No. 23-16200

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF CALIFORNIA,

Plaintiff-Appellee,

v.

AZUMA CORPORATION, et al.,

Defendants-Appellants.

Appeal from Order of the United States District Court
for the Eastern District of California
No. 2:23-cv-00743-KJM-DB
Hon. Kimberly J. Mueller

APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to the Federal Rules of Appellate Procedure, Rule 26.1, Defendant-Appellant Azuma Corporation ("Azuma"), hereby certifies, by and through its counsel of record, that it is a corporation organized under the laws of, and wholly owned by, the Alturas Indian Rancheria. No parent corporation or publicly held corporation owns 10% or more of stock or any other interest in Azuma. None of the other Defendants-Appellants is a "nongovernmental corporate party," and therefore no corporate disclosure is required on their behalf. Fed. R. App. Proc. 26.1(a).

Dated: January 12, 2024

PEEBLES KIDDER LLP

By: /s/ John M. Peebles

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STATEMENT OF JURISDICTION

The district court asserted federal question jurisdiction to issue the decision below. 28 U.S.C. § 1331.[1]

The court's order granting in part the State of California's motion for preliminary injunction is an appealable interlocutory order. 28 U.S.C. § 1292(a)(1). The order is also appealable as a final decision under 28 U.S.C. § 1291 because the district court denied Appellants' claim that sovereign immunity barred relief. *Pistor v. Garcia*, 791 F.3d 1104, 1110 (9th Cir. 2015).

The appeal is timely pursuant to Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure. The order appealed from was entered on September 8, 2023, and the notice of appeal was filed on September 15, 2023. 1-ER-2; 3-ER-442.

ISSUES PRESENTED

Azuma is a tribally owned corporation that manufactures cigarettes on its Indian reservation in California and sells them to tribally owned retailers located on other Indian reservations in California. The Prevent All Cigarette Trafficking Act

[1] Appellants contended below that jurisdiction is divested by the tribal sovereign immunity of defendant Azuma Corporation and the official-capacity defendants, as well as the personal immunities of the individual-capacity defendants. Appellants filed a motion to dismiss based in part on these arguments, which the district court took under submission on October 13, 2023. Dkt. 49 (minutes for motion hearing). Appellants also made a tribal sovereign immunity argument in response to California's motion for preliminary injunction, which the court considered only "in the context of defining whether the court has jurisdiction to grant the State's motion." 1-ER-8, Order at 7, n.7.

of 2009, or "PACT Act," Pub. L. 111-154, 124 Stat. 1087, primarily regulates "delivery sellers" making "delivery sales" of cigarettes "to a consumer." 15 U.S.C. § 376a(a); *see id.* § 375(4)-(6) (defining terms).[2] However, the PACT Act section under which California sought and obtained a preliminary injunction regulates persons who conduct delivery activities "for" certain delivery sellers. § 376a(e)(2)(A). The issues presented are:

1. Whether § 376a(e)(2)(A) applies only to third party deliverers, and not to the alleged "delivery seller" itself, Azuma, or to Azuma's corporate officers or the government officials of Azuma's sole shareholder, the Alturas Indian Rancheria.

2. Whether the district court erred in concluding that under § 376a(e)(2)(A), the delivery of Azuma's cigarettes to tribally-owned retailers licensed and operated by federally-recognized Indian tribes within Indian country—and exempted from California's tobacco licensing scheme both expressly and under principles of federal law barring state infringement of tribal sovereignty—constitutes delivery to "consumers," which term excludes "any person lawfully operating as a manufacturer, distributor, wholesaler, or retailer of cigarettes," § 375(4)(B).

[2] Statutory references are to Title 15 of the United States Code, unless otherwise specified.

STATEMENT OF THE CASE

I. Introduction

The Alturas Indian Rancheria ("Tribe") is one of the smallest, most remote federally recognized Indian tribes in California. To fund its governmental programs and reduce its reliance on federal aid, the Tribe engages in a variety of commercial activities, including the on-reservation cigarette manufacturing conducted by Azuma. The tribe-owned corporation, Azuma, manufactures cigarettes on the Tribe's reservation and delivers those cigarettes directly to tribe-owned retailers operating in the Indian Country of their respective Tribes, pursuant to tribal law.

This case involves California's effort to extend its tobacco licensing laws to inter- and intra-tribal commerce occurring within Indian Country, where state civil regulatory laws presumptively do not apply because they infringe the right of Indian tribes to govern their own conduct within their reservations. California sued Azuma and the other Appellants, then sought a preliminary injunction under § 376a(e)(2)(A) of the PACT Act. Broadly speaking, the PACT Act incorporates state laws "generally applicable to the sales of cigarettes," § 376a(a), while also expressly preserving longstanding federal limitations on states' "tax and regulatory authority with respect to the sale, use, or distribution of cigarettes and smokeless tobacco by or to Indian tribes, tribal members, tribal enterprises, or in Indian country," states' "jurisdiction, or lack thereof, over any tribe, tribal members, tribal enterprises, [and]

tribal reservations," and state "authority to bring enforcement actions against persons located in Indian country." PACT Act § 5(a), 124 Stat. 1109-10, § 375 note.

This appeal concerns the district court's partial granting of the State's preliminary injunction motion under § 376a(e)(2)(A) of the PACT Act. That provision, as relevant here, prohibits a "person who delivers cigarettes . . . to consumers" from delivering or causing to be delivered "any package for" Azuma, "unless . . . the delivery is made to a person lawfully engaged in the business of . . . selling cigarettes[.]"[3] The State based its motion exclusively on the assertion that Azuma's customers (the "Tribal Retailers") are not lawfully operating because they do not hold state tobacco licenses. *See* 2-ER-85, State Reply in Supp. of Mot. Prelim. Inj., Dkt. 28, at 8:4-5 ("While there are several laws Azuma's customers must comply with in order to be 'lawfully engaged' in cigarette retailing . . ., this motion focuses only on licensing, which unquestionably applies to Azuma's customers[.]") (citing 3-ER-340-342, Mem. P. & A. Supp. Pl.'s Mot. Prelim. Inj., Doc. 13-1, at 9-11).

The district court granted the motion in part. *See* 1-ER-2, Order, Dkt. 43 (the "Injunction Order" or the "Order"). After denying the requested injunction against

[3] The PACT Act defines "consumer" to exclude "any person lawfully operating as a manufacturer, distributor, wholesaler, or retailer of cigarettes or smokeless tobacco." 15 U.S.C. § 375(4)(B).

the Del Rosas in their capacities as officials of the Tribal government, the court enjoined Darren Rose, both in his official capacity as vice-chairman of the Tribe and in his official capacity as president/secretary of Azuma, from engaging in cigarette delivery activities "on behalf of Azuma Corporation to anyone in California in violation of section 376a(e)(2)(A) of the PACT Act." 1-ER-25, Order at 24:24-28.

The Order upsets the carefully laid structure of the PACT Act by misconstruing § 376a(e)(2)(A), which does not apply to an alleged "delivery seller" such as Azuma making deliveries for itself, nor to a corporate officer such as Rose, who, in that capacity, acts *as* Azuma, not "for" it. It also rests on the erroneous factual finding, unsupported by the record, that the office of Tribal vice-chairman engages in any cigarette-delivery conduct. Moreover, the Order erroneously enjoined the office of Azuma's president/secretary even though that officer is not even a party to this lawsuit. The Order commits further error in its analysis of a predicate question under the PACT Act, whether the reservation-based Tribal Retailers (to whom Azuma sells cigarettes) are obliged to comply with California laws for licensing cigarette retailers and distributors. That issue requires a fact-specific evaluation of such laws' infringement of the sovereign governmental interests of the Indian tribes who own, operate and regulate the Tribal Retailers. The district court conducted no such inquiry and held, also in error, that these tribes and Tribal Retailers are not indispensable parties, despite ruling that their on-reservation

commerce is now subject to control by the State of California. For all these reasons, the Order should be reversed.

II. Background.

A. Factual Background

Azuma is chartered pursuant to the laws of, and is wholly owned by, the Alturas Indian Rancheria (the "Tribe"), a federally recognized Indian Tribe, *see* 89 Fed. Reg. 944 (Jan. 8, 2024). The Tribe is governed by a three-member Business Committee.[4] Defendants Phillip Del Rosa, Darren Rose, and Wendy Del Rosa are the duly elected members of the three-person Business Committee. The State's PI Motion was brought only against the Del Rosas and Rose in their official capacities as officers of the Tribe. The Motion was not brought against Azuma or its officers.

Azuma holds a Permit to Manufacture Tobacco Products ("Permit") from the United States Department of Treasury's Alcohol and Tobacco Tax and Trade Bureau (TTB). Azuma's cigarette factory is within the Alturas Rancheria in Alturas, California. The land comprising the Alturas Rancheria is held by the United States in trust for the benefit of the Tribe. Azuma complies with all applicable federal tobacco product laws, the applicable tribal laws of the Alturas Indian Rancheria, and

[4] As an arm of the Tribe, Azuma is immune from civil suit, including the present suit. *See, e.g., White v. Univ. of California*, 765 F.3d 1010 (9th Cir. 2014). As noted, Azuma's motion to dismiss based on tribal sovereign immunity was heard and taken under submission on October 13, 2023. Dkt. 49 (minutes for motion hearing).

laws of the tribal jurisdictions into which it sells. *See generally* 2-ER-211-216, Declaration of Darren Rose ("Rose Decl.").

Pursuant to its Permit, Azuma manufactures cigarettes sold under various trade names. Once manufactured, Azuma sells its cigarettes to retailers that are wholly owned by other federally recognized Indian tribes ("Tribal Retailers"). The Tribal Retailers operate exclusively within their respective Indian Country inside the State of California. The Tribal Retailers are licensed and regulated by the laws of their respective tribes.

Azuma's cigarettes travel directly from the Alturas Rancheria to the Indian Country of the Tribal Retailers. They never cross state boundaries. The Tribal Retailers, in turn, sell the cigarettes at retail within their respective Indian Country. These sales occur exclusively at tribal commercial developments, including casinos owned and operated by their tribes. 2-ER-239-246, Declaration of Wendy Ferris ("Ferris Decl.") at ¶¶11-19; 2-ER-160, Declaration of Philip Del Rosa ("Del Rosa Decl.") at ¶13. The tribal casinos are regulated by the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq*. ("IGRA"), and gaming compacts between the State and the tribes. 2-ER-239-246, Ferris Decl. at ¶¶11-19; 2-ER-159-160, Del Rosa Decl. at ¶11-12. The compacts approved by the U.S. Secretary of the Interior provide, "Nothing herein shall be construed to make applicable to the Tribe any state

laws or regulations governing the use of tobacco." 2-ER-159-160, Del Rosa Decl. at ¶12.

These commercial developments were developed and are maintained and operated by each tribe. They were not developed simply to allow the sale of items such as cigarettes to take place on the reservations free of state taxes and regulation. 2-ER-239-246, Ferris Decl. at ¶¶11-19; 2-ER-159, Del Rosa Decl. at ¶10. Rather, they play a significant and active role in generating value on their respective reservations.

B. Statutory background.

The PACT Act generally requires persons who ship cigarettes or smokeless tobacco products in interstate commerce to file reports with the U.S. Attorney General and the tax administrator of the State into which the shipment is made. § 376. The Act also requires "delivery sellers"—generally defined as persons selling to "consumers" via the internet and other remote means—to comply with certain requirements related to shipping, labeling, and recordkeeping, in addition to other tax, licensing, and minimum age requirements of the jurisdiction into which the products are shipped. § 376a(a)-(c).

The Act also regulates deliveries of cigarettes. In that regard, it regulates deliveries directly by delivery sellers. *See* § 376a(d)(1) (except as provided thereunder, "no delivery seller may sell or deliver to any consumer . . ."). It also

regulates deliveries by third-party delivery services and common carriers for delivery sellers. § 376a(e)(2) (regulating deliveries by a "person . . . for any person whose name and address are on the [non-compliant] list[.]").

The Act creates a noncompliant list (the "List") administered by the U.S. Bureau of Alcohol Tobacco and Firearms ("ATF"). § 376a(e). The List contains the names and information of delivery sellers whom ATF determines are noncompliant with the Act. § 376a(e)(1). Any state, local or tribal government may nominate persons for inclusion on the List. § 376a(e)(1)(D). Relevant to this appeal, the Act prohibits any "person who receives the [L]ist" and any "person who delivers cigarettes or smokeless tobacco to consumers," from delivering packages "for any person whose name and address are on the [L]ist[.]" § 376a(e)(2)(A)

Finally, section 5 of the PACT Act provides that the Act "shall [not] be construed to amend, modify, or otherwise affect" any limitations on tribal or state "tax and regulatory authority with respect to the sale, use or distribution of cigarettes . . . by or to Indian tribes, tribal members, tribal enterprises, or in Indian country[.]" PACT Act § 5(a)(3), 124 Stat. 1109-10, § 375 note. Section 5 further provides that "[a]ny ambiguity between the language of th[at] section or its application and any other provision of th[e] Act shall be resolved in favor of this [S]ection [5]." PACT Act § 5(e), 124 Stat. 1110, § 375 note

C. Procedural Background.

1. California persuades ATF to add Azuma to the PACT Act's Non-Compliant List.

On December 19, 2018, California nominated Azuma to the PACT Act non-compliant list. 3-ER-356, Declaration of Moliki Alexander, Dkt. 13-3 ("Alexander Decl.") at ¶ 5. On April 10, 2019, ATF placed Azuma on the List. *Id.* ¶ 6.

On September 30, 2019, Azuma alerted ATF that Azuma did not receive notice from ATF that California had nominated Azuma to the List. *Id.* ¶ 7. As a result, ATF removed Azuma from the List, effective October 11, 2019. *Id.*

On November 12, 2019, after considering briefing from Azuma, ATF again alerted Azuma that Azuma would be placed on the List, effective December 18, 2019. Since that time, Azuma has remained on the List.[5]

2. California files the complaint in this litigation.

California filed this action on April 19, 2023. 3-ER-421, Complaint, Dkt. 1. The named defendants are: (1) Azuma Corporation; (2) Phillip Del Rosa (in his (i) personal capacity and (ii) official capacity as Chairman of the Alturas Indian Rancheria); (3) Darren Rose (in his (i) personal capacity and (ii) official capacity as Vice-chairman of the Alturas Indian Rancheria); and (3) Wendy Del Rosa (solely in

[5] An action for judicial review of ATF's placement of Azuma on the List is pending. *Azuma Corp. v. Garland*, D.D.C. No. 23-cv-1761-CKK (compl. filed Jun. 16, 2023).

her official capacity as Secretary-Treasurer of the Alturas Indian Rancheria). *Id.* at 1 (listing parties).

The complaint alleges five claims for relief. All claims are against all defendants, except that the third is solely against defendants Darren Rose and Phillip Del Rosa. The First Claim for Relief alleges violations of the PACT Act provisions at 15 U.S.C. §§ 376-376a. 3-ER-434-435, Compl. at 13-14. The Second Claim for Relief alleges violations of the provisions of the Contraband Cigarette Trafficking Act at 18 U.S.C. § 2342. 3-ER-435-436, Compl. at 14-15. The Third Claim for Relief alleges violation of the civil RICO provisions at 18 U.S.C. § 1962(c). 3-ER-436-437, Compl. at 15-16. The Fourth Claim for Relief alleges violations of California's tobacco directory statute, Cal. Rev. & Tax. Code § 30165.1. 3-ER-437, Compl. at 16. The Fifth Claim for Relief alleges violations of California's tobacco escrow statute, Cal. Health & Safety Code § 104557. 3-ER-437-438, Compl. at 16-17. The complaint seeks declaratory and injunctive relief against Azuma and the individual defendants in their capacities as tribal government officials. 3-ER-438-439, Compl. at 17-18. It also seeks civil penalties, damages, costs, and fees against Azuma and against Rose and Phillip Del Rosa personally. 3-ER-439-441, Compl. at 18-20.

3. The Injunction Motion

In June 2023, California moved for a preliminary injunction against Rose and the Del Rosas. 3-ER-330, 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. 3-ER-346, 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[.]

§ 376a(e)(2)(A).

4. The Injunction Order

On September 8, 2023, the Court issued the Injunction Order granting in part and denying in part California's preliminary injunction motion. 1-ER-2. 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.

1-ER-25, Order at 24:24-28.

The Injunction Order provided it would become effective upon California's filing proof of posting a $1,000.00 bond. 1-ER-25-26, Order at 24:28-25:2. Receipt of the posting of bond was filed in the district court on September 15, 2023. Later that day, the Defendants filed a Notice of Appeal of the Injunction Order. 3-ER-442, Notice of Appeal, Dkt. 44.

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. That motion is set for hearing before the district court on January 26, 2024. *See* Ntc. of Mot. and Mot. for Order to Show Cause, Dkt. 50. That date is after the filing of the instant brief.

SUMMARY OF THE ARGUMENT

The Order makes significant legal errors that require it to be reversed. First, the Order held that the State made a substantial case against Rose for relief under § 376a(e)(2)(A). 1-ER-18, Order at 17:27-28. That section, however, cannot apply to the Tribe, tribal officials, or Azuma's officers on the evidentiary record below.[6] Rather, § 376a(e)(2)(A) applies only to third parties engaged in delivery-related conduct "for" persons listed on the non-compliant list. Here, the record only shows

[6] As noted, Appellants never directly briefed below that this provision cannot apply to Azuma's officers. This is because California's motion sought an injunction exclusively against three officers of Alturas, not any officers of Azuma.

Azuma selling and delivering cigarettes. The Order does not articulate how the statutory provision directed at third parties applies to the offices of vice-chairman of Alturas or president/secretary of Azuma. The injunction against the office of Azuma's president/secretary is particularly problematic as California's motion did not target Rose in that capacity, nor was he sued in that capacity, depriving Azuma of notice and an opportunity to brief the issue. Whether in his capacity as a Tribal official or his capacity as an Azuma officer, Rose's conduct is not regulated by § 376a(e)(2)(A), and the district court erred in holding otherwise. The district court also erred in holding that California had made a "substantial case" that California licensing law (to the exclusion of tribal law) applies to the Tribal Retailers. 1-ER-20, Order at 19:2-4 ("Because Azuma's customers do not have [State] licenses and do not remit applicable taxes to California, they are not lawfully operating and are therefore, consumers as defined by the PACT Act.") (citations omitted). Contrary to the Order, state law recognizes that the Tribal Retailers are not required to hold a state-issued license, and that they are not required to purchase cigarettes only from state-licensed distributors. Cal. Bus. & Prof. Code § 22980.1(b)(2); CA B. An., A.B. 3092 Assem. (Aug. 26, 2004). Such requirements would unlawfully infringe upon the right of the Indian tribes who own and regulate the Tribal Retailers to govern their on-reservation activities under tribal law without state interference.

The Tribal Retailers' non-remittance of purportedly "applicable taxes" is also not grounds to find them unlawfully operating, as the Court did not attempt to determine whether, under the specific facts of this case, any valid tax applies to the Tribal Retailers' sales. Such a determination requires "a particularized inquiry into the nature of the state, federal, and tribal interests at stake," adapted to "the specific context" in which the state seeks to exercise authority. *White Mtn. Apache Tribe v. Bracker*, 448 U.S. 136, 144-45 (1980). 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); *see Big Sandy Rancheria Enter. v. Bonta*, 1 F.4th 710, 725-26 (9th Cir. 2021).

Not only did the district court fail to conduct this particularized balance of interests, but the court also erroneously held the Tribal Retailers and their parent Indian tribes were not indispensable parties to the case, depriving them and the Appellants of the ability to fully flesh out the specific tribal and federal interests that would be impacted by California's regulation of the Tribal Retailers.

Appellants therefore respectfully request that the Injunction Order be reversed.

STANDARD OF REVIEW

Appellate courts ordinarily review the grant or denial of a preliminary injunction for abuse of discretion. *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1027 (9th Cir. 2012). A district court's preliminary injunction decision is an abuse of discretion if it is based on an erroneous legal standard or clearly erroneous findings of fact. *Farris v. Seabrook*, 677 F.3d 858, 864 (9th Cir. 2012).

ARGUMENT

I. Section 376a(e)(2)(A) does not apply to Darren Rose, in his official capacities, on this record.

The Order enjoins "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 . . . 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." 1-ER-25, Order at 24:24-28.

The Order erred in that regard. That is because § 376a(e)(2)(A) does not reach Rose in either of those capacities on this record. First, in his Tribal capacity, the State provided no evidence that Rose performed any deliveries "for" Azuma. Second, in his Azuma capacity, Rose is not a third party to Azuma, as § 376a(e)(2)(A) commands. Moreover, even if he were, the injunction would still be

incorrect because the State did not seek to enjoin Rose in that capacity, nor is Rose even a party to the lawsuit in that capacity. These legal errors should be reversed.

A. The prohibition on delivery under § 376a(e)(2)(A) applies only to third parties engaged in delivery-related conduct "for" an entity listed on the non-compliant list.

Section 376a(e)(2)(A) generally prohibits two classes of person from "knowingly complet[ing], caus[ing] to be completed, or complet[ing] its portion of a delivery of any package for any person whose name and address are on the list." The two classes of person are: any "person who receives the list under paragraph (1)," and any "person who delivers cigarettes or smokeless tobacco to consumers." *Id.*

The text of § 376a(e)(2)(A) plainly applies only to third parties engaged in delivery-related conduct "for" persons listed on the non-compliant list.[7] Section 376a(e)(2)(A) identifies two groups of regulated persons: (1) any person who receives the non-compliant list, and (2) any person who delivers to consumers. Those persons shall not "knowingly complete, cause to be completed, or complete its portion of a delivery of any package[.]" However, that prohibition applies only

[7] The State seemed to acknowledge that § 376a(e)(2)(A) applies only to third parties—that is, a third person engaged in delivery-related conduct "for" a listed person. 2-ER-86-87, Reply Br., Dkt. 28, at 4:24-5:2; *see also* State Opp. to MTD, Dkt. 33, at 6:20-21 ("Once an entity is listed, the PACT Act prohibits anyone from knowingly transporting cigarettes on the behalf of the listed entity. *See id.* § 376a(e)(2)(A).").

to such conduct undertaken "for any person whose name and address are on the list[.]" Only a third person could engage in conduct "for any person whose name and address are on the list." § 376a(e)(2)(A) (emphasis added).

No other court has ever interpreted § 376a(e)(2)(A) as applying to the delivery seller itself. Until the decision below, courts had only invoked this provision against independent entities making deliveries "for" a listed delivery seller, in accordance with the statute's plain language. *See, e.g.*, *City of New York v. LaserShip, Inc.*, 33 F.Supp.3d 303, 316 (S.D.N.Y. 2014) (alleging LaserShip delivered for an entity, Indian Smokes, listed on the non-compliant list); *New York v. United Parcel Service, Inc.*, 942 F.3d 554, 566 (2d Cir. 2019) (noting that the PACT Act "imposes restrictions on common carriers' rights to transport cigarettes," including prohibiting common carriers, *i.e.*, a third party, under § 376a(e)(2)(A) from delivering for any person whose name and address are on the list); *City of New York v. FedEx Ground Package System, Inc.*, No. 17 Civ. 5183 (ER), 2018 WL 4625765, *6 (S.D.N.Y Sept. 26, 2018) ("Under the PACT Act, an entity that has received the non-compliant list cannot complete a delivery for someone on that list unless one of the exceptions apply.").

Further, deliveries made by sellers are governed by a different subsection of the PACT Act. *See* § 376a(d)(1) ("*no delivery seller may* sell or *deliver* to any consumer . . .") (emphasis added). 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). *See also Agredano v. Mut. of Omaha Cos.*, 75 F.3d 541, 544 (9th Cir. 1996) (each provision of a statute must be given independent meaning). This further demonstrates that Congress intended that § 376a(d)(1) applies to a delivery seller's deliveries for itself, and § 376a(e)(2), as its text states, applies only to third parties engaged in delivery conduct "for" a delivery seller listed on the non-compliant list.

Allowing California to proceed against Azuma under § 376a(e)(2)(A) introduces a significant loophole in favor of the State that Congress never intended. It relieves the prosecuting government of the burden of proving that the defendant is a "delivery seller" as defined by the PACT Act, permitting the State in some cases to bring the defendant within the ambit of the statutory prohibition by showing only that defendant received the List. In an action for alleged unlawful deliveries properly framed under § 376a(d), however, the State is required to prove in every case that the defendant makes "delivery sales" within the PACT Act's definition: that the products are either remotely ordered or delivered outside of the seller's presence, §

375(5), and that the buyer is not a "person lawfully operating" in the tobacco business, § 375(4).

Congress did not intend § 376a(e)(2)(A) to be used by a state to bypass its burden of proof under § 376a(d).

B. There is no evidence that Rose in his Tribal capacity engaged in any delivery-related conduct for Azuma as required under § 376a(e)(2)(A).

The Injunction Order acknowledges that the State's injunction 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*[.]" 1-ER-2, Order at 1:17-19; *id.* at 7:16-17 ("California moves to enjoin three individuals in their official capacities *as officers of Alturas* from violating the PACT Act.") (emphasis added). *See also* 3-ER-330, State Ntc. of Mot. and Mot. for Prelim. Inj., Dkt. 13, at 2:2-4; 3-ER-338, State Mem. P.'s & A.'s, Dkt. 13-1, at 1:16-19.

The State provided no evidence that Darren Rose, acting as a member of the Tribe's Business Committee, has engaged in third-party delivery-related conduct "for" Azuma within the ordinary meaning of that word. For example, the State's motion neither alleged nor provided evidence that the Tribe has contracted with Azuma to deliver Azuma's products to Tribal Retailers or anyone else. Nor did the State provide evidence of, or allege, any action by Rose in his official capacity for

the Tribal government pertaining to any delivery-related activity for Azuma (*e.g.*, a tribal resolution directing deliveries).

To the contrary, the evidence establishes the Tribal government's separation from Azuma. The Tribe's Governmental Corporations Ordinance expressly finds "it is necessary for the development and management of economic enterprises to be separated from other governmental functions of the Tribe and placed within the responsibility of persons and/or entities separate from the Alturas Indian Rancheria Business Committee." 2-ER-177, Alturas Indian Rancheria Governmental Corporations Ordinance § 2.2, Ex. B to Del Rosa Decl., Dkt. 23-2. *See also id.* § 7, 2-ER-179 (providing for separate corporate assets), § 14.6, 2-ER-184 (establishing "limited management functions" of the Business Committee), and § 15.1, 2-ER-185 (providing for corporate management by the corporation's board of directors). All of this is consistent with the well-settled principle that a parent corporation is legally distinct from its subsidiary. *United States v. Bestfoods*, 524 U.S. 51, 69 (1998) ("Control through the ownership of shares does not fuse the corporations, even when the directors are common to each.") The officials of the Tribal government do not conduct delivery-related activities "for" Azuma by virtue of the Tribe's governmental authority, its ownership, or otherwise.

The district court apparently agreed, despite its ultimate conclusion enjoining Rose in his capacity as an Alturas tribal official. The court held that California did

not "argue or show … that Alturas delivers … cigarettes to consumers." 1-ER-19, Order at 18:3-5. Since the Tribe does not deliver cigarettes, the officials of the Tribal government acting as the Tribe—including Rose in that capacity—necessarily do not deliver cigarettes. The court provided no coherent explanation for its contrary statement that California was entitled to relief against Rose "in his official capacity as Vice-Chairperson and a member of the [Alturas Tribal] Business Committee." 1-ER-20, Order at 19:17-20.

The State failed to prove that section 376a(e)(2)(A) applies to Rose in his capacity as a tribal official under this theory. The district court's unsupported conclusion to enjoin Rose in that capacity was an abuse of discretion.

C. Section 376a(e)(2)(A) does not apply to Darren Rose as an officer of Azuma.

It is beyond debate that the State did not name Rose as a party to its suit in his official capacity as an officer of Azuma, nor did it move to enjoin Rose in his official capacity as an officer of Azuma. Rather, the State sought to enjoin him solely as an officer of the Tribe.

Nonetheless, the Injunction Order, *sua sponte*, enjoins Darren Rose "in his official capacity as . . . president/secretary of Azuma Corporation[.]" 1-ER-25, Order at 24:24-27. In doing so, the district court extended § 376a(e)(2)(A) beyond its proper scope. The district court provided no justification for doing so.

1. Rose in his official Azuma capacity is not a third party to Azuma.

It is unreasonable to interpret § 376a(e)(2)(A) as prohibiting Azuma (through its officials acting in their official capacity) from engaging in delivery conduct "for" itself, and such an interpretation must be avoided. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."). As explained in Part I.A, *supra*, § 376a(e)(2)(A) only applies to third parties acting "for" listed delivery sellers, and does not reach Azuma acting "for" itself. Corporate entities cannot commit any act on their own, but must act through their agents, and a suit against a 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). Because Azuma cannot come within the prohibition under § 376a(e)(2)(E) as delivering "for" itself, its corporate officers likewise cannot be subject to this section.

2. The district court did not justify enjoining Rose in his Azuma capacity.

Perhaps a more fundamental issue is that the district court *sua sponte* enjoined Rose in his Azuma capacity without explanation, reasoning, or notice and opportunity for the Appellants to brief the issue.

The State's PI motion was, as already noted, brought against Darren Rose in his official capacity as Tribal Vice-Chairman; the Injunction Order confirms this. It therefore follows that the State did not move to enjoin Darren Rose in any other capacity, including as an officer of Azuma. Accordingly, Appellants opposed the injunction motion sought against Rose and the other two tribal officials in their official capacities for the Tribe. Appellants did not oppose the motion as if Azuma, through Rose in his official capacity as President/Secretary, was the target of the motion, and had no reason to believe the resulting order would directly resolve Azuma's legal rights.

The Injunction Order, however, extended the injunction to Rose in his official capacity as President/Secretary of Azuma. This is no small point. "A court ordinarily does not have power to issue an order against a person who is not a party and over whom it has not acquired in personam jurisdiction." Mary Kay Kane, 11A Fed. Prac. & Proc. Civ. § 2956 (3d ed.); *cf.* Fed. R. Civ. P. 65(d)(2)(C) (nonparties can be enjoined if "in active concert or participation with" an enjoined party). California made no attempt to establish that any exception to this general rule applies to Rose in his Azuma capacity, as the State sought no such injunction, and the district court did not explain how it concluded that its authority extended to Rose in his capacity as Azuma's President/Secretary. There is no justification for short-

circuiting the ordinary avenue of serving process upon a person before subjecting him to a binding judicial order.

It is black letter law that the 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). Similarly, Azuma would be the real party in interest if claims were asserted against Azuma officials in that capacity. 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 19:16, and that "Congress has repeatedly made clear that tribal governments and tribal corporations are purposefully separate and distinct entities[,]" *id.* at 19:16-18 (citing 25 U.S.C. § 5117(e)(1)). The State therefore concedes that Azuma is not the Tribe, and the Tribe is not Azuma.

The Injunction Order, however, never directly or meaningfully addresses the separation between Rose's Tribal capacity and his Azuma capacity or the impact of that distinction 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* 1-ER-19-20, Order at 18:9-19:20. There, the Order finds that "California has shown both Azuma and Mr. Rose deliver cigarettes to 'consumers.'" *Id.* at 18:9-10 (footnote omitted). Beyond the naked assertion 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. 1-ER-19, Order at 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 document supports the conclusion that Rose delivers cigarettes. For example, the first page of the invoices is a bill of lading listing Azuma as the shipper. This, at best, only 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 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[.]"[8]

II. Even if § 376a(e)(2)(A) did apply, there is no violation because the Tribal Retailers are lawfully operating/engaged in the cigarette business, and therefore not "consumers."

A. The State did not carry its burden to show that the Tribal Retailers are "consumers," i.e., that they are not lawfully operating.

The Order recognizes that "California does have the initial burden of showing defendants are within the scope of the prohibition and engaged in the prohibited activity." 1-ER-18, Order at 17:13-15. Thus, to show that Rose 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* 1-ER-19, Order 18:9-10.[9]

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[8] 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.

[9] The issue of which party bears the burden of showing the Tribal Retailers are "lawfully engaged" in the cigarette business was vigorously disputed issue in

On this point, the Injunction Order found, incorrectly, that "California ha[d] shown that both Azuma and Mr. Rose deliver cigarettes to 'consumers.'" 1-ER-19, 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."[10] 1-ER-20, 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[.]").

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connection with the State's original injunction motion. In this particular case, however, it undisputedly lies with the State. This is because, as the Injunction Order acknowledges, in order to show that Rose comes within the purview of § 376a(e)(2)(A), the State had to show that he delivers cigarettes to "consumers." A "consumer" under the Act excludes any person "lawfully operating" in the cigarette business. § 375(4)(B).

[10] "Licensing Act" is shorthand for the California Cigarette and Tobacco Products Licensing Act of 2003, Cal. Bus. & Prof. Code §§ 22970-22991. "Tax Law" refers to the Cigarette and Tobacco Products Tax Law, Cal. Rev. & Tax. Code §§ 30001-30483.

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).[11] Additionally, section 22980.1(b)(2) expressly permits "any person," such as Azuma, to sell

[11] 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).

cigarettes to the Tribal Retailers, since the Tribal Retailers "are not subject to the licensing requirements of the Cigarette and Tobacco Licensing Act of 2003."

B. 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* 3-ER-347, Mem. P.'s & A.'s in Supp. of Mot. Prelim. Inj., Dkt. 13-1, at 10:5-17. 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 5:7-14. 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 5:15-17. The plain language of Section 22980.1(b)(2) belies this argument, as it expressly permits "any person" to sell cigarettes to "any person" who is exempt from the licensing requirements, like the Tribal Retailers.

C. 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. 1-ER-22, Order at 21:15-22. This holding is also incorrect, for several reasons.[12] 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* 2-ER-230, Ltr. from Kate Su, Cal. Bd. of Equalization, to R. Johnson, BSR Dist., April 30, 2008, Ex. C to Rose Decl., Dkt. 23-3. Since there

[12] 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[.]" 2-ER-84-85, State Reply In Supp. Mot. Prelim. Inj., Dkt. 28, at 2:25-3:5.

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.[13] Moreover, as a further acknowledgment that 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.

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

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." Cal. Bus. & Prof. Code § 22971(f) (defining "Distributor" as "a distributor as defined in section 30011 of the Revenue and Taxation Code."). 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.[14] All of this is further evidence that the Tax Law's definition of "distributor" is not intended to apply to the Tribal Retailers.

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

[14] 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).

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[,]"*Bracker*, 448 U.S. at 144-45 (emphasis added).[15] 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." *Chickasaw*, 515 U.S. at 459 (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 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*, 1 F.4th at 725-26.

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," 1-ER-21, Order at 20:18-19 (citation omitted), and that it was previously held, under very different circumstances, that such interest

[15] The Injunction Order correctly articulates this portion of the *Bracker* test. 1-ER-21, Order at 20, n.11.

"outweighs tribes' modest interest in offering a tax exemption to customers who would ordinarily shop elsewhere," *id.* at 20:20-21.

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 nineteen 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. 2-ER-239, 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* 1-ER-21-22, Order at 20-21. Nor could necessary balancing occur because the Tribal Retailers are not parties to this litigation. *See 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* 1-ER-22-23, Order 21:26-22:2. It asserts that in those cases "the Supreme Court and the Ninth Circuit . . . upheld the Tax Law." *Id.* 21:26-28. 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) in their own Indian Country.

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. This is because even where the legal incidence of a tax falls on a non-Indian, the tax may still be preempted under *Bracker* balancing. *See Bracker*, 448 U.S. at 144-45; *Flandreau*, 938 F.3d at 935-37; *Indian Country, U.S.A., Inc. v. State of Okla.*, 829 F.2d 967, 983-87 (10th Cir. 1987). Thus, unlike in *Chemehuevi*, the initial salient question here is whether, under *Bracker*, the tax under the Tax Law is

validly imposed on cigarettes sold by the Tribal Retailers to their customers on their respective reservations.

As discussed 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*, 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. *Chickasaw*, 515 U.S. at 459; *see also Cayuga Indian Nation of New York v. Gould*, 930 N.E.2d 233, 253-55 (N.Y. 2010) (holding Indian tribal retailers cannot be prosecuted for failing to collect and remit cigarette taxes without a uniform "methodology developed by the State that respects

the federally protected right to sell untaxed cigarettes to members of the Nation" and "articulate[s]—before a transaction occurs—in what circumstances a tax is owned, who is obligated to collect it, how it should be calculated and when and how it must be paid.").

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, the district court abused its discretion in concluding the Tax Law applies to the Tribal Retailers, and its order must be reversed.

D. The Tribal Retailers are indispensable parties.

The heavy focus that § 376a(e)(2)(A) places on the Tribal Retailers, including the details of their business operations and the laws that apply to them, underscores why the Tribal Retailers are necessary and indispensable parties to this litigation under Rule 19 of the Federal Rules of Civil Procedure. The Injunction Order held that Rose failed to carry their burden on that point. 1-ER-14, Order at 13:25-26. That holding was in error.

As the district court recognized, "[a] party may be necessary under Rule 19(a) in three different ways." 1-ER-11, Order at 10:10-11 (quoting *Salt River Proj. Agr. Imp. & Power Dist. v. Lee*, 672 F.3d 1176, 1179 (9th Cir. 2012)). This inquiry is "fact-specific and practical." *Jamul Action Comm. v. Chaudhuri*, 200 F. Supp. 3d 1042, 1048 (E.D. Cal. 2016). The district court erred in concluding that the Tribal Retailers are not necessary parties.

"[A] person is necessary if he has an interest in the action and resolving the action in his absence may as a practical matter impair or impede his ability to protect that interest." *Salt River* at 1179 (citing Fed. R. Civ. P. 19(a)(1)(B)(i)). On this point, the district court acknowledged that it "may be true in part" that "the tribal retailers have a legally protected interest in this lawsuit because the court must determine whether the tribal retailers are operating unlawfully." 1-ER-13, Order at 12:14-16. But, the district court reasoned, "[i]f defendants do not ultimately prove the tribal retailers have acted lawfully, those tribal retailers could still prove they acted lawfully in a hypothetical future case regardless of their nonparticipation in this one." 1-ER-13, Order at 12:26-28.

This reasoning is contrary to law. The Supreme Court has held that just because "a judgment is not res judicata as to, or legally enforceable against, a nonparty . . . does not mean that a court may always proceed without considering the potential effect on nonparties simply because they are not 'bound' in the technical

sense." *Provident Tradesmens Bank & Tr. Co. v. Patterson*, 390 U.S. 102, 110 (1968). Moreover, one example of effects on a court's finding that the Tribal Retailers are not lawfully operating is damage to good will and reputation, which constitutes irreparable injury. *See Stuhlbarg Intern. Sales Co., Inc. v. John D. Brush and Co. Inc.*, 240 F.3d 832, 841 (9th Cir. 2001) ("Evidence of threatened loss of prospective customers or goodwill certainly supports a finding of the possibility of irreparable harm); *see also Herb Reed Ent. LLC v. Florida Entmt. Mgmt, Inc.*, 736 F.3d 1239, 1250 (9th Cir. 2013) (same). Further, the court's decision means the Tribal Retailers cannot purchase cigarettes from *anyone*, including licensed distributors, who, in the court's view, may sell only to state license holders, even in Indian Country. Additionally, the conclusion that the Tribal Retailers must obey state law obviously impacts the sovereign rights of the Indian tribes who own, operate, and regulate the Tribal Retailers to govern their conduct within the tribes' reservations. This is a protected interest that, in equity and good conscience, cannot be subject to impairment in the tribes' absence. *Deschutes River Alliance v. Portland Gen. Elec. Co.*, 1 F.4th 1153, 1163 (9th Cir. 2021); *see also Dine Citizens Against Ruining Our Environment v. Bureau of Indian Affairs*, 932 F.3d 843, 852 (9th Cir. 2019) ("an absent party may have a legally protected interest at stake … where the effect of a plaintiff's successful suit would be to impair a right already granted").

Next, "a person is necessary if he has an interest in the action and resolving the action in his absence may leave an existing party subject to inconsistent obligations because of that interest." *Salt River* at 1179 (citing Fed. R. Civ. P. 19(a)(1)(B)(ii)). On this point, the district court reasoned that "California does not request and this court will not issue an injunction abrogating Azuma's contracts." 1-ER-14, Order at 13:7-8. It further found no risk of inconsistent judgments. *Id.* at 13:8-10. That is because, according to the Court, the Tribe "ha[d] put forward no reasons why Azuma cannot both comply with the law and fulfill its contractual obligations[.]" *Id.* But the reason is simple: Azuma cannot do both unless the Tribal Retailers obtain state licenses. The district court's reasoning strayed from the fact-specific and practical inquiry required under Rule 19. In practical terms, the risk to Azuma of inconsistent obligations is apparent, as adjudication of this claim in the Tribal Retailers' absence could lead to inconsistent judgments if the Tribal Retailers or Azuma bring claims arising from the abrogation of those contracts, because a decision here would not be binding on the Tribal Retailers in their absence.

The district court erred in failing to find that the considerations under Rule 19(a)(1) show that the Tribal Retailers are necessary parties.

It further erred in concluding that, even if the Tribal Retailers have a legally protected interest in the litigation, Rose and the other defendants adequately represent the interests of the Tribal Retailers. 1-ER-14, Order at 13. That adequate-

representation inquiry considers whether the present party "will undoubtedly make all of the absent party's arguments," and is "capable and willing" to do so, and "whether the absent party would offer any necessary element to the proceedings that the present party would neglect." *Salt River* at 1180; *see also Klamath Irr. Dist. v. U.S. Bureau of Reclamation*, 48 F.4th 934, 945 (9th Cir. 2022) (alignment on case's ultimate outcome is insufficient to find adequate representation). The Tribal Retailers are arms of their sovereign tribal governments and are immune from suit, including subpoenas. *See Dine Citizens*, 932 F.3d at 856; *Alltel Comms., LLC v. DeJordy*, 675 F.3d 1100, 1105 (8th Cir. 2012). Defendants thus cannot provide concrete evidence of the Tribal Retailers' specific interests for purposes of the mandatory *Bracker* balancing test, but instead can only offer an outside perspective rooted in Defendants' distinct experience and interests. The Indian tribes whose territorial sovereignty stands to be infringed in this case must not be forced to have their sovereign rights presented and litigated in their absence by third parties. .

CONCLUSION

For all the foregoing reasons, the order of the district court must be reversed.

Dated: January 12, 2024

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STATEMENT OF RELATED CASES

Appellants know of no related cases pending in this Court.

CERTIFICATE OF COMPLIANCE

I am the attorney or self-represented party.

This brief contains 10,306 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief complies with the word limit of Cir. R. 32-1.

Dated: January 12, 2024 */s/ John M. Peebles*