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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

TWENTY-NINE PALMS BAND OF MISSION INDIANS, Plaintiff, v. ARNOLD SCHWARZENEGGER, GOVERNOR OF THE STATE OF CALIFORNIA, et al. Defendants.	Case No. EDCV 08-1753-VAP (OPx) **[Motion filed on June 5, 2009]** **ORDER GRANTING MOTION TO DISMISS AMENDED COMPLAINT**

Defendants' Motion to Dismiss Plaintiff's Amended Complaint ("Motion") came before the Court for hearing on August 3, 2009. After reviewing and considering all papers filed in support of, and in opposition to, the Motion, as well as the arguments advanced by counsel at the hearing, the Court GRANTS the Motion.

I. BACKGROUND

A. Plaintiff's Allegations

Plaintiff Twenty-Nine Palms Band of Mission Indians ("Plaintiff") is a federally-recognized Indian tribe based in California composed of twelve (12) persons over

the age of eighteen years ("members"). (First Amended Complaint ("FAC") ¶¶ 1, 5, 6.)

Plaintiff formed a wholly-owned federal corporation chartered under the provisions of 25 U.S.C. section 477 ("Tribal Corporation"); it operates a casino ("the casino") in Coachella, California which offers Class III gaming pursuant to a tribal-state gaming compact ("Compact") with the state of California, signed by California Governor Arnold Schwarzenegger ("Schwarzenegger"). (FAC ¶¶ 11-14.)

The Tribal Corporation distributes revenue to Plaintiff's members in two ways: (1) as wages for work at the casino; and (2) as per capita distributions pursuant to a Revenue Allocation Plan ("RAP") approved and monitored by the Bureau of Indian Affairs ("BIA"). (FAC ¶ 15.) The RAP does not account for California's personal income tax ("the tax"). (FAC ¶¶ 15, 17, 22.)

According to the FAC, Plaintiff occupies land in Coachella, California, which is recognized by the federal government as an Indian reservation ("the reservation"). (FAC ¶¶ 5, 12, 17.) No members of Plaintiff live on the reservation and it would be "very difficult to put housing" on it. (FAC ¶ 17.)

Plaintiff names both Schwarzenegger and Selvi Stainslaus[1] ("Stainslaus"), executive officer of the Franchise Tax Board, in their official capacities. (FAC ¶¶ 7-8.) The Franchise Tax Board assesses and collects the tax for California. (FAC ¶ 7.) Schwarzenegger, Stainslaus, and the State of California are referred to collectively as "Defendants."

Plaintiff alleges collection of the tax on per capita distributions and casino earnings violates: (1) the Compact; (2) the U.S. Constitution's Indian Commerce Clause, Art. I section 8, Clause 3, the U.S. Constitution's Supremacy Clause, the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. section 2701 et seq. ("IGRA"), and tribal sovereignty; and (3) California tax law. (FAC ¶¶ 28-30.)

B. Indian Commerce Clause

"Congress has broad power to regulate tribal affairs under the Indian Commerce Clause. . . ." White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980). Tribes have enjoyed "historic immunity from state and local control," including state taxation. N.M. v. Mescalero Apache Tribe, 462 U.S. 324, 332 (1983).

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[1]Stainslaus's name appears as "Stainslaus" in the caption of the FAC, as "Stainslaw" in some of the pleadings, and also as "Stainslau" at paragraph 7 of the FAC. The Court uses the spelling in the caption throughout.

When determining whether Indian persons are subject to state taxes, the Court looks to the person and place on which the legal incidence of the tax falls; this approach "accommodates the reality that tax administration requires predictability." Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 415, 460 (1995). The "general rule" is "that 'Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State.'" Chickasaw, 515 U.S. at 465.

C. Barriers to State Regulation

There are "two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members": (1) explicit or implicit preemption by federal law; (2) "unlawful[] infringe[ment] 'on the rights of reservation Indians to make their own laws and be ruled by them'", often described as tribal sovereignty. Bracker, 448 U.S. at 143; Cabazon Band of Mission Indians v. Wilson, 37 F.3d 430, 433 (9th Cir. 1994) ("Cabazon II").

D. IGRA

IGRA, which Congress enacted pursuant to its Indian Commerce Clause powers, "provides a comprehensive framework for regulating gaming on Indian land. See 25 U.S.C. § 2701-2721." Idaho v. Shoshone-Bannock Tribes,

465 F.3d 1095, 1096 (9th Cir. 2006); Seminole Tribe of Fla. v. Fla., 517 U.S. 44, 47 (1996). IGRA governs the Class III gaming at issue here and confers jurisdiction on federal courts to enforce tribal-state compacts.[2] Idaho, 465 F.3d at 1096; Cabazon Band of Mission Indians v. Wilson, 124 F.3d 1050, 1056 (9th Cir. 1997) ("Cabazon III"); (see FAC Ex. 1.)

E. Procedural History

Defendants filed their Motion to Dismiss Amended Complaint ("Mot.") on June 5, 2009 for hearing on July 20, 2009; the parties stipulated to continue the hearing to August 3, 2009. Plaintiff timely filed Opposition and Defendants Replied.

II. LEGAL STANDARD

A. Rule 12(b)(1)

Pursuant to Federal Rule of Civil Procedure 12(b)(1), a district court must dismiss an action if the court lacks jurisdiction over the subject matter of the suit. Fed. R. Civ. P. 12(b)(1). The party seeking to invoke federal jurisdiction bears the burden of establishing that jurisdiction exists. Scott v. Breeland, 792 F.2d

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[2]"Class III gaming may be conducted on Indian lands if it is: (1) authorized by the tribe seeking to conduct the gaming; (2) located in a State which does not bar such gaming; and (3) 'conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State . . . .' 25 U.S.C. § 2710(d)(1)." Idaho, 465 F.3d at 1096.

925, 927 (9th Cir. 1986). A complaint will be dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction if (1) the cause does not "arise under" any federal law or the United States Constitution, (2) there is no "case or controversy" within the meaning of that constitutional term, or (3) the cause is not one described by any jurisdictional statute. Baker v. Carr, 369 U.S. 186, 198 (1962).

B. Rule 12(b)(6)

Under Rule 12(b)(6), a party may bring a motion to dismiss for failure to state a claim upon which relief can be granted. As a general matter, the Federal Rules require only that a plaintiff provide "'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Conley v. Gibson, 355 U.S. 41, 47 (1957) (quoting Fed. R. Civ. P. 8(a)(2)); Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 545 (2007). In addition, the Court must accept all material allegations in the complaint - as well as any reasonable inferences to be drawn from them - as true. See Doe v. United States, 419 F.3d 1058, 1062 (9th Cir. 2005); ARC Ecology v. U.S. Dep't of Air Force, 411 F.3d 1092, 1096 (9th Cir. 2005).

"While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual

allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atlantic, 127 S. Ct. at 1964-65 (citations omitted). Rather, the allegations in the complaint "must be enough to raise a right to relief above the speculative level." Id. at 1965. "[T]he pleading standard Rule 8 announces . . . demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009).

Although the scope of review is limited to the contents of the complaint, the Court may also consider exhibits submitted with the complaint, Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555 n.19 (9th Cir. 1990), and "take judicial notice of matters of public record outside the pleadings," Mir v. Little Co. of Mary Hosp., 844 F.2d 646, 649 (9th Cir. 1988).

III. DISCUSSION

A. Justiciability

Defendants claim there is no case or controversy between Plaintiff and Schwarzenegger "because there is no causal connection between the Governor's actions and the alleged injury, and the alleged injury cannot be redressed by the requested relief" as "the Governor does

not have direct, primary responsibility for imposing or collecting state personal income tax." (Mot. 7, 9.) Defendants make a similar argument as to Stainslaus.

1. Schwarzenegger

Under Long v. Van de Kamp, 961 F.2d 151, 152 (9th Cir. 1992) (per curiam), "there must be a connection between the official sued and enforcement of the allegedly unconstitutional statute . . . ." In Long, the Ninth Circuit held the Eleventh Amendment barred plaintiffs' suit against the California Attorney General: "the searches of plaintiffs' premises were not the result of any action attributable or traceable to the Attorney General" and "[a]bsent a real likelihood that the state official will employ his supervisory powers against plaintiffs' interests, the Eleventh Amendment bars federal court jurisdiction." 961 F.2d at 152.

Here, Plaintiff offers evidence the governor of California can, and has, used his supervisory power to affect taxation. First, according to California Government Code section 12010, "[t]he Governor shall supervise the official conduct of all executive and ministerial officers," including the Franchise Tax Board. (See Mot. 9 citing Cal. Const. Art. V § 1.) Second, Plaintiff adduces evidence California's governor issued two executive orders, in 1993 and 2003, "unilaterally . .

. direct[ing] the Department of Motor Vehicles to refund to taxpayers [certain] vehicle license fees," and "creat[ing] a strike force consisting of the FTB [Franchise Tax Board] and other agencies to target enforcement relating to failure to pay taxes," respectively. (Opp'n 7 citing Cal. Exec. Order S1-03, Cal. Exec. Order 2-66-93[3]; Pl.'s App. of Authorities and Request for Judicial Notice Re Opp'n to Mot. to Dismiss Amended Compl. ("Pl.'s RJN") Ex. D.)[4]

Cabazon III also supports the proposition that the Eleventh Amendment does not block suits against California's governor arising from breach of a state-tribal compact or related taxation issues, although Cabazon III does not directly address Ex Parte Young, 209 U.S. 123 (1908). See Cabazon III, 124 F.3d at 1058-60.

Plaintiff has borne its burden of showing a decision in its favor against Schwarzenegger could result in redress. (See Opp'n 8 citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).) Accordingly, the

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[3]According to Pl.'s RJN, Plaintiff provides a copy of only the 2003 Executive Order as Plaintiff has requested but not received the 1993 Executive Order from the California State Library.

[4]Where the Court considers a motion to dismiss pursuant to Rule 12(b)(1), unlike Rule 12(b)(6), it can consider matters outside the pleadings presented by the moving party. (Mot. 6 citing Ass'n of Am. Med. Colleges v. U.S., 217 F.3d 770, 778 (9th Cir. 2000).)

Court denies the Motion insofar as it seeks dismissal based on the justiciability of a suit against Schwarzenegger.

2. Stainslaus

Stainslaus is the Executive Officer of the Franchise Tax Board. (Mot. 19.) Although she moved the Court to find the suit against her was nonjusticiable, she has conceded she is subject to suit for violations of IGRA. (Opp'n 5; Reply 3.) Also, the Ninth Circuit has found persons may bring suit against Franchise Board Tax Members alleging state taxes are unconstitutional under Ex Parte Young. See Capitol Industries-EMI Inc. v. Bennett, 681 F.2d 1107, 1120 (9th Cir. 1982); (Mot. 18-19.) See also Cabazon III, 124 F.3d at 1056, 1058-60. In sum, Plaintiff's claims against Schwarzenegger and Stainslaus are justiciable.

B. First Claim: Breach of Compact

Plaintiff claims Defendants breached the Compact by attempting to collect the tax. The Court has jurisdiction because California consented to suit in federal court for breach of the Compact. (FAC Ex. 1, Compact §§ 9.1(d), 9.4.) Also, "IGRA necessarily confers jurisdiction onto federal courts to enforce Tribal-State compacts and the agreements contained therein." Cabazon III, 124 F.3d at 1056.

Plaintiff alleges the parties to the Compact negotiated to eliminate the tax on wages and per capita distributions. (FAC ¶ 20.) Plaintiff cites no provision of the Compact for this proposition but claims the Compact, "taken as a whole, in the context in which it was negotiated," was "a negotiated elimination of PIT [the tax] . . . ." (FAC ¶ 20.)

In other words, Plaintiff asks the Court to disregard the text of the Compact and instead interpret its meaning based on evidence about Compact negotiations. The Court will not consider extrinsic evidence where, as here, the Compact language is unambiguous: the Compact nowhere explicitly exempts members of Plaintiff from the tax. See Cabazon III, 124 F.3d at 1057. Accordingly, the Court GRANTS the Motion as to the first claim WITHOUT LEAVE TO AMEND.

C. Second Claim: Federal Preemption and Tribal Sovereignty

Plaintiff's second claim alleges Schwarzenegger and Stainslaus violate IGRA and infringe on tribal sovereignty when attempting to collect the tax from Plaintiff's members on per capita distributions and on income earned from work at the casino.

1. Eleventh Amendment immunity for Schwarzenegger, Stainslaus

Schwarzenegger and Stainslaus assert they are immune from relief under the Eleventh Amendment as both act in their official capacities as officers of California when enforcing the state's tax laws. (See FAC ¶¶ 7-8.)[5] They rely on Seminole for the proposition that Ex Parte Young does not permit suit for actions involving IGRA. Seminole is distinguishable on its logic, however.

In Seminole, plaintiff tribe sued to force the governor and state of Florida to engage in good-faith negotiations to form a tribal-state compact pursuant to IGRA. The Supreme Court found IGRA's intricate remedial provisions relevant to good-faith bargaining prevented application of Ex Parte Young. Seminole, 517 U.S. 44, 47; (Mot. 18.) There is no such intricate remedial scheme here through which Plaintiff can seek adjudication of its claim regarding the tax. Id., 517 U.S. at 47.

Accordingly, Seminole does not apply; Ex Parte Young permits suit against Schwarzenegger and Stainslaus. See Cabazon III, 124 F.3d at 1057. Ninth Circuit authority

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[5] California was not named in the second claim. California did not consent in the Compact to be sued for violation of IGRA, only for breach of compact, and accordingly has not expressly waived its Eleventh Amendment immunity for the second claim. See Cabazon III, 124 F.3d at 1057; (see Compact §§ 9.1(d), 9.4.)

supports this position. In Cabazon III, the Ninth Circuit permitted suit against California's governor when a tribe asked the court to find state taxes preempted by federal law. See Cabazon III, 124 F.3d at 1057.

2. Federal preemption and tribal sovereignty

According to the FAC, "Defendants' effort to impose and collect and [*sic*] PIT [the tax] on the Members, and receive PIT from the Members, is preempted by federal law under the U.S. Constitution's Indian Commerce Clause, Art. I, § 8, Clause 3, the U.S. Constitution's Supremacy Clause, and IGRA" and interferes with tribal sovereignty. (FAC ¶¶ 28-30.) Plaintiff alleges the Indian Commerce Clause and IGRA preempt imposition of the tax because Congress enacted IGRA pursuant to its broad powers under the Indian Commerce Clause. Bracker, 448 U.S. at 143; Seminole, 517 U.S. at 47.

Federal law can preempt state law either expressly or implicitly. Federal preemption and tribal sovereignty are "independent but related barriers to the assertion of state regulatory authority over tribal reservations and members." Bracker, 448 U.S. at 143. As the cases on which both sides rely discuss these barriers together, the Court does so here.

a. Express preemption by IGRA

Federal law can preempt state tax law expressly when the taxed activities or sales occur, or the persons taxed reside, off-reservation.[6] Chickasaw, 515 U.S. at 458, 465 ("'[E]xpress federal law to the contrary' overrides the general rule that 'Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State.'").

IGRA section 2710(d)(4) states in its entirety:

> Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, **nothing** in this section **shall be interpreted as conferring upon a State** or any of its political subdivisions **authority to impose any tax,** fee, charge, or other assessment **upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity.** No State may refuse to enter into the negotiations described in paragraph (3)(A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.

This provision refers to the power of California to impose taxes upon tribal governments and their authorized gaming operators; it does not refer to natural persons such as Plaintiff's members. (Mot. 21.) The Ninth Circuit's holding in Cabazon II supports this reading.

[6] A tribe is generally immune from state taxation of tribe members residing on their reservation. Chickasaw, 515 U.S. at 458.

The Cabazon II Court held that "section 2710(d)(4) [of IGRA] is not on its face a prohibition on state taxation" and accordingly found that IGRA did not explicitly preempt California law regarding certain fees not at issue here. Cabazon II, 37 F.3d at 433.

Accordingly, the Court GRANTS the Motion as to Plaintiff's second claim WITHOUT LEAVE TO AMEND insofar as Plaintiff alleges IGRA explicitly preempts collection of the tax.

b. Implicit preemption and tribal sovereignty

"In determining whether federal law preempts a state's authority to regulate activities on tribal lands, courts must apply standards different from those applied in other areas of federal preemption." Cabazon II, 37 F.3d at 433. First, "the 'who' and the 'where' of the challenged tax have significant consequences . . . " Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95, 101 (2006).

The Court does not employ the Bracker implicit preemption balancing test, which takes federal, state, and tribal interests into account, although Plaintiff urges the Court to rely on it.[7] (See Opp'n 13 citing

[7]Cabazon II provides a good summary of the Bracker test. First, "no specific congressional intent to (continued...)

Cal. v. Cabazon Band of Mission Indians, 480 U.S. 202, 217 (1987) ("Cabazon I");) Bracker, 448 U.S. 136. The Bracker test applies "exclusively to on-reservation transactions between a nontribal entity and a tribe or tribal member . . . . " see Wagnon, 546 U.S. at 112. Plaintiff's members live off-reservation, however; hence, the balancing test does not apply. See Chickasaw, 515 U.S. at 458.

i. On whom the legal incidence of the tax falls

The "who," or the persons on whom the legal incidence of the tax falls, are the members of Plaintiff tribe. See Chickasaw, 515 U.S. at 453, 462 (legal incidence of state income tax falls on tribe member whose wages derive from tribal employment); Wagnon, 546 U.S. at 102-103 (examining whether legal incidence of fuel tax fell on tribe or non-tribal distributor of fuel); (FAC ¶¶ 15, 16,

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[7](...continued)
preempt state activity is required; 'it is enough that the state law conflicts with the purpose or operation of a federal statute, regulation, or policy.'" Cabazon II, 37 F.3d at 433 (internal citation omitted). Second, "'[s]tate jurisdiction is pre-empted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority.'" Id. (internal citation omitted) The Court determines such incompatibility by "balancing these federal, tribal, and state interests . . ." Id. (internal citation omitted) Finally, "'ambiguities in federal law are, as a rule, resolved in favor of tribal independence.'" Id. (internal citation omitted)

30 (Schwarzenegger and Stainslaus seek to impose the tax on Plaintiff's members).)

ii. Where the legal incidence of the tax falls

Plaintiff argues the legal incidence of the tax falls on the reservation because its assessment interferes with tribal governance. See Wagnon, 546 U.S. at 101-02; Okla. Tax Comm'n v. Sac and Fox, 508 U.S. 114, 126 (1993); (FAC ¶¶ 28-29.) Although the FAC states it would be difficult to put housing on the reservation, Plaintiff pleads no facts showing how assessment of the tax disrupts or otherwise infringes on tribal sovereignty. (FAC ¶¶ 17, 28-30.)

Plaintiff nevertheless argues the Court should consider the implications on tribal sovereignty of assessing the tax on wages and per capita distributions. For example, to avoid imposition of the tax, would Plaintiff need to re-arrange the casino or its parking lot to make space for housing? (See Opp'n 14.) If so, would "the Tribal Council's activities. . . be consumed by addressing financial, environmental, regulatory and other issues involving housing on the reservation"? (Opp'n 19.)

Pursuant to Iqbal and Bell Atlantic, this is insufficient. "[T]he pleading standard Rule 8 announces does not require 'detailed factual allegations,'" but a plaintiff must provide enough information to "raise a right to relief above the speculative level." Bell Atlantic, 550 U.S. at 545; Iqbal, 129 S. Ct. at 1950. Plaintiff asks the Court to engage in speculation regarding the effect of assessment of the tax on tribal sovereignty. See Bell Atlantic, 550 U.S. at 545; Iqbal, 129 S. Ct. at 1950; (see Opp'n 14, 19.) Accordingly, the Court GRANTS the Motion WITH LEAVE TO AMEND as to the second claim insofar as it is based on implicit preemption by federal law or infringement on tribal sovereignty.

The Court permits Plaintiff leave to amend because Chickasaw and Sac and Fox leave open the question of whether the legal incidence of a state tax could fall on the reservation if a tribe alleges collection of a tax infringes on tribal sovereignty. The Chickasaw Court premised its holding a tax fell outside the reservation in part on the plaintiff's failure to raise tribal sovereignty as a bar to taxation. 515 U.S. at 464. Likewise, in Sac and Fox, the Supreme Court explicitly declined to decide "whether the Tribe's right to self-governance could operate independently of its territorial jurisdiction to pre-empt the State's ability to tax

income earned from work performed for the Tribe itself when the employee does not reside in Indian country." 508 U.S. at 126; see also Jefferson v. Comm'r of Revenue, 631 N.W. 391, 397 (2001) (denying relief where plaintiffs offered no "clear explanation as to how the imposition of Minnesota's income tax on tribal members residing off the reservation infringes on tribal self-governance.").

In conclusion, the Court GRANTS the Motion as to the second claim WITHOUT LEAVE TO AMEND insofar as it is based on explicit preemption by IGRA. It GRANTS the Motion WITH LEAVE TO AMEND insofar as the second claim is based on implicit preemption by federal law and infringement on tribal sovereignty.

D. Third Claim: IGRA, Tribal Sovereignty, State Law

Plaintiff alleges collection of the tax: (1) is preempted or otherwise forbidden by IGRA; (2) interferes with tribal sovereignty; and (3) violates California tax law. (FAC ¶¶ 46-47.)

The first argument, that IGRA forbids assessment of the tax, lacks merit. Plaintiff shows IGRA requires per capita distributions be subject to federal income tax. 25 U.S.C. § 2710(b)(3)(D). Plaintiff fails to provide authority for the proposition IGRA forbids the state from taxing the per capita distributions, however. See 25

U.S.C. 2710(d)(4). As discussed above, section 2710(d)(4) neither enlarges nor constricts Defendants' ability to collect the tax on per capita distributions and earnings. See Cabazon II, 37 F.3d at 433 ("section 2710(d)(4) [of IGRA] is not on its face a prohibition on state taxation" and does not explicitly preempt California law regarding collection of certain fees in connection with gaming). The Court GRANTS the Motion as to the third claim, insofar as it is based on violation of IGRA or explicit preemption by IGRA, WITHOUT LEAVE TO AMEND.

The second argument fails as well. As discussed in the preceding section, Plaintiff alleges no facts from which the Court could find the legal incidence of the tax falls on the reservation. See Chickasaw,515 U.S. at 464; Sac and Fox, 508 U.S. at 126; (FAC ¶ 17; Opp'n 19, 21.) Accordingly, the Court GRANTS the Motion as to the third claim WITH LEAVE TO AMEND insofar as it is premised interference with tribal sovereignty or implicit preemption by the Indian Commerce Clause. See Bell Atlantic, 550 U.S. at 545; Iqbal, 129 S. Ct. at 1950; (FAC ¶¶ 46, 48.)

Third, Plaintiff alleges assessment of the tax on wages and per capita distributions violates California's tax laws. (FAC ¶¶ 44, 46-47.) "California income tax

law generally is based upon federal income tax law . . . ." Ordlock v. Franchise Tax Board, 44 Cal. 3d 212, 216 (2006). Plaintiff's Opposition relies heavily on the allegedly tax-exempt treatment of certain monies under federal tax law for the proposition they are also not subject to taxation under California law. (Opp'n 24-27.) The FAC also cites federal tax law regarding the proper classification under California law of wages and per capita distributions. (FAC ¶¶ 44, 47.)

This argument lacks merit, as the Court lacks jurisdiction insofar as the third claim is premised on violation of state law. The FAC contains several bases for jurisdiction: 28 U.S.C. section 1291 (final decisions of district courts); 28 U.S.C. section 1362 (jurisdiction over suits arising under federal law brought by tribes); IGRA; the Indian Commerce Clause; 28 U.S.C. section 2281 (injunctions, repealed); the Compact; and state pendent jurisdiction. (FAC ¶ 2.)

Of these, only the last is at issue with respect to the third claim because it is premised on violation of California tax laws. (FAC ¶¶ 39, 44, 46, 47.) The Eleventh Amendment bars pendent state law claims against a non-consenting state defendant in federal court. (Mot. 26-27 citing Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 120 (1984).) According to

Pennhurst, "a claim that state officials violated state law in carrying out their official responsibilities is a claim against the State that is protected by the Eleventh Amendment . . . this principle applies as well to state-law claims brought into federal court under pendent jurisdiction." 465 U.S. at 121. The third claim alleges Schwarzenegger and Stainslaus, acting in their official capacities, violate state tax law when they assess the tax. See Pennhurst, 465 U.S. at 121; (FAC ¶¶ 46-47.) Accordingly, the Court lacks jurisdiction to consider whether assessment of the tax violates California law.

Plaintiff does not dispute the effect of the Eleventh Amendment on the third claim. (Reply 11.) The court GRANTS the Motion at to the third claim insofar as it is based on violation of California law WITHOUT LEAVE TO AMEND.

IV. CONCLUSION

For the above reasons, the Court GRANTS the Motion as to the first claim WITHOUT LEAVE TO AMEND.

It GRANTS the Motion as to the second claim WITH LEAVE TO AMEND insofar as it is based on implicit preemption by federal law or interference with tribal sovereignty. It GRANTS the Motion as to the second claim

WITHOUT LEAVE TO AMEND insofar as it alleges the tax is expressly preempted by IGRA.

Likewise, the Court GRANTS the Motion as to the third claim WITH LEAVE TO AMEND insofar as it is based on implicit preemption by federal law or interference with tribal sovereignty. It GRANTS the Motion WITHOUT LEAVE TO AMEND insofar as it alleges the tax is expressly preempted by IGRA, violates IGRA, or violates California law.

Dated: September 4, 2009

Virginia A. Phillips

VIRGINIA A. PHILLIPS
United States District Judge