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

13  
 14 **STATE OF CALIFORNIA, ex rel. ROB**  
 15 **BONTA, in his official capacity as Attorney**  
**General of the State of California,**

2:23-cv-00743-KJM-DB

16 Plaintiff,

17 v.

**MEMORANDUM OF POINTS AND**  
**AUTHORITIES IN SUPPORT OF**  
**PLAINTIFF STATE OF CALIFORNIA’S**  
**MOTION FOR AN ORDER TO SHOW**  
**CAUSE WHY DEFENDANT DAREN**  
**ROSE SHOULD NOT BE HELD IN**  
**CIVIL CONTEMPT**

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

Date: January 26, 2024  
 Time: 10:00 am  
 Courtroom: 3, 15th Floor  
 Judge: Hon. Kimberly J. Mueller  
 Trial Date: N/A  
 Action Filed: April 19, 2023

24 Defendants.

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**INTRODUCTION**

On September 8, 2023, the Court issued an Order preliminarily enjoining Defendant Darren Rose in his official capacities as Vice-chairman of the Alturas Indian Rancheria and as President/Secretary of Defendant Azuma Corporation “from completing or causing to be completed any delivery, or any portion of a delivery, of packages containing cigarettes on behalf of Azuma Corporation to anyone in California.” Order 24 (“Prelim. Inj. Order”), ECF No. 43. That injunction became effective on September 15, 2023. Nevertheless, Azuma has continued the operations that formed the basis of the Court’s order without interruption, distributing the same cigarettes in now-greater quantities to the same customers. California respectfully requests that Rose be ordered to show cause why he should not be held in civil contempt of the Court’s order for his blatant violations of the injunction, and make a subsequent determination that he is in fact in contempt of that order.

**FACTUAL AND PROCEDURAL BACKGROUND**

**I. AZUMA CORPORATION’S LISTING ON THE PACT ACT NON-COMPLIANT LIST**

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. Defendant Darren Rose is the Tribe’s Vice-chairman and is Azuma’s President/Secretary. *Id.* ¶ 10; Rose Decl. ¶¶ 2–3, ECF No. 23-3.

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 and federal laws relating to the distribution of cigarettes in California. Relevant to this motion, Azuma is in violation of 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). That Act,

1 among other things, imposes reporting requirements and requires compliance with state law for  
2 certain transactions.

3 Over the past five years, the California Office of the Attorney General (“OAG”) has made  
4 repeated efforts to alert Azuma to its violations and to bring Azuma into compliance with state  
5 and federal law. Those efforts have failed, and the federal Bureau of Alcohol, Tobacco, Firearms  
6 and Explosives (“ATF”), placed Azuma on the so-called PACT Act non-compliant list on  
7 April 10, 2019, due to the company’s repeated PACT Act violations. Listing prohibits persons  
8 who have received the list, and persons who deliver cigarettes to “consumers” as defined in that  
9 act, from knowingly transporting cigarettes on the behalf of the listed entity. *See* 15 U.S.C.  
10 § 376a(e)(2)(A). Though Azuma has since made some of the reports required by the PACT Act,  
11 Compl. ¶ 54, Azuma and its customers have continued to operate in violation of state law.  
12 Accordingly—aside from a brief two-month interruption toward the end of 2019, *see id.* ¶ 56—  
13 Azuma has remained on that list ever since, *id.* ¶¶ 55, 58.<sup>1</sup>

14 After one last attempt to bring Azuma into compliance by a letter dated October 26, 2022,  
15 *see* Compl., ex. M, ECF No. 1-13, OAG filed the instant suit.

16 **II. PLAINTIFF’S MOTION FOR PRELIMINARY INJUNCTION**

17 On June 6, 2023, Plaintiff the State of California filed a motion for preliminary injunction,  
18 Pl. State Cal.’s Not. Mot. & Mot. Prelim. Inj., ECF No. 13, seeking to enjoin Azuma’s tribal  
19 officers in their official capacities from delivering or causing to be delivered cigarettes in  
20 violation of the PACT Act, Mem. P. & A. Supp. Mot. Prelim. Inj. 1, ECF No. 13-1. Specifically,  
21 the motion sought to enjoin deliveries made on behalf of Azuma, a listed entity, to retailers  
22 located on tribal land throughout California in violation of the PACT Act. *See id.* at 9–11 (citing  
23 15 U.S.C. § 376a(e)(2)(A)).

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25 \_\_\_\_\_  
26 <sup>1</sup> In June 2023, shortly after Plaintiff filed its motion for preliminary injunction in the  
27 instant case, Azuma filed suit against ATF in the U.S. District Court for the District of Columbia,  
28 claiming that its placement on the non-compliant list is improper. *See Azuma Corp. v. Garland*,  
No. 1:23-cv-01761 (D.D.C. filed Jun. 16, 2023). Cross-motions for summary judgment in that  
suit have been scheduled to finish briefing on April 3, 2024. Accordingly, Azuma will almost  
certainly remain listed through at least that date.

1 After extensive briefing and a hearing on the motion that Rose himself attended, *see* Defs.’  
2 Opp’n Pl.’s Mot. Prelim. Inj., ECF No. 23; Defs.’ Supp. Br. Opp’n Pl.’s Mot. Prelim. Inj., ECF  
3 No. 39; Min. Mot. Hr’g, ECF No. 32, the Court granted the motion as to Defendant Rose “in his  
4 official capacity as vice-chairman of the Alturas Indian Rancheria and as president/secretary of  
5 Azuma Corporation,” Prelim. Inj. Order 24. The Court found that “Rose has knowingly caused to  
6 be completed or has completed deliveries of cigarettes for Azuma, despite receiving notices from  
7 California and ATF about Azuma’s placement on the noncompliant list.” *Id.* at 19. Accordingly,  
8 the Court concluded:

9 California has shown it is likely to succeed on the merits of its PACT Act claim  
10 against Mr. Rose, i.e., that Darren Rose, in his official capacity as an officer of the  
11 Alturas Tribe violated section 376(a)(e)(2)(A) by delivering or causing the delivery of  
cigarettes on behalf of Azuma despite knowing Azuma was listed on the non  
compliant list.

12 *Id.*

13 After also finding “the balance of hardships sharply weigh in favor of California,” *id.* at 23,  
14 the Court enjoined Rose as well as “his employees and agents” from “completing or causing to be  
15 completed any delivery, or any portion of a delivery, of packages containing cigarettes on behalf  
16 of Azuma Corporation to anyone in California,” *id.* at 24.

17 The injunction became effective “upon California’s filing proof with the Clerk’s office that  
18 it has posted a bond in the sum of \$1,000.” *Id.* at 25; *see also* Fed. R. Civ. P. 65(c) (setting bond  
19 requirement). California filed such proof on September 15, 2023, *see* Receipt Number 200003040  
20 for \$1,000 from State of California (Dkt. Entry Sept. 15, 2023), and the injunction became  
21 effective on that date.<sup>2</sup>

22 The same day, Defendants filed a notice of appeal to the Ninth Circuit. Not. Appeal, ECF  
23 No. 44. Briefing of that appeal has been continued by agreement to accommodate settlement  
24 negotiations before a Ninth Circuit Mediator, and Defendants’ opening brief is currently due on  
25 January 12, 2024. *See* Order, *California v. Azuma Corp.*, No. 23-16200 (9th Cir. Nov. 20, 2023),

26 <sup>2</sup> Defendants have also filed a motion to dismiss. Defs.’ Not. Mot. & Mot. Dismiss, ECF  
27 No. 24. That motion has been fully briefed, and the Court took the matter under submission after  
28 a hearing on October 13, 2023. *See* Min. Mot. Hr’g, ECF No. 49. The Court has also deferred  
case scheduling while that motion is pending. *See id.*

1 DktEntry: 12. Defendants have not filed any motion for any stay of the injunction. Indeed, neither  
2 this Court nor the Ninth Circuit has stayed the preliminary injunction pending appeal.  
3 Accordingly, the injunction remains in effect.

4 **III. AZUMA’S SUBSEQUENT DISTRIBUTIONS**

5 Despite the injunction, Azuma’s cigarette distributions in California have continued. As  
6 indicated above, Azuma began making reports of its cigarette distributions in response to  
7 California’s request that it be placed on the PACT Act non-compliant list. Azuma registered with  
8 the California Department of Tax and Fee Administration (“CDTFA”) pursuant to the PACT Act,  
9 15 U.S.C. § 376(a)(1), via the Taxpayer Online Services Portal, on October 17, 2019. Dahlen  
10 Decl. (“OSC Dahlen Decl.”) ¶ 5. Using the resultant account, Azuma has filed monthly reports of  
11 cigarette shipments, indicating the recipient, brand, and quantity. *See, e.g.*, Dahlen Decl. (“Prelim.  
12 Inj. Dahlen Decl.”), ex. A, ECF No. 13-4.

13 On November 7, 2023, Azuma submitted a report to CDTFA for the month of October  
14 2023—in other words, the month *after* the injunction took effect—showing the shipment of 2.46  
15 million cigarettes to customers throughout California during that month. OSC Dahlen Decl. ¶¶ 6–  
16 7 & ex. A. That report was transmitted to OAG as part of the agencies’ ordinary operations on  
17 November 27, 2023. OAG staff learned of the injunction violations for the first time when  
18 reviewing that report as part of the agency’s ordinary operations on December 6, 2023. OAG  
19 reached out to CDTFA the following day and learned that Azuma had also submitted a report for  
20 the month of November 2023 on December 5, 2023, which showed the shipment of an additional  
21 2.604 million cigarettes to customers throughout California during that month. *See* OSC Dahlen  
22 Decl. ¶¶ 8–9 & ex. B.

23 Now apparently shipping over 2 million cigarettes each month, Azuma is distributing even  
24 more cigarettes than it was leading up to OAG filing this suit. *See* Compl. ¶ 46 (alleging 10  
25 million cigarettes is “sufficient to meet Azuma’s current reported distribution volume for about  
26 six months,” i.e., a distribution rate of about 1.67 million cigarettes per month). As with all of  
27 Azuma’s prior distributions, they are of off-Directory cigarettes to unlicensed retailers, who

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1 collect and remit no California excise tax. At bottom, the two reports show that Azuma’s  
2 shipments have continued uninterrupted since the preliminary injunction went into effect.

3 **LEGAL STANDARD**

4 Courts possess “an inherent contempt authority as a power ‘necessary to the exercise of all  
5 others.’” *Int’l Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 831 (1994) (citation  
6 omitted) (quoting *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812)). “A court may  
7 wield its civil contempt powers for two separate and independent purposes: (1) ‘to coerce the  
8 defendant into compliance with the court’s order’; and (2) ‘to compensate the complainant for  
9 losses sustained.’” *Shell Offshore Inc. v. Greenpeace, Inc.*, 815 F.3d 623, 629 (9th Cir. 2016)  
10 (quoting *United States v. United Mine Workers.*, 330 U.S. 258, 303–04 (1947)).

11 “The standard for finding a party in civil contempt is well settled: ‘The moving party has  
12 the burden of showing by clear and convincing evidence that the contemnors violated a specific  
13 and definite order of the court.’” *Fed. Trade Comm’n v. Affordable Media*, 179 F.3d 1228, 1239  
14 (9th Cir. 1999) (quoting *Stone v. City & County of San Francisco*, 968 F.2d 850, 856 n.9 (9th Cir.  
15 1992)). “This standard is generally an *objective* one,” *Taggart v. Lorenzen*, 139 S.Ct. 1795, 1802  
16 (2019), and “there is no good faith exception to the requirement of obedience to a court order,”  
17 *Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1323 (9th Cir. 1998) (quoting *In re Dual-Deck*  
18 *Video Cassette Recorder Antitrust Litig.*, 10 F.3d 693, 695 (9th Cir. 1993)). “The sole question is  
19 whether a party complied with the district court’s order.” *Donovan v. Mazzola*, 716 F.2d 1226,  
20 1240 (9th Cir. 1983).

21 Once such a showing has been made, “[t]he burden then shifts to the contemnors to  
22 demonstrate why they were unable to comply.” *Affordable Media*, 179 F.3d at 1239 (quoting  
23 *Stone*, 968 F.2d at 856 n.9). To avoid being held in contempt, a contemnor must “demonstrate he  
24 took ‘all reasonable steps within [his] power to insure compliance’ with the injunction[.]” *Hook v.*  
25 *Ariz. Dep’t of Corrections*, 107 F.3d 1397, 1403 (9th Cir. 1997) (first alteration in original)  
26 (quoting *Sekaquaptewa v. MacDonald*, 544 F.2d 396, 403–04 (9th Cir. 1976)).

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1 **ARGUMENT**

2 Rose’s conduct warrants the issuance of an order to show cause, a subsequent determination  
3 that he is in contempt of the Court’s preliminary injunction order, and the imposition of  
4 conditional fines and costs in order to induce compliance with the injunction.

5 **I. AZUMA’S PACT ACT REPORTS ARE CLEAR AND CONVINCING EVIDENCE OF**  
6 **ROSE’S VIOLATIONS**

7 It is difficult to imagine a more clear-cut example of contempt. The Court enjoined Rose in  
8 his official capacities, as well as his employees and agents, “from completing or causing to be  
9 completed any delivery, or any portion of a delivery, of packages containing cigarettes on behalf  
10 of Azuma Corporation to anyone in California.” Prelim. Inj. Order 24. Since then, under Rose’s  
11 direction and directly in contravention of this Court’s order, packages containing over five  
12 million cigarettes have been delivered to persons in California on behalf of Azuma.

13 The reports Azuma made to CDTFA of these deliveries are clear and convincing evidence  
14 that Rose has “complet[ed] or caus[ed] to be completed” deliveries in violation of the Court’s  
15 order. The deliveries are self-reported, uploaded to CDTFA’s Taxpayer Online Services Portal by  
16 Alyssa Rose,<sup>3</sup> who identifies herself as a manager. OSC Dahlen Decl. ¶¶ 6, 8 & ex. A, B. The  
17 reported transactions also match the distributions that formed the basis of the preliminary  
18 injunction order in the first instance, reporting deliveries of previously identified cigarette brands  
19 to previously identified customers. *Compare* Prelim. Inj. Dahlen Decl., ex. A, ECF No. 13-4;  
20 Ferris Decl., ex. A, ECF No. 23-4, *with* OSC Dahlen Decl., exs. A–B. Nor were the factual  
21 underpinnings of the preliminary injunction ever in dispute over the course of the motion’s  
22 extensive briefing. Moreover, because Azuma transmitted the reports to CDTFA pursuant to the  
23 PACT Act, 15 U.S.C. § 376(a)(1), the reports are “presumptive evidence that [the reported]  
24 cigarettes . . . were sold, or transferred for profit, by” Azuma, *id.* § 376(b).

25 Because Rose is the President/Secretary of Azuma and Vice-chairman of the Alturas Indian  
26 Rancheria, there is similarly no question that he “complet[ed] or caus[ed] to be completed” the

27 <sup>3</sup> Alyssa Rose has been identified in news articles as Darren Rose’s adult daughter. *See,*  
28 *e.g.,* Steven Magagnini, *Tiny Modoc Casino Tribe Adopts White Men in Failed Attempt to Profit,*  
*SACRAMENTO BEE* (Apr. 27, 2015), <https://www.sacbee.com/news/local/article19563546.html>.

1 deliveries. The Court has already found that Rose “knowingly caused to be completed or has  
2 completed deliveries of cigarettes for Azuma” by means of his official positions, Prelim. Inj.  
3 Order at 19, and Azuma’s operations have not changed. Moreover, the injunction runs not only to  
4 Rose, but also to “his employees and agents.” *Id.* at 24. Because these distributions were made on  
5 behalf of Azuma, they are necessarily “complet[ed] or caus[ed] to be completed,” *id.*, by either  
6 the President/Secretary of that corporation or the President/Secretary’s employees and agents, *see*  
7 Rose Decl., ex. A, at 2 (establishing the positions of Azuma President and Secretary as members  
8 of the Board of Directors).

## 9 **II. THE COURT HAS BROAD DISCRETION TO ADDRESS CONTEMPT**

10 “Under traditional principles of equity practice, courts have long imposed civil contempt  
11 sanctions to ‘coerce the defendant into compliance’ with an injunction . . . .”<sup>4</sup> *Taggart v.*  
12 *Lorenzen*, 139 S. Ct. 1795, 1801 (2019) (quoting *United States v. United Mine Workers*, 330 U.S.  
13 258, 303–04 (1947)). “The measure of the court’s power in civil contempt proceedings is  
14 determined by the requirements of full remedial relief.” *McComb v. Jacksonville Paper Co.*,  
15 336 U.S. 187, 193 (1949). “[T]he court must, in determining the size and duration of the sanction,  
16 ‘consider the character and magnitude of the harm threatened by continued contumacy, and the  
17 probable effectiveness of any suggested sanction in bringing about the result desired.’” *Whittaker*  
18 *Corp. v. Execuair Corp.*, 953 F.2d 510, 518 (9th Cir. 1992) (quoting *United Mine Workers*,  
19 330 U.S. at 304). Courts may also impose non-monetary sanctions aimed at coercing compliance.  
20 *See, e.g., Parsons v. Ryan*, 949 F.3d 443, 455 (9th Cir. 2020) (approving civil contempt order  
21 requiring filing of monthly reports).

22 Here monetary penalties are warranted to ensure compliance. The PACT Act’s civil  
23 penalties provision provides a guideline for the amount. That provision imposes \$5,000 for the  
24 first violation and \$10,000 for each subsequent violation. 15 U.S.C. § 377(b)(1)(A). Additionally,  
25 because Azuma’s distributions are not immediately observable by Plaintiff, additional sanctions

26 <sup>4</sup> The Court also has authority to refer Rose’s contempt to the U.S. Attorney’s Office for  
27 prosecution of criminal contempt. *See* Fed. R. Crim. P. 42(a)(2). Indeed, PACT Act violations  
28 create not only civil liability, but are also crimes. 15 U.S.C. § 377(a); *see also* 18 U.S.C.  
§§ 402, 3691.

1 are also warranted. *See, e.g.*, Compl. ¶¶ 50–51 (alleging Azuma’s operations are structured  
2 specifically to avoid detection). Statutory provisions again provide a guideline. At a minimum,  
3 Rose should be required to continue to make PACT Act reports while the injunction remains in  
4 effect. *See* 15 U.S.C. § 376(a). Access to Azuma’s records as if it were a properly licensed  
5 manufacturer would also aid ensuring compliance. *See* Cal. Bus. & Prof. Code §§ 22979.4–.6  
6 (requiring retention of all manufacturer purchase records, sales, and invoices for inspection).  
7 Attorney’s fees and costs are also warranted. *See Donovan v. Burlington N., Inc.*, 781 F.2d 680,  
8 683 (9th Cir. 1986) (concluding that the question of attorney’s fees is let “to the sound discretion  
9 of district courts”).

### 10 CONCLUSION

11 For the reasons provided, Plaintiff the State of California respectfully requests that this  
12 Court:

- 13 1. Issue an order directing Defendant Darren Rose to appear before the Court to show  
14 cause, if any, on January 26, 2024 or at such time as the Court shall direct, why he should not be  
15 held in civil contempt for failure to comply with the Court’s preliminary injunction order signed  
16 on September 7, 2023, and filed on the docket September 8, 2023;
  - 17 2. Following the issuance of the Order to Show Cause and an appropriate hearing, enter  
18 a judgment of civil contempt against Defendant Darren Rose for violations of the Court’s  
19 preliminary injunction order;
  - 20 3. Award the State of California its attorneys’ fees and court costs of the contempt  
21 proceeding; and
  - 22 4. Grant such other and further relief as the Court deems just and proper.
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1 Dated: December 13, 2023

Respectfully submitted,

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