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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

**VIDEO SOFTWARE DEALERS and  
ENTERTAINMENT SOFTWARE ASSOCIATION,**

Plaintiffs,

v.

**ARNOLD SCHWARZENEGGER, in his official  
capacity as Governor of the State of California;  
BILL LOCKYER, in his official capacity as  
Attorney General of the State of California;  
GEORGE KENNEDY, in his official capacity as  
Santa Clara County District Attorney, RICHARD  
DOYLE, in his official capacity as City Attorney for  
the City of San Jose, and ANN MILLER RAVEL, in  
her official capacity as County Counsel for the  
County of Santa Clara,**

Defendants.

CASE NO. C 05 4188 RMW RS

**[PROPOSED] ORDER  
DENYING IN PART  
PLAINTIFFS' REQUEST FOR  
JUDICIAL NOTICE**

On November 23, 2005, Plaintiffs' filed a Request for Judicial Notice concurrently with their filing of a reply brief to defendants' oppositions to the Motion for Preliminary Injunction. Plaintiffs ask this Court to judicially notice, pursuant to Rule 201 of the Federal Rules of Evidence, among other things, certain materials purportedly contained in the files of the Northern District of Illinois federal court concerning a lawsuit in which neither the State of California, nor any other defendants, were parties or privy to the action.

[PROPOSED] ORDER

VSDA V. Schwarzenegger, et al.  
Case No. C 05 4188 RMW RS

1 On November 29, 2005, plaintiffs Governor Arnold Schwarzenegger and Attorney General  
2 Bill Lockyer (collectively, the “State”) timely filed objections to Plaintiffs’ request as to Exhibits  
3 3 through 8. The State argues that these materials, consisting of portions of transcripts from a  
4 hearing before the Northern District of Illinois federal court and certain declarations submitted to  
5 the Northern District of Illinois federal court, do not constitute “adjudicative facts” subject to  
6 judicial notice pursuant to Rule 201. The State further argues that these materials each constitute  
7 hearsay and are therefore inadmissible pursuant to Rule 801 of the Federal Rules of Evidence.

8 Having reviewed the Request for Judicial Notice, the objections filed by the State, the  
9 memoranda, declarations, and exhibits submitted by the parties, and having considered the  
10 arguments of counsel, the Court hereby ORDERS as follows:

11 1. Plaintiffs’ Exhibit 3 to their Request is not properly subject to judicial notice under  
12 Rule 201 of the Federal Rules of Evidence. Exhibit 3 purports to be an incomplete portion of a  
13 transcript of court proceedings held on November 14, 2005, in a Northern District of Illinois  
14 lawsuit in which the State was not a party. Plaintiffs do not merely ask this Court to  
15 acknowledge the existence of this incomplete portion of the transcript of a different court, but  
16 cite the contents thereof for the truth of the matter asserted therein as providing evidentiary  
17 support for Plaintiffs’ present motion for preliminary injunction. (Pltfs.’ Reply, 6:12-16.)  
18 Because Exhibit 3 does not constitute an “adjudicative fact” it is not properly subject to judicial  
19 notice. The contents of Exhibit 3 further constitute inadmissible hearsay. The State’s objection  
20 to Exhibit 3 is therefore sustained;

21 2. Plaintiffs’ Exhibit 4 to their Request is not properly subject to judicial notice under  
22 Rule 201 of the Federal Rules of Evidence. Exhibit 4 purports to be an incomplete portion of a  
23 transcript of court proceedings held on November 15, 2005, in a Northern District of Illinois  
24 lawsuit in which the State was not a party. Plaintiffs do not merely ask this Court to  
25 acknowledge the existence of an incomplete portion of the transcript of a different court, but cite  
26 the contents thereof for the truth of the matter asserted therein as providing evidentiary support  
27 for Plaintiffs’ present motion for preliminary injunction. (Pltfs.’ Reply, 6:12-20; n. 6; 8:9-28;  
28 10:1-8.) Because Exhibit 4 does not constitute an “adjudicative fact” it is not properly subject to

1 judicial notice. The contents of Exhibit 4 further constitute inadmissible hearsay. The State's  
2 objection to Exhibit 4 is therefore sustained;

3 3. Plaintiffs' Exhibit 5 to their Request is not properly subject to judicial notice under  
4 Rule 201 of the Federal Rules of Evidence. Exhibit 5 purports to be a declaration and attached  
5 exhibit from an individual not a party to the present action, filed in a Northern District of Illinois  
6 lawsuit in which the State was not a party. Plaintiffs do not merely ask this Court to  
7 acknowledge the filing of the declaration in the Illinois court, but cite the contents thereof for the  
8 truth of the matter asserted therein as providing evidentiary support for Plaintiffs' present motion  
9 for preliminary injunction. (Pltfs.' Reply, 7:17-22.) Because Exhibit 5 does not constitute an  
10 "adjudicative fact" it is not properly subject to judicial notice. The contents of Exhibit 5 further  
11 constitute inadmissible hearsay. The State's objection to Exhibit 5 is therefore sustained;

12 4. Plaintiffs' Exhibit 6 to their Request is not properly subject to judicial notice under  
13 Rule 201 of the Federal Rules of Evidence. Exhibit 6 purports to be a declaration and attached  
14 exhibit from an individual not a party to the present action, filed in a Northern District of Illinois  
15 lawsuit in which the State was not a party. Plaintiffs do not merely ask this Court to  
16 acknowledge the filing of the declaration in the Illinois court, but cite the contents thereof for the  
17 truth of the matter asserted therein as providing evidentiary support for Plaintiffs' present motion  
18 for preliminary injunction. (Pltfs.' Reply, 7:17-22.) Because Exhibit 6 does not constitute an  
19 "adjudicative fact" it is not properly subject to judicial notice. The contents of Exhibit 6 further  
20 constitute inadmissible hearsay. The State's objection to Exhibit 6 is therefore sustained;

21 5. Plaintiffs' Exhibit 7 to their Request is not properly subject to judicial notice under  
22 Rule 201 of the Federal Rules of Evidence. Exhibit 7 purports to be an incomplete portion of a  
23 transcript of court proceedings held on November 14, 2005, in a Northern District of Illinois  
24 lawsuit in which the State was not a party. Plaintiffs do not merely ask this Court to  
25 acknowledge the existence of an incomplete portion of the transcript of a different court, but cite  
26 the contents thereof for the truth of the matter asserted therein as providing evidentiary support  
27 for Plaintiffs' present motion for preliminary injunction. (Pltfs.' Reply, 9:6-12.) Because  
28 Exhibit 7 does not constitute an "adjudicative fact" it is not properly subject to judicial notice.

1 The contents of Exhibit 7 further constitute inadmissible hearsay. The State’s objection to  
2 Exhibit 7 is therefore sustained;

3 6. Plaintiffs’ Exhibit 8 to their Request is not properly subject to judicial notice under  
4 Rule 201 of the Federal Rules of Evidence. Exhibit 8 purports to be a declaration and attached  
5 exhibit from an individual not a party to the present action, filed in a Northern District of Illinois  
6 lawsuit in which the State was not a party. Plaintiffs do not merely ask this Court to  
7 acknowledge the filing of the declaration in the Illinois court, but cite the contents thereof for the  
8 truth of the matter asserted therein as providing evidentiary support for Plaintiffs’ present motion  
9 for preliminary injunction. (Pltfs.’ Reply, 7:17-22.) Because Exhibit 8 does not constitute an  
10 “adjudicative fact” it is not properly subject to judicial notice. The contents of Exhibit 8 further  
11 constitute inadmissible hearsay. The State’s objection to Exhibit 8 is therefore sustained;

12 7. Because Exhibits 3 through 8 are not properly subject to judicial notice and further  
13 constitute inadmissible hearsay, Plaintiffs’ references to Exhibits 3 through 8 are hereby stricken  
14 from the record.

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16 DATED: \_\_\_\_\_

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RONALD M. WHYTE  
United States District Judge

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