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

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

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

II. UNDISPUTED FACTS

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

A. The advent of Proposition 5

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

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

B. Ratification of Proposition 1A

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

C. Licensing

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

D. Compact Renegotiation

Rincon submitted a formal request to renegotiate Compact sections 4.3.1 and 4.3.2 on March 8, 2003, in compliance with the March 2003 deadline set by the Proposition 1A Compacts for such a request to be made. [Undisputed Fact no. 37.] On February 26, 2004, the Rincon Band again requested to meet and confer over a variety of issues, one of which was the number of gaming device licenses. In that letter, the Rincon Band noted it recognized two reasonable interpretations of the number of available gaming devices, which would result in either 64,293 or 58,450 total licenses available in the pool. [Undisputed Fact no. 38.] On June 16, 2004, the office of the Governor issued a letter indicating "the position of the State is that the Commission's interpretation of the total number of permissible licenses [at 32,151] is correct." [Undisputed Fact 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

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

E. Breakdown of Tribal Operations

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

///

///

///

[1]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 (9th Cir. 1992)(quoting *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990).

In undertaking the Rule 19 analysis, the Court has examined the Compact, California statues 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

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

[*See* Exh. B. To Doc. No. 277, Executive Order D-31-01, March13, 2001 (emphasis added.)]

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

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

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

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

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

---

[2] The CGCC was clearly not a required for proper adjudication of the good faith negotiation determination because negotiation is a documented responsibility of the Governor's Office. *See* California Government Code Section12012.25(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....")

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

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

Id. at 650.

The Court finds the *Valencia* court's reasoning persuasive here where there is a Compact between the State and the Rincon Band, the Commission is mentioned in the Compact as the entity authorized by the State to regulate gaming licenses pursuant to the Gambling Control Act, and the Court has been called upon to interpret the language of the Compact as it pertains to licensing. As an agency of the State, the CGCC must honor the State's obligations under the Compact as the State would. To do otherwise would undermine the credibility of the State to execute Compacts or other contracts because entities negotiating with the State would have no assurance that 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

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

B. Standard on Motion for Summary Judgment

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

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

"The district court may limit its review to the document submitted for the purpose of summary judgment and those parts of the record specifically referenced therein." *Carmen v. San Francisco Unified Sch. Dist.*, 237 F.3d 1026, 1030 (9th Cir. 2001). Therefore, the court is not obligated "to scour the record in search of a genuine issue of triable fact." *Keenan v. Allen*, 91 F.3d 1275, 1279 (9th Cir. 1996) (citing *Richards v. Combined Inc. Co.*, 55 F.3d 247, 251 (7th Cir. 1995). If the moving party fails to discharge this initial burden, summary judgment must be denied and the court need not consider the nonmoving party's evidence. *Adickes v. S.H. Kress &*

[3]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.]

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

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

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

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

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

Rule 56(f) allows the hearing on a summary judgment motion to be continued "if the nonmoving party has not had an opportunity to make full discovery." *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986). *See also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.4 (1986). 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

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

a. Factual showing

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

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

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

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

[4] In 1988, Congress enacted the Indian Gaming Regulatory Act (IGRA), authorizing Native American tribes to conduct casino gambling pursuant to tribal-state compacts, if the state permits such 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).

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

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

Id.

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

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

///

///

///

///

Specifically, Compact Section 4.3.2.2(a)(1) reads: "The maximum number of machines that all Compact Tribes in the aggregate may license pursuant to this Section shall be[:]

a sum equal to 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].

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

After review of the Compact's terms and undisputed facts, the Court finds Rincon's interpretation of the first component of the licensing formula is strained because it attempts to create its own definition of the term "Non-Compact Tribe" by distorting the term expressly defined in the Compact, "Compact Tribes."[5] Rincon urges their own unique interpretation even though the express definition of the term "Non-Compact Tribes" appears in the Compact directly after the

[5] The term "Compact Tribe" is carefully defined in the Compact as "a tribe having a compact 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.]

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

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

As noted above, Section 4.3.2.2(a)(1) of the Compact reads: "The maximum number of machines that all Compact Tribes in the aggregate may license pursuant to this Section shall be [:] a sum equal to 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 (emphasis added). In order to determine the "lesser number authorized" in the second half of the formula, it is necessary to refer to Section 4.3.1 of the Compact which provides:

> "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."

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

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

reasonable interpretations. The parties also agree two reasonable interpretations of the Compact's formula lead to a maximum license pool number of 42,700[6] or 55,951.[7] [Doc. No. 271, Def. Oppo at13:6-8; Doc. No. 286, Transcript of August 7, 2009 Hearing at 60:3-6.] The Court further finds, despite the ambiguity acknowledged by all, Defendants do not need discovery to oppose the motion for summary judgment or aid the Court in fashioning a reasonable interpretation of the formula's second component. The State admits the Governor's office and later the CGCC (to which the oversight of the licensing pool was delegated) could not arrive at one fixed number for the licensing pool cap. [Undisputed Fact Nos. 27, 33, 39.] Given this concession, the Court is unpersuaded by Defendants' insistence on Judge Norris' interpretation of the license cap at a definitive 44,798 gaming devices. From the evidence presented, it appears the 44,798 figure may have been presented to Attorneys Howard Dickstein and Jerome Levine and the Tribes they represented during Compact negotiations but was never memorialized in the Compact itself. [Norris Decl., Doc. No. 253 - NOL at 11-199 to11-200.] That figure was never set forth in the Compact, nor have the parties presented any evidence in the record that 44,798 was agreed to or relied upon by either party. Indeed, after the Compact was signed, the Governor's office issued an information sheet on September 10, 1999 indicating a lesser cap of 44,448 devices. [Information Sheet, NOL at 13-216.] Later, on June 16, 2004, Defendants adopted yet another interpretation of the licensing cap at 32,151 licenses. [Undisputed Fact no. 39.] From this

---

[6]Rincon advocates adoption of the Eastern District's "alternative formulation" as articulated in *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. California*, 629 F.Supp.2d 1091 at 1114 (E.D. Cal. 2009). In the *Colusa* litigation, the parties did not dispute the first component of the formula and agreed it amounted to 29,400 devices. *Id.* at 1109. To calculate the second component of the formula, the *Colusa* court found 16,156 devices were authorized under Section 4.3.1(a) by multiplying 350 by the 23 *signatory* Tribes operating more than 350 devices as of September 1, 1999. The *Colusa* court also found 13,650 devices were authorized under Section 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.]

[7] 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].

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

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

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

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

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

- 23 tribes are assigned a "lesser number" of 350 in accordance with Section 4.3.1(b) because they were operating more than 350 devices as of September 1, 1999 - causing the lesser number by virtue of the formula to be 350;[8]

- 68 tribes are assigned a "lesser number" of zero (0) in accordance with Section 4.3.1(a) because they were operating[9] no Gaming Devices on September 1, 1999 - causing the lesser number by virtue of the formula to be zero; and

---

[8]According to undisputed facts discussed at the August 7, 2009 Hearing and in Appendix A 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.

[9]Defendants argue Tribes who were not operating any devices should not be calculated in the the second component of the formula because in general, one cannot be authorized to do nothing. [*See* Def.s Oppo., Doc. No. 271, p.13 fn.4.] The Court rejects this unduly narrow interpretation of the word 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. 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.

- 16 tribes are assigned a "lesser number" of 178 under Section 4.3.1(a)[10] because they were operating an average of 178 devices per Tribe which is less than 350 devices but more than one device as of September 1, 1999.

Now that the lesser number has been determined, the difference between 350 and the lesser number as required by the second half of the formula[11] shall be calculated as follows:

350-350 [lesser number per Section 4.3.1(b)] = 0 x 23 Tribes with > 350 devices =

zero (0) entitlement devices

350-0 [lesser number per Section 4.3.1(a)] = 350 x 68 Tribes with no devices =

23,800 entitlement devices

350-178 [lesser number per Section 4.3.1(b)] = 172 x16 Tribes with < 350 devices =

2,752 entitlement devices

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

///

---

[10]According to undisputed facts discussed at the August 7, 2009 Hearing and in Appendix A to Exhibit 10 of Rincon's Notice of Lodgment, it was determined the 16 Tribes operating more than 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.

[11]Specifically, the entire formula under Section 4.3.2.2(a)(1) reads: "The maximum number of machines that all Compact Tribes in the aggregate may license pursuant to this Section shall be [:] a sum equal to 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].

[12]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.

b. Diligence

Courts consider whether the party requesting the continuance has been diligent in pursuing discovery. *Panatronic USA v. AT&T*, 287 F.3d 840, 846 (9th Cir. 2002) (ruling counsel had not been diligent in pursuing discovery as they had "ample opportunity to conduct discovery."). The instant case is now in its sixth year of litigation, yet Defendants have not requested discovery as to the intent of the parties at the time of the Compact's initial formation until now. Defendants contend they have not been dilatory in pursuing discovery on Section 4.3.2.2. because the various issues raised by Rincon's licensing pool claim were not properly before this Court until the appellate court returned the claim to the court for further adjudication. [August 7, 2009 hearing at 50:23-51:13.]

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

///

c. Affidavits

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

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

///

///

///

///

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

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