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11 **UNITED STATES DISTRICT COURT**  
12 **SOUTHERN DISTRICT OF CALIFORNIA**

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

15 Plaintiff.

16 STATE OF CALIFORNIA, CALIFORNIA  
17 GAMBLING CONTROL COMMISSION, an  
18 agency of the State for California, and ARNOLD  
19 SCHWARZENEGGER, as Governor of the State  
20 of California

21 Defendants.

Case Number: 06CV0988 LAB AJB  
Judge: Hon. Larry Alan Burns  
Courtroom: 9

**SAN PASQUAL'S MEMORANDUM  
OF POINTS AND AUTHORITIES IN  
SUPPORT OF ITS MOTION FOR  
SUMMARY JUDGMENT**

**F.R.C.P. Rule 56**

**ORAL ARGUMENT REQUESTED**

[Filed Concurrently with Separate  
Statement of Uncontroverted Facts;  
Declaration of Chairperson Lawson;  
Declaration of George Forman; and  
Request for Judicial Notice]

**Hearing Date:** August 24, 2009  
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27 **TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

TABLE OF CONTENTS

1

2 I. SUMMARY OF MOTION FOR SUMMARY JUDGMENT .....1

3

4 II. THE BACKGROUND TO THE COMPACTS AND ITS NEGOTIATIONS  
 5 ESTABLISH THAT THE STATE DRAFTED THE STATE AGGREGATE  
 6 LIMIT AND IT MUST BE CONSTRUED AGAINST THE STATE..... 4

7

8 III. AFTER REVIEWING THE SAME PROVISION AT ISSUE HEREIN  
 9 AND ARGUMENTS AND EVIDENCE SUBMITTED BY THE STATE  
 10 THE *COLUSA* COURT HELD THAT THE STATE AGGREGATE LIMIT  
 11 AUTHORIZES 42,700 GAMING DEVICE LICENSES – THE SAME  
 12 NUMBER ADVOCATED BY SAN PASQUAL THROUGHOUT THIS  
 13 LITIGATION .....6

14

15 IV. THE PLAIN MEANING OF THE STATE AGGREGATE LIMIT IS A  
 16 QUESTION OF LAW AND THEREFORE THERE IS NO MATERIAL ISSUE  
 17 OF FACT THAT THE STATE AGGREGATE LIMIT AUTHORIZES  
 18 42,700 GAMING DEVICES AS ALSO HELD IN THE *COLUSA* MATTER .....8

19

20 V. THE STATE AGGREGATE LIMIT AUTHORIZES 42,700 GAMING  
 21 DEVICE LICENSES UNDER THE PLAIN MEANING OF COMPACT  
 22 SECTION 4.3.2.2(a)(1), AS DETERMINED BY THE *COLUSA* COURT..... 9

23

24 A. THE STATE AGGREGATE LIMIT .....10

25

26 B. IT IS UNDISPUTED THAT THE FIRST ELEMENT OF THE STATE  
 27 AGGREGATE LIMIT AUTHORIZES 29,400 GAMING DEVICE  
 28 LICENSES .....11

29

30 C. AS CORRECTLY CONCLUDED BY THE *COLUSA* COURT, THE  
 31 PLAIN MEANING OF THE SECOND ELEMENT OF THE STATE  
 32 AGGREGATE LIMIT AUTHORIZES 13,300 GAMING  
 33 LICENSES AND THEREFORE THE STATE AGGREGATE  
 34 LIMIT AUTHORIZES 42,700 GAMING DEVICES .....12

35

36 VI. CONCLUSION ..... 13

37

38

**TABLE OF AUTHORITIES**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**Federal Cases**

*Buckley v. Terhune*,  
441 F.3d 688, 695-96 (9th Cir. 2006) (citing Ca. Civil Code § 1654).....10

*Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1058.....9

*Idaho v. Shoshone-Bannock Tribes*,  
465 F.3d 1095, 1098 1099 (9th Cir. 2006).....10

*San Diego Gas & Electric Co. v. Canadian Hunter Marketing Ltd.*,  
132 F.3d 1303, 1307 (9th Cir. 1997).....9

*Tanadgusix Corp. v. Hunter*, 404 F.3d 1201, 1205.....8

*U.S. V. King Features Entertainment, Inc.*, 843 F.2d 394, 398 (9th Cir. 1988).....9

**State Cases**

*Badie v. Bank of America*, 67 Cal.App.4th 779, 780, 802 fn 9 (1998).....8, 10

*Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v.  
State of California* (Case No. CIV. S-04-2265).....1

*Shaw v. Regents of University of California*, 58 Cal.App.4th 44, 54 (1997).....10

**Other**

Compact § 2.6.....4

Compact § 4.3.1.....12

Compact § 4.3.1(a).....12

Compact § 4.3.2(a)(i).....11

Compact § 4.3.2.2.....5

Compact § 4.3.2.2(a).....5

Compact § 4.3.2.2 (a)(1).....1, 2, 3, 5, 8 ,9, 10, 13

Compact § 4.3.2.2(a)(2).....8

F.R.C.P. 56.....8

1		
2	F.R.C.P. 56(c).....	8
3	25 U.S.C. § 2702 (1).....	3
4	25 U.S.C. § 2703 (5).....	4
5	25 U.S.C. § 2704 (A).....	4
6		
7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
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1 Plaintiff, SAN PASQUAL BAND OF MISSION INDIANS (hereinafter "San  
2 Pasqual"), hereby submits its Motion for Summary Judgment against all Defendants, STATE  
3 OF CALIFORNIA, CALIFORNIA GAMBLING CONTROL COMMISSION and ARNOLD  
4 SCHWARZENEGGER (hereinafter collectively referred to as "the State") and requests oral  
5 argument on said Motion, as follows:

6  
7 **I. SUMMARY OF MOTION FOR SUMMARY JUDGMENT**

8 On April 21, 2009, the Eastern District Court of California in *Cachil Dehe Band of*  
9 *Wintun Indians of the Colusa Indian Community v. State of California* (Case No. CIV. S-04-  
10 2265) (hereinafter this lawsuit is referred to as "*Colusa*"), interpreted a compact with identical  
11 terms and language regarding how many Gaming Devices Licenses are authorized in the  
12 aggregate for all 1999 Tribes and held as a matter of law that the same State Aggregate Limit  
13 of Gaming Devices at issue herein "authorizes 42,700 Gaming Devices" – the exact number  
14 San Pasqual seeks to have this Court declare is the State Aggregate Limit in its Compact.  
15 SOF ¶1.

16 The relevance of the *Colusa* decision is that the *Colusa* compact and San Pasqual  
17 Compact are both contracts with the State of California and both contain the same State  
18 Aggregate Limit formula contained in Compact § 4.3.2.2 (a)(1) at issue herein. SOF ¶2.  
19 Both were negotiated at the same time with the same representatives of the State as well as  
20 other Tribes in 1999 and each were executed by the State on September 10, 1999,  
21 subsequently approved by the State legislature and federally approved on May 16, 2000.

22 The dispute in this Action, as in *Colusa*, is not over the 2,000 Gaming Devices per  
23 Tribe limit, but rather the dispute is over the State Aggregate Limit of Gaming Device  
24 Licenses as set forth in a calculation contained in Compact §4.3.2.2(a)(1) of each similar  
25 compact. Under the compacts, San Pasqual and other Compact Tribes are permitted to  
26 operate a given number of Gaming Devices without a license. Compact §4.3.1. If a Tribe  
27 seeks to operate more Gaming Devices than that given number, the Tribe must obtain a  
28

1 License but can never operate more than 2,000 Gaming Devices. As it did in *Colusa*, the  
2 State erroneously asserts in this Action that the State Aggregate Limit authorizes only 32,151  
3 Gaming Device Licenses. Both in *Colusa* and this Action, the true number of Gaming Device  
4 Licenses authorized statewide after correctly applying the formula in Compact § 4.3.2.2(a)(1)  
5 is indeed 42,700 Gaming Device Licenses.

6 The *Colusa* court granted the Colusa Indian Tribe's motion for summary judgment  
7 concluding the San Pasqual formulation "most accurately follows the language of [Compact]  
8 §4.3.2.2 (a)(1), giving the words their ordinary meaning." *Colusa*, slip op. 40. San Pasqual  
9 agrees with the Eastern District Court and this Motion for Summary Judgment mimics the  
10 *Colusa* court's Order that held the State Aggregate Limit to authorize 42,700 Gaming Device  
11 Licenses (a true and accurate copy of this Order is attached as Exhibit 1 to the Request for  
12 Judicial Notice).

13 While this Court is not bound by that decision, the *Colusa* court's rationale is  
14 informative and persuasive as that court reviewed the same compact provision and the same  
15 evidence that will be before this Court. The State fully litigated the *Colusa* matter submitting  
16 numerous declarations and asserted the same interpretation it does in this Action. After  
17 reviewing all evidence, arguments and the applicable law concerning interpretation of a  
18 compact, the *Colusa* court correctly held that the only reasonable interpretations of the State  
19 Aggregate Limit contained in Compact §4.3.2.2(a)(1) authorizes 42,700 gaming Device  
20 Licenses.

21 The State has unscrupulously withheld issuing the additional 10,549 Gaming Device  
22 Licenses bargained for in the Compact to the severe detriment of the counties, cities and  
23 towns of California, San Pasqual and other Compact Tribes. A Tribe is required to pay  
24 license fees for additional Gaming Device Licenses and these funds are deposited in the  
25 Revenue Sharing Trust Fund (hereinafter "RSTF"), which is a fund that disburses \$1.1 million  
26 every year to California Tribes that operate fewer than 350 Gaming Devices. Currently, the  
27 license fees collected are not sufficient to pay each Tribe its \$1.1 million and thus the RSTF

1 has been operating at a net loss. The Special Distribution Fund (hereinafter "SDF") is funded  
2 by certain Compact Tribes and under the terms of the Compact and implementing state  
3 legislation is utilized to make up any shortfall in the RSTF. However, the Compact also  
4 directs that the SDF will be distributed to California counties, cities and towns impacted by  
5 Indian Gaming. Thus, each dollar of the SDF spent making up the shortfall in the RSTF is a  
6 dollar that could have gone to California counties, cities and towns.

7 It is estimated that the fees for the additional 10,549 Gaming Device Licenses sought  
8 in this litigation could result in an additional \$30 million annually to the RSTF. This \$30  
9 million annual increase to the RSTF would decrease the funds necessary from the SDF and  
10 allow \$30 million from the SDF to then be distributed to California counties, cities and towns  
11 benefiting the California citizens directly as intended by the Compact.

12 The State refuses to abide by the terms of the Compact and issue all 42,700 Gaming  
13 Device Licenses available because the State seeks to force San Pasqual, and all other Compact  
14 Tribes, to amend their compacts just to operate Gaming Devices that San Pasqual is already  
15 entitled to operate under the terms of the Compact. Of course, the amended compacts would  
16 also require substantially larger payments for San Pasqual to operate additional Gaming  
17 Devices it is already entitled to operate. Each day that San Pasqual is denied its lawful right  
18 to operate the Gaming Devices is bargained for San Pasqual stands to lose over \$100,000 in  
19 income (approximately \$40 million annually) that was intended by Congress to promote  
20 "tribal economic development, self-sufficiency and [a] strong tribal government." 25 U.S.C.  
21 § 2702 (1).

22 Therefore, San Pasqual respectfully requests this Court to also order summary  
23 judgment that the State Aggregate Limit contained in Compact §4.3.2.2(a)(1) authorizes  
24 42,700 Gaming Device Licenses.

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1 **II. THE BACKGROUND TO THE COMPACTS AND ITS NEGOTIATIONS**  
 2 **ESTABLISH THAT THE STATE DRAFTED THE STATE AGGREGATE**  
 3 **LIMIT AND IT MUST BE CONSTRUED AGAINST THE STATE**

4 Plaintiff-San Pasqual is a federally recognized Indian Tribe within the meaning of  
 5 federal Indian Law and 25 U.S.C. § 2703(5) of IGRA, possessing governmental authority  
 6 over its Indian Lands. SOF ¶3. San Pasqual and the State entered into the Tribal-State  
 7 Gaming Compact (hereinafter the “Compact”) on September 10, 1999. SOF ¶4. San  
 8 Pasqual’s Compact with the State of California has been in effect since May 16, 2000. SOF  
 9 ¶5. San Pasqual owns and operates an Indian Gaming facility on the San Pasqual Indian  
 10 Reservation, which are “Indian Lands” within the meaning of 25 U.S.C. § 2703(4)A), and  
 11 located in San Diego County, California. SOF ¶6.

12 Eventually, sixty-one California Indian Tribes, including San Pasqual, signed the 1999  
 13 Model Compact (hereinafter these Tribes are referred to collectively as “Compact Tribes”)  
 14 that permits a Compact Tribe to operate a Gaming Device.<sup>1</sup> SOF ¶7. Compact § 2.6 defines a  
 15 Gaming Device as a slot machine. SOF ¶8.

16 In April 1999, then-Governor Gray Davis invited San Pasqual and other federally-  
 17 recognized tribes in California to a meeting in Los Angeles, at which Gov. Davis announced  
 18 his intention to negotiate a compact with California tribes. SOF ¶9. San Pasqual was a  
 19 member of a negotiating group of approximately 80 California Tribes called the United Tribes  
 20 Compact Steering Committee “UTCSC” that participated in negotiations with the State. SOF  
 21 ¶10. The main negotiator for the State was retired federal Judge William A. Norris, who was  
 22 assisted by the Governor's then deputy legal affairs secretary Shellyanne W.L. Chang and  
 23 members of the Attorney General's staff. SOF ¶11. At a May 26, 1999 negotiation, Judge

24 <sup>1</sup> In the *Colusa* matter, the State and Colusa agreed that there were 62 Compact Tribes. It is irrelevant to either  
 25 San Pasqual’s or the State’s formula interpretations whether there are 61 Compact Tribes or 62 Compact Tribes  
 26 and therefore it is not a material fact as to whether there are 61 Compact Tribes or 62 Compact Tribes. San  
 27 Pasqual has produced in support of its Motion for Summary Judgment numerous documents authored by the  
 28 State listing each of the 61 Compact Tribes. If the State is able to provide the “missing” Compact Tribe from  
 those lists showing 61 Compact Tribes, San Pasqual will stipulate to 62 Compact Tribes. Again, there is no  
 difference in the outcome of either San Pasqual’s or the State’s interpretations whether there are 61 or 62  
 Compact Tribes.

1 Norris declared the State had “grave reservations, if not opposition, to a cap in the aggregate.”  
2 SOF ¶12. Negotiations continued throughout the summer of 1999 and there was never  
3 mention of a statewide limit on the number of gaming devices available until early September  
4 1999. SOF ¶13.

5 On the evening of September 9, 1999, the State’s negotiators presented San Pasqual  
6 with a final draft of the Compact on a “take-it-or-leave-it” basis. SOF ¶14. This was the first  
7 time San Pasqual ever saw the State Aggregate Limit language contained in Compact §  
8 4.3.2.2(a)(1). SOF ¶15. The State drafted the State Aggregate Limit contained in Compact §  
9 4.3.2.2(a)(1). SOF ¶16. The State never stated or in any way communicated to San Pasqual  
10 the maximum number of Gaming Device Licenses authorized by the State Aggregate Limit.  
11 SOF ¶17.

12 Compact § 4.3.1 authorizes San Pasqual to operate either the number of Gaming  
13 Devices it had in operation as of September 1, 1999 or 350 Gaming Devices, whichever is  
14 larger. SOF ¶18. San Pasqual did not operate any Gaming Devices on September 1, 1999.  
15 SOF ¶19. Therefore, San Pasqual is authorized under Compact § 4.3.1(b) to operate 350  
16 Gaming Devices as a matter of right. SOF ¶20. In order for San Pasqual to operate more than  
17 the 350 Gaming Device Licenses authorized by Compact § 4.3.1, it must obtain a Gaming  
18 Device License for each such Device through the Gaming Device License Draw process  
19 outlined in Compact § 4.3.2.2. SOF ¶21. Under Compact § 4.3.2.2(a), each Compact Tribe is  
20 permitted to operate up to 2,000 Gaming Devices. SOF ¶22. This is often referred to as the  
21 “per Tribe” limit on Gaming Devices as compared to the State Aggregate Limit on the  
22 number of Gaming Devices Licenses. San Pasqual understood the State Aggregate Limit to  
23 be large enough to permit San Pasqual to obtain enough Gaming Device Licenses to operate  
24 2,000 Gaming Devices. SOF ¶23. The Gaming Device License Draw is currently  
25 administered by Defendant – California Gambling Control Commission. SOF ¶24.

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1 **III. AFTER REVIEWING THE SAME PROVISION AT ISSUE HEREIN AND**  
 2 **ARGUMENTS AND EVIDENCE SUBMITTED BY THE STATE, THE**  
 3 **COLUSA COURT HELD THAT THE STATE AGGREGATE LIMIT**  
 4 **AUTHORIZES 42,700 GAMING DEVICE LICENSES – THE SAME NUMBER**  
 5 **ADVOCATED BY SAN PASQUAL THROUGHOUT THIS LITIGATION**

6 The Cachil Dehe Band of Wintun Indians of the Colusa Indian Community  
 7 (hereinafter “Colusa”) filed a complaint in the Eastern District alleging as one of its causes of  
 8 action that the State erroneously determined the State Aggregate Limit at issue herein. Colusa  
 9 asserted the State Aggregate Limit authorized a higher number of Gaming Device Licenses  
 10 than the 42,700 Gaming Device Licenses advocated by San Pasqual.<sup>2</sup> After the *Colusa* matter  
 11 was remanded by the Ninth Circuit, both the State and Colusa filed motions for summary  
 12 judgment on the issue of the number of Gaming Device Licenses authorized by the State  
 13 Aggregate Limit.

14 Colusa submitted San Pasqual’s interpretation in its motion for summary judgment as  
 15 an “alternative interpretation” advocating that the State Aggregate Limit authorizes 42,700  
 16 Gaming Device Licenses. In its April 21, 2009 Order, the *Colusa* court rejected both the  
 17 State’s interpretation and Colusa’s primary interpretation finding each “force a more strained  
 18 reading of the Compact language.” The *Colusa* court then held that the “alternative  
 19 formulation” of 42,700 Gaming Devices “is supported by the contract language and the  
 20 principles of contract interpretation.”

21 In its holding, the Court rejected the extrinsic evidence submitted by the State ruling  
 22 “the circumstances under which the Compact was entered into does not aide the court in  
 23 discerning the parties’ intent.” *Colusa*, slip op. 39. The State submitted evidence that its  
 24 intention was that only 23,000 gaming Device Licenses would be authorized. SOF ¶25. This  
 25 evidence of “intent” contradicts the State’s position in *Colusa* and in this Action wherein the

26 \_\_\_\_\_  
 27 <sup>2</sup> Colusa advocated that the State Aggregate Limit authorized 55,951 Gaming Device Licenses and the State  
 28 advocates that 32,151 Gaming Device Licenses are authorized. Therefore, the San Pasqual interpretation of  
 42,700 Gaming Device Licenses is a middle of the road alternative to other tribes and the State.

1 State argues that 32,151 Gaming Device Licenses are authorized. *Colusa*, slip op. 39. Indeed,  
2 the State itself has rejected this interpretation of the Compact. SOF ¶26.

3 The *Colusa* court also rejected the State's argument based upon the multiple  
4 interpretations subsequent to the compact's execution by State representatives. *Colusa*, slip  
5 op. 40. In fact a month after the compact was signed, the State Legislative Analyst expressed  
6 her opinion that the State Aggregate Limit authorized 60,000 Gaming Device Licenses.  
7 *Colusa*, slip op. 39-40. SOF ¶27. Then six months after the compacts were signed, the  
8 principal negotiator for the State and the Chief Deputy Attorney General sent a letter to the  
9 Sides Accountancy Corporation, an accounting firm retained by Compact Tribes to issue  
10 Gaming Device Licenses, stating that 15,000 Gaming Device Licenses were available.  
11 *Colusa*, slip op. 40. SOF ¶28. Thereafter, the Sides Accountancy Corporation issued nearly  
12 30,000 Gaming Device Licenses. *Colusa*, slip op. 40. SOF ¶29. In contrast to the State's  
13 wildly inconsistent positions, San Pasqual's position in this lawsuit has always been that the  
14 State Aggregate Limit authorizes 42,700 Gaming Device Licenses. SOF ¶30.

15 The *Colusa* court further dismissed the relevance of the State's extrinsic evidence  
16 because the State's current position of 32,151 was adopted by the State two-and-a-half years  
17 after the compact was signed. This adoption occurred only after Defendant-California  
18 Gambling Control Commission considered at its June 19, 2002 meeting two other potential  
19 formulations advocated by other individuals or entities and therefore further establishes that  
20 there was not a clear understanding between the parties of the number of Gaming Devices  
21 Licenses authorized by the State Aggregate Limit prior to execution of the 1999 Compact.  
22 *Colusa*, slip op. 40. SOF ¶31. Based upon the State's failure to prove that a clear consensus  
23 existed between the parties or even State representative as to the State Aggregate Limit, the  
24 *Colusa* court concluded that the extrinsic evidence proved there was no consistent course of  
25 action and therefore was not helpful to the court in determining the meaning of the State  
26 Aggregate Limit. *Colusa*, slip op. 40.

27 ///

1 The State's extrinsic evidence was not helpful in the *Colusa* matter and will not be  
 2 helpful in this Action. The meaning of the State Aggregate Limit must be determined on the  
 3 face of the document. *Tanadgusix Corp. v. Hunter*, 404 F.3d 1201, 1205 (holding that "[t]he  
 4 terms of the contract control, regardless of the parties' subjective intentions shown by  
 5 extrinsic evidence."). The *Colusa* court based its ruling on the plain language of the Compact  
 6 and held that "the alternative formulation [of 42,700 Gaming Device Licenses] most  
 7 accurately follows the language of § 4.3.2.2(a)(1) giving the words their ordinary meaning."  
 8 *Colusa*, slip op. 40. Consistent with the *Colusa* holding, San Pasqual submits its Motion for  
 9 Summary Judgment on the objective intent as evidenced by the words of State Aggregate  
 10 Limit contained in Compact §4.3.2.2(a)(2) that authorizes 42,700 Gaming Device Licenses.

11  
 12 **IV. THE PLAIN MEANING OF THE STATE AGGREGATE LIMIT IS A**  
 13 **QUESTION OF LAW AND THEREFORE THERE IS NO MATERIAL ISSUE**  
 14 **OF FACT THAT THE STATE AGGREGATE LIMIT AUTHORIZES 42,700**  
 15 **GAMING DEVICES AS ALSO HELD IN THE COLUSA MATTER**

16 There is no genuine issue of material fact that the State Aggregate Limit authorizes  
 17 42,700 Gaming Devices, and therefore F.R.C.P. 56 permits the Court to enter summary  
 18 judgment in favor of San Pasqual. F.R.C.P. 56(c). The issue presented to this Court is a  
 19 question of law as to the objective intent of the parties as established by the plain meaning of  
 20 the State Aggregate Limit contained in Compact § 4.3.2.2(a)(1). As previously mentioned,  
 21 the Eastern District court in *Colusa* granted summary judgment that the same State Aggregate  
 22 Limit at issue herein authorizes 42,700 Gaming Devices Licenses. The *Colusa* court decided  
 23 the matter ruling that "[a]lthough the intent of the parties determines the meaning of the  
 24 contract, the relevant intent is objective – that is, *the objective intent as evidenced by the*  
 25 *words of the instrument*, not a party's subjective intent." *Colusa*, slip op. at 37-38 (citing  
 26 *Badie v. Bank of America*, 67 Cal.App.4th 779, 802 fn 9 (1998) (emphasis added).

1 “Interpretation of a contract is a matter of law,” and “[s]ummary judgment is  
 2 appropriate when the contract terms are clear and unambiguous, even if the parties disagree as  
 3 to their meaning.” *U.S. V. King Features Entertainment, Inc.*, 843 F.2d 394, 398 (9th Cir.  
 4 1988). In the instance of an ambiguity, Ninth Circuit case law mandates that after  
 5 “[c]onstruing all evidence in the light most favorable to, and making all reasonable inferences  
 6 in favor of, the non-moving party” the court still concludes that the ambiguity could not be  
 7 resolved in the State’s favor, then the motion for summary judgment must be granted. *San*  
 8 *Diego Gas & Electric Co. v. Canadian Hunter Marketing Ltd.*, 132 F.3d 1303, 1307 (9th Cir.  
 9 1997).

10 San Pasqual agrees with the Colusa court that there is only one reasonable  
 11 interpretation of the State Aggregate Limit contained in Compact § 4.3.2.2(a)(1) under the  
 12 plain meaning of the Compact language. While San Pasqual notes that there have been  
 13 several wildly inconsistent interpretations by the State and other entities, San Pasqual further  
 14 agrees with the *Colusa* court that these “formulations force a more strained reading of the  
 15 Compact language.” *Colusa*, slip op. at 42. Strained interpretations do not render a compact  
 16 provision ambiguous. See *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1058.  
 17 Therefore, as in the *Colusa* matter, summary judgment should be entered that the State  
 18 Aggregate Limit contained in Compact § 4.3.2.2(a)(1) authorizes 42,700 Gaming Devices.

19  
 20 **V. THE STATE AGGREGATE LIMIT AUTHORIZES 42,700 GAMING DEVICE**  
 21 **LICENSES UNDER THE PLAIN MEANING OF COMPACT SECTION**  
 22 **4.3.2.2(a)(1), AS DETERMINED BY THE COLUSA COURT**

23 San Pasqual agrees with the *Colusa* court that the plain meaning of Compact §  
 24 4.3.2.2(a)(1) is that the State Aggregate Limit authorizes 42,700 Gaming Device Licenses.  
 25 The *Colusa* court granted the plaintiff-tribe’s motion for summary judgment and denied the  
 26 State’s motion for summary judgment after the State argued the same theory it submits to the  
 27 court in this Action. SOF ¶32. As the *Colusa* court’s rationale is highly persuasive, San  
 28

1 Pasqual's Motion for Summary Judgment mimics the *Colusa* court's order in its request that  
2 the Court hold that the Compact authorizes 42,700 Gaming Devices Licenses.

3 The Tribal-State Compact is governed by the same principles of general contract  
4 interpretation. *Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095, 1098 (9th Cir. 2006).  
5 "Contract terms are to be given their ordinary meaning, and when terms of the contract are  
6 clear, the intent of the parties must be ascertained from the contract itself." *Id.* at 1099.  
7 "Although the intent of the parties determines the meaning of the contract, the relevant intent  
8 is objective – that is, the objective intent as evidenced by the words of the instrument, not a  
9 party's subjective intent." *Shaw v. Regents of University of California*, 58 Cal.App.4th 44, 54  
10 (1997).

11 In determining the intent of the parties, the court should consider the Compact as a  
12 whole and may also "consider the circumstances under which an agreement was made."  
13 *Badie v. Bank of America*, 67 Cal.App.4th 779, 800. The court should "provide an  
14 interpretation that will make an agreement lawful operative, definite, reasonable, and capable  
15 of being carried into effect, and must avoid an interpretation that would make it harsh, unjust  
16 or inequitable." *Id.* Words are to be given their ordinary meaning. *Id.* If necessary to  
17 resolve a dispute, then "the language of a contract should be interpreted most strongly against  
18 the party who caused the uncertainty to exist." *Buckley v. Terhune*, 441 F.3d 688, 695-96 (9th  
19 Cir. 2006) (citing Ca. Civil Code § 1654).

20  
21 **A. THE STATE AGGREGATE LIMIT**

22 The State Aggregate Limit formula contained in Compact § 4.3.2.2(a)(1) is essentially  
23 a "third grade word problem" that requires the addition of two elements. To wit, Compact §  
24 4.3.2.2(a)(1) containing the State Aggregate Limit provides as follows:

25  
26 "The maximum number of machines that all Compact Tribes in the aggregate  
27 may license pursuant to this Section shall be a sum equal to 350 multiplied by

1 the number of Non-Compact tribes as of September 1, 1999, plus the  
2 difference between 350 and the lesser number authorized under Section 4.3.1.”  
3 SOF ¶33.

4  
5 As a mathematical equation, the State Aggregate Limit formula would appear as:

6 
$$\text{First Element} + \text{Second Element} = \text{State Aggregate Limit.}$$

7 San Pasqual and the State agree that the First Element is equal to 29,400. SOF ¶34.  
8 The dispute is over the Second Element that San Pasqual asserts, and the *Colusa* court held, is  
9 equal to 13,300. Therefore, the State Aggregate Limit authorizes 42,700 Gaming Devices.

10

11 **B. IT IS UNDISPUTED THAT THE FIRST ELEMENT OF THE STATE**  
12 **AGGREGATE LIMIT AUTHORIZES 29,400 GAMING DEVICE**  
13 **LICENSES**

14 San Pasqual and the State agree the First Element of the State Aggregate Limit  
15 authorizes 29,400 Gaming Device Licenses. SOF ¶34. The First Element is “350 multiplied  
16 by the number of Non-Compact tribes<sup>3</sup> as of September 1, 1999.” SOF ¶35. On September 1,  
17 1999, there were 84 Non-Compact Tribes. SOF ¶36. Therefore, the First Element is 350  
18 times 84, which equals 29,400. SOF ¶37.

19 In substituting 29,400 in the mathematical equation for the First Element, the State  
20 Aggregate Limit now appears as follows:

21 
$$29,400 + \text{Second Element} = \text{State Aggregate Limit}$$

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27 <sup>3</sup> Compact § 4.3.2(a)(i) defines a “Non-Compact tribe” as a federally recognized tribe that operates fewer than  
28 350 Gaming Devices, whether or not the tribe has signed a compact.

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**C. AS CORRECTLY CONCLUDED BY THE COLUSA COURT, THE PLAIN MEANING OF THE SECOND ELEMENT OF THE STATE AGGREGATE LIMIT AUTHORIZES 13,300 GAMING DEVICE LICENSES AND THEREFORE THE STATE AGGREGATE LIMIT AUTHORIZES 42,700 GAMING DEVICES**

San Pasqual agrees with the holding of the *Colusa* court that, as a matter of law, the Second Element of the State Aggregate Limit authorizes **13,300** Gaming Device Licenses. For the Court’s ease, the Second Element is recounted below:

“the difference between 350 and the lesser number authorized under Section 4.3.1.”

To determine “the difference between 350 and the lesser number authorized under Section 4.3.1,” it is important to first determine “the lesser number authorized under Section 4.3.1.” Section 4.3.1 authorizes a tribe to operate the larger of either the number of slot machines in operation as of September 1, 1999 under subsection (a) or 350 slot machines under subsection (b) and is recounted below:

**Section 4.3.1**

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

- (a) A number of terminals equal to the number of Gaming Devices operated by the Tribe on September 1, 1999; **or**
- (b) Three hundred fifty (350) Gaming Devices.”

SOF ¶38

On September 1, 1999, 22 Compact Tribes were operating more than 350 devices. Those Compact Tribes operating greater than 350 devices as of September 1, 1999 operated a total of 16,156 Gaming Devices. SOF ¶39. Therefore, Compact § 4.3.1(a) authorizes a total of 16,156 Gaming Devices. SOF ¶40.

1 On September 1, 1999, 39 Tribes operated less than 350 Gaming Devices. SOF ¶41.  
2 Therefore, Compact § 4.3.1(b) authorizes a total of 13,650 Gaming Devices. SOF ¶42.  
3 13,650 is less than 16,156, and therefore “the lesser number authorized under Section 4.3.1” is  
4 13,650. SOF ¶43. The difference between 350 and 13,650 is 13,300. SOF ¶44.

5 Therefore, the State Aggregate Limit authorizes the sum of 29,400 and 13,300, which  
6 equals 42,700. SOF ¶45. This is the exact interpretation concluded by the *Colusa* court as a  
7 matter of law to be the correct interpretation of the State Aggregate Limit. San Pasqual agrees  
8 with the *Colusa* court’s reasoning and believes it to be informative and persuasive, and has  
9 attached the decision for the Court’s review as Exhibit 1 to its Request for Judicial Notice and  
10 hereby incorporates in this document by this reference. Therefore, San Pasqual respectfully  
11 requests that the Court grant its motion for summary judgment that 42,700 Gaming Devices  
12 are authorized by the State Aggregate Limit contained in Compact § 4.3.2.2(a)(1).

13  
14 **VI. CONCLUSION**

15 San Pasqual respectfully requests that the Court grant its Motion for Summary  
16 Judgment as the plain meaning of the State Aggregate Limit contained in Compact § 4.3.2.2  
17 (a)(1) authorizes 42,700 Gaming Device Licenses as also concluded by the *Colusa* court after  
18 that court reviewed the same provision at issue herein and the same arguments and evidence  
19 of the State.

20  
21 DATED: June 9, 2009

SOLOMON, SALTSMAN & JAMIESON

s/Stephen Warren Solomon

22  
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