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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' REPLY BRIEF 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 moved (ECF No. 170) for an order clarifying that the Preliminary Injunction (ECF No. 43) does not enjoin Azuma Corporation ("Azuma") from making face-to-face sales of cigarettes not involving a delivery. Such face-to-face sales include Azuma's transactions in July and August 2025, in which customers ordered and took possession of cigarettes in person at Azuma's facility.

As Defendants explained in their memorandum of law (ECF No. 170-1), the term "delivery" in the Preliminary Injunction and the PACT Act provision on which the Preliminary Injunction is based, § 376a(e)(2)(a),¹ must be construed in light of the PACT Act's term, "delivery sale." Delivery sales can occur two ways: (1) by remote order, or (2) by remote delivery. § 375(5). When

¹ All statutory citations herein are to Title 15 of the United States Code.

the PACT Act refers to a “delivery,” as in § 376a(e)(2)(A), it is referring to the same kind of remote delivery that can constitute a delivery sale, that is, a delivery “by common carrier, private delivery service, or other method of remote delivery,” in which “the seller is not in the physical presence of the buyer when the buyer obtains possession of the cigarettes.” § 375(5)(B).

Plaintiff State of California incorrectly insists that Defendants claim “delivery” means “delivery sale.” ECF No. 178 at 3:14. Defendants do not make that claim. California’s opposition is therefore largely aimed at tearing down a strawman. California would define “delivery” so broadly that it includes every “transfer” of cigarettes to a consumer, *id.* at 4:5, such that “all of Azuma’s sales” violate the Preliminary Injunction, *id.* at 3:10-11. However, California cannot stretch either the PACT Act or the Preliminary Injunction that far. Neither prohibits face-to-face transactions that do not involve remote delivery. Defendants therefore ask the Court to grant their motion to clarify the Preliminary Injunction.

ARGUMENT

The parties agree on certain basic premises—that “[t]he Preliminary Injunction addresses “deliveries,” and that it does not directly address “delivery sales.” ECF No. 178 at 2:15. The controversy boils down to the meaning of the term “delivery.”²

I. The Preliminary Injunction prohibits “remote delivery” conduct.

A “delivery” under the PACT Act and the Preliminary Injunction is related to a “delivery sale,” though the terms are not synonymous. As Defendants stated in their opening brief, §

² “Statutory construction,” the Supreme Court has explained, “is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear ... or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.” *United Sav. Ass’n of Texas v. Timbers of Inwood Forest Assoc.*, 484 U.S. 365, 371 (1988). It is therefore a “basic canon of statutory construction that identical terms within an Act bear the same meaning.” *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 478 (1992); *see also Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 587 U.S. 262, 268 (2019) (statutory construction “avoid[s] interpretations that would attribute different meanings to the same phrase”) (cleaned up). Courts should also “construe laws in harmony with the legislative intent and seek to carry out legislative purpose.” *Foster v. United States*, 303 U.S. 118, 120 (1938). “When words have several plausible definitions, context differentiates among them,” such that “a word capable of many meanings is refined by its neighbors, which often avoids the giving of unintended breadth to the Acts of Congress.” *United States v. Hansen*, 599 U.S. 762, 776 (2023) (cleaned up).

1 376a(e)(2)(A) only “applies to transactions that involve a ‘remote delivery’ of the kind described
 2 in the ‘Delivery sales’ definition, § 375(5)(B).” ECF No. 170-1 at 22-23. A face-to-face sale,
 3 where the buyer places and collects their order in the physical presence of the seller, does not come
 4 within § 376a(e)(2)(A). This is because no “method of remote delivery” is involved and the seller
 5 is “in the physical presence of the buyer when the buyer obtains possession of the cigarettes.” §
 6 375(5)(B). Face-to-face sales therefore do not violate the Prohibited Delivery Provision or the
 7 Preliminary Injunction.

8 Several considerations tie the term “delivery” in § 376a(e)(2)(A) to the defined term
 9 “delivery sale.” As detailed in Defendants’ opening brief, the PACT Act as a whole is focused on
 10 the regulation of “Internet and other remote sellers of cigarettes.” PACT Act, Pub. L. No. 111-154,
 11 § 1(c)(1). Congressional findings emphasize the dangers associated with the sale of cigarettes “over
 12 the Internet, and through mail, fax or phone orders.” *Id.* § 1(b)(4); *see* ECF No. 170-1 at 9.

13 To address the problem, the PACT Act imposes requirements on “delivery seller[s]” for
 14 their “delivery sales.” § 376a(a). Delivery sales have a remote ordering component, § 375(5)(A),
 15 or a remote delivery component, § 375(5)(B). Several provisions of the Act address deliveries, and
 16 because the Act’s express purpose is to regulate “delivery sales” by “delivery sellers,” naturally the
 17 deliveries referenced in the Act are the kind of deliveries that are involved in a delivery sale.

18 Examples of how the PACT Act uses the terms “deliver” or “delivery” demonstrate that
 19 these terms consistently refer to a method of remote delivery as described in § 375(5)(B), unless
 20 the context clearly requires a different meaning. Numerous PACT Act provisions link deliveries
 21 with the shipment of packages or with common carriers³ or other delivery services.⁴ These

22 ³ A “common carrier” transports merchandise from one place to another for hire. § 375(3).

23 ⁴ *See* § 376(a)(2) (requiring disclosure of the person “delivering the shipment to the recipient on
 24 behalf of the delivery seller”); § 376a(b)(1) (referring to the “delivery address” on the outside of a
 25 shipping package); § 376a(b)(2) (requiring improperly labelled packages to be “treated as
 26 nondeliverable matter by a common carrier or other delivery service,” and referring to “a common
 27 carrier or other delivery service” refusing to accept the package “for delivery”); § 376a(b)(4)
 28 (providing that a “delivery seller who mails or ships tobacco products ... shall not sell, deliver, or
 cause to be delivered any tobacco products” to an underage person, and otherwise referring to
 mailing or shipping as delivery); § 376a(e)(1)(A)(i)(II) (requiring distribution of the noncompliant
 (continued...))

provisions throughout the PACT Act consistently use the term “delivery” to mean the transportation of a package from one place to another, or in other words, a remote delivery.⁵ In accordance with the “basic canon of statutory construction that identical terms within an Act bear the same meaning,” *Estate of Cowart* at 478, the term “delivery” in § 376a(e)(2)(A) likewise means remote delivery.

Other PACT Act provisions separately enumerate sales and deliveries, indicating they are distinct from one another.⁶ These provisions demonstrate the Act’s consistent conceptual distinction between sale and delivery: the “delivery” of cigarettes does not encompass the “sale” of cigarettes. Therefore, when the Act intends to address both “delivery” and “sale,” it uses both terms.

The PACT Act’s conception of “delivery sales” also demonstrates the Act’s central premise that not every sale is a delivery sale, and therefore not every sale is subject to the Act. Moreover,

list to “common carriers and other persons that deliver small packages to consumers in interstate commerce, including the United States Postal Service”); § 376a(e)(1)(A)(ii) (requiring noncompliant list to be made available to others “engaged in the business of interstate deliveries or who deliver[] cigarettes or smokeless tobacco in or into any State”); § 376a(e)(3)(B) (referring to “a settlement agreement relating to tobacco product deliveries to consumers,” specifically including agreements with DHL, UPS, and FedEx “to block illegal deliveries of cigarettes” and other agreements with “common carrier[s]”); § 376a(e)(4)(A) (addressing the handling of “the delivery of a package” by a “common carrier or other delivery service” for a person on the noncompliant list); § 376a(e)(5)(A) (addressing state, local and tribal laws “relating to delivery sales that restrict[] deliveries of cigarettes or smokeless tobacco to consumers by common carriers or other delivery services on behalf of delivery sellers”); § 376a(e)(9)(A) & (B) (referring to “any common carrier or other person making a delivery subject to this subsection”); § 376a(e)(9)(C) (referring to a “delivery” or “deliveries” by “any common carrier or person in the business of delivering packages on behalf of other persons”); §§ 377(a)(1)(B) & (b)(3)(A) (addressing the liability of a “common carrier or independent delivery service” for “delivery violations”).

⁵ The only outlier is “electronic nicotine delivery system,” § 375(7), where the word “delivery” is used in a way that is plainly distinct from the PACT Act’s use of the term in any other context.

⁶ See § 376a(a)(3)(D) (referring to laws imposing “payment obligations or legal requirements relating to the *sale, distribution, or delivery* of cigarettes”) (emphasis added); § 376a(b)(3) (“A delivery seller shall not *sell, offer for sale, deliver, or cause to be delivered in any single sale or single delivery* any cigarettes or smokeless tobacco weighing more than 10 pounds.”) (emphasis added); § 376a(d) (providing that “no delivery seller may *sell or deliver* to any consumer, or *tender to any common carrier or other delivery service...*” without complying with specified requirements) (emphasis added); see also § 376(a) (separately enumerating “sale, transfer, or shipment”).

1 not every cigarette delivery, broadly defined, is the kind of delivery that triggers the PACT Act's
2 application. The specificity with which Congress defined and limited the Act's focus on "delivery
3 sales" by excluding any delivery other than a "remote delivery" further demonstrates the deliberate,
4 consistent intent to address remote deliveries throughout the Act.

5 The PACT Act section in question here is § 376a(e)(2)(A), which provides in relevant part,
6 "no person who delivers cigarettes ... to consumers shall knowingly complete, cause to be
7 completed, or complete its portion of a delivery of any package for any person whose name and
8 address are on the list, unless...." This language, and the use of the terms "delivers" and "delivery,"
9 are absolutely consistent with the use of these terms throughout the PACT Act. Section
10 376a(e)(2)(A) speaks of the delivery of any "package," similar to the numerous sections clearly
11 addressing the shipment of packages as deliveries. Moreover, it does not use the word "sale,"
12 unlike the other PACT Act sections that use both terms in order to cover both sales and deliveries.
13 If Congress had intended to prohibit all sales by persons listed on the noncompliant list, including
14 non-delivery, face-to-face sales, it would have simply used the word sale. "Delivery" refers to the
15 transportation of merchandise, just as it does everywhere else it appears in the Act.

16 Accordingly, the Court has characterized this provision and the Preliminary Injunction as
17 centered around "the physical transport of cigarettes for Azuma." Order, May 27, 2025, at 7, ECF
18 No. 131. Surrounding conduct such as "actions required to precipitate, plan and execute a delivery"
19 are also prohibited, but the central indispensable element is the "delivery" of Azuma cigarettes, or
20 "the physical transport of cigarettes for Azuma." *Id.*

21 Jeffery A. Cohen, a former attorney with the Bureau of Alcohol, Tobacco, Firearms and
22 Explosives ("ATF"), who supervised federal enforcement of the PACT Act for decades, confirms
23 in a Declaration submitted herewith that ever since the PACT Act was signed into law in 2010, the
24 consistent position of ATF has been that the Act's delivery sale provision applies solely to
25 remote/non-in person orders of cigarettes or orders of cigarettes which are delivered to another
26 location by either a common carrier or a private delivery service. Declaration of Jeffery A. Cohen,
27 Esq., ¶ 9. For instance, ATF has never placed an entity that was solely engaged in face-to-face
28 transactions, not involving remote orders or remote delivery, on the noncompliant list. *Id.* ¶ 10.

1 Nor has ATF ever initiated a criminal or civil PACT Act enforcement action for face-to-face
 2 transactions where a person placed an order for cigarettes at the vendor's location and the purchaser
 3 picked up the cigarettes at this location and transported the cigarettes to their place of business. *Id.*
 4 ¶ 11. When ATF encountered cigarette sellers conducting face-to-face transactions which did not
 5 involve common carriers, private delivery services, or remote delivery to another location, ATF did
 6 not consider these transactions delivery sales within the scope of the PACT Act, and therefore did
 7 not pursue PACT Act enforcement actions against such businesses. *Id.* ¶ 12. ATF did not proceed
 8 with PACT Act enforcement actions unless it could establish remote order or delivery by a private
 9 delivery service or common carrier. *Id.* ATF considered the term "delivery" in the PACT Act,
 10 including its use in § 376a(e)(2)(A), to mean a remote delivery as described in § 375(5)(B).⁷

11 **II. The Preliminary Injunction does not prohibit all Azuma's sales to consumers.**

12 California relies on dictionary definitions rather than the PACT Act to argue that a
 13 "delivery" under § 376a(e)(2)(A) is a sweepingly broad term encompassing a very technical
 14 definition such that any transfer of cigarettes to a consumer is prohibited. ECF No. 178 at 3-4. The
 15 surrounding context of § 376a(e)(2)(A), however, indicates Congress used the term "delivery" in a
 16 specific manner, not with the near limitless meaning California's dictionary definition would give
 17 it. *See Hansen*, 599 U.S. at 775-76; *Dubin v. United States*, 599 U.S. 110, 120 (2023). There is no
 18 evidence in § 376a(e)(2)(A) or in the greater context of the PACT Act that Congress intended the
 19 term "delivery" in this one provision to mean something different than it means throughout the rest
 20 of the Act, or that it intended to prohibit the hyperlocal in-person transfer of cigarettes in an Act
 21 overwhelmingly concerned with remote deliveries. If Congress had intended to prohibit all
 22 transfers of cigarettes to consumers, or all conveyances, handovers, or sales to consumers, it could
 23 have used different words, rather than repeating the term delivery, which the Act consistently uses

24 ⁷ Cohen also reports that ATF and the Department of Justice Office of Legal Counsel both took the
 25 position that transactions that begin and are consummated in the Indian Country of one tribe are
 26 not conducted in interstate commerce as defined in the PACT Act and would not trigger PACT Act
 27 reporting requirements. Cohen Decl. ¶ 14. Relatedly, the on-reservation sales of tribally
 28 manufactured cigarettes by Azuma to its sister Alturas-owned enterprises and to Cedarville
 Rancheria are not subject to state taxation. To the extent the State's interests may affect its on-
 reservation authority in this context, an evidentiary hearing on the relevant interests is necessary.

1 in other provisions to mean a remote delivery, such as the transportation of a package by a common
2 carrier or other delivery service.

3 As shown above, several other PACT Act provisions list delivery alongside other conduct
4 when Congress intends to enlarge the scope of the provision. Section 376a(e)(2)(A) does not do
5 this. On the contrary, Congress enlarged the scope of § 376a(e)(2)(A) by articulating multiple
6 stages of the “delivery of any package.” § 376a(e)(2)(A) (providing no person “shall knowingly
7 complete, cause to be completed, or complete its portion of a delivery of any package”). Further,
8 the three exceptions to § 376a(e)(2)(A) refer variously to the good faith belief of “the person making
9 the delivery,” the recipient to whom “the delivery is made,” the weight of “the package being
10 delivered,” and the reasonable knowledge of “the person making the delivery” about what the “the
11 package contains.” § 376a(e)(2)(A)(i)-(iii). Each of these provisions fits easily with the concept
12 of remote package delivery, but they would be awkward and unlikely ways to impose a general
13 prohibition against all sales by a listed delivery seller, and to express that certain sales to consumers
14 are nevertheless authorized. California’s highly technical construction of § 376a(e)(2)(A), a
15 construction not shared by any other provision of the PACT Act addressing package delivery, is
16 not a plausible interpretation of the Act.

17 California argues that “nonsensical” and “superfluous” results would follow from
18 substituting “delivery sale” for “delivery” in § 376a(e)(2)(A). ECF No. 178 at 4. However, this
19 argument misunderstands Defendants’ motion; it is not Defendants’ position that “delivery” and
20 “delivery sale” are synonymous. Rather, “delivery” refers to a remote delivery as described in §
21 375(5)(B) – the transportation of goods by common carrier, private delivery service, or other
22 method of remote delivery, or the seller is not in the physical presence of the buyer when the buyer
23 obtains possession of the item being delivered. Section 376a(e)(2)(A) remains logical and
24 internally consistent when the “delivery of any package” is understood to mean the remote delivery
25 of any package.

26 As California recognizes, other provisions of the PACT Act refer to “delivery” in the
27 context of a “delivery seller who mails or ships tobacco products,” and in the context of deliveries
28 made “pursuant to a delivery sale.” ECF No. 178 at 5 (citing §§ 376a(b)(4) & 376a(d)). As

discussed above, these provisions and others demonstrate the Act’s consistent use of the term “delivery” to refer to remote delivery, such as mailing or shipping, as may occur in a delivery sale. The term’s use in these provisions is entirely consistent with the same use in § 376a(e)(2)(A), which applies to the delivery of packages for a subset of delivery sellers, i.e., those on the noncompliant list. Furthermore, California fails to recognize that both § 376a(b)(4) and § 376a(d) use the word “sell” in addition to “deliver,” demonstrating that Congress did not consider the act of delivering to encompass the act of selling. These sections further demonstrate that, contrary to California’s argument, not every sale involves a delivery.

California next claims Defendants’ interpretation “collapses on itself,” because Defendants point out that “delivery” does not include remote orders. ECF No. 178 at 5 (citing Defs.’ Br., ECF No. 170-1 at 9-10 n.3). Again, the problem is California’s mistaken view of Defendants’ argument, as the State attempts to refute the strawman that Defendants equate “delivery” with “delivery sale.” To the contrary, however, “delivery” simply means a “delivery” as described in § 375(5)(B). Such remote deliveries are distinct from the remote orders described in § 375(5)(A). When the PACT Act references only the delivery and not the order, it means only the delivery and not the order.

California asserts that a face-to-face purchase by a buyer’s employee is no different than a delivery to the buyer. ECF No. 178 at 6. However, § 375(5)(B) contemplates remote deliveries “to the buyer” and does not treat face-to-face purchases as deliveries. Section 375(5)(B) refers to: (i) cigarettes delivered to the buyer by common carrier; (ii) cigarettes delivered to the buyer by private delivery service; (iii) cigarettes delivered to the buyer by other method of remote delivery; and (iv) cigarettes delivered to the buyer where the seller is not in the buyer’s physical presence when the buyer obtains possession. The references to common carriers and private delivery services expressly invoke third parties making deliveries from the seller to the buyer. The phrase “delivered to the buyer by ... other method of remote delivery” does not necessarily require a third-party deliverer, and could include a “remote delivery” made by the seller itself.⁸ However, it cannot reasonably include the buyer itself collecting the cigarettes from the seller, as one would not

⁸ The Court has previously held that § 376a(e)(2)(A) prohibits deliveries made by Azuma on its own behalf.

1 plausibly describe a seller handing items over to a buyer in person at the seller’s facility as making
2 a “delivery to the buyer by [a] method of remote delivery.” “Remote delivery,” particularly when
3 listed alongside deliveries to the buyer by common carrier and by private delivery service, does not
4 connote a direct in-store handoff from seller to buyer, but suggests, as the Court noted in describing
5 the core conduct prohibited by the Preliminary Injunction, the “physical transport of cigarettes for
6 Azuma.” ECF No. 131 at 7. The final descriptive phrase, “or the seller is not in the physical
7 presence of the buyer when the buyer obtains possession,” excludes circumstances in which the
8 buyer itself (as opposed to a third-party delivery service) collects cigarettes directly from the seller,
9 because in that case the buyer would obtain possession in the seller’s physical presence. Short of
10 a remote drop-off scenario, this type of remote delivery requires a third party to act as transporter
11 from seller to buyer.

12 Further confirmation is found in the fact that § 376a(e)(2)(E) addresses, at the core, the
13 “delivery of any package for any person whose name and address are on the list.” Ordinarily, we
14 would never say a person who buys an item and brings it home from the store is engaged in the
15 “delivery” of that item “for” the store. It would take a profound contortion of the English language
16 to conclude that a delivery for Azuma occurs under these circumstances.

17 California argues that no “practical” reason exists to distinguish between a buyer’s
18 employees and third-party delivery services. ECF No. 178 at 6. The reason is that the PACT Act
19 regulates delivery sales and remote deliveries, not face-to-face sales that do not involve remote
20 delivery. A business entity necessarily conducts transactions through employees acting on the
21 entity’s behalf, so when an employee of the Desert Rose Casino, for instance, appears in person at
22 Azuma’s facility to buy cigarettes from Azuma and collect them on behalf of Desert Rose Casino,
23 this is a face-to-face transaction between Azuma and Desert Rose Casino. It is functionally
24 identical to a face-to-face transaction between natural persons, to whom business entities are
25 equivalent under the PACT Act. *See* § 375(11) (“The term ‘person’ means an individual,
26 corporation,” etc.). Since it does not violate the Act when an individual obtains cigarettes in a face-
27 to-face transaction, it also does not violate the Act for a business entity to do so through its
28

1 employee. The reason it is different for a business entity (or individual) to use a third-party delivery
 2 service is that, in that case, the transaction involves a black-letter delivery under § 375(5)(B).

3 California’s interpretation of § 376a(e)(2)(A) and the Preliminary Injunction is not
 4 necessary to avoid a “gaping enforcement gap,” as they claim. *See* ECF No. 178 at 6. Defendants’
 5 interpretation does not “contravene the purposes of the PACT Act,” *id.*, but instead honors the
 6 PACT Act’s express statutory focus on delivery sales and delivery sellers. Defendants’
 7 interpretation respects the language that Congress used to hone precisely its specific intentions.
 8 Defendants’ interpretation still greatly limits the ability of a delivery seller whose name is on the
 9 noncompliant list to continue operating as a delivery seller – instead of remote deliveries, their
 10 business must rely on face-to-face transactions. California’s protest that Azuma should not be
 11 allowed to engage even in face-to-face transactions is simply the result of California’s having
 12 sought and obtained a preliminary injunction under § 376a(e)(2)(A) of the PACT Act. California
 13 cites no cases, and Defendants are not aware of any, indicating that any provision of the PACT Act
 14 applies to non-delivery, face-to-face sales. Moreover, the attached declaration of former ATF
 15 Attorney Jeffrey A. Cohen confirms the ATF has never interpreted the PACT Act to apply to non-
 16 delivery, face-to-face sales. The PACT Act is a statute whose specific focus is ensuring delivery
 17 sales—not all sales—comply with applicable state law, and under § 376a(e)(2)(A) the specific
 18 consequence for a delivery seller being listed as noncompliant is that their packages may no longer
 19 be delivered—not that they must halt all sales.

20 CONCLUSION

21 Defendants respectfully request that the Court clarify the Preliminary Injunction does not
 22 enjoin the face-to-face, non-delivery sale of cigarettes by Azuma, including Azuma’s July and
 23 August transactions with Desert Rose Casino, AIR Fuels, and Cedarville Rancheria.

24 Dated: September 19, 2025

Respectfully submitted,

25 PEEBLES BERGIN SCHULTE & ROBINSON LLP

26 *s/ John M. Peebles*

27 John M. Peebles

28 *Attorneys for Defendants*