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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SALTON SEA VENTURE, INC., a California corporation,

Plaintiff,

v.

ROBERT RAMSEY, an individual; and FIRST AMERICAN PETROLEUM, an unknown business entity, and Does 1-30, inclusive,

Defendants.

Case No. 11 CV 1968 IEG WMc

ROBERT RAMSEY AND FIRST AMERICAN PETROLEUM'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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Defendants Robert Ramsey and First American Petroleum, Inc. (collectively "First American") respectfully submit the following memorandum in response to the motion for preliminary injunction filed by Salton Sea Venture, Inc. ("Salton Sea").

I. INTRODUCTION

Salton Sea's motion for preliminary injunction is riddled with numerous factual inaccuracies and legal deficiencies that fail to state a claim for relief, much less come anywhere close to satisfying the rigorous test for injunctive relief as recently set forth by the Ninth Circuit just a few weeks ago in *Flexible Lifeline Systems v. Precision Lift*. Salton Sea's Complaint and its flimsy companion motion for injunctive relief are severely deficient in a number of key respects and neither one should have ever been filed by Salton Sea. The motion for preliminary relief should be swiftly denied for at least the following reasons.

First, First American is a tribal corporation organized and existing under the laws of the Yakama Nation, a federally-recognized sovereign American Indian Tribe. First American does not own the gas station at issue and the claims related to the Red Earth Travel Center are clearly directed at the wrong entity. The gas station giving rise to Salton Sea's complaint is situated entirely on trust property and owned by the Torres-Martinez Band of Desert Cahuilla Indians, a federally-recognized Indian Tribe. Salton Sea is well aware of this fact, and has no basis in law to seek an injunction that would require a Sovereign Indian Nation to set its gasoline prices at a tribally-owned gas station. Salton Sea's entire suit that seeks to dictate how the Tribe operates its gas station is precluded by the doctrine of sovereign immunity and the motion should be denied on this basis alone.

Second, Salton Sea has not established that it is likely to succeed on any claim that First American is selling petroleum below its "cost" as prohibited by California law. In fact, Salton Sea has presented no proof of First American's or the Torres-Martinez's Tribe's costs. Instead, Salton Sea has opted to simply cite to some unspecified and unidentified "wholesale-market cost" and argue that because the tribal gas station advertises its petroleum prices on occasions below that spurious "wholesale-market cost", First American must be selling its petroleum below its "costs." As First American's expert sets forth in his Declaration, and as common sense obviously dictates, Salton

Sea's "below cost" argument has no basis in fact or sound accounting principles and cannot support any claim for injunctive relief.

Third, First American does not fail to remit fuel taxes owed to the state of California. Pursuant to the Treaty of 1855 between the Yakama Nation and the United States, First American is not required to remit taxes for delivering fuel to the Torres-Martinez Reservation. Even assuming First American had such a legal obligation, though, its purported "failure" to do so cannot be redressed by a civil cause of action for unfair competition by Salton Sea. Salton Sea cites no authority in support of this unprecedented legal theory under California law. Further, Salton Sea conveniently fails to acknowledge that other courts throughout the country have roundly rejected similar "lack of tax payment" theories as a basis for unfair competition claims under state law. As Salton Sea concedes in its preliminary injunction papers, "[t]he issue of payment of taxes to the State of California is a matter best left to the appropriate state authorities."[1] *See* Declaration of Dennis C. Rieger, Docket Entry 1-7, ¶ 43. Salton Sea's concession simply underscores that its claim for injunctive relief based on a purported failure to pay state taxes is utterly baseless.

Fourth, the allegation regarding improper "oxygen content" in First American's fuel showcases, yet again, another claim that has no basis in fact or law. Salton Sea does not even cite to these so-called "RFG" standards and presents no evidence that First American has violated any applicable standards established by any California agency. Moreover, these standards do not apply to fuel sold on trust property in any event. This claim, like the others, is baseless.

Fifth, First American has no obligation to obtain a "certificate of qualification" because it is transacting business with the Torres-Martinez Tribe of Desert Cahuilla Indians on trust property, not "intrastate business" in the state of California. Even if First American was conducting "intrastate business," Salton Sea has no standing to bring a private cause of action—only the Attorney General is authorized to seek redress for a foreign corporation's purported failure to obtain a certificate of qualification.

[1] The matter of taxation between First American and the State of California is currently the subject of preliminary administrative proceedings at the California State Board of Equalization under Case Identification Numbers 477728 and 477731.

Finally, even **if** Salton Sea's legal claims were cognizable and even **if** Salton Sea could make out a *prima facie* case against First American, Salton Sea's supposed "injury" is so vague, speculative, and utterly lacking in factual support that it cannot remotely support injunctive relief. Salton Sea claims it is being damaged in an amount of over $5,000.00 per day, but provides absolutely no evidence or calculation in support of this purported "damage." Further, Salton Sea concedes that the gas station at issue is located 6 miles away from Salton Sea's station and has not presented evidence of any kind that a single customer of the Red Earth Travel Center would have purchased gas and convenience stores items but for First American's supposed violations of the law. Salton Sea's rank speculation and its attorneys' wholly unsubstantiated claims of injury are hardly sufficient to support entry of injunctive relief by this Court, even if Salton Sea could establish a violation of the law in the first instance.

This Court should reject Salton Sea's claim for injunctive relief.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Facts.

First American is in the business of fuel distribution and brokering. Robert Ramsey is the sole owner of First American. *See* Declaration of Robert Ramsey in Support of Robert Ramsey and First American's Opposition to Plaintiff's Motion for Preliminary Injunction ("Ramsey Dec."), ¶¶ 3, 6-10. Mr. Ramsey is an enrolled member of the Confederated Tribes and Bands of the Yakama Nation (the "Yakama Nation"), a federally-recognized sovereign American Indian Tribe. *Id*. at ¶ 2. First American is located in Toppenish, Washington on the Yakama Nation Reservation. *Id*. at ¶ 6. First American is a business entity licensed by the Yakama Nation, through the Yakama Nation Revised Law and Order Code and the Treaty of 1855 between the Yakama Nation and the United States.[2] *Id*. at ¶ 3. First American also holds retail and wholesale fuel licenses through the Yakama Nation, as well as a fuel distributor license in the State of Nevada. *Id*. at ¶¶ 3-5.

[2] As further detailed herein, the Treaty of 1855 reserved specific rights to the Yakama Nation and its members, including the right to trade and travel, free of restriction, for future business endeavors. 12 Stat. 951 (1855); *Yakima Indian Nation v. Flores*, 955 F. Supp. 1229, 1246-48, 1253 (E.D. Wash. 1997) (the Treaty of 1855 secures rights rather than limits them and "the Treaty was clearly intended to reserve the Yakamas' right to travel on the public highways to engage in future trading endeavors").

The Torres-Martinez Band of Desert Cahuilla Indians ("Torres-Martinez Tribe") is a federally-recognized sovereign American Indian Tribe with reservation lands located in the State of California. *See* Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs, 75 Fed. Reg. 60,813 (Oct. 1, 2010); *see also* Declaration of Rodney Bonner in Support of Robert Ramsey and First American's Opposition to Plaintiff's Motion for Preliminary Injunction ("Bonner Dec."), ¶ 2. The Torres-Martinez Tribe owns the Red Earth Travel Center, a fuel and convenience center located at 3089 Norm Niver Road, Thermal, California. *Id*. at ¶ 3. The Red Earth Travel Center is the fuel station alleged to be First American's place of business in Plaintiff's Memorandum in Support of its Motion for Preliminary Injunction (*see* Plaintiff's Memo., p.1), when in fact the station is owned by the Torres-Martinez Tribe. *Id*. The Red Earth Travel Center is located within the boundaries of the Torres-Martinez Reservation and on land owned by the tribe and held in trust by the United States. *Id*. The Torres-Martinez Tribe has delegated certain fuel management responsibility at the Red Earth Travel Center to First American. *Id*. at ¶ 4. All transactions between First American and the Torres-Martinez Tribe occur in Indian Country and between tribal and tribally-licensed entities. Ramsey Dec. ¶¶ 6-9.

Plaintiff knows, or should have known before filing the present suit and motion, that the Red Earth Travel Center is owned by the Torres-Martinez Tribe. In fact, the very news article submitted by Plaintiff as part of its "evidence" in support of the present motion specifically states that the "Red Earth Travel Center, *which is owned by the Torres Martinez Desert Cahuilla Indian Tribe*, is undercutting competition by not charging state sales tax." Plaintiff's Memo in Support of its Motion for Preliminary Injunction, Docket Entry 1-6 ("Plaintiff's Memo."), Exhibit 1 (emphasis supplied).

B. Procedural History.

On July 28, 2011, Plaintiff filed the instant action in California Superior Court in Imperial County and attempted to seek an *ex parte* temporary restraining order against Defendants. Although Defendants were not, and have not been, formally served with the lawsuit, on August 25, 2011 First American filed a notice of removal in this Court. *See* Docket Entry 1. On September 9, 2011, Plaintiff submitted a "supplemental statement" in support of its claim for preliminary relief and referenced and adopted "all documents previously filed in this case in the state court." *See* Docket

Entry 10, p. 1. Soon after First American became aware of this suit, its counsel attempted to contact Plaintiff's counsel to discuss the numerous substantive and procedural deficiencies with Salton Sea's claims.[3] Declaration of J. Michael Keyes in Support of Robert Ramsey and First American's Opposition to Plaintiff's Motion for Preliminary Injunction, ¶¶ 2-8. To date, Plaintiff's counsel has not returned multiple inquiries and requests for substantive discussions regarding this case. *Id*.

III. LAW & ARGUMENT

A. Plaintiff Has Failed To Meet The Rigorous Test For Injunctive Relief.

The U.S. Supreme Court has recently cautioned that:

> A preliminary injunction is an extraordinary remedy never awarded as of right. In each case, courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief. In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.

Winter v. Natural Res. Defense Council, Inc., 555 U.S. 7, 24, 129 S.Ct. 365, 376 (2008) (internal quotations and citations removed). The Ninth Circuit acknowledged just a month ago that there is no "presumption" of harm after *Winter*. *See Flexible Lifeline Sys. v. Precision Life, Inc*., No. 10-35987, 2011 WL 3659315 at *5 (9th Cir. Aug. 22, 2011). Instead, a party must satisfy the four-factor *Winter* test – that "[i]n order to obtain preliminary injunctive relief, a plaintiff must establish that [i] he is likely to succeed on the merits, [ii] that he is likely to suffer irreparable harm in the absence of preliminary relief, [iii] that the balance of equities tips in his favor, and [iv] that an injunction is in the public interest." *Id*. at *4. The Ninth Circuit has also warned that there must be a "sufficient causal connection" between the irreparable harm and the conduct to be enjoined. *See Perfect 10, Inc. v. Google, Inc*., No. 10-56316, 2011 WL 3320297, 5 (9th Cir. Aug. 3, 2011) (affirming denial of injunction because of insufficient connection between Google's conduct of operating its search engine and alleged infringement copyrighted photos).[4]

[3] Counsel for Robert Ramsey and First American also alerted Plaintiff's counsel specifically to the issues of proper parties, sovereignty, and the relief requested by Salton Sea in writing on August 23, 2011. *See* Keyes Dec., Exhibit C, p. 16.

[4] Even if Plaintiff is correct that under "California law" it need not establish "irreparable injury or inadequacy of money damages", *see* Plaintiff's Memo., p. 7, n. 3, that standard is irrelevant in this case where Plaintiff seeks injunctive relief pursuant to Federal Rule of Civil Procedure 65 in federal court.

Salton Sea fails these tests for no fewer than all of the following reasons.

B. The Real Party in Interest is the Torres-Martinez Tribe and Salton Sea's Preliminary Injunction is an Attempt to Restrain That Non-Party Sovereign Indian Nation.

Salton Sea's requests for relief are thinly-veiled attempts to restrain a non-party sovereign nation in violation of federal law. "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 1677 (1978) (citing *Turner v. United States*, 248 U.S. 354, 358, 39 S.Ct. 109, 110, 63 L.Ed. 291 (1919)). The Torres-Martinez Tribe is a federally-recognized American Indian entity and is a sovereign nation immune from suit. *See* Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs, 75 Fed. Reg. 60,813, 2010 WL 3811385 (F.R.) (Oct. 1, 2010); *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1182-83 (10th Cir. 2010) (dismissing suit against manager of tribally-owned casino on sovereign immunity grounds and noting that "sovereign immunity [is] an inherent part of the concept of sovereignty and what it means to be a sovereign"); *Cook v. AVI Casino Enters., Inc*., 548 F.3d 718, 727 (9th Cir. 2008); *see also* Felix S. Cohen, *Cohen's Handbook of Federal Indian Law* §§ 7.05, 21.02[2] (Nell Jessup Newton et al., eds., 2005 ed.).

A suit will be dismissed if the real party in interest is a sovereign American Indian tribe. If "it is clear from the 'essential nature and effect' of relief sought that the tribe is the real, substantial party in interest[,]" then a suit will be properly dismissed. *Shermoen v. United States*, 982 F.2d 1312, 1320 (9th Cir. 1992). The Torres-Martinez Tribe is not a party to this case, and cannot be. As stated by the Ninth Circuit, when "**[t]he relief sought in this case would prevent the absent tribes from exercising sovereignty over the reservations allotted to them by Congress. It is difficult to imagine a more 'intolerable burden on governmental functions**.'" *Id*. (emphasis supplied) Even if a decision effectively denies a plaintiff a forum in which to have some if its grievances heard, such denial is an illustration that Congress' authority over Indian matters is "extraordinarily broad," and the role of courts in adjusting relations between and among tribes and their members correspondingly restrained. *Id*. at 1320-21 (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72, 98 S.Ct. 1670, 1684 (1978)).

Here, Salton Sea alleges that it is "unaware" of the various "Does" named in its Complaint. *See* Complaint (Doc. 1-3) ¶ 4. However, as the "evidence" attached by Salton Sea to its preliminary injunction motion shows, Salton Sea and Mr. Rieger are well aware that the subject fuel station is owned by and operated through the Torres-Martinez Tribe. *See* Exhibit 1 to Salton Sea's Memorandum in Support of Its Preliminary Injunction; Rieger Declaration, ¶ 42 ("Dennis Rieger claims the Red Earth Travel Center, which is owned by the Torres Martinez Desert Cahuilla Indian Tribe ….''). In addition, on August 23, 2011 counsel for First American sent Plaintiff's counsel a letter stating that First American is not the owner of the Red Earth Travel Center. Keyes Dec., Exhibit C, p. 16. Yet, Salton Sea persisted in filing its request for preliminary injunction, and represented to the Court that the fuel station at issue belongs to First American. *See* Plaintiff's Supplemental Statement for Preliminary Injunction, Docket Entry 10, p. 2.

Salton Sea attempts to enjoin activities at the Red Earth Travel Center by filing suit against First American, when the true party in interest is the Tribe and the Tribe undoubtedly has a very important interest in the relief requested by Salton Sea. *See* Bonner Dec., ¶ 7. Salton Sea seeks the following relief in its proposed order, and has crafted the order to apply to the Torres-Martinez Tribe:

> The Defendants Robert Ramsey, First American Petroleum, **and Does 1-30, … and all persons acting in concert or participation with them**, are enjoined from: …
>
> (2) **selling fuel at Defendants' Fuel Station and failing to prepay, collect, and/or remit** the taxes and/or fees required by law to be prepaid, collected and/or remitted on the sale of said fuel; and
>
> (3) **selling fuel at Defendants' Fuel Station which does not comply with the requirements for Reformulated Gasoline** under California law.

Keyes Dec., Exhibit F (emphasis supplied).

Since the Tribe owns the Red Earth Travel Center, the relief sought by Salton Sea is clearly aimed at compelling or dictating tribal administration. Bonner Dec., ¶ 7. This lawsuit, and the request for preliminary injunction, effects how the Tribe governs itself on its lands. The suit cannot stand and Salton Sea cannot prevail – such an attack on the absent Tribe's sovereign immunity cannot be maintained by law.

C. Salton Sea's Motion Utterly Fails To Show Any Facts That First American is Selling Petroleum In Violation of California Business & Professions Code 17043.

Section 17043 of the California Business & Professions Code provides, in relevant part, as follows:

> It is unlawful for any person engaged in business within this State to sell any article or product at less than the cost thereof to such vendor, or to give away any article or product, for the purpose of injuring competitors or destroying competition.

Assessing the "cost" of a particular product is a fact-specific inquiry. *See Turnbull & Turnbull v. ARA Transp., Inc*., 219 Cal. App. 3d 811, 820 (1990).[5] California courts have determined that "the Unfair Practice Act employs a fully allocated cost or fully distributed cost standard to determine whether a sale has violated section 17043." *Id.* at 820-21 In addition to selling an item below "cost", the Business & Professions Code also requires "an injurious intent (a specific intent to injure or destroy) and *not just an intent to divert customers from a competitor." Western Union Fin. Servs., Inc. v. First Data Corp*., 20 Cal. App. 4th 1530, 1540 (1993) (emphasis supplied); *see also Vollrath Co. v. Sammi Corp.*, 9 F.3d 1455, 1460 (9th Cir. 1993) (denying injunctive relief due to Plaintiff's failure to present sufficient evidence of "below cost" sales).

Here, Salton Sea's motion fails for several reasons. First, Salton Sea failed to present a shred of evidence of First American's "costs" with respect to the petroleum products at issue. Instead, Salton Sea references an unidentified and unspecified "wholesale market cost" and "average" retail selling price that **Salton Sea** allegedly pays for its fuel, and then argues that because First American sells fuel below **Salton Sea's** wholesale market cost, it must be violating Section 17043. *See* Complaint, ¶ 10, 12, 14; *see also* Declaration of Dennis C. Rieger in Support of Plaintiff's Application for Preliminary Injunction; ¶ 33. There is no basis in law of fact for "calculating" First American's costs based on a vague reference to Salton Sea's wholesale costs. As First American's expert observed:

> Typically, the data or information that would be considered in such an analysis would include items such as: (i) an analysis of First American's invoices for the purchase of gasoline and diesel at, or near the time of the

[5] First American is not even a competitor of Plaintiff's. Plaintiff owns a retail gasoline station and travel center. First American is a fuel distributor. Ramsey Dec., ¶ 7.

> alleged below cost sales; (ii) an analysis of First American's historical selling, general, and administrative expenses before and during the time of the alleged below cost sales. Selling, general, and administrative expenses include, but are not limited to, advertising expenses, overhead expenses such as rent, and administrative expenses such as personnel costs. In order to determine First American's cost, selling, general and administrative expenses would need to be calculated on a per gallon basis and added to First American's invoice cost per gallon.

See Declaration of Michael Massey in Support of Robert Ramsey and First American's Opposition to Plaintiff's Motion for Preliminary Injunction, ¶¶ 11-15. Salton Sea's "below cost" argument is baseless for this reason alone.

Second, Salton Sea has presented no evidence or even any allegation of a specific intent by First American to destroy Salton Sea's business as is required under the statute:

> The intent or purpose of the below-cost sale is at the heart of the statute, and distinguishes the violation from a below-cost pricing strategy undertaken for legitimate, nonpredatory business reasons. Section 17043 does not make all sales below average total cost illegal per se. Instead, such sales must have been made for the purpose of injuring competitors or destroying competition. The intent requirement imposed by section 17043 is an especially stringent one. … [T]he California Supreme Court has concluded that to violate section 17043, a company must act with the purpose, i.e., the desire, of injuring competitors or destroying competition.

Bay Guardian Co. v. New Times Media LLC, 187 Cal. App. 4th 438, 456 (2010) (internal quotations omitted) (citing *Food & G. Bureau of S. California v. United States*, 139 F.2d 973, 974 (9th Cir. 1943); *William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co.*, 668 F.2d 1014, 1049 (9th Cir. 1981); *Cel–Tech Commc's, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 174, 973 P.2d 527 (1999)). Salton Sea has produced no evidence of any such intent on the part of Defendants. Salton Sea's "below cost" claim is not likely to succeed.

In short, Salton Sea failed to establish that it will prevail on its claim under Section 17403, let alone satisfy the other three elements of the *Winter* preliminary injunction standard on this claim. The request for injunctive relief should be denied.

D. Salton Sea Fails To State a Claim for Relief Based on First American's Purported "Failure" to Remit Taxes to the State of California.

For two independent reasons, Salton Sea has failed to establish it will prevail on its "unfair competition" claim under California Business and Professions Code Section 17200 based on First American's alleged failure to pay state taxes. First, Salton Sea lacks standing to bring a cause of action against First American for its alleged failure to pay state taxes, and such a claimed failure cannot be used as a vehicle for an unfair competition claim. Second, the state taxes at issue are barred by the Treaty of 1855 between the Yakama Nation and the United States.

1. Salton Sea's Allegations that First American Failed to Pay State Taxes Do Not Support an Unfair Competition Claim.

First, Salton Sea has cited no California case (or *any* case or other legal authority, for that matter) that supports its unprecedented unfair competition claim based on First American's alleged failure to pay state taxes. Several other courts throughout the country have roundly rejected similar attempts to use unfair competition laws as a basis to challenge a competitor's supposed failure to comply with state taxation laws. *See, e.g., Lexington Nat. Ins. Corp. v. Ranger Ins. Co.*, 326 F.3d 416, 417–19 (3d Cir. 2003); *Ecosure Pest Control, Inc. v. Eclipse Mktg., Inc.*, No. 2:09-cv-1108, 2010 WL 3363071, 4 (D. Utah Aug. 23, 2010) (holding that Utah's "unfair competition and antitrust laws were not intended to include a private right of action to challenge the legality of a competitor's employment tax practices."); *see also, Intervest Mortg. Inv. Co. v. Skidmore*, 632 F. Supp. 2d 1005, 1005 (E.D. Cal. 2009).

For example, in *Lexington National Insurance*, an insurer for bail bonds brought an action against a competitor, alleging that the competitor's failure to pay taxes on gross premiums for bail bonds constituted deceptive and wrongful business practice. After acknowledging the broad circumstances that can give rise to tort liability under New Jersey law, the United States Court of Appeals for the Third Circuit held that the insurer's allegations did not state a claim upon which relief could be granted because the competitor's payment of taxes was a matter between the State of New Jersey and the competitor. *See id.* at 420. Similarly, in *Ecosure Pest Control*, the plaintiff sued a competitor for failure to pay employment taxes on the theory that the competitor's tax practices

allowed it to increase its bottom line profits. 2010 WL 3363071, at *4. The Court held the plaintiff had no standing because "the unfair competition and antitrust laws were not intended to include a private right of action to challenge the legality of a competitor's employment tax practices." *Id*.

Also instructive is *Intervest Mortgage Investment*, where a lender sued a group of guarantors to collect on a loan guaranty. *See* 632 F. Supp. 2d at 1005. The guarantors filed a counterclaim under California's Unfair Competition Law alleging that the lender's real estate lending policy violated a "safety and soundness" regulation promulgated by the Federal Deposit Insurance Corporation ("FDIC"). *See id.* at 1005–06. The federal district court enunciated the broad purpose of California's unfair competition which was "to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services," and then held that the guarantors fell outside the zone of interests sought to be protected by California's UCL because the UCL could not have been intended to provide for private enforcement of an FDIC regulation. *See id.* at 1006.

Here, Salton Sea's unfair competition claim fails for the same reason that the claims failed in *Lexington National Insurance*, *Ecosure Pest Control*, and *Intervest Mortgage Investment*: state tax laws are not enforced through a private cause of action by an alleged competitor. Salton Sea has failed to establish that it is likely to prevail.

2. The Treaty of 1855 Prohibits California From Imposing Revenue-Generating Restrictions on Yakama Nation Member Commerce.

Even if Plaintiff had standing to pursue this unfair competition claim, Plaintiff has still failed to establish it is likely to prevail. As an enrolled member of the Yakama Nation, Mr. Ramsey and his tribally-incorporated business, First American, are protected by the guarantees of the Treaty of 1855 and the well-established cannons of federal Indian treaty interpretation. Because California's fuel taxation statute purports to levy a tax on gasoline transported into the state on state highways, *see* Cal. Rev. & T. Code § 60052(b)(2), it would be a violation of the Treaty of 1855 for the State of California to apply this revenue generation regime to First American's activities.

The Treaty of 1855 is a sacred document to the Yakamas. The Treaty was meant, in part, to protect the Yakamas' trade and travel way of life. Various federal courts over the years have time and again upheld the Yakamas' Treaty when it has come under attack:

> Treaties are a country's contracts. The solemn commitment of great nations, like the given word of good men, should be honored. It should not matter if the erosion of time and the bright glare of hindsight demonstrate that they were extravagant or ill-advised. The promises made at Walla Walla all those years ago were unconditional. They will be so enforced by this court.

Yakima Indian Nation v. Flores, 955 F. Supp. 1229, 1260 (E.D. Wash. 1997) (holding that state requirements with revenue-generating purposes, such as California's fuel taxation scheme, cannot be upheld against the Treaty of 1855). Rights reserved under the Treaty by the Yakama as a tribe extend to individuals and Yakama member-owned and operated corporations or businesses. *Id*. Mr. Ramsey is an enrolled Yakama and First American is a Yakama-licensed corporation. Ramsey Dec., ¶¶ 2,3.

All Native American treaties must be generously interpreted as the Native Americans would have understood them, and with any ambiguities resolved in favor of the Indian. The Ninth Circuit has noted that "the Treaty clause [Article III of the Treaty of 1855] must be interpreted to guarantee the Yakama *the right to transport goods to market over public highways without payment of fees for that use*." *Cree v. Flores*, 157 F.3d 762, 769 (9th Cir. 1998) (emphasis supplied). Additionally, "Indian Treaties must be interpreted as the Indians would have understood them . . . and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people." *Id.* (citing *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 630-31 (1970)) (emphasis supplied).

Here, the Treaty of 1855 guarantees to the Yakama the right to trade and travel without restriction and without fee, for future business endeavors. 12 Stat. 951 (1855); *Yakima Indian Nation*, 955 F. Supp. at 1246-48, 1253 (the Treaty of 1855 secures rights rather than limits them and "the Treaty was clearly intended to reserve the Yakamas' right to travel on the public highways to engage in future trading endeavors"). The Ninth Circuit has twice upheld the Yakamas' rights and the language in those opinions speaks for itself:

> [T]here is no basis in either the language of the Treaty or our cases interpreting it for distinguishing restrictions that impose a fee from those, as here, that impose some other requirement. Applying either type of requirement to the Yakamas imposes a condition on travel that violates their treaty right to transport goods to market without restriction.

U.S. v. Smiskin, 487 F.3d 1260, 1266 (9th Cir. 2007);

> [W]e refuse to draw what would amount to an arbitrary line between travel and trade in this context, holding, as the Government suggests that the Yakama Treaty does not protect the 'commerce' at issue [in this case]. We have already established that the Right to Travel provision 'guarantee[s] the Yakamas the right to transport goods to market' for 'trade and other purposes'

Id. (citing *Cree II*, 157 F.3d at 769 (9th Cir. 1998));

> Thus, whether the goods at issue are timber or tobacco products, the right to travel overlaps with the right to trade under the Yakama Treaty such that excluding commercial exchanges from its purview would effectively abrogate our decision in *Cree II* and render the Right to Travel provision truly impotent.

Id. at 1266-67.

Thus, Salton Sea's claim for relief based on First American's alleged failure to pay state taxes fails for this reason as well. The injunction should be denied.

E. <u>Salton Sea's Allegations That First American Sells Fuel in Violation of California Reformulated Gasoline Standards Are Unfounded and Improper</u>.

Setting aside the fact that First American does not own the Red Earth Travel Center, Salton Sea's baseless argument regarding alleged improper oxygen levels in fuel sold at the Red Earth Travel Center fails for three independent reasons. First, Salton Sea does not have standing to bring a private cause of action against First American for purported violations of California Reformulated Gasoline ("RFG") standards. Second, Salton Sea has produced no evidence whatsoever that First American is selling gasoline in violation of California RFG standards, or that such sales would cause First American's sales to be "below cost." Third, and in any event, such standards do not apply on Native American reservations.

1. <u>Salton Sea Does Not Have Standing to Bring Causes of Action for Purported Violations of California Reformulated Gasoline Standards</u>.

Salton Sea alleges that it has been harmed by First American's alleged sales of fuel that do not comply with California's state reformulated gasoline ("RFG") requirements. However, the California Health and Safety Code for the violation of fuel regulations states that enforcement of that chapter

shall be done through the office of the Attorney General or in administrative hearings established by regulation:

> The civil or administrative civil penalties prescribed in this chapter shall be assessed and recovered either in a civil action brought in the name of the people of the State of California by the Attorney General or by the state board, or in administrative hearings established pursuant to regulations adopted by the state board.

Cal. Health & Safety Code § 43031(a).

Salton Sea does not have standing to bring a private cause of action against First American for alleged violations of California's RFG standards. When a statute provides that a violation is to be litigated by the Attorney General's office, a private litigant lacks standing to bring the same claims. *See, e.g., Nat'l R. R. Passenger Corp. v. Nat'l Ass'n of R. R. Passengers*, 414 U.S. 453, 458, 94 S.Ct. 690, 693 (1974) ("When legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies."). This is especially true where, as here, additional authority is delegated to administrative agencies to deal with supposed violations of applicable regulations.

2. Salton Sea Has Produced No Evidence That Any Sales by First American Violate California RFG Requirements.

Salton Sea does not provide any citation to authority on California's RFG standards. Salton Sea states multiple times that the oxygen content requirement is "5%." *See* Rieger Declaration, ¶ 24; Memorandum in Support of Preliminary Injunction, p. 5 ln. 20-21. Salton Sea does not cite to ***any*** regulation or ***any*** applicable resource for this claim. In fact, this claim (like many others advanced by Mr. Reiger and his counsel) is wrong. It appears that the California standards require an oxygen content by weight of between 1.8 percent and 3.5 percent. *See* 13 CCR § 2262. Salton Sea again provides no evidence that First American has sold fuel in violation of the California regulations (or any others). Salton Sea simply states that First American sells gasoline with an oxygen requirement of "3.5%," although without any evidentiary support. Salton Sea does not offer any statutory citation, legal precedent, or factual evidence that First American has violated California's RFG requirements.[6]

[6] Additionally, Salton Sea offers no evidence that tie its claims that First American has violated California's RFG requirements to its claims that First American engages in "below cost" sales and

3 *Salton Sea's Allegations Fail When Applied to Activity Occurring on Native American Reservation Lands.*

Even if Salton Sea had standing or could substantiate its claims that First American violates California state RFG requirements, such requirements do not apply on an Indian reservation. "[T]ribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207, 107 S.Ct. 1083, 1087 (1987) (citations omitted). However, state laws may be applied to tribal Indians on their reservations if Congress has expressly so provided. *Id*. Here, Congress has expressly provided the opposite – that the Torres-Martinez Reservation will be treated as a state and the Tribe is in control of designating air quality regulations with respect to its lands. Congress "expressly delegated" authority to tribes to regulate air quality on reservations under the Environmental Protection Act, and tribes will be treated as states for that purpose. *Arizona Pub. Serv. Co. v. E.P.A.*, 211 F.3d 1280, 1287 (D.C. Cir. 2000). The Environmental Protection Act includes its own reformulated gasoline standards and regulations. *See* 40 C.F.R. 80, subpart D & E. The federal RFG standard is oxygen content by weight of greater than or equal to 2%. 40 C.F.R. § 80.41.

Thus, Salton Sea's allegations of violations of RFG standards are not likely to prevail because Congress has expressly delegated authority over air quality standards on the reservation to the Tribe. The injunction should be denied.

F. Salton Sea's Claim For Preliminary Relief Based On First American's Purported Failure To Comply With Cal. Corp. Code Section 2105 Fails.

Finally, Salton Sea's claim for preliminary relief for a supposed violation of Section 2105 of the California Corporations Code is invalid for at least two reasons. First, Section 2105(a), provides in pertinent part: "A foreign corporation shall not transact intrastate business without having first obtained from the Secretary of State a certificate of qualification." To "transact intrastate business" means "entering into repeated and successive transactions of its business in this state, other than

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unfair competition. Salton Sea gives the Court no evidence that fuel with a lower oxygen content is less costly, or that the sale of such fuel would support a claim for "below cost" sales, unfair competition, or interference with a business advantage.

interstate or foreign commerce." Cal. Corp. Code § 191. Here, First American is not "transacting intrastate business" by selling fuel to a federally-recognized tribe operating on trust property owned by the federal government and held in trust for the benefit of the Torres-Martinez Tribe of Desert Cahuilla Indians.

Second, even if conducting business with the Torres-Martinez Tribe on trust property could be considered "intrastate business" under Cal. Corp. Code § 2100, Salton Sea has no standing to bring a private cause of action under that statute. Rather, the remedies for failing to obtain the certificate of qualification are set forth in Cal. Corp. Code § 2203 and only include: (i) a fine that "may" be imposed in the amount of "twenty dollars ($20) for each day that unauthorized intrastate business is transacted", Cal. Corp. Code § 2203(a); and (ii) that the foreign corporation submits to jurisdiction of the California courts. *Id.* Further, Cal. Corp. Code § 2258 makes it clear that it is the Attorney General who has standing to bring any such action for a purported violation of the Code. Cal. Corp. Code § 2258 (noting that any action "under this section may be brought by the Attorney General or by any district attorney").

Thus, because First American has not violated the statute and Salton Sea has no standing to bring this cause of action even if it had, Salton Sea has failed to establish it is likely to prevail on this claim.

G. Salton Sea's Allegations of "Irreparable Harm" Are Woefully Deficient.

Salton Sea asserts that it need not show irreparable harm because its injunctive relief is authorized by statute. *See* Supplemental Statement, Docket Entry 10, p. 7-8. This is a demonstrably incorrect statement of the law. As just noted by the Ninth Circuit, "[u]nder our case-specific approach, 'we do not presume irreparable harm' simply because a defendant violates a statute that authorizes injunctive relief." *Park Village Apartment Tenants Ass'n v. Mortimer Howard Trust*, 636 F.3d 1150, 1162 (9th Cir. 2011) (quoting *Small ex rel. NLRB v. Operative Plasterers' & Cement Masons' Int'l Ass'n Local 200*, 611 F.3d 483, 494 (9th Cir. 2010) (rejecting, in light of *Winter*, the Court's prior holding that "once a likelihood of success is established, district courts are required to 'presume irreparable injury' in statutory enforcement actions.")). Thus, Salton Sea must show a likelihood of irreparable harm in order to obtain preliminary relief.

Salton Sea's allegations of irreparable harm are based on calculations that tie baseless allegations to unsupported sales volume in order to offer an estimated dollar amount of alleged daily damages. Putting it charitably, the resulting total of daily alleged "damages" is incomprehensible and wildly speculative. As noted by First American's expert:

> [T]here are methods that are used to evaluate whether a business has incurred any damages or has experienced a diminution in value. Plaintiff has not relied on any of those methods or principles in arriving at its 'damages' calculation. Instead, it appears to have used a wholly unorthodox method that is not supportable. As a result, Plaintiff's 'damages calculation' is inherently unreliable and should not be accepted by this Court.

Massey Dec., ¶ 9; *see also* ¶¶ 16-22. Salton Sea's evidence of harm is insufficient to meet the requirement for a showing of likelihood of irreparable harm. *In re Excel Innovations, Inc*., 502 F.3d 1086, 1098 (9th Cir. 2007) ("Speculative injury cannot be the basis for a finding of irreparable harm."); *Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1311 (9th Cir. 2003) ("[T]he cited harm must be real. The law does not require the identified injury to be certain to occur, but it is not enough to identify a purported injury which is only theoretical or speculative."); *Goldie's Bookstore, Inc. v. Superior Court of State of Cal*., 739 F.2d 466, 472 (9th Cir. 1984) ("Speculative injury does not constitute irreparable injury.").

Finally, Salton Sea has not presented any evidence that its requested relief would be in the public interest. In fact, an injunction that would purportedly require the Torres-Martinez Tribe to take some sort of action would be an affront to tribal sovereignty. A violation of tribal sovereignty is not in the public's interest. *See Alturas Indian Rancheria v. California Gambling Control Com'n*, 2011 WL 3503142, *3 (E.D. Cal. 2011) (finding that the interest in collection of unpaid taxes was outweighed by "the public's interest in respecting tribal sovereignty" and in honoring a compact between the state and the tribe).

IV. CONCLUSION

Salton Sea has failed to offer any evidence that it is likely to prevail on any of its claims. Salton Sea has failed to offer any evidence that it is likely to suffer irreparable harm in the absence of

a preliminary injunction. Salton Sea has failed to offer any evidence that an injunction is in the interest of the public. Salton Sea's motion should be denied, the case should be dismissed, and, at the appropriate time, First American should be allowed to recover its fees and costs for defending against this oppressive and burdensome motion that is utterly and totally baseless.

DATED September 23, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of September, 2011, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

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