

10-21-2008

State, ex rel. Wasden v. Maybee Order Dckt. 35200

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In the Supreme Court of the State of Idaho

LAW CLERK

STATE OF IDAHO, by and through)
LAWRENCE G. WASDEN, Attorney)
General,) ORDER GRANTING MOTION TO
) AUGMENT THE RECORD
Plaintiff-Respondent,)
) Supreme Court Docket Nos. 35200
v.) Ada County Case No. OC 0617645
)
SCOTT B. MAYBEE, d/b/a)
SMARTSMOKER.COM,)
BUYCHEAPCIGARETTES.COM and)
ORDERSMOKESDIRECT.COM,)
)
Defendant-Appellant.)

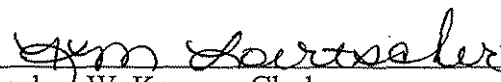
A MOTION TO AUGMENT THE RECORD AND STATEMENT IN SUPPORT THEREOF with attachment was filed by Respondent October 15, 2008. Therefore, good cause appearing,

IT HEREBY IS ORDERED that Respondent's MOTION TO AUGMENT THE RECORD be, and hereby is, GRANTED, and the augmentation record shall include the document listed below, a file stamped copy of which accompanied the Motion:

1. Affidavit of Brett T. DeLange with attachments file stamped January 2, 2007.

DATED this 21st day of October, 2008.

For the Supreme Court



Stephen W. Kenyon, Clerk
for

cc: Counsel of Record

AUGMENTATION RECORD

In the Supreme Court of the State of Idaho

STATE OF IDAHO, by and through
LAWRENCE G. WASDEN, Attorney
General,

Plaintiff-Respondent,

v.

SCOTT B. MAYBEE, d/b/a
SMARTSMOKER.COM,
BUYCHEAPCIGARETTES.COM and
ORDERSMOKESDIRECT.COM,

Defendant-Appellant.

)
)
) ORDER GRANTING MOTION TO
) AUGMENT THE RECORD

)
) Supreme Court Docket Nos. 35200
) Ada County Case No. OC 0617645
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1. Affidavit of Brett T. DeLange with attachments file stamped January 2, 2007.

DATED this 21st day of October, 2008.

For the Supreme Court


Stephen W. Kenyon, Clerk

cc: Counsel of Record

LAWRENCE G. WASDEN
ATTORNEY GENERAL
STATE OF IDAHO

FILED
JAN 02 2007
P.M.

BRETT T. DeLANGE (ISB NO. 3628)
STEPHANIE N. GUYON (ISB NO. 5989)
DEPUTY ATTORNEYS GENERAL
CONSUMER PROTECTION UNIT
OFFICE OF THE ATTORNEY GENERAL
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P. O. BOX 83720
BOISE, IDAHO 83720-0010
(208) 334-2424
(208) 334-2830 (FACSIMILE)
brett.delange@ag.idaho.gov
stephanie.guyon@ag.idaho.gov

JAN 02 2007

DAVID NAVARRO, Clerk
By PATRICIA A. DWIGDON
DEPUTY

ATTORNEYS FOR THE STATE OF IDAHO

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

STATE OF IDAHO, by and through
LAWRENCE G. WASDEN, Attorney
General,

Plaintiff,

vs.

SCOTT B. MAYBEE, d/b/a
SMARTSMOKER.COM,
BUYCHEAPCIGARETTES.COM, and
ORDERSMOKESDIRECT.COM,

Defendant.

) CASE NO. CV-OC-1617645

) AFFIDAVIT OF BRETT T.
) DELANGE

STATE OF IDAHO)
) ss.
County of Ada)

I, Brett T. DeLange, being first duly sworn, depose and say, upon personal knowledge, the following:

1. I am a deputy attorney general for the Consumer Protection Unit of the Idaho Attorney General's Office and have served in that capacity for over fifteen years.

2. I am over the age of eighteen and competent to testify in this matter. As the deputy attorney general assigned to this case, I am familiar with the facts stated herein, which are made to the best of my knowledge and belief.

3. On August 21, 2006, acting on behalf of the Attorney General, I sent a written warning to Defendant, advising him of Idaho's tobacco laws and requiring him to cease any further cigarette sales in Idaho. A copy of my letter is attached hereto as Exhibit A.

4. During a telephone conversation with Margaret Murphy, Defendant's general counsel, she explained that she would not accept service of the Complaint unless I allowed her until October 31, 2006, to respond in writing to my August 21, 2006, letter.

5. At no time did I agree to Ms. Murphy's request for an extension of time.


6. After two weeks passed with no further contact from Ms. Murphy or Defendant, I faxed Ms. Murphy a letter on September 21, 2006, reiterating our prior telephone conversation and informing her that the state was filing a lawsuit against Defendant on September 22, 2006. A copy of my letter is attached hereto as Exhibit B.

7. When Ms. Murphy contacted me on October 23, 2006, I told her that I would allow Defendant additional time to file his answer.

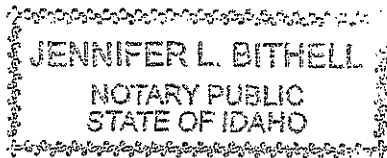
8. Almost two weeks after the deadline for filing his answer, Defendant still had not responded to the Complaint.

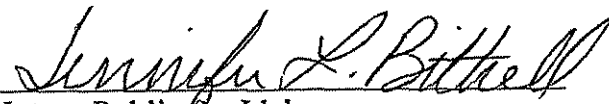
This concludes my affidavit.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By: 
BRETT T. DELANGE
Deputy Attorney General

Subscribed and sworn to before me this 2nd day of January, 2006.




Notary Public for Idaho
My Commission Expires: 11-30-07

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of January, 2007, I caused to be served, by the method indicated below, a true and correct copy of the foregoing, addressed to the following:

Christopher H. Meyer
Debora K. Kristensen
Givens Pursley LLP
601 West Bannock Street
P.O. Box 2720
Boise, ID 83701-2720

- U.S. Mail
- Hand Delivery
- Certified Mail, Return Receipt Requested
- Overnight Mail
- Facsimile
- Statehouse Mail



BRETT T. DELANGE
Deputy Attorney General

Exhibit A



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

August 21, 2006

VIA CERTIFIED MAIL; RETURN RECEIPT REQUESTED

Scott Maybee
P.O. Box 110
Salamanca, NY 14779

Margaret Murphy
Attorney at Law
54 Hollywood Ave.
Buffalo, NY 14220

Dear Mr. Maybee:

Re: Internet Cigarette Sales in Idaho—SmartSmoker, BuyCigarettesCheaper, OrderSmokesDirect

Notice of Apparent Liability Under Idaho law—Violations of Idaho's Tobacco Master Settlement Agreement Complementary Act (Complementary Act) and Prevention of Minors' Access to Tobacco Act (Minor Access Act)

We have received a number of Jenkins Act reports from you on behalf of SmartSmoker, BuyCigarettesCheaper, and OrderSmokesDirect. In total, these reports indicate that you have sold at retail in excess of one million cigarettes to Idaho consumers. Our review of this matter indicates multiple violations of Idaho law related to the sale of these cigarettes, as set forth below.

First, Idaho Code § 39-8403(3) of the Complementary Act prohibits the sale in this State of cigarettes that are not included on the Idaho Directory of Compliant Tobacco Product Manufacturers and Brand Families (Idaho's Directory). Your Jenkins Act reports indicate large numbers of sales of cigarettes of manufacturers that are not on Idaho's Directory.

Second, Idaho Code § 39-5704(1) of the Minor Access Act states that it is unlawful to sell or distribute tobacco products for sale or distribution at retail without having first obtained a tobacco permit from the Idaho Department of Health and Welfare. You do not have the requisite Idaho tobacco retail sales permit. Idaho Code § 39-5709 of the Minor Access Act states that the sale of tobacco products in violation of the Act and without a permit "is considered by the state of Idaho as an effort to subvert the state's public purpose to prevent minor's access to tobacco products."

Scott Maybee
August 23, 2006
Page 2

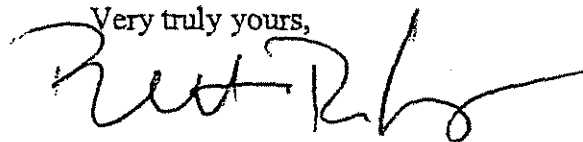
Third, Idaho Code §§ 39-5715 through 5718 impose upon tobacco retail sales permittees various age verification requirements, disclosure, notice and shipping obligations, and specific reporting duties with respect to delivery sales, with which we have reason to believe you have not complied.

The purpose of this letter is to advise you of these violations and that all sales into Idaho must immediately cease. We are also interested in obtaining sample disclosure, notice, shipping, and reporting documentation which establishes compliance with Idaho Code §§ 39-5716 through 39-5718 of the Minor Access Act. If you do, we ask that you provide it so we can review and investigate further.

The Minors Access Act, in part, authorizes the Attorney General to prevent or restrain violations of that Act. The Complementary Act imposes a penalty per violation of that Act of \$5,000 or five hundred percent of the retail value of the cigarettes, whichever is greater. For purposes of the Complementary Act, Idaho Code § 39-8406(1) of the Act states that each sale of cigarettes in violation of the Act is deemed to be a separate violation. Idaho Code § 39-8406(4) of the Complementary Act also authorizes the Attorney General to obtain injunctive relief and Idaho Code § 39-8406(3) of the Act states that cigarettes sold in violation of the Act are deemed contraband and subject to seizure.

Please promptly reply to this letter indicating what steps have been taken to ensure that all future sales into Idaho will cease. All action the Office of the Attorney General may take with respect to sales to date is under consideration.

Very truly yours,



BRETT T. DELANGE
Deputy Attorney General
Consumer Protection Unit

IDAG134365

Exhibit B



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WARDEN

September 21, 2006

VIA FACSIMILE TRANSMISSION

Margaret Murphy
Attorney at Law
54 Hollywood Ave.
Buffalo, NY 14220

Dear Ms. Murphy:

Re: Notice of Intended Action

Two weeks ago we had a telephone call in which you advised me that you are counsel for Scott Maybee, who does business as SmartSmoker.com, BuyCigarettesCheaper.com, and OrderSmokesDirect.com. Your telephone call was in response to this Office's letter to Mr. Maybee dated August 24, 2006. That letter advised you and Mr. Maybee of his various violations of Idaho law with respect to his retail sale of cigarettes to Idaho customers.

On our telephone call I understood you to say that Mr. Maybee would not be taking any steps to bring his retail cigarette sales to Idaho customers into compliance with Idaho law. If I understand your position correctly, it is that Mr. Maybee does not need to comply with various provisions of Idaho law relating to the sale of tobacco products. I also understood from your call that you would not be willing to accept service of the State of Idaho's complaint unless this Office granted you until the end of October to reply to our letter.

The purpose of this letter is to advise you that we will be filing our lawsuit tomorrow and proceeding with a process server to serve Mr. Maybee. We are disappointed in Mr. Maybee's apparent decision to operate his business in defiance of Idaho law's requirements.

Very truly yours,

A handwritten signature in black ink that reads "Brett T. Delange".

BRETT T. DELANGE
Deputy Attorney General
Consumer Protection Unit