No. 15-____

In the Supreme Court of the United States

STATE OF CALIFORNIA, *et al.*,

Petitioners,

v.

PAUMA BAND OF LUISENO MISSION INDIANS OF THE PAUMA & YUIMA RESERVATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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March 17, 2016

QUESTION PRESENTED

In *Edelman v. Jordan*, 415 U.S. 651 (1974), this Court held that a waiver of state sovereign immunity must be "stated 'by the most express language or by such overwhelming implication from the text as will leave no room for any other reasonable construction.'" *Id*. at 673 (alteration omitted). This case concerns a gaming compact between the State of California and the Pauma Band of Luiseno Mission Indians of the Pauma and Yuima Reservation. Both parties waived their sovereign immunity from suits arising under the compact, but only to the extent that "[n]either side makes any claim for monetary damages (that is, only injunctive, specific performance, including enforcement of a provision of this Compact requiring payment of money to one or another of the parties, or declaratory relief is sought) . . . ." App. 28a. A divided panel of the Ninth Circuit held that this limited waiver, which also appears in gaming compacts between California and 57 other tribes, waived the State's immunity with respect to an award of $36.2 million in restitution. The question presented is:

Whether, under *Edelman*, the language of the limited waiver—which expressly excludes claims for "monetary damages" and references only injunctive relief, specific performance, and declaratory relief—waived the State's sovereign immunity with respect to the district court's monetary award.

PARTIES TO THE PROCEEDING

Petitioners are the State of California, the California Gambling Control Commission, and Edmund G. Brown Jr., in his capacity as Governor of the State of California. Respondent is the Pauma Band of Luiseno Mission Indians of the Pauma and Yuima Reservation, also known as the Pauma Band of Mission Indians and the Pauma Luiseno Band of Mission Indians.

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PETITION FOR A WRIT OF CERTIORARI

The Attorney General of California, on behalf of the State of California, the California Gambling Control Commission, and Edmund G. Brown Jr., in his capacity as Governor of the State of California, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-41a) will be reported at ___ F.3d ____ (9th Cir. 2015), and is also available at 2015 WL 9245245. An earlier version of the court's opinion, before amendment on denial of rehearing and rehearing en banc, was reported at 804 F.3d 1031 (9th Cir. 2015). The relevant orders of the district court (App. 44a-90a) are unpublished.

JURISDICTION

The judgment of the court of appeals was originally entered on October 26, 2015. App. 1a. The court amended its opinion and re-entered judgment on December 18, 2015, in conjunction with the entry of an order denying rehearing and rehearing en banc. *Id.* The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of an-

other State, or by Citizens or Subjects of any Foreign State."

STATEMENT

1. Congress passed the Indian Gaming Regulatory Act (IGRA) to "provide a statutory basis for the operation of gaming by Indian tribes." 25 U.S.C. § 2702(1). IGRA creates three classes of gaming. Class III gaming includes "'the types of high-stakes games usually associated with Nevada-style gambling.'" App. 8a; *see* 25 U.S.C. § 2703(8). Class III gaming activities are lawful on tribal lands only if they are conducted in conformance with a tribal-state compact that has been approved by the Secretary of the Interior. 25 U.S.C. § 2710(d)(1), (3)(B).[1]

In 1999, several dozen tribes began negotiating with the State of California to enter compacts allowing the tribes to conduct class III gaming activities. *See* App. 9a. More than 60 tribes entered compacts with the State in 1999 and 2000, including the Pauma Band of Luiseno Mission Indians of the Pauma and Yuima Reservation (Pauma). *Id.* Among other things, these compacts addressed the allocation of licenses for slot machines; requirements for the conduct of gaming operations (such as a ban on minors in gaming facilities); compliance procedures; and payments into a trust fund for the benefit of other tribes. *See, e.g.*, C.A. Dkt. No. 14-4, at 5-44.

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[1] Class I gaming refers to "social games solely for prizes of minimal value or traditional forms of Indian gaming" associated with "tribal ceremonies or celebrations." 25 U.S.C. § 2703(6). Class II gaming includes bingo and similar games. *See id.* § 2703(7).

The gaming compacts entered in 1999 and 2000 were virtually identical. App. 9a. In particular, all of those compacts, including Pauma's, contained an identical provision regarding sovereign immunity:

> Sec. 9.4. Limited Waiver of Sovereign Immunity.
>
> (a) In the event that a dispute is to be resolved in federal court . . . , the State and the Tribe expressly consent to be sued therein and waive any immunity therefrom that they may have provided that:
>
> (1) The dispute is limited solely to issues arising under this Gaming Compact; [and]
>
> (2) Neither side makes any claim for monetary damages (that is, only injunctive, specific performance, including enforcement of a provision of this Compact requiring payment of money to one or another of the parties, or declaratory relief is sought) . . . .

Id. at 28a.[2]

The compacts authorized tribes like Pauma, that did not operate any slot machines as of 1999, to operate up to 350 slot machines without obtaining any licenses. C.A. Dkt. No. 14-4, at 13. The tribes were required to obtain a license for each additional slot machine beyond 350. *Id.* at 14. They paid no licensing fees so long as they operated fewer than 700 total machines; for additional machines beyond 700, the

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[2] *See generally* California Gambling Control Commission, Ratified Tribal-State Gaming Compacts (New and Amended), http://www.cgcc.ca.gov/?pageID=compacts (last visited Mar. 7, 2016) (collecting compacts).

compacts required the payment of licensing fees. *Id.* at 13-14. The fees went to a revenue-sharing trust fund benefiting other California tribes. *Id.* The compacts also contained detailed rules regarding the allocation of licenses, including a complex formula for determining the maximum number of licenses in the common pool available to all of the tribes that entered gaming compacts. App. 9a-10a; *see* C.A. Dkt. No. 14-4, at 14.

In December 2003, the State informed the tribes that the common pool of licenses had been exhausted. App. 10a. By that time, Pauma had obtained 700 licenses for slot machines, allowing it to operate a total of 1,050 machines. *See id.* at 12a. Pauma was operating those machines out of a casino in a tent facility, but it hoped to enter a contract with a gaming company to construct a "Las Vegas-style casino," and it required at least 2,000 slot machines for that purpose. *Id.* at 11a, 12a.

With that goal in mind, Pauma negotiated and entered an amended compact with the State in 2004. App. 10a-11a.[3] The amended compact allowed Pauma to operate an unlimited number of slot machines, and conferred other benefits on the tribe, in exchange for increasing the fees Pauma paid into the revenue-sharing trust fund and requiring the payment of additional fees to the State. *See id.* at 10a; C.A. Dkt. No. 14-5, at 179-212. As amended, the compact contained the same limited waiver of sovereign immunity as the original compact. App. 13a. The amended compact with Pauma was one of five similar amended

[3] At the time Pauma entered the amended compact, it had not yet secured a deal with a gaming company to construct a Las Vegas-style casino. App. 69a.

gaming compacts entered by the State in 2004 following joint negotiations with Pauma and four other tribes. *Id.* at 65a.

Around the same time, different tribes filed lawsuits challenging the State's calculation, under the terms of the original 1999 and 2000 compacts, of the total number of licenses available in the common pool. *See* App. 11a. The Ninth Circuit eventually held that the State's calculation was mistaken. It concluded that the formula in the original compacts allowed for approximately eight thousand more licenses than the State had calculated. *See Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. California*, 618 F.3d 1066 (9th Cir. 2010) ("*Colusa II*"); App. 11a-12a.[4] As a result of that decision, many tribes that were still operating under their original compacts were able to obtain additional licenses under the original fee structure. *See* App. 11a-12a.

2. In September 2009, after operating under its amended compact for five years, Pauma sued the State. App. 12a, 69a. In the intervening years, Pauma's plans to build a Las Vegas-style casino "fell through" after the tribe failed to reach a deal with several large gaming companies, including Caesars, Hard Rock, and Foxwoods. *Id.* at 12a; *see also id.* at

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[4] The Ninth Circuit noted that the formula for determining the total number of licenses in the common pool was "opaquely drafted and convoluted," "not a model of clarity," and "ambiguous and reasonably susceptible to more than one interpretation." *Colusa II*, 618 F.3d at 1069, 1075. The court also acknowledged that its own "de novo" interpretation of the formula differed from the interpretations advanced by the parties, as well as the interpretation adopted by the district court. *Id.* at 1070.

11a & n.4. The tribe still operated roughly the same number of slot machines as when it negotiated the amended compact, but it paid substantially higher fees than it would have paid under the original compact. *Id.* at 12a.

Pauma's suit asked the district court to reform or rescind the amended compact, and to award restitution equal to the difference between the fees Pauma paid the State under the amended compact and what it would have paid under the original compact. *See* App. 12a-13a. Pauma advanced 18 claims attacking the formation of the amended compact based on a variety of theories, including mistake and misrepresentation. *Id.* at 12a. The State argued that Pauma's claims failed on the merits, and that the tribe's request for money damages or restitution was barred by the Eleventh Amendment and fell outside the limited waiver of sovereign immunity in the compact. *See, e.g.*, Dist. Ct. Dkt. No. 191 at 73-75, No. 217 at 29.

After an interlocutory appeal regarding preliminary injunctive relief, the district court granted Pauma's motion for summary judgment on its misrepresentation claim. App. 12a-13a.[5] The court noted that "'misrepresentation of material facts may be the basis for the rescission of a contract, even where the misrepresentations are made innocently, without knowledge of their falsity and without fraudulent intent.'" *Id.* at 82a. It observed that the State told Pauma in 2003 that the demand for licenses exceeded

[5] The district court's April 2010 preliminary injunction, which has remained in place throughout this litigation, allowed Pauma to "pay only those payments required under the terms of the original compact." Dist. Ct. Dkt. No. 44 at 1.

the available supply, based on the State's calculation that there were 32,151 licenses in the common pool. *Id.* at 83a. The court reasoned that this statement was "false when made," because of the Ninth Circuit's determination in *Colusa II*—more than six years later—that the correct figure was actually 40,201 licenses. *Id.* at 84a. The court concluded that this misrepresentation was material, that it induced Pauma to enter the amended compact, and that Pauma was justified in relying on it. *Id.* at 84a-86a.

To remedy the misrepresentation, the district court rescinded the amended compact and allowed Pauma to return to the lower fee structure in the original compact. App. 13a. It also ordered the State to pay Pauma $36.2 million, the difference between the amount Pauma had paid the State under the amended compact and the amount it would have paid under the original compact. *Id.* The district court characterized this award as "specific performance." *Id.* at 13a, 47a.

The district court rejected the State's sovereign immunity defense. App. 47a. It held that "[s]pecific performance of the payment terms effectively returns money property wrongfully taken from Pauma and is available to Pauma pursuant to the State's limited contractual waiver of sovereign immunity." *Id.*

3. A divided panel of the Ninth Circuit affirmed. App. 36a. [6]

a. In analyzing the sovereign immunity issue, the majority first considered the nature of the district

[6] The panel issued its original opinion on October 26, 2015, and issued an amended opinion on December 18, 2015. App. 1a, 5a. This petition describes the amended opinion.

court's monetary award. App. 22a. It concluded that the "district court erred in awarding Pauma $36.2 million under the guise of 'specific performance,'" because specific performance is a remedy for breach of contract, not for a successful challenge to the formation of a contract. *Id.*; *see id.* at 23a. Despite "the district court's error in mislabeling the remedy," however, the majority affirmed the award "on the alternative grounds of equitable rescission and restitution." *Id.* at 24a.

Next, the majority considered whether the State "had waived its Eleventh Amendment sovereign immunity in this case to permit such relief." App. 27a. The majority noted that the Eleventh Amendment generally bars "'a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury.'" *Id.* It acknowledged that a waiver of sovereign immunity may be found only "'where stated by the most express language or by such overwhelming implication from the text as will leave no room for any other reasonable construction.'" *Id.* at 28a (quoting *Edelman v. Jordan*, 415 U.S. 651, 673 (1974)).

The majority concluded that the limited waiver in Pauma's compact "clearly envisions restitution as falling within its purview, and only actions for monetary damages or actions not arising from the Compact itself to be excluded." App. 31a (emphasis omitted). It reached this conclusion by "interpreting the contract as a whole." *Id.* at 29a. The majority noted that the terms of the waiver concerned claims seeking "specific performance, *including enforcement of a provision of this Compact requiring payment of money to one or another of the parties* [which must mean either Pauma or the State]." *Id.* at 30a (em-

phasis and alteration in majority opinion). This language "envisions payment of money to *either* party, and yet the Compact does not contain any provisions requiring payment of money from the State to the Tribe." *Id.* at 30a-31a (emphasis in majority opinion). The majority reasoned that "[e]xcluding restitution as a remedy that the Tribe could seek under this waiver would render this clause null and void," because "the provision would be operative only as to one party, not both." *Id.* at 31a.

b. Chief Judge Jarvey, sitting by designation, dissented. App. 36a. He disagreed "that California committed the tort of misrepresentation by interpreting the Compact differently than a later court decision." *Id.* He noted that the formula for calculating the size of the common pool of licenses was "hopelessly ambiguous," and that the State, the tribes, the district court, and the Ninth Circuit "all interpreted it differently." *Id.* at 36a, 37a. Given that ambiguity, the State's representations in 2003 about the number of available licenses did "not qualify under the common law definition of a material misrepresentation." *Id.* at 38a.

Chief Judge Jarvey also disagreed with the majority's holding on sovereign immunity. App. 39a. He noted that the provision waiving the State's sovereign immunity directs "that neither side can make a claim for monetary damages," and "then defines the waiver, beginning with the words 'that is,'" which are "used to preface a more specific delineation of the preceding contractual language." *Id.* at 39a-40a. In this compact, "to further clarify the limitation of the waiver, the parties stated, 'that is, *only* injunctive, specific performance, including enforcement of a provision of this Compact requiring payment of money to

one or another of the parties, or declaratory relief is sought . . . .'" *Id.* at 40a (emphasis in dissenting opinion). Observing that "the use of the word 'only' is routinely defined to mean alone, solely or exclusively," Chief Judge Jarvey concluded that the "waiver's applicability is therefore explicitly confined to the circumstances listed." *Id.* Because the "monetary damages awarded here do not qualify as injunctive, specific performance or declaratory relief," he concluded that "there can be no waiver found here." *Id.* at 41a.

Chief Judge Jarvey believed that the majority opinion "disregard[ed] the explicit text" of the waiver provision. App. 40a. In particular, he noted that the "majority infers a waiver of sovereign immunity for restitution from a canon of contract interpretation that prefers interpretations that do not render other terms 'superfluous, useless or inexplicable.'" *Id.* In his view, however, the "fact that the waiver includes specific performance of payment provisions does not render it superfluous, useless or inexplicable simply because those particular obligations run only from Pauma to the State." *Id.* at 40a-41a. Rather, the "clause makes clear that the parties intended 'specific performance' to include monetary payments only when the Compact requires them," and it "would be helpful in the event of that kind of breach by Pauma." *Id.*

c. The court denied panel rehearing and rehearing en banc. App. 5a.

REASONS FOR GRANTING CERTIORARI

The Ninth Circuit held that a limited waiver of sovereign immunity, which applies by its terms "only" to injunctive relief, specific performance, and de-

claratory relief, waived California's immunity with respect to an award of $36.2 million in monetary restitution. That holding conflicts with this Court's decisions requiring waivers of sovereign immunity to be strictly construed in favor of the sovereign and forbidding a finding of waiver unless the language permits no other reasonable construction. The importance of this issue extends well beyond the circumstances of the present case. Identical waiver provisions presently appear in gaming compacts between California and 57 other tribes. Moreover, if followed in future cases, the lower court's general approach to construing waivers of immunity could infringe on the prerogatives of sovereigns throughout the Ninth Circuit.

1. The Eleventh Amendment bars suits "seeking to impose a liability which must be paid from public funds in the state treasury." *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). It applies to suits brought against a State by a Native American tribe, like this action. *See Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779-782 (1991). It also applies to suits seeking "'equitable restitution'" in the form of a "retroactive award of monetary relief." *Edelman*, 415 U.S. at 668.

Although sovereign immunity may be waived, the test for determining whether a State has waived its immunity from suit "'is a stringent one.'" *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675 (1999). Courts must "indulge every reasonable presumption against waiver." *Id.* at 682 (quoting *Aetna Ins. Co. v. Kennedy ex rel. Bogash*, 301 U.S. 389, 393 (1937)). A court may find a waiver "only where stated 'by the most express language or by such overwhelming implications from the text as

will leave no room for any other reasonable construction.'" *Edelman*, 415 U.S. at 673 (alteration omitted).

Moreover, any express waiver of sovereign immunity must "'be strictly construed, in terms of its scope, in favor of the sovereign.'" *Sossamon v. Texas*, 563 U.S. 277, 285 (2011). For example, "a waiver of sovereign immunity to other types of relief does not waive immunity to damages: 'The waiver of sovereign immunity must extend unambiguously to such monetary claims.'" *Id.* (alteration omitted).

Here, the Ninth Circuit recited the general standard governing waivers of sovereign immunity (App. 29a), but did not apply it. Instead, the majority treated this as a case calling for routine contractual interpretation. *See id.* at 29a-32a. It construed "the contract as a whole" and referenced conventional tools for parsing contracts, such as the principle that constructions that would render a clause superfluous are disfavored. *Id.* at 30a-31a (citing Restatement (Second) of Contracts § 202(2) and 11 Williston on Contracts § 32:5 (4th ed. 2015)). Relying on these tools, the majority reasoned that the parties "clearly envision[ed]" they were waiving their immunity with respect to an award of monetary restitution following rescission of the compact. App. 31a; *see id.* at 28a.

Even viewing this question as an exercise in ordinary contract interpretation, as the majority did, the majority's analysis of the waiver provision is dubious. The majority relied on a clause waiving immunity with respect to "specific performance, *including enforcement of a provision of this Compact requiring payment of money to one or another of the parties*." App. 30a (emphasis in majority opinion). In the majority's view, the italicized words would be "null and void" unless the clause included monetary

restitution, because the compact did not include any provisions requiring the State to pay money to Pauma. *Id.* at 30a-31a. As Chief Judge Jarvey explained, however, the italicized words are not superfluous; they would be helpful in the event that Pauma breached a provision requiring it to pay money to the State. *See id.* at 40a-41a. Moreover, the majority itself concluded that the monetary restitution at issue here does not qualify as "specific performance." *Id.* at 24a. That conclusion cannot be squared with the majority's construction of the waiver provision, which reads the clause concerning "specific performance" to *include* an award of monetary restitution. *Id.* at 30a-32a.

In any event, the majority never actually confronted the question that governs the Eleventh Amendment analysis: whether there was "'any other reasonable construction'" of the waiver provision that would exclude monetary restitution of the sort awarded here. *Edelman*, 415 U.S. at 673. In particular, the majority never explained why it would be unreasonable to construe the waiver as limited to the forms of relief that are expressly referenced—injunctive relief, specific performance, and declaratory relief.

As Chief Judge Jarvey explained, there is ample room for such a construction. Not only does the limited waiver contain no mention of monetary restitution, it expressly provides that the "only" forms of relief available are "injunctive, specific performance, . . . or declaratory relief." App. 39a. This language can reasonably be construed as "explicitly confined to the circumstances listed." *Id.* at 40a. That reasonable construction excludes the monetary relief awarded by the district court—which all three judges on

the panel agreed does not qualify as "specific performance." *Id.* at 22a, 24a, 39a.

The availability of this reasonable construction means that the district court's $36.2 million award is barred by the Eleventh Amendment. *See, e.g.*, *Edelman*, 415 U.S. at 673. The Ninth Circuit's contrary holding conflicts with numerous decisions of this Court that have strictly construed the scope of waiver provisions in favor of the sovereign. *See, e.g.*, *Sossamon*, 563 U.S. at 285 (collecting cases).

2. The importance of this question extends beyond the present case. As of this year, California has entered gaming compacts with 73 different tribes. The compacts with 57 other tribes, all of which are currently in effect, contain limited waivers of sovereign immunity that are identical to the provision at issue here.[7] While this record does not contain information about aggregate payments to the State under the terms of gaming compacts, the State can represent that tribes have collectively paid more than

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[7] Fifteen additional gaming compacts include waiver provisions featuring language substantially similar to the provision at issue here. For example, the waiver in section 13.4(a) of the State's compact with the Pinoleville Pomo Nation applies provided that "neither side makes any claim for monetary damages (except that payment of any money required by the terms of this Compact may be sought, and injunctive relief, specific performance (including enforcement of a provision of this Compact requiring the payment of money to one or another of the parties), and declaratory relief may be sought)." Those compacts were negotiated more recently, and some do not expire for decades. *See generally* California Gambling Control Commission, Ratified Tribal-State Gaming Compacts (New and Amended), http://www.cgcc.ca.gov/?pageID=compacts (last visited Mar. 7, 2016) (collecting compacts).

two billion dollars into California's general fund. The Ninth Circuit's decision could allow other tribes to attempt to seek monetary restitution from California. And the circumstances in which a request for monetary restitution might arise could extend beyond the circumstances of this case, because, under California law, rescission may be premised on a range of theories in addition to the misrepresentation theory invoked here. *See* Cal. Civil Code § 1689(b)(1)-(7) (grounds for rescission include mistake, undue influence, failure of consideration, and prejudice to "the public interest").

Sovereign immunity "serves the important function of shielding state treasuries and thus preserving 'the States' ability to govern in accordance with the will of their citizens.'" *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 765 (2002). The Ninth Circuit's decision thwarts that function in this context, exposing California's treasury and its citizens to the possibility of demands far exceeding the $36.2 million at issue here.

More broadly, the Ninth Circuit's opinion could undermine the special solicitude owed to sovereigns. *See id.* Immunity from suit is "'central to sovereign dignity,'" *Sossamon*, 563 U.S. at 283, and any decision to waive sovereign immunity must be "'altogether voluntary on the part of the sovereignty.'" *Coll. Sav. Bank*, 527 U.S. at 675. Those principles are served by requiring an express and unambiguous statement before finding a waiver, and by strictly construing the scope of any waiver in favor of the sovereign. That settled approach to analyzing waivers protects sovereign immunity unless the waiver is "so clear[] and unambiguous[]" that "we can 'be cer-

tain that the State in fact consents' to" a particular type of suit. *Sossamon*, 563 U.S. at 285-286.

The approach followed by the Ninth Circuit below is markedly different. It treats the analysis of waiver provisions as a routine exercise in contract interpretation, under which a sovereign's immunity from suit rises or falls based solely on a court's preferred interpretation of the scope of a waiver. If repeated in other cases, the lower court's approach could infringe on the rights of other States within the Ninth Circuit, allowing suits to proceed even where States have not clearly consented to them. It could also threaten the sovereign rights of Native American tribes, who, similar to States, benefit from the rule that waivers of their sovereign immunity "must be unequivocally expressed." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (internal quotation marks omitted).

3. This case presents a suitable vehicle for plenary review or, alternatively, for summary reversal. The majority and dissenting opinions below squarely confront the Eleventh Amendment question. That question turns on the language of a single compact provision and is not complicated by factual disputes. And there are no jurisdictional impediments to review.

The Ninth Circuit suggested in a footnote that a state statute, California Government Code section 98005, might provide an alternative basis for holding that the State waived its sovereign immunity regarding the monetary restitution at issue here. *See* App. 32a n.12. The Ninth Circuit did not, however, analyze or resolve that issue. *See id.* Before the court of appeals, Pauma relied exclusively on a portion of section 98005 waiving California's sovereign immunity regarding "any cause of action arising from . . . the

state's violation of the terms of any Tribal-State compact to which the state is or may become a party." Cal. Gov't Code § 98005; *see* C.A. Dkt. No. 29-1 at 56. That waiver is inapplicable here because, as the Ninth Circuit acknowledged, "no breach of a contract has been alleged." App. 23a. Pauma's action instead raises "a challenge to [the] formation" of its amended compact. *Id.* Section 98005 therefore provides no basis for viewing this petition as an unsuitable vehicle.[8]

4. Although the Ninth Circuit's decision does not create any direct conflict between the federal courts of appeals, it may engender confusion in the lower courts over how to determine the scope of a waiver of sovereign immunity. Consistent with this Court's directives, lower courts typically find a waiver only

[8] Section 98005 also waives the State's sovereign immunity from claims regarding the State's refusal to enter into negotiations with a tribe about an IGRA compact or amended compact, or the State's refusal to conduct such negotiations "in good faith." Cal. Gov't Code § 98005. Pauma did not invoke these clauses before the court of appeals. *See* C.A. Dkt. No. 29-1 at 56. In any event, they do not apply here. The State negotiated with Pauma on both relevant occasions, culminating in the original compact and the amended compact. Even assuming that the district court properly entered summary judgment on Pauma's misrepresentation claim, that does not establish bad faith under section 98005. Section 98005 tracks IGRA's requirement that States negotiate in good faith with tribes concerning class III gaming. *See Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019, 1026 (9th Cir. 2010); 25 U.S.C. § 2710(d)(7)(B). Here, both the district court and the court of appeals held that Pauma's bad-faith claim under IGRA was "barred by the plain language of the IGRA statute" (App 33a), and the district court noted that "the Court does not find the State to have acted in bad faith in misrepresenting the size of the Pool." *Id.* at 48a n.2.

when the language before them leaves no room for any other reasonable construction.[9] In contrast, the Ninth Circuit's decision suggests that courts have discretion to interpret a waiver provision as they would any other contract, without indulging "'every reasonable presumption against waiver.'" *Coll. Sav. Bank*, 527 U.S. at 682. That approach conflicts with this Court's precedents and undermines the solicitude owed to sovereigns in our federal system.

[9] *See, e.g.*, *Pettigrew v. Oklahoma*, 722 F.3d 1209, 1210 (10th Cir. 2013) (venue provision in settlement agreement waived immunity from suit in federal court because there was "no reasonable construction" of the language other than as a consent to suit in federal court); *Watters v. Wash. Metro. Area Transit Auth.*, 295 F.3d 36, 40 (D.C. Cir. 2002) (compact provision that waived Authority's immunity "for its contracts and for its torts" but did not reference equitable liens "falls far short of a clear and unequivocal waiver of . . . immunity against attorney's charging liens").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 17, 2016

APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 14-56104 and 14-56105

PAUMA BAND OF LUISENO MISSION INDIANS OF THE PAUMA & YUIMA RESERVATION, AKA Pauma Band of Mission Indians, AKA Pauma Luiseno Band of Mission Indians, Plaintiff-Appellee/Cross-Appellant

v.

STATE OF CALIFORNIA; CALIFORNIA GAMBLING CONTROL COMMISSION, an agency of the State of California; EDMUND G. BROWN, JR., as Governor of the State of California, Defendants-Appellants/Cross-Appellees

D.C. Nos. 3:09-cv-01955- CAB-MDD
3:09-cv-01955- CAB-MDD

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

Cathy Ann Bencivengo, District Judge, Presiding

ORDER AND AMENDED OPINION

Argued and Submitted
July 10, 2015—San Francisco, California

Filed October 26, 2015
Amended December 18, 2015

Before: Mary M. Schroeder and Richard C. Tallman, Circuit Judges, and John A. Jarvey,* Chief District Judge.

Opinion by Judge Tallman; Dissent by Chief District Judge Jarvey

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SUMMARY**

Indian Law

The panel filed (1) an order amending its opinion and dissent and denying petitions for panel rehearing and rehearing en banc, and (2) an amended opinion and dissent in an action concerning a Tribal-State Gaming Compact.

In its amended opinion, the panel affirmed the district court's summary judgment and held that the Pauma Band of Luiseno Mission Indians was entitled to rescission of the 2004 Amendment to the 1999 Tribal-State Compact governing operation of Class III, or casino-style, gaming on Pauma's land.

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*The Honorable John A. Jarvey, Chief United States District Judge for the Southern District of Iowa, sitting by designation.

**This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel held that the interpretation of a Compact license pool provision in *Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. Cal.*, 618 F.3d 1066 (9th Cir. 2010), applied, such that the State of California would be deemed to have misrepresented a material fact as to how many gaming licenses were available when negotiating with Pauma to amend its Compact. The panel held that, unlike a change in judicial interpretation of a statute or law, the doctrine of retroactivity does not apply to contracts. Once there has been a final judicial interpretation of an ambiguous contract provision, that is and has always been the correct interpretation from the document's inception. The panel held that the district court properly granted summary judgment on Pauma's misrepresentation claim.

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The panel held that the district court awarded the proper remedy to Pauma by refunding $36.2 million in overpayments, even though the district court mislabeled the remedy as specific performance, rather than rescission and restitution for a voidable contract. The panel held that this equitable remedy fell within the State's limited waiver of its sovereign immunity in the Compacts, and thus was not barred by the Eleventh Amendment

On cross-appeal, the panel held that Pauma was not entitled to seek redress under the Indian Gaming Regulatory Act because the State and Pauma actually reached a gaming Compact.

Dissenting, Chief District Judge Jarvey wrote that the State did not commit the tort of misrepresentation by interpreting the Compact differently than a later court decision. He also wrote that, under the language of the Compact, the State did not waive its sovereign immunity with respect to this claim.

COUNSEL

Teresa Michelle Laird (argued), Deputy Attorney General; Kamala D. Harris, Attorney General of California; Sara J. Drake, Senior Assistant Attorney General; Neil D. Houston, Deputy Attorney General, San Diego, California, for Defendants-Appellants/Cross-Appellees.

Cheryl A. Williams (argued) and Kevin M. Cochrane, Williams & Cochrane, LLP, San Diego, California, for Plaintiff-Appellee/Cross-Appellant.

ORDER

The panel has voted to amend its previous opinion and issues the following opinion to replace it. With this amendment, the panel has voted to deny the petitions for panel rehearing and to deny the petitions for rehearing en banc.

The full court has been advised of the petitions for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petitions for panel rehearing and petitions for rehearing en banc are DENIED. No future petitions for rehearing or petitions for rehearing en banc will be entertained.

OPINION

TALLMAN, Circuit Judge:

Sixteen years ago more than sixty Native American tribes entered into Tribal-State Gaming Compacts with the State of California. Sadly, the long and tortured history leading to the culmination

of these Compacts did not cease there. Rather, litigation based on ambiguous provisions as to the number of authorized gaming devices has ensued for most of the duration of these Compacts. *See In re Indian Gaming Related Cases*, 331 F.3d 1094, 1095–1107 (9th Cir. 2003) (detailing the entire history before and after the Compacts were enacted). Before us is yet another installment in this ongoing saga, this time between the Pauma Band of Luiseno Mission Indians ("Pauma" or "the Tribe") and the State of California, the California Gambling Control Commission, and Governor Edmund G. Brown, Jr. (collectively "the State").

Pauma sued the State based on our prior decision in *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. California ("Colusa II")*, 618 F.3d 1066 (9th Cir. 2010). We have been asked to determine (1) whether *Colusa II*'s interpretation of the Compacts' license pool provision applies retroactively, such that the State would be deemed to have misrepresented a material fact as to how many gaming licenses were available when negotiating with Pauma to amend its Compact; (2) whether the district court awarded the proper remedy to Pauma by refunding $36.2 million in overpayments; and (3) whether the State has waived its sovereign immunity under the Eleventh Amendment. We answer each question in the affirmative, although on alternative grounds supporting the relief awarded by the district court with respect to the remedy. On cross- appeal, Pauma also asks us to determine whether the State acted in bad faith under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2710. We agree with the district court's finding that IGRA is inapplicable

here, and thus Pauma's argument that the State acted in bad faith is irrelevant.

We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

I

We begin our journey with a quick overview of the weathered past between Native American tribes and the State of California, and then discuss the complicated procedural history that leads us here.

A

In 1988, Congress attempted to strike a delicate balance between the sovereignty of states and federally recognized Native American tribes by passing IGRA. The purpose of IGRA is well established:

> IGRA was Congress' compromise solution to the difficult questions involving Indian gaming. The Act was passed in order to provide "a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments" and "to shield [tribal gaming] from organized crime and other corrupting influences to ensure that the Indian tribe is the primary beneficiary of the gaming operation." 25 U.S.C. §2702(1),(2). IGRA is an example of "cooperative federalism" in that it seeks to balance the competing sovereign interests of the federal government, state governments,

> and Indian tribes, by giving each a role in the regulatory scheme.

Artichoke Joe's Cal. Grand Casino v. Norton, 216 F. Supp. 2d 1084, 1092 (E.D. Cal. 2002), *aff'd*, 353 F.3d 712 (9th Cir. 2003). IGRA creates three classes of gaming, with Class III gaming consisting of "the types of high-stakes games usually associated with Nevada-style gambling." *In re Indian Gaming*, 331 F.3d at 1097. As a result, Class III gaming is subjected to the greatest degree of control under IGRA's regulations. Class III gaming is lawful on Native American lands only if such activities are conducted pursuant to a Tribal-State Compact entered into by the tribe and a state that permits such gaming, and the Compact is approved by the Secretary of the Interior. *Id*. (citing 25 U.S.C. § 2710(d)(1), (3)(B)).

California did not immediately allow Indian gaming within its boundaries after the passage of IGRA. Some gubernatorial administrations were hostile to tribes conducting Class III gaming because it was then prohibited by California's Constitution, and so the State refused to negotiate with the tribes to permit it. *See id*. at 1098–99. In 1998, the people of California spoke by passing the tribes' ballot initiative—Proposition 5 (codified at Cal. Gov't Code §§ 98000–98012). *See Hotel Emps. & Rest. Emps. Int'l Union v. Davis*, 21 Cal. 4th 585, 589 (1999). Proposition 5 contained a model compact purporting to effectuate IGRA's provisions within California. *Id* at 589-90. But the victory was short lived. The California Supreme Court found all but one sentence of Proposition 5 unconstitutional.[1] *Id*. at 589, 615.

[1] The sole surviving provision of Proposition 5 is the (continued…)

Undeterred, the voters of California responded by amending the California Constitution on March 7, 2000, to create an exception for certain types of Class III Indian gaming notwithstanding the general prohibition on gambling in the State. *In re Indian Gaming*, 331 F.3d at 1103 & n.11.

In September 1999, several tribes began negotiating with the State to enter nearly identical Compacts to operate Class III, or casino-style, gambling (the "1999 Compact"). In April 2000, Pauma joined more than sixty other tribes who ultimately signed the 1999 Compact. The 1999 Compact contains a provision limiting the number of licenses[2] available statewide for tribes based on a formula.[3] As we have previously observed, "[t]he

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(...continued)
statutory waiver of sovereign immunity by the State for claims arising out of violations of IGRA. Cal. Gov't Code § 98005. The California Supreme Court found this provision severable and recognized that the language was meant to effectuate IGRA since the U.S. Supreme Court had recently stripped the Act of its teeth in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). *Hotel Emps.*, 21 Cal. 4th at 614–15; *see also Rincon Band of Luiseno Mission Indians v. Schwarzenegger*, 602 F.3d 1019, 1026 n.8 (9th Cir. 2010) ("California has waived its Eleventh Amendment immunity from such suits [brought by tribes under IGRA].").

[2] Each license is the equivalent of one slot machine or electronic video gaming device, and each tribe was limited to a maximum of 2,000 licenses.

[3] The formula, which has been the subject of much litigation, is found in section 4.3.2.2(a)(1) and reads:

> The maximum number of machines that all Compact Tribes in the aggregate may license pursuant to this Section shall be a sum equal to

(continued...)

License Pool Provisions that California and [the tribes] included in their Compact as a foundation for establishing Class III gaming in California are murky at best." *Colusa II*, 618 F.3d at 1084. Due to the limited time the tribes had to negotiate with the State, the parties agreed to the 1999 Compact without ever discussing their radically different interpretations of how many licenses the statewide license pool formula actually produced. *See id.* at 1070–72; *In re Indian Gaming*, 331 F.3d at 1104. It required protracted litigation before we settled the number in *Colusa II*, 618 F.3d at 1082.

By December 2003, the State informed the tribes that the collective license pool had been exhausted—without stating the total number of licenses actually authorized—and Pauma received only 200 licenses in that draw instead of its requested 750. Thus several tribes, including Pauma, began negotiating with the State to amend their Compacts in order to abolish the license pool provision and gain access to an unlimited number of licenses. The State demanded substantially more money per operable license during negotiations, *Rincon Band of Luiseno Mission Indians v. Schwarzenegger*, 602 F.3d 1019, 1025 (9th Cir. 2010),

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(…continued)

> 350 multiplied by the number of Non-Compact tribes as of September 1, 1999, plus the difference between 350 and the lesser number authorized under Section 4.3.1.

Section 4.3.1 states tribes may not operate more gaming devices than "the larger of" "(a) A number of terminals equal to the number of Gaming Devices operated by the Tribe on September 1, 1999; or (b) Three hundred fifty (350) Gaming Devices."

and only five tribes—including Pauma—ultimately concluded such amendments ("2004 Amendment"). *Colusa II*, 618 F.3d at 1072. At the time, Pauma was set to enter into a contract with Caesars to build a Las Vegas-style casino in place of Pauma's tent facility near San Diego, but needed more gaming licenses to do so.[4]

Several lawsuits ensued. By 2009–2010, these suits had percolated in the district courts for several years, and culminated in dispositive opinions rendered by our court. *See Colusa II*, 618 F.3d at 1084; *Rincon*, 602 F.3d at 1026 (holding that the State negotiated in bad faith by refusing to remove a provision from the proposed 2004 Amendment for 15% of Rincon's net wins, which we declared an impermissible tax under IGRA). In *Colusa II*, we held that the State miscalculated the number of licenses

[4] For more detail on the unsuccessful deal with Caesars, see *Pauma Band of Luiseno Mission Indians v. Harrah's Operating Co.*, No. D050667, 2009 WL 3069578 (Cal. Ct. App. Sept. 28, 2009). In summary, the Pauma and Rincon tribes are competitors whose casinos are only six miles apart in San Diego County. *Id.* at *2. The Rincon tribe had already paired with Harrah's in building a Nevada-style casino, and was operating 1600 licenses when their negotiations with the State broke down over the proposed 2004 amendments. Pauma intended to enter its contract with Caesars to compete with Rincon, but then Caesars and Harrah's merged in 2004. *Id.* Pauma knew the Rincon's exclusivity agreement with Harrah's would preclude it from building a competing casino and so Pauma backed out of the Caesars deal. *Id.* at *3–4. Pauma continued by negotiating with several other large gaming companies (Hardrock, Foxwood, etc.), but the economic recession of 2008 struck and no deal was ever completed. *Id.* Pauma has never been able to build a larger casino, and still operates its 1,050 licenses out of a tent facility.

in the common pool under the 1999 Compact. 618 F.3d at 1080. We found that the formula in the 1999 Compact allows for a statewide total of 40,201 licenses, not the 32,151 that the State had originally calculated. *Id.* at 1082.

B

Shortly after the district court in *Colusa* rendered its decision holding that more licenses existed than the State had allowed, Pauma filed a complaint asserting eighteen claims attacking the formation of the 2004 Amendment under various theories, including mistake and misrepresentation. Pauma notes that it has remained at roughly 1,050 licenses since December 2003 when the State first asserted that the license pool had been depleted, while two neighboring tribes operate at least 2,000 gaming devices apiece. Pauma executed the 2004 Amendment because it needed to have at least 2,000 licenses in order to secure a viable deal with a Las Vegas-style operator. But after the putative deals fell through, Pauma continued paying California the exorbitantly expensive 2004 Amendment prices for the same machines it acquired under the 1999 Compact provisions. Under the original 1999 Compact, Pauma paid $315,000 annually for the 1,050 machines. Under the 2004 Amendment, Pauma paid $7.75 million annually. Pauma sought reformation, injunctive relief, rescission, and restitution.

In April 2010, the United States District Court for the Southern District of California granted Pauma's request for injunctive relief from the annual $7.75 million payments, permitting Pauma to revert to the 1999 Compact rate. The State appealed. On

the prior appeal, No. 10-55713, we left the injunction in place but remanded to the district court for reconsideration of the preliminary injunction factors in light of recent cases, including *Colusa II*. On remand, the case was reassigned to three different district judges before the court finally ruled on the summary judgment motions, leaving the injunction in place.

Presently before us is the district court's summary judgment ruling in favor of Pauma on its misrepresentation claim. In light of our ruling in *Colusa II*, the district court found the State had misrepresented the number of licenses available in December 2003 when it told Pauma the pool was exhausted; in fact, there were 8,050 remaining. As a result, the district court rescinded the 2004 Amendment, allowed Pauma to return to the 1999 Compact's lower rate, and ordered as specific performance a refund of the difference in payment that Pauma had made as between the higher and lower rates for the 1,050 machines (totaling $36,235,147.01). The district court also held that the State had waived its Eleventh Amendment sovereign immunity in a provision in the 1999 Compact, which the parties had left undisturbed in the 2004 Amendment. The court further held that the State was not entitled to a setoff for the profits Pauma made between 2004 and 2009 because Pauma should have been able to obtain the 1,050 machines under the correctly calculated license formula in the 1999 Compact.

The district court entered final judgment in December 2013, but was immediately asked by Pauma to vacate the order so it could request further relief. Pauma sought a ruling on two additional

claims labeled "bad faith/violation of IGRA" so that the Tribe would be entitled to reformation rather than rescission. The district court denied the request as moot since it would not result in a remedy different from the one already provided to Pauma, and held it would fail on the merits in any event. This ruling triggered Pauma's mandamus petition, which we denied as premature earlier this year.[5] The State's appeal and Pauma's cross-appeal are now ripe for review.

II

We review a district court's grant of summary judgment *de novo*. *Big Lagoon Rancheria v. California*, 789 F.3d 947, 952 n.4 (9th Cir. 2015) (en banc). "Summary judgment is appropriate if there is no genuine issue of material fact and, even making all reasonable inferences in favor of the nonmoving party, the moving party is entitled to judgment as a matter of law." *Rincon*, 602 F.3d at 1026. We also review the following legal determinations de novo: interpretation of contracts based on the plain meaning, *Colusa II*, 618 F.3d at 1070; whether negotiations were conducted in good faith under IGRA, *Rincon*, 602 F.3d at 1026; and the applicability of Eleventh Amendment sovereign immunity, *Idaho v. Coeur d'Alene Tribe*, 794 F.3d 1039, 1042 (9th Cir. 2015). "General principles of

[5] Pauma's mandamus petition essentially challenged the district court's decision to rule solely on its misrepresentation claim, and refusal to reach any of the other claims—such as the Tribe's bad faith claims under IGRA. We allowed Pauma to assert such claims in its cross-appeal, and Pauma has chosen to do so. We address them below.

federal contract law govern the Compacts, which were entered pursuant to IGRA." *Colusa II*, 618 F.3d at 1073 (citation omitted). We "often look to the Restatement when deciding questions of federal common law." *Curtin v. United Airlines, Inc.*, 275 F.3d 88, 93 n.6 (D.C. Cir. 2001). We may also rely on California contract law since there is no practical difference between state and federal law in this area. *Colusa II*, 618 F.3d at 1073.

"We review the district court's choice of remedy for abuse of discretion." *Id.* at 1082. A misapplication of the correct legal rule constitutes an abuse of discretion. *United States v. Hinkson*, 585 F.3d 1247, 1261–62 (9th Cir. 2009) (en banc). Otherwise, we must "determine whether the trial court's application of the correct legal standard was (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record." *Id.* at 1262 (internal quotations omitted).

III

The heart of the State's argument before us focuses on whether there was a "fact in existence" that it misrepresented to Pauma during the 2004 negotiations. Thus, we review whether *Colusa II*'s holding that 40,201 licenses were available—meaning 8,050 remained in December 2003 when the State told Pauma that the license pool had been depleted—constitutes a "fact in existence" giving rise to liability under Pauma's misrepresentation claim. We hold that, unlike a change in judicial interpretation of a statute or law, the doctrine of retroactivity does not apply to contracts. Once there has been a final judicial interpretation of an ambiguous contract provision, that is and has always

been the correct interpretation from the document's inception.

In order to establish its misrepresentation claim, Pauma must demonstrate: (1) the State made a misrepresentation about a fact in existence, (2) that was either fraudulent or material, (3) which induced Pauma to enter into the 2004 Amendment, and (4) Pauma was justified in relying on the State's misrepresentation. *See* Restatement (Second) of Contracts § 164(1) (1981); *see also Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1137 (9th Cir. 2000) (adopting the Restatement of definition for misrepresentation). The outcome of this case hinges on the first prong. "A misrepresentation is an assertion that is not in accord with the facts" as they exist at the time the assertion is made. Restatement (Second) of Contracts § 159 & cmt. c. "Such facts include past events as well as present circumstances but do not include future events. An assertion limited to future events . . . may be a basis of liability for breach of contract, but not of relief for misrepresentation." *Id*. § 159 cmt. c.

Furthermore, "an assertion need not be fraudulent to be a misrepresentation" so long as "it is material." *Id*. § 159 cmt. a; *cf. Reliance Fin. Corp. v. Miller*, 557 F.2d 674, 680 (9th Cir. 1977) (referring to this version as "innocent misrepresentation"). [6] A

[6] We note that the district court had before it Pauma's claims for either innocent/material misrepresentation or fraudulent/negligent misrepresentation—and the court ruled for Pauma solely on the former. Thus, we refuse to consider any of Pauma's assertions that the State knowingly acted in bad faith or with any kind of evil intent. The formula was confusing. We definitively resolved the issue in 2010. Nothing in our decision in *Colusa II* suggests the State *should have known* the correct (continued…)

misstated fact is "material if it would be likely to induce a reasonable person to manifest his [or her] assent" to enter a contract. Restatement (Second) of Contracts § 162(2). "A misrepresentation induces a party's manifestation of assent if it substantially contributes to his [or her] decision to" enter the contract. *Id.* § 167. Although a party must have justifiably relied upon the misrepresentation, "the requirement of justification is usually met unless, for example, the fact to which the misrepresentation relates is of only peripheral importance to the transaction . . . ." *Id.* § 164 cmt. d.

While both parties dispute whether the doctrine of retroactivity applies, that doctrine is a red herring because we are dealing with a contract provision. The State argues that our holding in *Colusa II* does not apply "retroactively." In essence, the State asserts that the district court erred in granting summary judgment for Pauma because the license pool did not expand until mid-2009 when a district court first handed down its ruling in *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. California ("Colusa I")*, 629 F. Supp. 2d 1091 (E.D. Cal. 2009). In the State's view, the number of available licenses changed when we handed down *Colusa II* in 2010. Thus, the State contends it could not have misrepresented an existing fact when it denied licenses to tribes beyond a total of 32,151. We reject this argument.

(…continued)
number of licenses when negotiating with Pauma in 2003–2004, and we refuse to so hold now. We review only whether innocent misrepresentation was properly applicable.

We find that the term "retroactive" is a misnomer in the realm of contract interpretation. Once a court has interpreted an ambiguous contract provision that is and has *always been* the correct interpretation from its formation. Although the cases discussing the retroactivity of judicial decisions interpreting statutes may be instructive, a contract is fundamentally different from a statute or a body of law. A contract is a private agreement formed between two parties to represent their mutual intent. *See* Restatement (Second) of Contracts § 3. Thus, a contract provision has only one true meaning—what it meant when written—even though the parties may later dispute the correct interpretation. By contrast, a statute is enacted by Congress and the understanding of its provisions may evolve over time, often through judicial interpretations or legislative amendments.[7]

"[T]he fundamental goal of contract interpretation is to give effect to the mutual intent of the parties as it existed at the time of contracting." *U.S. Cellular Inv. Co. v. GTE Mobilnet, Inc.*, 281 F.3d 929, 934 (9th Cir. 2002) (emphasis added). This fundamental axiom is widely accepted and uncontested. *See, e.g.*, *Colusa II*, 618 F.3d at 1073 (holding the "court gives effect to the mutual intention of the parties *as it existed at the time* the contract was executed" (emphasis added) (internal quotations omitted)); *Liberty Nat'l Bank & Trust Co.*

[7] Therefore, the dissent's reliance on *Curtin v. United Airlines, Inc.* is misplaced as it involves the judicial interpretation of a provision of the Warsaw Convention; a legislatively enacted document, similar to a statute, rather than a contract. *See* 275 F.3d 88, 96–97 & nn. 16–20 (D.C. Cir. 2001)

v. Bank of Am. Nat'l Trust & Sav. Ass'n, 218 F.2d 831, 840 (10th Cir. 1955) ("[T]he basic rule of universal acceptation for the ascertainment of [the parties] intention is for the court, so far as possible, to put itself in the place of the parties when their minds met upon the terms of the agreement. . . ."); 11 Williston on Contracts § 31:9 (4th ed. 2015).

When dealing with interpretation of a contract there is no such thing as a "change in the law"—once a final judicial decision determines what the contested language supports, that is it. The State's argument that *Colusa II* "changed" the number of licenses available under the license pool provision defies logic. As is typical in contract interpretation cases, the dispute was between the parties' competing calculations. Once we decreed that 40,201 licenses were available under the formula provision based on a reasonable interpretation of the contract language and the intention of the parties at the time it was formed, we resolved the dispute. *Colusa II*, 618 F.3d at 1081–82. Thus, the number of licenses never "changed" as the State asserts.

In *Colusa II*, we found that the State did not adequately explain why it had chosen 32,151 for the total available licenses since "the foundation for this . . . number is at odds with the plain language of the contract and with an interpretation of part of the formula that is now agreed upon by both parties." *Id.* at 1076; *see also id.* at 1078 nn. 9 & 12. We calculated the correct number of licenses that "were authorized for distribution statewide through the license draw process," to be 40,201, *id.* at 1082, and then we turned to the opinion's prospective effect on other tribes. We recognized that "the remedy deprived the state of its right to litigate the size of the license pool

under different facts in other pending and future cases" because we purposefully "anticipated that California would be liable for a single number of licenses in the statewide pool, *not separate numbers for separate litigants* based on their respective situations." *Id.* at 1084 (emphasis added) (internal quotation marks omitted). In sum, our interpretation in *Colusa II* of the 1999 Compact's license pool provision is the final word for all tribes, at all times.

The formula for calculating the license pool never changed—it just took over a decade to reach a final judicial interpretation which settled a longstanding dispute over the number of licenses it authorized. Innocent misrepresentation of a different number does not require a fraudulent or misleading intent. *See* Restatement (Second) of Contracts § 159 cmt. a. It simply requires a fact, which is material, to be false. *Id.* § 159 cmts. a, c. The formula stated in the 1999 Compact is a fact. The number of tribes with and without Compacts as of the listed date (September 1, 1999) was an ascertainable, existing fact. *See Colusa II*, 618 F.3d at 1073. The number of licenses each tribe with a Compact had as of that date was also an existing fact. *Id.* at 1074. The State had all of the information it needed to calculate its own formula[8]. The State simply miscalculated.

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[8] "[I]t is undisputed that the State's negotiation team actually drafted [this provision] in the Compact." *Colusa I*, 629 F. Supp. 2d at 1115. As such, general contract principles also indicate that any ambiguity in "'the language of the contract should be interpreted strongly against the party who caused the uncertainty to exist' [(i.e., the State drafters)]." *Id.* at 1113 (quoting *Buckley v. Terhune*, 441 F.3d 688, 695–96 (9th Cir. 2006)).

Understandably, the State "expresses a sense of unfairness engendered by the retrospective application of a new judicial interpretation of an [existing contract provision]. But the essence of judicial decisionmaking necessarily involves some peril to individual expectations." *Morales-Izquierdo v. Dep't of Homeland Sec.*, 600 F.3d 1076, 1090 (9th Cir. 2010) (internal quotation and alterations omitted). The State could have sought a declaratory judgment much earlier, but it did not. The State also could have simply used fixed numerals in the formula, but it did not. The fact that there was ambiguity in the formula's language or that the State interpreted the total number of licenses in good faith is irrelevant to the analysis. We interpreted the total number of licenses in the license pool to be 40,201 based on a reasonable interpretation of the contract language. Therefore, in December 2003, the State misrepresented an existing fact to the tribes—including Pauma—that no further licenses were available when, in fact, there were 8,050 more licenses under the correct interpretation of the formula.

The State's remaining arguments regarding the misrepresentation claim warrant only brief discussion. First, the State's argument that the license pool provision was not material to the 1999 Compacts borders on the incredible. *See Colusa II*, 618 F.3d at 1069 ("Central to the Compacts is a formula to calculate the number of gaming devices California tribes are permitted to license."). Second, the State's argument that the limited number of licenses did not induce Pauma to enter the 2004 Amendment is equally absurd, considering procurement of more licenses (at least 2,000) was essential to its putative contract with Caesars,

dependent on at least that many devices. Finally, Pauma justifiably relied on a fact that was entirely within the State's control (the total number of available licenses). Pauma has, therefore, established that no genuine issue of material fact remains as to its misrepresentation claim, and the district court properly granted summary judgment.[9]

IV

After granting summary judgment in favor of Pauma on its innocent misrepresentation claim, the district court turned to the appropriate remedy. Since the Compacts include a limited waiver of sovereign immunity that allows for suit seeking an equitable remedy, but not one seeking monetary damages, we must first decide what the correct remedy is. Then we determine whether that remedy is barred by the Eleventh Amendment or if it falls within the State's limited waiver.

A

The district court erred in awarding Pauma $36.2 million under the guise of "specific performance." Specific performance is a remedy associated with breach of contract. Restatement (Second) of Contracts § 357; 81A C.J.S. *Specific Performance* § 4 (2015) ("[A] cause for specific performance ordinarily cannot lie until there has

[9] We note that most tribes have already received their licenses under *Colusa II*, which approved the district court's remedy of re-opening the draw process for the remainder of the licenses. By contrast, Pauma is one of only five tribes who chose to amend its Compact and thus paid higher prices for licenses which it should have been able to obtain under the original 1999 Compact.

been a breach of the contract."). "A party who has avoided a contract on the ground of . . . misrepresentation . . . is entitled to restitution for any benefit that he has conferred on the other party by way of part performance or reliance." Restatement (Second) of Contracts § 376; 1 Witkin, Summary of California Law, Contracts § 1022 (10th ed. 2005) ("A person who pays money under the mistaken belief that he or she is under a duty to do so may recover it."). Furthermore, "[s]pecific performance . . . will not be granted unless the terms of the contract are sufficiently certain to provide a basis for an appropriate order." Restatement (Second) of Contracts § 362.

Where, as here, no breach of a contract has been alleged, but rather a challenge to its formation—i.e., Pauma would not have entered into the 2004 Amendment had it known additional licenses were available at the cheaper 1999 Compact rates—the contract is voidable and the appropriate remedy is rescission and restitution. *See* 1 Witkin, Summary of California Law, Contracts § 307 (10th ed. 2005) (noting innocent misrepresentation is grounds for rescission); *see also Reliance Fin. Corp.*, 557 F.2d at 680 (same); Restatement (Third) of Restitution §§ 52, 54 (2011); Dan B. Dobbs, *Law of Remedies* § 4.1(1) (2d ed. 1993) ("When the contract itself is unenforceable, restitution is usually the *only* remedy available for benefits the plaintiff has conferred upon a defendant in part performance." (emphasis in original)); *id*. § 9.2(2) ("A representation by the defendant, if believed by the plaintiff, would be the equivalent of a mutual mistake for which rescission would be granted."); *id*. § 9.3(1).

Moreover, one cannot specifically perform something that is not a term in the contract. *Cf.* Restatement (Second) of Contracts § 362. The Compact did not contain a clause for dealing with overpayments. The sole option for returning Pauma to the *status quo ante* was equitable restitution. *Id.* § 376; *see Ambassador Hotel Co. v. Wei-Chuan Inv.*, 189 F.3d 1017, 1031 (9th Cir. 1999). Thus, the district court misapplied the law in labeling the remedy specific performance.

However, in this case, the district court's error in mislabeling the remedy does not require reversal. Neither side disputes the calculation of $36,235,147.01 as the difference between the higher 2004 Amendment payments and the lower 1999 Compact's rates. Rather, the State challenges only whether it is entitled to a setoff for the profits Pauma gained from operating machines it would not have had absent the 2004 Amendment, and Pauma now alleges it is entitled to essentially reform the entire contract under the procedures outlined in IGRA. Since we reject both arguments, we affirm the district court's calculation of the remedy on the alternative grounds of equitable rescission and restitution.

Under general contract principles, "[w]hen calculating restitution, we must offset the Plaintiffs' award by the value of any benefits that Plaintiffs received from the [D}defendant under the contract, so that only the actual, or net, loss is compensated." *Republic Sav. Bank, F.S.B. v. United States,* 584 F.3d 1369, 1377–78 (Fed. Cir. 2009) (internal quotation omitted); *see, e.g., Cal. Fed. Bank v. Matreyek,* 8 Cal. App. 4th 125, 134 (1992) (holding restitutionary recovery inequitable where the bank would be able to

retain both a benefit and a profit); Restatement (Second) of Contracts § 384; Dan B. Dobbs, *Law of Remedies* § 9.3(3) (2d ed. 1993). The State is not entitled to a setoff here because Pauma would have made the same profits by acquiring the same number of machines under the 1999 Compact that it now operates under the 2004 Amendment if the State had not miscalculated the number of available licenses.

The State argues that, although this would return Pauma to the *status quo ante* in theory, in reality it would unjustly enrich Pauma vis-à-vis the other tribes who were parties to the 1999 Compact because the other tribes were unable to obtain "unlimited" machines as Pauma could under the 2004 Amendment and thus did not earn additional profits. Essentially, the State argues that Pauma will receive a windfall of roughly $16 million by sitting on the sidelines during the *Colusa* litigation.

However, the State's argument depends on viewing the situation holistically, in contravention to general litigation principles. The district court correctly stated it must deal solely with the parties before it. *See, e.g., Boating Indus. Ass'ns v. Marshall*, 601 F.2d 1376, 1382 n.7 (9th Cir. 1979) ("Remedy for this injury would depend upon actions of third parties not before the court in this action."). Under this view, as between Pauma and the State, Pauma is not obtaining a "windfall" because it should never have had to pay the State the $36.2 million in the first place, and it should have been able to obtain the same number of licenses (a total of 1,050) for less money. Thus, the State's argument— to consider Pauma's position in comparison to the other tribes who were unable to obtain further licenses and the

attendant profits—must fail. The district court correctly held that the State is not entitled to a setoff.

Pauma's argument for reformation meets a similar fate. On cross-appeal, Pauma requests reformation of the 2004 Amendment—rather than rescission—so that Pauma may keep the amended contract's extended term limit (expiring in 2030 instead of 2020) at the more favorable 1999 Compact price rates. "[H]owever, reformation is proper only in cases of fraud and [mutual] mistake." *Skinner v. Northop Grumman Ret. Plan B*, 673 F.3d 1162, 1166 (9th Cir. 2012); *see* Restatement (Second) of Contracts § 166 (referencing only fraudulent misrepresentation as giving rise to reformation as a remedy); Dan B. Dobbs, *Law of Remedies* § 9.5 (2d ed. 1993) ("Reformation is the appropriate remedy . . for fraud or mistake in the written expression of the agreement."). This case involves *innocent* misrepresentation, not *fraudulent* misrepresentation. Reformation is thus inappropriate here.

In sum, the district court erred in applying the law of contractual remedies by awarding Pauma specific performance rather than ordering rescission and restitution. But because neither side challenges the calculation of the remedy, only whether a setoff should be applied or reformation ordered as a superior remedy— both of which we reject—we affirm the district court's award to Pauma of $36,235,147.01 under the equitable remedies of rescission and restitution.

B

Because the State must refund the $36.2 million in overpayments, we next consider whether the

district court correctly held that the State had waived its Eleventh Amendment sovereign immunity in this case to permit such relief.

"[T]he rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). The Supreme Court has extended this bar to suits brought by Native American tribes even though they are sovereigns in their own right. *See Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779–82 (1991). In *Edelman*, the Court made clear that a state's sovereign immunity extends even to equitable judgments, particularly if "the award resembles far more closely the monetary award against the State itself . . . than it does the prospective injunctive relief . . . ." 415 U.S. at 665. The Court specifically rejected an individual's claims for "equitable restitution" based on the state's wrongful withholding of benefits under a public aid program. *Id.* at 656, 665. Thus, the Court held only prospective, non-monetary relief against state officials is exempt from the Eleventh Amendment bar. *Id.* at 677.

"However, there are exceptions to this general bar." *N.E. Med. Servs., Inc. v. Cal. Dep't Health Care Servs.*, 712 F.3d 461, 466 (9th Cir. 2013). The Supreme Court discussed one such exception at length in *Edelman*—waiver. 415 U.S. at 671–74. *Edelman* recognized that Congress may abrogate a states' sovereign immunity via a clear, express legislative statement, or a state may enter a "compact" by which the state expressly and unequivocally waives its own immunity. *Id.* at 672. "In deciding whether a State has waived its

constitutional protection under the Eleventh Amendment, we will find waiver only where stated by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction." *Id*. at 673 (internal quotation and alteration omitted).

Here, the State waived its Eleventh Amendment sovereign immunity through an explicit contractual waiver. The 1999 Compact contains a limited waiver of sovereign immunity on behalf of both the State and the Tribe, which the 2004 Amendment left undisturbed. It reads in relevant part:

> Sec. 9.4. Limited Waiver of Sovereign Immunity.
>
> (a) In the event that a dispute is to be resolved in federal court . . . , the State and the Tribe expressly consent to be sued therein and waive any immunity therefrom that they may have provided that:
>
> (1) The dispute is limited solely to issues arising under this Gaming Compact;
>
> (2) Neither side makes any claim for monetary damages (that is, only injunctive, specific performance, including enforcement of a provision of this Compact requiring payment of money to one or another of the parties, or declaratory relief is sought); . . . .

This is an express waiver that falls within the exception to the Eleventh Amendment delineated in *Edelman*—but the parties dispute the scope of the

waiver. We must determine whether the exclusion for monetary damages in Section 9.4(a)(2) includes authorization to seek the remedy of rescission and restitution.

We hold that the proper remedy here does not trigger the exclusion provision, and thus the State waived its sovereign immunity for Pauma's misrepresentation claim. We begin by analyzing the language of the contract itself. *See Colusa II*, 618 F.3d at 1073. The contractual language establishes a clear dichotomy between claims for monetary damages— which are excluded and thus barred by sovereign immunity—and equitable relief. Although restitution may be considered a legal or equitable remedy, *see* Restatement (Third) of Restitution § 4(1); Dan B. Dobbs, *Law of Remedies* § 4.1(1) (2d ed. 1993), interpreting the contract as a whole demonstrates that restitution was contemplated by the parties as a potential remedy for which sovereign immunity was waived. Thus, we hold that restitution is included in the waiver "by such overwhelming implications from the text as will leave no room for any other reasonable construction." *Edelman*, 415 U.S. at 673 (internal quotation and alteration omitted).[10]

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[10] The district court relied, as Pauma does on appeal, on *Bowen v. Massachusetts*, 487 U.S. 879 (1988), for the distinction drawn between monetary damages awards (meant to compensate for an injury) and specific monetary relief (meant to reinstate one to his or her original position). *Id.* at 893. But *Bowen* simply reaffirms two steadfast principles: (1) equitable relief, which may take the form of money, is different than monetary damages; and (2) when Congress has specifically provided a waiver of sovereign immunity in a statute that allows for equitable relief (there, the Administrative Procedure Act ("APA")), that may occasionally involve specific relief in the form of money. However, those propositions do not answer the

(continued…)

"A written contract must be read as a whole and every part interpreted with reference to the whole, with preference given to reasonable interpretations." *Wapato Heritage, L.L.C. v. United States*, 637 F.3d 1033, 1039 (9th Cir. 2011) (internal quotation omitted); *see* Restatement (Second) of Contracts § 202(2). Here, reading the contract as a whole, the present restitutionary order falls well within the waiver.

The waiver applies "provided that . . . [n]either side makes any claim for monetary damages (that is, only injunctive, specific performance, *including enforcement of a provision of this Compact requiring payment of money to one or another of the parties* [which must mean either Pauma or the State], or declaratory relief is sought)." This clause envisions payment of money to *either* party, and yet the Compact does not contain any provisions requiring

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(…continued)
contractual interpretation question presented here.

We have already stated that *Bowen* does "not implicate Eleventh Amendment concerns" since it only analyzed the statutory language of the APA. *Native Vill. of Noatak v. Blatchford*, 38 F.3d 1505, 1513 (9th Cir. 1994). Furthermore, although *Bowen* cited approvingly contract cases awarding specific performance, those cases all dealt with a breach of contract issue and enforcement of a *contract provision* to pay money—neither of which exist in the present case. Consequently, *Bowen* sheds light on the current case only to the extent it reinforces our conclusion that restitution of the money wrongfully paid by Pauma may still be awarded as an equitable remedy and is not a claim for monetary damages against the State.

payment of money from the State to the Tribe.[11] If this clause did not contemplate the restitutionary remedy ordered by the district court and affirmed herein, then the provision would be operative only as to one party, not both. Excluding restitution as a remedy that the Tribe could seek under this waiver would render this clause null and void. *Cf.* 11 Williston on Contracts § 32:5 (4th ed. 2015) ("An interpretation which gives effect to all provisions of the contract is preferred to one which renders part of the writing superfluous, useless or inexplicable."). When "that is" is construed to limit waiver only as to the remedies listed, as urged by the dissent, the restitution remedy ordered by the district court still falls within that restrictive interpretation. Thus, the district court properly held that restitution by the State of overpayments by the Tribe was included in the waiver.

In sum, the contractual waiver clearly envisions restitution as falling within its purview, and only actions for monetary *damages* or actions not arising from the Compact itself to be excluded. The proper remedy for Pauma due to the State's misrepresentation of the number of licenses available under the 1999 Compact's formula is rescission of the 2004 Amendment and restitution for the overpayments made. Therefore, the State contractually waived to this extent its Eleventh Amendment sovereign immunity and Pauma was not

[11] The State itself asserts that no provision in the contract required it to pay Pauma money when arguing that specific performance was the wrong remedy. That argument cuts against the State here given the language of the agreement.

barred from bringing its misrepresentation claim seeking rescission and restitution.[12]

V

On cross-appeal, Pauma asserts the district court erred by denying summary judgment on the Tribe's fifth and sixth claims for relief—styled as bad faith/IGRA violation claims. Pauma provides a lengthy and fact-intensive explanation why it thinks the State acted in bad faith with respect to the entirety of their course of dealings over the last fifteen years. The Tribe relies heavily upon our recent decision in *Rincon*, involving a different California tribe, that upheld a finding of bad faith under IGRA. However, in the process, Pauma ignores the explicit statutory language of IGRA under which it seeks relief. The district court held Pauma's IGRA claims were moot because rescission of the 2004 Amendment had already been granted,[13] judicially

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[12] In any event, California—unlike many states—has chosen to legislatively enact a broad statutory waiver of sovereign immunity for claims arising out of violations of IGRA. *See* Cal. Gov't Code § 98005; *Hotel Emps.*, 21 Cal. 4th at 615. Because we find the contractual waiver to include the restitutionary remedy sought and recovered here, we need not reach whether the statutory waiver would also apply. We do note, however, that our ruling is supported by the California Supreme Court, which upheld the constitutionality of the waiver provision contained in the referendum by the people. *Hotel Emps.*, 21 Cal. 4th at 615.

[13] Neither of the parties briefed this issue so we need not reach it, but we also note the district court's analysis is supported by our recent en banc decision in *Big Lagoon Rancheria*, 789 F.3d at 955 (holding the tribe's cross-appeal was moot regarding bad faith claim since the district court had ruled in the tribe's favor on other grounds).

estopped as inconsistent with Pauma's earlier position,[14] and barred by the plain language of the IGRA statute. We affirm on the last ground.

The plain language of IGRA does not support Pauma's argument. IGRA states that a Native American tribe "shall request" a state to enter into negotiations for the purposes of entering a Tribal-State Gaming Compact, and "[u]pon receiving such a request, the State *shall negotiate* with the Indian Tribe *in good faith* to enter into such a compact." 25 U.S.C. § 2710(d)(3)(A) (emphasis added). In order to give effect to this language, the statute vests federal

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[14] Pauma's claims are not inconsistent, as the district court found. Although Pauma did not use the words "bad faith" in the body of its complaint with respect to these IGRA claims, it relied heavily on *Rincon's* holding that the State's request for 15% of the tribe's net wins in its proposed 2004 Amendment was an impermissible tax under IGRA and that the State thus negotiated in bad faith when it refused to remove that provision. *Rincon*, 602 F.3d at 1024–25, 1036, 1042. We did not express an opinion as to the validity of the provision for the five tribes, including Pauma, who successfully negotiated and obtained a 2004 Amendment because their Compacts "were satisfactory to them" and the tribes freely entered into the amendments. *Id*. at 1037 n.17. Since Pauma had the same provision in its 2004 Amendment that was at issue in *Rincon*, Pauma argues that the same result should be applied in its case.

The district court also found that Pauma was requesting different relief, but in fact Pauma had been requesting "reformation" based on IGRA claims five and six in the complaint from the beginning. Pauma merely requested "rescission" and "restitution" in addition, with claim ten (misrepresentation) providing a basis for such relief. Thus, Pauma's claims in its complaint and summary judgment motion are not inconsistent

district courts with jurisdiction over "any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) *or* to conduct such negotiations in *good faith*[.]" *Id.* § 2710(d)(7)(A)(i) (emphasis added).

The next subsection describes, in detail, the procedure a tribe must follow if a state does not adhere to these mandates. *Id.* § 2710(d)(7)(B). Specifically, the Native American tribe must first introduce evidence that "a Tribal-State compact *has not been entered into* under paragraph (3)," and "the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith[.]" *Id.* § 2710(d)(7)(B)(ii)(I), (II) (emphasis added). Then, IGRA provides a remedy if such an event should occur: "If . . . the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, the court shall order the State and the Indian Tribe *to conclude such a compact* within a 60-day period." Id. § 2710(d)(7)(B)(iii) (emphasis added). This same section also lists factors a court may consider when determining whether a State has negotiated in good faith. *Id.*

The detailed procedures set forth in IGRA allow for redress by Native American tribes when a State refuses to negotiate or negotiates in bad faith for a gaming Compact. These procedures, by their own language, simply do not apply when the State and the Tribe have *actually reached a Compact*. *See id.* § 2710(d)(7)(B)(ii)(I). *Rincon* does not hold otherwise.

Cf. 602 F.3d at 1026. The Rincon tribe (Pauma's nearby competitor in San Diego) also entered into negotiations with the State in 2003 and 2004—but Rincon *refused to sign* an actual amended Compact with the State and filed suit instead. *Id.* at 1023, 1026; *see also Big Lagoon Rancheria*, 789 F.3d at 951–52; *In re Indian Gaming*, 331 F.3d at 1110 (holding the State did not negotiate in bad faith with respect to the 1999 Compact's revenue provisions, which the tribe refused to sign). Pauma is thus in a very different position than the Rincon tribe because it actually agreed to the 2004 Amendment and did not challenge the negotiation process under IGRA.

Therefore, the district court correctly concluded: "Although [ ] IGRA may allow a court to reform or rescind an unlawful agreement (which is what Pauma wanted until now), it does not allow the Court to turn back the clock and compel re-negotiation of an agreement actually reached ten years ago, let alone one that has been rescinded and never would have been negotiated in the first place in light of the relief the Court has already granted in this case." The relief Pauma seeks in its cross-appeal is not available under the plain statutory language of IGRA, and we affirm the district court's denial of Pauma's summary judgment motion on this ground.

VI

In conclusion, we hold that once a court's judgment interpreting an ambiguous contract provision becomes final, that is and has always been the correct interpretation from its inception. As such, the State innocently misrepresented a material fact when it erroneously informed Pauma the 1999 Compact's license pool had been depleted based on its

miscalculation of the formula. Since this misrepresentation induced Pauma to enter into the much more expensive 2004 Amendment, the Tribe is entitled to rescission of the amendment and restitution for the $36.2 million in overpayments made to the State. The Eleventh Amendment does not bar this suit because the State contractually waived its sovereign immunity for claims arising out of the Compacts seeking such relief. Finally, Pauma is not entitled on cross-appeal to seek redress under IGRA because the plain language of the statute precludes relief when the Tribe and the State actually enter into a Compact.[15]

AFFIRMED. Each party shall bear its own costs.

JARVEY, Chief District Judge, dissenting:

I agree with the majority's conclusion that courts determine contracting parties' intent as of the time the contract is executed. I disagree, however, that California committed the tort of misrepresentation by interpreting the Compact differently than a later court decision. The provision regarding the number of available licenses in the Compact was hopelessly ambiguous. California, the

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[15] Pauma makes conclusory references to the claims it advanced in its mandamus petition, asking the court to vacate the magistrate judge's order denying Pauma's motion to compel discovery and to reassign the case to a different district court judge based on her handling of the IGRA claims. We deny both of these requests as moot in light of our holding foreclosing further pursuit of Pauma's claims under IGRA.

compacting tribes, the district court and this court all interpreted it differently. That this court's opinion differed from that offered by California does not establish that California made "an assertion that [was] not in accord with the facts" as they existed at the time the assertion was made. RESTATEMENT (SECOND) OF CONTRACTS § 159 & cmt. c.

The decision in *Colusa II* was not the result of any judicial fact finding. In fact, this court rejected the parties' extrinsic evidence for contract interpretation purposes and determined the number of available licenses as a matter of law. Because extrinsic evidence was rejected and the number determined as a matter of law, all parties to the Compact were on equal footing with respect to their ability to interpret this ambiguous provision. 'The majority is correct when it notes that any party could have sued to get more clarity. The tribes in *Colusa II* did, but the plaintiff here chose instead to negotiate for the possibility of receiving more licenses than have ever been available under the 1999 Compact.[1]

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[1] I find it more than ironic that Pauma has received monetary damages as a result of *Colusa II* that were denied to the tribes that won that decision. I find it inequitable.

On the misrepresentation issue, *Curtin v. United Airlines, Inc.*, 275 F.3d 88 (D.C. Cir. 2001) is analogous and persuasive. *Curtin* involved a provision of the Warsaw Convention (a treaty) that established the compensation to be paid by a carrier when passengers' luggage was lost during international travel. The Warsaw Convention provided for a payment of $9.07 per pound up to the maximum of a seventy pound bag, or $635. United Airlines had a practice of paying the maximum amount ($635) for lost international luggage rather than weighing the bags and paying the $9.07 price per pound for the lost luggage. That practice had been interpreted by some courts as permissible, and by others as impermissible. Ultimately, the District of Columbia Circuit Court of Appeals rejected the practice, holding that the Warsaw Convention did not cap liability at $635 where the carrier had failed to weigh the bags as required.

In *Curtin*, passengers who had settled their lost luggage claims for $635 sued claiming, among other things, that the settlement agreements were procured by United's misrepresentation of its obligation under the Warsaw Convention, as later determined by the Court of Appeals. However, the District of Columbia Circuit held that United did not make a misrepresentation by reasonably interpreting the Warsaw Convention differently than the later District of Columbia Court of Appeals decision. This decision is sensible, intuitive and analogous to what happened in the matter now before the court. Because I believe that the State's interpretation of this ambiguous contractual provision does not qualify under the common law definition of a material misrepresentation, I respectfully dissent.

I also do not believe that the State of California waived sovereign immunity with respect to this claim. The 1999 Compact waives immunity as follows:

> Sec. 9.4. Limited Waiver of Sovereign Immunity.
>
> (a) In the event that a dispute is to be resolved in federal court . . . , the State and the Tribe expressly consent to be sued therein and waive any immunity therefrom that they may have provided that
>
> (1) The dispute is limited solely to issues arising under this Gaming Compact;
>
> (2) Neither side makes any claim for monetary damages (that is, only injunctive, specific performance, including enforcement of a provision of this Compact requiring payment of money to one or another of the parties, or declaratory relief is sought); . . . .

I agree with the majority that the remedy of specific performance is not available in this case. The majority upholds the award as restitution, concluding that the Compact waives immunity against claims for restitution because the Compact waives immunity against claims for "specific performance, including payment of money to one or another of the parties." I disagree with the majority's reading of the waiver.

The limited waiver of sovereign immunity is well drafted and clear. It states that neither side can make a claim for monetary damages. It then defines the waiver, beginning with the words "that is." The

phrase "that is" is commonly thought of as a shorthand version of the phrase "that is to say." It is used to preface a more specific delineation of the preceding contractual language. Here, to further clarify the limitation of the waiver, the parties stated, "that is, *only* injunctive, specific performance, including enforcement of a provision of this Compact requiring payment of money to one or another of the parties, or declaratory relief is sought . . . ." (emphasis added). The use of the word "only" is routinely defined to mean alone, solely or exclusively. The waiver's applicability is therefore explicitly confined to the circumstances listed.

The majority infers a waiver of sovereign immunity for restitution from a canon of contract interpretation that prefers interpretations that do not render other terms "superfluous, useless or inexplicable." It finds that reading the language "including payment of money to *one or another* of the parties" as allowing monetary payment only in the context of specific performance would render the clause superfluous because the Compact's payment provisions run only from Pauma to the State. But this reading disregards the explicit text of the clause. The clause makes clear that the parties intended "specific performance" to include monetary payments only when the Compact requires them. This language is the parties' clear recognition of *Bowen v. Massachusetts,* 487 U.S. 879 (1988), which held that a monetary payment can constitute specific performance when a contractual clause requires such payment. The fact that the waiver includes specific performance of payment provisions does not render it superfluous, useless or inexplicable simply because those particular obligations run only from Pauma to

the State. It would be helpful in the event of that kind of breach by Pauma.

The monetary damages awarded here do not qualify as injunctive, specific performance or declaratory relief. Because the law demands that waivers of sovereign immunity ordinarily derive only from "the most express language" or "such overwhelming implications from the text as [will] leave no room for any other reasonable construction," there can be no waiver found here. *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (citation and internal quotation marks omitted) (alteration in original). The express language of the sovereign immunity does not include suits for restitution, and in fact, explicitly excludes suits for monetary damages outside the context of specific performance. I find no other implications from the text, and certainly not overwhelming implications, of sovereign immunity waiver.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

No. 09CV1955-CAB-(MDD)

PAUMA BAND OF LUISENO MISSION INDIANS OF THE PAUMA & YUIMA RESERVATION, a federal recognized Indian Tribe, also known as, PAUMA LUISENO BAND OF MISSION INDIANS, also known as, PAUMA BAND OF MISSION INDIANS, Plaintiffs,

v.

STATE OF CALIFORNIA; CALIFORNIA GAMBLING CONTROL COMMISSION, an agency of the State of California; ARNOLD SCHWARZENEGGER, as Governor of the State of California; EDMUND G. BROWN, in his official capacity as Governor of the State of California, Defendants.

AMENDED JUDGMENT IN A CIVIL CASE
(Doc. 271) Filed June 9, 2014

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED:

The Court concludes that judgment shall issue in favor of Pauma and against Defendants in the amount of $36,235,147.01. Further, for the reasons stated in the Court's March 18, 2013 order, [Doc. No. 227], judgment shall also issue in favor of Pauma and

against Defendants on Claim 10 for misrepresentation.

Date: 6/9/14 CLERK OF COURT
JOHN MORRILL, Clerk of Court
s/ Y. Barajas
Y. Barajas, Deputy

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

No. 09CV1955-CAB (MDD)

PAUMA BAND OF LUISENO MISSION INDIANS OF THE PAUMA & YUIMA RESERVATION, a/k/a PAUMA LUISENO BAND OF MISSION INDIANS, a/k/a PAUMA BAND OF MISSION INDIANS,
Plaintiff,

v.

STATE OF CALIFORNIA, et al., Defendants.

ORDER ON THE AMOUNT OF SPECIFIC PERFORMANCE and DIRECTING THE CLERK OF COURT TO ENTER JUDGMENT (Document No. 245), December 2, 2013

On March 18, 2013, the Court issued its order resolving the parties' dispositive cross-motions. [Doc. No. 227.] In its March 18 order, the Court found that Pauma is entitled to complete rescission of the 2004 Amendment based on Defendants' misrepresentations concerning the number of machines that all compacted tribes in the aggregate could license under the 1999 Compact. Then, on June 11, 2013 after a hearing and supplemental briefing regarding other remedies sought by Pauma, the Court determined that specific performance of the 1999 Compact's payment terms was the most appropriate way to reinstate the 1999 Compact

contractual relationship between the parties.[1] [Doc. No. 238.] The Court declined to award prejudgment interest.

Having considered the supplemental submissions of the parties regarding the appropriate specific performance award, [Doc. Nos. 239, 241, 244], the Court concludes that judgment shall issue in favor of Pauma and against Defendants in the amount of $36,235,147.01. Further, for the reasons stated in the Court's March 18 order, [Doc. No. 227], judgment shall also issue in favor of Pauma and against Defendants on Claim 10 for misrepresentation.

The State shall satisfy the $36,235,147.01 judgment within 180 days of the Clerk's entry of the judgment.

IT IS SO ORDERED.

DATED: December 2, 2013

CATHY ANN BENCIVENGO
United States District Judge

[1] The Court did not award restitution, despite its use of the term in orders and argument leading to its June 11 order.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

No. 09CV1955-CAB-(MDD)

PAUMA BAND OF LUISENO MISSION INDIANS OF THE PAUMA & YUIMA RESERVATION, a/k/a PAUMA LUISENO BAND OF MISSION INDIANS, a/k/a PAUMA BAND OF MISSION INDIANS,
Plaintiff,

v.

STATE OF CALIFORNIA, et al., Defendants.

ORDER GRANTING PAUMA THE REMEDY OF SPECIFIC PERFORMANCE (Doc. 238) Filed June 11, 2013

This order supplements and should be read in conjunction with the Court's March 18, 2013 order [Doc. No. 227] granting in part and denying in part the parties' cross-motions for summary judgment. In its March 18 order, the Court found that Pauma is entitled to complete rescission of the 2004 Amendment based on Defendants' misrepresentations concerning the number of machines that all compacted tribes in the aggregate could license under the 1999 Compact. For this reason, the issue before the Court is how best to reinstate the 1999 Compact contractual relationship.

To this end, the Court allowed supplemental briefing [*see* Doc. Nos. 230, 231, 233] and oral argument to aid its consideration of the remedy available to Pauma. Having thoroughly reviewed the record and arguments of counsel, the Court finds that Pauma is entitled to specific performance of the 1999 Compact's payment terms, including the license and fee terms in Section 4.3.2.2(a).[1]

Specific performance of the payment terms effectively returns money property wrongfully taken from Pauma and is available to Pauma pursuant to the State's limited contractual waiver of sovereign immunity in section 9.4(a). [*See* Doc. No. 217-1 at 39, Ex. A.] The State violated the terms of the 1999 Compact when, for purposes of the December 2003 license draw, it misrepresented the Pool to be exhausted of licenses and refused to issue 550 licenses to Pauma on that basis. [*See* Doc. No. 209 at 5, 8, 14, Exs. 71, 72, 74.] In reality, there were over eight thousand more licenses still available in the Pool. *Cachil Dehe Band of Wintun Indians v. State*, 618 F.3d 1066, 1082 (9th Cir. 2010) (concluding that "40,201 licenses were authorized for distribution statewide through the license draw process"). While the Court may not be able to turn back the clock and redo the December 2003 license draw, specific performance of the payment terms with respect to the licenses that Pauma does have is an equitable remedy available to Pauma.

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[1] The State did not waive any sovereign immunity it may have by virtue of litigating this case. *See Westlands Water Dist. V. Firebaugh Canal*, 10 F.3d 667, 673 (9th Cir. 1993)("sovereign immunity is jurisdictional in nature").

In conclusion, there is sufficient evidence before the Court that Pauma overpaid the State for gaming device licenses and is entitled to get its overpayments back. The Court rejects the State's argument that the return of Pauma's overpayments constitutes money damages. This case is unique in that the State contractually waived any immunity to contest the remedy of specific performance, which here results in the State having to return money belonging to Pauma. *See also Bowen v. Mass.*, 487 U.S. 879, 894 (1988) ("while in many instances an award of money is an award of damages, '[o]cassionally a money award is also a [specific] remedy'"). However, having considered and balanced the equities of this unique case, the Court declines to award prejudgment interest to Pauma.[2]

The Court shall enter judgment in an amount certain upon receipt and consideration of the filings requested by the Court at the May 29, 2013 hearing and confirmed in the Court's May 30, 2013 order. [*See* Doc. No. 237.] The State shall return Pauma's overpayment within 180 days of entry of judgment.

IT IS SO ORDERED.

DATED: June 11, 2013

CATHY ANN BENCIVENGO
United States District Judge

[2] For example, the Court does not find the State to have acted in bad faith in misrepresenting the size of the Pool.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

No. 09cv1955-CAB (MDD)

PAUMA BAND OF LUISENO MISSION INDIANS OF THE PAUMA & YUIMA RESERVATION, a/k/a PAUMA LUISENO BAND OF MISSION INDIANS, a/k/a PAUMA BAND OF MISSION INDIANS,
Plaintiff,

v.

STATE OF CALIFORNIA, et al., Defendants.

ORDER GRANTING IN PART AND DENYING IN PART THE PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT [Doc. Nos. 197, 217-13], (Document 227) Filed March 18, 2013

Presently before the Court are cross-motions for summary judgment. [*See* Doc. Nos. 197, 217-13]. On November 30, 2012, the Court heard oral argument on the pending cross-motions. Upon consideration of the briefing and argument of counsel, the cross-motions are GRANTED IN PART AND DENIED IN PART as follows.

Plaintiff Pauma Band of Mission Indians ("Pauma") moves the Court for an order granting summary judgment in its favor on eleven claims in the First Amended Complaint. [Doc. No. 130, "FAC"]. [1] Defendants cross-move for summary

[1] The claims that are the subject of Pauma's motion are identified and numbered in the FAC as follows: (5) 2004 (continued…)

judgment as to the entirety of the FAC. [2]

Over a decade ago, Pauma and the State of California entered into a Tribal-State Gaming Compact (the "1999 Compact") under which Pauma received a certain number of licenses to operate gaming devices at its casino. Several of the claims at issue arise from Defendants' alleged breaches of fiduciary duties owed to Pauma under the 1999 Compact in interpreting its provisions concerning the number of gaming devices available to compacted tribes. Pauma alleges that, as a result of the State's unreasonable and erroneous interpretation of the 1999 Compact, the State told Pauma there were no more available gaming device licenses (when, in reality, there were thousands still available). This

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(…continued)
Compact Fees Used for Non-Gaming Purposes are in Bad Faith/Violation of IGRA; (6) 2004 Compact Fees Constitute an Illegal Tax in Bad Faith/Violation of IGRA; (7) Breach of Fiduciary Duty – Duty of Care; (8) Breach of Fiduciary Duty – Duty to Apply to a Court for Instructions; (9) Breach of Fiduciary Duty – Duty of Loyalty; (10) Misrepresentation – Restatement and General Principles of Federal Contract Law; (13) Mutual Mistake – Restatement and General Principles of Federal Contract Law; (14) Unilateral Mistake – Restatement and General Principles of Federal Contract Law; (15) Failure of Consideration – State Law; (16) Unconscionability – Restatement and General Principles of Federal Contract Law / State Law; and (17) Constructive Fraud– State Law.

[2] Therefore, in addition to the claims addressed in Pauma's motion, Defendants also cross-move on the claims identified and numbered in the FAC as follows: (1) Mutual Mistake of Fact – State Law; (2) Unilateral Mistake of Fact – State Law; (3) Mutual Mistake of Law – State Law; (4) Unilateral Mistake of Law – State Law; (11) Negligent Misrepresentation – State Law; (12) Violation of the Contracts Clause – U.S. Constitution art. 1, § 10.

caused Pauma to enter into an amended compact in 2004 (the "2004 Amendment"). Pauma thus seeks to rescind or reform the 2004 Amendment based on mistake, misrepresentation, failure of consideration unconscionability, or because its revenue sharing provisions violate the Indian Gaming Regulatory Act.

As set forth below, the Court finds that Defendants[3] did not owe Pauma any fiduciary duties that give rise to fiduciary liability with respect to their calculation of the maximum number of machines that all compacted tribes in the aggregate could license under the terms of the 1999 Compact. As such, Pauma's motion is **DENIED** and Defendants' motion is **GRANTED** with respect to Claims 7-9 and 17.

However, the Court **GRANTS IN PART** Pauma's motion and **DENIES** Defendants' motion with respect to Claim 10 for misrepresentation under the Restatement (Second) of Contracts (the "Restatement") and general principles of federal contract law. As explained below, Pauma is entitled to complete rescission of the 2004 Amendment based on Defendants' misrepresentations concerning the number of machines that all compacted tribes in the aggregate could license under the 1999 Compact.

The Court rejects Defendants' argument that Pauma's claims cannot survive summary judgment because they are based upon a retroactive application of Ninth Circuit's opinion in *Cachil Dehe Band of*

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[3] Defendants are the State of California, the California Gambling Control Commission, and the Office of the Governor, which are collectively referred to herein as the "State" or "Defendants".

Wintun Indians v. State, 618 F.3d 1066 (9th Cir. 2010) ("*Colusa II*") that: (1) the State erred when it calculated a cap of 32,151 gaming device licenses under the terms of the 1999 Compact; and (2) the actual cap on licenses under the 1999 Compact was 40,201. For the reasons stated herein, the Court applies *Colusa II* retroactively.

Before the filing of the instant motions, the Court granted the parties leave to conduct discovery on, *inter alia*, facts relevant to Defendants' statute of limitations defense – *i.e.*, when and what Pauma knew or could have known about the available number of gaming device licenses before Pauma entered into the 2004 Amendment with the State. [Doc. No. 182.] Defendants failed to address the Court's issue of primary concern, which was whether the statutes of limitation had run on Pauma's claims. Despite the disregard of the Court's direction on this issue, the State concedes that it is proper for the Court to address its statute of limitations defense. For the reasons stated herein, Defendants' affirmative defenses based on statute of limitations grounds are **DENIED.**

Finally, for the claims that the Court declines to address on the merits, the parties' cross-motions are **denied without prejudice**.

I. FACTUAL BACKGROUND

Tribal-State gaming compacts are the mechanism that gives the State a voice in the civil regulation of class III gaming on tribal lands, pursuant to the Indian Gaming Regulatory Act of 1988 ("IGRA"). This action concerns disputes over the 1999 Compact and the 2004 Amendment between

the State of California and Pauma. Pauma seeks rescission or reformation of the 2004 Amendment.[4]

Pauma entered into the 1999 Compact on April 27, 2000,[5] approximately seven months after the California Legislature ratified materially identical compacts entered into between the State and approximately fifty-seven other Indian tribes. Cal. Gov't Code § 12012.25(a) & (b). Most of the other 1999 Compact Tribes executed the agreement on September 10, 1999, following months of negotiations between the State and the tribes.[6] *Id*. § 12012.25(a). Pauma was not a part of these negotiations, and the California Gambling Control Commission (the "CGCC") was not in existence when the Compacts became effective.

An earlier model gaming compact (approved as part of Proposition 5 by the State's voters, but never made operative) was considered an important foundation for compact negotiations. The revenue sharing concept between the Compact Tribes and the State embodied in the Proposition 5 model compact

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[4] The background context for the 1999 Compact is set out in the Ninth Circuit's opinion in *Colusa II*.

[5] Pauma's 1999 Compact became effective upon notice of its approval in the Federal Register on October 19, 2000.

[6] "Compact Tribes" collectively refers to the tribes that separately entered into 1999 Compacts with the State of California. [*See* Doc. No. 217-1, Ex. A at 18.] "Federally-recognized tribes that [were] operating fewer than 350 Gaming Devices are 'Non-Compact Tribes.'" [*Id*.] Thus, under the 1999 Compact definition, "Non-Compact Tribes" included both uncompacted tribes and "Compact Tribes" operating less than 350 devices.

was incorporated into the 1999 Compact as a mutually beneficial concept. [Doc. No. 217-1, Ex. A at 14 (the tribes "agreed to provide the State, on a sovereign-to-sovereign basis, a portion of its revenue from Gaming Devices").][7] The concept was intended to help protect the forthcoming tribal monopoly over class III gaming in California and provide the State with the benefits of a significant revenue stream while limiting the growth of gaming.

Within the 1999 Compact, the Compact Tribes also agreed to revenue sharing with each non-gaming tribe and tribe operating fewer than 350 gaming devices (*i.e.*, "Non-Compact Tribes"). Under agreed upon conditions, Compact Tribes acquiring gaming licenses would have to pay fees and make quarterly contributions to a trust fund, called the Revenue Sharing Trust Fund ("RSTF"). Once the CGCC became operational,[8] the RSTF was administered by the CGCC, and its funds were distributed to "Non-Compact Tribes." As laid out in the 1999 Compact:

> The Revenue Sharing Trust Fund is a fund created by the Legislature and administered by the California Gambling Control Commission, as Trustee, for the receipt, deposition, and distribution of monies paid pursuant to this Section 4.3.2.
>
> * * * *

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[7] The Court's citations to Defendants' exhibits refer to the ECF-generated page numbers, whereas citations to Pauma's exhibits refer to the "P___" page citations contained in the Court's courtesy copies. Courtesy copies should be printed from the docket per the undersigned's chambers rules.

[8] The evidence suggests that the CGCC became operational in 2001.

> [The Compact Tribes agree] . . . that each Non-Compact Tribe in the state shall receive the sum of $1.1 million per year. In the event there are insufficient monies in the [RSTF] to pay $1.1 million per year to each Non-Compact Tribe, any available monies in that Fund shall be distributed to Non-Compact Tribes in equal shares. The Commission shall serve as the trustee of the [RSTF]. The Commission shall have no discretion with respect to the use or disbursement of the trust funds. Its sole authority shall be to serve as a depository of the trust funds and to disburse them . . . to Non-Compact Tribes.

[Doc. No. 197-4, Exs. 5 & 24 at § 4.3.2 (a)(ii), § 4.3.2.1(a), 4.3.2.1(b).]

The 1999 Compact authorized the Compact Tribes to operate a base number of gaming devices (also referred to as machines or slot machines) without having to seek licenses from the State to do so. However, to operate additional devices beyond the base number, Compact Tribes would need to participate in the competitive communal license draw process outlined in the 1999 Compact. These licenses would be drawn from a single license pool (the "Pool") based on predetermined priorities and conditions. Under the terms of the 1999 Compact, there was a maximum number of devices that all Compact Tribes in the aggregate could license from the Pool.

Pauma was a non-gaming tribe prior to entering into the 1999 Compact. [Doc. No. 217-1, Ex. A at 13.] Once the 1999 Compact became effective, Pauma

could establish a class III gaming facility on its lands and could conceivably operate up to 2000 slot machines under the terms of the 1999 Compact. *See* Cal. Const. art. IV, § 19(f).

Initially, and prior to the CGCC becoming operational, certain Compact Tribes, including Pauma, hired the firm of Sides Accountancy to administer the device draws under the 1999 Compact. [*See* Doc. No. 203, Ex. 26 at P104-05; Doc. No. 217-2, Ex. K at 53.]

Pauma opened Casino Pauma in San Diego in May 2001. [Doc. No. 217-7, Ex. GG at 48.] By that time, Pauma was authorized under the 1999 Compact to operate 850 devices. This number comprised of a base number of 350 devices (which could be operated without the need to obtain licenses), plus 500 device licenses it acquired in May 2000 from the Pool through Sides' draw process. [*See* Doc. No. 204, Ex. 29 at P 112; *id.*, Ex. 32 at P116.]

The State caused Sides to step down in 2001 after learning that Sides limited its responsibilities to ensuring gaming devices were properly allocated according to the predetermined priorities set forth in the 1999 Compact. In other words, Sides never accepted the responsibility of calculating the size of the Pool, or of ensuring that the allocation of licenses did not exceed the available number of licenses in the Pool. [*See, e.g.*, Doc. No. 205, Ex. 45 at P 148; 217-3, Ex. M at 41 ("no statewide limit was imposed . . . [Sides] awarded as many putative gaming device licenses as were requested").]

On March 13, 2001, Governor Davis issued Executive Order D-31-01, affirming that the 1999

Compact designated the CGCC as "trustee of the [RSTF]" and that the parties' intent was for the CGCC to collect fees remitted for device licenses from 1999 Compact Tribes to distribute to Non-Compact Tribes. [Doc. No. 217-7, Ex. MM at 86.] Accordingly, Governor Davis authorized the CGCC to distribute RSTF monies in accordance with Cal. Gov't Code § 12012.75, administer the license draw process under 1999 Compact section 4.3.2.2(a)(3) and enforce the provisions of sections 4.3.2.2(a)(1) through (3) and (e). [*Id*.] Executive Order D-31-01 directed the CGCC to ensure that the allocation of devices among gaming tribes did not exceed the number provided in the 1999 Compact. [*Id*.]

Thus, by March 2001, the 1999 Compact required each Compact Tribe to provide the State with notice of its request to participate in license draws. [*Id*.; Doc. No. 197-4, Exs. 5 & 24 at § 4.3.2.2(a)(3)(vi).] Further, the 1999 Compact required that the State keep confidential all information and documents received from Compact Tribes, including "any documents compiled from such documents or from information received from the Tribe." [Doc. No. 217-1, Ex. A at 34, § 7.4.3(b)(I).]

Prior to Pauma entering into the 1999 Compact, differences of opinion arose concerning the aggregate number of gaming devices authorized statewide in addition to those already in operation as of September 1, 1999 – in other words, the size of the Pool. [*See* Doc. No. 217-2, Exs. D, E, F, K at 53; Doc. No. 217-3, Exs. L at 12-13 & 29, M at 42-46; Doc. No. 217-10, Ex. ZZ at 4.]

In lieu of stating a fixed aggregate figure, the 1999 Compact sets forth an intricate formula to

determine the size of the Pool. The relevant portion of the Pool section reads:

> Sect. 4.3.2.2. Allocation of Licenses.
>
> (a) The Tribe, along with all other Compact Tribes, may acquire licenses to use Gaming Devices in excess of the number they are authorized to use under Sec. 4.3.1, but in no event may the Tribe operate more than 2,000 Gaming Devices, on the following terms, conditions, and priorities:
>
> (1) The maximum number of machines that all Compact Tribes in the aggregate may license pursuant to this Section shall be a ***sum*** equal to 350 multiplied by the number of Non-Compact tribes as of September 1, 1999, plus the difference between 350 and the lesser number authorized under Section 4.3.1. [(the "lesser number" is either the number of gaming devices operated by the Tribe on September 1, 1999 or 350, whichever number is smaller)].

[Doc. No. 217-1 at 19 (emphasis added).] The "lesser number" variable of the Pool formula requires knowledge of confidential information regarding each Compact Tribe's device count to which the State was contractually bound not to disclose. [*See, e.g.*, Doc. No. 197-4, Ex. 27 at P 108; *id.*, Ex. 39 at P134; Doc. No. 217-1, Ex. A at 20 & 34 ("The State . . . will exercise utmost care in the preservation of the confidentiality. . . . will consult with representatives of the Tribe prior to disclosure").]

Following the Executive Order, and the State's increased responsibilities with respect to the Pool, a series of eight meetings were held throughout California between CGCC representatives and Compact Tribes during February and March 2002. Four of the eight meetings sought to obtain tribal perspectives regarding "licensing issues" under the 1999 Compact in connection with the CGCC's administration of the license draw process. [Doc. No. 217-2, Ex. K at 54; Doc. No. 217-3, Ex. L at 14.] A lawyer representing Pauma attended the "Gaming Device License Meeting" held in San Diego on March 19, 2002. [Doc. No. 217-8 at 40, 42.] There is evidence that this meeting discussed "the reasoning underlying varying interpretations" of the number of licenses allowed under the 1999 Compact. Among the Pool formula interpretations was a calculation performed by Retired Ninth Circuit Judge William Norris, who served as the State's chief negotiator during the 1999 compact negotiations. This calculation, as well as an "analysis offered by other Tribes concerning the number of gaming devices permitted by the Compact," appears to have been discussed at the meeting.[9] [*Id.*; Doc. No. 217-2, Ex. K at 54; Doc. No. 217-3, Ex. L at 14 & 29.] The evidence further suggests that a focus of this meeting was a discussion of the ramifications of the Sides licensing process, including whether to ratify Sides' license draws.[10] At that time, the State believed that the number of licenses issued by Sides (26,915) exceeded

[9] In the end, the State did not adopt the Norris calculation.

[10] At a later date, the State ratified the licenses issued by Sides, including the licenses that Sides issued to Pauma. [*See* Doc. No. 217-3, Ex. L at 8.]

the Pool's initial supply (calculated by the State to be 15,400, as stated in a May 2000 letter by William Norris).[11] [*See* Doc. No. 217-3, Ex. L at 11-29.]

In May 2002, CGCC staff issued a report as part of its meeting minutes acknowledging the existence of "differing interpretations" of section 4.3.2.2 of the 1999 Compact. The report also stated throughout that the language of section 4.3.2.2 was "ambiguous." [Doc. No. 217-2, Ex. K at 50-67.] The report did not examine the Pool formula. The evidence suggests that this report, which was incorporated in CGCC meeting minutes from May 29, 2002, was somehow "published" in June 2002. [*Id*.]

At the CGCC's June 12, 2002 meeting, the State again discussed differing interpretations of the Pool size and its staff's recommendation as to how to interpret ambiguities. The report did not examine the Pool formula. Rather, the report addressed how the State should deal with ambiguities in the 1999

[11] A letter written by William Norris in May 2000 was relied on by the State as establishing an initial Pool size of 15,400 licenses that could increase in size by a vaguely quantified amount (by more than 8,050, but less than 13,650) depending on whether "Non-Compact Tribes" elected to place some or all of the eligible devices from their machine allotment into the Pool. Any devices operated by the "Non-Compact Tribes" as of September 1, 1999 were not eligible for placement in the Pool. The remaining devices, not in excess of the initial 350 machine allotment for "Non-Compact Tribes," constituted eligible devices. So, according to the analysis contained in the Norris letter, tribes that did not have any devices as of September 1, 1999, for example, could elect to place up to 350 licenses into the Pool. [Doc. No. 200, Ex. 15.] The State did not adopt this analysis, but it helps explain why the Norris calculation of 15,400 is so low.

Compact. The report recommended that the State ***not*** interpret ambiguities under the Indian canon of construction, that the State should ***not*** view itself to be the Compact's drafter so as to construe ambiguities against itself, and that the State should ***not*** view itself be a traditional trustee so as to construe ambiguities in favor of tribes. [Doc. No. 217-3, Ex. L at 14-16.] There is no evidence of when the State first published this information on its website, or otherwise.

The transparency of the license draw process also was addressed at the June 12 meeting. The State agreed that tribes who participated in a draw would be given "access to all relevant information used by the Commission staff in preparing its recommendation relating to that draw" "for the purpose of applying the priorities" of the Compact. [*See id.*, Exs. L at 27-28 & M at 35-36 ("unanimously adopting" recommendation that tribes applying for gaming device licenses be given "access to all relevant information. . .relating to that draw"); Doc. No. 217-4, Ex. Q at 52 (6/19/02: "Tribes have access to information used in draw").] Neither party has clarified what information constituted "all relevant information," but the evidence suggests that it included the number of gaming device licenses each tribe requested, the priority tier assigned to each requesting tribe, the number of gaming device licenses available, and the number of licenses that became available as a result of canceled licenses. [*Id.*; Doc. No. 217-3, Ex. N at 65-66.] There is no evidence that the Pool size or the inputs for its formula were included with this "relevant information," or that the access to information afforded to participating tribes was also given to nonparticipating tribes.

The CGCC's next meeting occurred on June 19, 2002. For purposes of that "June 19, 2002 Hearing," the CGCC tasked its staff (for the first time) to formulate and present its recommendation to the CGCC on the calculation on the statewide limit on gaming device licenses. [Doc. No. 219-2, Ex. K at 48; Doc. No. 217-3, Exs. L at 8 & M at 40.] The staff generated a report. This report was discussed at the meeting and incorporated into the CGCC's June 19 meeting minutes. The report laid out the staff's detailed examination of the formula for determining the Pool's limit on licenses, the inputs for the formula, alternative interpretations of the formula that would lead to different Pool sizes, and the interpretation that the staff recommended be adopted (and was adopted) by the State. [Doc. No. 207, Ex. 49; Doc. No. 217-2, Ex. M at 40-47.]

The June 19, 2002 report acknowledged multiple existing interpretations of section 4.3.2.2's Pool formula and described the ambiguity in section 4.3.2.2(a)(1) as "one of the most contentious issues of interpretation" affecting the 1999 Compact. The report went on to describe the Pool formula as sufficiently "obscure" and "ambiguous" such that:

> undoubtedly, agreement among all parties to the Compacts can only be achieved in the renegotiation that may be commenced under Compact section 4.3.3 in March, 2003. However, the implementation of the draws contemplated by the Compacts in the interim requires the Commission [(the CGCC)] to deal with the language.

[Doc. No. 217-3, Ex. M at 43.]

In the end, the staff's report recommended a formula interpretation that led to a Pool size of 32,151 licenses and stated that 2,753 licenses remained available in the Pool. The CGCC adopted this recommendation and voted to make the remaining 2,753 licenses available for draw. [*Id.*, Ex. M at 36 & 46.] In doing so, the State rejected alternative Pool size calculations of 55,951 and 64,283. [*Id.*][12] The June 19, 2002 minutes do not contain language about the publication of the information contained therein. There is no evidence as to when this information first became publicly available on the CGCC's website, or otherwise.

On March 28, 2003, in accordance with section 4.3.3, Governor Davis wrote to the 1999 Compact Tribes, including Pauma, requesting negotiations to amend the 1999 Compacts to address "matters encompassed by Compact Sections 4.3.1 and 4.3.2 and their subsections." [Doc. No. 207, Ex. 52.] The timing of Governor Davis' request to enter into amended compacts and his proposed topics for discussion tracked section 4.3.3 of the 1999 Compact:

> If requested to do so by either party after March 7, 2003, but not later than March 31, 2003, the parties will promptly commence negotiations in good faith with the Tribe concerning any matters encompassed by

[12] At an earlier date, the Governor's Press Office calculated the Pool to consist of 23,450 licenses, but the Ninth Circuit explained, *inter alia*, "that the foundation for this 23,450 number is at odds with the plain language of the contract." *Colusa II*, 618 F.3d at 1076; [*see also* Doc. No. 217-2, Ex. D at 10.]

> Sections 4.3.1 and Section 4.3.2, and their subsections.

[*Id.;* Doc. No. 217-1, Ex. A at 20, § 4.3.3.] Governor Davis was recalled in an election seven months later. Pauma did not enter into an amended compact with the State before he left office.

On November 20, 2003, Pauma received a letter about an upcoming license draw on December 19th for "at least 750 gaming device licenses." [Doc. No. 208, Ex. 65 at P242.] On December 8th, Pauma submitted an application requesting an additional 750 licenses. [Doc. No. 209, Ex. 71 at P267-71.] By letters dated December 19 and 30, 2003, Pauma received notice from the State that the December 19th draw resulted in Pauma receiving only 200 of the 750 licenses it requested and that "[t]he demand for licenses exceeded the available supply and it was therefore not possible to completely fill the Tribe's request for gaming device licenses."[13] [*Id.*, Exs. 73-74.] Pauma's former counsel submitted a declaration stating that, by January 2004, "the State made it very clear . . . that no licenses were available under the license pool process." [Doc. No. 96-2 at 2, ¶4.]

Within days of Pauma receiving the December 30th letter that there were no more licenses in the Pool, the Office of the Governor announced its appointment of the lead negotiator for the State's efforts to renegotiate the 1999 compacts. [Doc. No.

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[13] Therefore, by December 2003, Pauma was authorized to operate, and did operate, up to 1050 slot machines (including its 350 base number), plus an unlimited number of permissible card games. [*See* Doc. No. 217-1, Ex. A, § 4.1; Doc. Nos. 38-1 & 38-2.]

209, Exs. 75-76.] From January through June 2004, Pauma, represented by counsel, negotiated the 2004 Amendment with the State. [*See* Doc. No. 96-2.] By that time, Pauma had partnered with Park Place Entertainment ("Park Place"), a premier gaming company, to develop a local Caesars branded casino. [Doc. No. 207, Exs. 53-56.] During negotiations, Pauma informed the State that Pauma "needed at least 2,000 gaming devices to move forward with its pending deal with Park Place." [Doc. No. 96-2 at 2, ¶4.] Indeed, Pauma's ability to attain 2,000 machines within a "commercially reasonable time" became a material condition of the casino development agreement. [Doc. No. 208, Exs. 58-59; Doc. No. 217-6, Ex. CC at 75.]

The State's lead negotiator and Pauma's counsel never discussed the size of the Pool under the 1999 Compact. [Doc. No. 96-2 at 2, ¶4.] Pauma and the State executed the 2004 Amendment on June 21, 2004, which became effective on September 2, 2004. [Doc. No. 209, Ex. 78 & 79 at P303; Doc. No. 217-8 at 7, ¶10].[14]

Among other terms, the 2004 Amendment eliminated any restriction on the aggregate number of slot machines and the license draw system (Doc. No. 217-5, Ex. 11 U at § 4.3.1), gave Pauma the right

[14] The 2004 Amendment was one of five similar amended compacts between the State and tribes with 1999 Compacts that were entered following joint negotiations throughout early 2004. [Doc. No. 217-5, Ex. U; Doc. No. 217-8, Ex. OO.] The other tribes entering into amended compacts as a result of these negotiations were the Pala Band of Mission Indians, the Viejas Band of Kumeyaay Indians, the Rumsey Band of Wintun Indians and the United Auburn Indian Community. [Doc. No. 217-8, Ex. OO.]

to operate an unlimited number of devices based upon market demand (*id*.), extended Pauma's right to conduct class III gaming by an additional ten years (id. § 11.2.1), and provided for tribal gaming in Pauma's core geographic market (*id*. §§ 3.2 & 15.8). In exchange, Pauma agreed to pay a fixed fee of $5.75 million annually for eighteen years, a figure based on approximately thirteen percent of Pauma's reported net win for 2003, and a fee structure ranging from $8,500 to $25,000 per quarter applicable only to devices over 1050.[15] [*Id*. § 4.3.3; Doc. No. 217-8, Ex. OO.] Pauma also agreed to maintain its existing licenses by paying $500,000 quarterly into the RSTF, but received a singular concession to delay that payment until after March 31, 2008, or after completion of its expanded casino, whichever came first. [Doc. No. 217-5, Ex. U; Doc. No. 217-8, Ex. OO.]

On June 9, 2004, before Pauma executed the 2004 Compact, the Rincon Band of Luiseño Mission Indians ("Rincon"), a Southern California tribe with a 1999 Compact, filed a federal action. Rincon's complaint challenged the State's conclusion that the 1999 Compact provided for a 32,151 cap on the aggregate number of licenses available in the Pool and sought to enjoin the compacts being renegotiated, including Pauma's.[16] [Doc. No. 217-6,

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[15] Again, by December 2003, Pauma was authorized to operate, and did operate, up to 1050 slot machines (including its 350 base number), plus an unlimited number of permissible card games. [*See* Doc. No. 217-1, Ex. A, § 4.1; Doc. Nos. 38-1 & 38-2.]

[16] Rincon was concerned, *inter alia*, that the 2004 Amendment would allow Pauma's nearby casino to "jeopardiz[e] the economic viability" of Rincon's pending casino deal. [*See* Doc. No. 217-6, Ex. CC at 75.]

Ex. W at 6-34.] In its complaint, Rincon sought a declaratory judgment that the correct number of licenses available through the Pool was 64,293 or 58,240 – numbers much higher than the 32,151 number selected by Defendants. [*Id.* at 31.] Rincon alleged the following facts in support:

- On November 9, 1999 the Office of Legislative Analysts issued an opinion that the gaming device limitations and licensing pool provision allow for as many as 113,000 devices to be operated on Indian lands, 60,000 of which are available through the license pool.

- In response, the Office of the Governor issued an opinion that the Office of Legislative Analysts was wrong and that the gaming device limitations and licensing pool provision allow for no more than 44,798 gaming devices to be operated on Indian lands, 23,000 of which are available through the license pool.

- The State, through the California Gambling Control Commission, maintains that the license pool has been exhausted and that the only means by which new licenses may become available is through the termination of a license for non-payment of fees or by a Tribe or Tribes relinquishing license to revert back to the pool.

- The California Gambling Control Commission maintains that 32,151 licenses have been issued through the license pool.

- Rincon recognizes two reasonable interpretations of the Compact's language regarding the number of available gaming devices. Either (1)

the gaming device limitations and the license pool provision allow for no more than 115,393 gaming devices to be operated on Indian lands, 64,293 of which are available through the license pool, or alternatively (2) the gaming device limitations allow for no more than 109,550 gaming devices to be operated on Indian lands, 58,450 of which are available through the license pool.

[*Id.* at 14-15.] Rincon's complaint did not plead the inputs for the formula utilized by the State in calculating the size of the Pool, or facts about why the State's calculation was incorrect.

On June 30, 2004, nine days after the 2004 Amendment was executed (but prior to its September 2004 effective date), Pauma applied to participate and submitted an 18-page memorandum as amicus curiae in the *Rincon* action, along with the four other tribes entering into 2004 Amendments, seeking to defend and preserve their pending 2004 Amendment. [Doc. No. 217-6, Ex. V at 3-4; 04cv1151, Doc. No. 17.] Pauma continued to participate as amicus in support of the State through 2008. [*Id.*, Exs. X, Y, Z, AA & BB.] However, in defending the 2004 Amendment, Pauma did not demonstrate whether it knew of the inputs or the methodology the State used for the Pool size formula, nor did Pauma take a position on whether the State's position on the Pool size was reasonable or correct.

Instead of entering into amended compacts, Rincon and other 1999 Compact Tribes litigated the meaning of the ambiguous language in the 1999 Compact and added devices to their casinos only

when licenses became available.[17] [Doc. No. 217-4, Exs. P, Q, R & S; Doc. No. 217-5, Ex. T; Doc. No. 217-7, Exs. JJ & KK.] In contrast, Pauma proceeded with its 2004 Amendment. Pauma proceeded, in part, because "Caesar's obligations under the proposed deal depended on Pauma's ability to obtain authorization from the State of California to operate 2,000 slot machines." [Doc. No. 217-6, Ex. CC at 75.] Even when it seemed that the deal with Caesars may not go through in August 2004, Pauma voted to proceed with the 2004 Amendment. Pauma recognized that the 2004 Compact provided it with guaranteed access to additional licenses and, thus, the ability to attract other investors for a casino deal that would increase its gaming income. [*See id.*, Ex. CC at 76.]

Pauma operated under the terms of the 2004 Amendment for five years before filing this action. Pauma filed this action on September 4, 2009. By that time, Pauma had failed to secure a partner in its efforts to develop an expanded casino project and the economic recession had begun. Pauma's action also followed a finding by Judge Damrell in the Eastern District of California on April 22, 2009 that rejected and detailed the State's interpretation of the Pool formula. *See Colusa I,* 629 F.Supp.2d 1091, 1109 -10 (E.D. Cal. 2009) ("interpretation of the second aspect of the equation, the difference between 350 and the

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[17] Three other 1999 Compact Tribes raised legal challenges to the size of the License Pool: *Colusa I,* Civ. Case No. 04cv2265 (E.D. Cal.) (Oct. 25, 2004); *San Pasqual Band of Mission Indians v. State,* Civ. Case. No. 06cv0988 (S.D. Cal.) (May 3, 2006); and, *Tuolumne Band of Me-Wuk Indians v. State,* Civ. Case No. 09cv2263 (E.D. Cal.) (Aug. 17, 2009). The number of licenses was settled in *Colusa II* at 40,201 licenses.

lesser number authorized under Section 4.3.1. . .. [the State] Defendants contend that the appropriate multiplier is 16 because this reflects the number of tribes that were operating less than 350, but more than zero, devices as of September 1, 1999"). This appears to be the first time Pauma learned the details of the State's interpretation of the Pool formula.

The State enforced its interpretation of the aggregate number of licenses available under the 1999 Compact (32,151) until Judge Damrell found that the Pool contained 42,700 licenses and entered final judgment in favor of other plaintiff tribes. *See Colusa I*, No. 04cv2265, 2009 WL 2579051, *4 (E.D. Cal. Aug. 19, 2009). The State appealed this dispositive order in Colusa I to the Ninth Circuit. On August 20, 2010, the Ninth Circuit in Colusa II largely affirmed Judge Damrell's decision by holding that the license pool contains 40,201 licenses, or 8,050 more than the State previously allowed. In doing so, the Ninth Circuit also held that while the License Pool Provisions are ambiguous, "the language of the License Pool Provisions is not reasonably susceptible to an interpretation that would produce a license pool of 32,151." *Colusa II*, 618 F.3d at 1079.

Importantly, the Ninth Circuit explained that the State failed to reasonably interpret Step 2 of the Pool formula, which reads: "the difference between 350 and the lesser number authorized under Section 4.3.1." *Colusa II*, 618 F.3d at 1080-81. As *Colusa II* and the June 19, 2002 CGCC staff report reveals, the State construed Step 2 as only requiring calculations with respect to 16 of the 62 compacted tribes, despite the fact that the express purpose of the formula is to

calculate the "maximum number of machines that all Compact Tribes in the aggregate may license." *Id*.; [*see* Doc. No. 217-3, Ex. M at 44-46; Doc. No. 217-1, Ex. A at 19.] The Ninth Circuit held that this construction was "not reasonable" because in "ignor[ing] the language of Step 2" for the remaining 46 of the 62 compacted tribes, it failed to create an aggregate number. Colusa II, 618 F.3d at 1080 ("in order to calculate how many machines 'all Compact Tribes in the aggregate may license' . . . . apply *all* of Step 2 to *each* Compact Tribe in order to create an aggregate number").

II. LEGAL STANDARD

Summary judgment is proper only upon the movant's showing "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "Material," for purposes of Rule 56, means that the fact, under governing substantive law, could affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Cline v. Industrial Maintenance Engineering & Contracting Co.*, 200 F.3d 1223, 1229 (9th. Cir. 2000). For a dispute to be "genuine," a reasonable factfinder must be able to return a verdict for the nonmoving party. *Id.*, citing *Anderson*, 477 U.S. at 248. When ruling on a summary judgment motion, the court must view all inferences drawn from the underlying facts in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

III. ANALYSIS

A. Statute of Limitations

On May 18, 2012, the Court held a hearing on a then-pending motion to dismiss. Defendant moved for dismissal of the action asserting Pauma's complaint was untimely. The Court found that Pauma had sufficiently pled a fiduciary relationship with the State to survive the motion to dismiss, and in light of this alleged relationship, it would not dismiss claims on statute of limitations grounds. The Court found that Pauma adequately pled facts to support tolling based on Pauma's absence of actual knowledge of the facts constituting its causes of action. However, the Court cautioned that its denial was without prejudice to revisiting the lesser "should have known" standard on summary judgment. The Court allowed discovery to go forward on, *inter alia*, facts relevant to Defendants' statute of limitations defense.

In briefing filed after the Court submitted and heard oral argument on the cross-motions at issue, Pauma argues that the State waived its statute of limitations defense by failing to move for summary judgment on it. [Doc. No. 224.] The Court provided the State with an opportunity to respond to Pauma's waiver argument. [Doc. No. 226.] In its response, the State concedes that, given this case's procedural history, "this Court may consider the defense on its own initiative." [*Id.* at 3.] The State does not contend that it needs additional argument or evidence on its statute of limitations defense. Rather, the State's position is that, in light of the evidence now before the Court, the Court may consider the statute of limitations issues when ruling upon the parties' respective cross-motions. The Court agrees that the State's statute of limitations defense is properly

before the Court, especially since the parties were directed to address statute of limitation issues.[18]

As explained below, the State's affirmative defenses based on statute of limitations grounds are **DENIED**.

The Court finds that actual knowledge is no longer the appropriate standard for statute of limitations purposes. For the reasons stated herein, the State did not owe Pauma a fiduciary duty in the traditional sense with respect to determining the size of the Pool. However, while not giving rise to fiduciary liability, the State's responsibility in determining the Pool size was a quasi-trust responsibility. Instead of actual knowledge, the Court, therefore, must assess the timeliness of Pauma's suit under the discovery rule taking into consideration the State's quasi-trust responsibility and the evidence as to what information Pauma would have discovered had it investigated. The discovery rule "permits delayed accrual until a plaintiff knew or should have known of the wrongful conduct at issue." *El Pollo Loco, Inc. v. Hashim*, 316 F.3d 1032, 1039 (9th Cir. 2003) (quoting *April Enter., Inc. v. KTTV and Metromedia, Inc.*, 147 Cal.App.3d 805, 826 (1983)).

The Court finds no evidence in the record to infer that, upon investigating, Pauma would have discovered facts that reveal the State's calculation of

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[18] Further, several of the issues addressed in briefing the cross-motions present evidence and argument with regard to what Pauma knew or should have known prior to entering into the 2004 Amendment. For example, the State's assumption of the risk argument.

the Pool size did not constitute one of multiple reasonable interpretations of ambiguous compact language. As the Ninth Circuit found in *Colusa II*, the State ignored compact language. There is no evidence that Pauma would have discovered this fact (i.e., through the receipt of the Compact Tribes' confidential gaming information, the formula inputs, or even a general explanation of how the State defined the formula's steps) prior to 2009. Based on the evidence before the Court, Judge Damrell's *Colusa I* opinion in 2009 was the first time Pauma would have discovered the facts giving rise to its claims. Therefore, the statutes of limitation for Pauma's claims arising from the State's representations about the Pool size were tolled until 2009.

This construction of inquiry notice is appropriate given the evidence supporting this Court's finding that the State had a quasi-trust responsibility over the size of the Pool. Even the CGCC's staff report from May 29, 2002 acknowledged as much when it advised:

> The Commission [(CGCC)] cannot be regarded as a trustee in the traditional sense, but rather as an administrative agency with responsibilities under the Compacts for administration of a public program in the nature of a quasi-trust.

[*See* Doc. No. 217-2, Ex. K at 56.] The State undertook the authority to administer the draw process and with that undertaking came the responsibility to at the very least reasonably interpret (and not ignore) the formula's language establishing the size of the Pool.

Indeed, determining the Pool size was an implicit part of satisfying the CGCC's legal responsibility to the legislature to accurately account for the monies collected for the RSTF. [*See* Doc. No. 205, Ex. 38 at P130.] On March 13, 2001, the State expressly assumed this responsibility pursuant to Executive Order D-31-01. This Executive Order reads in pertinent part:

> the California Gambling Control Commission shall ensure that the allocation of machines among California Indian Tribes does not exceed allowable number of machines as provided in the Compacts and shall determine whether the machine license draw(s) complies with the limitations of the Tribal-State Gaming Compacts.

[Doc. No. 217-7, Ex. MM at 86.]

The State was uniquely positioned to both know and continually track the number of licenses in and drawn from the Pool. This is especially true given its authority over the draws and receipt of critical, confidential licensing information from the compacted tribes. [*See, e.g.*, Doc. No. 197-4, Ex. 27 at P108; *id*., Ex. 39 at P134; Doc. No. 217-1, Ex. A at 20 & 34 ("The State . . . will exercise utmost care in the preservation of the confidentiality. . . . will consult with representatives of the Tribe prior to disclosure").] The Court concludes that the State fails to put forth sufficient evidence to raise a genuine dispute as to any material fact refuting its quasi-trust responsibility over the Pool size. The evidence supports a finding that, prior to 2009, Pauma was permitted to trust and would not have

discovered facts undermining the State's Pool size determination. Accordingly, Pauma was not on inquiry notice of its claims regarding the Pool size until April 22, 2009.

Critically, the State fails to put forth and the Court has not found any evidence as to when facts were or would have been available to Pauma that should have put Pauma on notice of the Pool formula inputs (so as to allow Pauma to perform the calculation), or of ***how*** the State interpreted the Pool formula. For example, the CGCC staff's June 19, 2002 report would have put Pauma on notice of its claims as the report detailed the staff's examination of the formula for determining the Pool's limit on licenses, the inputs for the formula, alternative interpretations of the formula that would lead to different Pool sizes, and the interpretation that the State adopted. The State insists without evidentiary support that this information was public. Beyond Judge Damrell's April 22, 2009 order, the Court has not found any evidence as to whether and when this information was first made publicly available or would have been made available upon request. Therefore, the State's affirmative defenses based on statute of limitations grounds are **DENIED**.

B. Claims 7-9 for Breach of Fiduciary Duty

Pauma seeks summary judgment on three claims, Claims 7-9, alleging breaches of fiduciary duties. Each of Pauma's fiduciary duty claims – duty of care, duty to apply to a court for instructions, and duty of loyalty – arise from the CGCC's unreasonable calculation of the maximum number of machines that all Compact Tribes in the aggregate may license

under Section 4.3.2.2(a)(1) of the 1999 Compact. Thus, the threshold issue for summary judgment on Claims 7-9 is whether the State owed Pauma a fiduciary duty giving rise to fiduciary liability in determining the size of the Pool.[19]. The Court finds that it did not.

IGRA, the federal statute pursuant to which the parties entered into the 1999 Compact, does not impose fiduciary duties upon the State. *See* 25 U.S.C. §§ 2701-2721. Courts recognize that "IGRA 'does not create a fiduciary duty; it is a regulatory scheme that balances the competing interests of the states, the federal government and Indian tribes." *Redding Rancheria v. Salazar*, No. 11cv1493, 2012 WL 525484, *16 (N.D. Cal. Feb. 16, 2012). "Nothing in the Act [(IGRA)] indicates any intention by Congress to recognize or create a fiduciary duty." *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. U.S.*, 259 F.Supp.2d 783, 791 (W.D. Wis. 2003). Further, nothing in the language of the 1999 Compact states that the Pool formula should be interpreted by someone acting in a fiduciary capacity.

Given that there is an absence of any express assignment or assumption by the State of a trust responsibility owed to Pauma over the Pool size, this Court finds *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313 (2011) to be instructive. In deciding *Jicarilla*, the Supreme Court held that the United States "Government assumes Indian trust responsibilities only to the extent it expressly accepts

[19] While the term "State" refers collectively to the State Defendants, the CGCC does not negotiate or enter class III gaming compacts with Indian tribes. *See* Cal. Gov't Code § 12012.5(d).

those responsibilities by statute." *Jicarilla*, 131 S. Ct. at 2325. The *Jicarilla* court explained that the requirement of express acceptance of trust responsibilities "follows from the unique position of the Government as sovereign" – it must consent to be liable. *Id*. at 2323-24. For this reason, "Congress may style its relations with the Indians a 'trust' without assuming all the fiduciary duties of a private trustee, creating a trust relationship that is 'limited' or 'bare' compared to a trust relationship between private parties at common law." *Id*. at 2323. Such a limited relationship allows for the government's assertion of its own sovereign interest over competing tribal interests, for example, in enforcing statutory limitations placed on the distribution of property to tribes. *See id*. at 2323-26.

With this backdrop, the Court extends the rationale of *Jicarilla* to hold that, because IGRA does not give rise to fiduciary duties and given the State's unique position as a sovereign, the State cannot be held liable for violating Indian trust responsibilities where, as here, it never expressly accepted those responsibilities.

Through the 1999 Compact, the State entered into a sovereign-to-sovereign relationship. In the 1999 Compact, the parties agreed to the mathematical formula that determined the statewide limit on licenses. Importantly, the 1999 Compact imposed no express fiduciary duties upon the State with regard to the size of the Pool. The formula was not intended to be ambiguous, nor was its execution intended to involve discretion. [*See* 197-4, Ex. 5; *id*., Ex. 9 at P037 ("precise limit"); *id*., Ex. 24.] Further, both the State and tribes were beneficiaries of licenses issued from the Pool – the State benefitted

from revenue sharing, and the tribes benefitted from the machines. There is no evidence that the State ever agreed to subordinate its interests to tribal interests with regard to the size of the Pool.

Pauma argues that § 4.3.2.2(a)(3)(vi) of the 1999 Compact, a subsection of the Allocation of Licenses section, expressly imposes certain trust responsibilities on the State. Specifically, Pauma contends that the 1999 Compact identifies the administrator of the License Pool as the "Trustee" for the beneficiary gaming tribes.[20]

Section 4.3.2.2(a)(3)(vi)'s reference to "Trustee" is limited in scope and does not impose trust duties on the State concerning its administration of the Pool. Indeed, the reference to "Trustee" in § 4.3.2.2(a)(3)(vi) merely identifies the "Trustee" of the RSTF as an entity to whom notice is provided when a tribe desires to acquire a license. The 1999 Compact does not assign the responsibility of determining the size of the Pool to a trustee or the "Trustee." Rather, the "Trustee's" express responsibilities are set out in and concern the "Revenue Sharing Trust Fund" section of the 1999 Compact, not the administration of the "Allocation of Licenses" section. [Doc. No. 198, Ex. 5 (§ 4.3.2.1. Revenue Sharing Trust Fund, § 4.3.2.2. Allocation of Licenses).] And even the "Trustee's" responsibilities concerning the RSTF are

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[20] In contrast, Pauma previously argued (for purposes of a different litigation) that ***the 1999 compact does <u>not</u> "promise plaintiff or any other tribe that the state will become the fiduciary for the tribes, a role exclusively reserved to the federal government through its trust responsibility."*** [Doc. No. 217-6, Ex. X at 56, lines 16-18 (Pauma's amicus briefing in Rincon) (emphasis added).]

limited to tasks over which it "shall have no discretion" – "the receipt, deposit and distribution of monies paid" into the RSTF. [*Id.]* Thus, the text of the 1999 Compact does ***not*** support a finding that the State expressly assented to trust responsibilities concerning its determination of the size of the Gaming Device License Pool.

At the November 30, 2012 hearing on the pending summary judgment motions, Pauma's counsel pointed its exhibits 1-2, 8-10, 14-16, 26-29, 34-38, 40, 43 and 45 as evidence of a fiduciary relationship between the compacting tribes and the State. These exhibits, and others reviewed by the Court, do not meet the standard set out by the Court for the imposition of fiduciary liability on the State. For example, there is evidence that the State thought that Sides Accountancy had specifically agreed as "pool trustee" "to ensure that the allocation of machines did not exceed the available number of machines as provided in the compacts." [Doc. No. 204, Ex. 34.] However, there is no evidence of, *inter alia*, Sides' agreement to ensure that the maximum size of the Pool was not exceeded, the State's express adoption of such an agreement, or the State adopting such a purported agreement for the benefit of anyone other than itself. [*See, e.g.,* Doc. No. 197-4, Ex. 27 at P106 (Sides' "sole function and authority shall be to serve as the mechanism to distribute licenses"); Doc. No. 205, Ex. 38 at P130-33 ("The Commission is unable to comply with the law unless it can control the licensing. . ."); *id*., Ex. 39; Doc. No. 205, Ex. 45 at P148 ("Sides had no authority or responsibility to assure that the draws . . . complied with the Compacts").] Further, the evidence shows that the maximum number of licenses issued was supposed to

be a straight-forward mathematical calculation, not a compact provision requiring a trustee's discretion.

For the reasons stated above, Pauma's motion for summary judgment on Claims 7-9, alleging breach of fiduciary duty, are **DENIED**. The evidence does not support a finding that the State expressly assented to the type of trustee duties that would support Claims 7-9, alleging breach of fiduciary duty. Accordingly, the State's cross-motion for summary judgment is **GRANTED** with respect to Claims 7-9.

C. **Claim 17 for Constructive Fraud Under State Law**

Pauma's moves for summary judgment on its Claim 17, a state law claim for constructive fraud. Pauma argues that the State's alleged breaches of fiduciary duty give rise to its constructive fraud claim. As the Court denied summary judgment on the fiduciary duty claims, Pauma's summary judgment on Claim 17 is also **DENIED.** Accordingly, the State's cross-motion for summary judgment is **GRANTED** with respect to Claim 17.

D. Claim 10 for Misrepresentation under the Restatement and General Principles of Federal Contract Law

Pauma moves for summary judgment on its Claim 10 for misrepresentation. Specifically, Pauma seeks to rescind its 2004 Amendment based on the State's representations about the number of gaming device licenses available to the beneficiary gaming tribes.[21] To rescind the 2004 Amendment based on

[21] Pauma also seeks reformation of the 2004 Compact's (continued...)

contractual misrepresentation in this case, Plaintiff Pauma must establish that: (1) the State made a misrepresentation; (2) the misrepresentation was either a fraudulent or a material misrepresentation; (3) the misrepresentation induced Plaintiff to make the contract; and (4) Plaintiff was justified in relying on the misrepresentation. *See* Restatement § 164; *Kungys v. U.S.*, 485 U.S. 759, 787-88 (1988) (Stevens, Marshall and Blackmun concurring opinion) ("A material misrepresentation, that is, a statement not in accordance with the truth that a reasonable person would attach importance to in deciding whether to enter a contract, may form the basis for voiding or reforming the contract, but only if the contracting party in fact relied on the statement in entering the contract."); *Solar Turbines Inc. v. United States,* No. 96cv5088, 1997 WL 291971,*4 (Fed. Cir. 1997) ("[a] misrepresentation of material fact inducing another to enter into a contract may render that contract void, *ab initio*, voidable, or reformable"). "It is well established that misrepresentation of material facts may be the basis for the rescission of a contract, even where the misrepresentations are made innocently, without knowledge of their falsity and without fraudulent intent." *Barrer v. Women's Nat'l Bank*, 245 U.S. App. D.C. 349, 354, 761 F.2d 752, 757-58 (1985).

(…continued)
terms based on the State's misrepresentation concerning the 1999 Compact's terms. However, the Court is not persuaded that reformation is appropriate here, where the plaintiff is challenging the validity of a subsequent contract based on the interpretation of a prior contract, and the subsequent contract lacks the disputed terms.

As to the first element, the Restatement defines a misrepresentation as "an assertion that is not in accord with the facts." § 159. Pauma contends that the State made misrepresentations concerning the Pool consisting of 32,151 licenses. For example, on December 30, 2003, the State wrote to Pauma that "[t]he demand for licenses exceeded the available supply and it was therefore not possible to completely fill the Tribe's request for gaming device licenses." [Doc. No. 209, Exs. 73-74.] This statement was false. In making such statements, the State incorrectly under-calculated the statewide limit on licenses from the Pool available pursuant to the 1999 Compact. The State's calculations resulted in a limit of 32,151 licenses, whereas the actual limit was 40,201. *See Colusa II* at 1081-82.

The State argues that its representations about the size of the Pool were true from 2002-2009 and cross-moves for summary judgment on the vast majority of Pauma's claims based on this argument. The State reasons that the Pool purportedly did not consist of more licenses until the Ninth Circuit's *Colusa II* opinion in 2010. However, the text of *Colusa II* alone refutes the State's argument. *See Colusa II* at 1082 (concluding that "40,201 licenses ***were authorized*** for distribution statewide through the license draw process") (emphasis added).[22] *Colusa II* applies retroactively. Thus, Pauma has shown that

[22] The State's argument that *Colusa II* may only be applied prospectively also violates the doctrine of retroactivity. *See In re Debbie Reynolds Hotel & Casino, Inc.*, 255 F.3d 1061, 1066 (9th Cir. 2001).

the State made representations about the size of the Pool that were false when made.[23]

The second element of Plaintiff's misrepresentation claim is satisfied if the State's misrepresentations about the size of the Pool were either fraudulent or material. In contract law, a misrepresentation is material if "it would be likely to induce a reasonable person to manifest his assent, or if the maker knows that it would be likely to induce the recipient to do so." Restatement § 162; *Kungys*, 485 U.S. at 787-88 ("A material misrepresentation, that is, a statement not in accordance with the truth that a reasonable person would attach importance to in deciding whether to enter a contract").

The State argues its alleged misrepresentations were immaterial because they concern the size of the Pool under the 1999 Compact and do not affect the substance of the 2004 Compact, which did away with the limit on licenses. However, materiality is easily established here. The 1999 Compact provided Pauma with the opportunity to conduct class III gaming by giving it access to the Pool of 40,201 licenses. The State deprived Pauma of this important access through misrepresentations that the Pool was empty when it was not. [*See, e.g.*, Doc. No. 205, Ex. 50 at P194; *id.*, Ex. 61 at P220; *id.*, Ex. 73 at P274-75; *id.*, Ex. 74 at P276 ("demand for licenses exceeded the available supply").] Such misrepresentations were material as they would lead a reasonable tribe to agree to a new compact in order to get licenses, and the State acknowledged as much when it selected "the low-end" license cap number, stating:

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[23] Accordingly, to the extent it hinges on the retroactive application of *Colusa II*, the State's cross-motion is **DENIED**.

"undoubtedly, agreement among all the parties to the Compacts [on the cap] can only be achieved in the renegotiation" of the compact in March 2003. [*Id.*; Doc. No. 205, Ex. 48 at P174; *id.*, Ex. 49 at P181 ("the statewide limit. . . . is a subject for renegotiation in March"), P189.] There is no genuine dispute of material fact as to this element.

Moving to the third element, a misrepresentation induces a party's manifestation of assent "if it substantially contributes to his decision to manifest his assent." Restatement § 167. There is ample evidence that the State's misrepresentations substantially contributed to Pauma's decision to enter into the 2004 Compact. *[See, e.g.*, Doc. No. 207, Ex. 57; Doc. No. 208, Exs. 58–59, 69; Doc. No. 211, Exs. 89-90.] The State argues there are genuine issues of fact as to materiality and inducement. In support, the State puts forth evidence showing that Pauma entered into the 2004 Compact with the goal of obtaining 2500 licenses by the year 2006 (500 more licenses than allowed for under the 1999 Compact). [*See* Doc. No. 217-8 , Ex. OO at 6.] At best, this evidence shows there may have been additional facts motivating Pauma to enter into the 2004 Amendment. Taking all inferences in the State's favor, the Court is not persuaded that this evidence raises any genuine issue as to materiality or inducement.

The fourth and final element of misrepresentation is whether Plaintiff was justified in relying on the misrepresentations. Here, the evidence shows that Pauma knew that the Pool formula was ambiguous, and therefore, subject to more than one reasonable interpretation. However, and as set forth above, the evidence also shows that

the quasi-trust responsibility of selecting a reasonable interpretation implicitly rested with the State given its participation in each of the compact negotiation sessions, its receipt of confidential information from the compacted tribes for purposes of the draw process, and its RSTF reporting responsibilities with respect to accounting. [*See, e.g.*, Doc. No. 205, Ex. 38 at P130; Doc. No. 217-1, Ex. A at 34, § 7.4.3(b)(I).] Further, the State, through Executive Order D-31-01, expressly accepted this quasi-trust responsibility. [Doc. No. 217-7, Ex. MM at 86 (CGCC "shall ensure that the allocation of machines . . . does not exceed allowable number of machines as provided in the Compacts and shall determine whether the machine license draw(s) complies with the limitations of the Tribal-State Gaming Compacts").] There is no evidence that Pauma doubted the reasonableness of, or authority for, the State's Pool size calculation. Therefore, knowing that the State was uniquely positioned and legally bound to reasonably interpret the Pool formula, Pauma was justified in relying on the State to select which reasonable interpretation should determine the Pool size.

The State argues that Pauma entered into the 2004 Amendment assuming the risk that a later court decision might result in more licenses being available under the 1999 Compact. However, *Guthrie v. Times-Mirror Co.*, 51 Cal. App. 3d 879, 885 (1975) is the only authority cited for this argument, and *Guthrie* deals with assumption of the risk in the context of a mistake claim, not misrepresentation. As a result, the Court declines extend *Guthrie's* assumption of the risk analysis to Pauma's claim for misrepresentation.

In any event, the State's argument is premised on its mischaracterization of *Colusa II* as a revision of the State's purportedly then-sound judgment with respect to the Pool size. The State's judgment was never sound. As stated throughout, the Ninth Circuit found that the State adopted an interpretation that was not reasonable as it was incompatible with the language of the 1999 Compact – it ignored certain portions of it. The State decided on a Pool size of 32,151 licenses, and the Ninth Circuit found that "the language of the License Pool Provisions is not reasonably susceptible to an interpretation that would produce a license pool of 32,151." *Colusa II*, 618 F.3d at 1079. Pauma was not on notice of the facts that led the Ninth Circuit to conclude that the State failed to select a reasonable interpretation of the Pool formula until April 22, 2009. As to this fact, there is no genuine dispute.

For example, and as stated in the Court's statute of limitations analysis, there is no evidence that, by 2004, Pauma knew or even could have known the information revealed at the CGCC's June 19, 2002 meeting. Attendees of the CGCC's June 19, 2002 meeting learned of certain non-public information used for the formula and the State's rationale for concluding that the Pool comprised of 32,151 total licenses. This meeting revealed the facts that led the Ninth Circuit to conclude that the State failed to select a reasonable interpretation of the Pool formula. There is no evidence that this information was made available to Pauma, published, or otherwise in the public realm before 2009. Further, there is no evidence from which this Court can infer that this information would have been made available to Pauma upon request.

Pauma knew that other tribes sued the State seeking larger Pool sizes, but there is no evidence that Pauma knew of facts, such as the information disclosed in the June 19 meeting, that should have put it on notice that the State's Pool size conclusion was ***not*** the product of a reasonable interpretation of ambiguous terms. The Court finds that it was reasonable for Pauma to trust that the State's exercise of its quasi-trust responsibility in calculating the Pool size was the product of a reasonable interpretation of ambiguous terms. *See* Restatement § 168 (2) ("If it is reasonable to do so, the recipient of an assertion of a person's opinion as to facts not disclosed and not otherwise known to the recipient may properly interpret it as an assertion (a) that the facts known to that person are not incompatible with his opinion, or (b) that he knows facts sufficient to justify him in forming it."). To reiterate, while the Pool formula contained facially ambiguous language, there is no evidence that Pauma should have been aware that the State's calculation was "not reasonable" (*see Colusa II*, 618 F.3d at 1080) or that the State ever communicated the methodology for, or details of, its calculation to Pauma or the public at large.

The Court finds there to be no genuine issue of material fact regarding justifiable reliance. Pauma was justified in relying on the State to determine the cap on licenses in the Pool.

Therefore, Pauma's motion for summary judgment on its Claim 10 for misrepresentation is **GRANTED** in so far as Pauma is entitled to complete rescission of the 2004 Amendment. Defendants' cross-motion with respect to Claim 10 is **DENIED**.

E. Claims 1-6 and 11-16

As Pauma is entitled to rescission of the 2004 Amendment, the Court declines to address the remaining Claims in the cross-motions for summary judgment at this time. Therefore, the cross-motions are **DENIED WITHOUT PREJUDICE** with respect to Claims 1-6 and 11-16.

IV. CONCLUSION

For the reasons stated above, Pauma's motion for summary judgment [Doc. No. 197] is **GRANTED IN PART** as to Claim 10, and the State's cross-motion [Doc. No. 217-13] for summary judgment is **DENIED** as to Claim 10. Pauma is entitled to rescission of the 2004 Amendment and judgment on its Claim 10 for misrepresentation under the Restatement (Second) of Contracts and general principles of federal contract law.

The State's cross-motion is **GRANTED** as to Claims 7-9 and 17, and Pauma's motion is **DENIED** as to claims 7-9 and 17.

Further, Defendants' affirmative defenses based on statute of limitations grounds are **DENIED**.

Finally, for the claims that the Court declines to address on the merits (Claims 1-6 and 11-16), the parties' cross-motions on these unaddressed claims are **DENIED WITHOUT PREJUDICE.**

A hearing before the undersigned on Pauma's request for restitution of, or credit for, its heightened revenue sharing payments under the 2004 Amendment is hereby set for **April 30, 2013** at **3:00**

p.m. The parties are ordered to meet and confer and submit a joint proposal not to exceed 20 pages on or before **April 23, 2013** as to the form of the restitution/credit claim.

Finally, on or before **March 22, 2013**, the parties shall contact Magistrate Judge Mitchell D. Dembin to schedule a settlement conference.

IT IS SO ORDERED.

DATED: March 18, 2013

CATHY ANN BENCIVENGO
United States District Judge