14-56104/14-56105

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PAUMA BAND OF LUISENO MISSION INDIANS OF THE PAUMA & YUIMA RESERVATION, a federally-recognized Indian Tribe, AKA Pauma Band of Luiseno Mission Indians, AKA Pauma Band of Mission Indians,

Plaintiff and Appellee,

v.

STATE OF CALIFORNIA; CALIFORNIA GAMBLING CONTROL COMMISSION, an agency of the State of California; and EDMUND G. BROWN JR., as Governor of the State of California,

Defendants and Appellants.

PAUMA BAND OF LUISENO MISSION INDIANS OF THE PAUMA & YUIMA RESERVATION, a federally-recognized Indian Tribe, AKA Pauma Band of Luiseno Mission Indians, AKA Pauma Band of Mission Indians,

Plaintiff and Appellant,

v.

STATE OF CALIFORNIA; CALIFORNIA GAMBLING CONTROL COMMISSION, an agency of the State of California; EDMUND G. BROWN JR., as Governor of the State of California,

Defendants and Cross-Appellees.

On Appeal from the United States District Court
for the Southern District of California

No. 3:09-cv-01955-CAB-AJB
The Honorable Cathy A. Bencivengo, Judge

DEFENDANTS-APPELLANTS/CROSS-APPELLEES' STATE OF CALIFORNIA, CALIFORNIA GAMBLING CONTROL COMMISSION AND EDMUND G. BROWN JR.'S OPENING BRIEF

KAMALA D. HARRIS
Attorney General of California
SARA J. DRAKE
Senior Assistant Attorney General
T. MICHELLE LAIRD
Deputy Attorney General
State Bar No. 162979
NEIL D. HOUSTON
Deputy Attorney General
State Bar No. 168058
110 West A Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2323
Fax: (619) 645-2012
Email: Michelle.Laird@doj.ca.gov
Attorneys for Defendants-Appellants and Cross-Appellees State of California, California Gambling Control Commission, and Governor Edmund G. Brown Jr.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

INTRODUCTION

In 2004, the Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation (Pauma) faced a hurdle to developing a planned large-scale casino-resort in San Diego, California. It wanted to make itself as attractive as possible to Caesars Entertainment, Inc., Hard Rock, and Station Casinos, three major casino powerhouses vying to develop and operate the casino authorized by Pauma's tribal-state class III gaming compact (1999 Compact) with the State of California (California). In order to compete within its market and attract the investment funds required to develop its desired casino-resort, Pauma needed to be able to operate at least 2000, and preferably more, slot machines (also referred to herein and in California compacts as "Gaming Devices"). As part of its strategy to attract investment dollars, Pauma made informed and voluntary business choices which, ultimately, did not result in the profits it had anticipated.

Under the terms of its 1999 Compact, Pauma was limited to operating a maximum of 2000 slot machines and, in 2003, Pauma had to obtain 950 more licenses from the license pool established by the 1999 Compact (License Pool or Pool), and administered by the California Gambling Control Commission (Commission), in order to operate that number. The Commission, construing what is undisputed to be a highly ambiguous

provision of the 1999 Compact, deemed the Pool exhausted in December of 2003. Thus, to reach the minimum number of slot machines it believed was necessary to attract and secure a deal with one of the pursuing casino investors, Pauma had to either pursue litigation challenging the Commission's interpretation of the ambiguous License Pool provision – and wait for the outcome of that suit – or negotiate a 1999 Compact amendment authorizing it immediately to operate 2000 or more slot machines.

Pauma chose the amendment alternative. This alternative (2004 Amendment) permitted Pauma to operate an unlimited number of slot machines in exchange for higher payments than required under its 1999 Compact. Among other benefits, the 2004 Amendment extended the term beyond the expiration of the 1999 Compact by ten years. Despite having obtained the right to operate an unlimited number of slot machines, Pauma had not secured a casino investor by the fall of 2009. Nonetheless, Pauma was able to, and did, add slot machines to its casino under the authority conferred by the 2004 Amendment.

Beginning in 2004, several other of the 60 tribes subject to the License Pool limitations of the 1999 Compact mounted legal challenges to the Commission's interpretation of the License Pool provision, and did not enter into amended compacts. In 2009, the district court in *Cachil Dehe*

Band of Wintun Indians of the Colusa Indian Community v. California, 629 F. Supp. 2d 1091 (E.D. Cal. 2009) (*Colusa*), interpreted the 1999 Compact *de novo* and determined that the Pool consisted of 42,700 licenses, or 10,549 more licenses than the 32,151 under the Commission's interpretation, and ordered the Commission to make the additional licenses available to all eligible 1999 Compact tribes in October of that year. On appeal, this Court recalculated the size of the License Pool using a methodology that neither the Commission nor any tribe had ever considered, and found that the Pool consisted of 40,201 licenses – 8050 more than under the Commission's interpretation. *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. California*, 618 F.3d 1066 (9th Cir. 2010) (*Colusa II*).

Both this Court and the *Colusa* district court determined that the Commission's interpretation had, nonetheless, been made in good faith. In addition, the *Colusa* district court, in a ruling not disturbed on appeal, determined that the Commission's interpretation did not constitute a breach of compact because the court's judicial expansion of the License Pool applied only prospectively.

On September 4, 2009, sixteen days after the district court in *Colusa* entered judgment and five years into its 2004 Amendment, Pauma filed this

lawsuit against the State,[1] seeking rescission of its 2004 Amendment, reinstatement of its 1999 Compact, and restitution of all monies it paid under the 2004 Amendment. Pauma's principal factual theory was that the later judicial interpretation of the 1999 Compact's ambiguous License Pool provision could be enforced on a retroactive basis to transform the Commission's 2002 good faith interpretation of the size of the License Pool into a material misrepresentation. After this Court's 2010 decision in *Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019 (9th Cir. 2010) (*Rincon II*), Pauma amended its complaint to reference that decision in support of its two claims alleging that fees it agreed to pay under the 2004 Amendment were prohibited by the Indian Gaming Regulatory Act (18 U.S.C. §§ 1166-1168, 25 U.S.C. §§ 2701-2721) (IGRA).

Although acknowledging that Pauma desired to operate upwards of 2500 slot machines (something Pauma could obtain only with an amendment, irrespective of the size of the 1999 Compact's License Pool), and even though the *Colusa* district court had found the Commission had no

[1] Defendants below, the State of California, the California Gambling Control Commission, and Edmund G. Brown Jr., Governor of the State of California, are collectively referred to herein as "the State."

obligation to know of, or to comply with, that court's interpretation of the License Pool's size until it had been judicially determined, the district court in this case nevertheless found that the Commission's interpretation of the License Pool provision was a material misrepresentation of fact requiring rescission of Pauma's 2004 Amendment and reinstatement of its 1999 Compact.

Further, despite recognizing that it could not award Pauma compensatory damages or restitution because of express limits on the State's waiver of sovereign immunity under both the 1999 Compact and Pauma's 2004 Amendment, the district court nonetheless awarded Pauma more than $36.2 million for fees Pauma paid under the 2004 Amendment, finding that such a remedy constituted "specific performance" for violation of the 1999 Compact. The district court made this award even though Pauma did not allege that the 1999 Compact was breached, and despite the fact that no provision of the 1999 Compact obligates the State to pay that sum to Pauma.

Because the Commission could not misrepresent a fact that did not yet exist and could not at the time reasonably be known, and because the district court's recognition of Pauma's desire to operate upwards of 2500 slot machines made immaterial any statements about the meaning of a compact provision that, at most, could only allow the operation of a maximum of

2000 slot machines, the district court's judgment for rescission of the 2004 Amendment and reinstatement of the 1999 Compact should be reversed and remanded with instructions to enter judgment in favor of the State on all of Pauma's claims dependent on a retroactive application of *Colusa II*. Likewise, because the remedy afforded does not constitute specific performance within the meaning of the State's limited waiver of its sovereign immunity, and no obligation to make such a payment exists in the 1999 Compact, the order requiring the State to pay over $36.2 million as "specific performance" should be reversed. In addition, it is manifestly unjust to affirm an award of more than $36.2 million to Pauma on the basis of the *Colusa II* decision when the tribes that actually litigated that case were, unlike Pauma, unable to operate additional slot machines while that litigation was pending, and received no retrospective relief for their inability to do so. Finally, to the extent monetary relief was available, the court was required to offset Pauma's "net win" from the slot machines it added under the 2004 Amendment, and its failure to do so requires reversal of the judgment and remand for further proceedings to determine the amount of the offset.

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1362 over Pauma's claim for "Misrepresentation - Restatement and General Principles of Federal Contract Law." This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. After granting summary judgment to Pauma on its claim for misrepresentation, and for the State on four of Pauma's other claims (ER 38, 62-68), the district court deemed it unnecessary to address Pauma's remaining claims because their object was rescission and, even if every claim was determined in Pauma's favor, the court would have granted the identical relief it already awarded – "complete rescission of the 2004 Amendment," "reinstatement of the 1999 Compact" and "specific performance of the 1999 Compact's payment terms" (ER 62-69, 74-75, 80-89).[2] The amended judgment is thus a final decision because the district court: (1) intended it to dispose of all of the claims in the action (ER 38-68, 74-75, 80-89, 90-91), and (2) clearly evinced that it was

[2] Although the district court found it unnecessary, in light of the relief it had already granted, to address Pauma's unconscionability claim and Pauma's two IGRA claims for rescission of the 2004 Amendment based on the inclusion of allegedly impermissible fees, these claims are not alternative legal theories arising out of *Colusa II's* enlargement of the License Pool, and might, if proven, provide an alternative basis for rescission of the 2004 Amendment.

its final order in the case (ER 80-89, 90-91). *Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842, 845, 846 (9th Cir. 2009); *Squaxin Island Tribe v. Washington*, 781 F.2d 715, 718-719 (9th Cir. 1986). The State appealed within thirty days of the June 9, 2014 amended judgment. (ER 1-2.)

STATEMENT OF THE ISSUES

1. Did the trial court err by applying the Ninth Circuit's 2010 judicial expansion of the License Pool back in time to make the Commission's assertion in 2003 that the Pool held fewer licenses a misrepresentation of fact when made?

2. Did the trial court err by finding that the Commission's assertion was material and likely to induce Pauma's assent, when the License Pool formula was universally acknowledged to be ambiguous, and despite the accepted evidence that Pauma wanted, and received, the ability to offer more than 2000 slot machines?

3. Did the trial court err by awarding Pauma $36,235,147.01 as "specific performance" of the 1999 Compact, notwithstanding the State's express reservation of its Eleventh Amendment sovereign immunity from suits for monetary damages and where no provision of that agreement entitled Pauma to that sum?

4. Did the trial court abuse its discretion by failing to offset from the $36,235,147.01 award the financial benefits Pauma realized from slot machines it could not have placed into operation but for the State's performance of the 2004 Amendment?

STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

On April 27, 2000, following the March, 2000 passage of Proposition 1A authorizing casino-style gambling on Indian lands in California, Pauma and California entered into the 1999 Compact – a compact materially identical to earlier class III gaming compacts entered into between California and approximately sixty other Indian tribes. Cal. Gov't Code § 12012.25(a) & (b). (ER 236-290, 291-292.) Pauma's 1999 Compact became effective on October 19, 2000. 65 Fed. Reg. 62,749 (Oct. 19, 2000). Under its 1999 Compact, Pauma could establish a class III[3] gambling facility and potentially operate up to 2000 slot machines. (ER 245.) Cal. Const. art. IV, § 19(f). Pauma was authorized to operate a base number of 350

[3] Class III gaming authorized in California includes slot machines, parimutuel horse race betting, lotteries, and banking card games such as blackjack. *Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084, 1092 (E.D. Cal. 2002).

unlicensed Gaming Devices exempt from any fee payments. (ER 244-245.) To increase its number of Gaming Devices over 350, it was required to obtain one license to operate one slot machine. (ER 245.) To operate licensed Gaming Devices, all 1999 Compact tribes were required to make payments into the Revenue Sharing Trust Fund (RSTF), a fund established for the purpose of sharing tribal gaming revenue with California tribes operating no, or less than 350, slot machines. (ER 244-245.) The first 350 licensed Gaming Devices were exempt from RSTF payments. (ER 245.) As a non-gaming tribe prior to the 1999 Compact, Pauma did not make payments into the Special Distribution Fund (SDF), a fund available for appropriation by the Legislature for tribal gaming-related purposes. (ER 244-248.) Cal. Gov't Code § 12012.85. Pauma launched "Casino Pauma" in San Diego in May, 2001. (ER 293-294.)

The aggregate number of licenses available to all 1999 Compact tribes from the License Pool established by the 1999 Compact was specified by a formula widely acknowledged from the outset to be ambiguous. (See, e.g., ER 244-246, 307-323, 324-328, 332-334, 336-340, 342-345.) Immediately following the execution of the initial 1999 Compacts in September 1999, differing opinions emerged concerning the total number of slot machines that could be operated statewide, a number said to impact upon the aggregate

number of available licenses. (ER 307-323, 324-328, 332-334, 336-340, 342-345, 347-349, 357-374, 385-392, 393-394.) The California Legislative Analyst, in an effort to determine the total number of slot machines statewide, issued a November 1999 letter in which she twice described the License Pool language as "ambiguous and subject to several interpretations." (ER 332-334.) By the time Pauma executed the 1999 Compact, at least four different formulations were circulating publicly. (ER 324-328, 332-334, 336-340, 393-394, 307-323, 357-374.)

By executive order issued in March 2001, the Commission was charged with administering the License Pool. (ER 395-396.) Throughout February and March 2002, a series of eight meetings took place throughout California between Commission representatives and compact tribes, to obtain tribal perspectives regarding payment methodology and licensing under the 1999 Compact in connection with the Commission's administration of the license draw process. (ER 395-396, 307-323, 357-374, 385-392.) A lawyer representing Pauma attended the "Gaming Device License Meeting" held in San Diego on March 19, 2002. (ER 397-400.) At the Commission's May 29, 2002 public meeting, Commission staff issued a report in which it acknowledged the "differing interpretations" of section 4.3.2.2 of the 1999 Compact, expressing throughout that the language of section 4.3.2.2 was

"ambiguous." (ER 307-323) At its June 12 and June 19, 2002 public meetings, the License Pool provisions were again the subject of discussion by the Commission. (ER 350-376, 378-392.) In a report circulated at the June 19 meeting, Commission staff examined the License Pool formula. (ER 357-374.) Again, the report acknowledged multiple existing interpretations of section 4.3.2.2, describing the ambiguity in section 4.3.2.2(a)(1) as "one of the most contentious issues of interpretation" affecting the 1999 Compact. At its June 19, 2002 public meeting, after considering input from all stakeholders and the Commission staff report, the Commission announced its conclusion that the License Pool formula produced a pool of 32,151 licenses, incorporated its decision into the agency's minutes, and began administering the Pool employing that number. (ER 378-384, 347-349.)

Eighteen months later, at the December 2003 license draw, Pauma secured 200 additional licenses, but was unable to secure all 750 licenses it had applied for because, for the first time, the number of licenses requested by participating tribes exceeded those available. (ER 401-402, 418-420.) Pauma ultimately secured 700 licenses, so that following the December 2003 draw, with its 350-base Gaming Device entitlement and its 700 licenses

from the Pool, Pauma was authorized to operate 1050 slot machines. (ER 401-402, 630-637.)

By the fall of 2003, Pauma was already actively engaged in discussions with prospective investment partners, including Caesars Entertainment, Inc., aka Park Place Entertainment, Inc., for the development of an expanded resort casino offering 2000-plus slot machines. (ER 422-433, 434-438, 454-457, 458-462, 463-533.) Then, in early 2004, Pauma asked to participate in joint, bilateral negotiations between California and four other 1999 Compact tribes for an amended compact to ensure its ability to expand its gaming operation per its development plans. (ER 455, 458-462, 630-637.) The State was represented in these negotiations by former California Court of Appeal Judge Daniel M. Kolkey. (ER 458-462.) Pauma was represented by attorney Lawrence Stidman, with assistance from the firm of Patton Boggs, LLP. (ER 534, 543.) Between January and June, 2004, Pauma and California negotiated and reached agreement on the terms of an amended compact, which Pauma executed on June 21, 2004. (ER 458-462, 453-455, 534-548.) During the negotiations, Pauma represented that it was seeking to expand its casino to house 2500 slot machines. (ER 458-462.) The five negotiating tribes had rejected the State's proposal to pay a specified percentage of their "net win" from slot machines, which would have reduced

annual payments if "net win" declined, in favor of a fixed fee structure and revenue contribution based on their then-current operations. (*Id.*) The 2004 Amendment altogether repealed the 1999 Compact's License Pool provisions, and Pauma secured, among other benefits, the right to operate an unlimited number of slot machines based on market demand and without the need to procure licenses from the Pool, an extension of its right to conduct class III gaming by ten years beyond the expiration of the 1999 Compact, and an enforceable promise of exclusive tribal gaming in Pauma's core geographic market. (ER 549-596 at § 4.3.1(b), § 3.2, § 15.8, § 11.2.1.) In exchange, Pauma agreed to increase its RSTF payments to maintain its existing licenses – although it was granted a concession not granted to the other tribes to delay its increased RSTF payments until "after March 31, 2008, or the completion of its new Gaming Facility, whichever comes first" – and to pay other increased fees to the State, including to add slot machines over its existing 1050. (ER 549-596 at § 4.3.2.2(a), § 4.3.1(b).) The California Legislature ratified the 2004 Amendment, Cal. Gov't Code § 12012.40(a)(2), and it was affirmatively approved by the United States Secretary of the Interior (ER 597-600.) and made effective on September 2, 2004. 69 Fed. Reg. 53,733 (Sept. 2, 2004).

Pauma enjoyed the benefits of the 2004 Amendment for five years,

including the ability to increase its offering of slot machines – and thus its gaming profits – unimpeded by the licensing structure of the 1999 Compact, which Pauma recognized held value to attract other investors for its planned casino expansion. (ER 601-603, 604-611.) Ultimately, Pauma did not conclude a deal with Caesars (ER 613-626, 628-629) but did take advantage of its contractual right to add more slot machines to its casino.[4] (ER 630-637.)

Rather than enter into amended compacts with California, other 1999 Compact tribes chose to litigate the License Pool language, and were able to add slot machines to their casinos only when licenses became available from the Pool.[5] (See, e.g., ER 638-665, 669, 684, 690, 699, 708-709, 720-721, 736.) On June 9, 2004, before Pauma executed its 2004 Amendment, the Rincon Band of Luiseño Mission Indians (Rincon), a Southern California

[4] An unpublished 2009 California court of appeal decision recounts in detail the negotiations between Pauma and Caesars Entertainment, Inc., the circumstances leading to a vote by Pauma's Council to terminate its business relationship with Caesars, yet proceed with the 2004 Amendment, and the litigation that followed. *Pauma Band of Luiseño Mission Indians v. Harrah's*, 2009 Cal. App. Unpub. LEXIS 7720 (Ct. App. 2009) (ER 613-626).

[5] Gaming Device licenses became available after the December, 2003 draw had initially depleted the pool. The Commission issued a limited number of licenses in October 2004, October 2005, August 2006, August 2007, and December 2008.

tribe with a 1999 Compact, filed a federal action challenging the Commission's 2002 interpretation of the 1999 Compact to provide for a 32,151 cap on the number of licenses, and seeking to enjoin compacts being renegotiated, including Pauma's.[6] (ER 638.) Only days later, on June 30, 2004 – after execution of the 2004 Amendment but prior to its ratification or approval – Pauma applied to participate as *amicus curiae* in the *Rincon* action, seeking to defend and preserve its pending 2004 Amendment. (ER 740-766) Pauma continued to participate as *amicus* in support of the State through 2008.[7] (ER 767-775.) In August, 2004, Pauma's Tribal Council elected to proceed with the 2004 Amendment – at a time when Pauma admittedly could have withdrawn – despite its awareness of the pending *Rincon* License Pool case and recognizing that its deal with Caesars was then in doubt. (ER 604-611, 613-626.)

---

[6] *Rincon Band of Luiseño Mission Indians v. Schwarzenegger*, United States District Court for the Southern District Case No. 04-1151 (June 9, 2004) (*Rincon*).

[7] Three other 1999 Compact tribes also raised legal challenges to the size of the License Pool: *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. State*, Civ. Case No. 04-2265 (E.D. Cal.) (Oct. 25, 2004); *San Pasqual Band of Mission Indians v. State*, Civ. Case. No. 06-0988 (S.D. Cal.) (May 3, 2006); and, *Tuolumne Band of Me-Wuk Indians v. State*, Civ. Case No. 09-2263 (E.D. Cal.) (Aug. 17, 2009).

Pauma filed this action for rescission of its 2004 Amendment following the August 2009 *Colusa* district court's judgment, in which the court found the Pool held 42,700 licenses, rather than 32,151. (ER 777.) In *Colusa II*, this Court affirmed the *Colusa* court's remedy of a license draw open to all eligible tribes, but recalculated the size of the License Pool again, revising the number downward to 40,201. *Colusa II*, 618 F.3d at 1085.

Following cross-motions for summary judgment in the district court in this action, the court granted summary judgment to Pauma by applying the License Pool number originating in *Colusa II* retroactively to conclude that the Commission's application of its June, 2002 interpretation of the License Pool formula to all subsequent draws constituted a misrepresentation of a material fact inducing Pauma to enter into the 2004 Amendment. (ER 38-68.) The court found that Pauma was entitled to rescission of the 2004 Amendment, reinstatement to the 1999 Compact and a monetary award against the State of $36.2 million, characterized by the court as "specific performance" of the 1999 Compact's payment terms. (ER 38-63, 71-73, 74-75.)

B. PROCEDURAL BACKGROUND

On September 4, 2009, Pauma filed an eight-count complaint for declaratory relief regarding the size of the License Pool in the 1999

Compact, and seeking rescission of the 2004 Amendment. (ER 777.) Pauma also sought restoration to the 1999 Compact and restitution of fees it paid under the 2004 Amendment. (*Id.*) Following the State's motion to dismiss, Pauma sought a preliminary injunction. (ER 778-779.) On April 12, 2010, Judge Larry A. Burns issued a preliminary injunction permitting Pauma to pay "only those payments required under the terms of the [1999] compact" and enjoining the State "from enforcing the payments required of Pauma under the 2004 Compact . . . ." (ER 780.) Determined to "fast track" the case, the court dispensed with the "ordinary course" of civil proceedings in the Southern District.[8] (ER 109.) Although the court initially authorized the State to conduct limited discovery (ER 11-12), it stayed the entire action very shortly thereafter, including discovery, when the State appealed the preliminary injunction (ER 13-14, 781).

On November 20, 2010, this Court remanded the preliminary injunction to the district court for reconsideration. (ER 15-17.) Rather than proceed per the remand order, on December 17, 2010, the court directed Pauma to file a summary judgment motion, and kept in place its stay of discovery "until further notice." (ER 18.)

[8] E.g., a case management order never issued in the case. See Southern District Civil Local Rule 16.1(d)(2).

On March 15, 2011, the parties were notified the case would be reassigned. (ER 19, 20-21.) Thus, all pending matters were transferred to Judge Anthony J. Battaglia, who requested re-briefing of the State's motion to dismiss (ER 22-23) and vacated the hearing on Pauma's pending summary judgment motion until further notice (ER 24). The court granted and denied in part the State's motion to dismiss, and granted Pauma leave to amend two claims for relief. (ER 139-142.) The court took under submission the preliminary injunction remand, Pauma's summary judgment motion, and a motion by the State to continue the proceedings in order to conduct discovery. (ER 25.)

On September 9, 2011, Pauma filed a first amended complaint alleging seventeen claims for relief (FAC). (ER 788). The FAC alleged new facts and legal theories, amended existing claims not within the grant of leave to amend, and prayed for relief not sought in the complaint. The court denied Pauma's subsequent *ex parte* application asking for its submitted summary judgment motion to be construed as a motion for summary adjudication of the FAC because of the confusion that would cause, but granted Pauma leave to re-file its motion as to the FAC. (ER 27-28.) Thus, Pauma's pending summary judgment motion was denied as moot. (*Id.*) Contemporaneously, the State moved to strike, or in the alternative, dismiss

the FAC. (ER 789.) While that motion was pending, Pauma filed a partial summary judgment motion as to ten claims in the FAC. (ER 789.) Before these motion were heard, Judge Battaglia transferred the case to Judge Cathy A. Bencivengo. (ER 29-30, 31-32.)

The court largely denied the State's motion to strike or dismiss the FAC. (ER 794.) The court authorized the parties to conduct very narrow discovery over a sixty-day period (ER 33-35, 175, 207-216), after which time the court intended to schedule a summary judgment hearing (ER 215.) The court deemed Pauma's then-pending partial summary judgment motion withdrawn, and set a briefing schedule for cross-motions for summary judgment. (ER 36-37, 225-228.) Upon the State inquiring about the status of the remanded preliminary injunction previously taken under submission, the court responded:

> We're going to leave [the preliminary injunction] in place. . . . I think if it's been the status quo up 'til now in the litigation, it should stay there.

(ER 230-233.) Thus, the original preliminary injunction has remained in place throughout this litigation.

Thereafter, Pauma filed another partial summary judgment motion, this time as to eleven of its claims, and the State filed its cross-motion for

summary judgment addressing all seventeen claims in the FAC. (ER 795-796.)

The court granted and denied in part Pauma's motion for partial summary judgment, finding for Pauma on its tenth claim for misrepresentation. (ER 38-68.) The court granted summary judgment to the State on Pauma's three breach of fiduciary duty claims and its constructive fraud claim. (*Id*.) The court denied summary judgment as to the remaining claims addressed by the cross-motions. (*Id*.) Following additional proceedings relating to remedies, including "how best to reinstate the 1999 Compact contractual relationship" (ER 71-73), on December 2, 2013, the court issued its order awarding Pauma $36,235,147.01 (ER 74-75) and filed its original judgment (ER 76-77).

On December 16, 2013, the court vacated its judgment at Pauma's request to allow Pauma to file another summary judgment motion. (ER 78-79.) This turned out to be another motion for partial summary judgment as to Pauma's two IGRA claims, this time restyled by Pauma as "bad faith negotiation" claims. (ER 799, *see also*, n.2.) On June 6, 2014, the court denied Pauma's further motion for summary judgment (ER 80-89), and on

June 9, 2014, filed its amended judgment (ER 90-91).[9] On July 9, 2014, the parties cross-appealed to this Court. (ER 1-7.) The amended judgment is fully stayed pending the cross-appeals. (ER 92-97.)

STANDARD OF REVIEW

This Court reviews *de novo* a district court's grant of summary judgment. *Oak Harbor Freight Lines, Inc. v. Sears Roebuck & Co.*, 513 F.3d 949, 954 (9th Cir. 2008). "Viewing the evidence in the light most favorable to the nonmoving party, [the reviewing court] must determine whether there are genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Id*. This Court reviews under an abuse of discretion standard a district court's decision to grant or deny equitable relief. *Schroeder v. United States*, 569 F.3d 956, 961 (9th Cir. 2009). Determinations concerning the extent to which a state's sovereign immunity bars monetary awards present questions of law that this Court reviews *de novo*. *Stanley v. Trustees of the Cal. State Univ.*, 433 F.3d 1129, 1133 (9th Cir. 2006).

[9] Not expressly reflected in the amended judgment are the district court's earlier summary judgment rulings in favor of the State on Pauma's seventh, eighth, ninth (breach of fiduciary duty), and seventeenth (constructive fraud) claims, and the district court's denial of Pauma's fifth and sixth (IGRA) claims.

SUMMARY OF ARGUMENT

Fourteen of Pauma's seventeen claims for relief are based on the notion that the size of the License Pool determined by this Court in its 2010 *Colusa II* decision was an established fact both in 2002 when the Commission made its determination about the size of the Pool, and in 2003 through 2004 when the Commission denied licenses to Pauma and Pauma negotiated its 2004 Amendment. On appeal, the State contends that this retroactive application of *Colusa II's* expansion of the License Pool to render the Commission's earlier interpretation actionable misrepresentation is not only unprecedented, but also directly contrary to the only specific authority that exists: the refusal by the *Colusa* district court judge to give other than prospective effect to his expansion of the License Pool. The State contends that the *Colusa II* decision did not work to establish a fact in existence at the time Pauma entered into its 2004 Amendment, and therefore does not support relief for misrepresentation under the Restatement and general principles of federal contract law. For these reasons, the district court erred by granting Pauma the relief it did.

The State also contends that the Commission's administration of a License Pool consisting of 32,151 licenses in the timeframe 2002 through 2004 was not material to Pauma's assent to the terms of its 2004

Amendment because the 1999 Compact was at the time widely acknowledged to be ambiguous as to the size of the License Pool, and Pauma's business needs and objectives in 2004 required an authorization to operate additional slot machines beyond the maximum of 2000 allowed under the 1999 Compact, irrespective of the size of the License Pool.

With respect to the district court's remedy, the State contends that the district court's denomination of its relief as "specific performance" was misleading and erroneous, and constituted an impermissible end-run around the State's express reservation in both the 1999 Compact and the 2004 Amendment of its Eleventh Amendment immunity from claims for monetary damages. There is no provision of the 1999 Compact that requires the State to refund payments to Pauma, and thus no such contractual obligation to be "specifically performed." The district court's "specific performance" remedy constitutes a thinly-veiled monetary damages award barred by section 9.4 in both the 1999 Compact and Pauma's 2004 Amendment.

Finally, the State contends that the district court's "specific performance" remedy is an equally unavailable restitutionary award, and, moreover, without Pauma's prerequisite tender of the benefits it received under the 2004 Amendment – the operation of additional slot machines that were not permitted under its 1999 Compact, which resulted in approximately

$16 million of "net win" to Pauma, and which the district court has permitted Pauma to retain in addition to receiving a full refund of all sums paid under the 2004 Amendment. If rescission of Pauma's 2004 Amendment is affirmed, the refund of the fees Pauma paid under it should be offset by the benefit Pauma received from it, in accordance with the customary principles of rescission and restitution and to avoid unjust enrichment.

ARGUMENT

I. THE DISTRICT COURT ERRONEOUSLY AWARDED RESCISSION OF PAUMA'S 2004 AMENDMENT AND REINSTATEMENT OF ITS 1999 COMPACT

The district court awarded judgment in favor of Pauma on its claim for misrepresentation under the Restatement and general principles of federal contract law. The basis of this award was the district court's conclusion that this Court's 2010 decision in *Colusa II* expanded the License Pool retrospectively, thus causing the Commission's differing interpretation of the size of the Pool, which in December 2003 caused the Commission to issue to Pauma only 200 of the 750 licenses Pauma had requested from that license draw, to constitute a misrepresentation that induced Pauma to enter into its 2004 Amendment.

The district court was required under the Restatement (Second) of Contracts and general principles of federal contract law to find that:

> 1) The Commission made an assertion that was not in accord with a past or present fact at the time the assertion was made;[10]
>
> 2) The Commission's misrepresentation was fraudulent or material, with a material misrepresentation being one that would be likely to induce a reasonable tribe in Pauma's position to agree to the 2004 Amendment;[11]
>
> 3) The Commission's misrepresentation substantially contributed to Pauma's decision to agree to the 2004 Amendment;[12] and,
>
> 4) Pauma was justified in relying on the Commission's misrepresentation.[13]

As explained below, the district court erred in finding that the Commission misrepresented a fact in existence at, or before, the time of the 2004 Amendment. For this reason alone, the judgment in this case should be

---

[10] *See*, Restatement (Second) of Contracts § 159 (1981); *Id.* cmt. c; *Barrer v. Women's Nat'l Bank*, 761 F.2d 752, 758 (D.C. Cir. 1985) (citing Restatement (Second) of Contracts § 159 cmt. c); *Fed. Group, Inc. v. United States*, 67 Fed. Cl. 87, 102 (2005) (citing Restatement (Second) of Contracts § 159 cmt. c).

[11] *See*, Restatement (Second) of Contracts § 162; *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1137 (9th Cir. 2000); *Fed. Group, Inc. v. United States*, 67 Fed. Cl. at 102.

[12] *See*, Restatement (Second) of Contracts § 167; *Cruz v. Am. Airlines, Inc.*, 356 F.3d 320, 332 (D.C. Cir. 2004).

[13] *See*, Restatement (Second) of Contracts § 164; *Addisu v. Fred Meyer, Inc.*, 198 F.3d at 1137.

reversed. In addition, the district court erred in finding that the Commission's representation of the size of the License Pool, and that no further licenses were available from the Pool in December 2003, was material to, or actually induced Pauma to enter into its 2004 Amendment.

A. The Commission Did Not Misrepresent the Size of the License Pool

From 2002 until the *Colusa* judgment's entry in 2009, the Commission regarded the License Pool as consisting of 32,151 licenses, and administered it accordingly, promptly issuing licenses when licenses were available. See *Colusa*, 629 F. Supp. 2d at 1119-20. From 2003 onwards, license requests could generally be fulfilled only from licenses that had been voluntarily returned to the Pool by the recipient tribe, or canceled by operation of section 4.3.2.2(e) of the 1999 Compact. In December 2003, the Commission, deeming the License Pool insufficient to fully satisfy all current requests, issued 200 (of 750 requested) licenses to Pauma, and advised Pauma that the Pool had been exhausted. Based on this Court's expansion of the License Pool to 40,201 licenses in 2010, *Colusa II*, 618 F.3d at 1085, the district court concluded that the Commission's 2003 communication to Pauma misrepresented the status of the License Pool. That conclusion was erroneous.

The *Colusa II* License Pool number did not exist when Pauma entered into the 2004 Amendment. Consequently, it does not operate to convert the Commission's earlier representation concerning the size of the License Pool into a misrepresentation. The Restatement defines a "misrepresentation" as "an assertion that is not in accord with the facts." Restatement (Second) of Contracts § 159. A "fact" must be a fact *at the time the assertion is made* in order to be a misrepresentation. *Id.*, cmt. c (emphasis added); *Barrer v. Women's Nat'l Bank*, 761 F.2d 752, 758 (D.C. Cir. 1985); *see also*, *Fed. Group, Inc. v. United States*, 67 Fed. Cl. 87, 102 (2005). "Such facts include past events as well as present circumstances but do not include future events." Restatement (Second) of Contracts § 159 cmt. c.

Mistake cases analyzing the comparable temporal element also provide some guidance. "A mistake is a belief that is not in accord with the facts." Restatements (Second) of Contracts, § 151. "The erroneous belief must relate to the facts *as they exist at the time of the making of the contract*." *Id.*, cmt. (a) (emphasis added). To support rescission, a mistake must be as to an "objective, existing fact." *Hedging Concepts, Inc. v. First Alliance Mortgage Co.*, 41 Cal.App.4th 1410, 1421 (1986); *see also Mosher v. Mayacamas Corp.*, 215 Cal.App.3d 1, 5 (1989) (mistake of fact must be a mistake as to past or present facts). Where a belief or assumption under

which a contract is made is rendered mistaken by subsequent events, the mistake will not support rescission of the contract. *Id.* at pp. 4-6.

Accordingly, the later occurrence of *Colusa II*'s enlargement of the License Pool did not constitute a fact in existence at the time of the negotiation and execution of Pauma's 2004 Amendment, and, thus, does not give rise to a misrepresentation upon which rescission may be based.

B. The District Court Erred by Concluding that *Colusa II* Created a Fact that Existed in 2003

The district court's conclusion raises the question of whether *Colusa II's* determination of the License Pool's size in 2010 may reasonably be construed to be a fact that existed in 2003. With essentially no analysis, the district court concluded that it was. The district court did so by primarily relying upon a single verb tense in *Colusa II*. In particular, the district court seized upon this Court's use of the phrase "40,201 licenses *were authorized* for distribution statewide through the license draw process," *Colusa II*, 618 F.3d at 1082 (emphasis added), as evidence of the Court's intent to apply its enlargement of the License Pool retroactively. This, according to the district court, made the Commission's differing representation false when made seven years before. (ER 38-63.)

The court's reliance on that single phrase was misplaced, and ignored other compelling indicia that this Court intended only to establish the License Pool's size going forward. For example, this Court described the *Colusa* remedy (which this Court affirmed) as, "[t]he [trial court's] conclusion that 42,700 licenses *are available* in the pool provided the court's basis for ordering a new license draw, which took place in 2009." *Colusa II*, 618 F.3d at 1075 (emphasis added). More importantly, this Court's conclusion to its *Colusa II* decision was: "[w]e conclude that . . . the Compacts *authorize* 40,201 licenses for distribution through the license draw process" *id*. at 1085 (emphasis added). Even if these verb tenses, rather than a deeper analysis, control, *Colusa II* should be read to put the License Pool's enlargement in the present, i.e., 2010, rather than in the past.

A deeper analysis shows that *Colusa II* applied prospectively. The only issues before this Court in *Colusa II* were the *Colusa* court's 42,700 License Pool number and the prospective remedy it had granted, that being a license draw for the newly available licenses open to all eligible 1999 Compact Tribes. This Court's holding modified the number to 40,201, and affirmed the prospective remedy. The issue of the effect, if any, of the enlargement of the License Pool in any other circumstances, or at any time prior to the 2009 license draw ordered by the *Colusa* court, was not before

this Court in *Colusa II*. Accordingly, *Colusa II* cannot be authority for the district court's conclusion that this Court's 2010 expansion of the License Pool constituted a fact in existence in 2002 through 2004, with the effect of causing the Commission's 32,151 License Pool number to be a misrepresentation.

The district court in this case stands conspicuously alone in its belief that *Colusa II's* enlargement of the License Pool can serve to change the legal effect of actions taken years earlier. The retroactive effect of the judicial enlargement of the License Pool was, in fact, at issue in *Colusa*, and was specifically rejected by the *Colusa* court. Plaintiff Colusa alleged that the Commission breached the 1999 Compact by failing to conduct license draws on two occasions when Colusa requested licenses in 2006 and 2007. This claim was based on there having actually been licenses available at those times by virtue of *Colusa's* 2009 expansion of the pool. But the *Colusa* court adhered to a prospective-only application of its expansion of the Pool, and granted summary judgment in favor of the State. *Colusa*, 629 F. Supp. 2d at 1119-20. Plaintiff Colusa did not appeal this portion of the judgment, so the issue of the retroactive effect of the enlargement of the Pool did not come before this Court in *Colusa II*. Accordingly, the only case authority directly on point with regard to when the judicial expansion of the

Pool applies is contrary to the decision made by the district court in this case.

In addition to relying upon the language of *Colusa II* as described above, the district court justified its retroactive application of *Colusa II's* expansion of the License Pool by invoking the "doctrine of retroactivity" discussed in *In re Debbie Reynolds Hotel & Casino, Inc.,* 255 F.3d 1061, 1066 (9th Cir. 2001). (ER 38, 63 at n.22.) *Debbie Reynolds*, and the cases cited therein, including *Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993), and *United States v. Newman*, 203 F.3d 700 (9th Cir. 2000), are readily distinguishable from this case because they relate to the retroactive application of Supreme Court precedent adjudicating federal law, neither of which are relevant to this case. The retroactivity doctrine, as alluded to by the district court, concerns the retroactive application of changes in the law to previously existing factual scenarios, and not to retroactively changing facts.

The size of the License Pool is not a law; it is a contractual provision. The "retroactivity doctrine" does not cause *Colusa II's* expansion of the License Pool in 2010 to create a fact in existence in, or before, 2003, for the purpose of creating a misrepresentation under the Restatement and general principles of federal contract law.

Imputing to the Commission in 2003 this Court's undeniably unique 2010 calculation of the size of the License Pool is illogical and inequitable. The history of the adjudication of the License Pool clearly reflects the uncertainties of interpreting section 4.3.2.2 (a)(1) of the 1999 Compact. As this Court observed in 2010, "[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." *Colusa II*, 618 F.3d at 1084. Although *Colusa II* is now unquestionably the law of the Circuit as to the size of the License Pool, the multiplicity of interpretations proposed by stakeholders and the federal courts over the years suggests that the License Pool's size was previously far from an established fact.[14]

Colusa II's 40,201 number is a legal interpretation. It is not a fact in the same sense as is a determination of the presence or absence of pollution in groundwater, or of the number of acres actually constituting a plot of land. The extreme diversity of the stakeholders' interpretations during the transparent, inclusive, and deliberate process the Commission used to

[14] Underscoring the difficulty of interpreting the License Pool provision of the 1999 Compact are the different interpretations made by separate courts (and other interpretations by numerous interested parties) based on the same language. *See, Colusa II* (40,201 licenses); *Colusa* (42,700 licenses); and, *Rincon Band of Luiseño Mission Indians v. Schwarzenegger*, Civ. Case No. 04-1151 (S.D. Cal.) (55,952 licenses).

determine the size of the Pool in 2002, undermines any characterization of the size of the Pool as a fact then in existence and simply awaiting discovery. *Colusa II* interpreted the language of the 1999 Compact to direct the future conduct of the parties and all others similarly situated. It should not be construed, as the district court did here, to create an earlier existing fact that changes the legal effect of conduct that occurred seven years before.

The Commission should not face liability for failing to anticipate this Court's particular mathematical methodology and for failing to have arrived at the same final result seven years before this Court did. Furthermore, despite the advent of *Colusa II* in 2010, it cannot be disputed that Pauma's 2004 Amendment was the only way Pauma could, *in reality*, acquire the right to operate additional Gaming Devices in 2004. This remained essentially true up to the time of the *Colusa* court's license draw in 2009.[15] The Commission's Pool of 32,151 licenses was the operative fact from 2002 to 2009. *Colusa II's* Pool of 40,201 licenses is, as to all times before 2010, a later-occurring legal interpretation, not an operable fact capable of misrepresentation within the meaning of the Restatement and the general principles of federal contract law. Accordingly, Pauma cannot establish the

[15] As previously noted, a small number of licenses became available from the License Pool after the December 2003 draw. (See n.5.)

first element of an actionable misrepresentation – that in 2003, the Commission made an assertion that was not in accord with a fact in existence either then, or previously.

C. The District Court Erred by Concluding that the License Pool Size Was Material to Pauma

Not only was the district court mistaken in concluding that the Commission misrepresented a fact, but it also was mistaken in concluding that a representation concerning the License Pool size was material. A misrepresentation is material if it would be likely to induce a reasonable person to manifest assent. Restatement (Second) of Contracts § 162; *Addisu v. Fred Meyer, Inc.,* 198 F.3d 1130 at 1137; *Fed. Group, Inc. v. United States,* 67 Fed. Cl. at 102.

Taking all factual inferences in favor of the State as the non-moving party, the element of materiality has not been demonstrated to exist. The 1999 Compact limited Pauma to a maximum of 2000 Gaming Devices, regardless of the size of the License Pool. The evidence shows that Pauma sought the 2004 Amendment to increase the number of Gaming Devices it could operate to 2500, well beyond that 2000 cap. (ER 458-462, 630-637.)[16]

[16] The district court recognized the validity of the State's evidence, but then concluded that the License Pool size was still material as an (continued…)

The License Pool was not a subject of the 2004 negotiations and did not carry over into the 2004 Amendment. Pauma's business goals in 2004 exceeded the number of licenses that could possibly be provided from the 1999 Compact's License Pool under the Commission's interpretation of its size, or *Colusa II's*.

Consistent with Pauma's goal during compact negotiations, the 2004 Amendment places *no limit* on the number of Gaming Devices that it could operate at its casino. The only way Pauma could obtain the authorization to operate more than 2000 Gaming Devices was to negotiate its 2004 Amendment, regardless of the size of the License Pool in 2004.

A reasonable tribe in Pauma's position would not be induced to enter into an amended agreement based only on the number of available licenses in the Pool. No matter how many additional licenses there might have been in the Pool in 2004, Pauma could not have operated more than 2000 slot machines under the 1999 Compact. It follows that the availability of

---

(…continued)
additional factor leading Pauma to agree to the 2004 Amendment. That conclusion was erroneous in the face of the 1999 Compact cap. *See In re McKesson HBOC, Inc. Secs. Litig.,* 126 F. Supp. 2d 1248, 1260 (N.D. Cal. 2000) ("a misstatement or omission cannot be material if its correction or disclosure would only redouble the plaintiff's resolve to enter into the proposed transaction.").

licenses from the Pool was not material to Pauma in 2004, nor would it be material to a reasonable tribe in Pauma's position with respect to entering into the 2004 Amendment. *See In re McKesson HBOC, Inc. Secs. Litig.,* 126 F. Supp. 2d 1248, 1260 (N.D. Cal. 2000).

D. The District Court Erred by Concluding that the License Pool Size Substantially Contributed to Pauma's Decision to Agree to the 2004 Amendment

The district court was mistaken in concluding that the Commission's representation concerning the License Pool induced Pauma into entering into the 2004 Amendment. Inducement is a required element for rescission under the Restatement and general principles of federal contract law. Pauma failed to establish that the alleged misrepresentation of the availability of licenses from the License Pool substantially contributed to its decision to manifest assent to the 2004 Amendment. *See* Restatement (Second) of Contracts § 167; *Cruz v. Am. Airlines, Inc.,* 356 F.3d 320, 332 (D.C. Cir. 2004). Section 167 of the Restatement states that "[a] misrepresentation induces a party's manifestation of assent if it substantially contributes to his decision to manifest his assent." Restatement (Second) of Contracts § 167. For the same reasons that the License Pool size was not material, the License Pool size did not substantially contribute to Pauma's decision to agree to the 2004 Amendment.

Here, the district court recognized that the evidence submitted by the State indicated that Pauma sought authorization to operate upwards of 2500 Gaming Devices, 500 more than the maximum allowed to Pauma under the 1999 Compact. (ER 38, 64 ("this evidence shows there may have been additional facts motivating Pauma to enter into the 2004 Amendment").) Having conceded the effect of this evidence with regard to Pauma's motive, the district court's conclusion that the Commission's representation of the size of the License Pool in 2003 induced Pauma to agree to the 2004 Amendment defies logic. Because Pauma sought to operate more Gaming Devices than the maximum allowed under the 1999 Compact, the License Pool size could not have been a factor in Pauma's decision to agree to the 2004 Amendment, much less the requisite substantial factor contributing to Pauma's decision to agree to the 2004 Amendment. *See Cruz v. Am. Airlines, Inc.,* 356 F.3d at 332-33 (acceptance of the terms of an agreement for reasons different than the substance of the alleged misrepresentation does not permit a conclusion that there was inducement sufficient to make the agreement voidable). In sum, Pauma failed to prove, and the district court erred in finding, that the Commission's representation of the size of the License Pool in 2003 induced Pauma to enter into the 2004 Amendment.

II. THE $36.2 MILLION AWARD IS BARRED BY CALIFORNIA'S ELEVENTH AMENDMENT SOVEREIGN IMMUNITY AND THE LIMITED MUTUAL SOVEREIGN IMMUNITY WAIVERS IN THE COMPACTS

After concluding that the Commission misrepresented the size of the License Pool in 2003 based on the 2010 *Colusa II* decision, the district court turned to the appropriate remedy. (ER 38, 67-68.) The court first determined that Pauma was entitled to rescission of the 2004 Amendment, and scheduled further proceedings regarding Pauma's request for "restitution of, or credit for, its heightened revenue sharing payments under the 2004 Amendment" (ER 68). To that end, the court ordered the parties to "submit a joint proposal . . . as to the form of the restitution/credit claim." (*Id.*) The State objected to the proposed restitutionary remedy on the basis of *Edelman v. Jordan*, 415 U.S. 651 (1974), wherein the Supreme Court held that restitution requiring payment from a state's general revenues, like other forms of money damages, is barred by the Eleventh Amendment, *id.* at 664-65, and that no exception exists for suits to recover money alleged to have been wrongfully paid to or collected by a state. *Id.* at 668-69, citing *Ford Motor Co. v. Dep't of Treasury of the State of Indiana*, 323 U.S. 459, 464, (1945), overruled on other grounds by *Lapides v. Bd. of Regents*, 535 U.S. 613, 623 (2002). (ER 797.) The State further contended that the limited

mutual waiver of sovereign immunity included in the Compacts did not operate to permit a restitutionary remedy requiring the State to pay Pauma money out of the State treasury, no matter the form of that relief.

The district court apparently was persuaded by the State's arguments, inasmuch as when making its decision about "how best to reinstate the 1999 Compact contractual relationship," it elected to direct "specific performance" of that agreement, and expressly disavowed its earlier inclination to provide a restitutionary remedy. (ER 71-73, 74-75.) The court's specific performance-based remedy now was predicated on the State's purported violation of the 1999 Compact:

> The State violated the terms of the 1999 Compact when, for purposes of the December 2003 license draw, it misrepresented the Pool to be exhausted of licences [sic] . . . . In reality, there were over eight thousand more licenses still available in the Pool. [Citing *Colusa II*].
>
> In conclusion, there is sufficient evidence before the Court that Pauma overpaid the State for gaming device licenses and is entitled to get its overpayments back. The Court rejects the State's argument that the return of Pauma's overpayments constitutes money damages. This case is unique in that the State contractually waived any immunity to contest the remedy of specific performance, which here results in the State having to return money belonging to Pauma. *See also Bowen v. Mass.*, 487 U.S. 879, 894 (1988) ("while in many instances an award of money is an award of damages, '[o]cassionally a money award is also a [specific] remedy'").

(ER 71-73, 74-75.) The court ordered the State to pay Pauma $36,235,147.01 to compensate it for amounts Pauma paid the State under the 2004 Amendment, less what Pauma would have paid had it remained under the 1999 Compact and paid for additional licenses for the upwards of 1154 slot machines it placed into operation in its casino throughout 2007, 2008 and 2009, as though those licenses had been available from the Pool and issued to Pauma in the December 2003 license draw. (ER 74-75, *see also* ER 69-70, 630-637.)

The court's monetary award is barred by the State's Eleventh Amendment sovereign immunity, notwithstanding the court's re-characterization of the relief as specific performance of the 1999 Compact for a purported violation of its payment terms. Neither the limited mutual sovereign immunity waivers in the Compacts, nor *Bowen v. Massachusetts*, 487 U.S. 879 (1988) (*Bowen*), support the remedy granted to Pauma.

A. The State Retains its Eleventh Amendment Immunity Under the Compacts, and its Limited Waiver of Immunity Bars Claims for the Payment of Money Unless for Specific Performance of a Compact Term Requiring the Payment of Money

Under IGRA, a State and Indian tribe may negotiate the terms of a gaming compact, which may include provisions relating to "remedies for breach of contract" and "any other subjects that are directly related to the

operation of gaming activities." 25 U.S.C. § 2710(d)(3)(C)(v)-(vii). IGRA, however, does not itself operate to abrogate a state's sovereign immunity from suit under the Eleventh Amendment. *Seminole Tribe v. Florida*, 517 U.S. 44, 47 (1996). Notwithstanding the existence of a class III gaming compact, a state retains its Eleventh Amendment immunity and is subject to suit in federal court only to the extent it has expressly, and unequivocally, consented to be sued. *See Green v. Mansour*, 474 U.S. 64, 68 (1985).

The 1999 Compact and the 2004 Amendment both include, at section 9.4(a)(1) and (2), an identical limited waiver of sovereign immunity, in which the parties agree to expressly waive their sovereign immunity from suit only to the extent "[n]either side makes any claim for monetary damages (that is, only injunctive, specific performance, including enforcement of a provision of this Compact requiring payment of money to one or another of the parties, or declaratory relief is sought)." Under the express language of section 9.4(a)(1) and (2), the parties' limited waiver of sovereign immunity does not extend to claims seeking monetary damages or the payment of money apart from actions seeking specific performance of a Compact provision that itself requires the payment of money.

B. The District Court's Specific Performance Remedy Does Not Compel Fulfillment of a Compact Term, But is Instead a Prohibited Retrospective Award For Monetary Damages or Restitution

As noted above, the district court characterized its $36.2 million award against the State as specific performance of the 1999 Compact's payment terms for acquiring and maintaining Gaming Device licenses based on a purported violation of the 1999 Compact:

> Pauma is entitled to specific performance of the 1999 Compact's payment terms, including the license and fee terms in Section 4.3.2.2(a).
>
> Specific performance of the payment terms effectively returns money property wrongfully taken from Pauma and is available to Pauma pursuant to the State's limited contractual waiver of sovereign immunity in section 9.4(a). [Citations to record omitted.] The State violated the terms of the 1999 Compact when, for purposes of the December 2003 license draw, it misrepresented the Pool to be exhausted of licences [sic] and refused to issue 550 licenses to Pauma on that basis.
>
> Pauma overpaid . . . for gaming device licenses and is entitled to get its overpayments back. The Court rejects the State's argument that the return of Pauma's overpayments constitutes money damages. This case is unique in that the State contractually waived any immunity to contest the remedy of specific performance, which here results in the State having to return money belonging to Pauma. *See also Bowen v. Mass.*, 487 U.S. 879, 894 (1988) ("while in many instances an award of money is an award of damages, '[o]cassionally a money award is also a [specific] remedy'").

(ER 71-73.)

As a preliminary matter, the court's stated justification for its chosen remedy is inconsistent with its rationale for granting summary judgment to Pauma. The grant of summary judgment rests upon a finding that the Commission made a misrepresentation, not on a violation of the 1999 Compact. Pauma also did not allege a breach of Compact claim against the State. It would appear that the court shifted from a theory of "misrepresentation" to a theory of "violation of the 1999 Compact by misrepresentation" as a way of creating a purported basis for its specific performance remedy when the State raised its objections to restitution. But the court improperly merged the theories of misrepresentation and breach. Misrepresentation is fundamentally distinct from breach, which is a "violation of a contractual obligation by failing to perform one's own promise." BLACK'S LAW DICTIONARY 225 (10th ed. 2014). Thus, to the extent the court's specific performance remedy is based, in whole or in part, on a purported violation of the 1999 Compact, it is inconsistent with both the court's merits determination and Pauma's asserted claims for relief and, on that basis, should be reversed and remanded.

"Specific performance" is defined as "a court-ordered remedy that requires precise fulfillment of a legal or contractual obligation . . . ." BLACK'S LAW DICTIONARY 1617 (10th ed. 2014). Specific performance

may have been an available remedy if breach had been alleged and proved, which it was not. Even supposing that it had, or that specific performance of the 1999 Compact was an available remedy following a finding of misrepresentation and flowing from rescission of the 2004 Amendment, there is nothing in the payment provisions being ostensibly enforced by the district court that required the State to pay a tribe with respect to license fees, or for "overpayments" made in connection with a tribe acquiring and maintaining Gaming Device licenses.

The only 1999 Compact provision marginally touching upon the notion of a surplus payment is section 4.3.2.3(e), which requires a tribe to make a "pre-payment fee" of $1250 per Gaming Device license, to be deposited into the RSTF and then applied as a credit towards a tribe's future quarterly RSTF payment under 1999 Compact section 4.3.2.2(a)(2). Other Compact provisions specify consequences in the case of a tribe's nonpayment to the RSTF (see 1999 Compact section 4.3.2.3), and a tribe's overdue or understated SDF payments[17] (see 1999 Compact section 5.3), but no provision requires payment from the State to a tribe in connection with license fees or overpayments for licenses. Yet, the trial court's "specific

[17] Pauma has at no time made payments into the SDF.

performance" remedy requires the State to apply fees Pauma paid under the 2004 Amendment against fees to acquire and maintain hypothetical licenses for the operation of slot machines Pauma added to its casino throughout 2007 to 2009, as though Pauma had acquired those licenses in December 2003 while under the 1999 Compact, and to refund the balance of $36,235,147.01 to Pauma as an "overpayment." The obligations the district court would have the State specifically perform simply do not correspond to any obligation the State had a duty to perform under the 1999 Compact. Accordingly, even if specific performance was an appropriate remedy in this case, the district court failed to identify a 1999 Compact provision requiring the State to pay Pauma that sum.

The court's specific performance remedy is, in actuality, a thinly-veiled restitution or monetary damages award prohibited by the State's sovereign immunity. Restitution is, of course, a remedy distinct from specific performance. See Restatement (Second) of Contracts, § 345. Restitution is a component of recovery that normally flows from contract rescission. Restatement (Second) of Contracts § 376 (a party who has avoided a contract on the ground of misrepresentation "is entitled to restitution for any benefit that he has conferred on the other party by way of part performance or reliance").

In the usual case not involving a state's sovereign immunity, a party who has avoided a contract on the ground of misrepresentation may be entitled to restitution. Restatement (Second) of Contracts § 376. That "equitable restitution" requiring the payment of money from a state's treasury is the equivalent of prohibited monetary damages in the context of a State's Eleventh Amendment sovereign immunity was confirmed by the Supreme Court in *Edelman v. Jordan*, 415 U.S. 651, 664-65. There, the Court held that the Eleventh Amendment barred that portion of a decree ordering retroactive payment of benefits that had been found to have been wrongfully withheld. As demonstrated, the State has expressly retained its Eleventh Amendment immunity from suits for monetary damages arising from disputes under the Compacts.

Under the 2004 Amendment, to maintain its existing licenses, Pauma paid fees into the RSTF. (ER 549 at § 4.3.2.2(a).) The RSTF was created within the state treasury for the receipt and deposit of monies derived from Gaming Device license fees paid into the fund pursuant to the terms of Tribal-State class III gaming compacts for the purpose of making distributions to so-called Non-Compact Tribes. Cal. Govt. Code § 12012.75. (*See also*, ER 236 at § 4.3.2(a)(i) & (ii) & § 4.3.2.1.) Under its 2004 Amendment, Pauma also paid into California's treasury the required

fees for adding slot machines to its casino (ER 549 at § 4.3.1(b)-(d)), and its fixed revenue sharing payment (*Id.* at § 4.3.3(a)-(d)). *See* Cal. Govt. Code §§ 16372, 63048.65(d) & (e). Since the destination into which Pauma made its payments under the 2004 Amendment (and, thus, the source from which an award compelling return of those monies would necessarily come) is the State's treasury, a restitutionary remedy is barred by the State's Eleventh Amendment immunity and the express terms of the Compacts. *Edelman v. Jordan*, 415 U.S. at 668-69; *see*, *N. E. Med. Servs. v. Cal. Department of Health Care Servs.*, 712 F.3d 461, 464-470 (9th Cir. 2013) (a suit seeking reimbursement of monies paid to, and allegedly improperly retained by, California, was barred by California's Eleventh Amendment immunity).

In rejecting the State's argument that requiring it to pay Pauma money from the State's treasury constituted money damages or restitution barred by the Eleventh Amendment and the Compacts, the district court relied on *Bowen* for the proposition that "while in many instances an award of money is an award of damages, '[o]cassionally a money award is also a [specific] remedy.'" (ER 71-73.) But *Bowen* is not an Eleventh Amendment case and does not stand for the proposition that a court may order the payment of funds from a state's treasury notwithstanding sovereign immunity so long as

it designates the award as a "specific remedy."[18] This Court has recognized that *Bowen* "did not implicate [the] *Eleventh Amendment* concerns" considered in *Edelman v. Jordan,* but instead "dealt with the meaning of 'money damages' as that term is used in [the] Administrative Procedure Act . . . ." *Native Village of Noatak v. Blatchford*, 38 F.3d 1505, 1513 (9th Cir. 1994) (emphasis in original). Thus, *Native Village of Noatak* instructs, "the [*Bowen*] Court's discussion of the differences between monetary and specific relief . . . should not be treated as a widely applicable, general rule for determination of the nature of the relief sought." *Id.* Finally, *Bowen* is not a contract case and thus does not support the district court's reliance upon it as authorizing a remedy requiring the State "to return money belonging to Pauma." (ER 71-73.) *See Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 212 (2002) (expressing the view that *Bowen* "has no bearing on the unavailability of an injunction to enforce a contractual obligation to pay money past due.").

[18] Justice Scalia noted in his dissent in *Bowen*, "the line between damages and specific relief must surely be drawn on the basis of the substance of the claim, and not its mere form. It does not take much lawyerly inventiveness to convert a claim for payment of a past due sum (damages) into a . . . declaration that the sum must be paid." *Bowen,* 487 U.S. at 915-16 (Scalia, J., dissenting).

The district court wrongly characterized a monetary remedy that is barred by the State's Eleventh Amendment immunity and by the Compacts as an available equitable remedy. The district court's order requiring "performance of the 1999 Compact's payment terms, including the license and fee terms in Section 4.3.2.2(a)" provides a remedy that is an attempt to "substitute[] for that which ought to have been done," and therefore constitutes money damages or restitution barred by the doctrine of sovereign immunity. *Dia Navigation Co. v. Pomeroy*, 34 F.3d 1255, 1266-67 (3d Cir. 1994). The district court failed to identify any contractual obligation in the 1999 Compact requiring payment of money by the State to Pauma. Thus, its judgment requiring the State to pay Pauma $36.2 million from the State's treasury was both legal error and an abuse of the court's discretion and must be reversed.

III. THE DISTRICT COURT ABUSED ITS DISCRETION BY FAILING TO OFFSET THE VALUE OF THE BENEFITS PAUMA RECEIVED UNDER THE 2004 AMENDMENT FROM THE $36.2 MILLION AWARD

In the event this Court determines that monetary relief is not barred by California's sovereign immunity and the terms of the Compacts, the remedy remains subject to the fundamental principles of rescission and restitution, including the requirement that in exchange for restoration of the consideration Pauma paid for the 2004 Amendment, Pauma must restore the

benefits conferred upon it by the rescinded 2004 Amendment. Restatement (Second) of Contracts § 384. As the consideration Pauma paid for the 2004 Amendment appears to exceed the benefits Pauma received, Pauma's return of those benefits should have been applied as an offset to the restitutionary award. Accordingly, the basic form of restitution should be consideration paid minus all benefits received. The district court abused its discretion by failing to determine the full quantifiable benefit conferred on Pauma by the 2004 Amendment and to offset that amount from the fees Pauma paid under that agreement to calculate the correct amount of restitution.

The Restatement provides that a party who has avoided a contract on the ground of misrepresentation "is entitled to restitution for any benefit that he has conferred on the other party by way of part performance or reliance." Restatement (Second) of Contracts § 376. The Restatement further provides, in part:

> [A] party will not be granted restitution unless (a) he returns or offers to return, conditional upon restitution, any interest in property that he has received in substantially as good condition as when it was received by him, or (b) the court can assure such return in connection with the relief granted.

Restatement (Second) of Contracts § 384. The objective is to return the parties, as nearly as practicable, to the situation in which they found themselves before they made the contract. *Id.* cmt. a. "If all that is to be

returned is money, a credit against a larger sum allowed in restitution will suffice." *Id.*, cmt. b; *see, e.g.*, *The Ambassador Hotel Co., Ltd. v. Wei-Chuan Investment,* 189 F.3d 1017, 1031 (9th Cir. 1999) (rescission reverses the transaction and restores the *status quo ante,* that is, the plaintiff returns the subject of the transaction, plus any other benefit received under the contract, and the defendant returns the consideration furnished).

Under equitable rescission and restitution, Pauma's recovery should have been reduced by the sum of the quantifiable benefits Pauma received from the State's performance of the 2004 Amendment. *Republic Savings Bank, F.S.B, et al. v. United States*, 584 F.3d 1369, 1374 (Fed. Cir. 2009). The district court's refusal to subtract Pauma's "net win" derived from Pauma's operation of the additional slot machines it would not have been able to add but for the State's performance of the 2004 Amendment, was an abuse of discretion. The State was entitled to the "net win" offset because the principles of rescission and restitution require it.

As Pauma's own evidence showed, Pauma operated at least 1111 slot machines in 2007, 1154 in 2008, and 1145 in 2009. (ER 630-637.) But for entering into the 2004 Amendment Pauma could not have obtained licenses to operate these additional slot machines. Accordingly, the operation of these additional machines, and the net win obtained from them, constitute a

major benefit Pauma received under the 2004 Amendment. Pauma provided some evidence that, during the fiscal years 2007, 2008, and 2009, Pauma obtained a "net slot win" of $16,048,643.72 from the additional machines. (*Id.)* On the basis of Pauma's own representations, the district court, in restoring the parties to the *status quo ante*, should have offset against its award an amount of no less than $16,048,643.72, for fiscal years 2007, 2008, and 2009, alone.[19]

The district court rejected the State's request for a net win offset, again by altering actual events in December of 2003 to find that, had the Commission employed the *Colusa II* number at that draw, Pauma would have received the additional licenses to operate over 1050 machines and thus would have profited by the same amount the State was seeking as an offset. (ER 302TR, 322TR-325TR, 325TR-333TR.) This disregards the function of

[19] Pauma's evidence did not reflect the methodology Pauma's expert used to calculate "net slot win," and the calculation may not conform to the applicable standard for "net win" under the Compacts. The State sought limited discovery or the appointment of a neutral forensic accountant to calculate this offset, either of which should specifically be permitted upon remand for the purpose of determining the proper deduction. *See*, *Hansen Bancorp., Inc. v. United States,* 367 F.3d 1297, 1316 (Fed. Cir. 2004) (the value of restitution is a question of fact).

restitution which is to restore the parties to the *status quo ante*. When the parties entered into the 2004 Amendment, Pauma had not yet added to its 1050 slot machines. As such, the court erroneously augmented its restitutionary remedy by adding to it a benefit of the bargain remedy.

The State is entitled to the net win offset from an equitable standpoint as well. Without the net win offset, Pauma becomes the recipient of an unjust windfall afforded to no other California gaming tribe, including those tribes that actively litigated the License Pool number and that, unlike Pauma, did not enter into amended compacts and were unable to add slot machines to their casinos until licenses trickled back into the Pool or until the October 2009 license draw ordered by the *Colusa* court. During fiscal years 2007 through 2009 alone, Pauma already recovered approximately half of its total payments to the State under the 2004 Amendment. Refusing an offset unjustly enriches Pauma by at least $16,048,643.72, and likely more.

The district court's failure to offset Pauma's "net win" from added Gaming Devices was an abuse of its discretion. On that basis, this Court should reverse and remand the $36.2 million award for a determination of the amount of the offset.

CONCLUSION

The primary question before this Court is whether this Court intended its 2010 *Colusa II* decision to authorize retroactive relief and thus spawn and support litigation like Pauma's. The State strongly urges this Court to clearly establish that the judicial expansion of the License Pool that occurred through *de novo* interpretations of the 1999 Compact in 2009 and 2010 applies prospectively only and does not serve to change the legal meaning and consequences of actions taken by any parties prior to the issuance of those decisions.

Alternatively, the State urges that if this Court determines the Commission to have misrepresented the size of the License Pool to Pauma in 2003, this Court find that the size of the License Pool at that time was not material to Pauma's decision to seek an amended compact, and that Pauma was not induced to enter into the 2004 Amendment by it.

In the event this Court affirms the district court's retroactive application of *Colusa II*, and affirms the district court's determination that the Commission misrepresented the status of the License Pool in 2003, thus inducing Pauma to enter into its 2004 Amendment and providing grounds for rescission of the 2004 Amendment, the State urges this Court to recognize the State's Eleventh Amendment immunity from suits seeking

money damages, to distinguish the substance of the district court's odd "specific performance" remedy from its nominal form, and to find that the money judgment in this case effectively constitutes monetary damages or a restitutionary remedy barred by the express terms of the State's limited waiver of sovereign immunity under section 9.4 the 1999 Compact and Pauma's 2004 Amendment.

Alternatively, if this Court determines that the restitutionary portion of the district court's remedy is permissible, the State urges this Court to apply the usual and customary principles of rescission and restitution, and require that the award be offset by a sum equal to the benefit Pauma received from its 2004 Amendment, that is, the "net win" from the additional Gaming Devices it could not otherwise have operated had it been subject to the 1999 Compact from 2004 to 2009.

Dated: December 17, 2014

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
SARA J. DRAKE
Senior Assistant Attorney General
NEIL D. HOUSTON
Deputy Attorney General

s/T. Michelle Laird
T. Michelle Laird
Attorneys for Defendants-Appellants and Cross-Appellees State of California, California Gambling Control Commission, and Governor Edmund G. Brown Jr.

SA2014313605
70997422.doc

14-56104/14-56105

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PAUMA BAND OF LUISENO MISSION INDIANS OF THE PAUMA & YUIMA RESERVATION, a federally-recognized Indian Tribe, AKA Pauma Band of Luiseno Mission Indians, AKA Pauma Band of Mission Indians,

Plaintiff and Appellee,

v.

STATE OF CALIFORNIA; CALIFORNIA GAMBLING CONTROL COMMISSION, an agency of the State of California; and EDMUND G. BROWN JR., as Governor of the State of California,

Defendants and Appellants.

PAUMA BAND OF LUISENO MISSION INDIANS OF THE PAUMA & YUIMA RESERVATION, AKA Pauma Band of Mission Indians,

Plaintiff and Appellant,

v.

STATE OF CALIFORNIA; CALIFORNIA; CALIFORNIA GAMBLING CONTROL COMMISSION, an agency of the State of California; EDMUND G. BROWN, JR., as Governor of the State of California,

Defendants and Cross-Appellees.

STATEMENT OF RELATED CASES

To the best of our knowledge, there are no related cases.

Dated: December 17, 2014

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California
SARA J. DRAKE
Senior Assistant Attorney General
NEIL D. HOUSTON
Deputy Attorney General

s/T. Michelle Laird
T. Michelle Laird
Attorneys for Defendants-Appellants and Cross-Appellees State of California, California Gambling Control Commission, and Governor Edmund G. Brown Jr.

CERTIFICATE OF COMPLIANCE
PURSUANT TO FED.R.APP.P 32(a)(7)(C) AND CIRCUIT RULE 32-1
FOR 14-56104/14-56105

I certify that: (check (x) appropriate option(s))

[X] 1. Pursuant to Fed.R.App.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached **opening/answering/reply/cross-appeal** brief is

[X] Proportionately spaced, has a typeface of 14 points or more and contains 12,294 words (opening, answering and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words

or is

[ ] Monospaced, has 10.5 or fewer characters per inch and contains ____ words or ___ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words or 1,300 lines of text; reply briefs must not exceed 7,000 words or 650 lines of text).

[ ] 2. The attached brief is **not** subject to the type-volume limitations of Fed.R.App.P. 32(a(7)(B) because

[ ] This brief complies with Fed.R.App.P 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages.

or

[ ] This brief complies with a page or size-volume limitation established by separate court order dated _____ and is

[ ] Proportionately spaced, has a typeface of 14 points or more and contains _____ words,

or is

[ ] Monospaced, has 10.5 or fewer characters per inch and contains __ pages or __ words or __ lines of text.

[ ] 3. Briefs in **Capital Cases**.
This brief is being filed in a capital case pursuant to the type-volume limitations set forth at Circuit Rule 32-4 and is

[ ] Proportionately spaced, has a typeface of 14 points or more and contains _____ words (opening, answering and the second and third briefs filed in cross-appeals must not exceed 21,000 words; reply briefs must not exceed 9,800 words).

or is

[ ] Monospaced, has 10.5 or fewer characters per inch and contains __ words or __ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 75 pages or 1,950 lines of text; reply briefs must not exceed 35 pages or 910 lines of text).

☐ 4. **Amicus Briefs**.

☐ Pursuant to Fed.R.App.P 29(d) and 9th Cir.R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7,000 words or less,

or is

☐ Monospaced, has 10.5 or few characters per inch and contains not more than either 7,000 words or 650 lines of text,

or is

☐ Not subject to the type-volume limitations because it is an amicus brief of no more than 15 pages and complies with Fed.R.App.P. 32 (a)(1)(5).

December 17, 2014
Dated

s/T. Michelle Laird
T. Michelle Laird
Deputy Attorney General