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UNITED STATES DISTRICT COURT
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' MEMORANDUM OF
LAW IN SUPPORT OF MOTION TO
CLARIFY PRELIMINARY
INJUNCTION**

Hrg. Date: October 17, 2025
Time: 1:30 p.m.
Courtroom: 3
Judge: Hon. Kimberly J. Mueller
Action filed: April 19, 2023
Trial date: N/A

Defendants Philip Del Rosa and Darren Rose move for an order to clarify the scope of the Preliminary Injunction order signed on September 7, 2023, and filed on September 8, 2023 (ECF No. 43). Specifically, Defendants ask the Court to clarify that the Preliminary Injunction does not enjoin Azuma Corporation (“Azuma”)’s face-to-face sales of cigarettes, including the sales by Azuma to other entities owned and operated by the Alturas Indian Rancheria—the Desert Rose Casino and AIR Fuels—which order and take possession of the cigarettes in person at Azuma’s facility. These transactions are not a delivery sale of cigarettes under the Prevent All Cigarette Trafficking (PACT) Act.

Defendants contend the Preliminary Injunction was never intended to enjoin such non-delivery sale transactions. Moreover, the Preliminary Injunction does not do so because such

1 transactions are beyond the scope of the PACT Act delivery sales provisions, including the ban on
 2 deliveries for persons listed on the noncompliant list. In light of the State of California's recent
 3 contentions to the contrary, however, and Defendants' desire to ensure their conduct complies with
 4 the Preliminary Injunction, Defendants respectfully ask the Court for clarification.

5 The issue presented by this motion was also discussed in connection with Defendants'
 6 Motion for Reconsideration/Correction (June 27, 2025, ECF No. 136), which the Court ordered
 7 submitted without oral argument. Minute Order, Aug. 11, 2025, ECF No. 161. That motion
 8 addressed reconsideration and/or correction of portions of the Order finding Darren Rose in
 9 violation of the Preliminary Injunction. *See* Order signed May 23, 2025, filed May 27, 2025, ECF
 10 No. 131. This narrow but essential issue, however, was not the primary focus of the previous
 11 motion, and it may prove unnecessary to resolve this issue in disposing of that motion, so
 12 Defendants make the instant motion to bring specific focus to this question.

13 California has filed a notice of alleged violation of the Preliminary Injunction. ECF No.
 14 164. California alleges that Azuma's on-reservation, face-to-face, non-delivery transactions with
 15 other Alturas Indian tribal businesses violate the Preliminary Injunction. Defendants are
 16 responding to the Notice of Violation separately, but, as demonstrated herein, the delivery-focused
 17 Preliminary Injunction does not prohibit these transactions, nor indeed do these transactions involve
 18 any violation of the PACT Act. Because the transactions are outside the scope of the Preliminary
 19 Injunction, they cannot be the basis for sanctions.

20 BACKGROUND

21 In this action, California alleges in relevant part that Azuma, a tribal corporation wholly
 22 owned and operated by the federally recognized Alturas Indian Rancheria ("Tribe"), distributes
 23 cigarettes to on-reservation retailers owned by other Indian tribes in violation of the PACT Act.
 24 *See generally* First Am. Compl., ECF No. 68. On September 7, 2023, the Court granted California's
 25 motion for a preliminary injunction to stop Azuma's delivery of cigarettes in violation of 15 U.S.C.
 26 § 376a(e)(2)(A) (the "Prohibited Delivery Provision" of the PACT Act). Prelim. Inj. Order, ECF
 27 No. 43. The injunction states:
 28

1 Defendant Darren Rose, in his official capacity as vice-chairman of the Alturas
 2 Indian Rancheria and as president/secretary of Azuma Corporation, and his
 3 employees and agents are hereby enjoined from completing or causing to be
 4 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.

5 *Id.* at 24.¹

6 The Prohibited Delivery Provision of the PACT Act applies only to “delivery sales into a
 7 specific State and place,” 15 U.S.C. § 376a(a), and prohibits any person who receives the PACT
 8 Act non-compliant delivery sellers list, and any person who delivers cigarettes to consumers, from
 9 “knowingly complet[ing], caus[ing] to be completed, or complet[ing] its portion of a delivery of
 10 any package for any person whose name and address are on the list, unless” an exception applies.
 11 15 U.S.C. § 376a(e)(2)(A).

12 Neither the Preliminary Injunction Order nor the parties’ briefing on the preliminary
 13 injunction motion focused specifically on the internal Alturas tribal transactions between Azuma
 14 and the Tribe-owned entities—the Desert Rose Casino and AIR Fuels—although California’s
 15 evidence in support its motion did identify sales by Azuma to “Alturas Indian Rancheria.” *See*
 16 Decl. of James Dahlen (June 12, 2023) Ex. A, ECF No. 13-4.

17 On February 28, 2024, the Court found that Darren Rose violated the Preliminary
 18 Injunction. Order, ECF No. 71. The violation was based on Azuma’s self-reported deliveries of
 19 cigarettes on its own behalf “to the same customers identified in the preliminary injunction briefing
 20 and record.” *Id.* at 3, 5-6. Azuma’s customers again included “Alturas Indian Rancheria.” *See*
 21 Decl. of James Dahlen (Dec. 12, 2023) ¶¶ 6-9, ECF No. 50-2. The Court’s order did not address
 22 specific sales or deliveries.

23 In accordance with the Order of November 18, 2024 (ECF No. 95) and the Stipulation and
 24 Order of January 24, 2025 (ECF No. 107), Darren Rose provided California copies of Azuma’s
 25 sales records dated after September 15, 2023, including monthly updates, beginning on January 31,
 26 2025. *See* Order, ECF No. 131, at 4.

27 ¹ The Ninth Circuit upheld the Preliminary Injunction. *California v. Azuma Corp.*, No. 23-16200,
 28 2024 WL 4131831 (9th Cir. Sept. 10, 2024).

Based on the initial documents provided by Azuma, California filed a Notice of Violation. ECF No. 108. The Court on May 23, 2025, again found Rose violated the Preliminary Injunction. Order filed May 27, 2025, ECF No. 131. The Court rejected Rose’s defense that Azuma and Rose were not delivering cigarettes—instead, a third person (“most often Owen Ward”) was hired “to transport Azuma’s cigarettes to buyers off-reservation.” *Id.* at 6:28-7:3, 7:9-10; *see id.* at 9:15-17.² The Court also examined Azuma’s “transactions involving members of different tribes” and found they were “not ‘lawful’ under § 376a(e)(2)(A).” *Id.* at 9:3-4, 9:17-21.

Azuma’s sales records showed sales not only to off-reservation buyers operated by different tribes, and whose orders were picked up by a third person, but also sales to the Desert Rose Casino and AIR Fuels, whose orders were placed and picked up at the Azuma facility by an employee of the buyer itself in face-to-face transactions. *See* Defs.’ Ntc of Submission of Exhibit for Reference at Contempt Hearing and Decl. of John M. Peebles, ECF No. 142 (filed under seal, *see* Order, ECF

² Defendants are mindful that the Court strongly cautioned Rose and his counsel against advancing similar arguments in the future. *Id.* at 8. This motion does not seek to relitigate the Owen Ward deliveries, and is not intended to “escape the consequences” or “to avoid compliance with” the Preliminary Injunction, *id.* at 7-8, but seeks clarity about the conduct that is and is not enjoined.

Additionally, to be clear, since these sales do not involve delivery sales as defined by the PACT Act, this motion does not depend upon showing the Desert Rose Casino and AIR Fuels are “lawfully operating” for purposes of the PACT Act.

Nevertheless, it bears noting that this Court has previously held that “on-reservation transactions ‘involving only Indians’ are not subject to state regulation.” Order, May 27, 2025, at 9 (ECF No. 131). The Court was describing transactions such as those here, solely involving Alturas-owned entities. *Id.* In addition, California’s Complaint sets apart on-reservation tribal member transactions as outside the scope of the conduct alleged to violate the PACT Act. First Am. Compl. (ECF No. 68) ¶ 13 (alleging California’s licensing and stamping laws apply to tribal entities who “sell cigarettes to non-members or go beyond their own borders”), ¶ 85 (alleging “shipments of Azuma’s cigarettes to customers outside of the Alturas Rancheria are ‘delivery sales’” and “are made in ‘interstate commerce’ as defined under the PACT Act”), ¶ 88(a)-(b) (alleging PACT Act violations arising from Azuma’s “off-reservation sales” and “sales to nonmembers of the Alturas Tribe”), Prayer for Relief ¶ 2 (seeking declaratory relief only for sales off the Alturas Rancheria) (ECF No. 68). The PACT Act generally does not attempt to regulate non-delivery transactions occurring within a single Indian reservation, as is the case here. *See* 15 U.S.C. § 376(a) (establishing reporting requirements for sales of cigarettes “in interstate commerce”); 15 U.S.C. § 375(10)(A) (“interstate commerce” does not include commerce entirely in Indian country); 15 U.S.C. § 376a(a) (establishing obligations for “delivery sales”).

No. 156); *see also* Defs.’ Ntc. of Correction and Clarification, ECF No. 141 (regarding June 2025 sales to Desert Rose Casino and AIR Fuels).

On August 15, 2025, the Court ordered Darren Rose to pay civil contempt sanctions of \$68,000. Order, ECF No. 162. Neither the May 23 Order nor the August 15 Order specifically addressed the sales to Desert Rose Casino and AIR Fuels.

Azuma’s only cigarette sales since June 2025 have been to the Desert Rose Casino and AIR Fuels. *See* Decl. of Alyssa Rose ¶ 3 (Aug. 29, 2025); *see also* Decl. of Peter Nascenzi ¶ 8 & Ex. A (Aug. 28, 2025) (submitted with Notice of Violation, ECF No. 164, and Req. to File Documents Under Seal, ECF No. 165). Those entities, which are owned by the Alturas Indian Rancheria, place and pick up their orders in person at Azuma’s facility. Decl. of Alyssa Rose ¶¶ 4-8. Thus, Azuma has significantly curtailed its activities, now limiting its operations to transactions which involve a very limited number of in-person sales which do not involve remote orders, and do not involve deliveries, and only involve transactions to other Alturas tribal businesses. In these transactions, Azuma allows only the buyer itself, through the buyer’s employee, to place and collect orders from Azuma. *Id.* Defendants ask the Court to clarify and confirm that this conduct, which does not involve deliveries or delivery sales under the PACT Act, does not violate the Preliminary Injunction.

Defendants note that the PACT Act is a remedial statute which encourages voluntary compliance rather than punitive action. *See* 15 U.S.C. § 376a(e)(1)(E)(i) and (v) (Department of Justice/ATF, which enforces the Act, must ascertain if delivery seller is in compliance with PACT Act and shall remove compliant delivery sellers from PACT Act noncompliant list); *see also* ECF 68-15 (ATF letter to Azuma keeping it on noncompliant list while seeking voluntary compliance with PACT Act and stating that Azuma should notify ATF if it places its operations in compliance with PACT Act).

ARGUMENT

I. The Court has authority and discretion to clarify the Preliminary Injunction.

A district court possesses flexible discretion to clarify or modify the scope of an injunction. *Safari Club Int’l v. Bonta*, 756 F.Supp.3d 837, 840 (E.D. Cal. 2024). “By clarifying the scope of a

1 previously issued injunction, a court adds certainty to an implicated party's effort to comply with
 2 the order and provides fair warning as to what future conduct may be found contemptuous." *Id.*
 3 (internal quotation marks and brackets omitted). An injunction may be clarified on a party's motion
 4 or sua sponte. *Id.*

5 **II. The Preliminary Injunction does not enjoin non-delivery sales.**

6 The Preliminary Injunction, like the Prohibited Delivery Provision on which it is based,
 7 prohibits deliveries (and certain conduct constituting facilitation of such deliveries). Therefore, it
 8 does not enjoin face-to-face cigarette transactions, such as those occurring at Azuma's facility on
 9 the Alturas Indian Rancheria between Azuma as seller and Desert Rose Casino and AIR Fuels as
 10 buyers, in which the order is placed in-person and not remotely via voice transmission, telephone,
 11 internet, or mail, and the cigarettes are collected in-person and not delivered to the buyer by
 12 common carrier, private delivery service, or other method of remote delivery. *See* 15 U.S.C. §
 13 376(5) (defining "delivery sale").

14 The Preliminary Injunction was based upon California having shown that "both Azuma and
 15 Mr. Rose *deliver* cigarettes to 'consumers.'" Prelim. Inj. Order at 18 (emphasis added). As the
 16 Court observed, the "prohibited activity" under § 376a(e)(2)(E) is "knowingly completing, causing
 17 to be completed, or completing [the prohibited persons'] respective portions of a delivery of
 18 cigarettes for any person on the noncompliant list." *Id.* at 17; see also *id.* at 19 (finding California
 19 has shown likelihood of success on claim of violation of § 376a(e)(2)(A)). Accordingly, delivery
 20 conduct was the conduct the Preliminary Injunction prohibited. *Id.* at 24 (enjoining Rose "from
 21 completing or causing to be completed any delivery, or any portion of a delivery, of packages
 22 containing cigarettes on behalf of Azuma Corporation to anyone in California in violation of section
 23 376a(e)(2)(A) of the PACT Act"). Subsequent orders have maintained the focus on deliveries. *See*
 24 Order, Feb. 28, 2024, ECF No. 71, at 5 (finding "Azuma has continued to deliver cigarettes on its
 25 own behalf").

26 In the May 27, 2025, Order, ECF No. 131, the Court emphasized that the PACT Act
 27 "prohibits individuals from 'causing' a delivery to be completed or completing a 'portion of a
 28 delivery' for Azuma." *Id.* at 7. The Court explained that this prohibition encompasses not just "the

1 physical transport of cigarettes for Azuma, but also those actions required to precipitate, plan and
 2 execute a delivery.” *Id.* The transportation of Azuma cigarettes by a third person to buyers off-
 3 reservation constituted a delivery, and Rose effectively “continue[d] deliveries in violation of the
 4 Act by engaging third-party deliverers.” *Id.* The Court also explained that the Preliminary
 5 Injunction “‘does not prohibit anyone from lawfully engaging in the cigarette business in
 6 compliance with applicable federal law.’” Order (April 23, 2024) at 2. Rose and Azuma may sell
 7 cigarettes, but they must do so in compliance with the PACT Act and this court’s orders.” *Id.* at
 8 10.

9 These orders establish that, while the Preliminary Injunction prohibits more than deliveries
 10 themselves, the existence of a delivery sale is an essential element for conduct to come within the
 11 reach of the Preliminary Injunction. Therefore, a face-to-face sale, involving an order placed by
 12 the buyer in the physical presence of the seller, and the seller’s receipt of the cigarettes in the
 13 physical presence of the buyer, without any delivery, is outside the Preliminary Injunction’s scope.

14 California has urged a broad interpretation of the Preliminary Injunction as barring all of
 15 Azuma’s cigarette sales. *See* Notice of Violation, ECF No. 164; *see also* Tr. of Proceedings, July
 16 7, 2025, at 8:6-15 (State arguing that for Rose to purge himself of contempt, Azuma must “cease
 17 making sales” and “stop selling cigarettes”). The State’s reasoning appears to be that customers
 18 purchasing cigarettes at Azuma’s facilities are “delivering the[] [cigarettes] themselves,” Pl.’s Opp.
 19 to Defs.’ Mtn. for Reconsideration, ECF No. 150, at 4 n.2. California’s suggestion seems to be that
 20 every sale necessarily involves delivery. The PACT Act, however, distinguishes between face-to-
 21 face sales and delivery sales. The PACT Act expressly limits delivery sales and does not extend to
 22 circumstances wherein the order for a sale is not made remotely and the cigarettes are not delivered
 23 to the buyer. 15 U.S.C. § 376(5). Contrary to California’s interpretation, which collapses this
 24 distinction, only delivery sales are covered by the Preliminary Injunction, while face-to-face sales
 25 are not.

26 Although the PACT Act’s Prohibited Delivery Provision does not define what it means by
 27 “delivery,” or what it means to “cause [a delivery] to be completed, or complete [a] portion of a
 28 delivery,” 15 U.S.C. § 376a(e)(2)(A), the Act does define the term “delivery sale.” A “delivery

1 sale” is a type of “sale of cigarettes or smokeless tobacco to a consumer,” meeting either of the
 2 following criteria:

3 (A) the consumer submits the order for the sale by means of a telephone or other
 4 method of voice transmission, the mails, or the Internet or other online service, or
 5 the seller is otherwise not in the physical presence of the buyer when the request
 for purchase or order is made; or

6 (B) the cigarettes or smokeless tobacco are delivered to the buyer by common
 7 carrier, private delivery service, or other method of remote delivery, or the seller is
 8 not in the physical presence of the buyer when the buyer obtains possession of the
 cigarettes or smokeless tobacco.

9 15 U.S.C. § 375(5). Thus, a “delivery sale” only occurs where the buyer *orders* cigarettes outside
 10 the physical presence of the seller, or *obtains possession* of cigarettes outside the physical presence
 11 of the seller, or the cigarettes are delivered to the buyer by a method of remote delivery such as
 12 common carrier or private delivery service. The sale of cigarettes not involving either remote
 13 ordering or remote transfer of possession is still a sale, but not a “delivery sale.” *See Gordon v.*
 14 *Holder*, 721 F.3d 638, 642 (D.C. Cir. 2013) (explaining that a “delivery sale is any sale in which
 15 either the purchase or the delivery does not occur face-to-face”). The current Azuma sales are not
 16 delivery sales.

17 The larger structure of the PACT Act supports the conclusion that the PACT Act is limited
 18 to sales involving remote deliveries or remote deliveries. The Prohibited Delivery Provision is
 19 closely connected to the kind of remote deliveries which are a necessary element of the delivery
 20 sales the Act regulates. The Prohibited Delivery Provision is part of § 376a, entitled “Delivery
 21 sales.” Following several subdivisions establishing obligations for delivery sellers and delivery
 22 sales, and directing the creation of a list of delivery sellers not in compliance with these obligations,
 23 the Prohibited Delivery Provision, as stated above, bars certain people from knowingly completing,
 24 causing to be completed, or completing their portions of a delivery of any package for a person
 25 named on the noncompliant list. 15 U.S.C. § 376a(e)(2)(E). The prohibition is subject to three
 26 exceptions, each of which hinges on the nature of the delivery in question. *Id.* § 376a(e)(2)(E)(i)-
 27 (iii).
 28

1 The PACT Act’s Findings and Purpose sections confirm the Act’s overriding purpose is to
 2 regulate remote delivery sales, particularly internet cigarette sales to juveniles. Congress enacted
 3 the PACT Act, which added the “delivery sale” provisions to existing law, based on findings that
 4 emphasized why legislation focusing on these remote sales was desirable. The “Findings” section
 5 of the PACT Act states in part that “the sale of illegal cigarettes and smokeless tobacco over the
 6 Internet, and through mail, fax, or phone orders, makes its cheaper and easier for children to obtain
 7 tobacco products,” that “the majority of Internet and other remote sales of cigarettes and smokeless
 8 tobacco are being made without adequate precautions to protect against sales to children, without
 9 the payment of applicable taxes, and without complying with the nominal registration and reporting
 10 requirements in existing Federal law,” that “the number of Internet vendors in the United States
 11 and in foreign countries that sell cigarettes and smokeless tobacco to buyers in the United States
 12 increased from only about 40 in 2000 to more than 500 in 2005,” and that “the intrastate sale of
 13 illegal cigarettes and smokeless tobacco over the Internet has a substantial effect on interstate
 14 commerce.” PACT Act, Pub. L. No. 111-154, § 1(b)(4), (5), (9) & (10), 15 U.S.C. § 375 Note.
 15 The express purpose of the Act is primarily to “require Internet and other remote sellers of cigarettes
 16 and smokeless tobacco to comply with the same laws that apply to law-abiding tobacco retailers.”
 17 *Id.* § 1(c)(1).

18 Accordingly, the PACT Act delivery sales provisions are limited in scope. They only
 19 applies when either the orders are made remotely by means of telephone, voice transmissions or
 20 the mails, Internet, or other online service or outside the physical presence of the seller, or when
 21 the cigarettes are delivered to the buyer via common carrier, private delivery service, or other form
 22 of remote delivery. The Prohibited Delivery Provision applies to transactions that involve a
 23 “remote delivery” of the kind described in the “Delivery sales” definition, § 375(5)(B). By the
 24 same token, the Prohibited Delivery Provision does not apply to transactions in which there is no
 25 “remote delivery” involved and the seller is “in the physical presence of the buyer when the buyer
 26 obtains possession of the cigarettes,” *Id.*³ Therefore, Azuma would not violate the Prohibited

27 ³ In Defendants’ view, the Prohibited Delivery Provision of the PACT Act and the Preliminary
 28 (continued...)

1 Delivery Provision by engaging in a face-to-face transaction, in which the buyer places in the order
 2 in the physical presence of Azuma and thereafter obtains possession of the cigarettes while at
 3 Azuma's facility.

4 To be as clear as possible, this scenario is not the one the Court discussed in the May 23,
 5 2025, Order, where a third-party service was hired by multiple buyers for the purpose of picking
 6 up and transporting cigarettes on each buyers' behalf. *See* ECF No. 131 at 7. Here, Desert Rose
 7 Casino and AIR Fuels place orders for, and take possession of, the cigarettes at Azuma's location
 8 through bona fide employees of Desert Rose Casino and AIR Fuels.

9 It would stretch the meaning of the Prohibited Delivery Prohibition to conclude that a
 10 "delivery" occurs (and, therefore, that Rose and Azuma "cause" a delivery to be completed, or that
 11 they complete their "portion of a delivery") under these circumstances. No "delivery" within the
 12 meaning of the Prohibited Delivery Provision or the Preliminary Injunction occurs where the buyer
 13 itself orders the cigarettes and obtains possession at Azuma's facility. The buyer's subsequent
 14 conduct – i.e., bringing the cigarettes back to the buyer's retail store – is not a delivery, because in
 15 the PACT Act's contemplation, the "delivery" factors that distinguish a "delivery sale" from any
 16 other sale are tied to the moments the buyer places its order and obtains possession, and whether
 17 the buyer and seller are in one another's "physical presence" at those moments, or if the cigarettes
 18 are "delivered to the buyer by common carrier, private delivery service, or other method of remote
 19 delivery." 15 U.S.C. § 375(5)(B). When the Desert Rose Casino or AIR Fuels, through an
 20 employee, picks up cigarettes from Azuma and carries them to the casino or fuel station, there is
 21 no "delivery" to the Desert Rose Casino or AIR Fuels because they obtained and retained
 22 possession at and from the time of pickup.

23 In sum, "delivery" is central to the Preliminary Injunction, as demonstrated by the
 24 Preliminary Injunction Order, the subsequent enforcement orders, and the Prohibited Delivery
 25 Provision of the PACT Act on which it is based. The meaning of the term "delivery" under the

26 _____
 27 Injunction do not prohibit remote *orders* (§ 375(5)(A)), but only prohibit remote *deliveries* (§
 28 375(5)(B)). Nevertheless, as noted, Desert Rose Casino and AIR Fuels place their orders in the
 physical presence of Azuma.

1 Prohibited Delivery Provision, and thus under the Preliminary Injunction, is best understood by
2 reference to the “remote delivery” portion of the PACT Act’s “delivery sales” definition. So
3 understood, Azuma’s face-to-face sales to the Desert Rose Casino and AIR Fuels, in which the
4 buyers order, purchase and obtain possession of the cigarettes in person at the Azuma facility, do
5 not involve delivery or delivery sales as defined under the PACT Act. Since there is no delivery
6 sale, the PACT Act and the Preliminary Injunction do not prohibit these transactions.

7 **CONCLUSION**

8 Defendants respectfully request that the Court clarify the Preliminary Injunction does not
9 enjoin the face-to-face sale of cigarettes by Azuma, including its face-to-face transactions with the
10 Desert Rose Casino and AIR Fuels.

11
12 Dated: September 4, 2025

Respectfully submitted,

13 PEEBLES BERGIN SCHULTE & ROBINSON LLP

14 *s/ John M. Peebles*

15 John M. Peebles

16 *Attorneys for Defendants*
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