Case No. A144214

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION FOUR

PEOPLE OF THE STATE OF CALIFORNIA, ex rel. KAMALA D. HARRIS, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA
Plaintiff-Respondent,

vs.

ARDITH HUBER, individually, dba HUBER ENTERPRISES, *et al.*,
Defendants-Appellants.

Appeal from an Order Entering Permanent Injunction of the
Superior Court of the State of California, County of Humboldt
Superior Court Case No. DR110232
The Honorable W. Bruce Watson, Judge Presiding

APPELLANT'S OPENING BRIEF

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TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION 4	Court of Appeal Case Number: A144214
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APPELLANT/PETITIONER: Ardith Huber RESPONDENT/REAL PARTY IN INTEREST: People of the State of California	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (Check one): ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

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1. This form is being submitted on behalf of the following party (*name*): Ardigh Huber

2. a. ☑ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

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Date: 2/19/2015

Michael A. Robinson
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I. INTRODUCTION

American Indians have an undeniably unique and special status within the United States that is uniquely federal in nature. Article I, Section 8 of the Constitution provides Congress with the power: "To regulate commerce with foreign nations, and among the several states, and with the Indian tribes. Thus, since the ratification of the Constitution, power over commerce involving Indians on their own land has been located solely in Congress to the exclusion of the states.

Nonetheless, states, including California, have continuously attempted to encroach upon the rights of Indians by extending state laws to Indian and non-Indian activity within tribal territory that is land-locked by the states' geographical boundaries. With very few exceptions, involving exclusively the activities of non-Indians, Congress and the federal courts have repeatedly rebuffed the States' efforts to impose state sovereignty within tribal territories.

This case represents California's latest effort to extend its laws onto an Indian reservation to regulate a tribal member's commercial conduct. The Trial Court's Order issuing a permanent injunction prohibiting Appellant/Defendant Ardith Huber ("Huber"), a member of a federally recognized Indian tribe, from engaging in certain business practices on her reservation is at odds with volumes of federal Indian law. Moreover, by extending California's Unfair Competition Law to the on-reservation commercial conduct of tribal members, the Trial Court's order has the effect of giving California nearly unlimited power to regulate any and all on-reservation commercial activities in which an Indian tribe might allow its members to engage.

Alarmingly, the Trial Court granted this sweeping and incredibly broad power without any meaningful analysis of critical factors, such as its complete lack of adjudicatory – or subject matter – jurisdiction over this action, and by ignoring critical authorities and by relying on others that are inapposite. Because, federal law prohibits the exercise of jurisdiction over this matter and likewise prohibits the application of the civil regulatory laws at issue to Huber's on-reservation commercial conduct the Trial Court's order should be set aside and this case dismissed.

II. FACTS AND PROCEEDINGS BELOW.

A. Background.

1. Huber is an American Indian engaged in commerce on her own reservation.

Ardith Huber is a member of the Wiyot Tribe of California and is a resident on the Wiyot Tribe's Table Bluff Rancheria. (CT, page 001133, ¶ 2.) Huber lives on land owned by the Tribe and allotted to her under the Tribe's Tribal Allotment Ordinance. (CT, page 001133, ¶ 2.)

From approximately 2001, until the Trial Court entered the injunction, Huber operated a retail and wholesale business from her home on the Table Bluff Rancheria. (CT, page 001133, ¶ 3.) Huber's business involved selling cigarettes at retail from a small storefront added on to her home. (CT, page 001133, ¶ ¶ 3, 4, 7.) Additionally, Huber's wholesale business involved selling cigarettes at wholesale to over two dozen Indian smokeshops owned either by Indian tribes or Individual tribal members and operated within a recognized Indian reservation. (See, e.g., CT, pages 000076-000256

[which includes detailed reports on all of Huber's "wholesale" sales].) Sales for both the retail and wholesale portions of Huber's business occurred within the boundaries of the Table Bluff Rancheria. (CT, pages 001133-001135, ¶¶ 7-10, 19.)

Huber's business, Huber Enterprises, is a business formed on the Table Bluff Rancheria and operating under the laws of the Wiyot Tribe. (CT, page 001133, ¶ 5.) The Tribe specifically authorized Huber's business through its Tribal Tobacco Licensing Ordinance. (CT, pages 001133, lines 15-17; 001138).

Huber's business was never formed or incorporated pursuant to California law. (CT, page 001133, ¶ 6.) For a very brief time during 2002, Huber held a license issued by the California Board of Equalization. (CT, pages 001142-001143.) However, after discussions with the Board regarding the applicability of California's laws due to the location of Huber's business, Huber surrendered her license. (CT, page 001142.) Thereafter, the Board never required Huber to reapply for a California seller's permit and Huber never again obtained such a license. (CT, page 001135, lines 1-3.)

As part of Huber's business operations, she sold cigarette brands manufactured by other Native Americans or tribal enterprises. (CT, page 001134, ¶ 11.) The cigarettes were manufactured in Indian country or on Indian reservations and transported to the Table Bluff Rancheria. (*Id.*) Many of the cigarette brands that Huber' sold, and all of them after approximately 2007, were brands that the manufacturers did not undertake to have listed on the California tobacco directory. (See, CT, pages 00313, ¶¶ 6-7.) Additionally, prior to 2013 and 2014, many of the manufacturers of the brands Huber offered did not seek acknowledgement from the Fire Marshall that the cigarettes

complied with the Fire Safety Act. (CT, 000366, ¶ 4.) Finally, the distributers from whom Huber purchased her inventory did not affix California tax stamps to the cigarettes and Huber did not collect or remit taxes from customers.

2. **The People targeted Huber for her on-reservation commercial activity.**

The Attorney General (hereafter the "People") became aware of Huber's business operations, including the brand of cigarettes she was selling and the fact that the cigarettes did not bear California tax stamps or Fire Marshall approval sometime before May 17, 2010. (CT, 000525-26.) For months, the People attempted to obtain the Wiyot Tribe's assistance in forcing Huber to shut down. (CT, 000525-26; 000529 - 000531). However, presumably because the Wiyot Tribe did not support the People's request and because it authorized Huber's business operation, the Tribe offered no assistance in the matter. (See, CT, 000529 -0005230.)

After the People got no assistance from the Tribe, on October 28, 2010, she sent correspondence directly to Huber. The People's correspondence indicated that the Attorney General's office was aware that Huber offered and sold certain cigarettes that were not lawful for sale in California because the brands: (1) were not listed on the California Tobacco Directory, and (2) were not certified by their manufacturers as complying with the California Cigarette Fire Safety Act. (CT, 000536.) The People noted that the violation of these statutes, as well as Huber's "purchase and sale of unstamped cigarettes" constituted violations of the UCL. (CT, 000537.) Consequently, the People requested that Huber "immediately cease and desist from any further conduct

that will result, or is likely to result, in violation of any of the statutes described above." (CT, 000358.)

On November 30, 2010, Huber, through her attorneys, responded to the Attorney General's cease and desist letter asserting that her business authorized by the Wiyot Tribe and was compliant with the Tribe's laws governing tobacco sales on the Table Bluff Rancheria. (CT, 000533-000534.) Consequently, Huber questioned the People's regulatory authority over Huber and requested the basis for the People's belief otherwise.

The Attorney General did not respond to Huber's request. Instead, on March 11, 2011, the People the action below.

B. Trial Court Proceedings.

Relevant to this appeal, the People filed this regulatory action in the Superior Court of California, County of Humboldt. She alleged that Huber violated numerous of California's civil regulatory laws and sought relief, in the form of a permanent injunction and civil penalties, under the Unfair Competition Law and the Fire Safety Act.

In, September 2014, the parties filed cross-motions for summary judgment. After hearing oral argument on the motions, the Trial Court took the matter under submission. On January 5, 2015, the Trial Court issued the Order that is the subject of this appeal.

With practically no analysis, the Trial Court issued a permanent injunction prohibiting Huber from selling cigarettes that: (1) are not on the California tobacco directory list; (2) do not bear California cigarette tax stamps and on which Huber has not paid taxes; and (3) are not acknowledged by the California Office of State Fire Marshall

as compliant with the Fire Safety Act—which effectively forced Huber to close her business. (CT, pages 001360-001372)

Additionally, the Trial Court's Order determined that Huber is subject to civil penalties under the UCL and Fire Safety Act. (CT, page 001369, ¶ 22.) However, the Trial Court's Order left the issue of the proper amount of civil penalties for trial due to disputed material facts. (CT, page 001369, ¶ 22.)

Critical to the Trial Court's decision was its determination –without analysis – that the Trial Court had adjudicatory jurisdiction over this matter and that the UCL could be applied to the on commercial activities of a member of a federally recognized Indian tribe within the boundaries of her own reservation. (CT, pages 001370-001371, ¶¶ 23-25.)[1]

C. Statement of Appealability

This is an appeal pursuant to California Code of Civil Procedure section 904.1(6), which provides that an appeal may be taken "[f]rom an order granting or dissolving an injunction, or refusing to grant or dissolve and injunction."

D. Issues Presented.

1. **Did the Trial Court properly exercise adjudicatory jurisdiction over an action seeking to regulate the on-reservation activities of a member of an**

[1] Interestingly, the only analysis of the issues presented to the Trial Court are located in a section the Trial Court entitled: "DEFENDANT'S MOTION FOR SUMMARY JUDGMENT." There is no analysis whatsoever to be found the portion of the Trial Court's Order entitled "PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT/SUMMARY ADJUDICATION," only findings of fact and conclusions of law regarding Huber's liability. However, all of the arguments that Huber raised in opposition to the issuance of the permanent injunction are addressed in relation to the Trial Court's ruling on Huber's motion. Consequently, one can only presume that the Trial Court's reasoning is the same in both regards.

Indian tribe when a federal statute and federal and state judicial precedents provide that the jurisdiction of state courts over matters involving reservation Indians is limited to "private causes of action"?

2. **In light of the Indian Commerce Clause and federal and state authorities providing that states may not regulate commerce with Indians, or impose civil regulatory laws on the on-reservation activity of Indians, can the California Unfair Competition Law, including its injunctive provisions, be applied to the on-reservation conduct of a member of an Indian tribe?**

3. **Did the Trial Court err in determining that the California Unfair Competition Law is not a standalone statute that must be applicable under its own terms and purposes, but rather its applicability may be determined by "predicate statutes"?**

4. **Did the Trial Court err in determining that the "predicate statutes" that form the basis of the People's claims can be imposed on a member of an Indian tribe to regulate her on reservation activities and give rise to liability under the California Unfair Competition Law, when that law cannot be used as an enforcement mechanism of the "predicate statutes," United States Supreme Court precedent limits such regulation to instances enforcing tax obligations of non-tribal members, and the California legislature has provided that transactions occurring in Indian country occur in "interstate commerce" and, therefore, do not occur in California?**

E. ARGUMENT

A. Standard of Review.

When the ultimate facts of a case are undisputed the decision to issue a permanent injunction becomes a question of law. (*Dawson v. East Side Union High School District* (1994) 28 Cal.App.4th 998, 1041.) In such an instance, the "appellate court may determine the issue without regard to the conclusion of the trial court." (*Ibid.*, quoting *Eastern Columbia, Inc. v. Waldman* (1847) 30 Cal.2d 268, 273.) Here, the ultimate facts are not in dispute. Consequently, this case is subject to a *de novo* standard of review.

B. Subject Matter Jurisdiction.

A primary problem with the trial court's order is that it summarily determines several critical and complex issues of law without any analysis. This includes: (1) determining that the trial court had subject matter jurisdiction over this regulatory action despite United State Supreme Court, Ninth Circuit and California Supreme Court decisions that provide otherwise.

1. The authorities upon which the Trial Court relied to determine its adjudicatory jurisdiction do support the Trial Court's findings.

The entirety of the Trial Court's ruling on the critical gateway issue of is authority to adjudicate the action below consist of the following statement: "The Court is not persuaded that the Court lacks subject matter jurisdiction over this action ...." (CT, p. 001357, lines 5-6.) In apparent support of its ruling the trial court cites to *Washington v. Confederated Tribes of the Colville Indian Reservation* (1980) 447 U.S. 134, 155-61; *Moe v. Confederated Salish and Kootenai Tribe of Flathead Reservation* (1976) 425 U.S. 463,481-483; *Mescalero Apache Tribe v. Jones* (1973) 411 U.S. 145, 148-49; *Muscogee (Creek) Nation v. Pruitt* (10th Cir. 2012) 669 F.3d 1159, 1179-83; *People ex rel. Harris v. Black Hawk Tobacco, Inc.* (2011) 197 Cal.App.4th 1561-1568-71; *Mike v. Franchise Tax Board* (2010) 182 Cal.App.4th 817, 828-29; and *State ex rel. Edmonson v. Native Wholesale Supply Company* (Okla. 2010) 237 P.3d 199, 216.

Remarkably, none of these cases addresses the issue of a state court's adjudicatory jurisdiction over a regulatory action directed at the on-reservation activities of a member

of a federally recognized Indian tribe.[2] Consequently, these cases offer no assistance in determination of the Trial Court's adjudicatory jurisdiction.

2. Public Law 280 prohibited the Trial Court from exercising jurisdiction over the case below.

More remarkable than the Trial Court's reliance on inapplicable precedent, is the fact that it failed to discuss the cases that have addressed the scope of California state court's adjudicatory jurisdiction over matters involving the on-reservation activities of tribal members. In particular, in ruling that it had adjudicatory jurisdiction the Trial Court failed to address *Bryan v. Itasca* (1976) 426 U.S. 373 ("*Bryan*") and *Doe v. Mann* (9th Cir. 2005) 415 F.3d 1038, cert. den. (2006) 547 U.S. 1111 ("*Mann*"). As discussed in detail below, both these cases expressly provide Public Law 280 ("PL 280"), codified at 28 U.S.C. 1360, prohibits state courts from exercising adjudicatory jurisdiction over civil regulatory actions directed at the on-reservation conduct of Indians.

In pertinent part, PL 280 provides:

> Each of the States or Territories listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State or Territory to same extent that such State or Territory has jurisdiction over other civil causes of action, and those civil laws of such State or Territory that are of general application to private persons or private property shall have the same force and

[2] To be sure, four of the seven cases were cases brought in federal court, where the issue of state court jurisdiction would not arise. In the two California case, and one Oklahoma case the issue was never raised.

effect within such Indian country as they have elsewhere within the State or Territory. (28 U.S.C. § 1360(a).)[3]

Prior to *Bryan,* many courts considered PL 280 to be a grant of complete civil jurisdiction, including not only adjudicatory jurisdiction but also the general right to regulate Indians and their lands. (See, e.g., *Elser v. Gill Net No. One* (1966) 246 Cal.App.2d 30, 36-37; *Arnett v. Five Gill Nets* (1975) 48 Cal.App.3d 454, 459; *Agua Caliente Band of Mission Indians' Tribal Council v. City of Palm Springs* (C.D. Cal. 1927) 347 F.Supp. 42, 48-49, *vacated* Jan. 24, 1975.) *Bryan*, *supra*, cleared up the confusion.

a. **The United States Supreme Court's precedent concerning civil adjudicatory authority under Public Law 280.**

Bryan involved a state's attempt to regulate, through taxation and licensing schemes, Indians residing on a federally recognized Indian reservation. Minnesota claimed regulatory authority under PL 280 arguing that it extended the full complement of state civil laws to Indian country. *Bryan* responded with a lengthy and comprehensive discussion of the civil jurisdiction provisions of PL 280.

In doing so, *Bryan* recognized that "Indians stand in a special relation to the federal government from which the states are excluded unless Congress has manifested a clear purpose to terminate … immunity and allow states to treat Indians as part of the general community." *Bryan*, 426 U.S. at 392 [quoting *Oklahoma Tax Comm'n v. United States* (1943) 319 U.S. 598, 613-614].) Consistent with this premise, *Bryan* determined

[3] Regarding California, PL 280 relates to "[a]ll Indian country in the state." (28 U.S.C. § 1360(a).)

that the sole effect of the civil jurisdictional provisions of PL 280 was to allow state courts to adjudicate "private legal disputes between reservations Indians, and between Indians and other private citizens ...." (*Ibid,* at 383.) However, *Bryan* noted that the grant of civil adjudicatory jurisdiction did not extend to regulatory actions such as this. To the contrary, *Bryan* was explicit in providing that the adjudicatory jurisdiction Congress provided state courts pursuant to PL 280 was limited to actions and laws involving "private rights and status" including "laws of contract, tort, marriage, divorce, insanity, etc. ..." (*Ibid.*, at 384, n. 10.) However, that jurisdiction did not extend to actions "declaring or implementing the states' sovereign powers ...," which, *Bryan* noted "are not within the fair meaning of "private laws." (*Ibid.*)

b. The Ninth Circuit's precedent concerning civil adjudicatory authority under Public Law 280.

The Ninth Circuit has also considered the scope of PL 280 civil jurisdiction. First, in *Confederated Tribes of the Colville Reservation v. Washington* (9th Cir. 1991) 938 F.2d 146 ("*Confederated Tribes*") the Ninth Circuit considered whether, Washington could impose its traffic laws on reservation Indians. After a review of PL 280's civil jurisdiction provisions the Ninth Circuit found that a Public Law 280 state's civil jurisdiction was very limited and was only intended to provide "Indians a forum to settle *private disputes* among themselves." (*Confederated Tribes*, 938 F.2d at 147 [emphasis added].)

In 2005, in *Mann*, *supra*, the Ninth Circuit again took up the scope PL 280's civil jurisdiction provisions. Like *Byran*, *supra*, *Mann* expressly addressed the authority of

California courts to exercise adjudicatory — or subject matter — jurisdiction over civil actions involving reservation Indians.

Mann considered whether a California state court properly exercised adjudicatory jurisdiction over a child dependency proceeding involving an Indian child domiciled in Indian country in which the state court terminated the parental rights of the child's mother. (*Mann*, *supra*, 415 F.3d at 1040.) After the state court entered its termination order, the mother sought declaratory and injunctive relief in federal court challenging the superior court's adjudicatory jurisdiction over the matter. (*Ibid.*)

In addressing PL 280, *Mann's* analysis was complicated by the fact that the case involved ICWA, which has specific jurisdictional provisions. In particular, ICWA provides that state court's and tribal tribunals shall have "concurrent" jurisdiction over child dependency proceedings under certain circumstances. (*Mann*, *supra* 425 F.3d at 1048-1049) However, in matters involving an Indian child who is domiciled on a federally recognized Indian Tribe's reservation, ICWA provides that the Tribe has exclusive jurisdiction "except where such jurisdiction is otherwise vested in the State by existing Federal law." (*Id.* at 1047-48.)

The California Department of Social Services argued that PL 280, a prior existing law, expressly granted California courts adjudicatory jurisdiction over child dependency proceedings. (*Mann, supra*, 425 F.3d at 1049.) Therefore, *Mann* undertook a detailed examination of the scope of PL 280's civil jurisdiction provisions as they pertain to the adjudicatory jurisdiction of California courts.

Mann noted that the jurisdiction of California courts "is limited to disputes between *private* parties… ." and to cases involving the "status of private individuals." (*Mann*, *supra*, 415 F.3d at 1058-59.) Additionally, it noted that jurisdiction did not extend to actions seeking to regulate the conduct of Indians. (*Id.*, at 1051 [quoting *Bryan*, *supra*, 426 U.S. at 384.) Therefore, *Mann* proceeded to analyze the nature of California's child dependency laws. (*Id.*, at 1053- 1061.)

Mann explained that the analysis relating to whether a state laws — such as California's child dependency laws — are within California's PL 280 jurisdiction must proceed in two steps. (*Doe v. Mann*, 415 F.3d at 1053.) First, courts must determine whether the state law is criminal in nature, in which case California courts would have adjudicatory jurisdiction. (*Id.*)

However, if the state laws at issue are not criminal in nature, courts must determine whether the case involves a private cause of action, as to which PL 280 grants state courts adjudicatory jurisdiction, or whether the case is an attempt to enforce a state regulatory law, which fall "outside the state's jurisdiction under *Bryan*[.]" (*Mann*, *supra*, 415 F.3d at 1053.)

Mann's analysis of the nature of California's child dependency laws relied heavily on *Bryan*, *supra*. In particular, the Court noted numerous times that, under PL 280, a California court's jurisdiction over reservation Indians extends only to private legal disputes to which a reservation Indian is a party. However, the Court was clear that California courts did not have authority to adjudicate actions seeking to regulate an Indian's on-reservation conduct. (*Mann*, *supra*, 415 F.3d at 1048-49, 1059-62.)

Ultimately, *Mann* confirmed that child dependency proceedings are within the adjudicatory jurisdiction of California court basing its finding on two critical factors. (*Mann*, *supra*, 425 F.3d at 1060-62.)

First, *Mann* determined that action terminating parental rights was not a regulatory action but rather was a determination of private rights and status as contemplated in footnote 10 of *Bryan*, *supra*. (*Mann*, supra, 415 F.3d at 1059-1060.) *Mann* found this to be "compelling evidence" that California's child dependency laws were not regulatory. Therefore they fell within PL 280's grant of adjudicatory jurisdiction. (*Id.*, at 1060.)

Next, *Mann*, noted the express references to PL 280 in the ICWA. Of particular importance, *Mann* focused on ICWA language acknowledging the exclusive jurisdiction of Indian tribes over dependency proceedings involving Indian children domiciled in Indian country, except in states where federal law previously authorized to exercise civil adjudicatory jurisdiction. (*Mann*, *supra*, 425 F.3d at 1060.) Recognizing PL 280 as Congress' prior provision of limited civil jurisdiction, *Mann* found that ICWA's general recognition of exclusive tribal jurisdiction, did not preclude the preexisting adjudicatory jurisdiction over private causes of action. (*Ibid.*)

However, the Court made clear that matters that do not seek to determine private rights and status – such as matters involving a state attempting to assert its sovereign authority and regulate and control commerce – are beyond the adjudicatory authority of California courts. (*Mann*, *supra*, 425 F.3d at 1051.)

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c. The California Supreme Court's precedent Concerning civil adjudicatory jurisdiction under Public Law 280.

It is not only the federal courts that have opined regarding PL 280's limitation on the civil adjudicatory jurisdiction of California courts. In *Boisclair v. Superior Court* (1990) 51 Cal.3d 1140 ("*Boisclair*"), the California Supreme Court also addressed the issue.

Boisclair involved a private dispute pertaining to the ownership and use of a dirt road providing access to a granite mine. (*Boisclair*, *supra*, 51 Cal.3d at 1145.) Non-Indian owners of a ranch bordering the Indian reservation welded shut a gate on the road preventing access to the mine. (*Ibid.*) Indians who were joined to the action owned portion of land the road crossed claiming the land as trust land. (*Id.*, at 144-145.)

Boisclair noted that the central issue in the case was PL 280's impact on the state court's exercise of adjudicatory jurisdiction. (*Boisclair*, *supra*, 51 Cal.3d at 1146.) After an exhaustive discussion of PL 280, *Boisclair* determined that PL 280 precluded California courts from exercising jurisdiction over any property dispute in which an "Indian party to the litigation claims that the property is Indian trust or allotted land ..." (*Id.*, at 1154.)

To be sure, *Boisclair* relied on portions of PL 280 prohibiting the "alienation, encumbrance or taxation" of any real property held in trust by the United States. (*Boisclair*, *supra*, 51 Cal.3d at 1152.) However, that reliance only reaffirms the incredibly limited nature of PL 280's grant of civil adjudicatory jurisdiction.

It is undeniable that a cause of action addressing a property dispute is a "private cause of action." Therefore, one would assume that because PL 280 provided California courts with civil adjudicatory authority over "private causes of action" involving Indians there would be no jurisdictional issue. In PL 280 Congress placed even further limitations on the adjudicatory authority of California courts by excepting from the jurisdictional grant disputes involving land. In other words, *Boisclair* recognizes that even the grant of adjudicatory jurisdiction over "private causes of action" is not complete.

d. Under established precedent, the Trial Court erred in exercising jurisdiction over this regulatory action.

This case is not a case that falls within the adjudicatory jurisdiction Congress provided to California under PL 280. This case is neither a private cause of action, nor an action determining the status of private citizens. To the contrary, this action represents the People's direct efforts to regulate Huber's on-reservation conduct by prohibiting her from engaging in certain specified business practices. Consequently, under established Supreme Court and Ninth Circuit precedent, the Trial Court lacked jurisdiction to adjudicate the case below. Consequently, because California courts lack jurisdiction over this matter, the Trial Court's order should be vacated, and the action dismissed.

C. The UCL and Fire Safety Act are civil regulatory laws that cannot be applied to Huber's on-reservation commercial conduct.

Leaving aside the Trial Court's error in exercising adjudicatory jurisdiction, it's determination that the UCL and the Fire Safety Act may be applied to the commercial activities of an Indian on her own reservation or trust land is equally erroneous. The

Trial Court's analysis of these critical issues is, as it was concerning to the issue of adjudicatory jurisdiction, notably sparse. Indeed, the Trial Court does not provide any analysis whatsoever to explain how or why the Fire Safety Act applies to the on-reservation conduct of a tribal member.

1. The Trial Court's application of the UCL to Huber's on-reservation conduct was erroneous.

Regarding the application of the UCL, although the Trial Court's seems to have determined this incredibly broad and sweeping state regulatory law applies an Indian's on reservation conduct based on three considerations: (1) the case of *People ex rel. Harris v. Black Hawk Tobacco, Inc.* (2011) 197 Cal.App.4th 1561 ("*Black Hawk*") allowed the application of the UCL to the on-reservation business practices of a domestic California corporation (CT, 001357-001358); (2) the erroneous notion that Huber's off-reservation "*contacts*" give rise to UCL liability (CT, 001358.); and (3) the Trial Court's apparent belief that the UCL is not a "standalone regulatory law intended solely for the purpose of regulating commercial markets [that] must be viewed completely independently from the predicate statutes when considering its applicability to the conduct at issue." (CT, 001358) As discussed below, the Trial Court's reasoning in each instance is erroneous.

a. Black Hawk is inapposite.

As an initial matter, the Trial Court's reliance on *Black Hawk* is unjustified and ignores critical factors, which make *Black Hawk* inapposite.

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(1) Black Hawk was a California corporation licensed by the state as a "tobacco products retailer."

The first distinguishing factor the Trial Court ignored was that the defendant in *Black Hawk* was a domestic California corporation conducting business on the Agua Caliente Indian Reservation. (*Black Hawk*, 197 Cal.App.4th at 1564-1564.) Granted, a Native American who is a member of a tribe from Oklahoma owned the corporation. (*Ibid.*). However, the corporate defendant was an "artificial being, invisible, existing only in contemplation of [California] law." (*State Farm Mutual Auto Insurance Company v. Superior Court* (2003) 114 Cal.App.4th 434, 442.) Thus, being a creature of California law, that laws reasonably governed the business practices in which the corporation engaged.

Not only was the defendant incorporated under California, it was also licensed by the California Board of Equalization as a cigarettes and tobacco products retailer at each of the corporations' four retail stores. (*Black Hawk, supra,* 197 Cal.App.4th at 1565.) As a California licensed cigarette and tobacco products retailer, the defendant accepted numerous obligations, including the express obligation to "[p]urcahse and sell only those cigarettes and roll-your-own tobacco (RYO) authorized for sale in California as listed on the Attorney General's California Tobacco Directory, *http://oag.ca.gov/tobacco/directory*." (Cal.Bd. of Equalization, Publication 78, Sales of Cigarettes and Tobacco Products in California: License Requirements for Retailers (March 2014.), p. 2. ("Publication 78") [available at *https://www.boe.ca.gov.pdf/pub78.pdf*}.) Thus, as a state licensee, the corporate

defendant was, absent extenuating circumstances, inarguably subject to the California laws as it pertained to the sale of cigarettes and tobacco products.

(2) Tribal law required Black Hawk, Inc., to comply with California Cigarette Laws.

Another factor important to *Black Hawk* that the Trial Court ignored, was that twenty-six years before the *Black Hawk* decision, the Agua Caliente Band of Mission Indians adopted an ordinance expressly providing that sales of cigarettes on the reservation were prohibited unless they were made in "full compliance with the California Cigarette Tax Law (California Revenue & Taxation Code § 30001, et seq.), including payment of tax imposed on the distribution by that state law ..." (*Black Hawk*, *supra*, 197 Cal.App.4th at 1565.) Moreover, the Agua Caliente Band, specifically advised the defendant that it "was operating illegally, 'contrary to Tribal Law.'" (*Id.*, at 1570.)

(3) Black Hawk did not involve a direct challenge to the applicability of the UCL to the conduct of an Indian on her own reservation.

Finally, the Trial Court ignored that *Black Hawk* did not involve a direct challenge to the applicability of the UCL, or the conduct of an Indian on her own reservation or trust land. The issue presented in *Black Hawk* was whether California's ability to regulate a non-member California corporation was ousted because the Agua Caliente Band of Cahuilla Indians asserted regulatory authority over cigarette and tobacco sales within its reservation. (*Black Hawk*, *supra*, 197 Cal.App.4th at 1568.)

In relation to the UCL, *Black Hawk* never addressed the applicability of the UCL to the conduct an Indian undertook on her own reservation or federally protected trust land. Indeed, it could not have taken up that issue because those facts were not present. Under the facts that *Black Hawk* did present – a California corporation licensed by California as a cigarette and tobacco products retailer – the court simply assumed that the UCL applied.

(4) This case is factually and legally distinct from Black Hawk in nearly every regard.

This case does not present any of the factors critical to the decision in *Black Hawk.* Unlike the *Black Hawk* defendant, Huber Enterprises is not incorporated under California law. (CT, page 001135, ¶ 6.) Nor, did Huber take any steps to register or form her business pursuant any other California laws. (Id.) To the contrary, Huber operated her business pursuant to a tribally issued license and with the sole permission of the Wiyot Tribe. (CT, page 001133, ¶¶ 4-5.) Thus, Huber has not voluntarily submitted to California's laws in any way.

Similarly, unlike the *Black Hawk* defendant, Huber did not maintain a BOE issued cigarette and tobacco products licenses. (CT, page 001134, ¶ 12.) However, it is notable that when she initially opened her retail store, Huber did apply for and receive a license for her business from the BOE. (CT, page 001134, ¶¶ 12- 14; CT, pages 00141-001145.) After discussions with the BOE in which Huber informed it of the nature of her business, Huber surrendered her license returning it to the BOE. (*Id.*) Thereafter, Huber never heard from the BOE regarding any need to reapply for a cigarette and tobacco products

retailer. (CT, page 001135, ¶ 15.) Thus, Huber never voluntarily undertook the obligations the *Black Hawk* defendant undertook including the obligation to sell only directory listed cigarettes.

Additionally, this case does not involve a situation where the Tribe having jurisdiction over the reservation has expressly required cigarette and tobacco retailers to comply with California law. To the contrary, here the governing Tribe expressly authorized Huber's cigarette and tobacco sales. (CT, page 001133, ¶¶ 4-5; CT, page 001138.) Moreover, the record reflected that not only did not Tribe consider Huber's conduct to be lawful, but it appears to have rebuffed the Attorney General's numerous requests for assistance in forcing Huber to cease her business operations. (CT, pages 000525-000531.)

Finally, this case does not even present a situation involving an Indian conducting business on a foreign reservation. To the contrary, Huber conducted all of her business within her home on her Tribe's reservation and on land owned by the Wiyot Tribe.[4] (CT,

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[4] The Trial Court indicated that it believed that Huber's "off-reservation *contacts* across Northern California[]" were sufficient to trigger the UCL's application. (CT, page 001370-71, ¶ 25.) However, Huber's "*contacts*" are not the issue. The focus of all the Attorney General's claims are Huber' *sales*. The Attorney General presented no evidence to show that those sales occurred anywhere other than the Table Bluff Rancheria. Moreover, to the extent that the Huber's "off-reservation *contacts*" may be relevant, the record establishes that her only "off-reservation *contacts*" are contacts with other Indians and Indian tribes. Consequently, those contacts relate to *inter*tribal trade that is also beyond California's regulatory authority and is not subject to the type of state law restrictions the Attorney General seeks to impose here. (See *Warren Trading Post Co. v. Arizona Tax Comm'n* (1965) 380 U.S. 685, 690-691 ; *Milhelm, supra*, 512 U.S. at 74.)

pages 001133, ¶¶ 2-4.) Again, she did this with the Tribe's express permission. (CT, page 001133, ¶¶ 4-5; CT, page 001138.)

b. **There is no evidence showing Huber sold any cigarettes outside the boundaries of the Table Bluff Rancheria.**

The Trial Court indicated that it believed that Huber's "off-reservation *contacts* across Northern California[]" were sufficient to trigger the UCL's application. However, Huber's "*contacts*" are not the issue. The focus of all of the Attorney General's claims is Huber' *sales*. The Attorney General presented no evidence to show that those sales occurred anywhere other than the Table Bluff Rancheria.[5] Moreover, to the extent that the Huber's "off-reservation *contacts*" may be relevant, the record establishes that her only "off-reservation *contacts*" are contacts with other Indians and Indian tribes. Consequently, those contacts relate to *inter*tribal trade that is also beyond California's regulatory authority and is not subject to the type of state law restrictions the Attorney General seeks to impose here.

c. **State regulatory laws do not apply to Huber's conduct because she is an Indian engaging in business on her own reservation with the express permission of her Tribe.**

Because this case involves the on-reservation conduct of a tribal member this case is subject to a completely different set of rules and standard than was *Black Hawk*. As a general matter, in relation to the on-reservation conduct of tribal members, absent express

[5] The decision to issue a permanent injunction must be supported by the evidence. (*Cabrini Villas Homeowners Ass'n v. Haghverdian* (2003) 111 Cal.App.4th 683, 688.) Absent supporting evidence there is no basis for the exercising discretion to enter an injunction.

congressional consent state is excluded from exercising sovereign authority, over commercial activity. (See U.S. Const., Art. I, § 8, cl. 3; See also, *McClanahan v. Arizona Tax Comm'n* (1973) 411 U.S. 165, 168-169; *Bryan, supra*, 426 U.S. at 392 ["... Indians stand in special relation to the federal government from which the states are excluded unless the Congress has manifested a clear purpose to terminate (a tax) immunity and allow states to treat Indians as part of the general community."][internal citations omitted]; *People ex. rel. Department of Transportation v. Naegele Outdoor Advertising Company* (1985) 38 Cal.3d 509, 513-14 [California may not regulate outdoor advertising activities on Indian land]; *Middletown Rancheria of Pomo Indians v. W.C.A.B.* (1998) 60 Cal.App.4th 1340, 1343 [absent congressional authorization California's worker compensation laws are inapplicable to Indian owned businesses operating on the reservation]; *Arnett v. Five Gill Nets* (1975) 48 Cal.App.3d 454, 459 [absent congressional authorization California may not regulate on-reservation Indian fishing; see also, *In re Sonoma Fire Chief's Application for Inspection Warrant* (9th Cir. 2007) 228 Fed.Appx. 671, 673 [absent congressional authorization state and local fire safety laws may not be enforced within the boundaries of a federally established Indian reservation.].)

(1) Public Law 280 prohibits the application of California civil regulatory laws to Huber's on-reservation activity.

For California, the only expression of congressional intent regarding its civil jurisdiction over Indians on their reservations is PL 280. However, as discussed above, PL 280 does not provide California with any civil *regulatory* authority in Indian country.

To the contrary, as *Bryan*, *supra*, made clear, PL 280 prohibits states from exercising civil regulatory jurisdiction in instances such as this. (*Bryan, supra,* 426 U.S. at 390 [noting that "if Congress in enacting Pub.L. 280 had intended to confer upon States general civil regulatory powers, including taxation, over reservation Indians, it would have expressly said so."]; *California v. Cabazon Band of Mission Indians* (1987) 480 U.S. 202, 208 ["when a state seeks to enforce a law within and Indian reservation under the authority Pub. L. 280, it must be determined whether the law is criminal in nature, and thus fully applicable to the reservation under § 2, or civil in nature, and applicable *only as it may be relevant to private litigation in state court*." Emphasis added]; *Santa Rosa Band of Indians v. Kings County* (9th Cir. 1975) 532 F.2d 655, 658-659) [recognizing that "P.L. 280, by defining the limits of jurisdiction granted 'P.L. 280 states' such as California, necessarily preempts and reserves to the Federal government or the tribe jurisdiction not so granted [in P.L. 280.]"].)

(2) The United States District Court for the Northern District of California has determined California's civil regulatory laws do not apply within the Table Bluff Rancheria.

In accordance with the general categorical exclusion of state authority within the Table Bluff Rancheria, the United States District Court for the District of Northern California has expressly confirmed that California's civil regulatory laws have no application. (*Table Bluff Rancheria v. Andrus* (N.D. Cal. 1981) 532 F.Supp. 255 ("*Table Bluff*").) *Table Bluff* was a remedial action addressing the Wiyot Tribe's efforts to reestablish its trust relationship with the United States.

During the 1950s, the United States took steps to terminate the existence of a number of California Indian tribes and extinguish the trust relationship between them and the United States. (*Table Bluff, supra*, 258.) Under the California Rancheria Act of 1958, P.L. 85-671, 72 Stat. 619, as amended by the Act of August 11, 1964, P.L. 88-41. 78 Stat. 390, the United States purported to terminate forty-one California Indian tribes, including the Wiyot Tribe, distributing tribal property to individual members. (*Ibid.*). Upon distribution of tribal property, the tribes ceased to exist as recognized governments and the members of the former tribes were stripped of their "Indian" status. (*Ibid.*) Tribal lands and, which had been held in trust and exempted from state taxation and regulatory laws, were transformed into fee parcels. Thus, the land and individuals because subject to all state and local laws. (*Ibid.*).

In 1975, members of the formerly recognized Table Bluff Rancheria, or Wiyot Tribe, brought suit seeking the restoration of the Indian and tribal status and to return tribal land to it prior trust status thereby exempting it from state taxation and regulation. (*Table Bluff, supra*, 260) The members argued that their status, and the status of their tribe and lands were never property terminated under the Rancheria Act. (*Ibid.*).

On summary judgement, the District Court agreed. It found that the individuals' status as Indians and the tribes federal recognition were not properly terminated. (*Table Bluff, supra*, 532 F.Supp. at 260-261.) Additionally, the District Court found that because the termination was not effective the land within the Rancheria were never stripped of its trust status or its denomination as "Indian country." (*Id.*) On the latter issue, the District Court specifically addressed the fact that the tribal members sought the

have the Rancheria land returned to its "Indian country" status in order to "strip the state and county governments of any taxing or regulatory jurisdiction" within the Rancheria. (*Table Bluff, supra*, 532 F.Supp. at 262.)

Despite specific objections to stripping California and the county of taxing and regulatory authority the District Court emphatically declared: "Rancheria land designated as Indians Country will not be subject to state or local taxation *or other civil regulation* only so long as such lands remain in Indian ownership." (*Table Bluff, supra*, 532 F.Supp. at 262 [emphasis added].)

The decision in *Table Bluff* is neither an outlier, nor is it controversial. Rather, *Table Bluff* merely recognizes what the federal courts have consistently recognized since the beginning of our nation: That Indians on their own reservations are not subject to state control or regulation. (See e.g. *Williams v. Lee (1959)* 358 U.S. 217; *McClanahan, supra*, 411 U.S. 165; *Santa Rosa Band of Indians, supra*, 532 F.2d 655).

d. The Trial Courts justification for disregarding Table Bluff and other long standing federal precedents prohibiting California's regulatory depends on a misapplication or misunderstanding of United States Supreme Court precedent.

Despite a seemingly clear statement on the inapplicability of California's civil regulatory laws and the clear statement of the Indian commerce clause, the Trial Court ignored *Table Bluff* and other long standing federal precedent and expressly applied the UCL and the Fire Safety Act – two undeniably regulatory laws. The Trial Court's justification for the extension of is based on an apparent belief that the United States Supreme Court has authorized states to exercise blanket authority over on-reservation

conduct involving the sale of tobacco. As discussed in detail below, the Supreme Court precedent upon which the Trial Court seems to rely does not go nearly so far as the Trial Court believed.

(1) Supreme Court cases allowing states to impose minimal burdens on reservation retailers to aid in the collection of non-Indian taxes do not support the application of the UCL or Fire Safety Act.

As best can be discerned from the Trial Court's Order, it seems to have located that source of the People's on-reservation regulatory authority in the United States Supreme Court Cases *Department of Taxation & Finance of New York v. Milhelm Attea & Bros., Inc.* (1994) 512 U.S. 61 ("*Milhelm*"), *Washington v. Confederated Tribes of the Colville Indian Reservation* (1980) 447 U.S. 134 ("*Colville*"), *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation* (1976) 425 U.S. 463 ("*Moe*"), which the Trial Court referred to as the "tobacco cases." (CT, 001357, line 16.) However, they do not go so far as the Trial Court seems to suggest. In fact, even the Trial Court's classification of them as "tobacco cases" is misguided. Rather, than being "tobacco cases" *Moe*, *Colville*, and *Milhelm* are garden variety "tax" cases. Moreover, while they establish the sole exception to the categorical bar against state authority over reservation Indians, these case, and the exception are strictly limited to the issue of collecting taxes from *non-Indians* and *non-tribal members*. They do not, as the Trial Court's Order seems to suggest, provide for blanket regulation of the on-reservation commercial activity of Indians or Indian tribes.

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(a) Moe.

Moe, the first of the "cigarette tax cases," involved consolidated cases out of Montana addressing multiple issues. Specifically, in *Moe*, the Supreme Court considered the applicability within the Flathead Reservation of Montana's statutory scheme for assessing and collecting personal property taxes on vehicles owned by tribal members, the applicability of Montana's cigarette retailer licensing statutes as applied to tribal members selling cigarettes on the reservation, and Montana's attempt to require tribal cigarette retailers to precollect cigarette excise and sales taxes applicable to non-Indians purchasing cigarettes on the reservation. (*Moe*, *supra*, 425 U.S. at 467-69.)

In one combined portion of its opinion, the *Moe* court tacked the issues relating to Montana's attempt to impose property taxes on vehicles owned by tribal members, and its attempt to require that tribal members operating as on-reservation cigarette retailers obtain state issued vendor licenses.

Moe quickly dispensed with those portions of state law by which Montana sought to directly tax and regulate – through licensing – reservation Indians. In doing so, *Moe* relied on congressional statutes maintaining the trust relationship between the federal government and Indians and their lands as well as prior Supreme Court precedent announced in *McClanahan v. Arizona State Tax Commission* (1973) 411 U.S. 164 and *Mescalero Apache Tribe v. Jones* (1973) 145. Based on these precedents – which both recognized the sanctity of the notion that on-reservation activities of Indians are free from state taxation and regulation – *Moe* determined that personal property taxes could not be applied to tribal members and that that tribal members selling cigarettes on the

reservation were not subject to Montana's regulatory laws requiring them to obtain state vendor's licenses or pay licensing fees. (*Moe*, *supra*, 425 U.S. at 480-81.)

In addressing the issue of whether on-reservation Indian cigarette retailers could be required to pre-collect taxes from non-Indians, *Moe* took a slightly different approach. At the outset, *Moe* looked very closely at the taxes to determine whether they were imposed directly on the Indian retailers or whether they were in fact imposed on the non-Indian purchasers. (*Moe*, *supra*, 425 U.S. at 482.) Therefore, *Moe* concluded that because the taxes fell on non-Indians, assessment and collection would not frustrate the "congressional purpose of ensuring the no burden shall be imposed upon Indian traders for trading with Indians on reservations." (*Id.*)

Moe determined that the cigarette excise tax at issue was a tax on the purchaser, not the Indian retailer. *Moe* then noted that without having the retailer pre-collect the taxes from non-Indian purchasers, the non-Indians would be likely to continue to avoid their obligation to pay taxes in violation of Montana law. (*Moe*, *supra*, 425 U.S. at 482.). *Moe* held that a requirement that an Indian retailer pre-collect a cigarette tax from non-Indians was a minimal burden specifically "designed to avoid the likelihood that … non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax. (Id., at 483.) Moreover, *Moe* specifically found that "nothing in this burden … frustrates tribal self-government …" (*Id.*) Consequently, *Moe* held that Indian retailers may be required to "aid the State's collection and enforcement …" of taxes on non-Indians.

What *Moe* did not do is allow Montana to impose general state laws – such as the UCL and Fire Safety Act – broadly regulating any on-reservation commercial operation

in which a tribal member engages. Nor did it require tribal cigarette retailers to comply with the regulatory aspects of Montana's laws relating to the sale of cigarettes. Likewise, *Moe* did not allow Montana to dictate the kind and quality of cigarettes offered by tribal retailers. To the contrary, *Moe* prohibited the imposition of Montana law directly affecting or regulating reservation Indians. (*Moe*, *supra*, 425 U.S. at 478-81.)

(b) Colville.

Colville, the second of the "cigarette tax cases," is not significantly different from *Moe*. Like *Moe*, *Colville* involved a state's efforts to impose state taxes within the boundaries of an Indian reservation. (*Colville*, *supra*, 447 U.S. at pg 35.) Specifically, the State of Washington sought to impose motor vehicle and mobile home, camper, and trailer taxes on vehicles owned by the Tribe and its members. Additionally, Washington sought to impose and collect taxes from non-Indians and non-member Indians for their on-reservation cigarette purchases. (*Id.*, at 160.)

In response to Washington's attempt to tax non-Indian on-reservation cigarette purchases, *Colville* acknowledged that *Moe* largely decided the issue. (*Colville*, *supra*, 447 U.S. at 151-52.) Thus, the Court announced that, as a general matter, a state "may sometimes impose a nondiscriminatory tax on non-Indian customers of Indian retailers doing business on the reservation." (*Id.*, at 151.) Further, the Court additionally provided that a state may impose "minimal" burdens on the Indian retailer *to aid in enforcing and collecting the tax*." (*Id.* [emphasis added].)

However, as the Court recognized *Moe* die not resolve other issued raised in *Colville* relating to the effect of a tribal tax scheme had on a state's taxing authority, or

whether the state could tax sales to Indians who were not members of the Tribe. (*Colville*, *supra*, 425 U.S. at 151-52.)

Regarding the first issue, *Colville* concluded that the fact that a Tribe imposes a tax on cigarette sales similar to a state does not oust the state from its authority to likewise tax purchases of nonmembers. (*Colville*, *supra*, 425 U.S. 156-59.) *Colville* recognized that this was particularly the case when the tax is "directed at off-reservation value and when the taxpayer is the recipient of state services." (*Id.*, at 157.) Under those circumstances, *Colville* found that, even though imposition of the tax on nonmembers may deprive Indian tribes of revenues, it did not "infringe the right of reservation Indians to 'make their own laws' and be ruled by them ..." (*Id.*)

Next, *Colville* took up the issue of whether Washington's tax collection scheme imposed unreasonable burdens on the tribal retailers. The statutory scheme at issue required "smokeshop operators to keep detailed records of both taxable and nontaxable transactions." (*Colville*, *supra*, 425 U.S. at 159.) Specifically, it required the smokeshop operator to "record the number and dollar volume of taxable sales to nonmembers of the Tribe" and to "record and retain for state inspection the names of all Indian purchasers, their tribal affiliations, the Indian reservations within which sales are made, and the dollar amount and dates of sales." (*Id.*)

Colville upheld these burdens and found them valid. However, *Colville* made clear that the Court's finding was not based on the general assumption that the burdens were reasonable. Rather, *Colville* was specific in noting that it found the record keeping requirements were valid because Tribe's failed to meet their evidentiary burden of

showing "the State's recordkeeping requirements for exempt sales are not reasonably necessary as a means of preventing fraudulent transactions." (*Colville*, *supra*, 425 U.S. at 160.)

In addition to determining that a tribally imposed tax on on-reservation sales to nonmembers does not oust otherwise valid state taxes on those transactions, *Colville* also expanded the reach of *Moe*. Because the issue was not presented to it, the *Moe* court did not address the issue of whether a state may impose taxes on the purchases of Indians who are not members of the tribe having jurisdiction over the reservation on which the sales occur. *Colville* specifically addressed this issue.

Regarding transactions involving non-member Indians, *Colville* determined that just like non-Indians, nonmember Indians' purchases were also subject to otherwise valid state taxes. In large part, the *Colville* court based this determination on the fact imposing a state tax on non-member Indians would not "contravene the principle of self-government, for the simple reason that nonmembers are not constituents of the governing Tribe." (*Colville*, *supra*, 425 U.S. at 161.) Rather, in the Court's view, non-member Indians "stand on the same footing as non-Indian residents on the reservation." (*Id.*) Therefore, as to the non-member Indians, the Court found "that the State's interest in taxing these purchasers outweighs any tribal interest that may exist in preventing the State from imposing its taxes." (*Id.*)

Other than expanding the reach of the decision to include nonmember Indians, *Colville* is little different from *Moe*. Most importantly for purposes of this action, like *Moe*, *Colville* only addressed a state's authority to tax nonmembers who purchase

cigarettes from tribe's and tribal members operating from within their reservation. Moreover, like *Moe*, nothing in *Colville* can be read to allow a states to impose general regulatory laws within the reservation to regulate the commercial conduct tribal members.

In relation to this point, just as it did in *Moe*, the Supreme Court in *Colville* also addressed the states' ability to directly regulate tribal members through taxation. As noted above, separate from the cigarette tax issue, *Colville* also addressed Washington's ability to impose its motor vehicle and mobile home, camper, and trailer taxes on vehicles owned by the tribe's and their members. On this issue, *Colville* reiterated what the Supreme Court stated in *Moe*—that Washington had no authority to impose its tax laws directly on Indians in relation to their use and possession of motor vehicles within the boundaries of the reservation. In other words, in *Colville*, the Supreme Court again recognized that the identity of the target a state regulation and the location of the matter over which a state seeks to exercise authority are critical considerations. If the person is a tribal member, and the matter that is otherwise subject to regulation occurs within the boundaries of the reservation the state has no authority.

(c) Milhelm.

Milhelm, *supra*, the last of the United States Supreme Court's "cigarette tax cases" does not even involve tribal members selling cigarettes within the boundaries of their reservation. Rather, *Milehelm* involves New York's efforts to regulate non-Indian wholesalers located off-reservation but selling cigarettes to on-reservation retailers. (*Milhelm*, 512 U.S. 61, at 64, 74 n. 10.)

As the *Milhelm* court noted, the New York Department of Finance determined that "unlawful *purchases* of unstamped cigarettes [by non-Indians] deprived New York of substantial tax revenues . . .." (*Milhelm*, 512 U.S. at 65.) Therefore, the Department adopted comprehensive regulations to assist New York in capturing those taxes. (*Id.*)

Indeed, the regulations were comprehensive in their effort to prevent the flow of unstamped cigarettes onto the reservations as early in the distribution stream as possible. However, they also recognized the rights of reservation Indians to be free from state taxation and regulation.

New York's regulations recognized "the right of 'exempt Indian nations or tribes, qualified Indian consumers and registered dealers" to purchases and possess untaxed cigarettes. (*Milhelm*, 512 U.S. at 65.) However, to help ensure that non-Indians did not unlawfully purchase untaxed cigarettes, by non-Indians the regulations placed quotas on the number of cigarettes that off-reservation wholesalers could sell to tribes and tribal retailers. (*Id.*)

Additionally, before a wholesaler could engage in business with tribes and tribal retailers, the New York regulations required the off-reservation non-Indian wholesalers to hold state licenses. (*Milhelm*, 512 U.S. at 67.) Additionally, the regulations required the wholesalers to pre-collect taxes on all non-exempt sales. (*Id.*) Finally, the regulations required the off-reservation non-Indian wholesalers to maintain records of the identity of the buyer of exempted cigarettes and to make monthly reports to the Finance Department regarding such sales. (*Id.*)

The regulations did not impose any burdens or requirements directly on the tribes or Indian retailers.

In reviewing New York's scheme, *Milhelm* made several key observations and findings. First, as noted above, the Court made a point to recognize that the Plaintiff's and all other "wholesalers" were all non-Indians operating outside the reservations. (*Milhelm*, 512 U.S. at 74, n. 10.) Second, *Milhelm* went to pains to illuminate the fact that of New York's regulations were specifically "*designed*" to capture taxes from non-Indians. (*Id.* at 65-66, 74-75.) Third, *Milhelm* additionally recognized that the "sole purpose and justification" for the quota – the only portion of the regulations that had any potential impact on tribes and tribal retailers – was the "State's interest in avoiding tax evasion by non-Indian consumers." (*Id.* at 75.) Fourth, *Milhelm* observed that New York's regulatory scheme was intentionally designed to address the trade in tax-free cigarettes "early in the distribution stream" and "without unnecessarily intruding on core tribal interests." (*Id.*) Finally, *Milhelm*, noted that regulations designed to enforce the obligations of non-Indians in relation to goods purchased on the reservation "stands on a markedly different footing" from obligations imposed directly on members of Indian tribes. (*Id.* at 73.)

These observations and findings led the *Milhelm* to simple finding that "Indian traders are not wholly immune from state regulation that is "*reasonably necessary to the assessment and collection of lawful state taxes.*" (*Milhelm*, 512 U.S. at 75.)

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(2) Unlike the Supreme Court cases upon which the Trial Court relied, this is not a "tax" case.

While lengthy, this discussion of the United States Supreme Courts "cigarette tax cases" is important. These cases establish a few very basic principles. First, states sometimes have a right to impose non-discriminatory taxes on non-Indian and nonmember Indian customers of Indian retailers doing business on the reservation. (*Milhelm, supra*, 512 U.S. at 71-72.) Second, to assist with capturing taxes from non-Indians, a state may regulate non-Indians going onto the reservation to sell goods to Indian tribes and Indian retailers. (*Id.* at 75-77) Third, sometimes a state may impose minimal burdens on the Indian retailers to enlist them in the state's efforts to capture taxes on non-Indians and nonmember Indians. (*Id.* at 74.) Fourth, any burdens imposed on reservation Indians must be specifically designed to assist the state with the capture of taxes from non-Indians and nonmember Indians. (*Id.* at 74-76.) Fifth, and finally, any burdens imposed on either non-Indians or Indians relating to the capture of taxes cannot interfere with "core" tribal interests, including the rights of tribe and their members to make and live under their own laws.

This is not a tax case. The importance of this fact cannot be over emphasized. Indeed, if the People have made one thing clear, it is that they do not, and cannot, seek to assess or collect taxes attributable to non-Indians or non-members of the Wiyot Tribe. To be sure, the People adamantly maintain that: ***"The People do not assert any claims to collect unpaid taxes."*** (CT, 000052, lines 17-18.) Rather, the by utilizing the UCL the People seek only to regulate Huber's on-reservation commercial conduct and dictate the

business practices in which she may engage. Thus, by the People's own acknowledgement *Moe*, *Colville*, and *Milhelm* have no application to this case.

As *Milhelm* explained, and as discussed above, a critical factor in allowing state to impose "minimal burdens" on tribal retailers was that those burdens were specifically designed for the assessment and collection of taxes from non-Indians and nom-tribal member and were narrowly tailored and "reasonably necessary" for the achievement of that purpose.

(3) The UCL goes far beyond "burdens" allowed in the "tax" cases.

The burdens that the application of the UCL imposes on reservation Indians bears no resemblance to the very limited burdens allowed in *Moe*, *Colville*, and *Milhelm.* In particular, unlike the burdens allowed in those cases, the UCL is practically free from any limiting principles, let alone being limited to taxation. Rather, the sole purpose of the UCL is to "protect both consumers and competitors by promoting fair competition in commercial markets for goods and services. (*Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 949.)

Because of this expansive goal the Legislature drafted the UCL in "broad, sweeping language" defining unfair competition to include "any 'unlawful, unfair, or fraudulent business practice.'" (*Farmers Insurance Exchange v. Superior Court* (1992) 2 Cal.4th 377, 383. See also, e.g. *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180; *Korea Supply Co. v. Lockheed Martin Corp* (2003) 29 Cal.4th 1134, 1143.) Thus the coverage of the UCL embraces "anything that can properly be called a business practice and that at the same time is forbidden by law."

(*Cel-Tech*, *supra* 20 Cal.4th at 180, [internal citation omitted].) Moreover, because '[i]t would be impossible to draft in advance detailed plans and specifications of all acts and conduct prohibited [by the UCL], since unfair or fraudulent business practices may run the gauntlet of human ingenuity and chicanery[]" the UCL was drafted with the intention that it would be overly expansive and adaptive. (*Cel-Tech*, *supra.*, 20 Cal.4th at 181 [citations omitted].)

In addition, as part of its expansive scheme, the UCL "borrows violations of other laws" treating those violations as unlawful practices that then become independently actionable under the UCL. (*Id.*) Thus, the UCL, as it was intended, extends well beyond the very limited area of assisting California with the assessment and collection of taxes. Rather, it regulates every aspect of a business operation incorporating every state, local and federal law into its regulatory repertoire. And, in fact, that is precisely how the People are employing the UCL in this action – as a mechanism through which to impose other California laws on an Indian's on-reservation commercial activity and dictate the manner in which she conducts business.

The Trial Court's order imposing a permanent injunction restricting Huber's on-reservation commercial conduct raises immediate concerns because it directly violates the Indian commerce clause, which excludes states from regulating commerce with Indians. (U.S. Const., art. I, § 8, cl. 3.) As discussed above, it also violates PL 280, and long standing federal law.

e. **The Trial Court's finding that the UCL is not a standalone law and that the "Predicate Statutes" may determine the application of the UCL is without legal support.** [6]

The Trial Court appears to attempt to sidestep that the UCL is not the type of regulation or burden that People may properly impose on Huber by finding that the UCL is not a standalone statute and that Court may look behind the UCL and base its applicability on "predicate statutes." (CT, 001358, line 8-9.) The California Supreme Court seems to have said otherwise.

The California Supreme Court has made it abundantly clear that the UCL has the singular purpose of regulating competition in commercial markets for goods and services. (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 320) Moreover, the California Supreme Court recognizes that an action brought pursuant to the UCL to restrain "unlawful" business practices does not borrow the legislative purposes or intent of the predicate statutes. (*Rose v. Bank of America, N.A.* (2013) 57 Cal.4th 390, 396; *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 566.) Likewise, in both and *Rose* and *Stop Youth Addiction*, the California Supreme Court made clear the despite borrowing violations of the predicate statutes to serve as violations of the UCL, the UCL cannot be utilized as and enforcement mechanism for the predicate statutes. (*Rose*, 57 Cal.4th at 399; *Stop Youth Addiction*, 17 Cal.4th at 566.)

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[6] Oddly, the trial court's Order is that it addresses Huber's argument regarding the singular and standalone qualities of the UCL in relation to Huber's motion for summary judgment. However, Huber never raised this issue in her motion. Rather, this aspect of Huber's argument was raised only in opposition to the Attorney General's motion for summary judgment and her request for injunctive relief and civil penalties pursuant the UCL.

The California Supreme Court's explanation of the relationship between the UCL and the "predicate statues" which it borrows in certain instances should lead to only one conclusion – the UCL must be determined to apply to a particular case on its own merits and without reference to the "predicate statues."

D. The predicate statutes, even if properly considered, do not give rise to regulatory authority on the part of the People.

Even if the applicability of the UCL could derive from the "predicate statutes", the statutes that form the basis of the People's UCL action are, like the UCL itself, well beyond the type of regulatory authority the Supreme Court has recognized states may, in rare instances, exercise in Indian country. Again, the sole authority the United States Supreme Court has recognized is the authority to impose "minimal burdens" specifically designed to assist with the assessment and collection of valid state taxes from non-Indians and Indians going onto foreign reservations. (*Milhelm, supra*, 512 U.S. at 72-74.)

1. **The Directory Law does not impose minimal burdens "reasonably necessary" to narrow purpose of collection taxes from non-tribal members.**

Just as the UCL does not relate to the assessment or collection of lawful taxes, the California Directory Law is not designed for, or reasonably necessary to, that purpose. Rather, the purpose of the Directory Law is to assist the Attorney General with enforcing the Tobacco Master Settlement Agreement ("MSA").

Rather than creating regulations reasonably necessary to the collection of taxes, the Directory Law imposes obligations on cigarette manufacturers in an attempt to elicit their compliance with the MSA. Thus, manufacturers of cigarettes sold in California

must, on a yearly basis, certify to the Attorney General that they are either: (1) a "participating manufacturer" under the MSA that "has made all payments" due under the MSA; or (2) a "non-participating manufacturer" that has fully complied with California's tobacco escrow requirements. (Rev. & Tax. Code, § 30165.1(b).) The Attorney General then places the brands families of manufactures that comply with the terms of the MSA on a publically published list of brands considered lawful for sale in California. (Rev. & Tax Code, § 30156.1(c).)

To assist in forcing compliance with the MSA the Directory Law prohibits any person from selling, possessing for sale or distributing within California any cigarettes that do not appear on the Directory List. (Rev. & Tax. Code, §30165.1(e)(2).) In addition, the Directory Law also prohibits a person from distributing cigarettes that the person "knows or should know" are intended to be distributed in violation of the Directory Law. (Rev. & Tax. § 30165.1(e)(3).)

While the provisions of the Directory Law imposing burdens on cigarette manufactures in order to compel compliance with the MSA and satisfy California's obligations under its agreement with major tobacco companies are substantial, its provisions relating to taxation are very sparse. To be sure, the Directory Law, because it is not intended or designed to do so, cannot reasonably be said to assist the assessment and collection of taxes from non-Indians purchasing cigarettes on a reservation. Remarkably, the only way the Directory Law relates to taxation in any meaningful manner is *preventing the payment of cigarette surtaxes* by prohibiting any person from

paying cigarette taxes "levied pursuant to Sections 31023 and 30131.2 on a tobacco product defined as a cigarette under this section, unless the brand family of the cigarettes or tobacco product and the tobacco product manufacturer that makes or sells the cigarettes or tobacco product, are included on the [directory] list ...." (Rev. & Tax. Code, § 30165.1(e).)

Thus, rather than facilitating California's ability to collect cigarette and tobacco excise taxes from non-Indians the Directory Statute creates an artificial barrier to the collection of those taxes by limiting the brand of cigarette on which taxes may be collected. Consequently, it is not a stretch to say that the type of restrictions, or burdens, created by the Directory Law falls well outside the boundaries of the regulations sanctioned in the Cigarette Tax Cases.

2. Under California law, Huber's sales in purported violation of California's cigarette excise tax laws cannot give rise to UCL liability.

In addressing the Trial Court's finding that Huber violated the UCL by failing to collect and remit cigarette and tobacco products excise taxes required by sections 30101, 30108, 30123, and 30131.2 of the Revenue and Taxation Code, it is important to keep in focus the People's acknowledgment that "***The People do not assert any claims to collect unpaid taxes.***" (CT, 000052, lines 17-18.) Nor, as discussed fully below, could the People assert any claims to collect unpaid taxes because, the sales do not occur in California, and the People have no standing, or authority, to bring an action to collect unpaid taxes. To the contrary, that authority rests solely with the BOE, which appears to

have construed California's tax laws such that they do not apply to Huber's conduct on her reservation.

a. Indian Country is Separate From California Under the Cigarette and Tobacco Products Tax Law.

Even if the violations of the Directory Law and the failure to collect and remit cigarette excise taxes could provide a basis for UCL liability, they would give rise to liability in this instance. This is so because the California Cigarette Tax Law provides that Indian country, including the Table Bluff Rancheria, is not part of California.

Importantly, the limitations found in the Directory Law and the obligation to collect and remit cigarette products taxes and surtaxes only impose requirements on individuals selling cigarettes and other tobacco products *within* California. (Rev. and Tax Code, § 30165.1(e)(2)-(3).)

However, as provided in the California's Cigarette Tax Law, Indian country is not part of California. Section 30101.7(c)(5) of the Cigarette Tax Law – which also includes the Directory Law – defines "Indian country" as: (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether

within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.[7]

Importantly, the California Cigarette Tax Law recognizes that transactions occurring in Indian country occur in *inter*state commerce and thus outside California. Section 30101.7(c)(6) defines "Interstate commerce as: "commerce between a state and any place outside the state, commerce *between a state and Indian country in the state*, or commerce between two points in the same state but through a place outside the state *or through Indian country*. (Rev. and Tax. Code, § 30101.7(c)(6) [emphasis added].)

The fact that this definition appears in only one section of the Tax Law is immaterial. Taxing statutes are *in pari materia.* (*In re Jacob's Estate* (1943) 61 Cal.App.2 152, 158.) Statutes are considered *in pari material* "when they relate to the same person or thing, to same class of persons [or] things, or have the same purpose or object. The characterization of the object or purpose is more important than characterization of the subject matter in determining whether different statutes are closely enough related to justify interpreting one in light of the other." (*Walker v. Superior Court* (1988) 47 Cal.3d 112, 124 fn. 4.)

Here, the relevant definitions of "Indian county" and "Interstate commerce" are an integral part of the Cigarette Products Tax Law. The objective of the entire chapter is to

[7] These definitions appear in 18 U.S.C. 1151, which section 30101.7(c)(5) adopts and incorporates for the purpose of identifying Indian country.

establish a mechanism for imposing and collecting taxes on sales of cigarettes within California. Moreover, as the California Legislature announced, the purpose and intent of the definitions of section 30101.7, within the Cigarette Tax Law, is to "facilitate the collection of all applicable state surtaxes, sales or use taxes, and escrow and other payment obligations on cigarettes sold" in California.

It is notable that the "surtaxes" referenced in section 30101.7 are precisely the "surtaxes" the Attorney General claims Rose was required to collect pursuant to sections 30123 and 30131.2 of the Cigarette Tax Law and which are only due on cigarettes distributed *in* California. Also notable is the fact that section 30165.1 of Cigarette Tax Law is directed at collecting escrow and other payment obligations of cigarette manufacturers pursuant to the Tobacco Master Settlement Agreement and restricting the right sell any cigarettes not compliant with the Master Settlement Agreement *in* California.

By their very terms sections 30101.7, 30101, 30123, 30131.2, and 30165.1 are intended for the same purposes and objectives: They are *in pari material* and must be construed as one. The definitions of "Indian country" and "Interstate commerce" found in section 30101.7 dictate that "Indian country" is not part of California for purposes of any section of the Cigarette Tax Law. Therefore, because, the California Legislature has provided that the provisions of 30123, 30131.2 and 30165.1 *do not* apply in Indian country, which is outside California, they cannot form the basis of UCL violations arising out of Huber's on-reservation activities.

b. **The Board of Equalization has sole authority over the assessment and collection of cigarette excise taxes and has not determined taxes are due.**

Another reason that Huber cannot be held in violation of the UCL for the failure to collect and remit cigarette excise taxes is that the Board of Equalization has not determined that any such taxes are due. In fact, the Boards prior actions, or inaction, in relation to Huber indicates that the Board does not interpret California's cigarette and other tax laws to apply to Huber's cigarette sales.

As noted early on, at one point the BOE issued Huber a license in relation to her cigarette sales. (CT, page 001134, ¶ 12.) However, quickly after obtaining the California license, Huber surrendered her license to the Board. (CT, page 001134, ¶ 12; CT, page 001141.) Moreover, Huber expressly informed the Board that she was surrendering her license because she was conducting her cigarette retail business within the boundaries of the Table Bluff Rancheria and indicated that if she ever intended to conduct business off the reservation she would submit a new application. (CT, page 001145.) Although the Board has undoubtedly remained aware of Huber's cigarette sales it has never taken any action against Huber. (CT, page 001135, ¶ 15.) More specifically, the Board has never sent Huber any notification that she has any obligation to collect or remit taxes in relation to her cigarette sales. (Ibid.)

It is entirely incongruous to suggest that Huber's sales of cigarettes can violate California's tax laws and give rise to UCL liability, when, despite having full knowledge

of Huber's business operations, the agency with primary jurisdiction over the assessment and collection of taxes has never indicated to Huber that her cigarette sales are illegal.

c. The Cigarette Tax Law does not allow for UCL claims for failure to collect and pay cigarette excise taxes.

Finally, as it pertains to Huber's purported violation of California's cigarette excise tax laws, the Cigarette Tax Law does not allow those violations to be utilized as "predicate statutes" giving rise to liability under the UCL as "unlawful" business practices.

In the Cigarette Tax Law, the California Legislature indicated when violations of certain provisions of the Law would constitute unfair competition under section 17200 of the Business and Professions Code. (See Rev. & Tax. Code §§ 30163 and 30165.1.) Thus, the California Legislature expressly provided violations of section 30163(a) and (b) *shall constitute unfair competition under Section 17200 of the Business and Professions Code*. (Rev. & Tax. Code, § 30163(d)[declaring violations of section 30163(b) to be unfair competition]; 30165.1 (e)(1) and (2) [declaring a violation of section 30163(a) to be unfair competition].) Likewise, the Legislature declared that violation of section 30165.1(e) shall also *constitute unfair competition under Section 17200 of the Business and Professions Code*. The Legislature *did not* provide that a violation of any other provision, including a violation of sections 30101, 30123, or 30131.2 – the section requiring payment of cigarette taxes and surtaxes – constitute unfair competition under Section 17200 of the Business and Professions Code.

The Trial Court appears to have supposed that every violation of law automatically constitutes unfair competition. While, as discussed above, the UCL is incredibly broad and sweeping, it cannot apply in instances where the Legislature has, through direct provision or negative implication, stated its intention otherwise.

It is a bed-rock rule of construction that courts must give effect "to every word, clause and sentence of a statute." (*California Housing Finance Agency v. E.R. Fairway Associates I* (1995) 37 Cal.App.4th 1508, 1515 [citations omitted].)

Moreover, courts should interpret statutes "so that no part will be inoperative or superfluous, void or insignificant and so that one section will not destroy another unless the provision is the result of obvious mistake or error." (*Rodriguez v. Superior Court* (1993) 14 Cal.App.4th 1260, 1269 [quoting 2A Sutherland, Statutory Construction (5th ed. 1992) §46.06, pp. 119-120, fns. omitted].) Additionally, statutes must be considered as a whole and are directed at one primary purpose and thus "each part or section should be construed with every other part or section so as to produce a harmonious whole." (*Rodriguez*, 14 Cal.App.4th at 1268 [quoting Sutherland, Statutory Construction, § 46.05, p. 103, fn. omitted.)

3. Whether applied independently or as a "predicate statute" under the UCL the Fire Safety Act does not impose minimal burdens "reasonably necessary" to narrow purpose of collection taxes from non-tribal members.

With regard to the Cigarette Fire Safety Act, there is no room to argue that it relates to taxation in any way. There is not a single tax - related provision anywhere in

the Act. The fact that the Cigarette Fire Safety Act appears in the Health and Safety Code, and not in the Revenue and Taxation Code itself indicates that it is not tax related. Indeed, the actual provisions of the Act bear that out.

Rather, the sole purpose of the Cigarette Fire Safety Act is to regulate the characteristics of cigarettes and the markings that appear on cigarette packaging. (See Health & Saf. Code, §§ 14952 and 14954.) In particular, the goal of the Cigarette Fire Safety Act is to regulate cigarette manufacturers by requiring them to certify that cigarettes they manufacture have been tested and meet fire safety standards of reduced ignition propensity. (Health & Safety Code, §§ 14952 -14593.) By design, the law is intended to reduce the risk that cigarettes left unattended will ignite combustible material.

Like the Directory Law, the Cigarette Fire Safety Act imposes numerous burdens on cigarette manufactures relating to providing the California Office of the State Fire Marshall that cigarettes meet the necessary ignition propensity standards, including the testing and certifications discussed above as well as placing approved markings on cigarette packages. (Health & Safety Code, §§ 14952 – 14954.) Also, like the Directory Law, the Cigarette Fire Safety Act prohibits any person from selling within California any cigarette in violation of the Act. (Health & Safety Code, § 14955(b).)

While the purposes of the Cigarette Fire Safety Act are unquestionably admirable, they are just as unquestionably wholly unrelated to the assessment and collection of taxes. Indeed, the only provision the Cigarette Fire Safety Act that deals with taxation Section 14951(b)(1) which allowed distributers, wholesalers, or retailers of cigarettes to

sell cigarettes that were not certified as "fire-safe" if the tax stamps were affixed to the cigarettes prior the Act becoming effective. Therefore, there simply is no reasonable argument that the Cigarette Fire Safety Act is designed for, or "reasonably necessary" to the collection of taxes from non-Indians and non-tribal members purchasing cigarettes from a tribal retailer on a reservation.

Because the Fire Safety Act is not the type of regulation the United States Supreme Court has allowed it cannot be imposed on Huber's on-reservation conduct. Additionally, when it comes to the imposition of state and local fire related laws, we do not operate with an entirely clean slate. To the contrary, the Ninth Circuit has spoken to this very issue.

In the case of *In re Sonoma County Fire Chief's Application for an Inspection Warrant* (9th Cir. 2007) 228 Fed.Appx. 671 ("*Sonoma County*")[8], the Ninth Circuit considered whether the Sonoma County Fire Chief could enforce fire codes on the Dry Creek Rancheria. (*Sonoma County*, 228 Fed.Appx. at 672.) In very succinct fashion, the Ninth Circuit ruled "the County could not enforce fire codes on reservation lands." (*Ibid.*, citing, *California v. Cabazon Band of Mission Indians* (1987) 480 U.S. 202, 207-210 ("*Cabazon*").) The Ninth Circuit stated: "Public Law 280 does not authorize states

[8] Although, *Sonoma County* is an unpublished federal opinion it remains valid persuasive authority California. (*Harris v. Investor's Bus. Daily, Inc.* (2006) 138 Cal.App.4th 28, 34 ["[E]ven unpublished federal opinions have persuasive value in this court, as they are not subject to [Rule 8.1115] which bars citation of unpublished California opinions."].)

to enforce civil regulatory laws on tribal land, and the fire codes in question here fall into that category." (*Ibid.*)

While the Ninth Circuit acknowledged *Cabazon's* position that "there might exist 'exceptional circumstances' justifying a state's 'jurisdiction over the on-reservation activities of tribal members'" it found "the fire codes do not constitute such an "exceptional circumstance." (*Sonoma County*, 228 Fed.Appx, at 672.)

The same is true here the Cigarette Fire Safety Act is a purely regulatory law that may not be enforced against tribal members within the boundaries of the Table Bluff Rancheria. The Act does not fit within the narrow exception of the rule relating to the assessment and collection of taxes from non-Indians or non-tribal members. Moreover, there are no exceptional circumstances, and the Trial Court did not find any, the would militate in favor of the application of the Cigarette Fire Safety Act. As a consequence, it cannot form the basis of liability on the part of Huber under the UCL or its own terms.

III. CONCLUSION

Despite the constant recognition by federal and California courts that California may not exercise jurisdiction – adjudicatory or regulatory – over the commercial activities of reservation Indians, the People continue their quest for this elusive power. In this instance, the People seek to impose one of California's broadest and most sweeping commercial regulatory laws, for the thinly veiled purpose of enforcing California's laws relating to restrictions on the kind and quality of cigarettes that may be sold in California.

The Trial Court sanctioned the People's effort to circumvent federal and state law as well as the California Board of Equalization's sole and primary jurisdiction over demanding compliance with California's cigarette tax laws by imposing liability on Huber under the UCL. In so doing, the Trial Court turned decades of federal and state legal precedents on their heads and effectively subjected a tribal member's on-reservation conduct to the full panoply of California's civil laws.

Remarkably, the Trial Court approved this power grab despite the fact that it lacked any authority to adjudicate a regulatory action directed at the on-reservation activities of a tribal member. Moreover, it supported it decision to by utilizing standards and precedents applicable only to non-Indians or Indians engages in off-reservation conduct, and misconstruing United State Supreme Court non-Indian "tax" as cases granting wholesale regulatory authority over reservation Indians.

Because the Trial Court had no jurisdiction over this matter and because its other conclusions of law are erroneous the Trial Court's order permanently enjoining Huber's on-reservation conduct should be vacated and this case dismissed in its entirety.

DATED: May 22, 2015 **FREDERICKS PEEBLES & MORGAN LLP**

By: _____

Michael A. Robinson
Attorneys for Appellant

CERTIFICATION

I hereby certify that according to the computer program used to prepare the foregoing brief, it consists of 13,593 words, including footnotes.

By: _____

Michael A. Robinson
Attorneys for Appellant

PROOF OF SERVICE

Case Name: ***The People of the State of California, ex rel. Kamala D. Harris, Attorney General of the State of California v. Ardith Huber, et al.***

Case Number: A144214

I declare I am employed in the County of Sacramento, State of California. My business address is: 2020 L Street, Suite 250, Sacramento, California 95811. I am over the age of eighteen (18) years and not a party to the within action.

On **May 22, 2015**, I served the within: **APPELLANT'S OPENING BRIEF** on the party(ies) listed below, addressed as follows:

KAMALA D. HARRIS Attorney General of California KAREN LEAF Senior Assistant Attorney General **Nicholas M. Wellington** Deputy Attorney General 1515 Clay Street, 20th Floor Oakland, CA 94612 E-Mail: Nicholas.Wellington@doj.ca.g	Counsel for Plaintiff/Respondent **PEOPLE OF THE STATE OF CALIFORNIA, EX REL. KAMALA D. HARRIS, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA**
The Honorable W. Bruce Watson Humboldt County Superior Court 825 Fifth Street Eureka, CA 95501	Judge of the Superior Court
Supreme Court of California 350 McAllister Street San Francisco, CA 94102	Submission: Electronically via Court of Appeal website.

XX **Federal Express Mail:** by placing a true copy thereof in an overnight delivery envelope and placing the envelope in a Federal Express drop box at Sacramento, California, addressed to all above.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **May 22, 2015**, at Sacramento, California.

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