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10 **UNITED STATES DISTRICT COURT**
11 **CENTRAL DISTRICT OF CALIFORNIA**
12 **WESTERN DIVISION**

13 IN RE SEIZURE OF 365,380 EA (640
14 BOXES) OF CIGARETTES WORTH
\$568,000.00,

15 BIG SANDY RANCHERIA TOBACCO
16 DISTRIBUTION,

17 Movant.

18
19 UNITED STATES OF AMERICA,

20 Respondent.
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Case No. 2:15-cv-2886

**NOTICE OF MOTION AND
MOTION FOR RETURN OF
SEIZED PROPERTY
PURSUANT TO FED. R. CR.
PROC. 41(g)**

Date: TBD

Time: TBD

Hon.: TBD

Courtroom: TBD

**TO THIS HONORABLE COURT AND TO THE U.S. CUSTOMS AND
BORDER PROTECTION AND THE UNITED STATES OF AMERICA
THROUGH THEIR ATTORNEY:**

PLEASE TAKE NOTICE THAT on a date to be determined, at a time to be determined, in the courtroom of a judge to be determined, of the United States Courthouse, 312 North Spring Street, Los Angeles, California, 90012-4701, Movant, by and through its counsel, will move the Court for an order returning the above-captioned seizure property.

This motion is based on the Fourth and Fifth Amendments of the United States Constitution, the Court's equitable jurisdiction, Rule 41(g) of the Federal Rules of Criminal Procedure, all other relevant statutes and administrative rules and regulations, the attached Memorandum of Points and Authorities, the Declarations and the attached Exhibits cited herein, and upon any other oral or documentary evidence which may be adduced at the hearing on this motion.

Dated: April 17, 2015

Respectfully submitted,

/s/ Marc S. Harris

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 On February 9, 2015, officials of the United States Department of Homeland
4 Security, Immigration and Customs Enforcement, Homeland Security Investigations
5 (“HSI”) stopped a common carrier on Interstate 15 near Yermo, California in the
6 Central District of California, laden with cigarettes lawfully purchased and imported
7 into the state by the Big Sandy Rancheria Tobacco Distribution, an instrumentality
8 of the Big Sandy Band of Western Mono Indians, a federally recognized Indian tribe
9 headquartered in Auberry, California. HSI seized the above-reference property and
10 removed it to an unknown destination under U.S. Customs and Border Protection
11 (“CBP”), Seizure Case No. 2015-2714-00041-01/LAJ.

12 CBP asserts that the seized property is contraband under the Contraband
13 Cigarette Trafficking Act (“CCTA”), 18 U.S.C. § 2341 et seq., which makes it
14 unlawful to transport cigarettes not bearing evidence of payment of applicable state
15 or local taxes, because the seized goods purportedly violate Cal. Rev. & Tax. §
16 30165.1, otherwise known as the California Directory Law. The Directory Law
17 imposes no taxes, but instead requires state certification of tobacco products sold in
18 the state.

19 As detailed below, Movant’s property is not contraband under state or federal
20 law. First and foremost, no state taxes are due or owing on the seized property,
21 which even CBP does not allege. Second, California’s Directory Law imposes no
22 taxes, but mandates certain licensing and other regulatory requirements instead. It is
23 blackletter law that a state’s non-tax regulations are inapplicable to the activities of
24 tribes in Indian country without express authorization by Congress. The State of
25 California, through its Board of Equalization, agrees, having instructed Movant in
26 2008 that the State’s licensing requirements do not apply to its activities because it
27 is a tribal instrumentality. Finally, any effort to impose the California Directory Law
28 on Movant’s activities in Indian country would further run afoul of the Compact

1 Clause of the United States Constitution, since doing so would not only encroach
 2 upon the plenary power of Congress to exclusively regulate Indian affairs, but
 3 would also contravene Congress' decision not to allow state regulations like the
 4 Directory Law, which was adopted as part of California's obligations under an
 5 interstate settlement known as the Master Settlement Agreement, be enforceable
 6 against tribal activities.

7 **II. STATEMENT OF FACTS**

8 1. Movant BIG SANDY RANCHERIA TOBACCO DISTRIBUTION
 9 ("BSR Distribution") is a subordinate subdivision of the Tribal Council of the Big
 10 Sandy Band of Western Mono Indians (the "Tribe"), a federally recognized Indian
 11 tribe located in Auberry, California. BSR Distribution was formed pursuant to
 12 Resolution 0810-08 adopted by the Tribal Council on August 26, 2010. *See*
 13 Declaration of Elizabeth D. Kipp ("Kipp Decl."), Ex. A. BSR Distribution is an
 14 instrumentality of the Tribe that is operated and wholly owned by the Tribe.

15 2. BSR Distribution engages in the lawful business of purchasing tobacco
 16 products and importing them into the Tribe's Rancheria. BSR Distribution operates
 17 pursuant to the Tribe's Tobacco Ordinance No. 0310-01, adopted March 15, 2010,
 18 and in compliance with a federally-issued Tobacco Importer Permit issued by the
 19 U.S. Department of Treasury, Alcohol and Tobacco Tax and Trade Bureau. Kipp
 20 Decl., Ex. B. BSR Distribution conducts its operations in conformity with all federal
 21 laws and inbound regulations. As to the seized property, BSR Distribution has paid
 22 all federal taxes due and owing thereon.

23 **A. The Wrongful Seizure**

24 3. The seized property constitutes goods lawfully purchased and shipped
 25 by BSR Distribution to its facilities on the Tribe's reservation.

26 4. The value of the cigarettes has been clarified by the Big Sandy
 27 Rancheria Finance Assistant as \$609,811.00. *See* Declaration of H. Smith ("Smith
 28 Decl."), ¶ 18.

1 5. The seized property was lawfully imported into the United States
2 through the Department of Homeland Security CBP on January 21, 2015. BSR
3 Distribution is named as the Importer of Record on the Entry Summary CBP Form
4 7501. A true and correct copy of CBP Form 7501 is attached to the Smith Decl. as
5 Ex. A. The form indicates that BSR Distribution properly declared the property, that
6 it was invoiced, and that BSR Distribution paid all required duty, tax and fees.

7 6. BSR Distribution contracted with the common carrier, Precision
8 Transport, Inc. of Silver Creek, New York (“Precision Transport”), to retrieve the
9 cigarettes from the bonded warehouse and transport them to the Big Sandy
10 Rancheria. Smith Decl., ¶ 7. On February 2, 2015, Precision Transport retrieved
11 approximately 640 boxes of cigarettes from the Customs bonded warehouse in
12 Salamanca, New York and placed them in transit destined for the Big Sandy
13 Rancheria. Smith Decl., ¶ 8; Ex. B. Precision Transport outsourced the shipment to
14 the common carrier to AAA Logistics. Smith Decl., ¶ 14. The estimated time of
15 arrival of the shipment to the Big Sandy Rancheria was to be February 9, 2015. *Id.*

16 7. On February 9, 2015, the shipment failed to arrive at the Big Sandy
17 Rancheria as scheduled. Movant later learned that the common carrier was pulled
18 over by CBP officials approximately a mile west bound on Interstate 15 after
19 passing through a California Department of Agriculture station in Yermo,
20 California. Smith Decl., ¶¶ 13-14. There CBP officials detained the common
21 carrier and seized the shipment. Smith Decl., ¶ 14.

22 8. CBP officials were dressed as plain clothes officers at the time the
23 common carrier was detained and the shipment was seized. At that time, it was
24 unknown which law enforcement or governmental entity confiscated the shipment.
25 *See* Declaration of R. Colburn (“Colburn Decl.”), ¶¶ 6-11. The common carrier
26 driver was given a one-page CBP Form 6051S. *See* Colburn Decl., Ex. A. No
27 warrant or other paper showing the basis for the seizure was provided. The seizing
28 officials did not seize the common carrier’s truck.

1 9. At no time during February 9, 2015 was BSR Distribution or Big
2 Sandy Rancheria contacted by any federal agency with regard to the shipment of
3 cigarettes. Smith Decl., ¶ 11.

4 10. Since February 9, 2015, the seized property has been held at an
5 undisclosed location. Since February 27, 2015, Movant has not received and CBP
6 has refused to provide any information as to where the property is being held or
7 under what conditions it is being held. *See* Colburn Decl. The property is
8 perishable and may not be useable if stored improperly which will result in
9 irreparable harm to Movant. Smith Decl., ¶¶ 15-18.

10 **B. Lack Of Notice**

11 11. Numerous contacts with the various offices within CBP have been
12 made since the property was seized. *See* Colburn Decl. CBP has been unwilling to
13 provide any information as to the specific nature of the seizure, who has been
14 assigned the case, or where and how the property is being stored. *Id*; Declaration of
15 S. Balluff (“Balluff Decl.”). To date BSR Distribution has been unable to ascertain
16 any information as to where or how its perishable property is being stored.
17 Additional attempts to contact the United States Attorneys, Central District office
18 have been made to no avail. *See* Colburn Decl.; Balluff Decl.

19 **C. The First Asserted Basis for the Seizure: Smuggling, Contraband** 20 **Cigarettes & Delivery Sales**

21 12. By email dated February 27, 2015, CBP finally notified the Tribe that
22 BSR Distribution’s goods had been seized by HSI and were subject to forfeiture (the
23 “Seizure Notice”). *See* Declaration of D. Houck (“Houck Decl. 1”), Ex. A.

24 13. The Seizure Notice asserted two separate statutory bases for seizing the
25 goods and subjecting them to forfeiture. The first was under 18 U.S.C. § 545
26 (smuggling) and § 2342 (contraband cigarettes) on the alleged grounds that the
27 goods were involved or attempted to be involved in a financial transaction
28 representing the proceeds of an unlawful activity. The second was under 15 U.S.C.

§ 375 of the Prevent All Cigarette Trafficking Act (“PACT Act”), Pub. L. 111-154, 124 Stat. 1087, on the alleged grounds that the Tribe was not a California state licensed wholesaler and because the manufacturer of the seized goods was not approved under California’s tobacco directory laws. The Seizure Notice offered no factual basis whatsoever under either theory for the seizure or the probable cause for concluding that the seized property was subject to forfeiture.

D. The Later Asserted Basis for the Seizure: Money Laundering, Criminally Derived Property, Contraband Cigarettes & Master Settlement Agreement

14. A month after issuing the Seizure Notice, CBP withdrew it and issued a second, amended seizure notice on March 26, 2015 (the “Amended Seizure Notice”). *See* Houck Decl. 1, Ex C. The Amended Seizure Notice contained no references to illicit smuggling or to violations of the PACT Act, like the original Seizure Notice. Instead it asserted two new statutory bases for seizing the goods and subjecting them to forfeiture. The first was under the civil forfeiture provisions of 18 U.S.C. § 981 for violations of 18 U.S.C. § 1956 (money laundering), § 1957 (use of criminally derived property), and again § 2342 (trafficking in contraband cigarettes), still on the alleged grounds that the Tribe was not a California state licensed wholesaler and because the manufacturer of the seized goods was not approved under California’s tobacco directory laws. The second new basis was under the forfeiture provisions of 19 U.S.C. § 1595(c)(1)(C) for violation of 49 U.S.C. § 80302(a)(5), which incorporates violations of 18 U.S.C. § 2342 (contraband cigarettes) by reference.

15. Under both the original and the amended seizure notices, CBP appears to claim that the seized property is contraband because of purported violations of section 30165.1(e) of “California Law,” by which CBP likely means California’s Revenue and Taxation Code.

1 **III. LEGAL ANALYSIS**

2 16. “Rule 41(g) [of the Federal Rules of Criminal Procedure] is an
 3 appropriate means of obtaining the return of property improperly seized by the
 4 government.” *United States v. Comprehensive Drug Testing, Inc.*, 579 F.3d 989,
 5 1001 (9th Cir. 2009); *Ramsden v. United States*, 2 F.3d 322 (9th Cir. 1993). Where
 6 “the motion is made by a party against whom no criminal charges have been
 7 brought, such a motion is in fact a petition that the district court invoke its civil
 8 equitable jurisdiction.” *Comprehensive Drug*, 579 F.2d at 1001. “[T]he motion is
 9 treated as a civil complaint seeking equitable relief.” *United States v. Ritchie*, 342
 10 F.3d 903, 906 (9th Cir.2003). It is therefore “governed by the Federal Rules of Civil
 11 Procedure.” *United States v. Ibrahim*, 522 F.3d 1003, 1007 (9th Cir.2008 This Court
 12 Should Exercise Jurisdiction Under Rule 41(g)

13 17. A district court must consider four discretionary factors before reaching
 14 the merits of a pre-indictment motion under Rule 41(g). *Comprehensive Drug*
 15 *Testing, Inc.*, 621 F.3d at 1173. In determining at the outset whether to exercise its
 16 equitable jurisdiction, the Court should consider four factors:

- 17 1.) whether the Government displayed a callous disregard for the
- 18 constitutional rights of the movant; [¶]
- 19 2.) whether the movant has an individual interest in and need for the property
- 20 he wants returned; [¶]
- 21 3.) whether the movant would be irreparably injured by denying return of the
- 22 property; and [¶]
- 23 4.) whether the movant has an adequate remedy at law for the redress of his
- 24 grievance.

25 *Ramsden*, 2 F.3d at 325.

26 18. The movant need not satisfy all four factors. Rather, if the “balance of
 27 equities tilts in favor of reaching the merits” of the Rule 41(g) motion, the district
 28 court should exercise its equitable jurisdiction to entertain the motion. *See, e.g., id.*

1 at 326 (exercising jurisdiction in absence of irreparable injury); *see also United*
 2 *States v. Comprehensive Drug Testing, Inc.*, 473 F.3d 915, 936 (9th Cir. 2006)
 3 (exercising jurisdiction in absence of callous disregard) (reversed *en banc* on other
 4 grounds by *Comprehensive Drug*, 579 F.3d at 989).

5 19. All four factors weigh in favor of exercising jurisdiction here. The
 6 government has completely ignored BSR Distribution's constitutional rights to its
 7 property. There are several likely, irreversible, and irremediable damages from
 8 HSI's unwarranted seizure of Movant's property. And in light of the government's
 9 refusal to file any action, BSR Distribution has no adequate remedy save through
 10 this motion.

11 1. First Factor – Disregard for Movant's Rights

12 20. The United States' unlawful seizure of Movant's property was made in
 13 violation of applicable statutes, in disregard for Movant's rights as a federally
 14 recognized tribal instrumentality, and as an encroachment upon the exclusive and
 15 plenary authority of the United States Congress over Indian affairs.

16 (a) Failure to Comply with Warrantless Search 17 Requirement

18 21. 18 U.S.C. § 981(b) provides that property subject to forfeiture there
 19 under must be seized pursuant to a warrant obtained in the same manner as provided
 20 for a search warrant under the Federal Rules of Criminal Procedure. 18 U.S.C. §
 21 981(b)(2). The seizure of BSR Distribution's property occurred without a lawful
 22 warrant.

23 22. 18 U.S.C. § 981(b) also permits warrantless seizures, but if and only if
 24 one of the following conditions is met: (A) a forfeiture complaint was filed and an in
 25 rem arrest warrant issued by a United States district court; (B) probable cause exists
 26 to believe the property is subject to forfeiture and the seizure is made pursuant to a
 27 lawful arrest and search or another exception to the Fourth Amendment warrant
 28 requirement exists; or (C) the property was lawfully seized by a State or local law

1 enforcement agency and transferred to the federal agency. 18 U.S.C. §
2 981(b)(2)(A)-(C).

3 23. The warrantless seizure of BSR Distribution's property was made in
4 disregard of the requirements set forth in 18 U.S.C. § 981(b) in that no forfeiture
5 complaint was ever filed in a state or federal district court, no reasonable probable
6 cause existed to believe the property is subject to forfeiture, and in that the property
7 was not lawfully seized by California or local law enforcement officials and
8 ultimately transferred to CBP.

9 24. For the foregoing reasons, CBP lacked a lawful basis to seize BSR
10 Distribution's property under 18 U.S.C. § 981.

11 **(b) Unlawful Diminishment of Tribal Sovereignty**

12 25. Even if the United States had satisfied the warrantless seizure
13 requirements of 18 U.S.C. § 981(b), seizure would still be unlawful for failure to
14 establish probable cause for a violation of 18 U.S.C. § 2342 of the Contraband
15 Cigarette Trafficking Act ("CCTA"), the predicate for the civil forfeiture statutes on
16 which the United States relies.

17 26. The CCTA violations CBP purports in its Amended Seizure Notice are
18 predicated on the alleged facts (1) that the Tribe is not a California-licensed
19 cigarette wholesaler; and (2) that the manufacturer of the seized cigarettes is not
20 state-approved. Even if these facts were true, they could not give rise to a CCTA
21 violation since the underlying state laws are not tax-related and are inapplicable to
22 the activities of tribes in Indian country, as even California acknowledges.

23 27. The CCTA defines "contraband cigarettes" as cigarettes "which bear no
24 evidence of the payment of applicable State or local cigarette taxes in the State or
25 locality where such cigarettes are found." 18 U.S.C. § 2341(2). The CCTA makes it
26 unlawful to knowingly ship, transport, receive, possess, sell, distribute, or purchase
27 contraband cigarettes, or to knowingly make any false statement or representation
28

1 with respect to certain information required to be kept about transactions involving
2 10,000 cigarettes or more. 18 U.S.C. § 2342.

3 28. No state taxes are applicable on purchases made by a tribal tobacco
4 distributor operating on its own reservation, as here. *Moe v. Confederated Salish*
5 *and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 475-76 (1976).
6 With no state or local cigarette taxes applicable, there is no federal requirement that
7 tax stamps be affixed to Movant's seized property. Indeed, under federal law,
8 California is prohibited from taxing Indians or Indian tribes on the distribution of
9 tobacco products within Indian country, as the legal incidence of the tax cannot fall
10 on the Indian tribe. *See Moe*, 425 U.S. at 475-76; *California St. Bd. Of Equalization*
11 *v. Chemehuevi Indian Tribe*, 474 U.S. 9, 12 (1985).

12 29. The California Board of Equalization ("BOE") acknowledges this. In
13 an opinion issued in 2007, BOE stated that "[a]bsent authorization from
14 Congress...tribes cannot be taxed for their distributions within Indian country under
15 federal law." BOE Memorandum, "Cooperation with Native American Tribes-
16 Taxation of Cigarettes & Tobacco Products" (Aug. 3, 2007), at 2 n. 4 ("BOE
17 Memorandum"), a true and correct copy of which is attached to the Declaration of
18 Sally Eredia ("Eredia Decl.") as Ex. A. *See also* BOE Regulation 1616(d)(3)(A)
19 ("Sales by Indians"), a true and correct copy of which is attached to the Eredia Decl.
20 as Ex. B ("Sales tax does not apply to sales of tangible personal property made to
21 Indians by Indian retailers negotiated at places of business located on Indian
22 reservations if the purchaser resides on a reservation and if the property is delivered
23 to the purchaser on a reservation."); BOE Publication 146, "Cigarette and Tobacco
24 Taxes, Indian Retailers" (April 2014), at 23, a true and correct copy of which is
25 attached to the Eredia Decl. as Ex. B. ("An Indian retailer in California who buys
26 untaxed cigarettes without a California tax stamp, or buys untaxed tobacco products,
27 and sells them to non-Indians in Indian country is required to collect the cigarette
28 and tobacco products tax from those purchasers...").

30. The State's inability to tax tobacco purchases made by tribes in Indian country contrasts with its authority to "impose a nondiscriminatory tax on non-Indian customers of Indian retailers doing business on the reservation, with certain exceptions for products that have value added on the reservation." *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 151 (1980). The state may also impose this tax collection obligation on Tribal retailers. *See Okla. Tax Comm. v. Citizen Band of Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 512-13 (1991). The property seized by CBP was purchased by Movant, a tribal instrumentality, for distribution to other tribal entities in Indian country, not for retail sale to non-Indians.

31. This distinction between the State's inability to tax purchases by Tribes and tribal members within Indian country and its ability to tax sales to non-Indians is the basis for the BOE's positions described above and the reason that BSR Distribution may lawfully purchase and possess unstamped cigarettes for distribution in Indian country without violating the provisions of the CCTA.

(c) Improper Imposition of State Regulations in Indian Country

32. Rather than allege that taxes are due and owing on Movant's seized property, CBP claims alleges it is contraband under section 30165.1(e) of "California Law," by which CBP likely means California's Revenue and Taxation Code, otherwise known as the California Directory Law.¹

33. Section 30165.1(e)(1) of the Directory Law prohibits any person from affixing cigarette tax stamps to cigarette packs unless the cigarette brand family and

¹ See California Dept. of Justice, Office of the Attorney General, "California Tobacco Directory Legislation & Regulations," <http://oag.ca.gov/tobacco/directory/regulations> (Rev. & Tax. § 30165.1 known as the California Complementary Legislation or "directory law").

1 the manufacturer making or selling the cigarettes are included on the directory of
 2 approved manufacturers maintained by the State attorney general pursuant to
 3 subsection 30165.1(c).

4 34. Subsection 30165.1(c) requires the California Attorney General to
 5 maintain and publish a directory of all tobacco product manufacturers that have
 6 provided information conforming to subsection 30165.1(b). Subsection 30165.1(b),
 7 in turn, requires each tobacco manufacturer whose cigarettes are sold in the State to
 8 certify that it is either a participating manufacturer under the Master Settlement
 9 Agreement² or is in full compliance with certain provisions of the California Health
 10 & Safety Code³ requiring every tobacco product manufacturer selling cigarettes to
 11 consumers in the State either to sign the Master Settlement Agreement as a
 12 participating manufacturer or to pay funds into a qualified escrow fund. Cal. Health
 13 & Saf. Code § 104557(a) (the “Escrow Statute”).

14 35. CBP’s seizure of Movant’s property cannot be because the cigarettes
 15 “bear no evidence of the payment of applicable State or local cigarette taxes,” as
 16 required for a violation of the CCTA, because no such taxes are due and because
 17 none are imposed California’s Directory Law.

18 36. The Directory Law’s provisions instead demonstrate that the actual
 19 basis for CBP’s seizure is for alleged violations of non-tax related laws and
 20 regulations implementing the Master Settlement Agreement, compliance with which
 21 California makes a pre-condition for applying cigarette tax stamps. CBP’s original
 22 and amended Seizure Notices both allege that the seized property is contraband
 23 because the Tribe is “not a California state licensed wholesaler.” That fact does not
 24 _____

25 ² The Master Settlement Agreement (“MSA”) refers to the 1998 settlement
 26 agreement resolving lawsuits by the attorneys general of 46 states, the District of
 27 Columbia and five United States territories against five major American tobacco
 28 companies.

³ Specifically, Article 3 of Chapter 1 of Part 3 of Division 103 of the Health and
 Safety Code, commencing with § 104555.

1 and cannot render the seized property contraband under the CCTA. First, as
2 explained above, it is blackletter law that a state's regulations do not apply to the on-
3 reservation activities of tribal members. Second, according to the California Board
4 of Equalization, which is responsible for issuing and administering state tobacco
5 distributor licenses, BSR Distribution's on-reservation activities require no license
6 under California law.

7 37. In 2008 the Tribe applied to BOE on behalf of BSR Distribution for a
8 license to distribute tobacco products pursuant to the California Cigarette and
9 Tobacco Products Licensing Act of 2003, submitting a fee of \$2,000 for that
10 purpose. *See* Declaration of Chairwoman E. Kipp ("Kipp Decl."), ¶¶ 5-8 and Ex. C.
11 By letter dated April 30, 2008, BOE returned the application, stating that no
12 California distributor's license was required because of the Tribe's sovereign status
13 and because BSR Distribution would not be distributing tobacco products to off-
14 reservation California retailers and wholesalers. *See* Kipp Decl., ¶ 8 and Ex. C.
15 BSR Distribution has operated in conformity with BOE's determination ever since,
16 and the Tribe has never been informed of any subsequent changes in BOE's
17 position.

18 38. CBP's seizure notices also allege that the seized property is contraband
19 because the manufacturer of the seized goods is not a California-approved cigarette
20 manufacturer. This, too, cannot constitute a violation of the CCTA. First because
21 whether or not a cigarette manufacturer is state-approved is irrelevant to the issue of
22 whether State or local taxes are applicable to the seized property under the CCTA.
23 For the reasons set forth above, no state taxes are due or owing on the seized
24 property, and CBP nowhere alleges otherwise. Second, the CCTA is concerned
25 only for the enforcement of lawfully applicable taxes, not for compliance with a
26 state's licensing and other non-tax-related regulations, which federal law makes
27 otherwise inapplicable to activities in Indian country without express Congressional
28

1 authorization. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207
 2 (1987); *Wagnon v. Prairie Band of Potawatomi Nation*, 546 U.S. 95, 101-02 (2005).

3 **(d) CBP Cannot Impose State Regulations in Indian**
 4 **Country**

5 39. The California legislature enacted the Directory Law (Cal. Rev. & Tax.
 6 § 30165.1), which CBP purports Movant violated, to comply with the State's
 7 obligations under the Master Settlement Agreement ("MSA"), a 1998 agreement
 8 between 46 state attorneys general and five major tobacco companies to resolve
 9 tobacco-related lawsuits. Modeled on language contained in the MSA, the Directory
 10 Law forms part of a larger, interlocking set of laws and regulations enacted by
 11 California and the other settling states to effectively implement the terms of the
 12 MSA nationally.⁴

13 40. California's MSA regulations, like the Directory Law, have nothing to
 14 do with the imposition or collection of cigarette taxes, but create a host of non-tax-
 15 related regulations such as requiring cigarettes sold in the state to be approved as
 16 fire-safe certified or to appear on the state's directory of approved brands. *See e.g.*,
 17 Cal. Health & Saf. Code § 104557; Cal. Health & Saf. Code § 104951. Such laws
 18 are classic examples of "civil/regulatory" laws that are beyond the State's authority
 19 to impose in Indian country. *See Cabazon Band of Mission Indians*, 480 U.S. at 209-
 20 11.

21 41. When Movant purchases and imports cigarettes onto the Tribe's
 22 reservation in conformity with tribal and federal law, as it has indisputably done for
 23

24
 25 ⁴ California's other MSA-related laws include the Reserve Fund Statute (Cal. Health
 26 & Saf. §§ 104555-104557); Cigarette and Tobacco Products Licensing Act of 2003
 27 (Bus. & Prof. § 22970 et seq.); Fire Safety and Firefighter Protection Act (Health &
 28 Saf. §§ 14950-14960); and the Tobacco Directory Regulations (Cal. Code. Regs., tit.
 11, §§ 999.10 et seq.). *See generally*, State of California, Office of the Attorney
 General, <http://oag.ca.gov/tobacco/directory/regulations>.

1 years, there is no additional requirement that the Movant comply with the State's
2 non-tax regulations, including the State's MSA laws.

3 **(e) Compact Clause Violation**

4 42. CBP's seizure of Movant's property based on a purported underlying
5 violation of California's Directory Law effectively upends federal supremacy and
6 violates the Compact Clause of the United States Constitution, which provides that

7 No State shall, without the Consent of Congress...enter into
8 any Agreement or Compact with another State...

9 U.S.C.A., Art. I, sec. 10, cl. 3.

10 43. The Compact Clause applies only to interstate arrangements "directed
11 to the formation of any combination tending to the increase of political power in the
12 States, which may encroach upon or interfere with the just supremacy of the United
13 States." *Northeast Bancorp, Inc. v. Board of Governors of Federal Reserve System*,
14 472 U.S. 159, 175-76 (1985). This is precisely the case here.

15 44. The Compact Clause inquiry is functional, not formal, and assesses the
16 impact of an interstate arrangement like the MSA on the federal structure. *United*
17 *States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 470-71 (1978) Where
18 such an arrangement "encroach[es] upon or interfere[s] with the just supremacy of
19 the United States," *id.* at 468, then Congressional consent is required. Indeed, the
20 requirement of Congressional consent is at the heart of the Compact Clause. *Cuyler*
21 *v. Adams*, 449 U.S. 433, 439 (1981).

22 By vesting power in Congress the power to grant or withhold
23 consent, or to condition consent on the States' compliance
24 with specified conditions, the Framers sought to ensure that
25 Congress would maintain ultimate superiority over
cooperative state action" that might otherwise interfere with
"the free exercise of federal authority.

26 *Id.*, citing F. Frankfurter & J. Landis, "The Compact Clause of the Constitution—A
27 Study in Interstate Adjustments," 34 YALE L.J. 685, 694–695 (1925).

1 45. The MSA, to which California is a signatory, presents the classic
2 indicia of an interstate arrangement falling within the Compact Clause. Among other
3 things, the MSA requires the attorneys general of all 46 participating states to
4 coordinate their efforts to enforce the MSA and to monitor “potential conflicting
5 interpretations [of the MSA] by courts of different States.” A true and correct copy
6 of MSA § VII(f) and the Term Sheet dated November 14, 2012, representing the
7 settlement between 46 states, including California and the participating
8 manufacturers, is attached to the Second Declaration of Darcie Houck (“Houck
9 Decl. 2”) as Exhibits 1 and 2.

10 46. The MSA further requires all participating states, including California,
11 to “coordinate and resolve” the effects of conflicting interpretations “as to matters
12 that are not exclusively local in nature,” that is, that impact the MSA’s
13 implementation on an interstate basis. *Id.* Intra-state matters that could give rise to
14 interstate effects requiring such “coordination” would include, for example, tribal
15 tobacco businesses operating in Indian country within the boundaries of the settling
16 states but subject to federal authority. *See, e.g., In re the 2003 NPM Adjustment*
17 *Proceedings*, JAMS Ref. No. 1100053390, Final Award Re: State of New York
18 (Sept. 11, 2013), at 15 (describing conflicts between participating manufacturers and
19 settling states arising from attempts to implement MSA in Indian country).

20 47. The MSA further requires settling states’ attorneys general, acting
21 through the National Association of Attorneys General (“NAAG”), to convene
22 meetings twice per year and “one major national conference” once every three years
23 to “evaluate the success” of the MSA and to “coordinate efforts by the Attorneys
24 General and Participating Manufacturers” on certain issues. MSA, § VIII(a).
25 NAAG must also “support and coordinate the efforts of the Attorneys General” of
26 the settling states “in carrying out their responsibilities” under the MSA. MSA,
27 § VIII(a)(4). *See* Houck Decl. 2, Ex 1. Over the years, NAAG’s activities have
28 included efforts to coordinate the MSA’s enforcement in Indian country. *See, e.g.,*

1 *In re the 2003 NPM Adjustment Proceedings*, JAMS Ref. No. 1100053390, Final
 2 Award Re: State of New York (Sept. 11, 2013), at 3 (“It is undisputed that NAAG
 3 served as an advisory and legal resource to the Settling States, including interpreting
 4 the MSA and opining on potential requirements for ‘diligent enforcement.’”)

5 48. Because they are centrally coordinated, commonly funded and aim at a
 6 consistent national application, the enforcement mechanisms established by the
 7 MSA and adopted by the settling states thus present the “classic indicia” of an
 8 interstate compact. *Northeast Bancorp, Inc. v. Board of Governors*, 472 U.S. 159,
 9 175 (1985).

10 49. By relying ultimately on purported violations of California’s Directory
 11 Law, which has nothing to do with taxation, CBP’s seizure of Movant’s property
 12 has the effect of enhancing California’s authority over the Tribe at the expense of
 13 Congress’ authority over Indian affairs, which, under the Compact Clause, is simply
 14 impermissible without Congressional approval. *United States Steel*, 434 U.S. at 472.

15 50. Not only has Congress never approved such a state of affairs with
 16 respect to the MSA, it refused to do so when given the chance. When first
 17 introduced in 2003 and consistently thereafter, all drafts of what became the Prevent
 18 All Cigarette Trafficking Act (“PACT Act”) contained provisions that would have
 19 made state MSA laws effectively applicable in Indian country. *See, e.g.*, S. 1177
 20 (108th cong., 1st sess.) (June 3, 2003), § 5 (“Compliance with Model Statute or
 21 Qualifying Statute”); S. 1147 (111th cong., 1st sess.) (May 21, 2009), § 4 (same).
 22 Prior to its enactment and after considering the matter, Congress stripped these
 23 provisions from the PACT Act while at the same time including separate provisions
 24 reaffirming the rights of tribal sovereignty in the context of the manufacture and
 25 distribution of Native tobacco products. *See* Pub. L. 111-154, § 5.

26 51. Congress understood that including approval of the MSA provisions in
 27 the PACT Act would have rendered it into federal law. *Cuyler v. Adams*, 449 U.S.
 28 433, 440 (1981) (Compact Clause transforms Congressional approval of an

1 interstate cooperative agreement whose subject matter is an appropriate subject for
 2 congressional legislation into federal law). Thus Congress' decision to remove
 3 these provisions before the PACT Act's enactment provides clear and affirmative
 4 evidence that Congress refused the attempt, like CBP's here, to impose any state's
 5 MSA laws in Indian country.

6 52. CBP's seizure of Movant's property for purported violations of
 7 California's Directory Law thus seeks to do what Congress explicitly refused to do.
 8 CBP's reliance on an alleged violation of a participating state's MSA law to seize a
 9 tribe's property and subject it to forfeiture under the CCTA thus constitutes an
 10 unauthorized encroachment on federal supremacy over Indian affairs in violation of
 11 the Compact Clause.

12 **2. Second Factor – Movant's Interest In and Need for the** 13 **Seized Property**

14 53. As to the second factor, BSR Distribution has an individual interest in
 15 and need for the seized property it seeks returned. Movant is the legal owner of, and
 16 has possessory interest in the seized property. The Movant is a business
 17 instrumentality of the Tribe that has been legally conducting business since 2004
 18 and lawfully importing Native-made cigarettes from Canada since 2012. Nearly all
 19 of BSR Distribution's available capital is tied up in the goods, which it owns
 20 outright, and which it has already committed to existing customers. BSR
 21 Distribution is obliged under existing arrangements to provide the goods to its
 22 customers by a date certain. BSR Distribution is also obliged to pay the parties from
 23 whom it lawfully purchased the seized goods. Without this property Movant's
 24 business will be unable to function as payment for these products from Canadian
 25 suppliers will be in default.

26 **3. Third Factor - Irreparable Injury to BSR Distribution**

27 54. If the seized goods are not immediately returned, BSR Distribution will
 28 face imminent default on its obligations to its suppliers and its customers. As

1 agricultural products, BSR Distribution's property will spoil and their value will be
 2 entirely lost if not returned soon. Without the release of the goods, BSR Distribution
 3 could cease to operate and would have to terminate its employees. For these
 4 reasons, BSR Distribution will also be irreparably injured by denying return of the
 5 seized property, the third equitable factor. The harm to the Tribe's on-reservation
 6 economy and the lives of its members will be immediate and irremediable. Jobs will
 7 be lost, BSR Distribution may shut down, and the Tribe's small economy will be
 8 significantly harmed. *See* Declaration of H. Smith.

9 55. The returned property will not be used to commit any misconduct or be
 10 diverted from its intended destination on the Tribe's Rancheria. Any and all
 11 subsequent distribution will occur only within Indian country, consistent with
 12 federal and tribal law and with Movant's existing business practices. No violation
 13 of any state or federal law has occurred, and the hardship already suffered by the
 14 Movant outweighs any risks associated with continued possession by the
 15 Government.

16 4. Fourth Factor - No Adequate Remedy at Law

17 56. BSR Distribution has no adequate remedy at law in the event its
 18 property is either not returned or is ultimately destroyed by spoliation.

19 57. To date and to Movant's knowledge, no civil forfeiture, complaint, or,
 20 criminal indictment has been filed or returned with regard to the in-rem property.⁵

21 _____
 22 ⁵ On or about March 23, 2015 BSR Distribution returned to CBP its Election of
 23 Proceeding and CAFRA Seized Property Form filing a claim for the seized property,
 24 requesting that the matter be referred to the U.S. Attorney to either return the property or
 25 file a civil forfeiture action. *See* Declaration of D. Houck, as Ex. B. BSR Distribution
 26 through its counsel also requested that the assigned attorney contact BSR Distribution's
 27 counsel immediately to discuss the matter. To date attorney for BSR Distribution has not
 28 received a call or the name of the assigned attorney from CBP or the U.S. Attorney
 regarding this matter and no further information has been made available to BSR
 Distribution. *See* Declaration of R. Colburn; *See also* Declaration of S. Balluff.

1 If the government never makes any of these remedies “meaningfully available,” the
 2 simple fact that they might one day be invoked “cannot be considered an adequate
 3 remedy at law.” *United States v. Clagett*, 3 F.3d 1355, 1357 n.1 (9th Cir. 1993).
 4 Nor would it be particularly “meaningful” for BSR distribution to challenge the
 5 seizure after the goods have gone bad. Accordingly, the government’s failure to
 6 initiate a substantive forfeiture action over the past several months indicates that no
 7 adequate remedy at law exists.

8 58. Again, a movant need not show that it satisfies each and every factor.
 9 Even where one factor is arguably not met, a court can exercise jurisdiction “if the
 10 three other equitable jurisdiction factors weigh in favor of hearing the motion[.]”
 11 *United States v. Comprehensive Drug Testing, Inc.*, 513 F.3d 1085, 1104 (9th Cir.
 12 2008), *on reh’g en banc*, 579 F.3d 989 (9th Cir. 2009) *opinion revised and*
 13 *superseded*, 621 F.3d 1162 (9th Cir. 2010), citing *Ramsden*, 2 F.3d at 326 (where
 14 three of the four factors favor exercise of equitable jurisdiction, court has power to
 15 hear Rule 41(g) motion).

16 **IV. THE TOTALITY OF THE CIRCUMSTANCES WEIGH IN FAVOR**
 17 **OF THE COURT ORDERING THE GOVERNMENT TO RETURN**
 18 **THE PROPERTY**

19 59. The California laws that regulate and/or tax cigarettes sold in California
 20 do not apply to the importation of cigarettes for wholesale Distribution exclusively
 21 by and between federally recognized tribes and their instrumentalities in Indian
 22 country, as here. Indian tribal sovereignty is dependent on, and subordinate to, only
 23 the federal government, not the states. *California v. Cabazon Band of Mission*
 24 *Indians*, 480 U.S. 202, 207 (1987). Thus, in the absence of Congressional
 25 authorization, states are categorically barred from taxing or regulating Indian tribes
 26 or tribal members for their activities within Indian country, and states are generally
 27 precluded from otherwise applying their laws to Indians on their reservations. *Id.*;
 28 *Wagnon v. Prairie Band of Potawatomi Nation*, 546 U.S. 95, 101-02 (2005).

1 60. Congress has granted California limited authority to apply certain laws
2 within Indian country, but state “civil/regulatory” laws are not within that grant of
3 jurisdiction. *Cabazon* at 209-10. California’s cigarette laws, which incorporate a
4 host of non-tax-related regulations such as requiring cigarettes sold in the state to
5 bear an excise tax stamp, to be approved as fire-safe certified, and to be listed on the
6 state’s directory of approved brands, are classified as “civil/regulatory” laws. *See*
7 *id.* at 209-11. *See also* Cal. Rev. & Tax. Code § 30165.1; Cal. Health & Saf. Code
8 §§ 104557, 104951. Under federal law, these state regulations cannot be applied
9 against a tribal instrumentality operating in Indian country. When BSR Distribution
10 purchases cigarettes and imports them onto the Big Sandy Rancheria, there is no
11 applicable requirement that the product bear the State’s tax stamps or otherwise
12 satisfy the State’s regulatory standards, including the Directory and licensing
13 provisions of California law. BSR Distribution need only meet the applicable
14 requirements of federal and tribal law, which it indisputably did in this case, and
15 which it has indisputably done for many years.

16 61. The Court, when deciding the merits of a 41(g) Motion, should look
17 only to whether the Government’s continued retention of the property is reasonable
18 under the totality of the circumstances. *Ramsden v. United States*, 2 F.3d 322, 326
19 (9th Cir. 1993) (citing the Advisory Committee Notes to the 1989 Amendment of
20 Rule 41(g)).

21 62. BSR Distribution was not violating federal law, there is no criminal
22 proceeding pending, and the property was en route to the reservation at the time of
23 the seizure. The allegations in the notice and amended notice are vague at best,
24 given the only grounds noted for the seizure are citations to statutory codes. No
25 factual basis for any violation is provided in the notice what so ever. *See* Houck
26 Decl., Exs. A and C. (Copy of Notice and Amended Notice).

27 63. Movant promptly asserted its rights and has diligently continued to
28 contact CBP in attempts to resolve the matter with no response. In fact, CBP

1 continues to, after more than 2 months since the seizure, refuse to discuss the case
2 substantively with the Movant or Movant's counsel. The goods at issue are
3 perishable and if not released to Claimant immediately will lose significant if not all
4 of its value. *See* Declarations of R. Colburn and S. Balluff.

5 64. Movant has been diligent throughout the duration of the seizure and has
6 attempted to contact and consult with CBP to no avail. Moreover, CBP's assertions
7 and alleged violations are invalid as the goods at issue were being lawfully
8 transported to an Indian reservation in accordance with all applicable federal and
9 tribal laws.

10 **WHEREFORE**, the Movant moves this Court to issue an order directing the
11 United States Government to: (1) immediately unfreeze, release and return the
12 above-referenced property to Movant; (2) for any other relief this Court deems just
13 and proper; or, set a date for an evidentiary hearing wherein the Government can
14 attempt to demonstrate why the relief prayed for should not be granted.

15 This 17th day of April, 2015.

16 Respectfully submitted,

17
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