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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

LIL' BROWN SMOKE SHACK, **Plaintiff,** **vs.** **LAWRENCE G. WASDEN, Attorney General of the State of Idaho; OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF IDAHO; RICHARD ARMSTRONG, Director of the Idaho Department of Health and Welfare; IDAHO DEPARTMENT OF HEALTH AND WELFARE; and DOES 1-10,** **Defendants.**	**Case No. 2:09-cv-00044-CWD** **LAWRENCE G. WASDEN, ATTORNEY GENERAL OF THE STATE OF IDAHO, THE OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF IDAHO, RICHARD ARMSTRONG, DIRECTOR OF THE IDAHO DEPARTMENT OF HEALTH AND WELFARE, AND THE IDAHO DEPARTMENT OF HEALTH AND WELFARE'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS**

INTRODUCTION

Defendants Lawrence G. Wasden, Attorney General of the State of Idaho ("Attorney General"), the Office of the Attorney General of the State of Idaho, Richard Armstrong, Director of the Idaho Department of Health and Welfare, and the Idaho Department of Health and Welfare (collectively "Defendants"), ask this Court to dismiss in its entirety Plaintiff Lil' Brown Smoke Shack's ("Plaintiff") Complaint for Declaratory, Preliminary, and Permanent Injunctive Relief against Defendants from their Threatened Enforcement of I.C. § 39-57-1 et seq.

("Plaintiff's Complaint"). The Complaint should be dismissed because:

1. The Eleventh Amendment bars Plaintiff's claims in this Court against the Office of the Attorney General of the State of Idaho and Idaho Department of Health and Welfare; and
2. Under the doctrine announced in Younger v. Harris, 401 U.S. 37 (1971), this Court should abstain from exercising jurisdiction in this case and dismiss the matter.

STATEMENT OF FACTS & COURSE OF PROCEEDINGS

In 2008, the Office of the Attorney General became aware of Plaintiff's Internet retail sale and shipment of tobacco products to Idaho consumers. Because these sales violate the Idaho Prevention of Minors' Access to Tobacco Act ("Minors' Access Act"), codified at Title 39, Chapter 57, Idaho Code, the Office of the Attorney General wrote Plaintiff on December 23, 2008. *See* Plaintiff's Complaint, Exhibit C. Counsel for Plaintiff responded on January 12, 2009, *id,* Exhibit D, stating that Plaintiff rejected the Office of the Attorney General's request that Plaintiff bring itself into conformity with the Minors' Access Act. Additional letters and a telephone call were exchanged, *id.*, Exhibits E and F, but amicable resolution was not reached.

On February 5, 2009, Plaintiff filed its complaint, contending that the Defendants' alleged threatened enforcement of the Minors' Access Act violates the Commerce Clause, the Indian Commerce Clause, the Supremacy Clause, tribal sovereignty, and Plaintiff's treaty rights under the 1855 treaty between the Yakama Nation and the United States. Two business days later, the State of Idaho filed its lawsuit in Idaho State District Court against Plaintiff for violations of the Minors' Access Act.[1]

[1] A true and correct copy of this complaint is attached to this memorandum.

Plaintiff's Complaint should be dismissed. It impermissibly intrudes upon long-standing constitutional and federal law principles. This Court should not accept Plaintiff's invitation to become involved in the State's lawful enforcement of Plaintiff's retail tobacco business practices as they affect Idaho's consumers and violate Idaho law.

STANDARD OF REVIEW

A motion to dismiss challenges the legal sufficiency of a complaint. Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). As stated by the Eighth Circuit: "[D]ismissal under Rule 12(b)(6) serves to eliminate actions which are fatally flawed in the legal premises and deigned to fail, thereby sparing litigants the burden of unnecessary pretrial and trial activity." Young v. City of St. Charles, 244 F.3d 623, 627 (8th Cir. 2001).

In ruling on a motion to dismiss under Rule 12(b)(6), a court accepts as true "the facts alleged in the complaint." Zimmerman v. Oregon Dept. of Justice**,** 170 F.3d 1169, 1171 (9th Cir. 1999), *cert. denied* 531 U.S. 1189 (2001). It is equally clear, though, "that the court does not have to accept every allegation in the complaint as true in considering its sufficiency." 5A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1357, at 311 (2d ed. 1990). For example, Ninth Circuit courts have held that they do not have to accept as true "[c]onclusory allegations of law," Lee v. City of Los Angeles, 250 F.3d 668, 679 (9th Cir 2001), "legal conclusions," Clegg v. Cope Awareness Network, 18 F.3d 752, 754-55 (9th Cir. 1994), "unwarranted inferences," In re VeriFone Secs. Litig., 11 F.3d 865, 868 (9th Cir. 1993), or "unwarranted deductions." Westlands Water Dist. v. U.S. Dept. of Interior, Bureau of Reclamation, 805 F.Supp. 1503, 1506 (D.C. Cal. 1992), *aff'd* 10 F.3d 667 (9th Cir. 1993).

Defendants will concede (as they must for purposes of this 12(b) motion), that (1) it is the position of the Office of the Attorney General and the Attorney General that Plaintiff must

comply with the Minors' Access Act; and that (2) tobacco retail outlets, permitted by the Idaho Department of Health and Welfare, are subject to inspection under the Minors' Access Act.

Defendants do not concede, however, and they vigorously contest the following conclusions of law and unwarranted deductions cast as factual allegations: (1) Defendants are violating federal law and Plaintiff's treaty rights, Complaint at p. 7, ¶ 4.2; (2) Defendants believe that they can only inspect Plaintiff's compliance under the Minors' Access Act by entering onto Plaintiff's land on the Yakama Nation Indian Reservation, Complaint at p. 6, ¶ 4.1; and (3) only tobacco retail permittees are required to obey Idaho tobacco sales laws. *Id.*

ARGUMENT

I. This Court Should Dismiss Plaintiff's Complaint Against the Office of the Attorney General of the State of Idaho and the Idaho Department of Health and Welfare Because the Eleventh Amendment Bars Such Claims

The Eleventh Amendment[2] of the United States Constitution prohibits Plaintiff from filing a lawsuit in federal court against the State of Idaho. Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 267-68 (1997). State sovereign immunity is not limited to or by the terms of the Eleventh Amendment but is even broader and more expansive than that. *See* Del Campo v. Kennedy, 517 F.3d 1070, 1075 (9th Cir. 2007). In short, "each State is a sovereign entity in our federal system; and . . . it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." Seminole Tribe of Florida v. Florida, 517 U.S. 44, 54 (1996) (citations omitted). The type of relief sought is irrelevant to the question of whether the Eleventh Amendment bars the suit, and the grant of immunity applies in suits premised on federal-question jurisdiction as well as on diversity jurisdiction. *See id.* at 53, 58. Finally,

[2] Specifically, the Eleventh Amendment provides:

The Judicial powers of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

relevant here, a claim against a state agency is deemed to be a claim against the State and is barred by the Eleventh Amendment. Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 100 (1984).

The Office of the Attorney General of the State of Idaho and the Idaho Department of Health and Welfare are agencies of the State. *See* Article IV, § 1, Idaho Constitution; Idaho Code §§ 56-1001 et seq.; 67-1401 et seq.; and 67-2402. Thus, applying these rules here, Plaintiff's claims brought here against the Office of the Attorney General of the State of Idaho and the Idaho Department of Health and Welfare are in violation of the Eleventh Amendment and should be dismissed.

II. This Court Should Dismiss Plaintiff's Complaint under the *Younger v. Harris* Abstention Doctrine

While the Eleventh Amendment only addresses two of the four Defendants, there are separate grounds justifying dismissal of Plaintiff's entire case. Specifically, the Court should dismiss Plaintiff's Complaint based on the abstention principles first articulated in Younger v. Harris, 401 U.S. 37, 49-53 (1971).[3] The Younger doctrine holds that principles of equity, comity, and federalism limit the exercise of federal jurisdiction over matters being litigated in an ongoing state proceeding. *Id.* This doctrine further dictates that the federal matter be dismissed rather than stayed, as may be appropriate under some other forms of abstention, such as the "Pullman" abstention doctrine. Gibson v. Berryhill, 411 U.S. 564, 577 (1973); Gilbertson v. Albright, 381 F.3d 965, 981 (9th Cir. 2004) (*en banc*).

Younger abstention is required under the following three conditions: (1) there is an ongoing state judicial proceeding; (2) the state judicial proceeding implicates important state

[3] Although Younger was a criminal case, its rule of abstention and deference has been extended to state civil enforcement actions that are judicial in nature. *See* Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., 477 U.S. 619, 627 (1986).

interests; and (3) there is an adequate opportunity in the state judicial proceeding to raise the federal claims. Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 431 (1982); H.C. *ex rel* Gordon v. Koppel, 203 F.3d 610, 613 (9th Cir. 2000). Each of these conditions is present in this case.

A. There is an Ongoing State Judicial Proceeding

The State of Idaho has an ongoing judicial proceeding against Plaintiff. As noted above, on February 9, 2009, the State of Idaho filed suit against Plaintiff in Idaho State District Court for violations of the Minors' Access Act. In short, the State's action was filed at substantially the same time that this present action was filed and was made necessary only by the breakdown in discussion aimed at amicably resolving this matter. The State of Idaho is the plaintiff in the state court action and Plaintiff here is the defendant. The essential facts in the state case are substantially identical to those in the present case; however, the issues involved in the state case arise exclusively under state law.

For purpose of applying the Younger abstention doctrine, it makes no difference that the federal action was filed first. In Hicks v. Miranda, 422 U.S. 332, 349 (1975), *overruled on other grounds*, Mandel v. Bradley, 432 U.S. 173 (1977) (*per curium)*, the Court held that the Younger doctrine applies "in full force" even when the state proceedings are begun after the federal complaint is filed, as long as no proceedings of substance on the merits have taken place in federal court. *See also* Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 238 (1984). To date, no proceedings of substance have occurred in this federal action. Therefore, the first prong of the Younger abstention test is satisfied.[4]

[4] It is clear that briefing and denial of a motion for a temporary restraining order does not constitute a "proceeding of substance on the merits." *See* Polykoff v. Collins, 816 F.2d 1326, 1332 (9th Cir. 1987). Also the mere filing of a motion for a preliminary injunction does not preclude application of Younger to a later-filed state action. *See* M&A Gabaee v. Community Redevelopment Agency, 419 F.3d 1036,

B. The State's Proceeding Against Plaintiff Involves Significant State Interests

The second basis for Younger abstention—if the state court proceedings implicate an important state interest—is broadly applied to a variety of state issues. *See* Mission Oaks Mobile Home Park v. City of Hollister, 989 F.2d 359, 361 (9th Cir. 1993), *cert. denied* 510 U.S. 1110 (1994). The types of interests referred to are "those interests that the Constitution and our traditions assign primarily to the states." Harper v. Public Service Commission of West Virginia, 396 F.3d 348, 352 (4th Cir. 2005) and include matters relating to public health. *See* Brach's Meat Market, Inc. v. Abrams, 668 F.Supp. 275 (S.D.N.Y. 1987).

The Supreme Court has emphasized that federal courts should not weigh the importance of any federal interests, such as federal preemption or the state law's possible constitutional infirmities, in determining the relevant state interest and applying the Younger abstention test. New Orleans Public Service, Inc. v. Council of New Orleans, 491 U.S. 350, 364-66 (1989). Rather, the Court stated that federal courts must assess the state's interest in a more general way:

> [W]hen we inquire into the substantiality of the State's interest in its proceedings we do not look narrowly to its interest in the **outcome** of the particular case—which could arguably be offset by a substantial federal interest in the opposite outcome. Rather, what we look to is the importance of the generic proceedings to the State.
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> *Id. at 365* (emphasis in original)

Thus, the appropriate focus of the Court's inquiry here is the State's interest in the public health, regulating tobacco products, and reducing, if not eliminating, tobacco use by Idaho's children. As spelled out below, these are important interests to the State of Idaho.

1041 (9th Cir. 2005) ("mere motions for an injunction do not qualify as 'proceedings of substance' in federal court"); Franza v. Abrams, 695 F.Supp. 747, 749 (S.D.N.Y. 1988) (stage in proceeding where "plaintiff has moved this court for a preliminary injunction restraining the defendants from transferring, disposing, or forfeiting any of plaintiff's property, or seeking to do any such acts. . . and defendants have cross-moved for dismissal of the complaint on abstention grounds and for failure to state a cause of action" still sufficiently embryonic to permit Younger abstention).

There is no question that the State of Idaho has a vital public health interest in regulating tobacco and in protecting its youth from tobacco products and usage. In 1999, the Idaho Legislature found that cigarette smoking presents serious public health concerns to the State of Idaho and to Idaho citizens. Idaho Code § 39-7801(a). Indeed, the Legislature has determined that "[t]obacco is the number one killer in Idaho causing more deaths by far than alcohol, illegal drugs, car crashes, homicides, suicides, fires and AIDS combined," and that tobacco usage is "the single most preventable cause of death and disability in Idaho." Idaho Code § 39-5701.

Noting that the Surgeon General of the United States has also determined that smoking causes lung cancer, heart disease and other serious diseases, the Idaho Legislature found that cigarette smoking presents serious financial concerns for the State of Idaho. Under certain health-care programs, the State may have a legal obligation to provide medical assistance to eligible persons for health conditions associated with cigarette smoking, and those persons may have a legal entitlement to receive such medical assistance. Idaho Code § 39-7801 (a) and (b). Under these programs, the Legislature found, the State pays millions of dollars each year to provide medical assistance to persons for health conditions associated with cigarette smoking. Idaho Code § 39-7801(c).

The Idaho Legislature has also determined that youth access to tobacco is a matter of State concern. Idaho Code § 39-5701. Specifically, the Legislature has concluded "the prevention of youth access to tobacco products . . . to be a state goal to promote the general health and welfare of Idaho's young people." Idaho Code § 39-5701.

To address the serious health consequences of youth tobacco access and usage, the Idaho Legislature passed the Minors' Access Act, codified at Title 39, Chapter 57, Idaho Code. One way the State has implemented its goal of addressing youth tobacco usage and sales is Idaho

Code Section 39-5704 of the Minors' Access Act. That section prohibits the sale, distribution, or offering of tobacco products at retail without a tobacco permit having first been granted by the Idaho Department of Health and Welfare. Concerning this permit requirement, Idaho Code Section 39-5709 of the Minors' Access Act declares that the retail sale or distribution of tobacco products without a permit is "considered by the state of Idaho as an effort to subvert the state's public purpose to prevent minor's access to tobacco products."

Since its initial enactment, the Idaho Legislature expanded the scope of the Minors' Access Act expressly to include coverage of tobacco product sales over the Internet. *See* 2003 Idaho Sess. Laws. Ch. 273, p. 728. Such sales are defined as "delivery sales" by Idaho Code Section 39-5702(2) (Supp.) of the Minors' Access Act. The Legislature made clear that Internet tobacco retailers are to comply with all regulation of tobacco sales that exist for the more traditional ways in which tobacco products are sold and used. *See* Idaho Code § 39-5714 (Supp.) of the Minors' Access Act.

The State's interest in regulating tobacco usage and protecting and prohibiting underage tobacco usage is obvious and singularly compelling. *See* N.H. Motor Transp. Ass'n v. Rowe, 377 F.Supp. 2d 197, 206 (D. Me. 2005) ("Given the deadly health consequences, there are no persuasive arguments for allowing minors to have tobacco products."), *aff'd in part and rev'd in part*, 448 F.3d 66 (1st Cir. 2006), *aff'd*, 128 S. Ct. 989 (2008). That interest, no doubt, extends to retailers seeking to sell tobacco over the Internet. As the Second Circuit Court of Appeals has stated "the State has a legitimate interest in 'reduc[ing] minors' access to cigarettes through direct sales channels.'" Brown & Williamson Tobacco Corp. v. Pataki, 320 F.3d 200, 217 (2nd Cir. 2003), *quoting* Santa Fe Natural Tobacco Co., Inc. v. Spitzer, 2001 WL 636441, at *29 (S.D.N.Y. 2001).

Younger abstention is appropriate here because the State of Idaho has a substantial, legitimate and long-term interest in regulating tobacco sales and in prohibiting its sale to and usage by its children. The second prong of the Younger abstention test is therefore satisfied.

C. The State Judicial Proceedings Offer Plaintiff an Adequate Opportunity to Raise Constitutional Issues

Plaintiff's Complaint alleges violations of federal and constitutional law. Each of the assertions may be raised in the state court action. Thus, the third test for applying Younger abstention is met.

It makes no difference, for purposes of applying the Younger abstention test, that Plaintiff is seeking declaratory and injunctive relief in the present action. *See* Samuels v. Mackell, 401 U.S. 66, 72-73 (1971) (declaratory judgments result in same interference with and disruption of state proceedings as injunctions); Partington v. Gedan, 961 F.2d 852, 861 (9th Cir. 1992), *cert. denied* 506 U.S. 999 (Younger doctrine precludes not only federal injunctive relief against pending state enforcement proceedings, but also declaratory proceedings); Beltran v. State of California, 871 F.2d 777, 782 (9th Cir. 1988) (Younger abstention applies to suits seeking declaratory relief on constitutional issues before state court in pending proceeding). As the Supreme Court stated, "abstention is appropriate unless state law clearly bars the interposition of constitutional claims . . . .The burden on this point rests on the federal plaintiff to show that state procedural law barred presentation of claims." Moore v. Sims, 442 U.S. 415, 425-26 (1979).

Plaintiff cannot show that it is procedurally barred from raising its federal law and constitutional claims or any other defenses in the state court proceeding. Idaho state district courts are courts of original jurisdiction, Article V, § 20, Idaho Constitution, authorized and

created "for the purpose of hearing and determining all matters and causes arising under the laws of this state." Idaho Code § 1-701.

It should also be pointed out that if the state court proceeding raises federal questions, it will be reviewable by the United States Supreme Court. As that Court has stated:

> A civil litigant may, of course, seek review in this Court of any federal claim properly asserted in and rejected by state courts. Moreover, where a final decision of a state court has sustained the validity of a state statute challenged on federal constitutional grounds, an appeal to this Court lies as a matter of right. . . . But quite apart from appellee's right to appeal had it remained in state court, we conclude that it should not be permitted the luxury of federal litigation of issues presented by ongoing state proceedings, a luxury which . . . is quite costly in terms of the interests which Younger seeks to protect.
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> Huffman v. Pursue, Ltd., 420 U.S. 592, 605-06 (1975).

Therefore, the third, and final, prong of the Younger abstention test is satisfied.

In conclusion, Defendants have met the three requirements of the Younger abstention doctrine. Therefore, this Court should abstain from involving itself in the State's case and dismiss Plaintiff's Complaint. Baffert v. California Horse Racing Bd., 332 F.3d 613, 617 (9th Cir. 2003) *cert. denied* 540 U.S. 1075 ("If the circumstances giving rise to *Younger* abstention apply, the district court must dismiss the [federal] action.").

CONCLUSION

The Court should grant Defendants' motion and dismiss Plaintiff's Complaint under the Younger abstention doctrine. Dismissal will provide respect for the integrity of the Idaho state court system, and because there is an on-going state judicial proceeding, Plaintiff will be afforded every opportunity to raise its constitutional and federal law issues in that forum. If this Court does not dismiss on Younger abstention grounds, this Court should dismiss Plaintiff's Complaint against the Office of the Attorney General of the State of Idaho and Idaho Department

of Health and Welfare because the State of Idaho, including its state agencies, enjoys Eleventh Amendment immunity and may not be sued in federal court.

DATED this 17th day of February, 2009.

LAWRENCE G. WASDEN
ATTORNEY GENERAL
STATE OF IDAHO

By /s/ Brett T. DeLange
BRETT T. DeLANGE
Deputy Attorney General
Consumer Protection Division

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of February, 2009, I electronically filed Lawrence G. Wasden, Attorney General of the State of Idaho, the Office of the Attorney General of the State of Idaho, Richard Armstrong, Director of the Idaho Department of Health and Welfare, and the Idaho Department of Health and Welfare's Memorandum in Support of Motion to Dismiss in the matter of *Lil' Brown Smoke Shack vs. Lawrence G. Wasden et al.* with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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