

ROB BONTA, State Bar No. 202668
Attorney General of California
JAMES V. HART, State Bar No. 278763
Supervising Deputy Attorney General
DAVID C. GOODWIN, State Bar No. 283322
BYRON M. MILLER, State Bar No. 279763
PETER F. NASCENZI, State Bar No. 311664
Deputy Attorneys General
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 210-7805
Fax: (916) 327-2319
E-mail: Peter.Nascenzi@doj.ca.gov
Attorneys for Plaintiff
State of California

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

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

Plaintiff,

v.

**PHILLIP DEL ROSA, in his personal
capacity and official capacity as Chairman
of the Alturas Indian Rancheria; and
DAREN ROSE, in his personal capacity and
official capacities as Vice-chairman of the
Alturas Indian Rancheria and
President/Secretary of Azuma Corporation,**

Defendants.

2:23-cv-00743-KJM-DB

**NOTICE OF MOTION AND MOTION
FOR SANCTIONS AND ATTORNEYS'
COSTS AND FEES; MEMORANDUM OF
POINTS AND AUTHORITIES**

Date: May 17, 2024
Time: 10:00 am
Courtroom: 3, 15th Floor
Judge: Hon. Kimberly J. Mueller
Trial Date: N/A
Action Filed: April 19, 2023

TO THE PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that at 10:00 am on May 17, 2024, or as soon thereafter as this
matter may be heard in Courtroom 3, 15th Floor, of the United States District Court, located at
501 I Street, Sacramento, California 95814, Plaintiff State of California *ex. rel.* Rob Bonta, in his

1 official capacity as Attorney General of the State of California, will and hereby does move
2 pursuant to this Court's order filed February 28, 2024, ECF No. 71, holding Defendant Darren
3 Rose in contempt, for sanctions, attorneys' fees, and costs.

4 Because the instant motion addresses only the amount of sanctions, Defendants' opposed
5 the substantive motion prompting the imposition of sanctions, and the instant motion is filed
6 pursuant to the Court's order, Plaintiff understands that the instant motion does not require the
7 parties to meet and confer. *See generally* Chief Judge Mueller Civil Standing Order § 4.A.a.
8 Nevertheless, Plaintiff contacted Defendants' counsel by email on March 28, 2024, detailing the
9 sanctions requested and the bases for such sanctions, and asking whether Defendants' counsel
10 believed a telephonic conference could be fruitful. Defendants' counsel did not respond by the
11 time of the filing of the instant motion, exhausting meet and confer efforts.

12 This motion is based on this Notice of Motion and Motion, the accompanying
13 Memorandum of Points and Authorities, the pleadings and papers on file in this action, the
14 arguments of counsel, and any matters upon which the Court may or must take judicial notice.
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INTRODUCTION

On September 8, 2023, the Court issued an Order preliminarily enjoining Defendant Darren Rose in his official capacities as Vice-chairman of the Alturas Indian Rancheria and as President/Secretary of Azuma Corporation (“Azuma”) “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.” Order 24 (“Prelim. Inj. Order”), ECF No. 43. That injunction became effective on September 15, 2023. *See* Receipt Number 200003040 for \$1,000 from State of California (Dkt. Entry Sept. 15, 2023). Nevertheless, Azuma continued the operations that formed the basis of the Court’s order without interruption, distributing the same cigarettes in now-greater quantities to the same customers. California accordingly moved to hold Rose in contempt of the Court’s preliminary injunction, and on February 28, 2024, issued an order so holding. Order (“Contempt Order”), ECF No. 71. Rose subsequently filed a declaration stating that he “directed Azuma staff to cease all deliveries of cigarettes.” Rose Decl. ¶ 4, ECF No. 75. The Court however, found that “sanctions are warranted to ensure compliance with the court’s order,” Contempt Order 7, and thus ordered California to “move for sanctions and attorneys’ fees and costs, providing complete support for its position regarding the appropriate amounts,” *id.* at 8. California accordingly moves for compensatory damages, attorneys’ costs and fees, and both financial and non-financial coercive penalties.

LEGAL STANDARD

Courts possess “an inherent contempt authority as a power ‘necessary to the exercise of all others.’” *Int’l Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 831 (1994) (citation omitted) (quoting *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812)). “A court may wield its civil contempt powers for two separate and independent purposes: (1) ‘to coerce the defendant into compliance with the court’s order’; and (2) ‘to compensate the complainant for losses sustained.’” *Shell Offshore Inc. v. Greenpeace, Inc.*, 815 F.3d 623, 629 (9th Cir. 2016) (quoting *United States v. United Mine Workers.*, 330 U.S. 258, 303–04 (1947)). “Because civil compensatory sanctions are remedial, they typically take the form of unconditional monetary sanctions; whereas coercive civil sanctions, intended to deter, generally take the form of

conditional fines.” *Id.* “Where a fine is not compensatory, it is civil only if the contemnor is afforded an opportunity to purge.” *Int’l Union, UMWA v. Bagwell*, 512 U.S. 821, 829 (1994). Additionally, imprisonment is permissible when the contemnor is released upon compliance with the relevant order. *See id.* at 828 (“The paradigmatic coercive, civil contempt sanction . . . involves confining a contemnor indefinitely until he complies . . .”).

ARGUMENT

In holding Rose in contempt, the Court found “sanctions are warranted to ensure compliance with the court’s order.” Contempt Order 7. Though “the parties’ briefs and their arguments during hearing” allowed Rose to be “been heard in full in opposition and during oral argument” and obviated the need for the issuance of an order to show cause, they “d[id] not provide the court with enough information regarding the full extent of harm caused by Rose’s violation of the court’s order to fashion appropriate sanctions.” *Id.* at 8. The State now provides that information, supported by appropriate affidavits.

I. EXTENT OF HARM AND COMPENSATORY DAMAGES

A. Cigarette excise tax

Rose’s violations of the Court’s preliminary injunction directly injured the State by depriving it of tax revenue. Each of Azuma’s cigarette distributions is taxable, and the continued distribution of millions of cigarettes each month under Rose’s direction in violation of the Court’s order has deprived the State of millions of dollars.

At all relevant times, California’s cigarette taxes has been \$2.87 per pack of 20 cigarettes. *See* Cal. Rev. & Tax. Code §§ 30101, 30123(a), 30130.51(a), 30131.2(a). The tax attaches to the first taxable use, sale, or consumption of cigarettes, *see id.* § 30008, which is broadly defined as “the exercise of any right or power over cigarettes or tobacco products incident to the ownership thereof,” *id.* § 30009. Untaxed cigarettes do not generate a tax liability only under limited circumstances within the lawful distribution chain. For example, cigarettes are properly untaxed when sold “by the manufacturer to a licensed distributor.” *Id.* § 30103. Similarly, cigarettes are not subject to taxation when sold or kept “by a licensed distributor for the purpose of sale.” *Id.* § 30009; *see also id.* § 30431 (requiring a permit “to possess or acquire for transportation or

transport” untaxed cigarettes). Azuma fulfills none of the requirements for the possession, transportation, or sale of untaxed cigarettes, and thus taxes should have been collected for each of Azuma’s distributions made under Rose’s direction. *See also Big Sandy Rancheria Enters. v. Bonta*, 1 F.4th 710, 729 (9th Cir. 2021) (“[T]ribe-to-tribe sales made outside the tribal enterprise’s reservation [is] ‘off reservation’ activity subject to non-discriminatory state laws of general application.”).

In the months since the Court’s injunction came into effect, Azuma has distributed 12,780,000 cigarettes, or 639,000 packs of 20, through February 2024. *See* Dahlen Decl. ¶¶ 6–11 & exs. A–C. At a rate of \$2.87 per pack of 20 cigarettes, Rose’s contemptuous actions have deprived the State of \$1,833,930 in tax revenue.

B. Escrow fees

In addition to the consumer-paid taxes collected on the distribution of cigarettes, the State also receives compensation from cigarette manufacturers. “It is the policy of the state that financial burdens imposed on the state by cigarette smoking be borne by tobacco product manufacturers rather than by the state to the extent that those manufacturers either determine to enter into a settlement with the state or are found culpable by the courts.” Cal. Health & Safety Code § 104555(d). As a result of the tobacco Master Settlement Agreement (“MSA”),¹ the State receives annual payments from signatory manufacturers to that Agreement, called “Participating Manufacturers,” in perpetuity. *See* MSA § IX(c).

Other cigarette manufacturers, like Azuma, that have not signed the MSA, are called “Non-Participating Manufacturers,” and do not make annual payments but are required to escrow monies against a potential future recovery by the State. *See* Cal. Health & Safety Code § 104557(a)(2). These escrow fees attach to all cigarettes subject to state taxation. *See id.* § 104556(j). The per-cigarette rate of these fees are calculated annually based on inflation. *See id.* § 104557(a)(2). The rate for Azuma’s 2023 distributions was \$0.0434202 per cigarette, or about

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

1 \$0.87 per pack of 20. Cal. Att’y Gen., *Non-Participating Manufacturer Escrow Rate*, STATE CAL.
 2 DEPT. JUS., <https://oag.ca.gov/system/files/media/npm-escrow-rates.pdf> (last visited Mar. 14,
 3 2024). For Azuma’s 2024 distributions, the escrow rate’s inflation adjustment will not be
 4 finalized until the year’s end, but the preliminary rate is \$0.0447228 per cigarette, or about \$0.89
 5 per pack of 20. *Id.*

6 As explained above, each of Azuma’s distributions are taxable, and Rose’s contemptuous
 7 actions have therefore also deprived the State of escrow fees owed. At the same time, the injury to
 8 the State is not as direct as lost tax revenue—escrow fees are made available to the State “[t]o pay
 9 a judgment or settlement” for certain claims “brought against that tobacco product manufacturer
 10 by the state.” *See* Cal. Health & Safety Code § 104557(b)(1). Nevertheless, Azuma’s fee evasion
 11 under Rose’s direction has inflicted incalculable harm to the public health that is properly
 12 compensated in a civil contempt sanction.

13 While manufacturers do not have a “pass on and collect” obligation for escrow fees under
 14 State law, manufacturers making the payments would logically seek to recoup these amounts
 15 from their customers. Manufacturers like Azuma that evade their payment obligations, however,
 16 would not, allowing them to derive illicit cost advantages over their compliant rivals that impacts
 17 public health, particularly youth smoking rates.

18 “[T]he general rule is that a 10 percent increase in the real price reduces . . . the rate of
 19 smoking among youth by 7 percent.” Inst. of Med., Nat’l Acads. of Sci., *Ending the Tobacco*
 20 *Problem: A Blueprint for the Nation* 120 (Richard J. Bonnie et al. eds., 2007)). Since 1988 and
 21 through to the latest tax increase in 2016, California has used taxes to increase cigarette prices
 22 specifically to achieve reductions in youth smoking. *See* Robert L. Rabin, *Tobacco Control*
 23 *Strategies: Past Efficacy and Future Promise*, 41 Loy. L.A. L. Rev. 1721, 1729 (2008)
 24 (“[California’s 1988 cigarette tax increase] was explicitly billed as a tobacco control measure.”);
 25 Cal. Sec. of State, California General Election November 8, 2016, Official Voter Information
 26 Guide 52 (2016), <http://vig.cdn.sos.ca.gov/2016/general/en/pdf/complete-vig.pdf> (arguing in
 27 favor of Proposition 56’s tax increase because “[i]ncreasing tobacco taxes reduces youth

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1 smoking”). Though escrow fees were not implemented specifically to that same end, they
 2 logically have the same effect.

3 And though the exact extent of the public health harm caused by Azuma’s fee evasion
 4 might be incalculable, the State Legislature has itself used the escrow rate as a measure of harm
 5 to the State. Should a Non-Participating Manufacturer fail to place funds into escrow, it is subject
 6 to “a civil penalty to be paid to the General Fund of the state in an amount . . . not to exceed 100
 7 percent of the original amount improperly withheld from escrow.” *Id.* § 104557(c)(1). This
 8 penalty amount is accordingly properly applied to Rose as compensation to the State for Azuma’s
 9 fee evasion.

10 In the months since the Court’s injunction came into effect, Azuma has distributed
 11 12,780,000 cigarettes through February 2024. *See* Dahlen Decl. ¶¶ 6-8 & exs. A–B, ECF No. 50-
 12 2 (October through November 2023); Dahlen Decl. ¶¶ 6–11 & exs. A–C (December 2023 through
 13 February 2024). At a rate of \$0.0434202 per 2023 cigarette and \$0.0447228 per 2024 cigarette,
 14 Rose’s contemptuous actions have injured the State’s public health in an amount equal to
 15 approximately \$561,475.26.

16 **C. Attorneys’ fees and costs**

17 “[T]he cost of bringing the violation to the attention of the court is part of the damages
 18 suffered by the prevailing party” *Donovan v. Burlington N., Inc.*, 781 F.2d 680, 684 (9th Cir.
 19 1986); *see also* Contempt Order 7 (“The court also may award attorney’s fees and costs
 20 associated with the civil contempt motion.” (citing *Donovan*, 781 F.2d at 684)). “District courts
 21 must calculate awards for attorneys’ fees using the ‘lodestar’ method.” *Camacho v. Bridgeport*
 22 *Fin., Inc.*, 523 F.3d 973, 978 (9th Cir. 2008) (quoting *Ferland v. Conrad Credit Corp.*, 244 F.3d
 23 1145, 1149 n.4 (9th Cir. 2001)). “Under the lodestar method, the district court ‘multiplies the
 24 number of hours the prevailing party reasonably expended on the litigation by a reasonable hourly
 25 rate.’” *Gonzales v. City of Maywood*, 729 F.3d 1196, 1202 (9th Cir. 2013) (quoting *Ballen v. City*
 26 *of Redmond*, 466 F.3d 736, 746 (9th Cir. 2006)). “The ‘prevailing market rates in the relevant
 27 community’ set the reasonable hourly rate for purposes of computing the lodestar amount.” *Id.* at
 28 1206 (quoting *Dang v. Cross*, 422 F.3d 800, 813 (9th Cir. 2005)).

The declaration of Supervising Deputy Attorney General James V. Hart filed concurrently with this motion sets out the hours Plaintiffs’ attorneys reasonably spent bringing both the motion to hold Rose in contempt and the instant motion for sanctions, along with reasonable market rates in the community. *See* Hart Decl. ¶¶ 5–10 & ex. A. In the Sacramento area, the following ranges are generally reasonable: “\$650–\$750 for senior partners with over thirty years of experience; \$545–\$695 for partners and senior counsel; \$475–\$575 for senior associates; \$330–\$400 for junior associates; \$200 for paralegals.” *Prehired, LLC v. Provins*, No. 2:22-cv-00384-DAD-AC, 2023 WL 4187461, at *4 (E.D. Cal. June 25, 2023); *see also Mostajo v. Nationwide Mut. Ins. Co.*, No. 2:17-cv-00350-DAD-AC, 2023 WL 2918657, at *11 (E.D. Cal. Apr. 12, 2023) (collecting cases); *Quinonez v. FCA US, LLC*, No. 2:19-cv-02032-KJM-JDP, 2022 WL 2007429, at *2 (E.D. Cal. June 6, 2022) (approving \$500 and \$450 for 21 years’ experience); *Garcia v. Phillips Feed Serv., Inc.*, No. 2:21-cv-01548-KJM-KJN, 2022 WL 252668, at *3 (E.D. Cal. Jan. 27, 2022) (approving \$450); *Stoddart v. Express Serv.*, No. 2:12-cv-01054-KJM-CKD, 2021 WL 5761083, at *5–6 (E.D. Cal. Dec. 3, 2021) (approving \$300, \$550, \$575, and \$695). Rates at the low end of these ranges are reasonable for the State’s counsel.

Supervising Deputy Attorney General James V. Hart has 19 years of experience, and combined with his supervisory role, is equivalent to a partner in a private law firm, making \$545 per hour a reasonable rate for his hours spent on this matter. Deputy Attorneys General David C. Goodwin, Byron M. Miller, and Peter F. Nascenzi have 12, 13, and 7 years of experience, respectively, and are thus equivalent to senior associates, making \$475 per hour a reasonable rate for their hours. Applying these rates as laid out in the table below, results in a reasonable fee award of \$40,668.75. *See* Hart Decl. ¶ 10 & ex. A.

Attorney	Hours	Rate	Total
James V. Hart	2.5	\$545	\$1,362.50
David C. Goodwin	30.5	\$475	\$14,487.50
Byron M. Miller	3	\$475	\$3,325.00
Peter F. Nascenzi	45.25	\$475	\$21,493.75
			\$40,668.75

II. COERCIVE SANCTIONS

Since the Court’s order holding Rose in contempt issued, Rose has filed a declaration stating that he “directed Azuma staff to cease all deliveries of cigarettes” and that “no deliveries . . . will . . . occur in the future, unless and until the Contempt Order is dissolved, set aside or otherwise made ineffective.” Rose Decl. ¶¶ 4–5. However, failing to comply with the Court’s preliminary injunction order for almost six months demonstrates that coercive sanctions are necessary. Non-monetary sanctions requiring reports and access to invoices are appropriate to ensure compliance with the injunction, and per-day monetary sanctions culminating in imprisonment are appropriate in the event Rose again decides to flout the Court’s order.

A. Monetary sanctions

In the State’s motion to hold Rose in contempt, the State took the position that “The PACT Act’s civil penalties provision provides a guideline for the amount” of coercive penalties. Mem. P. & A. Supp. Pl.’s Mot. Order Show Cause (“Contempt Mot.”) 7, ECF No. 50-1. That Act imposes \$5,000 for the first violation and \$10,000 for each subsequent violation. 15 U.S.C. § 377(b)(1)(A). Since Rose has already violated the injunction, \$10,000 is the appropriate baseline for a per violation calculation.² However, it is possible that a flat \$10,000 per violation does not remove Rose’s financial incentive to deliver tax- and fee-evaded cigarettes. The State therefore proposes the following “monetary sanctions accruing per day for each day of non-compliance,” Contempt Order 8, culminating in imprisonment:

First day of noncompliance:	\$10,000
Second day of noncompliance:	\$12,000
Third day of noncompliance:	\$14,000
Fourth day of noncompliance:	\$16,000
Fifth day of noncompliance:	\$18,000
Sixth and subsequent days of noncompliance:	Imprisonment

² The Act contains an alternate calculation of penalties: “or (2) “2 percent of the gross sales of cigarettes . . . of the delivery seller.” 15 U.S.C. § 377(b)(1)(A). While the reporting sanctions requested below would allow the Court to impose this amount as a coercive penalty, the Act’s per-violation penalty would be easier to administer.

B. Nonmonetary sanctions

Courts may also impose non-monetary sanctions aimed at coercing compliance. *See, e.g., Parsons v. Ryan*, 949 F.3d 443, 455 (9th Cir. 2020) (approving civil contempt order requiring filing of monthly reports); Contempt Order 7 (“[N]onmonetary sanctions ‘such as the production of books’ may be appropriate.” (quoting *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 193–94 (1949))). Because Azuma’s deliveries are not immediately observable by the State, such sanctions are warranted.

Rose should be ordered to (1) submit PACT Act reports that confirm with the requirements of 15 U.S.C. § 376(a) or (2) a declaration under penalty of perjury that Azuma made no cigarette deliveries. Rose should be ordered to do so for each month beginning with March 2024, “not later than the 10th day of [the following] calendar month,” *id.* § 376(a)(2), filing such reports with the California Department of Tax and Fee Administration, or providing such declarations to State’s counsel by email.

Rose should also be ordered to retain for inspection by the State all of Azuma's purchase records, sales, and invoices dated after the injunction came into effect on September 15, 2023. *See* Cal. Bus. & Prof. Code §§ 22979.4–.6.

CONCLUSION

For the reasons provided, Plaintiff the State of California respectfully requests that this Court:

1. Order Rose to pay compensatory sanctions in the amount of:
 - a. \$1,833,930 in lost taxes;
 - b. \$561,475.26 in evaded escrow fees; and/or
 - c. \$40,668.75 in attorneys' fees and costs;
2. Order Rose to submit PACT Act reports that confirm with the requirements of 15 U.S.C. § 376(a) or (2) a declaration under penalty of perjury that Azuma made no cigarette deliveries, for each month beginning with February 2024;
3. Order Rose to retain for inspection by the State all of Azuma's purchase records, sales, and invoices dated after the injunction came into effect on September 15, 2023; and

4. Impose the following coercive monetary sanctions on Rose for any future noncompliance with the Court's preliminary injunction or the nonmonetary sanctions imposed to ensure compliance with that injunction:

First day of noncompliance:	\$10,000
Second day of noncompliance:	\$12,000
Third day of noncompliance:	\$16,000
Fourth day of noncompliance:	\$18,000
Fifth day of noncompliance:	\$20,000
Sixth and subsequent days of noncompliance:	Imprisonment

Dated: March 29, 2024

Respectfully submitted,

ROB BONTA
Attorney General of California
JAMES V. HART
Supervising Deputy Attorney General
DAVID C. GOODWIN
BYRON M. MILLER
Deputy Attorneys General

/s/ Peter F. Nascenzi

PETER F. NASCENZI
Deputy Attorney General
*Attorneys for Plaintiff
State of California*

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