

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

GRAND RIVER ENTERPRISES SIX)	Civil Action No.
NATIONS, LTD.,)	
)	3:16-CV-01087
Plaintiff,)	
)	
v.)	
)	
KEVIN B. SULLIVAN, Commissioner of)	
Revenue Services of the State of)	
Connecticut,)	
)	
Defendant.)	SEPTEMBER 5, 2017

SECOND AMENDED COMPLAINT

Introduction

1. The claims for relief in this Complaint focus principally on recent amendments to Conn. Gen. Stat. § 4-28m(a)(3). The amendments first took effect with respect to Plaintiff's Connecticut State regulatory filings that were submitted on April 30, 2016.

2. The amendments purport to authorize revocation of Plaintiff's right and license to have its tobacco products sold in Connecticut, if Plaintiff's regulatory filings cannot reconcile the number of products sold nationwide by importers of its products (as measured by the importer's national federal excise tax returns) with the number of products shipped by these importers throughout the United States in Interstate Commerce (as evidenced federal shipping reports required under federal law).

3. The amendments thus purport to permit revocation of Plaintiff's license in Connecticut based on the ability to reconcile two sets of federal regulatory filings of independent, third parties (importers), under two separate federal laws that federal law itself does not require to be reconciled. The federal tax laws measure the volume of cigarettes entered into

U.S. commerce nationwide, while the federal shipping laws require reporting of tobacco products shipped or sold nationwide in “Interstate Commerce,” which does not include products shipped intrastate or within or among Indian Country (as that term is defined under federal law) after importation into the United States.

4. The federal shipping law at issue requires that Connecticut receive certain reports each month for sales and shipments into Connecticut, and Connecticut may use the information contained in such reports only for the purpose of enforcing that federal law. The information received must be kept confidential according to the federal law’s confidentiality requirements.

5. Without prejudice to its rights and in accordance with the amendments, Plaintiff has provided Defendant with federal tax returns and federal shipping reports filed by those importers in 2015 and 2016 that operated outside of Native American land (as requested by Defendant); however, the numbers of cigarettes reported in each set of reports cannot be reconciled with the total number of cigarettes imported into the U.S., because three importers do not file shipping reports (as they distribute Plaintiff’s products solely within Indian Country); and a number of Plaintiff’s products after entering U.S. commerce are sold and shipped exclusively intrastate (for which no federal shipping report is required) or are held in inventory that carries over from prior years or is carried over until the next calendar year.

6. By authorizing revocation of Plaintiff’s Connecticut license based on an alleged inability to reconcile federal regulatory filings of independent, third parties, which federal law itself does not require to be reconciled, and which relate to the shipment and sale of tobacco products and conduct occurring entirely outside of Connecticut, Defendant’s threat of revocation of Plaintiff’s license under such amendments and circumstances and refusal to maintain the confidentiality of such information in accordance with federal law violates Due Process, the

Commerce Clause, and the Supremacy Clause of the United States Constitution and the Connecticut Constitution equivalent.

Background of Claims for Relief

7. Plaintiff Grand River Enterprises Six Nations, Ltd. (“GRE”) brings this action seeking a declaratory judgment and injunctive relief to prevent Defendant from removing GRE and its approved tobacco brands from the Connecticut Tobacco Directory. The Department of Revenue Services (“DRS”) has threatened to remove GRE and its brands from the Tobacco Directory unless GRE provides DRS confidential and proprietary business information from third-party importers regarding the number, location, and shipment of GRE cigarettes sold nationwide, regardless of whether the importers do business in or have any connection to Connecticut.

8. If the Commissioner is permitted to remove GRE from the Tobacco Directory, GRE’s products would be deemed contraband effective immediately and prohibited from being sold in Connecticut.

9. GRE and its products have been on the Tobacco Directory for the past four years, and its approval and status on the Directory is a property right and license regulated by the State of Connecticut. Indeed, GRE has each year (including 2016 and 2017) paid \$5,250 for its current Connecticut manufacturing license and currently maintains an approved bond to be listed on the Directory. GRE has expended over \$300,000 in seeking and obtaining approval to be listed on the Tobacco Directory, and has invested a similar amount in regulatory compliance fees and payments since obtaining such approval. In all, GRE has dedicated more than \$1 million to obtaining the necessary regulatory approvals and developing a market and good will for its products and approved brands in Connecticut through the date of filing this Complaint.

10. Removal of GRE and its products from the Tobacco Directory under these circumstances would violate GRE's constitutional rights, including its right to due process. Moreover, the basis that DRS has provided for initiating removal of GRE from the Tobacco Directory is contrary to federal law; thus, the removal of GRE would violate the Supremacy Clause and the Commerce Clause. An injunction is necessary to prevent the Commissioner from taking such illegal action.

Parties

11. Grand River Enterprises Six Nations, Ltd. ("GRE") is a Canadian corporation located at 2176 Chiefswood Road, Ohsweken, Ontario N0A 1MO and is the manufacturer of Seneca® brand cigarettes, among other brands. The Seneca® brand, and other brand cigarettes manufactured by GRE, are approved for sale in Connecticut, and have been listed on Connecticut's approved Tobacco Directory for the past three years.

12. Defendant Kevin B. Sullivan (the "Commissioner") is the Commissioner of Revenue Services, and this action is brought against him in his official capacity. The Commissioner is charged with maintaining the Connecticut Tobacco Directory described below and pursuant to Connecticut statute has certain authority to remove tobacco manufacturers from the Tobacco Directory.

Jurisdiction and Venue

13. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 because the claims herein arise under the Constitution, laws, or treaties of the United States.

14. Venue in this District is proper pursuant to 28 U.S.C. § 1391 because the defendant is a resident of Connecticut, and a substantial part of the events or omissions giving rise to this action occurred in Connecticut.

Facts

15. In 1998, the four major United States tobacco companies (“Original Participating Manufacturers” or “OPMs”) and the attorneys general of 46 states, including Connecticut, entered into a Master Settlement Agreement (“MSA”). Under the MSA, the Original Participating Manufacturers agreed to make payments to the states in perpetuity and to certain advertising and marketing restrictions.

16. The MSA permits other tobacco companies to join the MSA as Subsequent Participating Manufacturers or SPMs. Original Participating Manufacturers and Subsequent Participating Manufacturers are referred to collectively as Participating Manufacturers or PMs. Any tobacco company that chooses not to participate in the MSA is referred to as a Nonparticipating Manufacturer or NPM. GRE is a Nonparticipating Manufacturer.

17. Connecticut enacted enabling legislation to implement the provisions of the MSA. The enabling legislation provides the Commissioner with certain oversight and regulatory authority over the activities of Participating Manufacturers and Nonparticipating Manufacturers and their products in Connecticut.

18. Pursuant to Conn. Gen. Stat. § 4-28l(a), all manufacturers whose cigarettes are sold in Connecticut, whether directly or through a distributor, retailer or similar intermediary or intermediaries, shall execute a certificate annually on a form prescribed by the Commissioner, certifying under penalty of law for false statement that, as of the date of such certification, it is in full compliance with the provisions of Conn. Gen. Stat. §§ 4-28h to 4-28j, inclusive.

19. If such manufacturer elects to join the MSA as an SPM, the manufacturer must make the annual settlement payments required of PMs under the MSA. If such manufacturer elects not to join the MSA and remain an NPM, then Conn. Gen. Stat. §§ 4-28h *et seq.* requires

the manufacturer to deposit funds into an escrow account annually based on the volume of sales of its cigarette brands in Connecticut. The NPM is also required under Conn. Gen. Stat. § 4-28l(d) to certify its compliance with various aspects of its Connecticut escrow obligations.

20. Pursuant to Conn. Gen. Stat. § 4-28m(a), the Commissioner was required to, no later than July 1, 2005, develop a directory (the “Connecticut Tobacco Directory” or “Tobacco Directory”) listing of all tobacco product manufacturers that have provided current and accurate certifications conforming to the requirements of Conn. Gen. Stat. § 4-28l and all cigarette brand families that are listed in such certification. The statute authorizes the Commissioner to update the Tobacco Directory as necessary in order to correct mistakes and to add or remove a tobacco product manufacturer or brand family to keep the Tobacco Directory current and in conformity with the requirements of Conn. Gen. Stat. §§ 4-28k to 4-28r, inclusive. Pursuant to Conn. Gen. Stat. § 4-28m(a)(2), the Commissioner shall not include or retain in the Tobacco Directory the name or brand families of any manufacturer that has failed to provide the required certification or whose certification the Commissioner determines is not in compliance with the provisions of Conn. Gen. Sec. § 4-28l.

21. Prior to January 1, 2015, Conn. Gen. Stat. § 4-28m(a)(3) provided that the Commissioner shall not include or retain in the Connecticut Tobacco Directory any brand family of a Nonparticipating Manufacturer if the Commissioner concluded that all required escrow payments have not been fully paid, *see* Conn. Gen. Stat. § 4-28m(a)(3)(A); or that any outstanding final judgment for a violation of Conn. Gen. Stat. §§ 4-28h to 4-28j, inclusive, had not been fully satisfied for such brand family and such manufacturer, *see* Conn. Gen. Stat. § 4-28m(a)(3)(B).

22. Effective January 1, 2015, the Connecticut Legislature amended § 4-28m(a)(3), by adding an additional condition for listing on the Tobacco Directory, which is most pertinent to this action and provides in relevant part:

(3) The commissioner shall not include or retain in the directory any brand family of a nonparticipating manufacturer if the commissioner concludes ... (C) a nonparticipating manufacturer's total nation-wide reported sales of cigarettes on which federal excise tax is paid exceeds the sum of (i) its nation-wide reports under 15 USC § 375 et seq., as from time to time amended, or those made by its importer, and (ii) any intrastate sales reports under 15 USC § 375 et seq., as from time to time amended, by more than five per cent of its total nation-wide sales or one million cigarettes, whichever is less, during any calendar year, unless the nonparticipating manufacturer cures or satisfactorily explains the discrepancy not later than ten days after receiving notice of the discrepancy. Conn. Gen. Stat. § 4-28m(a)(3)(C).

23. In 2017, the Connecticut Legislature amended the reconciliation provision set forth in § 4-28m(a)(3)(C). Effective October 1, 2017, § 4-28m(a)(3) will provide in relevant part:

(3) The commissioner shall not include or retain in the directory any brand family of a nonparticipating manufacturer if the commissioner concludes ... (C) a nonparticipating manufacturer's total nation-wide reported sales of cigarettes on which federal excise tax is paid exceeds the sum of (i) its total interstate sales, as reported under 15 USC 375 et seq., as from time to time amended, or those made by its importer, and (ii) its total intrastate sales, by more than two and one-half per cent of its total nation-wide sales during any calendar year, unless the nonparticipating manufacturer cures or satisfactorily explains the discrepancy not later than ten days after receiving notice of the discrepancy.

24. Both the 2015 and 2017 amendments to § 4-28m(a)(3) require Plaintiff, as an NPM, to reconcile the federal excise tax returns of importers of Plaintiff's cigarettes nationwide with nation-wide reported sales under 15 USC § 375 (the "PACT Act"), a federal law with various purposes related to regulation of the sale and distribution of cigarettes, which encompasses the entire field of national cigarette distribution. Significantly, neither the federal excise tax law nor the PACT Act requires that the aforementioned returns and reports be reconciled, to within 1 million cigarettes, or 2.5%, or otherwise.

25. The PACT Act requires any person who sells, transfers, or ships for profit cigarettes or smokeless tobacco in interstate commerce, whereby such cigarettes or smokeless tobacco are shipped into a State, locality, or Indian country of an Indian tribe taxing the sale or use of cigarettes or smokeless tobacco, or who advertises or offers cigarettes or smokeless tobacco for such a sale, transfer, or shipment to comply with certain requirements relating to registration and reporting.

26. The PACT Act, subject to certain exceptions as discussed below, requires that any person to which the PACT Act applies file with the Attorney General of the United States and with the tobacco tax administrators of the State into which shipments are made, various information including: full name, trade name, address of principal place of business, address of any other places of business, telephone numbers for each place of business, principal electronic mail address, website address, name, address, and telephone number of any agent in the State authorized to accept service on behalf of the entity registering.

27. The PACT Act also requires, subject to certain exceptions as discussed below, any person registering with the U.S. Attorney General, to file, with the tobacco tax administrator of the State into which such shipment is made, a memorandum or a copy of the invoice covering each and every shipment of cigarettes or smokeless tobacco made during the previous calendar month.

28. Under the PACT Act, a tobacco tax administrator or chief law enforcement officer who receives PACT Act reports “shall use the memorandum or invoice solely for the purposes of the enforcement of [the PACT Act] and the collection of any taxes owed on related sales of cigarettes, and shall keep confidential any personal information in the memorandum or invoice except as required for such purposes.”

29. The State has made no allegation and has presented no evidence that GRE is not in full compliance with the PACT Act and, in fact, GRE is in full compliance with the PACT Act.

30. As such, any interest the State may claim to have is fully satisfied because GRE is fully compliant with the PACT Act.

31. Pursuant to Conn. Gen. Stat. § 4-28m(b), it is illegal to sell, offer, possess for sale or distribute in Connecticut, cigarettes of a tobacco product manufacturer or cigarette brand family not included in the directory.

32. GRE and its Seneca, Opal and Couture brand cigarettes are listed in the Connecticut Tobacco Directory. Over the past 4 years, GRE has incurred and invested over \$1 million to comply with the Conn. Gen. Stat. § 4-28l and its related legislation, including payment of more than \$500,000 in regulatory escrow deposits required under that legislation as well as posting hundreds of thousands of dollars in bonds posted to secure compliance with that legislation.

33. In April 2016, GRE submitted to DRS the annual certification for the 2015 calendar year as required by Conn. Gen. Stat. § 4-28l.

34. On June 16, 2016, DRS informed GRE that its certification had been reviewed, and DRS requested certain additional information and documents pursuant to the recent amendment of § 4-28m(a)(3), which, if not provided, would result in GRE's exclusion from the Connecticut Tobacco Directory effective as of July 1, 2016. Among the information DRS requested was an explanation of how GRE verified compliance with Conn. Gen. Stat. § 4-28m(a)(3)(C) through its records or those of the U.S. importers that import GRE's cigarettes into the U.S. DRS also contended that GRE had, in its certification, failed to enumerate its total

nationwide cigarette sales and its total nationwide cigarette sales as reported by GRE or these importers and had failed to submit the importers' Alcohol and Tobacco Tax and Trade Bureau (TTB) Forms 5220.6 and reports under 15 U.S.C. § 375 (PACT Act reports). A copy of DRS's e-mail to GRE is attached hereto as Exhibit A.

35. On June 21, 2016, GRE responded to DRS by, among other things, providing (i) copies of all the TTB Form 5220.6 forms and PACT Act reports provided to GRE by those importers that file such reports and (ii) detailed responses to DRS's information requests. A copy of GRE's response to DRS is attached hereto as Exhibit B.

36. In its June 21 response, GRE provided a detailed explanation of the reasons why the number of cigarettes for which federal excise tax was paid (as reflected on the TTB 5220.6 forms) cannot, for purposes of Conn. Gen. Stat. § 4-28m(a)(3)(C), be reconciled with the number of cigarettes for which the PACT Act reports were filed - within a margin of 5% or 1 million cigarettes.

37. GRE's explanation is simple and dictated by federal law. As GRE explained, three of the five importers that import GRE's cigarettes do not file PACT Act reports for cigarettes they distribute exclusively within Indian Country, as that term is defined by 15 U.S.C. § 375 (7). As a result, it is impossible for GRE to reconcile the importers' federal excise tax returns (which account for all cigarettes imported into the U.S.) with the number of cigarettes subsequently shipped or sold in "Interstate Commerce" as reported in the PACT Act reports of these independent, third-party importers, within a margin of 5% or 1 million cigarettes.

38. None of the three importers that distribute GRE cigarettes exclusively within Indian Country distribute any cigarettes in Connecticut.

39. The two remaining importers that import GRE's cigarettes into the United States distribute these cigarettes in interstate and intrastate transactions, and only one of these importers sells or ships in or into Connecticut. Intrastate sales of GRE cigarettes by these importers are not subject to PACT Act reporting requirements. Specifically, in 2015, over one million sticks of GRE cigarettes were sold by importers Tobaccoville and Everything Tobacco in wholly intrastate sales in states such as Florida and South Carolina.

40. DRS has changed its position with respect to GRE's sales in Indian Country. While DRS has indicated that, at present, it does not intend to remove GRE from the Tobacco Directory for failure to produce PACT Act reports for sales in Indian Country, where, by definition, no such reports are required, DRS persists in its claimed disparity related to GRE's intrastate sales.

41. The explanation for the discrepancy provided by GRE is satisfactory because the discrepancy is the result of the operation of federal law and the business records, or lack thereof, maintained by independent third parties over whom GRE exercises no control and has no affiliation. Moreover, the transactions or records at issue do not relate to GRE's distribution or activities in Connecticut but, rather, the distribution of GRE's cigarettes by importers in States other than Connecticut. (GRE has provided DRS with all records relating its importer's sales to Connecticut distributors and the latter's PACT Act reports and sales to Connecticut customers).

42. Nevertheless, DRS refused to communicate its acceptance of GRE's explanation as to GRE's inability to reconcile the national excise tax returns and interstate shipment reports of the importers that import GRE's products into the U.S. prior to July 1, 2016.

43. In light of DRS's refusal, GRE filed a Verified Complaint on June 29, 2016 in order to secure its placement of the Connecticut Tobacco Directory. (Docket No. 1).

44. In its initial response to GRE's Complaint, DRS took the position that it did not need to give GRE any hearing or any other form of due process.

45. On July 1, 2016, this Court granted DRS's Motion for a temporary restraining order and ordered DRS and the Commissioner refrain from removing GRE from the Tobacco Directory.

46. On July 6, 2016, after the filing of GRE's Complaint and after this Court's ruling on GRE's Motion, DRS sent GRE a letter notifying GRE of DRS's decision to not include GRE on the Connecticut Tobacco Directory. A copy of the letter is attached as Exhibit C.

47. DRS's July 6, 2016 letter states that GRE "failed to cure or satisfactorily explain a discrepancy of more than one million cigarettes between its total nation-wide reported sales of cigarettes on which federal excise tax was paid and the total sales of cigarettes under 15 USC 375 et seq. or those submitted by its importers and intrastate sales reports under 15 USC 375." DRS's position is in conflict with and preempted by federal law.

48. DRS's July 6, 2016 letter reiterated the Commissioner's position that GRE's importers were obligated to provide either PACT Act reports or "the documentary equivalent of PACT Act reports" to DRS, without any explanation as to what the documentary equivalent could be, nor any response to the constitutional claims GRE raised in its first Verified Complaint.

49. In addition to restating its position on PACT Act reports, DRS repeated its assertion that GRE failed to comply with Conn. Gen. Stat. § 4-28m because the TTB forms and the PACT Act forms that GRE submitted "do not reconcile within one million sticks."

50. In fact, such reconciliation is impossible due to exceptions within the PACT Act. In effect, Connecticut has purported to override federal law by imposing additional requirements

and undue burdens on cigarette manufacturers such as GRE that have fully complied with federal law, based only on a perceived discrepancy between distribution figures that are reported under two separate federal laws, which serve two very different functions, and under which such a “discrepancy” will naturally occur whenever there are sales of a manufacturer’s cigarettes in Indian Country or in intrastate transactions. In addition to directly conflicting with federal law, § 4-28m purports to allow DRS to regulate sales and importers that have no nexus to the state of Connecticut, and Grand River’s business relationship and dealings with such importers on matters having no nexus or connection to the State.

51. DRS’s July 6, 2016 letter also stated that GRE “has sixty (60) days, or until September 6, 2016, to protest the decision not to include it on the Connecticut Tobacco Directory.”

52. In order to protest DRS’s decision, the letter instructed GRE to “submit a written request for a hearing to the Commissioner of Revenue Services.”

53. GRE submitted such protest letter on September 1, 2016. A copy of the letter is attached as Exhibit D.

54. On April 19, 2017 – approximately one year from the date on which GRE initially submitted its annual certifications for the 2015 calendar year – DRS finally notified GRE that it was in compliance with § 4-28m(a)(3)(C) for the 2015 calendar year and that it would remain on the Tobacco Directory for the remainder of the period.

55. On May 1, 2017, GRE submitted its annual certifications for the 2016 calendar year. While reserving its rights to challenge the constitutionality of § 4-28m(a)(3)(C) in this litigation, GRE indicated that it would provide DRS the PACT Act reports, federal excise tax

returns, monthly TTB federal tax returns, and documentation of intrastate sales of GRE cigarettes from Tobacoville, the importer that sells GRE cigarettes to Connecticut distributors.

56. On May 31, 2017, DRS sent GRE a letter requesting additional documentation pursuant to § 4-28m(a)(3)(C). As it had in 2016, DRS again indicated that GRE would be required to submit PACT Act reports, federal excise tax returns, monthly TTB federal tax returns, and documentation of intrastate sales of GRE cigarettes from all United States importers of GRE cigarettes. Specifically, DRS informed GRE that it would be required to submit documentation from Everything Tobacco, a United States importer that distributes GRE cigarettes in interstate and intrastate sales, even though Everything Tobacco does not ship any cigarettes into Connecticut, does no business in Connecticut, and otherwise has no connection to the State.

57. On June 8, 2017, GRE submitted the requested documentation to DRS while again reserving its rights to challenge the constitutionality of § 4-28m(a)(3)(C).

58. If the Commissioner is allowed to remove GRE and GRE brand cigarettes from the Connecticut Tobacco Directory, it will become illegal to sell GRE brand cigarettes in Connecticut. Such a ban would irreparably harm GRE and its brands, because all of the good will and brand loyalty that GRE has built itself and for its brands in Connecticut over the past three years would be lost overnight if GRE and these brands are kicked off the Tobacco Directory.

59. The nature of the tobacco products market is such that once a banning takes effect as threatened by Defendant, distributors and customers immediately must turn to an alternative source of supply and substitute brand. This would result in replacement of GRE's products and investment by distributors and retailers into other products, which could not readily be reversed

or returned to GRE once the replacement process is initiated. Being “delisted” also creates a stigma in the marketplace and severely harms the confidence of distributors and retailers in carrying a brand that is viewed as lacking the appropriate compliance measures in place.

60. GRE and those distributing its products in Connecticut would also be harmed in the form of lost sales and revenue amounting to hundreds of thousands of dollars if GRE and its brands are removed from the Tobacco Directory. Such losses could be permanent due to Connecticut’s sovereign immunity. Inventory and pending and future sales would be at risk and rendered worthless upon such a ban being implemented.

61. As of the date of this complaint, DRS has not notified GRE whether it is in compliance with its reporting obligations for the 2016 calendar year. Even if DRS eventually approves GRE’s submission, however, the constitutional infirmities that plague § 4-28m(a)(3)(C) remain. The documentation that DRS requires GRE to submit as a condition to remaining on the Tobacco Directory is beyond what the State constitutionally can require.

62. DRS’s implementation of Conn. Gen. Stat. § 4-28m is unconstitutional on its face because it purports to regulate persons and transactions that are not subject to Connecticut’s jurisdiction, lacks any rational basis, is pre-empted by federal law, and violates the Commerce Clause.

63. DRS is attempting to regulate GRE based on GRE’s compliance with federal law on a national level.

64. DRS has requested documentation related not only to GRE’s compliance with Connecticut sales and escrow requirements, but GRE and the importers’ compliance with nationwide reporting requirements, and DRS is threatening to take adverse action against GRE

based on its claim that DRS can enforce nationwide reporting requirements in a manner that it is inconsistent with the federal statutory scheme.

65. The State cannot assert itself as a national regulator of GRE's compliance or that of its importers on a national level, because such regulation exceeds the State's authority under federal law. This is particularly true where the State is purporting to regulate a perceived discrepancy which raises no issue under the applicable federal laws and which has no nexus to the State of Connecticut.

66. Further, even if the State were found to possess such authority, GRE must be found to have complied with Conn. Gen. Stat. § 28m(a)(3)(C) because its explanation of the perceived discrepancy is fully consistent with the two federal laws that the State improperly is comparing under § 28m(a)(3)(C).

67. The State's refusal to acknowledge GRE's compliance unless GRE complies with DRS's interpretation of § 4-28m(a)(3)(C) violates federal law.

68. The State's refusal to agree to maintain the confidentiality of the information reported in the PACT Act reports as required by the PACT Act violates federal law.

69. The State's refusal to acknowledge GRE's compliance unless GRE complies with DRS's interpretation of § 4-28m(a)(3)(C) is arbitrary and capricious.

70. The State's attempt to use PACT Act reports and information to enforce Connecticut State law violates the PACT Act and federal law.

71. The State is needlessly taking issue with GRE's compliance on a state level by requesting far reaching and irrelevant information despite having no reason to doubt GRE's compliance.

COUNT ONE

Declaration that the Removal of GRE from the Connecticut Tobacco Directory Violates and Is Barred by Substantive Due Process under Article First, Section 10 of the Connecticut Constitution and the Fourteenth Amendment of the United States Constitution

72. GRE incorporates by reference the allegations of paragraphs 1 through 71 as if fully set forth herein.

73. The Commissioner's and DRS's interpretation of Conn. Gen. Stat. §4-28m(a)(3)(C) will deprive GRE of liberty and property without due process of law.

74. There is no basis for Connecticut to regulate persons and transactions over which Connecticut has no jurisdiction, nor is there any rational relation between the burden being imposed upon GRE by the Commissioner's and DRS's interpretation of Conn. Gen. Stat. §4-28m(a)(3)(C) as hereinabove alleged and GRE's compliance with the enabling legislation in Connecticut.

75. The Commissioner's and DRS's interpretation of Conn. Gen. Stat. §4-28m(a)(3)(C), which: (a) conditions GRE's property and due process rights in Connecticut on the production by GRE of federal reports filed by independent third parties nationwide; and (b) penalizes GRE if it fails to reconcile federal taxes paid by independent third parties for nationwide importation of its cigarettes with interstate shipment and sales reports that such importers might file nationwide under federal law violates due process, is arbitrary, irrational, and lacks any plausible rational basis.

76. GRE cannot and should not be required to reconcile the importers' federal excise tax returns with the number of cigarettes subsequently shipped or sold in "Interstate Commerce" as reported in the PACT Act reports of these importers within a margin of 2.5%, because neither the federal tax laws, the PACT Act, nor any other federal law requires such reconciliation and in

fact, the perceived discrepancy identified by the State is the result of exceptions to the PACT Act reporting requirements that are part of the federal law.

77. Defendant's enforcement of the Commissioner's and DRS's interpretation of Conn. Gen. Stat. §4-28m(a)(3)(C) deprives GRE of its rights to substantive due process.

78. The violation of GRE's substantive due process rights can be remedied only by an order preventing the Commissioner and DRS from removing GRE from the Tobacco Directory and a declaration that the Commissioner's and DRS's interpretation of Conn. Gen. Stat. § 4-28m(a)(3)(C) lacks any rational basis and is unconstitutional on its face and as applied.

COUNT TWO

Declaration that the Removal of GRE from the Connecticut Tobacco Directory Violates and Is Barred by the Supremacy Clause

79. GRE incorporates by reference the allegations of paragraphs 1 through 78 as if fully set forth herein.

80. Article VI, Clause 2 of the United States Constitution provides that the laws of the United States are "the supreme law of the land." When a state law is expressly or implicitly preempted by federal law, or when it would be impossible to comply with both state and federal law, the state law must yield.

81. The PACT Act requires a shipper or seller of cigarettes in interstate commerce to file various reports with the Attorney General of the United States and with the tobacco tax administrators of the states into which the shipper ships or sells such cigarettes.

82. The PACT Act requires GRE, with respect to Connecticut, to file memoranda, invoices, and other sales documentation detailing its sales in Connecticut only.

83. GRE is in full compliance with the PACT Act as are the importers of GRE's cigarettes into the U.S.

84. GRE cannot and should not be required to reconcile the importers' federal excise tax returns with the number of cigarettes subsequently shipped or sold in "Interstate Commerce" as reported in the PACT Act reports of these importers within a margin of 2.5%, because neither the federal excise tax laws, the PACT Act, nor any other federal law requires such reconciliation.

85. The PACT Act implicitly pre-empts the Commissioner's and DRS's interpretation and application of Conn. Gen. Stat. § 4-28m(a)(3)(C) because the PACT Act is so pervasive that it covers any issues that could arise with respect to reporting obligations that GRE has on a national level.

86. The PACT Act also provides that the information to be provided in PACT Act reports can only be used for purposes of enforcing the PACT Act and collection of taxes due to a State by the filing entity. Defendant is demanding and using the information contained in the PACT Act reports for purposes other than that permitted by federal law.

87. Defendant has also refused GRE's demands that he (and the State officials receiving the PACT Act and federal tax return information alleged herein) abide by and confirm their adherence to the confidentiality requirements imposed by the PACT Act and federal law, for persons receiving such information.

88. The Commissioner's and DRS's interpretation of Conn. Gen. Stat. § 4-28m(a)(3)(C) should be declared unconstitutional on its face and as applied.

COUNT THREE

Declaration that the Removal of GRE from the Connecticut Tobacco Directory Violates and Is Barred by the Commerce Clause

89. GRE incorporates by reference the allegations of paragraphs 1 through 88 as if fully set forth herein.

90. Article I, Section 8 of the United States Constitution grants the Congress exclusive authority to regulate interstate commerce and thus prohibits the State from doing so.

91. The Commissioner and DRS have threatened to remove GRE from the Tobacco Directory for violations of Conn. Gen. Stat. § 4-28m(a)(3)(C) if GRE fails to report to DRS its total nationwide cigarette sales as reported by GRE's importers in their PACT Act reports and their federal tax return information contained in TBB Form 5220.6.

92. DRS is purporting to enforce the PACT Act on a national level, which is outside of its regulatory authority as the State has no interest in the nationwide sales of GRE's cigarettes or the state taxation outside Connecticut.

93. The Commissioner's and DRS's interpretation of Conn. Gen. Stat. 4-28m(3)(C) interferes with Congress's exclusive authority to regulate interstate commerce.

94. The Commissioner's and DRS's interpretation of Conn. Gen. Stat. § 4-28m(a)(3)(C) violates the Commerce Clause and therefore should be unconstitutional on its face and as applied.

COUNT FOUR

Declaration that GRE Has Complied with Conn. Gen. Stat. § 4-28m(a)(3)(C)

95. GRE incorporates through reference paragraphs 1 through 94 as if fully set forth herein.

96. Conn. Gen. Stat. § 4-28m(a)(3) provides that the Commissioner shall not include or retain in the Connecticut Tobacco directory any brand family of a Nonparticipating Manufacturer if the Commissioner concludes that all required escrow payments have not been fully paid.

97. Conn. Gen. Stat. § 4-28(a)(3)(C) provides that "[t]he commissioner shall not include or retain in the directory any brand family of a nonparticipating manufacturer if the

commissioner concludes . . . (C) a nonparticipating manufacturer's total nation-wide reported sales of cigarettes on which federal excise tax is paid exceeds the sum of (i) its nation-wide reports under 15 USC 375 et seq., as from time to time amended, or those made by its importer, and (ii) any intrastate sales reports under 15 USC 375 et seq., as from time to time amended, by more than five per cent of its total nation-wide sales or one million cigarettes, whichever is less, during any calendar year, unless the nonparticipating manufacturer cures or satisfactorily explains the discrepancy not later than ten days after receiving notice of the discrepancy.”

98. GRE provided DRS with a detailed and satisfactory explanation of the reasons why the number of cigarettes for which federal excise tax was paid cannot, for purposes of Conn. Gen. Stat. § 4-28m(a)(3)(C), be reconciled with the number of cigarettes for which the PACT Act reports were filed within a margin of 5% of 1 million cigarettes.

99. GRE is entitled to a declaration that GRE has complied with Conn. Gen. Stat. § 4-28m(a)(3)(C).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Grand River Enterprises Six Nations, Ltd. prays for the following relief:

1. a declaratory judgment that removal of GRE from the Connecticut Tobacco Directory for alleged non-compliance with Conn. Gen. Stat. § 4-28m(a)(3)(C) violates and is barred by either or all of the Due Process Clause, Supremacy Clause, and Commerce Clause;
2. a declaratory judgment that GRE has complied with Conn. Gen. Stat. § 4-28m(a)(3)(C);

3. a permanent injunction enjoining the Commissioner from removing GRE from the Connecticut Tobacco Directory or otherwise not include GRE in the Connecticut Tobacco Directory for alleged non-compliance with Conn. Gen. Stat. § 4-28m(a)(3)(C);
4. an award of its attorney's fees and costs; and
5. any other and further relief that the Court deems just and proper.

PLAINTIFF,
GRAND RIVER ENTERPRISES SIX
NATIONS, LTD.,

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CERTIFICATION

I hereby certify that on this 5th day of September, 2017, the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF system.

/s/Erick M. Sandler
Erick M. Sandler (ct#25029)