UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GRAND RIVER ENTERPRISES SIX NATIONS, LTD.	:	CIVIL ACTION NO. 3:16-CV-01087 (WWE)
Plaintiff	:	
v.	:	
KEVIN B. SULLIVAN, COMMISSIONER OF REVENUE SERVICES OF THE STATE OF CONNECTICUT	:	
Defendant	:	NOVEMBER 17, 2017

DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS SECOND AMENDED COMPLAINT

INTRODUCTION AND CASE HISTORY

Plaintiff, Grand River Enterprises Six Nations, Ltd. ("GRE"), a foreign cigarette manufacturer, has brought suit against the Connecticut Commissioner of Revenue Services, alleging that a particular state statute, which is part of a complex scheme of state regulation of cigarette sales in Connecticut, is unconstitutional. Specifically, Plaintiff claims that the challenged requirement deprives GRE of substantive due process under the federal and state constitutions, and also violates the Supremacy Clause and the Commerce Clause of the federal constitution. The factual background of this dispute and an explanation of the applicable statutory framework is set forth in Defendant's Memorandum In Support Of Motion To Dismiss, Doc. #42-1, pp. 1-6 (February 17, 2017).

Plaintiff's Second Amended Complaint ("SAC") reiterates the causes of action and allegations set forth in the First Amended Complaint ("FAC"), but also details several significant factual developments that have occurred since the filing of the FAC. Paragraph 23 of the SAC sets forth an amendment to Conn. Gen. Stat. § 4-28m(a)(3)(C), which became effective on October 1, 2017. 2017 Conn. Pub Acts 17-105, § 2. That amendment clarifies what documentation must be submit-

ted, and also relaxes the compliance standard for cigarette manufacturers, like Plaintiff, with large national sales volumes. Paragraph 54 notes that Plaintiff successfully complied with that statute for the 2015 sales year (2016-17 certification year), and was fully certified to remain on the Directory for the remainder of that certification year. Paragraphs 55 - 57 describe how Plaintiff filed a timely annual application to be certified to the Connecticut Tobacco Directory for 2017-2018, and also provided all documentation requested by Defendant for the 2016 sales year. Paragraph 61 alleges that, as of the date of filing the SAC, Plaintiff was awaiting a determination by Defendant as to whether Plaintiff has successfully complied with the statute's requirements for the 2016 sales year (2017-2018 certification year). A recent letter from Defendant to Plaintiff (attached hereto as Exhibit A) demonstrates that Plaintiff's efforts were successful and that Plaintiff is now fully certified to the Connecticut Tobacco Directory until July 1, 2018.

Defendant now moves, pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), to dismiss Plaintiff's SAC. Plaintiff has suffered no actual injury and none is impending; therefore, there is no basis for this Court's exercise of Article III jurisdiction. Even if this Court were to have jurisdiction, the inadequacy of the SAC's allegations necessitate its dismissal. As explained below, there are specific legal elements that must be pled, along with substantiating facts, to support *each* of the three constitutional violations that Plaintiff alleges. The SAC's allegations do not satisfy those criteria for any of the three causes of action, and hence, the SAC fails to state a claim. The Court should therefore dismiss Plaintiff's SAC in its entirety.

ARGUMENT

I. Plaintiff Lacks Standing Because Plaintiff Has Alleged No Concrete Injury, And Its Alleged Future Injuries Are Not Certainly Impending

"No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies,"

which includes the requirement that a plaintiff have standing to sue. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (internal citation omitted); *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013). A federal court's inquiry regarding standing must be especially rigorous when it is asked to nullify the actions of a State's political branches, because a federal court must recognize "[t]he special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law." *City of Los Angeles v. Lyons*, 461 U.S. 95, 112 (1983) "If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S.Ct. 1645 (2017)(internal citation omitted).

> "To establish Article III standing, a plaintiff must have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. The plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing these elements. Where… a case is at the pleading stage, the plaintiff must clearly allege facts demonstrating each element.

Spokeo, Inc., 136 S. Ct. at 1547 (internal citations omitted).

Injury in fact is "the first and foremost of standing's three elements. " *Spokeo*, 136 S. Ct. at 1547 (internal citation omitted). An injury in fact is an injury that is "concrete and particularized, and actual or imminent, not conjectural or hypothetical." *Id*. at 1548 (internal citation omitted). A "concrete" injury is "'real' and not 'abstract.'" *Id*.

The "injury in fact" requirement is well illustrated in *Spokeo*. The petitioner in that case, a credit reporting agency, operated a "people search engine" that scanned a broad range of databases to gather personal information about individuals and provide "profiles" of them to a variety of users. The respondent, Thomas Robins, discovered that the profile that Spokeo had generated about him contained inaccurate information. Robins filed a federal complaint against Spokeo, alleging

that it had published misinformation about him, and had willfully failed to comply with the procedural requirements of the federal Fair Credit Reporting Act. The Supreme Court vacated the Ninth Circuit's ruling that Robins had established standing, and remanded the case for determination of whether Robins had alleged actual harm or loss as a result of the petitioner's alleged transgressions. The Supreme Court cautioned that "Article III standing requires a concrete injury even in the context of a statutory violation." *Id*. at 1549. Applying that holding to this case, Plaintiff's allegations of constitutional violations, without accompanying allegations of an actual injury, are insufficient to establish standing.

Plaintiff may contend that each annual certification cycle carries with it the risk that Defendant will find its application deficient, and that Plaintiff's possible future exclusion from the Directory would result in harm. However, "[a] party facing prospective injury has standing to sue [only] where the threatened injury is real, immediate, and direct." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008). "[A]llegations of *possible* future injury are not sufficient." *Clapper*, 133 S. Ct. at 1147 (emphasis in original)(citation omitted). In *Clapper*, the Supreme Court determined that the Second Circuit's framework for analyzing standing was too lenient, and admonished that "the Second Circuit's 'objectively reasonable likelihood' standard is inconsistent with our requirement that 'threatened injury must be certainly impending to constitute injury in fact…." 133 S. Ct. at 1147 (internal citation omitted).

Analogous to Plaintiff's situation is *Whitmore v. Arkansas*, 495 U.S. 149 (1990), in which the Supreme Court rejected the appeal of an inmate whose assertion of standing depended on the outcome of his future legal proceedings. The Court observed, "[w]e can take judicial notice of the fact that writs of habeas corpus are granted only in some cases, and that guilty verdicts are returned after only some trials. It is just not possible for a litigant to prove in advance that the judicial system will

lead to any particular result in his case." *Id*. at 159-60. In this case, Plaintiff will suffer future injury only if Defendant denies Plaintiff's future certification application. The possibility of such an occurrence is too speculative to satisfy the requirements of Article III.

For the foregoing reasons, the SAC's allegations of Plaintiff's possible future losses do not meet the "'irreducible constitutional minimum'" required by *Spokeo,* 136 S. Ct. at 1547 (citation omitted). No where in the SAC are there allegations that Plaintiff has incurred a "concrete" injury, or that such an injury is "certainly impending." To the contrary, Plaintiff is now fully certified to the Connecticut Tobacco Directory until July 1, 2018, *see* Exhibit A (attached),[1] and Plaintiff offers no facts to suggest that it will be unable to remain certified thereafter. Plaintiff's lack of injury in fact necessitates the dismissal of this case.

II. The Second Amended Complaint Fails To State A Claim

A. This Court Must Assess The Sufficiency Of The SAC By Applying The Standards Articulated By The United States Supreme Court

In *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the United States Supreme Court very clearly defined the standards that a complaint must meet to survive a motion to dismiss.

> [T]he pleading standard Rule 8 announces… demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement. …[A] complaint must contain sufficient factual matter… to state a claim to relief that is plausible on its face. … The plausibility standard… asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely

[1] "In resolving a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), a district court ... may refer to evidence outside the pleadings." *Makarova v. United States,* 201 F.3d 110,113 (2d Cir. 2000), *cited in Juvenile Matters Trial Lawyers Ass'n v. Judicial Dept.*, 363 F. Supp. 2d 239, 243 (D. Conn 2005).

> consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.

Id. at 678 (internal quotation marks and citations omitted). These standards, which require close scrutiny of Plaintiff's allegations with respect to each count, should guide this Court's analysis of Plaintiff's SAC.

Defendant previously moved to dismiss Plaintiff's FAC , pursuant to Fed. R. Civ. P. 12(b)(6), on the ground that the FAC failed to meet the minimum requirements for pleading under Fed. R. Civ. P. 8(a)(2). *See* Defendant's Motion to Dismiss (Doc. #42**)** and Defendant's Memorandum In Support of Motion To Dismiss **(**Doc. #42-1). This Court did not issue a written ruling on Defendant's motion or analyze the allegations of the FAC in the manner prescribed by *Iqbal*, but the Court did make the following observation at a hearing on Defendant's Motion to Dismiss on June 21, 2017:

> [O]ur goal, as the administrators in the court, is to keep the expenses down as low as we can. So with that in mind, we looked at all the papers. And it seemed to us that there is enough there to put this matter to a jury and not grant the motion to dismiss. There's a lot of issues raised.

Transcript of proceeding, June 21, 2017, pp. 3-4.

That comment does not reflect close scrutiny of the complaint, and does not comport with *Iqbal's* clear admonishment that '[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. Defendant therefore urges this Court to examine closely each allegation of each count in Plaintiff 's SAC, using the guidance provided by *Iqbal*, to evaluate which allegations are truly well-pleaded facts, and which are merely legal conclusions couched as factual allegations, which must be disregarded. *See Iqbal*, 556 at 678. The Court must then further determine whether the well-pleaded facts adequately support the legal requirements for each constitutional claim, and whether those alleged facts are suffi-

cient to "permit the court to infer more than the mere *possibility* of misconduct." *Iqbal,* 556 U.S. at 679 (emphasis added).

As the following analysis explains, the SAC does not meet the pleading standards established by *Iqbal* for any of the causes of action it alleges.

B. Plaintiff's SAC Fails To State A Claim For Denial of Substantive Due Process Under Either the Fourteenth Amendment to the United States Constitution or Article First, Section 10 of the Connecticut Constitution.

1. The SAC Provides Neither A Legal Framework For A Claim Of Denial Of Substantive Due Process Nor Well-Pleaded Facts To Substantiate It

The allegations set forth in Count One of the SAC, claiming a denial of substantive due process, are the very kind of "unadorned, the-defendant-unlawfully-harmed-me accusation[s]" that *Iqbal* condemns. 556 U.S. at 678. Paragraphs 73 – 78, which are the only paragraphs that relate specifically to that claim, are completely devoid of facts; they are merely bald conclusions that do not even accurately state the applicable legal requirements for asserting a denial of substantive due process. For example, instead of pleading, as Plaintiff must, that "there is no rational relationship between the legislation and a legitimate legislative purpose." *Beatie v. City of New York,* 123 F.3d 707, 711 (2d Cir. 1997), Plaintiff alleges, meaninglessly, that there is no "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) …and GRE's compliance with the enabling legislation in Connecticut." SAC, ¶ 74. Moreover, the general allegations set forth in Paragraphs 1-71 cannot salvage Count One, because most of them provide facts that are not relevant to demonstrating a plausible constitutional denial. For example, Paragraph 9 of the SAC alleges that "[GRE's] … status on the Directory is a property right," and further states that "[i]n all, GRE has dedicated more than $1 million to obtaining the necessary regulatory approvals and developing a market and good will for its prod-

ucts… in Connecticut." Although that paragraph makes an important legal claim - that Plaintiff has a property right - the accompanying factual allegations are not pertinent to substantiating Plaintiff's possession of such a right.

With respect to each cause of action, therefore, this Court must therefore parse the paragraphs of that Count to determine if the factual allegations asserted are relevant to the specific legal components of that cause of action, or whether the factual allegations are inconsequential to the claims that Plaintiff must prove.

2. Plaintiff's Substantive Due Process Claim Fails Because Plaintiff Has No Protected Property Interest or Liberty Interest In Being Listed On The Directory

To succeed on a substantive due process claim, a plaintiff must first "establish that state action deprived him of a protected property [or liberty] interest." *Sanitation & Recycling Indus., Inc. v. City of New York,* 107 F.3d 985, 995 (2d Cir. 1997), *quoting Mathews v. Eldridge,* 424 U.S. 319, 332 (1976).[2] *See also, Narumanchi v. Bd. of Trustees of Conn. State Univ.*, 850 F.2d 70, 72 (2d Cir. 1988) ("The threshold issue is always whether the plaintiff has a property or liberty interest protected by the Constitution.") "The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a "person has already acquired in specific benefits." *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 576 (1972). Thus, "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Id.* at 577. Property interests "are created and their dimensions are defined by existing rules or

[2] Resolving the issue of the existence of a federally protectable property or liberty right "is proper on a motion to dismiss because it is a question of law." *Allocco Recycling, Ltd v. Doherty*, 378 F.Supp.2d 348, 367 (S.D.N.Y. 2005) and cases cited therein.

understandings that stem from an independent source such as state law." *Id.*; *see also RR Village Ass'n, Inc. v. Denver Sewer Corp.*, 826 F.2d 1197, 1201 (2d Cir. 1987).

Courts have consistently held that no property interest is implicated by the nonrenewal of a government benefit where there is no entitlement to renewal. *See, e.g., Roth*, 408 U.S. at 578 (finding no property interest where respondent professor's "appointment secured absolutely no interest in re-employment for the next year" and, therefore, respondent had "no possible claim of entitlement to re-employment"); *Balise Motor Sales Co. v. Applus Techs.*, No. 3:12-CV-1676 (JBA), 2013 WL 6773633, at *5-6 (D. Conn., Dec. 20, 2013) ("Although Plaintiff was a long-standing test center and may have met the qualifications to continue in this role . . . Plaintiff had no more than an expectation as an applicant to have its inspection license renewed, which is not a legally protected property interest."); *Ace Partners, LLC v. Town of East Hartford*, No. 3:09-CV-1282 (RNC), 2011 WL 4572109, at *3 (D. Conn. 2011) ("plaintiff had a one-year pawnbroker license, not an indefinite one. Plaintiff's property right in the license, then, lasted for one year only. A plaintiff may have a property interest in the renewal of a license if mandatory language restricts the reviewing body's discretion. But no such language can be found in the pawnbroker statute.") (internal citation omitted); *Ansell v. D'Alesio*, 485 F. Supp. 2d 80, 85-86 (D. Conn. 2007) (finding no property interest where "[e]ach contract was for a one-year term only and nothing in the contracts themselves said anything, explicitly or implicitly, about entitlement to renewal at the end of the contractual term.").

In this case, there are several reasons a tobacco product manufacturer has no entitlement to retention on the Directory from one year to the next. First, the language of the statutes pertaining to certification makes clear that, to be retained on the Directory, a tobacco manufacturer must demon-

strate annually, on the basis of *current* information, that it satisfies all statutory requirements.

Conn. Gen. Stat. § 4-28*l* provides, in pertinent part, that:

> (a) Any tobacco product manufacturer whose cigarettes are sold in this state, whether directly or through a distributor, retailer or similar intermediary or intermediaries, *shall execute a certification annually on a form prescribed by the commissioner*, certifying under penalty of law for false statement that, *as of the date of such certification*, [if] such tobacco product manufacturer is . . . a nonparticipating manufacturer [it is] in full compliance with the provisions of sections 4-28h to 4-28j, inclusive. Such tobacco product manufacturer shall de liver such certificate to the commissioner and Attorney General no later than April thirtieth *of each year*.
> . . .
>
> (f) A tobacco product manufacturer shall also (1) certify *annually* that such manufacturer or its importer holds a valid permit under 26 USC 5713, as from time to time amended, and provide a copy of such permit to the commissioner, and (2) certify that it is in compliance with all reporting and registration requirements of 15 USC 375 et seq., as from time to time amended.

(emphasis added.) Defendant annually promulgates a Tobacco Directory, which contains a "listing of all tobacco product manufacturers that have provided *current* and accurate certifications…." Conn. Gen. Stat. § 4-28m(a)(1) (emphasis added). According to the foregoing statutes, each manufacturer must begin anew *each year* to explain its products and its business operations, and demonstrate its *current* compliance with the many state and federal laws that regulate tobacco. After the annual application deadline of April 30th, Defendant performs an extensive *de novo* review of each manufacturer before deciding whether to authorize the manufacturer to sell cigarettes in Connecticut during the ensuing year. The fact that a manufacturer may have been certified the preceding year carries no weight with respect to future certification.

Second, there is no property interest in being listed on the Tobacco Directory, because the decision to include or retain a manufacturer on the Directory rests within the discretion of the Defendant. Conn. Gen. Stat. § 4-28m(a) states, in pertinent part:

> (1) Not later than July 1, 2005 . . . . *The commissioner shall update the directory as necessary in order to correct mistakes and to add or remove a tobacco product manufacturer or brand family to keep the directory current and in conformity with the requirements of sections 4-28k to 4-28r, inclusive.*
>
> (2) *The commissioner shall not include or retain in such 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 section 4-28l, unless such violation has been remedied to the satisfaction of the commissioner.*
>
> (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.

(Emphasis added.)

Courts have consistently held that where a government agency has discretion to deny an application for a government benefit, the applicant has no protected property interest in that benefit. *See, e.g.*, *Sanitation & Recycling Indus., Inc.*, 107 F.3d at 995 ("Commission is vested with broad discretion to grant or deny a license application, which forecloses plaintiffs from showing an entitlement to one."); *Harlen Assocs. Inc. v. Village of Mineola*, 273 F.3d 494, 503-05 (2d Cir. 2001) (Village Board was "vested with significant discretion to deny applications even after proper filings have been made" and that, therefore, "[t]he presence of that discretion precludes any legitimate claim of entitlement by [Plaintiff]."); *Karout v. McBride*, No. 3:11-cv-1148 (JBA), 2012 WL 4344314, at *6 (D. Conn. Sept. 21, 2012) ("[I]f state law makes the pertinent official action discre-

tionary, one's interest in a favorable decision does not rise to the level of a property right entitled to procedural due process protection.") (internal quotation marks and citations omitted).

The final reason Plaintiff has no federally cognizable property or liberty interest is that the state statutory scheme at issue provides both administrative and judicial redress for any manufacturer whose Tobacco Directory certification application is denied. *See* Conn. Gen. Stat. §§4-28m(e) and 12-311. The Court of Appeals for the Second Circuit has cautioned:

> In deciding whether an applicant for a license or certificate of approval has presented a legitimate claim of entitlement under state law or merely a unilateral hope or expectation, we must bear in mind that the mere violation of a state statute does not automatically give rise to a violation of federal Constitutional rights. Indeed, even an outright violation of state law in the denial of a license will not necessarily provide the basis for a federal claim, at least when the applicant has a state law remedy. Otherwise every disappointed applicant, even though the state provided reasonably adequate redress, could invoke federal jurisdiction on the claim that the state administrative body acted arbitrarily in violation of his federal due process rights. To permit an influx of such cases into federal courts would violate principles of federalism, promote forum-shopping, and lead to unnecessary state-federal conflict with respect to governing principles in an area principally of state concern.

Yale Auto Parts v. Johnson, 758 F.2d 54, 58-59 (2d Cir. 1985)(internal citations omitted). *See also Zahra v. Southold*, 48 F.3d 674, 682 (2d Cir. 1995); *C&E Services, Inc. v. D.C. Water and Sewer Authority*, 310 F.3d 197, 200-01(D.C. Cir. 2002). Because Plaintiff can seek review of the denial of a certification application in both state administrative and judicial fora, Plaintiff cannot claim that it is subject to a deprivation of a federally protected entitlement without due process.

3. Conn. Gen. Stat. § 4-28m(a)(3)(C) Satisfies A "Rational Basis" Standard Of Review

It is well established that legislative acts regulating economic activity "come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way."

Pension Ben. Guaranty Corp. v. R. A. Gray & Co., 467 U.S. 717, 729 (1984). This standard is a "paradigm of judicial restraint" that "is very difficult to overcome . . . ." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314 (1993); *Beatie v. City of New York*, 123 F.3d 707, 712 (2d Cir. 1997). "In the area of economics or social welfare, legislation need not be effective or even logically consistent, in every respect, with its articulated aims in order to survive federal due process review. 'It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.'" *Alliance of Automobile Mfrs, Inc. v. Currey*, 984 F. Supp. 2d 32, 61 (D. Conn. 2013), *aff'd*, 610 Fed. Appx. 10 (2d Cir. 2015) *quoting Williamson v. Lee Optical*, 348 U.S. 483. 487-88 (1955).

In conducting such review, the court need only find "plausible reasons for [the] legislative action, whether or not such reasons underlay the legislature's action." *Beatie*, 123 F.3d at 712, *citing United States Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980). Thus, it is well established that this Court may not "strike down a law as irrational simply because it may not succeed in bringing about the result it seeks to accomplish [or] because the problem could have been better addressed in some other way." *Beatie*, 123 F.3d at 712 (citation omitted). Similarly, legislation does not violate due process merely because "no empirical evidence supports the assumptions underlying the legislative choice." *Id.* (citation omitted). Rather, "[s]o long as they do not burden fundamental rights or single out suspect classifications, lawmakers are free to engage in 'rational speculation unsupported by evidence.'" *Id., quoting FCC v. Beach Communications*, 508 U.S. at 315. *Accord, Molinari v. Bloomberg*, 564 F.3d 58, 606 (2d Cir. 2009). "In short, while a few courts have stated that 'rational basis review is not meant to be toothless,' the teeth are dull and the bite is rare." *Martinez v. Mullen*, 11 F. Supp 3d 149, 160 (2014), *aff'd sub. nom Sensational*

Smiles, LLC v. Mullen, 793 F.3d 281 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 1160 (2016) (internal punctuation and citation omitted).

The foregoing standards also apply to an analysis of substantive due process under Article First, Section 10 of the Connecticut Constitution. *See, e.g.*, *Ramos v. Town of Vernon*, 254 Conn. 799, 837 (2000) ("there is no support for the proposition that…our state constitution affords any greater substantive due process rights than the federal constitution"); *Lohnes v. Hospital of St. Raphael*, 132 Conn. App. 68,82 (2011), *cert. denied*, 303 Conn. 921 (2012) (applying rational basis review to substantive due process claim under state constitution); *Blakeslee Arpaia Chapman, Inc. v. El Constructors*, 239 Conn. 708,759 (1997) (same).

There is clearly a rational relationship between § 4-28m(a)(3)(C) and a legitimate legislative purpose. Lawmakers sought to grant state certification only to those nonparticipating manufacturers that can effectively track their cigarette sales, and can demonstrate, through diligent recordkeeping, that the vast majority of their cigarettes are being sold to distributors or retailers that comply with applicable federal and state reporting and taxation requirements. Connecticut has a strong interest in certifying only nonparticipating manufacturers that are able to monitor the nationwide channels through which their cigarettes are distributed, because cigarettes that are purchased illegally in another state may be brought into Connecticut and resold cheaply, free of the costs of state taxation or escrow payments. By requiring nonparticipating manufacturers to demonstrate that they can track virtually all of their cigarettes from the point of manufacture or importation to the point of retail sale, Connecticut hopes to reduce state tax evasion; increase compliance with the State's escrow statute, Conn. Gen. Stat. § 4-28i; and protect Connecticut residents from the many adverse public health effects, such as smoking initiation by minors, that are likely to occur wherever illegal, artificially underpriced, cigarettes are available.

The two data sources employed by Conn. Gen. Stat. § 4-28m(a)(3)(C) are (1) the federal excise tax returns of the manufacturer or its importer, and (2) federally required reports of interstate sales made by the manufacturer or its importer, as well as similar reports or invoices of intrastate sales. The first set of data is collected when cigarettes enter the national distribution chain, and the second set of data is collected when cigarettes exit the supply chain and pass into the possession of local retailers through the United States. Section 4-28m(a)(3)(C) represents a legislative judgment that if a nonparticipating manufacturer is unable to demonstrate (either through comparison of the numerical totals of the two respective data sets or through other means the Commissioner may consider) that the vast majority of its cigarettes remain within a legal chain of custody from the time they are manufactured or imported to the time they are sold to a retailer, then the nonparticipating manufacturer should not be certified to sell its cigarettes in Connecticut.

From a constitutional perspective, the rational basis of this statute, described above, is unassailable. The SAC alleges no facts that, if proven, could surmount the presumption in favor of the statute's constitutionality or support Plaintiff's legal conclusion that Section 4-28m(a)(3)(C) "is arbitrary, irrational, and lacks any plausible rational basis." SAC ¶ 75. Count One of the SAC must therefore be dismissed.

C. Plaintiff Fails To State A Claim That Conn. Gen. Stat. § 4-28m(a)(3)(C) Violates The Supremacy Clause

Count Two of the SAC, like Count One, suffers from the very defects that *Iqbal* declares to be fatal to a complaint. It offers little more than "labels and conclusions" and "it tenders naked assertions devoid of further factual enhancement." 556 U.S. at 678. Paragraphs 79 – 88, which are the only paragraphs of the SAC that relate specifically to Plaintiff's preemption claim, are completely devoid of facts; they are merely conclusory allegations that are either irrelevant to a preemption claim, or that misstate applicable legal principles. In Paragraph 85 of the SAC, for example, Plain-

tiff sums up its claim that Section 4-28m(a)(3)(C) violates the Supremacy Clause by stating: "[t]he 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." That garbled conclusion, which forms the heart of Plaintiff's cause of action, gravely misstates preemption jurisprudence and seriously misconstrues the intent and purpose of the PACT Act.

According to the United States Supreme Court, "[i]t has long been settled… that [federal courts] presume federal statutes do not… preempt state law…" *Bond v. United States*, 134 S. Ct. 2077, 2088 (2014). That presumption arises from "the assumption that the historic police powers of the States [are] not to be superseded by the [f]ederal [a]ct unless that was the clear and manifest purpose of Congress." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)(internal citations omitted). Plaintiff 's vague conclusion that the PACT Act is "pervasive," SAC ¶ 85, is insufficient to overcome that presumption.

Moreover, the express provisions of the PACT Act, as well as the history of the PACT Act and its predecessor statute, the Jenkins Act, make clear that Congress did not intend to preempt state activity with respect to tobacco control. For example, one provision of the PACT Act states:

> With respect to delivery sales into a specific State and place, each delivery seller shall comply with--
> . . .
> **(3)** all state, local, tribal, and other laws generally applicable to sales of cigarettes or smokeless tobacco as if the delivery sales occurred entirely within the specific state and place, including laws imposing--
> **(A)** excise taxes;
> **(B)** licensing and tax-stamping requirements;
> **(C)** restrictions on sales to minors; and
> **(D)** other payment obligations or legal requirements relating to the sale, distribution, or delivery of cigarettes or smokeless tobacco;

15 U.S.C. § 376a(a)(3). Far from preempting state laws, as Plaintiff suggests, the PACT Act actually incorporates certain types of state laws regulating the sale of cigarettes, and renders a violation of any such state law a violation of federal law as well. *See* 15 U.S.C. §§ 376 - 378.

For well over half a century, federal and state governments have collaborated in an effort to control the nationwide illicit tobacco trade. The Jenkins Act, Pub. L. No. 81-363, 63 Stat. 884, *codified at* 15 U.S.C. §375 *et seq*., was passed in 1949, and its stated purpose was "to assist States in collecting sales and use taxes on cigarettes."[3] The Jenkins Act requires that any person selling cigarettes in interstate commerce to someone other than a licensed distributor must provide, to the tobacco tax administrator of the state into which the shipment is made, a memorandum or copy of an invoice showing the name and address of the person to whom the cigarettes were shipped, as well as the brand and quantity of the cigarettes shipped. In *Consumer Mail Order Ass'n v. McGrath*, 94 F. Supp. 705 (D.D.C. 1950), *aff'd per curiam*, 340 U.S. 925, *rehearing denied*, 341 U.S. 906 (1951), the court upheld the constitutionality of the Jenkins Act, declaring that "[t]he use of the commerce power to aid the several states in this manner is valid." *Id*. at 710. The court emphasized that Congress and the states are "'not forbidden to cooperate or by doing so to achieve legislative consequences, particularly in the great fields of regulating commerce and taxation, which, to some extent at least, neither could accomplish in isolated exertion.'" *Id*. at 712, *quoting Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 439 (1946).

With the passage of time, and the emergence of the Internet as a vehicle for remote sales, it became clear that vast quantities of cigarettes were being shipped in interstate and intrastate transactions without the payment of state and local taxes, and without compliance with the federal re-

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[3] For the full text of the Jenkins Act, *see Consumer Mail Order Ass'n v. McGrath*, 94 F.Supp. 705, 707, n.1 (D.D.C. 1950), *aff'd per curiam*, 340 U.S. 925, *rehearing denied*, 341 U.S. 906 (1951).

porting requirements set forth in the Jenkins Act. To address those problems, Congress enacted the "Prevent All Cigarette Trafficking ("PACT") Act, Pub. L. No. 111-154, 124 Stat. 1087 (2010) to strengthen the Jenkins Act. Congress prefaced the PACT Act with the following pertinent statements:

> Section 1.
> …
>
> (b) … Congress finds that—
>
> (1) the sale of illegal cigarettes and smokeless tobacco products significantly reduces Federal, State, and local government revenues, with Internet sales alone accounting for billions of dollars of lost Federal, State, and local tobacco tax revenue each year;
>
> (2) Hezbollah, Hamas, al Qaeda, and other terrorist organizations have profited from trafficking in illegal cigarettes or counterfeit cigarette tax stamps;
>
> (3) terrorist involvement in illicit cigarette trafficking will continue to grow because of the large profits such organizations can earn;
>
> (4) the sale of illegal cigarettes and smokeless tobacco over the Internet, and through mail, fax, or phone orders, makes it cheaper and easier for children to obtain tobacco products;
>
> (5) the majority of Internet and other remote sales of cigarettes and smokeless tobacco are being made without adequate precautions to protect against sales to children, without the payment of applicable taxes, and without complying with the nominal registration and reporting requirements in existing Federal law;
>
> (6) unfair competition from illegal sales of cigarettes and smokeless tobacco is taking billions of dollars of sales away from law-abiding retailers throughout the United States;
>
> (7) with rising State and local tobacco tax rates, the incentives for the illegal sale of cigarettes and smokeless tobacco have increased;
> …
>
> (10) the intrastate sale of illegal cigarettes and smokeless tobacco over the Internet has a substantial effect on interstate commerce.

> (c) Purposes - It is the purpose of this Act to—
>
> (1) require Internet and other remote sellers of cigarettes and smokeless tobacco to comply with the same laws that apply to law-abiding tobacco retailers;
>
> (2) create strong disincentives to illegal smuggling of tobacco products;
>
> (3) provide government enforcement officials with more effective enforcement tools to combat tobacco smuggling;
>
> (4) make it more difficult for cigarette and smokeless tobacco traffickers to engage in and profit from their illegal activities;
>
> (5) increase collections of Federal, State, and local excise taxes on cigarettes and smokeless tobacco; and
>
> (6) prevent and reduce youth access to inexpensive cigarettes and smokeless tobacco through illegal Internet or contraband sales.

This detailed statement of legislative objectives makes clear that Congress intended to support, rather than displace, state or local laws that regulate and control the sale of cigarettes, because achieving the goals that Congress articulated in the PACT Act necessarily requires coordinated efforts by all levels of government.

Finally, Plaintiff's conclusion, in Paragraph 50 of the SAC, that compliance with the reconciliation requirement of Section 4-28m(a)(3)(C) "is impossible due to exceptions within the PACT Act," is directly contradicted by the allegations in Paragraphs 40 and 54 of the SAC. Paragraph 40 alleges that Defendant's agency has not required Plaintiff to submit documentation of sales made in Indian Country, and Paragraph 54 alleges that Defendant's agency determined that Plaintiff successfully complied with Section 4-28m(a)(3)(C) with respect to its sales in calendar year 2015, and qualified Plaintiff for the Tobacco Directory for the remainder of the certification year. Thus, Plaintiff's own allegations show that Section 4-28h(a)(3)(C) is being applied by Defendant in a manner that obviates any potential conflict between state and federal law.

Because Plaintiff's SAC provides neither the legal framework nor the factual enhancement necessary to show a plausible violation of the federal Supremacy Clause, Count Two of the Complaint must be dismissed.

D. Plaintiff Fails To State A Claim That Conn. Gen. Stat. §4-28m(a)(3)(C) Violates the Commerce Clause

The allegations of Count Three of the SAC are inadequate to state a plausible Commerce Clause violation. The SAC provides neither neither guiding legal principles nor substantiating factual allegations sufficient to plead such a cause of action.

A state statute violates "the dormant Commerce Clause only if it (1) clearly discriminates against interstate commerce in favor of intrastate commerce, (2) imposes a burden on interstate commerce incommensurate with the local benefits secured, or (3) has the practical effect of extraterritorial control of commerce occurring entirely outside the boundaries of the state in question." *Selevan v. New York Thruway Auth.*, 584 F.3d 82, 90 (2d Cir. 2009) (internal quotations omitted). "The party challenging a law...bears the threshold burden of demonstrating that it has a disparate impact on interstate commerce - the fact that it may otherwise affect commerce is not sufficient." *Town of Southold v. Town of East Hampton*, 477 F.3d 38, 47 (2d Cir. 2007)(internal citation omitted). *See also Heffner v. Murphy*, 745 F.3d 56, 73 (3d Cir. 2014)(stating that a regulation that burdens commerce, without discriminating against *interstate* commerce, does not violate the Commerce Clause).

Plaintiff has not alleged that the operation of § 4-28m(a)(3)(C) leads to any of the three possible kinds of prohibited consequences outlined above, much less provided facts to elucidate how the statute has created those effects. The absence of such essential legal and factual allegations necessitates the dismissal of Count Three of the SAC.

An analysis of Conn. Gen. Stat. § 4-28m(a)(3)(C) in the contest of Commerce Clause jurisprudence is provided below to illustrate in greater detail the deficiencies of Count Three of the SAC.

1. The Statute Does Not "Clearly Discriminate" Against Interstate Commerce In Favor Of Intrastate Commerce

"The term discrimination in this context 'means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" *Town of Southold*, 477 F.3d at 47, *quoting Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994). Section 4-28m(a)(3)(C) does not favor in-state manufacturers over out-of-state manyfacturers. Because the statute draws no distinction whatsoever on the basis of location, it does not favor intrastate commerce over interstate commerce. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471-74 (A state statute that "regulates evenhandedly" does not effect the "simple protectionism" that is prohibited by the dormant Commerce Clause.)

Significantly, Plaintiff does not identify a single market competitor who has obtained a market advantage over GRE as a result of the implementation of Section 4-28m(a)(3)(C). Under Commerce Clause analysis, "any notion of discrimination assumes a comparison of substantially similar entities." Indeed, "in the absence of actual or prospective competition between the supposed favored and disfavored entities in a single market there can be no local preference, whether by express discrimination against interstate commerce or undue burden upon it, to which the dormant Commerce Clause may apply." *Alliance of Auto. Mfrs, Inc. v. Curry*, 984 F. Supp. 2d 32, 57 (D. Conn. 2013) *aff'd* 610 Fed. Appx. 10 (2d Cir. 2015), *quoting General Motors v. Tracy*, 519 U.S. 278, 300. That absence of competition dooms any Commerce Clause objection to Section 4-28m(a)(3)(C), because courts "have never deemed a hypothetical possibility of favoritism to constitute discrimination that transgresses constitutional commands." *Associated Indus. of Missouri v.*

Lohman, 511 U.S. 641, 654 (1994). *See also Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 125 (1978) (Maryland's entire gasoline supply flowed in interstate commerce and there were no local producers or refiners; therefore, claims of disparate treatment between interstate and local commerce were meritless). Because Plaintiff has identified neither an interstate market adversely affected by § 4-28m(a)(3)(C), nor the existence of a competitor benefitting from those provisions, a claim of discrimination under the Commerce Clause has not been adequately pled. *See Alliance of Automobile Mfrs. v. Gwadosky*, 430 F.3d 30, 41 (1st Cir. 2015)(observing that the unsuccessful plaintiff, in support of its dormant Commerce Clause claim, "offered only prognostications woven from the gossamer strands of speculation and surmise, unaccompanied by any significantly probative evidence" of a discriminatory effect on interstate commerce.)

2. The Statute Does Not Impose A Burden On Interstate Commerce That Is Clearly Excessive In Comparison To Local Benefits

"Failing to allege facts that could plausibly show clear discrimination, Plaintiff must allege facts showing that 'the burdens on interstate commerce exceed the burdens on intrastate commerce.'" *Vizio, Inc., v. Klee*, 2016 WL 1305116 (D. Conn. 2016) p. 6, *quoting Automated Salvage Transp., Inc. v. Wheelabrator Envtl. Sys. Inc.*, 155 F.3d 59, 75 (2d Cir. 1998). A law that has a disparate impact on interstate commerce, but is not discriminatory, is analyzed under the balancing test set forth in *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970). Under the *Pike* test, "non-discriminatory regulations that have only incidental effects on interstate commerce are valid unless 'the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'" *Oregon Waste Systems*, 511 U.S. at 99, *quoting Pike*, 397 U.S. at 142. "[T]he extent of the burden that will be tolerated will . . . depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Pike*, 397 U.S.

at 142. In applying the *Pike* balancing test, it is important to remember that "the benefit-to-burden calculation is based on the *overall* benefits and burdens that the statutory provision may create, *not* on the benefits and burdens with respect to a particular company or transaction." *Quik Payday v. Stork* 549 F.3d 1302, 1309 (10th Cir, 2008), *cert. denied*, 556 U.S. 1209 (2009) (emphasis added). "For a state statute to run afoul of the *Pike* standard, the statute, at a minimum, must impose a burden on interstate commerce that is qualitatively or quantitatively different from that imposed on intrastate commerce." *United Haulers Ass'n, Inc, v. Oneida-Herkimer Solid Waste Mgmt Auth.*, 438 F.3d 150, 156-57 (2d Cir. 2006)(internal quotation marks omitted), *aff'd*, 550 U.S. 330 (2007). Because no disparate impact on interstate commerce has been alleged in Count Three of Plaintiff's SAC, a Commerce Clause claim cannot proceed on that ground.

With respect to the potential economic impact of § 4-28m(a)(3)(C) on GRE's own business, Plaintiff *does* make allegations about the amount of money it has invested to date in order to sell its cigarette brands in Connecticut. FAC ¶¶ 9, 31. Those circumstances, however, even if true, are not constitutionally cognizable. With respect to a plaintiff's' cost of doing business, even "the fact that a law may have devastating economic consequences on a particular interstate firm is not sufficient to rise to a Commerce Clause burden." *Pharm. Research & Mfrs of America v. Concannon*, 249 F.3d 66, 84 (1st Cir. 2001), *aff'd sub nom. Pharm. Research and Mfrs of America v. Walsh*, 538 U.S. 644 (2003)(internal citations and quotation marks omitted). *See also General Motors v. Tracy*, 519 U.S. 278, 300; *Alliance of Auto. Mfrs., Inc. v. Curry*, 984 F. Supp. 2d 32, 58 (D. Conn. 2013), *aff'd* 610 Fed. Appx. 10 (2d Cir. 2015) ("If companies' independent economic decisions were a sufficient basis for claims of discriminatory 'effects' or excessive 'burden,' interstate businesses would always be in a position to nullify state regulation simply by arguing that they will shift regulatory costs to an-

other state.") As this Court, in dismissing a Commerce Clause challenge to a Connecticut statute, recently observed:

> [T]he law merely requires that, if Plaintiff's products are offered for sale in Connecticut, then Plaintiff must comply with Connecticut's regulatory scheme. If Plaintiff wishes to continue selling in other state without being subject to that regulatory scheme, it is free to withdraw from the Connecticut market….In any event, these choices are Plaintiff's to make. *See [Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104],110-12; *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127(1978)(holding that while some business "may choose to withdraw entirely from" a state's market, "interstate commerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business to shift from one interstate supplier to another."

Vizio, Inc., v. Klee, 2016 WL 1305116 (D. Conn. 2016) at *10-11.

3. The Statute Does Not Operate To Control Conduct Beyond The Borders Of Connecticut

Count Three of the SAC contains no allegations to support a claim that Section 4-28m(a)(3)(C) has impermissible extraterritorial effects. To state such a claim, Plaintiff would have to allege that § 4-28m(a)(3)(C) is inconsistent with the regulatory regimes of other states; that Section 4-28m(a)(3)(C) forces out-of-state NPMs to seek Connecticut approval before undertaking an out-of-state transaction; or that adverse consequences would result if numerous other states adopted a similar statute.[4] *See Healy v. Beer Institute, Inc.*, 491 U.S. 324, 336-37. Few such claims succeed, however. "The Second Circuit has repeatedly rejected ... extraterritoriality challenges to state regulations containing no reference to other states." *Alliance of Auto. Mfrs., Inc. v. Curry*, 984 F.

[4] Nebraska and Arkansas have already enacted statutes virtually identical to Connecticut's, and similar legislation is currently under consideration in Nevada. *See* Neb. Rev. St. § 69-2709(14); Ark. Code Ann. § 26-57-1303(b)(3)(C); Nevada Assembly Bill No. 62, available at https://www.leg.state.nv.us/App/NELIS/REL/79th2017/Bill/4741/Text. Far from creating interjurisdictional conflict, the passage of statutes like Conn. Gen. Stat. § 4-28m(a)(3)(C) by other states will result in an overall enhancement of the impact of each state's statute.

Supp. 2d 32, 59 (D. Conn. 2013), *aff'd* 610 Fed. Appx. 10 (2d Cir. 2015) *citing Freedom Holdings v. Spitzer*, 357 F.3d 205, 219-21 (2d Cir. 2004); *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 110 (2d Cir. 2001), *cert. denied*, 536 U.S. 905 (2002).

Significantly, the SAC does not allege that Section 4-28h(a)(3)(C) allegedly controls the prices at which cigarettes are sold outside of Connecticut, or dictates the substance or procedure of an extraterritorial transaction. *See Vizio v. Klee*, 2016 WL 1305116 at *15 (D. Conn. Mar. 31, 2016) ("[T]he [challenged state statute] does not dictate or restrict the manner or terms upon which Plaintiff's out-of-state sales take place. Therefore, the [statute] does not 'regulate' those out-of-state sales.") *See also Energy and Environment Institute v. Epel*, 793 F.3d 1169, 1173 (10th Cir. 2015), *cert. denied*, 136 S. Ct. 595 (2015) (rejecting an "extraterritoriality" challenge to a Colorado statute that did not control prices, link prices paid in Colorado with those paid out-of-state, or discriminate against out-of-staters.)

Moreover, nowhere in the SAC does Plaintiff allege that the requirements of Section 4-28m(a)(3)(C) would apply to it, or burden it, if it were not seeking certification in Connecticut. *See Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 111 (2d Cir. 2001), *cert denied*, 536 U.S. 905 (2002)("[A] decision to abandon the state's market rests entirely with individual manufacturers…we cannot say that the choice to stay or leave has been made for manufacturers by the state legislature, as the Commerce Clause would prohibit.").

Finally, allegations regarding any financial losses or economic pressure that Plaintiff may experience, either by complying with the statute or ceasing to do business in Connecticut, are not pertinent to an extraterritoriality claim under the dormant Commerce Clause. Courts have uniformly rejected "upstream" pricing impacts or other economic "ripple effects" of an extraterritorial nature as grounds for a constitutional claim. *Vizio, Inc. v. Klee*, __F.Supp.3d__, 2016 WL 7410778 at

8-9 (D. Conn 2016), *appeal filed, Vizio, Inc. v. Klee*, Docket No. 17-227 (2d Cir. Jan. 23, 2017) and cases cited therein.

Because none of the indicia of an impermissible extraterritorial regulation have been alleged with respect to Section 4-28m(a)(3)(C), Count Three cannot proceed on that basis.

E. Plaintiff's Claim For A Declaration Of Compliance Has Already Been Satisfied

In Count Four of the SAC, Plaintiff seeks "a declaration that GRE has complied with Conn. Gen. Stat. § 4-28m(a)(3)(C);" SAC ¶ 99. Plaintiff, however, has already received from Defendant confirmation of its compliance with that statute for the 2016-17 certification year and the 2017-18 certification year. *See* SAC, ¶ 54 and Exhibit A (attached). Therefore, there is no further relief for the Court to provide pursuant to Count Four.

CONCLUSION

For all of the reasons stated above, Defendant's Motion to Dismiss the Second Amended Complaint should be granted.

DEFENDANT

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CERTIFICATION

I hereby certify that on November 17, 2017, a copy of 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 or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

/s/ Heather J. Wilson___
Heather J. Wilson
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