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7
8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10
11 SALTON SEA VENTURE, INC., a
California corporation,

12 Plaintiff,

13 v.

14 ROBERT RAMSEY, an individual, and
15 FIRST AMERICAN PETROLEUM, an
unknown business entity, and DOES 1
16 through 30, inclusive,

17 Defendants.

CASE NO. 3:11-cv-01968

**PLAINTIFF'S REPLY TO
DEFENDANTS' MEMORANDUM IN
OPPOSITION TO PLAINTIFF'S
MOTION FOR PRELIMINARY
INJUNCTION**

Date: October 7, 2011
Time: 10:00 a.m.
Dept: Courtroom 1
Judge: Irma E. Gonzalez

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19 Defendants Robert Ramsey's and First American Petroleum's (collectively, hereinafter,
20 "FAP") Memorandum in Opposition ("Opposition") to Plaintiff Salton Sea Ventures, Inc's ("SSV")
21 motion for preliminary injunction ("Motion") raises assorted irrelevant arguments and legal
22 theories, all of which fail to address the underlying bases supporting SSV's claims. SSV's
23 allegations, and the resultant claims, are simply described; FAP—not the Torres-Martinez Tribe—is
24 selling fuel at the Red Earth Travel Center. The sale of that fuel is at below market prices because
25 (1) FAP is not remitting the required sales and excise taxes to the State of California; (2) FAP is
26 able to obtain non-RFG fuel in Nevada at a cost lower than the wholesale cost for fuel which is
27 legal to sell in California, thus FAP is selling fuel at "below cost" and (3) FAP has failed to register
28 with the California Secretary of State, which allows FAP to avoid complying with certain rules and

1 regulations in California, and/or avoid being subject to oversight by California agencies.

2 With regard to the factors which SSV alleges allow FAP to sell fuel at below cost, SSV is
3 concerned only with those factors insofar as the factors result in FAP's business activities being
4 violative of California laws respecting unfair competition. SSV contends that FAP is using these
5 unfair and illegal business practices to reduce the price at which FAP can sell fuel for the purpose
6 of undercutting competition such as SSV's fueling station in an effort to drive competitors out of
7 business.

8 SSV has provided the Court with sufficient evidence of continuing and irreparable damages
9 to SSV resulting from FAP's illegal business practices. SSV has also provided the Court with
10 sufficient evidence to support a judicial determination that SSV's claim(s) are plausible, and
11 issuance of a preliminary injunction pending adjudication of this case on the merits appropriate. At
12 this point in the litigation, before any discovery has been conducted, SSV is not required to provide
13 more. SSV is not required to prove its case in full at the preliminary injunction stage. (*University*
14 *of Texas v. Camenisch* (1981) 451 U.S. 390, 395.)

15 Finally, SSV contends that the doctrine of sovereign immunity does not apply to FAP and
16 therefore does not afford FAP immunity from liability for FAP's unlawful business practices.
17 Furthermore, determining whether the doctrine of sovereign immunity in fact applies to FAP at this
18 early stage of the litigation would be premature.

19 For these reasons, as described more fully, below, SSV's request for a preliminary
20 injunction should be granted.

21 A. The Applicable Preliminary Injunction Standard:

22 A preliminary injunction is a provisional equitable remedy issued prior to consideration of
23 the underlying claims on the merits, to maintain the status quo and to prevent irreparable harm to
24 the plaintiff prior to final judgment. (*Sierra On-Line, Inc. v. Phoenix Software, Inc.* (9th Cir. 1984)
25 739 F.2d 1415, 1422.) Under the traditional four-part test, a plaintiff seeking a preliminary
26 injunction must establish that the plaintiff is (1) likely to succeed on the merits; (2) likely to suffer
27 irreparable harm in the absence of the preliminary relief; (3) that the balance of the equities tips in
28 the plaintiff's favor; and (4) that issuance of the preliminary injunction is in the public interest.

1 (*Winter v. Natural Resources Defense Council, Inc.* (2008) 555 U.S. 7.)

2 In applying this four-part test, the courts use a relaxed evidentiary standard. The plaintiff
3 need not meet, for example, the evidentiary standard necessary for a summary judgment motion.
4 (See, e.g., *Bynum v. Landreth* (5th Cir. 2009) 556 F.3d 442, 446.)

5 Here, FAP contends that SSV has not met SSV's burden with regard to the evidence SSV
6 has submitted with SSV's moving papers. In fact, SSV has provided evidence (1) that FAP is
7 importing non-California-compliant fuel from Nevada; (2) that FAP is not collecting taxes on that
8 fuel, which allows FAP to sell the fuel at below cost and below the price-point at which FAP's
9 competitors must sell the fuel; (3) that FAP is not registered with the California Secretary of State;
10 and (5) that FAP, not the Torres-Martinez Indians, is direct-selling the fuel at the Red Earth Travel
11 Center. Each of these activities is a violation of California Business & Professions Code Section
12 17200, et seq., and none has been denied by FAP.

13 FAP has not provided any evidence directly refuting SSV's allegations. By way of
14 example, FAP has submitted its Nevada petroleum exporter's license. This document is irrelevant
15 with respect to SSV's claim that FAP's importation of non-California-certified fuel into California,
16 and the subsequent sale thereof at the Red Earth Travel Center, violates California law.

17 B. FAP's Unlawful Business Practices:

18 The Opposition mixes up several different legal theories in asserting that SSV's claims
19 against FAP are meritless. These legal theories are wholly irrelevant and demonstrate a
20 fundamental misunderstanding of the nature of SSV's claims. SSV's claims are made pursuant to
21 the provisions of B & P Section 17200 ("Section 17200"). Thus, Section 17200 is the central and
22 operative legal authority in this litigation. Accordingly, this brief focuses on the provisions of that
23 Section.

24 First, Section 17200 defines unfair competition broadly to include "any unlawful, unfair or
25 fraudulent business act or practice" (Bus. & Prof. Code Section 17200.) The unlawful
26 practices prohibited by this Section are any practices forbidden by law, be it civil or criminal,
27 federal, state, or municipal, statutory regulatory or court-made. Section 17200 borrows violations
28 of other laws and treats them as unlawful practices that are independently actionable. (*Cel-Tech*

1 *Communications, Inc. v. Los Angeles Cellular Tel. Co.* (1999) 20 Cal.4th 163.) Moreover, in
 2 keeping with the broad scope of Section 17200, it is a strict-liability statute. (*South Bay Chevrolet*
 3 *v. General Motors Acceptance Corp.* (1999) 72 Cal.App.4th 861.) Thus, any illegal activity on the
 4 part of FAP results in FAP having liability under Section 17200.

5 Second, and directly contrary to FAP's contentions, California courts have expressly held it
 6 is not necessary that the predicate law, i.e., the law which the plaintiff alleges the defendant
 7 violated, provide for private civil enforcement. (*UFW v. Dutra Farms* (2000) 83 Cal.App.4th
 8 1146.) Standing to sue is expansive; a complaint under Section 17200 can be brought by any
 9 person acting for the interests of itself or members of the public. (Bus. & Prof. Code Section
 10 17204.) All that is required is that the party asserting the claim suffer injury due to the defendant's
 11 unlawful business practices. (*Bivens v. Gallery Corp.* (2005) 134 Cal.App.4th 847.) Accordingly,
 12 it is not necessary that, for example, SSV have the same standing to enforce FAP's failure to collect
 13 California taxes as the California Board of Equalization would have. SSV's allegation on this point
 14 is that FAP fails to collect the tax, in violation of California law. That failure is therefore in
 15 violation of Section 17200, which is a separate violation that is actionable by SSV. Similarly, SSV
 16 need not have the same enforcement powers as the California Air Resources Board ("CARB") with
 17 regard to FAP's importation of non-California-compliant gasoline for SSV to assert a claim under
 18 Section 17200. The violation of CARB regulations is merely the predicate violation which gives
 19 rise to private liability under Section 17200. (*UFW v. Dutra Farms* (2000) 83 Cal.App.4th 1146.)

20 Third, Section 17203 expressly provides that a person who has engaged, or is engaging, in
 21 unfair competition may be enjoined to prevent future use of the unfair practices. (*Coast Plaza*
 22 *Doctor's Hospital v. Blue Cross of California* (2000) 83 Cal.App.4th 677.) The remedial power
 23 granted to the court in Section 17200 cases is extraordinarily broad; the injunctive relief granted
 24 may be as wide and diversified as the means employed in perpetrating of the wrongdoing. (*Hewlett*
 25 *v. Squaw Valley Ski Corp* (1997) 54 Cal.App.4th 499 [superseded by statute as stated in *UFW v.*
 26 *Dutra Farms* (2000) 83 Cal.App.4th 1146].)

27 Finally, as to FAP's argument that SSV has failed to provide evidence of specific intent in
 28 FAP's activities (Opposition, p. 14 of 24, Lines 9-22) such a showing is expressly unnecessary to

1 pursue a claim under Section 17200. The statute imposes strict liability. Although SSV believes
 2 that FAP engages in its unlawful business practices for the purpose of undercutting competition and
 3 driving FAP's competitors out of business, to maintain an action under Section 17200 it is not
 4 necessary for SSV to show that FAP intended to injure SSV. (*South Bay Chevrolet v. General*
 5 *Motors Acceptance Corp.* (1999) 72 Cal.App.4th 861.)

6 C. FAP's Purported Affirmative Defenses:

7 FAP argues that it does not own the Red Earth Travel Center. SSV has only claimed that
 8 FAP is in charge of the sales of fuel at the Travel Center. In its Opposition, FAP admits that the
 9 Torres-Martinez Tribe has "delegated certain fuel management responsibility . . . to [FAP]." (See,
 10 Bonner Dec., Paragraph 4.) FAP has provided no further information as to what "certain fuel
 11 management responsibility" means. SSV alleges it means FAP is in charge of fuel sales at the
 12 Travel Center. Presumably, through subsequent discovery, more information on this point will
 13 come to light.

14 Beyond contending FAP does not own the Red Earth Travel Center, FAP has provided no
 15 evidence rebutting SSV's claims of illegality. FAP has not denied that (1) it fails to pay sales taxes
 16 on the fuel sold at the Travel Center; (2) it imports non-California compliant fuel; (3) it sells fuel at
 17 the Travel Center below cost; and/or (4) it has failed to register with the California Secretary of
 18 State. Instead, FAP has asserted the affirmative defense of tribal sovereign immunity. Put another
 19 way, FAP essentially admits that SSV's allegations of illegality are valid but, FAP answers, that
 20 doesn't matter because FAP is a tribal enterprise and therefore immune from suit.

21 At this preliminary stage, FAP has the burden of proof with respect to affirmative defenses.
 22 FAP must demonstrate that it is likely that the affirmative defense will succeed. (*Gonzales v. O*
 23 *Centro Espirita Beneficente Uniao do Vegetal* (2006) 546 U.S. 418, 429.) On the evidence
 24 presently before this Court, FAP has not met that burden. In particular, FAP has not demonstrated
 25 that it enjoys the same sovereign immunity which would attach to the Torres-Martinez Tribe. Nor
 26 has FAP shown that the Yakama Treaty of 1855, which admittedly allows enrolled Yakama tribal
 27 members unfettered access to travel on United States highways extends to allowing FAP to sell fuel
 28 in California that does not comply with California law.

FAP continues, daily, to engage in the above-noted unlawful business practices. As a consequence of that activity, SSV has suffered, and continues to suffer, irreparable harm. Thus, SSV requests that the Court issue a preliminary injunction to prevent SSV from being further harmed pending adjudication of this action on the merits.

For all of the foregoing reasons, Plaintiff SSV respectfully requests that this Court GRANT Plaintiff's Motion for a Preliminary Injunction.

BRADY & VINDING

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th 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:

J. Michael Keyes (mike.keyes@klgates.com)
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Dated: September 30, 2011

BRADY & VINDING

By: /s/ Blair W. Will
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