In the

Court of Appeal

of the

State of California

THIRD APPELLATE DISTRICT

Consolidated Appeals:

C084031 and C084961

THE PEOPLE EX REL. XAVIER BECERRA,

Plaintiff-Respondent,

v.

NATIVE WHOLESALE SUPPLY COMPANY,

Defendant-Appellant.

APPEAL FROM THE SUPERIOR COURT OF SACRAMENTO COUNTY
HON. DAVID I. BROWN · NO. 34200800014593CUCLGDS
SERVICE ON ATTORNEY GENERAL REQUIRED BY BUSINESS AND PROFESSIONS CODE § 17209

BRIEF OF APPELLANT

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL THIRD APPELLATE DISTRICT, DIVISION	COURT OF APPEAL CASE NUMBER: C084031 consolidated with C084961
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: 177957 NAME: Paul J. Cambria, Jr. FIRM NAME: Lipsitz Green Scime Cambria LLP STREET ADDRESS: 11845 West Olympic Boulevard, Suite 1000 CITY: Los Angeles STATE: CA ZIP CODE: 90064 TELEPHONE NO.: (323) 883-1807 FAX NO.: (716) 855-1580 E-MAIL ADDRESS: pcambria@lglaw.com ATTORNEY FOR (*name*): Native Wholesale Supply Company (Appellant)	SUPERIOR COURT CASE NUMBER: 34-2008-00014593-CU-CL-GDS
APPELLANT/ PETITIONER: Native Wholesale Supply Company RESPONDENT/ REAL PARTY IN INTEREST: The People ex rel Xavier Becerra as the Attorney Gen. for the State of California and Phillip Morris USA, Inc.	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(*Check one*): [X] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): Native Wholesale Supply Company

2. a. [ ] There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. [X] Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (*Explain*):
(1) Arthur A. Montour, Jr.	President and sole shareholder of Native Wholesale Supply Company
(2)	
(3)	
(4)	
(5)	

[ ] Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: February 19, 2018

Paul J. Cambria, Jr.
(TYPE OR PRINT NAME)

(SIGNATURE OF APPELLANT OR ATTORNEY)

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INTRODUCTION

I. SUMMARY OF ARGUMENT

In this action, the People sought to enforce the Directory Statute (Rev. & Tax Code § 30165.1), the Fire Safety and Firefighter Protection Act (Health & Saf. Code § 14950 *et seq*.), and the Unfair Competition Law ("UCL") (Bus. & Prof. Code §§ 17200 *et seq.*) against Native Wholesale Supply Company ("NWS"), an out-of-state, Indian-owned cigarette wholesaler, that purportedly sold cigarettes to a tribe that occupies land located within the geographic boundaries of the State of California ("State" or "California"). The parties engaged in limited discovery, most of NWS's discovery demands being denied by the lower court, and then cross-moved for summary judgment. Several decisions by the lower court are at issue in this appeal.

First, the lower court erred in denying NWS' motion to compel the People to provide further information and documents in response to NWS's interrogatories, request for admissions, and first request for the production of documents.

Second, the lower court erred in: (i) denying NWS's motion to compel further responses to its second request for the production of documents; and (ii) granting the People's motions for a protective order, and quashing the deposition notice NWS served upon the Office of the Attorney General and the subpoena NWS served upon the California Board of Equalization.

Third, the lower court erred in granting non-party Philip Morris USA, Inc.'s motion to quash the deposition subpoena NWS served upon it.

Fourth, the lower court erred in denying NWS's motion for summary judgment and in granting the People's motion for summary judgment, which resulted in the imposition of a permanent injunction, civil penalties, and attorneys' fees and costs against NWS. Critically, NWS asserted valid defenses to this entire enforcement action — including that the claims asserted by the People are preempted by federal law, and that there was no personal jurisdiction over NWS.

The lower court wrongly rejected NWS's defenses. Similarly, the lower court wrongly rejected NWS's assertion that enforcement of the Directory Statute against NWS violated the Equal Protection Clause.

Fifth, the lower court erred in entering a judgment in the People's favor and against NWS: (i) implementing a permanent injunction against NWS in relation to the sale of cigarettes within the geographic boundaries of California; and (ii) awarding the People $4,292,500.00 in civil penalties, plus costs.

Finally, the lower court erred by granting the People's motion for attorneys' fees and entering an order awarding the People $3,843,981.25 in fees and $9,116.25 in expert witness expenses.

II. STATEMENT OF FACTS

A. NWS

NWS is a corporation that is chartered under the laws of the Sac and Fox Nation of Oklahoma, which is a federally-recognized Indian tribe. (App. 4101, 4107.) Arthur Montour, an enrolled member of the Seneca Nation of Indians, is NWS's sole owner. (App. 4101, 4107.) NWS's principal place of business is located within and on the sovereign lands of the Seneca Nation which is located within the geographic boundaries of the State of New York. (App. 4101-02, 4107.)

NWS was formed to sell tobacco products produced and packaged for it by Grand River Enterprises Six Nations Ltd. ("Grand River"). (App. 4110.)

On November 21, 2011, NWS filed for bankruptcy in the Western District of New York. (App. 4104, 4107, 4114.)

B. Conduct at issue

From 2002-2012, NWS sold cigarettes to Big Sandy Rancheria, a federally-recognized Indian tribe that resides on a reservation located near Auberry, California. (App. 4102.) The terms of NWS's sales to Big Sandy Rancheria were F.O.B. Seneca Nation land, meaning that title and risk of loss transferred to Big

Sandy Rancheria before the products entered into the geographic boundaries of California. (*Id*.)

NWS sold no cigarettes directly to consumers. (App. 4103, 4109.) NWS sold no cigarettes to non-Indians. (App. 4103.)

In 2012, NWS ceased selling cigarettes to Big Sandy Rancheria, and it has no intent to restart such sales. (App. 4104, 4133.)

C. Regulations at issue

In 2008, California (as well as more than 40 other States) entered into a Master Settlement Agreement ("MSA") with the four major cigarette manufacturers as a result of litigation commenced by the States against the manufacturers. (Excerpts of the MSA are reprinted at App. 95-110, and the full text of the MSA is available at https://oag.ca.gov/sites/all/files/agweb/pdfs/tobacco/1msa.pdf). Under the MSA, the four cigarette manufacturers, and any other cigarette manufacturers who agreed to abide by the terms of the MSA, agreed to pay billions of dollars on an annual basis into a national foundation to be used to promote public health, in particular, anti-smoking campaigns. (*See* MSA, IX(c), available at App. 97.) The MSA affords participating manufacturers the right to reduce their payment into the fund if their market share declines due to any disadvantages incurred by their participation in the MSA, as well as if a State has not enacted and enforced a "qualifying statute." (*See* MSA, IX(d), available at App. 98-106.)

To comply with its end of the bargain under the MSA, California enacted its "qualifying statute," which is codified in Health & Safety Code §§ 104555-105447, and commonly referred to as the "Escrow Statute." The Escrow Statute requires cigarette manufacturers that do not participate in the MSA to pay a tax into an escrow fund to offset the participating manufacturers for any loss in market share attributable to participation in the MSA. *See* Health & Saf. Code § 104555.

To improve compliance with the Escrow Statute, all MSA States, including California, enacted "directory statutes." California's Directory Statute is codified

at Revenue & Taxation Code § 30165.1. The Directory Statute requires every tobacco product manufacturer that sells cigarettes in the State to certify that it is either a participating manufacturer under the MSA or that it has made all escrow payments required under the Escrow Statute. *See* Rev. & Tax Code § 30165.1(b). Each manufacturer that certifies its compliance is listed on the State's directory ("Directory") of compliant manufacturers. *See* Rev. & Tax Code § 30165.1(c).

Under the Directory Statute, "no person shall sell, offer, or possess for sale in this state, ship or otherwise distribute into or within this state or import for personal consumption in this state, cigarettes of a tobacco product manufacturer or brand family not included in the directory." Rev. & Tax Code § 30162.1(e)(2). Further, no person is permitted to "sell or distribute" or "acquire, hold, own, possess, transport, import, or cause to be imported cigarettes that the person knows or should know are intended to be distributed" without a required tax stamp or without appearing on the Directory. Rev. & Tax Code § 30165.1(b).

In addition to these regulations, California regulates the manufacture of cigarettes as a matter of fire safety under the Fire Safety Act and Firefighter Protection Act, codified at Health & Safety Code §§ 14950-14960 ("Fire Safety Act"). Under the Fire Safety Act, it is unlawful to sell, offer or possess with the intent to sell any cigarettes that do not comply with the testing, marking, performance standard, and certification requirements set forth in the Fire Safety Act.

III. PROCEDURAL HISTORY

A. The People commence an action against NWS.

On June 30, 2008, the People filed a civil enforcement action seeking injunctive relief, civil penalties, contempt, and other relief on the ground that NWS allegedly sold cigarettes in the State in violation of the Directory Statute, the Fire Safety Act, and the UCL ("Complaint"). (App. 2320-31.) NWS demurred, asserting that there was no personal jurisdiction over it because NWS had not

entered the State. (App. 8-113.) Ultimately, the lack of personal jurisdiction defense was denied.

On September 18, 2014, NWS filed its answer ("Answer"), admitting and denying certain allegations, and asserting the following affirmative defenses: Lack of Subject Matter Jurisdiction; Failure to Exhaust Tribal Remedies; Preemption; Failure to State a Claim Upon Which Relief Can Be Granted; Action Premature; Denial of Equal Protection of the Law; Statutory Safe Haven Defense to Second Cause of Action; and Laches. (App. 2333-45.)

B. The lower court issued five decisions that are subject to the instant appeal.

The parties engaged in discovery and extensive motion practice, all of which culminated in five decisions subject to the instant consolidated appeal.

1. Rulings on discovery disputes.

On November 14, 2012, the lower courted appointed a Discovery Referee to entertain discovery disputes. (App. 1060.) Both parties brought disputes to the Discovery Referee.

On or about August 12, 2015, NWS moved for an order compelling the People to provide further responses to its written discovery demands. (App. 189.) In particular, NWS sought to compel the People, in response to interrogatories, to provide information related to communications the State may have had with tobacco manufacturers and the National Association of Attorneys General in relation to the enforcement of the State's tobacco related laws within Indian Country. (App. 260-267.) To this end, NWS also sought: (i) the production of documents related to the enactment of the Directory Statute (Assembly Bill 71 (2003)) and Escrow Statute (Senate Bill 822 (1999)), and the State's enforcement of those statutes within Indian Country; and (ii) responses to various requests for admissions related to the State's enforcement of the Directory and Escrow Statutes, and the applicability of those statues to cigarette sales made within Indian Country. (App. 267-315.)

On February 16, 2016, the Discovery Referee issued the Report and Recommendation of Discovery Referee Regarding NWS's Motion to Compel Further Responses to Discovery recommending a partial denial of NWS's motion (the "February 16, 2016 Report"). (App. 1060-67.) According to the February 16, 2016 Report, "[t]he fundamental reason for denying the majority of NWS's Requests for Further Responses is their lack of relevance to the relevant time period or to NWS's equal protection and preemption defenses." (App. 1063.) On April 4, 2016, the lower court adopted the February 16, 2016 Report in its entirety. (App. 1065.)

On or about June 9, 2016, NWS filed another discovery related motion – this one seeking an order compelling further responses to its Request for Production of Documents (Set Two). (App. 1307-09.) Specifically, NWS moved for an order compelling the People to produce documents in response to the two document requests set forth in NWS's Request for Production of Documents (Set Two). (App. 1338-57.) In the first request to produce, NWS sought the production of all documents in the State's possession which indicate that the State took a legal and factual position in the 2003 NPM Arbitration which contradicts those taken by the State in its case against NWS.[1] (App. 1341.) NSW believes that during the arbitration, the People argued that the MSA did *not* apply to cigarette sales made by Native Americans and, thus, Native American owned manufacturers and distributors were *not* required to make escrow payments to the State under the Escrow Statute. (App. 1348.) In the second request to produce, NWS sought the production of documents related to the State's application of its tobacco laws to tobacco products sold or distributed on or within Indian Country or tribal lands. (App. 1349.)

[1] The 2003 NPM Arbitration was an arbitration proceeding held in relation to the enforcement of the MSA and it is officially titled *In the Proceedings Before An Arbitration Panel Concerning The 2003 NPM Adjustment Pursuant to Section XI(c) of the Master Settlement Agreement*, Case No. 1111234. (App. 1410.)

On or about June 9, 2016, the People also filed discovery related motions. The first was a motion for a protective order to quash the deposition notice that NWS served upon the Office of the Attorney General wherein NWS requested the deposition of the person at the Office most knowledgeable of the facts set forth in the People's Complaint. (App. 1108-11.) The second was a motion for a protective order in which the People and the California Board of Equalization sought an order quashing the subpoena NWS served upon the Board of Equalization. (App. 1068-71.) In both motions, the People sought the payment of monetary sanctions in the form of reasonable attorneys' fees and costs incurred in connection with the motions. (App. 1069, 1110.)

On July 22, 2016, the Discovery Referee issued a Report and Recommendation on: (i) NWS's motion to compel further responses to its second request for the production of documents; (ii) the People's motion for a protective order to quash the notice requesting the deposition of the person most knowledgeable at the Office of the Attorney General and monetary sanctions; and (iii) the People's and the Board of Equalization's motion for a protective order to quash the deposition subpoena served upon the Board of Equalization and for monetary sanctions (the July 22, 2016 Report"). (App. 3035-41.) In the July 22, 2016 Report, the Discovery Referee recommended the denial of NWS's motion to compel on the grounds that NWS's motion did not seek documents relevant to the subject matter. (App. 3036-37.) The Discovery Referee also recommended granting: (1) the People's and Board of Equalization's motion for a protective order to quash the Deposition Subpoena served upon the Board of Equalization on the grounds that the information sought was not relevant and it was inappropriate to seek such information from a third-party; and (2) the People's motion for a protective order on the deposition of the person most knowledgeable at the Attorney General's Office on the grounds that the request constituted an improper attempt to depose opposing counsel. (App. 3035-41.) The Discovery Referee also recommended sanctions against NWS in the amount of $7,055.00 for its

unsuccessful motion and for its unsuccessful opposition to the People's motions. (App. 3039-40.)

On September 6, 2016, NWS filed a supplemental declaration in support of its Partial Objections to the Report and Recommendation of the Discovery Referee, asserting that the lower court should disregard the Discovery Referee's recommendation and deny the People's motion for a protective order because during the deposition of Senior Legal Analyst Monica Gable, Ms. Gable: (i) denied having *any* relevant knowledge of the allegations set forth in the People's Complaint because the statutes at issue had been enacted prior to her joining the Attorney General's Office; and (ii) confirmed that Dennis Eckhart of the Office of the Attorney General had the most knowledge regarding the allegations. (App. 2899-3021.) Mr. Eckhart also has knowledge regarding the Directory Statute because he was involved in the drafting of California Assembly Bill 71 (2003), which ultimately was enacted as the Directory Statute. (App. 2899-3021.) On September 7, 2016, the People submitted their opposition to NWS's supplemental declaration. (App. 3022-42.)

On September 9, 2016, the lower court adopted the July 22, 2016 Report in its entirety. (App. 3035-42.)

2. Ruling on a non-party's motion to quash.

On or about August 8, 2016, NWS issued a Deposition Subpoena upon Philip Morris USA Inc. ("Philip Morris"), ordering Philip Morris to submit for a deposition and to produce copies of written communications exchanged between Philip Morris and legislative representatives of the State regarding the legislative purpose and intent behind the enactment of the Directory Statute (Assembly Bill 71 (2003)) and Escrow Statute (Senate Bill 822 (1999)), and copies of any documents identifying the positions and opinions taken by Philip Morris concerning the legislative purpose and intent of those bills. (App. 3049-70.) On September 14, 2016, NWS served the Deposition Subpoena upon Philip Morris. (App. 3046.)

On or about September 19, 2016, non-party Philip Morris moved for an order to stay the taking of its deposition and to quash the Deposition Subpoena on the grounds that the information sought by the subpoenas – *i.e.*, evidence concerning the legislative purpose and intent underlying the enactment of the Directory and Escrow Statutes – was not relevant to NWS's defenses and that discovery was unnecessary because the information sought was publically available (the "PM Motion to Quash"). (App. 3239-52.) Philip Morris and NWS stipulated to stay the scheduled deposition pending resolution of the PM Motion to Quash. (App. 3253-3255.)

On October 4, 2016, NWS filed its opposition to the PM Motion to Quash asserting that ordering Philip Morris to comply with the Deposition Subpoena would be consistent with prior rulings on discovery in this action in which the lower court ordered the State to produce evidence related to the enactment of the Directory and Escrow Statutes. (App. 3270-87.) Specifically, in the February 16, 2016 Report, the lower court, in adopting the Report, stated that NWS was entitled to discovery which "could yield information relevant to the legislative purpose and interest in enacting the Directory Statute and the Escrow Statute." (App. 1064.)

On October 25, 2016, the Discovery Referee issued a Report and Recommendation of Discovery Referee Regarding Philip Morris's Motion to Quash Subpoenas of Defendant NWS (the "October 25, 2016 Report"). (App. 4161-76.) The Discovery Referee recommended granting the PM Motion to Quash on the grounds that the information NWS sought from Philip Morris was not relevant to NWS's Equal Protection Clause defense and that, even if it was relevant, NWS had the ability to seek the requested information from sources other than non-party Philip Morris. *Id*.

On December 9, 2016, the lower court adopted the October 25, 2016 Report in its entirety. *Id*.

3. Rulings on the parties' motions for summary judgment.

At the conclusion of discovery, the Parties simultaneously moved for summary judgment.

a. The lower court granted the People's motion.

On August 30, 2016, the People moved for summary judgment or, in the alternative, summary adjudication, as well as for order conforming the Complaint to proof, and a request for civil penalties and an injunction. (App. 2252-2820; *see also* App. 4019-56.) On December 28, 2016, the lower court issued an order granting the People's motion. (App. 4187-4205.) In reaching its conclusion, the lower court ruled that: (i) NWS violated the Directory Statute; (ii) NWS violated the Fire Safety Act; (iii) NWS violated the UCL; (iv) NWS was subject to a civil penalty in the amount of $2,002,500 for its violations under the UCL and $2,290,000 for its violations of the Fire Safety Act, for a total civil penalty of $4,292,500; and (v) the People were entitled to permanent injunctive relief barring NWS from selling cigarettes that are not listed on the Directory or not certified in compliance with the Fire Safety Act to anyone in California, or to anyone anywhere when NWS knows or should know that those cigarettes will be resold in California. *Id*.

b. The lower court denied NWS's motion.

On August 31, 2016, NWS cross-moved for summary judgment or, in the alternative, summary adjudication. (App. 2821-98; *see also* App. 4078-4116, 4132-35.) On December 28, 2016, the lower court issued an order denying NWS's motion. (App. 4177-86.) In particular, the lower court ruled that: (i) NWS's preemption argument was not applicable to NWS's conduct at issue in the Complaint; and (ii) with respect to the People's request for injunctive relief, there was a material issue of fact as to whether NWS would refrain from engaging in sales of illegal cigarettes in the State in the future. *Id*.

c. The lower court entered final judgment.

The lower court issued its final judgment on December 28, 2016, incorporating the lower court's rulings on the parties' motions for summary judgment ("Judgment"). (App. 4211-14.) Subsequently, an amended notice of entry of judgment was entered on January 24, 2017. (App. 4215-21.)

4. Ruling on the People's motion for attorneys' fees.

On February 24, 2017, the People moved for attorneys' fees seeking an order requiring NWS to pay the People $4,013,336.25 in attorneys' fees and $4,372.50 in expert witness costs. (App. 4226-4993.) On March 8, 2017, NWS opposed the People's motion for attorneys' fees on the grounds that: (i) the lower court should refrain from ruling on the People's motion until NWS's appeal is resolved and/or discovery is conducted on the fees claimed; and (ii) if the court was inclined to rule on the motion before resolution of NWS's appeal, the lower court should deny the People the full amount requested because the People's hourly rates were unreasonable. (App. 5079-5385.)

On April 18, 2017, the lower court granted the People's motion ("Attorneys' Fees Order") awarding the People $3,843,981.25 in attorneys' fees and $9,116.25 in expert witness expenses. (App. 5456-65.)

IV. APPEALABILITY OF JUDGMENT AND ATTORNEYS' FEES ORDER

The Final Judgment is appealable. *See* Civ. Proc. Code § 904.1.

On February 3, 2017, NWS filed a timely notice of appeal seeking appellate review of the lower court's February 16, 2016 Report, July 22, 2016 Report, October 25, 2016 Report, and the Final Judgment insofar as it granted the People's Motion for Summary Judgment and denied NWS's Motion for Summary Judgment. (App. 4222-25.) On March 1, 2017, NWS filed its: (i) Civil Case Information Statement (App. 4995-5078) and (ii) Civil Appeal Mediation Statement. The appeal was determined to be ineligible for mediation. On March

17, 2017, NWS filed its Notice Designating the Record on Appeal. (App. 5451-55.)

Further, the post-judgment Attorneys' Fees Order is separately appealable. *See* Civ. Proc. Code § 904.1(a)(2).

On June 15, 2017, NWS filed a timely notice of appeal seeking appellate review of the Attorneys' Fees Order. (App. 5481-82.) On July 14, 2017, NWS filed its: (i) Civil Case Information Statement (App. 5483-5572); and (ii) Civil Appeal Mediation Statement. The appeal was determined to be ineligible for mediation. On July 31, 2017, NWS filed its Notice Designating the Record on Appeal. (App. 5573-77.)

On September 7, 2017, this Court granted the parties' stipulation to consolidate: (i) NWS' appeal of the Final Judgment and related discovery orders (Appeal No. C084031); and (ii) NWS' appeal of the lower court's award of attorneys' fees to the People (Appeal No. C084961).

V. STANDARD OF REVIEW

This Court's standard of review on the lower court's discovery orders is abuse of discretion. *See Liberty Mut. Fire Ins. Co. v. LcL Adm'rs, Inc.* (2008) 163 Cal.App.4th 1093-1102. Similarly, this Court's standard of review on the lower court's granting of non-party Philip Morris's motion to quash the subpoena issued by NWS is abuse of discretion. *See id*.

This Court's standard of review on the lower court's rulings on summary judgment is *de novo*. This Court "must decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law." *Intel Corp. v. Hamidi* (2003) 30 Cal. 4th 1342, 1348.

Finally, this Court's standard of review on the lower court's decision to award attorneys' fees and costs to the People is: (i) *de novo* as to whether any fees should be awarded; and (ii) abuse of discretion with respect to the amount of fees awarded, if any. *See Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1213.

ARGUMENT

I. The lower court erred in: (i) denying NWS's motions to compel; and (ii) granting the People's motions for protective order and to quash.

Through its motions to compel, NWS sought orders requiring the People to disclose information and documents related to the purpose and intent of the State's Directory Statute (Assembly Bill 71 (2003)) and Escrow Statute (Senate Bill 822 (1999)), and the State's enforcement of the statutes within Indian Country. NWS requested such information by serving interrogatories, requests for the production of documents, and requests for admissions. (App. 253-317, 1338-57.)

NWS's written discovery requests included demands seeking: (i) information related to communications California may have had with tobacco manufacturers and the National Association of Attorneys General in relation to the enforcement of the State's tobacco related laws within Indian Country (App. 260-267); and (ii) documents and admissions related to the enactment and enforcement of the Directory and Escrow Statutes, and the applicability of those statues to cigarette sold or distributed on or within Indian Country (App. 267-315 and 1349-57). NWS also requested documents which indicate that during the 2003 NPM Arbitration, the State took the position that the MSA did *not* apply to cigarette sales made by Native Americans and, thus, Native American owned manufacturers and distributors were *not* required to make escrow payments to California under the Escrow Statute – a legal and factual position which contradicts the position taken by the State in this case. (App. 1341-48). NWS's request for information related to the 2003 NPM Arbitration is related to its contention that because compliance with the Escrow Statute is required to be listed on the Tobacco Directory, a Native American owned manufacturer and distributor who is not required to comply with the Escrow Statute is exempt from placing their tobacco products on the Directory.

Through its written discovery requests, NWS sought information and documents which support its contention that there was a "discriminatory purpose"

motivating the State to enact the Directory Statute. *Wayte v. United States* (1985) 470 U.S. 598, 608; *Village of Arlington Heights v. Metro. Hous. Dev. Corp.* (1977) 429 U.S. 252, 265-66; and *Yick Wo v. Hopkins*, (1886) 118 U.S. 356, 373-74. Specifically, NWS, through discovery, requested information and documents that the Directory Statute was created to intentionally restrain the sales of Indian-manufactured tobacco products, products which are in direct competition with the same non-Indian tobacco manufacturers who: (i) are parties to the MSA; (ii) participated in the 2003 NPM Arbitration; and (iii) assisted with the drafting and enactment of the Escrow Statute.

Tellingly, the lower court agreed with NWS's position in the February 16, 2016 Report, ruling that NWS was entitled to discovery which "could yield information relevant to the legislative purpose and interest in enacting the Directory Statutes and the Escrow Statute." (App. 1064.) Surprisingly, however, the lower court, despite its above-stated finding, denied the majority of NWS's requests in its motions to compel. (App. 1060-67, 3035-42.) The lower court's denials of NWS' motions to compel should be reversed because "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights*, 428 U.S. at 266. Indeed, NWS should be provided access to information and documents related to communications the State may have had in relation to the purpose and enforcement of the Directory and Escrow Statutes within Indian Country, and the applicability of those statues to cigarettes sold or distributed on or within Indian Country, because such information and documents may indicate whether there was a discriminatory purpose behind the drafting of the statutes – *i.e.*, whether the Directory Statute was drafted and implemented for the specific purpose of restraining tobacco sales being made by Indian-owned manufacturers and distributors.

The discriminatory purpose behind the enactment of the Directory Statute may also be exposed by permitting NWS to gain access to the pleadings the State

submitted in the 2003 NPM Arbitration. NWS believes that during the arbitration, the State argued factual and legal positions that contradict its current contention that the Directory Statute is not discriminatory in its purpose and effect. Specifically, it is believed that during the 2003 NPM Arbitration, the State argued that the MSA did not apply to cigarette sales made by Native Americans and, thus, Native American owned manufacturers and distributors were not required to make escrow payments to the State under the Escrow Statute.

If the People took such a position during the arbitration, and such position was failing (*i.e.* it was apparent that People were not diligently enforcing the Escrow Statute as required under the MSA), it would indicate that the true and only purpose of the subsequently enacted Directory Statute was to pull Native American owned cigarette manufacturers and distributors into the requirements set forth in the Escrow Statute. Indeed, it would indicate that the Directory Statute was enacted to specifically require Indian-owned cigarette manufacturers and distributors to place their cigarette brands on the directory – a feat that can only be accomplished by making escrow payments to the State. Such purpose of the Directory Statute, and subsequent effect, would be in violation of NWS's equal-protection rights. It would also indicate that the Directory Statute should be preempted by federal law.

Tellingly, in a Complaint filed in a separate, unrelated action, the State pled that the Directory Statute was enacted to "strengthen[] California's ability to enforce" the Escrow Statute. (App. 1335.) Because the big tobacco companies complained in the 2003 NPM Arbitration that Native American owned cigarette manufacturers and distributors were failing to pay into escrow accounts, the term "strengthen" in the Complaint implies that the Directory Statute was specifically enacted to provide the State with the ability to enforce the Escrow Statute against Indian-owned cigarette manufacturers and distributors. Implementing the Directory Statute for the specific purpose of targeting tobacco sales made by

Indian-owned cigarette manufacturers and distributors would be a clear violation of NWS's equal protection rights.

Moreover, the 2014 amendment of the term "unit sold" in the Directory Statute, allowing the State of California to consider "the number of cigarettes sold to consumers in California *regardless of whether or not the state excise tax was collected* on the sale" further confirms that the true purpose of the Directory Statute was to target untaxed sales made by Indian-owned cigarette manufacturers and distributors. (App. 3847-59 (emphasis added).) Indeed, because the purpose of the Directory Statute was to pull Indian-owned cigarette-related businesses into the requirements set forth in the Escrow Statute, it is evident that the amendment of "units sold" was simply made to make it even easier to enforce the Directory Statute against Indian-owned businesses.

Furthermore, it is likely that the People will argue that NWS is not entitled to discovery because the question of discrimination is subject only to rational basis review in that NWS is not a member of a suspect classification. The People's likely contention, however, fails because discovery has been found to be necessary to establish that no rational basis exists for the difference in California's treatment of NWS from others similarly situated. *See Genesis Envtl. Servs. v. San Joaquin Valley Unified Air Pollution Control Dist*. (2003) 113 Cal.App.4th 597, 607 (noting that "requiring a plaintiff to plead factual details that establish a negative, *i.e.* no rational basis for the difference in treatment, might place the plaintiff in the position of pleading matters beyond its knowledge and ability to find out *prior to discovery*" (emphasis added)); *United States v. Carolene Prods. Co*. (1938) 304 U.S. 144, 153 (stating "[w]here the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry"). If facts related to the purpose of the Directory Statute are not in NWS's possession nor subject to judicial notice, then discovery is the necessary method for NWS to obtain such facts.

The People's probable contention also fails because any state classification of a Native American tribe or tribal member under state law, such as the Directory Statute, is a classification based on race and, therefore, must be reviewed under the "strict scrutiny" standard of review. In *KG Urban Enterprises LLC v. Patrick* (1st Cir. 2012) 693 F.3d 1, the court found that while Federal laws may be implemented which take a tribe's or tribal member's status as a Native American into consideration because of the unique relationship between the Federal government and Native American tribes, it is doubtful that states can enact laws that refer to "state classifications based on tribal status." *Id*. at 19. The decision in *KG Urban* further provides that no authority has been cited which holds that a state classification "based on tribal status which are not authorized be federal law are nonetheless not racial classification." *Id*. Thus, state laws identifying Native Americans under a specific classification are to be reviewed under the "strict scrutiny" standard of review.

Accordingly, this Court should reverse the lower court's decisions in the February 16, 2016 Report and the July 22, 2016 Report to deny NWS's motions to compel.

In the July 22, 2016 Report, the lower court also granted: (i) the People's motion for protective order quashing the deposition notice that NWS served upon the Office of the Attorney General wherein NWS requested the deposition of the person at the Office most knowledgeable of the facts set forth in the People's Complaint; and (ii) the People's and Board of Equalization's motion for protective order quashing the subpoena NWS served upon the State Board of Equalization. (App. 3035-42.) The lower court also awarded the People attorneys' fees in the amount of $7,055.00. *Id*.

The lower court's decision to grant the People's motions and to award attorneys' fees should be reversed because NWS should have been provided wide latitude to conduct depositions to reveal information material and relevant to its defense. Indeed, as a Defendant, NWS was entitled to conduct discovery to gather

and accumulate facts to help defend itself against the allegations set forth in the Complaint and to protect its pecuniary interest.

The issue of relevancy raised by the People in its motions should only have been given minimal consideration because objections to discovery by way of protective order should concentrate on "the specific harm shown by the respondent as opposed to a more general attack on the 'relevancy' of information the proponent seeks to discover." *Norton v. Sup. Ct. of Cal. for the Cnty. of Los Angeles* (1994) 24 Cal.App.4th 1750, 1761. Thus, "the party seeking discovery is entitled to substantial leeway." *Id*. Furthermore, when ruling on a discovery motion, "it is better that it be in favor of granting discovery of the nondiscoverable rather than denying discovery of information vital to preparation or presentation of the party's case or to efficacious settlement of disputes." *Id*.

With respect to the deposition notice served upon the People seeking the deposition of the person most knowledgeable at the Office of the Attorney General, contrary to the People's contention, NWS was not seeking to depose counsel for the People. Rather, NWS was simply seeking to depose the person at the office of the party who commenced the action (*i.e.* the People) who has the most knowledge regarding the facts related to the causes of action set forth in the People's Complaint. (App. 1518-21.) Just because the person most knowledgeable may be an attorney, does it mean that the People are free from the obligation of producing a person for a deposition. Simply put, NWS was merely looking to conduct a party deposition.

Through a deposition, NWS sought to obtain information related to the facts presented in the Complaint, and the purposes and effects of the statutes identified in the Complaint. (App. 1518-21.) The fact that such information is held by a "law practice" office maintained by attorneys does not automatically bar NWS from seeking information related to the lawsuit by way of deposition. Such a bar would be inequitable as it would prevent a defendant in a lawsuit brought by

an office of attorneys from being allowed to depose the very party that asserts allegations against it.

Moreover, contrary to the People's contention, NWS was not seeking to depose a high ranking official. Rather, NWS was simply seeking to depose the person who had the most input in preparing the Complaint that was filed against it. Such a deposition is permitted because there is no rule or law that bars a defendant in an action brought by the state from deposing state employees with knowledge of facts relevant to the lawsuit. *See Coleman v. Schwarzennegger*, 2008 WL 4300437 (N.D. Cal. 2008) (permitting the deposition of the Deputy Cabinet Secretary because "he is clearly of a significantly lower rank that the Governor or his Chief of Staff"). Thus, if a person at the People's office has knowledge of information related to the purpose and enactment of the Directory Statute and/or the Escrow Statute, NWS is entitled to depose that person to ascertain facts and information related to the two statutes.

In this case, the person who appears to possess the most knowledge regarding the allegations set forth in the People's Complaint is Dennis Eckhart, an employee of the Department of Justice. Documents produced by the People during discovery revealed that Mr. Eckhart was involved with the drafting and enactment of the Directory and Escrow Statutes. For instance, in e-mails dated July 2, 2003, and August 13, 2003, Mr. Eckhart made several comments related to the drafting of Assembly Bill 71 (which would ultimately be enacted as the Directory Statute). (App. 1566-82.) Because it appears Mr. Eckhart was involved with the drafting and enactment of the bills related to the Directory and Escrow Statutes, NWS should have been permitted to depose Mr. Eckhart regarding the documents produced by the People and information related to the drafting and enactment of the bills – information not related to litigation strategy and, thus, not protected by the attorney-client privilege or attorney-work-product privilege.

Deposing Mr. Eckhart regarding the drafting and enactment of Assembly Bill 71 (2003) may also disclose information related to the 2003 NPM Arbitration

and any influence the arbitration, and the contentions raised during the arbitration, may have had in creating the Directory Statute. The 2003 NPM Arbitration is material and relevant to this case because NWS has reason to believe that during the arbitration, Plaintiff argued factual and legal positions that contradict its current contention that the Directory Statute is not discriminatory in its purpose and effect. Specifically, upon information and belief, during the 2003 NPM Arbitration, Plaintiff argued that the MSA did not apply to cigarette sales made by Native Americans and, thus, Native American owned manufacturers and distributors were not required to make escrow payments to the State pursuant to the Escrow Statute.

If the State took such a position during the arbitration, and such position was failing (*i.e.*, it was apparent that the State was not diligently enforcing the Escrow Statute), it would indicate that the true and only purpose of the subsequent enactment of the Directory Statute was to close a "loophole" in the Escrow Statute by pulling Indian-owned cigarette manufacturers and distributors into the requirements set forth in the Escrow Statute. The People even made a reference to a "loophole" that needed to be corrected on page three of its Memorandum in support of its Motion for Protective Order. (App. 1118.) Thus, it would indicate that the Directory Statute was enacted to specifically require Indian-owned cigarette manufacturers and distributors to place their cigarette brands on the directory – a feat that can only be accomplished by making escrow payments to the State. Such purpose of the Directory Statute, and subsequent effect, would be in violation of NWS's equal protection rights. It would also indicate that the Directory Statute should be preempted by federal law.

Thus, NWS should have been permitted to depose Dennis Eckhart as it appears that he is the person with the most knowledge regarding the allegations set forth in the Complaint and regarding the purpose of the Directory and Escrow Statutes. Mr. Eckhart likely also possesses knowledge regarding the amendment of the term "unit sold." The term was amended in 2014 and it permitted the State

to consider "the number of cigarettes sold to consumers in California *regardless of whether or not the state excise tax was collected* on the sale." (App. 3847-59 (emphasis added).) Thus, the amendment was a subsequent measure made by the State to make it easier to enforce the Directory Statute against Native Americans – a telltale sign that the original intent of the Directory Statute was to specifically pull Indian-owned cigarette related businesses into the requirements set forth in the Escrow Statute.

The People's motion challenging the deposition notice served upon the Office of the Attorney General should also have been denied because it was premature and failed to identify a specific harm that the deposition would have caused the People. The motion was premature because the People asked the lower court to stop NWS from asking questions regarding facts critical to the case and related to the contentions raised in the Complaint before the questions were even asked. Because the deposition questions had not yet been asked, the lower court had no reference to make a determination. Thus, the lower court should not have precluded NWS from asking deposition questions related to critical issues in the case. The lower court should have allowed the deposition to take place with the understanding that the People could file a motion after the completion of the deposition challenging the relevancy of information disclosed during the deposition.

Also, rather than specify any particular harm that would occur if the People were deposed, the People merely argued that the deposition should not take place because of relevancy issues. Such argument is deficient because, as stated above, courts in California have "taken the view that wherever possible objections to discovery should be resolved by protective orders addressing the specific harm shown by the respondent as opposed to a more general attack on the 'relevancy' of information the proponent seeks to discover." *Norton*, 24 Cal.App.4th at 1761.

With respect to the Deposition Subpoena served upon the Board of Equalization, NWS planned to obtain information from the Board concerning the

purpose and effect of the Directory and Escrow Statutes, and the application and enforcement of the statutes. (App. 1478-1503.) The request for the deposition was based upon: (i) the lower court's previous determination that NWS was entitled to discovery that "could yield information relevant to the legislative purpose and interest in enacting the Directory Statute and the Escrow Statute" (App. 1064); and (ii) the fact that the Board of Equalization is the government agency that enforces the Escrow Statute, and the Directory Statute was enacted to strengthen the State's ability to enforce the Escrow Statute (App. 1501).

NWS's main interest in deposing the Board of Equalization was to explore whether, prior to the amendment of the term "unit sold" in the Escrow Statute, the Board determined that Indian-owned cigarette distributors were not required to place themselves on California's Directory because their untaxed sales fell outside the scope of the Escrow Statute. (App. 1480-83.) Such information is critical because it would likely provide NWS with a strong defense in relation to the cigarette sales at issue in this case which occurred between 2004 and 2012. (App. 1481.)

Indeed, during the period at issue in this case (2004-2012), the amount to be paid into the escrow fund was determined by measuring the cigarette excise taxes which were actually collected from a manufacturer or distributor. *Id*. Thus, if no excise tax was collected on a particular cigarette sale, that sale would not be included in the State's calculation of the escrow amount owed. *Id*. Accordingly, if all sales made by a manufacturer or distributor were free from California's excise tax, no escrow amount would need to be paid by the manufacturer or distributor. *Id*. Consequently, a manufacturer or distributor that was not required to make any escrow payment was unable to place itself onto the Directory. *Id*.

In this case, NWS contends that because it is an Indian-owned tobacco distributor which was not required to pay excise taxes on the cigarette sales it made between 2004 and 2012, it was not possible for NWS to place itself onto the Directory. As such, NWS should not be penalized for not being listed on the

Directory. Thus, the issue of whether taxes were due or escrow was owed on the cigarette sales made by NWS is critical to the proper resolution of this case.

As such, the lower court should have permitted NWS to depose the Board of Equalization to confirm, among other things, whether the Board collected or sought collection from NWS any excise tax related to the cigarette sales NWS made between 2004 and 2012. Allowing the deposition would have been in harmony with California's belief that "[o]ne of the principle purposes of civil discovery is to do away with the sporting theory of litigation. The purpose is accomplished by giving greater assistance to the parties in ascertaining the truth and in checking and preventing perjury." *Thoren v. Johnston and Washer* (1972) 29 Cal.App.3d 270, 274. Indeed, "[d]iscovery necessarily serves the function of 'testing the pleadings,' i.e., enabling a party to determine what his opponent's contentions are and what facts he relies upon to support his contentions." *Burke v. The Superior Ct. of Sacramento Cnty.* (1969) 71 Cal.2d 276, 281.

Accordingly, this Court should reverse the lower court's decision in the July 22, 2016 Report to grant: (i) the People's motion for protective order regarding NWS's notice to depose the person most knowledgeable at the Office of the Attorney General; and (ii) the People's and Board of Equalization's motion for protective order regarding the Deposition Subpoena served upon the Board of Equalization.

II. The lower court erred in granting the PM Motion to Quash.

In adopting the October 25, 2016 Report, the lower court granted the PM Motion to Quash on the basis that: (i) "the actual intent behind the challenged statutes is neither relevant nor likely to lead to the discovery of relevant information"; and (ii) "NWS can obtain all appropriate discovery related into legislative intent from sources other than PM USA." (App. 4162.)

The first basis for granting the PM Motion to Quash – that legislative intent is irrelevant - fails for two reasons. First, that premise was contradicted by the lower court's previous ruling in the February 16, 2016 Report that discovery

related to the Directory and Escrow Statutes "could yield information relevant to the legislative purpose and interest in enacting" those statutes. (App. 1064.) Indeed, in the February 16, 2016 Report, the Court previously ordered the People to produce all documents in its possession and control related to the purpose and intent of the Discovery Statute and Escrow Statute. *Id*. The lower court cited *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc*. (2005) 133 Cal.App.4th 26, in support of that finding. Thus, it was entirely improper for the lower court to decide that information and documents related to the purpose and intent of the Directory Statute and Escrow Statute in Philip Morris's possession is not subject to discovery.

The first basis also fails because contrary to the lower court's finding, information and documents related to the purpose and intent of the Directory and Escrow Statutes in Philip Morris's possession are relevant to this case. As this court is aware, one of the affirmative defenses raised in this matter is that the Directory Statute (California Assembly Bill 71) violates NWS's equal protection rights. (App. 603.) Thus, it is NWS's contention that the Directory Statute was enacted with a discriminatory purpose – *i.e.*, to specifically stop and prevent Indian-owned businesses from legally selling Indian-made cigarettes to Indian tribes and members of such tribes beyond the regulatory control of the State.

To determine the motivating factor or factors behind California's enactment of the Directory Statute, NWS sought, through discovery, information and documents from Philip Morris evidencing the intent behind the State's enactment of the statute. Importantly, "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Village of Arlington Heights*, 429 U.S. at 266 (identifying several facts relevant to determining the existence of a discriminatory purposes including historical background of a decision, the specific sequence of events, a departure from normal procedural sequence and legislative or administrative history).

Specifically, NWS requested Philip Morris to submit for a deposition and to produce copies of written communications exchanged between Philip Morris and legislative representatives of the State regarding the legislative purpose and intent of enacting the Directory and Escrow Statutes, and copies of any documents identifying the positions and opinions taken by Philip Morris concerning the legislative purpose and intent of those bills. (App. 3049-70.) NWS's belief that Philip Morris possesses such information was confirmed by Philip Morris in its own motion papers when it stated it is "among the many manufacturer and government parties joining the MSA and supporting bills enacting California's Escrow and Directory Statutes, as well as similar statutes in the other jurisdictions joining the MSA." (App. 3224.) As it is evident that Philip Morris possesses information and documents related to the enactment of the Directory and Escrow Statutes, the lower court should have required Philip Morris to appear for its deposition and produce documents related to the communications it had with California's legislators.

Furthermore, information in Philip Morris's possession related to the purpose and intent of the Escrow and Directory Statutes is relevant to this case because, as stated above, contrary to the lower court's findings, Federal case law exists which holds that it is likely that any state classification of a Native American tribe or tribal member in a state-enacted law, such as the statutes at issue in this case, is a classification based on race and, therefore, must be reviewed under the "strict scrutiny" standard of review. *See KG Urban supra.*

Moreover, even if NWS is not deemed to be a member of a suspect class, it is still entitled to discovery to establish that no rational basis exists for the enactment of the Directory Statute. *See Genesis Envtl. Servs. supra*; *Carolene Prods. Co. supra*; and *Borden's Farm Prods. Co., Inc. v. Baldwin* (1934) 293 U.S. 194 (stating that when "legislative action is suitably challenged, and a rational basis for it is predicated upon the particular economic facts of a given trade or industry, which are outside the sphere of judicial notice, these facts are properly

the subject of evidence and of findings"). Thus, even under a "rational basis" review, NWS is entitled to discovery to determine if a "rational basis" existed for the Directory Statue. Indeed, discriminatory motive can be discovered by examining the acts and statements of those who would likely try to conceal evidence of discriminatory intent because "officials acting in their official capacities seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a racial minority." *Smith v. Town of Clarkton* (4th Cir. 1982) 682 F.2d 1055, 1064.

Finally, the lower court's second basis for granting the PM Motion to Quash fails because Philip Morris likely possesses information and documents related to the enactment of the Directory and Escrow Statutes which are not publicly available. Such information may be related to the purpose of the statutes and the motive for creating the statutes, and they may be in addition to documents which are publicly available. Also, Philip Morris's contention that the information and documents it possess cannot be considered part of the State's legislative history is premature because such a determination cannot be made until the information and documents are disclosed. It is only after disclosure that a court can determine whether certain information and documents should be considered part of legislative history. Indeed, although Philip Morris cited *Kaufman* in support of its legal position, it must be noted that in *Kaufman*, the court determined whether certain documents should be provided judicial notice *after the documents were provided to the defendant and after the defendant filed a motion seeking judicial notice of certain documents*.

Accordingly, and because civil discovery is broad in scope, intended to permit parties to "obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action . . . if the matter is itself admissible in evidence or appears *reasonably calculated to lead to the discovery of admissible evidence*." Cal. Code Civ. Proc. § 2017.010 (emphasis

added), this Court should reverse the lower court's decision on the October 25, 2016 Report to grant the PM Motion to Quash.

III. The lower court erred in denying NWS's Motion for Summary Judgment.

In its motion for summary judgment, NWS asserted that the lower court should dismiss the Complaint in its entirety because the People's claims were preempted under the analysis set forth in *White Mountain Apache Tribe v. Bracker* (1980) 448 U.S. 136. (App. 2828-31, 4082-86.) The lower court erred in denying this ground for summary judgment. (App. 4179-82.)

In *Bracker*, the Supreme Court addressed Arizona's ability to apply and enforce its tax laws "over the activities of non-Indians engaged in commerce on an Indian reservation." *Bracker*, 448 U.S. at 137. The Court described its jurisprudence on the balance between the states' regulatory interest and the tribes' self-determination interest as "treacherous" because it has vacillated over time. *Id*. at 141-42. "As a result," explained the Court, "there is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian reservation or to tribal members." *Id*. at 142. However, the Court had previously recognized that Congress's authority to regulate tribal affairs under the Indian Commerce Clause (Art. 1, § 8, c.3), *coupled with* the "semi-independent position" of Indian tribes has deprived states of the exercise of their regulatory authority over tribal reservations and members when the exercise of such authority: (1) "may be pre-empted by federal law"; or (2) may "infringe on the right of reservation Indians to make their own laws and be ruled by them." *Id*. at 142 (quotations omitted).

The Court's recitation of its earlier holdings led it to recognize a principle of significance to the instant action: "When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest." *Bracker*, 448 U.S. at 144. The Court further

recognized that, when, like in that case, "a State asserts authority over the conduct of non-Indians engaging in activity on the reservation . . . [m]ore difficult questions arise." *Id*. Under those circumstances, *not present in this case*, courts must:

> . . . examine[] the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence. This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.

Id. at 144-45.

The lower court erred by conflating the two *separate* tests articulated in *Bracker*. The lower court correctly recognized that "[w]hen on-reservation conduct involving Indians is at issue, state law is generally inapplicable," but the lower court incorrectly skipped past that prohibition on enforcement of State law and, instead, evaluated the conduct at issue in this case under the test for a state's ability to regulate the on-reservation conduct of *non-Indians*. (App. 4179.) The Supreme Court made it clear that, when the on-reservation conduct at issue involved *only Indians*, state law has no legitimate application because the state's "regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest." *Bracker*, 448 U.S. at 144. The distinction between the two tests articulated in *Bracker* is critical and was lost on the lower court.

In this case, the State seeks to enforce its cigarette regulations on NWS's wholesale transactions with Big Sandy Rancheria. The two parties subject to the transactions at issue were NWS and Big Sandy Rancheria. NWS is an Indian-

owned, Indian-chartered entity, with its principal place of business located on the sovereign lands of the Seneca Nation. (App. 4101-02, 4107.) Big Sandy Rancheria is an Indian tribe located on the sovereign land of the Joaquin (or Big Sandy) Band of Western Mono Indians. (App. 4102.) Neither of these parties can be described as "non-Indian."

NWS did not sell any cigarettes directly to consumers. (App. 4103, 4109.) Consequently, NWS did not sell any cigarettes to non-Indians. (App. 4103.)

In light of the fact that there were *no non-Indians* involved with the transactions at issue (App. 4101-03, 4107, 4109), there was no reason for the lower court to look past the Court's admonition that "state law is generally inapplicable" to Indian-to-Indian transactions occurring on sovereign Indian land. *See Bracker*, 448 U.S. at 144. If the People had filed an action against the retail establishments that allegedly sold the cigarettes to non-Indian consumers, the second test articulated in *Bracker* (which was applied incorrectly by the lower court in this case), would have been appropriate to analyze the transactions between the Indian retail establishment and its non-Indian consumers because the Supreme Court allows states to exercise their regulatory power over the on-reservation conduct of *non-Indian* consumers and that power has been extended to the retailers who sell non-Indian consumers cigarettes, whether the retailer is Indian-owned or not. *See generally Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976).

But, the transactions between NWS and Big Sandy Rancheria had no involvement whatsoever with non-Indians. As set forth in the State's tax regulations, any entity owned by a member of an Indian tribe is deemed to be an Indian. *See* 18 Cal. Code Reg. § 1616(d)(2) ("Indian organizations are entitled to the same exemption as Indians. 'Indian organizations' includes . . . corporations organized under tribal authority and wholly owned by Indians."). Moreover, individuals do not lose their personal constitutional rights simply because they opt to incorporate. The Supreme Court has explained that, in certain contexts, closely held corporations, like NWS, take on the constitutionally enshrined rights of their

owners. *See generally Burwell v. Hobby Lobby Stores, Inc.* (2014), 573 U.S. ___, 134 S. Ct. 2751 (recognizing that the closely held corporations before the Court possessed the First Amendment rights of their owners). Thus, even if this Court finds that 18 Cal. Code Reg. § 1616(d)(2) does not qualify NWS as an Indian for purposes of this action, *Hobby Lobby* makes it clear that Arthur Montour, an Indian, was not divested of his status as an Indian simply because he elected to incorporate, rather than operate as a sole proprietorship.

Similarly, the lower court erred in faulting NWS for not offering evidence "regarding the balancing of the state, federal and tribal interests" at issue with the State's application of the Directory Statute, Escrow Statute, Fire Safety Act, and UCL to NWS's transactions. (App. 4179.) NWS did not fail to carry its burden of proof. NWS had no burden of proof on these issues because the *Bracker* balancing inquiry is not applicable to NWS's Indian-to-Indian transactions.

The lower court's failure to appreciate the distinction between the analysis required for determining the State's regulatory authority over Indian-to-Indian sales transactions versus Indian-to-non-Indian sales transactions continued throughout the decision. The lower court repeatedly cited to cases involving Indian-to-non-Indian sales as justification for denying NWS's preemption defense. For example, the lower court pointed to *People ex rel. Harris v. Black Hawk Tobacco, Inc.* (2011) 197 Cal.App.4th 1561, for the proposition that the "California Court of Appeal has held that with respect to the same laws at issue here and the on-reservation sale of the same cigarettes at issue, that no federal or tribal interest outweighs the state's interest in collecting cigarette tax revenue or enforcing the California tobacco directory and cigarette fire safety laws." (App. 4180.)

Critically, that case involved an enforcement action against an Indian-owned company that "operated four 'brick and mortar' stores" located on Indian land, where the company sold off-brand cigarettes directly to *non-Indian* consumers. *See Black Hawk*, 197 Cal.App.4th at 1564-65. Moreover, the retailer did not raise a preemption defense. Instead, on appeal, the retailer asserted that the

State lacked the authority to require compliance with its cigarette laws because the tribe had co-extensive sovereignty to regulate cigarettes and any attempt by the State to enforce its laws on transactions occurring on Indian land violated the sovereignty of the tribe. *See id*. at 1566. Consequently, in this case, the lower court erred in disposing of NWS's preemption argument with a case that was factually and legally distinguishable from the instant case. Similarly, *Washington v. Confederated Tribes of Colville Indian Reservation* (1980) 447 U.S. 134, addressed the ability to seize cigarettes bound for Indian-owned retail establishments that sold off-brand cigarettes to "non-Indian bargain hunters." *Id*. at 145.

There is also a very important and overlooked aspect of *Black Hawk* that is critical to this case. In *Black Hawk*, when the court issued a preliminary injunction, the injunction prohibited the defendant from selling off-directory cigarettes "except for sales to enrolled members of any federally-recognized tribe of California." *See Black Hawk*, 197 Cal.App.4th at 1567. Thus, the court in *Black Hawk* recognized that Black Hawk, a company owned by an enrolled member of the Sac and Fox Nation, a federally-recognized Indian tribe from Oklahoma, was legally permitted to sell off-directory cigarettes to any federally-recognized tribe of California. As such, NWS, a company chartered under the laws of the Sac and Fox Nation of Oklahoma, and owned by an enrolled member of the Seneca Nation of Indians, should not have been penalized by the lower court for selling off-directory cigarettes to Big Sandy Rancheria, a federally-recognized tribe located within California.

A similar determination was made in *People ex rel. Harris v. Huber*, (January 5, 2015, County of Humboldt, Case No. DR110262), where the court denied the plaintiff's motion for summary judgment with respect to damages because, among other reasons, the sale of off-directory cigarettes by the defendant, an Indian, to members of the Wiyot Tribe, a federally-recognized Indian tribe, did not violate the Directory Statute, the Fire Safety Act or UCL. (App. 3777-87.) The court in *Huber* further found that, although the defendant was enjoined from selling

off-directory cigarettes in California which did not comply with the Fire Safety Act, the injunction was expressly limited to the sale of cigarettes to "*non-members* of the Wiyot Tribe." (App. 3777-87 (emphasis added).)

Furthermore, even if, *arguendo*, this Court determines that sales between NWS and Big Sandy Rancheria were governed by the Directory Statute, Fire Safety Act and UCL, it is still evident that under *Black Hawk* and *Huber*, any and all sales made between Big Sandy Rancheria and its members were not subject to those State laws. All off-directory cigarettes sold by NWS to Big Sandy Rancheria which ultimately ended in the possession of a member of Big Sandy Rancheria were not sold in violation of Directory Statute, Fire Safety Act or UCL because it would be inequitable to require compliance with these by NWS, when further down the stream of commerce (*i.e.*, when Big Sandy Rancheria sold the same cigarettes to its members) the cigarettes were not subject to those statutes. Thus, it was erroneous of the lower court to grant summary judgment in the People's favor and issue a penalty against NWS in the amount of $4,292,500.00 when at no time did the People, when making their penalty calculations, ever segregate the legal sales made to members of Big Sandy Rancheria from the purportedly "illegal" sales made to non-members of the tribe.

Finally, the lower court's citation to precedent from outside the State is not binding and not persuasive. For example, the lower court cited to *Muscogee (Creek) Nation v Henry*, (2010) 867 F. Supp. 2d 1197, a district court opinion. This Court should ignore that opinion because it is difficult to find a narrower interpretation of Indian sovereignty.

The lower court's reliance on *State ex rel. Edmondson v. Native Wholesale Supply* (Okla. 2010) 237 P.3d 199 is also misplaced. In that case, the Oklahoma Supreme Court recognized that the Supreme Court "has held that, absent congressional consent, there is a 'categorical bar' to state tax levies whose legal incidence falls directly upon tribes or tribal members for conduct that takes place wholly on tribal land." *Id*. at 212. That court side-stepped Oklahoma's lack of

authority over NWS's Indian-to-Indian transactions on the ground that NWS was organized under the laws of one Indian tribe, and the sales at issue occurred on the sovereign land of another tribe. *See id*. at 215-17. By virtue of that fact, NWS was deemed to be a "non-Indian" on the land of the tribe where the Indian-owned retailers were located. *See id*. at 216.

This finding, which is critical to the application of *Bracker* analysis in *Edmondson*, has no application here. In this case, as a matter of State law, NWS is an Indian. *See* 18 Cal. Code Reg. § 1616(d)(2). Moreover, *Edmondson* is distinguishable on another ground. In this case, NWS has asserted that, even if this Court determines that NWS is not an Indian, such a finding would not render *Bracker* non-controlling. Arthur Montour, an Indian, is the sole owner of NWS, and should not be divested of his rights as an Indian simply because he made the design to incorporate rather than operate as a sole proprietorship. *See Hobby Lobby*, 134 S.Ct. at 2768-75 (recognizing that for-profit closely-held corporations can exercise the same constitutional rights as their owners). The absence of a discussion of these key issues from the *Edmondson* opinion, when those issues are before this Court, renders the *Edmondson* holding on *Bracker* analysis irrelevant to the issues before this Court.

For all these reasons, the lower court erred in rejecting NWS's preemption defense.

IV. The lower court erred in granting the People's Motion for Summary Judgment.

In their Motion for Summary Judgment, the People contended that the lower court should enter judgment in their favor on their first claim (alleging NWS's violation of the Directory Statute), second claim (alleging NWS's violation of the Fire Safety Act), and fourth claim (alleging NWS's violation of UCL). (App. 2265-70.) If the court ruled in favor of the People, they requested that the lower court enter an order imposing civil penalties against NWS in the amount of $3,480,000 for its alleged violations of UCL, and $2,290,000 for its alleged violations of the

Fire Safety Act, and to impose a permanent injunction barring NWS from selling off-brand cigarettes in the State. (App. 2270-78.) Finally, the People contended that none of NWS's affirmative defenses had merit. (App. 2278-82.)

The lower court granted the People's motion in its entirety. (App. 4187-4200.) As set forth below, NWS respectfully urges this Court to reverse the lower court.

A. The lower court erred in rejecting NWS's preemption defense.

In granting the People's Motion for Summary Judgment, the lower court rejected NWS's preemption argument, incorporating by reference its earlier denial of NWS's Motion for Summary Judgment. (App. 4190.) For all the reasons set forth above (*see, infra* ARGUMENT, Point III), this ruling was in error and should be reversed.

B. The lower court erred in denying NWS's personal jurisdiction defense.

The lower court dismissed NWS's personal jurisdiction defense on the ground that NWS had "extensively litigated" that issue in the past in "this Court and the Third District" and that both courts found personal jurisdiction to exist. (App. 4190-91.) Regardless of whether NWS has raised this issue of fundamental importance in the past, NWS maintains that it has done nothing to establish personal jurisdiction in the State (*see* App. 3752-53), and that issue should have been considered on its merits. Indeed, since the prior litigation in this case on the lack of personal jurisdiction over NWS, the Supreme Court has further constrained the ability of the states to exercise specific personal jurisdiction over out-of-state defendants.

For example, in *Walden v. Fiore* (2014) 571 U.S. ___, 134 S. Ct. 1115, the Court clarified the requirements for establishing the "minimum contacts" a defendant has with the forum state such that the defendant should be subjected to litigation in the forum state. The Court explained that its "'minimum contacts' analysis looks to the defendant's contacts with the forum State itself, not the

defendant's contacts with persons who reside there." *Id*. at 1122. Further, the Court recognized that, "[i]f the question is whether an individual's contract with an out-of-state party *alone* can automatically establish sufficient minimum contacts in the other party's home forum, we believe the answer clearly is that it cannot." *Id*. at 1122-23 (quoting *Burger King Corp. v. Rudzewicz* (1985) 471 U.S. 462, 478). Instead, it is the "intentional conduct by the defendant that creates the necessary contacts with the forum."

In *Bristol-Meyers Squibb Co. v. Superior Court of California* (2017) 582 U.S. ___, 137 S. Ct. 1773, the Court reiterated that "[t]he primary focus of our personal jurisdiction inquiry is the defendant's relationship to the forum State." *Id*. at 1779. However, "[w]hen there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State." *Id*. at 1781. Indeed, the Court recognized that California's "sliding scale approach" to specific jurisdiction analysis was incompatible with the requirements articulated by the Court. *See id*. In light of the Court's rejection of California's law on specific jurisdiction, this Court (and the lower court) should revisit jurisdiction.

To the extent that there was any uncertainty before the Court's issuance of these opinions, these opinions make it clear that NWS does not have sufficient "minimum contacts" to be hailed into the courts of this State for this action. Big Sandy Rancheria purchased the cigarettes at issue in this action freight on board ("FOB") the Seneca Nation of Indians' territory, some 2,000 miles away from California. (App. 3789.) Big Sandy Rancheria, not NWS, imported the cigarettes into the territory of Big Sandy Rancheria. (App. 3789.) Big Sandy Rancheria is a separate sovereign territory from the State by nature of treaties, the United States Constitution, federal legislation, and general principles of sovereignty. (App. 3789.) Although Big Sandy Rancheria may have engaged in conduct that resulted in the distribution of NWS's cigarettes within the geographic boundaries of the State, NWS had no part of that conduct. (App. 3789.) Big Sandy Rancheria

assumed all liability for damage and 100% ownership of the cigarettes the moment they were placed on a truck in the territory of the Seneca Nation of Indians. (App. 3789.) As set forth in NWS's prior briefing on this issue, NWS has insufficient contact with the State to qualify as "minimum contact" for purposes of specific personal jurisdiction. The Supreme Court's opinions in *Walden* and *Bristol Meyers* have only reinforced NWS's prior arguments.

Moreover, NWS does not have its domicile or its principle place of business located within the State, and it cannot be said to be "at home" in the State. (App. 40, 2841 and 2887.) Consequently, there is no ground for asserting general personal jurisdiction over NWS.

For all these reasons, NWS respectfully urges this Court to find that there is no jurisdiction, general or specific, over NWS.

C. The lower court erred in denying NWS's equal-protection defense.

The lower court ruled that the plain text of the Directory Statute did not violate the Equal Protection Clause because it did not expressly single out Indians, that legislative intent was irrelevant, that NWS was not a member of a suspect class because it was not a tribe, tribal member or native cigarette manufacturer, and that the amendments made to the Escrow Statute, to insure that Indian-owned cigarette sellers were subject to the Escrow and Directory Statutes, do not matter to the court's analysis of whether the Directory Statute violated the Equal Protection Clause. (App. 4191-92.) Each of the court's findings were flawed. The Directory Statute was enacted to target Indian-owned cigarette sellers and the singling out of Indian-owned cigarette sellers violates the Equal Protection Clause.

Under the Equal Protection Clause, no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Supreme Court has explained that the Clause mandates that "all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.* (1985) 473 U.S. 432, 439 (citation omitted). To succeed on a claim under

Equal Protection Clause, "[p]roof of racially discriminatory intent or purpose is required." *Arlington Heights v. Metro. Hous. Dev. Corp.* (1977) 429 U.S. 252, 265. "Intentional discrimination can be shown when: (1) a law or policy explicitly classifies citizens on the basis of race; (2) a facially neutral law or policy is applied differently on the basis of race; or (3) a facially neutral law or policy that is applied evenhandedly is motivated by discriminatory intent and has a racially discriminatory impact." *Doe v. Lower Merion Sch. Dist.* (3d Cir. 2011) 665 F.3d 524, 543 (citing *Hunt v. Cromartie* (1999) 526 U.S. 541; *Yick Wo v. Hopkins* (1886) 118 U.S. 356; and *Arlington Heights* (1977) 429 U.S. 252).

NWS asserted a valid equal-protection defense. First, as a matter of State law, NWS, a corporation wholly owned by an Indian, is to be considered an Indian. *See* 18 Cal. Code Reg. § 1616(d)(2). Further, *Hobby Lobby* makes it clear that NWS, owned solely by an Indian, has the same rights and status as its sole owner, Mr. Montour, an Indian. Consequently, the lower court erred in faulting NWS for not specifically pleading in its Answer that it is an Indian.

Further, any State law that classifies Indians constitutes a State law that classifies on the basis of a suspect class. The Court of Appeals for the First Circuit has explained that the singling out of Indians by a State constitutes the singling out of a suspect class for purposes of equal-protection analysis. *See KG Urban Enters. LLC v. Patrick* (1st Cir. 2012) 693 F.3d 1, 17-20. Although the Federal Government has the ability to enact legislation that classifies Indians without being found to legislate on the basis of a suspect class, the same leeway granted to the Federal Government, in light of its unique relationship with Indians, is not available for the States. *See id*. Therefore, NWS, an Indian, is a member of a suspect class for purposes of its equal-protection defense to a State enactment, the Directory Statute. The Statute violates the Equal Protection Clause if its enactment is found to have been "motivated by discriminatory intent and has a racially discriminatory impact." *Doe*, 665 F.3d at 543.

Second, the history of the Directory Statute is crucial to this Court's analysis of NWS's equal-protection defense. It is undisputed that, as part of its obligation under the MSA, the State enacted the Escrow Statute. *See* Health & Saf. Code § 104555. The text of the Escrow Statute indicates that it mandates that non-participating cigarette manufacturers (meaning manufacturers who decline to voluntarily pay into the national foundation established by the MSA to promote public health) must pay a tax based on a formula set forth in the Escrow Statute into a State-managed fund. *See id*. Under the terms of the MSA, the State is required to enforce compliance with the Escrow Statute on all non-participating cigarette manufacturers. Thus, a cigarette manufacturer must either (i) voluntarily pay into the national foundation for public health established by the MSA; or (ii) subject itself to the taxation scheme set forth in the Escrow Statute to be paid into a State-managed fund.

Although the Escrow Statute should have fulfilled its purpose in leveling the playing field between participating and non-participating cigarette manufacturers, *see* Health & Saf. Code § 104555(f), the Escrow Statute was not enforceable against a certain portion of cigarette manufacturers, Indian-owned cigarette manufacturers. It is well-settled that States have no authority to impose taxes of any kind on Indian-owned corporations. *See Warren Trading Post Co. v. Arizona Tax Comm'n* (1965) 380 U.S. 685, 688-92 (prohibiting Arizona from imposing a tax on a company that traded with Indians on an Indian reservation); *see also McClanahan v. State Tax Comm'n of Arizona* (1973) 411 U.S. 164, 181 ("[A]ppellant's rights as a reservation Indian were violated when the state collected a tax from her which it had no jurisdiction to impose."); U.S. Dep't. of the Interior, Federal Indian Law 845 (1958) ("Indians and Indian property on an Indian reservation are not subject to State taxation except by virtue of express authority conferred upon the State by act of Congress.").

At some point, the participating manufacturers caught wind of the State's inability to enforce the Escrow Statute – a tax – on Indian-owned cigarette

manufacturers. NWS believes that the participating manufacturers lobbied the State for enactment of the Directory Statute as a means to ensnare Indian-owned cigarette manufacturers under the Escrow Statute, which the State had no right to do. NWS stealthily sought discovery from Phillip Morris, one of the participating manufacturers, and the National Association of Attorneys General as to the motivation for enactment of the Directory Statute. (App. 3049-70.) However, the lower court blocked NWS from obtaining any discovery from non-party entities, or the State, on this fundamental issue.

The Directory Statute did not impose a tax and, thus, did not run afoul of the Supreme Court's prohibition on enforcement of State taxes on Indians. Instead, the Directory Statute made it illegal for anyone to sell cigarettes in the State if the cigarette manufacturer did not certify that it either participated in the national foundation established by the MSA or paid taxes into the State-managed fund under the Escrow Statute. *See* Rev. & Tax Code § 30165.1(b-c). Further, "no person shall sell, offer, or possess for sale in this state, ship or otherwise distribute into or within this state or import for personal consumption in this state, cigarettes of a tobacco product manufacturer or brand family not included in the directory." Rev. & Tax Code § 30162.1(e)(2). Finally, no person is permitted to "sell or distribute" or "acquire, hold, own, possess, transport, import, or cause to be imported cigarettes that the person knows or should know are intended to be distributed" without a required tax stamp or without appearing on the Directory. Rev. & Tax Code § 30165.1(b).

Critically, the State did not need to enact the Directory Statute to enforce the Escrow Statute against non-Indian-owned cigarette manufacturers because the State had the authority to tax non-Indian-owned cigarette manufacturers as it desired. However, without the Directory Statute, the State had no authority to directly impose the tax fund in the Escrow Statute on Indian-owned cigarette manufacturers. For this reason, it should be obvious that the State cleverly sought to enact a statute that targeted and impacted a suspect class—Indian-owned

cigarette manufacturers (deemed to be Indians)—in violation of the Equal Protection Clause. It does not matter that the text of the Directory Statute is facially neutral or that it is enforced evenhandedly against all non-participating cigarette manufacturers because the State was motivated to enact the Directory Statute to target a suspect class and its impact is felt solely by a suspect class.

For all these reasons, the lower court erred in granting the People's motion and disposing of NWS's equal-protection defense. Undoubtedly, if NWS had been permitted the discovery into legislative intent that it sought through its discovery demands, NWS's defense would have been better developed for summary judgment. However, even if the parties engaged in discovery on the issues of intent and motive, it still would have been improper for the lower court to dispose of NWS's equal-protection defense. It is well-settled that issues of intent and motive "are typically not appropriate for disposition on summary judgment." *Moore v. Regents of the Univ. of Cal.* (2016) 248 Cal.App.4th 216, 241. The lower court should have allowed NWS's defense to proceed to trial.

V. The lower court erred in granting the People's Motion for Attorneys' Fees.

On April 18, 2017, the lower court granted the People's Motion for Attorneys' Fees awarding the People $3,843,981.25 in attorneys' fees and $9,116.25 in expert witness expenses. (App. 5456-65.) The lower court's awarding of attorneys' fees was based on its granting of the People's motion for summary judgment. The Notice of Entry of the Attorneys' Fees Order was served on April 25, 2017. (App. 5466-80.) NWS served its Notice of Appeal of the Attorneys' Fees Order on June 14, 2017, and it filed the Notice of Appeal on June 15, 2017. (App. 5481-82.)

NWS argued above that the lower court erred in granting the People's motion for summary judgment. In the event this Court agrees with NWS's contention and reverses the lower court's granting of the People's motion for summary judgment, this Court should consequently reverse the lower court's

granting of the People's Motion for Attorneys' Fees. Indeed, the People will not be entitled to the payment of any attorneys' fees or costs should this Court determine that the People's motion for summary judgment should not have been granted.

In the event this Court affirms the People's motion for summary judgment, it should still reverse the lower court's granting of the People's Motion for Attorneys' Fees because the People were not entitled to an award of fees. "The issue of a party's entitlement to attorney's fees is a legal issue which [appellate courts] review de novo." *Garcia v. Santana*, (2d Dist. 2009) 174 Cal.App.4th 464, 468. The lower court erred in granting the People's motion because nowhere in either the Order Granting the People's Motion for Summary Judgment dated December 28, 2016 (App. 4187-4205) or in the Final Judgment dated December 28, 2016 (App. 4211-14) were the People awarded attorneys' fees. Although the Final Judgment recognized that the People are "entitled to costs in an amount to be determined by a bill of costs" (App. 4213), nowhere does either the Order or the Final Judgment expressly provide that the People are entitled to an award of attorneys' fees.

The lack of an express award of attorneys' fees is critical because a party seeking an award of fees pursuant to Rule 3.1702 of the California Rules of Court must first obtain a determination from the Court that it is entitled to an award of attorneys' fees. Indeed, Rule 3.1702(a) expressly provides that it applies to civil cases "when the court determines entitlement to the fees." Thus, a motion for attorneys' fees can only be filed once a court determines entitlement to the fees in favor of the prevailing party. In this case, because the lower court did not expressly provide in the Order Granting the People's Motion for Summary Judgment or in the Final Judgment that the People are entitled to attorneys' fees, there was never a determination that the People were entitled to an award of attorneys' fees.

The lower court's award of attorneys' fees was also erroneous because the award was granted without first providing NWS with the opportunity to conduct

limited discovery to determine if the Office of the Attorney General has an internal policy regarding the hourly rates of its attorneys and paralegals. Discovery was necessary because there appeared to be an inconsistency in the amount of fees that the People requested in this case.

In the People's Motion for Attorneys' Fees, the People stated that attorney Michelle Hickerson was entitled to an award of fees at an hourly rate of $500. (App. 4755-4803.) That amount, however, is considerably more than the $170 hourly rate that Ms. Hickerson claimed in a declaration she submitted earlier in the case, dated July 11, 2016. In that declaration, Ms. Hickerson stated that there is a "state agency rate for Deputy Attorneys General." (App. 5170-72.) Such statement creates the assumption that the Office of Attorney General has predetermined hourly rates for all of the attorney experience levels in its office. Ms. Hickerson further stated that her state agency rate is $170.00 per hour. (App. 5172.) Ms. Hickerson also claimed that same hourly rate - $170.00 - in yet another declaration dated April 2, 2013. (App. 5165-68)

Because such hourly rates appear to be significantly less than the rates the People sought in its Motion for Attorneys' Fees, the lower court, prior to ruling on the People's motion, should have permitted NWS to conduct limited discovery to determine whether the Office of Attorney General lists rates for its attorneys and paralegals that are much less than the rates the People were seeking in its Motion. Indeed, if the Office of the Attorney General has listed rates that are less than those sought in the People's Motion for Attorneys' Fees, such information was critical to the lower court's determination as to the hourly rate that should have been assigned to each attorney and paralegal that worked on this matter. The lower court's refusal to permit NWS to conduct limited discovery concerning the reasonableness of the hourly rates requested by the People warrants the reversal of the lower court's granting of the People's Motion for Attorneys' Fees.

In the event this Court does not reverse the lower court's granting of the People's Motion for Attorneys' Fees for the reasons stated above, it should still

reverse the lower court's decision because the amount of fees awarded to the People is unreasonable. "[T]he determination of the amount of fees to be awarded is reviewed for abuse of discretion." *Id*. "Discretion must not be exercised whimsically, and reversal is appropriate where there is no reasonable basis for the ruling or the trial court has applied to wrong test or standard in reaching its result." *Donahue v. Donahue* (2010) 182 Cal.App.4th 259, 269.

When assessing the reasonableness of attorneys' fees, a court begins "with a touchstone or lodestar figure, based on the careful compilation of the time spent and reasonable hourly compensation of each attorney . . . involved in the presentation of the case." *Pellegrino v. Robert Half International, Inc.* (2010) 182 Cal. App.4th 278, 290. Additionally, "trial courts must carefully review attorney documentation of hours expended; 'padding' in the form of inefficient or duplicative efforts is not subject to compensation." *Id*.; *see also Levy v. Toyota Motor Sales, USA, Inc.* (1992) 4 Cal. App.4th 807, 816. "[A] computation of time spent on a case and the reasonable value of that time is fundamental to a determination of an appropriate attorneys; fee award." *Donahue*, 182 Cal.App.4th at *271*.

The party seeking an award of attorneys' fees must provide documentary evidence to the court specifying the number of hours spent, and how it determined the hourly rate(s) requested. *See Hensley v. Eckhart* (1983) 461 U.S. 424, 433. The fee applicant has the burden of establishing an appropriate hourly rate." *ComputerXpress, Inc. v. Jackson* (2001) 93 Cal. App.4th 993, 1020; *Ambriz v. Arrow Fin. Servs., LLC*, 2008 WL 2095617, at 1 (C.D. Cal. May 15, 2008) (applicant must produce "satisfactory evidence, in addition to the affidavits of its counsel, that the requested rates are in line with those prevailing in the community for similar services of lawyers of reasonably comparable skill and reputation"). Ultimately, "[t]he experienced trial judge is the best judge of the value of the professional services rendered in his court." *Mountjoy v. Bank of America, N.A.* (2016) 245 Cal.App.4th 266, 272.

In this case, there are several reasons why the $3,843,981.25 in attorneys' fees awarded to the People is unreasonable. First, that amount should have been significantly reduced because neither attorney Ed DuMont (awarded $14,437.50 in fees) nor paralegal Monica Gable (awarded $218,643.75 in fees) provided the lower court with a declaration confirming the hours set forth in the time records presented by the People. (App. 5464.) Without any sworn testimony from Mr. DuMont or Ms. Gable confirming the accuracy of their respective time records, the People failed to authenticate the hours allegedly spent by them working on this matter.

The lower court found that such failure was "not fatal" because Mr. DuMont's and Ms. Gable's time records were attached to attorney Karen Leaf's declaration. (App. 5462.) Such finding, however, is flawed because only Mr. DuMont and Ms. Gable can verify the time each of them spent working on this matter. Although Ms. Leaf claims that the time spent by Mr. DuMont and Ms. Gable were recorded by them in an electronic time-keeping system (App. 4490), Ms. Leaf cannot confirm whether the time entered into the system is *correct*. Only Mr. DuMont and Ms. Gable have personal first-hand knowledge of the work they performed for this matter and the time they spent performing such work. For this reason, and because nowhere in her declaration did attorney Karen Leaf explain why neither Mr. DuMont nor Ms. Gable submitted their own sworn declarations, the lower court erred in failing to deduct all of the attorneys' fees requested by Mr. DuMont and Ms. Gable.

The $3,843,981.25 in attorneys' fees awarded to the People is also unreasonable because the hours spent on the matter by the People is excessive. The People initially claimed to have spent 9,174.75 hours working on the matter – an amount that is equal to over 382 business days. The lower court eventually reduced the hours to 7,953.50. (App. 5464.) That amount is equal to a little more than 331 business days and it still appears to be excessive.

"The evidence should allow the court to consider whether the case was overstaffed." *Donahue* at 271. "A reduced award might be fully justified by a general observation that an attorney overlitigated a case." *Id*. In this case, the excessiveness stems from the fact that the People used *eight* attorneys to prosecute this case – Ed DuMont, Dennis Eckhart, Michael Edson, Nora Flum, Michelle Hickerson, Laura Kaplan, Karen Leaf and Nicholas Wellington. *Id*. Using eight attorneys in a case where there is only one defendant, the time period at issue is only eight years (2004-2012), and no trial was ever held is excessive. (App. 1481.) In contrast, during the time Lipsitz Green Scime Cambria LLP has represented NWS in this matter (since December 2015), only three of its attorneys spent significant time working on the case. (App. 5099.) Thus, the lower court erred by not further reducing the hours used to calculate the attorneys' fees awarded to the People.

The lower court should have also substantially reduced the hourly rates requested by the People. In February 2016, the Court of Appeals for the Third Appellate District affirmed a trial court's determination that a reasonable hourly rate for an attorney in the City of Sacramento with 14 years of experience is $260. *See Mountjoy*. That amount is considerably less than the inflated $400 per hour that the lower court awarded for the legal services provided by attorney Nicholas Wellington who had 13 years of experience at the time the People's motion for summary judgment was decided. (App. 5464.)

Furthermore, as stated above, it appears that the Office of the Attorney General has an internal policy regarding the hourly rates it charges for its attorneys. During the litigation of this matter, attorney Michelle Hickerson stated, in two separate sworn declarations, that her hourly rate is $170. (App. 5170-72 and 5165-68.) Using Ms. Hickerson's sworn declaration, the lower court granted motions for discovery sanctions utilizing the $170 hourly rate. (App. 5174-79.) Because Ms. Hickerson already stated under oath in this matter that her hourly rate is $170,

and the lower court awarded her fees at that rate, the lower court should have rejected the People's claim that her legal services were worth $500 per hour.

Under California law, "[j]udicial estoppel precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position." *People v. Castillo* (2010) 49 Cal.4th 145, 154. The judicial estoppel doctrine is "designed to protect the integrity of the legal system as a whole, and does not require a showing of detrimental reliance by a party." *Castillo*, at 156. "Judicial estoppel generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Int'l Billing Servs., Inc. v. Emigh* (2000) 84 Cal.App.4th 1175, 1191. The judicial estoppel doctrine is applicable when: "(1) the same party has taken two position; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (*i.e.* the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud or mistake." *Castillo*, at 155.

In this case, the lower court had already adopted the People's previous position that attorney Michelle Hickerson's hourly rate is $170. (App. 5174-79.) Nevertheless, the People took the position in its motion that Ms. Hickerson's time is worth $500 per hour – a position that is contradictory to the dual goals of the judicial estoppel doctrine which is to "maintain the integrity of the judicial system and to protect parties from opponent's unfair strategies." *Id*. Accordingly, the lower court, when calculating the fees awarded to the People for the legal services provided by Ms. Hickerson, should have used the $170 hourly rate that was previously used by it and Ms. Hickerson – a rate that is 66% less than the $500 per hour that was awarded for Ms. Hickerson's time.

Similarly, the lower court should have also reduced the hourly rates for the other seven attorneys by a percentage similar to 66% - especially because it is likely the Office of the Attorney General has a policy that sets hourly rates at an amount

much less than those requested in the People's Motion for Attorneys' Fees. For instance, the awarded hourly rate of $525 for attorney Michael Edson should have been reduced to approximately $178.50 per hour and the awarded hourly rate of $675 for attorney Karen Leaf should have been reduced to approximately $229.50 per hour. The same adjustments should have also been done to the hourly rates requested for the remaining attorneys set forth in the chart provided in the Declaration of Karen Leaf. (App. 4496.)

Even if the lower court was not willing to reduce the requested hourly rates by 66%, it still should have reduced the hourly rates requested by the People because the rates are high for the Sacramento area. For instance, in *Fitzgerald v. Barnes*, 2013 WL 1627740 (E.D. Cal. 2013), a court sitting in the City of Sacramento acknowledged that the following hourly rates were deemed reasonable by courts in the Sacramento area: (i) $300 per hour for an attorney with over 40 years of experience; (ii) $315 per hour for an attorney with 20 years of experience; and (iii) $295 per hour for an attorney with 10 years of experience. Similarly, in *Branco v. Credit Collection Servs., Inc*., 2011 WL 6003877 (E.D. Cal. 2011), the court awarded the following fees: (a) $275 per hour for an attorney with 12 years of experience; and (b) $100 per hour for paralegal assistance. Additionally, in *Hall v. City of Fairfield*, 2014 WL 1286001 (E.D. Cal. 2014), the court, in a matter concerning constitutional issues, considered the hourly rates of $350 for an attorney with over 40 years of experience and $260 for an attorney with 12 years of experience to be the market rate in the Sacramento area.

The hourly rates granted by the lower court are also high when compared to the Burdge Report (*i.e.* the United States Consumer Law Attorney Fee Survey Report for 2013-2014). (App. 5240-5385.) The Burdge Report, addressing attorneys' fees related to unfair and deceptive business practices, provides that: (i) the median California Attorney hourly rate is $425; and (ii) the average attorney hourly rate for attorneys in Sacramento is $428. (App. 5262 and 5327.) The hourly rates awarded to the People are even high when compared to the USAO Attorney's

Fees Matrix 2015-2015, which is comparable to the Laffey Matrix utilized by many courts. (App. 5181-83.)

The hourly rates awarded by the lower court are also higher than those awarded in the various cases that the People cited in their motion papers. For instance, although the lower court determined that attorney Dennis Eckhart was entitled to fees based upon an hourly rate of $675, the court in *People v. Darren Rose*, Shasta County Superior Court, when determining reasonable fees for the City of Sacramento in 2016, awarded Mr. Eckhart fees based upon a $650 hourly rate. Also, in that case: (i) an attorney with 18 years of experience was provided $450 per hour (less than the $500 per hour that the lower court awarded Michelle Hickerson); (ii) an attorney with 11 years of experience was provided $350 per hour (less than the $400 per hour that the lower court awarded attorney Nicholas Wellington); and (iii) paralegal Monica Gable was provided $200 per hour (less than the $225 per hour that the lower court awarded Ms. Gable).

It should also be noted that the hourly rates suggested in the Declaration of Richard Pearl (App. 4755-4990) are similar to rates requested in actions more complex than this one. Indeed, many of the decisions attached to Mr. Pearl's declaration as exhibits concerned complex class action lawsuits – actions which traditionally entail the payment of higher hourly rates. Thus, the decisions attached to Mr. Pearl's declaration do not give an accurate portrayal of the hour rates traditionally found in the Sacramento area.

Finally, the hourly rates charged by Lipsitz Green Scime Cambria LLP in representing NWS in this matter are considerably less than those that were awarded to the People. "A comparative analysis of each side's respective litigation costs may be a useful check on the reasonableness of any fee request." *Donahue*, at 272. The hourly rates charged by Lipsitz Green Scime Cambria LLP were: (i) $425 per hour for work provided by attorney Paul J. Cambria, Jr. (43 years of experience); (ii) $330 per hour for work provided by attorney Patrick J. Mackey (15 years of experience); and (iii) $325 per hour for work provided by attorney Erin

McCampbell (10 years of experience). (App. 5099.) Such fact further evidences that the hourly rates that the lower court used to calculate the attorneys' fees awarded to the People were inflated.

Because it is evident that the lower court abused its discretion by awarding the People attorneys' fees in the amount of $3,843,981.25, this Court should reverse the lower court's decision granting the People's Motion for Attorneys' Fees.

CONCLUSION

For all these reasons, NWS respectfully urges this Court to enter an order: (i) reversing the lower court's decision in the February 16, 2016 Report to deny NWS's motion to compel; (ii) reversing the lower court's decision in the July 22, 2016 Report to deny NWS's motion to compel; (iii) reversing the lower court's decision in the July 22, 2016 Report to grant the People's motion for protective order and the Board of Equalization's motion for protective order; (iv) reversing the lower court's decision in the October 25, 2016 Report to grant Philip Morris's motion to quash; (v) reversing the lower court's denial of NWS's motion for summary judgment in the Order dated December 28, 2016; (vi) reversing the lower court's granting of the People's motion for summary judgment in the Order dated December 28, 2016; (vii) reversing and vacating the Final Judgment entered on December 28, 2016; and (viii) reversing the lower court's granting of the People's motion for attorneys' fees in the Order dated April 18, 2017.

DATED: March 14, 2018

Respectfully submitted,
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Native Wholesale Supply Company

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.504(d)(1) of the California Rules of Court, the enclosed Brief of Appellant is produced using 13 point or greater - Roman type including footnotes and contains 16,397 words, which is within the amount of words specified in the Appellant's Application for Leave to File an Over-length Brief filed previously with the Court pursuant to Rule 8.204(c)(5). Counsel relies on the count of the computer program used to prepare this brief.

DATED: March 14, 2018

Respectfully submitted,
LIPSITZ GREEN SCIME CAMBRIA LLP

By: /s/ Erin E. McCampbell
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Attorneys for Defendant-Appellant
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STATE OF CALIFORNIA
Court of Appeal, Third Appellate District

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Date

/s/Paul Cambria

Signature

Cambria, Paul (177957)

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