

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SHASTA**

HON. STEPHEN H. BAKER

Dept. 3/src

176689

**PEOPLE OF THE STATE OF CALIFORNIA, EX. REL. KAMALA D. HARRIS,
ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,**

Plaintiff,

vs.

**DARREN PAUL ROSE, INDIVIDUALLY, AND DOING BUSINESS AS
BURNING ARROW II, AND DOES 1 THROUGH 20,**

Defendants.

**NATURE OF PROCEEDINGS: ORDER ON DEFENDANT'S MOTION FOR
SUMMARY JUDDGMENT/SUMMARY
ADJUDICATION**

AND

**ORDER ON PLAINTIFF'S MOTION FOR
SUMMARY JUDDGMENT/SUMMARY
ADJUDICATION**

This matter was taken under submission from the Court's January 6, 2014 Law and Motion calendar. Having further considered the parties pleadings and the oral argument from that hearing, the Court hereby makes the following order.

Defendant's Motion for Summary Judgment/Summary Adjudication

Procedural Defects:

Both parties have failed to comply with CRC Rule 3.1110(f) which provides: "Each Exhibit must be separated by a hard 8.5 X 11 sheet with hard paper or plastic tabs extending below the bottom of the page, bearing the Exhibit designation. An index to exhibits must be provided." Neither party has marked the exhibits with the proper tabs. Neither party provided an index to the exhibits. The purpose of this rule is obvious. In motions that are document dependent, such as a motion for summary judgment, it is necessary for the court to readily locate the documents to which the parties refer. Failure

to provide an index, and failure to mark the exhibits properly, results in the Court expending additional time and energy to try to find the evidence supporting or opposing the motion. Counsel should be directed to comply with the Rules of Court with regard to the format of their motion papers in all future filings, or the Court may exercise its discretion to simply disregard non-compliant submissions.

Defendant's reply exceeds the page limits set forth in CRC Rule 3.113(d), which provides that no reply memorandum shall exceed 10 pages. CRC Rule 3.113(e) provides that a party may apply to the Court, at least 24 hours before the memorandum is due, for permission to file a longer memorandum. Defendant failed to do so. Plaintiff has objected. The court has not considered any portion of the reply after 10 pages.

Defendant has failed to properly bring a motion for summary adjudication. "(T)he specific cause of action, affirmative defense, claims for damages, or issues of duty must be stated specifically in the notice of motion and be repeated, verbatim, in the separate statement of undisputed material facts." [CRC 3.1350(b); see Truong v. Glasser (2010) 181 CA4th 102, 118, 103 CR3d 811, 823-824]. The separate statement of undisputed facts must tie each "undisputed material fact" to the particular claim, defense or issue sought to be adjudicated. When multiple causes of action, issues or defenses are presented for summary adjudication in one motion, each cause of action, issue or defense to which the motion for summary adjudication is directed must have a separate section heading indicating the issue number and specifying the issue. Where "undisputed facts" pertain to more than one claim, defense or issue, these facts (together with the supporting evidence) must be repeated for each such issue. [See CRC Rule 3.1350(h)].

Defendant's Notice of Motion and Motion does not state the grounds upon which defendant is requesting summary adjudication, and does not identify the separate causes of actions or claims that defendant wishes to have summarily adjudicated. Defendant's Separate Statement of Undisputed Facts does not separately identify the causes of action, or claims that defendant wishes to have summarily adjudicated.

This is sufficient to deny the motion for summary adjudication. Therefore, the Court can only proceed to consider this motion as a motion for summary judgment.

Plaintiff's objections to defendant's evidence:

1. The objection is sustained to the extent that defendant is testifying that the cigarettes are fire-safe. The objection is overruled as to defendant's statement that the cigarettes are marked as fire-safe.
3. The objection is sustained as to the phrase: "even though the cigarettes sold are fire-safe."

Objections 2 and 4-8 are not objections to evidence. Plaintiff objects to certain portions of defendant's argument or assertions made in the separate statement. While plaintiff objects to defendant's argument, the Court is only required to rule on evidentiary

objections. The Court will only consider evidence that is properly before the Court, and will disregard arguments purporting to present facts that simply are not supported by evidence.

Merits of the motion:

Defendant argues that: 1) the Unfair Competition Law cannot be applied to regulate the conduct of Indians in Indian Country; and 2) the only exception to this rule does not apply, as the cited statutes are not aimed at nor reasonably calculated to capture taxes from non-Indians.

The gist of defendant's motion is that the state has no regulatory authority over him, and State laws cannot be applied to Indians in Indian Country. Defendant has not established that the cigarette sales took place in "Indian Country." The only evidence on this issue is defendant's declaration, wherein he simply states: "I am the majority trust holder of a federally-granted Indian allotment known as the Benter Allotment. The Benter Allotment is held in trust by the United States and is considered to be 'Indian Country.'" (Rose declaration at paragraph 4). Plaintiff states this as Undisputed Material Fact 3. The plaintiff disputes this fact, indicating that there is no evidentiary support for defendant's claim that this "Allotment" is located within the Alturas Indian Rancheria. The People cite defendant's own deposition testimony, wherein he states that the Benter Allotment is not located in the Alturas Indian Rancheria, and that the Alturas Indian Rancheria does not have any ownership in the Benter Allotment. (Exhibit G, page 16:5-19; 232:8-10). Defendant simply states his opinion that the land at issue here is "Indian Country." No evidentiary support is provided for this conclusion. Plaintiff has submitted evidence that raises a triable issue of fact as to whether or not the land at issue is "Indian Country."

As defendant's entire motion is based on the premise that State laws cannot be applied to Indians in Indian Country, and there are triable issues of fact as to whether or not the land at issue is "Indian Country", the motion is denied.

Plaintiff's Motion for Summary Judgment/Summary Adjudication

Procedural Defects:

Defendant has failed to comply with CRC Rule 3.1110(f) which provides: "Each Exhibit must be separated by a hard 8.5 X 11 sheet with hard paper or plastic tabs extending below the bottom of the page, bearing the Exhibit designation. An index to exhibits must be provided." Neither party has marked the exhibits with the proper tabs. Neither party provided an index to the exhibits. The purpose of this rule is obvious. In motions that are document dependent, such as a motion for summary judgment, it is necessary for the court to readily locate the documents to which the parties refer. Failure to provide an index, and failure to mark the exhibits properly, results in the Court expending additional time and energy to try to find the evidence supporting or opposing the motion. Counsel is directed to comply with the Rules of Court with regard to the format of motion papers in

all future filings, or risk having the Court exercise its discretion to disregard non-compliant submissions.

Plaintiff's objections to evidence:

1. Sustained.
2. Sustained.
4. Sustained.
6. Sustained.
8. Overruled.
10. Sustained.

Objections 3, 5, 7, 9, and 11 are not objections to evidence. Plaintiff objects to certain portions of defendant's argument or assertions made in the separate statement. While plaintiff objects to defendant's argument, the Court is only required to rule on evidentiary objections. The Court will only consider evidence that is properly before the Court, and will disregard arguments purporting to present facts that simply are not supported by evidence.

Merits of the motion:

First Cause of Action:

The California directory Law (Revenue and Taxation Code section 30165.1) requires the Attorney General to create and maintain a directory of tobacco product manufacturers and their cigarette brands that are lawful for sale in California.

Subdivision (e)(2) and (3) provide:

(2) No person shall sell, offer, or possess for sale in this state, ship or otherwise distribute into or within this state or import for personal consumption in this state, cigarettes of a tobacco product manufacturer or brand family not included in the directory.

(3) No person shall do either of the following:

(A) Sell or distribute cigarettes that the person knows or should know are intended to be distributed in violation of paragraphs (1) and (2).

(B) Acquire, hold, own, possess, transport, import, or cause to be imported cigarettes that the person knows or should know are intended to be distributed in violation of paragraphs (1) and (2).

Subdivision (l) specifically provides: "A violation of subdivision (e) shall constitute unfair competition under Section 17200 of the Business and Professions Code."

Plaintiff seeks a permanent injunction. Furthermore, the Unfair Competition Law allows the Court to impose civil penalties of up to \$2,500 for each act of unfair competition.

Defendant has submitted evidence that, since 2010, defendant has sold numerous brands of cigarettes that are not (nor have they ever been) included on the Directory. Defendant does not dispute that certain brands of cigarettes were sold in his smoke shops. Plaintiff contends that defendant acquired and offered for sale to the general public 41,738 cartons of cigarettes. (Facts 41 and 43). Defendant sold 40,428 cartons (Fact 46). (The difference consists of 548 sold to Indians after the injunction, and 762 cartons remaining in inventory, facts 53 and 56). Plaintiff requests a civil penalty of \$15 for each of these sales.

Defendant does not deny that his cigarette sales are in violation of the above statute. Defendant merely contends that California state courts do not have jurisdiction in actions seeking to regulate the conduct of Indians in Indian country, and that the attorney general cannot assert regulatory authority over the defendant.

The case of People vs. Blackhawk Tobacco Inc. (2011) 197 Cal.App. 4th 1561 would appear to be dispositive of this issue. In that case, the Court of Appeal affirmed the granting of an injunction prohibiting defendants from selling cigarettes to non-Indians in violation of state and federal laws. (The state's complaint asserted causes of action for unlawful business practices, violation of the state tobacco directory law, and violation of the California cigarette fire safety and fire fighter protection act. The same causes of action that are asserted here). Defendants argued that the state of California could not regulate defendant sale of cigarettes to non-Indians because defendants were operating stores located on Indian land. The Court rejected this argument.

The case analyzes U.S. Supreme Court decisions bearing on this issue:

"More recently, the court has said where there is no federal preemption and the state has a strong off-reservation interest, the state's authority extends to conduct on the reservation, including even Indians and tribal members: 'Our cases make clear that the Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation. State sovereignty does not end at a reservation's border. Though tribes are often referred to as 'sovereign' entities, it was 'long ago' that 'the Court departed from Chief Justice Marshall's view that 'the laws of [a State] can have no force' within reservation boundaries. 'Ordinarily,' it is now clear, 'an Indian reservation is considered part of the territory of the State.' That is not to say that States may exert the same degree of regulatory authority within a reservation as they do without. To the contrary, the principle that Indians have the right to make their own laws and be governed by them requires 'an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other.' 'When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest.' When, however, state interests outside the reservation are.

implicated, States may regulate the activities even of tribe members on tribal land, as exemplified by our decision in [Washington v. Confederated Tribes of Colville Indian Reservation]. In that case, Indians were selling cigarettes on their reservation to nonmembers from off-reservation, without collecting the state cigarette tax. We held that the State could require the Tribes to collect the tax from nonmembers, and could 'impose at least "minimal" burdens on the Indian retailer to aid in enforcing and collecting the tax.'" People v. Blackhawk, supra, at 1570, citing Nevada v. Hicks (2001) 533 U.S. 353, 361-362.

The Blackhawk case makes it clear that state of California can regulate sales of cigarettes to non-Indians on tribal lands. While defendant indicates that his establishments are located on tribal land, it can be reasonably inferred that the majority of the sales are made to non-Indians.

As the court stated in Blackhawk: "The California tobacco directory law promotes public health by increasing the costs of cigarettes and discouraging smoking. (Revenue & Taxation Code, § 30165.1, subds. (b) and (e); Health & Safety Code, § 104555.) The California Cigarette Fire Safety and Firefighter Protection Act law—providing ignition-propensity requirements—serves the public interest in reducing fires caused by cigarettes. Likewise, California has an important state interest in enforcing the unfair competition law (Business & Professions Code, § 17200) and the federal and state laws taxing cigarettes. (18 U.S.C. § 2341 et seq.) No federal or tribal interest outweighs the state's interest in collecting cigarette tax revenue or in enforcing the California tobacco directory and cigarette fire-safety laws." *Id.*, at 157.

Defendant contends that the State does not have jurisdiction in actions seeking to regulate the conduct of Indians in Indian country, and that the Attorney General cannot assert regulatory authority over the defendant. Plaintiff has established that the State can enforce the tobacco directory law as to non-Indians on tribal lands.

Plaintiff has established its entitlement to summary adjudication on its claim for a permanent injunction to enjoin defendant from offering for sale to the general public (non-Indians) or selling to the general public (non-Indians) cigarettes that are not on the directory. However, there appear to be significant triable issues of fact regarding the proper amount of any civil penalties. Defendant argues that he is entitled to possess and sell these cigarettes to Indians on Indian land. The People do not argue this point. If defendant is entitled to possess and sell these cigarettes to Indians, then he cannot be guilty of a violation for every cigarette sold. While it can be inferred from the evidence that a large number of the sales of these cigarettes were made to non-Indians, triable issues of fact exist as to how many of the cigarettes were offered to sale and/or sold to Indians vs. non-Indians. Furthermore, as the Unfair Competition law allows the imposition of fines up to \$2500 per violation, there is a triable issue as to what is the appropriate amount of the penalty. These triable issues preclude the granting of summary adjudication as to the issue of penalties in the first cause of action.

Second Cause of Action

The Second Cause of Action asserts violations of the Cigarette Fire safety and Firefighter protection act (Health & Safety Code section 14950-14960), which prohibits the sale of cigarettes that do not comply with the requirements of the act. The act imposes testing, certification, and package marking requirements on cigarette manufacturers. The purpose of the act is to establish minimum standards regarding ignition propensity to reduce fires caused by cigarettes.

The undisputed evidence demonstrates that defendant has possessed and sold cigarettes that are not in compliance with the act. Thus, the same analysis applied above is applicable here.

Plaintiff has established its entitlement to summary adjudication on its claim for a permanent injunction to enjoin defendant from offering for sale to the general public (non-Indians) or selling to the general public (non-Indians) cigarettes that do not comply with the Fire Safety Act.

Third Cause of Action

The third cause of action asserts violation of the Unfair Competition Law, premised on the violations asserted in the first two causes of action (addressed above), and violation of the Revenue and Taxation code with respect to collection and payment of taxes.

The Court has already analyzed the claims for violation of the Directory Law and the Fire Safety Act and determined that, while plaintiff is entitled to a permanent injunction enjoining violations of those statutes by sales of cigarettes to non-Indians, triable issues exist as to the appropriateness and amount of any civil penalties to be imposed. That same analysis precludes summary adjudication of this third cause of action.

In addition, plaintiff asserts violation of the Revenue and Taxation Code with respect to the obligation to collect excise taxes on cigarettes distributed in the state. It is undisputed that defendant has sold cigarettes that do not bear a California tax stamp, and has not collected excise taxes from his customers for those sales.

However, as stated above, the amount of penalties to impose cannot be determined as a matter of law. Triable issues of fact remain as to the number of cigarettes sold to Indians versus non-Indians, therefore, the number of violations cannot be determined as a matter of law, nor can the appropriate amount of any penalty to be imposed per violation. Summary adjudication is denied as to this cause of action as well.

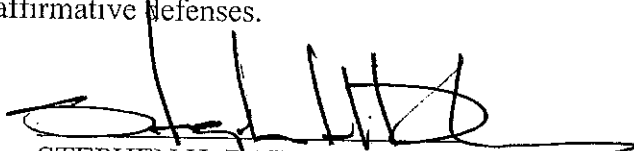
Affirmative Defenses

Plaintiff contends that there are 18 affirmative defenses that lack merit. However, the Court cannot grant summary adjudication as to these affirmative defenses because defendant has failed to properly set forth the undisputed facts that support the granting of

summary adjudication as to each of these affirmative defenses. "(T)he specific cause of action, affirmative defense, claims for damages, or issues of duty must be stated specifically in the notice of motion and be repeated, verbatim, in the separate statement of undisputed material facts." [CRC 3.1350(b); see Truong v. Glasser (2010) 181 CA4th 102, 118, 103 CR3d 811, 823-824]. The separate statement of undisputed facts must tie each "undisputed material fact" to the particular claim, defense or issue sought to be adjudicated. When multiple causes of action, issues or defenses are presented for summary adjudication in one motion, each cause of action, issue or defense to which the motion for summary adjudication is directed must have a separate section heading indicating the issue number and specifying the issue. Where "undisputed facts" pertain to more than one claim, defense or issue, these facts (together with the supporting evidence) must be repeated for each such issue.

Plaintiff's Separate Statement of Undisputed Facts does not separately identify the affirmative defenses that plaintiff wishes to have summarily adjudicated. The motion for summary adjudication is denied as to the affirmative defenses.


Dated: April 4, 2014


STEPHEN H. BAKER
Judge of the Superior Court

CERTIFICATE OF MAILING
State of California, County of Shasta

I, the undersigned, certify under penalty of perjury under the laws of the State of California that I am a Deputy Court Clerk of the above-entitled court and not a party to the within action; that I mailed a true and correct copy of the above to each person listed below, by depositing same in the United States Post Office in Redding, California, enclosed in sealed envelopes with postage prepaid.

Dated: April 4, 2014

, Deputy Clerk

Barry Alves, Esq.
Attorney General - State Of California
P.O. Box 944255
Sacramento, CA 94244-2550

Fredericks, Peebles & Morgan LLP
2020 L Street, Suite 250
Sacramento, CA 95811