UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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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.

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

Dated: Melville, New York
December 8, 2014

Respectfully submitted,

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INTRODUCTION

Pursuant to the Court's November 24, 2014 Order (DE 146), this Response Memorandum of Law is submitted in further support of Mr. Wheeler's motion to dismiss. The State's formal Memorandum of Law in Opposition (DE 147) ("State MOL"), submitted pursuant to that same Order, fails to overcome the demonstration in Mr. Wheeler's Memorandum of Law (DE 142-5) and Reply Memorandum of Law (DE 144) that this Court lacks subject matter jurisdiction over both federal claims against Mr. Wheeler. The State also appears to have abandoned the argument set forth in its prior letter (DE 143) that this Court should delay or defer resolution of this motion. Indeed, that issue is nowhere addressed in the State MOL in the face of our contrary demonstration. In any event, it is in all the parties' interests and it serves the goals of judicial economy for this Court to follow "custom[]" and "first resolve[] doubts about its jurisdiction over the subject matter" (Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 578 (1999)) and thereby avoid "burden[ing defendant] with expense and delay" (Sinochem Int'l Co. v. Malaysia Int'l. Shipping Corp., 549 U.S. 422, 435 (2007).

I. There Is No CCTA Jurisdiction Over An "Indian in Indian Country."

The State does not contend that Mr. Wheeler is not a member of the Yakama Nation or that the Yakama Nation is not "Indian country (as defined in section 1151)," per the specification at 18 U.S.C. § 2346(b)(1) of the CCTA. In short, it does not dispute that Mr. Wheeler qualifies as an "Indian" pursuant to the express statutory criteria. Instead, it now argues that the CCTA restriction does not apply to "non-reservation activities" of Indians, such as shipping cigarettes "into the State of New York" (*see*, State MOL, p. 5) and

that the only "Indians" protected against State claims are "tribal government officials." *See,* State MOL, p. 6.

Critically, although the State argues against the applicability of the restriction to Mr. Wheeler, the State does not dispute our showing that the "Indian in Indian Country" restriction is a *jurisdictional* restriction (as opposed to a mere ingredient of a federal claim). Thus, if Mr. Wheeler is an "Indian in Indian country" (he is), then there is no genuine dispute that there is no subject matter jurisdiction over a CCTA claim against him.

The State's argument that the "Indian in Indian country" restriction does not apply to "non-reservation activities" of "Indians," such as shipping cigarettes to reservations in New York, and that the restriction only applies to "tribal government officials," defies the plain language of the restriction. Indeed, it necessarily requires this Court to violate basic rules of construction by adding words to the statute; changing the statutory term "an Indian in Indian country" to "an Indian *tribal government official for acts taken* in Indian country." *See,* Connecticut National Bank v. Germain, 503 U.S. 249, 253-54 (1992) (citations omitted) ("in interpreting a statute a court should always turn first to one, cardinal canon before all others," namely that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete"); United States v. Desposito, 704 F.3d 221, 226 (2d Cir.2013) ("In construing a statute, we begin with the plain language, giving all undefined terms their ordinary meaning"). In any event, the State's legislative history argument, which presumes, without demonstrating, that the statute is ambiguous (it is not), merely cherry-picks certain statements, but not others,

made by certain congressmen, and does not and cannot establish that its proffered interpretation trumps the plain words of the statute.

Perhaps more importantly, the State's argument has been rejected by *every* court that has considered the issue. Thus, in discussing the restriction in City of N.Y. v. Milhelm Attea & Bros., Inc., 550 F.Supp.2d 332, 346 (E.D.N.Y. 2008) (emphasis added), this Court held, "However, amendments to the statute enacted in 2006 provide that no civil action may be commenced by a state or local government against an Indian tribe or an Indian in Indian country *for violations of the CCTA*." The State's contrary argument, that the restriction does not apply to off-reservation CCTA violations, ignores this holding, and also makes no sense because a violation of the CCTA necessarily presumes and involves non-reservation activities. Indeed, as this Court has held, "[t]he CCTA is expressly concerned with the flow of contraband cigarettes *between jurisdictions with differing tax obligations*, and the resulting deleterious effects on state and local tax collection." City of N.Y. v. Milhelm Attea & Bros., Inc., 2012 WL 3579568, *15 (E.D.N.Y. 2012) (emphasis added).

Moreover, in City of N.Y. v. Golden Feather Smoke Ship, Inc., 2009 WL 705815, *12 (E.D.N.Y. 2009) (emphasis added), this Court recognized the CCTA restriction as "the statutory *exemption*," and held that the analysis of whether the "Indian" in question "qualif[ies]" for the exemption turns upon whether the "land on which [the] Native American[] *reside[s]* is 'Indian country" (*Id.* at *11-12). This holding refutes the State's position. There, because the Unkechauge Nation "has no relationship with the federal government" and is therefore not "Indian country" as defined by the CCTA, this

Court concluded that, in that particular case, "the CCTA exemption for 'Indian[s] in Indian country' is not a bar to the City's CCTA claims." *Id.* at 12.

Consistent with these Eastern District rulings, the Southern District held in City of N.Y. v. Gordon, 1 F.Supp.3d 94, 103 (S.D.N.Y. 2013) (internal quotation marks and citations omitted)(emphasis added), "[t]he CCTA permits the City to bring an action in the United States district courts to prevent and restrain violations of [the Act] by any person *except* an Indian tribe or an Indian in Indian country. As Marcia Gordon is not herself an Indian in Indian country, she may - under the plain text of the Act - be sued for its violation." It also held, "the CCTA does not exempt Indians in Indian Country from its strictures altogether. Instead, it merely *prohibits parties from suing them civilly for its violation*." *Id.* (emphasis added). Notably, Mrs. Gordon (a non-Indian) and her husband defendant Robert Gordon ("a member of the Seneca Nation of Indians" (*Id.* at 99)) were selling cigarettes to customers in New York City (*i.e.*, off-reservation activity), and the Court stressed that "under the CCTA" the City only sought "a preliminary injunction against . . . Marcia Gordon (but *not* Robert Gordon)" (*Id.* at 102) (emphasis added). *Accord,* City of N.Y. v. Wolfpack Tobacco, 2013 WL 5312542, *2 (S.D.N.Y. 2013) (where the Court made a point of emphasizing that the City did "not make a CCTA claim against the ["Indian"] Defendants directly" in light of the restriction).

II. There Is No Subject Matter Jurisdiction Over The PACT Act Claim.

The State does not contend that the restrictions giving a State limited PACT Act enforcement authority with respect to delivery sales is not "jurisdictional." Instead, it now argues that the Amended Complaint "adequately alleges" (State MOL, p. 9) a

"colorable" (State MOL, p. 7) PACT Act claim because those tribal retailers are not actually "lawfully operating" and are therefore "consumers" (State MOL, pp. 8, 9). It contends that because none of the tribal retailers are "licensed stamping agents" they are "not 'lawfully operating' as a wholesaler or retailer of cigarettes" (State MOL, p. 9). This is meritless.

First, nothing in the statue requires a wholesaler/retailer to also be a "licensed stamping agent" in order to be "lawfully operating." To the contrary, it expressly distinguishes a "consumer" from "any person lawfully operating as a manufacturer, distributor, wholesaler, or retailer of cigarettes," without mention of the term "stamping agent." 15 U.S.C. § 375(4). Nothing more. Second, the expression in the statute is "lawfully operating *as a* . . . retailer" (emphasis added), *not* "a lawfully operating retailer." In other words, the plain language of the statute simply requires that the retailer/wholesaler be operating *as a* bona fide or legitimate business (*i.e.*, lawfully engaged in such a business), not that it be compliant with every law in order to retain its non-"consumer" quality. Under the State's proffered contrary interpretation if you sold cigarettes to a bona fide retailer whose building received a zoning code violation, it must now be deemed a "consumer" and your transaction is magically transformed into a "delivery sale." This is ridiculous and constitutes a tortured reading of the statute's plain language, particularly in view of its primary purpose, which is to end unlawful delivery sales to individual "consumers" and minors and to secure tax payment on *such* transactions. Finally, and in any event, the Amended Complaint does not allege that the *non-party* tribal retailers are not "lawfully operating," and no such determination could be made in their absence.