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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; SELVI STANISLAUS, in her official capacity as Executive Officer of the Franchise Tax Board,** Defendants.	EDCV08-1753 VAP (OPx) **DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS SECOND AMENDED COMPLAINT** **(Fed. R. Civ. P. 12(b)(1), (6))** **Oral Argument Requested** Date: January 18, 2010 Time: 10:00 a.m. Courtroom: 2 Judge The Honorable Virginia A. Phillips Trial Date: n/a Action Filed: 12/2/2008

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES

Page

COURT RULES

OTHER AUTHORITIES

INTRODUCTION

Defendant Governor Arnold Schwarzenegger (Governor) moves to dismiss Plaintiff Twenty-nine Palms Band of Mission Indians' (Tribe) second amended complaint (SAC) because the Court lacks subject matter jurisdiction. Defendant California Franchise Tax Board Executive Officer Selvi Stanislaus joins the Governor (collectively State Defendants) in additionally moving the Court to dismiss the SAC because it fails to state a claim for relief.

The Tribe asserts that State Defendants' efforts to impose personal income tax liability on Tribal members' per capita payments or casino wages is preempted by federal law and interferes with Tribal sovereignty. The SAC is procedurally defective because it fails to allege a causal connection between the Governor and the alleged injury. In addition, the alleged injury cannot be redressed by the Governor because he is not legally authorized to impose or collect the tax, nor can he direct the California Franchise Tax Board (FTB)—the independent state agency authorized to impose and collect the tax—not to do so. For the same reasons, the Eleventh Amendment bars the claim against the Governor.

Substantively, the SAC fails to state a claim for relief that is cognizable as a matter of law because, while a tribal member living on her tribe's reservation is ordinarily exempt from state personal income tax on income earned from on-reservation activities, no Tribal member in this case lives on the Tribe's reservation. The Tribe's attempt to explain why its members live off-reservation is irrelevant to a determination whether the exemption applies.

The SAC also fails to state a claim for preemption under the Supremacy Clause because in the Indian Gaming Regulatory Act, 18 U.S.C. §§ 1166-1168, 25 U.S.C. §§ 2701-2721 (IGRA), Congress did not impliedly preempt states from imposing personal income tax on individual Tribal members living off-reservation. In addition, the tax is valid under the Indian Commerce Clause because it is applied

in a nondiscriminatory manner. Finally, the SAC fails to state a claim for relief on the theory that tax infringes upon Tribal self-governance.

This motion is made following the conference of counsel pursuant to Local Rule 7-3, which took place on October 23 and 27, 2009.

BACKGROUND

The Tribe is a federally recognized Indian tribe with twelve adult members. (SAC ¶¶ 1, 6, 11.) Its reservation[1] includes about 240 contiguous acres located in the Cities of Indio and Coachella in Riverside County, and 160 contiguous acres separately located within the City of Twentynine Palms in San Bernardino County. (*Id.* at ¶ 12; Act of Apr. 21, 1976, Pub. L. No. 94-271, 90 Stat. 373 (Apr. 21, 1976); Defs.' Request for Jud. Not. (Defs.' RJN), Ex. A, Proclamation (Nov. 11, 1895).)

The Tribe operates a casino on part of its reservation located in Coachella. (SAC ¶¶ 3, 14.) Some Tribal members are "employed by the Tribe relative to issues involving the Casino." (*Id.* at ¶ 20.) No Tribal members live on the reservation. (*Id.* at ¶¶ 21, 23.) The Tribe alleges there is no housing on its reservation because it would be "financially, socially and politically very difficult" to put housing there. (*Id.* at ¶ 21.) According to the Tribe, there is no housing on the reservation in Coachella because a large part is taken up by the casino and parking lot, and the remainder cannot be used for residential purposes. (*Id.*) Nor is there housing on the reservation in Twentynine Palms because the land is undeveloped and cannot be used for housing. (*Id.* at ¶ 22.)

Nonetheless, the Tribe recently proposed to develop a second casino, hotel, RV park and residential housing on the reservation in Twentynine Palms. (Defs.' RJN, Ex. B, Tribal press release.) In March 2007, the Tribe began construction to expand its casino in Coachella. (Defs.' RJN, Ex. C, Tribal press release.) The

[1] State Defendants refer to the Tribe's trust land as a reservation for ease of reference. They take no position here as to whether the land constitutes a reservation under federal law.

expansion includes construction of a new casino and parking area; remodeling the existing casino; and construction of a new casino wing, including a 200-room hotel and 78,000-square foot conference space. (Defs.' RJN, Ex. D, Draft Envtl. Assessment, Spotlight 29 Casino Expansion (Nov. 11, 2000) 10.)

> There are no known cultural resources associated with the project site, and the site has not been previously used for religious or cultural events by the [Tribe]. A letter from the [Tribe] documenting this finding, dated March 21, 1994, stated that the Reservation is not the ancestral lands of the [Tribe] and has no cultural or religious significance to the [Tribe].

(*Id.* at 2-6; *see also id.* at 2-7 (noting the reservation in Coachella is "not a traditional homeland") & 3-6.) In addition, "[n]one of the [Tribe] currently live on the Reservation, or plan to live on the Reservation after development of this project, preferring to live in nearby housing." (*Id.* at 2-16.)

According to the Tribe, it periodically prepares a Revenue Allocation Plan, pursuant to IGRA, that details, among other things, how casino revenue is distributed to members, also known as "per capita payments." (SAC ¶ 16.) The Tribe alleges its Revenue Allocation Plan considers, among other things, the members' obligations to pay federal income taxes on per capita payments, but not state personal income tax. (*Id.* at ¶ 17.) The Tribe also alleges that its Gaming Ordinance "dictates how net revenues of gaming activity after payment of management fees may be used." (*Id.* at ¶ 19.)

The Tribe claims that the State Defendants' efforts to impose and collect state personal income tax upon Tribal members' per capita payments or casino employment wages are preempted by federal law—namely the federal Constitution's Indian Commerce Clause and Supremacy Clause, and IGRA—and that the tax infringes upon Tribal sovereignty. (*Id.* at ¶¶ 5, 17, 28-29.) The Tribe alleges that it and its members bear the legal incidence of the tax (*id.* at ¶¶ 10, 25),

and that the tax "falls directly on the reservation" (*id.* at ¶ 26). The Tribe seeks injunctive and declaratory relief. (*Id.* at 11, Prayer ¶¶ 1-2.)

STANDARD ON MOTION TO DISMISS

Federal Rule of Civil Procedure 12(b)(1) requires a court to dismiss an action if the court lacks jurisdiction over the subject matter of the suit. The party seeking to invoke federal jurisdiction bears the burden of establishing that jurisdiction exists. *Tosco Corp. v. Communities for Better Env't*, 236 F.3d 495, 499 (9th Cir. 2001). In reviewing a facial challenge to subject matter jurisdiction, a court will take the allegations in the complaint as true, *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004); however, in reviewing a substantive or factual challenge, a court is not required to accept the allegations as true, *Thornhill Pub. Co. v. General Tel. & Elec. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). Instead, the court may consider evidence related to the jurisdictional issue and resolve factual disputes as necessary, if the jurisdictional question can be separated from the merits. *Id.*; *see Ass'n of Am. Med. Colleges v. United States*, 217 F.3d 770, 778 (9th Cir. 2000) (a district court "obviously does not abuse its discretion by looking to this extra-pleading material in deciding the issue, even if it becomes necessary to resolve factual disputes").

Under Rule 12(b)(6), a claim may be dismissed either because it asserts a legal theory that is not cognizable as a matter of law or because it fails to allege sufficient facts to support an otherwise cognizable legal claim. *SmileCare Dental Group v. Delta Dental Plan of California, Inc.*, 88 F.3d 780, 783 (9th Cir. 1996).

> All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. The court need not, however, accept as true allegations that contradict matters properly subject to judicial notice or by exhibit. Nor is the court required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.

Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001) (citations omitted).

ARGUMENT

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

Article III of the Constitution limits federal courts to the resolution of cases and controversies. *Davis v. Fed. Election Comm'n*, 128 S. Ct. 2759, 2768, 171 L. Ed. 2d 737 (2008). A party invoking federal jurisdiction must have standing. *Id.* Lack of standing is a subject matter jurisdiction argument properly brought under Rule 12(b)(1). *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1174 (9th Cir. 2004). To demonstrate standing, a plaintiff must (1) have suffered an "injury in fact" that is "concrete and particularized," and "actual or imminent, not conjectural or hypothetical"; (2) there must be a causal connection between the injury and the conduct complained of; and (3) it must be "likely" as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (citations omitted). Here, the SAC fails to state a case or controversy between the Tribe and the Governor because there is no alleged nexus between the Governor and the asserted injury, and the Governor cannot redress the injury.

A. The Second Amended Complaint Fails to Allege a Causal Nexus Between the Governor's Conduct and the Alleged Injury

Federal Rule of Civil Procedure 8(a) requires a plaintiff to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127, S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (citations omitted). "[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, 173 L. Ed. 2d 868 (2009). The complaint must contain enough facts for a court to "infer potential victory," and important factual

material is omitted at the pleader's peril. *Bryson v. Gonzales*, 534 F.3d 1282, 1286-87 (10th Cir. 2008).

Here, the allegations fail even the most liberal notice pleading standard because they do not identify what the Governor did to cause the alleged injury. The Tribe sues the Governor "in his official capacity as an officer and representative of the State of California." (SAC ¶ 8.) According to the Tribe, this case centers around California's imposition of personal income tax on its members. (*Id.* at ¶¶ 5, 17.) The Tribe alleges the Governor's efforts to impose and collect the tax are preempted by federal law (*id.* at ¶ 29), but nowhere are any facts alleged that describe any connection between the Governor and any tax that may have been imposed upon Tribal members. Absent an alleged nexus between the Governor's actions and the asserted injury, the Tribe lacks standing to sue the Governor, and the case against him should be dismissed.

Moreover, to meet the causation requirement, the Tribe's injury must be fairly traceable to the Governor's conduct. *See Lujan*, 504 U.S. at 560. But the Governor does not have direct, primary responsibility for imposing or collecting state personal income tax. Instead, the FTB is the sole agency authorized by state law to administer and enforce the state's Personal Income Tax Law. Cal. Rev. & Tax. Code § 19501; *see People ex rel. Franchise Tax Bd. v. Superior Court*, 210 Cal. Rptr. 695, 701, 164 Cal. App. 3d 526 (Cal. Ct. App. 1985); *see also* Cal. Rev. & Tax. Code §§ 19503 (requiring FTB to prescribe rules and regulations necessary to enforce Personal Income Tax Law), 19504(a) (FTB duties include determining and collecting tax liabilities imposed by Personal Income Tax Law), 19862 (authorizing FTB to withhold taxes), 19201 (authorizing FTB to seek judgment for delinquent taxes), 19205 (authorizing FTB to execute tax judgments), 19231 (authorizing FTB to issue warrants to collect taxes), 19262 (authorizing certain procedures for FTB to follow in actions to collect delinquent taxes) & 19371(a) (authorizing FTB to sue for delinquent personal income taxes). Indeed, the Tribe alleges the FTB "is

empowered to assess and collect taxes under the personal income tax law of the State of California" (SAC ¶ 7) but no such allegation is made against the Governor.

The Governor is the state's supreme executive officer, and is generally required to "see that the law is faithfully executed." Cal. Const. art. V, § 1; Cal. Gov't Code § 11150. He also supervises "the official conduct of all executive and ministerial officers." Cal. Gov't Code § 12010. But these broad executive duties do not establish a causal link between the Governor and personal income tax that the FTB may impose on Tribal members. In short, the Tribe has sued the wrong party, and courts routinely dismiss actions in which the wrong party has been sued. *See Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S. 26, 41, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976) (injury at the hands of an absent party is insufficient to establish a case or controversy). Several Ninth Circuit cases that follow *Simon* are directly on point.

In *Long v. Van de Kamp*, 961 F.2d 151, 152 (9th Cir. 1992) (per curiam), the court held the plaintiff had failed to show a case or controversy with the California Attorney General in an action challenging a statute not directly enforced by the Attorney General. The court found that the Attorney General had not in any way indicated that he intended to enforce the statute, or that he intended to encourage local law enforcement agencies to do so. *Id.* (citing *Simon*, 426 U.S. at 38-41).

In *Southern Pacific Transportation Company v. Brown*, 651 F.2d 613, 615 (9th Cir. 1980), the court held that a state attorney general's power to advise local prosecutors was insufficient to create a justiciable controversy against the attorney general. The court noted "when a state officer is sued to enjoin enforcement of state law, he must have 'some connection' with enforcement or suit against him would be equivalent to suit against the state and would violate the Eleventh Amendment." *Id.* (citing *Ex parte Young*, 209 U.S. 123, 157 28 S. Ct. 441, 452, 52 L. Ed. 714 (1908)). The suit presented no justiciable controversy because "[t]he attorney general's power to direct and advise does not make the alleged injury fairly

traceable to his action, nor does it establish sufficient connection with enforcement to satisfy *Ex parte Young*." *Id.*

Similarly, in *Snoeck v. Brussa*, 153 F.3d 984, 986 (9th Cir. 1998), the court explained that "a generalized duty to enforce state law or general supervisory power over the persons responsible for enforcing the challenged provision will not subject an official to suit." *See also id.* at 987 ("[a]ny supposed threat . . . by the Commission, and there has never been one, can therefore be seen to be no more than 'imaginary, speculative or chimerical'").

More recently, in *Pritikin v. Department of Energy*, 254 F.3d 791 (9th Cir. 2001), the court held the plaintiff could not sue the Department of Energy to force it to budget for a program operated by a subsidiary agency. The court noted the plaintiff had not sued the party with "clear ability," or "statutory power and duty to act." *Id.* at p. 798.

Here, the Tribe faces similar problems. The Governor does not directly enforce the state's Personal Income Tax Law, nor is it alleged that he has or intends to assess any tax upon Tribal members, or directed the FTB to do so. There is no connection between the FTB's imposition of the tax and the Governor's general duty to see that all state laws are faithfully executed and to supervise executive officers. Indeed, the FTB is an independent state agency over which the Governor has no direct authority. FTB members are the State Controller, an independently elected Constitutional officer; the Director of the Department of Finance, as appointed by the Governor; and the Chair of the State Board of Equalization, as selected by the independently elected members of the State Board of Equalization. Cal. Const. art. V, § 11 & art. XIII, § 17; Cal. Gov't Code §§13002 & 15700. With only a single representative on the three-member FTB, the Governor has no authority to dictate policy, practice or procedure, or to order the FTB not to impose or collect personal income tax. *See* Cal. Rev. & Tax. Code § 19801.

Any tax enforcement or collection responsibility lies not with the Governor but with the independent FTB. Thus, there is no case or controversy between the Tribe and the Governor, and the suit against him should be dismissed.

B. The Second Amended Complaint Fails to Establish that the Alleged Injury Could be Redressed by a Decision Against the Governor

The same problems the Tribe encounters in establishing a causal connection between its claim and the Governor also demonstrate its inability to prove that its claim is redressable by the Governor. *See Pritikin v. Dep't of Energy*, 254 F.3d at 799. Here, the Tribe impermissibly seeks to change the Governor's behavior as a means to alter the conduct of a third party not before the Court—the FTB—which is the direct source of the Tribe's alleged injury. *See id.* at 799-800.

As noted, in *Long v. Van de Kamp*, the court found no causal nexus between the Attorney General's general supervisory powers and local law enforcement's enforcement of a statute. 961 F.2d at 152. Because there was no indication the Attorney General intended to pursue, or encourage local law enforcement to pursue, the statute, an injunction against the Attorney General would not forestall future conduct and, therefore, there was no case or controversy. *Id.*

In this case, the Tribe seeks an order enjoining the imposition of personal income tax on its members. (SAC, Prayer ¶ 1.) The Governor, however, lacks authority to accord the desired relief because he does not impose or collect personal income tax, nor is he authorized to order the independent FTB not to enforce the state's Personal Income Tax Law.

The Tribe may respond, as it did in opposition to the Governor's previous motion to dismiss, that California governors have issued executive orders utilizing their supervisory powers to affect taxation. The argument would fail for two reasons. First, the Governor is not authorized by state law to direct the FTB not to impose or collect the tax. Second, while the executive orders upon which the Tribe previously relied may be tangentially related to state revenue and taxation, neither

involves a governor imposing or collecting, or threatening to impose or collect, or instructing FTB on its obligation to impose or collect, personal income tax.

In Executive Order S-1-03, the Governor rescinded an increase in vehicle registration fees imposed by the previous administration. Cal. Exec. Order S-1-03 (Nov. 17, 2003). He did not repeal the fee either generally, or to the extent it was imposed upon a very select group of individuals, as the twelve-member Tribe asks this Court to do. Instead, he simply directed the Department of Motor Vehicles (DMV), which is exclusively within the executive branch, to restore the fee to its statutory rate. He did not, and could not, unilaterally order the DMV not to impose the tax on a limited group of individuals—an action that could only be authorized with the Legislature's approval but would likely be challenged as discriminatory.

In Executive Order W-66-93, Governor Pete Wilson formed a special task force where he ordered certain state agencies to share information to combat the expansion of an underground economy. Cal. Exec. Order W-66-93 (Oct. 26, 1993). Governor Wilson invited other agencies *not* under his direct executive authority, such as the FTB and the State Board of Equalization, to participate. Governor Wilson did not order any agency within his administration not to enforce state law, as the Tribe asks this Court to do. *See id.* ¶ 1.

There is little justification for imposing the burdens of litigation on a defendant who has not caused and cannot redress the injury. Because the Tribe has not shown an injury "fairly traceable" to the Governor's actions, or that the relief it seeks will remedy the injury, there is no case or controversy and the Court lacks jurisdiction to determine this suit against the Governor.

II. THE ELEVENTH AMENDMENT BARS THE CLAIM FOR RELIEF AGAINST THE GOVERNOR

The Governor moves to dismiss the claim against him under Rule 12(b)(1) because it is barred by California's Eleventh Amendment immunity. The Eleventh Amendment "'bars suits against a state or its agencies, regardless of the relief

sought, unless the state unequivocally consents to a waiver of its immunity.'" *Wilbur v. Locke*, 423 F.3d 1101, 1111 (9th Cir. 2005) (citation omitted). It also bars suits by Indian tribes against states without their consent. *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779-88, 111 S. Ct. 2578, 115 L. Ed. 2d 686 (1991). California has not consented to suits in federal court by Indian tribes alleging that state personal income tax is unconstitutional or that it violates federal law.

In *Ex parte Young*, 209 U.S. 123, however, the Supreme Court held that a suit challenging the constitutionality of a state official's action is not one against the state. Since then, "'courts have recognized an exception to the Eleventh Amendment bar for suits for prospective declaratory and injunctive relief against state officers, sued in their official capacities, to enjoin an alleged ongoing violation of federal law.'" *Wilbur*, 423 F.3d at 1111 (citations omitted).

In this case, the Tribe seeks injunctive and declaratory relief that its members are not required to pay personal income tax. (SAC, Prayer ¶¶ 1-2.) It is unclear whether the requested relief is prospective only, or is also retrospective. To the extent it is retrospective, it is clearly barred by the Eleventh Amendment. *See Wilbur*, 423 F.3d at 1111; *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 288, 117 S. Ct. 2028, 138 L. Ed. 2d 438 (1997) (O'Connor, J., concurring in part) (under *Ex parte Young*, "[a] federal court cannot award retrospective relief, designed to remedy past violations of federal law") (citations omitted).

To the extent the Tribe seeks only prospective relief, the *Ex parte Young* exception does not apply to the Governor for the same reasons that the Tribe lacks standing. *See Deida v. City of Milwaukee*, 192 F. Supp. 2d 899, 916-17 (E.D. Wis. 2002) (causal connection requirement under *Ex Parte Young* "closely overlap[s] with causation and redressability inquiries for standing"). For *Ex parte Young* to apply "there must be a connection between the official sued and the enforcement of the allegedly unconstitutional statute, and there must be a threat of enforcement." *Long v. Van de Kamp*, 961 F.2d at 152; *Southern Pac. Transp. Co. v. Brown*, 651

F.2d at 615. A high-ranking state official's "general supervisory power" is insufficient to establish the connection with enforcement required by *Ex parte Young*. *Long v. Van de Kamp*, 961 F.2d at 152 (citing *Southern Pac. Transp. Co. v. Brown*, 651 F.2d at 614). Instead, there must be "a real likelihood that the state official will employ his supervisory powers against plaintiffs' interests," otherwise the Eleventh Amendment bars federal court jurisdiction. *Id.*

As demonstrated, there is no direct connection between the Governor and the independent FTB's enforcement of the state Personal Income Tax Law, nor does the Governor have direct authority over the FTB, nor has the Tribe alleged that the Governor has threatened enforcement. California has not waived its immunity from Tribal suits claiming the tax is unconstitutional or infringes on tribal sovereignty, and the *Ex parte Young* doctrine does not apply to the Governor in this case. Therefore, the claim against the Governor is barred by the Eleventh Amendment and should be dismissed without leave to amend.

III. THE SECOND AMENDED COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AGAINST EITHER STATE DEFENDANT

A. Federal Case Law Permits State Taxation of Indians Living Off-Reservation

The Tribe alleges that State Defendants' efforts to impose and collect personal income tax on Tribal members' casino employment wages and per capita payments is preempted by federal law. (SAC ¶ 29.) Under federal common law, it is the "sovereign right" and "ordinary prerogative" of a state to "tax the income of every resident," including "income earned outside the taxing jurisdiction." *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 462-63, 464, 466, 115 S. Ct. 2214, 132 L. Ed. 2d 400 (1995). Only a tribal member living on her tribe's reservation *and* earning income from on-reservation sources is exempt from state personal income tax on that income. *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 168-71, 93 S. Ct. 1257, 36 L. Ed. 2d 129 (1973) (*McClanahan*). This has

been referred to as the "*McClanahan* presumption against state tax jurisdiction." *Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 123, 113 S. Ct. 1985, 124 L. Ed. 2d 30 (1993). Indians "going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State," including tax laws. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49, 93 S. Ct. 1267, 36 L. Ed. 2d 114 (1973).

Here, the Tribal members do not qualify for the *McClanahan* exemption, regardless of the source of income, because they live off-reservation. (SAC ¶¶ 21, 23.) "Domicil [sic] itself affords a basis for such taxation. . . . Neither the privilege nor the burden is affected by the character of the source from which the income is derived." *Chickasaw Nation*, 515 U.S. at 463 (internal quotation marks and citation omitted); *see Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Zeuske*, 145 F. Supp. 2d 969, 976 (W.D.Wis. 2000) ("[t]he state may tax persons resident within its borders who do not live on reservations because it has conferred upon these persons the benefit of domicile and its accompanying privileges and advantages"). The mere fact that an Indian's income derives from per capita payments from an on-reservation casino, or employment at that casino, is insufficient to immunize it from state taxation. The taxpayer must reside on her member reservation where she earned the income. *See McClanahan*, 411 U.S. at 170-71; *Osage Nation v. Oklahoma ex rel. Oklahoma Tax Comm'n*, 597 F. Supp. 2d 1250, 1262 (N.D. Okla. 2009) ("*McClanahan* never established either an exemption applying categorically to all tribal members living in Indian country, or an exemption which applied, regardless of the source of the tribal member's income"; finding tribe could not qualify for *McClanahan* exemption from state income tax because there were no qualifying reservations in Oklahoma).

While the Tribe offers several explanations why it cannot put housing on its reservation, the reason tribal members do not live on their membership reservation has never been relevant to the determination of whether members qualify for the

McClanahan exemption. For instance, in *Jefferson v. Commissioner of Revenue*, 631 N.W.2d 391, 395 n.4 (Minn. 2001), the Minnesota Supreme Court rejected as irrelevant tribal members' argument that because they had been "forced off the reservation and intended to return to the reservation." This Court should reach the same conclusion. The explanation why there is no on-reservation housing is irrelevant. No Tribal members live on the reservation and, therefore, none is entitled to the *McClanahan* exemption.

B. The Tax is Valid Under the Supremacy Clause

The Tribe claims IGRA preempts California's imposition of personal income tax on its members living off-reservation. The tax, however, does not intrude into an area preempted by IGRA, and thus does not violate the Supremacy Clause.

The Supreme Court has warned "against interpreting federal statutes as providing tax exemptions unless those exemptions are clearly expressed." *Chickasaw Nation v. United States*, 534 U.S. 84, 95, 122 S. Ct. 528, 151 L. Ed. 2d 474 (2001) (citing cases); *see also Mescalero Apache Tribe v. Jones*, 411 U.S. at 156 ("absent clear statutory guidance, courts ordinarily will not imply tax exemptions and will not exempt off-reservation income from tax simply because the land from which it is derived, or its other source, is itself exempt from tax"). This Court rejected the Tribe's argument that IGRA expressly preempts the tax but nonetheless allowed the Tribe to amend its complaint to state a claim for implied preemption. (Doc. 33 at 15-16.)

A claim for implied preemption requires proof that Congress intended federal law to occupy the legislative field, or that state law conflicts with a federal statute. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000) (citations omitted). Preemption exists where it is impossible for a private party to comply with both state and federal law and where the state law is an obstacle to the accomplishment and execution of Congress's full purposes and

objectives. *Id.* (citations omitted). What is a sufficient obstacle is determined by examining the federal statute and identifying its purpose and intended effects. *Id.*

"Through IGRA, Congress comprehensively regulates Indian gaming" and "how casinos function" to "'assure the gaming is conducted fairly and honestly by both the operator and players." *Barona Band of Mission Indians v. Yee*, 528 F.3d 1184, 1192-93 (9th Cir. 2008) (citing 25 U.S.C. § 2702(2)). The Tribe does not allege that California's personal income tax interferes with the Tribe's governance of gaming activities or its decision as to which gaming activities are allowed. *See County of Madera v. Picayune Rancheria of Chuckchansi Indians*, 467 F. Supp. 2d 993, 1002 (E.D. Cal. 2006) (citing *Confederated Tribes of Siletz Indians v. Oregon*, 143 F.3d 481, 486 n.7 (9th Cir. 1998); *Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536, 550 (8th Cir. 1996)). Indeed, this case does not at all involve the regulation of gaming activities. Thus, IGRA's comprehensive regulation of Indian gaming does not occupy the field with respect to state personal income tax imposed on Tribal members that work at the casino or receive per capita payments from net gaming revenue.

In addition, the tax does not violate IGRA's purpose to "promote tribal economic development, tribal self-sufficiency, and strong tribal government" by "ensur[ing] that the Indian tribe is the primary beneficiary of the gaming operation." 25 U.S.C. § 2702(1)-(2). The Tribe offers no facts demonstrating how California's income tax on Tribal members' casino employment wages is preempted by IGRA. Absent supporting factual allegations, the claim should be dismissed without leave to amend.[2] Instead, the Tribe relies exclusively upon IGRA's allowance of per capita payments made pursuant to a federally-approved

[2] Indeed, the Tribe's bald allegation that some members are "employed by the Tribe relative to issues involving the Casino" (SAC ¶ 20) is not equivalent to alleging that Tribal members are actually employed by the casino. Even if it were, the failure to allege an injury in fact to the Tribe remains fatal. *See Lujan v. Defenders of Wildlife*, 504 U.S. at 560-61.

Revenue Allocation Plan and its Tribal Gaming Ordinance to demonstrate preemption. (SAC ¶¶ 15-20.) Both assertions fail, however.

Per capita payments are made from a tribe's net gaming proceeds to individual members for their unrestricted use and for which the tribe as a whole is not a beneficiary. Federal regulations define a "per capita payment" as

> the distribution of money or other thing of value to all members of the tribe, or to identified groups of members, which is paid directly from the net revenues of any tribal gaming activity. This definition does not apply to payments which have been set aside by the tribe for special purposes or programs, such as payments made for social welfare, medical assistance, education, housing or other similar, specifically identified needs.

25 C.F.R. § 290.2.

Tribes are not required to make per capita payments. 25 U.S.C. § 2710(b)(2)(B); 25 C.F.R. § 290.8. If a tribe chooses not to make per capita payments, no Revenue Allocation Plan is required. 25 C.F.R. § 290.7. A tribe is then free to use its gaming proceeds, as allowed by IGRA, to fund government operations and programs, provide for the general welfare of the tribe and its members, promote tribal economic development, donate to charitable organizations and help local government agencies. 25 U.S.C. § 2710(b)(2)(B); 25 C.F.R. § 290.9.

If a tribe elects to make per capita payments, it can do so only after the Bureau of Indians Affairs (BIA) has reviewed and approved a Revenue Allocation Plan for compliance with IGRA. 25 U.S.C. § 2710(b)(3), (d)(1)(A)(ii); 25 C.F.R. §§ 290.5, 290.10, 290.11. BIA approval ensures that the payments are fair and equitable, and made only to enrolled members from gaming revenues, thus furthering IGRA's policy objectives. *Smith v. Babbitt*, 100 F.3d 556, 558 (8th Cir. 1996).

Here, the Tribe contends that its Revenue Allocation Plan is "tribal law and rule" and "dictates and details how the Tribe's net gaming proceeds must be

distributed and includes per capita payments to its members." (SAC ¶¶ 16, 18.) IGRA restricts how a tribe may spend its gaming proceeds but a Revenue Allocation Plan is only necessary here because the Tribe elects to make per capita payments. (*See id.* at ¶ 15.) IGRA does not mandate per capita payments, nor does it prohibit state income tax on those payments, particularly when the recipients live off-reservation. To the extent the Tribe claims the tax is preempted because its Revenue Allocation Plan does not consider the members' state income tax obligations (*id.* at ¶ 17), that those obligations are not considered is as irrelevant to whether IGRA exempts per capita payments from state income tax, as it is to whether Tribal members are subject to personal income tax in the first instance.

In addition, IGRA allows a tribe to make per capita payments to its members "only if" the tribe has met its other governmental obligations. 25 U.S.C. § 2710(b)(2)(B). In choosing to make per capita payments, the Tribe necessarily must have decided that its other obligations were sufficiently funded that it could distribute funds to individual members for their unrestricted use. Because the Tribe necessarily must have already met its sovereign obligations for the BIA to approve its Revenue Allocation Plan, as a matter of law, it cannot interfere with IGRA to tax the members' per capita payments.[3]

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[3] The Tribe's Gaming Ordinance (SAC ¶¶ 19-20) produces the same result because it essentially replicates IGRA and the BIA regulations discussed above. Specifically, the ordinance provides the following:

> IV. Use of Gaming Revenue
>
> A. Net revenues from class II gaming shall be used only for the following purposes: to fund tribal government operations and programs; provide for the general welfare of the Tribe and its members; promote tribal economic development; donate to charitable organizations; or help fund operations of local government agencies.
>
> B. If the Tribe elects to make per capita payments to tribal members, it shall authorize such payments only upon approval of a plan submitted to the Secretary of the Interior under 25 U.S.C. [§] 2710(b)(3).

(Defs.' RJN, Ex. E, Tribe's Class II Gaming Ordinance, 98-99.)

Further, California's personal income tax is imposed upon the Tribe's individual members and not upon the Tribe itself. There is no allegation that the Tribe pays the members' tax obligations, either directly or indirectly. Indeed, it is specifically alleged that the Tribe's Revenue Allocation Plan does not consider California's personal income tax on per capita payments. (SAC ¶ 17.) Thus, the members bear their own tax obligations and the tax has no effect on the Tribe.

Moreover, once the Tribe makes per capita payments, the funds are no longer Tribal funds and to tax them would not interfere with IGRA's policy objectives. Per capita payments are income attributable to the member for federal income tax purposes, and the Revenue Allocation Plan must include a provision notifying the member of her tax liability and detailing how the tribe will withhold the federal tax. 25 C.F.R. § 290.12(b)(4). Federal courts have determined that a tribal member's per capita payment is property of her bankruptcy estate and therefore available for distribution to creditors. *See In re McDonald*, 353 B.R. 287, 291 (Bankr. D. Kan. 2006) (discussing *In re Kedrowski*, 284 B.R. 439, 451-52 (Bankr. W.D. Wis. 2002) (debtor's per capita payment from gaming revenue constitutes property of the estate)); *Johnson v. Cottonport Bank*, 259 B.R. 125, 131 (Bankr. W.D. La. 2000) (per capita payments made to tribal members that derive from net gaming revenues of tribal-owned casino are property of the bankruptcy estate). Also, courts have treated tribal members' per capita payments as individual income for purposes of ordering spousal and child support. *In re Marriage of Jacobsen*, 18 Cal. Rptr. 3d 162, 121 Cal. App. 4th 1187, 1193 (Cal. Ct. App. 2004) (upon deposit into bank account the spouse's tribal per capita payment "lost its identity as immune Indian property"); *M.S. v. O.S.*, 97 Cal. Rptr. 3d 812, 176 Cal. App. 4th 548, 553-54 (Cal. Ct. App. 2009) (tribal member's per capita payment and tribal bonuses are income for calculating child support obligation). Therefore, the Tribe remains the primary beneficiary of its gaming operation.

Indeed, there is no allegation that it is impossible for the Tribe to comply with IGRA while its members pay the tax, or vice versa. *See Crosby v. Nat'l Foreign Trade Council*, 530 U.S. at 372. Nor is it alleged that imposition of the tax displaces the Tribe as the primary beneficiary of its gaming operation. *See* 25 U.S.C. § 2702(2). On the contrary, extending IGRA to preempt state tax on income remotely related to Indian gaming employment and per capita payments to members that live off-reservation stretches the statute beyond its stated purpose. Accepting the Tribe's claim would essentially extend the *McClanahan* exemption to wherever Tribal members reside, be it anywhere within California or any other state. It does not follow that in enacting IGRA, Congress intended to confer on Indian tribes an unmitigated right to enjoin the collection of state taxes on *all* tribal gaming proceeds, even those ultimately distributed to tribal members living off-reservation after the tribe has fulfilled its government obligations.

California's personal income tax does not run afoul of the Supremacy Clause because it does not interfere in a general way with the authority and policies of the federal government. Accordingly, the SAC fails to state a claim for implied preemption.

C. The Tax is Valid Under the Indian Commerce Clause

The Tribe also claims the tax is preempted by the Indian Commerce Clause. (SAC ¶ 29.) The Supreme Court, however, has held that "[i]t can no longer be seriously argued that the Indian Commerce Clause, of its own force, automatically bars all state taxation of matters significantly touching the political and economic interests of the Tribes." *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 157, 100 S. Ct. 2069, 2083, 65 L. Ed. 2d 10 (1980). Only undue discrimination is forbidden. *Id.* Indians traveling beyond the reservation generally have been held subject to such nondiscriminatory state laws that are otherwise applicable to all citizens of the state. *Mescalero Apache Tribe v. Jones*, 411 U.S. at 148-49. The tax burden that is placed here on the Tribal

members is not applied in a discriminatory manner; it is applied to all citizens of the state. *See* Cal. Rev. & Tax Code §§ 17041(a), 17014(a)(1). Therefore, the tax as applied to Tribal members does not violate the Indian Commerce Clause.

D. The Tax Does not Infringe Upon Tribal Self-governance

The Tribe alleges that the tax interferes with Tribal self-governance but it makes no distinction between the tax imposed on casino wages versus per capita payments. (SAC ¶¶ 26-28.) Nonetheless, the SAC fails to state a claim for relief.

The exercise of state authority may be barred if state law infringes unlawfully "on the right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959). The Tribe has failed to allege facts demonstrating that California's tax "substantially affect its ability to offer governmental services or its ability to regulate the development of tribal resources, and that the balance of state and tribal interests renders the state's assertion of taxing authority unreasonable." *See Crow Tribe of Indians v. Montana*, 650 F.2d 1104, 1117 (9th Cir. 1981).

For the same reasons that the Tribe's preemption claim fails, the sovereignty claim also fails. (*See ante* at 14-19.) State Defendants address in turn each allegation in the SAC to demonstrate the Tribe has failed to state a claim that is cognizable as a matter of law, or fails to allege sufficient facts to support an otherwise cognizable legal claim.

First, the Tribe alleges that California's income tax presents the Tribe with limited choices for avoidance by its members: either they can live off-reservation and pay the tax, or they can build housing on the Coachella or Twentynine Palms portions of the reservation to avoid the tax. (SAC ¶ 27.) According to the Tribe, the latter two choices would eliminate or significantly minimize Tribal revenue. (*Id.*) That the members' choices may be limited is irrelevant. The reason tribal members do not live on their membership reservation has never been relevant to a determination of whether the *McClanahan* exemption applies. *See Osage Nation v.*

Oklahoma ex rel. Oklahoma Tax Comm'n, 597 F. Supp. 2d at 1262; *Jefferson v. Comm'r of Revenue*, 631 N.W. 2d at 395 n.4

Further, any allegation that a decision to build housing is being forced upon the Tribe is belied by the Tribe's previous acknowledgment that following completion of its casino expansion project in Coachella, none of its members plan to live on the reservation, preferring to live in nearby housing instead, and that it planned to develop the Twentynine Palms parcel for residential housing, among other things. (Defs.' RJN, Ex. C & Ex. D-28.)

Moreover, as discussed, the tax is paid by the members that live off-reservation and has no effect on Tribal government. (*See ante* at 18.) Even if the Tribe were somehow affected by the tax, which has not been demonstrated in this case, the Ninth Circuit and the Supreme Court have repeatedly held that "reduction of tribal revenues does not invalidate a state tax." *Gila River Indian Cmty. v. Waddell*, 91 F.3d 1232, 1239 (9th Cir. 1996) (citing cases); *Salt River Pima-Maricopa Indian Cmty. v. Arizona*, 50 F.3d 734, 737 (9th Cir. 1995); *Crow Tribe of Indians*, 650 F.2d at 1116 ("It is clear that a state tax is not invalid merely because it erodes a tribe's revenues, even when the tax substantially impairs the tribal government's ability to sustain itself and its programs."). "It is true that tribes have an interest in their economic self-sufficiency." *Barona Band of Mission Indians*, 528 F.3d at 1191-92 (citation omitted). However, federal laws promoting tribal economic self-sufficiency are not, by themselves, sufficient to preempt state tax laws. *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 177-87, 109 S. Ct. 1698, 104 L. Ed. 2d 209 (1989). Here, the federal government requires that tribal government programs be appropriately funded and approved by the BIA before a tribe may make per capita payments. Thus, promoting tribal self-sufficiency does not provide a basis to preempt state tax laws.

Second, contrary to the allegation that the incidence of the tax falls on Tribal members living off-reservation (SAC ¶¶ 10, 21), the Tribe attempts to establish that

the tax occurs on the reservation by alleging the tax "has the potential of creating havoc in the way the Tribe uses its very limited land resources" (*id.* at ¶ 28(a)). According to the Tribe, if the tax is allowed to continue, its "council's activities will be consumed by addressing financial, environmental, regulatory and other issues involving construction of housing on the reservation," and the Tribe will be "forced" to reallocate or develop its unusable property. (*Id.*) To the extent this and any other allegation in Paragraph 28 is based upon "potential" harm to the Tribe, it is procedurally defective because it fails to demonstrate that the Tribe suffered an "injury in fact" that is "concrete and particularized," and "actual or imminent, not conjectural or hypothetical." *See Lujan v. Defenders of Wildlife*, 504 U.S. at 560-61. To hold otherwise would be to disregard the Supreme Court's admonition that a state's taxing power should not be restricted on "merely theoretical conceptions of interference with the functions of government." *Oklahoma Tax Comm'n v. Texas Co.*, 336 U.S. 342, 363, 69 S. Ct. 561, 93 L. Ed. 721 (1949).

In any event, the Tribe's gaming revenue distribution is not, as the Tribe claims, "dictated by the federal government." (SAC ¶ 28(a).) Instead, as shown, the Tribe is not required to make per capita payments, nor is it required to have a Revenue Allocation Plan before it provides government programs like housing. Indeed, if the tax "has a dramatic, negative impact on Tribal self-government" (*id.*), then the Tribe has not properly allocated its revenue under IGRA and the implementing regulations because per capita payments cannot be made unless the Tribe has met its other funding requirements. But this is does not appear to be the case because the BIA has approved the Tribe's Revenue Allocation Plan. (Defs.' RJN, Ex. F, letter from Dep't of the Interior to Tribal Chairman (Oct. 6, 2004).)

Third, the Tribe alleges that without the tax, more money would be available for various categories "required" by the Revenue Allocation Plan. (SAC ¶ 28(b).) The Tribe may still provide government services to its members without a Revenue Allocation Plan and without making per capita payments. 25 C.F.R. §§ 290.7-

290.9. Also, because the Tribe does not pay the members' state income tax obligations, and the Tribe's Revenue Allocation Plan does not consider state income tax on per capita payments, even if the tax were not imposed, it would not result in more money to the Tribe, only more money to the members. Moreover, a reduction in Tribal revenue does not invalidate the tax. (*See ante* at 21.) Therefore, the tax does not interfere with Tribal government services.

Fourth, the Tribe alleges that because its members must live off-reservation, it adjusts the per capita payments to include members' property taxes and sales taxes, and that sales taxes could otherwise occur on the reservation if the members lived there. (SAC ¶ 28(c).) This allegation has no bearing upon California's personal income tax on members living off-reservation. In addition, that tax-exempt sales "could" occur on the reservation inures to the benefit of Tribal members and not the Tribe, and therefore does not interfere with Tribal government.

Fifth, the Tribe claims the tax impacts Tribal sovereignty because it has a "minimal amount" of reservation land. (SAC ¶ 28(d).) The Tribe's reservation is 400 acres. The assertion that this is a "minimal amount" of land is conclusory. Moreover, the impact must be substantial to constitute unlawful interference. *Crow Tribe of Indians*, 650 F.2d at 1117. This allegation fails to explain how the tax substantially affects the Tribe's ability to provide governmental services or regulate development of Tribal resources, and therefore fails to state a claim.

Sixth, the Tribe alleges that to build housing on the reservation in Coachella would require it to readjust its Revenue Allocation Plan to provide for housing construction and infrastructure; would require it to address numerous safety and environmental issues; would require it to renegotiate agreements with local government agencies that could adjust its water rights; and could interfere with its plan to build a cemetery. (SAC ¶ 28(e).) As indicated, however, the reason Tribal members do not live on the reservation is irrelevant to a determination whether the *McClanahan* exemption applies. Contrary to the Tribe's assertion, 240 acres in

Coachella is not a "small amount of land." Also, the allegation that there are "spiritual and infrastructure problems associated with a cemetery" (*id.*) are conclusory and unreasonable inferences given the Tribe's previous admission that the reservation in Coachella is not the Tribe's ancestral lands and has no cultural or religious significance to the Tribe. (Defs.' RJN, Ex. D at 18, 19 & 36.) In addition, no Tribal members plan to live on the reservation after the Tribe completes its casino expansion project, preferring to live in nearby housing instead. (*Id.* at 28.) Moreover, a Revenue Allocation Plan is not required to provide for tribal housing. 25 C.F.R. § 290.9. Therefore, the tax would not require the Tribe to revise its Revenue Allocation Plan to adjust for housing.

Seventh, the Tribe alleges that its sovereignty would be infringed upon if it put housing on the reservation in Twentynine Palms because there are environmental issues and a lack of infrastructure. (SAC ¶ 28(f).) The Tribe also claims the distance between the reservation parcels "would create barriers to economic development," and the parcels are adjacent to different local governments, which would require the Tribe to negotiate different agreements concerning "critical self-governance issues such as fire, police, utilities access, and road access." (*Id.*) The 160-acre reservation in Twentynine Palms cannot fairly be characterized as "relatively small." The allegation that putting housing there would create a barrier to economic development is belied by the Tribe's recent plans to develop the parcel to include a second casino, hotel, RV park and *residential housing*. (Defs.' RJN, Ex. B.) In addition, the land is not completely undeveloped but instead has road access (*id.* at Ex. G, Draft Envtl. Assessment, Twenty-Nine Palms Casino Project (Mar. 2008), 286), and the Tribe previously contemplated agreements with local entities concerning access to police, fire, emergency, and utility services (*id.* at 147-50, 191-94, 204, 207-08.) These allegations fail to demonstrate how the tax substantially affects the Tribe's ability to provide governmental services or regulate development of Tribal resources, and therefore fail to state a claim.

Eighth, the Tribe alleges that California may not require the Tribe to revise its Revenue Allocation Plan or rezone its land, or dictate how and where the Tribe provides housing. (SAC ¶ 28(g).) California is not requiring the Tribe to take any action. Instead, by this action, the Tribe attempts to require that California apply the *McClanahan* exemption to its members wherever they reside in California, and prevent California from taxing its residents that receive the benefits and protections of its laws. But the Ninth Circuit has recognized that raising revenue to provide general government services is a legitimate state interest. *See Crow Tribe of Indians*, 650 F.2d at 1113 ("[o]f course, revenue raising to support government is a proper purpose behind most taxes"); *Salt River Pima-Maricopa Indian Cmty.*, 50 F.3d at 737 ("[t]he state also has a legitimate governmental interest in raising revenues, and that interest is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services").

Ninth, and last, the Tribe claims the tax disrupts its government because about one fourth of its members, or up to three adults, live out of state in part to avoid the tax, and that if exempt they "would be more eligible and able to directly take part in the Tribal government." (SAC ¶ 28(h).) There is, however, no allegation that if exempt, the members would return to California, that California residency is required to participate in essential Tribal government functions, or that the members are in fact ineligible and do not currently participate in government. This allegation does not demonstrate that the members' absence from California substantially affects the Tribe's ability to offer governmental services or regulate Tribal resources.

The imposition of California's personal income tax on tribal members residing off-reservation does not infringe on the Tribe's self-governance.

CONCLUSION

For the reasons stated above, State Defendants respectfully request this Court to dismiss the SAC without leave to amend.

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Respectfully submitted,

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