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IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF ARIZONA

**The State of Arizona; The Gila River
 Indian Community**, a federally
 recognized Indian tribe; and **The Salt
 River Pima-Maricopa Indian
 Community**, a federally recognized
 Indian tribe,

Plaintiffs,

v.

The Tohono O'odham Nation, a
 federally recognized Indian tribe,

Defendant.

Case No. 2:11-cv-00296-DGC

**PLAINTIFFS' SUPPLEMENTAL
 BRIEF**

(Assigned to Hon. David G. Campbell)

Pursuant to the Court’s Order of May 7, 2013 [Doc. 216], Plaintiffs hereby submit the following supplemental brief addressing the Court’s questions regarding the Restatement (Second) of Contracts (“Restatement” or “Rest.”) § 201(2).

I. SECTION 201(2) APPLIES ACCORDING TO ITS TERMS, WITHOUT ANY ADDED STANDARD OF REASONABLENESS.

There is no authority for imposing a standard of reasonableness as a limiting overlay on § 201(2). As far as Plaintiffs are aware, no court has applied a reasonableness requirement to § 201(2).¹ In particular, there is no such authority under Arizona law. To the contrary, the Restatement and case law applying it make clear that no such limitation exists. Arizona law applies to interpretation of the Compact [Doc. 216 at 14], and the language of the Restatement as written must control here because Arizona courts follow the Restatement “[a]bsent *Arizona law* to the contrary.” *Ft. Lowell-NSS Ltd. P’ship v. Kelly*, 166 Ariz. 96, 102, 800 P.2d 962, 968 (1990) (emphasis added).

The application of § 201(2) when one party has an “unreasonable” interpretation of a contract term is illustrated by *Bock v. Computer Associates Int’l, Inc.*, 257 F.3d 700 (7th Cir. 2001). *Bock* involved a suit against the company that had acquired Platinum, the plaintiff’s former employer, over whether a severance agreement included commissions in severance pay calculations. The district court held that the agreement was ambiguous because both plaintiff’s and defendants’ interpretations were reasonable. *Id.* at 705-06. The court of appeals reversed on this point, rejecting as unreasonable Platinum’s interpretation that commissions were excluded. *Id.* at 706 (“There is nothing in the language of the agreement itself to make this a reasonable interpretation.”) It nevertheless cited § 201(2) and remanded to the district court for “findings on the question whether Bock knew, or had reason to know, Platinum’s intent with respect to commissions.” *Id.* at 708, 709. The court

¹ The Nation has never raised this “reasonableness” argument against application of § 201.

1 explained: “The alleged breach turns entirely on the question for which we are
2 remanding to the district court: did Bock know, or have reason to know, that Platinum
3 intended to exclude commissions? If he did, Platinum may be rescued from the plain
4 and ordinary meaning of the severance agreement itself. If he did not, Bock may
5 prevail as a matter of pure contract interpretation.” *Id.* at 711; *cf. Local Union 1395,*
6 *Int’l Bhd. of Elec. Workers, AFL-CIO v. N.L.R.B.*, 797 F.2d 1027, 1035-1036 (D.C.
7 Cir. 1986) (citing § 201, reversing, and remanding for consideration of whether the
8 parties manifested differing interpretations of their agreement, even though, “[w]ere
9 we faced only with the language of the agreement itself, we would have little trouble
10 upholding the Board’s order”).

11 Here, as in *Bock*, findings regarding what each party knew or had reason to
12 know are required, notwithstanding the Court’s determination that the State’s
13 interpretation of the Compact is not reasonable. Application of § 201(2) is mandatory
14 and unconditional. “In cases of misunderstanding, *there must be an inquiry* into the
15 meaning attached to the words by each party and into what each knew or had reason
16 to know. See § 201.” Rest. § 214 cmt. b (emphasis added). Moreover, comment b to
17 § 201 explains that “the question of meaning in cases of misunderstanding *depends on*
18 an inquiry into what each party knew or had reason to know See § 20 and
19 Illustrations.” Rest. § 201 cmt. b (emphasis added).

20 Section 20 amplifies this point. It concerns contract formation and provides a
21 rule, in § 20(2), parallel to § 201(2): where there is a misunderstanding at formation, a
22 contract is formed according to the meaning attached by the one party, where the
23 other knows the meaning the one has attached. Section 20 places fault squarely on the
24 other party who knows of the first party’s meaning and enters the contract without
25 addressing it—regardless of objective reasonableness. “Subsection (2) deals with
26 cases where both parties are not equally at fault. If one party knows the other’s
27 meaning and manifests assent intending to insist on a different meaning, he may be
28 guilty of misrepresentation. *Whether or not there is such misrepresentation* as would

1 give the other party a power of avoidance, *there is a contract under Subsection (2)(a)*
 2” Rest. § 20 cmt. d (emphasis added). Thus, the party unaware of the difference
 3 in meaning may elect either to avoid the contract by proving misrepresentation (an
 4 election foreclosed here by the Court’s ruling on sovereign immunity [Doc. 43 at 20]),
 5 or to enforce the contract according to the meaning that it has attached to the contract.

6 An illustration in the Restatement makes clear that objective reasonableness is
 7 not a requirement to enforce the meaning of the party who was unaware:

8 A says to B, “I offer to sell you my horse for \$100.” B, knowing that A
 9 intends to offer to sell his cow for that price, not his horse, and that the
 10 word “horse” is a slip of the tongue, replies, “I accept.” The price is a
 11 fair one for either the horse or the cow. There is a contract for the sale
 of the cow and not of the horse.

12 Rest. § 20 cmt. d illus. 5. And even “[i]f the price is excessive for the cow,” A *still*
 13 can enforce the contract for the cow unless B meets the standards “applicable in a suit
 14 for reformation.” Rest. § 20 Reporter’s Note to cmt. d.

15 Obviously it is not objectively reasonable to believe that the word “horse”
 16 means “cow.” Without reference to extrinsic evidence, the contract in Illustration 5
 17 could mean only one thing. Yet under the Restatement, B’s contract to purchase a
 18 horse obligates B to purchase the cow, because “a party who makes a contract
 19 knowing of a misunderstanding is sufficiently at fault to justify his being subjected to
 20 the other party’s understanding.” *Centron DPL Co. v. Tilden Fin. Corp.*, 965 F.2d
 21 673, 675 (8th Cir. 1992) (quoting E. Allan Farnsworth, *Contracts* 488 (2d ed. 1982));
 22 accord E. Allan Farnsworth, *Contracts* § 7.9 at 462 (3d ed. 1999) (“Farnsworth”).

23 This case presents an analogous situation. The State negotiated and executed
 24 the Nation’s 2002 compact (the “Compact”) believing the written agreement
 25 expressed its unmistakable intent to bar additional casinos in the Phoenix area—the
 26 State meant “cow” but the Court has ruled that the written Compact says “horse.”
 27 The Compact is enforceable to prevent additional casinos in Phoenix if the Court’s
 28 resolution of the disputed facts shows that the Nation knew or had reason to know the

1 State meant “no additional casinos in Phoenix” when it executed the Compact, and the
 2 Nation knowingly remained silent—particularly where it did so with the intent of
 3 enforcing a different interpretation later. This result is required by the Restatement
 4 and thus required by Arizona law. *Ft. Lowell-NSS*, 166 Ariz. at 102, 800 P.2d at 968.

5 As the “horse-cow” illustration shows, enforcing a known yet unreasonable
 6 interpretation makes sense because § 201 is an inquiry into meanings actually
 7 attached by one or both parties, rather than the meanings of objectively reasonable
 8 third parties. “In a dispute over contract interpretation, each party claims that the
 9 language should be given the meaning that that party attaches to it at the time of the
 10 dispute. However, the resolution of the dispute begins, not with these meanings, but
 11 with the meanings attached by each party at the time the contract was made.”
 12 Farnsworth § 7.9 at 458-59. For this reason, objectively unreasonable meanings
 13 actually attached by at least one party are enforceable under 201(1) as well as 201(2).
 14 In *Johnson v. Cavan*, application of § 201(1) trumped the argument that “the lease
 15 does not mention parking spaces and is facially unambiguous.” 152 Ariz. 452, 454,
 16 733 P.2d 649, 651 (App. 1986). “Surely if one party shows that the other party
 17 attached the same meaning that the first party did, the other party should not be able
 18 to avoid that meaning by showing that a reasonable person would have attached a
 19 different one.” Farnsworth § 7.9 at 459.²

20 The same logic holds under § 201(2). Just as § 201(1) holds the parties to a
 21 meaning attached by both, § 201(2)(a) enforces one party’s attached meaning when
 22 the other party knowingly remains silent and signs the contract, because it has
 23 “acquiesced in and is bound by the meaning” attached by the other party. *Perry &*

24
 25 ² Indeed, if the parties each attached the same meaning to their agreement, that
 26 meaning must be enforced, even if the written agreement is based on a convoluted
 27 secret code known only to the parties. *See Bibb v. Allen*, 149 U.S. 481, 494-96
 28 (1896). The same reasoning applies under § 201(2), so long as the one party who
 attached a particular meaning to the contract can “convince the court that the other
 party knew or had reason to know the meaning of the symbols used in accordance
 with the translation asserted.” 5 Corbin on Contracts § 24.8 at 58 (rev. ed. 1998)
 (“Corbin”). The views of a hypothetical reasonable person are not relevant.

1 *Wallis, Inc. v. United States*, 427 F.2d 722, 725 (Ct. Cl. 1970) (cited in the Reporter's
2 Note to Rest. § 201 cmt. b). When § 201(2)(a) applies, only one meaning attached by
3 a party is known to both parties at the time of contracting. For this reason, "[a] party
4 who willingly and without protest enters into a contract with knowledge of the other
5 party's interpretation of it is bound by such interpretation and cannot later claim that it
6 thought something else was meant." *Perry & Wallis*, 427 F.2d at 725; *accord Emor*
7 *Inc. v. Cyprus Mines Corp.*, 467 F.2d 770, 775 (3d Cir. 1972) (also cited in the
8 Reporter's Note to Restatement § 201 cmt. b). This rationale of willing, knowing
9 acquiescence leaves no room for what a third party might think is reasonable. The
10 more unreasonable the one party's meaning, the more unreasonable the second party's
11 manifestation of assent without protest. Both parties may have been unreasonable,
12 but it is the second who knowingly proceeded in the face of a misunderstanding.

13 The Restatement explicitly establishes the primacy of the "subjective" intent of
14 the parties, manifested objectively. "Interpretation of contracts deals with the
15 meaning given to language and other conduct by the parties rather than with meaning
16 established by law." Rest. § 212 cmt. a. Even an objectively unreasonable meaning
17 attached by one of the parties controls under § 201, because an objective
18 reasonableness standard is an inferior "meaning established by law." While meaning
19 itself is subjective, proof of meaning must be objective: "the relevant intention of a
20 party is that manifested by him rather than any different undisclosed intention." *Id.*;
21 *accord* Rest. § 2 cmt. b. After making this distinction between subjective meaning
22 and objective proof, the comment refers back to § 201 as a search for a meaning
23 known to both parties: "*There may be a contract [i.e., mutual assent] in accordance*
24 *with the meaning of one party if the other knows or has reason to know of the*
25 *misunderstanding and the first party does not. See §§ 200, 201.*" If the Restatement
26 included an unwritten reasonableness requirement in § 201, these explanations of the
27 distinctions between the subjective and objective components in interpretation would
28

1 be incorrect and incomplete.³

2 The Restatement also notes the distinction between the inquiry of § 201(2)(a),
3 regarding actual subjective knowledge by the second party of the first party's attached
4 meaning, and § 201(2)(b), where the "reason to know" standard relies on a partly
5 objective determination: "When a party is thus held to a meaning of which he had
6 reason to know, it is sometimes said that the 'objective' meaning of his language or
7 other conduct prevails over his 'subjective' meaning." Rest. § 212 cmt. a. But the
8 comment emphasizes that even under § 201(2)(b), "the operative meaning is found in
9 the transaction and its context rather than in the law or in the usages of people other
10 than the parties."⁴ *Id.*

11 In sum, under Arizona law a court may not add a "reasonableness" element to
12 the Restatement in conflict with a meaning proven under § 201.

13 **II. THE STATE'S UNDERSTANDING OF THE COMPACT IS THE** 14 **MEANING ATTACHED BY THE GOVERNOR AND HER AGENTS.**

15 The trier of fact should look to the understanding of the Governor and her
16 agents in the negotiations to determine the meaning the State attached to the Compact.

17 ³ Other bodies of law make the same distinction between (1) meaning actually
18 subjectively attached by at least one party and known to the other, and (2) objectively
19 reasonable meanings, and prioritize the former over the latter. The Vienna
20 Convention "provides that if the other party 'knew or could not have been unaware'
21 of a party's intent, the latter's intent prevails, and that *otherwise* recourse is to be had
22 to 'the understanding that a reasonable person of the same kind as the other party
23 would have had in the same circumstances.'" Farnsworth 463 n.19. The United
24 Nations Convention on Contracts for the International Sale of Goods, Article 8,
25 Paragraph 1 provides that "statements made by and other conduct of a party are to be
26 interpreted according to his intent where the other party knew or could not have been
27 unaware what that intent was." Paragraph 2 then provides, "*If the preceding*
28 *paragraph is not applicable*, statements made by and other conduct of a party are to
be interpreted according to the understanding that a reasonable person of the same
kind as the other party would have had in the same circumstances." 5 Corbin § 24.5 at
19 & n.43 (noting that this "mirrors" the Restatement's approach) (emphasis added).

⁴ Thus, the one caveat to the § 201(2)(b) subjective inquiry is that the "reason
to know" standard has an objective aspect; an interpretation may be so unreasonable
that, absent other circumstances, the other party cannot have had "reason to know" of
it. Still, "reason to know" is not the same as objective reasonableness, because it
depends on inferences that would normally be drawn by a person in that party's
position from information actually possessed by that party. § 19 cmt. b. Thus "reason
to know" is "to be distinguished from knowledge and from 'should know.'" *Id.*

1 As the signer of the Compact and the only person authorized by the voters to
 2 negotiate and execute the Compact on behalf of the State, the Governor is the person
 3 whose understanding of the Compact is relevant for analyzing Restatement § 201(2),
 4 and the understanding of her agents is imputed to her.

5 **A. The State's Attached Meaning Is Determined by the Understanding**
 6 **of the Governor and Her Agents**

7 Since both the Arizona Legislature and the Proposition 202 voters expressly
 8 authorized the Governor to negotiate and execute tribal-state gaming compacts under
 9 IGRA, a trier of fact should look to Governor Hull and her representatives to
 10 determine the meaning the State attached to the Compact. In 1992, the Arizona
 11 legislature gave the Governor the power to negotiate and execute gaming compacts on
 12 behalf of the State. A.R.S. § 5-601(A). And in November 2002, through Proposition
 13 202, Arizona voters exercised the power reserved to them by the State's constitution
 14 to authorize the Governor to finalize and execute tribal-state gaming compacts that
 15 met certain conditions. A.R.S. § 5-601.02(A). Proposition 202 also authorized the
 16 State, through the Governor, to negotiate and enter into amendments to the Compact.
 17 A.R.S. § 5-601.02(E). Having been thus authorized to act for the State in negotiating
 18 and executing tribal-state compacts, the Governor had a duty to take care that these
 19 laws be faithfully executed. *See Salt River Pima-Maricopa Indian Community v.*
 20 *Hull*, 945 P.2d 818, 824-25 (Ariz. 1997).

21 Governor Hull negotiated the compacts for years, told voters what it would
 22 mean, and with authority from the voters she executed the compacts for the State. It
 23 is undisputed that Governor Hull understood that the Compact would permit no
 24 additional casinos in Phoenix. *E.g.*, Doc. 199 ¶¶ 142, 146, 157-58, 193. As Governor
 25 Hull explained in the publicity pamphlet that accompanied Proposition 202, “[v]oting
 26 ‘yes’ on Proposition 202 ensures that no new casinos will be built in the Phoenix
 27 metropolitan area and only one in the Tucson area for at least 23 years.” Doc. 199
 28 ¶ 193. Governor Hull also supported the Proposition 202 campaign, a major talking

1 point of which was that the Compact would not authorize any additional casinos in the
 2 Phoenix market. Doc. 199 ¶ 142-154, 156-170, 184-193.

3 There is no record evidence that Governor Hull's understanding of the
 4 Compact changed prior to execution. Indeed, the Nation does not dispute that it never
 5 corrected the statements by Governor Hull, AIGA, the Proposition 202 campaign,
 6 numerous print and broadcast reporters, and others that the standard form compact
 7 would allow no additional gaming facilities in the Phoenix market. Doc 204 ¶ 196.
 8 In fact, the Nation admits that the record does not reveal a *single* person who *ever*
 9 disputed the numerous claims that the Compact would permit no additional casinos in
 10 the Phoenix market. *Id.* at ¶ 194.

11 The Arizona voters who passed Proposition 202 gave the Governor authority to
 12 enter into compacts which included terms previously negotiated by the Governor, to
 13 conduct further negotiations (including authority to make both substantive and
 14 technical amendments), and to execute the compacts on the State's behalf. A.R.S.
 15 §§ 5-601.02(A); (E); (F); (I)(6). Unlike voters, who only authorized further actions
 16 by the Governor, Governor Hull negotiated, reviewed, and executed a complete
 17 compact; no complete compact was ever provided to the voters or Legislature.⁵

18 Governor Hull's understanding of the Compact was informed by the
 19 knowledge and understanding of the individuals who represented her in negotiations.
 20 The State negotiators, including Mike Bielecki and Steve Hart, acted as the
 21 Governor's agents in negotiating the Compact. *See, e.g.*, Restatement (Third) of
 22 Agency §§ 1.01 (agency defined), 1.08 (duty of agent to provide information to
 23 principal); *Salt River Valley Water Users' Association v. Giglio*, 549 P.2d 162, 167
 24 (Ariz. 1976) ("Agency is a question of intent and generally the agent must be acting
 25 under the control of the principal and for the principal's benefit."); *cf. Cachil Dehe*

26
 27 ⁵ After the election but before executing the Compact, the Governor and the
 28 Nation made changes to the text of Proposition 202. *Compare, e.g.*, Compact [Doc.
 195-11] § 3(v)(2)(D) *with* A.R.S. § 5-601.02(I)(6)(b)(iii) (authorized disclosure of
 confidential information expanded beyond authority granted by Proposition 202).

1 *Band of Wintun Indians v. California*, 618 F.3d 1066, 1076 n.5 (9th Cir. 2010)
 2 (California submitted declaration of state negotiators as evidence of state's intent);
 3 *Crow Tribe of Indians v. Racicot*, 87 F.3d 1039 (9th Cir. 1996) (Montana submitted
 4 declaration of state negotiators as evidence of state's understanding). The State
 5 negotiators understood from meetings with the tribes that there would be no additional
 6 casinos in the Phoenix area under the Compact. *E.g.*, Doc. 199 ¶¶ 79, 86, 120. There
 7 is no evidence that the State negotiators ever had a different understanding.⁶

8 Governor Hull and the State negotiators understood, and represented to voters,
 9 legislators, and tribes, that the Compact would not allow additional casinos in Phoenix
 10 and allow only one additional casino in the Tucson market. This meaning constitutes
 11 the State's meaning when the parties executed the Compact. Moreover, because the
 12 Nation dealt principally and extensively with the Governor's representatives in the
 13 negotiations, those communications are most probative in determining "what the
 14 Nation knew about the State's understanding." Doc. 216 at 25.

15 **B. The Meaning Attached by the State Is Not Dependent on the**
 16 **Legislature's or Voters' Understandings of the Executed Compact**

17 Neither the Legislature nor the voters had the opportunity to review the
 18 complete, integrated Compact and thus only the Governor could possibly know the
 19 full effect of the Compact at the time of execution. The voters intended, through
 20 Proposition 202, to remedy a "legal roadblock" precluding the Governor from
 21 executing the new compacts that the parties had been negotiating since 2000. Doc.
 22 195-14 at 2. The declaration of purpose explains that Proposition 202 was "critical to
 23 promptly resolve any technical deficiencies in current state law and provide a means
 24 for the state to enter into new or amended tribal-state gaming compacts." *Id.* The

25
 26 ⁶ The Nation cites only to negotiating meetings in which the State proposed a
 27 complete ban on all gaming on after-acquired lands. *See* Doc. 193 at 17. But a
 28 complete ban—including prohibiting gaming on contiguous after-acquired lands—is
 an entirely different proposal from one that prohibits new casinos in the Phoenix
 metropolitan area. These conversations shed no light on the State negotiators'
 understanding of whether the Compact barred additional casinos in the Phoenix area.

1 voters' intent was to authorize the Governor to complete and execute the tribal-state
 2 compacts; it was not their intent to execute on behalf of the State a fully integrated
 3 compact through Proposition 202, much less to preempt the terms previously
 4 negotiated by the Governor as understood by her and presented to voters.

5 The Legislature's intent here is not relevant. Any power the Legislature may
 6 have had to negotiate and execute tribal-state compacts was previously delegated to
 7 the governor. A.R.S. § 5-601. Because a judicial ruling held that authority to be
 8 insufficient, *American Greyhound Racing, Inc. v. Hull*, 146 F. Supp. 2d 1012 (D. Ariz.
 9 2001), the Compact entered into by the Governor on behalf of the State was executed
 10 by the authority granted from the people in A.R.S. § 5-601.02, not by any authority
 11 granted by the Legislature. Similarly, the Legislature's non-action in 1993 effectively
 12 permitted Governor Symington to negotiate and execute the 1993 compact without
 13 statutory conditions. Although statements made to the Legislature shed light on
 14 Governor Hull's view of the Compact, the Legislature's intent is irrelevant.

15 In any event, the record reveals no evidence that the voters who supported
 16 Proposition 202 or individual legislators held a different view on Phoenix casinos than
 17 Governor Hull.⁷ The Nation concedes that no statement was ever made to voters by
 18 anyone which contradicted the State and AIGA talking point that the Compact would
 19 permit no additional casinos in the Phoenix area. Doc. 204 ¶ 194. Objective evidence
 20 of voter or legislative intent leads to the same conclusion.

21 CONCLUSION

22 For the foregoing reasons, the Court should deny the Nation's motion for
 23 summary judgment and set the § 201(2) issue for trial.

25 ⁷ The Nation cites only to a single obtuse statement that Proposition 202
 26 "greatly widens the scope of gaming" in the publicity pamphlet by a *former* state
 27 negotiator who did not participate in the 1999-2002 negotiations. Doc. 195-14 at 33.
 28 This sheds no light whatsoever on the State's understanding of the Compact. In any
 event, the statement about the scope of gaming appears to refer to the addition of
 blackjack and poker to the compacts for the first time. *Compare* Doc. 195-4 at 16-17
 with Doc. 195-11 at 19 (Section 3(a) of 1993 and 2002 compacts).

RESPECTFULLY SUBMITTED this 22nd day of May 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2013, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all CM/ECF registrants:

s/ Julie Greenwood