UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

STATE OF NEW YORK,	:	
Plaintiff,	:	
v.	:	2:12-cv-06276 (JS) (SIL)
MOUNTAIN TOBACCO COMPANY, d/b/a KING MOUNTAIN TOBACCO COMPANY INC., and DELBERT WHEELER, Sr.,	:	
Defendants.	:	

DEFENDANT KING MOUNTAIN'S MEMORANDUM OF LAW
IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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March 7, 2016

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MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Defendant Mountain Tobacco Company, d/b/a King Mountain Tobacco Company Inc. ("King Mountain"), respectfully submits this Memorandum of Law in Opposition to Plaintiff's motion for summary judgment.[1]

PRELIMINARY STATEMENT

True to form, the State has again advocated law and arguments irrelevant to the claims it brought against King Mountain. For example, the State argues (Pl.'s Mem. at 17, 23) that King Mountain is not entitled to Indian tribal immunity, when, as has repeatedly been pointed out (*see, e.g.*, ECF No. 182), King Mountain does not contend that it is immune from suit. The State also, again, tries to deflect attention from the pertinent legal issues through the use of pejoratives: for example, it describes King Mountain as cigarette "traffickers," when it is an undisputed fact that

[1] Despite the Court granting the State ten additional pages for its memorandum of law in support of its motion for summary judgment, the State used 48 footnotes in its brief, many with citations and lengthy text that ordinarily would appear in the main text. The Second Circuit has admonished such tactics. *See Varda, Inc. v. Ins. Co. of N. Am.*, 45 F.3d 634, 640 (2d Cir. 1995) (denying costs of appeal to prevailing party when counsel "brazenly used textual footnotes to evade page limits.") (citation and internal quotation marks omitted).

King Mountains is a U.S. licensed manufacturer of cigarettes and, with respect to the boundaries of New York, only sells its cigarettes to companies owned by Indian nations or Indians, not to consumers. The State tries to create a legal landscape of its own making, and, in doing so, ignores the text of the pertinent statutes and its own prior tax adjudication regarding King Mountain.

The State also tries to intimidate the Court, for example:

> p. 23, "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";
>
> p. 24, "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";
>
> p. 27, "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";
>
> p. 28, "[i]f King Mountain's reading of 'interstate commerce' were applied . . . [r]emote 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."

Hyperbole and threats – a "flood" of "unstamped cigarettes"; "condone" "trafficking"; "immunize" "trafficking"; "undermin[e] . . . public health and the public fisc" – cannot be a proxy for legal analysis and due process.

For the reasons described in our moving brief, and for the reasons set forth herein, application of undisputed material facts to the statutes at issue establishes that the State is not entitled to summary judgment on any of its claims and that the Court should grant King Mountain's motion for summary judgment on the First, Second and Third Claims for Relief in the Amended Complaint.

ARGUMENT

I. Claim I, CCTA: Summary Judgment Should Not Be Granted for the State, Because The CCTA Does Not Apply to King Mountain

A. Indian in Indian Country

The State argues that because King Mountain is not entitled to tribal sovereign immunity, the State is entitled to summary judgment on Claim I. (*See* Pl.'s Mem. at 12-25.) King Mountain has not asserted and is not asserting a sovereign immunity defense, which is only available to Indian tribes. *See Catskill Dev., L.L.C. v. Park Place Entm't Corp.*, 206 F.R.D. 78, 86 (S.D.N.Y. 2002) ("It is [] well-settled that tribal sovereign immunity does not extend to individual members of a tribe."). The State's pages of protestation about King Mountain seeking and misconstruing tribal sovereign immunity are irrelevant.

While the CCTA does provide that it shall not be "deemed to abrogate or constitute a waiver of any sovereign immunity of . . . an Indian tribe," 18 U.S.C. § 2346(b)(2), it also, in a separate sub-paragraph, precludes suits by States against an "Indian in Indian country." *See* 18 U.S.C. § 2346(b)(1) ("No civil action may be commenced under this paragraph against an Indian tribe or an Indian in Indian country (as defined in section 1151"). The State does not address, even in one sentence, what "Indian in Indian country" means, and does not apply any canon of statutory construction or precedent to understand its meaning.

It is axiomatic that the "Court must 'interpret the unambiguous terms of statutes according to their ordinary and plain meaning.'" *DaCosta v. Prudential Ins. Co. of Am.*, No. 10-CV-720 (JS), 2010 WL 4722393, at *5 (E.D.N.Y. Nov. 12, 2010) (quoting *United States v. Sabhanani*, 599 F.3d 215, 255-56 (2d Cir. 2010)); *see also Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the

words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.") (citations and internal quotation marks omitted). The plain meaning of the CCTA is in fact unambiguous: States are prohibited from suing "an Indian tribe or an Indian in Indian country (as defined in section 1151)." 18 U.S.C. § 2346(b)(1). By Congress using two separate terms – "Indian tribe" and "Indian in Indian country" – and by placing an "or" between those terms, the sentence can only be read as prohibiting suits against an "Indian tribe" and an "Indian in Indian country." *See Green v. City of New York*, 465 F.3d 65, 78 (2d Cir. 2006) ("Statutory analysis begins with the text and its plain meaning, if it has one. Only if an attempt to discern the plain meaning fails because the statute is ambiguous, do we resort to canons of construction") (citations and internal quotation marks omitted).

To adopt the State's argument that 18 U.S.C. § 2346(b)(1) is meant only to convey tribal sovereign immunity is to discard the phrase "Indian in Indian country" from the statute. Such a "reading is [] at odds with one of the most basic interpretive canons, that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (2009) (alterations, citations, and internal quotation marks omitted). *See also Bailey v. United States*, 516 U.S. 137, 146 (1995) ("we assume that Congress used two terms because it intended each term to have a particular, no superfluous meaning"); *Russello v. United States*, 464 U.S. 16, 23, (1983) ("We refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship.").[2]

[2] The Supreme Court has also cautioned that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985).

In addition, the definitional reference for "Indian country" in § 2346(b)(1) is located in Chapter 53 ("Indians") of Title 18 ("Crimes and Criminal Procedure"), at § 1151 (among other things, "all land within the limits of any Indian reservation"). Also in Chapter 53 of Title 18, § 1152 exempts "offenses committed by one Indian against the person or property of another Indian," and in § 1153 addresses crimes committed by "[a]ny Indian." Title 18's use of the noun "Indian" does not mean "Indian tribe" or "Indian nation"; it means an "Indian." *See* Brief for the United States as Amicus Curiae Supporting Respondents, *Duro v. Reina*, 495 U.S. 676 (1990) (hereinafter "*Duro* Amicus Brief") (the Supreme Court, "and other courts, have held that in 18 U.S.C. 1151-1153 the term 'Indian' includes any Indian in Indian country, regardless of particular tribal membership"). *Cf. Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007) ("A standard principle of statutory construction provides that identical words and phrases within the same statute should normally be given the same meaning").

Notably, the State fails to address the statutory context of the language at issue: the "Indian in Indian country" exemption in 18 U.S.C. § 2346(b)(1) only prohibits *State* enforcement of the CCTA, and thereby confers exclusive enforcement of the statute against Indians to the federal government. Indians are not exempt from the provisions of the CCTA; the statute only requires that federal authorities prosecute any CCTA violations by Indians, an approach consistent with the long-standing policy that Indian affairs are the province of the federal government. *See Duro* Amicus Brief ("Congress has consistently operated on the premise that, absent congressional action, the States have no jurisdiction over offenses involving Indians in Indian country"); *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 470-71 (1979) ("As a practical matter, . . . criminal offenses by or against Indians have been subject only to federal or tribal laws, except where Congress in the exercise of its plenary

and exclusive power over Indian affairs has expressly provided that State laws shall apply.") (citations and internal quotation marks omitted).

The State cites to floor debate regarding the introduction of the amendment to the CCTA that added the language at issue, and, indeed, several legislators applauded the fact that the amendment would protect tribal sovereignty. However, the amendment did not simply add the phrase "Indian in Indian country"; it added all of the relevant language in 18 U.S.C. §§ 2346(b)(1) and 2346(b)(2), including the provision in § 2346(b)(2) that the statute should not be construed as abrogating or waiving tribal sovereign immunity. The fact that some legislators welcomed the amendment's explicit protection of tribal sovereignty does not undermine the fact that the amendment also prohibited State suits against individual Indians. *See Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring in the judgment) ("The meaning of terms on the statute books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis of which meaning is [] most in accord with context and ordinary usage, and thus most likely to have been understood by the whole Congress which voted on the words of the statute (not to mention the citizens subject to it)"); *Louis Vuitton Malletier S.A. v. LY USA, Inc.*, 676 F.3d 83, 108 (2d Cir. 2012) ("We turn to the legislative history only when the plain statutory language is ambiguous or would lead to an absurd result.") (citation and internal quotation marks omitted).[3]

[3] In fact, engaging in the exercise of gleaning Congressional intent would reach the opposite result advocated by the State, because it must be presumed that Congress was cognizant of the long-standing principle that only Indian tribes and their officers acting in an official capacity are immune from suit, not "Indians." *See Natural Res. Def. Council, Inc. v. U.S. Food & Drug Admin.*, 760 F.3d 151, 166 (2d Cir. 2014) ("In interpreting a statute, courts generally presume that Congress acts against the background of our traditional legal concepts") (citation and internal quotation marks omitted).

The plain meaning of the CCTA is unambiguous, is consistent with how Congress has previously used the phrases "Indian" and "Indian in Indian country" in Title 18, and reinforces long-standing Congressional policy that Indian affairs are the province of the federal government, not the States. *See Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) ("when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms") (citations, and internal quotation marks omitted). Because King Mountain is an Indian in Indian country,[4] the Court should grant summary judgment for King Mountain on Claim One.

B. <u>King Mountain is an IRC Chapter 52 Manufacturer</u>

The State argues (at p. 15) that it is "nonsensical" that licensed cigarette manufacturers are exempt from liability under the CCTA, citing Judge Amon's opinion in *City of New York v. Milhelm Attea & Bros.*, No. 06-CV-3620 (CBA), 2012 WL 3579568 (E.D.N.Y. Aug. 17, 2012), a case involving a stamping agent selling unstamped cigarettes. The State, however, has not cited a single instance of the CCTA being enforced against a licensed cigarette manufacturer.

Pursuant to 18 U.S.C. § 2341(2), cigarettes are not contraband if in the possession of a licensed cigarette manufacturer, a common or contract carrier with a proper bill of lading, or a licensed stamping agent. While Judge Amon is correct that "it would be almost nonsensical for the CCTA 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 WL 3579568, at *23, it would be equally nonsensical to confer CCTA liability on a licensed manufacturer, because manufacturers, who are not stamping agents, necessarily sell and deliver

[4] King Mountain is an "Indian in Indian country" because it is an Indian corporation licensed to do business by the Yakama Nation, is 100% owned by a member of the Yakama Nation, and because it conducts its business on the Yakama Reservation. *See* Def.'s Mem. at 12-13.

unstamped cigarettes. Because King Mountain holds an Internal Revenue Code Chapter 52 manufacturer's permit, 18 U.S.C. § 2341(2)(A) precludes prosecution of King Mountain for a violation of the CCTA.

C. King Mountain Cigarettes Were Not "Contraband" at the Time of Sale by King Mountain

The State mistakenly contends that King Mountain is arguing that it is exempt from liability under the CCTA because enforcement of New York Tax Law § 471 was stayed between September 1, 2010 and June 21, 2011. (Pl.'s Mem. at 16.) This is not King Mountain's argument. Instead, as explained in our moving brief (Def.'s Mem. at 14-15), the CCTA defines "contraband cigarettes" only as possession of 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 . . . to be placed on packages . . . to evidence payment of cigarette taxes[.]" 18 U.S.C. § 2341(2). King Mountain, as a cigarette manufacturer, was not required under New York law to affix a tax stamp onto the packs of cigarettes it possessed (and was not allowed to, as only state-licensed stamping agents may affix tax stamps (*see* Pl.'s Mem. at 5 n.11)). Because New York law did not require a tax stamp at the time of King Mountain's manufacture, sale and delivery of its cigarettes to Indian nations situated within New York, those cigarettes were not "contraband" under the CCTA.

D. Yakama Nation Precedent

The State does not even cite or attempt to distinguish *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007), which dismissed an indictment against two members of the Yakama Tribe for violations of the CCTA, because the prosecution violated the defendants' right to travel, including the right to transport goods to market for trade, as guaranteed by the Yakama Treaty of 1855. 487 F.3d at 1272 ("the Smiskins' alleged transportation and possession of unstamped

cigarettes without providing notice to the State cannot be the basis for prosecution under the CCTA."). Instead, the State cites to *King Mountain Tobacco Co. v. McKenna*, 768 F.3d 989 (9th Cir. 2014), which upheld a Washington State escrow statute as applied to King Mountain's market sales (i.e., *not* Nation-to-Nation sales) within the boundaries of Washington State, in support of its argument that the Yakama Treaty does not give King Mountain the right to make Nation-to-Nation sales of its cigarettes. (Pl.'s Mem. at 14, 30.) In contrast to the *McKenna* case, here the State of New York is attempting to impose liability on an Indian located 3,000 miles away for selling to Indian Nations and companies owned by members of Indian Nations, in violation of a treaty which guarantees "the Yakamas the right to transport goods to market for trade and other purposes." *Smiskin*, 487 F.3d at 1266 (emphasis, citation, and internal quotation marks omitted); *see also id.* ("[W]e refuse to draw what would amount to an arbitrary line between travel and trade in this context, holding, as the Government suggests, that the Yakama Treaty does not protect the 'commerce' at issue in the Smiskins' case.").

In addition, the State's argument that King Mountain lacks standing to assert a defense under the Yakama Treaty, because the rights reserved under the Yakama Treaty are only to the tribe itself, and not for individual members, is also without merit. (*See* Pl.'s Mem. at 14 n.20.) This argument was rejected by the Ninth Circuit in *Smiskin*, *see* 487 F.3d at 1268 (noting previous Ninth Circuit precedent held that the "Treaty right to travel can be exercised by [the Tribe's] *individual* members") (citation and internal quotation marks omitted), and by the Supreme Court, in resolving an attempt to obstruct Indians of the Yakama Nation from fishing on the Columbia River in *United States v. Winans*, 198 U.S. 371, 381 (1905) ("The [Yakama] reservations were in large areas of territory, and the negotiations were with the tribe. They reserved rights, however, to every individual Indian, as though named therein.").

II. Claim II, PACT Act: Summary Judgment Should Not Be Granted for the State, Because The PACT Act Does Not Apply to King Mountain

The PACT Act's filing requirements – 15 U.S.C. § 376(a)(1) and (a)(2) – do not apply to King Mountain's sales of cigarettes to Indians in Indian Country, including within the boundaries of New York State, because those sales did not occur in "interstate commerce," which the PACT Act defines as:

> commerce between a State and any place outside the State, commerce between a State and any Indian country in the State, or commerce between points in the same State but through any place outside the State or through any Indian country.

15 U.S.C. § 375(9)(A). "State" and "Indian country" are distinct terms and locales in the PACT Act: "State" is defined as "each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States," 15 U.S.C. § 375(11); and "Indian country" includes "all land within the limits of any Indian reservation under the jurisdiction of the United States Government . . . all dependent Indian communities . . . [and] all Indian allotments . . . ." 15 U.S.C. § 375(7); 18 U.S.C. § 1151. King Mountain's sales and shipments of cigarettes from the Yakama Nation (Indian country) to, for example, the Seneca Nation (Indian country), are not "interstate commerce" as defined by the PACT Act.

The State does not even address the plain meaning of the PACT Act. Instead, it argues that "Indian country" is "encompassed by the term 'State'" in the PACT Act because, "[o]rdinarily, 'an Indian reservation is considered part of the territory of the State.' *Nevada v. Hicks*, 533 U.S. 353, 361–62 (2001)." (Pl.'s Mem. at 27.) *Hicks* addressed the issue of whether federal courts or tribal courts had jurisdiction to hear a Section 1983 case regarding a search by state officers on tribal land, and whether or not Indian country is ordinarily considered part of State territory in the context of a Section 1983 action, or in any context other that the PACT Act,

is irrelevant. If Congress wanted the PACT Act to apply to "commerce between Indian country in one State and Indian country in another State," or for a State to encompass and include Indian country, it would have said so. Instead, the PACT Act provides distinct definitions for "State" and "Indian country"; one cannot be subsumed by the other in application of the PACT Act. *See Hartford Underwriters*, 530 U.S. at 6 ("when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms") (citation and internal quotation marks omitted); *Bailey*, 516 U.S. at 146 ("we assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning").

Given that the PACT Act was enacted to combat sales of cigarettes to consumers over the internet ("delivery sales"), it should be unsurprising that a sale by an Indian manufacturer, on an Indian Nation, to an Indian wholesaler on an Indian Nation does not come within the ambit of the statute. Precedent cited in the parties' briefs demonstrate that New York City and New York State have found numerous occasions to enforce the PACT Act. The statute, however, is inapplicable to King Mountain's manufacture and sale of its cigarettes from the Yakama Nation to another Indian Nation situated within the boundaries of New York State. *See Lewis v. City of Chicago*, 560 U.S. 205, 215 (2010) ("It is not for us to rewrite the statute so that it covers only what we think is necessary to achieve what we think Congress really intended").

III. Claim III: Summary Judgment Should Not Be Granted for the State, Because, *Inter Alia*, Res Judicata Precludes Re-Litigating the State's Article 20 Claim.

A. Res Judicata Bars the State's Tax Claims Against King Mountain

As noted in our motion for summary judgment (*see* Def.'s Mem. at 19-25), all of the elements necessary to apply res judicata to Claim Three are present: on December 20, 2012, the State brought an Administrative Proceeding alleging that King Mountain failed to pay taxes

under Article 20 for unstamped King Mountain cigarettes that were present in, and seized by, New York State on December 3, 2012; the next day (on December 21, 2012), the State filed the instant federal court action, alleging, in the Third Claim for Relief, that King Mountain failed to pay taxes as required by Article 20 for the King Mountain cigarettes present in, and seized by, New York State on December 3, 2012; and on November 19, 2014, the Administrative Proceeding was dismissed "with prejudice," thereby precluding the State from seeking recovery for its Third Claim in the instant federal court action. *See Maharaj v. Bankamerica Corp.*, 128 F.3d 94, 97 (2d Cir. 1997) (a "final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action"); *State v. Seaport Manor A.C.F.*, 19 A.D.3d 609, 610 (2d Dep't 2005) (holding that New York Attorney General could not bring action for claims that had been brought by Department of Health and dismissed with prejudice pursuant to stipulations of settlement).

The State argues that King Mountain's res judicata defense "lacks merit" for several reasons, each of which is baseless. First, the State claims that 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 . . . ." (Pl.'s Mem. at 31.) King Mountain has never made such an argument, and "fruit of the poisonous tree" has no import in adjudicating the applicability of res judicata.

The State also argues that "the stipulation entered into between the Tax Department and King Mountain has no binding effect outside of that particular proceeding," citing 20 N.Y. Comp. Codes R. & Regs. § 3000.11. (Pl.'s Mem. at 32.) Through its repeated use of the word "stipulation," the State appears unwilling to acknowledge or accept that the Administrative Proceeding was dismissed by Administrative Law Judge Herbert M. Friedman "with prejudice"

and without any finding of liability or monetary penalty for King Mountain. *See Hughes v. Lillian Goldman Family, LLC*, 153 F. Supp. 2d 435, 447 (S.D.N.Y. 2001) ("under New York law, a discontinuance with prejudice, including one pursuant to a settlement, constitutes a final judgment on the merits for purposes of res judicata"). In fact, courts have found res judicata applicable to dismissals with prejudice by reason of settlement in state administrative proceedings. *See Seaport Manor*, 19 A.D.3d at 610 (stipulation of settlement, discontinuing administrative proceeding with prejudice, "is subject to the doctrine of res judicata"). *Cf. Brugman v. City of New York*, 102 A.D.2d 413, 415 (1st Dep't 1984) ("It is well settled that the doctrines of res judicata and collateral estoppel generally are applicable to the determinations of administrative agencies rendered pursuant to their adjudicatory functions"), *aff'd*, 64 N.Y.2d 1011 (1985). 20 N.Y. Comp. Codes R. & Regs. § 3000.11 binds a party to factual stipulations made in an administrative proceeding, and therefore could have relevance to a claim of collateral estoppel (which King Mountain does not assert); but it has no bearing on res judicata, which relies upon the dismissal with prejudice against King Mountain.

The State argues, in one sentence and without citation, that the "stipulation is limited to those cigarettes" at issue in the Administrative Proceeding. (Pl.'s Mem. at 32.) In fact, the Amended Complaint, including the Third Claim, prominently feature the cigarettes at issue in the Administrative Proceeding. *See* Am. Compl. ¶¶ 67-68. Moreover, as addressed in our motion for summary judgment (Def.'s Mem. at 24-25), a dismissal with prejudice precludes a subsequent action on claims that were raised "or could have been raised" in the prior action. *Maharaj*, 128 F.3d at 97 (citation and internal quotation marks omitted). *See also Waldman v. Vill. of Kiryas Joel*, 207 F.3d 105, 111 (2d Cir. 2000) ("a suit for trespass precludes a subsequent action for trespass as to all the instances of trespass preceding the institution of the original suit")

(citation omitted); *Vill. of Laurel Hollow v. Nichols*, 260 A.D.2d 439, 440, (2d Dep't 1999) (res judicata barred claims that "could and should have" been raised in the prior proceeding). The dismissal with prejudice of the Administrative Proceeding precludes any subsequent litigation seeking New York Article 20 taxes from King Mountain, because the New York State Department of Taxation and Finance, in the Administrative Proceeding, could have claimed Article 20 taxes from King Mountain for all of the cigarettes alleged in the instant federal court action. *See Jones v. Safi*, No. 10-CV-2398 (JS) (ARL), 2012 WL 4815632, at *3 (E.D.N.Y. Oct. 3, 2012) ("New York courts apply a pragmatic test, asking whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations.") (citation and internal quotation marks omitted).

Finally, the State argues that King Mountain waived res judicata because King Mountain did not amend its Answer to include this defense. (Pl.'s Mem. at 32-33.) The State fails to note that the Administrative Proceeding was dismissed with prejudice over eighteen months after the Answer to the Amended Complaint was filed and a month after discovery was complete, and also fails to mention that King Mountain alerted the State that the dismissal of the Administrative Proceeding with prejudice was an undisputed material fact. The pertinent chronology is as follows:

- December 3, 2012: New York State Police seize 140 cases of unstamped King Mountain cigarettes on a New York State highway
- December 20, 2012: New York State Department of Taxation and Finance institutes Administrative Proceeding against King Mountain
- December 21, 2012: New York State Complaint filed against King Mountain (ECF No. 1)

- February 12, 2013: New York State Amended Complaint filed against King Mountain (ECF No. 6)

- May 9, 2013: Answer to Amended Complaint filed (ECF No. 47)

- October 8, 2014: Judge Spatt ruled that the State was permitted to take jurisdictional discovery of Delbert Wheeler (ECF No. 129)

- October 21, 2014: Discovery between Plaintiff and King Mountain closed

- November 19, 2014: Administrative Proceeding dismissed with prejudice

- November 26, 2014: King Mountain served its initial Rule 56.1 Statement, which described (in ¶24(c)-(e)) the Administrative Proceeding and its dismissal with prejudice as Undisputed Material Facts

- December 4, 2014: Magistrate Judge Locke ruled that the State could simultaneously take a jurisdictional deposition and a Rule 30(b)(1) deposition of Mr. Wheeler

- September 11, 2015: King Mountain served its Second Rule 56.1 Statement, which (in ¶26(c)-(e)) also described the Administrative Proceeding and its dismissal with prejudice as Undisputed Material Facts

- October 19, 2015: State served its Counter-statement to King Mountain's Second Rule 56.1 Statement, and in Response to ¶26(c)-(e), stated, "Not material and not disputed. The cigarettes at issue in this case (*i.e.*, the cigarettes upon which the State seeks to obtain damages, penalties, and other appropriate relief) do not include these seized cigarettes."

- October 27, 2015: King Mountain letter to court requesting permission to move for summary judgment, including (on pp. 2-3) based upon res judicata as to Claim Three (ECF No. 173)

- November 3, 2015: State's letter to the court requesting permission to move for summary judgment, including (on p. 3) the contention, "because the roughly 7,260 cartons of cigarettes to which King Mountain seeks to apply the *res judicata* doctrine, are not included within the over 2.5 million cartons of cigarettes upon which the State's case is based, King Mountain's *res judicata* argument may similarly be rejected out of hand." (ECF No. 176)

- November 9, 2015: King Mountain letter replying to the State's November 3 letter, arguing, with respect to res judicata, that "the cigarettes seized on December 3, 2012, are prominently relied upon in the State's Amended Complaint and were central to the affidavits [including by the State's counsel] submitted in support of the State's motion for a preliminary injunction. (*See* ECF No. 17)" (ECF No. 182)

- January 26, 2016: State and King Mountain filed motions for summary judgment

An affirmative defense may be "raised for the first time in a motion for summary judgment [when] the other side has had ample opportunity to respond." *S&L Vitamins, Inc. v. Australian Gold, Inc.*, 521 F. Supp. 2d 188, 213 (E.D.N.Y. 2007) (Seybert, J.) (citation and internal quotation marks omitted) (permitting affirmative defense to be raised for first time on motion for summary judgment, citing *Curry v. City of Syracuse*, 316 F.3d 324, 331 (2d Cir. 2003) (affirming consideration of collateral estoppel defense raised for first time in a reply memorandum of law, because the issue was fully briefed and "the primary purpose of requiring collateral estoppel to be pled as an affirmative defense is providing notice and an opportunity to respond")). *See also Schwind v. EW & Associates, Inc.*, 357 F. Supp. 2d 691, 698 (S.D.N.Y. 2005) ("Numerous courts have held that absent prejudice to the plaintiff, a defendant may raise an affirmative defense in a motion for summary judgment for the first time.") (citation and internal quotation marks omitted).

Fed. R. Civ. P. 15 provides that "[t]he court should freely give leave [to amend a pleading] when justice so requires," and a "district court has the discretion to entertain [an affirmative defense of res judicata] when it is raised in a motion for summary judgment, by construing the motion as one to amend the defendant's answer." *Monahan v. New York City Dep't of Corr.*, 214 F.3d 275, 283 (2d Cir. 2000) ("absent evidence of undue delay, bad faith or dilatory motive on the part of the movant, undue prejudice to the opposing party, or futility, Rule

15's mandate must be obeyed."). *See also Block v. First Blood Associates*, 988 F.2d 344, 351 (2d Cir. 1993) (affirming district court decision to construe motion for summary judgment as leave to amend answer); *Rachman Bag Co. v. Liberty Mut. Ins. Co.*, 46 F.3d 230, 234-35 (2d Cir. 1995) (affirming district court's decision to permit defendant to amend answer four years after filing because there was no prejudice to the plaintiff, noting that the "Supreme Court has emphasized that amendment should normally be permitted").

Here, the State has had ample time to respond to King Mountain's defense of res judicata, and the State will suffer no prejudice by construing King Mountain's motion for summary judgment as, in addition, a motion to amend its Answer. The affirmative defense of res judicata was not available at the time King Mountain filed its Answer; it was also unavailable at the time discovery between the State and King Mountain closed. In fact, "Courts have been especially flexible" in permitting motions to amend an answer "where the defense of res judicata was not available at the pleading stage because the other action had not yet been concluded." *Cowan v. Ernest Codelia, P.C.*, 149 F. Supp. 2d 67, 74 (S.D.N.Y. 2001). Moreover, King Mountain alerted the State that the dismissal of the Administrative Proceeding with prejudice was an undisputed material fact when King Mountain filed its original Rule 56.1 Statement on November 26, 2014, seven days after the Administrative Proceeding was dismissed. King Mountain also detailed its res judicata defense in its pre-motion conference letter to the Court on October 27, 2015 (ECF No. 173), and the State responded to King Mountain's res judicata defense on November 3, 2015 (ECF No. 176). In fact, notice to the State of King Mountain's res judicata defense is evidenced by the fact that the State raised the res judicata issue in its January 26, 2016, summary judgment *moving* papers. Undoubtedly, the State has had ample time to respond. *See S&L Vitamins, Inc.*, 521 F. Supp. 2d at 213.

The State claims that it would be prejudiced, because it would have to "use its limited resources to continue litigating this unsupported defense." (Pl.'s Mem. at 33.)[5] What resources the State alludes to, and why they are limited, is unstated. Nonetheless, the State's claim of prejudice should be rejected. First, when provided notice of the defense of res judicata, the State responded by arguing, *inter alia*, that because the cigarettes at issue in the Administrative Proceeding "are not included within the over 2.5 million cartons of cigarettes upon which the State's case is based, King Mountain's *res judicata* argument may similarly be rejected out of hand." After being reminded (on November 9, 2015, ECF No. 182) that "the cigarettes seized on December 3, 2012, are prominently relied upon in the State's Amended Complaint and were central to the affidavits submitted in support of the State's motion for a preliminary injunction. (*See* ECF No. 17)," the State has now changed course, and posits prejudice. The State's gamesmanship should not be countenanced by the Court.

Second, to determine whether a party will be prejudiced, courts "consider whether the assertion of the new claim would: (i) require the opponent to expend significant additional resources to conduct discovery and prepare for trial; (ii) significantly delay the resolution of the dispute; or (iii) prevent the plaintiff from bringing a timely action in another jurisdiction." *Block*, 988 F.2d at 350. The State will not expend any additional resources to conduct discovery related to res judicata, as no discovery is necessary, because it is entirely a legal issue. As the State has already addressed res judicata in its October 19, 2015, Rule 56.1 Counter-Statement, in its November 3, 2015, letter request to the Court seeking permission to move for summary judgment, and in its January 26, 2016, summary judgment moving papers, it cannot be said that consideration by the Court of King Mountain's res judicata defense will significantly delay the

[5] The State does not allege bad faith.

resolution of the case or the parties' summary judgment motions, or prevent the State from bringing a timely action in another jurisdiction. *Cf. Monahan*, 214 F.3d at 284 ("the fact that one party has spent time and money preparing for trial will usually not be deemed prejudice sufficient to warrant a deviation from the rule broadly allowing amendment to pleadings").

In sum, the Court should construe King Mountain's motion for summary judgment as also a motion for leave to amend its Answer to add the affirmative defense of res judicata, pursuant to Fed. R. Civ. P. 15; the Court should grant King Mountain's motion to amend; and the Court should grant King Mountain's motion for summary judgment on the Third Claim.

B. King Mountain, a Lawful Out-of-State Manufacturer, Is Not Liable for New York State Cigarette Taxes

The State argues that King Mountain is liable for taxes on cigarettes shipped to Indian reservations within the boundaries of New York State because King Mountain's "sale and delivery of cigarettes to its New York distributors fails to comply with Tax Law §§ 471 and 471-e" and because King Mountain "fails to meet its burden in showing that cigarettes are not subject to the State's tax." (Pl.'s Mem. at 30.)

Under New York Tax Law § 471, "the ultimate incidence of and liability for the [cigarette] tax shall be upon the consumer." N.Y. Tax Law § 471(2). Although "the agent shall be liable for the collection and payment of the tax," *id.*, an agent is defined as "[a]ny person licensed by the commissioner of taxation and finance to purchase and affix adhesive or meter stamps on packages of cigarettes under this article," *i.e.*, *not* a lawfully operating out of state manufacturer. N.Y. Tax Law § 470(11). The statute further provides that "[i]t shall be presumed that all cigarettes within the state are subject to tax until the contrary is established, and the burden of proof that any cigarettes are not taxable hereunder shall be upon *the person in possession* thereof." N.Y. Tax Law § 471(1) (emphasis added). The Amended Complaint also

alleges that King Mountain is liable under § 471 because it possessed cigarettes in New York. *See* Am. Compl. ¶ 87 ("Defendants have violated, and continue to violate, New York Tax Law §§ 471 and 471-e by possessing cigarettes for sale in New York State . . . .").

As argued in our moving papers (Def.'s Mem. at 20 n.7), the undisputed material facts establish that King Mountain never possessed in New York State unstamped cigarettes for sale. King Mountain manufactures and packages its cigarettes on the Yakama Reservation (located within the boundaries of Washington State), and then ships the cigarettes via common carrier or mail. (*See* Jan. 29, 2016 Pilmar Decl. Ex. 7, Dep. of Jay Thompson pp. 53-54; Jan. 29, 2016 Pilmar Decl. Ex. 8, Dep. of Yancey Black, p. 74; Jan. 29, 2016 Pilmar Decl. Ex. 6, Dep. of Delbert Wheeler pp. 53-54.) The State's motion for summary judgment does not claim to the contrary, and thus fails to establish, as required by both the New York Tax Law and its own Amended Complaint, that King Mountain possessed in New York State unstamped cigarettes.

While King Mountain did not sell its cigarettes to stamping agents licensed by the State of New York (because it sold cigarettes directly to Indian tribes and companies owned by members of Indian tribes), and King Mountain is considered a "wholesale dealer" under the New York Tax Law, there is no provision in Section 471 that directs, or even suggests, that a lawful out-of-state manufacturer of cigarettes is monetarily liable to the State. The only discussion of liability under New York Tax Law § 471 is of: (i) consumers, who bear the ultimate incidence of the tax; (ii) agents, as defined in Section 470(11), who are liable for the collection and payment of the tax; and (iii) persons "in possession" of unstamped cigarettes, who bear the burden of proof that the unstamped cigarettes are not taxable. Because King Mountain is not an agent as defined by the statute (and is obviously not a consumer), and because there is no dispute

that King Mountain was never in possession of unstamped cigarettes in New York, King Mountain is not liable under § 471.

It is logical that the New York Tax Law does not impose monetary liability on lawful manufacturers, because manufacturers never collect cigarette taxes or buy tax stamps. (*See* Pl.'s Mem. at 5 n.11 (noting that "[s]tate-licensed stamping agents are the only persons authorized to purchase and affix New York State cigarette tax stamps.").) Although the State argues that "New York law requires that each and every pack of cigarettes entering the State . . . be received first by a state-licensed stamping agent" (Pl.'s Mem. at 5), the State does not cite a section of the Tax Law, or any other statute or regulation, to support this proposition. In fact, nothing in the law precludes King Mountain from selling to Indian Nations, who could then sell those cigarettes to licensed-stamping agents. The relevant regulation merely creates a "presumption of a taxable event" when cigarettes are introduced into the State, and that presumption may be overcome if the cigarettes are "sold exclusively to licensed cigarette agents." N.Y. Comp. Codes R. & Regs. tit. 20, § 74.3(a)(i)(iii). There is also no evidence whatsoever in the record that King Mountain knew whether the Indian tribes and Indian-owned corporations it sold to intended to resell King Mountain cigarettes to members of their Nations or to a licensed stamping agent to affix stamps before resale off or on their Indian reservations, or both. Although the State claims to the contrary, contending that "King Mountain's business plan was to sell cigarettes—not just to Native Americans—but to all persons both on and off the reservation," (Pl.'s Mem. at 9), its support for this "fact" (and others in this paragraph of its brief) are its Local Rule 56.1 Statement ¶¶ 34-35, 50; however, no factual support for these statements appears in those respective paragraphs, or anywhere in the State's 56.1 Statement that it served on July 30, 2015. *See* Jan 29, 2015 Pilmar Decl. Ex. 3, State's Rule 56.1 Statement ¶ 34 ("Defendant Delbert Wheeler, Sr.

owns and operates King Mountain."); *id.* ¶ 35 ("Since December 2005, Wheeler has acted as King Mountain's sole owner and president."); *id.* ¶ 50 ("To solicit sales of King Mountain's cigarettes, Wheeler and other King Mountain sales representatives made phone calls from their offices on the Yakama Reservation, attended trade shows, and visited customers at their place of business.").[6] There is no evidence that King Mountain's business plan was to sell cigarettes to non-Indian purchasers in New York State, and the undisputed evidence establishes that King Mountain made Nation-to-Nation sales to entities situated within New York's boundaries. It was not King Mountain's responsibility to insure that any non-Indian consumers paid taxes on cigarettes.

Because King Mountain was not in possession of unstamped cigarettes in New York State, and because the State has alleged that King Mountain is liable under Section 471 because it was in possession of unstamped cigarettes in New York State, the State's motion for summary judgment as to the Third Claim of Relief should be denied and King Mountain's motion for summary judgment should be granted.

IV. Claim IV and V: Summary Judgment Should Not Be Granted for the State, Because Genuine Disputed Issues of Material Fact Exist.

With respect to Claims Four and Five, the State's motion for summary judgment should be denied, because genuine disputed issues of material fact exist. As described *supra* p. 21-22, there is no evidence in the record that King Mountain knowingly violated New York Tax Law § 480-b, because King Mountain only engaged in Nation-to-Nation sales within the boundaries of New York State. The State's repeated use of the invented phrase "New York distributors" ignores the fact (and the attendant legal arguments) that King Mountain does not sell cigarettes to "New Yorkers" and has only sold cigarettes to Indian Nations (and companies owned by a

[6] The videotaped 2012 interview of Mr. Wheeler (Pl.'s Mem. at 10 n.17) has no bearing on New York or this case.

member of an Indian Nation) which are situated within the boundaries of the State of New York, with a single exception.

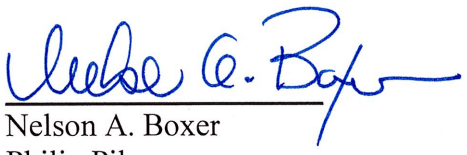
With respect to Claim Five, the evidence in the record demonstrates that King Mountain affixed the required "FSC" (Fire Standard Compliant) stamp to its cigarettes. *See* March 7, 2016, Declaration of Philip Pilmar, Ex. A, Pictures of Cigarettes Purchased by Investigator Scala; Pl.'s Counter-Statement ¶ 28; Jan. 29, 2016 Pilmar Decl. Ex. 10, Dep. of Andrew Scala, p. 84: (regarding photographs of King Mountain's cigarettes purchased by New York State Investigator Scala on November 6, 2012, that evidenced the letters "FSC" on the package, Q: So my question is simply: In your training and experience, the initials FSC depicts or represents compliance with the fire safety code requirement that you just described? A: Yes, sir.").

CONCLUSION

For all of the reasons discussed above and in our moving papers, the Court should deny the State's motion for summary judgment and grant King Mountain summary judgment on the First, Second and Third Claim for Relief.

Dated: March 7, 2016

Respectfully Submitted,



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