UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

THE STATE OF NEW YORK,

Plaintiff,

-against- Civil No.: 14-cv-00910

GRAND RIVER ENTERPRISES SIX NATIONS, LTD. and NATIVE WHOLESALE SUPPLY COMPANY INC.

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF NATIVE WHOLESALE SUPPLY COMPANY's MOTION TO DISMISS

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PRELIMINARY STATEMENT

The State of New York ("State"), in an unprecedented attempt to apply federal legislation beyond its express statutory limits, filed suit against two Indian-owned businesses, Native Wholesale Supply Company ("NWS") and Grand River Enterprises Six Nations, Ltd. ("Grand River"). The State's Second Amended Complaint alleges that NWS and Grand River have violated the federal Contraband Cigarette Trafficking Act ("CCTA") and the Prevent All Cigarette Trafficking Act ("PACT Act") and provisions of the New York Tax Law.

NWS moves to dismiss the State's CCTA and PACT Act claims under Federal Rule of Civil Procedure 12(b)(6). The CCTA, 18 U.S.C. § 2346(b)(1), bars the State from bringing a civil enforcement action against "Indians in Indian country" – a provision the State ignores. NWS has at all times been wholly-owned by a member of the Seneca Nation of Indians ("Seneca Nation"). NWS is located and operates exclusively on the Cattaraugus Territory of the Seneca Nation in Perrysburg, New York,[1] where it is licensed by the Seneca Nation (and the federal government) to operate its tobacco importing and distribution business. NWS imports exclusively tobacco products produced on Six Nations (Iroquois) land in Ontario, Canada, which NWS then distributes only (and directly) to First Nation or tribal governments within Indian country in the United States. NWS' import and distribution operations directly contribute to the livelihood of over 400 Native American families – and indirectly to 1,000 jobs nationwide that depend on the distribution system.

[1] Perrysburg is in Cattaraugus County, within this District. 28 U.S.C. § 112(d).

Since its inception, NWS has paid the federal government approximately $900,000,000, nearly one billion dollars, in tobacco excise taxes and duties. NWS' distribution chain is the biggest creator of jobs for Native Americans in the tobacco industry, and NWS is the 8th largest payer of federal tobacco excise taxes annually of any company (Native or otherwise) in the United States. In addition, along with the company that manufactures the products it imports, NWS was responsible for creating the Dreamcatcher Fund charitable organization that has, since its inception, contributed tens of millions of dollars to Native American causes throughout Western New York and North America. Separately, NWS' distribution chain has assisted in promoting self-sufficiency of multiple First Nations and Tribes in the United States whose economies rely upon the tobacco trade, especially during these recent times of economic hardship. One bright example is the Tonawanda Seneca Nation, which recently built a Cultural Center through proceeds of the distribution system that begins with NWS. For the first time, that Nation has been able to create a day-care program, community center, and school at the Center, where they teach children the traditional language and culture – providing working-parents with a safe environment for their children.

The PACT Act does not apply to NWS and its operations outlined above because the State does not and cannot allege that NWS engages in "delivery sales" (i.e., sales to consumers excluding retailers and wholesalers), a provision the State ignores. The State alleges that NWS sells only to downstream Native wholesalers (in fact, NWS only sells to Native American governments and their operating companies). Moreover, NWS' sales do not constitute "interstate commerce" as defined by the PACT Act, which does not include sales from Indian country to Indian country. Finally, the CCTA and the

PACT Act must be construed in favor of NWS under relevant canons of interpretation concerning laws affecting Native Americans, federal common law governing state-Native relations, and the language of the CCTA and PACT Act. Accordingly, this Court should dismiss the CCTA and PACT Act claims. NWS also files a motion to stay discovery pending resolution of this motion.

FACTUAL AND PROCEDURAL BACKGROUND

A. Procedural Background

On March 4, 2013, the State filed this action in the Eastern District of New York ("EDNY"). (Dkt. 1). Pursuant to Judge Wexler's procedures, the parties filed pre-motion letters. Defendants requested permission to file a motion to dismiss. The State requested permission for leave to file an Amended Complaint in order to clarify that its claims against NWS were limited to activities occurring after November 21, 2011, the filing date of the NWS bankruptcy petition.

By separate orders filed July 30, 2013, Judge Wexler granted the State's request to file the Amended Complaint and also granted permission for Defendants to file motions to dismiss. (Dkts. 32, 35, 37, 39) Defendants' motions to dismiss and opposition papers were submitted on December 16, 2013. (Dkts. 44-52)

While the Defendants' motions were pending, the State received permission to pursue discovery to establish venue in the EDNY. In particular, the State sought to establish direct transactions between Defendants and three cigarette retailers located on Shinnecock Indian land on Long Island, New York that were identified in the Amended Complaint. (Dkt. 33) After discovery failed to establish any such connection, the court ruled on the Defendants' pending motions.

By Order dated October 15, 2014, the court ruled that "Defendants' Motions to Dismiss are DENIED, without prejudice, and Defendants' alternative Motions to Transfer to the Western District of New York are GRANTED. This ruling is without prejudice to renew the motion to dismiss before the Court in the Western District." (Dkt. 65) This action was transferred to this Court on October 27, 2014. Pursuant to an approved stipulation (Dkt. 72), on December 15, 2014, the State filed its Second Amended Complaint (Dkt. 76).

B. The Second Amended Complaint[2]

The State alleges that NWS participates in a so-called "joint venture" with Grand River — a corporation owned by other Six Nations of Indians (Iroquois), with its principal place of business in Ontario, Canada — to sell, ship, and distribute "contraband cigarettes" in violation of state and federal law.[3]

In particular, the State alleges, in conclusory fashion and merely upon information and belief, that NWS and Grand River "act as a single enterprise whose purpose is to manufacture and distribute tobacco products, specifically Seneca Brand cigarettes."[4] Grand River is "the manufacturer of the Seneca brand cigarettes," and NWS is, allegedly, "Grand River's sole importer and distributer [sic] of Seneca brand cigarettes to Indian lands in New York and remains a primary importer of Seneca brand cigarettes to the present."[5] The State claims that NWS and Grand River, "collectively

[2] Solely for purposes of this motion to dismiss, NWS assumes the truth of all well-pleaded, nonconclusory factual allegations in the amended complaint. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 124 (2d Cir. 2010), *affd,* 133 S. Ct. 1659 (2013).
[3] 2d Am. Compl. ¶¶ 1-2, 8, 55-66.
[4] Id. ¶ 10.
[5] Id.

and individually," violate the state and federal laws referenced in the Second Amended Complaint.[6]

Grand River manufactures Seneca brand cigarettes in Ontario, Canada.[7] Grand River sells cigarettes to NWS FOB Canada in Canada, with title to the cigarettes transferring from Grand River to NWS in Canada.[8] NWS then imports the cigarettes to the United States.[9] The State alleges that since November 22, 2011, "defendants" have knowingly distributed millions of "unstamped and unreported cigarettes to various on-reservation wholesalers in the State of New York, such as Seneca Imports, Tonawanda Seneca Nation Distribution, and Tuscarora nation[10] and that NWS is "not a New York State licensed stamping agent."[11] The State does not allege that Defendants distribute their cigarettes to non-Native clients either inside or outside Indian country. After purchasing cigarettes from Grand River, NWS "then proceeded to sell these untaxed and unstamped cigarettes to reservation cigarette retailers in New York."[12] The State further alleges that, for the period, November 22, 2011 through February 2013, NWS sold cigarettes to "on-reservation wholesalers, such as Seneca Imports, Tonawanda Seneca Nation Distribution, and Tuscarora Nation."[13] NWS' alleged "distribution to on reservation wholesalers, continued after February 2013, until as recently as August

[6] Id.
[7] Id. ¶ 55.
[8] Id.
[9] Id. ¶ 56.
[10] Id. ¶ 58 (emphasis added). *See also* id. ¶¶ 62-63, 101, 105, 108-09.
[11] Id.
[12] Id. ¶ 59 (emphasis added).
[13] Id. ¶ 62.

2014."[14] The State alleges that none of these cigarettes were stamped or reported to the State Department of Tax and Finance.[15]

Without even attempting to allege a nexus to NWS, the State next alleges that "[l]arge quantities of these contraband Grand River cigarettes have been offered for sale at several reservation cigarette retailers in New York State, including Hank's Smoke Shop in Lewiston, Lake Erie Tobacco in Buck Kill, Onondaga Nation Smoke Shop in Onondaga, OJ's Smoke Shop in Steamburg, Steamburg Smokeshop in Cattaraugus, Arrowhawk Smoke Shop in Basom, Rising Native Sisters in Mastic, Turning Stone Casino in Oneida, and Mikey G's in Cattaraugus, among others."[16]

The State (insufficiently) alleges that a joint venture exists between NWS and Grand River, and that the "distributorship for defendants' joint venture is structured such that [NWS] is responsible for distributing Seneca brand cigarettes on Indian lands in the United States . . . ."[17] The State also alleges that the purported "joint venture between [Grand River and NWS] has at all times been focused, *inter alia*, on the sale and distribution of Seneca cigarettes to Indian lands in New York State."[18]

The State also alleges several "undercover" purchases of Seneca brand cigarettes from various retailers.[19] The State does not allege any undercover purchases from NWS (or Grand River).[20] Nor does the State allege that the cigarettes purchased by its undercover agents from retailers in Indian country were purchased by

[14] Id. ¶ 63.
[15] Id. ¶ 64.
[16] Id. ¶ 61.
[17] Id. ¶ 72 (emphasis added).
[18] Id. ¶ 73 (emphasis added).
[19] Id. ¶¶ 84-98.
[20] Id. ¶¶ 84-98.

those retailers from NWS.[21] Indeed, in alleging that NWS "remains a primary importer of Seneca brand cigarettes to the present"[22] the State concedes that NWS is admittedly not the only importer of Seneca brand cigarettes. Notably, the State does not identify dates when NWS allegedly acted as the sole importer of Seneca brand cigarettes.

The State's "First Claim for Relief" alleges a violation of the CCTA.[23] Yet, absent from its claim is any reference to the provision in the CCTA that bars the State from bringing a civil enforcement action against Indians in Indian country. The Second Amended Complaint is devoid of any allegation sufficient to address this provision.

The State's "Second Claim for Relief" alleges a violation of the PACT Act.[24] Absent from this claim is any reference to the PACT Act's predicate requirement of "delivery sales," i.e., sales to consumers excluding wholesalers and retailers. The State fails to allege any sale by NWS to consumers. To the contrary, the State repeatedly alleges that NWS sells only to wholesalers and/or retailers on Indian lands.

After neglecting the PACT Act's "delivery sale" requirement, the State attempts to satisfy that Act's "interstate commerce" requirement by including an allegation that Defendants engaged in shipments: (1) between various Native American lands in New York; and (2) between locations both inside and outside New York State.[25] These allegations fail as discussed below.

[21] Id. ¶¶ 84-98.
[22] Id. ¶ 10.
[23] Id. ¶¶ 118-123.
[24] Id. ¶¶ 124-132.
[25] Id. at ¶ 126.

STANDARD OF REVIEW

When considering a motion to dismiss under Rule 12(b)(6), this Court "must accept the allegations contained in the complaint as true and draw all reasonable inferences in favor of the nonmoving party."[26] Plaintiff's allegations must "raise a right to relief above the speculative level."[27] The State must plead enough facts "to 'state a claim to relief that is plausible on its face.'"[28] In other words, "plaintiff must provide the grounds upon which his claim rests through factual allegations sufficient 'to raise a right to relief above the speculative level.'"[29] As a result, "conclusory statements and legal conclusions are insufficient to state a plausible claim for relief."[30]

[26] Romeo Land Dev. LLC v CVS Pharm., Inc., 2014 WL 1920568, at *8 (W.D.N.Y. 2014).
[27] Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007).
[28] Stokes v. Nestle Purina Petcare Co., 2012 WL 3746810, at *2 (W.D.N.Y. 2012) (quoting Twombly).
[29] Swain v. Brookdale Sr. Living, 2011 WL 1213600, at *1 (W.D.N.Y. 2011) (citations omitted).
[30] Graham v. Knebel, 2009 WL 4334382, at *2 (S.D.N.Y. 2009) (citations omitted); *see also* Faber v. Metro. Life Ins. Co., 648 F.3d 98, 104 (2d Cir. 2011) (noting that courts are not "'bound to accept conclusory allegations or legal conclusions masquerading as factual conclusions'").

ARGUMENT

I. The CCTA Bars Civil Actions against "an Indian in Indian country"

The State's discussion of the CCTA overlooks 18 U.S.C. § 2346(b)(1),[31] which provides that "**[n]o civil action may be commenced** under this paragraph **against** an Indian tribe or **an Indian in Indian country**."[32] The State attempts to ignore this provision for good reason: NWS is an "Indian in Indian country" and § 2346(b)(1) thus bars the State's CCTA claim. NWS is a Native American entity established under Native American law that is located and operates on Seneca Nation land.[33] Under 18 U.S.C. § 1151, "Indian country" is defined to include "all land within the limits of any Indian reservation under the jurisdiction of the United States Government." The Cattaraugus Territory of the Seneca Nation falls within the definition of Indian country.[34]

A. The "Indian in Indian country" Exception Extends to Tribally-Chartered Business Entities

Because the CCTA does not expressly define "Indian," the Court must first look to the term's plain meaning. Interpreting "Indian" as including tribally chartered corporations is consistent with the ordinary legal meaning of the term "person," which

[31] 2d Am. Compl., ¶¶ 40-44.
[32] 18 U.S.C. § 2346(b)(1) (emphasis added); City of New York v. Gordon, 1 F. Supp. 3d 94, 103 (S.D.N.Y. 2013) (holding that § 2346(b)(1) did not bar claim against Marcia Gordon because she was not an Indian, even though her husband was); *cf.* City of New York v. Wolfpack Tobacco, 2013 WL 5312542, at *2 n.1 (S.D.N.Y. 2013) (noting that no CCTA claim was asserted against defendants, who were located on the Allegany Reservation of the Seneca Nation, and citing in a footnote § 2346(b)(1)).
[33] 2d Am. Compl., ¶¶ 9, 111, and Ex. D (at p. 9 of 47).
[34] Citizens Against Casino Gambling in Erie County v. Hogen, 2008 WL 2746566, at *42 (W.D.N.Y. 2008) (noting that Seneca Nation land, including Cattaraugus Reservation, constitutes Indian country).

extends to artificial, legal entities such as corporations and other business entities.[35] Although the CCTA does not define "person," the PACT Act defines "person" to mean "an individual, corporation, company, association, firm . . . Indian tribal government, governmental organizations such a government, or a joint stock company."[36] Tribal corporate entities chartered under tribal laws have distinct rights based on their status as Indian legal persons.[37]

Interpreting "Indian," like "person," as including tribally-chartered business entities is consistent with the legislative history of the "Indian in Indian country" provision contained in § 2346(b)(1). Section 2346 formed part of the CCTA when originally enacted in 1978.[38] Congress amended it in 2006 to add subsection 2346(b).[39] When introduced from the floor of the House in 2005,[40] the language of the proposed amendment was immediately opposed by legislative leaders who felt it would improperly

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[35] AMERICAN HERITAGE DICTIONARY, definition of "person" ("A human, corporation, organization, partnership, association, or other entity deemed or construed to be governed by a particular law").
[36] 15 U.S.C. § 375(10).
[37] *See, e.g.,* Am. Vantage Companies, Inc. v. Table Mountain Rancheria, 292 F.3d 1091, 1100 n.10 (9th Cir. 2002), *as amended on denial of reh'g* (July 29, 2002) (citing 28 U.S.C. § 3002(10) ("'Person' includes a natural person (including an individual Indian), a corporation, a partnership, an unincorporated association, a trust, or an estate, or any other public or private entity, including a State or local government or an Indian tribe"); 42 U.S.C. § 8802(17) ("The term 'person' means any individual, company, cooperative, partnership, corporation, association, consortium, unincorporated organization, trust, estate, or any entity organized for a common business purpose, any State or local government (including any special purpose district or similar governmental unit) or any agency or instrumentality thereof, or any Indian tribe or tribal organization."); 29 C.F.R. § 37.4 ("Entity means any person, corporation, partnership, joint venture, sole proprietorship, unincorporated association, consortium, Indian tribe or tribal organization....").
[38] Pub. L. 95–575, § 1 (Nov. 2, 1978), 92 Stat. 2465.
[39] Pub. L. 109–177, title I, § 121(f) (Mar. 9, 2006) ("USA Patriot Improvement and Reauthorization Act of 2005"), 120 Stat. 223.
[40] 151 Cong. Rec. H6282 (July 21, 2005).

impose liability on tribes and tribal entities that were "legally involved" in tobacco commerce.[41] Representative Dale Kildee pointed out that such were "clearly not the types of entities we are targeting with this provision."[42] By way of compromise, and to ensure the ability of tribes and tribal members to engage in the tobacco economy, the "Indian in Indian country" exception in subsection 2346(b)(1) was enacted.

Interpreting "Indian" to include tribally-chartered business entities is also consistent with Congress' treatment of tribally-licensed manufacturers, distributors, wholesalers and retailers of tobacco products under the PACT Act (see discussion below). The language of what ultimately became the PACT Act, first introduced in 2003 in the 108th Congress and enacted in 2009 by the 110th Congress, was also considered by the 109th Congress that added the "Indian in Indian country" clause to the CCTA.[43]

Interpreting "Indian" as including tribally-chartered business entities is further consistent with the understanding of state courts at the time, which considered tribal corporations "Indians" and thus exempt from certain state regulatory authority. Noting that "Congress has recognized the fact that there is such a thing as an 'Indian corporation,'"[44] for example, the South Dakota Supreme Court ruled in Pourier v. S.D. Dep't of Rev. that a corporation owned by an enrolled tribal member and operated on reservation lands would be considered a tribal member for purposes of assessing immunity from state taxation. Such a rule, the court found,[45] promoted what had been

[41] Id. at H6282, H6284-85 (remarks of Representatives John Conyers, Tom Cole, Jim Sennsenbrenner and Eric Cantor).
[42] Id. at H6284 (remarks of Rep. Dale Kildee) (emphasis added).
[43] See, e.g., S. 3810 (109th Cong., 2d sess.), § 2(a) (defining "consumer" as excluding "any person lawfully operating as a manufacturer, distributor, wholesaler, or retailer of cigarettes or smokeless tobacco"). Compare 15 U.S.C. § 375(4)(B) (same).
[44] Id. at 404.
[45] 658 N.W.2d at 404-05.

"Congress' primary objective in Indian law" for decades, namely, "to encourage tribal economic independence and development."[46] It would be contrary to those ends to limit the options available to tribal enterprises by depriving Native Americans of the economic benefits of incorporation. The South Dakota high court reached that result notwithstanding the fact that the corporation was formed under state law.[47]

Likewise, in Flat Ctr. Farms, Inc. v. Mont. Dep't of Rev., the Montana Supreme Court ruled that a state corporation license tax could not be imposed on a Montana corporation that was tribally chartered, and owned/operated by Indians conducting business entirely in Indian country.[48]

Here, NWS presents an even stronger case for treatment as an "Indian" because, unlike the corporations in Pourier and Flat Ctr. Farms, NWS is not incorporated under state law. Moreover, NWS is not only "Indian-owned," but it operates and maintains its principal place of business in Indian country, and it is tribally licensed and chartered.

Similarly, the United States Court of Appeals for the Ninth Circuit has held that tribally owned and operated corporations or business entities that are tribally licensed may exercise the rights of tribal members under treaty,[49] and that such treaty rights are not abrogated by the CCTA.[50]

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[46] Id. at 405.
[47] 658 N.W.2d 395, 404-05 (S.D. 2003), *vacated in part on other grounds*, 674 N.W. 2d 314 (S.D. 2004).
[48] 49 P.3d 578, 580-82 (Mont. 2002), *cert. denied*, 537 U.S. 1046 (2002).
[49] Yakama Indian Nation v. Flores, 955 F. Supp. 1229, 1260 (E.D. Wash. 1997), *aff'd*, 157 F.3d 762 (9th Cir. 1998).
[50] United States v. Smiskin, 487 F.3d 1260 (9th Cir. 2007) (CCTA does not abrogate right to travel under Yakama treaty).

Limiting the meaning of "Indian" as used in the CCTA's "Indian in Indian country" provision would be contrary to the Act's purpose and Congressional intent because such a limitation would contravene long-standing federal policies of protecting and promoting tribal self-determination and tribal economic independence and development.

Finally, to the extent that there is any ambiguity in the application of the term "Indian" in the CCTA, it must be construed in favor of NWS. The CCTA must be interpreted in accordance with the unique canons of construction applicable to Native Americans — including, most notably, the canons establishing that "States may tax Indians only when Congress has manifested clearly its consent to such taxation," and that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."[51] Moreover, as discussed in Point II(c) below, the CCTA and PACT Act must be viewed in light of existing federal statutes and well-established common law holding that states lack the ability to regulate Native to Native transactions in Indian country absent express Congressional authorization. Therefore, any ambiguity in the CCTA generally, or § 2346(b)(1) in particular, must be resolved against the State and in favor of NWS.

[51] County of Yakima v Confederated Tribes and Bands of Yakima Indian Nation, 502 U.S. 251, 269 (1992) ("When we are faced with these two possible constructions, our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: '[S]tatutes 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) (citing, *inter alia*, Bryan v. Itasca County, 426 U.S. 373, 393 (1976); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 174 (1973), Choate v. Trapp, 224 U.S. 665, 675 (1912)); *see also, id.* at 766 n.4 (noting that "although tax exemptions generally are to be construed narrowly, in 'the Government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal.'") (citation omitted).

B. NWS and Its Business Activities Come Within the "Indian in Indian country" Exception

NWS is a licensed entity chartered under the laws of the Sac and Fox Nation of Oklahoma, a federally recognized tribe located within the exterior boundaries of the State of Oklahoma.[52] NWS is wholly-owned by an enrolled member of the Seneca Nation of Indians, also a federally recognized tribe. NWS resides and operates exclusively within the boundaries of the Cattaraugus Indian Territories in Perrysburg, New York,[53] which are held by the United States in trust for the Seneca Nation of Indians, are within the jurisdiction of the Seneca Nation, and constitute Indian country of the Seneca Nation under federal law.[54] NWS and its business operations comply with the laws of the Sac and Fox Nation and the Seneca Nation. NWS is not licensed or chartered under the laws of any state and derives no benefit from incorporation laws in any state. Because it is an Indian in Indian country as defined by 18 U.S.C. § 1151, New York State is prohibited from bringing a civil action against NWS pursuant to § 2346(b)(1) of the CCTA. As a result, the State's first claim must be dismissed.

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[52] 75 Fed. Reg. 60812.

[53] 2d Am. Compl., ¶¶ 9, 111, and Ex. D (at p. 9 of 47).

[54] See 18 U.S.C. § 1151(a) (defining "Indian country" as including "all land within the limits of any Indian reservation under the jurisdiction of the United States Government"). See also Citizens Against Casino Gambling in Erie County v. Hogen, 2008 WL 2746566, at *42 (W.D.N.Y. 2008) (Seneca Nation land, including Cattaraugus Reservation, constitutes Indian country).

II. The PACT Act Does Not Apply to NWS' Sales to Native American Wholesalers

The PACT Act was enacted to address underage smoking and tax avoidance resulting from internet sales to end users.[55] The PACT Act, therefore, was never intended, and does not apply, to NWS' alleged transactions with wholesalers or retailers.[56]

The State alleges that NWS has violated the PACT Act by selling tobacco products to Native retailers and wholesalers in Indian country. This claim, however, must fail because NWS does not engage in "delivery sales" within the meaning of the PACT Act. NWS does not sell to consumers; rather, it sells to Tribal wholesalers that are excluded from the PACT Act. In addition, the PACT Act's definition of "interstate commerce" excludes the transactions alleged by the State. Finally, the PACT Act (and the CCTA) must be construed in light of existing federal law governing the tobacco trade in Indian country thus barring its use against NWS in this case. Moreover, as explained below, Section 5 of the Act expressly requires that any doubts over the applicability of the Act's provisions must be resolved in favor of NWS.

A. NWS does Not Engage in "Delivery Sales"

The PACT Act governs "delivery sales," which are sales to "a consumer if (A) the consumer submits the order for sale by means of a telephone . . . the mails, or the Internet . . . or the seller is otherwise not in the physical presence of the buyer when the request for purchase or order is made; or (B) the cigarettes . . . are delivered to the

[55] PACT Act of 2009, Pub. L. No. 111-154, 124 Stat. 1109 § 1(c); *see also* 15 U.S.C. § 375 (amending Jenkins Act of Oct. 19, 1949; 63 Stat. 884).
[56] As noted above, NWS only sells to First Nation or Tribal governments.

buyer by common carrier . . . or other method of remote delivery . . . ."[57] In other words, the PACT Act regulation regime focuses on "delivery sales" to consumers.

The State fails to mention this fundamental aspect of the PACT Act and, therefore, does not (and cannot) allege consumer transactions. Indeed, the State's allegations concerning NWS' purported transactions stop short of any transaction involving a consumer. Thus, the State alleges only that NWS has shipped "unstamped and unreported cigarettes to various on-reservation wholesalers in New York State, such as Seneca Imports, Tonawanda Seneca Nation Distribution, and Tuscarora Nation."[58] These Tribal wholesalers, however, are not "consumers" within the meaning of the PACT Act.

The PACT Act defines "consumer" as (A) "any person that purchases cigarettes or smokeless tobacco; and (B) does not include any person lawfully operating as a manufacturer, distributor, wholesaler, or retailer of cigarettes or smokeless tobacco."[59] In other words, "consumer" is defined as not including commercial transactions. It is well settled that, "when the statutory language is plain, [courts] must enforce it according to its terms."[60] Here, the language is plain: "consumer" does not include wholesalers and retailers.

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[57] 15 U.S.C. § 375(5).

[58] Second Am. Compl. ¶¶ 58, 62-63, 101, 105, 108-09. Although the State also makes conclusory allegations of sales to "on-reservation retailers," (id. ¶¶ 59, 61, 121, 128, 130), no such retailers are specifically identified (id. ¶ 61). The retailers identified by the State are alleged to have sold Seneca cigarettes, but no allegation is made that the retailers obtained those cigarettes from NWS. Id. Even if properly alleged, however, it is nonetheless futile because, like Tribal wholesalers, Tribal retailers are not consumers under the PACT Act for the reasons set forth in Point II(A).

[59] 15 U.S.C. § 375(4) (emphasis added).

[60] Jimenez v. Quarterman, 555 U.S. 113, 118 (2009).

Moreover, this statutory definition comports with the common meaning of "consumer." For example, Black's Law Dictionary defines "consumer" as "[a] person who buys goods or services for personal, household, or family use, with no intention of resale; a natural person who uses products for personal rather than business purposes."[61] Likewise, Webster's New World College Dictionary defines "consumer" as "a person or thing that consumes; specif., a person who buys goods or services for personal needs and not for resale or to use in the production of other goods for resale."[62]

Other provisions of the PACT Act confirm that Congress used "consumer" to mean an individual who consumes the product. For example, the PACT Act prohibits a delivery sale from "weighing more than 10 pounds."[63] Such a restriction only makes sense in the context of non-commercial transactions with an individual consumer as opposed to wholesalers that purchase tobacco products for re-sale. Likewise, common carriers may deliver cigarettes from entities on the list of Non-Compliant Delivery Sellers to persons manufacturing, distributing, or selling cigarettes.[64] This statutory scheme shows that Congress intended to regulate sales to individual consumers, not wholesalers (or retailers) as alleged by the State here.

The State alleges that investigators specifically targeted sales of Seneca brand cigarettes. There is, however, no allegation of any consumer who purchased Seneca Brand cigarettes from NWS. In addition, the State admits that NWS has made available

[61] Black's Law Dict., 358 (9th ed. 2009); *see also* In re Sterling Foster & Co., Inc., Sec. Litig., 222 F. Supp. 2d 216, 286 (E.D.N.Y. 2002) (citing *Black's Law Dictionary 311* (7th ed.1999) for same definition).
[62] Total Control, Inc. v Danaher Corp., 2004 WL 1878238, at *3 (E.D. Pa. 2004) (citing Webster's New World College Dictionary 313 (4th ed.1999)).
[63] 15 U.S.C. § 376a(b)(3).
[64] 15 U.S.C. § 376a(e)(2)(A)(ii).

all invoices of sales since the bankruptcy filing in November 2011. Not a single invoice is alleged to have involved a sale of cigarettes to a consumer.

NWS is alleged to have sold cigarettes to "on-reservation wholesalers" Seneca Imports, Tonawanda Seneca Nation Distribution, and the Tuscarora Nation.[65] These entities are not consumers – they are all Tribal governments or divisions of Tribal governments. Accordingly, NWS is not a "delivery seller" and the PACT Act does not apply. The State's second claim must be dismissed.

B. **NWS does Not Engage in "Interstate Commerce" under the PACT Act**

The State's PACT Act claim must be dismissed on the separate and independent ground that NWS' alleged transactions with Native wholesalers fail to satisfy the statutory definition of "interstate commerce."

The PACT Act defines "interstate commerce" in two parts. Part A of the definition defines "interstate commerce" 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.[66]

Part B provides a rule for deciding where commerce occurs, i.e., "into the State, place, or locality" in which they are delivered.[67] Part B of the definition provides as follows:

> A sale, shipment, or transfer of cigarettes or smokeless tobacco that is made in interstate commerce, as defined in this paragraph, shall be

[65] Second Am. Compl. ¶¶ 58, 62-63, 101, 105, 108-09.
[66] 15 U.S.C. § 375(9)(A).
[67] 15 USC § 375(9)(B).

> deemed to have been made into the State, place, or locality in which such cigarettes or smokeless tobacco are delivered.[68]

Thus, under the PACT Act, "interstate commerce" is commerce that moves between three different pairs of origins and destinations (one of which has two interim routes):

(1) between "a State and any place outside the State";

(2) between "a State and any Indian country in the State";

(3) between "points in the same State but through"

(a) "any place outside the State"; or

(b) "any Indian country."

15 USC § 375(9)(A) (emphasis added).[69]

In other words, under the PACT Act, "interstate commerce" is limited to one of three types of transactions: (1) commerce between a State and any place outside the State; (2) commerce between a State and Indian country in the State; and (3) commerce between two points in the same State but through any place outside the state or through any Indian country. Each of these transactions involves a starting or destination point in the State.

None of these statutorily defined transactions, include the alleged commerce between NWS and on-reservation Native wholesalers. The State vaguely alleges that Grand River sells to NWS in Canada and that NWS then ships the cigarettes from Canada (i.e., "any place outside the State") to on-reservation wholesalers (i.e., "Indian country").[70] As a result, delivery occurs in Indian country,[71] but does not begin from a

[68] 15 U.S.C. § 375(9)(B). This definitional rule eliminates the need to consider where or when title transfers.
[69] Congress defined "State" and "Indian country" to be distinct and separate geographic units. 15 USC §§ 375(7), (9)(A), (11).
[70] Second Am. Compl. ¶¶ 10, 55-59, 72.

point within the State. The State's allegations suggest, at best, that NWS ships the cigarettes (A) from Canada to on-reservation wholesalers, or (B) from Canada, to the Seneca Nation, and then to on-reservation wholesalers.[72]

The PACT Act, however, does not include within the definition of "interstate commerce" a trip starting outside the State (or in Indian country), traveling through the State, and ending in Indian country. Congress could have easily drafted a fourth provision applying to commerce "between any place outside the State and Indian country, but through the State." Congress did not do so.

Likewise, to the extent that the State alleges that NWS – located on the Seneca Nation -- sells to Tribal wholesalers located on different reservations (i.e., the Tuscarora Nation), the State nonetheless fails to allege "interstate commerce" as defined by the PACT Act. The PACT Act does not include commerce "between Indian country and Indian country, but through the State." Again, Congress could have included such language in the PACT Act, but it elected not to do so. Under either possible scenario, the transaction is deemed to have been made in Indian country.[73] Consequently, the PACT Act's definition of "interstate commerce" does not extend to NWS' alleged sales to on-reservation wholesalers.

Under the *expressio unius est exclusion alterius* canon of statutory construction, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[74] As a result, the

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[71] 15 U.S.C. § 375(9)(B).
[72] Second Am. Compl. ¶¶ 10, 55-59, 72.
[73] 15 U.S.C. § 375(9)(B).
[74] Liu Meng-Lin v Siemens AG, 763 F.3d 175, 181 (2d Cir. 2014).

fact that Congress distinguished between "points in the same State" and "Indian country," shows that it intended each to have a separate meaning. If Congress had wanted to include sales from "points in Indian country, but through the State," within the PACT Act's definition of "interstate commerce", it knew how to do so.

Finally, as noted above, to the extent that there is any ambiguity in the PACT Act's definition of "interstate commerce," such ambiguity must be construed against the State and in favor of NWS.

C. The State May Not Enforce its Laws in Indian country with respect to Native to Native Transactions

Both the CCTA and the PACT Act contain express provisions excepting certain Indian entities and transactions from their provisions. These statutes clearly and expressly were not intended to target Native Americans trading with one another.

The CCTA made this intent apparent by including a specific provision barring its enforcement by state and local government officials against "an Indian in Indian country." While the PACT Act does not have such an express bar, it addressed the issue by stating that it applies to interstate commerce, which is expressly defined to exclude commerce between, within, and among Indian country. Moreover, Congress stated in the Act that it must not be read as changing in any way existing federal law concerning the limits of state or local government enforcement of their own laws against Native Americans. The PACT Act provides that "[a]ny ambiguity between the language of this section or its application and any other provision of this Act shall be resolved in

favor of this section [i.e., Sec. 5, "Exclusions Regarding Indian Tribes and Tribal Matters"]."[75] The PACT ACT also provides that:

> (a) IN GENERAL.--**Nothing in this Act** or the amendments made by this Act **shall be construed to amend, modify, or otherwise affect**--
>
> > (1) any agreements, compacts, or other intergovernmental arrangements between any State or local government and any government of an Indian tribe (as that term is defined in section 4(e) of the Indian Self–Determination and Education Assistance Act (25 U.S.C. § 450b(e)) relating to the collection of taxes on cigarettes or smokeless tobacco sold in Indian country;
> >
> > (2) any State laws that authorize or otherwise pertain to any such intergovernmental arrangements or create special rules or procedures for the collection of State, local, or tribal taxes on cigarettes or smokeless tobacco sold in Indian country;
> >
> > (3) any limitations under Federal or State law, including Federal common law and treaties, **on State**, local, and tribal **tax and regulatory authority with respect to the sale, use, or distribution of cigarettes and smokeless tobacco by or to Indian tribes, tribal members, tribal enterprises, or in Indian country**;
> >
> > (4) any Federal law, including Federal common law and treaties, **regarding State jurisdiction, or lack thereof, over any tribe, tribal members, tribal enterprises, tribal reservations**, or other lands held by the United States in trust for one or more Indian tribes; or
> >
> > (5) **any State** or local government **authority to bring enforcement actions against persons located in Indian country**.[76]

As a result, under the PACT Act and the canon of construction of laws affecting Native Americans, any ambiguity in the PACT Act must be construed in favor of NWS.

As noted in paragraph 3 above, the PACT Act must be construed in light of pre-existing federal statutes and common law. When the PACT Act was enacted, it was well-established law that States may not tax or regulate tribes (or tribal members) with

[75] PL 111-154, March 31, 2010, 124 Stat 1087, 1109, § 5(e). (Attached as Exhibit A to Szanyi Decl.)
[76] PL 111-154, March 31, 2010, 124 Stat 1087, 1109, § 5(a) (emphasis added).

respect to commercial transactions occurring on reservation. For example, states cannot regulate on-reservation tobacco sales to tribal members. In Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation, the Supreme Court held that states cannot tax or regulate the tobacco trade on reservations by Indians to other Indians.[77] The Supreme Court later described Moe in Dept. of Taxation and Fin. of New York v Milhelm Attea & Bros., Inc., which noted that "[b]ecause New York lacks authority to tax cigarettes sold to tribal members for their own consumption, [citing Moe] cigarettes to be consumed on the reservation by enrolled tribal members are tax exempt and need not be stamped."[78]

Similarly, in Oklahoma Tax Comm'n v. Chickasaw Nation, the Supreme Court held that Oklahoma could not tax the retail sale of gas on a reservation to non-Indians because the legal incidence of the tax fell on tribal members.[79] The Court noted that:

> when a State attempts to levy a tax directly on an Indian tribe or its members inside Indian country, rather than on non-Indians, we have employed, instead of a balancing inquiry, "a more categorical approach: '[A]bsent cession of jurisdiction or other federal statutes permitting it,' we have held, a State is without power to tax reservation lands and reservation Indians." *County of Yakima v. Confederated Tribes and Bands of Yakima Nation,* 502 U.S. 251, 258 (1992) (citation omitted). Taking this categorical approach, we have held unenforceable a number of state taxes whose legal incidence rested on a tribe or on tribal members inside Indian country. See, *e.g., Bryan v. Itasca County,* 426 U.S. 373, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976) (tax on Indian-owned personal property situated in Indian country); *McClanahan,* 411 U.S., at 165–166, 93 S.Ct.,

[77] 425 U.S. 463, 480-81 (1976) (citing McClanahan). *See also* Rice v Cayetano, 528 US 495, 519 (2000) (citing Moe for the proposition that there is "Indian immunity from state taxes").
[78] 512 US 61, 64 (1994). *See also* City of New York v. Golden Feather Some Shop, Inc., 2013 WL 3187049, at *3 (E.D.N.Y. 2013) (citing Millhelm for same proposition); City of New York v. Chavez, 2012 WL 1022283, at *4 (S.D.N.Y. 2012) (citing Millhelm and Golden Feather for the proposition that "[t]here is an exception to the stamping schema where tribal retailers are concerned because the federal and state governments lack authority to tax cigarettes sold to members of the tribes for their own consumption").
[79] 515 US 450, 458 (1995).

> at 1258–1259 (tax on income earned on reservation by tribal members residing on reservation)."

Oklahoma Tax Comm'n v Chickasaw Nation, 515 U.S. at 458. Accordingly, under well-settled Supreme Court precedent, New York cannot tax or regulate NWS in Indian country absent express Congressional authorization. As discussed above, the PACT Act does not expressly authorize the State to enforce the PACT Act in Indian country under the circumstances alleged. In fact, it excludes such transactions and also expressly provides that nothing in the PACT Act shall be construed to amend, modify, or otherwise affect any limitations under federal law on the states' power to, *inter alia*, regulate tobacco distribution to tribal members in Indian country. Accordingly, the PACT Act claim should be dismissed.

CONCLUSION

For the foregoing reasons, the State's CCTA and PACT Act claims against NWS should be dismissed with prejudice.

Dated: January 15, 2015

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