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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, Plaintiff / Counter-Defendant, v. KING MOUNTAIN TOBACCO CO., INC., Defendant / Counter-Plaintiff.	Case No.: 1:14-CV-03162-RMP **DEFENDANT/COUNTER-PLAINTIFF KING MOUNTAIN TOBACCO CO., INC.'S RESPONSE IN OPPOSITION TO UNITED STATES OF AMERICA'S MOTION TO DISMISS COUNTERCLAIM** **5/7/2015 at 1:00 p.m.** **With Oral Argument**

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INTRODUCTION

USDA's Motion to Dismiss is founded on two flawed premises:

(1) That a decision by a federal district court in New York addressing two congressionally abrogated treaties with foreign nations is dispositive on the Yakama Treaty[1] issues in this case. Yet this single decision cited to support USDA's argument that FETRA fees do not violate American Indian treaties did not involve an Indian treaty at all. Instead, it involved two treaties *that have been abrogated by Congress*: the Jay Treaty and the Treaty of Ghent between the United States and Great Britain.

(2) That this Court's decisions in a federal *tax* case precludes a challenge of USDA's effort to collect a federal *fee* used by USDA to subsidize non-Yakama businesses. But this Court's prior decisions involving federal excise taxes are inapposite because this is not a tax case. This case involves a *fee* that funds direct subsidies of non-Yakama businesses, which requires the Court to apply a different standard of treaty interpretation.

Throughout its fee collection effort, USDA has claimed that it is not required to prove anything beyond the accuracy of the amount of the fees it seeks to impose. But it has never shown that its calculation of the fee at issue is accurate, and instead attempts to avoid that very showing through its motion to dismiss. And USDA argues that it should not even be required to address a challenge to the fee subsidy scheme itself – even a challenge based on the supreme law of the land.

King Mountain has plainly set forth and supported its challenges to the FETRA fee scheme USDA seeks to impose upon it. USDA's Motion to Dismiss must therefore be denied.

[1] 12 Stat. 951 (1855).

STATEMENT OF FACTS

To avoid redundant briefing, King Mountain incorporates by reference Defendant/Counter-Plaintiff King Mountain Tobacco Co., Inc.'s Response to United States of America's Statement of Material Facts and Additional Statement of Facts (filed on March 27, 2015). Citations to statements of fact and exhibits in this response are to exhibits identified in and produced in that filing.

MOTION TO DISMISS LEGAL STANDARD

The federal rules require only a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). The statement need only "'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957) *abrogated by Twombly*, 550 U.S. 544). In evaluating a motion to dismiss for failure to state a claim, the reviewing court considers "only the contents of the [counterclaim] and construes all allegations of material fact in the light most favorable to the nonmoving party." *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 248 (9th Cir. 1997)) (citing *Smith v. Jackson*, 84 F.3d 1213, 1217 (9th Cir. 1996)). In addition, when ruling on a motion to dismiss, "a judge must accept as true all of the factual allegations" contained in the counterclaim. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (citing *Bell Atl. Corp.*, 550 U.S. at 555-56).

ARGUMENT

I. USDA Cannot Rely on Congressionally Abrogated Treaties with Non-Parties to Determine the Application of FETRA to the Yakama Treaty.

Both in the administrative stage of this dispute, as well as in its filings with this Court, USDA has repeatedly ignored King Mountain's attempts to inform USDA of the terms of the Yakama Treaty and the protections it guarantees to the Yakama people. Indeed, at the administrative level, USDA "determined" that King Mountain's administrative appeal rights "extend only to contesting the

accuracy of the amount due." *See* KM-AR-000108. The Yakama Treaty is a unique source of federal law that confirms solemn promises between two sovereigns, one of which was an Indian tribe. The protections granted in the Treaty prevent the federal government, as a matter of federal law, from charging Yakamas a fee that is used solely to subsidize non-Yakama businesses.

In refusing to even consider the Yakama Treaty's guarantees, USDA relies on an opinion by the United States District Court for the District of New York interpreting two Treaties irrelevant to the current litigation: the Jay Treaty and the Ghent Treaty. *United States v. Native Wholesale Supply Co.*, 822 F. Supp. 2d 326, 337 (W.D.N.Y. 2011). Relying on that single case, USDA argues that "FETRA applies to King Mountain in the same manner that it applies *to any other similarly-situated company*." ECF No. 14 at p. 9 (emphasis added). But USDA fails to recognize that because of the Yakama Treaty, King Mountain is not "similarly-situated" to other companies. *United States v. State of Wash.*, 520 F.2d 676, 688 (9th Cir. 1975) ("The treaties must be viewed as agreements between independent and sovereign nations."); *id.* at 684 ("The treaties were 'not a grant of rights to the Indians, but a grant of rights from them a reservation of those not granted.' . . . The extent of that grant will be construed as understood by the Indians at that time, taking into consideration their lack of literacy and legal sophistication, and the limited nature of the jargon in which negotiations were conducted.") (citations omitted).

In *Native Wholesale Supply*. There were no tribal signatories to either the Jay Treaty or the Treaty of Ghent, nor was either treaty the result of negotiations with or concessions by a tribe to secure its travel and property use rights. Indeed, the sole provision of the treaty cited by the defendant in *Native Wholesale Supply* read:

> No Duty of Entry shall ever be levied by either Party on Peltries brought by Land, or Inland Navigation into the said Territories respectively, or shall the Indians passing or repassing with their own proper Goods and

> Effects of whatever nature, pay for the same any Impost or Duty whatever, But Goods in Bales, or other large packages unusual among Indians shall not be considered as Goods belonging bona fide to Indians.

822 F. Supp. 2d at 336-37. The Western District of New York relied on numerous cases that determined that the "duty exemption" had been abrogated as a matter of law by Acts of Congress and the War of 1812. *Id.* at 337. Critically, because these were not Indian treaties, the court in *Native Wholesale Supply* did not need to follow the mandate that the text of an Indian treaty must be construed as the Indian tribe would naturally have understood it at the time of the treaty. *E.g.*, *Tulee v. State of Washington*, 315 U.S. 681, 684-85 (1942) ("It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council").

Here, King Mountain does not bring its counterclaim pursuant to either the Jay Treaty or the Treaty of Ghent, or under any treaty language comparable to the "duty exemption" cited in *Native Wholesale Supply*. Rather, it brings the Counterclaim, *inter alia*, under the rights secured to it in the Yakama Treaty. *Native Wholesale Supply*, therefore, is not conclusive of any issue raised in King Mountain's Counterclaim and, as the Ninth Circuit did *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007), this Court should rejected USDA's comparisons of the Yakama Treaty to case that "addressed a different tribe, a different treaty, and a different right." *Id.* at 1267.

Furthermore, USDA's adoption of inapposite case law demonstrates why this action cannot be disposed of without a particular examination of the Yakama people's understanding of their Treaty rights. Namely, in accordance with substantial controlling decisions of the Ninth Circuit and the Supreme Court of the United States, the Court is required to interpret the text of the Treaty as the Yakama people would have understood its terms before the Court can determine whether application of FETRA assessments violates the Treaty. *See, e.g.*,

Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675-76, *modified sub nom. Washington v. United States*, 444 U.S. 816 (1979) ("'[T]he treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.' This rule, in fact, has thrice been explicitly relied on by the Court in broadly interpreting these very [Yakama] treaties in the Indians' favor.") (internal citations omitted); *Tulee*, 315 U.S. at 684-85; *Seufert Bros. Co. v. United States*, 249 U.S. 194 (1919) (concerning same); *United States v. Winans*, 198 U.S. 371, 381 (1905) (concerning same). This required analysis cannot be done on the face of the parties' pleadings or USDA's Motion, nor can this analysis be done in total reliance on a clearly irrelevant case.

II. This Court's Prior Ruling on a Federal Excise Tax Does Not Apply to this Challenge of a Fee/Subsidy Statute.

FETRA assessments do not generate revenue for the United States Government. Instead, they provide direct financial support to non-Yakama businesses in connection with termination of a former federal subsidy program benefitting non-Yakama tobacco farmers. The USDA concedes this fact. ECF No. 14 at p. 13. Because these assessments are fees, rather than revenue generating taxes, King Mountain's Counterclaim is subject to the general canon of construction mandated by the United States Supreme Court and the Ninth Circuit that the text of the Yakama Treaty must be construed as the Yakama people would naturally have understood it at the time of the treaty, with doubtful or ambiguous expressions resolved in the Indians tribe's favor. *Tulee*, 315 U.S. at 681-85 ("It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council"). Moreover, as concerning fees rather than taxes, King Mountain's Counterclaim is not subject to the offsetting canon of construction that "warns us against interpreting federal statutes as providing tax

exemptions unless those exemptions are clearly expressed." *Chickasaw Nation v. United States*, 534 U.S. 84, 95 (2001).

The United States concedes that assessments imposed under FETRA have been found to be "considered a fee rather than a tax." ECF No. 14, at p. 11 n.3 (citing *Swisher Int'l, Inc. v. Johanns*, 3:05-CV-871-J16-TEM, 2007 WL 4200816, , *6-7 (M.D. Fla. Nov. 27, 2007) *aff'd sub nom. Swisher Int'l, Inc. v. Schafer*, 550 F.3d 1046 (11th Cir. 2008); *see also Philip Morris USA, Inc. v. Vilsack*, 736 F.3d 284, 292 (4th Cir. 2013) ("There is no evidence in the text of FETRA or elsewhere to indicate that Congress intended to use FETRA as a vehicle to further tax policy writ large. The record equally supports the conclusion that Congress used the 2003 excise tax rates only because they were a useful mathematical expedient."). Specifically, "FETRA is primarily concerned with regulation-albeit through the seemingly incongruous aim of aiding in the transition of formerly heavily regulated industry to a free market system. If regulation is the primary purpose of a statute, revenue raised under the statute will be considered a fee rather than a tax." *Swisher Int'l, Inc.*, 2007 WL 4200816 at, *7.[2]

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[2] The mere fact a statute raises revenue does not, as a matter of law, indicate that it can be construed as a tax. *See South Carolina ex rel. Tindal v. Block*, 717 F.2d 874, 887 (4th Cir. 1983) (citing *Wickard v. Filburn*, 317 U.S. 111 (1942)). Specifically, "if regulation is the primary purpose of a statute, revenue raised under the statute will be considered a fee rather than a tax." *Id.* (citing *United States v. Stangland*, 242 F.2d 843, 848 (7th Cir. 1957); *Rodgers v. United States*, 138 F.2d 992, 994 (6th Cir. 1943). Moreover, an "assessment placed in a special fund and used only for special purposes is less likely to be a tax." *Bidart Bros. v. California Apple Comm'n*, 73 F.3d 925, 932 (9th Cir. 1996). Here, the United States concedes that this assessment is placed in the Tobacco Trust Fund and distributed in annual payments to specific "tobacco quota holders" and to "producers of quota tobacco." ECF No. 14 at p. 3. It is therefore a fee, not a federal tax.

As this Court is aware, in *King Mountain Tobacco Co. v. Alcohol & Tobacco Tax & Trade Bureau*, 996 F. Supp. 2d 1061 (E.D. 2014), King Mountain claimed *exemption* from federal tobacco excise taxes under the Yakama Treaty. Tax exemption claims are governed by a canon of construction that "requires a definite expression of exemption stated plainly in a statute or treaty before any further inquiry is made or any canon of interpretation employed." *Ramsey v. United States*, 302 F.3d 1074, 1076 (9th Cir. 2002); *see also Hoptowit v. C.I.R.*, 709 F.2d 564, 565 (9th Cir. 1983). Because King Mountain here does not seek exemption from a federal tax, the "express exemption" requirement does not apply and the Court must directly apply the canon of construction that requires the Court to look at the Yakama people's understanding of the Treaty terms.

The United States Supreme Court has clarified the distinction between "the canon that assumes Congress intends its statutes to benefit the tribes" and "the canon that warns us against interpreting federal statutes as providing tax exemptions unless those exemptions are clearly expressed." *Chickasaw Nation*, 534 U.S. at 95. In particular, the Supreme Court noted that in instances of a claimed federal tax exemption by a tribe, the two canons can "offset" each other. *Id.*

The Ninth Circuit has adhered to this distinction and employed these competing canons to construe a claim of federal tax exemption under the Yakama Treaty. For example, in *Hoptowit v. C.I.R.*, 709 F.2d 564, the Ninth Circuit set forth the test applied to tax exemption claims as follows:

> As a general rule, Indians are subject to federal income taxation, like other United States citizens, unless exempted by a treaty or an act of Congress. . . . Although ambiguous statues and treaties are to be construed in favor of Indians, they are not to be construed to grant tax exemptions unless they contain language which can reasonable be so construed. . . . The intent to exempt from taxation must be clearly expressed.

709 F.2d at 565. This "express exemptive" requirement is further defined by the Ninth Circuit in *Ramsey*, as follows:

> The applicability of a federal tax to Indians depends on whether express exemptive language exists within the text of the statute or treaty. The language need not explicitly state that Indians are exempt from the specific tax at issue; it must only provide evidence of the federal government's intent to exempt Indians from taxation. . . .
> Only if express exemptive language is found in the text of the statute or treaty should the court determine if the exemption applies to the tax at issue. At that point, any ambiguities as to whether the exemptive language applies to the tax at issue should be construed in favor of the Indians.

Ramsey, 302 F.3d at 1078-79. Following this line of cases, this Court in *King Mountain Tobacco Co.*, specifically confirmed that it applied the "express exemptive" requirement because the issue involved a federal tax. *King Mountain Tobacco Co.*, 996 F. Supp. 2d at 1069 ("Because this case concerns federal tax law, the question before this Court is whether Article II contains express exemptive language. In making this inquiry, the Court will not consider evidence extrinsic to the Treaty itself.")

Because FETRA assessments are not a federal tax, the "express exemptive" requirement does not apply and the Court must use the canons of construction employed in non-tax treaty-based challenges to federal law. Accordingly, USDA's reliance on the "express exemptive" standard and this Court's prior opinion in *King Mountain Tobacco Co.*, 996 F. Supp. 2d 1061, are misplaced. King Mountain is not required to prove that the Yakama Treaty expressly exempts it from FETRA. Because King Mountain's counterclaim sufficiently set forth facts that would entitle it to relief, the Motion to Dismiss must be denied. *See Bell Atl. Corp.*, 550 U.S. at 555-56.

III. Treaties Constitute Federal Law and Are the Supreme Law of the Land.

U.S. Const. art. VI, cl. 2, establishes the fundamental proposition that:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the supreme Law of the Land and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2. Despite repeated reference to the Constitution, the Yakama Treaty, and the General Allotment Act throughout the Counterclaim, USDA devotes the second half of its Motion to Dismiss to the somewhat remarkable argument that King Mountain "identifies no particular federal law that is being violated" sufficient to support its request for a declaratory judgment. ECF No. 14 at p. 14. This is a patent misstatement of the record in this case and is not supported by any responsive pleading, admission, or stipulation by King Mountain.

The Administrative Record, just like the pleadings in this case, are replete with King Mountain's consistent and repeated references to its claim that federal law prohibits the imposition of FETRA fees on King Mountain and that USDA's continued attempts to impose FETRA fees violate its Treaty rights and rights under federal statutes. Specifically, USDA has been aware since at least September 13, 2012, that King Mountain argued that it "is not subject to any tax or assessment imposed by the federal government pursuant to the Yakama Nation Treaty of 1855 between the United States of America and the Confederated Tribes and Bands of the Yakama Nation." *See* KM-AR-000104. Indeed, the Administrative Record filed in this case by the United States contains a complete copy of the Yakama Treaty. *See* KM-AR-000137 through KM-AR-000143.

In its Counterclaim, King Mountain again references violations of federal law, in particular the supreme law of the land. Specifically, King Mountain articulated this claim as follows:

> Counter-Defendant is not entitled to impose assessments on products grown and/or manufactured by Counter-Plaintiff on property held in trust by the United States for the beneficial use of a member of the Yakama Nation, because such assessments would violate the protections guaranteed to Defendant under federal law, including the Constitution of the United States, the General Allotment Act, and the 1855 Yakama Treaty as ratified by the United States on March 8, 1859 (12. Stat. 951).

ECF No. 10 at p. 6.

USDA's argument, therefore, that King Mountain has failed to identify a particular violation of federal law is meritless and contrary to the Administrative Record, the pleadings in this case, and reason.

IV. King Mountain Has Sufficiently Set Forth a Claim that Entitles it to Judgment in its Favor.

As set forth above, this case involves the construction of a specific Treaty between the United States and the Yakama Nation. The United States Supreme Court has repeatedly mandated that the interpretation of all Indian treaties is subject to canons of construction favorable to the Indian party. *See, e.g.*, *Oneida Cnty., N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226 (1985). Under those canons, the text of a specific treaty must be construed as the Indian tribe would naturally have understood it at the time of the treaty, with doubtful or ambiguous expressions resolved in the Indians tribe's favor. *Tulee*, 315 U.S. at 684-85. Here, King Mountain has alleged that "[p]ursuant to the 1855 Yakama Treaty, in exchange for nearly ten million acres of land, the United States guaranteed the people of the Yakama Nation that a tract of land would be set aside and apart for the Yakama for their exclusive use and benefit, and that the Yakama would be allowed to take their goods to market free of any fees, tolls, or other impediments." Answer and Counterclaim, ECF No. 10, at ¶ 22. Furthermore, King Mountain has claimed that FETRA's fee assessment violates those specific rights, and is also prohibited by the terms of the General Allotment Act. *Id.* at ¶¶ 38-39.

King Mountain's argument is supported by substantial Supreme Court, Ninth Circuit, and federal district court precedent interpreting the Yakama Treaty. The United States Supreme Court has been called upon on four separate occasions to interpret the Yakama Treaty. *Fishing Vessel*, 443 U.S. 658; *Tulee*, 315 U.S. 681; *Seufert Bros. Co.*, 249 U.S. 194; *Winans*, 198 U.S. 371. In each of these opinions, the Supreme Court evaluated the evidence offered by the Yakama party

showing the Yakama people's understanding of the text of the Treaty. In each case the Supreme Court found in favor of the Yakama's Treaty right.

An evaluation of this precedent reveals that these decisions have established numerous binding findings of fact regarding the Yakama's understanding of the Treaty. For example, it is undisputed that during the negotiations, federal negotiators emphasized that "entering into the Treaty would not infringe upon or hinder their tribal practice" and "was presented as a means to preserve Yakama customs and prevent further encroachment by white settlers, while at the same time providing tribes with modern accoutrements to enhance their standard of living and fortify their resources." *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229, 1244 (E.D. Wash. 1997) *aff'd sub nom. Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998). The Yakama people "understood the Treaty to grant them valuable rights that would permit them to continue in their ways." *See Cree* 157 F.3d at 769. The Yakama Nation "assigned a special significance to each part of the Treaty at the time of signing and continues to view the Treaty as a sacred document today." *Smiskin*, 487 F.3d at 1266.

Specifically, Article II of the Yakama Treaty set aside the reservation for "the exclusive use and benefit" of the confederated tribes and bands, which was explained by federal negotiators as affirming the Yakama's right to be free from encroachment, interference, and from preventing non-Yakama from taking advantage of the Yakama on the reservation. *See Yakama Indian Nation*, 955 F. Supp. at 1243. Article II reflects statements made during the negotiations by federal negotiators who "declared a resolution to protect the Indians from 'bad white men' if the tribes agreed to live within the designated reservations, explaining that 'when the white man and the red man lived together in the same ground the white man got the advantage and the red man passed away.'" *Id.* (citations omitted). During the negotiations, federal negotiators further "communicated to the tribes that whites and Indians should not occupy the same

territory and that the tribes would be protected from unlawful white men by living on the reservations." *Id.* There is no evidence in either the Treaty or the council proceedings to suggest that tribal leaders anticipated benefits from the use of reservation land to accrue to any non-Indian party or government. SOF 26, Ex. C. The word "exclusive" is at least sufficiently ambiguous to create a genuine issue of material fact that must be resolved at trial, through testimony of Yakama elders. *Cree*, 157 F.3d at 773-74 ("[t]estimony of this sort by Yakama elders has been sanctioned for over twenty years"). Reading Article II as part of the larger Treaty confirms that King Mountain has stated a valid claim that the "exclusive" promise suggests a right to be free from Government fees that are transferred to non-Yakama farmers, such that the Court must proceed with discovery and consider evidence of the Yakama people's understanding of this Treaty right.

Article III of the Treaty extended and protected Yakama economic activities beyond reservation boundaries. *See* SOF 28. The Ninth Circuit has similarly conducted detailed analyses of the Yakama people's understanding of their Treaty, as is required by the mandatory canon of treaty construction. Specifically, in *Smiskin*, 487 F.3d 1260, the Ninth Circuit accepted detailed findings made by a district court in a prior district court case regarding the intent and understanding of the Yakama people, and held that:

> We agree with the district court that there is no basis in either the language of the Treaty or our cases interpreting it for distinguishing restrictions that impose a fee from those, as here, that impose some other requirement. Applying either type of requirement to the Yakamas imposes a condition on travel that violates their treaty right to transport goods to market without restriction.

Id. at 1266. Thus, explicit and undisputed findings of fact from related cases on the Yakama Treaty demonstrate that the right to travel applies to fees.

King Mountain has stated a valid claim, based on material facts, that the Yakama could not have conceived that, many decades after 1855, fees or other conditions or economic restrictions would be imposed on their sovereign trade or

other economic activities by the States or federal government. Articles II and III of the Treaty of 1855 were understood to signify the firm commitment and agreement by the U.S. to allow the tribe to use their land for developing farms and crops for the purpose of engaging in their traditional practices of trade both on and off their reserved lands without interference or hindrance by the United States and without the imposition of a fee, toll, permit, license, encumbrance, or other permission of any kind. Consistent with binding precedent, King Mountain must be allowed to present evidence addressing how the Yakama people understood the protections of the Yakama Treaty.

V. King Mountain's Has Sufficiently Set Forth a Claim that the FETRA Fees Are Improperly Calculated.

King Mountain's Counterclaim also asserts that USDA fails to account for unreported cigarette production in determining gross domestic volume in its calculation of assessments under FETRA. ECF No. 10 at ¶ 31. This is a valid claim that must survive USDA's Motion to Dismiss. Several United States District Courts have agreed that, "[o]bviously, this statute is not a model of clarity." *Native Wholesale Supply Co.*, 822 F. Supp. 2d at 333 (discussing the application of definitions used in the formulation of FETRA assessments as "murky"); *see Philip Morris USA Inc. v. Vilsack*, 896 F. Supp. 2d 512, 515 (E.D. Va. 2012) *aff'd,* 736 F.3d 284 (4th Cir. 2013) ("Although the reasoning underlying the algorithm currently employed by USDA to calculate the assessment is clear, the underlying logic is a little more murky."). King Mountain, therefore, is entitled to pursue discovery regarding its Counterclaim that FETRA assessments were improperly calculated.

Specifically, 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). 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 congressional report. *See* SOF 32, Ex. D.

USDA's Complaint seeks a single specific dollar amount for an "outstanding balance, including late payment interest," and does not provide King Mountain with any justification of that alleged amount owed, the amount of fees separated from other alleged obligations included in the total figure demanded, or the relevant time period for which USDA calculated its claimed amount owed. ECF No. 1, at ¶ 12. Neither the Administrative Record nor any other submission by USDA in this matter has provided sufficient, undisputed evidence of the calculations regarding market share and product type upon which the alleged assessments are based, the amount of payments King Mountain has made 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. *See* SOF 32-38.

King Mountain, therefore, has sufficiently set forth a claim that it is entitled to a refund or abatement due to an erroneous calculation of King Mountain's FETRA fees.

CONCLUSION

The USDA's Motion to Dismiss (ECF No. 14) should be denied.

March 27, 2015

Respectfully submitted,

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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.Sealls@usdoj.gov

/s/ Randolph Barnhouse
Randolph H. Barnhouse