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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

CIGARETTES CHEAPER!, a California corporation, and THE CUSTOMER COMPANY, a California corporation,

Plaintiffs,

v.

STATE BOARD OF EQUALIZATION, an agency of the State of California, ALTRIA GROUP, INC., a Virginia corporation, PHILIP MORRIS USA INC., and COSTCO WHOLESALE CORPORATION, a Washington corporation,

Defendants.

CASE NO.: 2:11-CV-00631-JAM-EFB

ORDER GRANTING DEFENDANT PHILIP MORRIS USA INC.'S MOTION TO DISMISS

Action Filed: January 18, 2011

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ORDER

On June 15, 2011, the Motion to Dismiss brought by Defendant Philip Morris USA, Inc. (“Philip Morris USA”), joined by Defendant Costco Wholesale Corporation, came on for hearing before the Honorable John A. Mendez. After reviewing all pleadings in support of and in opposition to the Motion, and after considering the oral arguments of counsel, the Court hereby **GRANTS** Philip Morris USA’s Motion and **DISMISSES** this action against Philip Morris USA **WITH PREJUDICE**.

Plaintiffs’ attempt to maintain a sales tax refund suit against Philip Morris USA fails as a matter of law for the following independent reasons:

I. Plaintiffs Have Failed To Meet The Standing Requirements of Article III.

Standing is a threshold requirement to maintain a lawsuit in federal court. U.S. Const. art. III, § 2; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The “irreducible constitutional minimum” for standing requires the plaintiff to allege an injury-in-fact that is: (1) “fairly traceable” to the defendant’s allegedly unlawful conduct; and (2) likely to be redressed by the requested relief. *Lujan*, 504 U.S. at 560-561, 590. Plaintiffs have failed to meet their burden of demonstrating Article III standing. The alleged wrongdoing, including making the tax rulings which Plaintiffs dispute, assessment of a purportedly unlawful sales tax, and collection of the disputed tax, was exclusively within the control of the State Board of Equalization (the “BOE”) and not Philip Morris USA.

At most, Plaintiffs allege that Philip Morris USA cooperated with the state taxing authority in providing relevant sales information. *See, e.g.*, Complaint, ¶ 1. However, Philip Morris USA’s cooperation with the BOE is not only authorized, it is required under California law and therefore cannot serve as the basis of a claim

1 against Philip Morris USA. Cal. Rev. & T. Code § 7055. Plaintiffs’ allegations are,
2 therefore, inadequate to establish Article III standing as a matter of law.¹

3 **II. Plaintiffs Have Failed To State A Claim Against Philip Morris USA.**

4 Plaintiffs’ failure to allege a cognizable legal theory supported by well pled
5 facts provides an independent basis to dismiss with prejudice. Relying only on legal
6 conclusions and without the benefit of any legal authority, Plaintiffs attempt to allege
7 two claims against Philip Morris USA under California Business and Professions
8 Code § 17200 *et seq.* (“Section 17200”). First, Plaintiffs’ attempt to convert this tax
9 refund case into a Section 17200 claim is barred by Article XIII, § 32 of the California
10 Constitution and fails as a matter of law. *See, e.g., Woosley v. State of Cal.*, 3 Cal. 4th
11 758, 792 (1992). Plaintiffs cannot use Section 17200 to either expand the scope of
12 allowable remedies in a tax refund case or to circumvent the constitutional and
13 statutory restraints that California law places on tax refund suits. Instead, “the sole
14 legal avenue for resolving tax disputes is a post-payment refund action” against the
15 BOE. *State Bd. of Equalization v. Superior Court*, 39 Cal. 3d 633, 638 (1985).

16 Second, Plaintiffs have failed to allege facts sufficient to pass Rule 12(b)(6)
17 scrutiny under the principles set forth in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) and
18 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Plaintiffs’ Complaint makes
19 conclusory allegations that Philip Morris USA’s conduct is “unfair,” “deceptive” and
20 that it constitutes “price-fixing,” but such labels need not be accepted as true on a
21 motion to dismiss. *See, e.g., Oestreicher v. Alienware Corp.*, 544 F. Supp. 2d 964,
22 968 (N.D. Cal. 2008), *aff’d*, 322 Fed. Appx. 489 (9th Cir. Apr. 2, 2009) (courts need
23 not “accept as true allegations that are conclusory, legal conclusions, unwarranted
24 deductions of fact or unreasonable inferences.”). Because Plaintiffs’ Complaint does
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27 ¹ Under the same analysis, Plaintiffs lack statutory standing under Section 17200. *See, e.g., In*
28 *re Tobacco II Cases*, 46 Cal. 4th 298, 305-06 (2009) (plaintiff must suffer injury-in-fact and lose
money or property “as a result of” unfair competition).

1 not contain sufficient factual matter, accepted as true, which states a claim to relief
2 that is plausible, dismissal is warranted. *See Iqbal*, 129 S. Ct. at 1949.

3 **III. Amendment Would Be Futile.**

4 Leave to amend is properly denied where amendment would be futile. *Cal.*
5 *Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1472
6 (9th Cir. 1987) (futility is a valid reason for denying leave to amend). Amendment
7 would be futile here because: (1) Plaintiffs lack standing and the only remedy
8 available to them is a tax refund suit against the BOE (*see Lujan*, 504 U.S. at 560-561,
9 590 (harm caused by Defendant required for Article III standing));² (2) Plaintiffs'
10 Complaint relies only on threadbare allegations and legal conclusions (*see Ruiz v.*
11 *Mort. Elec. Registration Sys., Inc.*, No. CIV. S-09-0780 FCD, 2009 WL 2390824, *10
12 (E.D. Cal. Aug. 3, 2009)); and (3) Plaintiffs have failed to cite any legal authority to
13 oppose Philip Morris USA's Motion meaningfully (*see Allen v. Dollar Tree Stores,*
14 *Inc.*, No. C 10-4492 WHA, 2011 WL 198148, *1 (N.D. Cal. Jan. 20, 2011)
15 (dismissing action without leave to amend where "plaintiff fail[ed] to cite a single
16 legal authority in response to defendant's motion to dismiss" and instead relied on
17 implausible legal conclusions)).

18 **IV. Conclusion**

19 For the foregoing reasons, the Court hereby **GRANTS** Philip Morris USA's
20 Motion and **DISMISSES** this action against Philip Morris USA **WITH**
21 **PREJUDICE.**
22 **IT IS SO ORDERED.**

23
24 Dated: June 27, 2011

/s/ John A. Mendez

John A. Mendez

UNITED STATES DISTRICT JUDGE

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27 ² See also *United Food And Commercial Workers Unions, Employers Health and Welfare Fund*
28 *v. Philip Morris, Inc.*, 223 F.3d 1271, 1275 (11th Cir. 2000) (leave to amend properly denied on
futility grounds because proffered cause of action failed to state a claim under applicable state law).