UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HO-CHUNK, INC., WOODLANDS DISTRIBUTION COMPANY, HCI DISTRIBUTION COMPANY, and ROCK RIVER MANUFACTURING COMPANY,	)	
Plaintiffs,	)	No. 1:16-CV-1652-CRC
v.	)	
LORETTA LYNCH, UNITED STATES DEPARTMENT OF JUSTICE, THOMAS E. BRANDON, and UNITED STATES BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES,	)	
Defendants.	)	

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants, United States Department of Justice, et al. (hereinafter "Defendants"), by and through the undersigned counsel, respectfully moves, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment in the Defendants' favor on the ground that there is no genuine issue of material fact. The essential facts of this case, as set forth in the accompanying Defendants' Statement of Material Facts Not In Genuine Dispute, are not in dispute. Therefore, as demonstrated in the accompanying Memorandum of Points and Authorities, the Defendants are entitled to judgment as a matter of law.

Respectfully submitted,

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DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Defendants' Motion for Summary Judgment should be granted and Plaintiffs' request for equitable and other relief should be denied and the complaint dismissed. The facts of this case are not in dispute. Plaintiffs are distributors of cigarettes who are subject to inspection under the Contraband Cigarette Trafficking Act (CCTA) and the regulations implementing the CCTA. The Plaintiffs refused to allow ATF to inspect their operations and instead filed this lawsuit incorrectly theorizing that the CCTA does not apply in Indian country in that Indian country is not considered in a "State" for purposes of the CCTA. However, courts have unanimously held that persons, who are operating in Indian country, which is within a state border, are also considered to be operating within a state for purposes of the CCTA. Courts have also unanimously held that the CCTA is a statute of general applicability, which applies in Indian country. For decades, ATF has consistently considered Indian reservations to be in a state for

purposes of the CCTA and for decades has conducted CCTA enforcement actions in Indian country. Additionally, established Supreme Court precedent holds that an Indian reservation that is within the boundaries of a state, is also within the state, and the states can regulate tobacco distribution within Indian country within their state.

The statutory language of the CCTA record keeping provisions demonstrates that while Congress specifically intended to exempt tribal businesses from certain specific CCTA regulatory requirements, it did not consider Indian tribes exempted parties from the CCTA and did not exempt them from the CCTA recordkeeping requirements. Moreover, ATF certainly did not exempt Indian country from the territorial extent of the CCTA regulations. The ATF regulations mirror the statutory language of the CCTA, which apply to all businesses engaged in the commercial sale of cigarettes including businesses located in Indian country. Finally, this case does not involve the Master Settlement Agreement.

II. RELEVANT LAW

The CCTA makes it a crime "for any person knowingly to ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes." *United States v. Khan*, 771 F.3d 367, 373 (7th Cir. 2014); 18 U.S.C. § 2342(a). "Congress enacted the CCTA to enable federal enforcement agencies to assist states in curtailing [untaxed] interstate cigarette trafficking, which drains billions of dollars in tax revenues from state and local governments each year and often serves as a source of illicit financing for organized crime and terrorist organizations." *United States v. Mohamed*, 759 F.3d 798, 803 (7th Cir. 2014). Under the CCTA, it is unlawful for any person to ship, transport, receive, possess, sell, distribute or purchase contraband cigarettes. *Id.* The CCTA defines "contraband cigarettes" as "a 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, if the State or local government requires a stamp, impression, or other indication to be placed on packages

or other containers of cigarettes to evidence payment of cigarette taxes." *Khan*, 771 F.3d at 373; 18 U.S.C. § 2341(2).[1]

Pursuant to the CCTA, any person who ships, sells, or distributes any quantity of cigarettes in excess of 10,000, or any quantity of smokeless tobacco in excess of 500 single-unit consumer-sized cans or packages, in a single transaction shall maintain such information about the shipment, receipt, sale, and distribution of cigarettes as the Attorney General may prescribe by rule or regulation. The Attorney General may require such person to keep such information as the Attorney General considers appropriate for purposes of enforcement of this chapter, including:

(1) the name, address, destination (including street address), vehicle license number, driver's license number, signature of the person receiving such cigarettes, and the name of the purchaser;

(2) a declaration of the specific purpose of the receipt (personal use, resale, or delivery to another); and

(3) a declaration of the name and address of the recipient's principal in all cases when the recipient is acting as an agent.

18 U.S.C. § 2343(a).

Further, under 27 C.F.R. § 646.143, a "distributor" of cigarettes is "[a]ny person who distributes more than 60,000 cigarettes in a single transaction." Distributors of cigarettes "shall keep copies of invoices, bills of lading, or other suitable commercial records relating to each disposition of more than 60,000 cigarettes." 27 C.F.R. § 646.146. For each such disposition to an exempted person, a distributor who is an exempted person, (a person holding a cigarette operating permit under

[1] States tax cigarettes at rates ranging from $0.17 in Missouri to $4.35 in New York. *See* State Cigarette Excise Tax Rates and Rankings, Campaign for Tobacco-Free Kids, www.tobaccofreekids.org/research/factsheets/pdf/0097.pdf (last visited October 3, 2016). The 2012 Surgeon General's report concluded that increased cigarette prices promote health by deterring youth smoking. Excerpts from the 2012 Surgeon General's Report Supporting Tobacco Tax Increases, Campaign for Tobacco-Free Kids, www.tobaccofreekids.org/research/factsheets/pdf/0372.pdf (last visited October 6, 2016).

the Internal Revenue Code, a person who is operating a customs bonded warehouse, a common or contract carrier operating under a proper bill of lading or freight bill which states the destination of the cigarettes, a person who is licensed/authorized by the State he possesses cigarettes to account for and pay cigarette taxes and who complied with his payment or accounting obligations, a person operating a foreign trade zone, or an agent of the United States or individual States possessing duties in his official capacity), must show on dated commercial records, the following information:

(i) the full name of the purchaser (or recipient if there is no purchaser).

(ii) the street address (including city and State) to which the cigarettes are destined.

(iii) the quantity of the cigarettes disposed of.

See 27 C.F.R. §§ 646.147(a) (i)-(iii) and 27 C.F.R § 646.143.

Regarding sales to non-exempted persons, distributors must maintain the following records:

(i) the full name of the purchaser (if any);

(ii) the name, address (including city and state), and signature of the person receiving the cigarettes;

(iii) the street address (including city and state) to which the cigarettes are destined;

(iv) the quantity of cigarettes disposed of;

(v) the driver's license number of the individual receiving the cigarettes;

(vi) the license number of the vehicle in which the cigarettes are removed from the distributor's business premises;

(vii) A declaration by the individual receiving the cigarettes of the specific purpose of receipt (such as personal use, resale, delivery to another person, etc.); and

(viii) A declaration by the person receiving the cigarettes of the name and address of his principal when he is acting as an agent.

27 C.F.R. §§ 646.147(a)(2)(i)-(viii); s*ee also* 27 C.F.R. § 646.147(b) (persons who are not exempted persons shall show on dated commercial invoices the information in 27 C.F.R. §§ 646.147(a)(2)(i)-(viii) for each disposition of more than 60,000 cigarettes).[2]

Such records required under 27 C.F.R. §§ 646.146 and 646.147 must be kept for a period of "three years following the close of the year in which the records are made" and the distributor must keep the records on his business premises. 27 C.F.R. § 646.150(a). Knowing violations of rules and regulations promulgated under 18 U.S.C. §§ 2343(a) or 2346(a) or a violation of 18 U.S.C. § 2342(b) (false statements or representations with respect to required records) can result in fines of not more than $5,000 or imprisonment of not more than three years, or both. 18 U.S.C. § 2344(b). Pursuant to 18 U.S.C § 2343(c)(1), any officer of ATF may, during business hours, enter the premises of any person required to maintain records pursuant to the CCTA to inspect the records required to be maintained under the CCTA or the cigarettes and smokeless tobacco kept or stored by the person at the premises.

Whoever, denies access to an ATF officer or who fails to comply with an order issued by a district court shall be subject to a civil penalty in an amount not to exceed $10,000. 18 U.S.C. § 2343(c).

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[2] The threshold for violations for the original CCTA was 60,000 cigarettes. *See* Pub. L. No. 95-575, 92 Stat. 2463 (1978). This was lowered by Congress to 10,000 cigarettes when the CCTA was amended in 2006. *See* Pub. L. No. 109-177, 120 Stat. 192 (2006). The CCTA regulations have not yet been amended to reflect this change although the Department of Justice has issued a Notice of Proposed Rulemaking. *See* Implementation of the USA PATRIOT Improvement and Reauthorization Act of 2005 Regarding Trafficking in Contraband Cigarettes or Smokeless Tobacco, Notice of Proposed Rulemaking, 75 Fed. Reg. 44,173 (2010).

III. MATERIAL AND UNCONTESTED FACTS

Plaintiffs are four corporations that are wholly tribally-owned entities established by the federally-recognized Winnebago Tribe of Nebraska under its tribal law. *See* Compl. ¶¶ 9-12. Each is located on the Winnebago Reservation. *Id.* Plaintiff Woodlands Distribution Company, a "subsidiary" of Plaintiff Ho-Chunk Incorporated (HCI), "sells native tobacco products to off-reservation businesses." *Id.* at ¶ 11. Plaintiff HCI Distribution Company, "a wholly-owned subsidiary of HCI, "engages in the purchase and resale of tobacco products which are produced by, and purchased from [Plaintiff] Rock River [Manufacturing Company] and other Native American companies on Indian Reservations in the United States and Canada." *Id.* at ¶ 12.

On June 24, 2016, pursuant to the inspection authority under the record keeping provisions of the Contraband Cigarette Trafficking Act, (CCTA), 18 U.S.C. §§ 2343(a) and (c), Keith Krolczyk, Chief, Alcohol, Tobacco Enforcement Branch, Bureau of Alcohol, Tobacco Firearms and Explosives (ATF), sent letters to HCI Distribution, 710 Buffalo Trail, Winnebago, Nebraska, 68071; Rock River Manufacturing, 505 Ho-Chunk Plaza, Winnebago, Nebraska 68071; and Woodlands Distribution, One Mission Drive, Winnebago, Nebraska 68071. *See* Declaration of Ellen V. Endrizzi (Endrizzi Decl.) ¶ 3, Gov't Ex. 1; Compl. ¶ 24. These three companies, which are located on the Ho-Chunk Indian reservation in Nebraska, commercially distribute cigarettes in the United States. These companies currently, primarily distribute Native American manufactured cigarettes. HCID states on its public website that "[d]ue in part to tribal ownership, we market select brands of cigarettes at lower prices than competitors. That means you can sell quality products from HCI Distribution at lower costs and higher profit margins." http://www.hcidistribution.com/aboutus.html (last visited October 6, 2016). One means for distributors to cut the prices of cigarettes sold is to distribute cigarettes without payment of state taxes and distribute cigarettes without state tax stamps.

The letters stated ATF's intent to inspect and copy the records these entities must maintain under the CCTA and requested that each company schedule with ATF a date for such inspection. *See* Endrizzi Decl., Gov't Ex. 1. The letters identified circuit court decisions that held that the CCTA is applicable to Native Americans and also set forth the applicable statutory language of the CCTA. *Id.*

In a July 28, 2016 letter to ATF chief counsel Charles R. Gross, Plaintiffs' counsel stated that "the CCTA's implementing regulations are, by their own terms, not generally applicable to the Tribe or its on-reservation business." Endrizzi Decl. ¶ 4, Gov't Ex. 2, John M. Peebles Ltr., dated July 28, 2016 (Peebles Ltr.), at 3; *see* Compl. ¶ 35. Plaintiffs refused to allow ATF access to the three locations to inspect the records, but noted that "the Winnebago Tribe intends to provide the ATF with the requested information regarding its off-reservation transactions and initiate an appropriate action in federal court … to clarify, among other issues, whether or not it is obligated to provide its records on its inter-tribal trades." Govt. Ex. 2, Peebles Ltr. at 4.

On August 4, 2016, ATF Associate Chief Counsel Jeffrey A. Cohen responded to Mr. Peebles' letter indicating that it was ATF's view that the CCTA applied to all businesses engaged in commercial cigarette transactions, including Native American businesses. Endrizzi Decl. at ¶ 5, Gov't Ex. 3, Jeffrey A. Cohen Ltr., dated Aug. 4, 2016.

On August 9, 2016, Plaintiffs, through counsel, Joseph Zebrowski, provided ATF special agents with approximately 381 pages of documents purported to be the complete records of Plaintiffs' Rock River Manufacturing Company and Woodlands Distribution Company pertaining to "non-native sales," for the period May 13, 2014 through June 17, 2016. Endrizzi Decl. at ¶ 6.

On August 16, 2016, Plaintiffs filed the instant Complaint alleging that the CCTA recordkeeping provisions did not apply in Indian country. Case no. 1:16-CV-1652-CRC, D.E. 1. In light of this litigation, ATF has not attempted to enforce its inspection authority under the CCTA of

the Plaintiffs' corporations through an in-person demand, court order, or search warrant. Endrizzi Decl. at ¶ 7.

IV. SUMMARY JUDGMENT IS APPROPRIATE IN THIS CASE AS THE FACTS ARE UNDISPUTED

Pursuant to Federal Rule of Civil Procedure 56(a), a motion for summary judgment should be granted if there is no genuine dispute as to material fact, and if the moving party is entitled to judgment as a matter of law. *Maydak v. United States*, 630 F. 3d 166, 174 (D.C. Cir. 2010) (*quoting McCready v. Nicholson*, 465 F.3d 1, 7 (D.C. Cir. 2015)); *see Grimes v. District of Columbia*, 794 F.3d 83, 94-95 (2015); Fed. R. Civ. P. 56(a), (c). The moving party has the burden of showing that there is no genuine dispute as to material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-325 (1986). The moving party need not present evidence, and need only point out the lack of any genuine dispute as to material fact. *Celotex*, 477 U.S. at 323-325. Once the moving party has met this burden, the non-moving party must set forth evidence of specific fact showing the existence of a genuine issue for trial. *Id.*; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-249 (1986).

In this case, the facts are not in dispute and the pleadings do not contest the material facts. ATF attempted to inspect Plaintiffs' records, and Plaintiffs, through counsel, denied ATF its right of inspection of practically all of their CCTA records based on the legal argument that the CCTA record keeping provisions do not apply in Indian country because Indian country is not considered in a "State" under the CCTA regulations. *See* Compl. at ¶ 34; Endrizzi Decl. at ¶ 6 and Gov't Ex. 2, Peebles Ltr. (Plaintiffs only provided ATF with records pertaining to off-reservation sales and stated the CCTA is not applicable to them). Thus, this case solely involves interpretation of a legal issue and may be disposed of via summary judgment.

V. LEGAL ARGUMENT

A. THE CCTA APPLIES IN INDIAN COUNTRY WITHIN A STATE'S BORDERS

Plaintiffs' argument is essentially that a location in Indian country is not in a "State" under the CCTA and therefore all locations that are in Indian country are exempt from the CCTA. However, courts have unanimously held that the CCTA is a statute of general applicability that applies in Indian country, and ATF has conducted dozens of successful CCTA enforcement actions in Indian country. This would not be possible if Indian country were not considered to be in a state, as the term contraband cigarettes is defined as follows: "The term contraband cigarettes means a quantity in excess of 10,000 cigarettes, which bear no evidence of payment of applicable State taxes… *in the State… where such cigarettes are found*… if the State requires a stamp." 18 U.S.C. § 2341(2) (emphasis added). Accordingly, if Indian country were not also considered to be in a state under the CCTA, ATF could not enforce the CCTA on Indian reservations, which is clearly not the case.

Courts have held unanimously that the United States may enforce the CCTA in Indian country. *See generally United States v. Baker,* 63 F.3d 1478, 1483-86 (9th Cir. 1995) (holding that Native Americans are not exempt from the CCTA and affirming RICO, CCTA, and money laundering convictions involving untaxed cigarette shipments between Montana and Washington Indian reservations); *see United States v. Morrison*, 686 F.3d. 94, 107-08 (2d Cir. 2012) (affirming multiple criminal convictions relating to Indian reservation sales of cigarettes and holding that CCTA applies on New York reservation); *United States v. Parry*, No. 4:13-CR-291-07-BCW, 2015 WL 631979, at *6 (W.D. Mo. Feb. 13, 2015) (in ATF investigation, court holds law is settled that Native Americans are not exempt from the CCTA); *United States v. 1,920,000 Cigarettes*, No. 02-CV-437A, 2003 WL 21730528, at *4 (W.D.N.Y. Mar. 31, 2003) (holding in ATF cigarette seizure case that CCTA is a statute of general applicability and the "Second Circuit has adopted the Ninth Circuit jurisprudence on the applicability of general federal laws to Native Americans"); *United States v. Mahoney*, 298 F.

App'x 555, 556-557 (9th Cir. 2008) (holding in ATF case that CCTA applied to Native Americans, as there was no congressional intent to create an additional category of persons exempt from the CCTA, and the CCTA made it a crime to fail to pay state taxes on cigarettes subject to tax).

Additionally, the court in *United States v. Gord*, 77 F.3d 1192 (9th Cir. 1996), held, regarding an ATF investigation, that a smoke shop alleged to be a tribal organization violated the CCTA by receiving, possessing, and distributing cigarettes that did not have tax stamps required by Washington State law, even if the cigarettes were possessed by and distributed only to Native Americans, unless the cigarettes had been preapproved by the Washington Department of Revenue. *Id.* at 1194. The court in *Grey Poplars Inc. v. 1,371,100 Assorted Brands of Cigarettes*, 282 F.3d 1175 (9th Cir. 2002), held with regard to an ATF investigation that the Contraband Cigarette Trafficking Act is a federal statute of general applicability and it applies equally to Indians, even on a reservation in Indian country. *Id.* at 1177.

The *Baker* case is the seminal decision in this area of the law. In *Baker* the Ninth Circuit explained:

> *Indians are not among the specifically exempted categories. Nonetheless, the defendants argue Congress did not extend the provisions of the Act to apply to Indians. We reject this argument…* The defendants and amici curiae place great emphasis on (a) … footnote in House Conference Report No. 95-1778… *We do not interpret this footnote as evidence of congressional intent to create an additional category of persons exempt from the CCTA.*

63 F.3d at 1484, n.2, 1486.

B. COURTS HAVE HELD THAT INDIAN RESERVATIONS WITHIN STATE BOUNDARIES AND STATES CAN REGULATE NATIVE AMERICAN TOBACCO DISTRIBUTORS IN THEIR STATES

Indian reservations are in Indian country and those within state boundaries are also in the states. The Supreme Court has held, "'[O]rdinarily,' it is now clear [that] 'an Indian reservation is considered part of the territory of the State.'" *Nevada v. Hicks*, 533 U.S. 353, 361-62 (2001) (*quoting*

U.S. Dep't of Interior, *Federal Indian Law*, 510 & n.1 (1958), *citing Utah & Northern R. Co. v. Fisher*, 116 U.S. 28 (1885)). In *State ex rel. Edmondson v. Native Wholesale Supply,* 237 P.3d 199 (Okla. 2010), the Oklahoma Supreme Court presented a similar holding. *Edmondson* involved activity that is very similar to the business conducted by Plaintiffs in this case, specifically the shipment of substantial quantities of Native American produced cigarettes from reservation to reservation for commercial distribution. *Id.* at 208. There, the defendant distributor asserted that its sales were to tribal wholesalers for sale to reservation Indians, and therefore were not in Oklahoma. *Id.* The Oklahoma Supreme Court disagreed, concluding, "While the entity with which [defendant distributor] directly deals may operate on tribal land that tribal land is not located in some parallel universe. It is geographically within the State of Oklahoma." *Id.*; *People ex rel. Harris v. Native Wholesale Supply Co.,* 196 Cal. App. 4th 357, 362, 365 (3d Dist. 2011). Likewise, as the Supreme Court held in *Hicks*, "State sovereignty does not end at a reservation's border." 533 U.S. at 361; *see also Organized Vill. of Kake v. Egan*, 369 U.S. 60, 72, 75 (1962); *Chemehuevi Indian Tribe v. California Bd. of Equalization,* 800 F.2d 1446, 1450 (9th Cir. 1986) ("The attributes of sovereignty possessed by [a California] Tribe do not negate the fact that [its] Reservation is a part of the State of California.").

The United States Supreme Court has repeatedly upheld various states' ability to regulate tobacco sales in Indian country. Of course, unless Indian country was also considered to be within the boundaries of a state, such regulation would be impossible. The Court has determined that "[s]tates have a valid interest in ensuring compliance with lawful taxes that might easily be evaded through purchases of tax exempt cigarettes on reservations; that interest outweighs tribes' modest interest in offering a tax exemption to customers who would ordinarily shop elsewhere." *Dep't of Tax. & Fin. of New York v. Milhelm Attea & Bros Co.,* 512 U.S. 61, 64 (1994). A state's interest in ensuring the collection of taxes on cigarette sales to sales to non-Indians (in Indian country) continues to outweigh

a tribe's countervailing interests even when collection of an excise tax disadvantages or eliminates the Indian retailer's cigarette business with non-Indians. *Washington v. Confederated Tribes of Colville*, 447 U.S. 134, 151 (1980). Furthermore, tribes do not supplant a state's taxing or regulatory authority by collecting tribal taxes on reservation cigarette sales and regulating their cigarette economies. *Id.* at 157-58. In light of this balance of interests, the Supreme Court has determined that to enforce valid state taxation of on-reservation cigarette sales, states may impose "on reservation retailers minimal burdens reasonably tailored to the collection of valid taxes from non-Indians." *Milhelm Attea,* 512 U.S. at 64. The Court has also held that Native American tribes do not have, through treaties, "supersovereign authority to interfere with another jurisdiction's sovereign right to tax" activities within its borders. *Oklahoma Tax Comm'n v. Chickasaw Nation,* 515 U. S. 450, 466 (1995); *see also Rice v. Rehner*, 463 U.S. 713, 734 (1983) ("Congress did not intend to make tribal members 'super citizens' who could trade in a traditionally regulated substance free from all but self- imposed regulations."); *Hicks*, 533 U.S. at 361 ("Our cases make clear that the Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation. State sovereignty does not end at a reservation's border.").

The Supreme Court has repeatedly held that Indian tribes have no right to distribute untaxed cigarettes to non-tribal members. In *Colville*, in Indian country as defined under 18 U.S.C. § 1151, the Court held that the State of Washington properly seized unstamped cigarettes destined for Native American reservations. 447 U.S. at 161. Although the Court noted that Native Americans could sell cigarettes on their reservation to other tribal members for personal consumption free from State excise taxes, the Court emphatically supported the State of Washington's right to tax all cigarette sales on reservations to non-Native Americans. *Id.*; *see Oklahoma Tax Comm'n v. Citizen Bank Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 512 (1991); *see also Moe v. Salish and Kootanai Tribe*, 425 U.S. 463, 475-83 (1986) (holding that Montana could require reservation Indian

smoke shop owners to collect and enforce the tax on sales of cigarettes to non-Indians by adding tax to sales price).

In *Colville*, Indian smoke shops obtained cigarettes without payment of Washington State taxes and profited by making sales to non-tribal members at a price substantially lower than legitimate retailers. 447 U.S. at 145. The tribes argued that the State of Washington could not tax its cigarette sales to non-tribal members. The Court emphatically rejected that argument:

> It is painfully apparent that the value marketed by the smoke shops to persons coming from the outside is not generated by activities in which the tribes have a significant interest. [Internal citations omitted]. What the smoke shops offer these customers, and what is not available elsewhere, is solely an exemption from state taxation… *We do not believe that principals of federal Indian law, whether stated in terms of pre-exemption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere***.**

Id. at 155 (emphasis added).

The Supreme Court also held that sales of cigarettes from one tribe to a separate tribe could be taxed as the Court held that Washington State could tax sales to Indian residents on the Colville reservation who were not members of the Colville tribe. The Court held:

> [T]he mere fact that nonmembers resident on the reservation come within the definition of "Indian" for the purposes of the Indian Reorganization of 1934 . . . does not demonstrate a congressional intent to exempt such Indians from State taxation. Nor would the imposition of Washington's tax on *these purchasers contravene the principal of tribal self-government, for the simple reason that non-members are not constituents of the governing Tribe. For most practical purposes these Indians stand on the same footing as non- Indians residents on the reservation.*

Id. at 161 (emphasis added).

Accordingly, there is no federal common law right for Native Americans to sell untaxed cigarettes to non-tribal members or to distribute untaxed cigarettes to other tribes or for "tribe-to-tribe" sales to be outside of the scope of federal or state regulation. *See also Milhelm Attea,* 512 U.S. 61 (reasonable regulation of cigarette transactions by Native American distributors is permissible

under federal law and sales to non-tribal members are subject to state taxation); *Oneida v. Cuomo*, 645 F.3d 154, 160 (2d Cir. 2011) (under New York state law all cigarettes shipped to Native American reservations must have New York State tax stamps on them).

C. CONGRESS SPECIFICALLY EXEMPTED NATIVE AMERICANS FROM CERTAIN RECORDKEEPING REQUIREMENTS BUT NOT 18 U.S.C. § 2343(a)

As noted, Native American tribes and Native Americans are not listed as exempted parties under the CCTA. *See* 18 U.S.C. §§ 2341(2)(A)-(D) (list of exempted parties from CCTA); *Baker*, 63 F.3d at 1484-1486 (CCTA did not include Native Americans as exempted party). The authority under 18 U.S.C. § 2343(a) is extremely broad and it covers *any* person, including Native American businesses, who ships in excess of 10,000 cigarettes or 500 single-unit consumer-sized cans or packages of smokeless tobacco. Indeed, because of the inherently economic nature regarding the distribution of commercial quantities of cigarettes, which has a substantial effect on interstate commerce, there is no jurisdictional requirement under the CCTA that the shipment must cross state lines. *United States v. Abdullah*, 162 F.3d 897, 901 (6th Cir. 1998). Moreover, while Congress specifically exempted tribal governments from providing ATF with records relating to delivery sale shipments, in excess of 10,000 cigarettes or 500 units of smokeless tobacco each month, it specifically did not exempt tribal governments from any of the CCTA record keeping requirements. *Compare* 18 U.S.C. § 2343(a) (any person who distributes more than 10,000 cigarettes or 500 units of smokeless tobacco must keep records prescribed by the Attorney General) *with* 18 U.S.C. § 2343(b) (tribal governments do not have to submit reports of delivery sales to Attorney General); *see also* 18 U.S.C. § 2346(a), Enforcement and Regulations (Attorney General shall enforce provisions of 18 U.S.C § 2341, *et seq.*) with 18 U.S.C. § 2346(b) (state may not bring civil action against an Indian tribe or Indian in Indian country). The exemption for Native Americans for record keeping for delivery sales would be meaningless and unnecessary if Native Americans were exempt from *all* CCTA record

keeping requirements. Additionally, the language of the CCTA establishes that Indian tribes are *persons* under the CCTA and must comply with all applicable CCTA provisions. Section 2343(a) requires any person to keep CCTA records. 18 U.S.C. § 2343(a). Section 2343(b) reads in pertinent part, "(A)ny person, except for a Tribal Government … and who ships sells, or distributes may quantity in excess of 10,000 cigarettes....) 18 U.S.C. § 2343(b). Thus, Congress considered tribal governments and tribal businesses as persons who must comply with all pertinent provisions of the CCTA.

D. THE ATTORNEY GENERAL DID NOT CHOOSE TO EXEMPT INDIAN COUNTRY FROM THE CCTA

Plaintiffs allege that the Attorney General choose not to use the normal definition of the term "State" in promulgating the CCTA regulations and therefore since the term Indian country is not listed within the definition of a state, the CCTA therefore does not apply in Indian country. *See* Compl. at ¶ 9. This claim is incorrect. Congress passed the CCTA in 1978. Pub. L. No. 95-575, 92 Stat. 2463 (1978). In the CCTA, Congress defined the term "State" as "a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico or the Virgin Islands." *Id.* The CCTA was originally administered by ATF when ATF was within the Treasury Department. ATF's initial promulgation of regulations under the CCTA simply repeated the definition set forth by Congress. *See* 45 Fed. Reg. 48,612 (1980). Accordingly, neither the Secretary of Treasury nor the Attorney General (who has yet to promulgate CCTA regulations) engaged in any regulatory interpretation regarding the term "State" and certainly did not interpret the term as excluding Indian country. However as in the *Baker* case and every other published decision interpreting this issue for the past two decades, the courts have unanimously held Congress intended the CCTA to apply in Indian country and validated ATF enforcement actions in Indian country.

Plaintiffs, somewhat inexplicably, cite isolated passages from the 2005 Congressional record stating that the CCTA was passed to ensure Native American sovereignty and commerce. These 2005 comments have no bearing on the intent of Congress when it set forth the definition of a state in 1978. Moreover, when Congress amended the CCTA in 2006, it specifically chose to exempt tribal governments from delivery sale reporting requirements, s*ee* 18 USC § 2343(b), and barred states from enforcing the CCTA against Native Americans or tribes in Indian country, s*ee* 18 U.S.C. § 2346(b)(1), but it did not amend 18 U.S.C. § 2343(a)(1), which requires *any person* to maintain CCTA records. Thus, there is no merit to Plaintiffs' argument that the Attorney General has interpreted the term "State" as not including businesses in Indian country. Moreover, ATF and the Justice Department through multiple prosecutions and enforcement actions for decades predicated on the possession of unstamped cigarettes in Indian country, by which is statutorily required to involve possession within a state under the CCTA, has consistently interpreted Indian country as being in a state under the CCTA.

E. THE DEPARTMENT OF JUSTICE'S INTERPRETATION OF THE TERM "STATE" IS ENTITLED TO DEFERENCE

As noted, the Attorney General has interpreted the term "State" as including Indian country within a State under the CCTA. The CCTA statutory language, arguably, does not directly address this issue. "When Congress has 'explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation,' and any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." *United States v. Mead Corp*. 533 U.S. 218, 227 (2001) (*quoting Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984)). But whether or not they enjoy any express delegation of authority on a particular question, agencies charged with applying a statute necessarily make all sorts of interpretive choices, and while not all of

those choices bind judges to follow them, they certainly may influence courts facing questions the agencies have already answered. "The well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998) (*quoting Skidmore v. Swift,* 323 U.S. 134, 139-140 (1944)). The Court has long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer and the principal of deference to administrative interpretation. *Chevron*, 467 U.S. at 844. The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position. *Skidmore,* 323 U.S. at 139-140.

In this case, ATF and the Justice Department has formally, consistently, and persuasively, through judicially-validated enforcement actions, which have spanned decades, taken the position that Indian country is also within a State for the purposes of the CCTA. The Government respectfully suggests that in the event there is any doubt on this issue, the Court should defer to the position of the Department of Justice.

F. THIS CASE DOES NOT INVOLVE THE MASTER SETTLEMENT AGREEMENT

In their complaint, Plaintiffs falsely allege that behind ATF's official actions lie the Master Settlement Agreement (MSA). Compl. ¶¶ 4, 6, 8; Peebles Ltr. at 2-3. This is incorrect as the Plaintiffs' potential failure to comply with the MSA is irrelevant to any of the records that must be maintained under the CCTA record keeping provisions.

In 1998, 46 states, the District of Columbia, and 5 United States territories settled a lawsuit against 4 major cigarette manufacturers regarding the catastrophic health care costs resulting from

cigarette consumption. MSA, *available at* Public Health Law Center at Mitchell Hamline School of Law, http://publichealthlawcenter.org/sites/default/files/resources/master-settlement-agreement.pdf (last accessed Oct. 6, 2016). The settlement created the MSA, which requires the manufacturers to make substantial annual cash payments to the settling states and territories, in perpetuity, to offset the increased cost to the health care system created by smoking. In return, the manufacturers obtained a release of specified past and future tobacco-related claims against them. Not all cigarette manufacturers joined the MSA, either initially or later. The states feared that these nonparticipating manufacturers (NPMs) would become insolvent against future liability for smoking-related health care costs. Because of this concern, many states adopted escrow statutes. The escrow statutes require NPMs to either join the MSA or pay into a qualified escrow fund. *See, e.g.*, Wash. Rev. Code § 70.157.020(b) (2013); *see King Mountain Tobacco Co. v. McKenna*, 788 F.3d 989, 991 (9th Cir. 2014). Native Americans are not exempt from compliance with the MSA. *See McKenna*, 788 F.3d at 998; *see also Muscogee Nation v. Pruit*, 669 F. 3d 1159 (10th Cir. 2012); *Grand River Enter. Six Nations, Ltd. v. Pryor*, 481 F.3d 60 (2d Cir. 2007). Although Plaintiffs obviously do not like the various states' enforcement efforts regarding the MSA, the proposed inspection by ATF is not an effort by ATF to aid and abet enforcement of the MSA, which does not involve cigarette excise taxes or cigarette stamping requirements which are the concern of the CCTA.

VI. CONCLUSION

This case is straightforward and the facts are not in dispute. ATF attempted to inspect the Plaintiffs' operations and Plaintiffs denied ATF its right of inspection. This case involves an interpretation of essentially a single legal issue that is ripe for disposition via summary judgment. The case law unanimously holds that under the CCTA, Indian reservations are considered to be in a state and the CCTA is a statute of general applicability that applies in Indian country. Moreover, the language of the CCTA does not exempt tribal businesses from complying with the CCTA record

keeping provisions. The Supreme Court and other courts have held that Indian reservations are also considered to be territory within a state and has upheld the ability of the states to regulate certain tobacco transactions in Indian country within their respective States. Accordingly, the Government's Motion for Summary Judgment should be granted and Plaintiffs' request for equitable and declaratory relief should be denied.

Respectfully submitted,

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