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.

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF NATIVE WHOLESALE SUPPLY COMPANY'S MOTION TO STAY DISCOVERY AND IN OPPOSITION TO STATE'S MOTION FOR RULE 26(f) CONFERENCE

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PRELIMINARY STATEMENT

The State of New York ("State") filed this action against Native Wholesale Supply Company ("NWS") and Grand River Enterprises Six Nations, Ltd. ("Grand River"). The State asserts claims under the Contraband Cigarette Trafficking Act ("CCTA"), the Prevent All Cigarette Trafficking Act ("PACT Act"), and state law. NWS has filed a motion to dismiss the State's CCTA and PACT Act claims under Federal Rule of Civil Procedure 12(b)(6).

This Reply Memorandum is submitted in further support of NWS' motion to stay discovery and in opposition to the State's motion to schedule a Rule 26(f) conference. The State ignores many of NWS' points and authorities, presumably unable to refute them. Rather than address the arguments made by NWS, the State instead attacks straw-man arguments of its own design. This Court should stay discovery for several reasons, but primarily because Judge Brown has already denied the State's request to conduct any non-venue discovery before the motions to dismiss are decided. The State has proffered no reason to change the status quo. Moreover, a stay will promote judicial economy – which is why most courts confronted with motions to dismiss opt to stay discovery until the motion is resolved.

ARGUMENT

I. This Court Should Stay Discovery Until the Motion to Dismiss is Resolved

A. The State Ignores or Downplays NWS' Points and Authorities

NWS cited ample authority supporting a stay of discovery, but the State's response fails to address NWS' points and authorities. For example, the State ignores Judge Scott's decision in Covell v. Chiari & Ilecki, LLP, which noted that, "[p]rotective Orders are often issued against discovery while a dispositive motion is pending."[1] Likewise, the State ignores the admonition by the Supreme Court and the Second Circuit, that, "before proceeding to discovery, a complaint must allege facts suggestive of illegal conduct."[2] The State also ignored the vast majority of the cases cited by NWS – cases that stayed discovery until motions to dismiss are resolved.[3] The State's failure to address NWS' authorities signals an inability to refute them.

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[1] 2013 WL 3539192, at *5 (W.D.N.Y. 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. 2013) (same).

[2] 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).

[3] Phipps v. Gillani and State of New York, 2012 WL 265727 at 6 (N.D.N.Y. 2012) (granting stay of discovery pending resolution of dismissal motion); Ashcroft v. Dep't of Corrections, 2007 WL 1989265 (W.D.N.Y. 2007) (stating that it previously granted the motion of New York State Department of Corrections for a stay of discovery pending resolution of its motion to dismiss); Spencer Trask Software & Information Servs., LLC v. RPost Int'l Ltd., 206 F.R.D. 367, 378 (S.D.N.Y. 2002) (granting stay of discovery pending determination of motion to dismiss where court found defendants presented "substantial arguments" for dismissal of many if not all of the claims in the lawsuit); United States v. County of Nassau, 188 F.R.D. 187, 188-89 (E.D.N.Y. 1999) (granting stay of discovery during the pendency of a motion to dismiss where the "interests of fairness, economy and efficiency . . . favor[ed] the issuance of a stay of discovery," and where the plaintiff failed to claim prejudice in the event of a stay).

Rather than address these points and authorities, the State instead attacks a straw-man argument -- that stays are not automatic.[4] NWS never suggested otherwise. NWS' counsel simply noted that the practice in this District mirrors the many decisions cited by NWS (and ignored by the State) where courts stay discovery until after a motion to dismiss is resolved.[5] In this District, it is typically the filing of an Answer that triggers the scheduling of a Rule 16 conference. Saying that most parties and courts stay discovery pending a motion to dismiss for pragmatic reasons is a far cry from saying that a stay must be entered or that it is automatic.

The State also ignores that, when asked by Judge Brown 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."[6] The State downplays Judge Brown's stay of non-venue discovery pending resolution of motions to dismiss – which is the current posture of the case.[7]

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[4] Docket No. 84, at 4-5. Although the State cites this Court's decision (and mis-spells Your Honor's name) in Italian & French Wine Co. of Buffalo v. Negociants U.S.A., 842 F. Supp. 693, 697 n.1, that one-sentence footnote provided no analysis suggesting that this case is remotely similar. NWS' motion makes purely legal arguments – thus making it appropriate to stay discovery pending resolution of the motion.

[5] Peebles v. Holt, 2015 WL 196227, at *1 (M.D. Ga. Jan. 14, 2015) ("Should discovery be necessary, the stay will be lifted after an order is entered on Defendants' Motion to Dismiss."); *cf.* Hutchison v California Prison Indus. Auth., 2015 WL 179790, at *6 (N.D. Cal. Jan. 14, 2015) ("Defendants move for a stay of discovery until this Court rules on their motion to dismiss. Because this Order addresses Defendants' motion to dismiss, their motion to stay discovery is denied as moot."); Grenke v Hearst Communications, Inc., 2014 WL 6909883, at *3 (E.D. Mich. Dec. 8, 2014) ("To the extent that plaintiff seeks discovery unrelated to the issue of subject-matter jurisdiction, a stay is granted until resolution of the pending motion to dismiss.").

[6] Docket No. 77-2, p. 20:16-18 (emphasis added).

[7] Docket No. 77-2. Moreover, the State's attempt to suggest that Judge Brown's discovery stay was based on the fact that venue was being challenged, and that his ruling no longer applies (Docket No. 84, p. 3), should be rejected. First, the State

Indeed, although the State argues that NWS must show good cause (which it has), it is the State that should show why this Court should alter Judge Brown's ruling. No case cited by the State involved a prior ruling staying discovery. The State ignores Judge Brown's warning that non-venue discovery is "highly unfair to the parties who are making motions to dismiss. If they prevail they shouldn't be put to the expense of discovery."[8] Likewise, when the State had suggested "limited interrogatories and document requests on NWS, specifically regarding its activities distributing cigarettes in the State of New York" – Judge Brown responded, "Ah, no. But you could serve interrogatories requests on their distribution of cigarettes in the [EDNY]."[9] Although venue has changed, thus eliminating the need for venue discovery, nothing else has changed since Judge Brown made his ruling limiting the State to venue discovery.

B. **The State Must Show Cause to Alter Judge Brown's Discovery Stay**

The State argues that NWS improperly attempts to shift the burden of persuasion to the State. As noted above, the State should bear the burden of persuasion because, unlike the garden-variety cases cited by the State, the court has already stayed discovery in this case -- and it is the State that seeks to alter the status quo established by Judge Brown.

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agreed with Judge Brown that discovery "doesn't make sense . . . until the motions [to dismiss] are ruled upon (Docket No. 77-2, p. 20:16-18). Second, if discovery was ultimately to be had in federal court, then the venue challenge would not have made a difference because the discovery could be propounded while the action was pending in the EDNY for ultimate use in the WDNY. Venue, however, was not the basis for staying discovery, the unfairness of requiring NWS to respond to discovery before its motion to dismiss was resolved was the basis for the stay.

[8] Docket No. 77-2, p. 20:16-18.

[9] Docket No. 77-2, p. 25.

Moreover, even if NWS is required to show good cause, it has done so. First, NWS has made substantial arguments supporting dismissal of the State's federal law claims. Second, NWS recently emerged from bankruptcy. Rather than dispute the point, the State makes the unsupported assertion by counsel that NWS emerged "unscathed."[10] Third, as discussed below, the State has not identified any prejudice that it would suffer if discovery is stayed – and indeed has not identified a single demand that it wants to serve (which prevents NWS from providing specific feedback as to the burden of responding).[11] Finally, a stay would promote judicial economy. Indeed, courts have noted that "[a] stay of discovery pending the determination of a dispositive motion is an eminently logical means to prevent wasting the time and effort of all concerned, and to make the most efficient use of judicial resources."[12]

Although the State balks that NWS only describes the anticipated burden in conclusory terms,[13] the fact is that there is no outstanding discovery demand that would

[10] Docket No. 84, at 11.

[11] As a result, NWS has addressed the factors discussed in Rivera and cases cited by the State that are required to establish good cause. Docket No. 84, at 6. Likewise, City of New York v. YRC Worldwide, Inc., 2015 US Dist. LEXIS 961 is distinguishable because: (1) unlike YRC's anticipated motion, NWS has filed a motion to dismiss and has briefed arguments that make a "strong showing" of merit; (2) unlike YRC, the State here has obtained NWS' monthly operating reports, and has not indicated what else it needs. Although YRC denied a stay, the court directed the parties to "minimize the burden imposed on YRC, including exploring the possibility of deferring hard-copy document review, pending the resolution of YRC's motion to dismiss." Id.

[12] Chavous v. D.C. Fin. Responsibility & Mgmt. Assistance Auth., 201 F.R.D. 1, 2 (D.D.C. 2005) (internal quotation omitted). *See also* U.S. Commodity Futures Trading Com'n v. Banc de Binary, Ltd., 2015 WL 225419, at *2 (D. Nev. Jan. 15, 2015) ("a discovery stay pending a motion to dismiss may result in 'the just, speedy, and inexpensive determination of [an] action' because discovery is costly and unnecessary to adjudicate a merited motion to dismiss.").

[13] Docket No. 84, at 2, 11.

enable NWS to specifically describe the burden in terms of personnel-hours and cost. To the extent that NWS was not specific enough in describing the burden on it, it is because the State has not described what it will seek. The State simply notes that it will request discovery on "issues relevant to this case" – without describing what it will request.[14] Nor does the State even suggest what it could possibly need to address NWS' motion to dismiss. Consequently, this Court should stay "all discovery other than those pertaining to the issues in the parties' dispositive motions."[15]

C. **The State will Not be Prejudiced by a Stay of Discovery**

Where a plaintiff does not show prejudice and a motion to dismiss is pending that does "not appear to be without foundation in law," courts stay discovery pending determination of the motion to dismiss.[16] Likewise here. The State does not describe any prejudice that would be caused by a stay of discovery.[17] Rather, the purported "prejudice" described by the State is that allegedly caused by NWS' conduct – which is not the type of prejudice that courts consider when considering a stay.[18] The State simply argues that "discovery now will hasten the ultimate resolution of the State's

[14] Docket No. 84, at 11-12.

[15] Bethpage Water Dist. v. Northrup Grumman Corp., 2014 WL 6883529, at *2 (E.D.N.Y. Dec. 3, 2014) (citations omitted).

[16] Johnson v. New York Univ. Sch. of Educ., 205 F.R.D. 433, 434 (S.D.N.Y. 2002) (citations omitted).

[17] Docket No. 84, at 2, 12-14.

[18] Bethpage Water Dist., 2014 WL 6883529, at *3 (granting stay and finding no unusual prejudice where plaintiff had "not provided any specific examples of evidence that may become stale or witnesses whose memories may fade during the stay").

claims."[19] This case, however, is no different than any other case filed in any court of law where a plaintiff seeks a remedy in a lawsuit. Moreover, the purported prejudice is caused by the State's self-inflicted delay as noted below.

The State also argues that its investigators have observed Seneca® brand cigarettes displayed for sale by various Native retailers. The problem, however, is that – as Judge Brown observed previously – the State offers nothing that ties NWS to the presence of these cigarettes.[20] The State has already conceded in its pleadings that NWS is not the sole importer of Seneca® brand cigarettes. Consequently, the State's "investigative" affidavits are irrelevant.

The State suggests that discovery will not burden NWS because, even if its motion to dismiss is granted, the State's state law claim will "revert" to state court.[21] It is unclear what the State means when it suggests that this case may "revert" to state court. The case will either be dismissed or proceed, but it cannot "revert" to state court since it was never filed there (and the procedure would be to remand if it had been).

D. **No Question of Fact Exists**

The State seeks to establish a "question of fact" that "requires" discovery. Not only does the State cry wolf, but any purported fact issues are irrelevant at this stage because NWS' motion to dismiss assumes arguendo the truth of the State's allegations for purposes of these motions. The State's attempt to generate "fact issues" should be rejected.

[19] Docket No. 84, at 14.

[20] Docket No. 77-2, pp.16-18.

[21] Docket No. 84, at 10-11.

First, the "joint venture" issue has nothing to do with NWS' motion to dismiss,[22] another effort by the State to conflate GRE and NWS. The State's claim "that discovery will expose additional evidence"[23] is irrelevant to the motions to dismiss -- and thus the State's purported need to avoid a stay.

Second, the State suggests in a footnote that NWS raises the following "fact" issues: "the extent of which NWS sold Seneca brand cigarettes directly to on-reservation Indian retail outlets", and "when [GRE] determined that [NWS] would no longer be the sole importer of Seneca brand cigarettes to Indian lands in New York State."[24] The problem with this argument, however, is that NWS predicates its arguments solely upon the State's own allegations, as required in a Rule 12(b)(6) motion. NWS does not debate the allegations; it assumes them as true for this motion and explains why these allegations fail to state a cause of action as a matter of law.

E. **The Delay Complained of by the State is Self-Inflicted**

The State also argues that NWS seeks to "cause these proceedings to unnecessarily linger during the coming months."[25] As noted in its moving papers, however, it is the State who is responsible for the delay in this case. The vast majority of any "delay" was caused by the State's decision – in an attempt to obtain an unfair advantage – to file this lawsuit in an improper forum (for which Judge Wexler criticized the State at oral argument). The State cannot cause years of delay as a result of its

[22] Docket No. 84, at 7.

[23] Docket No. 84, at 2, 8.

[24] Docket No. 84, at 14.

[25] Docket No. 84, at 8 n.2.

litigation tactics and then act like it is NWS dragging its heels. Moreover, Judge Wexler already rejected the State's request for extraordinary relief or the need to proceed with an urgent timeframe when he denied the State's request to file a motion for a preliminary injunction (Dkt. #28), which the State never appealed.

Part of the State's delay in this case was the amount of time it took it to report to Judge Wexler that the non-party subpoenas failed to produce any evidence tying NWS to the EDNY. The State never filed a motion to compel or otherwise complained to Judge Wexler that the non-party on-reservation retailers obstructed discovery. Now, however, the State makes the unsupported assertion that the retailers "proved uncooperative, and claimed to have no responsive documents."[26] This *ipse dixit* statement by counsel, intended to portray Native businesses negatively, is meaningless.

F. **The Merits of NWS' Motion to Dismiss**

The State makes various arguments concerning the purported weakness of NWS' motion to dismiss. These arguments, however, must, in fairness, be analyzed in light of the parties' arguments contained in the Rule 12(b)(6) memoranda. Accordingly, NWS refers to and incorporates by reference the arguments in its Rule 12(b)(6) briefs, including its Reply Memoranda scheduled to be filed on March 20, 2015 in accordance with the parties' stipulated briefing schedule. NWS' Rule 12(b)(6) arguments will demonstrate the weakness of the State's arguments and the inapposite nature of the cases it cites. For this motion, it suffices to note that NWS' motion to dismiss

[26] Docket No. 84, at 4.

arguments raise only legal questions based on the State's allegations. Under these circumstances, no discovery is needed to address NWS' arguments.

CONCLUSION

For the foregoing reasons, the State's motion (Dkt. 77) requesting a Rule 16(b) discovery scheduling order conference should be denied without prejudice, and NWS' motion to stay discovery pending resolution of the motions to dismiss (Dkt. 79) should be granted.

Dated: February 5, 2015

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