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.	:	MARCH 1, 2018

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

This Court, in deciding Defendant's pending motion to dismiss, will render a decision of national significance on a case of first impression. This case is a new variant of the many legal challenges that Plaintiff and other Nonparticipating Manufacturers (NPMs), as well as their importers and distributors, have brought over the last two decades to attempt to derail state legislation enacted to implement or complement the Master Settlement Agreement (MSA). All of the challenged statutes, like the one in dispute in this case, were passed to enhance the health of states' residents and to deter the illegal sale of cigarettes within the states' respective jurisdictions. The ensuing lawsuits routinely raised the same constitutional claims asserted here: lack of substantive due process, federal preemption, violation of the Commerce Clause. Such cases, however, ultimately met with defeat, and most did not survive a motion to dismiss.[1] Those previ-

[1] *See* procedural history and related cases discussed in *Grand River Enterprises Six Nations, Ltd.*, v. King, 783 F.Supp.2d 516 (S.D.N.Y. 2011) and *Freedom Holdings, Inc. v. Cuomo,* 624 F.3d 38 (2d Cir. 2010). *See also S&M Brands v. Caldwell*, 614 F.3d 172 (5th Cir. 2010); *Grand River Enterprises Six Nations, Ltd. v. Beebe*, 574 F.3d 929 (8th Cir. 2009); *KT&G Corp., v. Att'y Gen. of Oklahoma*,

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ous unsuccessful challenges to MSA-related legislation provide an informative lens that brings clearly into focus the inviability of the constitutional claims contained in Plaintiff's Second Amended Complaint (SAC). The highlights of some of those cases are detailed below, after a discussion of the jurisdictional issue of standing.

Defendant, in his most recent brief in support of his motion to dismiss the SAC (Doc. #82-1) and his previous briefs in support of his motion to dismiss the first amended complaint (Doc. ##42-1, 60), has explained in detail why each count of Plaintiff's pending complaint should be dismissed, according to pleading standards articulated by the United States Supreme Court and the Court of Appeals for the Second Circuit. Defendant hereby incorporates and reiterates all of his arguments presented in those briefs.

I. Plaintiff Has Alleged No Injury Resulting From The Challenged Statute Sufficient To Establish Standing

The SAC contains no factual allegations adequate to demonstrate the kind of injury-in-fact necessary to establish Article III standing. Plaintiff's arguments to the contrary are insupportable.

First, Plaintiff's claim of standing must fail because none of the economic injuries that Plaintiff allegedly has suffered or may suffer are "fairly traceable" to compliance with the challenged statute. *See Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1547 (2016). For example, in ¶ 9 and ¶ 32 of the SAC, Plaintiff lists a variety of expenses it has incurred to be certified to the Connecticut Tobacco Directory and market its products in

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535 F.3d 1114 (2008); *Star Scientific, Inc. v. Beales*, 278 F.3d 339 (4th Cir. 2002); *Int'l Tobacco Partners v. Kline*, 475 F.Supp.2d 1078 (D. Kan. 2007).

Connecticut. Plaintiff, however, does not allege that *any* of those costs were incurred in connection with complying with the challenged statute. In fact, Plaintiff acknowledges in ¶ 9 that many of its alleged expenses were related to Plaintiff's initial certification to the Directory, which occurred long before the challenged statute was enacted. Other alleged expenses involved the deposit of funds into escrow and the cost of satisfying statutory bonding requirements; matters that are unrelated to the challenged statute. Nevertheless, Plaintiff's opposition brief, in direct contradiction to its own SAC, inaccurately attributes such expenses to complying with the challenged statute. *See* Plaintiff's Memorandum In Opposition To Defendant Kevin B. Sullivan's Motion To Dismiss Second Amended Complaint (Doc. #86) ("Plaintiff's Memo") p. 13. [2]

Plaintiff also misapprehends the sort of injury that must be pleaded to establish standing to challenge the constitutionality of an affirmative statutory mandate. Plaintiff asserts that it satisfies the injury-in-fact requirement, because it will suffer imminent and concrete harm if its brands are removed from the Connecticut Tobacco Directory. *See* SAC ¶¶ 58-60; Plaintiff's Memo, p. 13. Those alleged facts, however, are inapposite. Plaintiff must allege that it has, or will, suffer injury, economic or otherwise, as a result of *complying* with Conn. Gen. Stat. § 4-28m(a)(3)(C), *not* as a result of *violating* it. The SAC contains no specific allegations whatsoever regarding the specific costs or injury, if

[2] This critical discrepancy demonstrates the need to differentiate between the allegations of the SAC and the assertions of Plaintiff's Memo. Plaintiff's statement of its case is necessarily confined to the contents of its complaint. Any additional factual allegations or elaboration contained in Plaintiff's Memo must be discounted entirely.

any, associated with compliance. The lack of such factual allegations in the SAC is fatal to Plaintiff's claim of standing.

Plaintiff relies on *WC Capital Mgmt., LLC v. UBS Securities, LLC*, 711 F.3d 322, 329 (2d Cir. 2013) for the proposition that the injury-in-fact requirement to establish standing is a "low threshold." The *WC Capital* complaint, which Plaintiff implicitly suggests is illustrative of just how low that threshold can be, is a model of specificity and detail compared to the SAC.[3] To the extent that the complaint in *WC Capital* may exemplify the Second Circuit's minimum requirements, the SAC unquestionably falls short. Plaintiff also relies on *Lerman v. Bd. of Elections*, 232 F.3d 135, 142 (2d Cir. 2000), *cert.*

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[3] The Second Circuit described and analyzed the *WC Capital* complaint as follows:

> [T]he complaint alleged that information regarding UBS's specific margin rules was "material to [Willow Creek's] decisions whether to purchase and sell securities in [its] accounts," and that UBS's failure to disclose its specific margin rules to Willow Creek prior to the margin calls prevented it from using those rules "to plan and manage the [Willow Creek] accounts accordingly and effectively." The complaint further alleged that "[h]ad [UBS] disclosed the full, truthful margin terms in a timely fashion, plaintiffs would not have acquired securities on margin from UBS, would not have continued to hold securities they had previously purchased, and would have made other decisions regarding purchasing and selling securities in the [Willow Creek] accounts." Plaintiffs also assert that they were injured "[a]s a direct and proximate result of the foregoing conduct," and that meeting the margin call caused them to lose over $25 million. Taken together, these allegations are plainly enough to permit the inference that Willow Creek suffered a distinct and palpable financial injury fairly traceable to UBS's alleged failure to fully disclose its margin rules when Willow Creek opened its margin accounts.

Id. at 329.

denied, 533 U.S. 915 (2001) to persuade this Court that "general factual allegations of injury…suffice to support the existence of standing." The complaint in *Lerman*, however, was filed by a *pro se* plaintiff, and the Second Circuit repeatedly noted in its decision that it was evaluating the sufficiency of the complaint according to the less stringent pleading standard applicable to *pro se* plaintiffs. *Id*. at 140, 140 n.3, 142 n.8.

Lerman, however, does caution against another common legal misconstruction to which Plaintiff has fallen victim; namely, the conflation of injury-in-fact with the merits of the particular legal violation for which Plaintiff seeks redress. Plaintiff alleges that, because Defendant has violated Plaintiff's due process rights, Plaintiff has suffered injury-in-fact. Plaintiff's Memo, p. 12. That reasoning is fallacious, because, as the Second Circuit explained in *Lerman*, the question of whether a plaintiff has suffered injury-in-fact and the question of whether a plaintiff has a valid claim on the merits are entirely distinct questions. *Id*. at 143 n.9.

Because the SAC alleges no injury-in-fact attributable to Conn. Gen. Stat. § 4-28m(a)(3)(C), this Court lacks Article III jurisdiction and should dismiss the complaint.

II. The SAC Does Not Allege A Plausible Violation Of Substantive Due Process

A. Conn. Gen. Stat. § 4-28m(a)(3)(C) Accords Plaintiff No Constitutionally Protected Interest

Plaintiff and Defendant agree that whether the challenged statute creates a constitutionally protected interest turns on whether Defendant may exercise discretion in applying the statute. As Defendant noted in his most recent brief, (Doc. #82-1 p. 11), where a government agency has discretion to deny an application for a government

benefit, the applicant has no protected property in that benefit. Therefore, Plaintiff contends, as it must, that Defendant has no discretion whatsoever. *See* Plaintiff's Memo, pp. 14-19. Plaintiff's arguments in this regard are untenable. The statute, which gives an NPM a two and one-half percent margin of error in reconciling its production of imports and its distributors' sales, further guarantees an NPM the opportunity to "satisfactorily explain" a discrepancy in excess of two and one-half percent. The General Assembly, by assuring an NPM an opportunity to explain any such deviation, clearly gave Defendant discretion to assess the validity of the explanation provided. Any other interpretation would be absurd and would render the word "satisfactorily" meaningless. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001)("It is our duty to give effect, if possible, to every clause and word of a statute." (internal citation omitted)).

Plaintiff also ignores the fact that, without Defendant's exercise of discretion, Plaintiff would not currently be certified to the Connecticut Tobacco Directory. In late summer of 2016, shortly after two district courts in the Second Circuit ruled that the reporting requirements of the PACT Act did not apply to tribal sales,[4] Defendant excused Plaintiff from submitting data from its three importers that sell cigarettes exclusively to tribal entities. Since that time, Defendant has required Plaintiff to submit import data and distribution data from only two of its importers, Tobaccoville and Everything Tobacco, which make no tribal sales. *See* SAC, ¶¶ 38, 39. Defendant's exercise of discretion

[4] *State of New York v. Mountain Tobacco Co*., No. 2:12-CV-06276-JS-SIL, 2016 WL 3962992 (E.D.N.Y. Jul. 21, 2016); *State of New York v. Grand River Enterprises, LTD*., USDC, No. 1:14-CV-00910-RJA-LGF, Report & Recommendation by Foshio, USMJ (Doc. #97) (W.D.N.Y. Aug. 30, 2016).

in limiting the scope of the challenged statute as it applies to Plaintiff's situation is plainly reflected in the SAC's factual allegations. *See* SAC, ¶¶ 5, 40. Nevertheless, Plaintiff, in its Memo, contradicts the SAC and misrepresents to this Court the parties' ongoing and mutually recognized course of conduct, which Defendant has forged and followed in good faith. Plaintiff asserts that "whether the Commissioner will in fact be able to exempt Indian Country sales from enforcement is a factual issue that will need to be vetted in discovery, rendering a motion to dismiss inappropriate," Plaintiff's Memo, p. 23, even though *Defendant has exempted those sales from enforcement since August, 2016, and continues to do so. See* Defendant's Memorandum In Support Of Motion To Dismiss, February 17, 2017, Doc. #42-1**,** pp. 5-6 and Ex. D (attached thereto).

B. Conn. Gen. Stat. § 4-28m(a)(3)(C) Is Rationally Related To A Legitimate Government Interest

Even if Conn. Gen. Stat. § 4-28m(a)(3)(C) were to give rise to a constitutionally protected interest, which it does not, the statute still would not violate Plaintiff's right to substantive due process, because it has a conceivable rational basis. "[I]t is difficult to exaggerate the burden that a party must overcome to demonstrate that economic legislation fails rational basis review." *Star Scientific, Inc. v. Beales*, 278 F.3d 339, 348-49 (4th Cir.), *cert. denied sub nom. Star Scientific, Inc. v. Kilgore*, 537 U.S. 818 (2002) (internal citation omitted). All of the arguments raised in Plaintiff's Memo regarding the alleged arbitrariness of Conn. Gen. Stat. § 4-28m(a)(3)(C) have been specifically analyzed and refuted in Defendant's Reply Memorandum In Support Of Motion To Dismiss (First Amended Complaint), June 2, 2017, Doc. #42-1, pp. 7-11, and that analysis is incorporated by reference here.

The *Star Scientific* decision provides an excellent blueprint for this Court in evaluating the plausibility of Plaintiff's substantive due process claim. In *Star Scientific*, the Fourth Circuit Court of Appeals reviewed the district court's dismissal of constitutional challenges to the MSA and Virginia's "qualifying statute", which implements the provisions of the MSA by requiring NPMs to make escrow deposits based on their sales in Virginia.[5] Although the NPM plaintiff, Star Scientific, Inc., raised numerous, sophisticated arguments as to why Virginia's qualifying statute was not rationally related to any conceivable legitimate purpose, the court rejected them all. The court held that Virginia's qualifying statute "unquestionably" served the legitimate purpose of ensuring the state's ability to recover healthcare costs from a cigarette manufacturer regardless of whether the manufacturer had joined the MSA. *Id*. at 349. The court further concluded that the statute's requirement that an NPM make escrow deposits based on its cigarette sales in the state was rationally related to the statute's purpose. In affirming the dismissal of the plaintiff's due process claim, the court repeatedly emphasized that the judiciary should not assess the wisdom of economic legislation. "The courts defer to rational legislative decisionmaking with respect to economic legislation because the legislatures are better equipped to consider and evaluate 'the profound and far reaching consequences' that such legislation may have." *Id*. at 349, *quoting Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 83 (1978).

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[5] Connecticut's qualifying statute, which is substantially the same as Virginia's, is codified at Conn. Gen. Stat. §§ 4-28h - 4-28j. Both statutes are based on a model statute provided in the MSA.

The Tenth Circuit Court of Appeals subsequently relied on *Star Scientific* to affirm the dismissal of two complaints, both brought by NPMs, that raised substantive due process as a basis for challenging the qualifying statutes of Oklahoma and Kansas, respectively. *See KT&G Corp. v. Attorney General,* 535 F.3d 1114, 1142-43 (10th Cir. 2008) and cases cited therein.

This Court should adopt the reasoning of the federal decisions referenced above and dismiss Count One of the SAC.

III. The SAC Does Not Allege A Plausible Claim That Conn. Gen. Stat. § 4-28m(a)(3)(C) Is Preempted By The PACT Act

Defendant's three previous briefs, (Doc. ##42-1, 60, 82-1) have explained at length the many reasons why Conn. Gen. Stat. § 4-28m(a)(3)(C) complements, rather than conflicts with, the federal PACT Act. Those arguments are incorporated by reference here.

Plaintiff's continued insistence that compliance with both the PACT Act and the challenged statute is impossible is befuddling. As noted in the SAC, ¶ 54, and Defendant's prior brief, Doc. #82-1, p. 19 and Ex. A, Plaintiff *has continuously complied* with the challenged statute for the past two years, as have the other three NPMs that are listed on the Connecticut Tobacco Directory.[6] Moreover, the SAC does *not* allege that Plaintiff's compliance with Conn. Gen. Stat. § 4-28m(a)(3)(C) has somehow forced it to vio-

[6] The other NPMs currently certified to sell their brands in Connecticut are KT&G, Smokin' Joes, and Native Trading Associates. *See* Connecticut Tobacco Directory *available at* http://www.ct.gov/drs/lib/drs/cigarette/directorymanufacturers.pdf.

late the PACT Act. To the contrary, the SAC alleges that Plaintiff is fully compliant with the PACT Act. *See* SAC, ¶ 83.

Finally, Defendant is not attempting to enforce the PACT Act, as Plaintiff erroneously asserts. The challenged statute is part of a statutory scheme that determines which cigarette manufacturers may market their brands *in Connecticut.* The PACT Act's requirements and those of Conn. Gen. Stat. § 4-28m(a)(3)(C) are similar, but they are each part of a distinct regulatory regimen. For the convenience of manufacturers like Plaintiff, the challenged statute utilizes PACT Act data, but no aspect of Connecticut's scheme dictates the legality of cigarette sales beyond Connecticut's borders or infringes on the authority of the federal government.

It is noteworthy that other states' laws governing NPMs' escrow obligations and tobacco directory certification requirements have been the subject of numerous preemption challenges. Most of those lawsuits have raised antitrust allegations and have asserted preemption in the context of the Sherman Act. 15 U.S.C. § 1. *See Freedom Holdings, Inc. v. Cuomo,* 624 F.3d 38, 49-64 (2d Cir. 2010); *S&M Brands, Inc. v. Caldwell*, 614 F.3d 172, 176-77 (5th Cir. 2010), *cert. denied*, 562 U.S. 1270 (2011) and cases cited therein, including litigation brought by Plaintiff. A few cases have raised preemption in the context of the Federal Cigarette Labeling and Advertising Act **,** 15 U.S.C. §1334(b). *See S&M Brands, Inc.,* 614 F.3d at 179 and cases cited therein, including litigation brought by Plaintiff. None of those challenges has been sustained. Although those preemption cases are not exactly the same as Plaintiff's preemption claim under the PACT Act, they nevertheless demonstrate that federal courts have not held states' regulation of tobacco manufacturers that sell, or seek to sell, cigarettes in their respec-

tive jurisdictions to be an intrusion on, or an interference with, any aspect of federal authority.

In light of those decisions, and Plaintiff's ongoing compliance with both the PACT Act and Conn. Gen. Stat. § 4-28m(a)(3)(C), this Court should reject Plaintiff's preemption claim and dismiss Count Two of the SAC.

IV. The SAC Does Not Allege A Plausible Violation Of The Commerce Clause

As explained in Defendant's prior brief, Doc. #82-1, p. 20, the SAC fails to articulate any cognizable Commerce Clause violation. Nevertheless, Plaintiff's Memo indicates, belatedly, that the type of Commerce Clause violation that Plaintiff wants to plead is one of extraterritoriality: namely, that the challenged statute allegedly imposes requirements on commercial transactions that take place beyond Connecticut's borders.[7] Excellent guidance for this Court can be found in judicial rulings from other districts on similar claims. Those cases, discussed below, fully address and refute all of Plaintiff's arguments, and they lead inexorably to the conclusion that a Commerce Clause challenge to Conn. Gen. Stat. § 4-28m(a)(3)(C), even if one had been properly pled, is implausible as a matter of law.

Plaintiff's foremost allegation, as distilled from its Memo, pp. 33-36, appears to be that "importers of GRE cigarettes that conduct their business entirely outside of Connecticut would be required to report all of their sales of GRE cigarettes to the Commis-

[7] As previously noted, the assertions made in Plaintiff's Memo cannot rectify the deficiencies of the SAC. Defendant addresses the issue of extraterritoriality for the Court's benefit, even though no legal or factual basis for that claim is stated in the SAC itself.

sioner." *Id*. at p. 33. A strikingly similar argument was raised by the plaintiff NPM in *Star Scientific,* 278 F.3d at 357. Star Scientific, Inc. argued that Virginia's qualifying statute impermissibly regulated extraterritorial commercial transactions, because it required Star Scientific to calculate its escrow payments to Virginia based on sales information that it had to obtain from distributors located outside of Virginia. The Fourth Circuit Court of Appeals easily disposed of that contention with the following explanation:

> Star Scientific argues…that because the escrow payments are imposed on cigarettes sold not only by it, but also by its distributors, even when the distributors purchased the cigarettes outside of the State, Star Scientific is required to "police interstate sales or channel those sales into contractual forms that may be more burdensome to commerce." Star Scientific is, however, overstating its burden. As Virginia points out, distributors in Virginia are already required to record the number of cigarettes they stamp with the Virginia excise stamp and report that information to the Commonwealth. *See* Va.Code Ann. § 58.1–1000 *et seq.* Because distributors already have to keep track of this information, any additional burden caused by requiring manufacturers to obtain this information from the distributors is minimal.

Id. at 357. The court therefore concluded that the qualifying statute did not violate the Commerce Clause, and that the lower court had properly dismissed the complaint.

The Fourth Circuit's reasoning applies equally to the statute challenged here. All of the sales information that Plaintiff must collect from its importers and distributors regarding either interstate sales or intrastate sales of its brands is data that importers and distributors must already submit to state revenue departments pursuant to either federal law (the PACT Act) or state law. *See, e.g*. Fla. Stat. Ann. § 210.09 (attached as Ex. A); S.C. Code Ann. § 12-21-735 (attached as Ex. B). Furthermore, Conn. Gen. Stat. § 4-28m(a)(3)(C), like Virginia's qualifying statute, does not apply to NPMs generally; it

applies *only* to NPMs seeking to market their cigarettes *in Connecticut*. Moreover, it is purely a reporting requirement pertaining to sales transactions that have already occurred; it has no substantive impact whatsoever on those transactions themselves.

Plaintiff also contends that Conn. Gen. Stat. § 4-28m(a)(3)(C) exerts extraterritorial control because the word "nation-wide" appears in the statute. Plaintiff's Memo, p. 33. The General Assembly's use of that word in the statute is simply a recognition that the nature of the tobacco industry is such that cigarette manufacturers' sales often occur "nation-wide." A court, however, must examine the function of a statute, rather than a single word, to determine whether it contravenes the Commerce Clause. *See MERSCORP Holdings, Inc. v. Malloy*, 320 Conn. 448, 477 (2016), *cert denied*, 137 S.Ct. 372 (2016) ("It is only because… [the secondary mortgage] market, like many modern financial markets, happens to be national in scope that the [word] “national" ... found its way into § 7–34a. Both this court and the United States Supreme Court have emphasized in this regard the importance of looking past the formal language of a statute to its practical effect." (internal citations omitted.))

As in *Grand River Enterprises Six Nations, Ltd v. King*, 783 F. Supp. 2d 516, 543 (S.D.N.Y. 2011), involving Plaintiff's challenge to New York's qualifying statute, Plaintiff, in this case, "does not identify any provision in the …[statute] requiring an NPM to obtain one state's regulatory approval before selling in another state." *Accord*, *Grand River Enterprises Six Nations Ltd. v. Beebe*, 574 F.3d 929, 944 (8th Cir. 2009), *cert denied*, 559 U.S. 1068 (2010) ("[T]here has been [no] showing by appellants that escrow payments by NPMs in Arkansas have any effect, either directly or indirectly, on cigarette prices in other states.") *See also S&M Brands, Inc. v. Caldwell*, 614 F.3d 172, 177-78

(5th Cir. 2010), *cert denied*, 562 U.S. 1270 (2011) and cases cited therein ("The plaintiffs…argue that the MSA and Escrow Statute violate the Commerce Clause…because they create extraterritorial price increases. The plaintiffs' claims have been soundly rejected by the Fourth, Eighth and Tenth Circuits.").

In *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205 (2d Cir. 2004), the Second Circuit Court of Appeals reviewed a district court's dismissal of a complaint challenging the New York's statutes governing that state's tobacco directory (known in New York as the "Contraband Statutes"). The Second Circuit affirmed the lower court's conclusion that the plaintiffs had failed to allege that the Contraband Statutes had any legally cognizable extraterritorial impact:

> [T]he "practical effect" of the Contraband Statutes on extraterritorial commerce does not rise to the level of a constitutionally impermissible act. The effect does not constitute the "regulation of commerce," "control of commerce," "projection of one state regulatory regime into the jurisdiction of another State," or "application of a state statute to extraterritorial commerce" necessary to render a state statute invalid.
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> . . .
>
> [O]ut-of-state actors such as appellants remain free to conduct commerce on their own terms, without either scrutiny or control by New York State.

Id. at 220-21 (internal citations omitted). The Second Circuit's observations in *Freedom Holdings* apply equally well to the "practical effects" of Conn. Gen. Stat. § 4-28m(a)(3)(C), which is part of Connecticut's own tobacco directory statute.

As the foregoing discussion and analogous cases demonstrate, Conn. Gen. Stat. § 4-28m(a)(3)(C), as a matter of law, imposes no constitutionally impermissible extraterritorial impact on commerce. Count Three of the SAC should therefore be dismissed.

CONCLUSION

For the foregoing reasons, Defendant respectfully requests that the Court dismiss Plaintiff's Second Amended Complaint, pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), with prejudice.

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CERTIFICATION

I hereby certify that on March 1, 2018 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
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