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UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

STATE OF IDAHO by and through
LAWRENCE G. WASDEN, Attorney
General; and the IDAHO STATE TAX
COMMISSION,

Plaintiff,

vs.

NATIVE WHOLESALE SUPPLY
COMPANY, a corporation; and Does 1
through 20,

Defendants.

Case No. 1:08-cv-00396-EJL

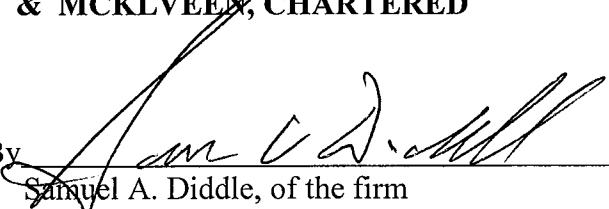
MOTION TO DISMISS FOR
LACK OF PERSONAL
JURISDICTION

COMES NOW the Defendant, Native Wholesale Supply Company, by and through its attorneys of record, Eberle, Berlin, Kading, Turnbow & McKlveen, Chartered, and submits this Motion pursuant to Rule 12(b)(2) seeking dismissal of the Complaint for lack of personal jurisdiction. This Motion is supported by a Memorandum submitted concurrently herewith, and the Affidavit of Arthur Montour.

DATED this 24 day of September, 2008.

**EBERLE, BERLIN, KADING, TURNBOW,
& MCKLVEEN, CHARTERED**

By


Samuel A. Diddle, of the firm
Attorneys for Defendant Native Wholesale
Supply Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing document was served upon the following attorney this 24 day of September, 2008, as indicated below and addressed as follows:

Lawrence G. Wasden
Attorney General
State of Idaho
Brett T. DeLange
Deputy Attorney General
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**DEFENDANT'S MEMORANDUM
IN SUPPORT OF MOTION TO
DISMISS FOR LACK OF
PERSONAL JURISDICTION**

COMES NOW the Defendant, Native Wholesale Supply Company ("NWS"), by and through its attorneys of record, Eberle, Berlin, Kading, Turnbow & McKlveen, Chartered, and submits this Memorandum in support of its Rule 12(b)(2) Motion to Dismiss for Lack of Personal Jurisdiction.

The action should be dismissed because NWS, a corporation chartered by the Sac and Fox Tribe, is not subject to personal jurisdiction in Idaho. NWS is not domiciled in Idaho, and

does not have the minimum contacts necessary with Idaho to subject NWS to the jurisdiction of Idaho courts. There is neither general jurisdiction nor specific jurisdiction over NWS.

NWS sells cigarettes from its office on the Seneca Nation of Indians Territory in northern New York, with all sales being on a F.O.B. Seneca Nation basis. Title to the cigarettes and risk of loss is passed to the purchaser at the time the transaction is consummated on the Seneca Nation of Indians Territory. NWS has no control over what purchasers may do with the cigarettes subsequent to the sale. NWS directs no commercial activity toward Idaho and does not transact any business here.

I. FACTUAL BACKGROUND.

The action was commenced against NWS in the State of Idaho District Court for Ada County. The Complaint generally alleges that NWS is illegally selling, distributing or importing cigarettes in Idaho and seeks to enjoin NWS from continuing its actions and also seeks the imposition of monetary sanctions. NWS has removed this action from the Idaho District Court to this Court, and now submits its Motion to Dismiss based on the following uncontroverted facts:

In or around 2001, NWS was chartered as a corporation by the Sac and Fox Tribe of Oklahoma. (Montour Aff. ¶ 2). NWS's office has always been located on Seneca Nation of Indians Territory in northern New York. (*Id.*) NWS has no other office. (*Id.*)

The primary business of NWS is the sale of tobacco products. (Montour Aff. ¶ 3) NWS imports cigarettes manufactured by Grand River Enterprises Six Nations, Ltd. ("Grand River") for resale to third parties. (*Id.*) Grand River is wholly owned by Native Americans who are members of the Six Nations that comprise the Iroquois Confederacy. (*Id.*) Grand River is a

Canadian corporation that produces, packages and sells tobacco products. (*Id.*) Grand River's facility is located on the Grand River Reserve in Oshweken, Ontario, Canada. (*Id.*)

NWS purchases and imports cigarettes from Grand River that are shipped to their ultimate destination on Indian territory in the United States via one of three facilities: (a) the Western New York Foreign Trade Zone in Lackawanna, New York; (b) the Southern Nevada Foreign Trade Zone in Las Vegas, Nevada; and (c) a bonded warehouse on the Seneca Nation of Indians Territory in New York. (Montour, Aff. ¶ 4) NWS does not own any of these facilities. (*Id.*)

As mentioned above, NWS resells the cigarettes only to tribes or entities in the United States that are located on tribal land and owned by Native Americans. Specifically, with respect to Idaho, cigarettes are sold only to tribes or entities that are located on trust land and which are owned by individuals who are enrolled members of federally recognized tribes. (Montour Aff. ¶ 5) All orders are placed and processed at NWS's office on the Seneca Nation of Indians Territory. (*Id.*) All checks or other forms of payment are remitted or forwarded to NWS's office. (*Id.*) All cigarettes sold by NWS are in packages that are stamped "for reservation sales only." (*Id.*)

All cigarettes sold by NWS are (and have always been) sold at all times on an F.O.B. Seneca Nation of Indians Territory basis, with title and risk of loss transferring to the purchaser at the time of sale on the Seneca Nation of Indians Territory,. (Montour Aff. ¶ 6) Once a transaction is completed, products are shipped via one of the three aforementioned facilities. (*Id.*) NWS does not exercise any control over its products subsequent to their sale to third parties. (*Id.*) NWS does not sell or import any cigarettes into the State of Idaho. (*Id.*) Any transport of products into Idaho occurs solely as a result of a third party's conduct or direction. (*Id.*)

As stated above, NWS is a corporation chartered by the Sac and Fox Tribe, with its place of business on the Seneca Nation of Indians Territory in New York. (Montour Aff. ¶ 7) NWS has no presence in Idaho, and does not do or transact business in Idaho. (*Id.*) Specifically, NWS does not sell products within the jurisdiction of the State of Idaho, nor has it ever contracted to do so; NWS does not maintain any place of business in Idaho; NWS has no personnel, office, real estate, sales agents, mailing address or bank account in Idaho; NWS does not advertise or solicit business in Idaho; NWS does not have a telephone number or listing in Idaho; and NWS does not own or have a registered automobile in Idaho. (*Id.*)

II. LEGAL ARGUMENT.

In a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of proof to demonstrate that jurisdiction is appropriate. *Dole Food, Inc. v. Watts*, 303 F.3d 1104, 1108 (9th Cir. 2002). The plaintiff must make a prima facie showing of the jurisdictional facts. *Sher v. Johnson*, 911 F.2d 1357, 1361 (9th Cir. 1990). Much of the following discussion is taken from *Melaleuca v. Hansen*, 2008 W.L. 2788470 (D. Idaho July 18, 2008).

Where there is no federal statute governing personal jurisdiction, the law of the state in which the district court sits applies. *See Schwarzenegger v. Fred Martin Motor Co.*, 374 F. 3d 797, 800 (9th Cir. 2004). Under Idaho law, a court may exercise jurisdiction over an out-of-state defendant where: (1) the act giving rise to the cause of action falls within Idaho's longarm statute and (2) the constitutional standards of due process must be met. *Smalley v. Kaiser*, 130 Idaho 909, 950 P.2d 1248, 1251 (1997). Because Idaho's longarm statute permits courts to assert personal jurisdiction to the same extent permitted by the due process clause of the

Constitution, courts are required to decide whether asserting personal jurisdiction complies with due process under Idaho law. *Lake v. Lake*, 817 F.2d 1416, 1420 (9th Cir. 1987).

Federal due process requires that a nonresident defendant have minimum contacts with the forum state of such a nature that the exercise of personal jurisdiction does not offend traditional notions of fair play and substantial justice. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L. Ed. 95 (1945). This constitutional test may be satisfied by showing that (1) the defendant has “substantial” or “continuous and systematic” contacts with the forum state, or (2) there is a strong relationship between the defendant’s forum contacts and the cause of action. *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 839 (9th Cir. 1986). The former is known as “general jurisdiction” and the latter as “specific jurisdiction.” *See Ziegler v. Indian River County*, 64 F.3d 470, 473 (9th Cir. 1995).

The Ninth Circuit established the following three-factor test to determine whether a court has specific jurisdiction over a nonresident defendant: “(1) the nonresident defendant must do some act or consummate some transaction with the forum state or perform some act by which it *purposely avails* itself of the privilege of conducting activities in the forum state, thereby invoking the benefits and protection of its laws; (2) the claim must *arise out of* or result from the defendant’s forum-related activity; and/or (3) the exercise of jurisdiction must be *reasonable*.” *Ochoa v. J.B. Martin & Sons Farms, Inc.*, 287 F.3d 1182, 1188-89 (9th Cir. 2002) (*emphasis added*) (citing *Brand v. Menelove Dodge*, 796 F.2d 1070, 1073 (9th Cir. 1986)).

Generally, specific jurisdiction cannot be established unless the plaintiff meets its burden of satisfying the first two requirements. *Schwarzenegger*, 374 F.3d at 802. If the plaintiff satisfies the first two requirements, the burden shifts to the defendant to show that the court’s exercise would not be reasonable. (*Id.*) The Ninth Circuit has taken a flexible approach in

determining specific jurisdiction by holding that it “can be established with a lesser showing of a minimum of contacts where considerations of reasonableness dictate.” *Ochoa*, 287 F.3d at 1189. (citing, *Haisten v. Grass Valley Med Reimbursement Fund, Ltd.*, 784 F.2d 1392, 1397 (9th Cir. 1986)).

A. Idaho does not have general jurisdiction over NWS.

It is unclear whether plaintiffs would seek to invoke general jurisdiction in this case, as there are no “substantial” or “continuous and systematic” contacts with Idaho. There is absolutely no evidence to justify this jurisdiction as NWS noticeably lacks contact with Idaho. NWS is chartered by the Sac and Fox Tribe, and is wholly owned by Mr. Montour, a member of the Seneca Nation. Since its inception, NWS has maintained its business operations on the Seneca Nation of Indians Territory. NWS does not have an office, employ personnel, maintain a mailing address, use bank accounts, utilize sale agents, have a telephone number or listing, or market its goods in Idaho. Nor does NWS own real estate or an automobile in Idaho. In short, NWS totally lacks any contacts in Idaho that would warrant the exercise of general jurisdiction.

B. Idaho does not have specific jurisdiction over NWS.

A state’s specific jurisdiction over a defendant is determined by three factors: (1) the “purposeful availment” requirement; (2) the “arising out of” requirement; and (3) the “reasonableness requirement.”

1. Purposeful Availment Requirement.

The Ninth Circuit recognizes purposeful availment and purposeful direction as two distinct concepts. *Schwarzenegger*, 374 F.3d at 802. The purposeful availment analysis is most often used in contractual cases, whereas a purposeful direction analysis is generally applied in tort cases. It is unclear how the plaintiffs would attempt to establish this requirement. NWS

has never purposefully availed itself of the benefits or protections of Idaho. NWS does not purposefully direct its business activities toward, or within, the jurisdiction of the State of Idaho. NWS does not sell products specifically for markets within Idaho, nor does it advertise within Idaho. NWS does not have agreements with persons or companies to serve as sales agents in Idaho for cigarettes that NWS sells. It has no offices in Idaho and no assets in the state. More importantly, NWS has never sold cigarettes to consumers in Idaho.¹ As NWS never sold cigarettes to Idaho consumers, no contact existed with individuals in Idaho out of which the State's claims could arise. Indeed, selling goods F.O.B. Seneca Nation at NWS's office on the Seneca Nation of Indians Territory affirms that the transactions occurred exclusively outside of Idaho. Moreover, the title and risk of loss with respect to the cigarettes passed to the third parties at the time their purchases were consummated on the Seneca Nations of Indians Territory..

The Ninth Circuit evaluates purposeful direction under the Supreme Court's three-part *Calder* test which "requires that the defendant allegedly have (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state." *Schwarzenegger*, 374 F.3d at 803 (citing *Dole Food Co. v. Watts*, 303 F.3d 1101, 1111 (9th Cir. 2002)). NWS's actions were obviously not "expressly aimed" at Idaho, nor did NWS know that any harm was "likely to be suffered" in Idaho.

2. "Arising out of" requirement.

In determining whether the plaintiff's claims against a defendant arise out of their Idaho related activities, the Ninth Circuit has applied a "but for test." *Harris Rutsky & Co. Ins.*

¹ If cigarettes that NWS sold to third parties were, in turn, sold to Idaho consumers, they were sold by, or at the direction of, independent third parties with NWS exercising neither direction nor control. See *Ashai Metal Indust. Co. v. Superior Court of Cal.*, 480 U.S. 102, 112 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (personal jurisdiction over a defendant cannot be predicated on the unilateral acts of independent third parties).

Servs., Inc. v. Bell & Clements, Ltd., 328 F.3d 1122, 1131-32 (9th Cir. 2003). This test is not met here because NWS took no action in Idaho nor directed any of its products to the Idaho market.

3. Reasonableness requirement.

Only if defendants are found to have met the first two requirements does this third issue even arise. At that point, NWS would have the burden of showing that the Court's jurisdiction over it would not be reasonable. In the Ninth Circuit, the court examines seven factors to determine whether the exercise of personal jurisdiction is reasonable: (1) extent of the defendant's purposeful interjection into the forum state's affairs; (2) the burden on the defendant of defending in the forum; (3) the extent of conflict with the sovereignty of the defendant's state; (4) the forum state's interest in adjudicating the dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the forum to the plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative forum. *Bancroft & Masters, Inc. v. Augusta Nat. Inc.*, 223 F.3d 1082, 1088 (9th Cir. 2000). Because no factor is dispositive by itself, the courts must balance all seven factors. *See Roth v. Garcia Marquez*, 942 F.2d 617, 623 (9th Cir. 1991).

NWS never purposely interjected itself into Idaho's affairs. It has no relationship with Idaho. Instead, it would be forced to bear an unreasonable burden of defending in Idaho where it has no office, no employees and no legal or economic relationships. Moreover, this attempt to assert jurisdiction by Idaho conflicts with the sovereignty of the Indian Tribes involved, particularly the Sac and Fox Tribe, by which NWS is chartered, and the Seneca Tribe, of which Mr. Montour is a member and which licenses NWS to do business on its tribal land. Idaho's interest in this case is minimal as Idaho's action is merely one skirmish in the overall concerted litigation strategy of the National Association of State Attorneys General, which has

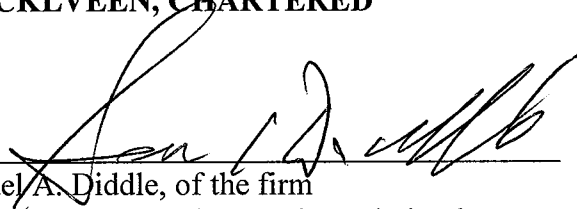
conducted a war against NWS in a variety of forums throughout the country. This divide and conquer litigation strategy in which multiple states are attacking NWS in order to increase litigation costs for a single corporation should not be condoned by this Court. Similar issues are being litigated in several alternative forums, and it is not essential to litigate in Idaho.

III. CONCLUSION.

For the foregoing reasons, NWS respectfully requests that this action be dismissed for lack of personal jurisdiction pursuant to Rule 12(b)(2) and its motion be granted in its entirety.

DATED this 24 day of September, 2008.

**EBERLE, BERLIN, KADING, TURNBOW,
& MCKLVEEN, CHARTERED**

By 
Samuel A. Diddle, of the firm
Attorneys for Defendant Native Wholesale
Supply Company

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**AFFIDAVIT OF ARTHUR
MONTOUR IN SUPPORT OF
MOTION TO DISMISS FOR
LACK OF PERSONAL
JURISDICTION**

STATE OF NEW YORK)
 : ss.:
COUNTY OF CATTARAUGUS)

ARTHUR MONTOUR, being duly sworn, deposes and says:

1. I am the President and sole owner of Defendant, Native Wholesale Supply Company ("NWS"). I am a Native American and a member of the Seneca Nation. I am fully familiar with the facts set forth herein, and I submit this affidavit in support of NWS's motion to dismiss the Complaint of Plaintiffs, State of Idaho by and through Lawrence G. Wasden,

Attorney General, and the Idaho State Tax Commission, due to Idaho's courts lacking personal jurisdiction over NWS.

2. In or around 2001, NWS was chartered as a corporation by the Sac and Fox Tribe of Oklahoma. I have been the President and sole owner of NWS since it was chartered. NWS's office has always been located on Seneca Nation of Indians Territory in northern New York. NWS has no other office.

3. The primary business of NWS is the sale of tobacco products. NWS imports cigarettes manufactured by Grand River Enterprises Six Nations, Ltd. ("Grand River") for resale to third parties. Grand River is wholly owned by Native Americans who are members of the Six Nations that comprise the Iroquois Confederacy. Grand River is a Canadian corporation that produces, packages and sells tobacco products. Grand River's facility is located on the Grand River Reserve in Oshweken, Ontario, Canada.

4. NWS purchases and imports cigarettes from Grand River that are shipped to their ultimate destinations on Indian territory in the United States via one of three facilities: (a) the Western New York Foreign Trade Zone in Lackawanna, New York; (b) the Southern Nevada Foreign Trade Zone in Las Vegas, Nevada; and (c) a bonded warehouse on the Seneca Nation of Indians Territory. NWS does not own any of these facilities.

5. As mentioned above, NWS resells the cigarettes only to tribes or entities in the United States that are located on tribal land and owned by Native Americans. Specifically, with respect to Idaho, cigarettes are sold only to tribes or entities that are located on trust land and which are owned by individuals who are enrolled members of federally recognized tribes. All orders are placed and processed at NWS's office on the Seneca Nation of Indians Territory. All checks or other forms of payment are remitted or forwarded to NWS's office. All cigarettes sold by NWS are in packages that are stamped "for reservation sales only."

6. All cigarettes sold by NWS are (and have always been) sold at all times on an F.O.B. Seneca Nation of Indians Territory basis, with title and risk of loss transferring to the purchaser at the time of sale on the Seneca Nation of Indians Territory. Once a transaction is completed, products are shipped via one of the three aforementioned facilities. NWS does not exercise any control over its products subsequent to their sale to third parties. NWS does not sell or import any cigarettes into the State of Idaho. Any transport of products to Idaho occurs solely as a result of a third party's conduct or direction.

7. As stated above, NWS is a corporation chartered by the Sac and Fox Tribe, with its place of business on the Seneca Nation of Indians Territory in New York. NWS has no presence in Idaho, and does not do or transact business in Idaho. Specifically, NWS does not sell products within the jurisdiction of the State of Idaho, nor has it ever contracted to do so; NWS does not maintain any place of business in Idaho; NWS has no personnel, office, real estate, sales agents, mailing address or bank account in Idaho; NWS does not advertise or solicit business in Idaho; NWS does not have a telephone number or listing in Idaho; and NWS does not own or have registered an automobile in Idaho.


ARTHUR MONTOUR

Sworn to before me this
24th day of September, 2008


NOTARY PUBLIC

TERRY L. THOMPSON
NOTARY PUBLIC, STATE OF NEW YORK
NO. 01TH6126516
QUALIFIED IN ERIE COUNTY
MY COMMISSION EXPIRES MAY 2, 2009

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