UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

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

Plaintiff,

vs.

STATE OF CALIFORNIA, CALIFORNIA GAMBLING CONTROL COMMISSION, an Agency of the State for California, and ARNOLD SCHWARZENEGGER, as Governor of the State of California,

Defendants.

CASE NO. 06cv0988-LAB (AJB)

ORDER DENYING MOTION TO STRIKE; AND

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

[Docket nos. 79, 86.]

Plaintiff seeks summary judgment of all claims in its second amended complaint ("SAC"). After full briefing was submitted, the Court took the motion under submission on August 19, 2009. That same day, the Eastern District of California issued its opinion in a factually related case ("*Colusa*"), *Cachil Dehe Band of Wintun Indians of Colusa Indian Community v. California*, No. CIV S-04-2265, 2009 WL 2579051 (E.D.Cal. Aug. 19, 2009). On August 20, Plaintiff filed a new reply brief (the "Second Reply") including a request for judicial notice of the *Colusa* decision. Defendants moved to strike the Second Reply, pointing out it is procedurally irregular, arguing Plaintiff is judicially estopped from citing the decision in *Colusa*, and arguing the *Colusa* decision is irrelevant.

I. Motion to Strike

Under Fed. R. Evid. 201(b), the Court can take judicial notice of facts not subject to reasonable dispute, including the existence orders and decisions by other courts. *Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001). Under FRE 201(d), the Court must take notice if requested by a party and if supplied with the necessary information.

Defendants object to the purposes for which Plaintiff asks the Court to take notice. The August 19 order, and other orders in *Colusa* are relevant as persuasive authority. Interpretation of written agreements is a question of law, *Operating Eng'rs Pension Trusts v. B & E Backhoe, Inc.*, 911 F.2d 1347, 1351 (9th Cir. 1990), so the Eastern District's interpretations of many of the same documents are relevant here. Because many of the questions are so closely aligned with questions presented here, the Court would have cited decisions in *Colusa* and considered their reasoning and holdings even if not requested. However, the judgment in *Colusa* is on appeal and therefore has not been litigated to a final decision, so Defendants are not collaterally estopped by findings or holdings there, *Hydranautics v. FilmTec Corp.*, 204 F.3d 880, 885 (9th Cir. 2000), nor does the Court take notice of facts as set forth in the August 19 decision or any other decision. *Lee*, 250 F.3d at 689–90.

Defendants argue the reply, including the request for notice, was untimely. However, the request for judicial notice could not have been made earlier, and pursuant to FRE 201(c) the Court could, and would, take notice of orders issued in *Colusa* even if Plaintiff had not requested it.

The Court does not agree that Plaintiff has taken such an inconsistent position with regard to *Colusa*'s relevance that it is now estopped from seeking judicial notice of orders in that case. *See Johnson v. Oregon*, 141 F.3d 1361, 1369 (9th Cir.1998) (explaining that a party can be judicially estopped only when its inconsistent position is "tantamount to a knowing misrepresentation to or even fraud on the court'").

Defendants are correct that the Second Reply was filed late and exceeds the page limit without leave. The Second Reply should properly have been filed simply as a

supplemental request for judicial notice, and the request could have included an explanation of the relevance of the new decision. The Court will treat it as such, disregarding arguments that could have been raised before the August 19 order in *Colusa* but considering Plaintiff's explanation of the significance of the newly issued decision. Defendants have set forth their position adequately in their motion to strike so no further briefing on these issues is needed. Except as noted, the motion to strike is **DENIED**, and the request for judicial notice is **GRANTED**.

Plaintiff has also requested judicial notice of numerous other documents, and the Court will consider those requests as needed.

II. Motion for Summary Judgment

Plaintiff is a federally-recognized Indian tribe[1] that in 1999 entered into a compact with the state of California (the "Compact")[2] for the licensing of gaming, pursuant to the Indian Gaming Regulatory Act. The parties agree that the Compact, attached as an exhibit to the SAC, was validly entered into, but disagree about its meaning. Under the Compact, Plaintiff is entitled to a base number of gaming device licenses plus the opportunity to participate in a draw from a statewide pool to obtain more. The licenses permit tribes with gaming compacts to operate slot machines and other similar gaming devices, and a part of the tribes' gaming revenue is distributed to other tribes and to the state and local governments.

Plaintiff argues that the Compact provides for a statewide pool of 42,700 gaming device licenses from which it and other tribes with the same compact may draw. (SAC, ¶ 26.)

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[1] Defendants question whether this is so, in light of a dispute over which governing faction the Bureau of Indian Affairs would recognize. (Opp'n to MSJ, 23:14–24:3 and Exs. E and F (letters concerning the dispute).) The second letter notes the dispute, but says the elected council would be recognized pending the outcome of mediation. (Ex. F.) The parties do not dispute that Plaintiff is on the list of Indian tribes published in the Federal register and recognized as eligible to receive services from the B.I.A. (Jt. Stmt. of Undisputed Facts, Docket no. 80-18.) The request for judicial notice of the actual list is therefore not required and is **DENIED AS MOOT**.

[2] The Compact attached to the SAC is a specific document identifying the compacting parties as the San Pasqual Band of Mission Indians and the State of California. However, Plaintiff and Defendants agree 38 other tribes signed compacts that are identical in every relevant respect other than the identity of the compacting tribes. In other words, the Compact is the agreement Plaintiff entered into with the state of California, as well as the overall agreement entered into by the state with each of the 39 tribes.

Defendants contend the size of the pool is 32,151. The aggregate limit of 32,151 has already been reached, so under Defendants' interpretation, Plaintiff cannot obtain any more licenses in the draw. Under Plaintiff's interpretation, more licenses are available. Plaintiff seeks a declaration that the statewide aggregate limit of gaming device licenses is at least 42,700, as well as costs and additional relief. (*Id*. at 10.) This would enable Plaintiff to increase the number of its licenses from the current allowance, which it represents is 1,572 licenses, potentially up to the limit of 2,000 licenses per tribe.

The Eastern District of California recently issued two decisions in *Colusa* that are relevant here. The first was issued April 22, 2009 and is published at 629 F. Supp. 2d 1091 (E.D.Cal. 2009) (*Colusa I*). The second was the decision of August 11, published at 649 F. Supp. 2d 1063 (E.D.Cal. 2009) (*Colusa II*). The third, issued September 11 and amended September 14, is available at 2009 WL 2971547 (E.D.Cal., 2009) (*Colusa III*). Plaintiff's motion for summary judgment ("MSJ") relies heavily on the holding of *Colusa I*. In particular, Plaintiff cites 629 F. Supp. 2d at 1114 (construing identical language in the other tribe's Compact as providing for a pool of 42,700 licenses). Plaintiff has requested that the Court take notice of the decision in *Colusa I* and, for reasons set forth above, the request is **GRANTED**.

A. Legal Standards

Federal Rule of Civil Procedure 56(c) empowers the Court to enter summary judgment if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is material if it "might affect the outcome of the suit under governing law." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 255 (1986). An issue is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id*. at 248. Therefore, "[f]actual disputes that are irrelevant or unnecessary [are] not counted." *Id*. at 248.

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Plaintiff, as movant, has the initial burden of demonstrating that there is no issue of material fact and that summary judgment is proper. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). If Plaintiff meets its burden, the burden then shifts to the non-movant to show that summary judgment is not appropriate. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 324 (1986).

General principles of contractual construction apply to tribal-state class III gaming compacts such as the one at issue here. *Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095, 1098 (9th Cir. 2006). Although the contract is governed by federal law, *id.*, the parties agree California contract law does not differ from federal law and under Ninth Circuit precedent should therefore be applied. *See FDIC v. N.H. Ins. Co.*, 953 F.2d 478, 481–482 (9th Cir. 1991) (where state contract law would not conflict with federal law, applying state law).

"Contract interpretation begins with the language of the written agreement." *Colusa I*, 629 F. Supp. 2d at 1106 (quoting *Coast Fed. Bank, FSB v. United States*, 323 F.3d 1035, 1038 (Fed.Cir. 2003)). The Compact is to be construed "by reading it as a whole and interpreting each part with reference to the entire contract." *Tanadgusix Corp. v. Huber*, 404 F.3d 1201, 1205 (9th Cir. 2005).

Interpretation of a contract is a matter of law. *United States v. King Features Entertainment, Inc.*, 843 F.2d 394, 398 (9th Cir. 1988). This includes the question whether a contract is ambiguous. *Id*. A contract is ambiguous if its terms are reasonably susceptible of more than one interpretation. *Doe 1 v. AOL LLC*, 552 F.3d 1077, 1081 (9th Cir. 2009). "That the parties dispute a contract's meaning does not render the contract ambiguous. . . ." *Id*.

Even if the parties' agreement appears clear on its face, the Court must entertain relevant extrinsic evidence that can prove a meaning to which the language of the contract is reasonably susceptible. *King Features*, 843 F.2d at 398. If the Court finds the contract is not reasonably susceptible of the asserted interpretation, extrinsic evidence cannot be admitted in support of that interpretation. *Id*. Strained interpretations of contract provisions

are not reasonable and the Court does not entertain them. *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1058 (9th Cir. 1997).

"If, after considering the language of the contract and any admissible extrinsic evidence, the meaning of the contract is unambiguous, a court may properly interpret it on a motion for summary judgment." *Miller v. Glenn Miller Prods., Inc.*, 454 F.3d 975, 934 (9th Cir. 1996).

B. The Compact

The *Colusa I* decision concerns itself with a number of alternate interpretations, most of which are not advanced here. While the Compact's provisions might appear at first blush susceptible of other interpretations, the parties' agree on the meaning of most of it, so the Court treats those portions as unambiguous *See Curry v. Moody*, 40 Cal.App.4th 1547, 1552 (Cal. App. 2 Dist. Dec. 12, 1995) (looking to the meanings urged by the parties to determine whether contract terms are ambiguous).

Section 4.3.2.2(a)(1) of the Compact gives the formula for calculating the aggregate limit (*i.e.*, the size of the pool):

> 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.

Section 4.3.1 in turn provides:

> The Tribe may operate no more Gaming Devices than the larger of the following:[3]
>
> (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.

The equation is thus a sum of two numbers. The first number ("First Number") is the product of 350 and the number of Non-Compact tribes as of September 1, 1999. The parties agree

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[3] Section 4.3.1 is initially used to determine the base number of devices the tribe may operate, before any more licenses are obtained in the draw.

there were 84 Non-Compact tribes and, as in *Colusa*, do not dispute that the product is therefore 29,400. The disagreement arises over the second number ("Second Number").

The parties agree the Second Number is determined by calculating the difference between 350 and the lesser number authorized under section 4.3.1 with regard to all tribes that signed a Compact (the 39 "Compact Tribes"). The phrase "authorized under Section 4.3.1" makes clear only Compact Tribes are of concern, because only Compact Tribes have any authorization for devices under Section 4.3.1. *See Colusa I*, 629 F. Supp. 2d at 1114–15 (discussing the meaning of "authorized" in the Compact).

Because the "Compact" means Plaintiff's own agreement, as well as the agreement entered into by all the Compact Tribes, "Section 4.3.1" could refer to that section in Plaintiff's Compact, or to Section 4.3.1 in the Compact entered into by all 39 tribes. Therefore, "the lesser number" could potentially refer to either the number for a single tribe only (here, the lesser number for Plaintiff), or to a total (the number authorized for all Compact Tribes). However, only the second construction is reasonable in light of the rest of the Compact,[4] and the parties agree the Compact concerns itself with a total number. Defendant, however, argues the total is the sum of each lesser number tallied individually (along with further calculations, discussed below), while Plaintiff argues the numbers are totaled and the lesser is then selected.

The difference arises in how the parties argue the number should be totaled. Under Plaintiff's interpretation, the numbers for section 4.3.1(a) are to be totaled, then the numbers for section 4.3.1(b) are to be totaled, and the lesser of those two is "the lesser number authorized under Section 4.3.1," bearing in mind that "number" means <u>total</u> number. The difference between that number and 350 is therefore the Second Number. Plaintiff presents evidence showing those Compact Tribes that were operating more than 350 devices on September 1, 1999 operated a total of 16,156 devices. Using Plaintiff's calculation method,

[4] This term could more literally be read as saying the maximum is calculated by taking the lesser of the two numbers Plaintiff ("the Tribe") was authorized to operate under Section 4.3.1. However, this number would vary among the 39 tribes, producing as many as 39 different statewide maxima. The Compact contemplates a single maximum, however, so this construction is unreasonable and must be rejected.

then, Section 4.3.1(a) of the Compact authorizes a total of 16,156 devices.[5] Using Plaintiff's method and relying on undisputed evidence, Section 4.3.1(b) authorizes a total of 39 times 350, or 13,650 gaming devices. The "lesser number authorized under Section 4.3.1" is therefore 13,650. The difference between 350 and 13,650 is 13,300. Adding this number to 29,400, the result is 42,700, the number of licenses Plaintiff argues should be available in the statewide pool.

Plaintiff's interpretation requires the Court to construe "the lesser number authorized under Section 4.3.1" to ignore what Section 4.3.1 actually does authorize , which is the larger number, and instead focus on the two numbers potentially authorized under Section 4.3.1(a) and (b), before the choice of the larger is required. But the "the lesser of" language in Section 4.3.2.2(a)(1) necessarily contemplates a choice between two numbers, so it is a reasonable construction. Plaintiff's interpretation then goes on to look at the Section 4.3.1(a) number (*i.e.*, total) and the Section 4.3.1(b) number (*i.e.*, total) and select the lesser of the two. Because "number" can mean "total," this is reasonable.

The Compact is reasonably susceptible of Plaintiff's interpretation, and Defendants concede this calculation is reasonable. (Opp'n to MSJ, 12:9–11 ("For the limited purpose of this opposition, State Defendants agree that San Pasqual's interpretation of section 4.3.2.2(a)(1) that 42,7000 licenses comprise the statewide license pool is not inherently unreasonable."))[6] Having determined Plaintiff's interpretation is reasonable, the Court must

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[5] This number, which was used in *Colusa I*, may actually be too low. Section 4.3.1(a) does not ask whether tribes were operating more or fewer than 350 devices on September 1, 1999, so it might be read as saying all devices the Compact Tribes were operating as of that date should be totaled, which would bring the total to 19,005. This may result from the interpretation of the definitions of "Contract Tribe" and "Non-Compact Tribe" given in Section 4.3.2, which could result in some Compact Tribes also being counted as Non-Compact Tribes for calculation purposes. Neither party interprets the Compact this way, however, and even if this is an error it makes no difference here, because either way the number calculated under Section 4.3.1(a) is the greater, not the lesser number and is therefore ignored.

[6] Defendants then go on to argue this number is "inadmissible" because Plaintiff cannot show this was its interpretation at the time the Compact was signed. (Opp'n to MSJ, 12:11–14.) The Court is not, however, admitting this number into evidence but construing the Compact, which is done as a matter of law. As discussed below, no evidence needs to be admitted.

decide whether the Compact is also reasonably susceptible of the construction Defendants urge.

Under Defendants' interpretation, the "lesser number" is first calculated for each Compact Tribe, that number is subtracted from 350, and the results are totaled. The result is the Second Number. Under Section 4.3.1, if a tribe that was operating more than 350 devices on September 1, 1999, the "lesser number" is 350, and the difference between the "lesser number" and 350 is zero. Therefore, only those tribes that were operating fewer than 350 devices have any impact on the Second Number.[7] The parties did not provide the numbers for each of the sixteen tribes that fall in this category, but they agree the total number of licenses held by the sixteen tribes was 2,849. The total of the differences between 350 and each of those sixteen tribes' "lesser numbers" is calculated as 350 times sixteen (*i.e.*, 5,600) minus 2,849. Under this interpretation, the Second Number is therefore 2,751 and the total number of licenses available in the statewide pool is 32,151.

Another way to state Defendants' calculation method is that for each tribe the number under Section 4.3.1(a) is compared with the number under Section 4.3.1(b), the lesser is taken, and the totals of all the lesser numbers are subtracted from the product of 16 (the number of tribes operating fewer than 350 devices) and 350. The effect of using Defendants' method is that the number 350 in the equation has a multiplier of 16.[8]

The Court considers Defendants' interpretation unreasonable. To begin with, it requires the Court to fill in provisions that are not present. For example, Defendants construe the phrase "the difference between 350 and the lesser number authorized under Section 4.3.1" to mean "the product of the number of Compact Tribes multiplied by the difference between 350 and the lesser number for each Compact Tribe authorized under Section 4.3.1." The problem is Section 4.3.2.2.(a)(1)'s First Number does contain a multiplier ("multiplied by the number of Non-Compact tribes as of September 1, 1999"), but the Second

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[7] For this reason, Defendants omit these tribes from their calculation. Including them, the "lesser number" would be 10,899, which would be subtracted from the product of 350 multiplied by 39, or 13,650. This yields the same result, 2,751.

[8] Or 39, if the method outlined in note 7, *supra*, is used.

Number omits any multiplier. Defendants' interpretation is also unreasonable because it requires the Court to interpret one or more singular words as plural, so the formula for the Second Number is "the differences between 350 and [each of] the lesser numbers authorized under Section 4.3.1," or "the differences between 350 and [each] . . . lesser number authorized under Section 4.3.1."

The alternative explanation that imputes a multiplier of 16 into the Second Number fares no better, because the language of Section 4.3.2.2(a)(1) does not mention or provide for such a multiplier. The figure 350 unambiguously means 350, not 350 multiplied by some other number. *Compare Colusa I*, 629 F. Supp. 2d at 1114 ("This multiplier is not provided for by the language in § 4.3.2.2(a)(1).")

Defendants put forward the interpretation proffered by their negotiator that the total of all licenses in the state "can be calculated by adding the number of existing Gaming Devices authorized in section 4.3.1(a) of the Compacts to the number of new Gaming Devices authorized in section 4.3.1(b)." (Opp'n,10:25–27 (quoting Decl. of William Norris, ¶ 14).) If this were what the Compact meant, however, the formula set forth in Section 4.3.2.2(a)(1) would be rather straightforward and not the more complex formula that was actually set forth.

Because the Court finds Plaintiff's proffered interpretation reasonable and Defendants' unreasonable, the Court concludes Section 4.3.2.2(a)(1)'s formula is susceptible of only one reasonable interpretation and is thus unambiguous. *Tanadgusix*, 404 F.3d at 1205 ("A contract is ambiguous if reasonable people could find its terms susceptible to more than one interpretation.") The Court does not admit extrinsic evidence to construe unambiguous contracts. *King Features*, 843 F.2d at 398. Instead, the Court holds the state to its word as embodied in the Compact. *Cabazon*, 124 F.3d at 1058.

The Court was presented with a different set of arguments from those presented to the Eastern District in *Colusa,* and has reached its conclusion in a different way. This Court has cited to portions of *Colusa I* as persuasive precedent, while recognizing that court's

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decision is not binding here. But it is worth noting this Court's construction of Section 4.3.2.2(a)(1) aligns with the Eastern District's.

C. Defenses

Defendants have raised a number of defenses to Plaintiff's claim for declaratory relief. Because the disputed portion of the Compact is unambiguous, the Court does not reach the evidence-based defenses, whether pertaining to the parties' intent or negotiating history, or matters related to these. This includes the number of licenses in the pool, and what the parties thought that number would be. Even if their calculations varied, their agreement as to the formula for calculating this number was unambiguously embodied in the Compact.

Defendants argue that because the parties each have a different understanding of the meaning of Section 4.3.2.2(a)(1), there was no "meeting of the minds," rendering the Compact unenforceable. (Opp'n at 4:14–21.) The Court rejects this argument, because later disagreements about the meaning of terms do not support a party's argument that the minds never met. *Warehousemen's Union Local No. 206 v. Continental Can Co., Inc.* 821 F.2d 1348 (9th Cir. 1987).

Defendants also raise the defense of unclean hands. This doctrine applies when a plaintiff has engaged in unconscionable, bad faith, or inequitable conduct in connection with the matter in controversy. *Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 602 (9th Cir. 1991); *General Elec. Co. v. Superior Court*, 45 Cal.2d 897, 899-900 (1955). Here, Defendants argue the doctrine would provide a defense because Plaintiff's representative at the negotiations may have heard that the chairman of another tribe had a different interpretation of Section 4.3.2.2(a)(1) from the one Defendants had. Defendants posit that Plaintiff's representative believed the other tribe's chairman, concluded the size of the pool would be larger than the state's representative did, and failed to make this known at the time to the state's representative. (Opp'n to MSJ at 18:15–19:12 and n.9.) Even if Plaintiff's representative was involved in this, it falls far short of the showing required for unclean hands.

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In discussing defenses generally, Defendants have mentioned several times a purported cap of 44,798 licenses statewide. (Opp'n to MSJ, 2:5– 8, 11:1–4, 11:16–21, 18:9–13; Norris Decl. in Supp. of Opp'n to MSJ, ¶¶ 14–16.) They argue this is all the state's negotiator was ever authorized to agree to. (Norris Decl. ¶ 15 ("During the negotiating process, Governor Davis made it clear to me that the statewide cap of 44,798, which included those Gaming Devices already in operation by gaming tribes, was not to be exceeded.")) This number supposedly represented the total number of available licenses. They also charge that the tribes were repeatedly told the state would not agree to a larger number.

To the extent Defendants are arguing the formula set forth in Section 4.3.2.2(a)(1) led to a result they did not intend to agree to, they are in fact attempting to offer extrinsic evidence to show the Compact has a meaning other than the unambiguous one the Court has recognized. Extrinsic evidence is, of course, inadmissible for this purpose. Alternatively, to the extent Defendants are arguing any number larger than 44,798 is void, they have not shown why the governor's wish for a statewide cap would support any recognized defense such as illegality or unconscionability. In either event, the number Defendants have argued for in this action is higher than the cap they allege.[9]

Finally, Defendants argue Plaintiff has not shown it has any need for declaratory relief, because Plaintiff has not shown it has not been provided the full benefit of the Compact. (Opp'n to MSJ at 23:7–13.) The short answer to this argument is that a request for declaratory relief requires only the showing of an actual and substantial controversy, where "the adverse positions have crystallized and the conflict of interests is real and

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[9] The Norris Declaration says the statewide cap was to include the devices already in operation at the time the Compact was adopted. (Norris Decl., ¶ 15.) Adding 16,156 (the number of existing devices among tribes operating more than 350), 2,849 (the number of devices operated by tribes operating 350 or fewer), and 32,151 (the number of licenses Defendants now argue should be in the pool) yields a sum significantly greater than the supposed cap. *Compare Colusa I*, 629 F. Supp. 2d at 1113 and n.21 (noting that if the cap of approximately 45,000 licenses were applied, only 23,000 more licenses would be authorized under the Compact, a number neither party's interpretation supported).

immediate." *Societe de Conditionnement v. Hunter Eng'g Co., Inc.*, 655 F.2d 938, 943 (9th Cir. 1981) (citation omitted). That requirement is met here.

D. Other Considerations

While the Court need not rely on any further evidence or principles of law, the circumstances under which the Compact was drafted and entered into support the Court's judgment here. It is undisputed Defendants drafted the Compact and presented it to Plaintiff and other tribes. Plaintiff and the other tribes were also given a rather short time to consider and adopt the Compact, including Section 4.3.2.2. The Norris Declaration shows the state's negotiators first presented the draft of Section 4.3.2.2 to key tribal negotiators on September 9, 1999. (Norris Decl., ¶¶ 16–17.) Later that day, the entire draft was presented to the assembled tribal representatives. (*Id*., ¶ 18.) The Compact was signed the next day. (Compact at 38.) While the Court need not and does not rely on these facts, and need not apply the doctrine of *contra proferentem*, they inform and support the judgment.

This background also helps put into proper perspective Defendants' suggestions that Plaintiff and the other tribes were aware of and took inequitable advantage of the situation, or that Plaintiff and the other tribes are bound by the result they thought on that day the formula would yield. Even if Plaintiff had suspected a drafting error, there would be no way in such a short time to confirm that suspicion and to determine its effect with any degree of confidence. Defendants were, by comparison, far more responsible for the Compact's language, and it is therefore equitable to hold them to it.

III. Conclusion and Order

Defendants' request to strike a portion of the MSJ is **DENIED**. Because the Court need not reach other requests for judicial notice, they are **DENIED** as moot. Except as noted above, the evidentiary objections are likewise moot and are therefore **OVERRULED**.

For reasons set forth above, Plaintiff's MSJ is **GRANTED**. Plaintiff is directed within 14 calendar days to lodge a proposed order granting declaratory relief in substantially the

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same language as requested in the SAC.[10] If Defendants object to wording of the proposed order, they may do so within three court days of the date the proposed order is lodged, instead of one business day as ordinarily permitted.

IT IS SO ORDERED.

DATED: March 29, 2010

HONORABLE LARRY ALAN BURNS
United States District Judge

[10] For instructions on lodging proposed orders electronically and objecting to lodged proposed orders, see this District's Electronic Case Filing Administrative Policies and Procedures Manual, § 2(h).