No. 05-

In the Supreme Court of the United States

TROY KING, DAVID W. MÁRQUEZ, TERRY GODDARD, BILL LOCKYER, JOHN SUTHERS, CARL DANBERG, THURBERT E. BAKER, LAWRENCE WASDEN, LISA MADIGAN, STEVE CARTER, THOMAS J. MILLER, PHILL KLINE, GREGORY D. STUMBO, CHARLES FOTI, G. STEVEN ROWE, J. JOSEPH CURRAN, JR., THOMAS F. REILLY, MIKE COX, JEREMIAH W. NIXON, MICHAEL MCGRATH, JON BRUNING, ROY COOPER, JIM PETRO, HARDY MYERS, HENRY MCMASTER, LARRY LONG, PAUL G. SUMMERS, ROB MCKENNA, PEG LAUTENSCHLAGER, AND PATRICK CRANK, IN THEIR OFFICIAL CAPACITIES AS ATTORNEYS GENERAL OF ALABAMA, ALASKA, ARIZONA, CALIFORNIA, COLORADO, DELAWARE, GEORGIA, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MISSOURI, MONTANA, NEBRASKA, NORTH CAROLINA, OHIO, OREGON, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, WASHINGTON, WISCONSIN, AND WYOMING, RESPECTIVELY, PETITIONERS,

v.

GRAND RIVER ENTERPRISES SIX NATIONS, LTD., NATIONWIDE TOBACCO, INC., AND 3B HOLDINGS, INC., RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether principles of due process and state sovereignty permit a court in one State to exercise personal jurisdiction over the Attorney General of another State in a suit brought to invalidate and enjoin enforcement of laws enacted and enforced entirely within the latter State.

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OPINIONS BELOW

The opinion of the court of appeals (App. 2a-28a) is reported at 425 F.3d 158 (2005), and the order of that court

[1] Pursuant to this Court's Rule 35.3, Troy King, David W. Márquez, Terry Goddard, John Suthers, Carl Danberg, Lawrence Wasden, Lisa Madigan, Phill Kline, Gregory D. Stumbo, Charles Foti, Mike Cox, Jon Bruning, Jim Petro, Henry McMaster, Larry Long, Rob McKenna, Peg Lautenschlager, and Patrick Crank are automatically substituted for, respectively, William Pryor, Bruce M. Botelho, Janet Napolitano, Ken Salazar, M. Jane Brady, Allan G. Lance, Jim Ryan, Carla J. Stovall, Albert Benjamin Chandler, III, Richard P. Ieyoub, Jennifer Granholm, Don Stenberg, Betty D. Montgomery, Charles Condon, Mark Barnett, Christine O. Gregoire, James E. Doyle, and Hoke Macmillan.

denying rehearing and rehearing en banc (App. 1a) is unreported. The opinions of the district court are unreported, but are available electronically at 2003 WL 22232974 (Sept. 29, 2003) (App. 43a-72a), 2004 WL 1594869 (July 15, 2004) (App. 35a-42a), and 2004 WL 2480433 (Nov. 3, 2004) (App. 29a-34a).

JURISDICTION

The court of appeals entered judgment on September 28, 2005, and denied petitioners' timely petition for rehearing on January 3, 2006. On March 27, 2006, Justice Ginsburg extended until April 18, 2006, the time within which to file a petition for a writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part, "nor shall any person . . . be deprived of life, liberty, or property, without due process of law."

STATEMENT

Respondent tobacco companies brought suit in New York federal court against petitioners, the Attorneys General of thirty other States, seeking to enjoin their enforcement of tobacco-related laws enacted by their respective States. Even though each State's laws reach only in-state cigarette sales, the Second Circuit held that petitioners were subject to personal jurisdiction in a New York court. The Second Circuit predicated jurisdiction on the ground that the Attorneys General or their agents allegedly "assemble[d] purposefully in New York" and agreed while there to "pass" the challenged statutes. App. 13a.

The Second Circuit's judgment violates principles of state sovereignty and due process by treating a State's most sovereign act — the passage of legislation — as though it were the culmination of a commercial antitrust conspiracy. This Court

should grant certiorari to affirm that state legislation is enacted by state legislatures sitting in state capitals, that any effort to locate the site of state legislation elsewhere, on the basis of pre-legislative activity by individual state officials, demeans state sovereignty, and that the exercise of personal jurisdiction over state Attorneys General based upon such pre-legislative activity cannot be reconciled with due process.

1. Between 1994 and 1998, many States sued numerous tobacco companies to recover costs incurred by the States in treating smoking-related illnesses. Over the course of five months in 1998, settlement discussions with the four largest tobacco companies took place in New York. The negotiations resulted in the Master Settlement Agreement ("MSA") (http://www.naag.org/backpages/naag/tobacco/msa), which was signed by the chief legal officers of 46 States ("Settling States"), and which resolved the pending lawsuits against those four companies and released them from future suits by the Settling States arising out of cigarette sales. App. 4a.

The MSA included provisions authorizing other tobacco companies to join the MSA. See MSA, §§ II(tt), XIII(aa). Respondents, three smaller tobacco companies, declined to join and, like other tobacco companies that did not join, are known as nonparticipating manufacturers ("NPMs"). App. 4a-5a.

Between 1999 and 2001, each of the Settling States enacted an "Escrow Statute," which requires NPMs either to join the MSA or to escrow funds based on the number of cigarettes they sell within that State. See, *e.g.*, 30 ILCS 168/1 *et seq*. (Illinois Tobacco Product Manufacturers' Escrow Act). The Escrow Statutes, which are substantially identical to model legislation included as an appendix to the MSA (see MSA, Exh. T), are intended to ensure that funds are available to satisfy future damage awards in cigarette-related litigation against the NPMs. App. 5a-6a.

Between 2001 and 2005, virtually all of the Settling States enacted a "Certification Statute," which requires NPMs to attest periodically to their compliance with that State's Escrow Statute. See, *e.g.*, 30 ILCS 167/1 *et seq*. (Illinois Tobacco Products Manufacturers' Escrow Enforcement Act). Unlike the Escrow Statutes, the Certification Statutes are not based on model legislation in the MSA.

2. Respondents brought suit in New York federal court against petitioners (and the Attorney General of New York) in their official capacities. The suit alleged that each State's Escrow and Certification Statutes violate, among other things, Section 1 of the Sherman Act and the "dormant" Commerce Clause, App. 6a-7a, and sought declaratory relief and an injunction prohibiting the Attorneys General from enforcing the Statutes in their respective States.

3. The district court dismissed the claims against petitioners for lack of personal jurisdiction. App. 46a-54a. Of the various alleged connections between petitioners and New York, the court noted that the "only legitimate" ground supporting jurisdiction was the allegation that the MSA was negotiated in New York. App. 52a. That contact was insufficient, the court concluded, because the negotiations "were not part of an attempt to formulate a business or commercial contract, as has traditionally been the situation in the case law that has found New York negotiations sufficient to confer personal jurisdiction over non-domiciliaries." App. 53a. The court explained:

> At no point did [petitioners] attempt to avail themselves of the protections of New York law. * * * Their presence in New York was purely coincidental. The negotiations could easily have been held anywhere, the fact that the negotiations took place in New York was entirely fortuitous.

Ibid. (internal quotations omitted). Because the Attorney General of New York did not contest personal jurisdiction, the district court found it necessary to address respondents' claims on the merits, and concluded that the complaint failed to state a claim on which relief could be granted. App. 60a-72a.

Respondents moved for reconsideration. With respect to personal jurisdiction, the court rejected respondents' argument that it had jurisdiction over petitioners because they allegedly engaged in tortious conduct in New York:

> Plaintiffs make clear in their Complaint * * * and their papers in opposition to the Motion to Dismiss for Lack of Personal Jurisdiction * * * that their claims are aimed at the Escrow and [Certification] Statutes, not the MSA itself. These Statutes were enacted by the individual states through their individual legislatures. The Statutes were not enacted in New York. Furthermore, the defendants are named in their individual capacities on the notion that they are the ones attempting to enforce the Statutes in their respective states. Any tortious conduct was, therefore, committed in the various states.

App. 40a. With respect to the merits, the district court reinstated respondents' antitrust claim against the Attorney General of New York. App. 37a-39a.

4. The district court entered final judgment under Fed. R. Civ. P. 54(b), App. 29a-34a, and respondents appealed. To support the district court's jurisdictional holding, petitioners invoked principles of state sovereignty, arguing that "[a] federal court in New York has no interest in adjudicating" the validity of other States' laws, and that "for it to do so would violate the foreign states' sovereign rights." Def. C.A. Br. 29-30, citing *PTI, Inc. v. Philip Morris, Inc.*, 100 F. Supp. 2d 1179, 1190 n.8 (C.D. Cal. 2000) (holding, in lawsuit challenging several States'

Escrow and Certification Statutes, that subjecting States other than California "to California jurisdiction" would "constitut[e] an extreme impingement on state sovereignty"). The Second Circuit disagreed, saying that it saw "no reason why the negotiation and execution of the [MSA] should be viewed any differently than an ordinary commercial contract." App. 12a. Applying precedent allowing personal jurisdiction over parties to commercial contracts negotiated and executed in New York, the court of appeals concluded that petitioners were subject to suit in New York because they or their agents allegedly "agree[d]" while in New York to "pass" the Escrow and Certification Statutes. App. 13a.[2]

On the merits, the Second Circuit affirmed the district court's dismissal of the non-antitrust claims, with the exception of the claim that the Escrow and Certification Statutes violate the "dormant" Commerce Clause. App. 14a-28a.

5. Petitioners sought rehearing and rehearing en banc. As in their merits brief, petitioners maintained that it would denigrate state sovereignty for a New York court to exercise personal jurisdiction over them in a lawsuit brought to enjoin them from enforcing their own States' laws with respect to in-state sales transactions. Def. C.A. Pet. Reh'g 9-12. The Second Circuit denied rehearing without comment. App. 1a.

REASONS FOR GRANTING THE PETITION

The question presented here is whether principles of due process and state sovereignty permit a court in one State to exercise personal jurisdiction over the Attorney General (or

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[2] On review of the district court's judgment granting petitioner's motion to dismiss, the Second Circuit was required to accept as true the complaint's allegations regarding petitioners' activities in New York. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 n.1 (2002).

other official) of another State in a lawsuit challenging laws enacted and enforced entirely within the latter State. That question is exceptionally important to the States and to the fair and efficient operation of the interstate judicial system. The Second Circuit's ruling — that personal jurisdiction may be exercised under those circumstances — upsets the delicate relationship between the States and the federal courts and warrants this Court's review.

A comparable issue regarding personal jurisdiction over out-of-state officials was presented and reserved in *Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979). The plaintiff corporation (Great Western) brought suit in Texas federal court to enjoin the Attorney General of Idaho from enforcing the Idaho corporate takeover statute to block the plaintiff's acquisition of a publicly traded company with substantial assets in Idaho. *Id.* at 175-177. The district court declined to dismiss the Attorney General for lack of personal jurisdiction, and a divided court of appeals affirmed. *Id.* at 177-179. Central to the majority's ruling was the fact that the Idaho statute would reach transactions not only in Idaho, but in Texas and throughout the Nation:

> Idaho's statute seeks to regulate the sale of a security even when neither the buyer nor the seller nor the sale itself has any connection with Idaho. The Idaho officials deliberately cast their regulatory net across the United States. They knew these regulations would entangle transactions with no connection to Idaho.

Great W. United Corp. v. Kidwell, 577 F.2d 1256, 1269 (5th Cir. 1978) (internal citations omitted). The majority concluded that "this extraterritorial regulation provides the necessary contacts with Texas" to support the Texas court's exercise of personal jurisdiction. *Id.* at 1270.

On review before this Court, the parties and their *amici* devoted substantial attention to whether personal jurisdiction lay over the Attorney General of Idaho. The Court, however, disposed of the case on venue grounds without reaching jurisdiction. *Leroy*, 443 U.S. at 180. To justify its "revers[al] of the normal order of considering personal jurisdiction [before] venue," the Court explained that resolution of the jurisdictional issue "would require the Court to decide a question of constitutional law it has not heretofore decided," and accordingly left the issue for another day. *Id.* at 181.

That day has come, albeit in a context where the exercise of personal jurisdiction is far less defensible than it was in *Leroy*. As the Fifth Circuit noted in *Leroy*, Great Western had a plausible claim that the Idaho statute would apply extraterritorially to transactions in Texas and elsewhere. 577 F.2d at 1269-1270. Here, by contrast, each State's Escrow and Certification Statutes reach only cigarette sales transactions within that particular State. See, *e.g.*, 30 ILCS 168/15(a) (Illinois Escrow Statute) (imposing obligations upon "[a]ny tobacco product manufacturer selling cigarettes to consumers within the State of Illinois"), 168/15(a)(2)(B)(ii) (referring to "the amount [an NPM] was required to place into escrow on account of units sold in the State"); 30 ILCS 167/15(a) (Illinois Certification Statute) (imposing obligations upon "[e]very tobacco product manufacturer whose cigarettes are sold in this State"), 167/15(a)(3)(F) (requiring each NPM to certify "the amount the [NPM] placed in the fund for cigarettes sold in the State during the preceding calendar year"); see also App. 5a (noting that Escrow Statutes require NPMs to "establish and fund an escrow or reserve account in an amount determined by the manufacturer's sales volume in the state"); *Star Scientific, Inc. v. Beales*, 278 F.3d 339, 356 (4th Cir.) (explaining that the Virginia Escrow Statute "imposes a fee only for cigarettes actually sold within the State" and "has no effect on

transactions undertaken by out-of-state distributors in other States"), *cert. denied*, 537 U.S. 818 (2002).

Thus, in holding that a New York court could exercise personal jurisdiction over thirty foreign state Attorneys General to enjoin their enforcement of state laws that do not operate extraterritorially, the Second Circuit went far beyond what the Fifth Circuit countenanced in *Leroy*. If the Texas district court's exercise of jurisdiction in *Leroy* was problematic enough to warrant this Court's invocation of the principle of constitutional avoidance, the New York court's exercise of jurisdiction here crosses well over the constitutional boundary. This is so not only because this matter presents a far weaker case for federal jurisdiction than did *Leroy*, but also because of this Court's increasing recognition in the quarter century since *Leroy* of the limits that federalism and state sovereignty place upon federal court jurisdiction over States and their officials.

A. Federalism and state sovereignty are an essential part of the constraints that due process imposes upon personal jurisdiction. Those constraints do more than "protect[] the defendant against the burdens of litigating in a distant or inconvenient forum"; they also "ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980). "The sovereignty of each State * * * implie[s] a limitation on the sovereignty of all of its sister States — a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment." *Id.* at 293. Accordingly, "the reasonableness of asserting jurisdiction over [a] defendant must be assessed 'in the context of our federal system of government.'" *Ibid.* In that way, due process "act[s] as an instrument of interstate federalism." *Id.* at 294.

Taking "our federal system of government" into account for jurisdictional purposes means, if nothing else, that a court asked

to exercise jurisdiction over challenges to state legislation must treat the enacting State as a sovereign entity, not a loose confederation of individual actors. A court therefore must treat the site of state legislation as the place of enactment, not some out-of-state location where the State's executive branch officials discussed plans to encourage their State's legislature to pass that legislation.

The district court recognized these fundamental principles, characterizing the Escrow and Certification Statutes as the products of "individual states [acting] through their individual legislatures" in their respective state capitals. App. 40a. The Second Circuit, by contrast, treated the State's enactment of legislation — its most sovereign act — as merely the last facet of a multi-staged scheme that commenced with the MSA negotiations in New York. Consistent with this view, the court of appeals held that a New York court could exercise jurisdiction over thirty foreign state Attorneys General because they or their agents allegedly assembled in New York and there "agree[d]" to "pass individual state statutes." App. 13a.

The Second Circuit's rationale conflates separately accountable branches of state government and disregards the independent legislative function, and in so doing demeans basic notions of state sovereignty. State Attorneys General do not have legislative power; only state legislatures do. Compare, *e.g.*, Ill. Const., art. IV, § 1 ("The legislative power is vested in a General Assembly consisting of a Senate and a House of Representatives * * * * "), with Ill. Const., art. V, § 15 ("The Attorney General shall be the legal officer of the State, and shall have the duties and powers that may be prescribed by law"). It necessarily follows that a meeting of state Attorneys General cannot possibly result in an "agreement" to enact state laws. It also follows that the Escrow and Certification Statutes were conceived not in New York City, but in the capitals of petitioners' thirty States. See, *e.g.*, 5 ILCS 190/1 ("the site of

government shall continue to be at Springfield, in the County of Sangamon, at which place all acts shall be done which are required to be done at the seat of government"). This is doubly so with respect to the Certification Statutes, where were not even addressed in the MSA.

The Second Circuit's decision, in both result and rationale, conflicts with *PTI, Inc. v. Philip Morris Inc.*, *supra*. The plaintiff tobacco companies in *PTI*, like respondents here, sued foreign state Attorneys General to enjoin their enforcement of their respective States' Escrow Statutes. 100 F. Supp. 2d at 1187. The court dismissed the claims against the foreign Attorneys General for lack of personal jurisdiction, citing "[t]he conflict with state sovereignty" as "perhaps the most compelling factor," and cautioning that "requiring the states to submit to California jurisdiction [would] constitute[] an extreme impingement on state sovereignty." *Id.* at 1189 n.8. The court explained that while "California [would have] an interest in determining the legitimacy of * * * California's [MSA-related laws]," other "states have a strong interest in having their own courts determine the legitimacy of [their own] legislation." *Ibid.*

B. In addition to incorporating principles of federalism and state sovereignty, due process requires a court to consider the "'quality and nature' of [a] defendant's activity" in deciding whether to exercise personal jurisdiction. *Kulko v. Superior Court*, 436 U.S. 84, 92 (1978). The Second Circuit disregarded the "quality and nature" of petitioners' conduct, and did so in a way that further demeans state sovereignty.

The Second Circuit's ruling rests on the premise that "the negotiation and execution of the Master Settlement Agreement" should not be "viewed any differently than an ordinary commercial contract." App. 12a. That premise is flawed in two significant respects. As an initial matter, respondents' lawsuit challenges the validity of the Escrow and Certification Statutes,

not the MSA. See Complaint, ¶¶ 111-150 (Counts I-VI) (alleging that Escrow and Certification Statutes violate Due Process Clause, Commerce Clause, First Amendment, Cigarette Labeling and Advertising Act, Sherman Act, and 42 U.S.C. § 1983). Likewise, while respondents' prayer for relief seeks a declaration that the Escrow and Certification Statutes are unlawful and an injunction against their enforcement, it does not seek *any* declaratory or injunctive relief with respect to the MSA. See *id.*, page 42. As the district court noted, respondents "ma[d]e clear in their Complaint and their papers in opposition to the Motion to Dismiss for Lack of Personal Jurisdiction that their claims are aimed at the Escrow and Contraband Statutes, not the MSA itself." App. 40a (internal citations omitted). Accordingly, the negotiation and execution of the MSA has no bearing on the jurisdictional inquiry.

In any event, the MSA is not and should not be treated like an "ordinary commercial contract." The MSA is the culmination of efforts by petitioners' thirty States, together with sixteen other States, "to further [their] policies regarding public health, including policies adopted to achieve a significant reduction in smoking by Youth." MSA, Section I, Recital 2. The expectation was that the MSA would "achieve for the Settling States and their citizens significant funding for the advancement of public health, the implementation of important tobacco-related public health measures, * * * as well as funding for a national Foundation dedicated to significantly reducing the use of Tobacco Products by Youth." *Id.*, Recital 7.

Far from being an ordinary commercial contract, the MSA establishes a complex regulatory solution to a most serious public health problem. As this Court has observed, "tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States." *FDA v. Brown & Williamson Tobacco Co.*, 529 U.S. 120, 161 (2000). The MSA combats that threat by requiring

signatory tobacco companies "to take steps aimed at reducing or eliminating tobacco use by minors and educating the public at large about the dangers of tobacco use." *Cardenas v. Anzai*, 311 F.3d 929, 932 (9th Cir. 2002). Among other things, the MSA obligates the companies:

> (1) to refrain from targeting youth in the advertising and marketing of tobacco products; (2) to refrain from using cartoon characters to promote cigarette sales; (3) to limit tobacco brand-name sponsorships of athletic and other events; (4) to refrain from lobbying Congress to preempt or diminish the States' rights under the [MSA] or to advocate that settlement proceeds under the [MSA] be used for programs other than those related to tobacco or health; (5) to dissolve the Tobacco Institute, the Council for Tobacco Research, and the Center for Indoor Air Research; and (6) to refrain from suppressing research relating to smoking and health and misrepresenting the dangers of using tobacco products.

Star Scientific, 278 F.3d at 345. The Second Circuit's reduction of the MSA to a "commercial" act, and its treatment of petitioners as ordinary private antitrust defendants, badly misunderstands the nature and quality of petitioners' activities on behalf of their States, and denigrates the States' status as co-equal sovereigns in our federal system. Cf. *Kulko*, 436 U.S. at 101 (distinguishing between defendant's conduct and "commercial act[s]" in rejecting personal jurisdiction).

C. Allowing a New York court to exercise jurisdiction over petitioners also threatens "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," *World-Wide Volkswagen Corp.*, 444 U.S. at 292; see also *Asahi Metal Indus. Co., Ltd. v. Superior Court*, 480 U.S. 102, 113 (1987), another consideration ignored by the Second Circuit. To date, several federal courts have rejected challenges to Escrow and Certification Statutes enacted by the

States in which they sit.[3] The Second Circuit's decision permits

[3] See *Mariana v. Fisher*, 338 F.3d 189 (3d Cir. 2003) (affirming dismissal of antitrust challenge to Pennsylvania Escrow statute on the merits and Commerce Clause challenge for lack of standing), *cert. denied*, 540 U.S. 1179 (2004); *Star Scientific, Inc. v. Beales*, 278 F.3d 339 (4th Cir.) (affirming dismissal of due process, equal protection and Commerce Clause challenges to Virginia Escrow Statute), *cert. denied*, 537 U.S. 818 (2002); *Grand River Enters. Six Nations, Ltd. v. Beebe*, 2006 WL 547919 (W.D. Ark. Mar. 6, 2006) (dismissing antitrust, First Amendment, due process and equal protection challenges to Arkansas Escrow Statute); *International Tobacco Partners, Ltd. v. Beebe*, ___ F. Supp. 2d ___, 2006 WL 547926 (W.D. Ark. Mar. 6, 2006) (same); *Dos Santos, S.A. v. Beebe*, ___ F. Supp. 2d ___, 2006 WL 547922 (W.D. Ark. Mar. 6, 2006) (same); *Xcaliber Int'l Ltd. v. Kline*, ___ F. Supp. 2d ___, 2006 WL 288705 (D. Kan. Feb. 7, 2006) (granting summary judgment against antitrust and procedural due process challenges to amendment to Kansas Escrow Statute), *appeal docketed*, No. 06-3061 (10th Cir.); *Tritent Int'l Corp. v. Kentucky*, 2005 WL 3766971 (E.D. Ky. Sept. 8, 2005) (dismissing antitrust challenge to Kentucky Escrow Statute), *reconsideration denied*, 395 F. Supp. 2d 521 (E.D. Ky. 2005), *appeal docketed*, No. 05-6791 (6th Cir.); *S&M Brands, Inc. v. Summers*, 393 F. Supp. 2d 604 (M.D. Tenn. 2005) (dismissing antitrust, due process and equal protection challenges to Tennessee Escrow Statute), *appeal docketed*, No. 06-5148 (6th Cir.); *Sanders v. Lockyer*, 365 F. Supp. 2d 1093 (N.D. Cal. 2005) (dismissing antitrust challenge to California Escrow and Certification Statutes), *appeal docketed*, No. 05-15676 (9th Cir.); *Xcaliber Int'l Ltd. v. Edmondson*, 2005 WL 3766933 (N.D. Okla. Aug. 31, 2005) (denying reconsideration of order granting summary judgment against antitrust challenge to amendment to Oklahoma Escrow Statute), *appeal docketed*, No. 05-5178 (10th Cir.); *Star Scientific, Inc. v. Carter*, 2001 WL 1112673 (S.D. Ind. Aug. 20, 2001) (dismissing Commerce Clause challenge to Indiana Escrow Statute); *PTI, Inc. v. Philip Morris Inc.*, 100 F. Supp. 2d 1179 (C.D. Cal. 2000) (dismissing antitrust, bill of attainder, Commerce Clause, equal protection and due process challenges to California Escrow Statute).

successive plaintiffs — unhappy with a prior judgment, entered against other tobacco companies, upholding a particular State's Escrow or Certification Statute — multiple bites at the apple in other forums. This is hardly an efficient way to resolve the validity of MSA-related laws. Moreover, so long as the Second Circuit's decision stands, petitioners will be denied the certainty and finality that ordinarily results from decisions rendered by federal courts (particularly federal courts of appeals) in their respective States.

D. Another component of the jurisdictional inquiry is whether New York has an interest in resolving challenges to the validity of other States' Escrow and Certification Statutes. See *World-Wide Volkswagen Corp.*, 444 U.S. at 292. As noted above, the Statutes do not operate extraterritorially; they govern only in-state sales transactions. See pages 8-9, *supra*. Although a New York court certainly has an interest in determining the legitimacy of New York's Statutes, it "has little interest in adjudicating disputes over other states' statutes." *PTI*, 100 F. Supp. 2d at 1190 n.8; see also *Asahi Metal*, 480 U.S. at 114 (finding only "slight" forum state interest in suit). At the same time, petitioners' thirty States have a substantial interest, rooted in their status as sovereigns, in not having an out-of-state court evaluate the validity of laws that govern only in-state conduct. Cf. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 99 (1986) ("A State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued") (emphasis in original).

E. The interlocutory posture of this case does not foreclose or weigh against a grant of certiorari. This Court has not hesitated to review an interlocutory decision from a federal court of appeals when "it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Constr. Co. v. Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372, 384 (1893); see also Robert L. Stern et al., *Supreme*

Court Practice 258-260 (8th ed. 2002). Review of such decisions has been granted in innumerable cases, including those presenting questions concerning the interplay between state sovereignty and federal jurisdiction. See, *e.g.*, *Tennessee v. Lane*, 541 U.S. 509, 514-515 (2004); *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 445 (2004); *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721, 725 (2003); *Board of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 363 (2001). Because the Second Circuit's ruling implicates such questions, the appropriate course is to end the wrongful exercise of jurisdiction as soon as possible, not to subject thirty Attorneys General to the indignity of defending this case through trial in a New York district court and appeal in the Second Circuit.

Moreover, although this case does not present a conflict among federal courts of appeals and/or state courts of last resort, it has several other features warranting this Court's review. First, the Second Circuit's ruling definitively resolves a matter expressly reserved in *Leroy*. See Stern, *supra*, at 234-235 ("certiorari has been granted where the court of appeals decision is based upon a point expressly reserved or left undecided in prior Supreme Court opinions") (citing cases). Second, the petition presents an important question involving "the jurisdiction of federal district courts," *id.* at 253 — and not just *any* jurisdictional question, but one brought by thirty Attorneys General who, having been sued in their official capacity only, are litigation proxies for the sovereign States they serve. See *id.* at 249 ("an important question * * * affecting * * * a state * * * can warrant review by certiorari").[4]

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[4] The conflict between the Second Circuit and the district court in *PTI* also weighs in favor of certiorari, as this Court has granted review where, as here, a court of appeals renders a decision that conflicts with a district court decision on an important issue concerning state sovereignty. See *Massachusetts v. United States*,

Finally, the Second Circuit's ruling, by its very nature, likely will preclude this question from arising in another court of appeals. Now that the Second Circuit has declared the Southern District of New York open for business for lawsuits seeking to enjoin foreign Attorneys General from enforcing their respective State's Certification and Escrow Statutes, there will be no reason to bring such actions anywhere else. Cf. *Cutting Edge Enters., Inc. v. The National Association of Attorneys General*, No. 06 CV 667 (S.D.N.Y.) (amended complaint filed Mar. 31, 2006) (suit brought by tobacco company against Attorneys General of 41 States and the District of Columbia to challenge, among other things, States' failure to list company's cigarette brands on their respective Web sites). Tobacco companies selling cigarettes in a State whose Statutes have been upheld by the federal court of appeals with jurisdiction over that State, see *Star Scientific, Inc. v. Beales*, *supra*, 278 F.3d 339 (4th Cir. 2002) (Virginia), can avoid the precedential effect of the decision by filing suit in New York. Likewise, companies selling cigarettes in a State whose Statutes have been upheld by a federal district court in that State and are currently on appeal, see, *e.g.*, *Sanders v. Lockyer*, 365 F. Supp. 2d 1093 (N.D. Cal. 2005), *appeal docketed*, No. 05-15676 (9th Cir.), can hedge their bets by suing in New York, which they may perceive to be a more hospitable forum. Compare *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 226-233 (2d Cir.) (reversing dismissal of antitrust claim against New York Certification Statute), *reh'g denied*, 363 F.3d 149 (2d Cir. 2004), with *Mariana v. Fisher*, 338 F.3d 189 (3d Cir. 2003) (affirming dismissal of antitrust claim against Pennsylvania Escrow Statute), *cert. denied*, 540 U.S. 1179 (2004). Because no sensible tobacco company, given the Second Circuit's ruling

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435 U.S. 444, 453 (1978) (certiorari granted to resolve a conflict between a court of appeals and a single-judge district court concerning States' constitutional immunity from a federal tax).

in this case, would sue a non-forum State anywhere but New York, a circuit split on the crucial jurisdictional issue presented here is unlikely to emerge.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Stamped "FILED" January 3, 2006]

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 3rd day of January two thousand six.

Grand River v. Pryor 03-9179-cv

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the Defendants-Appellees William Pryor, et al. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the court,

Roseann B. MacKechnie, Clerk

By: /s/

Motion Staff Attorney

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2004

(Argued: May 11, 2005 Decided: September 28, 2005
Errata Filed: September 29, 2005)

Docket No. 03-9179

GRAND RIVER ENTERPRISES SIX NATIONS, LTD., NATIONWIDE TOBACCO, INC.,

Plaintiffs-Appellants,

JASH INTERNATIONAL, INC., INTERNATIONAL TOBACCO PARTNERS, LTD., and SUN TOBACCO, INC.,

Plaintiffs,

— v. —

WILLIAM PRYOR, in his official capacity as Attorney General of Alabama, et al.,

Defendants-Appellees.

Before: WALKER, Chief Judge, SACK and RAGGI, Circuit Judges.

Appeal from an amended judgment of the United States District Court for the Southern District of New York (John F. Kennan, Judge) granting Federal Rule of Civil Procedure 54(b) certification for review of its dismissal of all non-NewYork

defendants-appellees for lack of personal jurisdiction and its dismissal of all substantive causes of action, except an antitrust claim, challenging state statutes enacted pursuant to a nationwide tobacco-settlement agreement.

AFFIRMED in part, REVERSED in part, and REMANDED.

JOHN M. WALKER, JR., Chief Judge.

This appeal involves challenges to certain state statutes enacted pursuant to the $206 billion dollar Master Settlement Agreement ("MSA") settling litigation between forty-six states, as well as the District of Columbia and five U.S. territories,[1] and the four major tobacco companies. The three plaintiffs-appellants are Grand River Enterprises Six Nations, Ltd. ("Grand River"), a Canadian cigarette manufacturer; Nationwide Tobacco, Inc., a Washington State company that distributes cigarettes manufactured in the Philippines; and 3B Holdings, Inc., a Washington State manufacturer of loose tobacco. Defendants-appellees are thirty-one current and former state attorneys general sued in their official capacities.

Appellants appeal from the November 8, 2004, amended judgment of the United States District Court for the Southern District of New York (John F. Keenan, *Judge*) dismissing all of the non-New York defendants for lack of personal jurisdiction and all of the causes of action, except an antitrust claim, attacking these statutes. Appellants argue that these dismissals were erroneous. Appellees contend that the district court improperly granted certification under Federal Rule of Civil Procedure 54(b), which was necessary to permit this appeal to be heard, and, in any event, that the district court properly

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[1] The five territories are American Samoa, Guam, the Northern Marianas, Puerto Rico, and the U.S. Virgin Islands.

granted the motions to dismiss. For the following reasons, we conclude that the district court was correct in granting Rule 54(b) certification and in dismissing all but one of the substantive challenges (a commerce clause claim), and erred in finding no personal jurisdiction over the non-New York defendants.

BACKGROUND

Between 1994 and 1998, many states sued the country's major tobacco companies (Philip Morris, R.J. Reynolds, Brown & Williamson, and Lorillard, collectively the "majors") in an attempt to recover the costs that the states had incurred in treating smoking-related illnesses. During the five months leading up to November 1998, the representatives of forty-six states (including New York) held numerous meetings with the majors in New York to negotiate and draft a nationwide settlement. The result was a Master Settlement Agreement, entered into on November 23, 1998, that resolved the pending lawsuits and released the majors from any future suits that the states might bring arising out of cigarette sales. Liggett, another tobacco company, previously settled with twenty-two of the states and was not party to the MSA. Four states (Florida, Minnesota, Mississippi, and Texas) had already settled independently with the majors.

Under the MSA, the majors agreed to pay the states $206 billion over the first twenty-five years of the agreement and, in addition, to accept advertising and marketing restrictions aimed primarily at reducing youth smoking. The majors, which manufactured approximately 97.5% of all cigarettes sold in the country when the MSA was signed, are referred to in the MSA as Original Participating Manufacturers ("OPMs").

The MSA included a provision authorizing other cigarette manufacturers to join the MSA as Subsequent Participating Manufacturers ("SPMs") and thereby resolve any claims that

the states could otherwise assert against them. SPMs that signed onto the MSA within ninety days of its execution are not required to make any payments to the states unless their respective nationwide market shares exceed the greater of their 1998 market share or 125% of their 1997 market share—the so-called grandfather share. SPMs that did not join within ninety days received no grandfather share. SPMs, to the extent they exceed their grandfather share, if applicable, pay approximately two cents per cigarette as part of their settlement, which is identical to the per-cigarette OPM payment. Since November 1998, more than forty companies have joined the MSA as SPMs.

During negotiations, the majors expressed their concern that they would face increased competition (and a resulting loss of market share) from smaller manufacturers that did not join the MSA, so-called Non-Participating Manufacturers ("NPMs"), because the majors would have to raise prices to fund the MSA settlement and would be subject to advertising restrictions. For their part, the states were worried that NPMs could cause the states to continue to incur significant tobacco-related health costs while avoiding liability. To address these concerns, the MSA includes an "NPM Adjustment," which provides for a potential reduction in annual payments by Participating Manufacturers (i.e., both OPMs and SPMs, collectively "PMs") to the states if, *inter alia,* there is an aggregate market share loss by PMs to NPMs since 1997.

In addition, the MSA provides that the NPM adjustment does not apply to states that enact "Escrow Statutes," also known as "Qualifying Statutes" (the "Statutes"). These Statutes require each NPM to either (1) join the MSA as an SPM or (2) establish and fund an escrow or reserve account in an amount determined by the manufacturer's sales volume in the state. The per-cigarette amount is roughly equal to what an OPM or SPM would pay under the MSA. If the total amount that an NPM

places into escrow in a given year exceeds what it would have paid under the MSA were it an SPM, the excess is refunded to the NPM. Unlike PMs who pay outright into the settlement fund, NPMs retain title to the escrowed funds and the interest on those funds. The funds are security for potential future damage awards resulting from cigarette-related claims. After 25 years, the escrow account will be restored to the NPM, minus any payments in respect of judgment against, or settlement by, the NPM because of its cigarette sales in a given state.

It is undisputed that the Escrow Statutes are an integral part of the nationwide settlement effected by the MSA. In order to facilitate passage of these Escrow Statutes, the majors and the states specifically negotiated in New York model escrow legislation that was ultimately included in the MSA's appendix. Each of the defendants' states independently enacted Escrow Statutes that are substantially identical to that suggested in the MSA. *See, e.g.,* N.Y. Pub. Health Law § 1399-nn *et seq.*

After enactment of the Escrow Statutes, New York and the other states passed "Contraband Statutes," or "Certification Statutes," to help ensure compliance with the Escrow Statutes. *See, e.g.,* N.Y. Tax Law §§ 480- b, 481(1)(c), 1846(a-1). These laws require cigarette manufacturers, other than OPMs, that sell products in a state to certify annually to the state attorney general that they are either (1) meeting their obligation as an SPM under the MSA or (2) making escrow deposits as an NPM. Each statute penalizes noncompliance by denying a tax stamp, and thereby prohibiting the sale of cigarettes in that state by the non-complying manufacturer.

In their complaint, the NPM appellants alleged that the defendants have commenced or threatened enforcement actions against them for failure to establish escrow funds or for failure to adequately fund their escrow accounts. Appellants contend that they should be held not to be subject to these NPM requirements because the Escrow and Certification Statutes are

unconstitutional under a variety of theories, violate Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, and are preempted by the Federal Cigarette Labeling and Advertising Act ("FCLAA"), 15 U.S.C. § 1334(b). All of the non-New York defendants subsequently moved to dismiss for lack of personal jurisdiction, and all of the defendants moved to dismiss under Federal Rule of Civil Procedure 12(b)(6).

By opinion and order, the district court dismissed the plaintiffs' complaint in its entirety. *Grand River Enters. Six Nations, Ltd. v. Pryor* ("*Grand River I*"), 2003 WL 22232974, at *17 (S.D.N.Y. Sept. 29, 2003). The district court found that it lacked personal jurisdiction over the non-New York defendants, and it granted the defendants' motion to dismiss on the pleadings, finding that the complaint failed to state a claim. *Id.* at *7, *17. Appellants appealed.

Subsequently, this court decided a related case, *Freedom Holdings, Inc. v. Spitzer* ("*Freedom Holdings I*"), 357 F.3d 205, 226-33 (2d Cir. 2004), that held, *inter alia,* that New York's Contraband Statutes were subject to the federal antitrust laws and rejected the argument that New York was immune from attack under the state-action immunity doctrine of *Parker v. Brown,* 317 U.S. 341 (1943). As a result, the district court in this case reconsidered its previous decision and reinstated the Sherman Act claim against New York State Attorney General Eliot Spitzer, the only remaining defendant. *Grand River Enters. Six Nations, Ltd. v. Pryor* ("*Grand River II*"), 2004 WL 1594869, at *2-*3 (S.D.N.Y. July 15, 2004). Appellants moved for an amended or final judgment, directing the entry of final judgment as to the dismissed defendants. *Grand River Enters. Six Nations, Ltd. v. Pryor* ("*Grand River III*"), 2004 WL 2480433, at *3 (S.D.N.Y. Nov. 3, 2004). The district court granted the motion with respect to the Rule 12(b)(2) dismissal of claims against the non-New York defendants and the Rule

12(b)(6) dismissal of claims against all defendants on all claims except the antitrust claim. *Id.* This appeal followed.

DISCUSSION

I. *Rule 54(b) Certification*

We first address the defendants' contention that the district court abused its discretion in granting certification under Federal Rule of Civil Procedure 54(b). *See Shrader v. Granninger,* 870 F.2d 874, 878 (2d Cir. 1989). Rule 54(b) permits certification of a final judgment where (1) there are multiple claims or parties, (2) at least one of the claims or the rights and liabilities of at least one party has been finally determined, and (3) "there is no just reason for delay." Fed. R. Civ. P. 54(b); *see also Info. Res., Inc. v. Dun & Bradstreet Corp.,* 294 F.3d 447, 451 (2d Cir. 2002).

> Respect for the historic federal policy against piecemeal appeals requires that a Rule 54(b) certification not be granted routinely. The power should be used only in the infrequent harsh case where there exists some danger of hardship or injustice through delay which would be alleviated by immediate appeal.

Citizens Accord, Inc. v. Town of Rochester, 235 F.3d 126, 128-29 (2d Cir. 2000) (per curiam) (internal citations and quotation marks omitted).

In granting appellants' Rule 54(b) motion, the district court reasoned that certification might avoid a duplicative trial should the decision denying personal-jurisdiction or dismissing the non-antitrust claims be reversed. *Grand River III,* 2004 WL 2480433, at *2 (citing *Advanced Magnetics, Inc. v. Bayfront Partners, Inc.,* 106 F.3d 11, 16 (2d Cir. 1997)). As they did below, the defendants contend that the district court gave insufficient weight to the availability to appellants of relief in state courts. Specifically, they assert that "Plaintiffs have always

been able to challenge the validity of the statutes at issue in this case by interposing their claims as defenses to actions brought by the Defendants in state courts to enforce those statutes."

The district court did not abuse its discretion in certifying the appeal. The states offer no support for the awkward argument that certification is inappropriate because appellants could gain relief by raising their claims as defenses in thirty-some hypothetical state lawsuits. As the district judge recognized, it would make no sense to try the antitrust count against New York State alone if the dismissals of the other states or the other claims turned out to be in error. This is precisely the type of "danger of hardship or injustice," *Citizens Accord,* 235 F.3d at 129, to which Rule 54(b) is directed.

II. *Personal Jurisdiction over the Non-New York Defendants*

We next turn to whether the district court erred in dismissing the non-New York defendants for lack of personal jurisdiction. The district court concluded that it lacked general jurisdiction under N.Y. C.P.L.R. § 301, as well as specific jurisdiction under either N.Y. C.P.L.R. § 302(a)(1) (transaction of business within New York) or N.Y. C.P.L.R. § 302(a)(2) (tortious act within New York).

A. *Legal Standards*

"District courts resolving issues of personal jurisdiction must . . . engage in a two-part analysis." *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez,* 171 F.3d 779, 784 (2d Cir. 1999). First, a district court must determine whether, under the laws of the forum state (New York in this case), there is jurisdiction over the defendant. *Id.* "Second, [it] must determine whether an exercise of jurisdiction under these laws is consistent with federal due process requirements." *Id.* We review a dismissal for want of personal jurisdiction *de novo. Id.* In opposing a motion to dismiss for lack of personal

jurisdiction, "the plaintiff bears the burden of establishing that the court has jurisdiction over the defendant." *Id.* "Where a court [has chosen] not to conduct a full-blown evidentiary hearing on the motion, the plaintiff need make only a prima facie showing of jurisdiction through its own affidavits and supporting materials." *Id.* (internal quotation marks omitted) (alteration in original).

B. *N.Y. C.P.L.R. § 302(a)(1)—Transaction of Business Within New York*

New York C.P.L.R. § 302(a)(1) provides, in relevant part, for specific jurisdiction over a non-resident defendant that "transacts any business within the state . . . ." *Id.*

> A nondomiciliary "transacts business" under [C.P.L.R. §] 302(a)(1) when he *purposefully avails* [himself] of the privilege of conducting activities within [New York], thus invoking the benefits and protections of its laws.
>
> No single event or contact connecting defendant to the forum state need be demonstrated; rather, the *totality of all defendant's contacts* with the forum state must indicate that the exercise of jurisdiction would be proper.

CutCo Indus., Inc. v. Naughton, 806 F.2d 361, 365 (2d Cir. 1986) (internal quotation marks and citations omitted) (second and third alterations in the original) (emphasis added). Section 302 "is a single-act statute requiring but one transaction—albeit a purposeful transaction—to confer jurisdiction in New York." *Parke-Bernet Galleries, Inc. v. Franklyn*, 26 N.Y.2d 13, 17 (1970) (internal quotation marks omitted). Moreover, where there is a showing that business was transacted, there must be a "substantial nexus" between the business and the cause of

action. *Hoffritz for Cutlery, Inc. v. Amajac, Ltd.,* 763 F.2d 55, 59-60 (2d Cir. 1985).

Appellants' argument in support of their claim that the states transacted business in New York is premised principally on the five months that the non-New York attorneys general spent negotiating in New York over the MSA and the model Escrow Statute. Appellants also contend that the non-New York defendants' business in New York continued because Citibank, N.A., and PriceWaterhouseCoopers, both New York firms, were appointed escrow agent and independent auditor under the MSA, respectively, and because, in an escrow agreement with Citibank, each defendant agreed to submit to the jurisdiction of the New York State Courts to resolve any dispute arising under the agreement.

The district court considered the New York location of the negotiations to be "purely coincidental" and "fortuitous." *Grand River I,* 2003 WL 22232974, at *6. The district court also explained that, in coming to New York to settle these numerous lawsuits, "[i]t is unlikely that any of the defendants could have foreseen the possibility that negotiations related to the settlement of lawsuits against the Majors would lead to them being sued in New York by non-parties to the MSA challenging statutes passed by their home-state legislatures." *Id.*

The non-New York defendants continue to press these arguments on appeal, but we are not convinced. The parties to the MSA could have negotiated it in any state, so it was, to some degree, fortuitous that the settlement was negotiated in New York. But one can make the same argument for almost any contract. This is not a case, like *Presidential Realty Corp. v. Michael Square West, Ltd.,* 44 N.Y.2d 672, 673 (1978), in which the New York Court of Appeals found no personal jurisdiction where an agreement negotiated elsewhere and a modification letter were signed in New York.

After reviewing the record *de novo,* we believe that the extensive New York negotiations over the MSA and model escrow legislation language, and the agreement's ultimate execution in New York, satisfy § 302(a)(1)'s transacts-any-business requirement.[2] Under New York law, the transacts-business standard can be satisfied where both the negotiations and execution of a contract took place within New York. *See, e.g., George Reiner & Co. v. Schwartz,* 41 N.Y.2d 648, 652-53 (1977). Here, the various state attorneys general purposefully dedicated five months to negotiating the MSA and the interconnected model escrow legislation with the majors in New York. Settling a civil suit seeking compensation for, *inter alia,* healthcare costs is a business transaction. *See Ainbinder v. Potter,* 282 F. Supp. 2d 180, 186-87 (S.D.N.Y. 2003) (finding negotiation and execution of settlement agreement satisfied transacting-business standard); *see also* David D. Spiegel, New York Practice § 86, at 152 (4th ed.2005) (stating § 301(a)(1) "may . . . be used for a contract of a non-commercial nature," such as a separation agreement). And we see no reason why the negotiation and execution of the Master Settlement Agreement should be viewed any differently than an ordinary commercial contract.

The next question is whether a "substantial nexus" exists between the New York negotiations and appellants' causes of action. Because the Escrow Statutes were formally and independently enacted by the individual sovereign states that enforce them, the states assert that the nexus is insufficient to

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[2] Because specific jurisdiction under § 302(a)(1) is appropriate, we do not reach the questions of whether specific jurisdiction under § 302(a)(2) could also be found for a tort committed within New York, or whether general jurisdiction under § 301 could be found over the non-New York defendants whose states maintain revenue offices in New York.

support personal jurisdiction. Despite the argument's superficial appeal, we are not persuaded.

The surviving antitrust cause of action challenges not only the passage and enforcement of the Escrow Statutes and the associated Contraband Statutes, but also the MSA. The complaint alleges that the Escrow Statutes require an NPM either to (1) enter into the MSA or (2) pay into an escrow fund. Compl. ¶ 143. It goes on to state that "*[these] restraints and agreements* . . . constitute a contract, combination or conspiracy in restraint of trade." *Id.* (emphasis added). These "restraints and agreements" refer to the MSA, as well as the Escrow and Contraband Statutes. Thus, the appellants' attack on the Escrow Statutes is also plainly an attack on the MSA itself. *See Freedom Holdings I,* 357 F.3d at 223-24 (permitting attack on Contraband Statutes as " 'hybrid' restraints on trade"); *Freedom Holdings Inc. v. Spitzer* ("*Freedom Holdings II*"), 363 F.3d 149, 154 (2d Cir. 2004) ("[A]lthough the statutes themselves are acts of the state, their function is to enforce the MSA . . . . Thus, the MSA is part and parcel of the Challenged Statutes . . . ."); *see also Star Scientific, Inc. v. Beales,* 278 F.3d 339, 359 (4th Cir. 2002). There is thus a substantial nexus between the negotiation and signing of the MSA in New York, and the antitrust suit. And because these negotiations were carried on in New York, it was foreseeable that appellants would be subject to suit in the state. *See Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 474 (1985); *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297-98 (1980). Accordingly, jurisdiction properly exists over the non-New York defendants.

We note that New York would not ordinarily be the proper forum to challenge another state's legislative and executive actions. It is a rare event for the representatives of various sovereign states to assemble purposefully in New York to attempt to jointly settle related lawsuits and to agree to then pass individual state statutes. But because that is what took

place, New York is the proper forum for this lawsuit. *Cf. Kronisch v. United States,* 150 F.3d 112, 131 (2d Cir. 1998) (finding federal official's visits to New York to "lay[ ] groundwork for [ ] LSD testing program" sufficient to sustain personal jurisdiction, where claim arose out of drug testing in France).

III. *Substantive Claims*

We next turn to appellants' arguments that the district court erred in dismissing their various challenges to the Escrow Statutes and the MSA. We review the dismissals *de novo,* accepting as true the material facts alleged in the complaint and drawing all reasonable inferences in favor of the appellants. *Freedom Holdings I,* 357 F.3d at 216.

A. *Commerce Clause*

Appellants first fault the district court for dismissing their claims that the Escrow Statutes contravened the dormant Commerce Clause and the Indian Commerce Clause. *See Grand River I,* 2003 WL 22232974, at *10-*12. We consider each in turn.

1. *Dormant Commerce Clause*

The Commerce Clause provides that "Congress shall have Power . . . To regulate Commerce with foreign Nations and among the several States . . . ." U.S. Const. art. I, § 8, cl. 3. While the Commerce Clause is more frequently invoked as authority for federal legislation, the so-called dormant Commerce Clause limits state legislation that adversely affects interstate commerce. *See Hughes v. Oklahoma,* 441 U.S. 322, 326 (1979); *Freedom Holdings I,* 357 F.3d at 216.

A state statute may violate the dormant Commerce Clause in three ways:

> First, a statute that clearly discriminates against interstate commerce in favor of intrastate commerce is virtually invalid *per se* and can survive only if the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism. Second, if the statute does not discriminate against interstate commerce, it will nevertheless be invalidated under the *Pike [v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970),] balancing test if it imposes a burden on interstate commerce incommensurate with the local benefits secured. Third, a statute will be invalid *per se* if it has the practical effect of extraterritorial control of commerce occurring entirely outside the boundaries of the state in question.

Freedom Holdings I, 357 F.3d at 216 (internal quotation marks and citations omitted).

In *Freedom Holdings I,* we rejected all three theories in a Commerce Clause challenge to New York's Contraband Statute. *Id.* at 217 ("Even assuming that appellants raised each of these theories in the district court and on appeal and that they are properly before us, none constitutes a valid claim under any version of the dormant Commerce Clause doctrine."). Here, we believe that the district court, while correctly rejecting two of the theories, erred in dismissing the extraterritorial-effect claim.

a. *Discrimination Against Interstate Commerce*

A state statute will be found to discriminate against interstate commerce only if it accords "differential treatment [to] in-state and out-of-state economic interests that benefits the former and burdens the latter. If a restriction on commerce is discriminatory, it is virtually *per se* invalid." *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality,* 511 U.S. 93, 99 (1994).

Appellants contend that the challenged statutes discriminate against interstate commerce in favor of the economic interests of each defendant's state. They allege that the Statutes have the "prohibited purpose and effect of favoring a finite set of businesses, *i.e.,* the OPMs and early signing SPMs, to the detriment of interstate commerce and, specifically, the interstate commerce in products produced or sold by Plaintiffs," who are NPMs.

This argument is unavailing. As in *Freedom Holdings I,* "[a]ppellants cannot and do not identify any in-state commercial interest that is favored, directly or indirectly, by the [challenged s]tatutes at the expense of out-of-state competitors." 357 F.3d at 218. And the district court properly found that all NPMs are treated the same: both in-state and out-of-state NPMs are subject to the same requirements. *Grand River I,* 2003 WL 22232974, at *11. The Commerce Clause prohibits, for example, New York from favoring New York tobacco manufacturers over out-of-state manufacturers, *see Granholm v. Heald,* 125 S.Ct. 1885, 1895 (2005); it is not violated simply by treating PMs and NPMs differently.

b. *Local Benefits Outweigh Burdens on Interstate Commerce (*Pike *Balancing Test)*

Appellants also contend that the district court erred, under the *Pike* balancing test, by finding that any burden the challenged statutes place on interstate commerce is outweighed by the benefits of local public health and reduced cigarette consumption. *See Grand River I,* 2003 WL 22232974, at *10-*11.

In *Pike v. Bruce Church, Inc.,* the Supreme Court established the balancing test applicable to nondiscriminatory state legislation affecting interstate commerce:

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

397 U.S. at 142 (internal citation omitted). To apply this balancing test, we consider (1) the nature of the local benefits advanced by the statute; (2) the burden placed on interstate commerce by the statute; and (3) whether the burden is "clearly excessive" when weighed against these local benefits. *Id.*

We agree with the district court that the challenged statutes were plainly enacted with significant public interests in mind: public health and the allocation of related costs. *Grand River I,* 2003 WL 22232974, at *11. The funds in the escrow account ensure a source of funds against which the states may settle judgments to recover smoking-related healthcare costs. As the Fourth Circuit observed in discussing a Virginia statute that is substantially the same as those challenged here:

> Virginia's qualifying statute serves the legitimate state interest of ensuring that Virginia has a source of recovery for future smoking-related healthcare costs attributable to tobacco manufacturers who have not subscribed to the Master Settlement Agreement and who, therefore, are not already compensating the Commonwealth for these healthcare costs. Thus, the putative local benefits are both legitimate and important.

Star Scientific, 278 F.3d at 357. Moreover, appellants have failed to even allege that there is a "qualitatively or quantitatively different" burden on interstate commerce than on intrastate commerce, *Nat'l Elec. Mfrs. Ass'n v. Sorrell,* 272 F.3d 104, 109 (2d Cir. 2001); *see also Freedom Holdings I,* 357 F.3d at 219 (holding, under the *Pike* balancing test, that Contraband Statutes "do not impose 'unequal burdens' on interstate and intrastate commerce"), or that the Escrow Statutes have a "disparate impact on interstate commerce," *Automated Salvage Transp., Inc. v. Wheelabrator Envtl. Sys., Inc.,* 155 F.3d 59, 75 (2d Cir. 1998).

c. *Extraterritorial Effect*

Appellants finally assert that the Escrow Statutes "limit, burden [,] and regulate directly" interstate commerce wholly outside of the respective states. Compl. ¶ 132. As they did below, appellants rely on the Supreme Court's price-parity decisions in *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573 (1986), and *Healy v. Beer Institute, Inc.*, 491 U.S. 324 (1989). In both Brown-Forman and Healy, the Supreme Court struck down state liquor regulations because they effectively set liquor prices in neighboring states. In Brown-Forman, a New York law required liquor distillers to affirm that their New York prices were no higher than the lowest price at which the same product would be sold in any other state during the month. 476 U.S. at 575-76. In *Healy*, a Connecticut law required out-of-state beer shippers to affirm that the prices at which their products were sold to Connecticut wholesalers were no higher than the prices at which those same products were sold in neighboring states. 491 U.S. at 326-27. The Supreme Court explained the extraterritoriality analysis as follows:

> First, the Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or

> not the commerce has effects within the State; and, specifically, a State may not adopt legislation that has the practical effect of establishing a scale of prices for use in other states. Second, a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature. The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State. Third, the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation. Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State. And, specifically, the Commerce Clause dictates that no State may force an out-of-state merchant to seek regulatory approval in one State before undertaking a transaction in another.

Id. at 336-37 (internal quotation marks and citations omitted) (emphasis added).

As noted above, the challenged statutes require an NPM selling cigarettes in a state to either pay into the state escrow fund or join the MSA as an SPM. See, e.g., N.Y. Pub. Health Law § 1399-pp. Appellants contend that the Statutes together "establish an interdependent and interconnecting system of regulation, the practical effect of which is to set uniform (higher) prices nationwide."

We do not agree with the defendants that Grand River's Commerce Clause claim can be so easily compared with that of *Freedom Holdings I*, where we rejected an extraterritorial-effect claim challenging New York's Contraband Statute. In that case, the appellants "claim[ed] that the 'artificially high prices' [in New York] fostered by the Contraband Statutes 'inflate[ ]' the prices charged by cigarette manufacturers to purchasers in sales transactions that occur wholly outside the State of New York." 357 F.3d at 220. We held that "[t]he extraterritorial effect described by appellants amounts to no more than the upstream pricing impact of a state regulation." *Id*. But *Freedom Holdings I* left open other avenues of attack:

> [A]ppellants have not alleged that the Contraband Statutes are inconsistent with the legitimate regulatory regimes of other states, that the Contraband Statutes force out-of-state merchants to seek New York regulatory approval before undertaking an out-of-state transaction, or that any sort of interstate regulatory gridlock would occur if "many or every" state adopted similar legislation.

Id. at 221. Appellants here have alleged the latter in their complaint.

In *Healy*, the Supreme Court recognized a potential problem where multiple states decide to enact "essentially identical" statutes in the pricing-parity context. *Healy,* 491 U.S. at 339. The Court worried about potential regulatory "price gridlock" or the "short-circuiting of normal pricing decisions" that could result:

> The short-circuiting of normal pricing decisions based on local conditions would be carried to a national scale if a significant group of States enacted contemporaneous affirmation statutes that linked in-state prices to the lowest price in any State in the

> country. This kind of potential regional and even national regulation of the pricing mechanism for goods is reserved by the Commerce Clause to the Federal Government and may not be accomplished piecemeal through the extraterritorial reach of individual state statutes.

Id. at 340.

Here, appellants contend that the aggregate effect of the states' Escrow and Contraband Statutes is to create a uniform system of regulation that results in higher prices nationwide. As noted, these Statutes require a manufacturer to either join the MSA or pay into a state escrow fund. If a manufacturer joins the MSA as an SPM, the amount it pays as part of the settlement is tied directly to the manufacturer's *national* market share, as well as the OPMs' national market shares and the NPM adjustment.[3] *See* Master Settlement Agreement ¶ IX(i).

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[3] The MSA requires the following payments by SPMs:

> (1) A Subsequent Participating Manufacturer shall have payment obligations under this Agreement only in the event that its Market Share in any calendar year exceeds the greater of *(1)* its 1998 Market Share or *(2)* 125 percent of its 1997 Market Share (subject to the provisions of subsection (i)(4)). In the year following any such calendar year, such Subsequent Participating Manufacturer shall make payments corresponding to those due in that same following year from the Original Participating Manufacturers pursuant to subsections VI(c) (except for the payment due on March 31, 1999), IX(c)(1), IX(c)(2) and IX(e). The amounts of such corresponding payments by a Subsequent Participating Manufacturer are in addition to the corresponding payments that are due from the Original Participating Manufacturers and shall be determined as described in subsections (2) and (3) below. Such payments by a Subsequent Participating

Manufacturer shall (A) be due on the same dates as the corresponding payments are due from Original Participating Manufacturers; (B) be for the same purpose as such corresponding payments; and (C) be paid, allocated and distributed in the same manner as such corresponding payments.

(2) The base amount due from a Subsequent Participating Manufacturer on any given date shall be determined by multiplying (A) the corresponding base amount due on the same date from all of the Original Participating Manufacturers (as such base amount is specified in the corresponding subsection of this Agreement and is adjusted by the Volume Adjustment (except for the provisions of subsection (B)(ii) of Exhibit E), but before such base amount is modified by any other adjustments, reductions or offsets) by (B) the quotient produced by dividing (i) the result of (x) such Subsequent Participating Manufacturer's applicable Market Share (the applicable Market Share being that for the calendar year immediately preceding the year in which the payment in question is due) minus (y) the greater of *(1)* its 1998 Market Share or *(2)* 125 percent of its 1997 Market Share, by (ii) the aggregate Market Shares of the Original Participating Manufacturers (the applicable Market Shares being those for the calendar year immediately preceding the year in which the payment in question is due).

(3) Any payment due from a Subsequent Participating Manufacturer under subsections (1) and (2) above shall be subject (up to the full amount of such payment) to the Inflation Adjustment, the Non-Settling States Reduction, the NPM Adjustment, the offset for miscalculated or disputed payments described in subsection XI(i), the Federal Tobacco Legislation Offset, the Litigating Releasing Parties Offset and the offsets for claims over [sic] described in subsections XII(a)(4)(B) and XII(a)(8), to the

Alternatively, a non-joining manufacturer, as an NPM, must make escrow payments in each MSA state in which it sells cigarettes. Although the states take the position that the escrow-fund option depends upon only in-state sales, they fail to acknowledge that the amount a manufacturer pays into the escrow fund is, in part, keyed to the amount an NPM would have paid if it had joined the MSA as an SPM—a national-market-share-dependent amount—because the manufacturer is refunded any excess over what it would have paid under the MSA. *See id.,* Ex. T (model statute); *see also, e.g.,* N.Y. Pub. Health Law § 1399-pp.[4]

> extent that such adjustments, reductions or offsets would apply to the corresponding payment due from the Original Participating Manufacturers. Provided, however, that all adjustments and offsets to which a Subsequent Participating Manufacturer is entitled may only be applied against payments by such Subsequent Participating Manufacturer, if any, that are due within 12 months after the date on which the Subsequent Participating Manufacturer becomes entitled to such adjustment or makes the payment that entitles it to such offset, and shall not be carried forward beyond that time even if not fully used.
>
> (4) For purposes of this subsection (i), the 1997 (or 1998, as applicable) Market Share (and 125 percent thereof) of those Subsequent Participating Manufacturers that either (A) became a signatory to this Agreement more than 60 days after the MSA Execution Date or (B) had no Market Share in 1997 (or 1998, as applicable), shall equal zero.

Master Settlement Agreement ¶ IX(i).

[4] New York's Escrow Statute, like those of the other states, links escrow payments to the MSA:

> to the extent that a tobacco product manufacturer establishes

Accordingly, appellants have successfully stated a possible claim that the practical effect of the challenged statutes and the MSA is to control prices outside of the enacting states by tying both the SPM settlement and NPM escrow payments to national market share, which in turn affects interstate pricing decisions. We cannot say at this early stage of the litigation on a motion to dismiss that the Statutes' practical effect is solely intrastate, for the appellants have essentially alleged that the aggregate effect of the thirty-one states' Escrow Statutes and the MSA is to "short-circuit[ ] normal pricing decisions" by effectively "regulat[ing] the pricing mechanism for goods" in interstate commerce. *Healy,* 491 U.S. at 340. While we take no position as to the ultimate viability of the dormant commerce clause claim, we believe that not dismissing this claim at the pleading stage is consistent with the district court's decision to reinstate the Sherman Act claim, which alleged that the MSA and interrelated statutes restrained trade and affected market prices.[5] *See Grand River II,* 2004 WL 1594869, at *2-*3.

> that the amount it was required to place into escrow on account of units sold in the state in a particular year was greater than the master settlement agreement payments, as determined pursuant to section IX(i) of the master settlement agreement including after final determination of all adjustments, that such manufacturer would have been required to make on account of such units sold had it been a participating manufacturer, the excess shall be released from escrow and revert back to such tobacco product manufacturer . . . .

N.Y. Pub. Health Law § 1399-pp(2)(b)(ii).

[5] For substantially the same reasons that specific jurisdiction is proper for the antitrust claim, we conclude that jurisdiction exists for this commerce clause claim as well.

2. *Indian Commerce Clause*

Grand River alone further argues that the Escrow Statutes regulate it in violation of the Constitution's Indian Commerce Clause; the district court rejected this argument. *See Grand River I,* 2003 WL 22232974, at *12. Grand River is controlled by Native Americans and alleges that it sells cigarettes only on Indian land. The company contends that the Statutes contravene the Indian Commerce Clause by holding it responsible for escrow payments because its cigarettes are subsequently resold by third parties off-reservation. This argument is unavailing.

The Indian Commerce Clause provides that "Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes." U.S. const. art. I, § 8, cl. 3. "[T]he central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs." *Cotton Petroleum Corp. v. New Mexico,* 490 U.S. 163, 192 (1989). And the Indian Commerce Clause's grant of authority to the federal government, and preemption of state authority, extends only to activities occurring in "Indian country," i.e., Indian lands within the territory of the United States. *See* 18 U.S.C. § 1151; *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 148-49 (1973); *cf. Okla. Tax Comm'n v. Chickasaw Nation,* 515 U.S. 450, 458-59 (1995).

Section 1151 of Title 18 of the United States Code makes clear that "Indian country" is limited to territory within the United States, defining it as:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof,

> and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Id.; see also DeCoteau v. Dist. County Court for Tenth Judicial Dist., 420 U.S. 425, 427 n. 2 (1975) (collecting cases and stating that "[w]hile § 1151 is concerned, on its face, only with criminal jurisdiction, the [Supreme] Court has recognized that it generally applies as well to questions of civil jurisdiction"); *Oneida Indian Nation v. City of Sherrill,* 337 F.3d 139, 153 n. 11 (2d Cir. 2003), *rev'd on other grounds,* 125 S.Ct. 1478 (2005). And Native Americans transacting business outside of Indian country can be subject to state regulation. In *Mescalero,* the Supreme Court held that New Mexico could impose a tax on the gross receipts of a ski resort, operated by the Mescalero Apache Tribe, that was located outside of the boundaries of the tribe's reservation. *Mescalero,* 411 U.S. at 146-50. The Court stated that "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Id.* at 149-50.

Here, Grand River states in its complaint that it is a "Canadian limited liability company that is owned by Native North Americans[, the Six Nations or Iroquois Confederacy]," and that it "operates and is located on tribal land in Ontario, Canada." Compl. ¶ 26. Although the Iroquois Confederacy reservation includes land in both the United States and Canada, Grand River itself operates *only* on land that is outside of the United States. Thus, the activities of Grand River in Canada are no different than the off-reservation activities in *Mescalero.* The fact that the Canadian part of the reservation may be given some special recognition by the Canadian government has no bearing on the question of whether Grand River is conducting business in "Indian country," as defined in § 1151. Thus, the imposition

of an escrow requirement for cigarette manufacturing in Canada does not run afoul of the Indian Commerce Clause, and the district court correctly dismissed this cause of action.

B. *Procedural Due Process*

Appellants next argue that the escrow funds operate as unconstitutional prejudgment deprivations of property without due process of law and that they are entitled to a hearing before the funds are placed in escrow. They compare the escrow accounts to the kind of unconstitutional prejudgment remedy found in *Krimstock v. Kelly,* 306 F.3d 40, 53 (2d Cir. 2002), where, without a hearing, the police took possession of a car allegedly used in a crime pending the outcome of a civil-forfeiture proceeding, or in *Connecticut v. Doehr,* 501 U.S. 1, 14 (1991), where, also without a hearing, Connecticut permitted the prejudgment attachment of real estate.

The district court properly rejected this argument. Appellants challenge the states' legislative, not adjudicative, actions, and "[o]fficial action that is legislative in nature is not subject to the notice and hearing requirements of the due process clause." *Interport Pilots Agency, Inc. v. Sammis,* 14 F.3d 133, 142 (2d Cir. 1994). Here, the escrow reserves are not specific to any particular litigation; rather, they are legislative preconditions for the privilege of engaging in future cigarette sales in the individual states. *See United States v. Fla. E. Coast Ry. Co.,* 410 U.S. 224, 245 (1973). The reserves are designed to ensure that funds are available should litigation *subsequently* begin and result in judgment against the manufacturers. Thus, the accounts are substantially different in kind from any individual prejudgment deprivation of property.

C. *Remaining Claims*

Appellants also contend that the Escrow Statutes violate their equal-protection and substantive due-process rights. These

arguments are unavailing because the Escrow Statutes are rationally related to a legitimate state interest: promoting public health and recovering the costs of tobacco-related illnesses. *See, e.g.,* N.Y. Pub. Health Law § 1399-nn (declaring that it is in the interest of New York to establish an escrow fund because of public health concerns); *see also Star Scientific,* 278 F.3d at 350 (concluding that legislation is rationally related to legitimate state interest).

We have carefully considered appellants' other arguments and find them to be without merit.

CONCLUSION

For the foregoing reasons, the judgment of the district court is hereby AFFIRMED in part and REVERSED in part, and the case is REMANDED to the district court for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

GRAND RIVER ENTERPRISES SIX NATIONS, LTD., et al.,	:	
Plaintiffs,	:	MEMORANDUM
	:	OPINION AND ORDER
— against —	:	
	:	02 Civ. 5068 (JFK)
WILLIAM PRYOR, et al.,	:	
Defendants.	:	

JOHN F. KEENAN, United States District Judge

Plaintiffs, a collection of cigarette manufacturers, importers and wholesalers, have commenced this action against 31 state attorneys-general whose states have enacted Escrow Statutes and Certification Statutes as part of a Master Settlement Agreement between their states and certain other cigarette companies. Plaintiffs intend to enjoin enforcement of the statutes on constitutional, antitrust, preemption and Civil Rights Act grounds.

On September 29, 2003, the Court issued an opinion and order (the "Original Order") granting the motions of the 30 non-New York defendants to dismiss for lack of personal jurisdiction, and granting the motions of all 31 defendants to dismiss for failure to state a claim upon which relief can be granted.

Soon thereafter, the Court of Appeals decided *Freedom Holdings, Inc. v. Spitzer,* 357 F.3d 205 (2d Cir. 2004), which rejected the basis of the Court's dismissal of the antitrust claims. In response to a motion for reconsideration, the Court issued an opinion and order dated July 15, 2004 (the "Reconsideration Decision"), reinstating only the antitrust claim as to Eliot Spitzer ("Spitzer"), the New York defendant. The Court denied plaintiffs' motion for reconsideration of the Original Order in all other respects.

Plaintiffs now move by order to show cause, dated October 1, 2004, for an amended or further judgment, directing the entry of final judgment as to the dismissed defendants pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. Plaintiffs also seek a stay of pretrial proceedings pending the appeal of the dismissal as to the 30 non-New York defendants and the non-antitrust claims. Lastly, plaintiffs ask the Court to vacate the dismissal of the claims against the non-New York defendants to the extent that the dismissal was based on lack of personal jurisdiction. Defendant Spitzer opposes the motion in all respects.

The federal courts have long viewed piecemeal appeals with an austere eye. Rule 54(b), however, provides the courts some leeway:

> When more than one claim for relief is presented in an action . . . or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

Three factors govern the applicability of Rule 54(b): (i) whether multiple, separate claims exist, (ii) whether one of them has been finally determined, and (iii) whether there is no just reason

for delay of an appeal. Even if these conditions are met, discretion to order Rule 54(b) certification remains with the district court. *Shrader v. Granninger,* 870 F.2d 874, 877 (2d Cir. 1989). The first two factors are easily resolved. First, plaintiffs make multiple claims, and the dismissed non-antitrust claims may be resolved independently of the antitrust claim. Second, the Court has dismissed all of the claims, with the exception of the antitrust claim against Spitzer.

The third factor presents the rub. The Court is mindful that Rule 54(b) certification is appropriate "only in the infrequent harsh case, where there exists some danger of hardship or injustice through delay which would be alleviated by immediate appeal." *Citizens Accord, Inc. v. Rochester,* 235 F.3d 126, 129 (2d Cir. 2000) (internal quotes and citations omitted). An instructive example is "where an expensive and duplicative trial could be avoided if, without delaying prosecution of the surviving claims, a dismissed claim were reversed in time to be tried with the other claims." *Advanced Magnetics, Inc. v. Bayfront Partners, Inc.,* 106 F.3d 11, 16 (2d Cir. 1997).

This potential scenario inclines the Court toward granting of the Rule 54(b) certification in this case. If, at the end of the trial on the merits against Spitzer, the Court of Appeals reverses the personal jurisdiction dismissals and/or the dismissals of the non-antitrust claims, another trial of the non-New York defendants, Spitzer, or both would be necessary. On the other hand, Rule 54(b) certification and immediate appeal of the dismissed claims would avoid the need for separate trial in the event of a reversal. See *Michelson v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.,* 709 F. Supp. 1279, 1290 (S.D.N.Y. 1989). While the Court in no way hesitates as to the propriety of its previous orders, the latter path is the more efficient one and better serves judicial economy in the event of a reversal.

In his letter dated October 19, 2004, defendant Spitzer relies on *Shrader v. Granninger,* 870 F.2d 874 (2d Cir. 1989), for the

proposition that Rule 54(b) certification is unnecessary because plaintiffs may obtain the relief they seek by asserting their claims as defenses to enforcement actions brought by the non-New York defendants in their state courts. *Shrader* is distinguishable. In that case, no party was completely dismissed from the action, which was cause for "hesitation." *Id.* at 878. Here, 30 of 31 defendants have been dismissed.

More importantly, *Shrader* was an action by individuals committed to the Albany Veterans Administration Medical Center (AVAMC) seeking, in part, declaratory judgment that the AVAMC must abide by Article 9 of the New York Mental Hygiene Law. *Id.* at 876. The district court determined that the Supremacy Clause prevented state law from regulating procedures at veterans' hospitals. *Id.* at 876-77. In rejecting Rule 54(b) certification of this ruling, the Court of Appeals noted plaintiffs' argument that delay was harmful because the AVAMC would not apply Article 9 to patients during the trial. The Court determined, however, that state habeas corpus proceedings would have resulted in the application of Article 9 to the plaintiffs, giving them some of the relief they sought. This belied plaintiffs' argument that delay of the appeal would be "harmful." *Id.* at 879.

Application of *Shader* to this case results in the proverbial mixing of apples and oranges. Certainly, the pursuit of the remedy in other actions would have alleviated the harm to plaintiffs in *Shader,* but the harm in *Shader* (failure to apply Article 9) was not the same kind of harm that preoccupies the Court in this case (multiple, duplicative trials). Plaintiffs' conduct, whatever it may be, in the non-New York cases does not assuage the Court's concern. Furthermore, the *Shrader* Court rejected the Rule 54(b) appeal largely because of an insufficient record that resulted in a "factual void," and the lack of a determination in the court below as to which provisions of Article 9 should apply to the AVAMC. *Id.* at 879. These

concerns are not present here. For the foregoing reasons, the motion for Rule 54(b) certification of the dismissed claims is granted.

As for plaintiffs' request for a stay of the Spitzer proceedings pending appeal, the Court looks to five factors: "(1) the private interests of the plaintiffs in proceeding expeditiously with the civil litigation as balanced against the prejudice to the plaintiffs if delayed; (2) the private interests of and burden on the defendants; (3) the interests of the courts; (4) the interests of persons not parties to the civil litigation; and (5) the public interest." *Volmar Distributors, Inc. v. N.Y. Post, Co.,* 152 F.R.D. 36, 39 (S.D.N.Y. 1993).

The first factor is not at issue because plaintiffs request the stay. The fourth factor also is of no concern. The remaining factors tip the balance to the defendant. In his October 19 letter, defendant Spitzer contends that the pending antitrust claim clouds the validity of New York public health legislation. The Court agrees. A stay would only exacerbate this problem, which jointly affects the defendant and the public interest. As for the interest of the courts, Rule 54(b) certification was granted to allow for a dismissed claim to be reversed in time for trial with the pending claim, without delay to the pending claim. A stay impedes this goal. While the Court is not deaf to plaintiffs' assertions of financial hardship (*See* Declarations of Steve Williams, Randy Bishop and Najib Boulos in Support of Stay and Related Relief), the other considerations are weightier, and a stay of a civil case is "an extraordinary remedy." *Jackson v. Johnson,* 985 F. Supp. 422, 424 (S.D.N.Y. 1997). The motion for a stay is denied.

Next, the Court takes up plaintiffs' motion for vacatur of the dismissal of the non-New York defendants for lack of personal jurisdiction. Plaintiffs contend that a motion for leave to file an amicus brief in *Freedom Holdings, Inc. v. Spitzer,* 02 Civ. 2939 (S.D.N.Y.) (Hellerstein, J.), by 28 of the 30 non-New York

defendants was sufficient for personal jurisdiction to attach in this matter as to those defendants.

The Court is not convinced. The amicus motion was filed on October 6, 2004, over two years after plaintiffs filed their complaint in this case. Only pre-litigation contacts are relevant to general personal jurisdiction analysis. *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.,* 84 F.3d 560, 569 (2d Cir. 1996). With respect to specific jurisdiction, the cases on point are sparse, though some cases have permitted consideration of events after the event that gave rise to the cause of action. *See McMullen v. European Adoption Consultants, Inc.,* 109 F. Supp. 2d 417, 420 (W.D. Pa. 2000). Nevertheless, the filing of a motion to submit amicus briefs in the *Freedom Holdings* case is hardly a continuation of the conduct that gave rise to the complaint in this case. *See Educational Testing Service v. Katzman,* 631 F. Supp. 550, 556 (D. N.J. 1986). Motion denied.

CONCLUSION

There being no just reason for delay, the Court grants Rule 54(b) certification with respect to the Rule 12(b)(2) dismissals of the claims against the 30 non-New York defendants, as well as the Rule 12(b)(6) dismissals of plaintiffs' claims against all defendants, with the sole exception of the antitrust claim against defendant Spitzer. Pursuant to Rule 54(b), the clerk is directed to enter final judgment with respect to the dismissed claims. Plaintiffs' other motions are denied.

SO ORDERED.

Dated: New York, New York
November 3, 2004

_____/s/_____
JOHN F. KENNAN
United States District Judge

UNITED STATES DISTRICT COURT FOR THE

SOUTHERN DISTRICT OF NEW YORK

GRAND RIVER ENTERPRISES SIX NATIONS, LTD., et al.,	:	
Plaintiffs,	:	OPINION & ORDER
— against —	:	02 Civ. 5068 (JFK)
WILLIAM PRYOR, et al.,	:	
Defendants.	:	

JOHN F. KEENAN, United States District Judge

Procedural Background

Originally commenced in July of 2002, this action was brought by several cigarette manufacturers, importers and wholesalers with the intent of enjoining the defendants, 31 current or former state's attorneys general, from enforcing Escrow Statutes and Contraband Laws enacted by the defendants' states.[1] In response to the Complaint, defendants made two motions to dismiss. The 30 non-New York defendants moved for dismissal due to lack of personal jurisdiction (Fed. R. Civ. P. 12(b)(2)). The other motion, brought by all 31 defendants sought dismissal of each of

[1] Familiarity with the facts is assumed and acronyms and abbreviations used in the Court's September 29, 2003 Opinion and Order are used without further explanation here.

plaintiffs' claims for failure to state a claim on which relief could be granted (Fed. R. Civ. P. 12(b)(6)) and lack of subject matter jurisdiction (Fed. R. Civ. P. 12(b)(1)). By Opinion and Order dated September 29, 2003, the Court granted the motions of the non-New York defendants to dismiss for lack of personal jurisdiction and all 31 defendants to dismiss for failure to state a claim on which relief could be granted.

On December 19, 2003, the parties submitted briefs on the instant Motion to Alter Judgment, For Relief from Judgment or For Leave to Amend the Complaint, timely noticed in October of 2003. Shortly after the motion was fully briefed, the Second Circuit rendered its decision in *Freedom Holdings, Inc. v. Spitzer,* 357 F.3d 205, 2004 WL 26498 (2d Cir. Jan. 6, 2004). In light of the fact that *Freedom Holdings* was relied on as persuasive authority by this Court in reaching its decision regarding a Sherman Act claim included in the plaintiffs' Complaint, the Court asked the parties to submit supplemental briefs setting forth their respective opinions as to how the Second Circuit's opinion affected the case at bar. Defendants requested that the Court refrain from considering the motion until the Second Circuit passed judgment on a Petition for Rehearing filed by the defendants in the *Freedom Holdings* case. In light of the importance of the that decision to this case, the Court found defendants' request reasonable and adjourned the briefing schedule. On March 25, 2004, the Circuit denied the Petition for Rehearing. Pursuant to this Court's order, the parties filed their supplemental briefs on May 21, 2004.

Motion for Reconsideration

Plaintiffs' motion for reconsideration is made pursuant to the Court for the Southern District of New York's Local Civil Rule 6.3 and Federal Rule of Civil Procedure 59(e). Rule 6.3 essentially elaborates on Rule 59(e). The two rules provide a vehicle for a party to call the court's attention to facts or controlling decisions it believes the court overlooked in

reaching its prior decision. The rules are not meant to serve as a substitute for a direct appeal or as an opportunity to reargue the original motion. *See Cohen v. Koenig,* 932 F. Supp. 505, 506 (S.D.N.Y. 1996). For that reason, motions to reconsider are not granted where the moving party is simply looking to relitigate an issue already decided. *Shrader v. CSX Transp., Inc.,* 70 F.3d 225, 257 (2d Cir. 1995).

The decision to grant or deny a motion for reconsideration falls squarely within the discretion of the district court. *See Devlin v. Transp. Communications Int'l Union,* 175 F.3d 121, 132 (2d Cir. 1999). Although granting reconsideration is within its discretion, "reconsideration of a previous order is an extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources." *In re Health Mgmt. Sys. Inc. Sec. Litig.,* 113 F. Supp. 2d 613, 614 (S.D.N.Y. 2000). "The standard for granting such a motion is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked . . . that might reasonably be expected to alter the conclusion reached by the court." *Shrader,* 70 F.3d at 257. This standard is to be narrowly construed and strictly applied in order to avoid retracing ground already covered. *Cohen,* 932 F. Supp. at 506-07.

Plaintiffs also seek relief pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. Rule 60(b) allows a Court to provide a party relief from a final judgment, order or proceeding where a party discovers new evidence that could not have been discovered in time to request a new trial under Rule 59(b). A court may also grant relief for any other reason it deems appropriate. *See* Fed. R. Civ. P. 60(b). As with Rules 6.3 and 59(e), the grant of relief pursuant to Rule 60(b) is solely within the discretion of the Court.

Reconsideration of the 12(b)(6) Motion

Plaintiffs' motion for reconsideration asserts that the Court was mistaken in its decision to dismiss its Commerce Clause, Fourteenth Amendment, Sherman Act, First Amendment and Federal Cigarette Labeling and Advertising Act claims. Setting aside the Sherman Act claim, which will be discussed separately, the Court finds plaintiffs' have failed to demonstrate that it was in error to have dismissed its claims. Plaintiffs' motion is, in essence, little more than an attempt to relitigate the 12(b)(6) motion. The arguments raised by plaintiffs in their briefs are the same arguments they raised in opposition to the 12(b)(6) motion. Plaintiffs seem to make the mistake of confusing the Court's rejection of certain arguments with "overlooking" those arguments. Contrary to plaintiffs' belief, the Court did consider the case law and facts they believe were overlooked. The Court simply was not persuaded by those cases and facts to accept the arguments plaintiffs' contend they support.

Plaintiffs' Sherman Act claim, however, warrants consideration for a different reason. As stated, shortly after the Court dismissed plaintiffs' claim, the Second Circuit handed down its decision in *Freedom Holdings.* The Court relied on the district court ruling in *Freedom Holdings* in reaching its decision relative to the Sherman Act claim. Just as Judge Hellerstein did in *Freedom Holdings,* this Court found the plaintiffs to be preempted from asserting a Sherman Act claim on the grounds that defendants were immune from such an attack under the doctrine set forth in *Parker v. Brown,* 317 U.S. 341, 350 (1943). In *Freedom Holdings,* the Second Circuit rejected *Parker* immunity as a basis for dismissing antitrust claims against the Contraband and Escrow Statutes. The Circuit held that the defendants in that case had failed to provide evidence of active state supervision of the pricing decisions of the OPMs and SPMs as required by *California Retail Liquor*

Dealer Association v. Midical Aluminum, Inc., 445 U.S. 97, 104 (1980), in order to qualify for *Parker* immunity. *See Freedom Holdings,* 357 F.3d 205, 2004 WL 26498, at *18-*19. In light of this decision, the Court must vacate its decision to dismiss the plaintiffs' Sherman Act claims.

The defendants may well be able to present evidence of active supervision, but to this point they have not offered anything beyond what the Second Circuit found to be insufficient in *Freedom Holdings.* Although plaintiffs have yet to prove that defendants have created the output cartel they allege, they are not required to do so in order to survive a motion to dismiss prior to discovery. For these reasons, dismissal pursuant to Rule 12(b)(6) is inappropriate. Plaintiffs' Sherman Act claim is reinstated.

Jurisdiction

Plaintiffs also seek to have the Court reconsider its decision to dismiss their claims against the non-New York defendants for lack of personal jurisdiction. As with its arguments in support of its attempt to have the Court reconsider its decision with respect to the motion to dismiss, plaintiffs arguments relative to the availability of jurisdiction are essentially a rehashing of the same arguments they made in response to the original motion. The facts the plaintiffs contend were overlooked by the Court were considered and expressly rejected. Contrary to the contention of the plaintiffs', the Court explicitly considered arguments that the five months spent negotiating the MSA in New York, the selection of a New York bank as the Escrow Agent and a New York choice of law provision conferred jurisdiction over the defendants. *See* Opinion, at pp. 13-14. The Court simply found that these contacts were not sufficient, when measured against the totality of the circumstances, to confer personal jurisdiction over the non-New York defendants.

Nor is the Court persuaded that submitting briefs as *amicus curiae* in a lawsuit filed in New York is satisfactory to create jurisdiction. The suit was not filed by the defendants. Appearing as *amicus curiae* does not reflect an attempt by the defendants to purposely avail themselves of the benefits of doing business in New York. To the extent that the filing of that action in New York is an outgrowth of the choice of law provision in the MSA, that argument was addressed in the Court's Order and Opinion.

Finally, plaintiffs submit that if the defendants violated the Sherman Act they committed a tortious act within the state. Were it the case that the defendants committed a tortious act within the state, NYCPLR § 302(a)(2) would grant this Court jurisdiction. Plaintiffs make clear in their Complaint, *see* Compl. ¶ 3, and their papers in opposition to the Motion to Dismiss for Lack of Personal Jurisdiction, *see* Pl. Brief in Opp., at p. 2,that their claims are aimed at the Escrow and Contraband Statutes, not the MSA itself. These Statutes were enacted by the individual states through their individual legislatures. The Statutes were not enacted in New York. Furthermore, the defendants are named in their official capacities on the notion that they are the ones attempting to enforce the Statutes in their respective states. Any tortious conduct was, therefore, committed in the various states. Only New York and defendant Eliot Spitzer can be claimed to have committed a potentially tortious act within the jurisdiction of this Court. Thus, the Court refuses to reconsider its decision to dismiss the claims against the non-New York defendants for lack of personal jurisdiction.

Request for Leave to Amend

Plaintiffs request, in the alternative, that they be granted leave to amend their complaint. Leave to amend should be freely given unless there is evidence of undue delay, bad faith, undue prejudice to the non-moving party or futility. *See Foman v. Davis,* 371 U.S. 178, 182 (1962). In this instance allowing the

plaintiffs to amend would result in undue prejudice and be an exercise in futility. The prejudice would stem from the fact that this action is two-years old and was the subject of motions to dismiss that took more than six months to brief and submit.

Even if the Court were to ignore the prejudice that this would cause to defendants, the Court could not possibly ignore the futility of allowing the amendment. Nothing in plaintiffs' proposed Amended Complaint, *see* Williams Aff. Ex. A, would change the Court's opinion with respect to the motion to dismiss for failure to state a claim on which relief can be granted. Courts of this circuit are instructed that if the proposed new claim cannot withstand a 12(b)(6) motion, leave to amend should be denied as futile. *See Ricciuti v. N.Y.C. Transit Auth.,* 941 F.2d 119, 123 (2d Cir. 1991). In this instance, plaintiffs do not add a new claim but rather seek to add alleged facts in further support of their existing claims. None of these facts are new to the case and none would change the Court's decision to dismiss all but the Sherman Act claim. Grand River, itself, concedes this very point in its request for leave to amend. Grand River states that "it does not believe it necessary" to amend the Complaint to include the additional information it seeks to add. *See* Pl. Brief in Supp., at p. 7. Allowing plaintiffs to amend would, therefore, be an exercise in futility.

Conclusion

Plaintiffs' request for reconsideration of the Court's decision with respect to its Sherman Act claim as to the New York defendant is granted. That portion of the Court's September 29, 2003 Opinion and Order regarding the Sherman Act claim is hereby vacated. The parties are to begin conducting the necessary discovery with respect to this claim immediately, and conclude the discovery process by no later than December 15, 2004. Discovery is to be overseen by Magistrate Judge Eaton. Any disputes or issues that should arise are to be submitted to him.

The remainder of plaintiffs' request for reconsideration is denied. This includes plaintiffs' motion for reconsideration of dismissal of the claims against the non-New York defendants. As such, the only defendant against whom the Sherman Act claim is to be reinstated is the New York defendant, Eliot Spitzer in his official capacity as Attorney General. Plaintiffs' request for leave of the Court to amend the Complaint is also denied. A status conference is set for December 20, 2004 at 9:45 a.m.

SO ORDERED.

Dated: New York, New York
July 15, 2004

_____/s/_____
JOHN F. KENNAN
United States District Judge

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

GRAND RIVER ENTERPRISES SIX NATIONS, LTD., et al.,	:	
Plaintiffs,	:	OPINION & ORDER
— against —	:	02 Civ. 5068 (JFK)
WILLIAM PRYOR, et al.,	:	
Defendants.	:	

JOHN F. KEENAN, United States District Judge

Background

The defendants in this case are 31 current or former state's attorneys general (collectively the "Attorneys General"). Plaintiffs are cigarette manufacturers, importers and wholesalers. This litigation is brought in response to the enactment of certain state statutes in each of the 31 states in which the individual defendants presently or at one time served. Defendants have made two motions to dismiss. One motion is brought by the 30 non-New York defendants seeking dismissal for lack of personal jurisdiction (Fed. R. Civ. P. 12(b)(2)). The other motion, brought by all 31 defendants, seeks to dismiss each of plaintiffs' claims for failure to state a claim on which relief can be granted (Fed. R. Civ. P. 12(b)(6)) and lack of subject matter jurisdiction (Fed. R. Civ. P. 12(b)(1)).

Facts

In the spring of 1994, several states sued the nation's five largest cigarette manufacturers–Phillip Morris Inc., R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corp., Lorillard Tobacco Company (collectively the "Majors") and Liggett Corp.—in an attempt to recover their costs incurred in treating cigarette-related illnesses. Compl. ¶ 64. Additionally, the state suits sought to address the manufacturers' marketing practices, and alleged violations of consumer protection, antitrust and other state laws. *See* Schick Decl. Ex. B. From 1994 until 1997 the Majors and Liggett Corp. mounted a strenuous defense to the suits. In early 1997, however, Liggett Corp. broke ranks and settled 22 of the suits. Not long after, the Majors settled cases brought by the states of Mississippi, Florida, Texas and Minnesota. Compl. ¶¶ 66-67.

On November 23, 1998, the Majors entered into a global settlement agreement with the 46 remaining states, Puerto Rico and four territories (collectively the "States"). The global settlement, known as the Master Settlement Agreement ("MSA"), resolved the pending law suits and released the defendants from future suits that the States might bring against the Majors arising out of the sales of their cigarettes. Compl. ¶ 69. In return, the Majors agreed to pay the States $206 billion over the course of the first 25 years of the agreement. In addition, the Majors agreed to a number of advertising and marketing restrictions. *See* M.S.A. § III. The advertising and marketing restrictions are targeted primarily at reducing smoking by youths. *See* Def. Mem. in Supp. of 12(b)(6) Motion at 8.

Although initially signed only by the Majors, referred to by the M.S.A. as the Original Participating Manufacturers ("OPMs"), the M.S.A. permits other tobacco companies to participate in the agreement as Subsequent Participating Manufacturers ("SPMs"). *See* M.S.A. § II(tt). Thirty-six

additional tobacco companies have joined the M.S.A. as SPMs. Def. Mem. in Supp. of 12(b)(6) Motion at 6. SPMs that signed on to the M.S.A. within 90 days of the MSA's execution date (November 23, 1998) are not required to make any payments to the states unless their share of the national cigarette market exceeded the greater of their 1998 market share or 125% of their 1997 market share. Compl. ¶ 74.

During the settlement discussions the concern emerged that Non-Participating Manufacturers ("NPMs") would take advantage of the fact that the OPMs and SPMs were subject to advertising and marketing restrictions and faced a significant price increase to pay the cost of the settlement to increase their sales in the States. The participating manufacturers were likely concerned that they faced the threat of a greatly diminished market share, and the States feared that NPMs could cause the States to continue to incur significant tobacco-related health care costs while avoiding liability. To alleviate these concerns, the M.S.A. requires each of the States to enact "Qualifying Statutes." States that choose not to enact the Qualifying Statutes will have their individual portions of the settlement fund reduced. In order to facilitate passage of these statutes, model language was appended to the MSA. *See* Compl. ¶¶ 79-80. Each of the 31 defendants' states enacted the Qualifying Statutes in essentially the language suggested by the MSA.

At issue in this action are two statutes in particular, the Escrow and Certification statutes (collectively the "Statutes"). An Escrow Statute requires each NPM to establish and fund an escrow account in an amount determined by the manufacturer's sales volume—as measured by the number of cigarettes on which state excise taxes are paid—in that state. If the amount an NPM puts into escrow in a particular year exceeds what it would have paid were it an SPM, the excess is refunded to the NPM at the end of the year. At the end of the 25 year period, provided no judgment has been entered against the NPM, the

entire fund is refunded to the NPM. While the money is in escrow, the NPM collects any interest earned on it. The Certification Statute is a companion to the Escrow Statute and prohibits the sale of cigarettes in a state (by denying the manufacturers a stamp—the equivalent of a license) by companies that fail to comply with the Escrow Statute. The Plaintiffs allege that the Statutes are unconstitutional (under a number of theories), violate antitrust laws, are preempted by federal statute and constitute a Civil Rights Act violation.

Now before the Court are two motions by the defendants. The first motion is to dismiss the complaint for lack of personal jurisdiction as to the defendant attorneys general from states other than New York. The second is a motion to dismiss each of plaintiffs causes of action for failure to state a claim upon which relief can be granted, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Discussion

I. *JURISDICTIONAL AND PROCEDURAL MOTIONS*

Personal Jurisdiction

The 30 non-New York Attorneys General have moved to have this action dismissed on the basis that this Court lacks personal jurisdiction over them. In response, plaintiffs claim this Court can exert general jurisdiction over eleven of the 30 non-New York defendants and specific jurisdiction over all of them. "Prior to discovery, a plaintiff challenged by a jurisdiction testing motion may defeat the motion by pleading in good faith, legally sufficient allegations of jurisdiction. At that preliminary stage, plaintiff's prima facie showing may be established solely by allegations.[1] *Bruce Ball v. Metallurgie Hoboken-Overpelt,* 902 F.2d 194, 197 (2d Cir. 1990) (citation

[1] Discovery has yet to be conducted in this action.

omitted); *see also Cutco Indus., Inc. v. Naughton,* 806 F.2d 361, 364 (2d Cir. 1986). In a federal question case, provided the federal statutes at issue do not specifically provide for national service of process, questions of jurisdiction are resolved by looking to the law of the forum state. *See PDK Labs, Inc. v. Friedlander,* 103 F.3d 1105, 1108 (2d Cir. 1997).

Determining whether a court has jurisdiction over an out-of-state defendant turns on a two-part analysis. First, the forum state's long-arm statute must permit the assertion of personal jurisdiction over the defendant. Second, the assertion of jurisdiction must not violate federal due process. Both prongs must be satisfied for a court to claim jurisdiction over an out-of-state defendant. *See Graphic Controls Corp. v. Utah Med. Prod., Inc.,* 149 F.3d 1382, 1385 (Fed. Cir. 1998); *see also Bank of Brussels Lambert v. Fiddler Gonzalez & Rodriguez,* 171 F.3d 779, 784 (2d Cir. 1999).

1. General Jurisdiction

A court's general jurisdiction is based on a defendant's general business contacts with the forum state and permits a court to exercise jurisdiction in a case where the subject matter is unrelated to the defendant's business contacts. *Metro. Life Ins. Co. v. Robertson-CECO Corp.,* 84 F.3d 560, 568 (2d Cir. 1996). Section 301 of the New York Civil Practice Law and Rules ("NYCPLR") provides, "A court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore." New York courts have construed this section to permit the exercise of jurisdiction over a foreign corporation on any cause of action if the defendant is engaged in a continuos and systematic course of "doing business" in New York so as to warrant a finding of its "presence" in New York. *Landoil Res. Corp. v. Alexander & Alexander Servs.,* 918 F.2d 1039, 1043 (2d Cir. 1990); *Hoffritz For Cutlery, Inc. v. AMJAC, Ltd.,* 763 F.2d 55, 58 (2d Cir. 1985); *McGowan v. Smith,* 52 N.Y.2d 268, 272 (1981). That the presence is

continuos and systematic, not occasional or casual is critical to a finding that a basis for general jurisdiction exists. *Tauza v. Susquehanna Coal Corp.,* 220 N.Y. 259, 267 (1917). For that reason, Courts employ a pragmatic test that relies heavily on basic indicia of "doing business" and "presence." Those indicia include: the existence of an office in New York, the solicitation of business in New York, the presence of bank accounts or other property in New York, and the presence of employees or agents in New York. *Landoil Res. Corp.,* 918 F.2d at 1043.

Plaintiffs argue that general jurisdiction is appropriate with respect to eleven[2] of the defendants.[3] The basis for the allegation is that each of the states represented by these eleven Attorneys General has a revenue office in either New York or New Jersey. These offices were established and are maintained by the eleven states for the purpose of raising state revenues—through tax audits and enforcement activities—in New York. According to plaintiffs, this indicates that those states are "doing business" in New York, and as agents of the

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[2] Actually, plaintiffs attempt to persuade this Court to exert general jurisdiction over the attorneys general of twelve states. Included in the list of twelve is the attorney general of Minnesota. *See* Pl. Brief in Opp. 12(b)(2) Motion at 9. There are two significant and fatal flaws to plaintiffs argument with respect to the attorney general of Minnesota. First, and foremost, he is not a defendant in this action. Second, Minnesota struck its own settlement with the Majors and is not a signatory of the MSA. The Court will assume that the inclusion of Minnesota in plaintiffs' brief and the reference to it in the Wentzel Affidavit are merely mistakes to be ignored.

[3] The eleven are: Bill Lockyer (California), Ken Salazar (Colorado), Jim Ryan (Illinois), Clara J. Stovall (Kansas), Thomas F. Reilly (Massachusetts), Jennifer Granholm (Michigan), Jeremiah W. Nixon (Missouri), Betty D. Montgomery (Ohio), Paul G. Summers (Tennessee), Christine O. Gregoire (Washington) and James E. Doyle (Wisconsin).

states the Attorneys General are within the Court's jurisdictional reach.

Plaintiffs rely heavily on a Southern District of Texas Case, *Stroman Realty, Inc. v. Antt,* 20 F. Supp. 2d 1050 (S.D. Tx. 1998). *Stroman* was a suit to enjoin California and Florida state officials from enforcing state regulatory statutes against a Texas broker operating in their states. The court determined that it could exert jurisdiction on the basis that the states each had offices in Houston. *See id.* at 1053-54. This decision is not binding on this Court and has not been followed by any courts in this district. Even if the Court were inclined to accept the notion that maintaining a revenue office in New York amounted to "doing business" in New York, which it is not inclined to do, due process considerations would prevent the Court from claiming to have jurisdiction over the eleven defendants.

The purpose of the due process analysis with respect to personal jurisdiction is to "protect[ ] a person without meaningful ties to the forum state from being subjected to binding judgments within its jurisdiction." *Metro. Life Ins.,* 84 F.3d at 567. Requiring meaningful ties provides individuals with fair warning that their conduct in a certain forum may lead them to be forced into court in that forum. In turn, this "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297 (1980).

The constitutional touchstone of the due process analysis is whether the defendant purposefully established "minimum contacts" in the forum state. *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 474 (1985). The requirement of minimum contacts is meant to ensure that a prospective defendant could reasonably anticipate being forced to appear in the court of the particular forum, and that compelling the defendant to do so

does not offend the traditional notions of fair play and substantial justice. *See Int'l Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945). Thus, contacts unilaterally forged by a resident of the forum with an out-of-state defendant will not suffice. Instead, "there must be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Burger King,* 471 U.S. at 475. The necessary "purposeful availment" exists "where the defendant deliberately has engaged in significant activities within a State, or has created continuing obligations between himself and residents of the forum." *Id.* at 475-76 (internal quotation marks and citation omitted).

Essentially, plaintiffs argue that because the eleven states have offices in New York they have purposefully availed themselves of the privilege of conducting activities in New York. This purposeful availment, they allege, was such that the Attorneys General should have reasonably anticipated being haled into a New York court to defend statutes passed by their home states' legislatures. Such a proposition cannot be accepted. For this Court to compel the Attorneys General of other states to defend the laws of their home states in New York solely on the basis of the existence of revenue offices in New York would offend the very notions of traditional fair play and substantial justice that federal due process is meant to protect. The eleven Attorneys General, therefore, are not subject to the general jurisdiction of this Court.

2. *Specific Jurisdiction*

Specific jurisdiction exists when the exercise of jurisdiction arises out of or is related to the defendant's contacts with the forum. *See Metro. Life Ins.,* 84 F.3d at 568. The long-arm statute governing the exercise of personal jurisdiction by New York courts is NYCPLR § 302. Plaintiffs claim that either of two subsections of § 302(a) provide the Court with specific

jurisdiction over all 31 defendants. The Court will address each subsection in turn.

A. § 302(a)(1)

In pertinent part, NYCPLR § 302(a)(1) states that jurisdiction exists over a non-domiciliary that—in person or through an agent—transacts business within the state, provided the cause of action arises out of the in-state transaction. "A nondomiciliary 'transacts business' under CPLR 302(a)(1) when he 'purposefully avails [himself] of the privilege of conducting activities within [New York], thus invoking the benefits and protections of its laws." *CutCo Indus., Inc. v. Naughton,* 806 F.2d 361, 365 (2d Cir. 1986) (quoting *McKee Elec. Co. v. Rauland-Borg Corp.,* 20 N.Y.2d 377, 382 (1967)). Whether a defendant engaged in purposeful availment so as to have transacted business in New York is determined by looking at factors such as: whether the defendant has an on-going contractual relationship with a New York corporation; whether the defendant negotiated or executed a contract in New York, and whether the defendant visited New York after executing the contract to meet with the parties; the choice of law in any such contract; and whether the contract requires the party to send notices and payments to New York. *See Agency Rent a Car Sys., Inc. v. Grand Rent a Car Corp.,* 98 F.3d 25, 29 (2d Cir. 1996). Each factor is considered informative, but no one factor is dispositive. *Id.* Proof of a single transaction in New York satisfies the "transacting business" requirement. *Parke-Bernet Gallaries, Inc. v. Franklyn,* 26 N.Y.2d 13, 16 (1970) (quoting *Longines-Wittnauer Watch Co. v. Barnes & Reinecke,* 15 N.Y.2d 443, 456 (1965)).

A claim "arises out of" a defendant's transaction of business in New York when there exists a substantial nexus between the business transacted and the cause of action sued upon. *See Hoffritz for Cutlery, Inc.,* 763 F.2d at 59. "[P]laintiffs need show only that the cause of action is sufficiently related to the

business transacted that it would not be unfair to deem it to arise out of the transacted business, and to subject the defendants to suit in New York." *Id.* As with general jurisdiction, specific jurisdiction must comport with the standards of due process. *See Burger King,* 471 U.S. at 472-73. The due process analysis for specific jurisdiction is identical to that of general jurisdiction. Naturally, the minimum contacts aspect is met if the "transacting business" requirements of section 302(a) are satisfied.

In support of their argument that the defendants transacted business in New York, plaintiffs point to the fact that from mid-June until mid-November 1998 the defendants, or their agents, met in New York City to negotiate the terms of the MSA. In addition, plaintiffs point to the fact that the M.S.A. required the settling parties to enter into an escrow agreement that appointed a New York City bank, Citibank, N.A., as the escrow agent. Plaintiffs note that the same escrow agreement contained a choice of New York law provision. Finally, plaintiffs point to the choice of a New York firm, PricewaterhouseCoopers, as the independent auditor responsible for calculating the payments to be made by the OPMs to the States.

Plaintiffs' strongest argument is the nearly five months the defendants, or their agents, spent negotiating the terms of the M.S.A. in New York. That, however, is plaintiffs only legitimate argument in support of finding that defendants transacted business in New York. The non-New York defendants' contacts with the escrow agent and the independent auditor, and the grant of jurisdiction to New York state courts over disputes arising under the escrow agreements entered into by the participating manufacturers, have nothing to do with plaintiffs' allegations regarding the invalidity of the Escrow and Certification Statutes. Although the negotiations provide some support for finding that the defendants transacted business in New York, that determination must be made by looking at the

totality of the circumstances. *See Agency Rent a Car,* 98 F.3d at 29.

When the negotiations are considered in the broader scope of the totality of the circumstances, it becomes clear that they alone do not provide a basis for finding jurisdiction to exist in New York. At no point did the defendants attempt to avail themselves of the protections of New York law. Nor have the defendants returned to New York to meet with the parties to the MSA, an important part of the "negotiation factor". Their presence in New York was purely coincidental. The negotiations could easily have been held anywhere, the fact that the negotiations took place in New York was entirely "fortuitous." *See CutCo Indus.,* 806 F.2d at 365. It is unlikely that any of the defendants could have foreseen the possibility that negotiations related to the settlement of lawsuits against the Majors would lead to them being sued in New York by non-parties to the M.S.A. challenging statutes passed by their home-state legislatures. *See SAS Group, Inc. v. Worldwide Inventions, Inc.,* 245 F. Supp. 2d 543, 548 (S.D.N.Y. 2003) ("The requisite minimum contacts must provide a fair warning to the defendant of a possibility of being subject to courts of the forum state."). It should also be noted that these negotiations were not part of an attempt to formulate a business or commercial contract, as has traditionally been the situation in the case law that has found New York negotiations sufficient to satisfy the transaction of business requirement. Rather, these negotiations were part of an attempt to settle civil litigation. Considering these realities, the Court concludes that the defendants did not purposely avail themselves of the privilege of doing business in New York, and therefore, cannot be subject to the long-arm jurisdiction of the state.

This determination is consistent with the words of caution expressed by New York's highest court: "In our enthusiasm to implement the reach of the long-arm statute, we should not

forget that defendants, as a rule, should be subject to suit where they are normally found, that is, at their pre-eminent headquarters, or where they conduct substantial general business activities. Only in a rare case should they be compelled to answer a suit in a jurisdiction with which they have the barest contact." *McKee Elec. Co., Inc.,* 20 N.Y.2d at 383. It is difficult to imagine that challenges to the statutes of other states, reviewed, passed and enforced by other state governments, are the rare cases that the Court of Appeals envisioned properly finding their way into New York courts.

B. § 302(a)(2)

NYCPLR § 302(a) provides New York courts with jurisdiction over any non-domiciliary who "commits a tortious act within the state." The tort on which plaintiffs rely in claiming jurisdiction exists under section 302(a)(2) is violation of antitrust laws. As is discussed in detail *infra,* defendants did not violate antitrust laws. As such, defendants have not committed a tort and jurisdiction, therefore, cannot be predicated on section 302(a)(2).

In sum, plaintiffs have failed to demonstrate that this Court has the power to exert personal jurisdiction over the 30 non-New York defendants. This fact alone is enough to warrant dismissing the complaint as to the non-New York defendants. Nonetheless, in light of the fact that Court does have personal jurisdiction over New York Attorney General Eliot Spitzer, it must address the substantive claims raised by the plaintiffs. A substantive review indicates that even if the Court were inclined to find that it could exert personal jurisdiction over the non-New York defendants the complaint should be dismissed.

II. *MOTIONS TO DISMISS PURSUANT TO RULE 12(b)(6)*

Standard of Review

In deciding a 12(b)(6) motion, a court must construe all well-pleaded factual allegations in the complaint in the favor of the plaintiff. *See Allen v. Westpoint-Pepperell, Inc.,* 945 F.2d 40, 44 (2d Cir. 1991). In order for the defendants to succeed in having plaintiffs' claims dismissed, it must "appear [ ] beyond doubt that the plaintiff[s] can prove no set of facts in support of [their] claim[s] which would entitle [them] to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957).

Rule 8

Rule 8 of the Federal Rules of Civil Procedure provides that a complaint "shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." The purpose of the complaint is to provide the adverse party with fair notice of the claims against it so as to allow for trial preparation. *See Salahuddin v. Cuomo,* 861 F.2d 40, 42 (2d Cir. 1988). When a complaint is so confused as to lack such fair notice a court has the discretion to dismiss the complaint. *See Elliott v. Bronson,* 872 F.2d 20 (2d Cir. 1989). Dismissal, however, is a harsh remedy and should only be used when "the complaint is so confused, ambiguous, vague, or otherwise unintelligible that its true substance, if any, is well disguised." *Salahuddin,* 861 F.2d at 42. When a court does dismiss a complaint, it is expected to allow the plaintiff to re-file. *See id.*

The defendants claim the complaint fails to give each individual defendant notice of the specific claims raised against him or her. They claim that because the defendants and plaintiffs are each aggregated, no defendant knows which claims are particular to him or her or which plaintiff—because each is a different company differently situated—is asserting which claims. Although it is true that the plaintiffs and

defendants are aggregated, this is not enough to warrant a finding that the complaint is so confused as to prevent the defendants from preparing for trial. The complaint's claims are directed at the nearly identical Escrow and Certification Statutes of the 31 States. That the manner in which each defendant has threatened the enforcement of the Statutes differs is not enough to render the complaint fatally flawed. That the defendants are fully capable of deciphering the claims is borne out by the more than 120 pages of detailed response offered by the defendants in support of this motion. The Court, therefore, denies the motion to dismiss the complaint as not in compliance with Rule 8.

Subject Matter Jurisdiction

Defendants allege the Court lacks subject matter jurisdiction over plaintiffs' claims. According to the defendants, plaintiffs do not have standing to bring this action seeking injunctive relief. Even if the Court is to believe the plaintiffs have standing, defendants believe the Court has an obligation to abstain from exercising jurisdiction in order to allow the individual states to address plaintiffs' claims.

Standing is a function of Article III of the Constitution, which limits the authority of the federal courts to decide only actual cases and controversies. The doctrine of standing has been developed to ensure that the parties are sufficiently adverse so as to fulfill the requirement of a true "case or controversy." *Lee v. Bd. of Govs. of the Fed. Reserve Sys.,* 118 F.3d 905, 910 (2d Cir. 1997). "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Warth v. Seldin,* 422 U.S. 490, 498 (1975). Standing requires a plaintiff to allege such a personal stake in the outcome of the case as to

warrant its invocation of federal-court jurisdiction and justify the court's remedial powers on its behalf. *Id.* at 498-99.

The Supreme Court has established three elements of standing. A plaintiff must demonstrate (1) that it has suffered an injury that is (a) concrete and particularized and (b) actual and imminent—not conjectural or hypothetical; (2) that there is a traceable causal connection between the injury and the conduct complained of; and (3) that it is likely the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). If any one of the elements is not fulfilled, the plaintiff is considered to lack standing and its action must be dismissed. At the pleading stage, general factual allegations of injury are sufficient. *See id.* at 561.

It is the defendants' position that the plaintiffs have failed to articulate a particular injury that is traceable to a particular defendant. The injury alleged by the plaintiffs is the one it claims to be imminent as a result of the clear threats of prosecution for violation of what the plaintiffs believe to be unconstitutional statutes. The Supreme Court has held that a well-founded fear that a statute will be enforced against a particular plaintiff satisfies the standing requirement. *See Virginia v. Booksellers Ass'n,* 484 U.S. 383, 384 (1988); *Ex Parte Young,* 209 U.S. 123, 155 (1908) (permitting plaintiff to sue a state officer to enjoin the enforcement of an unconstitutional act); *see also Allstate Ins. Co. v. Serio,* 2000 WL 554221 at *13 (S.D.N.Y. May 5, 2000) (finding standing where state threatened plaintiff with a fine). Although the defendants are aggregated, each has threatened to enforce nearly identical statutes alleged to have common constitutional flaws. Thus, the claimed injuries are traceable and defendants argument that the complaint lacks the specificity necessary for a fair evaluation of standing rings hollow.

The defendants argue that even if the Court finds the plaintiffs to have standing, which it does, it should nonetheless

abstain from exerting subject matter jurisdiction over the action. Federal courts are generally required to abstain from taking jurisdiction over federal constitutional claims that involve or call into question ongoing state proceedings. *Diamond "D" Constr. Corp. v. McGowan,* 282 F.3d 191, 198 (2d Cir. 2002). The abstention doctrine is born of the belief that comity among the several states and the federal courts is best served by allowing the state courts to decide issues of legitimate state interest without interference from the federal courts. In *Younger v. Harris,* 401 U.S. 37, 43-45 (1971), the Supreme Court held abstention to be appropriate when (1) there is an on-going state proceeding relative to the issue; (2) an important state interest is implicated; and (3) the state proceeding affords the federal plaintiff an adequate opportunity for judicial review of the federal claims. *See also Grieve v. Tamerin,* 269 F.3d 149, 152 (2d Cir. 2001). The importance of comity from a public policy perspective translates into a strong preference for abstention. *See Diamond "D",* 282 F.3d at 198; *Penzoil Co. v. Texaco, Inc.,* 481 U.S. 1, 11 (1987) (directing federal courts to abstain "if the State's interests in the proceedings are so important that exercise of federal judicial power would disregard the comity between the States and the National Government."). When a court does opt to abstain, *Younger* contemplates the actions outright dismissal by the federal court. *See Gibson v. Berryhill,* 411 U.S. 564, 577 (1973).

Applying the *Younger* factors to this case, defendants proffer that there are ongoing state actions to enforce the Escrow Statute in nine of the states.[4] The ability of states to insure themselves against the possibility of high health care costs that could wreak havoc on future budgets is without

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[4] Those states are: Arizona, Kansas, Michigan, Montana, Nebraska, North Carolina, South Dakota, Washington and Wyoming. *See* Schick Reply Decl. ¶ 2.

question an important state interest. And, the defendants should be able to raise the very claims they raise in this action as defenses or counterclaims in the state actions. With respect to the nine states in which there are ongoing state actions, the factors that typically lead to abstention appear to be present.

There exists, however, an exception to the abstention doctrine.[5] A federal court can exercise its judicial powers if "extraordinary circumstances" exist. *Diamond "D",* 282 F.3d at 198. The burden of demonstrating the presence of extraordinary circumstances rest squarely with the plaintiff. *See id.* A plaintiff must demonstrate that (1) there is no state remedy available to meaningfully, timely and adequately remedy the alleged constitutional violation; and (2) the plaintiff will suffer great and immediate harm if the federal court does not intervene. *Id.* at 201. Plaintiffs argue that bringing 31 separate actions in 31 states is far from a meaningful, timely or adequate remedy. Furthermore, they claim that the time and cost associated with litigating 31 separate state actions would drive them out of business long before their actions are resolved.

Plaintiffs argument that the time and cost of bringing 31 nearly identical state actions prevent them from having a meaningful, timely or adequate state remedy carries great weight. Although the terms "meaningful, timely and adequately" are intended to refer to the specific nature of the state remedy and are not concerned with external logistics, the reality is that the state remedies are rendered meaningless, untimely and inadequate by the present circumstances. Combined with the fact that plaintiffs have proffered the very real harm of going out of business if the Court does not intervene, this action qualifies as within the ambit of the

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[5] In fact, two exceptions exist. The other exception is reserved for bad faith or harassment in criminal proceedings. Clearly this exception does not apply here.

extraordinary circumstances exception. In fact, this action seems to be very much the type the court in *Younger* had in mind when it stated, "Other unusual situations calling for federal intervention might also arise." *Younger,* 401 U.S. at 54. For this reason, and because the defendants have only established ongoing state actions in nine of the 31 states, the Court will not abstain from taking subject matter jurisdiction over this action.

Commerce Clause

1. *The Dormant Commerce Clause*

Plaintiffs contend that the Statutes violate the Constitution's Commerce Clause. The Commerce Clause gives Congress the power "[t]o regulate commerce with foreign Nations, and among the several states, and with the Indian Tribes." U.S. Const. Art I, § 8, cl. 3. Although the Commerce Clause is phrased as an affirmative grant of power, courts have long understood it to have a negative corollary. This negative corollary, referred to as the "dormant commerce clause", prevents the states from unjustifiably discriminating against or burdening the flow of interstate commerce. *See Wyoming v. Oklahoma,* 502 U.S. 437, 454 (1992). Plaintiffs claim that the Statutes directly regulate interstate commerce that occurs wholly outside the boundaries of the various states.

The Supreme Court has set forth what is essentially a two-tiered approach to analyzing regulatory efforts by states relative to the Commerce Clause. When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, courts generally strike down the statute without further inquiry. *Brown-Forman Distillers Corp. v. New York State Liquor Auth.,* 476 U.S. 573, 579 (1986); *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.,* 261 F.3d 245, 255 (2d Cir. 2001). When, however, "the statute regulates even-

handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970). Assuming a legitimate local purpose exists, a court must determine whether the interest is sufficiently significant to justify the burden on interstate commerce and whether the same purpose could be accomplished in some other manner that does not impose as great a burden. *See id.*

Plaintiffs claim that the Statutes directly regulate interstate commerce that occurs wholly outside the boundaries of the various states. Plaintiffs reason by analogy to two liquor-price affirmation cases, *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.* and *Healy v. The Beer Institute,* 491 U.S. 324 (1989). In *Brown-Forman* and *Healy* the Supreme Court struck down state statutes that regulating liquor prices. Each of these cases is distinguishable, however, in that each involved statutes effectively establishing liquor prices in neighboring states. Unlike the statutes involved in those cases, the Escrow and Certification Statutes do not insist on price parity with cigarettes sold in other states. The Statutes "therefore [do] not have the 'practical effect' of controlling prices or transactions occurring wholly outside of the boundaries of [the various States], as was the case in *Brown-Forman* and *Healy.* Thus, the rule of *per se* invalidity does not apply to the qualifying statute[s]." *Star Scientific, Inc. v. Beales,* 278 F.3d 339, 356 (4th Cir. 2002) (rejecting a similar Commerce Clause challenge to Virginia's versions of the Statutes).

Plaintiffs contend that the Escrow Statutes are discriminatory because they favor NPMs who sell cigarettes in only one state. A statute is discriminatory if it benefits instate economic interests and burdens out-of-state economic interests. *See Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality,* 511 U.S.

93, 99 (1994); *Nat'l Elec. Mfrs. Ass'n v. Sorrell,* 272 F.3d 104, 109 (2d Cir. 2001). In this instance there is no local economic interest that is favored. The Statutes treat all cigarette manufacturers equally. Regardless of whether they are in-state or out-of-state manufacturers, all NPMs must satisfy the same requirements. As there is no preference to local commercial interest or unequal burden on out-of-state interests, there is no discrimination. *See Freedom Holdings, Inc. v. Spitzer,* 02 Civ. 2929 (AKH) (S.D.N.Y. May 14, 2002) (rejecting a Commerce Clause challenge to New York's Statutes).

In addition, the plaintiffs claim the Statutes discriminate between OPMs/SPMs and NPMs. Again, the Commerce Clause is concerned with discrimination in favor of in-state interests to the detriment of out-of-state interests. The only distinctions made by the stautes are among manufactures that have signed the M.S.A. and those that have not. Such a distinction is not discriminatory under Commerce Clause jurisprudence. Furthermore, the distinction made by the Statutes is acceptable because it bears a rational relationship to a legitimate state interest. The Commerce Clause does not prevent a state from legislating or regulating in the interests of the health, safety or welfare of its citizenry. *See Huron Portland Cement Co. v. Detroit,* 362 U.S. 440 (1960). The Statutes are part of an attempt by states to restrict cigarette consumption and reduce health care costs. Given the importance of the states' interest and the benefits of reducing cigarette consumption, the burden placed on manufacturers is far from excessive. *See Star Scientific,* 278 F.3d at 357.

2. *Foreign Commerce Clause*

Plaintiffs claim that the Statutes impermissibly encroach upon the federal government's commerce-clause power to regulate commerce with foreign nations. It is plaintiffs' assertion that the Statutes prevent the federal government from speaking with one voice. Plaintiffs note that some of the

plaintiffs are foreign corporations, and that the federal government has engaged in a trade initiative with Colombia that removes duties on tobacco imports in exchange for replacing coca crops with tobacco crops.

A statute violates what is referred to as the foreign commerce clause when it creates the risk of international multiple taxation or prevents the federal government from speaking with one voice when regulating commercial relations with foreign governments. *See Japan Line, Ltd. v. Los Angeles,* 441 U.S. 434, 452 (1979). The Statutes at issue neither create a risk of multiple taxation nor prevent the federal government from speaking with one voice. Any indirect impact the Statutes might have on the Colombian crop initiative is far too attentuated to be considered a threat to the federal government's ability to speak with on clear voice.

3. *Indian Commerce Clause*

Plaintiffs also claim that the Statutes violate the Commerce Clause by regulating Grand River, a Canadian company located on tribal land in Ontario. The Indian Commerce Clause applies only to Native-American tribes recognized by the federal government and operating within the United States. Plaintiffs' argument appears to be that Grand River is covered by the Indian Commerce Clause because Grand River conducts business on Iroquois property in the United States. Even if this suggestion is accepted as true and sufficient for coverage, an NPM's escrow obligation arises solely from its sales of cigarettes occurring off-reservation. It is well-settled that a state can regulate (i) off-reservation transactions conducted by native Americans; (ii) on-reservation sales to persons other than Native Americans; and (iii) impose certain requirements upon Native Americans in regulating those sales. *Dep't of Taxation & Finance v.. Attea,* 512 U.S. 61 (1994); *Washington v. Confederated Tribes of Colville Reservations,* 447 U.S. 134 (1980). The requirements of the Statutes are entirely consistent

with these principles. Thus, there is no violation of the Commerce Clause.

Sherman Act

The Sherman Act, 15 U.S.C. § 1, bans contracts, conspiracies and combinations that act as a restraint on trade. Combinations formed for the purpose and with the effect of raising, depressing, fixing, pegging or stabalizing the price of a commodity in interstate or foreign commerce are illegal *per se. See Catalanato, Inc. v. Target sales, Inc.,* 466 U.S. 643, 647 (1980). Plaintiffs claim that the Escrow Statutes require NPMs to enter into one of two agreements, either the M.S.A. or an escrow agreement with the state, each of which has the express purpose and effect of restraining trade among competitors.

Regardless of whether the Escrow Statutes have the purpose or effect of restraining trade, the reality is that the Escrow Statutes represent "state actions" and are, therefore, afforded immunity under the *Parker* doctrine. In *Parker v. Brown,* 317 U.S. 341, 350 (1943), the Supreme Court found "nothing in the language of the Sherman Act or in its history [to] suggest [ ] that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." "The rationale of *Parker* was that, in light of our national commitment to federalism, the general language of the Sherman Act should not be interpreted to prohibit anticompetitive actions by the States in their governmental capacities or as sovereign regulators." *City of Columbia v. Omni Qutdoor Adver.,* 499 U.S. 365, 374 (1991).

To qualify as a state action entitled to immunity the action must be clearly articulated and expressed as a state policy, and be actively supervised by the state itself. *Cal. Retail Liquor Dealers Ass'n v. Midical Aluminum, Inc.,* 445 U.S. 97, 104 (1980); *see also Fed. Trade Comm'n v. Ticor Title Ins. Co.,* 504 U.S. 621, 633 (1992); *S. Motor Carriers Rate Conf. v. United*

States, 471 U.S. 48, 57 (1985). When a state action is the result of legislative action, as in this instance, the state is deemed to have clearly articulated a state policy actively supervised by the state itself. *See Cine 42nd St. Theater Corp. v. Nederlander Org., Inc.,* 790 F.2d 1032, 1042 (1986) ("[W]hen the anticompetitive conduct is undertaken by the sovereign itself, for example, through its legislature or its Supreme Court, that activity is *ipso facto* immune from federal antitrust laws. No further inquiry need be made."); *PTI, Inc. v. Phillip Morris Inc.,* 100 F. Supp. 2d 1179, 1195-96 (C.D. Cal. 2000) ("The test to determine sufficient state involvement as sovereign is unnecessary when the state legislature or state supreme court acts directly."); *see also Freedom Holdings, Inc. v. Spitzer,* 02 Civ. 2929 (AKH) (S.D.N.Y. May 14, 2002). Thus, the Escrow Statutes are not violative of the Sherman Act. A point plainly stated by Judge Hellerstein in analyzing a Sherman Act claim against New York's escrow statute; "New York was not seeking to create any benefit to the cigarette manufacturing companies or the Majors or the Subsequent Participants. New York was dealing, as was the other states, in a very important local health interest. It enacted legislation that it considered appropriate to remedy these interests. That's the very thing that *Parker v. Brown* immunizes." *Freedom Holdings,* at Tr. 49.

It is also worth noting that plaintiffs contention that the Sherman Act preempts the Escrow Statutes is without merit. "A party may successfully enjoin the enforcement of a statute only if the statute on its face unreconcilably conflicts with federal antitrust policy." *Rice v. Norman Williams Co.,* 458 U.S. 654, 659 (1982); *City of Columbia*, 499 U.S. at 374. No such conflict exists between the Sherman Act and the Escrow Statutes.

Equal Protection

Plaintiffs next argue that the Escrow Statutes violate their rights under the Equal Protection Clause. The Equal Protection Clause of the Fourteenth Amendment directs that no state shall

"deny to any person within its jurisdiction the equal protection of the laws." Const., Amend XIV, § 1. Plaintiffs contend the Escrow Statutes essentially have the effect of bringing them within the confines of the M.S.A. without providing them any of the benefits of the MSA. They claim the governments have created separate classes—OPMs/SPMs and NPMs—without setting forth a legitimate basis for the distinction. Plaintiffs also believe the Escrow Statutes create classes among NPMs by including out-of-state sales in the escrow formula.

The Equal Protection Clause does not forbid classifications so long as they are not made along suspect lines. *See Nordlinger v. Hahn,* 505 U.S. 1, 10 (1992); *Jankowski-Burczyk v. INS,* 291 F.3d 172, 176 (2d Cir. 2002). In fact statutory classifications that relate to social or economic policies are given great deference. *See City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 440 (1985); *City of New Orleans v. Dukes,* 427 U.S. 297, 304 (1976). "[E]qual protection is not a license for courts to judge the wisdom, fairness or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Fed.*

as the ones at issue in this action, are to be upheld so long as their classifications rationally further state interests. *See Nordlinger,* 505 U.S. at 10. In this instance the classifications created by the Statutes are rationally related to the States' interests in reducing smoking, limiting the health care costs born by the States as a result of cigarette consumption and ensuring that they are able to recover health care costs from all cigarette manufacturers. These are interests that fall squarely

populace. *See Star Scientific,* 278 F.3d at 352; *see also FDA v.*

Brown & Williamson Tobacco Corp., 529 U.S. 120, 125 (2000) (referring to the tobacco-related deaths as "one of the most troubling public health problems facing our Nation today").

Whether the Court believes in the logic of the States' decisions to pass the Statutes is wholly irrelevant. "States are not required to convince courts of the correctness of their legislative judgments ." *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 464 (1981). A state need not even articulate its reasons for enacting a statute. *Beach,* 508 U.S. at 315. Nor is it enough to challenge a distinction on the basis that it was made with substantially less than mathematical exactitude. *City of New Orleans,* 427 U.S. at 304. Rather, "those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Beatie v. City of New York,* 123 F.3d 707, 712 (2d Cir. 1997) (quoting *Vance v. Bradley,* 440 U.S. 93, 111 (1979)). Plaintiffs have failed to meet this burden. Thus, because the distinctions created by the Escrow Statutes are rationally related to legitimate state interests and not arbitrary or irrational, the Escrow Statutes do not violate the plaintiffs' rights under the Equal Protection Clause.[6]

Due Process Clause

Plaintiffs argue that the Escrow Statutes violate their due process rights. The Due Process Clause of the Fourteenth Amendment contains a substantive component that protects against government interference with individuals' property interests. *See Concrete Pipe & Prods, of Cal., Inc. v. Constr.*

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[6] Plaintiffs' contention that the Escrow Statutes warrant a Strict Scrutiny analysis because they contain advertising restrictions is incorrect. As discussed *infra* free speech rights are not implicated by the Escrow Statutes.

Laborers Pension Trust for S. Cal., 508 U.S. 602, 636-37 (1993). The scope of this protection is, however, extremely narrow. This is particularly true with regard to economic legislation. Economic legislation enjoys a presumption of constitutionality and those who challenge economic legislation must overcome an enormous burden to prove it violates the Due Process Clause. *See Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 15 (1976) ("It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way."); *see also Duke Power Co. v. Carolina Envtl. Study Group. Inc.,* 438 U.S. 59, 83 (1978). As such, the challenged legislation need only be rationally related to a legitimate state interest. *See Concrete Pipe,* 508 U.S. at 637.

Plaintiffs contend that the Escrow Statutes are not rationally related to a legitimate state interest. The gravamen of plaintiffs' argument is that there is no proof that they will owe the States money or of how much they might owe in the future. Without such proof, plaintiffs insist, there is no rational basis for the Escrow Statutes. In reaching the conclusion that the Escrow Statutes do not violate the Equal Protection Clause, the Court has already determined that the Escrow Statutes are rationally related to a legitimate state interest. That the States cannot determine the precise amount the NPMs might owe in the future does not mean the Escrow Statutes are not rationally related to a legitimate state interest. *See Duke Power,* 438 U.S. at 83 (holding legislature's prognostication of liability did not violate due process); *Beatie,* 123 F.3d at 712 ("[D]ue process does not require a legislative body to await concrete proof of reasonable but unproven assumptions before acting to safeguard the health of its citizens.").

In addition, plaintiffs claim that the States lack legislative jurisdiction over the foreign NPMs that is required by due process jurisprudence. Like personal jurisdiction, legislative jurisdiction requires minimum contacts and reasonableness. The critical question, again, is whether the company has purposefully availed itself of the privileges of doing business within that legislature's jurisdiction. *See World-Wide Volkswagen Corp.,* 444 U.S. at 291-92. Because an NPM's escrow obligation is determined by the extent of its activity within the state, the necessary contacts and nexus exist to satisfy due process considerations.

Plaintiffs also claim that the Statutes are unconstitutionally vague. To assert such a claim, the plaintiffs must prove that the Statutes are vague in each and everyone of their applications. *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 494-95. In order to avoid being void for vagueness, the Statutes must provide a reasonable person notice of what is prohibited and provide explicit enforcement standards to those charged with enforcement. *Id.* Plaintiffs assert that the Escrow Statutes fail to provide how future liability would be calculated. Although an NPM may in the future dispute a state's calculation of its liability, that the specific calculation is not set forth in the Escrow Statute does not render the legislation unconstitutionally vague.

Also without merit is the plaintiffs' procedural due process claim. The scope of procedural due process protection is, in the context of this action, quite narrow. *See Dist. 28, United Mine Workers of Am., Inc. v. Wellmore Coal Corp.,* 609 F.2d 1083, 1086 (4th Cir. 1979). The escrow accounts function as a surety bond for the States, not as prejudgment remedies. In the event that a state attempts to withdraw funds from a plaintiff's escrow account, the plaintiff will have the opportunity to contest both its liability and the calculation of its liability. Thus, the Escrow Statutes do not impose prejudgment remedies and are not,

therefore, subject to the notice and hearing requirements mandated by due process jurisprudence. *See Texaco, Inc. v. Short,* 454 U.S. 516, 537 (1982); *Interport Pilots Agency, Inc. v. Sammis,* 14 F.3d 133, 142-43 (2d Cir. 1994).

Federal Cigarette Labeling and Advertising Act

The Federal Cigarette Labeling and Advertising Act ("FCLAA") states in relevant part: "No requirement or prohibition based on smoking and health shall be imposed under state law with respect to the advertising or promotion of any cigarettes, the packages of which are labeled in conformity with the provisions of this chapter." 15 U.S.C. § 1334(b). Plaintiffs claim the FCLAA preempts the Statutes. A federal law supersedes state law when Congress expressly states an intention to preempt state law or when the federal regulatory scheme is so comprehensive as to imply congressional intent to occupy the entire field. *See Hillsborough County v. Automated Medical Lab., Inc.,* 471 U.S. 707, 712 (1985); *Vango Media, Inc. v. City of New York,* 34 F.3d 68, 72 (2d Cir. 1994) ("Federal law may preempt state law explicitly, by stating that fact in the statute; impliedly, where the comprehensiveness of the federal legislation in a given field leaves no room for a state to act; and where state law actually conflicts with federal law so that compliance with both is impossible."). Plaintiffs believe the plain language of the FCLAA preempts the Escrow and Certification Statutes because those Statutes have the effect of forcing manufacturers to join the MSA. The MSA, in turn, contains advertising restrictions.

The Escrow and Certification Statutes do not, however, force manufacturers to join the MSA. In fact, the Statutes apply only to those manufactures that chose not to join the MSA. The very argument that plaintiffs raise in this action was raised and rejected in *PTI, Inc. v. Philip Morris Inc.,* 100 F. Supp. 2d 1179 (C.D. Cal. 2000). The court in *PTI* held that the Escrow Statute "does not have any connection whatsoever with cigarette

packaging, advertising, or promotion. To the extent plaintiffs object to the voluntary advertising restrictions to which signatories to the M.S.A. have agreed, they lack standing to challenge these provisions. Moreover, the restrictions are not legislatively required." *Id.* at 1205. As there is nothing in the FCLAA to indicate Congress's intention to preempt the entire field of cigarette regulation and nothing in the Statutes having to do with advertising, the FCLAA does not preempt the Statutes.

First Amendment Claim

Plaintiffs claim that the Statutes violate the First Amendment by effectively conditioning their ability to exercise their First Amendment rights on making escrow payments. The Escrow Statutes do not, however, contain any conduct-based restrictions. Nothing in the Escrow Statutes prevents an NPM from exercising its First Amendment rights. If an NPM does not enter into an escrow agreement, it maintains its First Amendment rights, but it may be enjoined from selling cigarettes in those States where it has failed to comply with the Statutes.

Additionally, plaintiffs allege that the OPMs and SPMs received a financial benefit not available to plaintiffs for agreeing to restrict their First Amendment rights. Plaintiffs' argument that they would not be afforded the same financial benefit were they to join the M.S.A. now as those manufacturers who joined earlier received has nothing to do with the constitutionality of the actual Escrow Statutes. Because the M.S.A. itself is not the subject of this action, only the Statutes are, plaintiffs claim must be dismissed.

Section 1983 Claim

Plaintiffs claim they are entitled to relief under 42 U.S.C. § 1983. Section 1983 does not create any substantive rights, but

merely creates a mechanism for plaintiffs to pursue remedies for violations of federal law committed by governmental officials. *See Sykes v. James,* 13 F.3d 515, 519 (2d Cir. 1993) (citing *City of Oklahoma City v. Tuttle,* 471 U.S. 808, 816 (1985)). Thus, In order to prevail on a section 1983 claim, the plaintiffs must demonstrate that the Statutes deprive them of a federal right. *Id.* In light of the fact that the Court is dismissing each of plaintiffs' federal claims, plaintiffs have failed to meet their burden. Plaintiffs' section 1983 claim must, therefore, be dismissed.

Conclusion

For the reasons set forth herein, the motion of the 30 non-New York defendants to dismiss the complaint as against them for lack of personal jurisdiction is granted. In addition, the motion of all 31 defendants to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure is also granted. The complaint is hereby dismissed. The Court orders this case closed and directs the Clerk of Court to remove it from the Court's active docket.

SO ORDERED.

Dated: New York, New York
September 29, 2003

_____/s/_____
JOHN F. KENNAN
United States District Judge