APPENDIX

APPENDIX

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United States Court of Appeals
for the Second Circuit

AUGUST TERM 2020

ARGUED: OCTOBER 15, 2020 DECIDED: FEBRUARY 8, 2021

NO. 20-1044-CV

GRAND RIVER ENTERPRISES SIX NATIONS, LTD.,
Plaintiff-Appellant,

– v. –

MARK BOUGHTON, COMMISSIONER, CONNECTICUT DEPARTMENT OF REVENUE SERVICES,
Defendant-Appellee.*

BEFORE:
LOHIER, WALKER, *Circuit Judges*, and STANCEU, *Judge*.**

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* The Clerk of Court is directed to amend the caption as set forth above.

** Chief Judge Timothy C. Stanceu, of the United States Court of International Trade, sitting by designation.

Plaintiff-Appellant Grand River Enterprises Six Nations, Ltd. ("Grand River" or "GRE") appeals from a September 27, 2018 judgment of the United States District Court for the District of Connecticut (Warren W. Eginton, *Judge*) dismissing its action pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim on which relief can be granted and a March 3, 2019 judgment (Jeffrey A. Meyer, *Judge*) denying its motion for reconsideration.

Grand River, a Canadian cigarette manufacturer, sued Defendant-Appellee Mark Boughton, the Commissioner of the Connecticut Department of Revenue Services ("DRS"), raising constitutional challenges to a Connecticut statute (the "Reconciliation Requirement," Conn. Gen. Stat. § 4-28m(a)(3)) that imposes certain reporting requirements upon Grand River as a prerequisite to the sale of GRE's cigarette brands in Connecticut. Grand River claimed the Reconciliation Requirement violates its due process rights and the Supremacy and Commerce Clauses of the United States Constitution.

We agree with the District Court that Grand River's Second Amended Complaint fails to state a claim upon which relief can be granted and, accordingly, **AFFIRM** the judgments of the District Court.

ERICK M. SANDLER, Day Pitney LLP, Hartford, CT (Stanley A. Twardy, Jr., Day Pitney LLP, Stamford, CT and Matthew J. Letten, Day Pitney LLP, Hartford, CT, *on the brief*), *for Plaintiff-Appellant*.

HEATHER J. WILSON, Assistant Attorney General, Hartford, CT (Joseph J. Chambers, Assistant Attorney General, *on the brief*), *for Defendant-Appellee.*

STANCEU, *Judge*:

The majority of cigarettes sold in the United States are produced by manufacturers that have entered into a "Master Settlement Agreement" ("Agreement") with a coalition of state attorneys general. Manufacturers that participate in the Agreement ("Participating

Manufacturers") are subject to various requirements, including restrictions on their advertising practices and the obligation to make certain payments to state governments to offset harms caused by smoking. To preserve a level playing field, the Agreement incentivizes states that have signed the Agreement to impose by statute a slate of restrictions and obligations on manufacturers that choose not to participate ("Nonparticipating Manufacturers").

Connecticut, a signatory to the Agreement, imposes upon Nonparticipating Manufacturers a reporting requirement known as the "Reconciliation Requirement." Described in brief summary, the Reconciliation Requirement directs each Nonparticipating Manufacturer to report annually to Connecticut's Department of Revenue Services its total nation-wide sales of cigarettes on which federal excise tax is paid, its total interstate cigarette sales, and its total intrastate cigarette sales. The Reconciliation Requirement is met if the total nation-wide sales of a manufacturer's cigarettes do not exceed the sum of the interstate and intrastate sales by more than 2.5%. If this threshold is exceeded, the manufacturer must explain to the State's satisfaction the reason for the discrepancy in order for its cigarette brands to be sold within the State.

Grand River, a Nonparticipating Manufacturer, brought an action in the District Court raising constitutional challenges to the Reconciliation Requirement, claiming it abridges GRE's rights under the Fourteenth Amendment Due Process Clause of the U.S. Constitution (and also under the Connecticut State Constitution) for lack of a rational justification and also is in violation of the Commerce and Supremacy Clauses of the U.S. Constitution. Concluding to the contrary, we hold that the Reconciliation Requirement has a rational relationship to the State's legitimate interests in collecting excise taxes and combatting cigarette smuggling that satisfies both federal and state due process requirements. We hold, further, that Connecticut has violated neither the Commerce Clause nor the Supremacy Clause by imposing the Reconciliation Requirement on a Nonparticipating Manufacturer as a condition of permitting that manufacturer's brands to be sold within the State. For these reasons, we **AFFIRM** the judgments of the District Court.

I. BACKGROUND

A. The Master Settlement Agreement

In November 1998, four of the largest tobacco manufacturers in the United States and the attorneys general of forty-six states,[1] five territories, and the District of Columbia executed the Master Settlement Agreement, which sought to supplant further state lawsuits against tobacco advertising practices and to require tobacco manufacturers to pay damages to compensate states for healthcare costs resulting from smoking-related conditions. Beyond the four original signatory manufacturers, other tobacco manufacturers since

[1] Four states, Florida, Minnesota, Mississippi, and Texas, had reached individual state-level agreements with tobacco manufacturers prior to the Master Settlement Agreement.

have signed the Agreement, and as a result the vast majority of cigarette sales in this country are of brands owned by Participating Manufacturers.

Participating Manufacturers agreed, *inter alia*, to restrict advertising and sponsorships, to dissolve three tobacco-related trade organizations, and to accept restrictions on lobbying and trade association activities. They also agreed to fund a youth smoking prevention organization and to make payments to the settling states in perpetuity, in amounts determined by each manufacturer's market share (with a system for adjusting these payments based on future sales).

To ensure that Nonparticipating Manufacturers do not gain a competitive advantage over Participating Manufacturers, the Agreement incentivizes signatory states such as Connecticut to impose by statute certain obligations on Nonparticipating Manufacturers. Among other things, signatory states require Nonparticipating

Manufacturers to deposit into escrow certain amounts, based on sales figures, to satisfy potential claims for damages resulting from cigarette smoking, as a parallel to the market share payment obligations to which the Participating Manufacturers agreed to be bound. *See* Master Settlement Agreement § IX(d)(2)(B). Some states also impose additional requirements, such as the Reconciliation Requirement at issue here.

B. The Reconciliation Requirement

In Connecticut, tobacco manufacturers may not sell cigarettes in the State unless their cigarette brands are listed in a "Directory" published by the DRS. Conn. Gen. Stat. § 4-28m. To be included in the Directory, a Participating Manufacturer must be "generally perform[ing] its financial obligations under the Master Settlement Agreement." *Id.* § 4-28i(a)(1)(A). In contrast, a Nonparticipating Manufacturer must satisfy the escrow payments described above and comply with additional statutory requirements, including the Reconciliation Requirement. *Id.* § 4-28l(a), (d).

The Reconciliation Requirement provides in pertinent part as follows:

> The commissioner shall not include or retain in the directory any brand family of a nonparticipating manufacturer if the commissioner concludes . . . a nonparticipating manufacturer's total nation-wide reported sales of cigarettes on which federal excise tax is paid exceeds the sum of (i) its total interstate sales, as reported under 15 USC 375 et seq., as from time to time amended, or those made by its importer, and (ii) its total intrastate sales, by more than two and one-half per cent of its total nation-wide sales during any calendar year, unless the nonparticipating manufacturer cures or satisfactorily explains the discrepancy not later than ten days after receiving notice of the discrepancy.

Id. § 4-28m(a)(3). Connecticut asserts that the purpose of the Reconciliation Requirement is to prevent Nonparticipating Manufacturers from diverting cigarettes into an illicit market that harms Connecticut residents and reduces the State's ability to collect taxes and escrow payments.

C. The Proceedings in the District Court

On June 29, 2016, Grand River commenced an action in the District of Connecticut against the Acting Commissioner of the DRS ("Commissioner") to challenge the Reconciliation Requirement. GRE amended its complaint on December 1, 2016. On February 17, 2017, the Commissioner filed a motion to dismiss the action under Federal Rule of Civil Procedure 12(b)(6). On July 5, 2017, the District Court denied this first motion to dismiss. After Grand River filed a second amended complaint on September 5, 2017, the Commissioner, on November 17, 2017, again moved to dismiss under Rule 12(b)(6). On September 26, 2018, the District Court granted this motion, holding that the Reconciliation Requirement does not violate the Due Process, Supremacy, or Commerce Clauses. The District Court also denied Grand River's claim for a declaratory judgment that it is in compliance with the Reconciliation Requirement. The District Court entered judgment on September 27, 2018. On October 3, 2018, GRE moved for reconsideration of the dismissal of its claims under the Commerce Clause and the Supremacy Clause in the District Court, a motion the District Court denied on March 3, 2020. This appeal followed.

II. DISCUSSION

We exercise appellate jurisdiction according to 28 U.S.C. § 1291. We review *de novo* the granting of a motion to dismiss, accepting all factual allegations in the Amended Complaint as true and drawing all inferences in favor of the nonmoving party. *Littlejohn v. City of New York*, 795 F.3d 297, 306 (2d Cir. 2015). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks and citation omitted).

Grand River argues on appeal that the District Court erred in holding that the Reconciliation Requirement does not violate substantive due process and is not prohibited by the Commerce or

Supremacy Clauses of the U.S. Constitution.[2] In the alternative, Grand River argues that the District Court erred in denying relief on its claim for a declaratory judgment that GRE is in compliance with the Reconciliation Requirement. The Commissioner disputes Grand River's arguments and further asserts that GRE lacks standing to pursue this appeal. We address each of these arguments below.

A. Article III Standing

The Commissioner argues that we should dismiss this appeal for lack of Article III standing, arguing that Grand River, being currently listed in the Directory, suffers no injury in fact. While Grand River's second amended complaint alleges that it has incurred

[2] GRE also argues that the District Court erred in holding that the Reconciliation Requirement does not violate substantive due process under the Connecticut Constitution. The requirements to state a violation of substantive due process under the Connecticut Constitution are the same as the requirements under the U.S. Constitution, so we analyze both claims under the same framework. *See Ramos v. Town of Vernon*, 254 Conn. 799, 837, 761 A.2d 705, 727 (2000) (noting the coextensive nature of state and federal due process protections while holding open the option to expand the Connecticut Constitution's due process rights in the future).

substantial costs to comply with the Reconciliation Requirement, the Commissioner asserts that Grand River has failed to plead these costs with sufficient particularity to meet its burden. We disagree with the Commissioner and conclude that Grand River has adequately pleaded an injury in fact sufficient to confer Article III standing.

The constitutional minimum of Article III standing is well established. To meet its burden, a plaintiff must show that it has "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *John v. Whole Foods Mkt. Grp., Inc.*, 858 F.3d 732, 736 (2d Cir. 2017) (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016)). The Supreme Court has instructed that an "injury in fact" is an invasion of a legally protected interest that is both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks omitted). When "a plaintiff is himself an object of the action (or foregone action) at issue . . . there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." *Id.* at 561–62.

A regulated entity may plead an "injury in fact" by plausibly alleging compliance costs associated with an increased regulatory burden. The Third Circuit has referred to economic injury in the form of "compliance costs" as "a classic injury-in-fact," *Am. Farm Bureau Fed'n v. EPA*, 792 F.3d 281, 293 (3d Cir. 2015), and the Fifth Circuit has held that "[a]n increased regulatory burden typically satisfies the injury in fact requirement," *Contender Farms, L.L.P. v. U.S. Dep't of Agric.*, 779 F.3d 258, 266 (5th Cir. 2015). The D.C. Circuit, as well, has applied *Lujan* to confer Article III standing on directly regulated entities that "must incur costs to ensure that they are properly complying with the terms" of a new regulatory regime. *State Nat'l Bank of Big Spring v. Lew*, 795 F.3d 48, 53 (D.C. Cir. 2015)

(Kavanaugh, J.). Although we have addressed this issue only in passing, *see Bridgeport & Port Jefferson Steamboat Co. v. Bridgeport Port Auth.*, 567 F.3d 79, 86 (2d Cir. 2009), the decisions of our sister circuits reflect a nearly uniform approach with which we agree. *See, e.g.*, *City of Kennett v. EPA*, 887 F.3d 424, 431 (8th Cir. 2018); *Weaver's Cove Energy, LLC v. Rhode Island Coastal Res. Mgmt. Council*, 589 F.3d 458, 467 (1st Cir. 2009).

Applying these standards, we have little difficulty concluding that Grand River has standing to pursue its claims. As a Nonparticipating Manufacturer, Grand River is the object of Connecticut's Reconciliation Requirement. It alleges that it "has expended over $300,000 in seeking and obtaining approval to be listed on the Tobacco Directory, and has invested a similar amount in regulatory and compliance fees and payments since obtaining such approval." Second Am. Compl. ¶ 9; *see also id.* ¶¶ 35, 36. Because at the pleading stage we "presum[e] that general allegations embrace those specific facts that are necessary to support the claim," we reasonably infer that some of these costs were incurred to comply with the Reconciliation Requirement and that Grand River's compliance costs will continue so long as it remains subject to the regulation. *John*, 858 F.3d at 737 (alteration in original) (quoting *Lujan*, 504 U.S. at 561). These allegations suffice to plead an injury in fact that is fairly traceable to the Commission's enforcement of the Reconciliation Requirement and would be redressed by a favorable judicial decision.

B. Substantive Due Process

Grand River claims that the Reconciliation Requirement violates the substantive guarantees of the Due Process Clause, U.S. CONST. amend. XIV, § 1. On appeal, GRE argues, first, that it has a protected interest in maintaining its current listing in the Directory and, second, that the Reconciliation Requirement is arbitrary and irrational and thereby fails the rational basis test. In considering this issue, we assume (as did the District Court), without deciding, that Grand River has a constitutionally protected interest in maintaining its listing in the Directory, which is necessary for it to continue to market cigarettes in Connecticut. We proceed to consider, therefore, whether the Reconciliation Requirement is "rationally related to a legitimate state interest." *Lange-Kessler v. Dep't of Educ.*, 109 F.3d 137, 140 (2d Cir. 1997).

It scarcely can be argued that Connecticut lacks a legitimate state interest in preventing smuggling and tax evasion that affects, or potentially affects, the distribution within its borders of cigarettes, an extensively taxed product with adverse health effects. The inquiry relevant to GRE's substantive due process claim is, therefore, whether the Reconciliation Requirement is rationally related to that state interest. Grand River offers three arguments to challenge that conclusion: (1) that the Reconciliation Requirement is arbitrary in affecting only Nonparticipating Manufacturers, (2) that it also is arbitrary in pursuing a national accounting of sales while

Connecticut's interest is limited to preventing illicit sales within the State, and (3) that no evidence proves the Reconciliation Requirement in fact reduces cigarette smuggling.

The logic of the Reconciliation Requirement is apparent from the types of reporting it seeks. Federal excise taxes are paid when a cigarette is manufactured in, or imported into, the United States, at which point it enters the flow of commerce in this country, *see* 26 U.S.C. § 5701(b), while state tobacco taxes typically are charged when cigarettes enter retail sale and thereby leave the flow of commerce, *see, e.g.*, Conn. Gen. Stat. § 12-430(8). The Reconciliation Requirement directs a Nonparticipating Manufacturer to report how many of its cigarettes entered the flow of commerce, when federal excise tax was charged, and then how many left the flow of commerce with, presumably, state taxes properly paid. We do not view it as irrational or arbitrary for a state legislature to conclude that data allowing a comparison of the quantities of a manufacturer's cigarettes entering

U.S. commerce with the quantities leaving U.S. commerce can reveal possible smuggling activity. A discrepancy between a manufacturer's data sets, unless explained, is a potential indicator of state tax evasion involving cigarettes diverted from the legitimate flow of commerce for eventual untaxed sale. In combatting cigarette smuggling, federal law employs a similar logic as to the use of data on quantities of cigarettes in commerce. The Prevent All Cigarette Trafficking Act ("PACT Act"), 15 U.S.C. § 375 *et seq.*, directs that reports of the quantities of cigarettes shipped into each state be reported to that state's tobacco tax administrator (as well as to localities and Indian tribes that charge tobacco taxes) for comparison with state and local records.

Grand River's argument that the Reconciliation Requirement fails rational basis review for arbitrarily affecting only Nonparticipating Manufacturers is not convincing. Participating Manufacturers are subject to information collection under the Agreement. *See* Master Settlement Agreement § II(jj). This causes us to conclude that limiting the effect of the Reconciliation Requirement to Nonparticipating Manufacturers does not invalidate it for arbitrariness.

Nor are we persuaded by GRE's argument that Connecticut improperly collects nationwide information from a manufacturer when its interest is confined to illicit sales within its own borders. If a manufacturer's cigarettes are diverted from the stream of legitimate commerce anywhere in the United States, it is rational, and not arbitrary, for a state legislature to anticipate that the diverted cigarettes may cause harm in that state.

Finally, Grand River's argument that the Reconciliation Requirement has not been demonstrated to prevent smuggling is unavailing. Rational basis review is not a post-hoc test of the effectiveness of a legislative policy. *See Beatie v. City of New York*, 123 F.3d 707, 712 (2d Cir. 1997) ("We will not strike down a law as irrational simply because it may not succeed in bringing about the result it seeks to accomplish." (citing *Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 50 (1966)). Rather, we examine whether, at enactment, there is a rational link between the harm a statute is intended to remedy and the method by which a legislature chooses to address it. *See F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313–14, (1993) (requiring only "'plausible reasons'" for legislative action under rational basis review (quoting *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980))). Grand River cannot demonstrate that it is irrational or arbitrary for a state legislature to regard unexplained discrepancies between quantities of cigarettes entering, and leaving, U.S. commerce as a potential subject of investigation that could uncover illegal activity affecting that state.

Of course, there are legitimate reasons why reporting under the Reconciliation Requirement that exceeds the 2.5% threshold might not indicate smuggling activity. Among other things, the number of cigarettes reported on federal excise tax forms may conflict with the number of cigarettes reported pursuant to the PACT Act because

PACT Act filings exclude intrastate sales, cigarette inventory, and—as Grand River argues—sales within "Indian Country." But notably, the Reconciliation Requirement affords a Nonparticipating Manufacturer the opportunity to explain any discrepancies before imposing the sanction of de-listing from the Directory. Conn. Gen. Stat. § 4-28(m)(3). Even for manufacturers that routinely report a discrepancy of greater than 2.5%, the expectation that the Commissioner will scrutinize the discrepancy may encourage accurate record-keeping practices that could reduce the number of cigarettes diverted to an illicit market.

In summary, we find no error in the District Court's dismissal of Grand River's claim that the Reconciliation Requirement is constitutionally impermissible on substantive due process grounds.

C. The Dormant Commerce Clause

Grand River argues that the Reconciliation Requirement violates the "dormant" (or "negative") Commerce Clause, which is an implied limitation on a state's power to regulate commerce outside its borders stemming from the grant to the federal government of the power to "regulate commerce . . . among the several states." U.S. CONST. art. I, § 8, cl. 3. GRE maintains that the Reconciliation Requirement impermissibly regulates its out-of-state commercial business decisions by forcing it to choose importers and distributors that will provide it with their business records, including federal excise tax records and PACT Act reports, so that Grand River can comply with the reporting demanded by the Reconciliation Requirement.

A state law may run afoul of the dormant Commerce Clause if it "clearly discriminates against interstate commerce in favor of intrastate commerce[,] . . . if it imposes a burden on interstate commerce incommensurate with the local benefits secured" when viewed according to the balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), or "if it has the practical effect of extraterritorial control of commerce occurring entirely outside the boundaries of the state in question." *Grand River Enters. Six Nations, Ltd. v. Pryor*, 425

F.3d 158, 168 (2d Cir. 2005) (quoting *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 216 (2d Cir. 2004)). Of these three possible grounds, Grand River confines its arguments to the third, extraterritoriality. Relying on *Healy v. Beer Institute, Inc.*, 491 U.S. 324 (1989), GRE argues that the statute must be invalidated as impermissibly extraterritorial because its practical effect is to control conduct outside the borders of Connecticut. Specifically, Grand River contends that the "practical effect" of the Reconciliation Requirement is to require each of its U.S. importers, including those who do no business in Connecticut, to provide the State with records on the number of cigarettes on which the importers paid federal excise tax and the number of cigarettes each importer sold into interstate and intrastate commerce for each year.

Grand River thus grounds its theory of extraterritoriality in the effect Connecticut's Reconciliation Requirement has upon its importers, even though the directly regulated party is Grand River itself. The practical effect of the Reconciliation Requirement on interstate commerce, being indirect as well as incidental to the purpose of the statute, is not analogous to that of the economic regulation held to violate the dormant Commerce Clause in *Healy*, the principal case Grand River cites as authority for its position. *Healy* invalidated a Connecticut statute requiring out-of-state shippers of beer to affirm that their prices for beer sold to Connecticut wholesalers, at the time of posting, were no higher than the prices at which the products were sold in bordering states. 491 U.S. at 337. The pricing decisions of out-of-state wholesalers were directly controlled by this price-regulating provision, which the Supreme Court held to have had the impermissible effect of controlling the wholesalers' commercial pricing and marketing activity that occurred outside of Connecticut. *Id.* "Moreover, the practical effect of this affirmation law, in conjunction with the many other beer-pricing and affirmation laws that have been or might be enacted throughout the country, is to create just the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude." *Id.* Here, the Reconciliation Requirement does not have, and is not intended to have, a controlling effect on the cigarette sales transactions involving the importers. Its reach is to the post-sale reporting of transactions. The effect on the importers, if any, is only incidental to the purpose of the Reconciliation Requirement, which is to allow for investigation of cigarette smuggling with the potential to affect adversely the State of Connecticut. Moreover, the adoption of this or similar reporting by other states would not constitute the "competing and interlocking local economic regulation" of a kind found objectionable by the Supreme Court in *Healy*. *Id.*; *see also id.* at 336 (considering "what effect would arise if not one, but many or every, State adopted similar legislation"). To the contrary, it is akin to the very sort of regulation that we have previously permitted. *See VIZIO, Inc. v. Klee*, 886 F.3d 249, 256 (2d Cir. 2018) (holding that Connecticut's E-Waste law, which calculates fees based on national market share data, "does nothing to *control* interstate commerce, but rather merely *considers* out-of-state activity in imposing in-state charges").

Grand River also cites *American Booksellers Foundation v. Dean*, 342 F.3d 96 (2d Cir. 2003), but that decision too is inapposite. In *American Booksellers Foundation*, we held that a Vermont statute prohibiting internet dissemination of sexually explicit materials harmful to minors had an extraterritorial effect prohibited by the dormant Commerce Clause. We reasoned that Vermont had projected "onto the rest of the nation" its prohibition on the dissemination of that material through the internet. 342 F.3d at 103. "Although Vermont aims to protect only Vermont minors, the rest of the nation is forced to comply with its regulation or risk prosecution." *Id.* Connecticut's Reconciliation Requirement does not seek to, and in practical effect does not, project onto the rest of the nation a scheme to prohibit cigarette sales or regulate the commercial terms of them and instead requires reporting of those sales, regardless of the terms, after the fact.

Grand River also cites, unavailingly, *Edgar v. MITE Corp.*, 457 U.S. 624, 642–43 (1982), which, unlike the Reconciliation Requirement, involved a state statute that directly regulated interstate commerce. In *Edgar*, the Supreme Court invalidated an Illinois statute that granted state officials authority to block corporate takeovers by regulating tender offers and that applied even where all the shareholders were residents of other states. Stating that the Commerce Clause "permits only *incidental* regulation of interstate commerce by the States" and that "direct regulation is prohibited," the Supreme Court held that the Illinois statute violated the Commerce Clause because it "directly regulates and prevents, unless its terms are satisfied, interstate tender offers which in turn would generate interstate transactions."[3] 457 U.S.

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[3] The Supreme Court concluded that the Illinois statute also was precluded by the Commerce Clause under the balancing test of *Pike* because it imposed burdens on interstate commerce that were excessive in light of the local interests of the Act in protecting resident security holders and regulating the corporate affairs of companies incorporated under Illinois law. *See Edgar v. MITE Corp.*, 457 U.S. 624, 643–46 (1982). Grand River makes no argument invoking the *Pike* balancing test.

at 640. While it requires reporting of interstate transactions, the Reconciliation Requirement neither regulates nor precludes them.

In summary, we conclude that the District Court correctly held that the Reconciliation Requirement is not prohibited by the dormant Commerce Clause.

D. Supremacy Clause

Grand River also claims that the Reconciliation Requirement violates the Supremacy Clause, U.S. CONST. art. VI, cl. 2, because the Reconciliation Requirement is preempted by the PACT Act and it is impossible for Grand River to comply with both statutes. Specifically, Grand River contends that this impossibility arises because (1) Grand River cannot reconcile its nationwide sales of cigarettes against interstate sales reported pursuant to the PACT Act, and (2) the Reconciliation Requirement uses PACT Act reports for purposes that are prohibited by federal law. According to GRE, this is a case in which "state law penalizes what federal law requires." Appellant's Br.

53 (quoting *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 725 F. 3d 65, 97 (2d Cir. 2013) ("*MTBE*")).

We review a district court's application of preemption principles *de novo*. *New York SMSA Ltd. P'ship v. Town of Clarkstown*, 612 F.3d 97, 103 (2d Cir. 2010) (per curiam) ("*SMSA*"). The doctrine of federal preemption provides that "[u]nder the Supremacy Clause of the Constitution, state and local laws that conflict with federal law are without effect." *Id.* (internal quotation marks omitted). In *SMSA*, we described the three general types of preemption:

> (1) express preemption, where Congress has expressly preempted local law; (2) field preemption, where Congress has legislated so comprehensively that federal law occupies an entire field of regulation and leaves no room for state law; and (3) conflict preemption, where local law conflicts with federal law such that it is impossible for a party to comply with both or the local law is an obstacle to the achievement of federal objectives.

Id. at 104 (internal quotation marks omitted). Grand River's argument is, essentially, that the Reconciliation Requirement violates the

Supremacy Clause due to "impossibility" preemption, the first of two types of conflict preemption, which is where "local law conflicts with federal law such that it is impossible for a party to comply with both." *Id.* For a plaintiff to establish impossibility preemption, "it must show that federal and state laws 'directly conflict.'" *MTBE*, 725 F.3d at 99 (quoting *Am. Tel. & Tel. Co. v. Cent. Office Tel., Inc.*, 524 U.S. 214, 227 (1998)).

We do not find merit in plaintiff-appellant's preemption argument. As is pertinent here, the PACT Act requires reporting by "[a]ny person who sells, transfers, or ships for profit cigarettes or smokeless tobacco in interstate commerce . . . or who advertises or offers cigarettes or smokeless tobacco for such a sale, transfer, or shipment." 15 U.S.C. § 376(a). A party regulated thereunder must file with the tobacco tax administrator of the state into which a shipment was made (and to the administrators and law enforcement officers of local governments and Indian tribes that apply their own tobacco taxes) a memorandum listing the recipient's name and address, the brands and quantities of cigarettes (or smokeless tobacco) shipped, and the information of the shipper acting on behalf of the delivery seller. *Id.*

Grand River argues that even if its importers file all reports required by the PACT Act, the figures Grand River submits to Connecticut's Department of Revenue Services to comply with the Reconciliation Requirement inevitably will not reconcile within the 2.5% margin. GRE explains that the PACT Act reporting does not apply, for example, to sales taking place within a single state and to sales of cigarettes distributed exclusively within Indian Country. This argument is unconvincing because a Nonparticipating Manufacturer need not achieve actual, numerical reconciliation within the 2.5% variance in order to achieve compliance with the Reconciliation Requirement; the statute affords the Nonparticipating Manufacturer the opportunity to "satisfactorily explain[] the discrepancy." Conn. Gen. Stat. § 4-28(m)(3). Grand River in fact has maintained its listing in the Directory during the pendency of this litigation. Therefore, we do not agree with Grand River's view that the federal and state statutes "directly conflict" or that the Reconciliation Requirement "penalizes what federal law requires." *MTBE*, 725 F.3d at 97, 99. Instead, the Reconciliation Requirement and the PACT Act can "stand together" as reporting requirements. *Id.* at 102.

As a second argument under the Supremacy Clause, Grand River maintains that the Reconciliation Requirement violates the PACT Act by using PACT Act reports for impermissible purposes. We are unconvinced by this argument as well. PACT Act reports may be used "solely for the purposes of the enforcement of this chapter and the collection of *any* taxes owed on related sales of cigarettes and smokeless tobacco." 15 U.S.C. § 376(c) (emphasis added). The Reconciliation Requirement uses PACT Act reporting for a purpose—the investigation of possible tax evasion involving cigarettes—expressly contemplated by the PACT Act.

E. Grand River's Request for a Declaratory Judgment

Grand River sought a declaratory judgment that it is in compliance with the Reconciliation Requirement in the District Court, in the event the Reconciliation Requirement is upheld as constitutional. On appeal, Grand River argues that the District Court erred in dismissing its request for a declaratory judgment as moot. We review a District Court's decision to refuse to issue a declaratory judgment for abuse of discretion. *Dow Jones & Co. v. Harrods Ltd.*, 346 F.3d 357, 359 (2d Cir. 2003).

Grand River seeks a declaratory judgment on the ground that it has provided adequate reasons why it cannot reconcile its federal excise tax and state sales figures and, therefore, is entitled to a decision that it is in compliance with the Reconciliation Requirement. GRE currently is listed in the Directory and so has complied with the Reconciliation Requirement for the most recent year. In the future, should the State of Connecticut rule that Grand River is no longer in compliance with the Reconciliation Requirement, Grand River might be in a position to pursue its potential administrative and judicial remedies in contesting that determination. The administrative determination of whether GRE has "satisfactorily explained" any discrepancies is for the DRS to make in the first instance for each year for which Grand River seeks listing in the Directory. It was not an abuse of discretion for the District Court to decline to make this determination.

III. CONCLUSION

We hold that Connecticut's Reconciliation Requirement is rationally related to the State's legitimate interest in preventing evasion of state tobacco taxes and, therefore, does not violate GRE's due process rights, that any incidental burdens the Reconciliation Requirement imposes on interstate commerce do not have an impermissible extraterritorial reach inconsistent with the dormant Commerce Clause, and that the Reconciliation Requirement is not preempted by federal law so as to violate the Supremacy Clause. We further hold that the District Court's decision to not issue Grand River a declaratory judgment was a permissible exercise of its discretion.

For the foregoing reasons, we **AFFIRM** the September 27, 2018 and March 3, 2019 judgments of the District Court.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GRAND RIVER ENTERPRISES SIX NATIONS LTD, Plaintiff,	:	
v.	:	3:16-cv-01087-WWE
KEVIN B. SULLIVAN, Commissioner of Revenue Services of the State of Connecticut, Defendant.	:	

MEMORANDUM OF DECISION ON DEFENDANT'S MOTION TO DISMISS

Plaintiff Grand River Enterprises Six Nations LTD alleges that defendant Kevin B. Sullivan, as Commissioner of Revenue Services, threatens to revoke plaintiff's license to have its tobacco products sold in Connecticut based upon plaintiff's inability to reconcile nationwide sales with federal interstate shipping reports. Plaintiff asserts that removal from the State's Tobacco Directory under these circumstances would violate its constitutional right to due process, as well as the Supremacy Clause and the Commerce Clause of the United States Constitution.

Defendant has moved to dismiss plaintiff's second amended complaint in its entirety. For the following reasons, defendant's motion will be granted.

BACKGROUND

The following background is taken from plaintiff's second amended complaint, which is accepted as true for purposes of this decision.

Plaintiff's claims focus principally on recent amendments to Conn. Gen. Stat. § 4-28m(a)(3). The amendments first took effect with respect to plaintiff's Connecticut state regulatory filings that were submitted on April 30, 2016. The amendments purport to authorize revocation of plaintiff's right and license to have its tobacco products sold in Connecticut if plaintiff's regulatory filings cannot reconcile the number of products sold nationwide by importers of its products (as measured by the importer's national federal excise tax returns) with the number of products shipped by these importers throughout the United States in Interstate Commerce (as evidenced by federal shipping reports required under federal law). The amendments thus purport to permit revocation of plaintiff's license in Connecticut based on the ability to reconcile two sets of federal regulatory filings of independent, third parties (importers), under two separate federal laws that federal law itself does not require to be reconciled.

The federal tax laws measure the volume of cigarettes entered into U.S. commerce nationwide, while the federal shipping laws require reporting of tobacco products shipped or sold nationwide in "Interstate Commerce," which does not include products shipped intrastate or within or among Indian Country (as that term is defined under federal law) after importation into the United States. The federal shipping law at issue requires that Connecticut receive certain reports each month for sales and shipments into Connecticut, and Connecticut may use the information contained in such reports only for the purpose of enforcing that federal law. The information received must be kept confidential according to the federal law's confidentiality requirements.

Without prejudice to its rights and in accordance with the amendments, plaintiff has provided defendant with federal tax returns and federal shipping reports filed by those importers in 2015 and 2016 that operated outside of Native American land (as requested by defendant); however, the numbers of cigarettes reported in each set of reports cannot be reconciled with the total number of cigarettes imported into the U.S., because three importers do not file shipping reports (as they distribute plaintiff's products solely within

Indian Country); and a number of plaintiff's products after entering U.S. commerce are sold and shipped exclusively intrastate (for which no federal shipping report is required) or are held in inventory that carries over from prior years or is carried over until the next calendar year.

Plaintiff alleges that defendant's threat of revocation of plaintiff's license under these circumstances violates its right to substantive due process, the Commerce Clause, and the Supremacy Clause of the United States Constitution, as well as the Connecticut Constitution equivalent.

DISCUSSION

At the outset, defendant argues that plaintiff lacks standing because it has alleged no concrete injury. Citing to paragraphs 9 and 32 of its second amended complaint, plaintiff responds that it has pleaded factual allegations of particularized injury in the form of substantial costs expended in complying with the Commissioner's demands, which are allegedly based on unconstitutional interpretation of § 4-28m(a)(3)(C). Although the second amended complaint does allege that plaintiff "has expended over $300,000 in seeking and obtaining approval to be listed on the Tobacco Directory," it does not specifically attribute any portion of that cost to compliance with the statutory provision at issue, Conn. Gen. Stat. § 4-28m(a)(3)(C). Plaintiff maintains that a "fair reading" of the second amended complaint should presume that plaintiff's alleged economic injuries are fairly traceable to complying with § 4-28m(a)(3)(C). Assuming that plaintiff has adequately alleged standing, or that it could amend its complaint to do so, the second amended complaint will nevertheless be dismissed for the reasons that follow.

Due Process

Defendant argues that plaintiff's due process claim should fail because plaintiff has no protected property or liberty interest in being listed on the State's Tobacco Directory. Moreover, defendant contends that plaintiff can seek review of any future denial in both state administrative and judicial fora. Finally, defendant submits that, regardless of plaintiff's property interest in a license or its available remedies upon a denial, § 4-28m(a)(3)(C) satisfies the rational basis standard of review.

Plaintiff responds that it has a due process interest in its license to sell tobacco based upon the issuing authority's lack of discretion to deny the benefit. See Mordukhaev v. Daus, Fed. Appx. 16, 18 (2d Cir. 2012) ("[T]he existence of an entitlement turns on whether the issuing authority lacks discretion to deny [the benefit], *i.e.,* is required to issue it upon ascertainment that certain objectively ascertainable criteria have been met."). Plaintiff asserts that the entire process is unconstitutional, regardless of state administrative and judicial remedy. Plaintiff argues that regardless of the State's proffered motives for § 4-28m(a)(3)(C), the statute is an irrational and arbitrary means of achieving these interests because the inability to reconcile the numbers in question is a result of federal law and has no bearing on whether the manufacturer's cigarettes were diverted to the illicit market.

Defendant submits that there is a rational relationship between § 4-28m(a)(3)(C) and a legitimate legislative purpose: Lawmakers sought to grant state certification only to those manufacturers that can effectively track their cigarette sales, and can demonstrate, through diligent recordkeeping, that the vast majority of their cigarettes are being sold to distributors or retailers that comply with applicable federal and state reporting and taxation requirements.

> By requiring nonparticipating manufacturers to demonstrate that they can track virtually all of their cigarettes from the point of manufacture or importation to the point of retail sale, Connecticut hopes to reduce state tax

> evasion; increase compliance with the State's escrow statute, Conn. Gen. Stat. § 4-28i; and protect Connecticut residents from the many adverse public health effects, such as smoking initiation by minors, that are likely to occur wherever illegal, artificially underpriced, cigarettes are available.

Pl.'s Mem. 14 [ECF No. 82, Ex. 1].

Accepting that these are legitimate state interests, plaintiff attacks defendant's reconciliation requirement as a means of supporting them.

Section 4-28m(a)(3) provides in relevant part:

> (3) The commissioner shall not include or retain in the directory any brand family of a nonparticipating manufacturer if the commissioner concludes … (C) a nonparticipating manufacturer's total nation-wide reported sales of cigarettes on which federal excise tax is paid exceeds the sum of (i) its total interstate sales, as reported under 15 USC 375 et seq. [PACT Act] , as from time to time amended, or those made by its importer, and (ii) its total intrastate sales, by more than two and one-half per cent of its total nation-wide sales during any calendar year, unless the nonparticipating manufacturer cures or satisfactorily explains the discrepancy not later than ten days after receiving notice of the discrepancy.

Plaintiff submits that the PACT Act exempts intrastate shipments and shipments within Indian Country from its reach, so plaintiff cannot reconcile the number of cigarettes reported on its importers' excise tax forms with the number reported on their PACT Act forms as required by § 4-28m(a)(3)(C). But plaintiff all but ignores the provision allowing manufacturers to explain such a discrepancy to the commissioner. Indeed, plaintiff labels the § 4-28m(a)(3)(C)'s requirement as impossible, yet plaintiff has been repeatedly certified to the Tobacco Directory based upon defendant's exercise of discretion in accepting plaintiff's explanations.

Section 4-28m(a)(3)(C)'s reconciliation requirement is not irrational merely because plaintiff has a satisfactory explanation for its disparity. Some manufacturers may lack a good explanation; for others, reconciliation *is* possible, as would be the case in the absence of intrastate or Indian Country shipments (presuming no other nefarious activity). Given the deferential standard, § 4-28m(a)(3)(C) can be viewed as rational means to reduce tax evasion; increase compliance with the escrow statute, and protect Connecticut residents from the many adverse public health effects of tobacco.

> Thus, it may be seen that today it is very difficult to overcome the strong presumption of rationality that attaches to a statute. We will not strike down a law as irrational simply because it may not succeed in bringing about the result it seeks to accomplish, *Seagram & Sons, Inc. v. Hostetter,* 384 U.S. 35, 50, 86 S.Ct. 1254, 1263, 16 L.Ed.2d 336 (1966), because the problem could have been better addressed in some other way, *Mourning,* 411 U.S. at 378, 93 S.Ct. at 1665 or because the statute's classifications lack razor-sharp precision, *Dandridge,* 397 U.S. at 485, 90 S.Ct. at 1161. Nor will a statute be overturned on the basis that no empirical evidence supports the assumptions underlying the legislative choice. *Vance,* 440 U.S. at 110–11, 99 S.Ct. at 949–50. To succeed on a claim such as this, "those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Id.* at 111, 99 S.Ct. at 949.

Beatie v. City of New York, 123 F.3d 707, 712 (2d Cir. 1997). Plaintiff's complaint fails plausibly to allege that § 4-28m(a)(3)(C) cannot satisfy the rational basis standard of review. See Alliance of Auto. Mfrs., Inc. v. Currey, 610 Fed. Appx. 10, 14 (2d Cir. 2015). Accordingly, plaintiff's due process claim will be dismissed.

Supremacy Clause

Defendant argues that Congress intended to support rather than displace state or local laws that regulate and control the sale of cigarettes. The Supreme Court has instructed courts to presume that federal statutes do not preempt state law. See Bond v. U.S., 134 S.Ct. 2077, 2088-89 (2014) ("[I]t is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the usual constitutional balance of federal and state powers.").

Plaintiff responds that the Supremacy Clause restricts the power of states to adopt policies that conflict with federal laws. When a federal statute does not contain an express preemption provision, state law nevertheless must yield to federal law if Congress has evinced an intent that federal law is to occupy the field, or if there is an actual conflict between state and federal law. See Altria Group, Inc. v. Good, 555 U.S. 70, 76-77 (2008). Plaintiff submits that the reconciliation requirement of § 4-28m(a)(3)(C) is preempted by the PACT Act because it is impossible for plaintiff to comply with both statutes.

> As discussed previously, § 4-28m(a)(3)(C) purports to require cigarette manufacturers to reconcile within two and one-half percent of cigarettes reported for federal excise tax purposes with the number reported, in effect, under the PACT Act. The PACT Act, on the other hand, makes this reconciliation impossible in certain circumstances because certain sales and shipments of cigarettes are exempt from the reporting requirements.

Pl.'s Resp. 27 [ECF No. 86].

The Court is not persuaded that § 4-28m(a)(3)(C) and the PACT Act are in conflict. Defendant points out that plaintiff has continuously complied with the challenged statute for the past two years, as have the other three similarly situated manufacturers that are listed on the Connecticut Tobacco Directory. Moreover, the parties agree that plaintiff is in compliance with the PACT Act, so plaintiff's compliance with § 4-28m(a)(3)(C) has not somehow forced it to violate federal regulations. Plaintiff is listed on the Directory in part due to its compliance with both statutes, so the argument that dual compliance is impossible is unavailing. Plaintiff's Supremacy Clause claim, based on alleged conflict between federal and state law, will be dismissed.

Commerce Clause

Defendant argues that plaintiff's allegations are inadequate to state a plausible Commerce Clause violation.

> The Supreme Court has recognized that "there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it." *Kassel v. Consol. Freightways Corp. of Del.,* 450 U.S. 662, 669, 101 S.Ct. 1309, 67 L.Ed.2d 580 (1981) (internal quotation marks omitted). Accordingly, "[t]he Commerce Clause does not ... invalidate all State restrictions on commerce." *Id.* A state statute or regulation may violate the dormant

> Commerce Clause only if it (1) "clearly discriminates against interstate commerce in favor of intrastate commerce," (2) "imposes a burden on interstate commerce incommensurate with the local benefits secured," or (3) "has the practical effect of 'extraterritorial' control of commerce occurring entirely outside the boundaries of the state in question." *Freedom Holdings Inc. v. Spitzer,* 357 F.3d 205, 216 (2d Cir.2004).

Selevan v. New York Thruway Authority, 584 F.3d 82, 90 (2d Cir. 2009).

Defendant contends that plaintiff has failed to alleged that the operation of § 4-28m(a)(3)(C) leads to any of the three possible kinds of prohibited consequences outlined above. Moreover, the dormant Commerce Clause's limitation on state power is not absolute. See Lewis v. BT Investment Mgrs., Inc., 447 U.S. 27, 36 (1980) ("In the absence of conflicting federal legislation the States retain authority under their general police powers to regulate matters of legitimate local concern, even though interstate commerce may be affected.").

Plaintiff responds that the practical effect of § 4-28m(a)(3)(C) is to control conduct beyond the boundaries of the State, in violation of the third prong of the dormant Commerce Clause. See VIZIO, Inc. v. Klee, 886 F.3d 249, 255 (2d Cir. 2018) ("A state law has unconstitutional extraterritorial effect if its practical effect ... is to control conduct beyond the boundaries of the State."). In an attempt to characterize § 4-28m(a)(3)(C) as directing plaintiff's conduct, plaintiff contends that, as a condition to having its products sold in Connecticut, it must either refrain from selling its products to parties that conduct business exclusively within the boundaries of another state or require such out of state importers to submit to the Commissioner's regulatory authority. But as VIZIO demonstrates, mere consideration of out-of-state or nationwide activity does not violate the extraterritoriality doctrine. Id. at 255-57. Indeed, the statute at issue in VIZIO not only required consideration of out-of-state commerce but also imposed in-state charges based on that conduct. Nevertheless, the Second Circuit found VIZIO's extraterritoriality arguments unavailing:

> VIZIO argues that the state's fee structure is pegged to VIZIO's national activities, which will inevitably affect its television prices outside Connecticut. VIZIO attempts to characterize this as control, arguing that Connecticut's E–Waste Law, "individually and collectively with other states' e-waste laws, is establishing a piecemeal pricing mechanism for interstate goods." But this practical effect amounts to no more than "upstream pricing impact" because the law does not go "a step further [and] control[ ] in-state and out-of-state pricing ...." *Spitzer*, 357 F.3d at 221. As such, Connecticut's E–Waste Law is merely one of "innumerable valid state laws affect[ing] pricing decisions in other States." *Healy*, 491 U.S. at 345, 109 S.Ct. 2491 (Scalia, J., concurring in part and concurring in the judgment) (cautioning against allowing Commerce Clause jurisprudence to "degenerate into disputes over degree of economic effect."). VIZIO has not alleged that Connecticut reaches out and directs VIZIO's decision-making apparatus or that of any other interstate commercial participant.

Id. at 256.

Here, defendant highlights that § 4-28m(a)(3)(C) is merely a reporting requirement pertaining to sales transactions that have already occurred; it has no substantive impact whatsoever on those transactions themselves, so the Commissioner cannot be said to have directed plaintiff's out-of-state conduct. See SPGGC, LLC v. Blumenthal, 505 F.3d 183, 193 (2d Cir. 2007) ("A state law may burden interstate commerce when it has the practical effect of requiring out-of-state commerce to be conducted at the regulating state's direction."). Accordingly, plaintiff's Commerce Clause claim will be dismissed.

Declaration of Compliance

For its fourth and final claim, plaintiff seeks a declaration that it has complied with § 4-28m(a)(3)(C). Plaintiff submits that it has provided the commissioner with a detailed and satisfactory explanation of the reasons why the number of cigarettes for which federal excise tax was paid cannot be reconciled for purposes of § 4-28m(a)(3)(C) with the number of cigarettes for which the PACT Act reports were filed within the applicable margin.

Defendant argues that this claim should be dismissed, as plaintiff has already received from defendant confirmation of its compliance with § 4-28m(a)(3)(C) for the 2016-17 certification year and the 2017-18 certification year. Plaintiff responds that confirmation of compliance does not render its claim for declaratory judgment moot because the offensive conduct is capable of repetition yet evading review. See Murphy v. Hunt, 455 U.S. 478, 482-83 (1982). Plaintiff's argument is not persuasive in the instant circumstances. While defendant's conduct is capable of repetition, in light of this decision, it has not evaded review. Moreover, if defendant were to revoke plaintiff's license based on future noncompliance with § 4-28m(a)(3)(C), plaintiff could challenge the revocation at that time. Accordingly, plaintiff's claim for declaration of compliance with be dismissed.

CONCLUSION

For the foregoing reasons, defendant's motion to dismiss is GRANTED. The Clerk is instructed to close this case.

Dated this 26th day of September, 2018, at Bridgeport, Connecticut.

/s/Warren W. Eginton
WARREN W. EGINTON
SENIOR UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GRAND RIVER ENTERPRISES
SIX NATIONS LTD,
Plaintiff,

V. CASE No. 3:16 CV 1087 (WWE)

KEVIN B. SULLIVAN
Defendant.

JUDGMENT

This matter came on for consideration of the defendant's motion to dismiss the second amended complaint doc. #82 before the Honorable Warren W. Eginton, Senior United States District Judge. The Court has reviewed all of the papers filed in conjunction with the motion and on September 26, 2018 a ruling entered granting the relief requested.

It is therefore ORDERE ADJUDGED and DECREED that judgment is entered in favor of the defendant Kevin B. Sullivan and the case is closed.

Dated at Bridgeport, Connecticut, this 27th day of September 2018.

ROBIN D. TABORA, Clerk

By /s/ Kristen Gould
Kristen Gould
Deputy Clerk

EOD:9/27/2018

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GRAND RIVER ENTERPRISES SIX NATIONS, LTD., *Plaintiff*,	
v.	No. 3:16-cv-01087 (JAM)
JOHN BIELLO, Acting Commissioner, Connecticut Department of Revenue Services, *Defendant*.	

RULING DENYING MOTION FOR RECONSIDERATION

Plaintiff Grand River Enterprises Six Nations, Ltd. ("GRE") has filed this lawsuit against the defendant Commissioner of the Connecticut Department of Revenue Services ("the Commissioner") to challenge a Connecticut statute that regulates the sale of cigarettes.[1] In order to deter "black market" cigarette sales, the Connecticut statute—Conn. Gen. Stat. § 4-28m(a)(3)(C)—requires the reporting of nationwide sales and shipping information by certain kinds of cigarette manufacturers including GRE.

GRE alleges that the Connecticut statute violates the Due Process Clause, the Commerce Clause, and the Supremacy Clause. Judge Eginton granted the Commissioner's motion to dismiss the complaint. *See Grand River Enterprises Six Nations Ltd. v. Sullivan*, 2018 WL 4623024 (D. Conn. 2018). GRE has filed a motion for reconsideration, and the case was later transferred to me. For the reasons set forth below, I will deny GRE's motion for reconsideration.

[1] The case was originally captioned "Kevin B. Sullivan, Commissioner of Revenue Services of the State of Connecticut." Since the filing of the case, John Biello has been appointed the Acting Commissioner of Revenue Services of the State of Connecticut, and he is substituted as the defendant pursuant to Fed. R. Civ. P. 25(d).

BACKGROUND

The Commissioner of the Department of Revenue Services maintains a "Tobacco Directory" of manufacturers who are authorized to sell their brands of cigarettes in Connecticut. *See* Conn. Gen. Stat. § 4-28m. The eligibility requirements for the Tobacco Directory depend in large part on whether a particular cigarette manufacturer has opted to comply with the terms of a nationwide Master Settlement Agreement ("MSA"), an omnibus settlement into which most States and the leading cigarette manufacturers entered in 1998. The MSA resolved legal claims by the States against cigarette manufacturers for the public health costs of smoking-related illnesses. A major part of the MSA was to require cigarette manufacturers who chose to participate in the MSA (so-called "participating manufacturers") to make regular payments into a settlement fund on the basis of their volume of cigarette sales. *See S&M Brands, Inc. v. Georgia ex rel. Carr*, 925 F.3d 1198, 1201 (11th Cir. 2019).

Not all cigarette manufacturers have chosen to participate in the MSA, and GRE is one of the so-called "nonparticipating manufacturers." As a nonparticipating manufacturer, GRE is subject to separate statutory requirements to make payments into Connecticut's escrow fund based on the number of cigarettes sold in-state, which serve as security for any future smoking-related damages claims. *See* Conn. Gen. Stat. § 4-28i, § 4-28*l* (describing state escrow requirements and annual certification requirements applicable to "participating" and "nonparticipating" manufacturers); *see also Grand River Enterprises Six Nations, Ltd. v. Pryor*, 425 F.3d 158, 162-64 (2d Cir. 2005) (describing operation of the MSA and regulatory consequences for both "participating" and "nonparticipating" manufacturers).

Over the years GRE has filed many challenges to the MSA and to related statutes that regulate its activities as a nonparticipating manufacturer. *See, e.g.*, *Grand River Enter. Six*

Nations, Ltd. v. Pryor, 481 F.3d 60, 62 & n. 1 (2d Cir. 2007) (*per curiam*) (listing lawsuits by GRE). In this action GRE focuses on recent amendments to Conn. Gen. Stat. § 4-28m(a)(3)(C), which applies to nonparticipating manufacturers like GRE.

Section 4-28m(a)(3)(C) provides in relevant part that the Commissioner of Revenue Services may not include or retain on the Tobacco Directory any brand family of a nonparticipating manufacturer if the Commissioner concludes there is an unsatisfactory discrepancy between the reported number of a non-participating manufacturer's cigarettes that have been *sold* nationwide and those that have been *shipped* nationwide. *Ibid.* The statute provides for the measurement of this sales-vs.-shipping discrepancy by reference to cigarette sales as shown on federal excise tax returns and by reference in part to interstate cigarette shipments that are reported under a separate federal statute, known as the Prevent All Cigarette Trafficking Act (the "PACT Act"), 15 U.S.C. § 375 *et seq.*[2]

As Judge Eginton observed in his initial ruling, the "legitimate legislative purpose" for section 4-28m(a)(3)(C) is "to grant state certification only to those manufacturers that can

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[2] Conn. Gen. Stat. § 4-28m(a)(3)(C) provides as follows:

> The commissioner [of Revenue Services in Connecticut] shall not include or retain in the directory any brand family of a nonparticipating manufacturer if the commissioner concludes … (C) a nonparticipating manufacturer's total nation-wide reported sales of cigarettes on which federal excise tax is paid exceeds the sum of (i) its total interstate sales, as reported under 15 U.S.C. § 375 *et seq*., as from time to time amended, or those made by its importer, and (ii) its total intrastate sales, by more than two and one-half per cent of its total nation-wide sales during any calendar year, unless the nonparticipating manufacturer cures or satisfactorily explains the discrepancy not later than ten days after receiving notice of the discrepancy.

Although the statute on its face requires a comparison only of cigarette "sales" figures, GRE alleges that the underlying records referenced by the statute reflect "shipment" figures, thus entailing a comparison between sales figures and shipment figures. GRE's second amended complaint alleges that the statute "purport[s] to authorize revocation of Plaintiff's right and license to have its tobacco products sold in Connecticut, if Plaintiff's regulatory filings cannot reconcile the number of products *sold* nationwide by importers of its products (as measured by the importer's national federal excise tax returns) with the number of products *shipped* by these importers throughout the United States in Interstate Commerce (as evidenced federal shipping reports required under federal law)." Doc. #74 at 1 (¶ 2) (emphasis added).

effectively track their cigarette sales, and can demonstrate, through diligent recordkeeping, that the vast majority of their cigarettes are being sold to distributors or retailers that comply with applicable federal and state reporting and taxation requirements." *Grand River Enterprises*, 2018 WL 4623024, at *2. Hence, the statute serves Connecticut's interest in deterring contraband cigarette sales—sales that evade state taxation as well as diminish payments to the escrow fund for any future damages claims.

To verify a nonparticipating manufacturer's certification of compliance pursuant to section 4-28*l*, section 4-28m(a)(3)(C) requires the Commissioner to reach a conclusion about whether there is an unsatisfactory discrepancy between reported sales and shipments. *See* Conn. Gen. Stat. § 4-28m(a)(3)(C), § 4-28*l*(a) & (d)(3) (requiring certification by nonparticipating manufacturer with terms of regulatory statute including section 4-28m). If there is a discrepancy, it is undisputed that the Commissioner may seek additional information from nonparticipating manufacturers such as GRE in order to determine whether any such discrepancy can be satisfactorily explained.

GRE's second amended complaint alleges that section 4-28m(a)(3)(C) violates the Due Process Clause, the Commerce Clause, and the Supremacy Clause. Doc. #74. Judge Eginton rejected all these claims and granted the Commissioner's motion to dismiss. *Grand River Enterprises*, 2018 WL 4623024; Doc. #100.

GRE's motion for reconsideration seeks reconsideration of just two aspects of Judge Eginton's ruling. Doc. #102. First, GRE seeks reconsideration of the dismissal of its Commerce Clause claim insofar as Judge Eginton ruled that the Connecticut law did not improperly regulate extraterritorial conduct. Second, GRE seeks reconsideration of the dismissal of its Supremacy Clause claim, arguing that the prior ruling improperly relied on extrinsic evidence that may not be considered at the stage of a preliminary motion to dismiss. My ruling here will address only these two reconsideration arguments.

DISCUSSION

Motions for reconsideration are disfavored unless a party can show that the Court overlooked facts or law in a manner that has led to a clear error or manifest injustice. A motion for reconsideration is not an occasion for a losing party simply to re-litigate arguments that were previously raised and considered by the Court. *See generally Analytical Surveys, Inc. v. Tonga Partners, L.P.*, 684 F.3d 36, 52 (2d Cir. 2012); *Shrader v. CSX Transp.*, 70 F.3d 255, 257 (2d Cir. 1995).

Commerce Clause

GRE argues that section 4-28m(a)(3)(C) imposes reporting requirements that amount to extraterritorial control over the business activities of GRE and third-party importers of GRE's cigarettes outside of Connecticut. Judge Eginton rejected this argument, and GRE argues that in doing so Judge Eginton misapplied the Second Circuit's decision in *VIZIO, Inc. v. Klee*, 886 F.3d 249 (2d Cir. 2018). In *VIZIO*, the Second Circuit dismissed a Commerce Clause challenge to the manner in which Connecticut calculated the fee to be imposed on certain electronics product manufacturers for the costs incurred by the State to recycle their products. In that case, the Connecticut law based the state fee calculation on each manufacturer's national market share rather than each manufacturer's market share only within Connecticut. The *VIZIO* plaintiff argued that to do so was to directly regulate its out-of-state sales and to control its conduct outside of the state's boundaries, and that the state law affected its out-of-state pricing decisions. *VIZIO*, 886 F.3d at 253. According to the Second Circuit, basing the in-state fee on out-of-state sales did not amount to the regulation of conduct occurring outside Connecticut, because the law "does nothing to *control* interstate commerce, but rather merely *considers* out-of-state activity in imposing in-state charges." *Id.* at 256.

Judge Eginton did not misapply *VIZIO* or otherwise err by relying on *VIZIO*. Although the facts and regulatory framework in *VIZIO* are not the same as those presented here, the reasoning of *VIZIO* applies with equal force in this case. Section 4-28m(a)(3)(C) on its face attaches regulatory significance to activity that has occurred outside of Connecticut but does not go so far as to mandate or control any extraterritorial commercial activity. The most that can be said is that section 4-28m(a)(3)(C) tasks GRE with gathering sales or shipping information from out-of-state importers and distributors of its cigarettes so that GRE in turn may certify its compliance with sections 4-28h to 4-28j, inclusive, and submit the required data, if necessary, for the Connecticut Commissioner to evaluate any discrepancy under section 4-28m(a)(3)(C).

"A state law has unconstitutional extraterritorial effect if its 'practical effect … is to control conduct beyond the boundaries of the State.'" *VIZIO*, 886 F.3d at 255 (quoting *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989)). Thus, for example, "the Commerce Clause dictates that no State may force an out-of-state merchant to seek regulatory approval in one State before undertaking a transaction in another." *Grand River*, 425 F.3d at 170 (quoting *Healy*, 491 U.S. at 337); *see also Freedom Holdings, Inc. v. Cuomo*, 624 F.3d 38, 67 (2d Cir. 2010) (same). On the other hand, "[c]ourts have consistently recognized that '[t]he mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids.'" *Ibid.* (quoting *Osborn v. Ozlin*, 310 U.S. 53, 62 (1940)).

Section 4-28m(a)(3)(C) does not control or regulate any of GRE's out-of-state commercial activity. GRE does not point to any precedent to suggest that a State engages in the "control" of conduct beyond its borders when, as GRE alleges here, the State conditions the right of a business to conduct in-state activity on the business's disclosure and reporting of information concerning its out-of-state activities.

It would not violate the Commerce Clause, for example, if Connecticut demanded that an applicant for a business license disclose whether he had been criminally convicted in California. Nor does it make a difference whether section 4-28m(a)(3)(C) may require a manufacturer to gather information about the sale and shipping of its products from its out-of-state business partners (such as requiring GRE to obtain information from GRE's cigarette importers and distributors). Section 4-28m(a)(3)(C) at most creates repercussions for the out-of-state activities of GRE and its importers but falls well short of actually controlling out-of-state business activity in violation of the Commerce Clause.

Moreover, as both the Second Circuit and Supreme Court have made clear, the "practical effect" of a State regulation "must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation," because "[g]enerally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State." *Grand River*, 425 F.3d at 170 (quoting *Healy*, 491 U.S. at 336-37). Here, because section 4-28m(a)(3)(C) requires the reporting of information that is already independently subject to federal reporting requirements (whether on federal excise tax forms or pursuant to PACT), there can be no plausible claim that section 4-28m(a)(3)(C) amounts to an improper projection of Connecticut's regulatory authority to encroach upon any regulatory interests of other States.

Even taking as true GRE's factual allegations in its second amended complaint, any practical effect on GRE's out-of-state activity is necessarily *de minimis* because the information that section 4-28m(a)(3)(C) requires to be reconciled—nationwide transactions of cigarettes as reported in federal reporting forms and under PACT Act—is based on information that GRE must collect from its importers and distributors as a nonparticipating manufacturer who must comply with Connecticut's escrow statute. *See* Doc. #74 at 20 (¶ 91) (alleging in its second amended complaint that GRE has been threatened with removal from the Tobacco Directory "if GRE fails to report to DRS its total nationwide cigarette sales as reported by GRE's importers in their PACT Act reports and their federal tax return information contained in TBB Form 5220.6").[3]

Indeed, as GRE itself alleges in the complaint, a nonparticipating manufacturer like GRE must make escrow payments to each State, and those escrow payments are based on the number of cigarettes sold within each state. Doc. #74 at 5-6 (¶ 19). If GRE's escrow payments to a certain State exceed what it would pay if GRE were a participating manufacturer under the MSA, then GRE would be entitled to a refund. *Ibid*. (citing Conn. Gen. Stat. §§ 4-28h *et seq.* to describe escrow requirements).[4] Yet the amount that GRE would pay if were a participating

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[3] Pursuant to the PACT Act, all persons who sell, transfer, or ship cigarettes in interstate commerce for profit must: (1) register with the tobacco tax administrator of the state into which shipment is made and (2) file monthly reports with the tobacco tax administrator. . . identifying the brands, quantities, and recipients of cigarette and smokeless tobacco shipments into such state. 15 U.S.C. §§ 375, *et seq*. Moreover, the Court takes judicial notice that TTB Form 5220.6—which is expressly referenced in GRE's second amended complaint as part of its Commerce Clause claim—is a monthly submission requiring importers to report the number of cigarettes and other tobacco products. *See* Doc. #74 (¶ 91); Alcohol and Tobacco Tax and Trade Bureau, Form 5220.6, U.S. Department of the Treasury, https://www.ttb.gov/resources/publications/forms; *see also* Doc. #74 (¶¶34-36) (describing GRE's submission of the TTB Forms 5220.6 to the Commissioner in response to its request for its reconciliation data under section 4-28m(a)(3)(C)).

[4] *See* Conn. Gen. Stat. § 4-28i(a)(1) ("Any tobacco product manufacturer selling cigarettes to consumers within this state, whether directly or through a distributor, dealer or similar intermediary or intermediaries, after July 1, 2000, shall (A) become a participating manufacturer . . . or (B) place into a qualified escrow fund not later than April fifteenth of the year following the year in question [$.0188482 per unit sold]."); Conn. Gen. Stat. § 4-28i(b)(2) ("[T]o the extent that a tobacco product manufacturer [that places funds into escrow pursuant to subsection (a) of this section] establishes that the amount it was required to place into escrow on account of units sold in this state in a

manufacturer under the MSA is determined in part by GRE's *national* market share.[5] In other words, to claim credit for any overpayments to the Connecticut escrow account, GRE would necessarily need to rely on its national market share information.

Thus, as the Commissioner notes, "[a]ll of the sales information that Plaintiff must collect from its importers and distributors regarding either interstate sales or intrastate sales of its brands is data that importers and distributors must already submit to state revenue departments pursuant to either federal law (the PACT Act) or state law." Doc. #95 at 12. In light of this regulatory context, it is impossible to conclude that the practical effect of section 4-28m(c)(3)(A) is an improper control by Connecticut of out-of-state business activities. *See Freedom Holdings, Inc. v. Spitzer,* 357 F.3d 205, 220 (2d Cir. 2004) (rejecting Commerce Clause extraterritoriality challenge to New York State cigarette regulation because "[t]he extraterritorial effect described by appellants amounts to no more than the upstream pricing impact of a state regulation").

GRE further argues that Judge Eginton failed to credit the allegations of the complaint as a court is required to do when evaluating a Rule 12 motion to dismiss. But a court is not required to accept legal conclusions or conclusory factual allegations. *See, e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Mastafa v. Chevron Corp.*, 770 F.3d 170, 177 (2d Cir. 2014) (same). Notwithstanding the hyperbole in GRE's complaint about the effect of section 4-28m(a)(3)(C),

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particular year was greater than the Master Settlement Agreement payments, as determined pursuant to section IX(i) of said agreement including after final determinations of all adjustments, that such manufacturer would have been required to make on account of such units sold had it been a participating manufacturer, the excess shall be released from escrow and revert back to such tobacco product manufacturer. . . .").

[5] *See Freedom Holdings*, 624 F.3d at 67 (noting that "escrow payments are still keyed, in part, to MSA payments, which in turn depend on national market share" but rejecting plaintiffs' Commerce Clause challenge to New York's escrow statute); *KT.& G Corp v. Attorney Gen. of State of Okla.*, 535 F.3d 1114, 1143-46 (10th Cir. 2008) (same).

GRE has not alleged facts that give plausible grounds to grant relief in light of the regulatory framework as described above that governs the consideration of its claims.[6]

In short, Judge Eginton correctly concluded that section 4-28m(a)(3)(C) "is merely a reporting requirement pertaining to sales transactions that have already occurred," and "it has no substantive impact whatsoever on those transactions themselves, so the Commissioner cannot be said to have directed plaintiff's out-of-state conduct." *Grand River*, 2018 WL 4623024, at *5. Accordingly, I will deny GRE's motion to reconsider the dismissal of its Commerce Clause claim.

Supremacy Clause

GRE next argues that Judge Eginton erroneously relied on extrinsic evidence to dismiss GRE's claim under the Supremacy Clause that section 4-28m(a)(3)(C) is inconsistent with, and thereby preempted by, the PACT Act. GRE points to a sentence in Judge Eginton's ruling in which he noted that GRE itself "has continuously complied with the challenged statute for the past two years, as have the other three similarly situated manufacturers that are listed on the Connecticut Tobacco Directory." *Grand River*, 2018 WL 4623024, at *4. According to GRE, it

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[6] As the Second Circuit in *VIZIO* explained,

> In *Grand River* [*v. Pryor*], we allowed plaintiffs' extraterritoriality claim to proceed under a national market share theory. [425 F.3d 158, 173 (2d Cir. 2005)]. Unlike the plaintiffs in *Grand River*, however, VIZIO has not made any of the allegations that we suggested in *Grand River* could give rise to a viable claim: "that the [E–Waste Law is] inconsistent with the legitimate regulatory regimes of other states, that the [E–Waste Law] force[s] out-of-state merchants to seek [Connecticut] regulatory approval before undertaking an out-of-state transaction, or that any sort of interstate regulatory gridlock would occur if many or every state adopted similar legislation." *Id*. at 171 (quoting *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 221 (2d Cir. 2004)]).

VIZIO, 886 F.3d at 257. Like the plaintiff in *VIZIO*, GRE does not plausibly make those allegations—that section 4-28m(a)(3)(C) is inconsistent with the regulatory regimes of other states, that it forces out-of-state merchants to seek Connecticut regulatory approval before undertaking an out-of-state transaction, or that any sort of interstate regulatory gridlock would occur if many or every state adopted similar legislation. *See* Doc. #74 at 1-20 (¶¶ 1-94).

was improper at the preliminary motion-to-dismiss stage of this litigation for Judge Eginton to rely on any fact-based reference to "three similarly situated manufacturers" who are listed on the Tobacco Directory.

I conclude that any error was not material as to whether there is a preemption conflict between section 4-28m(a)(3)(C) and the PACT Act. According to GRE, section 4-28m(a)(3)(C) requires a comparison and reconciliation of out-of-state sales and shipping data, which conflicts with the PACT Act because the PACT Act exempts some of the necessary data (non-interstate sales) from its reporting requirements. Doc. #86 at 33-36. But the fact that Connecticut seeks certain sales and shipping information that goes beyond what the PACT Act otherwise requires to be reported does not mean that the Connecticut law is in *conflict* with the PACT Act, much less that it is impossible to comply with both statutes. Indeed, to the extent that GRE complains that certain data may not be available to submit to Connecticut because it is not required to be reported under the PACT Act, Connecticut's section 4-28m(a)(3)(C) anticipates this concern by allowing GRE to furnish a satisfactory explanation for any discrepancy in the comparison of sales and shipping data. Because GRE has not otherwise alleged facts that plausibly support a preemption conflict between section 4-28m(a)(3)(C) and the PACT Act, any possible error in the initial ruling with respect to reliance on extrinsic evidence does not warrant reconsideration of the dismissal of the Supremacy Clause claim.

CONCLUSION

For the reasons set forth in this ruling, the Court DENIES plaintiff GRE's motion for reconsideration of the dismissal of its claims under the Commerce Clause and the Supremacy Clause. Doc. #102. Pursuant to Fed. R. Civ. P. 25(d), the Clerk of Court shall amend the official case caption as reflected in the caption above to substitute the Acting Commissioner of Revenue

Services John Biello as the defendant in place of former Commissioner Kevin Sullivan who was initially named as the defendant in this action.

It is so ordered.

Dated this 3rd day of March 2020.

/s/*Jeffrey Alker Meyer*______
Jeffrey Alker Meyer
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 24th day of March, two thousand twenty-one.

Grand River Enterprises Six Nations, Ltd.,

Plaintiff-Appellant,

v.

Mark Boughton, Commissioner, Connecticut Department of Revenue Services,

Defendant-Appellee.

ORDER

Docket No: 20-1044

Appellant, Grand River Enterprises Six Nations, Ltd., filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc.*

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

UNITED STATES SECOND CIRCUIT COURT OF APPEALS