

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF LOUISIANA  
SHREVEPORT DIVISION

A.B. COKER CO., INC.,  
S&M BRANDS, INC.  
CLP, INC.  
TOBACCO DISCOUNT HOUSE #1 AND  
MARK HEACOCK,

CASE NO. 05-1372

JUDGE HICKS

versus

JAMES D. "BUDDY" CALDWELL

MAGISTRATE JUDGE HAYES

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THE LOUISIANA ATTORNEY GENERAL'S  
MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I. PRELIMINARY STATEMENT.

S&M Brands, Inc.<sup>1</sup>, Tobacco Discount House #1, Inc., and Mark Heacock ("Plaintiffs")<sup>2</sup> seek in this action to invalidate, on federal constitutional grounds, the tobacco Master Settlement Agreement ("MSA"), which the United States Supreme Court has described as a "landmark" public health agreement,<sup>3</sup> and which addresses "tobacco use, particularly among children and adolescents, [which] poses perhaps the single most significant threat to public health in the United States."<sup>4</sup>

Specifically, Plaintiffs seek to enjoin James D. "Buddy" Caldwell, the Louisiana Attorney General (the "Attorney General") from enforcing the MSA, as well as certain statutes

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<sup>1</sup> A Motion to Dismiss S&M Brands for Lack of Standing is currently pending before this court (R. 75). S&M Brands lacks standing because it does not do business in Louisiana, has never done business in Louisiana and does not even have plans to do business in Louisiana. For the reasons set forth in the motion to dismiss and for the additional reasons set forth here, S&M's claims should be dismissed.

<sup>2</sup> A.B. Coker, Inc. and CLP, Inc. are no longer parties to this suit. On April 23, 2008, their claims were voluntarily dismissed (R. 71).

<sup>3</sup> *Lorillard Tobacco Corp. v. Reilly*, 533 U.S. 525, 533, 121 S.Ct. 2404, 2410 (2001).

<sup>4</sup> *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 120 S.Ct. 1291, 1315 (2000).

that Louisiana enacted to assist in its implementation.<sup>5</sup> The complaint alleges that the MSA and these statutes are invalid under the United States Constitution's Compact Clause, Commerce Clause, Due Process Clause, Tenth Amendment<sup>6</sup> and are preempted by the Federal Cigarette Labeling and Advertising Act.

This action is just the latest challenge to the MSA and/or its related statutes. In fact, this is S&M's second such attempt. S&M's first constitutional challenge was brought against the Attorney General for the State of Tennessee in that matter entitled *S&M Brands, Inc. v. Summers*.<sup>7</sup> All claims to enjoin Tennessee's attorney general from enforcing the MSA and that State's MSA-related statutes were dismissed on a 12(b)(6) motion.<sup>8</sup> The Sixth Circuit affirmed the District Court's dismissal of S&M's claims via a 12(b)(6) motion in an unreported decision.<sup>9</sup> In doing so, that Court joined more than fifteen (15) other federal courts that have firmly rejected such challenges on motions to dismiss or for summary judgment. Indeed, in every such case that has gone to judgment, the claims asserted against the MSA or related statutes have failed, and the Supreme Court has denied all requests for it to review those decisions.<sup>10</sup>

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<sup>5</sup> Those statutes are Louisiana's "Escrow Statute" (La. R.S. 13:5061, *et. seq.*) and its "Complementary Legislation" (La. R.S. 13:5071, *et. seq.*)

<sup>6</sup> The Tenth Amendment claims were dismissed for failure to state a claim under Rule 12(b)(6) on November 9, 2006 (R. 47-1).

<sup>7</sup> 393 F.Supp.2d 604 (M.D.Tenn. 2005), *affirmed*, 228 Fed. Appx. 560, 2007 WL 1175630 (6<sup>th</sup> Cir. 2007).

<sup>8</sup> For a detailed discussion of S&M's MSA challenge in Tennessee see Section II(D), *infra*. The claims S&M asserted against the MSA in Tennessee were violations of the Sherman Act, the Equal Protection Clause, the Due Process Clause, and the First Amendment.

<sup>9</sup> *S&M Brands, Inc. v. Summers*, 228 Fed. Appx. 560, 2007 WL 1175630 (6<sup>th</sup> Cir. 2007).

<sup>10</sup> *See, Star Scientific, Inc. v. Beales*, 278 F.3d 339 (4th Cir. 2002), *cert. denied sub nom. Star Scientific, Inc. v. Kilgore*, 537 U.S. 818, 123 S.Ct. 93 (2002) (due process, equal protection, Commerce Clause, Compact Clause); *Mariana v. Fisher*, 226 F.Supp.2d 575 (M.D. Pa. 2002), *aff'd on other grounds*, 338 F.3d 189 (3d Cir. 2003), *cert. denied sub nom. Mariana v. Pappert*, 540 U.S. 1179, 124 S.Ct. 1413 (2004) (Commerce Clause, Compact Clause); *Grand River Enter. Six Nations Ltd. v. Pryor*, 2003 WL 22232974 (S.D.N.Y. Sep 29, 2003) (Commerce Clause, due process, equal protection, preemption, First Amendment), *vacated in part on other grounds*, 2004 WL 1594869 (S.D.N.Y. Jul. 15, 2004), *rev'd as to Commerce Clause claim*, 425 F.3d 158 (2d Cir. 2005), *rehearing denied* (Jan. 3, 2006), *cert. denied sub nom. King v. Grand River Enterprises Six Nations, Ltd.*, 127 S.Ct. 379 (Oct. 10, 2006), *on remand*, 2006 WL 1517603 (S.D.N.Y.) (preliminary injunction denied), *aff'd*, 481 F.3d 60 (2nd Cir. 2007);

This action differs from the earlier ones only in that this time S&M and the other plaintiffs are represented by the Competitive Enterprise Institute (“CEI”), which describes itself as “a non-profit public policy organization dedicated to advancing the principles of free enterprise and limited government.”<sup>11</sup> S&M seems a strange party to sue in this Court given that it does not do business or sell its cigarettes in Louisiana. When Mr. Gee, S&M’s deposition representative, was asked why his company brought this action, he discussed a national strategy of bringing a separate legal challenge in this federal circuit.<sup>12</sup> Mr. Gee stated that legal challenges to the MSA and related legislation had already been filed in the Second, Fourth, and Ninth Circuits – he missed the Third, Sixth, Eighth, Tenth and D.C. Circuits where the courts have uniformly rejected MSA related challenges – but that no challenge yet was pending in the Fifth Circuit at the time CEI decided to initiate this action. Mr. Gee expressed hope that, “the

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*Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205 (2d Cir. 2004) (Commerce Clause); *Forces Action Project, LLC v. State of California*, No. C99-0607MJJ (N.D. Cal. Jan. 15, 2002), *aff’d*, 2003 WL 1900848 (9th Cir. Apr. 17, 2003) (No. 02-15336) (motion to amend complaint to add Commerce Clause claim denied on ground of futility); *Coker v. Foti*, 2006 WL 3307445 (W.D. La. Nov. 9, 2006) (10th Amendment); *S&M Brands, Inc. v. Summers*, 393 F.Supp.2d 604 (M.D. Tenn. 2005), *aff’d*, 2007 WL 1175630 (6th Cir. Apr 19, 2007) (due process, equal protection, First Amendment); *Xcaliber Int’l Ltd., LLC v. Ieyoub*, 377 F.Supp.2d 567 (E.D.La. 2005), *vacated and remanded*, *Xcaliber Int’l Ltd., LLC v. Foti*, 442 F.3d 233 (5th Cir. 2006) (First Amendment, due process, equal protection); *International Tobacco Partners, Ltd. v. Kline*, 475 F.Supp.2d 1078 (D.Kan. 2007), *appeal docketed*, No. 07-3075 (10th Cir. 2007) (Commerce Clause); *Xcaliber Int’l Ltd. v. Edmondson*, 2005 WL 5654220 (N.D. Okla. May 20, 2005) (C.A. 04-CV-922-EA(C)) (N.D. Okla. Apr. 5, 2005), *aff’d*, 535 F.3d 1114 (10th Cir. 2008) (First Amendment, due process, equal protection, Commerce Clause); *Xcaliber Int’l Ltd. v. Kline*, No. 05-2261, 2006 WL 288705 (D.Kan. July 29, 2005, Feb. 7, 2006), *aff’d*, 535 F.3d 1114 (10th Cir. 2008) (First Amendment, due process, equal protection); *Grand River Enterprises Six Nations, Ltd. v. Beebe*, 418 F.Supp.2d 1082 (W.D. Ark. 2006) (First Amendment, equal protection, due process, Commerce Clause, preemption), *appeal docketed*, No. 08-1436 (8th Cir. 2008); *International Tobacco Partners, Ltd. v. Beebe*, 420 F.Supp.2d 989 (W.D. Ark. 2006) (First Amendment, due process, equal protection); *Dos Santos, S.A. v. Beebe*, 418 F.Supp.2d 1064 (W.D. Ark. 2006) (First Amendment, due process, equal protection, Commerce Clause, preemption); *North American Trading Co. v. National Ass’n of Attys Gen’l*, Civ. Action No. 01-01600 (D.D.C. Sept. 18, 2001), *aff’d on other grounds*, No. 01-7173 (D.C. Cir. Nov. 25, 2002) (Commerce Clause); *Star Scientific, Inc. v. Carter*, 2001 WL 1112673 (S.D. Ind. Aug. 20, 2001) (Commerce Clause); *PTI, Inc. v. Philip Morris Inc.*, 100 F. Supp.2d 1179 (C.D. Cal. 2000) (Compact Clause, Commerce Clause, equal protection, due process, bill of attainder, preemption); *Hise v. Philip Morris Inc.*, 46 F. Supp.2d 1201 (N.D. Okla. 1999), *aff’d mem.*, 208 F.3d 226 (10th Cir.), *cert. denied*, 531 U.S. 959 (2000) (Compact Clause).

<sup>11</sup> See, CEI’s website, <http://cei.org>.

<sup>12</sup> See, the S&M Deposition, pp. 214-216, Exhibit 1.

Supreme Court may take up the whole issue. . . .”<sup>13</sup> That is why this Court is called on to add its voice to those that have already addressed these issues. Just as the prior attempts to challenge the MSA have failed, so should this attempt.

Shortly after the complaint in this action was filed, the Attorney General sought to have it dismissed via a 12(b)(6) motion.<sup>14</sup> Magistrate Judge Hornsby recommended that the complaint be dismissed.<sup>15</sup> Judge Hicks, however, stated that while he was “inclined to agree” with the recommendation, he denied the Attorney General’s 12(b)(6) motion due “to the high standard required by Rule 12(b)(6) and the Fifth Circuit’s decision in *Xcaliber International LLC v. Foti*, 442 F.3d 233 (5<sup>th</sup> Cir. 2006)” which found that the District Court for the Eastern District of Louisiana erred by granting a 12(b)(6) motion dismissing a tobacco manufacturer’s challenge to Louisiana’s Amended Escrow Statute.<sup>16</sup>

At the 12(b)(6) stage, the Plaintiffs did not have the burden to submit evidence of facts supporting their allegations; indeed, their allegations were assumed to be true.<sup>17</sup> Plaintiffs can no longer seek refuge under Rule 12 and rest on the mere allegations of the complaint. Instead, they must meet the much heavier burden established by Rule 56 and must set forth evidence of specific facts showing a genuine issue for trial. They must do more than merely show that there is some metaphysical doubt as to the material facts.<sup>18</sup> Discovery is now complete – thousands of documents have been produced, fact and expert witnesses have been deposed. The Plaintiffs

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<sup>13</sup> See, the S&M Deposition, pp. 214-216, Exhibit 1.

<sup>14</sup> R. 13-1.

<sup>15</sup> R. 43.

<sup>16</sup> R. 47-1.

<sup>17</sup> *Kennedy v. Tangipohoa Parish Library Bd. of Control*, 224 F.3d 359, 365 (5<sup>th</sup> Cir. 2000).

<sup>18</sup> *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1356 (1986).

have been given an opportunity to develop facts that support their allegations. Yet, Plaintiffs will be unable to meet the Rule 56 burden.

Summary judgment should be entered in favor of the Attorney General, dismissing the complaint against him in its entirety.

## **II. STATEMENT OF FACTS.<sup>19</sup>**

### **A. The Master Settlement Agreement.**

Cigarette smoking has been costly for the States. In particular, it is the States that are ultimately responsible through Medicaid and other health and welfare programs for the costs of treating cigarette-related diseases developed by many of its citizens. According to the most recent figures published by the United States Centers for Disease Control, the Medicaid Costs incurred on account of cigarette smoking in the State of Louisiana in 2004 amounted to approximately \$1.72 per pack of cigarettes smoked in the State in that year.<sup>20</sup> Given rapid increases in health care costs, the per-cigarette costs of smoking to the State are almost certainly substantially higher today than in 2004.

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<sup>19</sup> Most of the facts set forth below, while uncontestable, are provided for the Court's background understanding. The relatively few and simple facts that are material for disposition of this motion are set forth in the accompanying Statement of Material Facts as to Which There Is No Genuine Issue.

<sup>20</sup> See, Centers for Disease Control, Sustaining State Programs for Tobacco Control, 2006 Data Highlights, available at [http://www.cdc.gov/tobacco/data\\_statistics/state\\_data/data\\_highlights/2006/00\\_pdfs/DataHighlights06table4.pdf](http://www.cdc.gov/tobacco/data_statistics/state_data/data_highlights/2006/00_pdfs/DataHighlights06table4.pdf).

Louisiana and federal courts have held that courts may take judicial notice of information on government websites. See, *Nat'l Info. Services, Inc. v. Gottsegen*, 98-528 (La. App. 5 Cir. 6/1/99, 737 So.2d 909, 916 n. 1 (where the court took judicial notice of interest rate adjustments from a website maintained by the FDIC, stating "[W]e see no reason why a government internet site should not be considered as much an official government document as any printed pamphlet or other materials."); *State v. Carpenter*, 00-0436 (La. App. 3 Cir. 10/18/00), 772 So.2d 200 (where the court took judicial notice of information maintained on the Louisiana Secretary of State's website to determine that a defendant was a commissioned police chief at a certain moment in time); *Upfold v. O'Hara*, No. 04-CV-6235CJS(P), 2004 WL 1526233, n. 1 (W.D.N.Y. June 24, 2004) (where, under Fed. R. Evid. 201), the court took judicial notice of sentencing information contained on a Department of Corrections website due to the content being unquestionably accurate and readily available); and *Boone v. Menifee*, 387 F.Supp.2d 338, 343, n. 2 (S.D.N.Y. 2005) (where the court took judicial notice of information from a State Bureau of Prisons website due to the data being capable of accurate and ready determination.).

Beginning in 1994, most States sued the country's largest tobacco manufacturers to recover the costs incurred by the States in treating smoking-related diseases. The suits challenged the manufacturers' marketing practices and alleged a right to recover based on theories of consumer protection, antitrust, unjust enrichment, and other State-law remedies. On March 13, 1996, Louisiana filed its complaint, which was similar in substance to complaints filed by other States.<sup>21</sup>

The State lawsuits were settled by the execution of the MSA on November 23, 1998.<sup>22</sup> The MSA was signed by 52 governmental jurisdictions (Louisiana and 45 other States, the District of Columbia, Puerto Rico, and four territories), which are defined in the MSA as the "Settling States." MSA, § II(qq). (Four States – Florida, Minnesota, Mississippi, and Texas – had previously entered into separate settlements with the defendants.) The defendants signing the MSA were Phillip Morris, Lorillard, Brown & Williamson, and R.J. Reynolds, collectively referred to as the "Original Participating Manufacturers" or "OPMs."<sup>23</sup> After notice and hearing, the MSA was approved as a settlement of the litigation by a decree entered by the court in each Settling State that had jurisdiction of the lawsuit.<sup>24</sup>

The MSA includes a provision pursuant to which other cigarette manufacturers can join the agreement (MSA § II(tt)) and, since November 23, 1998, more than 40 additional tobacco companies have done so. These "Subsequent Participating Manufacturers" ("SPMs") are bound by the MSA's advertising and other restrictions and make settlement payments to the Settling

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<sup>21</sup> See, *Richard P. Ieyoub et al vs. Philip Morris, Inc et. al.*, Fourteenth Judicial District Court, Parish of Calcasieu, State of Louisiana, Docket No. 98-6473, Statement of Material Facts.

<sup>22</sup> A copy of the MSA is attached to the Complaint as Exhibit 1.

<sup>23</sup> MSA, § II(hh).

<sup>24</sup> See, *Richard P. Ieyoub et al vs. Philip Morris, Inc et. al.*, Fourteenth Judicial District Court, Parish of Calcasieu, State of Louisiana, Docket No. 98-6473, Judgment entered December 11, 1998, Statement of Material Facts.

States based upon their sales. The OPMs and SPMs are collectively referred to as “Participating Manufacturers” or “PMs.”

The MSA addresses the enormous public health problem posed by tobacco usage by, among other things, placing significant restrictions on the advertising and marketing of tobacco products by the Participating Manufacturers, including:

- prohibiting the targeting of tobacco product advertising or marketing to children under 18 years old;
- banning the use of cartoons;
- limiting tobacco brand name sponsorships;
- eliminating outdoor and transit advertising;
- prohibiting payments for the use of tobacco products in the media;
- prohibiting tobacco brand name merchandise;
- prohibiting the distribution of free tobacco products to children;
- prohibiting the distribution of tobacco coupons or other credits to children;
- restricting the licensing of tobacco brand names to third parties;
- prohibiting agreements to suppress research into the health consequences of smoking; and
- prohibiting material misrepresentations of fact regarding the health consequences of smoking.<sup>25</sup>

The MSA places additional affirmative obligations on OPMs, including:

- abolishing two trade associations – the Tobacco Institute and the Council for Tobacco Research – that had been instrumental in suppressing information about the health hazards of smoking (MSA § III(o));
- making publicly available millions of documents that had been produced in discovery that provided evidence of decades of industry misconduct (MSA § IV); and
- contributing over \$1.5 billion in funding to a national foundation to conduct a sustained, nationwide advertising and education program aimed at reducing youth smoking and educating the public about smoking-related illnesses (MSA § VI).

In addition to these restrictions and requirements, the MSA requires the Participating Manufacturers to make substantial payments to the Settling States every year in perpetuity to

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<sup>25</sup> See, MSA § III.

offset a portion of the costs imposed on the States by smoking-related diseases.<sup>26</sup> These payments are then “internalized” in the cost of the cigarettes and largely if not entirely passed on to consumers in the form of higher prices, which dampens demand for cigarettes – particularly by youth, who are more sensitive to price than adults. To date, more than \$60.7 billion has been paid to the Settling States, of which Louisiana has received approximately \$1.4 billion. The MSA payments of the PMs vary by the number of cigarettes sold. This was intended to reflect the fact that the harm done by cigarettes will necessarily vary depending on how many cigarettes are consumed. In exchange for these commitments and payments, the PMs receive a release of claims from the Settling States.<sup>27</sup>

The MSA’s marketing restrictions and price consequences appear to have had a large impact on cigarette consumption in the United States. Cigarette smoking in the United States has declined by approximately 25 percent compared to pre-MSA levels.<sup>28</sup> From 2006 to 2007 alone, the percentage of adults who were current smokers declined from 20.8% to 19.8%.<sup>29</sup>

Although there are no doubt other causes as well, much of this decline is attributable to the fact that requiring PMs to “internalize” at least a portion of the costs their deadly products impose on Louisiana and other States has led those companies to increase the prices they charge for their cigarettes. Higher prices have led to lower consumption, including by youth.<sup>30</sup> These

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<sup>26</sup> MSA § IX.

<sup>27</sup> MSA § XII.

<sup>28</sup> See, e.g., National Center for Health Statistics, Early Release of Selected Estimates on Data from the 2004 National Health Interview Survey 40-45 (2005).

<sup>29</sup> See, the Department of Health and Human Services, Centers for Disease Control and Prevention, Morbidity and Mortality Weekly Report, November 14, 2008 / 57(45);1226 - 1128, <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5745a2.htm>.

<sup>30</sup> See, the Department of Health and Human Services, Centers for Disease Control and Prevention, Morbidity and Mortality Weekly Report, June 27, 2008 / 57(25);689-691, <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5725a3.htm> the percentage of persons under the age of 18 who smoke has declined.

consumption declines will, in turn, lead to a substantial reduction in death and disease caused by smoking and will have a beneficial impact on the State's finances as the costs of medical care for smoking-related diseases also decline.

**B. The Escrow Statutes.**

The MSA parties hoped to achieve participation by as many tobacco companies as possible, but they recognized that some companies, referred to in the Agreement as “Non-Participating Manufacturers” (“NPMs”), might decline to participate. NPMs have no obligations under the MSA. None of the Agreement's public health provisions apply to them,<sup>31</sup> nor are they obligated to make any payments to the States.<sup>32</sup> Correspondingly, the Settling States expressly preserved in the MSA all their past and future claims against NPMs.<sup>33</sup>

Although the NPMs have not settled with the States, they still manufacture products that cause health-related problems and often-fatal diseases which impose huge health care costs on the States in which those products are used.<sup>34</sup> Louisiana, like other States, was concerned that NPMs would escape their potential liability for these costs by managing their finances such that they would be judgment-proof if and when called upon to pay for the harm they had done, or by otherwise lacking the resources to pay judgments against them. Such harm would in many cases

<sup>31</sup> Plaintiff S&M Brands alleges that it “advertises in ways that would be prohibited or sharply curtailed if it joined the MSA, such as placing its brand names on T-shirts and hats and promoting racing and sporting events.” Complaint, ¶ 77.

<sup>32</sup> See, generally MSA §§ II, III, IX, XII.

<sup>33</sup> See, MSA § XVIII(t).

<sup>34</sup> According to the United States Department of Health and Human Services, “cigarette use is the leading preventable cause of death in the United States.” See, Department of Health and Human Services, Centers for Disease Control and Prevention, Morbidity and Mortality Weekly Report, June 27, 2008 / 57(25);689-691, <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5725a3.htm>; Cigarette smoking in the United States was a, “primary causal factor for at least 30% of all cancer deaths, for nearly 80% of deaths from chronic obstructive pulmonary disease and for early cardiovascular disease and deaths.” Further, “during 2000 – 2004 cigarette smoking and exposure to tobacco smoke resulted in at least 443,000 premature deaths, approximately 5.1 million YPLL [years of potential life lost], and \$96.8 billion in productivity losses annually in the United States.” See, the Department of Health and Human Services, Centers for Disease Control and Prevention, Morbidity and Mortality Weekly Report, November 14, 2008 / 57(45);1226 - 1128, <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5745a3.htm>.

not manifest itself until years after an NPM had entered the market, and perhaps long after it had exited it. In contrast to NPMs, Participating Manufacturers have agreed to make settlement payments to help offset the costs imposed on the States by the cigarettes they manufacture and sell, and have accepted significant restrictions on their ability to promote their products.

The Settling States were also concerned about the prospect that NPMs, which had contributed nothing to the settlement and had assumed none of its public health and anti-promotional restrictions, would take advantage of their lower costs and commercial freedom to expand their markets at the expense of companies that had chosen to settle their claims with the States. Recognizing that such tactics would stimulate demand for an unsafe product and undermine the substantial health benefits expected of the MSA, Louisiana and other Settling States wanted NPMs to participate in the MSA's public health provisions or to otherwise be accountable for the harms caused by their products. Finally, the Settling States had an incentive to enact Escrow Statutes because their enactment and "diligent enforcement" help insulate the States against the application of an adjustment to the PMs' payments that could be triggered if certain other conditions are met.<sup>35</sup>

The Escrow Statute was designed to address these issues.<sup>36</sup> Every one of the Settling States enacted an Escrow Statute in substantially identical form to the "Model Statute" contained in Exhibit T to the MSA. The Louisiana escrow statute is codified at La. R.S. 13:5063. It requires all NPMs to make annual deposits into escrow accounts based on the sales of their products in the State.<sup>37</sup> These deposits are calculated to essentially equal the per-cigarette payments made under the MSA. But unlike settlement payments made by Participating

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<sup>35</sup> See, MSA § IX(d) ("Non-Participating Manufacturer Adjustment").

<sup>36</sup> See, La. Rev. Stat. 13 § 5061 ("Findings and purpose"). Contrary to Paragraph 9 of the Complaint, nothing in the MSA "required" the Settling States to enact the Escrow Statutes.

<sup>37</sup> *Id.* § 5063(C)(1).

Manufacturers, which become the property of the State, Louisiana has no right to an NPM's escrow deposits unless Louisiana obtains a future settlement or judgment of tobacco-related claims against the NPM.<sup>38</sup> As a result, NPMs earn interest on their escrow deposits and that interest is paid out to the depositing NPM as it accrues.<sup>39</sup> At the same time, § 5063(C)(2)(c) requires the principal amount of each annual deposit to be held in escrow for 25 years because of the substantial latency until the damage being caused by cigarettes currently sold in Louisiana will likely manifest itself.<sup>40</sup> If there is no judgment or settlement within 25 years, the escrowed amount reverts to the NPM.<sup>41</sup>

In addition, an NPM can obtain a release of escrowed funds under § 5063(C)(2)(b) of the Escrow Statute.<sup>42</sup> An unintended and unforeseen consequence of this provision was that certain NPMs concentrated their sales in a few States, which resulted in their obtaining an almost immediate release of practically all of their escrowed funds.<sup>43</sup> This frustrated the purposes of the Escrow Statute. Accordingly, Louisiana, like almost all of the Settling States, has amended the Escrow Statute to modify the formula by which releases can be made under § 5063(C)(2)(b).<sup>44</sup>

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<sup>38</sup> *Id.* § 5063(C)(2)(a).

<sup>39</sup> *Id.* § 5063(C)(2).

<sup>40</sup> *See, id.* § 5061(1).

<sup>41</sup> *Id.* § 5063(C)(2)(c).

<sup>42</sup> §5063(c)(2)(b), as originally passed by the Legislature, provided:

To the extent that a tobacco product manufacturer establishes that the amount it was required to place into escrow in a particular year was *greater than the state's allocable share of the total payments that such manufacturer would have been required to make in that year under the Master Settlement Agreement . . . had it been a participating manufacturer*, the excess shall be released from escrow and revert back to such tobacco product manufacturer. (Emphasis added.)

<sup>43</sup> This result followed because, for such an NPM, the amount escrowed in a State greatly exceeded the State's allocable share (in Louisiana's case, about 2.25 percent) of the NPM's hypothetical MSA payment had it been a PM.

<sup>44</sup> The Statute now provides that:

To the extent that a tobacco product manufacturer establishes 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 that 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*

This produces an “apples to apples” comparison by comparing the NPM’s escrow payments for its cigarettes sold in Louisiana to its hypothetical MSA payments for those very same cigarettes, and not arbitrarily limiting the comparison to Louisiana’s 2.25-percent Allocable Share of the hypothetical payments. This ensures that the Legislature’s purposes in enacting the Escrow Statute will be served.

**C. Complementary Legislation.**

Louisiana, like almost all the Settling States, has also enacted additional legislation designed to help achieve the purposes of the MSA and Escrow Statute. This “Complementary Legislation” provides that in order for a brand of cigarettes to be included on a directory of brands eligible for sale in Louisiana, its manufacturer must be either a PM under the MSA or an NPM in compliance with the Escrow Statute.<sup>45</sup>

**D. S&M Unsuccessfully Challenged the MSA and Related Statutes on Constitutional Grounds in Tennessee.**

On January 19, 2005 S&M filed suit against the Attorney General for the State of Tennessee in that matter entitled *S&M Brands, Inc. v. Summers*.<sup>46</sup> S&M alleged that the MSA and related statutes<sup>47</sup> created an “output cartel” between the settling states and the participating manufacturers and therefore were preempted by the Sherman Act. It also alleged that the MSA and related statutes violate the Equal Protection Clause, Due Process Clause, and the First Amendment. Finally, S&M claimed that the retroactive enforcement of Tennessee’s allocable share amendment violated the Due Process Clause.<sup>48</sup>

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*participating manufacturer*, the excess shall be released from escrow and revert back to such tobacco product manufacturer. (Emphasis added.)

<sup>45</sup> La. R.S. 47:843(D)(2)(f).

<sup>46</sup> 393 F.Supp.2d 604 (M.D.Tenn. 2005), *affirmed*, 228 Fed. Appx. 560, 2007 WL 1175630 (6<sup>th</sup> Cir. 2007).

<sup>47</sup> The Tennessee statutes challenged are identical to the Louisiana statutes challenged in this matter.

<sup>48</sup> *S&M*, 393 F.Supp.2d at 610.

The Tennessee Attorney General filed a 12(b)(6) motion to dismiss. The motion was granted as to all claims with the sole exception of S&M's claim that the retroactive enforcement of Tennessee's allocable share amendment violated the Due Process Clause.<sup>49</sup> In an unreported decision dated April 19, 2007, the Sixth Circuit affirmed the District Court's dismissal of S&M's claims via a 12(b)(6) motion.<sup>50</sup> In a separate, reported decision dated September 17, 2008, the Sixth Circuit dismissed the retroactive enforcement claim due to sovereign immunity.<sup>51</sup> Thus, all of S&M's claims against the MSA in Tennessee have been dismissed.

S&M, with the backing and support of CEI,<sup>52</sup> now has its sights set on Louisiana, a state in which it does not do business and has never sold a single cigarette.<sup>53</sup> It has fine tuned its Commerce Clause and Due Process Clause claims. It has added a new theory under the Compact Clause.<sup>54</sup> However, the relief sought in this matter and the Tennessee matter are identical – a declaration that the MSA and related statutes are unconstitutional. S&M's repackaged challenge should fail here as well.

#### **E. Related Litigation Pending in the Eastern District of Louisiana.**

Xcaliber International Limited, LLC ("Xcaliber"), an NPM tobacco manufacturer like S&M, filed a separate tobacco challenge in the Eastern District of Louisiana which is currently

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<sup>49</sup> *Id.* Louisiana's allocable share amendment is not retroactive. Thus, this is not an issue here.

<sup>50</sup> *S&M Brands, Inc. v. Summers*, 228 Fed. Appx. 560, 2007 WL 1175630 (6<sup>th</sup> Cir. 2007). This Court did not consider the retroactive enforcement claim.

<sup>51</sup> *S&M Brands, Inc. v. Cooper*, 527 F.3d 500 (6<sup>th</sup> Cir. 2008).

<sup>52</sup> CEI describes itself on its own website as "a non-profit public policy organization dedicated to advancing the principles of free enterprise and limited government." See, CEI's website, <http://cei.org>. CEI, in fact, announced that it had filed this lawsuit in a press release from Washington, D.C. on August 2, 2005: "The Competitive Enterprise Institute on Tuesday filed a Constitutional challenge to the 1998 tobacco settlement." See, <http://cei.org/gencon/003%2C04735.cfm>.

<sup>53</sup> Currently pending before this Court is a motion to dismiss S&M for lack of standing.

<sup>54</sup> If there's one thing the American people learned this campaign season it's that you can put lipstick on a pig but it's still a pig.

pending.<sup>55</sup> Unlike S&M and CEI which challenge the entire MSA and related statutes, Xcaliber only challenges the ASA, La. R.S. 13:5063. The Attorney General filed a 12(b)(6) motion to dismiss and it was granted by the district court.<sup>56</sup> However, the Fifth Circuit reversed without assigning reasons.<sup>57</sup>

Following remand, the *Xcaliber* matter assumed a similar track as this case. The undersigned represents the Attorney General in both matters, and S&M's attorney Kyle Keegan represents the plaintiffs in both matters. Counsel stipulated that the fact and expert depositions taken could be used in both cases. The Attorney General is filing a Motion for Summary Judgment in *Xcaliber* on the same day he is filing this motion for summary judgment. Discovery is complete and a trial date of January 29<sup>th</sup> has been set in *Xcaliber*. No trial date has been set in this matter.

Xcaliber, like S&M, has filed multiple tobacco challenges. Just this past summer, on July 23, 2008, the United States Court of Appeals for the Tenth Circuit considered challenges by Xcaliber in Oklahoma and Kansas.<sup>58</sup> Like its complaint in Louisiana, Xcaliber in these cases only challenged each State's Allocable Share Amendment.<sup>59</sup> The Tenth Circuit in a detailed opinion that has clear application to the claims asserted here found these statutes to be constitutional and affirmed summary judgment or dismissal in favor of the Oklahoma and Kansas Attorneys General.

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<sup>55</sup> See, *Xcaliber v. Foti*, Civil Action 04-0069, Sect. "S" Mag. 4 (E.D. La. 2004).

<sup>56</sup> *Xcaliber International LLC v. Foti*, 377 F.Supp.2d 567 (E.D.La. 2005), *rev'd*, 442 F.3d. 233 (5th Cir. 2006).

<sup>57</sup> *Xcaliber International LLC v. Foti*, 442 F.3d. 233 (5th Cir. 2006).

<sup>58</sup> *KT&G Corp, Xcaliber International Limited, LLC., vs. Attorney General for the State of Oklahoma, Drew Edmondson C/W Xcaliber International Limited, LLC v. Attorney General for the State of Kansas, Stephen Six*, 535 F.3d 1114 (10th Cir. 2008).

<sup>59</sup> The provisions of the Oklahoma and Kansas' Allocable Share Amendment that were found to be constitutional are identical to those in the Louisiana escrow statute at issue here.

**III. THE PLAINTIFFS MAY NO LONGER REST ON THE ALLEGATIONS OF THEIR COMPLAINT, UNDER RULE 56 THEY MUST PRODUCE EVIDENCE TO SUPPORT THESE ALLEGATIONS.**

A party opposing a motion for summary judgment is held to a higher standard than a party opposing a Rule 12(b)(6) motion to dismiss. As the court explained in *Schmoeger v. Algonquin Gas Transmission Co.*,<sup>60</sup> “[a] complaint which might, if challenged, pass muster as sufficient to withstand a 12(b)(6) motion to dismiss on its face does not, by being verified, automatically suffice to establish a genuine issue of material fact under Rule 56.”

The dismissal of a complaint for failure to state a claim upon which relief can be granted under Rule 12(b)(6) has been regarded as a disfavored means of disposing of a case. Prior to the Supreme Court’s decision in *Bell Atlantic v. Twombly*,<sup>61</sup> in a 12(b)(6) motion, unless it appeared beyond a doubt that a plaintiff could prove no set of facts in support of his claim which would entitle him to relief, courts avoided dismissals.<sup>62</sup> Courts construed a complaint liberally in the plaintiff’s favor and accepted all factual allegations in the complaint as true.<sup>63</sup>

In contrast, a party is entitled to summary judgment on a claim where there is no genuine issue of material fact and where the moving party is entitled to judgment as a matter of law.<sup>64</sup> On a motion for summary judgment under Rule 56(c), the moving party has the initial burden of showing that there is no genuine issue of material fact.<sup>65</sup> The moving party is not even required to present evidence proving the absence of a material fact; rather, the moving party may meet its

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<sup>60</sup> 802 F. Supp. 1084, 1086 (S.D.N.Y. 1992).

<sup>61</sup> 550 U.S. 544, 127 S.Ct. 1955 (2007). In *Twombly*, the Supreme Court changed the standard for a 12(b)(6) motion.

<sup>62</sup> *Conley v. Gibson*, 355 U.S. 41, 45, 78 S.Ct. 99, 101-102 (1957).

<sup>63</sup> *Kennedy v. Library Board of Control*, 224 F.3d 359, 365 (5<sup>th</sup> Cir. 2000).

<sup>64</sup> See Fed.R.Civ.P. 12(b)(6) and 56(c); *Kennedy v. Tangipahoa Parish Library Board of Control*, 224 F.3d 359, 365 (5<sup>th</sup> Cir. 2000)<sup>64</sup>, *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505, 2509-10 (1986).

<sup>65</sup> *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S.Ct. 2505, 2514 (1986).

burden by simply pointing to the absence of evidence to support non-moving party's case.<sup>66</sup> If the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, then there is no genuine issue for trial.<sup>67</sup> Once the moving party has carried its burden under Rule 56(c), the burden shifts to the non-moving party who must do more than merely show that there is some metaphysical doubt as to the material facts.<sup>68</sup>

The party opposing the motion may not rest on mere allegations or denials of pleading, but must set forth specific facts showing a genuine issue for trial.<sup>69</sup> An issue is material only if its resolution could affect the outcome of the action.<sup>70</sup> To meet this burden, the non-moving party must "identify specific evidence in the record and articulate the 'precise manner' in which that evidence support[s] [its] claim[s]." <sup>71</sup> Absent such evidence, no genuine issue of material fact has been established and the moving party is entitled to judgment dismissing the claims involved.<sup>72</sup> Unsupported allegations, conclusory in nature, are insufficient to defeat a proper motion for summary judgment.<sup>73</sup>

Here, no genuine issues of fact exist. The material issues, set forth in the accompanying Statement of Material Facts as to Which There Is No Genuine Issue, are simple and few. Like Xcaliber in the cases affirmed by the Tenth Circuit and S&M in the case affirmed by the Sixth Circuit, the Plaintiffs can present no set of facts that will support their claims. Nor can they any longer rest on the allegations of their complaint. As a matter of fact and law, summary judgment

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<sup>66</sup> *Boudreaux v. Swift Transportation Co.*, 402 F.3d 536, 544 (5<sup>th</sup> Cir. 2005).

<sup>67</sup> *Matsushita*, 475 U.S. at 597, 106 S.Ct. at 1361.

<sup>68</sup> *Matsushita*, 475 U.S. at 586, 106 S.Ct. at 1356.

<sup>69</sup> *Anderson*, 477 U.S. at 248, 256, 106 S.Ct. at 2510, 2514.

<sup>70</sup> *Anderson*, 477 U.S. at 248, 106 S.Ct. at 2510.

<sup>71</sup> *Forsyth v. Barr*, 19 F.2d 1527, 1537 (5<sup>th</sup> Cir.), *cert. denied*, 513 U.S. 871, 115 S.Ct. 195 (1994).

<sup>72</sup> *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2553 (1986).

<sup>73</sup> *Simmons v. Lyons*, 746 F.2d 265, 269 (5<sup>th</sup> Cir. 1984).

should be granted in favor of the Attorney General and Plaintiffs' Complaint should be dismissed, with prejudice.

**IV. THE MASTER SETTLEMENT AGREEMENT AND RELATED LOUISIANA STATUTES ARE CONSTITUTIONAL.**

Plaintiffs' remaining claims are that the MSA and related statutes are preempted by the Federal Cigarette Labeling and Advertising Act, and violate the Compact Clause, the Commerce Clause and the Due Process Clause of the United States Constitution.

The Attorney General briefed these issues of law in its Memorandum in Support of Motion to Dismiss filed on October 31, 2005;<sup>74</sup> Reply to Plaintiffs' Memorandum in Opposition to the Motion to Dismiss filed on January 13, 2006;<sup>75</sup> and Motion for Leave to Supplement Memorandum with Newly-Issued Decisions and Motion to Address A Recent Fifth Circuit Court of Appeals Ruling filed on March 14, 2006.<sup>76</sup> The discussion in those briefs generally applies to the current Motion for Summary Judgment as well, and the Attorney General refers the Court to the arguments therein as if copied *in extenso*.

The Attorney General also refers this Court to the well reasoned Report and Recommendation issued by Magistrate Judge Hornsby on September 5, 2006.<sup>77</sup> Therein the Magistrate Judge found that the Plaintiffs failed to state any constitutional claims. Furthermore, several significant cases have been decided since September 6, 2006, the date of the Magistrate Judge's Report and Recommendation including decisions of the Sixth Circuit, Ninth Circuit, and Tenth Circuit rejecting similar challenges.

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<sup>74</sup> R. 13-2.

<sup>75</sup> R. 27.

<sup>76</sup> R. 34-1.

<sup>77</sup> R. 43.

Overall, there have been more than fifteen (15) decisions of federal district courts rejecting challenges to the MSA and related statutes in actions brought by NPMs like S&M or smokers like Plaintiff Heacock, many of which have been affirmed by courts of appeals. No decision has invalidated any part of the MSA or any related statute. A brief summary of the most relevant cases is set forth in Exhibit 2. Just as these Courts across the United States have rejected constitutional challenges to the MSA and related statutes, so too should this Court.

**A. The MSA and related Statutes do not violate the Compact Clause.<sup>78</sup>**

Count I of the Complaint alleges that the MSA is an “Agreement or Compact” among the States within the meaning of the Compact Clause of the Constitution, Article I, § 10, and that, “[c]ontrary to the plain requirement of the Compact Clause, the MSA has not been submitted to or approved by the Congress.”<sup>79</sup> Claims that the MSA needed Congress’s consent under the Compact Clause have been rejected previously by four courts, including the United States Court of Appeal for the Fourth Circuit and the United States Court of Appeal for the Third Circuit.<sup>80</sup>

The Magistrate Judge, after applying the legal standard in *United States Steel v. Multistate Tax Commission*<sup>81</sup> and analyzing the above cases found that the Complaint did not meet the legal requirements for stating a Compact Clause claim.<sup>82</sup> As set forth in the accompanying Statement of Material Facts, the only fact material to this claim is that the MSA

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<sup>78</sup> For a detailed discussion of the Compact Clause and the allegations of the complaint see the Attorney General’s Memorandum in Support of Motion to Dismiss, p. 4 -15 (R. 13-2).

<sup>79</sup> Complaint, ¶¶ 58-59.

<sup>80</sup> *Star Scientific, Inc. v. Beales*, 278 F.3d 339, 359-60 (4th Cir. 2002), *cert. denied sub nom*; *Star Scientific, Inc. v. Kilgore*, 537 U.S. 818, 123 S.Ct. 93 (2002); *Mariana v. Fisher*, 226 F.Supp.2d 575, 586-87 (M.D. Pa. 2002), *aff’d on other grounds*, 338 F.3d 189 (3d Cir. 2003), *cert. denied sub nom*; *Mariana v. Pappert*, 540 U.S. 1179, 124 S.Ct. 1413 (2004); *PTI, Inc. v. Philip Morris Inc.*, 100 F.Supp.2d 1179, 1197-98 (C.D. Cal. 2000); *Hise v. Philip Morris Inc.*, 46 F.Supp.2d 1201, 1210 (N.D. Okla. 1999) (allegation of “unlawful confederation”), *aff’d mem.*, 208 F.3d 226 (10th Cir. 2000), *cert. denied*, 531 U.S. 959, 121 S.Ct. 384 (2000).

<sup>81</sup> 434 U.S. 452, 98 S.Ct. 799 (1978).

<sup>82</sup> See, p. 19 of the Magistrate Judge’s Report and Recommendation. (R. 43)

does not enhance the power of the States quoad the federal government. Given that the MSA expressly recognizes that it may be preempted by federal legislation, MSA § XVIII(a), it is apparent that Plaintiffs cannot establish specific evidence supporting facts under Rule 56 that would entitle them to avoid summary judgment on this claim. For these reasons, judgment should be entered in the Attorney General's favor dismissing Count I of the Complaint, with prejudice.

**B. The MSA and related statutes do not violate the Cigarette Labeling and Advertising Act.<sup>83</sup>**

Count II of the Complaint alleges that the MSA and Escrow Statute violate the preemption provision of the Federal Cigarette Labeling and Advertising Act ("FCLAA")<sup>84</sup> contained in 15 U.S.C. §1334(b).<sup>85</sup> Count II specifically alleges that the MSA and the Louisiana Escrow Statute constitutes a "national regulatory scheme on the advertising and marketing of cigarettes that violates and is preempted by the FCLAA" because "[t]he MSA bans many forms of cigarette advertising" and the Escrow Statute "compels cigarette makers to either join the MSA and thus restrict their advertising, or make substantial annual payments into escrow."<sup>86</sup>

This argument has already been rejected by the Second Circuit Court of Appeals in *Grand River Enter, Six Nations Ltd. v. Pryor*<sup>87</sup> and a California District Court in *PTI, Inc. v. Philip Morris, Inc.*<sup>88</sup> In these cases, the Courts rejected similar arguments that the Escrow

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<sup>83</sup> For a detailed discussion of the FCLLA claim and the allegations of the complaint see the Attorney General's Memorandum in Support of Motion to Dismiss, p. 15 - 17. (R. 13-2).

<sup>84</sup> 15 U.S.C. §1331 *et seq.*

<sup>85</sup> 15 U.S.C. §1334(b) states, "[n]o requirement or prohibition based on smoking and health shall be imposed under state law with respect to advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter."

<sup>86</sup> Complaint, ¶75.

<sup>87</sup> 425 F.3d 158, 175 (2<sup>nd</sup> Cir. 2005) affirming, 2003 WL 22232974 at \*16 -\*17 (S.D.N.Y. Sep. 29,2003).

<sup>88</sup> 100 F.Supp.2d 1179 (C.D.Cal. 2000).

Statute coerces NPMs to join the MSA and comply with its advertising restrictions. The Courts found the MSA to be a voluntary agreement and not legislatively required.<sup>89</sup> Further, the Magistrate Judge having found no allegations of “coercion or otherwise” recommended that this claim be dismissed.<sup>90</sup>

Indeed, as set forth in the accompanying Statement of Material Facts, the PM’s voluntarily agreed to the MSA’s restrictions on advertising and marketing activities contained within Section 15 of the MSA. These restrictions thus fall outside the scope of FCLAA’s preemption provision, which only applies to a “requirement or prohibition ... imposed under state law.”

Given that Plaintiffs cannot possibly raise a genuine issue that would show that the MSA or Escrow Statute imposes any requirement of prohibition under State law, the Attorney General is entitled to summary judgment in his favor dismissing Count II of the Complaint, with prejudice.

**C. The MSA and related statutes do not violate the Commerce Clause or the Due Process Clause.<sup>91</sup>**

Count III of the Complaint invokes the Commerce and Due Process Clauses, and alleges that the MSA and related statutes violate those constitutional provisions by acting extraterritorially in various ways.

Plaintiffs do not allege that the MSA discriminates in favor of intrastate commerce; instead, they attempt to claim that the MSA regulates “interstate commerce in an extraterritorial

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<sup>89</sup> *Grand River*, 2003 WL 22232974 at \*16 - \*17 (citing, *PTI*, 100 F.Supp.2d at 1205).

<sup>90</sup> See, p. 10 of the Magistrate Judge’s Report and Recommendation. (R. 43)

<sup>91</sup> For a detailed discussion of the Commerce Clause and the allegations of the complaint see the Attorney General’s Memorandum in Support of Motion to Dismiss, p.17 - 28 (R. 13-2).

fashion.”<sup>92</sup> According to Plaintiffs, this is because PMs’ payments under the MSA are based on the PMs’ sales in the entire United States, including the four “non-settling states.”<sup>93</sup> Plaintiffs also contend that the MSA violates the Due Process Clause by “regulating conduct occurring wholly outside the Settling States’ jurisdiction.”

As with Plaintiffs’ other claims, these have been repeatedly rejected by other courts in cases challenging the MSA and related statutes.<sup>94</sup> Indeed, having fully analyzed these claims, Magistrate Hornsby recommended that they be dismissed.<sup>95</sup>

#### 1. The Commerce Clause Claim Fails.

The MSA is not a “state regulation” subject to the dormant Commerce Clause. As the court in *Mariana v. Fisher* noted, after reviewing relevant Supreme Court authority, including *West Lynn Creamery, Inc. v. Healy*<sup>96</sup> and *Brown-Forman Distillers v. New York Liquor Auth.*,<sup>97</sup> “the M.S.A. is not a statute promulgated by the state legislature. Rather, it is a settlement agreement that disposed of pending litigation.”<sup>98</sup> The Commerce Clause is traditionally applied to State legislative or regulatory actions and not agreements involving a State.<sup>99</sup> In particular, an

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<sup>92</sup> Complaint, ¶ 79.

<sup>93</sup> *Id.* In fact, four States did enter into settlements, albeit separate from the MSA.

<sup>94</sup> *Mariana v. Fisher*, 226 F.Supp.2d 575, 585-86 (M.D. Pa. 2002), *aff’d on other grounds*, 338 F.3d 189 (3d Cir. 2003), *cert. denied sub nom. Mariana v. Pappert*, 540 U.S. 1179, 124 S.Ct. 1413 (2004); *Table Bluff Reservation (Wiyot Tribe) v. Philip Morris, Inc.*, 256 F.3d 879, 881 (9th Cir. 2001).

<sup>95</sup> See, p. 10 – 22 of the Magistrate Judge’s Report and Recommendation. (R. 43)

<sup>96</sup> 512 U.S. 186, 114 S.Ct. 2205 (1994).

<sup>97</sup> 476 U.S. 573, 106 S.Ct. 2080 (1986).

<sup>98</sup> *Mariana v. Fisher*, 226 F.Supp.2d 575, 585-86 (M.D. Pa. 2002), *aff’d on other grounds*, 338 F.3d 189 (3d Cir. 2003), *cert. denied sub nom., Mariana v. Pappert*, 540 U.S. 1179, 124 S.Ct. 1413 (2004).

<sup>99</sup> See, e.g., *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390, 114 S.Ct. 1677, 1682 (1994) (observing that the “central rationale” for the negative Commerce Clause “is to prohibit *state or municipal laws* whose object is local economic protectionism”) (emphasis added); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 626, 98 S.Ct. 2531, 2537 (1978) (discussing protectionism as flowing from “*legislative means as well as legislative ends*”) (emphasis added).

agreement that settles claims in litigation between a State and a private party is a voluntary act that does not constitute State regulation in any ordinary sense.

Furthermore, as the Supreme Court has explained, the dormant Commerce Clause is principally implicated by State legislation that interferes “with the maintenance of a national economic union,” either by discriminating against interstate commerce or by directly controlling “commerce occurring wholly outside the boundaries of a State.”<sup>100</sup> Unlike the price affirmation schemes at issue in *Healy* and *Brown-Forman*, which had the effect of controlling prices in other States, “[t]here is no allegation that the M.S.A. adopts a scale of prices that is applicable in other states, and the M.S.A. does not contain mandates on pricing akin to those in *Healy* or *Brown-Forman*.”<sup>101</sup> Thus, the District Court in *Mariana* dismissed the plaintiffs’ Commerce Clause challenge to the MSA.<sup>102</sup>

As set forth in the Statement of Material Facts, the MSA is a voluntary agreement that does not discriminate against interstate commerce. It is likewise apparent that the Louisiana Escrow Statute as it applies to Plaintiff S&M has no effect whatever on commerce occurring outside the boundaries of the State. Rather, as set forth in the Statement of Material Facts, the escrow deposits required under Louisiana law are based entirely on an NPM’s sales in the State and are fixed by statute.<sup>103</sup> Accordingly, Plaintiffs will be unable to raise a genuine issue of fact supporting their Commerce Clause claim; thus, the Attorney General is entitled to summary judgment dismissing the Commerce Clause claim with prejudice.

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<sup>100</sup> *Healy*, 491 U.S. at 335-36, 114 S.Ct. at 2499.

<sup>101</sup> *Mariana*, 226 F.Supp.2d at 586.

<sup>102</sup> In *Forces Action Project, LLC v. California*, No. C 99-0607 MJJ, Order (N.D.Cal. Jan. 15, 2002), the District Court refused to allow plaintiffs to amend their complaint to include a claim that the MSA violated the Commerce Clause because the proposed amendment was futile.

<sup>103</sup> *See*, La. R.S. 13:5062(10) limiting the cigarettes regulated in Louisiana to those “sold in the state ...”

2. The Due Process Claim Fails.

Plaintiffs similarly claim that the MSA and Escrow Statutes violate the Due Process Clause “by regulating conduct occurring wholly outside the settling state’s jurisdiction [,by] increasing cigarette prices nationally,”<sup>104</sup> and through “its extraterritorial reach.”<sup>105</sup> In *Table Bluff Reservation (Wiyot Tribe) v. Philip Morris, Inc.*,<sup>106</sup> the Second Circuit rejected a similar challenge to the MSA that increased prices result in a violation of the Due Process Clause.

The fact that MSA payments are based on national sales does not mean that the Settling States are “regulating conduct” outside their jurisdiction in violation of the Due Process Clause. First, there is no “regulation” because the MSA is a contract, not a requirement imposed by statute or regulation. Second, the impact of MSA payments outside of the MSA States is indirect and – even if the MSA were considered a State regulation – is not compelled by the MSA. Second, neither the MSA nor the Escrow Statute imposes any obligation on NPMs in non-MSA States. As Magistrate Hornsby explained in his recommendation that the Due Process claim be dismissed, the Escrow Statute limits an NPM’s escrow obligation in Louisiana based upon the “number of cigarettes ‘sold in the state’...”<sup>107</sup> This situation is far removed from the concerns of the Due Process Clause.

No basis exists on which Plaintiffs can establish the existence of a genuine issue of material fact on either their Commerce Clause claim or their Due Process claim, the Attorney General is therefore entitled to summary judgment dismissing Count III of the Complaint, with prejudice.

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<sup>104</sup> Complaint, ¶79.

<sup>105</sup> Complaint, ¶81.

<sup>106</sup> 256 F.3d 879, 881 (9th Cir. 2001).

<sup>107</sup> See, page 12-13 of the Magistrate Judge’s Report and Recommendations (R. 43) (citing, La. R.S. 13:5062(10)).

**V. CONCLUSION.**

For the reasons set forth above, the Court should grant the Attorney General's Motion for Summary Judgment and dismiss the Complaint, with prejudice, at Plaintiffs' cost.

Respectfully submitted,

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GENERAL

*/s/ M. Brent Hicks*

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**CERTIFICATE OF SERVICE**

I CERTIFY that a copy of this pleading was filed electronically with the Clerk of Court using the CM/ECF system. Notice of this filing will be sent to Joseph Brian Juban, Kyle M Keegan, Christopher D Kiesel, and Billy James Guin, Jr. by operation of the court's electronic filing system. I also certify that I have mailed by United States Mail, proper postage prepaid, this filing to the following non-CM/ECF participants:

Sam Kazman  
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Baton Rouge, Louisiana, this 24<sup>th</sup> day of November, 2008.

*/s/ M. Brent Hicks*

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M. Brent Hicks