

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA**

HCI DISTRIBUTION, INC.; and)	Case No. 18-cv-173
ROCK RIVER MANUFACTURING, INC.,)	
)	
Plaintiffs,)	
)	
v.)	COMPLAINT
)	
DOUGLAS PETERSON, Nebraska)	
Attorney General; TONY FULTON,)	
Nebraska Tax Commissioner,)	
)	
Defendants.)	

COME NOW Plaintiffs HCI Distribution, Inc. (“HCID”) and Rock River Manufacturing, Inc. (“RR”), by and through undersigned counsel, and complain of the Defendants as follows:

INTRODUCTION

Acting in collusion with Big Tobacco, the State of Nebraska has laid siege to the Winnebago Tribe of Nebraska’s (“Tribe”) inherent sovereignty, and the legislative jurisdiction of the United States. The State’s campaign against the Tribe is not only an insult to the inherent tribal sovereignty that predates the founding of the United States, but this campaign also blatantly flouts the most basic principles of federal Indian law as set forth in the U.S. Constitution and affirmed by the U.S. Supreme Court over the past 200 years. According to those principles, tribes retain the authority to regulate activity that occurs within tribal territory unless Congress expressly legislates to limit their sovereignty. As a matter of long-settled law, the State of Nebraska, therefore, lacks any regulatory authority over the Tribe for on-reservation activity unless Congress has provided otherwise.

In this suit, the Tribe challenges Nebraska legislation that purports to regulate the sovereign Tribe's activity occurring within Indian Country. This activity is directed by, and benefits, the Tribal government. Under pressure from the powerful forces of Big Tobacco, the State has attempted to unlawfully expand its legislative jurisdiction into Indian Country. In essence, Big Tobacco is attempting to use Nebraska law to bootstrap the MSA onto the Tribe. The State regulatory scheme underlying this matter cannot be enforced against Plaintiffs.

This story begins in the mid-1990s when 46 states brought separate suits against the four largest American tobacco manufacturers to recover healthcare costs related to smoking. The states had evidence of rampant fraud and corruption by Big Tobacco. The suits, therefore, posed an existential threat to the industry. In 1998, using their immense power and influence, the four largest cigarette manufacturers in the United States ("Big Tobacco" also known as the "Original Participating Manufacturers" or "OPMs")¹ convinced the attorneys general of the 46 states, including Nebraska, to enter into the 1998 Tobacco Master Settlement Agreement ("MSA"). The MSA established parameters for ensuring that a portion of Big Tobacco's revenues from tobacco sales each year would be paid to the settling states, ostensibly to offset healthcare costs related to smoking. Other manufacturers signed onto the MSA after the original signatory date. These manufacturers were called Subsequent Participating Manufacturers ("SPMs" or collectively with the OPMs they are referred to as the "Participating Manufacturers" or "PMs").

As a consequence of the MSA, the Big Tobacco OPMs were required to make such large payments to the settling states² that they became concerned that a price increase to cover this cost

¹ The OPMs derived much of their power from the fact that, at the time of the MSA, they controlled approximately ninety-seven percent (97%) of the domestic cigarette market and the vast revenues that would accompany such a market-share.

² Total yearly MSA payment is approximately nine billion dollars (\$9,000,000,000.00) for 2018, with states receiving individual shares of over seven hundred million dollars (\$700,000,000.00) a year in the case of California and approximately nineteen million dollars (\$19,000,000.00) a year in the case of Wyoming.

would threaten their market dominance. The MSA addressed Big Tobacco's concern by including the Non-Participating Manufacturer Adjustment ("NPM adjustment").

The NPM adjustment provides that a state can lose its MSA payment, thereby absolving OPMs from making their massive payment, if the state has not enacted and "diligently enforced" a state law to force tobacco manufacturers who did not sign the MSA ("non-participating manufacturers" or "NPMs") to pay a fee to sell cigarettes in the state. The sole purpose of the NPM adjustment is to ensure that the PMs are guaranteed price parity with the NPMs. In short, the NPM adjustment coerces the states into using state law to regulate tobacco manufacturers that were not parties to the financial burdens of the MSA in order to protect Big Tobacco's profits or else lose the benefit the states receive from Big Tobacco's MSA payments.

To accomplish this, the settling states agreed to enact certain model laws, drafted and blessed by Big Tobacco, that impose fees on NPMs, dictate the tobacco brands that can be sold in the state, the prices that can be charged in the state, and the persons who can engage in the sale of tobacco goods in the state (the "MSA Laws"). From the perspective of Big Tobacco, the MSA is essentially a federated agreement ensuring that Big Tobacco enjoys a level playing field across the MSA-settling states despite their previous bad actions. From the point of view of the settling states, the MSA is a mutual compact that protects each member-state's revenues by eliminating the opportunity for arbitrage from those choosing not to sign on to the MSA—the NPMs.

Significantly, in the years of discussions leading up to the MSA, neither the states' attorneys general nor Big Tobacco's representatives ever invited the participation of federally-recognized tribal governments ("tribes"). This failure was a particularly glaring omission in light of tobacco's ancient and continuing ceremonial and economic significance to tribes. From time immemorial to present, tribal people have used, traded, and sold tobacco. Up to, and including,

the period of the MSA negotiation, tribes were engaged in vigorous on-reservation tobacco economies that provided vital revenue to impoverished tribal governments. The global tobacco economy began, after all, when European settlers first encountered New World tobacco goods over five hundred years ago. In addition to failing to engage tribes, the settling states and Big Tobacco likewise did not seek the involvement of Congress which, since the founding of the United States, exercises exclusive and plenary control over sovereign tribes within its borders independent of state jurisdiction.

Despite their failure to include tribal parties and notwithstanding tribes' immunity from state regulation, the states and Big Tobacco apparently intended the MSA to have a universal effect, and they use state law to try and bootstrap the MSA onto tribes. The fact that tribes have remained legally beyond Big Tobacco's powerful influence—a fact that is partially of Big Tobacco's own making—has considerably vexed Big Tobacco, whose overarching goal has always been to protect its vast market share from any intrusion no matter how small. As a result, Big Tobacco has exerted pressure on states to continue to pursue unlawful regulation of tribal tobacco trade in Indian Country. Indeed, Big Tobacco has improperly withheld payments from many states alleging failure to “diligently enforce” their MSA Laws with respect to the Indian Country activities of tribes. Given the amount of money the states receive from Big Tobacco, the effect of withholding those payments effectively has coerced the states to enforce their MSA statutes against tribes, with no regard for the limitations on states' authority to regulate commerce within Indian Country. Nebraska's 2017 MSA payment was thirty-seven point seven million dollars (\$37.7 million). Nebraska's 2018 MSA payment has yet to be calculated.

Importantly, the settling states and Big Tobacco engaged in a protracted arbitration proceeding with the various states to determine the question of “diligent enforcement,” including

enforcement against tribes. Specifically, the decision-maker considered whether reservation sales that had not made escrow deposits pursuant to the MSA Laws impacted a state's claim that it had diligently enforced its escrow statute. Big Tobacco's Indian Country diligent enforcement challenge was largely determined against them. However, so great is the scale of Big Tobacco's financial coercion of the states, Nebraska settled and accepted settlement terms that violate principles of federal Indian law, invade tribal sovereignty, discriminate against tribes, and illegally force tribes to comply with state MSA Laws in Indian Country. This effort by the State to subvert federal law, including its collusion with Big Tobacco has done great damage to tribal economies generally and the Tribe's economy specifically. It creates a chilling effect on tribal tobacco, as tribes themselves, tribal entities, and individual tribal members are uncertain if states will impose penalties, seize products, or even arrest persons involved in the Indian Country tobacco trade. Where penalties, seizure, and threat of arrest become a reality, as they have for the Tribe, unlawful enforcement of state law creates more than a mere chilling effect. It creates actual, concrete, monetary harm to the tribal economy. Harm to tribal economies is harm to tribal sovereignty, tribal self-determination, and tribal self-government.

This campaign to unlawfully ensnare the Tribe in a state regulatory scheme sheds light on an ugly and often unseen power struggle that defies our basic principles of government. Big Tobacco, a wealthy and powerful industry, has effectively coerced one sovereign, Nebraska, to threaten another sovereign, the economic and political subdivisions of the Tribe, with myriad penalties to achieve one goal: to protect Big Tobacco's profits and cripple the Tribe's economy.

This action is a challenge to these efforts as unconstitutional, unlawful, and a violation of Plaintiffs' rights as instrumentalities of a federally-recognized Indian tribe.

PARTIES

1. HCID and RR are both incorporated under Tribal law and wholly owned by Ho-Chunk, Inc. (“HCI”). HCI is the economic development arm of the Tribe. The Tribe is a federally-recognized Indian tribe, 83 Fed. Reg. 4239 (January 20, 2018), with its reservation lands located within the exterior boundaries of Nebraska. HCID’s contact information is: 701 Buffalo Trail, Winnebago, NE 68071; Telephone: (402) 878-2560. RR’s contact information is: 506 Reuben Snake Ave, Winnebago, NE 68071; Telephone: (402) 878-2037.

2. Douglas Peterson is the Nebraska Attorney General and is charged with enforcing Nebraska’s MSA Laws. The contact information for the Nebraska Attorney General is: 1445 K Street, #2115, Lincoln, NE 68508; Telephone: (402) 471-2682.

3. Tony Fulton is the Nebraska Tax Commissioner and is charged with enforcing Nebraska’s MSA Laws. The contact information for the Nebraska Department of Revenue is: 301 Centennial Mall South, Lincoln, NE 68508; Telephone: (402) 471-5729.

JURISDICTION AND VENUE

4. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 (federal question) and 1362 (suit by Indian tribe).

5. This Court has jurisdiction to grant the declaratory relief requested in this action under the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202.

6. This Court has jurisdiction to grant injunctive relief to prevent ongoing violations of federal law by State officials. *Ex Parte Young*, 209 U.S. 123 (1908).

7. Venue in this action lies in this Court pursuant to 28 U.S.C. §§ 1391(b)(1)-(2) as the activity complained of occurred in Thurston and Sarpy Counties Nebraska. Omaha is the appropriate courthouse.

STATEMENT OF FACTS

HCI Distribution

8. HCID is an operating arm of the Tribe. It is imbued by the Tribe with the Tribe's sovereignty and sovereign immunity.

9. The Tribe created HCID in 1999 to foster economic development of the Tribe and to create economic opportunities for Tribal members. Before its creation, the Tribe's reservation was an economically depressed area experiencing chronic and severe unemployment.

10. HCID is in the business of purchasing and re-selling tobacco products exclusively in Indian Country throughout the United States. The company purchases exclusively from tribal-based manufacturers. The goods purchased by HCID are received at a facility that serves as both warehouse and headquarters on the Tribe's reservation. HCID resells and distributes those goods to reservation-based wholesalers and retailers exclusively in Indian Country. A large portion of HCID's sales are made to retailers located on the Tribe's reservation and to Tribal members. Additionally, a large portion of these sales are made to federally-sanctioned, Indian-owned casinos who are exempt from all state regulation under The Indian Gaming Regulatory Act.

11. HCID's business model is predicated on the lawfulness of trade between federally-recognized Indian tribes in Native manufactured goods and the general exemption of such trade from impermissible state regulation. HCID uses all diligence in ascertaining and complying with applicable laws. Any and all tobacco products shipped by HCID to customers have tribal tax stamps affixed in accordance with applicable tribal law.

12. HCID has succeeded in improving the social and economic well-being of the Tribe's members as well as surrounding localities. HCID has created dozens of jobs for Tribal members. All revenues earned by HCID belong to the Tribe. HCID remits twenty percent (20%)

of its net profits to the Tribe to support Tribal social welfare programs such as elder and child care, down-payment assistance for Tribal members buying their first homes on the reservation, and basic government services. In 2017, profits from HCID's dividend contributed one hundred fifty-seven thousand three hundred eighty-one dollars (\$157,381.00) to the Tribe. Unappropriated profits are reinvested in the company to ensure the continuing success of HCID.

ROCK RIVER

13. RR is an operating arm of the Tribe. It is imbued by the Tribe with the Tribe's sovereignty and sovereign immunity.

14. The Tribe created RR in 2009 to foster economic development of the Tribe and to create economic opportunities for Tribal members. Before its creation, the Tribe's reservation was an economically depressed area experiencing chronic and severe unemployment.

15. RR is a federally-licensed cigarette manufacturer with its manufacturing facilities located on the Tribe's reservation.

16. All of its product is manufactured on the Tribe's reservation.

17. RR is not a signatory to the MSA. It is an NPM.

18. RR's cigarettes are distributed by HCID and other national distributors to be sold to retailers throughout the country.

19. Like HCID, RR has created dozens of jobs for Tribal members at its manufacturing facilities on the Tribe's reservation.

20. RR's product is tax stamped with the tribal stamp of each jurisdiction in which it is sold.

THE MASTER SETTLEMENT AGREEMENT AND MSA LAWS

21. In 1998, the attorneys general from 46 settling states, including Nebraska, entered into the MSA with the four largest tobacco companies in the United States to settle suits by the states to recover tobacco-related healthcare costs.

22. Under the MSA, the largest tobacco companies agreed to pay monies to the settling states each year based generally on tobacco sales to be divided among the settling states. To protect the market share of PMs and thereby their annual MSA payments, each settling state agreed to enact model legislation or a “qualifying statute” known as the escrow statute penalizing NPMs who, unburdened by the compliance costs of the MSA, could sell their product at a lower rate and diminish the market share of PMs. Nebraska’s escrow statute is found at Neb. Rev. Stat. §§ 69-2701-2703.1.

23. The escrow statute requires NPMs selling cigarettes in the state either to join the MSA or to escrow funds in an amount equal to a percentage of their sales in the state each year. Neb. Rev. Stat. §§ 69-2703(1)-(2). Manufacturers that fail to comply are subject to court actions, penalties, and injunctive relief preventing them from selling cigarettes in the State of Nebraska. Neb. Rev. Stat. § 69-2703(c)(i)-(ii).

24. As set forth in the Introduction, the settling states must enact and diligently enforce the escrow statute or face losing their MSA payment under the NPM adjustment.

25. In the late 1990s and early 2000s, all 46 settling states enacted the escrow statute.

26. The settling states then went about “diligently enforcing” their escrow statutes in an effort to avoid the NPM adjustment.

27. The escrow statute proved difficult to enforce as many tobacco product manufacturers, especially the many located overseas, simply refused to comply. The injunctive

relief provided in the escrow statute was not sufficient to prevent violations of the escrow statute and thus the threat to the states' MSA payment under the NPM adjustment.

28. From the early 2000s until approximately 2006, the settling states began enacting what is known as the Directory Statute. Nebraska's Directory Statute is found at Neb. Rev. Stat. §§ 69-2704-2707. The Directory Statute requires the State to publish a list of tobacco product manufacturers and tobacco brand families deemed lawful for sale in the State. Neb. Rev. Stat. § 69-2706(2). To be included on the list, a tobacco product manufacturer must certify that it is registered to do business in the State or has appointed a resident agent for service of process and provided notice thereof; has obtained various federal licenses, approvals and permits; certify that it is in compliance with the escrow statute; and certify that it is in compliance with the State's tobacco product and manufacturing licensing laws. *See* Neb. Rev. Stat. § 69-2706. A brand of cigarettes or the cigarettes of a manufacturer not included on the list cannot be sold in the State. Neb. Rev. Stat. § 69-2706(4). Importantly, tax stamps cannot be affixed to such cigarettes either. *Id.* The prohibitions in the Directory Statute apply to "any person." *Id.*

29. Neb. Rev. Stat. §§ 69-2701-2703.1 and Neb. Rev. Stat. §§ 69-2704-2707 are collectively referred to as Nebraska's MSA Laws.

30. When enacting or amending its MSA Laws, Nebraska has not only acted in concert with Big Tobacco, but has sought their input and specific approval of the Nebraska laws that the Defendants seek to enforce against Plaintiffs. **Exhibit 1.** Tribal sales are of specific and significant concern to Big Tobacco and, thus, to Nebraska. Big Tobacco explicitly has insisted that Nebraska's amended MSA law must "[i]mpose a limit on tax exempted cigarettes that can be sold to a Native American reservation. . . . This is important in order to ensure that Native American

reservation sales do not become a source of unlimited . . . [escrow statute] exempt product.” Exhibit 1 at 9.

31. This “input” from Big Tobacco also includes assertions to Defendants, who are responsible for enforcing laws in Nebraska, that portions of the law should not apply to Big Tobacco, but only the tribes and NPMs. Specifically, Big Tobacco complained that the draft Nebraska statute burdened Big Tobacco. Big Tobacco, therefore, “suggested” edits that eliminated the burden. *See* Exhibit 1 at 8 (The amended MSA law “imposes burdens on [Big Tobacco]. . . . The proposed markup of the bill addresses these issues.”).

32. Only Congress has jurisdiction to diminish tribal sovereignty or allow a state to exercise regulatory control over tribal governments in Indian Country. There is no federal statute granting states with authority to regulate tobacco in Indian Country. To the contrary, federal statutes that address Indian Country tobacco routinely reassert tribal independence in regard to tobacco trade *vis-a-vis* state regulatory authority. *See, e.g.*, Prevent All Cigarette Trafficking Act of 2009 or “PACT Act,” Pub. L. 111-154, § 5(4) (“Nothing in this Act shall be construed to amend, modify or affect . . . any Federal law, including Federal common law and treaties, regarding State jurisdiction, *or lack thereof*, over any tribe, tribal members, tribal enterprises, tribal reservations, or other lands held by the United States in trust for one or more Indian tribes.” (emphasis added)). There is certainly no federal statute that allows a state to collude with a third party to regulate tribal governments or tribal government instrumentalities in Indian Country.

33. The Tribe has used its retained sovereignty to regulate tobacco within its jurisdiction. It has entered into the Universal Tobacco Settlement Agreement with manufacturers. **Exhibit 2.** This agreement imposes fees on the signatory manufacturers and distributors and other restrictions regarding tobacco use within the Tribe’s jurisdiction. Thirty-One Thousand Six

Hundred Eighty-One Dollars (\$31,681.00) was paid in fees under this agreement in 2017 alone.

The Tribe has enacted and enforces its Brand Listing Act to regulate settlement signatories.

Exhibit 3. Additionally, the Tribe imposes a tax on the sale of cigarettes within its jurisdiction.

Exhibit 4. One Hundred Twenty-Two Thousand Six Hundred Fifty-Eight Dollars (\$122,658.00) in tribal cigarette taxes were collected in 2017 alone.

THE NPM ADJUSTMENT AND ARBITRATION SETTLEMENT

34. An Independent Auditor found that for the year of 2003, the Participating Manufacturers incurred a market share loss. A nationally-recognized firm of economic consultants determined that the competitive disadvantages arising from the MSA were a significant factor contributing to the lost market share. These two events triggered the NPM adjustment proceedings.

35. The Independent Auditor calculated the potential NPM adjustment at one point one billion dollars (\$1.1,000,000,000) but declined to apply the NPM adjustment because all of the settling states had escrow statutes in effect in 2003, and there had been no finding as to whether any state had diligently enforced its escrow statute.

36. The Participating Manufacturers objected to the decision not to apply the NPM adjustment and alleged that no state diligently enforced the escrow statute in 2003.

37. Participating Manufacturers initiated an arbitration proceeding (“Arbitration Proceeding”) to reduce the amounts the Participating Manufacturers owed to the settling states. Under the MSA, such payments could be reduced by hundreds of millions of dollars if a settling state did not diligently enforce its escrow statute.

38. A major issue during the Arbitration Proceeding were sales of cigarettes in Indian Country. Big Tobacco argued states, including Nebraska, had not diligently enforced their escrow statutes as there were a large volume of sales in Indian Country for which no escrow was deposited.

39. As a result of this, Big Tobacco insisted that the states, including Nebraska, include new provisions in the MSA laws to target Indian sales.

40. The Arbitration Proceeding between Nebraska and Big Tobacco was tentatively resolved in 2012 with the execution of a memorandum of understanding (the “Arbitration Settlement”) and accompanying term sheet (the “Term Sheet”). A copy of the Term Sheet is attached hereto as **Exhibit 5**.

41. The Term Sheet makes clear that the terms of the Arbitration Settlement negotiated between Nebraska and Big Tobacco included provisions applicable to Native Americans.

42. The Term Sheet includes provisions applicable to the sale of tobacco products by federally-recognized tribes. It excludes from the definition of non-compliant cigarettes, for example, those which the state is barred from requiring escrow deposits by order of a court that such deposits are barred by federal or state constitutional law *except* state constitutional law “as it may impact or be applied in relation to sovereign immunity or other Native American issues.” Term Sheet at § III.B.2.c.

43. The Term Sheet also contains provisions limiting the amount of escrow funds that federally-recognized tribes could receive. It provides that tribes having reservations in more than one state would be eligible for the release of escrow only from the state in which the largest portion of its reservation land is located.

NEBRASKA'S HISTORY WITH ENFORCEMENT OF THE MSA LAWS

44. In March of 2014, the Nebraska Department of Revenue issued tax assessments against several reservation-based cigarette retailers located within the exterior boundaries of Nebraska that claimed these retailers made cigarettes sales subject to the jurisdiction of Nebraska and owed cigarette use tax.

45. The issuance of the assessments prompted HCID and RR to engage in compact negotiations with the Defendants pursuant to Neb. Rev. Stat. § 77-2606.06 to settle the longstanding disagreement about whether Nebraska's MSA Laws apply to HCID and RR's manufacture, distribution and sale of cigarettes. Importantly, the Tribe was willing to discuss voluntarily permitting the State to exercise some regulation of Tribal tobacco and to negotiate payment of a compromised amount without conceding whether the State had power to regulate tribal tobacco under federal law—the State does not have that power.

46. Tellingly, in the negotiations, the Defendants quickly agreed to the very small compromise amount on the taxes. Instead, the negotiations focused entirely upon whether HCID and RR were required to comply with Nebraska's MSA Laws.

47. During the negotiations, the Defendants continuously insisted that Nebraska's MSA Laws applied to HCID and RR and they must comply with those laws. Defendants threatened that only by entering into a compact with Nebraska would HCID and RR be excused from strict compliance with the Nebraska MSA Laws and instead be governed by the terms of the compact. The Defendants rejected any notion that Nebraska was preempted from enforcing its MSA Laws by the force of the U.S. Constitution and federal Indian law.

48. The negotiations broke down when the parties were unable to reach an acceptable compromise over how much regulatory authority the Tribe would allow Nebraska to assert.

49. Defendant Peterson informed Plaintiffs on June 13, 2016 that negotiations had failed. **Exhibit 6.**

50. Since March 2014, HCID and RR have been operating under a cloud of uncertainty in their business dealings, in a hostile environment where the Defendants demand compliance with Nebraska's MSA Laws that are categorically preempted by federal law from enforcement on the Tribe's reservation. This uncertainty and threat of penalty and retaliation has created a serious impediment to their business operations and, thus, the ability to expand economically.

**FIRST CAUSE OF ACTION
(Supremacy Clause)**

51. Plaintiffs incorporate by reference and re-allege the allegations contained in paragraphs 1 through 50 of this Complaint.

52. Defendants seek to force HCID and RR acting in Indian Country to comply with Nebraska's MSA Laws.

53. States' relationships with federally-recognized Indian tribes are controlled by federal law pursuant to the Indian Commerce Clause of the U.S. Constitution. U.S. Const. art. I, § 8, cl. 3.

54. The Indian Commerce Clause is the supreme law of the land controlling Nebraska's jurisdiction and interaction with federally-recognized Indian tribes. U.S. Const. art. VI, cl. 2.

55. Only Congress, through express and explicit action, can regulate an Indian tribe or otherwise limit their sovereign powers.

56. No federal statute provides Defendants with regulatory jurisdiction to enforce Nebraska's MSA Laws in Indian Country.

57. Defendants impermissibly seek to expand Nebraska's regulatory authority over HCID and RR in a manner forbidden by the U.S. Constitution. Such acts violate the rights of

HCID and RR and improperly alter the constitutional balance of federal, state and tribal authorities. Defendants must not be allowed to use the Nebraska MSA Laws as a means for expanding state regulatory jurisdiction into Indian Country.

**SECOND CAUSE OF ACTION
(Indian Commerce Clause)**

58. Plaintiffs incorporate by reference and re-allege the allegations contained in Paragraphs 1 through 57 of this Complaint.

59. HCID and RR are economic and political instrumentalities of a federally-recognized Indian tribe.

60. HCID and RR engage in commercial activities with Tribal members, entities, and instrumentalities in Indian Country throughout the United States.

61. HCID's and RR's commercial activities within Indian Country are protected by the Indian Commerce Clause and are beyond the jurisdictional reach of the State of Nebraska.

62. HCID's and RR's commercial activities within Indian Country are under the exclusive and plenary jurisdiction of Congress, to the exclusion of the states.

63. The Indian Commerce Clause prohibits state jurisdiction over Indian commerce in Indian Country absent express Congressional authorization.

64. No federal statute authorizes state regulatory jurisdiction over Indian Country regarding tobacco commerce. To the contrary, federal statutes, such as the Prevent All Cigarette Trafficking Act, 15 U.S.C. §§ 375-378, expressly preserve the existing balance of jurisdictional powers within our federal system of government. 15 U.S.C. § 375(a)(3)-(4) (Note).

65. Defendants are attempting to improperly impose Nebraska's state regulatory authority upon HCID and RR in Indian Country, an intrusion that Congress has not authorized.

**THIRD CAUSE OF ACTION
(Equal Protection)**

66. Plaintiffs incorporate by reference and re-allege the allegations contained in paragraphs 1 through 65.

67. The Equal Protection of the U.S. Constitution prohibits state action that treats persons differently under the law based on a suspect classification. U.S. Const. amend. XIV, § 1.

68. The State of Nebraska, by the Term Sheet, has specifically targeted Indian tribes and reservation Indians for increased scrutiny and increased legal burdens under its MSA laws.

69. The State of Nebraska's targeting of Indian tribes and reservation Indians violates the Equal Protection Clause.

**FOURTH CAUSE OF ACTION
(Declaratory Relief)**

70. Plaintiffs incorporate by reference and re-allege the allegations contained in Paragraphs 1 through 69 of this Complaint.

71. A controversy exists between Plaintiffs and Defendants concerning the Defendants' authority to enforce Nebraska's MSA Laws against them for their activity in Indian Country.

72. Defendants have continuously insisted in all dealings with Plaintiffs that Plaintiffs must comply with Nebraska's MSA Laws for activity that occurs in Indian Country.

73. Defendants' positions are contrary to the limits placed on state jurisdiction by the U.S. Constitution and tenets of federal Indian law.

74. Pursuant to 28 U.S.C. §§ 2201 and 2202, judicial determination of the parties rights with respect to Defendants' power to regulate Plaintiffs is necessary and appropriate.

75. Plaintiffs have no equally plain, speedy or adequate remedy to determine their rights other than seeking declaratory relief.

**FIFTH CAUSE OF ACTION
(Injunctive Relief)**

76. Plaintiffs incorporate by reference and re-allege the allegations contained in Paragraphs 1 through 75 of this Complaint.

77. Should this Court determine that Defendants' actions regarding enforcement of the Nebraska MSA Laws violates Plaintiffs' federal rights as instrumentalities of a sovereign Indian Tribe, prospective injunctive relief to prevent ongoing violations of federal law is appropriate.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that judgment be entered in their favor and against Defendants as follow:

1. Declare that Nebraska's MSA Laws may not be enforced against HCID and RR for any activity that occurs in Indian Country.
2. Enjoin Defendants from taking any action to enforce Nebraska's MSA Laws against HCID and RR for any activity that occurs in Indian Country.
3. Award costs, fees and expenses, and reasonable attorneys' fees and expenses, to Plaintiffs; and
4. Grant such other further relief as this honorable Court may deem just and proper.

CERTIFICATION AND CLOSING

Under Federal Rule of Civil Procedure 11, by signing below, I certify to the best of my knowledge, information, and belief that this Complaint: (1) is not being presented for an improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (2) is supported by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law; (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further

investigation or discovery; and (4) the Complaint otherwise complies with the requirements of Rule 11.

Respectfully submitted this 20th day of April, 2018.

HCI DISTRIBUTION, INC. and ROCK
RIVER MANUFACTURING, INC.,
Plaintiffs,

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