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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

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

Plaintiff,

v.

AZUMA CORPORATION, et al.,

Defendants.

2:23-cv-00743-KJM-DB

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR AN ORDER TO SHOW CAUSE WHY DEFENDANT DARREN ROSE SHOULD NOT BE HELD IN CIVIL CONTEMPT

Date: Jan. 26, 2024
Time: 10:00 a.m.
Courtroom: 3, 15th Floor
Judge: Hon. Kimberly J. Mueller
Trial date: N/A
Action filed: April 19, 2023

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INTRODUCTION

The State of California, through its Attorney General Rob Bonta (the "State") cannot show that this Court's order on preliminary injunction ("Injunction Order"), Dkt. 28, is "specific and definite" so as to be enforceable through contempt. Even if the Injunction Order satisfied that standard, however, the State has offered no evidence, nor can it, that Darren Rose violated it. This is because, *inter alia*, the injunction order enjoins Rose in his official capacity, though Rose in that capacity cannot plausibly be deemed a third party to Azuma, yet the PACT Act, at § 376a(e)(2)(A) does not apply to cigarette sellers, like Azuma, but instead only applies to persons who deliver "for" cigarette sellers. While the PACT Act does regulate deliveries by cigarette sellers, at § 376a(d), the State did not seek an injunction pursuant to that section, nor did the court enter an injunction pursuant to § 376a(d). In addition, the California Legislature has exempted Azuma's tribe-owned customers, the "Tribal Retailers," from its tobacco licensing requirements, and they are therefore lawfully engaged in the cigarette business under federal law and the laws of their respective tribal governments. As such, the PACT Act's delivery provisions do not apply to transactions with the Tribal Retailers. Moreover, Rose and the other Defendants preserve and reincorporate their arguments in their pending motion to dismiss, Dkt. 24, that this litigation should be dismissed for lack of jurisdiction and because the Tribal Retailers are indispensable parties. For these reasons, the State's motion for order to show cause ("Motion" or "OSC Motion") should be denied.

BACKGROUND

In April 2023, California filed this litigation against Azuma. Complaint, Dkt. 1, at 1. Also named as defendants are Darren Rose and Phillip Del Rosa in their individual capacities, and, along with Wendy Del Rosa, in their official capacities as officers of the Alturas Indian Rancheria ("Tribe"). *Id.*

In June 2023, California moved for a preliminary injunction against Rose and the Del Rosas. Mot. Prelim. Inj., Dkt. 13, 2:1-6. It did so only in their official capacities as officers of the Tribe. *Id.* That preliminary injunction was sought exclusively under § 376a(e)(2)(A) of the PACT Act. Mem. P. A. in Supp. of Prelim. Inj., Dkt. 13-1, at 15:5-17. That section of the PACT Act provides, as relevant here, that:

> [N]o person who delivers cigarettes or smokeless tobacco to consumers, shall knowingly complete, cause to be completed, or complete its portion of a delivery of any package for any person whose name and address are on the list, unless . . . the delivery is made to a person lawfully engaged in the business of manufacturing, distributing, or selling cigarettes[.]

15 U.S.C. § 376a(e)(2)(A).

On September 8, 2023, the Court issued its order resolving the State's preliminary injunction motion, Dkt. 43 (the "Injunction Order"). The Injunction Order stated, in relevant part:

> Defendant Darren Rose, in his official capacity as vice-chairman of the Alturas Indian Rancheria and as president/secretary of Azuma Corporation, and his employees and agents are hereby enjoined from completing or causing to be completed any delivery, or any portion of a delivery, of packages containing cigarettes on behalf of Azuma Corporation to anyone in California in violation of section 376a(e)(2)(A) of the PACT Act.

Inj. Order at 24:24-28.

On December 13, 2023, the State filed a motion for order to show cause why Darren Rose should not be held in contempt under the Injunction Order. Dkt. 50. Defendants now oppose.

LEGAL STANDARD

"The standard for finding a party in civil contempt is well settled: 'The moving party has the burden of showing by clear and convincing evidence that the contemnors violated a specific and definite order of the court." *Fed. Trade Comm'n v. Affordable Media*, 179 F.3d 1228, 1239 (9th Cir. 1999) (quoting *Stone v. City & County of San Francisco*, 968 F.2d 850, 856 n.9 (9th Cir. 1992)). "This standard is generally an objective one[.]" *Taggart v. Lorenzen*, 139 S.Ct. 1795, 1802 (2019). "[H]owever, a person should not be held in contempt if his action 'appears to be based on a good faith and reasonable interpretation of the court's order[.]'" *Reno Air Racing Ass'n., Inc. v. McCord*, 452 F.3d 1126, 1130 (9th Cir. 2006) (quoting *In re Crystal Palace Gambling Hall, Inc.*, 817 F.2d 1361, 1365 (9th Cir. 1987)).

Only if the moving party carries its burden, "[t]he burden shifts to the contemnors to demonstrate why they were unable to comply." *Affordable Media*, 179 F.3d at 1239 (quoting *Stone*, 968 F.2d at 856 n.9). To avoid being held in contempt, a contemnor must "demonstrate he took 'all reasonable steps within [his] power to insure [*sic*] compliance' with the injunction[]." *Hook v.*

Ariz. Dep't of Corrections, 107 F.3d 1397, 1403 (9th Cir. 1997) (first alteration in original) (quoting *Sekaquaptewa v. MacDonald*, 544 F.2d 396, 403-04 (9th Cir. 1976)).

ARGUMENT

I. The State has not shown that the Injunction Order is specific and definite.

Under Federal Rule of Civil Procedure 65 ("Rule 65"), sub. (d)(1)(A)-(C), "[e]very order granting an injunction . . . must [] state the reasons why it is issued; [] state its terms specifically; and [] describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required." "If an injunction does not clearly describe the prohibited or required conduct, it is not enforceable by contempt." *Reno Air*, 452 F.3d at 1132 (quoting *Gates v. Shinn*, 98 F.3d 463, 468 (9th Cir. 1996)). As the Supreme Court has explained:

> [T]he specificity provisions of Rule 65(d) are no mere technical requirements. The Rule was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood.

Schmidt v. Lessard, 414 U.S. 473, 476 (1974).

"The recipient of a[n] injunction . . . should not be left guessing as to what conduct is enjoined." *Reno Air*, 452 F.3d at 1134. "The benchmark for clarity and fair notice is not lawyers and judges, who are schooled in the nuances of the law." *Del Webb Cmnties., Inc. v. Partington*, 652 F.3d 1145, 1150 (9th Cir. 2011) (quoting *Reno Air* at 1134). "The 'specific terms' and 'reasonable detail' mandated by Rule 65(d) should be understood by the lay person, who is the target of the injunction." *Reno Air*, 452 F.3d at 1134. "This is a circumstance, among many in the legal field, that cries out for 'plain English.'" *Id.*

The Injunction Order falls short of being specific and definite so as to be enforceable through contempt. Accordingly, the State's OSC motion should be denied.

A. Under the Injunction Order, Azuma is not enjoined from continuing to make deliveries "for itself."

The Injunction Order expressly notes that "California [did] not move[] to preliminarily enjoin Azuma." Inj. Order at 19 n.10. That was so despite the court's finding that "California ha[d]

shown that Azuma is delivering cigarettes for itself." *Id.* Thus, Azuma is not enjoined in any fashion, even against "delivering cigarettes for itself." *Id.*

The State does not dispute this. For example, the State argues that "[t]he reports Azuma made to CDTFA . . . are clear and convincing evidence that *Rose* has complet[ed] or caus[ed] to be completed' deliveries in violation of the Court's order." Mtn. at 10:13-15 (emphasis added). Significantly, the State does not argue that Azuma's reports to CDTFA are evidence that *Azuma* has violated the Injunction Order.

Based on the foregoing, two aspects of the Injunction Order are beyond debate. First, Azuma conducts deliveries for itself. Second, Azuma is not enjoined from doing so. From those two points derives the unavoidable conclusion that the Injunction Order does not enjoin Azuma from continuing to make deliveries for itself.[1]

B. The Injunction Order is ambiguous in that it simultaneously declines to enjoin Azuma while purporting to enjoin Darren Rose in his capacity as President/Secretary of Azuma—an officer neither named in the State's injunction motion nor even party to the suit.

The State's PI motion was brought only against "Defendants Phillip Del Rosa, Darren Rose, and Wendy Del Rosa, *in their official capacities as Chairman, Vice-chairman, and Secretary-Treasurer of the Alturas Indian Rancheria*[.]" State Ntc. of Mot. and Mot. for Prelim. Inj., Dkt. 13, at 2:2-4 (emphasis added); State Mem. P.'s & A.'s, Dkt. 13-1, at 7:16-19 (same); *see also* Inj. Order at 1:17-19 (same), 7:16-17 ("California moves to enjoin three individuals in their official capacities *as officers of Alturas* from violating the PACT Act.") (emphasis added). The State did not move to enjoin Darren Rose in any other capacity, including as an officer of Azuma.

This is no small point. The State itself has emphasized that "Azuma, even if an arm of the Tribe, is not itself the Tribe[]," State Opp. to Mot. Dis., Dkt. 33, at 28:16, and that "Congress has repeatedly made clear that tribal governments and tribal corporations are purposefully separate and distinct entities[,]" *id.* at 28:16-18 (citing 25 U.S.C. § 5117(e)(1)). The State therefore concedes that Azuma is not the Tribe, and the Tribe is not Azuma. Further, it is black letter law that the

[1] As discussed, *infra*, the State has presented no evidence that Rose is delivering, or has ever delivered, cigarettes for Azuma, as opposed to Azuma conducting deliveries for itself.

Tribe, although not a named defendant, is the real party in interest to claims against tribal officials in their official capacities. *Lewis v. Clarke*, 581 U.S. 155, 162 (2017). From this, it is clear that the State sought its injunction only against the Tribe through three individuals in their official capacities as officers of the Tribe.[2]

The Injunction Order, however, never directly or meaningfully addresses the separateness and its impact on the State's injunction request under § 376a(e)(2)(A). Instead, the Injunction Order dedicates just one rather confounding paragraph to the topic. *See* Inj. Order at 18:9-19:20. But even that paragraph underscores that "California has shown *both* Azuma and Mr. Rose deliver cigarettes to 'consumers.'" *Id.* at 18:9-10 (footnote omitted; emphasis added). Beyond the naked confirmation that both Azuma and Rose are delivering cigarettes, the statement leaves more questions than answers. For example, the Injunction Order never states in what capacity Mr. Rose delivers, instead finding that his specific capacity did not matter. *Id.* at 19:17-20. However, the only relevant capacity is the capacity in which the State sued Mr. Rose and moved to enjoin him: his capacity as an officer of the Tribe.

What is more, the Injunction Order's statement that both are delivering cigarettes is not supported by competent or relevant evidence, thus depriving Defendants of an opportunity to infer the Court's reasoning. Rather, the Injunction Order cites two exhibits to the State's unverified complaint (invoices, and a so-called warning letter from the Attorney General to Darren Rose), and a second letter from the State to Azuma. Inj. Order 18:10-11. Neither the invoices nor the warning letter is of any guidance as to what might distinguish between a delivery by Azuma for itself and a delivery by Rose for Azuma. In addition, neither supports the statement for which they are cited. For example, the first page of the invoices is a bill of lading listing Azuma as the shipper. This undercuts the State's OSC Motion against Rose, as it shows Azuma is conducting the delivery for itself. As another example, the invoices list the "Contact Name" for Azuma as Darren Rose. That is consistent with Mr. Rose's position as the President/Secretary of Azuma. Surely, merely listing

[2] The Defendants raised these points about the distinction between the Tribe and Azuma, and its implications on the State's injunction motion under § 376a(e)(2)(A), in their briefing on the preliminary injunction motion. *See e.g.*, Defs.' Supp. Br. In Opp. to Prelim. Inj., Dkt. 39, at 5:13-17; *see also id.* at 7:6-14.

Rose as the contact name for Azuma does not constitute evidence that Rose delivers cigarettes for Azuma, and certainly not in his official capacity as Vice Chairman of the Tribe – the only capacity in which he was sued and sought to be enjoined. Similar to the invoices, the warning letter lacks any explanatory or evidentiary value on the issue of whether Rose delivers cigarettes for Azuma. For example, it contains factual allegations solely against Azuma, not Rose. Further, the warning letter lacks any apparent relevance to the statement in the Injunction Order that "both Azuma and Mr. Rose deliver cigarettes[.]"[3]

In short, the Injunction Order recognizes that Azuma delivers cigarettes, yet expressly does not enjoin Azuma from making such deliveries. Instead it enjoins Rose, as a tribal official, a capacity in which there is no evidence against him, and as an Azuma director, a capacity in which he was neither sued nor sought to be enjoined. Under these circumstances, the injunction is not specific and definite as to be enforceable by contempt.

C. The Injunction Order is not specific and definite regarding how § 376a(e)(2)(A) could apply to Azuma's employees, agents, and directors acting as Azuma.

Another defect in the Injunction Order is the ambiguity of its statement that "his employees and agents are [also] enjoined[.]" Inj. Order at 24:25-26 (underline added). Seizing on this language, the State suggests that the Injunction Order somehow binds Azuma on the basis that it, or its employees, are Rose's agents. OSC Mot. at 11:4-8. In actuality, Mr. Rose has no employees or agents; the State does not allege or provide evidence to the contrary. Moreover, individual officers, like Rose, "are not imputed to enjoy the same knowledge as their corporations, nor are they presumed to have engaged in the same acts or omissions as their corporations, merely by their status as corporate officers or owners." *See, e.g., Arista Records, Inc. v. Flea World, Inc.*, No. 03–2670, 2006 WL 842883, at *18 (D.N.J. Mar. 31, 2006). Thus, the statement that "[Rose's] employees and agents are [also] enjoined[,]" Inj. Order at 24:25-26, has no practical effect. Or

[3] The other letter the Injunction Order cites is dated November 29, 2018, and addressed to "Azuma Corporation, Attn: Darren Rose," from California Deputy Attorney General L. Kinnamon, and attached as an exhibit to the declaration of Peter Nascenzi, Dkt. 13-5. This letter, while authenticated, contains no competent evidence, or even assertions, that Mr. Rose (as opposed to Azuma) is distributing cigarettes.

perhaps the Injunction Order, despite never stating so, intended the phrase "his employees and agents" to mean employees of Azuma.[4] All of this demonstrates that the Injunction Order lacks the requisite clarity under Rule 65 to be enforced against Rose via contempt.

D. At best, the Injunction Order is an obey-the-law injunction, which is disfavored.

The Injunction Order essentially orders its targets not to violate the law. Specifically, it states that its targets are "**enjoined** from completing or causing to be completed any delivery, or any portion of a delivery, of packages containing cigarettes on behalf of Azuma Corporation to anyone in California *in violation of section 376a(e)(2)(A) of the PACT Act*." Inj. Order at 24:26-28 (italics added; bold in original). The problems raised by this language are numerous.

"'Obey the law' injunctions . . . are disfavored, as they are not narrowly tailored and are at odds [with] [Rule] 65(d), which requires that orders granting injunctive relief be 'specific in terms' and 'describe in reasonable detail . . . the act or acts sought to be restrained.'" *Gnassi v. Toro*, No. 3:20-cv-06095-JHC, 2023 WL 3018447, *16 (W.D. Wash. Apr. 20, 2023) (quoting *Roman v. MSL Cap., LLC*, No. EDCF 17-2066 JGB (SPx), 2019 WL 3017765, *5 (C.D. Cal. July 9, 2019), *aff'd* 820 F. App'x 592 (9th Cir. 2020), which in turn was quoting Rule 65(d)). *See also Del Webb*, 652 F.3d at 1150 n.3.

Here, the Injunction Order only enjoins Rose from engaging in delivery-related activity if it is "in violation of section 376a(e)(2)(A) of the PACT Act." This is the type of obey-the-law injunction that is "disfavored." It is especially problematic in this case, where the Injunction Order leaves so much unanswered about the operation of § 376a(e)(2)(A). For example, the Injunction Order never clarifies how a director of Azuma, in his official capacity, can possibly come within § 376a(e)(2)(A)'s prohibition against facilitating deliveries "for" Azuma. After all, a suit against a

[4] Relatedly, it is worth noting that an injunction against an agent ordinarily does not bind the principal. *Doctor's Assocs., Inc. v. Reinert & Duree, P.C.*, 191 F.3d 297, 304 (2d Cir. 1999) ("[W]e believe the mere fact of an employer/employee, master/servant, or principal/agent relationship, without more, does not necessarily satisfy the standard of 'persons in active concert,' at least where the consequence would be to extend the injunction to cover the dominant party."). "If it did, one would never need to obtain jurisdiction over a principal in order to obtain a binding injunction over her. It would be sufficient to sue and enjoin her agent." *Id.* Thus, insofar as the State claims that an injunction against Rose, as director of Azuma, also binds Azuma itself, it is incorrect.

corporate officer in his or her official capacity is in fact a suit against the corporation itself. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984) ("The general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter") (internal citation omitted). Thus, even if the injunction could be permitted against Rose in his official capacity for Azuma (despite that he was neither named as a party nor sought to be enjoined in that capacity), it would only be permitted, under the "general rule" set forth in *Halderman*, as an injunction against Azuma itself. And Azuma cannot come within the prohibition under § 376a(e)(2)(A) as delivering "for" itself. Instead, the provision of the PACT Act that would apply to Azuma's deliveries for itself is 376a(d), which is directed at sellers who deliver their own cigarettes, not those who merely make deliveries. *See* 15 U.S.C. § 376a(d)(1) (providing "no delivery seller may sell or deliver to any consumer … any cigarettes … pursuant to a delivery sale" unless applicable taxes have been paid and tax stamps affixed). Yet the State did not bring its injunction under that section.[5]

Moreover, enjoining a cigarette seller from making deliveries for itself under § 376a(e)(2)(A) would render § 376a(d) superfluous, in violation of a cardinal rule of statutory construction. *E.g.*, *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.") (internal quotations and citations omitted).

In sum, the Injunction Order is an obey-the-law injunction that, in addition to prohibiting conduct not barred by the referenced statute, lacks the requisite clarity required under Rule 65, as the order obscures, rather than defines, exactly what conduct would violate § 376a(e)(2)(A). For this reason, the Injunction Order cannot be enforced through contempt.

[5] Azuma extensively briefed issues centered around this question in opposition to the State's injunction motion. *See* Defs.' Supp. Br. in Opp. to Prelim. Inj., Dkt. 39, at 2-8.

II. Even if the Injunction Order was specific and definite, the State has not shown that Darren Rose has violated it.

Even if the Injunction Order had the requisite clarity, the State has not shown, by clear and convincing evidence, that Darren Rose has violated it.

A. The State offered no evidence that the subject sales are Darren Rose's deliveries for Azuma, rather than Azuma's deliveries for itself.

As noted, the Injunction Order found that "California has shown both Azuma and Mr. Rose deliver cigarettes to 'consumers.'" *Id.* at 18:9-10 (footnote omitted; emphasis added). The Injunction further underscored that "Azuma is delivering cigarettes for itself," but that "California [did] not move[] to preliminarily enjoin Azuma." Inj. Order at 19, n.10. Therefore, the State's OSC Motion must fail unless the State shows that Darren Rose delivered for Azuma—as opposed to Azuma delivering for itself—in violation of the Injunction Order.

The State did not, and cannot, make the required showing. Rose is not named anywhere on the PACT Act reports provided with the State's OSC motion. *See* Declaration of James Dahlen, Dkt. 50-2, at 8-12 (Ex. A: Oct. 2023 report), 13-17 (Ex. B: Nov. 2023 report). The State makes no assertion to the contrary. Rather, the State argues that the PACT Act reports are evidence of Darren Rose's conduct because Rose "is the President/Secretary of Azuma and Vice-chairman of the [Tribe]." Mtn. at 10:25-11:1. Merely by virtue of those positions, the State argues, "there is . . . no question that he 'completed or caused to be completed' the deliveries." *Id.* However, as noted above, individual officers, like Rose, "are not imputed to enjoy the same knowledge as their corporations, *nor are they presumed to have engaged in the same acts or omissions as their corporations, merely by their status as corporate officers or owners.*" *Arista Records*, 2006 WL 842883, at *18 (emphasis added).

Thus, the State's attempt to impute Azuma's alleged delivery conduct to Mr. Rose is contrary to law, and the State presents absolutely no evidence, much less clear and convincing

evidence, that Mr. Rose factually delivered cigarettes on behalf of Azuma.[6] That fact is therefore insufficient to support a contempt finding.

At most, the PACT Act reports show Azma's deliveries "for itself," and the State has offered no evidence proving these deliveries by Azuma were in fact deliveries by Rose.

B. The State cannot show Azuma's distributions violate § 376a(e)(2)(A) of the Act because the State cannot show that the Tribal Retailers are operating unlawfully.

Even if the State proved that Rose delivered cigarettes, the State's motion still fails. This is because the State has not shown by clear and convincing evidence that the cigarettes were delivered "in violation of section 376a(e)(2)(A) of the PACT Act." Inj. Order at 24:27-28.

There is no violation of § 376a(e)(2)(A) if Azuma's cigarettes are delivered "to a person lawfully engaged in the business of manufacturing, distributing, or selling cigarettes[.]" § 376a(e)(2)(A)(ii). Here, this carveout applies because the Tribal Retailers are "lawfully engaged" in the cigarette business.

1. The State bears the burden of showing the Tribal Retailers are not lawfully engaged in the cigarette business.

A threshold issue, and one heavily disputed in connection with the State's original injunction motion, is which party bears the burden of showing the Tribal Retailers are "lawfully engaged" in the cigarette business. In this particular case, however, it undisputedly lies with the State, as its burden in the present motion is "clear and convincing." *Affordable Media,* 179 F.3d at 1239. Also, the Injunction Order itself recognized that "California does have the initial burden of showing defendants are within the scope of the prohibition and engaged in the prohibited activity." Inj. Order at 17:13-15. To show that Rose violated the injunction, or even is a prohibited person engaged in prohibited activity under the PACT Act, the State had to show that he "delivers cigarettes . . . to consumers[.]" § 376a(e)(2)(A); *see also* Inj. Order 18:9-10. While the Court

[6] If the Court determines that Azuma's delivery conduct is imputable to Rose merely by the nature of his official capacity for Azuma (or the Tribe), then the Court must conclude that the State sought its injunction under the wrong section of the PACT Act, as Section 376a(d) applies to Sellers who also deliver their own cigarettes, as opposed to Section 376a(e)(2)(A), which only applies to persons who deliver "for" a seller.

addressed some aspects of this issue in the Injunction Order, the "obey-the-law" nature of the order effectively reopens the issue of whether the Tribal Retailers are "lawfully engaged" in the cigarette business for the purpose of determining compliance with the Injunction Order.

On this point, the Injunction Order found, incorrectly, that "California ha[d] shown that both Azuma and Mr. Rose deliver cigarettes to 'consumers.'" Inj. Order at 18:9-10 (quoting § 375(4) (defining "consumer" as excluding "any person lawfully operating as a manufacturer, distributor, wholesaler, or retailer of cigarettes or smokeless tobacco.")). The Injunction Order reasoned that the Tribal Retailers "do not have licenses as required by the Licensing Act or the Tax Law." Inj. Order at 19:1-2. As support, the Injunction Order merely cited a warning letter from the California Attorney General to Azuma and the Declaration of James Dahlen, Dkt. 13-4, at ¶ 8 (declaring that CDTFA staff confirmed that "between January 2019 and the present, none of the following Azuma Corporation customers, searching by name and address, have held an active manufacturer, importer, distributor, wholesaler, or retailer license pursuant to the Licensing Act, or a distributor license pursuant to the Cigarette Tax Law[.]"). However, California Business and Professions Code section 22980.1(b)(2) undoubtedly voids that analysis. It provides:

> This subdivision [prohibiting sales to any unlicensed person] does not apply to any sale of cigarettes . . . by a distributor, wholesaler, or any other person to a retailer, wholesaler, distributor, or any other person that the state, pursuant to the United States Constitution, the laws of the United States, or the California Constitution, is prohibited from regulating.

(Emphasis added.) Thus, under the plain language of the statute, "any other person" can sell cigarettes to "any other person" that the State is prohibited from regulating under federal or state law. Further, the legislative history of this provision reaffirms that on-reservation retailers, like the Tribal Retailers, are exempt from state licensing and may purchase cigarettes from any person:

> Exception for persons not subject to the licensing requirements of the Act: Distributors in the state may only sell tobacco products to licensed persons. Retailers on Indian Reservations and on military bases (PXs) are not subject to the licensing requirements of the Cigarette and Tobacco Licensing Act of 2003. This exemption allows distributors to sell cigarette and tobacco products to those retailers.

CA B. An., A.B. 3092 Assem., Aug. 26, 2004 (emphasis added).[7] Additionally, upstream from the Tribal Retailers, Azuma, as a tribal manufacturer operating exclusively within Indian Country commerce, is also an exempt person. *See* Cal. Bus. & Prof. Code § 22971.4 (the Licensing Act does not apply to any person that is "exempt from regulation under the United States Constitution, the laws of the United States, or the California Constitution.").

2. The Tribal Retailers are exempt from the licensing requirements under the Licensing Act.

Applied here, section 22980.1(b)(2) and its legislative history make clear that, contrary to the conclusion in the Injunction Order, the Licensing Act of 2003 does not apply to Tribal Retailers. The Tribal Retailers are therefore operating lawfully under their respective tribal laws without a retailer's (or distributor's) license under that Act.

Additionally, section 22980.1(b)(2) makes clear that "any person" may sell to the Tribal Retailers. Thus, the fact that Azuma does not have a state license—assuming one is even required—does not mean the Tribal Retailers are operating unlawfully simply by purchasing cigarettes from Azuma.

Notably, this guts the State's core argument for a preliminary injunction. *See* Mem. P.'s & A.'s In Supp. of Mot. Prelim. Inj., Dkt. 13-1, at 16:5-17. The State relied exclusively on the Licensing Act of 2003 to argue that the Tribal Retailers were not lawfully engaged in the cigarette business. *Id.* More specifically, the State cited the Licensing Act of 2003 for the proposition that "once licensed, each link in the distribution chain is required to transact only with other licensed entities." *Id.* at 16:7-14. The State reasoned that "whether or not any particular customer of Azuma's is licensed or unlicensed, Azuma's lack of its own license means that none of Azuma's customers are 'lawfully engaged' in the cigarette business." *Id.* at 16:15-17. The plain language of Section 22980.1(b)(2) belies this argument.

[7] California Bill Analyses "are the type of material that may be considered as an indication of the Legislature's intent in enacting a particular statute." *City of Hesperia v. Lake Arrowhead Cmnty. Svcs. Dist.*, 93 Cal.App.5th 489, 509 (4th Dist. 2023).

3. The Tribal Retailers are not required to hold a distributor's license under the Tax Law.

Separate from the Licensing Act, the Injunction Order also held that the Tribal Retailers "are distributors under the Tax Act" and therefore must have a state distributor license under that Act. *Id.* at 21:15-22. This holding is also incorrect, for several reasons.[8] First, this holding contradicts the position of the California Department of Tax and Fee Administration (CDTFA), the state agency with jurisdiction to administer the Tax Law. *See* Cal. Rev. & Tax. Code § 30101.7(j) ("The [CDTFA] shall enforce the licensing and tax provisions of this section."). By official correspondence dated April 30, 2008, the CDTFA states that a tribally owned entity operating on reservation lands is not required to apply for a California distributor's license. *See* Ltr. from Kate Su, CA Board of Equalization, to R. Johnson, BSR Dist., April 30, 2008, Ex C to Decl. of D. Rose, Dkt. 23-3 at 20. Since there is no evidence, or even a suggestion, that the Tribal Retailers operate outside reservation lands, they are not required to hold a distributor license. The Injunction Order points to no authority to overrule the state agency on this issue under its purview.

Second, the Tax Law as a whole does not support the notion that the Tribal Retailers are distributors. The Tax Law specifically regulates aspects of the "retail sale of cigarettes," *see, e.g.*, Cal. Rev. & Tax. Code § 30101.7(b), yet the Tax Law does not focus any tax or licensing on cigarette retailers. Indeed, the Tax Law, through its definition of the term "Dealer" recognizes that its licensing requirements does not reach all sales in the state. Cal. Rev. & Tax. Code § 30012 (defining "Dealer" as "every person, other than one holding a distributor's or wholesaler's license, who engages in this state in the sale of cigarettes or tobacco products."). Further, the fact that Azuma is not licensed as a distributor does not mean the Tax Law can be contorted to extend that licensing downstream to the Tribal Retailers.[9] Moreover, as a further acknowledgment that

[8] We focus exclusively on licensing of Azuma's customers, rather than taxation or licensing of Azuma, because the State has expressly stated that its "[preliminary injunction] motion focuses only on licensing, which unquestionably applies to Azuma's customers[.]" State Reply In Supp. Mot. Prelim. Inj., Dkt. 28, at 7:25-8:5.

[9] Indeed, this blinkered reading of the Tax Law would also potentially sweep into the "distributor" category all tribal member cigarette *consumers* since they, too, handle untaxed cigarettes. *See* Cal. Rev. & Tax. Code § 30008(b).

retailers, like the Tribal Retailers, could not be licensed under the Tax Law, the Legislature, in 2003, enacted the Licensing Act to reach up and down the distribution chain, from manufacturers to retailers. Tellingly, the Licensing Act, which was enacted as a complement to the Tax Law, defines "Retailer" as "a person who engages in this state in the sale of cigarettes . . . directly to the public from a retail location." Cal. Bus. & Prof. Code § 22971(q). That definition would, but for the exemption of Tribal Retailers under Cal. Bus. & Prof. § 22980.1(b)(2), clearly capture the Tribal Retailers who "engage . . . in the sale of cigarettes . . . directly to the public from a retail location." Notably, the Licensing Act contains that definition while incorporating the Tax Law's definition of the term "distributor." This is an indication that retailers, like the Tribal Retailers, are not also distributors. In line with this reading, the Licensing Act contains an entire chapter dedicated to licensing of retailers, and a separate chapter dedicated to licensing of wholesalers and distributors. All of this is further evidence that the Tax Law's definition of "distributor" is not intended to apply to the Tribal Retailers.[10]

Third, even if the Tribal Retailers were distributors under the Tax Law, in order to justify the application of the law against Indians on their reservations, the State must make the threshold showing that those licensing requirements are designed to facilitate the collection of a lawful tax from non-Indians. To determine whether such a tax is lawful, the court must conduct *Bracker* balancing, making "a *particularized inquiry* into the nature of the state, federal, and tribal interests at stake[,]" *White Mtn. Apache Tribe v. Bracker*, 448 U.S. 136, 144-45 (1980) (emphasis added).[11] Only "*if* the balance of federal, state, and tribal interests favors the State, and federal law is not to the contrary, the State may impose its levy . . . and may place on a tribe or tribal members 'minimal burdens' in collecting the toll." *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 459 (1995) (emphasis added) (citations omitted); *accord*, *Keweenaw Bay Indian Cmnty. v. Rising*, 477 F.3d 881, 887 (7th Cir. 2007). Thus, the State may *only* impose "minimal burdens" on the Tribal

[10] As noted already, however, the Legislature recognized the limitations on the State's jurisdiction to extend licensing requirements to on-reservation entities and carved Tribal Retailers out of the Licensing Act. *See* Cal. Bus. & Prof. Code § 22980.1(b)(2), *supra*.

[11] The Injunction Order correctly articulates this portion of the *Bracker* test. Inj. Order at 20, n.11.

Retailers *if* the Court *first* concludes, *after* making a "*particularized inquiry* into . . . the state, federal, and tribal interests at stake," that the balance tips in favor of the State. *Big Sandy Rancheria Enter. v. Bonta*, 1 F.4th 710, 725 (9th Cir. 2021).

In its Injunction Order, the Court did not conduct this "particularized inquiry." The Court did not make a particularized inquiry into the specific interests of the Tribal Retailers, despite noting that "States have a valid interest in ensuring compliance with lawful taxes that might easily be evaded through purchases of tax-exempt cigarettes on reservations," Inj. Order at 20 (citation omitted), and that such interest "outweighs tribes' modest interest in offering a tax exemption to customers who would ordinarily shop elsewhere," *id.*

For example, the Court did not consider that the Tribal Retailers in this case sell cigarettes in or near tribal gaming and entertainment venues – venues in which the tribes themselves "play[ed] an active role in generating value on [their] reservation." *Big Sandy* at 726. In fact, Wendy Ferris, Azuma's marketing manager and compliance officer, testified in her declaration that, of the 19 Tribal Retailers who buy Azuma's cigarettes, six of them sell the cigarettes inside of their tribally-owned and operated casinos, and nine of them sell the cigarettes at tribally-owned fuel mart/gas stations adjacent to or near tribal casinos. Ferris Decl., Doc 23-4, at ¶ 10. Ms. Ferris further testified that, "a substantial portion of the consumers who purchase Azuma-manufactured cigarettes do so while spending time at tribally-owned casinos and participating in gaming and related amenities offered by the tribes that own the Tribal Retailers." *Id.*

The State presented no evidence to the contrary. The evidence thus indisputably shows that these tribes have "built modern facilities which provide recreational opportunities and ancillary services to [their] patrons, who do not simply drive onto the reservations, make purchases and depart, but spend extended periods of time there enjoying the services that the Tribe[s] provide[]." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 219 (1987). "When 'a tribe plays an active role in generating activities of value on its reservation' with the aid of non-Indian entities, it has a 'strong interest in maintaining those activities free from state interference,' in contrast to when tribes 'simply allow the sale of items such as cigarettes to take place on their reservations.'" *Big Sandy* at 726 (citations omitted).

All of this implicates the strong tribal and federal interests, as expressed in IGRA, of fostering strong tribal governments through the operation of full-service, Las Vegas style gaming facilities. 25 U.S.C. §§ 2701-2702; *Flandreau Santee Sioux Tribe v. Noem*, 938 F.3d 928, 936 (8th Cir. 2019); *Prairie Band Potawatomi Nation v. Richards*, 379 F.3d 979, 983-86 (10th Cir. 2004) *rev'd on other grounds, sub. nom Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005) (holding that tribe's interests in generating revenues from selling fuel at tribally-owned fuel station located near the Tribe's casino outweighed state's interests in taxing the fuel because the tribe's fuel sales were driven primarily by its nearby casino). The Injunction Order, however, did not even consider these vital interests of the Tribal Retailers, and thus did not properly conduct the mandatory *Bracker* balancing test. *See* Doc. 43, Order at 20-21. Nor could necessary balancing occur because the Tribal Retailers are not party to this litigation. *See* sec. III, *infra* (discussing why Tribal Retailers are necessary and indispensable parties to this litigation).

The Injunction Order points to two decisions upholding the Tax Law: *Big Sandy*, 1 F.4th at 731, and *Cal. State Bd. of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9, 12 (1985). *See* Inj. Order 21:26-22:2. The Injunction Order misapprehends those decisions.

Big Sandy considered the question of the Tax Law's application to *a distributor operating outside Indian Country*. 1 F.4th at 729. Accordingly, it did not conduct *Bracker* balancing. *Id.* ("In these circumstances, the district court properly declined to balance federal state, and tribal interests under *Bracker*."). It therefore is inapposite here, where the question is whether the Tax Law applies to the Tribal Retailers' (*i.e.*, Indians) sales to nonmembers in Indian Country.

Like *Big Sandy*, *Chemehuevi* is also inapposite. *Chemehuevi* upheld the Tax Law on the basis that "the legal incidence of California's cigarette tax falls on the non-Indian consumers of cigarettes purchased from respondent's smoke shop, and that petitioner has the right to require respondent to collect the tax on petitioner's behalf." 474 U.S. at 12. In this case, as noted, the question is not where the legal incidence of the tax lies.

Instead, the threshold question is whether, under *Bracker*, the tax is validly imposed on cigarettes sold by the Tribal Retailers to their customers on their respective reservations. As noted above, the undisputed evidence shows that the Tribal Retailers have created on-reservation

economies by developing and operating gaming facilities, and most sell cigarettes from inside of or near such gaming facilities, which are regulated by the federal Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq.*, with the goal of promoting tribal self-governance. *See* Declaration of Wendy Ferris, Dkt. 23-4, at ¶¶ 8-20. Those interests are unique and must be balanced with the federal and state interests "on a case-by-case basis." *Gila River Indian Cmnty. v. Waddell*, 967 F.2d 1404, 1407 (9th Cir. 1992); *see also Flandreau Santee Sioux Tribe*, 938 F.3d at 932 ("Each case 'requires a particularized examination of the relevant state, federal, and tribal interests.'") (quoting *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 838 (1982)). Because the Injunction Order never conducted the necessary balancing under the facts of this case, it has not been established that the taxes imposed under the Tax Law are validly imposed, and without such a finding, the Court cannot even reach an inquiry into whether the law imposes minimal burdens on the Tribal Retailers.

Even if the Court had conducted *Bracker* balancing, and as was the case in *Cabazon*, *Flandreau*, and *Prairie Band Potawatomi*, here the evidence shows that the federal and Tribal Retailers' interests outweigh those of the State. *Accord* 25 U.S.C. §§ 2701-2702. Because a properly conducted balancing test favors the Tribal Retailers, the Tax Law's licensing requirement is invalid as applied to them, regardless of whether the burdens imposed by such laws are minimal. In light of the forgoing, it is apparent that the State has not provided clear and convincing evidence that Azuma has violated the terms of the Injunction Order, and accordingly its OSC motion must fail.

III. The State still has not established subject matter jurisdiction over this action.

Rose and the other defendants previously moved to dismiss each and every claim in the complaint. Dkt. 24 (filed July 17, 2023). That motion was heard and taken under submission on October 13, 2023. Dkt. 49 (minutes for motion hearing). Defendants hereby expressly preserve those arguments, and reemphasize that the Tribal Retailers' absence from this litigation, coupled with their immunity from court process like subpoenas, prejudices Rose's ability to fully defend against the State's suit and its OSC motion, as well as the ability of the Tribal Retailers and their parent tribes to defend their important right to govern their own on-reservation conduct without

undue State infringement of their territorial sovereignty. The Tribal Retailers are necessary and indispensable parties.

IV. The Injunction Order should, by its terms, be dissolved.

Under the Injunction Order, "Mr. Rose may move to dissolve the injunction [1] if he can show compliance with the PACT Act or [2] if he can show the State has unreasonably prevented him from complying with applicable laws." Inj. Order at 25:2-4. Because the first of these bases is satisfied here, the Court should dissolve the injunction.[12]

As Rose and the other defendants noted in briefing on the preliminary injunction, the State elected to pursue its injunction under the third-party delivery provision at § 376a(e)(2)(A). Through the extensive briefing both on the preliminary injunction, and now on this OSC Motion, it is clear that § 376a(e)(2)(A) has no application to Azuma's operations. This is primarily because Azuma does not utilize any third party to deliver its cigarettes. Azuma's officers are not third parties to Azuma, and there is no evidence that the Tribe conducts deliveries for Azuma. Instead, as the Injunction Order recognizes, Azuma conducts deliveries for itself. The PACT Act addresses such deliveries in a separate section: § 376a(d). The State, however, did not base its injunction on § 376a(d), nor did the Court base its order on that section. Accordingly, Azuma's deliveries are not subject to § 376a(e)(2)(A), on which the Injunction Order is based. To avoid unnecessary confusion going forward, the Injunction Order should be dissolved.

CONCLUSION

For the foregoing reasons, Rose and the other Defendants respectfully request that the OSC motion be denied, and that the Injunction Order be dissolved.

[12] Depending on how current settlement discussions proceed, Rose and the other Defendants may, at a later date, move to dissolve the injunction on the second basis.

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Respectfully submitted,

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