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

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

2:23-cv-00743-KJM-DB

16 Plaintiff,

**REPLY IN SUPPORT OF PLAINTIFF  
 THE STATE OF CALIFORNIA’S  
 MOTION FOR AN ORDER TO SHOW  
 CAUSE WHY DEFENDANT DARREN  
 ROSE SHOULD NOT BE HELD IN  
 CIVIL CONTEMPT**

17 v.

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

Date: January 26, 2024  
 Time: 10:00 am  
 Courtroom: 3, 15th Floor  
 Judge: Hon. Kimberly J. Mueller  
 Trial Date: N/A  
 Action Filed: April 19, 2023

23 Defendants.  
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**INTRODUCTION**

1  
2 The State filed its motion for preliminary injunction specifically to staunch the continuing  
3 injury incurred by Azuma’s illicit sales during the pendency of this case. Pl.’s Opp’n Defs.’  
4 Admin. Mot. 3, ECF No. 16. That motion named the Individual Defendants in their official  
5 capacities pursuant to the *Ex parte Young* doctrine—despite open questions about Azuma’s legal  
6 status—to avoid immunity issues and facilitate the Court enjoining the activities of an asserted-to-  
7 be-immune corporation already determined to be violating the PACT Act. *See* Alexander Decl.,  
8 ex. B, ECF No. 13-3 (ATF letter). At the subsequent hearing, with Defendant Darren Rose sitting  
9 in the courtroom, the Court talked through what lawful compliance with the injunction would  
10 look like for these officials, which included obtaining licenses on behalf of Azuma and stopping  
11 sales to unlicensed tribal retailers. *See* Tr. Proceedings (“Prelim. Inj. Hr’g Tr.”) 8:19–9:12, ECF  
12 No. 37 (colloquy between the Court and counsel for the State). In a thorough and well-reasoned  
13 order following that hearing, the Court enjoined Rose in his official capacity, both as a tribal  
14 officer and as an officer of Azuma, concluding that it did not matter for the purposes of the  
15 injunction which hat he was wearing while he was facilitating deliveries for Azuma. *See* Order  
16 (“Prelim. Inj. Order”) 24, ECF No. 43.

17 Defendants exclaimed that this injunction “would force the Tribe and Azuma to shut down  
18 all manufacturing operations, will render Azuma insolvent, and will force Azuma to terminate the  
19 employment of its employees.” Defs.’ Opp’n Mot. Prelim. Inj. 36, ECF No. 23. However, after  
20 the Court issued the injunction, Defendants failed to move for reconsideration. They filed an  
21 appeal, but did not request relief from the injunction, before either this Court or the Ninth Circuit.  
22 Then they stalled—requesting multiple extensions to their appellate briefing schedule and idling  
23 the case in this Court—all without mentioning to the State or the Court that Defendants did not  
24 pause any of their pre-injunction business activities. In the two months following the injunction  
25 taking effect, they delivered over five million additional cigarettes—nearly another million  
26 dollars in evaded taxes and fees—before the company’s continued sales were discovered.

27 Finally, in response to the State’s motion for an order to show cause why Rose should not  
28 be held in civil contempt for the continued deliveries made under his direction, Rose does not

1 deny that the prohibited deliveries occurred or contend they were not made under his direction.  
2 Nor does he indicate that future prohibited deliveries will stop. Instead, he posits theories the  
3 Court has already considered and rejected when issuing the injunction in the first instance.  
4 Demonstrating no intention of complying with this Court’s order, Rose’s blatant violations  
5 warrant holding him in civil contempt.

6 **ARGUMENT**

7 **I. CLEAR AND CONVINCING EVIDENCE DEMONSTRATES THAT ROSE IS VIOLATING**  
8 **THE COURT’S PRELIMINARY INJUNCTION ORDER**

9 **A. Rose is continuing the very activities that formed the basis of the Court’s**  
10 **injunction order**

11 The evidence of Azuma’s post-injunction deliveries comes from the same source as  
12 Azuma’s pre-injunction deliveries—PACT Act reports Azuma itself provided to the State. *See*  
13 15 U.S.C. § 376(b) (making such reports “presumptive evidence that [the reported] cigarettes . . .  
14 were sold, or transferred for profit, by” Azuma). These reports, combined with Rose’s self-  
15 attested position as Azuma’s “President/Secretary,” Rose Decl. ¶¶ 3–4, ECF No. 23-3, allowed  
16 the Court previously to conclude that “Rose has knowingly caused to be completed or has  
17 completed deliveries of cigarettes for Azuma, despite receiving notices from California and ATF  
18 about Azuma’s placement on the noncompliant list,” Prelim. Inj. Order 19. Rose, therefore,  
19 “violated section 376[a](e)(2)(A)” of the PACT Act. *Id.* On the basis of those violations, and after  
20 balancing the hardships of the parties, the Court enjoined Rose from making additional violations.  
*Id.* at 24.

21 Coming from the same source and in the same form as the evidence sufficient for the Court  
22 to issue the injunction, the new reports are also sufficient to show that Rose is violating the  
23 Court’s order to cease such violations. *See* 15 U.S.C. § 376(b). *Contra* Defs.’ Opp’n 15.  
24 Defendants continue to deliver the same cigarettes to the same customers throughout California.  
25 *Compare* Dahlen Decl. (“Prelim. Inj. Dahlen Decl.”), ECF No. 13-4, *with* Dahlen Decl. (“OSC  
26 Dahlen Decl.”), ECF No. 50-2. These continued deliveries are clear-cut violations of this Court’s  
27 order.

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1           **B. Defendants’ opposition demonstrates Rose understood the Court’s order**

2           The Court’s order specifically enjoins Rose in his relevant official capacities, both as a  
3 Tribal official and as Azuma’s corporate officer. *See* Prelim. Inj. Order 24. As Rose  
4 acknowledges, because he is enjoined in both capacities, the Court found that the “specific  
5 capacity” in which he is facilitating Azuma’s deliveries “did not matter.” Defs.’ Opp’n 11. That  
6 is, regardless of whether Rose directs Azuma’s activities as Tribal Vice-chairman or as Azuma’s  
7 Secretary/President, he is enjoined from doing so. His unsupported contention that the Court  
8 enjoined only deliveries made under his direction as Tribal Vice-chairman, *id.*, runs contrary to  
9 the plain language of the Court’s order.<sup>1</sup>

10           Rose’s claim that “the State’s attempt to impute Azuma’s alleged delivery conduct to Mr.  
11 Rose is contrary to law,” Defs.’ Opp’n 15, also rings hollow. Under the “legal fiction” of *Ex parte*  
12 *Young*, and as Defendants acknowledge, an injunction against Rose in his official capacity  
13 operates in practice “as an injunction against Azuma itself.” *Id.* at 14.<sup>2</sup> A corporation “can only  
14 act through its agents.” 1 Fletcher Cyclopedic of the Law of Corporations § 30 (Westlaw Nov.  
15 2023 update). An injunction against Rose as Azuma’s President/Secretary as well as “his  
16 employees and agents,” Prelim. Inj. Order 24, sweeps in precisely all those who can act on  
17 Azuma’s behalf.

18           By continuing to do what he understands the injunction prevents him from doing, Rose  
19 should be held in contempt.

20           **II. ROSE RELIES ON ARGUMENTS THE COURT ALREADY REJECTED**

21           In his attempt to avoid being held in civil contempt, Rose largely relies on arguments this  
22 Court has already considered and rejected in issuing the preliminary injunction order, positing

23           <sup>1</sup> Additionally, Defendants’ counsel has argued that the only relevant control over Azuma  
24 is that of “the Tribal government, the Business Committee.” Mot. Dismiss Hr’g Tr. 6:24. If so,  
25 the deliveries Rose facilitates as Tribal Vice-chairman thus also include all those he facilitates as  
Azuma’s President/Secretary.

26           <sup>2</sup> Indeed, Defendants’ observation is as old as the doctrine itself. As Justice Harlan noted  
27 in his dissent to *Ex parte Young*, the “suit . . . was, as to the defendant Young, one against him *as,*  
28 *and only because he was,* Attorney General of Minnesota. . . . And the . . . object of seeking such  
relief was *to tie the hands* of the *State* so that it could not . . . test the validity of the statues and  
orders in question. It would therefore seem clear that . . . the suit brought in the Federal court was  
one, in legal effect, against the State . . .” 209 U.S. 123, 173–74 (1908) (Harlan, J., dissenting).

1 essentially that the order should not be binding on him because he disagrees with it. This is not a  
2 valid defense: A party “may not challenge during contempt proceedings the validity of the legal  
3 or factual basis for the underlying order.” *Donovan v. Sovereign Sec., Ltd.*, 726 F.2d 55, 60 (2d  
4 Cir. 1984) (citing *United States v. Rylander*, 460 U.S. 752, 756–57 (1983)); *see also Thomas,*  
5 *Head & Greisen Emps. v. Buster*, 95 F.3d 1449, 1456 (9th Cir. 1996) (“[Contemnor] should have  
6 challenged the injunction ‘by direct appeal of the order.’” (quoting *Fed. Trade Comm’n v. Am.*  
7 *Nat. Cellular*, 868 F.2d 315, 317 (9th Cir. 1989))). And “[u]nder the ‘law of the case’ doctrine, ‘a  
8 court is generally precluded from reconsidering an issue that has already been decided by the  
9 same court, or a higher court in the identical case.’” *United States v. Alexander*, 106 F.3d 874,  
10 876 (9th Cir. 1997) (quoting *Thomas v. Bible*, 983 F.2d 152, 154 (9th Cir. 1993)). Rose has not  
11 moved for relief from the Court’s order, *see Fed. R. Civ. P.* 60(b), and it remains in effect.

12 Moreover, a review of these arguments shows that they were already carefully considered  
13 and weighed. To wit, Rose argues that Azuma only delivers cigarettes “for” itself, and so its  
14 deliveries fall outside of § 376a(e)(2)(A)’s prohibitions. *See* Defs’ Opp’n 9–10, 14, 16, 24. But, as  
15 Defendants admit, this argument was already brought before the Court, *id.* at 24, and the Court  
16 rejected it. Relying on reports of Azuma’s sales to find that “that Darren Rose, in his official  
17 capacity as an officer of the Alturas Tribe violated section 376[a](e)(2)(A),” Prelim Inj. Order 19,  
18 the Court necessarily found that § 376a(e)(2)(A) applies to delivery sellers themselves. As the  
19 State has explained, “the PACT Act clearly contemplates ‘person[s] who deliver cigarettes . . . to  
20 consumers,’ include delivery sellers themselves.” Supp. Br. Supp. Pl.’s Mot. Prelim. Inj. 1 n.1,  
21 ECF No. 40 (alterations in original) (citation omitted) (quoting 15 U.S.C. § 376a(e)(2)(A)) (citing  
22 15 U.S.C. § 376a(b)(3)–(4), (d)(1)).

23 Rose argues the State fails to show that Azuma is not entitled to the PACT Act’s exception  
24 for sales to those “lawfully operating” as cigarette businesses. *See* Defs.’ Opp’n 16–23.  
25 Specifically, Rose argues the State bears the burden of disproving the exception, *id.* 16, and that  
26 both the Licensing Act, *id.* at 18, and Tax Law, *id.* at 19, do not apply to Azuma’s customers. As  
27 the Court explained in response to Defendants’ requested supplemental briefing on the burden  
28 issue, Rose’s claimed exception “is best understood as an affirmative defense” and thus “the

1 burden is on defendants to show the exception applies to them.” Prelim. Inj. Order 16. The Court  
2 also found Rose had not met that burden. Relying on decades of Supreme Court precedent, the  
3 Court concluded “the States have a valid interest in ensuring compliance with lawful taxes that  
4 might easily be evaded through purchases of tax-exempt cigarettes on reservations” that  
5 “outweighs tribes’ modest interest in offering a tax exemption to customers who would ordinarily  
6 shop elsewhere.” *Id.* at 20 (quoting *Dep’t of Tax’n & Fin. v. Milhelm Attea & Bros.*, 512 U.S. 61,  
7 73 (1994)). Next relying on both Supreme Court and Ninth Circuit precedent addressing  
8 California’s cigarette laws specifically, the Court concluded it did not need to address  
9 Defendant’s Licensing Act arguments because “Rose has not shown the tribal retailers are exempt  
10 from California’s Tax Law.” *Id.* at 21–22 (citing *Cal. State Bd. of Equalization v. Chemehuevi*  
11 *Indian Tribe*, 474 U.S. 9, 12 (1985); *Big Sandy Rancheria Enters. v. Bonta*, 1 F.4th 710, 731 (9th  
12 Cir. 2021)).

13 Last, Rose argues—now for the third time in these proceedings—that Azuma’s customers  
14 are “necessary and indispensable parties” and thus that the Court lacks subject matter jurisdiction  
15 over this action under Rule 19. Defs.’ Opp’n 24; *see also* Defs.’ Opp’n Mot. Prelim. Inj. 26, ECF  
16 No. 23; Defs.’ Mem. P. & A. Supp. Mot. Dismiss 24, ECF No. 24-1. The Court not only  
17 thoroughly addressed this issue in its preliminary injunction order, *see* Prelim. Inj. Order 10–13, it  
18 also specifically admonished Defendants’ counsel at the hearing of October 13, 2023, on  
19 Defendants’ motion to dismiss that it had “already addressed joinder under Rule 19 in [its] prior  
20 order that’s at Docket ECF No. 43.” Tr. Proceedings (“Mot. Dismiss Hr’g Tr.”) 13:6–7, ECF  
21 No. 56. Rose provides no reason to disturb the Court’s conclusion that Rule 19 is no bar to this  
22 action, and only “reemphasize[s]” his disagreement with the Court. Defs.’ Opp’n 23.

23 For the Court to revisit its prior determinations, Rose would have to show: “1) the first  
24 decision was clearly erroneous; 2) an intervening change in the law has occurred; 3) the evidence  
25 on remand is substantially different; 4) other changed circumstances exist; or (5) a manifest  
26 injustice would otherwise result.” *Alexander*, 106 F.3d at 876. None of those conditions are  
27 satisfied here, nor does Rose attempt to argue that they are. Rose instead improperly attempts

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1 only to re-litigate the preliminary injunction in a bid to avoid the consequences of violating—and  
2 intending to continue violating—the Court’s order.

3 **CONCLUSION**

4 The post-injunction distribution and sale of millions of additional cigarettes by unlicensed  
5 Azuma to the same unlicensed tribal customers that were originally the subject of the injunction  
6 blatantly violates preliminary injunction order. The Court should issue an order to show cause  
7 why Rose should not be held in civil contempt, and make a subsequent finding that Rose is in fact  
8 in contempt of this Court.

9  
10 Dated: January 12, 2024

Respectfully submitted,

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