SANFORD I. MILLAR, SBN 66872
MILLAR LAW
DALE E. MOTLEY, SBN 69208
OGDEN & MOTLEY
1925 Century Park East, Suite 2000
Los Angeles, California 90067

(310) 788-8674; Fax (310) 556-3094
(310) 286-6760; Fax (310) 286-7419
Emails: **smillar@millarlaw.net**; **dalemotley@msn.com**

Attorneys for Plaintiff,
PALA BAND OF MISSION INDIANS

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

PALA BAND OF MISSION INDIANS,

Plaintiff,

vs.

NICHOLAS MADUROS, in his official capacity as the Director of the California Department of Tax and Fee Administration; THE CALIFORNIA DEPARTMENT OF TAX AND FEE ADMINISTRATION,

Defendants.

Case No. 3:20-cv-01767-AJB-JLB

OPPOSITION TO MOTION TO DISMISS SECOND AMENDED COMPLAINT

Date: April 1, 2021
Time: 2:00 P.M.
Courtroom: 4A
Judge: Hon. Anthony J. Battaglia
Trial Date: None Set
Action Filed: September 9, 2020

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A.

SUMMARY OF ARGUMENT

The case now before the Court comes down to one issue:

Does the incidence of the taxes imposed by the Defendants fall on the Plaintiff?

The Plaintiff and Defendants all agree (See Motion, p. 7:25-26) that this issue is dispositive as to whether or not the Defendants can require the federally recognized and sovereign PALA BAND OF MISSION INDIANS (hereinafter sometimes referred to as the "Plaintiff") to report, charge, collect, and/or remit to Defendants any California state taxes with respect to motor vehicle fuel products that are delivered to, received by, and/or sold by the Plaintiff on the Reservation. Since the incidence of tax falls on the Plaintiff, these taxes are categorically unenforceable.[1]

B.

STANDARD OF REVIEW

A court evaluating a motion to dismiss under *Rule 12(b)(6)* assumes the truth of the plaintiff's well-pleaded factual allegations and determines whether they plausibly give rise to an entitlement to relief. (*Eclectic Properties East, LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 996 (9th Cir. 2014).) Allegations are entitled to the presumption of truth if they contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively. The court must take all allegations of material fact as true and construe them in the light most favorable to the nonmoving party. (*Turner v. City and County of San Francisco*, 788 F.3d 1206, 1210 (9th Cir. 2015).) A complaint must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some theory. The Second Amended Complaint satisfies all of these requirements.

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[1] Contrary to the assertion in the Motion (p. 3:14-16), based on the fact that the incidence of tax falls on the Plaintiff, the Second Amended Complaint challenges the imposition of any taxes imposed by the Defendants on the Plaintiff.

C.

STATEMENT OF FACTS

The Plaintiff owns a retail gasoline station located at the Pala Mini Mart, 11154 Highway 76, Pala, California 92059. The gasoline station is on Reservation land held in trust by the United States for the benefit of the Plaintiff. The Plaintiff purchases motor vehicle fuel products from Supreme Oil (the "Distributor"). The State of California collects taxes from Supreme Oil which then adds the amount of those taxes to the price Supreme Oil charges to the Plaintiff (the "Retailer"). The price then charged by Plaintiff at the pump to retail customers (the "Consumers") includes the taxes paid to Supreme Oil. The CDTFA also requires the Plaintiff to report, charge, collect, and/or remit the California sales and use taxes on sales at the pump. The CDTFA imposes no liability of any kind on a Consumer for purchasing, possessing, or using untaxed motor vehicle fuel from the Plaintiff.

The Federal Indian Trader statutes (*25 U.S.C. § 261* through *25 U.S.C. § 264*), enacted by Congress pursuant to the Indian Commerce Clause (*United States Constitution, Article I § 8, clause 3*) and by virtue of the Federal Supremacy Clause (*United States Constitution, Article VI, clause 2*), expressly preempt any California statutes, regulations, and/or orders from serving as the basis for any requirement that the Plaintiff report, charge, collect, and/or remit to Defendants any California state sales and use taxes with respect to motor vehicle fuel products that are delivered to, received by, and/or sold by the Plaintiff on the Reservation. Additionally, the *Hayden-Cartwright Act* (*4 USCS §104-§109*), requires the Congress to provide "unmistakably clear" authorization to abrogate any of the Plaintiff's tax immunities regarding those motor vehicle fuel taxes.

Contrary to the authority established by the *United States Constitution* and the *Hayden-Cartwright Act*, the CDTFA has, by legislative and administrative fiat, imposed the legal incidence of tax on the Plaintiff and conscripted the Plaintiff to serve as a tax collector for the State of California. Relying on decisions from tobacco tax cases, the

CDTFA now attempts to justify its unlawful actions on the basis that they constitute only a "minimal burden" on the Plaintiff.

As the following discussion will demonstrate, the Defendants' argument misses the point. It does not matter if the burden is minimal or overwhelming. The point is that the State of California is not allowed to impose this burden, no matter what the degree of the burden, on the Plaintiff. As will be demonstrated in the following analysis, the taxation scheme imposed by the CDTFA places the incidence of tax on the Plaintiff. To the extent that the tobacco tax cases cited by the Defendants consider the concept of a "minimal burden" as a justification for allowing a state to impose its taxation scheme on a neighboring sovereign, the prohibition in the *Hayden-Cartwright Act*, regarding taxation of motor vehicle fuel sales on the Reservation, distinguishes this motor vehicle fuel case from any of the decisions cited by the Defendants relating to the taxation of tobacco.

Therefore, since the imposition of the Defendants' taxation scheme on the Plaintiff is a violation of federal law, the Second Amended Complaint states a claim for relief and the Motion to Dismiss should be denied.

D.

THE CALIFORNIA TAXATION SCHEME PLACES THE INCIDENCE OF TAX ON THE PLAINTIFF

"Unless Congress clearly provides otherwise, a State tax is not enforceable if its legal incidence falls on a Tribe or its members for sales made within Indian country." (*Squaxin Island Tribe v. Stephens,* 400 F.Supp.2d 1250, 1255 (2005).) To discern where the legal incidence lies, the Court must ascertain the legal obligations imposed upon the concerned parties. The question of where the legal incidence of a tax lies is decided by federal law. (See *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, 121, 74 S.Ct. 403, 98 L.Ed. 546 (1954). Further, a party does not bear the legal incidence of the tax if it is merely a transmittal agent for the state tax collector. (*Coeur D'Alene Tribe of Idaho v. Hammond*, 384 F.3d 674, 681 (9th Cir.2004) ("*Hammond*") As the Supreme Court held

in *Oklahoma Tax Commission v. Chicksaw Nation*, 515 U.S. 450, 459, 115 S.Ct 2214, 132 L.Ed.2d 400 (1995)("*Chicksaw Nation*"):

> "In examining the statutes, the Chickasaw Nation Court found that the following aspects of **Oklahoma's fuel taxation scheme placed the legal incidence on retailers**: (1) the Oklahoma law required distributors to remit the fuel tax "on behalf of a licensed retailer," indicating that distributors were merely transmittal agents; (2) distributors were allowed to deduct taxes that were uncollectible from retailers, but retailers could not deduct taxes uncollectible from consumers; (3) distributors were allowed to retain a small portion of the taxes as reimbursement for their collection services, but retailers were not; and (4) the Oklahoma law imposed no liability of any kind on a consumer for purchasing, possessing, or using untaxed fuel. Id. at 461-62, 115 S.Ct. 2214. **Because the Tribe in Chickasaw Nation was operating stations at the retail level on tribal land, and the legal incidence of Oklahoma's fuel tax fell on retailers**, the Supreme Court held that **the tax could not be enforced**." [Emphasis added]

Further, as the court recently stated in *Flandreau Santee Sioux Tribe v. Noem*, 938 F.3d 928, 932, (2019) ("*Noem*"):

> "If the legal incidence of a state tax falls on a Tribe or its members for sales made within Indian country, like the state motor fuels excise tax at issue in Chickasaw Nation, **the tax is categorically unenforceable, without regard to its "economic realities**." [Emphasis added]

In this case, the CDTFA' taxation scheme has placed the "incidence of tax" on the Plaintiff for the sale of motor vehicle fuel. Congress has not provided the "unmistakably clear" authorization for the CDTFA to abrogate the Plaintiff's tax immunities as to those taxes. Under both *Chickasaw Nation* and *Hammond*, the question at the heart of the legal incidence of tax analysis is whether the State both legally requires and enforces the imposition of a tax on a particular entity or person. Since that is exactly what the

CDTFA is doing and seeks to continue doing to the Plaintiff, the CDTFA's taxation scheme cannot be enforced. As the court found in *Hammond*, supra., at page 696:

> "We determine **as a matter of federal law** that notwithstanding the Idaho legislature's attempt to assign the legal incidence of the motor fuels tax to the distributors, **the tax's legal incidence falls on tribal retailers, not on the non-tribal distributors who act as transmittal agents for the state**. Moreover, this tax is impermissible because **Congress did not, in enacting the Hayden-Cartwright Act in 1936, provide the 'unmistakably clear' authorization necessary to abrogate Indian tax immunities** on the Tribes' reservations. Blackfeet, 471 U.S. at 765, 105 S.Ct. 2399. [Emphasis added]

Therefore, since the Defendants' taxation scheme unlawfully places the legal incidence of tax on the Plaintiff with respect to motor vehicle fuel products that are delivered to, received by, and/or sold by the Plaintiff on the Reservation, the Second Amended Complaint states a claim for relief and the Motion to Dismiss should be denied.

E.

THERE IS NO "UNMISTAKABLY CLEAR" SHOWING OF CONGRESSIONAL INTENT TO AUTHORIZE THE DEFENDANTS TO IMPOSE CALIFORNIA'S TAXATION SCHEME ON THE PLAINTIFF

In the Motion to Dismiss, the Defendant neither asserts nor argues that there has been an "unmistakably clear" showing of Congressional intent to authorize the State of California to impose its motor vehicle fuel taxation scheme on the Plaintiff. In order for the State of California to do that, the expression of Congressional intent must have been explicit in order to grant the state the power to tax within Indian country. Absent that "unmistakably clear" showing of Congressional intent, the *Hayden-Cartwright Act* prohibits the imposition of state taxes on motor vehicle fuel that is delivered to, received by, and/or sold by the Plaintiff on the Reservation. As the court held in *Hammond*,

supra., at page 691:

> " The Eighth Circuit, every federal district court, and every state court to address the issue thus far has held that **clear congressional authorization under the Hayden-Cartwright Act is not present, rejecting states' attempts to tax Indians for motor fuel delivered and sold on their own reservations**."[Emphasis added]

In the case now before the Court, there is no "unmistakably clear" showing of Congressional intent to authorize Defendants' taxation scheme. Absent that "unmistakably clear" showing, the *Hayden-Cartwright Act* bars the Defendants from imposing the motor vehicle fuel taxes on the Plaintiff. As the Court went on to decide in *Hammond*, supra., at page 695:

> "Given the standard for finding that Congress has authorized states by taxation to intrude on the sovereignty of Indian tribes, which requires that the showing of congressional intent be "unmistakably clear," and analyzing the Hayden-Cartwright Act's text, structure, and legislative history in this light, **we conclude that Congress did not abrogate the Tribes' immunity from state taxation of fuels delivered to and sold on their reservations**." [Emphasis added]

The Defendants have not shown and do not argue that there has been an "unmistakably clear" showing of Congressional intent to authorize Defendants' taxation scheme. Since that taxation scheme places the legal incidence of tax on the Plaintiff with respect to motor vehicle fuel products that are delivered to, received by, and/or sold by the Plaintiff on the Reservation, it cannot be enforced against the Plaintiff.

Therefore, the Second Amended Complaint states a claim for relief and the Motion to Dismiss should be denied.

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F.

THE BALANCING TEST UTILIZED IN "TOBACCO CASES" IS NOT APPLICABLE TO THIS MOTOR VEHICLE FUEL CASE

In *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 142-143 (1980) ("*Bracker*"), the Court stated:.)

> "Congress has broad power to regulate tribal affairs under the Indian Commerce Clause, Art. 1, § 8, cl. 3. (See United States v. Wheeler, 435 U.S. 313, 322-323 (1978).) This congressional authority and the "semi-independent position" of Indian tribes have given rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members. **First, the exercise of such authority may be pre-empted by federal law.** See, e.g., Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U. S. 685 (1965); McClanahan v. Arizona State Tax Comm'n, supra. **Second, it may unlawfully infringe "on the right of reservation Indians to make their own laws and be ruled by them."** Williams v. Lee, 358 U. S. 217, 220 (1959). See also Washington v. Yakima Indian Nation, 439 U. S. 463, 502 (1979); Fisher v. District Court, 424 U. S. 382 (1976) (per curiam); Kennerly v. District Court of Montana, 400 U. S. 423 (1971)." [Emphasis added]

The right of tribal self-government is ultimately dependent on and subject to the broad power of Congress. In this case, the *Hayden-Cartwright Act* specifically limits the state's ability to tax motor vehicle fuel sold on the Reservation. Because of the *Hayden-Cartwright Act* , the "minimal burden" analysis advanced by the Defendants is inapplicable to this case involving a comprehensive federal statutory scheme governing the sale of motor vehicle fuel on reservations. As Supreme Court went on to observe in *Chicksaw Nation*, supra., at page 458:

> "But when a State attempts to levy a tax directly on an Indian tribe or its members inside Indian country, rather than on non-Indians, **we have**

> **employed, instead of a balancing inquiry, "a more categorical approach**: `[A]bsent cession of jurisdiction or other federal statutes permitting it,' we have held, a **State is without power to tax** reservation lands and reservation Indians." County of Yakima v. Confederated Tribes and Bands of Yakima Nation, 502 U. S. 251, 258 (1992) (citation omitted)." [Emphasis added]

In the case now before the Court, the CDTFA has placed the incidence of tax on the Plaintiff and is therefore seeking to tax the Plaintiff. Although the Defendant offers authority to support its argument that other taxation schemes, arguably more burdensome than the one now before the Court, have been sustained because they involve a minimal burden on the tribe, those cases deal with state taxation of tobacco products.[2] The *Hayden-Cartwright Act* distinguishes the present case from all of those tobacco cases because this is a motor vehicle fuel case.

Therefore, since the balancing test that has been applied to tobacco cases is not applicable to motor vehicle fuel cases because of the *Hayden-Cartwright Act*, the Second Amended Complaint states a claim for relief and the Motion to Dismiss should be denied.

G.

A STATE LEGISLATURE CANNOT CONCLUSIVELY DEFINE WHERE THE LEGAL INCIDENCE OF TAX FALLS

A state legislature cannot by legislative fiat conclusively define where the legal incidence of tax falls. As the Court found in *Hammond*, supra., at page 682-683:

> "The incidence of a state tax on a sovereign Indian nation inescapably is a question of federal law **that cannot be conclusively resolved in and of**

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[2] The only motor vehicle fuel case cited in support of the Defendants' argument is *Wagnon v. Prairie Band of Potawatomi Nation*, 546 U.S. 95 (2005). That case is readily distinguishable from the instant action because it involved "off-reservation transactions" between non-Indians.

itself by the state legislature's mere statement." [Emphasis added]

Further, the Court went on to note in *Hammond*, supra., at page 684:

> "We agree with the Tribes that if we determined legal incidence solely by looking at the legislature's stated intent, we would be permitting the state to name one party the taxpayer while requiring another to pay the tax, in the process avoiding tax immunities held by the second party. Thus we conclude that, while **the legislative declaration** is "dispositive" as to what the legislature intended, removing the need to predict the legislative aim from reports and legislative statements, it **cannot be viewed as entirely "dispositive" of the legal issue that the federal courts are charged with determining as to the incidence of the tax**. And this is not merely a technical tax issue: **If state legislatures could tax Indian tribes merely on the assertion that the incidence of the tax lies elsewhere, it would permit states indirectly to threaten the very existence of the Tribes**. It has long been understood in our nation that, in the adage coined by the great Chief Justice John Marshall, the unchecked power to tax is the power to destroy. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 431, 4 L.Ed. 579 (1819)." [Emphasis added]

As argued above, the CDTFA tax is clearly a "collect and remit" scheme that places the incidence of the tax on the Plaintiff. As the Court also noted in *Hammond*, supra., at page 688:

> "We agree with the district court that "the statute retains the `pass through' quality of the prior statute, 'and that **it is still a "collect and remit" scheme which places the incidence of the tax on the Indian retailers**.' Hammond, 224 F.Supp.2d at 1270. **Under federal law, it is unlawful to place the legal incidence of the tax on tribal retailers** absent "clear congressional authorization" for the Idaho state taxation of the Tribes. Chickasaw Nation, 515 U.S. at 459, 115 S.Ct. 2214." [Emphasis added]

In the Motion to Dismiss, the Defendants cite a laundry list of state statutes that set forth the tax obligations that the Defendants seek to enforce against the Plaintiff.[3] However, those state statutes are merely pronouncements from the California Legislature and they do not conclusively establish the incidence of tax. Only the Court can determine if the legal incidence of tax falls on the Plaintiff. Since the evidence establishes that the incidence of tax falls on the Plaintiff, the California statutes are not dispositive and the Court should find that the incidence of tax falls on the Plaintiff.

Therefore, the Second Amended Complaint states a claim for relief and the Motion to Dismiss should be denied.

H.

CONCLUSION

The following facts in this case are clear:

1) The Plaintiff is a federally recognized sovereign Indian Nation.

2) The *Hayden-Cartwright Act* governs the imposition of motor vehicle fuel taxes on Indian Reservations.

3) There is no "unmistakably clear" showing of Congressional intent to authorize Defendants' taxation scheme on the Plaintiff.

4) The incidence of the motor vehicle fuel taxes imposed by the Defendants fall on the Plaintiff.

Given these four facts, the Second Amended Complaint clearly states a claim for relief against the Defendants. In evaluating the merits of the Defendants' Motion to Dismiss, it is important to note that the Defendants have deftly avoided mentioning the *Hayden-Cartwright Act*. The reason for the Defendants' avoidance of that legislation is obvious. The Defendants cannot point to anything that would constitute an

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[3] The Defendants cite 41 sections of the *Revenue and Taxation Code* and 5 sections of the *California Code of Regulations*. None of these statutes or regulations contain the "unmistakably clear" showing of Congressional intent required by the *Hayden-Cartwright Act*.

"unmistakably clear" showing of Congressional intent to authorize Defendants' taxation scheme on the Plaintiff. Indeed, the Defendants would have this Court ignore the fact that not a single one of the 41 statutes and 5 regulations cited by the Defendants in any way demonstrates "clear and unmistakable" approval of Congress.

As to the incidence of tax, it is overwhelmingly obvious that the Defendants' motor vehicle fuel tax system was designed with the intent to have commercial retail gas stations act as the tax collector of the California sales and use taxes. The state apparently never really thought about the tribal retailers when it enacted the 41 statutes and the 5 regulations that it now relies upon to justify the imposition of taxes on the Plaintiff. If the Defendants did consider the Plaintiff as part of its taxation scheme, then the state should have sought "unmistakably clear" Congressional approval to impose those taxes on the Plaintiff. However, regardless of what the Defendants did or did not consider, it is clear that the state intended that its collection efforts would end with the retailers and not the consumers.

Rather than going to Congress and obtaining approval, the Defendants have created a very elaborate statutory and regulatory scheme to tax the sale of motor vehicle fuels. This scheme employs a "sales tax" and "use tax" which create the illusion that the consumer is ultimately responsible for the payment of those taxes and that retailers, like the Plaintiff, are merely acting as collectors for convenience. However, in truth and in fact, there is no mechanism whereby the State of California can or will collect a "sales tax" or "use tax" on the sale of motor vehicle fuels other than by imposing that tax burden on the retailer. This burden establishes the incidence of tax is on the Plaintiff because the Plaintiff is the ultimate taxpayer, regardless of whether or not the tax is collected from the Consumer.

It should be very clear that the Defendants did have and still have the opportunity to go to Congress and ask for the "clear and unmistakable" authority to tax the retail sale of motor vehicle fuel and diesel sales made by the Plaintiff on the Reservation. However, for whatever reason, the Defendants have chosen not to take that action.

Perhaps it is because generally a State seeking to impose a tax on a transaction between a tribe and non-members must point to more than just its general interest in raising revenues. (See *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 336, 103 S. Ct. 2378, 76 L. Ed. 2d 611 (1983).

It is time to end this ruse. The Defendants' acknowledge that if the incidence of tax falls on the Plaintiff, then the Defendants cannot impose the tax on the Plaintiff without Congressional approval (See Motion, p. 7:25-26). In order to avoid that absolute bar to the tax on the Plaintiff, the Defendants' arguments regarding the incidence of tax are simply a diversion to mis-direct attention from the fact that the incidence of tax falls on the Plaintiff.

Therefore, since the Defendants' taxation scheme is categorically unenforceable as to the Plaintiff, the Second Amended Complaint states a claim for relief and the Motion to Dismiss should be denied.

DATED: February 4, 2021

MILLAR LAW,
OGDEN & MOTLEY,

By: *s/ Dale E. Motley*
DALE E. MOTLEY,
Attorneys for Plaintiff,
PALA BAND OF MISSION INDIANS

CERTIFICATE OF SERVICE

Case Name: **Pala Band of Mission Indians v. Nicholas Maduros, et al.**

Case No. **3:20-cv-01767-AJB-JLB**

I hereby certify that on February 4, 2021, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

OPPOSITION TO MOTION TO DISMISS SECOND AMENDED COMPLAINT

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on February 4, 2021, at Los Angeles, California.

Dale E. Motley
Declarant

s/ *Dale E. Motley*
Signature