UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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THE STATE OF NEW YORK, :
: No. 14-cv-00910 (RJA)(LGF)
Plaintiff, :
:
- against - :
:
GRAND RIVER ENTERPRISES SIX :
NATIONS, LTD. and NATIVE WHOLESALE :
SUPPLY COMPANY INC., :
:
Defendants. :
:
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DEFENDANT GRAND RIVER ENTERPRISES SIX NATIONS, LTD.'S REPLY BRIEF IN FURTHER SUPPORT OF ITS MOTION FOR A STAY OF DISCOVERY

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ARGUMENT

Nearly two years after filing its complaint in this matter, the Attorney General has suddenly decided that discovery – which had previously been stayed by the court in the Eastern District – cannot wait even five weeks until the motions to dismiss are fully briefed, let alone until they are decided. This newfound urgency represents a dramatic reversal from the Attorney General's prior representation to Judge Brown in the Eastern District that discovery "doesn't make sense, you know, unless and until the motion – until the motions are ruled upon." *See* December 17, 2013 Hearing Transcript ("Hearing Tr.") (Docket No. 77-2), at 20:16-18 (emphasis added).

It is also unwarranted.

In Grand River's motion to dismiss and stay discovery (Docket No. 81-1), Grand River demonstrated that it has substantial grounds for dismissal of the Attorney General's claims against it, and that the balance of factors favors a stay of discovery. The Attorney General's opposition to Grand River's motion for a stay rests on three arguments: *first*, that Grand River's motion raises only "factual issues" that cannot be decided on a motion to dismiss; *second*, that the burden on Grand River of conducting discovery is no different than the burden it will face if it prevails on its motion to dismiss; and *third*, that the Attorney General will suffer "unfair prejudice" if discovery were delayed at all. None of these arguments has merit.

The Attorney General's first argument is based on the false premise that Grand River's motion to dismiss argues a "factual issue" – namely, that the facts in the Second Amended Complaint concerning a supposed joint venture between Grand River and Native Wholesale are factually untrue. (Opp. Br. at 7.) The Attorney General's argument grossly mischaracterizes Grand River's argument. What Grand River *actually* argues in its motion to

dismiss– and what the Attorney General fails to acknowledge at all in his opposition – is that the Attorney General's repeated incantation of a "joint venture" in the Second Amended Complaint consists of nothing more than the type of unsupported "labels and conclusions" that the Supreme Court has held are insufficient to state a claim as a matter of law. (*See* Grand River Br. at 8-10, 17-21.) Stated differently, Grand River's argument on its motion to dismiss is a *legal* argument, not a factual one.

The Attorney General's present mischaracterization of Grand River's argument is demonstrably intentional. Specifically, when Judge Brown asked Grand River's counsel in December 2013 whether Grand River's argument "sounds a lot like a summary judgment motion than a motion to dismiss" (Hearing Tr. at 11:14-15), Grand River's counsel responded as follows:

> MR. CORNGOLD: Well I understand that, I believe that as we show <u>the allegations in the complaint, in the amended complaint don't rise to the legal level of being the kind of joint venture</u> that may or may not be subject to the United States law. So --
>
> THE COURT: Interesting.
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> MR. CORNGOLD: -- it's actually a, I think it's properly a motion to dismiss. If the Court finds, <u>I don't think the Court will</u>, but if the Court finds that somehow the State has met its allegation or its objections to allege more or enough than I think it will become a summary judgment motion.

(Hearing Tr. at 11:16-12:2 (emphasis added).) In his brief, the Attorney General cites the Court's predicate question, yet omits Grand River's subsequent response. Plainly, Grand River's

motion does not raise only "factual issues" that are not susceptible to dismissal on a motion to dismiss, and the Attorney General's suggestion to the contrary is disingenuous at best.[1]

The Attorney General's second argument – that Grand River suffers no burden by engaging in discovery now, because it will face the same discovery obligations eventually anyway – fares no better. The Attorney General's claim that "even if certain claims were to be dismissed, the discovery undertaken would still be pertinent to all remaining claims" (Opp. Br. at 12) is simply wrong. As just one example, if Grand River prevails on its motion to dismiss because this Court determines that the Second Amended Complaint does not plead facts sufficient to support the Attorney General's assertion of a "joint venture" between Grand River and Native Wholesale, then there will be no basis for the Attorney General to seek discovery on that issue. Judge Brown recognized as much when he stayed non-venue discovery, and declared broader discovery "highly unfair to the parties who are making motions to dismiss. If they prevail they shouldn't being put to the expense of discovery." (*See* Hearing Tr. at 26:2-6.)

Equally meritless is the Attorney General's curious assertion that Grand River would suffer no prejudice by beginning discovery now, because if it were to be dismissed from the case, "third-party discovery would remain highly relevant to the State's case against Native Wholesale" (Opp. Br. at 12). Even putting aside the questionable relevance of discovery that the Attorney General might wish to obtain, Grand River is a *Canadian*-based company. Any "third-party discovery" of Grand River would have to be conducted in accordance with the laws governing international third-party discovery in Canada, which is a far cry from the discovery that Grand River would be subjected to as a party to this litigation. Thus, the Attorney General's

[1] In addition, to the extremely limited extent that the Attorney General addresses the legal merit of Grand River's motion to dismiss, it would be inappropriate for Grand River to reply to those arguments before the Attorney General has filed his full opposition to Grand River's motion to dismiss, which he has not yet done.

argument that Grand River will face an identical discovery burden regardless of when discovery is conducted is without merit.[2]

The Attorney General's third argument – that he would suffer "unfair prejudice" if discovery does not begin immediately (Opp. Br. at 12-13) – also fails. As an initial matter, nowhere does the Attorney General acknowledge his own substantial role in the delay of this matter, a role that Grand River and Native Wholesale detailed in their moving papers (Grand River Br. at 24; Native Wholesale Br. (Docket No. 80-1) at 4). Instead, the Attorney General's argument hinges on a series of allegations and accusations that are completely extrinsic to the Second Amended Complaint.

But an opposition to a stay motion is not a proper method for the Attorney General to attempt to introduce a raft of new "facts" and accusations that were never included in any of his three filed complaints. Yet that is precisely what the Attorney General has done here, to an alarming degree. None of the myriad statements in the improperly-submitted affidavits of Andrew Scala or Chad Shelmidine – or any of the dozens of exhibits attached thereto – is included anywhere in the Second Amended Complaint. Nor does the Attorney General explain why, if the prejudice the State is purportedly suffering is so severe and emergent, he has waited roughly two years to investigate the sales he now purports to claim are wrongful. Simply put, there is no basis upon which to credit the newly-submitted extrinsic material, nor the urgency that the Attorney General hopes they convey.

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[2] The Attorney General also appears to misunderstand the procedure that would apply if this Court were to dismiss the action because only state law claims remained. The remaining claims would not "revert to state court" (Opp. Br. at 10-11), as the Attorney General suggests. Rather, the case would be dismissed, and it would be incumbent upon the Attorney General to attempt to institute a new action in state court.

Indeed, there is precedent in this case to suggest that this Court should *not* adopt the Attorney General's sudden sense of urgency: Judge Wexler (from whom this case was transferred) has already rejected the Attorney General's claims of immediate and irreparable harm, having denied his request for a preliminary injunction (Docket No. 28) based on the same sort of arguments that the Attorney General now recycles here.

* * *

In short, Grand River and Native Wholesale have demonstrated ample reasons why this Court should stay discovery pending a determination on their motions to dismiss, and the Attorney General's flawed arguments in his opposition brief do not support proceeding otherwise.

CONCLUSION

Accordingly, for the reasons stated above, as well as the reasons in Grand River's and Native Wholesale's moving papers, this Court should stay discovery until such time as the Court decides the motions to dismiss.

Dated: New York, New York
February 5, 2015

Respectfully submitted,

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