UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

STATE OF NEW YORK,

Plaintiff,

v.

GRAND RIVER ENTERPRISES SIX NATIONS, LTD., NATIVE WHOLESALE SUPPLY COMPANY, INC.,

Defendants.

REPORT and RECOMMENDATION

14-CV-910A(F)

APPEARANCES:

ERIC T. SCHNEIDERMAN
New York State Attorney General
Attorney for the Plaintiff
DANA BIBERMAN,
JOSHUA S. SPRAGUE,
Assistant Attorneys General, of Counsel
120 Broadway
New York, New York 10271

FRIEDMAN KAPLAN SEILER & ADELMAN LLP
Attorneys for Defendant Grand River Enterprises
ERIC O. CORNGOLD,
JEFFREY R. WANG, of Counsel
7 Times Square, 27th Floor
New York, New York 10036

WEBSTER SZANYI, LLP
Attorneys for Defendant Native Wholesale Supply
JEREMY COLBY,
NELSON PEREL, and
KEVIN A. SZANYI, of Counsel
1400 Liberty Building
Buffalo, New York 14202

JURISDICTION

On January 16, 2015, Hon. Richard J. Arcara referred this case to the undersigned for all pretrial matters including dispositive motions pursuant to 28 U.S.C. § 636(b)(1)(B) (Dkt. 83). The case is presently before the court on Defendants' motions

to dismiss filed January 15, 2015 (Dkts. 79 and 81).

BACKGROUND

Plaintiff State of New York's Second Amended Complaint, alleging as Plaintiff's First Claim for Relief violations by Defendants of the Contraband Cigarette Trafficking Act, 18 U.S.C. §§ 2341, *et seq.* ("the CCTA" or "the Act") ("Plaintiff's CCTA Claim"), the Prevent All Cigarette Trafficking Act, 15 U.S.C. §§ 375, *et seq.* ("the PACT Act"), Plaintiff's Second Claim for Relief ("Plaintiff's PACT Act Claim") ("Plaintiff's Federal Law Claims"), and New York Tax Law §§ 471, 471-e, 480-b, and 1814 ("N.Y. Tax Law § __"), Plaintiff's Third and Fourth Claims for Relief ("Plaintiff's State Law Claims") was filed December 15, 2014, Dkt. 76. Plaintiff's Federal Law Claims are asserted under 28 U.S.C. § 1331 and jurisdiction over Plaintiff's State Law Claims is asserted under 28 U.S.C. § 1367(a). The Second Amended Complaint attached as Exhibit A a Notice of Arbitration under The Arbitration Rules Of The United Nations Commission On International Trade Law And The North American Free Trade Agreement between Grand River Enterprises Six Nations, Ltd., Jerry Montour, Kenneth Hill and Arthur Montour, Claimants/Investors And Government Of The United States Of America, Respondent/Party dated March 10, 2004 ("the Arbitration Claim") ("Plaintiff's Exh. A"); Exhibit B Claimant's Memorial Merits Phase Under the Arbitration under The Arbitration Rules Of The United Nations Commission On International Trade Law And The North American Free Trade Agreement between Grand River Enterprises Six Nations, Ltd., Jerry Montour, Kenneth Hill and Arthur Montour, Claimants/Investors And Government Of The United States Of America, Respondent/Party dated July 10, 2008 ("Claimant's Memorial") ("Plaintiff's Exh. B"); Exhibit C are copies of two Native Wholesale Supply,

Inc.'s checks dated December 4, 2018, and January 7, 2009, signed by Peter Montour, a director of Grand River Enterprises Six Nations, Ltd. since deceased ("NWS's checks") ("Plaintiff's Exh. C:)"); and Exhibit D, an Amended Joint Consensual Disclosure Statement for Joint Consensual Plan of Reorganization of Native Wholesale Supply, Inc., and the States in the United States Bankruptcy Court, W.D.N.Y., dated June 13, 2014, with an Exhibit A (Financial Statements for Native Wholesale Supply, Inc.) ("NWS's Reorganization Plan") ("Plaintiff's Exh. D").

Defendant Native Wholesale Supply Company, Inc.'s ("NWS") motion to dismiss, with prejudice, pursuant to Fed.R.Civ.P. 12 (b)(6), Plaintiff's Federal Law Claims, was filed January 15, 2015 (Dkt. 79) together with the Declaration of Kevin A. Szanyi, Esq. (Dkt. 79-1), attaching Exhibit A ("Szanyi Declaration Exh. A") (a copy of the Prevent All Cigarette Trafficking Act) and Memorandum of Law in Support of Native Wholesale Supply Company's Motion to Dismiss (Dkt. 79-3) ("NWS's Memorandum"). On the same day, Defendant Grand River Enterprises Six Nations, Ltd.'s ("GRE") (collectively "Defendants") filed its motion to dismiss, with prejudice, Plaintiff's Federal Law Claims and State Law Claims together with Defendant Grand River Enterprises Six Nation, Ltd's Brief in Support of it Motion to Dismiss the Second Amended Complaint and for a Stay of Discovery (Dkt. 81-1), ("GRE's Memorandum") ("Defendants' motions"). Plaintiff's motion, filed December 29, 2014, to conduct a pretrial conference (Dkt. 77) was denied and Defendants' motions to stay discovery pending decision on Defendants' motions were granted by the undersigned in a Decision and Order filed February 18, 2015 (Dkt. 92). On March 2, 2015, Plaintiff filed the Declaration of Joshua S. Sprague, (Dkt. 94) ("Sprague Declaration"), attaching exhibits A, B and C (Dkts. 94-1, 94-2, and

94-3), respectively ("Sprague Declaration Exh(s). __"). Sprague Declaration Exh. A is a copy of the award by the Arbitration Panel on Economic Discrimination Claims Brought under the North American Free Trade Agreement by GRE, Jerry Montour and Kenneth Hill, GRE's shareholders, and Arthur Montour, Jr., sole shareholder of NWS as Claimants on the Arbitration Claim ("the Arbitration Panel Decision"); Sprague Declaration Exh. B is a copy of a GAO Report regarding U.S. ATF Investigative Authority under the PACT Act by the ATF ("GAO Report"), and Sprague Declaration Exh. C is a copy of a November 18, 2010 Memorandum Regarding Implementation of the PACT Act ("ATF Memorandum").

On March 20, 2015, NWS filed the Declaration of Jeremy A. Colby (Dkt. 95) ("Colby Declaration"), together with a Reply Memorandum of Law in Support of Native Wholesale Supply Company's Motion to Dismiss (Dkt. 95-2) ("NWS's Reply"); on the same day, GRE filed Defendant Grand River Enterprises Six Nations, Ltd's Reply Brief in Further Support of Its Motion to Dismiss the Second Amended Complaint (Dkt. 96), ("GRE's Reply").

Oral argument was deemed unnecessary. Based on the following, Defendants' motions to dismiss with prejudice Plaintiff's Federal Claims should be GRANTED; Plaintiff's State Law Claims should be DISMISSED without prejudice pursuant to 28 U.S.C. § 1367(c)(3).

FACTS[1]

Defendant GRE is a corporation chartered by the Six Nations of Indians of Ontario, Canada, and manufactures and sells Seneca™ brand cigarettes at GRE's

[1] Taken from the pleadings and papers filed in this action.

facility on the Six Nations of the Grand River Indian First Nation Reservation, Ohsweken, Ontario, Canada located in southern Ontario ("the reservation"). GRE manufactures the Seneca brand cigarettes exclusively for NWS. GRE sells the cigarettes to NWS which takes delivery of the cigarettes F.O.B. at GRE's manufacturing facility, at which time NWS acquires title to the cigarettes, on the reservation. NWS, an Indian corporation chartered by the Sac and Fox National of Oklahoma, then ships the cigarettes to NWS's place of business on the Seneca Indian Reservation in Cattaraugus County in New York State.

When sold and delivered to NWS, the cigarettes are not packaged with the New York State cigarette excise tax stamp indicating such tax has been prepaid by either GRE or NWS required by New York State as a precondition to possession and resale of any cigarettes, including on Indian reservations, within New York State. Under New York law only licensed stamping agents, who have prepaid to the state the required excise taxes for cigarettes to be sold within the State, are authorized to possess cigarettes for wholesale redistribution within New York; neither GRE nor NWS are licensed cigarette excise tax stamping agents. All of the Seneca brand cigarettes imported by NWS into New York State are manufactured by GRE. After delivery of the trademarked Seneca brand cigarettes, which is owned by NWS, NWS resells and distributes within New York large quantities of the untaxed Seneca cigarettes imported by NWS which are subject to New York State's excise taxing requirements, including required registration and filing of reports to the New York State Department of Taxation and Finance describing such sales, and no such filings with regard to the distribution of the Seneca cigarettes have been made by either GRE or NWS.

NWS sells and distributes the untaxed Seneca brand cigarettes to cigarette retailers and wholesalers located on other Indian reservations within New York State. During a one-year period, 2011 – 2012, NWS paid GRE over $47 million for the Seneca brand cigarettes delivered to NWS. During the same period, NWS distributed approximately 79 million packs of cigarettes to on-reservation wholesalers within New York State whereas the official estimate for on-reservation Indian purchases for consumption by Indians involving 11 Indian reservations was 1,916,000 packs for the same period, thereby indicating that the greatest proportion of such Seneca brand cigarette distributions by NWS were intended for purchase and off-reservation consumption by non-Indians as evidenced by investigative on-reservation purchases by Plaintiff's agents. Plaintiff also alleges the extensive and collaborative business relationship existing between NWS and GRE since 1998 establishes that the knowing sale, shipment and distribution of the large quantities of Seneca brand cigarettes by GRE and NWS constitutes a joint venture between GRE and NWS for the sole purpose of importing and distribution of the untaxed cigarettes into New York State in violation of the CCTA, PACT Act, and applicable provisions of the New York State tax laws.

The CCTA, enacted in 1978, prohibits the knowing shipment, transportation, receipt, possession, sale, distribution, or purchase of contraband cigarettes found in a jurisdiction without evidence of payment of cigarette taxes required by such jurisdiction in a quantity exceeding 10,000 such cigarettes. Violations of the CCTA are punishable by fine and imprisonment and provide the basis for civil actions to enjoin violations and recover damages by states and local governments for unpaid cigarette taxes. An exemption from a civil suit pursuant to the CCTA extends to "Indian tribes or Indians in

Indian country" for actions brought by states or local governments which impose excise taxes on cigarettes, but the exemption does not apply to actions brought under the CCTA by the United States Attorney General.

The PACT Act, enacted in 2010, amending the Jenkins Act, 15 U.S.C. § 375 *et seq.* (1949), requires registration with the Attorney General of the United States and reports to a state tobacco tax administrator detailing shipments of cigarettes to the administrator's state by any person who sells, transfers or ships for profit cigarettes or smokeless tobacco in interstate commerce, that is cigarettes which "are shipped into a state, locality, or Indian country of an Indian tribe taxing the sale or use of cigarettes or smokeless tobacco." The PACT Act defines "interstate commerce" as "commerce between a State and any place outside the State," "commerce between a State and any Indian Country in the State," and "commerce between points in the same State but through any place outside the State or through any Indian country." The PACT Act also restricts sales of cigarettes and smokeless tobacco to persons who are age eligible under state law to make such purchases, and prohibits the use of the U.S. mail for such sales. A state attorney general, local government or Indian tribe which taxes tobacco sales may bring suit in a federal court to obtain injunctive relief and damages for violations of the PACT Act. Violations may also be prosecuted criminally with civil penalties and three years incarceration upon conviction. Common carriers engaged in shipment of tobacco products are also subject to the PACT Act.

Under the relevant New York State tax law provisions all cigarettes possessed for sale within New York are subject to a per pack excise tax ($4.35 at present) which must be prepaid by a tax stamp agent licensed by the N.Y. State Department of

Taxation and Finance and evidence of which must be affixed to each pack of cigarettes possessed for sale in the State. N.Y. Tax Law §§ 471, 472, 1103. The prepaid tax is included in the wholesale and retail price of each pack of cigarettes. Under recent legislation, N.Y. Tax Law §§ 471[1], 471-e, all cigarettes sold on Indian reservations within New York State including to Indians, must include the prepaid excise tax; however, the taxing system under § 471-e provides for a coupon by which an Indian retailer may obtain untaxed cigarettes from licensed tax stamp agents, free of the New York excise taxes paid by such agents on cigarettes sold by such retailer to the Indians on their respective reservations, which sales are not subject to the excise tax, in an annual amount of cigarettes based on official estimates of probable demand on the reservations for retail untaxed cigarettes sold to Indians established on an annual basis by the State, thereby assuring that retail sales by such on-reservation retailers of cigarettes to non-Indians, for which the prepaid tax is applicable, has been paid by such purchases and that the State has received the prepaid excise taxes from a licensed tax stamp agent. The affected stamp agent may obtain a refund from the State in the amount of the prepaid excise taxes based on the number of cigarettes covered by the coupons redeemed by the agents. Defendants have not complied with N.Y. Tax Law § 480-b[1] and N.Y. Public Health Law § 1399-pp[1-2], which the latter requires either participation in the 1998 Master Settlement Agreement ("MSA") between various states and major cigarette manufacturers by payment into a fund established under the MSA or an escrow fund for small cigarette manufacturers like GRE which do not participate in the MSA but under N.Y. Public Health Law § 1399-pp are required to make payment into the fund based on the number of its cigarettes sold annually in New York State.

Only the cigarettes of manufacturers participating in the MSA or who have certified the required escrow fund payments have been made may obtain prepaid excise tax stamps for their respective cigarettes intended for sale in New York State. As a result of Defendants' violations of the CCTA, PACT Act, and New York Tax Laws and Section 1399-pp Public Health Law, New York State has lost millions of dollars in tax revenue and incurred additional health care costs associated with increased cigarette use that could have been reduced significantly had Defendants complied with these laws.

1. Motion to Dismiss.

In considering a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) ("Rule 12(b)(6)"), the Supreme Court requires application of "a 'plausibility standard,' which is guided by '[t]wo working principles.'" *Harris v. Mills*, 572 F.3d 66, 71-72 (2d Cir. 2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)) ("*Iqbal*"). "First, although 'a court must accept as true all of the allegations contained in a complaint,' that 'tenet' is inapplicable to legal conclusions,' and '[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.'" *Id.* at 72 (quoting *Iqbal*, 556 U.S. at 678). "'Second, only a complaint that states a plausible claim for relief survives a motion to dismiss,' and '[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.'" *Id.* (quoting *Iqbal*, 556 U.S. at 670).

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.'" *Iqbal*,

556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). "A claim will have 'facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Sykes v. Bank of America,* 723 F.3d 399, 403 (2d Cir. 2013) (quoting *Ashcroft*, 556 U.S. at 678); *see Twombly*, 550 U.S. at 570 (the complaint must plead "enough facts to state a claim to relief that is plausible on its face"). The factual allegations of the complaint "must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true." *Twombly*, 550 U.S. at 570.

"In ruling on a 12(b)(6) motion, . . . a court may consider the complaint as well as 'any written instrument attached to [the complaint][2] as an exhibit or any statements or document incorporated in it by reference.'" *Kalyanaram v. American Ass'n of University Professors at New York Institute of Technology, Inc.*, 742 F.3d 42, 44 n. 1 (2d Cir. 2014) (quoting *Yak v. Bank Brussels Lambert*, 252 F.3d 127, 130 (2d Cir. 2001)). "Moreover, 'on a motion to dismiss, a court may consider . . . matters of which judicial notice may be taken, [and] documents either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing suit.'" *Id.* (quoting *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002)).

2. <u>Plaintiff's CCTA Claim</u>.

As noted, Facts, *supra*, at 6-7, Plaintiff's CCTA Claim is based on the Contraband Cigarette Trafficking Act, 18 U.S.C. § 2341, *et seq*. enacted in 1978 ("the CCTA" or "the Act") which as relevant, makes it "unlawful for any person knowingly to ship, transport, receive, possess, sell, or purchase contraband cigarettes." 18 U.S.C. §

[2] All bracketed material is added unless indicated otherwise.

2342(a) ("§ 2342(a)"). For purposes of § 2342(a), counterfeit cigarettes are defined as "a quantity in excess of 10,000 cigarettes, which bear no evidence of the payment of applicable state . . . taxes in the state . . . where such cigarettes are found," if the state requires cigarettes bear a stamp evidencing prepayment of such tax and which may be found in the possession of "any person" other than a cigarette tax agent licensed by the State. *Id.* Violations of § 2342(a) are subject to imprisonment and a fine. 18 U.S.C. § 2344. Section 2342(a) also provides a basis for a civil action brought in a district court by a state attorney general (or the chief law enforcement officer of a local government) to "prevent and restrain violations" of the CCTA by "a person" and to obtain civil penalties as well as money damages. 18 U.S.C. § 2346(b)(1), (2). However, the Act specifies that no such civil action may be "commenced against an Indian tribe or an Indian in Indian country (as defined in section 1151 [of Title 18])." 18 U.S.C. § 2346(b)(1) ("§ 2346(b)(1)").[3]

Defendant GRE contends Plaintiff's CCTA Claim fails to state a claim because, by its terms, § 2342(a) does not apply to the GRE's actions as alleged in the Second Amended Complaint, specifically including the manufacture and sale of its Seneca brand of cigarettes to Defendant NWS in Ontario, Canada, outside the United States, Defendant GRE's Memorandum at 10-11, either directly, GRE Reply Memorandum at 4-5, or based on imputed or vicarious liability arising from Plaintiff's allegations that Defendants engaged in a joint venture with NWS to import into and distribute within New York State contraband cigarettes in violation of § 2342(a). GRE Memorandum at 17-22. Defendant NWS argues that the CCTA is by its terms inapplicable to NWS

[3] This restriction does not apply in the case of an action brought by the United States Attorney General pursuant to 18 U.S.C. § 2346(a). *See* § 2346(b)(1).

because as an Indian owned and chartered corporation conducting business in Indian country NWS is exempt from suit under § 2643(b)(1) which excludes actions by Plaintiff based on the CCTA against "an Indian in Indian country." NWS Memorandum at 9-15.

In opposition, Plaintiff contends that, as the Second Amended Complaint alleges, GRE sold untaxed cigarettes "as the start of the cigarette distribution claim where such cigarettes *become* contraband," Plaintiff's Memorandum at 9 (italics in original), and that Plaintiff has sufficiently alleged under New York law Defendants engage in a joint venture whereby the untaxed cigarettes sold by GRE to NWS in Ontario were imported and became contraband cigarettes upon their arrival in New York State thereby imposing direct and vicarious liability for violations of the CCTA upon GRE and NWS. Plaintiff's Memorandum at 9-10. Plaintiff's contentions fail for two reasons.

First, it is now established law that "absent a clear Congressional expression of a statute's extraterritorial application, a statute lacks extraterritorial reach." *Norex Petroleum Limited v. Access Industries, Inc.,* 631 F.3d 29, 32 (2d Cir. 2010) (holding RICO statute, 18 U.S.C. § 1961 *et seq*., lacks extraterritorial effect and citing *Morrison v. National Australia Bank*, 561 U.S. 247, 255 (2010) ("*Morrison*") ("When a statute gives no clear indication of an extraterritorial application, it has none.")). In *Morrison*, plaintiffs, defendant's shareholders, sued defendant, an Australian bank which had acquired a mortgage servicing company, which engaged in a fraud of which defendant was aware causing defendant's shares not traded on any U.S. exchange to lose value on the Australian stock exchange under Section 10(b) of the Securities Exchange Act which the Supreme Court held lacked extraterritorial effect. Here, Plaintiff alleges GRE manufactured and sold in Ontario to NWS the Seneca brand cigarettes which NWS then

imported into New York State for redistribution on a wholesale basis to other Indian cigarette resellers located in various Indian reservations within New York State. Second Amended Complaint ¶¶ 56, 58. Assuming, as required, the truth of Plaintiff's allegations upon which GRE's liability under the CCTA is based, *Harris*, 572 F.3d at 71-72, GRE's conduct, particularly GRE's starting of the Seneca brand cigarette distribution chain, as Plaintiff alleges, by sale F.O.B. to NWS of untaxed cigarettes to NWS in Ontario for importing into New York State, occurs wholly outside the jurisdiction of the United States, and Plaintiff points to nothing in the text of the CCTA to indicate that § 2342(a) was to be given such extraterritorial reach. *See Norex Petroleum Limited*, 631 F.3d at 32 citing *Morrison*, 561 U.S. at 255. Therefore, based on Plaintiff's allegation, GRE has not violated the CCTA by engaging in the manufacture and sale of the Seneca brand cigarettes, even assuming, as Plaintiff also alleged, GRE's sales were with the knowledge that NWS would import the untaxed cigarettes into New York State where upon arriving in the State they may become contraband under the CCTA. Plaintiff's CCTA Claim against GRE thus fails to state a claim based on the CCTA. *Id.* (lack of extraterritorial reach of statute upon which plaintiff's claim is based requires dismissal pursuant to Fed.R.Civ.P. 12(b)(6)).

Second, Plaintiff's reliance, Plaintiff's Memorandum at 11-12, on *City of New York v. Chavez*, 2012 WL 1022283, at *4 (S.D.N.Y. Mar. 26, 2012) ("*Chavez*"), asserting a CCTA claim against an out-of-state supplier of untaxed cigarettes into New York City for resale, does not require a different conclusion. In *Chavez*, plaintiff alleged defendants engaged in the purchase of untaxed cigarettes from states other than New York State and subsequently resold the cigarettes through local retailers in New York

City without evidence of applicable prepaid New York City excise taxes in violation of the CCTA and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 28 U.S.C. § 1961, *et seq*. In sustaining plaintiff's CCTA claim, the court rejected defendants' contention that because plaintiff had not alleged the cigarettes were untaxed cigarettes and thus contraband under § 2342(a) when the cigarettes were initially sold outside New York City by defendants to cigarette smugglers and later shipped by the smugglers to retailers in New York City, plaintiff had failed to alleged a valid CCTA claim against defendants. *Chavez*, 2012 WL 1022283, at *4. Specifically, *Chavez* held that § 2342(a) attaches liability to persons who sell or ship untaxed cigarettes when the cigarettes are "found" in a jurisdiction that requires "a stamp on the cigarettes indicating that taxes have been paid." *Id.* The cigarettes need not be contraband at the point of sale or shipment, "[r]ather, it suffices [for purposes of § 2342(a)] that the cigarettes become contraband *as a result* of the sale and shipment." *Id.* (citing *City of New York v. Golden Feather Smoke Shop, Inc.*, 2009 WL 705815, at *11 (E.D.N.Y. Mar. 16, 2009) (sales of untaxed cigarettes by non-exempt Indian wholesalers located on a reservation of an Indian tribe not recognized by federal government pursuant to 18 U.S.C. § 1151 to smugglers who transport such cigarettes into New York City for retail sale qualify as contraband sufficient to support injunctive relief under § 2346(b)(1))). However, even if, as Plaintiff contends, the cigarettes sold F.O.B.[4] by GRE to NWS in Ontario became, based on the analysis in *Chavez*,

[4] As GRE's sales transaction involving the Seneca brand cigarettes occurred in Ontario, based on Plaintiff's allegation, Ontario sales law or the tribal sales law of the Six Nations of Indians, would apply and whether F.O.B. under Ontario or applicable tribal law has the same meaning as under New York law, *i.e.*, that title transfers to the purchaser when delivered to a carrier for shipment, *see* N.Y.U.C.C. § 2-319(1) (McKinney 1962), is not addressed by the parties. In any event, for purposes of Defendants' motions the court is required to accept Plaintiff's assertion that GRE's sales to NWS are F.O.B. with title transferred to NWS in Ontario upon NWS taking delivery at GRE's manufacturing facility. Second

contraband upon being transported by NWS into New York State and thus potentially imposing liability upon GRE under § 2342(a), the Second Amended Complaint specifically alleges GRE's own conduct in regard to the cigarettes at issue was confined to Ontario, outside the territorial jurisdiction of the United States, thus plainly raising the question of whether the CCTA provides an "'affirmative intention of the Congress clearly expressed' to give a statute [the CCTA] extraterritorial effect," *Morrison* , 561 U.S. at 255 (quoting *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991)), thereby subjecting GRE's sale of the untaxed cigarettes to liability under § 2342(a) based on the cigarettes' later importation into New York State by NWS. A plain reading of the CCTA reveals no such intention.[5] Significantly, and as relevant to the instant case, in *Morrison,* the Court observed that even where foreign misconduct has some material effect within the United States, such effect does not overcome the presumption against a statute's extraterritorial effect. *Id.* at 258. Here, on its face the CCTA does not purport to apply to foreign commerce, in fact, it does not even expressly provide for applicability to interstate commerce. Thus, the mere fact that as a result of GRE's cigarette sales originating exclusively in Ontario, the cigarettes subsequently became contraband upon entry into New York State without prepayment of the applicable tax by GRE (or NWS) does not support a construction of the CCTA that satisfies the test for extraterritorial reach of the CCTA, established by *Morrison,* based upon GRE's sales of cigarettes in Ontario as the point of commencement in a chain of distribution into New

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Amended Complaint ¶ 55.

[5] Although courts should generally refrain from raising *sua sponte*, "non-jurisdictional defenses not raised by the parties," *Acosta v. Artuz*, 221 F.3d 117, 122 (2d Cir. 2000), an exception applies where an applicable "doctrine implicates . . . values that may transcend the concerns of the parties to an action." *Id.* (internal citations and quotations omitted). The important values in limiting the extraterritorial effect of the CCTA qualify for such exception. Plaintiff will have notice, pursuant to Fed.R.Civ.P. 72(b), of the undersigned's reliance on *Morrison* in finding the CCTA does not reach GRE's conduct.

York State. That Plaintiff alleges GRE knowingly caused the cigarettes at issue to be shipped into New York State by NWS is also irrelevant to whether the CCTA clearly indicates Congress's intent that it be given extraterritorial effect to cover GRE's sale of the Seneca brand cigarettes in Ontario. *See Morrison*, 561 U.S. at 266-67 (noting that "it is a rare case of extraterritorial jurisdiction that lacks *all* contact with the territory of the United States") (italics in original). In *Morrison,* the Court also found the "focus of the Exchange Act is not on the place where the deception originated, but upon purchases and sales of securities in the United States." *Id*. at 266. Here, the Second Amended Complaint does not allege GRE engaged in any activities within the United States prohibited by the CCTA. Likewise, in the instant case the CCTA's focus is upon preventing contraband cigarettes from entry into taxing jurisdiction, not the location of their manufacture or sale to the party, NWS, responsible for such entry. *See also Chavez*, 2012 WL 1022283, at *5 (defendants' bootleg untaxed cigarette distributions which "injected the unstamped cigarettes directly into New York State" are subject to the CCTA but not the out-of-state suppliers of such cigarettes to defendants). This conclusion is also consistent with the presumption against territoriality which assures that if Congress intended foreign application of the CCTA it "would have addressed the subject of conflicts with foreign laws and procedures," *Morrison*, 561 U.S. at 269, *viz*, that Defendants' conduct is lawful under Ontario and Canadian law. Significantly, there is no indication in the Second Amended Complaint that GRE's cigarette manufacturing and sales operation are not permissible under both Ontario provincial or Canadian federal law. Allowing Plaintiff's CCTA claim to proceed against GRE would therefore subject GRE to civil liability in the United States despite that fact that the activities upon

which such liability is predicated is lawful in its own country, including that of the Indian reservation in Ontario where its manufacturing facility is located, without any express intent by Congress to do so. Accordingly as relied on by Plaintiff, *Chavez* is inapposite to the alleged facts of the Second Amended Complaint with respect to GRE, and Plaintiff's CCTA Claim does not plausibly state a claim against GRE.[6]

Turning to Plaintiff's CCTA claim against NWS, the court finds the CCTA also has no application to NWS as, like GRE, Second Amended Complaint ¶ 8, NWS is an Indian-owned corporation chartered by an Indian tribe, the Sac and Fox Nation of Oklahoma, as Plaintiff alleged, *id.* ¶ 9, and as an Indian in Indian country is NWS thus exempt under § 2343(b)(1) from any civil action by Plaintiff to enforce the CCTA against it.[7] In a recent and carefully reasoned decision, the Southern District held that a corporation chartered by an Indian tribe recognized by the federal government and operating on a reservation in Indian country, like NWS, as defined by 18 U.S.C. § 1151 is an "Indian in Indian country" within the scope of the exemption from suit brought by a state or municipal law enforcement officer established by § 2345(b)(1). *State of New York v. Mountain Tobacco Company*, 2016 WL 3962992, at ** 5-7 (S.D.N.Y. July 21, 2016) ("*Mountain Tobacco*"). In *Mountain Tobacco*, the court found that the term Indian as used in § 2346(b)(1) is "akin to the term 'person' which . . . encompasses corporations and companies as well as individuals" as defined in 1 U.S.C. § 1, and that

[6] That the Second Amended Complaint does not name the principals of GRE as defendants based on GRE's agreement not to interpose a defense of a lack of personal jurisdiction, Plaintiff's Memorandum at 17 n. 6, is irrelevant to whether the CCTA provides for extraterritorial jurisdiction. Parties may waive such personal defenses, but cannot waive the lack of territorial reach of a statute by failing to raise the issue.

[7] GRE has not asserted exemption from suit based on § 2343(b)(1), most likely because it is not incorporated by an Indian tribe recognized by the federal government nor does it operate as an "Indian in Indian country" as defined under 18 U.S.C. § 1151 (Indian country is "a reservation under the jurisdiction of the United States government."); rather, the Six Nations of Indians of the Grand River in Ontario, which chartered GRE, is, presumably recognized by the government of Canada.

as defendant was located on the Yakama Indian Reservation located in the state of Washington, an Indian tribe "under the jurisdiction of the United States," defendant was an "Indian in Indian country" and thus exempt from suit by plaintiff under § 2346(b)(1) based on sales of defendant's untaxed cigarettes to other Indian nations and companies owned by Indians within New York State. *Mountain Tobacco*, 2016 WL 3962992, at ** 5-7. *See also Citizens Against Casino Gambling in Erie County v. Stevens*, 945 F.Supp.2d 391, 400 (W.D.N.Y. 2013) ("unique canon of construction applies to statutory provisions involving Indians . . . '[s]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'") (internal citation omitted). Thus, even though NWS is alleged to have imported untaxed cigarettes into New York State, and the CCTA arguably reaches NWS's conduct in transporting, possessing and selling untaxed cigarettes within New York State, it is, according to the Second Amended Complaint, nevertheless a corporation chartered by an Indian tribe, the Sac and Fox Nation of Oklahoma, with its principal place of business on the Seneca Nation of Indians Reservation in Perrysburg, New York. Second Amended Complaint ¶ 9. Plaintiff further alleges NWS operates on "Indian land," Second Amended Complaint ¶ 11, and Plaintiff does not dispute that the Seneca Indian Reservation qualifies as Indian country pursuant to § 1151. *See also Citizens Against Casino Gambling in Erie County v. Hogen*, 2008 WL 2746566, at *42 (W.D.N.Y. July 8, 2008) (Seneca Nation land, including the Seneca Cattaraugus Reservation, constitutes Indian country). As such, NWS is "an Indian in Indian country" and exempt from this suit under § 2346(b)(1). Accordingly, Plaintiff fails to allege a plausible CCTA claim against NWS, and NWS's motion should be GRANTED on this ground.

Plaintiff's alternative theory of liability against Defendants under the CCTA based on Plaintiff's allegation that GRE and NWS have entered into and operate a joint venture whose purpose is to import, distribute and resell untaxed cigarettes within New York State, thereby imposing vicarious liability against GRE under the CCTA, Second Amended Complaint ¶¶ 10, 66-83, and against NWS as a joint venturer in the joint venture, is also without merit for several reasons. First, as discussed, Discussion, *supra*, at 17-18, based on its status as "an Indian in Indian country," NWS is exempt from this suit pursuant to § 2346(b)(1) and extending liability to NWS pursuant to the CCTA as a result of its participation as a joint venturer in the joint venture between GRE and NWS as Plaintiff alleges is equivalent to imposing such liability directly against NWS contrary to the express exemption from this suit as provided by § 2346(b)(1). This conclusion results from several considerations. Under New York law,[8] a joint venture and partnership are "closely intertwined," and the "legal consequences of a joint venture are equivalent to those of a partnership." *Kidz Cloz, Inc. v. Officially for Kids, Inc.*, 2002 WL 392291, at *2 (S.D.N.Y. Mar. 13, 2002) (quoting *Itel Containers Int'l Corp. v. Atlanttrafik Express Service, Ltd.*, 909 F.2d 698, 701 (2d Cir. 1990) (internal citations and quotation marks omitted)). As pertinent to Plaintiff's joint venture theory, such

[8] The Second Amended Complaint does not allege whether the GRE – NWS joint venture was organized under New York, Ontario law or any tribal law (Six Nations, Sac and Fox or the Seneca Nation) nor does it allege the location of the joint-venturer's principal place of business. A fair reading of the Second Amended Complaint supports that GRE and NWS entered into the joint venture in Ontario, more particularly on the Six Nations of the Grand River Indian First Nation Reservation, Second Amended Complaint ¶¶ 68-69, where GRE is incorporated and its two shareholders reside. *See also* Plaintiff's Exh. C (two NWS business checks signed by Peter Montour, one of GRE's former shareholders and directors). As an Ontario or Indian reservation based joint-venture organized under Ontario law, the joint venture would also be beyond the reach of the CCTA. *See* Discussion, *supra*, at 12-18. Equally possible is that the alleged joint venture operates under the tribal business laws of the Six Nations Indian Tribe which chartered GRE; the requirements for a joint venture under such tribal law are not addressed by the parties. The resulting ambiguity substantially weakens Plaintiff's contention that Plaintiff has plausibly asserted a joint venture of NWS and GRE under applicable law.

consequences include that the joint ventures are vicariously liable for actions taken by either in the operation of the joint venture. *See In re Parmalat Securities Litig.*, 421 F.Supp.2d 703, 717 (S.D.N.Y. 2006) (citing *Bondi v. Grant Thornton, Int'l*, 377 F.Supp.2d 390, 405-08 (S.D.N.Y. 2005); *see also Itel Containers Int'l Corp.*, 909 F.2d at 701 (citing New York caselaw). Thus, imposing CCTA liability upon NWS based on its alleged status as a joint venture with GRE creates CCTA liability against NWS pursuant to § 2346(b)(1) for violating § 2342(a), a result prohibited by § 2346(b)(1) excluding "an Indian in Indian territory" from such suit. Second, as the term "person" includes "companies" as well as corporations, *see Mountain Tobacco*, 2016 WL 3962992, at *6 (citing 1 U.S.C. § 1), and such term is sufficiently "akin" to the term "Indian" as used in § 2346(b)(1), *id.*, a CCTA suit against a joint venture for violating § 2842(a) which includes an Indian chartered corporation as an alleged joint venturer like NWS is nevertheless a suit against "an Indian in Indian country," and thus also excluded by § 2346(b)(1).[9] Finally, whether a joint venture has been properly pleaded requires that each of the five elements under New York law (assuming New York law applies) be sufficiently pleaded.[10] Under New York law, asserted by Plaintiff, Plaintiff's Memorandum at 16-21, a joint venture exists where "'(a) two or more persons enter into an agreement to carry on a venture for profit; (b) the agreement evinces their intent to

[9] *See also* Treasury Regulation 31 C.F.R. § 1010.10 (mm) ("person" includes, *inter alia*, "a joint venture").

[10] Although the Second Amended Complaint alleges a bi-national business relationship exists between GRE and NWS, both sides refer to New York law for the legal indicia of a joint venture. However, as discussed, Discussion, *supra*, at 19 n. 8, the Second Amended Complaint fails to allege in which jurisdiction, Ontario or New York, the putative joint venture and under which body of law it was organized – Ontario, New York, or the tribal law of the Six Nations of Indians of Ontario, the Sac and Fox Nation or the Seneca Nation of Indians. The criteria for a joint venture under Ontario law is similar to that of New York. *See Oz Optics Ltd. v. Timbercon, Inc.*, 2010 Carswell Ont 310, para. 79-86 (Can. O.N.S.C.) (WL), *rev'd on other grds*, 2011 Carswell Ont 12462 (Can ONCA) (WL).

be joint venturers; (c) each contributes property [*sic*] financing, skill, knowledge, or effort; (d) each has some degree of joint control over the venture; and (e) provision is made for the sharing of both profits and losses.'" *Slip-N-Slid Records, Inc. v. Island Def Jam Music Group*, 2014 WL 2119857, at *2 (S.D.N.Y. May 12, 2014) (quoting *SCS Commc'ns, Inc. v. Herrick Co. Inc.*, 360 F.3d 329, 341 (2d Cir. 2005)). Significantly, "'[a]t the motion to dismiss stage, the absence of any one of these elements is fatal to the establishment of a joint venture.'" *Id.* (quoting *Goureau v. Goureau*, 2013 WL 417353, at *4 (S.D.N.Y. Feb. 4, 2013) (internal quotation marks omitted)). Although parties may manifest an intent to create a joint venture by written agreement or "'impliedly through actions and conduct,'" *id.* (quoting *Cosy Goose Hellas v. Cosy Goose USA, Ltd.*, 481 F.Supp.2d 606, 621 (S.D.N.Y. 2008)), the "best evidence" of such intent is what is stated in the parties' written agreement. *Id.* (quoting *Law Debenture Trust Co. of N.Y. v. Maverick Tube Corp*., 595 F.3d 458, 467 (2d Cir. 2010)).

Here, Plaintiff does not allege that the putative joint venture formed by GRE and NWS was pursuant to a written agreement sufficient to support that Defendants intended to form a joint venture, nor does the Second Amended Complaint allege any agreement between GRE and NWS with respect to the required element that the parties agreed to share both profits and losses incurred by the alleged joint venture in the course of its day-to-day business operations. *Slip-N-Slide Records, Inc.*, 2014 WL 2119857, at *3 (court dismissed complaint alleging a joint venture where agreement disclaimed any intention to form a joint venture and failed to demonstrate the existence of an agreement to share losses). Rather, fairly read, the Second Amended Complaint merely alleges Defendants "purposefully act as a single enterprise" and that "each of

their principals[11] share in the profits of both entities." Second Amended Complaint ¶ 10; ¶ 75b ("individual" claimants . . . shared in the profits. . .."). Such alleged facts accepted as true fail to plausibly allege that GRE and NWS, in contrast to their respective shareholders, *i.e.*, "principals," intended to create a joint venture in connection with their on-going business relationship involving the manufacture by GRE and purchase by NWS of cigarettes in Ontario and later shipped untaxed by NWS to NWS's principal place of business on the Seneca Indian Reservation in New York, or that GRE and NWS agreed to share in the profits and losses of the joint venture. Nor does the Second Amended Complaint specifically allege that the putative joint venturers, GRE and NWS, agreed to share in the profits of such joint venture, only that the "principals" of each entity, Jerry Montour, Kenneth Hill and Arthur Montour, in fact did so, but not GRE and NWS, the Indian tribe chartered corporations, which are the only defendants in this action, as the Second Amended Complaint alleges. Nor is there any allegation specifying that GRE and NWS had any agreement with respect to the sharing of any losses arising from the business operations of the alleged joint venture. *See Slip-N-Slide Records, Inc.*, 2014 WL 2119857, at *2 (failure to allege an agreement to share losses fatal at pleading stage); *see also Wagner v. Derecktor*, 118 N.E.2d 570, 572 (N.Y. 1954) (requiring that "plaintiffs were to share in the losses" as a required element for the existence of an alleged joint venture).

Plaintiff's joint venture theory also fails at the threshold because the Second Amended Complaint unambiguously alleges that GRE sells the Seneca cigarettes to NWS F.O.B. upon NWS taking delivery of the cigarettes, Second Amended Complaint ¶¶ 55-56, and a joint venture cannot be predicated on a buyer-seller relationship as it is

[11] Unless indicated otherwise, underlining is added.

contrary to the requirement that the putative joint-venturers contribute property to the joint venture over which the venturers have joint control. *See Slip-N-Slide records, Inc.*, 2014 WL 2119857, at *2 (joint venturers required to "contribute" property); *see also Wagner*, 118 N.E.2d at 701 ("contribution of property" required for joint venture). Such a buy-sell relationship as to the basic assets of the GRE-NWS joint venture, the untaxed Seneca brand cigarettes, therefore negates that GRE contributed such property or that NWS, which purchased the cigarettes, contributed any property to the venture. That the sale and purchase of the cigarettes, as alleged in Second Amended Complaint, was between GRE and NWS, and not to the alleged joint-venture, therefore defeats any plausible allegation of joint ownership of contributed property as required for a joint venture under New York law. "It is not enough . . . that the parties agree to act in concert to achieve some stated economic objective, unless there is a coagulation of property, profits, or other interests which the parties held jointly and which are made accessible to each . . ." no joint venture exists. 16 N.Y. Jur. 2d, Business Relationships § 2089 (citing New York caselaw). Additionally, even the Seneca brand trademark is alleged by the Second Amended Complaint to be owned by NWS, not the alleged GRE-NWS joint-venture. *See* Second Amended Complaint ¶ 10. The relevant allegations of the Second Amended Complaint thus directly undermines Plaintiff's allegation under this prerequisite essential to pleading a joint venture.

In a further attempt to plausibly demonstrate Defendants had formed a joint venture, also alleged that because GRE is a secured creditor of NWS on GRE's $19,200,000 loan to NWS, GRE has impliedly agreed, "availing itself to losses suffered by NWS," Second Amended Complaint ¶ 16. Such amorphous allegation fails to satisfy

the required element for a joint venture because (1) a secured creditor most certainly does not thereby agree to "share in debtor's losses"; quite the contrary, as the very purpose of obtaining the status of a secured creditor is to minimize the risk that such creditor will be forced to absorb a loss on its loan, and (2) the allegation on its face refers only to the debtor, as it must, as NWS, not the joint-venture alleged by Plaintiff. Thus, it is far-fetched to contend that the allegation plausibly satisfies the required agreement to share in losses as well as profits so as to plausibly establishes the existence of a joint-venture between GRE and NWS as Plaintiff alleges. *See Hannah Bros. v. OSK Marketing & Communications, Inc.*, 609 F.Supp.2d 343, 350 (S.D.N.Y. 2009) ("a loan does not spontaneously transform the lender and borrower into joint venturers"). *See also* 16 N.Y. Jur. 2d Business Relationships § 2085 ("A transaction involving a loan of money and creating a debtor-creditor relationship does not of itself make the lender and borrower joint venturers.") citing *Atlanta Shipping Corp. Inc. v. Chemical Bank*, 631 F.Supp. 335, 351 (S.D.N.Y. 1986), *aff'd*, 818 F.2d 240 (2d Cir. 1987). If a loan does not do so, most certainly a secured loan does not. Plaintiff's allegations that such a lender – borrower relationship plausibly shows GRE thereby intended to agree to share in the losses of the joint venture is therefore frivolous as is Plaintiff's assertion that if the Plaintiff's action succeeds, Defendants would "share in the lost profits" as a result. Plaintiff's Memorandum at 21. *See Atlanta Shipping Corp., Inc.* 631 F.Supp. at 351 (that lender to putative joint venture "stood to share in losses only to the extent that it is not repaid" does not evidence lender is a joint venture). Adverse financial outcomes from litigation hardly substitute for a prior agreement to share in a joint venture's operating losses sufficient to impose vicarious liability on putative joint

venturers as Plaintiff seeks to do so. Further, absent from the Second Amended Complaint is any allegation with respect to an agreement between GRE and NWS regarding the management of the joint venture. Although Plaintiff alleges a "managerial overlap," the sole evidence of such overlap is two NWS checks, signed approximately six years prior to the filing of the Second Amended Complaint, by Peter Montour, a former GRE director, now deceased, insufficient to demonstrate actual day-to-day managerial involvement in the joint-venture by either GRE or NWS. *See Slip-N-Slide Records, Inc.*, 2014 WL 2119857, at *2 (requiring for a joint venture under New York law that each participant "has some degree of joint control over the venture"); *see also State of New York v. United Parcel Service*, 2016 WL 4203547, at *7 (lack of "independent evidence" that defendant "operated or managed alleged enterprises as opposed to merely just operating its own affairs" fatal to plaintiff's RICO claim). Finally, at least under New York law, the Statute of Frauds requiring a writing evidencing the existence of a joint venture with a period of continuing operation as Plaintiff alleges more than one-year is required. N.Y. Jur. 2d Business Relationships § 2091 (citing N.Y. caselaw). Here the Second Amended Complaint alleges Defendants' joint venture commenced in 1998, Second Amended Complaint ¶ 70, and continues to the time of commencement of this action after the expiration of the "original joint venture agreement in 2002." Second Amended Complaint ¶ 74. The Second Amended Complaint fails to allege any writing between Defendants evidencing the alleged joint-venture between them sufficient to satisfy New York's Statute of Frauds, N.Y. Gen. Obig. Law § 5-701[a][1] (McKinney 2002). As such, the Second Amended Complaint cannot be said to plausibly allege compliance with this threshold prerequisite for a joint venture.

Nor does Plaintiff's reliance on statements filed by GRE and its principal shareholders in support of the arbitration seeking compensation from the United States pursuant to the North American Free Trade Agreement ("the Treaty"), Second Amended Complaint ¶¶ 67-68 (referencing Exh. A to the Second Amended Complaint (Dkt. 76) at 37 *et seq.*), overcome these multiple deficiencies. Such statement includes assertions to the arbitration panel that Defendant GRE's shareholders, Jerry Montour and Kenneth Hill (GRE), and NWS's sole shareholder Arthur Montour (NWS and no relation to Jerry Montour, one of GRE's two shareholders) have investments in Canada (GRE) and the United States (NWS), the Claimants in the arbitration proceeding, and that the "collective nature of the Claimants' underlying business venture in the United States," Second Amended Complaint ¶ 68, satisfied the Treaty's standing requirement that a claimant have investments in Canada and the United States sufficient to support Claimants' claim of discriminatory treatment caused by the MSA whereby as non-participants, Claimants' businesses, without prior consultation, were required to make payments, *see* N.Y. Public Health Law § 1399-pp (requiring payments for sale of cigarettes in New York State into an escrow fund by non-participants in the MSA such as Claimants), to mitigate the increased costs of future cigarette sales, in this case GRE's Seneca brand, by state laws enacted to enforce the settlement. Dkt. 76 ¶¶ 6-8, 10-48, Dkt. 74-1 ¶¶ 90, 98, 106; *see also* Second Amended Complaint ¶¶ 68-79 (asserting Claimants' representations to the Arbitration Panel show intent to create joint venture with respect to manufacture and sale of untaxed Seneca brand cigarettes).

However, the Arbitration Panel, in its January 13, 2011 decision, submitted to the court by Plaintiff, *see* Sprague Declaration Exh. A (Dkt. 94-1), rejected Claimants'

Arbitration Claim, Dkt. 94-1 ¶ 90, that Claimants had "an *investment* in the form of an *enterprise* constituted under applicable law meeting the requirements of" the Treaty. Dkt. 94-1 at 106 (italics in original). In reaching this conclusion the tribunal found, based on Claimants' Memorial, that Claimants – not Defendants GRE and NWS – had "structured their business to minimize tax liability in both the United States and Canada, and that this was only possible if they did not create a formal partnership or joint venture." Dkt. 94-1 ¶ 98. Contrary to Plaintiff's numerous allegations that the Claimants' statements to the Arbitration Panel in support of Claimants' Arbitration Claim upon which Plaintiff relies to demonstrate Defendants had engaged in illegal cigarette trafficking through a joint venture thus vicariously extending CCTA liability to GRE, Plaintiff's allegations show only that such assertions are not attributable to NWS, but only on behalf of GRE's and NWS's shareholders who, significantly, are not defendants in this action, and GRE itself as Claimants in the arbitration. Even where the Claimants' referred to their prior participation in a "joint venture," Second Amended Complaint ¶ 69, such reference on its face is not directed to the specific joint venture, as alleged by Plaintiff; rather it refers to various unspecified business investments prior to the MSA by the principals of GRE and NWS. Additionally, this assertion is not alleged to be one made by or on behalf of NWS.[12] Contrary to Plaintiff's contentions, the arbitration panel's determination, upon which Plaintiff relies, negates Plaintiff's reliance upon Claimants' supposed assertions of a joint venture between GRE and NWS as alleged in the Second Amended Complaint. Accordingly, these allegations do not plausibly

[12] NWS objects to Plaintiff's submission of the Arbitration Panel's determination on the ground that it was not referenced in the Second Amended Complaint, Dkt. 95 ¶ 4; however, the court finds that Plaintiff's extensive reliance on the Arbitration Claim statements is sufficiently connected to the later Arbitration Panel Decision's determination of the Arbitration Claim as to permit consideration of it as if it had been relied upon in the Amended Complaint itself in the court's evaluation of Defendants' motions.

establish, sufficient to withstand dismissal, that Defendants GRE and NWS intended to create a joint venture for the manufacture and distribution of contraband cigarettes within New York State. In fact, the Arbitration Panel's determination of Claimants' claim included a finding that Defendant GRE had no intention to do so. Contrary to Plaintiff's attempt to minimize the Arbitration Panel's Decision finding as of "no consequence," Plaintiff's Memorandum at 22, the court finds that the Arbitration Panel's adverse determination as referenced by Plaintiff further demonstrates Plaintiff's joint venture theory lacks plausibility. Thus, rather than supporting Plaintiff's allegation that CCTA liability may be vicariously imposed on GRE despite its Ontario locus through a joint venture with NWS, the Arbitration Panel's findings and conclusions, as stated in the Arbitration Panel's Decision dated January 12, 2011, Dkt. 94 ¶ 2, are in fact contrary to such allegation and, as such, fatal to its plausibility.

Plaintiff's additional reliance on NWS's recent Chapter 11 petition in the local U.S. Bankruptcy Court ("NWS's petition") to avoid dismissal is similarly unavailing. The sole statements in NWS's petition Plaintiff alleges as supporting Plaintiff's joint venture theory is that (1) NWS imports GRE Seneca cigarettes for resale to Indian tribes in the United States, Second Amended Complaint ¶ 81, and (2) that GRE was NWS's major secured creditor on a $19,200,000 outstanding loan. *Id.* ¶ 82. The first statement, of course, merely reiterates what is undisputed, *viz.*, that GRE and NWS engage in a buyer – manufacturer/seller relationship with respect to GRE's Seneca brand untaxed cigarettes, a fact at odds with the notion of a joint-venture as Plaintiff alleges, *see* Discussion, *supra*, at 22-23, and that NWS owes GRE, its major secured creditor, a large sum of money, $19,200,000, is not evidence in itself of a contribution of assets as

required for a joint venture. *See Slip-N-Slide Records, Inc.*, 2014 WL 2119857 at *2 (requirements for a joint venture include a contribution of property, financing, skill, knowledge, or effort). Moreover, a fair reading of the Bankruptcy Court's recent decision, 16-CV-542A, Dkt. 1-2, of which the court takes judicial notice, *see* Fed.R.Evid. 201(b), allowing the $47 million claim against NWS of the State of Oklahoma for payments by NWS due under the MSA and related Oklahoma law, reveals no indication that the court believed GRE and NWS had engaged in, or contributed financing or other property to, any kind of joint venture, which would have been at odds with the asserted GRE secured loan, a fact not mentioned in NWS's bankruptcy petition, *see* Dkt. 76 at 218, and one not likely to have escaped the court's attention based on the record before it. Plaintiff's reliance on the NWS Bankruptcy Court petition thus, rather than supporting Plaintiff's joint-venture theory, also severely weakens its plausibility. In fact, by indicating judicial acceptance of the GRE secured debt, the petition also supports that no contribution by GRE or NWS to the financing of the alleged joint-venture existed, negating one of the key required elements for such a joint venture. *See* Discussion, *supra*, at 24. Accordingly, the court finds the Second Amended Complaint devoid of any plausible allegations to support Plaintiff's joint venture theory in support of its CCTA Claim against Defendants.

Nor is there validity in Plaintiff's alternative argument that because evidence of the Defendants' alleged joint venture is peculiarly in Defendants' possession, deference should be accorded Plaintiff's allegations to permit Plaintiff to develop Plaintiff's joint venture theory through post-motion discovery. Plaintiff's Memorandum at 14 (citing *Celador Int'l, Ltd. v. Walt Disney Co.*, 347 F.Supp.2d 846, 853 (C.D. Cal. 2004)

("*Celador*")). Plaintiff's reliance in *Celador* , however, is misplaced; neither *Celador* nor the other state court cases cited by Plaintiff support Plaintiff's contention that an allegation of joint venture is exempt from *Iqbal's* requirement that a complaint challenged under Fed.R.Civ.P. 12(b)(6) must allege sufficient facts demonstrating the claim is plausible. A careful reading of *Celador* indicates the issue of whether plaintiff's joint venture allegations in that case satisfy *Iqbal* was not, contrary to Plaintiff's assertion, even addressed. That the existence of a joint-venture may, as Plaintiff argues, constitute a question of fact provides no immunity from *Iqbal's* general requirement that to survive a motion to dismiss brought pursuant Rule 12(b)(6), the challenged allegations as to the existence of a joint venture between GRE and NWS must nevertheless show sufficient plausibility. *See Iqbal*, 556 U.S. at 679; *see also Sykes*, 723 F.3d at 403 ("factual content which allows the court to draw the reasonable inference that defendant is liable for the misconduct alleged" required). Plaintiff cites to no authority that as regards an alleged joint-venture a motion to dismiss pursuant to Rule 12(b)(6) should be denied to enable a plaintiff to conduct fact discovery to satisfy *Iqbal* with regard to such a significant allegation. *See Angiulo v. County of Westchester*, 2012 WL 5278523, at *3 n. 4 (that evidence to support plaintiff's claim based on evidence of defendant's FLSA violation in "exclusive possession" of defendant does not excuse plaintiff's lack of compliance with *Iqbal's* pleading requirement). "[A]s *Iqbal* makes clear, a plausible claim must come *before* discovery, not the other way around." *Id.* Moreover, courts in this Circuit do not recognize that allegations of a joint-venture require a relaxed application of *Iqbal* in reviewing such allegation for plausibility. *See PB Americas, Inc. v. Continental Cas. Co.*, 690 F.Supp.2d 242, 248 (S.D.N.Y. 2010)

(applying *Iqbal* to plaintiff's joint-venture allegations and denying plaintiff's discovery request to support allegations); *Hannah Bros.*, 609 F.Supp.2d at 349-50 (granting defendant's motion to dismiss plaintiff's joint-venture claim based on *Iqbal* noting that under plaintiff's theory every support contract would "transform" the parties into joint-venturers).

Plaintiff's reliance, Plaintiff's Memorandum at 7, on *Arista Records, LLC v. Doe*, 604 F.3d 110, 120 (2d Cir. 2010) and *Carpenters Pension Trust Fund of St. Louis v. Barclays, PLC*, 750 F.3d 227, 235 (2d Cir. 2014), *id.* at 13, that because the existence of a joint-venture is often a fact-question warranting discovery of information that is "peculiarly" within a defendant's possession and control, *Arista Records, LLC*, 604 F.3d at 120, is misplaced. Neither case presented the question raised in this case – whether dismissal is required where the allegations presented in support of a joint-venture address persons not parties to the action and the allegations on their face fail to satisfy the factors required for a joint venture. *See* Discussion, *supra*, at 19-25. Thus, acceptance of Plaintiff's contention on this point would be tantamount to rejecting Defendants' legitimate request for dismissal merely because of Plaintiff's talismanic assertion that discovery may establish the plausibility of Plaintiff's joint venture claim, a result that would effectively turn *Iqbal's* requirement on its head.

3. Plaintiff's PACT Act Claim

In its Second Claim brought under the PACT Act, Plaintiff alleges GRE and NWS violated § 376(a) of the PACT Act by failing to comply with the filing requirements imposed by it on persons, including Indian tribe chartered corporations like GRE and

NWS, as defined in 15 U.S.C. § 375(10), under § 376(a)(2). Plaintiff also alleges neither GRE nor NWS have complied with the filing requirements. Second Amended Complaint ¶¶ 112-113. As relevant, Section 376(a) provides that such filing requirements apply to "[a]ny person who sells, transfers, or ships for profit cigarettes . . . in interstate commerce, whereby such cigarettes are shipped into a state, locality, or Indian country of an Indian tribe taxing the sale or use of cigarettes . . .." In support of its PACT Act claim against Defendants, Plaintiff alleges that GRE manufactures and sells F.O.B. untaxed cigarettes to NWS at its manufacturing facility in Ohsweken, Ontario, thereby transferring title to the cigarettes to NWS in Ontario. Second Amended Complaint ¶¶ 55, 58. In turn, NWS transports, *i.e.*, imports, the purchased cigarettes into New York State, across the United States – Canada border in this district, for distribution to several on-reservation wholesalers located within New York State. *Id.* ¶ 58. Based on Plaintiff's allegations that NWS directly ships untaxed cigarettes into New York State and that GRE and NWS are engaged in a joint venture to distribute untaxed cigarettes within New York State, Second Amended Complaint ¶ 66, and the vicarious liability that attaches to GRE and NWS arising from the alleged joint venture's action importing and distributing untaxed cigarettes within New York State, Plaintiff asserts that GRE and NWS were obligated, but failed, to comply with the filing requirements of § 376(a). Second Amended Complaint ¶¶ 129-130. While Plaintiff alleges NWS is incorporated under the tribal law of the Sac and Fox Nation of Oklahoma, with a principal place of business at 10955 Logan Road, Perrysburg, New York, Second Amended Complaint ¶ 9, Plaintiff fails to specifically allege whether such NWS business location is located in "Indian country of an Indian tribe taxing the sale or use of

cigarettes," as these terms are used in § 376(a). However, the court takes judicial notice, Fed.R.Evid. 201(b), that the NWS business location at 10955 Logan Road, Perrysburg, New York, as alleged by Plaintiff, is within the Cattaraugus Reservation of the Seneca Indian Nation. Further, § 375(7)(A) of the Act defines "Indian country" as the term is defined in 18 U.S.C. § 1151 which in relevant part is "all land within the limits of an Indian reservation under the jurisdiction of the United States . . .." The PACT Act, § 375(8), defines Indian tribe as that term is defined in 25 U.S.C. § 479a-1 ("§ 479a-1") or listed in regulations of the Secretary of Interior ("the Secretary"), promulgated pursuant to § 479a-1. The current listing of Indian tribes as defined by § 375(8) includes the Seneca Nation of Indians. *See* 81 Fed.Reg. 26826, 26830 (May 4, 2016). Therefore, even if Plaintiff has properly alleged GRE and NWS operate a joint venture the purpose of which is to manufacture, ship and distribute for sale untaxed cigarettes in New York State, Plaintiff's PACT Act Claim does not allege that such cigarettes are shipped "into . . . Indian country of an Indian tribe taxing the sale or use of cigarettes," as § 376(a) requires, *see* Second Amended Complaint ¶ 58 (alleging Defendants knowingly shipped and sold millions of untaxed cigarettes since November 22, 2011 to various on-reservation wholesalers within New York State).

Additionally, Plaintiff's contention that because under Plaintiff's joint venture theory, GRE is equally liable for NWS's failure to comply with § 376(a), Plaintiff's Memorandum at 6 ("As part of the joint venture . . . Defendants engage in 'interstate commerce' as defined under the PACT Act . . .."), in as much as the untaxed cigarettes imported by NWS into New York State constitute "interstate commerce," as defined by § 375(9)(A) ("'interstate commerce' means commerce between a State and any place of

trade outside the State") does not, contrary to Plaintiff's contention, demonstrate Plaintiff has plausibly alleged Defendants violated the PACT Act. Specifically, Plaintiff argues that, for purposes of construing § 376(a), any distinction between the terms "state" and "Indian country," is incorrect because the two jurisdictional territories are "overlapping jurisdictions," Plaintiff's Memorandum at 38, demonstrating that a shipment from GRE in Ontario by NWS is one to a location within New York State thereby constituting "commerce between a State and any place outside the State." *Id*. (quoting § 375(9)(A)). Plaintiff further asserts that reading the term "Indian country" to distinguish such term from that of the term "State," renders specific provisions of the PACT Act's definition of "interstate commerce" superfluous, in violation of the applicable canon of statutory construction. Plaintiff's Memorandum at 46 (citing *TWR Inc. v. Andrews*, 534 U.S. 19, 31 (2001)). However, Plaintiff's argument overlooks that § 376(a) specifies that its filing requirement applies where the cigarette shipment at issue is in interstate commerce and is also "shipped into a State" . . . or "Indian country, of a tribe taxing the sale or use of cigarettes." 15 U.S.C. § 376(a) (underlining added). Thus, as relevant, the statute itself unambiguously limits its applicability to two possible destinational elements: a shipment of cigarettes in interstate commerce, to either (1) a "State," or (2) "Indian country of an Indian tribe" which taxes the sale or use of cigarettes. The applicable statutory construction canon requires that the clause following the disjunctive preposition "or" as it appears in § 376(a) be given its full separate meaning and effect. *See Loughrin v. United States,* ___ U.S. ___, 134 S.Ct. 2384, 2390 (2014). Indeed, the Act's definition of "interstate commerce," § 375(9)(A), makes this basic distinction between a "State" and "any Indian country in the State," thereby negating Plaintiff's contention, Plaintiff's

Memorandum at 38, that such distinction improperly blurs the "overlapping jurisdictions," of the two jurisdictions. Thus, it is the language of the PACT Act itself which draws a material distinction between cigarette shipments into a State, on the one hand, or cigarette shipments to Indian country which taxes cigarette sales, on the other hand, for purposes of the PACT Act's applicability to such shipments and its related filing requirements. *See Mountain Tobacco*, 2016 WL 3962992, at *8 (holding shipment of untaxed cigarettes from defendant's facility on the Yakama Indian Reservation located in the state of Washington to Indian operated cigarette companies on reservations located in New York State not within the definition of interstate commerce under § 375(9)(A) of the PACT Act). As Judge Seybert stated in *Mountain Tobacco,* "[t]he notion that a qualified Indian reservation – which falls squarely within the definition of 'Indian country' – is somehow subsumed with the definition of 'state' [§ 375(11)] is belied by a plain reading of the statute." *Mountain Tobacco*, 2016 WL 3962992, at *8. Simply put, the alleged sales and shipments of the Seneca brand cigarettes by NWS to other Indian reservations within New York State, as Plaintiff alleges, do not take place between a state and any place outside a state, between a state and any Indian country within a state, or between points within a state but through any place outside the state or through any Indian country as § 375(9)(A) requires in order to render the PACT Act applicable to such shipments. *Id.*

While the Second Amended Complaint appears to allege that the cigarettes shipped by NWS are shipped to a location within an Indian country, *i.e.*, NWS's business location within the Seneca Indian Reservation, Second Amended Complaint ¶¶ 55-56, Plaintiff does not, based on the other alleged facts provided in the Second

Amended Complaint, allege that such Seneca "Indian country" taxes cigarette sales or use. Accepting Plaintiff's construction of § 376(a), *i.e.*, that the PACT Act coverage extends to all cigarette shipments into a State regardless of destination renders superfluous the disjunctive "or" and its following clause regarding shipments to Indian country which taxes cigarette sales or use as § 376(a) states contrary to controlling canons of statutory construction. *See TRW Inc.*, 534 U.S. at 31. "It is 'a cardinal principle of statutory construction' [that] a 'a statute ought upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *Id.* (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotation marks omitted)). Moreover, Plaintiff's attempt to rebut, Plaintiff's Memorandum at 39, NWS's contention that § 375(9)(A)'s definition of interstate commerce distinguishes between Indian country and a state, NWS's Memorandum at 19-21, fails because § 375(9)(A) itself establishes such a distinction. *See Mountain Tobacco*, 2016 WL 3962992, at *8. Therefore, the term "any place outside the State" refers to a location outside the geographical boundaries of a state, not a location such as "Indian country," located within the boundaries of a state, that for some purposes enjoys a limited exclusion from a state's legal authority, in violation of the required statutory construction canon. *See TRW Inc.*, 534 U.S. at 31. Under Plaintiff's construction of § 375(9)(A), the PACT Act's explicit reference to "Indian country," *see* § 376(a), would be unnecessary.

Likewise, Plaintiff's allegation, Second Amended Complaint ¶ 58, that NWS wholesales untaxed cigarettes to on-reservation wholesalers within New York State, resulting in retail sales to non-Indians on several Indian reservations within New York

State, Second Amended Complaint ¶ 61, does not bring Plaintiff's PACT Act claim against Defendants within the PACT Act's requirements, for the simple reason that such sales do not fall within the four-corners of the PACT Act's definition of interstate commerce. In particular, such sales alleged are neither sales between New York State and a location outside the state, between New York State and any Indian country in the [New York] state, nor do they constitute sales between points in New York State but "through any place outside the state or through Indian country." § 375(9)(A). The word "through," as commonly defined, is "used to indicate passage between or among the separate units of something," such as passing through a forest, or passing "from one end or side to the other," such as driving through a state or a similar geographically defined area. Webster's Third New Int'l Dictionary at 2384. *See also* Oxford Dictionaries, available at http://www.oxforddictionaries.com/definition/english/through, *last visited* Aug. 30, 2016 ("moving in one side and out of the other side of (an opening, channel, or location)"). Plaintiff's reliance on AFT's constructions of § 375(9)(A), Sprague Declaration Exhs. B & C, which ignore such accepted definitions of the term "through," is therefore unpersuasive. Here, the Second Amended Complaint does not allege NWS shipped or distributed the Seneca brand cigarettes "through," within the accepted definition of that word, any Indian country, *i.e.*, reservations within New York State; rather it alleges NWS shipped such cigarettes directly to other on-reservation retailers within New York State. *See* Second Amended Complaint ¶ 10 (NWS "sole importer and distributer [*sic*] to Indian lands in New York"), ¶ 59 (NWS sells "unstamped cigarettes to reservation retailers in New York"). Plaintiff's construction of the third option of establishing interstate commerce requires that § 375(9)(A) be read to include a

fourth possibility for such form of commerce, *viz.*, "or between any Indian country within the same State," not present in or implied by the text of § 375(7)(A). Had Congress wished to subject NWS's cigarette sales to other reservation retailers or wholesalers located within New York State the PACT Act regulations, and liability, as Plaintiff alleges, Congress certainly could have done so; it did not.[13] Thus, by its limited definition of interstate commerce, the PACT Act does not extend to sales or shipments of untaxed cigarettes between Indian countries, *i.e.*, reservations, within a state such as those alleged by Plaintiff in the Second Amended Complaint with respect to NWS cigarette shipments to other on-reservation wholesalers within New York State. Plaintiff's Second Amended Complaint asserting PACT Act liability against GRE based on its alleged vicarious liability for NWS's actions in importing untaxed cigarettes or, more specifically, inactions based on NWS's failure to file the information required by § 376(a)(1)-(3), thus fails to plausibly state a claim for violation of § 376(a) of the PACT Act against NWS or, vicariously, against GRE, and Defendants' motions, directed to Plaintiff's PACT Act claim should be GRANTED.

4. <u>Plaintiff's State Law Claims</u>.

As noted, Background, *supra*, at 2, Plaintiff also asserts violations of several sections of the New York Tax Law and Public Health Law, as to which GRE, but not NWS, has sought dismissal, pursuant to this court's supplemental jurisdiction under § 1367(a).

"Under 28 U.S.C. § 1367(a), a district court has 'supplemental jurisdiction' over

[13] Based on the foregoing analysis of the scope of PACT Act's interstate commerce definition, it is unnecessary to address Plaintiff's contention, Plaintiff's Memorandum at 32-36, that the Indian Commerce Clause authorizes such regulation.

all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy' once original jurisdiction is established." *Cicio v. Does*, 321 F.3d 83, 97 (2d Cir. 2003) (quoting 28 U.S.C. § 1367(a))*, vacated on other grounds by* 542 U.S. 933 (2004). "A state law claim forms part of the same controversy if it, and the federal claim 'derive from a common nucleus of operative fact." *Id*. (quoting *City of Chicago v. International College of Surgeons*, 522 U.S. 156, 165 (1997)). The court, however, may decline to exercise supplemental jurisdiction over a state law claim where (1) the court has dismissed all claims over which it has original jurisdiction, or (2) in exceptional circumstances, there are other compelling reasons for declining jurisdiction. 28 U.S.C. § 1367(c)(2), (3).

In exercising its discretion whether to retain supplemental jurisdiction over pendent state claims, the district court must balance several factors, including considerations of judicial economy, convenience, and fairness to the parties. *Correspondent Services Corp. v. First Equities Corp. of Florida*, 338 F.3d 119, 126-27 (2d Cir. 2003). "In general, where the federal claims are dismissed before trial, the state law claims should be dismissed as well." *Marcus v. AT &T Corp*., 138 F.3d 46, 57 (2d Cir. 1998); *see also Giordano v. City of N. Y*., 274 F.3d 740, 754 (2d Cir. 2001) (once federal claims are dismissed, whether plaintiff is disabled under New York state law "is a question best left to the courts of the State of New York"). "[T]he discretion implicit in the word 'may' in subdivision (c) of § 1367 permits the district court to weigh and balance several factors, including considerations of judicial economy, convenience and fairness to litigants." *Purgess v. Sharrock*, 33 F.3d 134, 138 (2d Cir. 1994) (citing *Castellano v. Board of Trustees*, 937 F.2d 752, 758 (2d Cir. 1991)). Where "dismissal of

the federal claim occurs 'late in the action, after there has been substantial expenditure in time, effort, and money in preparing the dependent claims, knocking them down with a belated rejection of supplemental jurisdiction may not be fair. Nor is it by any means necessary.'" *Purgess*, 33 F.3d at 1 38 (quoting 28 U.S.C. § 1 367, Practice Commentary (1993) at 835).

A district court abuses its discretion by exercising supplemental jurisdiction over state law claims, despite the dismissal of all federal claims, "where the federal claims had been dismissed at a relatively early stage and the remaining claims involved issues of state law that were unsettled." *Valencia ex. rel. Franco v. Lee*, 316 F.3d 299, 306 (2d Cir. 2003) (underlining added) (citing *Giordano v. City of New York*, 274 F.3d 740, 754 (2d Cir. 2001); *Oliveira v. Frito-Lay, Inc*., 251 F.3d 56, 64 (2d Cir. 2001); and *Seabrook v. Jacobson*, 153 F.3d 70, 71-73 (2d Cir. 1998)). In contrast, a district court's decision to retain state claims after dismissing all federal claims where the question arises late in the proceedings will be affirmed. *See Purgess*, 33 F.3d at 1 39 (holding district court did not abuse its discretion by exercising supplemental jurisdiction over state claims where four of five federal claims were dismissed on the eve of trial, final federal claim was dismissed after the close of all the evidence, the parties had spent years preparing for trial in federal court, jury had heard evidence for several days and was ready to deliberate, and it would have been wasteful to subject case to another full trial before different tribunal). Prior to declining to exercise supplemental jurisdiction over state law claims, however, the district court should consider whether the litigants will be prejudiced by the decision. *Correspondent Services Corp*., 338 F.3d at 127.

Here, as Defendants have not answered and discovery has been stayed, the

parties will suffer no prejudice if Plaintiff's remaining state laws are dismissed pursuant to § 1367(a)(2). Further, whether under the allegations of the Second Amended Complaint, GRE as an Indian chartered entity, may be subject to the New York Tax Law and Public Health Law provisions as asserted by Plaintiff could arguably present complex issues of state law establishing an additional reason, pursuant to § 1367(1) (permitting declining jurisdiction where remaining state claims present novel or complex issues of state law), for this court to refrain from exercising its supplemental jurisdiction over Plaintiff's remaining state law claims. Accordingly, Plaintiff's State Law Claims against GRE should be DISMISSED pursuant to § 1367(d).

5. Dismissal With or Without Prejudice.

Both NWS and GRE have requested that dismissal of Plaintiff's CCTA and PACT Act claims be dismissed with prejudice, Dkt. 79-3 at 28; Dkt. 81-1 at 29. Plaintiff has not responded to Defendants' requests. Although generally, the dismissal of a claim for failure to state a claim for which relief can be granted is without prejudice and with leave to amend, where amendment would be futile, dismissal may be with prejudice and without leave to amend. *Chavis v. Chappius*, 618 F.3d 162, 170 (2d Cir. 2010); *Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000).

As in this case, the court has determined that NWS is, for the purposes of Plaintiff's action, within the scope of the exclusion under § 2346(b)(1) for actions brought pursuant to the CCTA against "an Indian in Indian country," the applicability of which is established by the factual allegations of the Second Amended Complaint, and that as the CCTA has no extraterritorial effect regarding the alleged actions and conduct

of GRE upon which Plaintiff asserts GRE's liability under the CCTA, including its alleged participation in a joint venture with NWS as alleged by the Second Amended Complaint, and are therefore beyond the reach of the Act, any further attempt by Plaintiff to replead its CCTA claims against Defendants could not overcome these substantive obstacles and would therefore be futile. Similarly, with respect to Plaintiff's PACT Act claim, as Plaintiff has not, and likely cannot, allege the untaxed Seneca brand cigarettes are shipped by Defendants into Indian country which taxes such cigarettes, the alleged conduct of neither GRE nor NWS is within the scope of the PACT Act, and NWS's alleged shipments and sales of the cigarettes to other on-reservation sellers within New York State plainly fall outside the PACT Act's definition of interstate commerce and covered shipments to Indian country that tax cigarette sales, as discussed, Discussion, *supra*, at 31-38, thereby excluding such distributions from the PACT Act's registration and filing requirements. Accordingly, any attempt by Plaintiff to plead around such barriers to the PACT Act's applicability to Defendants would also be futile. Accordingly, Defendants' motions directed to Plaintiff's CCTA and PACT Act claims should be DISMISSED with prejudice.

CONCLUSION

Based on the foregoing, Defendants' motions, Dkts. 79 and 81 to dismiss with prejudice Plaintiff's CCTA and PACT Act claims should be GRANTED; Plaintiff's State Law Claims should be DISMISSED without prejudice pursuant to § 1367(d); the Clerk of

Court should be directed to close the file.

Respectfully submitted,

/s/ *Leslie G. Foschio*

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LESLIE G. FOSCHIO
UNTIED STATES MAGISTRATE JUDGE

Dated: August 30, 2016
Buffalo, New York

Pursuant to 28 U.S.C. §636(b)(1), it is hereby

ORDERED that this Report and Recommendation be filed with the Clerk of the Court.

ANY OBJECTIONS to this Report and Recommendation must be filed with the Clerk of the Court within fourteen (14) days of service of this Report and Recommendation in accordance with the above statute, Rules 72(b), 6(a) and 6(e) of the Federal Rules of Civil Procedure and Local Rule 72.3.

Failure to file objections within the specified time or to request an extension of such time waives the right to appeal the District Court's Order. *Thomas v. Arn*, 474 U.S. 140 (1985); *Small v. Secretary of Health and Human Services*, 892 F.2d 15 (2d Cir. 1989); *Wesolek v. Canadair Limited*, 838 F.2d 55 (2d Cir. 1988).

Let the Clerk send a copy of this Report and Recommendation to the attorneys for the Plaintiff and the Defendants.

SO ORDERED.

/s/ *Leslie G. Foschio*

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LESLIE G. FOSCHIO
UNTIED STATES MAGISTRATE JUDGE

Dated: August 30, 2016
Buffalo, New York