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10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF HUMBOLDT
12

13 **THE PEOPLE OF THE STATE OF**
14 **CALIFORNIA, ex rel. Kamala D. Harris,**
15 **Attorney General of the State of California,**
16 Plaintiff,

17 v.

18 **ARDITH HUBER, individually, dba**
19 **HUBER ENTERPRISES, and DOES 1**
20 **through 20 inclusive,**
21 Defendants.

Case No. DR110232

~~PROPOSED~~ ORDER GRANTING THE
PEOPLE'S MOTION FOR SUMMARY
ADJUDICATION, DENYING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT, AND
ENTERING PERMANENT
INJUNCTION

Date: TBD
Time: TBD
Dept: 8
Judge: Hon. W. Bruce Watson
Trial Date: TBD
Action Filed: March 8, 2011

22
23 The People's ("Plaintiff") Motion for Summary Judgment or, in the Alternative, Summary
24 Adjudication, and Defendant's Motion for Summary Judgment or, in the Alternative, Summary
25 Adjudication, came on regularly for hearing on September 29, 2014 at 1:45 p.m. The Court
26 considered all the arguments and evidence presented by the parties in support of and in opposition
27 to the motions and issued a ruling on November 12, 2014, determining that Plaintiff is entitled to
28 summary adjudication of each of its causes of action, that Defendant's affirmative defenses have

1 no merit, and that a permanent injunction should issue against Defendant as well as Defendant's
2 directors, officers, employees, agents, and persons acting in concert with or participation with her.
3 Plaintiff is not entitled to summary judgment because genuine issues of material fact exist as to
4 the amount of penalties to be imposed under the second and third causes of action. Defendant's
5 Motion for Summary Judgment or, in the Alternative, Summary Adjudication is denied in its
6 entirety.

7 Therefore, the Court now FINDS, ORDERS, ADJUDGES, AND DECREES as follows:

8 **PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT/SUMMARY ADJUDICATION**

9 **Findings of Fact**

10 1. Defendant is a member of the Wiyot Tribe. (Plaintiff's Separate Statement of
11 Undisputed Material Facts in Support of Motion for Summary Judgment or Summary
12 Adjudication ("UMF") 1.) The Wiyot Tribe is a federally-recognized Indian tribe and has
13 approximately 600 members. (UMF 1-2.) The Wiyot Tribe's reservation, known as the Table
14 Bluff Reservation, consists of approximately 88 acres and is located approximately 16 miles
15 south of Eureka, California (UMF 4-5.) Defendant resides on the Table Bluff Reservation. (UMF
16 4.)

17 2. Defendant owns Huber Enterprises, a cigarette sales and distribution business that she
18 operates from her home. (UMF 6, 8.) Defendant sells cigarettes from her retail store, which is
19 located at her home. (UMF 9.) Defendant also sells cigarettes to approximately 25 other retail
20 stores located off the Table Bluff reservation. (UMF 46-47.)

21 3. Defendant's retail store is open Monday through Saturday from 8 a.m. to 7 p.m.,
22 although it used to be closed on Saturdays. (UMF 29-30.) Defendant allows members of the
23 general public to purchase cigarettes from her retail store and has sold cigarettes to people who
24 were not members of any Indian tribe. (UMF 32.) Defendant has regular retail customers who do
25 not live on the Table Bluff Reservation. (UMF 37.) At one time, Defendant sold cigarettes via
26 mail order. (UMF 38.) Defendant also maintained two public websites advertising the sale of
27 "tax-free", "cheaper" cigarettes from her retail store. (UMF 39-43.)

1 4. Defendant does not have a policy requiring proof of tribal membership to purchase
2 cigarettes from Defendant's retail store, and does not check for tribal identification before selling
3 cigarettes to non-members of the Wiyot Tribe. (UMF 31.) Defendant cannot identify the number
4 of cigarette sales transactions made to members of the Wiyot Tribe from Defendant's retail store
5 between January 1, 2007, and April 30, 2014. (UMF 34.)

6 5. Defendant also sells cigarettes to approximately 25 other retail stores. (UMF 46.)
7 Defendant transports these cigarettes to other retail stores beyond the borders of the Table Bluff
8 Reservation on California roads and highways. (UMF 47.)

9 6. Since 2004, the Attorney General has maintained the California Tobacco Directory
10 (the "Directory"), which is a public list of cigarette manufacturers and their brands that are lawful
11 for sale in California. (UMF 58.) It is unlawful to sell, offer for sale, possess, distribute, or
12 transport cigarettes of a manufacturer or brand family not included on the Directory. (Rev. & Tax.
13 Code, § 30165.1, subd. (e).) Seneca, Opal, Couture, King Mountain, Sands, Skydancer, and
14 Heron cigarette brands were not listed on the Directory at any time between March 2007 and July
15 2014. (UMF 59.)

16 7. Between November 23, 2009, and October 1, 2013, Defendant sold, offered for sale,
17 possessed for sale, distributed and/or transported a total of 1,472,729 cartons (14,727,290 packs)¹
18 of Seneca, Opal, Couture, King Mountain and/or Sands brands of cigarettes to approximately 27
19 other tobacco stores in California (Defendant's "wholesale customers"). (UMF 66.) These
20 cigarette sales occurred in approximately 3,535 sales transactions, for which Defendant invoiced
21 more than thirty million dollars. (UMF 65.)

22 8. Between March 8, 2007, and October 1, 2013, Defendant possessed for sale, offered
23 for sale, and sold a total of 1,969,279 packs of Seneca Opal, Couture, King Mountain, and/or
24 Sands brand cigarettes from her retail store. (UMF 70.) Defendant admitted that on each day
25 during which Defendant's retail store was open for business, since January 1, 2007, she sold
26 cigarettes that were not at that time listed on the Directory. (UMF 27.)

27 ¹ The Court finds that there are 20 cigarette sticks in one pack of cigarettes and 200
28 cigarette sticks in one carton of cigarettes. (UMF 18.)

1 9. Effective January 1, 2007, it is unlawful to sell, offer, or possess for sale cigarettes
2 not in compliance with the testing, performance standard, marking, and certification requirements
3 of the California Cigarette Fire Safety and Firefighter Protection Act ("Fire Safety Act"). (Health
4 & Saf. Code, § 14951, subd. (a).)

5 10. Between January 1, 2007, and December 2, 2013, none of the manufacturers of the
6 Seneca, Opal, Couture, King Mountain, and Sands cigarette brands had submitted a certification
7 to the State Fire Marshal. (UMF 75.) At no time between January 1, 2007, and December 2, 2013,
8 did the State Fire Marshal approve the Seneca, Opal, Couture, King Mountain, or Sands brand
9 cigarettes under the Fire Safety Act. (UMF 76.)

10 11. On or about October 28, 2010, the California Attorney General's Office notified
11 Defendant in writing that she was selling cigarettes not lawful for sale in California because they
12 were not listed on the California Tobacco Directory, not certified as fire-safe, and not tax-paid in
13 violation of the Directory law, Fire Safety Act, state excise tax laws, and Unfair Competition Law,
14 and demanded that she cease and desist from making such sales. (UMF 53.)

15 12. Between October 29, 2010, and October 1, 2013, Defendant sold a total of 1,239,242
16 cartons (12,392,420 packs) of Seneca, Opal, Couture, King Mountain and/or Sands brands of
17 cigarettes to her wholesale customers. (UMF 67.)

18 13. Between October 29, 2010, and October 1, 2013, Defendant sold a total of 866,432
19 packs of Seneca Opal, Couture, King Mountain, and/or Sands brand cigarettes from her retail
20 store. On each day that Defendant's retail store was open for business, Defendant sold a total of
21 51 or more packs of Seneca, Opal, Couture, King Mountain, and/or Sands brand cigarettes. (UMF
22 28.)

23 14. On November 21, 2013, this Court preliminarily enjoined Defendant from selling to
24 non-members of the Wiyot tribe cigarettes whose manufacturers had not submitted certifications
25 to the State Fire Marshal as required by the Fire Safety Act. Between November 21, 2013 and
26 February 1, 2014, Defendant sold a total of 31,965 packs of Seneca cigarettes from her retail store
27 (UMF 78), even though the manufacturer of the Seneca brand had not filed a written certification
28 with the State Fire Marshal as of February 1, 2014. (UMF 77.)

1 15. Defendant never collected state excise taxes on cigarettes she sold in her retail store,
2 and did not purchase or sell cigarettes with a California tax stamp on them. (UMF 24.) The
3 California state excise tax on cigarettes is, and at all relevant times has been, \$0.87 per pack.
4 (Rev. & Tax. Code, §§ 30101, 30123, 30131.2.)

5 **Conclusions of Law Regarding Defendant's Liability**

6 16. Defendant violated the California tobacco directory law, Revenue and Taxation Code
7 section 30165.1, and specifically subdivision (e)(2), by selling, offering, possessing for sale in
8 this state, shipping, or otherwise distributing into or within this state, cigarettes of a tobacco
9 product manufacturer or brand family not included in the California Tobacco Directory.

10 17. Defendant violated Revenue and Taxation Code section 30165.1, subdivision
11 (e)(3)(A), by selling or distributing cigarettes that Defendant knew or should have known were
12 intended to be distributed in violation of paragraph (e)(2) of section 30165.1.

13 18. Defendant violated Revenue and Taxation Code section 30165.1, subdivision
14 (e)(3)(B), by acquiring, holding, owning, possessing, or transporting cigarettes that Defendant
15 knew or should have known were intended to be distributed in violation of paragraph (e)(2) of
16 section 30165.1.

17 19. Defendant violated the California Cigarette Fire Safety and Firefighter Protection Act
18 ("Fire Safety Act"), Health and Safety Code sections 14950-14960, and specifically subdivision
19 (a) of section 14951, by selling, offering, or possessing for sale cigarettes not in compliance with
20 the requirements of the Fire Safety Act.

21 20. Defendant violated California's Unfair Competition Law ("UCL"), Business and
22 Professions Code section 17200 et seq., by violating the California tobacco directory law (see
23 Rev. & Tax. Code, § 30165.1, subd. (l)) and the Fire Safety Act as set forth above, and by selling
24 and distributing untaxed cigarettes and by failing to collect and remit to the State Board of
25 Equalization applicable state excise taxes on the cigarettes she sold, as required by sections
26 30101, 30108, 30123, and 30131.2 of the Revenue and Taxation Code.

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1 **Conclusions of Law Regarding Defendant's Affirmative Defenses**

2 21. The Court has considered each and all of Defendant's 18 affirmative defenses, and
3 concludes that each of them lacks merit, as follows:

4 a. For the reasons stated below as to the denial of Defendant's Motion for
5 Summary Judgment and in the Court's ruling on Plaintiff's Motion for a Preliminary
6 Injunction, Defendant's first affirmative defense (lack of subject matter jurisdiction)
7 fails.

8 b. Defendant's second affirmative defense (failure to exhaust tribal remedies) fails
9 because Defendant made no showing that Plaintiff was required to exhaust before the
10 Wiyot Tribe's adjudicatory tribunals or that a tribal exhaustion procedure exists, and
11 even if Defendant did so there is undisputed evidence that Plaintiff initially contacted
12 tribal officials before filing this action. (UMF 95-97.)

13 c. For the reasons stated above as to granting summary adjudication in favor of
14 Plaintiff, Defendant's third affirmative defense (failure to state a claim upon which
15 relief can be granted) fails.

16 d. Defendant's fourth (estoppel), sixth (substantial hardship), fourteenth (laches),
17 fifteenth (unclean hands), and sixteenth (one who seeks equity must do equity)
18 affirmative defenses – all of which assert a form of estoppel – also fail. The operative
19 complaint does not allege a tax cause of action against Defendant. (UMF 101.) There
20 is undisputed evidence that Plaintiff first became aware of Defendant's business
21 operations in 2008. (UMF 102.) Defendant's responses to discovery and verified
22 answer to the complaint offer no evidence that Plaintiff became aware of Defendant's
23 business operations in 2003. (UMF 104.) There is undisputed evidence that Plaintiff
24 filed this action in March 2011 after a series of contacts with Wiyot tribal officials
25 and with Defendant in 2010. (UMF 96-97.) Defendant's argument that this action
26 would cause substantial hardship on Defendant out of proportion to the benefit
27 Plaintiff would obtain is not persuasive. There is undisputed evidence that Defendant
28 received notice of this lawsuit, continued to sell cigarettes that violated various state

1 laws, and that a large number of cigarette brands are listed on the California Tobacco
2 Directory. (UMF 109-110.) (See also *Feduniak v. Cal. Coastal Comm'n.* (2007) 148
3 Cal.App.4th 1346, 1381 [doctrines of estoppel not available against a public entity if
4 their application would nullify important policy of public benefit].)

5 e. Defendant's fifth affirmative defense (that the action is premature) fails because
6 Defendant offered no evidence or argument in support of this defense.

7 f. Defendant's seventh through tenth affirmative defenses (federal preemption,
8 Indian Commerce Clause, Supremacy Clause, and federal common law) fail for the
9 reasons stated above regarding granting summary adjudication in favor of the People.
10 Further, Defendant did not offer any evidence or argument to support these defenses
11 other than that Defendant is a member of a federally-recognized tribe, the Wiyot
12 Tribe, and that she resides and conducts business on the Table Bluff Reservation.
13 (UMF 1, 2, 4, 8, 9.) In addition, although Defendant claimed that the People failed to
14 exhaust tribal adjudicatory remedies, she offered no evidence in support of that claim.
15 (UMF 112, 114, 116, 118.)

16 g. Defendant's eleventh defense (failure to name an indispensable party) fails for
17 lack of either evidence or argument. (UMF 120-121.) Further, the Court rejected this
18 defense when it was raised in opposition to Plaintiff's Motion for a Preliminary
19 Injunction.

20 h. Defendant's twelfth (Board of Equalization has primary jurisdiction) and
21 thirteenth (failure to exhaust administrative remedies) affirmative defenses, regarding
22 the Board of Equalization, are not persuasive. The complaint does not set forth a
23 claim for relief under Revenue and Taxation Code section 30101.7. (UMF 123-124.)
24 Further, the Attorney General does have authority to enforce certain provisions of
25 section 30101.7. (UMF 125.) Defendant submitted no evidence in support of her
26 defense that Plaintiff failed to exhaust administrative remedies. (UMF 128.)

27 Defendant offered no argument that the Board – like the Wiyot Tribe – is a necessary
28 party.

1 i. Defendant's seventeenth (uncertainty of the pleading) and eighteenth
2 (vagueness of the complaint) affirmative defenses are not persuasive and are not
3 supported by any showing that Defendant was unable to understand the allegations of
4 the complaint. Further, in granting the preliminary injunction sought by Plaintiff, the
5 Court noted that Defendant more or less conceded that she violated the three statutes
6 at issue, and at summary judgment Defendant did not argue that she was harmed by
7 any vagueness or uncertainty in the underlying pleadings.

8 **Existence of Triable Issue**

9 22. The Court finds that a triable issue of material fact exists with regard to the amount of
10 civil penalties to be imposed under Plaintiff's second and third causes of action, and denies
11 Plaintiff's motion for summary judgment on that basis. ~~Specifically, as found above, Plaintiff has~~
12 ~~presented undisputed evidence showing the number of untaxed, off-Directory, non-fire-safe~~
13 ~~certified cigarette packs sold by Defendant at retail and at wholesale, the amount of state excise~~
14 ~~taxes owed on a cigarette pack, that Defendant did not collect excise taxes or sell cigarettes with a~~
15 ~~California excise tax stamp, and that Defendant sold cigarettes at retail to the general public and~~
16 ~~cannot identify the number of cigarette sales transactions made to members of the Wiyot Tribe~~
17 ~~between January 1, 2007 and April 30, 2014. (UMF 23-24, 31-36, 58-59, 63-78.) Additionally,~~
18 ~~although the Court did not rely on these facts in granting Plaintiff's motion for summary~~
19 ~~adjudication, Plaintiff presented undisputed evidence regarding the amount of escrow due on a~~
20 ~~cigarette pack lawfully sold in the state, and Defendant's assets, income, current inventory, and~~
21 ~~net worth. (UMF 61-62, 86-90.)~~ However, ^{As an example,} Defendant submitted the Declaration of Ardith Huber,
22 dated September 15, 2014, stating that she sells cigarettes to the general public and to a "large
23 number of Wiyot tribal members from her retail store." (Declaration of Ardith Huber in Support
24 of Defendant's Opposition to Plaintiff's Motion for Summary Judgment or, in the Alternative,
25 Summary Adjudication, at ¶ 16.) Plaintiff does not contend that Defendant's retail sales to
26 members of the Wiyot Tribe occurring on the Table Bluff Reservation would violate the state
27 laws at issue here. Defendant represented in her declaration that the quantity of such sales is
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As this example demonstrates,
1 “large” and Plaintiff offered evidence that Defendant could not identify the quantity of such sales.
2 Therefore this issue cannot be decided at summary judgment.

3 **DEFENDANT’S MOTION FOR SUMMARY JUDGMENT**

4 23. The Court denies Defendant’s Motion for Summary Judgment or, in the Alternative,
5 Summary Adjudication, in its entirety. The Court is not persuaded that the Court lacks subject
6 matter jurisdiction over this action or that the Attorney General lacks authority to regulate
7 Defendant’s commercial conduct. (See *Washington v. Confederated Tribes of the Colville Indian*
8 *Res.* (1980) 447 U.S. 134, 155-61; *Moe v. Confederated Salish and Kootenai Tribes of Flathead*
9 *Reservation* (1976) 425 U.S. 463, 481-483; *Mescalero Apache Tribe v. Jones* (1973) 411 U.S.
10 145, 148-49; *Muscogee (Creek) Nation v. Pruitt* (10th Cir. 2012) 669 F.3d 1159, 1179-83; *People*
11 *ex rel. Harris v. Black Hawk Tobacco, Inc.* (2011) 197 Cal.App.4th 1561, 1568-71; *Mike v.*
12 *Franchise Tax Bd.* (2010) 182 Cal.App.4th 817, 828-29; *State ex rel. Edmondson v. Native*
13 *Wholesale Supply* (Okla. 2010) 237 P.3d 199, 216.)

14 24. For reasons previously stated when granting the preliminary injunction in this case,
15 the State’s authority in this action does not derive exclusively from Public Law 280. In the
16 tobacco cases, the states regulated without any authority from the federal government and the
17 Supreme Court upheld those regulations. (See, e.g., *Dep’t of Taxation & Finance of N.Y. v.*
18 *Milhelm Attea & Bros., Inc.* (1994) 512 U.S. 61, 73.) Here, similarly, the State seeks to apply its
19 laws to Defendant’s conduct even though it does not claim any authority from the federal
20 government to do so. (See also *California v. Cabazon Band of Mission Indians* (1987) 480 U.S.
21 202, 214-15 [“Our cases . . . have not established an inflexible *per se* rule precluding state
22 jurisdiction over tribes and tribal members in the absence of express congressional consent”].)
23 Under the *Black Hawk* decision cited above, the Supreme Court’s tobacco cases do authorize the
24 State’s enforcement of the laws at issue here. (See 197 Cal.App.4th at 1568-71.) Defendant’s
25 attempt to apply *Doe v. Mann* (9th Cir. 2005) 415 F.3d 1038 and *Bryan v. Atasca County* (1976)
26 426 U.S. 373 is unavailing.

27 25. The Court also rejects Defendant’s argument that the UCL does not apply to
28 Defendant’s conduct. Courts have previously applied the UCL to an Indian’s sales occurring in

1 Indian Country. (*Black Hawk, supra*, 197 Cal.App.4th at pp. 1568-71.) In addition, Defendant's
2 wholesale business is premised on her off-reservation contacts across Northern California. Where,
3 as here, an Indian's cigarette business extends beyond the boundaries of her reservation, the state
4 may enforce its cigarette laws without weighing the federal, state, and tribal interests at stake.
5 (*White Mountain Apache Tribe v. Bracker* (1980) 448 U.S. 136, 144 n.11; *Mescalero, supra*, 411
6 U.S. at pp. 148-149; *Edmondson, supra*, 237 P.3d at p. 216.) The Court further rejects
7 Defendant's argument that the UCL is a standalone regulatory law intended solely for the
8 purposes of regulating commercial markets and must be viewed completely independently from
9 the predicate statutes when considering its applicability to the conduct at issue.

10 PERMANENT INJUNCTION

11 26. The Court also concludes, based on the evidence cited above, that there is a
12 reasonable probability that Defendant will continue her cigarette sales in violation of the
13 California tobacco directory law, Fire Safety Act, the state excise tax laws, and the UCL unless
14 she is permanently enjoined by the Court.

15 27. Pursuant to section 17203 of the Business and Professions Code and subdivision (f)
16 of section 14955 of the Health and Safety Code, the Court hereby permanently enjoins Defendant
17 Ardith Huber, individually and doing business as Huber Enterprises, Defendant's directors,
18 officers, employees, agents, and all persons acting in concert with or participation with Defendant
19 from engaging in any of the following unlawful business practices:

20 a. Selling, offering, possessing for sale, transporting, or otherwise distributing to
21 non-members of the Wiyot Tribe any cigarettes whose brand family and manufacturer
22 are not listed on the California Tobacco Directory, as prohibited by the California
23 tobacco directory law (Rev. & Tax. Code, § 30165.1, subd. (e));

24 b. Selling, offering, or possessing for sale to non-members of the Wiyot Tribe any
25 cigarettes that do not comply with the Fire Safety Act (Health & Saf. Code, §§
26 14950-14960); and

27 c. Selling cigarettes that do not bear a state excise tax stamp to non-members of
28 the Wiyot Tribe without collecting and remitting the applicable state excise tax, in

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violation of the state excise tax laws (Rev. & Tax. Code, §§ 30101, 30108, 30123, & 30131.2).

28. Defendant shall notify each and all of her directors, officers, employees, agents, and persons acting in concert with or participation with her of the provisions for injunctive relief granted in this Order and provide each of them with a copy of this Order, within 14 days of this Order.

29. Defendant shall obtain and retain a signed statement from all enjoined persons indicating that they have received and read a copy of this Order and agree to abide by it, and shall provide Plaintiff with a copy of all such signed statements within 30 days of this Order.

IT IS SO ORDERED.

Dated: _____

Handwritten signature
Handwritten signature

The Honorable W. Bruce Watson

W. BRUCE WATSON

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