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

RINCON BAND OF LUISENO MISSION  
INDIANS OF THE RINCON  
RESERVATION, a/k/a RINCON SAN  
LUISENO BAND OF MISSION INDIANS  
a/k/a RINCON BAND OF LUISENO  
INDIANS,

Plaintiff,

vs.

ARNOLD SCHWARZENEGGER, Governor  
of California; WILLIAM LOCKYER,  
Attorney General of California; STATE OF  
CALIFORNIA,

Defendant.

CASE NO. 04cv1151 WMc

**ORDER: (1) GRANTING  
PLAINTIFF’S PARTIAL MOTION  
FOR SUMMARY JUDGMENT;  
AND (2) GRANTING REQUEST  
FOR JUDICIAL NOTICE**

**[DOC. NOS. 252, 277, 278, 279, 281,  
284, 285]**

**I. INTRODUCTION**

On June 12, 2009, the Rincon Band of Luiseno Indians (“Plaintiff” or “Rincon”) filed a motion for partial summary judgment. [Doc No. 252.] On July 24, 2009, Defendants, the State of California and Governor Schwarzenegger (“Defendants” or “State”) filed an opposition to Rincon’s motion. [Doc. No.271.] On July 31, 2009, Rincon filed its Reply in support of the motion for partial summary judgment. [Doc. No. 273.] On August 7, 2009, the Court held oral argument on Rincon’s motion. [Doc. Nos. 276, 286.] Following oral argument, the Court ordered supplemental briefing on issues

1 of joinder under Rule 19(a) and consent to magistrate judge jurisdiction in the event of joinder. [Doc.  
2 No. 275.] The parties submitted simultaneous supplemental opening briefs on August 28, 2009. [Doc.  
3 Nos. 277-278.] The parties filed simultaneous supplemental rebuttal briefs on September 8, 2009.  
4 [Doc Nos. 281, 284, 285.]

5 For the reasons set forth below, the Court finds: (1) the California Gambling Control  
6 Commission (“CGCC”) is not a necessary party under Rule 19; (2) no further discovery is necessary  
7 under Rule 56(f) for Defendants to oppose Plaintiff’s motion; and (3) Plaintiff’s motion for partial  
8 summary judgment is **GRANTED**.

## 9 **II. UNDISPUTED FACTS**

10 The facts which the parties agree are undisputed are as follows:

### 11 **A. The advent of Proposition 5**

12 On November 3, 1998, voters in the State of California voted on an approved Proposition  
13 5, a statewide ballot measure that authorized the Governor of California to enter into a Tribal-State  
14 Gaming Compact with any federally recognized Tribe in California that wished to game under the  
15 Indian Gaming Regulatory Act (IGRA). [Undisputed Fact no. 1.] Proposition 5 passed by a vote  
16 of 62.4% (5,090,452) in favor and 37.6% (3,070,358) opposed. [Undisputed Fact no. 2.] On  
17 December 4, 1998, the Supreme Court of California entered an order staying the implementation  
18 of Proposition 5 until it ruled on the merits of a writ of mandate filed by the Hotel and Restaurant  
19 Employees International Union. The Union challenged the legality of Proposition 5. [Undisputed  
20 Fact no. 3.] The Secretary of the Interior did not approve Proposition 5 Gaming Compacts  
21 because the validity of the compacts was pending before the Supreme Court of California.  
22 [Undisputed Fact no. 4.] While the legality of Proposition 5 was before the Supreme Court, on  
23 March 25, 1999, then-Governor Davis notified California Tribes that he would begin to negotiate  
24 with the Tribes over a possible Tribal-State compact. [Undisputed Fact no. 5.] On May 4, 1999  
25 Rincon and 41 other Tribes submitted a letter to Governor Davis requesting an executed compact  
26 containing the same terms as those approved in Proposition 5. The Tribes requested that the State  
27 identify any portions of the Proposition 5 Compact to which it was unwilling to agree so that they  
28 could meet with the Governor’s representative to work out any issues. [Undisputed Fact no. 6.]  
[On August 24, 1999,] Governor Davis met with Tribal leaders and committed to negotiate a

1 compact with all interested Tribes. [Undisputed Fact no.8.]

2 **B. Ratification of Proposition 1A**

3 In September 1999, the California Legislature ratified the Proposition 1A Compacts subject  
4 to the condition that Proposition 1A was approved by the voters and the Governor signed the  
5 ratification into law. [Undisputed Fact no. 16.] On March 7, 2000, California voters approved  
6 Proposition 1A. [Undisputed Fact no. 17.] On May 5, 2000, the Secretary of the Interior approved  
7 the Proposition 1A Compacts, making them effective upon their publication in the Federal  
8 Register on May 16, 2000. [Undisputed Fact no. 18.]

9 **C. Licensing**

10 On September 10, 1999, the Governor's Office distributed an information sheet indicating  
11 a total of 44,448 slot machines could be operated under the new Proposition 1A Compacts once in  
12 effect, or enough for another 23,450 in addition to those already in operation. [Undisputed Fact no.  
13 27.] The CGCC acknowledged the ambiguous nature of these Compact sections in a report issued  
14 by the agency, stating, "[t]he [sic] language of the Compact section 4.3.2.2(a)(1) is sufficiently  
15 obscure that, undoubtedly, agreement among all the parties to the Compacts can only be achieved  
16 in the renegotiation that may be commenced under Compact section 4.3.3 in March 2003."  
17 [Undisputed Fact no. 33.]

18 **D. Compact Renegotiation**

19 Rincon submitted a formal request to renegotiate Compact sections 4.3.1 and 4.3.2 on  
20 March 8, 2003, in compliance with the March 2003 deadline set by the Proposition 1A Compacts  
21 for such a request to be made. [Undisputed Fact no. 37.] On February 26, 2004, the Rincon Band  
22 again requested to meet and confer over a variety of issues, one of which was the number of  
23 gaming device licenses. In that letter, the Rincon Band noted it recognized two reasonable  
24 interpretations of the number of available gaming devices, which would result in either 64,293 or  
25 58,450 total licenses available in the pool. [Undisputed Fact no. 38.] On June 16, 2004, the office  
26 of the Governor issued a letter indicating "the position of the State is that the Commission's  
27 interpretation of the total number of permissible licenses [at 32,151] is correct." [Undisputed Fact  
28 no. 39; June 16, 2004 Letter, Doc. No. 253 - NOL at 18-260.] During negotiation sessions on  
August 9, 2006, September 12, 2006 and October 5, 2006, Rincon again raised the issue of

1 interpreting the Proposition 1A Compact provisions governing the number of gaming device  
 2 licenses in the statewide pool. [Undisputed Fact no. 41.] On September 25, 2006, Rincon's  
 3 lawyers sent the State a memorandum providing a detailed analysis of the issues with respect to  
 4 the calculation of the number of available gaming device licenses. [Undisputed Fact no. 42.] On  
 5 October 23, 2006, the State acknowledged multiple interpretations of section 4.3.2.2 were possible  
 6 but concluded it would continue to follow the CGCC's interpretation of the total number of  
 7 gaming devices. [Undisputed Fact no. 43.; June 16, 2004 Letter from Office of the Governor, Doc.  
 8 No. 253 - NOL at 18-260 ("[T]he position of the State is that the Commission's interpretation of  
 9 the total number of permissible licenses is correct . . . ."]

#### 10 **E. Breakdown of Tribal Operations**

11 As of September 1, 1999, there were 107 federally-recognized Tribes with Tribal Lands  
 12 located within the exterior boundaries of the State of California. [Undisputed Fact no. 51.] Eighty-  
 13 four (84) of the federally recognized Tribes in the State of California were operating fewer than  
 14 350 gaming devices each on September 1, 1999. [Undisputed Fact no. 54.] Of those 84 Tribes, 16  
 15 Tribes were operating at least one, but less than 350 devices as of September 1, 1999. [Undisputed  
 16 Fact no. 56.] The other 68 Tribes were not operating an devices on September 1, 1999.  
 17 [Undisputed Fact no. 57.] Twenty- three (23) Tribes were operating more than 350 devices as of  
 18 September 1, 1999. [Undisputed Fact nos. 51, 56, and 57.] Specifically, the aggregate numbers  
 19 were: a.) 16,156 devices operated by Tribes with casinos operating *more than* 350 devices;<sup>1</sup> b.)  
 20 2,849 devices operated by Tribes with casinos operating *fewer* than 350 devices; and c.) 19,005  
 21 grand-fathered devices in all. [Doc. No. 286, Transcript August 7, 2009 Hearing at 23:16-20,  
 22 24:14-20; Doc. No. 253 - NOL at 10-168 to 10-171; June 16, 2004 Letter from Office of the  
 23 Governor, Doc. No. 253 - NOL at 18-259 (indicating 19,005 as the number of terminals equal to  
 24 the number of Gaming Devices operated by the Tribe on September 1, 1999).]

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28 <sup>1</sup>19,005 total devices - 2849 devices operated by Tribes with fewer than 350 devices = 16,156  
 devices operated by Tribes with more than 350 devices.

### III. DISCUSSION

#### A. Federal Rule of Civil Procedure, Rule 19(a)

Rule 19(a) of the Federal Rules of Civil Procedure provides in pertinent part:

“(1) Required Party. A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if: (a) in that person’s absence, the court cannot accord complete relief among existing parties; or (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person’s absence may: (i) as a practical matter impair or impede the person’s ability to protect the interest or leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.”

Fed. R. Civ. P. 19(a)(1)(A)-(B)(ii).

“The inquiry is a practical one and fact specific, and is designed to avoid the harsh results of rigid application.” *Shermoen v. United States*, 982 F.2d 1312, 1317 (9<sup>th</sup> Cir. 1992)(quoting *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9<sup>th</sup> Cir. 1990).

In undertaking the Rule 19 analysis, the Court has examined the Compact, California statutes and executive orders submitted by the parties to determine the powers and jurisdiction of the CGCC as it pertains to the States’ Tribal Gaming licensing operations. Under the Gambling Control Act, “[j]urisdiction, including jurisdiction over operation and concentration, and supervision over gambling establishments in this state and over all persons or things having to do with the operations of gambling establishments is vested in the commission.” California Business and Professions Code Section 19811(b). Additionally, Executive Order D-31-01 delineates the wide-ranging powers conferred upon the CGCC by the Gambling Control Act and the Tribal State Compact as follows:

“IT IS ORDERED that the California Gambling Control Commission **shall administer the gaming device license draw process** under Section 4.3.2.2.(a)(3), and control, collect and account for all license fees under Section 4.3.2.2.(a)(2);

IT IS FURTHER ORDERED that the **State of California’s rights** to enforce the provisions of Sections 4.3.2.2.(a)(1) through(3) and (e), and all subparagraphs thereunder, of the Tribal-State Gaming Compacts **are hereby delegated to the California Gambling Control Commission;**

IT IS FURTHER ORDERED that the California Gambling Control Commission shall

1           **ensure that the allocation of machines among California Indian Tribes does not**  
2           **exceed allowable number** of machines as provided in the Compacts and **shall determine**  
3           **whether the machine license draw(s) complies with the limitations of the Tribal-State**  
4           **Gaming Compacts.”**

5 [See Exh. B. To Doc. No. 277, Executive Order D-31-01, March 13, 2001 (emphasis added.)]

6           A review of these sources makes clear the responsibility for operation of the gaming device  
7 licensing pool rests with the CGCC. Moreover, Plaintiff’s First Amended Complaint specifically  
8 disputes the CGCC’s interpretation of the license pool cap (FAC, p.13 at paras. 59-60) and  
9 challenges the CGCC’s denial of the Rincon Tribe’s requests to participate in additional license  
10 draws. (FAC, p. 13 at para. 62.) However, this is not the end of the Court’s inquiry. The Court  
11 must consider whether the Court can provide the relief Rincon seeks with respect to the licensing  
12 issues raised in the fourth claim for relief without joinder of the CGCC to this action. In addition,  
13 the Court must evaluate whether disposing of the action in the CGCC’s absence may impair  
14 CGCC’s interests or leave the State and the Governor at substantial risk of inconsistent  
15 obligations. Fed. R. Civ. P. 19(a)(1)(A)-(B)(ii).

16           As explained in more detail below, this Court finds it can provide the relief Rincon seeks  
17 even if the CGCC is not named as a party to this suit. The Court also finds CGCC’s interests are  
18 identical to the interests of the State and the Governor’s office such that adjudication of the license  
19 cap will not impair the CGCC’s operations or actions. Therefore, the Court finds CGCC is not a  
20 required party under Rule 19 for adjudication of Plaintiff’s licensing claim. While it is true the  
21 responsibility for licensing of gambling operations has been delegated to the CGCC, that  
22 responsibility only exists by virtue of the State’s and the Governor’s delegation of authority to the  
23 Commission. *See* California Business and Professions Code Section 19824 (“The commission  
24 shall have all powers necessary and proper to enable it fully and effectually to carry out the  
25 policies and purposes of this chapter, including, without limitation, the power to: . . . (a) require  
26 any person to apply for a license . . . (b) for any cause deemed reasonable by the commission . . .

1 limit, condition or restrict any license.”)<sup>2</sup> As a state agency, the CGCC is also bound by judgments  
2 against the State. *People v. Rath Packing Co.*, 85 Cal. App. 3d. 308, 323 n.10 (1978) (“The People  
3 point out that the State of California was not a named party in the federal action, and argue thereby  
4 that the federal decisions are binding only on the individual state officials named therein. But . . .  
5 the general rule appears to be that an action in the federal courts against one governmental official  
6 will bind all other officials of the same government.”)

7 Defendants have presented no law indicating an order or judgment from this Court  
8 construing the terms of the State’s Compact with the Rincon Band would have no binding effect  
9 on the CGCC. Indeed, the Compact between the State and the Rincon Band specifically defines  
10 the “State” as “the State of California or an authorized official or agency thereof.” Compact,  
11 Section 2.17. Further, the Compact defines the term “State Gaming Agency” to mean “entities  
12 authorized to investigate, approve, and regulate gaming licenses pursuant to the Gambling Control  
13 Act.” Compact Section 2.18. Finally, in the Compact’s Section 6.3, which provides in part a  
14 summary of licensing principles, the Compact reads: “The parties intend that the licensing process  
15 provided for in this Gaming Compact shall involve joint cooperation between the Tribal Gaming  
16 Agency and the State Gaming Agency.” Compact, Section 6.4.1.

17 The Court is unpersuaded by Defendant’s undeveloped argument that as a non-party to this  
18 suit against the State, the CGCC, even though it is a subordinate state agency contemplated in the  
19 Compact, has no obligation to comply with a judicial interpretation of the Compact’s licensing  
20 provisions. To the contrary, the Court finds it can provide the relief Rincon seeks because,  
21 regardless of the CGCC’s status as a party, a ruling construing Rincon’s binding Compact with the  
22 State of California is also binding on the CGCC. This basic principle is discussed in *Valencia v.*  
23 *County of Sonoma*, 158 Cal. App. 4<sup>th</sup> 644 (2007), where the First District California Court of  
24 Appeal rejected an argument similar to the one being made by the State here in determining  
25 whether an agreement which was binding on the County of Sonoma (“County”) was also binding

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26  
27 <sup>2</sup> The CGCC was clearly not a required for proper adjudication of the good faith negotiation  
28 determination because negotiation is a documented responsibility of the Governor’s Office. *See*  
California Government Code Section 12012.25(d) (“The Governor is the designated state officer  
responsible for negotiating and executing, on behalf of the state, tribal-state gaming compacts with  
federally recognized Indian tribes located within the State California pursuant to the federal Indian  
Gaming regulatory Act of 1988....”)

1 on the County Civil Service Commission (“Commission”), an entity created by the County to  
2 oversee personnel matters. Specifically, in *Valencia*, the Plaintiff was terminated by the County  
3 and appealed the decision to the Commission. The Commission vacated the termination and  
4 imposed its own conditions on Plaintiff’s employment, which were outside the terms articulated in  
5 a memorandum of understanding between the County and the bargaining agent representing  
6 Plaintiff. *Valencia*, 158 Cal. App.4th at 646. Plaintiff appealed the decision of the Commission as  
7 an abuse of discretion and in excess of its jurisdiction. The state trial court ordered the  
8 Commission to impose discipline consistent with the MOU entered into by the State. *Id.* at 648.  
9 The County appealed the decision of the trial court, arguing the Commission was not bound by the  
10 MOU. *Id.* The state appellate court held the Commission, a subordinate agency of the County,  
11 was also bound by the terms of the MOU. *Id.* at 653. The state court of appeals explained:

12 “Defendants do not dispute that the County and the Union entered into an MOU . . . and  
13 that the agreement is binding on the county. . . . Nor do defendants dispute that the MOU  
14 contains provisions that address the scope and type of discipline that may be imposed upon  
15 an employee. . . . Instead defendants argue that, while the MOU might bind the Department  
16 in imposing discipline on [Plaintiff], the Commission is not so bound when reviewing and  
17 revising that discipline. The contention is contrary to logic and policy. It is contrary to  
18 logic because the Commission is merely a subunit of the County. If an agreement has been  
19 approved by the Board as binding on the “County” one would expect that the agreement  
20 would be binding on the various agencies of the County as well. The County, after all,  
21 normally operates through its various constituent agencies, just as a corporation operates  
22 through its employees. . . .The argument is contrary to policy because defendants’ position  
23 on this appeal would render portions of the MOU illusory, . . . . [as] employees are able to  
24 escape the negotiated, voluntary constraints the MOU would otherwise place on their  
25 conduct merely by appealing to the Commission, since the Commission is free to disregard  
26 those constraints.”

20 *Id.* at 650.

21 The Court finds the *Valencia* court’s reasoning persuasive here where there is a Compact  
22 between the State and the Rincon Band, the Commission is mentioned in the Compact as the entity  
23 authorized by the State to regulate gaming licenses pursuant to the Gambling Control Act, and the  
24 Court has been called upon to interpret the language of the Compact as it pertains to licensing. As  
25 an agency of the State, the CGCC must honor the State’s obligations under the Compact as the  
26 State would. To do otherwise would undermine the credibility of the State to execute Compacts or  
27 other contracts because entities negotiating with the State would have no assurance that  
28 departments, boards or commissions authorized to carry out State business would comply with  
contracts which the State entered. The Compact is binding on the CGCC and any term of the

1 Compact construed by the Court is also binding on CGCC in accordance with the expectation of  
2 the parties, logic and law. Thus, the Court finds the CGCC is not a required party under Rule 19  
3 for adjudication of Plaintiff's licensing claim.<sup>3</sup>

#### 4 **B. Standard on Motion for Summary Judgment**

5 Summary judgment is appropriate under Rule 56(c) where the moving party demonstrates  
6 the absence of a genuine issue of material fact and entitlement to judgment as matter of law. *See*  
7 Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A fact is material when,  
8 under the governing substantive law, it could affect the outcome of the case. *Anderson v. Liberty*  
9 *Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Freeman v. Apaio*, 125 F.3d 732, 735 (9<sup>th</sup> Cir. 1997). A  
10 dispute about a material fact is genuine if "the evidence is such that a reasonable jury could return  
11 a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

12 A party seeking summary judgment always bears the initial burden of establishing the  
13 absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. The moving party can  
14 satisfy this burden in two ways: (1) by presenting evidence that negates an essential element of the  
15 nonmoving party's case; or (2) by demonstrating that the nonmoving party failed to make a  
16 showing sufficient to establish an element essential to that party's case on which that party will  
17 bear the burden of proof at trial. *Id.* at 322-23. "Disputes over irrelevant or unnecessary facts will  
18 not preclude a grant of summary judgment." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors*  
19 *Ass'n*, 809 F.2d 626, 630 (9<sup>th</sup> Cir.)(citing *Anderson*, 477 U.S. at 248.)

20 "The district court may limit its review to the document submitted for the purpose of  
21 summary judgment and those parts of the record specifically referenced therein." *Carmen v. San*  
22 *Francisco Unified Sch. Dist.*, 237 F.3d 1026, 1030 (9<sup>th</sup> Cir. 2001). Therefore, the court is not  
23 obligated "to scour the record in search of a genuine issue of triable fact." *Keenan v. Allen*, 91  
24 F.3d 1275, 1279 (9<sup>th</sup> Cir. 1996) (citing *Richards v. Combined Inc. Co.*, 55 F.3d 247, 251 (7<sup>th</sup> Cir.  
25 1995). If the moving party fails to discharge this initial burden, summary judgment must be  
26 denied and the court need not consider the nonmoving party's evidence. *Adickes v. S.H. Kress &*  
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28 <sup>3</sup>The Court need not reach the issue of additional consent to Magistrate Judge jurisdiction as both the State of California and the Office of the Governor through their attorneys have consented to Magistrate Judge McCurine's jurisdiction. [See Consent form at Doc. No. 101.]

1 Co., 398 U.S. 144, 159-60 (1970).

2 If the moving party meets this initial burden, the nonmoving party cannot defeat summary  
3 judgment merely by demonstrating “that there is some metaphysical doubt as to the material  
4 facts.” *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Triton*  
5 *Energy Corp. v. Square D. Co.*, 68 F.3d 1216, 1221 (9<sup>th</sup> Cir. 1995) (citing *Anderson*, 477 U.S. at  
6 252) (“The mere existence of a scintilla of evidence in support of the nonmoving party’s position  
7 is not sufficient.”) Rather, the nonmoving party must “go beyond the pleadings and by her own  
8 affidavits or by ‘the depositions, answers to interrogatories, and admissions on file,’ designate  
9 ‘specific facts showing that there is a genuine issue for trial.’” *Celotex*, 477 U.S. at 324 (quoting  
10 Fed. R. Civ. P. 56 (e)).

11 When making this determination, the court must view all inferences drawn from the  
12 underlying facts in the light most favorable to the nonmoving party. *See Matsushita*, 475 U.S. at  
13 587. “Credibility determinations, the weighing of evidence, and the drawing of legitimate  
14 inferences from the facts are jury functions, not those of a judge, [when] he [or she] is ruling on a  
15 motion for summary judgment.” *Anderson*, 477 U.S. at 255.

16 **C. Defendants Request A Continuance of The Motion for Summary Judgment Under Rule**  
17 **56(f) Of The Federal Rules of Civil Procedure**

18 Defendants request a continuance under FRCP 56(f)(2) to conduct discovery on the  
19 circumstances surrounding the negotiation of the original Compact to determine: (1) if there was  
20 some consensus as to the ultimate size of the license pool that would assist the Court in  
21 determining one reasonable interpretation of the Compact’s license formula; and (2) whether any  
22 subsequent conduct of Rincon ratified the CGCC’s interpretation of the number of licenses  
23 available under Section 4.3.2.2(a)(1) of the Compact. [Defendants’ Oppo , Doc. No. 271 at 4:14-  
24 21.]

25 Rule 56(f) allows the hearing on a summary judgment motion to be continued “if the  
26 nonmoving party has not had an opportunity to make full discovery.” *Celotex Corp. v. Catrett*, 477  
27 U.S. 317, 326 (1986). *See also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.4 (1986).  
28 District courts have wide discretion in controlling discovery and rulings will not be overturned in  
the absence of clear abuse of this discretion. *Foster v. Arcata Assoc., Inc.*, 772 F.2d 1453, 1467

1 (9th Cir. 1985). The party requesting the continuance is required to make a factual showing, must  
 2 be diligent in pursuing discovery facts, and must request the continuance in a motion for additional  
 3 discovery and an accompanying affidavit. *California v. Campbell*, 138 F.3d 772, 779 (9th Cir.  
 4 1998)

5 **a. Factual showing**

6 The party seeking a continuance on a summary judgment hearing must show “(1) that they  
 7 have set forth in affidavit form the specific facts that they hope to elicit from further discovery, (2)  
 8 that the facts sought exist, and (3) **that these sought-after facts are ‘essential’ to resist the**  
 9 **summary judgment motion.”** *California*, 138 F.3d at 779 (emphasis added.). Further, the party  
 10 seeking the continuance cannot rely on vague assertions about the need for discovery. *U.S. v.*  
 11 *5,644,540.00 in U.S. Currency*, 799 F.2d 1357, 1363 (9th Cir. 1986).

12 **1. No Discovery Is Needed To Determine The First Figure Used In The**  
 13 **Compact Section 4.3.2.2(a)(1) Formula**

14 Both parties agree the formula in Compact Section 4.3.2.2 (“Allocation of Licenses”) is  
 15 ambiguous.<sup>4</sup> [Rincon’s Mot., Doc. No. 252 at 1:5-6; Defendants’ Oppo., Doc. No. 271, 10:13-15.]  
 16 Given the ambiguity, Defendants contend discovery is needed to acquire the extrinsic evidence  
 17 necessary to oppose Plaintiffs’ motion for summary judgment. [Defendants’ Oppo., Doc. No. 271,  
 18 4:5-10.] Plaintiffs oppose Defendants’ request on the grounds that: a.) no relevant factual disputes  
 19 exist to deter summary judgment; b.) Defendants’ purpose is to delay; and c.) Defendants have  
 20 failed to meet the requirements necessary for relief under Rule 56(f). [Rincon’s Reply, Doc. No.  
 21 273 at pp 1, 4, 5.]  
 22

23 A contract is ambiguous where it is susceptible to more than one reasonable interpretation.  
 24 *Tanadgusix Corp. v. Huber*, 404 F.3d 1201, 1205 (9<sup>th</sup> Cir. 2005); *Jones Hamilton Co. v. Beazer*

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25  
 26 <sup>4</sup> In 1988, Congress enacted the Indian Gaming Regulatory Act (IGRA), authorizing Native  
 27 American tribes to conduct casino gambling pursuant to tribal-state compacts, if the state permits such  
 28 gambling. *Greater New Orleans Broadcasting Ass’n, Inc. v. U.S.*, 527 U.S. 173, 178-179 (1999); 25  
 U.S.C. § 2710(d)(3)(A)-(C). Further, the Supreme Court has determined these tribal-state compacts  
 are contracts. *See, e.g., Oklahoma v. New Mexico*, 501 U.S. 221, 236 n.5 (1991); *Texas v. New*  
*Mexico*, 482 U.S. 124, 128 (1989). Accordingly, general principles of contract interpretation are used  
 to construe contracts governed, as in this case, by federal law. *Idaho v. Shoshone-Bannock Tribes*,  
 465 F.3d 1095, 1098 (9th Cir. 2006).

1 *Materials & Services, Inc.* 973 F.2d 688, 692 (9<sup>th</sup> Cir. 1992). To determine whether a contract  
2 term is ambiguous, the Court undertakes a two-part inquiry as articulated in *Winet v. Price*, 4 Cal.  
3 App. 4<sup>th</sup> 1159, 1165 (1992). There the Court explained:

4       The court provisionally receives (without actually admitting) all credible evidence  
5 concerning the parties' intentions to determine "ambiguity," i.e., whether the language is  
6 "reasonably susceptible" to the interpretation urged by a party. If in light of the extrinsic  
7 evidence the court decides the language is "reasonably susceptible" to the interpretation  
8 urged, the extrinsic evidence is then admitted to aid in the second step - interpreting the  
9 contract.

10 *Id.*

11       If the ambiguous language at issue is not reasonably susceptible to the interpretation  
12 proffered by a party, extrinsic evidence as to that party's interpretation is not admitted by the  
13 Court. *Id.*; *Slottow v. Am. Cas. Co.*, 10 F.3d 1355, 1361 (9<sup>th</sup> Cir. 1993). Indeed, the question of  
14 whether the language at issue is reasonably susceptible to two or more interpretations is a question  
15 of law. *Winet v. Price*, 4 Cal. App. 4<sup>th</sup> 1159, 1165 (1992).

16       The terms of the Proposition 1A Compact sets forth the scope of Class III gaming and  
17 specifically provide a formula for determining individual tribal and statewide maximum numbers  
18 of gaming devices. [See Rincon Compact, Doc. No. 253 - NOL 8-52 at Section 4.3 entitled  
19 "Authorized number of Gaming Devices."] Under the Compact, a Tribe may operate the larger of  
20 the following without drawing a gaming device license: a) any grand-fathered gaming devices in  
21 operation on September 1, 1999 or b) up to 350 gaming devices as entitlement devices. *Id.* at  
22 Section 4.3.1. A license is required under the Compact for Tribes intending to operate additional  
23 gaming devices up to a total of 2,000. See Rincon Compact, Doc. No. 253 - NOL 8-53 at Section  
24 4.3.2.2(a) entitled "Allocation of Licenses." Licenses for additional gaming devices are collected  
25 in a statewide pool. *Id.* at 4.3.2.2(a)(1).

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1 Specifically, Compact Section 4.3.2.2(a)(1) reads: “The maximum number of machines  
 2 that all Compact Tribes in the aggregate may license pursuant to this Section shall be[:]  
 3 **a sum equal to 350 multiplied by the number of Non-Compact tribes as of September**  
 4 **1, 1999,**  
 5 plus  
 6 **the difference between 350 and the lesser number authorized under Section 4.3.1.”**

7  
 8 *See* Compact Section 4.3.2.2(a)(i) [at Exh. 8 to Doc. No. 253 at p.8-53].

9 The Court has considered the evidence referenced by the parties and finds the first half of  
 10 the formula to be unambiguous. Specifically, the Court finds **29,400** or (350 multiplied by the 84  
 11 federally recognized Non-Compact Tribes as of September 1, 1999) is the appropriate figure to be  
 12 derived from a reasonable interpretation of the first half of the license formula. Such an  
 13 interpretation is based on the express definition of “Non-Compact Tribes” provided in the  
 14 Compact. Specifically, “Non-Compact Tribes”<sup>5</sup> are defined in the Compact as “[f]ederally-  
 15 recognized tribes that are operating fewer than 350 Gaming Devices.” *See* Compact, Section  
 16 4.3.2(a)(I). There is no dispute between the parties that 84 of the 107 federally recognized Tribes  
 17 in the State of California were operating less than 350 gaming devices on September 1, 1999.  
 18 [Undisputed Fact 54 at Doc Nos. 252-2, 12:10-12 and 271-3 at p.12.]. Accordingly, 350  
 19 multiplied by the 84 federally recognized Non-Compact Tribes on September 1, 1999 amounts to  
 20 **29,400**, which, as stated above, is the first figure to be used in the calculation.

21 After review of the Compact’s terms and undisputed facts, the Court finds Rincon’s  
 22 interpretation of the first component of the licensing formula is strained because it attempts to  
 23 create its own definition of the term “Non-Compact Tribe” by distorting the term expressly defined  
 24 in the Compact, “Compact Tribes.”<sup>5</sup> Rincon urges their own unique interpretation even though  
 25 the express definition of the term “Non-Compact Tribes” appears in the Compact directly after the  
 26

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27 <sup>5</sup> The term “Compact Tribe” is carefully defined in the Compact as “a tribe having a compact  
 28 with the State that authorizes Gaming Activities authorized by this Compact.” *See* Compact Section  
 4.3.2(a)(i). Accordingly, Rincon argues the term Non-Compact Tribe should mean each of  
 California’s 107 federally recognized tribes who, as of September 1, 1999, had no authorization to  
 game via Compact. [Rincon’s Mot., Doc. No. 252 at 9:9:15.]

1 definition of “Compact Tribes.” Essentially, Rincon would like to define Non-Compact Tribes as  
2 any and all federally recognized tribes without an official compact as of September 1, 1999.  
3 Although the Court could view Rincon’s interpretation of the first component as somewhat  
4 reasonable *in the absence* of an express definition of “Non-Compact Tribes,” there is an express  
5 definition of Non-Compact Tribes clearly set forth in the Compact itself. The Court cannot adopt  
6 an interpretation that would essentially render meaningless the unambiguous definition set forth in  
7 Section 4.3.2(a)(i). Indeed, the Court is called upon in these instances to “provide an  
8 interpretation that will make an agreement lawful, operative, definite, reasonable and capable of  
9 being carried into effect . . . .” *Badie v. Bank of Am.*, 67 Cal. App. 4<sup>th</sup> 779, 800 (1998). In light of  
10 the Court’s finding that 29,400 is the unambiguous and appropriate figure to use as the first  
11 component in the formula, no extrinsic evidence is needed by Defendants to demonstrate the first  
12 component of the formula. Therefore, discovery as to the first component of the formula is  
13 unnecessary.

14 **2. Discovery Is Not Necessary To Determine The Second Figure Used In The**  
15 **Section 4.3.2.2(a)(1) Formula**

16 As noted above, Section 4.3.2.2(a)(1) of the Compact reads: “The maximum number of  
17 machines that all Compact Tribes in the aggregate may license pursuant to this Section shall be [:]  
18 a sum equal to 350 multiplied by the number of Non-Compact tribes as of September 1, 1999,  
19 **plus the difference between 350 and the lesser number authorized under Section 4.3.1.”** *See*  
20 Compact Section 4.3.2.2(a)(i) at Exh. 8 to Doc. No. 253 at p.8-53 (emphasis added). In order to  
21 determine the “lesser number authorized” in the second half of the formula, it is necessary to refer  
22 to Section 4.3.1 of the Compact which provides:  
23

24 “The tribe may operate no more Gaming Devices than the larger of the following: (a) A  
25 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.”

26 *See* Compact Section 4.3.1 [at Exh. 8 to Doc. No. 253 at p.8-52].

27 After an examination of the evidence presented on the second component of Section  
28 4.3.2(a)(i), the Court finds the second half of the formula is ambiguous and open to one or more

1 reasonable interpretations. The parties also agree two reasonable interpretations of the Compact's  
 2 formula lead to a maximum license pool number of 42,700<sup>6</sup> or 55,951.<sup>7</sup> [Doc. No. 271, Def. Oppo  
 3 at 13:6-8; Doc. No. 286, Transcript of August 7, 2009 Hearing at 60:3-6.] The Court further finds,  
 4 despite the ambiguity acknowledged by all, Defendants do not need discovery to oppose the  
 5 motion for summary judgment or aid the Court in fashioning a reasonable interpretation of the  
 6 formula's second component. The State admits the Governor's office and later the CGCC (to  
 7 which the oversight of the licensing pool was delegated) could not arrive at one fixed number for  
 8 the licensing pool cap. [Undisputed Fact Nos. 27, 33, 39.] Given this concession, the Court is  
 9 unpersuaded by Defendants' insistence on Judge Norris' interpretation of the license cap at a  
 10 definitive 44,798 gaming devices. From the evidence presented, it appears the 44,798 figure may  
 11 have been presented to Attorneys Howard Dickstein and Jerome Levine and the Tribes they  
 12 represented during Compact negotiations but was never memorialized in the Compact itself.  
 13 [Norris Decl., Doc. No. 253 - NOL at 11-199 to 11-200.] That figure was never set forth in the  
 14 Compact, nor have the parties presented any evidence in the record that 44,798 was agreed to or  
 15 relied upon by either party. Indeed, after the Compact was signed, the Governor's office issued  
 16 an information sheet on September 10, 1999 indicating a lesser cap of 44,448 devices.  
 17 [Information Sheet, NOL at 13-216.] Later, on June 16, 2004, Defendants adopted yet another  
 18 interpretation of the licensing cap at 32,151 licenses. [Undisputed Fact no. 39.] From this

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 20 <sup>6</sup>Rincon advocates adoption of the Eastern District's "alternative formulation" as articulated  
 21 in *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. California*, 629 F.Supp.2d  
 22 1091 at 1114 (E.D. Cal. 2009). In the *Colusa* litigation, the parties did not dispute the first component  
 23 of the formula and agreed it amounted to 29,400 devices. *Id.* at 1109. To calculate the second  
 24 component of the formula, the *Colusa* court found 16,156 devices were authorized under Section  
 25 4.3.1(a) by multiplying 350 by the 23 *signatory* Tribes operating more than 350 devices as of  
 26 September 1, 1999. The *Colusa* court also found 13,650 devices were authorized under Section  
 27 4.3.1(b) by multiplying 350 by the 39 other *signatory* Tribes operating none or less than 350 devices.  
 From that, the *Colusa* court subtracted 350 from the lesser number of 13,650 which resulted in a  
 finding of 13,300 devices for component two. Adding 29,400 and 13,300, the *Colusa* court  
 determined the total license pool to consist of 42,400 devices. *Id.* at 1114. While the *Colusa* court's  
 alternative formulation is a reasonable interpretation, this Court declines to adopt it because  
 information regarding the 39 signatories to the Compact operating none or less than 350 devices was  
 not presented to this Court as an undisputed fact in support of Rincon's Motion for Summary  
 Judgment. The only similar information presented by Rincon concerned 57 letters of intent written  
 on September 10, 1999. [See Doc. No. 252-2, Rincon's Sep. Stat. at Fact No.13, p. 4:16-21.]

28 <sup>7</sup> The total license pool limit of 55,951 may be determined by the following formula:  
 29,400 [component one] + 350 devices x 84 Tribes w/ none or <350 devices - 2,849 [the total number  
 of Tribes with more than one, but fewer than 350 licenses].

1 evidence, the Court finds the numbers under the Compact's formula were in continual flux from  
2 the outset of the Compact and the State did not consider the 44,448 figure to be *its* operative or  
3 most desirable number. *See also Cachil Dehe Band of Wintun Indians of the Colusa Indian*  
4 *Community v. California*, 629 F.Supp.2d 1091 at 1113 (E.D. Cal. 2009) (noting evidence regarding  
5 the formation of the Compact did not aide the Court because the parties' submissions established  
6 "there was no clear consensus between the parties regarding the maximum number of Gaming  
7 Devices allowed under the Compact at the time the agreements were executed.") Regardless of the  
8 varying numbers, it is clear from the undisputed evidence that both a pooling concept and a  
9 capping concept were accepted by the signatories. *See Idaho v. Shoshone-Bannock Tribes*, 465  
10 F.3d 1095, 1098 (9th Cir. 2006)("Contract terms should be given their typical, ordinary meaning,  
11 and when the terms of a contract are clear, the intent of the parties must be ascertained from the  
12 contract itself.")(citing *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1549  
13 (9th Cir.1990) (amended opinion)). Further, one must read and interpret each contractual  
14 provision in light of the entire contract. *Tanadgusix*, 404 F.3d at 1205. The Court finds the  
15 ambiguity acknowledged by the parties arises as a result of the *formula* written to embody the  
16 pooling and capping concepts, not the pooling or capping concepts in and of themselves..

17 Defendants' submission of statements made by the Chairman of the Agua Caliente Band of  
18 Cahilla Indians at a June 12, 2002 meeting of the CGCC indicating members of the Agua Caliente  
19 Tribe may have had a different understanding of the number of licenses available in the licensing  
20 pool which they did not address with the Governor's negotiator does not change the Court's  
21 reasoning with respect to the Court's determination the parties had a meeting of the minds on all  
22 the essential elements of the Compact. The statements, made three years *after* the signing of the  
23 Compact, do not involve Rincon, are unreliable hearsay, and merely reflect what the Court has  
24 already found: Although the parties agreed upon the need for a license cap and the formula by  
25 which that cap is determined, the actual amount of the cap is unclear and depends on how the  
26 formula is interpreted. Neither party has asked the Court to rescind the Compact based on mutual  
27 or unilateral mistake (or any other ground). Nor has either party asked the Court to void or rescind  
28 the Compact because the parties never had a meeting of the minds on an essential element of the

1 Compact. Instead, Defendants argue if no meeting of the minds can be found, subsequent conduct  
 2 should be discovered and then considered to cure the discrepancies and determine whether any  
 3 ambiguities were removed. [See Def's Oppo. at Doc. No. 271 19:14-17.] The Court finds there is  
 4 no basis for rescission and no failure of the parties to agree on the essential elements of the  
 5 Compact. Moreover, the formula for determining the cap is in the Compact; there is only a  
 6 disagreement about how to interpret the formula, which the Court feels it can do.

7 The Court has found there was a meeting of the minds on all the essential elements of the  
 8 Compact. Consequently, no further discovery is needed concerning the parties' conduct after  
 9 execution of the Compact. *Yucca Water Co. v. Anderson*, 177 Cal. App. 2d 253, 259-60 (1960), as  
 10 cited by Defendants, does not apply here as this Court has found a meeting of the minds in the  
 11 instant case.

12 Based on the evidence submitted and the plain language of the formula provided in the  
 13 Compact, the Court has determined the lesser number will be derived as follows:

- 14 - 23 tribes are assigned a "lesser number" of 350 in accordance with Section 4.3.1(b)
- 15 because they were operating more than 350 devices as of September 1, 1999 - causing the
- 16 lesser number by virtue of the formula to be 350;<sup>8</sup>
- 17
- 18 - 68 tribes are assigned a "lesser number" of zero (0) in accordance with Section 4.3.1(a)
- 19 because they were operating<sup>9</sup> no Gaming Devices on September 1, 1999 - causing the
- 20 lesser number by virtue of the formula to be zero; and

21  
 22 \_\_\_\_\_  
 23 <sup>8</sup>According to undisputed facts discussed at the August 7, 2009 Hearing and in Appendix A  
 24 to Exhibit 10 of Rincon's Notice of Lodgment, it was determined the 23 Tribes operating more than  
 350 devices operated a cumulative total of 16,156 devices. When 16,156 devices is divided by 23  
 Tribes, an average of 702 devices per Tribe is found to have been in operation.

25 <sup>9</sup>Defendants argue Tribes who were not operating any devices should not be calculated in the  
 26 the second component of the formula because in general, one cannot be authorized to do nothing. [See  
 27 Def.s Oppo., Doc. No. 271, p.13 fn.4.] The Court rejects this unduly narrow interpretation of the word  
 28 authorized as it appears in Section 4.3.2.2(a)(1). To authorize is defined as "to establish by". See  
 "authorize" Merriam-Webster Online Dictionary. 2010. [http://merriam-  
 webster.com/dictionary/authorize](http://merriam-webster.com/dictionary/authorize). Moreover, Defendants have failed to establish the parties' intent  
 to exclude those Tribes operating no devices in the second half of the formula when Tribes operating  
 no devices are admittedly included in the first component of Section 4.3.2.2's formula. One must read  
 and interpret each contractual provision in light of the entire contract. *Tanadgusix*, 404 F.3d at 1205.

1 - 16 tribes are assigned a “lesser number” of 178 under Section 4.3.1(a)<sup>10</sup> because they  
 2 were operating an average of 178 devices per Tribe which is less than 350 devices but  
 3 more than one device as of September 1, 1999.

4 Now that the lesser number has been determined, the difference between 350 and the lesser  
 5 number as required by the second half of the formula<sup>11</sup> shall be calculated as follows:

6  $350-350$  [lesser number per Section 4.3.1(b)] =  $0 \times 23$  Tribes with  $> 350$  devices =

7  
 8 **zero (0) entitlement devices**

9  $350-0$  [lesser number per Section 4.3.1(a)] =  $350 \times 68$  Tribes with no devices =

10 **23,800 entitlement devices**

11  $350-178$  [lesser number per Section 4.3.1(b)] =  $172 \times 16$  Tribes with  $< 350$  devices =

12 **2,752 entitlement devices**

13  
 14 When all the entitlement devices noted above are added together to represent the 107 federally  
 15 recognized tribes, the figure for component two of the formula is **26,552**. To complete Section  
 16 4.3.2.2's equation for the maximum number of machines all Compact Tribes in the aggregate may  
 17 license, **26,552** is added to the figure derived from the first half of the formula, **29,400**. Thus, the  
 18 Court **HEREBY** finds the maximum number of machines under the Compact to be **55,952**  
 19 available licenses in the statewide pool.<sup>12</sup> See Compact Section 4.3.2.2(a)(i) [at Exh. 8 to Doc. No.  
 20 253 at p.8-53].

21 ///

22  
 23 <sup>10</sup>According to undisputed facts discussed at the August 7, 2009 Hearing and in Appendix A  
 24 to Exhibit 10 of Rincon's Notice of Lodgment, it was determined the 16 Tribes operating more than  
 25 one but less than 350 devices operated 2,849 devices in all. When 2,849 devices is divided by 16  
 Tribes, it is clear an average of 178 devices per Tribe is found to have been in operation.

26 <sup>11</sup>Specifically, the entire formula under Section 4.3.2.2(a)(1) reads: “The maximum number  
 27 of machines that all Compact Tribes in the aggregate may license pursuant to this Section shall be [:]  
 28 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.” See Compact  
 Section 4.3.2.2(a)(i) [at Exh. 8 to Doc. No. 253 at p.8-53].

<sup>12</sup>As the Court's findings do not rely on the doctrine of *contra proferuntum*, Defendants' request to conduct discovery into the Compact's drafting process is DENIED.

1           **b. Diligence**

2           Courts consider whether the party requesting the continuance has been diligent in pursuing  
3 discovery. *Panatronic USA v. AT&T*, 287 F.3d 840, 846 (9th Cir. 2002) (ruling counsel had not  
4 been diligent in pursuing discovery as they had “ample opportunity to conduct discovery.”).

5           The instant case is now in its sixth year of litigation, yet Defendants have not requested discovery  
6 as to the intent of the parties at the time of the Compact’s initial formation until now. Defendants  
7 contend they have not been dilatory in pursuing discovery on Section 4.3.2.2. because the various  
8 issues raised by Rincon’s licensing pool claim were not properly before this Court until the  
9 appellate court returned the claim to the court for further adjudication. [August 7, 2009 hearing at  
10 50:23-51:13.]

11           The Court is cognizant of the delay created by the appeal in this case and does not deny  
12 Defendants’ request for discovery on those grounds. Instead, the Court finds the diligence prong  
13 under Rule 56(f) weighs against Defendants’ due to its attempts at the beginning of this case to  
14 limit fact discovery to the administrative record. The Court is deeply concerned when comparing  
15 Defendants’ representations to the Court in a 2006 motion for protective order, which averred: (1)  
16 “there is no dispute over the *substance* of [the Compact amendment] offers” [See Doc. No. 69 at  
17 3:9-10 (emphasis added)]; and (2) “there is no dispute over what the *substance* of [the meet and  
18 confer] discussions were” [See Doc. No. 69 at 3:9-10 (emphasis added)] to Defendants’ current  
19 request for discovery concerning compact negotiations. Indeed, the joint stipulated administrative  
20 record is over 1,000 pages long and has been the subject of extensive discussion over the course of  
21 5 years. All the meaningful information about the formation of the Compact and its terms is  
22 contained in the joint stipulated administrative record. The completeness and age of the joint  
23 administrative record underscore the absence of any need to conduct discovery on Compact  
24 formation / negotiation. As demonstrated in the Court’s calculations above, the Court has been  
25 provided with the undisputed facts necessary to determine the size of the licensing pool under the  
26 terms of the Compact.

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1           **c. Affidavits**

2           Defendants also fail to submit affidavits in support of their Rule 56(f) request, choosing  
3 instead to discuss needed discovery in the body of their opposition brief. Technically, this method  
4 fails to meet the requirement for Rule 56(f) relief. Requests for a continuance for further  
5 discovery must be set forth in a motion for further discovery and an accompanying affidavit. *Brae*  
6 *Transp., Inc. v. Coopers & Lybrand*, 790 F.2d 1439, 1443 (9th Cir. 1986); *Barona Group of*  
7 *Captain Grande Band of Mission Indians v. Am. Mgmt. & Amusement*, 840 F.2d 1394, 1400 (9th  
8 Cir. 1987). The affidavits must set forth the specific facts expected from the movant's discovery.  
9 *Brae*, 790 F.2d at 1443.

10           Here, Defendants did not submit an affidavit attesting to their need for discovery and much  
11 of the information Defendants request in their brief is in their control. Indeed, this is particularly  
12 true with respect to their contention at the August 7, 2009 hearing that the number of devices  
13 operated by the various Tribes, which Defendants have previously adopted and relied, may now  
14 contain undefined "inconsistencies." [See Undisputed Fact no.43 indicating the State's adoption of  
15 the CGCC's interpretation of the number of gaming devices; June 16, 2004 Letter from Office of  
16 the Governor, Doc. No. 253 - NOL at 18-259 (indicating 19,005 as the number of terminals equal  
17 to the number of Gaming Devices operated by the Tribe on September 1, 1999); August 7, 2009  
18 Hearing Transcript at 23:21-24:2]. Further discovery from Rincon surely will not lead to a  
19 definitive number indicating the amount of devices in operation by all gaming Tribes as of  
20 September 1, 1999. If any party has the ability to calculate the number, it is Defendants who have  
21 overseen the licensing process. Accordingly, Defendants have failed to meet the affidavit  
22 requirement of Rule 56(f) relief.

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**IV. CONCLUSION AND ORDER THEREON**

In light of the foregoing, the Court ORDERS Plaintiff's Motion for Partial Summary Judgment is **GRANTED**.

**IT IS FURTHER ORDERED** that Plaintiff's Request for Judicial Notice In Support of the Supplemental Briefing is **GRANTED**. [Doc. No. 279, Exh. A, California Executive Order D-66-03].

**IT IS SO ORDERED.**

DATED: March 24, 2010



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Hon. William McCurine, Jr.  
U.S. Magistrate Judge, US District Court