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IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

EASTERN DIVISION

TWENTY-NINE PALMS BAND OF MISSION INDIANS, a federally recognized Indian Tribe,

Plaintiff,

v.

ARNOLD SCHWARZENEGGER, in his official capacity as Governor of the State of California; THE STATE OF CALIFORNIA; SELVI STANISLAUS, in her official capacity as Executive Officer of the Franchise Tax Board,

Defendants.

EDCV08-1753 VAP (OPx)

DEFENDANTS' REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS AMENDED COMPLAINT

Date: August 3, 2009
Time: 10:00 a.m.
Courtroom: 2
Judge Hon. Virginia A. Phillips

Trial Date: n/a
Action Filed: 12/2/2008

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INTRODUCTION

Plaintiff Twenty-nine Palms Band of Mission Indians' (Tribe) opposition to the motion to dismiss the Amended Complaint filed by Defendants Governor Arnold Schwarzenegger (Governor), the State of California (State) and California Franchise Tax Board (FTB) Executive Officer Selvi Stanislaus (Stanislaus) (collectively State Defendants) fails to establish that the Court has subject matter jurisdiction over any claim other than that State Defendants breached the class III gaming compact between the Tribe and the State (Compact), and that Stanislaus violated the Indian Gaming Regulatory Act, 18 U.S.C. §§ 1166-1168, 25 U.S.C. §§ 2701-2721 (IGRA). In any event, the Amended Complaint fails to state a claim.

ARGUMENT

I. THE FEDERAL LAW CLAIMS AGAINST THE GOVERNOR IN THE SECOND AND THIRD CLAIMS FALL OUTSIDE *EX PARTE YOUNG*

The Tribe claims the state executive department's general supervisory power to issue executive orders establishes a connection between the Governor and his ability to enforce and administer issues pertaining to the State's revenue and taxes. (Tribe's Opp'n 7 (citing Cal. Gov't Code § 13070 & Cal. Rev. & Tax. Code § 2209.)[1] The Tribe, however, fails to demonstrate that the Governor has "direct ties to enforcement of personal income tax," which it acknowledges is the correct standard for deciding whether it has standing. (Opp'n 5:13-14.)

California Government Code section 13070 provides:

> The [executive] department has general powers of supervision over all matters concerning the financial and business policies of the State and whenever it deems it necessary, or at the instance of the Governor, shall

[1] This appears to respond to argument III in the memorandum supporting the State Defendants' motion to dismiss (Motion). California Revenue and Taxation Code section 2209 is irrelevant as it is a definitional statute appearing within part of the state tax code governing property taxes and reimbursement of state-mandated costs, which has no bearing upon enforcement of state personal income tax.

> institute or cause the institution of such investigations and proceedings as it deems proper to conserve the rights and interests of the State.

Cal. Gov't Code § 13070. The statute authorizes the Governor to direct the executive department to initiate investigations and proceedings to protect the State's rights and interests, and allows the executive department to initiate such actions on its own "whenever it deems it necessary." *Id.* Regardless of who initiates it, any action taken under the statute is permissive and does not obligate the Governor to do anything, let alone collect or impose state personal income tax. Further, the statute speaks to the general supervisory powers of the entire executive department and not the Governor exclusively. The Governor has no direct authority to impose or collect personal income tax (Mot. 9:4-27, 11:17-25), and California Government Code section 13070 does not give him that ability.

The Tribe's reliance upon the Governor's authority to issue executive orders is equally misplaced. (Opp'n 7.) Executive orders are issued pursuant to the Governor's general supervisory powers expressed in the state Constitution and statutes. The Tribe concedes the Governor exercises this authority "whenever he deems appropriate." (*Id.* 7:13-14.) His general supervisory power to issue discretionary executive orders does not directly connect him with the FTB's independent enforcement of the state's Personal Income Tax Law. In addition, while the executive orders cited by the Tribe concern issues tangentially related to state revenue and taxes (*id.* 7:24-25), neither involves a governor imposing or collecting, threatening to impose or collect, or instructing FTB on its obligation to impose or collect personal income tax.

Also, the Tribe's reliance upon *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1058-60 (9th Cir. 1997) is misplaced. (Opp'n 7:25.) The issues there were whether the State breached its gaming compact with a tribe and expressly waived its Eleventh Amendment immunity in the compact. The tribe there did not raise separate federal constitutional and IGRA claims like the Tribe

here, and the State Defendants have not argued that the Eleventh Amendment bars the Tribe's breach-of-compact claim.

Last, the Tribe separately argues that *Seminole Tribe v. Florida*, 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996) does not preclude jurisdiction over the IGRA claim under *Ex Parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 2d 714 (1908). (Notice of Errata re Opp'n to Mot. to Dismiss Amend. Compl. (Errata) 1.)[2] It appears that, in reviewing an order on a motion to dismiss based upon Eleventh Amendment immunity, considering the availability of the *Ex Parte Young* doctrine to the IGRA claims in the second and third claims asserted here,[3] the Ninth Circuit would currently hold an *Ex Parte Young* action available against Stanislaus. *See Goldberg v. Ellett*, 254 F.3d 1135, 1145-47 (9th Cir. 2001); *Seven Up Pete Venture v. Schweitzer*, 523 F.3d 948, 956 (9th Cir. 2008). Thus, Stanislaus acknowledges that on this Motion, necessarily brought without facts that may be developed in discovery, and drawing all inferences in the Tribe's favor, this Court would be required to find that the Tribe can proceed with the IGRA claims against Stanislaus in her official capacity. Stanislaus reserves the right to assert Eleventh Amendment immunity and unavailability of the *Ex Parte Young* doctrine in a subsequent motion, should the facts developed or the procedural posture of this case at that time warrant it. *See Hill v. Kemp*, 478 F.3d 1236, 1262 (10th Cir. 2007).

The Governor maintains that even if *Seminole Tribe* is inapplicable here because IGRA does not contain intricate remedial provisions to address the Tribe's claim that a state official cannot violate IGRA's prohibition against the imposition of taxes on a tribe, or entity or person authorized by a tribe to engage in a class III

[2] The Governor and Stanislaus do not contend, as the Tribe suggests, that *Seminole Tribe* bars the second and third causes of action. (Errata 1:5-7.) Instead, they argued that Seminole Tribe barred only the IGRA claim stated in both the second and third claims for relief. (Mot. 18-19.)

[3] The Tribe contends its claims against Stanislaus fall within Ex Parte Young. (Opp'n 5-7.) Except for the IGRA violation, Stanislaus did not argue otherwise. (Mot. 19.)

activity, 25 U.S.C. § 2710(d)(4), the Tribe still fails to demonstrate the required nexus between the Governor and the FTB's enforcement of the Personal Income Tax Law. Without that connection, the Tribe's IGRA claim against the Governor cannot proceed under *Ex Parte Young*. (Mot. 10-11, 18 (cases cited therein).)[4]

II. THERE IS NO JUSTICIABLE CASE OR CONTROVERSY BETWEEN THE TRIBE AND THE GOVERNOR

The Tribe misapplies decisional authority cited by the Governor to claim that it has a justiciable case or controversy with him. (Opp'n 8-10.)[5] The Court in *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976) held that injury caused by an absent party is insufficient to establish a case or controversy. (*See* Mot. 10:1-7.) The Tribe claims *Simon* is inapposite because the Court held the plaintiffs' injury did not necessarily relate to a revenue ruling issued by defendants, and plaintiffs lacked standing because it was speculative whether the requested relief would redress the injury. (Opp'n 9:4-7.) Taking the Tribe's interpretation of *Simon* at face value, the case still controls here because the Tribe identifies no facts or law that connects the Governor to the FTB's imposition of state personal income tax. Also, as in *Simon*, it is speculative whether an order against the Governor would stop the FTB from enforcing state law against Tribal members.

The Governor also cites *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) for the proposition that for the Tribe to have standing its injury must be fairly traceable to his conduct; it cannot be the

[4] The Tribe claims that *Long v. Van de Kamp*, 961 F.2d 151 (9th Cir. 1992) (per curiam), *Southern Pacific Transportation Company v. Brown*, 651 F.2d 613 (9th Cir. 1980) and *Snoeck v. Brussa*, 153 F.3d 984 (9th Cir. 1998) are inapposite because the state officials lacked any connection with enforcement of the state law. (Opp'n 5:10-12 & n.4.) But, as the Governor has demonstrated, the Tribe provides no authority connecting him to the FTB's enforcement of the state Personal Income Tax Law. The Tribe makes no effort to distinguish additional decisional authority relied upon by the Governor on page eleven of the Motion.

[5] This appears to respond to argument I in the Motion. (Motion at 7-13.)

result of an independent third party actor not before the court. (Mot. 9:1-4.) Not only is the Governor not responsible for imposing or collecting personal income tax from Tribal members, the Tribe does not pay personal income tax and, therefore, could not have suffered an injury caused by the Governor. The Tribe claims *Lujan* is inapposite because the Court found an absentee had caused the injury and, therefore, redressability was not possible. (Opp'n 9:8-21.) But the same results should follow here because the Tribe acknowledges its alleged injury was caused by the FTB, which is not party to this action. (*See* Mot. 9:4-20; Opp'n 10:1-3.)

The Tribe also claims that, taking the facts of the Amended Complaint as true, the Governor promised in the Compact not to impose personal income tax on Tribal members. (Opp'n 9:24-10:1.) The Tribe cites no part of the Compact or Amended Complaint to support this assertion, and it is a legal conclusion that cannot be accepted as fact. Further, the Tribe contends the Governor has "caused the injury by allowing Tribal members to be taxed" (*id.* 10:3-4), yet it cites no authority for the proposition that the requisite causal nexus can be demonstrated by a defendant's inaction. Last, the Governor has explained here how exercising his discretionary, general supervisory authority to issue an executive order is insufficient to establish causation. Indeed, the Tribe provides no authority for its supposition that the Governor can order an executive agency not to enforce state law.

III. THE AMENDED COMPLAINT FAILS TO STATE A CLAIM FOR BREACH OF COMPACT

The Tribe contends its breach-of-compact claim survives the motion to dismiss because the Court must consider extrinsic evidence of the parties' intent at the time the Compact was executed to determine the meaning of Compact section 10.3(c). (Opp'n 10-11.)[6] The Tribe relies upon an incorrect legal standard by mistakenly citing *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80

[6] This appears to respond to argument II in the Motion. (Mot. 13-16.)

(1957) for the oft-cited maxim that a complaint should not be dismissed unless the plaintiff can prove "no set of facts" to support its claim. (Opp'n 3:4-7, 10:11-12.) The Supreme Court abrogated *Conley* in *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 561-63, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

In any event, the argument fails because general principles of contract interpretation apply to tribal-state class III gaming compacts, *Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095, 1098 (9th Cir. 2006), and a court does not consider extrinsic evidence with respect to a contract unless it is ambiguous, *In re Bennett*, 298 F.3d 1059, 1064 (9th Cir. 2002). When contract terms are clear, the parties' intent must be ascertained from the contract itself. *Shoshone-Bannock*, 465 F.3d at 1099. "Resolution of contractual claims on a motion to dismiss is proper if the terms of the contract are unambiguous." *Bedrosian v. Tenet Healthcare Corp.*, 208 F.3d 220, 1 (9th Cir. 2000) (citations omitted). Neither party claims Compact section 10.3(c) is ambiguous. Therefore, extrinsic evidence is unnecessary. *See Cabazon Band of Mission Indians v. Wilson*, 124 F.3d at 1057-58 (holding extrinsic evidence is unnecessary to construe unambiguous compact provision).

Moreover, the Tribe's assertion that the State knew certain facts at Compact execution (Opp'n 11:6-13) is unavailing because those allegations do not appear in the Amended Complaint, and new allegations in an opposition to a Rule 12(b)(6) motion are irrelevant and may not be considered by the Court. *See Schneider v. Cal. Dep't of Corrections*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998).

The Tribe also contends the State Defendants' argument that the Tribe "may" be required to collect taxes on its reservation from nonmembers[7] proves the Tribe's point, because if the Tribe is already "required" to collect taxes on the State's behalf, then Compact section 10.3(c) is meaningless. (Opp'n 11:23-12:2.) What

[7] The State Defendants argued the Tribe may be required to collect taxes from nonmembers, not nonmember Indians. (*Compare* Mot. 14:12-13 *with* Opp'n 11:23-24.)

may be required is significantly different from what *is* required. The Tribe identifies no authority outside Compact section 10.3(c) that requires it to collect and forward the State tax withholdings from nonmember Gaming Facility employees; that obligation does not exist but for Compact section 10.3(c). Therefore, the Tribe was not required to collect those taxes until it executed the Compact and section 10.3(c) is not superfluous. Moreover, the Tribe's agreement to collect certain withholdings from nonmember Gaming Facility employees is entirely unrelated to the imposition of state personal income tax on members' distributions.

Last, the Tribe claims the State Defendants cite no authority demonstrating that a commitment in a compact must be express rather than implied, yet all parties cite *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, for the proposition that a party's authority and obligations under a compact are limited by the compact's express terms. (Opp'n 12:4-9; Mot. 15:9-14.) The Tribe's attempt to distinguish *United States v. Winstar Corporation*, 518 U.S. 839, 878-79, 116 S. Ct. 2342, 135 L. Ed. 2d 964 (1986) and *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 56, 106 S. Ct. 2390, 91 L. Ed. 2d 35 (1986)[8] is equally unavailing as both cases hold that surrender of any sovereign power can only occur in unmistakable terms. That *Winstar* dealt with a permanent government promise instead of the twenty-year promise in the Compact is irrelevant. *Winstar* is not limited based upon the duration of the promise and the Tribe cites no authority for it to be construed so narrowly. Instead, *Winstar* controls the Tribe's claim here that Governor Davis' so-called "promise" in the Compact not to impose personal income tax on Tribal members' distributions (Opp'n 9:25-10:4) must be unambiguous to be enforceable. Had the State

[8] The Tribe makes no attempt to distinguish *Confederated Tribes of Warm Springs Reservation v. Kurtz*, 691 F.2d 878, 881 (9th Cir. 1982) (holding a tax exemption exists only in a statute or treaty that contains "express exemptive language"). (*See* Mot. 16:13-15.)

negotiated an elimination of personal income tax on all individual members of over sixty tribes that signed the 1999 Compact, it would have done so explicitly, which the Compact does not do. (Mot. 15-16.)

IV. FEDERAL LAW ALLOWS THE STATE TO IMPOSE PERSONAL INCOME TAX ON INDIANS LIVING OFF-RESERVATION

The Tribe's seeks to enjoin the Governor and Stanislaus from imposing and collecting state income taxes from Tribal members who reside anywhere within the geographic boundaries of California, even if that member drives exclusively on state or county maintained roads to a home on non-Tribal land, has children attending public schools, or receives most of her public services from the State.

This case turns on the Tribe's assertion that the imposition of state personal income tax on its members interferes with tribal sovereignty and is therefore preempted by federal common law. (Opp'n 12-21.)[9] No federal law or policy exempts from state income tax Tribal members who reside off the Tribe's reservation. The imposition of state income tax is not preempted because the Tribe cannot show specific federal statutes or established policies that foreclose the State's legitimate interest in securing revenues necessary to support its services to Tribal members residing in the state and off the Tribe's reservation.

McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 93 S. Ct. 1257, 36 L. Ed. 2d 129 (1973) (*McClanahan*) is not the sole authority requiring a tribal member to live on her tribe's reservation to qualify for an exemption from state income tax. In *Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. 114, 113 S. Ct. 1985, 124 L. Ed. 2d 30 (1993) (*Sac and Fox Nation*), the Court reversed a lower court decision that misconstrued *McClanahan* as immunizing tribal members' income from state taxation whenever the income derived from tribal employment on tribal trust lands, and specifically required that the member also

[9] This appears to respond to argument V in the Motion. (Mot. 20-25.)

live on trust land. The Court held that tribal member residence "is a significant component of the *McClanahan* presumption against state tax jurisdiction[,]" and narrowed the scope of available immunity to "tribal members living and working on land set aside for those members" *Id.* at 123-24. Subsequent to *Sac and Fox Nation*, the Court ruled that Oklahoma may tax the income of tribal members who earn income working for the tribe on tribal lands, but who live outside Indian country. *See Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 464, 115 S. Ct. 2214, 132 L. Ed. 2d 400 (1995). Given that holding, the Tribe cannot establish that state income taxation is prohibited when the taxpayer does not live on her tribe's lands.

Nor does IGRA prohibit state personal income tax on Indians living off-reservation. Outside of Indian country, absent "express federal law to the contrary," Indians are subject to nondiscriminatory state taxes. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 150, 93 S. Ct. 1267, 36 L. Ed. 2d 114 (1973). California Revenue and Taxation Code section 17041 provides that California residents are taxable on all income regardless of source. The Tribe has not cited an express federal law that prohibits the imposition of state income tax on members residing off-reservation.[10] Instead, the Tribe argues that the imposition of state income tax is preempted by IGRA because it interferes with its sovereignty.[11]

Preemption generally applies in Indian law where the application of state law "interferes or is incompatible with federal or tribal interests as reflected in federal law." *Confederated Tribes of Siletz Indians v. Oregon*, 143 F.3d 481, 487 (9th Cir. 1998). IGRA's purpose is to "provide a statutory basis for the operation and

[10] Title 25 U.S.C. § 2710(d)(4) "is not on its face a prohibition of state taxation." *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430, 433 (9th Cir. 1994).

[11] The Tribe quotes *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. at 465, out of context. (Opp'n at 14:1-7.) Instead, it was merely a procedural observation: the "self-governance plea was neither made in the lower courts nor presented here, and is therefore foreclosed in this case." 515 U.S. at 465.

regulation of gaming by Indian tribes," *id.* at 482, and to regulate tribal casinos so as to "'assure the gaming is conducted fairly and honestly by both the operator and players.' 25 U.S.C. § 2702(2)[,]" *Barona Band of Mission Indians v. Yee*, 528 F.3d 1184, 1193 (9th Cir. 2008). Because IGRA preemption is limited to gaming activities on Indian lands, the key question in determining its application is "whether a particular claim will interfere with the tribal governance of gaming." *Gaming Corp. Of America v. Dorsey & Whitney*, 88 F. 3d 536, 549 (8th Cir. 1996). If the state law question is "resolvable without reference to IGRA" it is not preempted. *Id.* at 544 n.8.

The Tribe argues that state income tax will interfere with its sovereignty because it will force the Tribe to "rearrange the way the Tribe operates the Casino and uses the reservation land." (Opp'n 14:9-10.) This new allegation is not in the Amended Complaint and cannot be considered in opposition to a Rule 12(b)(6) motion. *See Schneider v. Cal. Dep't of Corrections*, 151 F.3d at 1197 n.1. Even if this new allegation is taken at face value, it does not involve the governance of gaming activities or advance the objective of ensuring that games are conducted fairly and honestly. "The Tribe's argument should be rejected, however, as the application of [state] law here has no effect on the determination of 'which gaming activities are allowed.'" *Confederated Tribes of Siletz Indians v. Oregon*, 143 F.3d at 486. A state tax is preempted if it interferes with or stands as an obstacle to the full accomplishment of the federal goal or purpose. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 336, 103 S. Ct. 2378, 76 L. Ed. 2d 611 (1983). The Tribe has failed to establish that state income tax on its members who live off-reservation interferes with IGRA's objectives. Thus, preemption does not apply.

The Tribe spends much time discussing the interest-balancing test in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 100 S. Ct. 2578, 65 L. Ed. 2d 665 (1980). (Opp'n 15-20.) But *Bracker* is inapplicable to off-reservation activities. *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 112, 126 S.

Ct. 676, 163 L. Ed. 2d 429 (2005) ("[l]imiting the interest-balancing test exclusively to on-reservation transactions between a nontribal entity and a tribe or tribal member is consistent with our unique Indian tax immunity jurisprudence"); *see also Winnebago Tribe v. Kline*, 150 P. 3d 892, 901 (Kan. 2007) ("the *Bracker* interest-balancing test does not apply where the State asserts its taxing authority over non-Indians off the reservation").

V. INDIVIDUAL MEMBERS' INCOME IS SUBJECT TO STATE INCOME TAX DESPITE THE TRIBE'S CLAIM THAT IT, THE GAMING OPERATION, AND ITS MEMBERS ARE A TAX-EXEMPT PARTNERSHIP

The Tribe claims its gaming revenue is exempt from personal income tax because it is a partnership. (Opp'n 21-29.)[12] The Tribe did not oppose the Governor's and Stanislaus' argument that the Eleventh Amendment bars the state law claim. (Mot. 26-27.) Thus, it should be dismissed under Rule 12(b)(1). Alternatively, the claim should be dismissed under Rule 12(b)(6) because it is not legally cognizable. No state personal income tax exemption exists for Indians residing off-reservation on the theory that a tribal gaming operation is a partnership. (*Id.* 27-29.) Even if the Tribe, its gaming operation and individual members qualify as a partnership, the individual members are not exempt from state income tax on income received from the partnership. That the Tribe and its gaming operation are tax-exempt does not mean that immunity flows through to the individual members.

Regardless of the status of the partnership, the liability for income tax is based on the residence of the individual, not the tax immunity of the source. In *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, the Court held that a state

> may tax the income (including wages from tribal employment) of all persons, Indian and non-Indian alike, residing in the State outside Indian country. . . . 'Domicil [sic] itself affords a basis for such taxation . . . .

[12] This appears to respond to argument VIII in the Motion. (Mot. 27-29.)

> *Neither the privilege nor the burden is affected by the character of the source from which the income is derived*.'

Id. at 462-63 (emphasis added) (citation omitted).

Additionally, partners do not share their individual tax immunity with other partners. If one partner is entitled to an exemption—*e.g.*, due to another partner's physical disability—the exemption does not apply to any other members of the partnership. *United States v. Basye*, 410 U.S. 441, 447, 93 S. Ct. 1080, 35 L. Ed. 2d 412 (1973); *Hawkins v. Com'r*, 713 F.2d 347, 351 (8th Cir. 1983). Although the Tribe and its gaming operation are immune from state tax, that immunity is based on the intrinsic nature of the Tribe as a sovereign entity and the gaming operation run by the Tribal government receives immunity coextensive with the Tribal government. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 175, 109 S. Ct. 1698, 104 L. Ed. 2d 209 (1989); *Winnebago Tribe v. Kline*, 297 F. Supp. 2d 1291, 1300 n. 4 (D. Kan. 2004). Federal law is clear that individual tribal members do not have income tax immunity unless they qualify for the *McClanahan* exemption. (*See* Mot. 13, 20, 24-25.) Tax immunity is limited to "tribal members living and working on land set aside for those members." *Sac and Fox Nation*, 508 U.S. at 123-24.

As the Tribe and the State are both sovereigns, the situation is analogous to the relationship between the state and federal governments. A state government need not pay any tax to the federal government, but all state employees must pay federal income tax. Correspondingly, the Tribe need not pay any tax to the State, but its employees living off-reservation must pay state income tax.[13]

[13] An unpublished Seventh Circuit opinion addressed a tribal member's claim that he did not owe federal income tax because the income sources were exempt tribal entities. *Allen v. Com'r*, 2006 WL 3193648 (7th Cir. Nov. 6, 2006). "The question is not, however, whether the Band or the Council owes federal taxes. It is whether Allen owes tax on income he received *from* those entities." *Id.* at *1 (original emphasis.) The court held that Allen was liable for the taxes.

CONCLUSION

For reasons stated here and in the Motion, State Defendants respectfully request this Court to dismiss the Amended Complaint without leave to amend.

Dated: July 27, 2009

Respectfully submitted,

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