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 DENYING DEFENDANTS' MOTION TO TRANSFER, OR IN THE ALTERNATIVE STAY [DOC NO. 243.]**

I. INTRODUCTION

On January 16, 2009, Defendants filed a motion to sever Plaintiff's fourth claim for relief and transfer it to the Eastern District of California or, in the alternative, to stay the claim to wait for guidance from the United States District Court for the Eastern District, which is presently considering similar licensing issues raised by the Colusa Tribe in *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. State of California*, No. S-40-2265 FCD KJM (E.D. Cal.) ("*Colusa* I"). [Doc. No. 243 at 1:14-17.] Plaintiff filed an Opposition brief on January 30, 2009. [Doc. No. 244.] Defendants filed a Reply brief on February 5, 2009. After careful consideration of the parties' briefs, exhibits and declarations, the Court **DENIES** Defendants' motion to transfer or stay. As explained in detail below, Defendants have not met their burden of showing the inconvenience necessary to

warrant severance, transfer or stay of the licensing pool issue presented by Plaintiff's fourth claim for relief.

II. BACKGROUND

In September 1999, the State of California ("the State") and the Rincon Band ("Rincon or "the Tribe"") entered into a Compact to allow the Tribe to engage in Class III gaming. [Doc. No. 108, First Amended Complaint ("FAC"), paras. 35-38.] The Compact between the State and Rincon is materially identical to other compacts between the State and more than sixty federally recognized California Indian tribes. [Doc. No. 108, FAC, paras. 38-40, 44-50, 55-56.]

In Rincon's action against the State, it seeks a declaratory judgment regarding the aggregate maximum number of slot machine licenses available to California Indian tribes. At the outset of the case, the Honorable Thomas J. Whelan dismissed Rincon's declaratory judgment claim for failure to join all other tribes with similar compacts who were subject to the same licensing pool as required parties under Federal Rule of Civil Procedure 19. Rincon appealed the District Court's decision. The Ninth Circuit reversed the decision and remanded the license pool claim for further proceedings. [Doc. No. 239.]

In addition to reversing and remanding Rincon's case, the Ninth Circuit reversed and remanded two other actions which were similarly dismissed on Rule 19 grounds, including the *Colusa* I action. As explained in this Order's introduction section, *supra*, Defendants move to sever and transfer Rincon's licensing pool claim to the United States District Court for the Eastern District. Defendants propose Rincon's licensing pool claim be consolidated with the *Colusa* I action, which presents a similar licensing pool size question. [Doc No. 234-5, Defs' Request for Judicial Notice, Ex. B, paras. 42-48.]

III. DISCUSSION

Title 28 U.S.C. § 1404(a) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it may have been brought." 28 U.S.C. § 1404(a). The courts undertake a two-step analysis to determine whether an action should be transferred. First, the court must determine whether the action "might have been brought" in the potential transferee court. *See Hoffman v. Blaski*, 363 U.S. 335,

343-44 (1960); *Hatch v. Reliance Ins. Co.*, 758 F.2d 409, 414 (9th Cir. 1985).

If the action might have been brought in the proposed transferee court, the court then balances several case specific factors including: "(1) the location where the relevant agreements were negotiated and executed, (2) the state that is most familiar with the governing law, (3) the plaintiff's choice of forum, (4) the respective parties' contacts with the forum, (5) the contacts relating to the plaintiff's cause of action in the chosen forum, (6) the differences in the costs of litigation in the two forums, (7) the availability of compulsory process to compel attendance of unwilling non-party witnesses, and (8) the ease of access to sources of proof." *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498-99 (9th Cir. 2000). Of the various factors, the plaintiff's choice of forum is given significant weight and will not be disturbed unless other factors weigh substantially in favor of transfer. *See* 28 U.S.C. § 1404(a). In addition, although not dispositive, "'a forum selection clause is determinative of the convenience to the parties and is entitled to substantial consideration.'" *Unisys Corp. v. Access Co.*, 2005 WL 3157457, *4-5 (N.D. Cal. 2005).

The movant bears the burden of justifying the transfer by a strong showing of inconvenience. *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986). The motion may be denied if the increased convenience to one party is offset by the added inconvenience to the other party. *Id.*

A. The Compact Contains A Permissive Forum Selection Clause Which Allows The Action To Have Been Brought In The Eastern District of California

The State argues the Tribe's licensing pool claim may be severed and transferred under 28 U.S.C. s 1404(a) to the Eastern District of California to be consolidated with the *Colusa* I action. [Defs.' Motion at 5:5-13.] Further, the State contends the Compact regulating the conduct of the parties in the event of litigation only contains a permissive forum selection clause, which does not require this action be maintained in the Southern District. [Defs.' Motion at 5:23-6:8.]

The Rincon Band contends the Compact between the parties contains a mandatory forum selection clause which limits the location of this suit to the Southern District of California. [Plaintiff's Oppo. at 4:9-2.] Consequently, Rincon argues the Compact expressly precludes its licensing pool claim from being transferred to the Eastern District because the parties have consented, by the

Compact's terms, to the Southern District only. [Plaintiff's Oppo. at 4:27-5:16.]

Section 9.1(d) of the parties Compact states:

"Disagreements that are not otherwise resolved by arbitration or other mutually acceptable means as provided in Section 9.3 may be resolved in the United States District Court where the Tribe's Gaming Facility is located, or is to be located, and the Ninth Circuit Court of Appeals, (or if those federal courts lack jurisdiction, in any state court of competent jurisdiction and its related courts of appeal)."

[Doc. No. 13 at p. 20.]

In *Docksider, Ltd. v. Sea Technology*, the Ninth Circuit found the following language indicative of a mandatory forum selection clause:

"This agreement shall be deemed to be a contract made under the laws of the state of Virginia, United States of America, and for all purposes shall be interpreted in its entirety in accordance with the laws of said State. Licensee hereby agrees and consents to the jurisdiction of the courts of the State of Virginia. Venue of any action brought hereunder **shall be deemed to be in Gloucester County, Virginia**."

Docksider, Ltd. v. Sea Technology, 875 F.2d 762, 763 (9th Cir. 1989)(emphasis added).

In *Hunt Wesson Foods, Inc. v. Supreme Oil Co.*, however, the Ninth Circuit found the following language signaled a permissive forum selection clause:

"Buyer and Seller expressly agree that the laws of the State of California shall govern the validity, construction, interpretation and effect of this contract. **The courts of California, County of Orange,** shall have jurisdiction over the parties in any action at law relating to the subject matter of the interpretation of this contract."

Hunt Wesson Foods, Inc. v. Supreme Oil Co., 817 F.2d 75, 77 (9th Cir. 1987)(emphasis added).

To explain the difference between the permissive and mandatory effect of the two different clauses, the Ninth Circuit reasoned as follows:

"Hunt Wesson is distinguishable because the forum selection clause underlying this [the *Docksider*] action contains the additional sentence stating that '[v]enue of any action brought hereunder shall be deemed to be in ... Virginia.' This language requires enforcement of the clause

because Docksider not only consented to the jurisdiction of the state courts of Virginia, but further agreed by mandatory language that the venue for all actions arising out of the license agreement would be Gloucester County, Virginia. This mandatory language makes clear that venue, the place of suit, lies exclusively in the designated county."

Docksider, 875 F.2d at 764.

The wording of the forum selection clause at issue in this case lacks language indicating exclusivity, which was identified by the Ninth Circuit as a hallmark of mandatory forum selection clauses. Specifically, section 9.1(d) reads disagreements between the Tribe and the State "***may***" be resolved in a United States District Court where the Tribe's gaming facility "is located, or ***is to be*** located." The permissive effect of the word "may" in this clause, as well as the unidentified and potentially uncertain location of the district court where venue might be situated, indicate the clause is permissive. There is simply no language in section 9.1(d) of the Compact which indicates an intention on the part of the parties to exclusively restrict the filing of actions to the Southern District of California. Moreover, the clause provides if "federal *courts*" (plural) lack jurisdiction, "***any*** state court of competent jurisdiction" may hear the dispute. Unlike the forum selection clause at issue in *Docksider*, which clearly prohibited suits outside Gloucester County, Virginia, the clause in the parties' Compact does not require all actions to be brought exclusively in the Southern District. The clause at issue merely states jurisdiction can be had in the United States District Court for the Southern District of California.

As the controlling forum selection clause is permissive, the Court finds the action could have been brought in the United States District Court for the Eastern District Of California where Defendants reside and seek to transfer a portion of this action. *See* 28 U.S.C. s 1404(a) ("For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought"; *see also* 28 U.S.C. 1391(b)(1) ("A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in a judicial district where any defendant resides, if all defendants reside in the same State.")

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B. The State Has Not Shown the Strong Inconvenience Necessary to Offset the Weight Given To Plaintiff's Choice Of Forum and Permissive Forum Selection Clause

Having concluded the action might have been brought in the potential transferee court by virtue of the permissive forum selection clause, this Court now evaluates the factors demonstrating inconvenience. It is imperative to note, however, that of the various factors to be balanced by the Court, Plaintiff's choice of forum is accorded significant weight and will not be disturbed unless other factors weigh substantially in favor of transfer. *See* 28 U.S.C. § 1404(a). Moreover, "a forum selection clause is determinative of the convenience to the parties and is entitled to substantial consideration." *Unisys Corp.,* 2005 WL 3157457, at *4. These principles indicate this action's current location in the Southern District of California is the preferred convenient forum. The State must make a strong showing of inconvenience to warrant upsetting the Tribe's choice of forum as well as the permissive forum selection clause which favors, but does not mandate, a venue where the Tribe's gaming facility is located.

1. Convenience of Parties

The State contends the convenience of the parties favors transfer because the state of California's administrative offices and records are located approximately 500 miles away in Sacramento. (Defs Motion at 7:25-28.) Defendants do concede, however, that the state also maintains significant and substantial offices in the southern district. (Defs Motion at 7:25-26.) The Tribe, on the other hand, does not have a presence in the Eastern District. (Plaintiff's Oppo. at 9:5.) The Court will not order a transfer merely to shift a minor inconvenience from Defendants to Plaintiff. *Decker Coal Co.*, 805 F.2d at 843. Moreover, the location of records alone is not sufficient to support a motion for transfer. *STX, Inc. v. Trik Stik, Inc.*, 708 F.Supp. 1551, 1556 (N.D.Cal. 1988). Accordingly, the convenience of the parties weighs against transfer to the Eastern District.

2. Convenience of Witnesses

The convenience of witnesses is one of the most important factors the courts consider when determining whether to grant a motion to transfer. *Fisher v. Las Vegas Hilton Corp.*, 47 Fed. Appx. 824, 827 (9th Cir. 2002). The party requesting transfer must show through declarations that it is more convenient for witnesses to attend trial in the Eastern District. *Cochran v. NYP Holdings, Inc.*, 58 F.

Supp. 2d 1113, 1119 (C.D. Cal. 1998) ("Rather than relying on 'vague generalizations' of inconvenience, the moving party must demonstrate, through affidavits or declarations containing admissible evidence, who the key witness will be and what their testimony will generally include.") In addition, special consideration is given to third party witnesses as opposed to employee witnesses, who could be compelled to testify. *STX*, 708 F.Supp. at 1556.

Here, the Defendants have specifically identified three individuals it may call to offer testimony regarding the license pool formula; (1) retired Ninth Circuit Judge William A. Norris, (2) Judge Shelleyanne Chang of the Sacramento County Superior Court, and (3) Peter F. Melnicoe, Esq.

Judge Norris is presumed to work in the Central District. The two remaining potential witnesses are presumed to work in the Eastern District. (Doc. No. 243-2, Pinal Decl. at 2:6-3:5.) Defendants also assert generally that they may call witnesses from the staff of the California Gambling Control Commission (CGCC), the Legislative Analysts' Office and the Sides Accountancy Corporation; all are located in the Eastern District. (Doc. No. 243-2, Pinal Decl. at 3:9-25.) Defendants contend the individuals and staff identified above might be called to testify regarding their intention in drafting the license pool formula and their understanding of the size of the licensing pool. (Doc. No. 243-2, Pinal Decl. at 3:18-27; 4:14-27.)

The Rincon Band contends witness testimony is unnecessary and a non-factor in this case in light of the fact that the Tribe's declaratory relief action hinges on the language of the Compact and, therefore, would be appropriate for summary judgment. (Doc. No. 244, Plaintiff's Oppo. at 9:24-10:2.) The Tribe also asserts, in the event witness testimony at trial even materializes, any potential testimony may be barred by parol evidence. (Doc. No. 244, Plaintiff's Oppo. at 10:3-4.) As for actual inconvenience, the Rincon Band notes only two out of the three potential witnesses Defendants specifically identify presumably reside in the Eastern District and argues the potential witnesses it may call, including representatives of the Rincon Band as well as members of other Southern District Tribes, would be equally inconvenienced by having to travel to the Eastern District were a transfer to be ordered. (Doc. No. 244, Plaintiff's Oppo. at 10:9-15.)[1]

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[1]The Court is not presuming discovery would be allowed in any event.

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The Court finds Defendants have not met their burden of justifying a transfer through a strong showing of inconvenience to witnesses. *Decker Coal*, 805 F.2d at 843. Only three specific witnesses have been identified by Defendants, and their purported inconvenience in traveling from the Los Angeles or Sacramento area to San Diego County does not justify similarly inconveniencing the potential witnesses of the Rincon Band who would need to travel to travel from San Diego to the Sacramento area if the action were to be transferred. Indeed, Defendants' action differs from the typical transfer motion in that Defendants do not seek to transfer to an out-of-state forum, but merely to a different venue in California which is just as accessible to witnesses as the San Diego area. The State has not demonstrated the strong showing of inconvenience necessary to justify upsetting Plaintiff's choice of forum and thee parties' permissive forum selection clause. Accordingly, Defendants' motion to transfer is **DENIED.**

C. A Stay Of The Licensing Pool Claim Is Inappropriate At This Time

In the alternative, Defendants ask the Court to stay adjudication of the license pool claim pending: (1) a decision on the petition for writ of certiorari Defendants *intend* to file with respect to the Ninth Circuit's ruling on the license pool claim; or (2) a ruling on the State's authority to issue licenses by the District Court in *Colusa* I, in order to avoid inconsistent rulings and preserve resources of the parties and the court. (Doc. No. 243, Defs. Motion at 14:7-23.) The Rincon Band opposes a stay suggesting that any inconsistent rulings may be appealed and noting a ruling in *Colusa* I is not binding on the Court. (Doc. No. 244, Plaintiff's Oppo. at 13:10-20.) The Rincon Band also contends further delay of a decision on its license pool claim adversely impacts "an essential 'means of promoting tribal economic development'." (Doc. No. 244, Plaintiff's Oppo. at 13:18-20.)

The Ninth Circuit has explained "[a] trial court may, with propriety, find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings, which bear upon the case. This rule applies whether the separate proceedings are judicial, administrative, or arbitral in character, and does not require that the issue in such proceedings are necessarily controlling of the action before the court." *Leyva v. Certified Grocers of Cal. Ltd.*, 593 F.2d 857, 863-64 (9th Cir. 1979).

In considering whether a stay is warranted, the court weighs varying interests that will be affected by its decision. "Among those competing interests are the possible damage which may result from the granting of a stay, the hardship or inequity which a party may suffer in being required to go forward, and the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay. *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2005) (quoting *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962).

Here, the Court finds proceeding with a determination on Plaintiff's license pool claim is in the interests of justice and outweighs the outcome implicated by a stay of indefinite length as proposed by Defendants. Plaintiff's action has been on file since 2004. Other than the specter of potentially inconsistent district court rulings, Defendants have raised no concrete hardships or inequities which would be suffered by the State if the parties simply pressed forward with this issue in the present venue. If the merits of the licensing pool claim was awaiting review with the Ninth Circuit, the Court would be more inclined to grant a stay. However, that is not the case here. No further appeal is currently pending and when Plaintiff's fourth claim was on appeal, the Ninth Circuit addressed only the procedural issue of whether other Compact-signatory tribes were required parties who could or could not be joined due to tribal sovereign immunity. [*See* Doc. No. 239, Ninth Cir. Mandate.] Accordingly, Defendants' motion to stay, in the alternative, is **DENIED**.

D. Request For Judicial Notice

In conjunction with its Motion for Transfer, the State filed a Request for Judicial Notice of Exhibits A through H to its Memorandum of Points and Authorities in Support of the Motion for Transfer. [Doc. No. 243-2.]

Judicial notice is governed by Federal Rule of Evidence 201 which concerns only judicial notice of adjudicative facts. "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). "[A] party requesting judicial notice bears the burden of persuading the trial judge that the fact is a proper matter for judicial notice." *In re Tyrone F. Conner*

Corporation, 140 B.R. 771, 781 (United States Bankruptcy Court, E.D. California 1992). "To sustain its burden in persuading the trial judge that the adjudicative fact sought to be noticed is in fact proper for notice under Federal Rule of Evidence 201, the party must persuade the court that the particular fact is not reasonably subject to dispute and is capable of immediate and accurate determination by resort to a source 'whose accuracy cannot reasonably be questioned'...." *Id.* at 781. In other words, "the fact must be one that only an unreasonable person would insist on disputing." *United States v. Jones*, 29, F.3d 1549, 1553 (11th Cir. 1994).

Facts contained in public records are considered appropriate subjects of judicial notice. *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1025 (9th Cir. 2006). Accordingly, documents that are part of the public record may be judicially noticed to show, for example, that a judicial proceeding occurred or that a document was filed in another court case, but a court may not take judicial notice of findings of facts from another case. *See Wyatt v. Terhune*, 315 F.3d 1108, 1114 & n. 5 (9th Cir. 2003); *Lee v. City of Los Angeles*, 250 F.3d 668, 698 (9th Cir. 2001); *Jones*, 29 F.3d at 1553. Nor may the court take judicial notice of any matter in dispute. *Lee*, 250 F.3d at 689-90; *Lozano v. Ashcroft*, 258 F.3d 1160, 1165 (10th Cir. 2001).

Here, the Court **GRANTS** Defendants' Request For Judicial Notice. Exhibits A through H consist of public records and court pleadings, which are the proper subject of judicial notice under the Federal Rules of Evidence, Rule 201(b). In addition, facts 1 through 6, which state the various locations of the State's principal business offices are also capable of accurate and ready determination. Fed. R. Evid. 201(b).

IV. CONCLUSION AND ORDER THEREON

For the foregoing reasons, **IT IS ORDERED:**

(1) Defendants' Motion to Transfer or Stay in the Alternative is **DENIED;** and

(2) Defendants' Request for Judicial Notice is **GRANTED**.

IT IS SO ORDERED.

DATED: April 17 , 2009

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