DOCKET NOS. 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/k/a PAUMA LUISENO BAND OF MISSION INDIANS, a/k/a PAUMA BAND OF MISSION INDIANS, a federally-recognized Indian Tribe,

Plaintiff & Appellee/Cross-Appellant,

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 & Appellants/Cross-Appellees,

District Court No. 09-01955 CAB-MDD (S.D. Cal.)
Judges Tallman, Schroeder & Jarvey Retain Jurisdiction [Panel – No. 10-55713]

PRINCIPAL AND RESPONSE BRIEF BY APPELLEE/CROSS-APPELLANT PAUMA BAND OF LUISENO MISSION INDIANS

Cheryl A. Williams
Kevin M. Cochrane
Williams & Cochrane, LLP
525 B. St., Suite 1500
San Diego, California 92101
T/F: (619) 793-4809
Attorneys for Plaintiff & Appellee/ Cross-Appellant Pauma Band

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

///

DOCKET CITES

STATUTES

RULES AND REGULATIONS

///
///

SECONDARY SOURCES

GLOSSARY

PARTIES

CGCC	California Gambling Control Commission
Pauma	Pauma Band of Luiseno Mission Indians
State	State of California

UNDERLYING STATUTE

IGRA	Indian Gaming Regulatory Act (25 U.S.C. § 2701 *et seq.*)

BACKGROUND

1999 Compact	Form gaming compact entered into by the State and 63 tribes between the fall of 1999 and the spring of 2000
2004 Amendment	Amendment to the 1999 Compact that Pauma executed with the State in 2004
License Pool	Aggregate pool of gaming device licenses created by the formula in Section 4.3.2.2(a)(1) of the 1999 Compact

COURT CASES

Colusa	*Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. California*
Rincon	*Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger*

DISTRICT JUDGES

Battaglia	The Honorable Anthony J. Battaglia (2nd district judge)
Bencivengo	The Honorable Cathy A. Bencivengo (3rd district judge)
Burns	The Honorable Larry A. Burns (1st district judge)

ACTORS

For the State

Burton	*State Senator John Burton, for whom the Legislative Analyst's Office devised its second interpretation on the size of the license pool under the 1999 Compacts*
Chang	*Shelleyanne W.L. Chang, the Legal Affairs Secretary for Governor Gray Davis who assisted William Norris in negotiating the 1999 Compacts*
Hensley	*John Hensley, the inaugural chairman of the California Gambling Control Commission*
Hill	*Elizabeth Hill, the Legislative Analyst who interpreted the size of the license pool for Assemblyman Bruce Thompson and then Senator John Burton*
Kolkey	*Daniel Kolkey, the State's negotiator for Pauma's 2004 Amendment*
Melnicoe	*Pete Melnicoe, the chief legal counsel for the California Gambling Control Commission*
Norris	*William Norris, the State's lead negotiator for the 1999 Compacts*
Qualset	*Gary Qualset, the deputy director of the licensing division for the California Gambling Control Commission*
Thompson	*State Assemblyman Bruce Thompson, for whom the Legislative Analyst's Office devised its first interpretation on the size of the license pool under the 1999 Compacts*

For Pauma

Devers	*Cristobal Devers, chairman for Pauma in 2003-04 during the Caesars project and the 2004 Amendment negotiations*

Dixon	*Patricia Dixon, vice chairwoman for Pauma in 2003-04 during the Caesars project and the 2004 Amendment negotiations*
Majel	*Randall Majel, current chairman for Pauma, progenitor of the Caesars idea, and member of the tribal negotiation team for the Caesars project in 2003-04*
Richey	*Kent Richey, legal counsel for Park Place on the Caesars project*
Soll	*Michael Soll, point person for Park Place on the Caesars project*
Stidham	*Larry Stidham, legal counsel for Pauma during the Caesars project and the 2004 Amendment negotiations*

INTRODUCTION

Perhaps the only thing the parties agree on at this point is that prior lawsuits have resolved virtually all of the material issues in this case. First, there is the United States Court of Appeals for the Ninth Circuit's opinion in *Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. California,* 618 F.3d 1066 (9th Cir. 2010) ("*Colusa II*") that holds the California Gambling Control Commission ("CGCC" or "Commission") unreasonably interpreted the number of gaming device licenses available to signatory tribes under the 1999 Compacts. Then, there is the Ninth Circuit's opinion in *Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger,* 602 F.3d 1019 (9th Cir. 2010) ("*Rincon II*") that explains the Office of the Governor tried to exact exorbitant taxes from one of these tribes in amendment negotiations after its agent constrained the size of the license pool. And finally there is *Pauma Band of Luiseno Mission Indians v. Harrah's Operating Co.,* No. GIC847406 (Cal. Sup. Ct. 2012) ("*Harrah's*"), a case in which representatives from the Pauma Band of Mission Indians ("Pauma" or "Tribe") and its one-time development partner uniformly testified that the Tribe only amended its 1999 Compact in the wake of the CGCC's actions to obtain the machine rights that should have been available under the existing agreement.

The abundance of evidence proving these three points should have expedited the lower court proceeding, but it did anything but – turning a case that the first judge thought was ready for resolution in April of 2010 into a five year ordeal that the third judge was loath to address as late as June of 2014. In fact, one look at the initial order

on the parties' cross-motions for summary judgment shows that it considered all of the submissions from the State of California ("State") but says virtually nothing about those from Pauma. A trial in absentia like this may have sufficed to create a sanitized judgment that awarded the only remedies the district court admitted it was willing to consider, but comes far short of achieving "complete justice" by truly assuaging the wrongs inflicted by the State's excessive overreach. As such, the statement of the case herein will lay out *all* of the evidence the district court refused to detail in its summary judgment orders that would otherwise remain lost in the depths of the labyrinthian abyss otherwise known as the district court's docket. Doing so will hopefully dispel some of the misperceptions in the State's opening brief, such as Pauma attempting to impose "liability [on the State] for failing to anticipate" what this circuit would do seven years later, when in reality all it is trying to do is prevent a windfall for a party who advanced an interpretation it knew was wrong so it could exact illegal taxes from tribes in contravention of Section 2710(d)(4) of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq.*

STATEMENT OF JURISDICTION

The district court had jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1362 and 25 U.S.C. § 2710(d)(7)(A)(i). The finality of the amended judgment below that creates appellate jurisdiction under 28 U.S.C. § 1291 comes from this panel denying Pauma's prior petition for writ of mandamus [*see In re Pauma Band of Luiseno Mission Indians of Pauma-Yuima Reservation,* No. 14-71981, Doc. No. 15 (9th Cir. Nov. 7,

2014) ("*Pauma III*")] and thus treating the judgment as constituting a "de facto dismissal" of Pauma's unresolved claims. *See Ross Bros. Constr. Co. v. Int'l Steel Servs.,* 283 F.3d 867, 874 (7th Cir. 2002). The date of the amended judgment – which incorporates the four summary judgment orders of March 18, 2013, June 11, 2013, December 2, 2013 and June 6, 2014 – is June 9, 2014, thirty days before Pauma filed its notice of appeal with the district court on July 9, 2014 in compliance with Federal Rule of Appellate Procedure 4(a). [*Pauma Band of Luiseno Mission Indians of Pauma & Yuima Reservation v. California,* No. 09-01955, Doc. Nos. 227, 238, 245, 270, 271, 274 (S.D. Cal.) ("*Pauma I*")]

ISSUES PRESENTED FOR REVIEW

1. Whether, for the first time in the history of American jurisprudence, a misrepresentation about the central term of a contract is true up until the point in time that a court says otherwise so the misrepresenting party can retain the fruits of its misdeeds even though it admitted in a prior lawsuit that the provision at issue has a fixed rather than variable meaning.

2. Whether the State can invoke an Eleventh Amendment immunity defense that it admittedly raised "late in the case" to keep revenue sharing that it acquired through *ultra vires* acts and unlawfully funneled into the general fund where the State waived whatever shreds of its immunity remained by contract, statute, and its tactical litigation conduct.

3. Whether the State can evade a finding of bad faith when the two precedential opinions underlying this suit prove that it acted in objective bad faith by unreasonably construing the license pool and demanding excessive amounts of general fund revenue sharing afterward.

4. Whether Pauma may elect to reform or rescind the 2004 Amendment on account of the State's misrepresentation given that the remedial tests are coextensive in equity cases, especially when a fiduciary is the breaching party.

STATEMENT OF THE CASE

The impetus for the sixty-three form tribal-State gaming compacts in California that came about in the fall of 1999 was the passage of Proposition 5, an initiative occurring during the November 1999 general election that amended State statutory law to require the governor to execute gaming compacts under IGRA as a ministerial act with any interested tribe. *See In re Indian Gaming,* 331 F.3d 1094, 1100 (9th Cir. 2003). The enactment of this law produced challenges both direct and indirect. The Hotel Employees and Restaurant Employees International Union levied the former, filing a petition for writ of mandate in the California Supreme Court that sought to void the proposition on the basis that its statutory authorization to conduct gaming violated the outright prohibition of the same in Article IV, Section 19(e) of the State Constitution. *Id.* at 1101. With the petition pending, the Office of the Governor then launched an indirect challenge, commencing negotiations with three coalitions of tribes for the

purpose of crafting a model compact that was different from the one approved by the voters the prior fall. *Id.*

The negotiations began on May 13, 1999 and the State's lead negotiator William Norris expressed his desire to "stay as close to the text of Proposition 5 as possible" (*see In re Indian Gaming,* 331 F.3d at 1102), including using a revenue sharing structure similar to the one therein as a way to deter the legislature from allowing gaming to spread off the reservations:

> [I]t's kind of like a joint venture.[1] The state is saying, 'As long as we give you exclusive rights, then we think we should share some revenues, because if we license others to do it, we can get revenues from them.'

[SER160] This idea of creating a joint venture with the State giving exclusivity and the tribes paying revenue sharing in return came up again during the ensuing negotiation session on May 26, 1999, whereat Norris explained that the arrangement would serve the best interests of both parties:

> Now, again, it was an idea that maybe we could work together as sovereigns, treating this as a joint enterprise, where the state would say to you, 'we're going to rely on the tribes and the tribes alone with respect to machine gaming in California.'
> Now, that serves the Governor's interest, doesn't it, in limiting growth? Because we know the tribes are generally not in the major metropolitan areas, and I'm sure the Governor would like to keep… the machine gaming on the tribes, for that reason.

---

[1] "Joint adventurers… owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workday world for those acting at arm's length are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is the standard of behavior." *Meinhard v. Salmon,* 249 N.Y. 458, 463-64 (1928) (Cardozo, J.).

> But the Governor doesn't have full control over this. He recognizes, as we all must recognize, that there is a legislature to deal with in the future and, therefore, we thought, well, looking at this as a joint venture, if you will, that maybe we could… come up with a revenue stream that would be great enough to provide a serious disincentive to the legislature from allowing machine gaming outside the boundaries of reservations.

[SER163]

True to his word, the early conception of the revenue stream discussed by Norris closely reflected the terms of the Proposition 5 model compact, with 2% of net win going into a precursor of the Revenue Sharing Trust Fund ("RSTF"), 4% into two funds that ultimately consolidated into the Special Distribution Fund ("SDF"), and an indeterminate amount to cover the "actual reasonable costs" incurred by the State while regulating Indian gaming. [SER166-168] This fee structure was also progressive in nature, requiring no payments on the first 200 machines operated by a tribe, fifty percent of the mandated fees on the next 200 machines, and the full six percent only on machines 401 and above. [SER166] The number of machines that each tribe could operate was absent from this early draft of the compact, but set for discussion by the parties on June 14, 1999. [SER165] According to the evidence produced by the State during discovery, the benchmark machine count the parties focused on over the ensuing months was 2,000 machines. [SER172]

The tenor of the conversations then abruptly changed a few months later once the California Supreme Court struck down all but one sentence of the Proposition 5 model compact for violating Article IV, Section 19(e) of the State Constitution. *See Hotel*

Employees & Rest. Employees Int'l Union v. Davis, 21 Cal.4th 585 (1999) ("*HERE*"). The next compact offer from the State came out four days hence and created "virtually unanimous surprise and disappointment" amongst the negotiating tribes according to Chairman Maccaro of the Pechanga Band of Luiseno Indians, who acted as a spokes-person for the tribes during an August 31, 1999 meeting to discuss the perceived deficiencies with the State's latest draft compact. [SER169-170] Believing the material changes in the proposal took the parties away "from [the] common direction that [they] seemed to be headed in," Chairman Maccaro took issue with the fact that the compact *increased* the maximum revenue sharing rate from 6% to 25% and *decreased* the maximum number of machines from the prior benchmark of 2,000 to the larger of the tribe's prevailing device count or 350, plus a graduated increase over the next five years of 30 to 40%. [SER171-173]

This wave of tribal discontent led the State to alter its approach for dealing with these two areas of contention in its final compact proposal that it provided to the tribes for the first time on the night of September 9, 1999. *Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. California,* 629 F.Supp.2d 1091, 1111 (E.D. Cal. 2009) ("*Colusa I*"). The significance of this date arises from the fact that the legislature was set to go into recess for the remainder of the year the following day, and would need to approve the agreements before doing so if the tribes were to have any chance of staving off the federal government from closing the gaming facilities that were operating outside the confines of the compacting scheme. [ER325-326] Against this back-

drop, Norris presented the tribes with the State's final compact offer at 8:00 p.m. that evening and announced that tribal representatives had until 10:00 p.m. to accept the proposal – a deadline that was later extended to midnight. *Id.* The dissemination of the compact produced a number of questions pertaining to the terms in the proposal according to the chairman of the Colusa Indian Community, but the State's negotiators refused to explain the meaning of the new provisions. *Id.* After Norris left the room, a representative of the Coyote Valley Band of Pomo Indians followed him back to the Governor's office to discuss the proposal in a more personalized setting, but the State's negotiating team was inaccessible at that point and he was escorted from the room. *In re Indian Gaming,* 331 F.3d at 1104. Confronted with this total silence, the tribal leaders were left to discern the meaning of the compact language on their own and sign letters of intent to enter into the compacts during the specified four-hour window. *Colusa I,* 629 F.Supp.2d at 1111.

The reimagined machine count and revenue sharing provisions that these tribal leaders saw for the first time on the night of September 9th seemed to reach a reconciliatory solution, at least facially. In keeping with the State's prior stance in its August 27th proposal, Section 4.3.1 of the compact provided each tribe with a base number of machines equal to those it was already operating or 350:

> Sec. 4.3. Authorized number of Gaming Devices
> Sec. 4.3.1. The Tribe may operate no more Gaming Devices than the larger of the following:
> (a) A number of terminals equal to the number of Gaming Devices operated by the Tribe on September 1, 1999; or

(b) Three hundred fifty (350) Gaming Devices.

[SER178] Any revenue sharing fees associated with these machines would go into the SDF, a fund designed to appropriate money to, *inter alia*, State regulatory agencies and local communities impacted by tribal gaming. [SER181, § 5.2]

From this base number of machines the tribe is "authorized to use under Sec[tion] 4.3.1," any tribe with a compact can then apply to receive additional licenses through a communal draw process reminiscent of a professional sports draft in order to increase its device count up to a maximum of 2,000. [SER179-180, § 4.3.2.2(a)(3)] During this process, the administrator of the license pool will distribute capped blocks of licenses to applicant tribes in a series of rounds pursuant to a ranking system that gives priority to those tribes with the smallest preexisting device counts. [SER179-180, § 4.3.2.2(a)(3)] Once the initial pass through is complete, "[r]ounds shall continue until tribes cease making draws, at which time draws will be discontinued for one month or until the ***Trustee*** is notified that a tribe desires to acquire a license, whichever last occurs." [SER180, § 4.3.2.2(a)(3)(vi)]; *see Colusa I,* 629 F.Supp.2d at 1108 n.15 (identifying the administrator of the license pool as a trustee)

The exhaustion of license applications is just one of the two reasons that a draw can end, with the other being the trustee of the license pool fully distributed the total number of licenses available under the compacts. The quantum of licenses that serves as the corpus of the license pool is not expressly defined in the compact, but is instead set forth as a mathematical formula in Section 4.3.2.2(a)(1), which states:

> The maximum number of machines that all Compact Tribes in the aggregate may license pursuant to this Section shall be a sum equal to 350 multiplied by the number of Non-Compact tribes as of September 1, 1999, plus the difference between 350 and the lesser number authorized under Section 4.3.1.

[SER179] Unlike the baseline machine entitlements under Section 4.3.1, the revenue sharing fees attached to licensed machines go into the RSTF, a fund designed to provide each of the non-compact tribes in the State with $1.1 million of annual financial support. [SER178, § 4.3.2.1(a)] The mandatory nature of these payments means that the efficacy of the conjoined license pool/RSTF system turns on the trustee distributing the proper number of licenses; otherwise, satisfying the $1.1 million obligation to each non-compact tribe would require the State to "backfill" the RSTF with money from the SDF that would otherwise go towards local communities and public programs. [SER181, § 5.2]

As for calculating the total number of licenses, inserting the referenced Section 4.3.1 language into the tail end of Section 4.3.2.2(a)(1) reveals that the formula consists of three different components: the number 350 three times, the number of non-compact tribes as of September 1, 1999, and the number of machines operated by the compact tribes on the same date. The proprietary nature of the final element is one of the reasons that the outcome of the license pool formula was not generally known and the sole reason the Office of the Governor reached out to the compact tribes within a week of the compacts being executed. Specifically, by letter dated September 16, 1999, Shelleyanne W.L. Chang – the Legal Affairs Secretary for the Office of the

Governor who had assisted Norris in negotiating the terms of the 1999 Compacts (*see Colusa I,* 629 F.Supp.2d at 1111) – asked the chairman of the tribes that just executed compacts to "certify the number of Gaming Devices in operation by your Tribe on September 1, 1999," as the information was necessary to "complete and finalize the compact entered into by your Tribe and the State." [SER185-186]

The certified machine information sent in by the tribal chairman appears to have remained exclusively within the possession of the Office of the Governor, however. Over the next few months, a member of the State Assembly named Bruce Thompson contacted the independent and non-partisan Legislative Analyst's Office to find out the total number of slot machines the 1999 Compacts allowed statewide. [SER187] Via a response dated November 9, 1999, Legislative Analyst Elizabeth Hill explained that her office had been unable to obtain "verifiable information on the number of machines" that each tribe "was operating as of September 1, 1999." [SER188] Using a substitute estimate prepared by a law professor within the State, Hill concluded the 1999 Compacts permitted 53,000 baseline machine entitlements under Section 4.3.1 and another 60,000 licensed machines under Section 4.3.2.2(a)(1). [SER188]

The November 9th response from the LAO to Thompson elicited a quick rejoinder from Norris. In a letter dated December 3, 1999, Norris explained that the maximum number of machines permitted statewide under the compacts is "the product of a simple mathematical calculation set forth in Section 4.3.1 of the Model Compact" – the section that determines each tribes beginning device count. [SER190] According

to Norris, "[n]othing in Section 4.3.2 authorizes the operation of any more machines than are authorized by Section 4.3.1." [SER192] Rather, the license pool section of the 1999 Compacts was of limited importance. "Except for foreseeing that the California Gambling Control Commission may administer the provisions of Section 4.3.2 acting as a ***neutral trustee***, the State's interests in the statewide cap imposed by Section 4.3.1 are not implicated by Section 4.3.2." [SER193] All the same, Thompson used the information supplied by the LAO during the battle over Proposition 1A to try and dissuade California voters from approving the constitutional amendment that would make the compacts effective. [SER197-198] The rebuttal to the argument in favor of Proposition 1A authored in part by Thompson explained multiple times that approving the measure "would let Indian casinos operate as many as 100,000 slot machines, according to California's independent Legislative Analyst." [SER197]

The approval of Proposition 1A on March 7, 2000 positioned the tribes such that they had valid compacts, but no entity in place to disseminate the license rights under those agreements. With the CGCC not yet in existence and the State mum on implementing the licensing system, the attorneys for the signatory tribes developed "Gaming Device License Pool Rules" to govern the administration of the license pool. [SER203-204, ¶¶ 5-6; 207-209] The pool rules define the overseer of the license pool as the "Pool Trustee" and identify the appropriate entity to fill this role as a certified public accounting firm licensed in the State of California that had not performed any professional services during the prior twelve months for anyone with a financial stake

in the compacts. [SER207, ¶ 5] With the pool rules in place, the signatory tribes chose Sides Accountancy of Sacramento, California to serve as the Pool Trustee, who then scheduled the first license draw to take place on May 15, 2000. [SER203-204, ¶ 6; 210]

The appointment of Sides resulted in a second letter from Norris on May 10, 2000 to commend the tribes on reaching agreement on procedures for drawing machines licenses and to advise Sides of his responsibilities when conducting the license draw five days hence. [SER210-212] According to the draft of this letter Norris sent to the Office of the Governor on May 9, 2000, the summary of the State's expectations of Sides were as follows:

> We anticipate that your firm, as the Pool Trustee, will monitor the license pool to ensure that no more than the available number of licenses are issued. In addition, consistent with Section 4.3.2.2(a) of the Compact, we expect that in issuing licenses your firm will verify that no individual tribe will be issued licenses that will permit the tribe to operate a total of more than 2,000 machines.
> Finally, we request that your firm, as the Pool Trustee, certify to the Division of Gambling Control of the California Department of Justice that the draw complies with the limitations of the compacts.

[SER214-215] Before transmitting the final version of this letter to Sides, Norris eliminated both references to "Pool Trustee" and replaced the term with "pool administrator." [SER211-212]

The conveyance of the May 10th letter from Norris to Sides occurred roughly a month after Pauma made the decision to get into gaming so it could lift its tribal membership, which had a 55% unemployment rate and a per capita annual income of $11,711, out of poverty. [SER217, 220] By letter dated April 6, 2000, Pauma's legal

counsel Lawrence Stidham contacted Chang in the hopes of obtaining "a compact similar in terms to those signed by the Governor" the prior fall so the Tribe could participate in the license draw scheduled for May 15, 2000. [SER221-222] On the date of receipt, Chang responded by providing Pauma with the standard 1999 Compact along with the list of modifications the parties devised after executing the agreements. [SER223-224] Although explaining the import of these modifications, the response letter from Chang to Pauma says nothing about the license pool provisions in Section 4 of the 1999 Compact. [SER223-224] Pauma returned a signed version of the form compact on April 28, 2000, which Governor Davis signed and executed on the date of receipt. [SER225, 246]

This simple exchange of correspondence transformed Pauma from a tribe with neither experience gaming nor involvement in the 1999 compact negotiations into one with the sudden ability to operate a casino housing up to 2,000 machines in an environment devoid of non-Indian competition for the next twenty-two years. [SER239, § 4.3.2.2(a); 247, Modification No. 4] The first step down this path was executing an engagement letter with Sides on May 5, 2000 that specified "the terms and conditions of [its] engagement as trustee of the Gaming Device License process set forth in Section 4.3.2.2 of the Compact between the State of California and the Tribe." [SER250] With the draw just ten days off, Pauma completed the remaining prerequisites for participating in the license draw that were spelled out in the pool rules by contemporaneously mailing a letter to Sides as "Trustees" on May 5, 2000 certifying that the

tribe did not then operate any gaming devices, stating its desire to obtain 500 licenses at the forthcoming draw, and enclosing a cashier's check made payable to "Sides… as Trustee" to cover the compact-prescribed $625,000 prepayment fee attached to those licenses. [SER258-260] As a precaution in case Pauma inadvertently overlooked one of the necessary preconditions, the conclusion of the May 5th letter explains that "[a]lthough the Tribe trusts that the notice and enclosures fully comply with the Pool Rules, if the trustee finds that any item is missing, notice should be sent to the Tribe." [SER258] No notice appeared necessary, however, as Sides – acting as "trustee under the scope of work document" – informed Pauma that it had obtained 500 licenses at the May 15th draw, thus increasing the Tribe's total permissible device count to 850. [SER262]

Before Pauma placed these machines into commercial operation at its temporary tent facility the following May, the CGCC came into existence and its inaugural chair began to complain about the lack of transparency in the license draw process. [SER200, 263] By letter dated January 16, 2001, CGCC Chair John Hensley requested that Sides provide him with an "accounting of the payments and monies received from each tribe and a specification of the purposes for the payments." [SER265] The close of the January 16th letter bore dual reminders for Sides that as "pool trustee" it must ensure that the number of licenses distributed does not exceed that permitted by the 1999 Compacts and that it also has "a fiduciary responsibility to account for the funds received to the [CGCC] as trustee of the [RSTF]." [SER266] The "pool trustee"

language crept into a follow-up report from Hensley to the Office of the Governor in which he cited "the great deal of resistance from… the temporary trustee, Michael Sides Accountancy" to disclose the requested information. [SER283] The use of this "pool trustee" language occurs not only in communications with the Office of the Governor, however, as officers and directors of the CGCC also employed it in-house when formulating their own private version of the pool rules and when corresponding with other executive agencies like the Board of Equalization. [SER267; 328, § 5]

Yet, the outward complaints about transparency that Hensley expressed to Sides paled in comparison to the furtive discussions taking place behind the scenes in Sacramento. Shortly after transmitting the January 16th letter, the CGCC circulated an issue paper amongst its executive staff questioning whether the Commission should "immediately assert it's [sic] authority as Trustee under the Tribal-State Gaming Compacts and take over the machine licensing function and require accountability from the temporary trustee and the compacted tribes." [SER271] According to the issue paper, immediately assuming power would enable the CGCC to cap the licenses at either the number already drawn or the original cap formulated by Norris in his December 3, 1999 letter to the LAO, assuming it had not been exceeded. [SER273] Inserting a cap of this nature would also guarantee that "[t]he state could control any further machine growth during future compact negotiations where a finite number could be arrived at." [SER273]

The recommendations in this issue paper found a captive audience in the Office of the Governor, which then unilaterally enacted Executive Order D-31-01 on March 13, 2001, conferring upon the CGCC the power to "administer the gaming device license draw process under Section 4.3.2.2(a)(3), and control, collect and account for all license fees under Section 4.3.2.2(a)(2)." [SER275-276] The resultant fallout of the Executive Order included Sides sending a Notification of Termination of Engagement to the tribes to end its "engagement as license trustee under the scope of work and pool rules," and the CGCC nevertheless suing Sides in superior court to forcibly take over the license trust. [SER277-279]

The instant settlement reached in the superior court suit provided the CGCC with unfettered control of the license pool, thereby enabling it to turn its attention to the "major" license question raised in its previous issue paper. [SER280-284] In a letter conveyed to the Office of the Governor, Hensley explained that "[t]he Commission intends to proceed on the issue of gaming device limits as soon as possible and to ask for input from tribal leaders so they can buy into the process and the solution." [SER283] Inviting tribal input seems to have been simply a token gesture on Hensley's part, as he already had his eyes set on choosing one of two numbers as the size of the license pool: a reformulation of Norris' original number in his December 3, 1999 letter to the LAO that turned the 44,798 baseline machine entitlements he identified under Section 4.3.1 into the licenses he omitted under Section 4.3.2.2(a)(1), or a second interpretation by the LAO that it prepared for State Senator John Burton in the wake

of receiving Norris' December 3, 1999 letter, which yielded 32,151 licenses and 61,000 total machines statewide. [SER284] According to Hensley, "[i]f either of these numbers were found to be the position of the Commission, I believe there would be acceptance by the tribes, especially if they were involved in the process of finding it." [SER284]

The "process of finding it" turned out to be two meetings the CGCC held in its Sacramento office during the spring of 2002.[2] [SER287, 300] The first of these meeting took place on May 29, 2002 and concerned the rules the CGCC would employ when interpreting purportedly ambiguous compact language. [SER288] While recognizing "the natural implication of [the trustee reference in Section 4.3.2.2(a)(3)(vi)] is that the 'Trustee' is the party with responsibility for conducting the draws," the CGCC nevertheless concluded that it would not employ a canon of interpretation that favored the beneficiaries of the system. [SER289-291] According to a legal memorandum prepared by the CGCC staff in connection with the May 29th meeting, "although the Commission is referred to in the Compacts as a trustee… the Commission cannot be regarded as a trustee in the traditional sense, but rather as an administrative agency with responsibilities under the Compacts for administration of a public program in the nature of a quasi-trust."[3] [SER289-290] This dismissive interpretation

[2] No representatives from Pauma attended these meetings. [SER286]

[3] *See Cotter v. City of Boston,* 193 F.Supp.2d 323, 356 (D. Mass. 2003) (applying traditional trust rules to a public trust); 4 S. Symons, *Pomeroy's Equity Jurisprudence* § 1088. Quasi Trustees – Fiduciary Persons (5th ed. 1941) ("*Pomeroy*") ("Wherever there

of the compact occurred even though the CGCC's general policy has been to "take the Compact language as it was written" in order to "ascertain objective intent" since the Commission admittedly lacks the power to "alter or amend the meaning of any Compact provision." [SER290, 292]

This disavowal of any fiduciary restraints marked the first of many decisions by the CGCC that repudiated any canons of construction even remotely favorable to the signatory tribes. The Indian Canon of Construction was also inapplicable according to a memorandum from CGCC Chief Legal Counsel Pete Melnicoe because "[n]o reported judicial decision has… applied the canon to the interpretation of a tribal-state gaming compact." [SER288-289]; *contra Rincon II,* 602 F.3d at 1029 n.9 (applying the Indian Canon of Construction to IGRA). As for the *contra proferentum* doctrine that construes ambiguities against the drafter of the contract, that interpretive device supposedly had no place in the discussion since it was "employed only when none of the other canons of construction succeed in dispelling uncertainty." [SER289]; *contra Colusa I,* 629 F.Supp.2d at 1113-15 (resolving license pool ambiguities against the State since "it is undisputed that the State's negotiation team actually drafted the language in the Compact").

With these procedural rules in place, the CGCC tabled any discussion about the interpretation of the license pool until the following month. When discussions re-

---

is a fiduciary relation, … the dealings of the parties with each other and with the subject matter of the relation are governed by the same rules which determine the duties of actual trustees towards their *cestuis que trustent*.")

sumed during the ensuing meeting on June 19, 2002, the CGCC branded the license pool formula as "very, very ambiguous" and "perhaps the most ambiguous provision in the compacts," although this time the Commission said nothing of the *contra proferentum* doctrine. [SER307-308] Moreover, ascertaining the original understanding that Norris had when drafting the formula was purportedly impossible since the CGCC lacked an "agreed upon apocryphal record that tells us what those provisions really intend to mean." [SER295] The explanation contained in the letter Norris sent to the LAO on December 3, 1999 could not sub-in and dispel any uncertainty because its assumption that the license pool provision did not permit any machines beyond the baseline machine entitlements in Section 4.3.1 "contradicts the express language of" the compact. [SER304] The avowed lack of an interpretive key served as the basis for the CGCC considering three different interpretations of the size of the license pool: (1) a proposal by a group of signatory tribes that totaled 64,283 licenses; (2) the LAO's original projection to Assemblyman Thompson that yielded 55,951 licenses; and (3) the LAO's second projection to Senator Burton that Hensley championed, which yielded 32,151 licenses. [SER304] In keeping with Hensley's plan, the formulation the CGCC chose after interpreting the compact language head-on without the aid of any canons of construction was the smallest option of 32,151 licenses, a figure that Melnicoe described as "the most logical interpretation of language which admittedly is very unclear." [SER304]

The articulated reason for the decision to choose the Senator Burton number was that it interpreted the final clause of the Section 4.3.2.2(a)(1) license pool formula appropriately unlike the other two options. [SER303] The final portion of that formula looks at the "difference between 350 and the lesser number authorized under Section 4.3.1" [SER179] In other words, this portion of the license pool formula considers the number of machines operated by each of the signatory tribes immediately before the 1999 Compacts went into effect, selects the lesser of either that number or 350, and then aggregates the results. *See Colusa II,* 618 F.3d at 1081. As an illustration, the lesser number authorized for the twenty-three tribes that operated more than 350 machines on September 1, 1999 would be 350, which would result in an output of zero. *Id.* The CGCC employed this basic methodology when interpreting the license pool formula, but ultimately chose the Senator Burton number because it excluded from the calculation the sixteen signatory tribes that operated zero devices on September 1, 1999. [SER303] In the opinion of the CGCC, the "lesser number authorized under Section 4.3.1" could not be "deemed to refer to non-gaming tribes. Simply put, there is no authorization under Compact section 4.3.1 to operate zero gaming devices." [SER303]

Yet, what the CGCC did not disclose to those in attendance was that this stance concerning the interpretation of the final clause of the license pool formula ran contrary to the one detailed within its own pool rules for administering the draw process. According to the evidence disclosed by the State during discovery, the CGCC authored its own private version of the pool rules by the summer of 2002 that detailed

everything from the basic concept behind the system to the procedures for awarding licenses. [SER327-331, 336] The section of these rules that defines the total size of the license pool recites the entire Section 4.3.2.2(a)(1) license pool formula verbatim and then states immediately after the final "lesser number authorized under Section 4.3.1" language that "[t]he number of devices operated by a tribe shall be the number of devices certified to the State in accordance with the Compact." [SER328, § 4] Those certifications which Chang sent out the week following the execution of the 1999 Compacts went to all the signatory tribes, including those that did not conduct gaming prior to September 1, 1999. [SER186] After disclosing the key for interpreting the final clause of the license pool formula, the private pool rules created by the CGCC then explained that the entity charged with administering the draw process was a "Pool Trustee," a term that arises no less than ten times throughout the remaining sections of the document. [SER328, § 5(a)]

None of this information came up during the discussion of the proper size of the license pool, though, and afterwards the CGCC focused upon discussing the merits of the Senator Burton number it had just selected. After admitting "reasonable minds may differ concerning the interpretation" just settled upon, one of the Commissioners confessed they took the "more conservative view[ ]" and picked the "low-end interpretation" simply because the "provisions are imprecise [and] subject to varying interpretations." [SER309, 315] This flippant approach to ascertaining contract rights that Hensley characterized as "the Commission arbitrarily picking a number" instituted the

cap on the license pool the CGCC had long since desired and brought the signatory tribes one step closer to renegotiation. [SER314] As to that, the legal memorandum prepared by the CGCC in connection with the June 19th meeting disclaimed ahead of the license pool analysis that "the language of Compact section 4.3.2.2(a)(1) is sufficiently obscure that, undoubtedly, agreement among all the parties to the Compacts can only be achieved… [by] renegotiation." [SER301]

Although faced with what it considered to be a "very, very ambiguous provision" over which "reasonable minds may differ," the CGCC never submitted – or even considered submitting – the license pool issue to an impartial federal district court for resolution. *See* Restatement (Third) of Trusts § 71 & cmt. a (2007) ("To avoid undue risk of liability when reasonable doubt exists in [regards to the interpretation of trust provisions], a trustee may seek protection by applying for instructions from an appropriate court."); *accord* 3 Austin W. Scott et al., *Scott & Ascher on Trusts* §§ 16.4.1, 16.8 (5th ed. 2007) ("*Scott & Ascher*"); George G. Bogert et al., *The Law of Trusts and Trustees* § 559 (2d ed. rev. 1984) ("*Bogert*"); 4 *Pomeroy* § 1064. Selecting the conservative Senator Burton number consequently created a huge structural shortfall in the RSTF totaling $50,568,787.99 in fiscal year 2002-03 and similar amounts in future years. [SER322]; Cal. Gov't Code § 12012.90. As previously indicated, curing these massive shortfalls has required the CGCC to take an equivalent amount of money from the SDF that would otherwise go to public programs and local communities. [SER322]

These enormous deficits contrast rather starkly with the abundance of licenses that would remain in the pool after selecting the Senator Burton number in the opinion of the CGCC. With the Senator Burton number of 32,151 licenses "exceed[ing] the number of putative gaming device licenses previously issued by… Sides… by 2,753," the available licenses could total in excess of 4,500 after accounting for those returned by tribes that failed to put the associated machines into commercial operation within a year of acquiring the licenses:

> Chief Counsel Melnicoe: It's also staff's recommendation… that the Commission make available for draw… all unused gaming devices… that are surrendered to the Commission within 30 days of the notice from the Commission. That will increase number [sic] of licenses available to tribes that wish to use them for gaming.
> Commissioner Smith: Do we have any guesstimate, any idea at all what that might be?
> Chief Counsel Melnicoe: It could be between 2- and 3,000, depending.
> Commissioner Smith: So in other words, the total pool would be someplace maybe up to 4500, adding to the 2700?
> Chief Counsel Melnicoe: Yes. Could be higher than that.

[SER304, 311-312]

These 4,500-plus licenses became a talking point within a follow-up letter from the Office of the Governor some eight months after the June 19th meeting. On March 28, 2003, Governor Davis transmitted a letter to Pauma requesting that the Tribe enter into negotiations "concerning matters encompassed by Compact Sections 4.3.1 and 4.3.2 and their subsections, and such other matters as the parties deem appro-

priate," such as further "revenue sharing with the State [and] the authorized number of gaming devices and their allocation." [SER339-340] Though conveying a desire to commence negotiations about the license pool provisions, the March 28th letter nevertheless went on to explain that there were still "several thousand licenses and entitlements that are not being used." [SER339]

Against this backdrop of hoped-for negotiations and thousands of unused licenses, actual negotiations were soon to take place between Pauma and Park Place Entertainment about replacing the Tribe's temporary tent gaming facility with a permanent Caesars-branded resort casino. [SER341-344] The September 17, 2003 press release announcing the partnership described the proposed project as costing $250 million and featuring "500 hotel rooms, more than 100,000 square feet of gaming space, 2,000 slots, 75 table games, and a full complement of restaurants, spas, and live entertainment venues." [SER346] The 2,000 machine projection in the press release was actually a material condition of the development agreement that empowered Park Place to walk away from the joint venture if Pauma failed to attain that machine count within a "commercially reasonable time." [SER349, § 10.3(a)(i); 359-360; 366-367]

The need for the 2,000 machine requirement arose from the reality of trying to construct a permanent facility for a tribe with only two years of commercial experience and virtually no capital to its name. As explained by Pauma's legal counsel Larry

Stidham during a trial in 2006,[4] the revenues generated by the 2,000 machines would likely be the only assets a historically-impoverished incipient gaming tribe like Pauma had to make the principal and interest payments on the development loan:

> Q: Was there some threshold number of machines which Caesars made a condition of going forward on the deal?
> A: Well, every time that we talked in terms of how this was going to go forward, what the sizing was, you know, how big the operation should be, we had always talked about trying to get, at that time, the maximum of 2000 machines.
> Q: Okay. And did the obtaining of 2000 machines have anything to do with the ability to get the financing for the $250 million that would be necessary in order to build the project?
> A: Well, it pretty much had everything to do [with] that. … Because in Indian casino financing, the only source of repayment and the only – usually in the deals that I have worked on, is that the only collateral besides the furniture and fixtures and things is the revenue that is derived from that casino. So that a bank, in terms of loaning the money, has got to be convinced that the money generated from the operation is going to be sufficient to pay the bank loan.

[SER357-359]

This perceived and real link between the number of machines and the prospects of repayment meant that the viability of the partnership depended upon Pauma obtain-

[4] All the forthcoming testimony block-quoted in the statement of the case arose during a lawsuit related to the dissolution of the Pauma and Park Place partnership. *See Harrah's,* No. GIC847406 (Cal. Sup. Ct. 2012) ("*Harrah's*"). The elicitation dates for all this testimony in the summer and fall of 2006 predated the current suit and followed the United States District Court for the Eastern District of California originally dismissing the *Colusa* suit under Federal Rule of Civil Procedure 19 for the failure to join sixty-plus sovereign tribes. *See Colusa,* No. 04-2265, Doc. No. 25 (E.D. Cal. May 16, 2006).

ing the ability to operate 2,000 machines according to the Tribe's Vice Chairwoman Patricia Dixon:

> Q: Did any Caesars representatives ever talk to you about a need for 2000 machines?
> A: At both presentations. …
> Q: During the negotiating period of time that led up to the March 2004 General Counsel meeting, did you ever talk to people from Caesars again about the need for 2000 machines?
> A: All negotiations were based on the idea of 2000 machines. We had different scenarios where we looked at more machines, I believe we may have looked at one that was less, but basically it was always understood we needed the 2000 machines to achieve our goals.
> Q: Specifically, do you recall anybody from Caesars between say September of '03 and March of '04, talking about the need for Pauma to get 2000 machines?
> A: Michael Soll, when he did his presentations he'd give us charts, and in these charts he'd be talk about wins per unit for a machine, he'd be talking about the number of machines that are necessary for that.

[SER372-373]

As the point person for Park Place on the Caesars project, Michael Soll agreed there was an "expectation" that Pauma would take measures to increase its device count to 2,000 machines, a stance that did not surprise the tribal members since they could attain this figure under the 1999 Compact.

> Q: At the first meeting do you recall whether there was any discussion with respect to the number of machines, electronic machines that the Tribe had or would like to get?
> A: From early in the process and always there was the expectation that there would be a parallel process to either revise or renew the Tribe's compact so that it would be able to operate with a minimum of 2,000 electronic gaming devices. We had held that

> we wouldn't do the project as a Caesars gaming with less than 2,000 gaming devices.
>
> Q: Did the Tribe appear surprised by this discussion of 2,000 machines? …
>
> A: No, because the existing compact, if they were able to secure enough pooled licenses, would have allowed them to go to 2,000.

[SER375-376]

The first opportunity to increase Pauma's device count towards the 2,000 machine cap of the 1999 Compact came about roughly two months into the Caesars negotiations when, on November 20, 2003, the CGCC's Deputy Director of the Licensing Division Gary Qualset notified the Tribe of a draw on December 19, 2003 for "at least 750 gaming device licenses." [SER379-380] The clandestine manner in which the CGCC conducted the draw process kept virtually all the material information concerning the draw secret, from the total number of licenses remaining within the pool, to the *actual* number of those being made available during the draw, to the number of licenses earmarked for smaller gaming tribes with higher priorities in the pecking order. [SER332-338, 379-380, 385-386] This abject lack of transparency led Caesars trial counsel to describe the process in 2006 as a "mystery" and one that only an "arcane specialist" could solve:

> [M]aybe if you understand the NBA Draft and how many ping pong balls [there are, then] maybe you understand how the [license] draft work[s]. But essentially, … there was a certain maximum number of slot machines in California, you made an application to draw some of those machines, … you put in there your wish list... [of] how many, you send a check to… cover the amount, … and then they looked at it, [and] applied some standards that… you need to be kind of [an] arcane

> specialist in this to know exactly what they weigh, then they tell you we're giving you th[is] many.

[SER385-386, 392] These sentiments about the inner workings of the license draw system reflect those held by Pauma's Chairman Chris Devers, who believed the Tribe could operate at the 2,000 machine cap of the 1999 Compact so long as the CGCC said the necessary licenses were available:

> Q: …With respect to the 2000 compact, did Pauma band have the ability to obtain licenses for more than 850 machines?
> A: Correct.
> Q: It did?
> A: If they were available.
> Q: If they were available. And what do you mean by that, "if they were available"?
> A: There was a limit of licenses that were set aside within the state for the tribes that were interested in gaming.
> Q: Okay.
> A: And they went through a draw process for all the tribes, and some of them, you know, got 2,000; some of them got less.
> Q: And why did Pauma end up with less than 2,000? …
> A: We were going off of our market analysis.
> Q: Okay. So do you understand – do you know whether the tribe could have gotten more than 850 if the market analysis had suggested that it should?
> A: I don't know if we could have or not.
> Q: Because it would have depended on whether or not they were available?
> A: Correct.

[SER396-397]

Despite the uncertainty, Devers viewed the December 19, 2003 license draw as a worthwhile opportunity and likely the first of the two draws required to raise Pauma's device count from 850 to the 2,000 machine cap of the 1999 Compact:

A: …As you know, we were going through the development of our project, there was an opportunity to acquire some additional licenses, which both parties agreed would be a benefit to the tribe and to our project. And so we said, "Well, let's see what we can get out of it."
Q: Why would it be a benefit to the tribe?
A: It would be a benefit to the tribe that as we negotiated – or if we looked at the time frame between the development process and our opening, there may be other opportunities to obtain additional licenses –
Q: Right.
A: – or there may not be.
Q: Right.
A: So if we had an opportunity now, we'd get them now, and if we were looking at – you know, as we went along with the project, we were looking at any means that we could get our gaming licenses up to 2,000 to accommodate our project.
Q: All right. And why was the magic number 2,000?
A: 2,000 is the most that we could have had under the existing 1999, 2000 compact[.]

[SER400]

The license acquisition process began with Pauma submitting an application for 750 licenses and a cashier's check in the amount of $937,500 to cover the prepayment fee associated with the licenses. [SER404-408] Section 4.3.2.2(a)(3)(iii) defined the targeted number of licenses as the most Pauma could request at one draw given its placement in the third priority tier. [SER179-180, § 4.3.2.2(a)(3)(iii); 409] Obtaining these licenses would have increased Pauma's device count to 1,600 and enabled it to trigger one last draw for the final 400 licenses as soon as the following month. [SER180, § 4.3.2.2(a)(3)(iv)] The license request went mostly unfulfilled, however, with Qualset mailing a letter on December 30, 2003 to return the vast majority of the prepayment

fee and to inform Pauma that "[t]he demand for licenses exceeded the available supply [using the Senator Burton number of 32,151 licenses] and it was therefore not possible to completely fill the Tribe's request for gaming device licenses." [SER414-415] The ultimate outcome of the December 19th license draw was that Pauma only obtained 200 of the 750 licenses it requested before the license pool, for the very first time, became fully depleted. [SER410-412] Yet, this outcome would have been vastly different if the CGCC applied an interpretation of the license pool formula that included those tribes operating zero devices on September 1, 1999 like the United States Court of Appeals for the Ninth Circuit in *Colusa II*. With the at-the-time confidential breakdown of the December 19th draw disclosing that only nine tribes participated and requested a grand total of 2,384 licenses, using the *Colusa II* number that exceeded the CGCC's cap by 8,050 would have satisfied every license request and still left 6,416 licenses in the pool in advance of Pauma's final draw for the 400 outstanding licenses. [SER409]

On the day after Pauma received Qualset's December 30th letter, the Office of the Governor announced the appointment of an attorney named Daniel Kolkey to lead the State's efforts to renegotiate the compacts. [SER416-421] The introductory comments made by Kolkey to a consortium of reporters during the press conference announcing his appointment include him stating that "[c]learly, we think the current compacts do not provide fair payment to the state for what is a monopoly on Class

III (casino-style) gaming" and therefore it was "an opportune time to re-examine the tribal-state relationship." [SER416, 420]

The reexamination of this relationship began shortly thereafter when the State commenced negotiations with a cohort of four tribes that all operated at or near the 2,000 machine limit of the 1999 Compact. [ER 459, § 2; SER422-429] With these ongoing negotiations providing one last glimmer of hope of satisfying the machine condition of its development plan, Pauma asked to join the talks and informed Kolkey directly at the outset that it was participating solely to obtain the right to operate 2,000 machines. [SER431-432, ¶¶ 3-4] This disclaimer that a tribe was on hand simply to obtain preexisting rights was met with silence from Kolkey, who subsequently tried to validate his lack of candor by adhering to the party line that the "aggregate number of gaming device licenses available under the 1999 compacts was… an ambiguous term," and the "compact negotiations would give the tribes *certainty* that they could acquire more gaming devices to meet their needs." [ER460-461, ¶¶ 5 & 7]

This process of purchasing a guarantee for preexisting contract rights went on for five months until the State and Pauma executed an amendment to the 1999 Compact ("2004 Amendment") on June 21, 2004. [ER582] Curious about the amount of new revenue the State could generate from the amendments entered into by Pauma and the four tribes that operated around the 2,000 machine ceiling of the 1999 Compact, a reporter for the San Francisco Chronicle contacted Stidham in the weeks following the execution of the agreements to inquire about the number of machines the Tribe

planned on offering in the future. [SER446-449] Although hedging his answer by explaining the expected completion date for the Caesars project was still "a couple of years off," Stidham responded that Pauma could eventually add up to 800 machines. [SER448]

The price tag on these machines grew exponentially under the 2004 Amendment. A comparison of the annual revenue sharing fees required to operate 1,050 machines shows that the amount paid by Pauma went from a $315,000 payment into the RSTF to a $5,750,000 payment into the General Fund plus a $2,000,000 payment into the RSTF. [SER179, § 4.3.2.2(a)(2); 437, §§ 4.3.2.2(a) & 4.3.3(a); 450; 452] The revenue sharing terms of the 2004 Amendment, in other words, represent a 2,460% increase from those of the predicate agreement. [SER003, ¶ 4] As for the amount of revenues these fees were expected to consume, Section 4.3.3(a) of the 2004 Amendment indicates the $5,750,000 General Fund payment represents "at least 13% of the Tribe's net win" for the year preceding amendment, which means the $2,000,000 RSTF fee represented another 4.5% of net win. [SER437-438, § 4.3.3(a)] The projection that Pauma would pay in excess of 17.5% of its preexisting annual gaming revenues under the 2004 Amendment to the State to simply retain the right to operate 1,050 machines turned out to be a reality. The financial statements for Pauma's gaming facility show that the baseline revenue sharing fee of $7,750,000 actually totaled 20.03% of net win and 76.86% of net income in 2003. [ER633] The progressive nature of these revenue sharing fees made the annual cost for 2,000 machines even more onerous; the total

fee increased by $14,000,000, going from a $3,075,000 payment into the RSTF under the 1999 Compact to payments of $15,075,000 into the General Fund plus another $2,000,000 into the RSTF. [SER435-436, § 4.3.1(b)] What is more, these amounts are just the fees that Pauma had to pay to the State, and do not include the additional fees going to the County of San Diego pursuant to the intergovernmental agreement required by Section 10.8.8 of the 2004 Amendment, including approximately $38 million in off-reservation road-improvements. [SER443, 455-465]

The harm imparted by the 2004 Amendment lies not only in its revenue sharing terms, but also in its effect on the partnership between Pauma and Park Place. The timeline of the negotiations for the 2004 Amendment spanned roughly nine months, going from the failed December 19, 2003 license draw to the Department of the Interior's ratification of the 2004 Amendment on September 2, 2004. [SER445] On July 14, 2004, nearly seven months into this process and five weeks after the ink was dry on the 2004 Amendment, Park Place announced it was merging with Harrah's Entertainment in a move that would signal the impending demise of the Caesars project. [SER471] On May 13, 2005, Pauma filed suit against the surviving entity of the merger in San Diego County Superior Court for various pre- and post-contractual breaches. *See* Complaint, *Harrah's,* No. GIC847406, Doc. No. 1 (Cal. Sup. Ct. May 13, 2005).

As the case proceeded to trial, opening statements featured virtual unanimity about the factual history, with Pauma's trial counsel explaining that the Tribe only entered into the 2004 Amendment in order to fulfill the 2,000 machine requirement of the

Caesars development plan, and Harrah's attorney defending on the basis that *any* potential developer would have wanted 2,000 machines given the commensurate device counts at the four reservations surrounding Pauma in the northeastern reaches of San Diego County. [SER476-480] The tribal testimony made no question about the sole reason Pauma amended its compact, starting with the visionary of the Caesars idea and the current tribal chairman Randall Majel relaying a conversation he had with a councilmember from the neighboring Rincon tribe two years after the license pool had supposedly become fully depleted:

> Q: Do you recall what you discussed with her in early 2006?
> A: It started off about why we did the amended compact. …
> Q: What did you tell her?
> A: That in order for us to do a larger facility, we had to have – we had to secure and know that we were going to have 2,000 machines, if that's what we were going to shoot for.
> Q: Do you recall anything else you said to her about why Pauma did the amended compact?
> A: No, other than she said, "Why didn't you just get licenses?" …
> Q: Did you comment back to her on that?
> A: I said, "The license pool is over."

[SER483-484]

The causal link between obtaining 2,000 machines and executing the 2004 Amendment also came up during the questioning of Chairman Devers:

> Q: Could you look at… paragraph 10.3 of the [development] agreement. And this is under the heading article 10, "term of agreement." And 10.3a(i) talks about 2000 gaming devices; right?"
> A: Correct.
> Q: What did you understand that to mean?
> A: That in order for our project to be fully developed we would need the 2000 gaming machines.

Q: And was there any relationship to that clause to the Tribe's decision to enter into the amended compact?
A: It was very important to us. We had agreed to it and that was our intent, to obtain those 2000 machines.
Q: Okay. And did the Tribe enter into the compact for additional machines?
A: Yes, we did.
Q: And would the Tribe have entered into a[n] amended compact if it didn't have a deal with Caesars?
A: No, we wouldn't.

[SER489]

The most direct testimony on this issue nevertheless came from Vice Chairwoman Dixon, who matter-of-factly described the 2004 Amendment as the instrument that enabled Pauma to reach the 2,000 machine mark:

Q: We were talking about an amended compact before we broke. Can you describe to the jury your understanding of the amended compact?
A: The amended compact was something that we entered into with the State of California so that we could acquire the additional machines to come up to 2000.

[SER492]

The dissolution of the Caesars development plan then led into a period of time following the execution of the 2004 Amendment where Pauma considered proposals from other suitors to build a permanent gaming facility housing 2,000 machines – first with Hard Rock in 2005 and then Foxwoods Development Corporation in the summer of 2006. [SER499-524] Months after the economic recession of 2007 killed any chance of financing the Foxwoods project, a provision in the 2004 Amendment triggered that increased the annual RSTF payment to the full $2,000,000 mandated by the

contract. [SER437, § 4.3.2.2(a)] The reality of paying the State $7,750,000 in revenue sharing each year forced Pauma to lay off 15.1% of its casino workforce within eight months of the start date of the new payment arrangement in order to shave roughly $2,174,000 in payroll costs. [SER525; 527-529, ¶ 2 & Ex. A] These mass layoffs occurred as Pauma began meeting with the State about obtaining some temporary relief from the revenue sharing terms of the 2004 Amendment to prevent further reductions in force. [SER029, ¶¶ 1771-179] In the midst of eight months of futile "good faith" meetings with the Office of the Governor, Judge Damrell issued his dispositive order in *Colusa I* finding the CGCC unreasonably calculated the total number of licenses authorized under the 1999 Compacts and consequently suppressed the license pool by upwards of 10,549 licenses. *Colusa I,* 629 F.Supp.2d at 1113. This substantive wrong at the backend of the process had a procedural counterpart at the beginning according to Judge Damrell, as the "license draw process [did] not give the Commission concomitant authority to interpret the Compact. While interpretation issues may have arisen throughout the draw process, the Commission's role as Trustee does not grant deferential review to its interpretation." *Id.* at 1108 n.15.

The slow death of the meet and confer process turned into a sudden one when counsel for Pauma raised the intervening decision in *Colusa I* and argued that it showed the parties entered into the 2004 Amendment under a mutual mistake that would warrant substantial equitable relief including rescission and "restitution to Pauma in in the form of refunded compact fees." [SER030-031, ¶ 187] The response

letter from the Office of the Governor came six weeks later on June 22, 2009 and explained that it "disagreed that the Band's compact with the State is subject to judicial rescission" and any federal court decision to the contrary may still require Pauma to disgorge *all* the revenues generated by its gaming facility since 2004 if not the start of operations:

> [I]t is possible that Pauma may not benefit from such a determination given that rescission of the Band's compact could leave it with no compact at all. ... Thus, assuming Pauma's suit for rescission could overcome the State's sovereign immunity, any financial restoration obligation would not rest solely upon the State, but could require the Band to disgorge all the benefits it has received from the ability to operate class III gaming under its compact.

[SER535]

After explaining the potential consequences of any future lawsuit, the Office of the Governor then terminated its involvement in the discussions since it did "not believe it would be fruitful to continue the meet and confer process to discuss the matter further." [SER535] Attempts to resurrect the meet and confer over the next two months as Pauma fell more and more behind in its revenue sharing payments simply elicited a forewarning from the State that it would hold the Tribe in material breach of its compact if it did not become current on its obligations in four days and thereafter adhere to the financial terms of the 2004 Amendment without deviation. [SER032, ¶¶ 195-198] The deterioration of relations and the looming threat of irreparable actions led Pauma to file its original complaint with the United States District Court for the Southern District of California on September 4, 2009. [SER031, ¶ 192]

The prayer for relief in the complaint sought rescission of the 2004 Amendment and restitution of the excess revenue sharing fees paid under the agreement. [SER538] Yet, the request for restitution did not compel the State to raise a sovereign immunity defense over the next eight months during the briefing on its motion to dismiss or Pauma's motion for preliminary injunction. [ER777-781] When the April 11, 2010 hearing on Pauma's motion for preliminary injunction began, Judge Burns explained that he had just issued a dispositive order in a second suit questioning the size of the license pool that mirrored the one by Judge Damrell in *Colusa I,* and he believed Pauma was entitled to a final remedy at law rather than just a preliminary injunction. [ER099-101] A last minute plea from counsel for the State for the right to conduct discovery persuaded Judge Burns to go to "Plan B" and issue an injunction reducing the revenue sharing fees of the 2004 Amendment to those of the 1999 Compact for the remainder of the suit. [ER103-107] The order memorializing the terms of the preliminary injunction that came out the following day reiterated Pauma's "strong showing of likelihood of success on the merits" and further stated that "[i]f, as appears likely, Pauma prevails, the state would be required to make restitution so the larger payments would not benefit it." [ER09]

The forewarning that it would pay restitution following an adverse decision also did not convince the State to try and build a defense through the unilateral discovery granted by Judge Burns, as it instead chose to appeal the injunction order the following month before submitting a single discovery request. [SER034, ¶ 209] In the three

weeks between Judge Burns granting the injunction and the State filing its notice of appeal, the Ninth Circuit issued *Rincon II*, an opinion that addresses the State's attempt to tax a tribe through a compact amendment admittedly "similar to those accepted by the Pauma and Pala Bands" (*see Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger,* 2008 WL 6136699, *6 (S.D. Cal. 2008)) after constraining the size of the license pool. *See Rincon II,* 602 F.3d at 1024-26. Though the opinion does not deal with the actions by the CGCC that induced the negotiations, the holding in *Rincon II* still explains that "[t]he States' demand for 10-15% of Rincon's net win, to be paid into the State's general fund, is simply an impermissible demand for the payment of a tax by the tribe." *Rincon II,* 602 F.3d at 1042.

With the case law clear that the State was wrong to both constrain the size of the license pool and try to impose taxes on a tribe afterward, the responsive brief filed by Pauma in the interlocutory appeal asked this panel to render the final decision that Judge Burns delayed and award a group of remedies that included restitution of the excess revenue sharing fees paid under the 2004 Amendment. [*Pauma Band of Luiseno Mission Indians of Pauma-Yuima Reservation v. California,* No. 10-55713, Doc. No. 34, p. 3 (9th Cir. July 13, 2010) ("*Pauma II*")] The subsequent reply brief from the State acknowledged this request and recited a litany of reasons why this panel should not resolve the merits, but once again said nothing about the request for restitution. [*Pauma II,* No. 10-55713, Doc. No. 41, pp. 13-15 (9th Cir. July 30, 2010)] The interlocutory appeal ultimately culminated with an order preserving the injunction and "remand[ing]

the matter to the district court for reconsideration of all four of the *Winter* factors" in light of the recently released opinion in *Colusa II* that tweaked the excess number of licenses found by Judge Damrell from 10,549 to 8,050. [*Pauma II,* No. 10-55713, Doc. No. 64 (9th Cir. Nov. 30, 2010)]

The first event in the proceedings after remand was not a motion for summary adjudication on the sovereign immunity issue by the State but a conference call during which Judge Burns explained that he saw the merits of the case even more clearly than he had at the injunction hearing, and "the writing [was] on the wall" in the case because he was ordering Pauma to file a lone motion for summary judgment as soon as possible. [*Pauma III*, No. 14-71981, Doc. No. 1-1, p. 9 (9th Cir. July 3, 2014)] After three more months elapsed, the State filed an opposition to summary judgment in which it mentioned sovereign immunity for the very first time and reiterated the Office of the Governor's pre-suit position that it intended to turn any adverse restitution award into a windfall of new revenues for its coffers:

> In the event the State were to be ordered to pay restitution to Pauma, the Court would also have to order Pauma to restore to the State everything of value it received under the 2004 Compact. Cal. Civ. Code § 1691. Should the Court order the State to pay restitution, the State requests that it be permitted to conduct discovery to determine all financial benefits gained by Pauma as a result of the 2004 Compact so these amounts may offset any restitution ordered to be paid by the State.

[SER546] Thus, the first mention of sovereign immunity arose more than eighteen months after the filing of the complaint; approximately twenty-one months after the Office of the Governor raised the issue during the pre-suit meet and confer process;

and after the district court expressed both preliminary and presumably final remarks regarding the merits. Nevertheless, the hearing on the motion for summary judgment turned into a transfer of the case to Judge Battaglia after Pauma raised the trustee issue in its brief and argued that the State may have acted in bad faith dereliction of its duties by limiting the size of the license pool. [*Pauma III,* No. 14-71981, Doc. No. 1-1, p. 10 (9th Cir. July 3, 2014)]

The litigation strategy by the State during the second stage of the district court proceeding bore a remarkable similarity to that in the first. With the transfer order and Judge Battaglia's decision to take Pauma's motion for summary judgment off-calendar in favor of hearing the State's motion to dismiss seeming to restart the case, the State reverted to saying nothing about sovereign immunity for the entire nine month period after the filing of its opposition to Pauma's motion for summary judgment, whether it be in the re-briefing on its first motion to dismiss, the answer it preemptively filed in an attempt to forestall any amendments of the complaint, or in the second motion to dismiss aimed at the First Amended Complaint. [SER541-543; *Pauma I,* No. 09-01955, Doc. Nos. 111-1, 129, 142-1 (S.D. Cal.)] The contents of this revised pleading include an additional 137 evidence-based allegations on top of those set forth in the original complaint and a prayer for relief that – while still requesting restitution – shifts its primary focus away from rescission and towards a host of other equitable remedies like reformation. [SER001-081] After Judge Battaglia ordered Pauma to file a refashioned motion for summary judgment in the wake of reviewing the First Amended Com-

plaint, the State, again sensing defeat, mentioned sovereign immunity for a second time in its December 15, 2011 opposition brief that it filed some twenty seven months after the start of the case and thirty months after raising it during the meet and confer process. [SER548-549] The lone paragraph of the opposition discussing sovereign immunity once again reiterated the disgorgement argument advanced by the Office of the Governor during the pre-suit meet and confer process. [SER549]

The circular pattern of the proceedings would then continue as Judge Battaglia issued a transfer order before the summary judgment hearing and incoming Judge Bencivengo took the motion off-calendar and scheduled a hearing on the State's second motion to dismiss instead. [ER792-793] Among the eight arguments raised in the second motion to dismiss was one contending that Pauma's trustee argument had to fail as a matter of law in light of the Supreme Court of the United States' purported holding in *United States v. Jicarilla Apache Nation,* 564 U.S. __, 131 S. Ct. 2313 (2011) that the federal government (but not the State) can style its relations with an Indian tribe as a trust without assuming all the duties that traditionally accompany that label. [SER568] The hearing on the motion turned into a whitewash for the State, though, as Judge Bencivengo rejected all eight arguments and brushed aside the State's *Jicarilla Apache* argument because the "1999 Compact… expressly state[s] that a 'Trustee' is responsible for administering the distribution of gaming device licenses to applicant gaming tribes." [SER586]

The discussion at the hearing segued from the second motion to dismiss into the handling of the remainder of the case, with Judge Bencivengo explaining she was ordering the parties to engage in expedited discovery on the trustee issue for sixty days before tending to cross motions for summary judgment so she could resolve the case all at once instead of piecemealing through individual claims. [ER209-210] This stated intention to resolve all the pending claims clashed with a comment Judge Bencivengo made just moments earlier when detailing how she would limit any decision favorable to Pauma:

> And a lot of other issues raised by the complaint regarding whether or not the 2004 compact is fair, should be reformed, composes some sort of inappropriate tax, a lot of these issues would never need to be reached if there is a determination there was a mutual mistake of fact or a unilateral or mutual mistake of law in a decision to enter the 2004 compact that would cause it to be rescinded. I don't really care what it says. It just gets rescinded, and they're put back in the position they would have been under the 1999 agreement, and any restitution or other remedies that would come with that.

[ER202-203] This predisposition for deciding the case turned into a reality at the end of the summary judgment process. The opening motion filed by Pauma detailed the wealth of evidence contained in the statement of case herein showing the State truly meant trustee when it wrote "trustee" into Section 4.3.2.2(a)(3) of the 1999 Compact, and then requested relief in the form of restitution and either, "in order of preference,… (a) an equitable estoppel, (b) reformation or the reshaping of the 2004 Amendment, (c) partial rescission of the 2004 Amendment, or (d) complete rescission of the 2004 Amendment with such further equitable relief as it necessary to achieve

'complete justice.' " [SER565] The counterargument in the opposition brief took pages from prior filings, reiterating the *Jicarilla Apache* argument to defend against the trustee issue and the Office of the Governor's pre-suit position to challenge the restitution request. [SER551-552, 571]

The evidence and competing opinions regarding the trustee issue went up on the docket and soon thereafter Judge Bencivengo tried to convert the summary judgment hearing into an impromptu settlement conference before going forward with the hearing and raising an overarching statute of limitation defense on the State's behalf *sua sponte*. [ER254TR] Objections from Pauma may have blunted the effect of these actions, but the March 18, 2013 order on the parties' cross-motions for summary judgment still followed through on her prior comments in a way that kept any incriminating evidence against the State hidden from view. [ER037-068] After disregarding most of the evidence filed in connection with Pauma's summary judgment motion by explaining "[t]he background context for the 1999 Compact is set out in the Ninth Circuit's opinion in *Colusa II*," Judge Bencivengo revisited her prior trustee ruling in order to dismiss any claims alleging a breach of fiduciary duty by the State. [ER041, 058-061] Notwithstanding her original holding that the express terms of the 1999 Compact created a trust relationship despite *Jicarilla Apache*, Judge Bencivengo now conversely found *Jicarilla Apache* to be "instructive" and extended its rationale so that a government can assert "its own sovereign interests over competing tribal interests" even when it styles its relationship as a trust. [ER059] As for the only new evidence on

the trustee issue under consideration, "exhibits 1-2, 8-10, 14-16, 26-29, 34-38, 40, 43 and 45" in Pauma's submission did not sway Judge Bencivengo from adhering to her unspecified "standard… for the imposition of fiduciary liability on the State." [ER06-061] With any claims implicating a breach of fiduciary duty out of the way, Judge Bencivengo then held multiple times that Pauma was "entitled to complete rescission of the 2004 Amendment" on the basis of a single misrepresentation claim within the seventeen-count First Amended Complaint. [ER067] The issue of the restitution that inherently flows from such a remedy was saved for another day, as Judge Bencivengo first ordered the parties to partake in a settlement conference before a hearing on the form of the restitution claim could occur. [ER068]

That restitution hearing that took place on May 29, 2013 focused less on the specifics of the remedy than on discrediting the State's sovereign immunity defense. The first waiver discussed at the hearing is the one set forth in Section 9.4(a) of the 1999 Compact, which provides that both Pauma and the State expressly consent to suit in federal court and "waive any immunity therefrom that they may have provided that":

> (2) Neither 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)[.]

[SER243] In discussing this language, Judge Bencivengo stated that she did not believe the return of property was "money damages in the sense that [its] outside of the enforcement of the compact." [ER305TR] Rather, the equitable remedy could be a

form of specific performance and "it would be rather one-sided" to interpret the bi-lateral "payment of money to one or another of the parties" clause in the waiver such that it empowered the State to acquire past due funds unreasonably withheld while baring Pauma from doing the same for funds unreasonably paid. [ER310TR]

From this contract waiver, Judge Bencivengo then turned her attention to the waiver in Section 98005 of the Government Code that provides that:

> the State of California also submits to the jurisdiction of the courts of the United States in any action brought against the state by any federally recognized California Indian tribe asserting any cause of action arising from the state's refusal to enter into negotiations with that tribe for the purpose of entering into a different Tribal-State compact pursuant to IGRA or to conduct those negotiations in good faith, the state's refusal to enter into negotiations concerning the amendment of a Tribal-State compact to which the state is a party, or to negotiate in good faith concerning that amendment, or the state's violation of the terms of any Tribal-State compact to which the state is or may become a party.

Cal. Gov't Code § 98005. Latching on to the final clause of this provision covering the State's violation of the terms of any compact, Judge Bencivengo explained:

> That's exactly what happened here. The State did not properly determine the number of licenses available. They were entitled to licenses under the [1999] Compact. There was licenses available. They should have gotten them under the terms of that compact. It was a violation, and the money should be returned.

[ER305TR]

Finally, Judge Bencivengo also raised the possibility that the State waived its sovereign immunity by actively litigating the case since the defense "isn't even in your

answer." [ER306TR] This remark sparked the ensuing exchange in which the State explained both *where* it affirmatively raised the defense and *when* it did so:

> Ms. Laird: But there was a subsequent First Amend[ed] Complaint, and the State filed an answer to that. And in there, we did spell out the sovereign immunity defense. But –
> The Court: Do you have a docket number for that? Because I didn't find it. I will look for it, but…
> Ms. Laird: It was late in the case. I'm going to say towards the end of the 2010, or, no, the end of 2011.

[ER314TR] As mentioned earlier, the actual filing date of the second answer is August 3, 2012 – or one day shy of thirty-five months from the commencement of the law-suit. [ER794]

The restitution hearing did not conclude before counsel for Pauma implored Judge Bencivengo to release one final order containing a certification under Federal Rule of Civil Procedure 54(b) rather than create another immediately appealable fractional or-der that addressed sovereign immunity separate from restitution. [ER334TR-335TR] Although stating that she "[did not] see any point to doing this piecemeal," Judge Bencivengo nevertheless released a standalone order denying the State's sovereign immunity defense six week later on June 11, 2013. [ER071-073, 335TR]. Of the three waivers discussed at the restitution hearing, the June 11th order expressly adopts the one within Section 9.4(a) of the 1999 Compact by finding that the State contractually waived any immunity from specific remedies like the return of property. [ER072] The language of the statutory waiver in Section 98005 of the Government Code also crept into the order, with Judge Bencivengo explaining that "the State violated the terms of

the 1999 Compact when… it misrepresented the Pool to be exhausted of licenses and refused to issue 550 licenses to Pauma on that basis." [ER072]

The final order in the summary judgment triumvirate came out six months later on December 2, 2013 – right before the three year anniversary of Judge Burns ordering Pauma to file its first summary judgment motion – and directed the State to return the $36,235,147.01 in excess revenue sharing that Pauma paid under the 2004 Amendment within 180 days of entry of judgment. [ER074-075] With the repayment obligation tied to the termination of the proceedings, Judge Bencivengo then attempted to make the order immediately appealable by directing the clerk of the court to enter judgment and simply close the case despite the abundance of unheard claims. [ER074] This atypical action produced instant questions regarding the status of the case, a conference call in which counsel for Pauma explained that it still wanted to pursue its bad faith claims like the plaintiff tribe in *Rincon*, and a subsequent court order vacating the judgment as "not final as to all claims that remain in this action" and setting a hearing date of February 6, 2014 for the desired motion. [ER078-079] This fourth and final round of summary judgment briefing that began with Pauma recounting all the evidence from its prior motion ended with Judge Bencivengo taking the hearing off calendar, denying the motion on three separate technical grounds instead of addressing the merits, and once again entering judgment and closing the case. [ER080-090]

///

///

STANDARD OF REVIEW

The Ninth Circuit reviews summary judgment *de novo*. *Gomez v. Campbell-Ewald Co.,* 768 F.3d 871, 874 (9th Cir. 2014). The filing of cross-motions for summary judgment is an acknowledgement by both parties that there are no uncontested issues of material fact (*see Fair Hous. Council v. Riverside Two,* 249 F.3d 1132, 1136 (9th Cir. 2001)), but this joint perception does not obviate the traditional duty of a court to determine whether there are any genuine issues of material fact, when viewing the evidence in the light most favorable to the non-movant, and whether the district court correctly applied the substantive law. *See Curley v. City of N. Las Vegas,* 772 F.3d 629, 632 (9th Cir. 2014). In situations involving cross-motions for summary judgment, performing the factual inquiry requires the court to "consider each party's evidence, regardless under which motion the evidence is offered." *Las Vegas Sands, LLC v. Nehme,* 632 F.3d 526, 532 (9th Cir. 2011) (citing *Fair Hous. Council,* 249 F.3d at 1136). Despite this, the court "rel[ies] on the nonmoving party to identify with reasonable particularity the evidence that precludes summary judgment" and will not "scour the record in search of a genuine issue of triable fact." *Keenan v. Allan,* 91 F.3d 1275, 1279 (9th Cir. 1996). After undertaking this review, the court may affirm a grant of summary judgment on any ground supported by the record, even one not relied upon or expressly rejected by the district court. *Curley,* 772 F.3d at 632; *Fleischer Studios, Inc. v. A.V.E.L.A., Inc.,* 654 F.3d 958, 964 n.3 (9th Cir. 2011).

The global *de novo* standard of review also applies to an assortment of subordinate rulings in the case, such as those regarding whether the State negotiated in good faith under IGRA (*see Rincon II,* 602 F.3d at 1026); the denial of Eleventh Amendment immunity (*see Ass'n des Eleveurs de Canards et D'oies du Quebec v. Harris,* 729 F.3d 937, 943 (9th Cir. 2013)); the meaning of contract language (*see Asarco, LLC v. Union Pac. R.R. Co.,* 765 F.3d 999, 1008 (9th Cir. 2014)); and the interpretation of a federal statute (*see Tourgeman v. Collins Fin. Servs.,* 755 F.3d 1109, 1119 (9th Cir. 2014)). While the decision to award an equitable remedy is generally reviewed for an abuse of discretion (*see FTC v. Grant Connect, LLC,* 763 F.3d 1094, 1101 (9th Cir. 2014)), the tests for contract remedies like rescission and reformation are seen as claims and conversely reviewed *de novo. Skinner v. Northrop Grumman Ret. Plan B,* 673 F.3d 1162 (9th Cir. 2012).

As for the applicable body of law for considering those remedies, "[g]eneral principles of federal contract law govern the Compacts, which were entered pursuant to IGRA." *Colusa II,* 618 F.3d at 1073. The foremost repository of these general principles of federal contract law is the Restatement (Second) of Contracts. *First Interstate Bank v. SBA,* 868 F.2d 340, 343 (9th Cir. 1989); *see Island Ins. Co. v. Hawaiian Foliage & Landscape, Inc.,* 288 F.3d 1161, 1164 n.2 (9th Cir. 2002) ("We will look to the Restatement (Second) of Contracts as a primary source for the most recent statement of these general principles."). Under the Restatement, the test for either rescinding or reforming a contract on the basis of a misrepresentation is whether a "party's manifestation of assent [was] induced by either a fraudulent or a material misrepresentation by

the other party upon which the recipient [was] justified in relying." *Compare* Restatement (Second) of Contracts § 164 (1981) (setting forth the test for rescission) *with Skinner,* 673 F.3d at 1166-67 (citing Restatement (Second) of Contracts § 166 and setting forth the test for reformation). The inclusion of the materiality element in both of these either/or tests occurred from a general standpoint because "fraud in the equitable sense differs from fraud in the legal sense [in that] it does not require proof of scienter" (*Farris v. County of Camden,* 61 F.Supp.2d 307, 339-40 (D.N.J. 1999)), and specifically in fiduciary cases on account of the fact that "fraud comprises any act, omission or concealment involving a breach of legal or equitable duty, trust, or confidence… even though the conduct is not otherwise fraudulent." *In re Harmon,* 250 F.3d 1240, 1249 (9th Cir. 2001). By permitting relief on the basis of a material misrepresentation, the federal standard in the Restatement set itself apart from its anomalous State counterpart that looks for negligence instead. *See* Cal. Civil Code § 1572.

SUMMARY OF THE ARGUMENT

The course of conduct in this case involves the State misrepresenting the gateway term of one contract so it could resell those rights at 2,640% of the original price under a second one. A complex plan has in turn produced the rather simple defense that the State's misrepresentation was true up until the point in time that a court says otherwise. The one egregious flaw with arguing that the federal courts opinions uncovering the misrepresentation operate only prospectively is that it conflicts with both the fundamental legal principle that courts find the law rather than create it, and the

admission the State made in the *Colusa* lawsuit that the license pool provision has a fixed rather than variable meaning. As for the State's attempt to retain the fruits of its *ultra vires* acts that it unlawfully funneled into the general fund, the Eleventh Amendment provides no protection in such circumstances without even accounting for the three applicable waivers of immunity that arose by contract, statute, and the State's preconceived litigation strategy to withhold the defense so it could pursue a massive damages remedy.

The district court went to astonishing lengths to ensure the only available remedies were complete rescission of the 2004 Amendment and restitution of the heightened revenue sharing payments made thereunder, and not any others to which Pauma had an entitlement. The first of these entitlements would apply in addition to the existing remedies and is a finding of bad faith against the State under Section 2710(d)(7)(B)(iii) of IGRA due to at least ten separate objectively unreasonable acts in the process for negotiating the 2004 Amendment – from the decision to unilaterally interpret the "very, very ambiguous" gateway license pool provision of the 1999 Compact without judicial assistance to the imposition of excessive and overwhelmingly-general-fund revenue sharing that amounts to 2,460% of the fees under the 1999 Compact and fits squarely within the illegal taxation guidelines this circuit devised in *Rincon II*. The second entitlement would apply in the event that the IGRA remedial procedures are unavailable and is reformation, the test for which is coextensive with that for rescission in equity cases involving misrepresentations by fiduciaries.

ARGUMENT ON APPEAL

I. THE LAW OVER THIS LAST MILLENNIUM HAS TREATED CONTRACT PROVISIONS AS POSSESSING FIXED MEANINGS, JUST AS THE STATE VIEWED THE LICENSE POOL FORMULA IN THE *COLUSA* LITIGATION

A. DECLARING LEGAL OR FACTUAL MATTERS PROSPECTIVELY MAKES COURTS CREATORS RATHER THAN FINDERS AND IS THUS INCOMPATIBLE WITH THE JUDICIAL ROLE

The primary argument advanced by the State in an attempt to block the rescission of the 2004 Amendment is that a misrepresentation is true up until the point in time that a court says otherwise. The opening brief seeks to eliminate any grounds for discrediting this stance by shifting the sands so the license pool provision is an invincible nullity rather than a fact or a law; on one hand "it is not a law [but] a contractual provision" while on the other it is a number subject to a "legal interpretation" and thus "not a fact in the same sense as a determination of the presence or absence of pollution in groundwater, or the number of acres actually constituting a plot of land." The failure to classify the license pool provision as one or the other has little effect under the long-standing retroactivity doctrines that view interpretations of legal and factual matters in much the same way.

From a legal perspective, a fundamental rule of retroactive operation has governed judicial decisions for near a thousand years. *See Harper v. Va. Dep't of Taxation,* 509 U.S. 86, 94 (1993) (quoting *Kuhn v. Fairmont Coal Co.,* 215 U.S. 349, 372 (1910) (Holmes, J., dissenting)). One of the foremost progenitors of this view was Sir William Blackstone, who authored a series of legal commentaries in the eighteenth and nineteenth centur-

ies explaining that judges do not create the law, but simply discover what was already there. *See, e.g., Cash v. Califano,* 621 F.2d 626, 628 (4th Cir. 1980) ("For it to be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was bad law, but that it was not the law." (citing 1 Blackstone, Commentaries on the Law of England 70 (1765))). The task of finding the meaning inherent in a legal document has come to be known as the declaratory theory of the law and is a staple undertaking in equity suits around the Nation that deal with the interpretation of the Constitution, statutes, or other fixed writings like contracts. *See James B. Beam Distilling Co. v. Georgia,* 501 U.S. 529, 535-36 (1991).

This elucidative remedy was also the principal request in the *Colusa* lawsuit (*see Colusa II*, 618 F.3d at 1072 ("[I]n its complaint, Colusa sought a declaration that the license pool consisted of 'more than 62,000 Gaming Device licenses[.]' ")), though the State would nevertheless have this panel resolve the retroactivity issue by tallying the present and past tenses of the word "are" in the sentences of the opinion describing the total number of licenses that "were" and "are" available under the 1999 Compacts. Yet, the test recognized by the Supreme Court of the United States for determining whether a decision bears the anomalous markings of prospectivity turns not on isolated semantics but identifying an express indication that the court "reserve[d] the question whether its holding should be applied to the parties before it." *Harper,* 509 U.S. at 97-98. A reservation of this sort was not in the cards in *Colusa II*, though, as the opinion first holds that "40,201 licenses were authorized for distribution state-

wide through the license draw process" and then affirms the district court's decision to force the State to make those licenses available to the plaintiff tribes within forty-five days of entry of judgment. *See Colusa II,* 618 F.3d at 1082-85. By resolving the declaratory claim and then extending relief to the plaintiff tribes, the Ninth Circuit issued a retroactive opinion on the size of the license pool that consequently "must be given retroactive effect by all courts adjudicating federal law." *Harper,* 509 U.S. at 96.

The object in declaring the state of the law echoes that for resolving factual issues like the interpretation of a contractual provision. Harkening back to the "find it; don't create it" credo mentioned above, a central tenet of contract law is that "[c]ourts do not make contracts, but interpret and construe them whenever any question arises as to what are their terms and conditions." *Ky. Vermillion Mining & Concentrating Co. v. Norwich Union Fire Ins. Soc.,* 146 F. 695, 699 (9th Cir. 1906). This focus on discerning the essence of the language means "the fundamental goal of contract interpretation is to give effect to the mutual intent of the parties as it existed at the time of contracting." *U.S. Cellular Inv. Co. of L.A., v. GTE Mobilnet, Inc.,* 281 F.3d 929, 934 (9th Cir. 2001). And yet, this goal remarkably appears at the outset of the opinion the State now brands as spontaneously creating new contract obligations some eleven years into the course of performance, as *Colusa II* states:

> The rules governing the role of the court in interpreting a written instrument are well established. The interpretation of a contract is a judicial function. … In engaging in this function, the trial court 'give[s] effect to the mutual intention of the parties as it existed' at the time the contract was executed.

Colusa II, 618 F.3d at 1073. Thus, the form of the claim (i.e., declaratory relief) and the purpose behind it (i.e., finding the mutual intent of the parties at the time of contracting) simply shut the door on any argument that the holding on the size of the license pool operates only prospectively.

B. COMPLEX, CONVOLUTED, AND EVEN AMBIGUOUS CONTRACT PROVISIONS STILL HAVE FIXED MEANINGS FROM THE OUTSET OF THE AGREEMENTS

The crux of the State's argument is that these general retroactivity principles only apply to the sort of precise contract language that would never come before a court, and convoluted or ambiguous contract provisions that routinely require judicial interpretation still lack any fixed meanings until the point in time that the court resolves the uncertainty. A myriad of federal court opinions have addressed this topic, with the most cogent explanation arguably coming from the United States Court of Appeals for the Eleventh Circuit in *Downs v. U.S. Army Corps of Eng'rs,* 333 F. App'x 403 (11th Cir. 2009). In *Downs,* the federal government through the auspices of the Army Corps of Engineers carried out a re-nourishment project for the beaches in Dade County, Florida to combat the erosion of the coastline, dredging fill material from outlying areas and then depositing roughly nine vertical feet of it along the shore. *Id.* at 405. The agreement between Dade County and the Corps defined the suitable fill material as "non-rocky, sandy material similar to that of the existing beach." *Id.* Echoing the dubious conduct in this case, the Corps and one of its agents decided to unilaterally interpret the contract provision during the course of performance such that five

percent of the total fill volume could consist of rocks ranging in size from two to ten inches in diameter. *Id.* After a swimmer broke his neck on one of these rocks that was purportedly the size of a basketball and subsequently brought suit against the Corps under the Federal Tort Claims Act, the district court held that the fill provision was ambiguous to the point that it did not create any fixed or readily ascertainable standard since it would have been impossible for the Corps to devise a fill material that was nothing but sand and rocks less than four inches in diameter. *Id.* at 412.

The Eleventh Circuit took umbrage with the district court's conclusion that "ambiguity in a contract equates to government discretion to decide whether or not to adhere to the term" and explained that ambiguity does not translate to the absence of a duty:

> Ambiguous contract terms do not obviate contract duties. By the terms of the contract, the Corps had a duty to ensure that all fill used for the project was "non-rocky, sandy material similar to that of the existing beach." The definition of "non-rocky, sandy material similar to that of the existing beach," as an ambiguous term, is subject to the court's review of parol evidence. The duty to ensure that the beach fill was of this sort, however, is clear. A contractual duty does not cease to exist because the terms of that duty are ambiguous and require elucidation by parol evidence.

Id. at 413. After remand, a second look at the contract language resulted in a judicial interpretation that the fill material had to be "almost exclusively… sand… with only a small percentage of interspersed gravel no larger than one or two inches in diameter." *Downs v. United States,* 2010 U.S. Dist. LEXIS 83196, *10 (S.D. Fla. 2010). As for the impact of this "new" interpretation on actions that took place decades earlier, the

district court explained that the Corps had "no rightful option but to adhere to [that] directive" and would be found liable if the fill material contained rocks "as large as coconuts, baseballs, or basketballs… as Downs contends." *Id.* at *19.

Other circuits, including this one, have similarly interpreted complicated if not ambiguous contract provisions to create liability for antecedent events. In *United States v. 300 Units of Rentable Housing,* 668 F.3d 1119 (9th Cir. 2012), the Ninth Circuit dealt with the question of whether the federal government had the right to continue leasing housing constructed on Eielson Air Force Base for an additional one year term where the option to renew did not precisely identify the amount of rent but rather determined it according to an opaque formula:

> The renegotiated rent each year will not exceed ten (10%) percent of the fair market value of the improvements erected on the land as determined by a duly qualified appraiser selected with the approval of the Lessor and Lessee.

Id. at 1121-22. Finding that the "contract provides a practicable method for establishing the amount of rent in the event the parties cannot themselves agree," the Ninth Circuit concluded that the option to renew was enforceable and directed the plaintiff to the Court of Federal Claims should it desire to recoup any past due rent payments from the federal government under the agreement. *Id.* at 1125.

Liability for prior acts arises from not only non-compliance with complicated contract formulas but also from incorrectly construing even more straightforward terms that have nevertheless created significant dissension amongst the involved parties. For

instance, the meaning of the term "mental illness" in a health insurance benefit plan was at issue in *Phillips v. Lincoln Nat'l Life Ins. Co.,* 978 F.2d 302 (7th Cir. 1993). With a major medical limitations clause in the plan seriously curtailing mental health benefits, the parties construed the term "mental illness" in light of their own self-interests, with the guardian of the would-be beneficiary claiming that coverage should turn on the *cause* of the condition and the plan administrator conversely emphasizing the *manifestations* of the disease. *Id.* at 308. Noting the competing definitions of the term have "divided not only the litigants but also federal and state courts," the Seventh Circuit invoked the *contra proferentum* doctrine that "is followed in all fifty states and the District of Columbia, and with good reason" to construe the term against the plan administrator. *Id.* at 310-12. The first of multiple reasons articulated by the Seventh Circuit for applying the doctrine – one that could apply equally well to the case at hand – was that "an insurer's practice of forcing the insured to guess and hope regarding the scope of coverage requires that any doubts be resolved in favor of the party who has been placed in such a predicament." *Id.* at 312. This discussion about unequal footing and the likelihood for abuse arose again in the conclusion to the opinion that first admonished that "[i]nsurers should not be permitted to exploit policy term ambiguities, which they could have avoided, to deny coverage to an unsuspecting insured" before remanding the case to the district court for a determination of the amount owed by the plan administrator for forsaking its prior obligations under the terms of the plan. *Id.* at 314. Whether taken together or read individually, the point these three opinions

make is that an ambiguous yet enforceable contract term has one definitive meaning from the outset of the agreement, no matter the complexity of the language or the number of tentative interpretations.

C. THE STATE ADMITTED THE LICENSE POOL HAS A FIXED MEANING IN THE *COLUSA* LAWSUIT AND SHOULD BE ESTOPPED FROM ARGUING OTHERWISE NOW

This realization that the law treats contract language as having one fixed meaning comes as no surprise to the State, though, which admitted as much about the license pool during the *Colusa* litigation. The staunch perception held by the State throughout the district court proceeding in *Colusa* was that the license pool set forth an "arithmetic formula" that yields a "mathematical value" as an output. [Mot. to Supplement R., SER590-591] The phrasing of this explanation mirrors that used by Norris in his December 3, 1999 letter to the LAO, wherein he described the total number of licenses as being the "product of a simple mathematical calculation" in the 1999 Compacts. [SER190] After Judge Damrell released his dispositive order in *Colusa I*, this "arithmetic formula" language received clarification from the State's motion for stay, which explained the license pool created a fixed number of licenses:

> One thing the evidence shows all parties *did* agree upon was that the number was a *fixed* number based on the facts as of September 1, 1999. (Compact § 4.3.1(a).) … Thus, because the parties did have a common understanding that the number of available Gaming Device licenses would be fixed, the Court is without authority to adopt a number that is inconsistent with that common understanding.

[Mot. to Supplement R., SER596]

This admission about the unvarying nature of the license pool provision then led to the State putting forward the same argument that it is advancing now – namely, that the federal court's rejection of the CGCC's formulation means that the license pool provision lacked any meaning during the formative years of the 1999 Compacts and thus amounts to a missing term:

> Moreover, the Court failed to make predicate findings necessary to support the imposition of what the Court effectively deemed to be a missing term in the Compacts – the numerical size of the statewide license pool.

[Mot. to Supplement R., SER595-596] Seeing the State pull an eleventh-hour about-face triggered an impassioned response from Judge Damrell, who rejected the argument on the basis it conflicted with the position the State had taken in a "multitude of motions, briefings, and supplemental briefings submitted to the court" over the prior four-plus years that the license pool provision was simply an ambiguous term within an otherwise enforceable contract. *See Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. California,* 2009 U.S. Dist. LEXIS 89371, *10-*12 (E.D. Cal. 2009).

The failure to appeal this adverse ruling did not stop the State from raising it yet again in the only other 1999 Compact suit filed in the aftermath of the *Colusa I* decision. In moving for summary judgment on the claims brought by the San Pasqual Band of Mission Indians that the State breached the 1999 Compact by constraining the size of the license pool, the State reiterated that its duty to distribute licenses only arose with the release of the decisions in the *Colusa* litigation:

> Simply put, the Compact's ambiguity regarding the size of the license pool precluded a judicial determination that the State breached any duty to the tribes that sought additional licenses because of the existence of that ambiguity made impossible the creation of an obligation by State Defendants to tribes with a 1999 Compact. The obligation could only arise after the ambiguity was judicially resolved. Thus, the *Colusa II* decision did not and cannot create a contract obligation retroactively.

[Mot. to Supplement R., SER599] This argument met the same fate the second time around as it did the first, with the superior court finding that the State failed to meet its "burden of showing the *Colusa II* interpretation of gaming device licenses may not be applied retroactively." [Mot. to Supplement R., SER606-608] Whether described as pertaining to a missing term or retroactivity, the argument the State is now pursuing on appeal is undeniably at odds with both its original position and the holdings of multiple judges who have previously addressed the issue, considerations that warrant estopping the State from pursuing this argument any further. *See In re Palmer,* 207 F.3d 566, 568 (9th Cir. 2000) (detailing the elements of collateral estoppel).

D. THE MISREPRESENTATION CONCERNED THE GATEWAY PROVISION OF THE 1999 COMPACT AND CAUSED PAUMA TO AMEND SOLELY TO OBTAIN PREEXISTING RIGHTS

The final argument offered by the State on the rescission front is that the CGCC's actions in constraining the license pool were neither material to nor an inducing factor for the execution of the 2004 Amendment. The elements of the misrepresentation test all interrelate, with the materiality standard looking in part at whether the statement "would be likely to induce a reasonable person to manifest assent" (*see* Restatement (Second) of Contracts § 162(2) (1981)) and the commentary to the inducement ele-

ment explaining that "the materiality of the misrepresentation is a particularly significant factor in this determination." *See* Restatement (Second) of Contracts § 167 cmt. b. Thus, proving materiality suffices to create a presumption that the party relied on the misrepresentation when manifesting assent. *See* Restatement (Second) of Contracts § 167 cmt. b; 1 E. Allen Farnsworth, *Farnsworth on Contracts* § 4.13 (3d ed. 2004); 27 Richard A. Lord, *Williston on Contracts* § 69.32 (4th ed. 2003) ("*Williston*").

The test for materiality incorporates one objective and one subjective component that require showing either that the "misrepresentation… would be likely to induce a reasonable person to manifest his assent" or "the maker knows that it would be likely to induce the recipient to do so." Restatement (Second) of Contracts § 162(2); *see Archdiocese of Milwaukee v. Appeal of Doe,* 743 F.3d 1101, 1107 (7th Cir. 2014). Many authorities on the subject equate "likelihood" with a "natural tendency to influence the decision of a reasonable person," at least for the first prong of the test. 26 *Williston* § 69:12. When gauging materiality, a court should analyze this likelihood of inducement from the viewpoint of the maker of the misrepresentation. Restatement (Second) of Contracts § 162 cmt. c.

The key consideration in the materiality issue is the centrality of the gaming device licenses to the compacting scheme. In *Mobil Oil Exploration & Producing Se. v. United States,* 505 U.S. 604 (2000), the Supreme Court considered an analogous situation in which the federal government executed market-opening contracts with a group of oil companies that conferred the right to conduct deep-water drilling off the North

Carolina coast in exchange for bonus payments of $156 million and annual rental fees. *Id.* at 609. Changing sentiments about the desirability of the endeavor, however, led the federal government to tighten the pertinent licensing requirements set forth within the terms of the agreement midway into the course of performance. *Id.* Lamenting this action, Justice Breyer rhetorically inquired "if the companies did not at least buy a promise that the Government would not deviate significantly from those procedures and standards, then what did they buy?" *Id.* at 621. After all:

> The incorporated procedures and standards amounted to a gateway of the companies' enjoyment of all other rights. To significantly narrow the gateway violated material conditions in the contracts. The Breach was 'substantia[l],' depriving the companies of the benefit of their bargain.

Id. In the same vein as these procedures, the entitlements and licenses authorized by Section 4 of the 1999 Compacts are the gateway rights that actually enable the signatory tribes to carry out the main purpose of the agreements. If restricting the gateway provision of a contract amounts to a material breach, then reselling these rights in the wake of the constraint invariably constitutes a material inducement for the subsequent agreement when one views the scenario from the perspective of the misrepresenting party.

The true acknowledgement of materiality comes not from the Supreme Court in *Mobil Oil*, but from the State admitting in the *San Pasqual* suit that the deprivation of four-hundred licenses – or at least one-hundred less than the number implicated in

the present matter – would have a material effect upon the rights and future actions of an affected tribe:

> The *Colusa* court's decision, however, does not make any finding regarding whether the alleged breach in that case was 'material' or 'simple.' It only states that there was no breach of the Compact. … Indeed, it would be difficult to argue, in the plain meaning of the word 'material,' that the Commission's failure to issue the correct number of licenses would somehow be an insignificant or immaterial breach where, as here, the Tribe asserts that the consequences of the failure amounts to over $200 million in harm to it.

[Mot. to Supplement R., SER611-612]

The sheer magnitude of this materiality should sufficiently resolve any questions about inducement. For the sake of completeness, though, the inducement factor does not require "but for," "sole," or even "predominant" causation, but simply inquires whether the misrepresentation "substantially contributed to [the party's] decision to make the contract." *Archdiocese of Milwaukee,* 743 F.3d at 1106-07 (citing Restatement (Second) of Contracts § 167). Rather than being just a contributive factor, all the principals involved in the Caesars project on behalf of Pauma and Park Place uniformly testified in a prior lawsuit that took place at a point in time when the CGCC's license pool interpretation was a non-issue that the Tribe entered into the 2004 Amendment solely to obtain the license rights that should have been available under the existing agreement – including Chairman Cristobal Devers [SER400, 489], Vice Chairwoman Patricia Dixon [SER372-373, 391-393, 492, 494-495], the progenitor of the idea for the Caesars project Randall Majel [SER483-484, 497-498], the attorney for Pauma

Larry Stidham [SER357-360], the point person for Park Place Michael Soll [SER375-376], the attorney for Park Place Kent Richey [SER365-367], and trial counsel for both parties [SER476-480].

The lone evidentiary bulwark put forward by the State to defend against this onslaught of testimony and associated evidence is a declaration from the State's negotiator concerning what someone possibly connected with Pauma might have said *after* he already lured the Tribe to the negotiating table. Of course, this self-serving declaration seeks to aid the former principal of an agent who candidly stated that his goal was to force tribes into renegotiations so they could pay more money, relayed hearsay that purportedly arose seven years earlier, failed to produce any corroborating evidence for his testimony, and flatly refused to partake in the discovery process. [ER458-462; SER416-421]; *see Dubois v. Ass'n of Apartment Owners,* 453 F.3d 1175, 1180 (9th Cir. 2006) (explaining an uncorroborated and self-serving declaration does not create a genuine issue of material fact). Yet, the ability of this singular piece of evidence to somehow create a dispute about the antecedent reasons behind the decision by Pauma to enter into the negotiations for the 2004 Amendment would still not prevent this panel from affirming the rescission award on account of any one of the other sixteen claims in the First Amended Complaint, including the mutual mistake claim that Judge Burns believed the Tribe had proven as of April of 2010. *See* Restatement (Second) of Contracts § 152(1) (detailing the test to rescind a contract due to a mutual mistake).

II. AN ASSERTION OF SOVEREIGN IMMUNITY THAT ADMITTEDLY AROSE "LATE IN THE CASE" CANNOT OVERCOME THREE WAIVERS AND TWO ADDITIONAL GROUNDS THAT RENDER THE DEFENSE INAPPLICABLE

The argument against the specific performance award in the State's opening brief applies a form of "a equals b equals c" transitive logic to conclude that the bar against monetary damages in *Edelman v. Jordan,* 415 U.S. 651 (1974) blocks the repayment of the heightened revenue sharing payments Pauma made under the 2004 Amendment because specific performance is tantamount to restitution which in turn is tantamount to damages. This insistence that the repayment of *any* monies necessarily violates the Eleventh Amendment was the sole argument raised by the State "late in the case" after realizing that the odds of having to return Pauma's money were far more likely than those for disgorging all the revenue the Tribe generated while operating under the 2004 Amendment. Yet, this flawed logical argument completely ignores the five different bases that support the district court's decision by either waiving sovereign immunity or holding that the defense does not apply in the first place.

A. THE FIRST WAIVER AROSE BY CONTRACT AND APPEARS IN SECTION 9.4(A) OF THE 1999 COMPACT AND 2004 AMENDMENT

The primary way in which the State waived its sovereign immunity according to the district court was through Section 9.4(a) of the compact, which states in pertinent part that both parties consent to suit in federal court and "waive any immunity therefrom that they may have" provided that:

> (2) Neither 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)[.]

[SER243] The analysis of this language within the order granting specific performance relies on the discussion in the Supreme Court's opinion in *Bowen v. Massachusetts,* 487 U.S. 879, 894 (1988) about the fundamental differences between specific remedies, like the return of money or property, and compensatory damages that are meant to substitute for a loss. [ER072] This invocation of *Bowen* is nevertheless objectionable to the State because the case "did not implicate Eleventh Amendment concerns." The relevance of *Bowen* arises not from the configuration of the parties in the lawsuit (i.e., whether a state was suing the federal government or being sued by an Indian tribe), but from its interpretation of the meaning of the phrase "monetary damages."

The general rule of interpretation for any contract, including a tribal/State gaming compact, is that the terms "are to be given their ordinary meaning, and when terms of a contract are clear, the intent of the parties must be ascertained from the contract itself." *Idaho v. Shoshone-Bannock Tribes,* 456 F.3d 1095, 1099 (9th Cir. 2006). As indicated above, the "ordinary meaning" of the term "money damages" is a "sum of money used as compensatory relief" to substitute for a loss, unlike specific remedies that "give the plaintiff the very thing to which he was entitled." *Md. Dep't of Human Res. v. Dep't of Health & Human Servs.,* 763 F.2d 1441, 1446 (D.C. Cir. 1985) (Bork, J.) (citing D. Dobbs, *Handbook on the Law of Remedies* p. 135 (1973)); *see United States v. Minor,* 228 F.3d 352, 355 (4th Cir. 2000) ("In suing for the return of currency, Minor seeks resti-

tution of 'the very thing' to which he claims an entitlement, not damages in substitution for a loss.").

In the sovereign immunity context, this ordinary definition of "money damages" becomes universal when one reviews the federal court opinions interpreting the term in various statutory waivers. The aforementioned *Bowen* opinion relied on by the district court confronted the question in connection with the waiver in the Administrative Procedures Act ("APA") (*see* 5 U.S.C. § 702), and explained in much the same way as Judge Bork in *Maryland Department of Human Resources* that "[o]ur cases have long recognized the distinction between an action at law for damages… and an equitable action for specific relief – which may include an order providing for… 'the recovery of specific property or monies.' " *Bowen,* 487 U.S. at 893 (citing *Larson v. Domestic & Foreign Commerce Corp.,* 337 U.S. 682, 688 (1949)). The contention that "money damages" might be synonymous with all forms of "monetary relief" curried no favor with the Supreme Court, which pointed out there were obvious differences between the two terms and only "the most compelling reasons could justify a revision of a statutory text that is this unambiguous." *Id.* at 896.

This meaning of "money damages" in the APA mirrors that for "monetary damages" under the Fair Housing Act ("FHA"). The original enactment of the FHA permitted the Attorney General to file suit on behalf of an aggrieved party so long as it only sought "preventative relief" such as:

> an application for a permanent or temporary injunction, restraining order, or other order against the person or persons responsible for such pattern or practice or denial of rights, as he deems necessary to insure the full enjoyment of the rights granted by this subchapter.

United States v. Rent Am. Corp., 734 F.Supp. 474, 476 (S.D. Fla. 1990) (citing 42 U.S.C. § 3613 (West 1977)). A literal reading of this language permitted the Attorney General to recover "any items which are appropriately the subject of equitable restitution," but not monetary damages. *United States v. Long,* 537 F.2d 1151, 1153-55 (4th Cir. 1975). Purely textual interpretations of this sort from the federal circuits spurred an amendment to the FHA some fifteen years later augmenting the forms of available relief by allowing a court to "award such other relief as the court deems appropriate, including monetary damages to persons aggrieved." *Rent Am. Corp.,* 734 F.Supp. at 477-78 (citing 42 U.S.C. § 3614(d) (1989)). Supplementing the text of the FHA with this language produced another round of declaratory lawsuits, and at least one federal court opinion giving the term "monetary damages" a "common sense" definition that includes all the subtypes of legal damages such as "actual damages, damages for emotional distress, and punitive damages." *Rent Am. Corp.,* 734 F.Supp. at 481-82. Yet, reminiscent of *Bowen,* an attempt by the losing party to expand the scope of "monetary damages" to include pecuniary equitable remedies like restitution produced a terse refutation that "[t]he word damages has a commonly understood meaning: it generally connotes payment in money for a plaintiff's losses caused by a defendant's breach of

duty, and is something different from equitable restitution." *United States v. Balistreiri,* 981 F.2d 916, 928 (7th Cir. 1993).

The chorus of opinions interpreting "money damages" as omitting specific equitable remedies even includes the two circuit judges on this panel who helped construe analogous waivers in the Motor Carrier Act and the Internal Revenue Code. *See Zapara v. Comm'r of Internal Revenue,* 652 F.3d 1042, 1047 (9th Cir. 2011) (Schroeder, J.) (explaining that "damages" under 26 U.S.C. § 7433 does not include specific remedies); *Fulfillment Servs. Inc. v. UPS,* 528 F.3d 614, 621 (9th Cir. 2008) (Tallman, J.) (interpreting "damages" in 49 U.S.C. § 14704(a)(2) as not covering the disgorgement of monies). One other surprising addition to this chorus is the State itself, which admitted in the *San Pasqual* case that the plaintiff tribe in that suit was the *only* tribal litigant who has sought damages from the State for its actions in connection with the license pool:

> Of all the 1999 Compact tribes denied Licenses due to the Commission's interpretation of the Pool number, and of all the plaintiff tribes with federal lawsuits over the Pool number, *only* San Pasqual has sought damages.

[Mot. to Supplement R., SER615] With this admission evidencing complete unanimity about the difference between monetary damages and specific remedies, this panel should affirm the specific performance award that, at least from a payment perspective, is aimed at having "the same effect that performance due under a contract would have produced." *Lary v. USPS,* 472 F.3d 1363, 1369 (Fed. Cir. 2006).

///

B. THE SECOND WAIVER AROSE BY STATUTE AND APPEARS IN SECTION 98005 OF THE CALIFORNIA GOVERNMENT CODE

Prefacing Section 9.4(a) of the compact is a proviso that the waiver set forth therein only waives whatever immunity the parties "may have" and thus does not impinge upon standalone ones found elsewhere. [SER243] The lone portion of Proposition 5 that withstood the constitutional challenge in *HERE* during the lead up to the 1999 Compacts is the final sentence of the statute that contains the following functionally-separable consent to suit for claims concerning other compacts:

> Without limiting the foregoing, the State of California also submits to the jurisdiction of the courts of the United States in any action brought against the state by any federally recognized California Indian tribe asserting any cause of action arising from the state's refusal to enter into negotiation with that tribe for the purpose of entering into a different Tribal-State compact pursuant to IGRA or to conduct those negotiation in good faith, the state's refusal to enter into negotiations concerning the amendment of a Tribal-State Compact to which the state is a party, or to negotiate in good faith concerning that amendment, or the State's violation of the terms of any Tribal-State compact to which the state is or may become a party.

Cal. Gov't Code § 98005 (1998). In defining the scope of this waiver, the California Supreme Court explained that it covers any claims "arising" from "the negotiation, amendment, or performance of compacts." *HERE,* 21 Cal. 4th at 614. "Arising" is the key word in this sentence, as the basis for the remedy need not be a violation of the compact *per se*, but simply a claim originating, springing, or resulting from such a violation. *See White v. Lambert,* 370 F.3d 1002, 1011 (9th Cir. 2004) (defining "arise" in accordance with the Oxford English Dictionary as "[t]o spring, originate, or result

from"). The district court understood this distinction and made sure that the language of its order granting specific performance tracked Section 98005, first finding that the State "violated the terms of the 1999 Compact when… it misrepresented the Pool to be exhausted of licenses and refused to issue 550 licenses to Pauma on that basis" and then holding that the State had to return the excess revenue sharing payments arising from these misrepresentations through the specific performance award. [ER072]

The qualm for the State is that the court supposedly merged the theories of misrepresentation and breach in order to create this second justification for the specific remedy. Arguing that a misrepresentation concerning the gateway term of a contract is not a violation, however, runs directly counter to the position the State took in the *San Pasqual* suit when discussing whether withholding 400 licenses constituted a material breach:

> Indeed, it would be difficult to argue, in the plain meaning of the word 'material,' that the Commission's failure to issue the correct number of Licenses would somehow be an insignificant or immaterial breach where, as here, the Tribe asserts that the consequences of that failure amounts to over $200 million in harm to it.

[Mot. to Supplement R., SER611-612] Not to mention, the argument also conflicts with the standard test for a breach that is "a pure and simple question of contract interpretation which should not vary from state to state." *Klay v. Humana, Inc.,* 382 F.3d 1241, 1262 (11th Cir. 2004). While the State tries to create variance in this test equating breach with misrepresentation on account of any number of special considerations, the simple fact of the matter is that "[a] breach is a breach is a breach, whether

you are on the sunny shores of California or enjoying a sweet autumn breeze in New Jersey." *Id.* (defining "breach of contract" as a "violation of a contractual obligation by failing to perform one's own promise" (citing Black's Law Dictionary 200 (8th ed. 2004))).

C. THE THIRD WAIVER AROSE FROM THE STATE'S STRATEGIC DECISION TO REFRAIN FROM ASSERTING A SOVEREIGN IMMUNITY DEFENSE SO IT COULD TRANSFORM AN ADVERSE RESTITUTION AWARD INTO A WINDFALL OF DAMAGES

The express waivers within the compact and the government code have an implied counterpart when this panel considers that the State did not raise sovereign immunity until "late in the case" after realizing its strategy to turn an adverse restitution award into a bounty of damages was sure to fail. The precedent of this circuit treats Eleventh Amendment immunity as an affirmative defense that the state entity bears the burden of raising "early in the proceedings" before the "parties and the court have invested substantial resources in the case." *Hill v. Blind Indus. & Servs. of Md.,* 179 F.3d 754, 757-58 (9th Cir. 1999), *amended by* 201 F.3d 1186, 1886 (9th Cir. 2000). The initial discussion of the issue that took place at the restitution hearing on May 29, 2013 involved the following exchange between Judge Bencivengo and counsel for the State, in which opposing counsel conceded that it raised the sovereign immunity defense late in the case:

> Laird: But there was a subsequent First [Amended] Complaint, and the State filed an answer to that. And in there, we did spell out the sovereign immunity defense. But –

> Court: Do you have a docket number for that? Because I didn't find it. I will look for it, but …
> Laird: It was late in the case. I'm going to say toward the end of 2010, or, no, the end of 2011.

[ER314TR] The actual filing date for this second answer is August 3, 2012 [ER794], thirty five months after the filing of the original complaint on September 4, 2009 and years after Judge Burns issued his order on the preliminary injunction explaining a final decision adverse to the State would require restitution. [ER009]

Grasping on to the gravity of this admission, opposing counsel then backtracked and tried to pinpoint earlier junctures at which it may have mentioned the defense in response to one of Pauma's filings. [ER315TR] Understanding the history of the sovereign immunity defense in this case requires looking at the strategy the Office of the Governor devised in anticipation of the lawsuit, which is set forth in its June 22, 2009 meet and confer letter:

> Thus, assuming Pauma's suit for rescission could overcome the State's sovereign immunity, any financial restoration obligation would not rest solely upon the State, but could require the Band to disgorge all the benefits it has received from the ability to operate class III gaming under its compact.

[SER535] This attempted deterrent to suit conveyed that the State would litigate any future action in such a way that it would attempt to turn a request for restitution of the heightened revenue sharing fees under the 2004 Amendment into a final order disgorging all the revenue Pauma generated from the 1,050 or so machines it operated under that agreement. An invocation of sovereign immunity would necessarily frus-

trate this pursuit, so the State intentionally refrained from raising the defense for the first eighteen months of the case. Only after Judge Burns ordered Pauma to file a lone motion for summary judgment during the post-remand conference call did the State mention sovereign immunity, and even then it did so in connection with its original disgorgement plan. [SER545-546] This practice of not raising sovereign immunity until the "writing was on the wall" became a pattern following the transfer of the case to Judge Battaglia, with the State again saying nothing about the defense over the next nine months in two motions to dismiss and an answer before reversing course once the court granted Pauma the unilateral right to file a new summary judgment motion. [SER541-543, 548-549] Simply put, allowing the State to invoke sovereign immunity after intentionally withholding the defense until late in the case so it could pursue a massive damages remedy would absolutely "undermine[ ] the integrity of the judicial system." *In re Bliemeister,* 296 F.3d 858, 862 (9th Cir. 2002) (Tallman, J.).

D. THE ELEVENTH AMENDMENT DOES NOT EVEN APPLY IN THE FIRST PLACE BECAUSE THE STATE OBTAINED PAUMA'S MONEY THROUGH A SERIES OF *ULTRA VIRES* ACTS

The discussion about waivers presupposes that sovereign immunity exists in the first place, which is not the case when the State does something it cannot legally do to acquire money it cannot legally obtain. The rule in this circuit is that the "Eleventh Amendment does not bar a request for the return of the plaintiff's property if the complaint alleges that state officials acted either *ultra vires* or unconstitutionally." *Suever v. Connell,* 439 F.3d 1142, 1144 (9th Cir. 2006) (citing *Taylor v. Westly,* 402 F.3d 924,

932-35 (9th Cir. 2005)). One of the rationales underlying this rule is that "[c]laims requesting the return of individuals' property are less likely to offend a state's sovereign immunity than claims requesting the payment of government funds." *Id.* at 1147. The defining characteristic of the booked acts in the negotiations for the 2004 Amendment is *ultra vires*. At the outset of the process, the CGCC unilaterally interpreted the license pool provision despite the fact that its "role as Trustee" of the draw process did not confer the "concomitant authority to interpret the [1999] Compact." *Colusa I,* 629 FSupp.2d at 1108 n.15; *see Herzberger v. Standard Ins. Co.,* 205 F.3d 327, 330 (7th Cir. 2000) (Posner, J.) ("[T]he meaning of a contract is ordinarily decided by the court, rather than by a party to the contract, let alone the party that drafted it."). The admittedly "conservative" figure the CGCC selected then served as the basis for its principal the Office of the Governor reselling preexisting license rights to Pauma in exchange for a massive stream of General Fund revenue sharing that is "not [even] an authorized subject of negotiation" under IGRA. *See Rincon II,* 602 F.3d at 1034. Rather than being a mere abuse of power, this entire course of conduct occurs completely outside the bounds of lawful authority and renders sovereign immunity inapplicable.

E. THE ELEVENTH AMENDMENT ALSO SHOULD NOT APPLY BECAUSE THE REVENUE SHARING UNDER THE 2004 AMENDMENT WAS NEVER MEANT TO BE THE STATE'S MONEY

The diversion of these revenue sharing fees into the General Fund should not take away from a second basis that invalidates sovereign immunity. Questions about the applicability of the Eleventh Amendment turn not only on the nature of the conduct

by the State, but the true ownership of the monies in its possession. For instance, this circuit has held that funds maintained in a custodial trust for the benefit of property owners are not state funds and thus fall outside of the Eleventh Amendment. *See Suever,* 439 F.3d at 1146. All of the revenue sharing payments for 1,050 machines under the 2004 Amendment were meant to go into special, dedicated funds like those in the predicate agreement. Of the $7,750,000 annual revenue sharing obligation for 1,050 machines under the 2004 Amendment, $2,000,000 of that total went into the RSTF to support non-compact tribes while the remaining $5,750,000 was supposed to go into an SDF-like regulatory fund until the State assigned those monies to a third party for the purpose of securitizing transportation bonds. [SER437-438, §§ 4.3.2.2(a), 4.3.3(a-b)] Rather than do this, the State simply dumped all of the bond payments into the General Fund and later claimed it could not account for the monies because the fund is impossible to trace. [SER450, 452] Thus, one can make a compelling case that the intended situses for the revenue sharing payments under the 2004 Amendment are in the State's possession *but* outside of its ownership. Holding otherwise now simply because the bond payments ended up in the General Fund would do little else than reward the State for flouting federal law. Nevertheless, the invalidity of this and all four previously discussed exceptions to sovereign immunity would still not eliminate Pauma's right to use the specific performance award as a credit against future revenue sharing payments. *See Elephant Butte Irrigation Dist. of N.M. v. Dep't of Interior,* 160 F.3d

602, 611 (10th Cir. 1998) (explaining the loss of future revenues under a contract does not offend Eleventh Amendment immunity).

F. THE OFFSET ARGUMENT BELIES THE ACTUAL NUMBER OF LICENSES THAT SHOULD HAVE BEEN AVAILABLE AT THE DECEMBER 2003 LICENSE DRAW AND IS SIMPLY A REHASH OF THE PROSPECTIVITY ARGUMENT

Winding up on the losing end of summary judgment tempered the State's disgorgement plan so that now it is only trying to obtain damages in the amount of the net win generated by the handful of additional machines Pauma operated under the 2004 Amendment that it continues to insist were not available under the 1999 Compact. To explain, a graph of Pauma's annual post-amendment machine counts would look like a deflated parabola, starting at 1,050 devices and gradually rising to a peak of roughly 1,154 before dropping back down to the 1,050 baseline shortly before the Tribe filed suit in September of 2009. [ER633] Infusing the license pool for the December 19, 2003 draw with the 8,050 licenses recognized in *Colusa II* would have provided Pauma with these 94 additional licenses, the other 456 it requested, and a virtual guarantee of receiving its remaining 400 at an ensuing draw the following month. The monetary offset the State requests, in other words, actually comes from the revenues of preexisting rights under the 1999 Compact and not the illusory ones of the 2004 Amendment. Along with simply rehashing the prospectivity argument in yet another form, this disgorgement request has a second flaw in that it bears all the trappings of a damage award proscribed by Section 9.4(a) of the compact rather than a counter-

vailing equitable remedy. At this juncture, the focus should be on a rather straightforward equitable remedy and not on having this panel decide who really suffered the most damages: the State given the 94 "additional" machines the Tribe operated under the 2004 Amendment or Pauma in light of the lost revenues on the 950 licensed machines the State withheld under the 1999 Compact.

ARGUMENTS ON CROSS-APPEAL

III. BAD FAITH SATURATES THE STATE'S COURSE OF CONDUCT IN INDUCING THE 2004 AMENDMENT AND WARRANTS THE IGRA REMEDIAL PROCESS

Preparing a comprehensive list of the grounds for this cross-appeal would likely be impossible in light of the innumerable barriers the district court erected to prevent the consideration of any claims implicating remedies other than rescission and any evidence scratching the surface of a facially-sufficient misrepresentation. The crux of this cross-appeal will thus become detailing the additional remedies to which Pauma has an entitlement above and beyond those already granted. With rescission in hand, the principal remedy Pauma seeks is a finding that the State negotiated in objective bad faith for the 2004 Amendment and the triggering of the remedial procedures set forth in Section 2710(d)(7)(B) of IGRA for purposes of creating a successor to a compact that now only has five years remaining on its term. *See* 25 U.S.C. § 2710(d)(7)(B). What this panel will find in evaluating this argument is that the relatively low burden imposed by an objective standard of bad faith that is meant to expedite negotiations rather than embroil the parties in interminable litigation (*see Rincon II,* 602 F.3d at

1041) makes at least two of the State's actions during the negotiations for the 2004 Amendment indisputable examples of bad faith that in and of themselves trigger the IGRA remedial scheme.

A. THE BAD FAITH STANDARD UNDER IGRA LOOKS AT OBJECTIVELY UNREASONABLE BELIEFS OR CONDUCT

The search for good faith on the part of a state in gaming compact negotiations is an objective one. *See Rincon II,* 602 F.3d at 1041. Satisfying this standard requires patent reasonableness from a state, from the manner in which it conduct its deliberative process (*see Donovan v. Cunningham,* 716 F.2d 1455, 1467-68 (5th Cir. 1983) ("[T]his is not a search for subjective good faith – a pure heart and an empty head are not enough. … [Carrying the burden requires] showing that they arrived at their determination… by way of a prudent investigation in the circumstances then prevailing.")), to the ultimate decisions it made or actions it undertook. *See Rincon II,* 602 F.3d at 1041 ("[A] state's subjective belief in the legality of its requests is not sufficient to rebut the inference of bad faith created by objectively improper demands."); *Mashantucket Pequot Tribe v. Connecticut,* 913 F.3d 1024, 1033 (2d Cir. 1990) ("The statutory terms [of IGRA] are clear, and provide no exception for sincere but erroneous legal analyses.").

The backdrop against which the good faith analysis takes place is the "record of negotiations," a flexible term that derives meaning from the allegations raised in the suit. *See Rincon II,* 602 F.3d at 1041. For instance, an isolated complaint about the

sheer amount of a revenue sharing demand can involve nothing more than an analysis of the formal offers and counteroffers exchanged by the parties. *Id.* at 1041 n.25. However, more elaborate allegations of bad faith that go outside the four corners of an offer – such as where the parties are not starting from a clean slate and the bad faith may pertain to the manner in which those terms came about – enlarges the record of negotiations with additional "evidence in the possession of the State that bears on the reasonableness of its bargaining position." *Big Lagoon Rancheria v. California,* 2010 U.S. Dist. LEXIS 69144, *15 (N.D. Cal. 2010). Thus, gauging reasonableness in amendment negotiations that intertwine the past and present should involve looking at "[t]he previous relations of the parties, antecedent events explaining behavior at the bargaining table, and the course of negotiations." *NLRB v. Truitt Mfg. Co.,* 351 U.S. 149, 155 (1956) (Frankfurter, J., dissenting).

B. TWO INSTANCES OF *PER SE* BAD FAITH ARISE FROM THE STATE'S INTERPRETATION OF THE LICENSE POOL AND IMPOSITION OF ANNUAL GENERAL FUND REVENUE SHARING FEES IN EXCESS OF 10%

Uncovering two indisputable forms of objective bad faith on the part of the State requires simply quoting from the Ninth Circuit opinions dealing with the CGCC constraining the size of the license pool and its principal the Office of the Governor trying to tax a tribe in the aftermath. The analysis section of the opinion in *Colusa II* explains that the Ninth Circuit analyzed the meaning of the license pool provision with-

out the aid of the State's evidence because the formulation chosen by the CGCC was unreasonable and failed to track the language of the 1999 Compact:

> California continues to urge an application of the Compact that results in a license pool of 32,151 devices, but is not able to demonstrate a connection between its extrinsic evidence regarding original intention and that interpretation. Further, the language of the License Pool Provisions is not reasonably susceptible to an interpretation that would produce a license pool of 32,151 devices.

Colusa II, 618 F.3d at 1079.

Creating this unreasonable interpretation then empowered the Office of the Governor to perpetuate its own unreasonable conduct at the bargaining table. Although the opinion makes no mention of the suppression of the license pool, *Rincon II* addressed the legality of the State's offer in the wake of constraining the license pool to increase a tribe's device count from 1,600 to 2,500 in exchange for annual general fund revenue sharing payments of 10% of the tribe's net win for the year preceding amendment on its existing 1,600 machines and 15% of the net win generated by any new machines. *Rincon II,* 602 F.3d at 1025. The conclusion reached in *Rincon II* about the legality of these fees is that "[t]he State's demand for 10-15% of Rincon's net win, to be paid into the State's general fund, is simply an impermissible demand for the payment of a tax by a tribe." *Id.* at 1042 (citing 25 U.S.C. §§ 2710(d)(3)(B)(iii), 2710(d)(4)). No matter the counterargument to try and downplay the revenue sharing fees of the 2004 Amendment, Section 4.3.3(a) of that agreement explicitly states that the $5,750,000 general fund segment of the $7,750,000 annual payment to operate

1,050 machines "represents at least 13% of the Tribe's net win in 2003," the year before amendment. Thus, the constituent general fund payment alone fits squarely within the range of illegality under controlling circuit precedent.

C. OTHER INSTANCES OF OBJECTIVE BAD FAITH LITTER THE HISTORY OF THIS CASE

The wildly inaccurate license pool interpretation and the onerous general fund revenue sharing demands arising therefrom are simply the most obvious examples of bad faith in a course of conduct that is replete with them. The subsections below will briefly detail further actions by the State during the path towards renegotiations that are objectively unreasonable from a factual or legal perspective and thus provide further grounds for invoking the IGRA remedial procedures.

1. INTERPRETING THE LICENSE POOL PROVISION

The entire process began with the CGCC determining that it would interpret the license pool provision so it could enforce one of the two smaller formulations devised by State actors after the execution date for the 1999 Compacts. [SER283-284] The main problem with this is that contract law places the powers of interpretation with a court and not a representative of one of the parties to the agreement. *See Herzberger,* 205 F.3d at 330 ("[T]he meaning of a contract is ordinarily decided by the court, rather than by a party to the contract, let alone the party that drafted it."). Occupying a fiduciary position does not alter this basic tenet according to the Supreme Court, which explains that a trustee may only exercise these sorts of interpretive powers if

they are explicitly set forth in the contract. *See Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 111 (1989) (citing *Bogert* § 559 (2d ed. rev. 1980)). And yet the total absence of such a provision within the 1999 Compact led Judge Damrell to find that the State acted unreasonably and wholly outside the bounds of its discretion when it decided to unilaterally interpret the license pool provision after taking over the trusteeship:

> The court notes that the authority to administer the draw process does not give the Commission concomitant authority to interpret the Compact. While interpretation issues may have arisen throughout the draw process, the Commission's role as Trustee does not grant deferential review to its interpretation.

Colusa I, 629 F.Supp.2d at 1108 n.15.

2. NOT SUBMITTING THE ISSUE TO AN IMPARTIAL COURT FOR RESOLUTION

Any unreasonable exercise of authority should have nevertheless ended when Melnicoe noted the sheer patent ambiguity of the license pool language and the dearth of any materials that could help decipher the text according to the mutual intent of the parties. [SER295, 307-309] At that point, any reasonable person lacking a financial interest and ties to one of the parties would have submitted the issue to an impartial district court for resolution, as the weight of authorities suggests. *See* Restatement (Third) of Trusts § 71 cmt. a ("To avoid undue risk of liability when reasonable doubt exists in [regards to the proper interpretation of trust provisions], a trustee may seek protection by applying for instructions from an appropriate court."); *accord* 3 *Scott & Ascher* § 16.8; 4 *Pomeroy* § 1064; *see Bogert* § 559 ("The doubt as to powers and duties

may be so evident and important that it is the duty of the trustee to apply for instructions, and not merely his privilege."). The rules of trust law expect no less from a conflicted fiduciary predisposed to act in a partial manner, requiring the trustee to step aside from the management of the trust until the conflict resolves. *Leigh v. Engle,* 727 F.2d 113, 125 (7th Cir. 1984).

3. DISCLAIMING ITS TRUSTEE STATUS

This decision to venture into the dark without the guiding light of the federal courts did not lead the CGCC to act with an abundance of caution, but simply to free itself of any unfavorable baggage by renouncing its trustee status. As indicated, the memo prepared by the CGCC for the May 29, 2002 meeting explained that a trustee was responsible for administering the draws, but "the Commission cannot be regarded as a trustee in the traditional sense, but rather as an administrative agency with responsibilities under the Compacts for administration of a public program in the nature of a quasi-trust." [SER289-291] This "quasi" language is unique to outgoing communications from the State to the tribes, as the CGCC repeatedly referred to the overseer of the license pool as strictly a "trustee" in its messages with the Office of the Governor and other executive agencies. [SER267, 271, 283] Not to mention, the rules the CGCC admits it authored to administer the draw process define the administrator of the license pool as a "Pool Trustee" and then continuously use that term throughout the remainder of the document. [SER327-331, 335-336]

4. REJECTING ANY CANONS OF CONSTRUCTION FAVORABLE TO THE TRIBES

Abandoning any interpretive rules that accompany the trustee status then led into the CGCC refusing to also apply the *contra proferentum* doctrine. [SER289] The purported reason behind shirking this rule was that "[d]iscussions with individuals who participated in the 1999 Compact negotiations… indicate that tribal attorneys and the State's representatives each participated in… drafting the Compact language, although not necessarily the same portions of the language." [SER289] A global application of the doctrine thus enabled the CGCC to refuse the construe the gateway license pool provision against the State simply because the signatory tribes may have helped draft something as attenuated as liability insurance requirements. Yet, the opinion of the negotiation process the CGCC formed from these undisclosed, off-the-record discussions directly conflicts with that held by Judge Damrell, who found after reviewing all the evidence in the *Colusa* trial court proceeding that "it is undisputed that the State's negotiating team actually drafted the language in the Compact." *Colusa I,* 629 F.Supp.2d at 1115.

5. FAILING TO CONDUCT AN INDEPENDENT AND SCRUPULOUS ANALYSIS THAT ENABLED THE RSTF TO FUNCTION PROPERLY

Operating under a conflict heightens the applicable standard of care for a fiduciary such that it is "obligated at a minimum to engage in an intensive and scrupulous independent investigation." *Howard v. Shay,* 100 F.3d 1484, 1484-89 (9th Cir. 1996).

Independence seems like a rather inapt term for an agency whose chief commissioner covertly informed his financially-interested principal in advance of the meetings what he intended to do and then carried out that plan. [SER283-284] The number Hensley and his two subordinate commissioners chose is unreasonable not only from a textual perspective, but a functional one as well. *See Colusa II,* 618 F.3d at 1084 (explaining the license pool interpretation needed to give effect to the "structure" of the 1999 Compacts). The revenue sharing system created by the 1999 Compacts has two separate arms: the baseline entitlements that direct monies into the SDF to offset the impacts of tribal gaming, and the licenses that conversely pay money into the RSTF to provide each non-compact tribe with $1.1 million annually in compulsory financial support. [SER238-239, §§ 4.3.2.1(a), 4.3.2.2(a)(2); 241, §§ 5.1(a), 5.2] Fully funding both of these accounts should have been the overriding goal in the interpretive process, but the CGCC instead selected a "conservative" and "low end" number that created a $50 million structural shortfall in the RSTF and accordingly deprived the beneficiaries of the SDF of an equivalent amount of money each year. [SER322]

6. WITHHOLDING PRIVATE DOCUMENTS PROVING THE CHOSEN INTERPRETATION WAS INCORRECT

Acting in an objectively good faith manner requires not only interpreting a contract in light of its purpose but substantiating any chosen outcome with relevant back-up evidence. *See Truitt Mfg. Co.,* 351 U.S. at 152. The test for relevancy involves a "liberal, discovery-type standard" in order to facilitate a number of intrinsic qualities

in good faith negotiations, like candor and informed decision-making. *Press Democrat Pub. Co. v. NLRB,* 629 F.2d 1320, 1325 (9th Cir. 1980). Yet, somehow the CGCC determined that the pool rules it authored and kept hidden from the signatory tribes would not make the accuracy of its interpretation any more or less probable despite the fact that those rules completely refute the notion that the "lesser number authorized under Section 4.3.1" clause of the license pool formula excludes those signatory tribes that were not operating any machines as of September 1, 1999. [SER328, § 5(a)]

7. IMPOSING DRACONIAN TAXES THROUGH THE 2004 AMENDMENT

One does not even need to fit the total amount of general fund revenue sharing under the 2004 Amendment into the *Rincon II* framework to determine whether or not the State was attempting to tax Pauma. As was the case in *Rincon,* the terms of the 2004 Amendment have three distinct concessions: additional machines; additional years on the term of the compact; and an "enhanced" form of exclusivity that this circuit branded "practically worthless" and of nothing more than "speculative value." [SER435, § 4.3.1(a-b); 441, § 3.2(a); 444, § 11.2.1]; *Rincon II,* 602 F.3d at 1038. The real value of "enhanced" exclusivity went from "practically" to utterly worthless, though, as the State refused to issue the transportation bonds that would have brought the power to enjoin any non-tribal competition into being and instead just funneled all of Pauma's revenue sharing payments into the general fund. [SER450-452] With "enhanced" exclusivity non-existent and the material portion of the license rights actually

available through the draws of the 1999 Compact, the only real concession imparted by the 2004 Amendment was the term extension from December 31, 2020 (or June 30, 2022 if the parties had not entered into a new compact by the original expiration date) to December 31, 2030. [SER247, Modification No. 4; 444, § 11.2.1] Yet, simply extending the regulatory regime for eight to ten years has nevertheless increased the cost of doing business with the State by 2,460%, turning a $315,000 payment into the RSTF into $7,750,000 of overwhelmingly general fund revenue sharing. [SER239, § 4.3.2.2(a)(2); 437-438, §§ 4.3.2.2(a), 4.3.3(a)] Given the false pretenses and dearth of concessions underlying these payments, the remittance of a single extra dollar under the 2004 Amendment should amount to an illegal tax under Section 2710(d)(4) of IGRA. *See* 25 U.S.C. § 2710(d)(4).

8. DEMANDING ADDITIONAL TAXES THROUGH A LATTER-DAY MOU THAT NEVER RECEIVED SECRETARIAL APPROVAL

The exorbitant fees that Pauma paid to the State under the 2004 Amendment turned out to be just the tip of the iceberg of its revenue sharing obligations. Section 10.8.8 of the agreement also required Pauma to enter into an MOU with San Diego County to mitigate any significant adverse effects on the off-reservation environment and provide compensation for "law enforcement, emergency medical services… any other public services to be provided by the County…. [and a] gambling addiction [program]." [SER443] The commitment to mitigate adverse impacts somehow morphed into a financial obligation that now requires Pauma to expend upwards of $38

million on improvements to county roads. [SER455-463] As surprising as this turn of events was for Pauma, the Secretary of the Interior would doubtlessly find it equally as surprising considering this latter-enacted MOU is really just a *de facto* compact that successfully circumvented the IGRA review process by arising in the aftermath of the 2004 Amendment. Aggregating the fees under the 2004 Amendment with the State and the *de facto* compact with San Diego County turns a clear case of bad faith into an extraordinary one, as the total annual revenue sharing now includes $5,750,000 into the general fund; $2,000,000 into the RSTF; $400,000 for sheriff's protection; $200,000 for a gambling addiction program; $40,000 for the cost of prosecuting casino related crimes; and a portion of the $38 million road improvement obligation. [SER464]

D. THE MULTITUDE OF PRETEXTUAL REASONS JUDGE BENCIVENGO RECITED FOR REFUSING TO CONSIDER THE BAD FAITH CLAIMS SHOULD NOT CARRY ANY WEIGHT

The total unwillingness of the district court to consider Pauma's evidence clearly surfaces when one considers that it took four years to find one basis for rescinding the 2004 Amendment and roughly four months to come up with three basis (with various subparts) for declining to address the merits of the Tribe's bad faith claims. As background, the First Amended Complaint sets forth two claims alleging the State acted in "bad faith/violation of IGRA." [SER044-045] The allegations in the complaint are a skeletal outline of the evidence in the statement of the case herein, detailing everything from the IGRA remedial process, to the CGCC constraining the size

of the license pool, to the Office of the Governor using the resulting interpretation to jumpstart the formal negotiations for the 2004 Amendment. [SER008, ¶ 31; 017-019, ¶¶ 85-101; 022-023, ¶¶ 120-127] The use of alternate phrasing in the headings arose because the law was not entirely clear what relief would be available to Pauma since this was *not* a situation where "a Tribal-State compact has not been entered into." 25 U.S.C. § 2710(d)(7)(B)(ii)(I). This precondition in IGRA drew the State's attention, as it argued early on that "federal courts only have jurisdiction to rule upon a bad faith negotiation claim under 25 U.S.C. § 2710(d)(7)(A)(i) where 'a Tribal-State compact has not been entered into.' (25 U.S.C. § 2710(d)(7)(B)(ii)(I)." [*Pauma I,* No. 09-01955, Doc. No. 11-1, 14:20-15:26 (S.D. Cal. Oct. 9, 2009)] Noting the similarities between *Rincon* and the instant matter, Judge Battaglia nevertheless rejected this argument on the ground that it would defy logic if "a bad faith claim predicated on IGRA [could not] be alleged after a Class III gaming compact has been negotiated." [ER137-138]

Applying the "law of the case" doctrine to this ruling would seem just, especially after the rescission of the 2004 Amendment made the present situation one that complies with the express text of IGRA. *See Dow Chem. Co. v. United States,* 226 F.3d 1334, 1345 (Fed. Cir. 2000) ("Rescission has the effect of voiding a contract from its inception, i.e., as if it never existed." (citing 17B C.J.S. Contracts § 456 (1999)). Nevertheless, Judge Bencivengo reversed course and held that "a plain reading of the statute indicates that these procedures do not apply in circumstances where the State and a Tribe actually reach a compact." [ER087] Continuing on, she then selectively

quoted statements counsel for Pauma made concerning the "illegal taxation" aspect of these claims *before* the case came to her, *before* discovery took place, and even *before* the amendment of the original complaint in 2011 in order to estop the Tribe from arguing "bad faith" even though she refused to hear the claims. [ER086-087]; *see Ah Quin v. County of Kauai DOT,* 733 F.3d 267, 274 (9th Cir. 2013) (explaining a position articulated on an unheard claim cannot satisfy the first two elements of judicial estoppel). And finally, she held that the claims were moot because all Pauma requested, and all that she would ever order, was complete rescission of the 2004 Amendment [ER083] – a statement that is clearly at odds with the requests for relief in the First Amended Complaint and the first three summary judgment motions. [SER078-081, 557-565] Identifying the real reason for refusing to hear these claims should focus less on supposed litigation foibles by counsel for Pauma and more on the fact that the district court only mentioned the arguably-controlling decision in the *Rincon* case *one time* during the five year history of the lawsuit despite the fact that the Tribe raised it in two complaints and sixteen different substantive filings. [*Pauma III,* No. 14-71981, Doc. No. 14-1, p. 2 (9th Cir. Oct. 31, 2014)]

IV. REFORMATION IS A VALID SUBSTITUTE FOR THE COEXTENSIVE RESCISSION REMEDY IF THIS PANEL DECLINES TO TRIGGER THE IGRA REMEDIAL PROCESS

One of the primary goals of Pauma since the outset of this lawsuit has been to find some way to restore the *true* status quo in 2003 – including the seventeen years of contract rights remaining when the State restricted the license pool in order to induce

renegotiations. The bad faith claims are one method for reacquiring these lost years while reformation of the 2004 Amendment is another in the event this panel finds that the IGRA procedures are unavailable.

A general principle of federal contract law is that a plaintiff has the option to choose its remedy by either standing on the contract or rescinding it. *See, e.g., Addisu v. Fred Meyer, Inc.,* 198 F.3d 1130, 1137-38 (9th Cir. 2000); *Guddee v. Abudanza,* 2007 U.S. Dist. LEXIS 91272, *16 (D. Haw. 2007) ("[T]he nonbreaching party may elect its remedy, choosing from among damages, reformation, and rescission."). The third motion for summary judgment filed by Pauma recited this principle and then chiefly asked the district court to reform the 2004 Amendment to assuage the lost contract rights. [SER565] Adhering to her prior position that all she would ever award was complete rescission of the 2004 Amendment, Judge Bencivengo declined to consider reformation since the subsequent agreement "lacks the disputed term." [ER062] Yet, the test this circuit and the Restatement employ for gauging reformation, which was also set forth in Pauma's summary judgment motion, asks whether the misrepresentation went to "the terms *or the effect* of the contract." *Skinner,* 673 F.3d at 1166 (citing Restatement (Second) of Contracts § 166). It is beyond dispute that the effect of the 2004 Amendment, in the eyes of the State, was to provide gaming devices that were not otherwise available through the license pool process of the 1999 Compact. Given that, the district court's decision to award rescission on account of a misrepresentation necessarily carries with it an award of reformation since the equitable tests for

each are one and the same, especially in the context of breaching fiduciaries. *Skinner,* 673 F.3d at 1166-67.

Speaking of which, the plan to close off any reformative remedies included Judge Bencivengo reversing her prior ruling that the express terms of the 1999 Compact created a trust relationship on account of the rationale in a case she previously rejected. [ER059] What is more, the rules of contract interpretation should have required Judge Bencivengo to consider the abundance of extrinsic evidence that Pauma submitted in connection with its motion (*see United States v. King Features Entm't,* 843 F.2d 394, 398 (9th Cir. 1988)), which would have shown that both contracting parties construed the trustee reference in Section 4.3.2.2(a)(3) of the 1999 Compact in the same manner and thus required her to do so as well. *See Am. Cas. Co. v. Bajer,* 22 F.3d 880, 887 (9th Cir. 1994) (citing Restatement (Second) of Contracts § 201(1)). All of this evidence came about despite the fact that counsel for the State obfuscated any meaningful discovery by blocking every subpoena, refusing to turn over any evidence from prior gubernatorial administrations, and further claiming that the CGCC could not produce any electronic documents because the requisite search would take four years and cost $200,000. [SER572-578] Should this case require a remand to determine the appropriateness of any reformative remedies arising from these or other claims, this panel should vacate the order denying Pauma's motion to compel and require the State to make a reasonable discovery production – one that it can hopefully do before

a newly-assigned district judge. [SER579-580; *Pauma III,* No. 14-71981, Doc. No. 2-1, pp. 19-20 (9th Cir. Sep. 12, 2014) (detailing the grounds for reassignment)]

CONCLUSION

For the foregoing reasons, Pauma respectfully requests that this panel affirm the district court's rescission and specific performance remedies as well as find that the State failed to negotiate the 2004 Amendment in objective good faith under Section 2710(d)(7)(B)(iii) of IGRA. If the IGRA remedial procedures are unavailable, this panel should alternatively hold that Pauma may elect between the coextensive rescission and reformation remedies that flow in equity from a misrepresentation by a fiduciary.

RESPECTFULLY SUBMITTED this 17th day of February, 2015

By: */s/ Kevin M. Cochrane*

Cheryl A. Williams
Kevin M. Cochrane
Williams & Cochrane, LLP
525 B. St., Suite 1500
San Diego, California 92101
T/F: (619) 793-4809
Attorneys for Plaintiff & Appellee/ Cross-Appellant Pauma Band

STATEMENT OF RELATED CASES

Pursuant to Local Circuit Rule 28-2.6, Appellee/Cross-Appellant Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation is aware of the following related cases:

(1) *Pauma Band of Luiseno Mission Indians of Pauma & Yuima Reservation v. California,* No. 10-55713 (9th Cir. Nov. 30, 2010) (prior interlocutory appeal in this case regarding the propriety of the district court issuing an injunction in Pauma's favor to reduce the payment terms of the 2004 Amendment to those of the 1999 Compact); and

(2) *In re Pauma Band of Luiseno Mission Indians of Pauma & Yuima Reservation,* No. 14-71981 (9th Cir. Nov. 7, 2014) (petition for writ of mandamus asking the Ninth Circuit to order the district court to rule on the claims it refused to hear before closing the case).

Dated: February 17, 2015

By: */s/ Kevin M. Cochrane*

Cheryl A. Williams
Kevin M. Cochrane
Williams & Cochrane, LLP
525 B. St., Suite 1500
San Diego, California 92101
T/F: (619) 793-4809
Attorneys for Plaintiff & Appellee/ Cross-Appellant Pauma Band

APPENDIX

SECTION 2710(D)(3)-(7) OF IGRA

(d) Class III gaming activities; authorization; revocation; Tribal-State compact

(3)

(A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

(B) Any State and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian tribe, but such compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register.

(C) Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to—

(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;

(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;

(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;

(v) remedies for breach of contract;

(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

(vii) any other subjects that are directly related to the operation of gaming activities.

(4) Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity. No State may refuse to enter into the negotiations described in paragraph (3)(A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.

(5) Nothing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with the State, except to the extent that such regulation is inconsistent with, or less stringent than, the State laws and regulations made applicable by any Tribal-State compact entered into by the Indian tribe under paragraph (3) that is in effect.

(6) The provisions of section 1175 of title 15 shall not apply to any gaming conducted under a Tribal-State compact that—

(A) is entered into under paragraph (3) by a State in which gambling devices are legal, and

(B) is in effect.

(7)

(A) The United States district courts shall have jurisdiction over—

(i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,

(ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect, and

(iii) any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B)(vii).

(B)

(i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

(ii) In any action described in subparagraph (A)(i), upon the introduction of evidence by an Indian tribe that—

(I) a Tribal-State compact has not been entered into under paragraph (3), and

(II) the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith,

the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities.

(iii) If, in any action described in subparagraph (A)(i), the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, the court shall order the State and the Indian Tribe [2] to conclude such a compact within a 60-day period. In determining in such an action whether a State has negotiated in good faith, the court—

(I) may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and

(II) shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

(iv) If a State and an Indian tribe fail to conclude a Tribal-State compact governing the conduct of gaming activities on the Indian lands subject to

the jurisdiction of such Indian tribe within the 60-day period provided in the order of a court issued under clause (iii), the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best comports with the terms of this chapter and any other applicable Federal law and with the findings and order of the court.

(v) The mediator appointed by the court under clause (iv) shall submit to the State and the Indian tribe the compact selected by the mediator under clause (iv).

(vi) If a State consents to a proposed compact during the 60-day period beginning on the date on which the proposed compact is submitted by the mediator to the State under clause (v), the proposed compact shall be treated as a Tribal-State compact entered into under paragraph (3).

(vii) If the State does not consent during the 60-day period described in clause (vi) to a proposed compact submitted by a mediator under clause (v), the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures—

(I) which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions of this chapter, and the relevant provisions of the laws of the State, and

(II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.