

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA-23-0640

---

IN THE MATTER OF:  
GRAND RIVER ENTERPRISES, INC.,  
Respondent-Counter Plaintiff-Appellant,

---

GRAND RIVER ENTERPRISES, INC.,  
Counter Plaintiff-Appellant,

v.

STATE OF MONTANA ex rel.  
DEPARTMENT OF JUSTICE,  
Counter Defendant-Appellee.

---

**APPELLANT'S REPLY BRIEF**

---

On Appeal from Montana First Judicial District Court,  
Lewis and Clark County, Cause No. ADV-2012-246  
Honorable Mike Menahan

---

Michael G. Black, Esq.  
Black Law Office  
7 West Sixth Ave., Ste. 514  
P.O. Box 1311  
Helena, MT 59624-1311  
Phone (406) 546-0017  
blacklaw@blackfoot.net

Robert C. Lukes  
Michael H. Hekman  
Garlington, Lohn & Robinson, PLLP  
350 Ryman Street • P. O. Box 7909  
Missoula, MT 59807-7909  
Phone (406) 523-2500  
rclukes@garlington.com  
mhhekman@garlington.com

Kelli J. Keegan (admitted *pro hac vice*)  
Barnhouse Keegan Solimon & West LLP  
7424 4th Street NW  
Los Ranchos de Albuquerque, NM 87107

Phone (505) 842-6123  
kkeegan@indiancountrylaw.com

*Counsel for Appellant Grand River  
Enterprises Six Nations, Ltd.*

Terisa Marie Oomens  
Agency Legal Services Bureau  
Montana Department of Justice  
P.O. Box 201440  
Helena, MT 59620-1440  
Phone (406) 444-2026  
Terisa.Oomens@mt.gov

Kali Griffin  
Montana Department of Justice  
P.O. Box 200151  
Helena, MT 59620-0151  
Phone (406) 404-0089  
Kali.Griffin@mt.gov

*Counsel for Appellee State of Montana*

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	iii
INTRODUCTION .....	1
I. The Standard of Review is Well-Established. ....	1
II. GRE is Entitled to a Preliminary Injunction. ....	2
A. GRE is Likely to Succeed on the Merits.....	2
1. The AVC requires the AG to seek enforcement and obtain a remedy through the district court.....	2
2. The AG’s course of conduct demonstrates enforcement of the AVC is through the district court, not unilateral action. ....	6
3. The AG’s failure to seek enforcement of the AVC through the district court conflicts with Mont. Code Ann. § 30-14-112.....	9
4. The AG is precluded from unilaterally suspending performance or rescinding the AVC absent demonstrating a material breach.....	11
5. The AG is prohibited from requiring a tobacco manufacturer to waive its due process rights as guaranteed by the Montana Administrative Procedure Act and Montana Code Annotated § 16-11-510.....	12
B. GRE Will Suffer Irreparable Harm Absent an Injunction.....	14
C. The Balance of Hardships and Public Interest Tips in GRE’s Favor.....	14
CONCLUSION .....	16
CERTIFICATE OF COMPLIANCE .....	17

## TABLE OF AUTHORITIES

Cases	Page(s)
<i>Doe v. Cmty. Med. Ctr., Inc.</i> , 2009 MT 395, 353 Mont. 378, 221 P.3d 651 .....	14
<i>Driscoll v. Stapleton</i> , 2020 MT 247, 401 Mont. 405, 473 P.3d 386 .....	1
<i>Four Rivers Seed Co. v. Circle K Farms, Inc.</i> , 2000 MT 360, 303 Mont. 342, 16 P.3d 342.....	14
<i>Gordon v. Holder</i> , 721 F.3d 638 (D.C. Cir. 2013) .....	16
<i>Grand River Enterprises Six Nations, Ltd. v. Pryor et al.</i> , No. 02 Civ.5068IJFK, 2003 WL 25749945 (S.D.N.Y. filed July 1, 2002, amended Oct. 23, 2003).....	13
<i>Jacksonville Port Auth. v. Adams</i> , 556 F.2d 52 (D.C. Cir. 1977) .....	16
<i>League of Women Voters of U.S. v. Newby</i> , 838 F.3d 1 (D.C. Cir. 2016) .....	16
<i>Mont. Democratic Party v. State</i> , 2020 MT 244, 401 Mont. 390, 472 P.3d 1195 .....	14
<i>Netzer L. Off., P.C. v. State by &amp; through Knudsen</i> , 2022 MT 234, 410 Mont. 513, 520 P.3d 335.....	14
<i>Ophus v. Fritz</i> , 2000 MT 251, 301 Mont. 447, 11 P.3d 1192 .....	2
<i>Planned Parenthood of Mont. v. State by &amp; through Knudsen</i> , 2022 MT 157, 409 Mont. 378, 515 P.3d 301 .....	1
<i>R.C. Hobbs Enters., LLC v. J.G.L. Distrib., Inc.</i> , 2004 MT 396, 325 Mont. 277, 104 P.3d 503 .....	11
<i>South Dakota v. Grand River Enterprises Six Nations, Ltd.</i> , 757 N.W.2d 305 (S.D. 2008) .....	13
<i>Stand Up Mont. v. Missoula Cnty. Pub. Sch.</i> , 2022 MT 153, 409 Mont. 330, 514 P.3d 1062 .....	1

<i>Sweet Grass Farms, Ltd. v. Bd. of Cnty. Comm’rs of Sweet Grass Cnty.</i> , 2000 MT 147, 300 Mont. 66, 2 P.3d 825 .....	1, 2
--	------

## **Statutes**

Mont. Code Ann. § 2-4-601 .....	12
Mont. Code Ann. § 16-11-403(2)(c)(iii).....	5
Mont. Code Ann. § 16-11-504(4) .....	5
Mont. Code Ann. § 16-11-510.....	5, 7, 12
Mont. Code Ann. § 28-3-202 .....	5
Mont. Code Ann. § 28-3-704(1) .....	4
Mont. Code Ann. § 30-14-111 .....	9
Mont. Code Ann. § 30-14-111(4) .....	9
Mont. Code Ann. § 30-14-112.....	9

## **Other Authority**

Tobacco Product Manufacturer Certificate of Compliance, available at <a href="https://dojmt.gov/wp-content/uploads/2024-TPM-Certificate-of-Compliance-Revised-January-2024.pdf">https://dojmt.gov/wp-content/uploads/2024-TPM-Certificate-of-Compliance-Revised-January-2024.pdf</a> .....	10, 11
---	--------

## INTRODUCTION

GRE is entitled to a preliminary injunction prohibiting implementation of the AG's June 16, 2023 decision banning the sale of all GRE products in the State of Montana. The AG's ban was unlawful because the AVC expressly provides that only the district court, not the AG, has authority to determine whether there has been a material breach of the AVC and order a ban.

### **I. The Standard of Review is Well-Established.**

The AG's response contends the standard of review is abuse of discretion (AG Br. 3), however, the AG fails to address case law cited by GRE establishing that this Court's review of the district court's legal conclusions is *de novo*. Namely, the AG ignores this Court's recent decisions, including *Planned Parenthood of Mont. v. State*, holding, "[w]e review the grant of a preliminary injunction to determine whether the district court manifestly abused its discretion ... [i]f the decision was based on legal conclusions, however, we review those conclusions *de novo*." 2022 MT 157, ¶ 5, 409 Mont. 378, 515 P.3d 301 (emphasis added); *e.g.*, *Stand Up Mont. v. Missoula Cnty. Pub. Sch.*, 2022 MT 153, ¶ 6, 409 Mont. 330, 514 P.3d 1062; *Driscoll v. Stapleton*, 2020 MT 247, ¶ 12, 401 Mont. 405, 473 P.3d 386.<sup>1</sup> Here, the district court's denial of the preliminary injunction

---

<sup>1</sup> The single case cited by the AG also supports this point. *Sweet Grass Farms, Ltd. v. Bd. of Cnty. Comm'rs of Sweet Grass Cnty.*, 2000 MT 147, ¶ 21, 300 Mont.

turns on the interpretation of a contract, which presents a legal question reviewed de novo. *Ophus v. Fritz*, 2000 MT 251, ¶ 19, 301 Mont. 447, 11 P.3d 1192 (“[t]he construction and interpretation of a contract is a question of law”).

Similarly, the AG failed to address case law cited by GRE establishing that this Court’s review of constitutional questions is plenary. GRE Br. 16, 34-36.

## **II. GRE is Entitled to a Preliminary Injunction.**

### **A. GRE is Likely to Succeed on the Merits.**

#### **1. The AVC requires the AG to seek enforcement and obtain a remedy through the district court.**

The AG does not have authority to unilaterally ban GRE products from Montana. To the contrary, paragraph 7 of the AVC expressly confers exclusive jurisdiction to the district court “over the subject matter of this AVC and *over Grand River for purposes of enforcement* of this AVC” (emphasis added). GRE Br. 16, 21-24. When each of the AVC’s enforcement paragraphs – 7, 8, 9 and 10 – are given effect, and all are read together, they demonstrate enforcement must take place in a proceeding before the district court to determine whether GRE materially breached the contract as is necessary to order removal of GRE from the directory, and if so, to award costs, including attorney’s fees.<sup>2</sup>

---

66, 2 P.3d 825 (“we review a district court’s conclusions of law to determine whether the district court’s interpretation of the law is correct”).

<sup>2</sup> The AVC provides:

The AG ignores AVC paragraph 7 in its response and makes no effort to read the enforcement paragraphs – 7, 8, 9 and 10 – together in a way that gives effect to each. AG Br. 7-9. Instead, the AG interprets paragraph 9 to give it unilateral, unfettered enforcement authority. However, GRE’s opening brief explained that paragraph 9 “does not address *who* determines an alleged violation of the AVC or *who* orders the immediate removal. This is because those directives are contained in the other paragraphs.” GRE Br. 23-24. In response, the AG claims paragraph 8 addresses who determines an alleged violation – the AG states paragraph 8 “*foresees* the AG enforcing the AVC” (emphasis added). AG Br. 7. That is incorrect, paragraph 7 addresses who has authority to enforce the AVC, and

---

7. The Montana First Judicial District Court, Lewis and Clark County, shall retain jurisdiction over the subject matter of this AVC and over Grand River for purposes of enforcement of this AVC.

8. In the event that Grand River violates any provision of this AVC, Grand River shall reimburse the State for any costs the State incurs, including reasonable attorney’s fees, in any proceeding to enforce the provisions of this AVC.

9. Failure to abide by any terms of this AVC is grounds for the immediate removal of Grand River from the Montana Directory.

10. Grand River waives any possible sovereign immunity from suit, liability, judgment, and collection with respect to its obligations to fully comply with the requirements imposed upon Grand River as tobacco product manufacturer selling cigarettes in Montana . . . .

GRE Br., App. Tab 1 at 4-5.



paragraph 8 simply allows for an award of costs and fees.<sup>3</sup> Paragraph 7 states the district court has jurisdiction “over Grand River for purposes of enforcement of this AVC,” and if the AG prevails, paragraph 8 allows the AG to recover its costs and fees in the “proceeding to enforce the provisions of this AVC.” The AG ignores paragraph 7 and misinterprets paragraph 8.<sup>4</sup>

As noted above, paragraph 9 also does not address who orders the remedy of directory removal. In response, the AG claims that Mont. Code Ann. § 16-11-504(4) “places the duty to remove GRE and any other tobacco product manufacturer on the AG, not a court.” AG Br. 7-8, 10. There are three problems with the AG’s argument.

First, the AG appears to conflate two issues: who has authority to order directory removal as a remedy under the contract is a separate issue from who performs the subsequent act of removing a manufacturer or brand family from the directory and posting the updated list on the AG’s website.

Second, the AG is flat wrong – there are statutes (not cited by the AG) that specifically grant authority to a court, not the AG. For example, the escrow

---

<sup>3</sup> Although not at issue at this juncture, such a contractual right to attorney’s fees is reciprocal. Mont. Code Ann. § 28-3-704(1).

<sup>4</sup> The AG’s response also does not address the fact that under its interpretation, it would never bring an enforcement proceeding before the district court because it could act unilaterally and therefore paragraphs 7, 8 and 10 would be rendered superfluous.

statutes expressly provide that only a court, not the AG, has authority to enter an order banning a manufacturer. Mont. Code Ann. § 16-11-403(2)(c)(iii) (upon a court determination of a second knowing violation of the escrow requirement, *the court* may order a ban for up to two years). The directory statutes also expressly provide that a court, not the AG, has authority to determine whether the AG may remove a manufacturer. Mont. Code Ann. § 16-11-510 (providing for judicial review of AG decision to remove from directory).<sup>5</sup>

Third, the AG contends that because AVC paragraph 9 is silent on who orders removal, this Court should look to Mont. Code Ann. Section 16-11-504(4) for the answer, instead of looking to AVC paragraph 7. Not only does this argument ignore Mont. Code Ann. § 28-3-202,<sup>6</sup> it also conflicts with the AG's prior position that the AVC enforcement provisions replaced the statutory enforcement provisions. GRE Br. 34-35 (the district court ruled that "the terms of the AVC replace[d]" the notice and hearing requirements provided by MAPA. App. Tab 12

---

<sup>5</sup> The AG's reliance on Mont. Code Ann. § 16-11-504(4) undercuts its position because that section is qualified by the requirement that the AG proceed with removals from the directory "in conformity with the requirements of [Part 5]," which includes Mont. Code Ann. § 16-11-510 ("Tobacco Judicial Review Statute"). Accordingly, any contention that the statutes allow the AG unfettered power to remove manufacturers from the directory unilaterally, is incorrect.

<sup>6</sup> "The whole of a contract is to be taken together so as to give effect to every part if reasonably practicable, each clause helping to interpret the other." Mont. Code Ann. § 28-3-202.

at 409-410).

The AG and district court's interpretation of paragraph 9 as giving the AG unchecked, unilateral enforcement authority creates an irreconcilable conflict with the express language in paragraph 7, which confers jurisdiction to the district court "for purposes of enforcement." The AG's interpretation effectively usurps the district court's enforcement authority, and renders Paragraphs 7, 8, and 10 superfluous.

**2. The AG's course of conduct demonstrates enforcement of the AVC is through the district court, not unilateral action.**

The AG's course of conduct in the decade following the AVC demonstrates the AG understood the AVC did not provide him the power to unilaterally remove GRE from the directory for an alleged breach of the AVC. GRE Br. 26-28. To explain why he never claimed unilateral authority prior to June 16, 2023, let alone attempt to exercise it, the AG now states he did not remove GRE when he previously alleged violations during 2020, 2021 and 2022 because he was giving GRE "chances." AG Br. 8.<sup>7</sup> But this contention is belied by the facts set forth in GRE's brief at 26-27, outlining admissions by the AG, none of which were addressed in the AG's response. The AG's own correspondence demonstrates he

---

<sup>7</sup> The AG contends the words "grounds for" in AVC paragraph 9 mean he has "deference in whether immediate removal from the Directory is the proper punishment." AG Br. 8.

understood he had to seek enforcement of the AVC through the district court, not unilateral action. And the AG further understood that if he did not do so, GRE had a right to court review under Mont. Code Ann. § 16-11-510 (“Tobacco Judicial Review Statute”). GRE Br. 26-27.<sup>8</sup>

What the AG cannot explain is why on May 9, 2022 (a year earlier), he stated GRE had a right to court review under Mont. Code Ann. § 16-11-510 if GRE did not agree with removal of the Couture brand from the directory; yet, 13 months later he took a completely different position – removing GRE and all its brands without any court review. The AG’s new assertion of unilateral authority is further undermined by the fact that he took the current action based on the same allegations that were already addressed in May 2022 (for which he did not remove GRE from the Directory and said were subject to judicial review). Moreover, the allegations concerned an immaterial FDA matter, which the FDA itself took no action on, and which the AG was preempted from acting on – let alone 13 months later after having already raised them a year earlier and concluded were subject to

---

<sup>8</sup> The AG alleged GRE violated the AVC in his 2020 and 2021 certification denial letters, but rather than seek enforcement in the district court, he stated GRE had a right to review prior to removal under Mont. Code Ann. § 16-11-510 (“Tobacco Judicial Review Statute”). Similarly, the AG alleged GRE violated the AVC in his May 9, 2022, letter, but rather than seek enforcement in the district court, he stated GRE had a right to review prior to removal under Mont. Code Ann. § 16-11-510.

judicial review.<sup>9</sup>

Finally, the AG contends that GRE filing a federal action contradicts its position that the AG is required to seek enforcement of the AVC in the district court. AG Br. 9. Again, the AG conflates two separate issues. The AVC governs enforcement *by the AG* that results in removal from the directory; if the AG alleges GRE is in violation the AVC, the AG must seek enforcement and the removal remedy from the district court – the AG cannot act on his own. Here, the AG unilaterally acted based upon his improper decision under federal law that grants exclusive enforcement authority to the Food and Drug Administration (“FDA”) where the FDA had not made any such decision, so GRE was forced to ask the federal court for relief because federal preemption prohibits the AG from using an alleged violation of the Federal Food, Drug, and Cosmetic Act (“FDCA”) as a basis for adverse action against GRE. The AG did not seek to enforce the AVC in the district court in June 2023, and to this day it has not done so, so there was and is no pending enforcement proceeding in the district court. The only proceeding in the district court is GRE’s present action which concerns the AG’s breach of the AVC.

---

<sup>9</sup> It is nonsensical that the AG would decide an alleged FDA matter would warrant removal when the AG’s prior allegations concerning escrow would not, because escrow was the material basis of the dispute that led to the creation of the AVC in the first place.

**3. The AG's failure to seek enforcement of the AVC through the district court conflicts with Mont. Code Ann. § 30-14-112.**

Mont. Code Ann. § 30-14-112 (“AVC Judicial Enforcement Statute”) requires an assurance of voluntary compliance be filed with the district court, and that matters closed may at any time be reopened by the AG for further proceedings in the public interest, pursuant to Mont. Code Ann. § 30-14-111. Therefore, if the AG alleges the other party to an assurance of voluntary compliance has violated its terms, he may seek enforcement in the district court under Mont. Code Ann. § 30-14-111, and if the district court rules in favor of the AG, the court may issue “temporary or permanent injunctions or temporary restraining orders” under Mont. Code Ann. § 30-14-111(4).

The AG contends he complied with Mont. Code Ann. § 30-14-112 because the AVC was filed in the district court, but that misses the point, which is that Mont. Code Ann. §§ 30-14-111, -112 require the AG to seek enforcement of an AVC through the court, not unilateral action. The AG does not address this point. AG Br. 11-12. The AG disregarded the AVC Judicial Enforcement Statute’s enforcement process.

GRE’s opening brief gave examples of another AVC, and a settlement agreement with other tobacco companies, both of which require the AG to seek enforcement through the district court, not by unilateral action. GRE Br. 29-30. The AG’s attempt to distinguish the language of those contracts fails – the AVC

and these two examples all grant enforcement authority to the district court. The opening brief pointed out that the AG should not be permitted take opposite approaches to enforcement of AVCs -- for GRE, the AG claims he has unilateral authority and removes GRE from the directory, but for the MSA tobacco companies, the AG seeks court enforcement and does not remove them from the directory. AG Br. 30. Attempting to justify the disparate treatment, the AG asserts that Participating Manufacturers and Non-Participating Manufacturers are “held to different levels of enforcement,” but the AG does not cite any authority to support this argument. AG Br. 13.

There is one other place in the AG’s response where it contends it can treat GRE differently from other manufacturers. AG Br. 1-2 (“The AVC contains several provisions which allow the Montana Attorney General (“AG”) a higher degree of discretion and control over GRE’s placement on the Directory, including that GRE must remain in compliance with all local, state, and federal laws. (Doc. 1 at ¶ 4).”). However, the single AVC provision cited for that contention simply provides that GRE must follow the law. That is something every manufacturer must do, and furthermore the same provision is contained in the annual certification that every manufacturer must sign.<sup>10</sup> The AG’s contention that it can

---

<sup>10</sup> *E.g.*, Tobacco Product Manufacturer Certificate of Compliance, p. 16 at ¶ 6 (“On behalf of the Applicant, the undersigned certifies that Applicant is in full compliance with Mont. Code Ann. Title 16 Chapter 11 and applicable federal,

treat GRE more harshly based upon his *allegation* that GRE has violated federal law -- specifically, that the AG can deny GRE its right to an independent review prior to removal from the directory, is wrong as a matter of fact (there is no contract or other document sanctioning this) and wrong as a matter of law because the AVC, the Tobacco Judicial Review Statute, and the AVC Judicial Enforcement Statute all provide a right to independent review before GRE is removed from the directory.

**4. The AG is precluded from unilaterally suspending performance or rescinding the AVC absent demonstrating a material breach.**

Montana law requires the nonbreaching party to establish material breach prior to suspending performance or rescinding. GRE Br. 31-34. A material breach is “one that touches the fundamental purpose of the contract and defeats the object of the parties in making the contract.” *R.C. Hobbs Enters., LLC v. J.G.L. Distrib., Inc.*, 2004 MT 396, ¶ 33, 325 Mont. 277, 104 P.3d 503.

The AG cannot legitimately argue, even though he asserts any violation of law by GRE justifies immediate removal of GRE (*e.g.*, AG Br. 13), that an unadjudicated allegation of a FDCA violation defeats the object of the parties in

---

state, and local laws and acknowledges that it must remain in compliance with such laws to be listed on the Tobacco Product Directory.”), available at <https://dojmt.gov/wp-content/uploads/2024-TPM-Certificate-of-Compliance-Revised-January-2024.pdf>.



making the contract. The AG should not be entitled to an extreme, unilateral remedy that effectively rescinds the contract without any process whatsoever.

GRE Br. 33-34. The AG failed to squarely address this argument in his response.

**5. The AG is prohibited from requiring a tobacco manufacturer to waive its due process rights as guaranteed by the Montana Administrative Procedure Act and Montana Code Annotated § 16-11-510.**

The AG’s contention that GRE does not have a property right fails. AG Br. 15.<sup>11</sup> And the AG’s contention that GRE is not owed due process is entirely undercut by the fact that the Montana statutes expressly provide due process rights to manufacturers. GRE Br. 34.<sup>12</sup> The district court agreed -- it recognized a tobacco manufacturer is entitled due process under by the MAPA and Mont. Code Ann. § 16-11-510 “*before* being deprived of its right to participate in the Montana

---

<sup>11</sup> The AG claims, in effect, that GRE did not need a pre-deprivation hearing because manufacturers have a right to have their products sold in Montana only if they follow the law. AG Br. at 15 (“GRE shall only be listed on the Directory upon compliance with certain criteria...” (emphasis in original)). But that is precisely what is in dispute—whether GRE complied with those criteria. Due process requires a neutral decisionmaker—not the AG on his own say-so—to resolve that dispute before GRE can be stripped of a property right. Indeed, that is what the pre-deprivation hearing guaranteed by due process is for.

<sup>12</sup> Mont. Code Ann. § 16-11-510 provides that a preliminary decision by the AG to remove a manufacturer from the directory is subject to review through a Montana Administrative Procedure Act (“MAPA”) contested case proceeding and the subsequent right to judicial review. The MAPA requires that all parties be afforded reasonable notice and an opportunity for a hearing in a contested case. Mont. Code Ann. § 2-4-601.

tobacco products market,” however, the district court improperly determined that in this case, “the terms of the AVC replace[d]” the notice and hearing requirements provided by MAPA. GRE Br. 34, App. Tab 12 at 409-410 (emphasis added). GRE’s opening brief set forth three reasons why this ruling is incorrect. GRE Br. 34-36. The AG’s response fails to address any of those three arguments. AG Br. 15-16.

Lastly, the AG’s comments about the bargaining position of the parties at the time the AVC was entered, mischaracterize the facts and law.<sup>13</sup>

---

<sup>13</sup> The AG maintains that “[i]n 2003, the State of Montana received a judgment against GRE and an injunction preventing GRE from selling tobacco products in Montana until it was back in compliance with Montana law.” AG Br. 1. Because of the 2003 decision, according to the AG (who did not submit the 2003 order into the record), when the AVC was negotiated, “[t]he AG was under no obligation to allow GRE to sell its tobacco products in Montana *ever again*.” AG Br. 15 (emphasis added). This is false. In fact, the 2003 injunction was not indefinite, but lasted for a period of two years, as limited by Mont. Code Ann. § 16-11-403(2)(c)(iii), and the AVC settlement agreement therefore did not include (nor require) any provision to vacate any existing injunction. The 2003 judgment was also entered by default rather than on the merits. *See* TEU Response to GRE Motion for TRO and Preliminary Injunction (Doc. Seq. 7) at 6 (AG suit was “for failure to deposit escrow” and AG cited the prior *Order and Judgment by Default*). (Further, in separate litigation, GRE disputed Montana’s authority to require GRE to comply with its escrow statutes, under which the AG brought the 2003 action. *Grand River Enterprises Six Nations, Ltd. v. Pryor et al.*, No. 02 Civ. 5068IJFK, 2003 WL 25749945 (S.D.N.Y. filed July 1, 2002, amended Oct. 23, 2003). GRE’s case against Montana was resolved by the AVC. GRE Br., App. Tab 1 at ¶ 6. In a separate case, GRE later prevailed on the issue of whether a state had jurisdiction over GRE. *South Dakota v. Grand River Enterprises Six Nations, Ltd.*, 757 N.W.2d 305 (S.D. 2008) (GRE not subject to in-state jurisdiction for purposes of enforcement of escrow deposit requirements).

### **B. GRE Will Suffer Irreparable Harm Absent an Injunction.**

GRE suffers irreparable harm each day its products remain banned from the market. GRE Br. 37, App. Tab 2 at 12 ¶ 8-9. Damage to GRE's reputation, goodwill, relationships, and market share constitute irreparable injuries. *Doe v. Cmty. Med. Ctr., Inc.*, 2009 MT 395, ¶ 37, 353 Mont. 378, 221 P.3d 651 (damage to reputation constitutes irreparable injury); *Four Rivers Seed Co. v. Circle K Farms, Inc.*, 2000 MT 360, ¶¶ 17-18, 303 Mont. 342, 16 P.3d 342 (approving the district court's finding that "once the reputation of the seed potato variety is tainted, it is difficult or impossible to repair that reputation"). Furthermore, "[t]he loss of a constitutional right constitutes harm or irreparable injury for the purposes of issuing a preliminary injunction." *Netzer L. Off., P.C. v. State by & through Knudsen*, 2022 MT 234, ¶ 20, 410 Mont. 513, 520 P.3d 335 (citing *Mont. Democratic Party v. State*, 2020 MT 244, ¶ 15, 401 Mont. 390, 472 P.3d 1195). The AG's response fails to address these types of irreparable harm. AG Br. 16-17.

### **C. The Balance of Hardships and Public Interest Tips in GRE's Favor.**

The balance of hardships and the public interest tip sharply in GRE's favor. The AG will not suffer any hardship if a preliminary injunction is issued to maintain the status quo. The GRE brand families listed on the directory as of June 14, 2023, are lawful products that have been listed on the directory for over a

decade. GRE Br. 37, App. Tab 7 at 130 ¶ 3. The AG does not dispute the fact that he will suffer no hardship if an injunction is entered. AG Br. 17. Indeed, an injunction will merely return the parties to the status quo that has been in place for nearly 10 years. In contrast, absent an injunction, GRE will continue to suffer damage to its reputation, goodwill, relationships, and market share that have taken years to establish. GRE will also continue to suffer the continued violation of its rights.

Turning to the public interest, the AG argues, without citing any authority, that the “public has an interest in punishing companies that repeatedly break the law.” AG Br. 18. Yet, neither the FDA nor a federal court has determined GRE violated federal law as the AG alleges (much less any material breach of the AVC). The AG next argues that “the public has an interest in the safety of the products it consumes.” AG Br. 18. What the AG fails to acknowledge, however, is that if GRE were returned to the directory today, none of the eight brand styles lacking current FDA approval would re-enter the stream of commerce.<sup>14</sup> The AG has never claimed that GRE’s Seneca and Opal brands listed on the directory as of June 16, 2023, were unsafe for human consumption under the FDCA.

---

<sup>14</sup> GRE never sold the eight brand styles after GRE withdrew them from FDA review in 2020. GRE Br. 9, n.14 (“GRE did not manufacture or export to the U.S. any of the eight products after it withdrew them from FDA review. App. Tab 7 at 131 ¶¶ 7-8.”). It is undisputed that manufacture and export of the eight brand styles was legal under the FDCA.

Here, the only relevant public interest is in ensuring that the AG does not exceed his statutory authority or otherwise violate the law or the rights of businesses that seek to compete in the marketplace. *Jacksonville Port Auth. v. Adams*, 556 F.2d 52, 59 (D.C. Cir. 1977) (“[T]here is an overriding public interest . . . in the general importance of an agency’s faithful adherence to its statutory mandate”); *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) (“There is generally no public interest in the perpetuation of unlawful agency action.”); *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) (“the Constitution is the ultimate expression of the public interest”).

### **CONCLUSION**

GRE is entitled to a preliminary injunction. GRE requests the Court reverse the district court and direct it to enter a preliminary injunction prohibiting the AG from implementing its June 14, 2023 decision to remove GRE from the Montana tobacco directory, and preserving the status quo as it existed prior to June 14, 2023, pending final resolution of this matter.

DATED this 19th day of March, 2024.

/s/ Michael G. Black  
*Counsel for Grand River Enterprises Six Nations, Ltd.*

## **CERTIFICATE OF COMPLIANCE**

I certify that, pursuant to Mont. R. App. P. 11(4), this reply brief is proportionately spaced, has a typeface of 14 points or more, and contains 4,229 words, as determined by the undersigned's word processing program.

/s/ Michael G. Black  
*Counsel for Grand River Enterprises Six Nations, Ltd.*

## **CERTIFICATE OF SERVICE**

I, Michael G. Black, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 03-19-2024:

Michael H. Hekman (Attorney)  
350 Ryman St  
PO Box 7909  
Missoula MT 59807  
Representing: Grand River Enterprises Six Nations, Ltd.  
Service Method: eService

Kelli J. Keegan (Attorney)  
7424 4th Street NW  
Los Ranchos de Albuquerque NM 87107  
Representing: Grand River Enterprises Six Nations, Ltd.  
Service Method: eService

Robert C. Lukes (Attorney)  
Garlington, Lohn & Robinson, PLLP  
P.O. Box 7909  
Missoula MT 59807  
Representing: Grand River Enterprises Six Nations, Ltd.  
Service Method: eService

Terisa Marie Oomens (Govt Attorney)  
1712 9th Avenue  
HELENA MT 59601-4522  
Representing: Department of Justice  
Service Method: eService

Kali L. Griffin (Govt Attorney)  
555 FULLER AVE  
HELENA MT 59601-3394  
Representing: Department of Justice  
Service Method: eService

Electronically Signed By: Michael G. Black

Dated: 03-19-2024