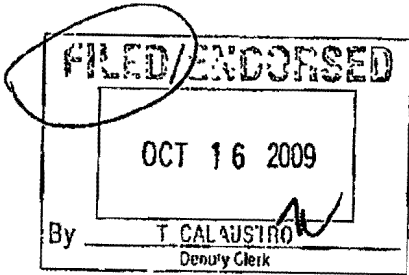


1 JOHN M. PEBBLES (BAR NO. 237582)
2 DARCIE L. HOUCK (BAR NO. 196556)
3 A. ROBERT RHOAN (BAR NO. 232949)
4 **FREDERICKS PEBBLES & MORGAN LLP**
5 1001 Second Street
6 Sacramento, California 95814
7 Telephone: (916) 441-2700
8 Facsimile: (916) 441-2067



9 Attorney for Defendants
10 NATIVE WHOLESALE SUPPLY

11 **. SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12 **IN AND FOR THE COUNTY OF SACRAMENTO**

13 PEOPLE OF THE STATE OF CALIFORNIA)
14 ex rel. EDMUND G. BROWN, Attorney)
15 General,)
16 Plaintiff,)
17 v.)
18 NATIVE WHOLESALE SUPPLY, a Sac and)
19 Fox Nation Corporation, and DOES 1 to 20,)
20 inclusive)
21 Defendant(s).)

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

22 **NOTICE OF ENTRY OF ORDER AND**
23 **STATEMENT OF DECISION**
24 **GRANTING MOTION TO QUASH**

25 **TO ALL PARTIES AND THEIR COUNSELS OF RECORD:**

26 PLEASE TAKE NOTICE that, on September 25, 2009, Judge Shellyanne W L Chang of the
27 California Superior Court, County of Sacramento, issued an order in the above captioned case
28 GRANTING Native Wholesale's motion to quash. A true and correct copy of the order is attached as
Exhibit "A."

Respectfully submitted,

Dated: October 16, 2009

FREDERICKS PEBBLES & MORGAN LLP
John M. Peebles
Darcie L. Houck
A. Robert Rhoan

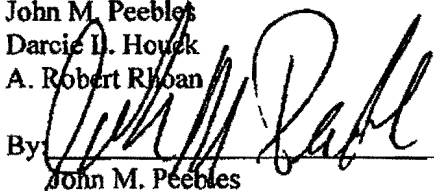
By 
John M. Peebles
Attorneys for Defendants
Native Wholesale Supply Company

EXHIBIT A

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO
G() JON D SCHABER COURTHOUS
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

Date: 09/25/2009

MINUTE ORDER

Page: 1

Dept: 54

Calendar No.:

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 *Amerloan 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. Prairie 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 2003 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 Tomberg 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

Michelle Hickson
Dennis Eckard
P.O. Box 944255
Sacramento, CA 94244

John Peebles
Darcie Houck
Robert Rhoades
Fredericks Peebles & Morgan
1001 Second Street
Sacramento, CA 95814

3 **PROOF OF SERVICE**

4 I declare I am employed in the County of Sacramento, State of California. My
5 business address is: 1001 Second Street, Sacramento, California 95814. I am over the age of
6 eighteen (18) years and not a party to the within action.

7 On **October 16, 2009** I served the within:

8 **NOTICE OF ENTRY OF ORDER AND STATEMENT OF DECISION
GRANTING MOTION TO QUASH**


9 on the party listed below, addressed as follows:

10 Edmund G. Brown, Jr. Counsel for Plaintiff
11 Attorney General People Of The State Of California
12 **Dennis Eckhart,**
13 Senior Assistant Attorney General
14 Michelle Hickerson, Deputy AG
15 State of California
16 Department of Justice
17 1300 I Street
18 Sacramento, CA 95814
19 E-Mail: dennis.eckhart@doj.ca.gov

20 **XX** By First Class Mail by placing a true copy thereof in a sealed envelope with postage thereon
21 fully prepaid and placing the envelope in the firm's daily mail processing center for mailing in
22 the United States mail at Sacramento, California, pursuant to Code of Civil Procedure section
23 1013.

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

26 Executed on **October 16, 2009** at Sacramento, California.

27 
28 Jodi Stevens

ATTACHMENT 2

1 John M. Peebles (# 237582)
2 Darcie Houck (#196556)
3 FREDERICKS PEEBLES & MORGAN
4 1001 Second Street
5 Sacramento, CA 95814
6 Tel. (916) 441-2700
7 Fax (916) 441-2067
8 E-mail: jpeebles@ndnlaw.com
9 E-mail: dhouck@ndnlaw.com

6 Amy L. Vandamme, *pro hac vice*
7 MICHAEL BEST & FRIEDRICH LLP
8 100 East Wisconsin Avenue, Suite 3300
9 Milwaukee, WI 53202
10 Tel. (414) 271-6560
11 Fax (414) 277-0656
12 E-mail: alvandamme@michaelbest.com

10 *Attorneys for Grand River Enterprises*
11 *Six Nations, Ltd.*

12 **IN THE SUPERIOR COURT**
13 **FOR THE COUNTY OF SACRAMENTO**

14 PEOPLE OF THE STATE OF
15 CALIFORNIA ex rel. BILL LOCKYER,
16 Attorney General of the State of California,

16 Plaintiff,

17 v.

18 GRAND RIVER ENTERPRISES/6
19 NATIONS LTD., a foreign corporation,
20 and DOES 1 through 100, inclusive,

20 Defendant.

Case No.: 02AS07518

**NOTICE OF ENTRY OF ORDER
GRANTING GRAND RIVER
ENTERPRISES' MOTION TO VACATE
JUDGMENT, ENTERING JUDGMENT OF
DISMISSAL WITH PREJUDICE AND
DENYING STATE'S MOTION TO AMEND
JUDGMENT**

Date:
Time:
Dept. 54
Judge: Judge Shelleyanne W.L. Chang

Trial Date: N/A
Action Filed: December 6, 2002

21
22
23
24
25
26
27
28
**NOTICE OF ENTRY OF ORDER GRANTING MOTION TO VACATE JUDGMENT, ENTERING JUDGMENT
OF DISMISSAL WITH PREJUDICE AND DENYING MOTION TO AMEND JUDGMENT**

FILED
10 JAN 15 PM 4:13
LEGAL PROCESS #7

RECEIVED
JAN 20 2010
FP&M-Sacramento

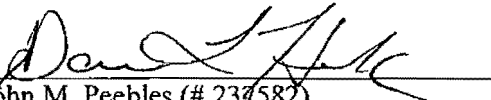
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on December 31, 2009, the Court GRANTED Grand River Enterprises Six Nations Ltd.'s Motion to Vacate Judgment, ENTERED Judgment of Dismissal of Prejudice and DENIED the People of the State of California's Motion to Amend Judgment. A true and correct copy of the Court's endorsed and filed order is attached hereto as Exhibit A.

Dated: January 15, 2010

FREDERICKS PEEBLES & MORGAN LLP

By: 
John M. Peebles (# 237582)
Darcie Houck (# 196556)
1001 Second Street
Sacramento, CA 95814
Tel: (916) 441-2700
Fax: (916) 441-2067
E-mail: jpeebles@ndnlaw.com
E-mail: dhouck@ndnlaw.com

Amy L. Vandamme, *pro hac vice*
Michael Best & Friedrich LLP
100 East Wisconsin Ave., Suite 3300
Milwaukee, WI 53202
Phone: (414) 271-6560
Fax: (414) 277-0656
E-mail: alvandamme@michaelbest.com

Attorneys for Grand River Enterprises Six Nations, Ltd.

EXHIBIT A

FILED
ENDORSED

2009 DEC 31 AM 10:14

SACRAMENTO COURTS
DEPT. 54

RECEIVED

JAN 05 2010

FP&M-Sacramento

1 John M. Peebles (# 237582)
Darcie Houck (#196556)
2 **FREDERICKS PEEBLES & MORGAN**
1001 Second Street
3 Sacramento, CA 95814
Tel. (916) 441-2700
4 Fax (916) 441-2067
E-mail: jpeebles@ndnlaw.com
5 E-mail: dhouck@ndnlaw.com
6 Amy L. Vandamme, *pro hac vice*
MICHAEL BEST & FRIEDRICH LLP
7 100 East Wisconsin Avenue, Suite 3300
Milwaukee, WI 53202
8 Tel. (414) 271-6560
Fax: (414) 277-0656
9 E-mail: alvandamme@michaelbest.com
10 *Attorneys for Grand River Enterprises*
Six Nations, Ltd.

11
12 **IN THE SUPERIOR COURT**
FOR THE COUNTY OF SACRAMENTO

13
14 **PEOPLE OF THE STATE OF**
CALIFORNIA ex rel. **BILL LOCKYER,**
15 **Attorney General of the State of California,**

16 **Plaintiff,**

17 **v.**

18 **GRAND RIVER ENTERPRISES/6**
NATIONS LTD., a foreign corporation,
19 **and DOES 1 through 100, inclusive,**

20 **Defendant.**

Case No.: 02AS07518

[PROPOSED] ORDER GRANTING GRAND
RIVER ENTERPRISES' MOTION TO
VACATE JUDGMENT, ENTERING
JUDGMENT OF DISMISSAL WITH
PREJUDICE AND DENYING STATE'S
MOTION TO AMEND JUDGMENT

Date:
Time:
Dept. 54
Judge: Judge Shelleyanne W.L. Chang.

Trial Date: N/A
Action Filed: December 6, 2002

21
22
23
24
25
26
27
28
[PROPOSED] ORDER GRANTING MOTION TO VACATE JUDGMENT, ENTERING JUDGMENT OF
DISMISSAL WITH PREJUDICE AND DENYING MOTION TO AMEND JUDGMENT

1 After considering the Motion to Vacate Judgment in Case No. 02AS07518 (dated May 1,
2 2009), filed by Grand River Enterprises Six Nations, Ltd. ("Grand River") and the papers in
3 support thereof; the Motion to Amend Judgment in Case No. 02AS07518 (dated October 24,
4 2008) filed by the People of the State of California ("State"), and the papers in support thereof;
5 and, the arguments presented at the hearing, it is hereby ordered that in *People v. Grand River*
6 *Enterprises/6 Nations, Ltd.*, Case No. 02AS07518 (filed Dec. 6, 2002):


7 1. The Court's ruling and the reasons therefor, as stated in the Court's minute orders
8 dated November 30, 2009, copies of which are attached hereto, are specifically incorporated by
9 reference herein as if restated *verbatim* and form the basis for this Order.

10 2. The State has failed to meet its burden of establishing that Grand River had
11 sufficient minimum contacts with the State of California to support personal jurisdiction over
12 Grand River in Case No. 02AS07518.

13 3. The default judgment entered on December 7, 2004 in Case No. 02AS07518 is
14 void *ab initio* and is vacated. The complaint is dismissed and judgment of dismissal with
15 prejudice is entered.

16 4. As the default judgment in Case No. 02AS07518 has been vacated and the
17 complaint has been dismissed with prejudice, the State's Motion to Amend Judgment in Case No.
18 02AS07518 is denied.

19 APPROVED AS TO FORM:

20 

21 Phil Priesman
22 Attorney for Plaintiff
23 State of California

24 IT IS SO ORDERED.

25 DATED: DEC 31 2009

26 PATRICIA C. ESGRO

27 Hon. Shelleyanne W. Chang
28 SIGNATURE PURSUANT
TO 635 CCP

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

MINUTE ORDER

Date: 11/30/2009

Time: 02:38:00 PM

Dept: 54

Judicial Officer Presiding: Shelleyanne W L Chang

Clerk: E. Higginbotham

Reporter/ERM:

Bailiff/Court Attendant:

Case No: **02AS07518**

Case Init. Date: 04/13/2007

Case Title: **PEOPLE. ET AL VS. GRAND RIVER ENTERPRISES/6 NATIONS. LTD.**

Case Category: Civil - Unlimited

EVENT ID/DOCUMENT ID: 1306365

EVENT TYPE: Motion - Other - Civil Law and Motion

APPEARANCES

Nature of Proceeding: Motion to Vacate Judgments (Taken Under Submission 11/23/3009)

TENTATIVE RULING

Defendant Grand River Enterprises/Six Nations, Ltd. ("Grand River")'s motion to vacate judgments is granted for the reasons set forth below.

Default judgments were entered against Grand River in cases no. 02AS07518, 05AS01688, and 05AS04121. Grand River contends that these judgments are void ab initio because it was not properly served with the summons and complaint, and because it has insufficient minimum contacts with the State of California to support personal jurisdiction. The Court finds the latter contention meritorious.

The evidence produced by Grand River establishes the following. Grand River is a Canadian company wholly owned and operated by Native Americans who are members of the Six Nations, and operated on the Grand River Reserve in Oshweken Canada under the express sanction and authorization of the governing councils of the Six Nations Native Americans. Grand River does not maintain any place of business in California; it has no personnel, office, real estate, sales agents or banks accounts in California; it does not advertise or solicit business in California; it does not have a telephone listing in California. At all times since its formation, Grand River has engaged in the production, packaging, and sale of tobacco products. It has not sold cigarettes to any consumer in California.

Plaintiff contends that this Court has specific jurisdiction over Grand River because Grand River has imported billions of cigarettes into the U.S., with millions destined for California. In support of that contention, plaintiff cites State of South Carolina v. NV Sumatra Tobacco Trading, Co. (2008) 379 S.C. 81, 666 S.E.2d 218 as authority "on all fours" with this case. There, the court held that evidence of Grand River's sales of millions of cigarettes in the United States established minimum contacts with the

Date: 11/30/2009

MINUTE ORDER

Page: 1

Dept: 54

Calendar No.:

United States, and under the stream of commerce theory, the State had shown minimum contacts with that forum. Included in the summary of evidence produced by the State was a statement from the Department of Revenue that over six million cigarettes of the brand of cigarettes produced by Sumatra was sold in South Carolina in 2001.

Here, however, plaintiff has produced no competent evidence in support of its claims that millions of cigarettes manufactured by Grand River have been sold to consumers in California. The Williams and Soo Hoo declarations state, on information and belief, that Grand River has manufactured and sold in California directly or indirectly certain brands of cigarettes. The Court finds that statements on information and belief that Grand River sold cigarettes in California do not satisfy due process. *Floyveyor Internat., Ltd. v. Superior Court* (1997) 59 Cal.App.4th 789, 796 (declarations on information and belief regarding forum-related contacts were inadmissible hearsay and thus insufficient to establish jurisdictional facts).

Plaintiff contends that Grand River admitted selling cigarettes directly or indirectly to California in its application to join the Master Settlement Agreement, attached as exhibit A to the Hering declaration. Plaintiff does not identify the language it relies on as the purported admission. The Court's review of that document found that Grand River admitted only that it intended to sell and has sold certain brands of cigarettes solely on Indian land in Canada for subsequent distribution to Indian land in the United States. Nowhere does Grand River state that sales have occurred or will occur in California.

The only evidence of any contacts with California are the exhibits to the Hering declaration showing sales by Grand River to Royal Tobacco, Inc., a distributor located in and licensed by California. The evidence shows four sales in February and December, 2002, and March and May 2003. As Grand River points out, these documents do not evidence any in-forum contacts in cases 02AS07518 ("first case") and 05AS04121 ("second case"), which pertain to alleged sales in 2000, 2001 and 2004. Further, there is no evidence of Royal Tobacco's business activities, i.e. whether they resell the cigarettes to other distributors, to Indian tribes, or to consumers. Other than the fact that Royal Tobacco is a distributor located in California, there is no evidence from which this Court can draw any inference that the cigarettes sold by Grand River to Royal Tobacco were in turn sold to California consumers. Even if evidence of such sales existed, it would be insufficient to establish minimum contacts absent evidence showing that Grand River had some control over where the distributor sold the cigarettes. When personal jurisdiction is challenged, it is the plaintiff's burden to establish all facts necessary to establish jurisdiction. *Floyveyor, supra*; *Bridgestone Corp. v. Superior Court* (2002) 99 Cal.App.4th 767, 777.

Plaintiff suggests that personal jurisdiction can be based on the fact that twenty other states have entered judgments against Grand River for violation of their escrow laws. Hering decl., exhibit A. However, 18 of those judgments were default judgments in which there was no appearance by Grand River and hence no challenges to personal jurisdiction were raised or decided against Grand River. The remaining judgments did not discuss any issues related to personal jurisdiction. This Court finds that the existence of these other judgments against Grand River is not persuasive and does not support a finding of personal jurisdiction in this case.

The Court finds that the evidence submitted by plaintiff in opposition to this motion is far less substantial than that submitted by the plaintiff in *State of South Dakota v. Grand River Enterprises, Inc. a/k/a Grand River Enterprises Ltd.*, 2008 SD 98, which held that Grand River's sales to an independent wholesale distributors were insufficient to establish minimum contacts with that forum. Plaintiff's contention that the South Dakota court's decision was based on a deficient evidentiary record is not persuasive, particularly as plaintiff urges this Court to dismiss the thoughtful and thorough analysis of the South Dakota court in favor of the perfunctory default judgments entered by other states.

The Court concludes that plaintiff has not met its burden of producing evidence showing that Grand River has sufficient minimum contacts with this state to support personal jurisdiction in case nos. 02AS07518 and 05AS04121, and the default judgments in those cases were void ab initio and are hereby vacated.

As to case no. 02AS01688, the Court finds that plaintiff's tenuous showing of minimum contacts is outweighed by considerations of fairness. This Court takes judicial notice of the action pending in the U.S. District Court for the Southern District of New York, entitled Grand River Enterprises v. Pryor, et. al, case no. 02-CV-5068, in which Grand River has challenged the constitutionality of the Escrow Statute plaintiff sought to enforce in these actions. The Attorneys General of over 40 states which enacted escrow statutes pursuant to the 1998 settlement agreement with major tobacco companies are defendants in the New York action, including the Attorney General of the State of California. In Grand River Enterprises Six Nations, Ltd. v. Pryor, (2d Cir. 2005) 425 F.3d 158, the court reversed the trial court's dismissal of Grand River's Commerce Clause claims. Given the pendency of litigation directed to the constitutionality of the specific statute which plaintiff seeks to enforce here, this Court finds the convenience of the parties and the State's interest in exercising jurisdiction tips in favor of not exercising jurisdiction over Grand River in any of the three cases that are the subject to this motion.

Having determined that Grand River has no forum related contacts that would support personal jurisdiction, the Court need not address plaintiff's other arguments concerning the sufficiency of service of the summons and complaint.

The default judgments entered in case nos. 02AS07518, 05AS01688, and 05AS04121 are hereby vacated, and the complaints in these actions are hereby dismissed.

Defendant is directed to submit judgments of dismissal for the Court's signature.

COURT RULING

The matter was argued and submitted. The court takes this matter under submission.

SUBMITTED MATTER RULING

Having taken this matter under submission, the court rules as follows:

The tentative ruling is affirmed with the following comments. At oral argument, plaintiff asserted that the People had presented admissible evidence of \$160 million in sales of cigarettes manufactured by Grand River Enterprises, Inc. (GRE) in California. Specifically, the People directed the court to the Declarations of Tracie West, Lynn Bartolo, and Clinton Scott and the exhibits attached to those declarations.

As the defendant correctly points out however, none of the Schedule F's attached to the declarations are properly authenticated by anyone who prepared them. In fact, the identities of the company or entity that allegedly prepared and filed them with the BOE are redacted so the identities are unknown. (Declaration of West, paragraph 6.)

Moreover, the Schedule F's attached to the Declarations constitute inadmissible hearsay. Plaintiff argued that the Schedule F's were official records pursuant to Evidence Code section 1280 and an exception to the hearsay rule. That section, however requires that the writing be made by a public employee. The Schedule F's filed by the distributors are clearly not a writing prepared by a public employee.

Furthermore, the Schedule F's do not constitute an exception to the hearsay rule under the Business Record exception under Evidence Code section 1271. The People have not laid any foundation by any witness that the Schedule F's are writings were made in the regular course of the business of the distributors or otherwise established any of the other foundational elements necessary for admission of said documents under Evidence Code section 1271.

As defendant pointed out in their papers, and as plaintiff acknowledged at hearing, the spreadsheets attached to the Declarations of Tracie West, Lynn Bartolo and Clinton Scott contain several inaccuracies. The Board's spreadsheet for 2004 contains an entry for 1,320,000 Scenic 101 cigarettes lists GRE as the NPM, but the corresponding Schedule F lists the NPM as "Mr. Cinnamon Tobacco Dist". Because of the discrepancies in the documents, the court finds them inherently unreliable. Given the dearth of admissible evidence, the State's assertion that millions of GRE cigarettes were sold in California is unsupported and plaintiff has failed to establish the requisite minimum contacts with the State.

Finally, the court notes that plaintiff has requested that the court take judicial notice of the truth of the matters asserted in the above declarations filed with the court in connection with Plaintiff's Request for Entry of Default Judgment. Judicial notice of other court records and files is limited to matters that are indisputably true. Although the existence of a document may be judicially noticeable, the truth of statements contained in the document and its proper interpretation are not subject to judicial notice if those matters are reasonably disputable. (*Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal. App. 4th 97, 113) The Court cannot take judicial notice of the truth of the statements in the declarations as they concern matters reasonably disputable

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: December 1, 2009

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

John M. Pebbles
Darcie Houck
Fredericks Pebbles & Morgan
1001 Second Street
Sacramento, CA 95814

Amy L. VanDamme
Michael Best & Friedrich LLP
100 East Wisconsin Ave., Ste. 3300
Milwaukee, WI 53202

Phillip Priesman
Jeanne Finberg
California Department of Justice
110 West A Street, Ste. 1100
San Diego, CA 92101

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

MINUTE ORDER

Date: 11/30/2009

Time: 02:06:00 PM

Dept: 54

Judicial Officer Presiding: Shelleyanne W L Chang

Clerk: E. Higginbotham

Reporter/ERM:

Bailiff/Court Attendant:

Case No: **02AS07518**

Case Init. Date: 04/13/2007

Case Title: **PEOPLE. ET AL VS. GRAND RIVER ENTERPRISES/6 NATIONS. LTD.**

Case Category: Civil - Unlimited

EVENT ID/DOCUMENT ID: 1306321

EVENT TYPE: Motion - Other - Civil Law and Motion

APPEARANCES

Nature of Proceeding: Motion to Amend Judgment

TENTATIVE RULING

As the Court has vacated the default judgment entered in this action for lack of personal jurisdiction over the defendant, and has dismissed the complaint, plaintiff's motion for leave to amend the judgment is denied.

COURT RULING

The matter was argued and submitted. The court takes this matter under submission.

SUBMITTED MATTER RULING

Having taken the matter under submission, the Court now rules as follows:

The tentative ruling is affirmed.

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: December 1, 2009

Date: 11/30/2009

MINUTE ORDER

Page: 1

Dept: 54

Calendar No.:

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

John M. Pebbles
Darcie Houck
Fredericks Pebbles & Morgan
1001 Second Street
Sacramento, CA 95814

Amy L. VanDamme
Michael Best & Friedrich LLP
100 East Wisconsin Ave., Ste. 3300
Milwaukee, WI 53202

Phillip Priesman
Jeanne Finberg
California Department of Justice
110 West A Street, Ste. 1100
San Diego, CA 92101