APPENDICES

APPENDIX A

614 F.3d 172

United States Court of Appeals,
Fifth Circuit.

S&M BRANDS, INC.; Tobacco Discount House # 1, Inc.; Mark Heacock, Plaintiffs-Appellants,

v.

James D. "Buddy" CALDWELL, in his official capacity as Attorney General State of Louisiana, Defendant-Appellee.

No. 09-30985.

Aug. 10, 2010.

Appeal from the United States District Court for the Western District of Louisiana.

Before DAVIS, SMITH and HAYNES, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

Plaintiffs appeal the district court's grant of summary judgment in favor of the Attorney General of Louisiana. This case arises out of the Master Settlement Agreement ("MSA") reached in the 1990s between the four largest tobacco manufacturers and the several states. The plaintiffs-who are not signatories to the MSA-sued the Louisiana Attorney General, alleging that the MSA and the Louisiana*174 Escrow Statute, LA.REV.STAT. § 13:5061, *et seq.,* violate the Compact Clause, First Amendment, Federal Ciga-

rette Labeling and Advertising Act ("FCLAA"), Commerce and Due Process Clauses, and federal antitrust laws. For the following reasons, we AFFIRM.

I.

In 1994, several states, including Louisiana, brought lawsuits against the four largest tobacco manufacturers: Philip Morris, R.J. Reynolds, Lorillard, and Brown & Williamson (collectively referred to as the Original Participating Manufacturers "OPMs"). The states alleged that the OPMs' tobacco products, as well as the marketing related to their tobacco products, cost the states billions of dollars in increased health care costs.

In 1998, the OPMs reached a settlement agreement, the MSA, with fifty-two governmental entities (collectively referred to as the "Settling States"), including Louisiana. The MSA released the OPMs from past, present, and future tobacco-related legal claims. In return, the OPMs were prohibited from participating in certain types of tobacco-related state and federal lobbying, engaging in litigation adverse to the MSA or its enacting state statutes, and various types of advertising. The OPMs also were required to make annual payments into a fund (hereinafter "the MSA fund") based on their present market share. Money paid into the MSA fund is paid out in fixed shares to the individual Settling States.

Smaller tobacco manufacturers that were not part of the OPMs were permitted to join the MSA as Subsequent Participating Manufacturers ("SPMs"). The MSA created two groups of SPMs. The first group (hereinafter the "grandfathered SPMs") included those SPMs that signed on to the MSA within the

first 90 days of its execution. As a means of encouraging smaller tobacco manufacturers to become grandfathered SPMs, the MSA provides that grandfathered SPMs do not have to pay into the MSA fund, so long as their market share does not exceed the greater of their 1998 sales or 125% of their 1997 sales. The second group (hereinafter the "non-grandfathered SPMs") are those SPMs that joined the MSA after 90 days of its execution. Non-grandfathered SPMs must pay into the MSA fund based on their annual market share, but unlike grandfathered SPMs, they need not remain at the same market size as when the MSA was executed. Both grandfathered SPMs and non-grandfathered SPMs must abide by the aforementioned prohibitions in lobbying, litigation, and advertising that OPMs are subject to under the MSA.

In return for the above concessions, the MSA encourages, but does not demand, that the Settling States pass a Model Statute (hereinafter the "Escrow Statute"). The Escrow Statute requires that tobacco manufacturers not participating in the MSA (referred to as Non-Participating Manufacturers ("NPMs")) and selling tobacco products in the state either (1) join the MSA or (2) make an annual deposit into a qualified escrow account based on the quantity of cigarettes the NPM sold in the state during the previous calendar year. To encourage the Settling States to pass the Escrow Statute, the NPM Adjustment was created. The MSA provides that if any of the OPMs, grandfathered SPMs, or non-grandfathered SPMs (collectively the "PMs") lose its market share, a nationally-recognized firm of economists will be hired to determine whether the loss in market share is due to

the aforementioned restraints in lobbying, litigation, and advertising required by the MSA. If those restraints are determined by the economists to be a significant factor contributing***175?** to the loss of market share, then the PM may reduce the amount it pays into the MSA fund. This reduction is the NPM Adjustment, which is borne only by the Settling States that have not enacted the Escrow Statute. Louisiana enacted an Escrow Statute, LA.REV.STAT. § 13:5061, *et seq.* Under the Louisiana Escrow Statute, if an NPM fails to join the MSA or fails to make the appro-priate annual deposit into a qualified escrow account, the NPM is subject to civil and criminal penalties. LA.REV.STAT. §§ 13:5073, 5076. However, if an NPM pays more to the qualified escrow account than it would have to pay if it were a non-grandfathered SPM, the NPM is entitled to a refund of the excess amount it paid. LA.REV.STAT. § 13:5063(C)(2)(b).

II.

Since its implementation, several NPMs and smokers have challenged the validity of the MSA and state Escrow Statutes before a number of courts, including, most recently, this court.[1] This case is yet another challenge to the MSA and Louisiana Escrow Statute.

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[1] *See, e.g., Xcaliber Int'l Ltd. LLC v. Caldwell,* No. 09-30492, 612 F.3d 368, 2010 WL 2773431, 2010 U.S.App. LEXIS 14513 (5th Cir. Jul. 15, 2010); *Grand River Enters. Six Nations v. Beebe,* 574 F.3d 929 (8th Cir. 2009); *KT&G Corp. v. Six,* 535 F.3d 1114 (10th Cir. 2008); *Grand River Enters. Six Nations v. Pryor,* 425 F.3d 158 (2d Cir. 2005); *Star Sci., Inc. v. Beales,* 278 F.3d 339 (4th Cir. 2002).

The plaintiffs[2] filed suit against the defendant, Louisiana Attorney General Buddy Caldwell, seeking to invalidate the MSA and Louisiana Escrow Statute on the grounds that they were unconstitutional because they violated the Compact Clause, the First Amendment, the Commerce Clause, and the Due Process Clause. The plaintiffs further alleged the MSA and Escrow Statute violated federal antitrust laws, the FCLAA, and the Bankruptcy Code.

Following proceedings before the district court, both parties filed motions for summary judgment. Finding there were no genuine issues of material fact, and that the plaintiffs' claims failed as a matter of law, the district court granted the Attorney General's motion for summary judgment and dismissed the plaintiffs' claims with prejudice. The plaintiffs timely filed this appeal. On appeal, the plaintiffs press all of the aforementioned challenges except for their allegation that the MSA and Escrow Statute violate the Bankruptcy Code.

We review the district court's grant of summary judgment *de novo. Breaux v. Halliburton Energy Services,* 562 F.3d 358, 364 (5th Cir. 2009) (citing *LeMaire v. La. Dep't of Transp. & Dev.,* 480 F.3d 383, 386 (5th Cir. 2007)).

III.

We first address the plaintiffs' assertion that the MSA violates the Compact Clause, U.S. CONST., Art.

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[2] The specific parties in this case include a cigarette manufacturer who has not joined the MSA, i.e. an NPM (S&M Brands, Inc.), a cigarette dealer (Tobacco Discount House # 1), and a smoker (Mark Heacock) (collectively, "the plaintiffs").

I, § 10, cl. 3, because it is an agreement among the Settling States that has the potential to interfere with the plaintiffs' constitutional rights and has not been approved by Congress. The district court found that the proper analysis to determine whether congressional approval is required under the Compact Clause is the test provided in *United States Steel Corp. v. Multistate Tax Commission,* 434 U.S. 452, 473, 98 S.Ct. 799, 54 L.Ed.2d 682 (1978): "whether ***176** the Compact enhances state power *quoad* the National Government." Because the MSA only increases states' power *vis-a-vis* the PMs and not in relation to the federal government, the district court concluded there was no violation of the Compact Clause.

The Fourth Circuit in *Star Sci.* reached this same end. *See* 278 F.3d at 359-60. The *Star Sci.* court stated:

> Although the Master Settlement Agreement implicates the Compact Clause, we see no reason to conclude that it encroaches on federal power. In *Multistate Tax Commission,* the Supreme Court upheld a compact resulting in reciprocal State legislation and establishing an administrative body to coordinate State taxation of certain entities. The Court noted that the compact might result in an increase in bargaining power of the member States with respect to the corporations subject to their taxing jurisdictions, but it found such an increase in power to be acceptable because "the test is whether the Compact enhances state power quoad the National Government." Similarly,

> the Master Settlement Agreement may result in an increase in bargaining power of the States *vis-a-vis* the tobacco manufacturers, but this increase in power does not interfere with federal supremacy because the Master Settlement Agreement "does not purport to authorize the member States to exercise any powers they could not exercise in its absence."

278 F.3d at 360. *See also Vibo Corp. v. Conway,* 594 F.Supp.2d 758, 785-86 (W.D. Ky. 2009) (finding that the MSA does not violate the Compact Clause because "[a]n increase in the states' collective bargaining power does not result in an accompanying decrease of federal power").

We agree with the reasoning expressed by the Fourth Circuit and the district court in the instant case, and accordingly find no merit in the plaintiffs' Compact Clause challenge.

IV.

The plaintiffs also argue that the MSA and Escrow Statute are *per se* violations of the Sherman Act, 15 U.S.C. § 1, because the structure of the MSA creates a national cigarette cartel designed to increase the prices paid out to the OPMs and protect the OPMs market share. The plaintiffs further assert that the only defense potentially available to the Attorney General is the implied state-action immunity found under *Parker v. Brown,* 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), but that such immunity does not apply in this case where Louisiana acted as a private player when it entered an agreement with other states and the OPMs to restrain trade.

The plaintiffs' argument that the Escrow Statute is a *per se* violation of the Sherman Act is foreclosed by this court's recent decision in *Xcaliber.* The *Xcaliber* court concluded that the Escrow Statute did not "mandate or authorize conduct that necessarily constitutes a violation of the antitrust laws in all cases." 612 F.3d 368, 375, 2010 WL 2773431, *4, 2010 U.S.App. LEXIS 14513, at *14 (quoting *Rice v. Norman Williams Co.,* 458 U.S. 654, 661, 102 S.Ct. 3294, 73 L.Ed.2d 1042 (1982)). Moreover, the *Xcaliber* court found that the Escrow Statute did not "pressure [NPMs] to conspire together to set a specific price, to carve up markets, or otherwise to violate antitrust law." *Id.* (citation omitted). Thus, this court's precedent in *Xcaliber* precludes the plaintiffs' argument that the Escrow Statute violates the Sherman Act.

This court's decision in *Xcaliber,* however, does not complete our antitrust analysis. In *Xcaliber,* the court was faced with ***177** a challenge to only the Escrow Statute. *See id.* at 375, 2010 WL 2773431, *3 n. 5, 2010 U.S.App. LEXIS 14513 *12 n. 5. In the present case, the plaintiffs challenge both the Escrow Statute *and* the MSA. Thus, we must also consider whether the MSA and Escrow Statute working together create an antitrust violation.

Whether the MSA and Escrow Statute violate federal antitrust laws has been addressed by the Sixth, Eighth, and Ninth Circuits, and all of those courts have rejected the plaintiffs' arguments. *See Grand River Enters. Six Nations,* 574 F.3d at 936-38; *Sanders v. Brown,* 504 F.3d 903, 908-11 (9th Cir. 2007); *Tritent Int'l Corp. v. Kentucky,* 467 F.3d 547, 557

(6th Cir. 2006). *See also S&M Brands, Inc. v. Summers,* 393 F.Supp.2d 604, 622 (M.D. Tenn. 2005), *aff'd by, S&M Brands, Inc. v. Summers,* 228 Fed.Appx. 560 (6th Cir. 2007) (finding that the MSA and Escrow Statute were immune from challenge on antitrust grounds under the state-action doctrine). The Sixth Circuit in *Tritent* aptly described the argument the present plaintiffs raise and why it must be rejected:

> The PMs' practice of increasing cigarette prices, thus keeping sales volume down, has allowed them to maintain a stable market share. This has resulted in lower payments to the settling states. If Tritent and the other NPMs had chosen not to raise their prices in response to the PMs' price increase, the NPMs' market share would have presumably increased, but this would have subjected them to higher payments under the Escrow Statute. Kentucky's current statutory scheme ... thus provides a disincentive for the NPMs to engage in price competition with the PMs. The genesis of this anticompetitive behavior, however, stemmed neither from the MSA nor the complementary legislation that Kentucky enacted to give effect to the MSA's provisions. Instead, the behavior with which Tritent *really* takes issue is the behavior of the PMs following the MSA's enactment. Because such behavior was neither mandated nor explicitly authorized by the state of Kentucky, *McNeilus* [*Truck & Mfg., Inc. v. State ex rel. Montgomery,* 226

> F.3d 429 (6th Cir.2000)] forecloses Tritent's argument on this issue.

467 F.3d at 557.

We agree with the Sixth Circuit and the other circuits that have already considered the issue of whether the MSA and Escrow Statute violate the Sherman Act, and we adopt their rationale. Accordingly, we find no merit to the plaintiffs arguments that the MSA and Escrow Statute violate federal antitrust laws.

V.

The plaintiffs also briefly argue that the MSA and Escrow Statute violate the Commerce Clause and Due Process Clause because they create extraterritorial price increases.

The plaintiffs' claims have been soundly rejected by the Fourth, Eighth, and Tenth Circuits. *See Grand River Enters. Six Nations,* 574 F.3d at 943-44; *KT&G Corp.,* 535 F.3d at 1145-46; *Star Sci., Inc.,* 278 F.3d at 356-57. In examining whether the Arkansas Escrow Statute created extraterritorial price increases, the Eighth Circuit stated,

> NPM escrow payments are entirely a function of an NPM's sales in Arkansas. The payments are not based on nationwide sales. Nor has there been a showing by appellants that escrow payments by NPMs in Arkansas have any effect, either directly or indirectly, on cigarette prices in other states. NPMs must make escrow payments *to* Arkansas based on that NPM's cigarette sales *in* *178 Arkansas. Arkansas has no control over cigarette prices in

> other states. The MSA calculates an NPM's hypothetical MSA payment in order to refund the excess back to that NPM, but it does not allow Arkansas to control commerce in other states.

Grand River Enters. Six Nations, 574 F.3d at 944. We agree with the Eighth Circuit's analysis. The Louisiana Escrow Statute and the MSA only allow Louisiana to regulate and collect escrow payments based on the sale of cigarettes within Louisiana's jurisdiction. Therefore, there is no violation of the Due Process or Commerce Clause.

VI.

The remaining challenges brought by the plaintiffs rest on the underlying argument that NPMs are compelled to join the MSA to avoid the economic burdens imposed on them by the Escrow Statute. This argument, however, is also foreclosed by this court's recent decision in *Xcaliber.* In *Xcaliber,* the plaintiff asserted that the Escrow Statute "makes doing business as an NPM so unattractive that it compels NPMs to join the MSA ...." 612 F.3d at 368, 380, 2010 WL 2773431, *8, 2010 U.S.App. LEXIS 14513, at *28.[3] The court disagreed, finding that there was no

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[3] In *Xcaliber,* the plaintiff challenged the Allocable Share Revocation ("ASR"). The ASR was an amendment that Louisiana, and all Settling States, passed to the original escrow statutes in order to close a loophole in the original escrow statutes that was advantageous to NPMs. *See* 612 F.3d at 368, 372-73, 2010 WL 2773431, *2-3, 2010 U.S.App. LEXIS 14513, at *6-7 (discussing the reason for the ASR). The Louisiana Escrow Statute considered in the plaintiffs' instant challenge incorporates the alteration of the ASR.

evidence that the Louisiana Escrow Statute created a price or non-price disadvantage for NPMs. *Id.* at 380-81, 2010 WL 2773431, *8-9, 2010 U.S.App. LEXIS 14513, *29-31. Because no disadvantage is created for NPMs by remaining as NPMs, NPMs are not compelled to join the MSA. *Id.* at 381, 2010 WL 2773431, *9, 2010 U.S.App. LEXIS 14513, *31.

Based on the *Xcaliber* court's conclusion that the Escrow Statute does not compel NPMs to become signatories to the MSA, any argument by the plaintiffs based on this premise is foreclosed. With this in mind, we turn to the plaintiffs' claims that the MSA and the Louisiana Escrow Statute violate the First Amendment, the FCLAA, the Commerce Clause and the Due Process Clause, and antitrust laws.

A.

The plaintiffs argue that the MSA and Louisiana Escrow Statute violate the First Amendment because the MSA directly restrains the speech of PMs by forbidding various forms of lobbying and petitioning activity concerning tobacco products and the MSA itself, as well as prohibiting numerous forms of cigarette advertising.

This same argument was raised in *S&M Brands, Inc. v. Summers,* 393 F. Supp.2d 604 (M.D. Tenn. 2005), *aff'd, S&M Brands, Inc. v. Summers,* 228 Fed.Appx. 560, 563 (6th Cir. 2007). In that case, the court stated,

> The Escrow Act ... leaves [NPMs] no worse off financially than they would be under the MSA, because it expressly provides that [NPMs] are entitled to a refund on any amounts paid into escrow that they can demonstrate is in excess

> of the amount they would have paid under the MSA. Further, [NPMs] retain all of the First Amendment and other rights that the PMs gave up when they signed the MSA.

*179 *Id.* at 638. *See also KT&G Corp.,* 535 F.3d at 1134-36 (holding that an escrow statute did not violate NPMs First Amendment rights).

We agree with this reasoning. While the MSA does restrict the speech activities of PMs, the plaintiffs are not PMs and, as previously noted, are not coerced to become PMs. The only statute applicable to the plaintiffs is the Louisiana Escrow Statute, which in no way compels or abridges speech. Therefore, we find no merit to the plaintiffs' First Amendment claims.

B.

The FCLAA states that "[n]o 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). The plaintiffs argue that the MSA and Escrow Statute violate the FCLAA because the FCLAA preempts state regulations targeting cigarette advertising, and the MSA and Escrow Statute prohibit certain forms of cigarette advertising.

This same argument has been raised and rejected in *Grand River Enters. Six Nations, Ltd. v. Pryor,* 2003 U.S. Dist. LEXIS 16995, at *48-50 (S.D.N.Y. 2003), *aff'd by, Grand River Enters. Six Nations, Ltd.,* 425 F.3d at 175, and *PTI, Inc. v. Philip Morris Inc.,* 100 F. Supp.2d 1179, 1205 (C.D. Cal. 2000). Like the district court below, we agree with the rationale

expressed in those decisions. The plaintiffs are not compelled to join the MSA and the Louisiana Escrow Statute "does not have any connection whatsoever with cigarette packaging, advertising, or promotion." *PTI, Inc.,* 100 F.Supp.2d at 1205. Therefore, the plaintiffs' FCLAA argument must fail.

CONCLUSION

For the above reasons, we AFFIRM the district court's grant of summary judgment in favor of the Attorney General.

AFFIRMED.

APPENDIX B

Unpublished

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

A.B. COKER, INC., ET AL.	CIVIL ACTION NO. 05-1372
VERSUS	JUDGE S. MAURICE HICKS, JR.
JAMES D. "BUDDY" CALDWELL, in his official capacity as LOUISIANA ATTORNEY GENERAL	MAGISTRATE JUDGE HORNSBY

MEMORANDUM RULING

Before this Court are two cross motions for summary judgment. The Motion for Summary Judgment [Record Document 87], filed by Defendant James D. "Buddy" Caldwell, in his official capacity as the Attorney General for the State of Louisiana, is **GRANTED,** and the Motion for Summary Judgment [Record Document 95], filed by Plaintiffs S&M Brands, Inc., Tobacco Discount House #1 Inc., and

Mark Heacock, is **DENIED.** All claims by Plaintiffs are **DISMISSED WITH PREJUDICE.**

FACTUAL BACKGROUND

Beginning in 1994, the attorneys general of several States (including Louisiana) brought lawsuits against the country's four largest tobacco manufacturers alleging that their tobacco products and related marketing had cost the States billions of dollars in increased Medicaid and other healthcare costs incurred while treating the health problems caused by the use of tobacco. The States sought to recoup the costs of these medical services based on theories of consumer protection, antitrust, unjust enrichment, and other state-law remedies.

On November 23, 1998, the state lawsuits were settled by execution of the tobacco Master Settlement Agreement ("MSA"). The MSA was signed by 52 governmental jurisdictions (46 states, including Louisiana, the District of Columbia, Puerto Rico, and four territories) (collectively referred to as the "Settling States")[1] and the four major tobacco manufacturers (Philip Morris, R.J. Reynolds, Lorillard, and Brown & Williamson) (collectively referred to as the "Original Participating Manufacturers" or "OPMs"). [Doc. 1, ¶27]. The MSA released the OPMs from all past, present, and future tobacco-related legal claims initiated by the States. In return, each OPM agreed to make annual payments into a fund with each OPM's contribution based principally on its national market

[1] Four states (Florida, Mississippi, Texas, and Minnesota) made separate individual settlements before the MSA. [Doc. 1, ¶ 27].

share. The payments are allocated among the states based upon a fixed formula, with Louisiana receiving approximately 2.26 percent of the payments as its "allocable share." In addition, the OPMs agreed to various restrictions and bans on advertising, political lobbying, and trade association activities, and relinquished legal challenges to state laws and rules regulating tobacco. Id. at ¶ 30.

Other tobacco manufacturers were permitted an opportunity to join the MSA as Subsequent Participating Manufacturers ("SPMs").[2] Those who joined the MSA within a ninety-day window from the execution of the MSA were granted an exemption on MSA payments so long as their yearly market shares do not exceed the larger of their 1998 market share or 125 percent of their 1997 market share. SPMs thus share in the profits generated by the MSA without paying any money to the Settling States, as long as they limit their sales. However, if SPMs increase their sales by selling additional packs of cigarettes, they are required to make a higher MSA payment on each additional pack they sell than the OPMs pay on each pack they sell. After the ninety-day period, other tobacco manufacturers were allowed to join the MSA, but they were not exempt from any portion of the annual payment. Id. at ¶ 34-36.

As an incentive for the Settling States to protect the OPMs market share,[3] the MSA includes a provi-

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[2] Hereinafter, OPMs and SPMs are collectively referred to as PMs.

[3] The MSA requires the OPMs to make substantial payments to the Settling States each year. These costs are "internalized" in the cost of cigarettes and largely, if not entirely, passed on to

sion that, if one of the OPMs loses market share in a particular year, a nationally recognized firm of economic consultants is to determine whether the restraints imposed on the OPMs by the MSA were a significant factor contributing to the market share loss. If so, the OPMs payments under the MSA may be reduced by as much as three times its market share loss. This potential reduction is known as the Nonparticipating Manufacturer Adjustment (or "NPM Adjustment"). The NPM Adjustment is imposed only on those states that fail to enact and enforce a Qualifying Statute prescribed by the MSA. If all but one Settling State enacted a Qualifying Statute, the entire NPM Adjustment would be applied to reduce that one state's MSA payments. Thus, there is strong incentive for all of the Settling States to enact a Qualifying Statute. Id. at ¶ 38-39.

In 1999, Louisiana enacted the "Model Statute", provided for as Exhibit T to the MSA, which is codified in Louisiana Revised Statutes 15:5061 et *seq.* ("Louisiana's Escrow Statute"). Pursuant to its terms, every NPM selling cigarettes in Louisiana is required to either (1) join the MSA and become a participating member, or (2) make an annual deposit into a qualified escrow account of a specified amount of money per cigarette sold in the State during the prior calendar year. Unlike the settlement payments made by PMs under the MSA, which become the property of the State, Louisiana has no right to an NPM's escrow

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consumers in the form of high prices. The ability of NPMs, who are not required to make payments under the MSA, to sell their brands at lower prices poses a threat to the market share held by the OPMs. *See* Doc. 87, p.7-8.

deposits unless or until it obtains a settlement or judgment of tobacco-related claims against the NPM. NPMs are entitled to receive the interest earned on each escrow deposit as it accrues, while the principal amount of each deposit must be held in escrow for twenty-five years. To the extent the funds are not released from escrow to pay a settlement or judgment during those twenty-five years, the escrow funds are to be released and revert back to the NPM. *See* La. R.S. § 5063(C)(2).

Louisiana also enacted "Complementary Legislation," codified in Louisiana Revised Statutes 13:5071 et *seq.,* which 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 either be a PM under the MSA or an NPM in compliance with the Escrow Statute. If cigarette makers are found in violation of the Complementary Legislation, they can be criminally prosecuted and jailed, fined $5,000 for each such violation, and can have their cigarettes seized and destroyed. The statute also subjects makers who violate it to Louisiana's unfair trade laws and other statutes.

The National Association of Attorneys General ("NAAG") is directed by the MSA to "provide coordination and facilitation for the implementation and enforcement of the [MSA] on behalf of the Attorneys General of the Settling States." [Doc. 1, ¶ 31 (citing MSA § VIII(a))]. Payments made by PMs pursuant to the MSA are not made to individual states, but into a central escrow account from which payments are later made to the Settling States. Id. at ¶ 32 (citing MSA, Exhibit B). NAAG also administers the Settling

States' Antitrust/Consumer Protection Tobacco Enforcement Fund, established with $50 million from the OPMs. One purpose of the Fund is to directly implement and enforce the MSA; another is to pay for the investigation and litigation of suspected MSA violations, including enforcement of the MSA's Consent Decrees against PMs and its Qualifying Statutes against NPMs. States must notify NAAG in advance of planned enforcement proceedings, and NAAG must coordinate discovery in such proceedings. Id. at ¶ 31 (citing MSA §§ VII(c)(2), (g), VIII(a)) In addition, NAAG must provide guidance to state assistant attorneys general and legislators about what action by States is sufficient to comply with their duty to diligently enforce the MSA. Id.

PROCEDURAL HISTORY

On August 2, 2005, A.B. Coker, Co., Inc., S&M Brands, Inc., CLP, inc., Tobacco Discount House #1, and Mark Heacock (collectively "Plaintiffs")[4] filed suit against the Louisiana Attorney General seeking to invalidate, on federal constitutional grounds, the MSA and the statutes Louisiana enacted to assist in its implementation.[5] [Doc. 1]. Plaintiffs contend the MSA and Louisiana's Escrow Statute encroach on

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[4] On April 24, 2008, Plaintiffs and Defendant stipulated that A.B. Coker, Co., Inc. and CLP, Inc. be dismissed from the action pursuant to Federal Rule of Civil Procedure 41 (a)(1)(ii), after A.B. Coker, Co., Inc. filed for bankruptcy and CLP, Inc. chose to end its participation in the lawsuit due to financial difficulties. [Doc. 71].

[5] Those statutes are Louisiana's "Escrow Statute" (La. R.S. 13:5061 *et seq.*) and its "Complementary Legislation1' (La. R.S. 13:5071 *et seq.*). See, supra.

federal and state power without congressional consent, in violation of the Compact Clause, and potentially violate federal antitrust laws, the First Amendment, the Federal Cigarette Labeling and Advertising Act, and the Bankruptcy Code; are preempted by the Federal Cigarette Labeling and Advertising Act; and impose extraterritorial regulation of interstate commerce in violation of the Commerce Clause and Due Process Clause.[6] [Docs. 1, 111].

Shortly after the Complaint in this action was filed, the Attorney General sought to have it dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. *See* Doc. 13. The Magistrate Judge issued a Report and Recommendation [Doc. 43] recommending that the complaint be dismissed. This Court, however, stated that while it was "inclined to agree with the reasoning of Magistrate Hornsby's Report and Recommendation, it [was] constrained by the Fifth Circuit's decision in Xcaliber Int'l Ltd., LLC v. Foti, 442 F3d 233 (5th Cir. 2006)," wherein the Fifth Circuit found that the District Court for the Eastern District of Louisiana erred by granting a Rule 12(b)(6) motion to dismiss a tobacco manufacturer's challenge to Louisiana's Escrow Statute and

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[6] In the Complaint, Plaintiffs also asserted that the MSA and Escrow Statutes violated the Tenth Amendment "by commandeering state legislatures to adopt the Qualifying Statute and delegating their powers to bodies outside the control of either the state or federal governments." [Doc. 1, ¶ 85], However, the Court dismissed this claim on November 9, 2006, as it was undisputed that the federal government had no involvement with the MSA. *See* Docs. 43, 47, 48.

remanded the case for further proceedings. *See* Doc. 48.

The parties are now before the Court on cross motions for summary judgment. Plaintiffs contend they are entitled to a declaration that the MSA and Escrow Statutes are unconstitutional as a matter of law, and seek to have the Attorney General enjoined from enforcing the MSA and Escrow Statutes. [Doc. 111]. The Attorney General, however, seeks dismissal of the Complaint in its entirety. In support of its motion, the Attorney General points to a significant and growing body of jurisprudence that has rejected claims virtually identical to those asserted by Plaintiffs in this action, including the Eastern District of Louisiana which recently addressed cross motions for summary judgment in Xcaliber and dismissed the plaintiff's claims against the Attorney General. *See* Xcaliber Int't Ltd., LLC v. Caldwell, 2009 WL 1324042 (E.D. La. 2009).

LAW AND ANALYSIS

1. Summary Judgment Standard

Summary judgment is proper pursuant to Rule 56 of the Federal Rules of Civil Procedure "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986). Rule 56(c) "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essen-

tial to that party's case, and on which that party will bear the burden of proof at trial." Id., 477 U.S. at 322, 106 S. Ct. at 2552. If the party moving for summary judgment fails to satisfy its initial burden of demonstrating the absence of a genuine issue of material fact, the motion must be denied, regardless of the nonmovant's response. Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc). If the motion is properly made, however, Rule 56(c) requires the nonmovant to go "beyond the pleadings and designate specific facts in the record showing that there is a genuine issue for trial." Wallace v. Texas Tech. Univ., 80 F.3d 1042,1047 (5th Cir. 1996) (citations omitted). The nonmovant's burden may not be satisfied by conclusory allegations, unsubstantiated assertions, metaphysical doubt as to the facts, or a scintilla of evidence. Little, 37 F.3d at 1075; Wallace, 80 F.3d at 1047. All factual controversies must be resolved in favor of the nonmovant. Cooper Tire & Rubber Co. v. Farese, 423 F.3d 446, 456 (5th Cir. 2005).

2. Constitutional Claims

A. Compact Clause

The Compact Clause of Article I, § 10, of the United States Constitution, provides: "No State shall, without the Consent of Congress,. . . enter into any Agreement or Compact with another State, or with a foreign Power." U.S. Const. art. I, § 10, cl. 3. It is well established that the Compact Clause is not to be applied to every agreement between the States, only "to the formation of any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of

the United States." Virginia v. Tennessee, 148 U.S. 503, 519, 13 S.Ct. 728, 734 (1893); see also, Northeast Bancorp, Inc. v. Board of Governors of the Fed. Res. Sys., 472 U.S. 159, 175-76, 105 S.Ct. 2545, 86 L.Ed.2d 112 (1985); United States Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 468, 98 S.Ct. 799, 54 L.Ed.2d 682 (1978); New Hampshire v. Maine, 426 U.S. 363, 369, 96 S.Ct. 21 13, 48 L.Ed.2d 701 (1976). The test under the Compact Clause, therefore, is "whether the Compact enhances state power *quoad* the National Government." Multistate Tax Comm'n, 434 U.S. at 473, 98 S.Ct. at 813. The agreement or compact does not have to actually usurp the power of the federal government; rather, "the pertinent inquiry is one of potential, rather than actual, impact upon federal supremacy." Id. at 812.

Plaintiffs assert that the MSA is an "Agreement or Compact" among the States for purposes of the Compact Clause, and that it is invalid because it has not been submitted to or approved by Congress.[7] [Doc. 1,

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[7] Specifically, Plaintiffs claim congressional consent was required to validate the MSA because the MSA and its supplemental statutes "encroach upon federal supremacy by patently violating the federal antitrust laws, including the Sherman Act;" that the MSA "encroaches upon federal authority and policy by establishing a comprehensive regulatory scheme governing the advertising and promotion of cigarettes," in violation of the preemption provisions of the Federal Cigarette Labeling and Advertising Act, First Amendment, and the Dormant Commerce Clause; "encroaches upon federal supremacy by establishing a nationwide excise tax on cigarettes in the form of annual, perpetual payments by PMs and NPMs (in the form of escrow payments);" prohibits protected lobbying activity in violation of the speech and petition clauses of the First Amendment; and "conflicts with the federal Bankruptcy Code by giving Settling

¶¶ 58-59]. In opposition, the Attorney General contends Plaintiffs' Compact Clause is not applicable to the MSA and, therefore, the Settling States were not required to obtain congressional consent for the MSA. Even if congressional consent was necessary, the Attorney General claims Congress provided it. *See* Docs. 13, 87.

States an unfair advantage over tobacco companies' other creditors." [Doc. 1, ¶¶ 62-65, 661. But see, Xcaliber Int'l Ltd., LLC v. Caldwell, 2009 WL 1324042 (E.D. La. May 7, 2009) (Sherman Act, First Amendment, equal protection, due process); KT&G Corp. v. Attorney Gen. of the State of Oklahoma, 535 F.3d 1114 (10th Cir. 2008) (Sherman Act, First Amendment, equal protection, due process, Commerce Clause); S&M Brands, Inc. v. Cooper, 527 F.3d 500 (6th Cir. 2008) (State sovereign immunity); S&M Brands, Inc. v. Summers, 228 Fed. Appx. 560 (6th Cir. 2007) (Sherman Act, preemption); Star Scientific, Inc. v. Beales, 278 F.3d 339 (4th Cir. 2002), cert. denied, Star Scientific, Inc. v. Kilgore, 537 U.S. 818, 123 S.Ct. 92 (2002) (due process, equal protection, Commerce Clause, Compact Clause); Int'l Tobacco Partners, Ltd. v. Kline, 475 F.Supp.2d 1078 (D.Kan. 2007) (Sherman Act, Dormant Commerce Clause); Grand River Enterprises Six Nations, Ltd. v. Beebe, 41 8 F.Supp.2d 1082 (W.D.Ark. 2006) (antitrust state action immunity doctrine, First Amendment, equal protection, due process, Commerce Clause, Supremacy Clause); Mariana v. Fisher, 226 F.Supp.2d 575 (M.D.Penn. 2002), aff'd**,** 338 F.3d 189, 198 (3rd Cir. 2003), g&**.** denied, Mariana v. Pappert, 540 U.S. 11 79, 124 S.Ct. 141 3 (2004) (Sherman Act, *Noerr-Pennington doctrine*, Commerce Clause, Compact Clause); PTI, Inc. v. Philip Morris, Inc., I00 F.Supp.2d 11 79 (C.D. Cal. 2000) (*Noerr-Pennington doctrine*, antitrust state action immunity doctrine, Compact Clause, bill of attainder, Commerce Clause, preemption, equal protection, due process); Hise v. Philip Morris, Inc., 46 F.Supp.2d 1201 (N.D. Okla. 1999), aff'd**,** 208 F.3d 226 (10th Cir. 2000), cert. denied, 531 U.S. 959, 121 S.Ct. 384 (2000) (Sherman Act/*Noerr-Pennington* doctrine, due process, Compact Clause).

Addressing this same argument, the Fourth Circuit concluded that the MSA implicates the Compact Clause to the extent the States agree on the creation of a single administrative body of national economic consultants. Star Scientific, Inc. v. Beales, 278 F.3d 339, 360 (4th Cir. 2002). However, the Court saw "no reason to conclude that [the MSA] encroaches on federal power." The Fourth Circuit relied on Multistate Tax Comm'n, wherein the United States Supreme Court rejected similar challenges to the Multistate Tax Compact:

> On its face the Multistate Tax Compact contains no provisions that would enhance the political power of the member States in a way that encroaches upon the supremacy of the United States. There may well be some incremental increase in the bargaining power of the member States *quoad* the corporations subject to their respective taxing jurisdictions. Group action in itself may be more influential than independent actions by the States. But. . . [t]his pact does not purport to authorize the member States to exercise any powers they could not exercise in its absence. Nor is there any delegation of sovereign power to the Commission; each State retains complete freedom to adopt or reject the rules and regulations of the Commission. . .

434 U.S. at 472-73, 98 S.Ct. at 812-13.

Similarly, while the MSA may result in an increase in bargaining power of the States vis-a-vis the tobacco manufacturers, this increase in power does not interfere with federal supremacy. The MSA "does

not purport to authorize the member States to exercise any powers they could not exercise in its absence." Star Scientific, 278 F.3d at 260 (quoting Multistate Tax Comm'n, 434 U.S. at 473, 98 S.Ct. at 81 3); see also, Mariana v. Fisher, 226 F.Supp.2d 575 (M.D.Penn. 2002).[8] Nor does the MSA derogate from the power of the federal government to regulate tobacco, as sections X and XVIII(a) specifically provide for adjustments of the MSA's terms in the event Congress passes future laws regulating tobacco and section XVIII(w)(1)(c) expressly states that the provision is enforceable only if consistent with the Bankruptcy Code. *See* MSA §§ X, XVIII(a), XVIII(w)(1)(c). Furthermore, each Settling State could have independently settled its claims against the OPMs, included in the settlement agreements the same provisions contained within the MSA, and independently enacted the Model Act (or Qualifying Escrow Statute). See PTI, Inc. v. Philip Morris, Inc., 100 F. Supp.2d 1179, 1198 (C.D. Cal. 2000). The mere fact that the States acted collectively to settle their disputes with the participating tobacco manufacturers does not establish an encroachment on federal supremacy. Thus, in the absence of any actual or potential encroachment or interference, the Compact Clause does not apply to the MSA and the Settling States were not required to obtain congressional consent.

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[8] Affirmed on jurisdictional grounds without addressing the merits, 338 F.3d 189, 198 (3rd Cir. 2003), cert. denied, Mariana v. Pappert, 540 U.S. 1179, 124 S.Ct. 1413 (2004).

Even if the MSA did require congressional consent, the Court agrees with the Attorney General that Congress has plainly provided it. The Supreme Court has long held that "Congress may consent to an interstate compact by authorizing joint state action in advance *or by giving expressed or implied approval to an agreement the States have already joined*." Cuyler v. Adams, 449 U.S. 433,441, 101 S.Ct. 703, 708, 66 L.Ed.2d 641 (1981) (emphasis added) (citing Virginia v. Tennessee, supra, 148 U.S. at 521, 13 S.Ct. at 735; Green v. Biddle, 8 Wheat. I , 85-87, 5 L.Ed. 547 (1823)). In this case, Congress expressly recognized the MSA's existence in 1999, when amending the Medicaid statute, and disclaimed any federal interest in the moneys received by the Settling States pursuant to the Agreement. Specifically, the amendment provided that the federal rules governing health overpayments

> (i). . .shall not apply to any amount recovered or paid to a State as part of the comprehensive settlement of November 1998 between manufacturers of tobacco productions. . .and State Attorneys General, or as part of any State settlement or judgment reached in litigation initiated or pursued by a State against one or more manufacturers.
>
> (ii). . . a State may use amounts recovered or paid to the State as part of a comprehensive or individual settlement, or a judgment, described in clause (i) for any expenditures determined appropriate by the State.

42 U.S.C. § 1396b(d)(3)(B)(i-ii). Unquestionably, Congress' express reference to the MSA and its provision

for disposition of the settlement proceeds to the Settling States demonstrates Congress' approval to the agreement.

Accordingly, for all the reasons stated above, the Court finds that Plaintiffs' Compact Clause claim fails as a matter of law.

3. Federal Cigarette Labeling and Advertising Act

The Federal Cigarette Labeling and Advertising Act ("FCLAA"), 15 U.S.C. § 1331 *et seq.,* sets forth a comprehensive federal program to deal with cigarette labeling and advertising. Section 1334(b) provides: "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). In Count II of the Complaint, Plaintiffs contend that the MSA and Escrow Statute are preempted by the FCLAA. Federal law supersedes state law when Congress expressly states an intention to pre-empt state law, or when a federal regulatory scheme is sufficiently comprehensive so as to imply congressional intent to preoccupy the entire field. Hillsborough County, Fla. v. Automated Medical Laboratories, Inc., 471 U.S. 707,713,105 S.Ct. 2371,2375,85 L.Ed.2d 714 (1985) (citing Jones v. Rath Packing Co., 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1977); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947)). Plaintiffs claim the Settling States and PMs, through the MSA, have created a national regulatory scheme on the advertising and marketing of cigarettes that violates and is preempted by the FCLAA. Because

the MSA prohibits many forms of cigarette advertising, Plaintiffs argue Louisiana's Escrow Statute compels tobacco manufacturers to either join the MSA and thus restrict their advertising, or make substantial annual payments into escrow. [Doc. 1,¶75].

Despite Plaintiffs assertions, the Court is inclined to agree with the growing number of courts that have expressly rejected this argument. *See* Grand River Enterprises Six Nations, Ltd. v. Prior, 2003 WL 22232974, "16-17 (S.D.N.Y. 2003), aff'd in part, 425 F.3d 158 (2nd Cir. 2005); Omaha Tribe of Nebraska v. Miller, 311 F.Supp.2d 816,823-28 (S.D. Iowa 2004); PTI, Inc. v. Philip Morris, Inc., 100 F.Supp.2d 1179, 1204-06 (C.D. Cal. 2000). Louisiana's Escrow Statute requires tobacco product manufacturers to join the MSA or make an annual deposit into an escrow account to cover potential future liability. The statute does not in any way concern cigarette packaging, advertising, or promotion. "To the extent the plaintiffs object to the voluntary advertising restrictions to which the signatories to the [MSA] have agreed, they lack standing to challenge these provisions. Moreover, the restrictions are not legislatively required." Grand River Enterprises Six Nations, Ltd., 2003 WL 22232974, *I7 (citing PTI, Inc., 100 F.Supp.2d at 1205). In fact, Congress has refused to regulate the entire field of tobacco, "opting instead to create a distinct regulatory scheme focusing mainly on the labeling and advertising of tobacco products." Omaha Tribe of Nebraska, 31 1 F.Supp.2d at 823 (citing Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 137, 120 S.Ct. 1291, 1303, 146 L.Ed.2d 121 (2000)). As there is no indication that

Congress intended, either explicitly or implicitly, for the FCLAA to preempt the entire field of tobacco regulation, the Court concludes that the FCLAA does not preempt Louisiana's Escrow Statute. Thus, Plaintiff's FCLAA preemption claim fails as a matter of law.

4. Commerce Clause and Due Process Clause

Count III of the Plaintiff's Complaint alleges that the MSA violates the Commerce Clause and Due Process Clause by regulating interstate commerce in an extraterritorial fashion. [Doc. 1, ¶ 791. Plaintiffs similarly allege that Louisiana's Escrow Statute is unconstitutional under the Commerce Clause and Due Process Clause because of its extraterritorial reach. at 81. As with Plaintiffs' other claims, these arguments have been repeatedly rejected by other courts in cases challenging the MSA and its Qualifying Statutes.

1. Commerce Clause

The Commerce Clause gives Congress the power "[tlo regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. Art. I, § 8, cl. 3. While the Commerce Clause is more frequently invoked as authority for federal legislation, there is also a dormant or negative aspect of the Clause that limits the power of States to enact legislation that adversely affects interstate commerce. *See* Hughes v. Oklahoma, 441 U.S. 322, 326,99 S.Ct. 1727,60 L.Ed.2d 250 (1979); Piazza's Seafood World, LLC v. Odum, 448 F.3d 744,750 (5th Cir. 2006). The dormant Commerce Clause's limitation on State power, however, "is by no means absolute." Lewis v. BT Investment Mgrs., Inc.,

447 U.S. 27, 36, 100 S.Ct. 2009, 64 L.Ed.2d 702 (1980). In the absence of conflicting federal legislation, the States retain authority under their general police powers to regulate matters relating to the health, life, and safety of their citizens, even though interstate commerce may be affected. Id.; Huron Portland Cement Co. v. City of Detroit, Mich., 362 U.S. 440, 443-44, 80 S.Ct. 81 3, 81 6, 4 L.Ed.2d 852 (1 960).

To determine whether a state statute violates the dormant Commerce Clause, the court conducts a two-tiered analysis. First, the court must determine whether the state statute facially discriminates against interstate commerce. Oregon Waste Sys., Inc. v. Dept. of Environmental Quality, 51 1 U.S. 93, 99, 114 S.Ct. 1345, 1350, 128 L.Ed.2d 13 (1994); Hughes, 441 U.S. at 336, 99 S.Ct. at 1736. In this context, "'discrimination' simply means differential treatment of 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." Id. Second, if the regulation has only an "incidental effect" on interstate commerce, the Court must applying the balancing test derived from Pike v. Bruce Church, Inc., 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970). A nondiscriminatory regulation will generally be upheld unless "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." Id., 397 U.S. at 142, 90 S.Ct. at 847. "If a legitimate local purpose is found, ... the question becomes one of degree." Id. "[Tlhe extent of the burden that will be tolerated will of course depend on the nature of the lo-

cal interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." Id.

Plaintiffs allege that the MSA and the Escrow Statute directly regulate interstate commerce because the PM's payments under the MSA are based on the national market share and the Escrow Statute directly links escrow payments to MSA payments. [Doc. 1, ¶ 79; Doc. 111] . This argument is unavailing. Louisiana's Escrow Statute requires that NPMs pay into an escrow account a certain amount based on a rate "per unit sold," which is defined as "the number of individual cigarettes sold in the state" by the NPM. La. R.S. §§ 13:5062(1O), 5063(C). But the statute makes no distinction based on cigarette origin; rather, the requirement applies equally to in-state, out-of-state, and foreign tobacco manufacturers. *See* Star Scientific, Inc. v. Beales, 278 F.3d 339, 356 (4th Cir. 2002); Grand River Enterprises Six Nations, Ltd. v. Prior, 425 F.3d 158, 169 (2nd Cir. 2005); PTI Morris, Inc. v. Philip Morris, Inc., 100 F.Supp.2d 1179, 1201 (C.D.Cal. 2000).

Plaintiffs also allege that the Escrow Statute imposes a burden on interstate commerce that is clearly excessive in relation to any putative local benefits because the statute mandates the collection of escrow payments from NPMs, regardless of whether they are located in, or sell cigarettes in, Louisiana, if their cigarettes ultimately end up in Louisiana. [Doc. 1, ¶81; Doc. 111] . Louisiana's Escrow statute serves the legitimate state interest of ensuring that the state has a source of funds available to provide medical care to persons with smoking-related health conditions from

those tobacco manufacturers who are not members of the MSA and, thus, are not already compensating the state for these costs. The statute also prevents tobacco manufacturers who were not members of the MSA from earning quick, large profits and then becoming judgment proof before being sued by the State. *See* La. R.S. § 13:5061; Star Scientific, 278 F.3d at 257. Nevertheless, Plaintiffs argue an unreasonable "burden" is imposed on NPMs to monitor distributors and the number of cigarettes distributed to the state because the escrow payment is based on all cigarettes sold in Louisiana, whether directly or indirectly through a distributor. But as the Magistrate Judge previously pointed out:

> [A] manufacturer should be able to contractually obligate those who purchase cigarettes from it to distribute the cigarettes only for sale in particular states. Furthermore, if the manufacturer has not filed the proper certificates to have a particular brand approved for sale in Louisiana, it is illegal for a distributor to sell that brand in the state. Louisiana law, La. R.S. 13:5073(C), makes it unlawful for "any person" to sell a brand or affix a stamp to a package of a brand that has not been properly certified by the manufacturer and approved by the state. These rules reduce the alleged burden that manufacturers have to monitor the stream of their products.

[Doc. 43]; see also, Star Scientific, 278 F.3d at 357 (recognizing that because distributors in Virginia were already required to record the number of cigarettes they stamp with the Virginia excise stamp and

report that information to the state, "any additional burden caused by requiring manufacturers to obtain this information from the distributors is minimal.").

Considering the important state interests advanced by Louisiana's Escrow Statute and the minimal burden placed on interstate commerce by its operation, the Court concludes that the burden on interstate commerce is not clearly excessive when compared to the significant local benefits. Accordingly, Plaintiffs' Commerce Clause claim fails as a matter of law.

2. Due Process Clause

Plaintiffs include with their Commerce Clause claim a similar Due Process Clause claim based on the alleged extraterritorial reach of the MSA and Louisiana's Escrow Statute. As discussed above, the Escrow Statute imposes escrow requirements on NPMs, regardless of whether or not their cigarettes are sold in the state directly or indirectly through a distributor. But there is no evidence that Plaintiffs' have been required to make escrow payments on account of cigarettes that have been sold without their knowledge of consent. To the contrary, as a result of Louisiana's Complementary Legislation, see supra, an NPM's cigarettes may not be lawfully sold in Louisiana unless the NPM has taken affirmative steps to have its cigarettes certified for sale in the state. *See* La. R.S. § 13:5073(C). Thus, because any due process challenge that might be made by a NPM would be frivolous, Plaintiffs' Due Process claim lacks merit.

CONCLUSION

Accordingly, the Court concludes that there are no genuine issues of material fact remaining and that

Plaintiff's challenges to the MSA and Louisiana's Escrow Statute fail as a matter of law. Therefore, the Attorney General's Motion for Summary Judgment [Record Document 87] is **GRANTED,** and the Plaintiffs' Motion for Summary Judgment [Record Document 95] is **DENIED.** All claims by Plaintiffs are **DISMISSED WITH PREJUDICE.**

THUS DONE AND SIGNED in Shreveport, Louisiana, this 24th day of September, 2009.

s/ S. Maurice Hicks, Jr.

S. MAURICE HICKS, JR.

UNITED STATES DISTRICT JUDGE