

1 ROB BONTA, State Bar No. 202668
 Attorney General of California
 2 JAMES V. HART, State Bar No. 278763
 Supervising Deputy Attorney General
 3 DAVID C. GOODWIN, State Bar No. 283322
 PETER F. NASCENZI, State Bar No. 311664
 4 Deputy Attorneys General
 1300 I Street, Suite 125
 5 P.O. Box 944255
 Sacramento, CA 94244-2550
 6 Telephone: (916) 210-7805
 Fax: (916) 327-2319
 7 E-mail: Peter.Nascenzi@doj.ca.gov
Attorneys for Plaintiff
State of California

9 IN THE UNITED STATES DISTRICT COURT
 10 FOR THE EASTERN DISTRICT OF CALIFORNIA
 11 SACRAMENTO DIVISION

13 **STATE OF CALIFORNIA, ex rel. ROB**
 14 **BONTA, in his official capacity as Attorney**
 15 **General of the State of California,**

2:23-cv-00743-KJM-DB

16 Plaintiff,

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF’S MOTION FOR
PRELIMINARY INJUNCTION

17 v.

18 **AZUMA CORPORATION; PHILLIP DEL**
 19 **ROSA, in his personal capacity and official**
 20 **capacity as Chairman of the Alturas Indian**
 21 **Rancheria; DAREN ROSE, in his personal**
 22 **capacity and official capacity as Vice-**
chairman of the Alturas Indian Rancheria;
and WENDY DEL ROSA, in her official
capacity as Secretary-Treasurer of the
Alturas Indian Rancheria,

Date: July 21, 2023
 Time: 10:00 am
 Courtroom: 3, 15th Floor
 Judge: Hon. Kimberly J. Mueller
 Trial Date: N/A
 Action Filed: 4/19/2023

23 Defendants.

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INTRODUCTION

1
2 Defendants unlawfully distribute cigarettes throughout California, organizing their business
3 in an attempt to avoid state regulation. Specifically, Defendants use the Azuma Corporation
4 (“Azuma”), a tribal corporation wholly owned by the Alturas Indian Rancheria (the “Tribe”), to
5 manufacture and sell their products to other tribal entities around the State, falsely believing that
6 the State lacks authority to regulate their activities. Defendants’ disregard of state law, however,
7 has landed Azuma on the federal Bureau of Alcohol, Tobacco, Firearms and Explosives
8 (“ATF”)’s so-called PACT Act non-compliant list. Inclusion on this list prohibits anyone from
9 knowingly delivering cigarettes on behalf of the listed entity, except to those “lawfully engaged in
10 the business of manufacturing, distributing, or selling cigarettes.” *See* 15 U.S.C. § 376a(e)(2).
11 Neither Azuma nor its customers operate lawfully as they continue to break the very state laws
12 that landed Azuma on the PACT Act non-compliant list in the first place.

13 Despite Azuma’s listing, Defendants continue to distribute cigarettes throughout the State
14 through Azuma. Indeed, in a letter to ATF dated April 10, 2023, Azuma admits that it continues
15 to operate in violation of the PACT Act, and that it and its customers do not abide by applicable
16 California law. Accordingly, Plaintiff the State of California, acting by and through its Attorney
17 General Rob Bonta, moves to preliminarily enjoin Chairman Phillip Del Rosa, Vice-chairman
18 Darren Rose, and Secretary–Treasurer Wendy Del Rosa of the Alturas Indian Rancheria in their
19 official capacities, from violating the PACT Act.¹

LEGAL BACKGROUND

I. THE PACT ACT

21
22 Cognizant of the difficulties of enforcing state cigarette regulations, Congress has passed a
23 number of laws aimed at aiding state enforcement, including the Prevent All Cigarette Trafficking
24 Act of 2009 (“PACT Act”), Pub. L. 111-154, 124 Stat. 1087 (codified at 15 U.S.C. §§ 375–378,
25 18 U.S.C. §§ 1716E, 2343). Among other things, the PACT Act expanded the cigarette reporting
26 requirements of the prior Jenkins Act, Pub. L. 81-363, 83 Stat. 884 (1949), enacted sixty years

27
28 ¹ Plaintiff does not intend to present oral testimony and anticipates an hour would be more
than sufficient for any hearing on this motion. *See* L.R. 231(d).

1 prior. It requires those transporting cigarettes to make reports of certain shipments to the state
2 tobacco tax administrator, including all shipments into or out of Indian country. *See* 15 U.S.C.
3 § 376(a) (requiring reports for shipments made in “interstate commerce”); *id.* § 375(10) (defining
4 “interstate commerce” to include commerce into and out of Indian country). By requiring such
5 reports, the PACT Act provides states with information to track cigarettes shipped into the state
6 so it can collect taxes and enforce other cigarette laws as applicable.

7 The PACT Act also federalizes state cigarette laws. It does this by regulating “delivery
8 sales,” which are defined as a sale of cigarettes to a “consumer” when the order is either made or
9 completed when the buyer and seller are not in the physical presence of each other. 15 U.S.C.
10 § 375(5). A “consumer” is defined as “any person that purchases cigarettes,” except that it “does
11 not include any person lawfully operating as a manufacturer, distributor, wholesaler, or retailer of
12 cigarettes.” *Id.* § 375(4). Sales to such “consumers” must “comply with . . . all State, local, tribal,
13 and other laws generally applicable to sales of cigarettes . . . as if the . . . sales occurred entirely
14 within the specific State and place.” *Id.* § 376a(a)(3). That is, either a cigarette distributor sells
15 only to those “lawfully operating” as a cigarette business, or it is subject to the PACT Act’s
16 regulation of delivery sellers. Either way, the distributor’s sales must comply with state law—
17 such compliance is required for the buyer to be “lawfully operating” and exempt from the PACT
18 Act’s regulation of delivery sellers, or such compliance is required by the PACT Act’s regulation
19 of delivery sellers. *See* Alexander Decl., ex. B, at 2 (“[T]he phrase ‘lawfully operating’ includes
20 compliance with State and Federal law as well as Tribal law.”)

21 The PACT Act also requires the U.S. Attorney General to maintain a list of non-compliant
22 sellers. 15 U.S.C. § 376a(e)(1). It directs the U.S. Attorney General to include in the list “any
23 noncomplying delivery sellers identified by any State, local, or tribal government.” *Id.*
24 § 376a(e)(1)(D); *see also id.* § 376a(e)(6) (detailing requirements for state, local, or tribal
25 nominations to the non-compliant list). Listed entities are provided an opportunity to challenge
26 their listing, and must be removed if, after investigation, “the Attorney General of the United
27 States determines that the basis for including a delivery seller on the list is inaccurate, based on
28 incomplete information, or cannot be verified.” *Id.* § 376a(e)(1)(E).

1 Once an entity is listed, the PACT Act prohibits anyone from knowingly transporting
2 cigarettes on the behalf of the listed entity. *See id.* § 376a(e)(2). Mirroring the “consumer”
3 definition, deliveries may still be made to those “lawfully engaged in the business of
4 manufacturing, distributing, or selling cigarettes.” *Id.* § 376a(e)(2)(A)(ii).

5 State attorneys general are among those granted authority to enforce the PACT Act and are
6 empowered to bring actions in United States district courts for injunctive relief to restrain
7 violations. *Id.* § 378(c)(1)(A).

8 **II. THE CALIFORNIA TAX AND LICENSING SCHEME**

9 California has established a comprehensive statutory scheme of licensing and stamping
10 designed to ensure the collection of taxes on all cigarettes sold to non-exempt consumers and to
11 prevent fraudulent transactions to flout such taxes. This scheme consists of the Cigarette and
12 Tobacco Products Licensing Act of 2003 (the “Licensing Act”), Cal. Bus. & Prof. Code
13 §§ 22970–22991, and the Cigarette and Tobacco Products Tax Law (the “Cigarette Tax Law”),
14 Cal. Rev. & Tax. Code §§ 30001–30483. At its center are licensed distributors, who are
15 authorized to purchase, receive, and possess cigarettes before State taxes are collected or stamps
16 affixed. *See* Cal. Rev. & Tax. Code § 30011 (defining “distributor” as one who “within the
17 meaning of the term ‘distribution’ as defined in this chapter, distributes” cigarettes or tobacco
18 products); *id.* §§ 30008–30009 (defining “distribution” as the “sale,” “use,” or “consumption” of
19 untaxed cigarettes or tobacco products, “other than the sale of the cigarettes or tobacco products
20 or the keeping or retention thereof by a licensed distributor for the purpose of sale.”); *id.* § 30005
21 (defining “untaxed cigarette” to mean “any cigarette which has not yet been distributed in such
22 manner as to result in a tax liability under this part”).

23 Since 1959, California has imposed excise taxes on the distribution of cigarettes. The rate
24 has increased over time, and now sits at \$2.87 per pack of 20 cigarettes. *See id.* §§ 30101,
25 30123(a), 30130.51(a), 30131.2(a). The tax attaches to the first taxable use, sale, or consumption
26 of cigarettes. *See id.* § 30008. Where the distributor of the cigarettes cannot be taxed, the tax is
27 “paid by the user or consumer,” *id.* § 30107, and it is collected by a distributor “at the time of
28 making the sale or accepting the order,” *id.* § 30108(a).

1 The tax is generally collected through the use of valued tax stamps, which are purchased by
2 a licensed distributor and affixed to the cigarette packages at or near the time of sale. *See id.*
3 § 30163. The scheme recognizes, however, that certain purchasers may not be taxable at the time
4 of sale and requires distributors to collect taxes only after they become due. *Id.* § 30108(a)
5 (providing “if the purchaser is not then obligated to pay the tax,” the distributor must collect the
6 tax “at the time the purchaser becomes so obligated”). The Supreme Court has considered the
7 application of the California cigarette scheme to on-reservation sales and concluded that it
8 “evidences an intent to impose on the Tribe . . . a ‘pass on and collect’ requirement,” that “the
9 legal incidence of California’s cigarette tax falls on non-Indian consumers of cigarettes
10 purchased” on the reservation, and that the State “has the right to require [the Tribe] to collect the
11 tax on [the State’s] behalf.” *Cal. State Bd. of Equalization v. Chemehuevi Indian Tribe*, 474 U.S.
12 9, 12 (1985) (per curiam).

13 To facilitate collection of these taxes, distributors are required to obtain licenses and make
14 regular reports to the California Department of Tax and Fee Administration (“CDTFA”)
15 regarding their transactions, and have been since 1967. *See* Cal. Rev. & Tax. Code §§ 30140,
16 30182; Cal. Bus. & Prof. Code § 22975(a). Because not all cigarette distributions are taxable, the
17 monthly distributor tax reports include space to identify exempt distributions. *See* Cal. Dep’t of
18 Tax & Fee Admin., CDTFA-810-CTE REV. 6 (8-21), Instructions for Preparing Cigarette Tax
19 Schedules 7 (2021), <https://www.cdtfa.ca.gov/formspubs/cdtfa810cte.pdf> (providing instructions
20 for distributors to report “Stamp-Unaffixed or Tax-Unpaid Product Returned to Seller or
21 Destroyed,” “Sales Under the United States Constitution Tax Exempt,” and “Distributions or
22 Sales to the United States Military or Government Tax Exempt”).

23 In 2003, finding that “[t]ax revenues have declined by hundreds of millions of dollars per
24 year due, in part, to unlawful distributions and untaxed sales of cigarettes,” Cal. Bus. & Prof.
25 Code § 22970.1(b), the Legislature expanded its licensure program to include all other persons in
26 the distribution chain, reasoning “[t]he licensing of manufacturers, importers, wholesalers,
27 distributors, and retailers will help stem the tide of untaxed distributions and illegal sales of
28 cigarettes and tobacco products,” *id.* § 22970.1(d). Licensed entities are required to transact only

1 with other licensed entities, *see, e.g., id.* § 22980.1(b)(1) (“[A] distributor or wholesaler shall not
2 sell cigarettes or tobacco products to a retailer, wholesaler, distributor, or any other person who is
3 not licensed . . .”), and all licensees are required to maintain copies of transaction records to
4 facilitate auditing and collection of taxes owed, *see, e.g., id.* § 22974 (retailer purchase records);
5 *id.* §§ 22978.1, 22978.4–.5 (distributor and wholesaler purchase, invoice, and sales records); *id.*
6 §§ 22979.4–.6 (manufacturer and importer purchase, invoice, and sales records).

7 **FACTUAL BACKGROUND**

8 **I. PARTIES**

9 Defendant Azuma Corporation (“Azuma”) is a tribally chartered corporation that is wholly
10 owned by the Alturas Indian Rancheria (the “Tribe”), a federally recognized tribe of Achumawi
11 Indians located near Alturas, California, in Modoc County. Compl. ¶ 8. The Tribe directs the
12 activities of Azuma through the Tribe’s Business Committee, which is composed of three elected
13 members and holds virtually all of the Tribe’s decision-making powers. *Id.* ¶¶ 63–64.

14 Defendant Phillip Del Rosa is the Tribe’s Chairman, and Defendant Darren Rose is the
15 Tribe’s Vice-chairman. *Id.* ¶¶ 9–10. Holding two of the three seats of the Business Committee,
16 Rose and Phillip Del Rosa control the Business Committee and the authority “[t]o administer all
17 lands and assets and manage all economic affairs and enterprises of the [Tribe].” Compl. ¶ 64
18 (alterations in original) (quoting *Alturas Indian Reservation*, 54 I.B.I.A. 1, 4 (Aug. 5, 2011)). As
19 the driving forces behind Azuma’s unlawful cigarette activities, Rose and Phillip Del Rosa are
20 named in this suit in both their official and personal capacities.

21 Defendant Wendy Del Rosa is the third member of the Business Committee as the Tribe’s
22 Secretary–Treasurer. *Id.* ¶ 11. Wendy Del Rosa has been in a leadership dispute with the other
23 two members of the Business Committee, *see Alturas Indian Rancheria v. Berhardt*, No. 19-
24 16885, 2023 WL 385176, at *1 (9th Cir. Jan. 25, 2023) (describing a conflict between a faction
25 including Wendy Del Rosa and “the Phillip Del Rosa–Darren Rose . . . faction”), and is named in
26 this suit only in her official capacity.

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28 ///

1 **II. DEFENDANTS’ UNLAWFUL CIGARETTE BUSINESS**

2 Azuma holds a federal manufacturer’s permit issued by the U.S. Tobacco Tax and Trade
3 Bureau (“TTB”), Compl., ex. H, at 2, ECF No. 1-8, and manufactures cigarettes under the brands
4 Tracker and Tucson, Compl. ¶ 47. It also previously imported cigarettes under the Heron and
5 Sands brands into California from Seneca Manufacturing Company (“SMC”). Compl. ¶ 42 & ex.
6 H, at 2. It distributes these cigarettes from its facility in Modoc County, California to retailers
7 around the State, including as far north as Crescent City and as far south as El Cajon. *See* Dahlen
8 Decl. ¶ 6 & ex. A (report of Azuma shipments). However, Azuma and its customers do not abide
9 by numerous state laws relating to the distribution of cigarettes in California. They do not hold
10 cigarette licenses,² Dahlen Decl. ¶¶ 7–9; they do not collect, pay, or remit state cigarette taxes
11 when owed, *id.* ¶ 11; and the cigarettes they distribute—Tracker, Tucson, Heron, and Sands—are
12 not found on the California Tobacco Directory, *see California Tobacco Directory*, CAL. DEP’T
13 JUST., OFF. ATT’Y GEN., <https://oag.ca.gov/tobacco/directory> (last updated June 8, 2023).

14 In 2018, the California Office of the Attorney General (“OAG”) learned that Azuma was
15 distributing Heron and Sands cigarettes, and sent an inquiry to both Azuma and SMC. In
16 response, Azuma claimed in a letter dated September 14, 2018, that definitions sections of the
17 Code of Federal Regulations and the U.S. Code rendered their cigarettes “not subject to state
18 regulation or taxation.” Compl., ex. H, at 2–3. Azuma also claimed that it was not subject to
19 PACT Act reporting requirements. *Id.* at 3. The California Attorney General’s Office rejected
20 Azuma’s arguments in a letter dated November 29, 2018. Nascenzi Decl. ¶ 3 & ex. A. Azuma
21 responded with another letter dated December 10, 2018, *id.* ¶ 4, writing, “Due to the numerous
22 factual inaccuracies, and questionable legal analysis, while Azuma Corporation will respond,
23 Azuma will not be able to do so until January 31, 2019,” *id.* ex. B. No such response ever came.
24 *Id.* ¶ 5.

25 ///

26 ///

27 ² Only one of the customers listed on Azuma’s 2023 PACT Act reports currently holds an
28 active retail license. Dahlen Decl. ¶ 10. Regardless, as explained below, all of Azuma’s shipments
violate the PACT Act because Azuma does not itself hold any tobacco license.

1 Due to Azuma’s failure to make the required reports under the PACT Act and its and its
2 customers’ failure to abide by state cigarette regulations, California nominated Azuma to the
3 PACT Act non-compliant list on December 19, 2018. Compl., ex. J, at 15–16, ECF No. 1-10; *see*
4 *also* 15 U.S.C. § 376a(e)(1). As a result—aside from a brief two-month interruption toward the
5 end of 2019³—ATF has included Azuma on that list since April 10, 2019. *See* Alexander Decl.
6 ¶¶ 6–11.

7 Azuma has since registered with ATF and the State, as required by the PACT Act, Dahlen
8 Decl. ¶ 5; Alexander Decl. ¶ 4, and has made some of the reports required by that Act, *see* Dahlen
9 Decl. ¶ 6 & ex. A (data from Azuma reports). However, Azuma and its customers continue to
10 operate in violation of state law. Accordingly, California sent a warning letter to Azuma, care of
11 Defendants Phillip Del Rosa and Darren Rose, dated October 26, 2022, alerting Azuma of its
12 violations of law and demanding that it cease its unlawful cigarette distributions and sales.
13 Compl., ex. M, ECF No. 1-13. Instead, Azuma continued operating as it had, and in a letter dated
14 April 10, 2023, reiterated its legal arguments to ATF in a failed attempt to be removed from the
15 PACT Act non-compliant list. *See* Compl., ex. L, ECF No. 1-12; Alexander Decl., ex. B, at 1
16 (“ATF declines to remove Azuma from the PACT Act Non-Compliant list . . .”). That letter
17 primarily argued that its customers are “lawfully operating as a manufacturer, distributor,
18 wholesaler, or retailer of cigarettes,” and thus not “customers” under the PACT Act. 15 U.S.C.
19 § 375(4); *see also id.* § 376a(e)(2)(A)(ii) (exempting deliveries to “person[s] lawfully engaged in
20 the business of manufacturing, distributing, or selling cigarettes” from the non-compliant list’s
21 prohibitions).

22 ///

23 ³ On September 30, 2019, Azuma claimed that it did not receive any notice from ATF of
24 its nomination for the list, Alexander Decl. ¶ 7, despite Federal Express confirming delivery to
25 Azuma’s physical address, complete with signature of a tribal employee. Though the PACT Act
26 only requires that ATF “make a reasonable attempt to send notice to the [nominated] seller by
27 letter, electronic mail, or other means,” 15 U.S.C. § 376a(e)(1)(E)(ii); *see also id.* § 376a(e)(8),
28 ATF nonetheless removed Azuma from the non-compliant list due to the purported defect on
October 11, 2019. Alexander Decl. ¶ 7. ATF provided Azuma with opportunity to respond to the
nomination by November 1, 2019. *Id.* Azuma filed an objection on that date, making various legal
arguments against its listing. *Id.* ¶ 8 & ex. A. ATF correctly rejected those arguments and placed
Azuma on the list once again effective December 18, 2019. *Id.* ¶¶ 9–10.

1 **ARGUMENT**

2 **I. THE STATE WILL SUCCEED ON THE MERITS BECAUSE DEFENDANTS’ CIGARETTE**
3 **ENTERPRISE VIOLATES FEDERAL LAW**

4 **A. Defendants deliver cigarettes on behalf of Azuma, which is on the non-**
5 **complaint list**

6 ATF determined that Defendants’ contraband cigarette enterprise is operating in violation
7 of the PACT Act. Compl., ex. J, at 1, ECF No. 1-10. Among other violations, ATF specifically
8 found that Azuma violated the PACT Act because it “shipped cigarettes into the State of
9 California . . . to unlicensed entities.” *Id.* at 13. ATF therefore placed Azuma on the PACT Act
10 non-compliant list. Alexander Decl. ¶¶ 6–11. Because of its listing, the PACT Act makes it
11 unlawful for anyone to “knowingly complete, cause to be completed, or complete its portion of a
12 delivery of any package for” Azuma. 15 U.S.C. § 376a(e)(2)(A). Azuma and its officers have
13 received ample warning that it is on the non-compliant list, and Azuma has been given more than
14 sufficient opportunity to bring its business into compliance with the PACT Act. Azuma, however,
15 acting through its officers, has opted to continue shipping untaxed cigarettes to unlicensed entities
16 throughout California while listed on the non-compliant list, and has done so for over two years.
17 These shipments are plainly unlawful, and California will succeed on the merits of its PACT Act
18 claim.

19 **B. Neither Azuma nor Azuma’s customers are licensed and therefore are not**
20 **“lawfully operating” under the PACT Act**

21 In response to its nomination to that list, Azuma has not denied that it is unlicensed and
22 ships cigarettes throughout California to unlicensed entities. Indeed, it admitted that both it and its
23 customers do not comply with state cigarette laws, claiming instead that federal Indian law
24 precludes state authority. *See* Compl., ex. L, at 4–5, ECF No. 1-12. But a long line of cases have
25 held that cigarette retailers on Indian land are properly subject to state regulation, including
26 licensing and recordkeeping requirements. *See, e.g., Big Sandy Rancheria Enters. v. Bonta,*
27 1 F.4th 710, 728 (9th Cir. 2021) (affirming dismissal of an Indian business’s challenge to
28 California’s licensing and recordkeeping requirements for failing as a matter of law).
Accordingly, each of Azuma’s customers are not “lawfully engaged in the business of . . . selling

1 cigarettes,” and the PACT Act bars Defendants from delivering cigarettes to them. 15 U.S.C.
2 § 376a(e)(2)(A); *see also* Alexander Decl., ex. B, at 2 (“Azuma and its Tribal Retailers must
3 comply with California licensing and excise tax laws in order to be removed from the PACT Act
4 Non-Compliant list.”).

5 As explained above, California requires licensing and recordkeeping up and down the
6 distribution chain—manufacturers, importers, distributors, wholesalers, and retailers. *See supra*,
7 pp. 4–5. And once licensed, each link in the distribution chain is required to transact only with
8 other licensed entities. *See* Cal. Bus. & Prof. Code § 22980.1(a) (“A manufacturer or importer
9 shall not sell cigarettes or tobacco products to a distributor, wholesaler, retailer, or any other
10 person who is not licensed pursuant to [the Licensing Act]”); *id.* § 22980.1(c) (“A retailer,
11 distributor, or wholesaler shall not purchase packages of cigarettes . . . from a manufacturer or
12 importer who is not licensed pursuant to [the Licensing Act]”); *id.* § 22980.1(d)(1) (“A
13 retailer or wholesaler shall not purchase cigarettes . . . from any person who is not licensed
14 pursuant to [the Licensing Act]”). Azuma holds no license under the Licensing Act.
15 Accordingly, whether or not any particular customer of Azuma’s is licensed or unlicensed,
16 Azuma’s lack of its own license means that none of Azuma’s customers are “lawfully engaged”
17 in the cigarette business.

18 Azuma claims that federal Indian law preempts California’s licensing requirements as to it
19 and its customers because of their location on Indian land. But a long line of cases makes clear
20 that state licensing requirements are properly applied to Azuma and its customers. Indeed, forty
21 years ago, even then, “the decisions of [the Supreme] Court ha[d] already foreclosed” any
22 argument that “licensing requirements infringe upon tribal sovereignty.” *Rice v. Rehner*, 463 U.S.
23 713, 720 (1983) (addressing liquor licensing); *see also, e.g., Dep’t of Taxation & Fin. v. Milhelm*
24 *Attea & Bros.*, 512 U.S. 61, 67, 78 (1994) (approving state licensing and recordkeeping
25 requirements for cigarette retailers located on Indian land). Such requirements, the Court has
26 explained, allow the State to impose taxes or fees when they are owed, and help to avoid
27 “spillover” effects resulting from “a distribution network over which the State has no control.”
28 *Rehner*, 463 U.S. at 724; *see also Washington v. Confederated Tribes of the Colville Indian*

1 *Reservation*, 447 U.S. 134, 159 (1980) (approving Washington’s requirement that on-reservation
 2 smokeshops “keep detailed records of both taxable and nontaxable transactions”); *Milhelm Attea*,
 3 512 U.S. at 67 (approving requirements that distributors be licensed and “keep records reflecting
 4 the identity of the buyer in each tax-exempt sale and make monthly reports to the [State] on all
 5 such sales”). With regard to California’s cigarette licensing and recordkeeping regime, the Ninth
 6 Circuit has specifically found that they, too, are properly applied to on-reservation cigarette
 7 businesses. *See Big Sandy*, 1 F.4th at 731 (“These minimal burdens may be imposed on Indian
 8 businesses”); *id.* at 732 (“[T]he State’s licensing and reporting requirements allow [the State]
 9 to see if someone owes the tax, and then, if they do, to collect it.” (quoting *Big Sandy Rancheria*
 10 *Enters. v. Becerra*, 395 F. Supp. 3d 1314, 1332 (E.D. Cal. 2019)) (second alteration in original)).

11 Because Azuma is on the non-compliant list and—along with almost all of its customers—
 12 unlicensed, any cigarette delivery knowingly made on behalf of Azuma necessarily violates the
 13 PACT Act. *See* 15 U.S.C. § 376a(e)(2).

14 **C. Azuma’s potential sovereign immunity does not preclude injunctive relief**

15 As an Indian tribe, the Alturas Indian Rancheria enjoys sovereign immunity unless it is
 16 abrogated by Congress. *See Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788–89 (outlining
 17 the contours of tribal sovereign immunity). To simplify the issues under consideration on this
 18 motion, the Court need not reach the issue of how sovereign immunity might affect Azuma.⁴ That
 19 is because even if Azuma is immune from suit, the Alturas Indian Rancheria Business Committee
 20 that directs its activities—Defendants Darren Rose, Phillip Del Rosa, and Wendy Del Rosa—are
 21 properly enjoined from violating federal law under the *Ex parte Young* doctrine as they are sued
 22 in their official capacities.

23 ⁴ As an initial matter, it is Azuma’s burden to assert such immunity. *See In re Bliemeister*,
 24 296 F.3d 858, 861 (9th Cir. 2002) (“Sovereign immunity is quasi-judicial in nature. It may
 25 be . . . viewed as an affirmative defense.”). Moreover, determination as to whether Azuma is
 26 properly considered an “arm of the tribe” entitled to sovereign immunity is a multi-factor, fact-
 27 driven exercise. *See White v. Univ. of Cal.*, 765 F.3d 1010, 1025 (9th Cir. 2014) (listing five
 28 factors to consider in determining “whether an entity is entitled to sovereign immunity as an ‘arm
 of the tribe’”). Azuma has at times represented itself to OAG as an arm of the Alturas Indian
 Rancheria, but has never provided any relevant evidence—such as articles of incorporation or a
 charter—to evaluate such claim. *See id.* (evaluating an entity’s “method of creation” and
 “structure” as necessary factors). We anticipate such evidence will be subject to future discovery
 in this case.

1 “Under the doctrine of *Ex Parte Young*, immunity does not extend to officials acting
2 pursuant to an allegedly unconstitutional statute.” *Burlington N. & Santa Fe Ry. Co. v. Vaughn*,
3 509 F.3d 1085, 1092 (9th Cir. 2007). “This doctrine has been extended to tribal officials sued in
4 their official capacity such that ‘tribal sovereign immunity does not bar a suit for prospective
5 relief against tribal officers allegedly acting in violation of federal law.’” *Id.* (quoting *Burlington*
6 *N. R.R. Co. v. Blackfeet Tribe*, 924 F.2d 899, 901 (9th Cir. 1991), *overruled on other grounds by*
7 *Big Horn Elec. Coop., Inc. v. Adams*, 219 F.3d 944, 953 (9th Cir. 2000)); *see also Bay Mills*
8 *Indian Cmty.*, 572 U.S. at 796 (“[A]nalogizing to *Ex parte Young*, tribal immunity does not
9 bar . . . suit for injunctive relief against individuals, including tribal officers, responsible for
10 unlawful conduct.” (citation omitted)). Thus, tribal sovereign immunity does not apply to tribal
11 officers so long as the plaintiff has “alleged an ongoing violation of federal law and seeks
12 prospective relief.” *Vaughn*, 509 F.3d at 1092 (emphasis removed).

13 Both of those conditions are easily satisfied here. Azuma’s cigarette enterprise consists
14 almost exclusively of ongoing violations of federal law. Each month, the Defendants make
15 multiple cigarette shipments to unlawfully operating cigarette business throughout California,
16 despite Azuma’s inclusion on the non-compliant list. *See Dahlen Decl.* ¶ 6 & ex. A (report of
17 Azuma shipments). Absent injunctive relief, Defendants’ unlawful acts will continue unabated.
18 Similarly, this motion seeks only perspective relief. It seeks to restrain only future violations of
19 the PACT Act and does not seek any monetary or backward-looking relief.

20 **II. IRREPARABLE INJURY**

21 Because state attorneys general are specifically empowered by the PACT Act to obtain
22 injunctive relief, there is no need of a showing for irreparable injury. *See United States v. Odessa*
23 *Union Warehouse Co-op*, 833 F.2d 172, 175 (9th Cir. 1987) (“Where an injunction is authorized
24 by statute, and the statutory conditions are satisfied . . . , the agency to whom the enforcement of
25 the right has been entrusted is not required to show irreparable injury.” (footnote omitted)).
26 Regardless, Defendants have and will continue to inflict irreparable injury on the People of the
27 State of California unless enjoined.

28 ///

1 First, ATF listed Azuma on the non-compliant list in part due to it and its customers failing
 2 to collect and remit California’s \$2.87 per pack excise tax where owed. *See* Cal. Rev. & Tax.
 3 Code §§ 30101, 30123(a), 30130.51(a), 30131.2(a); Compl., ex J, at 3–4, 8–9; Nascenzi Decl. ¶ 6.
 4 Absent injunctive relief, Azuma will continue to distribute cigarettes without it or its customers
 5 collecting and remitting any taxes where owed. Nascenzi Decl. ¶ 6; Alexander Decl., ex. B, at 1
 6 (“[Azuma’s violations of the PACT Act] potentially defraud the State of California out of
 7 millions of dollars of cigarette tax revenue”); *cf.* *Big Sandy*, 1 F.4th at 732 (approving
 8 application of California’s license and reporting regime to tribe-to-tribe sales because they allow
 9 the State “to see if someone owes the tax, and then, if they do, to collect it.”). In fact, this is
 10 exactly the sort of harm the PACT Act was intended to remedy. *See* PACT Act § 1(b)(1)
 11 (codified at 15 U.S.C. § 375 note) (“Congress finds that . . . the sale of illegal cigarettes . . .
 12 significantly reduces Federal, State, and local government revenues”); *id.* § 1(c)(5) (codified
 13 at 15 U.S.C. § 375 note) (“It is the purpose of this Act to . . . increase collections of Federal,
 14 State, and local excise taxes on cigarettes”).

15 Second, ATF specifically noted in its listing that Azuma’s cigarettes are not listed on
 16 California’s Tobacco Directory. Compl., ex J, at 10; *see also California Tobacco Directory*, CAL.
 17 DEP’T JUST., OFF. ATT’Y GEN., <https://oag.ca.gov/tobacco/directory> (last updated June 8, 2023).
 18 To have their cigarettes listed on the Tobacco Directory, manufacturers must either (1) be a
 19 signatory of and make payments pursuant to the tobacco Master Settlement Agreement,⁵ or (2)
 20 provide various assurances to the Attorney General’s office that they will escrow monies against
 21 a potential future recovery by the State and make such escrow payments. Cal. Rev. & Tax. Code
 22 § 30165.1(b); Cal. Health & Safety Code § 104557(a)(2); Nascenzi Decl. ¶ 7. Azuma is not a
 23 signatory to the MSA, and thus must make escrow payments. However—and uniquely among
 24 non-signatory cigarette manufacturers actively introducing cigarettes into the California market—
 25 Azuma does not provide the required assurances that it will comply with those escrow

26 ⁵ In 1998, 52 states and territories entered into a “landmark agreement” with cigarette
 27 manufacturers called the tobacco Master Settlement Agreement (“MSA”). *Lorillard Tobacco Co.*
 28 *v. Reilly*, 533 U.S. 525, 533 (2001). The text of the MSA can be found at <https://oag.ca.gov/sites/all/files/agweb/pdfs/tobacco/1msa.pdf>.

1 obligations. Under the Tobacco Directory law, Azuma’s cigarettes are contraband, unlawful for
2 sale to consumers and forfeitable to the State. Cal. Rev. & Tax. Code § 30436(e); Nascenzi Decl.
3 ¶ 7.

4 Third, by avoiding California’s taxes and any escrow fees owed, Azuma undercuts the
5 public health goals of those payments. In response to data that showed that increased cigarette
6 prices directly correlated to reduced youth smoking rates, California was the first State to pass a
7 cigarette tax “explicitly billed as a tobacco control measure” in 1988. Robert L. Rabin, *Tobacco*
8 *Control Strategies: Past Efficacy and Future Promise*, 41 Loy. L.A. L. Rev. 1721, 1729 (2008);
9 *see also* Inst. of Med., Nat’l Acads. of Sci., *Ending the Tobacco Problem: A Blueprint for the*
10 *Nation* 120 (Richard J. Bonnie et al. eds., 2007) (“[T]he general rule is that a 10 percent increase
11 in the real price reduces . . . the rate of smoking among youth by 7 percent.”); Nascenzi Decl. ¶ 9.
12 Proposition 56, passed in 2016 as the latest California cigarette tax measure, continued in this
13 vein, with proponents arguing that “[i]ncreasing tobacco taxes reduces youth smoking.” Cal. Sec.
14 of State, California General Election November 8, 2016, Official Voter Information Guide 52
15 (2016), <http://vig.cdn.sos.ca.gov/2016/general/en/pdf/complete-vig.pdf>.

16 These policies take on increased salience in light of the health effects of Azuma’s products.
17 Currently, smoking is “responsible for more than 480,000 deaths per year in the United States”
18 constituting “about one in five deaths annually.” Ctrs. for Disease Prevention & Control
19 (“CDC”), *Health Effects of Cigarette Smoking* (Oct. 29, 2021), <https://tinyurl.com/3zbj4kwe>;
20 Nascenzi Decl. ¶ 8. Smoking causes 90 percent of all lung cancer deaths; it causes 80 percent of
21 all deaths from chronic obstructive pulmonary disease; it increases the risk of coronary heart
22 disease and stroke by two to four times; and it leads to tens of billions of dollars in increased
23 health care costs. *Id.* Moreover, the total economic cost in the United States due to these health
24 effects is “hundreds of billions of dollars each year.” CDC, *Smoking & Tobacco Use: Fast Facts*,
25 <https://tinyurl.com/yj2kudvw> (Aug. 22, 2022); Nascenzi Decl. ¶ 8.

26 **III. PUBLIC INTEREST/EQUITIES**

27 The public interest and equities also decisively favor injunctive relief. As discussed above,
28 Defendants’ cigarette enterprise directly undermines public policy, and distributes untaxed

1 contraband cigarettes throughout the State. Defendants' PACT Act violations allow Azuma's
2 deadly products to be distributed unlawfully throughout the State, with illicit cost advantages
3 undermining the health goals of California's cigarette taxes and MSA fees. An injunction will
4 serve to uphold state law and is therefore in the public's interest.

5 **CONCLUSION**

6 For the reasons stated above, the Court should grant Plaintiff's motion for a preliminary
7 injunction, and enjoin Defendants' distribution of cigarettes in violation of the PACT Act.

8
9
10 Dated: June 16, 2023

Respectfully submitted,

11 ROB BONTA
12 Attorney General of California
13 JAMES V. HART
14 Supervising Deputy Attorney General
15 DAVID C. GOODWIN
16 Deputy Attorney General

17 /s/ Peter F. Nascenzi

18 PETER F. NASCENZI
19 Deputy Attorney General
20 *Attorneys for Plaintiff*
21 *State of California*

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