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.,

Civil Action No.

2:12-CV-06276 (JS) (SIL)

Defendant.

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MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFF STATE OF NEW YORK'S MOTION FOR SUMMARY JUDGMENT
(REDACTED IN PART)

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INTRODUCTION

This case is about the large-scale, systematic trafficking of contraband cigarettes by defendant Mountain Tobacco Company d/b/a King Mountain Tobacco Company Inc. ("King Mountain"). This private business is owned and operated by an enrolled member of the Yakama Tribe, which is located in eastern Washington State. Between June 2010 and December 2014, King Mountain sold and shipped over [REDACTED] packs of untaxed and unreported cigarettes into the State of New York. These illegal sales and shipments violate a number of federal and state laws, and are furthermore believed to be continuing to this day.

The State's motion seeks summary judgment on each of claim alleged against King Mountain for violations of the Contraband Cigarette Trafficking Act (18 U.S.C. § 2341 *et seq*.), the Prevent All Cigarette Trafficking Act (15 U.S.C. § 375 *et seq*.), and certain state laws concerning the payment of the state's cigarette excise tax, affixation of tax stamps, and other reporting requirements applicable to cigarettes sold or offered for sale within the State. *See* N.Y. Tax Law §§ 471 and 471-e; N.Y. Tax Law § 480-b; N.Y. Exec. Law § 156-c.

To date, King Mountain's arguments have implicitly suggested that Congress did not intend to prohibit the company's large-scale trafficking of untaxed and unreported cigarettes. But such a reading would be incorrect. Simply put, there is nothing in these statutes, the case law, or the Yakama Treaty of 1855 that suggests that Congress intended to protect or promote King Mountain's actions here. To the contrary, Congress has on many occasions acted to assist the states' efforts to enforce their tax laws and combat the illegal trafficking of cigarettes. The Supreme Court has also consistently affirmed the states' right to impose such a tax on cigarettes sold on tribal reservations when such cigarettes are sold to non-tribal members, as well as affirmed the states' right to impose certain reporting requirements aimed at assisting the states' efforts to collect such taxes.

In sum, because King Mountain's misreading of the applicable law would contradict Congress' expressed intent to assist the states' fight against the trafficking of untaxed cigarettes, King Mountain's implied request for a "free pass" should be rejected. And, because King Mountain's cited evidence to-date fails to set out "specific facts" showing a genuine dispute of material fact, or else relies on mere speculation, conjecture, denials, conclusory allegations, and self-serving testimony, an Order granting the State's motion here is appropriate.

STATEMENT OF FACTS

I. The State of New York's interest in protecting public health.

Each year in the United States, cigarette smoking kills roughly 480,000 people[1]—more people than alcohol, AIDS, car accidents, illegal drugs, murders, and suicides combined.[2] For the millions more living with a smoking-related disease, the health care costs are substantial. U.S. Dept. of Health and Human Services, *The Health Consequences of Smoking, A Report of the Surgeon General* ("S. Gen. Rept."), at 11, 678 (2014). In 2012, for example, New Yorkers spent an estimated $10 billion on such costs. 2012 RTI Int'l. Rept. at 50.[3]

To combat these harms and protect the public health of its citizens, the State of New York—like the federal government, 49 other states, and District of Columbia—taxes the sale and use of cigarettes. *See* N.Y. Tax Law § 470 *et seq.*; S. Gen. Rept. at 788, 790. This is because

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[1] U.S. Dept. of Health and Human Services, *The Health Consequences of Smoking, A Report of the Surgeon General* ("S. Gen. Rept."), at 11, 678 (2014), *available* at U.S. Dept. of Health & Human Services, Reports & Publications, Surgeon General's Reports, http://www.surgeongeneral.gov/library/reports/50-years-of-progress/.

[2] Campaign for Tobacco-Free Kids, Toll of Tobacco in the United States (last visited Jan. 21, 2016), *available* at Campaign for Tobacco-Free Kids, Toll of Tobacco in the United States, https://www.tobaccofreekids.org/facts_issues/toll_us/; *see also* PolitiFact, *Claims That Smoking Kills More People Annually Than Other Dangerous Activities Combined* (June 29, 2009), *available* at http://www.politifact.com/truth-o-meter/statements/2009/jun/29/george-will/claims-smoking-kills-more-people-annually-other-da/.

[3] *Available* at N.Y.S. Dept. of Health, Reports, Brochures and Fact Sheets, http://www.health.ny.gov/prevention/tobacco_control/reports_brochures_fact-sheets.htm.

higher taxes decrease the consumption of tobacco products, especially cigarettes, thereby improving public health. S. Gen. Rept. at 788.[4] Today, New York's cigarette tax—$4.35 per pack of cigarettes[5]—is the highest in the country, nearly $3.00 more than the national average.[6]

a. Cigarette tax evasion hurts public health and the public fisc.

Notably, however, the revenue generated by such taxes is dwarfed by the actual health care costs spent by New Yorkers.[7] And, as different levels of state taxation have widened, tax avoidance and evasion practices have increased. S. Gen. Rept. at 791. These practices include "cross-border, Internet, and untaxed purchases on tribal lands"; bootlegging from low tax jurisdictions for resale in high tax jurisdictions; and large-scale organized smuggling. *Ibid*. In whatever form, these illegal trade practices hurt the public health and public fisc. *Id*. at 789; *see* RTI Rept. 2012 at 41 (estimating "between $465 million and $610 million per year in lost [New York State] tax revenue"). Accordingly, Congress on several occasions has sought to assist the states in combatting the sale and delivery of unstamped and untaxed cigarettes.[8]

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[4] *See also* S. Gen. Rept. at 789 (noting that "a 10% increase in cigarette price will result in [an estimated] 3 – 5% reduction in overall cigarettes consumed" and that "both youth and young adults [appear] to be two to three times as responsive to changes in price as adults."); 2011 RTI Int'l. Rept., at 40 (2011), *available at* N.Y.S. Dept. of Health, Reports, Brochures and Fact Sheets http://www.health.ny.gov/prevention/tobacco_control/reports_brochures_fact-sheets.htm.

[5] *See* N.Y. Tax Law § 471(1) (tax rate eff. July 1, 2010); 20 N.Y. Codes R. & Regs. § 74.1(a)(2).

[6] 2012 RTI Rept., at 5, *available at* N.Y.S. Dept. of Health, Reports, Brochures and Fact Sheets, http://www.health.ny.gov/prevention/tobacco_control/reports_brochures_fact-sheets.htm.

[7] *Compare* N.Y.S. Sen. Maj., Fin. Comm., Economic and Revenue Review (for FY 2016), at 7, 8 (Feb. 2015) (identifying roughly $1.3 billion in collected cigarette and tobacco taxes), *available at* N.Y.S. Senate, 2015–16 N.Y.S. Budget, https://www.nysenate.gov/sites/default/files/articles/attachments/Rev_Forecast_FY_16.pdf, *with* N.Y.S. Dept. of Health, Smoking and Tobacco Use – Cigarettes and Other Tobacco Products (identifying $10.4 billion spent by New Yorkers on tobacco-related health care costs; last revised Nov. 2015), *available* at https://www.health.ny.gov/prevention/tobacco_control/.

[8] Over 60 years ago, for example, Congress enacted the Jenkins Act (15 U.S.C. § 375 *et seq.*), which established certain reporting requirements for out-of-state companies selling cigarettes to citizens of taxing states. Congress later enacted the Contraband Cigarette Trafficking Act (18 U.S.C. § 2341 *et seq.*), as a means to supplement the states' efforts to "combat cigarette bootlegging" and the rise of organized racketeering. *See* H.R. Rept. No. 95–1778, at 7–8, 13 (1978) (Conf. Rep.), *as reprinted in* 1978 U.S.C.C.A.N. 5535–36, 5541; *United States v. Morrison*, 686 F.3d 94, 106 n. 8 (2d Cir. 2012). Most recently, Congress passed the Prevent All Cigarette Trafficking Act to provide yet another tool for the states to combat the illegal trafficking of unstamped, untaxed cigarettes. *See* 15 U.S.C. § 375 Note, Pub. L. No. 111–154, § 1(b)–(c), 124 Stat. 1087–88 (2010).

b. New York's cigarette tax framework.

New York has also taken several measures to prevent the widespread evasion of its cigarette taxes. *City of New York v. Golden Feather Smoke Shop, Inc.*, 2013 U.S. Dist. LEXIS 47037, *8 (E.D.N.Y., Mar. 29, 2013) ("*Golden Feather II*"). All cigarettes within the State, for example, are presumed taxable "until the contrary is established." N.Y. Tax Law § 471(1); *Golden Feather II*, 2013 U.S. Dist. LEXIS 47037, *7. And a tax is imposed on all cigarettes possessed for sale or use within the State, except those that the State is "without power" to tax. N.Y. Tax Law § 471.

In practice, this means that New York cannot tax sales of cigarettes sold on tribal reservations, where such sale or purchase is between enrolled members of the tribe. *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 476 (1976) (relying on the "Indian sovereignty doctrine"); *see*, *e.g.*, *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 512 (1991) (recognizing a tribe's sovereign immunity from suit concerning such state cigarette taxes). In such instances, the tribe's sovereign interest in regulating its enrolled members' on-reservation activities outweighs any asserted state interests. *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 156–57 (1980) (noting that the tribe's sovereign interests are "strongest when the revenues are derived from the value generated on the reservation by activities involving the Tribe and when the taxpayer is the recipient of tribal services").[9] But for all other on-reservation cigarette sales to persons other than an enrolled tribal member of that reservation (*e.g.*, to a tribal member of a different Indian reservation, a non-enrolled Indian, resident non-Indian, etc.), the State may

[9] *See also Nevada v. Hicks*, 533 U.S. 353, 392 (2001) (noting that "tribes retain sovereign interests in activities that occur on land owned and controlled by the tribe"); *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 327, 334 (2008) (noting that tribal sovereignty "is of a unique and limited character. It centers on the land held by the tribe and on tribal members within the reservation" and is "confined to managing tribal land, protecting tribal self-government, and controlling internal relations") (citations and internal quotation marks omitted).

legitimately tax those transactions. *Colville*, 447 U.S. at 161 (explaining why a non-enrolled tribal member stand on the same footing as non-Indian)[10]; *Dep't of Taxation & Fin. of N.Y. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 64 (1994); *Oneida Nation of N.Y. v. Cuomo*, 645 F.3d 154, 158 (2d Cir. 2011).

Thus, New York law requires that each and every pack of cigarettes entering the State (for use or consumption within the State) be received first by a state-licensed stamping agent. *Oneida*, 645 F.3d at 158 (noting that such agents are "the only entry point for cigarettes into New York's stream of commerce").[11] These agents, usually wholesale dealers, pre-pay the State's excise tax by purchasing tax stamps from the State and affixing a stamp to the bottom of each cigarette package (or "pack"). *Golden Feather II*, 2013 U.S. Dist. LEXIS 47037, at *7; N.Y. Tax Law § 471(2); 20 N.Y. Codes R. & Regs. §§ 74.2(a), 74.3(a)(2)(i). As a result, the State's tax is built into the cost of the cigarettes. *See* N.Y. Tax Law § 471(2); *In re N.Y. Assoc. of Convenience Stores v. Urbach*, 92 N.Y.2d 204, 209 (1998). And, "[w]hether taxable or tax-free, all [packs of] cigarettes must bear a tax stamp." *Oneida*, 645 F.3d at 160 n.8.

II. King Mountain's sale and delivery of cigarettes into the State of New York.

Here, as detailed below and by the State's accompanying 56.1 Statement, King Mountain has sold and shipped millions of unstamped, untaxed packs of cigarettes into the State of New York.

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[10] "[T]he mere fact that nonmember residents on the reservation come within the definition of 'Indian' … does not demonstrate a congressional intent to exempt such Indians from state taxation. … [T]he simple reason [is] that nonmembers are not constituents of the governing Tribe. For most practical purposes those Indians stand on the same footing as non-Indians resident on the reservation. There is no evidence that nonmembers have a say in tribal affairs or significantly share in tribal disbursements. [Thus] the State's interest in taxing these purchasers outweighs any tribal interest that may exist in preventing the State from imposing its taxes." *Colville*, 447 U.S. at 161.

[11] State-licensed stamping agents are the only persons authorized to purchase and affix New York State cigarette tax stamps. N.Y. Tax Law § 471; 20 N.Y. Codes R. & Regs. §§ 74.3(a)(2), 74.2(c). And, only state-licensed wholesale dealers of cigarettes may sell cigarettes to a retail dealer or other person for the purpose or resale. N.Y. Tax Law § 470(8); 20 N.Y. Codes R. & Regs. §§ 70.2(h)(2), 74.4(b). *See also* N.Y.S. Dept. of Taxation and Finance, Cigarette And Tobacco Products Tax, *available at* http://www.tax.ny.gov/bus/cig/cigidx.htm.

King Mountain is a for-profit corporation, engaged in the manufacturing and sale of cigarettes. ¶ 28.[12] These cigarettes are intended for sale in and throughout the United States, including the State of New York. ¶ 29. King Mountain was formed and operates under the laws of the Yakama Indian Nation. ¶ 30. Its principal place of business and manufacturing is in White Swan, Washington, which is located within the Yakama Indian Nation Reservation. ¶ 32. King Mountain is furthermore owned and operated by an enrolled member of the Yakama Tribe, Delbert Wheeler, Sr. ¶ 34.

Significantly, King Mountain is not an "arm" or division of the Yakama Tribe, is not an official tribal enterprise or official tribal program of the Yakama, and does not act on behalf of the Yakama Tribe in managing King Mountain's business activities. ¶¶ 102–04. The Yakama Tribe furthermore does not manage King Mountain's business decisions or activities. ¶¶ 95–101. In addition, King Mountain's profits go to Wheeler and not the Yakama Nation. ¶ 105. King Mountain also does not qualify as an "Indian" under Yakama law. ¶¶ 90–93.[13] As a business entity only licensed by the Yakama Tribe, King Mountain is not an enrolled member of the Yakama Tribe, and therefore not an "Indian" under Yakama law. ¶ 94.[14]

a. King Mountain's New York distributors.

Since at least June 1, 2010, King Mountain has used the following companies to market, distribute and sell its cigarettes into the State of New York:

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[12] References to the State's 56.1 Statement are denoted throughout as "¶ ___." The State's 56.1 in turn identifies the supporting documents, deposition testimony, and other materials relied on by the State, as well as the corresponding exhibit number to the accompanying Declaration of Christopher K. Leung, dated January 29, 2016 ("Leung Dec.").

[13] The Yakama Indian Nation Law and Order Code defines an "Indian" as "(A) An enrolled member of the Yakama Nation; or (B) A member by enrollment or custom of any federally recognized tribe in the United States and its territories; or (C) Any resident of the Reservation who is considered an Indian by the traditions, customs, culture and mores of the Yakama Nation." Yakama Code § 2.01.07(1) (attached as Leung Dec. Ex. 3; *see also* ¶ 90).

[14] Messrs. Thompson and Black were each offered as King Mountain's Rule 30(b)(6) witness. At the time of their depositions, Mr. Thompson was King Mountain's CEO and Mr. Black was King Mountain's General Manager. Leung Dec. Ex. 21 (Thompson Depo. at 7–8, 11, 20), Ex. 20 (Black Depo. at 9–10, 23, 49).

- [15]

¶¶ 52–53. These King Mountain distributors would typically submit an order for King Mountain's cigarettes by fax, email or phone. ¶ 57. King Mountain would then load the cigarettes onto a truck (carrying up to 26 pallets, *i.e.*, up to 32 cases of cigarettes[16]) and arrive in New York between five to seven days later. ¶¶ 58–60.

Further relevant here, each above-identified distributor is not a member of the Yakama Tribe, is not located on the Yakama Reservation, and does not receive any disbursements from the Yakama Tribe. ¶ 56. Nor has any above-identified distributor ever purchased and affixed any New York State tax stamps to any King Mountain packs of cigarettes. *Id.*

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[15] is not located on a New York State qualified Indian reservation, but the County of Chautauqua, New York. ¶ 54.

[16] A "case" of King Mountain brand cigarettes contains 60 cartons; a "carton" of cigarettes contains 10 packages or "packs" of cigarettes; and each "pack" of cigarettes contains 20 cigarettes. ¶¶ 47–49.

b. King Mountain's failure to affix any tax stamps, pay the applicable excise tax, and make the required filings and certifications as required by State law.

Similarly, King Mountain itself did not affix any New York State tax stamps to the packs of cigarettes that it sold and shipped to its distributors located within the State of New York. ¶ 64. Nor did King Mountain prepay any State excise tax on such packs of cigarettes. ¶ 65.

King Mountain furthermore did not file any reports or registrations with the New York State Department of Taxation and Finance ("Tax Department") under the provisions of the Prevent All Cigarette Trafficking Act. ¶ 86. Nor did it certify or file any certifications with the Tax Department, State Attorney General's Office, or any State-licensed stamping agent (pursuant to New York Tax Law § 480-b), that King Mountain was either a participating manufacturer under the 1998 Tobacco Master Settlement Agreement, or was otherwise in full compliance with Public Health Law § 1399-pp(2). ¶ 87. King Mountain also did not submit to the Tax Department a list of cigarette brands that King Mountain sold for consumption within the State, as required by Tax Law § 480-b. ¶ 88. In addition, King Mountain did not certify to the State Office of Fire Prevention and Control that its cigarettes met the performance standards prescribed by the Office, as set forth under Executive Law § 156-c. ¶ 89.

c. King Mountain's sale and delivery of cigarettes to its New York customers.

Instead, King Mountain made the following sales and deliveries of untaxed, unstamped cigarettes to its New York distributors, between June 1, 2010 and December 31, 2014:

King Mt. New York Distributor	Dates of New York sales	State 56.1 Statement ¶	Cases of Cigarettes	Cartons of Cigarettes	Sales Amount ($)
[redacted]	Dec. 17, 2010 – May 1, 2012	¶ 66	[redacted]	[redacted]	[redacted]
[redacted]	Feb. 13, 2012 – Dec. 16, 2014	¶ 67	[redacted]	[redacted]	[redacted]
[redacted]	Aug. 12, 2011	¶ 70	[redacted]	[redacted]	[redacted]

[redacted]	Aug. 12, 2011	¶ 71	[redacted]	[redacted]	[redacted]
[redacted]	June 24, 2010 – May 1, 2012	¶ 72	[redacted]	[redacted]	[redacted]
[redacted]	June 22 & 30, 2011	¶ 73	[redacted]	[redacted]	[redacted]
[redacted]	June 12, 2010 – June 13, 2011	¶ 74	[redacted]	[redacted]	[redacted]
[redacted]	July 14, 2010 – Sept. 12, 2014	¶ 75	[redacted]	[redacted]	[redacted]
[redacted]	June 3, 2011 – Oct. 21, 2011	¶ 76	[redacted]	[redacted]	[redacted]
[redacted]	June 29, 2010	¶ 77	[redacted]	[redacted]	[redacted]

In total, King Mountain sold and delivered approximately [redacted] cartons (or [redacted] packs) of cigarettes sold and delivered to its above-identified New York distributors, between June 1, 2010 and December 31, 2014. ¶¶ 47–49, 78. For these sales, King Mountain received roughly $[redacted]. *Id.* It is believed that King Mountain's cigarette sales and deliveries to at least two New York distributors is continuing today. ¶ 79.

d. King Mountain's cigarettes were likely destined for non-Indians.

The evidence further shows that King Mountain knew or had reason to believe that these cigarettes were destined for non-Native Americans. ¶¶ 80–85. Per King Mountain's sole owner, operator, and president, King Mountain's business plan was to sell cigarettes—not just to Native Americans—but to all persons both on and off the reservation. ¶¶ 34–35, 50(a). Under Wheeler's interpretation of the Yakama Treaty of 1855, tribal members such as Wheeler (and his company King Mountain) could engage in the free trade of tobacco and other products with non-Native Americans. ¶ 50(b). This interpretation "totally" affected how King Mountain conducted its business, and explains why the company did not pay any New York State excise taxes. ¶

50(c).[17] Accordingly, King Mountain did not limit, or consider limiting, who might consume or use its cigarettes. ¶ 85. At most, King Mountain instructed its New York distributors that such cigarettes were to be sold in Indian country within that area. ¶ 84.

The evidence further shows that the quantity of King Mountain's cigarette sales and deliveries to its New York distributors well exceeded the "probable demand" for cigarettes on each New York Indian reservation where such distributors are respectively located. ¶¶ 80–82. The "probable demand" for cigarettes by Indians located on a New York qualified Indian reservation is set forth as follows:

Indian Nation or Tribe	Population (2000 census)	Probable Demand for Packs of Cigarettes (packs per 3-month period)
Cayuga	947	20,100
Oneida	1,473	31,200
Onondaga	2,866	60,600
Seneca	7,967	168,600
Shinnecock	1,915	40,500
St. Regis Mohawk	13,784	291,600

20 N.Y. Codes R. & Regs. § 74.6(e)(1).

A comparison of the probable demand with King Mountain's sales records shows that King Mountain's sale and shipment of cigarettes to companies located on New York Indian reservations well exceed the probable demand for such cigarettes by such reservation members.

Indian Reservation	Probable Demand for Packs of Cigarettes (adjusted to an annual consumption rate unless otherwise stated)	Packs of Cigarettes Sold and Delivered by King Mountain	Percentage (%) over Probable Demand (State 56.1 ¶)
Cayuga	20,100 (3-month period)		¶82(d)

[17] Wheeler has previously explained his interpretation of the Yakama Treaty as follows: "Delbert Wheeler says I decide that I read my treaty, and in my treaty, it states that I'm untaxable, so I'm not going to pay this tax." ¶ 50(d) (YouTube, Chasing The American Dream: Delbert Wheeler (published May 30, 2012), *available* at https://www.youtube.com/watch?v=-aHduZ3IcNo at 20:46–21:00 (last accessed on Jan. 27, 2016).

Oneida	124,800		¶ 82(a) % (2010) % (2011)
Onondaga	242,400		¶ 82(f) % (2010) % (2011) % (2012) % (2013) % (2014)
Seneca	674,400		¶ 82(e) % (2012)[18] % (2013) % (2014)
Shinnecock	162,000		¶ 82(b) %
St. Regis Mohawk	291,600 (3-month period)		¶ 82(c) %

LEGAL STANDARD

Summary judgment is appropriate when, construing the evidence in the light most favorable to the non-moving party, "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Rojas v. Roman Catholic Diocese of Rochester*, 660 F.3d 98, 104 (2d Cir. 2011). Upon such a showing, a non-moving party must set out "specific facts" showing a genuine dispute of material fact. *Wright v. Goord*, 554 F.3d 255, 266 (2d Cir. 2009). Speculation, conjecture, denials, conclusory allegations, and self-serving affidavits are insufficient. *See Hicks v. Baines*, 593 F.3d 159, 166 (2d Cir. 2010); *BellSouth Telecomms. v. W.R. Grace & Co.*, 77 F.3d 603, 615 (2d Cir. 1996).

[18] This percentage figure was calculated using the 2012 figures of cigarette sales and deliveries that King Mountain made to companies located on the Seneca Reservation— . ¶¶ 66–70.

ARGUMENT

I. The State is entitled to a judgment as a matter of law on its Contraband Cigarette Trafficking Act claim.

Under the Contraband Cigarette Trafficking Act, it is unlawful for any person knowingly to ship, transport, sell, or distribute "contraband cigarettes." 18 U.S.C. § 2342(a); *City of New York v. FedEx Ground Package Sys.*, 91 F. Supp. 3d 512, 519 (S.D.N.Y. 2015). "Contraband cigarettes" are defined as follows:

> [A] quantity in excess of 10,000 cigarettes which bear no evidence of the payment of applicable State … cigarette taxes in the State … where such cigarettes are found, if the State … requires a stamp, impression, or other indication to be placed on the packages … of cigarettes to evidence of cigarette taxes, and which are in the possession of any person other than—(A) a … manufacturer of tobacco products … (C) a person … who is licensed or otherwise authorized by the State … to account for and pay cigarette taxes imposed by such State … or (D) an … agent of the United States or a State ….

18 U.S.C. § 2341(2). Together, these provisions establish four elements: "that a party (1) knowingly ship, transport, receive, possess, sell, distribute or purchase (2) more than 10,000 cigarettes (3) that do not bear tax stamps, (4) under circumstances where state … cigarette tax law requires the cigarettes to bear such stamps." *FedEx*, 91 F. Supp. 3d at 520. To show a defendant's knowledge, all that a defendant is required to "know" is "the physical nature of what he possessed, *i.e.*, cigarettes without stamps, not that the actions engaged in violate the law." *City of New York v. Milhelm Attea & Bros.*, 2012 U.S. Dist. LEXIS 116533, *73 (E.D.N.Y. Aug. 17, 2012) (internal quotation marks and citation omitted; citing cases).

a. King Mountain knowingly sold and shipped over [REDACTED] packs of unstamped cigarettes into the State of New York.

Each element is met here. In New York, each pack of cigarettes entering the State must bear a tax stamp. *Oneida*, 645 F.3d at 160 n.8 ("Whether taxable or tax-free, all cigarettes must

bear a tax stamp.") (citing N.Y. Tax Law § 471(2)). Each pack of King Mountain cigarettes sold and delivered into the State lacked an affixed New York State tax stamp. ¶ 64. King Mountain furthermore did not prepay any such tax on such cigarettes. ¶ 65. The evidence also shows that King Mountain sold and delivered at least [redacted] packs of cigarettes into the State (¶ 78, referring to ¶¶ 66–77)—an amount well over the Act's "in excess of 10,000 cigarettes" [*i.e.*, 50 cartons or 500 packs] triggering threshold. *FedEx*, 91 F. Supp. 3d at 520–21 (noting that sales and deliveries under the Act are to be aggregated; and collecting cases).

The evidence further shows that King Mountain "knowingly" sold and delivered these unstamped cigarettes into the State. Here, King Mountain knew that it possessed unstamped cigarettes and that such cigarettes were destined for New York. ¶¶ 50(a)–(d), 64–65. The evidence further shows that King Mountain took no steps to inquire into whether its cigarettes were actually destined for resale to reservation tribal members. ¶¶ 84–85. King Mountain also took no steps to control or restrict the enormous volume of unstamped cigarettes being sold to these reservation retailers. *Ibid.* As a result, King Mountain's actions are "materially indistinguishable from selling bulk quantities of unstamped cigarettes directly to members of the public." *Milhelm Attea & Bros.*, 2012 U.S. Dist. LEXIS 116533, at *65 (holding that the defendants' funneling of cigarettes through tribal reservation retailers did not insulate them from liability, and that the sheer volume of sales refuted any belief that such cigarettes might be later resold to tribal members).

In short, no genuine dispute of material fact exists. This is especially true where King Mountain's asserted arguments to-date are unsupported as a matter of law.

b. King Mountain's arguments to the contrary do not create a genuine dispute.

As detailed below, King Mountain's Yakama Treaty argument is contradicted by the express language of the treaty, and its misconstruction of the Act's provisions is undercut by a

close reading of the Act's language, legislative history, and Congress's expressed purpose in enacting this legislation.

1. The Yakama Treaty of 1855 does not authorize the Yakama Tribe to engage in the off-reservation "free trade" of tobacco products.

To begin, King Mountain's reliance on the Yakama Treaty of 1855 is unavailing because the Treaty lacks any off-reservation right to engage in the "free trade" of tobacco products. *King Mt. Tobacco Co. v. McKenna*, 768 F.3d 989, 997 (9th Cir. 2014). This treaty interpretation was conclusively determined in another case actively litigated by King Mountain and the Yakama Tribe. There, King Mountain and the Tribe argued that the Treaty was an "express federal law" that preempted King Mountain's compliance with a Washington state law regulating the off-reservation sale of cigarettes. *Id.* at 993.[19] Upon a close reading of the Treaty's language, however, the Ninth Circuit Court of Appeals affirmed the district court's decision holding that "there is no right to trade in the Yakama Treaty." *Id.* at 998. Accordingly, King Mountain's off-reservation sales of cigarettes were subject to the state's escrow law, a non-discriminatory state statute otherwise applicable to all citizens selling cigarettes within the State of Washington. Thus, given the Ninth Circuit's conclusive holding on this question of law, King Mountain's treaty argument is meritless.[20]

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[19] King Mountain and the Yakama Tribe sought to fit within the "express federal law" exception set out in *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 non-discriminatory state law otherwise applicable to all citizens of the State."). As previously recognized by the Supreme Court in *Colville*, 447 U.S. at 157, a state's cigarette excise tax is such a non-discriminatory law.

[20] Notably, even if the Yakama Treaty contained such a provision (which it does not), King Mountain lacks the necessary standing to enforce the Treaty's provisions—only the Yakama Tribe may assert this treaty defense. For example, in *Smith v. Spitzer*, 28 A.D.3d 1047, 1048 (3d Dep't 2006), the Third Department rejected a tribal member's claim of protection under the "free trade" provision of the 1664 Treaty of Fort Albany, where the provision was reserved to the Tribe, and not the tribe's individual members. *See id.* Thus, because the tribal member had not joined or otherwise sued on behalf of the Tribe, the tribal member lacked the necessary standing to otherwise invoke the Treaty's provisions. *Id.* The same situation exists here. The Yakama Treaty reserves all rights to the tribe and not its individual members. *See* Yakama Treaty, 12 Stat. 951 (June 9, 1855, ratified Mar. 8, 1859). And because King Mountain has not joined the Yakama Tribe or otherwise been authorized to represent the Tribe's

2. The Act applies to manufacturers that sell, distribute, ship, or transport contraband cigarettes.

Next, King Mountain erroneously contends that the Act exempts cigarette manufacturers from liability. *See*, *e.g.*, King Mt. Ltr. (Oct. 27, 2015; ECF No. 173). But again, this is wrong.

Although the Act permits a federally licensed cigarette manufacturer to "possess" unstamped cigarettes (18 U.S.C. § 2341(2)(A)), the Act also prohibits such manufacturers from selling, shipping, transporting or otherwise distributing such unstamped cigarettes (*id.* § 2342(a)). As explained by Chief Judge Amon when confronted with a similar argument:

> Although it is true that, under the [Act], a licensed stamping agent may possess unstamped cigarettes, the terms of [the exemption] apply only to possession, not the other acts prohibited by the [Act] and relevant to this case, including shipment, transport, sale, or distribution. This interpretation makes common sense. … Indeed, it would be almost nonsensical for the [Act] to create a broad safe-harbor for state-licensed stamping agents to distribute large quantities of untaxed cigarettes in violation of state law.

Milhelm Attea & Bros., 2012 U.S. Dist. LEXIS 116533, at *67–68.

King Mountain's argument here is similarly "nonsensical". The Act was not intended to create a broad safe-harbor for cigarette manufacturers to sell and distribute enormous quantities of untaxed cigarettes in violation of a state's laws. Rather, the Act was intended to assist each state's efforts to enforce their tax laws and fight the trafficking of contraband cigarettes. *See United States v. Morrison*, 686 F.3d 94, 106 (2d Cir. 2012) ("Congress designed the [Act] to provide federal support to the states in enforcing their tax laws."); H.R. Rep. No. 95–1778, at 13 (1978) (Conf. Rep.), *as reprinted in* 1978 U.S.C.C.A.N. 5535, 5541 ("The proposed legislation is designed to supplement current efforts by the States to combat cigarette bootlegging").[21] Indeed,

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interests (*e.g.*, through this litigation or King Mountain's New York cigarette sales), King Mountain lacks the necessary standing to invoke whatever treaty right may exist. Thus, under any scenario, this argument fails.

[21] A statute's scope and meaning are most authoritatively explained through "a Conference Report acted upon by both Houses and therefore unequivocally representing the will of both Houses as the joint legislative body."

Congress even authorized such cigarette manufacturers to bring suit under the Act, presumably to help further assist the states' enforcement of such tax laws. *See* 18 U.S.C. § 2346(b)(1). Thus, because applying King Mountain's interpretation would only serve to frustrate Congress's expressed intent to assist the states, King Mountain's argument on this point may be discarded.[22]

3. King Mountain's "stamping requirement" argument has been previously rejected, and may be rejected again here.

This Court may also reject King Mountain's erroneous argument that "at the time of King Mountain's sales" New York law did not require packs of cigarettes "to bear tax stamps" (King Mt. Oct. 27 Ltr., at 2; ECF No. 173). King Mountain is presumably referring to the time period between September 1, 2010 and June 21, 2011 when certain court decisions stayed the enforcement of amended Tax Law § 471. *See Milhelm Attea & Bros.*, 2012 U.S. Dist. LEXIS 116533, at *73–74. In essence, King Mountain seems to argue that the prior version of § 471 (which remained in effect during the noted time period) lacked a stamping requirement, and that as a result, King Mountain is absolved from any liability under the federal Act.

But this is incorrect. Per *Milhelm Attea*, "the prior, existing version of § 471 … was sufficient to impose a stamping requirement[.]" 2012 U.S. Dist. LEXIS 116533, *75. As Chief Judge Amon explained, "the absence of a statutory 'collection mechanism' does not affect the applicability of the general tax imposed by § 471. Accordingly, a stay of enforcement of the

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Comm'r v. Acker, 361 U.S. 87, 94 (1959) (Frankfurter, J., dissenting); *Bay View v. United States*, 278 F.3d 1259, 1264 (Fed. Cir. 2001) ("a joint statement of a conference committee more often reflects the joint will of each house of Congress"). *See also* H.R. Rep. No. 95–1778, at 7–8 (1978) (Conf. Rep.), *as reprinted in* 1978 U.S.C.C.A.N. 5535–36 (noting that "there is widespread traffic[king] in cigarettes moving in or otherwise affecting interstate ... commerce"; "the States are not adequately able to stop the movement into their States and the sale of such cigarettes in violation of their tax laws"; "a Federal role in the fight against cigarette smuggling will assist the States in their law enforcement efforts"; and the Act's purpose is "to help provide law enforcement assistance to individual States").

[22] *See SEC v. Joiner*, 320 U.S. 344, 350–51 (1943) ("courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy"); *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975) (noting further that a court "must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy").

amended collection mechanism could not remove this tax liability." *Id*. at *75–76. As a result, because the prior version of § 471 included "a tax on reservation sales to non-Native Americans that was sufficient to trigger liability under the [Contraband Cigarette Trafficking Act]", the court appropriately rejected the defendants' contention that the stays of enforcement insulated their conduct from liability. *Id*. at *76.

4. King Mountain lacks standing to invoke the "Indian in Indian country" tribal sovereignty defense.

Finally, this Court may also discard King Mountain's "Indian in Indian country" argument. *See* King Mt. Oct. 27 Ltr. (ECF No. 173), at 2 (relying on 18 U.S.C. § 2346(b)(1), which provides the following: "No civil action may be commenced … against an Indian tribe or an Indian in Indian country"). This argument improperly ignores the legislative history surrounding the exemption, as well as applicable surrounding text and purposes of the Act.

As detailed below, Congress simply intended this exemption to protect only "tribal sovereignty" and the limited interests implicated under the doctrine. And at no point did Congress ever express its intent to either modify or expand the standing requirements for invoking this defense. To the contrary, Congress mandated that such standing requirements remain the same. *See* 18 U.S.C. §2346(b)(2) ("Nothing in this chapter shall be deemed to abrogate or constitute a waiver of any sovereign immunity of … an Indian tribe against any unconsented lawsuit under this chapter, or otherwise to restrict, expand, or modify any sovereign immunity of … an Indian tribe.").

Thus, even assuming King Mountain is considered an enrolled member of the Yakama Tribe (which it is not), King Mountain would still lack the necessary standing to invoke this tribal sovereignty defense. *See*, *e.g.*, *Puyallup Tribe v. Department of Game*, 433 U.S. 165, 171–72 (1977) (holding that "The doctrine of sovereign immunity … does not immunize the

individual members of the Tribe").[23] Similarly, even if King Mountain had taken the appropriate steps to join the Yakama Tribe here, there would be no valid sovereign interests for the Tribe to protect. As the Supreme Court has explained, for tribal sovereign immunity to apply, such cigarette transactions would need to be confined to the Yakama Tribe's reservation and involve King Mountain's sale of cigarettes to other enrolled members of the Yakama Tribe. *See Moe*, 425 U.S. at 476 (relying on the "Indian sovereignty doctrine" to bar a state's taxation of cigarettes sold on a tribal reservation between enrolled members of the same tribe); *Potawatomi*, 498 U.S. at 512 (holding that the "tribal sovereign immunity" doctrine bars state efforts to tax cigarette transactions engaged by Potawatomis while on the Potawatomi reservation). But because King Mountain's activities here (*i.e.*, its sale and delivery of over [redacted] packs of untaxed cigarettes into the State of New York) were not confined to the Yakama reservation (much less sold to other Yakama tribal members), there are no Yakama sovereign interests at issue that would permit the application of this tribal sovereignty defense. As further explained by the Court in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148–49 (1973), "Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." *See also Colville*, 447 U.S. at 157 (holding that a state's cigarette excise tax is a non-discriminatory state law).

Thus, under any set of facts, King Mountain's "Indian in Indian country" argument fails. King Mountain lacks the necessary standing to invoke the exemption, and its activities are well beyond the Yakama Tribe's reservation. In short, King Mountain and its activities fall well outside of Congress' intended scope of the exemption.

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[23] *See also City of New York v. Golden Feather Smoke Shop, Inc.*, 2009 U.S. Dist. LEXIS 20953, *22 (E.D.N.Y. Mar. 16, 2009) (*Golden Feather I*) (noting that "[i]t is 'well-settled that tribal sovereign immunity does not extend to individual members of a tribe'") (collecting cases).

i. The legislative history conclusively confirms that Congress intended this defense to protect tribal sovereignty.

As originally enacted in 1978, the Contraband Cigarette Trafficking Act did not contain King Mountain's relied-on exemption (18 U.S.C. § 2346(b)(1)), much less provide a cause of action for the State.[24] It wasn't until 2005 that Congress first authorized state and local governments (and licensed tobacco products manufacturers) to bring suit to prevent and restrain violations of the Act.[25] That statutory provision—*i.e.*, subsection 2346(b)(1), the same one King Mountain now relies on—was originally introduced as follows:

> A State, through its attorney general, a local government, through its chief law enforcement officer (or a designee thereof), or any person who holds a permit under chapter 52 of the Internal Revenue Code of 1986, may bring an action in the United States district courts to prevent and restrain violations of this chapter by any person (or by any person controlling such person), except that any person who holds a permit under chapter 52 of the Internal Revenue Code of 1986 may not bring such an action against a State or local government.

151 Cong. Rec. H6273, H6283 (July 21, 2005). As shown above, no reference to the "Indian tribe or Indian in Indian country" exemption exists in the original bill. *See id.*

In response to a "Dear Colleague" letter, however, the bill's sponsor Representative Howard Coble proposed modifying this language to address concerns that this provision might infringe on principles of "tribal sovereignty."[26] As explained by Representative Coble:

> A "Dear Colleague" went out today, and I will share it with my colleagues. It says: "The Coble amendment attacks tribal sovereignty. The Coble amendment reverses two statutes of

[24] *See* Pub. L. No. 95-575, 92 Stat. 2463 (1978) (authorizing only the U.S. Treasury Secretary to bring a cause of action); *see also* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, 2277 (2002) (substituting the U.S. Attorney General for the Treasure Secretary).

[25] *See* Providing for Consideration of H.R. 3199, USA Patriot And Terrorism Prevention Reauthorization Act of 2005, H. R. Rep. No. 109–178 (2005) (Conf. Rep.), *available at* https://www.congress.gov/congressional-report/109th-congress/house-report/178.

[26] *See* Congress.gov, H.Amdt. 500 to H.R. 3199 (109th Congress, 2005 – 2006), *available* at https://www.congress.gov/amendment/109th-congress/house-amendment/500.

> Federal Indian policy. Oppose the Coble amendment."
>
> Well, oftentimes in this body, Mr. Chairman, we engage in semantical wars, and I disagree with the choice of these words; but in any event, we have resolved the differences.

151 Cong. Rec. at H6284.

In response to these tribal sovereignty concerns, Representative Coble proposed modifying the subsection's language to include the words King Mountain now relies on. *See* 151 Cong. Rec. at H6283 ("In the matter proposed to be inserted as subsection (b) of section 2346 of title 18, United States Code, by subsection (f) after the period at the end of paragraph (1) insert "No civil action may be commenced under this paragraph against an Indian tribe or an Indian in Indian country (as defined in section 1151).").

With no objection to Representative Coble's proposed modification, other legislators then rose to speak in support of the bill and explain how "tribal governments and tribal sovereignty" would be protected by this new language:

- "I would also say that as a result of the modification that the gentleman from North Carolina has proposed, there is no longer a question of tribal sovereignty. That has been taken care of in the modification. So anybody who has read the 'Dear Colleague' letter that was sent out earlier today, that is now out of date, and it is about as accurate as last year's calendar." Rep. Sensenbrenner (*id*. at H6284);

- "And as the gentleman from Wisconsin (Mr. Sensenbrenner) has said, all the modifications make sure that there is no impact on tribal sovereignty. I urge my colleagues to support this amendment." Rep. Cantor (*ibid.*);

- "Mr. Chairman, I am glad that Mr. Coble offered language to mitigate concerns over his amendment's impact on tribal sovereignty. As initially drafted, the amendment by Mr. Coble could have had the unintended effect of targeting tribal governments who are legitimately involved in the retailing of tobacco products. With the help of Mr. Cole and other Members, Mr. Coble has modified his amendment and has incorporated language that will go a long way to protecting tribal governments and tribal sovereignty." Rep. Conyers (*ibid.*);

- "Indian tribal governments that are legally involved in the retailing of tobacco products are clearly not the types of entities we are targeting with this

> provision. As initially drafted, the Coble Amendment would have had the unintended effect of targeting tribal governments who are legitimately involved in the retailing of tobacco products. With the great help of the gentlemen from Oklahoma (Mr. Cole) I understand an amendment has been incorporated that will go a long way to protecting tribal governments and tribal sovereignty." Rep. Kildee (*id*. at H6284–85).

Following these supporting remarks that constituted the entire debate of the exemption, Representative Coble's modification to the bill was voted on, approved, and enacted into law. *See* USA Patriot Improvement and Reauthorization Act of 2005, Public Law 109–177, 120 Stat. at 221–24, Sec. 121 (Mar. 9, 2006).

Given this legislative history then, the "Indian in Indian country" exemption language is conclusively understood as protecting only tribal sovereignty. The sponsor and legislators' consensus views each support this interpretation, as does the fact that the exemption's entire legislative history was contained in the above-referenced floor debate.[27] Indeed, any interpretation of this exemption that would otherwise exclude this relevant legislative history would be "in error." *Train v. Colorado Public Interest Research Group*, 426 U.S. 1, 10 (1976).[28]

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[27] *See Ne. Bancorp v. Bd. of Governors of the Fed. Reserve Sys.*, 472 U.S. 159, 169–70 (1985) (noting that where an amendment is added to the floor of a legislative chamber and its "entire legislative history is confined to the [that chamber's] debate … the comments of individual legislators carry substantial weight, especially when they reflect a consensus as to the meaning and objectives of the proposed legislation"); *Rice v. Rehner*, 463 U.S. 713, 728 (1983) (noting that sponsor's interpretation of the bill "is an 'authoritative guide to the statute's construction'"); *Ex parte Kumezo Kawato*, 317 U.S. 69, 77 (1942) (in interpreting the scope of a law's provision, finding the bill sponsor's statements made on the floor of the House to be "conclusive"); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394–95 (1951) ("It is the sponsors that we look to when the meaning of the statutory words is in doubt.").

[28] As at least one jurist has cautioned before going on to consider a statute's legislative history, "[t]here is no surer way to misread any document than to read it literally[.]" *Guiseppi v. Walling*, 144 F.2d 608, 624 (1944) (Learned Hand, J., concurring). *See also Fed. Commc'ns Com. v. Cohn*, 154 F. Supp. 899, 910 (S.D.N.Y. 1957) (noting that the plain meaning rule "is not to be used to thwart or distort the intent of Congress by excluding from consideration enlightening material from the legislative files."); *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543–44 (1940) ("[w]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'").

ii. Congress did not expand or modify the scope or standing requirements for invoking the tribal sovereignty defense.

In any event, other provisions within the statute further confirm that the "Indian in Indian country" exemption (a) concerns tribal sovereignty (or tribal sovereign immunity[29]), and (b) was not intended by Congress to enlarge or modify the scope of this principle to encompass King Mountain's off-reservation activities in New York.[30]

As noted earlier, subsection (b)(1) authorizes a State to bring an action "to prevent and restrain violations of [the Act] by any person (or by any person controlling such person)[.]" 18 U.S.C. §2346(b)(1). That same provision further bars a civil action against "an Indian tribe or an Indian in Indian country[.]" *Id.* The following provision—subsection (b)(2)—deals with the remedies that a State may obtain in any such action brought under paragraph (1) (*i.e.*, 18 U.S.C. § 2346(b)(1)). Specifically, a State may obtain "any appropriate relief … from any person (or any person controlling such person)," but that, "[n]othing in this chapter shall be deemed to abrogate or constitute a waiver of any sovereign immunity of … an Indian tribe against any unconsented lawsuit under this chapter [18 U.S.C. § 2341 *et seq*.], or otherwise to restrict, expand, or modify any sovereign immunity of … an Indian tribe." *Id.* § 2346(b)(2).

In sum then, the belt-and-suspenders approach of subsections (b)(1) and (b)(2) confirms that the "Indian in Indian country" exemption to liability under (b)(1) is the equivalent to the tribal sovereign immunity exemption to liability referenced under (b)(2). This understanding furthermore makes sense in light of the Supreme Court's decisions holding that this defense bars

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[29] *See Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014) (noting that "the core aspects of sovereignty" that a tribe possesses, subject to Congressional action, is the "common-law immunity from suit traditionally enjoyed by sovereign powers").

[30] As this Court is well aware, statutory construction "is a holistic endeavor." *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988). Thus, a provision that "may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme," for example, "because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law[.]" *Id.* That is the case here.

a state from attempting to tax a tribe's on-reservation sales of cigarettes made between enrolled members of the tribe. *See*, *e.g.*, *Moe*, 425 U.S. at 476; *Potawatomi*, 498 U.S. at 512. This understanding also makes sense when considering the consequences of adopting King Mountain's reading—*i.e.*, that the exemption from liability under the Act should be extended to ***any Indian*** selling or purchasing unstamped cigarettes in ***any Indian country***.

Simply put, if King Mountain's reading were adopted, the object and purposes of the Act would be defeated. Rather than assisting the states in enforcing their tax laws,[31] King Mountain's reading would create a new loophole by which other non-New York Native Americans and tribes would flood New York's reservations with enormous quantities of unstamped cigarettes. King Mountain's reading would further represent a dramatic enlargement and modification of the standing requirements for a party to assert the tribal sovereign immunity defense, by allowing any "Indian" (much less any enrolled member of a tribe) to assert the defense, devoid of any consideration of the tribal sovereign interests being protected. Congress did not intend such an outcome, and such a reading should be rejected here.[32] Indeed, subsection (b)(2) expressly states that nothing in the Act should be deemed to "expand" or "modify" a tribe's sovereign immunity defense. 18 U.S.C. § 2346(b)(2). Thus, because King Mountain's reading would improperly "expand" the number of persons who could assert a tribe's sovereign immunity defense, such a reading should be rejected. "Tribal freedom from suit is an attribute of

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[31] *See Morrison*, 686 F.3d at 106 ("Congress designed the [Act] to provide federal support to the states in enforcing their tax laws."); H.R. Rept. No. 95–1778, at 13 (1978) (Conf. Rep.), *as reprinted in* 1978 U.S.C.C.A.N. at 5541 ("The proposed legislation is designed to supplement current efforts by the States to combat cigarette bootlegging").

[32] *See* 18 U.S.C. § 2346(b)(2) ("[n]othing in this chapter shall be deemed to … expand, or modify any sovereign immunity of … an Indian tribe"); *Colville*, 447 U.S. at 156–57 (noting that a tribe's sovereign interest "is strongest when the revenues are derived from the value generated on the reservation by activities involving the Tribe and when the taxpayer is the recipient of tribal services"); *Rice v. Rehner*, 463 U.S. 713, 734 (1983) (noting that Congress did not intend "to make tribal members 'super citizens' who could trade in a traditionally regulated substance free from all but self-imposed regulations"); *see also Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 466 (1995) (declining to read the Tribe's treaty "as conferring super-sovereign authority to interfere with another jurisdiction's sovereign right to tax").

Indian [tribal] sovereignty and may not and should not be extended to cover private entities operating for private gain based solely on the ethnicity of their owners." *State ex rel. Edmondson v. Native Wholesale Supply*, 237 P.3d 199, 210 (Okla. 2010).

iii. King Mountain lacks the necessary standing to invoke this tribal sovereignty defense.

Against this relevant backdrop then, it becomes clear that the Act's "Indian in Indian country" exemption to liability cannot be read to condone King Mountain's large scale trafficking of unstamped, untaxed cigarettes in New York State. As noted above, Congress intended this exemption to protect only tribal governments, tribal sovereignty and the "core aspect" of this doctrine—tribal sovereign immunity. Thus, King Mountain cannot assert this defense, much less fall within it.[33]

To begin, even if King Mountain were an enrolled Yakama tribal member (which it is not, ¶¶ 90–94), King Mountain still would be unable to assert the defense of tribal sovereign immunity. *See*, *e.g.*, *Puyallup*, 433 U.S. at 172–73 (holding that "[t]he doctrine of sovereign immunity … does not apply to individual members of the Tribe"). Likewise, even if King Mountain had joined the Yakama Tribe to assert this defense, there would be no valid sovereign interest for the Yakama Tribe to protect. *See Colville*, 447 U.S. at 156–57 (noting that a tribe's sovereign interest "is strongest when the revenues are derived from the value generated on the reservation by activities involving the Tribe and when the taxpayer is the recipient of tribal services"). Because King Mountain's revenues are generated outside the Yakama Tribe's reservation—*i.e.*, through the sale of King Mountain's cigarettes in New York, to persons who are not members of the Yakama Tribe—there is no valid Yakama sovereign interest being

[33] The party asserting tribal sovereign immunity bears the burden of establishing this defense. *Golden Feather I*, 2009 U.S. Dist. LEXIS 20953, at *13.

implicated. *Cf.*, *e.g.*, *Moe*, 425 U.S. at 476 (relying on the "Indian sovereignty doctrine" to bar a state's taxation of cigarettes sold on a tribal reservation between enrolled members of the same tribe); *Potawatomi*, 498 U.S. at 512 (holding that "tribal sovereign immunity" bars state efforts to tax cigarette transactions engaged by Potawatomis while on the Potawatomi reservation).

Thus, under any set of facts, King Mountain does not fall within the "Indian in Indian country" exemption to liability under the Act.[34] And, an Order granting the State's motion for summary judgment on this claim is appropriate here.

II. The State is entitled to a judgment as a matter of law on its Prevent All Cigarette Trafficking Act claim.

The State is also entitled to a judgment as a matter of law concerning King Mountain's violation of the Prevent All Cigarette Trafficking Act's ("PACT Act") filing requirements. King Mountain is subject to the Act's filing requirements, and yet, has not filed the required memoranda, invoices, or registration statements.

a. King Mountain is subject to the Act's filing requirements.

Pursuant to the PACT Act, "[a]ny person who sells, transfers, or ships for profit cigarettes … in interstate commerce, whereby such cigarettes … are shipped into a State … taxing the sale or use of cigarettes… for such sale, transfer, or shipment, shall" make certain filings with the tax administrator of the State, *i.e.*, the Tax Department. 15 U.S.C. § 376(a).[35]

[34] Other applications of the tribal sovereign immunity doctrine involve, for example, an "arm" of the tribe or tribal government officials. *Golden Feather I*, 2009 U.S. Dist. LEXIS 20953, at *15–16, *23 (setting forth test and numerous factors to be considered). Here, however, King Mountain has declined to assert that it falls under any such applications of the doctrine. In any event, any attempt by King Mountain to do would fail where King Mountain has already admitted that it is not an "arm" of the Yakama Tribe. ¶¶ 95–105.

[35] More specifically, persons subject to the Act must (1) first file with the U.S. Attorney General and New York State Department of Taxation and Finance ("Tax Department") a statement containing certain contact, address, and website information for such person; and (2) file with the Tax Department "a memorandum or copy of the invoice covering each and every shipment of cigarettes … made during the previous calendar month into such State," including the name and address of each recipient of cigarettes, the brand and quantity of cigarettes, and the name and address of the person delivering such cigarettes. 15 U.S.C. § 376(a)(1)(2).

Here, King Mountain is subject to the Act's filing requirements. As noted above, King Mountain is a for-profit corporation that manufactures and sells King Mountain brand cigarettes. ¶ 28; *see also* 15 U.S.C. § 375(10) (defining a "person," *inter alia*, as an "individual, corporation, [and] company"). These cigarettes are intended for sale in and throughout the United States, including the State of New York. ¶ 29. Between June 2010 and December 2014, King Mountain sold and delivered over [REDACTED] packs of cigarettes from the Yakama Indian Reservation (located in Washington State) to the certain persons largely located on Indian reservations within the State of New York. ¶¶ 66–77.[36] For these cigarette sales and deliveries into the State of New York, King Mountain generated over $[REDACTED] in revenue. ¶¶ 66–78. Finally, as noted earlier, New York is a State that taxes the sale or use of cigarettes. *See* N.Y. Tax Law § 471. Given these facts, King Mountain is subject to the Act's filing requirements.

b. King Mountain has not filed the requisite memoranda, invoices or registration statements in connection with its cigarette sales and deliveries.

King Mountain, however, has not filed any such memoranda, invoices, or registration statements with the Tax Department. ¶ 86. This is because King Mountain contends that its sale and delivery of cigarettes into the State of New York does not constitute "interstate commerce" within the meaning of the Act.[37]

c. King arguments to the contrary lack merit.

But King Mountain's "interstate commerce" argument fails for at least two reasons: First, King Mountain's reading depends on an incorrect assumption—*i.e.*, that the term "Indian

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[36] [REDACTED] is not located on a New York qualified Indian reservation. ¶ 54(a)–(b).

[37] More specifically, King Mountain asserts that "[b]ecause King Mountain's sales of cigarettes from Indian country located within the boundaries of one state (Washington) to Indian country located within the boundaries of another state (New York) are excluded from the definition of interstate commerce … the PACT Act does not apply to King Mountain's sales of cigarettes to Indian country within the boundaries of New York." King Mt. Ltr., Oct. 27, 2015, at 2 (ECF No. 173).

country" is not encompassed by the term "State." And second, because King Mountain's interpretation would defeat—rather than carry out—the Act's objective and purpose.

1. An Indian reservation is ordinarily considered part of the State.

Ordinarily, "an Indian reservation is considered part of the territory of the State." *Nevada v. Hicks*, 533 U.S. 353, 361–62 (2001). As a result, the courts have applied the common sense understanding that all federal Indian country necessarily resides within, and is considered a part of, a state's territory.[38] Indeed, nothing in the Act suggests that Congress intended to upset this ordinary understanding, much less immunize or promote King Mountain's large-scale trafficking of unstamped cigarettes.[39] Accordingly, when applying this ordinary understanding here, it becomes clear that King Mountain's sale and delivery of cigarettes from the Yakama Indian reservation to certain persons and companies residing on New York Indian reservations is encompassed within the Act's definition of "interstate commerce." 15 U.S.C. § 375(9)(A) (defining "interstate commerce," *inter alia*, as "commerce between a State and any place outside the State"). And that as a result, King Mountain is subject to the Act's filing requirements.

2. King Mountain's interpretation would frustrate Congress' purposes.

Accepting King Mountain's argument would furthermore only serve to frustrate Congress' objective and purpose in enacting this legislation; accordingly, such an interpretation

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[38] *See*, *e.g.*, *State ex rel. Edmondson v. Native Wholesale Supply*, 237 P.3d 199, 208 (Okla. 2010) ("While the entity with which [defendant cigarette distributor] directly deals may operate on tribal land, that tribal land is not located in some parallel universe. It is geographically within the State of Oklahoma."); *Chemehuevi Indian Tribe v. California Bd. Of Equalization*, 800 F.2d 1446, 1450 (9th Cir. 1986) ("The attributes of sovereignty possessed by [the] Tribe do not negate the fact that [its] Reservation is a part of the State of California.").

[39] As explained by Congress, nothing in the Act is to be "construed to amend, modify, or otherwise affect … (2) any State laws that authorize or otherwise pertain to … the collection of State … taxes on cigarettes … sold in Indian country; (3) any limitations under Federal or State law, including Federal common law … on State … tax and regulatory authority with respect to the sale, use, or distribution of cigarettes … by or to Indian tribes, tribal members, tribal enterprises, or in Indian country; (4) any Federal law, including Federal common law … regarding State jurisdiction … over any tribe, tribal members, tribal enterprises, tribal reservations, or other lands held by the United States in trust for one or more Indian tribes; or (5) any State or local government authority to bring enforcement actions against persons located in Indian country." Prevent All Cigarette Trafficking Act of 2009, Pub. L. No. 111–154, 124 Stat. 1087, 1109–10, Sec. 5(a) (enacted Mar. 31, 2010).

must be rejected.[40] Here, the Act's general purpose is to "(1) require … remote sellers of cigarettes … to comply with the same laws that apply to law-abiding tobacco retailers; (2) create strong disincentives to illegal smuggling of tobacco products; (3) provide government enforcement officials with more effective enforcement tools to combat tobacco smuggling; (4) make it more difficult for cigarette … traffickers to engage in and profit from their illegal activities; [and] (5) increase collections of Federal, State, and local excise taxes on cigarettes[.]" Prevent All Cigarette Trafficking Act of 2009, Pub. L. No. 111–154, 124 Stat. 1087, 1088, Sec. 1(c) (Purposes) (Mar. 31, 2010).[41] In other words, Congress enacted this legislation to assist states like New York enforce their tax laws against remote sellers of cigarettes.

If King Mountain's reading of "interstate commerce" were applied, however, the purpose and object of the statute would be defeated. Remote sellers of cigarettes on innumerable Indian reservations outside the State would inundate New York's Indian reservations with millions of untaxed cigarettes, thereby undermining New York's efforts to protect the public health and the public fisc. Given that this outcome is contrary to Congress' expressed purpose in enacting the statute, this Court should reject King Mountain's proposed reading. Certainly, Congress and the Supreme Court have declined to confer "super-sovereign" status on tribal members before in the

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[40] *See Joiner*, 320 U.S. at 350–51 ("courts will construe the details of an act in conformity with its dominating general purpose … so as to carry out in particular cases the generally expressed legislative policy"); *Philbrook*, 421 U.S. at 713 (noting that a court "must … look to the provisions of the whole law, and to its object and policy.").

[41] These expressed purposes of the Act were intended to address certain findings made by Congress concerning the illegal sale and delivery of untaxed cigarettes. For example, Congress specifically found that "(1) the sale of illegal cigarettes … significantly reduces Federal, State, and local government revenues … (4) the sale of illegal cigarettes … through mail, fax, or phone orders, makes it cheaper and easier for children to obtain tobacco products; (5) the majority of … remote sales of cigarettes … are being made … without the payment of applicable taxes, and without complying with the nominal registration and reporting requirements in existing Federal law; (6) unfair competition from illegal sales of cigarettes … is taking billions of dollars of sales away from law-abiding retailers throughout the United States; (7) with rising State and local tobacco tax rates, the incentives for the illegal sale of cigarettes … have increased; … (10) the intrastate sale of illegal cigarettes … over the Internet has a substantial effect on interstate commerce." Prevent All Cigarette Trafficking Act of 2009, Pub. L. No. 111–154, 124 Stat. 1087, 1087–88, Sec. 1(b) (Mar. 31, 2010).

past[42]—this Court should do the same here. In sum, no genuine dispute of material fact exists here. King Mountain is subject to the Act, but has failed to make the required filings.

III. The State is entitled to a judgment as a matter of law on its remaining State law claims.

The State's complaint further alleges King Mountain's violation of three state law causes of action: (1) violation of Tax Law §§ 471 and 471-e (failure to pay cigarette excise tax, and failure to affix tax stamp); (2) violation of Tax Law § 480-b (failure to certify compliance with either the 1998 Tobacco Master Settlement Agreement, or New York's complementary legislation); and (3) violation of Executive Law § 156-c (failure to certify that the cigarettes sold in New York are "fire-safe" cigarettes that comply with the State's identified performance standards). As detailed below, no genuine issue material fact exists and summary judgment is appropriately granted in favor of the State on such claims.

a. King Mountain's failure to affix a tax stamp on its packs of cigarettes, or otherwise pay such applicable tax, violates Tax Law §§ 471 and 471-e.

Per Tax Law § 471, a tax is imposed "on all cigarettes sold on an Indian reservation to non-members of the Indian nation or tribe and to non-Indians[.]" N.Y. Tax Law § 471(1). The payment of this tax ($4.35) is evidenced by tax stamp affixed to each pack of cigarettes. *Id.* "[A]ll cigarettes within the state are subject to tax until the contrary is established, and the burden of proof that any cigarettes are not taxable … shall be upon the person in possession" of such cigarettes. *Id.* Furthermore, "[a]ll cigarettes sold by … wholesalers to Indian nations or tribes or reservation cigarette sellers located on an Indian reservation must bear a tax stamp." *Id.* § 471(2); *see also* § 471-e. A "wholesale dealer" is "[a]ny person who (a) sells cigarettes …

[42] *See Rice*, 463 U.S. at 734 ("Congress did not intend to make tribal members 'super citizens' who could trade in a traditionally regulated substance free from all but self-imposed regulations."); *Chickasaw*, 515 U.S. at 466 (declining to read the Tribe's treaty "as conferring super-sovereign authority to interfere with another jurisdiction's sovereign right to tax … of those who choose to live within that jurisdiction's limits").

other persons for purposes of resale, or … (c) sells cigarettes … to an Indian nation or tribe or to a reservation cigarette seller[.]" *Id.* § 470(8).

Here, King Mountain's sale and delivery of cigarettes to its New York distributors fails to comply with Tax Law §§ 471 and 471-e. King Mountain admits that each of the millions of packs of cigarettes that it sold and shipped to New York lacked an affixed New York State tax stamp. ¶ 64. King Mountain further concedes that for such cigarettes, King Mountain did not purchase any tax stamps or otherwise pay any applicable tax on such cigarettes. ¶ 65. King Mountain sold and delivered these cigarettes into New York for the purposes of resale. ¶¶ 52–53. King Mountain's cited evidence to-date moreover fails to show that the New York purchasers of King Mountain's cigarettes were state-licensed stamping agents that otherwise paid such tax or affixed the required tax stamps to such cigarette packs.

King Mountain furthermore fails to meet its burden in showing that such cigarettes are not subject to the State's tax. As explained earlier, for example, King Mountain's reliance on the Yakama Treaty is unavailing. And, as detailed below, King Mountain's evidence presented in opposition to the State's cited records (King Mountain's produced sales invoices and shipping records) is insufficient to create a genuine dispute of material fact.

1. King Mountain's self-asserted right to engage "nation-to-nation" sales do not create a genuine dispute of material fact.

King Mountain contends through its testimony of its General Manager and CEO (Messrs. Black and Thompson, respectively), for example, that King Mountain may engage in certain "nation-to-nation" sales pursuant to the Yakama Treaty of 1855. As discussed above, however, this argument is unavailing. The Ninth Circuit Court of Appeals, whose judicial circuit encompasses the Yakama Tribe and King Mountain, has conclusively determined in a case initiated by King Mountain and the Tribe that the Treaty's language lacks such a right. *King Mt.*

Tobacco Co. v. McKenna, 768 F.3d 989, 997 (9th Cir. 2014). Accordingly, no genuine dispute of material fact is created. Likewise, to the extent King Mountain attempts to rely on its self-serving testimony, such evidence is insufficient to create a genuine dispute. And finally, King Mountain fails to cite any evidence to meet its burden in showing any tribal sovereign immunity from suit, either to itself or its New York distributors. *See Golden Feather I*, 2009 U.S. Dist. LEXIS 20953, at *15–17 (setting out tribal sovereign immunity test for an "arm" of a tribe).

2. King Mountain's *res judicata* defense lacks merit.

King Mountain's reliance on the *res judicata* doctrine similarly lacks merit. This argument appears to be based on an October 2014 stipulation entered into between the Tax Department and King Mountain (agreeing to a $0 tax deficiency determination on a December 2012 seizure of roughly 7,260 cartons of unstamped King Mountain cigarettes). *See* Leung Dec. Ex. 4. King Mountain is presumably arguing that this stipulation has the effect of absolving King Mountain from any tax liability for the over [redacted] packs of unstamped, untaxed cigarettes that it sold and shipped into New York between June 2010 and December 2014. But for several reasons, this argument lacks merit.

First, to the extent King Mountain appears to be relying on a fruit of the poisonous tree theory to argue that the later discovered cigarettes at issue in this case should not be subject to the State's instant enforcement action, the Court of Appeals for the Second Circuit has already held that this theory does not apply to non-criminal contexts, including civil tax proceedings. *Townes v. City of New York*, 176 F.3d 138, 145 (2d Cir. 1999).[43] Thus, because the instant action is not a criminal proceeding, King Mountain's reliance on this theory lacks merit.

[43] As explained by the Second Circuit, "The fruit of the poisonous tree doctrine is calculated to deter future unlawful police conduct and protect liberty by creating an incentive—avoidance of the suppression of illegally seized evidence—for state actors to respect the constitutional rights of suspects. Like the exclusionary rule, the fruit of the poisonous tree doctrine is a judicially created remedy designed to safeguard Fourth Amendment rights generally

Second, the stipulation entered into between the Tax Department and King Mountain has no binding effect outside of that particular proceeding. Per the Rules of that administrative agency: "A stipulation and the admissions therein shall be binding and have effect only in the pending proceeding and not for any other purpose, and cannot be used against any of the parties thereto in any other proceeding." 20 N.Y. Codes R. & Regs. § 3000.11(e).[44] Thus, because the Rules governing that prior proceeding do not permit any binding effect outside of that proceeding, King Mountain's reliance on the *res judicata* doctrine here fails.[45]

Third, because the scope of the stipulation is limited to those cigarettes seized by the State on December 1, 2012, and not those millions of packs of cigarettes that King Mountain successfully delivered to its New York distributors for resale with the State, the application of the doctrine is inappropriate here.

And finally, King Mountain has waived this defense by failing to amend its earlier filed answer. Per Rule 8, the defense of *res judicata* is to be affirmatively stated in any responsive pleading. *See* Fed. R. Civ. P. 8(c). And, the failure to plead such an affirmative defense in the

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through its deterrent effect, rather than a personal constitutional right of the party aggrieved. [¶] As with any remedial device, the application of the exclusionary rule has been restricted to those areas where its remedial objectives are thought most efficaciously served. If … the exclusionary rule does not result in appreciable deterrence, then, clearly, its use … is unwarranted. The Supreme Court has refused for that reason to extend the exclusionary rule to non-criminal contexts, including civil tax proceedings[.]" *Townes*, 176 F.3d at 145 (internal quotation marks, citations and brackets omitted).

[44] *See* N.Y.S. Tax Appeals, Rules of Practice and Procedure, 20 N.Y. Codes R. Regs. § 3000.11(e), *available at* http://www.dta.ny.gov/rules/.

[45] In any event, the *res judicata* doctrine does not apply when the administrative agency's decision does not use procedures "substantially similar" to those employed by the courts. *See Delamater v. Schweiker*, 721 F.2d 50, 53–54 (2d Cir. 1983). For example, in *Delamater v. Schweiker*, the Second Circuit Court of Appeals rejected a *res judicata* defense where the administrative agency did not incorporate any adjudicative procedures—*e.g.*, holding a hearing, taking testimony, using subpoenaed evidence, permitting oral argument, and permitting the opportunity to test any contention by confrontation. *Id.* (noting that an agency's incorporation of such adjudicative procedures are "necessary to yield an adjudication that is binding under the rules of *res judicata*"). Here, because King Mountain fails to show that the Tax Appeals administrative agency reached a decision by actually incorporating any adjudicative procedures (*e.g.*, holding a hearing, taking testimony, using subpoenaed evidence, permitting the opportunity to test any contention by confrontation, etc.) the application of the defense here is inapt. *See id.* At most, the parties entered into a stipulation, which under the applicable Rules has no binding effect outside of that proceeding. The terms of the stipulation further state that neither party shall be considered a "prevailing party."

answer "results in 'the waiver of that defense and its exclusion from the case.'" *Satchell v. Dilworth*, 745 F.2d 781, 784 (2d Cir. 1984). Simply put, there was nothing prior to entering into the October stipulation that would suggest that the over [redacted] packs of unstamped, untaxed cigarettes would somehow be the subject of that stipulation or that the Tax Appeals administrative agency even had jurisdiction to adjudicate such a dispute that was already on-going before this Court. Similarly, even following the Tax Department and King Mountain's October 2014 stipulation, King Mountain took no steps to amend its previously filed answer or otherwise put the State on formal notice of this affirmative defense. Under such circumstances, the application of the *res judicata* doctrine is unsupported and would otherwise prejudice the State by having to use its limited resources to continue litigating this unsupported defense.

b. King Mountain's failure to failure to file certain annual certifications beginning in 2010 violates Tax Law § 480-b.

The evidence further shows King Mountain's violation of Tax Law § 480-b. This law requires each "tobacco product manufacturer"[46] whose cigarettes are sold for consumption in New York State to annually certify that such manufacturer: (a) is "a participating manufacturer" (as defined by Public Health Law § 1399-pp(1)); or (b) is in full compliance with § 1399-pp(2). N.Y. Tax Law § 480-b(1).[47] Such certifications are to be delivered to the Tax Commissioner, the Attorney General, and any agent who affixes New York tax stamps to the manufacturer's

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[46] A "tobacco product manufacturer" is defined as an "entity that … manufactur[es] cigarettes anywhere that such manufacturer intends to be sold in the United States[.]" N.Y. Public Health Law § 1399-oo(9)(a).

[47] Per section 1399-pp, "[a]ny tobacco product manufacturer selling cigarettes to consumers within the state (whether directly or through a distributor, retailer or similar intermediary or intermediaries)" shall either (1) become a participating manufacturer and generally perform its financial obligations under the 1998 Tobacco Master Settlement Agreement; or (2) place certain monies into an escrow fund. N.Y. Public Health Law § 1399-pp(1)–(2).

The purpose of this fund is to ensure that cigarette manufacturers who choose not join the 1998 Tobacco Master Settlement Agreement do not use their "resulting cost advantage to derive large, short-term profits in the years before liability may arise without ensuring that the state will have an eventual source of recovery from them if they are proven to have acted culpably." *Id.* § 1399-nn.

cigarettes. *See id*. The law furthermore requires a manufacturer to provide the Tax Department with a list of cigarette brands that the company intends to sell within the State. *Id*.

Here, King Mountain has not provided such lists or certifications, has not joined the 1998 Tobacco Master Settlement Agreement, and has not otherwise complied with the State's escrow requirements. ¶¶ 87–88. Accordingly, because no genuine issue of material fact exists as to this claim, an Order granting summary judgment in favor of the State is appropriate here.

c. King Mountain's failure to submit a written certification to the State Office of Fire Prevention and Control violates Executive Law § 156-c.

Similarly, no genuine issue of material fact exists as to King Mountain's violation of New York's fire-safe certification filing requirement. Per Executive Law § 156-c, "no cigarettes shall be sold or offered for sale in this state unless the manufacturer thereof has certified in writing to the office of fire prevention and control that such cigarettes meet the performance standards prescribed by the office of fire prevention and control[.]" N.Y. Exec. Law § 156-c(3).[48] And, no person or entity shall "sell in this state cigarettes that have not been certified by the manufacturer[.]" *Id*. § 156-c(4). *See also* 19 N.Y. Codes R. & Regs. §§ 429.1 & 429.6.

Here, King Mountain is a manufacturer of cigarettes intended for sale within the State of New York. ¶¶ 28–29. Between June 2010 and December 2014, King Mountain sold and delivered over [REDACTED] packs cigarettes into the State of New York. ¶¶ 51–78. These deliveries are believed to be continuing today. ¶ 79. To date, however, King Mountain "has not certified in writing to the New York State Office of Fire Prevention and Control that its cigarettes meet the performance standards prescribed by the Office[.]" ¶ 89. Thus, because no genuine dispute exists, and an Order entering a judgment as a matter of law is appropriate.

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[48] Notably, "[a]ny person engaged in the business of selling cigarettes in or for shipment into New York who possesses cigarettes that have not been certified or marked in accordance with the requirements of this section shall be deemed to be offering such cigarettes for sale in New York." N.Y. Exec. Law § 156-c(5)(a).

CONCLUSION

For all the above reasons, the State requests an Order granting the State's motion for summary judgment and all appropriate relief as requested by the State's amended complaint.

Dated: New York, New York
January 29, 2016

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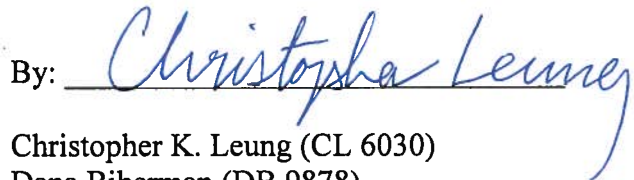
By: 

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