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No. _____

IN THE SUPREME COURT OF CALIFORNIA

NATIVE WHOLESALE SUPPLY COMPANY,

Specially Appearing Defendant and Petitioner,

v.

THE PEOPLE ex rel. KAMALA D. HARRIS, as Attorney General, etc.,

Plaintiff and Respondent.

PETITION FOR REVIEW

After a Decision of the California Court of Appeal
Third Appellate District, No. C063624

From a Judgment of the Superior Court of California
Sacramento County Superior Court No. 34-2008-00014593-CU-CL-GDS
The Honorable Shelleyanne W.L. Chang

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To the Honorable Chief Justice Tani Gorre Cantil-Sakauye and the Honorable Associate Justices of the California Supreme Court:

Defendant Native Wholesale Supply Company ("NWS") petitions for review of a decision of the Court of Appeal for the Third Appellate District filed on June 8, 2011 (hereafter the "Opinion") reversing the Sacramento County Superior Court's order quashing service on NWS for lack of personal jurisdiction (hereafter "Order"). The Opinion is attached as "Attachment A" and the Order is attached as "Attachment B."[1]

Two recent United States Supreme Court ("U.S. Supreme Court" or "Supreme Court") decisions, both decided after the Court of Appeal entered its decision, clarify the standards to be applied by state courts seeking to exercise personal jurisdiction over out-of-state defendants. The U.S. Supreme Court specifically rejected the purposeful availment/minimum contacts test relied upon extensively by the Court of Appeal. This Court's review of the Opinion is necessary to settle important questions of law, particularly in light of the recent U.S. Supreme Court decisions. (Cal. Rules of Court, rule 8.500(b)(1).)

[1] The Opinion is published at 196 Cal.App.4th 357.

I. ISSUES PRESENTED FOR REVIEW

1. Whether a contract entered into by an Indian Tribe with an out-of-state Indian owned corporation and performed outside the exterior boundaries of California can constitutionally subject the out-of-state Indian owned corporation to the personal jurisdiction of California.

2. Whether it is fair and reasonable for California to exercise specific personal jurisdiction over an out-of-state defendant for conduct occurring wholly outside the state with a federally recognized Indian tribe in Indian country.

II. GROUNDS FOR REVIEW

Petitioner is an out-of-state tribally chartered corporation with its principle place of business on the Seneca Cattaraugus Indian Territory (the "Seneca Reservation") within the exterior boundaries of the State of New York. "NWS does not have an office, personnel, mailing address, bank accounts, sales agents, telephone, real estate or vehicles in California. NWS is an out-of-state corporation that has no office or other presence in this State." (Order at 1.) Big Sandy Rancheria, a federally-recognized Indian tribe (see 75 Fed. Reg. 60,810 (Oct. 1, 2010)) that operates its business on its sovereign territory located within the exterior bounds of California, purchased from NWS goods marked "For Reservation Sales Only," and directed those goods to be shipped to its sovereign territory. The Court of Appeal held that NWS, because it "place[d] goods in the stream of commerce," was subject to the specific personal jurisdiction of California courts based on these transactions. (Opinion at 8-11.)

In two U.S. Supreme Court decisions issued after the Court of Appeal decided this case, the Supreme Court addressed the matter of personal jurisdiction and provided additional clarity to state and federal courts as to the constitutional standards applicable to personal jurisdiction analysis. (See *J. McIntyre Machinery, Ltd. v. Nicastro* (June 27, 2011, No. 09-1343) __ S.Ct. __ [2011 WL 2518811] (hereafter *McIntyre*); *Goodyear Dunlop Tires Operations, S.A. v. Brown* (June 27, 2011, No. 10-76) __ S.Ct. __ [2011 WL 2518815] (hereafter *Goodyear*).)

The Supreme Court in *McIntyre* reversed a ruling by the New Jersey Supreme Court that held the placement of goods into the

stream of commerce flowing into "any of the fifty states" was sufficient for the exercise of personal jurisdiction over an out-of-state defendant. (*McIntyre, supra,* at *4.) The U.S. Supreme Court in reversing this ruling found that placement of goods into the stream of commerce, without "actions" by the defendant "target[ing] the forum" was not sufficient for a finding of minimum contacts with the forum State. (*Id.* at *6, *7.) The Supreme Court held that the "substantial connection" between a defendant and the forum State "must come about by an action of the defendant purposefully directed toward the forum State." (*Id.* at *7.) The court stated that "[t]his Court's precedents make clear that it is the defendant's actions, not his expectations, that empower a State's courts to subject him to judgment." (*Ibid.*)

The Supreme Court in *Goodyear* reversed the North Carolina Court of Appeals' ruling, holding that North Carolina "elided the essential difference between case-specific and all-purpose (general) jurisdiction." (*Goodyear*, *supra*, at *8.) In *Goodyear* the Supreme Court provided guidance for making a determination as to whether personal jurisdiction exists in a given case. The Court stated "[s]pecific jurisdiction ... depends on an 'affiliatio[n] between the forum and the underlying controversy,' principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." (*Id.* at *3.) If the State has no regulatory authority over the out-of-state actor or the transaction at issue[2] then it has no authority to subject the out-of-state defendant to suit for enforcement of state law. (See *International Shoe Co. v.*

[2] The transaction here was an out-of-state purchase of cigarettes from an out-of-state entity by an Indian tribal entity within Indian country.

Washington (1945) 326 U.S. 310, 319 [tying together the State's right "to enforce" defendant's "obligations aris[ing] out of or ... connected with the activities within the state" and the "procedure which requires the corporation to respond to [such] a suit"].)

These recent U.S. Supreme Court decisions establish rules and standards for the determination of personal jurisdiction that conflict with the rules and standards relied upon by the Court of Appeal. The Court of Appeal held that merely placing goods in the stream of commerce with the *expectation* that they eventually will be purchased by consumers in the forum state indicates an intention to serve that market and constitutes minimum contacts sufficient for the State court to exercise personal jurisdiction over this out-of-state defendant. (Opinion at 8-11.) The Court relied extensively on an Oklahoma Supreme Court decision (issued prior to *McIntyre*) that also misapplied the minimum contacts test. (See Opinion at 10-11, quoting *State ex. rel. Edmondson v. Native Wholesale Supply* (Ok. 2010) 237 P.3d 199 (hereafter *Edmondson*).) The recent *McIntyre* decision confirms that the Court of Appeal's reliance on NWS's "expectations" rather than its "actions" was improper. (Opinion at 8.) This Court should review the Opinion to address this conflict considering these recent U.S. Supreme Court rulings.

The Opinion also summarily found without analysis that "NWS's cigarette distribution *in California* constitutes NWS's contacts with California." (Opinion at 11, emphasis added, original emphasis removed.) However, NWS did not distribute cigarettes in California. Big Sandy Rancheria purchased products out-of-state from NWS and directed that the products be delivered to Big Sandy's reservation within the exterior boundaries of California. In

contrast to the Court of Appeal's approach, the Superior Court carefully considered whether NWS's sales to Indian country did or did not constitute contacts with California. In examining this issue the Superior Court considered the fact that all sales occurred on the Seneca Reservation and all deliveries were to Indian country at the direction of the tribal customer, after title transferred. (Order at 2-4.) The Superior Court found that these actions did not constitute contacts with California. (Order at 4.) The Court of Appeal did not discuss how it concluded that distribution of cigarettes by an Indian tribe or other Indian entities, not NWS, on sovereign Indian territory constitutes minimum contacts between NWS and California.

The Court of Appeal then found that it was fair and reasonable to exercise jurisdiction over NWS. The Opinion reached this conclusion through a circular analysis that relied entirely upon the analysis in *Edmonson*, *supra*. The Opinion found that the State's interest in enforcing the Master Settlement Agreement ("MSA")[3] and

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[3] The MSA is an agreement originally between 46 states, including California, and four major tobacco manufacturers. (See <http://www.naag.org/backpages/naag/tobacco/msa/msa-pdf/MSA%20with%20Sig%20Pages%20and%20Exhibits.pdf/file_view> [as of July 12, 2011] [copy of the MSA]; Health & Saf. Code, § 104555 et seq.) In exchange for releases of liability in litigation brought against the manufacturers by dozens of states, the manufacturers agreed to pay over $200 billion to the states over 25 years. To ensure that these manufacturers, which controlled nearly all of the U.S. cigarette market, experienced no competitive disadvantage as a result of the MSA, the states required manufacturers not participating in the MSA to pay per-cigarette taxes roughly equal to the payments made by participating manufacturers. (See Health & Saf. Code, § 104557 [requiring tobacco manufacturers "selling cigarettes to consumers within the state" to

collecting the revenues produced by enforcing the MSA outweigh any due process rights of the defendant.

The Court of Appeal misapplied the rules and standards to determine whether minimum contacts between NWS and California exist. The Court of Appeal failed to examine the definition of "forum State" and whether Indian country is part of that definition, particularly where the conduct occurs out-of-state and involves interstate and Indian commerce (15 U.S.C.A. 375(7), (8) & (9).)

The Opinion allows California courts to extend their jurisdiction beyond the constitutional limits of due process. The Opinion opens the door for California to hale any out-of-state defendant into court regardless of how far removed from the forum the defendant's conduct is, so long as a showing has been made that the out-of-state entity had "expectations" that a California resident may purchase the product at some point in time at some location, even a location outside of California.

The Opinion also ignores the two long standing settled barriers to State jurisdiction over Indian tribes and tribal members in Indian country: preemption and infringement. (*White Mountain Apache Tribe v. Bracker* (1980) 448 U.S. 136, 142 (hereafter *Bracker*).) The Superior Court correctly considered these two tests

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either "[b]ecome a participating manufacturer" in the MSA or pay funds into a state escrow account].) Participating manufacturers and those making escrow payments are listed on a directory; brands not on the directory are not to be sold in California. (See Rev. & Tax Code, § 30165.1.)

in rejecting the State's "contention that NWS' sales to Big Sandy constitute minimum contacts with this state." (Order at 4.)

The Opinion undermines federal goals promoting tribal self-sufficiency and self-governance creating a potential for the unconstitutional infringement of an Indian tribe's right to "make [its] own laws and be ruled by them." (*Bracker, supra*, at 142, quoting *Williams v. Lee* (1959) 358 U.S. 217, 220.) The Court of Appeal has also created the potential for serious implications as to the exercise by Congress of its plenary authority over Indian affairs and interstate commerce. (See 15 U.S.C.A. § 375(9) [defining "interstate commerce" as a commerce "between a State and any Indian country in the State or commerce...through any Indian Country"].)[4]

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[4] Prevent All Cigarette Trafficking Act of 2009 (PACT Act) 15 U.S.C.A § 375(9):

(A) In general

The term "interstate commerce" means commerce between a State and any place outside the State, commerce between a State and any Indian country in the State, or commerce between points in the same State but through any place outside the State or through any Indian country.

(B)Into a State, place, or locality

A sale, shipment or transfer of cigarettes or smokeless tobacco that is made in interstate commerce, as defined in this paragraph, shall be deemed to have been made into the State, place, or locality in which such cigarettes of smokeless tobacco are delivered.

The Court of Appeal decision involves significant errors of law, is inconsistent with recent U.S. Supreme Court decisions, creates serious implications for the exercise by Congress of its plenary authority, and unlawfully allows interference with the rights of Indians in Indian country. This case therefore presents important questions of law that should be resolved by this Court. (Cal. Rules of Court, rule 8.500(b)(1).)

NWS respectfully requests that the Court grant the petition for review.

III. FACTUAL AND PROCEDURAL BACKGROUND

A. Native Wholesale Supply Company

NWS is a corporation chartered under the laws of the Sac and Fox Nation of Oklahoma, a federally-recognized Indian Tribe. (See 75 Fed. Reg. 60,812 (Oct. 1, 2010).) NWS is wholly owned by an enrolled member of the Seneca Nation of New York, also a federally-recognized Indian Tribe. (*Ibid.*) NWS is a wholesale distributor of tobacco products manufactured by Native Americans on Indian reservations. NWS's primary business purpose is to market Native American-manufactured tobacco products to Native Americans in Indian country. NWS does not distribute to individuals, and all tobacco products distributed and sold by NWS bear the marking "For Reservation Sales Only."

NWS's principal place of business is on the Seneca Reservation in New York State. It has no presence in or contacts with the State of California. It has no offices, personnel or sales agents and no mailing address or telephone listing in California. It owns or operates no vehicles and has no bank account in California.

It does not advertise in, or modify its products for, or otherwise seek to serve the California market. Its principals or employees do not travel to California for any purpose connected to its business. (See Order at 1.)

The goods NWS distributes are stored exclusively in federally-regulated storage facilities in New York and Nevada.[5] All goods are sold F.O.B. the Seneca Reservation. To purchase its products, its customers must contact NWS's offices in Gowanda, New York, where all orders are processed and payments received. Once purchased, the goods are released from the storage facility to the responsibility of the purchasers, who arrange for and direct their deliveries. NWS's only link to California is through a single customer: Big Sandy which exercises jurisdiction over a rancheria near Auberry, California. Big Sandy purchased tobacco products from NWS in New York and directed shipment of the products to tribal facilities in Indian country located within the exterior boundaries of California.

B. The Trial Court's Order and the Court of Appeal's Decision to Reverse

The State of California brought this action against NWS in 2009 alleging, among other things, that NWS violated Revenue & Tax Code section 30165.1 (the "directory statute") and Health & Safety Code section 14950, known as the Cigarette Fire Safety and

[5] The Western New York Foreign Free Trade Zone in Lackawana, New York; the Southern Nevada Foreign Trade Zone in Las Vegas, Nevada; and a bonded warehouse on the Seneca Reservation in New York.

Firefighter Protection Act ("CCFS").[6] NWS moved to quash service of the summons and complaint for lack of personal jurisdiction, pursuant to Code of Civil Procedure section 418.10.

Following extensive briefing and oral argument, the Superior Court granted NWS's motion to quash. (See Order.) Finding no general jurisdiction over NWS, the court examined whether it could exercise specific jurisdiction over NWS and found it could not. Noting that the transactions between NWS and Big Sandy took place in Indian country, the court found that the mere presence of Indian country within a state does not legally render it part of the state forum for purposes of the exercise of personal jurisdiction. (Order at 2). The court thus found that NWS's on-reservation contacts, without off-reservation activities, could not constitute minimum contacts with California. (Order at 2.)

The court also found relevant the limited scope of the State's regulatory authority over Indian country. "'When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest.'" (Order at 3, quoting *Bracker*, *supra*, 448 U.S. at 144;

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[6] The directory statute requires all cigarettes sold, offered, or possessed "for sale in this state" or imported "for personal consumption in this state," to be included on California's directory of approved cigarette brands. (Rev. & Tax Code, § 30165.1, subd. (e)(2).) The directory statute also provides that "no person shall ... sell[,] distribute[,] [a]cquire, hold, own, possess, transport, import, or cause to import cigarettes that the person knows or should know are intended to be distributed in violation of paragraphs (1) and (2)." (Rev & Tax Code, § 30165.1, subd. (e)(3).) The CCFS is a statute that regulates, inter alia, the type of paper that is used in manufacturing cigarettes. (Health & Saf. Code, § 14952, subd. (a).)

see also Order at 5, quoting *Nevada v. Hicks* (2001) 533 U.S. 353, 361-62.) Noting that California's civil regulatory authority "does not extend to Indian tribes," the court added that the violations alleged by the state against NWS were not criminal violations which, if they were, "would be enforceable [by California] against Indian tribes under Public Law 280." (Order at 5.) The court found that the transactions between Big Sandy and NWS "constitute not only commerce between Indian-owned entities but also interstate commerce" that is "more properly subject to Congressional regulation, which has plenary power to regulate Indian commercial activities." (Order at 4.)

The court found that NWS did not purposefully avail itself of California's jurisdiction by placing its goods into the stream of commerce. (Order at 4). The undisputed evidence showed that NWS did not "direct" any acts alleged to have violated California's laws, and that NWS exercised no control over Big Sandy's downstream sales. (Order at 4.) The evidence instead demonstrated that "NWS intended to sell its cigarettes only to Indian reservations and not the wider California market." (Order at 4.) The court rejected claims that the foreseeability of Big Sandy's downstream sales sufficed for the exercise of personal jurisdiction, holding that foreseeability without control over the ultimate destination "does not satisfy the due process clause of the United States Constitution." (Order at 5, quoting *As You Sow v. Crawford Laboratories, Inc.* (1996) 50 Cal.App.4th 1859, 1869.)

The Court of Appeal reversed the Superior Court on each element of its minimum contacts analysis. The Court of Appeal held that NWS purposefully availed itself of the benefits of conducting

activities in the forum state by placing goods into the stream of commerce "with the expectation that they eventually will be purchased by consumers in the forum state." (Opinion at 8-9.) In doing so the court adopted wholesale the analysis from an intervening decision by the Oklahoma Supreme Court. (Opinion at 10, quoting *Edmondson, supra.*) Ignoring the Superior Court 's determination that it was Big Sandy that acted as the "seller and distributor of cigarettes to other entities in California ... as a result of the tribe's own independent economic decision," (Order at 4) the Court of Appeal held NWS responsible for "cigarette distribution in California," thus finding contacts with the state. (Opinion at 11.)

Having determined minimum contacts between NWS and California existed, the Court of Appeal failed, indeed expressly refused, to consider the legal significance of the facts that Big Sandy is a federally-recognized tribe, and that its transactions with NWS occurred in Indian country, when considering whether the exercise of personal jurisdiction would be fair and reasonable. Instead the court suggested that "the Indian commerce clause, the interstate commerce clause, federal law preemption, [and] Indian self-government" were irrelevant to the question of personal jurisdiction. (Opinion at 13, fn. 3.)

IV. ARGUMENT: REVIEW OF THE COURT OF APPEAL'S OPINION IS NECESSARY TO SETTLE IMPORTANT QUESTIONS OF CONSTITUTIONAL LAW CONCERNING PERSONAL JURISDICTION AND THE DUE PROCESS RIGHTS OF OUT-OF-STATE DEFENDANTS.

The Court of Appeal's decision requires review because shortly after its issuance the U.S. Supreme Court significantly refined

the stream of commerce analysis in *McIntyre*, *supra*. The analysis as clarified by *McIntyre* requires a reversal of the Court of Appeal's decision and a reexamination of this Court's treatment of nonresident defendants whose only "contacts" with California result from their placement of goods into the stream of commerce.

In addition, review in this matter will allow this Court, for the first time, to address the State's limited sovereign authority within Indian country and the concomitant jurisdictional status of Indian country as *outside* the "forum state." As the Superior Court explicitly held following a considered analysis, Big Sandy's purchases from NWS and the resulting transmission of goods into Indian country could not alone establish minimum contacts. The Court of Appeal, however, turned directly to a more attenuated stream of commerce analysis, examining only Big Sandy's subsequent transmission of goods to California consumers. The appellate court's outright refusal to consider the relevant principals of Indian law (see Opinion at 13, fn. 3) led to a mischaracterization of NWS's transactions, NWS's "purposeful direction" toward the forum state, and the fairness to NWS in subjecting it to California's jurisdiction for transactions over which the State has no sovereign authority. This Court's review will not only allow for the correction of the Court of Appeal's error, but will provide this Court the opportunity to explicitly examine the issue of how federal rules defining jurisdiction in Indian country relate to due process where the conduct of Indian tribes and out-of-state entities occurs exclusively in Indian country.

A. Recent U.S. Supreme Court Authority Rejecting the Stream of Commerce Analysis Demonstrates Error by the Court of Appeal.

As Justice Kennedy recently wrote in *McIntyre*, "The rules and standards for determining when a State does or does not have jurisdiction over [a nonresident] party has been unclear because of decades-old questions left open in *Asahi* ..." (*McIntyre*, *supra*, at *4, referencing *Asahi Metal Industry Co. v. Superior Court of Cal., Solano Cty.* (1987) 480 U.S. 102.) In an effort to "provide greater clarity" to these standards, the Court substantially limited the application of the widely-used "stream of commerce" metaphor. (*Ibid.*) Because the Court of Appeal in the instant case relied entirely on the "stream of commerce" doctrine in the very manner *McIntyre* emphatically rejected, it is essential to the orderly and predicable administration of justice that this Court grant review to evaluate the standard California courts should apply in light of *McIntyre*.

In *McIntyre*, the plurality emphasized the "general rule" that "the sovereign's exercise of power requires some act by which the defendant 'purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'" (*McIntyre*, *supra*, at *5, quoting *Hanson v. Denckla* (1958) 357 U.S. 235, 253.) Such "purposeful availment" is a "form of submission to a State's authority for disputes that 'arise out of or are connected with the activities within the state.'" (*Id.* at *6, quoting *International Shoe, supra,* 326 U.S. at 319.)

McIntyre pinpoints the "imprecision arising from *Asahi*" as to application of the "stream of commerce" test. (*McIntyre* at *6.) Prior

to *Asahi*, the Court had "stated that a defendant's placing goods into the stream of commerce 'with the expectation that they will be purchased by consumers within the forum State' may indicate purposeful availment." (*Id.* at *6, quoting *World-Wide Volkswagen Corp. v. Woodson* (1980) 444 U.S. 286, 298.) *McIntyre*, however, clarifies that "that statement does not amend the general rule of personal jurisdiction." (*Id.* at *6.) Instead, "[t]he principal inquiry in cases of this sort is *whether the defendant's activities manifest an intention to submit to the power of the sovereign*." (*Ibid.*, emphasis added.) Under *McIntyre*, for a defendant to "'purposefully avail itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws'" through the "transmission of goods," the evidence must show that the defendant "*targeted the forum*; as a general rule it is not enough that the defendant might have predicted that its goods will reach the forum state." (*Ibid.*, quoting *Hanson v. Denckla*, *supra*, at 253, emphasis added.)

Asahi found the Court split into two concurring opinions of four Justices, each setting forth a competing standard for evaluating whether a defendant's placement of a product into the stream of commerce, without more, is enough to subject the defendant to the authority of the courts of any state where the product ends up. The opinion authored by Justice Brennan "made foreseeability the touchstone of jurisdiction." (*McIntyre*, *supra*, at *7, citing *Asahi*, *supra*, 480 U.S. at 117.) Justice O'Connor's opinion, on the other hand, required a "'substantial connection between the defendant and the forum state [which] must come about by an action of the defendant purposefully directed toward the forum State. The

placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State.'" (*Ibid.*, quoting *Asahi*, *supra*, at 112.)

McIntyre attempts to resolve the split, holding: "This Court's precedents make clear that *it is the defendant's actions, not his expectations, that empower a State's court to subject him to judgment.*" (*McIntyre, supra*, at *7, emphasis added.) The exercise of personal jurisdiction "is in the first instance a question of authority rather than fairness...." (*Id.* at *8.) While the limits of personal jurisdiction are defined "'as a matter of individual liberty,' [because] due process protects the individual's right to be subject only to lawful power[,] whether a judicial judgment is lawful depends on whether the sovereign has authority to render it." (*Ibid.*, quoting *Insurance Corp. of Ireland, Ltd. v. Compagnie de Bauxites de Guinee* (1982) 456 U.S. 694, 702.) Thus, "[t]he question is whether a defendant has followed a course of conduct *directed at the society or economy existing within the jurisdiction of a given sovereign*, so that the sovereign has the power to subject the defendant to judgment concerning that conduct." (*Ibid.*, emphasis added.) "Specific jurisdiction ... depends on an affiliation between the forum and the underlying controversy, principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." (*Goodyear, supra*, at *3, quotation marks and alteration omitted.)

The Court of Appeal's stream of commerce analysis focused on just two factors: NWS's "expectation" that its goods would reach customers in California, and the amount of income NWS earned from the possible eventual sale or use of goods sold to California

residents by third parties. The Court of Appeal analyzed the issue in the instant case using a standard *McIntyre* rejected. (Opinion at 4 and 8-9, citing, inter alia, *Bridgestone Corp. v. Superior Court* (2002) 99 Cal.App.4th 767, 774-75.)

McIntyre explicitly rejected reliance on a defendant's "expectations" as a basis for establishing jurisdiction. *McIntyre* repeatedly emphasized that "it is the defendant's actions ... that empower a State's courts to subject him to judgment." (*McIntyre*, *supra*, at *7; see also *McIntyre* at *5 ["some act by which the defendant 'purposefully avails itself...'"], *6 ["only where the defendant can be said to have targeted the forum"], *7 ["the question is whether a defendant has followed a course of conduct directed at the [forum]"].)

Here, Big Sandy purchased cigarettes from NWS outside the State of California where the State has no regulatory authority. Big Sandy, independently of NWS, sold some of those cigarettes – still in a location outside of California's regulatory authority – to customers who, independently of NWS, ultimately may have brought the cigarettes into California. Because foreseeability is not "the controlling criterion," NWS cannot be sued in California. (*McIntyre*, supra, at *8.)

In addition, in the absence of "some act" by NWS (not an act by Big Sandy or another third party) "targeted" or "directed" at the forum (*McIntyre*, *supra*, at *5, *6, *7.) the Court of Appeal should not have relied so heavily on the volume of cigarettes purchased by Big Sandy and the income NWS earned from those sales. (See Opinion at 9-11.) NWS's transactions with Big Sandy occurred entirely

outside of California's jurisdiction, and any subsequent transmission of cigarettes for sale to California residents (i.e., purchase by non-Indians) was not an action by NWS.[7] NWS's actions ended outside California. Because the analysis must hinge on "the defendant's actions" directed at the forum state, the volume of goods exchanged and profits realized in transactions outside the forum state cannot alone support a state's exercise of judicial authority over an out-of-state defendant. This is particularly true where the goods continue into the forum state only through the actions of independent third parties.

NWS had no control over Big Sandy, did not direct Big Sandy's actions, and did not dictate or advise Big Sandy on who it sold products to. In *McIntyre* the connection between the nonresident defendant and its exclusive distributor which sold the product that ended up within the jurisdiction of New Jersey involved McIntyre's "direction and guidance" with the goal of selling its goods "anywhere in the United States." (*McIntyre, supra*, at *16 (dis. opn. of Ginsburg, J.), internal quotation marks omitted.) The Court found that even this was not enough. Therefore any limited contacts that NWS has with California through the subsequent downstream purchase of its product from Big Sandy by California residents entering Indian country is not enough to demonstrate purposeful availment or direction toward California.

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[7] Indeed, even the transportation of the cigarettes purchased by Big Sandy into Indian country within California was at Big Sandy's direction, and was not an action by NWS. (See Opinion at 6.) Transportation alone is not sufficient to allow personal jurisdictional over actions connected to sales outside of California's jurisdiction when sales occur as a matter of interstate commerce. (See Order at 5; 15 U.S.C. § 375(7), (8), and (9).)

The Court of Appeal's contrary opinion requires the review of this Court, and to the extent this Court's precedents may support a standard based on the defendant's expectations and the effects of independent actors, they should be reexamined to ensure that California maintains jurisdiction over litigants within the limits of the U.S. Constitution.[8]

B. The Court of Appeal Erred in Summarily Concluding that "NWS Distributed Cigarettes in California."

This lawsuit does not arise out of any contacts by NWS with the State of California. It arises from California's attempt to conduct an end run around our federal system to regulate beyond the constitutional limits of the due process clause of the Fourteenth Amendment. The U.S. Supreme Court has protected the rights of Indian tribes to "make their own laws and be ruled by them" since it issued the opinion in *Worcester v. Georgia* (1832) 31 U.S. 515. (See *Bracker, supra*, 448 U.S. at 142.) *Worcester* held that Indian tribes have the inherent right to regulate their internal affairs. Civil jurisdiction over Indians in Indian country remains almost exclusively a matter of tribal concern. Congress has authorized few exceptions to this rule. The U.S. Supreme Court has defended the right of

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[8] For example, this Court has stated: "A manufacturer engages in economic activity within a state as a matter of 'commercial actuality' whenever the purchase or use of its product within the state generates gross income for the manufacturer and is not so fortuitous or unforeseeable as to negative the existence of an intent on the manufacturer's part to bring about this result." (*Buckeye Boiler Co. v. Superior Court* (1969) 71 Cal.2d 893, 902.) After *McIntyre*, the Court is obligated to examine whether this equation – relied upon by the Court of Appeal below – places undue emphasis on the actions of third parties such as ultimate consumers, and ignores the truly essential jurisdictional requirement, the defendant's actions. (See *McIntyre, supra*, at *7.)

Indian tribes and tribal members to remain free of state jurisdiction/regulation in the absence of Congressional authorization.

The U.S. Supreme Court has developed two tests to determine whether state authority exists within Indian country. "First, the exercise of such authority may be pre-empted by federal law. ... Second, it may unlawfully infringe on the right of reservation Indians to make their own laws and be ruled by them." (*Bracker*, *supra*, 448 U.S. at 142, internal quotation marks omitted.) These barriers are almost impossible to overcome when the law or regulation at issue impacts the tribe or its members for their on-reservation activities. The Court in *Nevada v. Hicks*, *supra*, 533 U.S. at 362, stated, "When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable."

Unless expressly authorized by Congress, a state may not tax the income of Indians that reside on the reservation from employment on the reservation, the personal property of Indians owned on the reservation, the sale of goods to Indians and Indian tribes within the reservation, fuel purchased on the reservation, profits by non-Indian companies from the sale of items sold to tribal businesses, the fuel used by non-Indians working for tribal businesses, the profits made by non-Indian companies that construct facilities on the reservation for an Indian tribe, or income received by the tribe for leasing mineral rights. (See *McClanahan v. State Tax Commission of Arizona* (1973) 411 U.S. 164; *Bryan v. Itasca County* (1976) 426 U.S. 373; *Moe v. Confederated Salish and Kootenai Tribe* (1976) 425 U.S. 463; *Oklahoma Tax Commission v. Chickasaw Nation* (1995) 515 U.S. 450; *Central Machinery Co. v. Arizona State Tax Commission* (1980) 448 U.S. 160; *Bracker*, *supra*,

448 U.S. 136; *Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico* (1982) 458 U.S. 832; *Montana v. Blackfeet Tribe of Indians* (1985) 471 U.S. 759.)

The U.S. Supreme Court has held that a state may not regulate hunting and fishing or gaming operations on the reservation. (See *New Mexico v. Mesclaro Apache Tribe* (1983) 462 U.S. 324, 333; *California v. Cabazon Band of Mission Indians* (1987) 480 U.S. 202; see also *Cabazon Band of Mission Indians v. Wilson* (9th Cir. 1985) 124 F.3d 1050.) Courts relying on these cases have held that a state has no jurisdiction to regulate the placement of billboards, disposal of hazardous waste, or harvesting of timber on the reservation. (See *People ex rel. Dept. of Transportation v. Naegle Outdoor Advertising Co.* (1985) 38 Cal.3d 509 (in bank); *Washington Dept. of Ecology v. EPA* (9th Cir. 1985) 752 F.2d 1465; *In re Blue Lake Forest Products, Inc.* (9th Cir. 1994) 30 F.3d 1138.) States cannot enforce child support orders, rent control laws, or land use zoning regulations on the reservation. (See *Flammond v. Flammond* (Mont. 1980) 621 P.2d 471; *Segundo v. City of Rancho Mirage* (9th Cir. 1987) 813 F.2d 1387; *Santa Rosa Band v. Kings County* (9th Cir. 1975) 532 F.2d 655.) Since 1832, when it issued the opinion in *Worcester v. Georgia*, the Supreme Court has upheld the rights of Indian tribes and tribal members to be free from state regulation within Indian country.

The Supreme Court has allowed States to assert authority over non-Indians on the reservation. However, to exercise this authority, the State must also have regulatory authority or jurisdiction over the defendant generally or for the specific conduct at issue. Here the purchase by Big Sandy from NWS took place outside

California, with deliveries directed by the purchaser to Indian country (a separate forum from the State for purposes of interstate commerce). The Supreme Court has not allowed a State to infringe on the actions of an Indian tribe in Indian country. NWS is an out-of-state defendant with no presence in California. Therefore, all conduct at issue by this out-of-state defendant was not "in California" as defined by federal law, and California cannot exercise personal jurisdiction over NWS.

The Court of Appeal does not cite to any authority beyond the *Edmondson* case regarding application of state law to reservation activity that would support the exercise of personal jurisdiction over NWS. In *Pennoyer v. Neff* (1878) 95 U.S. 714, the U.S. Supreme Court declared that a court which entered a judgment without personal jurisdiction violated the due process clause of the Fourteenth Amendment. (*Id.* at 732.) "Although the minimum contacts test established by *International Shoe* is itself a fairness inquiry, the scope of that inquiry necessarily acknowledges that the constitutionality of a state's assertion of in personam jurisdiction reflects territorial limitations on the power of an individual state." (*Max Daetwyler Corp. v. R. Meyer* (3d Cir. 1985) 762 F.2d 290, 264; see also *Johnson Creative Arts, Inc. v. Wool Masters, Inc.* (1st Cir. 1984) 743 F.2d 947, 950, fn. 3.) One of those historical and statutory territorial limitations on State power is its inability to extend its civil regulatory and adjudicatory jurisdiction on to Indian reservations. (*DeCoteau v. Dist. Cty. Ct. for the Tenth Judicial Dist.* (1975) 420 U.S. 425, 427, fn. 2.)

The Court of Appeal ignores the fact that the transaction here is between NWS an out-of-state entity and Big Sandy, an Indian

tribe that the State has no regulatory authority over. There is no contact with California for purposes of the transaction between NWS and Big Sandy. Contrary to the premise set forth in the Opinion, the U.S. Supreme Court has stated that it has "never accepted the proposition that state lines are irrelevant for jurisdictional purposes." (*Boaz v. Boyle & Co., Inc.* (1950) 40 Cal.App.4th 700, 720, quoting *World-Wide Volkswagen, supra,* 444 U.S. at 291; see also *Hanson v. Denckla, supra*, 337 U.S. at 251 [minimum contacts analysis is "a consequence of territorial limitations on the power of the respective States"].) The premise of the Supreme Court's statement turns on interstate federalism concerns. These limitations based on "state lines" are equally applicable to Tribal lands. The sovereignty interests of Tribal entities are also implicated by a State Court's attempt to extend its jurisdictional reach over persons and entities located on Tribal lands, or outside the forum State conducting business with Tribal entities on tribal lands.

Congress has plenary power over interstate commerce just as it does over Indian commerce. (U.S. Const., Art. I § 8, cl. 3; *Pike v. Bruce Church* (1970) 397 U.S. 137.) Congress, exercising its plenary power has adopted a statutory definition of "interstate commerce" that specifically includes Indian Country as a separate forum from a state when dealing with the sale of tobacco products. (See 15 U.S.C.A. § 375(9).)

An out-of-state entity is amenable to suit only from obligations arising out of the activities in the forum State. A State may only maintain a suit in personam to collect a tax or enforce a regulatory scheme where the out-of-state entity avails itself or exercises a

privilege of conducting business in the State. (See *International Shoe, supra*, 326 U.S. at 321.)

Therefore to subject NWS to suit in California the Plaintiff must demonstrate that NWS's actions (not expectations) occurred within California and that NWS availed itself of doing business in California.

The authority cited by the Court of Appeal does not support the conclusion reached. In fact the Opinion completely ignores the location and conduct of NWS at issue. The Court of Appeal through its reliance on the Oklahoma decision applies the preemption and infringement tests as if NWS sold products directly to California residents in California, ignoring the sovereign status of Big Sandy and that all deliveries occurred in Indian country at Big Sandy's direction. Per federal statute a delivery to Indian country, is the equivalent of a delivery in interstate commerce. (See 15 U.S.C.A. § 375(9).) Therefore California has no more authority to hale NWS into Court under the facts of this case then it would if all purchases of NWS's product were by an Indian tribe in Nevada or Georgia. The holding by the Court of Appeal is based on circular logic where the ends define the means, allowing California to assert backdoor regulation over tribes and entities conducting business with tribes under the guise of exercising personal jurisdiction contrary to the fundamental structure of our federal system.

In contrast, case law supports the Superior Court's finding that contacts with an Indian tribe within Indian country occur outside the forum and do not confer personal jurisdiction upon a state. (See *North Pacific Insurance Company v. Swizler* (1996) 143 Or.App.

223, 236; *In re Commitment of Beaulieu* (Minn. App. 2007) 737 N.W. 2d 231, 235; *Flammond v. Flammond*, *supra*, 621 P.2d at 473; *Martinez v. Superior Court.* (Ariz.App. 1987) 731 P.d 1244, 1246; *Dixon v. Picopa Constr. Co.* (Ariz. 1989) 772 P.2d 1104, 1113; *Byzewski v. Byzewski* (N.D. 1988) 429 N.W.2d 394; *Balyeat Law, P.C. v. Pettit* (Mont. 1998) 967 P.2d 398, 408, partially overruled on other grounds in *In re Estate of Big Spring* (Mont. 2011) __ P.3d __ [360 Mont. 370]; *Cook v. AVI Casino Enterprises, Inc.* (Ariz.App. 2008) 2008 WL 4108121, *2.)

In support of this conclusion, the Superior Court closely examined the State's authority to regulate transactions between NWS and Big Sandy, a federally-recognized Indian tribe with the "right to make [its] own laws and be governed by them." (Order at 2, quoting *Nevada v. Hicks, supra*, 533 U.S. at 362.) The Superior Court correctly found that "the legal incidence of the statutes at issue in this case ... would fall directly on Big Sandy as an importer as well as NWS as a seller of unregistered cigarettes." (Order at 3.) "'When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest.'" (Order at 3, quoting *Bracker, supra*, at 144; see also Order at 5, quoting *Nevada v. Hicks, supra*, at 362.) "Of even more significance, NWS' sales to Big Sandy constitute not only commerce between Indian-owned entities but also interstate commerce. ... Such activities are more properly subject to Congressional regulation, which has plenary power to regulate Indian commercial activities." (Order at 4.) Consequently, NWS's out-of-state contacts with Big Sandy, over which California lacked

any regulatory authority, did not constitute minimum contacts with the forum state sufficient to establish personal jurisdiction over NWS. (Order at 4.)

The Superior Court also found that NWS did not purposefully avail itself of California's jurisdiction by placing its goods into the stream of commerce. (Order at 4.) The evidence showed that NWS did not "direct" its sales through Big Sandy to California consumers; instead, the court found "[t]here is no evidence supporting an inference that NWS exercised any control over Big Sandy's downstream sales. ... NWS intended to sell its cigarettes only to Indian reservations and not the wider California market." (Order at 4.) Furthermore, the court observed, mere "[f]oreseeability that a product will enter California without having some control over its ultimate destination does not satisfy the due process clause of the United States Constitution." (Order at 5, quoting *As You Sow v. Crawford Laboratories, Inc.* (1996) 50 Cal.App.4th 1859, 1869.)[10]

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[10] California's lack of regulatory authority over areas that are geographically within the state factors into the personal jurisdiction analysis in *As You Sow v. Crawford Laboratories, Inc., supra*, 50 Cal.App.4th 1859. There, the court concluded that an out-of-state manufacturer's sales and deliveries to a federal agency located in California did not support personal jurisdiction over the manufacturer because "the performance of the contract occurred on federal land, and California had no significant relationship with the contract." (*Id.* at 658, fn. 15; see also *id.* at 658-59 [contrasting manufacturer's other sales with those to the federal agency].) Unlike the manufacturer in *As You Sow*, NWS made no direct sales of cigarettes anywhere in California. The Court of Appeal's refusal to consider whether California possessed sovereign authority over Big Sandy is in direct conflict with the Fourth Appellate District's opinion in *As You Sow*.

The Superior Court conducted an extensive analysis of how and when actions by an out of state entity and Indian tribes constitute minimum contacts for purposes of personal jurisdiction, which was summarily discarded by the Court of Appeal without explanation. This Court's review is necessary not only to correct this error, but to resolve this foundational issue of territorial limitations of sovereignty and the exercise of personal jurisdiction.

C. Exercising Jurisdiction is Not Fair or Reasonable

The exercise of jurisdiction in this case would not be fair or reasonable. The Court of Appeal erroneously justified its conclusion that it would be fair and reasonable to exercise jurisdiction primarily on California's interest in enforcing the MSA. (Opinion at 12, citing extensively to *Edmonson, supra*). In *Edmonson*, the Oklahoma Attorney General sued NWS for alleged violation of Oklahoma's version of the Directory statute. (*Edmonson* at 204.) On appeal from the trial court, the Oklahoma Supreme Court subjected NWS to a "stream of commerce" analysis. Based on the quantity of cigarettes transmitted from NWS to the Muscogee Creek Nation, the court found that NWS had purposefully directed its cigarettes toward Oklahoma. (*Id.* at 208.) The court then found, primarily because of the state's interest in maintaining the "integrity" of its arrangement with the major cigarette manufacturers, it was fair and just to try NWS in Oklahoma's courts. (*Id.* at 209.)[11] The Court of Appeal in

[11] The "integrity" of the MSA and the States desire to enforce the MSA are irrelevant to the question of whether the State may exercise personal jurisdiction over NWS. The State's desire to enforce a regulatory scheme where it has no authority to do so does not and cannot create jurisdiction where it does not exist. It would not be fair or reasonable to allow the State to assert personal

the instant case simply imported the Oklahoma court's analysis into its own opinion.

Federal statutes and case law, however, define actions occurring in Indian country as interstate commerce and Indian commerce. If the State has no ability to regulate an out-of-state entity, it has no ability to hale the out-of-state entity into Court.

The *Edmondson* case relies on authorities that involve actions where a tribe or an Indian aggrieved by a State's attempts to regulate reservation activity bring suit against the State. (*Edmondson, supra*, 237 P.3d at 211-214, citing, inter alia, *Washington v. Confederated Tribes of the Coleville Indian Reservation* (1980) 447 U.S. 134 [suit by a tribe against state seeking to enjoin state from seizing cigarette shipments to reservation]; *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, *supra*, 425 U.S. 463 [Indian smoke shop owner brought declaratory action against state to prevent collection of state cigarette taxes]; *New Mexico v. Mescalero Apache Tribe, supra*, 462 U.S. 324 [tribe brought action to enjoin state from enforcing state game laws on tribal land].) None of these cases involved claims of personal jurisdiction, and none of these cases allowed direct interference or regulation of tribes or Indians by a State. All of these cases dealt specifically with purchases or actions by state resident non-Indians directly with a tribal entity. Neither *Edmondson* nor the Court of Appeal should have considered these

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jurisdiction over NWS solely because it wants to enforce a comprehensive regulatory scheme designed to monetary benefit the State and big tobacco without authority to otherwise regulate either the Indian tribe purchaser or the out-of-state Indian corporation.

cases determinative for purposes of making a finding as to personal jurisdiction issues.

The Superior Court correctly held that the exercise of jurisdiction over NWS would not be "fair and reasonable" because

> there is uncertainty at the other end of the distribution as to whether the state's financial responsibility and other laws at issue in this case could be enforced against Big Sandy. It would be unfair to place the burden on an out of state distributor to determine ... what state laws are enforceable against the tribe with respect to any resales of those products.... The Court finds that, under these circumstances, it would not be reasonable or fair to exercise jurisdiction over NWS.

(Order at 5.) In short, the Court of Appeal's decision unreasonably and unfairly allows California to hale into Court an out-of-state corporation conducting business outside of California.

Federal law defines Indian country as separate from a state for purposes of interstate commerce, therefore it is only reasonable to conclude that Indian country is not part of California. The only conduct at issue raised by the State in this matter is sales "in the State." NWS has no "presence" in California and the purchases at issue did not take place in California. The Court of Appeal did not consider these facts or how each relates to whether it would be unfair or unreasonable for California to hale NWS into Court to defend against such an action. The Court's review is necessary to consider these critical facts in relation to the fairness prong of the minimum contacts test as well as to provide guidance for determining the fundamental issue as to the definition of forum for jurisdictional purpose.

V. CONCLUSION

For the foregoing reasons this Court should grant review of this petition as it is necessary to settle important questions of Constitutional law, and to determine whether the Court of Appeals Opinion comports with recent decisions issued by the United States Supreme Court. This Court's review is necessary to establish clear guidance for defining this fundamental issue, how to define the "forum State" for purposes of personal jurisdiction where conduct involving Indians in Indian country is at issue.

Dated: July 15, 2011.

FREDERICKS PEEBLES & MORGAN LLP

John M. Peebles
Darcie L. Houck
Tim Hennessy

By: _____
Darcie L. Houck
Attorneys for Specially Appearing Defendant and Petitioner Native Wholesale Supply Company

CERTIFICATE OF COMPLIANCE PURSUANT TO CAL. RULES OF COURT, RULE 8.504(d)(1)

I certify that:

Pursuant to California Rules of Court, rule 8.504(d)(1) that attached Petition For Review is printed in Arial typeface with 13 point font and contains 8,025 words (excluding cover, tables, and certificate of service and compliance), according to the count of the computer program Microsoft Word used to prepare the brief.

July 15, 2011

Darcie L. Houck
Attorney

CERTIFICATE OF SERVICE

I am a resident of the County of Sacramento, California. I am over the age of eighteen years and not a party to the within action. My business address is 2020 L Street, Suite 250, Sacramento, CA 95811.

On the date stated below, I served the within **PETITION FOR REVIEW** via personal delivery through First Legal Support Services to the following recipients:

Counsel for Plaintiff/Respondent, People of the State of California

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One (1) copy

Superior Court of California
County of Sacramento
Attn: Court Clerk, Dept. 54
720 9th Street
Sacramento, CA 95814-1398
One (1) copy

I also certify that the above **PETITION FOR REVIEW** was served by transmitting a copy via Federal Express Mail to:

Counsel for Plaintiff/Respondent, People of the State of California

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: July 18, 2011

Sally Eredia

ATTACHMENT A

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE ex rel. KAMALA D. HARRIS, as Attorney General, etc., Plaintiff and Appellant, v. NATIVE WHOLESALE SUPPLY COMPANY, Defendant and Respondent.	C063624 (Super. Ct. No. 34-2008-00014593-CU-CL-GDS)

APPEAL from a judgment of the Superior Court of Sacramento County, Shelleyanne W.L. Chang, Judge. Reversed.

Edmund G. Brown, Jr., and Kamala D. Harris, Attorneys General, Dennis Eckhart and Karen Leaf, Assistant Attorneys General, Michelle L. Hickerson and Michael E. Edson, Deputy Attorneys General, for Plaintiff and Appellant.

Fredericks Peebles & Morgan, John M. Peebles and Darcie L. Houck for Defendant and Respondent.

The State of California (the State) sued defendant Native Wholesale Supply Company (NWS) for allegedly violating state law

on cigarette distribution[1] and state law on cigarette fire safety.

NWS moved successfully to quash service for lack of personal jurisdiction.

NWS is an out-of-state, tribal-chartered corporation that is owned by a Native American individual. Its principal business is the sale and distribution of cigarettes manufactured by Grand River Enterprises Six Nations Ltd. (Grand River), a tribal-owned corporation in Canada. Since late 2003, NWS has sold hundreds of millions of Grand River cigarettes to a small Indian tribe in California, and these cigarettes, in turn, have been sold to the California public.

Based on this scenario, we conclude that NWS has purposefully derived benefit from California activities under the stream of commerce theory, sufficient to invoke personal jurisdiction. Indeed, for personal jurisdiction purposes, we see not just a stream of commerce, but a torrent. Consequently, we shall reverse the order quashing service and remand this matter to the trial court. (Code Civ. Proc., § 904.1, subd. (a)(3).)

We will set forth the pertinent facts in the discussion that follows.

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[1] The state law in question is based on the 1998 litigation settlement agreement between American tobacco companies and 46 states. (See Rev. & Tax Code, § 30165.1.)

DISCUSSION

I. The Law

The constitutional limits to the exercise of personal jurisdiction are discussed in *Bridgestone Corp. v. Superior Court* (2002) 99 Cal.App.4th 767 (*Bridgestone*):

"A California court may exercise personal jurisdiction to the extent allowed under the United States Constitution and the California Constitution. (Code Civ. Proc., § 410.10; *Vons Companies, Inc. v. Seabest Foods, Inc.* [(1996)] 14 Cal.4th [434,] 444.) Under the Fourteenth Amendment due process clause, a state court may exercise personal jurisdiction over a nonresident defendant who has not been served with process inside the state only if the defendant has sufficient 'minimum contacts' with the state so that the exercise of jurisdiction is reasonable and comports with '"fair play and substantial justice."' (*Internat. Shoe Co. v. Washington* (1945) 326 U.S. 310, 316-317 [90 L.Ed. 95, 102-103]; *Vons Companies*, at p. 444.)

"A nonresident defendant whose activities within the state are substantial, continuous, and systematic is subject to 'general jurisdiction' in the state, meaning jurisdiction on any cause of action. [Citations.] Absent such pervasive activities, a [nonresident] defendant is subject to 'specific jurisdiction' only if (1) the defendant *purposefully availed* itself of the benefits of conducting activities in the forum state . . . [citations]; (2) the dispute arises out of or has a substantial connection with the defendant's contacts with the

state [citations]; and (3) the exercise of jurisdiction would be fair and reasonable [citations]." (*Bridgestone* at pp. 773-774, boldface added to factor numbers [citing for the three-factor test, *Burger King Corp. v. Rudzewicz* (1985) 471 U.S. 462, 472, 475-478 [85 L.Ed.2d 528, 542-545] (*Burger King*) & *Vons Companies, Inc. v. Seabest Foods, Inc., supra*, 14 Cal.4th at pp. 447-453 (*Vons Companies*)].)

"Purposeful availment" (factor No. (1) above) is shown if the nonresident defendant has "purposefully directed" its activities at forum residents, "purposefully derived benefit" from forum activities, or "purposely availed" itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of the state's laws. (*Vons Companies, supra*, 14 Cal.4th at p. 446, citing *Burger King, supra*, 471 U.S. at pp. 472-473, 475 [85 L.Ed.2d at pp. 541-542].)

The United States Supreme Court has explained that placing goods in the stream of commerce with the expectation that they will be purchased by consumers in the forum state indicates an intention to serve that market and constitutes purposeful availment, as long as the conduct creates a "substantial connection" with the forum state—for example, if the income earned by a manufacturer or distributor from the sale or use of its goods in the forum state is "substantial." (*Bridgestone, supra*, 99 Cal.App.4th at pp. 774-775, 777; see *id.* at p. 776, citing *Secrest Machine Corp. v. Superior Court* (1983) 33 Cal.3d

664, 670-671 (*Secrest*) & *World-Wide Volkswagen Corp. v. Woodson* (1980) 444 U.S. 286, 297-298 [62 L.Ed.2d 490, 501-502] (*World-Wide*); see also *Asahi Metal Industry Co. v. Superior Court* (1987) 480 U.S. 102, 112, 116-117, 122 [94 L.Ed.2d 92, 104-105, 107-108, 110-111] (*Asahi*) (plur. opn. of O'Connor, J.; separate opns. of Brennan, J., & Stevens, J., conc. in part & conc. in the judg.).)

Purposeful availment does not arise where a nonresident manufacturer or distributor merely foresees that its product will enter the forum state. But purposeful availment is shown where the sale or distribution of a product "'arises from the efforts of the manufacturer or distributor to serve, directly *or indirectly*, the [forum state's] market for its product . . . .'" (*Secrest*, *supra*, 33 Cal.3d at p. 670, italics added, quoting *World-Wide*, *supra*, 444 U.S. at p. 297 [62 L.Ed.2d at p. 501]; see also *Bridgestone*, *supra*, 99 Cal.App.4th at p. 776.)

The California Supreme Court has equated "purposeful availment" with engaging in economic activity in California "'as a matter of commercial actuality'"—i.e., as a matter of "economic reality." (*Buckeye Boiler Co. v. Superior Court* (1969) 71 Cal.2d 893, 901-902, 903 (*Buckeye Boiler*).)

A plaintiff opposing a defendant's motion to quash service has the burden of establishing factor Nos. (1) (the defendant's purposeful availment) and (2) (lawsuit relates to the defendant's contacts with state). (*Bridgestone*, *supra*, 99 Cal.App.4th at p. 774.) If the plaintiff does so, the burden

then shifts to the defendant to show factor No. (3), that the exercise of jurisdiction would be unreasonable. (*Ibid.*; *Burger King*, *supra*, 471 U.S. at p. 476 [85 L.Ed.2d at p. 543].)

If the material facts are undisputed, as here, we independently review the determination of personal jurisdiction. (*Vons Companies*, *supra*, 14 Cal.4th at p. 449; *Bridgestone*, *supra*, 99 Cal.App.4th at p. 774.)

II. The Facts

The undisputed material facts are as follows.

NWS is a tribal-chartered corporation headquartered on an Indian reservation in New York. The president and sole owner of NWS is Arthur Montour, a member of the Seneca Nation of Indians. NWS (1) imports cigarettes from Grand River, a tribal-owned Canadian cigarette manufacturer; (2) stores the cigarettes at three locations in the United States (including the Free Trade Zone in Las Vegas, Nevada); and (3) then sells the cigarettes to tribal entities in the United States.

In California, NWS sells the Grand River cigarettes primarily to Big Sandy Rancheria (Big Sandy), an Indian tribe with 431 members located on a reservation about 40 miles northeast of Fresno. A sales transaction occurs when Big Sandy places an order with NWS. NWS then releases the cigarettes from storage and arranges for their transport either to Big Sandy or to other Indian retailers (as apparently directed by Big Sandy) in California. Big Sandy and the other Indian retailers then

sell the cigarettes to the general public in California. The cigarettes are stamped "'For Reservation Sales Only.'"

Using this system since late 2003, NWS has delivered over 325 million cigarettes, worth nearly $12 million, to California. In 2007 alone, NWS shipped and sold approximately 80 million cigarettes (4 million standard packs) to the 431-member Big Sandy.

The present lawsuit had its genesis in the 1998 litigation settlement agreement that was reached between several states (including California) and major American tobacco manufacturers.

In November 1998, California and 45 other states entered into a Master Settlement Agreement (the MSA or Master Settlement Agreement) with the major American tobacco manufacturers. In exchange for a liability release from the states for smoking-related public healthcare costs, the settling manufacturers agreed to limit their marketing and to pay the settling states billions of dollars in perpetuity.

To protect the efficacy of the MSA, which applies only to tobacco manufacturers, California enacted a statute in 2003 (the Directory law) (Stats. 2003, ch. 890, § 7), which, in effect, allegedly prohibits any person from selling, distributing, transporting, importing, or causing to be imported, cigarettes that do not comply with the MSA's requirements, and that the person "knows or should know" will be sold, offered, or possessed for sale in California. (Rev. & Tax. Code, § 30165.1,

subds. (e), (b), (c); see *State ex rel. Edmondson v. Native Wholesale Supply* (Ok. 2010) 237 P.3d 199, 203-204 (*Edmondson*).)

The State sued NWS, principally alleging that NWS violated the Directory law as well as state law on cigarette fire safety. (Health & Saf. Code, § 14950 et seq.)

III. Applying the Law to the Facts

A. Factor No. (1)—Purposeful Availment/Minimum Contacts

The State alleges without dispute that, since the end of 2003, NWS has shipped and sold over 325 million cigarettes to Big Sandy and, as apparently directed by Big Sandy, to other Indian retailers in California, reaping millions of dollars in the process. In 2007 alone, NWS shipped and sold approximately 80 million cigarettes (i.e., 4 million standard cigarette packs) to Big Sandy. Again, Big Sandy has just 431 members; in other words, even if nearly every member of Big Sandy smoked *two* packs every day that would still total only about 280,000 packs a year. These cigarettes, in turn, are sold to the general public in California.

As we have seen, "purposeful availment"—which is the shorthand standard for the "minimum contacts" that a nonresident defendant must have with a forum state for the forum to assert personal jurisdiction consistent with due process—is shown if the nonresident defendant has "purposefully derived benefit" from forum activities. (*Vons Companies, supra*, 14 Cal.4th at p. 446.) Placing goods in the stream of commerce with the expectation that they eventually will be purchased by consumers

in the forum state indicates an intention to serve that market and constitutes purposeful availment, as long as the conduct creates a "substantial connection" with the forum state; for example, if the income earned by a manufacturer or distributor from the sale or use of its goods in the forum state is "substantial." (*Bridgestone*, *supra*, 99 Cal.App.4th at pp. 774-775, 777; see also *Bridgestone*, at p. 776, citing *Burger King*, *supra*, 471 U.S. at pp. 473, 475 [85 L.Ed.2d at pp. 541, 542] & *World-Wide*, *supra*, 444 U.S. at pp. 297-298 [62 L.Ed.2d at pp. 501-502]; *Asahi*, *supra*, 480 U.S. at pp. 112, 116-117, 122 [94 L.Ed.2d at pp. 104-105, 107-108, 110-111] (plur. opn. of O'Connor, J.; separate opns. of Brennan, J., & Stevens, J., conc. in part & conc. in the judg.); *Secrest*, *supra*, 33 Cal.3d at p. 670.)

As a matter of "commercial actuality,"—i.e., as a matter of "economic reality" (*Buckeye Boiler*, *supra*, 71 Cal.2d at pp. 901-903), NWS's distribution into California of hundreds of millions of profitable cigarettes over the past few years, via a small Indian tribal network in which the cigarettes are eventually sold to the general public, meets the "minimum contacts" legal standard of "purposeful availment": NWS has "purposefully derived benefit" from California activities through a "substantial" stream of commerce.

In a recent decision, the Supreme Court of Oklahoma found similarly as to NWS involving a nearly identical distributive process, reasoning:

"The State alleges [without real dispute] that over a fifteen-month period *more than one hundred million cigarettes worth more than eight million dollars* were sold into the Oklahoma market through this process. . . . [¶] . . . [¶]

" . . . [W]e are looking here at a distributor [i.e., NWS] of a finished product—cigarettes—who causes the product to be delivered to [a] [tribal] entity in this state in such quantities that its ultimate destination can only be the general public in this state. While the [tribal] entity with which Native Wholesale Supply [(NWS)] directly deals may operate on tribal land, that tribal land is not located in some parallel universe. It is geographically within the State of Oklahoma. Both entities are engaged in an enterprise whose purpose is to serve the Oklahoma market for cigarettes.

"This is not a case where [NWS] is merely aware that its product might be swept into this State and sold to Oklahoma consumers. The sheer volume of cigarettes sold by [NWS] to [tribal] wholesalers in this State shows the Company to be part of a distribution channel for Seneca [Grand River] cigarettes that intentionally brings that product into the Oklahoma marketplace. [NWS] is not a passive bystander in this process. It reaps a hefty financial reward for delivering its products into the stream of commerce that brings it into Oklahoma. To claim, as [NWS] does, that it does not know, expect, or intend that the cigarettes it sells to [the tribal entity] are intended for distribution and resale in Oklahoma is simply disingenuous.

" . . . We hence hold that the minimum contacts segment of due process analysis is satisfied." (*Edmondson, supra*, 237 P.3d at pp. 208-209, fn. [citation] omitted.)[2]

As evident from our extensive quoting of the *Edmondson* decision, we find "Oklahoma is OK" on this point. Such persuasion was not available to the trial court when it granted NWS's motion to quash. In line with *Edmondson*, we conclude that NWS has minimum contacts with California sufficient for the State to assert personal jurisdiction over the company consistent with due process.

The presence of minimum contacts, however, does not end the due process inquiry. We must still consider factor Nos. (2) and (3), to which we turn now. (*Bridgestone, supra*, 99 Cal.App.4th at pp. 773-774.)

B. Factor No. (2)—Lawsuit Arises Out of Defendant's Contacts with the State

This factor is readily met here. In this lawsuit, the State alleges that NWS is violating California's cigarette distribution and fire safety laws. NWS's cigarette distribution in California *constitutes* NWS's contacts with California. Obviously, then, this lawsuit "arises out of" NWS's contacts with California. (*Bridgestone, supra*, 99 Cal.App.4th at p. 774.)

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[2] We recognize that Oklahoma's population is about a tenth of California's, but this does not lessen the persuasive punch of this reasoning with regard to NWS's activities in California.

C. Factor No. (3)—Exercising Personal Jurisdiction Is Fair and Reasonable

This factor poses little hindrance to reversal as well.

"[I]n evaluating the reasonableness of personal jurisdiction, a court must consider (1) the burden on the foreign defendant of defending an action in the forum state; (2) the forum state's interest in adjudicating the dispute; (3) the plaintiff's interest in obtaining relief; (4) judicial economy; and (5) the states' shared interest '"in furthering fundamental substantive social policies."'" (*Bridgestone*, *supra*, 99 Cal.App.4th at p. 778, citing *Asahi*, *supra*, 480 U.S. at p. 113 [94 L.Ed.2d at p. 105] & *World-Wide*, *supra*, 444 U.S. at p. 292 [62 L.Ed.2d at p. 498].)

NWS can hardly claim a heavy burden in having to defend this action in California. After all, NWS stores its highly profitable cigarettes just next door in Nevada.

The forum state's interest and the plaintiff's interest merge here, creating a potent combination. As *Edmondson* recognized, the integrity of the Master Settlement Agreement depends on the ability of the State to enforce its terms. (See *Edmondson*, *supra*, 237 P.3d at p. 209.)

That leaves judicial economy and the states' shared interest in social policy. As the court in *Edmondson* aptly put it once again, "[t]he courts of this State and only the courts of this State [(here, California)] offer the most efficient and rational forum for the resolution of a controversy over the meaning and effect of State statutes governing the allocation of

the financial and health-care costs associated with smoking between the public and private sectors." (*Edmondson, supra*, 237 P.3d at p. 209.)

We conclude the trial court erred in granting NWS's motion to quash service. The State has personal jurisdiction over NWS regarding this lawsuit.[3]

DISPOSITION

The order quashing service on NWS is reversed. The matter is remanded to the trial court for further proceedings. The

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[3] In light of our resolution, it is unnecessary to address the State's two other contentions on appeal; namely, that the trial court abused its discretion (1) in failing to sanction NWS for discovery violations, and (2) in excluding certain evidence. Both contentions involve the issue of personal jurisdiction.

Also, we express no views on the Indian commerce clause, the interstate commerce clause, federal law preemption, or Indian self-government—all of which are discussed briefly on appeal and involve the issue of whether the State has authority to regulate NWS's cigarette sales and distribution. These legal principles and this issue may implicate the merits of this lawsuit and/or subject matter jurisdiction; again, we express no views on these matters. (See, e.g., *Edmondson, supra*, 237 P.3d at pp. 209-217 [discussing Indian commerce clause].) The parties did not adequately argue below, and have not adequately briefed here, any of these issues. This is understandable because the issue of the State's *personal jurisdiction* over NWS in this lawsuit was the only issue actually before the trial court.

Finally, we deny the State's request for judicial notice in support of its reply brief (which goes to evidentiary issues involving personal jurisdiction), as well as NWS's related motion to strike portions of the State's reply brief. We also deny NWS's request for judicial notice in support of its respondent's brief (which cites to pending superior court orders in other cases, as well as to treatises regarding the regulation of Indian commerce).

State is awarded its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1), (2).) ***(CERTIFIED FOR PUBLICATION)***

BUTZ, J.

We concur:

RAYE, P. J.

ROBIE, J.

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

MAILING LIST

Re: The People ex rel. Kamala D. Harris as Attorney General, etc. v. Native Wholesale Supply Company
C063624
Sacramento County
No. 34200800014593CUCLGDS

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ATTACHMENT B

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO
GORDON D SCHABER COURTHOUSE

MINUTE ORDER

Date: 09/25/2009 Time: 02:25:14 PM Dept: 54

Judicial Officer Presiding: Judge Shelleyanne W L Chang
Clerk: E. Higginbotham

Bailiff/Court Attendant: None
ERM: None

Case Init. Date: 06/30/2008

Case No: 34-2008-00014593-CU-CL-GDS Case Title: People of the State of California ex real Edmund G Brown Jr Attorney General vs. Native Wholesale Supply

Case Category: Civil - Unlimited

Event Type: Motion to Quash Service of Summons - Civil Law and Motion

Causal Document & Date Filed:

Appearances:

Nature of Proceeding: Motion to Quash Service of Summons (Taken Under Submission 8/24/2009)

TENTATIVE RULING

Defendant Native Wholesale Supply ("NWS")'s motion to quash is granted for the reasons set forth below.

The complaint alleges that NWS has violated Rev. & Tax. Code section 30165.1 by selling to California businesses brands of cigarettes that are not listed in the Attorney General's directory of manufacturers who have complied with this state's financial responsibility laws. Such sales also allegedly violate Health and Safety Code section 14950 (establishing ignition-propensity standards), 15 USC section 375 et. seq (shipping cigarettes in interstate commerce to persons or entities in California that are not licensed as cigarette distributors by the California Board of Equalization) and Bus. & Prof. Code section 17200 (unfair competition).

NWS contends that California does not have personal jurisdiction over it because it has no minimum contacts with the State of California, as it is an out-of-state corporation that sells and ships cigarettes only to Native American tribes and Native American-owned entities located on the land of recognized Indian tribes.

The following facts are undisputed. NWS is chartered by Sac and Fox Nation, a federally recognized sovereign Native American nation, and is wholly owned by Arthur Montour, a member of the Seneca Nation of Indians, a federally recognized sovereign Native American nation. Its business operations are maintained on the Seneca Cattaraugus Indian Territory which is physically situated in New York. NWS does not have an office, personnel, mailing address, bank accounts, sales agents, telephone, real estate or vehicles in California. NWS is an out-of-state corporation that has no office or other presence in this State. Montour decl.

The record before the Court establishes that the only entity in this state to which NWS has directly sold

cigarettes is Big Sandy Rancheria, a recognized Indian tribe. Big Sandy, in turn, has sold cigarettes purchased from NWS to other Indian and non-Indian persons and entities in California. Some of NWS sales to Big Sandy were shipped directly to other entities in California.

Plaintiff concedes that the State has no general jurisdiction over defendant. Plaintiff contends, however, that this court has specific jurisdiction over NWS. Specific jurisdiction arises when a defendant has purposefully availed itself of the privilege of conducting activities in California; the claim arises out of defendant's California-related activity; and the exercise of jurisdiction would be fair and reasonable. F. Hoffman-LaRoche, Ltd. v. Superior Court (2005) 130 Cal.App.4th 782, 796. Plaintiff asserts that NWS has purposefully availed itself of the privilege of conducting activities in California by: 1) its direct sales to Big Sandy Rancheria, and 2) its indirect sales to entities and persons "downstream" from Big Sandy. The Court examines each of these contentions in turn.

Whether minimum contacts are established by sales to Big Sandy

Plaintiff has cited no authorities, and the Court is aware of none, holding that sales by an out-of-state corporation to an Indian tribe on a reservation located in this state constitute minimum contacts with this state that will support personal jurisdiction over the out-of-state corporation. Indeed, the Court has found no California authorities applying a minimum contacts analysis where any activities on an Indian reservation were involved.

Authorities in other jurisdictions applying a minimum contacts analysis involving Indian reservations have concluded that activities taking place solely on Indian lands do not constitute contacts with the forum state. In Flammond v. Flammond (Mont. 1980) 621 P.2d 471, the Court held that Montana did not have personal jurisdiction to enforce a California court's order to pay child support against a father who was an enrolled member of the Blackfeet Tribe and lived on the tribe's reservation. The Montana court reasoned that there were no off-reservation acts in Montana sufficient to vest that state's courts with personal jurisdiction over the father. The marriage had taken place in California, and the mother had returned to California after separating from the father. The father's domicile on the reservation was not an in-state contact that would support jurisdiction.

In Martinez v. Superior Court (Ariz.App.1987) 731 P.2d 1244, 1246, a dissolution action by a non-Indian wife against a reservation Indian husband, the court applied the general rule that state courts do not have jurisdiction over an Indian living on an Indian reservation absent sufficient minimum contacts by the Indian within the state away from the reservation. As the marital domicile was on the reservation, the children were conceived on the reservation and the separation occurred on the reservation, the court concluded that it had no jurisdiction. On similar facts, the court in Byzewski v. Byzewski (N.D. 1988) 429 N.W.2d 393, 397 came to the same conclusion.

Out-of-state authorities are not, of course, controlling. Further, these cases involve domestic relationships, while this case involves commercial activity. However, to the extent that plaintiff asserts that NWS' sales to Big Sandy constitute minimum contacts with this state simply because Big Sandy is physically located in this state, the Court rejects that proposition. The Court is persuaded by the cases discussed above that on-reservation conduct is insufficient to establish minimum contacts with a forum state absent off-reservation activities within the forum state.

Plaintiff further contends that NWS' sales to Big Sandy constitute minimum contacts with this state because state law applies to reservations located in this state. The issue of the application of state law to Indian reservations is not as simple as the broad generalities relied upon by plaintiff, e.g. "reservations are part of the state within which they lie and state laws, civil and criminal, have same force within reservation as elsewhere except for restricted application to Indian wards. Surplus Trading Co. v. Cook (1930) 281 U.S. 647, 650-651. That statement was, in any event, dicta as the only issue decided by the court was state taxation of non-Indian owned private property located on a federal military base. As the U.S. Supreme Court later observed, "That is not to say that States may exert the same degree of regulatory authority within a reservation as they do without. To the contrary, the principle that Indians have the right to make their own laws and be governed by them requires 'an accommodation between the interests of the Tribes and the Federal Government; on the one hand, and those of the State, on the other.'" Nevada v. Hicks (2001) 533 U.S. 353, 362, quoting Washington v. Confederated Tribes of Colville Reservation (1980) 447 U.S. 134, 156.

As the court in San Manuel Indian Bingo and Casino v. NLRB (D.C.Cir. 2007) 475 F.3d 1306, 1312, concluded, "[a]n examination of Supreme Court cases shows tribal sovereignty to be at its strongest when explicitly established by a treaty .. or when tribal government acts within the borders of its reservation, in a matter of concern only to members of the tribe[.] [citations omitted] Conversely, when a tribal government goes beyond matters of internal self-governance and enters into off-reservation business transaction with non-Indians, its claim of sovereignty is at its weakest."

In sum, state's interests are generally highest when the individual Indian or Indian tribe engages in off-reservation conduct within the forum state. E.g., Nevada v. Hicks, supra (state officers executing process related to the violation, off reservation, of state laws), Organized Village of Kake v. Egan (1962) 369 U.S. 60 (state regulation of fish traps operated in non-reservation waters); Mescalero Apache Tribe v. Jones (1973) 411 U.S. 145 (state tax on gross receipts of ski resort operated on land outside the tribe's reservation).

The state's interests are weakest where the conduct of the individual Indian or Indian tribe is on-reservation conduct relating to tribal sovereignty. "When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest." White Mountain Apache Tribe v. Bracker (1980) 448 U.S. 136, 144

Plaintiff contends that, where state interests outside the reservation are implicated, a state may regulate the activities of even tribe members on tribal land, such as sales of cigarettes on reservation land by tribal entities to nonmembers from off the reservation. Nevada v. Hicks, supra, 533 U.S. at 362, citing Washington v. Federated Tribes of Colville Reservation (1980) 447 U.S. 134, 151. Plaintiff urges the Court to find that NWS' sales to Big Sandy implicate unidentified state interests outside the reservation because Big Sandy, in turn, sells those cigarettes to California entities and consumers off the reservation.

The Court initially notes that the power of the state to regulate on-reservation conduct implicating off-reservation state interests cannot be assumed in every situation. In Lawrence v. Barona Valley Ranch Resort & Casino (2007) 153 Cal.App.4th 1364, 1368-1370, the court held it had no subject matter jurisdiction to apply state tort laws against Indian casino operated on reservation. In Ameriloan v. Superior Court (2008) 169 Cal.App.4th 81, 84, the court held that tribal immunity extends to a tribe's for-profit business entities when the entity is operating on behalf of the tribe. In Middletown Rancheria v. Workers' Comp. Appeals Bd. (1998) 60 Cal.App.4th 1340, the court concluded that Public Law 280 does not confer on California the power to enforce its full panoply of general civil regulatory jurisdiction over Native American Indian tribes, and therefore the California Workers Compensation Appeals Board had no jurisdiction over injuries sustained by an employee of an Indian casino operating on reservation land.

Recognition by the courts that states have the power to impose taxes on the on-reservation sales of cigarettes to non-Indians is not authority that the states may regulate on-reservation sales in general, or NWS' sales to Big Sandy in particular. As the U.S. Supreme Court explained in Federated Tribes, supra, state taxing schemes on cigarettes and other goods sold to non-Indians have been upheld because the legal incidence of the tax fell on the non-Indian purchaser. The effect was simply to neutralize the competitive advantage gained by the tribes over other retailers by exploiting the willingness of non-Indian purchasers to "flout" their legal obligation to pay the taxes. 447 U.S. at 151. States are categorically barred from placing a tax's legal incidence on a tribe or on tribal members for sales made inside Indian country. Wagnon v. Prarie Band Potawatomi Nation (2005) 546 U.S. 95, 106 (upholding sales tax imposed on in-state distributors, manufacturers or importers of fuel sold to Indian tribe for sale on tribal land because the legal incidence of the tax did not fall on the tribe).

Here, the legal incidence of the statutes at issue in this case would not fall on non-Indian consumers. These statutes do not impose a tax that can be passed along to the non-Indian consumer. Rev. & Tax. Code section 30165.1 imposes an absolute ban on the sales of certain brands of cigarettes that are not listed on the Attorney General's directory: "No person shall sell, offer, or possess for sale in this state, or import for personal consumption in this state, cigarettes of a tobacco product manufacturer not included in the directory." Rev. & Tax. Code section 30165.1(e)(2). The legal incidence of this ban, if applied here, would fall directly on Big Sandy as an importer as well as NWS as a seller of unregistered cigarettes.

Of even more significance, NWS' sales to Big Sandy constitute not only commerce between Indian-owned entities but also interstate commerce. The authorities upholding the power of a state to impose taxes on sales of goods have concerned only sales within that state. Plaintiff has not cited, and this Court is not aware of any authority permitting a state to regulate interstate commerce between Indian tribes or tribal entities. Such activities are more properly subject to Congressional regulation, which has plenary power to regulate Indian commercial activities. Agua Caliente Band of Cahuilla Indians v. Superior Court (2006) 40 Cal.4th 239, 249.

As the Court finds that the state cannot regulate the interstate commerce between NWS and Big Sandy, it rejects defendant's contention that NWS' sales to Big Sandy constitute minimum contacts with this state.

Stream of commerce theory

Plaintiff alternatively contends that purposeful availment can be shown by placing goods in the stream of commerce with the expectation that they will be purchased by consumers in the forum state. Bridgestone Corp. v. Superior Court (2002) 99 Cal.App.4th 767, 777. Plaintiff contends that courts regularly find jurisdiction over a foreign defendant where the defendant's product arrived through the stream of commerce in the forum state via an equally foreign middleman. A. Uberti & C. v. Leonardo (Ariz. 1995) 892 P.2d 1354, 1362-1363 (jurisdiction over Italian manufacturer whose guns were sold in Arizona through third party middleman in Massachusetts); Duple Motor Bodies, Ltd. v. Hollingsworth (9th Cir. 1969) 417 F.2d 231 (sale of product by foreign manufacturer via middleman in England to buyers in Hawaii); Barone v. Rich Bros. Interstate Display Fireworks Co. (9th Cir. 1994) 25 F.3d 610, 613-614 (Japanese corporation subject to suit in Nebraska where middleman was South Dakota distributor).

Defendant contends that shipments of cigarettes purchased by Big Sandy to other entities is at the direction of Big Sandy, and that Big Sandy's re-sales of cigarettes to other entities are the unilateral activities of a third party.

Plaintiff bears the initial burden to demonstrate facts that support the exercise of jurisdiction. Bridgestone Corp. v. Superior Court, supra, 99 Cal.App.4th 767. Plaintiff has produced the following evidence in opposition to this motion: declarations of Cook, Allison, Carlson and Diaz regarding their purchases of Opal and Seneca cigarettes from Big Sandy Rancheria, Huber Enterprises Smoke Shop, Native Made Tobacco Shop, and Black Hawk Tobacco Shop; the declaration of Gable regarding various records demonstrating the amount of sales and shipments made by defendant to Big Sandy and to Big Sandy consignees. The Court notes that the Gable declaration includes as an exhibit the declaration of Vincent Buehler, a law clerk who prepared spread sheets based on sales and shipping documents. Notably, Buehler's declaration states at para. 8 that the only purchaser identified on any of the 234 shipments made by defendant from December 203 to mid-2008 was Big Sandy Rancheria, although several shipments designated Huber Enterprises and Native Buy as consignees. Gable's declaration states that her review of all records available regarding defendant's sales and shipments to entities in California show sales only to Big Sandy, with 40 shipments to Huber Enterprises, 27 shipments to Native Made Tobacco, 6 shipments to Native Buy and one shipment to Black Hawk Tobacco.

Plaintiff's contention that this evidence shows that defendant directed the sales to Big Sandy and downstream to other California entities is not persuasive. The only inference the Court draws from the evidence of Big Sandy's downstream sales is that Big Sandy acted as a seller and distributor of cigarettes to other entities in California, Indian and non-Indian, as a result of the tribe's own independent economic decision. There is no evidence supporting an inference that NWS exercised any control over Big Sandy's downstream sales. The record establishes only that NWS filled orders placed by Big Sandy and shipped those orders to Big Sandy or other entities designated by Big Sandy. NWS did not place its own name on the cigarettes as the Massachusetts distributor did in Uberti, supra, 892 P.2d at 1360-1361. Unlike the manufacturer in Duple, supra, who made special modifications to its coach for the Hawaii market, NWS did not modify the cigarettes it sold to Big Sandy in any way so as to serve the California market. Rather, the evidence that each package of cigarettes sold by NWS was stamped "for reservation sales only" indicates NWS intended to sell its cigarettes only to Indian reservations and not the wider California market.

While it may have been foreseeable to NWS that cigarettes sold to Big Sandy would be resold to others, foreseeability alone is insufficient to support specific jurisdiction. As You Sow v. Crawford Laboratories,

Inc. (1996) 50 Cal.App.4th 1859, 1868-1869 (multi-million dollar sales to GSA's California depot over a period of six years insufficient to apply stream of commerce theory where seller had no control over final destination of its products). "Foreseeability that a product will enter California without having some control over its ultimate destination does not satisfy the due process clause of the United States Constitution."

Finally, the Court must also find that the exercise of jurisdiction in this case would be fair and reasonable. Bridgestone Corp., supra, 99 Cal.App.4th at 774. The Court initially observes that this is not the typical personal injury case in which a manufacturer places a defective produce in the stream of commerce, and jurisdiction will allow a California consumer to seek redress from injuries caused by that product. This is also not a case where the sales of unregistered cigarettes is a criminal violation, and thus the ban on such sales would be enforceable against Indian tribes under Public Law 280.

This case involves state laws which allow some cigarette manufacturers and not others to sell their cigarettes in California. The primary burden of these laws falls on the manufacturer, i.e. to meet the financial responsibility requirements and ignition-propensity standards. There is no evidence here that NWS knew or should have known that Grand River, the cigarette manufacturer and another Indian-owned entity operating in Canada, was subject to and had not complied with these conditions when NWS sold the cigarettes to Big Sandy. As the state's general civil regulatory power does not extend to Indian tribes, there is uncertainty at the other end of the distribution as to whether the state's financial responsibility and other laws at issue in this case could be enforced against Big Sandy. It would be unfair to place the burden on an out-of-state distributor to determine, whenever it sells products to an Indian tribe located in California, what state laws are enforceable against the tribe with respect to any resales of those products. In the Court's view, that burden more fairly falls on the tribe importing the products for resale. The Court finds that, under these circumstances, it would not be reasonable or fair to exercise jurisdiction over NWS.

Transportation of cigarettes over state highways

Plaintiff contends that defendant's shipment of the cigarettes by truck over California roadways is sufficient to find jurisdictional contacts. However, there is no evidence in this case to on which the Court may find that defendant has directed the shipments on California roadways. Rather, the evidence shows only that defendant has sold cigarettes to a California Indian tribe, and at that tribe's direction, has shipped the cigarettes primarily to the tribe itself and occasionally to consignees. In these circumstances, mere shipment of goods over California roadways is insufficient to establish minimum contacts. Lakeside Bridge and Steel Co. v. Mountain State Construction Co., Inc. (7th Cir. 1979) 597 F.2d 596, 604 n.14 (out-of-state defendant's shipment of goods through state to another forum did not constitute minimum contacts not established solely by fact that goods were transited through a state).

The minute order is effective immediately. No formal order pursuant to CRC Rule 3.1312 or further notice is required.

COURT RULING

The matter was argued and submitted. The Court took this matter under submission.

SUBMITTED MATTER RULING

Having taken this matter under submission, the Court now rules as follows. The tentative ruling is affirmed with the following comments and evidentiary rulings.

At the hearing, plaintiff contended that the law recognizes no distinction between shipments of cigarettes to Big Sandy and shipments of cigarettes to a WalMart store located in the State of California. The argument is fundamentally flawed as it ignores the fact that Big Sandy is a sovereign Indian tribe Activities involving a sovereign physically located in California are not treated in the same manner as activities involving other entities located in California. "When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest." Nevada v. Hicks (2001) 533 U.S. 353, 361-362. Absent Congressional authorization or a tribe's or consent, the courts do not have subject matter jurisdiction over a tribe. Lawrence v. Barona Valley Ranch Resort &

Casino (2007) 153 Cal.App.4th 1364, 1368-1370.

Plaintiff is correct that this is not a lawsuit against an Indian tribe. However, plaintiff too narrowly construes the subject matter of this action as merely sales by an out-of-state corporation to a California entity, as though the sales were a unilateral act of NWS. No sales would be made by NWS unless Big Sandy purchased the cigarettes. Thus, the activity which plaintiff contends is unlawful is not just the act of NWS in shipping cigarettes into California; it is a business transaction between an out-of-state corporation and an Indian entity located in California. This kind of business transaction is not only subject to limitations on a state's power to regulate interstate commerce, it is also subject to limitations imposed by the Indian Commerce clause. None of the authorities relied upon by plaintiff discuss minimum contacts where the activity involves interstate commerce and/or the Indian Commerce clause.

Defendant's request for rulings on its objections to plaintiff's evidence is granted as follows.

Defendant's objections to the declarations of Gerald K. Carlson (4/15/09 and 5/18/09), Chris Cook, Albert Allison (4/15/09 and 5/15/09), and Andrew Diaz are sustained on the ground of relevance. These declarations are not relevant in the absence of a showing that defendant exercised control over Big Sandy's sales to downstream customers. Having sustained the objections on the grounds of relevance, the court need not rule on defendants' other objections (e.g. hearsay, etc.).

Defendant's objections to the declaration of Monica Gable are overruled.

Defendant's objections to the lodging of the transcript of the Jo Anne Tornberg deposition are overruled.

Declaration of Mailing

I hereby certify that I am not a party to the within action and that I deposited a copy of this document in sealed envelopes with first class postage prepaid, addressed to each party or the attorney of record in the U.S. Mail at 720 Ninth Street, Sacramento, California.
Dated: September 28, 2009

E. Higginbotham, Deputy Clerk **/s/ E. Higginbotham**

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