

SUPERIOR COURT OF CALIFORNIA

County of San Diego

DATE: April 3, 2006

DEPT. 71

REPORTER:

CSR#:

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

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Judicial Council
Coordination Proceedings
No. JCCP 4041

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

**TENTATIVE RULING
NAAG DEMURRER-U.S. SMOKELESS**

The Demurrer filed on behalf of the National Association of Attorneys General (hereinafter "NAAG") to the Amended Cross-Complaint filed by U.S. Smokeless Tobacco Company (hereinafter "US Smokeless") is hereby SUSTAINED.

US Smokeless' first and fourth causes of action for breach of STMSA Sections VII(c)(6) and XV(m) and the Consent Decree are hereby SUSTAINED without leave to amend as NAAG is not a signatory relative to the STMSA or the Consent Decree, and although it may have adopted certain obligations contained in section VIII of the STMSA, sections VII(c) and XV(m) do not expressly or impliedly impose any obligations on NAAG. Section VII (c) is expressly limited to "the parties," and Section XV(m) is expressly limited to "[e]ach Settling State and each Participating Manufacturer." Furthermore, the introductory paragraph states in pertinent part: "This Agreement ... is intended to and shall be binding upon each Settling State and each Participating Manufacturer in accordance with the terms hereof," and the Agreement defines "NAAG" as an "organization that is directed by the Attorneys General to perform certain functions under this Agreement."

Similarly, the Consent Decree does not impose any obligations on NAAG. The "Applicability" section of the Consent Decree expressly limits its application as follows: "This Consent Decree and Final Judgment is not intended to and does not vest standing in any third party with respect to the terms hereof. No portion of this Consent Decree and Final Judgment shall provide any rights to, or be enforceable by, any person or entity

other than the State of California or a Released Party. The State of California may not assign or otherwise convey any right to enforce any provision of this Consent Decree and Final Judgment.” [See Consent Decree, Section III.B., pp.3-4.] Moreover, the “Final Disposition” section of the Consent Decree is expressly limited to “the persons signing” the STMSA and the Stipulation for Entry of Consent Decree. US Smokeless does not allege that NAAG is a signatory, nor does US Smokeless allege that NAAG approved or adopted any portion of the Consent Decree.

NAAG’s demurrer to the third cause of action for breach of Sections VII(f) and VIII(a) is hereby SUSTAINED with leave to amend. US Smokeless has not and cannot properly state a claim for breach of Section VII(f) as it is inapposite. Section VII(f) states in pertinent part: “The Attorneys General of the Settling States (through NAAG) shall monitor potential conflicting interpretations by courts of different States of this Agreement and the Consent Decree.” US Smokeless has not alleged any potential conflicting interpretations by courts of different States, and this Court is only aware of the underlying action relative to US Smokeless’ alleged violation of the STMSA.

Although US Smokeless cannot properly state a claim based on a breach of Section VII(f) of the STMSA, it may be able to state a claim based on Section VIII(a). In ruling on a demurrer, the court will construe the complaint “liberally . . . with a view to substantial justice between the parties.” [C.C.P., §452, see also *Stevens v. Superior Court* (1999) 75 Cal.App.4th 594, 601.] “And, complaints which show *some* right to relief are held sufficient against demurrer – even though the facts are not clearly stated; or are intermingled with irrelevant matters; or the plaintiff has demanded relief to which he is not entitled [under the facts alleged].” [*California Practice Guide, Civil Procedure Before Trial*, 7:125, citing *Gressley v. Williams* (1961) 193 Cal.App.2d 636, 639.] Despite the fact that NAAG is not a signatory to the STMSA [Amended Cross-Complaint, ¶16], Section VIII (a) of the STMSA provides: “Upon approval of the NAAG executive committee, NAAG will provide coordination and facilitation for the implementation and enforcement of this Agreement on behalf of the Attorneys General of the Settling States.” US Smokeless alleges that “[p]ursuant to the STMSA, the Executive Committee of NAAG approved NAAG’s assumption of its obligations under the STMSA.” [¶16.] Although these allegations may be sufficient to allege the existence of obligations on the part of NAAG pursuant to Section VIII of the STMSA [see *ALF v. Lorillard Tobacco Co.* (Del. Ch. Ct. 2003) 831 A.2d 335], US Smokeless’ failed to properly allege NAAG’s breach of those obligations, US Smokeless’ performance under the STMSA or resulting damages. Relative to its performance, US Smokeless merely alleges that it “worked diligently to comply with its obligations under the STMSA.” [¶9.] Leave to amend is liberally granted, and US Smokeless is hereby granted leave to properly state a cause of action against NAAG for breach of its obligations under Section VIII of the STMSA, if possible. In addition, US Smokeless argues in its opposition that it has stated a claim for a declaration [see Opposition, 13:12.] US Smokeless can pursue multiple theories of liability, and the question of US Smokeless’ ability to prove their

allegations, or possible difficulties in making such proof is of no concern in ruling on a demurrer [*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214], and US Smokeless may also attempt to state a separate cause of action for Declaratory Relief, if possible.

In light of the fact that the Court has granted US Smokeless leave to amend to state a proper breach of contract cause of action against NAAG, if possible, NAAG's demurrer to the fifth cause of action for breach of the covenant of good faith and fair dealing, which is a derivative cause of action, is also hereby SUSTAINED with leave to amend.

US Smokeless is hereby granted twenty (20) days to file a Second Amended Cross-Complaint in accordance with this ruling.

IT IS SO ORDERED.