UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

STATE OF NEW YORK,

Plaintiff,

v.

GRAND RIVER ENTERPRISES SIX NATIONS, LTD., AND NATIVE WHOLESALE SUPPLY COMPANY INC.

Defendants.

No. 13-cv-01112-LDW-GRB

ORAL ARGUMENT REQUESTED

MEMORANDUM OF LAW IN SUPPORT OF NATIVE WHOLESALE SUPPLY COMPANY's MOTION TO DISMISS

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PRELIMINARY STATEMENT

The State of New York, in an unprecedented attempt to extend its taxing and regulatory powers beyond their rightful limits, filed suit against two Indian-owned businesses, Native Wholesale Supply Company ("NWS") and Grand River Enterprises Six Nations, Ltd. ("Grand River"). The State's amended complaint alleges that NWS and Grand River have violated several provisions of the New York Tax Law pertaining to cigarette taxes, as well as the federal Contraband Cigarette Trafficking Act ("CCTA") and the Prevent All Cigarette Trafficking Act ("PACT Act").

NWS now moves to dismiss the State's amended complaint under Federal Rules of Civil Procedure 12(b)(3) and 12(b)(6), for the reasons identified in NWS's pre-motion letters and addressed in further detail below. Specifically, this action must be dismissed for improper venue because the allegations in the amended complaint fail to show that a substantial part of the events or omissions giving rise to the State's claims occurred in this judicial district. Moreover, even if the State could somehow meet its burden of establishing proper venue in this District, the amended complaint would still be subject to immediate dismissal because the State Attorney General lacks standing to sue NWS under the CCTA or the PACT Act, and the Court should decline to exercise supplemental jurisdiction over the Attorney General's purely state law claims. Indeed, even if the State could somehow establish both proper venue and standing to sue, the amended complaint still must be dismissed for failure to state a plausible claim to relief or, alternatively, failure to satisfy the heightened pleading standard applicable to allegations of fraud.

FACTUAL AND PROCEDURAL BACKGROUND

According to the State's amended complaint,[1] NWS is a corporation formed under the laws of the Sac and Fox Nation of Oklahoma, with its principal place of business in Perrysburg, New York.[2] (Am. Compl. ¶ 9.) The State alleges that NWS participates in a "joint scheme" with codefendant Grand River — a corporation formed under the laws of the Six Nations of Indians, with its principal place of business in Ontario, Canada (*id.* ¶ 8)[3] — to sell, ship, and distribute "contraband cigarettes" in violation of several provisions of the New York Tax Law, as well as the CCTA and Pact Act. (*Id.* ¶¶ 1-2, 55.) In particular, the State alleges, merely upon information and belief, that NWS and Grand River "act as a single enterprise whose purpose is to manufacture and distribute Grand River Enterprise's tobacco products, specifically Seneca Brand cigarettes." (*Id.* ¶ 10.) Grand River is, allegedly, "the manufacturer of the Seneca brand cigarettes," and NWS is, allegedly, "Grand River's sole importer and distributer of Seneca brand cigarettes to Indian lands in New York." (*Id.*) The State claims that NWS's and Grand River's actions, "collectively and individually," violate the state and federal laws discussed at length in the amended complaint. (*Id.*)

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[1] In accordance with the legal standards governing this motion to dismiss, NWS assumes the truth of all well-pleaded, nonconclusory factual allegations in the amended complaint, but solely for the purpose of this motion. *See, e.g.*, *United States v. Bushwick United Hous. Dev. Fund Corp.*, No. 11 Civ. 1592(BMC), 2013 WL 5607181 (E.D.N.Y. Oct. 14, 2013); *Dolson v. N.Y.S. Thruway Auth.*, No. 00 Civ. 6439(RLC), 2001 WL 363032, at *1 (S.D.N.Y. Apr. 11, 2001).

[2] Perrysburg is in Cattaraugus County, which is among the seventeen counties comprising the federal judicial district known as the Western District of New York. *See* 28 U.S.C. § 112(d).

[3] In fact, the public record reveals that Grand River is a federal corporation licensed under the laws of Canada, owned by Native North Americans, with its principal place of business on the Six Nations Reserve in Ontario, Canada.

On June 13, 2013, in accordance with Your Honor's Amended Rules, Grand River and NWS submitted separate letters identifying the grounds for proposed motions to dismiss and requesting a pre-motion conference. (Dkts. 13, 14.)

On July 30, 2013, this Court held a pre-motion conference to address the parties' respective requests. At the conference, the Court granted the State's interim request for leave to file an amended complaint (Dkt. 32), and the Court directed Grand River and NWS to submit additional pre-motion letters regarding their intentions as to the State's amended complaint.

On August 2, 2013, the State filed its amended complaint. (Dkt. 33.) In accordance with the Court's directions, Grand River and NWS submitted pre-motion letters on August 16, 2013, confirming their intentions to move to dismiss the amended complaint. (Dkts. 35, 37.)

On September 11, 2013, the Court issued an Order directing the parties to confer and agree upon a briefing schedule for Grand River's and NWS's motions to dismiss. In accordance with the Court's directions, the parties agreed upon and submitted a joint proposed briefing schedule (Dkt. 39), which the Court accepted by Order dated September 14, 2013. NWS now moves to dismiss with prejudice the State's amended complaint under Rule 12(b)(3) or 12(b)(6).

STANDARD OF REVIEW

I. Rule 12(b)(3) Motion To Dismiss For Improper Venue

Where, as here, a timely objection is made to venue, the plaintiff bears the burden of establishing that venue is proper. *See, e.g.*, *Ambac Assurance Corp. v. Adelanto Pub. Util. Auth.*, 696 F. Supp. 2d 396, 399 (S.D.N.Y. 2010) ("[T]he burden of showing that venue in the forum district is proper falls on the plaintiff.") (internal quotation marks and citation omitted); 14D Charles Alan Wright et al., *Federal Practice and Procedure* § 3826 & n.24 (3d ed. West 2013) (collecting cases). Although the relevant facts must be construed in a light most favorable to the plaintiff, the Court may consider documents beyond the complaint or hold an evidentiary hearing to resolve disputed factual issues. *See, e.g.*, *Blass v. Capital Int'l Sec. Grp.*, No. 99-CV-5738 (FB), 2001 WL 301137, at *2 (E.D.N.Y. Mar. 23, 2001).

II. Rule 12(b)(6) Motion To Dismiss For Failure To State A Claim Upon Which Relief Can Be Granted

The Supreme Court has made clear that "[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)). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Twombly*, 550 U.S. at 555). "'[N]aked assertions' devoid of 'further factual enhancement'" likewise do not suffice. *Id.* (quoting *Twombly*, 550 U.S. at 557).

As the Court pointed out in *Iqbal*, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Id.*; *accord Faber v. Metro. Life Ins. Co.*, 648 F.3d 98, 104 (2d Cir. 2011) (noting that

courts are not "'bound to accept conclusory allegations or legal conclusions masquerading as factual conclusions'") (quoting *Rolon v. Henneman*, 517 F.3d 140, 149 (2d Cir. 2008) (Sotomayor, J.)). Thus, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements" are not adequate. *Iqbal*, 556 U.S. at 678; *see also, e.g.*, *Silverman v. Household Fin. Realty Corp. of N.Y.*, No. 12-CV-3559, 2013 WL 4039381, at *1 (E.D.N.Y. Aug. 5, 2013) (noting that "a pleading that does nothing more than recite bare legal conclusions is insufficient to 'unlock the doors of discovery'") (quoting *Iqbal*, 556 U.S. at 678).

Deciding whether a complaint has satisfied the plausibility standard is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679. "Plausibility thus depends on a host of considerations: the full factual picture presented by the complaint, the particular cause of action and its elements, and the existence of alternative explanations so obvious that they render plaintiff's inferences unreasonable." *L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 430 (2d Cir. 2011) (citing *Iqbal*, 129 S. Ct. at 1947-52). Where the "well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct," the complaint is subject to dismissal, for "the complaint has alleged — but it has not 'show[n]' — 'that the pleader is entitled to relief.'" *Iqbal*, 556 U.S. at 679 (quoting Fed. R. Civ. P. 8(a)(2)); *see also, e.g.*, *Kondaur Capital Corp. v. Cajuste*, No. 849 F. Supp. 2d 363, 366 (E.D.N.Y. 2012) (noting that "[b]ald contentions, unsupported characterizations, and legal conclusions are not well-pleaded allegations" (citation and internal quotation marks omitted)).

Claims sounding in fraud must satisfy an additional, heightened pleading requirement, since under Rule 9(b), the circumstances of the alleged fraud must be stated "with particularity." Fed. R. Civ. P. 9(b). The Second Circuit has explained that to comply with Rule 9(b), the complaint must do four things: "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 290 (2d Cir. 2006) (citation and internal quotation marks omitted).

In deciding a motion to dismiss under Rule 12(b)(6), the Court may consider not only the facts alleged in the complaint, but also documents attached to the complaint or incorporated in the complaint by reference, as well as "documents 'integral' to the complaint and relied upon in it, and facts of which judicial notice may properly be taken under Rule 201 of the Federal Rules of Evidence." *Grant v. Cnty. of Erie*, No. 13-451-cv, 2013 WL 5645566, at *1 & n.1 (2d Cir. Oct. 17, 2013) (summary order) (citing *Rothman v. Gregor*, 220 F.3d 81, 88 (2d Cir. 2000); *Int'l Audiotext Network v. AT&T Co.*, 62 F.3d 69, 72 (2d Cir. 1995); *Brass v. Am. Films Techs., Inc.*, 987 F.2d 142, 150 (2d Cir. 1993)).[4]

[4] Although NWS's pre-motion letters contemplated also moving to dismiss for lack of subject-matter jurisdiction under Rule 12(b)(1) (*see, e.g.*, Dkt. 37, at p. 2), NWS has instead elected to present its argument for summary dismissal based on the State's lack of standing pursuant to Rule 12(b)(6) — a course which is (arguably) favored by Second Circuit precedent. *See generally Rent Stabilization Ass'n of N.Y. v. Dinkins*, 5 F.3d 591, 594 & n.2 (2d Cir. 1993) (noting that "dismissals for lack of standing may be made pursuant to Fed. R. Civ. P. 12(b)(6) rather than 12(b)(1)," and stressing that "standing and *subject matter* jurisdiction are separate questions"). *But see Thompson v. Cnty. of Franklin*, 15 F.3d 245, 248 (2d Cir. 1994) ("[A]s Judge McCurn correctly noted in a prior opinion analyzing an individual member of an Indian tribe's standing to bring a claim under the Nonintercourse Act, '[t]he concept of standing — *even its prudential dimension* — is a limitation on federal court jurisdiction.'") (quoting *Canadian St. Regis*

ARGUMENT

I. The Allegations In The Amended Complaint Fail To Show That A Substantial Part Of The Events Or Omissions Giving Rise To The State's Claims Occurred In This Judicial District

The federal venue statute, 28 U.S.C. § 1391, provides in relevant part that "[a] civil action may be brought in — a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred." § 1391(b)(2) (emphasis added). In its amended complaint, the State baldly asserts that "venue within this judicial district is proper" pursuant to § 1391(b) because "[a] substantial part of the events or omissions giving rise to the claims occurred within this judicial district, and these events are material to plaintiff's claims." (Am. Compl., ¶ 6.) However, as NWS explained in its pre-motion letters, the allegations in the amended complaint fail to show that a substantial part of the events or omissions giving rise to the State's claims occurred in this judicial district. (*See* Dkt. 37, at pp. 1-2; Dkt. 29, at pp. 2-3 & n.1, Dkt. 14, at pp. 1-2.) In fact, there is no remotely plausible basis for establishing venue in the Eastern District of New York ("EDNY").

As the State is well aware, NWS resides and operates on the Cattaraugus Indian Territories of the Seneca Nation of Indians, which is located in the Western District of New York ("WDNY"). (*Cf.* Am. Compl., ¶ 9 (stating, correctly, that NWS's principal place of business is located at 10955 Logan Road, Perrysburg, New York).)

Band of Mohawk Indians v. New York, 573 F. Supp. 1530, 1538 (N.D.N.Y. 1983)). The technical distinction between moving under Rule 12(b)(1) or Rule 12(b)(6) is of no practical import here, since the applicable standards are substantively identical. *See, e.g., Lerner v. Fleet Bank, N.A.*, 318 F.3d 113, 126-28 (2d Cir. 2003) (Sotomayor, J.) (discussing statutory standing under RICO, and observing that the choice between dismissing for lack of standing under Rule 12(b)(6) or 12(b)(1) "rarely has practical consequences, because the standards for dismissal under 12(b)(6) and 12(b)(1) are substantively identical").

As the Court knows from the parties' pre-motion letters, NWS's preexisting Chapter 11 bankruptcy case was filed, and remains pending, in the WDNY. (*See, e.g.*, Dkt. 37, at p. 3; Dkt. 26, at p. 3 & Ex. A.) In its role as an unsecured creditor — one that, incidentally, asserts an "administrative claim" totaling over $343 million (*see* States' Motion for Withdrawal of Oral Ruling on Motion to Dismiss, *In re Native Wholesale Supply Co.*, No. 11-14009 (Bankr. W.D.N.Y. July 26, 2013), Bankr. Dkt. 480, at p. 8) — the State has had access to all of NWS's Chapter 11 filings, including NWS's complete financial statements and monthly operating reports (*see, e.g.*, Debtor's Amended Statement of Financial Affairs and Schedules A and B, *In re Native Wholesale Supply Co.*, No. 11-14009 (Bankr. W.D.N.Y. Dec. 13, 2011), Bankr. Dkts. 45-4 to 45-6, attached to the accompanying Szanyi Declaration as Exhibit A; Debtor's Amended Statement of Financial Affairs, Bankr. Dkt. 120, attached to the Szanyi Declaration as Exhibit B; Debtor's Monthly Operating Reports for Reporting Periods Nov. 21-30, 2011, through Feb. 1-28, 2013, Bankr. Dkts. 117-119, 164-165, 247-248, 275-276, 373-378, 388, attached to the Szanyi Declaration as Exhibit C) Indeed, it is apparent that the State relied on these very documents in drafting the amended complaint. (*See, e.g.*, Am. Compl., ¶¶ 61, 81, 85 (referencing "invoices" and "operating reports" and alleging sales figures to the penny, without specifying the source of such documents or information.) Yet the documents on which the State obviously relied demonstrate conclusively that NWS has no connection to this judicial district; rather, NWS's lone shareholder, management, employees, property, records, and ongoing business activities are all based in the WDNY. (*See, e.g.*, Debtor's Amended Statement of Financial Affairs and Schedules A and B, Bankr. Dkts. 45-4 to 45-6, Szanyi Decl., Ex. A;

Debtor's Amended Statement of Financial Affairs, Dkt. 120, Szanyi Decl., Ex. B, at pp. 7-9.)[5]

Additionally, where a plaintiff relies on § 1391(b)(2), the complaint must allege material acts or omissions within the judicial district bearing a close nexus to the asserted claims, for as the Second Circuit has explained, "[w]hen material acts or omissions within the forum bear a close nexus to the claims, they are properly deemed 'significant' and, thus, substantial, but when a close nexus is lacking, so too is the substantiality necessary to support venue." *Daniel v. Am. Bd. of Emergency Med.*, 428 F.3d 408, 433 (2d Cir. 2005) (emphasis added) (citing *Jenkins Brick Co. v. Bremer*, 321 F.3d 1366, 1372 (11th Cir. 2003)); *see also, e.g.*, *Gulf Ins. Co. v. Glasbrenner*, 417 F.3d 353, 357 (2d Cir. 2005) (cautioning district courts "to take seriously the adjective 'substantial," and noting that the federal venue statute must be construed "strictly").

Here, the amended complaint fails to identify any acts or omissions by NWS or Grand River occurring in this judicial district — let alone "material" acts or omissions bearing a "close nexus" to the State's asserted claims. Although hardly a model of clear drafting, the amended complaint acknowledges that only very specific actions or events — such as shipping, transporting, receiving, possessing, selling, distributing, or purchasing certain cigarettes — can give rise to the State's claimed statutory violations. (*See, e.g.*, Am. Compl., ¶¶ 1, 9, 57-58, 61, 98-101, 103-08, 112-13.) Thus, the specific actions or events capable of giving rise to the claimed statutory violations — that is, shipping, transporting, receiving, possessing, selling, distributing, or purchasing certain cigarettes — are the "operative facts" for the purpose of this Court's

[5] The motion to dismiss separately filed by codefendant Grand River makes clear that it too has had no transaction, connection, or contacts with this judicial district. (*See* Grand River's Br., at pp. 15-17).

venue analysis. *G.F.C. Fashions, Ltd. v. Goody's Family Clothing, Inc.*, No. 97 Civ. 0730(LAP), 1998 WL 78292, at *2 (S.D.N.Y. Feb. 24, 1998) (emphasis added); *see also, e.g.*, *Schieffelin & Co. v. Jack Co. of Boca, Inc.*, 725 F. Supp. 1314, 1319 (S.D.N.Y. 1989) ("Deciding which facts are operative requires reference to the substantive law underlying the plaintiff's legal claims."). Yet the amended complaint fails to allege that either NWS or Grand River performed any of these actions or took any part in such events (let alone a "substantial part") in this District.

The only link to the EDNY discernible from the amended complaint involves three alleged "undercover purchases" of Seneca brand cigarettes from third-party smoke shops located on the Poospatuck Reservation in Mastic, New York. (*See* Am. Compl., ¶¶ 64-76.) According to the amended complaint, an undercover State investigator made three separate purchases of one carton each of Seneca brand cigarettes — once paying $25 for the carton, and twice paying $28 — and none of the packs in these cartons bore a New York State cigarette tax stamp. (*Id.*)[6]

[6] The amended complaint also alleges, in connection with each of these purchases, that "[t]here were more than fifty cartons of Seneca brand cigarettes for sale on display shelves in the smoke shop at the time." (Am. Compl., ¶¶ 66, 71, 74.) However, the veracity of the State's allegations concerning the number of cartons on display in these nonparty smoke shops is dubious at best, since the investigator who made the alleged purchase on November 6, 2012, stated in his official report that "[t]here was [*sic*] approximately 50 plus cartons of Seneca and/or King Mountain Brand Cigarettes on display shelves, in various flavors at the above mentioned Smoke Shops [i.e., the Rising Native Sisters and Native Delight Smoke Shops]." (Report of Investigator Andrew Scala dated Nov. 7, 2012, attached to the Szanyi Declaration as Exhibit D (emphasis added).)

Additionally, the amended complaint alleges that "[l]arge quantities" of "contraband Grand River cigarettes have been offered for sale" at "reservation cigarette retailers" in Lewiston, Buck Kill, Onondaga, Steamburg, Cattaraugus, Basom, Mastic, Oneida, and other unspecified locations. (Am. Compl., ¶ 60.) However, as Grand River correctly notes, the retailers identified in the amended complaint (with the lone exception of the third-party smoke shop in Mastic) are located outside this District. (Grand River's Br., at p. 15-16). And in stark contrast to the alleged undercover

Remarkably, in the amended complaint, the State does not even attempt to establish the complete chain of distribution resulting in Seneca brand cigarettes being sold at unaffiliated, third-party retail outlets on the Poospatuck Reservation. Instead, the State mistakenly assumes, without facts or evidence, that the cigarettes were shipped in or into this District by NWS. However, as NWS explained in its pre-motion letters, the mere presence of Seneca brand cigarettes in unaffiliated, third-party retail outlets in the EDNY does not establish, *ipso facto*, that NWS had anything to do with the cigarettes' arrival or sale in this District. (*See, e.g.*, Dkt. 37, at p. 2.)

The State's response to these points in its pre-motion letters reveals a fundamental misunderstanding of the limits on plaintiffs' authority to bring suit in a forum of their choosing, based solely on the presence of a defendant's product in that forum. Specifically, the State contends that NWS's alleged role in importing and distributing Seneca brand cigarettes somehow establishes, *ipso facto*, NWS's participation in, and responsibility for, any and all later acts of unaffiliated third-parties. (*See* Dkt. 38, at p. 3; Dkt. 18, at pp. 2-3.) If the State's contention were correct, then any action or event involving a defendant's product performed by or involving any person (including third-parties) and occurring anywhere, would automatically qualify as a "material" act bearing a "close nexus" to all claims against the defendant concerning the same product. Here, the State's contention is, in substance and practical effect, that any action or event involving Seneca brand cigarettes performed by or involving any person, anywhere — including, of course, mere possession and three sales by third-party smoke shops in

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purchases of just three cartons of cigarettes at third-party smoke shops in Mastic, the amended complaint describes the seizure of 16,230 cartons of cigarettes in Seneca Falls, New York, which of course is within the WDNY. (Grand River's Br., at p. 16 (citing Am. Compl., ¶¶ 77-78).)

Mastic — necessarily qualifies as a "material" act of these defendants bearing a "close nexus" to the State's asserted claims against NWS and Grand River simply because the State's claims involve the same product (Seneca brand cigarettes). But that is not the law.

On the contrary, federal courts have squarely rejected the proposition that the mere presence of a product in a judicial district is, without more, sufficient to establish venue in that District. *See French Transit, Ltd. v. Modern Coupon Sys., Inc.*, 858 F. Supp. 22, 27 (S.D.N.Y. 1994) (concluding that plaintiff failed to demonstrate that a substantial part of the events giving rise to a trademark infringement action occurred in the Southern District of New York ("SDNY"), for while the relevant product was available in the SDNY, plaintiff "ha[d] not provided support for the allegation that Defendant sold the product directly in this District or that Defendant should be held responsible for the distributors' actions with respect to his product") (citing *Asahi Metal Indus. Co. v. Superior Ct.*, 480 U.S. 102 (1987)); *accord, e.g., Kusha, Inc. v. Int'l Modern Inv.*, No. 12CV1140-LAB (MDD), 2013 WL 1191193, at *3 (S.D. Cal. Mar. 21, 2013), at *3 (holding that the sale of defendant's products in the District — where the products caused some of the alleged harm — was "too attenuated to constitute a substantial part of the claim" given the lack of evidence that defendant actually sent the products into the District); *Methode Elecs., Inc. v. Adam Techs., Inc.*, No. 03 C 2971, 2003 WL 21799934, at *8-11 (N.D. Ill. July 25, 2003) (adopting the reasoning set out in *French Transit* and imposing sanctions on plaintiff's counsel for violating Fed. R. Civ. P. 11(b)(2) "in that there was no legal basis for the allegation that 'a substantial part of the events giving rise to [plaintiff's] claim occurred in [the Northern District of Illinois].'"),

aff'd, 371 F.3d 923 (7th Cir. 1994). Thus, the State's position that venue is proper because Seneca brand cigarettes have (allegedly) been sold at third-party retail outlets in this District cannot withstand even cursory scrutiny. Under clearly established law, the mere availability of Seneca brand cigarettes in unaffiliated, third-party retail outlets does not satisfy the "substantial part of events" test on which the State relies. *See French Transit*, 858 F. Supp. at 27; *Kusha*, 2013 WL 1191193, at *3; *Methode Elecs.*, 2003 WL 21799934, at *8-11; *see also, e.g.*, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 296 (1980) (stating, in the closely related context of personal jurisdiction, that "'foreseeability' alone has never been a sufficient benchmark," since, if foreseeability were the criterion, "[e]very seller of chattels would in effect appoint the chattel his agent for service of process," and "[the seller's] amenability to suit would travel with the chattel").

Indeed, even if the State's allegations could be taken at face value, contriving to purchase three cartons of cigarettes (or, for that matter, all 150 cartons allegedly on display in the third-party smoke shops) is clearly insufficient to establish a substantial connection to this District in a case where tens of millions of cartons and hundreds of millions of dollars are allegedly at issue. Consequently, for all these reasons, and the reasons set out in Grand River's separately filed motion to dismiss, venue in the EDNY is plainly improper and dismissal is the only appropriate remedy. *See, e.g.*, *McEvily v. Granai*, No. 01 CIV. 5430(DLC), 2001 WL 1098005, at *2 (S.D.N.Y. Sept. 18, 2001) (exercising the Court's discretion to dismiss the action for

improper venue instead of transferring the action to another judicial district); *Nizami v. Woods*, 263 F. Supp. 124, 125 (S.D.N.Y. 1967) (same).[7]

II. The New York State Attorney General Lacks Standing To Sue NWS Under The CCTA Or The PACT Act, And This Court Should Decline To Exercise Supplemental Jurisdiction Over The Attorney General's State Law Claims

Even if the State could somehow meet its burden of establishing proper venue in this District, the State's federal claims would still be subject to immediate dismissal due to the complete absence of well-pleaded facts demonstrating that the New York State Attorney General has standing to sue NWS under either the CCTA or the PACT Act. Indeed, while the amended complaint includes extensive commentary about the CCTA and PACT Act, the State conveniently overlooks provisions in both statutes establishing that state attorneys general lack standing to bring civil enforcement actions against Indian defendants based on alleged violations occurring in Indian country.

As detailed in NWS's pre-motion letters, the CCTA specifically provides that state attorneys general lack standing to bring a civil enforcement action, like this one, against "an Indian tribe or an Indian in Indian country." 18 U.S.C. § 2346(b). There is no dispute that NWS is an Indian entity established under Indian law, which resides and operates exclusively on the Cattaraugus Indian Territories in Perrysburg,

[7] In the unlikely event that venue is found to be technically proper in this District, NWS would request that this action be transferred to the WDNY pursuant to 28 U.S.C. § 1404(a), for the reasons identified in Grand River's separately filed motion to dismiss. (*See* Grand River's Br., at pp. 18-19). In particular, because NWS resides and operates exclusively in the WDNY, and because its bankruptcy case is pending there, transferring this action to the WDNY would clearly serve the interests of justice, as well as the convenience of the parties and witnesses. *See generally Employers Ins. of Wausau v. Fox Entm't Grp., Inc.*, 522 F.3d 271, 274-75 (2d Cir. 2008) ("As a general rule, where there are two competing lawsuits, the first suit should have priority.") (internal quotation marks, brackets, and citation omitted).

New York. (*See* Am. Compl., ¶ 9; Debtor's Amended Statement of Financial Affairs and Schedules A and B, *supra*, Szanyi Decl., Ex. A; Debtor's Amended Statement of Financial Affairs, *supra*, Szanyi Decl., Ex. B, at pp. 7-9.) Thus, under the plain language of § 2346(b), the State lacks standing to sue NWS for alleged violations of the CCTA occurring in Indian country. *See, e.g.*, 18 U.S.C. § 1151 (defining "Indian country" to include "all land within the limits of any Indian reservation under the jurisdiction of the United States Government"); *Pourier v. S.D. Dep't of Rev.*, 658 N.W.2d 395, 404-05 (S.D. 2003) (holding that a corporation owned and operated on reservation lands by an enrolled tribal member qualified as a tribal member for the purpose of assessing immunity from state taxation), *vacated in part on other grounds*, 674 N.W. 2d 314 (S.D. 2004); *see also Flat Ctr. Farms, Inc. v. Mont. Dep't of Rev.*, 49 P.3d 578, 580-82 (Mont. 2002) (holding that state license tax could not be imposed on tribally chartered corporation owned and operated by Indians, which conducted business entirely in Indian country), *cert. denied*, 537 U.S. 1046 (2002).

Significantly, because the State seeks to enforce the CCTA in Indian country, against Indians, and for the purpose of restricting Indian commerce, the relevant statutory provisions must be interpreted in accordance with the unique canons of construction applicable in Indian law — including, most notably, the canons establishing that "States may tax Indians only when Congress has manifested clearly its consent to such taxation, *e.g.*, *Bryan v. Itasca County*, [426 U.S. 373, 393 (1976)]," and that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit, *e.g.*, *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174 (1973), *Choate v. Trapp*, 224 U.S. 665, 675 (1912)." *Montana v.*

Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985) (internal citations abridged); *see also, e.g.*, *id.* at 766 n.4 (noting that "although tax exemptions generally are to be construed narrowly, in 'the Government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal.'") (ellipsis omitted) (quoting *Choate*, 224 U.S. at 675). Therefore, any ambiguity in the CCTA generally, or § 2346(b) in particular, must be resolved against the State and in favor of NWS.

Similarly, the PACT Act does not confer standing on state attorneys general to file suit in federal court to enforce state laws purporting to restrict or regulate the "sale, use, or distribution of cigarettes and smokeless tobacco by or to Indian tribes, tribal members, tribal enterprises, or in Indian country." *See* PACT Act of 2009, Pub. L. No. 111-154, 124 Stat. 1109, note (a); *see also* 15 U.S.C. §§ 375(7) to (9), 376, 376a. Yet the State's avowed purpose in bringing this action is to restrict — indeed, to eliminate altogether — the sale, use, or distribution of Seneca brand cigarettes to Indian tribes, tribal members, and tribal enterprises in Indian country. (*See* Am. Compl., ¶¶ 57, 61, 81-82, 85 and Prayer for Relief.) And, as the State is well aware from NWS's Chapter 11 filings, NWS sells cigarettes only to Indian tribes. (*See, e.g.*, Debtor's Amended Statement of Financial Affairs and Schedules A and B, *supra*, Szanyi Decl., Ex. A; Debtor's Amended Statement of Financial Affairs, *supra*, Szanyi Decl., Ex. B; Debtor's Monthly Operating Reports for Reporting Periods Nov. 21-30, 2011, through Feb. 1-28, 2013, *supra*, Szanyi Decl., Ex. C.) Thus, under the plain language of the PACT Act, the State lacks standing to sue NWS for alleged PACT Act violations.

Moreover, because the State seeks to enforce the PACT Act in Indian country, against Indians, and for the purpose of restricting Indian commerce, the

relevant statutory provisions must again be interpreted in accordance with the unique canons of construction applicable in Indian law — including the canons establishing that "States may tax Indians only when Congress has manifested clearly its consent to such taxation," and that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *See Blackfeet Tribe of Indians*, 471 U.S. at 766. Therefore, any ambiguity in the PACT Act or its specific provisions must again be resolved against the State and in favor of NWS.

* * *

The amended complaint also includes several state law claims against NWS and GRE. (Am. Compl., ¶¶ 22-39, 111-118.) However, given the Court's anticipated dismissal of the State's federal claims, the Court should decline to exercise supplemental jurisdiction over the purely state law claims and, instead, dismiss the amended complaint in its entirety. *See* 28 U.S.C. § 1367(c)(3); *see also, e.g.*, *Izmirligil v. Bank of New York Mellon*, No. CV 11-5591(LDW)(AKT), 2013 WL 1345370 (E.D.N.Y. Apr. 2, 2013) (citing *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988)); *Stewart v. Victoria's Secret Stores, LLC*, 851 F. Supp. 2d 442, 447 (E.D.N.Y. 2012) (citing *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966), and *Grace v. Rosenstock*, 228 F.3d 40, 55 (2d Cir. 2000)).

Alternatively, even assuming that the State's CCTA and PACT Act claims could somehow escape dismissal, this Court should still decline to exercise supplemental jurisdiction over the purely state law claims because those claims raise novel and extraordinarily complex issues of state law which ought to be decided, in the first instance, by New York's state courts. *See* 28 U.S.C. § 1367(c)(1); *see also, e.g.*,

Oneida Indian Nation of N.Y. v. Madison Cnty., 665 F.3d 408, 438-40 (2d Cir. 2011), *petition for cert. filed*, 81 U.S.L.W. 3277 (U.S. Nov. 12, 2012) (No. 12-604).[8]

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[8] In the unlikely event that any portion of the State's federal or state claims survive immediate dismissal, NWS will show that the State's prosecution of this action is at odds with clearly established principles of federal law. For example, the State's assertion of unfettered power over on-reservation cigarette sales by Indians to Indians directly contravenes U.S. Supreme Court precedent establishing that States generally lack authority to tax or otherwise regulate "on-reservation conduct involving only Indians," *White Mtn. Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980). *See also, e.g.*, *Cent. Mach. Co. v. Ariz. State Tax Comm'n*, 448 U.S. 160 (1980); *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 480-81 (1976); *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 180-81 (1973); *Warren Trading Post Co. v. Ariz. State Tax Comm'n*, 380 U.S. 685 (1965). Rather, the Supreme Court has consistently held that States lack authority to tax on-reservation cigarette sales by Indians to Indians. *E.g.*, *Dep't of Tax & Finance of N.Y. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 64 (1994) ("Because New York lacks authority to tax cigarettes sold to tribal members for their own consumption, cigarettes to be consumed on the reservation by enrolled tribal members are tax exempt and need not be stamped.") (emphasis added; citation omitted); *Moe*, 425 U.S. at 480-81; *Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 258 (1992) ("'Absent cession of jurisdiction or other federal statutes permitting it,' we have held, a State is without power to tax reservation lands and reservation Indians.") (brackets omitted) (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973)).

NWS will also demonstrate that the combined effect of New York's cigarette taxation statutes and its regulatory enforcement regime impose onerous burdens on Indians and Indian traders in Indian country, without furthering the State's interest in collecting lawful taxes. These burdens include statutes and regulations (a) mandating a coercive price structure which effectively bars New York-licensed cigarette dealers from selling at lower prices than their competitors; (b) dictating and limiting the cigarettes that can be sold by Indians to Indians for consumption on Indian land; (c) imposing draconian reporting requirements that are incompatible with federal law; and (d) purporting to regulate commerce involving only Indians. Consequently, New York's statutory and regulatory scheme runs afoul of well-established Supreme Court precedent. *See, e.g.*, *Milhelm Attea & Bros.*, 512 U.S. at 73-75 (holding that state regulations must be "reasonably necessary to the assessment or collection of lawful state taxes"). In accordance with Rule 12(b), Rule 12(c), Rule 56 and other applicable authorities, NWS expressly reserves its right to raise the foregoing merits-based defenses, and others, at the appropriate time.

III. The Amended Complaint Fails To State A Plausible Claim To Relief And, Moreover, Fails To Satisfy The Heightened Pleading Standard Applicable To Allegations Of Fraud

It is by now well established that "[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.'" *Iqbal*, 556 U.S. at 678. In this case, however, the State's amended complaint falls well short of plausibility.

Specifically, much of the amended complaint is devoted to general contentions about the dangers of smoking (*see* Am. Compl., ¶¶ 11-14), and extraneous legal commentary (*see id.* ¶¶ 15-54). And despite being revised in response to the defendants' pre-motion letters, the amended complaint remains devoid of well-pleaded facts showing a cognizable violation of any federal or state law. Indeed, the amended complaint's factual allegations are few and scattered, and mostly amount to mere "labels and conclusions" rather than well-pleaded facts. *See Iqbal*, 556 U.S. at 678; *see also, e.g.*, *Silverman*, 2013 WL 4039381, at *1; *Kondaur Capital*, 849 F. Supp. 2d at 366. Whether considered individually or collectively, the amended complaint's factual allegations — including, specifically, the State's allegations concerning "probable demand" for cigarettes among individual tribal members and the purported volume of Indian commerce involving cigarettes (*see* Am. Compl., ¶¶ 82-85) — do not permit the Court to infer more than the mere possibility of misconduct. *See Iqbal*, 556 U.S. at 679. Thus, the amended complaint is subject to immediate dismissal, since it "has alleged — but it has not 'show[n]' — 'that the pleader is entitled to relief.'" *See id.* (quoting Fed. R. Civ. P. 8(a)(2)).

Moreover, to the extent the amended complaint includes allegations of fraud — such as by alleging a "joint scheme" to avoid taxation (*see* Am. Compl., ¶¶ 10,

55-57) — the State was required to plead the circumstances of the alleged fraud with particularity, as required by Federal Rule of Civil Procedure 9(b). *See generally In re Refco Inc. Secs. Litig.*, 826 F. Supp. 2d 478, 492 (S.D.N.Y. 2011). The amended complaint fails to satisfy this heightened pleading standard, for it contains no details at all about the alleged "joint scheme" itself or the putative schemers' allegedly fraudulent efforts to avoid lawful taxes. *See, e.g.*, *Rombach v. Chang*, 355 F.3d 164, 171 (2d Cir. 2004) (holding that the heightened pleading standard of Rule 9(b) applies to all allegations of fraud — including allegations not "styled" or "denominated" as fraud, and even where fraud is not an element of, or otherwise "requisite to," the plaintiff's claim); *DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir. 1990) ("Although states of mind may be pleaded generally, the 'circumstances' must be pleaded in detail. This means the who, what, when, where, and how: the first paragraph of any newspaper story."). Accordingly, in addition to the other grounds for dismissal under Rule 12(b)(6), the amended complaint is subject to dismissal for failure to comply with the heightened pleading standard applicable to allegations of fraud under Rule 9(b).

CONCLUSION

Therefore, for all the foregoing reasons, the State's action against NWS and GRE should be dismissed with prejudice.[9]

[9] Because the State already had one opportunity to cure the deficiencies identified in NWS's and GRE's pre-motion letters, granting the State a third bite at the apple would be contrary to the interests of justice. *See* Fed. R. Civ. P. 15(a)(2); *see generally Murphy v. IBM Corp.*, No. 10 Civ. 6055 (LAP), 2012 WL 566091, at *7 (S.D.N.Y. Feb. 21, 2012) (denying leave to amend where plaintiffs had already amended their complaint once in response to a detailed letter from defendant identifying deficiencies in the original complaint). And, in any event, because the Attorney General lacks standing to bring any federal claims against NWS, granting leave to file a second amended

Dated: October 23, 2013

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complaint would be futile. *See, e.g.*, *Brandon v. Musoff*, No. 10 Civ. 9017 (KBF), 2012 WL 135592, at *4 (S.D.N.Y. Jan. 17, 2012).