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STATE OF MICHIGAN  
IN THE 30<sup>th</sup> CIRCUIT COURT FOR THE CITY OF LANSING  
COUNTY OF INGHAM

People of the State of Michigan,  
Plaintiff,

Hon. Rosemarie E. Aquilina  
Case No. 17-406-FH C30  
Case No. 17-407 FH C30

John Francis Davis,  
Gerald Magnant,  
Defendants.

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PEOPLE'S REPLY BRIEF TO DEFENDANTS' JOINT MOTION TO DISMISS  
FOR DUE PROCESS VIOLATIONS

A. Introduction.

Now come, the People of the State of Michigan, by and through counsel, Bill Schuette, Attorney General for the State of Michigan, and Daniel C. Grano, Assistant Attorney General for the State of Michigan, and file reply brief to Defendants' Motion to Dismiss for Due Process Violations. The People request that the court deny the defendants' motion for the reasons articulated below. The People also note to this

court that the Michigan Supreme Court has requested briefing for a MOAA hearing, regarding a fair notice issue related to manufacturing and manufacturing licensing requirements under the TPTA in *People v. Shami*, MSC 155273. All briefs have been filed in the *Shami* matter and the parties are awaiting a hearing date in front of the Michigan Supreme Court. Because the issues are similar to the one raised in defendants' motion, the People believe staying the Defendants' Motion to Dismiss for Due Process Violations is proper until the Michigan Supreme Court rules in *Shami*.

**B. The standard to determine whether a defendant was given sufficient notice by the law with which he has been charged is well-settled.**

“Due process requires that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.” *People v. Hall*, 499 Mich 446, 461 (2016), quoting *BMW of North America, Inc. v. Gore*, 517 US 559, 574 (1996). “Statutes are presumed to be constitutional, and [courts] have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent.” *In re Sanders*, 495 Mich 394, 404 (2014). “The party challenging the constitutionality of a statute bears the burden of proving that the law is unconstitutional.” *People v. Harris*, 495 Mich 120, 134 (2014).

“The pertinent inquiry is whether the ... statute gives a person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited,” and also whether the statute provides sufficient guidance to fact-finders in order to avoid arbitrary enforcement.” *Id.* at 134 citing *Grayned v. City of Rockford*, 408 US 104, 108-109 (1972). “A statute is not vague if the meaning of the words in controversy

can be fairly ascertained by referring to their generally accepted meaning.” *Id.* at 138. “[A] statute is not vague when the meaning of the words in controversy can be fairly ascertained by reference to judicial determinations, the common law, dictionaries, treatises or even the words themselves, if they possess a common and generally accepted meaning.” *Id.* at 138 n. 49, quoting *People v. Cavaiani*, 172 Mich App 706, 714 (1988). Ignorance of the law does not excuse violation of the same. *People v. Longwell*, 120 Mich 311, 317 (1899).

**C. Application of well-settled due process law should result in denial of defendant’s due process argument.**

The Legislature passed the Tobacco Products Tax Act (TPTA) in 1993. The language of the TPTA is clear to person of ordinary intelligence. The pertinent parts for the analysis in this case are:

MCL 205.423:

[A] person shall not purchase, possess, acquire for resale, or sell a tobacco product as a manufacturer, wholesaler, secondary wholesaler, vending machine operator, unclassified acquirer, transportation company, or transporter in this state unless licensed to do so.

MCL 205.428(3):

A person who possesses, acquires, transports, or offers for sale contrary to this act 3,000 or more cigarettes... is guilty of a felony, punishable by a fine of not more than \$50,000.00 or imprisonment for not more than 5 years, or both.

MCL 205.422(o):

“Person” means an individual, partnership, fiduciary, association, Limited Liability Company, corporation, or other legal entity.

MCL 205.422(y):

“Transporter” means a person importing or transporting into this state, or transporting in this state, a tobacco product obtained from a source located outside this state, or from any person not duly licensed under this act. Transporter does not include an interstate commerce carrier licensed by the interstate commerce commission to carry commodities in interstate commerce, or a licensee maintaining a warehouse or place of business outside of this state if the warehouse or place of business is licensed under this act.

The Legislature’s decision to include the definition of what actors needed a license, a description of what a transporter does, and the articulation of penalty puts people of average intelligence on notice what a transporter is and what is required. Moreover, the words the legislature used are common words Michiganders would understand. The TPTA language relates to an expansive process involving many different activities. Any person who was unsure of the meaning of these words could do what courts do and pick up a dictionary and find a long list of conduct included within their meaning.

Not only is the meaning of transporter clear, but a complete reading of the TPTA would demonstrate the necessity of prohibiting Defendant’s conduct. Accurate collection of the tobacco tax on cigarettes and other tobacco products is dependent upon fulfillment of labeling, record-keeping, and reporting requirements set forth in the TPTA. Those who transport tobacco products that are sold in Michigan must obtain a license and must file a reports with Treasury documenting their movement of tobacco products to other licensees or retail stores.

Further, the TPTA regulatory scheme requires tobacco products must be packaged and labelled. Invoices documenting these acquisition and sales must contain

numerous elements. All of these requirements exist so that Michigan's Treasury can track tobacco product sales from manufactures, through distributors and transporters, and ultimately to retailers. This tracking system, if followed, allows Treasury to verify unclassified acquirers and wholesalers are remitting the appropriate tobacco tax. If people are allowed to import out-of-state tobacco products and transport them and sell those products at retail without a license and without complying with the reporting and record-keeping requirements, as Defendants did, the TPTA would be rendered meaningless. It would be impossible for Treasury to determine where the tobacco products came from and whether the tobacco tax was paid. A person with average intelligence would understand that importing tobacco and transporting it for resale without a license and without complying with all the reporting duties that come with obtaining such a license would severely limit the effectiveness of the TPTA. An ordinary intelligent person would realize a violation of the TPTA by transporting over 3,000 cigarettes without license would subject them to a 5 year felony.

As it relates specifically to Transporters, the TPTA, requires that for anyone acting as a Transporter upon the public highways, roads, or streets of this State, obtain a license, have complete records for the tobacco being transported on his person, and obtain a permit. For each load of tobacco transported the transporter shall obtain a permit from Treasury indicating what is being transported, and to whom. See MCL 205.426(7) and (8). If the tobacco is being imported from out-of-state the transporter should stop at the first MSP post for inspection.

Defendants cite to Angela Littlejohn's testimony regarding Treasury's position. She does not set policy for the Michigan Department of Treasury. Nevertheless, most of what defendants' cite of Ms. Angela Littlejohn's testimony related to a hypothetical licensed wholesaler moving tobacco to customers that was inquired about at the Preliminary Examination, not the facts of this case. No one in this case maintains a Michigan tobacco license. Not the tribe, nor the defendants, nor the stores involved in the sale of the tobacco products. There simply is no license involved. Moreover, Angela Littlejohn's understanding of the TPTA has no bearing on what the law really is. The Court of Appeals has instructed that "[a State] agency's interpretation is not binding on the courts, and it cannot conflict with the Legislature's intent as expressed in the language of the statute at issue." *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136 (2010). Here, Treasury employee's summary of what they think the law is during the Preliminary Examination is not the actual law and does not limit what the Legislature required for a tobacco transporter.

Finally, The Michigan Court of Appeals recently reviewed a due-process claim against the TPTA and held that the TPTA gave the defendant sufficient notice. *People v. Assy*, 316 Mich App 302 (2016). The *Assy* panel held that the Legislature defined "retailer" with sufficient precision to place persons of ordinary intelligence on notice..." *Id.* at 311. The panel also held that "the statutory scheme is sufficiently definite to preclude arbitrary or discriminatory enforcement." *Id.* at 312, citing *People v. Hayes*, 421 Mich 271 (1984). Likewise, the TPTA defines Transporter with sufficient notice to place each defendant on notice that his actions could subject him

to criminal liability. Further, the statutory scheme precludes arbitrary and discriminatory enforcement of the TPTA.

#### **D. Criminal liability is not dependent on job status**

Even if Defendants are correct that each acted as an employee of the tribe, each are still criminally liable. Defendants argues that the tribe or business is the entity that needs to obtain the transporter license and that as an employee driver they do not have to comply with the law. This is incorrect. First, no one nor any entity maintained a tobacco license here. Accordingly, defendants were not transporting under a business's transporter license or his own transporter's license, putting each defendant in violation of MCL 205.423(1). Second, a similar argument was raised in *People v. Shouman*, and the Court of Appeals agreed with the State's position that criminal liability is not dependent on job status. See *People v. Shouman*, (2016; 2016 WL 5853301)(unpublished).

The *Shouman* court found as it relates to this issue:

Regardless of whether defendant was employed by LZ, defendant was required by MCL 205.426(7) and (8) to have in his possession a transporter license and a permit for the load in his possession. Defendant's contention that he lacked a means of determining the licensure status of his purported employer is thus incorrect in light of his statutory responsibility to have the required license and permit in his possession when transporting the tobacco product. (*Shouman*, 7)

Moreover, in *People v. Assy*, 316 Mich App 302 (2016), the defendant claimed the store owner, not the defendant manager, should be held criminally liable. The Court of Appeals rejected this argument. It found the TPTA defined "retailer" sufficiently to put those who operate a store on notice. The court

noted, “[t]he Legislature defined the term “person” to include both individuals and legal entities. MCL 205.422(o).” MCL 205.428(3) makes it a crime for a person to possess, transport, acquirer in violation of the act over 3,000 cigarettes. An individual can be held criminal liable for violating the TPTA, not just a legal entity. By following the TPTA’s requirements, an employee would be in a position to know that he was transporting cigarettes without a Michigan tobacco license. No one maintained a license in this case. Criminal liability on the person or persons possessing and transporting the tobacco is appropriate. MCL 205.428(3).

Last, defendants’ claim that they would not be a position to know they needed a license to do the activity they were doing because of the fact that they were mere employees. Ignorance of the law does not excuse violation of the same. *People v. Longwell*, 120 Mich 311, 317 (1899). Furthermore, in *People v. Shouman*, *supra*, the Court of Appeals rejected the argument that the TPTA requires the defendant to know he needed a license. The court wrote,

There is no support in *Nasir* or other case law for defendant's contention below that the prosecutor had to prove that defendant knew he was required to have a license and that he specifically intended to violate the TPTA. Rather, as discussed above, the *mens rea* element required by *Nasir* is that the defendant had knowledge that the stamp was counterfeit. *Nasir*, 255 Mich.App at 45–46. That is, the defendant was required to have knowledge of what it was that he possessed... *Shouman*, 5.

Likewise, in this matter, defendant did not have to know he needed a tobacco license from Treasury for a violation to occur. All defendants’ needed to know is that they were transporting tobacco, in this case, over 672,000

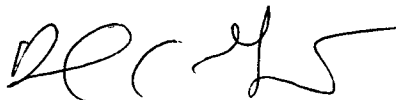


cigarettes.

**E. Conclusion**

WHEREFORE, the People of the State of Michigan pray that this court deny Defendants' Motion to Dismiss for Due Process violations. The TPTA puts ordinary citizens on proper notice of the regulatory scheme regarding tobacco products in the State of Michigan, and the TPTA adequately notifies the public of the criminal liability at stake for violating the act. For that reason, and the other reasons articulated above, the People request the Defendants' Motion to Dismiss be denied.

Respectfully submitted,



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