UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

THE STATE OF NEW YORK,	:	
	:	No. 14-cv-00910 (RJA)
Plaintiff,	:	
	:	
- against -	:	
	:	
GRAND RIVER ENTERPRISES SIX NATIONS, LTD. and NATIVE WHOLESALE SUPPLY COMPANY INC.,	:	
	:	
Defendants.	:	

DEFENDANT GRAND RIVER ENTERPRISES SIX NATIONS, LTD.'S BRIEF IN SUPPORT OF ITS MOTION TO DISMISS THE SECOND AMENDED COMPLAINT AND FOR A STAY OF DISCOVERY

FRIEDMAN KAPLAN SEILER & ADELMAN LLP
Eric Corngold
Jeffrey R. Wang
7 Times Square
New York, NY 10036-6516
(212) 833-1100

Attorneys for Defendant Grand River Enterprises Six Nations, Ltd.

January 15, 2015

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

PRELIMINARY STATEMENT

As the Attorney General makes clear in the Second Amended Complaint, defendant Grand River Enterprises Six Nations, Ltd. ("Grand River") manufactures Seneca brand cigarettes *in Canada only*, sells them *in Canada only*, and transfers title to the cigarettes *in Canada only*. Notwithstanding the multiple efforts by the Attorney General over the past two years to formulate a viable claim against Grand River, the Attorney General's case remains an overreaching effort to bring an action against a Canadian-based company, whose activities took place entirely outside of New York State, under statutes that govern actions that take place within New York.

The Attorney General asserts that Grand River, a manufacturer of cigarettes in Canada, has violated statutory requirements for the payment of taxes and informational filings that accompany the sale and distribution of cigarettes within New York State. But the Attorney General acknowledges that Grand River does not sell, ship, transfer, or possess cigarettes into or within the United States, let alone New York State, and the Second Amended Complaint makes clear that all of Grand River's activities take place wholly within Canada. Nevertheless, the Attorney General claims that Grand River has violated these federal and state laws, even though they prohibit or proscribe only activities relating to transactions in interstate commerce or within the state of New York, neither of which Grand River has engaged in. Because the laws that form the basis for the Attorney General's first three claims for relief do not apply to Grand River's activities in Canada, these claims fail to state a claim upon which relief can be granted, and should be dismissed under Rule 12(b)(6).

The new allegations that the Attorney General has now added to the Second Amended Complaint do not save any of his claims against Grand River. In the First Amended Complaint, the Attorney General alleged that Grand River and Native Wholesale Supply, the

other defendant in this action, were separate businesses who acted as "*informal* partners." (First Amended Complaint ¶ 10 (Docket No. 33) (emphasis added).) That concession was fatal to the Attorney General's previous arguments – which he made in opposition to Grand River's motion to dismiss the First Amended Complaint – that Grand River and Native Wholesale Supply were somehow a legally-cognizable "joint venture" (even though the allegation of a "joint venture" appeared nowhere in the First Amended Complaint). Now, in the latest attempt to salvage his claims against Grand River, the Attorney General has simply deleted the words "informal partners" from the allegation in the Second Amended Complaint, and newly characterizes the defendants in that same paragraph as "joint venturers." (SAC ¶ 10.) But a joint venture is, by definition, not an informal arrangement. And though the Attorney General may wish to back-pedal on his telling concession in the First Amended Complaint by simply replacing the term "informal partners" with "joint venturers," that semantic switch cannot save the State's defective claims against Grand River.

In addition, the Attorney General now peppers the Second Amended Complaint with numerous additional pronouncements of a so-called "joint venture" between Grand River and Native Wholesale Supply (which, unlike Grand River, does conduct business in the United States). But the mere incantation of a "joint venture" – even if repeated as many times as the Attorney General does in the Second Amended Complaint – does not create one; and the law is clear that this Court need not accept such bald, unsupported legal characterizations as true, even on a motion to dismiss. Here, those characterizations are particularly hollow. As set forth in more detail below, the new "facts" in the Second Amended Complaint do not satisfy the elements of a "joint venture." In any event, the "joint venture" allegations consist only of:

> (a) A series of stale allegations relating to actions and statements made long before November 22, 2011 – the earliest date as of

> which the Attorney General is seeking relief in this action – which, even if they supported the conclusion of a joint venture at *some* point (they do not), would not support the conclusion of a joint venture during the period relevant to *this* litigation;[1]
>
> (b) Contentions that were, in any event, rejected by the arbitration tribunal in which they were proffered, which panel held that no joint venture existed; and
>
> (c) Allegations that are demonstrably false – including, most alarmingly, allegations concerning the current actions of an individual, Peter Montour, who has been *deceased* for more than two years, a fact that would have been obvious to the Attorney General had he performed any diligence whatsoever into the allegations before including them "upon information and belief."

This Court should not countenance the Attorney General's scattershot attempt to bloat the Second Amended Complaint with allegations that he has made no effort at all to test, nor does it comport with the principles of justice or fairness to impose upon defendants the burden of litigating a meritless case based on such reckless allegations.

For all of these reasons, the Second Amended Complaint fails to fix the fatal defects in the prior two complaints, and these claims against Grand River should be dismissed with prejudice. In addition, because forcing Grand River to participate in discovery while this motion to dismiss is pending would cause unnecessary burden and expense to Grand River, Grand River also requests that this Court stay discovery until such time as the motions to dismiss are decided.

STATEMENT OF FACTS

A. Facts in the Second Amended Complaint Concerning Each of the Two Separate Entities

As the Second Amended Complaint acknowledges, Grand River and co-defendant Native Wholesale Supply are two separate legal entities. (SAC ¶ 10.) Grand River is alleged to

[1] The stale allegations pertain to an international arbitration (which ended four years ago) involving the legality of certain State tobacco laws under NAFTA.

be a corporation formed under the laws of the Six Nations of Indians; its principal place of business is in Ontario, Canada. (SAC ¶ 8.)[2] Native Wholesale Supply is a for-profit corporation formed under the laws of the Sac and Fox Nation of Oklahoma; its principal place of business is on Seneca Nations of Indians land (Cattaraugus Reservation) in Perrysburg, New York. (SAC ¶ 9.) According to the Second Amended Complaint, "Grand River is the manufacturer of the Seneca brand cigarettes," while "Native Wholesale Supply was Grand River's sole importer and distributor of Seneca brand cigarettes to Indian lands in New York and remains a primary importer of Seneca brand cigarettes to the present." (*Id.*) The Second Amended Complaint alleges no facts establishing that Grand River has control over Native Wholesale Supply's activities.

Most importantly for purposes of this motion, the Amended Complaint alleges:

> Grand River manufactures Seneca brand cigarettes in Ontario, Canada. In a joint venture,[3] Grand River then sells, transfers or assigns the cigarettes to Native Wholesale FOB Canada in Canada. Upon information and belief, title to the cigarettes transfers from Grand River to Native Wholesale in Canada. Native Wholesale, holding title for the Grand River cigarettes, then imports and distributes the cigarettes inside the United States, including in New York State.

(SAC ¶¶ 55-56.) As these allegations show, Grand River is simply the manufacturer of the cigarettes at issue here, and it sells the cigarettes in Canada. After doing so, Grand River has no control over any sale, shipment, distribution, transfer, possession, or the like with respect to the importation of these cigarettes by Native Wholesale Supply into the United States or New York.

---

[2] As required on a motion to dismiss, this brief assumes all well-pleaded, non-conclusory allegations to be true, although Grand River does not concede their truth.

[3] As explained in more detail below, this conclusory claim of a "joint venture" is not factually or legally relevant to the defendants' respective actions or liabilities. The Second Amended Complaint simply does not contain sufficient allegations to support any claim that Grand River is legally responsible for Native Wholesale Supply's actions, or vice versa.

B. Facts Concerning the Background of New York's Excise Tax on Cigarettes

The Second Amended Complaint sets forth at length the complex statutory and enforcement background of New York's excise tax on cigarettes "possessed for sale within the State." (SAC ¶ 22.) State-licensed cigarette stamping agents prepay the excise and sales tax, and affix tax stamps to packages of cigarettes. These taxes are, in turn, advanced and paid by each dealer in the chain of distribution and passed on to the ultimate consumer of the cigarettes. (SAC ¶¶ 23-29.) However, the state lacks the power to impose its taxing obligations on a seller that sells cigarettes in Canada, and also lacks the power to tax cigarettes sold "to qualified Indians for their own use and consumption on their nations' or tribes' qualified reservation." (SAC ¶ 23.) So, with respect to the latter point, until 2010, the New York State Department of Taxation and Finance (the "Department") "allowed untaxed cigarettes to be sold from New York State licensed cigarette stamping agents to recognized Indian Nations or tribes and reservation cigarette sellers making retail sales on qualified Indian reservations." (SAC ¶ 30.) Since revoking that policy, the Department purports to operate a system whereby cigarettes sold on reservations must be tax-stamped, but Indian nations and tribes can still make tax-exempt cigarettes available to their members for personal use and consumption. (SAC ¶¶ 35-38.)

C. New Allegations Added to the Second Amended Complaint Concerning the So-Called "Joint Venture" Between Grand River and Native Wholesale Supply

Notwithstanding the concession that Grand River is a "separate legal entit[y]" (SAC ¶ 10) that manufactured, sold, and transferred title to the cigarettes at issue here *in Canada* (SAC ¶ 55) and despite the allegations that Native Wholesale Supply, another separate legal entity, took title to those cigarettes *in Canada* before importing them into the United States and then sold them to reservation cigarette retailers in New York (SAC ¶¶ 56-59), the Attorney General now posits that Grand River and Native Wholesale Supply were in fact a "joint venture."

To that end, the Attorney General includes a new section in the Second Amended Complaint titled "'Joint Venture' Between Grand River and Native Wholesale to Do Business in New York." (SAC ¶¶ 66-83.) That section begins with the broad and conclusory pronouncement that "[a]t all times, defendants have engaged in this conduct of manufacturing, selling and distributing Seneca brand cigarettes in New York as a single enterprise, *i.e.*, as a joint venture." (SAC ¶ 66.) The allegations in those paragraphs, to the extent they are sourced at all (many are unsourced, and others are based solely on "information and belief"), derive almost entirely from (a) filings dating back to 2004 and 2008, from a NAFTA Arbitration involving Grand River, and (b) two Native Wholesale Supply checks from December 2008 and January 2009 signed by Peter Montour, who the Attorney General claims, among other things, "may continue to collect management bonuses from [Grand River]" as an officer of Grand River, but who in reality *died* more than two years ago.

In addition, because these new allegations relate almost exclusively to statements made and actions taken years before November 22, 2011 (the earliest date for which the Attorney General seeks relief for the Defendants' alleged violations (*see* SAC ¶ 58 & n.8)), they are wholly irrelevant to this action. For these and other reasons explained in detail in the argument section below, the paragraphs that follow the Attorney General's sweeping pronouncement of a "joint venture" cannot and do not support that legal conclusion.

D. The Claims for Relief Against Grand River

The Second Amended Complaint asserts four claims for relief against Grand River, all ostensibly arising out of the sale and distribution of Seneca brand cigarettes in New York State, even though the Second Amended Complaint makes clear that Grand River itself neither sold nor distributed Seneca brand cigarettes in New York State.

The first and second claims for relief are based on federal laws. The first claim for relief asserts violation of the Contraband Cigarette Trafficking Act ("CCTA"), which prohibits the "knowing" shipment, transportation, receipt, possession, sale, distribution, or purchase of "contraband cigarettes." (SAC ¶ 42.) "Contraband cigarettes" are defined as more than 10,000 cigarettes that bear no evidence of the payment of applicable State or local cigarette taxes "in the State or locality where such cigarettes are found." (*Id.*) Plaintiff alleges that both defendants have violated the CCTA. With respect to Grand River, the Amended Complaint alleges only that "[d]efendant Grand River possessed, sold and shipped cigarettes to Native Wholesale, an entity that is not a New York State licensed stamping agent." (SAC ¶ 121.) The Amended Complaint alleges that Native Wholesale Supply "proceeded to sell these untaxed and unstamped cigarettes to reservation cigarette retailers in New York." (*Id.*)[4]

The second claim for relief, under the Prevent All Cigarette Trafficking Act ("PACT Act"), seeks to impose liability on both Grand River and Native Wholesale Supply for failing to submit certain filings to the tobacco tax administrator for the State of New York. (SAC ¶¶ 129-132.) Plaintiff claims that Grand River is required to submit these filings because it "sold, transferred, and shipped cigarettes to defendant Native Wholesale that were not tax stamped and were to be sold in and into the state of New York by Native Wholesale as part of a joint venture with Grand River." (SAC ¶ 127 (emphasis added).) Notably, the Second Amended

[4] Critically, the Second Amended Complaint does not, and cannot, allege that Grand River's sale of untaxed cigarettes to Native Wholesale Supply in and of itself violates the CCTA. No State or federal law requires a foreign manufacturer to obtain a New York stamping license and affix State tax stamps prior to their shipment from a foreign country. Indeed, at all times relevant to Grand River's transactions with Native Wholesale Supply, the products at issue are not even in or entered into U.S. commerce. It is only after Native Wholesale Supply unilaterally enters the products into U.S. commerce and distributes them to Tribes and Indian Country in New York that New York raises an issue under the CCTA. Thus, the Attorney General has attempted to recast defendants' relationship as "joint venturers," in an effort to assert liability against one defendant (Grand River) for the acts of the other defendant (Native Wholesale Supply).

Complaint contains no allegation that Grand River *itself* sold, transferred, or shipped cigarettes in or into the state of New York.

The third and fourth claims are for violations of the New York Tax Laws. The third claim asserts that defendants violated New York Tax Law §§ 471 and 471-e "by possessing cigarettes for sale in New York State, namely Seneca brand cigarettes manufactured by Grand River and imported and distributed by Native Wholesale Supply, upon which no state excise tax has been paid, and the packages of which have no tax stamps affixed." (SAC ¶ 134.) Plaintiff also asserts that "[e]ach defendant" violates Section 471's implementing regulations. (SAC ¶ 135.) The fourth claim asserts that defendants violated Section § 480-b by failing to file annual certifications allegedly required by "tobacco product manufacturers." (SAC ¶¶ 137-140.)

ARGUMENT

I.
THE CLAIMS SHOULD BE DISMISSED UNDER RULE 12(B)(6) FOR FAILURE TO STATE A CLAIM

A. The Second Amended Complaint Does Not Contain Sufficient Factual Matter To Meet The Pleading Requirements Explained In *Ashcroft v. Iqbal*.

As the Supreme Court has held, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The Second Amended Complaint falls well short of plausibility. While the Second Amended Complaint contains many general contentions about the dangers of smoking (SAC ¶¶ 11-14) and irrelevant legal background and commentary (SAC ¶¶ 15-54), there are relatively few factual allegations relating to Grand River. The existing allegations – and particularly the new allegations that supposedly relate to the so-called "joint venture" between Grand River and Native Wholesale Supply – are principally "labels and conclusions"

rather than well-pleaded facts, and do not approach the standard for plausibility enunciated in *Iqbal*. *See Iqbal*, 556 U.S. at 678. The Attorney General does not plead facts that could give rise to claims under the CCTA, the PACT Act, or the New York Tax Laws that he accuses Grand River of violating. To the contrary, the facts pleaded in the Second Amended Complaint are fatal to the Attorney General's claims, because they that show that Grand River is *not*, and cannot be, liable for the violations that the Attorney General alleges that it has committed.

As the Second Circuit has stated, the *Iqbal* standard creates a "two-pronged approach." *Pension Ben. Guar. Corp. ex rel. St. Vincent Catholic Medical Centers Retirement Plan v. Morgan Stanley Inv. Management Inc.*, 712 F.3d 705, 717-718 (2d Cir. 2013) (internal citation omitted). In considering a motion to dismiss, the court must review a complaint to ensure that it "alleges nonconclusory factual content raising a plausible inference of misconduct." *Id*. at 718.

First, a complaint is insufficient if, as here, it merely "offers labels and conclusions or a formulaic recitation of the elements of a cause of action. Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement." *Id*. at 717 (internal citations to *Iqbal* omitted). Although a court considering a motion to dismiss must take all of the factual allegations in the complaint as true, the court is "not bound to accept as true a legal conclusion couched as a factual allegation. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Id.* (internal citations omitted).

Second, "when there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief. This facial plausibility prong requires the plaintiff to plead facts allowing the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Importantly, the

complaint must demonstrate more than a sheer possibility that a defendant has acted unlawfully. Where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not shown—that the pleader is entitled to relief." *Id*. at 717-18 (internal citations to *Iqbal* omitted).

Here, as discussed below, the Second Amended Complaint contains labels and conclusions rather than facts, and even the Second Amended Complaint's "well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct." *Iqbal*, 556 U.S. at 679. Because the Second Amended Complaint has merely "alleged – but it has not 'show[n]' – 'that the pleader is entitled to relief,'" the Second Amended Complaint should be dismissed pursuant to Rule 12(b)(6). *Id.* And to the extent the Attorney General has alleged facts concerning the parties' actions, these allegations demonstrate why Grand River *cannot* be liable for the claims he asserts.[5]

B. <u>The Contraband Cigarette Trafficking Act Does Not Apply to Grand River Because Grand River Did Not Sell Cigarettes Within New York.</u>

By alleging that Grand River sold its cigarettes *solely within Canada*, the Attorney General pleads himself out of a CCTA violation against Grand River, because the CCTA does *not* govern activities outside the United States. Instead, the CCTA is violated only when a person sells (among other activities) "contraband cigarettes," which are defined as "a

[5] Furthermore, as co-defendant Native Wholesale Supply argues in its separate motion to dismiss, the claims against it should be dismissed because (a) the CCTA bars civil actions against Indians in Indian Country; (b) the PACT Act does not apply to Native Wholesale Supply because Native Wholesale Supply does not engage in "delivery sales" or engage in "interstate commerce," as the Act requires; and (c) New York may not enforce its tax laws in Indian Country with respect to the transactions alleged here. Assuming that Native Wholesale Supply prevails on its motion, then this case would boil down to a claim asserting liability against Grand River for Native Wholesale Supply's subsequent sales and shipments of cigarettes into New York, even though Native Wholesale Supply itself cannot be held liable, and absent any allegations that Grand River controlled Native Wholesale Supply in any way. Such a perverse result is neither contemplated nor authorized by the statutes at issue here.

quantity in excess of 10,000 cigarettes, which bear no evidence of the payment of applicable State or local cigarette taxes in the State or locality where such cigarettes are found." 18 U.S.C. § 2341(2). Under the plain language of the CCTA, cigarettes are not "contraband cigarettes" until they are "found" in a particular state or locality without evidence of the payment of the applicable tax imposed by that state or locality.[6] When Grand River sold the cigarettes to Native Wholesale Supply in Canada, the cigarettes were not contraband cigarettes; those sales are therefore not covered by the CCTA. And there is no allegation that Grand River sold any cigarettes within New York, or indeed, anywhere outside of Canada.

In setting forth the alleged violations of the CCTA, Plaintiff states the legal conclusion that "defendants have violated the CCTA" (SAC ¶ 120). But the alleged facts do not support a claim against Grand River. The Attorney General concedes in his Amended Complaint that Grand River sells, transfers, or assigns cigarettes to Native Wholesale Supply "in Canada," and that "title to the cigarettes transfers from Grand River to Native Wholesale in Canada." (SAC ¶ 55; see also SAC ¶ 121.) Thus, the complaint alleges that Grand River sold cigarettes to Native Wholesale Supply within Canada, and the importation of those cigarettes into the United

[6] The cases that the Attorney General cites in the Second Amended Complaint reinforce that the definition of contraband cigarettes relies upon the cigarettes being located in a state requiring the payment of applicable taxes. *See U.S. v. Skoczen*, 405 F.3d 537, 547 (7th Cir. 2005) ("The statute defines 'contraband' as those cigarettes 'which bear no evidence of the payment of applicable State cigarette taxes *in the State where such cigarettes are found*, if such State requires a stamp, impression, or other indication to be placed on packages or other containers of cigarettes to evidence payment of cigarette taxes.'") (emphasis supplied); *City of New York v. Golden Feather Smoke Shop, Inc.*, 597 F.3d 115, 122 (2d Cir. 2010) ("Contraband cigarettes, in turn, are a quantity of cigarettes in excess of 10,000 that 'bear no evidence of the payment of applicable State or local cigarette taxes in the State or locality where such cigarettes are found.'"); *U.S. v. Elshenawy*, 801 F.2d 856, 858 (6th Cir. 1986) ("the definition of 'contraband cigarettes' depends only upon the absence of indicia of state tax payment *and location in a state requiring such indicia*") (emphasis supplied).

States and New York was accomplished solely by Native Wholesale Supply. These factual allegations refute the conclusory claim that Grand River violated the CCTA.

The Attorney General's CCTA claim against Grand River is premised on the assertion that Grand River "knew" and "intended" that Native Wholesale Supply would violate the tax laws. In particular, plaintiff alleges that based on a prior course of dealing, "Grand River knew and in fact intended that cigarettes sold to defendant Native Wholesale would be sold into New York without going through a New York State licensed stamping agent, and thus would be neither stamped nor taxed as required by New York law." (SAC ¶ 122.) The CCTA, however, does not make it unlawful to "know" or "intend" that a third party will violate relevant tax laws. Moreover, the Second Amended Complaint contains no factual allegations to establish that Grand River had any control over Native Wholesale Supply's actions once Grand River sold its cigarettes to Native Wholesale Supply in Canada. Even if Grand River knew or intended that Native Wholesale Supply was not going to comply with the tax requirements (which Grand River does not concede), the statute itself does not in any manner contemplate Grand River's liability for Native Wholesale Supply's alleged violations of the CCTA after Grand River sold cigarettes to Native Wholesale Supply and Native Wholesale Supply obtained title to those cigarettes. Accordingly, the First Claim for Relief should be dismissed.

C. The PACT Act Does Not Apply To Grand River Because Grand River Did Not Sell Cigarettes In Interstate Commerce.

The Prevent All Cigarette Trafficking Act ("PACT Act") does not apply to Grand River because there is no allegation that Grand River sold cigarettes in interstate commerce, which the Act requires. Grand River sold the cigarettes to Native Wholesale Supply in Canada. A sale within Canada is not a sale in interstate commerce as defined by the PACT Act.

The PACT Act imposes specific filing requirements on "any person who sells, transfers, or ships for profit cigarettes or smokeless tobacco in interstate commerce, whereby such cigarettes or smokeless tobacco are shipped into a State, locality, or Indian country of an Indian tribe taxing the sale or use of cigarettes or smokeless tobacco, or who advertises or offers cigarettes or smokeless tobacco for such a sale, transfer, or shipment." 15 U.S.C. § 376(a). The statute 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." 15 U.S.C. § 375(9)(A).

The Second Amended Complaint does not allege that Grand River sold or shipped cigarettes into New York or elsewhere in the United States. The Attorney General tries to obfuscate this issue by using the passive voice to avoid alleging which particular defendant acted, claiming that "sales, transfers, and shipments of cigarettes have been made between Province of Ontario and State of NY; between NY and Indian country within NY; and/or between two points in NY through Indian country. As a result, these are made in interstate commerce under the PACT Act." (SAC ¶ 126.) But the Attorney General admits elsewhere that these sales, transfers and shipments outside Canada were performed only by Native Wholesale Supply, not by Grand River. (SAC ¶ 56.)

As with the CCTA claim, the Attorney General attempts to hold Grand River liable for PACT Act violations because it allegedly "knew" and "intended" that Native Wholesale Supply would sell cigarettes into New York without being stamped or taxed as required by New York law. (SAC ¶ 127.) But, like the CCTA, the PACT Act does not make it a violation to "know" that another party will violate the law. The PACT Act does not require a

manufacturer to submit filings merely because it knows, or even intends, that a third party will sell or ship its cigarettes into New York. The statute applies, on its face, to "sellers of cigarettes who ship them to states or localities that impose taxes on them." *City of New York v. Wolfpack Tobacco*, 2013 WL 5312542, at *3 (S.D.N.Y. Sept. 9, 2013).

Indeed, the filings required by the PACT Act include information about shipments that only the shipper itself can know and provide. The PACT Act requires covered entities, before making a shipment into a particular state, to "first file" with the Attorney General of the United States and with the relevant state and local tobacco tax administrators a statement setting forth specific information about the person making the shipment. This information includes: name and trade name; address of principal place of business and of any other place of business; telephone numbers for each place of business; a principal electronic mail address; any website addresses; and the name, address, and telephone number of an agent in the State authorized to accept service on behalf of the person. *See* 15 U.S.C. § 376(a)(2). Furthermore, not later than the tenth day of each calendar month, a person who "sells, transfers, or ships" cigarettes must file with the tobacco tax administrator of the State into which such shipment is made a memorandum or copy of the invoice covering each and every shipment of cigarettes made during the previous calendar month into the state, which must include the following information: name and address of the person to whom the shipment was made; the brand of the shipment; the quantity of the shipment; and the name address, and phone number of the person delivering the shipment to the recipient on behalf of the delivery seller. *See id*.

These filing requirements cannot feasibly be met by a manufacturer like Grand River, which sells cigarettes outside the United States but does not itself sell or ship cigarettes into the United States, or, more importantly, to any particular State. If Grand River were

required to "first file" the requisite statements with the Attorney General of the United States and with the tobacco tax administrators of each State where a shipment of its cigarettes is made by a separate party (here, Native Wholesale Supply), Grand River would have to know when Native Wholesale Supply is making each shipment. The Attorney General does not allege that Grand River has such close control over Native Wholesale Supply's activities. Similarly, if Grand River were required to file with State tobacco tax administrators the filings required by 15 U.S.C. § 376(a)(2), Grand River would have to know detailed information about each shipment made by Native Wholesale Supply. Not only are there no allegations that Grand River even knows – let alone controls – such granular detail about Native Wholesale Supply's operations, but the PACT Act nowhere supports a claim that Grand River could be required to file such information merely because it manufacturers cigarettes in Canada and sells them within Canada to a third party who sells and ships them into New York. The Second Claim for Relief should therefore be dismissed.

D. New York Tax Law §§ 471 and 471-e Do Not Apply To Grand River Because Grand River Does Not Ship Cigarettes Into New York.

In the Third Claim for Relief, Plaintiff accuses Grand River of violating New York Tax Law §§ 471 and 471-e. But again, Grand River is not subject to these laws' requirements because it does not ship cigarettes in or into New York. Tax Law § 471 states: "any manufacturer or importer shipping unstamped cigarettes in or into New York to anyone other than a state-licensed stamping agent is in violation of section 471(1)." While Grand River is a manufacturer of cigarettes, there is no allegation that Grand River shipped the cigarettes into New York. To the contrary, the Second Amended Complaint plainly alleges that Grand River sold cigarettes within Canada and the title to its cigarettes transferred within Canada.

The Attorney General alleges that Grand River is implicated by New York Tax Law § 481(2)(a), which provides that "the possession within [New York] State of more than four

hundred cigarettes in unstamped or unlawfully stamped packages . . . by any person other than an agent or distributor . . . at any one time shall be presumptive evidence" that the cigarettes are subject to tax. (SAC ¶ 27.) The Attorney General states, "[d]efendants have violated, and continue to violate, New York Tax Law §§ 471 and 471-e by possessing cigarettes for sale in New York State . . . upon which no state excise tax has been paid, and the packages of which have no tax stamps affixed." (SAC ¶ 134.) But the Attorney General *nowhere* alleges that Grand River possessed *any* cigarettes "in New York State."

The Attorney General further alleges that "[e]ach defendant … violates Section 471's implementing regulations discussed above by failing to ship its unstamped cigarettes from outside New York directly to a New York-licensed stamping agent so that the excise tax can be paid and tax stamps properly affixed." (SAC ¶ 135.) Although the Second Amended Complaint does not identify which specific regulations Grand River is alleged to have violated, the implementing regulations referenced earlier in the Second Amended Complaint are found in N.Y. Comp. Codes R. & R. tit 20, 70.2, and 74.1. (*See* SAC ¶¶ 24, 25, 26.) These regulations set forth the scheme for stamping and prepaying taxes. And while the regulations provide that "a dealer of cigarettes, other than an agent, shall be precluded from purchasing and affixing cigarette stamps and, unless specifically provided for in this Title, from possessing, selling or distributing, in any manner whatsoever, unstamped packages of cigarettes," they do not impose liability on a manufacturer who sells cigarettes outside the United States to a third party outside the United States, even if that third party is not a "New York-licensed stamping agent," as the Attorney General alleges. (SAC ¶ 135.)

Finally, while the Attorney General does not delineate between Grand River and Native Wholesale Supply in claiming that Tax Law § 471-e has been violated, section 471-e

covers only the sale and transportation to Indian reservations in New York State. (*See* New York Tax Law § 471-e; SAC ¶¶ 32-38.) This law cannot apply to Grand River because there is no claim that Grand River sold or shipped cigarettes to Indian reservations. For all of these reasons, the Third Claim for Relief should be dismissed.

E. The Attorney General's Conclusory Allegation of a "Joint Venture" Between Grand River and Native Wholesale Supply is Not Supported by the Facts Alleged

In opposition to Grand River's motion to dismiss the First Amended Complaint, the Attorney General argued, for the first time, that Grand River and Native Wholesale Supply were a "joint venture," even though the First Amended Complaint never once mentions a "joint venture" between the two, much less alleges facts to support the existence of such a formal legal relationship. Moreover, as Grand River pointed out in its prior reply brief, the allegations of the First Amended Complaint – including the allegation that Grand River and Native Wholesale Supply are "informal partners" – refute the existence of a legally-cognizable joint venture. In the Second Amended Complaint, the Attorney General attempts to remedy the fatal defects in the First Amended Complaint by deleting the reference to "informal partners" and replacing it with "joint venturers" (compare First Amended Complaint ¶ 10 *with* SAC ¶ 10), and by pervasively using the term "joint venture" throughout its complaint. These are precisely the sort of "labels and conclusions" that the Supreme Court in *Iqbal* held were insufficient to state a claim, nor do they establish a joint venture, which is a formal arrangement with specific, prescribed elements.

Under New York law, a plaintiff pleading the existence of a joint venture must establish five elements:

> (1) two or more parties entered an agreement to create an enterprise for profit, (2) the agreement evidences the parties' mutual intent to be joint venturers, (3) each party contributed property, financing, skill, knowledge, or effort to the venture, (4) each party had some degree of joint management control over the venture, and (5) there was a provision for the sharing of both losses and profits. *The absence of any one element is fatal*

> *to the establishment of a joint venture.* Further, a joint venture represents more than a simple contractual relationship. Thus, it is insufficient for a plaintiff to allege mere joint ownership, a community of interest, or a joint interest in profitability.

Kidz Cloz, Inc. v. Officially For Kids, Inc., 320 F. Supp. 2d 164, 171 (S.D.N.Y. 2004) (emphasis supplied) (internal citations omitted); *see also Commander Terminals Holdings, LLC v. Poznanski*, 84 A.D.3d 1005, 1009 (2d Dep't 2011) (dismissing claim for breach of joint venture agreement appropriate because parties were not joint venturers).

While the new section of the Second Amended Complaint – titled "'Joint Venture' Between Grand River and Native Wholesale to Do Business in New York" (SAC ¶¶ 66-83) – and the documents the Attorney General attaches to the Second Amended Complaint create the illusion of support for the Attorney General's conclusory allegation of a joint venture, a closer examination of that section reveals that the new documents and allegations do not adequately plead all of the required elements of a joint venture, and in fact contradict the existence of one.

The new documents and allegations are taken primarily from two sources: (1) two filings by Grand River – made in 2004 and 2008 – in a NAFTA Arbitration (Exhibits A and B to the Second Amended Complaint), and (2) two Native Wholesale Supply checks from December 2008 and January 2009 signed by Peter Montour (Exhibit C to the Second Amended Complaint).

First, with respect to the NAFTA filings, the Attorney General relies on selective and misleading snippets, which – even putting aside their staleness – do not establish a "joint venture." For example, the Attorney General's allegation of an agreement that "formalized the joint venture" (SAC ¶ 71) is completely unsupported. The quoted portion of the NAFTA filing that follows states only that Native Wholesale Supply was the exclusive importer and distributor of Seneca products in the United States. (SAC ¶ 71a.) More importantly, the portion makes

clear that such agreement ran only "until the end of 2002" – more than 10 years before the filing of this action. (*Id*.) In an effort to get around the import of that statement, the Attorney General states that "[u]pon information and belief, after the expiration of the original joint venture agreement in 2002, the two defendants have continued to operate as joint venturers to manufacture and distribute Seneca brand cigarettes in the United States." (SAC ¶ 74.) But the Attorney General gives no basis for this "information" or "belief," nor could he. Simply put, the Attorney General's allegations are nothing more than the sort of "labels and conclusions" that cannot satisfy the pleadings requirements of *Iqbal*.

Similarly, the Attorney General asserts that Grand River and Native Wholesale Supply "exert significant control over the venture's operations," but provides no support for that allegation either. (SAC ¶ 74.) The "Claimants' Memo" attached as Exhibit B to the Second Amended Complaint states that certain individual shareholders of Grand River and Native Wholesale Supply consulted with each other about "important strategic decisions" about the Seneca brand, but it neither states nor suggests that Grand River had or has control over Native Wholesale Supply's day-to-day operations in distributing Seneca brand cigarettes in New York. (SAC ¶ 74c. (citing Ex. B at ¶ 113).) And the Attorney General's allegation that Grand River and Native Wholesale "correspondingly share in any losses of the joint venture" is based solely upon "information and belief." (SAC ¶¶ 10, 76). The Attorney General does not allege that a loss-sharing agreement exists between the parties, and an informal sharing of profits is not sufficient to establish a joint venture. The absence of such an agreement is fatal to the assertion of a joint venture. *See Kaufman v. Torkan*, 51 A.D.3d 977, 979 (2d Dep't 2008) (no joint venture existed absent a provision for sharing losses); *Latture v. Smith*, 1 A.D.3d 408, 409 (2d

Dep't 2003) (plaintiff "failed to plead a mutual promise or undertaking to share the burden of the losses of the alleged enterprise, an indispensable element of a partnership or joint venture").

The Attorney General's allegation that "Defendants' joint venture is aimed, in part, to vertically integrate manufacturing tobacco products and distributing tobacco products to the United States" (SAC ¶ 69) is equally unfounded; the quoted portions of the NAFTA filing refer only to the actions and investments by *individuals* who are not parties to this action. (SAC ¶ 69a-c; *see also* SAC ¶ 73.) Similarly, the Attorney General asserts that "Defendants' joint venture is specifically to manufacture and distribute Seneca brand cigarettes in the United States" (SAC ¶ 70), yet the quoted portions from the NAFTA filings that follow purporting to support that statement say nothing more than that Native Wholesale Supply markets and distributes Seneca cigarettes in the United States. (SAC ¶ 70a-b.)

Most egregiously, the Attorney General neglects to acknowledge that, in the NAFTA Arbitration from which most of the new allegations derive, the United States Government argued that there was *no* legally cognizable interrelationship between Grand River and Native Wholesale Supply. And the Attorney General conveniently omits that the NAFTA Arbitration Panel agreed with the Government's position, and concluded that there is no legally relevant co-venture between the two independent businesses. *See* Jan. 12, 2011 Opinion of the Int'l Centre for Settlement of Investment Disputes, in *Grand River Enters. Six Nations, Ltd. v. United States*, ¶¶ 90-106, available at http://www.state.gov/documents/organization/156820.pdf (last visited January 10, 2015). Those facts, combined with the fact that the statements in the NAFTA filings relate to a period many years before what the Attorney General concedes is the relevant period here (November 22, 2011 to the present), render these new allegations in the Second Amended Complaint without any legally-relevant effect.

Second, with respect to the checks that the Attorney General attaches to the Second Amended Complaint, those checks in no way establish a "joint venture" between Grand River and Native Wholesale Supply. The checks are allegedly signed by Peter Montour, who the Attorney General notes is the father of Grand River CEO Jerry Montour. (SAC ¶ 78 & Ex. C.) The Attorney General describes Peter Montour as "a *current* and/or former shareholder and director of Defendant Grand River." (SAC ¶ 78 (emphasis added).) The Second Amended Complaint alleges that "[u]pon information and belief, Peter Montour was previously an officer of Grand River, and although no longer listed as an officer, *still collected, and may continue to collect*, management bonuses from GRE." (SAC ¶ 79 (emphasis added).) The Attorney General asserts this is "[f]urther indicia of the managerial overlap of the two defendants." (SAC ¶ 77.)

This conclusion is reckless and misleading at best. To begin, these checks were executed in December 2008 and January 2009 – well before the operative period of November 22, 2011 to the present. (SAC ¶ 58 & n.8.) Worse yet, even a cursory inquiry by the Attorney General would have revealed that Peter Montour <u>died</u> more than two years ago, in June 2012. There is, simply put, no basis whatsoever for the Attorney General to allege that Mr. Montour is a "current" shareholder and director of Grand River, let alone that he "may continue to collect[] management bonuses from GRE." The latter allegation is proffered – astonishingly – by the Attorney General "[u]pon information and belief," yet there is no reasonable information or belief upon which that allegation could possibly be based.

* * *

At most, the newly-added documents and allegations show that Grand River and Native Wholesale Supply had an agreement under which Grand River would sell cigarettes to Native Wholesale Supply in Canada, which Native Wholesale Supply would promote and sell in

the United States, and that both parties invested a great deal of time and effort trying to ensure the success of that agreement and benefited from that relationship. If that were sufficient to constitute a joint venture, then every time two companies had an important, lucrative business relationship in which the parties invested time and money, it could be deemed a joint venture. That is decidedly not the law, nor should it be.

Accordingly, the Second Amended Complaint does not and cannot remedy the defects in the prior complaints with respect to the claims discussed above against Grand River. For those reasons, those claims against Grand River should be dismissed with prejudice.

II.

THIS COURT SHOULD STAY DISCOVERY UNTIL RESOLUTION OF THE MOTIONS TO DISMISS

The Attorney General filed a motion (Docket No. 77) requesting a Rule 16(b) discovery scheduling order conference. By Order dated December 30, 2014 (Docket No. 78), this Court directed Defendants to respond to the State's motion and address whether initial disclosures and a Rule 26(f)(1) conference are proper at this time. For the reasons discussed below, (1) discovery should be stayed under Rule 26(c)(1); and (2) there is no reason for a Rule 26(f) conference or the exchange of initial disclosures at this time.

This Court should stay discovery. Under Rule 26(c)(1), this Court has substantial discretion to stay discovery pending resolution of the pending motions to dismiss. In *Covell v. Chiari & Ilecki, LLP*, for example, Judge Scott noted that, "Protective Orders are often issued against discovery while a dispositive motion is pending." 2013 WL 3539192, at *5 (W.D.N.Y. July 11, 2013) (staying discovery); *see also Nowlin v. 2 Jane Doe Female Rochester New York Police Officers*, 2013 WL 3897504, at *3 (W.D.N.Y. July 29, 2013) (same). District Courts in the Second Circuit often stay discovery pending resolution of motions to dismiss. *See, e.g.,*

Bethpage Water Dist. v. Northrup Grumman Corp., 2014 WL 6883529, at *2 (E.D.N.Y. Dec. 3, 2014) (citing jurisprudence "staying 'all discovery other than those pertaining to the issues in the parties' dispositive motions'"). Courts examine the following factors when considering a stay request: (1) a strong showing of an unmeritorious claim; (2) breadth of discovery and burden of responding; and (3) the risk of unfair prejudice to party opposing stay. *Barnes v. County of Monroe*, 2013 WL 5298574, at *1 (W.D.N.Y. Sept. 19, 2013) (staying discovery). The Attorney General's motion for a Rule 16(b) conference fails to offer any valid reason why this Court should impose the expense and burden of conducting discovery while their substantial motions to dismiss are pending, and there are ample reasons why this Court should not.

First, a stay of non-venue discovery pending resolution of dispositive motions is the posture of the case that has been transferred to this Court. In December of 2013, the parties participated in a hearing before Magistrate Judge Brown. *See* December 17, 2013 Hearing Transcript (Docket No. 77-2). When Judge Brown asked the State whether discovery should start while the motions to dismiss are pending, the State responded, "I mean I guess it doesn't make sense, you know, unless and until the motion – until the motions are ruled upon." *Id*. at 20:16-18 (emphasis added). Although the venue issue has been resolved, the State does not even attempt to offer any reason why discovery is needed or appropriate before the motions to dismiss are resolved. Judge Brown limited the parties to venue-related discovery and told the State, "let's keep them short and keep them limited because it's in some ways highly unfair to the parties who are making motions to dismiss. If they prevail they shouldn't be put to the expense of discovery." *Id*. at 26:2-6. Nothing has changed since Judge Brown made this ruling that would justify discovery before the motions are resolved.

Second, the Supreme Court and the Second Circuit have both recognized, as Judge Brown did, that, "before proceeding to discovery, a complaint must allege facts suggestive of illegal conduct." *S. Cherry St., LLC v. Hennessee Group LLC*, 573 F.3d 98, 114 (2d Cir. 2009) (citing *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 564 n.8 (2007)). The rationale for this rule is obvious: neither judicial economy nor the economy of the parties is served by burdening with discovery defendants who have meritorious motions to dismiss because, if successful, the motions will result in dismissal of the action. Here, as Native Wholesale Supply notes in its accompanying motion papers, the burden is particularly acute for Native Wholesale Supply, which is seeking to emerge from bankruptcy protection.

Third, any delay in addressing Defendants' motions to dismiss arguments has been caused by the Attorney General. The Attorney General has now filed two amendments to his original complaint. The Attorney General chose to file this action in the Eastern District of New York without any factual basis for doing so, eventually resulting in a transfer to this District. The Attorney General took several months to conduct third-party discovery before reporting to Judge Wexler that it located *no* information tying Native Wholesale Supply to the existence of Seneca brand cigarettes allegedly observed in the Eastern District, and even after that continued to oppose transfer to the Western District all the way through oral argument before Judge Wexler. Any delay in this case is self-inflicted by the Attorney General.

Similarly, there is no need to discuss a discovery scheduling order until the pending dispositive motions to dismiss are resolved. Until then, no purpose is served by a Rule 26(f) conference or an exchange of Rule 26 initial disclosures. Indeed, a meaningful Rule 26(f) conference and decisions concerning Rule 26 initial disclosures can only be made after this Court decides what claims are in (or out) of this case. There is no reason to deviate from Judge

Brown's prior ruling denying non-venue discovery before the motions to dismiss are resolved. Accordingly, the State's motion for a Rule 16(b) scheduling order should be denied and discovery stayed pending resolution of the motions to dismiss.

CONCLUSION

For all of the reasons stated above, this Court should dismiss the claims against Grand River with prejudice. In addition, in order to avoid imposing upon Defendants the economic and other burdens of conducting discovery in a case where there are multiple legitimate bases for dismissal, Grand River requests that this Court stay discovery pending a determination on the pending motions and deny the Attorney General's request for a Rule 16 scheduling order.

Dated: New York, New York
January 15, 2015

Respectfully submitted,

FRIEDMAN KAPLAN SEILER &
ADELMAN LLP

s/ Eric Corngold
Eric Corngold
Jeffrey R. Wang
7 Times Square
New York, New York 10036-6516
(212) 833-1100
Attorneys for Defendant Grand River Enterprises Six Nations, Ltd.