

SUPERIOR COURT OF CALIFORNIA

County of San Diego

DATE: September 8, 2006 DEPT. 71

REPORTER:

CSR#:

**HON. RONALD S. PRAGER,
JUDGE PRESIDING**

REPORTER'S ADDRESS:

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San Diego, CA 92112-4104

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BAILIFF:

Judicial Council
Coordination Proceedings
No. JCCP 4041

Coordination Proceeding
Title [Rule 1550(b)]
TOBACCO CASE

RULING AFTER ORAL ARGUMENT

DEMURRER BY STATE TO SECOND AMENDED CROSS COMPLAINT

DEMURRER BY NAAG TO SECOND AMENDED CROSS COMPLAINT

After considering the argument of counsel the Court affirms the tentative ruling.

STATE OF CALIFORNIA'S DEMURRER TO THE SECOND AMENDED CROSS COMPLAINT IS OVERRULED. STATE SHALL SERVE AND FILE ITS ANSWER BY OCTOBER 6, 2006.

NAAG'S DEMURRER TO THE SECOND AMENDED CROSS COMPLAINT IS OVERRULED. NAAG SHALL SERVE AND FILE ITS ANSWER BY OCTOBER 6, 2006.

The Court's ruling on the prior demurrer indicated that USSTC was entitled to pursue multiple theories of liability including claims for declaratory relief. The First through Fourth Causes of Action sufficiently state viable claims for declaratory relief. USSTC is entitled to seek alternative and cumulative remedies. *See Code Civ. Proc. §1062.* Section VII(c)(1) of the STMSA specifically provides for declaratory relief actions to construe the terms of the agreement. It is within the court's discretion whether to sustain a general demurrer to a declaratory relief claim when the same matter can be raised as an affirmative defense. *See C.J.L.*

Construction, Inc. v. Universal Plumbing (2nd Dist. 1993) 18 Cal.App.4th 376, 390-391. Further, the Court is not persuaded that any of the declaratory relief causes of action are necessarily identical to the any of the breach of contract causes of action.

An actual controversy exists as to each of the First through Fourth Causes of Action. State and NAAG take the position that as to the entire cross complaint, USSTC cannot state a cause of action because State and NAAG have done nothing wrong based on their interpretation of the terms of the settlement agreement. Attendant to that position is that State's and NAAG's interpretations of the contract terms are the correct interpretations. Herein lies the controversy that State and NAAG contend does not exist.

As to the First through Fourth Causes of Action, the legal premise that the covenant of good faith and fair dealing is implied in every contract does not, in and of itself, preclude either the First or any of the other causes of action in this case. "Only when the parties are under a contractual compulsion to negotiate does the covenant of good faith and fair dealing attach, as it does in every contract." *Copeland v. Baskin Robbins U.S.A.* (2nd Dist. 2002) 96 Cal. App. 4th 1251, 1260 The provisions of the STMSA and the Consent Decree at issue say: (1) the parties shall seek to resolve issues by discussion; (2) the Attorney General shall give good faith consideration to whether the claimed violation has been cured and whether a legitimate good faith dispute exists; (3) NAAG will provide coordination and facilitation; (4) parties agree to use their best efforts and to cooperate with each other as to the STMSA; (5) parties will support the integrity of the STMSA. All of this language implies an on going process of negotiations.

The Court is not persuaded that USSTC should be legally precluded from seeking an affirmative declaration that everyone should act in good faith when complying with the terms of the STMSA or that everyone should make good faith efforts in the course of discussing disputes or that State should act in good faith when determining whether to issue a notice of intention to sue or that NAAG is bound by section VIII(a) of the STMSA and that this provision imposes a duty of good faith.

The Fifth through Tenth Causes of Action of the Second Amended Cross Complaint sufficiently allege the obligations breached by State and/or NAAG, USSTC's own performance and recoverable damages caused by the alleged breach. Whether State and/or NAAG's conduct in dealing with the Brand Name Sponsorship issue or the notice of intention to sue satisfied the terms of the STMSA is for the trier of fact. Similarly, whether USSTC can prove its damages is also for the trier of fact. Whether USSTC, State or NAAG have properly or improperly interpreted the terms of the STMSA is exactly what the complaint and cross complaint are all about.