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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REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF STATE OF NEW YORK'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

In a nutshell, the plaintiff State of New York seeks to hold defendant Mountain Tobacco Company d/b/a King Mountain Tobacco Company Inc. ("King Mountain") liable for the company's unlawful sale and delivery of over 25 million packs of untaxed, unstamped, and unreported cigarettes into the State of New York. To date, King Mountain has reaped millions of dollars in profit for its part in selling and delivering such cigarettes into the State. *See* State 56.1 Statement, ¶ 78 (ECF No. 197[1]). These continued sales and deliveries hurt the State, both financially and as a matter of public health. *Id*. ¶¶ 4–16, 79. To date, King Mountain's unreported sales are conservatively estimated to have cost the State over $111.5 million in lost tax revenue. *See id*. ¶ 78 (identifying 25,641,710 packs of unstamped, untaxed cigarettes sold and delivered by King Mountain between 2010 and 2014); *see* N.Y. Tax Law § 471(1) (establishing $4.35 as the state excise tax rate).

As detailed below and by the State's prior filings, King Mountain's arguments seeking to justify its activities lack merit. *See* State MSJ (ECF Nos. 197); State Opp. (ECF No. 201). Accordingly, the State asks this Court to issue an Order granting the State's motion for summary judgment. Out-of-state companies such as King Mountain cannot be permitted to sell and deliver millions of unstamped, untaxed, and unreported packs of cigarettes into the State, to the detriment of the State and the public health of its citizens.

ARGUMENT

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

In its opposing brief, King Mountain makes several arguments as to why the State's motion for summary judgment on its Contraband Cigarette Trafficking Act ("CCTA" or "Act")

[1] The State's reference to its public filings (*e.g.*, ECF No. 197) necessarily includes the State's related documents filed under seal (*e.g.*, ECF No. 198).

claim should be denied. *See* King Mt. Opp., at 3–9 (ECF No. 202). But these arguments lack merit. *See* State MSJ, at 12–25 (ECF No. 197); State Opp., at 2–11 (ECF No. 201).

a. The Yakama Treaty lacks a "free trade" provision.

For example, King Mountain relies on *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007), to argue that the Yakama Treaty permits the company to engage in the unfettered sale and delivery of unstamped cigarettes. *See* King Mt. Opp., at 8–9. But as explained by the State's opposing brief, *Smiskin* does not control in light of *King Mt. Tobacco Co. v. McKenna*, 768 F.3d 989, 998 (9th Cir. 2014), *cert. denied sub nom, Confederated Tribes & Bands of the Yakama Indian Nation v. McKenna*, 2015 U.S. LEXIS 1816 (Mar. 9, 2015). *See* State Opp., at 2 (ECF No. 201). Per that more recent decision, (1) *Smiskin* is inapt and limited to the Treaty's "right to travel" provision—a matter not at issue here; (2) the Treaty lacks a "right to trade" provision, much less a right to trade in unstamped cigarettes; and (3) as a result, King Mountain's sales of cigarettes beyond the Yakama Reservation are subject to a state's non-discriminatory law regulating such sales. *McKenna*, 768 F.3d at 998[2]; *see also* State Opp., at 2.

In any case, even if the Treaty contained such a provision (which it does not), King Mountain's cited case, *United States v. Winans*, 198 U.S. 371, 381 (1905), does not provide the

[2] Given King Mountain and the Yakama Tribe's active participation and litigation in *King Mt. Tobacco Co. v. McKenna*, 768 F.3d 989 (9th Cir. 2014), *cert. denied*, *Confederated Tribes & Bands of the Yakama Indian Nation v. McKenna*, 2015 U.S. LEXIS 1816 (Mar. 9, 2015)—as well as other federal litigation—the Ninth Circuit's holding that the Yakama Treaty does not contain a "right to trade" should remain well-settled here. King Mountain has enjoyed a full and fair opportunity to litigate such Treaty interpretation claims, including the application of such asserted Treaty rights to King Mountain's off-reservation sales of cigarettes; such litigation occurred within the company and tribe's "home" judicial district, the Eastern District of Washington; and the resolution of King Mountain's claims were necessary to support the valid and final judgment on the merits reached in that case. *See King Mt. Tobacco Co. v. McKenna*, 2013 U.S. Dist. LEXIS 49740 (E.D. Wash. Apr. 5, 2013); *see also United States v. King Mt. Tobacco Co.*, 2015 U.S. Dist. LEXIS 99832, at *41 (E.D. Wash. July 27, 2015) (distinguishing *Smiskin*, concurring that the plain language of the Yakama Treaty "does not guarantee the right to trade unencumbered," and dismissing with prejudice King Mountain's counterclaim that the Yakama Treaty precluded the imposition of federal assessments against the company); *King Mt. Tobacco Co. v. Alcohol & Tobacco Tax & Trade Bureau*, 923 F. Supp. 2d 1280,1285–87 (E.D. Wash. 2013) (holding that the 1855 Yakama Treaty did not exempt King Mountain from the federal excise tax on tobacco products). Under such facts, King Mountain should be bound by the Ninth Circuit's prior holding in *McKenna*. *See Proctor v. LeClaire*, 715 F.3d 402, 414 (2d Cir. 2013) (setting forth the test for issue preclusion).

company with standing to assert such a "right." *See* State Opp., at 2 n. 1. In *Winans*, the Court considered the Yakama Treaty's ***fishing*** provision—a wholly different provision that is not at issue here. Fishing provisions "need not be expressly mentioned in [a] treaty" and (absent language clearly relinquishing such right or modification by Congress) may be asserted by individual members of a tribe. *United States v. Dion*, 476 U.S. 734, 784 n.4 (1986). Thus, because King Mountain is not enforcing a fishing right, and is not a member of the Yakama Tribe (nor an "Indian"), *Winans* is inapt and the company's Treaty argument may be set aside.

b. The Act does not exempt licensed cigarette manufacturers from liability.

Similarly, because the CCTA does not provide blanket-immunity to licensed cigarette manufacturers, King Mountain's "licensed manufacturer" argument may be discarded. *See* King Mt. Opp., at 7–8 (citing 18 U.S.C. § 2341(2)(A)). As the State's opposing brief explains, the company's argument fails to account for the Act's additional language prohibiting "any person"—including cigarette manufacturers—from knowingly selling, shipping, transporting or otherwise distributing unstamped cigarettes to persons not otherwise authorized to possess such cigarettes. State Opp., at 3 (citing 18 U.S.C. § 2342(a)); State MSJ, at 15–16. Thus, because King Mountain's reading "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); *City of New York v. Milhelm Attea & Bros.*, 2012 U.S. Dist. LEXIS 116533, *67–68 (E.D.N.Y. Aug. 17, 2012)), that argument may also be discarded.

c. New York Tax Law § 471(4) does not apply.

King Mountain's "not contraband cigarettes" argument also fails. *See* King Mt. MSJ, at 14–15 (ECF No. 195); King Mt. Opp., at 8. As the State's opposing brief explains, King Mountain's relied-on statute (N.Y. Tax Law § 471(4)) does not exempt a cigarette manufacturer

from the State's tax stamp requirement, much less apply to King Mountain. *See* State Opp., at 4–5 (citing N.Y. Tax Law § 471(1), (2)). Thus, King Mountain's argument here fails as well.

d. The Act's "Indian in Indian country" exemption does not apply.

King Mountain's "Indian in Indian country" argument fares no better. As explained by the State's opposing brief, King Mountain falls outside both the literal and intended scope of the Act's "Indian in Indian country" exemption. State Opp., at 6–11; *see also* State MSJ, at 17–25. To begin, King Mountain is neither an "Indian," nor an enrolled member of the Yakama tribe; rather, it is an "Indian-owned business." State MSJ, at 6. And, because Congress knows the difference between an "Indian," (*e.g.*, as a "person who is a member of an Indian tribe") and an "Indian-owned business" (*e.g.*, "an entity organized for the conduct of trade or commerce … [where] at least 50 percent of the property interests of the entity are owned by Indians or Indian tribes"), King Mountain falls outside the literal terms of the Act's exemption. *Id*. at 6–7.[3]

Congress furthermore created this exemption to protect "tribal governments and tribal sovereignty"—not private companies like King Mountain. State Opp., at 8–9. As explained by the State's opposing brief, a tribe's sovereign interests are limited to the "land held by the tribe" and "tribal members within the reservation"; accordingly, an Indian's activities limited to his or her own reservation are appropriately and generally considered within the traditional ambit of a tribe's sovereign interests (absent Congress's expressed intent otherwise). *Id*. at 10–11. In contrast, a tribe's exercise of sovereign power beyond such interests (*e.g.*, over activities or lands beyond the tribe's reservation boundaries) is inconsistent with the dependent status of each tribe. *Id*. Thus, an Indian's activities beyond the tribal reservation's borders are generally "held subject to non-discriminatory state law[s] otherwise applicable to all citizens of the State." *Id*. at

[3] Indeed, the *Duro* amicus brief cited by King Mountain further supports the State's interpretation that an "Indian" is an "individual" that "is an enrolled member of an Indian tribe." *Duro v. Reina*, 1989 U.S. S. Ct. Briefs LEXIS 1024, * 21 n.8 (Oct. 6, 1989) (Br. For the U.S. as Amicus Curiae Supporting Respondents); *see* King Mt. Opp., at 5.

1 (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148–49 (1973)). Here, because King Mountain's sales and deliveries of cigarettes to person in New York State are well beyond the Yakama reservation's borders, the Act's "Indian in Indian country" exemption from liability does not apply to King Mountain. State Opp. at 1, 9–11.[4] In sum, because no genuine dispute of material fact exists, the State is entitled to a judgment as a matter of law on its CCTA claim.

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

As to the State's claim under the Prevent All Cigarette Trafficking Act ("PACT Act"), King Mountain's arguments are addressed by the State's opposing and moving briefs. *Compare* King Mt. Opp., at 10–11; King Mt. MSJ, at 17–19; *with* State Opp., at 12–15; State MSJ, at 25–29. In short, King Mountain incorrectly assumes that Congress's intention to define 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. State Opp., at 12. But because King Mountain fails to identify anything in the PACT Act's provisions, structure, or legislative history that "speak directly" to Congress's intent to upset this common law understanding, King Mountain fails to meet its burden and its argument fails. *Id*. at 12–14; *see also* State MSJ, at 27–29. In sum, no genuine dispute exists. King Mountain is subject to the Act, and its failure to submit the required reports violates the Act. State Opp., at 12–15; State MSJ, at 25–29.

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

An Order granting judgment as a matter of law as to the State's remaining state law

[4] King Mountain's remaining arguments are inapt. Because King Mountain has not identified any ambiguity in the statute, the case *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985), does not apply. *Montana* moreover does not stand for the proposition that a statute's legislative history should be ignored. In that case, for example, the Court examined the Act's legislative history to reach its holding. *Id*. at 766. Similarly, the "plain meaning rule" should not exclude this Court's consideration of the exemption's relevant history. State Opp., at 9 (citing cases); State MSJ, at 21 n.28. As cautioned by the Supreme Court, any interpretation of a statute that would exclude such relevant history would be "in error." *Train v. Colorado Pub. Interest Research Grp.*, 426 U.S. 1, 10 (1976).

claims is also appropriate. *See* Am. Compl, at ¶¶ 86–98 (alleging violations of (1) Tax Law §§ 471 and 471-e (failure to pay cigarette excise tax and failure to affix tax stamp); (2) violation of Tax Law § 480-b (failure to certify compliance with either the Tobacco Master Settlement Agreement, or New York's complementary legislation); and (3) violation of Executive Law § 156-c (failure to certify that the cigarettes sold in New York are "fire-safe" cigarettes that comply with New York's performance standards). As set forth by the State's moving papers, no genuine dispute of fact exists. State MSJ, at 29–34; *see also* State Opp., at 15–25 (addressing *res judicata* defense). And as detailed below, King Mountain's arguments lack merit.

a. King Mountain "possessed" unstamped cigarettes for sale within the State.

King Mountain asserts, for example, that the company "never possessed" unstamped cigarettes for sale in New York—*i.e.*, that its hired common carriers did—and that as a result, the company cannot be held liable for payment of the State's excise tax. King Mt. Opp., at 20. But King Mountain is mistaken. Per *Harder's Express, Inc. v. State Tax Com.*, 418 N.Y.S.2d 199, 201 (App. Div. 3d Dep't 1979), a common carrier, transporting unstamped cigarettes on behalf of a cigarette manufacturer, does not "possess" such cigarettes for sale (*i.e.*, Section 471(1) liability). Such a carrier is merely "facilitating a sale" between the sender and the recipient. *Id*. And thus, the cigarette tax "is to be paid [for] by dealers or agents (Tax Law, § 471, subd 2)." *Id*. Here, because the unstamped cigarettes remained in King Mountain's possession for the purpose of completing a sale, King Mountain—as a self-described "dealer" and "wholesale dealer" of cigarettes—is responsible for paying the excise tax due on each pack of cigarettes. *See* King Mt. Opp., at 20 (identifying the company as a "wholesale dealer" under New York Law); N.Y. Tax Law § 470(7) (defining a "dealer" to encompass the term "wholesale dealer"). Indeed, with the sole exception of a single sale made to Valvo Candies, none of King Mountain's sales to its New York customers were made to a state-licensed stamping agent. State 56.1, at ¶¶

55–56. Under such facts then, King Mountain's "lack of possession" argument is unsupported.

b. King Mountain's customers have not been shown to be Indian nations, or companies owned by a member of an Indian Nation.

King Mountain's "nation-to-nation" trope—*i.e.*, that each of its New York customers are Indian nations, or otherwise owned by members of an Indian nation (King Mt. Opp., at 22)—is furthermore unsupported (*see* State's Resp. to King Mt. 56.1 2nd L.R. 56.1 Statement, at 7–9 (Resp. to Statement No. 13)[5] (Pilmar Decl., Ex. 2; ECF No. 195)) and irrelevant. Even if King Mountain's unsupported assertions were accepted as true, King Mountain has failed to present any evidence that such cigarettes were intended for resale between enrolled members of the same tribe, for such tribal members' own use and consumption—*i.e.*, the only sales that the State may not tax. *See* State MSJ, at 4 (citing cases). Furthermore, even if such evidence were presented, King Mountain's cigarettes would still be required to be sold and shipped to a state-licensed stamping agent, and affixed with a pre-paid New York state tax stamp. *Id*. at 4–5 (citing applicable cases, statutes, and regulations requiring all cigarettes sold to a New York Indian nation or tribe or to a reservation cigarette seller to bear a tax stamp, the cost of which is to be prepaid in advance by a state-licensed stamping agent); State 56.1, at ¶¶ 18–19[6]; N.Y. Tax Law § 471(2). Thus, because King Mountain has not complied with these requirements, the

[5] As noted by the State's Counterstatement (Pilmar Decl., Ex. 2) (ECF No. 195), a court must consider several factors before concluding that a business is an "arm" of a tribe, and thus protected under the tribal sovereign immunity doctrine. *Id*. at 7–9 (State Resp. to King Mt. Statement No. 13) (citing, *e.g.*, *Gristede's Foods, Inc. v. Unkechauge Nation*, 660 F. Supp. 2d 442, 466, 477–78 (E.D.N.Y. 2009) (further noting that the "burden of proof for an entity asserting immunity as an arm of a sovereign tribe is on the entity [that seeks] to establish that it is, in fact, an arm of the tribe"); *City of New York v. Golden Feather Smoke Shop, Inc.*, 2009 U.S. Dist. LEXIS 20953, *17–18 (E.D.N.Y. Mar. 16, 2009) (applying *Gristede*'s multi-factor test, and holding that defendant businesses were not an arms of a tribe)). Furthermore, the cited testimony of King Mountain's own general manager and CEO do not establish that such New York customers are each an arm of a tribe. *See id.* (citing Thompson Depo., at 42–44 (Leung Decl. (ECF No. 197), Ex. 21), and Black Depo., at 99–103 (Leung Decl., Ex. 20)).

[6] References to the State's 56.1 Statement are denoted throughout as "¶ ___." (ECF No. 197.) The State's 56.1 statement identifies the supporting documents, deposition testimony, and other materials relied on by the State, as well as the corresponding exhibit number to the accompanying Declaration of Christopher K. Leung, dated Jan. 29, 2016 ("Leung Decl.") (ECF No. 197).

company's "nation-to-nation" argument is simply a distraction that lacks merit.

c. The State's asserted evidence shows King Mountain's knowledge.

As to King Mountain's assertion that no evidence shows King Mountain's knowledge concerning whether its customers intended to resell King Mountain's delivered cigarettes to other Indian members or non-Indians (King Mt. Opp., at 21–22), King Mountain's argument neglects to address the State's evidence showing (1) that King Mountain used 12 companies to market, distribute, and sell its cigarettes within the State of New York; (2) that the quantity of cigarettes sold and delivered by King Mountain to each customer vastly exceeded the probable demand for such cigarettes on such customer's reservation; and (3) that King Mountain imposed only geographic restrictions on where its cigarettes might be resold, as opposed to any end-user restrictions. *See* State MSJ, at 9 (citing ¶¶ 80–85) & 30 (citing ¶¶ 52–53). King Mountain further ignores the testimony of its sole owner and president, Mr. Delbert Wheeler, who testified (4) 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; and (5) that his interpretation of the Yakama Treaty "totally" affected how King Mountain conducted its business and explained by the company did not pay any New York State excise taxes. State MSJ, at 9–10 (citing ¶¶ 50(a)–(d)[7]). Given King Mountain's silence, King Mountain's arguments here may be rejected.

d. The *res judicata* doctrine does not bar the State's claims.

King Mountain's *res judicata* argument is similarly unsupported. As explained by the State's opposing brief, (1) the facts of the earlier action do not arise out of the "same transaction

[7] *See* Leung Decl. (ECF No. 197), Ex. 22 (Wheeler Dep.), at 14–16, 88–90, 99; Ex. 32 (YouTube, Chasing The American Dream: Delbert Wheeler—Standing by Yakama's 1855 Treaty (published May 30, 2012) *available at* https://www.youtube.com/watch?v=-aHduZ3IcNo at 20:46–21:00 (last accessed on Mar. 24, 2016)) ("Delbert Wheeler says I decide that I read my treaty, and in my treaty, it states that I'm untaxable, so I'm not going to pay this tax."); *see also* Ex. 19 (King Mt. Resp. to Req. For Admis. No. 118) (admitting to the authenticity of Mr. Wheeler's YouTube video interview). The State further relies on the arguments contained in its concurrently filed letter (dated Mar. 28, 2016), which responds to King Mountain's March 16, 2016 letter request , seeking to strike such testimony (ECF No. 204). As detailed by the State's response, King Mountain's request lacks merit.

or series of transactions"; (2) the Tax Department and the Attorney General's Office lack the requisite "privity of interests" in this case; and (3) King Mountain has waived this defense by not including it in its Answer. State Opp., at 15–25. Accordingly, to the extent this Court considers the company's belated request to include this defense in an amended Answer (*see* King Mt. Opp., at 19), such a request should be denied as futile. *See, e.g., O'Brien v. Board of Educ.*, 92 F. Supp. 2d 110, 115 (E.D.N.Y. 2000).[8] In sum, because no genuine dispute of material fact exists, an Order entering a judgment as a matter of law in favor of the State is warranted.

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

No genuine issue of material fact exists as to King Mountain's violation of New York's fire certification filing requirement. *See* State MSJ, at 34. Per Executive Law § 156-c, "no cigarettes shall be sold or offered for sale in this state unless the manufacturer thereof has certified in writing to the office of fire prevention ["Fire Office"] and control that such cigarettes meet the performance standards prescribed by the office of fire prevention and control[.]" N.Y. Exec. Law § 156-c(3). And as the State's moving brief notes, King Mountain sold and delivered over 25 million packs of cigarettes into the State, and has not submitted the required "fire-safe" certifications. State MSJ, at 34; *see, e.g.*, Leung Decl. Ex. 2 (King Mt. Answer, ¶ 15); Ex. 18 (King Mt. Resp. to Req. For Admis. No. 6).

Against this evidence, King Mountain presents a single photograph of a pack of King Mountain cigarettes bearing the letters "FSC," which the company contends means "fire standard compliant." King Mt. Opp., at 23. Such evidence, however, is insufficient to create a genuine

[8] In the alternative, King Mountain's request may also be denied for the company's undue delay or dilatory motive in failing to raise this affirmative defense sooner. *See* State Opp., at 19–20, 24–25 (identifying King Mountain's lack of fair notice in the earlier administrative tax proceeding and undue delay in raising this potential defense in this case); *O'Brien*, 92 F. Supp. 2d at 114 (identifying undue delay, bad faith, and dilatory motive as additional grounds for rejecting a request for leave to amend).

dispute of material fact. To begin, the cited photograph has no bearing on whether the company submitted the required certifications—it did not. Moreover, an "FSC" marking by itself does not show that King Mountain's cigarettes meet ***New York's*** "fire-safe" standards. This is because in New York, each proposed "FSC" marking is subject to the Fire Office's approval, and is "unique to packs of cigarettes that meet New York standards." 19 N.Y. Codes R. & Regs. § 429.8(b).[9] Here, King Mountain fails to show that it proposed (much less that the Fire Office approved) of an FSC marking that is "unique" to its packs of cigarettes sold in New York. Thus, regardless of whichever ***other state*** in which King Mountain's cigarettes may be "fire-safe" compliant in, King Mountain has not shown that its over 25 million packs of cigarettes sold and delivered into New York somehow comply with ***New York's*** fire-safe standards. King Mountain furthermore fails to show that Andrew Scala—an investigator with the Attorney General's Office, and not the Fire Office, is somehow qualified to opine on the company's compliance with this statute—*i.e.*, a legal determination for which Investigator Scala lacks training for. *See* Pilmar Decl. (ECF No. 195), Ex. 10 (Scala Dep.), at 10–21. Thus, because no genuine dispute of material fact exists, an Order entering a judgment as a matter of law on the State's fire-safe claim is appropriate.

CONCLUSION

For all the foregoing reasons, an Order granting the State's motion for summary judgment is appropriate. Out-of-state companies like King Mountain cannot be permitted to flaunt the rule of law, by selling and delivering millions of contraband cigarettes into the State, while at the same time reaping millions of dollars in profit, to the detriment of the State and the public health of its citizens.

[9] In addition to requiring unique markings for cigarettes that meet New York's performance standards (19 N.Y. Codes R. & Regs. § 429.8(b)), New York regulations further require a manufacturer (i) to use only one marking for its brands sold or marketed within the State, (ii) to notify the Office of Fire Prevention and Control as to the selected marking; and (iii) present such proposed marking for approval by the Office. *Id*. § 429.8(c)–(e). Here, King Mountain has failed to present any evidence of compliance with any of these requirements.

Dated: New York, New York
March 28, 2016

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