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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

**STATE OF CALIFORNIA, ex rel. ROB
BONTA,**

Plaintiff,

v.

PHILIP DEL ROSA, et al.,

Defendants.

2:23-cv-00743-KJM-SCR

**DEFENDANTS' RESPONSE TO
STATE'S NOTICE OF VIOLATION**

Date: Feb. 13, 2025
Time: 10:00 a.m.
Courtroom: 3
Judge: Hon. Kimberly J. Mueller
Action filed: April 19, 2023
Trial date: N/A

This Court's preliminary injunction order indisputably does not bar Azuma from manufacturing or selling cigarettes. This much has been established through extensive briefing concerning 15 U.S.C. § 376a(e)(2)(A), on which the preliminary injunction is based. Despite the defined scope of the preliminary injunction order, the State continues to assert that Azuma's activities of manufacturing and selling cigarettes from its manufacturing facility at 901 County Road 56 in Alturas, within its sovereign reservation boundaries, violates the preliminary injunction. As shown below, Azuma, immediately following Darren Rose's receipt of the Contempt Order, ceased all deliveries and has fully complied with the preliminary injunction order.

LEGAL STANDARD

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

Only if the moving party carries its burden does “[t]he burden shift[] to the contemnors to demonstrate why they were unable to comply.” *Affordable Media*, 179 F.3d at 1239 (quoting *Stone*, 968 F.2d at 856 n. 9). To avoid being held in contempt, a contemnor must “demonstrate that he took ‘all reasonable steps within [his] power to insure [sic] compliance’ with the injunction[.]” *Hook v. Ariz. Dept. of Corrections*, 107 F.3d 1397, 1403 (9th Cir. 1997) (first alteration in original) (quoting *Sekaquaptewa v. MacDonald*, 544 F.2d 396, 403-04 (9th Cir. 1976)).

Courts may employ coercive sanctions to deter future violations of their orders. *Shell Offshore Inc. v. Greenpeace*, 815 F.3d 623, 629 (9th Cir. 2016). These sanctions “generally take the form of conditional fines.” *Id.* They “may only be imposed ‘after a reasoned consideration’ of ‘the character and magnitude of the harm threatened by the continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired.’” *Parsons v. Ryan*, 949 F.3d 443, 457 (9th Cir. 2020) (quoting *Shuffler v. Heritage Bank*, 720 F.2d 1141, 1148 (9th Cir. 1983)). The court also does have the power to confine a contemnor until that person complies. *See Int’l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 828 (1994).

BACKGROUND

Prior to the preliminary injunction, Azuma sold and delivered tobacco products to Indian tribal governments (“Tribal Retailers”) operating on reservations in Indian country at locations within the exterior boundaries of the State of California. The State moved for a preliminary injunction under 15 U.S.C. § 376a(e)(2)(A), a section of the Prevent All Cigarette Trafficking Act (PACT Act) which precludes deliveries for persons on a federal non-compliant list. One of the principal focuses of the PACT Act was to regulate non face-to-face cigarette deliveries, as opposed to in-store sales. *See* Prevent All Cigarette Trafficking (PACT) Act, 124 Stat. 1087, P.L. 111-154 (Mar. 31, 2010). Understanding § 376a(e)(2)(A) not to reach Azuma’s activities, but to instead apply only to third parties, Azuma continued its sales and direct deliveries to its tribal government customers. Those direct deliveries entailed Azuma staff loading cigarettes onto an Azuma vehicle whereafter an Azuma employee would drive the vehicle to the respective reservation lands of each of Azuma’s customers where the purchased product would be offloaded.

The State took exception to Azuma’s continued delivery activities as violating the preliminary injunction and moved for an order to show cause why Azuma should not be held in contempt. *See* ECF 50 (State’s Motion for OSC). In its February 28, 2024 Order, the Court agreed with the State’s argument that the preliminary injunction reached Azuma’s delivery activities and was not limited to third-party deliverers. *See* Order, ECF 71 (granting contempt motion and denying motion for OSC). In that regard, the Court found that “California has provided evidence showing Azuma has continued to deliver cigarettes on its own behalf.” *Id.* at 5:7-8. The Court held Rose in contempt. *Id.* The Court ordered the State to move for sanctions and attorney fees within 30 days of that order. *Id.* at 8:16-18. The court further ordered Rose to “submit an affidavit detailing the steps he has taken to ensure compliance with this court’s order.” *Id.* at 8:16-18. Rose did so. *See* Declaration of Darren Rose, ECF 75. That declaration, dated March 6, 2024, states that Rose “took various steps” to ensure compliance with the contempt order, including “direct[ing] Azuma staff to cease all deliveries of cigarettes.” *Id.* at 2 ¶ 4. The declaration further states that that directive “effectively halts all Azuma deliveries because Azuma does not deliver any tobacco products other than cigarettes.” *Id.* Rose further declared

1 that “no deliveries have occurred following that time, nor will they occur in the future, unless and
2 until the Contempt Order is dissolved, set aside or otherwise made ineffective.” *Id.* at ¶ 5.

3 Further, following the Contempt Order, Azuma notified all of the California Indian Tribal
4 Governments with which it does business that Azuma could no longer deliver cigarettes. See
5 Exhibit A to the Declaration of Darren Rose, filed concurrently herewith (letter to Indian Tribal
6 Government customers). In the notification letter, Azuma informed its customers that the court
7 had “issued an order prohibiting Azuma from delivering its tobacco products to other tribal lands
8 in California,” and that Azuma was therefore required to “temporarily halt deliveries of its
9 products to you, its customers.” *Id.* Azuma advised its customers that as long as the order
10 remained in place, Azuma’s “tobacco products will only be available for sale and pickup at
11 Azuma’s manufacturing facility in Alturas, California.” *Id.*

12 Also on March 5, 2024, Azuma emailed its customers, informing them that, because
13 Azuma would not be delivering cigarettes, that customers would be required to designate their
14 “authorized pick up person” so the individual could “be verified at time of pick up.” See Ex. B to
15 Rose Decl. The email also stated that Azuma would no longer be charging the delivery fee it had
16 charged until then. *Id.*

17 The State has now filed a Notice of Violation. The Notice is based on records Azuma
18 produced to the State showing its sales to its Indian Tribal Government customers at Azuma’s
19 facility at 901 County Road 56 in Alturas, California. The State argues that the transactions are
20 “substantially identical to those forming the basis of the Court’s Preliminary Injunction and
21 Contempt Order.” State Ntc. Of Violation, ECF 108 at 2:19-24. They are not.

22 The Court ordered Rose to file a response. See Minute Order, ECF 111. The Court
23 further set a hearing on an order to show cause why additional sanctions should not be imposed
24 under the Court’s sanctions order, ECF 95. See Minute Order.

ARGUMENT

I. The State Does Not Show a Violation Through Vague Assertions That Azuma’s Sales Are “Substantially Identical” to the Transactions That Gave Rise to the Preliminary Injunction.

The State bases its Notice of Violation on the assertion that Azuma’s records show that “Azuma cigarettes have continued to be delivered to the same customers in transactions substantially identical to those forming the basis of the Court’s Preliminary Injunction and Contempt Order.” NOV at 2:19-22.

Beyond pointing to the Azuma records, the State does not articulate facts that it believes violate the preliminary injunction. In other words, apart from the deliveries that occurred one day after the Contempt Order issued, the State does not articulate how it believes any evidence shows Azuma is delivering cigarettes, or causing them to be delivered, to the Tribal Retailers. In fact, as discussed below, Azuma promptly and entirely ceased delivering cigarettes following Rose’s receipt of the Contempt Order on February 29, 2024. In this way—the only way relevant to the Notice of Violation—Azuma’s transactions with its customers are not identical at all—and indeed are in no way similar—to its pre-Contempt Order transactions with its customers.

As shown herein, Azuma does not deliver cigarettes, and its continued manufacturing and sales do not violate the preliminary injunction.

A. The Preliminary Injunction Does Not Bar Azuma from Manufacturing and Selling Cigarettes.

The preliminary injunction indisputably does not bar Azuma from continuing to manufacture or sell cigarettes. Instead, the court preliminarily enjoined “Rose in his official capacity as vice-chairman of the Alturas Indian Rancheria and as president/secretary of Azuma Corporation from completing or causing to be completed any delivery, or any portion of a delivery, of packages containing cigarettes on behalf of Azuma in violation of 376a(e)(2)(A) of the PACT Act.” Contempt Order (ECF 71) at 4:20-24 (citing Prelim. Inj. Order at 24).

The Ninth Circuit also acknowledged these limitations of the preliminary injunction. See Mem. Dispo., *State of Cal. v. Azuma Corp. et al.*, Ninth Circuit No. 23-16200, ECF 94 at 2-3

1 (describing Prohibited Delivery Provision and preliminary injunction).

2 Promptly following the contempt order, Rose declared that, “In response to the Contempt
3 Order, [he] immediately directed Azuma staff to cease all deliveries of cigarettes.” *See*
4 Declaration of Darren Rose Following Contempt Order, ECF 71, at ¶ 4. Rose further declared
5 that said directive “effectively halts all Azuma deliveries because Azuma does not deliver any
6 tobacco products other than cigarettes.” *Id.* Finally, Rose declared that “no deliveries have
7 occurred following that time, nor will they occur in the future, unless and until the Contempt
8 Order is dissolved, set aside or otherwise made ineffective.” *Id.* at ¶ 5. Although Mr. Rose
9 mistakenly stated in his March 6, 2024, Declaration that he had given the direction to stop
10 deliveries on the date the Contempt Order issued, February 28, 2024, in fact he did so on the date
11 he received a copy of the order, February 29, 2024. *See* Rose Decl. ¶ 7. Therefore, while the
12 records Rose provided to the State show Azuma deliveries on February 29, 2024, these were the
13 final Azuma deliveries before Rose instructed Azuma to cease all deliveries, and Azuma has not
14 made any deliveries since that date. *Id.* ¶¶ 7, 11. In accordance with the Contempt Order and
15 preliminary injunction, Azuma has not completed, or caused to be completed, any delivery or
16 portion of a delivery from that date to the present.

17 On March 5, 2024, the date before Mr. Rose’s declaration, Azuma notified its Indian
18 Tribal Government clientele of the Contempt Order and its effect of prohibiting Azuma from
19 continuing to deliver cigarettes. *See* Rose Decl. ¶ 9; *id.* at Ex. A (letter dated March 5, 2024, to
20 Indian Tribal Government clientele). Specifically, Azuma wrote that “Azuma must . . .
21 temporarily halt deliveries of its products . . . until the district court order is rectified.” In the
22 meantime, Azuma wrote, “[Azuma’s] tobacco products will only be available for sale and pickup
23 at Azuma’s manufacturing facility in Alturas, California[.]” *Id.*

24 Also on March 5, 2024, Azuma employee Alyssa Rose emailed Azuma’s customers,
25 informing them that, because Azuma would not be delivering cigarettes, customers would be
26 required to designate their “authorized pick up person” so the individual could “be verified at time
27 of pick up.” *See* Ex. B to Rose Decl. The email also stated, “Since our original pricing included
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1 shipping and we are no longer providing shipping at this time, we are lowering the price \$1 per
2 carton which equals \$60 per case.”

3 Following these events, all of Azuma’s Indian Tribal Government clients who continued
4 to make any purchases from Azuma began retrieving cigarettes from Azuma’s manufacturing
5 facility on the Alturas Reservation. These transactions are those reflected in the records Azuma
6 produced to the State and on which the State relies as support for its Notice of Violation. After
7 February 29, 2024, Azuma has not delivered or caused to be delivered any cigarettes (or
8 completed any portion of a cigarette delivery).

9 In this way, Azuma’s post-Contempt Order business model is like the one described as
10 lawful and beyond the reach of state taxation or regulation in a memorandum dated October 8,
11 1997, from U.S. Department of Justice, Office of Tribal Justice, to the Bureau of Alcohol,
12 Tobacco and Firearms regarding “cigarettes sales . . . where the Tribe manufactures the cigarettes
13 and sells them to both Indian and non-Indian consumers at retail outlets on its reservation.” *See*
14 Ex. A to the Declaration of John M. Peebles; *see id.* at 3 (“Clearly the [Contraband Cigarette
15 Trafficking] Act does not affect the right of the Omaha Indian Tribe to sell cigarettes which it
16 manufactures on-reservation to non-Indians at retail outlets on-reservation. Thus, because sales
17 of such cigarettes are based on reservation generated value they would not be subject to state
18 taxation.”) (footnote omitted).

19 The State does not articulate facts or its theory for how Azuma’s sales to Tribal Retailers
20 violate the preliminary injunction. To the contrary, the State’s assertions are often inconsistent in
21 that regard.

22 The State, for example, characterizes the transactions as Azuma “distribut[ing]” cigarettes.
23 See Declaration of Peter Nascenzi, Feb. 5, 2025, (“Nascenzi Decl.”), ¶¶ 7 (“Those invoices,
24 receipts, and packing slips . . . demonstrate that Azuma has distributed . . . cigarettes in violation
25 of the Preliminary Injunction in the time since the Contempt Order was filed.”), 8; *see also* NOV
26 (ECF 108) at 3:14-15 (“despite the Preliminary Injunction, the Contempt Order, and the Sanctions
27 Order, the distribution of Azuma cigarettes has continued uninterrupted”). Such characterization
28

1 is consistent with the State’s implicit and mistaken belief that the preliminary injunction
2 effectively enjoins Azuma from operating in any fashion.

3 The State also sometimes characterizes Azuma’s transactions in terms of delivery, rather
4 than in terms of distribution, particularly in its Notice of Violation (ECF 108). Despite that, the
5 NOV does not articulate any theory of or facts constituting a delivery. Rather, the State
6 characterizes the delivery in the passive voice, asserting that “Azuma cigarettes have continued to
7 be delivered[.]” NOV (ECF 108) at 2:20. The apparent linchpin of the State’s position is its
8 assertion that Azuma’s transactions today are “substantially identical to those forming the basis of
9 the Court’s Preliminary Injunction and Contempt Order.” *See* NOV at 2:21-22.

10 The State concludes the NOV with the assertion that “[i]n the over eleven months since
11 Rose swore that no further cigarettes would be delivered on Azuma’s behalf, Azuma, under the
12 direction of Rose as President/Secretary, his employees, or agents, has completed or caused to be
13 completed the delivery, or some portion of the delivery, of packages containing 29,376,000
14 cigarettes to persons throughout California.”

15 The State is incorrect. Rose has complied with the preliminary injunction and contempt
16 order. Azuma, consistent with its letter to its Indian Tribal Government customers, immediately
17 ceased all deliveries of cigarettes. Further, Azuma has not “completed or caused to be completed
18 the delivery, or some portion of the delivery” of cigarettes, as the State asserts. The mere fact that
19 Azuma continues to sell cigarettes from its manufacturing facility does not render its transactions
20 “substantially identical” to its prior transactions, at least in any way that is material to assessing
21 Azuma’s compliance with Preliminary Injunction. Azuma has thus shown cause why sanctions
22 would be improper.

23 **B. The State Fails to Recognize the Economic Realities of Azuma’s Indian Tribal**
24 **Government Customers and Their Dependence Upon Revenues from Gaming**
25 **and Associated Tobacco Sales.**

26 The State seems to attribute Azuma’s continued cigarette sales to nefarious activity by
27 Azuma. In doing so, the State ignores the economic realities of the inter-tribal commerce
28 between Azuma and its Indian Tribal Government customers. More specifically, as Azuma

intends to show at trial, Indian Tribal Governments continue purchasing Azuma's products from Azuma's reservation in order to maintain scarce jobs and revenues often vital to supporting their respective governments and on-reservation economies. Thus, despite Azuma ceasing deliveries to comply with the preliminary injunction, the Indian Tribal Government clientele throughout California have, under their own sovereign decision-making processes, developed their own means to continue purchasing Azuma cigarettes through transactions occurring at Azuma's manufacturing facility in Alturas, California.

These realities undercut the State's attempt to show a contempt violation merely because Azuma's customers and sales figures are, according to the State, "substantially identical" to those before the preliminary injunction.

II. The State's Discussion of Uncollected Taxes and Escrow Fees is Unproven and Irrelevant.

The Nascenzi Declaration asserts that Azuma's cigarette distributions since February 29, 2024, represent over \$4 million "in taxes not collected or remitted" and over \$1 million "in escrow fees not paid into a qualified escrow account." Nascenzi Decl. ¶ 7. These assertions are unproven and irrelevant, and therefore should be disregarded.

California previously attempted to convince the Court to impose sanctions to compensate the State for the taxes and escrow fees it claimed Azuma owed. *See* Sanctions Order (ECF 95) at 2. As the Court ruled, however, "California has not proved any defendant is actually liable; it has proved only that it is likely to prevail." *Id.* Thus, "[o]rdering Rose to pay taxes and fees now would, in effect, award damages to the state prematurely." *Id.* The Court denied the State's request for sanctions based on its theory that Azuma's sales deprived the State of taxes and escrow fees, and instead set the daily schedule of further sanctions set forth in the Sanctions Order. *Id.* at 2, 5-6.

California's view that Azuma owes taxes and escrow fees remains nothing more than the plaintiff's unproven theory of the case. As Defendants have contended from the outset, and the Ninth Circuit recognized in this case, principles of federal Indian law govern the limits of the State's authority to tax and regulate on-reservation commerce like Azuma's. *See* Memorandum

Opn. (ECF 94) at 8 (“When a tribe plays an active role in generating activities of value on its reservation..., it has a strong interest in maintaining those activities free from state interference”) (quoting *Big Sandy Rancheria Enters. v. Bonta*, 1 F.4th 710, 726 (9th Cir. 2021)).

Indeed, now that Azuma engages in on-reservation, face-to-face sales of cigarettes it manufactures on its reservation, its activity mirrors the business model the United States Department of Justice declared in 1997 was not subject to state taxation or regulation. *See* Letter from Mark C. Van Norman, Deputy Dir., U.S.D.O.J. Ofc. of Tribal Justice, to Barry S. Orlow, A.T.F. Ofc. of Chief Counsel (Oct. 8, 1997) (Exhibit A to the Declaration of John M. Peebles filed herewith). Based on its analysis of Supreme Court precedent, the Justice Department determined that where the Omaha Indian Tribe manufactured cigarettes for on-reservation resale to Indian and non-Indian consumers, “the State may not tax or regulate the Tribe’s cigarette business within tribal territory.” *Id.* at 2-3.

The State’s focus on unpaid taxes and escrow fees reflects an unproven assumption that is contrary to long-standing precedent. It provides no support for the NOV and should be disregarded.

CONCLUSION

Darren Rose and Azuma have fully complied with the Contempt Order and, since receiving the Contempt Order on February 29, 2024, fully complied with the preliminary injunction. Rose requests that the Court find that he has shown cause why he should not be sanctioned.

Dated: February 11, 2025

Respectfully submitted,

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s/ John M. Peebles

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