Robert E. Kovacevich
818 W. Riverside Ave., Ste. 525
Spokane, WA 99201
Telephone: (509) 747-2104
Facsimile: (509) 625-1914
Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

TERRY TONASKET, dba STOGIE SHOP; and DANIEL T. MILLER, an individual; Plaintiffs, v. TOM SARGENT, TOBACCO TAX ADMINISTRATOR, AND THE COLVILLE BUSINESS COUNCIL; MICHAEL O. FINLEY, CHAIRMAN; HARVEY MOSES JR.; SYLVIA PEASLEY; BRIAN NISSEN; SUSIE ALLEN; CHERIE MOOMAW; JOHN STENSGAR; ANDREW JOSEPH; VIRGIL SEYMOUR SR.; MIKE MARCHARD; ERNIE WILLIAMS; DOUG SEYMOUR; SHIRLEY CHARLEY; RICKY GABRIEL; and THE COLVILLE CONFEDERATED TRIBES OF	No. CV-11-073-LRS PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT

ROBERT E. KOVACEVICH, P.L.L.C.
A PROFESSIONAL LIMITED LIABILITY COMPANY
818 WEST RIVERSIDE
SUITE 525
SPOKANE, WASHINGTON 99201-0995
509/747-2104
FAX 509/625-1914

THE COLVILLE INDIAN)
RESERVATION, A FEDERALLY)
RECOGNIZED INDIAN TRIBE;)
)
Defendants.)

The Motion is brought under Fed.R.Civ.P. 12(b)(1), lack of subject matter jurisdiction and (7), failure to join and indispensable party under Rule 19.

Defendants' sovereign immunity argument is a defense, hence not within Rule 12(b). This motion must be confined to examining the Amended Complaint (ECF No. 40) to determine whether subject matter jurisdiction exists.

A party asserting the defense of sovereignty has the burden of proof. *New York v. Shinnecock Indian Nation,* 523 F.Supp.2d 185, 297-299 (E.D.NY 2007); *New York v. Golden Feather Smoke Shop,* 2009 WL 705815, page 4 (E.D.NY 2009); *Dye v. Choctaw Casino of Pocola,* 230 P.3d 507 (Okla. 2009). *Vann v. Kempthorne,* 534 F.3d 741, 750 (D.C.Cir. 2008) and *TTEA v. Ysleta del Sur Pueblo,* 181 F.3d 676, 680 (5th Cir. 1999) deny sovereign immunity if ongoing violations are sought to be enjoined.

ROBERT E. KOVACEVICH, P.L.L.C.
A PROFESSIONAL LIMITED LIABILITY COMPANY
818 WEST RIVERSIDE
SUITE 525
SPOKANE, WASHINGTON 99201-0995
509/747-2104
FAX 509/625-1914

The burden to establish absolute immunity is upon the defendant that wishes to use it as a defense. *Burns v. Reed,* 500 U.S. 478, 486-87, 111 S.Ct. 1934, 114 L.Ed.2d 547 (1991); *Lacey v. Maricopa County,* ____ F.3d ____, 2011 WL 2276198, page 3 (9th Cir. 2011).

In the Amended Complaint (ECF No. 40 at 31-36), injunctions and declaratory judgments are sought. *Burns v. Reed,* 500 U.S. 478, 486 (1991) states, "These decisions have also empathized that the official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question."

The complaint may be inartfully drawn, but if it contains sufficient facts, it survives dismissal. *Mendiondo v. Centinela Hosp. Medical Center,* 521 F.3d 1097, 1104 (9th Cir. 2008).

At ECF No. 46 at 1, Defendants attempt to characterize the Amended Complaint (ECF No. 40) as a challenge to the cigarette compact between the Tribe and the State. This is misleading as the Amended Complaint's title and introduction and ECF No. 40

ROBERT E. KOVACEVICH, P.L.L.C.
A PROFESSIONAL LIMITED LIABILITY COMPANY
818 WEST RIVERSIDE
SUITE 525
SPOKANE, WASHINGTON 99201-0995
509/747-2104
FAX 509/625-1914

at 5 states, "This is an action for illegal price fixing, antitrust and unfair competition violating the Sherman and Clayton Acts, 15 U.S.C. §§ 1, 3, 13, 15 and 26." ECF No. 40 at 14-31.

The incidence of the cigarette tax is on Miller. ECF No. 40 at 29. The Tribe has no regulatory jurisdiction on Miller, therefore, sovereign immunity is never an issue.

The Defendant Tribe has no Sovereign Immunity to a Federal Law of General Applicability. In Any Event, The Tribe has Waived Immunity.

The Tribe is bound by the decision of the Ninth Circuit denying sovereignty, *Donovan v. Coeur d'Alene Tribal Farm,* 751 F.2d 1113 (9th Cir. 1985). The specific holding is that tribal sovereignty cannot be used as a refusal to follow federal statutes of general applicability. The court rejected the defense of tribal sovereignty on the basis that the tribe was conducting a commercial enterprise.

William C. Canby, Jr., Senior Judge of the Ninth Circuit, states in his book, *"American Indian Law"* 5th Edition, West 2009 at pages 310-311 that "The most widely accepted rule is that set

ROBERT E. KOVACEVICH, P.L.L.C.
A PROFESSIONAL LIMITED LIABILITY COMPANY
818 WEST RIVERSIDE
SUITE 525
SPOKANE, WASHINGTON 99201-0995
509/747-2104
FAX 509/625-1914

forth in *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985)."

In *Freedom Holdings v. Spitzer*, 357 F.3d 205, 226 (2nd Cir. 2004), the MSA was held to be a per se violation of the Sherman Antitrust Act, 25 U.S.C. § 1.

Costco Wholesale Corp v. Maleng, 522 F.3d 874, 895 (9th Cir. 2008) also held that state price fixing was an antitrust violation.

U.S. v. Baker, 63 F.3d 1478, 1485 (9th Cir. 1995) holds that the federal statutes forbidding Indians to transport cigarettes is a federal law of general applicability. The Defendant is an Indian tribe cigarette retailer.

The argument of sovereign immunity has no application to a horizontal restraint of liquor prices. *TFWS Inc v. Schaefer*, 242 F.3d 198, 210-11 (4th Cir. 2001) states:

> The district court's denial of immunity is validated by *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 344-45, 107 S.Ct 720, 93 L.Ed.2d 667 (1987), a case in which the Supreme Court held that one aspect of the New York State liquor pricing system was not entitled to

ROBERT E. KOVACEVICH, P.L.L.C.
A PROFESSIONAL LIMITED LIABILITY COMPANY
818 WEST RIVERSIDE
SUITE 525
SPOKANE, WASHINGTON 99201-0995
509/747-2104
FAX 509/625-1914

> antitrust immunity under *Parker v. Brown*. . . .The Court ruled that New York's program was not entitled to antitrust immunity because the State did not actively supervise the pricing scheme.

This state antitrust immunity issue and the case upholding lack of immunity from injunctive relief on tribal tax have the same common cases, *Ex parte Young*, 209 U.S. 123, 155-56, 28 S.Ct 441, 52 L.Ed 714 (1908) and *Burlington Northern and Santa Fe Railway v. Vaughn*, 509 F.3d 1085, 1092 (9th Cir. 2007). The harmony of these cases deny sovereign immunity of the Defendant Tribe where injunctive relief, as here, is sought against a tribal market competitor.

McArthur Dairy, LLC v. McCowtree Bros. Dairy, Inc., 2011 WL 2118701 (S.D.Fla 2011) held that an agreement on distribution of milk products violated the Sherman Antitrust Act and denied a motion to dismiss.

In *L.G. Balfour Company v. F.T.C.*, 442 F.2d 1, 6 (7th Cir. 1971) the market competitor organized a company that recommended that all purchases of jewelry by college fraternities

ROBERT E. KOVACEVICH, P.L.L.C.
A PROFESSIONAL LIMITED LIABILITY COMPANY
818 WEST RIVERSIDE
SUITE 525
SPOKANE, WASHINGTON 99201-0995
509/747-2104
FAX 509/625-1914

be exclusively with Balfour. The holding was that the exclusive supply contract was a violation of the antitrust laws. *Balfour* states that a violation does not require that all violators be listed as Defendants.

Solis v. Matheson, 563 F.3d 425, 434 (9th Cir. 2009) is also conclusive. Federal wage and hour laws are statutes of general applicability.

The Amended Complaint, (ECF No. 40 at page 28) states, "Plaintiff Daniel T. Miller has never been and cannot be subject to any defense of tribal immunity as he has no nexus with the Defendant Colville Tribe that would allow a defense of sovereign immunity." ECF No. 40 at 30 states, "the action by the Defendant Tribe in delegating price control to the State of Washington waives tribal immunity." The Tribe, despite its assertion of sovereign immunity by its conduct, waived its immunity by entering into the agreement, by agreeing to mediation and by waiving any judicial enforcement. The Compact, ECF No. 1 at 76, 19.0 contains detailed mediation.

ROBERT E. KOVACEVICH, P.L.L.C.
A PROFESSIONAL LIMITED LIABILITY COMPANY
818 WEST RIVERSIDE
SUITE 525
SPOKANE, WASHINGTON 99201-0995
509/747-2104
FAX 509/625-1914

Mediation and arbitration waives immunity. *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 121 S.Ct 1589, 149 L.Ed.2d 623 (2001); *Smith v. Hopland Band of Pomo Indians*, 115 Cal.Rptr.2d 455, 463 (2002). These waivers alone overcome a motion to dismiss.

The Tribe designated control to the State or at least joint control. The Compact, ECF No. 1 at 70-72, 14.0 provides that all wholesalers must be licensed by the State; enforcement is joint. ECF No. 1 at 73, 15.2. The Tribe will provide Colville retailer information. ECF No. 1 at 68, 6.1.4, 6.1.3. By delegating the information the joint venture is not an "arm" of the Tribe. The Amended Complaint, ECF No. 40 at 23 states, ". . .the conduct of the Defendant Tribe by entering into a price fixing agreement alone waives the tribal sovereignty of Defendants." *Dixon v. Picopa Constr. Co.*, 772 P.2d 1104 (Ariz. 1989).

The Defendant Tribe operates a cigarette retail business. ECF No. 40 at 4-5. It agreed that the State could regulate the sale of its cigarettes. ECF No. 1 at 72-73, 14.2.3, 14.4. This

ROBERT E. KOVACEVICH, P.L.L.C.
A PROFESSIONAL LIMITED LIABILITY COMPANY
818 WEST RIVERSIDE
SUITE 525
SPOKANE, WASHINGTON 99201-0995
509/747-2104
FAX 509/625-1914

brings the situation completely within *Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 25 (1st Cir. 2006). The case holds that an Indian tribe's sovereign immunity may be "limited" by tribal conduct. . ."an effective limitation on tribal sovereign immunity need not use magic words." 449 F.3d at 25.

The Amended Complaint, ECF No. 40 at 31, states that forcing the State's lawsuit settlement (MSA) by increased prices waives immunity. ECF No. 40 at 32-33 states, "The Defendant Colville Tribe cannot claim sovereign immunity, as it was not a party to the MSA agreement and is collecting a substitute tax that increases prices. . . The Defendant Tribe has no sovereign immunity to a federal statute of general application."

ECF No. 40 at 3, 21, 27, 31-35 and especially at 32-3, alleges that the Defendant Tribe agreed to force Plaintiff Tonasket to purchase his cigarettes from an exclusive group of wholesalers who had to have a cigarette license with the State of Washington or certify that they would comply with state law. No licensed retailer (ECF No. 40 at 27) was a party to the MSA

ROBERT E. KOVACEVICH, P.L.L.C.
A PROFESSIONAL LIMITED LIABILITY COMPANY
818 WEST RIVERSIDE
SUITE 525
SPOKANE, WASHINGTON 99201-0995
509/747-2104
FAX 509/625-1914

agreement. No Indian tribe was a party to the MSA lawsuit settlement (ECF No. 40 at 23) and the Colville Tribe gets no benefit. However it is required to pay into the state escrow. ECF No. 40 at 26. The requirement by the Tribe also requires that Tonasket sell his cigarettes at a minimum price plus the taxes. Compact, ECF No 1 at 68, 6.2, 6.2.1. This pricing overcharges Tonasket by approximately $5 per carton of cigarettes. He is forced to increase his price to Miller. ECF No. 40 at 27.

At ECF No. 46 at 2 of their memorandum, the Defendants refer to the Declaration of Tom Sargent that completely contradicts the compact and its own law.

The Defendants assert that they do not "set wholesale prices" but the truth is contained in the Amended Complaint ECF No. 40 at 19-24. The Defendant Tribe forces Tonasket to buy from wholesalers who charge more for the cigarettes. If the State raises its tax, Tonasket must raise his prices. As stated at ECF No. 40 at 22, "this practice violates the common law revenue rule and is classic price fixing." At ECF No. 40 at 21 it

ROBERT E. KOVACEVICH, P.L.L.C.
A PROFESSIONAL LIMITED LIABILITY COMPANY
818 WEST RIVERSIDE
SUITE 525
SPOKANE, WASHINGTON 99201-0995
509/747-2104
FAX 509/625-1914

states:

> The Defendant Tribe has a substantial market share of the retail cigarette sales in the same market as Plaintiff Tonasket. The forced conduct by the Tribe making Tonasket sell at the same prices exerts competitive market pricing that has substantial anti-competitive effects on pricing to Plaintiff Daniel T. Miller and other purchasers.

These are factual allegations and do not require specificity. *Newcal Industries v. IKON Office Solutions,* 513 F.3d 1038, 1045 (9th Cir. 2008); on remand 2011 WL 1899404 (D.C.N.D. Cal., 2011). The court held that the complaint also met the plausible standard.

The statement at ECF No. 46 at 2 of Defendants' Memorandum, "The compact and code do not limit wholesalers to those approved by the state" is untrue. Wash.Rev.Code 43.06.455(5)(b) clearly states that the state must approve.

The Compact, ECF 1 at 69, 7.0 states that tribal retailers must buy from state certified retailers.

ROBERT E. KOVACEVICH, P.L.L.C.
A PROFESSIONAL LIMITED LIABILITY COMPANY
818 WEST RIVERSIDE
SUITE 525
SPOKANE, WASHINGTON 99201-0995
509/747-2104
FAX 509/625-1914

The Colville Tribal Code states:

6-8-10 Purchase of Cigarettes by Tobacco Retailers
Tobacco retailers must purchase cigarettes only from:
(a) Wholesalers or manufacturers licensed to do business in Washington State;
(b) Self-certified tribal wholesalers;
(c) Self-certified wholesalers.

The Second Declaration of Tom Sargent filed with the Motion at ECF No. 47, is merely a legal argument on the contents of the compact and state law. At ECF No. 47 at 2, it states that the wholesaler collects the tax by tax stamps. It states that the Tribe does not set wholesaler prices.

Pacific Coast Agr. Export Assn v. Sunkist Growers, 526 F.2d 1196, 1205 (9th Cir. 1975) held that where competitive selling was prevented by an association controlled by market prices, 15 U.S.C. § 1 was violated and denied a motion to dismiss.

Ice Cream Liquidators Inc. v. Land O Lakes, 253 F.Supp.2d 262, 272 (D.Conn 2003) applies as it also held that 15 U.S.C. § 1 was violated by cheese prices that could be manipulated to reduce milk prices.

ROBERT E. KOVACEVICH, P.L.L.C.
A PROFESSIONAL LIMITED LIABILITY COMPANY
818 WEST RIVERSIDE
SUITE 525
SPOKANE, WASHINGTON 99201-0995
509/747-2104
FAX 509/625-1914

Knevelbaard Dairies v. Kraft Foods, 232 F.3d 979, 984 (9th Cir. 2000) is conclusive. When horizontal market competitors manipulate prices, directly and indirectly an antitrust action is sufficient to avoid dismissal.

Idaho ex rel. Wasden v. Native Wholesale Supply Company, 2009 WL 940731 (D.Idaho 2009) exemplifies the issue. The Coeur d'Alene Tribe bought from a wholesaler who was not bound by the MSA agreement and paid less for the cigarettes.

If a competitor interferes at the wholesaler level by prohibiting a retailer from purchasing at the same price as sold to other retail purchasers, an antitrust injunction will be issued. *Bergen Drug v. Parke Davis*, 307 F.2d 725, 728 (3rd Cir. 1962).

Restrictions on choice raising costs is an antitrust violation. *Real Comp II Ltd. v. F.T.C.*, 635 F.3d 815, 830 (6th Cir. 2011).

The Defendants argue at ECF No. 46 at 7 that the language of the Compact, ECF No. 1 at 65 stating non-waiver binds Plaintiffs. Yet the Compact, ECF No. 1 at 65, also states, "No third party shall have any rights or obligations under this

ROBERT E. KOVACEVICH, P.L.L.C.
A PROFESSIONAL LIMITED LIABILITY COMPANY
818 WEST RIVERSIDE
SUITE 525
SPOKANE, WASHINGTON 99201-0995
509/747-2104
FAX 509/625-1914

compact." Plaintiffs are not parties to the compact. The citation, at ECF No. 46 at 2, to *Matheson v. Gregoire*, 139 Wash.App 624, 161 P.3d 486 (Div. II 2007) a state intermediate court, did not construe a complaint against the tribe presuming factual allegations as true.

Mendoza v. Zirkle Fruit Co., 301 F.3d 1163, 1169 (9th Cir. 2002) states that in antitrust actions "The complaint need not set out the facts in detail."

Much is said about the fact that the Tribe taxes itself. This results in the Tribe collecting tax from its competitor and also raising its own price by the tax it charges but does not pay the tax to anyone. It gets $30 a carton on Tonasket's sales and keeps $30 more in profit by adding its own tax to its own sales.

Double Taxation is Not Possible on these Plaintiffs.

Defendants, at ECF No. 46 at 14, again argue that the compact prohibits double taxation of cigarettes by smoke shops. The reality is that the State continues to arrest smoke shop owners even when compacts are in effect. *U.S. v. Wilbur*, 2010

ROBERT E. KOVACEVICH, P.L.L.C.
A PROFESSIONAL LIMITED LIABILITY COMPANY
818 WEST RIVERSIDE
SUITE 525
SPOKANE, WASHINGTON 99201-0995
509/747-2104
FAX 509/625-1914

WL 519735, pgs. 4-5 (D.C.W.D.Wa 2010); *State v. Comenout*, Case No. 85067-4, Washington State Supreme Court, argued June 30, 2011.

The State is not an Indispensable Party.

Defendants attempt to characterize the Amended Complaint as an attack on the compact. The compact is not the issue. The subject matter easily gives this court jurisdiction pursuant to 15 U.S.C. § 15. At ECF No. 40 at 4, the Amended Complaint states, "The State of Washington is not a competitor of Plaintiffs, hence is not a Defendant in this action."

The Defendants in their memorandum, ECF No. 46 at 16-17, states that the State is in an unlawful conspiracy and that the validity of the compact is at issue. The Tribe is a market participant against Plaintiff Tonasket, not the State. The Plaintiffs are not a party to the compact and never signed it. It states that third parties are not affected. ECF No. 1 at 65. The Defendant Tribe states that it is trying to protect Tonasket. Fed.R.Civ.P 19 by its terms, is not applicable. The reason is that

ROBERT E. KOVACEVICH, P.L.L.C.
A PROFESSIONAL LIMITED LIABILITY COMPANY
818 WEST RIVERSIDE
SUITE 525
SPOKANE, WASHINGTON 99201-0995
509/747-2104
FAX 509/625-1914

complete relief can be obtained by Plaintiff Miller without the State as a party. The Plaintiffs do not attack the compact. No relief is sought against the State. If the Defendants want to proceed against the State, they may seek interpleader. *Hudson v. Newell*, 172 F.2d 848, 852 (5th Cir. 1949). This is a suit by a competitor against another competitor. No joinder was necessary to invalidate a tribal tax on a non-Indian. In *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 647, 121 S.Ct 1825, 149 L.Ed.2d 889 (2001), complete relief was obtained. *American Needle Inc. v. National Football League*, 130 S.Ct 2201, 2216-17, 176 L.Ed.2d 947 (2010) applies it states, ". . .competitors cannot simply get around antitrust liability by acting through a third party intermediary or joint venture" to serve as exclusive sellers. Joinder is unnecessary.

Defendants at ECF No. 46 at 3, cite *Water Wheel Camp Recreational Area,* 642 F.3d 802 (9th Cir. 2011) as applying a rule not requiring a consensual relationship for tribal jurisdiction of non-Indians. The case holds that a consensual relationship

ROBERT E. KOVACEVICH, P.L.L.C.
A PROFESSIONAL LIMITED LIABILITY COMPANY
818 WEST RIVERSIDE
SUITE 525
SPOKANE, WASHINGTON 99201-0995
509/747-2104
FAX 509/625-1914

existed. 642 F.3d at 818. The court also noted that the party lived on the land for more than 20 years and trespass was at issue. 642 F.3d at 811. *Water Wheel*, 642 F.3d at 814, also distinguishes the case of *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 121 S.Ct. 1825, 149 L.Ed.2d 889 (2001). *Atkinson*, 532 U.S. at 653 states, "An Indian tribe's sovereign power to tax whatever its derivation reaches no further than tribal land." The tax on a non-member is "presumptively invalid." *Atkinson*, 532 U.S. at 659. Since *Atkinson* involved the incidence of tax on a non-member, that the activity was not on tribal land and that the customers lawfully entered onto the reservation. *Water Wheel*, 642 F.3d at 810.

Defendants argue at ECF No. 46 at 13, that both the State and Tribe can impose their own cigarette taxes. This is wrong. The State cannot impose its taxes on Tonasket as he does not have to pay state taxes including cigarette tax; nor does he have to obtain a tobacco sales license. *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 93 S.Ct 1257, 36 L.Ed.2d

ROBERT E. KOVACEVICH, P.L.L.C.
A PROFESSIONAL LIMITED LIABILITY COMPANY
818 WEST RIVERSIDE
SUITE 525
SPOKANE, WASHINGTON 99201-0995
509/747-2104
FAX 509/625-1914

129 (1973); *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 480, 96 S.Ct 1634, 48 L.Ed.2d 96 (1976).

The Individual Defendants are not Immune from Injunction or Declaratory Judgment. Tribal Officials Have no Immunity When They Act Without and Beyond Their Authority.

The Defendants, at ECF No. 46 at 8 argue that the individual Defendants are immune. The Defendants also assume that they can tax non-Indians, a principle that was rejected by the Supreme Court in *Atkinson, supra.* The Defendants also ignore the allegations that they cannot force Plaintiff Tonasket to collect the MSA lawsuit settlement. ECF No. 40 at 9-13.

Regarding injunction, the law is stated in Canby, *Federal Indian Law*, 5th Ed. 2009 at 106:

> Thus a party claiming that a tribe had no power under federal law to impose a tax can sue tribal officials to enjoin enforcement, just as state taxpayers can sue state officials under *Ex Parte Young*, 209 U.S. 123 (1908). *Burlington Northern & Sante Fe Ry. v. Vaughn*, 509 F.3d 1085 (9th Cir. 2007).

ROBERT E. KOVACEVICH, P.L.L.C.
A PROFESSIONAL LIMITED LIABILITY COMPANY
818 WEST RIVERSIDE
SUITE 525
SPOKANE, WASHINGTON 99201-0995
509/747-2104
FAX 509/625-1914

A tribal officer is not protected by a tribe's immunity. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59, 98 S.Ct 1670, 56 L.Ed.2d 106 (1978).

Burlington Northern Santa Fe Railway v. Vaughn, 509 F.3d 1085, 1092, (9th Cir. 2007) is conclusive. The court stated:

> This doctrine has been extended to tribal officials sued in their official capacity such that "tribal sovereign immunity does not bar a suit for prospective relief against tribal officers allegedly acting in violation of federal law."
>
> BNSF seeks a declaration that the tax is invalid as applied to its right-of-way and a permanent injunction prohibiting the tribal officials from enforcing the tax against it. Compl. ¶ 1. This is clearly the type of suit that is permissible under the doctrine of *Ex Parte Young*.

Conclusion.

The Defendant Tribe operates a retail store in direct competition with Plaintiff Tonasket. It has no sovereign immunity against a complaint alleging violation of federal statutes of general applicability and antitrust laws. Its activities, by agreeing to enforcement, also waives immunity. Joinder of a

ROBERT E. KOVACEVICH, P.L.L.C.
A PROFESSIONAL LIMITED LIABILITY COMPANY
818 WEST RIVERSIDE
SUITE 525
SPOKANE, WASHINGTON 99201-0995
509/747-2104
FAX 509/625-1914

non-competitor to Plaintiffs Tonasket and Miller where complete relief can be had against a horizontal competitor, is not required. The motion should be denied.

DATED this 18th day of August 2011.

s/ Robert E. Kovacevich
ROBERT E. KOVACEVICH, #2723
Attorney for Plaintiffs

ROBERT E. KOVACEVICH, P.L.L.C.
A PROFESSIONAL LIMITED LIABILITY COMPANY
818 WEST RIVERSIDE
SUITE 525
SPOKANE, WASHINGTON 99201-0995
509/747-2104
FAX 509/625-1914

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of August 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to attorney for Defendants.

s/ *Robert E. Kovacevich*
ROBERT E. KOVACEVICH, #2723
Attorney for Plaintiffs

ROBERT E. KOVACEVICH, P.L.L.C.
A PROFESSIONAL LIMITED LIABILITY COMPANY
818 WEST RIVERSIDE
SUITE 525
SPOKANE, WASHINGTON 99201-0995
509/747-2104
FAX 509/625-1914