to provide each non-compact tribe with $1.1 million annually using the revenue sharing fees paid on licensed machines*
Special Distribution Fund / SDF	*A fund set forth in Section 5.1(a) of the 1999 compacts that is designed to distribute money to, inter alia, State and local agencies using the revenue sharing payments from the established gaming tribes on their carried-over machines, but is subject to reduction if there is a shortfall in the RSTF from insufficient license allocations*
The Administration of the 1999 Compacts	
State Procedures	*"California Tribal-State Compact Gaming Device License Pool Draw Procedures," the rules William Norris created for administering the license draws under the 1999 compacts*

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State Actors

Davis	*Gray Davis, the 37th Governor of the State of California who executed the 1999 compacts and then covertly tried to renegotiate the deals before being removed from office*
Hensley	*John Hensley, the first Chair of the California Gambling Control Commission who referred to Sides Accountancy as the "pool trustee" and "temporary trustee," and later expressed his desire to limit the size of the license pool to 32,151 licenses after the CGCC took over the trusteeship*
Norris	*William Norris, the State's negotiator for the 1999 compacts who admitted to Elizabeth Hill that a "neutral trustee" oversees the license draw process before removing similar language from a letter sent to the initial trustee, Sides Accountancy*
Qualset	*Gary Qualset, the director of the California Gambling Control Commission's licensing division who also identified Sides Accountancy as the "pool trustee," and recently told our firm that William Norris must have drafted the State Procedures since he never saw the "Big Five" accounting firm language before*

Tribal-side Actors

Devers	*Chris Devers, Pauma's Chairman from 2002 to 2010 who testified that the Tribe would not have executed the 2004 Amendment but for the need to satisfy the 2,000 machine requirement of its development plan with Park Place*
Dixon	*Patricia Dixon, Pauma's Vice Chairwoman from 2002 to 2006 who testified that the Tribe entered into the 2004 Amendment to acquire the additional machines to come up to 2,000*
Majel	*Randall Majel, Pauma's current Chairman who originally envisioned the Caesars idea and later testified that the Tribe entered into the 2004 Amendment to get 2,000 machines – something*

	it couldn't do under the 1999 Compact because the license pool was over
Stidham	*Lawrence Stidham, Pauma's attorney during the Park Place / 2004 Amendment negotiations who informed a San Francisco Chronicle reporter after the execution of the 2004 Amendment that the Tribe may add up to 800 machines under its Caesars project, but the development was still a couple of years off*

INTRODUCTION

The lack of common ground over the past three years has finally given way with the State's acknowledgement that "[t]his case is vastly simpler than [one of the parties] would have the Court believe." [Doc. No. 217-14, 2:3] Of course, the State once again tries to obscure this fact by continuing its insistence on arguing wholly in terms of California law, which it has now done in three motions for summary judgment and three motions to dismiss despite contrary directives from two separate judges. The reason for the defiance is simple, and lays squarely in the inescapable reality that once you strip away the white-washed facts, all the State has really done is file a fourth motion to dismiss presenting purely legal arguments, and not even the one contemplated by the Court at the inception of the expedited discovery process this past summer. The table of contents within the Opposition reveals as much, brandishing the scattershot phrase "fails as a matter of law" against Pauma's misrepresentation, mistake,[1] unconscionability, and failure of consideration claims. [Doc. No. 217, i:13:23] Elsewhere, issues that are stylized as "factual disputes" turn out to be nothing more than the State arguing inapposite legal standards under California law. For instance, the fiduciary test inverted, going from looking at the "defendant's position in the [contractual] transaction" rather than the "victim's credulity," *United States v. Milovanovic,* 678 F.3d 713, 722 (9th Cir. 2012), into analyzing such vulnerability on the part of the victim whether through "advanced age, youth, lack of education, weakness of mind, grief, sickness, or some other incapacity." [Doc. No. 217, 14:25-27] Even more astonishing, the procedural unconscionability inquiry advanced by the State abandoned what should be the overarching search for "conduct or other circumstances indicating that a party's consent was not an informed choice," *Sanchez v. W. Pizza Enters.*, 172 Cal.App.4th 154, 173 (2d Dist. 2009), in favor of trying to find "odd-sized font[s]" or "misleading headings" in the challenged contract. [Doc. No. 217, 20:16-20] With these sorts of diversionary arguments incapable of changing the undisputed facts, the record on the instant motion clearly proves that this case is ripe for resolution in Pauma's favor. *See Transworld Airlines, Inc. v. Am. Coupon Exch., Inc*., 913 F.2d 676, 684 (9th Cir. 1990) (allowing the resolution of ultimate fact issues on summary judgment if the evidence is undisputed and a trial would not aid in the disposition of the case).

[1] Since both of the underlying briefs raise it, Pauma will address the State's no existing fact/the-truth-is-what-we-said-it-was arguments in the concurrently-filed opposition to the State's cross-motion for summary judgment.

ARGUMENT

I. FEDERAL CONTRACT AND TRUST LAW GOVERN THIS CASE

The evolution of the argument about which jurisdiction's law to apply in this case has been a thing to behold. After the Ninth Circuit announced "[g]eneral principles of federal contract law govern the Compacts, which were entered pursuant to IGRA," *Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. California*, 618 F.3d 1066, 1073 (9th Cir. 2010), Judge Battaglia accordingly instructed the parties that he was going to use federal contract law when analyzing Pauma's claims for relief. [Doc. No. 132, 4:15-17] Nevertheless, the State still objected to its use, citing an unpublished District of Oregon order for the proposition that the Restatement is a "non-binding authority" that should not displace the use of "state law and Ninth Circuit decisions" applying the same state law authorities. [Doc. No. 168, 10:17-25] In ruling on the merits of this argument, the present Court referenced Judge Battaglia's prior holding and explained that "it seems clear to this Court, federal law as set forth in the Restatement and other common law issues is what would be the contract law the court would rely on." [Doc. No. 182, 12:6-17] The issue was so abundantly clear to the Court that it concluded the discussion by stating, "I think everybody here is on the same page[;] it starts from federal and we can use state to the extent it is in accordance with federal, not where it may be different." [Doc. No. 182, 16:13-16] This perceived harmony was rather fleeting, as the State has simply regurgitated the same unpublished order for refusing to apply the Restatement, and inexplicably decided that it will "analyze the[ ] claims applying [what it considers to be] federal law" as set forth in virtually nothing other than California law opinions. [Doc. No. 217, 22:23-27]

The applicability of the Court's holding to both the contract and trust law issues in this case is validated by a District of Columbia Circuit opinion that addressed the question of what sort of trust law to apply to a trust imbedded within a contract that arose pursuant to a federal statute. In *Beckett v. Air Line Pilots Ass'n*, 995 F.2d 280, 282 (D.C. Cir. 1993), a class of air line pilots sued Pan Am under the Employee Retirement and Income Security Act ("ERISA") for ceasing contributions into their pension plan. According to the terms of a post-settlement consent decree, the monies paid by Pan Am would go into a trust account administered by the Air Line Pilots Association ("ALPA"), who would then distribute the designated amounts to the beneficiaries. *Id.* at 283. After the ALPA withheld funds from

specific pilots as a set-off for refusing to help finance an earlier machinists' strike, the affected pilots brought suit for breach of trust. *Id.* In answering the question of how to properly analyze a breach of trust under a contract that arose pursuant to ERISA, the District of Columbia Circuit expressed that "we see appellant's trust claim as a federal claim because it arises out of the Consent Decree[.]" *Id.* at 285. As such, the Court relied on "fundamental principles of trust law" as set forth in the Restatement and other recognized trust authorities to interpret the trust in the consent decree. *Id.* This result aligns with those reached by other federal courts when determining how to interpret trust arrangements that arise directly from federal statutes. *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989) (ERISA); *Sunkist Growers, Inc. v. Fisher*, 104 F.3d 280, 282 (9th Cir. 1997) (Perishable Agricultural Commodities Act); *In re Gotham Provisions Co.*, 669 F.2d 1000, 1011 (5th Cir. 1982) (Packers and Stockyards Act of 1921). Certainly, the same result should apply in this case, where the trust is within a compact that arose pursuant to IGRA.

II. THE LICENSE TRUST CONTAINS VALID PROPERTY, JUST AS THE SETTLOR INTENDED

The statement made by counsel for the State at the last hearing that she does not "have expertise in the areas of fiduciary duty" [Doc. No. 182, 27:6-10] still holds true, as the argument challenging the manifestation of the settlor's intent and the viability of the trust property is beset with fundamental misconceptions about trust law. As for the intent issue, the State argues that intent must be ascertained solely from the trust instrument and any ambiguity is *per se* proof that a trust relationship does not exist. [Doc. No. 217, 13:27-14:18] Yet, "[a] trust … is a fiduciary relationship with respect to property, arising from a manifestation of intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for the benefit of… one or more persons, at least one of whom is not the trustee." Restatement (Third) of Trusts § 2 (2003). "In order to create a trust, the settlor, alone or together with the trustee, must properly manifest an intention to create a relationship that constitutes a trust[.]" Restatement (Third) of Trusts § 13 cmt. a. "No particular manner of expression is necessary to manifest trust intention," as it may be by "written or spoken words or by conduct." Restatement (Third) of Trusts § 13 cmt. b. In interpreting the words or actions of the settlor, "circumstances that shed light upon [its] intentions are relevant," including "[a]cts or communications prior to and subsequent to, as well as those contemporaneous with, the transfer or other act that is

claimed to create a trust[.]" *Id.*

As explained in the original motion, Section 4.3.2.2(a)(3)(vi) of the trust instrument specifically mentions that a "trustee" is responsible for overseeing the license pool of the 1999 compacts. [WD1, Ex. 5] The negotiator for the State who drafted this language – and was intimately familiar with its meaning from his time on the Ninth Circuit – repeatedly mentioned during the compact negotiations that the parties were forming a "joint venture," before admitting outright that a "neutral trustee" would administer the "provisions of Section 4.3.2" relating to the license pool. [WD1, Exs. 1-2, 9] This was no fly-by-night statement, as both the chairman and the director of the licensing division for the CGCC would refer to the initial administrator of the license pool as both the "pool trustee" and, ominously enough, the "temporary trustee." [WD1, Exs. 34-36] In fact, the former phrase arises in both the CGCC's initial draft rules for the license pool as well as the State Procedures, the document the State claims the CGCC authored even though all the evidence points directly to the State's negotiator. [WD1, Exs. 10, 37] However, the disagreement over authorship is irrelevant to the present inquiry because the admissions by both the settlor and its chosen trustee prove that the State clearly intended to create a license trust in the 1999 compacts.

The argument that ambiguity in the trust instrument forecloses consideration of this evidence is inaccurate under the general principles of trust law discussed above. *See Winchell v. United States*, 180 F.Supp. 710, 712 (S.D. Cal. 1960) ("There is no doubt that the settlor's subsequent acts are of great significance in construing an ambiguous trust instrument." (quoting *Helfrich's Estate v. Comm'r of Internal Revenue*, 143 F.2d 43, 46 (7th Cir. 1944))). It is also inaccurate under the federal contract law rules for interpreting tribal/state compacts. Order Den. Mot. to Strike; and Order Granting Pl.'s Mot. for Summ. J. at 5:18-23, *San Pasqual Band of Mission Indians v. California*, No. 06-0988 LAB AJB, Docket No. 97 (S.D. Cal. Mar. 29, 2010) ("*San Pasqual*") (stating in cases of patent or latent ambiguity, "the Court must entertain relevant extrinsic evidence that can prove a meaning to which the language of the contract is reasonably susceptible." (citing *United States v. King Features Entm't, Inc.*, 843 F.2d 394, 398 (9th Cir. 1988))); *see Crow Tribe of Indians v. Racicot*, 87 F.3d 1039, 1045 (9th Cir. 1996) (admitting negotiation statements to help interpret compact language). And it is further inaccurate under fundamental tenets of property law. *See* Restatement (Third) of Property § 11.2 cmt. d (2003) ("Once an

ambiguity, patent or latent, is established, direct as well as circumstantial evidence of the donor's intention may be considered in resolving the ambiguity in accordance with the donor's intention.").

The reason that property law treatises also apply in this situation is because the licenses form the subject matter of the trust. The identity of the trust property created significant confusion on the State's end, as it somehow viewed Pauma as the settlor who placed money into trust for the non-compact tribes rather than the State placing licenses in trust for the gaming tribes. [Doc. No. 217, 14:3-6] "The conception of what is property… is undoubtedly an elastic conception that has expanded through the years." 1 Austin W. Scott et al., *Scott and Ascher on Trusts* § 10.1.1 (5th ed. 2007) ("*Scott and Ascher*"). Currently "no policy of trust law restricts the types of property interests a trustee may hold in that fiduciary capacity." Restatement (Third) of Trusts § 40 & cmt. b. Therefore, the corpus of a trust can and typically does consist of intangible income producing property such as "trademarks, patents, [ ] copyright[s], [and] even an unpatented invention or uncopyrighted production." Restatement (Third) of Trusts § 40 cmt. b; 1 *Scott and Ascher* § 1.6. There is no reason to apply a different rule in the context of income producing government licenses. While certain things like water in a stream or wild animals at large are not capable of ownership, a license that provides "the right to take water" or "the right to capture such animals" can be owned and consequently placed into trust. George G. Bogert et al., *The Law of Trusts and Trustees* § 111, pp. 308-09 (2d ed. rev. 1984). In fact, the federal courts have consistently recognized that licenses are valid trust property. *Martha Graham Sch. & Dance Found. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 466 F.3d 97, 99 (2d Cir. 2006) (license for seven copyrighted dances); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 41 n.19 (1st Cir. 1993) (public broadcasting license); *Nat'l Football League Props., Inc. v. Dallas Cowboys Football Club, Ltd.*, 922 F.Supp. 849, 851 (S.D.N.Y. 1996) (license to use trademark for commercial purposes); *Fear v. Horner Sales Corp.*, 10 F.R.D. 25, 27 (W.D. Pa. 1950) (license to sell patented sugar).

Moreover, the structure of the 1999 Compact confirms that the specific licenses at issue in this case qualify as property. In certain circumstances, a person can have not just a property interest, but a "constitutionally protected property interest in a government benefit, such as a license or permit." *Gerhart v. Lake County Mont.*, 637 F.3d 1013, 1019 (9th Cir. 2011). In order to possess such an interest in a government license, a party must have a "legitimate claim of entitlement to it," *id.* (quoting *Bd. of*

Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972)), which arises when there are "significant limitations on the discretion of the decision maker." *Id.* (quoting *Braswell v. Shoreline Fire Dep't*, 622 F.3d 1099, 1100 (9th Cir. 2010)). Here, the provisions of the 1999 compacts should have removed all discretion on the part of the CGCC, as the terms defined the eligible applicant pool, formulated the total number of available licenses, and created the mandatory procedures by which the trustee would process applications and distribute licenses. Even though the total number of licenses is finite, these exacting requirements establish the fact that the licenses are property and the corollary proposition that a compact tribe should have a legally-recognized interest in the license it applies for, assuming it is available. With over seven thousand licenses still remaining roughly three years after the first post-*Colusa I* license draw, it seems remiss to suggest that Pauma does not have such an interest in the underlying license property. This should be especially true considering Judge Burns' earlier finding that Pauma had the right to operate 2,000 machines under the 1999 Compact from the "get-go" pursuant to a corrected interpretation of the size of the license pool. [Doc. No. 56, 4:24-5:2 & 6:6-11]

The only other trust argument advanced by the State is that the CGCC possessed the discretion to interpret the size of the license pool given Governor Davis' enactment of Executive Order D-31-01 in May of 2002. [Doc. No. 217, 17:15-18:6] The most glaring problem with this argument is that it is moot because it relates to the amount of deference the federal courts should have afforded the CGCC's determination in the *Colusa* litigation. *See Kearney v. Standard Ins. Co.*, 175 F.3d 1084, 1088 (9th Cir. 1999) (explaining the varying standards of review for trustee plan interpretations). However, for purely academic purposes, the State's argument is flawed because it misses the point that the settlor does not have any "rights… or powers with regard to [ ] trust administration" after the creation of the trust unless the trust instrument so provides. Amy M. Hess et al., *The Law of Trusts and Trustees* § 42, p. 445 (3d ed. 2007). In the eyes of the Supreme Court, the only potential safe haven for the CGCC would be the terms of the 1999 compacts themselves, s*ee Firestone*, 489 U.S. at 111 (explaining that a trustee's power to construe uncertain terms must come from the trust instrument), which are noticeably silent on the interpretation issue. This perception that discretion must arise from the trust instrument conforms to the general contract law rule that "the meaning of a contract is ordinarily decided by the court, rather than by a party to a contract, let alone the party that drafted it." *Herzberger v. Standard Ins. Co.*, 205 F.3d

327, 330 (7th Cir. 2000) (Posner, J.) These trust and contract rules taken together certainly help explain why Judge Damrell concluded that "the Commission's role as Trustee does not grant deferential review to its interpretation." *Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. California*, 629 F.Supp.2d 1091, 1108 n.15 (E.D. Cal. 2009).

This holding in *Colusa I* gains support from the Restatement (Third) of Trusts, which explains that discretion ends where breach of fiduciary duty begins. *See* Restatement (Third) of Trusts § 87 cmt. a (2007) ("[A] power is discretionary except to the extent its exercise is directed by the terms of the trust or compelled by the trustee's fiduciary duties."). In other words, discussion about discretion only comes into play if the trustee's "conduct is reasonable, not based on an improper interpretation of the terms of the trust, and not otherwise inconsistent with the trustee's fiduciary duties." Restatement (Third) of Trusts § 87 cmt. b. The various license pool opinions expressly state that the CGCC's interpretation was unreasonable and not entitled to any sort of deference. *See Colusa II*, 618 F.3d at 1079 ("[T]he language of the License Pool Provisions is not reasonably susceptible to an interpretation that would produce a license pool of 32,151 devices."); *San Pasqual*, Docket No. 97, 9:19-10:5 ("The Court considers Defendants' interpretation unreasonable" for multiple reasons.). The question presently before the Court – which the State completely failed to address – is whether this unreasonable interpretation breached the trustee's duties of administration, care, and loyalty. The undisputed evidence in Pauma's initial motion proves that it certainly did.

III. BY DEFINITION, A FIDUCIARY PROVIDES INFORMATION ON WHICH ANOTHER INTENDS TO ACT

Reliance on incorrect legal standards similarly plagues the State's fiduciary duty argument. Selectively ignoring the realities of the arrangement, the State cites California law to support its argument that the CGCC cannot be a fiduciary with respect to Pauma because the "relationship between the [two parties] has no similarities to commonly-recognized fiduciary relationships such as between real estate brokers, accountants, securities brokers, corporate directors and physicians and their respective clients." [Doc. No. 217, 15:12-15] Curiously missing from this list are both trustees and joint adventurers, which courts have long-recognized as occupying fiduciary positions in their respective engagements. *See Meinhard v. Salmon*, 249 N.Y. 458, 463-64 (1928) (Cardozo, Ch. J.). But, whittling the legal definition of fiduciary into a finite, circumscribed list of professionals runs directly counter to

federal law, *see Ensminger v. Terminix Int'l Co.*, 102 F.3d 1571, 1574 (10th Cir. 1996), which explains:

> [a] fiduciary relation does not depend upon some technical relation created by, or defined in, law. It may exist under a variety of circumstances, and does exist in cases where there has been a special confidence reposed in one who, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing the confidence. … The courts have consistently refused to give an exact definition to… that class of human relations which, by principles of common honesty, require fair dealing between the parties, and which is commonly known as fiduciary relations.

The second mistake made by the State is its assumption that this flexible definition of fiduciary only applies in the commercial context where the "special confidence reposed" results from a physical or mental defect on the part of the trusting party, whether it is "advanced age, youth, lack of education, weakness of mind, grief, sickness, or some other incapacity." [Doc. No. 217, 14:21-27] An *en banc* panel of the Ninth Circuit recently explained that the focus of the analysis is not on such "credulity" on the part of the victim, but rather the "defendant's position in the transaction." *Milovanovic*, 678 F.3d at 723 (quoting *United States v. Pappert*, 112 F.3d 1073, 1080 (10th Cir. 1997)). The meaning behind this phrase gains clarification from other federal court opinions that look at whether there is "intrinsically a more intimate relationship… than that… commonly encountered [between] buyer and seller," *Congress Fin. Corp. v. John Morrell & Co.*, 790 F.Supp. 459, 475 (S.D.N.Y. 1992), and hence one in which "influence has been acquired and abused, in which confidence has been reposed and betrayed." *Grund v. Del. Charter Guarantee & Trust Co.*, 788 F.Supp.2d 226, 248 (S.D.N.Y. 2011). Ultimately, the "key" is finding an "unequal relationship in which the claimant seeks particular information from a specialist upon which the recipient intends to rely or act." *Ensminger*, 102 F.3d at 1574. This definition fits the present circumstances to a tee, with the CGCC having sole authority for calculating and distributing an outwardly-obscure number of licenses, and Pauma completely dependent upon such decisions.

Nevertheless, occupying such a fiduciary position, in the opinion of the State, does not entitle Pauma to relief because trust duties are inapplicable in the context of other fiduciary relationships. [Doc. No. 217, 16:16-18] However, as explained in our original motion, "[w]herever there is a fiduciary relation,… the beneficiaries are, … entitled to the same remedies which are given to *cestuis que trustent* against those who are truly express trustees." 4 S. Symons, *Pomeroy's Equity Jurisprudence* § 1088, p. 263 (5th ed. 1941) ("*Pomeroy*"). The Restatement (Third) of Agency adopts this rule, imposing the same trust duties to act loyally, carefully, and within the scope of one's actual authority (i.e., to ask a

court for instructions in cases of reasonable doubt) upon an agent even if it is simply a fiduciary. *See* Restatement (Third) of Agency §§ 8.01, 8.08 & 8.09 (2006). Considering this, the Court should grant Pauma full relief on its breach of fiduciary duty claims.

IV. THE STATE PROCEDURES ARE MATERIAL AND SHOULD HAVE BEEN DISCLOSED

Continuing its game of "hide the ball," the State argues that the CGCC's withholding of the State Procedures cannot serve as a separate basis of liability for constructive fraud under California law because the "assertion that Judge Norris drafted the rules at issue lacks any evidentiary support and is based entirely on speculative and tenuous assertions by Pauma's counsel of record." [Doc. No. 217, 18:18-20] Neither part of this contradiction is the least bit true, as the original motion explains how the document contains terms that predate the existence of the CGCC, is referred to in later Commission memoranda with language indicating that it came from the Office of the Governor, and was specifically identified by the Commission's director with primary responsibility for administering the license draw process as Norris' creation. [WD1, Exs. 11-13; WD2, ¶¶ 19-22] Now, compare this with the State's abject failure to present even a shred of evidence showing that the State Procedures were not drafted by Norris, even though he is their witness and could have simply declared as much. Given the disparity in evidence submitted by the parties, the Court can and should infer that Norris authored the State Procedures. *See In re Placid Oil Co.*, 932 F.2d 394, 398 (5th Cir. 1991) (permitting evidentiary inferences on summary judgment in the absence of disputed material facts or witness credibility issues).

This result is particularly appropriate given the State's "protect Norris at all costs" stratagem during the sixty-day discovery period. The three-part plan involved the State first blocking Pauma's subpoena to Norris, then producing on the thirty-eighth day of their response period and immediately scheduling depositions for the closing days of discovery to prevent Norris' deposition, and ultimately admitting during a last-ditch meet-and-confer concerning a forthcoming motion to compel that Norris had recently "destroyed" all of this evidence. [WD2, ¶¶ 2-17] Why would the State go to such extraordinary lengths to protect this witness if all he had to say was "I did not author that document"? *See Nursing Home Pension Fund v. Oracle Corp.*, 254 F.R.D. 559, 563 (N.D. Cal. 2008) (indicating a court has the inherent discretion "to make appropriate evidentiary rulings [on summary judgment] in response to the destruction[,] spoliation[,]" or refusal to turn over relevant evidence).

Ultimately, the question of whether or not Norris drafted the State Procedures is irrelevant to the constructive fraud analysis. The State produced a privilege log indicating the document not only came from the CGCC, but was in its possession long before the failed December 2003 license draw. [WD1, Ex. 119 at P466] If this is true, the CGCC had an obligation to disclose the State Procedures to Pauma, explain how it undermined one of the basic assumptions that determined the size of the license pool, and clarify that a definitive tally of the number of licenses could not be determined without court assistance. The failure to do any of this provides additional grounds for granting Pauma's constructive fraud claim.

V. THE MISTAKE WAS REAL, REAL MATERIAL, AND REALLY NOT PAUMA'S FAULT

Offering three more flawed legal arguments, the State posits that the CGCC's misrepresentation about the size of the license pool was simply a statement of opinion upon which Pauma could not rely and the 2004 Amendment did not depend. The first of these arguments claims that "discrepancies in calculations based on matters of opinion as to differing methods of calculation do not result in mistakes of fact." [Doc. No. 217, 24:23-25] However, the fact-versus-opinion dichotomy is more nuanced than this, with a statement of fact being one "that can fairly be adjudged true or false, in a way that is subject to empirical verification." 26 Richard A. Lord, *Williston on Contracts* § 69:5, p. 508 (4th ed. 2003) (citing *Presidio Enters., Inc. v. Warner Bros. Distrib. Corp.*, 784 F.2d 674, 679 (5th Cir. 1986)). The overriding consideration in this determination is that the object of the statement is quantifiable, whether it is the value of a franchise at the end of a particular year, the number of prospective customers within an identifiable market, or the wealth amassed by the president of a company. *Nationwide Motorist Ass'n of Mich., Inc. v. Nationwide Motorist Ass'n, Inc.*, 273 F.Supp. 875, 884 (W.D. Mich. 1967). The number of licenses under the 1999 compacts should also fall into this category since it only includes two fixed variables that were ascertainable before the execution date of the agreements (i.e., the number of compact tribes and Class III machines in operation on September 1, 1999). [Doc. No. 197, 5:1-15]

Failing to meet this standard does not alter the representation into an opinion because the CGCC possessed "superior knowledge concerning the subject matter of the statement[ ]." *Ryan v. Glenn*, 489 F.2d 110, 112-13 (5th Cir. 1974); 7 Joseph M. Perillo, *Corbin on Contracts* § 28.17, pp. 81-82 (rev. ed. 2002) ("*Corbin*"). On top of which, the Restatement (Second) of Contracts explains that a party can rely on a statement of opinion if, as here, there is a "relation of trust or confidence" or he reasonably believes

that "the person whose opinion is asserted has special skill, judgment or objectivity with respect to the subject matter." Restatement (Second) of Contracts § 169 (1981).

According to the State, a finding that the statement is one of fact still does not produce an actionable mistake because the "alleged mistake must also be shown to be material to the contract rather than merely a collateral matter relating to the inducement." [Doc. No. 217, 25:12-18] This California law standard seems to conflate two distinct considerations that form part of the Restatement (Second) of Contracts' mutual mistake test: (1) the mistake pertaining to a basic assumption, and (2) it having a material effect on the agreed exchange of performances. *See* Restatement (Second) of Contracts § 152(1). Assuming the State intends to refer to the basic assumption element, it is true that "[t]he term *basic* is apparently intended to exclude mistakes relating to such collateral or peripheral matters as 'market conditions or financial ability.'" 2 E. Allen Farnsworth, *Farnsworth on Contracts* § 9.3, pp. 596-97 (3d ed. 2004). However, as the reporter for the Restatement (Second) of Contracts explains, "a wide variety of assumptions, such as those concerning the existence, identity, quantity, or quality of the subject matter, would seem to be 'basic' in the sense that they are regarded as vitiating the judgment of a contracting party, entitling that party to reverse the transaction." *Id.* As touched upon in the original motion, the vast catalogue of assumptions that courts recognize as forming the basis of actionable mistakes include: that the person being insured is alive, *see* Restatement (Second) of Contracts § 152 cmt. b, and that the antique violin being purchased is really a nineteenth century Bernardel. *Bentley v. Slavik*, 663 F.Supp. 736, 741 (S.D. Ill. 1987). To this list, the Court should add the structurally-identical assumption that the licenses being purchased are not already within one's possession.

The final argument advanced by the State tries to foreclose relief by suggesting Pauma exhibited conscious ignorance because it was a "sophisticated" gaming tribe that knew the "number of licenses available under the 1999 Compact was a long-standing matter of controversy and debate when it freely executed the 2004 Compact." [Doc. No. 217, 26:22-27] The risk of mistake can shift onto the plaintiff if he exhibits "conscious ignorance," which occurs if "he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient." Restatement (Second) of Contracts § 154(b) & cmt. c. At least one federal court has described this concept as a "'conscious present want of knowledge of facts' which a party

manifestly concluded will not influence the decision to contract." *Bentley*, 663 F.Supp. at 742. With its focus on deliberate indifference, the doctrine of conscious ignorance does not apply when a "contracting party or a transferor actively or passively perceives a fact – even when further investigation would have revealed that the perception was flawed." Keith A. Rowley, *To Err is Human*, 104 Mich. L. Rev. 1407, 1416 (2006). Rather, successfully invoking the doctrine typically requires an affirmative "showing that the ignorant party is willing to bear the risk of the unknown facts." *Bentley*, 663 F.Supp. at 742 (citing *S. Nat'l Bank of Houston v. Crateo, Inc.*, 458 F.2d 688, 698 (5th Cir. 1972)). But such willingness is not evident here, as Chairman Devers testified that, in the aftermath of the failed December 2003 license draw, the Tribe only entered into the 2004 Amendment to attain the "magic number" of 2,000 machines. [WD1, Exs. 69, 89] Corroborating this testimony, Vice Chairwoman Dixon summed up the situation by explaining "[t]he amended compact was something that we entered into with the State of California so that we could acquire the additional machines to come up to 2,000." [WD1, Ex. 90] Both logic and common sense dictate that neither one of the individuals would knowingly obligate the Tribe to pay $9.3 million per year for licenses it had the present right to operate for $2.76 million.

It is worth repeating that assumption of risk involves a "conscious choice made by the claimant" and does not apply where such "person… acts carelessly… on the basis of imperfect information." Restatement (Third) of Restitution and Unjust Enrichment § 5 cmt. b(2) (2011). For instance, the Northern District of Indiana invoked this principle as the reason for refusing to shift the risk of mistake in a remarkably similar case where the plaintiff's consent to contract was obtained through material misrepresentations about the subject matter of the agreement. *See The Lincoln Nat'l Life Ins. Co. v. Donaldson*, 9 F.Supp.2d 994 (N.D. Ind. 1998). Therein, the plaintiff purchased approximately $41 million in mortgage-backed securities – instruments whose return on investment depends upon "rates of prepayment and delinquency" rather than a set yield to maturity like typical notes or bonds. *Id.* at 996. Citing inaccuracies in the sixty-nine page prospectus, the plaintiff brought suit against the securities broker for materially misrepresenting the delinquency rate and the number of barren properties that were then bank-owned as a result of foreclosure. *Id.* Attempting to defend the contract, the securities broker claimed that the plaintiff assumed the risk of any "statistical errors and poor judgment by the servicer of the underlying loans, just like any other investor in a subordinated mortgage-backed security." *Id.* at

1005. This argument became the object of ridicule for the district court, who considered it an unconvincing "academic exercise," and reasoned that arguing "[plaintiffs] bore the risk of errors by the [loan servicer] would be akin to saying that a negligent driver is not liable for crashing into a careful driver because all careful drivers bear the risk of being hit by one who is careless." *Id.*

This analogy focuses in on one of the most crucial aspects of the assumption of risk analysis, which is that it goes "to the extent of a [person's] duty to discover facts with respect to which he is mistaken." *Shore Builders, Inc. v. Dogwood, Inc.*, 616 F.Supp. 1004, 1017 (D. Del. 1985). Yet, the bedrock duty of inquiry arises in neither the fiduciary context, *see Eisenbaum v. W. Energy Res., Inc.*, 218 Cal.App.3d 314, 324 (4th Dist. 1990), nor in cases involving misrepresentations since the Restatement (Second) of Contracts allows parties to reasonably rely on one another's assertions without investigating their accuracy. *Petrucelli v. Palmer*, 596 F.Supp.2d 347, 363 (D. Conn. 2009); *see El Pollo Loco, Inc. v. Hashim*, 316 F.3d 1032, 1040 (9th Cir. 2003). Together, these rules explain why federal contract law refuses to shift the risk of mistake in cases that concern "bad faith, breach of confidence, misrepresentation, culpable concealment, [or] other like conduct amounting to actual or constructive fraud." 3 *Pomeroy* § 855, p. 332; *see Shore Builders*, 616 F.Supp. at 1018 (holding that "a misrepresentation would preclude a finding that… reliance… was unjustified[.]").

This rule is immutable and unaffected by the State's desire to impute constructive knowledge on the basis of a singular claim within the Rincon suit. In *In re Beef Indus. Antitrust Litig.*, 600 F.2d 1148, 1153 (5th Cir. 1979), a class of cattle ranchers brought suit against Kroger, Safeway, and other retail stores for conspiring to fix the price of beef at artificially low prices. The retailers defended on statute of limitations grounds, arguing that a similar lawsuit by California cattlemen nearly a decade earlier imparted constructive knowledge because it was widely publicized in newspapers and an issue of the Beef Business Bulletin, an industry-sponsored publication with a circulation of nearly 300,000. *Id.* at 1170. Noting the difference between a document and its contents, the Court held that the mere act of filing a complaint is not "tantamount to actual or constructive knowledge" of the claims contained therein, nor would it even provide "good ground" for filing suit because the claims "might well be frivolous or baseless." *Id.* at 1171. Appearing just eleven days before the execution of the 2004 Amendment, the Rincon complaint contained a singular discrete claim by one of the sixty-plus compact

tribes concerning the CGCC's determination of the total number of licenses available under the 1999 compacts. Putting aside the fact that the State staunchly withheld all evidence that could help prove the underlying allegations, this claim had nothing to do with the initial thrust of the case, which centered on restraining the amended compacts from taking effect. *See Rincon Band of Luiseno Mission Indians v. Schwarzenegger*, No. 04-1151 WMc, Docket No. 8 (S.D. Cal. June 28, 2004) ("*Rincon*"). When asked about his understanding of the Rincon suit during the *Harrah's* trial, Pauma's attorney Larry Stidham responded accordingly, that "what they were trying to do is to stop those compacts from going forward." [WD3, Ex. 121] In fact, an exchange during a recent deposition of Chairman Majel revealed that while Pauma was indeed aware of the suit at some point before signing on to a joint *amicus* brief in response to the TRO request, it was not aware that the suit "challeng[ed] the Commission's determination of the number of licenses available under the 1999 compact." [WD3, Exs. 120, 123] This evidence serves as yet one more reason for placing the risk of mistake squarely on the shoulders of the offending party.

VI. THE ASSISTANT SECRETARY WAS MISTAKEN, JUST LIKE PAUMA

Rather than challenge the Ninth Circuit's principal holding in *Rincon II* that "the demand for 10-15% of [ ] net win, to be paid into the State's general fund, is simply an impermissible demand for the payment of a tax by the tribe," *Rincon*, 602 F.3d 1019, 1042 (9th Cir. 2010), the State instead argues that the fees on the first 2,000 machines cannot constitute an illegal tax because Pauma and the Assistant Secretary both said they were fine at the time. [Doc. No. 217, 11:23-26] The amount of deference the Assistant Secretary's decision deserves is extremely limited given the number of mistaken assumptions in its ratification letter. Believing Pauma was an established gaming tribe, the Assistant Secretary first assumed that the Tribe was paying into both the RSTF and the SDF on every machine under the 1999 Compact, and consequently that the difference in payments between the initial agreement and the 2004 Amendment was considerably smaller. [WD3, Ex. 124] Using Casino Pauma's financial data for 2004, this error produced a belief that the "new" baseline concessions cost $3,309,071.75 less on an annual basis than they really did. [Doc. No. 38-2] Compounding this problem, the Assistant Secretary also misperceived the value of the concessions Pauma would receive in exchange for these and other payments. Described as providing "much stronger protection" than the related provision in the 1999 Compact, "enhanced exclusivity" never actually came about because the State indiscriminately funneled

Pauma's revenue sharing into the general fund. [WD1, Exs. 78 at § 3.2(a); 81; WD3, Ex. 124] More importantly, the undiscovered misrepresentation about the license pool prevented the Assistant Secretary from knowing the licenses for machines 1,051 to 2,000 were actually preexisting contract rights. Thus, unbeknownst to the Assistant Secretary, the real exchange under the 2004 Amendment involved Pauma paying $3.3 million more annually than he expected, and the Tribe receiving not just substantially less, but practically nothing other than an eight year extension on the term of the original agreement.

The conduct that engendered this brutal fallout underscores the central premise of the case: that Pauma could not knowingly "agree[ ]… [that] the financial benefits [it] would receive from amending [its] 1999 compact[ ], [was] satisfactory to [it]." [Doc. No. 217, 11:16-17] After all, the basic premise of a mistake is that it results in "the doing of some act which would not have been done in the absence of the particular conception or conviction which influenced the free action of the will." 3 *Pomeroy* § 839, p. 284; *see* Restatement (Third) of Restitution and Unjust Enrichment § 5 reporter's note, cmt. c ("That cannot be said with propriety to be voluntarily done, where a formal assent thereto is induced by mistake, or procured by fraud or deception,… any more than where such formal assent is extorted by the application of a force which fetters and obstructs its free working."). With this misconception resulting from the State's overreaching, the Court should correct the financial terms for the first 2,000 machines.

VII. THE UNCONSCIONABILITY CLAIM IS BOTH VALID AND TIMELY

Citing a unique procedural hang-up under California statutory law, the State argues that Pauma's unconscionability claim fails as a matter of law because the doctrine is "an affirmative defense to enforcement of a contract, as opposed to a stand-alone cause of action" under Civil Code § 1670.5. [Doc. No. 217, 19:4-8]. Only the first half of this quoted recitation of the law is correct, as the common law traditionally viewed unconscionability as a defense against contract enforcement, just not a basis *for recovering damages per se*. *Doe v. SexSearch.com*, 551 F.3d 412, 419 (6th Cir. 2008). Notwithstanding this limitation, "[a]s a general proposition, most matters of defense [like unconscionability] can be raised affirmatively… so long as there is an actual controversy between the parties." *Hughes v. TD Bank, N.A.*, 856 F.Supp.2d 673, 679 (D.N.J. 2012) (quoting *In re Checking Account Overdraft Litig.*, 694 F.Supp.2d 1302, 1318 (S.D. Fla. 2010)). Thus, unconscionability can form the basis of a cause of action if the plaintiff is seeking "a declaratory judgment or reformation of the contract," *SexSearch.com*, 551 F.3d at

420; 7 Corbin § 29.3, p. 387, and any restitution that would naturally flow from the past enforcement of the unconscionable terms. *See Eva v. Midwest Nat'l Mortgage Banc, Inc.*, 143 F.Supp.2d 862, 896 (N.D. Ohio 2001). Holding otherwise would force the plaintiff into the untenable and disconcerting position of having "to breach [the contract], get sued, and raise unconscionability as a defense before the Court may examine the enforceability of the contract." *Id.* at 895. Quite simply, the law "favors" avoiding such potential forfeitures by permitting "the party suspecting unconscionability to raise that issue in a declaratory judgment action or in an action for reformation." *Id.*

Naturally, the timeliness of the claim is also under challenge from the State, who argues without legal support that "[a]n 'unconscionability' claim accrues when the allegedly unconscionable contract is formed." [Doc. No. 217, 19:12-13] "A claim that a cause of action is barred by the statute of limitations is an affirmative defense." *Fanucci v. Allstate Ins. Co.*, 638 F.Supp.2d 1125, 1132 (N.D. Cal. 2009). When essentially moving for summary judgment on a statute of limitations defense, the defendant "must establish beyond peradventure all of the essential elements of the … defense to warrant judgment in [its] favor." *Id.* at 1132-33 (citing *Martin v. Alamo Cmty. College Dist.*, 353 F.3d 409, 412 (5th Cir. 2003)).

For federal contract law claims like unconscionability, "the general rule is that a state limitations period for an analogous cause of action is borrowed and applied to the federal claim[s] provided that the application of the state statute would not be inconsistent with underlying federal policies." *County of Oneida N.Y. v. Oneida Indian Nation of N.Y. State*, 470 U.S. 226, 240 (1984). Although state law governs the length of the limitations period, federal law still determines when the period begins to run. *See Trotter v. Int'l Longshoremen's & Warehousemen's Union, Local 13*, 704 F.2d 1141, 1143 (9th Cir. 1993). This "is not the date on which the wrong that injures the plaintiff occurs, but the date… on which the plaintiff discovers that he has been injured." *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450 (7th Cir. 1991) (Posner, J.). Whereas California law ties discovery to when the plaintiff "***suspects*** or should suspect" the injury, *O'Connor v. Boeing North American, Inc.*, 311 F.3d 1139, 1148 (9th Cir. 2002), federal law pushes back the triggering date until he "***knows*** or has reason to know of the injury which is the basis of the action." *Trotter*, 704 F.2d at 1143. In the analogous ERISA context, this "reason to know" standard equates with a "clear and continuing repudiation of a claimant's rights under a plan such that the claimant could not have reasonably believed but that his or her benefits had been

finally denied." *Winthrow v. Halsey*, 655 F.3d 1032, 1036 (9th Cir. 2011). Considering that procedural unconscionability "does not appear [in cases of mistake] at the time the contract is made," Restatement (Second) of Contracts § 153 cmt. c, Pauma could not have reasonably known about the State's misrepresentation of facially-complex contract language until the release of *Colusa I* in the fall of 2009.

Three different considerations verify the correctness of this conclusion. First, the Restatement allows parties to place "reasonable reliance on each others' representations without investigating their accuracy." *Petrucelli*, 596 F.Supp.2d at 363. Second, this rule becomes even more generous where the misrepresentation comes from a fiduciary. *Eisenbaum*, 218 Cal.App.3d at 324. Third, any investigation would not have produced knowledge of an actionable claim because the State withheld all the "vital information," whether it is Norris' original papers, the State Procedures, or simply any basic information about the administration of the license draw process. [WD1, Exs. 118-19]; *see Santa Maria v. Pac. Bell*, 202 F.3d 1170, 1178 (9th Cir. 2000) (tolling statute where plaintiff cannot obtain vital information).

For argument's sake, even assuming the unconscionability claim accrued on the June 21, 2004 execution date of the 2004 Amendment, Pauma still tolls enough time under California law to bring the claim within either a three or four year limitations period. "In actions like this [ ], where the federal courts borrow the state statute of limitations, [they] also borrow the forum state's tolling rules." *TwoRivers v. Lewis*, 174 F.3d 987, 992 (9th Cir. 1999). California law tolls any periods during which a plaintiff cannot brining an effective suit because of an appeal in a related case, *see Paniagua v. Orange County Fire Auth.*, 149 Cal.App.4th 83, 88 (4th Dist. 2007), or has to pursue mandatory administrative remedies. *McDonald v. Antelope Valley Cmty. College Dist.*, 45 Cal.4th 88, 101 (2008). Together these two rules advance the accrual date from June 21, 2004 to August 12, 2007 by writing-off the 235 days of compulsory pre-suit negotiations and the 921 days during which *Colusa I* was originally dismissed for failure to join necessary and indispensible parties – a decision that Judge Burns subsequently applied to San Pasqual in the only license pool suit filed during the interim period preceding the Ninth Circuit's reversal. *See Colusa*, No. 04-2265 FCD KJM, Docket Nos. 25 & 40 (E.D. Cal. May 16, 2006 & Nov. 12, 2008); *San Pasqual*, Docket No. 42 (S.D. Cal. Mar. 20, 2007).

VIII. *COLUSA I* REVEALED THE FAILURE OF THE RE-PURCHASED LICENSES

The lone authority cited by the State in its failure of consideration argument is indeed correct,

but the manner in which it applied the case is not. [Doc. No. 217, 27:5-28:4] "[F]ailure of consideration is based, not upon facts existing at the time the mutual promises bargained for in a bilateral contract are made, but upon some fact or contingency which occurs between the time of the making of the contract and the action which results in the material failure of performance by one party." *Taliaferro v. Davis*, 216 Cal.App.2d 398, 411 (1st Dist. 1963). In *People v. Munoz*, 167 Cal.App.4th 126, 129 (4th Dist. 2008), an innkeeper rented a room for the day in exchange for two $20 bills and one $5 bill. After inspecting the currency, an on-site police officer informed the innkeeper that one of the $20 bills was "less dense" than real legal tender, and likely counterfeit. *Id.* Once the innkeeper discovered that part of the consideration she received was valueless, in the opinion of the court, she "had the right to rescind the agreement for an extra day['s lodging] based upon failure of consideration." *Id.* at 134. Much like the police officer in *Munoz*, the federal courts revealed that the license consideration at the heart of the instant contract was not what it appeared to be, as the principal portion (i.e., licenses 1,051 to 2,000) actually belonged to Pauma "all along." [Doc. No. 56, 6:6-11]; *Salmeron v. United States*, 724 F.2d 1357, 1362 (9th Cir. 1983) ("[G]iving a party something to which he already has an absolute right is not consideration[.]"). This contingency, in other words, exposed the material failure that permits rescission of the affected contract under Section 1689 of the Civil Code.

XI. THE STATE WAIVED IMMUNITY BY STATUTE, CONTRACT, AND CONDUCT

Having obstinately refused to familiarize itself with federal contract law, the State incorrectly assumes that the merits and remedies questions are not inherently intertwined, and therefore capable of bifurcation. [Doc. No. 217, 29:23-25] The value of repeating this laborious process for a fourth time seems incredibly slight where the requesting party has wasted each of its three opportunities to address the merits, all because it does not like the body of law being discussed. At this point, rehashing these arguments would "serve no purpose," so the Court should "refuse to give [the State] another kick at the cat." *Phillips v. Lincoln Nat'l Life Ins. Co.*, 978 F.2d 302, 314 (7th Cir. 1992). Plus, the Court can avoid the "estoppel versus reformation versus rescission" question by simply reducing the revenue sharing fees on the first 2,000 machines to the prior rates of the 1999 Compact as a quasi "rescissionary measure of damages." *Strategic Diversity, Inc. v. Alchemix Corp.*, 666 F.3d 1197, 1208 (9th Cir. 2012).

Whatever principal remedy the Court awards, combining it with a present value-adjusted credit

to account for Pauma's past heightened revenue sharing payments under the 2004 Amendment would not raise sovereign immunity concerns. *Elephant Butte Irrigation Dist. v. Dep't of Interior*, 160 F.3d 602, 612 (10th Cir. 1998) (stating that the loss of future profits under a contract does not offend sovereign immunity). In fact, neither would granting actual restitution in lieu of such a credit. The preface of the waiver of sovereign immunity within the 1999 Compact states that the parties agree to "waive any immunity [ ] ***that they may have***" provided certain conditions are met. [WD1, Ex. 24 at § 9.4] Two years before the execution date of the 1999 Compact, the State enacted Cal. Gov't Code § 98005, which repealed the State's sovereign immunity in compact suits like this by providing that "the 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… violation of the terms of ***any*** Tribal-State compact" or refusal to "negotiate in good faith concerning [an] amendment." *See Rincon II*, 602 F.3d at 1026 (the eleventh federal opinion to recognize the validity of this waiver). When a party deceives another about existing contract rights in order to better its financial haul, the only two possible bases for any cause of action are the violation of the predicate agreement or the refusal to negotiate in good faith for the subsequent one.

Should the claims at issue somehow fall outside this waiver, the dependent waiver of sovereign immunity in the 1999 Compact provides a second method for obtaining restitution. Putting the State's cherry-picked reading aside, Section 9.4 states the parties waive any immunity that they may have provided "the dispute is limited solely to issues arising under this Gaming Compact" and "neither side makes any claim for monetary damages." [WD1, Ex. 24] "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." *United States v. Balistrieri*, 981 F.2d 916, 928 (7th Cir. 1993). A long line of federal cases adheres to this definition, allowing plaintiffs to use declaratory claims to obtain restitution where damages is otherwise prohibited. *See Bowen v. Massachusetts*, 487 U.S. 879, 893 (1988) (construing "money damages" under the APA to permit "the recovery of specific property or monies"); *United States v. Rent Am. Corp.*, 734 F.Supp. 474, 481-82 (S.D. Fla. 1990) (giving "monetary damages" in the FHA a "common-sense" interpretation covering "damages properly recoverable in a court of law").

But before reaching either of these inquiries, the Court first has to ask whether the State waived its sovereign immunity by failing to raise the defense until summary judgment. While rooted in the Eleventh Amendment, sovereign immunity is treated as an affirmative defense that the state government "bears the burden of asserting and proving." *Hill v. Blind Indus. & Servs. of Md.*, 179 F.3d 754 (9th Cir. 1999), *amended by* 201 F.3d 1186, 1186 (9th Cir. 2000). Like any other affirmative defense, a waiver of sovereign immunity occurs if the state appears and defends on the merits, provided that it "has been adequately notified of the pendency of the suit and of the particular matters at issue." *Hill*, 179 F.3d at 759 (quoting *Fordyce v. City of Seattle*, 55 F.3d 436, 441 (9th Cir. 1995)); *see Levine v. Fair Political Practices Comm'n*, 222 F.Supp.2d 1182, 1187 (E.D. Cal. 2002) (finding a waiver where the state did not contest jurisdiction in its answer and participated in preliminary injunction briefing). Despite informally debating the availability of restitution ***months*** before the filing of the suit, the State did not actually raise sovereign immunity until ***years*** into the proceeding – well after it partook in the preliminary injunction proceedings wherein Judge Burns stated that a judgment in Pauma's favor would require "the state… to make restitution," conducted an eighth month interlocutory appeal, heard Judge Burns order Pauma to file a motion for summary judgment, and then filed an answer and two motions to dismiss that make no mention of sovereign immunity from paying restitution. [Doc. Nos. 11; 44; 111; 129; 130, ¶ 189; 142] Allowing the State to raise sovereign immunity after all of this would surely "undermine the integrity of the judicial system." *Hill*, 179 F.3d at 756.

Along with post-judgment interest under 28 U.S.C. § 1961, "[t]he Restatement of Restitution recognizes that if restitution is ordered, the recipient is also entitled to an award of prejudgment interest." *In re Ray*, 2011 WL 4829416, *3 (W.D. Wash. 2011); *see* Restatement (Third) of Restitution and Unjust Enrichment §§ 49, 53(4) & cmt. e. This general rule reflects the widely accepted remedial purpose of pre-judgment interest, which is to prevent the defendant from being unjustly enriched by its infringing use of the plaintiff's property. *Frank Music Corp. v. MGM Inc.*, 886 F.2d 1545, 1552 (9th Cir. 1989). Since this case concerns both federal and California claims, the equities weigh against using the "historically low" T-Bill rate, *Bard Peripheral Vascular, Inc. v. W.L. Gore & Assocs., Inc.*, 2009 WL 920300, *2 (D. Ariz. 2009); and in favor of averaging the prime rate and the statutory rate in Cal. Const. art. XV, § 1. *Jadwin v. County of Kern*, 767 F.Supp.2d 1069, 1096-97 (E.D. Cal. 2011).

CONCLUSION

For the foregoing reasons, Pauma respectfully requests that the Court grant *in toto* its Motion for Summary Judgment on Claims Five through Ten and Thirteen through Seventeen in the First Amended Complaint, and enter final judgment pursuant to Federal Rule of Civil Procedure 54(b).

RESPECTFULLY SUBMITTED this 26th day of October, 2012

THE PAUMA BAND OF MISSION INDIANS

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