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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, ex rel. ROB BONTA, in his official capacity as Attorney General of the State of California, Plaintiff, **v.** **AZUMA CORPORATION, et al.,** Defendants.	2:23-cv-00743-KJM-DB **DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS** Date: October 13, 2023 Time: 10:00 a.m. Courtroom: 3, 15th floor Judge: Hon. Kimberly J. Mueller Trial Date: N/A Action filed: April 19, 2023

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INTRODUCTION

Defendants move to dismiss all claims in the Complaint. The Court lacks subject matter jurisdiction based on the sovereign immunity of Azuma Corp. ("Azuma") as an arm of the Alturas Indian Rancheria ("Tribe"), and of Philip Del Rosa, Darren Rose, and Wendy Del Rosa ("Tribal Officials") as sued in their official capacity. Philip Del Rosa and Darren Rose are entitled to qualified personal immunity from the claims against them in their personal capacity. The Complaint fails to join Azuma's tribally-owned customers ("Tribal Retailers") who are necessary and indispensable parties under Federal Rule of Civil Procedure 19. Finally, the Complaint fails to state a claim for violation of the Contraband Cigarette Trafficking Act ("CCTA"), as the CCTA provisions at issue do not apply to federally licensed cigarette manufacturers or their agents, and fails to state a claim for violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), which is premised on the alleged CCTA violation.

BACKGROUND

Azuma is chartered pursuant to the laws of, and is wholly owned and operated by, the Alturas Indian Rancheria (the "Tribe"), a federally recognized Indian Tribe, *see* Indian Entities Recognized…, 88 Fed. Reg. 2112 (Jan 12, 2023), which is governed by its three-member Business Committee. Defendants Phillip Del Rosa, Darren Rose, and Wendy Del Rosa are the members of the Business Committee.

Azuma's cigarette factory is on the Alturas Indian Rancheria, the title to which is held by the United States in trust for the benefit of the Tribe. Azuma holds a Permit to Manufacture Tobacco Products issued by the United States Department of Treasury, Alcohol, Tobacco Tax and Trade Bureau and complies with all applicable federal tobacco product laws, the applicable tribal laws of the Alturas Indian Rancheria, and laws of the tribal jurisdictions into which it sells. *See generally* Declaration of Darren Rose ("Rose Decl."), Doc. No. 23-3. Pursuant to its Permit, Azuma manufactures cigarettes sold under various trade names. Once manufactured, Azuma sells its cigarettes to retailers that are wholly owned by other federally recognized Indian tribes ("Tribal Retailers") operating within Indian Country inside the State of California. The Tribal Retailers are licensed and regulated by the laws of their respective tribes.

Azuma's cigarettes travel directly from the Alturas Rancheria to the Indian Country of the Tribal Retailers, and do not travel in interstate commerce at any time. The Tribal Retailers sell the cigarettes to consumers within Indian Country at tribal commercial developments including casinos owned and operated by their tribes. Declaration of Wendy Ferris ("Ferris Decl."), Doc. No. 23-4, at ¶¶ 11-19; Declaration of Philip Del Rosa ("Del Rosa Decl."), Doc. No. 23-2, at ¶ 13. These commercial developments were developed and are operated by each tribe and play a significant and active role in generating value on their respective reservations. The enterprises are not developed simply to allow the sale of items such as cigarettes to take place on the reservations. Ferris Decl. at ¶¶ 11-19; Del Rosa Decl. at ¶ 10. The tribal casinos are regulated by the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq*., and gaming compacts between the State and the tribes. Ferris Decl. at ¶¶ 11-19; Del Rosa Decl. at ¶ 12. The compacts approved by the U.S. Secretary of the Interior provide, "Nothing herein shall be construed to make applicable to the Tribe any state laws or regulations governing the use of tobacco." *Id*.

LEGAL STANDARDS FOR DISMISSAL UNDER RULE 12(b)

Rule 12(b)(1). Federal Rule of Civil Procedure 12(b)(1) is a proper vehicle for an Indian tribal defendant to invoke sovereign immunity from suit. *Pistor v. Garcia*, 791 F.3d 1104, 1111 (9th Cir. 2015). "[W]hen a defendant timely and successfully invokes tribal sovereign immunity, [the Court] lack[s] subject matter jurisdiction." *Acres Bonusing, Inc. v. Marston*, 17 F.4th 901, 908 (9th Cir. 2021). When a defendant moves to dismiss under Rule 12(b)(1) "on the basis of tribal sovereign immunity, the party asserting subject matter jurisdiction has the burden of proving its existence, i.e. that immunity does not bar the suit." *Pistor* at 1111 (internal quotation marks omitted). In resolving a motion challenging the court's subject matter jurisdiction, the plaintiff's allegations are not presumed to be true, and the "district court may hear evidence regarding jurisdiction and resolve factual disputes where necessary." *Id.*

Rule 12(b)(6). A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the claims asserted in a complaint. "Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). Factual allegations

must be enough to "raise a right to relief above a speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In considering a Rule 12(b)(6) motion, the court accepts all material allegations in the complaint and construes them in the light most favorable to the non-moving party. *Doe v. United States*, 419 F.3d 1058, 1062 (9th Cir. 2005). Determining whether a complaint states a plausible claim for relief is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

Rule 12(b)(7). A court should grant a motion to dismiss under Rule 12(b)(7) if an absent party is necessary to the suit under Rule 19(a), cannot be joined without destroying the court's subject matter jurisdiction, and is so indispensable that in equity and good conscience the suit should be dismissed. *Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir. 1992); Fed. R. Civ. P. 19. The court evaluating a Rule 12(b)(7) motion "may consider facts beyond the scope of the plaintiff's complaint." *Biagro Western Sales Inc. v. Helena Chem. Co.*, 160 F.Supp.2d 1136, 1143 (E.D. Cal. 2001).

DISCUSSION

I. Each defendant is immune from suit.

"The 'common-law immunity from suit traditionally enjoyed by sovereign powers'" is one of "the core aspects of sovereignty that tribes possess." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) ("*Bay Mills*"), quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). "It is inherent in the nature of sovereignty not to be amenable to suit without consent." *Id.* at 788-89. "Thus, we have time and again treated the 'doctrine of tribal immunity as settled law' and dismissed any suit against a tribe absent congressional authorization (or a waiver)." *Id.* at 789, quoting *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 756 (1998). "[T]ribal immunity applies no less to suits brought by States … than to those by individuals." *Bay Mills*, 572 U.S. at 789. Moreover, tribal sovereign immunity applies equally to "suits arising from a tribe's commercial activities, even when they take place off Indian lands." *Id.* at 790.

A. Azuma is immune from suit as an arm of the Tribe.

Tribal sovereign immunity applies when a tribe elects to engage in commerce using a tribally created entity, i.e., an arm of the tribe. *See Inyo Cty. v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony*, 538 U.S. 701, 704, 705 n.1, (2003); *Kiowa* at 753. The Ninth Circuit has recognized that "tribal sovereign immunity not only protects tribes themselves, but also extends to arms of the tribe acting on behalf of the tribe." *White v. Univ. of California*, 765 F.3d 1010, 1023 (9th Cir. 2014). Indeed, it is "settled law" in the Ninth Circuit "that tribal corporations acting as an arm of the tribe enjoy the same sovereign immunity granted to a tribe itself." *Dine Citizens Against Ruining Our Env't v. Bureau of Indian Affs.*, 932 F.3d 843, 856 (9th Cir. 2019). *See also Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 726 (9th Cir. 2008) (corporation operating casino constituted an "arm of the tribe" where "the Tribe created [the corporation] pursuant to a tribal ordinance and intergovernmental agreement, … the tribal corporation is wholly owned and managed by the Tribe[,] … the economic benefits produced by the casino inure to the Tribe's benefit[,]" and a majority of the corporation's board must be tribal members, with tribe's council serving as the sole shareholder.); *Allen v. Gold Country Casino*, 464 F.3d 1044, 1047 (9th Cir. 2006) (tribally owned and operated casino constituted an "arm of the Tribe" where the "[i]mmunity of the Casino directly protects the sovereign Tribe's treasury").

In determining whether an entity is an arm of the tribe for purposes of sovereign immunity, the Ninth Circuit considers "(1) the method of creation of the economic entities; (2) their purpose; (3) their structure, ownership, and management, including the amount of control the tribe has over the entities; (4) the tribe's intent with respect to the sharing of its sovereign immunity; and (5) the financial relationship between the tribe and the entities." *White*, 765 F.3d at 1023 (citing *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173, 1187 (10th Cir.2010)). Applying the *White* factors to Azuma leads to the inescapable conclusion that Azuma is an arm of the Tribe entitled to sovereign immunity.

1. The *White* factors demonstrate that Azuma is an arm of the Tribe.

a. Method of Creation

In *Breakthrough*, the Tenth Circuit held that an entity's "method of creation . . . weighs in favor" of sovereign immunity when that entity is "created . . . under tribal law" and "under [the tribe's] constitution." 629 F.3d at 1191. The *Breakthrough* Court also looked to "the Tribe's own descriptions" of the entity in its resolution and ordinances, finding it significant that the tribe in that case had dubbed the entity an "instrumentality" and "authorized agency" of the tribe. *Id.* at 1192. In *Block v. Tule River Tribal Council*, Case No. 12-CV-1691, 2022 WL 2533483, at *4 (E.D. Cal. July 7, 2022), this Court found that a tribal entity satisfied this factor where it was "wholly owned and formed by the Tribe," where the Tribe held "one-hundred percent of the voting stock issued in" the tribal entity. Here, Alturas' governing body, the Business Committee, chartered Azuma pursuant to its constitutional authority "to administer all lands and assets and manage all economic affairs and enterprises of the Alturas Indian Rancheria." Del Rosa Decl. at ¶¶ 4, 6; Ex. A at art. VII § 2(e). Azuma was created pursuant to the Tribe's Governmental Corporations Ordinance, which provides:

> The Tribe retains as one of its governmental powers the authority to commercially utilize its resources for the economic benefit of the Tribe and to organize corporations for this purpose. This Ordinance establishes policies and procedures consistent with this authority to regulate the incorporation, governance and dissolution of the governmental corporations as distinct arms of the Tribal government . . ..

Del Rosa Decl. ¶ 6; Ex. B at § 2.1. The Ordinance further provides that "Corporations established under this Ordinance are wholly-owned entities of the Tribe, created to carry out Tribal economic development and the advancement of Tribal Members. *Id.* § 3.1. Furthermore, Azuma's Articles of Incorporation provide that the Tribe is the "sole owner and shareholder of the corporation." Rose Decl. ¶ 5; Ex. A at Art. VI. Clearly Azuma satisfies the first factor of the arm-of-the-tribe test.

b. Purpose of Azuma

The *Breakthrough* Court explained that the purpose factor "weighs strongly in favor of immunity" where an entity is "created for the financial benefit of the Tribe and to enable it to engage in various governmental functions." 629 F.3d at 1192. The Court looked to the purpose of the entity as expressed in tribal resolutions and pointed approvingly at the way in which the tribe had allocated revenues received from the entity towards tribal government and support services. *Id*.

Here, the Tribe created Azuma "to carry out Tribal economic development and the advancement of Tribal members." Del Rosa Decl., Ex. B at § 3.1, and to "manufacture tobacco products as the corporation may deem advisable in Modoc County, California in the best interests of the Tribe." Rose Decl. ¶ 5; Ex. A at Art. 2. Azuma has served those goals: Azuma has funded other economic development ventures that are wholly owned and operated by the Tribe. Del Rosa Decl. at ¶ 8. These tribally-owned businesses employ approximately 45 persons, many from the surrounding community, including members of the Tribe, and provide essential benefits to their employees, including health insurance housing and transportation benefits. *Id*.; Rose Decl. at ¶ 17 Absent funding from Azuma, these tribally-owned businesses would likely be insolvent and unable to continue to provide employment and benefits. Del Rosa Decl. at ¶ 8. To date, the Tribe has invested more than nine million dollars ($9,000,000) into Azuma's tobacco manufacturing business. Rose Decl. at ¶ 9. If the Court issues the relief the State seeks, the loss of this substantial investment, along with the revenue that the Tribe would have realized from this investment, will have a substantial and direct negative effect on the economic and socioeconomic welfare of the Tribe and its members, not to mention the loss of jobs for those employed by Azuma. *Id*.; *see* Del Rosa Decl. at ¶ 8. This factor strongly favors a determination that Azuma is an arm of the Tribe.

c. Structure, Ownership, and Management of Azuma

The third *White* factor examines the structure, ownership, and management of the entity, "including the amount of control the tribe has over the entit[y]." *White*, 765 F.3d at 1023. Azuma satisfies this factor. Azuma was established as a tribally-owned corporation by the governing body of the Tribe, pursuant to the Tribe's Governmental Corporations Ordinance. Del Rosa Decl. ¶ 6. Azuma is governed by a board of directors appointed by the Tribe's governing body, its Business

Committee. Rose Decl. Ex. A at Art. V. The Azuma Board of Directors has delegated its day-to-day management authority over Azuma to its executives that are solely employed by Azuma. Rose Decl., Ex. A. No third party or other outside individual or entity exercises control, management, or ownership over Azuma. Clearly this factor favors a finding that Azuma is an arm of the Tribe.

d. The Tribe's Intent to Share its Sovereign Immunity

In analyzing the fourth factor, the *Breakthrough* Court held that a Tribe's explicit conferral of sovereign immunity on an entity is an important consideration in the "arm of the tribe" analysis. 629 F.3d at 1194. Azuma's Articles of Organization provides, "The Azuma Corporation is entitled to all of the privileges and immunities enjoyed by the Tribe." Rose Decl. Ex. A at Art. III § 1. Also, the Governmental Corporations Ordinance provides that tribal corporations incorporated pursuant to the Ordinance, along with "their directors, officers and employees" are "entitled to all of the privileges and immunities enjoyed by the Tribe; including, but not limited to immunities from suit in federal, state, and tribal courts." Del Rosa Decl. Ex. B at § 3.1. Clearly this factor favors a finding of immunity.

e. The Financial Relationship Between the Tribe and Azuma

As to the fifth factor, the *Breakthrough* Court instructed courts to examine the way in which a tribe is affected by the financial fortunes of the relevant entity. In examining this factor, courts consider the extent to which a tribe "depends ... on the [entity] for revenue to fund its governmental functions, its support of tribal members, and its search for other economic development opportunities." *Breakthrough*, 629 F.3d at 1195. The *Breakthrough* Court explained that where such a relationship exists, any financial harm to the entity will "reduce the Tribe's income," and if a judgment against the entity would significantly impact the tribal treasury, this factor will weigh in favor of immunity even if the tribe's liability for an entity's actions is formally limited. *Id.*

Precisely such a relationship exists between Azuma and the Tribe. From its inception to the present day, the Tribe has been the sole owner of Azuma. *See* Rose Decl. ¶ 3. The Tribe depends heavily on the income it receives from Azuma in order to fund vital government services to its members. Del Rosa Decl. ¶ 8. A reduction in Azuma's revenues would have a substantial and

direct negative effect on the economic and socioeconomic welfare of the Tribe and its members, not to mention the loss of jobs for those employed by Azuma. *Id.*

Azuma satisfies every element of the "arm of the tribe" test as set forth by the Ninth Circuit. Moreover, the State's Complaint virtually concedes that Azuma is an arm of the Tribe. The Complaint acknowledges that Azuma is a "tribal entity." Compl. ¶ 1. The Complaint further alleges that Azuma is "a tribally chartered corporation wholly owned by the Alturas Indian Rancheria . . ., a federally recognized Indian tribe of Achumawi Indians located in Modoc County, California." Compl. ¶ 8 (citations omitted). It also acknowledges the Tribal government's control over Azuma by alleging that Defendants Darren Rose and Philip Del Rosa, by virtue of their positions on the Tribe's Business Committee, "have authority to govern all aspects of the Alturas Tribe and its subdivisions and arms," and that as a result, "Rose, in turn, exercises control over Azuma's operations." Compl. ¶¶ 65, 66.

2. No waiver or abrogation of immunity permits the claims against Azuma.

Having established Azuma is an arm of the Tribe, the State must demonstrate that sovereign immunity does not bar its claims against Azuma. *Pistor* at 1111. To meet that burden, the State must demonstrate that sovereign immunity has been either waived by the sovereign or abrogated by Congress. *Bay Mills*, 572 U.S. at 789. Congressional abrogation of tribal sovereign immunity must be "unequivocally" expressed, and similarly, any waiver of immunity by the tribe must be "clear." *C & L Enters. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001).

Here, the Complaint entirely fails to demonstrate that immunity is not a bar to the claims against Azuma. To the contrary, while the complaint recognizes that Azuma is an arm of the Tribe, the Complaint does not make even a single allegation that immunity has been waived or abrogated. As such, the claims against Azuma must be dismissed.

B. The Tribal Officials sued in their official capacities are immune from suit and the *Ex parte Young* exception does not apply.

Defendants demonstrated in a previous brief the infirmity of the State's claims seeking injunctive relief against the Tribal Officials in their official capacities, for which the State relies on

the *Ex parte Young* doctrine to skirt tribal sovereign immunity. *See* Defs.' Opp. to Pl.'s Mot. for Prelim. Injunction, Doc. No. 23 at 30-33. These official-capacity claims are barred by tribal sovereign immunity and therefore should be dismissed for lack of subject matter jurisdiction.

As detailed in the previous brief, the PACT Act forecloses the use of the *Ex parte Young* exception to immunity. The PACT Act expressly preserves tribal sovereign immunity, forbidding "any unconsented lawsuit" against an Indian tribe under the Act. 15 U.S.C. § 378(c)(1)(B). It recognizes that tribal sovereign immunity means some persons would be "not subject to State, local or tribal government enforcement actions for violations" of the Act, and directs the law enforcement officers of those governments to "provide evidence" of any such violations "to the Attorney General of the United States or a United States attorney, who shall take appropriate actions to enforce" the Act. 15 U.S.C. § 378(c)(2). The Act thus prescribes a statutory mechanism for its enforcement against sovereign tribal entities, in lieu of reaching such entities through their officials under *Young*. Since the Act creates a remedial scheme that makes *Young* unnecessary to secure the compliance of sovereign alleged violators, the doctrine is unavailable to the State in this case. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 74 (1996).

The CCTA, the alleged violation of which is another basis of the State's official-capacity claims, also precludes the availability of *Ex parte Young*. Like the PACT Act, the CCTA preserves tribal sovereign immunity. 18 U.S.C. § 2346(b)(2). The CCTA also affirmatively states, "No civil action may be commenced under this paragraph against an Indian tribe or an Indian in Indian country." 18 U.S.C. § 2346(b)(1). This provision comprehensively bars any action by a State to enforce the CCTA against any Indian tribe (including an arm of a tribe) or against *any* "*Indian in Indian country*." The statutory language contains no exceptions or qualifications, and thus unambiguously encompasses an "Indian in Indian country" who is a tribal government official. The broad prohibition of State suits against reservation Indians thus includes a prohibition against states' use of the *Ex parte Young* fiction. And again, like the PACT Act, the United States Attorney General is directed to enforce the provisions of the CCTA, 18 U.S.C. § 2346(a), and neither tribal sovereign immunity nor the CCTA's statutory limitation on State enforcement actions prevent the federal government from pursuing an action against an Indian tribe.

Finally, the State's official-capacity claims for alleged *direct* violations of state law (as opposed to violations of federal laws that incorporate state law) cannot proceed under *Ex parte Young* because that doctrine is available only to permit actions against "tribal officials in their official capacity to enjoin them from violating *federal* law," and for declaratory relief "in the same circumstances." *Jamul Action Committee v. Simermeyer*, 974 F.3d 984, 994 (9th Cir. 2020) (emphasis added); *see Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) (explaining that the "entire basis" of the *Young* doctrine is to "vindicate the supreme authority of federal law"). The Ninth Circuit has not permitted the use of *Ex parte Young* for alleged violations of *state* law.

C. The Tribal Officials sued in their personal capacities are immune from suit on the basis of qualified personal immunity.

The State asserts claims against the Tribal Officials not only in their official capacity, but also in their personal capacity. Personal-capacity claims "seek to impose *individual* liability upon a government officer for actions taken under color of [tribal] law." *Lewis v. Clarke*, 581 U.S. 155, 163 (2017); *see Pistor*, 791 F.3d at 1112. The State seeks civil penalties and money damages, as well as other costs and fees, against Rose and Philip Del Rosa in their personal capacities based on alleged violations of state and federal statutes. Complaint at pp. 18-20.

While a suit against a tribal official that would impose *personal* liability on the individual is generally not barred by the tribe's sovereign immunity, the individual may nonetheless be immune from suit under the distinct defense of official or personal immunity. *Lewis* at 163; *Acres Bonusing*, 17 F.4th at 914. "An officer sued in his individual capacity [is] entitled to certain 'personal immunity defenses, such as objectively reasonable reliance on existing law.'" *Pistor* at 1112 (quoting *Kentucky v. Graham*, 473 U.S. 159, 166-67 (1985)). "Tribal officials, like federal and state officials, can invoke personal immunity defenses." *Acres Bonusing* at 915.

Tribal government officials may be entitled to absolute immunity, in the case of "legislators, in their legislative functions, … judges, in their judicial functions, prosecutors and similar officials, [and] executive officers engaged in adjudicative functions." *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982). Outside of those particular functions, tribal government officials are entitled to

qualified immunity, which "shields an officer from suit when she makes a decision that, even if constitutionally [or statutorily] deficient, reasonably misapprehends the law governing the circumstances she confronted." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004); *see Harlow* at 818 (holding "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known").) "Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions. When properly applied, it protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011).

Further, qualified immunity is not a "mere defense to liability," but is "an immunity from suit" which entitles the immune defendant "not to stand trial or face the other burdens of litigation," so the issue should be resolved "at the earliest possible stage in litigation." *Saucier v. Katz*, 533 U.S. 194, 200-01 (2001) (internal quotation marks omitted).

Under the qualified immunity standard, a tribal government official cannot be subjected to personal liability, or even the burden of litigation, unless the "contours" of "the right the official is alleged to have violated" were, at the time of the conduct, "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). The plaintiff bears the burden of proof that the right allegedly violated was clearly established at the time of the alleged misconduct. *Davis v. Scherer*, 468 U.S. 183, 197 (1984); *Emmons v. City of Escondido*, 921 F.3d 1172, 1174 (9th Cir. 2019). In short, "officials who act in ways they reasonably believe to be lawful … should not be held personally liable" if their belief turns out to be mistaken. *Anderson* at 641.

Courts have discretion to prioritize either of the two prongs of the qualified immunity analysis – whether the plaintiff has sufficiently alleged the violation of a legal right, and whether the right at issue was clearly established at the time of the defendant's conduct. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

Rose and Philip Del Rosa are alleged to have violated state regulatory and tax laws governing cigarette sales and, derivative of those alleged state-law violations, the federal PACT

Act, CCTA, and RICO. Their alleged personal liability stems from their control of Azuma as Tribal government officials under color of Tribal law. Compl. ¶¶ 63-66. They are immune from the State's claim because it is far from clearly established that Azuma's operations violate the state and federal laws at issue. As Tribal officials, Rose and Del Rosa are entitled to make reasonable discretionary judgments about open legal questions as they conduct the Tribe's business without facing personal liability or the burdens of litigation.

As Defendants discussed in their recent briefing, federal law significantly limits state authority over conduct involving Indian tribes in Indian Country. "[S]tate action may not burden 'the right of reservation Indians to make their own laws and be ruled by them.'" *Big Sandy Rancheria Enterprises v. Bonta*, 1 F.4th 710, 724-25 (9th Cir. 2021) (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980)). "Whether state regulation infringes on tribal sovereignty depends on *who* is being regulated—Indians or non-Indians—and *where* the activity to be regulated takes place—on or off a Tribe's reservation." *Id.* at 725.

"States are categorically barred from placing the legal incidence of an excise tax 'on a tribe or on tribal members for sales made inside Indian country' without congressional authorization." *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 101-02 (2005). This categorical bar forecloses any contention by the State that Azuma is liable to pay any State tax imposed on Azuma for activities within the Alturas Indian Rancheria. It also means that each of Azuma's customers, the Tribal Retailers, is immune from direct State taxation imposed upon their conduct within their respective reservations. Furthermore, to the extent the MSA escrow obligation may be regarded as a tax, federal law categorically bars its imposition upon Azuma.

The Supreme Court held on the same basis that a state cannot impose a license requirement upon "a reservation Indian conducting a cigarette business for the Tribe on reservation land." *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 480 (1976). This rule forecloses the State's assertions that Azuma and the Tribal Retailers are obliged to hold State-issued licenses to conduct their on-reservation cigarette business.

There is otherwise no "inflexible *per se* rule precluding state jurisdiction over tribes and tribal members in the absence of express congressional consent." *California v. Cabazon Band of*

Mission Indians, 480 U.S. 202, 214-15 (1987). Rather, "in exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members." *Id*. at 215. The only relevant "exceptional circumstance" the Court has identified relates to nonmember consumers making purchases at retail tribal smokeshops "when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services." *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 157 (1980). In this exceptional circumstance, the state can impose *only* a "minimal burden" on the tribal retailers "to aid in collecting and enforcing that tax" on non-members. *Id*. at 159; *see also Moe*, 425 U.S. at 482-83 (1976); *Cabazon* at 215-16; *Dept. of Tax. and Fin. of N.Y. v. Milhelm Attea & Bros., Inc*., 512 U.S. 61, 73 (1994).

Where the legal incidence of a state tax falls on a non-member transacting with tribes or tribal members on the reservation, federal law preempts the tax if it fails to satisfy the balancing test articulated in *Bracker* (the "*Bracker* balancing test"). *Wagnon* at 102, 110. The *Bracker* balancing test generally applies "when a state 'asserts authority over the conduct of non-Indians engaging in activity on the reservation.'" *Big Sandy* at 725 (quoting *Bracker* at 145). *Bracker* calls for a "particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *Bracker* at 145. Courts must make this assessment "on a case-by-case basis." *Gila River Indian Community v. Waddell*, 967 F.2d 1404, 1407 (9th Cir. 1992).

To the extent the State's claims are not foreclosed by the categorical rules set forth above – the on-reservation taxation of an Indian tribe, tribal enterprise, or tribal member and the preclusion of state licensure requirements for on-reservation tribal cigarette enterprises – they require application of *Bracker*'s particularized inquiry, which focuses on the specific context and requires courts to identify and weigh the relevant interests of the affected Indian tribes, states, and the federal government on a case-by-case basis.

Particularly relevant here, tribal interests are at their "strongest" under the *Bracker* balancing test where "the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services." *Colville*, 447 U.S. at 156–57. The Supreme Court has recognized that a tribe generates value on its reservation where

it has "built modern facilities which provide recreational opportunities and ancillary services to [its] patrons, who do not simply drive onto the reservations, make purchases and depart, but spend extended periods of time there enjoying the services the Tribe provides." *Cabazon*, 480 U.S. at 219; *see Gila River*, 967 F.2d at 1410-11; *Salt River Pima-Maricopa Indian Cmty. v. Arizona*, 50 F.3d 734, 737 (9th Cir. 1995) (balance of interests allowed for state taxation because, "[m]ost importantly, the goods and services sold are non-Indian"); *Prairie Band Potawatomi Nation v. Richards*, 379 F.3d 979, 984-85 (10th Cir. 2004) (rev'd on other grounds by *Wagnon*, 546 U.S. 95). Azuma and the Tribal Retailers have made substantial investments in commercial facilities on their reservations to manufacture products there using tribal capital, and to offer the tribally-made products for sale to tribal members and to others who come to the reservation to shop and to spend time and money at a tribal casino, hotel, or restaurant. Azuma's products contain tribally-generated value both from their manufacture on-reservation by a tribally-owned and operated enterprise, and from the market conditions created by the tribes who sell the products as an amenity to accompany multi-million-dollar gaming, dining, lodging and other entertainment offerings to consumers who otherwise would not have visited the Indian Country of the retailer-tribes.

In addition, the State's relevant regulatory and taxing interests vary according to the specific context. Its interest in raising revenue is "strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services." *Colville* at 156-57. To justify an on-reservation tax, the Supreme Court has required that the state provide "governmental functions … to those who must bear the burden of paying" the tax, and that such services be provided on the reservation. *Ramah Navajo School Bd., Inc. v. Bureau of Rev. of N.M.*, 458 U.S. 832, 843-44 (1982). The state services must be "connected with the … activities directly affected by the tax." *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 661 (9th Cir. 1989).

The immediate point of this discussion is not to prove that under *Bracker*, the State's claims must fail. Qualified immunity does not protect only government officials who are fully vindicated in their view of the law. Rather, the point is that, to overcome qualified immunity, "existing precedent must have placed the statutory or constitutional question beyond debate." *al-Kidd*, 563 U.S. at 741. The question of the reach of state law in this case is not "beyond debate." The *Bracker*

analysis is highly dependent on the particular circumstances of a given case such that it is inherently unsuited to *clearly* establishing the contours of a state's authority to regulate and tax reservation activities. The Bracker balancing test has been called "rudderless, affording insufficient guidance to decisionmakers," with the acknowledgment that no preferable alternative appears. *Wagnon*, 546 U.S. at 124 (Ginsburg, J., dissenting). "No 'bright-line' test is capable" of adequately accommodating "the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other.'" *Id.* (quoting *Colville* at 156). *Bracker*'s "'flexible' test has provided little guidance other than that courts should balance federal, tribal, and state interests." *Rogers Cty. Bd. of Tax Roll Corrections v. Video Gaming Techs., Inc.*, 141 S.Ct. 24, 25 (2020) (Thomas, J., dissenting from denial of certiorari). *Bracker* supplies a "vague test" that defies certainty of outcome. *Id.*; *see also HCI Distrib., Inc. v. Hilgers*, No. 8:18-cv-173, 2023 WL 3122201, *5 (D. Neb. Apr. 27, 2023) (summarizing "the complicated (and somewhat contradictory) legal morass in which the State's attempted regulation of [a tribal entity's] tobacco sales is situated"). The broad, general standards of the *Bracker* test, under which "the result depends very much on the facts of each case," do not provide the kind of "obvious" clear answers that can justify imposing personal liability on the Tribal Officials. *Brosseau*, 543 U.S. at 198-201.

The cases on which the State relies each arose under distinguishable circumstances, so they do not "clearly establish" Azuma's alleged violations. As explained in Defendants' previous brief, *Big Sandy* plainly does not establish that the Tribal Retailers are in violation of any state law. Doc. No. 23 at 16. Nor does *Big Sandy* place the alleged state-law violations by Azuma "beyond debate." *Big Sandy* "express[ed] no opinion" about the imposition of cigarette excise taxes on the tribal entity's intertribal transactions. 1 F.4th at 724 n.8. This left open not only the tax question itself, but also the related question of determining which cigarettes, if any, would be subject to the MSA escrow requirement and the Directory statute which enforces it, given that manufacturers need not make escrow payments on cigarettes "sold by a Native American tribe to a member of that tribe on that tribe's land, or that are otherwise exempt from state excise tax pursuant to federal law." Cal. Health & Safety Code §§ 104556(j), 104557(a)(2). Moreover, the application of the escrow obligation to an on-reservation tribal cigarette manufacturer was not at issue in *Big Sandy*, where

no manufacturer was a party to the case. As to the State's regulation of sales by a tribal entity to an Indian tribe on the purchasing tribe's reservation, *Big Sandy* "declined to balance federal, state, and tribal interests under *Bracker*," *Big Sandy* at 729, because in that case the tribal corporation alleged that state regulation of its sales activities off its reservation "infring[ed] *the Tribe's* self-governance," *id.* at 730 (emphasis added). In virtually the same breath, the Court emphasized that "*Bracker* balancing is appropriate when a tribe or tribal entity challenges a state's regulation of transactions between the tribe and nonmembers *on the tribe's reservation*." *Id.* at 729. The Court's discussion shows that *the purchasing tribe's self-governance interests* are appropriately considered when analyzing state regulation of nonmember conduct – here, Azuma's conduct – on the purchasing tribe's reservation. It is those interests, the interests of the tribes that operate the Tribal Retailers, that informed the Tribal Officials' judgments as to how to conform Azuma's conduct to applicable law.

The remaining cases on which the State has relied also fail to clearly establish Azuma's violations because they reflect significantly different sets of interests than those in this case, as discussed in Defendants' previous brief. Doc. No. 23 at 17-18.

Further, California has refused to promulgate or amend State laws to clearly establish the extent to which they impose obligations on reservation Indians consistent with federal law and without infringing upon tribal sovereignty. Defendants highlighted in their previous brief how the State conducted a *Bracker* analysis to develop regulations for the application of sales and use tax in Indian country, while declining to take any similar steps with respect to cigarette taxes or regulations. *See* Doc. 23 at 23. Other states such as New York, Washington, Oklahoma and Nebraska have implemented systems that promote certainty for the state government and for tribal governments and Indian country businesses, which have received court approval as consistent with federal law and tribal self-government. *Id.* at 22; see *Milhelm Attea*, 512 U.S. at 64-68. California's unwillingness to provide clear direction through state law exacerbates the difficulty tribal officials face in their decision making.

Qualified immunity permits government officials to fulfill their duties, even when doing so requires them to navigate legal gray areas, without fear of incurring personal liability if an adversary

or court later disagrees with their judgment. Because the personal-capacity claims in this case would impair the public interest in allowing government officials to vigorously exercise their official authority, they should be dismissed.

II. The Complaint fails to state a claim under the CCTA, which is also fatal to its RICO Claim.

The State's CCTA claim (its Second Claim for Relief) is foreclosed by the statutory definition of "contraband cigarettes," which, by its plain language, does not apply to federally licensed tobacco manufacturers such as Azuma. By extension, that definition is also fatal to the State's RICO claim (its Third Claim for Relief), which is premised entirely on the allegation that Rose and Phillip Del Rosa, "through the Azuma enterprise," Compl. ¶ 86, "engaged in multiple and repeated acts of cigarette trafficking in violation of the CCTA," *id.*

Relevant here, the CCTA defines "contraband cigarettes" as "a quantity in excess of 10,000 cigarettes" bearing no evidence of an applicable tax stamp, "and which are in the possession of any person *other than* . . . (A) a person holding a permit issued pursuant to chapter 52 of the Internal Revenue Code of 1986 as a manufacturer of tobacco products . . . or an agent of such person[.]" 18 U.S.C. § 2341(2)(A) (emphasis added).

In this case, it is beyond dispute that Azuma possesses a federal permit under the Internal Revenue Code of 1986 (IRC) to manufacture tobacco products. Indeed, the State specifically alleges that fact in its introduction of Azuma in the Complaint, and elsewhere. Compl. ¶¶ 8 ("Azuma possesses a federal manufacturer's permit issued by the U.S. Tobacco Tax and Trade Bureau ("TTB") and distributes cigarettes from its facility in Modoc County, California."), 41 ("Defendants Rose and Phillip Del Rosa obtained a federal TTB tobacco manufacturer's permit for Azuma, license number TP CA-15012."); *see also* Rose Decl. ¶ 6 & Ex. B. Based on this definition under the CCTA, the Complaint necessarily "lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory," *Mendiondo*, 521 F.3d at 1104. Accordingly, because the Complaint's second and third claims for relief are predicated on the CCTA, each must be dismissed.

III. The Tribal Retailers are necessary and indispensable parties who cannot be joined under Rule 19.

Defendants have detailed in prior briefing why the Tribal Retailers are required to be joined under Rule 19(a), cannot be joined because they are immune from suit as sovereign Indian tribes or tribal arms, and why under Rule 19(b), "in equity and good conscience" this action should not proceed without them. *See* Defs.' Opposition to Motion for Prelim. Injunction, Doc. 23 at 25-29.

Rule 19 calls for a three-part inquiry into (1) whether absent persons are necessary, (2) if necessary, whether it is "feasible" to join them, and (3) if not feasible, whether the litigation cannot proceed in their absence. Fed. R. Civ. P. 19. "Absent parties are necessary if they claim an interest relating to the subject of the action and are so situated that the disposition of the action in the parties' absence may as a practical matter impair or impede the parties' ability to protect that interest." *Kescoli v. Babbitt*, 101 F.3d 1304, 1309 (9th Cir. 1996) (brackets omitted). Absent parties are also necessary where "the court cannot accord complete relief" that is meaningful "as between the parties." Fed. R. Civ. P. 19(a)(1)(A); *Alto v. Black*, 738 F.3d 1111, 1126 (9th Cir. 2013). The Court cannot involuntarily join a party that has not waived its sovereign immunity. *Id*. at 1310. To determine whether absent parties are indispensable, preventing the Court from proceeding in their absence, the Court evaluates: (1) prejudice to any party or to the absent party; (2) whether relief can be shaped to lessen the prejudice; (3) whether an adequate remedy can be awarded without the absent party; and (4) whether there exists an alternative forum. *Kescoli*, 101 F.3d at 1310-1311.

A. The Tribal Retailers are necessary parties.

As previously explained, claims based on the PACT Act's "delivery seller" provisions require the Court to determine that the Tribal Retailers are not "lawfully operating." 15 U.S.C. §§ 375(4), (5), (6), 376a(a); *see also* 15 U.S.C. § 376a(e)(2)(A) (permitting deliveries to persons "lawfully engaged in the business of … selling cigarettes"). Since these claims accuse the Tribal Retailers of wrongdoing, the Tribal Retailers are the proper parties to defend themselves against the State's accusations. *Paiute Shoshone Indians of Bishop Cmty. v. City of Los Angeles*, 637 F.3d 993, 1001 (9th Cir. 2011). The accusations against the Tribal Retailers *in absentia* are especially prejudicial to their interests because the question of whether they are lawfully operating implicates

the overriding sovereign interest of the Indian tribes that own and operate the Tribal Retailers to make and be governed by their own laws while engaged in activities upon their reservations.

Moreover, all the claims in this case that contend Azuma is obliged to comply with California's civil regulatory law or remit California taxes in connection with its sales to the Tribal Retailers implicate the same sovereign interests of the absent parties. The sales take place upon the reservations of the Indian tribes that own and operate the Tribal Retailers. Determining the reach of the State's authority to regulate or tax Azuma (which, although an Indian entity, is a nonmember of the purchaser tribes) while it is engaged in transactions with the other tribes on the other tribes' reservations requires the Court to conduct the *Bracker* balancing test. *Bracker*, 448 U.S. at 144-45. Bracker balancing requires identifying and weighing the relevant tribal interests at stake to answer the overarching question whether the State action would burden the Indian tribes' right to make their own laws and be ruled by them. *Id.* at 145; *see Williams v. Lee*, 358 U.S. 217, 220 (1959). The absent Indian tribes have an interest in preserving their own self-governance authority on their reservations, and the "concomitant right not have their legal duties judicially determined without their consent." *Shermoen*¸ 982 F.2d at 1317 (internal quotation marks omitted).

B. Sovereign immunity makes it infeasible to join the Tribal Retailers.

Each of the Tribal Retailers is an Indian tribe or an arm of an Indian tribe. Declaration of Wendy Ferris, Doc. No. 23-4, at ¶ 10(b) & Ex. A.; *see also* Declaration of James Dahlen, Doc. No. 13-4, at ¶¶ 8-10. As such, each one enjoys sovereign immunity and cannot be compelled to join this lawsuit. *Dine Citizens*, 932 F.3d at 856.

C. The Tribal Retailers are indispensable parties.

The Tribal Retailers' immunity alone compels the conclusion, without the need to balance the Rule 19(b) factors, that as necessary parties, they are also indispensable, and the suit must be dismissed in their absence. *Deschutes River Alliance*, 1 F.4th at 1163; *White*, 765 F.3d at 1028. A case "may not proceed when a required-entity sovereign is not amenable to suit." *Republic of Philippines v. Pimentel*, 553 U.S. 851, 867 (2008).

Regardless, the Rule 19(b) factors require dismissal in this case. First, the absent Indian tribes and the Tribal Retailers they own and operate will be severely prejudiced by a judgment

rendered in their absence, as the claims herein necessarily require the court to assess the legitimacy and weight of the absent tribes' sovereign interests. Proceeding with the case in their absence is also highly prejudicial to the Defendants, who would be put at the severe disadvantage of mounting a defense based in significant part on the specific interests and conduct of absent tribal governments and enterprises. Second, these prejudicial effects cannot be reduced by any measure short of dismissal, as the source of prejudice is inherent in the State's claims. Determining whether the Tribal Retailers are lawfully operating is an essential element of the claims under the PACT Act's "delivery sales" provisions, and evaluating the absent Indian tribes' governmental interests is an essential element of that determination as well as all the claims based on Azuma's alleged violation of state law arising from its sales to the Tribal Retailers. Third, for the same reasons, the State cannot obtain an adequate remedy in their absence. Fourth, as discussed, enforcement actions by the United States are not only available as alternative remedies under the PACT Act and CCTA, they are the primary remedies contemplated by the statutes in these circumstances. Moreover, even if no alternative remedy were available, this consideration does not weigh against concluding that necessary parties who cannot be joined due to sovereign immunity are indispensable. *Deschutes River Alliance* at 1163; *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1025 (9th Cir. 2002).

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Complaint be dismissed in its entirety.

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Respectfully submitted,

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