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 OPPOSITION TO KING MOUNTAIN'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The plaintiff State of New York hereby opposes the motion for summary judgment filed by defendant Mountain Tobacco Company d/b/a King Mountain Tobacco Company Inc. ("King Mountain"). As explained in the State's own cross-motion for summary judgment (ECF Nos. 197, 198), King Mountain has sold and shipped over 2.5 million cartons of unstamped, untaxed, unreported cigarettes into the State of New York. These illegal shipments occurred from at least 2010 and are believed to be continuing to this day.

King Mountain contends, however, that Congress in essence intended to immunize Indian-owned cigarette manufacturers like King Mountain. But for many reasons, King Mountain is mistaken. If anything, Congress intended to assist the States in their efforts to combat the illegal trafficking of cigarettes. Furthermore, as numerous courts have held and recognized, the fact that King Mountain is owned by a Native American Indian is of little consequence here: "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." *Rice v. Rehner*, 463 U.S. 713, 734 (1983). As a result, Indians going beyond reservation boundaries "have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148–49 (1973); *see also Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 157 (1980) (holding that a state's cigarette excise tax is a non-discriminatory state law).

Accordingly, for all the reasons set forth below and in the State's corresponding cross-motion for summary judgment, the State respectfully asks this Court to reject King Mountain's motion and instead grant the State's motion for such judgment on its claims.

ARGUMENT

I. The State of New York is entitled to Summary Judgment for King Mountain's violation of the Contraband Cigarette Trafficking Act.

In its brief, King Mountain asserts several grounds for why it is entitled to summary judgment on the State's Contraband Cigarette Trafficking Act ("CCTA") claim: (1) the Yakama Treaty of 1855 contains a "right to trade," which permits the company to "sell its cigarettes to other Indians without State restriction"; (2) the Act exempts cigarette manufacturers like King Mountain from prosecution; (3) King Mountain's cigarettes are not "contraband" within the meaning of the Act; and (4) King Mountain falls within the "Indian in Indian country" exemption to liability (citing 18 U.S.C. §2346(b)(1)). King Mt. Br., at 12–15.

But these arguments lack merit.

A. The Yakama Treaty does not authorize King Mountain's sale and delivery of unstamped, untaxed cigarettes.

To begin, the Yakama Treaty does not contain a "right to trade," much less a right to trade in unstamped cigarettes. As explained by the Ninth Circuit Court of Appeals in a case previously litigated by King Mountain and the Yakama Tribe concerning the company's off-reservation sales of cigarettes within the State of Washington, under "the plain and unambiguous text" of the Treaty, "there is no right to trade in the Yakama Treaty." *King Mt. Tobacco Co. v. McKenna*, 768 F.3d 989, 998 (9th Cir. 2014). Given this holding then, the Yakama Treaty does not bar the State's claims.[1]

[1] King Mountain's remaining arguments furthermore lack merit. As recognized by the Ninth Circuit in *King Mt. Tobacco Co. v. McKenna*, its earlier decision in *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007), was limited to addressing the Yakama Treaty's "right to travel" provision. 768 F.3d at 997–98. Similarly, *Yakama Nation v. Flores*, 955 F. Supp. 1229 (E.D. Wash. 1997), is properly limited to its facts. There, the plaintiff-intervenor Yakama tribe owned and sold the timber being hauled to off-reservation mills under the "right to travel" provision of the Yakama Treaty. *Id*. at 1233, 1261. Thus, the court there recognized that "the tribe ha[d] a special sovereignty interest that might not be present under different circumstances." *Id*. at 1260. Here, the Yakama tribe has not intervened or otherwise expressed any ownership interest in the cigarettes being sold and delivered into New York State. Thus, even if there were a "right to trade" provision in the Treaty, King Mountain would lack the necessary standing to invoke the right. *See Smith v. Spitzer*, 28 A.D.3d 1047, 1048 (3d Dep't Apr. 27, 2006).

B. The Act does not authorize licensed manufacturers to sell or deliver contraband cigarettes.

Next, King Mountain mistakenly contends that the Act provides blanket-immunity to cigarette manufacturers. *See* King Mt. Br., at 14 (citing 18 U.S.C. §2341(2)(A)).

But this is incorrect. Although the Act permits manufacturers (as well as common carriers and stamping agents) to "possess" unstamped cigarettes (18 U.S.C. § 2341(2)), the Act also prohibits "any person"—including manufacturers—from knowingly selling, shipping, transporting or otherwise distributing such unstamped cigarettes to persons not otherwise authorized to possess such cigarettes (*id*. § 2342(a)). As Chief Judge Amon has explained in addressing 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.

City of New York v. Milhelm Attea & Bros., 2012 U.S. Dist. LEXIS 116533, * 67–68 (E.D.N.Y. Aug. 17, 2022). In other words, "it suffices that the cigarettes become contraband ***as a result*** of the sale and shipment. To interpret the statute otherwise would, effectively, limit liability to the possession of contraband cigarettes, which Congress did not intend." *City of New York v. Chavez*, 944 F. Supp. 2d 260, 265 (S.D.N.Y. 2013) (emphasis in original); *see also City of New York v. Gordon*, 1 F. Supp. 3d 94, 106 (S.D.N.Y. 2013).[2] As a result, courts have held that such "possession-exempt" entities may otherwise be held liable for selling or distributing contraband

[2] *See also City of New York v. Chavez*, 2012 U.S. Dist. LEXIS 42792, * 11 (S.D.N.Y. Mar. 26, 2012) (finding that the Act's language "suggests that Congress intended … to cover circumstances where a wholesaler or distributor of cigarettes sells and ships cigarettes that become contraband because of that sale and shipment").

cigarettes. *See, e.g.*, *Milhelm Attea*, 2012 U.S. Dist. LEXIS 116533, at * 23 (stamping agent wholesalers); *Gordon*, 1 F. Supp. 3d at 106 (common carriers).

Here, King Mountain's arguments are simply unsupported. King Mountain's brief fails to cite anything in the Act or its legislative history suggesting that Congress intended to create a broad safe-harbor for cigarette manufacturers to sell and distribute vast quantities of untaxed cigarettes. *See* King Mt. Br., at 14. King Mountain's citation to *United States v. Morrison*, 596 F. Supp. 2d 661, 715 (E.D.N.Y. 2009), is similarly unavailing. That case simply restates the statute's language and otherwise fails to suggest that Congress intended to immunize cigarette manufacturers under the Act. *See id*. In short, this argument lacks merit.

C. King Mountain's sold and delivered cigarettes are "contraband cigarettes" within the meaning of the Act.

King Mountain's "not contraband cigarettes" argument fares no better. Here, King Mountain erroneously contends that, pursuant to New York Tax Law section 471(4), King Mountain was not required to affix tax stamps to its cigarettes sold and delivered to purported "Indian nations" within the State of New York. *See* King Mt. Br., at 14. As a result, King Mountain argues that such cigarettes are not "contraband" under the Act. *See id.*

Wrong again. First, New York law is clear that state-licensed stamping agents located either within the State or outside of it, are the "only entry point for cigarettes into New York's stream of commerce" and that for each pack of cigarettes introduced, a tax stamp must be affixed. *City of N.Y. v. Golden Feather Smoke Shop, Inc.*, 2013 U.S. Dist. LEXIS 47037, at * 7–8 (E.D.N.Y. Mar. 29, 2013) (emphasis added); *Chavez*, 2012 U.S. Dist. LEXIS 42792, * 13; *see also* N.Y. Tax Law §§ 471(1), (2). Indeed, the tax law specifically provides that "[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." N.Y. Tax Law § 471(2). Thus, because King

Mountain purports to sell and deliver cigarettes to Indian nations within the State (King Mt. Br., at 14, 15[3]), King Mountain is a wholesale dealer (or "wholesaler") under New York law. N.Y. Tax Law § 470(8) (defining a "wholesale dealer" as "[a]ny person who … sells cigarettes or tobacco products to an Indian nation or tribe or to a reservation cigarette seller on a qualified reservation"). As such, each pack of cigarettes that King Mountain sold and delivered into New York was required to bear a tax stamp. N.Y. Tax Law § 471(2). Because King Mountain failed to affix such tax stamps, however, King Mountain's cigarettes are "contraband" within the meaning of the Act. *See* 18 U.S.C. § 2341(2).

Second, King Mountain's relied-on provision—Tax Law section 471(4)(a)—does nothing to absolve King Mountain of this stamping requirement. That provision simply states:

> Notwithstanding any provision of law to the contrary, no person, including but not limited to a tobacco product manufacturer, shall sell unstamped packages of cigarettes to any agent, if such person has not been provided with a certification by the agent as required in paragraph (b) of this subdivision.

N.Y. Tax Law § 471(4)(a). Here, the obvious purpose of this provision is to ensure that each stamping agent receiving cigarettes complies with the applicable New York Tax Laws. *See id.* § 471(4)(b). Nothing in this provision suggests, however, that cigarette manufacturers may inject unstamped cigarettes into the State. Furthermore, because King Mountain's evidence does not suggest that it sold or delivered its cigarettes to any state-licensed stamping agents (much less received any such referenced-certifications, King Mt. Br., at 14–15), the relied-on provision has no application here.

[3] Here, King Mountain fails to meet its burden in showing that its customers are in fact tribal entities entitled to sovereign immunity. *City of New York v. Golden Feather Smoke Shop, Inc.*, 2009 U.S. Dist. LEXIS 20953, *13–21 (E.D.N.Y. Mar. 16, 2009). Absent such evidence, such businesses are treated as ordinary businesses subject to the applicable state tax. *Id*. *19–21; *see also* N.Y. Tax Law § 471(1) (noting that "the burden of proof that any cigarettes are not taxable … shall be upon the person in possession thereof").

D. King Mountain falls outside the scope of the Act's "Indian in Indian country" exemption to liability.

Finally, because King Mountain falls outside both the literal and intended scope of the Act's "Indian in Indian country" exemption to liability (18 U.S.C. § 2346(b)(2)), King Mountain's motion on this claim fails.

i. King Mountain is not an "Indian."

It is a rule of statutory construction that an undefined term is given its "ordinary, contemporary, [and] common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979). Thus, the Act's use of the undefined term "Indian" is read to mean an individual member of a tribe. *See*, *e.g.*, Am. Heritage Dictionary 655 (2d Coll. Ed. 1985) ("[a] member of any of the aboriginal peoples of North America"); F. Cohen, Handbook of Fed. Indian Law § 3.03 (2015) ("a person meeting two qualifications: (a) that some of the individual's ancestors lived in what is now the United States before its discovery by Europeans, and (b) that the individual is recognized as an Indian by the individual's tribe or community").

This reading makes sense, especially when considering (1) Congress's other definitions for the term "Indian" that are practically identical (*see*, *e.g.*, 20 U.S.C. § 80q-14(7) ("a member of an Indian tribe"); 42 U.S.C. § 1996a(c)(1) (same); 25 U.S.C. § 1801(a)(1) ("a person who is a member of an Indian tribe"))[4], as well as (2) Congress's use of the term as an adjective when referring to businesses or entities owned or operated by Indians (*see*, *e.g.*, 25 U.S.C. § 4302(5) (defining "Indian-owned business"); *see also* 18 U.S.C. § 1163 (defining "Indian tribal organization"); 25 U.S.C. § 2021(11) (defining "Indian organization")). For example, when

[4] *Accord* 16 U.S.C. § 1722(5); 18 U.S.C. § 1159(c)(1); 20 U.S.C. §§ 1401(12), 4402(4), 7491(3); 25 U.S.C. §§ 305e(a)(1), 450b(d), 1903(3), 2101(1), 2511(3), 3103(9), 3703(8), 4103(10); 29 U.S.C. § 705(19); 42 U.S.C. § 3002(26), 13925(a)(13), 9911(e)(2), 12511(19), 13925(13); 43 U.S.C. § 2401(3). *See also United States v. Rogers*, 45 U.S. 567, 573 (1846) (holding that the term "Indian … does not speak of members of a tribe, but of the race generally—of the family of Indians").

Congress enacted the Indian Financing Act of 1974 (93 P.L. 262, 88 Stat. 77), Congress defined the term "Indian" separate and apart from those businesses that might be "Indian-owned". 25 U.S.C. § 1452(b) & (e) (requiring such "Indian ownership" to constitute "not less than 51 per centum of the enterprise"). Likewise, when Congress enacted The Native American Business Development, Trade Promotion, and Tourism Act of 2000 (106 P.L. 464, 114 Stat. 2012), Congress separately defined the terms "Indian" (as "a person who is a member of an Indian tribe") and "Indian-owned business" ("an entity organized for the conduct of trade or commerce with respect to which at least 50 percent of the property interests of the entity are owned by Indians or Indian tribes"). 25 U.S.C. § 4302(2), (5).

In short then, because Congress knows the difference between an "Indian" and an "Indian-owned business", the exemption's reference to an "Indian" is properly read to include only individual members of a tribe, and not simply any Indian-owned business or entity. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (noting that courts "must presume that a legislature says in a statute what it means and means in a statute what it says there"). And, because King Mountain is not an "Indian" (much less an enrolled member of the Yakama tribe[5]), King Mountain falls outside the Act's "Indian in Indian country" exemption to liability and may be prosecuted under the Act.

ii. The "Indian in Indian country" exemption does not apply to King Mountain's New York activities.

That said, even if King Mountain were treated as an "Indian" (which it is not), the company would still fall outside the scope of the exemption. As noted above, Congress only

[5] *See* Leung Dec. ISO Pl.'s MSJ (ECF Nos. 197, 198), Ex. 3 (Yakama Law and Order Code § 2.01.07(1)), Ex. 20 (Dep. Of Yancey Black, at 116, 117), and Ex. 21 (Depo. of Jay Thompson, 116–119). 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).

intended this exemption to protect "tribal governments and tribal sovereignty." *See* 151 Cong. Rec. H6273, H6283–85 (July 21, 2005). And, because King Mountain's status and activities invoke neither, the Act's "Indian in Indian country" exemption to liability does not apply to King Mountain here. *See also* State MSJ Br., at 5–11, 17–25 (ECF Nos. 197, 198).

As originally enacted, 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.[6] In fact, it wasn't until 2005 that Congress first authorized state and local governments to bring suit under the Act.[7] Notably, however, the originally introduced provision that provided this right did not include the statutory exemption that King Mountain now relies on. 151 Cong. Rec. H6273, H6283 (July 21, 2005). And as a result, Congressional members expressed concern that state and local governments' ability to bring suit would infringe on principles of "tribal sovereignty."[8] To address those concerns, the bill's sponsor, Representative Howard Coble, proposed including the exemption that King Mountain now relies on. 151 Cong. Rec. at H6283 ("'No civil action may be commenced under this paragraph against an Indian tribe or an Indian in Indian country (as defined in section 1151)'"). Without objection, other legislators then rose to speak in unanimous support of the amendment and explain how "tribal governments and tribal sovereignty" would be protected by this new language:

[6] 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).

[7] 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.

[8] As explained by the bill's sponsor Representative Howard 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 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.

- "I would also say that as a result of the modification … 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. … With the great help of the gentleman 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 entirety of the exemption's debate, Representative Coble's proposed modification was then approved and enacted into law.[9]

Given these facts, several conclusions are apparent:

First, because King Mountain's reading ignores the exemption's relevant history, King Mountain's reading is "in error." *Train v. Colorado Public Interest Research Group*, 426 U.S. 1, 10 (1976). Second, Congress's intention in creating this exemption was to protect only "tribal governments and tribal sovereignty."[10] To accomplish this, Congress relied on the existing

[9] USA Patriot Improvement and Reauthorization Act of 2005, P.L. 109–177, 120 Stat. at 221–24, § 121 (Mar. 9, 2006).

[10] *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'").

scope of the tribal sovereign immunity doctrine. *See Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014) (noting that the common law immunity from suit—*i.e.*, "tribal sovereign immunity"—is a "core aspect" of tribal sovereignty that each tribe possesses); 18 U.S.C. § 2346(b)(2) ("Nothing in this chapter shall be deemed to … expand, or modify any sovereign immunity of … an Indian tribe"). Thus, even if King Mountain were considered an "Indian" (which it is not), King Mountain is unable to invoke this exemption's tribal sovereign immunity defense because such defense is reserved only to the tribe, and not its individual members. *Puyallup Tribe v. Department of Game*, 433 U.S. 165, 171–72 (1977); *City of New York v. Golden Feather Smoke Shop, Inc.*, 2009 U.S. Dist. LEXIS 20953, *22 (E.D.N.Y. Mar. 16, 2009) (same) (collecting cases).[11]

Finally, to the extent King Mountain suggests that Congress sought to enlarge the scope of the tribal sovereign immunity doctrine (*i.e.*, by permitting this defense to be raised by *any Indian*, much less an enrolled member of the tribe), such an outcome is refuted by the plain language of the Act: "Nothing in this chapter shall be deemed to … expand, or modify any sovereign immunity of … an Indian tribe." 18 U.S.C. § 2346(b)(2). Thus, because King Mountain's reading would improperly and dramatically expand the number of persons able to invoke a tribe's sovereign immunity defense, such a reading cannot stand. Similarly, because King Mountain's interpretation is simply at odds with the dependent status of each tribe, such a reading must also be rejected. As the Supreme Court has explained, a tribe's sovereignty "is of a unique and ***limited*** character. It centers on the land held by the tribe[,] … tribal members within

[11] *See also State ex rel. Edmondson v. Native Wholesale Supply*, 237 P.3d 199, 210 (Okla. 2010) ("Tribal freedom from suit is an attribute of 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"); *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").

the reservation," and is "confined to managing tribal land, protecting tribal self-government, and controlling internal relations." *Plains Commerce Bank v. Long Family Land & Cattle Co*., 554 U.S. 316, 327, 334 (2008) (emphasis added).[12] Beyond a tribe's protection of such interests, a tribe's exercise of sovereign power (*e.g.*, over non-member Indians, non-Indians, etc.) is "'inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.'" *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 171 (1982) (Stevens, J., dissenting) (quoting *Montana v. United States*, 450 U.S. 544, 564 (1981)); *Nevada v. Hicks*, 533 U.S. 353, 359 (2001). Indeed, the Yakama Tribal Code explicitly recognizes this limitation by statute.[13] Accordingly, because King Mountain's interpretation of this provision would permit the assertion of the tribal sovereign immunity defense by ***any Indian***—without regard to the dependent status of the tribes or the "limited" interests protected by tribal sovereignty—such a reading lacks merit.

Here, King Mountain's motion fails to identify anything in the Act's provisions or its legislative history that "speak directly" to any such Congressional intent to create such a sea-change in the common law. *AG of Can. v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 128 (2d Cir. 2001) (noting that "a party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change").[14] Given this silence, King Mountain's unsupported reading and motion on this claim must be rejected.

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[12] *See also Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991).

[13] *See* Leung Dec. ISO Opp. To King Mt. MSJ, Ex. D (Title II – Yakama Tribal Judiciary § 2.01.03 Jurisdiction), Ex. E (Title XXX – Licensing and Incorporation Authority § 30.09.16 Liability; noting that "[t]he Yakama Nation is not in privity with any applicant. The Yakama Nation will not represent or counsel any applicant who incurs any tortuous, statutory, or contractual liability towards a third party. The Yakama Nation does not waive, alter, or otherwise diminish their 'sovereign immunity'").

[14] *See also Robert C. Herd & Co. v. Krawill Mach. Corp.*, 359 U.S. 297, 304–05 (1959) (noting that any derogation of the common law, "must be strictly construed, for 'no statute is to be construed as altering the common law, farther than its words import'"); *Scharfeld v. Richardson*, 133 F.2d 340, 341 (D.C. Cir. 1942).

II. The State of New York is entitled to Summary Judgment for King Mountain's violation of the Prevent All Cigarette Trafficking Act.

King Mountain's arguments concerning the State's Prevent All Cigarette Trafficking Act, 15 U.S.C. §§ 375 *et seq.* ("PACT Act") claim are also unavailing. In essence, King Mountain asserts that the Act's definition of the term "State" (*id.* § 375(11)) excludes the Act's definition of the term "Indian country" (*id.* § 375(7)). King Mt. Br., at 17. As a result, King Mountain mistakenly contends that its cigarette sales and deliveries do not constitute "interstate commerce" and the company is absolved of complying with the Act's reporting requirements. *Id.* at 16–17.

But for several reasons, King Mountain's reading is in error.

To begin, King Mountain's argument incorrectly assumes that Congress's definitions of the terms "State" and "Indian country" somehow changed the common law rule that Indian country is ordinarily considered a part of a state's territory. *See, e.g.*, *Hicks*, 533 U.S. at 361–62 ("State sovereignty does not end at a reservation's border. … 'Ordinarily,' it is now clear, 'an Indian reservation is considered part of the territory of the State'"); *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"); *State ex rel. Edmondson v. Native Wholesale Supply*, 237 P.3d 199, 208 (Okla. 2010) ("tribal land is not located in some parallel universe. It is geographically within the State").

But to reach that conclusion, King Mountain must first show that the statute "'speak[s] directly' to the question addressed by the common law." *R.J. Reynolds Tobacco*, 268 F.3d at 128 (noting further that "a party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change"). Absent such a showing, a court presumes "that Congress understood the common law against which it legislated and intended that [the] common law doctrine should co-exist with the [federal] statute." *Id.* at 129 (declining

to read the RICO Act as changing the common law "revenue rule" where the Act, its structure, and legislative history did not suggest an intent by Congress to change the common law rule).[15]

Here, King Mountain fails to carry its burden. Its arguments fail to identify anything in the PACT Act's provisions, structure, or legislative history that "speak directly" to an intention by Congress to upset the common law understanding that Indian country is ordinarily considered a part of a state's territory.

Indeed, a review of the Act's provisions, history, and purposes show that Congress sought to preserve each common law rule affected by the Act. At Section 5 of the Act, for example, Congress stated the following:

> Nothing in this Act or the amendments made by this Act shall be construed to amend, modify, or otherwise affect— …
>
> (2) any State laws that authorize or otherwise pertain to … the collection of State, local, or tribal taxes on cigarettes … sold in Indian country;
>
> (3) any limitations under Federal or State law, **including Federal common law** … on State, local, and tribal 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.

[15] *See, e.g.*, *Robert C. Herd*, 359 U.S. at 304–05 (declining to read the Carriage of Goods by Sea Act's definition of the word "carrier" as an attempt by Congress to change the common law understanding that such term also included a carrier's stevedores or other agents, where the Act's provisions and legislative history lacked any indication that Congress sought to limit the liability of a carrier's negligent agents); *Scharfeld*, 133 F.2d at 341 (declining to read the District of Columbia Code as somehow changing the common law rule that a dog is the personal property of its owner, where no explicit provision for such change was contained in the Act).

Prevent All Cigarette Trafficking Act of 2009, Pub. L. No. 111–154, 124 Stat. 1087, 1109–10, § 5(a) (enacted Mar. 31, 2010) (emphasis added). Congress furthermore sought to "increase [the] collections of Federal, State, and local excise taxes on cigarettes," by, among other things, (i) requiring remote cigarette sellers to comply with the same laws applicable to law-abiding tobacco retailers; (ii) creating "strong disincentives to [the] illegal smuggling of tobacco products;" (iii) providing government enforcement officials with more effective enforcement tools to combat tobacco smuggling; and (iv) making it more difficult for cigarette traffickers to engage in and profit from their illegal activities. Pub. L. No. 111–154, 124 Stat. at 1088, § 1(c).

Given this expressed Congressional understanding and intent, it becomes clear then that King Mountain's proposed reading must be rejected. Adopting King Mountain's view would defeat the purposes and object of the Act (by permitting out-of-state Indian reservation cigarette sellers to flood New York Indian reservations with unstamped, unreported cigarettes), as well as contravene Congress's expressed intent to maintain the common law rules already in effect.

In sum then, the common law rule remains: "Indian country" is ordinarily considered a part of the territory of a "State." *See, e.g.*, *Hicks*, 533 U.S. at 361–62. Accordingly, King Mountain's sales and deliveries of cigarettes from the Yakama Indian reservation (located within the State of Washington) to other Indian reservations within the State of New York constitute "interstate commerce" within the meaning of the Act; and as a result, King Mountain is subject to the Act's reporting requirements. This conclusion is consistent with the Act's provisions and legislative history, as well as the views of the federal agency charged with enforcing the PACT Act's provisions.[16] Thus, because King Mountain has not complied with the Act's reporting

[16] Letter from Joseph Fox, Chief, Alcohol and Tobacco Enforcement Branch, Bureau of Alcohol, Tobacco, Firearms and Explosives, to King Mountain Tobacco Company, Inc., dated Sept. 29, 2015, at 8–9 (noting that the PACT Act's definition for the term "interstate commerce … encompasses shipments from King Mountain to California, regardless that the final destination in California may be located in Indian Country. This interpretation is supported

requirements, King Mountain's motion here must be rejected and summary judgment granted in favor of the State.[17]

III. King Mountain's *res judicata* defense does not apply here.

Finally, because King Mountain's *res judicata* argument does not apply here, the company's motion may be rejected in total. As detailed below, (1) the facts underlying the earlier action (*i.e.*, between the Department of Taxation and Finance and the company) do not arise out of the "same transaction or series of transactions" in this case; (2) the Tax Department and Office of the Attorney General lack privity; and (3) King Mountain has waived this defense by not including it in its Answer.

A. The Tax Department action arises from a different transaction or series of transactions.

To begin, a federal court will give preclusive effect to an earlier state court decision when such an effect would be given by the courts of that state. *City of New York v. Beretta U.S.A. Corp.*, 315 F. Supp. 2d 256, 264 (E.D.N.Y. 2004). In New York, this means that "once a final decision on the merits is issued on a claim, all other claims among the parties or their privies arising out of the same transaction or series of transactions are barred." *Id*. Under this transactional test then, a court looks to "how the facts are 'related in time, space, origin, or

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by both the definition's language and the broader contexts of the purpose of the law and the overall statutory and taxation scheme for tobacco, which is a pervasively regulated commodity") (attached as Ex. A to the Dec. of Christopher K. Leung ISO Pl.'s Opp. To King Mt.'s MSJ). *See also* Bureau of Alcohol, Tobacco, Firearms and Explosives, *Implementation of the Prevent All Cigarette Trafficking Act of 2009 (PACT Act) Tribal Consultation Process*, dated Nov. 18, 2010, at 2 (noting that the Act's reporting requirements "apply to sales within and between Indian country") (attached as Ex. B to Leung Dec. ISO Opp. To King Mt. MSJ).

[17] King Mountain's final argument concerning Valvo Candies also lacks merit. Here, King Mountain contends that its May 2010 delivery of cigarettes to Valvo Candies predates the applicable June 29, 2010 effective date of the PACT Act, and that as a result, the Act's reporting requirements do not apply to this sale. King Mt. Br., at 19. But again, the company is mistaken. Each person subject to the Act's reporting requirements (such as King Mountain) must report their shipments of cigarettes "during the ***previous calendar month*** into such State[.]" 15 U.S.C. §376(a)(2). Thus, because the PACT Act's reporting requirements took effect in June 2010, King Mountain was required to report its May 2010 shipment of cigarettes to Valvo Candies.

motivation, whether they form a convenient trial unit, and whether … their treatment as a unit conforms to the parties' expectations or business understanding or usage.'" *Council v. Better Homes Depot, Inc.*, 2006 U.S. Dist. LEXIS 57851, *16 (E.D.N.Y. Aug. 16, 2006) (quoting *Reilly v. Reid*, 45 N.Y.2d 24, 30 (1978)); *see also Iwachiw v. N.Y. City Bd. of Educ.*, 194 F. Supp. 2d 194, 202 (E.D.N.Y. 2002).

Here, a comparison of the facts underlying the earlier Tax Department proceeding and the instant action is appropriate:

i. The facts underlying the earlier Tax Department action.

The traffic stop: On December 3, 2012, State Police Trooper Stephen Posada observed a white van fail to stop for a commercial vehicle inspection checkpoint. King Mt. Pilmar Decl. (ECF No. 195), Ex. 12 (Police Rept.). Trooper Posada initiated a traffic stop of the vehicle and asked the driver for his bill of lading. *Id*. The driver Shawn Snyder provided a bill of lading that showed (1) he was hauling King Mountain brand cigarettes from the Oneida Indian reservation to the Ganienkeh (St. Regis Mohawk Indian) territory, and (2) that these cigarettes were being hauled on behalf of ERW Wholesale, a company located on the Seneca Indian reservation. *Id*.; Pilmar Decl., Ex. 11 (Bill of Lading). Trooper Posada then instructed the driver to follow him to the commercial vehicle checkpoint. Pilmar Decl., Ex. 12. The driver complied and at the checkpoint, an inspection was commenced. *Id*. It was then discovered that the vehicle contained 7,260 cartons of unstamped King Mountain brand cigarettes. *Id*. A further interview conducted by Investigator Joel Revette revealed that the driver worked for ERW Enterprises. *Id*.

The seizure of cigarettes: Following this inspection, Investigator Revette contacted his supervisor and was advised to seize the cigarettes and release the driver. Pilmar Decl., Ex. 12. Investigator Revette did so, and provided a receipt (of the off-loaded cigarettes) to the driver who

was later released with the van. *Id*. On December 5, 2012, the seized cigarettes were then turned over the Tax Department, and the matter considered closed by Investigator Revette. *Id*.

The Tax Department Notice: On December 20, 2012, the Tax Department then issued a "Notice of Determination" to King Mountain, asserting that on December 3, 2012, the company had been found "to be in possession and/or control of unstamped or unlawfully stamped cigarettes[.]" Pilmar Decl., Ex. 13. Based on this finding, the Tax Department determined that the company owed $1,259,250 in penalties. *Id*.

King Mountain's Petition: Following the Tax Department's Notice, King Mountain then filed a "Petition for Redetermination of Deficiency/Revision of a Determination under Article 20 of the Tax Law for the Year(s)/Period(s) 1/23/12." Leung Dec. (ISO Pl.'s Opp. To King Mt. MSJ), Ex. C. This petition alleged, among other things, that (1) King Mountain "[did] not have any contacts" or "conduct business" within New York[18], and (2) that King Mountain "was not in possession and/or control" of the unstamped cigarettes found within the State of New York on December 3, 2012. *Id*. (Petition pp. 2, 3).

Significantly, King Mountain's requested relief asked for, *inter alia*, an order staying the administrative tax proceeding pending the resolution of this instant action—*i.e.*, "a lawsuit filed by the State of New York against [King Mountain] in the United States District Court for the Eastern District of New York, captioned *State of New York v. King Mountain Tobacco Co.*, 12-cv-6276 (ADS)(ETB), filed on December 21, 2012." *Id*. (Petition p. 5). In other words, King Mountain limited the scope of its petition to the Tax Department's Notice of Determination concerning the December 3, 2012 seizure. *See id*., generally.

[18] As noted by the State's cross motion for summary judgment, the State clearly disputes King Mountain's purported lack of contacts with the State. State MSJ Br., at 5–11 (establishing shipments of over 2.5 million cartons of unstamped King Mountain cigarettes into the State of New York, and over $47 million in sales).

The Stipulation of Discontinuance: On October 23, 2014, the Tax Department and King Mountain then entered into a Stipulation for Discontinuance of Proceeding. Pilmar Dec., Ex. 16. Under that agreement, the Tax Department recalculated King Mountain's tax deficiency and penalty as $0, and the parties agreed that neither would be considered a prevailing party. *Id.* The Stipulation was transmitted to the Hon. Herbert M. Friedman, Administrative Law Judge for the New York State Division of Tax Appeals (*id.*), who then issued a final judgment and Order of Discontinuance on November 19, 2014. Pilmar Dec., Ex. 17.

ii. The facts underlying the instant action.

In this action, the State seeks to hold King Mountain accountable for the over 2.5 million cartons of unstamped, untaxed, and unreported cigarettes sold and delivered from King Mountain's factory located on the Yakama Indian reservation in Washington State, into the six different New York State Indian reservations. State MSJ Br., at 5–11. These illegal cigarette sales and deliveries covered a nearly 4-year time period, beginning from at least May 1, 2010 through December 31, 2014, and are believed to be continuing to this day. *Id.*[19]

Notably, none of the cigarettes at issue in this case were seized by the State Police or any other state agency. King Mountain received over $47 million dollars for its sale and delivery of cigarettes into the State of New York. State MSJ Br., at 9; State 56.1 Statement, at ¶ 78 (referring to Leung Dec. Exs. 41–50). Thus, while the facts of the December 3, 2012 seizure of cigarettes do form a single paragraph of the Amended Complaint's background section (¶ 67; ECF No. 96), such alleged facts are just that—background, and are inessential to the State's instant claims or motion for summary judgment in this action.

[19] *See also* State 56.1 Statement, at ¶¶ 64–79 (identifying Leung Dec. Exhs.) (ECF Nos. 197, 198). Please also note that the over 2.5 million cartons of illegal cigarette sales and deliveries at issue in this case do not include the 7,260 cartons that were the subject of the December 3, 2012 seizure. Id; see also State MSJ Br., at 32.

iii. The facts underlying each action arise from different transactions.

Taken together then, the facts underlying the earlier tax proceeding and the State's instant action and cross-motion for summary judgment are unrelated in "time, space, origin, or motivation." In the earlier proceeding, for example, the Tax Department had no evidence establishing a connection between King Mountain and the cigarettes seized on December 3, 2012, including no evidence suggesting that King Mountain itself transported or directed such cigarettes into the State of New York, directed ERW Wholesale's transportation of such cigarettes, or otherwise exercised "possession and/or control of unstamped or unlawfully stamped cigarettes" as alleged by the Tax Department's Notice. Given this apparent lack of evidence concerning King Mountain's involvement in the seized cigarettes being transported between two points within the State of New York, the Tax Department reasonably entered into the October 23,2014 Stipulation with King Mountain. In contrast to this case, however, King Mountain's central role in selling and delivering enormous amounts of unstamped and unreported cigarettes into the State of New York is readily apparent and well documented.

As to whether the underlying facts from the earlier tax proceeding would "form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations," King Mountain clearly believed that it would. As noted earlier, King Mountain's petition specifically asked that the tax proceeding be stayed pending the resolution of this instant action, and furthermore never sought to include (as part of its petition) the company's cigarettes or conduct at issue in this case. Leung Dec., Ex. C (at Petition p. 5). These facts are significant, given that under the applicable rules, the purpose of King Mountain's petition pleadings was "to give the parties and the division of tax appeals fair notice of the matters in controversy[.]" 20 N.Y.C.R.R. § 3000.4(a). Here, given King Mountain's lack of "fair notice" that the instant action should or might have been considered together with its administrative tax petition, each

participant to that proceeding reasonably believed and expected that the underlying facts of the December 3, 2012 seizure would "form a convenient trial unit."

In sum, because the underlying facts of the earlier tax proceeding do not arise out of the same transaction and was treated as such by King Mountain in its petition, applying the *res judicata* doctrine here is inappropriate.[20]

B. The Tax Department and Attorney General's Office lack a privity of interests.

Similarly, because the Tax Department and Attorney General's Office lack a privity of interests, *res judicata* does not apply.

To establish the privity between a party to an earlier litigation and a non-party, the connection between the parties "must be such that the interests of the nonparty can be said to have been represented in the prior proceeding." *City of New York v. Beretta U.S.A. Corp.*, 315 F. Supp. 2d 256, 265 (E.D.N.Y. 2004) (internal quotation marks and citations omitted). For a court, this means considering on a "case-by-case" basis whether "the actual relationship, their mutuality of interests and the manner in which the nonparty's interests were represented in the earlier litigation establishes a functional representation such that the nonparty may be thought to have had a vicarious day in court." *Id.*; *Juan C. v. Cortines*, 89 N.Y.2d 659, 668 (1997) ("all the circumstances must be considered from which one may infer whether or not there was participation amounting to a sharing in control of the litigation").

[20] King Mountain's cited cases are furthermore distinguishable, based on their vastly differing facts. For example, in *U.S. ex rel. Sarafoglou v. Weill Med. Coll. Of Cornell Univ.*, 451 F. Supp. 2d 613 (S.D.N.Y. 2006), the plaintiff's second action concerned the same grant application, same time period, and same false statements as from the first action. And, although plaintiff's second action purportedly contained allegations of a "greater misconduct", those additional allegations of harm and misconduct all arose from the same grant at issue. *Id.* at 621. King Mountain's reliance on *Waldman v. Village of Kiryas Joel*, 207 F.3d 105 (2d Cir. 2000), is similarly misplaced. There, the overlapping facts derived ultimately from the same origin or motivation: the alleged entanglement of church and state; the suits would have formed a convenient trial unit since both involve substantially the same incidents and with minor exceptions, involved the same witnesses and evidence; and the fact that plaintiff's own expressed views saw all of these overlapping facts "as arising from the same polluted spring of pervasive entanglement." *Id.* at 112.

In the context of government agencies, this also means considering whether applying preclusion "would interfere with the proper allocation of authority between them[.]" *Beretta*, 315 F. Supp. 2d at 267 (quoting *Juan C.*, 89 N.Y.2d at 679). Specifically, if the second action involves an agency "whose functions and responsibilities are so distinct" from those of the agency in the first action, "the earlier judgment should not be given preclusive effect in the second action." *Id*. (declining to preclude the City's suit against gun manufacturers, despite an earlier public nuisance suit brought by the State of New York, where the functions and responsibilities of the two governmental units was so distinct).

In *Juan C. v. Cortines*, for example, the New York Court of Appeals reversed a lower court decision that had precluded New York City education officials from determining the suspension and reassignment of a student found with a gun at school, when in an earlier Family Court juvenile delinquency proceeding (involving the same City prosecutor), the evidence of the gun was suppressed and the delinquency petition dismissed. 89 N.Y.2d at 665–66. As explained by New York's highest court—

> In law, purpose and actual practice, the [educational officials'] procedures and wider educational community concerns are functionally and fundamentally discrete and independent from the [Corporation Counsel's] uniquely delegated and described responsibility in a juvenile delinquency proceeding in Family Court.

Id. at 672 (citations omitted). In this same vein then, "New York courts have largely refused to find two functionally independent governmental entities in privity with each other for purposes of preclusion." *Beretta*, 315 F. Supp. 2d at 267 (citing *Juan C.* with approval).[21]

[21] *See, e.g.*, *Brown v. City of New York*, 60 N.Y.2d 897, 458 N.E.2d 1250, 1251, 470 N.Y.S.2d 573 (N.Y. 1983) (district attorney and City of New York not in privity); *Saccoccio v. Lange*, 194 A.D.2d 794, 599 N.Y.S.2d 306 (N.Y. App. Div. 1993) (district attorney and county attorney not in privity); *Doe v. City of Mount Vernon*, 156 A.D.2d 329, 548 N.Y.S.2d 282 (N.Y. App. Div. 1989) (district attorney and county not in privity); *People v. Morgan*, 111 A.D.2d 771, 490 N.Y.S.2d 30 (N.Y. App. Div. 1985) (city housing authority and district attorney not in privity); *see also* 18A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure: Jurisdiction § 4458 at

Here, under the specific circumstances of this case, the Tax Department and the Attorney General's Office are two "functionally independent governmental entities" that lack a privity in interests. To begin, the Tax Department's mission is limited to "efficiently collect[ing] tax revenues" and "[administering] the tax laws of New York State." N.Y. Dept. Tax & Fin., About us, *available at* https://www.tax.ny.gov/about/; *see also* N.Y. Tax Law §171 (setting forth the Tax Department's powers and duties). Accordingly, within this narrow sphere, the Tax Department has "sole charge". N.Y. Tax Law § 170(1). And for all such administrative tax procedures and determinations (whether made by the Tax Department or before the Division of Tax Appeals), there is simply no role for the Attorney General. *See* N.Y. Tax Law § 2000 *et seq.* (Article 40, Div. of Tax Appeals) (providing no role for the Attorney General's Office); 20 N.Y.C.R.R. § 3000.0 *et seq.* (same).

This limited mission of the Tax Department stands in stark contrast to the much wider mission and function of the Attorney General's Office. As the State's chief law enforcement officer and "representative of the people of the State," the Attorney General is vested with "broad authority" to prosecute legal actions in which the state has an interest—a determination committed to his "absolute discretion[.]" *EEOC v. Fed. Express Corp.*, 268 F. Supp. 2d 192, 196 (E.D.N.Y. 2003) (citing cases); *People v. Ballard*, 134 N.Y. 269, 293 (1892); *People v. Bunge Corp.*, 25 N.Y.2d 91, 97 (1969); *Love Canal Area Revitalization Agency*, 134 A.D.2d 885, 886 (4th Dep't 1987); *People v. Kramer*, 33 Misc. 209, 214 (N.Y. County Ct. 1900); N.Y. Exec. Law § 63(1).[22] These broad interests include, for example, protecting the public health of the State's

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558-59 (2d ed. 2002) ("State law may recognize substantial autonomy that frees a subdivision from the burdens—and even the benefits—of litigation by a state agency") (citing *Harris County, Texas v. Carmax Auto Superstores, Inc.*, 177 F.3d 306, 318-19 (5th Cir 1999) (county not in privity with or virtually represented by state attorney general)).

[22] This independent authority is, of course, in addition to the Attorney General's duties and responsibilities to act as a state agency's attorney, upon such agency's request. *Morgan v. N.Y. State Dep't of Envtl. Conservation*, 9 A.D.3d

citizens[23] and protecting those public interests, like those underlying the State's "cigarette delivery-ban" law (N.Y. Public Health Law § 1399-*ll*[24]), the Contraband Cigarette Trafficking Act, or the other innumerable laws regulating the sale and delivery of cigarettes that the Attorney General cannot enforce before the Division of Tax Appeals.

In any event, the Attorney General's Office also cannot be said to have enjoyed "a vicarious day in court" via the earlier tax proceeding. *See Delamater v. Schweiker*, 721 F.2d 50, 54 (2d Cir. 1983) (declining to apply *res judicata* where the previous administrative proceeding did not provide an "opportunity to test any contention by confrontation"). Under the applicable administrative rules, "motions related to discovery procedures as provided for in the CPLR will not be entertained." 20 N.Y.C.R.R. § 3000.5(a). Thus, the Tax Department had no means for testing King Mountain's petition allegations, including such assertions that the company "[d]id not have any contacts" or "conduct business" within the State of New York (Leung Dec., Ex. C (Pet. pp. 2, 3))—allegations that are clearly contrary to the invoices produced and shielded by King Mountain via its "confidential" designation of such invoices. *See, e.g.*, Leung Dec. (ISO Pl.'s MSJ), Exs. 41–50 (produced King Mountain invoices, showing sale and shipment of over

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586, 587 (3d Dep't. 2004) (noting that the Attorney General holds an attorney-client relationship with such agencies under such circumstances). In such instances, the Attorney General's interests are aligned with those of the requesting state agency. *See* N.Y. Exec. Law § 63(1), (3). Until such a request, however, the Attorney General has no role much less "control over the litigation"—at least until a final agency decision is reached and the Tax Department has referred the matter to the Attorney General. In this case, however, the Attorney General's action is not being brought on behalf of the Tax Department, but under the Attorney General's own public interest determination.

[23] *See, e.g.*, *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475, 485 (1996) (noting "the historic primacy of state regulation of matters of health and safety"); *NLRB v. New York*, 436 F. Supp. 335, 338 (E.D.N.Y. 1977) ("State's primary concern is to protect and promote the health of its inhabitants").

[24] As declared by the State Legislature in enacting Section 1399-*ll*, "the shipment of cigarettes … to residents of this state poses a serious threat to public health, safety, and welfare, to the funding of health care pursuant to the health care reform act of 2000, and to the economy of the state." N.Y. Pub. Health Law § 1399-*ll*, ch. 262, § 1 (also noting that the "existing penalties for cigarette bootlegging are inadequate").

2.5 million cartons of cigarettes into New York State) (ECF No. 198); *see also* Stipulation Regarding Confidential Docs., ¶ 5 (ECF No. 66) (adopted by Pretrial Order, dated Oct. 8, 2013).

Thus, given these clear statutory constraints and distinctions of authority and responsibilities, any privity in interests between the two state agencies is lacking. And under such circumstances, the earlier tax proceeding judgment should not be given preclusive effect in this action. Indeed, equating the Attorney General's Office with the role and function of the Tax Department within the course of an administrative tax proceeding would simply "interfere with the proper allocation of authority" between the two agencies. As a result, this Court should find that privity is lacking and that the *res judicata* doctrine does not bar the State's case here.[25]

C. King Mountain has waived its *res judicata* defense.

Finally, because King Mountain did not include its *res judicata* defense in its Answer (ECF No. 47), this defense has been waived. Per Rule 8, a party's answer must "affirmatively state any avoidance or affirmative defense, including … *res judicata*[.]" Fed. R. Civ. P. 8(c)(1); 2–8 Moore's Fed. Practice – Civil § 8.08[1] (noting that the purpose of the Rule is to avoid surprise and give the opposing party an opportunity to respond). Thus, a party's failure to include such an affirmative defense in the 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) (quoting 5 C. Wright & A. Miller, Federal Practice & Procedure § 1278, at 339 (1969)).

[25] King Mountain's relied on authorities are furthermore inapt. For example, *Overview Books, LLC v. United States*, 755 F. Supp. 2d 409 (E.D.N.Y. 2010), dealt with two federal agencies existing under a different statutory scheme. Likewise, *State v. Seaport Manor A.C.F.*, 19 A.D.3d 609 (2d Dep't 2005), is limited to the facts in that case. There, the Health Department engaged in two administrative enforcement proceedings, which were later discontinued with prejudice upon stipulations of settlement. *Id*. at 610. In a later separate proceeding, the Attorney General's participation was initiated by the Health Department, which had been sued by MFY Legal Services. *State of New York v. Seaport Manor A.C.F.*, 2003 N.Y. Misc. LEXIS 2025 *2–3 (Sup. Ct. June 11, 2003). Thus, in that later proceeding, the Attorney General's asserted interests were entirely those of—and in privity with—the Health Department's. *See id.* That is not the case here, where the Attorney General has independently initiated this action under a "public interest" determination. N.Y. Exec. Law § 63(1), (12); *Love Canal*, 134 A.D.2d at 886; *Kramer*, 33 Misc. at 214.

Here, King Mountain's Answer did not plead a *res judicata* defense. *See* King Mt. Answer (ECF No. 47). King Mountain's petition in the tax proceeding did not seek to include the over 2.5 cartons of unstamped cigarettes in this case that were not otherwise seized by the State. Given this subterfuge then, King Mountain's defense here should be excluded.

CONCLUSION

For all of the foregoing reasons, this Court should reject King Mountain's motion for summary judgment and issue an Order granting the State's cross-motion for summary judgment.

Dated: New York, New York
March 7, 2016

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