APPENDIX

APPENDIX

TABLE OF CONTENTS

Appendix A Order Denying Petition for Review in the Supreme Court of California (September 25, 2019) . . . . App. 1

Appendix B Opinion in the Court of Appeal of the State of California, Third Appellate District (July 2, 2019) . . . . App. 2

Appendix C Opinion in the Court of Appeal of the State of California, Third Appellate District (June 8, 2011) . . . . App. 48

Appendix D Minute Order in the Superior Court of the State of California, County of Sacramento (September 25, 2009) . . . . App. 62

Appendix E Order Granting People's Motion for Summary Judgment or, Alternatively, for Summary Adjudication and Request for Civil Penalties and Injunction in the Superior Court of the State of California, County of Sacramento (December 28, 2016) . . . . App. 79

Appendix F Order Denying Native Wholesale Supply Company's Motion for Summary Judgment, or Alternatively, Motion for Summary Adjudication in the Superior Court of the State of California, County of Sacramento (December 28, 2016) . . . . App. 98

Appendix G Amended Notice of Entry of Judgment in the Superior Court of the State of California, County of Sacramento (January 24, 2017) . . . . App. 111

Appendix H Letter Granting Motion for Extension of Time in the United States Supreme Court (December 5, 2019) . . . . App. 117

Appendix I Declaration of Erlind Hill in Support of Native Wholesale Supply Company's Opposition to the People's Motion for Summary Judgment, or Alternatively, Motion for Summary Adjudication in the Superior Court of the State of California, County of Sacramento (November 17, 2016). . . . . App. 119

Appendix J Complaint for Injunction, Civil Penalties, Contempt and Other Relief in the Superior Court of the State of California, County of Sacramento (June 30, 2008) . . . . App. 123

APPENDIX A

IN THE SUPREME COURT OF CALIFORNIA

En Banc

S257409

[Filed September 25, 2019]

THE PEOPLE ex rel. XAVIER BECERRA,	)
as Attorney General, etc.,	)
Plaintiff and Respondent,	)
	)
v.	)
	)
NATIVE WHOLESALE SUPPLY COMPANY,	)
Defendant and Appellant.	)
	)

Court of Appeal, Third Appellate District -
No. C084031, C084961

The petition for review is denied.

CANTIL-SAKAUYE
Chief Justice

APPENDIX B

CERTIFIED FOR PARTIAL PUBLICATION[*]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

C084031, C084961
(Super. Ct. No. 34200800014593CUCLGDS)

[Filed July 2, 2019]

THE PEOPLE ex rel. XAVIER BECERRA, as Attorney General, etc.,
Plaintiff and Respondent,

v.

NATIVE WHOLESALE SUPPLY COMPANY,
Defendant and Appellant.

APPEAL from a judgment of the Superior Court of Sacramento County, David I. Brown, Judge. Affirmed.

Lipsitz Green Scime Cambria and Paul J. Cambria, Jr. , Erin E. McCampbell and Patrick J. Mackey for Defendant and Appellant.

[*] Pursuant to California Rules of Court, rules 8.1105 and 8.1110, this opinion is certified for publication with the exception of parts II and III of the Discussion.

Xavier Becerra, Attorney General, Karen Leaf, Senior Assistant Attorney General; Nicholas M. Wellington, Michael M. Edson, and Nora Flum Deputy Attorneys General for Plaintiff and Respondent.

Defendant Native Wholesale Supply Company (NWS), an Indian-chartered corporation headquartered on a reservation in New York, sold over a billion contraband cigarettes to an Indian tribe in California, which then sold the cigarettes to the general public in California. (*People ex rel. Harris v. Native Wholesale Supply Co.* (2011) 196 Cal.App.4th 357, 362-364 (*Harris*).) The cigarettes were imported from Canada, stored at various places in the United States (not including California), and then shipped to California after they were ordered from the reservation in New York. The Attorney General succeeded on his motion for summary judgment holding NWS liable for civil penalties in violation of two California cigarette distribution and sale laws and Business and Professions Code section 17200 (the unfair competition law), and obtained a permanent injunction precluding NWS from making future sales. The Attorney General further obtained an award of attorney fees and expert expenses.

NWS appeals from the judgment and the attorney fee order. We affirm.

BACKGROUND

I

Factual Background -- The Cigarette Sales Transactions

The material facts are undisputed.[1] NWS is a corporation chartered under the laws of the Sac and Fox Nation of Oklahoma (Sac and Fox), a federally-recognized Indian tribe, headquartered on the Seneca Nation of Indians' (Seneca) reservation in New York.[2] Arthur Montour, an enrolled Seneca member, is NWS's sole owner. NWS's principal business is the sale of tobacco products produced and packaged by Grand River Enterprises Six Nations Ltd. (Grand River), a Canadian corporation located in Ontario, Canada. Grand River has never been listed on the California Attorney General's Tobacco Directory as specified in Revenue and Taxation Code section 30165.1.

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[1] The trial court sustained the Attorney General's objections to the separate statement of undisputed facts, noting: "while NWS purports to dispute a number of the facts set forth in the [Attorney General's] separate statement, none of the facts are truly disputed and/or to the extent there is any dispute, it is not material." NWS does not challenge the trial court's finding in that regard.

[2] Although immaterial to this appeal, we note NWS filed for bankruptcy in 2011; the bankruptcy court issued an order confirming NWS's bankruptcy plan in 2014. NWS's disclosure statement supporting confirmation of its bankruptcy plan reveals the bankruptcy had virtually no effect on its business: " 'The year prior to the Petition, the annual sales were at a level of approximately $200,000,000 and it has continued at that level for the majority of the Chapter 11 administration period.' "

NWS imported Grand River's cigarettes and stored them in rented space at one of the following three federally regulated facilities before shipping them to customers: (a) the Western New York Foreign Trade Zone in Lackawana, New York; (b) the Southern Nevada Foreign Trade Zone in Las Vegas, Nevada; or (c) a bonded warehouse located on the Seneca reservation in New York.

Between 2004 and 2012, NWS sold and shipped 98,540 cases of Grand River cigarettes (equaling more than 54.5 million cigarette packs or over a billion cigarettes) to the Big Sandy Rancheria Band of Mono Indians (Big Sandy), a small Indian tribe residing in California.[3] The sales occurred in 476 invoiced transactions, with a total value of almost $67.5 million. NWS used a customs broker located in Woodland Hills, California, to assist with some of the transactions, and paid shipping carriers headquartered in Texas, Nebraska, and New York to deliver the cigarettes.

II
Legal Background -- The Cigarette Distribution And Sale Statutes

To provide context for the trial court's rulings and the discussion that follows, we briefly summarize the two pertinent sets of statutes governing different aspects of the sale and distribution of cigarettes in California -- the Directory Statute (Rev. & Tax. Code, § 30165.1) and the California Cigarette Fire Safety and

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[3] As of 2005, Big Sandy had approximately 434 members.

Firefighter Protection Act (Fire Safety Act) (Health & Saf. Code, § 14950 et seq.).

A

The Directory Statute

In 1998, California and 45 other states entered into a master settlement agreement (the MSA) with the four largest American tobacco product manufacturers. (*State ex rel. Edmondson v. Native Wholesale Supply* (2010) 2010 OK 58 [237 P.3d 199, 203] (*Edmondson*); *Harris*, *supra*, 196 Cal.App.4th at p. 363; see Health & Saf. Code, § 104555, subd. (e).) The states had sued the manufacturers to recoup health care expenses incurred by the states because of cigarette smoking. (*Edmondson*, at p. 203.) "In exchange for a liability release from the states for smoking-related public healthcare costs, the settling manufacturers agreed to limit their marketing and to pay the settling states billions of dollars in perpetuity" (*Harris*, at p. 363) by making "an annual payment to each settling state computed in relation to that manufacturer's volume of cigarette sales in the state" (*Edmondson*, at p. 203).

"In order to prevent tobacco manufacturers not participating in the MSA from gaining a cost advantage over the settling manufacturers and to provide the states with a source of money from which to recover tobacco-related health care costs attributable to the sales of cigarettes by non-participating manufacturers, the MSA calls for each settling state to enact and enforce a statute (a 'qualifying statute') requiring all tobacco manufacturers not participating in the MSA who sell cigarettes in a state to make annual payments into an escrow account based on the manufacturer's

relative market share in such state." (*Edmondson*, *supra*, 237 P.3d at p. 203.)

California's "qualifying statute" is commonly referred to as the Escrow Statute. It provides that cigarettes sold in this state must be produced by manufacturers who either (a) have signed the MSA, or "(b) in lieu of signing the MSA, have agreed to pay sufficient funds into a reserve fund in escrow to guarantee a source of compensation should liability arise." (*People ex rel. Becerra v. Huber* (2019) 32 Cal.App.5th 524, 530.)

The Directory Statute serves as a complement to the Escrow Statute, to ensure compliance with its provisions. "Under the Directory [Statute], the Attorney General maintains a published list of all cigarette manufacturers who have annually certified their compliance with the requirements of the MSA or the alternative escrow funding requirements." (*People ex rel. Becerra v. Huber*, *supra*, 32 Cal.App.5th at p. 530; Rev. & Tax. Code, § 30165.1, subds. (b)-(c).) The Directory Statute prohibits any person from selling, offering, or possessing for sale in California, or shipping or otherwise distributing into or within California any cigarettes not listed as legal for sale on the Attorney General's directory. (Rev. & Tax. Code, § 30165.1, subd. (e)(2).) Revenue and Taxation Code section 30165.1, subdivision (e)(3) prohibits persons from selling, distributing, acquiring, holding, owning, possessing, importing, transporting, or causing to be imported, cigarettes that the person knows or should know are intended to be distributed in violation of subdivision (e)(2).

B

The Fire Safety Act

"[U]nder the Fire Safety Act, any manufacturer of cigarettes sold in California must meet specified testing, performance, and packaging standards established for the purpose of minimizing the fire hazards caused by cigarettes. [Citations.] This statute provides that all cigarettes sold in this state must, among other things, be packaged in a specified manner and certified with the State Fire Marshal as compliant with these safety standards. [Citation.] It is categorically illegal for any 'person' to 'sell, offer, or possess for sale in this state cigarettes' that do not comply with the Fire Safety Act." (*People ex rel. Becerra v. Huber*, *supra*, 32 Cal.App.5th at pp. 530-531.)

III

Procedural Background

The Attorney General filed a civil enforcement action against NWS in 2008, seeking an injunction, civil penalties, contempt and other relief for violations of the Directory Statute and Fire Safety Act, violation of Business and Professions Code section 17200 predicated on violations of the Directory Statute, Fire Safety Act, and a federal statute, and violation of an injunction. NWS filed a motion to remove the case to federal court, but the case was remanded back to state court for lack of federal subject matter jurisdiction.

In state court, NWS filed a motion to quash service for lack of personal jurisdiction, which culminated in our 2011 opinion concluding NWS is subject to personal jurisdiction in California for the claims asserted

against it in this action. This court held that, among other things, NWS purposefully availed itself of the substantial benefits of conducting activities in California (i.e., it had minimum contacts) because the cigarettes it sold to Big Sandy were in turn sold to the general public in California. (See *Harris*, *supra*, 196 Cal.App.4th at pp. 360, 362-365.) NWS then filed a demurrer to all the causes of action. The trial court sustained the demurrer with respect to the injunction violation cause of action and overruled it with respect to the remaining causes of action.

The parties subsequently engaged in discovery, resulting in several motions and rulings, five of which are the subject of this appeal. Those motions and rulings are discussed in greater detail in the pertinent Discussion section below.

In August 2016, the Attorney General and NWS filed their respective motions for summary judgment. The Attorney General argued NWS did not dispute the essential facts supporting the causes of action. NWS argued: (1) the Indian Commerce Clause preempted the claims against NWS because the "transactions occurred on a reservation solely among various Indian-owned entities"; and (2) injunctive relief would be unnecessary and ineffectual because NWS is a bankrupt entity and voluntarily discontinued selling cigarettes within California in 2012.

NWS raised the same preemption and injunctive relief arguments in its opposition to the Attorney General's motion for summary judgment, and further argued: (1) the trial court lacked personal jurisdiction over NWS for the claims presented; (2) the Directory

Statute violated NWS's equal protection rights; (3) NWS "was under no legal obligation to comply with the mandates of the Directory and Escrow Statutes at the time of the cigarettes sales at issue in this case (i.e. 2004-2012)" because the statutes did not apply to NWS until 2013; and (4) the calculation of civil penalties was too speculative for summary judgment because the Attorney General submitted no proof of the quantity of cigarettes sold to non-Indian customers and could not seek penalties for cigarettes sold to Indian customers.

The trial court granted the Attorney General's motion and denied NWS's motion, finding none of NWS's defenses availing and no triable issues of material fact relating to the alleged violations.

The trial court found the Attorney General provided sufficient evidence to establish Directory Statute violations by "demonstrat[ing] that NWS sold in and shipped or otherwise distributed into California cigarettes that were not listed on the Attorney General's directory in violation of subdivision (e)(2)" and "that NWS knew or should have known that Big Sandy intended to redistribute the cigarettes in violation of subdivision (e)(2), which constitutes a violation of subdivision (e)(3)." The Attorney General "met [his] burden to shift to NWS the burden on demonstrating the existence of a triable issue of material fact. It failed to do so."

The trial court further found the Attorney General provided sufficient evidence to establish Fire Safety Act violations by "show[ing] that NWS sold cigarettes to Big Sandy for which no certification had been filed between July 9, 2008, when it was served with the

complaint in this action, and May 25, 2012, when it claimed to have stopped selling the cigarettes. [Citations.] At no time prior to February 2014 were any [Grand River]-Cigarettes certified as being in compliance with Health & Safety Code section 14951, subdivision (a)(4). [Citations.] The evidence [wa]s sufficient to shift to NWS the burden of demonstrating the existence of a triable issue of material fact." NWS again failed to carry its burden.

Finally, the trial court found the Attorney General proved NWS's violation of Business and Professions Code section 17200 through the violations of the Directory Statute and Fire Safety Act, and violation of a federal cigarette interstate commerce statute (15 U.S.C., § 376), which required NWS to file monthly reports with the state tax administrator, providing specific information about each shipment. "The evidence show[ed] that NWS, headquartered in New York, sold and shipped cigarettes from outside California to Big Sandy in California, which is not a licensed distributor in California, thus engaging in interstate commerce. [Citations.] NWS failed to file monthly reports with the state tax administrator. [Citation.] The evidence [wa]s sufficient to shift to NWS the burden of demonstrating the existence of a triable issue of material fact." NWS failed to carry its burden.

Given that there were no disputed factual issues regarding remedies, the trial court granted the Attorney General's request for civil penalties in the amount of $4,292,500, and his request for an injunction.

The Attorney General subsequently moved for attorney fees. The court granted that motion and awarded $3,843,981.25 in attorney fees and $9,119.25 in expert expenses, for a total of $3,853,100.50. We discuss the specifics relating to the attorney fee order in the pertinent Discussion section below.

NWS appeals from the trial court's judgment in favor of the Attorney General and the order granting the Attorney General's request for attorney fees.

DISCUSSION

I

Summary Judgment

Summary judgment is properly granted when no triable issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) We review the grant and denial of summary judgment motions de novo. (*Law Offices of Dixon R. Howell v. Valley* (2005) 129 Cal.App.4th 1076, 1092.) We independently examine the record and evaluate the correctness of the trial court's ruling, not its rationale, and must affirm the order if it reaches the correct result under any legal theory. (*Moore v. William Jessup University* (2015) 243 Cal.App.4th 427, 433.) Here, the material facts are undisputed, raising only questions of law.

A

Personal Jurisdiction

NWS challenges the trial court's refusal to relitigate the issue of personal jurisdiction, raised as a defense to the Attorney General's motion for summary judgment. The trial court declined to consider the defense because

the issue had been extensively litigated earlier in the proceedings and, on appeal in 2011, we concluded NWS is subject to specific personal jurisdiction in this case because "NWS has purposefully derived benefit from California activities under the stream of commerce theory." (*Harris*, *supra*, 196 Cal.App.4th at p. 360.) NWS argues we should reconsider our 2011 decision in light of *Walden* or *Bristol-Myers*, cases decided by the United States Supreme Court after 2011. We disagree.

Neither of those cases demands a different result or requires us to revisit jurisdiction. As we explained in the 2011 opinion, NWS is subject to personal jurisdiction under the stream of commerce theory -- a theory of personal jurisdiction neither addressed nor applied in *Walden* or *Bristol-Myers*. (*Walden v. Fiore* (2014) 571 U.S. 277 [188 L.Ed.2d 12]; *Bristol-Myers Squibb Co. v. Superior Court* (2017) 582 U.S. __ [198 L.Ed.2d 395].) More importantly, the facts in those cases are highly distinguishable. (*Walden*, at p. 291 [188 L.Ed.2d at p. 24] [where the "relevant conduct occurred entirely in Georgia . . . the mere fact that [the] conduct affected plaintiffs with connections to [Nevada] d[id] not suffice to authorize [personal] jurisdiction" over the defendant in Nevada]; *Bristol-Myers Squibb Co.*, at p. __ [198 L.Ed.2d at pp. 404-405] [no personal jurisdiction over drug manufacturer in California where nonresidents were not prescribed the drug in California, did not purchase or ingest the drug in California, and were not injured by the drug in California, and the fact that other plaintiffs were prescribed, obtained, and ingested the drug in California -- and allegedly sustained the same injuries

as the nonresidents -- did not warrant specific jurisdiction over the nonresidents' claims].)

Whereas a connection between the forum and the specific claims against the defendants was lacking in *Walden* and *Bristol-Myers*, here we held NWS had substantial contacts with California. As this court previously explained, NWS sold millions of cigarettes to Big Sandy, a tribe with only 431 members, and the cigarettes were in turn sold to the general public. (*Harris*, *supra*, 196 Cal.App.4th at pp. 363-364.) "Placing goods in the stream of commerce with the expectation that they eventually will be purchased by consumers in the forum state indicates an intention to serve that market and constitutes purposeful availment" where, as in this case, the income earned by NWS was substantial. (*Harris*, at p. 364.)

The trial court also did not err in declining to relitigate the issue of personal jurisdiction. The law of the case doctrine cemented our 2011 personal jurisdiction decision, rendering it binding on the trial court and in this appeal. " ' "The doctrine of the law of the case is this: That where, upon an appeal, the [reviewing] court, in deciding the appeal, states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to throughout its subsequent progress, both in the lower court and upon subsequent appeal . . . and this although in its subsequent consideration this court may be clearly of the opinion that the former decision is erroneous in that particular." ' " (*People v. Stanley* (1995) 10 Cal.4th 764, 786.)

Our 2011 opinion stands; NWS is subject to personal jurisdiction for the claims asserted against it in this litigation.

B

Indian Commerce Clause Preemption

Distilled to its essence, NWS argues the Attorney General's claims are preempted because the Indian Commerce Clause precludes application of state laws (such as the Directory Statute and the Fire Safety Act) to on-reservation transactions between Indians (which NWS believes is the nature of the transactions at issue in this case). This is not the first time NWS has raised this argument in a state enforcement action relating to the sale of contraband cigarettes. Indeed, both the Oklahoma and Idaho Supreme Courts have considered and rejected NWS's preemption defense in analogous enforcement actions under similar circumstances. (*Edmondson*, *supra*, 237 P.3d 199; *State ex rel. Wasden v. Native Wholesale Supply Co.* (2013) 155 Idaho 337 [312 P.3d 1257] (*Wasden*).)

1

The Guiding Principles

"Indian tribes do not have an automatic exemption from state law." (*Confederated Tribes of Siletz Indians v. Oregon* (9th Cir. 1998) 143 F.3d 481, 486.) " '[There] is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian reservation or to tribal members.' " (*People v. McCovey* (1984) 36 Cal.3d 517, 524.) However, generally, "[s]tate jurisdiction is pre-empted by the operation of federal law if it interferes or is

incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." (*New Mexico v. Mescalero Apache Tribe* (1983) 462 U.S. 324, 334 [76 L.Ed.2d 611, 620].)

"Congress has broad power to regulate tribal affairs under the Indian Commerce Clause, Art. 1, § 8, cl. 3.[[4]] [Citation.] This congressional authority and the 'semi-independent position' of Indian tribes have given rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members. First, the exercise of such authority may be pre-empted by federal law. [Citations.] Second, it may unlawfully infringe 'on the right of reservation Indians to make their own laws and be ruled by them.' [Citations.] The two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members. They are related, however, in two important ways. The right of tribal self-government is ultimately dependent on and subject to the broad power of Congress. Even so, traditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important 'backdrop,' [citation], against which vague or ambiguous federal enactments must always be measured.

[4] The Indian Commerce Clause provides: "The Congress shall have power . . . [t]o regulate commerce . . . with the Indian tribes." (U.S. Const., art. I, § 8, cl. 3.)

"The unique historical origins of tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards of pre-emption that have emerged in other areas of the law. Tribal reservations are not States, and the differences in the form and nature of their sovereignty make it treacherous to import to one notions of pre-emption that are properly applied to the other. The tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been pre-empted by operation of federal law. [Citation.] As we have repeatedly recognized, this tradition is reflected and encouraged in a number of congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development. Ambiguities in federal law have been construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence. [Citation.] We have thus rejected the proposition that in order to find a particular state law to have been pre-empted by operation of federal law, an express congressional statement to that effect is required. [Citation.] At the same time any applicable regulatory interest of the State must be given weight, [citation], and 'automatic exemptions "as a matter of constitutional law" ' are unusual. [Citation.]

"When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest. [Citations.] More

difficult questions arise where . . . a State asserts authority over the conduct of non-Indians engaging in activity on the reservation. In such cases we have examined the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence. This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law."[5] (*White Mountain Apache Tribe v. Bracker* (1980) 448 U.S. 136, 142-145 [65 L.Ed.2d 665, 672-673], fns. omitted (*Bracker*).)

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[5] NWS asserts this paragraph in *Bracker* delineates two preemption analyses: (1) a per se rule of preemption if the state seeks to regulate on-reservation transactions between tribal members; and (2) a balancing-of-the-interest test when the state seeks to regulate on-reservation transactions between tribal members and nontribal members. We disagree. As the Attorney General explains: "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*.' " The United States Supreme Court has also expressly rejected the idea of a per se rule, except "[i]n the special area of state taxation of Indian tribes and tribal members." (*California v. Cabazon Band of Indians* (1987) 480 U.S. 202, 214-215 & fn. 17 [94 L.Ed.2d 244, 258-259].)

2

The Oklahoma And Idaho Supreme Court Decisions

a

Oklahoma

Oklahoma sued NWS for violation of that state's statute analogous to the Directory Statute, called the Master Settlement Agreement Complementary Act (OK Complementary Act).[6] (*Edmondson*, *supra*, 237 P.3d at pp. 203-204.) NWS purchased the cigarettes in Canada, stored them "in several locations in the United States, including the Free Trade Zone in Las Vegas, Nevada," and sold the cigarettes to a tribal entity known as Muscogee Creek Nation Wholesale in Oklahoma. (*Id.* at pp. 207-208.)

The Oklahoma Supreme Court considered the doctrine of tribal immunity to determine if the state had a remedy against NWS for violation of the OK Complementary Act and preemption under the Indian Commerce Clause to determine whether the state had a right to enforce NWS's noncompliance with state law. (*Edmondson*, *supra*, 237 P.3d at pp. 209-210.) The

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[6] The legislation "obligates all tobacco product manufacturers whose products are sold in Oklahoma to provide the Attorney General's office with an annual certification that the manufacturer has either signed on to participate in the MSA or is fully compliant with the qualifying statute's escrow requirement" and "makes it unlawful for any person to 'sell or distribute . . . or acquire, hold, own, possess, transport, import, or cause to be imported cigarettes that the person knows or should know are intended for distribution or sale in the State in violation of the Complementary Act.' " (*Edmondson*, *supra*, 237 P.3d at pp. 203, 204.)

court found neither tribal immunity nor preemption applied.

With respect to the preemption analysis, NWS argued "that transactions between Native Americans -- 'tribal to tribal transactions' -- are beyond the reach of state regulatory power." (*Edmondson*, *supra*, 237 P.3d at p. 215.) The court disagreed, explaining: "While Native Wholesale Supply does not say so expressly, it seems to be arguing that there is a dormant or negative aspect to the Indian Commerce Clause analogous to that found in the Interstate Commerce Clause. By granting to Congress the power to regulate Indian commerce, [NWS] implies, the Indian Commerce Clause forbids states to regulate such commerce. We see no support for such an interpretation of the Indian Commerce Clause in the jurisprudence of the United States Supreme Court, whose decisions clearly establish that the Indian Commerce Clause does not 'of its own force' automatically bar all state regulation of Indian commerce. Rather, each state assertion of authority over tribal land and tribal members must be examined in light of the Indian sovereignty principles developed by the Supreme Court for conformity to federal law." (*Ibid*., fn. omitted.)

The court continued: "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, [NWS's] argument that enforcement of the [OK] Complementary Act against it violates the Indian Commerce Clause is clearly wrong. There is no blanket

ban on state regulation of inter-tribal commerce even on a reservation. The Supreme Court has ruled precisely on that point by allowing state taxation of retail sales made on-reservation by tribal retailers to Native Americans who are not members of the governing tribe. 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.

"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 [OK] Complementary Act 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.' The [OK] Complementary Act is a law of general application and there is no evidence that it is applied to Native-American cigarette wholesalers in a discriminatory manner." (*Edmondson*, *supra*, 237 P.3d at pp. 215-216, fn. omitted.)

The court further concluded "the State's interest in enforcing the MSA through the [OK] Complementary Act would outweigh any interest the tribe or federal government might have in prohibiting its enforcement against Native Wholesale Supply." (*Edmondson*, *supra*, 237 P.3d at p. 216.)

b
Idaho

Idaho sued NWS seeking a permanent injunction and civil penalties for, in part, violation of that state's statute analogous to the Directory Act, also called the Complementary Act (ID Complementary Act).[7] (*Wasden*, *supra*, 312 P.3d at pp. 1259-1260.) NWS had sold over 100 million noncompliant cigarettes wholesale to Warpath, an Idaho corporation owned by a member of the Coeur d'Alene tribe and operated

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[7] The ID Complementary Act "requires every tobacco manufacturer that sells cigarettes in Idaho to annually certify compliance with the requirements of the [MSA]. The State of Idaho maintains a registry of such compliant manufacturers. It is unlawful to sell cigarettes from a non-compliant manufacturer within the state of Idaho." (*Wasden*, *supra*, 312 P.3d at p. 1259.)

solely on the tribe's reservation. (*Id*. at p. 1259.) As in this case, NWS purchased the cigarettes in Canada and stored them "in a foreign trade zone in Nevada." (*Id*. at pp. 1259-1260.) The cigarettes were shipped from Nevada to the Coeur d'Alene tribe's reservation. (*Id*. at p. 1260.) The state obtained an injunction prohibiting NWS from selling noncompliant cigarettes and was awarded $214,200 in civil penalties. (*Ibid*.)

NWS appealed, asserting as one of the bases for the appeal that "because it is owned by a tribal member and it operates on an Indian reservation, the State lacks subject matter jurisdiction to regulate its transactions with Warpath." (*Wasden*, *supra*, 312 P.3d at p. 1261.) The Idaho Supreme Court disagreed. Relying on a federal district court case, the Idaho Supreme Court said: "A 'corporation is not an Indian for purposes of immunity from state taxation.' " (*Id*. at p. 1262.) The court continued: "there is no indication that the corporation is acting as a surrogate for the tribe itself. There is nothing to suggest that it is controlled by the tribe or operated for tribal governmental purposes. The fact that NWS is operated on a different reservation than the one under which it is organized suggests that it is not connected to tribal business. Thus, we hold that, as a corporation, NWS is not an Indian." (*Ibid*.)

NWS also argued "that even if it is found not to be an Indian, the Indian Commerce Clause prevents the State from regulating its transactions with Warpath because it is selling cigarettes strictly to a reservation-based retailer. When a state desires to regulate non-Indians inside Indian Country, the U.S. Supreme Court

has employed a balancing test to determine whether the state's authority has been preempted by federal law." (*Wasden*, *supra*, 312 P.3d at p. 1262.) The Idaho Supreme Court agreed with the district court's finding that "NWS's activities occurred off reservation and the *Bracker* balancing test was not applicable." (*Id.* at p. 1263.) The court explained:

" '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.' [Citations.] In other words, whether a member of a tribe or not, when a person operates outside of reservation boundaries, the *Bracker* test does not apply. For this reason, tribal members operating outside reservation boundaries have been subject to state regulation. [Citations.] [¶] Thus, the location of the activity can be an important factor in analyzing state regulation where Indian commerce is implicated. Here, however, the activity is not occurring strictly on the reservation. We decline NWS's invitation to characterize the activity as merely the sale of cigarettes to Warpath on the Coeur d'Alene reservation. NWS's activities are far broader than just sales to Warpath. The activity at issue here extends beyond the borders of the reservation. Looking at NWS's activity as a whole, it cannot be characterized as an on-reservation activity. NWS is operated on the Seneca reservation in New York, but is organized under the laws of a separate tribe. It purchases cigarettes that are manufactured in Canada. It stores those cigarettes in a foreign trade zone in Nevada. It then ships those cigarettes from Nevada into Idaho.

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." (*Wasden*, *supra*, 312 P.3d at p. 1263, fn. omitted.)

3

The Indian Commerce Clause Is Inapplicable

NWS argues it qualifies as an "Indian" for purposes of the Indian Commerce Clause analysis in two ways: (1) by regulation under California law because it is an Indian-owned corporation; and (2) derivatively through its owner's tribal member status based on United States Supreme Court precedent. We disagree.

The California regulation upon which NWS relies exempts "Indians," as the term is defined therein, from certain sales and use tax obligations. (Cal. Code Regs., tit. 18, § 1616, subd. (d).) The term "Indian" is defined to include "corporations organized under tribal authority and wholly owned by Indians."[8] (*Ibid.*)

The regulation has no application here. In the Revenue and Taxation Code, the statutes governing the

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[8] NWS does not argue (nor is there any evidence to suggest) that the corporation is an arm of a tribal government and, therefore, immune from suit. (See *Agua Caliente Band of Cahuilla Indians v. Superior Court* (2006) 40 Cal.4th 239, 247-248 [" 'Although [Indian tribal] immunity extends to entities that are arms of the tribes, it apparently does not cover tribally chartered corporations that are completely independent of the tribe' "]; cf., e.g., *Allen v. Gold Country Casino* (9th Cir. 2006) 464 F.3d 1044, 1046-1047 [casino considered arm of the tribe].)

"Sales and Use Tax" and the "Cigarette Tax" are located in separate parts of the code (see Rev. & Tax. Code, §§ 6001 et seq. [Part 1 -- sales and use taxes], 30001 et seq. [Part 13 -- cigarette tax]), and have been implemented through distinct sets of regulations in different chapters of the California Code of Regulations (see Cal. Code Regs., tit. 18, §§ 1500 et seq. [sales and use tax regulations], 4001 et seq. [cigarette tax regulations]). The Directory Statute is located within the Cigarette Tax part of the code, and none of the statutes contained therein nor the implementing regulations relating thereto contain a provision like the one upon which NWS relies. The Fire Safety Act is even further removed from the regulation because it is located in the Health and Safety Code not the Revenue and Taxation Code. We find no indication from the language in the sales and use tax statutes or regulations that the definition of "Indian" under California Code of Regulations, title 18, section 1616, subdivision (d) was intended to apply in any context other than the sales and use tax exemptions at issue in that provision.

The United States Supreme Court's *Hobby Lobby* opinion does not bring NWS within the ambit of the Indian Commerce Clause either. (*Burwell v. Hobby Lobby Stores, Inc.* (2014) 573 U.S. __ [189 L.Ed.2d 675].) NWS argues *Hobby Lobby* supports the conclusion that "closely held corporations, like NWS, take on the constitutionally enshrined rights of their owners." It believes the case "makes it clear that Arthur Montour, an Indian, was not divested of his status as an Indian simply because he elected to incorporate, rather than operate as a sole

proprietorship." Thus, NWS seeks to cloak itself in tribal membership status derivatively through Montour's Seneca tribal membership. A reading of *Hobby Lobby* makes clear, however, that NWS's argument finds no footing in the text of the opinion.[9]

Hobby Lobby dealt with the interpretation and application of a specific statute, the Religious Freedom Restoration Act of 1993 (RFRA). The United States Supreme Court considered whether a federal agency could, pursuant to RFRA, "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." (*Burwell v. Hobby Lobby Stores, Inc.*, *supra*, 573 U.S. at p. __ [189 L.Ed.2d at p. 686].) The court found it could not -- "the regulations that impose[d] this obligation violate[d] RFRA, which prohibits the Federal Government from taking any action that substantially burdens the exercise of religion unless that action constitutes the

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[9] We note that even if NWS could cloak itself in Montour's tribal membership, it would not transform the transactions with Big Sandy into "Indian-to-Indian" transactions, as NWS claims. That is because there is no constitutional or statutory right afforded to an Indian of one tribe (such as Montour) to conduct business free from state regulation with an Indian of a different tribe (such as a member of Big Sandy) under the Indian Commerce Clause. (*People ex rel. Becerra v. Rose* (2017) 16 Cal.App.5th 317, 329 [nonmember Indians (i.e., Indians who are not members of the governing tribe) stand on the same footing as non-Indians for purposes of the Indian commerce clause]; *Rice v. Rehner* (1983) 463 U.S. 713, 720, fn. 7 [77 L.Ed.2d 961, 971] ["Indians resident on the reservation but nonmembers of the governing tribe 'stand on the same footing as non-Indians resident on the reservation' insofar as [state regulation] is concerned"].)

least restrictive means of serving a compelling government interest." (*Ibid.*)

The court rejected the federal agency's argument that "the owners of the companies forfeited all RFRA protection when they decided to organize their businesses as corporations rather than sole proprietorships or general partnerships" based on its reading of the statute. (*Burwell v. Hobby Lobby Stores, Inc.*, *supra*, 573 U.S. at p. __ [189 L.Ed.2d at p. 686].) The court explained: "RFRA applies to 'a person's' exercise of religion, [citations], and RFRA itself does not define the term 'person.' We therefore look to the Dictionary Act, which we must consult '[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise.' [Citation.] [¶] Under the Dictionary Act, 'the wor[d] "person" . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.' [Citations.] Thus, unless there is something about the RFRA context that 'indicates otherwise,' the Dictionary Act provides a quick, clear, and affirmative answer to the question whether the companies involved in these cases may be heard." (*Id.* at p. __ [189 L.Ed.2d at p. 696].) The court concluded "[t]he plain terms of RFRA make it perfectly clear that Congress did not discriminate in this way against men and women who wish to run their businesses as for-profit corporations in the manner required by their religious beliefs." (*Id.* at p. __ [189 L.Ed.2d at p. 686].)

The United States Supreme Court did not consider or discuss the extension of any protections from a company's owners to the corporation outside the

context of RFRA. More specifically, the Indian Commerce Clause does not contain the word "person" as defined by the Dictionary Act or as discussed in *Hobby Lobby*. NWS points us to no federal statute, nor are we aware of any, that includes a corporation within the definition of Indian, tribe, or tribal member. Thus, *Hobby Lobby* is wholly irrelevant to the issue at hand.

NWS has provided no legitimate basis for concluding it qualifies as a tribal member. It is thus considered a non-Indian for purposes of the Indian Commerce Clause analysis.

NWS's non-Indian status does not, however, dispose of the preemption defense. If the liability-creating conduct occurred on-reservation, we must further conduct a balancing-of-the-interest analysis as provided in *Bracker*. (*Bracker*, *supra*, 448 U.S. at pp. 144-145 [65 L.Ed.2d at p. 673].) On the other hand, if the liability-creating conduct occurred off-reservation, no such analysis is necessary and we may conclude the Indian Commerce Clause does not apply. We therefore next consider the geographical reach of the transactions as applied under the Directory Statute and the Fire Safety Act.

The United States Supreme Court "has repeatedly emphasized that there is a significant geographical component to tribal sovereignty" in determining whether state authority has exceeded the permissible limits. (*Bracker*, *supra*, 448 U.S. at p. 151 [65 L.Ed.2d at p. 677]; *Mescalero Apache Tribe v. Jones* (1973) 411 U.S. 145, 148-149 [36 L.Ed.2d 114, 119] ["Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been

held subject to nondiscriminatory state law otherwise applicable to all citizens of the State"].) To determine whether a transaction is off-reservation or on-reservation for purposes of analyzing the applicability of the Indian Commerce Clause, we must determine where the party bearing the legal incidence of the regulation conducted the liability-creating conduct. (See *Wagnon v. Prairie Band Potawatomi* (2005) 546 U.S. 95, 105-110 [163 L.Ed.2d 429, 439-442].)

We agree with the Oklahoma and Idaho Supreme Courts that the Indian Commerce Clause was not intended to cloak in sovereignty the type of transactions at issue here. (*Edmondson*, *supra*, 237 P.3d at pp. 215-216; *Wasden*, *supra*, 312 P.3d at p. 1263.) Like NWS's transactions in violation of the OK Complementary Act in *Edmondson* and the ID Complementary Act in *Wasden* -- statutes analogous to the Directory Act -- NWS's activity in this case involved violations of the Directory Act occurring off-reservation. (See *ibid*.)

Revenue and Taxation Code section 30165.1, subdivision (e)(2) provides that a corporation shall not ship or otherwise distribute contraband cigarettes *into* or *within* California (irrespective of where the cigarettes were ultimately sold), and subdivision (e)(3) provides that a corporation shall not transport, import, or cause to be imported cigarettes knowing the cigarettes are intended to be distributed in violation of subdivision (e)(2). (See also Rev. & Tax. Code, § 30010.) Here, NWS arranged for the transport of millions of contraband cigarettes to Big Sandy in California. (*Harris*, *supra*, 196 Cal.App.4th at p. 362.) NWS does

not dispute the trial court's factual finding that NWS had the requisite knowledge, and there is no evidence that the contraband cigarettes somehow avoided passing through California.

Thus, the legal incidence of the penalties and liability under the Directory Statute attached before the contraband cigarettes reached Big Sandy's reservation -- while the cigarettes were on their way to their final destination and after they breached the California border.[10] Under such circumstances, the *Bracker* test is inapplicable.[11] (See *Wagnon v. Prairie*

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[10] The trial court noted: "NWS attempts to dispute almost all of the [Attorney General's] material facts with evidence that it sold cigarettes to Big Sandy, a federally recognized tribe, on sovereign land, in transactions that were [freight on board] New York with title and risk of loss transferring to Big Sandy before the products entered into California." The trial court disregarded the argument because it "ha[d] sustained the [Attorney General's] objections to the evidence on this point." NWS does not challenge the trial court's finding in that regard.

[11] *Black Hawk* is of no assistance to NWS. NWS asserts "*Black Hawk* recognized that Black Hawk, a company owned by an enrolled member of the Sac and Fox Nation, a federally-recognized Indian tribe from Oklahoma, was legally permitted to sell off-directory cigarettes to any federally-recognized tribe of California. As such, NWS, a company chartered under the laws of the Sac and Fox Nation of Oklahoma, and owned by an enrolled member of the Seneca Nation of Indians, should not have been penalized by the lower court for selling off-directory cigarettes to Big Sandy Rancheria, a federally-recognized tribe located within California." However, NWS relies on a paragraph in the "Factual and Procedural Background" of the opinion, which merely recites the trial court's preliminary injunction ruling. (*People ex rel. Harris v. Black Hawk Tobacco, Inc.* (2011) 197 Cal.App.4th 1561, 1566-1567.) The appellate court neither considered nor endorsed the

Band Potawatomi Nation, *supra*, 546 U.S. at p. 113 [163 L.Ed.2d at p. 444] ["If a State may apply a nondiscriminatory tax to Indians who have gone beyond the boundaries of a reservation, then it follows that it may apply a nondiscriminatory tax where, as here, the tax is imposed on non-Indians as a result of an off-reservation transaction. In these circumstances, the interest-balancing test set forth in *Bracker* is inapplicable"].)

The location of the conduct to which the Fire and Safety Act liability attaches is not as clear; but, as we explain, preemption nonetheless does not apply. Health and Safety Code section 14955, subdivision (a) provides: "A manufacturer or any other person or entity that knowingly sells or offers to sell cigarettes other than through retail sale in violation of this part is subject to a civil penalty not to exceed ten thousand dollars ($10,000) for each sale."[12] "Sale" is defined as "any transfer, exchange, or barter, in any manner or by any means whatever, or any agreement for these purposes." (Health & Saf. Code, § 14950, subd. (b)(10).) Whether the sales of the contraband cigarettes occurred on the Seneca reservation, the Big Sandy reservation, or somewhere in between is immaterial to the outcome of this case. That is because California's interests in regulating the conduct at issue are

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propriety of the preliminary injunction's language, and the opinion contains no discussion in that regard. A decision is not authority for propositions not considered. (*McDowell & Craig v. City of Santa Fe Springs* (1960) 54 Cal.2d 33, 38.)

[12] The trial court noted: "NWS has admitted that the sales were not retail sales."

sufficient to justify the assertion of state authority under the *Bracker* balancing-of-the-interests test in any event.

" 'The California Cigarette Fire Safety and Firefighter Protection Act -- providing ignition-propensity requirements -- serves the public interest in reducing fires caused by cigarettes. . . . [And n]o federal or tribal interest outweighs the state's interest in . . . enforcing the California tobacco directory and cigarette fire safety laws.' " (*People ex rel. Becerra v. Huber*, *supra*, 32 Cal.App.5th at pp. 549-550, agreeing with *People ex rel. Harris v. Black Hawk Tobacco, Inc.* (2011) 197 Cal.App.4th 1561 & *People ex rel. Becerra v. Rose*, *supra*, 16 Cal.App.5th at p. 328; see also *Washington v. Confederated Tribes of the Colville Reservation* (1980) 447 U.S. 134 [65 L.Ed.2d 10] [state may regulate on-reservation cigarettes sales between tribal members and nonmembers].)

We need not address the geography of the liability-creating conduct for purposes of Business and Professions Code section 17200 because the cause of action is predicated on violations of the Directory Statute, Fire Safety Act, and a federal statute. We have already determined the Directory Statute and the Fire Safety Act are not preempted under the Indian Commerce Clause, and the federal statute is not subject to the preemption analysis.

C
Equal Protection

The equal protection clause of the Fourteenth Amendment directs no state shall "deny to any person

within its jurisdiction the equal protection of the laws." (U.S. Const., 14th Amend., § 1.) It generally requires the government to treat similarly situated people alike. (*Cleburne v. Cleburne Living Center* (1985) 473 U.S. 432, 439 [87 L.Ed.2d 313, 320].) In opposition to the Attorney General's motion for summary judgment, NWS argued the Directory Statute violates the equal protection clause based on race discrimination and genuine issues of material fact existed regarding the legislative intent behind the statute's enactment. As explained *ante*, we review the trial court's denial of this defense de novo.

Our review rests on the resolution of one pivotal question: Is the corporation considered an "Indian"? That is because NWS's defense is grounded in the singular argument that the Directory Statute "impacts or singles out an identifiable group of people for particular or special treatment, in this case, Indians," like NWS.[13] The decisiveness of this question hails from the fundamental premise that a charge of unconstitutional discrimination can only be raised by the person or a member of the class of persons

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[13] Although NWS's equal protection defense in its verified answer stated, "[t]he state laws on which each and every cause of action alleged in the Complaint is based, and the Master Settlement Agreement from which the state's tobacco directory law [citation] derives, impermissibly discriminate against 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," NWS's opposition to the motion for summary judgment on the ground of equal protection was based *solely* on the Directory Act as applied to NWS, as an Indian.

discriminated against. (*Rubio v. Superior Court* (1979) 24 Cal.3d 93, 103.) The limited exception to this rule in cases where no member of the class would ever be in a position to complain of the discrimination is not at issue here. (*Ibid.*)

As we explained *ante*, neither California Code of Regulations section 1616, title 18, subdivision (d) nor *Hobby Lobby* supports the conclusion that NWS is an Indian. NWS raises no alternate argument in support of its equal protection defense. Accordingly, NWS's equal protection defense fails for lack of standing and we need not address the merits.

II

The Discovery Orders

NWS challenges five discovery rulings in which the trial court denied its motions to compel further responses and production of documents by the Attorney General and granted motions for protective orders and to quash a nonparty deposition subpoena relating to discovery propounded by NWS. A trial court's discovery rulings are reviewed for abuse of discretion. (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 733.) Further, as we explained in *Lickter*, when a party does not seek writ review of the trial court's discovery rulings and instead appeals from a judgment to obtain review of those discovery orders, the party must also show the error was prejudicial; i.e., the party must show that it is reasonably probable the outcome would have been more favorable to the party had the trial court not erred in the discovery rulings. (*Lickter v. Lickter* (2010) 189 Cal.App.4th 712, 740; accord *MacQuiddy v. Mercedes-Benz USA, LLC* (2015) 233

Cal.App.4th 1036, 1045.) NWS has the burden to make an affirmative showing that the erroneous discovery ruling resulted in a miscarriage of justice. (*MacQuiddy*, at p. 1045; *Carolina Casualty Ins. Co. v. L.M. Ross Law Group, LLP* (2012) 212 Cal.App.4th 1181, 1197-1198.)

Here, we need not delve into the substance of the discovery rulings or decide whether the rulings were an abuse of discretion because, even assuming they were, NWS has failed to demonstrate it is reasonably probable the outcome of the motions for summary judgment would have been more favorable to it had the trial court ruled in its favor on the discovery motions. (*Conservatorship of Maria B.* (2013) 218 Cal.App.4th 514, 532-533 [appellant bears burden to make affirmative showing the trial court committed error and that error resulted in a miscarriage of justice].) Indeed, NWS does not even attempt to make this showing, arguing instead that it "is not required to establish that it was prejudiced by the lower court's discovery rulings" because "[p]rejudice need only be found in instances where a party is appealing a final judgment made pursuant to a court error which occurred *during trial* - not in appeals of discovery motions." NWS fails to provide any clarification for this statement and cites no authority for this proposition either; and, in any event, it is plainly wrong in light of this court's established legal precedent. NWS did not seek writ review of the discovery orders and now seeks to attack those orders on appeal from a judgment against it. Therefore, it is required to show prejudice. (*Lickter v. Lickter*, *supra*, 189 Cal.App.4th at p. 740.)

"[W]e cannot presume prejudice and will not reverse the judgment in the absence of an affirmative showing there was a miscarriage of justice. [Citations.] Nor will this court act as counsel for appellant by furnishing a legal argument as to how the trial court's ruling was prejudicial." (*Century Surety Co. v. Polisso* (2006) 139 Cal.App.4th 922, 963.) Because there is no showing of prejudicial error, we affirm the trial court's discovery rulings.

III
The Motion For Attorney Fees
A
The Order Generally

The Attorney General sought $4,017,708.75 in attorney fees, representing 9,174.74 hours of legal work in this matter.[14] The trial court applied the lodestar method to determine the appropriate amount of the attorney fee award.

Under the lodestar method, attorney fees are calculated by multiplying the number of hours reasonably expended by the reasonable hourly rate prevailing in the community for similar work. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095.) "The lodestar figure may then be adjusted, based on consideration of factors specific to the case, in order to fix the fee at the fair market value for the legal services provided." (*Ibid.*)

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[14] The Attorney General also requested expert expenses in the amount of $4,372.50, which is not at issue in this appeal.

In its order, the trial court described the case as follows: "This case has a long protracted history involving removal to and remand from Federal Court, extensive litigation related to the issue of whether personal jurisdiction existed over NWS including appeals to the Third District Court of Appeals [*sic*], and NWS's bankruptcy and attempts to stay the action. The case was designated complex and a discovery referee was assigned. Numerous discovery motions were filed and NWS also attempted to re-litigate the personal jurisdiction issue on numerous occasions. Demurrers were filed and novel issues of Tribal immunity were raised. Ultimately, the Court granted the [Attorney General's] motion for summary judgment finding that they were entitled to $4,292,500 in civil penalties and permanent injunctive relief. The final judgment entered on December 28, 2016 found that NWS committed 476 violations of the Directory Statu[t]e, 229 violations of the Fire Safety Act and 96 violations of 15 U.S.C. § 376."

The trial court noted the Attorney General voluntarily applied a 10 percent reduction to the hours worked on the case to account for inefficiencies in billing and also "deducted the time spent by attorneys who did not materially contribute to the action." The trial court, however, determined that a further reduction was required. The order states: "The Court would note, that despite the reductions made by the [Attorney General], the billing entries do contain a level of vagueness which suggest some inefficiency in the billings which may not have been captured by the voluntary reductions by the [Attorney General]. To that end, the Court finds that an additional downward

reduction is necessary with respect to some of the attorney's hours. The Court reached this conclusion after carefully reviewing the time records. The lodestar calculated by the [Attorney General] appears to have already reduced 10% from the hours listed and thus in order to reflect the additional reductions based on its review of the records, the Court will reduce the hours further [to] reflect what it perceives are inefficiencies that were not captured by the [Attorney General's] 10% reduction. This essentially amounts to an additional 5% reduction (the Court rounded to the nearest quarter hour)."

The trial court awarded the Attorney General $3,843,981.25 in attorney fees and $9,119.25 in expert expenses, for a total of $3,853,100.50.

B

The Trial Court Did Not Err

" 'On review of an award of attorney fees after trial, the normal standard of review is abuse of discretion. However, de novo review of such a trial court order is warranted where the determination of whether the criteria for an award of attorney fees and costs in this context have been satisfied amounts to statutory construction and a question of law.' " (*Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1175.) " 'The value of legal services performed in a case is a matter in which the trial court has its own expertise. [Citation.] 'The trial court may make its own determination of the value of the services contrary to, or without the necessity for, expert testimony. [Citations.] The trial court makes its determination after consideration of a number of factors, including 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, Inc. v. Drexler*, *supra*, 22 Cal.4th at p. 1096.)

NWS first raises a procedural challenge claiming neither the trial court's order granting the Attorney General's motion for summary judgment nor the final judgment "expressly provided that the [Attorney General is] entitled to an award of attorney's fees," and, therefore, the Attorney General was not entitled to such an award. NWS believes "[t]he lack of an express award of attorneys' fees is critical because a party seeking an award of fees pursuant to Rule 3.1702 of the California Rules of Court must first obtain a determination from the Court that it is entitled to an award of attorneys' fees" and no such determination was made prior to the Attorney General's filing of the attorney fees motion. As NWS acknowledges, however, the final judgment did provide that the Attorney General was "entitled to costs in an amount to be determined by a bill of costs," and, as the Attorney General correctly points out, attorney fees are an element of costs under California law. (*Meister v. Regents of University 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).) Further, nothing in California Rules of Court rule 3.1702 requires the trial court to make an express determination of entitlement to attorney fees prior to a party filing a motion requesting such an order. Thus, we find no merit in this argument.

NWS's second complaint is that the trial court did not provide "NWS with the opportunity to conduct limited discovery to determine if the Office of the Attorney General has an internal policy regarding the hourly rates of its attorneys and paralegals." It argues "[d]iscovery was necessary because there appeared to be an inconsistency in the amount of fees that the [Attorney General] requested in this case." NWS specifically points to a different hourly amount stated in support of the attorney fee motion ($500) as compared to the "state agency rate" identified by declarations in support of prior discovery motions ($170).

The trial court rejected NWS's request to stay the hearing on the attorney fee motion to allow NWS an opportunity to conduct discovery regarding the Attorney General's internal hourly rates policy, explaining the Attorney General was "permitted to seek recovery based on private sector rates and thus the fact that the [Attorney General] may have internal rates that are lower than such rates does not preclude the Court from making a determination as to a reasonable hourly rate." We agree. Such discovery would have been irrelevant to the trial court's determination of the appropriate hourly rate since the Attorney General was entitled to the prevailing market rates irrespective of any internal hourly rates policy. (See *Serrano v. Unruh* (1982) 32 Cal.3d 621, 643 [fee awards are properly calculated based on prevailing market rates regardless of the actual costs to the prevailing party]; *Syers Properties III, Inc. v. Rankin* (2014) 226 Cal.App.4th 691, 701 ["There is no

requirement that the reasonable market rate mirror the *actual* rate billed"].)

NWS's final contention is that the amount of the attorney fee award was unreasonable. It attacks both factors in the lodestar equation: (1) the number of hours -- arguing the total number was excessive and some of the hours lacked authentication, and; (2) the hourly rate -- arguing judicial estoppel precluded the Attorney General from seeking a greater hourly amount than that reflected in the Attorney General's internal policy, and the rates were too high for the Sacramento market. As we explain, the trial court appropriately rejected all of these arguments.

The trial court did not abuse its discretion in calculating the number of hours pertinent to the lodestar formula. The trial court noted the Attorney General voluntarily applied a 10 percent reduction to the hours worked to account for inefficiencies in billing and made other deductions such as deducting the time spent by attorneys who did not materially contribute to the action. The trial court then further reduced the hours by another 5 percent to account for additional inefficiencies found in the billing records. The trial court exercised its discretion, and NWS points us to nothing in the record suggesting the court abused its discretion.

That eight attorneys in the Attorney General's Office worked on the matter (although only two of the attorneys billed the bulk of the time) and the hours spent by the Attorney General's Office were greater than those spent by NWS's current attorneys (even though NWS does not include the hours of its prior

counsel in its calculation), while relevant, do not establish an abuse of discretion by the trial court. Additionally, NWS's attempt to minimize the scope of the litigation does not square with the actual history of the case, as described by the trial court in the order.

NWS's challenge to the authenticity of certain hours included in the Attorney General's attorney fee motion fares no better. NWS argues the hours for work performed by an attorney and a paralegal must be disregarded because the two individuals did not provide personal declarations of their time spent or of their hourly rate. The trial court found sufficient a declaration submitted by the individuals' supervisor, which detailed the individuals' experience and attached their respective time records from an electronic timekeeping system. We are aware of no statute or case law requiring the type of documentation NWS demands. The trial court has the discretion to award fees based on its own view of the number of hours reasonably spent. (*Syers Properties III, Inc. v. Rankin*, *supra*, 226 Cal.App.4th at p. 698.) We see no reason why the trial court could not accept the supervisor's declaration attesting to the hours entered into the electronic timekeeping system, particularly since the trial court was in the best position to verify the claims given the proceedings before it. Thus, we find no abuse of discretion.

Turning to the amount of the attorney fees, NWS argues the trial court should have rejected the Attorney General's asserted rate of $500 per hour for the work of attorney Michelle Hickerson on judicial estoppel grounds because she submitted a sworn declaration in

support of discovery motions declaring her hourly rate to be $170 -- "a rate that is 66% less than the $500 per hour that was awarded for Ms. Hickerson's time." NWS asserts the trial court should have reduced the Attorney General's asserted rates for the other attorneys by 66 percent as well, "especially because it is likely the Office of the Attorney General has a policy that sets hourly rates at an amount much less than those requested in the [attorney fees motion]." The Attorney General argues the trial court properly rejected this argument because judicial estoppel is inapplicable under these facts.

We agree with the trial court and the Attorney General, the doctrine of judicial estoppel has no application here. " ' "Judicial estoppel precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position. [Citations.] The doctrine's dual goals are to maintain the integrity of the judicial system and to protect parties from opponents' unfair strategies. [Citation.] Application of the doctrine is discretionary." ' [Citation.] The doctrine applies when '(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.' " (*Aguilar v. Lerner* (2004) 32 Cal.4th 974, 986-987.) "It should be invoked, however, only in egregious cases [citation] where a party misrepresents or conceals material facts

[citation].” (*Safai v. Safai* (2008) 164 Cal.App.4th 233, 246.)

The Attorney General’s use of a $170 hourly rate in connection with discovery motions may well reflect the office’s internal policy setting rates; however, as explained *ante*, it does not preclude the Attorney General from seeking prevailing market rates in its attorney fee motion. The different hourly rates are also not contradictory because one is an internal hourly rate and the other is a prevailing market hourly rate -- one does not necessarily exclude the other. (See *Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 960 [judicial estoppel cannot be invoked where the first position was not clearly inconsistent so that holding one position necessarily excludes the other].) Further, NWS does not explain how (nor do we see how) the Attorney General sought to gain an advantage by stating the internal hourly rate of $170 in the discovery motions, such that judicial estoppel is appropriate. And, as the trial court noted during oral argument, NWS did not claim any prejudice or that it would have changed its position had it known of the different market rate. NWS has, therefore, failed to show that this is the type of egregious case that warrants the application of judicial estoppel.

We also do not agree with NWS that the hourly rates used in calculating the attorney fee award were too high for the Sacramento area. As the trial court said in its order: “Here, while NWS argues that the rates requested are out of line with market rates, it offers no evidence to counter the [Attorney General’s] expert’s opinion (again a leading attorney’s fees expert)

that the rates are in line with prevailing market rates in the Sacramento legal marketplace for attorneys of reasonably comparable experience, skill, and expertise for reasonably comparable services."

The unreported federal district court cases and the California superior court case cited by NWS are of no assistance given the factual distinctions in this case. And, NWS's own attorney fees, while relevant, also does not render the Attorney General's rates unreasonable. (See *Mountjoy v. Bank of America, N.A.* (2016) 245 Cal.App.4th 266, 281 [although " '[a] comparative analysis of each side's respective litigation costs may be a useful check on the reasonableness of any fee request' [citation], such a comparison, by itself, cannot establish the reasonableness of a particular fee award"].) Further, the United States Consumer Law Attorney Fee Survey Report for 2013-2014 is irrelevant because the trial court credited the Attorney General's expert's opinion that "the report does not provide 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 that report." It was within the trial court's discretion to credit the expert's opinion.

Ultimately, "[t]he ' "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." ' " (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132.) The trial court's determination of the hourly rates was not clearly erroneous.

DISPOSITION

The judgment and order awarding attorney fees are affirmed. The Attorney General shall recover his costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1) & (2).)

/s/
Robie, J.

We concur:

/s/
Blease, Acting P. J.

/s/
Mauro, J.

APPENDIX C

<u>CERTIFIED</u> <u>FOR</u> <u>PUBLICATION</u>

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA THIRD APPELLATE DISTRICT (Sacramento)

C063624

(Super. Ct. No. 34-2008-00014593-CU-CL-GDS)

[Filed June 8, 2011]

THE PEOPLE ex rel. KAMALA D. HARRIS, as Attorney General, etc.,

Plaintiff and Appellant,

v.

NATIVE WHOLESALE SUPPLY COMPANY,

Defendant and Respondent.

APPEAL from a judgment of the Superior Court of Sacramento County, Shelleyanne W.L. Chang, Judge. Reversed.

Edmund G. Brown, Jr., and Kamala D. Harris, Attorneys General, Dennis Eckhart and Karen Leaf, Assistant Attorneys General, Michelle L. Hickerson and Michael E. Edson, Deputy Attorneys General, for Plaintiff and Appellant.

Fredericks Peebles & Morgan, John M. Peebles and Darcie L. Houck for Defendant and Respondent.

The State of California (the State) sued defendant Native Wholesale Supply Company (NWS) for allegedly violating state law on cigarette distribution[1] and state law on cigarette fire safety.

NWS moved successfully to quash service for lack of personal jurisdiction.

NWS is an out-of-state, tribal-chartered corporation that is owned by a Native American individual. Its principal business is the sale and distribution of cigarettes manufactured by Grand River Enterprises Six Nations Ltd. (Grand River), a tribal-owned corporation in Canada. Since late 2003, NWS has sold hundreds of millions of Grand River cigarettes to a small Indian tribe in California, and these cigarettes, in turn, have been sold to the California public.

Based on this scenario, we conclude that NWS has purposefully derived benefit from California activities under the stream of commerce theory, sufficient to invoke personal jurisdiction. Indeed, for personal jurisdiction purposes, we see not just a stream of

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[1] The state law in question is based on the 1998 litigation settlement agreement between American tobacco companies and 46 states. (See Rev. & Tax Code, § 30165.1.)

commerce, but a torrent. Consequently, we shall reverse the order quashing service and remand this matter to the trial court. (Code Civ. Proc., § 904.1, subd. (a)(3).)

We will set forth the pertinent facts in the discussion that follows.

DISCUSSION

I. The Law

The constitutional limits to the exercise of personal jurisdiction are discussed in *Bridgestone Corp. v. Superior Court* (2002) 99 Cal.App.4th 767 (*Bridgestone*):

"A California court may exercise personal jurisdiction to the extent allowed under the United States Constitution and the California Constitution. (Code Civ. Proc., § 410.10; *Vons Companies, Inc. v. Seabest Foods, Inc.* [(1996)] 14 Cal.4th [434,] 444.) Under the Fourteenth Amendment due process clause, a state court may exercise personal jurisdiction over a nonresident defendant who has not been served with process inside the state only if the defendant has sufficient 'minimum contacts' with the state so that the exercise of jurisdiction is reasonable and comports with '"fair play and substantial justice."' (*Internat. Shoe Co. v. Washington* (1945) 326 U.S. 310, 316-317 [90 L.Ed. 95, 102-103]; *Vons Companies*, at p. 444.)

"A nonresident defendant whose activities within the state are substantial, continuous, and systematic is subject to 'general jurisdiction' in the state, meaning jurisdiction on any cause of action. [Citations.] Absent

such pervasive activities, a [nonresident] defendant is subject to 'specific jurisdiction' only if **(1)** the defendant *purposefully availed* itself of the benefits of conducting activities in the forum state . . . [citations]; **(2)** the dispute arises out of or has a substantial connection with the defendant's contacts with the state [citations]; and **(3)** the exercise of jurisdiction would be fair and reasonable [citations]." (*Bridgestone* at pp. 773-774, boldface added to factor numbers [citing for the three-factor test, *Burger King Corp. v. Rudzewicz* (1985) 471 U.S. 462, 472, 475-478 [85 L.Ed.2d 528, 542-545] (*Burger King*) & *Vons Companies, Inc. v. Seabest Foods, Inc.*, *supra*, 14 Cal.4th at pp. 447-453 (*Vons Companies*)].)

"Purposeful availment" (factor No. (1) above) is shown if the nonresident defendant has "purposefully directed" its activities at forum residents, "purposefully derived benefit" from forum activities, or "purposely availed" itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of the state's laws. (*Vons Companies*, *supra*, 14 Cal.4th at p. 446, citing *Burger King*, *supra*, 471 U.S. at pp. 472-473, 475 [85 L.Ed.2d at pp. 541-542].)

The United States Supreme Court has explained that placing goods in the stream of commerce with the expectation that they will be purchased by consumers in the forum state indicates an intention to serve that market and constitutes purposeful availment, as long as the conduct creates a "substantial connection" with the forum state—for example, if the income earned by a manufacturer or distributor from the sale or use of its goods in the forum state is "substantial." (*Bridgestone*,

supra, 99 Cal.App.4th at pp. 774-775, 777; see *id*. at p. 776, citing *Secrest Machine Corp. v. Superior Court* (1983) 33 Cal.3d 664, 670-671 (*Secrest*) & *World-Wide Volkswagen Corp. v. Woodson* (1980) 444 U.S. 286, 297-298 [62 L.Ed.2d 490, 501-502] (*World-Wide*); see also *Asahi Metal Industry Co. v. Superior Court* (1987) 480 U.S. 102, 112, 116-117, 122 [94 L.Ed.2d 92, 104-105, 107-108, 110-111] (*Asahi*) (plur. opn. of O'Connor, J.; separate opns. of Brennan, J., & Stevens, J., conc. in part & conc. in the judg.).)

Purposeful availment does not arise where a nonresident manufacturer or distributor merely foresees that its product will enter the forum state. But purposeful availment is shown where the sale or distribution of a product "'arises from the efforts of the manufacturer or distributor to serve, directly *or indirectly*, the [forum state's] market for its product . . . .'" (*Secrest*, *supra*, 33 Cal.3d at p. 670, italics added, quoting *World-Wide*, *supra*, 444 U.S. at p. 297 [62 L.Ed.2d at p. 501]; see also *Bridgestone*, *supra*, 99 Cal.App.4th at p. 776.)

The California Supreme Court has equated "purposeful availment" with engaging in economic activity in California "'as a matter of commercial actuality'"—i.e., as a matter of "economic reality." (*Buckeye Boiler Co. v. Superior Court* (1969) 71 Cal.2d 893, 901-902, 903 (*Buckeye Boiler*).)

A plaintiff opposing a defendant's motion to quash service has the burden of establishing factor Nos. (1) (the defendant's purposeful availment) and (2) (lawsuit relates to the defendant's contacts with state). (*Bridgestone*, *supra*, 99 Cal.App.4th at p. 774.)

If the plaintiff does so, the burden then shifts to the defendant to show factor No. (3), that the exercise of jurisdiction would be unreasonable. (*Ibid.*; *Burger King*, *supra*, 471 U.S. at p. 476 [85 L.Ed.2d at p. 543].)

If the material facts are undisputed, as here, we independently review the determination of personal jurisdiction. (*Vons Companies*, *supra*, 14 Cal.4th at p. 449; *Bridgestone*, *supra*, 99 Cal.App.4th at p. 774.)

II. The Facts

The undisputed material facts are as follows.

NWS is a tribal-chartered corporation headquartered on an Indian reservation in New York. The president and sole owner of NWS is Arthur Montour, a member of the Seneca Nation of Indians. NWS (1) imports cigarettes from Grand River, a tribal-owned Canadian cigarette manufacturer; (2) stores the cigarettes at three locations in the United States (including the Free Trade Zone in Las Vegas, Nevada); and (3) then sells the cigarettes to tribal entities in the United States.

In California, NWS sells the Grand River cigarettes primarily to Big Sandy Rancheria (Big Sandy), an Indian tribe with 431 members located on a reservation about 40 miles northeast of Fresno. A sales transaction occurs when Big Sandy places an order with NWS. NWS then releases the cigarettes from storage and arranges for their transport either to Big Sandy or to other Indian retailers (as apparently directed by Big Sandy) in California. Big Sandy and the other Indian retailers then sell the cigarettes to the general public

in California. The cigarettes are stamped "'For Reservation Sales Only.'"

Using this system since late 2003, NWS has delivered over 325 million cigarettes, worth nearly $12 million, to California. In 2007 alone, NWS shipped and sold approximately 80 million cigarettes (4 million standard packs) to the 431-member Big Sandy.

The present lawsuit had its genesis in the 1998 litigation settlement agreement that was reached between several states (including California) and major American tobacco manufacturers.

In November 1998, California and 45 other states entered into a Master Settlement Agreement (the MSA or Master Settlement Agreement) with the major American tobacco manufacturers. In exchange for a liability release from the states for smoking-related public healthcare costs, the settling manufacturers agreed to limit their marketing and to pay the settling states billions of dollars in perpetuity.

To protect the efficacy of the MSA, which applies only to tobacco manufacturers, California enacted a statute in 2003 (the Directory law) (Stats. 2003, ch. 890, § 7), which, in effect, allegedly prohibits any person from selling, distributing, transporting, importing, or causing to be imported, cigarettes that do not comply with the MSA's requirements, and that the person "knows or should know" will be sold, offered, or possessed for sale in California. (Rev. & Tax. Code, § 30165.1, subds. (e), (b), (c); see *State ex rel. Edmondson v. Native Wholesale Supply* (Ok. 2010) 237 P.3d 199, 203-204 (*Edmondson*).)

The State sued NWS, principally alleging that NWS violated the Directory law as well as state law on cigarette fire safety. (Health & Saf. Code, § 14950 et seq.)

III. Applying the Law to the Facts

A. Factor No. (1)—Purposeful Availment/Minimum Contacts

The State alleges without dispute that, since the end of 2003, NWS has shipped and sold over 325 million cigarettes to Big Sandy and, as apparently directed by Big Sandy, to other Indian retailers in California, reaping millions of dollars in the process. In 2007 alone, NWS shipped and sold approximately 80 million cigarettes (i.e., 4 million standard cigarette packs) to Big Sandy. Again, Big Sandy has just 431 members; in other words, even if nearly every member of Big Sandy smoked *two* packs every day that would still total only about 280,000 packs a year. These cigarettes, in turn, are sold to the general public in California.

As we have seen, "purposeful availment"—which is the shorthand standard for the "minimum contacts" that a nonresident defendant must have with a forum state for the forum to assert personal jurisdiction consistent with due process—is shown if the nonresident defendant has "purposefully derived benefit" from forum activities. (*Vons Companies, supra*, 14 Cal.4th at p. 446.) Placing goods in the stream of commerce with the expectation that they eventually will be purchased by consumers in the forum state indicates an intention to serve that market and

constitutes purposeful availment, as long as the conduct creates a "substantial connection" with the forum state; for example, if the income earned by a manufacturer or distributor from the sale or use of its goods in the forum state is "substantial." (*Bridgestone*, *supra*, 99 Cal.App.4th at pp. 774-775, 777; see also *Bridgestone*, at p. 776, citing *Burger King*, *supra*, 471 U.S. at pp. 473, 475 [85 L.Ed.2d at pp. 541, 542] & *World-Wide*, *supra*, 444 U.S. at pp. 297-298 [62 L.Ed.2d at pp. 501-502]; *Asahi*, *supra*, 480 U.S. at pp. 112, 116-117, 122 [94 L.Ed.2d at pp. 104-105, 107-108, 110-111] (plur. opn. of O'Connor, J.; separate opns. of Brennan, J., & Stevens, J., conc. in part & conc. in the judg.); *Secrest*, *supra*, 33 Cal.3d at p. 670.)

As a matter of "commercial actuality,"—i.e., as a matter of "economic reality" (*Buckeye Boiler*, *supra*, 71 Cal.2d at pp. 901-903), NWS's distribution into California of hundreds of millions of profitable cigarettes over the past few years, via a small Indian tribal network in which the cigarettes are eventually sold to the general public, meets the "minimum contacts" legal standard of "purposeful availment": NWS has "purposefully derived benefit" from California activities through a "substantial" stream of commerce.

In a recent decision, the Supreme Court of Oklahoma found similarly as to NWS involving a nearly identical distributive process, reasoning:

"The State alleges [without real dispute] that over a fifteen-month period *more than one hundred million cigarettes worth more than eight million dollars* were sold into the Oklahoma market through this process. . . . [¶] . . . [¶]

" . . . [W]e are looking here at a distributor [i.e., NWS] of a finished product—cigarettes—who causes the product to be delivered to [a] [tribal] entity in this state in such quantities that its ultimate destination can only be the general public in this state. While the [tribal] entity with which Native Wholesale Supply [(NWS)] directly deals may operate on tribal land, that tribal land is not located in some parallel universe. It is geographically within the State of Oklahoma. Both entities are engaged in an enterprise whose purpose is to serve the Oklahoma market for cigarettes.

"This is not a case where [NWS] is merely aware that its product might be swept into this State and sold to Oklahoma consumers. The sheer volume of cigarettes sold by [NWS] to [tribal] wholesalers in this State shows the Company to be part of a distribution channel for Seneca [Grand River] cigarettes that intentionally brings that product into the Oklahoma marketplace. [NWS] is not a passive bystander in this process. It reaps a hefty financial reward for delivering its products into the stream of commerce that brings it into Oklahoma. To claim, as [NWS] does, that it does not know, expect, or intend that the cigarettes it sells to [the tribal entity] are intended for distribution and resale in Oklahoma is simply disingenuous.

" . . . We hence hold that the minimum contacts segment of due process analysis is satisfied."

(*Edmondson*, *supra*, 237 P.3d at pp. 208-209, fn. [citation] omitted.)[2]

As evident from our extensive quoting of the *Edmondson* decision, we find "Oklahoma is OK" on this point. Such persuasion was not available to the trial court when it granted NWS's motion to quash. In line with *Edmondson*, we conclude that NWS has minimum contacts with California sufficient for the State to assert personal jurisdiction over the company consistent with due process.

The presence of minimum contacts, however, does not end the due process inquiry. We must still consider factor Nos. (2) and (3), to which we turn now. (*Bridgestone*, *supra*, 99 Cal.App.4th at pp. 773-774.)

B. Factor No. (2)—Lawsuit Arises Out of Defendant's Contacts with the State

This factor is readily met here. In this lawsuit, the State alleges that NWS is violating California's cigarette distribution and fire safety laws. NWS's cigarette distribution in California *constitutes* NWS's contacts with California. Obviously, then, this lawsuit "arises out of" NWS's contacts with California. (*Bridgestone*, *supra*, 99 Cal.App.4th at p. 774.)

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[2] We recognize that Oklahoma's population is about a tenth of California's, but this does not lessen the persuasive punch of this reasoning with regard to NWS's activities in California.

C. Factor No. (3)—Exercising Personal Jurisdiction Is Fair and Reasonable

This factor poses little hindrance to reversal as well.

"[I]n evaluating the reasonableness of personal jurisdiction, a court must consider (1) the burden on the foreign defendant of defending an action in the forum state; (2) the forum state's interest in adjudicating the dispute; (3) the plaintiff's interest in obtaining relief; (4) judicial economy; and (5) the states' shared interest '"in furthering fundamental substantive social policies."'" (*Bridgestone*, *supra*, 99 Cal.App.4th at p. 778, citing *Asahi*, *supra*, 480 U.S. at p. 113 [94 L.Ed.2d at p. 105] & *World-Wide*, *supra*, 444 U.S. at p. 292 [62 L.Ed.2d at p. 498].)

NWS can hardly claim a heavy burden in having to defend this action in California. After all, NWS stores its highly profitable cigarettes just next door in Nevada.

The forum state's interest and the plaintiff's interest merge here, creating a potent combination. As *Edmondson* recognized, the integrity of the Master Settlement Agreement depends on the ability of the State to enforce its terms. (See *Edmondson*, *supra*, 237 P.3d at p. 209.)

That leaves judicial economy and the states' shared interest in social policy. As the court in *Edmondson* aptly put it once again, "[t]he courts of this State and only the courts of this State [(here, California)] offer the most efficient and rational forum for the resolution of a controversy over the meaning and effect of State statutes governing the allocation of the financial and

health-care costs associated with smoking between the public and private sectors." (*Edmondson*, *supra*, 237 P.3d at p. 209.)

We conclude the trial court erred in granting NWS's motion to quash service. The State has personal jurisdiction over NWS regarding this lawsuit.[3]

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[3] In light of our resolution, it is unnecessary to address the State's two other contentions on appeal; namely, that the trial court abused its discretion (1) in failing to sanction NWS for discovery violations, and (2) in excluding certain evidence. Both contentions involve the issue of personal jurisdiction.

Also, we express no views on the Indian commerce clause, the interstate commerce clause, federal law preemption, or Indian self-government—all of which are discussed briefly on appeal and involve the issue of whether the State has authority to regulate NWS's cigarette sales and distribution. These legal principles and this issue may implicate the merits of this lawsuit and/or subject matter jurisdiction; again, we express no views on these matters. (See, e.g., *Edmondson*, *supra*, 237 P.3d at pp. 209-217 [discussing Indian commerce clause].) The parties did not adequately argue below, and have not adequately briefed here, any of these issues. This is understandable because the issue of the State's *personal jurisdiction* over NWS in this lawsuit was the only issue actually before the trial court.

Finally, we deny the State's request for judicial notice in support of its reply brief (which goes to evidentiary issues involving personal jurisdiction), as well as NWS's related motion to strike portions of the State's reply brief. We also deny NWS's request for judicial notice in support of its respondent's brief (which cites to pending superior court orders in other cases, as well as to treatises regarding the regulation of Indian commerce).

DISPOSITION

The order quashing service on NWS is reversed. The matter is remanded to the trial court for further proceedings. The State is awarded its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1), (2).) **(*CERTIFIED FOR PUBLICATION*)**

BUTZ, J.

We concur:

RAYE, P. J.

ROBIE, J.

APPENDIX D

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO
GORDON D SCHABER COURTHOUSE**

MINUTE ORDER

Date: 09/25/2009 Time: 02:25:14 PM Dept: 54

Judicial Officer Presiding: Judge Shelleyanne W L Chang
Clerk: E. Higginbotham

Bailiff/Court Attendant: None
ERM: None

Case Init. Date: 06/30/2008

Case No: 34-2008-00014593-CU-CL-GDS

Case Title: People of the State of California ex real Edmund G Brown Jr Attorney General vs. Native Wholesale Supply

Case Category: Civil - Unlimited

Event Type: Motion to Quash Service of Summons - Civil Law and Motion

Causal Document & Date Filed:

Appearances:

Nature of Proceeding: Motion to Quash Service of Summons (Taken Under Submission 8/24/2009)

TENTATIVE RULING

Defendant Native Wholesale Supply ("NWS")'s motion to quash is granted for the reasons set forth below.

The complaint alleges that NWS has violated Rev. & Tax. Code section 30165.1 by selling to California businesses brands of cigarettes that are not listed in the Attorney General's directory of manufacturers who have complied with this state's financial responsibility laws. Such sales also allegedly violate Health and Safety Code section 14950 (establishing ignition-propensity standards), 15 USC section 375 et. seq (shipping cigarettes in interstate commerce to persons or entities in California that are not licensed as cigarette distributors by the California Board of Equalization) and Bus. & Prof. Code section 17200 (unfair competition).

NWS contends that California does not have personal jurisdiction over it because it has no minimum contacts with the State of California, as it is an out-of-state corporation that sells and ships cigarettes only to Native American tribes and Native American-owned entities located on the land of recognized Indian tribes.

The following facts are undisputed. NWS is chartered by Sac and Fox Nation, a federally recognized sovereign Native American nation, and is wholly owned by Arthur Montour, a member of the Seneca Nation of Indians, a federally recognized sovereign Native American nation. Its business operations are

maintained on the Seneca Cattaraugus Indian Territory which is physically situated in New York. NWS does not have an office, personnel, mailing address, bank accounts, sales agents, telephone, real estate or vehicles in California. NWS is an out-of-state corporation that has no office or other presence in this State. Montour decl.

The record before the Court establishes that the only entity in this state to which NWS has directly sold cigarettes is Big Sandy Rancheria, a recognized Indian tribe. Big Sandy, in turn, has sold cigarettes purchased from NWS to other Indian and non-Indian persons and entities in California. Some of NWS sales to Big Sandy were shipped directly to other entities in California.

Plaintiff concedes that the State has no general jurisdiction over defendant. Plaintiff contends, however, that this court has specific jurisdiction over NWS. Specific jurisdiction arises when a defendant has purposefully availed itself of the privilege of conducting activities in California; the claim arises out of defendant's California-related activity; and the exercise of jurisdiction would be fair and reasonable. F. Hoffman-LaRoche, Ltd. v. Superior Court (2005) 130 Cal.App.4th 782, 796. Plaintiff asserts that NWS has purposefully availed itself of the privilege of conducting activities in California by: 1) its direct sales to Big Sandy Rancheria, and 2) its indirect sales to entities and persons "downstream" from Big Sandy. The Court examines each of these contentions in turn.

Whether minimum contacts are established by sales to Big Sandy

Plaintiff has cited no authorities, and the Court is aware of none, holding that sales by an out-of-state corporation to an Indian tribe on a reservation located in this state constitute minimum contacts with this state that will support personal jurisdiction over the out-of-state corporation. Indeed, the Court has found no California authorities applying a minimum contacts analysis where any activities on an Indian reservation were involved.

Authorities in other jurisdictions applying a minimum contacts analysis involving Indian reservations have concluded that activities taking place solely on Indian lands do not constitute contacts with the forum state. In Flammond v. Flammond (Mont. 1980) 621 P.2d 471, the Court held that Montana did not have personal jurisdiction to enforce a California court's order to pay child support against a father who was an enrolled member of the Blackfeet Tribe and lived on the tribe's reservation. The Montana court reasoned that there were no off-reservation acts in Montana sufficient to vest that state's courts with personal jurisdiction over the father. The marriage had taken place in California, and the mother had returned to California after separating from the father. The father's domicile on the reservation was not an in-state contact that would support jurisdiction.

In Martinez v. Superior Court (Ariz.App.1987) 731 P.2d 1244, 1246, a dissolution action by a non-Indian wife against a reservation Indian husband, the court applied the general rule that state courts do not have jurisdiction over an Indian living on an Indian reservation absent sufficient minimum contacts by the

Indian within the state away from the reservation. As the marital domicile was on the reservation, the children were conceived on the reservation and the separation occurred on the reservation, the court concluded that it had no jurisdiction. On similar facts, the court in Byzewski v. Byzewski (N.D. 1988) 429 N.W.2d 393, 397 came to the same conclusion.

Out-of-state authorities are not, of course, controlling. Further, these cases involve domestic relationships, while this case involves commercial activity. However, to the extent that plaintiff asserts that NWS' sales to Big Sandy constitute minimum contacts with this state simply because Big Sandy is physically located in this state, the Court rejects that proposition. The Court is persuaded by the cases discussed above that on-reservation conduct is insufficient to establish minimum contacts with a forum state absent off-reservation activities within the forum state.

Plaintiff further contends that NWS' sales to Big Sandy constitute minimum contacts with this state because state law applies to reservations located in this state. The issue of the application of state law to Indian reservations is not as simple as the broad generalities relied upon by plaintiff, e.g. "reservations are part of the state within which they lie and state laws, civil and criminal, have same force within reservation as elsewhere except for restricted application to Indian wards. Surplus Trading Co. v. Cook (1930) 281 U.S. 647, 650-651. That statement was, in any event, dicta as the only issue decided by the court was state taxation of non-Indian owned private property located on a federal military base. As the U.S. Supreme Court

later observed, "That is not to say that States may exert the same degree of regulatory authority within a reservation as they do without. To the contrary, the principle that Indians have the right to make their own laws and be governed by them requires 'an accommodation between the interests of the Tribes and the Federal Government; on the one hand, and those of the State, on the other.'" Nevada v. Hicks (2001) 533 U.S. 353, 362, quoting Washington v. Confederated Tribes of Colville Reservation (1980) 447 U.S. 134, 156.

As the court in San Manuel Indian Bingo and Casino v. NLRB (D.C.Cir. 2007) 475 F.3d 1306, 1312, concluded, "[a]n examination of Supreme Court cases shows tribal sovereignty to be at its strongest when explicitly established by a treaty ... or when tribal government acts within the borders of its reservation, in a matter of concern only to members of the tribe[.] [citations omitted] Conversely, when a tribal government goes beyond matters of internal self-governance and enters into off-reservation business transaction with non-Indians, its claim of sovereignty is at its weakest."

In sum, state's interests are generally highest when the individual Indian or Indian tribe engages in off-reservation conduct within the forum state. E.g., Nevada v. Hicks, supra (state officers executing process related to the violation, off reservation, of state laws); Organized Village of Kake v. Egan (1962) 369 U.S. 60 (state regulation of fish traps operated in non-reservation waters); Mescalero Apache Tribe v. Jones (1973) 411 U.S. 145 (state tax on gross receipts of ski resort operated on land outside the tribe's reservation).

The state's interests are weakest where the conduct of the individual Indian or Indian tribe is on-reservation conduct relating to tribal sovereignty. "When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest." White Mountain Apache Tribe v. Bracker (1980) 448 U.S. 136, 144.

Plaintiff contends that, where state interests outside the reservation are implicated, a state may regulate the activities of even tribe members on tribal land, such as sales of cigarettes on reservation land by tribal entities to nonmembers from off the reservation. Nevada v. Hicks, supra, 533 U.S. at 362, citing Washington v. Federated Tribes of Colville Reservation (1980) 447 U.S. 134, 151. Plaintiff urges the Court to find that NWS' sales to Big Sandy implicate unidentified state interests outside the reservation because Big Sandy, in turn, sells those cigarettes to California entities and consumers off the reservation.

The Court initially notes that the power of the state to regulate on-reservation conduct implicating off-reservation state interests cannot be assumed in every situation. In Lawrence v. Barona Valley Ranch Resort & Casino (2007) 153 Cal.App.4th 1364, 1368-1370, the court held it had no subject matter jurisdiction to apply state tort laws against Indian casino operated on reservation. In Ameriloan v. Superior Court (2008) 169 Cal.App.4th 81, 84, the court held that tribal immunity extends to a tribe's for-profit business entities when the entity is operating on behalf of the tribe. In Middletown

Rancheria v. Workers' Comp. Appeals Bd. (1998) 60 Cal.App.4th 1340, the court concluded that Public Law 280 does not confer on California the power to enforce its full panoply of general civil regulatory jurisdiction over Native American Indian tribes, and therefore the California Workers Compensation Appeals Board had no jurisdiction over injuries sustained by an employee of an Indian casino operating on reservation land.

Recognition by the courts that states have the power to impose taxes on the on-reservation sales of cigarettes to non-Indians is not authority that the states may regulate on-reservation sales in general, or NWS' sales to Big Sandy in particular. As the U.S. Supreme Court explained in Federated Tribes, supra, state taxing schemes on cigarettes and other goods sold to non-Indians have been upheld because the legal incidence of the tax fell on the non-Indian purchaser. The effect was simply to neutralize the competitive advantage gained by the tribes over other retailers by exploiting the willingness of non-Indian purchasers to "flout" their legal obligation to pay the taxes. 447 U.S. at 151. States are categorically barred from placing a tax's legal incidence on a tribe or on tribal members for sales made inside Indian country. Wagnon v. Prarie Band Potawatomi Nation (2005) 546 U.S. 95, 106 (upholding sales tax imposed on in-state distributors, manufacturers or importers of fuel sold to Indian tribe for sale on tribal land because the legal incidence of the tax did not fall on the tribe).

Here, the legal incidence of the statutes at issue in this case would not fall on non-Indian consumers. These statutes do not impose a tax that can be passed along

to the non-Indian consumer. Rev. & Tax. Code section 30165.1 imposes an absolute ban on the sales of certain brands of cigarettes that are not listed on the Attorney General's directory: "No person shall sell, offer, or possess for sale in this state, or import for personal consumption in this state, cigarettes of a tobacco product manufacturer not included in the directory." Rev. & Tax. Code section 30165.1(e)(2). The legal incidence of this ban, if applied here, would fall directly on Big Sandy as an importer as well as NWS as a seller of unregistered cigarettes.

Of even more significance, NWS' sales to Big Sandy constitute not only commerce between Indian-owned entities but also interstate commerce. The authorities upholding the power of a state to impose taxes on sales of goods have concerned only sales within that state. Plaintiff has not cited, and this Court is not aware of any authority permitting a state to regulate interstate commerce between Indian tribes or tribal entities. Such activities are more properly subject to Congressional regulation, which has plenary power to regulate Indian commercial activities. Agua Caliente Band of Cahuilla Indians v. Superior Court (2006) 40 Cal.4th 239, 249.

As the Court finds that the state cannot regulate the interstate commerce between NWS and Big Sandy, it rejects defendant's contention that NWS' sales to Big Sandy constitute minimum contacts with this state.

Stream of commerce theory

Plaintiff alternatively contends that purposeful availment can be shown by placing goods in the stream of commerce with the expectation that they will be

purchased by consumers in the forum state. Bridgestone Corp. v. Superior Court (2002) 99 Cal.App.4th 767, 777. Plaintiff contends that courts regularly find jurisdiction over a foreign defendant where the defendant's product arrived through the stream of commerce in the forum state via an equally foreign middleman. A. Uberti & C. v. Leonardo (Ariz. 1995) 892 P.2d 1354, 1362-1363 (jurisdiction over Italian manufacturer whose guns were sold in Arizona through third party middleman in Massachusetts); Duple Motor Bodies, Ltd. v. Hollingsworth (9th Cir. 1969) 417 F.2d 231 (sale of product by foreign manufacturer via middleman in England to buyers in Hawaii); Barone v. Rich Bros. Interstate Display Fireworks Co. (9th Cir. 1994) 25 F.3d 610, 613-614 (Japanese corporation subject to suit in Nebraska where middleman was South Dakota distributor).

Defendant contends that shipments of cigarettes purchased by Big Sandy to other entities is at the direction of Big Sandy, and that Big Sandy's re-sales of cigarettes to other entities are the unilateral activities of a third party.

Plaintiff bears the initial burden to demonstrate facts that support the exercise of jurisdiction. Bridgestone Corp. v. Superior Court, supra, 99 Cal.App.4th 767. Plaintiff has produced the following evidence in opposition to this motion: declarations of Cook, Allison, Carlson and Diaz regarding their purchases of Opal and Seneca cigarettes from Big Sandy Rancheria, Huber Enterprises Smoke Shop, Native Made Tobacco Shop, and Black Hawk Tobacco Shop; the declaration of Gable regarding various records demonstrating the

amount of sales and shipments made by defendant to Big Sandy and to Big Sandy consignees. The Court notes that the Gable declaration includes as an exhibit the declaration of Vincent Buehler, a law clerk who prepared spread sheets based on sales and shipping documents. Notably, Buehler's declaration states at para. 8 that the only purchaser identified on any of the 234 shipments made by defendant from December 203 to mid-2008 was Big Sandy Rancheria, although several shipments designated Huber Enterprises and Native Buy as consignees. Gable's declaration states that her review of all records available regarding defendant's sales and shipments to entities in California show sales only to Big Sandy, with 40 shipments to Huber Enterprises, 27 shipments to Native Made Tobacco, 6 shipments to Native Buy and one shipment to Black Hawk Tobacco.

Plaintiff's contention that this evidence shows that defendant directed the sales to Big Sandy and downstream to other California entities is not persuasive. The only inference the Court draws from the evidence of Big Sandy's downstream sales is that Big Sandy acted as a seller and distributor of cigarettes to other entities in California, Indian and non-Indian, as a result of the tribe's own independent economic decision. There is no evidence supporting an inference that NWS exercised any control over Big Sandy's downstream sales. The record establishes only that NWS filled orders placed by Big Sandy and shipped those orders to Big Sandy or other entities designated by Big Sandy. NWS did not place its own name on the cigarettes as the Massachusetts distributor did in Uberti, supra, 892 P.2d at 1360-1361. Unlike the

manufacturer in Duple, supra, who made special modifications to its coach for the Hawaii market, NWS did not modify the cigarettes it sold to Big Sandy in any way so as to serve the California market. Rather, the evidence that each package of cigarettes sold by NWS was stamped "for reservation sales only" indicates NWS intended to sell its cigarettes only to Indian reservations and not the wider California market.

While it may have been foreseeable to NWS that cigarettes sold to Big Sandy would be resold to others, foreseeability alone is insufficient to support specific jurisdiction. As You Sow v. Crawford Laboratories, Inc. (1996) 50 Cal.App.4th 1859, 1868-1869 (multi-million dollar sales to GSA's California depot over a period of six years insufficient to apply stream of commerce theory where seller had no control over final destination of its products). "Foreseeability that a product will enter California without having some control over its ultimate destination does not satisfy the due process clause of the United States Constitution."

Finally, the Court must also find that the exercise of jurisdiction in this case would be fair and reasonable. Bridgestone Corp., supra, 99 Cal.App.4th at 774. The Court initially observes that this is not the typical personal injury case in which a manufacturer places a defective produce in the stream of commerce, and jurisdiction will allow a California consumer to seek redress from injuries caused by that product. This is also not a case where the sales of unregistered cigarettes is a criminal violation, and thus the ban on

such sales would be enforceable against Indian tribes under Public Law 280.

This case involves state laws which allow some cigarette manufacturers and not others to sell their cigarettes in California. The primary burden of these laws falls on the manufacturer, i.e. to meet the financial responsibility requirements and ignition-propensity standards. There is no evidence here that NWS knew or should have known that Grand River, the cigarette manufacturer and another Indian-owned entity operating in Canada, was subject to and had not complied with these conditions when NWS sold the cigarettes to Big Sandy. As the state's general civil regulatory power does not extend to Indian tribes, there is uncertainty at the other end of the distribution as to whether the state's financial responsibility and other laws at issue in this case could be enforced against Big Sandy. It would be unfair to place the burden on an out-of-state distributor to determine, whenever it sells products to an Indian tribe located in California, what state laws are enforceable against the tribe with respect to any resales of those products. In the Court's view, that burden more fairly falls on the tribe importing the products for resale. The Court finds that, under these circumstances, it would not be reasonable or fair to exercise jurisdiction over NWS.

Transportation of cigarettes over state highways

Plaintiff contends that defendant's shipment of the cigarettes by truck over California roadways is sufficient to find jurisdictional contacts. However, there is no evidence in this case to on which the Court may find that defendant has directed the shipments on

California roadways. Rather, the evidence shows only that defendant has sold cigarettes to a California Indian tribe, and at that tribe's direction, has shipped the cigarettes primarily to the tribe itself and occasionally to consignees. In these circumstances, mere shipment of goods over California roadways is insufficient to establish minimum contacts. Lakeside Bridge and Steel Co. v. Mountain State Construction Co., Inc. (7th Cir. 1979) 597 F.2d 596, 604 n.14 (out-of-state defendant's shipment of goods through state to another forum did not constitute minimum contacts not established solely by fact that goods were transited through a state).

The minute order is effective immediately. No formal order pursuant to CRC Rule 3.1312 or further notice is required.

COURT RULING

The matter was argued and submitted. The Court took this matter under submission.

SUBMITTED MATTER RULING

Having taken this matter under submission, the Court now rules as follows. The tentative ruling is affirmed with the following comments and evidentiary rulings.

At the hearing, plaintiff contended that the law recognizes no distinction between shipments of cigarettes to Big Sandy and shipments of cigarettes to a WalMart store located in the State of California. The argument is fundamentally flawed as it ignores the fact that Big Sandy is a sovereign Indian tribe. Activities involving a sovereign physically located in California

are not treated in the same manner as activities involving other entities located in California. "When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest." Nevada v. Hicks (2001) 533 U.S. 353, 361-362. Absent Congressional authorization or a tribe's or consent, the courts do not have subject matter jurisdiction over a tribe. Lawrence v. Barona Valley Ranch Resort & Casino (2007) 153 Cal.App.4th 1364, 1368-1370.

Plaintiff is correct that this is not a lawsuit against an Indian tribe. However, plaintiff too narrowly construes the subject matter of this action as merely sales by an out-of-state corporation to a California entity, as though the sales were a unilateral act of NWS. No sales would be made by NWS unless Big Sandy purchased the cigarettes. Thus, the activity which plaintiff contends is unlawful is not just the act of NWS in shipping cigarettes into California; it is a business transaction between an out-of-state corporation and an Indian entity located in California. This kind of business transaction is not only subject to limitations on a state's power to regulate interstate commerce, it is also subject to limitations imposed by the Indian Commerce clause. None of the authorities relied upon by plaintiff discuss minimum contacts where the activity involves interstate commerce and/or the Indian Commerce clause.

Defendant's request for rulings on its objections to plaintiff's evidence is granted as follows.

Defendant's objections to the declarations of Gerald K. Carlson (4/15/09 and 5/18/09), Chris Cook, Albert Allison (4/15/09 and 5/15/09), and Andrew Diaz are sustained on the ground of relevance. These declarations are not relevant in the absence of a showing that defendant exercised control over Big Sandy's sales to downstream customers. Having sustained the objections on the grounds of relevance, the court need not rule on defendants' other objections (e.g. hearsay, etc.).

Defendant's objections to the declaration of Monica Gable are overruled.

Defendant's objections to the lodging of the transcript of the Jo Anne Tornberg deposition are overruled.

Declaration of Mailing

I hereby certify that I am not a party to the within action and that I deposited a copy of this document in sealed envelopes with first class postage prepaid, addressed to each party or the attorney of record in the U.S. Mail at 720 Ninth Street, Sacramento, California.
Dated: September 28, 2009

E. Higginbotham, Deputy Clerk **/s/ E. Higginbotham**

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APPENDIX E

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SUPERIOR COURT OF THE
STATE OF CALIFORNIA
COUNTY OF SACRAMENTO

Case No. 34-2008-00014593 CU-CL-GDS

[Filed December 28, 2016]

PEOPLE OF THE STATE OF CALIFORNIA ex rel. Kamala D. Harris, Attorney General,)
)
Plaintiff,)
)
v.)

NATIVE WHOLESALE SUPPLY)
COMPANY, a corporation, and)
DOES 1 through 20,)
)
Defendant.)
)

ORDER GRANTING PEOPLE'S MOTION FOR SUMMARY JUDGMENT OR, ALTERNATIVELY, FOR SUMMARY ADJUDICATION AND REQUEST FOR CIVIL PENALTIES AND INJUNCTION

Dept: 53
Judge: Hon. David I. Brown
Trial Date: Feb. 21, 2017
Action Filed: June 30, 2008

Plaintiff, the People of the State of California's motion for motion for summary judgment, or in the alternative, summary adjudication, is ruled upon as follows.

In this action, the People allege numerous causes of action against Native Wholesale Supply Company ("NWS") based on its conduct in importing illegal cigarettes from Canada and selling them in California. The People assert causes of action for violation of the Directory Statue (Rev. & Tax. Code, § 30165.1), the Fire Safety Act (Health & Safety Code, § 14955 et seq.), and violations of Bus. & Prof. Code, § 17200.

The parties' requests for judicial notice are granted.

The People's separate statement includes the following. The Attorney General's Tobacco Directory as

specified in Health & Safety Code § 30165.1(c) went live on June 29, 2004. Neither Grand River Enterprises nor Seneca, Opal and/or Couture brands (GRE-Cigarettes) have ever been listed on the Tobacco Directory. Big Sandy's land is "within the exterior limits of the State of California [including] all territory within these limits owned by or ceded to the United States of America." Each year from 2004 to 2012 NWS sold GRE-Cigarettes to Big Sandy Rancheria. Between at least June 30, 2004 and May 25, 2012, NWS sold to Big Sandy and shipped to California GRE-Cigarettes. NWS paid carriers to transport GRE-Cigarettes to California. NWS admits that each year from 2004 to 2012 it arranged for GRE-Cigarettes to be shipped or transported to California at Big Sandy's direction.

NWS admits that funds paid by NWS were used for promotion of GRE-Cigarettes at tobacco retailers in Indian country in California who were customers of Big Sandy. NWS used funds for promotion of GRE-Cigarettes at tobacco retailers in Indian country in California, which promotions were accessible to persons in California who do not reside in Indian Country if those persons entered Indian Country. At least 15 NWS employees promoted GRE-Cigarettes in California. NWS's promotional activities in California included product and merchandise give-aways, personal appearances by NWS personnel at retail locations where promotional-priced products or samples would be provided as well as customer loyalty items. NWS was served with the instant complaint on July 9, 2008. After that time, NWS continued to sell and ship GRE-Cigarettes to Big Sandy for another 4 years until at least May 25, 2012.

GRE is a Canadian corporation located in Oshweken, Ontario, Canada. NWS imported GRE-made cigarettes from Canada. The Big Sandy Rancheria Band of Mono Indians is an Indian tribe that had approximately 434 members in 2005.

NWS admits that no GRE-Cigarette has been certified by the manufacturer to the State Fire Marshal as meeting the fire safety requirements of the California Cigarette Fire Safety and Firefighter Protection Act, specifically Health & Safety Code section 14951 et seq., at any time from 2004 to 2012. The State Fire Marshal's Office has no record of any certification submitted to or approved at any time prior to February 2014 for any brand or style of GRE-Cigarettes. NWS sold no GRE-Cigarettes to anyone in California after May 25, 2012.

NWS never filed with the Board of Equalization the statement required by 15 U.S.C. § 376(a) or any monthly report as specified in 15 U.SC. § 376(b) with respect to any sale and/or shipment of GRE-Cigarettes to anyone in California. Big Sandy is not a licensed cigarette distributor in California. After the cigarettes NWS purchased were passed through Customs, they were stored at one of three federally regulated facilities in New York and Nevada. Cigarettes were shipped to customers from the storage facilities. The GRE-Cigarettes that NWS sold to Big Sandy were shipped to persons in California from outside California. NWS's headquarters is on the Seneca reservation in New York.

I. FIRST CAUSE OF ACTION (VIOLATION OF THE DIRECTORY STATUTE-REV. & TAX. CODE § 30165.1(E)(2), (E)(3).)

The People's motion for summary adjudication on the first cause of action is granted. Rev. & Tax. Code § 30165.1, commonly referred to as the Directory Statute, requires, among other things, that every cigarette manufacturer whose cigarettes are sold in California to annually deliver to the Attorney General a document certifying that the manufacturer is in full compliance with various provisions of the Directory Statute and other state laws. Subdivision (e)(2) provides that no person shall sell, ship, or otherwise distribute cigarettes or tobacco products that are not listed in the AG's directory. (Rev. & Tax. Code, § 30165.1(e)(2).) Subdivision (e)(3) prohibits persons from selling, distributing, acquiring, holding, owning, possessing, importing, transporting, or causing to be imported, cigarettes that the person knows or should know are intended to be distributed in violation of subdivision (e)(2). (*Id.,* subd. (e)(3).) The People's evidence set forth above shows that the GRE-Cigarettes have never been listed on the Tobacco Directory. (People's Separate Statement of Undisputed Material Facts ("UF") 2.) NWS sold these cigarettes to Big Sandy in California. NWS shipped many of the cigarettes to other entities in California at Big Sandy's direction and engaged in promotional activities directed at a California market beyond Big Sandy. (UF 4-7; 8-12, 15.) In addition, as described by the Court of Appeal in this very case, "[i]n 2007 alone, NWS shipped and sold approximately 80 million cigarettes (1.4 million standard cigarette packs) to Big Sandy. Again,

it bears noting Big Sandy has just 431 members; in other words, even if nearly every member of Big Sandy smoked *two* packs every day that would still total only about 280,000 packs a year. It equally is clear that these cigarettes, in turn are sold to the general public in California." (*People v. Native Wholesale Supply Co.* (2011) 196 Cal.App.4th 357, 363-364 [emphasis in original].)

The People's evidence is sufficient to demonstrate that NWS sold in and shipped or otherwise distributed into California cigarettes that were not listed on the Attorney General's directory in violation of subdivision (e)(2). The evidence also shows that NWS knew or should have known that Big Sandy intended to redistribute the cigarettes in violation of subdivision (e)(2), which constitutes a violation of subdivision (e)(3). The People met their burden to shift to NWS the burden on demonstrating the existence of a triable issue of material fact. It failed to do so.

In this regard, in its opposition, NWS does not specifically address the individual causes of action, but argues that its defenses preclude summary adjudication/judgment. First, it argues that the People's claims are pre-empted under *White Mtn. Apache Tribe v. Bracker* (1980) 448 U.S. 136. The Court rejected this argument in connection with its ruling on NWS's motion for summary judgment, also decided today, which ruling is incorporated herein.

NWS next argues that this Court has no personal jurisdiction over it. However, this contention has been extensively litigated in this matter and both this Court and the Third District Court of Appeal have found that

personal jurisdiction exists. (*People v. Native Wholesale Supply Co.* (2011) 196 Cal.App.4th 357.)

NWS next argues that enactment and enforcement of the Directory Statute violates the Equal Protection Clause of the 14th Amendment and the corresponding protections under the California Constitution. NWS argues that where the state legislation singles out Indian tribes for particular or special treatment, the legislation is unlawful unless it passes strict scrutiny. However, the subject Directory Statute does *not* single out Indian tribes and is equally applicable to *all citizens of California.* Indeed, "[a]bsent express federal law to the contrary, Indian's 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.) The case law cited by NWS involves legislation that was not equally applicable to all citizens. Again, the Directory Statute is equally applicable to *all citizens.* (*KG Urban Enters., LLC v. Patrick* (2012) 693 F.3d 1, 19 [statutes containing differentiation based on tribal preference].) NWS argues that the Court must examine the Legislature's intent in enacting the Directory Act and that it is currently pursuing discovery on this subject. But the cases cited by NWS for the proposition that the Legislature's intent is relevant deal again with statutes that contain a classification based on a protected class. (*United States v. Windsor* (2013) 133 S. Ct. 2675, 2693-2694; *United States Dep't of Agriculture v. Moreno* (1973) 413 U.S. 528, 534-537.) Here, NWS alleges that the subject laws impermissibly discriminate against Indian tribes, tribal members, tribal cigarette

manufacturers and entities that sell or desire to sell Native-made cigarettes to tribal members or tribes or both. However, NWS does not allege it is a tribe, tribal member or native cigarette manufacturer. An equal protection claim can only be raised by "a member of the class of persons discriminated against." (*Rubio v. Superior Court* (1979) 24 Cal.3d 93, 103.). Further, individuals who sell cigarettes to tribes are not a suspect class. Where 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.) Under a rational basis review, a statute alleged to discriminate "must be upheld against an equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." (*FCC. v. Beach Communications, Inc.* (1993) 508 U.S. 307, 313.) "[I]t is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged [statute] actually motivated the legislature.... 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." (*Id.,* at p. 315.) A statute "comes [before the Court] bearing a strong presumption of validity,... and those attacking its rationality have the burden to negate every conceivable basis which might support it." (*Id.,* at pp. 314-315.) The Court of Appeal has already held that the subject statutes promote public health which is certainly a rational basis. (*Black Hawk, supra,* 197 Cal.App.4th at p. 1561.) There is no basis for an equal protection defense and the argument that the Legislature's intent in enacting the Directory Statute

creates a triable issue of fact on NWS's equal protection affirmative defense is rejected.

NWS argues that it was under no obligation to comply with the Directory Statute until 2013 when the Legislature amended the "Escrow Statute" to revise the definition of "units sold" to specifically include tribal sales by specifying that "units sold" equaled the number of cigarettes sold to consumers in California regardless of whether or not the state excise tax was collected on the sale. NWS then attempts to cite to the legislative history behind the Escrow Statute. The Court rejects this argument which is confusing at best. Indeed, the language of the Directory Statute is clear and unambiguous and provides that "[n]o person shall [sell, ship, etc.] cigarettes of a tobacco product manufacturer or brand family not included in the [Attorney General's Directory]." (Rev. & Tax. Code § 30165.1, subd. (e)(2), (3).) The Court would only look to legislative intent to construe a statute "only when the statutory language is susceptible of more than one reasonable interpretation." (*People v. Salazar-Merino* (2001) 89 Cal.App.4th 590, 596 [italics in original].) The Directory Statute contains no carve out for certain kinds of persons, manufacturers, etc. and there is no argument made that the Act is ambiguous or unclear and thus resort to legislative history regarding the Escrow Statute, a different statute, is not permissible. The Court rejects the argument that NWS was not subject to the Directory Statute between 2004 and 2012.

NWS offers no other argument in support of its opposition. In addition, while NWS purports to dispute

a number of the facts set forth in the People's separate statement, none of the facts are truly disputed and/or to the extent there is any dispute, it is not material. For example, NWS attempts to dispute almost all of the People's material facts with evidence that it sold cigarettes to Big Sandy, a federally recognized tribe, on sovereign land, in transactions that were FOB New York with title and risk of loss transferring to Big Sandy before the products entered into California. NWS does not specifically discuss this point in its opposition, but essentially it is attempting to argue the same point that it did in its own motion, that is, that the claims at issue are pre-empted. As already made clear, they are not. In any event, the Court has sustained the People's objections to the evidence on this point, a single sentence in a declaration from NWS' "manager," Erlind Hill. Mr. Hill's declaration was made "to the best of [his knowledge and belief." (Hill Decl. 1:27-28.) Such a declaration is insufficient to establish the personal knowledge required by section 437c. (*Ahrens v. Superior Court* (1988) 197 Cal.App.3d 1134, 1151, fn. 13.) Nor does Mr. Hill indicate that he is an officer, director, or specify what he manages on NWS's behalf to indicate how he would have personal knowledge about the nature of the transactions. In any event, as the Court noted in the ruling on NWS's motion, it appears that NWS is trying to argue that sales between tribes are pre-empted. As noted, they are not. Case law has consistently held "inter-tribal" trade is not exempt from state regulation. (See, e.g., *Muscogee (Creek) Nation v. Henry* (E.D. Okla. 2010) 867 F.Supp.2d 1197, 1206-1211.)

As a result, NWS has failed to raise a triable issue of material fact with respect to the First Cause of Action and the motion for summary adjudication is granted.

II. SECOND CAUSE OF ACTION (FIRE SAFETY ACT –VIOLATION 01 HEALTH & SAFETY CODE § 14950 ET SEQ.)

The People's motion for summary adjudication is granted. The Fire Safety Act provides that "[a] person shall not sell, offer, or possess for sale in this state cigarettes not in compliance with the following requirements: ... (4) A written certification is filed by the manufacturer with the State Fire Marshal in accordance with Section 14953." (Health & Saf. Code, § 14951, subd. (a)(4).) The People's evidence shows that NWS sold cigarettes to Big Sandy for which no certification had been filed between July 9, 2008, when it was served with the complaint in this action, and May 25, 2012, when it claimed to have stopped selling the cigarettes. (UF 13, 23.) At no time prior to February 2014 were any GRE-Cigarettes certified as being in compliance with Health & Safety Code section 14951, subdivision (a)(4). (UF 3, 4, 20, 21, 22.) The evidence is sufficient to shift to NWS the burden of demonstrating the existence of a triable issue of material fact.

As discussed above, NWS did not present separate arguments to the separate causes of action and instead presented the arguments as to all causes of action, which have been extensively discussed and rejected above. The Court would note that NWS' responsive separate statement attempts to rely upon its seventh

affirmative defense in its answer, that it relied in good faith on the manufacturer's certification and markings that the GRE-Cigarettes complied with the requirements of the Fire Safety Act. Health and Safety Code section 14955, subdivision (g) provides a defense to penalties based on such good faith reliance. However, the People only seek penalties based on NWS's violations from July 9, 2008, the date NWS received service of the complaint in this action. At that point, NWS was on notice that the cigarettes at issue were alleged to have violated the Act. NWS presents no evidence to demonstrate that it continued to rely in good faith on any certification from any manufacturer.

As a result, NWS has failed to raise a triable issue of material fact with respect to the Second Cause of Action and the motion for summary adjudication is granted.

III. FOURTH CAUSE OF ACTION (VIOLATION OF BUS. & PROF. CODE § 17200 ET SEQ.)

The People's motion for summary adjudication is granted. Unfair competition includes "any unlawful ... business act or practice...." (Bus. & Prof. Code, § 17200.) "By defining unfair competition [in this manner], the UCL permits violations of other laws to be treated as unfair competition that is independently [from the underlying offense] actionable." (*Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 949.) The People's evidence, as set forth above, demonstrates that NWS violated the Directory and Fire Safety Acts. In addition, 15 USC § 376 requires any person who sells cigarettes in interstate commerce, whereby such cigarettes are shipped into a state that taxes their sale

or use, to file monthly reports with the state tax administrator, providing specific information about each shipment. The evidence shows that NWS, headquartered in New York, sold and shipped cigarettes from outside California to Big Sandy in California, which is not a licensed distributor in California, thus engaging in interstate commerce. (UF 3, 4, 6, 7, 26-28.) NWS failed to file monthly reports with the state tax administrator. (UF 25.) The evidence is sufficient to shift to NWS the burden of demonstrating the existence of a triable issue of material fact.

As discussed above, NWS did not present separate arguments to the separate causes of action and instead presented the arguments as to all causes of action were extensively discussed and rejected above. As a result, NWS has failed to raise a triable issue of material fact with respect to the Fourth Cause of Action and the motion for summary adjudication is granted.

In sum, the People's motion for summary adjudication is granted as to the first, second, and fourth causes of action which are the only remaining causes of action asserted against NWS. Accordingly, the People's motion for summary judgment is granted.

IV. PENALTIES AND INJUNCTION

The People seek penalties under both the UCL and the Fire Safety Act. The People seek a total of $4,292,500 in civil penalties ($2,002,250 for UCL violations and $2,290,000 for Fire Safety Act violations). The People seek an order that they are entitled to these penalties.

At the outset, the civil penalties and injunctive relief are *remedies* and not part of any cause of action. As a result, to the extent there are factual disputes as to these issues, the Court can still grant summary judgment (as it did above) and could simply hold an evidentiary hearing to resolve factual issues related to remedies. (*People v. Superior Court* (2015) 234 Cal.App.4th 1360, 1372-1377.) As will be discussed below, there are no such disputed facts.

The UCL authorizes civil penalties of up to $2,500 for each violation. (Bus. & Prof. Code, § 17206, subd. (a).) Once a violation is found, the duty to impose a penalty for each violation is mandatory. (*People v. First Federal Credit Corp.* (2002) 104 Cal.App.4th 721, 728.) "In assessing the amount of the civil penalty [under the UCL], the court shall consider any one or more of the relevant circumstances presented by any of the parties, including, but not limited to, the following: the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant's misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant's conduct, and the defendant's assets, liabilities, and net worth." (Bus. & Prof. Code, § 17206, subd. (b).) The Court may also consider the revenues received by the defendant from the unlawful conduct. (*People v. Morse* (1993) 21 Cal.App.4th 259, 272.) "[P]enalties provided by [the UCL] are cumulative to each other and to the remedies or penalties available under all other laws of this state." (Bus. & Prof. Code, § 17205.)

Here, the evidence shows that NWS funneled more than one billion contraband cigarettes into California over an eight year period and more than 2/3 of the sales in California took place *after* NWS had been served with the complaint in this action. (Edson Decl. Exhs. 6 and 13.) Further, even after May 25, 2012, when it claims to have stopped selling the cigarettes, NWS spent millions of dollars promoting the GRE-cigarette sales in California, including paying $3 million towards a customer appreciation gala in Las Vegas to which it invited over 500 people, including the chairperson of Big Sandy and persons affiliated with stores that sell/distribute GRE-cigarettes in California. (*Id.,* Exh. 17, pp. 366-367, 371-372; 374-376; Exh. 18, pp. 381-382, 386, 386-405; Exh. 19, pp. 409-411, 413-414.) According to NWS, these were "people we need to be buying our product or [people] we desire to become customers." (*Id.,* Exh. 20, p. 421:14-15.) In addition, when the Attorney General found that NWS had been storing cigarettes in Las Vegas at the foreign trade zone ("FTZ") and requested that the cigarettes stop being released for shipment into California, NWS began concealing from the FTZ the destinations in California to which the cigarettes would be shipped upon release. (*Id.,* Exh. 14, pp. 257-261, 274-280; Exh. 4, pp. 31-33.) Finally, although NWS was in bankruptcy, it has recently emerged and has admitted that its bankruptcy plan is feasible such that it has the "ability to ... stay current with its obligations and to make the proposed payments to all Allowed Claimants [including California] over time." (*Id.,* Exh. 21, pp. 425-426.) "Debtor will have sufficient cash flow and capital resources to pay its liabilities as they become due [including Plan provisions for payment of any

California judgment] and to satisfy its capital needs for the conduct of its business." (*Id.,* Exh. 22, p. 430, ¶ I.)

In short, the Court finds that NWS's unlawful conduct, committed on a large scale over a substantial period of time, and even after it was served with notice of the complaint in this action, and its attempts to continue to promote the unlawful conduct even after claiming to have stopped the sales, together with its financial condition, justify the maximum penalty per violation. This is especially true given that NWS reaped over $67 million in sales from the unlawful conduct. (Edson Decl. Exh. 6.) The proposed penalty here is but a small fraction of that amount. Moreover, the People have requested a penalty based on invoiced transactions between NWS and Big Sandy, as opposed to the number of cigarettes sold, despite the fact that other courts have upheld penalties against NWS based on the number of cigarettes sold for essentially the same conduct. (*State v. Native Wholesale Supply* (Okla. 2014) 338 P.3d 613, 624.) The People's evidence demonstrates 476 violations based on violations of the Directory Statute (**476** invoiced transactions of shipping GRE-cigarettes into California that were on the AG's directory), **229** violations predicated on the Fire Safety Act (229 invoiced transactions of cigarettes that were not properly certified as fire safe), and **96** violations predicated on violations of 15 U.S.C. § 376 (failures to report to the Board of Equalization) for a total of 801 violations of the UCL. At $2,500 per violation, the People are entitled to penalties in the amount of $2,002,500 under the UCL.

In addition, the People are separately entitled to penalties under the Fire Safety Act which provides that "any manufacturer or any other person or entity that knowingly sells or offers to sell cigarettes other than through retail sale in violation of this part is subject to a civil penalty not to exceed $10,000 per sale." (Health & Safety Code, § 14955, subd. (a).) NWS has admitted that the sales were not retail sales. (Edson Decl. Exh. 1, p. 2.) NWS committed at least **229** invoiced transactions since July 9, 2008 when it was served with the complaint and thus knew that the GRE-Cigarettes had not been certified as fire-safe. The Fire Safety Act does not set forth the factors to consider in assessing the amount of the penalty, but the same factors discussed above support a maximum penalty for each violation. As a result at $10,000 per violation, the People are entitled to penalties in the amount of $2,290,000 under the Fire Safety Act.

In opposition, NWS argues that there is a triable issue of fact as to how many cigarettes were sold to "non-Indians" after they were sold to Big Sandy. However, the penalty sought here is based on a per-transaction basis, not the number of cigarettes sold. This distinguishes the matter from the nonbinding trial court decision referred to by NWS in its opposition. (Mackey Decl. Exh. B.) There the penalty was sought based on the number of cigarettes sold. By contrast here, the penalty is sought based on the number of transactions to Big Sandy and there is no dispute that NWS sold all cigarettes to Big Sandy. NWS in essence attempts to repeat its failed arguments that under a pre-emption analysis, it cannot be liable for sales made to Indian customers. That argument has been rejected.

In sum, the Court finds that there are no disputed factual issues on the issue of remedies, which would require a separate evidentiary hearing and the People are therefore entitled to penalties in the amount of $4,292,500. In addition, the People are entitled to injunctive relief. The People seek injunctive relief in connection with their cause of action under the UCL which expressly allows for injunctive relief even in situations where a person "has engaged" in the challenged practice. (Bus. & Prof. Code § 17203.) This section was expanded to "encompass past activity.... " (*Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 570.) The remedial power under the UCL "necessarily includes authority to make orders to prevent such activities from occurring in the future." (*Hewlett v. Squaw Valley Sid Corp.* (1997) 54 Cal.App.4th 499, 540 [citations omitted].) Injunctive relief is also available under the Fire Safety Act. (Health &. Safety Code,§ 14955, subd. (f).) "Injunctive relief will be denied [only] if ... there is no reasonable probability that the past acts complained of will recur." (*Colgan v. Leatherman Tool Group,* Inc. (2006) 135 Cal.App.4th 663, 702 [citations omitted].) "The Court has the power to refuse to enjoin future conduct where it is satisfied that there is no reasonable possibility past unlawful acts will be repeated." (*People v. National Association of Realtors* (1981) 120 Cal.App.3d 459, 476.) The People seek injunctive relief enjoining NWS from selling cigarettes that are not listed on the Attorney General's Directory or not certified in compliance with the Fire Safety Act to anyone in California, or to anyone anywhere when NWS knows or should know that those cigarettes will be resold in or

into California, and if NWS makes any such sales, to file all documents required by 15 U.S.C. § 376.

While NWS claims to have stopped selling contraband cigarettes in California in May 2012, as already discussed, it did not cease selling the cigarettes even after the instant complaint was filed and even after it claims to have stopped, it engaged in conduct in 2014 promoting sales of the cigarettes in California when it spent $3 million on a customer appreciation event.

NWS's arguments that it is bankrupt and that it does not intend to resume sales were fully addressed in the Court's ruling denying NWS's motion for summary judgment and need not be addressed again. In short, the People's evidence shows the injunctive relief is proper as there is a probability that NWS will resume sales unless otherwise enjoined.

As a result, the People's motion for summary judgment is GRANTED in full. The People are entitled to $4,292,500 and permanent injunctive relief as requested.

The People's evidentiary objections are sustained. In any event, even if the objections were overruled, the result would not change.

IT IS SO ORDERED.

DATED: DEC 28 2016

/s/David I. Brown
JUDGE OF THE SUPERIOR COURT

[SEAL] DAVID I. BROWN

APPENDIX F

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SUPERIOR COURT OF THE STATE OF CALIFORNIA COUNTY OF SACRAMENTO

Case No. 34-2008-00014593 CU-CL-GDS

[Filed December 28, 2016]

PEOPLE OF THE STATE OF)
CALIFORNIA ex rel. Kamala D.)
Harris, Attorney General,)
)
Plaintiff,)
)
v.)

NATIVE WHOLESALE SUPPLY COMPANY, a corporation, and DOES 1 through 20,	))))
Defendant.	))

ORDER DENYING NATIVE WHOLESALE SUPPLY COMPANY'S MOTION FOR SUMMARY JUDGMENT, OR ALTERNATIVELY, MOTION FOR SUMMARY ADJUDICATION

Dept:	53
Judge:	Hon. David I. Brown
Trial Date:	Feb. 21, 2017
Action Filed:	June 30, 2008

Upon consideration of the papers and oral arguments of counsel, and the evidence submitted, Defendant Native Wholesale Supply Company's ("NWS") Motion for Summary Judgment, or in the Alternative, Summary Adjudication is ruled upon as follows.

In this action, the People of the State of California allege numerous causes of action against NWS based on its conduct in importing illegal cigarettes from Canada and selling them in California. The People assert causes of action for violation of the Directory Statute (Rev. & Tax. Code, § 30165.1), the Fire Safety Act (Health & Safety Code, § 14955 et seq.), and violations of the Unfair Competition Law"("UCL") (Bus. & Prof. Code, § 17200 et seq.).

The People's request for judicial notice is granted.

NWS moves for summary judgment on the basis that the complaint is pre-empted and also seeks summary adjudication as to the People's request for injunctive relief.

The People are correct that NWS's Notice of Motion and Separate Statement of Undisputed Material Facts fail to comply with California Rules of Court, rule 3.1350(b). While the notice of motion indicates that NWS is moving for summary judgment and summary adjudication, the notice fails to identify any specific cause of action, affirmative defense, claim for damages, or issues of duty as to which summary adjudication is sought and the separate statement is silent as well. NWS attempted to correct the errors by filing an amended statement in reply. The Court will not deny the motion on these procedural deficiencies.

NWS's separate statement includes the following. Arthur Montour, an enrolled member of the Seneca Nation of Indians ("Seneca Nation") is NWS's sole owner. NWS is a corporation that was chartered under the laws of the Sac and Fox Nation of Oklahoma, which is a federally recognized Indian tribe. NWS's headquarters are located within and on the sovereign lands of the Seneca Nation in New York. NWS filed for bankruptcy in the Western District of New York on November 21, 2011. In 2012, NWS ceased selling cigarettes to entities in California. Prior to that time NWS sold cigarettes to tribal entities in California. NWS does not intend to resume these sales. All sales underlying the claims in this action occurred within the Big Sandy Rancheria located on the sovereign land of the Joaquin Band of Western Mono Indians. The terms

of NWS's sales were FOB Seneca Nation land with title and risk of loss passing to Big Sandy Rancheria before the products entered into California. NWS did not sell cigarettes directly to consumers. The People have admitted in discovery that NWS made its sales to persons in Indian Country and that delivery occurred in Indian Country.

I. ENTIRE COMPLAINT

NWS first moves for summary judgment on the basis that the People's claims are preempted by federal law under the *Bracker* balancing test enunciated in *White Mtn. Apache Tribe v. Bracker* (1980) 448 U.S. 136, 143 ["*Bracker*"]. NWS argues that it is entitled to summary judgment based on *Bracker* because "State law is 'inapplicable' to the transactions underlying the People's claims because those transactions occurred on a reservation solely among various Indian-owned entities." (NWS Mem. 7:5-7.) The Court finds that NWS failed to meet its burden to show that it is entitled to judgment on this basis.

"When on-reservation conduct involving Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest." (*Bracker, supra,* 448 U.S. at p. 144.) "More difficult questions arise where, as here, a State asserts authority over the conduct of non-Indians engaging in activity on the reservation." (*Ibid.*) *Bracker* does not, as NWS appears to contend, lay down a per se rule that States may not regulate conduct on reservations where only Indians or tribal members are involved, much less an Indian-owned

entity such as NWS. Rather, when such conduct is at issue, the ability of a State to regulate that conduct depends on a balancing of the state, federal, and tribal interests. (*Id.,* at pp. 144-145.) *Bracker's* balancing test calls for careful attention to the factual setting, requiring "a particularized inquiry into the nature of the state, federal, and tribal interests at stake, and inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." (*Id.,* at p. 145.) NWS fails to offer any evidence or even any argument regarding the balancing of the state, federal and tribal interests under the circumstances of the case. As a result, NWS has failed to demonstrate that it is entitled to judgment as a matter of law on the People's complaint on the basis that it is preempted by *Bracker.* The burden never shifted to the People to demonstrate the existence of a triable issue of material fact and the motion is denied on this basis alone.

In any event, any argument or evidence regarding a *Bracker* balancing test would be insufficient to demonstrate that NWS was entitled to judgment. The California Court of Appeal has held that with respect to the same laws at issue here and the on-reservation sale of the same cigarettes at issue, that "[n]o federal or tribal interest outweighs the state's interest in collecting cigarette tax revenue or enforcing the California tobacco directory and cigarette fire safety laws." (*People ex rel. Harris v. Black Hawk Tobacco, Inc.* (2011) 197 Cal.App.4th 1561, 1571.) The Oklahoma Supreme Court has reached a similar conclusion in connection with the prosecution of NWS in Oklahoma for the same cigarette sale scheme at issue here.

Persuasively, the Oklahoma Supreme Court indicated that *Bracker* did not apply at all but even if it did, "the State's interest in enforcing the [Directory Statute] would outweigh any interest the tribe or federal government might have in prohibiting its enforcement against Native Wholesale Supply." (*Stale ex rel. Edmondson v. Native Wholesale Supply* (Okla. 2010) 237 P.3d 199, 216.) These decisions are consistent with the decisions of the United States Supreme Court which have held that a state could regulate the sale of cigarettes by a tribal member on his own reservation to non-member Indians of the tribe. (*Washington v. Confederated Tribes of the Colville Reservation* (1980) 447 U.S. 134, 160-161.) Here NWS claims it is located on the Seneca reservation but sells cigarettes to Big Sandy, a tribe, but not a member of the Seneca Nation. That is no different than *Colville.* As a result, the motion is denied.

Further, as shown by the People, even if *Bracker* laid down a per se rule barring States from regulating on-reservation conduct of an "Indian-owned entity" or even an Indian or tribal member, which as seen above *Bracker* did not, the motion still fails. Indeed, "[a]bsent 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.) The only evidence that NWS appears to offer to support its preemption argument is evidence that the subject transactions occurred with the Big Sandy Rancheria. But even if the Court considered this evidence, case law has held "inter-tribal" trade is not exempt from state

regulation. (See. e.g., *Muscogee (Creek) Nation v. Henry* (E.D.Okla. 2010) 867 F.Supp.2d 1197. 1206-1211.) Thus, even if *Bracker* created a per-se rule, the evidence is insufficient to demonstrate that NWS was engaged in on-reservation activity subject to *Bracker,* and the burden never shifted to the People to demonstrate the existence of a triable issue of material fact.

Further, as shown by the People, the evidence offered in support of the motion is objectionable, and the Court has sustained the People's objections. In any event, even if this evidence were sufficient, the People have demonstrated the existence of triable issues of material fact. 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. (People's Separate Statement of Undisputed Material Facts in Opposition to [NWS's Motion]. UF 5). 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. (People's UF 10, 12, 14.) 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. (People's UF 15, 16, 25.) The evidence creates a triable issue of material fact as to whether the sales at issue extended beyond reservation boundaries and thus would not be preempted even if *Bracker* created the per se rule NWS believes it did. In

fact, the Oklahoma Supreme Court has found that an essentially identical cigarette scheme involving NWS comprised sales taking place in multiple locations both on and off different tribal lands was not on-reservation conduct for purposes of Indian Commerce Clause jurisprudence but rather off-reservation conduct by members of different tribes and thus subject to state regulation without even considering *Bracker*. (*Edmondson, supra,* 237 P.3d at 215-216.) *Edmondson* has been cited favorably by the Third District Court of Appeal in this very case in finding that California has personal jurisdiction over NWS. (*People ex rel. Harris v. Native Wholesale Supply Co.* (2011) 196 Cal.App.4th 357, 364-365.) Indeed, the Idaho Supreme Court has reached an identical conclusion: "Looking at NWS's activity as a whole, it cannot be characterized as an on reservation activity. NWS is operated on the Seneca reservation in New York, but is organized under the laws of a separate tribe. It purchases cigarettes that are manufactured in Canada. It stores those cigarettes in a foreign trade zone in Nevada. It then ships those cigarettes from Nevada into Idaho. 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, 1267.) Thus, even if *Bracker* created a per se rule, there would be triable issues of material fact as to whether NWS was engaged in on reservation activity.

As a result, NWS's motion for summary judgment on the basis that the People's claims are pre-empted under *Bracker* is denied.

II. THE PEOPLE'S REQUEST FOR INJUNCTIVE RELIEF

NWS next seeks summary adjudication on the People's request for injunctive relief because it is bankrupt and ceased selling cigarettes in California in 2012. The motion is denied.

First, the notice of motion does not even identify that NWS was seeking adjudication of this issue. In any event, "[i]njunctive relief is a remedy, not a cause of action." (*Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 65.) While the People seek injunctive relief in this action, they do so in connection with their numerous causes of action. A pleaded cause of action states a legal ground for recovery supported by specific allegations of conduct by the defendant on which the plaintiff relies to establish a right to relief. The People have not asserted a cause of action for "injunctive relief." Thus, even assuming that NWS was correct that the People cannot obtain injunctive relief, this would not completely dispose of any cause of action, affirmative defense, claim for damages, or an issue of legal duty as required by Code of Civil Procedure section 437c, subdivision (f)(1). Nor has NWS obtained a stipulation from the People allowing a motion for summary adjudication of certain legal issues or damages not covered by subdivision (f)(1). (Code Civ. Proc., § 437c, subd. (t).) The motion is denied on this basis alone.

In any event, even if such motion were proper, which it is not, NWS failed to meet its burden. Indeed, the People seek injunctive relief in connection with their cause of action under the UCL, which expressly allows for injunctive relief even in situations where a person "has engaged" in the challenged practice. (Bus. & Prof. Code § 17203.) This section was expanded to "encompass past activity...." (*Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17. Cal.4th 553, 570.) The remedial power under the UCL "necessarily includes authority to make orders to prevent such activities from occurring in the future." (*Hewlett v. Squaw Valley Ski Corp.* (1997) 54 Cal.App.4th 499, 540 [citations omitted].) "Injunctive relief will be denied [only] if ... there is no reasonable probability that the past acts complained of will recur." (*Colgan v. Leatherman Tool Group, Inc.* (2006) 135 Cal.App.4th 663, 702 [citations omitted].) "The court has the power to refuse to enjoin future conduct where it is satisfied that there is no reasonable possibility past unlawful acts will be repeated." (*People v. National Association of Realtors* (1981) 120 Cal.App.3d 459, 476.)

Here, NWS's evidence is that it filed for Chapter 11 bankruptcy in 2011. But it does not offer any evidence that the bankruptcy left it unable to restart cigarette sales in California. The case cited by NWS did not hold that the mere fact a company filed for bankruptcy demonstrated that an injunction should not issue. (*Paul v. Milk Depots, Inc.* (1964) 62 Cal.2d 129.) Rather, there, an injunction against future sales of milk was denied as "unnecessary" and "ineffectual" not simply because the company was bankrupt but because the company lost its license to distribute milk and the

pricing regulation that the company was charged with violating was repealed and replaced with a new regulation. (*Id.,* at pp. 133-134.) In addition, the evidence from NWS's "manager" Erlind Hill that NWS does not intend to restart sales does not show that there is no reasonable probability that NWS will restart sales. This statement was made "to the best of [his] knowledge and belief." (Hill Decl. 1:27-28.) Such a declaration is insufficient to establish the personal knowledge required by section 437c. (*Ahrens v. Superior Court* (1988) 197 Cal.App.3d 1134, 1151, fn. 13.) Nor does Mr. Hill indicate that he is an officer, director, or specify what he manages on NWS's behalf to indicate how he would have personal knowledge about NWS's intent. Mr. Hill's attempt to submit a more detailed declaration in reply for the first time is rejected. Even if this statement from Mr. Hill were admissible, statements of intent are insufficient to foreclose future conduct different from that intent. (*People v. JTH Tax, Inc.* (2013) 212 Cal.App.4th 1219, 1256 ["without an injunction, Liberty could easily and indeed unilaterally change its policies"].) The cases cited by NWS are not to the contrary and do not set forth any per se rule that a defendant's statement of present intent not to resume illegal conduct precludes issuance of an injunction. (*National Association of Realtors, supra,* 120 Cal.App.3d at pp. 476-477 [discussing not just an intent to cease the conduct but also that the conduct was not performed by the defendants sought to be enjoined, assurances to the Court that they would comply with the Court's holding, would not interfere with the remaining defendant's compliance with the injunction and the fact that the Court reserved jurisdiction for an indefinite time to

impose an injunction in the future].) Courts impose injunctions even where the defendant indicates that the conduct will not be repeated. "Defendant [ ] contends that the case is moot as to him because there is no reasonable probability that his past advertising practices will recur.... The point is without merit since a permanent injunction may be issued where the guilty party retains the means of continuing his transgressions, even though he testified that he no longer intends to do so." (*Department of Agriculture v. Tide Oil Co.* (1969) 269 Cal.App.2d 145, 150.) In sum, NWS's evidence fails to demonstrate that an injunction should not be issued here and failed to shift to the People the burden of demonstrating a triable issue of material fact.

In any event, the People have presented evidence creating a triable issue of material fact as to whether NWS will resume sales in California. This includes evidence that NWS will not formally agree to stop such sales unless and until a Court decrees such sales to be illegal, that months after emerging from bankruptcy in 2014, it paid $3 million towards a "customer appreciation gala" in Las Vegas which was attended by numerous persons affiliated with entities that sell the subject cigarettes, including Big Sandy's chairperson. (People's UF 28, 31.) NWS indicated that these were "the people we need to be buying our product or [people] we desire to become customers." (People's UF 30.)

As a result, the motion directed to the People's request for injunctive relief is denied. The motion is denied in its entirety.

The People's evidentiary objections are sustained. NWS's evidentiary objections are overruled.

CONCLUSION

For the foregoing reasons, NWS's Motion for Summary Judgment or Alternatively for Summary Adjudication is DENIED in its entirety.

IT IS SO ORDERED.

DATED: DEC 28 2016

/s/DAVID I. BROWN
JUDGE OF THE SUPERIOR COURT

[SEAL] DAVID I. BROWN

APPENDIX G

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SUPERIOR COURT OF THE
STATE OF CALIFORNIA
COUNTY OF SACRAMENTO

Case No. 34-2008-00014593 CU-CL-GDS

[Filed January 24, 2017]

PEOPLE OF THE STATE OF)
CALIFORNIA ex rel. Kamala D.)
Harris, Attorney General,)
)
Plaintiff,)
)
v.)

NATIVE WHOLESALE SUPPLY COMPANY, a corporation, and DOES 1 through 20,)
)
)
)
Defendant.)
)

AMENDED NOTICE OF ENTRY OF JUDGMENT

TO DEFENDANTS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on December 28, 2016, the Court entered final judgment for plaintiff and against defendant. A true and correct copy of the final judgment is appended to this notice.

Dated: January 24, 2017

Respectfully Submitted,

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/s/Michelle Hickerson
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SA2008303415

JUDGMENT

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**SUPERIOR COURT OF THE
STATE OF CALIFORNIA
COUNTY OF SACRAMENTO**

Case No. 34-2008-00014593 CU-CL-GDS

[Filed December 28, 2016]

PEOPLE OF THE STATE OF)
CALIFORNIA ex rel. Kamala D.)
Harris, Attorney General,)
)
Plaintiff,)
)
v.)
)
NATIVE WHOLESALE SUPPLY)
COMPANY, a corporation, and)

DOES 1 through 20,)
)
Defendant.)
)

FINAL JUDGMENT

Dept:	53
Judge:	Hon. David I. Brown
Trial Date:	Feb. 21, 2017
Action Filed:	June 30, 2008

Having granted plaintiff's motion for summary judgment in full and in accordance with the Court's formal order granting that motion, the Court now enters judgment for civil penalties and a permanent injunction against defendant Native Wholesale Supply Company as follows:

1. Defendant shall pay to plaintiff, the People of the State of California, ("People") $2,002,500 in civil penalties, pursuant to section 17206 of the Business and Professions Code for violations as follows: a $1,190,000 civil penalty for defendant's 476 violations of Revenue and Taxation Code section 30165.1, subdivision (e); a $572,500 civil penalty for defendant's 229 violations Health and Safety Code section 14950 et seq., and; a $240,000 civil penalty for defendant's 96 violations of 15 U.S.C. § 376.

2. Defendant shall pay to the People $2,290,000 civil penalty, pursuant to Health and Safety Code section 14955, subdivision (a), for defendant's 229 violations of Health and Safety Code section 14950 et seq.

3. Defendant Native Wholesale Supply Company, its directors, officers, employees, agents, successors, and any persons acting in concert or participation with them are permanently enjoined from engaging in any of the following unlawful business practices:

a. Violating Revenue and Taxation Code section 30165.1 in any way and specifically from:

i) Selling, offering, or possessing for sale in this state (as used in this judgment, "this state" has same meaning as defined by Revenue and Taxation Code section 30013: "within the exterior limits of the State of California and includes all territory within these limits owned by or ceded to the United States of America"), shipping or otherwise distributing into or within this state cigarettes of a tobacco product manufacturer or brand family not included in the California Tobacco Directory, which conduct is prohibited by subdivision (e)(2) of section 30165.1;

ii) Selling or distributing cigarettes that defendant knows or should know are intended to be distributed in violation of subdivision (e)(2), which conduct is prohibited by subdivision (e)(3) of section 30165.1; and

iii) Acquiring, holding, owning, possessing, transporting, importing or

causing to be imported cigarettes that defendant knows or should know are intended to be distributed in violation of subdivision (e)(2), which acts are prohibited by subdivision (e)(3) of section 30165.1.

b. Violating Health and Safety Code section 14950 et seq., and specifically from selling, offering or possessing for sale in this state cigarettes not in compliance with the requirements of the Act, which conduct is prohibited by section 14951, subdivision (a) of the Health and Safety Code.

c. Selling, transferring, or shipping for profit cigarettes into this state without filing the reports required by 15 U.S.C. § 376.

4. The People are entitled to costs in an amount to be determined by a bill of costs.

DATED: DEC 28 2016

/s/DAVID I. BROWN
JUDGE OF THE SUPERIOR COURT

[SEAL] DAVID I. BROWN

APPENDIX H

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

December 5, 2019

Mr. Randolph Henry Barnhouse
Barnhouse Keegan Solimon & West LLP
7424 4th Street NW
Los Ranchos de Albuquerque, NM 87107

Re: Native Wholesale Supply Company
v. California, ex rel. Xavier Becerra, et al.
Application No. 19A629

Dear Mr. Barnhouse:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Kagan, who on December 5, 2019, extended the time to and including February 3, 2020.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk

by Redmond K. Barnes

Redmond K. Barnes
Case Analyst

NOTIFICATION LIST

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Barnhouse Keegan Solimon & West LLP
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APPENDIX I

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NATIVE WHOLESALE SUPPLY
COMPANY, a corporation

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
COUNTY OF SACRAMENTO

Case No. 34-2008-00014593-CU-CL-GDS

[Filed November 17, 2016]

PEOPLE OF THE STATE OF)
CALIFORNIA ex rel. Kamala D.)
Harris, Attorney General,)
)
Plaintiff,)
)
vs.)
)
NATIVE WHOLESALE SUPPLY)

COMPANY, a corporation,)
)
Defendant.)
)

DECLARATION OF ERLIND HILL IN SUPPORT OF NATIVE WHOLESALE SUPPLY COMPANY'S OPPOSITION TO THE PEOPLE'S MOTION FOR SUMMARY JUDGMENT, OR ALTERNATIVELY, MOTION FOR SUMMARY ADJUDICATION

Date:	November 17, 2016
Time:	2:00 P.M
Dept:	53
Judge:	Hon. David I. Brown
Trial Date:	February 21, 2017
Action Filed:	June 30, 2008

I, Erlind Hill, being a manager of Native Wholesale Supply Company ("NWS"), declare that the following is true and correct to the best of my knowledge and belief:

1. Arthur Montour, an enrolled member of the Seneca Nation of Indians ("Seneca Nation"), is NWS' sole owner.

2. NWS is a corporation that is chartered under the laws of the Sac and Fox Nation of Oklahoma, which is a federally-recognized Indian tribe. NWS' headquarters is located within and on the sovereign lands of the Seneca Nation of Indians, which is located within the geographic boundaries of New York.

3. NWS filed for bankruptcy in the Western District of New York on November 21, 2011, in a case assigned docket entry number 11-BK-14009(CLB).

4. In 2012, NWS ceased selling cigarettes to entities located within the geographic boundaries of California. Prior to such cessation, NWS sold cigarettes to tribal entities located within the geographic boundaries of California. NWS does not intend to restart such sales.

5. My understanding is that all of the transactions underlying the People's claims occurred with the Big Sandy Rancheria, which is located on the sovereign land of the Joaquin (or Big Sandy) Band of Western Mono Indians. The terms of NWS' sales to Big Sandy Rancheria were FOB Seneca Nation land, with title and risk of loss transferring to Big Sandy Rancheria before the products entered into the geographic boundaries of the State of California.

6. NWS did not sell cigarettes directly to consumers. I am informed and believe that all cigarettes sold by Big Sandy Rancheria were re-distributed solely in Indian Country in California.

7. In connection with other threatened or actual lawsuits involving Indian-owned companies, I am aware that the States have taken positions and produced documents in discovery relating to the application of the MSA laws to Indian Country and Native Americans and their

businesses including, but not limited to, the Model NPM Statute, Frequently Asked Questions, a true and correct copy of which is attached hereto as **Exhibit A**, and an April 30, 2008, letter from the California State Board of Equalization to Richard Johnson, a true and correct copy of which is attached hereto as **Exhibit B**.

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

DATED: October 19, 2016 /s/Erlind Hill

Erlind Hill

APPENDIX J

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**SUPERIOR COURT OF CALIFORNIA
IN AND FOR THE COUNTY OF SACRAMENTO**

Case No. 34-2008-00014593-CU-CL-GDS

[Filed June 30, 2008]

People of the State of California)
ex rel. Edmund G. Brown Jr.,)
Attorney General,)
)
Plaintiff,)

v.	)
	)
Native Wholesale Supply Company,	)
a corporation, and Does 1 through	)
20 inclusive,	)
Defendant.	)
	)

Department Assignments
Case Management 39
Law and Motion 54
Minors Compromise 22

COMPLAINT FOR INJUNCTION, CIVIL PENALTIES, CONTEMPT AND OTHER RELIEF

Plaintiff People of the State of California, through Edmund G. Brown Jr., Attorney General of the State of California, allege as follows:

NATURE OF ACTION

Since at least January 2004, defendant Native Wholesale Supply Company (Native Wholesale), a cigarette importer headquartered in New York state, has been selling tens of millions of Seneca and Opal brand cigarettes each year to businesses in California. None of these cigarettes are lawful for sale in California because neither their Canadian manufacturer, Grand River Enterprises/6 Nations, Ltd., (Grand River or Grand River Enterprises) nor the Seneca and Opal brands have ever been listed on California's Tobacco Directory. Since June 29, 2004, no one may lawfully sell cigarettes in California unless both the brand and the manufacturer are listed on the

Directory, which the Attorney General maintains, based upon whether the manufacturer is in compliance with state financial responsibility laws. (Rev. & Tex. Code, § 30165.1.)

In addition, neither Seneca nor Opal brand cigarettes comply with the ignition-propensity standards and related requirements for cigarettes sold in California, established by the California Cigarette Fire Safety and Firefighter Protection Act (Health & Saf. Code, § 14950 et seq.). Since January 31, 2007, no one may lawfully sell cigarettes that do not comply with this Act.

Since at least January 2004, Native Wholesale has also been violating federal law by shipping cigarettes in interstate commerce to persons or entities in California that are not licensed as cigarette distributors by the California Board of Equalization but failing to report such shipments to the Board, as required by the Jenkins Act (15 U.S.C. § 375 et seq.).

Native Wholesale's violations of state and federal law constitute unfair competition pursuant to California's Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq.), which prohibits unlawful business acts or practices.

Native Wholesale's actions also violate injunctions issued by the Superior Court in and for the County of Sacramento against Grand River Enterprises, that enjoin Grand River from selling any cigarettes in California "either directly or through a distributor, retailer or other intermediary" because with knowledge of these injunctions Native Wholesale has acted as an

agent or intermediary for Grand River and aided and abetted Grand River in the sale of cigarettes in California.

PARTIES

1. The People of the State of California act through their duly elected Attorney General, Edward G. Brown Jr., the chief law officer of the state. (Cal. Const., art. 5, § 13.)

2. The Attorney General is charged with administering the tobacco directory law (Rev. & Tax. Code, § 30165.1) and may bring actions to enforce this law.

3. Health and Safety Code section 14955(f) authorizes the Attorney General to bring actions on behalf of the people of the state to restrain violations of the California Cigarette Fire Safety and Firefighter Protection Act (Health & Saf. Code § § 14955, subd. (f).)

4. Business and Professions Code section 17204 authorizes the Attorney General to bring actions to enforce the California Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq.).

5. Defendant Native Wholesale Supply Company is a closely held corporation chartered by the Sac and Fox Tribe of Oklahoma. On information and belief, Native Wholesale has its principal place of business in the state of New York.

6. The true names and capacities of defendants sued in this complaint under the fictitious names of Does 1 through 20, inclusive, are unknown to plaintiff

who therefore sues such defendants by such fictitious names. Plaintiff will amend this complaint to show the true names of each when the same has been ascertained. Defendants sued herein as Does 1 through 20 are, and at all relevant times were, engaged with defendant Native Wholesale in the activities and conduct complained of herein.

7. Whenever reference is made in this Complaint to any act of Native Wholesale, such allegations shall mean that Native Wholesale through its agents, employees, or representatives, did or authorized such acts while actively engaged in the management, direction or control of the affairs of Native Wholesale's cigarette importing business and while acting within the scope and course of their duties.

8. At all relevant times, each of the defendants has acted as an agent, representative, employee, servant, partner, franchisee, affiliate, successor or joint venturer of each of the other defendants and has acted within the course and scope of such agency, representation, employment, service, partnership, franchise or joint venture.

JURISDICTION AND VENUE

9. The violations of law alleged in this complaint occurred in Sacramento County and in other counties in California or occurred outside of California but were intended by defendants to have effects in California. This court has personal jurisdiction over defendant Native Wholesale because defendant sold, offered for sale and profited from the sale of cigarettes to persons within the state of California, thus transacting

business within this state and purposely and voluntarily availing itself of the privilege of conducting activities within the state of California.

10. Venue is proper in this county pursuant to Code of Civil Procedure section 395(a) because defendant Native Wholesale is not a ·resident of California.

FACTUAL ALLEGATIONS

11. Since at least January 1, 2004, Native Wholesale has been importing into the United States cigarettes manufactured by Grand River Enterprises in Canada, including Seneca and Opal brand cigarettes.

12. Since at least January 1, 2004, Native Wholesale has been shipping or causing to be shipped cigarettes manufactured by Grand River Enterprises from the Nevada International Trade Corporation, a Foreign Trade Zone located in Las Vegas, Nevada, to persons or businesses located in California, including but not limited to Big Sandy Rancheria, sometimes also known as BSR Distributing, in Auberry, California, and Huber Enterprise in Loleta, California.

13. During the past four calendar years, Native Wholesale shipped or caused to be shipped into California at least the following amounts of Seneca and Opal brand cigarettes manufacturer by Grand River Enterprises:

- 2004 9,896,000 cigarettes (30 shipments)
- 2005 37,798,000 cigarettes (46 shipments)
- 2006 72,690,000 cigarettes (58 shipments)

- 2007 79,110,000 cigarettes (63 shipments; 58 since January 31, 2007)

14. From January 1, 2008, through May 14, 2008, Native Wholesale shipped or caused to be shipped at least 31,782,000 Seneca and Opal brand cigarettes into California (17 shipments), of which 19,512,000 cigarettes (9 shipments) occurred after March 12, 2008.

15. Since the California Tobacco Directory was first established and posted on the Attorney General's public web site, on June 29, 2004, Seneca brand cigarettes have never been listed on the Directory.

16. Since the California Tobacco Directory was first established and posted on the Attorney General's public web site, on June 29, 2004, Opal brand cigarettes have never been listed on the Directory.

17. Since the California Tobacco Directory was first established and posted on the Attorney General's public web site, on June 29, 2004, Grand River Enterprises has never been listed on the California Tobacco Directory.

18. At all times relevant to this complaint, Big Sandy Rancheria has not been licensed by the California Board of Equalization as a cigarette distributor.

19. At one or more locations on tribal land in Auberry, California, Big Sandy Rancheria sells and offers for retail sale to non-Indians cigarettes manufactured by Grand River Enterprises that Big Sandy Rancheria has purchased from Native Wholesale.

20. Plaintiff is informed and believes that Big Sandy Rancheria distributes to other persons and businesses for retail sale to non-Indians in California cigarettes manufactured by Grand River Enterprises that Big Sandy Rancheria has purchased from Native Wholesale.

21. Native Wholesale knows or should know that Big Sandy Rancheria is selling and offering for retail sale to non-Indians in California and distributing to other persons and businesses for retail sale to non-Indians cigarettes manufactured by Grand River Enterprises that Big Sandy Rancheria has purchased from Native Wholesale.

22. At all times relevant to this complaint, Huber Enterprise, a business located on Wyot Indian Table Bluff land, has not been a California licensed cigarette distributor.

23. At a retail location in Loleta, California, Huber Enterprise sells and offers for retail sale to non-Indians cigarettes manufactured by Grand River Enterprises that Huber Enterprise has purchased from Native Wholesale.

24. Plaintiff is informed and believes that Huber Enterprise distributes to other persons and businesses for sale at retail to non-Indians in California cigarettes manufactured by Grand River Enterprises that Huber Enterprise has purchased from Native Wholesale.

25. Native Wholesale knows or should know that Huber Enterprise is selling and offering for retail sale in California to non-Indians and distributing to other persons and business for retail sale to non-Indians

cigarettes manufactured by Grand River Enterprises that Huber Enterprise has purchased from Native Wholesale.

26. Native Wholesale has not reported to the California Board of Equalization any of its cigarette shipments to Big Sandy Rancheria or Huber Enterprise.

27. Grand River Enterprises has never certified to the State Fire Marshal that any of the cigarettes it manufactures, including its Seneca and Opal brand cigarettes, meet the ignition-propensity standards established by the California Legislature in the California Cigarette Fire Safety and Firefighter Protection Act (Health & Saf. Code, §§ 14950 - 14960).

28. On December 14, 2004, the Superior Court in and for the County of Sacramento in case number 02AS07518, entitled People of the State of California, *ex rel.* Bill Lockyer, Attorney General, v. Grand River Enterprises/6 Nations Ltd., etc., entered a final judgment enjoining Grand River Enterprises for a period of two years from selling any cigarettes in California "either directly or through a distributor, retailer or other intermediary."

29. On December 19, 2006, the Superior Court in and for the County of Sacramento in case number 05AS04121, entitled People of the State of California, *ex rel.* Bill Lockyer, Attorney General, v. Grand River Enterprises/6 Nations Ltd., etc., entered a final judgment enjoining Grand River Enterprises for a period of two years from selling any cigarettes in

California "either directly or through a distributor, retailer or other intermediary."

30. On October 29, 2007, the Superior Court in and for the County of Sacramento in case number 05AS01688, entitled People of the State of California, *ex rel.* Bill Lockyer, Attorney General, v. Grand River Enterprises/6 Nations Ltd., etc., entered a final judgment enjoining Grand River Enterprises for a period of two years from selling any cigarettes in California "either directly or through a distributor, retailer or other intermediary."

31. On March 7, 2008, the California Attorney General's Office mailed a letter, certified mail, return receipt requested, to the president of Native Wholesale Supply Company, Arthur Montour. A true and correct copy of this letter and of the return receipt, signed on March 12, 2008, by Tricia Thomas are attached to this Complaint as Exhibit A and incorporated in this complaint as though fully set forth. Among other things, the letter notified Native Wholesale of the injunction described in paragraph 30, above, and asked Native Wholesale to confirm that it has ceased shipping Grand River cigarettes into the state of California.

32. Despite having received the letter described in paragraph 31, above, Native Wholesale has continued to ship for sale in California Seneca and Opal brand cigarettes from the Nevada International Trade Corporation to Big Sandy Rancheria and Huber Enterprise, in knowing violation of the October 29, 2007, injunction, described in paragraph 30, above.

31. Plaintiff is informed and believes and on that basis alleges that since at least January 1, 2004, Native Wholesale and Grand River have operated under an agreement or business arrangement by which Native Wholesale imports into the United States and distributes to persons or businesses operating on Indian land in California and other states cigarettes manufactured by Grand River.

FIRST CAUSE OF ACTION

(Violation of California Tobacco Directory Law, against All Defendants)

34. Plaintiff realleges and incorporates by reference paragraphs 1 through 33 of this complaint.

35. California's tobacco directory law, Revenue and Taxation Code section 30165.1, subdivision (e)(2), prohibits any person from selling cigarettes or offering cigarettes for sale in California unless both the manufacturer and the cigarette brand meet the conditions for listing on the directory and, in fact, are listed on the directory at the time they are sold or offered for sale. (Rev. & Tax. Code, § 30165.1.)

36. California's tobacco directory law, Revenue and Taxation Code section 30165.1, subdivision (e)(3)(A), prohibits any person from selling or distributing cigarettes that the person knows or should know are intended to be distributed in violation of subdivision (e)(2).

37. California's tobacco directory law, Revenue and Taxation Code section 30165.1, subdivision (e)(3)(B), prohibits any person from acquiring, holding,

owning, possessing, transporting, importing or causing to be imported cigarettes that the person knows or should know are intended to be distributed in violation of subdivision (e)(2).

38. Since June 29, 2004, and continuing to the present, defendant Native Wholesale has sold, held, owned, possessed, imported, or caused to be imported cigarettes manufactured by Grand River Enterprises that Native Wholesale knew or should have known do not meet the conditions for listing on the directory and, in fact, have never been listed on the directory.

39. Defendant Native Wholesale's sales of and other activities relating to cigarettes of tobacco product manufacturers or brand families that are not included in California's tobacco directory violate Revenue and Taxation Code section 30165.1, subdivisions (e)(2) and (3).

SECOND CAUSE OF ACTION

(Violation of the California Cigarette Fire Safety and Firefighter Protection Act, against All Defendants)

40. The People reallege and incorporate by reference paragraphs 1 through 33 of this complaint.

41. Section 14951, subdivision (a) of the California Cigarette Fire Safety and Firefighter Protection Act prohibits any person from se1ling, offering, or possessing for sale in California cigarettes not in compliance with the testing, certification and marking requirements of subdivision (a) of section

14952, subdivision (b) of section 14952, section 14953 and section 14954 of the Act.

42. Any person who sells cigarettes in California, other than at retail, in violation of the Act is subject to a civil penalty of up to $10,000 for each sale. (Section 14955, subd. (a).)

43. Plaintiff is informed and believes and on that basis alleges that none of the cigarettes defendant Native Wholesale has sold to Big Sandy Rancheria and Huber Enterprise since February 1, 2007, have been tested, certified or marked as required by subdivision (a) of section 14952, subdivision (b) of section 14952, section 14953 and section 14954 of the Act.

THIRD CAUSE OF ACTION

(Contempt for Violation of Injunctions Against Grand River Enterprises, against All Defendants)

44. The People reallege and incorporate by reference paragraphs 1 through 33 of this complaint.

45. Since at least March 12, 2008, the day Native Wholesale received notice from the Attorney General's Office of the court injunction, entered on October 29, 2007, that enjoins Grand River Enterprises from selling cigarettes in California either directly or through an intermediary, defendant Native Wholesale has knowingly acted as an intermediary for and in concert or participation with Grand River by selling cigarettes manufactured by Grand River in California; has knowingly violated the injunction; and is subject to remedies for contempt.

46. Since December 14, 2004, Native Wholesale has acted as an agent or intermediary for Grand River Enterprises or has otherwise aided and abetted Grand River Enterprises in violating the court injunctions entered against Grand River on October 29, 2007, December 19, 2006, and December 14, 2004, respectively, by shipping Seneca and Opal brand cigarettes to persons and businesses in California for sale in California.

47. The People are informed and believe and on that basis allege that Native Wholesale had actual knowledge of each of these injunctions from at or about the time the People served Grand River Enterprises with notice of their entry and that despite that knowledge Native Wholesale acting for and in concert or participation with Grand River has shipped Seneca and Opal brand cigarettes to persons and businesses in California for sale in California; and as such Native Wholesale is in contempt of each of these injunctions.

FOURTH CAUSE OF ACTION

(Violations of California Unfair Competition Law against All Defendants)

48. The People reallege and incorporate by reference paragraphs 1 through 45 of this complaint.

49. Pursuant to Business and Professions Code section 17203, the court may enjoin any person who engages, has engaged or proposes to engage in unfair competition.

50. Pursuant to Business and Professions Code section 17206, any person who engages, has engaged,

or proposes to engage in unfair competition shall be liable for a civil penalty up to $2,500 for each violation.

51. A violation of subdivision (e) of section 30165.1 of the Revenue and Taxation Code constitutes unfair competition under section 17200 of the Business and Professions Code. (Section 30165.1, subd. (1).)

52. Defendant Native Wholesale has engaged in acts of unfair competition prohibited by California's unfair competition law (Business and Professions Code section 17200 et seq.) in that Native Wholesale has:

A. Sold cigarettes to persons and businesses in California for resale in California in violation of California's tobacco directory law (Rev. & Tax. Code, § 30165.1) because neither the cigarette brands nor their manufacturer have ever been listed on the California tobacco directory, as alleged in the first cause of action, above;

B. Sold cigarettes to persons and businesses in California for resale in California in violation of the California Cigarette Fire Safety and Firefighter Protection Act (Health & Saf. Code, §§ 14950-14960) because the cigarettes have not been tested, certified or marked as required by subdivision (a) of section 14952, subdivision (b) of section 14952, section 14953 and section 14954 of the Act, as alleged in the second cause of action, above;

C. As an agent or intermediary for, or aiding and abetting, Grand River Enterprises to sell cigarettes in California in violation of court injunctions entered against Grand River

Enterprises selling cigarettes directly or through an intermediary; and,

D. Shipped cigarettes to persons or entities in California that are not licensed cigarette distributors and failing to report such shipments to the California Board of Equalization in violation of the federal Jenkins Act, 15 U.S.C. § 375 et seq.

PRAYER FOR RELIEF

The People pray for the following relief:

1. That, pursuant to Business and Professions Code section 17203, the court enjoin defendants, their successors, employees, agents, representatives, and all other persons acting in concert with them, from engaging in unfair competition as defined in Business and Professions Code section 17200 and specifically from the following acts and practices:

A. Selling to persons and businesses in California for resale in California any cigarettes whose brand family and manufacturer are not listed on the California tobacco directory, as required by California's tobacco directory law (Rev. & Tax. Code, § 30165.1);

B. Selling to persons and businesses in California for resale in California any cigarettes that do not comply with the California Cigarette Fire Safety and Firefighter Protection Act (Health & Saf. Code, §§ 14950-14960), including but not limited to the testing, certification, and marking requirements of subdivision (a) of section 14952,

subdivision (b) of section 14952, section 14953 and section 14954 of the Act;

C. Acting as an agent or intermediary for, or otherwise aiding and abetting, Grand River Enterprises to sell cigarettes in California in violation of court injunctions prohibiting Grand River from selling cigarettes in California; and,

D. Shipping cigarettes to persons or entities in California that are not licensed cigarette distributors and then failing to report such shipments to the California Board of Equalization in violation of the federal Jenkins Act, 15 U.S.C. § 375 et seq.

2. That, pursuant to Health and Safety Code section 14955(f), the court preliminarily and permanently enjoin defendants, their successors, employees, agents, representatives, and all other persons acting in concert with them, from selling or offering for sale cigarettes that do not comply with the California Cigarette Fire Safety and Firefighter Protection Act (Health & Saf. Code, §§ 14950-14960), including but not limited to the testing, certification, and marking requirements of subdivision (a) of section 14952, subdivision (b) of section 14952, section 14953 and section 14954 of the Act;

3. That, pursuant to Business and Professions Code section 17206, the court assess against defendants a civil penalty of $2,500 for each act of unfair competition, as alleged in the complaint, in a total amount to be determined by proof but not less than

$507,500, based on 211 separate shipments of cigarettes from January 1, 2004 through May 14, 2008.

4. That, pursuant to Health and Safety Code section 14955(a), the court assess against defendants a civil penalty of $10,000 for each sale of cigarettes that did comply with the California Cigarette Fire Safety and Firefighter Protection Act, in a total amount to be determined by proof, but not less than $750,000, based on at least 75 shipments from after January 31, 2007, to May 14, 2008.

5. That the court find defendants in contempt of the court's prior injunctions and impose an appropriate monetary fine on Native Wholesale.

6. That, pursuant to Revenue and Taxation Code section 30165.1(p), Health and Safety Code section 14955(f), and Code of Civil Procedure section 1218, the court award the People costs of investigation, expert witness fees, costs of the action, and reasonable attorney's fees.

7. That the court retain jurisdiction of this action.

8. That the court order defendant Native Wholesale to disclose any and all information needed to enforce a judgment and/or injunction.

9. That the court award such other and further relief as is appropriate and just.

Dated: June 30, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

J. MATTHEW RODRIQUEZ
Chief Assistant Attorney General

DENNIS ECKHART
Senior Assistant Attorney General

/s/Dennis Eckhart

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Senior Assistant Attorney General
Attorneys for Plaintiff
People of the State of California

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