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Attorneys for Defendant King Mountain Tobacco Co., Inc.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

KING MOUNTAIN TOBACCO CO.,
INC.,

Defendant.

Case No.: 1:14-CV-03162-RMP

**DEFENDANT KING MOUNTAIN
TOBACCO CO., INC.'S RULE 56(d)
MOTION IN OPPOSITION TO
UNITED STATES OF AMERICA'S
MOTION FOR SUMMARY
JUDGMENT**

**DATE: May 7, 2015
TIME: 1:00 p.m.
With Oral Argument**

Pursuant to Federal Rule of Civil Procedure 56(d), King Mountain Tobacco Co., Inc. submits this motion in opposition to USDA's Motion for Summary Judgment (ECF No. 15). This Motion is accompanied by the Affidavit of Randolph Barnhouse in Support of Rule 56(d) Motion for Discovery, attached hereto as Exhibit A. As explained in more detail herein, summary judgment is improper at this time because King Mountain has never had the opportunity to discover the information that it requires to fully and completely present its claims

DEFENDANT'S RULE 56(D) MOTION

1 and defenses in this matter. Accordingly, King Mountain respectfully requests that
 2 the Court enter an order denying USDA's summary judgment motion or, in the
 3 alternative, continuing consideration of the motion until sufficient discovery has
 4 been conducted.

5 Concurrent with and in the alternative to this Motion, King Mountain will
 6 also submit on this date its Response in Opposition to United States of America's
 7 Motion for Summary Judgment, providing both legal and factual reasons why
 8 judgment cannot be entered at this time. Moreover, in compliance with this
 9 Court's Scheduling Order (ECF No. 18), King Mountain will also submit on this
 10 date a Motion and Memorandum in Support of Defendant's Essential Right to
 11 Conduct Discovery. King Mountain incorporates by reference, as if fully stated
 12 herein, all arguments in these concurrent filings.

13 **ARGUMENT**

14 Federal Rule of Civil Procedure 56(d) provides that when, in response to a
 15 motion for summary judgment, the "nonmovant shows by affidavit or declaration
 16 that, for specified reasons, it cannot present facts essential to justify its opposition,
 17 the court may: (1) defer considering the motion or deny it; (2) allow time to obtain
 18 affidavits or declaration or to take discovery; or (3) issue any other appropriate
 19 order." As explained below, USDA's summary judgment motion is based on an
 20 insufficient record, that has not been the subject of discovery or dispute in any
 21 forum, and King Mountain has been prohibited, both at the administrative level
 22 and in this lawsuit, from conducting discovery necessary to either validate or
 23 challenge USDA's requested relief in this matter, which is in excess of \$6,300,000.
 24 *See* USDA Complaint, ECF No. 1.

25 Specifically, the collection of documents presented to the Court in USDA's
 26 summary judgment motion, identified as the "administrative record" in this case, is
 27 little more than a series of purported assessments, King Mountain's responses, and
 28 USDA's flat denials of King Mountain's claims. *See generally* KM-AR-000001-

190. King Mountain twice requested formal administrative review of the assessments where it could present oral and written evidence in support of its position. *See* KM-AR-000107, KM-AR-000112. The first request was denied, *see* KM-AR-000108, and the second was never responded to. USDA now requests that this Court limit consideration to what it claims is the “administrative record” and asks the Court to prohibit King Mountain from requesting discovery necessary to fully and completely present and support its claims and defenses in this matter.

King Mountain has a good faith belief that were discovery allowed, King Mountain would be able to establish that the assessments are inherently flawed for failure to account for unreported cigarette production, for miscalculation of market share, and erroneous calculation of amounts due, penalties, and interest. Specifically, the federal statute upon which USDA’s Complaint is based, the Fair and Equitable Tobacco Reform Act of 2004 (“FETRA”), unequivocally forbids USDA from imposing an assessment on any manufacturer or importer that is disproportionate to its market share, as follows: “No manufacturer or importer shall be required to pay an assessment that is based on a share that is in excess of the manufacturer’s or importer’s share of domestic volume.” 7 U.S.C. § 518d(e)(2). Several United States District Courts have agreed that, “[o]bviously, this statute is not a model of clarity.” *United States v. Native Wholesale Supply Co.*, 822 F. Supp. 2d 326, 333 (W.D.N.Y. 2011) (discussing the application of definitions used in the formulation of FETRA assessments as “murky”); *see Phillip Morris USA Inc. v. Vilsack*, 896 F. Supp. 2d 512, 515 (E.D. Va. 2012) (“Although the reasoning underlying the algorithm currently employed by USDA to calculate the assessment is clear, the underlying logic is a little more murky.”).

Moreover, USDA does not include unreported cigarette production in its calculation of assessments under FETRA. USDA Complaint, ECF No. 1, at ¶¶ 7-8. Unreported cigarette production comprises a significant share of domestic cigarette volume – as much as 5% of the domestic cigarette market, according to a

1 congressional report. *See* Complaint, *R.J. Reynolds Tobacco Co., et al. v. United*
 2 *States Department of Agriculture, et al.*, No. 14-1388, in the United States District
 3 Court for the District of Columbia (filed Aug. 14, 2014), at ¶¶ 39-75, attached as
 4 Exhibit D. to King Mountain’s Response to United States of America’s Statement
 5 of Material Facts and Additional Statement of Facts.

6 USDA’s Complaint seeks a single specific dollar amount for an “outstanding
 7 balance, including late payment interest,” and does not provide King Mountain
 8 with any allegations explaining the basis of that alleged amount owed, the amount
 9 of fees separated from other alleged obligations included in the total figure
 10 demanded, or the relevant time period for which USDA calculated its claimed
 11 amount owed. ECF No. 1, at ¶ 12. Neither the administrative record nor any other
 12 submission by the USDA in this matter has provided sufficient, undisputed
 13 evidence of the liabilities USDA seeks in this matter.

14 In particular, King Mountain requires discovery regarding the following
 15 specific matters in order to fully and completely respond to Plaintiff’s pending
 16 motions:

- 17 a. whether and how unreported cigarette production by other companies
 18 and individuals was considered in calculating King Mountain’s
 19 assessments;
- 20 b. the basis for calculating the alleged amount owed, the amount of fee
 21 assessments separated from other alleged obligations included in the
 22 total figure demanded, and the relevant time period for which USDA
 23 calculated its claimed amount owed;
- 24 c. whether an authorized delegate of the Secretary of Agriculture made
 25 assessments of alleged unpaid FETRA assessments, and if so for
 26 which fee periods, on which dates, and in which specific amounts;
- 27 d. evidence of the calculations regarding market share and product type
 28 upon which the alleged assessments are based;

- e. the amount of payments USDA agrees it has received from King Mountain in connection with USDA's assessments, how USDA has applied those payments to the various categories of recovery USDA seeks in this action, the amount of outstanding assessments USDA claims are due, the relevant quarters for which USDA claims King Mountain has not paid assessments, and the calculation of late payment interest;
- f. an explanation of how USDA has determined what it alleges to be King Mountain's production volume, product class, and the market share of such market class;
- g. the classes of tobacco product and the respective market share of any class product USDA claims King Mountain has sold and for which it claims King Mountain owes assessments;
- h. whether USDA claims assessments are due for the sale of tobacco used for religious and ceremonial purposes;
- i. the basis for USDA's allegations of fraudulent conduct, such as evidence of the times, dates, places, benefits received, and other details of the alleged fraudulent activity; and
- j. evidence that adequate notice and demand for payment were made;
- k. the basis, if any, for the admissibility of the documents filed with the Court as ECF No. 16;
- l. whether the collection of documents filed with the Court as ECF No. 16, if admissible, is a complete and accurate compilation of documents in USDA's possession regarding this matter;
- m. the factual basis upon which Plaintiff relies in representing that the unsworn collection of documents filed with the Court as ECF No. 16 is an "administrative record".

1 *See* Ex. A. To rule on USDA's pending motions for summary judgment before
2 such discovery occurs would be fundamentally unfair and a denial of due process.

3 **CONCLUSION**

4 For the foregoing reasons, King Mountain respectfully requests that the
5 Court enter an order denying USDA's summary judgment motion or, in the
6 alternative, continuing consideration of the motion until sufficient discovery has
7 been conducted.

8 March 27, 2015

Respectfully submitted,

9
10 /s/ Randolph H. Barnhouse

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22 Attorneys for Defendant

23 King Mountain Tobacco Co., Inc.

CERTIFICATE OF SERVICE

I hereby certify that on March 27, 2015 I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

Kenneth E. Sealls, Email: Kenneth.Seall@usdoj.gov

/s/ Randolph Barnhouse
Randolph H. Barnhouse