

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X

STATE OF NEW YORK,

*Plaintiff,* Case No.: 12-CV-6276  
(ADS) (SIL)

*-against-*

MOUNTAIN TOBACCO COMPANY d/b/a KING  
MOUNTAIN TOBACCO COMPANY INC. and  
DELBERT WHEELER, Sr.,

*Defendants.*

-----X

**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS**  
**BY DEFENDANT DELBERT WHEELER, SR.**

**HAMBURGER, MAXSON, YAFFE  
& McNALLY, LLP**  
*Attorneys for Defendant Delbert Wheeler, Sr.*  
David N. Yaffe, Esq.  
Andrew K. Martingale, Esq.  
225 Broadhollow Road, Suite 301E  
Melville, New York 11747  
631.694.2400

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
INTRODUCTION .....	1
THE AMENDED COMPLAINT .....	1
THE PRIOR MOTION TO DISMISS .....	4
POINT THE COURT DOES NOT HAVE SUBJECT MATTER JURISDICTION OVER THE CLAIMS ASSERTED AGAINST MR. WHEELER. ....	5
A. The Provisions of the CCTA Are Not Enforceable by the State in this Court Against Mr. Wheeler, Because He Is an “Indian on Indian Land.” .....	6
B. The PACT Act Violation Alleged in the Complaint Is Not Enforceable Against Mr. Wheeler in this Court. ....	8
CONCLUSION .....	13

## INTRODUCTION

This Memorandum of Law is submitted, together with the Declaration of David N. Yaffe, Esq. (“Yaffe Dec.”), in support of the motion by defendant Delbert Wheeler, Sr. (“Wheeler”) to dismiss the two claims asserted against him in the Amended Complaint for lack of subject matter jurisdiction.

## THE AMENDED COMPLAINT

Plaintiff, State of New York (“State” or “Plaintiff”), has filed an Amended Complaint in which it asserts that Mr. Wheeler has violated the Contraband Cigarette trafficking Act, 18 U.S.C. §§ 2341-2346 (“CCTA”) and the Prevent All Cigarette Trafficking Act, 15 U.S.C. §§ 375-378 (“PACT Act”). These claims are based upon the alleged sale and shipment by defendant Mountain Tobacco Company d/b/a King Mountain Tobacco Company, Inc. (“King Mountain”) of untaxed, unstamped and unreported King Mountain cigarettes to “tribal retailers” on Indian reservations located in the State of New York. *See*, Amended Complaint, ¶¶ 57, 78, 80, 83. Mr. Wheeler is alleged to be the President, co-founder and 50% co-owner of King Mountain. *See*, Amended Complaint, ¶ 10.

Although the Amended Complaint asserts five claims for relief against “defendants,” the State has, through the Declaration of Assistant Attorney General Christopher K. Leung (submitted by the State in this action under penalty of perjury and dated June 16, 2014 (“Leung Dec.”) (DE 99-2)), represented and confirmed to Mr. Wheeler and this Court that, in fact, only two claims in the Amended Complaint are asserted against Mr. Wheeler. Thus:

Accordingly, the State initiated this action, and alleged *two claims against Mr. Wheeler* and five claims against King Mountain:

a. Mr. Wheeler is alleged to have violated the Contraband Cigarette Trafficking Act, 18 U.S.C. §§ 2341-46, and the Prevent All Cigarette Trafficking Act, 15 U.S.C. §§ 375-78. Am. Compl. at ¶¶ 76-85.

b. King Mountain is alleged to have violated *the same two federal Acts*, as well as New York Tax Law sections 471 and 471-e (failure to transport unstamped cigarettes to a New York State licensed stamping agent, and failure to pay applicable cigarette excise tax on cigarettes brought into the State of New York), section 480-b (failure to file state certification, when importing cigarettes for sale into the State of New York), and Executive Law section 156-c (failure to certify cigarettes sold in New York as being fire-standards compliant). *Id.* at ¶¶ 76-98.

Yaffe Dec., Exh. “C,” Leung Dec., ¶ 10 (emphasis added).

In alleging that this Court has subject matter jurisdiction, the State avers, “[p]ursuant to 28 U.S.C. § 1331, 18 U.S.C. § 2346, and 15 U.S.C. § 378, this Court has original jurisdiction over plaintiff’s claims made under the CCTA and the PACT Act.” Amended Complaint, ¶ 4.

In alleging a violation of the CCTA, the Amended Complaint asserts:

¶ 77. Defendants have violated the CCTA by knowingly shipping, transporting, receiving, possessing, selling, and distributing contraband cigarettes within New York State.

¶ 78. As detailed in paragraphs 1 through 69 above, King Mountain’s continuing sales and shipments of hundreds of thousands of untaxed and unstamped cigarettes in and into the state of New York - - a state which requires that packs of cigarettes to be sold therein bear a state tax stamp to evidence

payment of the excise tax - - have been, and continue to be, far in excess of the 10,000-cigarette limit imposed by the CCTA.

Amended Complaint, ¶¶ 77-78.

In alleging a violation of the PACT Act, the Amended Complaint asserts:

80. Defendants' sales, transfers and shipments of cigarettes for profit to tribal retailers in New York State violate the PACT Act.

81. Defendants sell, transfer, and otherwise ship such cigarettes to tribal wholesalers and/or retailers in New York State for profit. Such sales, transfers, and shipments have been made between the State of Washington and the State of New York, between New York and Indian country within New York, and/or between two points in New York but through Indian country. As a result, defendants' sales, transfers and shipments of cigarettes are considered to be made in "interstate commerce" under the PACT Act. *See* 15 U.S.C. § 375(9).

82. Accordingly, defendants were required to submit certain filings to the tobacco tax administrator for the State of New York, *i.e.*, DTF.

83. Nonetheless, defendants did not submit to DTF any of the filings required under the PACT Act for any of their sales, transfers and/or shipments of cigarettes to tribal retailers in New York State.

84. Specifically, each defendant failed to file with DTF "a statement setting forth his name and trade name (if any), and the address of his principal place of business and of any other place of business, as well as telephone numbers for each place of business, a principal electronic mail address, any website addresses, and 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)(1).

85. In addition, each defendant failed to file with DTF "a memorandum or a copy of the invoice covering each and every

shipment of cigarettes or smokeless tobacco made during the previous calendar month into such State; the memorandum or invoice in each case to include the name and address of the person to whom the shipment was made, the brand, the quantity thereof, and the name, address, and phone number of the person delivering the shipment to the recipient on behalf of the delivery seller, with all invoice or memoranda information relating to specific customers to be organized by city or town and by zip code[.]” 15 U.S.C. § 376(a)(2).

Amended Complaint, ¶¶ 80-85.

### **THE PRIOR MOTION TO DISMISS**

Mr. Wheeler previously moved to dismiss the Amended Complaint based upon the grounds that he was not properly served, the court lacks personal jurisdiction over him, and the Amended Complaint failed to state a claim against him (*see*, DE 94 through 94-4). By Decision and Order dated October 8, 2014, this Court denied so much of the motion to dismiss as asserted lack of proper service. It also denied “without prejudice, and with leave to renew following the completion of jurisdictional discovery as to Wheeler, that part of Wheeler’s motion to dismiss for lack of ‘minimum contacts’ personal jurisdiction and for failure to state a claim upon which relief can be granted.” DE 129, Decision and Order, p. 24.

**POINT**

**THE COURT DOES NOT HAVE SUBJECT MATTER JURISDICTION OVER THE CLAIMS ASSERTED AGAINST MR. WHEELER.**

Federal courts enjoy only limited jurisdiction and “may not decide cases over which they lack subject matter jurisdiction.” Lyndonville Sav. Bank & Trust Co. v. Lussier, 211 F.3d 697, 700 (2d Cir. 2000). The basic statutory grants of federal subject-matter jurisdiction are contained in 28 U.S.C. §§ 1331 and 1332. A plaintiff properly invokes § 1331 jurisdiction when he pleads a colorable claim “arising under” the Constitution or laws of the United States. *See*, 28 U.S.C. § 1331; Ramos v. Zucker, 2014 WL 5363778 (E.D.N.Y. 2014). Here, the State alleges subject matter jurisdiction pursuant to § 1331. *See*, Amended Complaint, ¶ 4 (specifically alleging, “[p]ursuant to 28 U.S.C. § 1331, 18 U.S.C. § 2346 [the CCTA], and 15 U.S.C. § 378 [the PACT Act], this Court has original jurisdiction over plaintiff’s claims made under the CCTA and the Pact Act”).

As the Second Circuit instructed in Lyndonville 211 F.3d at 700-701 (2d Cir. 2000), “Unlike failure of personal jurisdiction, failure of subject matter jurisdiction is not waivable and may be raised at any time by a party or by the court *sua sponte*. If subject matter jurisdiction is lacking, the action must be dismissed.” *See also*, Fed.R.Civ.P. 12(h)(3) (“If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action”); Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541, 106 S.Ct. 1326 (1986); United Food & Commercial Workers Union, Local 919 v. CenterMark Properties Meriden Square, Inc., 30 F.3d 298, 301 (2d Cir.1994).

**A. The Provisions of the CCTA Are Not Enforceable by the State in this Court Against Mr. Wheeler, Because He Is an “Indian on Indian Land.”**

The CCTA authorizes a “State, through its Attorney General . . . [to] bring an action in the United States district courts to prevent and restrain violations of [the CCTA],” however, that same provision expressly limits such authority and subject matter jurisdiction by also providing, “No civil action may be commenced under this paragraph against an Indian tribe or *an Indian in Indian country* (as defined in section 1151).” 18 U.S.C. § 2346(b)(1) (emphasis added); *see also*, City of New York v. Wolfpack Tobacco, 2013 WL 5312542 \*2 (S.D.N.Y. 2013) (observing that the City of New York did “not make a CCTA claim against the [“Indian”] Defendants directly” in light of the restriction); City of New York v. Gordon, 1 F.Supp.3d 94 (S.D.N.Y. 2013) (noting the restriction and its applicability to an individual member of the Seneca Nation of Indians but not to his wife, who was not a member of the Seneca Nation).

18 U.S.C. § 1151 defines “Indian country,” *inter alia*, as “all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation.” 18 U.S.C. § 1151(a). The Yakama reservation was established by a treaty between the Yakama people and the United States government that was ratified by the United States Senate and signed by President James Buchanan in 1859. *See*, 12 Stat. 951, Articles I and II, 1859 WL 10142 (June 9, 1855). As such, the land within the Yakama reservation constitutes “Indian country” as defined by 18 U.S.C. § 1151(a) and as



incorporated by express reference into the restriction set forth in the CCTA at 18 U.S.C. § 2346(b)(1).

Nowhere in the Amended Complaint does the State allege that Mr. Wheeler is not an “Indian in Indian country.” Thus, the State has failed to satisfy the pleading requirements necessary to aver a basis for this Court to exercise subject matter jurisdiction over its CCTA claim against Mr. Wheeler.

Moreover, and in any event, there is no genuine dispute that Mr. Wheeler is, in fact, a member of the Yakama Nation, that he lives within the borders of the Yakama Reservation in Washington State and that the Yakama Reservation was established through a treaty with the Federal Government and is under the jurisdiction of the Federal Government. In short, he is an “Indian in Indian country.”

In this regard, the Amended Complaint asserts that King Mountain “is a corporation formed under the laws of the Yakama Nation of Indians” (¶ 8), “is located within the Yakama Indian Reservation” (*Id.*) and conducts its manufacturing operations “on the Yakama Reservation” (Amended Complaint, ¶ 55). The Amended Complaint alleges that Mr. Wheeler “is a Washington State resident; is the President, co-founder, and 50% co-owner of King Mountain” (¶ 10), but it makes no allegation as to his status as a member in the Yakama Nation of Indians. Nonetheless, the State admitted in the Leung Declaration previously filed with this Court, that “Mr. Wheeler is also an enrolled member of the Yakama Indian Nation” (Yaffe Dec., Exh. “C,” Leung Dec., ¶ 30), and King Mountain averred in its Answer to the Amended Complaint, “Delbert Wheeler, Sr. is an

enrolled member of the Yakama Nation, he resides on Trust lands within the exterior boundaries of the Yakama Nation's Reservation." Yaffe Dec., Exh. "B," King Mountain Answer, ¶ 7.

Accordingly, the CCTA does *not* provide the State with enforcement authority against Wheeler (an "Indian in Indian country") in this Court, and the Amended Complaint does not allege a basis for the exercise by this Court of subject matter jurisdiction over this claim against Wheeler. Therefore, the CCTA claim must be dismissed.

**B. The PACT Act Violation Alleged in the Complaint Is Not Enforceable Against Mr. Wheeler in this Court.**

The Second Circuit has described and synthesized the various provisions of the PACT Act as follows:

The PACT Act, signed into law on March 31, 2010, imposes strict restrictions on the '*delivery sale*' of cigarettes and smokeless tobacco. Pub.L. No. 111-154, § 2(a), 124 Stat. 1087, 1088 (2010). A '*delivery sale*' occurs when the buyer and seller are not in each other's physical presence at the time the buyer requests or receives the cigarettes, as when cigarettes are ordered over the Internet and delivered by mail. 15 U.S.C. § 375(5). In order to 'prevent tobacco smuggling' and 'ensure the collection of all tobacco taxes,' the statute demands that *delivery sellers* 'comply with the same laws that apply to law-abiding tobacco retailers.' 124 Stat. at 1087-88. To that end, the PACT Act *requires delivery sellers* to pay excise taxes, obey licensing and tax-stamping requirements, and otherwise comply with state and local tobacco laws 'as if the *delivery sales* occurred entirely within the specific State and place' where the tobacco product is delivered.'

Red Earth LLC. v. United States, 657 F.3d 138, 141 (2d Cir. 2011) (emphasis added) (where the Court upheld a preliminary injunction staying enforcement of the provisions of the PACT Act that required mail-order cigarette sellers to pay state and local excise taxes).

Thus, the provisions of the PACT Act place restrictions upon the “delivery sale” of cigarettes to “consumers” and, in association with such sales, provides a vehicle to enforce the payment of state and local excise taxes, compliance with state and local tax stamping requirements and state and local restrictions against sales to minors. *See*, 15 U.S.C. § 375(4), (5) and 15 U.S.C. § 376a; *see also*, City of New York v. Wolfpack Tobacco, 2013 WL 5312542, \*3 (S.D.N.Y. 2013) (“The PACT Act regulates remote sales of cigarettes, and imposes a variety of requirements on sellers of cigarettes with the aim of ensuring that taxes are paid and cigarettes are not sold to children”).

A “delivery sale” “means any sale of cigarettes or smokeless tobacco *to a consumer*” under certain delineated circumstances, typically involving the on-line or mail order purchase of cigarettes (as opposed to a purchase in the physical presence of the seller). *See*, 15 U.S.C. § 375(5) (emphasis added). A “consumer” is defined as: (A) “any person that purchases cigarettes or smokeless tobacco; and (B) *does not include* any person lawfully operating as a manufacturer, distributor, *wholesaler*, or *retailer of cigarettes* or smokeless tobacco.” *See*, 15 U.S.C. § 375(4)(A),(B) (emphasis added).

The Amended Complaint does *not* allege that Wheeler (or, for that matter, King Mountain) is a “delivery seller” or that he has violated any of the “delivery sale”

restrictions set forth in the PACT Act. *See*, Amended Complaint. Indeed, the allegations in the Amended Complaint concern cigarette sales to tribal wholesalers and/or retailers, which, by definition, are *not* “consumers” under the statute. *See*, 15 U.S.C. § 375(4)(B). Consistent with this limitation, the State does *not* allege that Wheeler (or, for that matter, King Mountain) has violated the “general” restrictions set forth in § 376a(a) (requiring “delivery sellers” to comply with all state and local laws including laws imposing excise taxes, licensing and tax-stamping requirements, and restrictions on sales to minors in connection with “delivery sales”), the “shipping and packaging” restrictions set forth in § 376a(b), the “records” restrictions set forth in § 376a(c), or the “delivery” restrictions set forth in § 376(d).

Instead, the Amended Complaint seeks to invoke federal court jurisdiction and the enforcement provisions of the PACT Act with respect to the *non*-delivery sale of King Mountain cigarettes to “tribal retailers in New York State” (Amended Complaint, ¶¶ 80, 83) which it characterizes as “wholesale dealers and retailers” (Amended Complaint, ¶ 69). The State maintains that such non-delivery sales constitute “interstate commerce” (Amended Complaint, ¶¶ 71, 81), and, in connection with such sales, it seeks enforcement against Wheeler’s (and King Mountain’s) alleged failure to “submit certain filings to the tobacco tax administrator for the State of New York, *i.e.*, DTF” (Amended Complaint, ¶ 82). It specifies these missing filings as: (a) statements setting forth the defendants’ trade name, address and phone number and its agent in the state authorized to accept service (*see*, Amended Complaint, ¶ 84, citing 15 U.S.C. § 376(a)(1)); and (b) invoices or memoranda

related to every “delivery seller” shipment of cigarettes or smokeless tobacco during the previous calendar month (*see*, Amended Complaint, ¶ 85, citing 15 U.S.C. § 376(a)(2)).

Inasmuch as the Amended Complaint does not allege a single underlying “delivery sale” of cigarettes by Wheeler (or King Mountain), nor could it, the State has no authority to invoke the jurisdiction of this Court to compel Wheeler to comply with the delivery sale invoice/memoranda filing requirement of § 376(a)(2). Indeed, § 376(a)(2) expressly posits such reporting requirement on there having been a “delivery seller,” and here the Amended Complaint does not allege that Wheeler (or King Mountain) are “delivery sellers” under the statute or that the alleged cigarette sales in question constitute “delivery sales.”

Moreover, the thrust of the invoice/memoranda filing requirement set forth in § 376(a)(2) and the trade name and agent filing requirement set forth in § 376(a)(1) is to aid in the enforcement of the “delivery sale” restrictions set forth in § 376a (of which *no violation* is asserted by the State). Thus, as the Sixth Circuit observed in United States v. Contents of Accounts, 629 F.3d 601, 603 (6<sup>th</sup> Cir. 2011)(emphasis added), referring to the filings to be made under § 376(a)(1) and (2), “[t]hese disclosures are meant to aid the states in collecting taxes from *consumers*, whose cigarette purchases might otherwise go undetected”). Indeed, the PACT Act imposes no civil penalty for the mere failure to file trade name and agent statements and to file reports on “interstate commerce” sales which are not also “delivery sales” (*i.e.*, sales to “consumers”) and thereby do not invoke the “delivery sales” restrictions set forth in § 376a. *See*, 15 U.S.C. § 377(b). To the contrary,

the penalties section of the statute only applies to violation of the “delivery sales” provisions. *Id.* No case holds that the provisions of § 376(a)(1) and (2) may nonetheless be enforced by a state, through its Attorney General, in the absence of an underlying “delivery sale” (*i.e.*, a sale to a “consumer” as opposed to a retailer/wholesaler) in that particular state.

Likewise, the State’s limited authority to bring an enforcement proceeding pursuant to the PACT Act is expressly premised upon the State’s suffering of an actual *harm* sought to be prohibited by the statute; *i.e.*, a defendant’s “delivery sale” of cigarettes to minors or a defendant’s failure to pay State and local taxes in connection with the “delivery sale” of cigarettes to “consumers” in that State. *See*, 15 U.S.C. § 378(c)(1)(A) entitled, “Standing,” which provides, “A state, through its attorney general, . . . that levies a tax subject to section 376a(a)(3) of this title [*i.e.*, a “delivery sale” tax] . . . may bring an action in a United States district court to prevent and restrain violations of this chapter . . . .” Here, where no “delivery sale” is asserted, let alone involved, and where the State does not allege a PACT Act-recognized harm (*e.g.*, delivery sales to minors, non-payment of local taxes associated with delivery sales to “consumers,” etc.), the State has no enforcement authority with respect to this matter and this Court does not have subject matter jurisdiction over the PACT Act claim asserted against Mr. Wheeler.

**CONCLUSION**

For the foregoing reasons, plaintiff's Amended Complaint against Mr. Wheeler should be dismissed for lack of subject matter jurisdiction, together with such other and further relief as this Court deems just and proper.

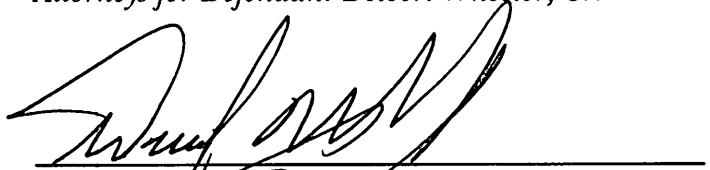
Dated: Melville, New York  
November 12, 2014

Respectfully submitted,

**HAMBURGER, MAXSON, YAFFE  
& McNALLY, LLP**

*Attorneys for Defendant Delbert Wheeler, Sr.*

By: \_\_\_\_\_



David N. Yaffe, Esq.  
Andrew K. Martingale, Esq.  
225 Broadhollow Road, Suite 301E  
Melville, New York 11747  
631.694.2400