09-16942

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CACHIL DEHE BAND OF WINTUN INDIANS OF THE COLUSA INDIAN COMMUNITY, a federally recognized Indian Tribe,

Plaintiff-Appellee,

PICAYUNE RANCHERIA OF THE CHUKCHANSI INDIANS, a federally recognized Indian Tribe,

Plaintiff-Intervenor-Appellee,

v.

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

Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of California
No. 04-2265 FCD KJM
Frank C. Damrell, Jr., Judge

COLUSA'S OPPOSITION BRIEF

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INTRODUCTION AND SUMMARY OF ARGUMENT

On the parties' cross-motions for summary judgment, the district court ruled in favor of Plaintiffs,[1] declaring that their identical 1999 Compacts with the State of California[2] authorize the issuance of 42,700 gaming device licenses – 10,549 more licenses than defendant California Gambling Control Commission ("CGCC") had calculated. The parties' respective motions, each premised on the non-existence on any material questions of fact, required the district court to interpret an admittedly convoluted formula, undisputedly drafted by the State's[3] compact negotiators, set forth in §4.3.2.2(a)(1) of the Compact. The parties offered different interpretations of the contested language, but the court held that only the one advanced by Colusa as an alternative to a previously-offered interpretation,

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[1] Cachil Dehe Band of Wintun Indians of the Colusa Indian Community ("Colusa"), and plaintiff in intervention Picayune Rancheria of Chukchansi Indians ("Picayune").

[2] The Compacts were executed on September 10, 1999, ratified by the California Legislature the same day, and took effect on May 16, 2000, upon publication in the Federal Register of notice that the Compacts had been approved by the Secretary of the Interior. In all, 61 Tribes entered into the 1999 Compact with the State of California. To distinguish these Compacts from subsequent new or amended Compacts with other tribes containing substantially different terms, the Compacts at issue in this action are referred to as "1999 Compacts."

[3] Except where otherwise indicated, references to "the State" encompass defendants the State of California, the California Gambling Control Commission, and Governor Arnold Schwarzenegger

"most accurately follows the language of [the formula], giving the words their ordinary meaning," whereas the State's "formulation[] force[s] a more strained reading of the Compact language." Moreover, the formulation adopted by the district court vindicates the purpose of the formula "as clarified by [the State's] counsel at oral argument." Thereafter, the district court entered partial final judgment ordering the CGCC to make those additional licenses available in a license draw open to *all* eligible California tribes with 1999 Compacts, not just to Plaintiffs.[4]

To cast doubt on the district court's decision, the State's Opening Brief offers up a miasma of what the State claims are disputed questions of fact that should have precluded entry of summary judgment. Yet, as the undisputed evidence shows, and the district court held, the State's evidence was offered in support of an interpretation of the contested formula to which the language was not susceptible. Although the formula may have been characterized as ambiguous, only one interpretation was supported by the undisputed material facts. the district court properly determined that neither the State nor the tribes had presented any disputed extrinsic evidence relevant to clarifying the formula's meaning. Thus, the

[4] The 1999 Compact caps the number of gaming devices any Tribe may operate at 2000; only Tribes operating fewer than that amount are eligible to draw a gaming device licence. (ER 466 [§4.3.2.2(a)].).

district court did not impermissibly resolve material questions of fact against the State; rather, the district court found that State had not presented evidence relevant to clarifying the formula's meaning and, thus, had not raised any disputed issues of material fact. Under these circumstances, the district court properly ruled that Plaintiffs were entitled to judgment as a matter of law.

The district court's Order opening the license draw to tribes that were not parties to this litigation was no less appropriate. To have allowed done otherwise would have been inconsistent with both this Court's previous decision in *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community, v. California,* 547 F.3d 962 (9th Cir. 2008) ("*Colusa I*"), and the Compact.

For all of the reasons set forth below, the Court should affirm the district court's judgment in its entirety.[5]

UNDISPUTED FACTS RELEVANT TO SUMMARY JUDGMENT

The only facts material to the interpretation of Compact §4.3.2.2(a)(1), which were not in dispute in the district court and are not disputed on appeal, are as follows:

1. Compact §4.3.1 states:

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[5] Other issues were raised on the parties' cross-motions for summary judgment, but those are not at issue on this appeal.

The Tribe may operate no more Gaming Devices than the larger of the following:

(a) A number of terminals equal to the number of Gaming Devices operated by the Tribe on September 1, 1999; or

(b) Three hundred fifty (350) Gaming Devices. (ER 465.)

2. Compact §4.3.2.2(a)(1) states:

The maximum number of machines that all Compact Tribes in the aggregate may license pursuant to this Section shall be a sum equal to 350 multiplied by the number of Non-Compact tribes as of September 1, 1999, plus the difference between 350 and the lesser number authorized under Section 4.3.1. (ER 466.)

3. "Non-Compact Tribes" is defined in Compact §4.3.2(a)(1): "Federally-recognized tribes that are operating fewer than 350 Gaming Devices are 'Non-Compact Tribes.'" (ER 465.) Even if a tribe is a party to a 1999 Compact, it is a Non-Compact Tribe as long as it operates fewer than 350 gaming devices.

4. As of September 1, 1999, there were 84 Non-Compact Tribes (defined as tribes operating fewer than 350 gaming devices). (ER

392.)[6]

5. Of the 84 Non-Compact Tribes, 68 operated zero gaming devices; the other 16 tribes operated a total of 2,849 gaming devices. (ER 392; Supplemental ER ("SER") 106:18-23.)

6. As of September 1, 1999, there were 23 Tribes operating more than 350 gaming devices; in total, these tribes operated 16,156 gaming devices. (ER 73:7-10, SER 220.)

7. 39 Tribes that were operating fewer than 350 gaming devices as of September 1, 1999, executed the 1999 Compact. (ER 73:10-12; SER 220-21, 224.)

8. Compact §4.3.2.2(a)(1) was drafted by William Norris and Shellyanne Chang, Governor Gray Davis's lead negotiators for the 1999 Compact. (ER 183:7-20; 255:13-20; SER 73:17-18.

STANDARD OF REVIEW

The district court's grant of summary judgment is to be reviewed de novo. *U.S. Cellular Inv. Co. v. GTE Mobilnet, Inc.*, 281 F.3d 929, 934 (9th Cir. 2002).

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[6] Technically, as of September 1, 1999, no tribe had entered into a compact authorizing the operation of gaming devices or house-banked card games. However, the district court determined that the formula was not reasonably susceptible to an interpretation that would include all of the State's tribes as an element of the formula.

This Court may affirm that judgment on any basis supported by the record. *Satey v. JPMorgan Chase & Co*., 521 F.3d 1087, 1091 (9th Cir. 2008). "[T]he determinations of whether contract language is ambiguous, and [w]hether the written contract is reasonably susceptible of a proffered meaning" also are reviewed de novo. *U.S. Cellular*, 281 F.3d at 934 (citations and quotations omitted). The district court's evidentiary rulings are to be reviewed for abuse of discretion "even when the rulings determine the outcome of a motion for summary judgment." *Domingo ex rel. Domingo v. T.K*., 289 F.3d 600, 605 (9th Cir. 2002) (citations omitted).

ARGUMENT

A. The District Court Correctly Held, as a Matter of Law, That the Formula Set Forth in Compact §4.3.2.2(a)(1) Authorizes the Issuance of 42,700 Licenses.

The State contends that questions of fact concerning the meaning of §4.3.2.2(a)(1) should have precluded a determination as a matter of law that the Compact authorizes the issuance of 42,7000 Gaming Device licenses. As explained below, the facts material to interpreting the formula were undisputed. Consequently, the court properly granted summary judgment in Colusa's favor.

Where, as here, a party files a properly supported motion for summary judgment, the adverse party must "set forth specific facts showing there is a

genuine issue for trial" – i.e., evidence from which a jury reasonably could return a verdict in the non-moving party's favor. Fed. R. Civ. Proc. 56; *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 250 (1986). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50. Summary judgment on a question of contract interpretation is appropriate where the language is unambiguous. *So. Cal. Gas. Co. v. City of Santa Ana*, 336 F.3d 885, 888 (9th Cir. 2003). "The interpretation of a contract must give effect to the mutual intent of the parties . . . at the time the contract was formed." *Northrop Grumman Corp. v. Factory Mutual Ins. Co*., 563 F.3d 777, 783 (9th Cir. 2009) (citing Cal. Civ. Code §1636 and California Supreme Court case law). "[T]he relevant intent is objective – that is, the objective intent as evidenced by the words of the instrument, not a party's subjective intent." *Badie v. Bank of America*, 67 Cal.App.4th 779, 802 n.9 (1998). "Where one interpretation can reasonably reconcile the language of each part of a contract and another interpretation cannot, it is safe to say that the contract is not reasonably susceptible to the second interpretation. (*See* Civ. Code §§1641, 1644.)" *Pacific State Bank v. Greene*, 110 Cal.App.4th 375, 387 (2003).

Here, the parties to the Compact intended to limit the total number of gaming devices that could be operated under all 1999 Compacts. That limit

necessarily reflects the number of devices that tribes could operate without licenses as well as the size of the license pool (from which tribes would draw to operate additional gaming devices). The number of licenses in the pool is calculated in accordance with the formula set forth in §4.3.2.2(a)(1). The formula quantifies the total number of available licenses as the sum of two numbers:

> [1] 350 x Number of Non-Compact tribes as of September 1, 1999; and
>
> [2] the difference between 350 and the lesser number authorized under §4.3.1

There was and is no dispute that as of September 1, 1999, there were 84 Non-Compact tribes (*i.e.*, tribes operating fewer than 350 gaming devices); thus, the product of first half of the calculation, 350 x 84 = 29,400 is readily ascertainable and undisputed. The parties' disagreement turns on the meaning of "the lesser number authorized under Section 4.3.1." Compact §4.3.1 provides that a Tribe,

> may operate no more Gaming Devices than the larger of the following:
>
> (a) A number of terminals[7] equal to the number of Gaming

[7] Although §4.3.1 uses the term "terminals," the Compact uses multiple terms to refer to gaming devices, including "terminals," "Gaming Devices" and "machines. For the purpose of interpreting §4.3.2.2(a)(1), the parties and the district court have interpreted "terminals" as synonymous with "Gaming Device"

> Devices operated by the Tribe on September 1, 1999; or
> (b) Three hundred fifty (350) Gaming Devices.

For the district court, calculating the "lesser number authorized" by this Section proved relatively easy, because the parties agreed on the critical numbers. First, the district court calculated the number of machines authorized by §4.3.1(a), consisting of the machines being operated by Tribes that were operating more than 350 gaming devices as of September 1, 1999.[8] The parties agree that on September 1, 1999, 23 Tribes were operating more than 350 Gaming Devices, and thus were within the ambit of subsection (a), and that in the aggregate, these 23 Tribes operated a total of 16,156 machines. (ER 73:7-9; SER 220-21, 224.)

To calculate the number of devices authorized by subsection (b), the district court began by ascertaining the number of Tribes with 1999 Compacts that did not operate more than 350 devices as of September 1, 1999. The undisputed evidence showed that as of this date, there were 39 such tribes; 16 had been operating at least one machine, and 23 had operated zero machines. (ER 73:10-12; SER 220-

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and "machines," and no party argues for a different meaning on appeal.

[8] Subpart (a) concerns only tribes that operated more than 350 Gaming Devices because the Section as a whole authorizes tribes to operate the *greater* of either the number of machines in (a) or the fixed number of 350 machines in (b). Thus, (a) could only be greater than (b) when the number it authorizes exceeds 350.

21, 224.) Finding that "by the plain language of the Compact, all of these tribes were authorized to operate at least 350 Gaming Devices," the district court multiplied 350 times 39, yielding a product of 13,650 devices *authorized* by subsection (b). (ER 73:12-14.) Comparing 13,650 to 16,156 yielded the "lesser number authorized" by §4.3.1 From there, it was simple to calculate "the difference" between 350 and 13,650: 13,300. Adding this number to 29,400 yielded an authorized license pool of 42,700. (ER 73-74.)

The district court considered the other interpretations of §4.3.2.2(a)(1) advanced by the parties, but rejected them because none could be reconciled with all of the elements of §4.3.2.2(a)(1) or the formula's accepted purpose. For example, the State argued that only the 16 tribes that operated at least one but not more than 350 machines as of September 1, 1999, were tribes *authorized* to operate at least 350 machines for purposes of interpreting the "lesser number authorized" language; the 23 tribes that operated zero machines on September 1, 1999, and subsequently entered into the Compact were irrelevant to the calculation. (ER 244:3-17.) But as the district court held, this interpretation cannot be reconciled with the plain language of Section 4.3.1, which plainly states that "The Tribe may operate" at least 350 gaming devices. (Compact §4.3.1)."

(ER 73:12-14.)[9] The Compact does not make this authorization contingent on operating a certain number of machines, and the court refused to infer such a qualification.

While the district court's analysis of the Compact's language was sufficient to find for Colusa as a matter of law, the court's determination was buttressed by the purpose of the second half of the equation. As explained by the State's counsel at oral argument on the summary judgment motion, that portion of the formula is intended to account for the "unused entitlement" – *i.e.*, the portion of a Tribe's authorized allotment that was not in operation. (ER 68-71.) As discussed above, the State insisted that only tribes operating some machines, but no more than 350, should be included in the calculation; those tribes that had signed Compacts but were not yet operating any machines were to be ignored. When questioned at the hearing about this dubious proposition – one the district court found at odds with the "plain language" of the Compact (ER 74:10) – the State's counsel offered no reasonable basis for distinguishing between tribes operating some and none of their base entitlements of 350 machines. Between the Compact's underlying

[9] The district did confine its skepticism to the State, as it rejected Colusa's argument that non-Compact tribes that never executed a Compact should be accounted for in §4.3.1(b), because a Tribe without a Compact is not "authorized" by the Compact to operate any machines. (ER 74:12-19.)

policy and plain language, "in order to fully account for these unused authorized devices, the equation should take into account hose tribes who signed a compact but were not operating any licenses." (ER 75:9-11.) The State's suggested interpretation doesn't do that; "[Colusa's] alternative formulation does." (ER 75:12.)

In short, the district court properly granted summary judgment on the meaning of §4.3.2.2(a)(1), despite its less-than-clear phrasing, because the relevant facts necessary were undisputed, and only the interpretation supported by Colusa could be reconciled with all of the formula's language and purpose. Therefore, this Court should affirm the district court's judgment that the 1999 Compact authorizes issuance of 42,700 licenses.

B. The District Court Did Not Impermissibly Resolve Issues of Material Fact in Colusa's Favor – Or At All.

In its January 20, 2009 Motion for Partial Summary Judgment, the State asserted that "no triable issues of fact remain" that would prevent the summary adjudication of the size of the license pool. On appeal, however, the State contends that it submitted evidence from which a trier of fact[10] could conclude that Colusa shared Governor Davis's alleged intention that the Compact would impose

[10] A jury trial was waived. (ER 107: 6 ["Trial will be to the court."].)

a cap of 44,798 Gaming Devices (including those already in operation). According to the State, this evidence raised a question of disputed fact that should have precluded summary judgment. As explained below, however, the district court correctly found that the parties' extrinsic evidence was not helpful in interpreting §4.3.2.2(a)(1), and thus properly proceeded to resolve the matter on summary judgment.

As an initial matter, the State's argument rests on the dubious premise that evidence of the parties' respective subjective intention or understanding concerning the meaning of "the lesser number authorized" is relevant to the interpretation of the disputed language. In fact, such evidence likely is irrelevant and inadmissible because neither the Governor (or his negotiators) nor the tribal chairs who signed the Compacts actually bound the parties to the Compacts. The State bound itself to the Compacts only through the Legislature's enactment of a statute, (*see* Cal. Gov. Code §12012.25) that ratified the Compacts; the respective Tribes bound themselves to the Compacts through the adoption of their own resolutions. The Compacts did not take effect until the Assistant Secretary of the Interior for Indian Affairs approved them and caused a notice to that effect to be published in the *Federal Register* on May 16, 2000. 65 Fed. Reg. 31189 (May 16, 2000); 25 U.S.C. §2710(d)(3)(b) (describing the publication requirement). Thus,

if an entity's intention is relevant, it is the California Legislature's. But the State did not offer any evidence concerning either the Legislature's[11] or the Secretary of the Interior's understanding or intent regarding the total number of licenses authorized by the 1999 Compacts, and because the intent of the Legislature and Assistant Secretary cannot be discovered, *see United States v. Morgan*, 313 U.S. 409 (1941) (establishing the privilege preventing deposition of high-ranking government officials); *Kyle Engineering Corp. v. Kleppe*, 600 F.2d 226, 231 (9th Cir. 1979), such evidence would be inadmissible in any event.

Second, even if the relevant intentions are those of the signatories to the Compact,[12] to the extent that the formula in §4.3.2.2(a)(1) can be said to be ambiguous, rather than merely convoluted or opaque, the district court properly applied California and federal law governing the interpretation of contractual

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[11] In fact, there is no legislative history concerning the 1999 Compacts, as they were ratified without hearing the same day the parties signed them.

[12] The State has not proffered direct evidence of Governor Davis's own statement of his intent, just the hearsay and speculative statements of his negotiators about Davis's intentions. Colusa objected to much of this evidence (*see* SER 43-55, 125-131), but the district court did not expressly rule on these objections. (ER 34 n.2.) To the extent that this Court determines that any of that objected-to evidence supports anything other than an affirmance of the summary judgment order, Colusa asks that this Court sustain its objections on appeal. In any case, the State has repudiated the positions attributed to Davis by his negotiators since at least June, 2002, so their probative value as to the issues raised on appeal is dubious. (ER 391-95.)

ambiguity. "That the parties dispute a contract's meaning does not render the contract ambiguous; a contract is ambiguous if reasonable people could find its terms susceptible to more than one interpretation." *Doe 1 v. AOL LLC*, 552 F.3d 1077, 1081 (9th Cir. 2009) (per curiam) (citations and quotations omitted). And where such an ambiguity exists, the court must admit the extrinsic (parol) evidence of the parties' intended meaning only if it is (1) "relevant" to prove (2) "a meaning to which the language of the instrument is reasonably susceptible." *U.S. Cellular*, 281 F.3d at 938 (citing *Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co.*, 69 Cal.2d 33, 37 (1969)); *see also Wagner v. Columbia Pictures Indus., Inc.*, 146 Cal.App.4th 586, 589-92 (2007) (holding that extrinsic evidence was not admissible because it supported an interpretation to which the contract was not susceptible).

"The mutual intention to which the courts give effect is determined by objective manifestations of the parties' intent, including the words used in the agreement, as well as extrinsic evidence of such objective matters as the surrounding circumstances under which the parties negotiated or entered into the contract; the object, nature and subject matter of the contract; and the subsequent conduct of the parties. *People v. Shelton*, 37 Cal.4th 759, 767 (2006) (citations omitted). Where a party proffers extrinsic evidence for an interpretation of an

ambiguous contract provision to which the language is not susceptible, the court must not admit the evidence for that purpose. *In re Bennett*, 298 F.3d 1059, 1065 (9th Cir. 2002) (holding, in affirming summary judgment under California law, that the court properly excluded parol evidence offered for meaning to which contract provision was not susceptible); *In re Smith*, 148 Cal.App.4th 1115, 1123 (2007) (affirming decision to exclude extrinsic evidence because contract language was not susceptible to desired interpretation).

Here, to be sure, the interplay of Sections 4.3.2.2(a)(1) and 4.3.1 is not a paragon of clarity, and the parties advanced (and sometimes retracted) significantly different interpretations. But the district court was not obligated – indeed, was not permitted – to admit the State's extrinsic evidence unless the disputed Compact language was reasonably susceptible to the State's interpretation. And the district court held that it was not.[13]

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[13] As additional evidence of the supposed "gravity of the court's error" in granting summary judgment, the State again attempts to inject into this action an unauthenticated September 8, 1999 letter purportedly from Scott Crowell to William Norris – a document that languished in the State's possession for more than two, and possibly nearly ten years prior to the February 20, 2009 hearing on the cross-motions for summary judgment, and was not produced either in response to Colusa's discovery requests or in support of the State's motion for summary judgment. Rather, the State waited until it submitted its Motion for Reconsideration on June 19, 2009 to attempt to introduce the letter. (Opening Br. at 43). In denying the State's Motion for Reconsideration, the district court held that the letter was neither newly discovered nor material to the issues raised on

The record provides ample support for the district court's conclusion. Again, the State's position on appeal is that it introduced evidence from which a reasonable jury could have concluded that the parties mutually understood that the Compact authorized no more than 44,798 slot machines (Opening Brief at 36, 40). Yet, that interpretation has long been rejected by defendant CGCC and is subverted by the State's own evidence. One day after the Compacts were signed, one of Governor Davis's two chief negotiators, Shellyanne Chang, helped prepare a press release purporting to state the Governor's understanding that the Compact authorized 23,450 licenses and a total of 44,448 gaming devices. (ER 256-58.). In May, 2000, William Norris (Governor Davis's chief negotiator in the Compact negotiations) and Peter Siggins (Chief Deputy Attorney General) sent a letter on behalf of the State to Sides Accounting explaining that the Compact authorized 45,206 total machines, 15,400 of which would come from the license pool. (SER

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summary judgment. (ER 15-32.). The State does not contest the district court's rejection of the letter, and for good reason: such a challenge would fail on the merits as the district court's judgment was, for the reasons discussed, not an abuse of discretion. *See Domingo ex rel. Domingo v. T.K.*, 289 F.3d 600, 605 (9th Cir. 2002) ("We review the district court's evidentiary rulings for abuse of discretion even when the rulings determine the outcome of a motion for summary judgment."). Indeed, the State is fortunate that the district court did not impose sanctions on the State or its counsel, given that the State's sworn representation that the letter's existence had been unknown to the State until June 15, 2009 was demonstrably false. SER 14-25.

220-21.) Thus, not even a year removed from the execution of the Compacts, the Governor was expressing his understanding that the same Compact authorized both 15,400 and 23,450 licenses and authorized the operation of 44,448, and 45,206 Gaming Devices.

Two years later, the staff for defendant CGCC – the State agency that administers the license-draw process and a defendant in this litigation – offered its own interpretation of the license pool formula. The CGCC admitted that "ambiguity in these provisions has produced a number of different interpretations" and that the license pool formula "is sufficiently obscure that, undoubtedly, agreement among all the parties to the Compact can only be achieved" by renegotiation the Compacts. (ER 391-92.) The CGCC then expressly repudiated as inconsistent with the plain meaning of the Compact the earlier position(s) espoused by Norris (ER 394 & n.8.), before concluding that the Compact created a pool of 32,151 licenses.[14] (ER 395.) The State has maintained this latest interpretation since 2002.

It is self-evident that the State's current position cannot be squared with the

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[14] Adding to the confusion pervading the divergent analyses of the gaming machine and license allowances, the CGCC Report states that Norris had calculated 45,556 machines in his May, 2000 letter, rather than the 45,206 he actually calculated. (ER 391 fn.3.)

ones it claims the parties to the Compact espoused around the time the Compacts were executed. Other than the number of digits, 32,151 bears no resemblance to 23,450 or 15,400. Moreover, it is undisputed that as of September 1, 1999, tribes were already operating 19,005 gaming devices[15] – machines the tribes could continue to operate under the Compact without licenses. Thus, if the State's total of 32,151 licenses were correct – the district court explained at length why it is not – then the State, in effect, advocates yet another interpretation of the Compact that would authorize the operation of more than 51,000 Gaming Devices. This, of course, is 7,000 more than the 44,798 cap that the State says the parties had in mind when they executed the 1999 Compact.

The State's inconsistent interpretations of §4.3.2.2(a)(1) speaks for themselves. To say the least, it is difficult to reconcile this position with the State's contention on appeal either that the parties to the Compact mutually understood it to authorize 44,798 Devices. Nor can the 32,151 figure be reconciled with the 23,450 (number of licenses) that Ms. Chang said were authorized on September 10, 1999. It is no wonder, then, in considering the State's evidence that the Compact authorized 44,798 devices, that the district court observed: "Significantly, no party proffers an interpretation of the Compact that

[15] SER 220-24; 106:18-23.

substantiates this number [44,798 total licenses]." (ER 71 n.21.). In light of the demonstrated incoherence of the State's interpretation of the Compact over the years, the district court was entirely justified in finding that "the extrinsic evidence does not reveal a plain intent or meaning that was either mutually understood by the parties at the time the Compact was executed or followed by the parties in their subsequent relationships." (ER 72:10-14.)[16] No less justified was its determination that the Compact's formula for calculating the license pool could only be reasonably interpreted to authorize the issuance of 42,700 licenses. (ER 70-75.) Consequently, the evidence that the State now contends is disputed was not admissible to resolve any uncertainty about the size of the license pool, and thus did not preclude the district court's grant of summary judgment to Colusa and Picayune. *See In re Smith*, 148 Cal.App.4th at 1123 (allowing the admission of extrinsic evidence "as long as such evidence is not used to give the instrument a meaning to which it is not reasonably susceptible").

Finally, even if the State's proffered evidence were admissible, it supports

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[16] That is not to say that there was not agreement that there would be a statewide cap on the number of licenses, and on the wording of the formula by which that number would be ascertained. Indeed, precisely because the number of tribes that would actually sign a compact was unknown, the only way an exact number of either licenses or machines would be authorized by the Compact's formula could have been known at the time would have been by putting that number into the Compact, something the State chose not to do.

nothing more than the notion that Tribes knew that at various points during the negotiation process that Governor Davis intended that the Compact impose a statewide limit on the number of licenses that tribes may obtain to operate more machines than authorized by §4.3.1. That proposition is entirely consistent with Colusa's evidence that its Chairman interpreted the Compact's language to provide for 56,000 licenses. (ER 329, ¶17.] The State does not contend, nor could it, that Colusa ever *shared* the State's intention, ever *agreed* with the State's interpretation of the license pool formula, or ever even *knew* what the State claims to have had in mind prior to executing the Compact. Indeed, the State has proffered no evidence whatsoever that the Governor's negotiators ever explained their interpretation of the formula *to Colusa*, much less any evidence contradicting Chairman Mitchum's stated understanding of the Compact's formula at the time he executed the Compact.[17] Chairman Mitchum could have been aware of Norris's statements of the Governor's intention concerning the number of gaming machine licenses and still interpreted the opaquely drafted license pool formula – drafted by the State –

[17] The State argued that Colusa's failure to protest the pronouncements in the press release evidences its shared understanding of the formula, but the district court properly rejected that argument, not only because the State didn't present any evidence that Colusa – or any other tribe – ever was made aware of that press release, but also that Colusa *did* object to the State's interpretation of the formula when the issue arose with Colusa. (ER 72 n.22.)

to provide for more licenses than the State had earlier indicated.[18]

In sum, the State's evidence concerning the parties' supposed meeting of the minds (or lack thereof) did not actually conflict with Colusa's evidence and could not support a finding that the parties manifested an agreement about the meaning of the formula other than that there would be a statewide cap on the number of licenses that could be issued, and that the formula would be used to calculate that number. The district court did not err by granting summary judgment on the proper interpretation of the Compact's license pool provision, as no trier of fact could find that the language of §4.3.2.2(a) is reasonably susceptible of any of the State's various interpretations.[19]

C. Because the State Undisputedly Drafted the Ambiguous Formula, the District Court Properly Resolved Any Unresolved Ambiguity Against the State.

Under California law, contractual ambiguities that cannot be resolved by resort to standard rules of interpretation and consideration of relevant extrinsic evidence "should be interpreted most strongly against the party who caused the uncertainty to exist." Cal. Civ. Code §1654; *see also In re Emery,* 317 F.3d 1064,

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[18] From Colusa's perspective, the State may have changed its mind or carelessly drafted a provision that did not achieve its intended aim.

[19] *E.g.,* 44,448 (ER 257-58); 45,206 (SER 220-21); 51,156+ (19,005 + 32,151 (ER 395; SER 223).

1070 (9th Cir. 2003) ("The reference to sums 'owe[d],' in contrast, is at least ambiguous, and, under California law, must be construed against World Savings."); *City of Hope Nat'l Med. Center v. Genentech, Inc*., 43 Cal. 4th 375, 397-98 (2008) (affirming jury instruction to resolve ambiguities against the drafter even as "to contracts that are the result of negotiations").

Whether or not the State's negotiators ever talked with *any* tribal representatives about the language or meaning of the proposed formula prior to presenting the Compact to the assembled tribes on the evening of September 9, 1999, there was and is absolutely no dispute about the fact that the State drafted §4.3.2.2(a)(1). In its Opening Brief, the State recalls:

> the Governor's negotiators discussed the concept of the license pool concept with a group of tribal representatives *before drafting section 4.3.2.*2; the Governor's negotiators later presented a draft of Compact section 4.3.2.2, including subdivision (a)(1), to a group of tribal attorneys for comment. (Emphasis added.)

The declarations of Governor Davis's lead negotiators, William Norris and Shellyanne Chang, amply support this version of events. (ER 183 ¶16:10-11 (Norris); ER 255, ¶5 (Chang).) In light of this admission, the district court clearly was correct in finding that "it is undisputed that the State's negotiation team actually drafted the language in the Compact." (ER 75:17-18; *see also* ER 23:18-

24.)

What is surprising more than five years into this litigation (plus another year during the meet-and-confer process) is that the State now is attempting to disclaim the authorship that it heretofore has freely admitted. The State argues that the district court impermissibly ignored the State's "evidence concerning the negotiation of section 4.3.2.2(a)(1) – including evidence that Governor Davis' negotiators actually modified a portion of section 4.3.2.2 at the request of negotiating tribes." (Opening Br. at 45.) And on a related note, the State attempts to avoid the application of *contra proferentum* on the alleged ground that the Compact was the result of an arms-length negotiation between parties of equal bargaining power.

It is sufficient to say that even if *other* provisions of the Compact might have been the subject of vigorous negotiation, the *contra proferentum* principle would still apply to the interpretation of the ambiguous formula drafted by Norris and Change. *See City of Hope*, 43 Cal. 4th at 397-98 (affirming the jury instruction applying to a vigorously negotiated contract the canon that an ambiguity is to be construed against the drafter: "It may well be that in a particular situation the discussions and exchanges between the parties in the negotiation process may make it difficult or even impossible for the jury to determine which

party caused a particular contractual ambiguity to exist, but this added complexity does not make the underlying rule irrelevant or inappropriate for a jury instruction.") Moreover, even if Norris had modified the formula in response to at least some Tribes' requests, he remained the sole drafter relative to Colusa, which undisputedly had no role in drafting the formula. (ER 328, ¶15:15-21.)

Finally, it is impossible to ignore the obvious – and undisputed – truth that the State, as the drafter of §4.3.2.2(a)(1), could have proposed a specific number for the statewide cap on licenses, rather than devising a complicated formula seemingly intended more to obscure than clarify the Compact's intent. It didn't do so. If it had, no matter what objections the Tribes might have had about that specific number, it would have been clear to all what that number was going to be. Having created the uncertain language, whether or not it rises to the level of outright ambiguity, the State should not be allowed to turn the ambiguity to its advantage. *See Wallis v. Princess Cruises, Inc*., 306 F.3d 827, 838 (9th Cir. 2002) ("The problem with the contract terms . . . in this case may be that they are opaque rather than ambiguous. But opaqueness, like ambiguity, obscures the meaning of an instrument that in case of doubt . . . is to be taken against the party that drew it.") (quotations omitted). Accordingly, the district court properly resolved any

ambiguity in the formula against the State.[20]

D. The District Court Did Not Supply A Missing Term.

Raising an argument on appeal that it failed to present in the district court, the State contends that the district court erred by supplying a "missing" term to the Compact – the 42,700 licenses. The crux of the State's position is that the district court interpreted the formula in a way that varied so greatly from the parties' intentions as to call into question whether the parties should be deemed to have a contract at all.[21] The State could have raised this argument in its Supplemental Brief, which the district court allowed after the summary judgment hearing specifically so the parties could address the "alternative interpretation" of the

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[20] It also is worth noting – as the State knows full well – that the tribes had to accept what the State offered on the evening before the Legislature was due to adjourn for the year if they wished to avoid closure of their casinos by federal authorities. *See, generally, United States v. Santa Ynez Band of Chumash Mission Indians*, 33 F.Supp.2d 862, 865 (C.D.Cal. 1998) (permanently enjoining tribes from operating casinos in absence of compact with the State of California).

[21] Ratification of the Compacts by the Legislature and the tribes, and approval of the Compacts by the Assistant Secretary of the Interior (Indian Affairs), actually would render such an inquiry both futile and irrelevant, as the Compacts now are part of the laws of the State of California and of the United States and the unspoken, subjective intent of the parties' representatives would be irrelevant to ascertaining their intent. *Winet v. Price,* 4 Cal.App.4th 1159, 1166 (1992) (holding that evidence of a parties' subjective intent is "not competent extrinsic evidence, because evidence of the undisclosed subjective intent of the parties is irrelevant to determining the meaning of contractual language").

formula that Colusa had proposed and that the court eventually adopted. Had the State done so, the district court could have ordered additional discovery, an evidentiary hearing or some other means of uncovering relevant and admissible evidence about whether the parties would have entered into their Compact without a firm sense of the size of the license pool. But having opted not to raise the issue below, none of those things were done. Consequently, the State should not be permitted to raise it for the first time on appeal. *See Barrientos v. 1801-1825 Morton LLC*, 583 F.3d 1197, 1215-16 (9th Cir. 2009) (holding that an argument raised for the first time on appeal is deemed waived if it raises issues that the district court might have been able to address).

Fundamentally, the State's argument is premised on the unknown (or unknowable) intent of the respective parties concerning the size of the license pool. The Compact language is deemed to embody the intention of the drafter – here, the State. As the drafter, it was incumbent upon the State to provide an understandable provision, both so that the parties could (in theory) negotiate more freely and so disputes such as this one could be efficiently resolved. If one of the parties has to suffer because the primary evidence of the drafter's intention is unclear, that party must be the State, not tribes such as Colusa that would be locked into perpetual competitive inferiority relative to tribes that already had

larger casinos.

Because the extrinsic evidence was not helpful to the district court, it would not have been helpful to the trier of fact in a trial. Thus, the district court properly chose not to rely on it in interpreting the Compact, and was able to adopt an interpretation – 42,700 licenses – that was not only internally consistent and complete, but also was consistent with the overall intent of the Compact to permit tribes to attain economic self-sufficiency through well-regulated, prudently expanded tribal government Class III gaming.

E. The District Court Properly Opened the Draw to All Eligible Tribes, Rather Than Only Colusa and Picayune.

Sixty-one tribes ultimately executed 1999 Compacts. Although the Compacts constitute separate bilateral agreements, they are unified in one vital respect: all tribes are subject to the same statewide cap on available Gaming Device licenses, and the Compact gives every Tribe that does not already operate 2,000 machines an equal right to participate in any license draw.

The State argues at length that the district court exceeded its authority by ordering the State to open the October 5, 2009 license draw to all Tribes with 1999 Compacts that are not already authorized to operate the maximum 2,000 machines allowed under §4.3.2.2(a). There are two reasons why the State is wrong, and the

district court's order was correct.

First, the only authority that the State or the CGCC has to administer the draw process is derived from the Compact, as interpreted by the district court; indeed, the district court found in favor of the State and against Colusa on that issue: "The court holds that the Commission's appointment as Trustee of the RSTF carries with it the authority to administer the draw process." (ER 60:23-25.) The Compact, in §4.3.2.2(a)(3), specifies the general procedure to be followed by the administrator of the draw process in conducting rounds of license draws, including the manner in which draw priorities are to be assigned.[22] The Compact does not permit the administrator to exclude from participation in a round of draws any tribes that have 1999 Compacts but do not already operate 2,000 machines.

Second, the district court's order was completely consistent with the principle set forth in *Makah Indian Tribe v. Verity*, 910 F.2d 555, 559 (9th Cir. 1990), that,

> To the extent that the Makah seek relief that would affect only the future conduct of the administrative process, the claims set forth in ¶¶ 1.3.3 and 6.8.2 are reasonably susceptible to adjudication without the presence of other tribes. The absent tribes would not be prejudiced because

[22] The State has not appealed from the district court's determination that a tribe is entitled to continue drawing in its original draw priority tier until it has drawn as many licenses as permitted to be drawn in that priority tier.

> all of the tribes have an equal interest in an administrative process that is lawful.

This Court applied the same principle in *Colusa I*, when it specifically contemplated that a decision in Colusa's favor on the size of the statewide license pool would benefit any other tribe that does not operate 2,000 machines:

> On the other hand, those who intend to expand their gaming operations and compete with the dominant gaming tribes will gladly accept an increase in the size of the license pool created by the 1999 Compacts.
>
> ***
>
> Colusa seeks to enforce a provision of its own Compact which may affect other tribes only incidentally.

Colusa I, 547 F.3d at 971-72. Moreover, throughout its opinion in *Colusa I*, this Court referred to 1999 Compact*s*, and discussed the potential impacts on other tribes of resolution of Colusa's claims in the context of its determination that absent tribes were not necessary parties to the adjudication of Colusa's claims for relief as long as that relief did not extend to taking away any licenses previously issued.

Form insurance contracts are analogous to the identical 1999 Compacts that were signed by the State and various Tribes. As to such contracts, this Court has held that once a court has interpreted a form contract provision as a matter of law, that interpretation applies to the provision when it occurs in other substantially

identical contracts. *See Wetzel v. Lou Ehlers Cadillac Group Long Term Disability Insurance Program*, 189 F.3d 1160, 1167 (9th Cir. 1999).

Compact §4.3.2.2(a)(1) establishes that only one "license pool [is] created under the 1999 Compacts." *Colusa I*, 547 F.3d at 972 n.12. Having been ratified by statute (Gov. Code §12012.25), Colusa's Compact is part of the laws of the State of California; having been approved by the Assistant Secretary of the Interior – Indian Affairs, the Compact also is part of the laws of the United States.[23] Thus, there is only one statewide license pool, and the district court's determination of the size of that pool is binding unless and until this Court rules otherwise. Particularly in light of the fact that both the district court and this Court denied the State's application to stay implementation of the district court's judgment and order, any license draw conducted by the CGCC must make available the 10,549 additional licenses that the district court determined are authorized by the 1999 Compact, and must be open to all tribes that have 1999 Compacts but do not yet operate 2,000 machines.

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[23] Among other things, §8.2 of the Compact allocates criminal jurisdiction over gambling on the Colusa Reservation between the State, the Tribe and the United States, something that cannot be done simply by contract, or unilaterally by the Tribe. *Kennerly v. District Court*, 400 U.S. 427, 429 (1971).

CONCLUSION

For more than five years, Colusa has sought to vindicate its rights under its Compact through the dispute-resolution process created by §9 of the Compact. For an equally long time, the State has done all that it could to prevent Colusa from obtaining that vindication, and to minimize Colusa's benefits from its Compact. The State's appeal, by challenging not the merits of the district court's judgment, but the procedure by which that judgment was rendered, represents but the latest effort to deny Colusa its legal rights and the benefit of the bargain that it struck with the State more than ten years ago.

The district court saw through the smokescreen of irrelevant and otherwise inadmissible evidence proffered by the State in its opposition to Colusa's motion for summary judgment, determined that both the State's and Colusa's extrinsic evidence, even if otherwise admissible, was not helpful in clarifying the apparent ambiguity of the convoluted – but ultimately quite simple – formula in §4.3.2.2(a)(1), and based on a few undisputed material facts interpreted the meaning of the formula as a matter of law to authorize the issuance of 42,700 licenses.

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For all of the foregoing reasons, the judgment of the district court should be affirmed.

Dated: December 18, 2009

Respectfully submitted,

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Respectfully submitted,

December 18, 2009

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CERTIFICATE OF SERVICE

Case Name: **Cachil Dehe Band, et al. v. State of California, et al.**
Case No.: **09-16942**

I hereby certify that on December 18, 2009, I electronically filed the following document with the Clerk of the Court by using the CM/ECF system:

COLUSA'S OPPOSITION BRIEF

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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Rebecca Schmadeke	/s/ Rebecca Schmadeke
Declarant	Signature