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

THE STATE OF CALIFORNIA, THE CALIFORNIA GAMBLING CONTROL COMMISSION, AND GOVERNOR EDMUND G. BROWN JR.'S THIRD BRIEF ON CROSS APPEAL

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INTRODUCTION

This case is simpler than Pauma would have this Court believe. In 2004, Pauma, which was then seeking a large-scale resort-casino development deal with a major corporate partner (ER 428, 432-433), entered into an amended gaming compact with the State (2004 Amendment) that, unlike Pauma's 1999 Compact, allowed Pauma to operate an unlimited number of slot machines (Gaming Devices) at its planned facility. (ER 551 through ER 552 at § 4.3.1.) Apparently confident in its ability to put a large number of machines into operation, Pauma rejected the State's offer of a fee structure based on a percentage of "net win," and instead requested a flat rate fee that would be more advantageous once a large number of machines were up and running. (ER 558 at § 3.2(f).) But Pauma's plans ran into unforeseen difficulties that prevented the existing casino's planned expansion. Pauma lost its initial development partner to a corporate merger, and was then unable to secure a replacement, presumably in part due to the economic downturn that began in 2007. (ER 613-616, 628-629.) As a result, Pauma found itself without a facility that could accommodate a large number of machines.

Then, in 2009, the size of the statewide Gaming Device license pool under the 1999 Compact (License Pool) was expanded by the judgment entered in *Cachil Dehe Band of Wintun Indians of the Colusa Indian*

Community v. California, 629 F. Supp. 2d 1091 (E.D. Cal. 2009) (*Colusa*). The remedy granted by the district court in *Colusa* consisted of a declaration as to the size of the License Pool, and an injunction requiring the Commission to conduct a license draw for the newly available licenses open to all eligible 1999 Compact Tribes. (Unnamed Order, Doc. 127, filed 08/19/2009 in *Colusa*.) The Commission conducted that license draw on October 5, 2009.

On September 4, 2009, Pauma filed this action seeking to rescind its 2004 Amendment and be reinstated to its 1999 Compact. To achieve this end, Pauma has alleged many things, including an elaborate conspiracy theory reaching back many years and quite improbably spanning the Davis and Schwarzenegger gubernatorial administrations. Similarly, Pauma has alleged every conceivable theory of recovery, ending up with a First Amended Complaint (FAC) (SSER-008) containing seventeen mostly alternative claims for relief arising from the same facts. Even within that framework, Pauma's claims continued to evolve, expand, and shift, creating a procedural morass in the district court that has now spread to the appellate level where Pauma, in its cross-appeal, seeks adjudication of two IGRA claims it never properly pleaded, and properly lost in the district court.

This case presents a relatively odd scenario in which Pauma has sued on a misrepresentation concerning a term within its 1999 Compact in order

to obtain rescission of its subsequent 2004 Amendment, which lacks the disputed term, and reinstatement of its original 1999 Compact, followed by the imposition of a remedy for breach of its 1999 Compact even though Pauma, as a non-party even now, lacks standing to sue upon the latter.[1]

For purposes of the State's appeal, this scenario primarily turns upon three issues:

1) Did the district court err by giving this Court's *Colusa II* decision retroactive effect in order to change the legal meaning of actions taken by the Commission seven years before the *Colusa II* decision was issued, thereby providing Pauma with unprecedented retroactive relief that no other 1999 Compact Tribe has received?

2) Did the district court in this case err under the Restatement (Second) of Contracts and general federal contract law by construing a 2009 or 2010 judicial decision to create a misrepresentation at a point in time six or seven years prior?

3) Did the district court in this case err by improperly interpreting the reciprocal limited waiver of sovereign immunity contained in the 1999

[1] Until final judgment is entered in this case, Pauma remains a party to its 2004 Amendment, rather than its earlier 1999 Compact, and therefore lacks standing to sue on the 1999 Compact. *See Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1021-1022 (9th Cir. 2004).

Compact and in Pauma's 2004 Amendment to permit a money judgment against the State in the guise of "specific performance?"

If answered in the affirmative, either of the first two of these three questions would be dispositive of every claim Pauma has alleged in this case except, arguably, its claim that the 2004 Amendment's payment structure constitutes impermissible taxes under IGRA, and its unconscionability claim. If answered in the affirmative, the third question would substantially alter the range of possible remedies available to Pauma.

REPLY TO PAUMA'S JURISDICTIONAL STATEMENT

The parties agree that this Court has jurisdiction over the cross-appeals under 28 U.S.C. §1291, but differ on how that jurisdiction is established. Pauma contends that appellate jurisdiction arises from this Court's denial of its petition for writ of mandamus rather than from any district court action, but this contention is not supported either by the plain language of 28 U.S.C. §1291, or by Pauma's sole case authority. (Pauma AOB, p. 17.)

The termination of proceedings by the district court provides the basis for this Court's appellate jurisdiction. *See Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842, 844-46 (9th Cir. 2009) (a ruling is final for purposes of 28 U.S.C. §1291 if it clearly evidences the judge's intention that it be the court's final act and is a full adjudication of the issues). Here, the

district court granted summary judgment to Pauma on its misrepresentation claim and deemed twelve other claims not adjudicated in favor of either party "moot." These twelve claims were moot because the court had already awarded all of the relief Pauma claimed would give it "complete justice" in the case: "rescission of the 2004 Amendment," "reinstatement of the 1999 Compact" and "specific performance of the 1999 Compact's payment terms." (ER-81 thru ER-83.) On that basis, the court issued the amended judgment, closed the case, issued a stay of execution pending appeal, and declared the case "finished." (Ninth Cir. No. 14-71981, doc. 2-2 pp. 60-63.)

Although the district court formally adjudicated just five of Pauma's seventeen claims[2], the amended judgment should be viewed as an "attempt to dispose of all claims in the action" because the district court considered Pauma's other claims "moot," and because the court's pronouncement of *Colusa II's* effect on the case, and this Court's review of that ruling, informs the outcome of the remaining claims.[3] *See Squaxin Island Tribe v. Washington*, 781 F.2d 715, 719 (9th Cir. 1986).

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[2] The district court granted summary judgment to the State on Pauma's three "breach of fiduciary duty claims" and its "constructive fraud" claim, and granted summary judgment to Pauma on its "misrepresentation" claim. (ER-39.)

[3] Only the fifth and sixth claims, grounded on the inclusion of allegedly impermissible fees in the 2004 Amendment, and the sixteenth

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These cross-appeals present that rare case "coming within what might well be called the 'twilight zone' of finality" (see *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152 (1964)), and for which appellate jurisdiction should be deemed established under 28 U.S.C. §1291.

I. THE COMMISSION DID NOT MISREPRESENT THE SIZE OF THE LICENSE POOL IN 2003

The judgment in favor of Pauma is based on the district court's conclusion that the Commission's 2002 interpretation of the License Pool's size under the 1999 Compact, and the Commission's denial of Pauma's request for licenses in December, 2003, based upon the Commission's determination that no licenses were then available from the License Pool, constituted material misrepresentations warranting rescission of Pauma's 2004 Amendment. This conclusion was based on the expansion of the License Pool's size effected by the *Colusa* decision in 2009, and this Court's affirmance of that decision (with modification of the size of the License Pool) in its 2010 *Colusa II* decision.

The district court's conclusion was erroneous for two fundamental reasons. First, the *Colusa* cases provided only prospective relief with

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claim for unconscionability, arguably do not rest primarily on giving effect to the *Colusa II* License Pool number at a time substantially prior to 2010.

respect to the size of the License Pool. *Colusa* expressly denied relief for the earlier conduct of the Commission, and *Colusa II* provided for no relief for the earlier conduct of any party. Second, Pauma alleged its misrepresentation claim under the Restatements and general principles of federal law. The Restatement (Second) of Contracts, and federal cases relying thereon, provide that a later occurring judicial decision will not cause an earlier representation to become an actionable misrepresentation. But that is exactly what the district court has done here.

Pauma entirely disregards the significance of the way in which the current size of the License Pool came about and the limitations that were necessarily imposed upon its litigation by the particular nature of the 1999 Compact and its parties. Pauma also disregards the principle that a misrepresentation or mistake must be based on a past or then existing fact, rather than a later occurrence, and misdirects the Court to general principles of retroactivity of certain kinds of judgments, none of which are analogous to the judgment at issue. Finally, Pauma argues that the State is in one way or another estopped from arguing that the 2009-10 *Colusa* decisions do not apply retroactively to create a misrepresentation in 2002-2003. As shown below, the State is not estopped from taking the positions that it takes here.

A. The nature of the parties and subject matter of the *Colusa* decisions impliedly or expressly required limitations on potential remedies concerning the size of the License Pool

The *Colusa* cases concern the interpretation of the 1999 Compact. These compacts were an aggregation of sixty substantively identical, but separate and bilateral, contracts between political sovereigns, each with immunity from suit. In *Colusa*, these basic facts created two unusual problems – first, that an adjudication of the size of the License Pool would necessarily affect all sixty Compact Tribes because the License Pool was common to each contract. Second, because of its sovereign immunity, no Compact Tribe could be involuntarily joined in the action. For these reasons, the Cachil Dehe Band's (Colusa) 2004 complaint challenging the Commission's determination of the License Pool's size was initially dismissed by the district court on Rule 19 grounds for Colusa's failure, and inability, to join all the other Compact Tribes in the action. (Mem. & Order, Doc. 25 filed 05/16/2006 in *Colusa*.)

On appeal, this Court reversed and remanded, and provided a conceptual framework within which Colusa *could* litigate the size of the License Pool without running afoul of Rule 19. *See Colusa I*, 547 F.3d 962 (9th Cir. 2008). A primary aspect of this framework was that no remedy could result in taking away licenses that had already been issued to a Compact Tribe. "The licenses that have already been issued comprise the absent tribes' only legally protected interest at stake. As we have made clear, however, none of those licenses may be invalidated at the remedial

stage." *Id.* at 974. Because a de novo interpretation of the License Pool provision of the 1999 Compact in *Colusa* could result, as this Court noted retrospectively in its later *Colusa II* decision,[4] in a determination that the License Pool was *either larger or smaller* than alleged by the parties, the necessary prohibition against invalidating licenses that had already been issued required one of two things: either a limitation of remedy that would overtly provide Compact Tribes with the opportunity to litigate the size of the License Pool, one after the other, with a judicial guarantee of no outcome worse than the status quo, or a limitation of remedy to prospective relief only, which, by its nature, could not interfere with licenses already issued. While not explicit, the language of *Colusa I*, *Colusa*, and *Colusa II* strongly indicates that this Court and the district court intended that any remedy granted to Colusa as to the License Pool size would be prospective only. This Court was more explicit with respect to Colusa's license draw "tier ranking" claim, noting with approval that, "[t]o the extent that Colusa seeks *prospective relief* in the form of a declaration that may place it in the third priority tier in future draws, such relief, if granted, would not prejudice the

[4] *See Colusa II*, 618 F.3d at 1084 (referring to "an adjudication that the license pool *was smaller or larger* than California previously maintained") (italics added).

absent tribes' legally protected interest in their *existing* licenses." *Colusa I*, 547 F.3d at 974 (first italics added, second italics in original.).

The relief granted by the *Colusa* district court after remand *was* prospective only. As to the size of the License Pool, the district court ordered the Commission to conduct an open draw for the newly available licenses within 45 days of the entry of judgment. (Unnamed Order, Doc. 127 filed 08/19/2009 in *Colusa*.) This Court later affirmed this remedy, noting:

> The district court correctly read *Colusa I* to assume that a decision within this litigation resulting in a larger license pool that California had yet recognized would be followed by a remedy ordering the eventual distribution of the remaining licenses to all Compact Tribes that applied and were eligible to receive them.

Colusa II, 618 F.3d at 1084.

The *Colusa* district court also provided another, very explicit, indication of its understanding that this Court had mandated prospective relief through *Colusa I*. In *Colusa*, the district court granted summary judgment in favor of the State on Colusa's claim that the Commission had breached the 1999 Compact by failing to conduct license draws when requested by Colusa in 2006 and 2007. The district court ruled that its expansion of the License Pool (in 2009) did not yet apply in 2006 or 2007, and observed that the Commission had at those times acted in good faith

when asserting that no licenses were available. *See Colusa*, 629 F. Supp. 2d at 1119-20. This is the only existing judicial authority as to when the expansion of the License Pool became effective.

By ruling as it did on Colusa's breach of compact claims, the *Colusa* district court denied Colusa exactly what Pauma sought and obtained in the district court in this case – a retroactive application of the 2009-10 judicial expansion of the License Pool for the purpose of obtaining relief for a prior act of the Commission. When the district court entered judgment for Pauma, Pauma erroneously became the first and only of the sixty 1999 Compact Tribes to receive any form of retroactive relief based on *Colusa's* License Pool expansion.

Pauma's arguments ignore all of the foregoing. While the *Colusa I* decision is clearly the enabling foundation for the litigation of the License Pool's size, nowhere is it mentioned by Pauma. In light of this litigation's history regarding the License Pool's size, Pauma has sought, and so far obtained, relief that is inconsistent with the principles this Court established in *Colusa I*. The remedy granted in *Colusa* and affirmed in *Colusa II* – declaratory relief as to the License Pool's size and injunctive relief requiring a license draw within 45 days of the entry of judgment in Colusa – resulted in an open license draw conducted on October 5, 2009. (Unnamed Order, Doc. 127 filed 08/19/2009 in *Colusa*.) This is the earliest date on which any

1999 Compact Tribe received relief arising from *Colusa's* expansion of the License Pool. To the extent, if any, that Pauma may be granted relief based on the expansion of the License Pool, that relief should operate only from October 5, 2009 forward and thus be comparable to the relief granted to all other 1999 Compact Tribes. *Colusa* and *Colusa II* do not support the unprecedented relief that was granted to Pauma by the district court, and the district court erred by basing its decision upon them.

B. Later judicial decisions do not create earlier misrepresentations

The district court granted summary judgment to Pauma on its Tenth Claim for Relief (Misrepresentation—Restatement and General Principles of Federal Contract Law). (ER 62 thru ER 67.) Under the Restatement (Second) of Contracts, and general principles of federal contract law, the expansion of the License Pool effected by the *Colusa* decision in 2009, and affirmed with modifications in *Colusa II* in 2010, cannot serve to create an actionable misrepresentation by the Commission in 2002-03.

As the State argued in its opening brief, the Restatement provides that a misrepresentation is "an assertion that is not in accord with the facts." Restatement (Second) of Contracts § 159 (1981). "An assertion must relate to something that is a fact at the time the assertion is made in order to be a misrepresentation. Such facts include past events as well as present

circumstances but do not include future events." *Id.*, cmt. c; *Barrer v. Women's Nat'l Bank*, 761 F.2d 752, 758 (D.C. Cir. 1985).

In a case not entirely unlike Pauma's, an airline made certain representations concerning limits on its liability for lost baggage, thus inducing passengers whose bags had gone missing to accept settlements on terms consistent with the airline's representations. The law concerning the airline's liability for lost bags then changed. The aggrieved passengers sued, seeking to set aside the settlements, which they contended had been induced by the airline's misrepresentations. The court rejected the passengers' contention that a subsequent change in the law had rendered the accords and satisfactions they had entered into void for misrepresentation or mistake, holding instead that "we must look to the state of the law at the time of the events in question." *Curtin v. United Airlines, Inc.*, 273 F.3d 88, 96 (D.C. Cir. 2001). Accordingly, with respect to misrepresentation and mistake, a change in the law resulting from a subsequent judicial decision did not apply retroactively to create an actionable misrepresentation or mistake. *See also, Curtin v. United Airlines, Inc.*, 120 F. Supp. 2d 73, 77 (D.D.C. 2000).

Mistake cases hold similarly. "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 (Cal. Ct. App. 1986).[5] A 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. *Mosher v. Mayacamas Corp*., 215 Cal.App.3d 1, 4-6 (Cal. Ct. App. 1989). Under longstanding California law, "[t]he understanding of the law prevailing at the time of the settlement of the contract, although erroneous, will govern, and the subsequent settlement of a question of law by judicial decision does not create such a mistake of law as courts will rectify." *B.E. Campbell v. Rainey*, 127 Cal.App. 747, 750 (Cal. Ct. App. 1912), quoting *Cooley v. County of Calaveras*, 121 Cal. 482, 486-87 (Cal. 1901).

The Commission's representation concerning the License Pool size in December of 2003, was in accord with the facts as they then existed under the Commission's good faith[6] 2002 adoption of 32,151 as the License Pool size. While that determination was subsequently found erroneous under a much later judicial decision, the determination did not constitute a

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[5] The State observes no substantive difference between federal and state law on this point. *See Colusa II*, 618 F.3d at 1073 (noting that unless there is a substantive difference between them, the Ninth Circuit relies on federal and California contract law in California contract cases).

[6] The *Colusa II* court noted that the Commission had acted in good faith. *Colusa II*, 618 F.3d at 1075.

misrepresentation at the time. Accordingly, it cannot serve as the basis for rescission of Pauma's 2004 Amendment.

C. Pauma's general principles of retroactivity do not apply

Pauma's recitation of authority concerning the retroactive effect of the United States Supreme Court's interpretations of federal law, e.g., *Harper v. Va. Dep't of Taxation*, 509 U.S. 86 (1993); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991), has no applicability here as this case involves neither the Supreme Court nor federal law. In particular, Pauma's citation to the latter case is misleadingly overbroad in that *James B. Beam Distilling* itself concerns a matter of constitutional law and the many cases cited within the portion relied upon by Pauma involve the application of federal and state laws rather than ascertaining the meaning of "other fixed writings like contracts," as Pauma avers.

While judgments may, as a general principle, apply retroactively in a variety of contexts, the principle clearly cannot apply with regard to misrepresentation and mistake claims without completely vitiating the principles stated in the Restatements (Second) of Contracts and the cases cited in Part I (B), above. Here, Pauma employs general principles of retroactivity as a distraction from the law Pauma relied upon in the district court.

It is important to note that this is not a breach of contract case. Even though the district court's remedy (primarily specific performance) suggests otherwise, this is a misrepresentation or possibly a mistake case. Pauma's operative FAC (SSER-008) alleges seventeen claims for relief, but could not, and does not, include any breach of contract claims against the State. This is because the License Pool provision that Pauma's case is based upon is a term of the 1999 Compact, to which Pauma has not been a party since 2004. The License Pool provision was repealed in the 2004 Amendment, because Pauma negotiated for and received the authorization to operate an unlimited number of Gaming Devices under its terms. While the adjudication of the License Pool's size in *Colusa* and *Colusa II* might for certain purposes apply for Pauma's benefit if its 1999 Compact were reinstated, the adjudication of the License Pool size in *Colusa* and *Colusa II* in 2009-10 cannot serve to create a misrepresentation by the Commission in 2003 for the purpose of permitting Pauma to rescind its 2004 Amendment and thereby be reinstated to its 1999 Compact.

D. Pauma fails to address the impact of the limitation of remedies in the *Colusa* and *Colusa II* decisions

Rather than acknowledging the limitations arising from the *Colusa* litigation and the *Colusa I* and *Colusa II* decisions discussed in Part I (A), above, Pauma instead analogizes the adjudication of the License Pool size to

cases that bear absolutely no similarity to the *Colusa* cases. These cases do not involve misrepresentation or mistake claims.

In each instance, Pauma's point in citing to these cases appears to be that adjudication of an arguably ambiguous contract term can give rise to liability for a past act. This is an obvious point, and the State does not argue otherwise. The State's earlier arguments in the *Colusa* cases concerning the ambiguity of the License Pool provision of the 1999 Compact did not concern that particular issue. Instead, the State's argument concerned the propriety of the district court's imposition of a specific contract term upon the parties when the evidence arguably indicated there had been no meeting of the minds. This is not an issue in this case or in this appeal.[7]

E. Pauma incorrectly asserts judicial admission, judicial estoppel, and collateral estoppel against the State

Presumably aware of the infirmities of relying upon general principles of retroactivity while trying to establish a past misrepresentation on the basis of a later occurring judicial decision, Pauma advances several additional arguments. But all are inapposite.

First, Pauma claims that the License Pool's size was a "fixed number," that, once finally determined by the Court, must be deemed to

[7] The State has opposed Pauma's motion to supplement the record with select pages from legal briefs filed in unrelated cases. (Doc. 26, filed 02/19/2015.)

have been in existence with full legal effect for all purposes at all times since the 1999 Compacts were executed in 1999-2000. As stated previously, such an interpretation is inconsistent with the definition of a misrepresentation under the Restatement (Second) of Contracts, and Pauma's argument is therefore inapplicable to a misrepresentation case.

Pauma also contends that the State cannot now argue otherwise because the State previously argued the "fixed number" theory in the *Colusa* district court, and has therefore "judicially admitted" that the size of the License Pool is such a number. However, Pauma's claim mischaracterizes the State's prior argument. As noted above, the State's arguments in the district court concerned the propriety of the district court's imposition of a contract term that had not been contemplated by either party, and did not concern the question of *when* the district court's new interpretation of the License Pool size could be deemed to exist. More importantly, the State's position in the *Colusa* district court constituted *an argument* rather than an assertion of a material fact, and thus did not constitute a judicial admission. *See ACLU of Nevada v. Masto*, 670 F.3d 1046, 1064-65 (9th Cir. 2012) (distinguishing between argument and fact); *see also Am. Title Ins. Co. v. Lacelaw Corp*., 861 F.2d 224, 226-27 (9th Cir. 1988) (statements of *fact* contained in a brief may be considered admissions of a party in the discretion of the district court).

Pauma also implies that the State is judicially estopped from disavowing the "fixed number" argument. This implication is incorrect. To the extent the State made a "fixed number" argument in the *Colusa* district court, the district court in no way accepted or relied upon it. Accordingly, the fundamental rationale and prerequisite for judicial estoppel – prior acceptance and reliance by the court – is not present. *See Lowery v. Stovall*, 92 F.3d 219, 224 (4th Cir. 1996) ("the prior inconsistent position must have been accepted by the court").

Pauma next argues that a recent interlocutory rejection of the State's non-retroactivity (of the expansion of the License Pool) argument by a superior court in *San Pasqual Band of Mission Indians v. California* (Los Angeles County Sup. Ct. Case No. BC431469), collaterally estops the State from asserting that the expansion of the License Pool cannot be applied retroactively in this case to provide a basis for Pauma's relief. (*See* Pauma AOB, p. 46.) This argument is inapposite for three reasons. First, Pauma is impermissibly asserting non-mutual offensive collateral estoppel against the State. Non-mutual collateral estoppel refers to use of collateral estoppel by a nonparty to a previous action to preclude a party to that action from relitigating a previously determined issue in a subsequent lawsuit against the non-party. *State of Idaho Potato Comm'n v. G & T Terminal Packaging, Inc.*, 425 F.3d 708, 714 (9th Cir. 2005). Here, Pauma seeks to preclude the

State from litigating the issue of whether the Colusa Number applies retroactively, based on the superior court's interlocutory rejection of that argument in the *San Pasqual* litigation, to which Pauma was neither a party, nor in privity with a party. The Ninth Circuit has held that "nonmutual offensive collateral estoppel cannot be asserted against the government." *Nat'l Med. Enters. Inc. v. Sullivan*, 916 F.2d 542, 545 (9th Cir. 1990); *see also Coeur D'Alene Tribe of Idaho v. Hammond*, 384 F.3d 674, 689-90 (9th Cir. 2004), citing *United States v. Mendoza*, 646 U.S. 154, 159-160 (1984). Second, even if the State could be collaterally estopped from litigating an issue lost in litigation with another party in another forum, the State has not lost on the issue of whether the Colusa Number may be applied retroactively. The State prevailed in the *San Pasqual* case on other grounds, so the non-retroactivity finding by the superior court was neither essential to, or embodied in, a judgment against the State. Instead, it was merely an interlocutory ruling. And third, the *San Pasqual* case is currently on appeal and therefore neither final nor citable. Case Number B254870 has been fully briefed and is awaiting further proceedings in the California Court of Appeal for the Second Appellate District. San Pasqual is not citable as authority under California law. *Sandoval v. Superior Court*, 140 Cal.App.3d 932, 936 (Cal. Ct. App. 1983).

F. The expansion of the License Pool[8] did not take effect until August 18, 2009, and no remedy was available to any Compact Tribe prior to October 5, 2009

Because of the nature of the Compact and its parties, and of the operation of the License Pool within each of sixty separate compacts between Indian tribes and the State, the adjudication of the License Pool's size could, as a practical matter, only be prospective. Accordingly, the enlargement of the License Pool effected by the *Colusa* decisions came into being on August 18, 2009, when judgment was entered in *Colusa*, and became operational when the additional licenses first became available to the eligible Compact Tribes. Relief was not available to any Compact Tribe until the Commission conducted the October 5, 2009 license draw pursuant to the order of the *Colusa* district court. No 1999 Compact Tribe should be granted relief prior to that date as a result of the enlargement of the License Pool by *Colusa* and *Colusa II*.

II. THE COMMISSION'S CALCULATION OF THE LICENSE POOL SIZE DID NOT INDUCE PAUMA TO ENTER INTO THE 2004 AMENDMENT

Although the district court rather uncritically accepted Pauma's contention that its 2004 Amendment merely sought to obtain the rights it should have had under the 1999 Compact had the Commission correctly

[8] The first enlargement of the License Pool, to 42,700, took effect upon entry of judgment in *Colusa* on August 18, 2009. The "final" enlargement of the License Pool, to 40,201, took effect upon this Court's remittitur following the issuance of *Colusa II* on August 20, 2010.

calculated the License Pool, the case's basic facts strongly suggest otherwise.[9]

Pauma now argues that all it wished to obtain through its 2004 Amendment was the right to operate a total of 2000 slot machines. Before entering into the 2004 Amendment, Pauma was already authorized to operate 1050 machines. (ER 401 thru 402, ER 630 thru 637.)The maximum number of additional licenses Pauma could have obtained under the 1999 Compact therefore was 950 (for a total of 2000). The record reflects, however, that Pauma negotiated for, obtained, *and agreed to pay for* the entitlement to operate an *unlimited* number of slot machines. (ER 551 thru 552 at § 4.3.1, This act, by Pauma, was consistent with its objective, at the time, of partnering with Caesars Entertainment, Inc., to build a major "destination" casino resort. ER 422-433, 434-438, 454-457, 458-462, 463-533. Moreover, the record reflects that Pauma declined the State's offer of a payment structure based on a percentage of net win rather than a flat fee (ER 558 at § 3.2(f)), thus strongly suggesting that Pauma had no doubts at the time of negotiating its 2004 Amendment that it would be operating far more

[9] Though not raised in the district court, this Court has previously held that "[no] particular degree of likelihood of receiving licenses 'arises from terms in bargained contracts' and, more specifically, from the 1999 Compacts." *Colusa I*, 547 F.3d at 973, quoting *Am Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1023 (9th Cir. 2002).

than 2000 machines. If Pauma had had any doubts about the number of machines it would operate, a percentage fee structure would have been greatly preferable.

Pauma's "buyer's remorse" over its negotiated 2004 Amendment arose from the failure of Pauma's large scale development plan, rather than from the sudden apparent availability of 950 licenses at favorable terms from the newly expanded License Pool under the 1999 Compact. The *Colusa* decisions conveniently provided Pauma with an arguable basis for a "do-over" and relief from its ill-fated, or perhaps just ill-timed, business decision to seek the authorization to operate an unlimited number of machines. Notably, none of the other four tribes that negotiated amended compacts in 2004 with terms similar to Pauma's, and then developed successful casinos, have sought to rescind their amendments.[10]

The evidence Pauma proffers to contradict the foregoing, which primarily consists of testimony given during Pauma's lawsuit concerning the Caesar's project, is inadmissible hearsay. The State was not a party to that litigation, and therefore had no opportunity to cross-examine any of the

[10] These tribes include the Rumsey Band of Wintun Indians (now the Yocha Dehe Band of Wintun Indians), the United Auburn Indian Community, the Viejas Band of Kumeyaay Indians, and the Pala Band of Mission Indians. (See Kolkey Decl., ER 458-460.)

witnesses. On the other hand, the State offered the testimony of Daniel Kolkey, the State's primary negotiator, who stated that Pauma's *stated* intention at the time of the negotiation of the 2004 Amendment was to obtain the right to operate "*at least*" 2,500 machines, i.e., more than the 1999 Compact would have allowed regardless of the size of the License Pool.[11] (ER 458-462.) The State's evidence, combined with the inferences that may reasonably be drawn from the deal Pauma actually negotiated, created a disputed issue of material fact as to Pauma's reliance upon the Commission's representation of the size of the License Pool in 2003. In light of the circumstantial evidence concerning Pauma's motive for entering into the 2004 Amendment, the district court erred when it concluded that the Kolkey Declaration did not create a triable issue of fact as to whether the Commission's representation as to the size of the License Pool in 2003 induced Pauma to enter into the 2004 Amendment.

III. THE $36.2 MILLION AWARD, CHARACTERIZED BY THE DISTRICT COURT AS SPECIFIC PERFORMANCE OF THE 1999 COMPACT FOR ITS BREACH, IS IRRECONCILABLE WITH ITS MERITS DETERMINATION FINDING A MISREPRESENTATION

[11] Contrary to Pauma's assertion to this Court, the State did not "lure" Pauma to the negotiating table (Pauma AOB, p. 50). The record reflects that Pauma contacted the State and requested to be allowed to join negotiations that were then ongoing between the State and four other tribes. (See Kolkey Decl., ER 458 thru ER 460 at ¶ 3.)

The district court predicated the $36.2 million award against the State on a purported violation of the 1999 Compact, even though it had granted summary judgment to Pauma on a claim for misrepresentation in connection with the 2004 Amendment, and no claim for breach of the 1999 Compact was ever alleged by Pauma or presented to the court for resolution. This casual shift from misrepresentation supporting rescission, to breach by misrepresentation[12] was apparently done to create a viable ground for awarding "specific performance" of the 1999 Compact in addition to rescinding the 2004 Amendment, as the court was precluded from awarding damages or restitution flowing from the rescission. (ER 71 thru ER 73; ER 74 n.1.)

This remedial mixed metaphor conflicts with the court's earlier merits determination finding misrepresentation, which ordinarily would result in rescission of the agreement at issue and, if available, restitution. *See Menuskin v. Williams*, 145 F.3d 755, 770 (6th Cir. 1998) (relying on the Restatement, the court rejected plaintiffs' argument they were entitled to pursue a claim for breach in addition to misrepresentation even though plaintiffs contended that rescission alone would not make them whole). Nor can it be reconciled with the usual choice of remedy for proven

[12] The State has not located authority for the existence of a claim for breach arising from a misrepresentation permitting contract avoidance.

misrepresentation that gives the aggrieved party the option to rescind and be returned to the status quo or, alternatively, to ratify the agreement. *See* Restatement (Second) of Contracts §§ 164 & 380(2); Restatement of Restitution § 68.[13]

Pauma does not dispute its failure to allege breach of the 1999 Compact. Instead, Pauma attempts, like the court below, to combine misrepresentation supporting rescission of the 2004 Amendment with breach of the 1999 Compact to support the court's additional "specific performance" remedy. In furtherance of this endeavor, Pauma relies on an out-of-context quote from a reply brief filed by the State in an unrelated superior court case now on appeal. (Pauma AOB p.72). However, that quote does not equate misrepresentation with breach.[14] Moreover, the quote certainly cannot serve to override the well-established distinctions between the two legal theories or the remedies attendant to each. *Compare*, *e.g.*, *Inkster v. Fed. Home Loan Mortg. Corp.*, 2012 U.S. Dist. LEXIS 169062, *10 (E.D. Cal. Nov. 27, 2012) (noting that specific performance is a remedy for breach of contract, and requiring proof that the contract was breached), *with* Restatement (Second) of Contracts § 164(1) (elements and remedies for

[13] *See also Ballow Brasted, et al. v. Logan*, 435 F.3d 235, 238 (2d Cir. 2006).

[14] The excerpt appears to concern the distinction between a material and immaterial breach in connection with a res judicata defense.

misrepresentation). Pauma's additional citation to *Klay v. Humana, Inc.*, 382 F.3d 1241 (11th Cir. 2004), fails to support Pauma's suggestion that the elements of misrepresentation and breach are the same.

In sum, the court's $36.2 million monetary award is based on a non-existent claim against which the State had no opportunity to defend. Further, this huge award conflicts with the court's actual merits determination. This constitutes reversible error, and it is so irrespective of the extent of the State's limited waiver of sovereign immunity.[15]

IV. THE STATE NEVER EXPRESSLY AND UNEQUIVOCALLY, OR BY ITS ACTIONS IN THE CASE, WAIVED ITS ELEVENTH AMENDMENT IMMUNITY SO AS TO PERMIT THE $36.2 MILLION MONETARY AWARD

Even if this Court could reconcile the district court's merits determination on the misrepresentation claim with its stated basis for the monetary remedy, the district court lacked jurisdiction to order the State to pay Pauma money due to the State's Eleventh Amendment immunity and section 9.4(a)(2) of the 1999 Compact. This is true no matter the form of the award because its substance is monetary damages or restitutionary relief

[15] Even assuming no procedural barriers to, or substantive inconsistencies behind, the court's award, there remain other barriers to sustaining it as "specific performance." As discussed in the State's principal brief and herein, there is no provision in the 1999 Compact that requires the State to make payments to a tribe in connection with the allocation of Gaming Device licenses.

barred by *Edelman v. Jordan*, 415 U.S. 651 (1974), and the 1999 Compact, and the State has not waived immunity from such relief.

A. Whether the Court's Order for Specific Performance is Prohibited by the Section 9.4(a)(2) Does Not Turn on the Interpretation of "Money Damages" in Unrelated Federal Statutes But on Whether the Order in Fact Enforces a Contractual Obligation

Pauma contends that the court's monetary remedy constitutes "specific relief" authorized by 1999 Compact section 9.4(a)(2). The text of this compact section includes a waiver of immunity from claims seeking "specific performance" to enforce a Compact provision, including one that requires the payment of money to one or the other of the parties, but expressly prohibits money damages awards. Rather than address the nature of the monetary relief provided, Pauma directs this Court to decisions distinguishing the term "money damages" as used in federal statutes from a "specific relief" remedy to support its position that the $36.2 million award constitutes specific performance authorized by section 9.4(a)(2), and not prohibited money damages. A thorough examination of Pauma's argument exposes its several flaws.

First, Pauma's cited authorities are not relevant because none involve a State's sovereign immunity from suits seeking money damages or restitution. Second, although these cases concluded that the sought remedy did not constitute barred "monetary damages," as that phrase was used in the

statute at issue, it was because the underlying claim involved either an entitlement to a benefit under the terms of a federal statute (e.g., *Md. Dep't of Human Res. v. Dep't of Health & Human Services*, 763 F.2d 1441, 1446 (D.C. Cir. 1985), and *Bowen v. Massachusetts*, 487 U.S. 879, 899 (1988)); the value of seized or levied property (e.g. *United States v. Minor*, 228 F.3d 352, 353 (4th Cir. 2000), and *Zapara v. Comm'r*, 652 F.3d 1042, 1046 fn.3 (9th Cir. 2011), or a restitutionary remedy (*Fulfillment Servs. v. UPS*, 528 F.3d 614 (9th Cir. 2008)). No seizure or levy is involved here, and that equitable restitution is the same as money damages for purposes of the Eleventh Amendment was decided by *Edelman v. Jordan*, 415 U.S. 651, 664-65 (1974) (*Edelman*). More importantly, the question here is not whether the bar on money damages in the 1999 Compact is a bar on specific relief–after all, the plain language of section 9.4(a)(2) authorizes claims for specific enforcement of a provision requiring the payment of money. The question here is whether the money judgment at issue in fact enforces a payment provision in the 1999 Compact, or is instead a restyled money damages or restitutionary award.[16]

[16] Pauma's citation to another excerpt from the same brief in the unrelated superior court case provides no logical support for the proposition that the district court's award does not constitute prohibited money damages or restitution. (Pauma AOB p.70.)

Pauma's argument also fails to account for or distinguish the *Edelman* decision. *Edelman* held that the Eleventh Amendment bars an award requiring a state to make retroactive benefits payments, even when found to have been wrongfully withheld. *Edelman*, 415 U.S. at 664-65 (the retroactive award of money against a state is not permissible in the form of "equitable restitution"). Thus, even if the award here were deemed "equitable restitution" flowing from rescission of the 2004 Amendment, it remains barred. *See, N.E. Med. Servs. v. Cal. Department of Health Care Servs.*, 712 F.3d 461, 464-70 (9th Cir. 2013).

Pauma also fails to convincingly demonstrate how requiring the State to refund $36.2 million it paid to the State for the exchange of performances under the 2004 Amendment enforces a payment provision in the 1999 Compact, particularly where the latter lacks any provision requiring the State to pay Pauma money in connection with the issuance of Gaming Device licenses. Pauma advances the idea that the court's remedy had the "same effect" that performance under the 1999 Compact would have produced. Its authority on this point, *Lary v. U.S. Postal Service*, 472 F.3d 1363 (Fed. Cir. 2006), is distinguishable. *Lary* is a breach of contract case wherein specific performance of the breached promise–providing documents by a certain date–was an impossibility because the date had passed. *Lary*, 472 F.3d at

1369. *Lary* is not a rescission case and does not involve sovereign immunity or a dispute over the identification of the promise to be enforced.

Moreover, given the constitutional imperative that a state's waiver of its sovereign immunity must be explicit and unequivocal, and that such waivers are to be construed narrowly, any award that purports to be based on an immunity waiver as to enforcement of a contractual payment obligation must be required to identify and conform precisely to the obligation being enforced, or risk running afoul of the Eleventh Amendment. Pauma's "it has the same effect" argument minimizes the necessity of adhering strictly to the scope of a limited immunity waiver. *See, e.g, Tamiami Partners, Ltd. by & Through Tamiami Dev. Corp. v. Miccosukee Tribe of Indians*, 177 F.3d 1212, 1224-25 (11th Cir. 1999) (holding that a suit to compel the return of funds and for other relief did not fall within the scope of a limited waiver from actions to compel arbitration and enforce an arbitration award).

Finally, Pauma's argument fails to acknowledge the underlying purpose of the limited, and mutual, sovereign immunity waivers in the 1999 Compact, which are designed to protect tribes, at least as much as the State, from money damage awards. The fact that the language of section 9.4(a)(2) largely tracks the limited immunity waivers in the Proposition 5 model compact drafted by a coalition of California Indian tribes supports this purpose. (*See Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712,

717 (9th Cir. 2003) (ER to prop 5)). Tribal sovereign immunity has been preserved by Congress to help promote economic development and tribal self-sufficiency. *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 510, (1991) . A decision in this case that makes possible large money judgments under the guise of specific performance or injunctive relief disregards these "overriding goals" of tribal sovereign immunity (*Potawatomi*, 498 U.S at 510) by potentially exposing tribes to such judgments in the future.

Under limited circumstances, section 9.4(a)(2)'s limited waiver of immunity would authorize a court to order the State or Pauma to pay money to the other. For the reasons stated, this case does not present one of those circumstances. The court's $36.2 million award against the State is barred by the Eleventh Amendment and section 9.4(a)(2), and must be reversed.

B. Pauma's Contention That Government Code Section 98005 is an Immunity Waiver Authorizing the Monetary Award Depends Upon a Flawed Breach/Misrepresentation Equivalency Argument and also Ignores Limiting Language in Section 9.4(a)(3)(c)

Pauma contends that California Government Code section 98005, enacted in 1998, is a waiver of the State's immunity from the monetary award in this case. Section 98005 states, in pertinent part, that the State:

> submits to the jurisdiction of the courts of the United States in any action brought against the state by any federally recognized California Indian tribe asserting

> any cause of action arising from . . . the state's violation of the terms of any Tribal-State compact to which the state is or may become a party.

(Cal. Gov. Code § 98005.) Focusing on the term "arising," Pauma contends that section 98005 authorizes any claim arising from a breach of compact, and not just for a breach itself, and thus the district court was correct in predicating its monetary award on a "breach by misrepresentation" theory.[17] But the argument begs the question, because no breach of compact was ever alleged or presented for adjudication, and misrepresentation is not the equivalent of breach. Moreover, while Section 98005 includes a waiver from immunity to suit in federal court for certain claims, it does not expressly and unequivocally waive immunity from the types of retrospective monetary relief states receive protection from under the Eleventh Amendment. Finally, even if these two obstacles could be overcome, 1999 Compact section 9.4 places a limit on the operation of section 98005 by delineating what relief is and is not available to compacting parties, and by this language appearing at 9.4(a)(3)(c):

> Except as stated herein or elsewhere in this Compact, no other waivers or consents to be sued, either express of implied, are granted by either party.

[17] Pauma's contention that the district court had section 98005 in mind as a basis for its monetary award is contradicted by the court's express reliance on 1999 Compact section 9.4(a)(2) in its order. (ER 71 thru ER 73.)

Section 98005 does not support the monetary award here because its language does not expressly and unequivocally waive the State's immunity to every conceivable claim and remedy. Section 98005 is inapplicable in any event in light of both the flawed procedural and substantive bases for the monetary award, and the "no other waivers" language of section 9.4.

C. Pauma's Claim of Waiver by Litigation Conduct is Defeated by its Concession that the State's Immunity Was a Reason to Grant its Motion for a Preliminary Injunction, and by the State's Assertion of Immunity in the Litigation

Pauma's portrayal of how and when the sovereign immunity defense arose is misleading. This court should reject Pauma's contention of waiver by litigation conduct because at the outset of the case Pauma conceded that the State retained its sovereign immunity from monetary damages and the State asserted its immunity early in the case and throughout the litigation.

1. Pauma's waiver argument is foreclosed by its early concession that the State possessed sovereign immunity from money damages

On February 16, 2010, Pauma asserted the following to demonstrate irreparable harm as required to support issuance of a preliminary injunction in its favor:

> [T]he effects of the State's harmful conduct are irreparable and cannot be adequately redressed at law. First, the State enjoys sovereign immunity from suit. While the 2004 Compact waives sovereign immunity for Pauma's claims arising from the compact, it specifically exempts any claims for damages or compensatory relief. . . . [S]ee *Entergy, Ark., Inc. v.*

> *Neb.*, 210 F.3d 887, 889-900 (8th Cir. 2000) (chances for injunctive relief "heightened" where relief in the form of money damages is barred by the government's sovereign immunity).

(SSER-030, lines 17-22.) Thus, at this case's outset, and in order to obtain injunctive relief from having to make further payments required by the 2004 Amendment, Pauma conceded that it was barred by the State's sovereign immunity from recouping monies it paid to the State. There was no reason for the State to formally assert an immunity defense in connection with the preliminary injunction motion because Pauma had already conceded it and Pauma was not seeking funds from the state's treasury.[18] Having acknowledged the State's immunity from damages and compensatory relief early in the litigation and in support of its successful preliminary injunction motion, Pauma's contention that this Court should find the State waived its immunity by its litigation conduct lacks substance and should be summarily rejected.[19]

2. Pauma's waiver argument fails because the State asserted its sovereign immunity at the first opportunity and throughout the litigation

[18] The State still pointed out that "Pauma is barred from seeking damages against the State" in its opposition to the motion. (SSER-026, line 22, citing the 1999 Compact.)

[19] Likewise, Pauma's invented account of the supposed motivations behind the State's litigation strategy based on pre-suit meet and confer efforts should be rejected out of hand.

Pauma's assertion that the State, for tactical reasons, did not assert sovereign immunity until late in the case is demonstrably wrong. Even after it appeared that the parties were in agreement that the tribe was "barred from seeking damages,"[20] the State asserted its immunity upon Pauma's subsequent request for restitutionary relief, and consistently maintained its immunity defense throughout the litigation.

After the preliminary injunction issued, the State appealed the order and Judge Burns stayed all of the proceedings in the district court pending the appeal. (ER-14, p.2.) Approximately eight months passed while the matter was on appeal and before this Court remanded the case. (ER 15 thru ER 17; SSER-022a.) One month after the mandate issued, Pauma filed its initial summary judgment motion. (SSER-021.) At that stage, the State had not answered the complaint, the court had not ruled on the State's motion to dismiss, and Pauma had not made an attempt to force the State to assert the defense.[21] In its summary judgment motion, however, Pauma asked the court to award it "restitution for all previously-paid 2004 Compact fees." (SSER-022, lines 25-26.) In response, the State argued that sovereign

[20] See SSER-026, line 22 and SSER-022d, lines 5-6.

[21] Sovereign immunity is not waived by a failure to include it in a motion to dismiss. *Canadian Overseas Ores, Ltd. v. Compania de Acero del Pacifico S.A.*, 528 F. Supp. 1337, 1344 (S.D.N.Y. 1982), citing Fed.R.Civ.P. 8(c).

immunity barred the requested restitutionary relief, citing *Edelman* as authority. (SSER-018, line 4 thru SSER-020, line 3.)

This was the State's earliest necessity and opportunity to raise the defense. The State never waivered from this position. The State's remark at the May 29, 2013 hearing about a filing "late in the case," which Pauma seizes upon as an admission of belated assertion of immunity, was an effort to assist the court in locating the answer to the FAC in the docket, and a review of the full discussion that day makes clear the State was advancing and supporting its position of early and consistent assertion of immunity. (ER-302TR thru ER-320TR.) *Hill v. Blind Indus. & Servs.*, 179 F.3d 754 (9th Cir. 1999) and *In re Bliemeister*, 296 F.3d 858 (9th Cir. 2002), are distinguishable. The State neither waited until the first day of trial to assert the defense or failed to raise the defense in opposition to Pauma's motions for summary judgment.

V. THE *ULTRA VIRES* EXCEPTION TO ELEVENTH AMENDMENT IMMUNITY IS INAPPLICABLE BECAUSE THE FEES PAUMA PAID TO THE STATE DO NOT BELONG TO PAUMA

Pauma includes two arguments, not raised below, to support the proposition that Eleventh Amendment immunity does not apply because: 1) the State obtained the fees Pauma paid under the 2004 Amendment through

ultra vires acts; and 2) those fees never belonged to the State. This court should reject both arguments for essentially the same reasons.

The *ultra vires* exception to Eleventh Amendment immunity may arise in suits involving the unlawful seizure of a plaintiff's own property by an individual state official. *Suever v. Connell*, 439 F.3d 1142, 1143 (9th Cir. 2006) (plaintiffs stated a claim where it was alleged the Controller illegally seized their own property under the Unclaimed Property Law[22]); see also *Suever v. Connell*, 579 F.3d 1047, 1058-59 (*Suever II*) (in a subsequent appeal, the court emphasized that plaintiffs were entitled only to the return of their *own*, *actual* property).

Pauma seeks the return of fees it allegedly overpaid to the State for the exchange of performances under an approved Gaming Compact, not the return of its own property seized by a public official. Accordingly, Pauma's claim remains comparable to those in the *Edelman* line of cases upholding sovereign immunity in actions seeking refunds of overpayments. *See, e.g.*, *N. E. Med. Servs. v. Cal. Dep't of Health Care Servs.*, 712 F.3d 461 (9th Cir. 2013); and *Fontenot v. McCraw*, 777 F.3d 741 (5th Cir. 2015).

Pauma's argument that the money was never meant to be the State's fails for essentially the same reasons. Pauma provides no legal authority for

[22] Cal. Civ. Proc. Code § 1500.

its contention that although the fees it paid for the purposes expressed in the 2004 Amendment are within the State's treasury, the money should nonetheless be considered "outside of [the State's] ownership." (Pauma AOB p.77.) Only the RSTF payments, being held in a fund within the state treasury for the benefit of Non-Compact tribes, have not permanently escheated to the State, but there is no support for the proposition that these monies belong to Pauma.

VI. FAILURE TO OFFSET THE BENEFITS PAUMA RECEIVED FROM THE STATE'S PERFORMANCE OF THE 2004 AMENDMENT PLACES PAUMA IN A BETTER POSITION THAN BEFORE IT ENTERED INTO THAT AGREEMENT

In the event this Court determines Pauma is not barred from a refund flowing from rescission of the 2004 Amendment, the State has asked this Court to reverse and remand the $36.2 million award for a determination of an appropriate offset to account for the benefits Pauma obtained by the State's performance. This is because the fundamental principles of rescission and restitution require it. Restatement (Second) of Contracts §§ 376, 384; 3 H. Black, Rescission of Contracts and Cancellation of Written Instruments § 617, at 1488 (2d ed., 1929) ("[A] party will not be permitted to rescind a contract so as to reclaim what he has parted with, and at the same time retain what he has received in the transaction"). (See State AOB pp. 59-63.)

The inequities of not requiring an offset are evident. Pauma took advantage of its right to add devices in 2007 through 2009 and profited therefrom. It did so before the *Colusa* license draw in October, 2009. If Pauma is allowed to recover the fees it paid (less what it would have paid in December, 2003 under the 1999 Compact for its added devices) but is not required to restore the benefits it received from the 2004 Amendment, Pauma is placed in an even better position than the plaintiff tribes that brought *Colusa* and all the 1999 Compact tribes benefitting from that decision. Pauma, having decided to amend its compact while other tribes filed challenges to the License Pool number, and doing so despite knowing that funding for its expanded resort-casino project was uncertain, would be rewarded with an unjust windfall. Requiring an offset is the only way to return the parties to the true *status quo ante*.

OPPOSITION TO PAUMA'S CROSS-APPEAL

I. THE DISTRICT COURT CORRECTLY DENIED PAUMA'S MOTION FOR SUMMARY JUDGMENT ON ITS IGRA CLAIMS

In denying Pauma's motion for summary judgment on claims five and six of the FAC (claims under IGRA), the district court did not reach the merits of those claims because the court held that the threshold issues of judicial estoppel, and the unavailability of IGRA remedies, prevented it from considering the merits. But in its brief, Pauma does not address these

threshold issues, even though they are the only issues decided by the district court, and the only issues properly before this Court. Instead, Pauma now attempts to argue the merits of an IGRA "bad faith" claim against the State for which it contends it is entitled to a new compact imposed by the Secretary of Interior based on 25 U.S.C. section 2710(d)((7)(B) (Secretarial procedures).

Rather than attempting to frame a legal argument that the district court erred in finding in the State's favor on the threshold issues, Pauma claims that the judicial estoppel portion of the district court's ruling was a pretext for a purported hidden agenda. That is an attack on the court's credibility, not a legal argument. Pauma also fails to provide any argument whatsoever regarding the court's finding that Secretarial procedures are unavailable in this case under the terms of the statute.

Pauma's argument for IGRA relief should not be accepted by this Court for two primary reasons: (1) the district court correctly held that judicial estoppel prevented the court from addressing the merits of Pauma's purported bad faith arguments, and (2) the district court correctly held that the IGRA Secretarial procedures Pauma seeks are unavailable in these circumstances. Pauma provides no legal argument for overturning the district court's ruling on these two threshold issues. Furthermore, Pauma makes numerous arguments on the merits before this Court that it did not

make before the district court. This is a continuing trend, and follows Pauma's efforts in the district court where Pauma pursued claims and issues not alleged in its FAC in its summary judgment motion. Pauma is now pursuing claims and issues never raised in its summary judgment moving papers. Pauma's attempt to address the merits of its bad faith allegations is misplaced since the district court did not address the merits of those claims, and as a result, the merits of Pauma's IGRA claims are not properly before this Court.

A. The District Court Correctly Ruled that Judicial Estoppel Prevented it from Considering Pauma's IGRA Claims

The district court held that Pauma was judicially estopped from arguing for relief pursuant to IGRA. As the district court explained, "Judicial estoppel . . . precludes a party from gaining advantage by taking one position, and then seeking a second advantage by taking an incompatible position." *Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 600 (9th Cir. 1996). For the doctrine of judicial estoppel to apply, a court must find that: (1) the party's later position is "clearly inconsistent" with the party's earlier position; (2) the court accepted the earlier position; and (3) the party asserting the inconsistent position would derive an unfair advantage if not estopped from doing so. *See New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001).

1. Pauma's current position of arguing bad faith is clearly inconsistent with its earlier position of arguing illegal taxation

As the district court held, Pauma's position, first argued in its brief in support of its final partial summary judgment motion seeking the imposition of Secretarial procedures is inconsistent with its prior position in at least two respects. First, Pauma's original complaint included two IGRA claims that, like the IGRA claims in the FAC, alleged that the 2004 Amendment's fee provisions are unlawful because they were not earmarked for a gaming related purpose (SSER-033, lines 25-27), and because Pauma did not receive meaningful concessions in exchange therefor (SSER-034, lines 21-22). Despite the fact that Pauma had alleged, within the framework of the IGRA claims in its original complaint, that "[t]he 2004 Compact is therefore illegal and void, and negotiated in bad faith" (SER-034, lines 2-3; SSER-035, line 8), Pauma expressly denied that its IGRA claims had anything to do with whether the State fulfilled a duty to negotiate in good faith, asserting during the preliminary injunction proceedings that:

> The State once again mischaracterizes Pauma's [former] Seventh and Eighth Claims for Relief as bad faith negotiation claims. [reference omitted.] Simply put, Pauma is not asking for a subjective analysis of the State's compliance with its duty of good faith during the compacting process. While this question naturally inheres in this suit, the central focus of these claims is on whether the State is using the 2004 Compact to tax the Tribe in violation of IGRA and the legions of

> federal precedent unequivocally holding that State taxation of reservation activities is unlawful absent Congressional approval.

(SSER-024, lines 4-9.) (emphasis added.)

Later, in opposition to a motion to dismiss the original complaint, Pauma bolstered its position that its IGRA claims were not based on the State's failure to negotiate a compact in good faith, declaring that Pauma's "IGRA claim[s] allege[] the State is illegally taxing Pauma through the revenue sharing fees of the 2004 Amendment. Compl., 20:15-22:10." (SSER-014, lines 17-18.) In the same pleading, Pauma characterized the State's jurisdictional arguments as suggesting the district court lacked authority "to do anything about latent forms of taxation that escape the bad faith filter," concluding its argument by describing its former seventh and eighth claims as "well-pled illegal taxation claim[s]," and not bad faith claims. (SSER-015, lines 18-19; SSER-016, line 27.) In denying the State's motion to dismiss, the district court agreed with Pauma's characterization of its IGRA claims, finding it had jurisdiction over those claims because:

> [T]he issues of the illegality or lawfulness of the terms with regard to impermissible use of fees and illegal taxation, clearly and necessarily, in my view, arise under IGRA.

(ER-137 thru ER-138.)

Pauma took further action to clarify that its IGRA claims were not based on a bad faith theory. Consistent with its stance taken in support of its

preliminary injunction motion and in opposition to the State's motion to dismiss, Pauma removed the language referencing the 2004 Amendment as having been "negotiated in bad faith" from its IGRA claims in the FAC, and adhered to describing them as "illegal taxation claims," for which it was allegedly entitled to reformation of the 2004 Amendment, or elimination of its fee provisions. (SSER-006, line 19; SSER-007, lines 9-15; SSER-011, line 28 thru SSER-012, line 4; SSER-012, lines 15-21.) The State, in reliance upon Pauma's characterization of its IGRA claims throughout the litigation, defended against Pauma's August 31, 2012 summary judgment motion on its IGRA claims as "illegal taxation" claims. (SSER-002, line 1 thru SSER-003, line 11.) However, Pauma completely reversed its earlier position by arguing for the first time in its subsequent December 20, 2013 partial summary judgment motion that its IGRA claims were bad faith negotiation claims.

A second significant change in Pauma's position first appearing in connection with its December, 2013 summary judgment motion is its desire for a new compact through Secretarial procedures when, at all times prior to its summary judgment motion, its claim had been that, but for the CGCC's improper calculation of the number of Gaming Device licenses available under the 1999 Compact, Pauma would not have entered into amended compact negotiations at all. Pauma claims that all it wanted to achieve

through the 2004 Amendment was to obtain "the machine rights that should have been available under the 1999 Compact." (SSER-009, lines 3-5.) Pauma has consistently asserted that it would not have agreed to the 2004 Amendment had the CGCC "properly" calculated the number of licenses under the 1999 Compact, and that as a result, Pauma was entitled to a remedy to restore those rights it believed it was already entitled to:

> Pauma mistakenly agreed to the significantly higher payment terms of the 2004 Compact in exchange for something it already had (the right to operate 2000 gaming devices).

(SSER-032, lines 12-13.)

> Pauma would not have entered into the 2004 Compact if it had known that it could have obtained a total of 2,000 gaming devices under the 1999 Compact.

(SSER-028, lines 22-24.)

> The CGCC's misrepresentations about the license pool were not only a substantial factor in the Tribe's manifestation of assent, but the "but for" cause of . . . the decision to execute a decidedly more expensive compact.

(SSER-010, lines 3-5.)

Pauma's position prior to its IGRA summary judgment motion, where it disavowed any need for the district court to analyze the State's compliance with its duty of good faith negotiation during the compacting process, is "clearly inconsistent" with its current position advocating for a finding of bad faith based on that very analysis.

The district court correctly held that Pauma's position as argued in connection with its December, 2013 summary judgment motion is inconsistent with the allegations and prayer for relief in the FAC, as well as Pauma's arguments opposing the State's motion to dismiss and Pauma's evidence in support of its request for injunctive relief. As the court observed, while the IGRA claims used the phrase "bad faith" in their titles, the allegations underlying the claims make it clear that Pauma only alleged that the 2004 Amendment contained illegal taxation provisions and not that the State acted in bad faith in the negotiation of the 2004 Amendment itself. Pauma never alleged in the FAC that the State negotiated the 2004 Amendment in bad faith, and Pauma did not pray for relief in the form of Secretarial procedures. Since Pauma's position arguing bad faith for the first time in connection with its December, 2013 summary judgment motion is clearly inconsistent with what Pauma argued prior to that motion, the district court correctly found the first factor of judicial estoppel.

2. Pauma succeeded in persuading the district court to accept its earlier position of alleged illegal taxation

Pauma succeeded in persuading the district court to accept the earlier illegal taxation characterization of its IGRA claims, successfully opposing the State's motion to dismiss with that position and, consistent with that characterization, excised the "negotiated in bad faith" language from the

FAC. The district court relied on Pauma's illegal taxation argument both in denying the State's motion to dismiss these claims and in connection with granting Pauma summary judgment on claim ten in the FAC. (ER-87.) As a consequence, the district court correctly found the second factor of judicial estoppel .

3. Pauma would derive an unfair advantage if not estopped from asserting its inconsistent position alleging bad faith

In light of Pauma's inconsistent positions over the course of this litigation by pursuing an entirely different theory in connection with its December, 2013 summary judgment motion, it would impose an unfair detriment on the State if Pauma were permitted to proceed on a bad faith negotiation claim at this time. Prior to its December, 2013 summary judgment motion, Pauma convinced the district court that it entered into amended compact negotiations in 2004 solely to obtain Gaming Device rights it already had under the 1999 Compact, and Pauma benefited from that position. These benefits included securing for itself rescission of the 2004 Amendment, including the ability to retain the benefits received under the 2004 Amendment, the return of the bulk of its 2004 Amendment fee s, and to be restored to its 1999 Compact.

With its December, 2013 summary judgment motion, Pauma urged for the first time that it desired an amended compact after all, and to obtain

an amended compact, Pauma seeks to invoke Secretarial procedures. But the district court had already relied on contrary representations by Pauma in order to deny the State's motion to dismiss and to grant rescission of the 2004 Amendment and reinstatement of the 1999 Compact as requested by Pauma. Permitting Pauma to proceed on a bad faith negotiation claim after it asked the district court to decide the case based on an inconsistent set of representations is unfair and unwarranted under the facts of the case. The district court correctly found that to allow Pauma to assert this inconsistent position would give it an unfair advantage over the State, and would harm the integrity of the judicial process. *New Hampshire*, 532 U.S. at 749. Consequently, the district court correctly found the third factor of judicial estoppel.

B. The District Court Correctly Ruled that Pauma Is Not Entitled to IGRA Secretarial Procedures

The district court correctly held that even if Pauma's new bad faith arguments were not barred by judicial estoppel, IGRA does not entitle Pauma to the relief it seeks.

1. IGRA Secretarial procedures are not available because negotiation of the 2004 Amendment had concluded and a Compact had been entered into

As the court correctly observed, Pauma's December, 2013 summary judgment motion also presents the question of whether IGRA could be construed to entitle Pauma to the relief it seeks when the parties actually

reached agreement on a compact – the 2004 Amendment. The relief Pauma seeks is not a compact in the first instance, but the issuance of a new compact under terms imposed through Secretarial procedures. However, Secretarial procedures can only be invoked in circumstances where the provisions of 25 U.S.C. section 2710(d)((7)(B) apply. As the district court correctly found, a plain reading of Section 2710(d)(7) indicates that it does not entitle Pauma to the relief it seeks.

The district court correctly held that Secretarial procedures do not apply in circumstances where a state and a tribe actually reach agreement on, and conclude negotiation of, a compact. *See Wisconsin Winnebago Nation v. Thompson*, 824 F.Supp. 167, 172 (W.D. Wis. 1993), *aff'd*, 22 F.3d 719. It is undisputed that Pauma and the State concluded negotiation of the 2004 Amendment, and that agreement was ratified by the California Legislature, approved by the Department of Interior, and has been in effect for more than ten years. Therefore, as the district court correctly held, the procedures outlined in Section 2710(d)(7)(B)(iii)-(vii) do not apply.

Pauma places great emphasis on the alleged applicability here of this Court's decision in *Rincon*. However, Pauma ignores a crucial factual distinction between *Rincon* and this matter: that negotiation of an amended compact had not been completed in *Rincon*. Consistent with the procedures clearly established by Congress in Section 2710(d)(7), the decision in

Rincon was expressly limited to negotiations that did not result in a compact being entered into. *Rincon*, 602 F.3d 1019 at 1024. Indeed, in referencing the amended compact with the Pala Tribe, one of the five tribes that negotiated for and entered into similar 2004 amended compacts along with Pauma, the Ninth Circuit explicitly stated that it was:

> [express]ing no opinion concerning the validity of [any amended] compacts. Those tribes agreed that the revised exclusivity offered, and the financial benefits they would receive from amending their 1999 compacts, were satisfactory to them.

Id. at 1037 n.17. The Ninth Circuit also recognized that the tribes entering into amended compacts had confirmed to the Secretary of the Interior, when seeking approval of their compacts, that the exclusivity provisions constituted "'meaningful geographical exclusivity' and that the 'amount of payment to the State [was] appropriate in light of the exclusivity right conferred.'" *Id*. at 1042 n.26. (ER-597 thru ER-599; ER-549 thru ER-551.)[23] The Secretarial procedures in Section 2710(d)(7) are not applicable to situations involving "second thoughts" after negotiations have concluded and a compact has been finalized.

[23] The Secretary's approval references an August 4, 2004 Tribes/State joint letter urging approval of the 2004 Amendments, in which the parties jointly acknowledged that "in the overall context of these compacts, these payments should not be considered to be a tax, fee, charge, or assessment." (ER-597 thru ER-599.)

2. A bad faith finding is necessary to reach IGRA Secretarial procedures and no bad faith has been found in this case

Pauma seeks to use this litigation as a vehicle to have Secretarial procedures imposed to provide Pauma with a new compact. A federal court judgment finding bad faith by a state is a prerequisite to obtaining Secretarial procedures for imposition of a compact. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 50, 74-75 (1996). This is clear from IGRA itself because the subsections of 25 U.S.C. section 2710(d)((7)(B) all refer, either directly or indirectly, to the threshold requirement of a federal district court judgment with a finding of bad faith against the state issued in an action arising under 25 U.S.C. section 2710(d)(7)(A)(i).

Pauma does not dispute the requirement of a judicial determination of bad faith. However, as discussed above, Pauma has not pled bad faith, so it cannot raise the issue now. Pauma's effort to raise the bad faith issue now should be rejected. Irrespective of whether rescission is granted, it does not undo the fact that, for purposes of IGRA, Pauma and the State indisputably entered into the 2004 Amendment. But even if the Court were to overlook reality and find that the 2004 Amendment was never entered into and a threshold requirement for an IGRA bad faith claim could be satisfied, Pauma provides no evidence that the State acted in bad faith

a. Pauma's Factual Allegations of Bad Faith Relate to Conduct Extrinsic to the Negotiation of the 2004 Amendment

An IGRA bad faith claim can only be based on the actual negotiations between the tribe and the state, and not from the historical relationship between the tribe and the state, or contemporaneous events extrinsic to the negotiations themselves. *See Cheyenne River Sioux Tribe v. South Dakota*, 830 F. Supp. 523, 527 (D.S.D. 1993). The Ninth Circuit has held that a "good faith" determination should be evaluated objectively based on the official record of negotiations. *See Rincon*, 602 F.3d at 1041.

In this case, the district court determined that the representation that no further licenses were available from the 1999 Compact license pool, which is the foundation of all of Pauma's claims, occurred on December 30, 2003, when the Commission represented to the Tribe that no further licenses were available. (ER-63.) The court thus found that the representation was communicated to Pauma before the negotiation of the 2004 Amendment, which the district court found to have commenced in January 2004. (ER-49.) The court also determined that the State's lead negotiator and Pauma's counsel never discussed the size of the pool under the 1999 Compact. (ER-50.) While Pauma alleges numerous purported instances of bad faith in its brief, Pauma fails to explain how any of them have anything to do with the negotiations between the State and Pauma for the 2004 Amendment.

Pauma's purported factual recitation, which covers a number of years, separate and distinct state agencies, and two separate and distinct gubernatorial administrations with significantly differing policies toward the negotiation of tribal-state gaming compacts, is comprised of factual allegations extrinsic to the compact negotiations, and thus are immaterial to a bad faith claim as a matter of law.

b. The Ninth Circuit Has Held that the State's License Pool Finding Was Made in Good Faith

The Commission's calculation of the size of the license pool under the 1999 Compacts has not been found by the district court or this Court to have been made in bad faith. The district court stated in its Order Granting Pauma the Remedy of Specific Performance, "[T]he Court does not find the State to have acted in bad faith in misrepresenting the size of the Pool." (ER-73 n.2.) The Ninth Circuit observed, in referring to the difficulty of calculating the size of the license pool under the 1999 Compacts, "[t]hat the parties and the district court, each, in good faith, divine multiple results from the same formula underscores this ambiguity." *Colusa II*, 618 F.3d at 1075.

c. The Department of Interior Did Not Find any Bad Faith Associated with the Negotiation of the 2004 Amendment

Pauma's strained efforts in pursuing this new approach of attempting to paint a picture of IGRA bad faith are unsupported by any relevant facts. Pauma cannot legitimately dispute that the negotiation Pauma now

complains of resulted in the execution of the 2004 Amendment that was ratified by the California Legislature and expressly approved by the Secretary of the Interior as IGRA-compliant. (ER-597 thru ER-599.) Despite the Department of Interior's express seal of approval of the 2004 Amendment, which was the direct result of the negotiation process, Pauma insists on conjuring up a bad faith claim. But the record on appeal wholly fails to support such an IGRA claim. Moreover, Pauma fails to provide any substantive basis for why it should be entitled to address the merits of an IGRA claim in the first place.

II. IT WAS NOT AN ABUSE OF DISCRETION FOR THE DISTRICT COURT TO DECLINE TO GRANT PAUMA EQUITABLE RELIEF IN THE FORM OF REFORMATION

Despite the fact that the district court granted Pauma's claim for equitable relief in the form of rescission of the 2004 Amendment, Pauma now argues that it should be entitled to further equitable relief in the form of reformation of the 2004 Amendment. Since Pauma fails to explain how it might be entitled to the mutually exclusive remedies of rescission and reformation for the same alleged conduct, simultaneously referring to the two remedies illogically as "substitute" remedies and "coextensive" remedies, the only logical conclusion that may be drawn from Pauma's brief is that Pauma is arguing for reformation as an alternative to rescission.

Pauma argued in the district court that rescission of the 2004 Amendment would provide complete justice. (ER-82.) Pauma prevailed on its argument for rescission, and the district court provided Pauma with the equitable relief Pauma sought. Pauma sets forth no grounds for a determination that the court abused its discretion when it granted the remedy Pauma requested.

Pauma now attempts to advance an argument that it should be entitled to reformation of the 2004 Amendment in order to "restore the true status quo." However, Pauma's request for reformation of the 2004 Amendment contradicts its position that it would never have entered into negotiations for the 2004 Amendment if it had known there were more licenses available under the 1999 Compact. Pauma fails to explain why reformation of the 2004 Amendment should be granted in light of the fact that the district court already addressed the only harm that Pauma consistently argued—some form of misrepresentation with regard to the number of licenses available under the 1999 Compact. Pauma provides no explanation of why it should be entitled to reformation in this context. *See, e.g., Continental Ins. Co. v. Cotten*, 427 F.2d 48, 53 (9th Cir. 1970).

Pauma suggested several forms of relief in its FAC, all of which would produce a new contract built around a fusing of the 1999 and 2004 Compacts. A court may only reform a contract where it is doing so "to

conform with the mutual understanding of the parties," such as when the original contract does not reflect the true intent of the parties. *Hess v. Ford Motor Co.*, 27 Cal.4th 516, 524 (2002).[24] "'Although a court of equity may revise a written instrument to make it conform to the real agreement, it has no power to make a new contract for the parties . . . .'" *Am. Home Ins. Co. v. Travelers Indem. Co.*, 122 Cal. App. 3d 951, 963 (Cal. Ct. App. 1981), quoting *Shupe v. Nelson*, 254 Cal. App. 2d 693, 700 (Cal. Ct. App. 1967).

Pauma's request for reformation is misplaced since it would be contrary to equitable principles to reform the 2004 Amendment. A fundamental aspect of reformation as a remedy is that the agreement includes the disputed term, in this case the License Pool formula, since the purpose of reformation is to effectuate the common intention of both the parties in the language of the written agreement. *See, e.g., McConnell v. Pickering Lumber Corp.*, 217 F.2d 44 (9th Cir. 1954). The License Pool was repealed in the 2004 Amendment. Furthermore, equity does not support granting reformation to create a fused 1999/2004 Compact because Pauma entered into the 2004 Amendment knowing that there was doubt associated with the License Pool since it was under a legal challenge.

[24] As there is a lack of applicable federal precedent on the availability of reformation in this context, the State has cited relevant decisions applying California law, which the State believes would be consistent with federal precedent.

Pauma's current argument that it should be entitled to reformation stretches the concept of equity to the breaking point. To support its argument for reformation, Pauma cites *Skinner v. Northrop Grumman Ret. Plan B*, 673 F.3d 1162 (9th Cir. 2012), but that case is distinguishable. First, it is an Employee Retirement Income Security Act[25] (ERISA) case, and ERISA principles do not apply here. ERISA case law involves the duties of pension plan administrators under ERISA, which have no application to any respective duties that might attach to the parties to completed class III gaming compacts entered under IGRA.[26] Second, Pauma's discussion of the availability of reformation is based on Section 166 of the Restatement (Second) of Contracts ("When a Misrepresentation as to a Writing Justifies Reformation"). But Section 166 of the Restatement only applies to fraudulent misrepresentation. Third, *Skinner* is based on the existence of a fiduciary relationship that IGRA does not impose on states, (*See Rancheria v. Salazar*, 881 F. Supp. 2d 1104, (N.D. Cal. 2012), *aff'd in part and rev'd in part* by *Rancheria v. Jewell*, 776 F.3d 706 (9th Cir. 2015) ("IGRA 'does not create a fiduciary duty; it is a regulatory scheme that balances the competing

[25] 29 U.S.C. § 1001, et seq.

[26] Pauma's repeated attempts to place the Commission in the role of a fiduciary owing concomitant obligations toward Pauma should be rejected for the reasons stated in the district court's order granting summary judgment to the State on Pauma's various breach of fiduciary duties claims. (ER-58 thru ER-61.)

interests of the states, the federal government and Indian tribes,'" quoting *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. United States*, 259 F. Supp. 2d 783, 790 (W.D. Wis. 2003)), and that the State did not consent to here: the Commission's only express trust duties under the 1999 Compact concern its duty to collect and disburse RSTF funds to tribes.

Finally, the court found that the State did not owe a trust obligation to Pauma. Pauma's only challenge to the district court's finding conflates the sufficiency of a pleading to survive a motion to dismiss and adjudication on summary judgment based on undisputed facts. Since Pauma provides no other authority to support its argument, it was not an abuse of discretion for the district to have declined to grant Pauma equitable relief in the form of reformation.

III. THE MAGISTRATE JUDGE'S DISCOVERY ORDER DENYING PAUMA'S MOTION TO COMPEL MUST BE UPHELD

Pauma requests that this Court vacate the magistrate judge's discovery order denying Pauma's motion to compel, but Pauma fails to provides any grounds for vacating the order. Since no error has been demonstrated, the magistrate judge's order should be upheld.

IV. THIS CASE SHOULD NOT BE REASSIGNED TO A NEW DISTRICT COURT JUDGE IF THE CASE IS REMANDED

Other than merely stating the request, Pauma fails to provide any grounds for reassignment to a new judge if the case is remanded. Reassignment is only available if there is a demonstration of personal bias or in "unusual circumstances." 28 U.S.C. § 2106; *California v. Montrose Chem. Corp.*, 104 F.3d 1507, 1521 (9th Cir. 1997), quoting *Smith v. Mulvaney*, 827 F.2d 558, 562 (9th Cir. 1987). Neither of those situations is present here. Pauma's attempt to incorporate by reference arguments contained in its earlier "urgent motion" that was denied by this Court appears to be an improper request for reconsideration of the denial and should be rejected. *See, e.g.*, Ninth Cir. R. 28-1(b). However, if the Court were to consider Pauma's arguments made in its denied urgent motion, the State respectfully requests that the Court consider the State's arguments filed in opposition to the denied urgent motion. (Case No. 14-71981, docket entry 8-1.)

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Respectfully submitted,

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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

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

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Dated

s/T. MICHELLE LAIRD
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Deputy Attorney General