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

13 **BIG SANDY RANCHERIA**
 14 **ENTERPRISES, a federally chartered**
 15 **corporation,**

16 Plaintiff,

17 v.

18 **XAVIER BECERRA, in his official capacity**
 19 **as Attorney General of the State of**
 20 **California; and NICOLAS MADUROS, in**
 21 **his official capacity as Director of the**
 22 **California Department of Tax and Fee**
 23 **Administration,**

24 Defendants.

1:18-cv-00958-DAD-EPG

REPLY IN SUPPORT OF DEFENDANT
BECERRA’S MOTION TO DISMISS
PLAINTIFF BSRE’S FIRST AMENDED
COMPLAINT

Date: February 20, 2019
 Time: 9:30 a.m.
 Courtroom: 5, 7th Floor
 Judge: The Honorable Dale A. Drozd
 Trial Date: N/A
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25
26
27
28

TABLE OF CONTENTS

	Page
Introduction	1
Argument	3
I. BSRE’s Challenge to the State Taxing Scheme Fails Because BSRE Is Not a “Governing Band or Tribe”	3
II. BSRE’s Complaint Says Too Little and Demands Too Much to State a Claim on Which Relief May Be Granted.....	4
III. The Full Force of California’s Regulatory Power May Be Implemented During Transport of Cigarettes Between Indian Reservations	6
IV. Neither Federal Common Law nor the Indian Trader Statutes Preempt California’s Cigarette Laws	8

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

CASES

Aetna Life Ins. Co. v. Haworth
300 U.S. 227 (1937)..... 5

Burke v. Barnes
479 U.S. 361 (1987)..... 4

Department of Taxation & Finance v. Milhelm Attea & Bros.
512 U.S. 61 (1994)..... 6, 9, 10, 11

Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation
425 U.S. 463 (1976)..... 9

Muscogee (Creek) Nation v. Pruitt
669 F.3d 1159 (10th Cir. 2012) 3, 7, 8, 10

Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe of Oklahoma
498 U.S. 505 (1991)..... 9

People ex rel. Becerra v. Rose
16 Cal. App. 5th 317 (2017)..... 5

People v. Huber
Order Granting People’s Motion for Summary Adjudication, No. DR 110232
(Humboldt Super. Ct. Jan. 6, 2015) 9

United States v. Baker
63 F.3d 1478 (9th Cir. 1995)..... 6, 11

Wagon v. Prairie Band of Potawatomi Nation
546 U.S. 95 (2005)..... 4, 10

Washington v. Confederated Tribes of the Colville Indian Reservation
447 U.S. 134 (1980)..... 1, 2, 9, 10

Western Union Telegraph Co. v. Kansas ex rel. Coleman
216 U.S. 1 (1910)..... 11

White Mountain Apache Tribe v. Bracker
448 U.S. 136 (1980)..... 2, 7

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

Cigarette and Tobacco Products Licensing Act of 2003, Cal. Bus. & Prof. Code
 § 22980.2..... 7

Cigarette and Tobacco Products Tax Law, Cal. Rev. & Tax. Code
 § 30011..... 4
 § 30163..... 11
 § 30436..... 7

Reserve Fund Statute, Cal. Health & Safety Code
 § 104556(j) 9

COURT RULES

Fed. R. Civ. P. 8(a)(2)..... 5

OTHER AUTHORITIES

Cal. Dep’t of Tax & Fee Admin., CDTFA-501-CD Rev. 13 (10-17), Cigarette
 Distributor’s Tax Report (2017) 11

1 INTRODUCTION

2 More than four decades ago, an Indian tribe, the Confederated Bands and Tribes of the
3 Yakima Indian Nation (Yakima), created an on-reservation business enterprise to engage in the
4 wholesale distribution of cigarettes. The tribal enterprise purchased untaxed cigarettes and
5 transported them onto the tribe’s reservation. It re-sold and delivered the cigarettes to on-
6 reservation smokeshops operated by tribal members, who then re-sold the cigarettes to the
7 nonmember public. The State of Washington demanded licensing, reporting, and assistance with
8 the collection of state excise taxes. It seized trucks in transit and assessed the sellers for taxes due.
9 The Yakima responded by going to court seeking a declaration that the state’s laws could not
10 apply to its business and that of its tribal-member retailer customers.

11 Along nearly every colorable axis, the Yakima’s case was stronger than the instant one.
12 There and here, the challenged schemes “require[] collection only upon sale to a non-Indian on
13 trust land, on reservation.” Br. Appellee (Yakima Br.) 38, *Washington v. Confederated Tribes of*
14 *the Colville Indian Reservation*, 447 U.S. 134 (1980), 1979 WL 200128; *see also* First Am.
15 Compl. (FAC) ¶¶ 74–75, ECF No. 13 (discussing California scheme); Mem. Supp. Def. Becerra’s
16 Mot. to Dismiss BSRE’s First Am. Compl. (Becerra MTD) 5, ECF No. 15-1 (same). Both
17 schemes “require[] registration without fee and extensive record keeping,” although the
18 Washington scheme also required “verification of sales that are not taxable to members.” Yakima
19 Br. 38; *see also* FAC ¶¶ 78–81; Becerra MTD 6. In both, the cigarettes at issue were “purchased
20 from tribal enterprise[s] bringing employment and income to [the] tribe.” Yakima Br. 38; *see also*
21 FAC ¶¶ 100–01. In Washington, the Yakima program also included “[e]xtensive tribal regulation
22 providing for location, total employment of tribal members and pricing,” Yakima Br. 38; this case
23 includes no comparable tribal regulation because Plaintiff Big Sandy Rancheria Enterprises’s
24 (BSRE) off-reservation customers are not subject to regulations of the Big Sandy Rancheria. The
25 Yakima licensed its customers and assessed its own tax; BSRE does not allege it does so. Before
26 the lawsuit, Washington had actually assessed the Yakima-licensed tribal sellers for taxes owed;
27 the California Department of Tax and Fee Administration (CDTFA) has not. In challenging
28 Washington’s enforcement actions, the United States, as trustee, began the suit and the tribe

1 intervened; BSRE sued on its own behalf without involvement of the Tribe or the United States.
2 The list goes on.¹ *See Yakima Br.* 38–41.

3 The Yakima’s challenge failed. *See Colville*, 447 U.S. at 159–61. Its argument that the state
4 was ousted from jurisdiction by the tribe’s own regulatory scheme or its particular economic
5 interests was rejected. *Id.* at 154–59. Its argument that the state could not require licensing and
6 recordkeeping was rejected. *Id.* at 159–60. Its argument that the state lacked authority to regulate
7 transactions between the tribe and persons who were not members of the tribe was rejected. *Id.* at
8 160–61. Its argument that the state lacked the authority to seize the transportation of products
9 destined for the tribe’s Indian country was rejected. *Id.* at 161–62. Using the same measuring
10 stick formalized weeks later in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980),
11 the Court balanced the state’s interests against the federal/tribal interests for those activities
12 occurring on Indian country and upheld the state taxes as well as the licensing and reporting
13 requirements placed on Indian trader wholesalers as minimal burdens aimed to collect those
14 taxes. *See Colville*, 447 U.S. at 155–57.

15 In rejecting the Yakima’s arguments, the *Colville* Court observed that “the value marketed
16 by the smokeshops to persons coming from outside is not generated on the reservations by
17 activities in which the Tribes have a significant interest.” *Id.* at 155. Instead, “[w]hat the
18 smokeshops offer these customers, and what is not available elsewhere, is solely an exemption
19 from state taxation.” *Id.* That statement no longer covers the whole of it—as noted in our opening
20 brief, smokeshops now seek to avoid state taxes *and* fees associated with the Master Settlement
21 Agreement. *Becerra MTD 1* (citing U.S. Gov’t Accountability Office, GAO-11-313, *Illicit*
22 *Tobacco: Various Schemes Are Used to Evade Taxes and Fees* (2011)). So it certainly does not

23 ¹ Incidentally, even the Yakima thought off-reservation distribution of cigarettes was a
24 bridge too far. As they argued to the Supreme Court:

25 [Y]our writer wishes to make it clear that the Yakima Indian nation does not propose
26 any tribal pre-emption of state application of any of its laws outside of the exterior
27 boundaries of the Yakima Indian Reservation. In this case we specifically defer to the
28 state taxation of any personal property in the possession of non-Indians *outside* of the
exterior boundaries of the Yakima Indian Reservation.

Yakima Br. 31.

1 weigh in BSRE’s favor that, shortly after filing this suit, it upended its whole supply chain when
2 its primary supplier agreed to comply with State escrow fee laws. *See* Opp’n Def. Maduros’[s]
3 Mot. Dismiss FAC (Opp’n Maduros MTD) 2 & n.3, ECF No. 20. It is not such flagrancy that
4 compels dismissal of this action, however. Instead, it is the body of relevant law, settled over the
5 course of decades, that show Plaintiff’s claims to be both premature and contrary to precedent.

6 Our opening brief outlines four largely independent reasons the Complaint should be
7 dismissed. The Court should, as also detailed in Defendant Maduros’s briefing, dismiss BSRE’s
8 tax claims as barred by the Tax Injunction Act. *See* Becerra MTD 10–13; Mem. P. & A. Supp.
9 Mot. Dismiss Fifth Cause Action First Am. Compl. (Maduros MTD), ECF No. 16-1. The Court
10 should reject the Complaint for pleading facts too general and speculative to provide adequate
11 notice of its claims or a path forward for relief. Becerra MTD 18–19. The Court should, following
12 the recent lead of the Tenth Circuit in *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159 (10th
13 Cir. 2012), reject as futile BSRE’s challenges to off-reservation enforcement of state tax and
14 Complementary Statutes. *See* Becerra MTD 24–25 (discussing case); *id.* at 13–15 (describing the
15 differing standards for on- and off-reservation activities). Finally, in analyzing the facts alleged
16 by BSRE, the Court should observe, as we have, that BSRE offers nothing which, if true, could
17 rebalance state, tribal, or federal interests that have for decades sustained state cigarette laws
18 against precisely this sort of challenge. *See id.* at 15–18 (Licensing Act); *id.* at 19–20 (Cigarette
19 Tax Law); *id.* at 23–24 (Complementary Statute).

20 For these reasons as set forth in Defendant Becerra’s opening brief and as set forth below,
21 Plaintiff BSRE’s Complaint should be dismissed.

22 ARGUMENT

23 I. BSRE’S CHALLENGE TO THE STATE TAXING SCHEME FAILS BECAUSE BSRE IS 24 NOT A “GOVERNING BAND OR TRIBE”

25 Defendant Becerra agrees with and adopts the analysis presented by Defendant Maduros
26 with respect to the Tax Injunction Act. *See* Maduros MTD; Reply Supp. Maduros Mot. Dismiss
27 FAC, ECF No. 23.

28 ///

1
2 **II. BSRE’S COMPLAINT SAYS TOO LITTLE AND DEMANDS TOO MUCH TO STATE A CLAIM ON WHICH RELIEF MAY BE GRANTED**

3 Federal courts do not render advisory opinions. And the State of California does not apply
4 its cigarette laws in the abstract. BSRE says it wants the Court “to clarify the limits of State
5 authority concerning BSRE’s wholesale distribution of tribally-manufactured cigarettes to Indian
6 tribes and their members on their reservations.” Opp’n Def. Becerra’s Mot. Dismiss FAC (Opp’n
7 Becerra MTD) 1, ECF No. 21. We objected that the requested relief—asking this Court to sign
8 off on every transaction the company has made or will ever make—was impossible to reconcile
9 with the remainder of the Complaint, which details precisely zero of those transactions or any
10 current enforcement against it by the State Defendants. Plaintiff responds that it “cannot
11 understand” our claim that the Complaint contains inadequate factual detail to show its
12 entitlement to relief, and points to our sending of warning letters as evidence that we know
13 enough to move this case forward. *Id.* at 3.

14 These are not answers. They do nothing to help the Court or the parties resolve the
15 fundamental disconnect between the sweeping declarations Plaintiff seeks and the absence of any
16 allegations as to exactly who its customers are and where or how the relevant transactions occur.
17 *See* Becerra MTD 18–19; *cf. Wagon v. Prairie Band of Potawatomi Nation*, 546 U.S. 95, 101
18 (2005) (“[U]nder our Indian tax immunity cases, the ‘who’ and the ‘where’ of the challenged tax
19 have significant consequences.”). As pleaded, we cannot determine whether the purported dispute
20 between BSRE and our office is factual, legal, or both. Indeed, given the level of generality
21 pleaded, we cannot even rule out the possibility that as to some of the issues raised there are no
22 disputes, and this Court is being asked to adjudicate a consensus.²

23 Courts require there to be an actual claim or controversy before taking up a case. *See Burke*
24 *v. Barnes*, 479 U.S. 361, 363 (1987). They resolve disputes that are “definite and concrete . . . as
25 distinguished from [providing] an opinion advising what the law would be upon a hypothetical

26 ² Plaintiff has pleaded adequate detail to subject itself to the State’s licensing and
27 reporting requirements. *See* Cal. Rev. & Tax. Code § 30011 (defining “distributor”); *cf.* FAC ¶ 79
28 (“On its face, the Cigarette and Tobacco Products Licensing Act would apply to the Tribe as a distributor and as an importer.”).

1 state of facts.” *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240–41 (1937) (citations omitted).
 2 They do not make a practice of endorsing transactions or events as to which there is no
 3 disagreement. They do not, as BSRE asks here, “consider every conceivable situation which
 4 might possibly arise in the application of complex and comprehensive legislation.” *Becerra MTD*
 5 19 (quoting *United States v. Raines*, 362 U.S. 17, 21 (1960)).

6 And, perhaps most obviously, Courts do not make a habit of excusing future bad acts. Even
 7 if the Court believes the Complaint contains a “plain statement of the claim showing that the
 8 pleader is entitled to relief,” Fed. R. Civ. P. 8(a)(2), as to its past business dealings, BSRE cannot
 9 receive a declaration that application of state law will be “preempted by federal law” or an
 10 injunction barring the State from “enforcing, applying or implementing such laws” against it no
 11 matter what. FAC Req. Relief ¶¶ 1–2, at 36. The Complaint demonstrates BSRE’s repeated
 12 willingness and ability to tack its business—to change its business structure,³ reorganize its
 13 supply chain,⁴ or engage in trade with an evolving pool of customers⁵—in ways that could raise
 14 different factual and legal questions in the future. Given the paucity of concrete allegations and
 15 failure to identify even a single particular transaction, the only relief the Court could give is to
 16 declare that when in the future Plaintiff comports with the law, its activities are lawful, and that
 17 when it does not, they are not.

18 BSRE admits that “a complaint . . . must contain either direct or inferential allegations
 19 respecting all the material elements necessary to sustain recovery under some viable legal
 20 theory.” *Opp’n Becerra MTD 2–3* (alteration in original) (quoting *Cummings v. Cenergy Int’l*

21 ³ See FAC ¶ 116 (describing the Tribe’s earlier distribution enterprise).

22 ⁴ See *Opp’n Maduros MTD 2* (“The cigarettes BSRE sells are manufactured by Azuma
 23 Corporation When the FAC was drafted and filed, BSRE also imported and sold cigarettes
 24 manufactured by Grand River Enterprises Six Nations, Ltd. (‘GRE’) BSRE now no longer
 imports GRE cigarettes and no longer sells them BSRE also intends to begin manufacturing
 cigarettes on its reservation” (citations omitted)).

25 ⁵ Despite Plaintiff’s allegations, it has counted among its customers those who are not
 26 Indians on their own reservations, and those customers have already been held subject to State tax
 27 and fee requirements. See, e.g., *People ex rel. Becerra v. Rose*, 16 Cal. App. 5th 317, 321 (2017)
 28 (“Defendant Darren Paul Rose, who is a member of the Alturas Indian Rancheria, ran two smoke
 shops . . . located in Indian country but far from any lands governed by the Alturas Indian
 Rancheria.”).

1 *Servs., LLC*, 258 F. Supp. 3d 1097, 1105 (E.D. Cal. 2017)). It fails to provide such adequate
2 allegations, and so the Complaint should be dismissed.

3
4 **III. THE FULL FORCE OF CALIFORNIA’S REGULATORY POWER MAY BE IMPLEMENTED
DURING TRANSPORT OF CIGARETTES BETWEEN INDIAN RESERVATIONS**

5 The Complaint states that BSRE purchases and receives its off-directory cigarettes “at its
6 warehouse facilities on the Tribe’s reservation in Auberry, California.” FAC ¶ 122. Then, the
7 Complaint states that those cigarettes are sold and delivered to its customers on those customers’
8 “own Indian reservation / Indian Country.” FAC ¶¶ 123–24. Plaintiff claims these allegations
9 establish that it is an Indian trader and thus its trade in cigarettes off its own reservation are
10 immune from State regulation under the Indian Trader Statutes. *See, e.g.,* Opp’n Becerra MTD 7–
11 8.

12 Contrary to Plaintiff’s assertions, our opening brief neither concedes the factual predicate
13 that BSRE qualifies as an Indian trader, nor its argument that its alleged status as an Indian trader
14 preempts all State interests in its sales to Indians on their Indian country. Becerra MTD 20–22,
15 24; *see also Dep’t of Taxation & Fin. v. Milhelm Attea & Bros.*, 512 U.S. 61, 71 (1994)
16 (“Although language in *Warren Trading Post [Co. v. Ariz. Tax Comm’n]*, 380 U.S. 685 (1965),]
17 suggests that no state regulation of Indian traders can be valid, our subsequent decisions have
18 ‘undermine[d]’ that proposition.” (second alteration in original) (quoting *Central Machinery Co.*
19 *v. Ariz. State Tax Comm’n*, 448 U.S. 160, 172 (1980) (Powell, J., dissenting))); *cf. United States*
20 *v. Baker*, 63 F.3d 1478, 1490 (9th Cir. 1995) (upholding conviction of Indian traders based on
21 transportation of cigarettes to on-reservation retailers in violation of Washington state law).

22 Regardless of such status, we explain, BSRE minimizes the portion of its alleged
23 transactions where the State claims the greatest interest—when the cigarettes BSRE “wholesales”
24 to its customers are neither on the Big Sandy Rancheria awaiting sale nor on the purchasing
25 customer’s reservation where the transaction is allegedly consummated. Between those two
26 points, BSRE inaccurately claims that “federal law analysis requires a ‘particularized inquiry’
27 into the facts underlying the State’s asserted interests.” Opp’n Becerra MTD 4 (quoting *Bracker*,
28 448 U.S. at 145). Instead, when BSRE is “going beyond reservation boundaries,” it is subject to,

1 and must comply with, “nondiscriminatory state law otherwise applicable to all citizens of the
2 State.” Becerra MTD 14 (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148–49
3 (1973)); *see also* Cal. Rev. & Tax. Code § 30436(a)–(b), (e) (declaring both unlicensed transport
4 of unstamped cigarettes and stamped off-directory cigarettes seizable contraband); Cal. Bus. &
5 Prof. Code § 22980.2(c) (declaring unlicensed sellers’ cigarettes seizable contraband).

6 BSRE tries to dismiss this as the State “bootstrapping” off-reservation powers into on-
7 reservation ones. Opp’n Becerra MTD 20. But even as BSRE describes it, the State’s enforcement
8 can anticipate violations of state law—the State need not wait for BSRE’s on-reservation
9 customers to make prohibited sales before intervening. *See* Opp’n Becerra MTD 20–21 (noting
10 that the state is authorized to seize cigarettes “even though ‘the cigarettes in transit are as yet
11 exempt from state taxation’” (quoting *Colville*, 447 U.S. at 161–62)). Thus, BSRE’s
12 “bootstrapping” argument collapses given BSRE’s repeated concessions that some on-reservation
13 sales of its cigarettes would be subject to California law even under its analysis. *See id.* at 11
14 (“BSRE acknowledges the possibility that some cigarettes may not be exempt . . . and . . .
15 identified State taxes ultimately may apply to some retail sales”); *id.* at 13–14 (asserting that
16 State reporting obligations will be satisfied by retailer reporting alone); FAC ¶¶ 195–96.

17 BSRE’s responses attempt to draw the Court into a *Bracker* analysis of its on-reservation
18 sales, *see* Opp’n Becerra MTD 4 (Complementary Statute); *id.* at 18–19 (Cigarette Tax Law); *id.*
19 at 22 (Licensing Act), despite the State’s assertion that its off-reservation powers, evaluated under
20 *Mescalero*, are adequate to end the case. So held the Tenth Circuit in *Muscogee (Creek) Nation v.*
21 *Pruitt*, 669 F.3d 1159 (10th Cir. 2012). There, Oklahoma enforced its tax and complementary
22 statutes by seizing unstamped cigarettes en route to on-reservation sellers. The circuit court, in
23 affirming the district court’s dismissal, agreed that such off-reservation enforcement could not
24 support the Indian trader plaintiff’s challenge to those laws. “According to the Supreme Court,” it
25 explained, “ancillary effects arising from enforcement of nondiscriminatory state laws outside
26 Indian country do not call for a *Bracker* preemption analysis.” *Muscogee (Creek) Nation*,
27 669 F.3d at 1181 (citing *Wagnon*, 546 U.S. at 112–14).

28

1 BSRE's only response to *Muscogee (Creek) Nation* is to say the case involved a
2 precollection tax system. *See* Opp'n Becerra MTD 10, 15–16. But that (1) is not a relevant part of
3 the court's analysis, which agreed that anticipated non-collection of state taxes was sufficient, *see*
4 669 F.3d at 1178 (citing *Colville*, 447 U.S. at 161–62); and (2) is wholly irrelevant to the court's
5 Complementary Statute analysis, where off-reservation seizures were also sustained, *see id.* at
6 1180–81.

7 Plaintiff is not entitled to the relief it seeks due to the logistical realities of the distributions
8 it alleges in its Complaint. Even assuming all of Plaintiff's transactions would be exempt from the
9 challenged laws if viewed at the point of sale in isolation, Plaintiff cannot obtain a declaration
10 that its activities are wholly beyond the reach of the Licensing Act, Cigarette Tax Law, and
11 Complementary Statute.

12 **IV. NEITHER FEDERAL COMMON LAW NOR THE INDIAN TRADER STATUTES PREEMPT** 13 **CALIFORNIA'S CIGARETTE LAWS**

14 Plaintiff "alleges that the State lacks the specific interest in compelling BSRE to comply
15 with [the challenged laws], as is necessary to outweigh the federal and tribal interests in tribal
16 self-government." Opp'n Becerra MTD 21. But the challenged California laws fit squarely within
17 those already sanctioned by the Supreme Court as consonant with federal common law—the
18 balance of interests has already been struck, and Plaintiff's challenge fails as a matter of law.

19 Plaintiff first claims that California's interest in its licensing scheme is a nullity, arguing
20 that it "reinforces itself, rather than enhancing tax collection." Opp'n Becerra MTD 22. This
21 misconstrues California's cigarette regime. As explained in our opening brief, the licensing
22 scheme is "designed to ensure the collection of tax on all cigarettes sold to non-exempt
23 consumers and to prevent fraudulent transactions to flout such taxes." Becerra MTD 4; *see also*
24 *id.* at 6 (describing legislative intent to prevent "unlawful distributions and untaxed sales of
25 cigarettes" in expanding licensure requirements (quoting Cal. Bus. & Prof. Code § 22970.1(b))).
26 Far from "serv[ing] no purpose," Opp'n Becerra MTD 23, California's comprehensive cigarette
27 licensing regime is central to its collection of valid cigarette taxes, *see* Becerra MTD 4–5. By
28 requiring all distributors to become licensed and to report their distributions, the State is able to

1 determine if any particular cigarette transaction incurs a tax obligation, and collect tax if
2 appropriate. *See id.* at 4–6. For those distributions that are themselves tax exempt, the licensing
3 scheme similarly allows the State to track these cigarettes—which remain potentially taxable—so
4 that it can determine if subsequent distributions incur a tax obligation. *See id.* at 16–17. Similarly,
5 the licensing scheme allows for correct accounting of escrow fee obligations held by the
6 manufacturer. *See* Cal. Health & Safety Code § 104556(j) (defining the distributions that incur
7 escrow fee obligations).

8 In an attempt to negate the State’s interests, Plaintiff floats some ideas about why *some* on-
9 reservation retailers may *sometimes* be able sell untaxed, off-directory cigarettes to the general
10 public. *See* Opp’n Becerra MTD 16–20. We disagree with those arguments, but regardless and as
11 noted above, in making these arguments, Plaintiff admits that some of the sales its retail
12 customers make are subject to State regulatory authority. *See, e.g.,* Opp’n Becerra MTD 11; *cf.*
13 Order Granting People’s Mot. Summ. Adjudication, *People v. Huber*, No. DR 110232 (Humboldt
14 Super. Ct. Jan. 6, 2015), appeal docketed, Case No. A144214, 1st Dist., Div. 4 (Cal. Ct. App. Feb.
15 10, 2015) (enjoining BSRE-supplied tribally-licensed retailer from selling untaxed, off-directory
16 cigarettes after it sold millions of such cigarettes). Plaintiff’s acknowledgment that some of the
17 cigarettes it distributes are sold in regulable transactions contradicts its assertion that the State
18 lacks an interest in applying the challenged laws to Plaintiff.

19 Instead, the State’s interest in the tax and licensing scheme is identical to the states’
20 interests in every Supreme Court case validating state taxation of on-reservation sales to
21 nonmembers and the licensing requirements necessary to collect those taxes. *See, e.g., Moe v.*
22 *Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 483 (1976)
23 (holding the Montana’s interest in collecting lawful taxes outweighs the burden of collection and
24 remittance); *Colville*, 447 U.S. at 159–60 (upholding recordkeeping requirements aimed at
25 collecting cigarette taxes lawfully imposed on sales to nonmembers); *Okla. Tax Comm’n v.*
26 *Citizen Band of Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 512 (1991) (“[T]he doctrine of
27 tribal sovereign immunity . . . does not excuse a tribe from all obligations to assist in collection of
28 validly imposed state sales taxes.”); *Dep’t of Taxation & Fin. v. Milhelm Attea & Bros.*, 512 U.S.

1 61, 73 (1994) (“*Moe, Colville, and Potawatomi* make clear that the States have a valid interest in
2 ensuring compliance with lawful taxes that might easily be evaded through purchases of tax-
3 exempt cigarettes on reservations . . .”). And as explained in our opening brief, the
4 Complementary Statute serves near-identical State interests in ensuring cigarettes sold to the
5 public do not avoid the \$7.00 per carton escrow fee. *See* Becerra MTD 23–24 (citing cases).

6 Plaintiff places nothing on the other side of the scale. It alleges no tribal interest that could
7 outweigh the State’s legitimate interest in collecting lawful cigarette taxes or ensuring that escrow
8 fees are collected for sales *made to the nonmember public*. Instead, all it alleges are vague
9 “interests in tribal self-government.” FAC ¶ 184. Plaintiff contends that “[i]ts goal is to guard
10 against unjustified State interference with commerce in Indian country,” Opp’n Becerra MTD 23,
11 but its Complaint contains no allegations of how California’s licensing and reporting
12 requirements impede that commerce in any way. It also claims “it is not BSRE’s goal to hide its
13 sales activities from view,” *id.*, but read in the light most favorable to it, as is required at this
14 stage in the proceeding, what other benefit could it receive from flouting the State’s reporting
15 requirements?

16 The analysis under the Indian Trader Statutes is no different. Plaintiff argues the Indian
17 Trader Statutes preempt the challenged laws as applied to it because Plaintiff is a wholesale
18 distributor instead of a retailer. *See* Opp’n Becerra MTD 21–23. As detailed in our opening brief,
19 this core “wholesale/retail” distinction has been considered and rejected by higher courts. *See*
20 Becerra MTD 16–17. *Milhelm* squarely addressed whether the Indian Trader Statutes preempt the
21 state regulatory burdens approved in *Colville*, when those burdens are moved up the supply chain
22 from the Indian retailer to its Indian trader wholesaler. The Court said no, there is no such
23 preemption. *See Milhelm* 512 U.S. at 74 (“It would be anomalous to hold that a State could
24 impose tax collection and bookkeeping burdens on reservation retailers who are themselves
25 enrolled tribal members . . . but that similar burdens could not be imposed on wholesalers, who
26 often . . . are not.”); *accord Muscogee (Creek) Nation*, 669 F.3d at 1177 (“Requiring wholesalers,
27 who are the stamping agents, to be [l]icensed helps protect the State’s valid interest in preventing
28 evasion of its valid cigarette tax.”).

1 In response, Plaintiff argues that *Milhelm* is distinguishable because “there the wholesale
2 distributor had primary responsibility for differentiating taxed and tax-free cigarettes.” Opp’n
3 Becerra MTD 22. But in California, distributors have the same responsibility. *See* Cal. Rev. &
4 Tax. Code § 30163 (placing the responsibility of applying tax stamps on distributors); Cal. Dep’t
5 of Tax & Fee Admin., CDTFAs-501-CD Rev. 13 (10-17), Cigarette Distributor’s Tax Report
6 (2017) (requiring distributors report both taxed and untaxed distributions). Furthermore,
7 Plaintiff’s argument, in essence, is that California’s imposition of a lesser burden on its
8 distributors—requiring only licensing and reporting of cigarette distributions rather than
9 precollection of the taxes as well—could somehow tilt the balance of interests towards
10 preemption. That defies logic. Borrowing from Justice Holmes: “Even in the law the whole
11 generally includes its parts. If the State may prohibit, it may prohibit with the privilege of
12 avoiding the prohibition in a certain way.” *W. Union Tel. Co. v. Kansas ex rel. Coleman*, 216 U.S.
13 1, 53 (1910) (Holmes, J., dissenting). Likewise, if the State may compel, it may also compel *less*.
14 *Cf. Baker*, 63 F.3d at 1489 (“There are no longer any record-keeping requirements imposed upon
15 Indian retailers, nor are the retailers required to buy stamps from the state and personally affix
16 them to packages of cigarettes bound for sale to nontribal members. If Washington’s tax scheme
17 did not unduly interfere with Indian sovereignty when *Colville* was decided, it certainly does not
18 do so now.” (footnote omitted))

19 Applying the challenged laws to Plaintiff falls squarely within the state regulatory authority
20 that the Supreme Court has already found outside the preemptive scope of both federal common
21 law and the Indian Trader Statutes. Aside from the pleading defects outlined above and Plaintiff’s
22 disregard for the time its cigarettes are in transit between the Big Sandy Rancheria and the
23 purchasing customer’s reservation, Plaintiff’s challenges fail as a matter of law and should be
24 dismissed with prejudice.

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Respectfully Submitted,

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