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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

FRESNO DIVISION

BIG SANDY RANCHERIA ENTERPRISES, a federally chartered corporation, Plaintiff, **v.** **XAVIER BECERRA, in his official capacity as Attorney General of the State of California; and NICOLAS MADUROS, in his official capacity as Director of the California Department of Tax and Fee Administration,** Defendants.	1:18-cv-00958-DAD-EPG **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT BECERRA'S MOTION TO DISMISS PLAINTIFF BSRE'S FIRST AMENDED COMPLAINT** Date: December 4, 2018 Time: 9:30 a.m. Courtroom: 5, 7th Floor Judge: The Honorable Dale A. Drozd Trial Date: N/A Action Filed: July 13, 2018

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INTRODUCTION

In 2011, the U.S. Government Accountability Office (GAO) issued a report to Congress regarding illicit trade in cigarettes. Trafficking, it explained, arises because "[t]obacco products face varying levels of taxation in different locations, creating opportunities and incentives for illicit trade." U.S. Gov't Accountability Office, GAO-11-313, Illicit Tobacco: Various Schemes Are Used to Evade Taxes and Fees (2011). The report described several common illicit trade schemes, specifically identifying the "[p]urchasing [of] cigarettes in Indian country for resale to nontribal members" as a scheme for the avoidance of state and local taxes and fees associated with the tobacco Master Settlement Agreement (MSA).[1] *Id.* at 16. This constitutes trafficking because "[c]igarettes sold to tribal members in Indian country are exempt from state taxation but not sales to nontribal members, unless state law or an agreement exempts sales to nontribal members from taxation." *Id.* at 21. Officials at the federal Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) added that "another common scheme involves falsely reporting that cigarette sales are destined for . . . Indian country, when the sale is actually made in a[n] MSA state." *Id.* at 22.

The GAO's findings were not novel or surprising. Observers of the domestic cigarette market have reached similar conclusions for decades. *E.g.*, Advisory Comm'n on Intergovernmental Relations, Cigarette Bootlegging: A State and Federal Responsibility 6 (1977) ("[W]estern States have listed the purchase of tax-free cigarettes on reservations by non-Indians as their major tax evasion problem."). All the while, the Supreme Court has rejected arguments that federal Indian law "authorize[s] Indian tribes . . . to market an exemption from state taxation to persons who would normally do their business elsewhere." *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 155 (1980). Thirty-five years ago, even then, "the decisions of [the Supreme Court] ha[d] already foreclosed" any argument that "licensing requirements infringe upon tribal sovereignty." *Rice v. Rehner*, 463 U.S. 713, 720 (1983).

[1] The tobacco Master Settlement Agreement is a "landmark agreement" reached in 1998 between cigarette manufacturers and 52 states and territories *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 533 (2001). The text of the MSA can be found at http://www.naag.org/assets/redesign/files/msa-tobacco/MSA.pdf.

Despite the Supreme Court's previous rejections, Plaintiff now seeks this Court's blessing to obscure its movement of cigarettes into and throughout the State of California under the auspice of "tribal" sales. The State has not sought to tax tribally-exempt distributions, and has not sought to impermissibly restrict goods tribes make available to their own members. If the State is not alleged to be doing such things, and it is not, we are left to wonder—why does Plaintiff not want the State to know where its cigarettes are going?

* * *

Plaintiff Big Sandy Rancheria Enterprises (BSRE) imports hundreds of millions of cigarettes each year onto the Tribe's[2] Rancheria. When received, State excise taxes have not been paid, and MSA payments or escrow fee deposits have not been made. These cigarettes are re-bundled and distributed to other purchasers around the State of California for later retail sale. First Am. Compl. (FAC) ¶¶ 91, 123, ECF No. 13. The Complaint alleges that all of its purchasers are retailers in Indian country, *see id.* ¶¶ 192–93, and acknowledges existing law that "[t]o the extent taxable consumers purchase taxable cigarettes and tobacco products from retailers . . . , it is the consumers' obligation to pay the tax, and the retailers' obligation to collect the tax from the consumers and remit it to the State," *id.* ¶ 196. The State, however, has repeatedly flagged failures of Plaintiff and its customers to do just these things. *E.g.*, FAC. ¶ 147 (citing FAC Ex. G); *id.* ¶ 155 (citing FAC Ex. I); *id.* ¶ 158 (citing FAC Ex. J); *see also, e.g.*, *People ex rel. Becerra v. Rose*, 16 Cal. App. 5th 317, 321–22 (2017) (enjoining tribal member after he sold untaxed, off-directory cigarettes to consumers, some who "drove from as far away as southern California to purchase tax-free cigarettes at the smoke shops").

Plaintiff has refused to secure a state-issued license and report its transactions as the State has repeatedly insisted is required, withholding basic information regarding the "who" and "where" of its sales that would allow the State to assess whether any taxes or fees are properly

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[2] Plaintiff has amended its complaint to define both itself, a federally-chartered tribal corporation named Big Sandy Rancheria Enterprises, and the federally-recognized tribal government of the Big Sandy Rancheria Band of Western Mono Indians as the "Tribe." FAC 1, ¶ 10, ECF No. 13. This motion shall refer to Plaintiff as "Plaintiff" or "BSRE," and the government as "the Tribe."

due from consumers or manufacturers of the cigarettes it sells. The regulatory scheme in place in California fully comports with well-settled federal law and Plaintiff's claims should be dismissed.

Defendant Xavier Becerra, in his official capacity as Attorney General of the State of California, therefore submits this memorandum of points and authorities in support of his Motion to Dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Plaintiff BSRE's tax claims must be dismissed for lack of jurisdiction and all its claims fail as a matter of law.

BACKGROUND

I. BIG SANDY RANCHERIA ENTERPRISES

The Big Sandy Rancheria Band of Western Mono Indians (Tribe) occupies approximately 300 acres of land in the western foothills of the Sierra Nevada, south of Yosemite and about 40 miles east of Fresno. In the 2010 federal census, the Rancheria population was 118 individuals: members and nonmembers, adults and children.[3] The Tribe has a gaming compact with the State of California and operates the Mono Wind Casino pursuant to that compact. *See* Notice of Approved Tribal–State Compacts, 65 Fed. Reg. 31,189, 31,189 (May 16, 2000) (approving, among others, the gaming compact between California and the Tribe). It has also operated, in various guises, the tobacco business at the center of this dispute. Despite its relationship with BSRE, the Tribe is not a party to this action. *See* FAC at 1, ¶¶ 10, 17.

The action is instead brought by Plaintiff BSRE, a tribal corporation, incorporated under section 17 of the Indian Reorganization Act of 1934, 25 U.S.C. § 5124, and wholly owned by the Tribe. Compl. ¶ 9, ECF No. 1; FAC ¶ 10. According to the Complaint, it currently operates its tobacco distribution business through two subdivisions: BSR Importing and BSR Distributing. *Id.* ¶¶ 98, 100, 111, 113.[4] BSR Importing is a federally-licensed importer, each year purchasing foreign-made cigarettes and importing them onto the Big Sandy Rancheria. *See id.* ¶¶ 113, 115. As amended, the Complaint adds that BSR Distributing is now also purchasing cigarettes from

[3] U.S. Census, 2010 Demographic Profile, CA - Big Sandy Rancheria, https://www.census.gov/popfinder/?fl=0265.

[4] The Complaint also identifies other businesses not currently engaged in the sale or distribution of tobacco products within California. *See* FAC ¶¶ 102–05 (BSR Distribution, IRA); ¶¶ 106–10 (Big Sandy Manufacturing, IRA).

the Azuma Corporation, FAC ¶ 117, a business recently raided by federal agents for, according to the U.S. Attorney's Office, cultivating marijuana "to be distributed off tribal lands at various unidentified locations."[5] BSR Distributing purchases these and other cigarettes and sells them off the Rancheria to customers located elsewhere in Indian country. *Id.* ¶¶ 100, 119–20, 122–23.

BSR Distributing's business model is, according to the original Complaint, "predicated on the lawful trade between federally recognized Indian tribal governments in Native goods manufactured within Indian Country and the general exemption of such trade from impermissible state regulation." Compl. ¶ 91. The company is thus "organized to engage in the wholesale distribution of tobacco products to Indian tribes and Indian-owned entities in Indian Country." FAC ¶ 100. In operating its tobacco distribution businesses, Plaintiff holds a Nevada-issued license for tobacco sales into that state.[6] It does not, however, hold a California-issued distributor's license, having abandoned its application for such a license in 2008. *See id.* ¶¶ 178–79. The State has noted in correspondence that "BSR [Distributing] continues to distribute cigarettes and other tobacco products to unlicensed persons selling to the California public," FAC Ex. J, and "[is] required to obtain distributor's licenses from the California Board of Equalization," *id.* ¶ 158. Plaintiff and its subdivisions hold no California license or permit, *id.* ¶ 179, and make no reports of in-state sales activities to CDTFA.

II. THE CALIFORNIA TAX AND LICENSING SCHEME

California has established a comprehensive statutory scheme of licensing and stamping designed to ensure the collection of tax on all cigarettes sold to non-exempt consumers and to prevent fraudulent transactions to flout such taxes. This scheme consists of the Cigarette and Tobacco Products Licensing Act of 2003 (the Licensing Act), Cal. Bus. & Prof. Code §§ 22970–22991, and the Cigarette and Tobacco Products Tax Law (the Cigarette Tax Law), Cal. Rev. &

[5] Press Release, U.S. Dep't of Justice, Federal and Local Law Enforcement Execute Search Warrants at Large Scale Commercial Marijuana Cultivation Facilities on Tribal Lands (July 8, 2015), https://www.justice.gov/usao-edca/pr/federal-and-local-law-enforcement-execute-search-warrants-large-scale-commercial.

[6] Nev. Dep't of Taxation, Licensed Cigarette Wholesale Accounts (Aug. 1, 2018), https://tax.nv.gov/uploadedFiles/taxnvgov/Content/Forms/Cigarette%20Wholesale%20Accounts%208-1-18.pdf (account 1014511577 "Big Sandy Distribution IRA").

Tax. Code §§ 30001–30483. At its center are licensed distributors, who are authorized to purchase, receive, and possess cigarettes before State taxes are collected or stamps affixed. *See* Cal. Rev. & Tax. Code § 30011 (defining "distributor" as one who "within the meaning of the term 'distribution' as defined in this chapter, distributes" cigarettes or tobacco products); *id.* §§ 30008–30009 (defining "distribution" as the "sale," "use," or "consumption" of untaxed cigarettes or tobacco products, "other than the sale of the cigarettes or tobacco products or the keeping or retention thereof by a licensed distributor for the purpose of sale."); *id.* § 30005 (defining "untaxed cigarette" to mean "any cigarette which has not yet been distributed in such a manner as to result in a tax liability under this part"); FAC ¶ 73. Because BSR Distributing sells untaxed cigarettes, it is a "distributor" under California law. *See* Cal. Rev. & Tax. Code § 30011; *cf.* FAC ¶ 79 ("On its face, the Cigarette and Tobacco Products Licensing Act would apply to [BSRE] as a distributor . . . .").

Since 1959, California has imposed excise taxes on the distribution of cigarettes. The rate has increased over time, and now sits at $2.87 per pack of 20 cigarettes. *See* Cal. Rev. & Tax. Code §§ 30101, 30123(a), 30131.2(a), 30130.51(a); FAC ¶¶ 68–72. The tax attaches to the first taxable use, sale, or consumption of cigarettes. *See* Cal. Rev. & Tax. Code § 30008. Where the distributor of the cigarettes cannot be taxed, the tax is "paid by the user or consumer," *id.* § 30107, and it is collected by a distributor "at the time of making the sale or accepting the order," *id.* § 30108(a); *see also* FAC ¶¶ 75–77.

The tax is generally collected through the use of valued tax stamps, which are purchased by a licensed distributor and affixed to the cigarette packages at or near the time of sale. *See* Cal. Rev. & Tax. Code § 30163. The scheme recognizes, however, that certain purchasers may not be taxable at the time of sale and requires distributors to collect taxes only after they become due. *Id.* § 30108(a) (providing "if the purchaser is not then obligated to pay the tax," the distributor must collect the tax "at the time the purchaser becomes so obligated"); *see also* FAC ¶ 76. The Supreme Court has considered the application of the California cigarette scheme to on-reservation sales and concluded that it "evidences an intent to impose on the Tribe . . . a 'pass on and collect' requirement," that "the legal incidence of California's cigarette tax falls on non-Indian consumers

of cigarettes purchased" on the reservation, and that the State "has the right to require [the Tribe] to collect the tax on [the State's] behalf." *Cal. State Bd. of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9, 12 (1985) (per curiam); *see also* FAC ¶ 75 (acknowledging decision).

To facilitate collection of these taxes, distributors are required to obtain licenses and make regular reports to the California Department of Tax and Fee Administration (CDTFA) regarding their transactions, and have been since 1967. *See* Cal. Rev. & Tax. Code §§ 30140, 30182; Cal. Bus. & Prof. Code § 22975(a). Because not all cigarette distributions are taxable, the monthly distributor tax reports include space to identify exempt distributions. *See* Cal. Dep't of Tax & Fee Admin., CDTFA-501-CD (S1F) Rev. 13 (10-17), Cigarette Distributor's Tax Report (2017) (including entries for "Tax exempt distributions and product returned or destroyed," "8b. United States constitutionally exempt transactions," and "8c. Sold to U.S. Military exchanges").

In 2003, finding that "[t]ax revenues have declined by hundreds of millions of dollars per year due, in part, to unlawful distributions and untaxed sales of cigarettes," the Legislature expanded its licensure program to include all other persons in the distribution chain, reasoning "[t]he licensing of manufacturers, importers, wholesalers, distributors, and retailers will help stem the tide of untaxed distributions and illegal sales of cigarettes and tobacco products." Cal. Bus. & Prof. Code § 22970.1(b), (d). These other licensees in the distribution chain do not make regular reports to CDTFA, but are required to maintain copies of transaction records to facilitate auditing and collection of taxes owed. *See, e.g.*, Cal. Bus. & Prof. Code § 22974 (retailer purchase records); *id.* §§ 22978.1, 22978.4–.5 (distributor and wholesaler purchase, invoice, and sales records); *id.* §§ 22979.4–.6 (manufacturer and importer purchase, invoice, and sales records).

III. IMPLEMENTATION OF THE TOBACCO MASTER SETTLEMENT AGREEMENT

In addition to the consumer-paid taxes collected on the distribution of cigarettes, the State also receives compensation from cigarette manufacturers. "It is the policy of the state that financial burdens imposed on the state by cigarette smoking be borne by tobacco product manufacturers rather than by the state to the extent that those manufacturers either determine to enter into a settlement with the state or are found culpable by the courts." Cal. Health & Safety Code § 104555(d). As a result of the tobacco Master Settlement Agreement, the State receives

annual payments from signatory manufacturers to that Agreement, called "Participating Manufacturers," in perpetuity. *See* MSA § IX(c); FAC ¶ 33 (alleging that Participating Manufacturers "agreed to pay the states hundreds of billions of dollars"). Other cigarette manufacturers that have not signed the MSA, called "Non-Participating Manufacturers," do not make annual payments but are required to escrow monies against a potential future recovery by the State. *See* Cal. Health & Safety Code § 104557(a)(2); FAC ¶ 39.

Unlike the consumer-paid State excise tax, the legal incidence of these MSA payments and fees are on the cigarette manufacturers. *See* Cal. Health & Safety Code § 104557(a). The economic incidence, however, is still generally borne by consumers in the form of a higher retail price. The two charges—MSA payments by Participating Manufacturers and escrow fees by Non-Participating Manufacturers—are not identical and are calculated differently, although they are "roughly equal" on a per-cigarette basis. FAC ¶ 37. Participating Manufacturers' MSA payments are determined nationally based on federal excise collections, *see* MSA §§ II(z), IX(c), regardless of whether state excise tax later applies. Non-Participating Manufacturers' escrow fees, in contrast, are assessed at the state level, and do not attach to cigarettes beyond the reach of state taxation, including "cigarettes . . . sold by a Native American tribe to a member of that tribe on that tribe's land." Cal. Health & Safety Code § 104556(j). To assist in the collection of MSA escrow fees, licensed distributors identify distributions of Non-Participating Manufacturer cigarettes on a schedule accompanying their monthly tax report. Cal. Dep't of Tax & Fee Admin., CDTFA-501-CD (S1F) Rev. 13 (10-17), Cigarette Distributor's Tax Report (2017). BSR Distributing exclusively distributes Non-Participating Manufacturer cigarettes, but makes no reports of its in-state distributions.

Because MSA payments and escrow fees are assessed against manufacturers and collected months after the underlying distributions, distributors do not have a "pass on and collect" obligation for MSA payments or escrow fees under State law. Manufacturers making the payments would logically seek to recoup these amounts from their customers, but manufacturers evading their payment obligations would not, allowing them to derive illicit cost advantages over their compliant rivals.

The Complementary Statute—also called the Directory Statute—was enacted to close the door to such scofflaw manufacturers. Under the Complementary Statute, manufacturers are required to provide various assurances to the Attorney General's office that they will meet their obligations under the escrow statute, also called the Reserve Fund Statute. *See* Cal. Rev. & Tax. Code § 30165.1(b). Manufacturers that provide such assurances are placed on the "Tobacco Directory" and their cigarettes may be sold to consumers in the State. *Id.* § 30165.1(c); *see also* FAC ¶ 41.[7] A manufacturer's failure to meet its obligations or provide adequate assurances that it will do so renders its cigarettes contraband, unlawful for sale to consumers and forfeitable to the State under the same provisions governing forfeiture of other illicit cigarettes, Cal. Rev. & Tax. Code § 30436(e), including cigarettes unlawfully transported, *id.* § 30436(a), unstamped cigarettes not in the possession of a licensed distributor, *id.* § 30436(b), or cigarettes intended for export made available for sale, *id.* § 30436(d). The State has repeatedly advised BSR Distributing that the cigarettes it distributes are "off-directory." FAC ¶ 156 (citing FAC Ex. I); *see also* FAC Ex. J ("[W]e are not aware of any recent distributions by [BSR Distributing] of any on-directory cigarettes; *all* of its recent sales activity has involved off-directory brands.").

LEGAL STANDARD

Federal pleading requires only a short and plain statement that Plaintiff is entitled to relief and a demand for the relief sought. Fed. R. Civ. P. 8(a). Any such claim may then be attacked by a motion to dismiss if it fails to demonstrate the subject-matter jurisdiction of the court or fails to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(1), (6).[8] "Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a

[7] The California Tobacco Directory, which lists certified manufacturer's brands, can be found at https://oag.ca.gov/tobacco/directory.

[8] It is well-settled that a court may dismiss a complaint pursuant to Rule 12(b)(6) on its own motion. *See Omar v. Sea-Land Serv., Inc.*, 813 F.2d 986, 991 (9th Cir. 1987) ("A trial court may dismiss a claim *sua sponte* under [Rule] 12(b)(6). Such a dismissal may be made without notice where the claimant cannot possibly win relief." (citation omitted)). This Court may also dismiss a claim *sua sponte* for any defendant who has not moved on the relied-upon grounds. *See Ricotta v. California*, 4 F. Supp. 2d 961, 968 n.7 (S.D. Cal. 1998); *Wash. Petroleum & Supply Co. v. Girard Bank*, 629 F. Supp. 1224, 1230–31 (M.D. Pa. 1983) (collecting cases and dismissing action *sua sponte* as to the second defendant on grounds raised by co-defendant); *see also generally* 5B Charles Alan Wright, et al., Federal Practice and Procedure § 1357 (Westlaw, 3d ed., database updated Sept. 2018).

cognizable legal theory." *Balisteri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988). While a court will accept as true all well-pled factual allegations, it need not accept as true any legal conclusion "couched as a factual allegation," *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), and a court must not "assume that the [plaintiff] can prove facts that it has not alleged or that the defendants have violated . . . laws in ways that have not been alleged," *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983). A plaintiff can also "plead himself out of court by alleging facts which show that he has no claim, even though he is not required to allege those facts." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988–89 (9th Cir. 2001) (quoting *Soo Line R.R. v. St. Louis Sw. Ry.*, 125 F.3d 481, 483 (7th Cir. 1997)). Dismissal with prejudice is appropriate when amendment would be futile. *See Dumas v. Kipp*, 90 F.3d 386, 393 (9th Cir. 1996).

ARGUMENT

Plaintiff brings five causes of action challenging the application of the State Cigarette Tax Act, the Licensing Statute, and the Complementary Statute to its business activities within the State. These arguments fail for several reasons. Plaintiff's Cigarette Tax Act challenge is barred by the Tax Injunction Act, 28 U.S.C. § 1341. Its other arguments also fail under existing federal Indian law, which acknowledges the State's authority to require on-reservation sellers to assist with the collection of validly-owed taxes and to disrupt shipments of cigarettes headed into Indian country in contravention of applicable State law. Plaintiff's case is premised on its unflinching belief that California's licensing scheme does not apply to it, and that its sales to on-reservation customers are both non-taxable and beyond the reach of the Complementary Statute. Plaintiff reaches too far. As a section 17 corporation conducting business from its reservation, Plaintiff may very well have some transactions that are exempt from State tax, or to which the Complementary Statute does not apply. State licensing and reporting *strip away* these exempt transactions, leaving only those transactions in which the State has a recognized interest.

But Plaintiff and its customers refuse state licenses or to report their transactions, remit no taxes, and sell to the public cigarettes barred from the State due to their manufacturers' refusals to make their own state-mandated payments. Decades of case law regarding sales by tribal smoke

shops have already foreclosed the declaratory relief Plaintiff seeks, confirming the right of the State to regulate the alleged transactions and to intervene in the transportation of shipments when tribes or Indian traders fail to keep up their end of the bargain. These precedents are fatal to Plaintiff's causes of action, and the Complaint should be dismissed with prejudice as a result.[9]

I. THIS COURT LACKS JURISDICTION OVER PLAINTIFF'S TAX CHALLENGE

Plaintiff's fifth cause of action challenges application of the Cigarette Tax Law. The Tax Injunction Act bars such challenges, however, as that Act divests federal district courts of jurisdiction to enjoin "the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. The Act forecloses challenges not only to the direct collection of state taxes, but also to an underlying taxing scheme that "would restrain assessment indirectly." *Blangeres v. Burlington N., Inc.*, 872 F.2d 327, 328 (9th Cir. 1989) (per curiam). It "prohibits declaratory as well as injunctive relief." *California v. Grace Brethren Church*, 457 U.S. 393, 411 (1982). Plaintiff's request for declaratory relief that the Cigarette Tax Law does not apply to it, FAC ¶¶ 189–97, therefore, fits squarely within the Act's prohibition.

Plaintiff alleges that 28 U.S.C. § 1362 exempts it from the Act's jurisdictional bar based on the Supreme Court's recognition of such an exemption for Indian tribes in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976). FAC ¶¶ 5, 8. But Plaintiff, a corporation organized under section 17 of the Indian Reorganization Act, is a distinct entity from the Tribe and may not invoke the Tribe's jurisdiction under § 1362 or its corresponding exemption from the Act.

In *Moe*, the Supreme Court found § 1362 "contemplated that a tribe's access to federal court . . . would be at least in some respects as broad as that of the United States suing as the tribe's trustee." *Id.* at 473. Accordingly, "[s]ince the United States is not barred by [the Tax

[9] We interpret Plaintiff's claims to sound under *Ex parte Young*, 209 U.S. 123 (1908). Courts have often "found federal jurisdiction over a suit against a state official when that suit seeks only prospective injunctive relief in order to 'end a continuing violation of federal law.'" *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 73 (1996) (quoting *Green v. Mansour*, 474 U.S. 64, 68 (1985)). Except under such waiver or exception from the State's Eleventh Amendment immunities, this action is properly dismissed on this basis as well. *Elwood v. Drescher*, 456 F.3d 943, 949 (9th Cir. 2006).

Injunction Act] from seeking to enjoin the enforcement of state tax law, . . . the Tribe is not barred from doing so." *Id.* at 474–75 (citation omitted). Looking to § 1362's legislative history, the Court noted "a congressional purpose to open the federal courts to the kind of claims that would have been brought by the United States as trustee, but for whatever reason were not so brought," allowing tribes to obtain "the same judicial determination whether the action is brought in their behalf by the Government or by its own attorneys." *Id.* at 472–73 (quoting H.R. Rep. No. 2040, at 2–3 (1966), *reprinted in* 1966 U.S.C.C.A.N. 3145, 3147).

The Ninth Circuit has had occasion to consider whether § 1362 also extends jurisdiction beyond tribal governments to include other tribal entities and held that it does not. In *Navajo Tribal Utility Authority v. Arizona Department of Revenue*, 608 F.2d 1228 (9th Cir. 1979), the Ninth Circuit explained that the plain language of the statute "makes no provision for wholly controlled or owned subordinate economic tribal entities, nor did the Supreme Court in *Moe* suggest that section 1362 provided for jurisdiction beyond the plain language of the statute, that is, beyond Indian tribes or bands," *id.* at 1231; *see also* 13D Charles Alan Wright, et al., Federal Practice and Procedure § 3579 (Westlaw, 3d ed., database updated Sept. 2018) ("[Section 1362] applies only to suits brought by a tribe with a governing body duly recognized by the Secretary of the Interior."). The Ninth Circuit went on to conclude "[i]f the leadership of a tribe or band decides that litigation is necessary to protect the rights of the tribe or band, then section 1362 will provide federal court access." *Navajo Tribal Utility*, 608 F.2d at 1232. Other courts have likewise required the tribe join as co-plaintiff. *See Winnebago Tribe v. Kline*, 297 F. Supp. 2d 1291, 1300 n.4 (D. Kan. 2004) (distinguishing *Navajo Tribal Utility* because "[c]entral to [that] court's decision . . . was that the tribe was not joined as co-plaintiff"). The Tribe has not joined this suit.

Rather than seeking to add the Tribe as a party, Plaintiff instead elected to amend the Complaint so as to blur the distinction between itself and the Tribe. *Compare* Compl. ¶ 9 ("[Big Sandy Rancheria] Enterprises is wholly owned by the Big Sandy Rancheria Band of Western Mono Indians."), *and id.* at 1 (defining the Big Sandy Rancheria Band of Western Mono Indians as the "Tribe"), *with* FAC ¶ 10 ("Big Sandy Rancheria Enterprises is the name under which the Tribe is federally chartered . . . ."), *and id.* at 1 & ¶ 10 (defining both Plaintiff and the Big Sandy

Rancheria Band of Western Mono Indians as the "Tribe"). BSRE cannot through wordsmithing the Complaint alter the fact that "[m]ost courts . . . have recognized the distinctness of these two entities." *Linneen v. Gila River Indian Cmty.*, 276 F.3d 489, 493 (9th Cir. 2002) (citing *Ramey Constr. Co. v. Apache Tribe of the Mescalero Reservation*, 673 F.2d 315, 320 (10th Cir. 1982) (collecting cases)). Indeed, as here, whether the relevant party is a section 17 corporation or a tribe is often a dispositive issue. *See, e.g., Am. Vantage Cos., Inc. v. Table Mountain Rancheria*, 292 F.3d 1091, 1094 n.1 (9th Cir. 2002) (diversity jurisdiction); *Parker Drilling Co. v. Metlakatla Indian Cmty.*, 451 F. Supp. 1127, 1131 (D. Alaska 1978) (sovereign immunity).

Section 1362's own distinction between governmental and economic entities is clear from the text of the statute, which provides a path into court for those Indian tribes or bands with a "governing body duly recognized by the Secretary of the Interior." 28 U.S.C. § 1362; *cf.* 25 C.F.R. § 81.4 (defining the term "recognized governing body" as a political classification, referring to the entity "recognized by the Bureau for purposes of government-to-government relations"). The Secretary publicly maintains and updates a list of those tribes and bands with "the immunities and privileges available to federally recognized Indian tribes by virtue of their government-to-government relationship with the United States" and acknowledged to possess "the responsibilities, powers, limitations, and obligations of such Tribes." Notice of Indian Entities Recognized, 83 Fed. Reg. 34,863, 34,863 (July 23, 2018). The Tribe is on the list; Plaintiff is not. *See id.* We do not dispute that the Tribe may have "operated a tobacco distribution enterprise" through its tribal government before establishing BSRE. FAC ¶ 116. We also do not dispute BSRE may have been conferred certain sovereign powers by the Tribe at the time of its formation, though Plaintiff's federal charter is conspicuously absent from the extensive exhibits accompanying the amended Complaint. The change in business form proves rather than disproves the central objection raised by Defendants—BSRE and the Tribe "are separate legal entities, having different powers, privileges and responsibilities." Separability of Tribal Organizations Organized Under Sections 16 and 17 of the Indian Reorganization Act, 65 Interior Dec. 483, 483 (1958). BSRE is not the tribal government, and therefore cannot invoke § 1362 to speak on the Tribe's behalf.

Plaintiff's allegations do not fit the narrow carve-out available to Indian tribal governments recognized in *Moe*. Instead, the Tax Injunction Act bars Plaintiff's challenge. Having failed to meet its burden of establishing jurisdiction, Plaintiff's challenges to California's tax scheme must be dismissed under Rule 12(b)(1).

II. PLAINTIFF'S CLAIMS SUPPORT STATE REGULATORY POWER UNDER WELL-SETTLED LAW

A. State Regulation and Indian Tribes Generally

Historically, the Marshall Court took the view presented by Plaintiff here, that state laws "have no force" within a tribe's boundaries. *Worchester v. Georgia*, 31 U.S. (6 Pet.) 515, 520 (1832). However, "[l]ong ago the Court departed from Mr. Chief Justice Marshall's view," *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141 (1980), and "the trend has been away from the idea of inherent sovereignty as a bar to state jurisdiction," *Colville*, 447 U.S. at 165 n.1 (Brennan, J., concurring in part and dissenting in part). The Court "ha[s] recognized that the Indian tribes retain 'attributes of sovereignty overs both their members and their territory.'" *Bracker*, 448 U.S. at 142 (quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975)). But it has also "ma[d]e clear that the Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation." *Nevada v. Hicks*, 533 U.S. 353, 361 (2001). "State sovereignty does not end at a reservation's border." *Id.*

Congress's plenary power to regulate tribal affairs under the Indian Commerce Clause, U.S. Const. Art. 1, § 8, cl. 3, and "the 'semi-independent position' of Indian tribes have given rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members." *Bracker*, 448 U.S. at 142. The first is preemption by federal law. *Id.* The second is that state regulation "may unlawfully infringe 'on the right of the reservation Indians to make their own laws and be ruled by them.'" *Id.* (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959)). Plaintiff argues that the disputed State laws run afoul of both—that they are preempted by the Indian Trader Statutes and are otherwise barred by the operation of federal common law and/or tribal sovereignty. As demonstrated below, the law is settled that they run afoul of neither.

The most important determinants of whether a state law applies to Indians is who exactly is being regulated, and where the activity to be regulated takes place. *See, e.g.*, *Wagnon v. Prairie Band of Potawatomi Nation*, 546 U.S. 95, 101 (2005) ("[U]nder our Indian tax immunity cases, the 'who' and 'where' of the challenged tax have significant consequences.").

"When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable," *Bracker*, 448 U.S. at 144, up to and including a "categorical bar" against levying state taxes on tribes or member Indians for activities on their own reservation, *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 459–60 (1995). Following the *Chickasaw* approach, the exclusions from state law are deep but narrow, resting on the union between tribe, its members, and their reservation. The Supreme Court has recognized that Indians who are nonmembers of a governing tribe "stand on the same footing as non-Indians." *Colville*, 447 U.S. at 161. And so, the "on-reservation conduct involving only Indians" that forces the state out of a transaction includes only conduct of member Indians on the reservation *they are a member of* and not any other Indian or tribe who happens to come to town. *See Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1172 (10th Cir. 2012). Such analysis could apply to Plaintiff's sales to the Tribe or tribal members on the Rancheria, but Plaintiff incorrectly asserts this standard is applicable with respect to all of its sales—on reservation and off, to members of the Big Sandy Rancheria or any other tribe or group in Indian country. *See, e.g.*, FAC ¶ 166 ("The State lacks civil regulatory jurisdiction over Indians' commerce with Indians within Indian country except with express congressional approval . . . .").

Where "Indians [are] going beyond reservation boundaries," they are "subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148–49 (1973); *accord Bryan v. Itasca County*, 426 U.S. 373, 376 n.2 (1976) ("[The preemption analysis] yields different conclusions as to the application of state laws to tribal Indians who have left or never inhabited federally established reservations, or Indians 'who do not possess the usual accoutrements of tribal self-government.'"). Under the *Mescalero* approach, state power to enforce its laws outside of Indian country is broad, up to and including the power to seize contraband located outside Indian lands but in transit to a tribal

smoke shops. *See Colville*, 447 U.S. at 161–62. The transactions alleged in the Complaint involve the movement of goods from Plaintiff to buyers located in Indian country other than its Rancheria. These transactions necessarily involve conduct outside of the Rancheria (as the Big Sandy Rancheria borders no other Rancherias or reservations), and are subject to this most lenient review.

Lastly, relevant state, federal, and tribal interests are balanced where "a State asserts authority over the conduct of non-Indians engaging in activity on the reservation." *Bracker*, 448 U.S. at 144–45. Questions related to the applicable interests of states, the federal government, and Indian tribes with respect to state cigarette tax and licensing schemes have been heavily litigated using this *Bracker* balancing approach, producing several Supreme Court decisions. The law is settled that states can impose "a minimal burden" on tribal sellers on their reservation that is "designed to avoid a likelihood in its absence non-Indians . . . will avoid payment of a concededly lawful tax," *Moe*, 425 U.S. at 483, including specific recognition and affirmance of the State tax scheme challenged by Plaintiff here, *see Chemeheuvi*, 474 U.S. at 11–12.

Correctly identifying the relevant setting for Plaintiff's alleged transactions (the "where" and the "how") reveals that Plaintiff's causes of action are mere retreads of long-rejected arguments, properly dismissed under Rule 12(b)(6).

B. Application of California's Cigarette and Tobacco Licensing Scheme to Tribal Entities Is Consonant with Federal Law

Counts three and four dispute the State's authority to require Plaintiff to possess a state-issued license or make regular reports of its in-state sales. FAC ¶¶ 177–88. Such licensing requirements are consonant with federal law when applied to tribal entities that sell to nonmembers. Decades-old cases thought this question already asked and answered. In 1983's *Rice v. Rehner*, the Supreme Court held that "[t]o the extent [plaintiff] seeks to sell to non-Indians, or to Indians who are not members of the tribe with jurisdiction over the reservation on which the sale occurred, the decisions of [the Supreme Court] have already foreclosed [her] argument that the licensing requirements infringe upon tribal sovereignty." 463 U.S. at 720. "Regulation of sales to non-Indians or nonmembers of the [governing] Tribe simply does not

'contravene the principle of tribal self-government,' and, therefore, neither [plaintiff] nor the [governing] Tribe has any special interest that militates against state regulation in this case, providing that Congress has not pre-empted such regulation." *Id.* at 720 n.7 (citation omitted). Tobacco licensing requirements have likewise been specifically considered and allowed as against challenges based on tribal sovereignty or the Indian Trader Statutes. *See, e.g.*, *Dep't of Taxation & Fin. v. Milhelm Attea & Bros.*, 512 U.S. 61, 67, 78 (1994).

As discussed above, the California licensing program works to assure that cigarettes distributed in the State are within the licensed distribution chain by requiring participants at each level to hold a license, transact business with other license holders, and either make regular reports of sales and distributions or maintain records CDTFA could use to confirm such reports. *See supra* at pp. 4–6. In *Colville*, Washington employed a similar system of licensure and reporting, requiring that cigarette sellers "keep detailed records of both taxable and nontaxable transactions," that included "the number and dollar volume of taxable sales" and for nontaxable sales "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." 447 U.S. at 159. The State does not (and could not) *charge* tribal sellers for such a license, *cf. Moe*, 425 U.S. at 480–81, but it can (and does) require they *hold* one—license and reporting requirements do not work to impose taxes or fees where none are owed, and such licensing helps avoid "spillover" effects resulting from "a distribution network over which the State has no control." *Rehner*, 463 U.S. at 724. Courts have consistently recognized such requirements work only to impose "a minimal burden designed to avoid the likelihood that in its absence non-Indians purchasing from the tribal seller will avoid payment of a . . . lawful tax." *Moe*, 425 U.S. at 483; *see also Milhelm*, 512 U.S. at 75.

Plaintiff's claims work from its desired conclusion backwards, characterizing its transactions as exempt and therefore deeming any licensing beyond the State's interest in the collection of valid taxes. *See, e.g.*, FAC ¶¶ 79, 186–87. Even assuming all of Plaintiff's own transactions are exempt from taxation, however, the licensing and reporting regime still properly applies to Plaintiff's business so the State can track what happens to the cigarettes further down the chain. Even if Plaintiff does not owe the tax, or Plaintiff's customers do not owe the tax, the

State's licensing and reporting requirements allow CDTFA to see if *someone* owes the tax, and then, if they do, to collect it.

Programs with more demanding requirements than California's have been consistently upheld as imposing only "a minimal burden," demonstrating that Plaintiff's claims must also fail. In *Milhelm*, for example, the Supreme Court upheld the New York licensing and reporting scheme, including its requirements that tribes obtain state tax exemption certificates in order to make tax-exempt sales to their members and that tribal sellers collect "a 'certificate of individual Indian exemption' and provide written evidence of their identity" before making tax-exempt sales. 512 U.S. at 66–67. New York's regime also capped the number of tax-exempt cigarettes that could be sold on a reservation through the calculation of a "probable demand" based on tribal membership and other factors. *Id.* This regime properly vindicated New York's "valid interest in ensuring compliance with lawful taxes that might easily be evaded through purchases of tax-exempt cigarettes on reservations" and that "interest outweigh[ed] tribes' modest interest in offering a tax exemption to customers who would ordinarily shop elsewhere." *Id.* at 73; *accord Muscogree (Creek) Nation v. Pruitt*, 669 F.3d at 1177 (upholding licensing requirement and holding that "[r]equiring wholesalers, who are the stamping agents, to be [state]-licensed helps protect the State's valid interest in preventing evasion of its valid cigarette tax").

Plaintiff has alleged no facts that would change this calculus, nor could it do so. The State does not require sellers to collect information on individual Indian consumers, or to pre-pay the tax and seek reimbursement for any tax-exempt sales, although programs with these more onerous elements have been upheld. *E.g.*, *Confederated Tribes & Bands of the Yakama Indian Nation v. Gregoire*, 658 F.3d 1078, 1089 (9th Cir. 2011) (finding imposition of a "precollection obligation" on Indian tribes to be "a minimal burden on the Tribes and their retailers"); *Keweenaw Bay Indian Cmty. v. Rising*, 477 F.3d 881, 893 (6th Cir. 2007) (approving imposition of a pre-collection and refunding regime on Indian tribes). Nor could Plaintiff articulate a justification for why its sales activities *should* be hidden from view, having acknowledged the responsibility of downstream sellers to collect and remit State taxes owed. FAC ¶ 196.

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In *Milhelm*, the Court was "persuaded . . . that [the State's] decision to staunch the illicit flow of tax-free cigarettes early in the distribution stream is a 'reasonably necessary' method of 'preventing fraudulent transactions,' one that 'polices against wholesale evasions of [the State's] own valid taxes without unnecessarily intruding on core tribal interests.'" 512 U.S. at 75 (quoting *Colville*, 447 U.S. at 162). The same reasoning applies to the California licensing scheme, and accordingly, Plaintiff's challenge to that scheme should be dismissed.

C. The Cigarette Tax Law "Applies" to Plaintiff; Whether It Owes Any Tax Depends on Particulars Not Alleged in the Complaint

Plaintiff in its fifth cause of action seeks a blanket declaration that its activities do not implicate California's Cigarette Tax Law. *See* FAC ¶ 197. And while it is true that the Supreme Court has recognized a "categorical bar" on the imposition of state taxes on member Indians for activities on their own Indian country, *Chickasaw*, 515 U.S. at 459–60, the Supreme Court has also made clear that state cigarette taxes imposed on non-Indians and nonmembers are valid in Indian country, *Moe*, 425 U.S. at 483. Within this guidance, whether a transaction involving an Indian as the buyer or seller is subject to state taxation requires a case-by-case and fact-specific analysis. The Complaint, however, does not begin to describe Plaintiff's alleged sales activities with the precision required to evaluate potential claims of exemption. Alternately, to the extent Plaintiff is making a broader challenge to the Cigarette Tax Law, the law is clear that sales to nonmembers are not exempt in Indian country, and cigarettes in transit are subject to the full panoply of State tax laws, defeating Plaintiff's claim.

1. The Complaint Lacks Sufficient Detail Regarding Past and Future Sales

Plaintiff does not—and could not—allege that it has been subject of a tax collection demand by CDTFA. In response to the original Complaint, we noted the ambiguity in Plaintiff's allegations, where Plaintiff argued that its BSR Distributing subdivision "resells and distributes [purchased] goods to Indian tribal governmental and tribal-member reservation-based wholesalers and retailers exclusively in Indian Country." Compl. ¶ 90. In response, Plaintiff amended its Complaint to make its business practices even less clear, alleging now that its subdivision merely

"distribut[es purchased] . . . tobacco products to Indian tribes and Indian-owned entities in Indian country." FAC ¶ 100. These allegations don't provide the State enough information to assess the taxability of any alleged transaction or group of transactions, as the "who" is incomplete (e.g., What is an Indian-owned entity? Have they incorporated their businesses under State law? Do they engage in sales to the general public?), the "where" is unclear (e.g., Is it meaningful that the Complaint alleges that these retailers are "in Indian country" and not that they are making sales on their own reservations?), and the facts of different transactions may vary. *Cf. Wagnon*, 546 U.S. at 101 ("[U]nder our Indian tax immunity cases, the 'who' and 'where' of the challenged tax have significant consequences.").

Indeed, it doesn't appear that Plaintiff is speaking to particular transactions at all. Instead, Plaintiff appears to seek a determination that *any* transaction it could possibly engage in would not be taxable—only such a determination could support "a judicial declaration that [it] has no liability . . . for the taxes imposed under the [Cigarette Tax Law]." FAC ¶ 197. This Court need not entertain such hypotheticals. "It is neither [the Court's] obligation nor within [its] traditional institutional role to resolve questions of constitutionality with respect to each potential situation that might develop." *Gonzales v. Carhart*, 550 U.S. 124, 168 (2007). It would "be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation." *United States v. Raines*, 362 U.S. 17, 21 (1960).

The Court need not make abstract pronouncements of law about different types of activities until presented with a particular transaction where the parties have actually disagreed as to its proper characterization. Until then, Plaintiff asks the Court to help it chase wild geese, and the Court need not answer.

2. Plaintiff's Broad Challenge to the Cigarette Tax Law Fails as a Matter of Law.

a. The State May Impose a "Pass On and Collect" Requirement Under Its Cigarette Tax Law.

The Supreme Court made clear 42 years ago in *Moe* that state cigarette taxes imposed on non-Indians are valid in Indian country. 425 U.S. at 483. As noted above, this analysis treats Indians who are "not constituents of the governing Tribe . . . on the same footing as non-

Indians . . . on the reservation." *Colville*, 447 U.S. at 161. Indians traveling outside their Indian country are "subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Mescalero*, 411 U.S. at 148–49. That expressly includes Indian tribes and tribal businesses under the California Tax Law. *Chemehuevi*, 474 U.S. at 11–12. It applies with equal force to Indian traders operating under the Indian Trader Statutes. *Milhelm*, 512 U.S. at 74 ("Although *Moe* and *Colville* dealt most directly with claims of interference with tribal sovereignty, the reasoning of those decisions requires rejection of the submission that [the Indian Trader Statutes] bar[] any and all state-imposed burdens on Indian traders. It would be anomalous to hold that a State could impose tax collection and bookkeeping burdens on reservation retailers who are themselves enrolled tribal members, including stores operated by the tribes themselves, but that similar burdens could not be imposed on wholesalers, who often . . . are not." (footnote omitted)); *id.* at 75 ("Indian traders are not wholly immune from state regulation that is reasonably necessary to the assessment or collection of lawful state taxes.").

Plaintiff alleges its founding documents authorize it to engage in the sort of behavior already found to be within reach of the Cigarette Tax Law. *See* FAC ¶ 91 ("[Tribal Ordinance No. 0310-01] authorizes the Tribe . . . to manufacture tobacco products . . . , to acquire tobacco products from native manufacturers and wholesalers operating in Indian Country, and to distribute retail tobacco products to individuals or other entities on the Rancheria or in Indian country."); *id.* ¶ 100 (alleging BSR Distributing was created "to engage in the wholesale distribution of tobacco products to Indian tribes and Indian-owned entities in Indian country"). Premising its claim on not doing precisely the things the law says it must do is a short walk to dismissal under Rule 12(b)(6).

b. The State May Seize Shipments of Cigarettes in Transit to Indian Country That Do Not Comport with the Requirements of Its Cigarette Tax Law.

Plaintiff's invocations of the Indian Trader Statutes or tribal sovereign interests do not alter the fact that all transactions alleged in the Complaint involve the movement of goods through the State *outside* of Indian country. In that context, the State's power has been routinely found to reach the transactions alleged in the Complaint.

The application of State law to off-reservation conduct under the *Mescalero* approach is broad because "[t]he presumption of pre-emption derives from the rule against construing legislation to repeal by implication some aspect of tribal self-government." *Rehner*, 463 U.S. at 726 (citing *Bryan*, 426 U.S. at 391–92). "[T]he retained sovereignty of the tribes is that needed to control their own internal relations, and to preserve their own unique customs and social order." *Duro v. Reina*, 495 U.S. 676, 685–86 (1990), *superseded by statute*, 25 U.S.C. § 1301(2); *see also Muscogee (Creek) Nation v. Henry*, No. CIV 10-019-JHP, 2010 WL 1078438, at *3 (E.D. Okla. Mar. 18, 2010) ("Tribal tax immunity []does not apply to taxation of 'inter-tribal commerce' even where the commerce takes place inside of Indian country." (citing *Duro*, 495 U.S. at 686–87)). It does not include those parts of sovereignty "which the Indians implicitly lost by virtue of their dependent status . . . [including] those involving the relations between an Indian tribe and nonmembers of the tribe." *Duro*, 495 at 686 (quoting *United States v. Wheeler*, 435 U.S. 313, 326 (1978), *superseded by statute*, 25 U.S.C. § 1301(2)). Put another way, a tribe's inherent power over the relations among its members reflects the "geographical component of [its] tribal sovereignty," *Wagnon*, 546 U.S. at 112, and doesn't apply to external relations. Cases have consistently held that tribes do not have "supersovereign authority to interfere with another jurisdiction's sovereign right[s]" within that jurisdiction's borders. *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 466 (1995); *see also Rehner*, 463 U.S. at 734 ("Congress did not intend to make tribal members 'super citizens' who could trade in a traditionally regulated substance free from all but self-imposed regulations.").

As such, courts have repeatedly affirmed the rights of States to seize such goods when their movement violates state law, concluding "[i]t is beyond peradventure that a state may seize contraband located outside Indian lands but in transit to a tribal smoke shop." *Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 21 (1st Cir. 2006), *cert. denied*, 549 U.S. 1053 (2006); *see also Colville*, 447 U.S. at 161–62 (authorizing off-reservation seizures, even when tax is not due, noting "[i]t is significant that these seizures take place outside the reservation, in locations where state power over Indian affairs is considerably more expansive than it is within reservation boundaries"); *Okla. Tax Comm'n v. Citizen Band Potwatomi Indian Tribe*, 498 U.S. 505, 514

(1991) (finding "seizing unstamped cigarettes off the reservation" to be a valid state enforcement tool). The Complaint does nothing to dispel the State's off-reservation authority to enforce the challenged laws and includes no allegations that the State has sought to enforce these laws against it for on-Rancheria conduct. It has therefore provided this Court no path forward for declaring its activities outside the reach of State authority, and its claims should be dismissed.

3. The Complementary Statute Validly Restricts the Kinds of Cigarettes Plaintiff May Sell to the Public.

Plaintiff also alleges, in its first and second causes of action, that the State's Complementary Statute may not be applied to its on-reservation sales activities because the law may incidentally affect the sales of "Native" cigarettes to tribal members. *See* FAC ¶ 166 ("The State lacks civil regulatory jurisdiction over Indians' commerce with Indians within Indian country . . . ."); *id.* ¶ 172 ("The State's [Complementary] Statute . . . specifies the kind and price of goods that may be sold to Indians . . . ."). The Reserve Fund Statute and the Complementary Statute, however, make clear that the exempt transactions Plaintiff uses as its justification are already beyond the statutes' intended reach. *See, e.g.*, Cal. Health & Safety Code § 104556(j) ("[MSA escrow fee] shall not include cigarettes . . . sold by a Native American tribe to a member of that tribe on that tribe's land, or that are otherwise exempt from state excise tax pursuant to federal law."); Cal. Bd. of Equalization, Publ'n 4, Analysis of California Cigarette and Tobacco Products Tax Law 26 (2012) ("Distributions which this state is prohibited from taxing under the Constitution or laws of the United States or under the Constitution of this state are exempt."). As to other transactions involving nonmembers, State authority is clear.

First, it bears noting that Plaintiff does not allege that the State has sought to enforce the Complementary Statute on the Tribe's Rancheria, or to prevent the Tribe from possessing and selling cigarettes of its choice to its own tribal members. The absence of such allegations was enough for the Tenth Circuit to reject similar claims brought by the Muscogee (Creek) Nation under Rule 12(b)(6). *See Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1180 (10th Cir. 2012) ("The complaint makes no allegation that the State has seized non-directory cigarettes in [the Tribe's] Indian country or taken enforcement actions there due to noncompliance with the

Complementary Act. Thus, [the Tribe] has failed to state a plausible claim based on Complementary Act enforcement in [the Tribe's] Indian country.").

Second, if the issue raised by Plaintiff was whether the Complementary Statute could be applied to on-reservation sales to nonmembers, the Complaint does not identify a valid interest that would be served by allowing on-reservation sales of these "off-directory" products to the general public. Evaluation of the State's power to have the Complementary Statute enforced as against nonmembers making their purchases on the reservation would be subject to so-called "*Bracker* balancing." *See supra* at p. 14. Under such balancing, the respective interests of the state, federal government, and tribe are analogous to those considered and upheld in the Supreme Court's various smoke shop tax cases.

We agree that the escrow fees are not a tax, but they operate like a tax in that they require Non-Participating Manufacturers to set aside monies to satisfy potential claims of the State. These fees are required because "[i]t would be contrary to the policy" of California if Non-Participating Manufacturers "could use a resulting cost advantage [from making payments to the State] to derive large, short-term profits" and subsequently "becom[e] judgment proof before liability may arise." Cal. Health & Safety Code § 104555(f). While a manufacturer could underwrite these fees, the expectation is that they will recoup them from their customers, just like they recoup the costs of production or of federal excise taxes paid. The enforcement provisions of the Complementary Statute with respect to a non-compliant manufacturer's cigarettes include the same powers used by CDTFA with respect to other illicit cigarettes, including tax-evaded cigarettes. *See* Cal. Rev. & Tax. Code § 30436(e). And, like a tax, their avoidance leaves the State with a shortfall of expected funds that are due under State law and have not been paid.

As in the tax interest-balancing cases, the Tribe's interest in being able to offer such products is at best minimal, because as there Plaintiff is "merely importing a product onto the reservation[] for immediate resale." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 219 (1987), *superseded by statute*, Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701–2721. When a tribe "is merely marketing an exemption" from state regulations, *id.*, and "the tribal contribution to an enterprise is *de minimis*," *New Mexico v. Mescalero Apache Tribe (Mescalero*

II), 462 U.S. 324, 341 (1983), its interest is at its nadir. If Plaintiff's only relief sought involved a challenge to the on-reservation application of the Complementary Statute, it would be hard-pressed to identify an interest other than providing California customers a way to avoid the $7.00 per carton escrow fee by distributing cigarettes of manufacturers who refuse to pay it. That interest is simply not enough. *Cf. Colville*, 447 U.S. at 155.

Nor would the Indian Trader Statutes compel a different result. Those statutes "were enacted to prevent fraud and other abuses by persons trading with Indians." *Milhelm*, 512 U.S. at 70. They address only trade of goods to Indians on their own land. *See Warren Trading Post v. Tax Comm'n*, 380 U.S. 685, 691–92 (1965) (invalidating state taxes "[i]nsofar as they are applied . . . with respect to sales made *to reservation Indians on the reservation*" (emphasis added)). With respect to sales to nonmembers, Indian traders are at least as subject to State law as the tribes themselves. *Milhelm*, 512 U.S. at 74.

Third, because Plaintiff does not limit its claims to sales on the Tribe's Rancheria, its argument that the State has no enforcement authority simply cannot succeed under the approach applied to Indians' off-reservation activities. *See Mescalero*, 411 U.S. at 148–49 ("Indians going beyond reservation boundaries [are] subject to nondiscriminatory state law otherwise applicable to all citizens of the State."). The Tenth Circuit considered this issue in connection with a tribal challenge to Oklahoma's Complementary Statute in *Muscogee (Creek) Nation*, and reached the same conclusion, affirming dismissal of that tribe's challenge. It explained:

> Because the Escrow Statute and Complementary Act are enforced outside [the tribe's] Indian country and any resulting "consequences" are "downstream," we need not perform a *Bracker* preemption analysis. And even if [the tribe] is arguing the Indian Trader Statutes preempt the Escrow Statute and Complementary Act under a traditional preemption analysis, we conclude there is no such preemption.

669 F.3d at 1181. Other courts that have considered whether Complementary Statutes interfere with tribal interests have likewise rejected the argument. *See State ex rel. Edmondson v. Native Wholesale Supply*, 237 P.3d 199, 215–17 (Okla. 2010), *abrogated on other grounds* by *Montgomery v. Airbus Helicopters, Inc.*, 414 P.3d 824 (Okla. 2018); *State ex rel. Wasden v. Maybee*, 224 P.3d 1109, 1124 (Idaho 2010).

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Plaintiff's first and second causes of action are properly dismissed. The Tenth Circuit's reasoning in *Muscogee* is correct, and Plaintiff's first and second causes may be dismissed on similar grounds.

CONCLUSION

If Plaintiff was concerned with whether it could deliver off-directory, "Native" cigarettes to members among the 118 or so people who live on the Rancheria, or with whether other tribes could afford their own resident members similar access to off-directory brand cigarettes, we believe State law would already provide its desired answer, as the State agrees such sales lie beyond the intended reach of State tax and MSA escrow fee requirements but subject to State licensing and reporting. As the Complaint and its exhibits make clear, however, the State has been requesting Plaintiff and its customers secure such licenses and make such reports for years, to no avail.

Instead, the Complaint objects to what Plaintiff characterizes as "compelling price parity for cigarettes and tobacco products," FAC ¶ 54, through State laws preventing the consuming public from avoiding the $28.70 per carton in State excise taxes and nearly $7.00 per carton in MSA escrow fees owed through the simple expedient of driving onto Indian country to transact their business. In this, the law is long-since decided—such objections make "painfully apparent that the value marketed by . . . smokeshops to persons coming from outside is not generated on . . . reservations by activities in which the Tribes have a significant interest," and "principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise" do not "authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere." *Colville*, 447 U.S. at 155. The GAO report names such distributions "illicit trade," and they should not receive this Court's imprimatur through the declaratory relief Plaintiff seeks.

For the reasons described above, Plaintiff is barred from obtaining the relief it seeks as a matter of law. Accordingly, this Court should dismiss Plaintiff's challenge to the Cigarette Tax Law under Rule 12(b)(1) for lack of jurisdiction and dismiss Plaintiff's remaining causes of action under Rule 12(b)(6) for failing to articulate a legally cognizable cause of action.

Dated: October 22, 2018

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