UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

THE STATE OF NEW YORK,	:	
	:	No. 13-cv-1112-LDW-ETB
Plaintiff,	:	
	:	
- against -	:	
	:	
GRAND RIVER ENTERPRISES SIX NATIONS, LTD. and NATIVE WHOLESALE SUPPLY COMPANY INC.,	:	
	:	
Defendants.	:	

DEFENDANT GRAND RIVER ENTERPRISES SIX NATIONS, LTD.'S BRIEF IN SUPPORT OF ITS MOTION TO DISMISS THE AMENDED COMPLAINT

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October 23, 2013

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PRELIMINARY STATEMENT

The Attorney General's case is an overreaching effort to bring an action against a Canadian-based company, whose activities took place entirely outside of New York State, under statutes that govern actions that take place within New York. The Attorney General asserts that Grand River Enterprises Six Nations, Ltd. ("Grand River"), a manufacturer of cigarettes in Canada, has violated statutory requirements for the payment of taxes and informational filings that accompany the sale and distribution of cigarettes within New York State. But the Attorney General acknowledges that Grand River does not sell, ship, transfer, or possess cigarettes into or within the United States, let alone New York State. Indeed, as the Attorney General makes clear, Grand River manufactures Seneca brand cigarettes in Canada and sells them in Canada.

Despite alleging that all of Grand River's activities take place wholly within Canada, the Attorney General nonetheless claims that Grand River has violated federal and state laws that prohibit or prescribe certain activities relating to transactions in interstate commerce or within the state of New York. Because the laws that form the basis for the Attorney General's first three claims for relief do not apply to Grand River's activities in Canada, these claims fail to state a claim upon which relief can be granted, and should be dismissed under Rule 12(b)(6).

Moreover, even if this action could be brought in *a* district court in this state, it cannot be maintained in *this* district. The Amended Complaint's assertion that a substantial part of the events or omissions giving rise to the claims occurred within this judicial district is not supported by the actual allegations. Instead, the allegations focus principally on activities outside this district; indeed, there is no allegation that Grand River engaged in *any* activities – prohibited or otherwise – in this district. Thus, under the very statutory basis on which the Attorney General purports to hang its assertion of proper venue, the Amended Complaint should be dismissed. Nor is venue appropriate under the other statutory bases. The Amended

Complaint does not allege facts sufficient to allow this Court to determine whether 28 U.S.C. § 1391(d) – the provision governing venue for a corporation in states with multiple judicial districts – could properly apply.

Finally, even if this Court were to find venue proper as to Grand River, the case should be dismissed or transferred because venue is not proper as to co-defendant Native Wholesale Supply, as Native Wholesale Supply will show in its motion to dismiss. Only by keeping the claims against Grand River and Native Wholesale Supply together in one action will the judicial policy of litigating related claims in the same tribunal be effectuated. In the alternative, the case should be transferred to the Western District of New York, on the grounds of *forum non conveniens.*

STATEMENT OF FACTS

Grand River and co-defendant Native Wholesale Supply Company ("Native Wholesale Supply") are two separate entities, as the Amended Complaint initially makes clear. Grand River is alleged to be a corporation formed under the laws of the Six Nations of Indians; its principal place of business is in Ontario, Canada. (Am. Compl. ¶ 8.)[1] Native Wholesale Supply is a for-profit corporation formed under the laws of the Sac and Fox Nation of Oklahoma; its principal place of business is in Perrysburg, New York. (Am. Compl. ¶ 9.) Grand River and Native Wholesale Supply are "separate businesses" which act as "informal partners" that "manufacture and distribute Grand River Enterprise's tobacco products, specifically Seneca brand cigarettes." (Am. Compl. ¶ 10.) "Grand River is the manufacturer of the Seneca brand cigarettes, and Native Wholesale Supply is Grand River's sole importer and distributor of Seneca

[1] As required on a motion to dismiss, this brief assumes all alleged facts to be true, although Grand River does not concede the truth of the allegations asserted against it.

brand cigarettes to Indian lands in New York." (*Id.*) The Amended Complaint nowhere alleges that Grand River has any control over Native Wholesale Supply's activities.

Most importantly for purposes of this motion, the Amended Complaint alleges plainly:

> Grand River Enterprises manufactures Seneca brand cigarettes in Ontario, Canada. In a joint scheme,[2] Grand River then sells, transfers or assigns the cigarettes to Native Wholesale Supply FOB Canada in Canada. Upon information and belief, title to the cigarettes transfers from Grand River to Native Wholesale Supply in Canada. Native Wholesale Supply, holding title for the Grand River cigarettes, then imports and distributes the cigarettes inside the United States, including in New York.

(Am. Compl. ¶¶ 55-56.) As these allegations show, Grand River is simply the manufacturer of the cigarettes at issue here, and it sells the cigarettes in Canada. After doing so, Grand River has no control over any sale, shipment, distribution, transfer, possession, or the like with respect to the import of these cigarettes into the United States or New York.

The Amended Complaint sets forth at length the complex statutory and enforcement background of New York's excise tax on cigarettes "possessed for sale within the State." (Am. Compl. ¶ 22.) State-licensed cigarette stamping agents prepay the excise and sales tax, and affix tax stamps to packages of cigarettes. These taxes are, in turn, advanced and paid by each dealer in the chain of distribution and passed on to the ultimate consumer of the cigarettes. (Am. Compl. ¶¶ 23-29.) However, the state lacks the power to impose its taxing obligations on a seller that sells cigarettes in Canada, and also lacks the power to tax cigarettes sold to "qualified Indians for their own use and consumption on their nations' or tribes' qualified reservation." (Am. Compl. ¶ 23.) So, with respect to the latter point, until 2010, the New York

[2] This conclusory claim of a "joint scheme" is not factually or legally relevant to the defendants' respective actions or liabilities. The Amended Complaint contains no allegations to support any claim that Grand River is legally responsible for Native Wholesale Supply's actions, or the opposite.

State Department of Taxation and Finance (the "Department") "allowed untaxed cigarettes to be sold from New York State licensed cigarette stamping agents to recognized Indian Nations or tribes and reservation cigarette sellers making retail sales on qualified Indian reservations." (Am. Compl. ¶ 30.) Since revoking that policy, the Department purports to operate a system whereby cigarettes sold on reservations must be tax-stamped, but Indian nations and tribes can still make tax-exempt cigarettes available to their members for personal use and consumption. (Am. Compl. ¶¶ 35-38.)

The Amended Complaint asserts four claims for relief against Grand River, all ostensibly arising out of the sale and distribution of Seneca brand cigarettes in New York State. But the Amended Complaint does not allege that Grand River has any control over such sale and distribution.

The first and second claims for relief are based on federal laws. The first claim for relief asserts violation of the Contraband Cigarette Trafficking Act ("CCTA"), which prohibits the "knowing" shipment, transportation, receipt, possession, sale, distribution, or purchase of "contraband cigarettes." (Am. Compl. ¶ 42.) "Contraband cigarettes" are defined as more than 10,000 cigarettes that bear no evidence of the payment of applicable State or local cigarette taxes "in the State or locality where such cigarettes are found." (*Id.*) Plaintiff alleges that both defendants have violated the CCTA. With respect to Grand River, the Amended Complaint alleges only that "[d]efendant Grand River possessed, sold and shipped cigarettes to Native Wholesale Supply, an entity that is not a New York State licensed stamping agent." (Am. Compl. ¶ 99.) The Amended Complaint alleges that Native Wholesale Supply "proceeded to sell these untaxed and unstamped cigarettes to reservation cigarette retailers in New York." (Am. Compl. ¶ 100.)

The second claim for relief, under the Prevent All Cigarette Trafficking Act ("PACT Act"), seeks to impose liability on both Grand River and Native Wholesale Supply for failing to submit certain filings to the tobacco tax administrator for the State of New York. (Am. Compl. ¶¶ 107-110.) Plaintiff claims that Grand River is required to submit these filings because it "sold, transferred, and shipped cigarettes to defendant Native Wholesale Supply that were not tax stamped and were to be sold in and into the state of New York by Native Wholesale Supply." (Am. Compl. ¶ 105.) Notably, the Amended Complaint contains no allegation that Grand River *itself* sold, transferred, or shipped cigarettes in or into the state of New York.

The third and fourth claims for relief are for violations of the New York Tax Laws. The third claim asserts that both defendants have violated New York Tax Law §§ 471 and 471-e "by possessing cigarettes for sale in New York State, namely Seneca brand cigarettes manufactured by Grand River and imported and distributed by Native Wholesale Supply, upon which no state excise tax has been paid, and the packages of which have no tax stamps affixed." (Am. Compl. ¶ 112.) Plaintiff also asserts that "each defendant" violates Section 471's implementing regulations. (Am. Compl. ¶ 113.) The fourth claim for relief asserts that both defendants violated New York Tax Law § 480-b by failing to file annual certifications allegedly required by "tobacco product manufacturers."

ARGUMENT

I.
THE CASE SHOULD BE DISMISSED UNDER RULE 12(B)(6) FOR FAILURE TO STATE A CLAIM

A. The Amended Complaint Does Not Contain Sufficient Factual Matter To Meet The Pleading Requirements Explained In *Ashcroft v. Iqbal*.

As the Supreme Court has held, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible

on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The Amended Complaint falls well short of plausibility. While the Amended Complaint contains many general contentions about the dangers of smoking (Am. Compl. ¶¶ 11-14) and irrelevant legal background and commentary (*id*. ¶¶ 15-54), there are few factual allegations relating to Grand River. The existing allegations are principally "labels and conclusions" rather than well-pleaded facts, and fall short of the standard enunciated in *Iqbal*. *See Iqbal*, 556 U.S. at 678. Plaintiff does not plead facts that could give rise to claims under the CCTA, the PACT Act, or the New York Tax Laws that Plaintiff accuses Grand River of violating. To the contrary, as discussed in more detail below, the facts pleaded in the Amended Complaint are fatal to Plaintiff's claims, because they that show Grand River is *not*, and cannot be, liable for the violations that the Plaintiff alleges Grand River has committed (albeit in conclusive fashion).

As the Second Circuit has stated, the *Iqbal* standard creates a "two-pronged approach." *Pension Ben. Guar. Corp. ex rel. St. Vincent Catholic Medical Centers Retirement Plan v. Morgan Stanley Inv. Management Inc.*, 712 F.3d 705, 717-718 (2d Cir. 2013) (internal citation omitted). In considering a motion to dismiss, the court must review a complaint to ensure that it " alleges nonconclusory factual content raising a plausible inference of misconduct." *Id*. at 718.

First, a complaint is insufficient if it merely "offers labels and conclusions or a formulaic recitation of the elements of a cause of action. Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement." *Id*. at 717 (internal citations to *Iqbal* omitted). While a court considering a motion to dismiss must take all of the factual allegations in the complaint as true, the court is "not bound to accept as true a legal conclusion

couched as a factual allegation. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Id.* (internal citations to *Iqbal* omitted).

Second, "when there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief. This facial plausibility prong requires the plaintiff to plead facts allowing the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Importantly, the complaint must demonstrate more than a sheer possibility that a defendant has acted unlawfully. Where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not shown—that the pleader is entitled to relief." *Id*. at 717-18 (internal citations to *Iqbal* omitted).

Here, as discussed below, the Amended Complaint contains conclusions rather than facts, and even the Amended Complaint's "well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct." *Iqbal*, 556 U.S. at 679. Because the Amended Complaint has merely "alleged – but it has not 'show[n]' – 'that the pleader is entitled to relief,'" the Amended Complaint should be dismissed pursuant to Rule 12(b)(6). *Id.* And to the extent Plaintiff has alleged facts concerning the parties' actions, these allegations demonstrate why Grand River *cannot* be liable for the claims Plaintiff asserts.[3]

[3] Furthermore, as co-defendant Native Wholesale Supply argues in its separate motion to dismiss, Plaintiff does not have standing to bring the federal causes of action against Native Wholesale Supply, because Native Wholesale Supply is "an Indian in Indian country" within the meaning of 18 U.S.C. § 2346(b). Assuming that Native Wholesale Supply prevails on its motion, then this case would boil down to a claim asserting liability against Grand River for Native Wholesale Supply's subsequent sales and shipments of cigarettes into New York, even though Native Wholesale Supply itself cannot be held liable, and absent any allegations that Grand River controlled Native Wholesale Supply in any way. Such a perverse result is neither contemplated nor authorized by the statutes at issue here.

B. The Contraband Cigarette Trafficking Act Does Not Apply to Grand River Because Grand River Did Not Sell Cigarettes Within New York.

By alleging that Grand River sold its cigarettes *solely within Canada*, Plaintiff pleads itself out of a CCTA violation against Grand River. The CCTA does not govern activities outside the United States. Instead, the CCTA is violated only when a person sells (among other activities) "contraband cigarettes," which are defined as "a quantity in excess of 10,000 cigarettes, which bear no evidence of the payment of applicable State or local cigarette taxes in the State or locality where such cigarettes are found." 18 U.S.C. § 2341(2). Under the plain language of the CCTA, cigarettes are not "contraband cigarettes" until they are "found" in a particular state or locality without evidence of the payment of the applicable tax imposed by that state or locality.[4] When Grand River sold the cigarettes to Native Wholesale Supply in Canada, the cigarettes were not contraband cigarettes; those sales are therefore not covered by the CCTA. And there is no allegation that Grand River sold any cigarettes within New York, or indeed, anywhere outside of Canada.

In setting forth the alleged violations of the CCTA, Plaintiff states the legal conclusion that "defendants have violated the CCTA" (Am. Compl. ¶ 98). But the alleged facts do not support a claim against Grand River:

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[4] The cases that Plaintiff cites in the Amended Complaint reinforce that the definition of contraband cigarettes relies upon the cigarettes being located in a state requiring the payment of applicable taxes. *See U.S. v. Skoczen*, 405 F.3d 537, 547 (7th Cir. 2005) ("The statute defines 'contraband' as those cigarettes 'which bear no evidence of the payment of applicable State cigarette taxes *in the State where such cigarettes are found*, if such State requires a stamp, impression, or other indication to be placed on packages or other containers of cigarettes to evidence payment of cigarette taxes.'") (emphasis supplied); *City of New York v. Golden Feather Smoke Shop, Inc.*, 597 F.3d 115, 122 (2d Cir. 2010) ("Contraband cigarettes, in turn, are a quantity of cigarettes in excess of 10,000 that 'bear no evidence of the payment of applicable State or local cigarette taxes in the State or locality where such cigarettes are found.'"); *U.S. v. Elshenawy*, 801 F.2d 856, 858 (6th Cir. 1986) ("the definition of 'contraband cigarettes' depends only upon the absence of indicia of state tax payment *and location in a state requiring such indicia*") (emphasis supplied).

> Defendant Grand River possessed, sold and shipped cigarettes to Native Wholesale Supply, an entity that is not a New York State licensed stamping agent. These untaxed and unstamped Grand River cigarettes were to be sold in and into the state of New York by Native Wholesale Supply. Native Wholesale Supply received, possessed, and distributed untaxed and unstamped Grand River cigarettes in violation of the CCTA. Native Wholesale Supply then proceeded to sell these untaxed and unstamped cigarettes to reservation cigarette retailers in New York.

(Am. Compl. ¶ 99.) Plaintiff concedes in its Amended Complaint that Grand River sells, transfers, or assigns cigarettes to Native Wholesale Supply "in Canada," and that "title to the cigarettes transfers from Grand River to Native Wholesale Supply in Canada." (Am. Compl. ¶ 55.) Thus, the complaint alleges that Grand River sold cigarettes to Native Wholesale Supply within Canada, and the importation of those cigarettes into the United States and New York was accomplished solely by Native Wholesale Supply. These factual allegations refute the conclusory claim that Grand River violated the CCTA.

Plaintiff's CCTA claim against Grand River is premised on the assertion that Grand River "knew" and "intended" that Native Wholesale Supply would violate the tax laws. In particular, plaintiff alleges that based on a prior course of dealing, "Grand River Enterprises knew and in fact intended that cigarettes sold to defendant Native Wholesale Supply would be sold into New York without going through a New York State licensed stamping agent, and thus would be neither stamped nor taxed as required by New York law." (Am. Compl. ¶ 100.) The CCTA, however, does not make it unlawful to "know" or "intend" that a third party will violate relevant tax laws. Moreover, Grand River is not alleged to have any control over Native Wholesale Supply's actions once Grand River sold its cigarettes to Native Wholesale Supply in Canada. Even if Grand River knew or intended that Native Wholesale Supply was not going to comply with the tax requirements, the statute itself does not in any manner contemplate Grand River's liability for Native Wholesale Supply's alleged violations of the CCTA after Grand

River sold cigarettes to Native Wholesale Supply and Native Wholesale Supply obtained title to those cigarettes. Accordingly, the First Claim for Relief should be dismissed.

C. The PACT Act Does Not Apply To Grand River Because Grand River Did Not Sell Cigarettes In Interstate Commerce.

The Prevent All Cigarette Trafficking Act ("PACT Act") does not apply to Grand River because there is no allegation that Grand River sold cigarettes in interstate commerce. Grand River sold the cigarettes to Native Wholesale Supply in Canada. A sale within Canada is not a sale in interstate commerce as defined by the PACT Act.

The PACT Act imposes specific filing requirements on "any person who sells, transfers, or ships for profit cigarettes or smokeless tobacco in interstate commerce, whereby such cigarettes or smokeless tobacco are shipped into a State, locality, or Indian country of an Indian tribe taxing the sale or use of cigarettes or smokeless tobacco, or who advertises or offers cigarettes or smokeless tobacco for such a sale, transfer, or shipment." 15 U.S.C. § 376(a). The statute defines "interstate commerce" as "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." 15 U.S.C. § 375(9)(A).

The Amended Complaint does not allege that Grand River sold or shipped cigarettes into New York or elsewhere in the United States. Plaintiff tries to obfuscate this issue by using the passive voice to avoid alleging which particular defendant acted, claiming that "sales, transfers, and shipments of cigarettes have been made between Province of Ontario and State of NY; between NY and Indian country within NY; and/or between two points in NY through Indian country. As a result, these are made in interstate commerce under the PACT Act." (Am. Compl. ¶ 104.) But Plaintiff itself admits elsewhere that these sales, transfers and

shipments outside Canada were performed only by Native Wholesale Supply, not by Grand River. (Am. Compl. ¶ 56.)

As it did with the CCTA claim, Plaintiff attempts to hold Grand River liable for PACT Act violations because it allegedly "knew" and "intended" that Native Wholesale Supply would sell cigarettes into New York without being stamped or taxed as required by New York law. (Am. Compl. ¶ 105.) But, like the CCTA, the PACT Act does not make it a violation to "know" that another party will violate the law. Nowhere does the PACT Act require a manufacturer to submit filings merely because it knows, or even intends, that a third party will sell or ship its cigarettes into New York. The statute applies, on its face, to "sellers of cigarettes who ship them to states or localities that impose taxes on them." *City of New York v. Wolfpack Tobacco*, 2013 WL 5312542, at *3 (S.D.N.Y. Sept. 9, 2013).

Indeed, the filings required by the PACT Act include information about shipments that only the shipper itself can know and provide. The PACT Act requires covered entities, before making a shipment into a particular state, to "first file" with the Attorney General of the United States and with the relevant state and local tobacco tax administrators a statement setting forth specific information about the person making the shipment. This information includes:

- Name and trade name;
- Address of principal place of business and of any other place of business;
- Telephone numbers for each place of business;
- A principal electronic mail address;
- Any website addresses;
- The name, address, and telephone number of an agent in the State authorized to accept service on behalf of the person.

15 U.S.C. § 376(a)(2). Furthermore, not later than the tenth day of each calendar month, a person who "sells, transfers, or ships" cigarettes must file with the tobacco tax administrator of

the State into which such shipment is made a memorandum or copy of the invoice covering each and every shipment of cigarettes made during the previous calendar month into the state, which must include the following information:

- Name and address of the person to whom the shipment was made;
- The brand of the shipment;
- The quantity of the shipment;
- The name address, and phone number of the person delivering the shipment to the recipient on behalf of the delivery seller.

15 U.S.C. § 376(a)(2).

These filing requirements cannot feasibly be met by a manufacturer like Grand River, which sells cigarettes outside the United States but does not itself sell or ship cigarettes into the United States, or, more importantly, to any particular State. If Grand River were required to "first file" the requisite statements with the Attorney General of the United States and with the tobacco tax administrators of each State where a shipment of its cigarettes is made by a separate party (here, Native Wholesale Supply), Grand River would have to know when Native Wholesale Supply is making each shipment. But Plaintiff does not allege that Grand River has such control over Native Wholesale Supply's activities. Similarly, if Grand River were required to file with State tobacco tax administrators the filings required by 15 U.S.C. § 376(a)(2), Grand River would have to know detailed information about each shipment made by Native Wholesale Supply. Not only are there no allegations that Grand River even knows – let alone controls – such detail about Native Wholesale Supply's operations, but the PACT Act nowhere supports a claim that Grand River could be required to file such information merely because it manufacturers cigarettes in Canada and sells them within Canada to a third party who sells and ships them into New York. Plaintiff's assertion that Grand River has violated the PACT Act is

purely conclusory, unsupported by the statute or the facts alleged, and the Second Claim for Relief should be dismissed.

D. New York Tax Law §§ 471 and 471-e Do Not Apply To Grand River Because Grand River Does Not Ship Cigarettes Into New York.

In the Third Claim for Relief, Plaintiff accuses Grand River of violating New York Tax Law §§ 471 and 471-e. But again, Grand River is not subject to these laws' requirements because it does not ship cigarettes in or into New York. Tax Law § 471 states: "any manufacturer or importer shipping unstamped cigarettes in or into New York to anyone other than a state-licensed stamping agent is in violation of section 471(1)." While Grand River is a manufacturer of cigarettes, there is no allegation that Grand River shipped the cigarettes into New York. To the contrary, the Amended Complaint plainly alleges that Grand River sold cigarettes within Canada and the title to its cigarettes transferred within Canada to Native Wholesale Supply.

Plaintiff alleges that Grand River is implicated by New York Tax Law § 481(2)(a), which provides that "the possession within [New York] State of more than four hundred cigarettes in unstamped or unlawfully stamped packages . . . by any person other than an agent or distributor . . . at any one time shall be presumptive evidence" that the cigarettes are subject to tax. (Am. Compl. ¶ 27). Plaintiff states, "[d]efendants have violated, and continue to violate, New York Tax Law §§ 471 and 471-e by possessing cigarettes for sale in New York State. . . upon which no state excise tax has been paid, and the packages of which have no tax stamps affixed." (Am. Compl. ¶ 112.) But Plaintiff *nowhere* alleges that Grand River possessed *any* cigarettes "in New York State."

Plaintiff further alleges that "[e]ach defendant … violates Section 471's implementing regulations discussed above by failing to ship its unstamped cigarettes from

outside New York directly to a New York-licensed stamping agent so that the excise tax can be paid and tax stamps properly affixed." Although the Amended Complaint does not identify which specific regulations Grand River is alleged to have violated, the implementing regulations referenced earlier in the Amended Complaint are found in N.Y. Comp. Codes R. & R. tit 20, 70.2, and 74.1 (*see* Am. Compl. ¶¶ 24, 25, 26). These regulations set forth the scheme for stamping and prepaying taxes. And while the regulations provide that "a dealer of cigarettes, other than an agent, shall be precluded from purchasing and affixing cigarette stamps and, unless specifically provided for in this Title, from possessing, selling or distributing, in any manner whatsoever, unstamped packages of cigarettes," they do not impose liability on a manufacturer who sells cigarettes outside the United States to a third party outside the United States, even if that third party is not a "New York-licensed stamping agent," as Plaintiff alleges. (Am. Compl. ¶ 113.)

Finally, while Plaintiff does not delineate between Grand River and Native Wholesale Supply in claiming that Tax Law § 471-e has been violated, section 471-e covers only the sale and transportation to Indian reservations in New York State. (*See* New York Tax Law § 471-e; Am. Compl. ¶¶ 32-38.) This law cannot apply to Grand River because there is no claim that Grand River sold or shipped cigarettes to Indian reservations.

For all of these reasons, the State has not pled facts sufficient to raise even a plausible inference that Grand River's sales of cigarettes to Native Wholesale Supply in Canada are covered by, let alone violate, New York Tax Law § 471 or 471-e, or the regulations cited in

the Amended Complaint. The Third Claim for Relief should therefore be dismissed for failure to state a claim upon which relief can be granted.[5]

II.
THE AMENDED COMPLAINT SHOULD BE DISMISSED BECAUSE VENUE IS NOT PROPER IN THIS DISTRICT

Separate and apart from the pleading defects that warrant dismissal of Plaintiff's claims, the Amended Complaint should also be dismissed in its entirety for lack of venue.

A. Venue Is Not Proper Pursuant To 28 U.S.C. § 1391(b).

The Amended Complaint alleges that venue in this District is proper pursuant to 28 U.S.C. § 1391(b) because "[a] substantial part of the events or omissions giving rise to the claims occurred within this judicial district." (Am. Compl. ¶ 6). But the Amended Complaint's own allegations belie this conclusion; there is no allegation, nor could there be, that Grand River engaged in any transaction or act in this District or with parties or entities located in this District.

Instead, the Amended Complaint alleges only that an undercover agent made three separate purchases of one carton each of Seneca brand cigarettes that did not contain a New York State cigarette tax stamp. Two purchases occurred at one smoke shop in Mastic, New York and one purchase occurred at another smoke shop in Mastic. (Am. Compl. ¶¶ 64-76.) In

[5]As for the Fourth Claim for Relief – alleging a violation of New York Tax Law § 480-b – while Grand River disputes liability, it is not a subject of Grand River's motion to dismiss for failure to state a claim. However, if the Court dismisses the federal claims, then the basis for federal jurisdiction is eliminated, and, therefore, the Court should dismiss the Fourth Claim as well. A federal court may decline to exercise supplemental jurisdiction over state law claims if "the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). Particularly when federal claims are dismissed early in an action – as here, on a motion to dismiss – and where the state law claims involve novel or unsettled issues, concerns of judicial economy, convenience, fairness, and comity all militate in favor of declining to exercise supplemental jurisdiction. *Cox v. North Shore University Hosp.*, 2006 WL 1720388, at *2 (E.D.N.Y. June 19, 2006) (declining to exercise supplemental jurisdiction over state law claims after dismissing sole federal claim); *see Valencia v. Lee*, 316 F.3d 299 (2d Cir. 2003) ("where the federal claims had been dismissed at a relatively early stage and the remaining claims involved issues of state law that were unsettled, we have concluded that the exercise of supplemental or pendent jurisdiction was an abuse of discretion").

addition to these purchases, the Amended Complaint alleges that "[l]arge quantities" of "contraband Grand River cigarettes have been offered for sale" at retailers in Lewiston, Buck Kill, Onondaga, Steamburg, Cattaraugus, Basom, Mastic, Oneida, and "others" that are not specified. (Am. Compl. ¶ 60.) All of these locations, except Mastic, are located outside this District. In contrast to the three cartons of cigarettes purchased in Mastic, the Amended Complaint describes the seizure of 16,230 cartons of Seneca brand cigarettes in Seneca Falls, New York, in the Western District of New York. (Am. Compl. ¶¶ 77-78.)

The Second Circuit has cautioned courts that the adjective "substantial" is meaningful in the venue statute: "[W]e caution district courts to take seriously the adjective 'substantial.' We are required to construe the venue statute strictly. That means for venue to be proper, *significant* events or omissions *material* to the plaintiff's claim must have occurred in the district in question, even if other material events occurred elsewhere." *Gulf Ins. Co. v. Glasbrenner*, 417 F.3d 353, 357 (2d Cir. 2005) (emphasis in original). Three isolated purchases of one carton of cigarettes (or even the display of 50 cartons) in a case where tens of millions of cartons and hundreds of millions of dollars are at issue plainly cannot constitute "significant" events "material" to the plaintiff's claim. Simply put, the Amended Complaint does not allege that any – let alone substantial – events or material omissions giving rise to Plaintiff's claims against Grand River occurred in this District.

But even more significantly, there is no allegation that Grand River shipped the cigarettes to the locations listed in the Amended Complaint, or that Grand River offered them for sale at these locations. The allegations merely state that Seneca brand cigarettes were present and offered for sale at various locales; they do not show what entity sold them to those locations. And any claim that Grand River can be liable for actions relating to the sales or shipments of

cigarettes inside New York State is contradicted by Plaintiff's blanket allegation that Grand River's title to Seneca brand cigarettes transferred to Native Wholesale Supply upon Grand River's sale of those cigarettes to Native Wholesale Supply in Canada.

B. The Amended Complaint Does Not Allege Sufficient Facts To Establish Venue In This District Under Any Other Statute.

Not only is venue improper under the Amended Complaint's stated basis for venue, 28 U.S.C. § 1391(b) (Am. Compl. ¶6), but venue would not be proper as to Grand River under *any* of the statutory bases for venue. Because New York is a state with more than one judicial district, this Court must determine in which district(s) venue is appropriate for Grand River, a corporation, pursuant to 28 U.S.C. § 1391(d). That statute provides that in a state with multiple judicial districts, a defendant corporation is deemed to reside in "any district in that State within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State, and, if there is no such district, the corporation shall be deemed to reside in the district within which it has the most significant contacts." The Amended Complaint does not allege facts sufficient to conclude that Grand River has sufficient contacts with this District to subject it to personal jurisdiction (nor does Grand River have such contacts), such that venue would be proper under § 1391(d). Absent such factual allegations, this Court cannot conclude that venue is proper in this District, and the case should be dismissed for improper venue.

III.
EVEN IF THE COURT FINDS THAT VENUE IS PROPER AS TO GRAND RIVER, THE CASE SHOULD BE DISMISSED OR TRANSFERRED BECAUSE VENUE IS IMPROPER AS TO CO-DEFENDANT NATIVE WHOLESALE SUPPLY

A. The Entire Case Against Grand River And Native Wholesale Supply Should Be Litigated In The Same Tribunal To Avoid Duplicitous Litigation And Inconsistent Results.

Even if this Court were to find that venue is proper in this District as to Grand River (which it should not find), the entire case should be dismissed or transferred because venue is improper as to co-defendant Native Wholesale Supply, and the allegations against the defendants are intricately intertwined.

The Second Circuit has recognized a "strong policy favoring the litigation of related claims in the same tribunal in order that pretrial discovery can be conducted more efficiently, duplicitous litigation can be avoided, thereby saving time and expense for both parties and witnesses, and inconsistent results can be avoided." *Wyndham Associates v. Bintliff*, 398 F.2d 614, 619 (2d Cir. 1968).

Native Wholesale Supply has indicated that it will demonstrate, in its motion to dismiss, that it has no connection to this District, but that it has significant connections to the Western District of New York. If this Court finds venue to be improper as to Native Wholesale Supply, then the entire case should be dismissed or transferred accordingly, rather than litigated separately as to each defendant.

B. In The Alternative, The Case Should Be Transferred To The Western District of New York Under 28 U.S.C. § 1404(a).

In the alternative, the entire case should be dismissed and transferred to the Western District of New York pursuant to 28 U.S.C. § 1404(a). That section provides, "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or

division to which all parties have consented." 28 U.S.C. § 1404(a). The Plaintiff is The State of New York and can pursue this case in any district. But Native Wholesale Supply resides and operates exclusively in the Western District, and its bankruptcy case is pending in that District. The convenience of the parties and witnesses and the interest of justice weigh in favor of transferring this case to the Western District of New York.

CONCLUSION

Grand River engaged in no prohibited activities within the State of New York. The Amended Complaint is clear that Grand River manufactured cigarettes in Canada and sold them in Canada. The allegations offer no basis upon which Grand River can be liable for violating the CCTA, the PACT Act, or New York Tax Laws §§ 471 or 471-e. And even if Native Wholesale Supply could be alleged to have violated such laws – which is similarly unfounded – the Amended Complaint provides no legal basis to hold Grand River accountable for any alleged violations by Native Wholesale Supply. Moreover, this court should not exercise jurisdiction over the Fourth Claim for Relief, which is premised entirely on New York Tax Law, and should dismiss that claim as well.

Furthermore, even if this Court finds that claims have been properly alleged, the Amended Complaint does not demonstrate any basis for venue in this District as to Grand River or co-defendant Native Wholesale Supply. The case should therefore be dismissed for improper venue, or in the alternative transferred in its entirety to the Western District of New York.

Dated: New York, New York
October 23, 2013

Respectfully submitted,

FRIEDMAN KAPLAN SEILER &
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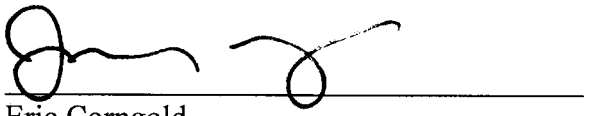

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