UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK
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STATE OF NEW YORK,

Plaintiff,

-against-

Civil Action No.
14 CV 00910 (RJA) (LGF)

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

Defendants.

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MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTIONS FOR A STAY OF DISCOVERY

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Plaintiff, the State of New York (the "State"), respectfully submits this memorandum of law in opposition to the motions of defendants Grand River Enterprises Six Nation, Ltd. ("Grand River") and Native Wholesale Supply Company Inc. ("Native Wholesale") (collectively, "Defendants") seeking a stay of discovery pursuant to Fed. R. Civ. P. 26(c)(1).

PRELIMINARY STATEMENT

Grand River and Native Wholesale, through the filing of the instant motions to stay discovery, seek to cause these proceedings to unnecessarily linger during the coming months while the Court considers their pending motions to dismiss, despite their inability to make a strong showing that a stay of discovery is warranted. This failure is fatal to their Rule 26(c) motions.

Upon reading Defendants' motion papers, one would assume that the party opposing a Rule 26(c) stay motion bears the initial burden to affirmatively establish that a stay of discovery is inappropriate, and that such stays are automatically granted when there is a pending motion to dismiss. Such an assumption, of course, is incorrect, for it is black letter law that the party seeking a stay of discovery pursuant to Rule 26(c) has the burden of demonstrating good cause for the stay, and that such motions are not automatic, but rather, they are denied in the absence of a sufficient showing of good cause. For the following principal reasons, Grand River and Native Wholesale have failed to carry this burden, and thus their motions for a stay should be denied.

First, Grand River and Native Wholesale have failed to make the requisite strong showing that the State's claims are unmeritorious. Grand River's motion to dismiss raises the pertinent factual question as to the existence of a joint venture between itself and Native Wholesale to manufacture, ship and distribute untaxed Grand River's cigarettes into New York

State. Such factual questions are inappropriate for a motion to dismiss prior to any discovery, particularly where, as here, the complaint sets forth sufficient allegations to raise a reasonable expectation that discovery will expose additional evidence of the joint venture.

Native Wholesale, for its part, mistakenly presumes that its motion to dismiss will be successful—it will not. Under applicable legal standards, the State has adequately alleged claims against Native Wholesale under the Contraband Cigarette Trafficking Act ("CCTA"), the Prevent All Cigarette Trafficking Act ("PACT Act") and several State laws. As explained *infra*, in response, Native Wholesale advances tired legal arguments that have no basis in the law as to why the CCTA and Pact Act do not apply to its conduct. Therefore, like Grand River, Native Wholesale fails to demonstrate that the case against it is likely to be dismissed.

Second, Defendants state they will be burdened by discovery in only the most conclusory of terms, falling well short of establishing good cause for a stay of discovery. The discovery that the State will request will go directly to issues relevant to this case, and it will not require Native Wholesale to produce any documents already made available in its ongoing bankruptcy proceeding.

Finally, a stay of discovery would cause significant prejudice to the State of New York and its citizens. Nearly two years have passed since this action was filed by New York's chief law enforcement officer, and yet, Defendants continue to knowingly manufacture and distribute large quantities of Seneca brand cigarettes into New York State that are sold to consumers untaxed and unstamped, as well as unreported to state taxing authorities. Therefore, with every day that passes, the state losses additional tax revenue and the public health purpose for those taxes is diminished. It is time for the discovery process to begin in earnest so that this case can proceed towards resolution.

STATEMENT OF FACTS

On March 4, 2013, nearly two years ago, the State initially filed this action against Grand River and Native Wholesale for violating the CCTA, the PACT Act and New York Tax Law §§ 471, 471-e, 1814 and 480-b. The gravamen of the State's allegations is that Grand River and Native Wholesale engaged as business partners in a joint venture for the specific purpose of manufacturing, distributing, shipping and selling untaxed and unstamped contraband cigarettes into the State of New York, through the pursuit of a business model specifically designed to evade paying the State's cigarette excise and sales taxes. The State further contends, as explained *infra*, that this conduct continues until the present, notwithstanding the filing of this lawsuit.

The original complaint has been amended twice. The first amendment on August 2, 2013 was required to comply with the stay order issued in Native Wholesale's bankruptcy proceeding before the United States Bankruptcy Court for the Western District of New York ("W.D.N.Y. Bankruptcy"), which limits the State to pursuing an action against Native Wholesale for liability stemming from its post-petition distribution of contraband cigarettes. The State subsequently amended the complaint a second time, with Defendants' consent, upon the case being transferred to this Court, causing no significant delay.

Eastern District of New York ("E.D.N.Y.") Magistrate Judge Brown held a status conference on December 17, 2013 to discuss discovery-related issues, during which the State expressed its interest in obtaining discovery on the "nature of the relationship between Grand River and Native Wholesale as well as Native Wholesale Supply's involvement in the distribution of cigarettes throughout New York [S]tate." *See* Dec. 17, 2013 Hr'g Tr. at 21:16–21 (Docket No. 77-2) (hereinafter "Dec. 17 Hr'g Tr."). However, given the unresolved issue of whether the E.D.N.Y. was an appropriate venue, the court declined to allow party to party

discovery at that time. Instead, Judge Brown restricted discovery to the issue of whether Defendants were responsible for the distribution of cigarettes into the E.D.N.Y. *See id.* at 24:12–19; 25:17–26:12.

Thereafter, in January and February 2014, the State issued non-party subpoenas to eight Indian retail outlets located on Indian Reservations within the E.D.N.Y. Unfortunately, as has been the State's experience, each of these Indian retail outlets proved uncooperative, and claimed to have no responsive documents, including any records of sales, purchases, or deliveries of the products they sell. This has been the only discovery to date.

Following oral argument on October 15, 2014, Judge Wexler granted Defendants' motions to transfer this case to the Western District of New York and denied their motions to dismiss without prejudice so that they could be renewed before this Court.

On December 17, 2014, the State reached out to Defendants' counsel to schedule the Rule 26(f) conference so that the parties could discuss various issues related to the initiation of discovery and the pretrial process. Defendants refused to confer and have since filed the instant motions to stay discovery.

ARGUMENT

I. THE FACTORS CONSIDERED WHEN DECIDING WHETHER TO STAY DISCOVERY PENDING A MOTION TO DISMISS MILITATE AGAINST A STAY IN THIS CASE.

It is axiomatic that "there is no automatic stay of discovery pending determination of a motion to dismiss." *Rivera v. Inc. Vill. of Farmingdale*, 06-CV-2613, 2007 U.S. Dist. LEXIS 99970, at *2 (E.D.N.Y. Oct. 17, 2007) ; *see also In re Currency Conversion Fee Antitrust Litig.*, MDL No. 1409, 2002 U.S. Dist. LEXIS 974, at *4-5 (S.D.N.Y. Jan. 22, 2002)

("imposition of a stay is not appropriate simply on the basis that a motion to dismiss has been filed, as the Federal Rules make no such provision").

Native Wholesale suggests otherwise—that in its counsel's "experience," courts do not require the parties to conduct Rule 26(f) conferences or exchange initial disclosures until Rule 12(b)(6) motions to dismiss are decided. *See* the Mem. of Law in Supp. of Native Wholesale's Mot. to Stay Disc., at 3, dated Jan. 15, 2015 (Docket No. 80-1) ("NWS Stay Mot."). This is an argument made out of whole cloth. Native Wholesale cites to no Local or Federal Rules of Civil Procedure that provides for such an automatic stay, nor to any case law. In fact, the very cases relied on by Grand River and Native Wholesale in their motion papers acknowledge that the pendency of a dispositive motion, including a motion to dismiss, "does not automatically stay discovery." *See Nowlin v. 2 Jane Doe Female Rochester New York Police Officers*, 11-CV-712S, 2013 U.S. Dist. LEXIS 106615, at *8 (W.D.N.Y. July 29, 2013) (citations omitted); *Bethpage Water Dist. v. Northrop Grumman Corp.*, 13-CV-6362, 2014 U.S. Dist. LEXIS 168468, at *3-4 (E.D.N.Y. Dec. 3, 2014) (stating that the "pendency of a dispositive motion is not, without more, grounds for an automatic stay") (citation omitted); *see also Italian & French Wine Co. v. Negociants U.S.A.*, 842 F. Supp. 693, 697 n.1 (W.D.N.Y. 1993) (Fochio, J.) (noting that in an earlier opinion, this Court had denied "motions to stay discovery pending the resolution of [12(b)(6)] dismissal motions").

Instead, pursuant to Rule 26(c), a stay of discovery is appropriate ***only*** when "good cause" is shown, *Rivera*, 2007 U.S. Dist. LEXIS 99970, at *2-3; and it is well-settled that "[t]he party seeking the protective order bears the ultimate burden of persuading the Court" that there is such good cause. *City of New York v. YRC Worldwide Inc.*, 14-CV-4322, 2015 U.S. Dist. LEXIS 961, at *3 (E.D.N.Y. Jan. 6, 2015) (citation omitted).

In determining whether the moving party has shown good cause, courts consider the following three factors: (1) whether the defendant has made a "strong showing" that the plaintiff's claims are unmeritorious, in other words whether the motion to dismiss is likely to succeed; (2) "the breadth of discovery and the burden of responding to it"; and (3) "the risk of unfair prejudice to the party opposing the stay." *Rivera*, 2007 U.S. Dist. LEXIS 99970, at *3 (citation omitted). Courts also take into consideration "the nature and complexity of the action . . . and the posture or stage of the litigation." *Alford v. City of New York*, 2011-CV-0622, 2012 U.S. Dist. LEXIS 37876, at *3 (E.D.N.Y. Mar. 20, 2012) (citation omitted).

Defendants attempt to shift the initial burden to the State, requiring it to explain why a stay is not necessary,[1] without first satisfactorily establishing good cause as to why one is necessary pursuant to the above factors; this failure by Defendants is fatal to their motions to stay discovery. *See generally Country Club of Fairfield, Inc. v. N.H. Ins. Co.*, 3:13-CV-00509, 2014 U.S. Dist. LEXIS 109392, at *25 (D. Conn. Aug. 8, 2014) ("[T]he Court finds that the Defendant has failed to satisfy its burden to establish that . . . a stay of discovery . . . is warranted"). This is particularly true in the instant case because, when examined, as described below, each of these factors weigh against a stay of discovery.

A. Grand River And Native Wholesale Fail To Make A Strong Showing That The State's Claims Are Unmeritorious.

A stay pending resolution of a motion to dismiss requires the moving party to make a "strong" showing that the claims that they seek to dismiss lack merit. *See YRC Worldwide Inc.*, 2015 U.S. Dist. LEXIS 961, at *3-*5 (denying stay after determining, *inter alia*,

[1] Both Grand River and Native Wholesale note verbatim that "the State does not even attempt to offer any reason why discovery is needed or appropriate before the motions to dismiss are resolved." *See* NWS Stay Mot. at 3; Grand River's Br. in Supp. of its Mot. to Dismiss the Second Am. Compl. and for a Stay of Disc., at 23, Jan. 15, 2015 (Docket No. 81-1) ("GRE Br.").

that where the motion to dismiss had not yet been fully briefed, and there was a correspondingly limited factual and legal record, the court could not decide that defendant had "made a strong or substantial showing that the City's claims are unmeritorious"). Grand River and Native Wholesale do not sustain this burden.

1. Grand River's motion to dismiss raises factual issues that are inappropriate for dismissal at this early stage in the proceedings.

The crux of Grand River's motion to dismiss is that it did not ship, sell or distribute its cigarettes into or within New York State itself, but rather Native Wholesale engaged in this conduct. *See* GRE Br. at 8-17. Grand River further asserts that the State has not adequately averred that Grand River and Native Wholesale engaged in a joint venture to manufacture, ship and distribute Grand River's cigarettes into New York State. *See id.* at 17-22. What Grand River fails to appreciate is that the very issue it has raised, the existence of a joint venture, is a factual question unsuitable for a motion to dismiss. *See Carpenters Pension Trust Fund of St. Louis v. Barclays PLC*, 750 F.3d 227, 235 (2d Cir. 2014) (holding that with regard to certain claims defendants seek to dismiss, their arguments "involve questions of fact and should not be resolved upon a motion to dismiss"). Instead, it is more appropriately adjudicated in a summary judgment motion after discovery has taken place. This very point was recognized by Judge Brown in the December 2013 conference, when he stated to Grand River's counsel that with such allegations concerning a joint venture, "how can you possibly win on a motion to dismiss"; and further that "it just sounds a lot like a summary judgment motion than a motion to dismiss." Dec. 17 Hr'g Tr. at 10:18–11:15. The State agrees.

Furthermore, as the Court is aware, the State must only set forth in its complaint only "enough facts to state a claim to relief that is plausible on its face" and "raise a reasonable expectation that discovery will reveal evidence of illegal[ity]." *Bell Atlantic Corp. v. Twombly*,

550 U.S. 544, 556, 570 (2007). It is self-evident from the face of the Second Amended Complaint that the abundant joint venture allegations raise a reasonable expectation that discovery will expose additional evidence of the joint venture (Second Am. Compl. at ¶¶ 66-83), including that the joint venture has continued to the present.[2] For these reasons, Grand River fails to strongly establish that the State's claims against it are unmeritorious.

2. Native Wholesale's assertions as to the inapplicability of the PACT Act and CCTA are misguided and have no legal foundation.

Native Wholesale similarly fails to make a strong showing that it is likely to succeed on its motion to dismiss. Specifically, Native Wholesale states that its "motion to dismiss provides a substantial basis for staying discovery because, if successful, this motion will result in dismissal of the CCTA and PACT Act claims." NWS Stay Mot. at 4. This hardly satisfies its burden of making a strong showing that the State's claims are unmeritorious. In fact, it relies on the misplaced assumption that its motion to dismiss will in all likelihood be successful—it will not. *See Howard v. Galesi*, 107 F.R.D. 348, 350 (S.D.N.Y. 1985) (denying stay of discovery where defendant "assumed that the underlying motion to dismiss [would] be successful," but the court determined its success was not "inevitable").

The arguments set forth in Native Whole's motion to dismiss with regard to the PACT Act and CCTA are either tired arguments that have previously been rejected or they are unfounded in the law. As an initial matter, it is well-settled that the State unquestionably has the

[2] Both Grand River and Native Wholesale raise various other pertinent questions of fact in their motions to dismiss, which would similarly make dismissal inappropriate at this early stage of the litigation without the benefit of any discovery. *See, e.g.*, NWS Stay Mot. at 6 – the extent to which NWS sold Seneca brand cigarettes directly to on-reservation Indian retail outlets, 7 – when Grand River determined that Native Wholesale would no longer be the sole importer of Seneca brand cigarettes to Indian lands in New York State; GRE Br. at 15 – what level of knowledge Grand River had as to each shipment of Seneca brand cigarettes made by Native Wholesale into New York.

authority to tax and regulate sales of cigarettes on Indian reservation lands in New York State. *See, e.g., Oneida Nation of New York v. Cuomo et al.*, 645 F.3d 154, 161, 166-70 (2d Cir. 2011). The Supreme Court has also long held that New York has the power to tax sales on Indian reservations made to non-tribal members. *See Dep't of Taxation & Fin. of N.Y. v. Milhem Attea & Bros., Inc.*, 512 U.S. 61, 73 (1994).

With regard to the CCTA, Native Wholesale asserts that the law does not apply to its conduct because Native Wholesale falls under the CCTA provision prohibiting civil actions against an "Indian in Indian country"; it does not. *See* Mem. of Law in Supp. of Native Wholesale's Mot. to Dismiss, at 9-14, dated Jan. 15, 2015 (Docket No. 79-3) ("NWS MTD"). In at least two previous cases in which Native Wholesale has made a similar immunity argument, courts in Idaho and Oklahoma found that Native Wholesale is not an Indian, but rather a for-profit corporation that is operated for the personal profit of its owner, Arthur Montour, who happens to be a Native American belonging to the Seneca Nation. *See Idaho v. Native Wholesale Supply Co.*, 2009 U.S. Dist. LEXIS 28688, at *7 - 8 (D. Idaho Apr. 6, 2009) (finding that Native Wholesale is a corporation and not "an Indian," and therefore the state was entitled to sue it for the illegal importation and sales of cigarettes into Idaho); *State of Oklahoma v. Native Wholesale Supply Co.*, 237 P.3d 199, 210-11 (Okla. July 2010) (finding that Native Wholesale as a private corporation, rather than a tribal enterprise, as it is not owned by the tribe, was subject to suit in Oklahoma because it is not entitled to tribal immunity). Further, even if Native Wholesale were a corporation owned by a tribe, which it is not, that still would not necessarily be enough to fall under the protections of tribal immunity, as was recently decided by the New York Court of Appeals. *Sue/Perior Concrete & Paving, Inc. v Corp.*, No. 196, 2014 N.Y. LEXIS 3352, at *16-20 (N.Y. Nov. 25, 2014) (holding that the Lewiston Golf Course Corp., an indirect wholly

owned subsidiary of the Seneca Nation, was not an "arm" of the tribe, and thus was not protected from suit by tribal immunity, because the corporation's purposes were sufficiently different from tribal goals and it lacked the power to obligate the tribe's funds). Consequently, for this and other reasons that will be further explained in the State's response to the motions to dismiss, privately owned corporations like Native Wholesale are not protected by the "Indian in Indian country" exception of the CCTA, nor was it ever Congress's intention to provide such protection.

Native Wholesale's arguments that the PACT Act does not apply are equally unavailing. For example, one of the arguments put forth by Native Wholesale is that a violation of the PACT Act requires a "delivery sale," which is defined as a sale of cigarettes to a "consumer," but the complaint only references sales to Indian wholesalers and/or retailers who are not "consumers" under the PACT Act. *See* NWS MTD at 15-18. This argument is unavailing for two reasons. First, the PACT Act's registration and filing requirements, promulgated in 15 U.S.C. § 376(a), do not only apply to "delivery sellers," but rather to "any person" selling or shipping cigarettes for profit in "interstate commerce," which is defined more broadly in the preceding definitions section of the statute. And second, "consumer" is defined as any person who is not "lawfully operating" as a wholesaler or retailer. Only New York state-licensed stamping agents are authorized to receive and possess unstamped cigarettes, yet none has ever reported sales of Seneca brand cigarettes in New York. Thus, each tribal purchaser of Seneca brand cigarettes is not "lawfully operating" as a wholesaler or retailer of cigarettes in New York, and thus falls within the definition of a "consumer" under the PACT Act.

Finally, it is relevant to note that Native Wholesale is only seeking a partial dismissal, as it does not challenge the state law claims. Thus, even if the Court were to dismiss the PACT Act and CCTA claims against both Defendants, and the remaining claims were to

revert to state court, a cause of action against Native Wholesale and Grand River would survive. Consequently, regardless of the outcome of Defendants' motions to dismiss, discovery is inevitable at some point, either at the federal or state level, and there is no reason that discovery should not begin now. *See Brooks v. Macy's Inc.*, 10-CV-5304, 2010 U.S. Dist. LEXIS 135415, at *6 (S.D.N.Y. Dec. 21, 2010) (denying stay of discovery and finding that even if remanded "it is probably inevitable that the discovery will be conducted at some time," and that there was no "valid reason why it should not be conducted now").

B. Grand River And Native Wholesale Fail To Demonstrate That Discovery Will Be Unreasonably Burdensome.

Grand River and Native Wholesale address the burden of discovery in only the most general and conclusory of terms, stating that discovery will serve "neither judicial economy nor the economy of the parties" because they "have meritorious motions to dismiss" (GRE Br. at 24); and further that the stay would help preserve Native Wholesale's assets as it emerges from bankruptcy (NWS Stay Mot. at 4), even though Native Wholesale has emerged seemingly unscathed as it continues to sell and distribute Grand River cigarettes in New York, as discussed *infra* at C. Merely stating that discovery will be burdensome in conclusory terms, when a level of cost and burden is obvious with any discovery that takes place, does not establish good cause for issuing a stay. *See YRC Worldwide Inc.*, 2015 U.S. Dist. LEXIS 961, at *3-4 (concluding that among the reasons for denying the motion to stay was that the movant's "claims of burden are conclusory and bereft of support").

In addition, the breadth of discovery that the State will request of Defendants will go directly to issues relevant to this case, including the factual questions raised by Defendants' motions to dismiss discussed above. For example, the allegations of the Second Amended Complaint raise the reasonable expectation that discovery will produce additional evidence of the

joint venture between Grand River and Native Wholesale, giving further definition to the exact nature of the relationship between the two Defendants, including the level of control Grand River exerts over Native Wholesale's distribution of its cigarettes in the State of New York. This will be accomplished through document requests, interrogatories and eventually depositions of the principal players of both Grand River and Native Wholesale.[3]

The State will also refrain from requesting any documents already produced by Native Wholesale in the W.D.N.Y. bankruptcy. Native Wholesale's burden should also be lessened because many of the documents that the State will request presumably would have already been collected and maintained by Native Wholesale in order to properly prepare the monthly operating reports it has been filing in the bankruptcy proceeding.

It is also worth noting that all of the claims for relief against Defendants arise from the same nucleus of facts; in other words, the same conduct of Defendants violates several state and federal laws. As a result, even if certain claims were to be dismissed, the discovery undertaken would still be pertinent to all remaining claims, even if, as referenced *supra*, all that remained were state law claims which reverted to state court. The same holds true if, for example, Grand River were to be dismissed; third-party discovery of Grand River would remain highly relevant to the State's case against Native Wholesale.

C. The State Will Suffer Unfair Prejudice If A Stay Of Discovery Is Imposed.

If the motion for a stay is granted, discovery will not begin for several months, and the Defendants will continue to "import and distribute contraband Seneca cigarettes into [New York] and reap millions of dollars from the sale of the contraband cigarettes to [New

[3] The State understands the burden that accompanies the deposition process, and therefore is willing to proceed initially with document requests and interrogatories while the motions to dismiss are pending, and delay depositions until afterwards so as to lessen the burden on Defendants.

York] consumers," as they have for the nearly two years since this suit was filed, in unabashed violation of well-settled state and federal laws and to the detriment of the State and its residents. *See State of Oklahoma v. Native Wholesale Supply*, 2014 OK 49, 2014 Okla. LEXIS 71, at *38-39 (Okla. June 10, 2014) (upholding summary judgment decision against Native Wholesale for "$47,767,795.20 from the sale of contraband Seneca cigarettes for resale in Oklahoma").

Recently filed monthly operating reports in the W.D.N.Y. bankruptcy demonstrate the ongoing relationship between Grand River and Native Wholesale and their continuing joint venture to distribute GRE's cigarettes in New York State. For instance, according to the November 2014 monthly operating report, Native Wholesale paid Grand River approximately $5,730,849.46, and owed an additional $2,000,000 to Grand River for something referred to as the "2014 Gala." *See* Native Wholesale's November 2014 Monthly Operating Report, Part II, at 38, attached to the Declaration of Joshua S. Sprague ("Sprague Decl.") as Ex. A. In that same month, Native Wholesale accrued invoices for various on-reservation customers, such as Tonawanda Seneca Nation Distribution totaling $5,242,139.19. *See id.* at 31. The same was true in December 2014, the last month for which an operating report was filed. *See* Native Wholesale's December 2014 Monthly Operating Report, attached as Ex. B to the Sprague Decl.

Further, the Seneca brand cigarettes that continue to be sold and distributed throughout New York to unlicensed entities are done so unstamped, untaxed and unreported. In December, as part of the State's ongoing investigation of Grand River and Native Wholesale, investigators from the New York State Office of the Attorney General conducted additional purchases of Seneca brand cigarettes from twelve Indian retail outlets located across the state on several different Indian reservations, including the Tonowanda, Cattaraugus, Allegany, St. Regis and Poospatuck reservations. Those purchases are described in detail in the affidavits of the

investigators who conducted the investigations: Andrew Scala and Chad Shelmidine. *See* the Declaration of Andrew Scala, dated Jan. 28, 2015, and the Declaration of Chad Shelmidine, dated Jan. 28, 2015. After each purchase, the carton of cigarettes—which was sold for as little as $19.95—was opened and the ten individual packs inspected. *See id.* In each case none of the packs had a New York State tax stamp affixed, *see id.*, and thus there was no pre-payment of state cigarette excise and sales taxes as required by New York tax law.

Consequently, with each month that this case is delayed, the State is further prejudiced through the loss of additional tax revenue owed by Defendants, and an ongoing public health crisis is perpetuated, as cheap untaxed cigarettes manufactured and distributed by Grand River and Native Wholesale remain widely available in New York State, undermining the public health purpose of the State's cigarette taxes, particularly as it relates to lowering cigarette usage among children and adolescents. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000) ("tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States"). Until this case proceeds towards resolution, the State has no other recourse to prevent Defendants' evasion of New York State's cigarette excise and sales taxes. Commencing discovery now will hasten the ultimate resolution of the State's claims.

D. Judge Brown's Previous Order Does Not Require A Stay Of Discovery.

Finally, Grand River and Native Wholesale both assert that the posture of the case upon transfer to this Court was that Judge Brown had stayed all non-venue discovery, and that although the venue issue was now resolved, "[n]othing has changed" since that ruling that would justify further discovery because the State "does not even attempt to offer any reason why discovery is needed." GRE Br. at 23; NWS Stay Mot. at 3. This argument is of no moment.

Judge Brown's order regarding limited venue-related discovery has been rendered moot following Judge Wexler's granting of Defendants' motion to transfer the venue to this Court. Defendants seek to improperly extend Judge Brown's two-year-old ruling to circumstances that Judge Brown was never presented with nor did he rule on: whether further discovery would be appropriate once the venue issue was resolved.

Further, as noted above, this is an attempt by Defendants to inappropriately shift their burden of demonstrating good cause for the stay. For all of the reasons stated *supra*, Grand River and Native Wholesale have failed to carry this burden pursuant to the established factors: their motions to dismiss are unlikely to succeed; they will not be overly burdened by the discovery process; and the State will be prejudiced if the stay is not granted.

CONCLUSION

For all of the reasons set forth above, the State respectfully requests that the Court deny Defendants' motions to stay discovery and order that the parties exchange initial disclosures and participate in a Rule 26(f) conference as soon as practicable so that a case management order may be issued and the discovery process initiated.

Dated: New York, New York
January 29, 2015

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