



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL

DIVISION OF SOCIAL JUSTICE
TOBACCO COMPLIANCE BUREAU

Christopher K. Leung
Assistant Attorney General
Christopher.Leung@ag.ny.gov

November 14, 2014

Via Electronic Case Filing

Honorable Arthur D. Spatt
United States District Judge
P.O. Box 9014
Central Islip, New York 11722-9014

Re: *State of New York v. Mountain Tobacco Co. d/b/a King Mountain Tobacco Co., Inc., and Delbert Wheeler, Sr., No. 2:12-CV-6276 (ADS) (SIL)*

Dear Judge Spatt,

I represent the plaintiff State of New York in the above-referenced matter. I am writing to address defendant Delbert Wheeler, Sr.'s motion to dismiss for lack of subject matter jurisdiction (ECF No. 142), filed on November 12, 2014. Because this motion is, at its core, a merits-based defense and thus procedurally improper, the State asks this Court to exercise its discretion and order that Wheeler's motion be brought (a) in a future answer, a Rule 12(c) motion, or at trial; or (b) together with his to-be-renewed motion to dismiss challenging the sufficiency of the State's claims.

I. Factual Background

As this Court is aware, Wheeler is the owner and president of defendant Mountain Tobacco Company d/b/a King Mountain Tobacco Company, Inc. ("King Mountain"). Wheeler and King Mountain are alleged to have sold and shipped enormous quantities of contraband cigarettes into the State of New York. The State's amended complaint alleges two federal claims against Wheeler, for violations of the Contraband Cigarette Trafficking Act, 18 U.S.C. § 2341–46 ("CCTA"), and the Prevent All Cigarette Trafficking Act, 15 U.S.C. § 375–78 ("PACT Act"), as well as three state law claims concerning Wheeler's failure to pay the State's required excise tax, and failure to file certain certifications. (An earlier declaration submitted by this State's counsel [ECF No. 103] incorrectly stated that the State had only asserted two federal claims against Wheeler, when in fact, the State's complaint asserts five claims in total against Wheeler.)

Per this Court's October 8 Order, this Court denied Wheeler's motion to dismiss for improper service; denied without prejudice, and with leave to renew, Wheeler's motion to dismiss for lack of personal jurisdiction and failure to state a claim; and permitted the State to conduct jurisdictional discovery of Wheeler, after first submitting a joint letter to Magistrate Judge Locke no later than October 22, 2014. To date, no jurisdictional discovery scheduling order has been issued. And, the Magistrate Judge has scheduled a December 4 hearing on the State's second motion to compel the Rule 30(b)(1) deposition of Wheeler, testifying on behalf of King Mountain.

II. Wheeler's motion is procedurally improper.

Here, the crux of Wheeler's motion is based on his erroneous contentions that (a) he is an "Indian in Indian country," and therefore not amenable to suit under the CCTA; and (b) he is not a "delivery seller," and therefore not amenable to suit under the PACT Act. In each instance, Wheeler contends that this Court lacks subject matter jurisdiction over the State's federal claims. But this argument is flawed.

At bottom, Wheeler's motion improperly conflates the question of this Court's subject matter jurisdiction with the merits question of whether the State can prove that the federal statutes at issue apply to Wheeler or Wheeler's conduct. As many courts and authorities have noted, however, these two questions are separate and distinct. *See, e.g., Arbaugh v. Y & H Corp.*, 546 U.S. 500, 511 (2006) ("Subject matter jurisdiction in federal-question cases is sometimes erroneously conflated with a plaintiff's need and ability to prove the defendant bound by the federal law asserted as the predicate for relief—a merits-related determination."); *Bell v. Hood*, 327 U.S. 678, 682 (1946); *Lotes Co., Ltd. v. Hon Hai Precision Industry Co., Ltd.*, 753 F.3d 395, 403 n. 3 (2d Cir. 2014); 2-12 Moore's Federal Practice – Civil § 12.30[1].

Moreover, contrary to Wheeler's mistaken assertion, a statute's threshold requirement of applicability is a merits-based question, and not a jurisdictional one. In *Arbaugh*, for example, the Supreme Court held that a Title VII provision, limiting the Act's application to employers with 15 or more employees, was not a jurisdictional defense, but rather a merits-based defense. 546 U.S. at 511. Likewise, in *EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 622–24 (D.C. Cir. 1997), the appellate court reversed a district court's order, dismissing a complaint for lack of subject matter jurisdiction on grounds that defendant did not have enough employees to be subject to ADA, because that defect went to merits of claim, and not the court's jurisdiction. Similarly in *United States v. Baker*, 63 F.3d 1478, 1484 (9th Cir. 1995), the Ninth Circuit rejected defendants' contentions that, due to their status as Indians, the CCTA did not apply to them. In doing so, the court properly analyzed the defendants' arguments as part of a merits-based determination, and not a jurisdictional one. *See id.*

Thus, because Wheeler's instant motion is challenge to the merits of the State's claims and not this Court's jurisdiction, Wheeler's instant motion (raising defenses previously available at the time of Wheeler's first motion to dismiss) is improper. Per Rule 12, such merits-based defenses may not be raised in a second motion (as Wheeler has done here), but may only be included in a future answer, a Rule 12(c) motion, or at trial. *See Fed. R. Civ. P. 12(g)(2) and (h)(2).*

In any case, even if this Court were to consider Wheeler’s instant motion as a jurisdictional motion (which it should not) or as part of Wheeler’s to-be renewed motion to dismiss for failure to state a claim, judicial economy dictates that this Court defer hearing Wheeler’s instant motion until Wheeler has renewed his prior motions to dismiss. As the Supreme Court has explained, a court is not required to determine its subject matter jurisdiction in advance of other jurisdictional issues. *Ruhrgas Ag v. Marathon Oil Co.*, 526 U.S. 574, 578 (1999) (“there is no unyielding jurisdictional hierarchy. . . . [T]here are circumstances in which a district court appropriately accords priority to a personal jurisdiction inquiry”); *Sinochem Int’l Co. v. Malay. Int’l Shipping Corp.*, 549 U.S. 422, 431 (2007) (same); 2-12 Moore’s Federal Practice – Civil § 12.30[1] (citing cases). And, merits-related challenges may only be heard after a court has properly exercised its jurisdiction. *Bell*, 327 U.S. at 682.

As this Court is well aware, Wheeler certainly could have brought his instant motion to dismiss at the same time as his prior motion, thereby allowing this Court to rule on these issues at the same time. Wheeler, however, chose to bring his motions to this Court in a piecemeal fashion. Wheeler accordingly will not suffer any prejudice by having this Court’s hear both motions (the personal jurisdiction and stylized subject matter jurisdiction motions) together, following the completion of the State’s jurisdictional discovery (as well as any outstanding discovery relating to the State’s second motion to compel Wheeler’s Rule 30(b)(1) deposition).

Finally, this Court may also simply reject Wheeler’s motion out of hand. Per 28 U.S.C. § 1331, a district court has “original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” “A plaintiff properly invokes § 1331 jurisdiction when she pleads a colorable claim ‘arising under’ the Constitution or laws of the United States.” *Arbaugh*, 546 U.S. at 513 (citing *Bell*, 327 U.S. at 681–85). In other words, the plaintiff’s complaint must “necessarily draw[] into question the interpretation or application of federal law.” *State of New York v. White*, 528 F.2d 336, 338 (2d Cir. 1975). Given this Court’s prior examination of the State’s complaint in granting the State the opportunity to conduct jurisdictional discovery, this Court may appropriately deny Wheeler’s motion here.

Very truly yours,

/s/ Christopher K. Leung

Christopher K. Leung

cc: David N. Yaffe, counsel for Delbert Wheeler, Sr. (via e-mail)
Kelli Keegan, counsel for King Mountain (via e-mail)
Nelson Boxer, counsel for King Mountain (via e-mail)