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

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

16 Plaintiff,

17 v.

18 **PHILLIP DEL ROSA, in his personal**
19 **capacity and official capacity as Chairman**
20 **of the Alturas Indian Rancheria; and**
21 **DARREN ROSE, in his personal capacity**
22 **and official capacities as Vice-chairman of**
23 **the Alturas Indian Rancheria and**
24 **President/Secretary of Azuma Corporation,**

25 Defendants.
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27
28

2:23-cv-00743-KJM-SCR

**PLAINTIFF'S SUR REPLY IN SUPPORT
OF NOTICE OF VIOLATION**

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

INTRODUCTION

Instead of complying with this Court’s injunction, Defendant Darren Rose has again claimed to have found a (non-existent) loophole, this time relying on an almost-30-year-old U.S. Department of Justice letter addressing a different business operating under different laws, conducting different sales, and not subject to this Court’s preliminary injunction. The State, in accordance with the Court’s order directing it to file a sur reply, Mins. Mot. Hr’g, ECF No. 115, here responds to the production of that letter.

ARGUMENT

In response to the State’s Notice of Violation, ECF No. 108, showing the distribution of tens of millions of cigarettes in the months following the Court’s contempt order, Rose claims that he modified Azuma’s “business model” to be “like the one described as lawful and beyond the reach of state taxation or regulation in a memorandum dated October 8, 1997, from U.S. Department of Justice, Office of Tribal Justice, to the Bureau of Alcohol, Tobacco and Firearms.” Resp. Not. Violation 7, ECF No. 113; *see also* Peebles Decl. ex. A, ECF No. 113-1 (copy of letter). That letter has no effect on Rose’s continued violations of the Court’s injunction for three reasons: (1) the touchstone of Rose’s violations is this Court’s order, which plainly encompasses Azuma’s continued sales; (2) an advisory U.S. Department of Justice memorandum does not displace binding court precedent; and (3) to the extent U.S. Department of Justice views impact the issue, it has recently evaluated and expressly stated that Azuma’s business is unlawful.

I. THE COURT’S INJUNCTION BARS AZUMA’S DISTRIBUTIONS

Azuma is subject to this Court’s preliminary injunction. Thus, any analysis of whether Azuma’s continued sales violate the injunction must accordingly begin with that injunction, which bars not only Azuma from delivering cigarettes itself, but also from “causing to be completed any delivery . . . of packages of cigarettes.” Order (“Prelim. Inj. Order”) 24, ECF No. 43. Azuma’s supposedly new “business model” does exactly that. *See* Resp. Not. Violation 7. Azuma receives an order by email from customers located sometimes hundreds of miles away. *See* Rose Decl. ex B, ECF No. 113-2 (“Please send purchase orders to my email”); *cf.* 15 U.S.C. § 375(5) (defining “delivery sale” as one made where “the seller is not in the physical

1 presence of the buyer” at the time of order *or* at the time the buyer obtains possession). It gathers
 2 the pallets and cases of requested cigarettes for delivery, complete with packing slip that displays
 3 a “Ship To” field, a “ship” date, and the “Quantity Shipped.” *See, e.g.*, AZUMA-393 (filed under
 4 seal). Then a person the customer designates as the “authorized pick up person,” Resp. Not.
 5 Violation 6, acting as a private courier, delivers the cigarettes, *cf.* 15 U.S.C. § 375(5)(B) (defining
 6 “delivery sale” to include sales “delivered to the buyer by . . . private delivery service, or other
 7 method of remote delivery”).¹

8 At times, the invoice dictates payment terms demonstrating that the transaction is not
 9 completed until after delivery. *See, e.g.*, AZUMA-392 (marked “PAID” several weeks after the
 10 invoice date); AZUMA-437 (marked with payment term of “NET 15”); AZUMA-445 (marked
 11 with payment term “Due on receipt”) (filed under seal). At other times, the order form
 12 demonstrates that the product is going to be delivered to the off-reservation customer’s retail
 13 location. *See, e.g.*, AZUMA-879 (“CONFIRM PO FOR DELIVERY FOR JANUARY 15
 14 DELIVERY DATE”); AZUMA-893 (“Please have delivery company inform us if delivery will
 15 be after 4 PM”); AZUMA-894 (“You can send the following: . . .”) (filed under seal).

16 Such sales are clearly “deliver[ies] . . . of packages of cigarettes” and Azuma’s actions
 17 cannot be described as anything other than “causing to be completed” such deliveries. Falling
 18 within the clear language of the injunction and the Prevent All Cigarette Trafficking Act of 2009
 19 (“PACT Act”) on which it is based, Rose’s actions violate the preliminary injunction.

20 Additionally, as the State explained the first time it moved to hold Rose in contempt, *see*
 21 Suppl. 1, ECF No. 63, “[a] party ‘may not nullify a decree by carrying out prohibited acts through

22 ¹ Rose previously argued that the injunction applied only to third-party deliveries, and
 23 thus did not reach the deliveries “Azuma conducts . . . for itself.” Defs.’ Opp’n Pl.’s Mot. Order
 24 Show Cause 10, ECF No. 53. He now argues the opposite—that the injunction *only* reaches
 25 deliveries Azuma conducts itself, and leaves those completed by others untouched. And beyond
 26 the injunction, Rose is also now specifically facilitating deliveries that are unlawful due to
 27 Azuma’s presence on the PACT Act non-compliant list and under the Contraband Cigarette
 28 Trafficking Act. *See* 15 U.S.C. § 376a(e)(2)(A) (“[N]o person who delivers cigarettes . . . 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 . . .”); 18 U.S.C.
 § 2341(2) (defining “contraband cigarettes” as “a quantity in excess of 10,000 cigarettes, which
 bear no evidence of the payment of applicable State . . . cigarette taxes in the State . . . where such
 cigarettes are found”); *id.* § 2342(a) (“It shall be unlawful for any person knowingly to ship,
 transport, receive, possess, sell, distribute, or purchase contraband cigarettes . . .”).

aiders and abettors,” *Inst. of Cetacean Research v. Sea Shepherd Conservation Soc’y*, 774 F.3d 935, 948 (9th Cir. 2014) (quoting *Regal Knitwear v. N.L.R.B.*, 324 U.S. 9, 14 (1945)). And so beyond Rose’s direct contempt, his active concert with others in an attempt to circumvent this Court’s order is also contemptuous. Indeed, the records tendered by Azuma in January reveal that, in response to this Court’s most recent order on contempt, Rose has not only solicited others to deliver Azuma’s cigarettes, but also monetarily induced them to do so, offering a per-case discount should they send their own couriers to Azuma’s factory and violate the injunction—and the PACT Act—themselves. *See* Rose Decl. ¶ 10 & ex. B.^{2, 3}

If Defendants believe Azuma’s current operations mean that some of its sales should be carved out from the Court’s broad injunction against “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,” they can move the Court for a modification of the injunction. *See* Fed. R. Civ. P. 62(d). But rather than so move, Rose instead again violated the injunction, clandestinely delivering and/or causing to be delivered over 30 million *additional* cigarettes, Nascenzi Decl. ¶¶ 6–7;⁴ inducing agreements from the State to defer resolution on pending appeals by keeping those sales hidden from the State; and reporting to the Court in its PACT Act reports that such sales did not occur, *see, e.g.*, Not. Filing PACT Act Reports, ECF No. 99 (filing “zero sales” reports for March 2024 through November 2024). Defendants cannot

² Regardless of the precise relationship between Rose and the new delivery drivers, alerting Azuma’s customers of the injunction means that those drivers are likely themselves bound by the injunction. *See* Fed. R. Civ. P. 65(d)(2) (“The order binds only the following who receive actual notice of it by personal service or otherwise: (A) the parties; (B) the parties’ officers, agents, servants, employees, and attorneys; and (C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B).”); Rose Decl. ex. A (“[T]he federal district court in Sacramento issued an order prohibiting Azuma from delivering its tobacco products . . .”).

³ Plaintiff reiterates its observation from the hearing that—according to Defendants—nearly all of its customers selected the same individual to courier these deliveries. Specifically, a single individual delivered almost 26 million of the ca. 30 million cigarettes Azuma distributed after it changed its “business model.”

⁴ Additional review of the documents Rose provided pursuant to the Court’s sanctions order, ECF No. 95, and submitted to the Court under seal in support of the State’s Notice of Violation, *see* Mins. Mot. Hr’g, ECF No. 115, has revealed that the State’s prior tabulation double-counts certain transactions. The declaration submitted concurrently corrects the discovered errors.

1 selectively decide when to follow the Court’s orders based on their own reading of the law and
 2 what they believe the injunction *should* say. Instead, they remain subject to the full scope of the
 3 injunction.

4 **II. BINDING PRECEDENT DEMONSTRATES THE LETTER’S ANALYSIS DOES NOT APPLY**

5 The letter cited by Defendant is inapposite not only because of the PACT Act and the
 6 Court’s injunction, but also because it does not accurately reflect the law. First, the letter is years
 7 out of date. The letter was drafted as a then-inter-agency communication between the U.S.
 8 Department of Justice’s Office of Tribal Justice and the U.S. Treasury’s Bureau of Alcohol,
 9 Tobacco & Firearms—a deliberative solicitation of “views” regarding a particular seller. Peebles
 10 Decl. ex. A, at 1. It predates by several years ATF Industry Circular 99-2, where ATF articulated
 11 its position (in contrast to Defendants’ generalization of the letter):

12 Sales or shipments from Native American Reservations are *not* exempt from the
 13 requirements of the Contraband Cigarette Trafficking Act and [the predecessor of the
 14 PACT Act,] the Jenkins Act. Additionally, the application of State taxes and
 regulatory requirements to sales made on Native American reservations varies
 depending on the transaction.

15 ATF, Dep’t of the Treasury, Industry Circular 99-2, Unlawful Transportation, Shipment, or Sale
 16 of Cigarettes and Domestic Sale of Cigarettes Labeled for Export (1999), [https://www.atf.gov](https://www.atf.gov/alcohol-tobacco/docs/industry-circular/atf-industry-circular-1999-2-unlawful-transportation-shipment/download)
 17 /alcohol-tobacco/docs/industry-circular/atf-industry-circular-1999-2-unlawful-transportation-
 18 shipment/download. It predates the tobacco Master Settlement Agreement (“MSA”) and the
 19 implementation of state tobacco escrow, directory, and manufacturer licensing laws at issue in
 20 this suit. *Cf. HCI Distribution, Inc. v. Peterson*, 110 F.4th 1062, 1070 (8th Cir. 2024) (citing the
 21 MSA and its enabling laws as part of Nebraska’s “strong interest in protecting the health of its
 22 citizens”). And, significantly, it predates by more than a decade the PACT Act *and* ATF’s
 23 consideration and rejection of many of the same arguments raised in this action by Defendants.
 24 See PACT Act, Pub. L. 111-154, 124 Stat. 1087 (codified at 15 U.S.C. §§ 375–378, 18 U.S.C.
 25 §§ 1716E, 2343); ATF, U.S. Dep’t of Justice, Implementation of the Prevent All Cigarette
 26 Trafficking Act of 2009 (PACT Act)—Tribal Consultation Process (Nov. 18, 2010), Nascenzi
 27 Decl., ex. A. Among the arguments considered and rejected by ATF was the assertion that
 28 “lawfully operating” does not require “compliance with state civil and regulatory law within

1 Indian country.” *Id.* at 6. ATF disagreed, explaining—13 years after the cited letter and 15 years
 2 ago—that “‘lawfully operating’ means compliance with applicable Federal, State, and Tribal
 3 Laws.” *Id.*

4 Second, the letter’s analysis was wrong when written and is even more wrong now. The
 5 Supreme Court, balancing state, federal, and tribal interests, made clear over 50 years ago that
 6 state cigarette taxes imposed on non-Indians are valid in Indian country, *Moe v. Confederated*
 7 *Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 483 (1976), and nine years
 8 later, specifically found that California’s cigarette taxes are validly imposed on non-Indian
 9 purchasers in Indian country, *Cal. State Bd. of Equalization v. Chemehuevi Indian Tribe*, 474 U.S.
 10 9, 11–12 (1985) (per curiam). And because “nonmembers are not constituents of the governing
 11 Tribe,” nonmember Indians “stand on the same footing as non-Indians” in this analysis.
 12 *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 161 (1980).
 13 Additionally, States can impose “minimal burden[s]” on tribal businesses “to avoid the likelihood
 14 that in [their] absence non-Indians purchasing from the tribal seller will avoid payment of a
 15 concededly lawful tax.” *Moe*, 425 U.S. at 483.

16 Those “minimal burdens” can be applied both to on-reservation retailers as in *Moe*,
 17 425 U.S. at 483; *see also Colville*, 447 U.S. at 159–60 (upholding state recordkeeping
 18 requirements for Indian retailers), and also to wholesalers bringing cigarettes to Indian retailers,
 19 *Dep’t of Tax’n & Fin. v. Milhelm Attea & Bros.*, 512 U.S. 61, 75 (1994). Moreover, those
 20 “minimal burdens may be imposed on Indian businesses that . . . purport to engage only in tax-
 21 exempt transactions.” *Big Sandy Rancheria Enters. v. Bonta*, 1 F.4th 710, 731 (9th Cir. 2021).
 22 Thus, regardless of whether any of Azuma’s sales are taxable, the State still has authority to
 23 impose minimal burdens, including its licensing, reporting, and recordkeeping regime, to ensure
 24 that taxes are collected when owed and only when owed. *See id.* (“[T]ax enforcement schemes
 25 ‘with even more demanding requirements than those of California have been repeatedly upheld
 26 by the Supreme Court as imposing only a “minimal burden.”’” (quoting *Big Sandy Rancheria*
 27 *Enters. v. Becerra*, 395 F. Supp. 3d 1314, 1332–33 (E.D. Cal. 2019))). And dealing with non-

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members, those non-members “stand on the same footing” as any other non-nonmember, regardless of whether they are Indians themselves or not.

Neither Azuma nor its customers are licensed, nor do they collect or remit any taxes when owed. Indeed, on this basis the Court found that Azuma’s customers are “consumers” under the law and Azuma’s delivery sales to such “consumers” are unlawful under the PACT Act. *See* Prelim. Inj. Order 18–19. Azuma has not provided evidence otherwise, and its activities remain unlawful. *See* 15 U.S.C. § 375(4) (defining “consumer” as “any person that purchases cigarettes” except for “person[s] lawfully operating as a manufacturer, distributor, wholesaler, or retailer of cigarettes”).

Azuma’s status as a manufacturer does not change the legal analysis either. *Contra* Resp. Not. Violation 7. Indeed, the Ninth Circuit has previously described a similar manufacturer who imported its tobacco into the reservation and then “sells cigarettes and other tobacco products on the reservation, throughout Washington, and in about sixteen other states” as “tak[ing] place largely off-reservation” and thus subject to state regulation. *King Mountain Tobacco Co. v. McKenna*, 768 F.3d 989, 991, 994 (9th Cir. 2014). The Eighth Circuit came to a similar conclusion just six months ago in *HCI Distribution, Inc. v. Peterson*, where it held that a tribal manufacturer selling cigarettes at retail on its reservation to non-members was subject to Nebraska’s “regulatory authority,” 110 F.4th at 1070. Specifically addressing a tribal manufacturer in Nebraska making sales at retail to non-members, the Eight Circuit’s decision in *HCI Distribution* acts as an almost direct repudiation of the letter’s legal analysis. Thus, both caselaw and statutory developments demonstrate and reinforce that the letter on which Rose now purports to rely got the analysis wrong.

III. ATF HAS SPECIFICALLY DESCRIBED AZUMA’S BUSINESS AS UNLAWFUL

While a U.S. Department of Justice advisory letter should not alter the legal analysis, it may be relevant that the Department has repeatedly concluded that Azuma’s business is unlawful. Indeed, ATF has listed Azuma on the PACT Act non-compliant list on that basis—aside from a brief two-month interruption toward the end of 2019—since April 10, 2019. Alexander Decl. ¶¶ 6–11, ECF No. 13-1. ATF has repeatedly rejected Azuma’s attempts to be delisted, *see, e.g.*,

1 *id.* ex. B, at 1 (“ATF declines to remove Azuma from the PACT Act Non-Compliant list . . .”),
 2 and is currently defending a challenge from Azuma in the U.S. District Court for the District of
 3 Columbia, *see Azuma Corp. v. Garland*, Case No. 1:23-cv-1761-CKK (D.D.C. filed June 16,
 4 2023). Specifically, ATF has written that “Azuma continues to violate the Contraband Cigarette
 5 Trafficking Act (CCTA) and PACT Act by illegally shipping unstamped, untaxed cigarettes . . .
 6 to unlicensed entities which cannot lawfully possess untaxed, unstamped cigarettes.” Alexander
 7 Decl., ex. B, at 1. “These actions,” ATF continued, “potentially defraud the State of California
 8 out of millions of dollars of cigarette tax revenue and . . . could form the basis for violations of
 9 the Federal wire fraud and money laundering statutes.” *Id.* In conclusion, ATF characterized
 10 Azuma’s request for delisting as a request “to be treated differently than every other cigarette
 11 manufacturer in the State of California.” *Id.* at 10.

12 Other cigarette-making tribes recognize that ATF’s current policy is inconsistent with the
 13 arguments and letter presented by Defendants now. In a 2022 letter to the agency, for example, a
 14 number of such tribes⁵ reached out to the Department to discuss ATF’s policy, which they
 15 acknowledged “purports to enforce and apply state licensing requirements and taxes on products,
 16 such as tobacco, manufactured and marketed on Indian lands.” Letter from Matthew Pagels,
 17 President, The Seneca Nation, et al. to Hon. Merrick B. Garland, Att’y, Gen. U.S. Dep’t of
 18 Justice, et al. 1 (May 2, 2022), Nascenzi Decl., ex. B. That letter continued that the tribes
 19 “understand that the ATF believes its policy position has been made clear in recent litigation,” but
 20 the tribes took issue with the agency’s decision to extend that position to tribally owned
 21 businesses like Azuma. *Id.* at 3. And after specifically invoking the letter Rose cited in response
 22 to the Notice of Violation, the tribes concluded:

23 It is our understanding that ATF is now taking a contrary view and contending that
 24 state licensing requirements and taxes may be applied and enforced by ATF on
 25 tobacco products manufactured by a Native Nation or an individual Native American
 licensed by the Native Nation on the Nation’s territory or reservation, where the sale
 and delivery of the tobacco products occurs on the territory or reservation.

26 *Id.* at 2.

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28 ⁵ The Alturas Indian Rancheria is not listed among the tribes signing the letter.

1 It is difficult to understand how an almost-30-year-old letter addressing a different
2 tribe completing different transactions and not subject to either the PACT Act or this
3 Court's injunction displaces ATF's current and specific analysis of Azuma and its
4 activities or the injunction itself.

5 **CONCLUSION**

6 For the reasons above, Plaintiff respectfully requests the Court hold Rose in contempt once
7 again for his blatant violations of the Court's Preliminary Injunction, ECF No. 43.

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9
10 Dated: February 27, 2025

Respectfully submitted,

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