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BAND OF MISSION INDIANS

10  
11 UNITED STATES DISTRICT COURT  
12 CENTRAL DISTRICT OF CALIFORNIA  
13 EASTERN DIVISION – RIVERSIDE COURTHOUSE

14  
15 TWENTY-NINE PALMS BAND OF  
MISSION INDIANS, a federally  
16 recognized Indian Tribe,  
17 Plaintiff,  
18 v.  
19 ARNOLD SCHWARZENEGGER, , in  
his official capacity as Governor of the  
20 State of California; SELVI  
STANISLAUS in her official capacity  
21 as Executive Officer of the Franchise  
Tax Board,  
22 Defendants.  
23

Case No. EDCV 08-1753-VAP (OPx)  
SECOND AMENDED COMPLAINT

24 Plaintiff, Twenty-Nine Palms Band of Mission Indians, (hereafter  
25 “Plaintiff” or the “Tribe”) alleges:  
26  
27  
28



1 allocation plan approved by the Bureau of Indian Affairs pursuant to the federal  
2 Indian Gaming Regulatory Act; and (b) compensation paid to members working at  
3 the Casino.

4  
5 6. The Tribe is an Indian tribe federally recognized tribe by the  
6 Secretary of the Interior of the United States of America.

7  
8 7. Defendant Selvi Stanislaus executive officer of the Franchise  
9 Tax Board and is sued in her official capacity. The Franchise Tax Board is and at  
10 all times mentioned herein was an agency of the State of California, organized and  
11 existing under and by virtue of the laws of the State, particularly Government Code  
12 Sections 15700-15702. The Franchise Tax Board is empowered to assess and  
13 collect taxes under the personal income tax law of the State of California.

14  
15 8. Arnold Schwarzenegger is the Governor of the State of  
16 California and is sued in his official capacity as an officer and representative of the  
17 State of California.

18  
19 9. The State of California is a party to the Tribal Compact, oversees  
20 the Franchise Tax Board, and receives the taxes collected by the Franchise Tax  
21 Board.

22  
23 10. The members of the Tribe ("Members") are third party  
24 beneficiaries of the Tribal Compact and bear the legal incidence of the tax.

25  
26 11. The Tribe is quite small and has only twelve Members who are  
27 over the age of 18 years.

28

1           12. The Tribe occupies certain real property located in Coachella,  
2 California (in Riverside County) and comprising a federal recognized Indian  
3 reservation pursuant to 25 U.S.C. § 2703(4). In addition, the Tribe's reservation  
4 includes a smaller parcel near Twenty-Nine Palms, California.

5  
6           13. Pursuant to the Indian Gaming Regulatory Act of 1988 (P.L.  
7 100-497, modified at 18 U.S.C. § 1166 et seq. and 25 U.S.C. § 2701 et seq.) (and  
8 any successor statute of amendments, hereinafter "IGRA"), the Tribe and the State  
9 entered into the Tribal-State Gaming Compact between the Tribe and the State of  
10 California regarding Class III Gaming (the "Tribal Compact"). The governor of  
11 California signed the Tribal Compact in his official capacity on behalf of the State  
12 of California.

13  
14           14. The Tribe's Articles of Association authorizes the Tribal council  
15 to manage the Tribal lands. Pursuant to the Articles of Association, Tribal Compact  
16 and IGRA, the Tribe operates a Class III gaming casino (the "Casino") on the  
17 Tribe's reservation located in Coachella, California. The Tribe operates the Casino  
18 through the Tribe's wholly owned federal corporation chartered under the provisions  
19 of 25 U.S.C. § 477.

20  
21           15. In accordance with IGRA, the Tribe periodically prepares and  
22 submits a revenue allocation plan (the "RAP") to the federal Bureau of Indian  
23 Affairs. The RAP is a detailed financial plan for the Casino that is approved and  
24 monitored by the Bureau of Indian Affairs. Federal regulations expressly require  
25 the RAP to provide for the general welfare of the tribe and its members and to  
26 promote tribal economic development. 25 C.F.R. § 290.12(b)(ii), (iii).

1           16. The RAP dictates and details how the Tribe's net gaming  
2 proceeds must be distributed and includes per capita payments to its members. The  
3 RAP contains detailed funding requirements and precise financial allocations for the  
4 net revenues. The RAP also expressly allocates a specific percentage of the net  
5 revenue to the Tribe's general welfare. Of the amount allocated for general welfare,  
6 a specific amount must be allocated to housing. In addition, the RAP expressly  
7 allocates a specific percentage to promote Tribal economic development. The RAP  
8 also provides a mechanism for net revenues to enhance the general welfare of the  
9 Tribe and its member through per capita payments for general living expenses.

10  
11           17. In accordance with IGRA, the RAP provides for per capita  
12 distributions to Members of the Tribe and takes into consideration, among other  
13 things, the Members' obligations to pay federal income taxes with respect to the per  
14 capita payments made under the RAP. The RAP does not take into consideration  
15 California PIT, which the State of California seeks to impose on the Members.

16  
17           18. The RAP is a tribal law and rule.

18  
19           19. The Twenty-Nine Palms Band of Mission Indians Gaming  
20 Ordinance, approved by the National Indian Gaming Commission, dictates how net  
21 revenues of gaming activity after payment of management fees may be used.

22  
23           20. The Tribe operates its Casino pursuant to the RAP and the  
24 Twenty-Nine Palms Band of Mission Indians Gaming Ordinance and in a manner  
25 designed to maximize revenues and promote the welfare of the Tribe and its  
26 Members. The economic viability of the Casino is the lifeblood of the Tribe and its  
27 Members. The overwhelming majority of the Tribe's income comes from the

28

1 Casino. A number of the Members are employed by the Tribe relative to issues  
2 involving the Casino.

3  
4 21. There is no housing on the Tribe's reservation, nor has there been  
5 any housing on the reservation at any of the relevant times herein. It would be  
6 financially, socially and politically very difficult to construct housing on the  
7 reservation. The Tribe's reservation in Coachella is comprised of two portions. The  
8 Casino and parking lot are on one portion. The other portion included in the  
9 reservation in Coachella comprises approximately 92 acres and is located across the  
10 Interstate-15 freeway away from the Casino and near a sanitation plant. The  
11 effluent from the plant flows through a canal next to the 92-acre parcel. As a  
12 practical matter, the reservation cannot be used for homes or the raising of families.

13  
14 22. The smaller reservation parcel near Twenty-Nine Palms is  
15 primarily desert. The land is completely undeveloped, with absolutely no  
16 infrastructure. As a practical matter, the reservation cannot be used for homes or the  
17 raising of families.

18  
19 23. Because of the inability of the Tribe to provide housing to its  
20 Members on the reservation, the Members have been forced to live off the  
21 reservation. The Tribe takes the off-reservation housing costs into account when it  
22 establishes its payments pursuant to the RAP.

23  
24 CLAIM FOR RELIEF

25 (Federal Preemption)

26 (Against Selvi Stanislaus and Arnold Schwarzenegger)

27 24. Plaintiff repeats and realleges herein paragraphs 1 through 23.

1           25. The legal incidence of PIT with respect to per capita distribution  
2 to Members in accordance with the RAP and compensation of Members earned  
3 from employment at the Casino falls directly on the Tribe and its Members.  
4

5           26. Imposition of PIT with respect to per capita distribution to  
6 Members in accordance with the RAP and compensation of Members earned from  
7 employment at the Casino falls directly on the reservation in that the PIT disrupts  
8 and infringes upon tribal sovereignty and self-governance in a variety of ways.  
9

10           27. Imposition of PIT creates two Hobson's choices for the Tribe's  
11 Members. The first choice is to live off the reservation and pay PIT or to construct  
12 housing on the Coachella reservation where part of the Casino or parking lot is  
13 currently located, therefore eliminating or significantly minimizing the Tribe's  
14 revenues and disrupting Tribal Sovereignty in many ways. Because work  
15 opportunities in the nearby area are scarce, moving onto the reservation near the  
16 Casino, without being able to rely upon the Casino for income, threatens the  
17 economic security of the Tribe and its Members. The other choice is to live off the  
18 reservation and pay PIT or somehow construct housing and an entire infrastructure  
19 on the Twenty-Nine Palms portion. At this point in time, and in the current  
20 economic climate, it is simply not feasible to implement the latter choice. Even  
21 assuming doing so were possible, it would economically threaten the viability of the  
22 Tribe and disrupt Tribal sovereignty in many ways.  
23

24           28. The PIT infringes upon the Tribe's sovereignty and self-  
25 governance in numerous ways, including but not limited to following:  
26

27           (a) Some of the most critical aspects of Tribal self-governance  
28 include impacts on the RAP, housing, impacts on Tribal agreements

1 with local governments, infrastructure and land use on the  
2 reservation. The Tribe's revenue must be distributed in a manner  
3 dictated by the federal government. The RAP is expressly designed to  
4 enhance the general welfare of the Tribe. Here, the PIT has a dramatic,  
5 negative impact on Tribal self-government and has the potential of  
6 creating havoc in the way the Tribe uses its very limited land and  
7 resources. If the PIT is permitted to continue, the Tribal council's  
8 activities will be consumed by addressing financial, environmental,  
9 regulatory and other issues involving construction of housing on the  
10 reservation. The Tribe will be forced to reallocate its usable property  
11 or develop its unusable property as a result of the State's PIT.  
12

13 (b) If the State was not imposing PIT, the Tribe would have  
14 more money available to distribute and spend relative to various  
15 categories in the RAP such as funding Tribal government operations,  
16 retirements, medical clinics on reservation, charitable contributions and  
17 other economic development as required by the RAP. Because of the  
18 imposition of PIT all of these fundamental categories of a sovereign are  
19 directly impacted.  
20

21 (c) The Tribe has gauged and adjusted its per capita  
22 distributions to Tribal members who must live off the reservation  
23 because there is not sufficient room on the reservation in Coachella to  
24 provide for the cost of off reservation housing. Because the Tribe's  
25 members live off the reservation, the Tribe pays the State significant  
26 amounts in addition to the PIT (which by itself approaches 10%),  
27 property taxes, sales taxes (where numerous, significant sales  
28



1 transactions could otherwise take place on the reservation if they lived  
2 there), and other various and significant taxes.

3  
4 (d) The Tribe is impacted unlike many other tribes because of  
5 the minimal amount of land it was granted by the federal government  
6 as a reservation.

7  
8 (e) To build housing on the Tribe's reservation in Coachella  
9 would require the Tribe to readjust and redesign its RAP, including  
10 significantly adjusting the reallocations, in order to install specific  
11 residential infrastructure (such as roads, utilities, emergency response,  
12 etc.) for residential housing. Placing of housing, with children,  
13 immediately next to a casino (the Tribe's source of income), raises  
14 numerous safety and environmental issues on Tribal land with which  
15 the Tribal government must deal. The Tribe would be required, in  
16 essence to rezone the Tribal land relative to permitted uses. Also, the  
17 Tribe currently has contractual arrangements with off reservation local  
18 fire and law enforcement department relative to life safety activities on  
19 reservation. If residential housing were built to avoid PIT, the Tribal  
20 government would have to renegotiate such agreements to  
21 accommodate residential activities. It could readjust uses of its Indian  
22 water rights as a result thereof. In addition, a portion of the Coachella  
23 reservation is slated to become a Tribal cemetery. The Tribe's plans for  
24 the cemetery may be disrupted by the PIT. Because of the small  
25 amount of land available in Coachella and the spiritual and  
26 infrastructure problems associated with a cemetery, the impact would  
27 be significant.  
28

1 (f) In order to avoid the PIT, and provide housing on the  
2 relatively small portion of the reservation near Twenty-Nine Palms, the  
3 Tribe would experience even more severe legal and economic  
4 infringement on its sovereignty. There are significant environmental  
5 issues which must be resolved before construction of any nature can  
6 occur on that parcel. Essentially no infrastructure exists at this second  
7 reservation parcel. Roads, utilities, drainage grading, zoning and a  
8 multitude of issues which go directly to the essential sovereignty and  
9 operation of a government would be directly impacted in a similar, but  
10 perhaps even more dramatic fashion that the impacts on the Coachella  
11 parcel. Tens of millions of dollars for approximately 12 Tribal  
12 members would have to be spent to create a residential area on this  
13 parcel. This smaller parcel is several miles from the Coachella parcel  
14 and the distance would create barriers to economic development. The  
15 local governments adjacent to the two reservation parcels are different  
16 and would require the Tribe to enter into separate negotiations with  
17 local governments involving critical self-governance issues such as fire,  
18 police, utilities access, and road access. This not only involves  
19 payments, but would involve negotiation over one sovereign's access  
20 (e.g. the police or fire department) on to another sovereign's (the  
21 Tribe's) property.  
22

23 (g) The State does not any more have the ability to dictate  
24 how the Tribe conducts most of the fundamental business of the Tribe  
25 and its land and resources than the State has in dictating the  
26 fundamental operations of the federal government. The State may not  
27 dictate or require reallocation or revision of the RAP or rezoning on  
28

1 Tribal land. Moreover, the State may not dictate how and where the  
2 Tribe provides for housing.

3  
4 (h) Approximately one-fourth of the Tribal members are  
5 living out of state in part to avoid PIT. If the PIT were not imposed,  
6 these members would be more eligible and able to directly take part in  
7 the Tribal government. Thus, the State is disrupting how the Tribe  
8 governs itself.

9  
10 29. Defendants' effort to impose and collect and PIT on the  
11 Members, and receive PIT from the members, is preempted by federal law,  
12 including the U.S. Constitution's Indian Commerce Clause, Art. I, § 8, Clause 3, the  
13 U.S. Constitution's Supremacy Clause, and IGRA.

14  
15 PRAYER FOR RELIEF

16  
17 WHEREFORE, PLAINTIFF prays for judgment as follows:

- 18  
19 1. An order from the Court enjoining the imposition of PIT on the  
20 Tribe's Members;
- 21  
22 2. A declaration that the Tribe's members are not required to pay  
23 PIT;
- 24  
25 3. Costs of suit; and
- 26  
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4. Such other orders and directives that the Court considers just and proper.

Dated: October 1, 2009

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

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10 UNITED STATES DISTRICT COURT  
11 CENTRAL DISTRICT OF CALIFORNIA  
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official capacity as Executive Officer of  
21 the Franchise Tax Board,

22 Defendant.  
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Case No. EDCV 08-1753 VAP (OPx)

**PROOF OF SERVICE**

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

I am employed in the County of San Diego; I am over the age of eighteen years and not a party to the within entitled action; my business address is 12275 El Camino Real, Suite 200, San Diego, California 92130-2006.

On **October 1, 2009**, I served the following document(s) described as:

**SECOND AMENDED COMPLAINT**

**AMENDED CERTIFICATE OF INTERESTED PARTIES**

**AMENDED NOTICE OF RELATED CASE**

on the interested party(ies) in this action by placing true copies thereof enclosed in sealed envelopes and/or packages addressed as follows:

**See Attached Service List**

- BY MAIL:** I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at San Diego, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.
- BY CM/ECF SYSTEM:** I caused the above-referenced document(s) to be sent by electronic transmission to the Clerk's Office using the CM/ECF System for filing which generated a Notice of Electronic Filing to the CM/ECF registrants in this case.
- BY OVERNIGHT DELIVERY:** I served such envelope or package to be delivered on the same day to an authorized courier or driver authorized by the overnight service carrier to receive documents, in an envelope or package designated by the overnight service carrier.
- BY FACSIMILE:** I served said document(s) to be transmitted by facsimile pursuant to Rule 2.306 of the California Rules of Court. The telephone number of the sending facsimile machine was 858-509-3691. The name(s) and facsimile machine telephone number(s) of the person(s) served are set forth in the service list. The sending facsimile machine (or the machine used to forward the facsimile) issued a transmission report confirming that the transmission was complete and without error. Pursuant to Rule 2.306(g)(4), a copy of that report is attached to this declaration.
- BY HAND DELIVERY:** I caused such envelope(s) to be delivered by hand to the office of the addressee(s).
- STATE:** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

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**FEDERAL:** I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on **October 1, 2009**, at San Diego, California.

/s/ Joanna Keeping  
JOANNA KEEPING

**SERVICE LIST**

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