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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

**PLAINTIFF'S REPLY IN SUPPORT OF
MOTION FOR SANCTIONS AND
ATTORNEYS' COSTS AND FEES**

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

INTRODUCTION

In September 2023, the Court ordered Defendant Darren Rose to stop delivering “packages containing cigarettes on behalf of Azuma Corporation to anyone in California in violation of section 376a(e)(2)(A) of the PACT Act.” Order (“Injunction Order”) 24, ECF No. 43. Rose did not stop making deliveries and did not bring Azuma into compliance with applicable law. *Cf.* Order (“Stay Denial Order”) 2, ECF No. 88. (“The injunction does not prohibit anyone from lawfully engaging in the cigarette business in compliance with applicable federal law.”). The Court accordingly held Rose in contempt, and invited the State to bring a sanctions motion that sets out “the full extent of harm caused by Rose’s violation of the court’s order.” Order (“Contempt Order”) 6, ECF No. 71; *see also Am. Unites for Kids v. Rousseau*, 985 F.3d 1075, 1090 (9th Cir. 2021) (explaining sanctions are appropriate when “a party acted deliberately” to violate a court order).

As a result of Rose’s open defiance of the Court’s order, Defendants grossed millions of dollars in revenue while introducing nearly thirteen million additional, illicit cigarettes into the California marketplace. In response to the Court’s order that the State move for sanctions, Contempt Order 8, the State asked the Court to impose compensatory and coercive sanctions tied to these actual cigarette volumes, Pl.’s Mot. Sanctions 10–11, ECF No. 82. Rose does not oppose the imposition of compensatory or coercive sanctions, but mischaracterizes the sanctions sought and arbitrarily proposes a total sanction of “no more than \$10,000,” and “for attorney fees only.” Defs.’ Opp’n State’s Mot. Sanctions 2, ECF No. 87. Rose’s arguments misapprehend both the law and facts and are properly disregarded.

ARGUMENT

I. CIGARETTE EXCISE TAX

Rose’s months of noncompliance with the Court’s injunction resulted in the distribution of 12,780,000 cigarettes, or 639,000 packs of 20 cigarettes. *See* Dahlen Decl. ¶¶ 6–8 & exs. A–B, ECF No. 50-2 (October through November 2023); Dahlen Decl. ¶¶ 6–11 & exs. A–C, ECF No. 82-1 (December 2023 through February 2024). The state excise tax on such cigarettes during the relevant period was and has remained \$2.87 per pack of 20 cigarettes. *See* Cal. Rev. & Tax.

Code §§ 30101, 30123(a), 30130.51(a), 30131.2(a). Thus, Rose’s contemptuous actions have deprived the State of \$1,833,930 in tax revenue that would have been paid had Rose and Azuma “complied with applicable federal law.” Stay Denial Order 2; *see also* 15 U.S.C. § 376a(d)(1)(A) (requiring delivery sellers ensure that “any cigarette . . . excise tax . . . imposed by the State . . . has been paid to the State” *prior to* “sale, delivery, or tender”).¹

In response, Rose ignores the PACT Act and claims that imposition of such taxes “hinge on [a] novel and unsupported theory.” Defs.’ Opp’n State’s Mot. Sanctions 4. The Ninth Circuit already made clear in *Big Sandy Rancheria Enterprises v. Bonta*, 1 F.4th 710 (9th Cir. 2021), that “tribe-to-tribe sales made outside the tribal enterprise’s reservation [is] ‘off reservation’ activity subject to non-discriminatory state laws of general application,” *id.* at 729. Azuma makes precisely such “tribe-to-tribe” sales, and Rose does not show—or even argue—that California’s cigarette excise tax is not a non-discriminatory law of general application. Accordingly, it is properly applied to Azuma’s deliveries—while off-reservation, Azuma’s “exercise of . . . right[s] or power over” its cigarettes, Cal. Rev. & Tax. Code § 30009, constitutes a taxable “distribution” of such cigarettes,” *id.* § 30008, *see also* 15 U.S.C. § 376a(d)(1)(A).

Rose’s only response to *Big Sandy* is to claim it “is inapposite here.” Defs.’ Opp’n State’s Mot. Sanctions 7–8. Arguing that attachment of tax liability “potentially occurs while Azuma possesses the cigarettes in its own Indian Country, or when the Tribal Retailers take possession of the cigarettes on their own reservation,” *id.* at 8, Rose ignores the time between those two events when the cigarettes are on no Indian country at all and undoubtedly “subject to non-discriminatory state laws of general application,” *Big Sandy*, 1 F.4th at 729. Rose appears to

¹ As has happened routinely in this suit, Rose argues from a counterfactual backward. Yes, the State agrees there is a scenario where a lawfully compliant Azuma could distribute cigarettes to lawfully compliant on-reservation customers without collecting and remitting any cigarette excise tax. *Cf. Big Sandy*, 1 F.4th at 732 (“[E]ven if [the Corporation] does not owe the tax, or [the Corporation’s] customers do not owe the tax, the State’s licensing and reporting requirements allow [the State] to see if someone owes the tax, and then, if they do, to collect it.” (second, third, and fourth alterations in original) (quoting *Big Sandy Rancheria Enters. v. Becerra*, 395 F. Supp. 3d 1314, 1332 (E.D. Cal. 2019))). But that is not what has happened. Both before the injunction and since, Azuma and its customers have lacked the necessary licenses and have not taken the necessary steps to engage in such exempted sales. The relevant measure for compensatory sanctions in this action is not what Azuma and Rose could have owed had they had been “complying with state law,” Injunction Order 23, it is what they should have paid given their actual non-compliance.

1 argue that potential non-taxability at the either end of a transaction renders the entire transaction
 2 non-taxable. Such theory, however, has no basis in law and runs directly contrary to the Ninth
 3 Circuit’s explicit holding in *Big Sandy*. Cf. *Okla. Tax Comm’n v. Citizen Band Potawatomi*
 4 *Indian Tribe of Okla.*, 498 U.S. 505, 514 (1991) (“States may of course collect the sales tax from
 5 cigarette wholesalers, either by seizing unstamped cigarettes off the reservation, or by assessing
 6 wholesalers who supplied unstamped cigarettes to the tribal stores.” (citations omitted)).

7 **II. ESCROW FEES**

8 “It is the policy of the state that financial burdens imposed on the state by cigarette smoking
 9 be borne by tobacco product manufacturers rather than by the state” Cal. Health & Safety
 10 Code § 104555(d). “And though the exact extent of the public health harm caused by Azuma’s
 11 fee evasion might be incalculable,” the State proposed using the amount of escrow fees as a proxy
 12 for such harms: \$561,475.26. Pl.’s Mot. Sanctions 6, ECF No. 82.

13 Rose objects to the imposition of such damages, first by claiming that “because the State
 14 has not shown Azuma’s cigarettes are taxable, . . . the State has necessarily failed to show any
 15 escrow fees are due.” Defs.’ Opp’n State’s Mot. Sanctions 10. Not only is the premise of Rose’s
 16 contention incorrect—as explained above, each of Azuma’s distributions in violation of the
 17 Court’s injunction is properly taxable—it misapprehends the compensation requested. The State
 18 is not asking for Azuma to pay “any escrow fees due,” *id.*, or “for a civil penalty” for failure to
 19 escrow such funds, *id.* at 11. Instead, the State is asking for compensation for the health harms the
 20 illicit cigarette distributions caused, as measured by the amount designated by the Legislature as
 21 “the financial burden[] imposed on the state by cigarette smoking.” Cal. Health & Safety Code
 22 § 104555(d); *see also KT&G Corp. v. Att’y Gen. of Okla.*, 535 F.3d 1114, 1139 (10th Cir. 2008)
 23 (describing escrow payments as “directly tie[d] . . . to the amount of harm [a manufacturer]’s
 24 cigarettes may do in that state”); *S & M Brands, Inc. v. Summers*, 393 F. Supp. 2d 604, 636 (M.D.
 25 Tenn. 2005) (“The [manufacturers’] escrow obligation is proportionate to their sales of cigarettes
 26 in Tennessee, . . . and is therefore reasonably related to the degree of harm the cigarettes have the

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potential to inflict on Tennessee’s citizens and the state’s treasury.”).² Accordingly, \$561,475.26 is an appropriate measure of the public health damages caused by the Azuma cigarettes distributed in contravention of this Court’s injunction.

III. ATTORNEYS’ FEES AND COSTS

The State incurred \$40,668.75 in attorneys’ fees and costs in bringing Rose into compliance with the Court’s injunction, and such fees are properly awarded as compensatory. The State supported its figure with a declaration addressing both the time spent and the hourly rate applied. *See* Hart Decl. ¶¶ 4–5, ECF No. 82-2. Supported by contemporaneous records, *id. ex. A*, the time used to calculate the requested attorneys’ fees was reduced from actual time spent, removing time “related to general background research, as well as tangential or duplicative work,” *id.* ¶ 4. The State also supported its requested fees with the years’ practiced by all attorneys who worked on the matter. *Id.* ¶¶ 6–10.

In response, Rose argues “that a reasonable number for such fees would be no more than \$10,000.” Defs.’ Opp’n State’s Mot. Sanctions 13. However, he provides no basis for his preferred amount or any reason to discount the time or rates provided. Moreover, Rose’s rationale for a reduction misapprehends the fees requested in the first instance. Rose claims that because the damages sought by the State are punitive, the requested attorneys’ fees are also punitive. *Id.* As explained above, the damages sought are compensatory, but they are also immaterial to the attorneys’ fees requested. That is because \$40,668.75 represents only the attorneys’ fees that were incurred to bring Rose in compliance with the Court’s injunction, not the instant motion for sanctions. *See* Hart Decl. ¶ 4 (“I . . . reviewed the reported entries and narratives to identify entries related to the State’s motion to hold Defendant Darren Rose in contempt of the Court’s preliminary injunction order.”). The State would have thus incurred these fees regardless of any sanctions the Court imposes and are properly awarded here. *See Perry v. O’Donnell*, 759 F.2d ///

² Rose also questions whether the State’s public health goals are furthered by its policies, but he provides no evidence to discount them. *See* Opp’n Mot. Sanctions 11 n.1. Providing no such evidence, Rose provides no reason to doubt the Legislature’s choices. *Cf. City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) (“The factfinding process of legislative bodies is generally entitled to a presumption of regularity and deferential review by the judiciary.”).

702, 706 (9th Cir. 1985) (approving award of attorneys' fees incurred only to ensure compliance with the court's order).

CONCLUSION

For the reasons provided above, Plaintiff respectfully requests that the Court impose the sanctions requested in its motion for sanctions, ECF No. 82.

Dated: May 2, 2024

Respectfully submitted,

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