

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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STATE OF NEW YORK,

Plaintiff,

-against-

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

Civil Action No.
2:12-CV-06276 (ADS) (SIL)

Defendants.

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MEMORANDUM OF LAW IN OPPOSITION TO
DEFENDANT DELBERT WHEELER, SR.'S MOTION TO DISMISS
FOR LACK OF SUBJECT MATTER JURISDICTION

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INTRODUCTION

The plaintiff State of New York hereby opposes defendant Delbert Wheeler, Sr.'s motion to dismiss for lack of subject matter jurisdiction. As this Court is aware, Wheeler and his company, defendant Mountain Tobacco Company d/b/a King Mountain Tobacco Company, Inc. ("King Mountain"), have allegedly sold and shipped hundreds of thousands of unstamped, untaxed, and unreported cigarettes to persons not otherwise licensed to possess such cigarettes. In all, the State conservatively estimates that Wheeler and King Mountain have avoided over \$68 million in state excise taxes.

Here, this Court should reject Wheeler's motion in its entirety. Under the applicable legal standard, the State's complaint, on its face, alleges a "colorable" claim "arising under" both the federal 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"). Wheeler's motion fails to show that these alleged claims, created under federal law, are "wholly insubstantial and frivolous," much less "made solely for the purpose of obtaining jurisdiction." Indeed, as explained below, Wheeler's arguments only highlight why Wheeler should remain in this case as a defendant for his sale and shipment of cigarettes into the State of New York.

In sum, because federal question jurisdiction exists, this Court possesses the requisite subject matter jurisdiction over this action and should reject Wheeler's motion in total.

STATEMENT OF FACTS

The State's amended complaint alleges five claims against Wheeler. Am. Compl., ¶¶ 2, 76–98. Two claims arise under federal law: (1) the Contraband Cigarette Trafficking Act, 18 U.S.C. § 2341–46 ("CCTA"), and (2) the Prevent All Cigarette Trafficking Act, 15 U.S.C. § 375–78 ("PACT Act"). Am. Compl., ¶¶ 4 (citing 18 U.S.C. § 2346 and 15 U.S.C. § 378), 76–85. And, three claims are asserted under state law. *Id.* at ¶¶ 86–98.

On October 8, 2014, 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 outlining a proposed jurisdictional discovery plan and submitting a joint letter to Magistrate Judge Locke no later than October 22. Order, dated Oct. 8, 2014 (ECF No. 129).

Following this Court's October Order, the parties submitted a joint letter, setting forth their respective positions concerning jurisdictional discovery. (ECF No. 136.) The State and King Mountain also filed various non-dispositive motions to compel certain discovery, including the Rule 30(b)(1) deposition of Wheeler, testifying on behalf of King Mountain. (ECF Nos. 137 and 138.) King Mountain has also served the State with a Rule 56.1 statement.

To date, the parties' non-dispositive and jurisdictional discovery matters remain pending. Magistrate Judge Locke has scheduled, however, a December 4 hearing for the State's second motion to compel the Rule 30(b)(1) deposition of Wheeler. The Magistrate's resolution of this motion will affect the scheduling of the State's jurisdictional discovery, as well as the timing of the parties' December 16 dispositive motion deadline. *See* Order, dated Oct. 6, 2014.

LEGAL STANDARD

Pursuant to 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." Such "federal question" jurisdiction exists when a plaintiff pleads a "colorable claim 'arising under' the Constitution or laws of the United States." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 513 (2006) (citing *Bell v. Hood*, 327 U.S. 678, 681–85 (1946)). For example, if the claim is created by federal law, then federal question jurisdiction exists. *West 14th Street Commercial Corp. v. 5 West 14th Owners*

Corp., 815 F.2d 188, 192 (2d Cir. 1987); *see also Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 808 (1986). Likewise, if the asserted claim “necessarily draws into question the interpretation or application of federal law,” then federal question jurisdiction exists. *State of New York v. White*, 528 F.2d 336, 338 (2d Cir. 1975). On the other hand, if a claim is “‘immaterial and made solely for the purpose of obtaining jurisdiction’ or is ‘wholly insubstantial and frivolous,’” then federal question jurisdiction does not exist. *Arbaugh*, 546 U.S. at 513 n. 10 (quoting *Bell*, 327 U.S. at 682–83).

In resolving this inquiry, a court looks to the complaint’s allegations, accepting all well-pleaded facts as true and construing the complaint in the light most favorable to the plaintiff. *West 14th Street*, 815 F.2d at 193; *Solow v. Stone*, 994 F. Supp. 173, 178 (S.D.N.Y. 1998). A court may also, if it so chooses, refer to evidence outside the pleadings. *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). Significantly, however, a claim’s merit has no bearing on the question of whether federal jurisdiction exists. *Bell*, 327 U.S. at 682; *Carlson v. Principal Fin. Group*, 320 F.3d 301, 306 (2d Cir. 2003). Thus, to sustain federal jurisdiction, a complaint need only allege a claim “that arises under the Constitution or laws of the United States and that is neither made solely for the purpose of obtaining jurisdiction nor wholly insubstantial and frivolous.” *Carlson*, 320 F.3d at 306.

ARGUMENT

The State’s complaint asserts two colorable claims against Wheeler arising under the laws of the United States: The first asserted cause of action is alleged under the Contraband Cigarette Trafficking Act, 18 U.S.C. §§ 2341–46; the second asserted cause of action is alleged under the Prevent All Cigarette Trafficking Act, 15 U.S.C. § 375–78. As shown by the face of the State’s complaint, each claim is created by, and necessarily draws into question, the

interpretation or application of federal law. And, because neither claim is “wholly insubstantial and frivolous” or “made solely for the purpose of obtaining jurisdiction,” this Court possesses the requisite federal jurisdiction over this action.

I. The State’s federal Contraband Cigarette Trafficking Act claim supports this Court’s federal question jurisdiction.

Here, Wheeler’s challenge fails because it misapplies the applicable legal standard.

A. The State’s asserted claim under the federal Contraband Cigarette Trafficking Act claim is colorable.

To begin, the State’s complaint contains a colorable claim under the federal Contraband Cigarette Trafficking Act. As alleged by the State’s complaint, Wheeler is the President, founder and owner of King Mountain. *See* Am. Compl., at ¶ 10 (identifying Wheeler as the President, co-founder and co-owner of King Mountain); Wheeler Decl. (ECF No. 94-3), ¶ 2 (identifying Wheeler as the President and owner); King Mt. Answer, ¶ 10 (identifying Wheeler as the President and founder). Wheeler sold and shipped, and continues to sell and ship, large quantities of unstamped and unreported cigarettes into the State of New York. Am. Compl., at ¶ 1. These cigarettes were sold to New York Indian reservation wholesalers and retailers, with the expectation that such cigarettes would then later be sold to non-tribal consumers in New York State. *Id.* at ¶¶ 55–58, 69. And in contravention of New York state law, these on-reservation Indian wholesalers and retailers were not licensed by the State as stamping agents. *Id.* at ¶¶ 22–38; *see id.* at p. 25 (requesting an order enjoining Wheeler from, *inter alia*, selling or shipping cigarettes to “any person other than a New York state-licensed stamping agent”).

As a result of these alleged acts, the State’s complaint asserts Wheeler’s violation of the federal Contraband Cigarette Trafficking Act, 18 U.S.C. §§ 2341–46; identifies the elements for such a violation of the Act; and identifies the Act as a basis for this Court’s jurisdiction. *Id.* at ¶¶ 2, 4, 39–41, 76–78. The complaint furthermore seeks civil penalties and damages, as authorized

by the Act, as well as a permanent injunction enjoining Wheeler (and King Mountain) from, among other things, future sales and shipments of such unstamped cigarettes “to New York residents or other persons in New York not authorized to possess unstamped cigarettes, *i.e.*, any person other than a New York state-licensed stamping agent.” *Id.* at 25 (Prayer for Relief). In short, the State’s complaint, on its face, alleges a colorable cause of action under the federal Contraband Cigarette Trafficking Act. Wheeler’s arguments to the contrary are unavailing.

B. Wheeler’s arguments are unavailing.

Wheeler contends that because he is a Yakama Indian residing on the Yakama Indian reservation located in Washington State, that he falls within the “Indian in Indian country” exception to liability under the Contraband Cigarette Trafficking Act. *Wheeler Br.*, at 7. As explained here, however, this argument fails to show that the State’s asserted federal claim is “wholly insubstantial and frivolous.” Instead, Wheeler’s argument only highlights why Wheeler should be held to account for his sales and shipments of contraband cigarettes in New York.

1. The State’s allegations concern Wheeler’s activities in New York.

First, the State’s claim against Wheeler is not limited to his activities on the Yakama Indian reservation. Rather, the State’s claim is based on Wheeler’s activities outside the Yakama reservation—*i.e.*, his sale and shipment (via his agent King Mountain) of unstamped, untaxed, and unreported contraband cigarettes into the State of New York. *See Am. Compl.* at ¶¶ 1–2, 76–78; *see also State Opp. To Wheeler 1st MTD*, at 10–16 (ECF No. 99-1). Such non-reservation activities, absent an express federal law to the contrary, are properly subject to the State of New York’s taxation and stamping requirements, which form the basis for the State’s federal Contraband Cigarette Trafficking Act claim. *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148–49 (1973) (“Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law”);

Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2034 (2014) (quoting *Mescalero*, 411 U.S. at 148). Indeed, the Ninth Circuit has already affirmed a district court’s order, holding that King Mountain’s sale of tobacco products and tobacco-related activities were “off-reservation,” therefore subject to *Mescalero*; and that the clear language of the Yakama Treaty of 1855, 12 Stat. 951, did not constitute a “federal law” otherwise barring a state’s claim to regulate such off-reservation activities. *King Mt. Tobacco Co. v. McKenna*, 768 F.3d 989, 994–98 (9th Cir. 2014).

2. Wheeler’s cited affirmative defense does not apply to Wheeler.

Second, Wheeler’s motion fails to show that his cited affirmative defense (*i.e.*, “No civil action may be commenced under this paragraph against an Indian tribe or Indian in Indian country,” 18 U.S.C. § 2346(b)(1)) somehow applies to him. As the legislative history of this cited statutory language shows, Congress only included this language to protect tribal sovereignty. 151 Cong. Rec. H6273, H6283–85, USA Patriot and Terrorism Prevention Reauthorization Act of 2005 (July 21, 2005) (*available at* U.S. Gov. Printing Office, <http://www.gpo.gov/fdsys/granule/CREC-2005-07-21/CREC-2005-07-21-pt1-PgH6273-4>) (discussing Modification to Amendment No. 12) (attached as Ex. to Decl. of Christopher Leung). Significantly, tribal sovereignty, or tribal sovereign immunity, does not extend to individual members of a tribe, who are not otherwise shown to be tribal government officials. *City of New York v. Golden Feather Smoke Shop, Inc.*, 2009 U.S. Dist. LEXIS 20953, *22–23 (E.D.N.Y. Mar. 16, 2009). Moreover, on a disputed motion to dismiss for lack of subject matter jurisdiction, the party asserting tribal sovereign immunity bears the burden of establishing his entitlement this defense. *Id.* at *13–14.

Here, Wheeler’s motion fails to meet this burden. For example, Wheeler’s motion fails to cite any evidence that Wheeler is a tribal government official. *See* Wheeler Mot. To Dismiss (ECF No. 142), *generally*. King Mountain admits that it is neither owned nor operated by the

Yakama Nation, that it is not an arm or division of the Yakama Nation, and that Wheeler is not a member of the Yakama Tribal Council. *See* King Mt. Answer, ¶ 5; Leung Decl., Ex. B (King Mt. Resp. to Req. For Admis. Nos. 85 and 89). And, while Wheeler is admitted to be a member of the Yakama General Council (*id.*), so is every member of the Yakama Nation. *See* Leung Decl. Exs. B (King Mt. Resp. to Req. For Admis. No. 89) and C (Depo. of Jay Thompson, King Mt. CEO) at p. 122. As a result, Wheeler cannot be fairly considered to be a tribal *government* official. In sum, because Wheeler’s arguments fail to show that the State’s asserted federal Contraband Cigarette Trafficking Act claim is “wholly insubstantial and frivolous,” much less made for the purpose of obtaining jurisdiction, this Court possesses the requisite federal question jurisdiction in this action.

II. The State’s asserted claim under the federal Prevent All Cigarette Trafficking Act supports this Court’s federal question jurisdiction.

Wheeler’s challenge to the State’s federal Prevent All Cigarette Trafficking (“PACT”) Act claim fares no better—this claim is created by federal law, appears on the face of the State’s complaint, and is colorable.

A. The State’s asserted claim under the Prevent All Cigarette Trafficking Act claim is colorable.

As alleged by the State’s complaint, Wheeler sold and shipped, and continues to sell and ship, large quantities of unstamped and unreported cigarettes into the State of New York. Am. Compl., at ¶ 1. These cigarettes were purchased and sold to New York Indian reservation wholesalers and retailers for profit; in interstate commerce, as defined by the PACT Act; and with the expectation that such cigarettes would then later be sold to non-tribal consumers in New York State. *Id.* at ¶¶ 55–58, 69–70, 81. Although New York state law only authorizes State-licensed stamping agents to receive and possess unstamped cigarettes (and to subsequently purchase and affix State tax stamps to such packs of cigarettes), no State-licensed stamping

agents reported sales of King Mountain brand cigarettes in New York. *Id.* at ¶¶ 27, 58. In any event, as a result of Wheeler’s sale and shipment of such cigarettes (in interstate commerce and for profit), Wheeler was required to register and make certain filings with the New York State Department of Taxation and Finance. *Id.* at ¶¶ 44–46, 69–72, 79–85. Because Wheeler failed to register and make these filings as required by the PACT Act (*see id.*), the State’s complaint requests (1) an Order directing Wheeler to comply with the PACT Act’s registration and reporting requirements; as well as (2) civil penalties and money damages, as authorized by the PACT Act. *Id.* at 25 (Prayer for Relief). In short, the State’s complaint asserts a colorable claim that arises under the federal Prevent All Cigarette Trafficking Act.

B. Wheeler’s argument is unavailing.

Wheeler’s arguments to the contrary lack merit. Here, Wheeler’s basic contention is that the PACT Act requires a “delivery sale”—*i.e.*, a sale of cigarettes to a “consumer”— for a violation of the Act; that the tribal wholesalers and/or retailers (that Wheeler is alleged to have sold and shipped cigarettes to) are not “consumers” under the Act; that the State’s complaint fails to allege a “delivery sale” by Wheeler (or by King Mountain); and that Wheeler is not a “delivery seller.” Wheeler Br. at 9–10. The Act defines a “consumer” means any person that purchases cigarettes, and who is not “lawfully operating” as a cigarette wholesaler or retailer. 15 U.S.C. § 375(4). But because this argument fails to show that the State’s claim is either “made solely for the purpose of obtaining jurisdiction” or “wholly insubstantial and frivolous,” Wheeler’s argument here fails.

1. The registration and filing requirement under Section 376(a) is not limited to “delivery sellers.”

First, Wheeler mistakenly contends that the PACT Act’s registration and filing requirements, as cited by the State’s complaint—15 U.S.C. § 376(a)—only applies to “delivery

sellers.” In fact, the statute states that the reporting requirement applies to “any person” selling or shipping cigarettes for profit in “interstate commerce,” whereby such cigarettes are shipped into a State that taxes the sale or use of cigarettes. *Id.* To clarify this distinction further, the Act defines a “person” differently from a “delivery seller.” Compare 15 U.S.C. § 375 (6) (defining a “delivery seller”) with (10) (defining a “person”).

2. Tribal purchasers of Wheeler’s cigarettes are “consumers” within the meaning of the Act.

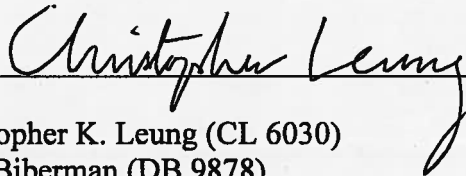
Second, the State’s complaint adequately alleges that Wheeler’s sale of King Mountain brand cigarettes to tribal wholesalers and retailers does constitute a “delivery sale” within the meaning of the Act. This is because (1) only New York State-licensed stamping agents are authorized to receive and possess unstamped cigarettes; and (2) none of the tribal purchasers of Wheeler’s cigarettes are licensed stamping agents. Am. Compl. at ¶¶ 27, 58; *see id.* at p. 25 (requesting an Order enjoining Wheeler from, *inter alia*, selling and shipping cigarettes to persons not otherwise licensed by the State as stamping agents); *see also* 20 N.Y.C.R.R. § 76.1(b)(2). As a result, each tribal purchaser of Wheeler’s cigarettes is not “lawfully operating” as a wholesaler or retailer of cigarettes, and therefore falls within the definition of a “consumer” under the Act. Consequently, each sale of Wheeler’s cigarettes to such tribal wholesalers and retailers constitutes a “delivery sale” under the Act, something which the State’s complaint adequately alleges.

CONCLUSION

In sum, the State’s complaint adequately alleges colorable claims, under both the federal Contraband Cigarette Trafficking Act and the federal Prevent All Cigarette Trafficking Act. Accordingly, federal question jurisdiction exists under 28 U.S.C. § 1331, and Wheeler’s motion to dismiss should be denied.

Dated: New York, New York
December 1, 2014

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