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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

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

Plaintiff,

v.

AZUMA CORPORATION; PHILLIP DEL ROSA, in his personal capacity and official capacity as Chairman of the Alturas Indian Rancheria; DAREN ROSE, in his personal capacity and official capacity as Vice-chairman of the Alturas Indian Rancheria; and WENDY DEL ROSA, in her official capacity as Secretary-Treasurer of the Alturas Indian Rancheria,

Defendants.

2:23-cv-00743-KJM-DB

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Date:	October 13, 2023
Time:	10:00 am
Courtroom:	3, 15th Floor
Judge:	Hon. Kimberly J. Mueller
Trial Date:	N/A
Action Filed:	April 19, 2023

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INTRODUCTION

Faced with years of warnings from both the California and United States Departments of Justice that their cigarette operations are unlawful, including a recent warning of criminality from the federal Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"), Defendants claim that the law is not sufficiently clear to hold them liable for their unlawful conduct. Defendants' claim that the State has not "provide[d] clear direction through state law," Defs.' Mem. P. & A. Supp. Mot. Dismiss ("Mot.") 22, ECF No. 24-1, amounts to little more than complaining that the law is not different than what it is. Defendants' arguments are unavailing and their Motion to Dismiss, ECF No. 24, should be denied.

LEGAL BACKGROUND

I. THE CALIFORNIA TAX AND LICENSING SCHEME

California has established a comprehensive statutory scheme of licensing and stamping designed to ensure the collection of tax on all cigarettes sold to non-exempt consumers and to prevent fraudulent transactions to flout such taxes. This scheme consists of the Cigarette and Tobacco Products Licensing Act of 2003 ("Licensing Act"), Cal. Bus. & Prof. Code §§ 22970–22991, and the Cigarette and Tobacco Products Tax Law ("Cigarette Tax Law"), Cal. Rev. & Tax. Code §§ 30001–30483. At its center are licensed distributors, who are authorized to purchase, receive, and possess cigarettes before State taxes are collected or stamps affixed. *See* Cal. Rev. & Tax. Code § 30011 (defining "distributor" as one who "within the meaning of the term 'distribution' as defined in this chapter, distributes" cigarettes); *id.* §§ 30008–30009 (defining "distribution" as the "sale," "use," or "consumption" of untaxed cigarettes, "other than the sale of the cigarettes . . . or the keeping or retention thereof by a licensed distributor for the purpose of sale."); *id.* § 30005 (defining "untaxed cigarette" to mean "any cigarette which has not yet been distributed in such a manner as to result in a tax liability under this part"); *id.* § 30103 ("The taxes imposed by this part shall not apply to the sale of cigarettes . . . by the manufacturer to a licensed distributor.").

"Since 1959 California has imposed an excise tax on the distribution of cigarettes." *Cal. State Bd. of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9, 10 (1985) (per curiam). The

rate has increased over time, and now sits at $2.87 per pack of 20 cigarettes. *See* Cal. Rev. & Tax. Code §§ 30101, 30123(a), 30130.51(a), 30131.2(a). The tax attaches to the first taxable use, sale, or consumption of cigarettes. *See id.* § 30008. Where the distributor of the cigarettes cannot be taxed, the tax is "paid by the user or consumer," *id.* § 30107, and it is collected by a distributor "at the time of making the sale or accepting the order," *id.* § 30108(a).

The tax is generally collected through the use of valued tax stamps, which are purchased by a licensed distributor and affixed to the cigarette packages at or near the time of sale. *See id.* § 30163. The scheme recognizes, however, that certain purchasers may not be taxable at the time of sale. "In such instances, a 'user or consumer,' who is 'obligated to pay the tax,' owes the tax, and the exempt distributor is responsible for collecting the tax from such purchasers and remitting it to the state." *Big Sandy Rancheria Enters. v. Bonta*, 1 F.4th 710, 715 (9th Cir. 2021). The Supreme Court has considered the application of the California cigarette scheme to on-reservation sales and concluded that it "evidences an intent to impose on the Tribe . . . a 'pass on and collect' requirement," that "the legal incidence of California's cigarette tax falls on the non-Indian consumers of cigarettes purchased" on the reservation, and that the State "has the right to require [the Tribe] to collect the tax on [the State's] behalf." *Chemehuevi*, 474 U.S. at 12; *see also Big Sandy*, 1 F.4th at 731 ("Valid state taxes include the cigarette excise taxes that California seeks to collect from customers who purchase cigarettes on reservations to which they do not belong.").

To facilitate collection of these taxes, distributors have been required since 1967 to obtain licenses and make regular reports to the California Department of Tax and Fee Administration ("CDTFA") regarding their transactions. *See* Cal. Rev. & Tax. Code §§ 30140, 30182; Cal. Bus. & Prof. Code § 22975(a). Because not all cigarette distributions are taxable, the monthly distributor tax reports include space to identify exempt distributions. *See* CDTFA, CDTFA-810-CTE REV. 6 (8-21), Instructions for Preparing Cigarette Tax Schedules 7 (2021), https://www.cdtfa.ca.gov/formspubs/cdtfa810cte.pdf (providing instructions for distributors to report "Stamp-Unaffixed or Tax-Unpaid Product Returned to Seller or Destroyed," "Sales Under the United States Constitution Tax Exempt," and "Distributions or Sales to the United States Military or Government Tax Exempt").

In 2003, finding that "[t]ax revenues have declined by hundreds of millions of dollars per year due, in part, to unlawful distributions and untaxed sales of cigarettes," Cal. Bus. & Prof. Code § 22970.1(b), the Legislature expanded its licensure program to include all other persons in the distribution chain, reasoning "[t]he licensing of manufacturers, importers, wholesalers, distributors, and retailers will help stem the tide of untaxed distributions and illegal sales of cigarettes," *id.* § 22970.1(d). Licensed entities are required to transact only with other licensed entities, *see, e.g.*, *id.* § 22980.1(b)(1) ("[A] distributor or wholesaler shall not sell cigarettes or tobacco products to a retailer, wholesaler, distributor, or any other person who is not licensed . . . ."), and all licensees are required to maintain copies of transaction records to facilitate auditing and collection of taxes owed, *see, e.g.*, *id.* § 22974 (retailer purchase records); *id.* §§ 22978.1, 22978.4–.5 (distributor and wholesaler purchase, invoice, and sales records); *id.* §§ 22979.4–.6 (manufacturer and importer purchase, invoice, and sales records); *see also Big Sandy*, 1 F.4th at 715–16 (describing licensing, reporting, and recordkeeping regime).

II. IMPLEMENTATION OF THE TOBACCO MASTER SETTLEMENT AGREEMENT

In addition to the consumer-paid taxes collected on the distribution of cigarettes, the State also receives compensation from cigarette manufacturers. "It is the policy of the state that financial burdens imposed on the state by cigarette smoking be borne by tobacco product manufacturers rather than by the state to the extent that those manufacturers either determine to enter into a settlement with the state or are found culpable by the courts." Cal. Health & Safety Code § 104555(d). As a result of the tobacco Master Settlement Agreement ("MSA")[1], the State receives annual payments from signatory manufacturers to that Agreement, called "Participating Manufacturers," in perpetuity. *See* MSA § IX(c). Other cigarette manufacturers that have not signed the MSA, called "Non-Participating Manufacturers," do not make annual payments but are required to escrow monies against a potential future recovery by the State. *See* Cal. Health & Safety Code § 104557(a)(2).

[1] In 1998, 52 states and territories entered into a "landmark agreement" with cigarette manufacturers called the tobacco Master Settlement Agreement ("MSA"). *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 533 (2001). The text of the MSA can be found at https://oag.ca.gov/sites/all/files/agweb/pdfs/tobacco/1msa.pdf.

Unlike the consumer-paid State excise tax, the legal incidence of these MSA payments and fees are on the cigarette manufacturers. *See* Cal. Health & Safety Code § 104557(a). The economic incidence, however, is still generally borne by consumers in the form of a higher retail price. The two charges—MSA payments by Participating Manufacturers and escrow fees by Non-Participating Manufacturers—are not identical and are calculated differently, although they are roughly equal on a per-cigarette basis. Participating Manufacturers' MSA payments are determined nationally based on federal excise collections, *see* MSA §§ II(z), IX(c), regardless of whether state excise tax later applies. Non-Participating Manufacturers' escrow fees, in contrast, are assessed at the state level, and do not attach to cigarettes beyond the reach of state taxation, including exempted "cigarettes . . . sold by a Native American tribe to a member of that tribe on that tribe's land." Cal. Health & Safety Code § 104556(j). To assist in the collection of MSA escrow fees, licensed distributors identify distributions of Non-Participating Manufacturer cigarettes in their monthly tax reporting. *See* CDTFA, CDTFA-810-CTE REV. 6 (8-21), Instructions for Preparing Cigarette Tax Schedules 2 (2021), https://www.cdtfa.ca.gov/formspubs/cdtfa810cte.pdf. Because MSA payments and escrow fees are assessed against manufacturers and collected months after the underlying distributions, distributors do not have a "pass on and collect" obligation for MSA payments or escrow fees under State law. Manufacturers making the payments would logically seek to recoup these amounts from their customers, but manufacturers evading their payment obligations would not, allowing them to derive illicit cost advantages over their compliant rivals.

The Complementary Statute—also called the Directory Statute—was enacted to close the door to such scofflaw manufacturers. Under the Directory Statute, manufacturers are required to provide assurances to the Attorney General's office that they will meet their obligations under the Escrow Statute, also called the Reserve Fund Statute. *See* Cal. Rev. & Tax. Code § 30165.1(b). Manufacturers that provide such assurances are placed on the "Tobacco Directory" and their cigarettes may be sold to consumers in the State. *Id.* § 30165.1(c).[2] A manufacturer's failure to

[2] The California Tobacco Directory, which lists certified manufacturer's brands, can be found at https://oag.ca.gov/tobacco/directory.

meet its obligations or provide adequate assurances that it will do so renders its cigarettes contraband, unlawful for sale to consumers and forfeitable to the State under the same provisions governing forfeiture of other illicit cigarettes, Cal. Rev. & Tax. Code § 30436(e), including cigarettes unlawfully transported, *id.* § 30436(a), unstamped cigarettes not in the possession of a licensed distributor, *id.* § 30436(b), or cigarettes intended for export made available for sale, *id.* § 30436(d). The State has repeatedly advised Azuma that its cigarettes are "off-directory," but Azuma has refused to provide the required assurances to be placed on the directory. Escrowing no monies for any of Azuma's California sales, Azuma underprices its cigarettes, undermining the MSA in precisely the manner the Legislature sought to avoid in enacting the Escrow Statute. *See* Cal. Healthy & Safety Code § 104555(f).

III. FEDERAL STATUTES EMPOWERING STATE ENFORCEMENT

Cognizant of the difficulties of enforcing state cigarette regulations, Congress has passed a number of laws aimed at aiding state enforcement, including the Prevent All Cigarette Trafficking Act of 2009 ("PACT Act"), Pub. L. 111-154, 124 Stat. 1087 (codified at 15 U.S.C. §§ 375–378, 18 U.S.C. §§ 1716E, 2343), and the Contraband Cigarette Trafficking Act ("CCTA"), 18 U.S.C. §§ 2341–2346, as well as including CCTA violations as predicate acts under the Civil Racketeer Influenced and Corrupt Organization Act ("Civil RICO"), 18 U.S.C. §§ 1961–1968.

The PACT Act, among other things, expanded the cigarette reporting requirements of the Jenkins Act, Pub. L. 81-363, 63 Stat. 884 (1949), enacted sixty years prior. It requires those transporting cigarettes to make reports of certain shipments to the state tobacco tax administrator, including all shipments into or out of Indian country. *See* 15 U.S.C. § 376(a) (requiring reports for shipments made in "interstate commerce"); *id.* § 375(10)(A) (defining "interstate commerce" to include commerce into and out of Indian country); *see generally* U.S. Gov't Accountability Office, GAO-11-313, Illicit Tobacco: Various Schemes Are Used to Evade Taxes and Fees 16 (2011) (identifying "[p]urchasing [of] cigarettes in Indian country for resale to nontribal members" as a scheme for the avoidance of state and local taxes and MSA fees).

The PACT Act also federalizes state cigarette laws. It does this by regulating "delivery sales," which are defined as a sale of cigarettes to a "consumer" when the order is either made or

completed when the buyer and seller are not in the physical presence of each other. 15 U.S.C. § 375(5). A "consumer" is defined as "any person that purchases cigarettes," except that it does not include "any person lawfully operating as a manufacturer, distributor, wholesaler, or retailer of cigarettes." *Id.* § 375(4). Sales to such "consumers" must "comply with . . . all State, local, tribal, and other laws generally applicable to sales of cigarettes . . . as if the . . . sales occurred entirely within the specific State and place." *Id.* § 376a(a)(3). That is, either a cigarette distributor sells only to those "lawfully operat[ing]" as a cigarette business, or it is subject to the PACT Act's regulation of delivery sellers. Either way, the distributor's sales must comply with state law—such compliance is required for the buyer to be "lawfully operat[ing]" and exempt from the PACT Act's regulation of delivery sellers, or such compliance is required by the PACT Act's regulation of delivery sellers. *See* Alexander Decl., ex. B, at 2, ECF No. 13-3 ("[T]he phrase 'lawfully operating' includes compliance with State and Federal law as well as Tribal law.").

The PACT Act also requires the U.S. Attorney General to maintain a list of non-compliant sellers. 15 U.S.C. § 376a(e)(1). It directs the U.S. Attorney General to include in the list "any noncomplying delivery sellers identified by any State, local, or tribal government." *Id.* § 376a(e)(1)(D); *see also id.* § 376a(e)(6) (detailing requirements for state nominations to the non-compliant list). Listed entities are provided an opportunity to challenge their listing, and must be removed if, after investigation, "the Attorney General of the United States determines that the basis for including a delivery seller on the list is inaccurate, based on incomplete information, or cannot be verified." *Id.* § 376a(e)(1)(E). Once an entity is listed, the PACT Act prohibits anyone from knowingly transporting cigarettes on the behalf of the listed entity. *See id.* § 376a(e)(2)(A). Mirroring the "consumer" definition, deliveries may still be made to those "lawfully engaged in the business of manufacturing, distributing, or selling cigarettes." *Id.* § 376a(e)(2)(A)(ii).

The CCTA similarly federalizes state cigarette laws. Subject to several exceptions for those who can lawfully possess untaxed cigarettes, it defines "contraband cigarettes" as "a quantity in excess of 10,000 cigarettes, which bear no evidence of the payment of applicable State . . . cigarette taxes in the State . . . where such cigarettes are found." 18 U.S.C. § 2341(2). It then makes it "unlawful for any person knowingly to ship, transport, receive, possess, sell, distribute,

or purchase [such] contraband cigarettes." *Id.* § 2342(a); *see also id.* § 1961(1) (defining "racketeering activity" to include "any act which is indictable" under the CCTA); *id.* § 2344(a) (criminalizing violations of 18 U.S.C. § 2342(a)). As with the PACT Act, its exceptions are for those operating within the lawful channels of cigarette distribution. *See id.* § 2341(2)(A)–(D).

State attorneys general have authority to enforce both the PACT Act and CCTA. Both acts empower them to bring actions in United States district courts for injunctive relief to restrain violations, as well as for civil penalties and money damages. 15 U.S.C. § 378(c)(1)(A); 18 U.S.C. § 2346(b).

FACTUAL BACKGROUND

I. THE PARTIES

Defendant Azuma Corporation ("Azuma") is a tribally chartered corporation wholly owned by the Alturas Indian Rancheria (the "Tribe"), a federally recognized tribe of Achumawi Indians located near Alturas, California, in Modoc County. Compl. ¶ 8. The Tribe directs the activities of Azuma through the Tribe's Business Committee, which is composed of three elected members and holds virtually all of the Tribe's decision-making powers. *Id.* ¶¶ 63–64.

Defendant Phillip Del Rosa is the Tribe's Chairman, and Defendant Darren Rose is the Tribe's Vice-chairman. *Id.* ¶¶ 9–10. Holding two of the three seats of the Business Committee, Rose and Phillip Del Rosa control the Business Committee and the authority "[t]o administer all lands and assets and manage all economic affairs and enterprises of the [Tribe]." Compl. ¶ 64 (alterations in original) (quoting *Alturas Indian Reservation*, 54 I.B.I.A. 1, 4 (Aug. 5, 2011)). As the driving forces behind Azuma's unlawful cigarette activities, Rose and Phillip Del Rosa are named in this suit in both their official and personal capacities.

Defendant Wendy Del Rosa is the third member of the Business Committee as the Tribe's Secretary–Treasurer (together with Rose and Phillip Del Rosa, "Individual Defendants"). *Id.* ¶ 11. Wendy Del Rosa has been in a leadership dispute with the other two members of the Business Committee, *see Alturas Indian Rancheria v. Berhardt*, No. 19-16885, 2023 WL 385176, at *1 (9th Cir. Jan. 25, 2023) (describing a conflict between a Wendy Del Rosa faction and "the Phillip Del Rosa–Darren Rose . . . faction"), and is named in this suit only in her official capacity.

II. DEFENDANTS' UNLAWFUL CIGARETTE BUSINESS

Azuma holds a federal manufacturer's permit issued by the U.S. Tobacco Tax and Trade Bureau ("TTB"), Compl., ex. H, at 2, ECF No. 1-8, and manufactures cigarettes under the brands Tracker and Tucson, Compl. ¶ 47. It also previously imported cigarettes under the brands Heron and Sands into California from Seneca Manufacturing Company ("SMC"). Compl. ¶ 42 & ex. H, at 2. It distributes these cigarettes from its facility in Modoc County, California to retailers around the State. Compl. ¶ 48. However, Azuma and its customers do not abide by numerous state laws relating to the distribution of cigarettes in California. They do not hold state cigarette licenses, *id.* ¶ 59; they do not collect, pay, or remit state cigarette taxes when owed, *id.*; and the cigarettes they distribute—Tracker, Tucson, Heron, and Sands—are not found on the California Tobacco Directory, *see California Tobacco Directory*, CAL. DEP'T JUST., OFF. ATT'Y GEN., https://oag.ca.gov/tobacco/directory (last updated June 8, 2023), and are thus contraband statewide.

In 2018, the California Office of the Attorney General ("OAG") learned that Azuma was distributing (off-directory) Heron and Sands cigarettes, and sent an inquiry to both Azuma and SMC. In response, Azuma claimed in a letter dated September 14, 2018, that definitions sections of the Code of Federal Regulations and the U.S. Code rendered their cigarettes "not subject to state regulation or taxation." Compl., ex. H, at 2–3. Azuma also claimed it was not subject to PACT Act reporting requirements. *Id.* at 3. In response to Azuma's failure to make the required reports under the PACT Act and its customers' failure to abide by state cigarette regulations, California nominated Azuma to the ATF's PACT Act non-compliant list on December 19, 2018. Compl., ex. J, at 15–16, ECF No. 1-10; *see also* 15 U.S.C. § 376a(e)(1). After investigating California's claims, ATF placed Azuma on that list on April 10, 2019, and—aside from a brief two-month interruption toward the end of 2019, *see* Compl. ¶ 56—Azuma has remained on that list ever since. Compl. ¶¶ 55, 58.

Azuma has subsequently made some of the reports required by the PACT Act. *See id.* ¶ 54. However, Azuma and its customers continue to operate in violation of state law. Accordingly, California sent a warning letter to Azuma, care of Defendants Phillip Del Rosa and Darren Rose, dated October 26, 2022, alerting Azuma of its violations of law and demanding that it cease its

unlawful cigarette distributions and sales. Compl., ex. M, ECF No. 1-13. Azuma continued operating as it had, and in a letter dated April 10, 2023, reiterated its legal arguments to ATF in a failed attempt to be removed from the PACT Act non-compliant list. *See* Compl., ex. L, ECF No. 1-12. That letter primarily argued that its customers are "lawfully operating as a manufacturer, distributor, wholesaler, or retailer of cigarettes," and thus not "consumers" under the PACT Act. 15 U.S.C. § 375(4); *see also id.* § 376a(e)(2)(A)(ii) (exempting deliveries to "person[s] lawfully engaged in the business of manufacturing, distributing, or selling cigarettes" from the non-compliant list's prohibitions).

ARGUMENT

Defendants' activities are textbook PACT Act and CCTA violations, and Defendants admit the essential allegations made against them in this suit. Flouting state tax law and the regulations aimed at ensuring tax compliance, Defendants distribute contraband cigarettes throughout California. Defendants also directly violate California's Escrow and Directory Statutes by failing to collect escrow or make assurances that Azuma will meet its escrow obligations. Defendants' unregulated cigarettes are then sold overwhelmingly to California consumers for consumption off-reservation.

Almost fifty years ago, the Supreme Court recognized that, because the "user or consumer" is ultimately responsible for California's cigarette taxes, Cal. Rev. & Tax. Code § 30107, "the competitive advantage which the Indian seller doing business on tribal land enjoys over all other cigarette retailers, within and without the reservation, is dependent on the extent to which the non-Indian purchaser is willing to flout *his* legal obligation to pay the tax." *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 482 (1976); *see also Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 155 (1980) ("What the smokeshops offer these customers, and what is not available elsewhere, is solely an exemption from state taxation."). Congressional action strengthening federal statutes aimed at enforcing state law in the following decades only confirmed the federal policy recognized by the Supreme Court that Indians cannot aid cigarette tax evasion by refusing to comply with "minimal burden[s] designed to avoid the likelihood that in its absence non-Indians purchasing from the

tribal seller will avoid payment of a concededly lawful tax." *Moe*, 425 U.S. at 483. Rising excise tax rates and the imposition of fees associated with the tobacco MSA in the intervening years has only broadened the illicit advantage between lawful and unlawful sales.

Avoidance of both taxes and MSA fees directly undermines their public health goals. California cigarette taxes are expressly aimed at lowering youth smoking rates, *see, e.g.*, Cal. Sec. of State, California General Election November 8, 2016, Official Voter Information Guide 52 (2016), http://vig.cdn.sos.ca.gov/2016/general/en/pdf/complete-vig.pdf (arguing in favor of Proposition 56's cigarette tax increase by noting "[i]ncreasing tobacco taxes reduces youth smoking"), and MSA fees are expressly aimed at "the policy of the state that financial burdens imposed on the state by cigarette smoking be borne by tobacco product manufacturers," Cal. Health & Safety Code § 104555(d). Defendants' cigarettes' price advantage accordingly deprives the State of more than just revenues, but also of the ability to reduce smoking rates and hold cigarette manufacturers responsible for cigarette health harms.

Defendants' motion confirms that, despite decades of precedent demonstrating the essential illegality of their operations, they continue to distribute tax- and fee-evaded cigarettes outside of lawful distribution channels. Defendants' only response to this action is to claim their business is organized such that it avoids state enforcement by exploiting loopholes that either do not exist or are based on long since rejected theories of Indian law. Defendants' motion should be denied.

I. STATE REGULATION AND TRIBAL SOVEREIGNTY

A. The relevant law is well-settled

Nearly two hundred years ago, the Marshall Court took the view that state laws "have no force" within a tribe's boundaries. *Worchester v. Georgia*, 31 U.S. (6 Pet.) 515, 520 (1832). However, "[l]ong ago the Court departed from Mr. Chief Justice Marshall's view," *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141 (1980), and "the trend has been away from the idea of inherent sovereignty as a bar to state jurisdiction," *Colville*, 447 U.S. at 165 n.1 (Brennan, J., concurring in part and dissenting in part). The Court "ha[s] recognized that the Indian tribes retain 'attributes of sovereignty over both their members and their territory.'" *Bracker*, 448 U.S. at 142 (quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975)). But it has

also "ma[d]e clear that the Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation." *Nevada v. Hicks*, 533 U.S. 353, 361 (2001). "State sovereignty does not end at a reservation's border," *id.*, and tribal sovereignty does not extend "beyond what is necessary to protect tribal self-government or to control internal relations," *Montana v. United States*, 450 U.S. 544, 564 (1981).

Congress's plenary power to regulate tribal affairs under the Indian Commerce Clause, U.S. Const. Art. 1, § 8, cl. 3, and "the 'semi-independent position' of Indian tribes have given rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members." *Bracker*, 448 U.S. at 142. The first is preemption by federal law. *Id.* The second is that state regulation "may unlawfully infringe 'on the right of the reservation Indians to make their own laws and be ruled by them.'" *Id.* (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959)). "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." *Big Sandy*, 710 F.4th at 725; *see also Wagnon v. Prairie Band of Potawatomi Nation*, 546 U.S. 95, 101 (2005) ("[U]nder our Indian tax immunity cases, the 'who' and the 'where' of the challenged tax have significant consequences.").

"When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable," *Bracker*, 448 U.S. at 144, up to and including a "categorical bar" against levying state taxes on tribes or member Indians for activities on their own reservation, *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 459 (1995). Following the *Chickasaw* approach, the exclusions from state law are deep but narrow, resting on the union between tribe, its members, and their reservation. Importantly, given Azuma's acknowledged business dealings with other tribes, the Supreme Court has recognized that Indians who are nonmembers of a governing tribe "stand on the same footing as non-Indians." *Colville*, 447 U.S. at 161. And so, the "on-reservation conduct involving only Indians" that forces the State out of a transaction includes only conduct of member Indians on the reservation *they are a member of* and not any other Indian or tribe who happens to come to town. *See Big Sandy*, 1 F.4th at 726 ("Absent evidence that such nonmembers 'have a say in tribal affairs or significantly share in tribal disbursements,' 'the State's interest in

taxing these purchasers outweighs any tribal interest that may exist in preventing the State from imposing its taxes.'" (quoting *Colville*, 447 U.S. at 161)).

Alternately, when "Indians [are] going beyond reservation boundaries," they are "subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148–49 (1973). Under the *Mescalero* approach, state power to enforce its laws outside of Indian country is broad, up to and including the power to seize contraband outside Indian lands even if in transit to tribal smoke shops. *See Colville*, 447 U.S. at 161–62 (approving seizure of cigarettes en route to tribal smoke shops that "refused to fulfill collection and remittance obligations which the State has validly imposed"); *Dep't of Taxation & Fin. v. Milhelm Attea & Bros.*, 512 U.S. 61, 78 (1994) (approving state regulation of wholesalers selling cigarettes into Indian land). Applying *Mescalero*, the Ninth Circuit specifically held that "the Directory Statute and California's licensing, recordkeeping, and reporting requirements" are properly applied to "intertribal wholesale cigarette sales." *Big Sandy*, 1 F.4th at 728.

Lastly, where "a State asserts authority over the conduct of non-Indians engaging in activity on the reservation," relevant state, federal, and tribal interests are balanced. *Bracker*, 448 U.S. at 144–45. And as above, because "nonmembers are not constituents of the governing tribe," nonmember Indians "stand on the same footing as non-Indians" in this analysis. *Colville*, 447 U.S. at 161; *see also Big Sandy*, 1 F.4th at 726 (quoting *Colville*, 447 U.S. at 161). Balancing these interests, the Supreme Court made clear almost 50 years ago in *Moe* that state cigarette taxes imposed on non-Indians are valid in Indian country. 425 U.S. at 483. Nine years later, the Supreme Court specifically found that California's cigarette taxes are validly imposed on non-Indian purchasers in Indian country. *Chemehuevi*, 474 U.S. at 11–12.

B. Defendants are in clear violation of state law

The application of California's licensing, and directory laws to tribe-to-tribe cigarette distributions is well-settled. As explained above, Defendants, traveling off of the Alturas Indian Rancheria, are properly subject to California cigarette regulations, regardless of whether their ultimate customers are Indians, or on Indian land, or not. *See Big Sandy*, 1 F.4th at 729 ("We . . . treat[] tribe-to-tribe sales made outside the tribal enterprise's reservation as 'off reservation'

activity subject to non-discriminatory state laws of general application."). The Ninth Circuit has expressly held that California's Licensing Act and Directory Statute applies to tribe-to-tribe sales such as those made by Defendants, *see id.* 730–31, and Defendants provide no reason why California's Cigarette Tax Law would not also apply.

Instead, Defendants apply precisely the reasoning rejected in *Big Sandy*. They focus only on their conduct on the Alturas Indian Rancheria and their customers' land to argue in favor of so-called *Bracker* balancing. *See* Mot. 18–21. Despite admitting they distribute cigarettes throughout California, however, they ignore the portions of their deliveries that take place entirely off of Indian land in favor of an already-rejected theory of "tribe-to-tribe" immunity. *Big Sandy*, 1 F.4th at 729 ("[Plaintiff] does not remain 'on reservation' for purposes of the tribal-sovereignty analysis by selling cigarettes on *other tribes'* reservations."). Regardless of whether any particular transaction is taxable or generates an escrow obligation, *see* Mot. 21–22, Azuma must comply with state cigarette regulations when traveling off of the Rancheria, *see Big Sandy*, 1 F.4th at 730. Notably, California cigarette taxes apply to the first "sale," "use," or "consumption" of untaxed cigarettes or tobacco products, and "use" is broadly defined as "the exercise of any right or power over cigarettes . . . incident to the ownership thereof." Cal. Rev. & Tax. Code §§ 30008–30009. The only relevant exemptions are for "the sale of the cigarettes . . . or the keeping or retention thereof by a *licensed* distributor for the purpose of sale," *id.* § 30009 (emphasis added), and for "the sale of cigarettes . . . by the manufacturer to a *licensed* distributor," *id.* § 30103 (emphasis added). Defendants freely admit that neither they nor their customers hold California distributor licenses. *See* Mot. 7–8.

Defendants argue that "*Big Sandy* [does not] place the alleged state-law violations by Azuma 'beyond debate.'" Mot. 21. This is because, Defendants claim, the Ninth Circuit in *Big Sandy* "express[ed] no opinion as to whether . . . California may . . . impose any excise taxes on . . . intertribal transactions," 1 F.4th at 724 n.8," thus "le[aving] 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," Mot. 21. Defendants, do not however, identify any legal theory that would place "the tax question" or the attendant escrow

fees *in* debate in the first instance, or otherwise. Moreover, *Big Sandy* did address the Directory Statute, finding it was properly applied, like all non-discriminatory laws, to off-reservation activities regardless of whether any particular transaction generated escrow fees. 1 F.4th at 728.

More importantly, the court in *Big Sandy* merely applied long-standing Supreme Court precedent to reach its conclusions. The arguments Defendants raise here are the same rejected in *Big Sandy*, which even then were an "attempt to retread old ground." *Big Sandy Rancheria Enters. v. Becerra*, 395 F. Supp. 3d 1314, 1334 (E.D. Cal. 2019). Raising them again four years later does not transform these long-settled areas of law into "open legal questions." Mot. 18.

II. SOVEREIGN IMMUNITY DOES NOT BAR THIS SUIT

Defendants claim that Azuma possesses sovereign immunity as an "arm" of the Tribe, *see* Mot. 10–14, and that various immunities emanating from Alturas's sovereign immunity preclude the federal law causes of action leveled against them, *see* Mot. 14–23. Azuma, however, has not established that it properly enjoys Alturas's sovereign immunity. Moreover, Individual Defendants are also properly subject to suit. *Ex parte Young* permits injunctive relief against Individual Defendants in their official capacity to prevent their ongoing federal law violations, and Rose and Phillip Del Rosa are personally liable for their violations of state and federal law.

A. Azuma's alleged sovereign immunity

As an Indian tribe, the Alturas Indian Rancheria enjoys sovereign immunity unless abrogated by Congress. *See Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788–89 (outlining the contours of tribal sovereign immunity); Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 88 Fed. Reg. 54,654, 54,654 (Aug. 11, 2023) (listing the Alturas Indian Rancheria). Its sovereign immunity may also extend to "arms of the tribe acting on behalf of the tribe." *White v. Univ. of Cal.*, 765 F.3d 1010, 1025 (9th Cir. 2014). Determination of whether any given entity is an "arm of the tribe" is a multi-factor, fact-driven exercise. *See id.* ("In determining whether an entity is entitled to sovereign immunity as an 'arm of the tribe,' we examine several factors . . . .").

Defendants provide evidence showing that Azuma was created with the intention of granting it the Tribe's sovereign immunity, Mot. 11–13, but fails to provide evidence relevant to

the core of the State's allegations—"the financial relationship between the tribe and the entities." *White*, 765 F.3d at 1025. The Complaint alleges Defendants "unlawfully converted Azuma into a distributor of contraband cigarettes throughout California," Compl. ¶ 48, and that Rose and Phillip Del Rosa "us[e] th[at] enterprise to accomplish the uniform purpose of profiting from the repeated and ongoing sale of contraband cigarettes in California," *id.* ¶ 86. In response, Defendants make conclusory statements that the Tribe uses Azuma's profits "to fund vital government services to its members." Mot. 13. But the evidence Defendants cite in support merely states that Azuma's profits are used in the way any business profits are used—to pay employees and reinvest in the business. Del Rosa Decl. ¶ 8, ECF No. 23-2. Defendants identify no services for Alturas members funded by Azuma's profits, and the only individuals identified as beneficiaries of Azuma's profits are almost entirely non-members: Alturas's businesses employ "approximately 45 persons," *id.*, while the Tribe itself has fewer than ten members, Compl. ¶ 25. The lack of evidence surrounding the financial relationship between Azuma and the Tribe is all the more striking given the Tribe's leadership dispute, *see Bernhardt*, 2023 WL 385176, at *1 (describing a conflict between a Wendy Del Rosa faction and "the Phillip Del Rosa–Darren Rose . . . faction"), which was itself at least partially spurred by disagreement over legality of the very business challenged here, Compl. ¶ 62. Absent evidence showing where its unlawful profits go or who benefits from those unlawful profits, Azuma has not met its burden in claiming sovereign immunity. *Cf. People v. Miami Nation Enters.*, 2 Cal. 5th 222, 253–54 (2016) ("Although [defendants] have asserted that their profits go to support tribal operations and programs, they conspicuously omit any mention of how much revenue actually reaches each tribe's coffers or how that income was allocated among . . . tribal programs . . . .").

Defendants' motion should be denied to the extent it rests on Azuma's alleged sovereign immunity.[3] That is, Defendants' motion to dismiss for lack of jurisdiction should be denied as to Azuma, *see* Mot. 11–14, as well as to Individual Defendants in their official capacity, *see* Mot. 14–16, and to Rose and Phillip Del Rosa in their individual capacities, *see* Mot. 16–18.

[3] Alternatively, the Court may order limited discovery for Azuma's claimed immunity. *See Boschetto v. Hansing*, 539 F.3d 1011, 1020 (9th Cir. 2008) ("[Jurisdictional d]iscovery may be appropriately granted . . . where a more satisfactory showing of the facts is necessary.").

B. *Ex parte Young* permits Plaintiff's claims against Individual Defendants

Even assuming Azuma enjoys sovereign immunity, Rose and Phillip Del Rosa are properly subject to suit in their official capacities. "Under the doctrine of *Ex Parte Young*, immunity does not extend to officials acting pursuant to an allegedly unconstitutional statute." *Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1092 (9th Cir. 2007). "This doctrine has been extended to tribal officials sued in their official capacity such that tribal sovereign immunity does not bar a suit for prospective relief against tribal officers allegedly acting in violation of federal law." *Id.* (cleaned up); *see also Bay Mills*, 572 U.S. at 796 ("[A]nalogizing to *Ex parte Young*, tribal immunity does not bar . . . suit for injunctive relief against *individuals*, including tribal officers, responsible for unlawful conduct." (citation omitted)). Thus, tribal sovereign immunity does not apply to tribal officers so long as the plaintiff has "alleged an ongoing violation of federal law and seeks prospective relief." *Vaughn*, 509 F.3d at 1092 (emphasis removed).

Both of those conditions are easily satisfied here for the claims against Individual Defendants in their official capacities. Azuma's cigarette enterprise consists almost exclusively of ongoing violations of federal law. Each month, the Defendants make multiple cigarette shipments to unlawfully operating cigarette business throughout California. *See* Compl. ¶ 61. These cigarettes are contraband under the CCTA as they "bear no evidence of the payment of applicable State . . . cigarette taxes," 18 U.S.C. § 2341(2), and violate the PACT Act both as "delivery sales" that comply with none of the requirements for such sales, 15 U.S.C. § 376a(a)–(d), and for being made on behalf of an entity on listed on the PACT Act non-compliant list, *id.* § 376a(e)(2). Absent injunctive relief, these shipments made in violation of both the PACT Act and CCTA will continue unabated. Similarly, this action seeks only prospective relief against Individual Defendants in their official capacities. It seeks to restrain only future violations of the PACT Act and CCTA and does not seek any monetary or backward-looking relief against Individual Defendants in their official capacities.

In response, Defendants claim that the PACT Act's and CCTA's disclaimers of abrogating sovereign immunity limit the availability of *Ex parte Young* suits. Mot. 14–15. This argument misconstrues the relevant doctrine. When acting contrary to federal law, officials are "stripped of

[their] official or representative character and [are] subjected in [their] person to the consequences of [their] individual conduct." *Ex parte Young*, 209 U.S. 123, 160 (1908); *see also Agua Caliente Band of Cahuilla Indians v. Hardin*, 223 F.3d 1041, 1045 (9th Cir. 2000) ("The *Young* doctrine is premised on the fiction that such a suit is not an action against a 'State' and is therefore not subject to the sovereign immunity bar."). By acting contrary to federal law—here, contrary to the PACT Act and CCTA—Defendants are "stripped of [their] official or representative character" and enjoy no immunity in the first instance. *Ex parte Young*, 209 U.S. at 160.

The existence of federal enforcement mechanisms, Mot. 15, is no bar, either. Defendants cite *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), in support, but that case stands for the proposition that *Ex parte Young* is unavailable when Congress implements an "intricate" alternative remedial scheme, *id.* at 74–75. With regard to the PACT Act, its single sentence giving the State the option to rely on federal enforcement, 15 U.S.C. § 378(c)(2), "does not approach the standard of comprehensiveness required under *Seminole Tribe*." *Rosie D. ex rel. John D. v. Swift*, 310 F.3d 230, 236 (1st Cir. 2002) (explaining that the analysis turns on the "statutory detail and intricacy" of the law in question); *cf.* 25 U.S.C. § 2710(d)(7) (IGRA remedial scheme addressed in *Seminole Tribe*). Defendants' argument is even weaker with respect to the CCTA, which merely gives concurrent enforcement to the federal government. *See* 18 U.S.C. § 2346(a) ("The Attorney General . . . shall enforce the provisions of this chapter.").

III. PLAINTIFF STATES A VALID CCTA CLAIM

The CCTA makes it unlawful for "any person knowingly to ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes." 18 U.S.C. § 2342(a). The term "contraband cigarettes" is defined to "a quantity in excess of 10,000 cigarettes, which bear no evidence of the payment of applicable State or local cigarette taxes in the State or locality where such cigarettes are found," and which are in the possession of a person not authorized by statute to possess such cigarettes. *Id.* § 2341(2). Defendants—themselves unlicensed—distribute millions of unstamped cigarettes throughout California to other unlicensed entities. Plaintiff has accordingly stated a claim for relief under the CCTA and Defendants' motion should be denied as to Plaintiff's second claim for relief.

A. Defendants' cigarettes become contraband because they are not merely "in possession" of Azuma

Defendants attempt to escape liability under the CCTA by arguing they are among those authorized to possess unstamped cigarettes. Specifically, they argue Azuma's TTB permit renders their cigarettes not "contraband" under the CCTA. Mot. 23 (citing 18 U.S.C. § 2341(2)(A)). However, the CCTA makes it unlawful not just to "possess" contraband cigarettes, but also "to ship, transport, receive, . . . sell, distribute, or purchase" them. 18 U.S.C. § 2342(a). While Azuma's unstamped cigarettes may not be contraband when Azuma manufactures them or holds them in federal bond, they become contraband when Defendants distribute them throughout the State, i.e., when Azuma no longer possesses them, but ships, transports, sells, or distributes them.

Consider, for example, how the Southern District of New York responded to a defendant invoking the analogous exception for "a common or contract carrier," *id.* § 2341(2)(B), when neither the carrier's source nor the carrier's recipients were exempt under § 2341, *City of New York v. Gordon*, 1 F. Supp. 3d 94, 106 (S.D.N.Y. 2013). "Thus," the court explained, "the cigarettes at issue were plainly contraband when in the possession of [the seller] and became contraband again when in the possession of the consumer." *Id.* Accordingly, "[i]t follow[ed] that [the carrier] 'receive[d]' contraband cigarettes from [the seller] and 'distribute[d]' contraband cigarettes to the consumers." *Id.* (fourth and sixth alterations in original). The court concluded that "[t]he fact that the cigarettes were non-contraband while in its possession does not immunize [the carrier] from these prohibitions." *Id.*

The same analysis applies here. Even accepting Defendants' position that Azuma's cigarettes may not be contraband when in Azuma's possession, Defendants still violate the CCTA when they "ship, transport, . . . sell, [or] distribute," 18 U.S.C. § 2342(a), those cigarettes to those not exempt under § 2341. As explained in a Senate Report, the CCTA's exemptions were for the purpose of allowing "those persons who are legally entitled to possess cigarettes upon which state cigarette taxes have not been paid" to continue to possess them. S. Rep. 95-962, at 6 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5518, 5521. Defendants' reading of the statute would do the opposite, allowing manufacturers to distribute unstamped cigarettes with impunity to those *not*

legally entitled to possess them. It is unlawful for Azuma to distribute unstamped cigarettes by virtue of its unlicensed status, *see* pp. 12–14, *supra*, and the CCTA does not immunize such conduct, *see* Alexander Decl., ex. B, at 8 ("Azuma's sales of more than 10,000 unstamped, untaxed cigarettes to the Tribal Retailers violate the CCTA as said sales constitute 'dispositions' to non-exempted persons . . . ."). Azuma's cigarettes become contraband when transferred to their customers, and Defendants are properly held liable for "ship[ping], transport[ing], . . . sell[ing], [and] distribut[ing]" them. 18 U.S.C. § 2342(a).

B. Defendants are proper subjects of state CCTA enforcement because they are not the Tribe and distribute cigarettes outside Indian country

Defendants also point to the CCTA's exemption to state enforcement that prohibits actions against "an Indian tribe or an Indians in Indian country," in an attempt to avoid the CCTA claims against them *See* Mot. 15 (citing 18 U.S.C. § 2346(b)(1)). Defendants, however, provide no support for their claim that the "Indian tribe" exemption applies to arms of the tribe. Additionally, Plaintiff's CCTA claims are not premised on any actions taken on the Alturas Indian Rancheria, but rather on Defendants' activities outside of the Rancheria.

First, Azuma, even if an arm of the Tribe, is not itself the Tribe. Congress has repeatedly made clear that tribal governments and tribal corporations are purposefully separate and distinct entities. *See, e.g.*, 25 U.S.C. § 5117(e)(1) (defining "tribal organization" to include "the recognized governing body of any Indian tribe" or "any legally established organization of Indians which is controlled, sanctioned, or chartered by a governing body"). And, like here, those differences are often jurisdiction-determinative. *See, e.g.*, *Am. Vantage Cos. v. Table Mountain Rancheria*, 292 F.3d 1091, 1094 n.1 (9th Cir. 2002) (explaining that, contrary to a tribe, a tribal corporation is a citizen of the state in which it resides for diversity purposes); *Big Sandy*, 1 F.4th at 722–23 (holding that a tribal corporation is not entitled to a jurisdictional grant made to "Indian tribe[s] or bands"); *cf. Ho–Chunk, Inc. v. Sessions*, 253 F. Supp. 3d 303, 311 (D.D.C. 2017) ("Congress knew precisely how to exempt governmental agencies and instrumentalities from the reach of the CCTA, but chose *not* do so with respect to tribal agencies and instrumentalities.").

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Second, the CCTA's "Indian in Indian country" exemption does not apply to any Defendant because Plaintiff brings this suit for CCTA violations that have taken place outside of their Indian country. Defendants admit that they leave their reservation to make their sales of untaxed, unstamped cigarettes. *See* Mot. 8. That removes them from the ambit of the CCTA's exemption, and they are accordingly properly subject to suit.

As the legislative history makes clear, the CCTA intended merely to preserve Indians' right to sell cigarettes tax-free to tribal members. When Congress amended the CCTA to empower States to enforce the Act, some members feared the amendments might "reverse[]" established "Federal Indian policy" in the area. 151 Cong. Rec. H6284 (daily ed. July 21, 2005) (statement of Rep. Coble, the House sponsor). In response to that concern, the CCTA's drafters inserted the provision at issue here, barring civil enforcement by States "against an Indian tribe or an Indian in Indian country." 18 U.S.C. § 2346(b)(1). This "modification" addressed "question[s] of tribal sovereignty," 151 Cong. Rec. H6284 (statement of Rep. Sensenbrenner), by ensuring that the amendment would have "no impact on tribal sovereignty," *id.* (statement of Rep. Cantor). Absent the "Indian in Indian country" exemption, private Indian businesses—themselves lacking sovereign immunity, *United States v. James*, 980 F.2d 1314, 1319 (9th Cir. 1992)—could have been subject to CCTA enforcement by possessing untaxed cigarettes for otherwise lawful tax-free sales to members. A contrary reading, prohibiting enforcement for contraband cigarettes distributed wherever so long as they originate from Indian country and are sent by an Indian would not simply have "no impact on tribal sovereignty," but instead immunize broad swaths of clearly unlawful conduct from state enforcement.[4]

[4] Only one case has addressed the scope of the "Indian in Indian country" exemption, but it should have little bearing on the instant one. *See New York v. Mountain Tobacco Co.* (*Mountain Tobacco II*), 942 F.3d 536 (2d Cir. 2019). That case addressed whether a tribal member-owned corporation was considered an "Indian" for purposes of that exception, and concluded that it was. *Id.* at 548. The Second Circuit did not address the claim that the defendant, even if an Indian, was not subject to the exemption due to its off-Indian country activities, but the district court did. It concluded that because the defendant corporation "is undisputedly located on the Yakama Indian reservation," it was entitled to the exemption. *New York v. Mountain Tobacco Co.* (*Mountain Tobacco I*), No. 12-CV-6276(JS)(SIL), 2016 WL 3962992, at *7 (E.D.N.Y. July 21, 2016); *see also Mountain Tobacco II*, 942 F.3d at 548 (noting defendant is "located on the Yakama reservation"). For the reasons above, that conclusion is wrong. *See Wagnon*, 546 U.S. at 101 ("[U]nder our Indian tax immunity cases, the 'who' and the 'where' of the challenged tax have

C. Stating a valid claim under the CCTA, the Complaint also states a valid claim under Civil RICO

Civil RICO defines "racketeering activity" as any act that is indictable under any one of a long list of crimes. 18 U.S.C. § 1961(1). That list includes violations of the CCTA. *Id.* Defendants' only argument in favor of dismissal of Plaintiff's Civil RICO claim is that Azuma's TTB permit immunizes their conduct under the CCTA. *See* Mot. 23. As explained above, Defendants are incorrect. Providing no other theory of dismissal, Plaintiff's motion should be denied as to Plaintiff's Civil RICO claim.[5]

Additionally, Defendants' arguments claiming various exemptions to direct state enforcement of the CCTA, *see* Mot. 15, have no impact on the State's authority to bring a Civil RICO claim. This is because Defendants remain indictable under the CCTA. *See Gordon*, 1 F. Supp. 3d at 112 ("[I]mmunity from a *civil* suit under the Act does not render [the defendant] immune from indictment and criminal prosecution under the Act."). Civil RICO provides a civil cause of action for those harmed by certain criminal acts, including violations of the CCTA. *See id.* Limitations of direct enforcement of CCTA violations have no impact on the ability to bring racketeering claims based on the same acts. *Cf. United States v. Fiander*, 547 F.3d 1036, 1042 (9th Cir. 2008) ("[A]lthough [the defendant] may not be prosecuted for a substantive violation of the CCTA . . . , he may be prosecuted for a RICO conspiracy in which the racketeering activity is contraband cigarette trafficking.").

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significant consequences."). Moreover, that holding creates absurdities when applied to natural persons, and "interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982). While a corporation can be said to be located in Indian country, applying domicile rules to individuals would make immunity turn on whether defendant lays their head to rest at night on-reservation or off. The exemption must instead turn on the location of the challenged activity. *See United States v. Singh*, 979 F.3d 697, 726 (9th Cir. 2020) ("In construing provisions . . . in which a general statement of policy is qualified by an exception, we usually read the exception narrowly in order to preserve the primary operation of the provision." (ellipsis in original) (quoting *Comm'r v. Clark*, 489 U.S. 726, 739 (1989))).

[5] Plaintiff's Civil RICO claim is premised on *Gordon*'s reading of the CCTA. In the event the Court disagrees with the *Gordon* Court, Plaintiff asks for leave to amend the Complaint to include a claim under 18 U.S.C. § 1962(d)—conspiracy. Azuma's cigarettes are undoubtedly contraband when in the possession of its customers, and by distributing those cigarettes, Defendants Rose and Phillip Del Rosa necessarily agreed to do so.

IV. DEFENDANTS ROSE AND DEL ROSA ARE PERSONALLY LIABLE

A. Qualified immunity generally

Qualified immunity[6] protects government officials from civil liability where "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). "Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Id.* But "[w]here an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action." *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982). That is because qualified immunity does not protect "those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986); *see also Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 514 (1991) ("We have never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State.").

Qualified immunity is analyzed under a two-prong inquiry: (1) whether the alleged facts violate the law, and (2) if so, whether the constitutional or statutory right at issue was clearly established at the time of the violation.[7] *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Courts have discretion to decide which of the two prongs to analyze first. *Pearson*, 555 U.S. at 236. "[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Messerschmidt v. Millender*, 565 U.S. 535, 546 (2012) (alteration in original) (quoting *Anderson*

[6] Defendants' motion also mentions tribal absolute immunity, but does not claim it applies to any of Plaintiff's claims. *See* Mot. 16.

[7] As an initial matter, it is unclear whether qualified immunity applies to state statutory enforcement actions in the first instance. The cases Defendants cite all address violations of constitutional or statutory *rights*, *see* Mot. 17, but Defendants identify no allegations of rights violations in the Complaint. As it is Defendants' burden to prove that qualified immunity applies in the first instance, *see Harlow*, 457 U.S. at 812, their motion is properly denied on that basis.

v. Creighton, 483 U.S. 635, 639 (1987)). "'Clearly established' means that, at the time of the officer's conduct, the law was '"sufficiently" clear that every "reasonable official would understand that what he is doing"' is unlawful." *District of Columbia v. Wesby*, 583 U.S. 48, 63 (2018) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)).

Despite multiple warnings from both OAG and ATF that their conduct was unlawful, decades of Supreme Court precedent making application of cigarette laws to tribal entities clear, and a Ninth Circuit case applying that clear precedent to California law in particular, Defendants here claim that "it is far from clearly established that Azuma's operations violate the state and federal laws at issue." Mot. 18. They are incorrect. As explained above, Plaintiffs have stated valid claims under the PACT Act, the CCTA, and Civil RICO. The relevant law, spelled out in statutes and resting upon decades of Supreme Court precedent, has been clearly defined, and Defendants are not entitled to qualified immunity.

B. The contours of state cigarette law applied to tribal entities has been clearly established for decades

As explained above, Defendants focus only on their conduct on the Alturas Indian Rancheria and their customers' land to argue in favor of *Bracker* balancing in an attempt to muddy the relevant law. *See* Mot. 18–21. But they ignore the portions of their deliveries that take place entirely off of Indian land, rendering *Bracker* inapplicable. It has been clearly established since 1973 that Indians traveling outside their Indian country are subject to "nondiscriminatory state law otherwise applicable to all citizens of the State," *Mescalero*, 411 U.S. at 148–49, and clearly established since 1994 that state cigarette laws apply to cigarettes en route to Indian country, *Milhelm*, 512 U.S. at 67, 78. Indeed, the Ninth Circuit had no trouble applying that clearly established law to affirm specifically that California's "Directory Statute and California's licensing, recordkeeping, and reporting requirements" were properly applied to a tribal business traveling off reservation to sell to Indians on other tribes' land, *Big Sandy*, 1 F.4th at 728, after the district court found the tribal business's arguments to be an "attempt to retread old ground," *Big Sandy Rancheria Enters. v. Becerra*, 395 F. Supp. 3d at 1334; *see also Big Sandy*, 1 F.4th at 729 ("In these circumstances, the district court properly declined to balance federal, state, and

tribal interest under *Bracker*."). Defendants' attempt to resurrect those long since rejected arguments here does not change the fact that the relevant law is well-established.[8] Defendants' business is clearly unlawful, and they are not entitled to qualified immunity under the state and federal laws aimed at such unlawful conduct.

C. Defendants' cigarette business is unlawful, and no tribal official in Defendants' position could reasonably understand otherwise

Beyond the clearly established law identified above, Defendants in particular could not reasonably understand their cigarette business was not unlawful. Rose has engaged in the unlawful retail sales of contraband cigarettes since at least 2009. Compl. ¶ 28. After notification from both OAG and the federal government that his tobacco operations were unlawful, the Shasta County Superior Court imposed hundreds of thousands of dollars in fines against Rose and enjoined him from selling cigarettes except to members of the Alturas Tribe on the Alturas Tribe's land. *Id.* ¶¶ 29–33. As the California Court of Appeal recognized in affirming the judgment against Rose, his sales off of his tribe's land made him "stand[] on the same footing as non-Indians for the purpose of determining whether the state can assert its civil/regulatory authority over him," and thus California's Directory Statute and cigarette tax applied. *People ex rel. Becerra v. Rose*, 16 Cal. App. 5th 317, 329 (2017). It beggars belief that someone held personally liable for violating these exact laws could reasonably understand Azuma's sales not also to be unlawful. The same can be said of Phillip Del Rosa, who was also fully aware of that prior litigation. *See* Compl., ex. E, ECF No. 1-5, Statement of Decision, *People ex rel. Harris v. Rose*, Case No. 176689, ¶ 40 (Shasta Cnty. Super. Ct. Aug. 28, 2015) ("[Rose] and Phillip Del Rosa have elected not to authorize [Rose's salary] payments pending the outcome of this matter."). The only difference appears to be the two partnering to make those sales through Azuma in order to fraudulently exploit the Tribe's sovereign immunity. *See* Compl. ¶¶ 24, 48.

Rose and Phillip Del Rosa undoubtedly should have been "expected to know that [their] conduct would violate" the law and "should [have been] made to hesitate." *Harlow*, 457 U.S. at

[8] It is perhaps unsurprising that Defendants here raise the same arguments as Big Sandy did—at the time Big Sandy sourced its cigarettes from Azuma, *see Big Sandy*, 1 F.4th at 718 n.5, and the same law firm that represented Big Sandy in that action represents Defendants here.

819. Rather than hesitate, Rose and Phillip Del Rosa continued their conduct in the face of warnings from OAG and ATF, listing on the PACT Act non-compliant list, and repeatedly rejected attempts to be removed from that list. *See* Compl. ¶¶ 55–61. California accordingly "ha[s] a cause of action" against them. *Harlow*, 457 U.S. 819.

V. RULE 19 IS NO BAR TO PLAINTIFF'S CLAIMS

Defendants ask the Court to dismiss "all the claims in this case that contend Azuma is obliged to comply with California civil regulatory law or remit California taxes in connection with its sales into the Tribal Retailers" for failure to join necessary and indispensable parties under Rule 19. Mot. 25. It is not clear from this scattershot approach which claims Defendants believe should be dismissed under Rule 19, but to the extent Defendants believe Plaintiff's claims require a determination of any third party's rights, they misunderstand the underlying statutes.[9]

And, as an initial matter, none of Azuma's customers have claimed an interest in the litigation. *See United States v. Bowen*, 172 F.3d 682, 689 (9th Cir. 1999) (requiring, as a threshold mater, "that the absent party *claim* a legally protected interest"). Plaintiff's Rule 19 argument fails to meet the first hurdle and is properly disregarded.

A. PACT Act

With respect to Plaintiff's PACT Act claim, Defendants' failure to make required reports implicates no other party whatsoever and Rule 19 is clearly no bar. *See* Compl. ¶ 71. The Complaint also seeks relief for both Defendants' failure to abide by the PACT Act's delivery seller requirements, and the deliveries Defendants make on Azuma's behalf despite Azuma's listing on the PACT Act non-compliant list. *See id.* ¶¶ 68–70, 72–73, 75. These claims, too, address only Defendants' conduct. Azuma is a delivery seller subject to the Act's requirements, Azuma is on the non-complaint list, and Plaintiff's PACT Act claims are against Defendants' violations. Defendants' contention that the "[d]etermin[ation] whether [their customers] are lawfully operating is an essential element" of Plaintiff's PACT Act claims, Mot. 26, misreads the statute.

[9] Defendants' do not appear to argue Plaintiff's CCTA or Civil RICO claims implicate any third party's rights. They have accordingly not met their burden under Rule 12(b)(7) and Defendants' motion should be denied as to those claims.

As to deliveries on behalf of an entity listed on the non-compliant list, Defendants point to § 376a(e)(2)(A). But that section, listing three exceptions to its prohibition on deliveries on behalf of those listed on the PACT Act non-compliant list, establishes three affirmative defenses, not three "essential elements." *See United States v. Carey*, 929 F.3d 1092, 1100–01 (9th Cir. 2019) ("Where . . . the 'statutory prohibition is broad and an exception is narrow, it is more probable that the exception is an affirmative defense.'" (quoting *United States v. Gravenmeir*, 121 F.3d 526, 528 (9th Cir. 1997))). Defendants' claim that their deliveries are to "person[s] lawfully engaged in the business of manufacturing, distributing, or selling cigarettes," 15 U.S.C. § 376a(e)(2)(A)(ii), is Defendants' burden to establish and does not implicate Rule 19(a)(1).

Similarly, all persons who "purchase cigarettes" are presumptively "consumers" under the Act, 15 U.S.C. § 375(4)(A), subjecting Defendants' to the PACT Act's "delivery sales" requirements, *id.* § 376a(a)–(d). Defendants once again bear the burden of proving the exception—that their customers are "lawfully operating as a manufacturer, distributor, wholesaler, or retailer of cigarettes," *Id.* § 375(4)(B)—and Rule 19(a)(1) is again not implicated.

Moreover, Defendants have not and cannot meet either of those burdens. As explained above, California can impose "minimal burdens" on tribal retailers, regardless of whether any of those retailers' sales are ultimately taxable, and arguments premised to the contrary need not be credited. *Cf. Shermoen v. United States*, 982 F.2d 1312, 1318 (9th Cir. 1992) (rejecting that a court should "find a party necessary based on patently frivolous claims"). Defendants' failure to establish they are entitled to an affirmative defense has no impact—practical or otherwise—on any legally protectable interest of their customers and they are not necessary under Rule 19(a)(1).

Even assuming, *arguendo*, Azuma's customers are necessary under Rule 19(a)(1), they are not indispensable under Rule 19(b). As explained above, a determination of whether Defendants have met their burden under § 376a(e)(2)(A)(ii) or § 375(4)(B) would result in no prejudice to any third parties. *See* Fed. R. Civ. P. 19(b)(1). Any potential prejudice could be eliminated by making any order clear that it contains no determination of any third-party rights, but merely of whether Defendants have met the burden of their affirmative defenses. *See* Fed. R. Civ. P. 19(b)(2). Additionally, any prejudice can be "minimized" even further if, as here, "the absent

party is adequately represented in the suit." *Salt River Project Agric. Improvement & Power Dist. v. Lee*, 672 F.3d 1176, 1180 (9th Cir. 2012) (quoting *Shermoen*, 982 F.2d at 1318). Given the overlapping interests of Defendants and Azuma's customers here, there is no indication that those interests will be unrepresented here. Finally, a finding that Azuma's customers are indispensable parties could deprive the State of any venue to litigate the instant claim, *see* Fed. R. Civ. P. 19(b)(4), severely undermining the purposes of that Act, *compare* 15 U.S.C. § 375(10), as amended by the PACT Act, Pub. L. 111-154, 124 Stat. 1087 (2009) (including commerce to, from, and through Indian country as "interstate commerce" requiring PACT Act reports), *with* 15 U.S.C. § 376 (1952) (requiring reports only for commerce "in interstate commerce").

B. Directory and Escrow Statutes

As explained above, Defendants violate the Directory Statute when they transport cigarettes from the Alturas Indian Rancheria to their customers. It is undisputed that these deliveries take Defendants off of Indian land, and the Directory Statute is properly applied as soon as Defendants step foot off of the Rancheria. *See Big Sandy*, 1 F.4th at 730. No third party rights are implicated.

Similarly, because of Defendants' unlicensed status, their "sale," "use," or "consumption" of untaxed cigarettes or tobacco products, is a taxable "distribution" under California law. Cal. Rev. & Tax. Code §§ 30008–30009 (exempting from "use or consumption" only "the sale of the cigarettes . . . or the keeping or retention thereof by a licensed distributor for the purpose of sale"); *id.* § 30103 ("The taxes imposed by this part shall not apply to the sale of cigarettes . . . by the manufacturer to a licensed distributor."). Regardless of how many of Azuma's cigarettes would be taxable if Azuma were licensed, Azuma is currently unlicensed and thus all of the cigarettes it distributes off-reservation are taxable regardless of their ultimate distributions. As with Defendants' Directory Statute violations, Defendants Escrow Statute violations implicate no third party's rights.

CONCLUSION

The Court should deny Defendants' Motion to Dismiss, ECF No. 24.

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Respectfully submitted,

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