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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION

BIG SANDY RANCHERIA ENTERPRISES, a federally-recognized Indian tribe, incorporated under the Indian Reorganization Act, Plaintiff, vs. 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.	Case No.: 1:18-cv-00958-DAD-EPG **OPPOSITION TO DEFENDANT BECERRA'S MOTION TO DISMISS FIRST AMENDED COMPLAINT** Date: February 5, 2019 Time: 9:30 a.m. Courtroom: 5 District Judge Dale A. Drozd

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INTRODUCTION

Plaintiff Big Sandy Rancheria Enterprises ("BSRE") brought this suit to clarify the limits of State authority concerning BSRE's wholesale distribution of tribally-manufactured cigarettes to Indian tribes and their members on their reservations. Defendant Xavier Becerra ("Becerra") contends in his motion to dismiss that all the legal questions are settled. There are significant differences, however, between BSRE's *wholesale* tobacco sales to Indian tribes and their members in the Indian country over which the tribes have jurisdiction and the *retail* sales of cigarettes to non-members at issue in the cases on which Becerra relies; and significant differences between California's tangled cigarette directory and tax schemes and the cigarette tax schemes at issue in the cases Becerra relies on.

The innuendo introducing Becerra's brief mischaracterizes BSRE's intentions as unsavory or nefarious. *See* Becerra Mem. (Doc. 15-1) at 2. Becerra paints BSRE's tobacco business in a negative light and seeks to maximize the State's taxation and regulatory control over tribal commerce to satisfy the State's contractual agreement with the "Big Tobacco" manufacturers to protect their share of the cigarette market and the revenue Big Tobacco pays to the State. Becerra ignores that BSRE is simply conducting commerce between Indian nations. Indian tribes, including Big Sandy's ancestors, engaged in such tribe-to-tribe trade before California was a state. 8 Handbook of North American Indians 427 (Spier, ed., 1978). Indeed, native trade networks existed for millennia before Columbus' arrival, playing a vital role in the daily lives of native communities.

Federal law today recognizes the critical importance of tribal business to advance tribal self-government and, under the plenary authority over Indian affairs the Constitution gives to the federal government, protects such commerce from impermissible state interference. *See, e.g.*, *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 101-02 (2005) (reiterating that "the States are categorically barred from placing the legal incidence of an excise tax 'on a tribe or tribal members for sales made inside Indian country' without congressional authorization," and that even a tax imposed on a non-Indian "may nonetheless be pre-empted if the transaction giving rise to the tax liability occurs on the reservation and the imposition of the tax fails to satisfy the *Bracker* interest-balancing test") (quoting *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 540, 459 (1995); and

citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980)); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 341 (1983) (state regulation of reservation activity involving "'value generated on the reservation by activities involving the Tribe'" is preempted because it would "'stand as an obstacle to the accomplishment of the full purposes and objectives of Congress,'" including its "overriding objective of encouraging tribal self-government and economic development") (quoting *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 156-57 (1980)); *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 462, 480-81 (1976) (holding that state "vendor license fee" is preempted as "applied to a reservation Indian conducting a cigarette business for the Tribe on reservation land").

This brief responds to Becerra's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). Defendant Nicolas Maduros' motion to dismiss based on Rule 12(b)(1) and the Tax Injunction Act, 28 U.S.C. § 1341, *see* Doc. 16-1, and the portion of Becerra's motion based on the same grounds, *see* Doc. 15-1 at 10-13, are addressed by BSRE in a separate brief filed concurrently. That brief contains an overview of the factual background and allegations, which BSRE incorporates by reference.

ARGUMENT

I. Legal standard.

A court evaluating a motion to dismiss under Rule 12(b)(6) assumes the truth of the plaintiff's well-pleaded factual allegations and determines whether they plausibly give rise to an entitlement to relief. *Eclectic Properties East, LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 996 (9th Cir. 2014) (internal quotation marks omitted). Allegations are entitled to the presumption of truth if they "contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively." *Id.* (internal quotation marks omitted); *see also Turner v. City and County of San Francisco*, 788 F.3d 1206, 1210 (9th Cir. 2015) (in assessing 12(b)(6) motion, "a court must take all allegations of material fact as true and construe them in the light most favorable to the nonmoving party"). "In practice, 'a complaint … must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some

viable legal theory.'" *Cummings v. Cenergy Int'l Servs., LLC*, 258 F.Supp.3d 1097, 1105 (E.D.Cal. 2017) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562 (2007)).

II. The First Amended Complaint alleges sufficient facts to support its claims.

Contrary to Becerra's assertions, Doc. 15-1 at 18-19, the FAC alleges the necessary factual elements to support BSRE's claims. BSRE distributes cigarettes "exclusively to Indian tribal governmental, and Indian tribal-member, reservation-based retailers operating within their own Indian reservations/Indian country within the geographical limits of the State of California." FAC ¶ 123. All such cigarettes "are sold and delivered to such retailers at their respective retail establishments within such retailer's own Indian reservation/Indian Country." FAC ¶ 124. These allegations answer Becerra's questions. In other words, BSRE's FAC alleges that BSRE distributes cigarettes exclusively to Indian tribes and tribal members on their reservation or within their recognized Indian country.[1] Thus, BSRE cannot understand Becerra's claim that the FAC does not allege sufficient detail to inform Becerra of the nature of BSRE's business.

Moreover, the asserted lack of information has not stopped the State from sending letters and even filing a federal lawsuit demanding compliance with State and federal laws. *See* FAC Ex. B, C, E, G, I, J, and K.

III. Becerra admits that the Directory Statue is preempted.

The Directory Statute broadly regulates the distribution and possession of "cigarettes of a tobacco product manufacturer or brand family not included in the directory." Cal. Rev. & Tax. Code § 30165.1(e)(2). The Directory Statute also provides that non-directory cigarettes cannot bear State tax stamps. *Id.* § 30165.1(e)(1). It further states that no person may "[s]ell or distribute" or "[a]cquire, hold, own, possess, transport, import or cause to be imported cigarettes that the person knows or should know are intended to be distributed in violation of paragraphs (1) and (2)," i.e., off-directory cigarettes with unlawfully affixed tax stamps. *Id.* § 30165.1(e)(3).

[1] There is no relevant difference concerning whether the distribution occurs on a reservation or in Indian Country. *See* 18 U.S.C. § 1151 (defining "Indian country" to include "all land within the limits of any Indian reservation under the jurisdiction of the United States government" and land of other types); *Okla. Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 125 (1993) (in tribal-state tax jurisdiction analysis, "we ask only whether the land is Indian country").

The State advised BSRE (or its predecessor business) on several occasions that its distributions violate the Directory Statute. *See* FAC Ex. G (Doc. 13-7), Ex. I (Doc. 13-9), Ex. J (Doc. 13-10), and Ex. K (Doc. 13-11). However, because BSRE distributes to Indian purchasers in Indian country, the Indian Trader Statutes and the policy of leaving Indians free from State jurisdiction and control preemptively govern such sales, leaving no room for the State's Directory Statute to dictate which products BSRE may sell or the prices it must charge. 25 U.S.C. §§ 261-264; *Dept. of Tax. and Fin. of N.Y. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 74-75 (1994); *Central Machinery Co. v. Ariz. State Tax Comm'n*, 448 U.S. 160, 165-66 (1980); *Warren Trading Post v. Ariz. State Tax Comm'n*, 380 U.S. 685, 688-92 (1965). The State's assertion that its interests are sufficient to overcome this preemption is an issue that cannot be resolved on the pleadings alone because the necessary federal law analysis requires a "particularized inquiry" into the facts underlying the State's asserted interests. *Bracker*, 448 U.S. at 145.

Becerra concedes that the Directory Statute does not apply to certain sales, and therefore that some off-directory cigarette distributions are permitted. Doc. 15-1 at 22. Citing a provision of the Escrow Statute, Cal. Health & Safety Code § 104556(j), and a Board of Equalization publication, Becerra acknowledges that transactions which are exempt from the State excise tax "are already beyond the … intended reach" of both the Escrow Statute and the Directory Statute. *Id.* Becerra's reasons for this interpretation are not entirely evident, but BSRE agrees with the conclusion.[2] Becerra fails to recognize, however, that BSRE's sales all fall squarely within the scope of the transactions that are exempt, under federal law, from the Directory Statute.

[2] Subdivision (j) of § 104556 defines "units sold" to exclude "cigarettes sold on federal military installations, 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." The Escrow Statute then requires Non-Participating Manufacturers under the MSA ("NPMs") to place an amount of money "per unit sold" into an escrow fund. Cal. Health & Safety Code § 104557(a)(2). The definition is also carried over to the Directory Statute, which then provides that an NPM's certification of compliance with the Escrow Statute must list "the number of units sold for each brand family" during the preceding year. Cal. Rev. & Tax. Code §§ 30165.1(a)(10), (b)(2)(A). None of the NPMs' other Directory Statute obligations are expressly tied to "units sold," nor does the universal ban on off-directory cigarette brands expressly provide any exception for cigarettes that are not "units sold." Becerra perhaps construes the Directory Statute as impliedly exempting such cigarettes from its coverage, or perhaps interprets federal law to preempt state regulation of such cigarettes to precisely the same extent that it preempts state taxation.

Becerra bases his argument on two premises: (1) under certain circumstances, California has the right to regulate on-reservation *retail sales by Indians to nonmembers*, which are sales that BSRE *does not make*; and (2) irrespective of whether BSRE is engaged in the trade of goods to Indians on their own land, BSRE is subject to the full panoply of California law because its sales do not occur on the Big Sandy Rancheria. Becerra's first argument is a strawman attack. Becerra's second argument is wrong and fails to appreciate that when BSRE engages in trade with Indians on their land, BSRE is an Indian Trader. Therefore, BSRE's trade is governed by the federal Indian Trader Statutes.

Throughout Becerra's argument concerning BSRE's first and second causes of action, Becerra continually ignores that BSRE exclusively distributes tobacco products to Indian tribes and Indian tribal members on their land. Instead, he focuses on sales to nonmembers that BSRE does not make. For example, his argument suggests that Becerra understands BSRE's FAC to challenge "whether the Complementary Statute could be applied to on-reservation sales to nonmembers," or whether the Indian Trader Statues would shield BSRE from State regulation "with respect to sales to nonmembers[.]" Doc. 15-1 at 23:3-4, 24:11-12.

As the FAC alleges, BSRE does not sell tobacco products to nonmembers. Rather, "Big Sandy Distributing IRA resells and distributes those tobacco products *exclusively to Indian tribal governmental, and Indian tribal-member, reservation-based retailers operating within their own Indian reservations/Indian Country* within the geographical limits of the State of California." FAC ¶ 123 (emphasis added). Thus, BSRE's claims challenge whether the Directory Statute applies to sales made directly to Indian tribes and tribal members on their reservations – not sales to the general public or nonmembers purchasing from third-party retailers.

It is unclear why Becerra focuses on sales that BSRE specifically alleges it does not make.[3] What is clear, however, is that Becerra has not met its burden to show that BSRE's claims fail as a

[3] Becerra also seems to raise a strawman attack on any challenge to the application of California's "Reserve Fund Statute," commonly known as the "Escrow Statute." *See* Doc. 15-1 at 23:11-24:5. Again, BSRE's FAC does not raise any challenges to the Escrow Statute. Nor could it, as the Escrow Statute applies only to cigarette manufactures. As BSRE's FAC makes clear, BSRE does not currently manufacture cigarettes.

matter of law. Indeed, Becerra has not squarely addressed all of the claims raised in the FAC. Instead of addressing BSRE's allegations and the law, Becerra presents strawman arguments on entirely unrelated issues to which BSRE does not seek relief.

In pursuing strawman attacks, Becerra never directly addresses the actual issue raised in the FAC – whether under federal law the Directory Statute can be applied to BSRE's sales to Indian tribes and tribal members on their reservation. He does, however, address the issue indirectly. Thus, in explaining the reach of the Directory Statute, Becerra emphasizes that certain transactions are "beyond the [Directory Statute's] intended reach" and thus are exempt. Doc. 15-1 at 22:13-15. This includes any cigarette sales that are "exempt from state excise tax pursuant to federal law." Doc. 15-1 at 22:16-18. And, Becerra adds, "Distributions [of cigarettes] which this state is prohibited from taxing under the Constitution or laws of the United States or the Constitution of this state are exempt [from the application of the Directory Statute.]" Doc. 15-1 at 22:19-20. Furthermore, Becerra acknowledges that "cigarettes sold to tribal members in Indian country *are exempt from state taxation*[.]" Doc. 15-1 at 1:10-12 (emphasis added).

Becerra expressly recognizes that the sale of cigarettes to Indian tribes or tribal members on their reservations are categorically exempt from State excise taxes and are therefore exempt from the application of the Directory Statute. Consequently, Becerra admits that the Directory Statute cannot be enforced on BSRE's exempt on-reservation sales to Indian tribes or tribal members. Put differently, Becerra not only admits that BSRE has stated a plausible claim for declaratory relief concerning the application of the Directory Statute, but he also admits that BSRE must ultimately prevail on that claim.

Through his arguments, Becerra admits that under the Indian Trader Statutes, the sale of goods to Indians is categorically exempt from State excise taxes. Doc. 15-1 at 24:8-10. Thus, because Becerra has admitted that the Directory Statute has no application to cigarettes that are exempt from California's cigarette excise tax, he necessary admits that the Indian Traders Statutes preempt application of the Directory Statute to BSRE's sales to Indians on their reservations.

Quizzically, after acknowledging that the Indian Trader Statues apply to the "trade of goods to Indians on their land[]" Doc. 15-1 at 24:8, Becerra suggests that BSRE is not an Indian Trader

and its trade with Indian tribes and tribal members is not subject to the Indian Trader Statutes. This is so, Becerra suggests, because BSRE does not limit its sales to its reservation, but rather BSRE leaves its reservation to conduct business with Indian tribes and tribal members *on their reservations*. Doc. 15-1 at 24:13-27. Put differently, Becerra seems to urge that because BSRE is engaging in trade in conformance with the Indian Trader Statutes – which require it to conduct business on the reservation of the Indian buyer – BSRE cannot be considered an Indian Trader and its sales cannot be subject to the Indian Trader Statutes.

For the proposition that, BSRE's trade with other Indian tribes or tribal members on their reservation is subject to the full panoply of California law, Becerra relies on *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973). However, *Mescalero* has nothing to do with Indian traders and does not in any way involve an analysis of the Indian Trader Statutes.

The tribe in *Mescalero* operated a ski resort on U.S. Forest Service lands located completely outside the Tribe's reservation. *Mescalero*, 411 U.S. at 146. The ski resort was open to the general public and did not involve the trade of goods to Indians on their lands in any fashion. The issue in *Mescalero* was not whether a state could tax or otherwise regulate an Indian trader, it was whether the state could impose a gross receipts tax and use taxes in relation to a ski resort that was not on any reservation. *Id.* In other words, *Mescalero* has no application to BSRE's second cause of action whatsoever and Becerra's reliance on *Mescalero* as a basis for dismissing BSRE's claims based on the Indian Traders Statutes is misguided.

Here, unlike the Indian tribe in *Mescalero*, BSRE is unquestionably an Indian Trader. As BSRE alleges in its FAC, BSRE "resells and distributes … tobacco products exclusively to *Indian tribal governmental, and Indian tribal-member,* reservation-based retailers operating within their own reservations[.]" FAC ¶ 123 (emphasis added). Moreover, BSRE alleges that "[a]ll tobacco products sold by Big Sandy Distributing IRA, *are sold and delivered to such retailers at their respective retail establishments within such retailer's own Indian reservation/Indian Country*." FAC ¶ 124. Consequently, even under Becerra's definition of an Indian trader – one who engages in the "trade of goods to Indians on their own land[] – BSRE is an Indian Trader. As such, the Indian Trader Statutes fully apply to each of BSRE's transactions.

As Becerra allows, under the Indian Trader Statutes, State taxes are invalid "[i]nsofar as they are applied … with respect to sales made to *reservation Indians on the reservation*." Doc. 15-1 at 24:9-11. Again, this is exactly the transaction in which BSRE engages – it sells exclusively to reservation Indians on the reservation. Doc. 13 at ¶¶ 123 -124. Thus, there is no basis for Becerra's oblique suggestion that BSRE is not an Indian Trader, or that because BSRE is engaged in transactions with different Indian tribes or members from different tribes on their reservations that somehow BSRE is subject to the full panoply of California law.

Notably, in addressing the Indian Trader Statutes, Becerra does not dispute that fact that the Indian Trader Statutes preempt a state's ability to regulate the kind or price of goods sold to reservation Indians. The Indian Trader Statutes specifically provide that "the Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians." 25 U.S.C. § 261.[4] Moreover, in 1965 the Supreme Court held that the "all-inclusive regulations and the statutes authorizing them would seem in themselves sufficient to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders." *Warren Trading Post* at 690. Then in 1980, the Court expanded on *Warren Trading Post*, holding that "[i]t is the existence of the Indian trader statutes, … not their administration, that preempts the field of transactions with Indians occurring on reservations." *Central Machinery* at 165. "Until Congress repeals or amends the Indian trader statutes," the Court held, "we must give them a sweep as broad as their language, … and interpret them in light of the intent of the Congress that enacted them[.]" *Id*. at 166 (quotation marks and citations omitted).

Accordingly, under specific federal legislation – and long-standing precedent interpreting that legislation – a state has no right to impose taxes or other burdens on the transactions between

[4] The Commissioner of Indian Affairs' duties have been transferred to the Secretary of the Interior, who is authorized to delegate those duties to other officers. Reorganization Plan No. 3 of 1950, 15 Fed. Reg. 3174 (May 25, 1950).

Indian Traders and the Indian tribes and tribal members with whom they deal. *Central Machinery* at 165-66.

Presumably because he recognizes that the State cannot restrict the kind of goods sold to Indian tribes and tribal members on their reservations or regulate the price at which those goods are sold, Becerra renews his strawman attacks. Thus, Becerra asserts that "[w]ith respect to sales to nonmembers, Indian traders are at least as subject to State law as the tribes themselves." Doc. 15-1 at 24:11-12. While this may be true, it is irrelevant to this action. BSRE does not engage in the type of trade – trade with nonmembers – over which Becerra claims to have regulatory authority. Rather, as the FAC alleges, BSRE exclusively sells tobacco products to Indian tribes and tribal members on their reservations. FAC at ¶¶ 123-124. These transactions, even under Becerra's analysis, fall squarely within the preemptive reach of the Indian Trader Statutes.

To be sure, in some instances where an Indian tribe or any other entity engages in trade with non-Indians and nonmembers, the Supreme Court has allowed states more power over those transactions – so far as the collection of taxes arising from non-exempt sales are concerned. But, under the Indian Trader Statutes, the Supreme Court has never recognized a state's authority to dictate the kind or price of goods that an Indian Trader can sell to reservation Indians. And, even when the Supreme Court has allowed states to exercise authority over Indian Traders, it has squarely limited that authority to regulation that "*is reasonably necessary to the assessment or collection of lawful state taxes*." *Milhelm* 512 U.S. at 74 (emphasis added).

Here, Becerra admits that the Directory Statute is not a tax and does not serve to assist the State with the assessment or collection of State taxes. Rather, as Becerra acknowledges, the purpose of the Directory Statute is to compel enforcement of the Reserve Fund Statute, or Escrow Statute – which Becerra also acknowledges is neither a tax statute nor one that is reasonably necessary to the assessment or collection of lawful State taxes.[5] Accordingly, to the extent that Becerra even

[5] It is notable that immediately after acknowledging that the Escrow Statute – which the Directory Statute seeks to compel compliance – is not a tax, Becerra immediately recognizes the impact of his admission and claims that it somehow "operates like a tax." Doc. 15-1 at 23:11. That is simply wrong. The primary purpose of the Escrow Statute is to mandate price parity among all tobacco manufacturers. Notably, the Escrow Statute is required by the Master Settlement Agreement, which explains that the purpose of the escrow

obliquely suggests that *Milhelm* supports his attempt to dictate the kind of tobacco products that can be sold to reservation Indians or the price at which they can be sold, his suggestion is misplaced and unjustified.[6] The same is true with regard to *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159 (10th Cir. 2012).

Muscogee involved a tax and regulatory system nearly identical to the system employed by New York and analyzed in *Milhelm*. *Muscogee*, 669 F.3d at 1174-1178. Thus, it considered a system that that is substantially different from California's legal scheme. For instance, California, unlike Oklahoma, recognizes that the applicability of the Directory Statute is directly tied to whether the cigarettes are sold in a manner that is exempt from California's excise taxes. *See Muscogee*, 699 F.3d at 1179; Doc. 15-1 at 22:13-21. Second, as developed further below, unlike Oklahoma, California's cigarette excise taxes do not arise until the cigarettes are distributed to an individual or entity that is obligated to pay the excise tax. Cal. Rev. & Tax. Code § 30108, *see also Cal. State Board of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9, 10-12 (1985). Thus, in an instance

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requirement is to "effectively and fully neutralize[] the cost disadvantages that the Participating Manufacturers experience vis-à-vis Non-Participating Manufacturers within [California] as a result of the provisions of [the MSA]." MSA § IX(d)(2)(E). The Escrow Statute requires tobacco manufacturers to deposit funds into escrow accounts with third-party lending institutions. Cal. Health & Safety Code §§ 104557, 104556(f). The funds are held in escrow – with interest paid to the manufacturer – for a maximum period of twenty-five years, after which they are returned to the manufacturer. *Id.* § 104557(b)(3). There are only two circumstances under which funds can released from escrow before the end of the twenty-five year holding period. First, funds can be released to satisfy a judgment or settlement in an action a state brings against a manufacturer for claims limited by the Master Settlement Agreement. *Id.* § 104557(b)(1) – something that as far as BSRE can discern has never happened. Second, funds can be released to a manufacturer any time the manufacturer can show that its escrow deposits for a given year exceeded the payments that manufacturer would have paid if it were a signatory to the MSA. *Id.* § 104557(b)(2). While the entire structure of the Escrow Statute belies any reasonable claim that it is a tax, section 104557(b)(2) drives home the fact that the primary purpose of the statute is price parity – which is neither a legitimate nor an important state interest.

[6] As Becerra is aware, and as developed further below, *Milhelm* involved a state tax and regulation scheme decidedly different from California's scheme. *See* section III.C, infra. This makes *Milhelm* even less applicable to the issues raised in BSRE's FAC. As previously discussed, Becerra tacitly recognizes this when he admits two key points: (1) that any sale that is exempt from the direct application of California's cigarette excise tax is similarly exempt from application of the Directory Statute; and (2) that cigarette sales to Indians on their reservations are exempt from California excise taxes. Doc. 15-1 at 22, 24. Put differently, Becerra acknowledges that even if *Milhelm* authorized the imposition of state regulations for some purpose other than the assessment and collection of lawful state taxes, California's scheme does not allow the application of the Directory Statute in this instance.

of the distribution chain involving on-reservation tribal retailers, the transaction only becomes taxable upon the retail sale to a nonmember. *Chemehuevi*, 474 U.S. at 10-12. Moreover, as developed more fully below, whether a sale to a nonmember is subject to the excise tax depends on a number of distinct factual considerations. *See* section III.D, infra.

Contrary to Becerra's suggestion, *Milhelm* and *Muscogee* do not create a one-size-fits-all approach to determining the scope of a state's regulatory authority over the sale of tobacco products to Indian tribes and tribal members on their reservations. Rather, each of them reviewed and analyzed the specific state statutes at play to determine whether the respective state's regulatory efforts went too far. That is precisely what is required in this instance. Thus, as stated above, not only has BSRE alleged a plausible claim that federal law preempts the application of the Directory Statute, based on Becerra's explanation of when the Directory Statute does or does not apply, BSRE has stated a claim on which it should ultimately prevail.

IV. The FAC states a viable claim that federal law preempts the application of the Cigarette Tax Law to BSRE and its transactions.

As discussed above, State taxes directly imposed on BSRE's wholesale sales to Indian tribes and tribal members on their reservations are preempted. Also, the circumstances of the downstream retail sales mean that many of the cigarettes BSRE distributes are ultimately exempt from State taxes altogether – not only those sold at retail to tribal members on their own reservation but also those retailed to tribal casino patrons. BSRE acknowledges the possibility that some cigarettes may not be exempt for any of these reasons and depending on the balance of the relevant interests that are identified State taxes ultimately may apply to some retail sales and, if so, the consumers may be obliged to pay the State taxes on those cigarettes. State law requires, as federal law allows, the retailer to collect the taxes from such consumers and remit payment to the State. However, State law does not require BSRE to collect these taxes when it makes its wholesale sales. Nor would federal law permit such a requirement, as California's tax scheme (unlike New York's or Oklahoma's) provides no mechanism for BSRE to predetermine the number of taxable sales.

A. Each transaction in the chain of commerce is untaxable until the final transaction between retailer and consumer.

"States are categorically barred from placing the legal incidence of an excise tax 'on a tribe or tribal members for sales made inside Indian country' without congressional authorization." *Wagnon*, 546 U.S. at 101-02 (quoting *Chickasaw*, 515 U.S. at 458). Therefore, the tribal retailer does not owe tax when it purchases product from BSRE because the retailer is an Indian engaged in activity on its own reservation, and BSRE does not owe tax when it purchases product from Azuma because it, too, is an Indian engaged in activity on its own reservation. This is the same rule that Becerra acknowledges to apply to tribal member consumers, exempting their cigarette purchases from State tax, and it appears undisputed that the rule applies throughout the distribution chain.

The on-reservation Indian retailer also does not owe tax when it sells cigarettes. As an Indian engaged in activity on its own reservation, federal law again categorically bars the State from imposing the legal incidence of a tax on the retailer. *Id.* (The retailer, however, may be required to collect and remit tax owed by the buyer, given the appropriate tax scheme. *Moe*, 425 U.S. at 483.)

No State tax may be imposed on BSRE when it makes its sales as alleged because, in each case, BSRE is engaged in sales to an Indian on the Indian buyer's reservation. The Indian Trader Statutes preempt State laws imposing taxes upon traders as to their sales made to reservation Indians on the reservation. *Central Machinery*, 448 U.S. at 163-66; *Warren Trading Post*, 380 U.S. at 691-92; *see Milhelm*, 512 U.S. at 74.

B. California law does not require tax collection by a seller, except from a purchaser who is at that time obligated to pay the tax.

California's four cigarette taxes, as Becerra asserts, "attach[] to the first taxable use, sale, or consumption of cigarettes." Doc. 15-1 at 5; *see Chemehuevi*, 474 U.S. at 11 ("the legal incidence of the tax falls on consuming purchasers if the vendors are untaxable"); Cal. Rev. & Tax. Code § 30107 (providing that taxes resulting from the use or consumption of untaxed cigarettes "shall be paid by the user or consumer"). As it did in *Chemehuevi*, the first taxable distribution of BSRE's cigarettes occurs (if at all) with the retail sale to the consumer. When such a taxable distribution occurs, California law imposes on the retailer (who is also a "distributor") "a 'pass on and collect'

requirement," which *Chemehuevi* held is within the State's authority, even when imposed on a tribal retailer making sales on its own reservation. *Chemehuevi* at 12. *Chemehuevi* held that the retail distributor (not the wholesale distributor) must collect the tax. *Chemehuevi* did not address whether California law requires a wholesaler like BSRE to collect and remit the tax on cigarettes later retailed to taxable consumers. A fair reading of the State's cigarette tax scheme shows that it does not impose such a requirement.

Generally, the taxes are to be "paid by distributors through the use of stamps" affixed "on each package of cigarettes prior to the distribution of the cigarettes." Cal. Rev. & Tax. Code §§ 30161, 30163. The State tax scheme recognizes that the tax may not apply to a distributor's sale of cigarettes (as is the case for distributions of BSRE cigarettes, until any taxable retail sale). Addressing such a circumstance, the law provides:

> *Every distributor* engaged in business in this state and *selling* or accepting orders for *cigarettes* or tobacco products *with respect to the sale of which the tax imposed under this part is inapplicable shall,* ***at the time of making the sale*** or accepting the order ***or, if the purchaser is not then obligated to pay the tax with respect to his or her distribution*** *of the cigarettes* or tobacco products, ***at the time the purchaser becomes so obligated****, collect the tax from the purchaser, if the purchaser is other than a licensed distributor,* and shall give to the purchaser a receipt therefor in the manner and form prescribed by the board.

Cal. Rev. & Tax. Code § 30108(a) (emphasis added).

Under § 30108(a), then, BSRE would have a duty to collect the tax from the retailer to whom it sells cigarettes. But the collection duty would not arise at the time of making the sale, because the retailer would not be "then obligated to pay the tax with respect to [the retailer's] distribution of the cigarettes." *Id.* It would arise "at the time the [retailer] becomes so obligated." *Id.* We know, however, that the tax cannot be directly imposed on the retailers to whom BSRE sells cigarettes since they are reservation Indians categorically exempt from State taxes. In that sense, a duty for BSRE to collect from the retailer never arises, because BSRE's retailer-customers are never obligated to "pay the tax with respect to [their] distribution" – at most, they are obligated to collect the tax from any taxable consumers and remit the consumers' payment.

However, the statute cannot reasonably be interpreted to carry the collect-and-remit obligation up the distribution chain to a distributor which is not a party – and would not know about – the retailer's taxable distribution. To be sure, that is why the statute provides for three separate and distinct definitions of "distributor." Cal. Rev. & Tax. Code § 30101.

California's tax scheme provides that every distributor who is required to collect any tax under § 30108 shall file a monthly report and remit the amount of tax due. Cal. Rev. & Tax. Code §§ 30183, 30184. The retail distributor is the first person with the ability to comply. If the retail distributor complies, then nothing is required of the wholesale distributor, since the tax can only be remitted once. If the retail distributor does not comply and fails to collect tax from a consumer as required by § 30108, then the duty devolves to the "consumer or user subject to the tax," who must file a report and submit the amount of tax due. *Id.* § 30187. Sensibly, the tax scheme keeps the remittance obligation on the only people who are direct parties to the taxable transaction, the retailer or the consumer – not the wholesale distributor.

This is consistent with *Chemehuevi*, which construed California's cigarette tax scheme to "place on consumers the obligation to pay the tax for all previously untaxed cigarettes," and to impose on the retailer the obligation to collect the tax from the consumer.[7] 474 U.S. at 11. The absence of any taxable event earlier in the distribution chain and the absence of a tax collection requirement by any person beyond the retail seller are both necessary to *Chemehuevi*'s conclusion. Moreover, the State's efforts to impose the collection requirement on the reservation retailer in *Chemehuevi*, rather than on an upstream person, such as the off-reservation wholesale distributor, demonstrate that the State also understood that under the California tax scheme as written, the relevant obligations must be borne at the level of the retail transaction.

[7] Moreover, this is entirely consistent with the State of California's argument in *Chemehuevi*, in which California successfully argued that the tax and the collection and remission requirement for the tax did not arise until the first non-exempt distribution of cigarettes – even when the first distribution does not occur until the retail sale. *See* Petition for Writ of Certiorari of Cal. State Board of Equalization, *Cal. State Bd. of Equalization v. Chemehuevi Indian Tribe*, No. 85-130, 1985 WL 692144, *6-8 (Jul. 22, 1985).

C. Federal Indian law would preempt a collection and remittance requirement imposed on BSRE as part of the California cigarette tax scheme.

Even assuming California law required tax remittance by a wholesaler in BSRE's position, significant differences in California's tax scheme from those of other states where such requirements were upheld mean that federal law would preempt any similar duty on wholesalers in California (or, at least, that such a claim of preemption is not foreclosed by existing authority). In *Milhelm*, the Court allowed New York to impose upon a cigarette wholesaler and Indian trader minimally burdensome regulations that were "reasonably necessary to the assessment or collection of lawful state taxes." *Milhelm* at 75. These included a requirement that the wholesaler pre-collect the state taxes on cigarettes to be sold on-reservation to taxable non-member consumers. *Id.* at 76. The state's authority to impose this collection burden was integrally tied to its "decision to stanch the illicit flow of tax-free cigarettes early in the distribution stream," a decision the state implemented with quotas on tax-free cigarettes. *Id.* at 75. Because the state created a system for calculating the "probable demand" of legitimately tax-exempt sales and gave the tribes the right to challenge the probable demand (a system the Court was willing to assume was adequate and would be fairly administered), the Court held that "the precollection regime will not require prepayment of any tax to which New York is not entitled." *Id.* at 76. There is no such assurance in the California scheme, which lacks any system to inform the wholesale distributor and the State how much tax the wholesaler would need to remit. Instead, the most likely result is that BSRE would need to stamp all cigarettes – prepaying taxes to which California is not entitled – and then seek a refund (relying on whatever second-hand information it can obtain about the later retail sales). It cannot be said that the *Milhelm* decision forecloses BSRE's ability to state a legal claim that, on the facts and circumstances here, such obligations would be unduly burdensome and would not come within *Milhelm*'s exception to the Indian Trader Statutes.

The *Muscogee* case on which Becerra relies also arises from a state with a quota system like New York's, and it is therefore similarly distinguishable. *See Muscogee*, 669 F.3d at 1175 (holding that Indian Trader Statutes did not preempt Oklahoma tax pre-collection requirements similar to tax

scheme permitted in *Milhelm*, with respect to tribal on-reservation cigarette wholesaler).[8] The only Ninth Circuit decision to apply the rule of *Milhelm* was also in the context of a New York-style cigarette tax scheme. *United States v. Baker*, 63 F.3d 1478, 1489-90 (9th Cir. 1995) (holding that Indian Trader Statutes did not preempt Washington prepayment requirement "substantially similar" to the scheme in *Milhelm*).[9]

D. The retail sales of cigarettes BSRE distributes to retailers are potentially tax-exempt for a variety of reasons.

1. Retail cigarette sales at a tribal casino are not subject to California taxation or regulation.

Many of the cigarettes BSRE distributes to retailers are ultimately sold by those retailers to consumers at tribal casinos. Indian Gaming Regulatory Act, 25 U.S.C. § 2701, et seq. ("IGRA") and applicable Tribal-State gaming compacts preempt California's authority to tax and regulate such sales.

Congress enacted IGRA in 1988 to "create[] a framework for regulating gaming activity on Indian lands." *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 758 (2014). The Act was adopted in response to *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 221-22 (1987), "which held that States lacked any regulatory authority over gaming on Indian lands." *Bay Mills* at 794. IGRA "extends to the States a power withheld from them by the Constitution," granting them "a power that they would not otherwise have, viz., some measure of authority over gaming on Indian

[8] The Oklahoma cigarette tax scheme at issue in *Muscogee* allowed reservation retailers to sell tax-exempt cigarettes to tribal members, and required such cigarettes to bear a "tax-free stamp," issued by the Oklahoma Tax Commission in limited quantities according to probable demand, which the state determined based on the in-state population of the affected tribe. *Muscogee* at 1163. Cigarette wholesalers were required to purchase tax stamps from the state and affix them to taxable cigarettes as evidence of tax payment. *Id.* (The legal incidence of the tax was passed on to the ultimate consumer. *Id.* at 1163, 1174 & n.7.) The wholesalers also received an allocated share of tax-free stamps to be affixed to all untaxable cigarettes. *Id.* The plaintiff tribe operated an on-reservation cigarette wholesale business. *Id.* at 1165.

[9] Under the Washington scheme, the state limited the quantity of unstamped cigarettes that could be delivered to reservations, based on its determination of the probable demand of tribal member purchasers. *Baker* at 1486. All cigarettes were required either to bear a stamp evidencing payment of the state excise tax, or to be preapproved by the state as within the reservation's allotment of tax-exempt cigarettes. *Id.*

lands." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 58 (1996); *see Artichoke Joe's Calif. Grand Casino v. Norton*, 353 F.3d 712, 715 (9th Cir. 2003).

IGRA's "comprehensive regulatory structure for Indian gaming" is a framework into which various aspects of tribal gaming are assigned to federal, tribal and state jurisdiction. *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 544 (8th Cir. 1996). "[R]ather than directing the federal courts to perform the balancing of interests between the state on the one side and the federal government on the other, Congress conducted the balancing itself," creating a "fixed division of jurisdiction." *Id.* at 546-47 (citing S. Rep. No. 100-446, 3, 6 (1988), *reprinted in* 1988 U.S.C.A.N.N. 3071, 3073, 3076). "The only avenue for significant state involvement is through tribal-state compacts covering class III gaming." *Gaming Corp.* at 544.

Where a state and a tribe agree to a compact provision setting forth rules pertaining to a particular subject, and the compact provision differs from generally-applicable state law, "the terms of the compact control." *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430, 434 (9th Cir. 1994). Similarly, where the terms of a gaming compact speak to the application of state regulatory authority over a particular subject, the compact itself controls, making an analysis of federal preemption inappropriate and unnecessary with respect to that subject. *Confederated Tribes of Siletz Indians v. Oregon*, 143 F.3d 481, 484-85 (9th Cir. 1998).

The gaming compacts between California and Indian tribes in the State deal expressly with the application of State regulatory authority over cigarettes at tribal casinos, uniformly providing that such State laws do not apply at the casinos. *See* FAC ¶¶ 126-128. The FAC highlights the provisions contained in the so-called "1999 Compacts," which state, at two separate locations in the Compacts, "Nothing herein shall be construed to make applicable to the Tribe any state laws, regulations, or standards governing the use of tobacco," and "nothing herein shall be construed to make applicable to the Tribe any state laws or regulations governing the use of tobacco." 1999 Compacts §§ 8.1.2 and 10.1; *see* FAC ¶ 127. Newer California gaming compacts are even more explicit that State laws regarding *sales* of tobacco products at tribal casinos are inapplicable except as otherwise provided in the compact. The 2017 compact between the State and Wilton Rancheria, for example, states in § 12.1 (in terms identical to § 10.1 of the 1999 Compacts) that "nothing herein

shall be construed to make applicable to the Tribe any state laws or regulations governing the use of tobacco," and then goes on to provide in § 12.2 that:

> Notwithstanding section 12.1, the Tribe agrees … not to offer or sell tobacco products, including but not limited to smokeless tobacco products or ecigarettes, to anyone younger than the minimum age specified in state law to lawfully purchase tobacco products.

See FAC § 128. The State's gaming compacts with the Karuk Tribe and the Fort Independence Indian Community, each executed in 2013, contain similar agreements to apply age-restriction regulations to cigarette sales, along with the agreement that "any state laws or regulations governing the use of tobacco" other than this one restriction on sales, are disclaimed. *Id.* Thus, under the terms the State agreed to in its tribal gaming compacts, no State laws governing the use of cigarettes – which includes laws governing the sale of cigarettes – apply at a class III tribal casino. The Cigarette and Tobacco Products Tax Law is such a law, as are the Directory Statute and the Cigarette and Tobacco Products Licensing Act.

IGRA's overall preemption of state authority over gaming-related matters – specifically including matters that are subject to compact negotiation – means the State possesses no authority to regulate the sale of cigarettes at tribal casinos except as may be provided in a gaming compact. *See* 25 U.S.C. § 2710(d)(3)(c); *Gaming Corp.*, 88 F.3d at 544-47. IGRA emphasizes in particular that State taxes (or State fees, charges, or assessments) cannot be imposed, except to the limited extent that the compact may provide for assessments to defray the State's regulatory costs. 25 U.S.C. § 2710(d)(4). The complete preemption effected by IGRA reinforces the unambiguous terms of the compacts and the conclusion that State laws regulating and taxing the use and sale of cigarettes do not apply to cigarettes sold at a tribal casino.

2. The taxability of other retail cigarette sales requires identifying and weighing the relevant tribal, State and federal interests.

Retail cigarette sales that are not preemptively regulated by gaming compacts or IGRA may yet be outside the State's taxing authority. Where Congress has not balanced the interests and enacted the resulting jurisdictional rule, as it has with IGRA, the preemption "inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a

particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *White Mountain Apache Tribe v. Bracker*, 448 U.S. at 145. The "specific context" of the downstream sales of BSRE cigarettes has not been judicially analyzed, so those sales cannot be deemed taxable based solely on the pleadings.

For instance, the interests relevant to the commerce in this case differs from cases such as *Colville* in that the products at issue here are tribally-manufactured cigarettes sold exclusively via intertribal commerce, which consumers seek out and purchase because they prefer these cigarettes to other brands, resulting in a market for these products that exist because of the value of the brands. This value is created by the exclusively tribal network that makes up the chain of commerce, from the manufacturer to the wholesaler to the retailer. The products cannot be purchased "at the same price and with greater convenience" off-reservation, as the cigarettes in the *Colville* smokeshop could. *Colville*, 447 U.S. at 158. The value in these products is not simply "an exemption from state taxation" attempted to be sold to "persons who would normally do their business elsewhere," creating an "artificial competitive advantage over all other businesses" in the State, as the Court found in *Colville*. *Id.* at 155. If there is a competitive advantage in offering these products, it arises from the fact that, through the efforts of Indian tribal governments to develop this market, certain consumers look for these cigarettes and only reservation retailers sell them. The relevant tribal and federal interests are therefore at their "strongest." *Colville* at 156-57; *see also Prairie Band Potawatomi Nation v. Richards*, 379 F.3d 979, 985 (10th Cir. 2004), *rev'd on other grounds sub nom. Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005) (Tribe's development of casino and fuel station created a market for reservation fuel sales, giving rise to strong tribal interest in exemption from state fuel tax).

Unique aspects of State law inform the State's interests, as well. For instance, *Colville* held that "[f]or most practical purposes" nonmember Indians "stand on the same footing as non-Indians" and that, therefore, "the State's interest in taxing these purchasers outweighs any tribal interest that may exist in preventing the State from imposing its taxes." *Colville* at 161. However, the regulations of the CDTFA, the State agency that administers cigarette taxes, place nonmember

Indians on the same footing as members for purposes of exemptions from State taxes imposed in Indian country. 18 Cal. Code Regs. § 1616(d). Regulation 1616, which addresses State sales and use taxes, defines "Indian" to mean "any person of Indian descent who is entitled to receive services as an Indian from the United States Department of the Interior." *Id.* § 1616(d)(2). It eschews any distinction between members and nonmembers, providing instead that on-reservation sales by any Indian to any Indian are exempt from sales tax, and that use tax is owed only if the property is used off- reservation more than on-reservation. *Id.* § 1616(d)(3)(A). Although this regulation is aimed at sales and use taxes, rather than cigarette excise taxes, it evidently reflects a State interest in avoiding the sometimes arbitrary results of basing taxability determinations on tribal membership, and instead recognizes that, perhaps especially for California Indians, in some cases an individual's Indian identity may be more significant than membership in a given tribe. This interest is important enough for the State to forego some sales or use taxes it might otherwise collect under *Colville*'s member-focused rule.

In short, since preemption under *Bracker* depends on the specific context, it is insufficient for Becerra to point to decisions that arose in different contexts and declare that the outcome must be the same here. Moreover, no system exists in California law to predict or predetermine what BSRE's collect-and-remit obligation may be. BSRE pre-collection requirements cannot reasonably be imposed on BSRE.

E. State authority to seize cigarettes in transit is immaterial to BSRE's claims.

Becerra makes an apparent bootstrapping argument that the State's authority to seize off-reservation goods somehow invalidates BSRE's claim that its on-reservation commerce is beyond State authority to tax and regulate. Doc. 15-1 at 20-22. Seizure of cigarettes, or any similar "off reservation authority to enforce the challenged laws," *id.* at 22, requires some violation of the challenged laws. In *Colville* (which Becerra relies on in this context, Doc. 15-1 at 21), the Court held that Washington's "interest in enforcing its valid taxes" was sufficient to justify the state's off-reservation seizures of cigarettes in transit from out-of-state wholesalers to reservation retailers, even though "the cigarettes in transit are as yet exempt from state taxation" ("because sales by

wholesalers to the tribal businesses are concededly exempt"), "when the [tribal retailers], as here, have refused to fulfill collection and remittance obligations which the State has validly imposed." *Colville*, 447 U.S. at 161-62. That is, the Court first determined whether the on-reservation collection and remittance obligation was valid, then turned to the question of enforcement. The power to enforce state regulations *if* they apply cannot demonstrate that they *do* apply.

V. The FAC states viable claims that federal law preempts the application of the State's licensing requirements to BSRE.

BSRE's complaint alleges that California's licensing scheme for cigarette distributors does not aid in the State's collection of valid taxes. FAC ¶ 182. It also alleges that the State lacks the specific interest in compelling BSRE to comply with the scheme, as is necessary to outweigh the federal and tribal interests in tribal self-government and in protecting the on-reservation commerce of Indian tribes and Indian businesses from additional State-imposed burdens. FAC ¶¶ 183, 186-187. Becerra argues that these allegations should be disregarded, however none of the authorities on which Becerra relies establish as a matter of law that California's licensing obligations (as opposed to the obligations in Washington, New York, or Oklahoma) can be imposed on a wholesaler like BSRE buying and selling exclusively to and from Indians in Indian country.

Becerra's reliance on *Rice v. Rehner*, 463 U.S. 713 (1983), ignores the factual circumstances here and in *Rice*. The issue in *Rice* was whether 25 U.S.C. § 1161, a federal statute that delegated authority concurrently to states and Indian tribes to govern on-reservation alcohol sales, included in its grant of authority to states the power to require reservation sellers to hold state-issued liquor licenses. Reviewing the principles of tribal sovereignty that would inform its statutory analysis, the Court reiterated the holdings of *Moe* and *Colville* and declared that "[r]egulation of sales to non-Indians or nonmembers … simply does not 'contravene the principle of tribal self-government[.]'" *Id.* at 720 n.7 (quoting *Colville* at 161). For that reason, in the case of on-reservation sales to a non-Indian or a nonmember of the Tribe with jurisdiction over the reservation where the sale occurs, the State's liquor license requirements did not infringe upon tribal sovereignty. *Id*. at 720. In light of that (together with what the Court asserted was a total historical absence of tribal sovereign authority over alcohol within Indian country – a fact that is not true of tobacco), the Court concluded that

states can require a liquor license for on-reservation alcohol sales without contravening the otherwise-prevailing congressional plan to protect tribal self-governance. *Id.* at 722-25, 731-32; *see Cabazon*, 480 U.S. at 220 (distinguishing *Rice*). BSRE's sales, however, are not made to nonmembers or non-Indians. It sells "exclusively to Indian tribal governmental, and Indian tribal-member, reservation-based retailers, operating within their own Indian reservations[.]" FAC ¶ 123. This type of sale is preemptively governed by the Indian Trader Statutes in a way that simply does not apply to non-Indians buying goods in Indian country. Nor is there any federal statute authorizing state regulation of tribal tobacco transactions, or any "tradition" of concurrent state authority to regulate tobacco sales to Indians in Indian country. *Cf. Rice* at 733.

The *Milhelm* exception to the Indian Trader Statutes (like the *Colville*/*Moe* exception to the general preemption of state authority to directly regulate Indians on their own reservations) arises where state regulation "is reasonably necessary to the assessment or collection of lawful state taxes." *Milhelm*, 512 U.S. at 74. Becerra asserts but does not prove, that California's licensing system meets this standard when imposed on a wholesale cigarette distributor. Doc. 15-1 at 16. (Indeed, Becerra's first assertion is that the "licensing program works to assure that cigarettes distributed in the State are within the licensed distribution chain" – that is, the licensing program reinforces itself, rather than enhancing tax collection. *Id.*) As discussed, the New York quota system at issue in *Milhelm* (and in the Tenth Circuit's *Pruitt* decision out of Oklahoma) is very different from California's cigarette tax system, and the remaining caselaw involving non-quota systems focuses on retailers, rather than wholesalers. These decisions require that Becerra establish sufficient parallels with the California system. BSRE contends the factual differences compel a different result.

The obligations upheld in *Milhelm* were specifically designed to support New York's quota system for reservation cigarette sales, which effectively determined whether cigarettes were taxable "early in the distribution stream[.]" *Milhelm* at 75. Unlike California's system, there the wholesale distributor had primary responsibility for differentiating taxed and tax-free cigarettes appropriately, with the help of information provided to it by its retailer customers, so the recording and reporting obligations were justified as a reasonably necessary part of the system.

The retailers in *Colville* had a direct connection to (a direct transaction with) the taxable nonmember consumer, so these retailers were uniquely able to keep records and provide information the states could use to ascertain whether cigarettes sold without tax stamps were validly exempted. The Court accepted that the state's recordkeeping requirements were "reasonably necessary as a means of preventing fraudulent transactions." *Colville* at 160.

Here, BSRE will show that when the State imposes such requirements on the retailer, it is not reasonably necessary to also impose the burden on the wholesale distributor. This is particularly true in the circumstances presented here because, as Becerra acknowledges, if BSRE and its customers do not owe the tax, then the purpose of these burdens is simply "to see if *someone* owes the tax, and then, if they do, to collect it." Doc. 15-1 at 16-17. Only the retailer's records would reveal if someone (a consumer) owes the tax and (again, if BSRE is correct) only the retailer would shoulder the collection burden. The burdens on a wholesaler such as BSRE would serve no purpose, and therefore would not be "reasonably necessary" to State tax collection, and would be preempted by federal law. *Cf. Milhelm* at 74; *Colville* at 160.

Further, the fact that Becerra disclaims State authority to charge BSRE a license fee, Doc. 15-1 at 16 (an exception evidently not found in the State's licensing statutes), highlights the value of testing the licensing scheme against the limits of federal Indian law, and demonstrates the plausibility of the claim that the licensing system as written cannot be applied to BSRE.

Despite Becerra's negative characterization, it is not BSRE's goal to hide its sales activities from view. *See* Doc. 15-1 at 17; *see also id.* at 2. Its goal is to guard against unjustified State interference with commerce in Indian country, among Indians, involving Indian products made in Indian country. Its goal is to realize, as much as it can, the objectives shared by Indian tribes and the federal government, including tribal self-sufficiency, economic development and self-government, so that the members of the Big Sandy Rancheria and the Indian tribes on whose reservations it sells its products may exercise meaningful control over their reservation activities and tribal governments with the power and resources to govern their territories. Its goal in bringing the claims in this action is to finally and reliably clarify the parties' respective rights and obligations

under applicable laws, to allow BSRE to conduct its activities in public view without the looming and uncertain threat of State enforcement.

CONCLUSION

For all of the foregoing reasons, BSRE respectfully requests that the Court deny the State's motions to dismiss the First Amended Complaint.

Dated: January 8, 2019

Respectfully submitted,

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