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**FILED**  
SUPERIOR COURT OF CALIFORNIA  
COUNTY OF LOS ANGELES

APR 18 2012

John A. Clarke, Executive Officer/Clerk  
BY  Deputy  
Kimber La-Fleur-Clayton

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES

SAN PASQUAL BAND OF MISSION  
INDIANS, a federally recognized Indian Tribe,

Plaintiff,

vs.

STATE OF CALIFORNIA; CALIFORNIA  
GAMBLING CONTROL COMMISSION, an  
agency of the State of California,

Defendants.

**CASE NO.: BC 431469**

**Judge:** Hon. Ruth Ann Kwon

**NOTICE OF MOTION AND MOTION FOR  
LEAVE OF COURT TO FILE SECOND  
AMENDED COMPLAINT;  
MEMORANDUM OF POINT AND  
AUTHORITIES; DECLARATION OF  
RYAN MICHAEL KROLL; [PROPOSED]  
ORDER  
LODGED WITH THE PROPOSED  
SECOND AMENDED COMPLAINT**

**Hearing:**

Date: May 22, 2012

Time: 9:00 a.m.

Dept.: 72

TO ALL PARTIES AND TO THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on May 22, 2012, or as soon thereafter as the matter can be heard in Dept. 72 of the Los Angeles Superior Court, Stanley Mosk Courthouse, Plaintiff SAN PASQUAL Band of Mission Indians (hereinafter "SAN PASQUAL") will and hereby does move the Court for leave to file a Second Amended Complaint in this action. The Proposed Second Amended

NOTICE OF MOTION AND MOTION FOR LEAVE OF COURT TO FILE SECOND AMENDED COMPLAINT; DECLARATION OF RYAN MICHAEL KROLL; [PROPOSED SECOND AMENDED COMPLAINT] LODGED WITH THE PROPOSED SECOND AMENDED COMPLAINT

CIT/CASE: 9CV13146, LEA/EF#: 13146  
RECEIPT #: 0850085702  
DATE PAID: 05/21/12 12:45:55 PM  
PAYMENT: \$40.00  
RECEIVED:  
CHECK: \$0.00  
CASH:  
CHANGE  
CARD:

1 Complaint is attached hereto and will be lodged separately with the Court.

2 SAN PASQUAL brings this Motion in response to the continued erroneous assertion by  
3 Defendants STATE OF CALIFORNIA and CALIFORNIA GAMBLING CONTROL COMMISSION  
4 (hereinafter referred to collectively as the "STATE"), that despite the continuing and reoccurring  
5 obligation of the STATE to issue available Gaming Device Licenses that SAN PASQUAL duly  
6 requests and the STATE's repeated failures to issue available Gaming Device Licenses after being  
7 duly requested by SAN PASQUAL, that STATE's lone breach of the 1999 Tribal-State Gaming  
8 Compact between the parties (hereinafter the "Compact") occurred in June 2002 and that based upon  
9 that erroneous assertion this Action is barred by the statute of limitations.

10 SAN PASQUAL disputes this contention. The STATE is wrong. The Compact creates a  
11 continuing obligation that the STATE repeatedly breached *each time* the Commission failed to issue  
12 all Gaming Device licenses authorized to be issued under the Compact. Indeed there was a separate  
13 Breach on six(6) independent unique occasions July 10, 2003, October 22, 2004, October 7, 2005,  
14 August 16, 2006, October 10, 2007, and December 11, 2008. None of those breaches was in 2002.  
15 The first of those Breaches was in 2003, and most recent December 2008. All of them, however, are  
16 compensable by this Complaint by Application of the applicable Statutes of Limitations on their face,  
17 as well as by the doctrines by equitable tolling and/or the application of *C.C.P. § 355*.

18 This Second Amended Complaint makes especially clear that this Action before this Court at  
19 this time encompasses all such dates, all such breaches, and thus contrary to the STATES assertions in  
20 its pending Motion for Summary Judgment. This is true even as to the earliest breach in 2003, or even  
21 if the Court were to accept, albeit wrong by, that a Breach occurred in 2002. The Second Amended  
22 Complaint alleges all these facts explicitly.

23 In addition, *C.C.P. § 355* now permits SAN PASQUAL to file its Federal Action (Case NO.  
24 06-CV-0988) in STATE Court as a Breach of Contract Action to obtain damages against the STATE  
25 because SAN PASQUAL's judgment in the Federal Action was reversed by the Ninth Circuit on  
26 September 12, 2011 when the Ninth Circuit vacated the lower court's judgment in favor of SAN  
27 PASQUAL due to the matter being moot, which is not a decision on the merits, and remanded  
28

1 the matter back to the district court in order for that court to dismiss the Federal Action without  
2 prejudice, which it did on November 29, 2011.

3 SAN PASQUAL now diligently brings this Motion to Amend based upon the recent  
4 concessions of the STATE that the Federal Action and this Action are "based on same facts," and also  
5 that the STATE admits to suffering no prejudice by applying the doctrine of equitable tolling since the  
6 STATE has recently asserted that discovery is unnecessary into the parties' interpretations of Compact  
7 §4.3.2.2(a)(1) because the matter is resolved and also that discovery is unnecessary into the  
8 underlying the matters based upon the parties' recent Stipulation of Facts.

9 Therefore, in light of the STATE's continued assertions that the lone breach of the Compact  
10 occurred in June 2002 and that this Action is "based on same facts" as the previous Federal Action,  
11 SAN PASQUAL seeks to amend its Complaint to include specific facts that support the application of  
12 C.C.P. §355 and the doctrine of equitable tolling to this matter; and explicitly identify all six (6)  
13 breaches based thereon.

14 California law requires a liberal view to allowing amendments to pleadings to ensure trial on  
15 the merits and even permits amendments to pleadings up through trial. Here, no trial date has even  
16 been set. Additionally, SAN PASQUAL has not been dilatory in filing this Motion for Leave to  
17 Amend. No prejudice will result to the STATE from granting this leave to file SAN PASQUAL's  
18 proposed Second Amended Complaint because the new facts asserted in the Second Amended  
19 Complaint are well-known to the STATE as they reflect the occurrences in the parties' Federal Action  
20 and, in fact, many of them were asserted as true by the STATE in its recent assertions in its Motion  
21 for Summary judgment. Simply put, the facts asserted in the Second Amended Complaint have  
22 always been known to the STATE, and are relied upon by the STATE in its pending Motion for  
23 Summary Judgment, so the STATE cannot now complain it has been surprised in any way.

24 SAN PASQUAL's Motion for Leave to File a Second Amended Complaint is and will be  
25 based upon this Notice, the Points and Authorities set forth below, the Declaration of Ryan Michael  
26 Kroll, and the Proposed Second Amended Complaint attached hereto and served and filed herewith,  
27 the Proposed Order served and filed herewith, and the complete files and records of this action. In  
28 addition, if such leave is granted, then SAN PASQUAL respectfully requests that the Proposed

1 Second Amended Complaint be deemed filed and served as of the date of the granting of the motion.

2 Respectfully submitted,

3  
4 DATED: April 16, 2012

SOLOMON, SALTSMAN & JAMIESON

5  
6 By: 

Stephen Warren Solomon

Stephen Allen Jamieson

R. Bruce Evans

Ryan M. Kroll

Attorneys for Plaintiff-SAN PASQUAL Band of Mission  
Indians

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## MEMORANDUM OF POINTS AND AUTHORITIES

### I. INTRODUCTION

Based upon the STATE's concession in its recent Motion for Summary Judgment that this Action is "based on same facts" as SAN PASQUAL's prior Federal Action, and STATE'S spurious arguments therein that the facts alleged are barred by Statutes of Limitation, SAN PASQUAL now seeks leave to file a Second Amended Complaint in order to plead facts that explicitly state what should be obvious: There was one "wrong" and one "dispute" when the STATE announced its misinterpretation of the Compact in 2002, but that no breach of Contract occurred until the STATE first refused certain slot machine Licenses demanded. This happened the first time on July 10, 2003 then 5 more independent unique breaches on October 22, 2004, October 7, 2005, August 16, 2006, October 10, 2007, and the most recent breach on December 11, 2008; and, that each and every such breach is actionable in the current timely filed Action pending in this Court. On its face, the relevant Statutes of Limitation for each independent breach reflect this lawsuit as timely for each one. Moreover, the application of the Doctrine of Equitable Tolling and C.C.P. § 355 assure that to be the case.

Thus, since the STATE asserts that this Action, as pled in the First Amended Complaint, is seeking damages for a breach that occurred in June 2002, and while SAN PASQUAL continues to refute that the First Amended Complaint does not seek damages for a breach that occurred in June 2002, SAN PASQUAL seeks leave to file an amended complaint that alleges facts dating back to the dates of Actual breaches in Response to the STATE'S assertions that the 4 year Statute of Limitations for breach of written contract, C.C.P. §337, apply.

SAN PASQUAL has not been dilatory in filing this Motion for Leave to Amend. No prejudice will result to the STATE from granting this leave to file SAN PASQUAL's proposed Second Amended Complaint because the new facts asserted in the Second Amended Complaint are well-known to the STATE, as they were part of the federal court litigation in which both parties were involved. These facts and this dispute have been litigated, and discussed amongst the parties numerous times in person and otherwise over a period of years and there is no question that the

1 STATE is well aware of the new facts alleged in SAN PASQUAL's Second Amended Complaint.

2  
3 **II. WHILE SUMMARY JUDGMENT MOTIONS ARE PENDING REQUESTS FOR**  
4 **LEAVE ARE ROUTINELY AND LIBERALLY GRANTED BY THE COURTS**  
5 **CONSISTENT WITH JUDICIAL POLICY FAVORING RESOLUTION OF ALL**  
6 **DISPUTED MATTERS**

7 "The court may grant leave to amend the pleadings at any stage of the action. Motions for  
8 leave to amend the pleadings are directed to the sound discretion of the Judge. 'The court may, in  
9 furtherance of justice, and on such terms as may be proper, allow a party to amend any pleading'  
10 [CCP § 473(a)(1); and see CCP § 576]." The Rutter Group, California Practice Guide, Civil  
11 Procedure Before Trial Ch. 6, § 6:636, 6:637. The court's discretion to permit amendment of the  
12 pleadings is liberally exercised, *Nestle v. Santa Monica*, (1972) 6 Cal.3d 920, 939, and the policy  
13 favoring amendment is so strong that it is a rare case in which denial of leave to amend can be  
14 justified, *Howard v. County of San Diego*, 184 Cal.App.4th 1422, 1428 (2010).

15 *In the context of summary judgment motions*, requests for leave to amend are "routinely and  
16 liberally granted." *Kirby v. Albert D. Seeno Constr. Co.*, 11 Cal. App. 4th 1059, 1069 (1992).  
17 Amendments after summary judgment motions have been filed are particularly appropriate where  
18 such amendments "are intended to repair complaints that are legally insufficient, in other words, those  
19 that would be subject to a motion for judgment on the pleadings." See *College Hospital, Inc. v.*  
20 *Superior Court*, 8 Cal.4th 704, 719, fn. 5 (1994). Furthermore, when considering challenges to the  
21 sufficiency of a pleading, it is an abuse of discretion to dismiss an action if it is reasonably possible  
22 that a defect in a complaint could be cured by an amendment. *Kirby*, 11 Cal. App. 4th at 1069. Thus,  
23 in *Kirby*, it was abuse of discretion to deny leave to amend where a reasonable probability existed that  
24 the appellants could amend the complaint to state facts which would have shown that claims were not  
25 barred by statute of limitations, due to the delayed discovery rule. *Id.* Once a motion to amend a  
26 complaint is granted, the filing of an amended complaint moots any motion directed at a prior  
27 complaint and it is error to grant summary adjudication on a cause of action contained in a previous  
28 complaint. *State Comp. Ins. Fund v. Superior Court*, 184 Cal. App. 4th 1124, 1131 (2010).

1 Here, the Court should follow the policy of "liberally and routinely" granting leave to amend  
2 and allow SAN PASQUAL to amend its complaint to address the defects alleged (albeit denied by  
3 Plaintiff) in the STATE's summary judgment motion. As in *Kirby*, in which leave to amend should  
4 have been granted because allowing amendment would have allowed the appellants to plead facts that  
5 could have supported a theory that would have supported their argument that the statute of limitations  
6 did not bar their claim, SAN PASQUAL should be granted leave to amend its complaint because  
7 doing so will allow SAN PASQUAL to remedy a supposed "defect" in the pleadings by including  
8 facts that clearly reflect that SAN PASQUAL's Breach of Contract Claims are timely and support the  
9 argument that the statute of limitations does not bar SAN PASQUAL's claims.

10 By allowing leave to amend now, and addressing these issues now, it will enable the court to  
11 more effectively deal with the parties' dispositive motions and prevent the need for further  
12 amendment before trial. Therefore, it is clearly in the "furtherance of justice" to permit SAN  
13 PASQUAL to amend its Complaint to include the facts supporting SAN PASQUAL's arguments  
14 regarding the STATE's position on the breach of the Compact.

15  
16 **III. LEAVE TO AMEND SHOULD BE GRANTED BECAUSE IT WAS TIMELY MADE BY**  
17 **SAN PASQUAL AND WILL NOT PREJUDICE THE STATE**

18 If, as here, a the motion to amend is timely made and the granting of the motion will not  
19 prejudice the opposing party, it is error to refuse permission to amend. *Morgan v. Sup. Ct.*, (1959)  
20 172 Cal.App.2d 527, 530. In addition, "as long as no prejudice to the defendant is shown, the liberal  
21 policy re amendment prevails and it is an abuse of discretion to refuse the amendment." The Rutter  
22 Group, California Practice Guide, Civil Procedure Before Trial Chp. 6, § 6:653; see *Mesler v. Bragg*  
23 *Mgt. Co.*, (1985) 39 Cal.3d 290, 297. Furthermore, "an otherwise proper amendment should not be  
24 refused solely because the case is on fast track. This is true even where the amendment will require a  
25 continuance of the trial date." The Rutter Group, California Practice Guide, Civil Proc. Before Trial ¶  
26 6:654; *Honig v. Financial Corp. of America*, (1992) 6 Cal.App.4th 960, 967.

27 Even if, unlike here, the moving party delayed in seeking amendment but the delay has not  
28 misled or prejudiced the opposing side, the liberal policy of allowing amendments still prevails.

1 *Higgins v. Del Faro*, (1981) 123 Cal.App.3d 558, 564-565 (holding it was abuse of discretion to deny  
2 amendment even as late as time of trial even though moving party had delayed where delay had not  
3 misled or prejudiced the opposing side); The Rutter Group, California Practice Guide, Civil Procedure  
4 Before Trial ¶ 6:659.

5 Here, SAN PASQUAL should be granted leave to amend the Complaint because SAN  
6 PASQUAL's motion is timely. SAN PASQUAL is relying upon the STATE's recent admissions that  
7 these proposed amendments to the Complaint would not cause the STATE to suffer any prejudice  
8 since the STATE asserts in its recent February 14, 2012 Motion for Summary Judgment that the two  
9 actions are "based on same facts" and the STATE recently asserted that that discovery into the  
10 underlying facts is unnecessary because the parties agree that the Compact requires the Commission to  
11 issue 40,201 Licenses and also because the parties have executed a Stipulation of Facts as to many of  
12 the underlying facts. Similarly, SAN PASQUAL could not have alleged facts relevant to *C.C.P.* §  
13 355 previously because *C.C.P.* § 355 was not applicable until the Ninth Circuit's reversal on  
14 September 12, 2011 and the eventual dismissal of the Federal Action without prejudice on November  
15 29, 2011. Therefore, SAN PASQUAL's request for leave to amend is timely and should be granted in  
16 accordance with California's liberal policy of allowing amendments to pleadings.

17 Furthermore, SAN PASQUAL should be granted leave to amend the Complaint because an  
18 amendment to the Complaint will not prejudice the STATE in any way. The allegations added by  
19 SAN PASQUAL in the Second Amended Complaint are facts well-known to the STATE as they have  
20 been part of the prior federal court litigation between SAN PASQUAL and the STATE, as well as  
21 relied upon by the STATE in other litigation. This enabled the STATE to find and preserve evidence  
22 related to this Action, including evidence related to the factual allegations in the Second Amended  
23 Complaint. The STATE itself has repeatedly asserted that no discovery is necessary in this Action  
24 since the facts of the dispute are well-known by both parties, and so the STATE cannot now claim that  
25 the basic factual allegations in the Second Amended Complaint create any prejudice to the STATE.  
26 Therefore, because an amendment will cause no prejudice whatsoever to the STATE, SAN  
27 PASQUAL should be granted leave to amend in accordance with California's liberal policy of  
28 allowing amendments to pleadings.

1 IV. WHILE THIS MOTION IS NOT THE PROPER TIME TO RULE ON THE MERITS OF  
2 SAN PASQUAL'S INTENDED AMENDMENTS, LEAVE TO AMEND SHOULD BE  
3 GRANTED BECAUSE THE ARGUMENTS PREDICATED ON SAN PASQUAL'S  
4 SECOND AMENDED COMPLAINT HAVE MERIT

5  
6 A. UNDER THE EQUITABLE TOLLING DOCTRINE, AN ACTION  
7 CONTESTING THE COMMISSION'S JUNE 2002 ANNOUNCEMENT OF  
8 ITS INTERPRETATION OF THE NUMBER OF AVAILABLE LICENSES  
9 AND EACH SUBSEQUENT DRAW UTILIZING THE INCORRECT  
10 NUMBER OF LICENSES WOULD STILL BE TIMELY PURSUED IN THIS  
11 ACTION

12 In its Motion for Summary Judgment, the STATE wrongly asserts that its lone breach of the  
13 Compact occurred in June 2002 when the Commission announced its incorrect interpretation of  
14 Compact §4.3.2.2(a)(1) despite the fact that all of the elements for a breach of contract did or even  
15 could have occurred then. June 2002 is not the correct accrual date for breach of Contract but even if,  
16 assuming arguendo, it were, the Action would still be timely. While SAN PASQUAL continues to  
17 assert that the Compact creates a continuing obligation that the State repeatedly breached each time  
18 the Commission failed to issue all Gaming Device licenses authorized to be issued under the  
19 Compact, under the doctrine of equitable tolling, this Action may be amended to allege facts that  
20 would permit this Action to be a timely claim to pursue the STATE's erroneous interpretation in June  
21 2002 and also to pursue damages for each subsequent Draw that the STATE denied SAN PASQUAL  
22 Licenses based upon that incorrect interpretation beginning thereafter in July 2003, with the first  
23 breach of contract that caused damages to be incurred, and accruing on the date of each independent  
24 unique breach, i.e. on October 22, 2004, October 7, 2005, August 16, 2006, October 10, 2007, and  
25 December 11, 2008.

26 The equitable tolling doctrine permits an action to be filed after the time period for which it  
27 normally must be commenced, as here, if the following three elements are met: 1) plaintiff provided  
28 timely notice of the claim, 2) the defendant's ability to defend the claim is not prejudiced and 3) the

1 plaintiff's conduct was reasonable and in good faith. *Addison v. State of California*, (1978) 21 Cal. 3d  
2 313, 319.

3 The State asserts that the statute of limitations for this Action accrued on June 19, 2002 when  
4 the Commission announced its interpretation of the Compact, which SAN PASQUAL disputes,  
5 [because the June 2002 announcement was not a breach since all elements of a breach were not met at  
6 that time], but for purposes of illustrating how the tolling would apply will be assumed to be true for  
7 this limited purpose. SAN PASQUAL filed its Federal Action on May 3, 2006, which is within four  
8 years of the Commission's announcement of its incorrect interpretation, and thereby tolled the statute  
9 of limitations for claims based on the Commission's incorrect interpretation and the Draws conducted  
10 by the Commission in reliance thereon.

11 Thereafter, and while the Federal Action was still pending and thus while the statute of  
12 limitations was still being tolled, SAN PASQUAL filed this State Court Action on February 9, 2010.  
13 Therefore, since the STATE asserts in its Motion for Summary Judgment that this State Court Action  
14 is "based on same facts" as Federal Action, the STATE concedes that the filing of the Federal Action  
15 would toll the statute of limitations for this State Court Action.

16 California law has "a general policy which favors relieving plaintiff from the bar of a  
17 limitations statute when, possessing several legal remedies [plaintiff], reasonably and in good faith,  
18 pursues one designed to lessen the extent of [its] injuries or damages." *Addison*, 21 Cal. 3d at 317-18.  
19 In this instance, SAN PASQUAL possessed several legal remedies including commencing a federal  
20 action for pure declaratory relief or filing a state court action that sought monetary damages. *See*  
21 *Bertero v. National Gen. Corp.*, (1967) 254 Cal. App. 2d 126, 136 (comparing declaratory relief with  
22 an "alternative remedy, such as damages, injunctive relief and the like").

23 Initially, SAN PASQUAL chose the typically more expedient route of seeking pure  
24 declaratory relief in pursuing its federal action. *Mycogen Corp. v. Monsanto Co.*, (2002) 28 Cal. 4th  
25 888, 902 (noting that actions for pure declaratory relief "provide parties with a quick way of resolving  
26 disputes without the need to assert all claims based on the same cause of action.").

27 However, the State's frivolous argument in the Federal Action that SAN PASQUAL had no  
28 judicial remedy, which the Ninth Circuit wholly rejected, caused years of delay and thereby greatly

1 increased the damages suffered by SAN PASQUAL. After incurring such high losses, SAN  
2 PASQUAL then made the decision to file this State Court Action for damages since it became clear  
3 that the State would continue to attempt to delay SAN PASQUAL's efforts for an expedient court  
4 remedy, which it did at every point that it could.

5 Here, all three elements for equitable tolling are met. First, since SAN PASQUAL timely filed  
6 the Federal Action that the State now claims is "based on same facts" as this Action since that Federal  
7 Action was filed within four years of the Commission's June 2002 announcement of its incorrect  
8 interpretation. Thus, the STATE'S assertion the two actions are "based on same facts" is an admission  
9 that the STATE believes that the Federal Action gave it notice of the facts at issue in this Action.

10 Second, the STATE suffers no prejudice since the STATE was able to gather and preserve  
11 evidence related to this Action after being notified and served with the federal action. "The second  
12 prerequisite essentially translates to a requirement that the facts of the two claims be identical or at  
13 least so similar that the defendant's investigation of the first claim will put him in a position to fairly  
14 defend the second. "So long as the two claims are based on essentially the same set of facts timely  
15 investigation of the first claim should put the defendant in position to appropriately defend the second.  
16 Once he is in that position the defendant is adequately protected from stale claims and deteriorated  
17 evidence." *Tarkington v. California Unemployment Ins. Appeals Bd.*, 172 Cal. App. 4th 1494, 1504  
18 (internal citations omitted). Here, the STATE cannot show any prejudice due to loss of evidence since  
19 the STATE alleges in its Motion for Summary Judgment that the two actions are "based on same  
20 facts," and also because the parties have in fact stipulated to the basic underlying facts and the State  
21 has repeatedly asserted that discovery should not be permitted into the parties' interpretations since  
22 those matters are resolved. Thus, the STATE suffers no prejudice in allowing this Action to continue.

23 Third, SAN PASQUAL has always acted reasonably and in good faith. Courts generally look  
24 to whether "a plaintiff delayed filing the second claim until the statute on that claim had nearly run,"  
25 or "whether the plaintiff [took] affirmative action which misle[d] the defendant into believing the  
26 plaintiff was foregoing his second claim." *Tarkington v. California Unemployment Ins. Appeals Bd.*,  
27 //

1 172 Cal. App. 4th 1494, 1505, (2009). In this instance, SAN PASQUAL did not delay in filing this  
2 State Court Action since SAN PASQUAL filed this State Court Action while the Federal Action was  
3 still pending, and, in fact, over 20 months before the Federal Action became final. Additionally, SAN  
4 PASQUAL never took any affirmative action to state that it would not pursue this Action for damages  
5 and in fact repeatedly informed the State that its acts and omissions were causing SAN PASQUAL to  
6 suffer millions of dollars in damages.

7       The three prerequisites of equitable estoppel are met herein and therefore the statute of  
8 limitations for this State Court Action should be tolled during the pendency of the Federal Action,  
9 which was filed May 3, 2006 and was thus timely to contest the Commission's June 2002  
10 announcement of its incorrect interpretation. Because this State Court Action was filed while the  
11 Federal Action was still pending and statute of limitations was being tolled, then even under the  
12 State's theory this Action is timely to challenge the Commission's June 2002 announcement.  
13 Therefore, consistent with the liberal policy demanding that leave be granted to ensure a trial on the  
14 merits, SAN PASQUAL respectfully requests Leave to File a Second Amended Complaint to allege  
15 facts to support the application of the equitable tolling doctrine so that SAN PASQUAL may refute  
16 the STATE's contention in its Motion for Summary Judgment that this State Court Action is barred by  
17 the statute of limitations.

18       B. C.C.P. §355 PERMITS SAN PASQUAL TO FILE ITS FEDERAL ACTION IN  
19 STATE COURT UP TO ONE YEAR AFTER THE NINTH CIRCUIT'S  
20 REVERSAL AND THEREFORE, SAN PASQUAL MAY STILL TIMELY  
21 PURSUE AN ACTION BASED UPON THE COMMISSION'S ERRONEOUS  
22 INTERPRETATION IN JUNE 2002

23       In the Federal Action on September 12, 2011, due to the matter becoming moot, the Ninth  
24 Circuit Court of Appeals reversed the decision of the district court in the federal action between SAN  
25 PASQUAL and the STATE by vacating the judgment and remanding the matter back to the district  
26 court in order for the Federal Action to be dismissed without prejudice, as the parties requested in  
27 their Joint Stipulation. The parties agreed in the Joint Stipulation that the Federal Action became  
28



1 moot because the STATE concurred with SAN PASQUAL that the Compact requires the Commission  
2 to issue a total of 40,201 Gaming Device licenses.

3 Because the Federal Action for Declaratory relief was the moot due to the parties no longer  
4 having a case or controversy, the federal courts were without subject matter jurisdiction of SAN  
5 PASQUAL's federal action. *Tilley Lamp Co. v. Thacker*, 454 F.2d 805, 808 (5th Cir. 1972) (holding  
6 that "if there is no "case or controversy", the court has no jurisdiction over the subject matter of a  
7 claim.). Thus, the Ninth Circuit's decision was not on the merits since it reversed the matter before  
8 either party submitted a brief based upon the parties' representation that the parties were in agreement  
9 that the Compact requires the Commission to issue 40,201 Gaming Device Licenses and thus the  
10 Ninth Circuit had no subject matter jurisdiction since there no longer was a "case of controversy."  
11 *Nichols v. Canoga Industries*, 83 Cal.App.3d 956, 967 (holding that when a federal court lacks subject  
12 matter jurisdiction it is "powerless to make a decision on its merits.").

13 C.C.P. §355 permits SAN PASQUAL to file the prior federal action as a State Court Action  
14 within one year of the Ninth Circuit's reversal since the district court judgment was reversed for being  
15 moot and not on the merits. To wit, C.C.P. §355 states that:

16 "If an action is commenced within the time prescribed therefor, and  
17 a judgment therein for the plaintiff be reversed on appeal other than  
18 on the merits, a new action may be commenced within one year  
19 after the reversal."

20 Courts have noted that the purpose of C.C.P. § 355 is "to avoid the harsh forfeiture of a  
21 plaintiff's rights where his first action, wherever it may have been attempted, has resulted in a  
22 judgment later reversed on appeal, or when the action has been thwarted on some procedural ground  
23 unrelated to the merits of the claim." *Schneider v. Schimmels*, 256 Cal.App. 2d 366, 370 (disapproved  
24 of on different grounds). Additionally, the Supreme Court has encouraged a liberal interpretation of  
25 statutory tolling provisions "[b]ecause the Legislature cannot predict all of the circumstances that  
26 come within the purpose of the tolling exceptions," and therefore "it is appropriate for courts to  
27 construe the statutory tolling scheme and implicit tolling exceptions to effect the ostensible legislative  
28 purpose." *Lambert v. Commonwealth Land Title Ins. Co.*, 53 Cal. 3d 1072, 1078-79.

1 While SAN PASQUAL disagrees with the STATE's argument that this Action is based upon a  
2 breach in June 2002 because not all of the elements of a breach had yet occurred, pursuant to *C.C.P.*  
3 §355, SAN PASQUAL may now pursue an action based upon the same facts as the Federal Action.  
4 *Nichols v. Canoga Industries*, 83 Cal.App.3d 956, 959 (holding that "the timely filing of a federal  
5 action under the described circumstances sufficiently asserts tolling of the statute of limitations upon  
6 the California cause of action so that the state cause is not barred.").

7 Since the Federal Action was filed on May 3, 2006, which is within four years of the  
8 Commission's announcement of its interpretation in June 2002, and concerned the June 2002  
9 interpretation, SAN PASQUAL could now still file an action based upon the Commission's  
10 announcement of its interpretation in June 2002. Thus, it would simply be a matter of form over  
11 substance to require SAN PASQUAL to file a new action instead of simply proceeding with this  
12 Action and allowing SAN PASQUAL to amend its Complaint. However, it should be noted that out  
13 of an abundance of caution, SAN PASQUAL is filing a new action based upon the same facts of the  
14 Federal Action and pursuant to *C.C.P.* §355 and will then seek to relate that case to this Action. If this  
15 Motion is granted the other new Action can be related, consolidated, or perhaps become moot subject  
16 to dismissal.

17 **C. THE 4 YEAR STATUTE OF LIMITATIONS IN C.C.P. §337 ALSO MAKES**  
18 **ACTION TIMELY**

19 C.C.P. § 337 provides a 4 year Statute of Limitations which the State now contends is  
20 applicable to the Breaches of Contract. Application of the 4 year Statute of Limitations to each of the  
21 independent unique Breaches of the Contract here reflects the Action was filed timely and the  
22 Amendment of the Complaint to explicitly allege each of the six (6) independent separate Breach of  
23 the Contract is appropriate to make abundantly clear that this lawsuit for Breach of Contract against  
24 the STATE is timely under all the theories.

25 **V. THE PROPOSED AMENDMENTS TO THE EXISTING COMPLAINT ARE ALL IN**  
26 **THE FURTHERANCE OF JUSTICE AND SHOULD ALL BE GRANTED**

27 **A. Modifications to Allegations in the Original Complaint.**  
28

1 SAN PASQUAL's proposed Second Amended Complaint modifies the Title of Section 1.E  
2 (which was formerly 1.C) (Second Amended Complaint 10:1-59) to allude to the multiple breaches  
3 now being sought in the Second Amended Complaint. SAN PASQUAL's proposed Second Amended  
4 Complaint modifies the Title of Section 1.F (which was formerly 1.D) (Second Amended Complaint  
5 10:1-59) to mention with more specificity the initial date of the Meet and Confer and to allude to all  
6 other attempts by San Pasqual to meet and confer. Paragraph 70 (formerly Paragraph 47) (SAC 21:9-  
7 13) was modified to now allege at least \$200,000,000 in damages and to request prejudgment and  
8 postjudgment interest. Additionally, the Second, Third and Fourth Causes of Action have been  
9 deleted in the Second Amended Complaint due to the Court's ruling to sustain the Demurrer to those  
10 causes of action without leave to amend on October 13, 2011. Also, the First Paragraph of the Prayer  
11 for Relief (22:4-8) was modified to now request at least \$200,000,000 in damages and prejudgment  
12 interest and postjudgment interest. *There were other minor editorial changes regarding grammar and*  
13 *other nonmaterial issues.*

14 **B. New Allegations in the Proposed Second Amended Complaint.**

15 San Pasqual has alleged DOE defendants. (SAC 2:16-17). San Pasqual has included  
16 allegations concerning the origination of the Dispute in June 2002 and the difference between that  
17 Dispute, or "Wrong," and the actual injuries that San Pasqual suffered when it was denied Licenses  
18 subsequently. (SAC 6:6-13). The Second Amended Complaint contains new allegations in Section  
19 1.D (contained on SAC 6:15 through 9:21) that support SAN PASQUAL's contention that the  
20 Doctrine of Equitable Tolling and C.C.P. §355 are applicable and thereby refute the STATE's  
21 contention in its Motion for Summary Judgment that this Action is barred by the statute of limitations  
22 and additionally allow SAN PASQUAL to pursue an Action based upon the Commission's incorrect  
23 interpretation of Compact §4.3.2.2(a)(1) and every Draw held subsequently in which the Commission  
24 utilized its incorrect interpretation of Compact §4.3.2.2(a)(1) regarding the number of Licenses  
25 available to be issued.

26 Paragraph 34 (SAC 14:9-10) now alleges each of the separate and independent breaches by the  
27 State when the Commission failed to issue San Pasqual the Licenses it requested at six different  
28 Draws. Paragraphs 35, 36 and 44 (SAC 14:18-28 and SAC 17:1-5) further outline the numerous meet

1 and cofner efforts by San Pasqual regarding its Dispute with the State over the number of available  
2 Licenses. The Second Amended Complaint contains new allegations in Section II (contained on SAC  
3 17:7-14 through 18;20) that support SAN PASQUAL's contention that the Doctrine of Equitable  
4 Tolling and C.C.P. §355 are applicable to this Action and allow San Pasqual to timely seek the  
5 damages alleged in the Second Amended Complaint.

6 Paragraphs 65 through 70 (SAC 21:17 through 22:28) were added to support SAN  
7 PASQUAL's claim for damages based upon the Commission's failure to issue available Licenses to  
8 SAN PASQUAL on July 10, 2003; October 22, 2004; October 7, 2005; August 16, 2006; and October  
9 10, 2007. Additionally, Paragraphs 73 through 77 (SAC 23:12 through 24:10) were added to support  
10 SAN PASQUAL's claim for damages based upon the Commission's failure to issue available  
11 Licenses to SAN PASQUAL on July 10, 2003; October 22, 2004; October 7, 2005; August 16, 2006;  
12 and October 10, 2007.

13  
14 **VI. CONCLUSION**

15 It is hereby respectfully requested that leave to amend the complaint be granted; that it would  
16 be error and an abuse of discretion to deny said Motion—and that, the Second Amended Complaint  
17 be deemed filed and served as of the date of the granting of the motion.

18  
19 Respectfully submitted,

20 DATED: April 16, 2012

SOLOMON, SALTSMAN & JAMIESON

21  
22 By: 

Stephen Warren Solomon

Stephen Allen Jamieson

Ryan M. Kroll

23  
24 Attorneys for Plaintiff SAN PASQUAL BAND OF  
25 MISSION INDIANS  
26  
27  
28

1 **DECLARATION OF RYAN MICHAEL KROLL**

2  
3 I, Ryan Michael Kroll, declare as follows

4 1. I am an attorney at law duly admitted to practice before all the courts of the State of  
5 California and I am a partner at SOLOMON, SALTSMAN & JAMIESON, attorneys of record herein  
6 for Plaintiff SAN PASQUAL Band of Mission Indians. I am over 18 years of age and am competent  
7 to testify as stated herein. The facts stated herein are of my own personal knowledge except where  
8 stated on information and belief, and where stated on information and belief, I believe them to be true.

9 2. This declaration is made in support of Plaintiff's Motion for Leave to File Second  
10 Amended Complaint. There is good cause for granting this Motion for Leave same and given the  
11 stated liberal policy of the courts in granting leave to amend, it is respectfully submitted that it would  
12 be an abuse of discretion to deny said Motion.

13 3. The purpose and effect of the proposed amendments is to incorporate additional facts  
14 into this lawsuit in order for SAN PASQUAL to make explicit allegations of fact that the Defendants  
15 know to exist and which otherwise refute the Defendants' contention in its Motion for Summary  
16 Judgment that this Action is barred because of the statute of limitations. Based upon the STATE's  
17 assertion in its recent Motion for Summary Judgment that this Action is "based on same facts" as  
18 SAN PASQUAL's prior Federal Action, SAN PASQUAL now seeks leave to file a Second  
19 Amended Complaint in order to plead facts that will refute the STATE's spurious argument that this  
20 Action, as pled in the First Amended Complaint, is barred by the Statute of Limitations. While SAN  
21 PASQUAL wholly disagrees with the STATE's contentions, SAN PASQUAL seeks leave in order to  
22 plead facts that will allow SAN PASQUAL to refute the STATE's contentions in its Motion for  
23 Summary Judgment based upon the doctrine of equitable tolling and also based upon C.C.P.  
24 §355and, based upon the STATE'S recent admissions, seek monetary damages for the STATE's  
25 failure to issue Licenses dating back to the July 2003 Draw, and to make clear that there allegations  
26 are made so that they may be proven at the time of trial.

27 4. Specifically, the equitable tolling doctrine applies here because the STATE asserts in  
28 its Motion for Summary Judgment that the Federal Action and this Action in State Court are "based

1 on same facts" and therefore the STATE had notice of the facts in this Action through the Federal  
2 Action filed by SAN PASQUAL against the STATE on May 3, 2006, the STATE is not prejudiced  
3 since the STATE was able to gather and preserve evidence related to this Action after being notified  
4 and served with the federal action, and SAN PASQUAL has always acted reasonably and in good  
5 faith. SAN PASQUAL's good faith is evidenced in particular by the fact that SAN PASQUAL did  
6 not delay in filing this Action, which was filed while the Federal Action was pending, and the fact  
7 that SAN PASQUAL has repeatedly informed the STATE that its acts and omissions were causing  
8 SAN PASQUAL to suffer millions of dollars in damages.

9 5. Additionally, *C.C.P.* § 355 allows a party to file an action within one year of a  
10 reversal of a judgment, not based on the merits, in the party's favor where that party received a  
11 judgment that was reversed on appeal on grounds other than the merits. Because of the September  
12 12, 2011 reversal by the Ninth Circuit when it vacated the district court judgment in SAN  
13 PASQUAL's favor and remanded the Federal Action back to the district court for dismissal without  
14 prejudice, SAN PASQUAL also seeks leave to amend the Complaint to allege facts to support its  
15 contention that *C.C.P.* §355 permits SAN PASQUAL to file an action based upon the allegations of  
16 the Federal Action that concerned the Commission's June 19, 2002 announcement of its incorrect  
17 interpretation of Compact §4.3.2.2(a)(1). Thus, since the STATE erroneously asserts that this  
18 Action, as pled in the First Amended Complaint, is seeking damages for a breach that occurred in  
19 June 2002, and while SAN PASQUAL continues to refute that the First Amended Complaint does  
20 not seek damages for a breach that occurred in June 2002, SAN PASQUAL seeks leave to file an  
21 amended complaint that alleges facts that would permit SAN PASQUAL to seek damages dating  
22 back to June 2002 in order to refute the STATE's assertions; and, more importantly, to seek and  
23 prove damages on the more accurate facts that, although no breach occurred in 2002 when the  
24 STATE announced its incorrect interpretation of the Contract, that a Breach of Contract did occur on  
25 each of the following dates: July 10, 2003, October 22, 2004, October 7, 2005, August 16, 2006,  
26 October 10, 2007, and December 11, 2008.

27 6. SAN PASQUAL has not been dilatory in filing this Motion for Leave to Amend. No  
28 prejudice will result to the STATE from granting this leave to file SAN PASQUAL's proposed

1 Second Amended Complaint because the new facts asserted in the Second Amended Complaint are  
2 well-known to the STATE, as they were part of the federal court litigation in which both parties were  
3 involved. These facts have been litigated and discussed amongst the parties over a period of years  
4 and there is no question that the STATE is well aware of the facts alleged in SAN PASQUAL's  
5 Second Amended Complaint. Given that the facts asserted in the Second Amended Complaint have  
6 always been known to the STATE, the STATE cannot now complain it has been surprised in any  
7 way.

8 7. SAN PASQUAL should be granted leave to amend the Complaint because SAN  
9 PASQUAL's motion is timely. SAN PASQUAL is relying upon the STATE's recent admissions that  
10 these proposed amendments to the Complaint would not cause the STATE to suffer any prejudice  
11 since the STATE asserts in its recent February 14, 2012 Motion for Summary Judgment that the two  
12 actions are "based on same facts" and the STATE recently asserted that that discovery into the  
13 underlying facts is unnecessary because the parties agree that the Compact requires the Commission  
14 to issue 40,201 Licenses and also because the parties have executed a Stipulation of Facts as to many  
15 of the underlying facts. Similarly, SAN PASQUAL could not have alleged facts relevant to C.C.P. §  
16 355 previously because C.C.P. § 355 was not applicable until the Ninth Circuit's reversal on  
17 September 12, 2011 and the eventual dismissal of the Federal Action without prejudice on November  
18 29, 2011. Furthermore, the application of C.C.P. §337, i.e. 4 year Statute of Limitation for breaches of  
19 a written contract also apply to make each independent breach of the contract actionable. Therefore,  
20 SAN PASQUAL's request for leave to amend is timely and should be granted in accordance with  
21 California's liberal policy of allowing amendments to pleadings.

22 Respectfully submitted,

23 I declare under penalty of perjury under the laws of California that the foregoing is true and  
24 correct.

25 Executed on April 16, 2012, at Los Angeles, California.

26   
27 Ryan Michael Kroll





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**[PROPOSED] ORDER**

GOOD CAUSE APPEARING THEREOF leave of Court to file the Second Amended Complaint is hereby granted and the Proposed Second Amended Complaint is deemed filed and served as of this date.

Dated: \_\_\_\_\_, 2012

\_\_\_\_\_  
JUDGE OF THE SUPERIOR COURT



STEPHEN WARREN SOLOMON SBN 36189  
STEPHEN ALLEN JAMIESON SBN 115805  
R. BRUCE EVANS SBN 217098  
RYAN M. KROLL SBN 235204  
SOLOMON, SALTSMAN & JAMIESON  
426 Culver Boulevard  
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(310) 822-9848

Attorneys for Plaintiff:  
SAN PASQUAL Band of Mission Indians

**SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
**COUNTY OF LOS ANGELES**

SAN PASQUAL BAND OF MISSION  
INDIANS, a federally recognized Indian Tribe

Plaintiff.

VS.

STATE OF CALIFORNIA; CALIFORNIA  
GAMBLING CONTROL COMMISSION, an  
agency of the State of California; and  
DOES 1-25, inclusive

Defendants.

CASE NO.: BC 431469  
Hon. Ruth Ann Kwan  
Filed on February 9, 2010

[PROPOSED] SECOND AMENDED  
COMPLAINT FOR DAMAGES FOR:

1. Breach of Contract

Plaintiff, the SAN PASQUAL BAND OF MISSION INDIANS, hereby complains and alleges  
as follows:

1. Plaintiff, SAN PASQUAL BAND OF MISSION INDIANS ("SAN  
PASQUAL") is a federally recognized Indian Tribe within the meaning of federal Indian Law  
and § 2703(5) of IGRA, and operates a gaming casino under the name Valley View Casino.  
For all times alleged herein, SAN PASQUAL is a signatory to a Tribal-State Gaming  
Compact (hereinafter referred to as the "Contract") with Defendant-State of California that is

1 in effect. The Contract was executed on September 10, 1999, and took effect upon the  
2 publication in the Federal Register on or about May 16, 2000.

3 2. Defendant-STATE OF CALIFORNIA is a sovereign state of the United States.  
4 The STATE OF CALIFORNIA is a signatory to the Contract with Plaintiff-SAN PASQUAL.

5 3. Defendant-CALIFORNIA GAMBLING CONTROL COMMISSION  
6 (hereinafter "CGCC") is an agency of the State that, pursuant to Executive Order D-31-01,  
7 administers the gaming device license draw process under Section 4.3.2.2(a)(3), and controls,  
8 collects and accounts for all license fees under Section 4.3.2.2(a)(2); enforces the rights of the  
9 State of California to enforce the provisions of Sections 4.3.2.2(a)(1) through (3) and (e), and  
10 all subparagraphs thereunder, of the Contract; and ensures that the allocation of machines  
11 among California Indian Tribes does not exceed the allowable number of machines as  
12 provided in the Contract and shall determine whether the machine license draw(s) complies  
13 with the provisions of the Contract. At all times relevant to the facts and claims alleged in  
14 this Complaint, the CGCC was acting or purporting to act as an agent of the State and the  
15 Governor of California. (Defendants STATE OF CALIFORNIA and the CGCC are  
16 hereinafter collectively referred to as the "STATE."). DOES 1- 25 are fictional named  
17 Defendants whose identities and/or companies or liability have not yet been identified.

18  
19 **I. FACTUAL ALLEGATIONS**

20 **A. The Public Policy Objectives Of the Indian Gaming Regulatory Act**

21 4. This action seeks to protect a delicate, and now threatened, balance of Tribal and  
22 State Governmental interests embodied within the Contract, which was executed in 1999  
23 pursuant to IGRA.

24 5. Congress enacted IGRA in 1988 in response to the United States Supreme Court  
25 decision in *California v Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), which  
26 recognized the rights of Indian tribes to engage in certain kinds of gaming within California.

27 6. IGRA recognized that "numerous Indian tribes have become engaged in or have  
28 licensed gaming activities on Indian lands as a means of generating tribal governmental

1 revenue,” 25 U.S.C. § 2701 (1), and set forth “a statutory basis for the operation of gaming by  
2 Indian tribes as a means of promoting tribal economic development, self-sufficiency, and  
3 strong tribal governments.” 25 U.S.C. §2702(1). Congress found that “Indian tribes have the  
4 exclusive right to regulate gaming activity on Indian lands if the gaming activity is not  
5 specifically prohibited by Federal law and is conducted within a State which does not, as a  
6 matter of criminal law and public policy, prohibit such gaming activity.” 25 U.S.C. § 2701(5).

7 7. IGRA divides gaming into three classifications: Class I, comprising of social or  
8 traditional forms of gaming connected with tribal ceremonies or celebrations; Class II,  
9 encompassing bingo and similar or associated games, and non-banking card games (e.g.,  
10 poker); and Class III, encompassing all other forms of gaming, including slot machines,  
11 banked card games (e.g. blackjack), lottery, horse racing, and the like, provided such gaming  
12 is permitted within the State. 25 U.S.C. § 2703. At issue in this Action is SAN PASQUAL’s  
13 rights to operate Class III Gaming Devices (Slot Machines) and the damages SAN PASQUAL  
14 suffered because of the STATE’s failure to issue SAN PASQUAL all available Gaming  
15 Device Licenses pursuant to its obligations under its Contract with SAN PASQUAL.

16  
17 **B. The State of California Drafted the Contract that Allows Class III Gaming**  
18 **(Slot Machines) and Presented the Contract to SAN PASQUAL on a “Take It**  
19 **or Leave It” Basis. Therefore, Any Ambiguity Contained in the Contract**  
20 **Must Be Construed in Favor of SAN PASQUAL and Against the State**

21 8. On September 10, 1999, SAN PASQUAL executed its Contract with the State of  
22 California that permits the operation of Class III gaming on Indian Lands.

23 9. The STATE unilaterally drafted the Contract and all of its provisions  
24 including, but limited to, Sections 4.3, 4.3.1, 4.3.2, 4.3.2.2, 9.0, 9.1, 9.2, 9.3 and 9.4. The  
25 STATE then presented the Contract, in its final form, to SAN PASQUAL on the evening of  
26 September 9, 1999 on a “take-it-or-leave-it” basis. Therefore, any ambiguity contained in any  
27 provision of the Contract including, but limited to, Sections 4.3, 4.3.1, 4.3.2, 4.3.2.2, 9.0, 9.1,  
28 9.2, 9.3 and 9.4 must be construed in favor of SAN PASQUAL and against the STATE,

1 which was the drafter of the Contract. In addition, case law requires that the Contract be  
2 interpreted in an Indian Tribe's favor and therefore in favor of SAN PASQUAL.

3 10. The Contract at issue herein is a valid, binding agreement, in effect as a matter of  
4 tribal, federal and state law. SAN PASQUAL has performed all its material obligations  
5 thereunder. The Contract is set to expire on December 31, 2020. Not sooner than eighteen  
6 months of that termination date either party may request the other party to negotiate an  
7 extension of this Contract or to enter into a new contract. If the parties have not agreed to  
8 extend the termination date of the Contract or entered into a new contract by the termination  
9 date, then the termination date of the Contract shall be June 30, 2022, unless the parties  
10 agreed to an earlier termination date.

11 11. Explicitly by its terms, the STATE entered into the Contract with SAN  
12 PASQUAL "out of respect for the sovereignty of the Tribe; in recognition of the historical  
13 fact that Indian gaming has become the single largest revenue-producing activity for Indian  
14 tribes in the United States; out of a desire to terminate pending 'bad faith' litigation between  
15 the Tribe and the State; to initiate a new era of tribal-state cooperation in areas of mutual  
16 concern; out of a respect for the sentiment of the voters of California who, in approving  
17 Proposition 5, expressed their belief that the forms of gaming authorized herein should be  
18 allowed; and in anticipation of voter approval of SCA 11 [Prop. 1A] as passed by the  
19 California Legislature." (Contract, Preamble ¶ D.)

20 12. Section 1.0(a) of the Contract states its terms are designed and intended, among  
21 other things, to "[e]vidence the goodwill and cooperation of the Tribe and the State in  
22 fostering a mutually respectful government-to-government relationship that will serve the  
23 mutual interests of the parties."

24 13. The Contract provides in relevant part, as follows:

- 25 a. Contract §2.6 defines the term "Gaming Device" to mean a slot machine.  
26 b. Contract §4.3.1(b) authorizes SAN PASQUAL to operate 350 Gaming Devices  
27 as a matter of right and without the need to obtain a Gaming Device License.  
28

- 1 c. Contract §4.3.2.2 provides that SAN PASQUAL may acquire Gaming Device  
2 licenses to operate Gaming Devices in excess of 350. For each Gaming  
3 Device License obtained, SAN PASQUAL must pay the applicable fees to be  
4 deposited into the Revenue Sharing Trust Fund.
- 5 d. Contract §4.3.2.2(a) limits SAN PASQUAL to operate no more than 2,000  
6 Gaming Devices. In order for SAN PASQUAL to operate 2,000 Gaming  
7 Devices, it must obtain 1,650 Gaming Device Licenses since it is permitted to  
8 operate 350 Gaming Devices as a matter of right and without the need to  
9 obtain a Gaming Device License.
- 10 e. Contract §4.3.2.2(a)(1) states that the number of Gaming Device Licenses  
11 available for all Compact Tribes in the aggregate is at least 40,201 Gaming  
12 Device Licenses.
- 13 f. The Contract provides in §4.3.2.2(a)(3) that Gaming Device Licenses are to be  
14 "awarded" through a draw process. The STATE conducts this draw process in  
15 which Gaming Device Licenses are awarded.
- 16 g. As of October 9, 2008, SAN PASQUAL had 1,222 Gaming Device Licenses  
17 issued to it by the STATE and was also authorized to operate 350 Gaming  
18 Devices as a matter of right and without the need to obtain a License. Thus, as  
19 of October 9, 2008, SAN PASQUAL could operate 1,572 Gaming Devices and  
20 was entitled to an additional 428 Gaming Device Licenses (to get to the 2,000  
21 License individual limit) if there were sufficient Licenses available for a Draw  
22 after a result of a correct application of an aggregate limit contained in  
23 Contract § 4.3.2.2(a)(1).

24  
25 ///

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1       C.     In June 2002, the CGCC, on Behalf of the State of California, Announced Its  
2             Incorrect Interpretation that Contract §4.3.2.2(a)(1) authorized the Issuance  
3             of Only 32,151 Gaming Device Licenses. This Decision Initiated the  
4             “DISPUTE,” but there was not yet a Breach of the Contract Since SAN  
5             PASQUAL had not yet Sustained Damage.

6             14.     On or around June 19, 2002, the CGCC, on behalf of the State of California,  
7             announced its incorrect interpretation that Contract §4.3.2.2(a)(1) authorized the issuance of  
8             only 32,151 Gaming Device Licenses, thus initiating the “DISPUTE” between the parties,  
9             creating the WRONG, but SAN PASQUAL had not, as of that date, sustained any monetary  
10            damages. As of that date, June 19, 2002, SAN PASQUAL had not yet demanded from the  
11            STATE, and been denied by the STATE CGCC, any additional Gaming Device Licenses due  
12            to the STATE’S incorrect calculation of the aggregate number of Licenses available, and  
13            therefore no Breach of the Contract had yet occurred.

14  
15       D.     Due to the CGCC, on behalf of the State of California, Incorrectly  
16             Interpreting Contract §4.3.2.2(a)(1), A “Controversy” Existed Between SAN  
17             PASQUAL and the State and Therefore, SAN PASQUAL Filed an Action  
18             Seeking a Judicial Declaration as to the Correct Number of Gaming Device  
19             Licenses Authorized to Be Issued to 1999 Compact Tribes pursuant to SAN  
20             PASQUAL’s Contract

21            15.     Because a “controversy” existed due to the incorrect interpretation by the  
22            CGCC, on behalf of the State of California, otherwise known as the DISPUTE or WRONG,  
23            SAN PASQUAL filed a lawsuit for Declaratory Relief on May 3, 2006 against the State of  
24            California, the CGCC, and Arnold Schwarzenegger, in his capacity as Governor of California,  
25            in the United States District Court for the Southern District of California (Case No. 06-  
26            CV0988) (hereinafter the “Federal Action”). In the Federal Action, SAN PASQUAL sought a  
27            judicial declaration that the CGCC, on behalf of the State of California, incorrectly interpreted  
28            the State Aggregate Limit.



1           16. On March 20, 2007, the District Court in the Federal Action incorrectly  
2 granted the STATE'S Motion to Dismiss SAN PASQUAL's Second Amended Complaint for  
3 an alleged failure to join all Indispensable Parties per F.R.C.P. 19. However, the Ninth  
4 Circuit Court of Appeals reversed this erroneous decision on October 6, 2008 and remanded  
5 the matter back to the District Court.

6           17. On March 29, 2010, the District Court in the Federal Action granted SAN  
7 PASQUAL's Summary Judgment and thereby declared that the STATE's interpretation that  
8 Contract §4.3.2.2(a)(1) authorizes only 32,151 licenses was indeed erroneous. The STATE  
9 appealed the District Court judgment to the Ninth Circuit Court of Appeals.

10           18. On August 20, 2010, while the STATE'S appeal to the Ninth Circuit was  
11 pending, the Ninth Circuit issued a decision in *Cachil Dehe Band of Indians v. State of*  
12 *California et. al. (Colusa)* holding that the correct interpretation of § 4.3.2.2(a)(1) was not, as  
13 the STATE had suggested, 32,151, but rather 40,201. In its opinion, the Ninth Circuit also  
14 upheld the remedy ordered by the *Colusa* district court – a license draw in which all Compact  
15 Tribes could participate – in order to distribute the additional licenses made available by the  
16 new State Aggregate limit of 40,201.

17           19. On or about July 8, 2011, in the Federal Action now before the Ninth Circuit,  
18 SAN PASQUAL and the STATE submitted a Joint Stipulation in which the parties agreed to  
19 request that the Ninth Circuit dismiss without prejudice the Federal Action because the parties  
20 agree that Contract §4.3.2.2(a)(1) authorizes the issuance of 40,201 Licenses and therefore the  
21 Federal Action is moot since a controversy no longer exists.

22           20. On or about September 12, 2011, due to the matter becoming moot, the Ninth  
23 Circuit Court of Appeals reversed the decision of the District Court by vacating the judgment  
24 and remanding the matter back to the district court in order for the Federal Action to be  
25 dismissed without prejudice.

26           21. Thereafter, on September 5, 2002, July 10, 2003, December 19, 2003, October  
27 22, 2004, October 7, 2005, August 16, 2006, October 10, 2007, and December 11, 2008, the  
28 CGCC conducted Gaming Device License Draws utilizing 32,151 as the total number of

1 Gaming Device Licenses available in the pool of Gaming Device licenses issued or available  
2 to be issued to California tribes with 1999 Compacts. At six (6) of these eight (8) Draws SAN  
3 PASQUAL demanded additional Licenses but was denied as a result of the CGCC utilizing  
4 and applying the incorrect calculations of aggregate Licenses at 32,151. Each of the six (6)  
5 separate Draws caused SAN PASQUAL to sustain separate unique damages on each of these  
6 six (6) occasions where the wrong aggregate number was used.

7         22. SAN PASQUAL requested but was denied 500 Licenses in the July 10, 2003  
8 Draw due to the CGCC's incorrect interpretation that only 32,151 Licenses were available to  
9 be issued to 1999 Compact Tribes. This was the first (1<sup>st</sup>) unique Breach of the Contract. SAN  
10 PASQUAL requested 341 Licenses but was granted only 72 Licenses in the October 22, 2004  
11 Draw due to the CGCC's incorrect interpretation that only 32,151 Licenses are available to be  
12 issued to 1999 Compact Tribes. This was the second (2<sup>nd</sup>) unique Breach of the Contract.  
13 SAN PASQUAL requested but was denied 333 Licenses in the October 7, 2005 Draw due to  
14 the CGCC's incorrect interpretation that only 32,151 Licenses are available to be issued to  
15 1999 Compact Tribes. This was the third (3<sup>rd</sup>) unique Breach of the Contract. SAN  
16 PASQUAL requested but was denied 50 Licenses in the August 16, 2006 Draw due to the  
17 CGCC's incorrect interpretation that only 32,151 Licenses are available to be issued to 1999  
18 Compact Tribes. This was the fourth (4<sup>th</sup>) unique Breach of the Contract. SAN PASQUAL  
19 requested but was denied 300 Licenses in the October 10, 2007 Draw due to the CGCC's  
20 incorrect interpretation that only 32,151 Licenses are available to be issued to 1999 Compact  
21 Tribes. This was the fifth (5<sup>th</sup>) unique Breach of the Contract. SAN PASQUAL requested but  
22 was denied 428 Licenses in the December 11, 2008 Draw due to the CGCC's incorrect  
23 interpretation that only 32,151 Licenses are available to be issued to 1999 Compact Tribes.  
24 This was the sixth (6<sup>th</sup>) and most recent unique Breach of the Contract, while based upon the  
25 same "dispute." Each of these breaches caused separate independent unique damages to  
26 accrue to SAN PASQUAL, and thus each breach independently created a separate claim or  
27 cause of Action for each for statute of limitations purposes.

28

1           23.     The separate independent unique damages each caused damages to accrue, as  
2 of the date of that respective DRAW, in an amount equal to the product of multiplying the  
3 number of Licenses denied by the dollar value of each daily "win" generated by each slot  
4 machine times the number of days SAN PASQUAL would have operated that Gaming Device  
5 but for the denial on the date of that particular DRAW. As just one example, the damages  
6 caused by the Breach created on October 7, 2005 will be the product of multiplying 333  
7 Licenses (denied that day) by \$250 (theoretical daily win used only for this example) which is  
8 \$83,250 per day. Then multiply \$83,250 by the number of days these Licenses were denied  
9 (assume 100 days for this example only), which equals approximately \$8,325,000 solely for  
10 that one Breach of the Contract. Each of the other five (5) breaches occurred on different  
11 dates of different DRAWS with different numbers of Licenses demanded and denied by the  
12 CGCC at each of those times. Each breach, therefore, has a unique separate independent date  
13 for accrual of the Breach of Contract cause of Action as to that particular breach.

14           24.     Each of the six (6) independent unique DRAWS caused unique damages, and  
15 each was a Breach of the Contract arising from the "DISPUTE." This claim for compensation  
16 for the damages caused by each breach is timely brought in this Action. As the most recent  
17 example of these independent breaches, the breach that occurred on December 12, 2008 when  
18 the CGCC denied issuing the 428 Licenses demanded by SAN PASQUAL is set forth in  
19 detail below. Note, however, that each of the previous breaches have a similar analysis to be  
20 applied, albeit with different factual details for each breach, i.e. date of breach, amount of  
21 breach, accrual date of breach, calculation of dollar value of breach.

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1       **E. The State Most Recently Breached Its Recurring Obligation to Issue All**  
2       **Available Licenses When On December 11, 2008 the CGCC Failed To Issue**  
3       **SAN PASQUAL The 428 Licenses It Requested for that Specific Draw**  
4       **Despite SAN PASQUAL Providing Multiple Written Notices That The**  
5       **STATE Would Be In Breach If It Failed To Issue All Available Licenses**

6           25. On October 9, 2008, the STATE mailed to SAN PASQUAL a Notice that the  
7 CGCC would conduct a public hearing on December 11, 2008 in order to determine how to  
8 issue available Gaming Device Licenses. In this October 9, 2008 Notice of Draw, the STATE  
9 erroneously declared that only 75 Gaming Device Licenses were available. The State's  
10 determination that only 75 Licenses were available was due to the STATE's incorrect  
11 application of Contract §4.3.2.2(a)(1) that sets forth the aggregate limit of Licenses available  
12 under the Contract. The STATE informed SAN PASQUAL that if it sought Licenses in this  
13 Draw, then it must submit its application on or before November 12, 2008.

14           26. On November 5, 2008, SAN PASQUAL submitted its application for 428  
15 Gaming Device Licenses and concurrently submitted a cashier's check for \$535,000 in  
16 accordance with the Contract's requirement that SAN PASQUAL submit a prepayment of  
17 \$1,250 for each of the 428 requested Licenses.

18           27. Recognizing that the State erroneously contended that only 75 Gaming Device  
19 Licenses were available at the December 11, 2008 Draw and accordance with the Contract's  
20 suggestion that the parties "meet and confer" to informally try to resolve disputes,<sup>1</sup> SAN  
21 PASQUAL submitted written notice of its concern that the State may not issue all available  
22 Licenses at the December 11, 2008 Draw. To wit, the November 5, 2008 letter from SAN  
23 PASQUAL to the STATE clearly articulates SAN PASQUAL's concern that:

24                   "Although the CGCC has advertised only 75 Licenses are  
25                   available, that is based upon the CGCC's erroneous  
26                   interpretation of the Compact terms, and thus issuing to SAN  
27                   PASQUAL any number of Licenses less than 428 Licenses

28       <sup>1</sup> The suggestion to "meet and confer" to informally try to resolve disputes was a permissive suggestion and not a mandatory requirement before filing an action.

1 will constitute a Breach of the Compact, which is a Breach of  
2 Contract.

3 The State of California has incorrectly interpreted the State  
4 Aggregate Limit of gaming device licenses as defined in  
5 Section 4.3.2.2 (a)(1) of the Compact. The State, acting  
6 through the CGCC, has incorrectly determined the State  
7 Aggregate Limit to be 32,151 gaming device licenses.  
8 However, under the express terms of Section 4.3.2.2 (a)(1) of  
9 the Tribal-State Gaming Compact, the correct State  
10 Aggregate Limit is at least 42,700 gaming device licenses. A  
11 correct interpretation of the Compact will yield enough  
12 available licenses to provide all 428 Licenses demanded  
13 herein.

14 We respectfully request that a copy of this letter be circulated  
15 to all Commissioners of the CGCC prior to the November 25,  
16 2008 public hearing, and made part of the record at the  
17 November 25, 2008 and the December 11, 2008 public  
18 hearings.

19 Please also find enclosed SAN PASQUAL's Gaming Device  
20 License Application and Exhibit A thereto that requests the  
21 CGCC to issue 428 Gaming Device Licenses to SAN  
22 PASQUAL. SAN PASQUAL has also enclosed a cashier's  
23 check made payable to the CGCC in the amount of \$535,000  
24 in accordance with the terms of the Compact for its request  
25 for 428 Gaming Device Licenses.

26 Please contact the undersigned if you have any questions or  
27 would like to discuss these issues further. We look forward  
28 to hearing from you."

29 28. Despite the receipt of this written notice, the STATE chose not to contact SAN  
30 PASQUAL with any questions and chose not to contact SAN PASQUAL "to discuss these  
31 issues further." SAN PASQUAL reasonably took the non-response from the State as an  
32 admission that the STATE understood SAN PASQUAL's concerns and that the STATE did  
33 not want to discuss these issues in order to try and resolve this dispute, and therefore SAN  
34 PASQUAL had fully complied with the Contract's suggestion that it "meet and confer" with  
35 the STATE.

36 29: On November 12, 2008, the STATE did request that SAN PASQUAL submit an  
37 amended Gaming Device License Application that reflected a demand for only 75 Licenses.

1 The STATE did not request any further information concerning the dispute as to the number  
2 of Gaming Device Licenses available at the December 11, 2008 Gaming Device License  
3 Draw. In response to the STATE's request and explicitly without waiving or releasing its  
4 rights to assert that more than 75 Licenses would be available at the December 11, 2008  
5 Draw, on November 12, 2008, SAN PASQUAL did submit an amended application that  
6 requested only 75 Licenses solely in order to try to obtain 75 additional Licenses since each  
7 License is very valuable and SAN PASQUAL was required to, and did, try to mitigate its  
8 damages caused by the STATE's breach.

9 30. Again in accordance with the Contract's suggestion that the parties "meet and  
10 confer," SAN PASQUAL once again submitted written notice on November 12, 2008 of its  
11 concern that the State is unlawfully choosing not to issue all available Licenses at the  
12 December 11, 2008 Draw. To wit, the November 5, 2008 letter states that:

13 "Per the request made today, November 12, 2008, by CGCC  
14 Staff Management Auditor Frank Lechner, please find enclosed  
15 an Amended Gaming Device License Application. This  
16 Application reflects a demand by this Tribe for the 75 licenses  
17 the CGCC has advertised as available in the upcoming  
18 scheduled draw. By making this Amended Demand please  
19 note that the Tribe does not in any way waive or release its  
20 rights and remedies to its continued demand for all licenses  
21 necessary to bring the number of licenses held by the Tribe to a  
22 total of 2,000.

23 The Tribe continues to maintain its contention, and intention to  
24 exercise all available remedies, that the CGCC erroneously  
25 interprets the Compact terms. Thus issuing to SAN  
26 PASQUAL any number of Licenses less than 428 Licenses will  
27 constitute a Breach of the Compact, which is a Breach of  
28 Contract. Notwithstanding this contention, the CGCC has  
advertised that only 75 Licenses are available, and per the  
request of Mr. Lechner the enclosed Amended Demand is  
being submitted.

To reiterate, the State of California has incorrectly interpreted  
the State Aggregate Limit of gaming device licenses as defined  
in Section 4.3.2.2 (a)(1) of the Compact. The State, acting  
through the CGCC, has incorrectly determined the State  
Aggregate Limit to be 32,151 gaming device licenses.

1 However, under the express terms of Section 4.3.2.2 (a)(1) of  
2 the Tribal-State Gaming Compact, the correct State Aggregate  
3 Limit is at least 42,700 gaming device licenses. A correct  
4 interpretation of the Compact will yield enough available  
5 licenses to provide all 428 Licenses which would provide 2,000  
6 devices to the Tribe.

7 We respectfully request that a copy of this letter, as well as all  
8 prior correspondence and Application materials, be circulated  
9 to all Commissioners of the CGCC prior to the November 25,  
10 2008 public hearing, and made part of the record at the  
11 November 25, 2008 and the December 11, 2008 public  
12 hearings, as well as all other proceedings relative to the  
13 upcoming Gaming License draw.”

14 31. After receiving this second written notice, the STATE again chose not to contact  
15 SAN PASQUAL with any questions and chose not to respond in any way to the issues and  
16 concerns raised by SAN PASQUAL. SAN PASQUAL reasonably took this second non-  
17 response from the State to its second written notice of SAN PASQUAL’s concerns as a  
18 further admission that the STATE understood SAN PASQUAL’s concerns and that the  
19 STATE did not want to discuss these issues and therefore SAN PASQUAL had fully  
20 complied with the Contract’s suggestion that it “meet and confer” with the STATE.

21 32. The STATE held a public hearing on December 11, 2008 to determine how to  
22 issue available Gaming Device Licenses. The STATE incorrectly asserted on December 11,  
23 2008 that only 32,151 Gaming Device Licenses were available and therefore incorrectly  
24 asserted that only 75 Licenses were available.<sup>2</sup> Thus, because the STATE unjustifiably  
25 asserted that only 32,151 Gaming Device Licenses were available in the aggregate for all  
26 Tribes, the State incorrectly asserted that it had issued all available Gaming Device Licenses  
27 and therefore did not issue SAN PASQUAL any of the 428 Gaming Device Licenses that  
28 were requested. Under the correct interpretation of the Contract, there were more than

<sup>2</sup> The process by which the STATE awarded Gaming Device Licenses in December 2008 occurred over a span of three days that included December 10, 11 and 12, 2008. Throughout the Complaint, SAN PASQUAL’s use of December 11, 2008 is a collective reference to the relevant events that occurred on December 10, 11 and 12, 2008 whereby the STATE failed to issue SAN PASQUAL the 428 Gaming Device Licenses it requested.

1 enough Licenses available at the December 11, 2008 License Draw in order for the STATE to  
2 award 428 Licenses to SAN PASQUAL, as it had properly requested.

3 33. Because the STATE refused to issue all available Gaming Device Licenses on  
4 December 11, 2008, SAN PASQUAL only possessed Licenses for, and operated, only 1,572  
5 Gaming Devices instead of the 2,000 Gaming Devices that it was authorized to operate under  
6 the Contract but for the STATE's refusal to issue all available Gaming Device Licenses and  
7 its Breach of Contract on December 11, 2008 and its refusal to meet and confer to try to  
8 informally resolve this dispute.

9 34. Other unique independent Breaches of Contract also occurred on July 10, 2003,  
10 October 22, 2004, October 7, 2005, August 16, 2006, and October 10, 2007.

11  
12 **F. While Not A Mandatory Requirement Prior To Filing Suit, SAN PASQUAL "Met**  
13 **And Conferred" With The State Regarding The Allegations Contained Herein**  
14 **Beginning October 2005, And Many Times Before, During, and After the Federal**  
15 **Action and, Before and Since the State Action was Commenced.**

16 1. **A Meet and Confer of the Dispute Between the Parties Took Place Many**  
17 **Times from March 2006 to Present.**

18 35. Beginning in October 2005 and continuing thereafter including after the filing of  
19 this Action, SAN PASQUAL made numerous efforts to Meet and Confer with the State,  
20 including the submission of approximately 35 written notices about the Dispute to the State of  
21 California. Additionally, on at least the following dates the Parties engaged in meet and  
22 confer efforts, or attempted to do so, in an attempt to resolve the dispute: March 15, 2006,  
23 May 19, 2009, March 1, 2011, and March 24, 2011.

24 36. While the State has asserted as its defense that the Compact requires San Pasqual  
25 to meet and confer prior to filing this Action and therefore the State has the burden to prove  
26 that defense, the numerous actions by San Pasqual each individually and certainly collectively  
27 comply with the "meet and confer" provisions in the Compact, or, at minimum, substantially  
28 comply with those requirements.



1           **2.   The Government Claim Process, Which Is Also a Meet And Confer Process**  
2           **Created By The Legislature for Breach of Contract**

3           37. The California Legislature created a “meet and confer” process (hereinafter the  
4 “Government Claim Process”) wherein a claimant that alleges the State breached a contract,  
5 such as SAN PASQUAL, is required to file a claim with the California Victim Compensation  
6 and Government Claim Board before procedurally it may file an action for that claim. The  
7 purpose of filing the claim is to allow the State to review the claim, request from the claimant  
8 as much information as the State needs in order to evaluate the claim, allow the State to “meet  
9 and confer” with the claimant and then have the State make a decision as to whether to settle  
10 the claim or allow the claimant to file a civil action.

11           38. Despite Contract §9.2 stating that “[i]n no event may [SAN PASQUAL] be  
12 precluded from pursuing any arbitration or judicial remedy against the State on the grounds  
13 that [SAN PASQUAL] has failed to exhaust its state administrative remedies, SAN  
14 PASQUAL did timely and properly file on June 1, 2009 a Government Claim with the  
15 California Victim Compensation and Government Claim Board regarding the wrongful  
16 conduct of the STATE alleged herein in yet another good faith attempt to “meet and confer”  
17 with the State to try to resolve the issues short of litigation. While the Contract’s suggestion in  
18 Section 9.1 that the parties “meet and confer” prior to filing an action is not mandatory and  
19 does not need to be complied with before filing a civil action, SAN PASQUAL’s government  
20 claim provided written notice of the specific facts and issues relevant to SAN PASQUAL’s  
21 claim, comporting with the Contract §9.1(a) suggestion that parties provide “a written notice  
22 setting forth, with specificity, the issues to be resolved.”

23           39. On or about June 22, 2009, the State contacted SAN PASQUAL’s counsel to  
24 request further information in order to evaluate the Claim for purposes of meeting and  
25 conferring on the Claim. The State requested only a copy of the Contract and SAN  
26 PASQUAL faxed a copy of the Contract. No other information was requested by the State in  
27 order to evaluate the Claim.  
28

1           40. On July 1, 2009, the State sent out notice to SAN PASQUAL's counsel with  
2 copies to Janelle Desomer at the Governors' Office, the Attorney General's office, and Cy  
3 Rickards at the CGCC regarding SAN PASQUAL's Government Claim. The July 1, 2009  
4 letter stated the Claim was "accepted" by the State, requested no further information from  
5 SAN PASQUAL in order to meet and confer on the claims and then stated that the State  
6 "believes that the court system is the appropriate means for resolution of these claims."

7           41. On July 9, 2009, another letter was sent out by the STATE to SAN PASQUAL,  
8 with copies to the Governor, the Attorney General, and the CGCC (same individuals in each  
9 office) advising that the Claim would now be considered by the State on August 13, 2009 and  
10 that SAN PASQUAL's presence at this meeting to review its Claim was unnecessary because  
11 the Claim would be rejected. While the State had the opportunity to take SAN PASQUAL up  
12 on its offer to further discuss the issues in the Claim, the State chose not to negotiate or  
13 respond to the issues raised.

14           42. Instead, the State rejected SAN PASQUAL's claim at an August 13, 2009  
15 meeting of the Victims Compensation and Government Claims Board and directed SAN  
16 PASQUAL to file a lawsuit within 6 months to pursue the claim. On August 20, 2009, the  
17 California Victim Compensation and Government Claim Board mailed to SAN PASQUAL  
18 notice that the STATE rejected SAN PASQUAL's Government Claim on August 13, 2009.  
19 SAN PASQUAL provided all information requested by the State and was ready, willing and  
20 able to further "meet and confer" with the State. However, as of July 1, 2009, the State  
21 clearly did not wish to further "meet and confer" and had made its final decision when **the**  
22 **STATE explicitly stated that "the court system is the appropriate means for resolution**  
23 **of these claims."** (Emphasis added).

24           43. Therefore, once again, SAN PASQUAL complied with the Contract's suggestion  
25 in Contract §9.1 that the parties "meet and confer" prior to filing this Action.

26  
27 ///

28 ///

1       **3. Despite All the Meet and Confer That Took Place, it is Clear the Efforts and**  
2       **Future Efforts, Were, Are, and Will be a Futile Act**

3       44. Despite all the Meet and Confer that took place, it is clear the efforts and future  
4 efforts, were, are, and will be a futile act; nevertheless, if desired SAN PASQUAL will further  
5 engage in such further efforts.

6  
7       **II. THE CLAIM FOR EACH, AND/OR ALL, OF EACH INDEPENDENT**  
8       **BREACHES OF CONTRACT THAT OCCURRED IS TIMELY.**

9       45. Whether applying the Statutes of Limitation Applicable to denial of Government  
10 Claims, or applying the 4 year Statute of Limitations set forth in CCP §337 or applying CCP  
11 355 or applying the Doctrine of Equitable Tolling, the Cause of Action for each breach is  
12 timely made. While the facts reflecting the application of each statute and/or doctrine remain  
13 in dispute, the result is that all breaches are timely commenced, either on their own or by  
14 relation back, or both.

15  
16       **A. Under the Doctrine of Equitable Tolling, SAN PASQUAL's Filing of the**  
17       **Federal Action Tolloed the Statute of Limitations as to the Facts Underlying**  
18       **the Federal Action**

19       46. SAN PASQUAL timely filed the Federal Action on May 3, 2006 in the  
20 Southern District of California (Case NO. 06-CV-0988), which was within four years of the  
21 CGCC's June 19, 2002 announcement that the number of Gaming Device Licenses authorized  
22 by Contract §4.3.2.2(a)(1) was only 32,151.

23       47. The STATE now claims the Federal Action is "based on same facts" as this  
24 Action filed in State Court. Therefore, the STATE concedes that the Federal Action gave it  
25 notice of the facts at issue in this Action filed in State Court since the STATE contends that  
26 both actions are "based on same facts."

27       48. In the current Action, the parties have in stipulated to the basic underlying  
28 facts and the STATE has repeatedly asserted that discovery should not be permitted into the

1 parties' interpretations since those matters are resolved. Moreover, the STATE was able to  
2 gather and preserve evidence related to the interpretation of § 4.3.2.2(a)(1) after being notified  
3 and served with the federal action and has retained agendas, minutes and records of the  
4 various CGCC meetings at which the STATE failed to issue SAN PASQUAL its Licenses  
5 and is therefore not prejudiced by the filing of this Action in State Court.

6 49. With regard to its filing and pursuing the Federal Action and this Action in  
7 State Court, SAN PASQUAL acted at all times in Good Faith. SAN PASQUAL filed this  
8 Action in State Court while the Federal Action was still pending, and, in fact, over 20 months  
9 before the federal action became final. Additionally, SAN PASQUAL never took any  
10 affirmative action to state that it would not pursue this Action for damages and in fact  
11 repeatedly informed the STATE that its acts and omissions were causing SAN PASQUAL to  
12 suffer millions of dollars in damages. SAN PASQUAL attempted to resolve its claim for  
13 damages before filing this Action through the Government Claims process created by the  
14 California Legislature "to provide the public entity with notice of the proposed action so as to  
15 permit investigation and settlement, if appropriate, thereby avoiding the expense of litigation.  
16 *Scott v. County of Los Angeles*, (1977) 73 Cal. App. 3d 476, 481. However, the STATE  
17 merely responded to SAN PASQUAL Government Claim by stating that "the court system is  
18 the appropriate means for resolution of these claims."

19 50. Code of Civil Procedures §355 also applies to allow this San Pasqual in this  
20 Action to pursue the earliest breaches based upon the above facts and circumstances.

21  
22 **III. DEFENDANTS DO NOT POSSESS GOVERNMENT IMMUNITY FROM A**  
23 **BREACH OF CONTRACT CAUSE OF ACTION AND THEREFORE SAN**  
24 **PASQUAL IS PERMITTED TO FILE THIS ACTION IN STATE COURT AND**  
25 **SEEK MONETARY DAMAGES**

26 51. The STATE does not have Government Immunity from a Breach of Contract  
27 Cause of Action. No statute creates immunity for the STATE from a Breach of Contract  
28

1 Cause of Action. No case has ever held that the State of California has immunity from a  
2 Breach of Contract Cause of Action.

3 52. The Government Claim Process referred to above does not otherwise change the  
4 maxim of law that the STATE does not have immunity from a Breach of Contract Cause of  
5 Action. As explained in *City of Stockton v. Superior Court*, (2007) 42 Cal. 4th 730, 737-42  
6 the Government Claim process is a procedural requirement to be applied to torts, as well as  
7 contract claims, notwithstanding the recognition and confirmation in that Supreme Court  
8 decision that the STATE has never been protected by immunity for such breach of contract  
9 claims (in contrast to purely personal injury tort claims).

10 53. The STATE therefore has no sovereign immunity for this Breach of Contract  
11 with SAN PASQUAL, and this court therefore has jurisdiction over this Action and SAN  
12 PASQUAL's cause of action for Breach of the Contract because a compact is a contract,  
13 *Texas v. New Mexico*, 482 U.S. 124, 128 (1987), and the STATE does not have immunity  
14 from this Action alleging the STATE breached the Contract.

15 54. While the Contract contains a waiver of immunity by both the STATE and SAN  
16 PASQUAL, SAN PASQUAL is not relying upon that waiver to file this lawsuit because such  
17 reliance is not necessary. Because SAN PASQUAL is not relying upon the Limited Waiver  
18 contained in Contract §9.4, SAN PASQUAL is not restricted by the conditions imposed by  
19 the Limited Waiver, such as the restriction against monetary damages.

20 55. With regard to a Breach of Contract claim, the STATE only has immunity from  
21 suit in federal court, not because it is a breach of contract claim, but only because of the  
22 Eleventh Amendment to the United States Constitution, which provides the STATE with  
23 immunity from any action filed in a federal court (whether it is for Breach of Contract or any  
24 other claim) unless the STATE waives that Eleventh Amendment Immunity. Because the  
25 STATE has no immunity from a Breach of Contract claim in State Court and only possesses  
26 immunity from a federal Breach of Contract claim due to its general Eleventh Amendment  
27 immunity, the waiver of immunity in the Contract is only necessary to bring suit for an action  
28 arising under the Contract that is filed in federal court. Thus, the prohibition on monetary

1 damages that appears solely in Contract §9.4, entitled "Limited Waiver of Sovereign  
2 Immunity," is applicable only when the STATE is sued in federal court by using the waiver of  
3 Eleventh Amendment immunity contained in Contract §9.4.

4 56. By its explicit terms, the waiver of immunity in the Contract is not the exclusive  
5 remedy for SAN PASQUAL to enforce the terms of the Contract. Because the STATE does  
6 not have immunity from a Breach of Contract cause of action filed in State Court, SAN  
7 PASQUAL may file this Action in State Court on that basis and without relying upon the  
8 waiver of immunity in the Contract and without the monetary damages prohibition contained  
9 in the Contract's Limited Waiver applying to this Action in State Court.

10 57. Furthermore, Contract §9.3 explicitly permits SAN PASQUAL to file this  
11 Action for Breach of the Contract in State Court because it states "This Section 9.0 may not  
12 be construed to waive, limit or restrict any remedy that is otherwise available to either party."  
13 Because the STATE does not have immunity from a breach of contract cause of action, SAN  
14 PASQUAL has and always had available to it the right to file this Action for breach of the  
15 Contract in state court and seek monetary damages. Therefore, Contract §9.3 explicitly  
16 permits SAN PASQUAL to file this Action in state court and seek monetary damages.

17 58. SAN PASQUAL timely filed this Action in state court on February 9, 2010  
18 regarding the State's breach of the Contract on December 11, 2008, as well as for all other  
19 unlawful conduct alleged herein.

### 20 21 **III. VENUE**

22 59. C.C.P. §395 states that venue is proper for a breach of contract cause of action in  
23 "the superior court in the county where the obligation is to be performed, where the contract  
24 in fact was entered into, or where the defendant or any defendant resides at the  
25 commencement of the action." The State conducts Gaming Device License Draws in the  
26 County of Sacramento, the Contract was entered into in the County of Sacramento, and the  
27 CGCC's office is in Sacramento County. Therefore, this action could be commenced or tried  
28 in Sacramento County under C.C.P. §395.

1           60. C.C.P. §401, however further states that "[w]henever it is provided by any law of  
2 this State that an action or proceeding against the State ... shall or may be commenced in,  
3 tried in, or removed to the County of Sacramento, the same may be commenced and tried in  
4 any city or city and county of this State in which the Attorney General has an office."

5           61. The Attorney General has an office in Los Angeles County. Therefore, this  
6 Action was commenced in Los Angeles County pursuant to C.C.P. §401.

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9                                   **FIRST CAUSE OF ACTION**

10                               (Breach of Contract against All Defendants)

11           62. SAN PASQUAL realleges all the allegations contained in paragraphs 1 through  
12 61, inclusive, and hereby incorporate each of them by this reference.

13           63. SAN PASQUAL and the STATE OF CALIFORNIA entered into the Contract  
14 on or about September 10, 1999.

15           64. SAN PASQUAL has done everything that the Contract requires SAN  
16 PASQUAL to do.

17           65. On or about June 19, 2002, when the CGCC announced its interpretation that  
18 Contract §4.3.2.2(a)(1) authorized the issuance of only 32,151 Gaming Device Licenses, the  
19 STATE thereby announced its then present intention not to comply with the terms of the  
20 Contract.

21           66. For the July 2003 License Draw, all conditions required by this Contract for the  
22 STATE's performance had occurred including, but not limited to, SAN PASQUAL timely  
23 submitting its Gaming Device License Application for 500 Gaming Device Licenses and  
24 tendering to the STATE a prepayment of \$625,000 for the 500 requested Gaming Device  
25 Licenses. Therefore, STATE was required to issue SAN PASQUAL the additional 500 Gaming  
26 Device Licenses requested by SAN PASQUAL at the July 10, 2003 Gaming Device License  
27 Draw.

1           67. For the October 2004 License Draw, all conditions required by this Contract for  
2 the STATE's performance had occurred including, but not limited to, SAN PASQUAL timely  
3 submitting its Gaming Device License Application for 341 Gaming Device Licenses and  
4 tendering to the STATE a prepayment of \$426,250 for the 341 requested Gaming Device  
5 Licenses. Therefore, STATE was required to issue SAN PASQUAL the additional 341 Gaming  
6 Device Licenses requested by SAN PASQUAL at the October 22, 2004 Gaming Device  
7 License Draw.

8           68. For the October 2005 License Draw, all conditions required by this Contract for  
9 the STATE's performance had occurred including, but not limited to, SAN PASQUAL timely  
10 submitting its Gaming Device License Application for 333 Gaming Device Licenses and  
11 tendering to the STATE a prepayment of \$416,250 for the 333 requested Gaming Device  
12 Licenses. Therefore, STATE was required to issue SAN PASQUAL the additional 333 Gaming  
13 Device Licenses requested by SAN PASQUAL at the October 7, 2005 Gaming Device License  
14 Draw.

15           69. For the August 2006 License Draw, all conditions required by this Contract for  
16 the STATE's performance had occurred including, but not limited to, SAN PASQUAL timely  
17 submitting its Gaming Device License Application for 50 Gaming Device Licenses and  
18 tendering to the STATE a prepayment of \$62,500 for the 50 requested Gaming Device  
19 Licenses. Therefore, STATE was required to issue SAN PASQUAL the additional 50 Gaming  
20 Device Licenses requested by SAN PASQUAL at the August 16, 2006 Gaming Device License  
21 Draw.

22           70. For the October 2007 License Draw, all conditions required by this Contract for  
23 the STATE's performance had occurred including, but not limited to, SAN PASQUAL timely  
24 submitting its Gaming Device License Application for 300 Gaming Device Licenses and  
25 tendering to the STATE a prepayment of \$375,000 for the 300 requested Gaming Device  
26 Licenses. Therefore, STATE was required to issue SAN PASQUAL the additional 300 Gaming  
27 Device Licenses requested by SAN PASQUAL at the October 10, 2007 Gaming Device  
28 License Draw.



1           71. All conditions required by this Contract for the STATE's performance had  
2 occurred including, but not limited to, SAN PASQUAL timely submitting its Gaming Device  
3 License Application for 428 Gaming Device Licenses and tendering to the STATE a  
4 prepayment of \$535,000 for the 428 requested Gaming Device Licenses. Therefore, STATE  
5 was required to issue SAN PASQUAL the additional 428 Gaming Device Licenses requested  
6 by SAN PASQUAL at the December 11, 2008 Gaming Device License Draw.

7           72. Based upon the CGCC's erroneous interpretation, the STATE failed to issue  
8 SAN PASQUAL 500 Gaming Device Licenses requested by SAN PASQUAL at the July 10,  
9 2003 Gaming Device License Draw. SAN PASQUAL was harmed by the STATE's failure to  
10 issue SAN PASQUAL the 500 Gaming Device Licenses requested by SAN PASQUAL at the  
11 July 10, 2003 Gaming Device License Draw.

12           73. Based upon the CGCC's erroneous interpretation, the STATE failed to issue  
13 SAN PASQUAL 269 Gaming Device Licenses requested by SAN PASQUAL at the October  
14 22, 2004 Gaming Device License Draw. SAN PASQUAL was harmed by the STATE's failure  
15 to issue SAN PASQUAL the 269 Gaming Device Licenses requested by SAN PASQUAL at  
16 the October 22, 2004 Gaming Device License Draw.

17           74. Based upon the CGCC's erroneous interpretation, the STATE failed to issue  
18 SAN PASQUAL 333 Gaming Device Licenses requested by SAN PASQUAL at the October 7,  
19 2005 Gaming Device License Draw. SAN PASQUAL was harmed by the STATE's failure to  
20 issue SAN PASQUAL the additional 333 Gaming Device Licenses requested by SAN  
21 PASQUAL at the October 7, 2005 Gaming Device License Draw.

22           75. Based upon the CGCC's erroneous interpretation, the STATE failed to issue  
23 SAN PASQUAL 50 Gaming Device Licenses requested by SAN PASQUAL at the August 16,  
24 2006 Gaming Device License Draw. SAN PASQUAL was harmed by the STATE's failure to  
25 issue SAN PASQUAL the additional 50 Gaming Device Licenses requested by SAN  
26 PASQUAL at the August 16, 2006 Gaming Device License Draw.

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1           76.     Based upon the CGCC's erroneous interpretation, the STATE failed to issue  
2 SAN PASQUAL 300 Gaming Device Licenses requested by SAN PASQUAL at the October  
3 10, 2007 Gaming Device License Draw. SAN PASQUAL was harmed by the STATE's failure  
4 to issue SAN PASQUAL the additional 300 Gaming Device Licenses requested by SAN  
5 PASQUAL at the October 10, 2007 Gaming Device License Draw.

6           77.     The STATE failed to issue SAN PASQUAL any of the additional 428 Gaming  
7 Device Licenses requested by SAN PASQUAL at the December 11, 2008 Gaming Device  
8 License Draw. SAN PASQUAL was harmed by the STATE's failure to issue SAN PASQUAL  
9 the additional 428 Gaming Device Licenses requested by SAN PASQUAL at the December 11,  
10 2008 Gaming Device License Draw.

11           78.     As a direct and proximate result of such wrongful conduct by the STATE,  
12 SAN PASQUAL suffered and will continue to suffer in the future direct, incidental and  
13 consequential economic compensatory damages in an amount to be determined at trial, but at  
14 least two hundred million dollars (\$200,000,000), as well as prejudgment and postjudgment  
15 interest; and other damages in an amount subject to proof at trial.

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1 WHEREFORE, SAN PASQUAL prays as follows:

2 **For the First Cause of Action Against All Defendants (Breach of Contract):**

- 3 1. For all general, special damages, direct damages, incidental damages, and  
4 consequential damages, in an amount exceeding the jurisdictional minimum of this  
5 court, which amount is to be adduced according to proof at trial, but which shall not  
6 be less than two hundred million dollars (\$200,000,000); and,  
7 2. For such other and future special and/or general damages in an amount subject to  
8 proof at trial; and,  
9 3. For Pre-Judgment and Post Judgment interest at lawful rates; and,  
10 4. For those Causes of Action allowing attorneys fees, reasonable attorneys fees; and,  
11 5. For costs of suit; and,  
12 6. For such other further and further relief as the court may deem proper.

13  
14 DATED: April 16, 2012

SOLOMON, SALTSMAN & JAMIESON

15  
16  
17 By: \_\_\_\_\_

Stephen Warren Solomon

Stephen Allen Jamieson

R. Bruce Evans

Ryan M. Kroll

Attorneys for Plaintiff-SAN PASQUAL Band of  
Mission Indians

1 **PROOF OF SERVICE**

2 C.C.P. § 1013a(3)

3 **STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

4 I am employed in the County of Los Angeles, State of California. I am over the age of 18  
5 and not a party to the within action; my business address is 426 Culver Boulevard, Playa del Rey,  
6 California 90293.

7 On March 16, 2012, I served the foregoing documents described as

8 **NOTICE OF MOTION AND MOTION FOR LEAVE OF COURT TO FILE SECOND**  
9 **AMENDED COMPLAINT; MEMORANDUM OF POINT AND AUTHORITIES;**  
10 **DECLARATION OF RYAN MICHAEL KROLL; [PROPOSED] ORDER LODGED WITH**  
11 **THE PROPOSED SECOND AMENDED COMPLAINT**

12 on all interested parties in this action by placing a true copy of each document, enclosed in a  
13 sealed envelope addressed as follows:

14 Jennifer Henderson  
15 Office of Attorney General  
16 1300 "I" St Ste 125  
17 PO Box 944255  
18 Sacramento, CA 94244  
19 [Jennifer.henderson@doj.ca.gov](mailto:Jennifer.henderson@doj.ca.gov)

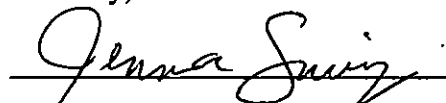
20 **[ X ] VIA U.S. MAIL:** I deposited such envelopes in the mail at Playa del Rey, California.  
21 The envelope was mailed with first class postage thereon fully prepaid. I am "readily  
22 familiar" with the firm's practice of collection and processing of correspondence for  
23 mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary  
24 course of business. I am aware that on motion of party served, service is presumed  
25 invalid if the postal cancellation date or the postage meter date is more than 1 day after  
26 date of deposit for mailing in this Proof of Service.

27 **[ ] BY PERSONAL SERVICE:** I caused a true and correct copy of the foregoing document  
28 to be personally delivered to the above - mentioned addressee(s).

**[ ] VIA EMAIL:** I caused the above-referenced document(s) to be transmitted to the above  
named person(s) at the following email address:

I declare under penalty of perjury under the laws of the State of California that the  
foregoing is true and correct.

Executed on March 16, 2012, at Playa del Rey, California.

  
Jenna Spivey