UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK
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STATE OF NEW YORK,

Plaintiff,

-against-

Civil Action No.
14 CV 00910 (RJA) (LGF)

GRAND RIVER ENTERPRISES SIX NATIONS, LTD.
and NATIVE WHOLESALE SUPPLY COMPANY INC.,

Defendants.

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MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS THE SECOND AMENDED COMPLAINT

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Plaintiff, the state of New York (the "State"), respectfully submits this memorandum of law in opposition to the respective motions to dismiss the Second Amended Complaint of defendants Grand River Enterprises Six Nation, Ltd. ("Grand River" or "GRE") and Native Wholesale Supply Company Inc. ("Native Wholesale" or "NWS") (collectively, "Defendants"), both of which are made pursuant to Fed. R. Civ. P. 12(b)(6).

PRELIMINARY STATEMENT

This case arises from a joint venture entered into by Grand River and Native Wholesale, that has continued to this day, to sell Seneca brand cigarettes in New York State at an exceptionally discounted price, unencumbered by New York State's cigarette taxes, in order to gain a competitive advantage overs its law-abiding competitors. The State brought this action to put an end to Defendants' blatant disregard for federal and state laws that were enacted to prohibit Defendants' very conduct: the shipment and sale of contraband cigarettes that evade Defendants' tax obligations under New York State law. Indeed, NWS touts that it has paid the federal government nearly one billion dollars in excise taxes and duties,[1] which, while completely irrelevant to this case, does serve to highlight the degree to which Defendants flout their New York State tax obligations for the hundreds of millions of cigarettes they have sold in New York without the remittance of a single tax dollar to the State.

In the Second Amended Complaint, the State sets forth in substantial detail Defendants' violations, both individually, and as part of the joint venture, of the Contraband Cigarette Trafficking Act ("CCTA"), 18 U.S.C. § 2341 *et seq*., the Prevent All Cigarette Trafficking Act of 2009 ("PACT Act"), 15 U.S.C. § 375 *et seq*. and New York Tax Law §§ 471, 471-e, 1814, and 480-b. The same conduct of each Defendant violates each of these federal and

[1] *See* Mem. of Law in Supp. of Native Wholesale Supply Co.'s Mot. to Dismiss, dated Jan. 15, 2015, at 2 (Docket No. 79-3) ("NWS Br.").

state statutes and has been more than plausibly pled by the State under applicable pleading standards. Specifically, this well-pled conduct consists of Defendants' practice of knowingly shipping, transporting, transferring, distributing, possessing and selling large quantities of Seneca brand cigarettes in New York State that do not have the State's tax stamp affixed and have not been reported to State tax officials, as state and federal law require. Moreover, as discussed below, the State's abundant allegations certainly "raise a reasonable expectation" that through discovery further evidence of Defendants' illegal conduct will emerge.

Defendants advance several arguments in their motions to dismiss in yet a further attempt to avoid responsibility for their ongoing illegal business activity. As set forth herein, those arguments are wholly without merit and should be rejected by this Court.

With regard to GRE, the State has adequately alleged its direct violation of the CCTA and New York Tax Law §§ 471 and 471-e, both of which contemplate application to a party in GRE's position at the start of the cigarette distribution chain where such a manufacturer knows that its cigarettes will become contraband by being sold untaxed in New York State. GRE is also liable for each of the claims against it by virtue of its joint venture with NWS, the elements of which have been adequately alleged by the State. Moreover, such allegations raise a question of fact that is beyond the scope of a court's examination on a motion to dismiss.

NWS, for its part, advances legal arguments that have no foundation in the law and have been previously rejected by other courts. The decisions of Oklahoma and Idaho courts, discussed *infra* at III, prove instructive as to the baselessness of NWS's challenge to its obvious liability, as alleged, under the CCTA, PACT Act and New York State laws. Specifically, Contrary to NWS's assertions, its off-reservation conduct is not protected by the Indian Commerce Clause; as a private corporation NWS is not an "Indian" under the CCTA's "Indian

in Indian country" exception; and NWS's conduct of shipping and selling Seneca brand cigarettes into and in New York State is clearly "interstate commerce" under the PACT Act.

As a result, Defendants' motions to dismiss should be denied in full and each Defendant should be ordered to file an answer to the Second Amended Complaint.

STATEMENT OF FACTS

The applicable facts summarized below are set forth in the Second Amended Complaint which contains a full recitation of the allegations against Defendants.

Defendants' Participation in a Joint Venture

Defendant GRE is a corporation formed under the laws of the Six Nations of Indians, and its principal place of business is located in Ontario, Canada. Second Am. Compl. ("SAC") ¶ 8. GRE is in the business of manufacturing, selling, transferring, transporting and shipping its cigarettes, including Seneca brand cigarettes, for profit throughout the United States, including in and into New York. *Id.* Defendant NWS is a for-profit corporation, formed under the laws of the Sac and Fox Nation of Oklahoma, although it is neither controlled by the tribe nor operated for tribal government purposes. *Id.* at ¶ 9. Its principal place of business is in Perrysburg, New York. *Id.* The only tobacco products NWS imports to the United States are those manufactured by GRE. *Id.* at ¶ 57.

Though Defendants may be registered as separate corporations, throughout the relevant time period they have purposefully acted as a single enterprise as part of a joint venture in which Defendants knowingly shipped, transported, transferred, sold and distributed millions of unstamped and unreported cigarettes to various on-reservation dealers in New York State, among other individuals and entities. *Id.* at ¶¶ 58-66. Moreover, "Grand River knew and in fact intended that cigarettes sold to defendant Native Wholesale" as part of the joint venture "would be sold into New York without going through a New York State licensed stamping agent for pre-

payment of the state taxes, and thus would be neither stamped nor taxed as required under New York law." *Id.* at ¶ 60.

Defendants' engagement in the joint venture, and their intent to do so, is plainly established by the sworn statements filed jointly by Grand River, together with its principals Jerry Montour and Kenneth Hill, and by Arthur Montour, the sole shareholder, officer and director of Native Wholesale, in an arbitration initiated by these parties pursuant to the North American Free Trade Agreement ("NAFTA"). *Id.* at ¶¶ 66-83 (citing the Claimants' Notice of Arbitration and Claimants' Memorial, which are attached to the Second Amended Complaint as Exs. A and B, respectively).

Specifically, Defendants admit that they agreed to conduct a "vertically integrated" for profit "business enterprise" to manufacture and distribute Seneca brand cigarettes in the United States, and formalized this joint venture relationship by entering into a contractual relationship. *Id.* at ¶¶ 68-74. Defendants continue to operate as joint venturers to this day. *Id.* As co-venturers, Defendants have spelled out particular roles assumed by each, with GRE as the exclusive manufacturer of Seneca Brand cigarettes and NWS responsible for the brands marketing and distribution in the United States, a role which requires NWS to possess the brand's trademark. *Id.* at ¶¶ 70-74. No doubt, both defendants have invested a significant amount of their capital, time, skill and effort into the endeavor. *Id.* Moreover, both GRE and NWS exercise significant control over the joint venture's operation, demonstrated by the fact that even after "formally incorporating their manufacturing and distribution arms," those individuals who own and run Defendants, "have continued, and are required, to consult with each other before making important strategic decisions about marketing and distribution of the Seneca brand." *Id.*

Additionally, each Defendant shares in the profits of the enterprise, and correspondingly shares in any losses suffered by the joint venture. *Id.* ¶¶ 10, 75-76. GRE has also extended "continuous loans to Native Wholesale," further subjecting itself to "losses suffered by Native Wholesale." *Id.*

Purchase of Contraband Cigarettes by Investigators

On November 6, 2012, and again on June 5, 2013, as part of an investigation into Defendants' illegal shipment and sale of Seneca brand cigarettes in New York State, investigators from the New York State Office of the Attorney General entered the Poospatuck Reservation in Mastic, New York and purchased Seneca brand cigarettes from smoke shops located on the reservation. *Id.* at ¶¶ 84-96. After each purchase, the investigator opened the carton of cigarettes and inspected the ten individual packs contained therein. *Id.* In each case, none of the packs had a New York State tax stamp affixed, and thus there was no pre-payment of state cigarette excise and sales tax as required by New York State tax law. *Id.*[2]

Additionally, on January 16, 2013, federal agents from the Bureau of Alcohol, Tobacco, Firearms and Explosives entered the Skydancer Smoke Shop located in Seneca Falls, New York as part of a search and seizure operation and observed 16,230 cartons of Seneca brand cigarettes. *Id.* at ¶¶ 97-98. None of the packs from within those cartons bore New York State cigarette tax stamps. *Id.*

Significantly, Defendants have not ceased their illegal activity since the time the State filed this lawsuit two years ago. In December of last year, as part of the State's ongoing investigation of Defendants, investigators made additional purchases of Seneca brand cigarettes

[2] New York Tax Law § 471 does allow for the tax-free sale of cigarettes to tribal members on Indian land, but those cigarettes must nonetheless bear a New York State excise stamp. New York Tax Law §§ 471(1), (2) ("All cigarettes sold by agents and wholesalers to Indian nations or tribes or reservation cigarette sellers located on an Indian reservation must bear a tax stamp.")

from twelve Indian retail outlets located across the state on several different Indian reservations. Those purchases are described in detail in the affidavits of the investigators who conducted the investigations. *See* the Declaration of Andrew Scala, dated Jan. 28, 2015 (Docket No. 86), and the Declaration of Chad Shelmidine, dated Jan. 28, 2015 (Docket No. 87). As before, after each of the purchases, the cartons—which sold for as little as $19.95—were inspected and none of the packs inside had a New York State tax stamp affixed. *Id.*

Defendants' Failure to Register and Report

As part of the joint venture, and individually, Defendants engage in "interstate commerce" as defined under the PACT Act, through their actions of transferring and shipping hundreds of millions of cigarettes between Ontario, Canada and New York State, between New York and Indian country within New York, and/or between two points in New York through Indian country. *Id*. at ¶ 126. Yet, although required under the PACT Act, neither Defendant has registered with the New York Department of Taxation and Finance ("DTF") nor reported any of their New York State cigarette shipments or sales to DTF. *Id.* at ¶¶ 111-13, 129-32.

ARGUMENT

I. THE SECOND AMENDED COMPLAINT SUFFICIENTLY STATES PLAUSIBLE CLAIMS AGAINST BOTH DEFENDANTS

Defendants have moved to dismiss the State's Second Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim. Defendants argue that the allegations of the Second Amended Complaint are "principally 'labels and conclusions' rather than well-pleaded facts" and do not pass the "plausibility" standard.[3] Defendants' contentions are without merit. Rather, under governing standards, the State has more than adequately carried

[3] *See, e.g.*, Def. Grand River Enters. Six Nations, Ltd.'s Br. in Supp. of its Mot. to Dismiss the Second Am. Compl. and for a Stay of Discovery, dated Jan. 15, 2015, at 8-9 (Docket No. 81-1) ("GRE Br.").

its burden and asserted colorable claims against both GRE and NWS for violations of the CCTA, PACT Act and New York State tax law.

Pursuant to Rule 8(a)(2) of the Federal Rules of Civil Procedure, a complaint is only required to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Rule 8 does not require the sort of detailed factual allegations Defendants suggest. Instead, a complaint need do no more than state a claim that is "plausible on its face," *i.e.*, offer sufficient factual content "that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 and 570 (2007)). Stated differently, this plausibility standard "does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal[ity]." *Arista Records LLC v. Doe*, 604 F. 3d 110, 120 (2d Cir. 2010) (quoting *Twombly*, 550 U.S. at 556). The *Twombly* plausibility standard even permits plaintiffs to plead facts alleged "upon information and belief" to support its allegations "where the facts are peculiarly within the possession and control of the defendant." *Arista Records*, 604 F. 3d at 120 (citation omitted).

Moreover, specifically with respect to a Rule 12(b)(6) motion to dismiss, it is well-settled within the Second Circuit, that district courts "must accept the material facts alleged in the complaint as true and construe all reasonable inferences in the plaintiff's favor." *Hernandez v. Coughlin*, 18 F.3d 133, 136 (2d Cir. 1994) (citation omitted). Additionally, when deciding such a motion, the Second Circuit has continuously agreed that courts may only consider "the factual allegations in the complaint" as well as "documents attached to the complaint," "matters of which judicial notice might be taken," and "documents either in

plaintiff[s'] possession or of which plaintiffs had knowledge and relied on in bringing suit." *Brass v. Am. Film Techs., Inc.*, 987 F.2d 142, 150 (2d Cir. 1993) (internal citations omitted). Courts may not rely on factual contentions from outside the complaint that are introduced by defendants. *See Friedl v. City of New York*, 210 F.3d 79, 83-84 (2d Cir. 2000) (finding that "a district court errs when it considers affidavits and exhibits submitted by defendants . . . or relies on factual allegations contained in [defendants'] legal briefs or memoranda . . . in ruling on a 12(b)(6) motion to dismiss" (internal quotations and citations omitted)).

As explained below, Defendants' assertion that the Second Amended Complaint "falls well short of plausibility," and only contains "labels and conclusions" (GRE Br. at 8-10) completely ignores the abundant factual allegations from which, for example, it can be inferred that Defendants engaged in a joint venture to ship and sell untaxed cigarettes in and within New York State. *See* SAC ¶¶ 55-83. Indeed, it is self-evident from the face of the Second Amended Complaint that the State has more than plausibly—and certainly "more than a sheer possibility"—set forth Defendants' practice of knowingly selling, shipping and distributing unstamped and untaxed cigarettes throughout New York State in violation of the CCTA, PACT Act and New York State law. These averments unquestionably "raise a reasonable expectation that discovery will reveal" additional evidence of Defendants' engagement in the illegal distribution and sale of contraband cigarettes. *See Twombly*, 550 U.S. at 556.[4]

[4] It should also be noted that Defendants repeatedly assert, incorrectly, that the State is limited to evidence and conduct that is from the period following NWS's filing of a Chapter 11 bankruptcy petition, November 22, 2011 to the present; specifically with regard to the numerous joint venture allegations found in the Second Amended Complaint. *See, e.g.*, GRE Br. at 6, 20. While GRE and NWS will only be held liable in this lawsuit for their post-petition distribution of unstamped and untaxed cigarettes, evidence of their conduct prior to November 2011 is certainly relevant to establish the existence of a joint venture, which the State then alleges has continued to the present. *See, e.g.*, SAC ¶¶ 66, 74.

Accordingly, the Court should deny Defendants' Rule 12(b)(6) motions to dismiss.

II. DEFENDANT GRE IS SUBJECT TO CLAIMS UNDER THE CCTA, PACT ACT AND NEW YORK STATE LAW

The gravamen of GRE's motion to dismiss is that there are no allegations that GRE "*itself* sold, transferred or shipped cigarettes in or into the state of New York," or within the United States for that matter. GRE Br. at 1, 7-8 (emphasis in original). Rather, they claim that "all of Grand River's activities" with regard to the manufacturing and selling of Seneca brand cigarettes "take place wholly within Canada." *Id.* As a result, GRE posits that it should be immune from any liability under the PACT Act, CCTA and New York State law. GRE further argues that the State's allegations of a joint venture between Grand River and Native Wholesale "is not supported by the facts alleged," and that the State only provides "labels and conclusions" of a joint venture. *Id.* at 17-21. GRE's contentions are unavailing in several respects.

First, the State has adequately alleged GRE's direct violation of the CCTA and New York Tax Law §§ 471 and 471-e,[5] which, contrary to GRE's assertion, do not require that the State allege that GRE itself shipped or sold its cigarettes into or within New York State, or that GRE itself possessed the contraband cigarettes. To the contrary, the CCTA and New York Tax Law contemplate application to a party such as GRE who is at the start of the cigarette distribution chain, where such cigarettes *become* contraband. Second, GRE is also in violation of the CCTA, PACT Act and New York Tax Law §§ 471 and 471-e by virtue of its joint venture with NWS to manufacture and distribute unstamped Seneca brand cigarettes throughout New York State, which has been adequately pled and also raises a central question of fact that is

[5] The State also sets for claims against GRE under New York Tax Law § 480-b for failing to file certain certifications, which GRE does not refute. *Id.* at ¶¶ 136-40.

unsuitable for a motion to dismiss prior to the taking of discovery.[6] Accordingly, for the reasons that follow, GRE's motion to dismiss should be denied.

A. Grand River Is Directly Liable For Violations Of The CCTA And New York Tax Law §§ 471 And 471-e.

1. The CCTA, as intended by Congress, applies directly to GRE's alleged conduct.

GRE asserts that it is not directly liable under the CCTA because it did not sell cigarettes within New York, claiming instead it only sold cigarettes to Native Wholesale in Canada. GRE Br. at 10-11. Thus, according to GRE, at the time of sale, the cigarettes were not contraband because they had not yet been "found" in New York without the requisite tax stamps affixed. *Id.* In other words, GRE is suggesting that it was not Congress's intention that the CCTA should reach actors in the position of Grand River, but rather liability should be limited to those found presently to be in possession of contraband cigarettes. Defendant is mistaken.

Instructive of Grand River's faulty interpretation of the CCTA is the sound reasoning of Judge Jones in *City of New York v. Chavez*, 11-CV-2691, 2012 U.S. Dist. LEXIS 42792 (S.D.N.Y. Mar. 26, 2012). In *Chavez,* Judge Jones rejects GRE's proposition, making clear that to establish liability, the CCTA "does not require that the cigarettes sold, shipped, or transported *be contraband* at the time of the sale, shipment, or transport." *Id.* at *10 (emphasis added). Instead, the court noted that it is sufficient under the CCTA that the "cigarettes *become* contraband." *Id.* (emphasis added). Stated differently, the "CCTA focuses on the end result,"

[6] It should be noted that to the extent GRE's arguments sound like a challenge to personal jurisdiction, both Defendants have already agreed not to "interpose or assert the defense of personal jurisdiction." *See* Ltr. from Robert J. Luddy to Dana Biberman, dated Apr. 29, 2013, attached as Ex. A to the Notice of Voluntary Dismissal (Docket No. 7). GRE and NWS did so in exchange for the State dismissing the individually named defendants. *Id.* Consequently, GRE's motion to dismiss is made only pursuant to Rule 12(b)(6), and as such, its arguments, and the State's pleadings, should be decided only under standards applicable to a Rule 12(b)(6) motion.

not whether the cigarettes were contraband at the moment GRE possessed them. *Id.* at *11. As a result, CCTA claims may be pursued against those at the "start of the cigarette distribution chain," like GRE, even though the claimed injury—contraband cigarettes being found in New York—"did not accrue at the time of defendants' conduct but rather further down the chain of causation." *See City of New York v. Milhelm Attea & Bros.*, 06-CV-3620, 2012 U.S. Dist. LEXIS 116533, at *61 (E.D.N.Y. Aug. 17, 2012); *City of New York v. Golden Feather Smoke Shop, Inc.*, 08-CV-03966, 2013 U.S. Dist. LEXIS 47037, at *72 (E.D.N.Y. Mar. 29, 2013) (noting that CCTA liability attaches to those "injecting unstamped cigarettes" into the stream of commerce, "the reasonable and foreseeable consequence of which" was to cause cigarettes on which taxes had not been collected to be present in the City of New York).

Importantly, as Judge Jones recognized in *Chavez*, this interpretation is consistent with the specific intent of Congress. *See Chavez*, 2012 U.S. Dist. LEXIS 42792, at *10-11. Congress's intention not to limit the CCTA to possession of contraband cigarettes at the time of sale or shipment "is evidenced by the legislative history of the CCTA, which reveals Congress's contemporaneous interest in addressing the problem of cigarette 'bootlegging.'" *Id.* *10-11 (citation omitted); *see also* H.R. REP. NO. 95-1778, at 7) (1978) ("In 1978, Congress outlawed trafficking in contraband cigarettes with the aim of reducing evasion of state cigarette taxes . . . . Congress knew that '[t]here [was] widespread traffic in cigarettes moving in or otherwise affecting interstate or foreign commerce[.]'"). Additional congressional intent can be gleaned from the CCTA's use of the "passive voice in defining contraband," which, with regard to where the cigarettes "are found," requires an analysis that "focuses on an event that occurs without respect to a specific actor." *Chavez*, 2012 U.S. Dist. LEXIS 42792, at *11 (citation omitted). In other words, it is not necessary that the defendant alleged to have violated the CCTA be found in

actual possession of the contraband cigarettes or have at any point possessed the contraband cigarettes.

Consequently, it is irrelevant for purposes of CCTA liability that the Seneca brand cigarettes were not "contraband cigarettes" at the moment they were sold to NWS in Canada. Instead, it is clear that Congress intended for the CCTA to directly apply to cigarette manufacturers like GRE, an entity at the start of the distribution chain, wherever they may be located, so long as its cigarettes were to "become contraband" as a reasonable and foreseeable consequence of their insertion into the stream of commerce, and the cigarettes were ultimately "found" in a state without the requisite tax stamps affixed. If bad actors like GRE, who are engaging in the purposeful evasion of New York State tax laws, are deemed to be beyond the direct "reach of the CCTA," then "it seems clear that Congress's purpose" for enacting the CCTA "would be frustrated." *See Chavez*, 2012 U.S. Dist. LEXIS 42792, at *11.[7]

2. GRE is directly liable under New York Tax Law §§ 471 and 471-e because it knew its cigarettes were "destined for" sale in New York State without having taxes paid or tax stamps affixed.

Under the same reasoning, as an entity at the front of the cigarette distribution chain, GRE is also directly liable under New York Tax Law §§ 471 and 471-e. In *Milhelm*, Judge Amon discussed the New York Court of Appeal decision in *Cayuga Indian Nation of New York v. Gould*, 930 N.E.2d 233 (N.Y. 2010), which "expressly stated that it was permissible to enforce § 471 against parties engaged in 'large-scale' distribution of untaxed cigarettes,"

[7] It should also be mentioned that the CCTA authorizes a State, through its attorney general, to obtain appropriate relief for CCTA violations "from any person (*or by any person controlling such person*)." 18 U.S.C. § 2346(b)(1) & (2) (emphasis added). GRE states that the complaint lacks factual allegations establishing Grand River's "control over [NWS's] actions" once GRE sold cigarettes to NWS. GRE Br. at 12. However, as discussed *infra*, this is the very sort of factual question for which the underlying evidence is in the sole possession of Defendants, making dismissal of such claims inappropriate until such time as discovery can been conducted.

including "those entities at the start of the cigarette distribution chain" who "had knowledge that the cigarettes were 'destined for' non-Native American consumers," *i.e.*, destined for a taxable event. *Milhelm*, 2012 U.S. Dist. LEXIS 116533, at *59-61 (citing *Cayuga*, 930 N.E.2d at 256).

The *Cayuga* court's application of § 471 reasonably covers GRE's conduct in the instant case. The State has alleged that GRE has "knowledge" that its cigarettes "are destined" for "non-Native consumers," and further knows that they are shipped not to licensed stamping agents, as New York law requires, but instead to unlicensed, on-reservation entities without the required tax stamps. *See* SAC ¶¶ 58-60, 121-22. Such intentional and knowing conduct directly implicates GRE under New York Tax Law §§ 471 and 471-e.

B. The Existence Of A Joint Venture Presents A Fact Issue That Cannot Be Answered On A Motion To Dismiss.

GRE further contends that the State has not adequately averred that Defendants engaged in a joint venture to manufacture, ship and distribute Grand River's cigarettes into New York State. More specifically, GRE claims that the Second Amended Complaint's nearly thirty allegations outlining Defendants' illegal conduct as joint venturers do not remedy the State's "conclusory allegation of a joint venture." GRE Br. at 17-18. What Grand River fails to appreciate is that the very existence of a joint venture, including the establishment of a joint venture's several elements, requires a factual determination that is unsuitable for a motion to dismiss; reason alone to deny GRE's motion to dismiss.

It is axiomatic that questions of fact are not appropriate for dismissal at the early stages of a case prior to any development of the factual record through the exchange of documents and interrogatories, and the deposition of witnesses with pertinent knowledge. *See Carpenters Pension Trust Fund of St. Louis v. Barclays PLC*, 750 F.3d 227, 235 (2d Cir. 2014) (holding that with regard to certain claims defendants seek to dismiss, their arguments "involve

questions of fact and should not be resolved upon a motion to dismiss"). Instead, factual questions "should be reserved for the trier of fact—or at least the summary judgment stage." *Great Am. Fun Corp. v. Hosung New York Trading, Inc.*, 935 F. Supp. 488, 489 (S.D.N.Y. 1996). The reasoning for this is obvious: a plaintiff should be afforded the opportunity to prove the existence or non-existence of a factual question only after discovery, particularly where the evidence of that fact is in the sole possession of defendants. This well-settled principle rings equally true where a joint venture has been alleged.

"Whether a joint venture [between parties] exists"—a central issue as to GRE's liability—"is a question of fact" for which a motion to dismiss has been widely recognized as an improper mechanism for resolution. *See Celador Int'l, Ltd. v. Walt Disney Co.*, 347 F. Supp. 2d 846, 853 (C.D. Cal. 2004) (citation omitted); *see also Island Rehabilitative Servs. Corp. v. Maimonides Med. Ctr.*, 2008 N.Y. Misc. LEXIS 1590, at *22 (N.Y. Sup. Ct., Kings County 2008) (denying defendant's motion to dismiss so far as it improperly relied on the factual assertion that "a joint venture never existed"); *O'Conell v. Pharmaco*, 517 N.E.2d 688, 691 (Ill. App. Ct. 1987) (stating that the existence of a joint venture is ordinarily a question of fact). This is because, as previously mentioned, a plaintiff "should be given the opportunity to prove a joint venture existed by virtue of the conduct of the parties," which necessarily requires discovery from those with unique knowledge of that conduct. *Celador*, 347 F. Supp. 2d at 854. Thus, as recognized by New York courts, a "factual question [concerning the existence of a joint venture] . . . is beyond the scope of [a] court's examination on a motion to dismiss," *Island Rehabilitative Servs. Corp.*, 2008 N.Y. Misc. LEXIS 1590, at *22 (citation omitted), particularly whereas here, the elements of the joint venture have been adequately pled.

In the instant case, the State has included in its pleadings numerous factual allegations concerning Defendants' joint venture. In fact, these allegations are largely drawn from Defendants' own public filings in NWS's bankruptcy proceeding and in the NAFTA arbitration, in which Defendants held themselves out as being part of a co-venture with one another. *See* SAC ¶¶ 66-83. All additional evidence of Defendants' joint venture—which the State has alleged continues to the present based on Defendants' own representations in the NAFTA arbitration and the uninterrupted relationship between Defendants to manufacture, ship and sell untaxed Seneca brand cigarettes in New York State (SAC ¶¶ 58-83)—is uniquely within the possession and control of Defendants. The State, therefore, "should be given the opportunity to prove a joint venture existed" between Defendants only after full discovery of this factual inquiry. *See Celador*, 347 F. Supp. 2d at 854; *see also* Dec. 17, 2013 Hr'g Tr. at 10:18–11:15 (Docket No. 77-2) (Magistrate Judge Gary R. Brown stating to Grand River's counsel that with such allegations concerning a joint venture, "how can you possibly win on a motion to dismiss"; and further that "it just sounds a lot like a summary judgment motion than a motion to dismiss.")

Along the same lines, it also bears noting that in their motions to dismiss, Defendants raise numerous pertinent questions of fact—some of which go to the issue of joint venture and others of which go to different elements of the State's claims against them. For example:

- The level of control GRE had "over Native Wholesale Supply's actions once Grand River sold its cigarettes to Native Wholesale Supply in Canada." GRE Br. at 12.
- What level of knowledge GRE had, including all information that was provided to it, concerning "each shipment made by Native Wholesale Supply" into New York. *Id.* at 15.
- The extent of GRE's knowledge of NWS's operations. *Id.*

- When GRE determined that NWS would no longer be "the sole importer of Seneca brand cigarettes" into New York State. NWS Br. at 7.

- Whether "NWS operates exclusively within the boundaries of the Cattaraugus Indian Territories in Perrysburg, New York." *Id.* at 14.

- Whether the on-reservation dealers to whom NWS sold Seneca brand cigarettes were "tribal governments or divisions of Tribal governments," as NWS asserts unsupported. *Id.* at 18.

Such factual questions similarly make dismissal inappropriate at this early stage of the litigation without first conducting discovery to bring further clarity as to each.

C. The Second Amended Complaint Adequately Sets Forth Allegations Of A Joint Venture.

Grand River contends that the Second Amended Complaint contains "relatively few factual allegations relating to Grand River," and that those addressing the alleged joint venture "are principally 'labels and conclusions.'" GRE Br. at 8, 17. It would appear that GRE overlooked the nearly thirty well-pled factual allegations which describe GRE's unlawful conduct and set forth in substantial detail GRE's engagement with NWS in a joint venture to illegally sell untaxed and unstamped cigarettes in New York State. SAC ¶¶ 55-83. For the reasons that follow, the State has plausibly pled the existence of a joint venture between Defendants such that it should be permitted to conduct discovery to further prove those allegations.

It is well-settled that parties found to be in a joint venture may be held vicariously liable for each other's actions. *See Zehnick v. Meadowbrook II Assocs.*, 799 N.Y.S.2d 604, 607 (N.Y. App. Div. 3d Dep't 2005) (acknowledging that if two parties were found to "be engaged in a joint venture" then "one would be vicariously liable for the acts of the other"); *Energy Brands, Inc. v. Jorgensen*, 09-CV-591A, 2011 U.S. Dist. LEXIS 6937, at *13-14 (W.D.N.Y. Jan. 24, 2011) (finding the existence of a joint venture adequately pled, such that the transactions of one co-venturer in the state could be imputed upon the other co-venturers); 1897 N.Y. Jur. Business

Relationships § 2099, 2d Edition (2014) ("[E]ach joint venturer ordinarily stands in the relation of principal, as well as agent, as to each of the other co-venturers.")

Under New York law, to plead the existence of a joint venture, a plaintiff must plausibly set forth the following five elements: "(1) two or more parties entered an agreement to create an enterprise for profit, (2) the agreement evidences the parties' mutual intent to be joint venturers, (3) each party contributed property, financing, skill, knowledge, or effort to the venture, (4) each party had some degree of joint management control over the venture, and (5) there was a provision for the sharing of both losses and profits." *Kidz Cloz, Inc. v. Officially for Kids, Inc.*, 00-Civ.-6270, 2001 U.S. Dist. LEXIS 1135, at *7 (S.D.N.Y. Feb. 8, 2001) ("*Kidz Cloz I*").

Moreover, although GRE appears intent on holding the State to a more exacting standard than is required for pleading a joint venture, as evidenced by its reliance on summary judgment decisions, *see Kidz Cloz, Inc. v. Officially For Kids, Inc.*, 320 F. Supp. 2d 164, 168 (S.D.N.Y. 2004) ("*Kidz Cloz II*"); *Kaufman v. Torkan,* 859 N.Y.S.2d 253, 255 (N.Y. App. Div. 2d Dep't 2008), under appropriate motion to dismiss standards, courts applying New York law have made clear that they will treat the required joint venture elements in a light most favorable to the plaintiff, and if plausibly pled, will allow plaintiff the opportunity to further support its joint venture claim with information produced in discovery. *See Kidz Cloz I*, 2001 U.S. Dist. LEXIS 1135, at *7 ("Read in the light most favorable to plaintiffs, the complaint adequately asserts the elements of a partnership or joint venture."); *Energy Brands*, 2011 U.S. Dist. LEXIS 6937, at *19-20 ("While each defendants' role in the purported joint venture remains to be seen after discovery, the allegations in the complaint are sufficient to state a claim for liability against each of the . . .

defendants under a joint venture theory.").[8] As set forth below, the State has adequately pled all five elements of Defendants' self-described "vertically integrated" joint venture. Therefore GRE's motion to dismiss should be denied.

The first element is satisfied where there is an agreement between two parties to conduct a for-profit business together. *See Kidz Cloz I*, 2001 U.S. Dist. LEXIS 1135, at *7 (finding the first element satisfied where two parties agreed to conduct a for-profit business together through their individual companies to manufacture and sell children's clothing). In the instant matter, GRE and NWS admittedly agreed to conduct a "vertically integrated," for-profit "business enterprise" of manufacturing and distributing Seneca brand cigarettes in the United State as part of a "co-venture." *See* SAC ¶¶ 68-74. Defendants formalized this business relationship by entering into a "contractual relationship" in which GRE was designated "the exclusive manufacturer and packager" of Seneca brand cigarettes and NWS as the "exclusive importer distributor" of those cigarettes through 2002. SAC ¶ 71. It is immaterial that this contractual relationship between GRE and NWS may have ended in 2002, because a joint venture may exist absent a written agreement, but instead "based upon the *implied* agreement evidenced by the parties' conduct." *Richbell Info. Servs. v. Jupiter Partners, L.P.*, 765 N.Y.S.2d 575, 583 (N.Y. App. Div. 1st Dep't 2003) (emphasis in original) (holding that a complaint adequately pled a joint venture where there was an implied agreement). Here, as alleged, there is an implied joint venture agreement between GRE and NWS that has continued to the present, which may be reasonably inferred from Defendants' ongoing relationship to manufacture and

[8] It is certainly telling that Defendants cite to the *Kidz Cloz II* summary judgment decision as an example of a court rejecting joint venture claims, but fail to acknowledge that the same court in *Kidz Cloz I* denied a motion to dismiss and found the elements of a joint venture adequately pled.

distribute Seneca brand cigarettes that are sold to New York State consumers both untaxed and unstamped.

The second element, intent of the parties to be joint venturers, has been determined to be the "most important element." *See In re Parmalat Securities Litig.*, 421 F. Supp. 2d 703, 717 (S.D.N.Y. 2006). Moreover, as with the first element, intent to enter into a joint venture may be "either express or implied." *McGhan v. Ebersol*, 608 F. Supp. 277, 282 (S.D.N.Y. 1985) (emphasis added). In the instant case, Defendants' intent to enter into a joint venture could not be more obvious, as evinced by the many affirmative representations GRE made in the NAFTA arbitration, many of which are set forth in the Second Amended Complaint. For example, GRE represents that in 1999, Defendants "established the basic structure of the [vertically integrated] business enterprise" to manufacture, distribute and promote Seneca brand products in the United States, which they refer to as a "co-venture," and that this business enterprise "continues to exist today." SAC ¶¶ 68-74. Further representative of Defendants' intent is Grand River's insistence that, although the Defendants "constitute separate legal entities," this "does not change the collective nature of [their] underlying business venture in the United States." *Id.* at ¶ 68(b).

The third element, requiring contribution of "property, financing skill, knowledge, or effort" is also adequately alleged based on GRE's numerous admissions in the NAFTA arbitration. To satisfy this element it is sufficient that both parties "contribute[] capital to the enterprise." *Kidz Cloz I*, 2001 U.S. Dist. LEXIS 1135, at *8. This was the case in *Kidz Cloz I*, in which one party to the joint venture was alleged to have paid all marketing and sales expenses, and the other bore the manufacturing costs. *Id.* The same relationship exists here: NWS bears the costs of distribution and marketing, and GRE is responsible for manufacturing costs. SAC ¶¶

69-74. Moreover, GRE explicitly claims that defendants and their principals, "have each contributed their own know-how and the resources of their respective companies towards [the joint venture's] success." *Id.* at ¶ 75.

With regard to the fourth element of "joint management control," the State has specifically alleged that both Defendants "exert significant control over the venture's operations." *Id.* at ¶ 74. This assertion is not a mere "label or conclusion," as GRE contends, but instead is supported by GRE's own admission that even after "formally incorporating their manufacturing and distribution arms," those who own and run the Defendants "have continued, and are required, to consult with each other before making important strategic decisions about marketing and distribution of the Seneca brand." *Id.*

The final element of a joint ventureship—profit and loss sharing—is also satisfactorily alleged in the Second Amended Complaint. For the profit component, it is sufficient if a complaint "plainly" asserts that the two parties share in the profits generated by the enterprise. *See Kidz Cloz I*, 2001 U.S. Dist. LEXIS 1135, at *8. For example, in *Kidz Cloz I*, it was sufficient that one co-venturer was alleged to have received commissions from marketing and the other co-venturer profits from manufacturing. *Id.* Here, as previously explained, this reflects the exact business model of GRE and NWS as reasonably inferred from GRE's factual assertions in the NAFTA arbitration.

To adequately aver shared losses, courts have found that where the co-venturers' joint profitability depends on the sale of a product, then it can be reasonably inferred that the co-venturers will each absorb shared losses if the joint venture fails to sell that product. *See Kidz Cloz I*, 2001 U.S. Dist. LEXIS 1135, at *9-10 (finding the "sharing of losses" to be adequately alleged, even without those exact words, where if the children's clothing the joint venture

manufactured, marketed and sold was unsuccessful, both co-venturers "would share the loss"). In other words, shared losses, for pleading purposes, is established where both parties stand to lose if the venture is unsuccessful, *see id.* (citation omitted), even where they "suffer losses in different proportions." *Richbell*, 765 N.Y.S.2d at 584.

In the instant case, as in *Kidz Cloz I*, to the extent the sale of Seneca brand cigarettes is no longer successful—for example because of this lawsuit and others like it, which would prevent these Defendants from continuing to evade State cigarette taxes—both Defendants would share in the lost profits they currently enjoy from unlawfully selling untaxed cigarettes to unlicensed dealers across New York State. Further indicative of the Defendants' shared losses is GRE's extension of "continuous loans to Native Wholesale," which as a result, exposes GRE to "losses suffered by Native Wholesale." SAC ¶ 75. At a minimum, even if no express agreement is alleged, such allegations in concert with the obvious shared losses if their joint venture fails, raise a question of fact that requires denial of GRE's motion to dismiss. *See Don v. Singer*, Case No. 105584/06, 2011 N.Y. Misc. LEXIS 3569, at *23 (N.Y. Sup. Ct. July 13, 2011) (denying a motion to dismiss a joint venture claim where "a genuine issue of material fact exist[ed] as to whether there was an agreement to share losses as part of the joint venture").

Thus, for the above reasons, the State's allegations do in fact plausibly allege the existence of joint venture between Defendants. Importantly, they also "raise a reasonable expectation that discovery will reveal" further evidence of the Defendants' joint illegal activity. *See Twombly*, 550 U.S. at 556. Defendants' assertions as to the purported inadequacies of the State's joint venture allegations only further highlight the need for discovery.

For example, in seeking dismissal of the State's joint venture allegations, GRE relies substantially on the fact that Peter Montour—who is alleged to have signed checks drawn

on *NWS's* operating account even though he was the father of *GRE* CEO Jerry Montour and a former *GRE* shareholder and director (SAC ¶¶ 77-78)—is now deceased. GRE Br. at 3, 21. The fact of Peter Montour's death, however, is both irrelevant and an attempt by GRE to divert the Court's attention. What is relevant is that these NWS checks, signed by a former GRE shareholder and director, along with the State's other joint venture allegations, are merely representative of the larger universe of evidence of a joint venture that is uniquely within Defendants' possession. As such, these averments raise a reasonable expectation that discovery will expose additional evidence of Defendants' joint venture to illegally distribute and sell contraband cigarettes.

As a final matter, Grand River asserts that the NAFTA arbitration tribunal's final conclusion renders GRE's factual admissions from that proceeding "legally-[ir]relevant" in this case. Again, GRE is trying to deflect from what are otherwise incontrovertible factual allegations of GRE's joint venture with NWS. The ultimate determination of the NAFTA tribunal, which was deciding whether an "investment" threshold was met under NAFTA standards, is of no consequence to this Court's use of facts coming out of that arbitration. The tribunal's determination relied on prior NAFTA tribunal decisions interpreting NAFTA standards, made a legal determination under those NAFTA standards, and only used factual evidence extracted from United States case law to be applied against the NAFTA standards. *See* Final Award issued in *Grand River Enters. Six Nations, Ltd. v. United States*, dated Jan. 12, 2011, available at http://www.state.gov/documents/organization/156820.pdf ("NAFTA Final Award"), and attached to the Sprague Decl. as Ex. A.[9]

[9] See the NAFTA Final Award at ¶¶ 95-97. The Tribunal refers in footnotes 15-17 to affidavits submitted by GRE principals in *Grand River Enters. v. King*, Case No. 02 Civ. 5068 (S.D.N.Y. 2009), *Kansas v. Grand River Enters.*, Case. No. 08C207 (D. Kan. 2008) and

This is an exact reflection of what the Attorney General is asking this Court to do with the admissions GRE made in the NAFTA arbitration: The Court should consider factual evidence from the NAFTA arbitration, and analyze that evidence using New York's legal standards for joint venture. However, for the reasons explained, the tribunal's legal determination, measured against an entirely different legal threshold, is irrelevant to that analysis.

In sum, GRE should not be permitted to hold itself out as being part of a joint venture with NWS when it suits their collective financial objectives, but then later disavow the existence of that relationship in order to use NWS as a shield in the face of significant liability as a result of their joint illegal activity—activity that has inflicted significant damage upon the state of New York and its residents.

III. DEFENDANT NWS IS SUBJECT TO CLAIMS UNDER THE CCTA, PACT ACT AND NEW YORK STATE LAW

The State's Second Amended Complaint adequately asserts claims against NWS arising under the CCTA, PACT Act and New York State Tax Law. With regard to each of NWS's violations, the State avers the applicable elements for each claim and identifies NWS's conduct which satisfies each of those elements. NWS does not seek dismissal of the state law claims and thus there is no need to analyze those below.

The CCTA makes it "unlawful for any person knowingly to ship, transport, receive, possess, sell, distribute or purchase contraband cigarettes." 18 U.S.C. § 2342(a). A CCTA violation requires that four elements be satisfied: "that a party (1) knowingly ship, transport, receive, possess, sell, distribute or purchase (2) more than 10,000 cigarettes (3) that do

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Tobaccoville USA, Inc. v. McMaster, No. 2007-ALJ-30-0198-CC S.C. 287 (S. Car. Admin. Law Ct. 2010).

not bear tax stamps, (4) under circumstances where state or local cigarette tax law requires the cigarettes to bear such stamps." *City of New York v. Golden Feather Smoke Shop, Inc.*, No. 08-CV-3966, 2009 U.S. Dist. LEXIS 20953, at *33 (E.D.N.Y. Mar. 16, 2009) (internal quotation marks and citation omitted). In the instant case, as alleged, NWS has knowingly possessed, distributed and sold millions of cigarettes in New York State without the requisite New York State tax stamp being affixed—a clear violation of the CCTA.

With regard to the PACT Act, the State sets forth claims against NWS under 15 U.S.C. § 376, which requires "[a]ny person who sells, transfers, or ships *for profit* cigarettes . . . *in interstate commerce*, whereby such cigarettes . . . are shipped into a State, locality, or Indian country of an Indian tribe taxing the sale or use of cigarettes," to register with the U.S. Attorney General and with the tobacco tax administrators of each State into which such shipments are made, in this case DTF, and to file monthly reports providing details of each shipment. *Id.* at § 376(a) (emphasis added).

NWS's obligations under the PACT Act to register with DTF and file monthly reports for its shipments into New York State are straightforward and incontrovertible. NWS, as a business corporation formed under the laws of the Sac and Fox Nation of Oklahoma, is a "person," as the term is broadly defined; its shipments clearly go through "interstate commerce," as explained below; and those shipments terminate in New York State, which imposes cigarette taxes. *See* 15 U.S.C. § 376(a). As alleged, NWS and GRE have failed to register with DTF or file the monthly reports, undermining the State's tax collection efforts on taxable sales in Indian country, the foundational purpose of the PACT Act and the Jenkins Act before it. *See* SAC ¶¶ 112-13.

NWS seeks to avoid liability under the CCTA and PACT Act, not by challenging the State's well-pled allegations of its illegal conduct, including that it knowingly and purposefully evades New York State cigarette tax laws, but rather by futilely searching for applicable exceptions under the CCTA and PACT Act that have no foundation in the law and have previously been rejected.

Accordingly, for the reasons explained below, NWS's motion to dismiss should be denied.

A. The State's Regulation Of NWS's Cigarette Sales In New York Is Not Limited By The Indian Commerce Clause.

In arguing that the CCTA and PACT Act are not applicable to its conduct, Native Wholesale, a private corporation organized under the laws of one tribe and operated on the lands of another, couches a futile Indian Commerce Clause argument in other terms. Specifically, NWS argues that New York State may not enforce its laws—*i.e.*, taxation of cigarettes sold to non-Indians, and the State's pre-collection mechanism for collecting such taxes—in "Indian country" with respect "to Native to Native" commercial transactions. *See* NWS Br. at 13, 21-24. NWS concludes, therefore, that this case must be dismissed because "New York cannot tax or regulate NWS in Indian country absent Congressional authorization," and no such authorization exists. *Id.* at 24. Unquestionably, NWS is asserting a federal preemption defense with its roots in the Indian Commerce Clause.

The vagueness of NWS's Indian Commerce Clause argument, and what can only be assumed was an intentional decision not to use those exact words, is attributable to the fact that NWS previously raised this very argument—"that transactions between Native Americans . . . are beyond the reach of state regulatory power," *State ex rel. Edmondson v. Native Wholesale Supply*, 237 P.3d 199, 215 (Okla. 2010) (hereinafter "*State of Oklahoma*")—before others Courts

and, as described below, in each instance the court determined this argument to be "clearly wrong." *See id.*; *accord Idaho v. Native Wholesale Supply Co.*, 08-CV-396, 2009 U.S. Dist. LEXIS 28688, at *6-10 (D. Idaho Apr. 6, 2009); *State v. Native Wholesale Supply Co.*, 155 Idaho 337, 342-43 (Idaho 2013) (hereinafter "*State of Idaho*"). These cases, therefore, are instructive of the erroneous nature of NWS's argument which has no basis in the law and is undermined by well-settled Supreme Court precedent.

The Indian Commerce Clause of the United States Constitution provides Congress with the power to "regulate Commerce . . . with the Indian tribes." U.S. Const. art. 1, § 8. As was recognized by the Supreme Court of Oklahoma, NWS's argument that on-reservation native to native transactions are beyond the State's regulatory power is in truth an argument "that there is a dormant or negative aspect to the Indian Commerce Clause"; that "[b]y granting to Congress the power to regulate Indian commerce . . . the Indian Commerce Clause forbids states to regulate such commerce." *State of Oklahoma*, 237 P.3d at 215. As Oklahoma's highest court correctly held, there is no support for such an interpretation in United States Supreme Court jurisprudence. *Id.* Rather, it is well-settled that the Indian Commerce Clause "does not 'of its own force' automatically bar all state regulation of Indian commerce," including state taxation of on-reservation activities. *Id.* (quoting *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 157 (1980) ("It can no longer be seriously argued that the Indian Commerce clause . . . automatically bars all state taxation . . . .") (other citation omitted). Instead, each state assertion of authority over tribal land must be examined under the balancing test employed by the Supreme Court in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-45 (1980), in order to determine whether or not the State is preempted by federal law. *See State of Oklahoma*, 237 P.3d at 215; *State of Idaho*, 155 Idaho at 342.

With regard to State taxation of cigarettes, the Supreme Court has already held under the *Bracker* analysis that States are allowed to regulate and tax on-reservation cigarette sales from Indians to non-Indians, and further, to impose regulations on tribal wholesalers that are necessary to assess and collect those taxes. *See State of Oklahoma*, 237 P.3d at 213-14 (citing *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 481-82 (1976) (upholding Montana tax law requiring "that the Indian tribal seller collect a tax validly imposed on non-Indians"); *Colville*, 447 U.S. at 161 (upholding precollection scheme that required retailers to either purchase prestamped cigarettes from Wholesalers or purchase tax stamps directly from the state)).

Importantly, despite NWS's suggestion to the contrary, NWS Br. 22-23, under the *Bracker* analysis, there is also "no blanket ban on state regulation of inter-tribunal commerce *even on a reservation*." *State of Oklahoma*, 237 P.3d at 215-16 (emphasis added). This is because the Supreme Court has ruled on this very issue "by allowing state taxation of retail sales made on-reservation by tribal retailers to Native Americans who are not members of the governing tribe," *i.e.*, transactions between Indians of different tribes is not protected. *Id.* at 216 (citing *Colville*, 447 U.S. at 154-62; *Dep't of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 75 (1994) (upholding regulations "reasonably necessary" to enforce assessment and collection of a valid state tax imposed on Non-Indian and *nonmember Indian* purchasers of cigarettes from reservation retailers (emphasis added))). Here, as in *State of Oklahoma*, NWS is a corporation chartered under the Sac and Fox Nation of Oklahoma, operating on the land of a different tribe in New York State and conducting business with various private entities located on other tribal lands throughout New York State. *See* 237 P.3d at 216. Consequently, even if NWS were an Indian, which it is not, as discussed *infra*, it is not a member

of the tribe on whose land it operates, nor of the tribe with whose members it transacts business, and therefore is not "beyond the reach" of New York State taxation and regulatory authority. *See id.*

Further, in the instant case, the *Bracker* analysis is not even necessary because NWS's conduct is not "on-reservation conduct for purposes of Indian Commerce Clause jurisprudence," but rather "off-reservation conduct" unencumbered by any of the limitations suggested by NWS. *Id.* at 216. The Supreme Court has made clear that "activities conducted by Native Americans off the reservation or the off-reservation activities of non-Indians or nonmember Indians doing business with reservation Indians are generally held to be subject to non-discriminatory state laws." *Id.* at 214 (citing *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973) ("Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State.")). Here, as the courts in Oklahoma and Idaho noted, NWS's activities extend well beyond the boundaries of any one reservation: "NWS is operated on the Seneca reservation in New York, but is organized under the laws of a separate tribe"; "[i]t purchases cigarettes that are manufactured in Canada"; it then ships those cigarettes into New York where they are sold throughout the State on various tribal lands. *State of Idaho*, 155 Idaho at 343; *see also State of Oklahoma*, 237 P.3d at 216 ("[T]he entire process comprising these sales thus takes place in multiple locations both on and off different tribal lands."). Thus, NWS's conduct is "off-reservation," and the State is well within its right to regulate NWS's sale of cigarettes in New York, and to enforce both state and federal law where NWS purposefully evades its cigarette tax obligations.

B. The CCTA's "Indian In Indian Country" Exception Is Inapplicable To NWS.

NWS asserts in its motion to dismiss that NWS is an "Indian" operating on tribal lands, and as such, is an "Indian in Indian country" protected from civil suit under the CCTA. NWS Br. at 9-14; *see* 18 U.S.C. § 2346(b)(1) ("No civil action may be commenced under this paragraph against an Indian tribe or an Indian in Indian country.") This a tired argument that has been repeatedly advanced by NWS and soundly rejected in each case because, as explained below, under no circumstances is a privately owned corporation such as NWS, which is operated for the benefit of its sole shareholder, deemed an "Indian" or protected by tribal sovereign immunity. This Court should not allow NWS yet another bite at the apple of this baseless argument.[10]

As an initial matter, it is a well-settled "interpretive principle that statutory exceptions are to be construed narrowly in order to preserve the primary operation of the general rule." *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 403 (2d Cir. 2008) (internal brackets and citations omitted). Here, NWS seeks not to narrowly interpret "Indian in Indian country," but rather to expand the exception beyond its plain meaning to include a privately owned corporation as an "Indian." This is clearly an improper interpretation in contravention of established principles of statutory interpretation, and has been repeatedly rejected.

[10] It also bears mentioning that, as discussed *supra* at Point II-A, NWS's conduct as part of its joint venture with GRE "takes place in multiple locations both on and off different tribal lands." *State of Oklahoma*, 237 P.3d at 216. As such it is not on-reservation conduct taking place "in Indian country," but rather off-reservation conduct subject to the State's taxation and stamping regulations under New York Tax Law §§ 471 and 471-e, which form the basis of the State's federal CCTA claims. *See City of New York v. Milhelm Attea & Bros., Inc.*, 550 F. Supp. 2d 332, 346-49 (E.D.N.Y. 2008) ("§ 471 constitutes an 'applicable' tax for the purposes of the CCTA and may serve as the basis for claims under . . . the CCTA").

NWS cites to the legislative history of the "Indian in Indian country" exception as evidence that Congress intended to protect "tribally-chartered business entities" under this provision. NWS Br. at 11-12. However, NWS grossly mischaracterizes the congressional record and selects out of context snippets intended to fit its false narrative of blanket immunity for private corporations chartered under tribal laws. When thoroughly examined, the legislative history cited by NWS actually demonstrates that Congress only included the exception to protect tribal sovereign immunity and tribal governments; there is no mention of "tribally-chartered business entities" or privately-owned corporations, despite NWS's best efforts to read such language into the record.

For example, NWS cites to statements made by Representative Dale Kildee of Michigan during the brief debate of the "Indian in Indian country" exception. Specifically, NWS suggests that Rep. Kildee felt it "improper to impose liability on tribes and tribal entities that were 'legally involved' in tobacco commerce"; and that these were "clearly not the types of entities we are targeting." NWS Br. at 11 (citing 151 CONG. REC. H6273, H6284, USA Patriot and Terrorism Prevention Reauthorization Act of 2005 (July 21, 2005)) (emphasis supplied by NWS). NWS conveniently omits that Rep. Kildee specially referenced "Indian tribal governments," *not* tribally-chartered entities, as the "type of entities" that were not being targeted by the CCTA. 151 CONG. REC. at H6284. Rep. Kildee further notes the purpose of the "Indian in Indian country" exception, stating that he understood "an amendment has been incorporated that will go a long way to protecting tribal governments and tribal sovereignty." *Id.* at H6285. This language is also notably absent from NWS's motion.

The other representatives who introduced and debated the "Indian in Indian country" exception similarly make clear that the amendment was offered to avoid the unintended

targeting of tribal governments and to preserve tribal sovereign immunity; not to protect individually-owned businesses as NWS wrongly suggests:

- Rep. John Conyers (MI): "I am glad that Mr. Coble offered language *to mitigate concerns over his amendment's impact on tribal sovereignty* . . . Mr. Coble has modified his amendment and has incorporated language that will go a long way to protecting *tribal governments* and *tribal sovereignty*." *Id.* at H6284 (emphasis added).

- Rep. Jim Sennsenbrenner (WI): I would also say that as a result of the modification that the gentleman from North Carolina has proposed, *there is no longer a question of tribal sovereignty*." *Id.* (emphasis added).

- Rep. Eric Cantor (VA): "[A]ll the modifications make sure that there is *no impact on tribal sovereignty*." *Id.* (emphasis added).

With regard to the aforementioned doctrine of tribal sovereign immunity, NWS has twice before asserted that it is an Indian and subject to its protections. And in both instances, which were before the same Idaho and Oklahoma courts that denied its Indian Commerce Clause arguments, NWS's contention was soundly rejected. *See State of Idaho*, 155 Idaho at 341-42; *State of Oklahoma*, 237 P.3d at 210-11. Consequently, those decisions also prove equally instructive here in illustrating the error in NWS's assertion that it should be considered an "Indian" under the CCTA.

Under established principles of tribal sovereign immunity, which Congress sought to protect through the "Indian in Indian country" exception, courts widely acknowledge that such immunity, "does not automatically apply to every business that happens to be tribally chartered or owned by individuals of Native-American ancestry." *State of Oklahoma*, 237 P.3d at 210 (citation omitted). Instead, it has been held, including by New York's highest courts, that a corporation "is clothed with a tribe's sovereign immunity from suit only if it operates as an extension of a tribe"; in other words, where "the entity acts as an arm of the tribe so that its

activities are properly deemed to be those of the tribe." *Id.; see also Sue/Perior Concrete & Paving, Inc. v. Lewiston Golf Course Corp.*, No. 196, 2014 N.Y. LEXIS 3352, at *10-11 (N.Y. Nov. 25, 2014). The purpose of this is apparent: "Individual Native Americans acting for their own purposes are no more entitled to the immunity from suit afforded a tribe than a private state citizen engaging in his or her own business is entitled to the State's sovereign immunity." *State of Oklahoma*, 237 P.3d at 210.

Among the factors considered in determining if a corporation is an "arm of the tribe" is whether the business is incorporated under tribal laws, "managed by tribal officers," "operated to further tribal governmental objectives," "and whether the business's property is owned by the tribe." *State of Oklahoma*, 237 P.3d at 210. Indeed, as the New York Court of Appeals held in *Lewiston Golf Course Corp*, even where the corporation is owned by the tribe, immunity still will not attach if the business purpose is not closely aligned enough with that of the tribe. 2014 N.Y. LEXIS 3352, at *13-19 (noting that the "United States Supreme Court has never held that corporations affiliated with an Indian tribe have sovereign immunity").

Applying those factors to circumstances essentially identical to those here, the Oklahoma Supreme Court refused to recognize NWS as an arm of the tribe:

> Native Wholesale Supply is not clothed with tribal immunity from suit. Although Native Wholesale Supply is chartered by the Sac and Fox Nation, it does business on the tribal land of a different tribe; it is not managed by tribal officials of either tribe; and it is not operated to further the governmental objectives of any tribe. *It operates solely as a private business for the personal profit of its owner who happens to be a Native American belonging to the Seneca Nation*. The Company simply does not have a sufficiently close affiliation with any tribe to share in that tribe's sovereign immunity from suit.

State of Oklahoma, 237 P.3d at 210-11 (emphasis added). The State agrees: NWS should not be permitted to hide behind the cloak of its owner's Native-American ancestry or the fact that it was chartered under the laws of an Oklahoma tribe where it does not even operate.

The Idaho Supreme Court rejected a similar argument advanced by NWS to avoid the state of Idaho's regulatory reach. In that case, the court specifically held that "as a corporation, *NWS is not an Indian*," and therefore the state was entitled to sue and regulate NWS's importation and sale of cigarettes in Idaho. *State of Idaho*, 155 Idaho at 342 ("The fact that NWS is operated on a different reservation than the one under which it is organized suggests that it is not connected to tribal business.") (emphasis added). This is in line with other courts which have similarly concluded that a "corporation" like NWS "is not an Indian for purposes of immunity from state taxation." *Baraga Prods., Inc. v. Comm'r of Revenue*, 971 F. Supp. 294, 298 (W.D. Mich 1997) (concluding that plaintiff is a corporation, a legal fiction not equivalent to a member of the Keweenaw Bay Indian Community Tribe, and therefore, "since plaintiff is not acting on behalf of or in place of the Tribe, it is subject to" state taxation); *see also Muscogee Nation v. Henry*, CIV 10-019, 2010 U.S. Dist. LEXIS 26445, at *9 (E.D. Okla. Mar. 18, 2010) (concluding that Lake Erie Tobacco Co. is a corporation, and therefore "not an Indian" protected by immunity, nor is it "an arm of the Seneca Nation of New York" (citation omitted)).

In sum, given the directly applicable decisions and reasoning of these courts, this Court should similarly find that NWS is a private business "operated solely for the personal profit of its owner who happens to be a Native American"—it is not an "arm of the tribe" and certainly is not an "Indian." *See State of Oklahoma*, 237 P.3d at 210-11. Thus, it is not protected by tribal sovereign immunity, nor is it protected by the "Indian in Indian country" exception of the CCTA.

C. NWS Is Liable Under The PACT Act For Failing To Comply With Its Registration And Monthly Reporting Requirements.

The PACT Act was enacted because, despite the already existing legal framework by which the federal government assisted States in enforcing their cigarette tax laws, *i.e.*, the

Jenkins Act and the CCTA, Congress realized that cigarettes continued to be smuggled into states, including by businesses located on Indian land, without the payment of state cigarette taxes or submission of required Jenkins Act reports. *See* GAO, Internet Cigarette Sales: Giving ATF Investigative Authority May Improve Reporting and Enforcement, at Appx. II (August 2002) ("GAO Report"), attached to the Sprague Decl. as Ex. B. Through the PACT Act, Congress sought, *inter alia*, to make it "more difficult for cigarette and smokeless tobacco traffickers to engage in and profit from their illegal activities." Pub. L. 111-154, PACT Act findings, § 1(c) (3)-(5), 124 Stat. 1088 (appended to 15 U.S.C. § 375).

As described above, NWS continues to flout its State cigarette tax obligations and is in blatant violation of the PACT Act. NWS has neither registered with DTF nor filed monthly reports for its shipments into New York State, as the law requires. SAC ¶¶ 112-13. NWS contends that the PACT Act's reporting and registration requirements do not apply to it because it "does not engage in 'delivery sales'" and because the transactions in which it engages do not fit within the PACT Act's definition of "interstate commerce." NWS Br. at 15. As explained below, both arguments are devoid of any merit and only further highlight why NWS should be held accountable for its shipment and sale of hundreds of millions of unstamped and untaxed cigarettes in New York State.

1. <u>The PACT Act's registration and reporting requirements are entirely separate from the provisions governing "delivery sales</u>."

NWS asserts that because the PACT Act governs "delivery sales," which are sales to "consumers," and because NWS only shipped and sold cigarettes to on-reservation wholesalers, not consumers, the PACT Act's regulatory scheme does not apply to it. *Id.* at 15-18. It is true that the PACT Act does govern "delivery sales," and that so far as such sales go to a "consumer" they are subject to 15 U.S.C. § 376a. However, what NWS inexplicably fails to

recognize is that § 376a is not the provision included in the State's allegations. Instead, the State's complaint avers that NWS is bound by, and has violated, the PACT Act's registration and reporting requirements promulgated in 15 U.S.C. § 376. NWS is conflating, whether intentionally or not, two separate provisions of the PACT Act, each of which, independent of the other, creates liability for violators. The registration and reporting obligations under § 376 apply to "any person" selling or shipping cigarettes "for profit" in "interstate commerce," where those cigarettes are shipped into a State that imposes cigarette taxes; not included is any requirement that the shipments constitute "delivery sales." 15 U.S.C. § 376(a).

However, to the extent NWS would like to put at issue the requirements of § 376a, and further expand Defendants' liability in this suit under the PACT Act, contrary to NWS's assertion, its distribution and sale of cigarettes within New York State do constitute "delivery sales" to "consumers," and thus NWS is subject to the requirements of § 376a.

Specifically, under the PACT Act, "consumer" is broadly defined to encompass "any person that purchases cigarettes or smokeless tobacco"; however, as NWS notes, "consumer" does not include "any person *lawfully operating* as a manufacturer, distributor, wholesaler, or retailer." 15 U.S.C. § 375(4) (emphasis added).[11] Herein lies the fatal flaw in

[11] NWS further contends, improperly, that "Congress used 'consumer' to mean an individual who consumes the product." NWS Br. at 17. Besides being facially more expansive than the definition, *see* 15 U.S.C. § 375(4), Congress also included provisions in the PACT Act that distinguish between individual consumers (the only type who could personally consume cigarettes) and other consumers. *See, e.g., id.* at § 376a(e)(5)(C)(ii) (preempting State enforcement against common carriers for deliveries "to individual consumers or personal residences" in certain situations). Further, Congress knows how to define the term "consumer" to mean an individual purchaser when it so intends, and indeed did so during the same term. *See* Pub. L. 111-31, § 900(7) (distributor is any person who furthers the distribution of a tobacco product at any point "from the original place of manufacturer to the person who sells or distributes the product to individuals for personal consumption"), 123 Stat. 1776, codified at 21 U.S.C. § 387(7); *see also* 15 U.S.C. § 1601 ("consumer" means "a natural person" using services

NWS's argument. In New York State, only state-licensed stamping agents are authorized to receive or possess unstamped cigarettes. Those to whom NWS is selling unstamped Seneca brand cigarettes are not licensed stamping agents, and thus, are not "lawfully operating" in New York State. As a result, the purchasers of those cigarettes fall squarely within the definition of consumer under 15 U.S.C. § 375(4), and NWS's shipments to those consumers are "delivery sales."

Further, to the extent that any of NWS's customers are in possession of tribally-issued licenses, this is simply not enough to be found to be "lawfully operating" in New York State. Such an interpretation is consistent with the findings of the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"), the agency tasked by the U.S. Attorney General with enforcing the PACT Act, who has previously rejected this very argument, stating that to be "lawfully operating," and therefore exempt from the "delivery sales" requirements, a person must be in "compliance with applicable Federal, State, and Tribal Laws." ATF, Implementation of the Prevent All Cigarettes Trafficking Act of 2009 (PACT Act)—Tribal Consultation Process, at 3, 6 (Nov. 18, 2010), attached to the Sprague Decl. as Ex. C. Moreover, "licensed distributor" under the Jenkins Act, the PACT Act's precursor, was defined as "any person authorized by *State statute or regulation* to distribute cigarettes at wholesale or retail." *See* prior 15 U.S.C. § 375(d), Pub. L. 81-363 § 1(d), 63 Stat. 884 (1949) (emphasis added). While that term is not present in the PACT Act, the purpose is the same as the "lawfully operating" language: to protect state-licensed operators against unfair competition.[12] Therefore, this too is suggestive

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"primarily for personal, family, or household purposes"). It did not do so, however, under 15 U.S.C. § 375(4).

[12] It is also worth noting that previously, under the earlier Jenkins Act, monthly reports while required, did not need to be provided for shipments by distributors licensed by the State;

that "lawfully operating" was intended by Congress to require that the entity be in compliance with New York State laws and regulations.

Accordingly, all of NWS's sales in New York State have been "delivery sales" to unlawfully operating dealers, subjecting NWS to liability under § 376a, in addition to its separate liability for violating § 376's registration and reporting requirements.

2. NWS's sale and shipment of cigarettes in and into New York are made in "Interstate Commerce."

Under the PACT Act, "interstate commerce" is broadly defined as "commerce between a State and any place outside the State, commerce between a State and any Indian country in the State, or commerce between points in the same State but through any place outside the State or through any Indian country." 15 U.S.C. § 375(9)(A). In the instant case, the State has alleged that Defendants' shipment and sale of cigarettes to cigarette dealers in New York State for profit take place between Canada, where they are manufactured, and the state of New York, including to reservations within the State, where they are shipped and sold, satisfying the first part of the definition; between New York State and Indian country within New York, satisfying the second part; and/or between two points in New York through Indian country, satisfying the third part. SAC ¶¶ 55-65, 126. As such, the "interstate commerce" requirement of the PACT Act, is easily satisfied by Defendants' conduct, as alleged, requiring that they register with and submit the requisite monthly reports to DTF—Defendants have done neither.

In its defense, NWS advances the unsupported argument that its shipments do not take place in "interstate commerce" because the shipments "start[] outside the State (or in Indian country), travel[] through the State, and end[] in Indian country"; and that the definition of

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that provision was removed, leaving the remaining language largely unchanged. Thus, unlike the exception under § 376a for shipments to "lawfully operating" wholesalers, no such exceptions apply under § 376(a).

"interstate commerce" does not include a provision for this specific transaction. NWS Br. at 20. This argument is flawed in several respects.

First, as was just explained, it is unmistakable that NWS's conduct of shipping and selling Seneca brand cigarettes in and into New York State, including onto Indian reservations, satisfies not only one, but all three of the definitions of "interstate commerce" based on the plain meaning of the statute.

Second, NWS's contention rests on the improper construction that "Indian country" and "the State" are mutually exclusive, which they are not. Rather several courts, including the Supreme Court, have made clear that Indian reservations are "considered part of the territory of the State" in which they are located. *Nevada v. Hicks*, 533 U.S. 353, 361-62 (2001) (recognizing that "Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation. State sovereignty does not end at a reservation's border.") (citation omitted); *see also, e.g., Chemehuevi Indian Tribe v. Cal. State Bd. of Equalization*, 800 F.2d 1446, 1450 (9th Cir. 1986) ("The attributes of sovereignty possessed by the Tribe do not negate the fact that the Reservation is a part of the State of California."); *State of Oklahoma*, 237 P.3d at 208 ("[T]ribal land is not located in some parallel universe. It is geographically within the State of Oklahoma."). Thus, "Indian country" and "the State" are overlapping territorial jurisdictions, and an NWS shipment of cigarettes from Canada onto a reservation in New York State also constitutes a shipment to a point within the state, *i.e.*, "commerce between a State and any place outside the State." 15 U.S.C. § 375(9)(A).

This is further confirmed by the fact that the definition of "Indian country" borrowed by the PACT Act expressly allows the term "Indian country" to include lands "within

or without the limits of a state." *See* 18 U.S.C. § 1151(b). Similarly, the PACT Act states that "Indian country" may be a place "*in the State*." 15 U.S.C. § 375(9)(A) (emphasis added).

Moreover, to treat "the State" and "Indian country" as mutually exclusive would render much of the PACT Act's definition of "interstate commerce" extraneous, in violation of the "cardinal principle of statutory construction" that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void or insignificant." *TWR Inc. v. Andrews*, 534 U.S. 19, 31 (2001). For example, if Indian country is already outside of the State where it is located, as NWS presumes, then the second clause of the definition is unnecessary because any commerce into or out of Indian country would already constitute "commerce between a State and [a] place outside the State" under the first clause. *See* 15 U.S.C. § 375(9)(A). The same holds true of the third clause—if Indian country is already outside the State, then "or through any Indian country" would not affect the meaning of that clause which already includes the language "outside the State."

Third, NWS's interpretation of the term "interstate commerce" is directly at odds with the purpose of the PACT Act. The PACT Act was intended to *expand* the reporting requirements already a part of the Jenkins Act. This includes extending "interstate commerce" to include, not only what would be included in its ordinary or natural meaning, as the Jenkins Act required, "commerce between any point in a State and any point thereof, or between points within the same State but through any place outside thereof," *See* 15 U.S.C. § 717a(7), but also certain intrastate commerce into or out of "Indian country" in a State. *See* 15 U.S.C. § 375(9)(A). Indeed, one major reason for the PACT Act was the systemic non-reporting by Native American businesses under the Jenkins Act, which this increased reporting was intended to help address. *See generally* GAO Report at 17.

NWS's construction of "interstate commerce" under the PACT Act would have the effect of *narrowing*, rather than *expanding*, the Jenkins Act reporting requirements, and would therefore be directly opposed to congressional intent. NWS shipments would have been reportable under the earlier Jenkins Act, and therefore are also reportable under the expanded requirements of the PACT Act.

In short, NWS's conduct in New York State, as set forth in the Second Amended Complaint, is precisely the type of business Congress intended to prohibit when it enacted the PACT Act. NWS's meritless arguments provide no excuse for its blatant violation of the PACT Act's registration and reporting requirements.

CONCLUSION

For all of the reasons set forth above, the Court should deny Defendants' motions to dismiss in their entirety and direct each Defendant to file an Answer to the Second Amended Complaint.

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