UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

STATE OF NEW YORK,

Plaintiff,

-against- Civil No.: 14-cv-00910(RJA)

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

Defendants.

REPLY MEMORANDUM OF LAW IN SUPPORT OF NATIVE WHOLESALE SUPPLY COMPANY'S MOTION TO DISMISS

WEBSTER SZANYI LLP
Attorneys for Defendant
Native Wholesale Supply Company
Kevin A. Szanyi
Nelson Perel
Jeremy A. Colby
1400 Liberty Building
Buffalo, New York 14202
(716) 842-2800

PRELIMINARY STATEMENT

This Reply Memorandum is submitted by Native Wholesale Supply Company ("NWS") in further support of its motion to dismiss. NWS seeks dismissal of the federal claims asserted by the State of New York ("State") under the Contraband Cigarette Trafficking Act ("CCTA") and the Prevent All Cigarette Trafficking Act ("PACT Act").

The State has not identified a single decision permitting a state to enforce the CCTA or PACT Act against a tribally-chartered corporation, let alone one doing business with Native American wholesalers in Indian country. By its own terms, the CCTA may not be enforced against an "Indian in Indian country." Rather than address this fundamental point, the State devotes virtually all of its response to an issue NWS never asserted -- whether NWS is a "tribal" entity. The CCTA, however, may not be enforced against tribes or Indians in Indian country. Since NWS is an Indian in Indian country, the CCTA cannot be enforced against it.

Concerning the PACT Act, the State represents that it is not alleging violations based on "delivery sales" to consumers under § 376a, thus rendering the issue moot. Rather, the State's only PACT Act claim concerns purported registration and reporting obligations under § 376. This claim nonetheless fails because (1) the alleged sales to reservation wholesalers do not constitute "interstate commerce" as defined by the PACT Act and (2) because the shipments were not allegedly made into the Indian country of a tribe that taxes the use or sale of such tobacco. Accordingly, the registration and reporting requirements do not apply. The State's opposition to NWS' motion to dismiss is primarily based upon straw man arguments and state court decisions from Oklahoma and Idaho that having nothing to do with the State's CCTA and PACT Act claims.

ARGUMENT

I. The Indian Commerce Clause Is Not A Basis For NWS' Motion To Dismiss

The State's primary argument is that the Indian Commerce Clause does not preempt the CCTA or PACT Act. (Dkt. 93, at 25-28). This, however, is a straw-man argument because NWS does not make any Indian Commerce Clause argument. The fact that the State's primary argument addresses an issue that NWS did not assert shows that it hopes to obscure the grounds actually asserted by NWS. The State's Indian Commerce Clause analysis is thus irrelevant.[1]

NWS' motion to dismiss is restricted to the State's federal claims. Any argument concerning preemption of state law is irrelevant to this motion. Again, the State prefers to combat a straw man rather than the arguments raised by NWS. The State responds to a nonexistent preemption argument in order to address several decisions from other states where state laws not germane to this action were construed. These cases applying Idaho and Oklahoma state law, however, do not address the CCTA or the PACT Act.[2] They are, therefore, irrelevant – as is the State's analysis. (Dkt. 93, at 25-28).

[1] The State takes NWS to task for not "challenging the State's well-pled allegations." (Dkt. 93, at 25). NWS does not "refute" the State's allegations because it is not permitted to do so under Rule 12(b) – NWS intends to refute the allegations of unlawful conduct at the appropriate stage.

[2] For the same reasons, the State's reliance upon U.S. Supreme Court decisions concerning the contours of state enforcement of state tax laws against Native Americans is misplaced. If NWS' motion is denied, NWS intends to dispute the State's interpretation of cases such as Colville, Moe etc., which involve state tax law, not the CCTA or the PACT Act. Issues concerning the ability of a state to enforce the CCTA or PACT Act against Native Americans are not resolved, despite the State's assertion to the contrary.

II. The CCTA Bars Civil Actions Against Indians In Indian Country

NWS points to the CCTA, which provides that "[n]o civil action may be commenced under this paragraph against an Indian tribe or an Indian in Indian country."[3] The State ignored this provision in its pleadings, but finally addressed it on page 29 of its brief. The State describes the "Indian in Indian country" argument as "tired." (Dkt. 93, at 29). Contrary to the State's assertion, NWS' argument has been neither "repeatedly advanced" nor "soundly rejected."[4] Indeed, the State again points to decisions from Idaho and Oklahoma that did not involve the CCTA -- and thus did not address whether NWS is an Indian under the CCTA.[5] The State does not cite a single case addressing the meaning of "Indian" under the CCTA – and ignores NWS' cases.

In an apparent effort to "say something," the State erroneously conflates tribal sovereign immunity with the separate question of whether a tribally-chartered

[3] 18 U.S.C. § 2346(b)(1). Notably, in City of New York v. Gordon, 1 F. Supp. 3d 94, 103 (S.D.N.Y. 2013), a CCTA claim was not asserted against an Indian-owned company selling tobacco, or its owner, but was asserted against the owner's wife, a non-Indian.

[4] Dkt. 93, at 29, 31. *See, e.g.,* New York v. Mtn. Tobacco Co., 2014 WL 7174239, at *1 (E.D.N.Y. 2014) ("Notably, Wheeler did not argue that as an 'Indian in Indian Country,' certain sections of the CCTA did not, on the State's allegations, apply to him or his conduct. Nor did Wheeler argue that the PACT Act claim, on the State's allegations, applies to him or his conduct. King Mountain did not join in Wheeler's motion"); Id. at *4 ("This is not to say that the State's claims against Wheeler under the CCTA or PACT Act would withstand Rule 12(b)(6) scrutiny.").

[5] The State's reliance upon State of Idaho, State of Oklahoma, Muscogee and Baraga are misplaced. (Dkt. 93, at 31-33). State of Idaho applied Idaho law, not the CCTA. It also relied upon Baraga, 971 F. Supp. 294, 298 (W.D. Mich. 1997), which concerned the question of whether Michigan may enforce a state tax on a Michigan corporation owned by an Indian. Unlike State of Idaho and Baraga, NWS is not incorporated under state law (it is tribally chartered) and neither Idaho nor Michigan law is relevant here. Notably, the State did not cite to the Sixth Circuit's decision in Baraga, which noted that the holding was premised on the fact that the corporation there "was **not organized under tribal laws**." 1998 WL 449674 (6th Cir. 1997) (emphasis added). This omission by the State is highly suspect. Muscogee simply follows Baraga, and is thus likewise distinguishable. Finally, State of Oklahoma is even farther afield because it addressed tribal sovereign immunity, which is not even argued by NWS.

corporation is deemed an "Indian" under § 2346(b) of the CCTA. NWS does not assert sovereign immunity -- rendering the State's "tribal immunity" analysis inapposite. The State's suggestion that the CCTA's "Indian in Indian country" exception seeks to protect tribal sovereign immunity misreads NWS' argument and ignores the plain language of the CCTA, including the disjunctive use of "or" in the phrase "Indian tribe or an Indian in Indian country."[6] Indeed, the State does not address the language of the CCTA. Nor does it address the fact that its companion statute, the PACT Act, defines "person" to include corporations – or that the term "person" is typically understood by Congress to include legal persons like corporations.

That the legislative history cited by the State focuses on tribes does not suggest that a tribally chartered, Indian-owned corporation is not "an Indian in Indian country." To the contrary, the State's misreading of the CCTA's legislative history derives from its limited comprehension of tribal sovereignty, a "fundamental principle of law."[7] Tribal sovereignty encompasses more than just immunity from suit. It includes an inherent and retained sovereign authority to charter tribal entities and to regulate them. Consequently, Congress understood that, when adopting §2346(b), the "rule of law enforcement in Indian country will fall to tribal governments."[8]

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[6] *Compare* Dkt. 93, at 31 *with* 18 U.S.C. § 2346(b)(1) (emphasis added). This Court, however, must give the phrases "Indian tribe" and "Indian in Indian country" separate meanings. Loughrin v. United States, 134 S. Ct. 2384, 2390 (2014) ("To read the next clause, following the word 'or,' as somehow repeating that requirement, even while using different words, is to disregard what 'or' customarily means. As we have recognized, that term's "ordinary use is almost always disjunctive, that is, the words it connects are to be given separate meanings.") (citation omitted).

[7] Remarks of Rep. Conyers, 151 Cong. Rec. H6273, H6284, USA Patriot and Terrorism Prevention Reauthorization Act of 2005 (July 21, 2005).

[8] Id.

The State also ignores that when the CCTA was enacted, state courts of last resort uniformly agreed that Indian owned corporations were deemed an Indian for purposes of state taxation.[9] Congress was undoubtedly aware of this. NWS has an even stronger basis to be deemed an Indian because, unlike the corporations in in Pourier and Flat Ctr. Farms,[10] NWS is not incorporated under state law.

The State makes a half-hearted argument that NWS is not "in Indian country." (Dkt. 93, 29 n.10). This, however, ignores that the State itself repeatedly alleges that NWS engaged in "on reservation" sales with "reservation" wholesalers.[11] Moreover, the phrase "Indian in Indian country" must be interpreted to mean where NWS is located (i.e. the Seneca Nation). Even if this phrase could also be construed to mean "where NWS' products travel," and even if the State alleged that NWS engaged in relevant conduct outside Indian country, such an ambiguity would have to be construed in favor of NWS. The State fails to address the canon of construction that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."[12] The State thus concedes the point. Therefore, any ambiguity in the CCTA generally, or § 2346(b)(1) in particular, must be resolved against it in favor of NWS.

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[9] (Dkt. 79-3, at 11-12) (citing cases).

[10] 658 N.W.2d 395 (S.D. 2003), *vacated in part on other grounds*, 674 N.W. 2d 314 (S.D. 2004); 49 P.3d 578 (Mont. 2002), *cert. denied*, 537 U.S. 1046 (2002).

[11] Am Compl. ¶¶ 58, 62-63, 101, 105, 108-09.

[12] (Dkt. 79-3, at 13) (citing cases); Citizens Against Casino Gambling in Erie County v. Stevens, 945 F. Supp. 2d 391, 400 (W.D.N.Y. 2013) ("A unique canon of construction applies to statutory provisions involving Indians. Under this canon, '[s]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'") (citation omitted).

III. The PACT Act Claim Must Be Dismissed

The State clarifies in its opposition papers that its PACT Act claim is based solely on 15 U.S.C. § 376's reporting/registration requirements – but not 15 U.S.C. § 376a's "delivery sale" provisions. The State's Amended Complaint cited sections 375-378 of the PACT Act (Am. Compl. ¶¶ 2, 45), causing NWS to believe that those sections provided the basis for the State's claim, albeit inartfully pled. The State, however, has now confirmed that its claim is based solely upon § 376. (Dkt. 93, at 34-35).[13] Although the State then quibbles with NWS' "delivery sale" analysis – such argument is irrelevant since the State contends that the "delivery sale" provisions do not apply to a § 376 claim. (Dkt. 93, at 35). NWS thus restricts its analysis to § 376.[14]

A. The State Does Not Allege That NWS Ships Into Indian Country Of A Tribe That Taxes The Sale Or Use Of Such Tobacco

By its own admission, the State's sole PACT Act claim is under § 376, which requires registration and reporting under certain circumstances. Such obligations arise if two conditions are met: i.e., where tobacco is (1) shipped in interstate and (2) "shipped into a [i] State, [ii] locality, or [iii] Indian country of an Indian tribe taxing the

[13] Leason Ellis LLP v. Patent & Trademark Agency LLC, 2014 WL 3887194, at *4 (S.D.N.Y. 2014) ("plaintiff waived any such claim when it expressly represented it was not pursuing such a claim in its opposition brief"); In re Monahan Ford Corp. of Flushing, 390 B.R. 493, 502 (Bankr. E.D.N.Y. 2008) ("A judicial admission is a formal concession by a party, or its counsel, in a pleading, brief, or stipulation and is binding on the party and the Court.") (citing Purgess v. Sharrock, 33 F.3d 134, 144 (2d Cir. 1994)).

[14] Since the State has conceded that its Amended Complaint does not assert liability under § 376a, NWS briefly disputes the State's "delivery seller" analysis. In suggesting that Indian wholesalers are "consumers" under the PACT Act, the State ignores the statutory provisions that show otherwise, for example, provisions limiting consumer transactions to ten pounds; and permitting common carriers to deliver non-compliant products to distributors. 15 U.S.C. § 376a(e)(2)(A)(ii). The State does not allege that tribal entities are not "lawfully operating." The State also proffers material outside the Complaint (Dkt. 93, 36) to suggest that wholesalers owned by the tribe are not "lawfully operating" under a tribal license – an improper argument on a motion to dismiss.

sale or use of cigarettes or smokeless tobacco, or [iv] where a person advertises or offers "for such a sale . . . ." § 376(A) (emphasis added). Under § 375(9)(B), a shipment of tobacco in interstate commerce is "deemed to have been made into the State, place, or locality in which such cigarettes or smokeless tobacco are delivered." In other words, the locus of delivery controls.

To trigger § 376's registration and reporting requirements, therefore, requires NWS to deliver tobacco into a State, locality, or Indian country of a tribe that taxes such tobacco. Under this provision, the registration and reporting requirements are triggered by the presence of both (1) interstate commerce and (2) a sales or use tax at the site of delivery. "Delivery" means the end destination of a shipment.[15] Here, the State alleges that the tobacco was delivered into Indian country – but it does not allege that any tribe taxes the sale or use of such tobacco. Consequently, § 376(a)'s registration and reporting requirements do not apply.

B. The State's Alleged Transactions Are Not "Interstate Commerce" Under The PACT Act

NWS' alleged shipments are not made in "interstate commerce" as defined by the PACT Act. The State alleges shipments from Canada, through New York, to Indian country within the State. This, however, does not satisfy the PACT Act, which requires shipments to either start or end in New York. Here, the State alleges neither. The State attempts to gloss over this by making the conclusory assertion that NWS ships into New York by shipping into Indian country located inside New York. This argument, however, ignores the Act's use of "State" and "Indian country" as distinct jurisdictions.[16]

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[15] http://www.merriam-webster.com/dictionary/deliver.

[16] 15 U.S.C. § 375(9)(A). Under the PACT Act, "interstate commerce" must move between: (1) "a State and any place outside the State"; (2) "a State and any Indian

To accept the State's definition (i.e., that shipments into Indian country located in New York constitutes a shipment into New York) would render meaningless Congress' use of the phrases "Indian country" and "a State." The State's interpretation ignores the *expressio unius est exclusion alterius* canon of statutory construction -- "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[17] NWS' interpretation affords meaning to each phrase used by Congress when defining "interstate commerce" in the PACT Act, while the State's interpretation does not and must therefore be rejected.[18]

The State attempts to address NWS' statutory construction argument by pointing to cases that do not construe "interstate commerce" under the PACT Act. Consequently, the cases relied upon by the State are inapplicable (Dkt. 93, at 38). Whether or not state sovereignty includes Indian country for some purposes, such as criminal law governing non-Indians, has no bearing on the definition of "interstate commerce" adopted in the PACT Act. Indeed, unless the definition is ambiguous, this Court cannot look elsewhere for Congressional intent of the meaning of "interstate commerce."[19] The issue is not, as the State supposes, whether "Indian country" is

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country in the State"; (3) "points in the same State but through" (a) "any place outside the State"; or (b) "any Indian country." 15 U.S.C. § 375(9)(A).

[17] Liu Meng-Lin v. Siemens AG, 763 F.3d 175, 181 (2d Cir. 2014).

[18] Knox v. Agria Corp., 613 F. Supp. 2d 419, 422 (S.D.N.Y. 2009) ("courts must interpret a statute to give meaning to each provision so as to 'avoid statutory interpretations that render provisions superfluous.'"); State St. Bank & Trust Co. v. Salovaara, 326 F.3d 130, 139 (2d Cir. 2003) ("It is our duty to give effect, if possible, to every clause and word of a statute.").

[19] Cohen v. JP Morgan Chase Co., 498 F.3d 111, 117 (2d Cir. 2007) ("To ascertain Congress's intent, we begin with the statutory text because if its language is unambiguous, no further inquiry is necessary. If the statutory language is ambiguous, however, we will "resort first to canons of statutory construction, and, if the [statutory]

"within" or "outside" the State.[20] The issue is whether Congress intended a distinction between the terms when it used them in the PACT Act's definition of "interstate commerce." The answer, of course, is that it did. Congress used the language that it did to specifically exclude from the Act certain Indian country transactions, such as those starting and ending in Indian country, or those starting outside the State and ending in Indian country. (Dkt. 79-3, at 19-21).

If Congress had intended "Indian country" to be part of "State," then there would have been no need to include the term "Indian country" in the statutory definition of interstate commerce. Instead, the definition makes clear that each term has a territorially distinct meaning. The State's interpretation would render "Indian country" superfluous. The State's interpretation would extend the Act's coverage to a transaction starting and ending in Indian country even if the tobacco was walked across the street.

The State also ignored the Indian canon of construction, suggesting that it concedes the point. Likewise, the State ignores NWS' analysis of Section 5 "Exclusions," which confirms that the Act did not modify a state's "authority to bring enforcement actions against persons located in Indian country."[21]

Finally, this Court should disregard the State's citation of materials outside the Amended Complaint since it is improper on a motion to dismiss.[22] This effort by the State is doubly improper because it cites materials outside the Amended Complaint as

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meaning remains ambiguous, to legislative history, to see if these "interpretive clues" permit us to identify Congress's clear intent,") (citations omitted). And even if the Court were to find the Act ambiguous, it would first resort to canons of construction (which the State ignored) before looking to legislative history. Id.

[20] Nor is it how other statutes define "Indian country." Dkt. 93, at 38-39 (citing 15 U.S.C. § 1151(b)). The starting point in construing a statute is the language of the statute itself.

[21] Dkt. 79-3, at 21-22 (citing PL 111-154, March 31, 2010, 124 Stat 1087, 1109, § 5(a)).

[22] Smith v. Campbell, 2013 WL 8183469, at *8 (W.D.N.Y. 2013), *report and recommendation adopted as mod,* 2014 WL 1338803 (W.D.N.Y. 2014).

purported evidence of Congressional intent for the PACT Act, which is not germane unless this Court finds the PACT Act to be ambiguous (in which case canons of construction favoring NWS must first be considered).[23] Likewise, citation to language in the Jenkins Act is irrelevant (unless the PACT Act is ambiguous), and even if considered, merely highlights language that Congress specifically declined to adopt (or continue in force) when it amended the Jenkins Act. The State also cites the ATF's purported position on PACT Act enforcement (outside the record), but fails to inform the Court that this is no longer ATF's position. Colby Reply Decl. ¶¶ 7-9.

In sum, NWS was not required to register or report as set forth under § 376(a) because the State did not adequately allege (1) interstate commerce or (2) shipment into Indian country of an Indian tribe taxing the sale or use of cigarettes.

CONCLUSION

For these reasons, the State's federal claims should be dismissed.

Dated: March 20, 2015

WEBSTER SZANYI LLP
Attorneys for Defendant
Native Wholesale Supply Company

By: /s/Jeremy A. Colby
Kevin A. Szanyi
Nelson Perel
Jeremy A. Colby
1400 Liberty Building
Buffalo, New York 14202
(716) 842-2800

[23] Cohen, 498 F.3d at 117.