UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

STATE OF NEW YORK,

Plaintiff,

v.

MOUNTAIN TOBACCO COMPANY, d/b/a KING MOUNTAIN TOBACCO COMPANY INC., and DELBERT WHEELER, Sr.,

Defendants.

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

DEFENDANT KING MOUNTAIN'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT

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TABLE OF CONTENTS

PAGE

Preliminary Statement 1

Argument 1

I. Contraband Cigarette Trafficking Act 1

A. Indian in Indian Country 1

B. King Mountain Cigarettes Were Not "Contraband" at the Time of Sale by King Mountain 3

II. Prevent All Cigarette Trafficking Act 4

III. New York Tax Law § 471. 6

A. Res Judicata 6

B. King Mountain Is Not Liable for New York State Cigarette Taxes 9

Conclusion 10

TABLE OF AUTHORITIES

CASES **PAGE(S)**

City of New York v. Golden Feather Smoke Shop, Inc.,
No. 08-CV-03966 CBA JMA, 2013 WL 3187049 (E.D.N.Y. June 20, 2013)..........3

City of New York v. Gordon,
1 F. Supp. 3d 94 (S.D.N.Y. 2013)..........4

De La Mota v. U.S. Dep't of Educ.,
412 F.3d 71 (2d Cir. 2005)..........5

Exxon Mobil Corp. v. Allapattah Servs., Inc.,
545 U.S. 546 (2005)..........2

In re Oswego Barge Corp.,
664 F.2d 327 (2d Cir. 1981)..........4

Oneida Nation of New York v. Cuomo,
645 F.3d 154 (2d Cir. 2011)..........3

State v. Seaport Manor A.C.F.,
19 A.D.3d 609 (2d Dep't 2005)..........8

STATUTES

15 U.S.C. § 375..........5

15 U.S.C. § 376..........5

18 U.S.C. § 2346..........2

20 U.S.C. § 80q-14..........1

New York Tax Law § 471..........9

REGULATIONS

20 N.Y. Comp. Codes R. & Regs. § 74.3..........3

Defendant Mountain Tobacco Company, d/b/a King Mountain Tobacco Company Inc. ("King Mountain"), respectfully submits this Reply Memorandum of Law in further support of King Mountain's motion for partial summary judgment.

PRELIMINARY STATEMENT

The State's opposition[1] to King Mountain's motion for partial summary judgment repeatedly exaggerates and misstates King Mountain's arguments. For example, King Mountain does not ask the Court to re-write common law or to re-interpret Supreme Court precedent as it pertains to Indians. It also does not suggest that the Court apply the doctrine of tribal immunity. Instead, King Mountain's motion is predicated upon application of clear, unequivocal statutes, and upon settled principles of res judicata.

ARGUMENT

I. Contraband Cigarette Trafficking Act

A. Indian in Indian Country

Although not argued in its moving papers, the State now claims that the CCTA "is read to mean" that it only prohibits suits against "an individual member of a tribe." (Pl.'s Opp'n at 6.) The State does not cite any authority in support of how the CCTA is "meant" to be read, and instead relies upon a list of statutes that explicitly define "Indian" to mean, for example, "a member of an Indian tribe." *See*, *e.g.*, 20 U.S.C. § 80q-14(7). The State's citations in fact disprove its argument: because Congress did not limit the term "Indian" in the CCTA to, for example, "a member of an Indian tribe," and because the CCTA addresses large quantity sales

[1] Once again the State has abused the use of footnotes – in quantity (25, in a 25-page brief), by inclusion of pertinent legal argument (*see*, *e.g.*, f.n. 1, 3, 17, 20, 22, and 25), and by citation to and quotation from precedent (*see*, *e.g.*, f.n. 2, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 19, 21, 23 and 24) – all of which ordinarily appear in the body of a brief.

(over 10,000) of cigarettes, Congress exempted from State enforcement of the CCTA individual Indians and Indian wholly-owned corporations formed under Indian law.

Coupled with hyperbole – for example, King Mountain is not a "super citizen"; or, "King Mountain's reading [of the CCTA] would improperly and dramatically expand the number of persons able to invoke a tribe's sovereign immunity defense" "by **any Indian**"; or, King Mountain's reading of the statute would "create [] a sea-change in the common law" (Pl.'s Opp'n at 1, 10, and 11 (emphasis in original)) – the State reiterates the contention it made in its moving brief, that the "Indian in Indian country" exemption is only meant to confer tribal sovereign immunity. There is no textual support for this claim, and there is also no logic to the State's recitation of legislative history, which only relates to a section of the CCTA, at 18 U.S.C. § 2346(b)(2) (the CCTA shall not be "deemed to abrogate or constitute a waiver of any sovereign immunity of . . . an Indian tribe"). If the CCTA was coextensive with tribal immunity, there would be no reason to add any provision in addition to 18 U.S.C. § 2346(b)(2). Yet, the same Amendment that added the relevant language of § 2346(b)(2) also added a provision precluding State civil enforcement of the CCTA against Indians in Indian country, at 18 U.S.C. § 2346(b)(1), and against tribes when they are not immune. Legislative history which, as here, addresses only portions of a statute, cannot be a proxy for the unambiguous text of an entire statute.

Because a CCTA suit against King Mountain – an Indian in Indian country – may only be prosecuted by the federal government, the Court should grant King Mountain summary judgment on the First Claim for Relief. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) ("As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material. Extrinsic materials have a role in statutory

interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms.").

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

According to the State's opposition brief, King Mountain argued that the cigarettes King Mountain sold were not contraband because New York Tax Law § 471(4) permitted King Mountain to sell unstamped cigarettes. (Pl.'s Opp'n at 4-5.) King Mountain never made that argument. Instead, King Mountain contends that New York Tax Law does not require cigarette manufacturers, including King Mountain, to affix tax stamps to their cigarettes, and therefore the cigarettes *King Mountain* sold to Indian tribes or entities owned by members of Indian tribes were not "contraband" cigarettes, as defined by the CCTA. In fact, King Mountain was and is not allowed to affix tax stamps to its cigarettes, a fact the State admits. (Pl.'s Mem. at 5 n.11.) Not surprisingly, the State has not cited a single case where a CCTA claim was brought against a lawful manufacturer of cigarettes.

Although the Second Circuit stated in dicta that stamping agents are the "only entry point for cigarettes into New York's stream of commerce," (Pl.'s Opp'n at 4 (quoting *City of New York v. Golden Feather Smoke Shop, Inc.*, No. 08-CV-03966 CBA JMA, 2013 WL 3187049, at *2 (E.D.N.Y. June 20, 2013)[2] (quoting *Oneida Nation of New York v. Cuomo*, 645 F.3d 154, 158 (2d Cir. 2011)))), the regulation cited by the Circuit – N.Y. Comp. Codes R. & Regs. tit. 20, § 74.3(a)(1) – does not support this statement. Instead, § 74.3(a)(1) only creates a "presumption of a taxable event" if unstamped cigarettes are possessed in New York State. Nothing in the law precluded King Mountain from selling its cigarettes unstamped to Indian tribes or entities owned

[2] Although the State cited to a March 29, 2013, memorandum and order in *Golden Feather*, that opinion was corrected and superseded by the June 20, 2013, decision cited herein.

by members of Indian tribes, who could then sell those cigarettes to New York licensed-stamping agents. At the time of the sale by King Mountain, the King Mountain cigarettes at issue in this case were not "contraband" cigarettes as defined in the CCTA.[3]

II. Prevent All Cigarette Trafficking Act

The State makes no effort to address King Mountain's argument that the PACT Act ascribes two distinct meanings to "State" and "Indian country" in the Act's definition of "interstate commerce." Instead, the State argues that not only is "Indian country" "ordinarily considered part of a state's territory," but that King Mountain's argument supposes that Congress "somehow changed [this] common law rule." (Pl.'s Opp'n at 12.) What may or may not "ordinarily" be the case has no bearing on the unambiguous and distinct terms "State" and "Indian country" in the PACT Act. *See, e.g.*, *In re Oswego Barge Corp.*, 664 F.2d 327, 335 (2d Cir. 1981) ("we are to conclude that federal common law has been preempted as to every question to which the legislative scheme spoke directly, and every problem that Congress has addressed") (alterations, citations, and internal quotation marks omitted). In the PACT Act, Congress did not simply import the common law notions of "interstate commerce," "State," or "Indian country"; to the contrary, it explicitly defined each of those terms. Applying those definitions, King Mountain's shipment from Indian country located within the boundaries of one state to Indian country located within the boundaries of another state is not "interstate commerce." *Compare, e.g.*, *City of New York v. Gordon*, 1 F. Supp. 3d 94, 101 (S.D.N.Y. 2013) (cigarettes shipped from Allegany Reservation (located within the boundaries of New York) to New York City satisfied definition of "interstate commerce" under the PACT Act).

[3] We solely rely on our previous briefs for our CCTA arguments regarding IRC Chapter 52 manufacturers and the Yakama Treaty. (*See* Def.'s Mem. at 14-16; Def.'s Opp'n at 7-9.)

The State claims that the conclusion that King Mountain's sales are interstate commerce under the PACT Act is consistent "with the federal agency charged with enforcing the PACT Act's provisions," citing a letter from the Bureau of Alcohol, Tobacco, Firearms and Explosives to King Mountain stating that King Mountain's sales to Indian tribes in California constituted "interstate commerce." (Pl.'s Opp'n at 14.) The State does not claim that this interpretation is entitled to deference, likely because such litigation-related pronouncements are not entitled to *Chevron* deference and may not even be entitled to *Skidmore* respect. *See De La Mota v. U.S. Dep't of Educ.*, 412 F.3d 71, 80 (2d Cir. 2005) ("A position adopted in the course of litigation lacks the indicia of expertise, regularity, rigorous consideration, and public scrutiny that justify *Chevron* deference. Such endorsements [in this case] also lack the thoroughness required for *Skidmore* respect.") (alteration, citation, and internal quotation marks omitted). Further, in the cited letter, ATF did not actually reference the definitions of "State" and "Indian country" in the PACT Act. In the other ATF authority cited in its brief, the State quotes ATF as stating that the PACT Act applies "to sales within and between Indian country." (Pl.'s Opp'n at 14-15 n.16.) However, the State's quote is misleading, because ATF, in this document, was discussing "commerce between points in the same State through any Indian Country," which the PACT Act defines as "interstate commerce" in 15 U.S.C. § 375(9)(A). *See* Mar. 7, 2016 Leung Decl. Ex. B.

Finally, in a footnote, the State claims that King Mountain was required to report its May 2010 shipment to Valvo Candies because the PACT Act was effective June 29, 2010 and the PACT Act requires reporting of all shipments during the previous calendar month. (Pl.'s Opp'n at 15 n.17.) The State is incorrect: the first report pursuant to the PACT Act could not be due until July 10, 2010, for the previous calendar month, and thus the May 2010 shipment predated the onset of reporting requirements pursuant to the PACT Act. *See* 15 U.S.C. § 376(a)(2); Mar.

28, 2016 Pilmar Decl. Ex. A (ATF Open Letter noting that reporting requirements begin July 2010).

III. <u>New York Tax Law § 471</u>

A. <u>Res Judicata</u>

The State contends that its Third Claim for Relief is not barred by res judicata because the "Tax Department action arises from a different transaction or series of transactions" and the two cases "are unrelated in time, space, origin, or motivation." (Pl.'s Opp'n at 15, 19; s*ee also* Pl.'s Opp'n at 18 ("[W]hile 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.").) That contention is meritless, if not frivolous.

On April 1, 2013, the State's supervising counsel, Assistant Attorney General Dana Biberman, submitted a sworn Declaration (Mar. 28, 2016 Pilmar Decl. Ex. B) to this Court "in support of the State of New York's . . . application for a preliminary injunction, enjoining [King Mountain] from selling, shipping, distributing, and continuing to sell, ship and distribute large quantities of unstamped and unreported cigarettes within the State of New York, in violation of [*inter alia*], New York Tax Laws §§ 471, 1814, and 480-b," in which, under the heading, "**<u>NY State Police's Stop and Seizure of Unlawful King Mountain Brand Cigarettes</u>**," she described, in seven paragraphs, the State's December 3, 2012, seizure of unstamped King Mountain cigarettes and argued that:

> this one shipment of 84,000 packs of King Mountain cigarettes intercepted by the New York State Police during this routine inspection accounts for nearly one-sixth (1/6th) of the total quarterly probable demand for *all* cigarettes on Indian lands in the entire state of New York.

Id. ¶ 25. Also submitted in support of the State's motion for a preliminary injunction was a sworn March 4, 2013, Declaration from New York State Investigator Joel Revette, in which he too described the December 3, 2012 seizure of unstamped King Mountain cigarettes and attached as exhibits reports documenting and itemizing the seizure. (Mar. 28, 2016 Pilmar Decl. Ex. C) In fact, the only additional evidence recounted by Ms. Biberman in her Declaration was November 6, 2012, observations by a New York State investigator of King Mountain cigarettes for sale at two smoke shops on the Poospatuck Reservation and his purchase of one carton of unstamped King Mountain cigarettes at one of those smoke shops.

Perhaps most telling, on June 7, 2013, Assistant Attorney General Marc Konowitz wrote a letter to the driver of the truck whose cigarettes were seized by the State Police on December 3, 2012, stating:

> It is my understanding that you were driving the truck when it was pulled over and that therefore you would be able to testify as to where the cigarettes were headed at that time. We have a [preliminary injunction] hearing scheduled on Thursday, June 20, 2013, at 11:00am at the United States Courthouse, 100 Federal Plaza, Room 830, in Central Islip, New York. Would you be able to appear in person to testify at the hearing regarding where the cigarettes were coming from and where they were going?

(Mar. 28, 2016 Pilmar Decl. Ex. D.) The State intended to prove its likelihood of success on the merits of the claims in the Amended Complaint by eliciting evidence of the December 3, 2012, seizure. To call the December 3 seizure "background" or "inessential" to the Amended Complaint is baseless.

Like in the instant action, which was filed on December 21, 2012, the Administrative Proceeding, initiated on December 20, 2012, also sought relief under the New York State tax laws from King Mountain for the 84,000 packs of unstamped King Mountain cigarettes seized by New York State police on December 3, 2012, that were allegedly possessed or controlled by

King Mountain. *Compare* 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 . . . .") *with* Jan. 29, 2016 Pilmar Decl. Ex. 13, NYSDTF Notice of Determination, p. 2 (ECF No. 195-15) ("[o]n 12/03/12, you were found to be in possession and/or control of unstamped or unlawfully stamped cigarettes"). As the State points out (Pl.'s Opp'n at 19), King Mountain has always understood these two cases to form a convenient trial unit and to arise from the same factual grouping or series of transactions, and, when it sought, in the alternative, a stay of the Administrative Proceeding, King Mountain put the State on notice of this belief prior to the State dismissing the Administrative Proceeding with prejudice. (*See* Mar. 7, 2016 Leung Decl. Ex. C.)

Finally, the State's argument that the Attorney General and NYSDTF are not in privity is also without merit. The Attorney General and NYSDTF are two agencies of New York State, and the "mission" and "role" of both agencies include the enforcement of New York State cigarette tax laws. The State's attempt to distinguish *State v. Seaport Manor A.C.F.*, 19 A.D.3d 609, 610 (2d Dep't 2005) (NY Attorney General in privity with the NY Department of Health and was barred from seeking relief on claims that were brought by the Department of Health that "were discontinued with prejudice upon stipulations of settlement"), is nonsensical: it contends, in a footnote, that *Seaport Manor* is "limited to the facts in that case" because the interests of the New York Attorney General and the Health Department in *Seaport Manor* were "in privity," as opposed to this case, where the Attorney General "independently initiated this action under a 'public interest' determination." (Pl.'s Opp'n at 24 n.25.) Why the "public interest" here is somehow greater than the "public interest" in *Seaport Manor* is unexplained. Notably, the State has not cited a single instance where a court found that the New York State Attorney General and a New York State agency were *not* in privity for purposes of res judicata, and the cases the

State does cite (at pp. 20-21) – no privity between New York State and New York City; no privity, in the context of collateral estoppel, not res judicata; and no privity, where one party is the district attorney and the other party is a city or county attorney – are all inapposite.

B. King Mountain Is Not Liable for New York State Cigarette Taxes

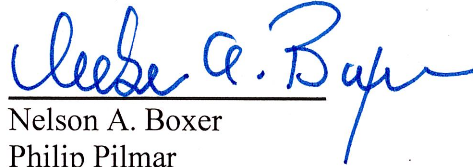
Finally, the Court should also grant summary judgment for King Mountain on the State's Third Claim for Relief because the undisputed material facts establish that King Mountain is not monetarily liable for New York State taxes. (*See* Def.'s Mem. at 20 n.7; Def.'s Opp'n at 19-22.) The State repeatedly alleged in its Amended Complaint that King Mountain is liable because it possessed unstamped 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 . . . ."). The undisputed material facts demonstrate that King Mountain never possessed unstamped cigarettes in New York. New York Tax Law § 471 imposes monetary liability only on consumers and stamping agents, and persons in possession of unstamped cigarettes bear the burden of proof that the unstamped cigarettes are not taxable. Nothing in that law (i) precludes King Mountain from selling to Indian Nations, or companies owned by Indians on Indian Nations, who could then sell those cigarettes to licensed-stamping agents; or (ii) proscribes that a lawful out-of-state manufacturer (and not the tribal entities located within the boundaries of New York who sold cigarettes to consumers without stamps) is monetarily liable for those taxes.

CONCLUSION

For all of the reasons discussed herein and in our prior filings, the Court should grant King Mountain summary judgment on the First, Second and Third Claims for Relief.

Dated: March 28, 2016

Respectfully Submitted,



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