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]

REPLY BRIEF BY APPELLEE/CROSS-APPELLANT PAUMA BAND OF LUISENO MISSION INDIANS

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GLOSSARY

PARTIES

CGCC	California Gambling Control Commission
Pauma/Tribe	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

PRIOR COURT DECISIONS

Colusa II	*Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. California,* 618 F.3d 1066 (9th Cir. 2010)
Colusa I	*Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. California,* 629 F.Supp.2d 1091 (E.D. Cal. 2009)
Harrah's	*Pauma Band of Luiseno Mission Indians v. Harrah's Operating Co.,* No. GIC847406 (Cal. Sup. Ct. 2012)
HERE	*Hotel Employees & Rest. Employees Int'l Union v. Davis,* 21 Cal.4th 585 (1999)
Rincon II	*Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger,* 602 F.3d 1019 (9th Cir. 2010)

Rincon I	*Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger,* 2008 WL 6136699 (S.D. Cal. 2008)

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)

CASE PROCEEDINGS

Pauma I	*Pauma Band of Luiseno Mission Indians of Pauma & Yuima Reservation v. California,* No. 09-01955 CAB MDD (S.D. Cal. 2014)
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Pauma III	*In re Pauma Band of Luiseno Mission Indians of Pauma & Yuima Reservation,* No. 14-71981 (9th Cir. 2014)
Pauma IV	*Pauma Band of Luiseno Mission Indians of Pauma & Yuima Reservation v. California,* Nos. 14-56104 & 14-56105 (9th Cir. filed on July 8 & 9, 2014)

ACTORS

For the State

Burton	*John Burton, the State Senator 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	*Bruce Thompson, the State Assemblyman 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 and tribal negotiator 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 on the Caesars project and for the 2004 Amendment negotiations*

INTRODUCTION

Imagine the historical revisionism that can occur within a fourteen-thousand word brief that mentions nary a single piece of evidence save one. Therein, one can freely soliloquize about the CGCC being a dutiful administrator that inherited a complex problem without a clear-cut solution and created an outcome by dint of magnanimity that was in everyone's best interests. And how the federal courts could not fact-check the result without the involvement of all sixty-plus compact tribes since the actual number of licenses may have been lower than the selected figure. And how the one tribe that amended its compact to obtain preexisting licenses before the judiciary ultimately resolved the situation sought certain things, conceded other things, admitted additional things, and omitted different things during a consequent lawsuit that should somehow foreclose any relief.

The truth of the matter contrasts rather starkly with this painted picture, and involves the CGCC suppressing contract rights in order to aid its financially-interested principal and then doing everything in its power to prevent the federal courts from reviewing the situation. When a plaintiff tribe brought suit to have a neutral district judge perform the task that the CGCC should have asked it to do in the first place, the State took advantage of a bare evidentiary backdrop by arguing a technical defense that sought dismissal due to the inability to join beneficiaries that it knew could not be harmed even though "[i]t has long been the rule that beneficiaries of a trust ordinarily need not be joined as necessary parties under Rule 19." *See Az. Laborers, Teamsters &*

Cement Masons Local 395 Health & Welfare Trust Fund v. Conquer Cartage Co., 753 F.2d 1512, 1521 (9th Cir. 1985).

These sort of overarching technical defenses arise yet again, accompanied by some "wink wink nudge nudge" insinuations that dismissal for one's convenience is better than proceeding for another's justice. The only difference now is that mountains of evidence plainly show the bad faith behind the State's actions. Avoiding this evidence created lots of misinformation in the State's brief, but it is correct that injured tribes should be treated similarly. In light of *Rincon,* principles of equal justice require nothing short of affirming the granted remedies and triggering the IGRA remedial scheme.

ARGUMENT ON CROSS-APPEAL

I. THE BAD FAITH DEFENSE STICKLES ABOUT TECHNICAL POINTS IN ORDER TO MASK THE STATE'S UTTER AVERSION TO THE EVIDENCE

A. A PLAIN READING OF IGRA, THE PURPOSE OF THE ACT, AND A FAIR AND EVENHANDED APPLICATION OF THE LAW ALL DICTATE THAT THE REMEDIAL SCHEME IN SECTION 2710(D)(7)(B)(II) APPLY TO LATENT BAD FAITH ONCE A TRIBE RESCINDS THE RESULTANT COMPACT

A recurrent theme in this case has been the State acknowledging the existence of a duty to negotiate in good faith under IGRA, but nevertheless explaining that the federal courts lack any ability to enforce such a duty should the State successfully mislead a tribe into executing a compact. Such nugatory interpretations of IGRA that are designed solely to protect the sale of empty promises were rebuked by the Ninth Circuit nearly two decades ago in *Cabazon Band of Mission Indians v. Wilson,* 124 F.3d 1050 (9th

Cir. 1997), and also fail to appreciate how neatly the law fits together when it is applied in the appropriate fashion. To explain, the one element in the two-pronged test for establishing a *prima facie* case of bad faith under Section 2710(d)(7)(B)(ii) of IGRA that the State latches on to is the requirement that "a Tribal-State compact has not been entered into" under the statute. *See* 25 U.S.C. § 2710(d)(7)(B)(ii)(I). A cursory review of this language may lead one to conclude at first blush that the execution of a compact denotes the line of demarcation between viable and defective bad faith claims. However, the law is more nuanced than that and treats a rescinded contract, like the one in this case, as having never been entered into by the parties. *See, e.g., 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))); *accord Griggs v. E.I. DuPont de Nemours & Co.,* 385 F.3d 440, 446 (4th Cir. 2004); *Roberts & Schaefer Co. v. Hardaway Co.,* 152 F.3d 1283, 1295 (11th Cir. 1998); *Monex Int'l, Ltd. v. CFTC,* 83 F.3d 1130, 1135 (9th Cir. 1996); *Williams v. Agribank, FCB,* 972 F.2d 962, 966 (8th Cir. 1992).

This panoply of opinions equating rescission with non-existence puts the State into the untenable position of confronting controlling canons of construction no matter which way it turns. On the one hand, the preeminent canon of statutory construction that simply looks at the plain meaning of the text would allow a bad faith claim to proceed once a tribe rescinds a compact procured through latent forms of wrongdoing like material misrepresentations. *See Metro One Telecoms., Inc. v. Comm'r,* 704 F.3d

1057, 1063 (9th Cir. 2012) (explaining statutory analysis should begin and end with the plain meaning rule if it provides a clear answer). However, even if reasonable minds differ about the proper interpretation of the "not been entered into" language and thus render it ambiguous, this panel would then have to invoke the Indian Canon of Construction that requires that "statutes [like IGRA] are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Artichoke Joe's Cal. Grand Casino v. Norton,* 353 F.3d 712, 729 (9th Cir. 2003). Resolving ambiguities in IGRA according to this principle is more than just a permissive guideline, as this circuit explained in *Rincon II* that the canon triumphs over *any* dueling ones given Congress' oft-repeated invocation of the former in the statute's legislative history. *See Rincon II,* 602 F.3d 1019, 1029 n.9 (9th Cir. 2010).

More than just merely conforming to precedent, applying the Indian Canon of Construction in the present context would vindicate Congressional intent and make IGRA wholly functional by "restrain[ing] aggression by powerful states" that might not surface until after the close of negotiations. *See Rincon II,* 602 F.3d at 1027 (citing, *e.g*, S.Rep. No. 100-446, 33 (1988)).[1] As to that, a cohesive interpretation of this sort is

[1] In fact, reading IGRA to cover both patent and latent forms of bad faith aligns perfectly with recent Supreme Court opinions explaining that textual interpretations and theories of liability should further the central purpose of a statute. *See King v. Burwell,* 576 U.S. __, 2015 U.S. LEXIS 4248, *28 (2015) (interpreting a provision of the ACA to effectuate the purpose of the act); *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.,* 576 U.S. __, 2015 U.S. LEXIS 4249, *30 (2015) (recognizing disparate impact claims under the FHA since they are "consistent" with the statute's "central purpose").

necessary to ensure that federal law keeps up with evolving state practices. Opinions from prior bad faith suits that have sought to quell state taxation have not accomplished their purpose, with states like California becoming increasingly sophisticated in their schemes to obtain such monies. What started as blunt requests for a certain percentage of revenue morphed into proposals for even more money in exchange for actual concessions of indeterminate value, which in turn morphed into even more exorbitant demands counterbalanced by imaginary concessions, the true nature of which a tribe would be unlikely to discover until after executing the agreement. This pattern of states staying one step ahead of the courts and bad faith practices becoming less and less apparent over time will turn IGRA into an anachronism unless the acutely devious state that tricks a tribe into parting with its money is held to the same standard as the brutish one that just demands the same outright.

One ancillary benefit of the proffered interpretation is that it will treat similarly-situated plaintiffs in the same manner as well. The only meaningful distinction between Pauma and Rincon is that one tribe executed an amendment and the other tribe did not. For the tribe who simply objected to the sheer amount of requested revenue sharing without connecting the demand to the prior restraint of the license pool, the federal courts invoked the IGRA remedial scheme with an eye on putting the tribe in the position that it should have been if the negotiations were conducted in good faith. Conversely, for the tribe who acquiesced to the revenue sharing demand in order to satisfy a time-is-of-the-essence clause in its development plan without realizing it was

actually repurchasing preexisting rights, the district court would only put the tribe in the position that it would have been in if the negotiations never occurred. Yet, turning back the clock to a prior date *actually requires turning back the clock* rather than pretending that the state of affairs under a fixed-term contract is the same in 2015 as it was in 2003. Given this, an interpretation of IGRA that excludes claims for latent bad faith would create a huge disparity, leaving Pauma short twelve years on the term of a compact that now only has five years remaining while Rincon ventures forth into the future with a new agreement in hand.

A second benefit of the suggested interpretation is that it will avoid producing an absurd result that Congress never envisioned. One of the functions of the good faith requirement is to "process gaming arrangements on an expedited basis" (*see Rincon II,* 602 F.3d 1041), which Congress verified when it delayed the implementation of the act for one year so tribes that were lawfully conducting class III gaming could conclude compacts with their respective states through either voluntary negotiations or the statute's remedial scheme. *See* 25 U.S.C. § 2703(7)(D). Bad faith suits in California have become so acrimonious, however, that this one-year expectancy has turned into a six-to-eight year reality. What is worse, should IGRA exclude claims of latent bad faith, the path to obtaining a new compact for a tribe who is misled into executing an unconscionable agreement would likely involve spending six to eight years in federal court trying to rescind the agreement, then requesting that the misrepresenting party act more dutiful during a second round of voluntary negotiations with no assurance

that it will (something the commensurate first step of the IGRA remedial process would provide), and then devoting the next six to eight years to litigating the bad faith issue once the State invariably tries to obtain its desired tax receipts in an alternate way. While a bad faith suit will never resolve within the anticipated one-year window, a consolidated action that allows a victimized tribe to rescind its compact and then obtain the statutory remedy much better comports with Congress' desire for a swift resolution to the impasse than interminable litigation.

Considerations of legislative intent and the equities like those just detailed receive less attention in the State's brief than a bare citation to a case from the Western District of Wisconsin that supposedly stands for the proposition that the IGRA remedial scheme does not apply if the parties actually conclude a gaming compact. *See Wis. Winnebago Nation v. Thompson,* 824 F.Supp. 167 (W.D. Wis. 1993). The axiom the "devil is in the details" has special meaning in this case, as *Winnebago* dealt with a tribe who raised a belated bad faith claim in order to exact additional concessions above and beyond those agreed to by a hard-bargaining state rather than to cure some insidious impropriety. The run-of-the-mill if not altogether innocuous allegations of bad faith conduct in *Winnebago* may have led the district judge to conclude that the plaintiff tribe did not have a "cause of action *at this time*," but they did not stop him from nevertheless stating that he was "not prepared to hold that there are no circumstances under which a tribe can sue a state to compel good faith negotiations over class III gaming once a compact is concluded." *Id.* at 173. As explained, one such circumstance

should exist when a tribe executes a compact on account of latent bad faith by the State and then rescinds the resultant agreement before moving for judgment on the claims in order to comply with the plain meaning of Section 2710(d)(7)(B)(ii)(I).

B. TWO UNRELATED POSITIONS CANNOT FORM THE BASIS OF A SINGLE JUDICIAL ESTOPPEL ARGUMENT, ESPECIALLY WHEN THE STATE KNEW PAUMA WAS CLAIMING BAD FAITH AND LITIGATED THE CASE ACCORDINGLY

A judicial estoppel argument pieced together out of imaginary prejudice and different positions to satisfy the first two elements of the test should not bar a discussion of the merits of Pauma's two bad faith claims that is now at least three years overdue. Gauging the inconsistency in a supposed position articulated in 2010 before the interlocutory appeal of the preliminary injunction order occurred requires laying out the procedural history of the claims at issue. The initial complaint filed by Pauma on September 4, 2009 contained two claims alleging that the State acted in "bad faith/violation of the IGRA" in bringing about the 2004 Amendment. [*Pauma I,* Doc. No. 1, 20:15-22:10] Given the multiple layers of wrongdoing at the heart of the current predicament, the terminology in the headings of the claims referred to distinct concepts. Bad faith meant that the State negotiated the 2004 Amendment in bad faith under Section 2710(d)(7)(A) of IGRA. *See* 25 U.S.C. § 2710(d)(7)(A). On the other hand, the "violation of the IGRA" language spoke to Section 2710(d)(4) of the statute and the belief that the State was illegally taxing Pauma in contravention of the rule proscribing

the imposition of "any tax, fee, charge, or other assessment" on a tribe during the compacting process. *See* 25 U.S.C. § 2710(d)(4).

However, strict compliance with the terms of IGRA required Pauma to first litigate the illegal taxation issue and thereby rescind the 2004 Amendment before it turned to the potentially consequent issue of whether or not the State negotiated the amendment in bad faith. *See* 25 U.S.C. § 2710(d)(7)(B)(ii)(I). Reversing the order of the issues or litigating them simultaneously would have resulted in the same argument that the State raised at the outset of the case in connection with other claims and just mentioned in passing with respect to the specific performance award, which is that Pauma lacks standing to assert any claims that do not arise directly under the 2004 Amendment. [*Pauma I,* Doc. No. 11-1, 17:11-18:16] While taking the position that any such claims were not ripe for review, the State nevertheless asserted a form of this argument with respect to the illegal taxation aspect of the claims by contending that the term really meant "bad faith negotiation," an issue that "cannot be alleged after a class III gaming compact has been negotiated" and, even then, only entitles the plaintiff tribe to "an order requiring the parties to conclude a compact within 60 days… or, should the parties fail to conclude a compact, to require them to submit their last best offers for a compact to a mediator appointed by the court." [*Pauma I,* Doc. No. 11-1, 14:14-15:20]

What arose next was an epic battle of "he said, she said" in which the State continued to argue in the briefing on the preliminary injunction and the re-briefing on its

first motion to dismiss that the claims only concerned bad faith negotiation [*Pauma I,* Doc. Nos. 30, 15:23-17:12; 111-1, 15:22-17:19], while Pauma explained that they were about more than that since they also dealt with the then-predominant issue of illegal taxation. [*Pauma I,* Doc. No. 114, 23:18-25] As the debate about the nature of the claims died down and the hearing on the State's first motion to dismiss began, Judge Battaglia broached the claims by detailing some of the background allegations and then explaining that Pauma was "alleg[ing] that the 2004 [Amendment] is therefore illegal and void and negotiated in bad faith." [ER133] With the claims framed to encompass both of the intertwined "illegal taxation" and "bad faith" issues, the discussion then turned to the merits of the State's argument that a bad faith negotiation claim cannot be alleged after the execution of a compact under Section 2710(d)(7)(b)(ii)(I) before ending on an analysis of whether the complaint sufficiently pled bad faith negotiation under the complementary Section 2710(d)(7)(b)(ii)(II). [ER137-139] Referencing the then recent decision in *Rincon II* in which the Ninth Circuit "considered whether the State negotiated in bad faith by" conditioning its acquiescence to a compact on the receipt of General Fund revenue sharing, Judge Battaglia denied the State's challenge to the sufficiency of the claims after finding that the underlying allegations were "quite similar to those considered impermissible in *Rincon*." [ER138-139] Nevertheless, the general allegations supporting these claims increased by roughly 184 paragraphs two weeks after the hearing when Pauma amended its original complaint to detail everything from the IGRA remedial scheme, to the CGCC con-

straining the license pool, to the Office of the Governor using the interpretation by its agent to resell preexisting rights at prodigiously increased prices. [SER001-041]

Against this backdrop, two notable things occurred in the aftermath of the hearing on the State's first motion to dismiss. The first is that the district court would never again mention the *Rincon* case despite Pauma raising it countless times over the course of the remaining thirty-three months of the trial court proceeding. The second is that the State would actively litigate the "bad faith/violation of the IGRA" claims in accordance with Judge Battaglia's directive that they dealt with both bad faith and illegal taxation. As to that, the strategy the State employed during the discovery process had nothing to do with ascertaining whether the black-and-white terms of the 2004 Amendment constituted an illegal tax, but with gathering evidence to defend against a future bad faith negotiation claim. In particular, the State sought and received from Pauma:

> 8. Each document referencing any representations you made to any negotiator for the State during the 2004 Amended Compact negotiations.
>
> 9. Each document referencing any representation the State made to any negotiator for you during the 2004 Amended Compact negotiations.
>
> 10. Each document referencing any presentations you made to any negotiator for the State during the 2004 Amended Compact negotiations.
>
> 11. Each document referencing any presentations the State made to any negotiator for you during the 2004 Amended Compact negotiations.
>
> 12. Each document you sent to the United States Department of the Interior… concerning the 2004 Amended Compact.

> 13. Each document you received from the United States Department of the Interior… concerning the 2004 Amended Compact.

[*Pauma I,* Doc. No. 256-3, P529-530]

Yet, a complete about face occurred once Pauma moved for summary judgment on the bad faith issues in the wake of Judge Bencivengo adhering to her forewarning that all she would ever award is total rescission of the 2004 Amendment. The sight of Pauma's fourth summary judgment motion compelled the State to cry unfair surprise, suggesting that it had always perceived the claims as alleging nothing more than illegal taxation despite taking the antithetical position during the briefing on the first motion to dismiss. [*Pauma I,* Doc. No. 254, 11:16-19] This formative stage of the proceedings played an instrumental part in the State's opposition, as the brief also re-raised the prior argument that a bad faith negotiation claim under IGRA cannot be alleged after the execution of a compact *even though* Judge Battaglia had earlier rejected the notion. [*Pauma I,* Doc. No. 254, 6:3-14] Debating the sufficiency of the pleadings yet again five years into the lawsuit led Pauma to detail much of the background information that it is recounting now along with twice requesting leave to amend if the district court reversed course and somehow found that the bad faith claims failed to allege bad faith. [*Pauma I,* Doc. No. 256, 7:13-16, 11:4-6] Despite this, the order on the fourth motion for summary judgment adopted the aforementioned arguments from the State wholesale along with a third one that Judge Bencivengo raised on her own initiative – namely, that the claims were moot because the district court had made

Pauma whole by putting it back into the position "it would have been in under the 1999 Agreement," notwithstanding the twelve years of lost compact rights. [ER083-084] With that, Judge Bencivengo simply closed the case for a second time without saying anything about Pauma's multiple requests to amend the complaint. [ER089]

A fundamental flaw with the judicial estoppel argument raised by the State that Judge Bencivengo ultimately adopted is that it uses separate and distinct positions in order to satisfy the first two elements of the test. For starters, the purportedly inconsistent position for the first element of the test is that Pauma alleged bad faith after contending at the outset of the case that the "bad faith/violation of the IGRA" claims only concerned illegal taxation. Given the ruling by Judge Battaglia on the first motion to dismiss that the "bad faith/violation of the IGRA" claims quite naturally dealt with both of the issues, the focus of the second element of the test that looks at whether a court accepted the earlier position shifts away from the bad faith/illegal taxation dichotomy and to unrelated statements concerning whether or not Pauma would have executed the 2004 Amendment but for the State's misrepresentations. From there, Judge Bencivengo seemingly tries to tie the two positions together by stating that she relied on Pauma's representations concerning inducement when ruling on the cross-motions for summary judgment and consequently would not have granted rescission had she known that Pauma would now be arguing bad faith. [ER087]

Using these supposed positions as the basis for a judicial estoppel defense results in additional problems. The earlier position implicated in the first element of the test

concerns the scope of relief requested at the outset of the case in the spring of 2010, before any discovery had taken place and also before the Ninth Circuit released either of its major legal pronouncements in the *Colusa* and *Rincon* actions. In other words, the legal landscape was completely different and any reasonable plaintiff tribe would not have seen the connection between the restraint of the license pool and the subsequent imposition of large-scale General Fund revenue sharing that would make a bad faith finding all but certain. And yet, a single inartful sentence in a preliminary injunction reply brief somehow serves as the foundation for an estoppel argument that seeks to foreclose any remedies that may have come to light upon "further investigation and discovery" despite the fact that an actual and express renunciation of these remedies in the original complaint would not have produced such a result. *See Asarco, LLC v. Union Pac. R.R. Co.,* 765 F.3d 999, 1005-06 (9th Cir. 2014) (permitting a plaintiff to amend a complaint to seek remedies that it disclaimed in the original filing). As for the second element of the test, unrelated topics cannot produce inconsistent positions. There is nothing inconsistent about saying that Pauma would not have amended but for the misrepresentations about the license pool on the one hand and that it wants to hold the State accountable for its bad faith conduct during the negotiations on the other. While it is true that Pauma would rather have not partaken in the process, the negotiations still took place and the rescission of the 2004 Amendment does not obviate that fact.

Contrasting the abundance of analysis on the first two elements of the test is a dearth related to the third. Both the State and the district court have been quite outspoken about the unfairness that would result from considering the bad faith claims, but neither one has been able to articulate what sort of improper advantage Pauma would receive by having its day in court on claims that technically could not have been brought any sooner. Is the detriment that the State, for the first time, will have to discuss the evidence underlying the claims? Or is it that the evidence is so overwhelmingly damning that there is nothing the State can argue in order to avoid a finding of bad faith? Conjecture aside, the sort of unfairness this circuit looks for is whether the evidence adduced and the prior manner of trying the case have left the opposing party unprepared to address a supposedly omitted remedy. *See Rental Dev. Corp. v. Lavery,* 304 F.2d 839, 842 (9th Cir. 1962). The appropriate judicial action in such circumstances, however, is providing the affected party with additional time to prepare a defense rather than just dismissing the underlying claims and closing the case. *See House of Flavors, Inc. v. TGF Mich., L.P.,* 643 F.3d 35, 49 (1st Cir. 2011). Yet, linking unfairness to notice has left the State will little to argue, as it already conducted discovery on the bad faith claims and nothing Pauma could have raised from a factual standpoint would have altered the State's resolve to refrain from discussing the merits of the case at all costs.

The remainder of the judicial estoppel section in the State's response brief simply advances an assortment of technical pleading challenges that flip federal law on its

head by positing that the dimensions of a lawsuit are determined by the formal demands in the complaint rather than what is pleaded and proven. *See Minyard Enters., Inc. v. Se. Chem. & Solvent. Co.,* 184 F.3d 373, 386 (4th Cir. 1999) (citing *Thomas v. Pick Hotels Corp.,* 224 F.2d 664, 666 (10th Cir. 1955)). Again, there are qualms about the true meaning of the term "bad faith" in the headings of the claims that simply ignore the 247 evidence-based allegations supporting them and the rule in the circuit that Pauma would not have even needed to "pin" these allegations to the "precise legal theory" of bad faith under IGRA for the claims to proceed. *See, e.g., Alto v. Black,* 738 F.3d 1111, 1117 (9th Cir. 2013). Accompanying this, there is also argument about the sufficiency of the prayer for relief that contends any final judgment must confine the ultimate remedies to those enumerated in the complaint rather than "grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings." *Z Channel Ltd. P'ship v. HBO,* 931 F.2d 1338, 1341 (9th Cir. 1991) (citing Fed. R. Civ. P. 54(c)). However, looking for answers about the potential remedies in this case by parsing the prayer for relief ignores Judge Battaglia signing off on the bad faith negotiation aspect of these claims nearly four years ago, which the State admitted beforehand could result in the triggering of the remedial scheme set forth in IGRA.

Detailing just how the State's position has evolved over time helps to show that its adherence to formalism is nothing more than a thinly-veiled attempt to avoid a discussion about the merits of the claims. What started as a contention that the claims con-

cerned bad faith negotiation when a standing defense appeared to deflect the claims abruptly morphed into the contrary position that the claims raised a redundant illegal taxation issue once the defense vanished. If anything, this radical change in position highlights the fact that judicial estoppel in this present circumstances is best applied against the party who is asserting the defense. With that said, any lingering doubts from this panel concerning the sufficiency of the pleadings will elicit the same response from Pauma that it twice gave to Judge Bencivengo during the briefing on the fourth summary judgment motion: grant leave to amend the complaint in order to perfect the two bad faith negotiation claims. [*Pauma I,* Doc. No. 256, 7:13-16, 11:4-6] Though the makeup of any future appeal regarding the amended claims will undoubtedly mirror the present one, Pauma is nevertheless willing to go through the motions once again and simply asks that this panel level the playing field by reassigning the case to a different district judge and ordering the State to produce its evidence on the trustee issue so the answer to the bad faith negotiation question will come from a complete factual record.

C. THE MISCELLANEOUS ARGUMENTS DEALING WITH THE SCOPE OF REVIEW AND UNKNOWING IMPRESSIONS FROM OTHERS SEEK TO RESOLVE THE CASE IN AN EVIDENTIARY VACUUM

The theme of avoiding the evidence carries over to the remaining arguments opposing the bad faith claims that either try to winnow the scope of the claims down to nothing or decide this case by proxy according to the unwitting views of other entities. The former category contains two different arguments, the first of which is that

the merits of the bad faith claims are not properly up for discussion since the district court did not address them in the first instance. Putting aside the fact that the response brief concedes that the district court found that the State did not "act[ ] in bad faith in misrepresenting the size of the Pool" [State's AOB, p. 54], the appropriate standard of review for the bad faith claims is *de novo*, a Latin term that literally means "anew" and requires the panel to analyze the issue "as if no decision has been rendered below." *Dawson v. Marshall,* 561 F.3d 930, 933 (9th Cir. 2009). Asking the appellate court to conduct this analysis by only considering the treatment of issues decided within an order that is not supposed to exist creates a paradoxical standard that opportunistically but erroneously makes the review impossible.

The sort of Catch-22 inherent in having to defer to a nonexistent order also appears in the second argument that asks this panel to limit the review to the record of negotiations, but then labels everything from the inducing actions to the final terms of the resultant contract extrinsic to that process. Context plays a pivotal role in understanding the meaning of "record of negotiations." While the court in *Rincon II* did explain that the issue of objective bad faith in an appeal focused solely upon the amount of revenue sharing demanded in a compact proposal could be adjudged according to the amorphous "record of negotiations," the Ninth Circuit previously held in a case raising both procedural and substantive forms of bad faith that the resolution of the issue would turn upon the "totality of the State's actions," just as the "fact-specific good-faith inquiry [under] IGRA generally requires." *In re Indian Gaming,* 331 F.3d

1094, 1112 (9th Cir. 2003). This view that the scope of the record is malleable and changes depending upon the allegations raised in the complaint certainly seems to align with the perception of Justice Frankfurter that the good faith inquiry involves 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., concurring).

Should all the evidence come under review, the second category of argument tries to predetermine the good faith issue by pointing out the positions of prior panels and outside agencies. A stray comment about good faith in *Colusa II* receives considerable attention, but the lone declaratory relief claim at issue in that appeal was not raised by an amendment tribe and the supposed good faith therein curiously morphed into bad faith once the Ninth Circuit observed the State's subsequent monetary demands in *Rincon II*. Accompanying this dictum are two other statements, the first being further dictum from *Rincon II* speculating that amendment tribes "agreed" that the concessions received under General Fund revenue sharing compacts were satisfactory, and the second being the Department of the Interior's approval of the 2004 Amendment. A common thread undermines both of these statements and provides the perfect segue for the forthcoming reformation section: neither Pauma nor the Department of Interior could knowingly consent to the financial terms of the 2004 Amendment given the profound material misrepresentations by the State that brought that agreement about. *See* Restatement (Third) of Restitution & Unjust Enrichment § 5 reporter's

note c (2011) ("That cannot be said with propriety to be voluntarily done, where a formal assent thereto is induced by mistake, or procured by fraud or deception… any more than where such formal assent is extorted by the application of a force which fetters and obstructs [the will's] free working.").

II. THE REFORMATION TESTS UNDER FEDERAL CONTRACT LAW ARE SET FORTH WITHIN *SKINNER V. NORTHROP GRUMMAN*

A. THE MISTAKE TEST PRESUMES THE STATE SHARED THE SAME INTENT AS PAUMA

The reformation argument in the State's response brief engages in sleight of hand by relying upon California contract law and claiming without support that it would be consistent with federal precedent if such a thing existed. As luck would have it, this circuit issued an opinion just three years ago in *Skinner v. Northrop Grumman Retirement Plan B,* 673 F.3d 1162 (9th Cir. 2012) that sets forth the federal tests for reforming a contract on the basis of either mistake or misrepresentation. An abridgement of the mistake standard is the heart of the State's argument, but nevertheless warrants discussing since "a misrepresentation induces the recipient to make a contract under a mistake." Restatement (Second) of Contracts ch. 7, topic 1, introductory note (1981). As such, a reformative remedy in this case could arise from either of the interconnected theories.

While it is quite true that a court may reform a contract under the mistake theory to "reflect the true intent of the parties," the meaning of "true intent" only possesses its natural definition in cases where "*both* parties were [genuinely] mistaken about the

content or the effect of the contract." *Skinner,* 673 F.3d at 1166 (citing Restatement (Second) of Contracts § 155 (1981)). Conversely, mistake cases implicating inequitable conduct infuse the definition with an element of estoppel given that this "rule of justice… prevails over all other rules" in its proper field. *United States v. Georgia-Pacific Co.,* 421 F.2d 92, 96 (9th Cir. 1970). The "generally accepted" rule articulated by courts around the Nation and the foremost treatises in such situations is that a party committing an inequity who knows or suspects of the other party's mistake is presumed to enter into the contract "on the basis of the unmistaken facts." *La Mancha Dev. Corp. v. Sheegog,* 78 Cal.App.3d 9, 17 (4th Dist. 1978); *see Stare v. Tate,* 21 Cal.App.3d 432, 438-39 (2d Dist. 1971) (explaining the rule permitting estoppel-based reformation in mistake cases "appears to be quite generally accepted"); *cf.* 2 J. Story, *Commentaries on Equity Jurisprudence* § 1994 (14th ed. 1918) ("Where a party by misrepresentation draws another into a contract, he may be compelled to make good the representation if that be possible."). As applied in this case, estopping the State from arguing that its intent in executing the 2004 Amendment differs from that of Pauma not only satisfies the reformation-for-mistake test, but also instructs that the actual act of carrying out the remedy should mirror the preliminary injunction by merely reducing the revenue sharing fees for the first 2,000 machines to the prior rates of the 1999 Compact.

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B. THE MISREPRESENTATION TEST ONLY REQUIRES MATERIAL MISSTATEMENTS OR OTHER FORMS OF OBJECTIVE BAD FAITH, AND NOT LEGAL FRAUD AS THE STATE CONTENDS

Separate and apart from the test mentioned above is the one for reformation on account of equitable fraud, which simply asks whether:

> (1) one party seeks reformation, (2) that party's assent was induced by the other party's misrepresentations as to the terms or effect of the contract, and (3) the party seeking reformation was justified in relying on the other party's misrepresentations.

Skinner, 673 F.3d at 1166 (citing Restatement (Second) of Contracts § 166 (1981)). One question the elements of this test leave open is "what kind of misrepresentation is needed for reformation?" The analysis section within the *Skinner* opinion, however, goes on to state that the plaintiff was not entitled to the remedy due to its failure to show that the end contract was induced by either fraudulent or materially-misleading statements. *Id.* at 1166-67. Incorporating these two grounds into the reformation test harmonizes it with the one set forth in the Restatement for rescission on account of misrepresentation. *See* Restatement (Second) of Contracts § 164 (1981).

Yet, the ostensible incongruity between the reformation tests in *Skinner* and Section 166 of the Restatement becomes a point of contention in the State's brief. The relative positions occupied by the plan administrator in *Skinner* and the license pool trustee in the present action, however, explain why fraud equates with materiality in these specific circumstances; after all, fraud committed by a fiduciary broadly encompasses "any act, omission, or concealment involving a beach of legal or equitable duty,

trust or confidence which results in damage to another even though the conduct is not otherwise fraudulent." *Harmon v. Korbin,* 250 F.3d 1240, 1249 n.10 (9th Cir. 2001). Conveniently enough, a substantively identical standard also applies to equitable fraud more generally, though, because fraud in the equitable sense does not require proof of scienter. *See, e.g., SEC v. Capital Gains Research Bureau, Inc.,* 375 U.S. 180, 193-94 (1963) (detailing the same standard); 3 S. Symons, *Pomeroy's Equity Jurisprudence* § 885 (5th ed. 1941) ("A person making any untrue statement, without knowing or believing it to be untrue, and without any intent to deceive, may be chargeable with actual fraud in equity."). This special definition for fraud in equity means that Judge Goodwin was correct in *Skinner* to condition the right of reformation upon a showing of either a material misrepresentation or some other act that is "unconscientious or a violation of good faith" and thus falls under the vast umbrella of objectively unreasonable conduct. *See Amara v. CIGNA Corp.,* 775 F.3d 510, 526 (2d Cir. 2014) (citing 3 S. Symons, *Pomeroy's Equity Jurisprudence* § 873 (5th ed. 1941)).

C. THE MISCELLANEOUS ARGUMENTS DEALING WITH THE STANDARD OF REVIEW AGAIN AFFORD DEFERENCE TO THE DISTRICT COURT WHEN NONE IS WARRANTED

Harkening back to the bad faith section, the remaining argument advanced by the State would have the district court's order serve as the foundation for the review of the reformation issue. Abuse of discretion language permeates the reformation argument in the State's response brief despite the fact that the Ninth Circuit treats the tests for equitable remedies like rescission and reformation as claims and accordingly

reviews them *de novo*. *See Gabriel v. Alaska Elec. Pension Fund,* 755 F.3d 647, 654-55 (9th Cir. 2014). A deferential standard of review focused on correcting errors in judgment would seemingly only come into play if the *application* of the equitable remedy resulting from such claim were under challenge, such as if the State hypothetically objected to the reformation of the revenue sharing terms on the first 2,250 machines of the 2004 Amendment. *See FTC v. Grant Connect, LLC,* 763 F.3d 1094, 1101 (9th Cir. 2014). Irrespective of the law, utilizing this more stringent standard of review would still not effect Pauma's entitlement to reformation due to the district court only considering half of the requisite test after previously disclosing that the remedy was not an option. *See In re Debbie Reynolds Hotel & Casino, Inc.,* 255 F.3d 1061, 1065 (9th Cir. 2001) (stating an erroneous interpretation of the law is a *per se* abuse of discretion).

Wrapped up in the abuse of discretion discussion is also the trustee issue, with the basic premise of the State's argument being the district court reached the correct conclusion notwithstanding Pauma's confusion about the purposes of the various stages of the trial court proceeding. Taking a fresh look at the issue renders the prior looks extraneous in more ways than one, but an accurate depiction of these earlier events will at least show how the rest of the viewing world perceives the trustee reference in Section 4.3.2.2(a)(3)(vi) of the 1999 Compact. The first look by Judge Bencivengo ended with her interpreting the plain meaning of the compact language, concluding in line with the only other federal judge who considered the issue that "trustee" actually means trustee. Switching out the allegations with actual evidence resulted in nothing

from the State, while counsel for Pauma introduced a wealth of documents showing that the author of the 1999 compact, the public and private entities that administered the license pool, and the tribes that benefited from the system (including the one involved in this appeal) all interpreted the trustee reference in accordance with Judge Bencivengo's initial understanding. What came next, including the district court raising a statute of limitations defense on the State's behalf *sua sponte* and closing off any non-rescissionary remedies, has no bearing on the essential point that *every* stakeholder and *every* reviewing court originally believed that the compact plainly states a "trustee" oversees the license pool. There is simply no reason for this panel to diverge from these opinions, especially given the absence of countervailing evidence or argument from the State.

CONCLUSION

Dismissing the allegations of the plaintiff as an elaborate and improbable conspiracy theory might work if all the substantiating evidence was under lock and key in some underground governmental bunker. The trickle of evidence that has come out in this case, though, proves rather clearly that sometimes conspiracies do exist, and the people who rant about them are not tin-foil-hat-wearing lunatics. A change in administrations and the purging of the executive officeholders that often comes therewith may cause most schemes to cease, but not when the principal advisors to the Office of the Governor on Indian affairs – like Senior Assistant Attorney General Sara Drake – have been setting policy and fighting against tribes since before the start of

the 1999 Compact negotiations. *Compare Chemehuevi Indian Tribe v. Wilson,* No. 97-01478 (N.D. Cal. 1997) (listing Ms. Drake as lead attorney); *with Pauma IV,* Nos. 14-56104 & 14-56105 (9th Cir. filed on July 10, 2014) (same); *and* everything in between. Simply put, lines have formed, parties are entrenched, and the battle is poised to go on forever unless this panel turns back the clock and then sets it forward by triggering the IGRA remedial scheme.

RESPECTFULLY SUBMITTED this 29th day of June, 2015

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the undersigned certifies that this cross-appeal reply brief is proportionally-spaced, has a typeface of 14 points, and contains exactly 7,000 words (excluding the parts exempted under Fed. R. App. P. 32(a)(7)(B)(iii)), in compliance with the type-volume limitation of Fed. R. App. P. 28.1(e)(2)(C).

Dated: June 29, 2015

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