IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

People of the State of California ex rel. Xavier Becerra, Attorney General, Plaintiff/Respondent, **v.** **Native Wholesale Supply Company, a corporation, and Does 1 through 20,** Defendant/Appellant.	No. C084031 No. C084961

Sacramento County Superior Court, No. 34-2008-00014593
Hon. David I. Brown, Judge

PEOPLE'S ANSWERING BRIEF

XAVIER BECERRA
Attorney General of California
KAREN LEAF
Senior Assistant Attorney General
NICHOLAS M. WELLINGTON
Supervising Deputy Attorney General
MICHAEL M. EDSON, SBN 177858
NORA FLUM, SBN 278775
Deputy Attorneys General
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, CA 94612-0550
Telephone: (510) 879-1986
Fax: (510) 622-2270
E-mail: Nora.Flum@doj.ca.gov
Attorneys for Plaintiff/Appellee

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

Case Name:	*People v. Native Wholesale Supply Co.*	Court of Appeal No.:	Sac. Super. Ct. No.
		C084031	34-2008-00014593

CERTIFICATE OF INTERESTED PARTIES OR ENTITIES OR PERSONS
(Cal. Rules of Court, Rule 8.208)

(Check One) **INITIAL CERTIFICATE** [X] **SUPPLEMENTAL CERTIFICATE** [ ]

Please check the applicable box:

[XX] There are no interested entities or persons to list in this Certificate per California Rules of Court, rule 8.208(d).

[ ] Interested entities or persons are listed below:

Full Name of Interested Entity or Party	Party *Check One*	Non-Party *Check One*	Nature of Interest *(Explain)*
	[ ]	[ ]	
	[ ]	[ ]	
	[ ]	[ ]	
	[ ]	[ ]	
	[ ]	[ ]	
	[ ]	[ ]	

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 (i) an ownership interest of 10 percent or more in the party if an entity; or (ii) 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).

Attorney Submitting Form

NORA FLUM, SBN 278775
Deputy Attorney General
1515 Clay Street, 20th Floor
Oakland, CA 94612-0550
Telephone: (510) 879-1986
Fax: (510) 622-2270
E-mail: Nora.Flum@doj.ca.gov

Party Represented

Attorney for People of the State of California, Plaintiff/Appellee

/s/ *Nora Flum*
(Signature of Attorney Submitting Form)

June 13, 2018
(Date)

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

COURT RULES

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page

INTRODUCTION AND SUMMARY OF ARGUMENT

Native Wholesale Supply Company ("NWS") does not challenge the trial court's determinations that NWS violated every law it was charged with violating, by shipping and selling in California over 1 billion contraband cigarettes. (See Appellant's Appendix ("Appen.") 4187-4195:13 [Ord. granting People's MSJ].) NWS argues only that despite these violations NWS should not have been held liable because (a) California courts lack personal jurisdiction over NWS; (b) the Directory Statute (underlying NWS's liability under the first cause of action) is invalid under the Equal Protection clause; (c) its application to NWS is preempted by federal law; and (d) NWS was not allowed to proceed with certain discovery demands. NWS also contends that the People were not entitled to fees and that the fee award was too high.

Each of NWS's contentions lacks merit because, among other reasons:

- **Personal jurisdiction:** NWS is precluded from appealing the issue of personal jurisdiction because NWS chose to litigate this case on the merits, waiving any further challenges to personal jurisdiction.
- **Equal protection:** NWS failed both here and below to offer any evidence that the Directory Statute has a discriminatory effect – an essential element of any equal protection claim.
- **Preemption:** There is no authority for the preemption rule that NWS relies on, which conflicts with holdings by the U.S. Supreme Court and every other court to have considered the issue.

- **Discovery rulings:** NWS has not even argued, much less shown, that it was prejudiced by the discovery rulings, even if they were incorrect.
- **Fee award:** The trial court properly awarded fees as a component of costs, and NWS has made no showing that the trial court abused its discretion in calculating the total amount.

FACTS

The undisputed facts[1] as found by the trial court in connection with cross-motions for summary judgment, show that NWS is a corporation headquartered in New York on the Seneca Indian reservation. (Appen. 2803, ¶ 30 [People's Separate Statement of Undisputed Facts re MSJ ("UF") 30].) In its California-directed operations, NWS purchased cigarettes from Grand River Enterprises Six Nations Ltd. ("GRE"), a Canadian corporation, and with the help of a California-based customs broker, among others, imported them into the United States, storing them at various foreign trade zones and customs warehouses in New York and/or Nevada. NWS sold those cigarettes to Big Sandy Rancheria (Big Sandy), an Indian tribe with about 434 members located on a reservation near Fresno, California. NWS then paid and arranged for the shipment of the cigarettes either to Big Sandy or, at Big Sandy's request, directly to Big

[1] NWS's brief is replete with statements of fact that are not supported by the record. As one example only, NWS states that "The terms of NWS's sales to Big Sandy Rancheria were F.O.B. Seneca Nations land . . . ," citing "App. 4102" as support. (NWS Brf., p. 12.) That citation, however, is to the Separate Statement of Undisputed Facts NWS submitted in support of its motion for summary judgment. Although NWS fails properly to cite the specific paragraph, it clearly intends paragraph 5, which cites as support paragraph 5 of the Hill Declaration. The trial court, however, held this evidence to be inadmissible. (See Appen. 3734, ¶ 2 [People's objections to NWS evidence]; Appen. 4184, lines 27-28 [sustaining all of the People's evidentiary objections].)

Sandy's downstream customers, for resale to the general public. (Appen. 4181:9-17 [Ord. denying NWS MSJ]; see also NWS Appen 2797-2803 [People's UF].) Using this scheme, between June 30, 2004 and May 25, 2012, NWS sold and shipped over one billion contraband GRE-Cigarettes in or into California. (Appen. 4196:8-10 [Ord. granting People's MSJ].)

I. STATUTES NWS WAS FOUND LIABLE FOR VIOLATING

A. First Cause of Action – Violating the Directory Statute (Rev. & Tax. Code, § 30165.1, subd. (e)(2) & (3))

Background – The Master Settlement Agreement and Escrow Statute. In November 1998 (not 2008, as NWS incorrectly states (see NWS Brf., p. 13)), California and 45 other states entered into a settlement with the major United States tobacco companies. (*KT& G Corp v. Attorney General of State of Okla.* (10th Cir. 2008) 535 F.3d 1114, 1118-1119.) This Master Settlement Agreement ("MSA"),[2] in exchange for a release of liability from the states for smoking-related public healthcare costs, requires all Participating Manufacturers ("PMs"; those who entered the settlement) to abide by a number of restrictions on their marketing practices – such as refraining from targeting young people – and to pay the settling states billions of dollars each year in perpetuity. (*Ibid.*)

Tobacco manufacturers that do not join the MSA have no such conduct or financial obligations. So, California and every other MSA Settling State enacted statutes designed to prevent non-participating tobacco manufacturers ("NPMs") from undermining public health by using the cost and advertising advantages they have by not joining the MSA to encourage more smoking. (See *Grand River Enterprises Six Nations, Ltd. v. Pryor* (2d Cir. 2005) 425 F.3d 158, 163; Health & Saf. Code, § 104555, subd. (f).) California's Escrow Statute (Health & Saf. Code, § 104555 et

[2] The MSA can be found at http://www.ag.ca.gov/tobacco/msa.php.

seq.) requires NPMs that sell cigarettes in California – "whether directly or through a distributor, retailer or similar intermediary" – to deposit funds into an escrow account each year, to cover future liabilities to the state for the damage that their products cause. (*Id*. § 104557, subd. (a).) The amount of money NPMs must deposit approximates, on a per-cigarette basis, the amount Participating Manufacturers must pay under the MSA. (*KT&G*, *supra,* 535 F.3d at p. 1122.)

The Directory Statute. To ensure adherence to this program, one provision of the Directory Statute requires all manufacturers whose products are sold in California to certify to the Attorney General each year that they either are a participating manufacturer ("PM"; bound to comply with the MSA's restrictions) or an NPM that is in full compliance with the Escrow Statute. (See Rev. & Tax. Code, § 30165.1, subd. (b).) This provision, however, applies only to tobacco product manufacturers, and is not at issue in this action, despite NWS's extensive efforts to focus attention on escrow payments.

The provisions at issue are those that prohibit the sale and distribution of cigarettes by *any* person, including distributors like NWS. (See Rev. & Tax. Code, § 30165.1, subd. (e).) They prohibit any person from, among other things, selling, shipping, or distributing into or within California cigarette brands that are not listed as legal for sale on a directory maintained by the Attorney General. (Rev. & Tax. Code, § 30165.1, subd. (e)(2) & (3).) To be listed on the Directory, a brand's manufacturer must satisfy certain requirements, including compliance with the Escrow Statute, as described above. (*Id.,* subd. (b), (c).)

It is undisputed that neither GRE nor any of its cigarette brands have been listed as legal for sale on the California Directory. (Appen. 4190:3-5 [Order granting People's MSJ].) Accordingly, NWS's sale and shipment of over one billion GRE Cigarettes in and to California were clear violations

of the Directory Statute, and NWS was found so liable. (Appen. 4187-4199 [Ord. granting People's MSJ]).

B. Second Cause of Action – Violating the Fire Safety Act (Health & Saf. Code, § 14950 et seq.)

The Cigarette Fire Safety and Firefighter Protection Act ("Fire Safety Act"; Health & Saf. Code, § 14950 et seq.) provides in relevant part: "A person shall not sell, offer, or possess for sale in this state cigarettes not in compliance" with certain specified cigarette fire-safety requirements. (*Id*., § 14951, subd. (a).) NWS did not dispute that the cigarettes NWS sold to Big Sandy between 2004 and 2012 were not certified as fire-safe, as required by that provision. (Appen. 3817-3818, ¶¶ 21-22 [NWS Opp. UF].) Accordingly, NWS was found liable for violating the Fire Safety Act.

C. Fourth[3] Cause of Action – Violating the Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq.)

The unlawful conduct described in the first two causes of action also constitutes a violation of California's Unfair Competition Law ("UCL"), which makes independently actionable any unlawful business practice or act. (See Bus. & Prof. Code, § 17200 et seq.) On the basis of NWS's violations of the Directory and Fire Safety Statutes, and its failure to report its sales and shipments into California in violation of 15 U.S.C. § 376, NWS was found liable for violation of the UCL. (Appen. 4194:20-4195:13 [Ord. granting People's MSJ].)

STANDARD OF REVIEW

This Court reviews de novo the trial court's grant of summary judgment, "independently evaluating the correctness of the trial court's ruling and applying the same legal standards as the trial court." (*California*

[3] The trial court sustained NWS's demurrer to the 3rd Cause of Action.

Public Records Research, Inc. v. County of Yolo (2016) 4 Cal.App.5th 150, 165.)

Discovery orders are reviewed for abuse of discretion. (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 733.)

Determination of the legal basis for an award of attorney fees is reviewed de novo. (*In re Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1213.) However, the amount of a fee award is reviewed for an abuse of discretion. (*Laffitte v. Robert Half Intern. Inc.* (2016) 1 Cal.5th 480, 488; *Serrano v. Priest* ["*Serrano I*"] (1977) 20 Cal.3d 25, 49.)

ARGUMENT

"Perhaps the most fundamental rule of appellate law is that the judgment challenged on appeal is presumed correct, and it is the appellant's burden to affirmatively demonstrate error." (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573.) NWS has not carried that burden with respect to any of its claims of error.

I. NWS MAY NOT APPEAL PERSONAL JURISDICTION

NWS may not appeal the issue of personal jurisdiction because by answering the complaint, filing a motion for summary judgment, propounding discovery, and otherwise litigating the merits of this action NWS waived any further challenges to personal jurisdiction. (See *Roy v. Superior Court* (2005) 127 Cal.App.4th 337, 341; Code Civ. Proc., § 418.10, subd. (e)(2).)

II. THE TRIAL COURT PROPERLY REJECTED NWS'S EQUAL PROTECTION DEFENSE

As an initial matter, NWS grossly mischaracterizes the rationales underlying the trial court's rulings regarding equal protection. (Compare NWS Brf., p. 46 [last complete para.], with NWS Appen. 4191:3-4192:12 [Ord. granting People's MSJ].) We will, however, not take space to correct

all of NWS's inaccurate recitation here, because even if the trial court had said what NWS contends, this Court "review[s the trial court's] ruling, not its rationale." (*Moore v. William Jessup University* (2015) 243 Cal.App.4th 427, 433.)

A. NWS Failed to Argue or Offer Evidence Regarding an Essential Element of Its Defense: Discriminatory Effect

NWS's equal protection challenge should be rejected first because NWS failed below, and fails here, to offer any evidence or argument that the Directory Statute has a discriminatory effect.[4] (See Appen. 3750-3762 [NWS Opp. CA MSJ].)[5] Evidence of discriminatory effect, however, is an essential element of any equal protection defense. (See, e.g., *People v. Guzman* (2005) 35 Cal.4th 577, 584 ["Part of the threshold inquiry in assessing an equal protection claim is whether the law, in fact, accords 'disparate treatment' to similarly situated persons. [Citation.]"]; *In re Eric J.* (1979) 25 Cal.3d 522, 530 ["The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification [statute] that affects two or more *similarly situated* groups in an unequal manner."].) Thus, even if all of NWS's assertions that the Directory Statute was enacted with the intent to harm Indians were correct, and even if NWS had obtained all of the discovery regarding that legislative purpose that it complains was improperly denied, it still could not have prevailed in its equal protection defense.

---

[4] Although NWS's defense is directed at "state laws on which each and every cause of action alleged in the Complaint is based" (Resp. Appen. 90:1-7 [Answer, 6th Aff. Def.]), NWS does not argue here that the Fire Safety Act or the UCL run afoul of the Equal Protection clause. Nor did any of the discovery that NWS claims was improperly denied go to that issue.

[5] NWS did not assert this defense in its own motion for summary judgment. (See Appen. 2824-2833 [MPAs re NWS MSJ].)

B. Even if NWS had Shown Discriminatory Effect, Its Equal Protection Defense Could Not Survive Rational Basis Review

Even if NWS had successfully shown that the Directory Statute has a discriminatory effect, its equal protection defense still would fail. NWS's defense requires only rational basis review, which the Directory Statute easily satisfies, and NWS offered no evidence or argument to the contrary in its summary judgment papers.

"[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end." (*Romer v. Evans* (1996) 517 U.S. 620, 631.) NWS does not allege that the laws at issue burden any fundamental rights (Respondent's Appendix ("Resp. Appen.") [Answer] 82-95). It alleges discrimination against four classes – "Indian tribal members, Indian tribes, Native cigarette manufacturers, and entities that sell or desire to sell Native-made cigarettes to Indian tribal members or Indian tribes, or both." (Resp. Appen. 90:1-7.)

Of those classes NWS only alleges, via an admission in its answer, that it is a member of the last class – an entity that sells cigarettes to an Indian tribe in California. (Resp. Appen. 84, ¶ 12 [Answer].) This fact is significant because, even if tribes, tribal members, or native cigarette manufacturers were suspect classes (entitling NWS to more than rational basis review), "a charge of unconstitutional discrimination can only be raised . . . by the person or a member of the class of persons discriminated against." (*Rubio v. Superior Court* (1979) 24 Cal.3d 93, 103.) Because, of the classes NWS asserts are discriminated against, NWS only claims to be a member of a clearly non-suspect class (see *Jones v. Reagan* (9th Cir. 1984) 748 F.2d 1331, 1337 [only three suspect classifications: race, nationality,

and alienage]), the trial court correctly determined that NWS's defense is subject to only rational basis review.

The Directory Statute easily passes that review. To prevail on rational basis review, the state is required only to point to some "conceivable" rational basis for statute; it does not need to prove that particular basis was the Legislature's actual reason for enactment. For NWS to succeed, it must "negative" all such conceivable bases that the state offers:

> On rational-basis review, a classification . . . comes to us bearing a strong presumption of validity [citation], and those attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it,' [citations.] Moreover, because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. [Citations.] . . . In other words, a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data. [Citation.]"

(*F.C.C. v. Beach Communications, Inc*. (1993) 508 U.S. 307, 314-315; accord *Warden v. State Bar* (1999) 21 Cal.4th 628, 650.)

Here, NWS concedes that the Directory Statute is intended to enhance California's enforcement of its tobacco laws. (NWS Brf., pp. 13-14.) One conceivable purpose of those laws, as the Legislature itself has stated, is to protect the public health from the dangers of cigarette smoking. (See, e.g., Health & Saf. Code, § 104555 [legislative findings].) Other states' materially identical Escrow and Directory Statutes have universally been held to be non-discriminatory laws that have the rational basis of promoting public health. (See, e.g., *King Mountain Tobacco Co., Inc. v. McKenna* (E.D. Wash., Apr. 5, 2013, CV-11-3018-LRS) 2013 WL 1403342, at *8, affd. (9th Cir. 2014), cert. denied (2015) 135 S.Ct. 1542; *Omaha Tribe of Nebraska v. Miller* (S.D. Iowa 2004) 311 F. Supp. 2d 816, 826-827; *Grand*

River Enterprises Six Nations, Ltd. v. Pryor (2d Cir. 2005) 425 F.3d 158, 175; *Muscogee (Creek) Nation v. Pruitt* (10th Cir. 2012) 669 F.3d 1159, 1179.)

NWS failed below, and fails here, even to attempt to negative this conceivable rational basis. It argues only that it was entitled to discovery to see if the Legislature also intended to discriminate against Indians. But, "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." (*Beach Communications*, *supra,* 508 U.S. at p. 315.)

NWS next argues that rational basis review does not apply to its defense because, as a company wholly owned by an Indian, NWS itself should be deemed to be an Indian, a racial classification for equal protection purposes. This argument lacks merit for several reasons.

First, even if NWS were deemed to be an Indian for equal protection purposes, that conclusion could not save NWS's defense because NWS's answer does not allege discrimination against Indians. This omission is fatal to NWS, because the scope of claims/defenses cognizable on summary judgment is confined to the allegations in the pleadings. (*Jacobs v. Coldwell Banker Residential Brokerage Company* (2017) 14 Cal.App. 5th 438, 444.) The People repeatedly pointed out this flaw in NWS's arguments below (see, e.g., Appen. 328:8-23 [People's Opp. to 1st NWS MTC]), yet NWS never responded or attempted to amend its answer.

Second, not only does NWS's answer not allege that NWS is an Indian (or a member of any suspect class), but its current contention is directly contrary to the position it took earlier in this case when it argued:

> [N]o Indians are parties to the instant litigation. The only parties in this litigation are a State government, and an Indian owned corporation . . . . "[and] a corporation, even one wholly owned by members of the tribe on whose reservation it sits, is not a tribal member *or Indian itself*."

(Resp. Appen. 52:26-28, fn. 22 [NWS supp. reply re MTQ].)

Third, NWS's arguments about why it should be deemed to be an Indian are fatally flawed. NWS argues that it should be deemed an Indian because "as a matter of State law, NWS is an Indian," citing a California regulation that exempts Indian-owned corporations from certain sales tax obligations. (NWS Brf., pp. 43, 39, 47.) That regulation, however, says only that "Indian organizations are entitled to the same exemptions as Indians" for the purposes of certain California tax laws. (See Cal. Code. Regs., tit. 18, § 1616.) It does not say that Indian organizations are deemed to be Indians for any purpose other than the tax exemption it references.

NWS's citation to *Hobby Lobby* is equally misplaced. *Hobby Lobby* was not a 14th Amendment equal protection case; it was a case about the interpretation of a federal statute regarding the exercise of religion. (See *Burwell v. Hobby Lobby Stores, Inc.* (2014) __ U.S. __ [134 S.Ct. 2751, 2759] ["We must decide in these cases whether the Religious Freedom Restoration Act of 1993 . . . permits the United States Department of Health and Human Services (HHS) to demand that three closely held corporations provide health-insurance coverage for methods of contraception that violate the sincerely held religious beliefs of the companies' owners."].)

Virtually every court to have expressly considered the question of whether a corporation can be an Indian or tribal member has held that it cannot, including in other cases where NWS has made the same argument it makes here. (See *State ex rel. Wasden v. Native Wholesale Supply Co.* (Idaho 2013) 312 P.3d 1257, 1262 [rejecting NWS claim that it is an Indian], cert. denied (2014) 134 S.Ct. 2839; *Baraga Products, Inc. v. Comr. of Revenue* (W.D. Mich. 1997) 971 F.Supp. 294, 296-298 [corporation is not a tribal member or an Indian], affd. sub nom. *Baraga Products, Inc. v. Michigan Comr. of Revenue* (6th Cir. 1998) 156 F.3d 1228; *Muscogee (Creek) Nation v. Henry* ["*Muscogee I"*] (Mar. 18, 2010, No. CIV 10-019-

JHP) 2010 WL 1078438, at *3 [corporation not a tribal member or an Indian]; *W. Sky Fin., LLC v. Maryland Comr. of Fin. Regulation* (D. Md. Apr. 9, 2012, No. CIV. WDQ-11-1256) 2012 WL 1284407 at *4 [corporation not a tribal member]; *Zempel v. Liberty* (Mont. 2006) 143 P.3d 123, 132 [same].)

As *Baraga* explained, when a person "chooses the advantages of incorporation, [he] must also accept the disadvantages . . . ." (971 F.Supp. at p. 296.) The source of many of those advantages and disadvantages is the fact that "a corporation is regarded as a legal entity separate and distinct from its stockholders . . . ." (*Communist Party v. 522 Valencia, Inc.* (1995) 35 Cal.App.4th 980, 993; see also *Ocasio v. U.S.* (2016) 136 S.Ct. 1423, 1436 ["A corporation is an entity distinct from its shareholders . . . ."].) The one exceptional case is *Pourier v. South Dakota Dept. of Revenue* (S.D. 2003) 658 N.W.2d 395, 404, which held that for the purpose of application of South Dakota tax law a corporation wholly owned by Indians could be deemed to be an enrolled member of a tribe if it is "doing business on the reservation for the benefit of reservation Indians . . . ." Even if *Pourier* were controlling, NWS makes no argument nor offers any evidence that it is a member of any tribe or that its business is "for the benefit of reservation Indians."

C. NWS Produced No Evidence of Discriminatory Purpose

If, however, strict scrutiny applies as NWS contends, NWS's defense fails because not only did NWS offer no evidence of discriminatory effect, it also offered no evidence of discriminatory purpose. (See *Village of Arlington Heights v. Metropolitan Housing Development Corp.* (1977) 429 U.S. 252, 264-265 [must show both discriminatory purpose and effect].) NWS does not argue that it offered any evidence of discriminatory purpose on summary judgment. It contends only that it could not do so without

discovery and that was improperly denied. We address those arguments starting on page 32, below.

III. THE TRIAL COURT PROPERLY REJECTED NWS'S PREEMPTION DEFENSE

A. The *Per Se* Rule NWS Relies on Does not Exist

State law applied on Indian reservations may be preempted under "familiar principles of preemption." (*New Mexico v. Mescalero Apache Tribe* (1983) 462 U.S. 324, 334.) These familiar principles apply to all state laws and have as their touchstone whether in enacting a specific federal law Congress intended to preempt state law in question. (See *Wyeth v. Levine* (2009) 555 U.S. 555, 565.) NWS does not assert this type of preemption.

There is, however, an additional way that state laws may be preempted when they are applied to conduct on Indian reservations. The so-called *Bracker* test that describes this rule is the sole focus of NWS's preemption argument. (See *White Mountain Apache Tribe v. Bracker* (1980) 448 U.S. 136, 143-145.) *Bracker* held that, besides ordinary preemption, state regulation of on-reservation conduct also may be preempted if the balance of state, federal, and tribal interests does not favor the state. (See *Agua Caliente Band of Cahuilla Indians v. Superior Court* (2006) 40 Cal.4th 239, 248, citing and quoting *Bracker, supra,* 448 U.S. at p. 145.) (For a more extensive discussion of the balancing test, see, e.g., *People ex rel. Becerra v. Rose* (2017) 16 Cal.App.5th 317, 325-329, review denied (Jan. 17, 2018).)

NWS argues that *Bracker* controls here but that its balancing test does not. NWS contends that, besides the balancing test, *Bracker* announced a special preemption rule that applies to all "Indian-to-Indian" trade, regardless of the balance of state/federal/tribal interests. (NWS Brf., pp. 38-40.) This argument depends entirely on a misquoted half-sentence

example given in *Bracker*: "When on-reservation conduct involving Indians is at issue, state law is generally inapplicable . . . ." NWS interprets this sentence-fragment as announcing a *per se* rule that "Indian-to-Indian" transactions are immune from state regulation, without regard to *Bracker's* balancing test. (NWS Brf., p. 38.)

Bracker, however, announced no such rule, and the trial court correctly concluded that no such *per se* rule exists. (Appen. 4179:17-21 [Ord. denying NWS MSJ].) Read in context, and paying attention to language NWS ignores, the half-sentence NWS relies on is just part of an example of application of the balancing test, not a separate, *per se*, rule: "When on-reservation conduct involving only Indians is at issue, state law is *generally* [not always, as NWS contends] 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, supra,* 448 U.S. at p. 144, italics added.)

Indeed, the Supreme Court, years after *Bracker,* confirmed that there is no *per se* rule as NWS suggests: "Our cases . . . have not established an inflexible *per se* rule precluding state jurisdiction over [even] tribes and tribal members . . . ." (*California v. Cabazon Band of Mission Indians* (1987) 480 U.S. 202, 214-215.) Instead, whenever on-reservation conduct is at issue, the authority of a state to regulate that conduct always depends on how the balance of state, federal, and tribal interests tip so that, "[u]nder certain circumstances a State may validly assert authority over the activities of nonmembers on a reservation, and . . . in exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members." (*New Mexico v. Mescalero, supra,* 462 U.S. at pp. 331-332.)

It thus is not surprising that NWS does not cite a single decision that interprets *Bracker* the way NWS insists. In fact, every court to have considered the issue has held that "Indian-to-Indian" transactions have no

special status. "Congress did not intend to make tribal members 'super citizens' who could trade in a traditionally regulated substance free from all but self-imposed regulations." (*Rice v. Rehner* (1983) 463 U.S. 713, 734.)

> [T]he Supreme Court has repeatedly held that Native American immunities from state taxation and regulation only extend to commerce *within* a particular tribe, not to commerce *among* different tribes or their members. *See*, *e.g.*, *Rice v. Rehner*, 463 U.S. at 720 & n. 7 (State may require tribal retailer to obtain state license for sales to "all non-Indians and all Indians who are not members of the particular tribe" to which the retailer belongs.); *Washington v. Confederated Tribes of the Colville Reservation,* 447 U.S. 134, 160–61, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980) (State may tax and regulate tribal sales to members of other tribes); *see also Duro v. Reina*, 495 U.S. 676, 686–87, 110 S.Ct. 2053, 109 L.Ed.2d 693 (1990) (Tribal tax immunity does not apply to taxation of "inter-tribal commerce" even where the commerce takes place inside of Indian country.).

(*Muscogee I*, *supra*, 2010 WL 1078438, at *3, italics in original.) Other cases, including cases where NWS itself made this same argument, are in accord. (See *Muscogee (Creek) Nation v. Henry* (E.D. Okla, 2010) 867 F.Supp.2d 1197, 1206-1209, affd. sub nom. *Muscogee (Creek) Nation v. Pruitt* (10th Cir. 2012) 669 F.3d 1159; *State ex rel. Edmondson v. Native Wholesale Supply* (Okla. 2010) 237 P.3d 199, 215-217 [in action by state for NWS's violation of Oklahoma's Directory Statute using the same scheme as in California, rejecting NWS's "Indian-to-Indian" immunity argument, and holding, "There is no blanket ban on state regulation of inter-tribal commerce even on a reservation"].) The trial court thus correctly concluded that NWS's preemption defense failed, because it offered no evidence or argument regarding the balance of state, federal, and tribal interests here. (See Appen. 4179:21-4180:2 [Ord. denying NWS MSJ].)

B. NWS's Conduct at Issue is Off-Reservation Conduct Not Subject to *Bracker*

In any event, there is no dispute that *Bracker's* preemption rules apply only to state regulation of "on-reservation" conduct, as the first four words of the fragment NWS relies on make clear ("When on-reservation conduct . . . ."). "Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." (*Mescalero Apache Tribe v. Jones* (1973) 411 U.S. 145, 148-149.)

This distinction is fatal to NWS's preemption claim even under NWS's proposed *per se* rule, because NWS makes no argument and points to no evidence here, and offered none in its summary judgment papers, that its conduct was on-reservation for *Bracker* purposes. In fact, the trial court's unchallenged findings show that its conduct was off-reservation:

> The People's evidence shows that NWS utilized a middleman to deliver cigarettes to Big Sandy and also that some of the cigarettes were delivered to entities other than Big Sandy. [Citation.] The evidence shows that NWS sold contraband cigarettes purchased from Grand River Enterprises Six Nations Ltd. ("GRE") a Canadian corporation, imported them into the United States storing them at various foreign trade zones and customs bonded warehouses in New York and/or Nevada. [Citation.] NWS used at least one customs broker to facilitate the importation process and then paid and arranged for the shipment of the cigarettes either to Big Sandy or directly to Big Sandy's downstream customers. [Citation.]"

(Appen. 4181:9-17 [Order denying NWS MSJ].)

As we noted below (Appen. 3316:20-3318:10), two courts have considered this exact issue in connection with NWS's materially identical contraband cigarette scheme in their states and rejected NWS's identical preemption defense, finding that NWS's conduct was not on-reservation conduct subject to *Bracker* preemption. The Oklahoma Supreme Court, in

a case that this Court already has determined is factually on all fours with this case (see *People of the State of California ex rel Harris v. Native Wholesale Supply Co.* (2011) 196 Cal.App.4th 357, 364), is worth quoting at length:

> ¶ 44 Even accepting for the sake of argument that Native Wholesale Supply's transactions with Muscogee Creek Nation Wholesale take place on the Seneca Cattaraugus Indian Territory in New York because the business is located and accepts orders there, the Company's argument that enforcement of the Complementary Act [Directory Statute] against it [is preempted by the Indian Commerce Clause] is clearly wrong. There is no blanket ban on state regulation of inter-tribal commerce even on a reservation. . . . The transactions at issue in this case are between a Sac and Fox chartered corporation operating on the tribal land of another tribe with a third tribe, the Muscogee Creek Nation. Such transactions are not beyond the reach of state authority.
>
> ¶ 45 In reality, Native Wholesale Supply's transactions with Muscogee Creek Nation Wholesale extend beyond the boundaries of any single "reservation." The cigarettes at issue are manufactured in Canada, shipped into the United States, and stored in a Free Trade Zone in Nevada. Muscogee Creek Nation Wholesale places orders for cigarettes from its "reservation" located within the territorial boundaries of this State to Native Wholesale Supply at the latter's principal place of business on another "reservation" in another State. Delivery of the cigarettes to Muscogee Creek Nation Wholesale requires shipment of the cigarettes from Nevada to the purchaser's tribal land in Oklahoma. The entire process comprising these sales thus takes place in multiple locations both on and off different tribal lands. *This is not on-reservation conduct for purposes of Indian Commerce Clause jurisprudence, but rather off-reservation conduct by members of different tribes. Therefore, Oklahoma's enforcement of the Complementary Act [Directory Statute] against Native Wholesale Supply passes muster* without even evaluating it under the *Bracker* interest balancing test. "Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of

> the State." [fn. 91, citing *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148–49.]

(*Edmondson, supra,* 237 P.3d at pp. 215-216, emphasis added.) Substitute "Big Sandy" for "Muscogee Creek Nation Wholesale," and "California" for "Oklahoma," and you have the instant case.

The Idaho Supreme Court, in an action in which NWS was found liable for violating Idaho's Directory Statute using the same sort of scheme as in California and Oklahoma, came to an identical conclusion.

> NWS's activities in this case are not limited to a single reservation, or even several reservations. *Thus, we hold that NWS's importation of non-compliant cigarettes into Idaho is an off-reservation activity and is therefore not subject to a Bracker analysis.*

(*State ex rel. Wasden v. Native Wholesale Supply Co.* (Idaho 2013) 312 P.3d 1257, 1263, cert. den. sub nom. *Native Wholesale Supply Co. v. Idaho* (2014) 134 S.Ct. 2839.)

IV. NWS'S CHALLENGES TO THE TRIAL COURT'S DISCOVERY RULINGS LACK MERIT

Without discussing any specific discovery request, NWS contends that each of the trial court's rulings on dozens of requests were wrong. NWS describes the discovery at issue as all having a single purpose: to seek "information and documents related to the purpose and intent of [the Directory Statute and Escrow Statute] and the State's enforcement of the statutes within Indian Country." (NWS Brf., p. 23). It argues that this discovery relates to both its equal protection and preemption defenses because "[s]uch purpose . . . and subsequent effect, would be in violation of NWS's equal protection rights [and also] indicate that the Directory Statute should be preempted by federal law. (NWS Brf., p. 25.)

As explained below, NWS's challenges to the discovery rulings should be rejected because:

- NWS fails to even attempt to carry its burden to show that it was prejudiced by the challenged rulings;
- NWS could not have shown prejudice even if it had tried; and
- Trial court's discovery rulings were, in any case, correct.

A. NWS Fails to Show Prejudice

To successfully appeal the trial court's discovery rulings, NWS has the burden to show *both* that the court's rulings were so erroneous as to constitute an abuse of discretion, *and* that the error was prejudicial – that it is "reasonably probable" that NWS would have prevailed on summary judgment if it had received the discovery it sought. (*MacQuiddy v. Mercedes-Benz USA, LLC* (2015) 233 Cal.App.4th 1036, 1045; Code Civ. Proc., § 475.) NWS "bears the duty of spelling out in [its] brief exactly how the error caused a miscarriage of justice." (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106.) NWS neither acknowledges this standard nor attempts to satisfy it. Consequently, its challenges to the trial court's discovery rulings may be rejected without further consideration.

B. NWS Could Not Have Shown Prejudice Even If It Had Tried

In any event, NWS could not have shown prejudice even if it had tried. NWS argues that it needed the discovery "because such information and documents may indicate whether there was a discriminatory purpose behind the drafting of the statutes . . . ." (NWS Brf., p. 24.) Even if the discovery would have shown this, however, NWS still could not show prejudice.

1. No prejudice as to equal protection defense

As to NWS's equal protection defense, on summary judgment (as well as in this appeal) NWS failed to make any argument or offer any evidence

to establish that the Directory Statute has a discriminatory effect – which is an essential element of its defense. NWS does not argue that the discovery at issue was intended to show, much less would have shown, that the challenged statues have a discriminatory effect. NWS therefore cannot show that it was prejudiced by the trial court's rulings, even if they were erroneous. (See, e.g., *Mercury Cas. Co. v. Scottsdale Indem. Co.* (2007) 156 Cal.App.4th 1212, 1220 [where party failed to show statute's discriminatory effect, court properly granted summary judgment despite party's claim that it should be allowed discovery directed at statutory purpose].)

Moreover, the discovery could not have helped NWS, much less made it "reasonably probable that the outcome" of the case would have been more favorable. (*MacQuiddy, supra,* 253 Cal.App.4th at p. 1045.) As explained above, NWS's defense is subject only to rational basis review, and under that standard discovery is unnecessary and irrelevant as a matter of law; the state's "conceivable" rational basis "is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." (*Beach Communications, supra,* 508 U.S. at p. 315; see also, e.g. [emphasis added in all], *Myers v. County of Orange* (2nd Cir. 1988) 157 F.3d 66, 74, fn. 3 ["*rational basis . . . is a legal issue for the court and not a factual issue for jury determination*"]; *Johnson v. Bredesen* (M.D. Tenn. 2008) 579 F.Supp.2d 1044, 1054, affd, (6th Cir. 2010) 624 F.3d 742 [parties challenging a statute subject to rational basis review "*must carry [their] burden by resorting to logic rather than to discovery*"]; *Balentine v. Tremblay* (D. Vt., June 4, 2012, 5:11-CV- 196) 2012 WL 1999859, at * 11 [no discovery for rational basis review]; *Internat. Longshoremen's Assn. v. Miami-Dade County* (S.D. Fla., Mar. 29, 1999, No. 98-0014-CIV) 1999 WL 726883, at *3, fn. 4 ["*Under a rational basis test, there is no need for discovery . . . .*"].)

The authority NWS cites is not to the contrary. *Genesis Environmental Services. v. San Joaquin Valley Unified Air Pollution Control District* (2003) 113 Cal.App.4th 597, 607, did not even involve discovery. At issue was whether California's pleading rules required the plaintiff to allege in a complaint facts sufficient to show that no rational basis for a challenged law existed. In dictum, the court speculated that it could be difficult for the plaintiff to do this without discovery. The court, however, did not acknowledge or consider the U.S. and California Supreme Courts' rulings that rational basis review requires no "courtroom fact-finding." (*Beach Communications, supra,* 508 U.S. at p. 315; *Warden, supra,* 21 Cal.4th at p. 650.) Similarly, *U.S. v. Carolene Products Co.* (1938) 304 U.S. 144, was a Commerce Clause case, not an equal protection case; and it predated by over 50 years *Beach Communications,* where the Court made clear that rational basis review for equal protection claims is not subject to "courtroom fact-finding."

2. No prejudice as to the preemption defense

NWS's entire discussion of the relevance of the discovery to its preemption defense is that the discovery would have "indicate[d] that the Directory Statute should be preempted by federal law." (NWS Brf., p. 25.) NWS offers no explanation, argument, or citation to authority as to why or how evidence that the Directory Statute was enacted with a discriminatory purpose would support its preemption defense. Consequently, as the referee and the trial court observed (see, e.g., Appen. 1063:10-14 [2016-04-04 Ord. adopting ref. rpt.]),[6] NWS cannot carry its burden, and the issue

[6] In its appendix, NWS incorrectly labels this document as the referee's report and recommendation, when in fact it is that report *along with the court's order approving and adopting it*. NWS makes similar labeling errors throughout the appendix. For example, Appen. 3737 is labeled "Rulings on The People's Objections to Evidence . . .", when in fact

should be deemed waived. (See *Digital Music News LLC v. Superior Court* (2014) 226 Cal.App.4th 216, 224 [discovery proponent must "identify a disputed fact that is of consequence in the action and explain how the discovery sought will tend in reason to prove or disprove that fact or lead to other evidence that will tend to prove or disprove the fact"]; *Berman v. HSBC Bank USA, N.A.* (2017) 11 Cal.App.5th 465, 471 ["'The absence of cogent legal argument or citation to authority allows this court to treat the contention as waived.' [Citation.]"].)

3. No prejudice as to either defense because no basis to conclude that the discovery would have uncovered evidence of an improper legislative purpose

Even without the defects just described, NWS still could not carry its burden to show prejudice, because it offers no plausible reason to believe that discovery might have shown that the Legislature enacted the Directory Statute with a discriminatory purpose. The only inkling of the basis for NWS's belief that the discovery would have shown an improper legislative purpose is this: According to NWS, the Escrow Statute is a tax, and states have no authority to impose taxes on Indian-owned corporations. (NWS Brf., p. 48.) When manufacturers who participate in the MSA "caught wind of the State's inability to enforce the Escrow Statute – a tax – on Indian-owned cigarette manufacturers," they "lobbied the State for enactment of the Directory Statute as a means to ensnare Indian-owned cigarette manufactures under the Escrow Statute," because the "Directory Statute . . . did not run afoul of the Supreme Court's prohibition on enforcement of State taxes on Indians." (NWS Brf. pp. 48-49.) "For this

---

it is the *proposed* rulings, which the People submitted pursuant to Rules of Court, Rule 3.1354. The trial court did not, however, use this document to rule on the People's objections; instead it sustained them all in its order. (See Appen. 4184:27-28 [Ord. denying NWS MSJ].)

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 . . . ." (NWS Brf., pp. 49-50.)

Virtually nothing in that story is correct. Among other things, every court to have considered the issue has determined that the Escrow Statute does not impose a tax; it is just a deposit into an escrow account that pays interest and that can be returned to the depositor after a period of time if the depositor is not found liable for damages caused by its cigarettes. (See, e.g., *PTI, Inc. v. Philip Morris Inc.* (C.D. Cal. 2000) 100 F.Supp.2d 1179, 1203; *King Mountain Tobacco Co., Inc. v. McKenna* (9th Cir. 2014) 768 F.3d 989, 996; see also *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, 873-874 [providing definition of a tax].) NWS cites no contrary authority. In fact, in NWS's petition for review of the trial court's denial of its second motion to quash for lack of personal jurisdiction, it told this Court that the Escrow Statute does *not* impose a tax. (See Attachment B hereto, p. 68 [excerpt from Pet. for Writ of Mandate, *NWS v. Superior Court* (Cal. Ct. App. 3rd DCA, No. C077733, Nov. 10, 2016)].)[7]

Equally untrue and unsupported is NWS's contention that the Directory Statute was enacted as a "means to ensnare Indian-owned cigarette manufacturers under the Escrow Statute." As matter of law, the Directory Statute could not do that because it has no effect on who must pay escrow. All the Directory Statute says, as it relates to the Escrow Statute, is that to get on the Directory a manufacturer must apply and show that it is in "compliance" with the Escrow Statute, among other things. (See Rev. & Tax. Code, § 30165.1, subd. (b).) And the text of the Escrow

[7] Pursuant to Evid. Code, § 452, subd. (d), the People request judicial notice that NWS recited to this Court the passage marked in the attached excerpt.

Statute reveals that "compliance" does not necessarily require payment of escrow, as NWS wrongly asserts. The statute in effect at the time of NWS's California activities required escrow payments only on tax-collected cigarettes. (See Health & Saf. Code, § 104557, subd. (a)(2) [providing for escrow deposits on "units sold"]; § 104556, sub. (j) [defining "units sold"].) If no escrow payment was required on California sales of cigarettes from a specific manufacturer because no tax was collected on those sales, then the manufacturer's failure to pay any escrow was no bar to being listed on the Directory. All of this was explained in the People's papers below and summarized by Justice Morrison, the referee, and the trial court when they rejected NWS's discovery requests. (See, e.g., Appen. 1597:16-1598:9 [People's opp. to NWS MTC]; 3038:14-23 [Ord. approving and adopting Ref. rpt.].)

Finally, NWS offers no evidence or even grounds for suspicion of its assertion that the PMs "lobbied the State" for enactment of the Directory Statute in order to suppress Indian-owned businesses.

In short, its NWS offers no valid reason – based on correct citations to the law and evidence – why it was remotely likely, much less "reasonably probable," that the discovery would have revealed any evidence that the California Legislature enacted the statute with the intent to discriminate against Indians.

C. The Trial Court's Discovery Rulings Were Proper

Even if NWS had made the required showing of prejudice, its appeal still could not succeed, because NWS has not shown, and cannot show, that the trial court's rulings were an abuse of discretion.

1. NWS did not satisfy the threshold requirements for the discovery at issue

NWS's inability to offer any valid argument or even a scintilla of evidence that the discovery it sought would reveal an improper legislative

purpose shows not only that NWS cannot show the required prejudice, but also justifies the trial court's denial of NWS's discovery requests. "Although the scope of civil discovery is broad, it is not limitless. [Code of Civil Procedure] [s]ection 2017, subdivision (a) provides matters are subject to discovery 'if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence.'" (*Calcor Space Facility, Inc. v. Superior Court* (1997) 53 Cal.App.4th 216, 223.) Therefore, "[t]he burden rests upon the party seeking the discovery to provide *evidence* from which the court may determine these conditions are met." (*Ibid.*, emphasis in original.)

NWS has admitted that it not only lacks sufficient independent evidence to satisfy these thresholds for discovery, it admitted that it lacked evidence at all to support its defense, and had none when it filed its answer asserting the defense: In response to Form Interrogatory No. 15.1, demanding that NWS state all facts upon which its equal protection defense is based, NWS did not state even a single fact that supported its defense, instead simply asserting legal conclusions in the form of the elements of its defense. (See Appen. 354-355, ¶ 19 [2015-10-02 Hickerson Decl.].) Under the authority just cited, the trial court could have denied NWS's motions on this basis alone.

Nothing in the Code of Civil Procedure allows NWS to make up a defense that it has no reason to believe is valid and then propound wide-ranging and burdensome discovery in the hope that some piece of information might suggest that its equal protection defense could have some merit. (*Los Angeles Cemetery Assn. v. Superior Court* (1968) 268 Cal.App.2d 492, 494 ["there are cases in which discovery should not be allowed merely to enable a litigant to discover whether or not he has a cause of action or a defense"].) This lack of any basis for the defense was an independent basis to deny NWS's motion. "When discovery requests

are grossly overbroad on their face and hence do not appear reasonably related to a legitimate discovery need, a reasonable inference can be drawn of an intent to harass and improperly burden." (Appen. 1063:28-1064:3 [Ord. re NWS MTC, quoting *Obregon v. Superior Court* (1998) 67 Cal.App.4th 424, 431]; cf. *Mabie v. Hyatt* (1998) 61 Cal.App.4th 581, 595-96 ["There is never any legitimate basis for pleading a claim unsupported by probable cause."]; Code Civ. Proc., § 128.7, subd. (b)(3) [pleadings must have factual basis].)

2. The discovery is entirely irrelevant, and much of it also is unduly burdensome

a. The written discovery

Although not clearly labeled, pages 23-28 of NWS's brief appear to pertain to its challenge to the trial court's denial of its motions to compel regarding written discovery. NWS argues, without identifying any specific request or the trial court's corresponding basis for rejection, that every single request at issue was relevant to showing "the purpose and intent of [the Directory Statute and Escrow Statute]" and enforcement thereof. (NWS Brf., pp. 23-24.)

Such generalized arguments, without discussion of specific discovery requests at issue, are insufficient to show that the trial court abused its discretion. (See, e.g., *Calcor, supra,* 53 Cal.App.4th at p. 224 [affirming denial of discovery because "the justifications offered for the production are mere generalities"].) For example, Interrogatory 11, at issue in NWS's first motion to compel, asks, "IDENTIFY each COMMUNICATION YOU have had with National Association of Attorneys General regarding Native Wholesale." (Appen. 265:20-22 [NWS Sep. Stmt. Re 2015-08-12 NWS MTC].) Among other things, both Justice Morrison and trial court ruled that this request and 25 other interrogatories, requests for production, and requests for admission were "unduly burdensome and oppressive," based

on undisputed evidence of the burden, and that the request obviously is overbroad. (Appen. 1063:24-1064:3 [Ord. re MTC].) Yet NWS asks this Court to overturn all of the trial court's discovery rulings without even addressing this finding.

NWS argues that the discovery would have been relevant to the alleged discriminatory purpose of the Directory Statute. (NWS Brf., p. 24.) However, the fundamental problem with NWS's relevance argument is this: The purpose relevant for equal protection analysis is the purpose *of the legislature,* which enacted the statute, not the purpose of interested parties like the Attorney General. (*Baluyut v. Superior Court* (1996) 12 Cal.4th 826, 837 ["'Discriminatory purpose . . . implies that *the decisionmaker, in this case a state legislature*, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.' [Citation.]"], italics added.)

Importantly, evidence is relevant to legislative purpose only if it "shed[s] light on the collegial view of the Legislature *as a whole*." (*Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 30.) "'Material showing the motive or understanding of an individual legislator, *including the bill's author*, his or her staff, or *other interested persons* [such as the Attorney General], is generally not considered. [Citations.] This is because such materials are generally not evidence of the Legislature's *collective* intent.' [Citation.]" (*Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 572, fn. 5, all but last italics added.)

These statements are consistent with the U.S. Supreme Court's guidance regarding relevant evidence of legislative purpose in an equal protection case. (See *Arlington, supra,* 429 U.S. at pp. 264-268 [relevant evidence includes "historical background" of challenged action; "sequence of events" leading up to the action; "legislative or administrative history";

in "rare" cases stark evidence of discriminatory effect; and in "extraordinary instances" testimony of "members" of the decision-making body].) NWS argued below that its discovery pertains to two of these *Arlington* factors: "NWS intends to show a discriminatory purpose by presenting evidence of 'historical background' and the 'specific sequence of events' leading up to the enactment of the pertinent law." (Appen. 209:7-10 [citing *Arlington*] [2015-08-12 NWS MTC., p. 16].) As evidenced by the Supreme Court's own examples in *Arlington* (see 429 U.S. at p. 267),[8] the key feature of these *Arlington* factors (and, indeed, all of the *Arlington* factors) is that they involve evidence of events of which the Legislature (the decisionmaker) was aware, or conduct of the decisionmaker itself from which one could legitimately infer the Legislature's purpose, just as the California decisions cited in the preceding paragraph require.

None of NWS's requests, however, pertain to anything the Legislature did, or to anything of which the Legislature as a whole was aware, when it enacted the Directory Statute in 2003, and so they cannot shed light on the Legislature's purpose. Instead NWS's discovery pertains to:

- The Attorney General's communications with third parties, such as communications with the National Association of Attorneys

[8] Regarding *Arlington*'s "historical background" examples, see, e g., *Griffen v. County School Board* (1964) 377 U.S. 218, 221-225, 231-232 [decisionmaker's (the county's) past efforts to maintain segregated schools in the face of court orders to desegregate are evidence that purpose of later enacted statute was to perpetuate that discrimination]. Regarding the "sequence of events" preceding enactment, see, e.g., *Arlington*, *supra,* 429 U.S. at p. 267 [hypothetical where a town "suddenly" changes a parcel's zoning to make it more difficult to build low-income housing immediately after learning of plans to build integrated housing on the site].

General or parties to the MSA (Appen. 1239:8-1246:5 [Special Interrogatory Nos. 9-11]);[9]

- Documents filed by the Attorney General and others in legal proceedings that post-date enactment of the Directory Statute (Appen. 1259:1-4 [Request for Production No. 8]; 1284:15-19, 1285:23-28, 1287:7-12, 1288:19-24 [Requests for Admission Nos. 49.1, 49.2, 50.1, and 50.2]);
- The Attorney General's own views concerning the statutes at issue in this case (Appen. 1248:4-1258:24 [Request for Production Nos. 4-7]; 1290:3-1291:19 [Request for Admissions No. 54.1].);
- Confidential settlement negotiations between the Attorney General and the parties to the MSA that post-date the Directory Statute (Appen. 1262:9-1265:13, 1276:14-1284:14 [Request for Production No. 9 and Requests for Admission Nos. 42, 43.1, 43.2, 44.1, 45.1, 45.2, 46.1]); and
- The publicly available legislative histories of several statutes that were enacted years after the Directory Statute. (Appen. 1253:14-15, 1256:1-2 [Requests for Production 6-7].)

This information might shed light on the Attorney General's motives in supporting the Directory Statute or other subsequently enacted laws, but the Attorney General's views are not probative of the Legislature's intent in enacting the Directory Statute. As the California Supreme Court explained in rejecting as irrelevant exactly the sort of evidence NWS seeks (a memo written by the Attorney General about a statute that had originated in the Attorney General's office): "we do not consider the objective of an

[9] Because NWS's written discovery requests at issue are not neatly listed in the record, we have attached as Exhibit A hereto (p. 62) such a list, excerpted from the record, pursuant to Rules of Court, rule 8.204(d).

authoring legislator when there is no reliable indication that the Legislature as a whole was aware of that objective and believed the language of the proposal would accomplish it. [Citation.]" (*People v. Johnson* (2002) 28 Cal.4th 240, 247; see also *Mt. Hawley Insurance Company v. Lopez* (2013) 215 Cal.App.4th 1385, 1401 ["material showing the motive or understanding of an individual legislator, including the bill's author, his or her staff, or other interested person" not relevant] [citation and quotation omitted].)

Similarly fatal problems attend NWS's other discovery requests. For example, many requests pertain to what NWS calls the "2003 NPM Arbitration." (See, e.g., NWS Brf., pp. 16, 23-25, 29-30.) NWS contends that during that arbitration the Attorney General took the position that Indian-related entities "were not required to make escrow payments," and that "[i]f the People took such a position during the arbitration, and such position was failing . . . , 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 . . . ." (NWS Brf., p. 25, italics added.)

Not only are the Attorney General's views irrelevant to the Legislature's purpose, but NWS's argument is replete with misstatements of law and fact that further reveal why the discovery could not have helped NWS.

First, the Directory Statute was not "subsequently enacted" after the "2003 NPM Arbitration." Although NWS calls it the "2003 NPM Arbitration," uncontested evidence in the record, which NWS ignores,

established that this arbitration proceeding did not even commence until 2010 – *after* enactment of the Directory Statute in 2003. (See Assem. Bill No. 71 (2003-2004 Reg. Sess.) § 7 [enacting Directory Statute in 2003]; Appen. 409:17-20 [2015-10-01 Leaf Decl., ¶ 7] [arbitration proceedings commenced in 2010].) Such post-enactment events are irrelevant to showing the Legislature's intent. (See *Kaufman, supra,* 133 Cal.App.4th at p. 42.) As the trial court recognized, the same sort of "timing" defect is the reason why many other discovery requests are irrelevant, including, for example, numerous requests that seek information about a "term sheet" prepared in 2012, nine years after enactment of the Directory Statute,[10] and requests relating to SB 680 (2013), a bill enacted ten years after the Directory Statute.[11] (See Appen. 1063:3 [Order re NWS MTC noting "lack of relevance to the relevant time period"]; see also 3036:20-27 [same].)

Second, it is also untrue that being listed on the Directory is "a feat that can only be accomplished by making escrow payments." The plain text of the Directory Statute states that to be listed on the Directory a manufacturer must apply and certify that it either is a Participating Manufacturer (which certainly does not require escrow payments) or a Non-Participating Manufacturer that it is "in compliance" with the Escrow Statute (which does not necessarily require payment.) (See pp. 37-38, above.)

Third, many of the discovery requests seek information about the Attorney General's "enforcement" of the Escrow and Directory Statutes in

---

[10] See Appen. 1262:9-15 [RFP 9], 1278:6-9 [RFA 43.1]; 1279:15-20 [RFA 43.2]; 1280:25-28 [RFA 44.1]; 1281:19-21 [RFA 45.1]; 1282:15-17 [RFA 45.2]; 1283:15-18 [RFA 46.1]; 1284:15-19 [RFA 49.1]; 1285:23-28 [RFA 49.2]; 1287:8-12 [RFA 50.1]; 1288:19-23 [RFA 50.2].

[11] See Appen. 1256:1-2 [RFP 7]; 1290:3-6 [RFA 54.1]; 1291:20-25 [RFA 55.1].

"Indian Country." (See, e.g., NWS Brf., pp. 15-16, 23-24)[12] NWS's defense, however, is not a discriminatory enforcement defense,[13] so it is impossible to see (and NWS fails to explain) how this information could pertain to the Legislature's purpose in enacting the Directory Statute. Moreover, as we explained in the trial court (see Appen. 334:15-26), persons in Indian country (defined at 18 U.S.C. § 1151) are not among the classes against whom NWS alleges discrimination, and even if they were, geographic discrimination is subject to only rational basis review. (See *Griffen v. County School Bd. of Prince Edward County* (1964) 377 U.S. 218, 230.)

Finally, NWS contends that its discovery into the legislative purpose underlying the Directory Statute is relevant to its equal protection defense even if that defense is subject only to rational basis review, arguing that the discovery is necessary "to establish that no rational basis exists for the difference in California's treatment of NWS from others similarly situated." (NWS Brf., p. 26.) To begin, as demonstrated above, NWS produced no evidence that there *is* any difference in California's treatment of NWS from others similarly situated, and that alone is sufficient reason to preclude

---

[12] These requests include: Appen. 1239:8-12 [Interrog. 9]; 1242:15-18 [Interrog. 10]; 1244:20-22 [Interrog. 11]; 1268:8-11 [RFP 11]; 1271:3-7 [RFP 12]; 1280:25-28 [RFA 44.1]; 1281:19-21 [RFA 45.1]; 1283:15-18 [RFA 46.1]; 1284:15-19 [RFA 49.1]; 1285:23-28 [RFA 49.2]; 1287:7-12 [RFA 50.1]; 1288:19-23 [RFA 50.2]; 1293:11-15 [RFA 55.2]; 1349:9-18 [RFP No. 2 (Set 2)].

[13] There are "three types of equal protection violations: (1) a facially discriminatory law; (2) a facially neutral statute that was adopted with a discriminatory intent and applied with a discriminatory effect (*i.e.,* a 'gerrymandered' law); and (3) a facially neutral law that is enforced in a discriminatory manner." (*Chabad Lubavitch of Litchfield County, Inc. v. Litchfield Historic Dist. Com.* (2d Cir. 2014) 768 F.3d 183, 199.) NWS's defense asserts the second type (Resp. Appen. 90:1-7 [NWS Answer, 6th Aff. Def.]), and indeed NWS has expressly denied that the defense is about discriminatory enforcement, (Appen. 203:5-13. [NWS 1st MTC]).

discovery. (See *Crawford v. Board of Educ. of City of Los Angeles* (1982) 458 U.S. 527, 544, fn. 31 ["'Absent discriminatory effect, judicial inquiry into legislative motivation is unnecessary, as well as undesirable.' [Citation.]"; *Mercury Cas., supra,* 156 Cal.App. at p. 1220 [where party failed to show statute's discriminatory effect, court properly granted summary judgment despite party's claim that it should be allowed discovery directed at statutory purpose].)

Aside from the bald assertion that the discovery is necessary, NWS never explains how the discovery would accomplish NWS's goal. NWS actually demanded that the People identify all the state interests promoted by the Directory Statute (and Escrow Statute, and UCL), and the People responded, identifying public health and safety, among other things. NWS did not move to compel further responses. (See Appen. 355, ¶ 20 & pp. 390-400 [Hickerson Decl. & cited exhibit].) NWS fails to explain how any of the discovery at issue now could possibly yield information to "negative" any of these bases.

More significantly, the trial court's decision to deny NWS's discovery was based on established law, already discussed: "[I]t is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature" (*Beach Communications, supra,* 508 U.S. at p. 315.) NWS fails to explain how this was an abuse of discretion.

Finally, the trial court's discovery orders were proper because NWS already had all information relevant to legislative purpose: The only "reliable indication" (*Johnson, supra,* 28 Cal.4th at p. 247) that information or documents were before the Legislature as a whole, and thus relevant, is that such documents/information are found in specific types of publicly available files, such as legislative committee files. (See *Kaufman, supra,* 133 Cal.App.4th at pp. 31-39.) And undisputed expert testimony reiterated

that such documents are publicly available; they were even produced by the People in this case. (See Appen. 1616-1620 [Keller decl.]; Appen. 1063:15-18 [Ord. granting in part NWS MTC].) NWS never explained to the trial court, as it fails to explain here, how it could show that any information or documents it got from the discovery requests was before the legislature as a whole. It is not at all obvious, for example, how pleadings filed in the "2003 NPM Arbitration," which did not get going until 2010, were before the Legislature when it enacted the Directory Statute in 2003, or how various communications between the Attorney General and the National Association of Attorneys General were before the Legislature when it enacted the Directory Statute. And if they were before the Legislature, the uncontroverted expert testimony just cited shows that NWS could have found them in public files. (Appen. 1618-1619, ¶¶ 5-6 [Keller Decl.]; see generally Weil and Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2015) § 8:1063 [responding party as "no duty to search out matters of public record"].)

b. The depositions

Besides its written discovery, NWS also sought to depose (a) the Board of Equalization, (b) one of the People's lawyers in this action, and (c) Philip Morris, the tobacco company.

(1) Board of Equalization

NWS argues that it wants to depose the Board of Equalization ("BOE") "to confirm, among other things, whether the Board collected or sought collection from NWS any excise tax related to the cigarette sales NWS made" that it was found liable for selling in violation of the Directory Statute. (NWS Brf., p. 32.) NWS attempts to explain the relevance of this information by arguing that if BOE did not "require [NWS] to pay excise taxes on the cigarette sales it [NWS] 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." (NWS Brf., pp. 32-33.)

Once again, NWS misstates the law. First, NWS, a distributor, could not "place itself onto the Directory." Only manufacturers and the brands they make are listed on the Directory. (Rev. & Tax. Code, § 30165.1, subd. (a)-(c).) Thus, only GRE – the manufacturer of the cigarettes that NWS sold (Appen. 4188:10-19 [Ord. granting People's MSJ]) – could be listed. The record is devoid of evidence that GRE has ever applied to be on the Directory, or wants to be on it. Second, as explained above (see pp. 37-38, above), *compliance* with the Escrow Statute, not payment of escrow, is a requirement for a non-participating manufacturer to get on the Directory. (Rev. & Tax. Code, § 30165.1, subd. (b) [requirements to be listed on Directory].)

BOE's deposition also would have been irrelevant to determining the Legislature's purpose in enacting the Directory Statute, for all the reasons discussed above with respect to the written discovery: Only the Legislature's purpose is relevant. NWS offers no reason why deposing BOE could shed light on that purpose and offers no reason to believe that BOE has any information relevant to that purpose that would not be in the legislative history.

(2) The Attorney General's Office

NWS also served on the Attorney General's office a notice of deposition for the person most knowledgeable about 30 separate topics. (Appen. 1169-1173 [list of topics].) The Attorney General's office, however, is in effect a law firm for the People, and NWS does not dispute that the only people knowledgeable about its listed topics are lawyers – the

same ones who are prosecuting this case. Depositions of opposing counsel, however, "are presumptively improper, severely restricted, and require 'extremely' good cause – a high standard." (*Carehouse Convalescent Hosp. v. Superior Court* (2006) 143 Cal.App.4th 1558, 1562.) Such depositions are permitted only when the party seeking to take one "has shown that (1) no other means exist to obtain the information than to depose opposing counsel, [citation]; (2) the information sought is relevant and non-privileged; and (3) the information is crucial to the preparation of the case." (*Spectra-Physics, Inc. v. Superior Court* (1988) 198 Cal.App.3d 1487, 1494-1495.) The discovery referee and the trial court both concluded that "NWS has not made the required showing." (Appen. 3039:10-13 [2016-09-09 Ord. adopting Ref. rpt.].)

On appeal, as it did below, NWS makes no attempt to satisfy this standard. Instead, identifying Dennis Eckhart, a Deputy Attorney General, as the person most knowledgeable (NWS Brf., p. 18), NWS contends that it was "not seeking to depose counsel for the People. . . . NWS was merely looking to conduct a party deposition." (NWS Brf., p. 28.) Mr. Eckhart, however, is not a party to this action; Mr. Eckhart is one of the People's lawyers, as NWS's brief later admits. (See NWS Brf., p. 55 [complaining that Mr. Eckhart is one of the "excessive" number of attorneys who work on this case].) Thus the strictures of *Spectra-Physics* apply.

Furthermore, and as was the case with NWS's written discovery, the information sought from Mr. Eckhart is irrelevant to ascertaining the Legislature's intent in enacting the Directory Statute. For instance, NWS argues that Mr. Eckhart must have relevant information because he was involved in "drafting and enactment of the Directory Statute." Even if Mr. Eckhart was involved, his views or motives are not relevant to the issue of the Legislature's intent, unless they were communicated to the Legislature as a whole. (See p. 41, above, citing, *inter alia, Graham, supra,* 34 Cal.4th

at p. 572, fn. 5.) NWS cites no authority to the contrary or offers any reason to gainsay the expert testimony that NWS could have obtained any such information from the public legislative history. (See Appen. 1616-1620 [Keller Decl.].)

The other deposition topics similarly demonstrate the irrelevance of the information NWS sought, as detailed in the People's papers below. (See Appen. 1121:14-1128:25 [2016-06-09 MPAs re CA Mtn. for Prot. Ord.].) For example:

- Topics 1, 2, 6, 10, 28, 29 and 30 (Appen. 1168-1173 [Depo. Notice]), call for testimony about the facts related to certain contentions in the Complaint. However, contention questions are improper in a deposition, and must be served as interrogatories. (*Rifkind v. Superior Court* (1994) 22 Cal.App.4th 1255, 1262.)
- Topics 24 and 25 seek information about the 2003 NPM Arbitration, which is irrelevant, as discussed above.
- Topics 5, 9, 13, 15, 17, 19, 21, 23, 25 and 27 ask for "the identity of all persons . . . ." Pursuant to *Spectra-Physics*' first requirement, and *Rifkind*'s admonition about seeking these sorts of facts in a deposition, NWS should have propounded these via interrogatories (if the information was relevant), as the trial court ruled.
- Topics 3, 4, 7, 11, 12, and 18-23 seek information about "the application of California's Tobacco Directory law to tobacco products sold or distributed on or within Indian Country or Tribal lands." Other than substituting the synonym "application" for "enforcement," these questions are virtually identical to the written discovery about enforcement of various

laws in Indian country discussed above, and are irrelevant for the same reasons.

- Topics 20 and 21 seek information about AB 2496 (2010), which amended provisions of the Directory Statute that are not at issue here, and which post-dates enactment of the relevant provisions by 7 years. Similarly, topics 22 and 23 seek information about AB 680 (2013), which post-dates the Directory Statute by 10 years. Moreover, although required by *Spectra-Physics,* NWS made no showing below, and makes none here, that it could not obtain the same information from the public legislative histories of those bills.
- Topics 26 and 27 pertain to a 2012 term sheet which like the 2003 NPM Arbitration post-dates enactment of the Directory Statute.

(3) Philip Morris

The People do not represent Philip Morris, but note the following: NWS states that Philip Morris may have communicated with the Legislature about the Directory Statute before it was enacted. But as explained above, uncontroverted expert testimony indicated there is virtually no chance that any such communications that were relevant to establishing the Legislature's intent (communications with the Legislature as a whole) are not in the history that NWS already has. (See Appen. 1063:15-18 [Ord. granting in part NWS mtn. to compel production].) It was not an abuse of discretion for the trial court to rely on this testimony rather than, for example, NWS's bald claim, unsupported by any evidence, that "Philip Morris likely possesses information and documents related to the enactment of the Directory and Escrow Statutes which are not publicly available." (NWS Brf., p. 36.)

V. THE TRIAL COURT'S FEE AWARD WAS ENTIRELY PROPER

A. The People Were Entitled to an Award of Fees

NWS attacks the legal basis for the People's fees award by arguing that because the Final Judgment stated that the People were entitled to costs, but did not mention fees, the People could not seek fees until the trial court determined that they were entitled to fees under California Rules of Court, rule 3.1702. (NWS Brf., p. 51.) This argument is wrong on both counts. First, the Final Judgment implicitly contained an authorization for fees because fees are an element of costs under California law. (*Meister v. Regents of Univ. of California* (1998) 67 Cal.App.4th 437, 450 ["Statutory attorney's fees are an element of costs."]; Code Civ. Proc., § 1033.5, subd. (a)(10)(B).) Second, Rule 3.1702 does not require a party to obtain court authorization before filing a fee request; rather, it merely lays out the briefing schedule for a notice of motion to claim attorney's fees for situations in which "the court determines entitlement to the fees, the amount of the fees, or both." (Rules of Court, rule 3.1702(a).) Instead, the applicable provision is Code of Civil Procedure, § 1033.5, subd. (c)(5)(A), which the People correctly followed by requesting "attorney's fees allowable as costs" "upon a noticed motion" following the Notice of Entry of Judgment.

B. The Trial Court Did Not Abuse Its Discretion in Calculating the Amount of Attorney's Fees

NWS repeats many of the arguments about attorney's fees it made below without making any attempt to establish that the trial court's rulings were an abuse of discretion. There is a high bar for overturning the trial court's judgment regarding the amount of attorney's fees. (*Serrano I,* 20 Cal.3d at p. 49 ["The 'experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of

course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong.'"].) Here, with 43 years of experience as both a judge and an attorney, Judge Brown was intimately familiar with billing practices in the Sacramento area, and he used that knowledge to inform his decision. (Reporter's Transcript ("RT") (Mar. 23, 2017) 5:24-26 & 8:27-9:3.) The trial court carefully analyzed the People's fee request, as evidenced by its seven-page Tentative Ruling (Appen. 5459-5465), and it properly exercised its discretion by reducing the People's requested fees by 5%, in addition to the 10% reduction voluntarily taken by the People (Appen. 5463). NWS fails to meet its burden because it does not, and cannot, show that the amount awarded by the trial court "is so large . . . that it shocks the conscience and suggests that passion and prejudice influenced the determination." (*Akins v. Enterprise Rent-A-Car Co. of San Francisco* (2000) 79 Cal.App.4th 1127, 1134.)

1. The People Presented Adequate Evidence in Support of Their Requested Fees

Without any citation to authority, NWS contends that the award of fees should be reversed because the trial court denied NWS the opportunity to conduct discovery regarding the Attorney General's internal billing practices. (NWS Brf., pp. 51-52.) This complaint is baseless; the trial court did not deny NWS the opportunity to conduct discovery given that NWS never served discovery related to the attorney's fees in the first place. Furthermore, as the trial court recognized, no discovery into internal billing rates was necessary because the People were entitled to prevailing market rates. (*Serrano v. Unruh* ["*Serrano II*"] (1982) 32 Cal.3d 621, 643; *Lolley v. Campbell* (2002) 28 Cal.4th 367, 373-375; Appen. 5460, 5463-5464.)

NWS goes on to argue that fees were improperly awarded for work done by Monica Gable and Ed DuMont, contending that their time is unrecoverable because the People submitted their timesheets along with the

declaration of supervisor Karen Leaf and did not include separate declarations for Ms. Gable and Mr. DuMont. (NWS Brf., p. 54.) However, California law does require that each timekeeper submit individual billing records accompanied by a supporting declaration. (See *Rancho Mirage Country Club Homeowners Assn. v. Hazelbaker* (2016) 2 Cal.App.5th 252, 263 ["California law does not require detailed billing records to support a fee award . . . ."].) In fact, it is common practice for a party seeking fees to attach records for multiple time keepers to a single declaration. (*E.g.*, *Syers Props. III, Inc. v. Rankin* (2014) 226 Cal.App.4th 691, 695 [lead attorney submitted single declaration attaching the hours of one associate and four paralegals]; *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 63-64 [attorney's single declaration attached the hours of two partners].) The trial court was well within its discretion to make awards for Ms. Gable's and Mr. DuMont's time based solely on Ms. Leaf's declaration and the timesheets provided.

NWS also attacks the total hours the People worked on the matter as "excessive." (NWS Brf., p. 54.) However, the trial court explained that "while it cannot be denied that a significant number of hours are claimed . . . , this action began in 2008 and involved significant litigation including numerous appellate proceedings." (Appen. 5462.) NWS argues that because eight attorneys worked on this case for the People over the course of eight years, while only three attorneys for Lipsitz Green Scime Cambria LLP "spent significant time" on the matter over the course of three years, the case was overstaffed. (NWS Brf. p. 55.) This comparison is meaningless for three reasons. First, only two of the People's eight attorneys (Michelle Hickerson and Michael Edson) billed the bulk of the time on this case. (Appen. 5463.) Second, NWS fails to include the number of attorneys at Lipsitz who billed "insignificant time." And third, NWS neglects to count any attorneys from Fredericks, Peebles & Morgan

LLP, who represented NWS in this matter for most of the case – from 2008 to 2015. (Resp. Appen. 96 [Nov. 20, 2015 Notice of Entry of Order Granting Attorney's Motion to Be Relieved as Counsel].)

Ultimately, it was well within the discretion of the trial judge to determine whether the level of staffing and the hours expended by the People were reasonable. (*Syers*, *supra*, 226 Cal.App.4th at p. 696.) The trial judge who awarded fees had presided over this matter for several years "and was well able to evaluate whether the time expended by counsel in this case, given its complexity and other factors, was reasonable." (*Id.* at p. 700.) After "carefully reviewing the time records," the trial court reduced the People's requested hours by 5% (in addition to the 10% reduction voluntarily taken by the People) to account for inefficiency in billing. (Appen. 5462-5463.) The very fact that the trial court reduced the People's request "is proof positive that the trial court did not utterly fail to exercise its discretion," and NWS has not met its burden to establish otherwise. (*Rhule v. WaveFront Technology, Inc.* (2017) 8 Cal.App.5th 1223, 1229, fn. 6.)

2. The Trial Court Properly Awarded the People Reasonable Hourly Rates

NWS raises six challenges to the People's rates, all of which were considered and rejected by the trial court. Nowhere does NWS even attempt to explain how the trial court abused its discretion in setting rates, an area over which the trial court is given great deference. (*Syers*, *supra*, 226 Cal.App.4th at p. 702 ["the trial court is in the best position to value the services rendered by the attorneys in his or her courtroom"].) Here, the trial court properly set rates after giving careful consideration to "the nature of the litigation, its difficulty, the amount involved, the skill required in its handling, the skill employed, the attention given, the success or failure, and other circumstances in the case." (*PLCM Group v. Drexler* (2000) 22

Cal.4th 1084, 1096; Appen. 5463-5464.) As none of NWS's complaints establish an abuse of discretion, the trial court's decision should be upheld.

First, NWS argues that the People's rates should have been reduced to the levels awarded in *Mountjoy v. Bank of America, N.A.* (2016) 245 Cal.App.4th 266. (NWS Brf., p. 55.) However, as the trial court noted, "the Third District [in *Mountjoy*] simply stated that the appellant failed to show that the trial court abused its discretion [in holding] that a $260/hr rate was reasonable. [Citation.] The Court did not say that a higher rate would be unreasonable." (Appen. 5463.) Furthermore, in relying on *Mountjoy*, NWS completely ignores its admonition that a "'reasonable hourly rate is the product of a multiplicity of factors . . . . the level of skill necessary, time limitations, the amount to be obtained in the litigation, the attorney's reputation, and the undesirability of the case.' [Citation.]" (*Mountjoy*, *supra*, 245 Cal.App.4th at p. 272.) When appellants in *Mountjoy* questioned the rate awarded based on two of these factors only, the court declined to reverse, explaining that "[b]ecause they [appellants] fail[ed] to address any of the other applicable factors to show that any such conclusion would still be an abuse of discretion, the Mountjoys have failed to carry their burden of showing the trial court abused its discretion . . . ." (*Id.* at pp. 272-273.) Here, NWS neglects to address *any* of the *Mountjoy* factors, thereby failing to carry its burden just like the *Mountjoy* appellants.

Second, NWS argues that because Ms. Hickerson stated in the context of discovery sanctions that her internal hourly rate was $170 per hour, the People should have been judicially estopped from requesting a higher fee for her time. (NWS Brf., pp. 55-56.) The trial court properly rejected this argument for two reasons. First, the doctrine of judicial estoppel does not apply because the People did not take two "totally inconsistent positions." (*People v. Castillo* (2010) 49 Cal.4th 145, 155.) Second, as discussed above, it is well-established that the People are not bound by internal rates

but may use private sector rates when requesting fees. (*Serrano II*, *supra*, 32 Cal.3d at p. 643; *Lolley*, *supra*, 28 Cal.4th at pp. 373-375.) The trial court's decision not to apply Ms. Hickerson's internal rate was not an abuse of discretion; in fact, it would be an abuse of discretion not to award government attorneys the prevailing market rate. (*City of Santa Rosa v. Patel* (2010) 191 Cal.App.4th 65, 68, 71.) NWS's contention that rates for the People's other attorneys should have been reduced by 66% to approximate internal rates should be rejected for the same reason. (NWS Brf., pp. 56-57.)

Third, NWS points to three cases from the Eastern District of California as evidence for its assertion that the People's rates were unreasonably high for attorneys in the Sacramento area. (NWS Brf., p. 57.) The trial court was not persuaded by these cases and chose instead to rely on the opinion of expert witness and "leading attorney's fees expert," Richard Pearl. (Appen. 5464.) Mr. Pearl based his opinion "on review of other fee awards to the People in tobacco-related work based on similar rates, in addition to fee awards issued by Sacramento Superior Court in other matters." (Appen. 4755-4990 [Pearl Decl.], 5433-5444 [Supp. Pearl Decl.].) As Mr. Pearl explained in his supplemental declaration, the Eastern District cases cited by NWS were out of date and did not establish rates for comparably qualified Sacramento attorneys engaged in similar work. (Appen. 5439, ¶ 19.) NWS tries to undermine the opinion of Mr. Pearl by arguing that the cases he relied on were inapplicable because they were complex class action lawsuits. (NWS Brf., p. 58.) However, NWS overlooks the fact that Mr. Pearl also "based his opinion "on review of other fee awards to the People in tobacco-related work based on similar rates." (Appen. 5464 [Tentative Order]; Appen. 4761 [Pearl Decl. ¶ 12].) Given that NWS produced no expert of its own, it was not an abuse of discretion for the trial court to rely on Mr. Pearl's expert opinion.

(*Heritage Pacific Financial, LLC v. Monroy* (2013) 215 Cal.App.4th 972, 1010 [trial court did not abuse its discretion in setting rates based on evidence of attorney's past rates and expert declaration of Richard Pearl, given that appellant "did not submit evidence of current rates contradicting this rate"].)

Fourth, NWS argues that the People's rates are too high compared to the Burdge Report and the USAO Attorney's Fees Matrix.[14] (NWS Brf., pp. 57-58.) The trial court rejected these comparisons based on Mr. Pearl's expert opinion that neither report "provide[s] rates for attorneys of similar skill and experience in the Sacramento market and in any case, the requested rates are close to or even lower than rates" in the reports. (Appen. 5464 [Tentative Order]; 5434-39, ¶¶ 3-14 [Suppl. Pearl Decl].) The trial court's decision not to adopt the rates in NWS's proffered reports does not amount to an abuse of discretion. (*Syers*, *supra*, 226 Cal.App.4th at p. 702 [trial court is not "*required* to follow the *Laffey* Matrix"; emphasis in original].)

Fifth, NWS points out that the trial court awarded the People rates slightly higher than the rates awarded in *People v. Darren Rose*. (NWS Brf. p. 58; Appen. 4515-4517.) As was explained below, the People sought fees for *Rose* in 2015, and, in 2017, based on consultation with Mr. Pearl, the People sought increases of $25 an hour in this action to reflect the change in prevailing market rates over time. (Appen., 5400; RT (March 23, 2017) 15:13-16:1.) It was well within the trial court's discretion to increase the *Rose* rates. (*Charlebois v. Angels Baseball LP* (C.D. Cal. 2012) 993 F.Supp.2d 1109, 1119, fn. 6 [yearly increase in rates "is justified by comparable increases in the market"].)

[14] Formerly known as the *Laffey* Matrix.

Finally, NWS argues that the People's rates were inflated compared to the rates charged by the Lipsitz firm in this matter. (NWS Brf., pp. 58-59.) While a comparative analysis of each side's litigation costs may sometimes be useful, there is no requirement that the trial court cap fees at the rates charged by opposing counsel. (*Goglin v. BMW of North America, LLC* (2016) 4 Cal.App.5th 462, 474.) The trial court's decision not to adopt the rates of opposing counsel is not "clearly wrong," and its decision should therefore be upheld. (*Ibid.*)

CONCLUSION

The People respectfully request that the Court affirm the trial court's rulings, judgment, and fee award in all respects.

Dated: June 13, 2018

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
KAREN LEAF
Senior Assistant Attorney General
NICHOLAS M. WELLINGTON
Supervising Deputy Attorney General
MICHAEL M. EDSON
Deputy Attorney General

/s/ ***Nora Flum***

NORA FLUM
Deputy Attorney General
Attorneys for the People of the State of California, Plaintiff/Appellee

CERTIFICATE OF COMPLIANCE

I certify that the attached PEOPLE'S ANSWERING BRIEF uses a 13 point Times New Roman font and contains 13,897 words.

Dated: June 13, 2018

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
KAREN LEAF
Senior Assistant Attorney General
NICHOLAS M. WELLINGTON
Supervising Deputy Attorney General
MICHAEL M. EDSON
Deputy Attorney General

/s/ *Nora Flum*

NORA FLUM
Deputy Attorney General
Attorneys for the People of the State of California, Plaintiff/Appellee

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

People of the State of California ex rel. Xavier Becerra, Attorney General, Plaintiff/Respondent, **v.** **Native Wholesale Supply Company, a corporation, and Does 1 through 20,** Defendant/Appellant.	No. C084031 No. C084961

Sacramento County Superior Court, No. 34-2008-00014593
Hon. David I. Brown, Judge

ATTACHMENT A TO PEOPLE'S ANSWERING BRIEF

XAVIER BECERRA
Attorney General of California
KAREN LEAF
Senior Assistant Attorney General
NICHOLAS WELLINGTON
Supervising Deputy Attorney General
MICHAEL M. EDSON, SBN 177858
NORA FLUM, SBN 278775
Deputy Attorneys General
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, CA 94612-0550
Telephone: (510) 879-1986
Fax: (510) 622-2270
E-mail: Nora.Flum@doj.ca.gov
Attorneys for Plaintiff/Appellee

ATTACHMENT A

January 8, 2015 NWS Discovery at Issue
(Excerpted from NWS Appen. 1227-1296)

Special Interrogatories

9. IDENTIFY each COMMUNICATION you have had with any entity identified as a Participating Manufacturer pursuant to the MSA CONCERNING enforcement of California's tobacco related laws against individuals or entities located within INDIAN COUNTRY.

10. IDENTIFY each COMMUNICATION you have had with the National Association of Attorneys General CONCERNING enforcement of California's tobacco related laws against individuals or entities located within INDIAN COUNTRY.

11. IDENTIFY each COMMUNICATION YOU have had with National Association of Attorneys General regarding Native Wholesale.

Requests for Production

1. ALL DOCUMENTS identified in YOUR responses to Defendant's Special Interrogatories (Set One).

4. ALL DOCUMENTS RELATING TO California Senate Bill 822 (1999).

5. ALL DOCUMENTS RELATING TO California Assembly Bill 71 (2003).

6. ALL DOCUMENTS RELATING TO California Assembly Bill 2496 (2010).

7. ALL DOCUMENTS RELATING TO California Assembly Bill 680 (2013).

8. ALL DOCUMENTS RELATING TO ALL legal proceedings, including arbitration proceedings, RELATING TO claims that the State of California was not diligently enforcing its "qualifying statute," Health and Safety Code sections 104555-104557, in accordance with the MSA.

9. ALL DOCUMENTS RELATING TO ALL matters concerning the NOVEMBER 14, 2012 TERM SHEET and the provisions set out in the term sheet, particularly those provisions concerning application of the MSA in INDIAN COUNTRY, and including how such provisions were developed, drafted, and agreed to by the parties to the settlement of the diligent enforcement proceeding. This request also includes any and all subsequent documents in YOUR possession that concern interpretation, application, and enforcement of the term sheet provisions.

10. ALL DOCUMENTS RELATING TO whether the MSA requires the State of California to take enforcement actions against Indian PERSONS.

11. ALL DOCUMENTS RELATING TO whether the MSA requires the State of California to take enforcement actions against PERSONS located in INDIAN COUNTRY.

12. ALL DOCUMENTS RELATING TO coordination, collaboration, or consultation among and between YOU and the National Association of Attorney Generals and its member Attorney Generals concerning enforcement of the MSA against PERSONS in INDIAN COUNTRY.

Requests for Admission

42. Admit that Big Tobacco brought before arbitration the issue of whether states, including California, were diligently enforcing the MSA.

43.1 Admit that the State of California agreed to the November 14, 2012 Term Sheet, attached hereto as Exhibit A.

43.2 Admit that the November 14, 2012 Term Sheet was intended to lead to settlement of a dispute between the State of California (among other states) and BIG TOBACCO, as to whether the State of California had "diligently enforced" the provisions of the ESCROW STATUTE. For this request, the phrase within quotation marks has the same meaning it has in section IX(d)(2)(B)(i) of the MSA.

44.1 Admit that the November 14, 2012 Term Sheet includes provisions that concern tobacco sales in INDIAN COUNTRY.

45.1 Admit that the State of California's compliance with the November 14, 2012 Term Sheet requires application of the DIRECTORY STATUTE in INDIAN COUNTRY.

45.2 Admit that the State of California's compliance with the November 14, 2012 Term Sheet requires application of the ESCROW STATUTE in INDIAN COUNTRY.

46.1 Admit that the State of California did not consult with any Indian tribes located in CALIFORNIA about the terms of the November 14, 2012 Term Sheet before agreeing to the November 14, 2012 Term Sheet.

49.1 Admit that during arbitration of the dispute with BIG TOBACCO as to whether certain states had "diligently enforced" their "Qualifying Statute" pursuant to section IX(d)(2)(B) of the MSA, the State of Washington took the position that cigarette sales in INDIAN COUNTRY are not subject to escrow payments under the State of Washington's Qualifying Statute.

49.2 Admit that the "Final Award Re: State of Washington" issued on September 11, 2013, in the arbitration of the dispute with BIG TOBACCO as to whether certain states had "diligently enforced" their "Qualifying Statute" pursuant to section IX(d)(2)(B) of the MSA, concluded in part that the State of Washington had diligently enforced its "Qualifying Statute."

50.1 Admit that during arbitration of the dispute with BIG TOBACCO as to whether certain states had "diligently enforced" their "Qualifying Statute" pursuant to section IX(d)(2)(B) of the MSA, the State of New York took the position that it would not impose excise taxes on, nor collect escrow from, cigarette sales in INDIAN COUNTRY.

50.2 Admit that "Final Award Re: State of New York" issued on September 11, 2013, in the arbitration of the dispute with BIG TOBACCO as to whether certain states had "diligently

enforced" their "Qualifying Statute" pursuant to section IX(d)(2)(B) of the MSA, concluded in part that the State of New York had diligently enforced its "Qualifying Statute."

54.1 Admit that the Attorney General's Office proposed the change in the statutory definition of "units sold" (see Cal. Senate Bill 680 (2013), Health & Saf. Code, § 104556, subd. (j)) as part of the State of California's compliance with the provisions of the November 14, 2012 Term Sheet.

55.1 Admit that the Attorney General's Office proposed the change in the statutory definition of "units sold" (see Cal. Senate Bill 680 (2013), Health & Saf. Code, § 104556, subd. (j)) in order to ensure Native made tobacco products sold within INDIAN COUNTRY are subject to the requirements of the ESCROW STATUTE.

55.2 Admit that the Attorney General's Office proposed the change in the statutory definition of "units sold" (see Cal. Senate Bill 680 (2013), Health & Saf. Code, § 104556, subd. (j)) in order to ensure Native made tobacco products sold within INDIAN COUNTRY are subject to the requirements of the DIRECTORY STATUTE.

APRIL 8, 2016 NWS DISCOVERY
(Excerpted from NWS Appen. 1338-1358)

Request to Produce No. 1

In the Declaration of Monica Gable in Support of People's Opposition to Native Wholesale Supply's Motion to Compel filed in this action and dated October 1, 2015, Ms. Gable declared, under the penalty of perjury, that she: (i) "located all of the places where documents were store in connection with the 2003 NPM Arbitration' ; and (ii) created "the repository where pleading were filed in the case." Accordingly, and because NWS believes that the State of California too legal and factual positions in the 2003 NPM Arbitration which contradict those the State o California is now taking in this action in support of its contentions that NWS violated California' Tobacco Directory Law and Cigarette Fire Safety and Firefighter Protection Act, NWS hereby requests that Plaintiff produce copies of all pleadings located in the repository which were drafted and filed by, or on behalf of, the State of California in the 2003 NPM Arbitration.

Request to Produce No. 2

NWS hereby requests that Plaintiff produce copies or evidence of all written or electrom communications in Plaintiff's possession, custody or control, or in the possession, custody or control of its agents, relating to the application of California's tobacco laws to tobacco product sold or distributed on or within Indian Country or Tribal lands. By way of example only, an without limiting in any way the scope of this request, memoranda of the type or similar to tha attached in exhibit "A" are responsive to this request, as would be emails or other writte communications discussing this subject matter.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

People of the State of California ex rel. Xavier Becerra, Attorney General, Plaintiff/Respondent, **v.** **Native Wholesale Supply Company, a corporation, and Does 1 through 20,** Defendant/Appellant.	No. C084031 No. C084961

Sacramento County Superior Court, No. 34-2008-00014593
Hon. David I. Brown, Judge

ATTACHMENT B TO PEOPLE'S ANSWERING BRIEF

XAVIER BECERRA
Attorney General of California
KAREN LEAF
Senior Assistant Attorney General
NICHOLAS WELLINGTON
Supervising Deputy Attorney General
MICHAEL M. EDSON, SBN 177858
NORA FLUM, SBN 278775
Deputy Attorneys General
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, CA 94612-0550
Telephone: (510) 879-1986
Fax: (510) 622-2270
E-mail: Nora.Flum@doj.ca.gov
Attorneys for Plaintiff/Appellee

ATTACHMENT B

ORIGINAL

IN THE COURT OF APPEAL
FOR THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

Native Wholesale Supply Company, Inc.,

Defendant and Petitioner,

v.

Superior Court of the State of California,
County of Sacramento,

Respondent.

(People of the State of California ex rel.
Kamala D. Harris, Attorney General,
Plaintiff and Real Party in Interest.)

CASE NUMBER C077733

Sacramento County Superior Court Case
No. 34-2008-00014593-CU-CL-GDS

IMMEDIATE STAY REQUESTED

FILED

NOV 10 2014

Court of Appeal, Third Appellate District
Diana G. Fawcett, Clerk
BY _____ Deputy

From the Sacramento County Superior Court
Hon. Steven H. Rodda, Judge
Dept. 53, Telephone No. (916) 874-7858

PETITION FOR WRIT OF MANDATE AND REQUEST FOR STAY OF PROCEEDINGS

*John M. Peebles (Bar No. 237582)
Darcie L. Houck (Bar No. 196556)
Tim Hennessy (Bar No. 233595)
FREDERICKS PEEBLES & MORGAN, LLP
2020 L Street, Suite 250
Sacramento, California 95811
(916) 441-2700
Facsimile: (916) 441-2067

*Attorneys for Defendant and Petitioner
Native Wholesale Supply Company, Inc.*

Indians or require wholesalers or retailers to precollect taxes on cigarettes destined for Indian consumption. (*Id.* at 75.)

This limited exception does not apply in this case because the state laws at issue are not connected with the assessment or collection of state taxes. The Fire Safety Act plainly does not concern taxes; it forbids the sale of cigarettes that do not comply with the ignition propensity standards. (Health & Saf. Code, § 14951.) Nor does the directory statute concern taxes.

As explained above, the key prerequisite for being listed on the state's directory of approved cigarette brands, for manufacturers like Grand River Enterprises who are not MSA participants, is the payment of money into an escrow account. The escrow payment is not a tax. The escrow deposit requirement is directly imposed on the Indian trader. The payment is retained in escrow for 25 years, during which time the manufacturer is entitled to the interest accrued, and after which period the funds may be released to the manufacturer. (Health & Saf. Code, § 104557, subd. (b).)

The directory statute expressly differentiates between the escrow payments necessary to be listed on the directory, and tax payments, which *cannot* be made unless the manufacturer and brand in question are included on the directory. (Rev. & Tax. Code, § 30165.1, subd. (e)(1).) Tellingly, the complaint does not seek to compel the payment of any taxes owed by non-Indians. It only seeks compliance with regulatory requirements

Dated: November 10, 2014

Respectfully submitted,

FREDERICKS PEEBLES & MORGAN LLP
John M. Peebles
Darcie L. Houck
Tim Hennessy

By: _____
John M. Peebles
Attorneys for Petitioner
Native Wholesale Supply Company

STATE OF CALIFORNIA California Court of Appeal, Third Appellate District	***PROOF OF SERVICE*** **STATE OF CALIFORNIA** California Court of Appeal, Third Appellate District

Case Name: **The People ex rel. Xavier Becerra v. Native Wholesale Supply Company**
Case Number: **C084031**
Lower Court Case Number: **34200800014593CUCLGDS**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **nora.flum@doj.ca.gov**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
BRIEF - RESPONDENT'S BRIEF (FEE PREVIOUSLY PAID)	Peoples Answering Brief
EXHIBIT - TO PETITIONS / RESPONSES / SUPPORTING DOCUMENTS	ATTACHMENT A TO PEOPLES ANSWERING BRIEF
EXHIBIT - TO PETITIONS / RESPONSES / SUPPORTING DOCUMENTS	ATTACHMENT B TO PEOPLES ANSWERING BRIEF
APPENDIX - RESPONDENT'S APPENDIX	RESPONDENTS APPENDIX

Service Recipients:

Person Served	Email Address	Type	Date / Time
Erin Mccampbell Lipsitz Green Scime Cambria LLP NY4480166	erin.mccampbell@gmail.com	e-Service	6/13/2018 4:04:22 PM
Michael Edson California Dept of Justice 177858	michael.edson@doj.ca.gov	e-Service	6/13/2018 4:04:22 PM
Nora Flum California Attorney General's Office-Oakland 278775	nora.flum@doj.ca.gov	e-Service	6/13/2018 4:04:22 PM
Patrick Mackey Lipsitz Green Scime Cambria LLP NY4505582	pmackey@lglaw.com	e-Service	6/13/2018 4:04:22 PM

Paul Cambria Lipsitz Green Scime Cambria LLP 177957	pcambria@lglaw.com	e-Service	6/13/2018 4:04:22 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

6/13/2018

Date

/s/Nora Flum

Signature

Flum, Nora (278775)

Last Name, First Name (PNum)

California Attorney General's Office-Oakland

Law Firm