UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

THE CITY OF NEW YORK

Plaintiff,

-against-

Civil Action No.
06-CV 3620 (CBA)

MILHELM ATTEA & BROS., INC.,
DAY WHOLESALE, INC.,
GUTLOVE & SHIRVINT, INC.,
MAURO PENNISI, INC.,
JACOB KERN & SONS, INC.,
WINDWARD TOBACCO, INC.,
and CAPITAL CANDY COMPANY, INC.

Defendants.

JOINT MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

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DEFENDANTS' JOINT MEMORANDUM OF LAW

Civil Action No.
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PRELIMINARY STATEMENT

Defendants Milhelm Attea & Bros., Inc. ("Attea"), Gutlove & Shirvint, Inc. ("Gutlove"), Mauro Pennisi, Inc. ("Pennisi"), Jacob Kern & Sons, Inc. ("Kern"), Windward Tobacco, Inc. ("Windward"), and Capital Candy Company, Inc.("Capital") submit this joint memorandum of law in support of their motion to dismiss the plaintiff's amended complaint filed March 5, 2007. Defendant Day Wholesale, Inc. ("Day") is submitting a separate memorandum of law.

The City of New York (the "City") seeks to enjoin defendants for business practices that are not unlawful. While the New York State Department of Taxation and Finance and representatives of the Governor continue to negotiate the thorny political issues of taxing cigarette sales to Indian nations and tribes, the City has elected to hale defendants into this Court, seeking to litigate a state political question which this Court cannot resolve. The instant case presents, and can be resolved

upon, a question of law: whether New York State requires wholesale cigarette dealers licensed by the State to affix New York State tax stamps to cigarettes sold to sovereign Indian Nations and Native Americans.

The federal claim in the Amended Complaint, like the claim in the nearly identical original Complaint, hinges on the assertion that cigarettes sold by defendants to Native Americans are "contraband" because they do not bear required New York State tax stamps. The plaintiff's claim fails as a matter of law because New York State, through the relevant executive body, the New York State Department of Taxation and Finance, does not require that such cigarettes bear tax stamps. As a result, the cigarettes in question are not contraband, as a matter of law, and the plaintiff's claim that defendants are violating the Contraband Cigarette Trafficking Act should be dismissed.

Plaintiff's remaining claims should be dismissed because there is no reason for the Court to exercise supplemental jurisdiction over purely state law claims. Substantively, the supplemental claims fail as a matter of law. The City's claim that defendants are violating New York State's Cigarette Marketing Standards Act depends on the same faulty premise - that cigarettes sold by defendants to Native Americans must bear New York State Tax stamps, something that New York State does not now require. Plaintiff's third claim, for nuisance, does not meet the elements of that tort.

STATEMENT OF THE CASE

Defendants are wholesale dealers of cigarettes, licensed under New York Tax Law §480, and agents appointed by the New York State Tax Commission to purchase and affix cigarette tax stamps pursuant to New York Tax Law § 471. Defendants sell cigarettes wholesale to Indian Nations and Indian vendors on Indian reservations located within the territorial boundaries of New York State. Defendants report their sales to Indians on separate schedules "E" attached to their

monthly Cigarette Tax Returns filed with the New York State Department of Taxation and Finance ("The Department").

The City's sole federal claim, brought pursuant to 2006 amendments to the federal Cigarette Contraband Trafficking Act (18 U.S.C. § 2341, et seq.), seeks to enjoin defendants from making remote sales of unstamped cigarettes to Indian nations and Indian vendors. The plaintiff also seeks damages for lost cigarette excise taxes imposed by the City, claiming that unstamped cigarettes sold to Indians outside the City are ultimately resold to New York City residents without affixing City tax stamps. The claim fails as a matter of law because the statute does not apply, by its express terms, to licensed wholesalers such as defendants, or to transactions involving Indians.

In 2005, Governor George Pataki signed into law an amendment to the New York State Tax Law addressing the issue of the taxes to be paid on the sale of cigarettes to Native American reservations. *See* N.Y. Tax L. § 471-e. An important facet of the legislation was the creation of a system of "Indian tax-exemption coupons" that would be distributed to the governing bodies of recognized Native American nations to ensure that those nations could obtain tax-exempt cigarettes for use of members of the nation. Significantly, the new legislation was to:

> Take effect March 1, 2006, provided that any actions, rules and regulations necessary to implement the provisions of this act on its effective date are authorized and directed to be completed on or before such date.

L. 2005, c. 61, pt. K, § 7, as amended by L. 2005, c. 63, pt. A, §4. The Department has not yet promulgated any rules, regulations, or advisory bulletins, let alone issued the actual tax exempt coupons, that are necessary for the amended § 471-e to take effect.

On March 16, 2006, the Tax Department issued Advisory Opinion TSB-A-06(2)M ("Advisory Opinion") based on the petition of Defendant Attea. The Advisory Opinion (see

Murphy Affirmation, Exhibit B) stated that it "would be premature to begin enforcement" until deficiencies in the 2005 Tax Amendment "are addressed and considered." Moreover, the Advisory Opinion reaffirmed "long-standing policy" that allowed "untaxed cigarettes to be sold from licensed stamping agents to recognized Indian Nations and reservation-based retailers making sales from qualified Indian reservations." Furthermore, the Advisory Opinion addressed the specific question of whether the Department intended to issue assessments to stamping agents such as defendants for sales of unstamped cigarettes "to Indian Nations and Indian retailers making sales from reservations after March 1, 2006." The Department stated that it had a "long-standing policy" of forbearing assessment on such sales and that, even in light of the enactment of § 471-e, "the Department will not issue such assessments with respect to transactions occurring during the period of forbearance as that would be inconsistent with the State's long-standing policy."

Enforcement of Tax Law §471-e was ultimately enjoined in *Day Wholesale, Inc. v. State of New York*, Index No. 2006/7688 (Sup. Ct. Erie Co., Sconiers J., January 2, 2007). Following the *Day Wholesale* decision, the City deleted all explicit references to Tax Law §471-e in the Amended Complaint.

The City seeks, through this lawsuit, the authority to supplant the Department as the principal state authority for the collection of tobacco-related taxes. The State's Indian forbearance policy, defended in briefs submitted by the New York Attorney General to the New York Court of Appeals and the United States Supreme Court, has been scrutinized and approved by the New York Court of Appeals. While the City may be unhappy with the Department's decision, it should not be permitted to use the federal civil litigation system to bludgeon lawfully operating businesses in order to register its displeasure with the State's policy.

Accordingly, defendants respectfully submit that the Amended Complaint should be

dismissed for the City's failure to state claims upon which relief can be granted. Both the City's claim that defendants violated the federal Contraband Cigarette Trafficking Act, § 18 U.S.C. 2341 *et seq.*, (the "CCTA") and its supplemental claim that they violated the New York State Cigarette Marketing Standards Act, N.Y. Tax L. § 483 *et seq.*, (the "CMSA") are dependent on the assumption that defendants' sales of unstamped cigarettes to Indians violate the requirements of New York State's government. As this premise is plainly erroneous, these claims fail as a matter of law. In addition, the City seeks to bolster this tax dispute with a supplemental claim that defendants' actions contribute to a public nuisance. This theory has been considered by a federal court previously and roundly rejected.

The Contraband Cigarette Trafficking Act

In legislation extending the Patriot Act, signed by President Bush on March 9, 2006, Congress amended the Contraband Cigarette Trafficking Act ("CCTA"), originally enacted in 1978 to restrict the transport of contraband cigarettes in interstate commerce. The CCTA, as amended in 2006, defines contraband cigarettes at 18 U.S.C. §2341(2) in relevant part as follows:

> the term "contraband cigarettes" means a quantity in excess of 10,000 cigarettes, which bear no evidence of the payment of applicable State or local cigarette taxes in the State or locality where such cigarettes are found, if the State or local government requires a stamp, impression, or other indication to be placed on packages or other containers of cigarettes to evidence payment of cigarette taxes, and which are in the possession of any person other than
>
> * * *
>
> (c) a person
>
> (i) who is licensed or otherwise authorized by the State where the cigarettes are found to account for and pay cigarette taxes imposed by such State and
>
> (ii) who has complied with the accounting and payment requirements relating to such license or authorization with respect to the cigarettes involved.

The 2006 CCTA amendments also created a right to bring an action to prevent and restrain

violators of the CCTA by states, local governments and persons holding federal tobacco importing or manufacturing permits, however, no civil action pursuant to the CCTA may be commenced by a local government or a state against an Indian tribe or an Indian in Indian country [18 U.S.C. § 2346(b)(1)]. Nothing in the CCTA shall be deemed to abrogate or constitute a waiver of any sovereign immunity of an Indian tribe against any unconsented lawsuit or to restrict, expand, or modify any sovereign immunity of an Indian tribe [18 U.S.C. § 2346(b)(2)]. Further, nothing in the CCTA shall be construed as expanding, restricting or modifying rights of state or local officials to proceed in state court or to take enforcement action based on violations of state or local law. 18 U.S.C. § 2346(b)(4) and (5).

Summarized History of New York's Indian Policy

In the mid-1980's, the Department sought to require persons purchasing cigarettes (or motor fuel) on Indian reservations to pay state taxes on such purchases. See *Herzog Brothers Trucking, Inc. v. State Tax Commission*, 69 N.Y.2d 536, 516 N.Y.S.2d 179 (1987), vacated and remanded, 487 U.S. 1212, 1085 S. Ct. 2861 (1988), on remand 72 N.Y.2d 720, 536 N.Y.S.2d 416 (1988), (holding that the Department's motor fuel tax scheme which covered all sales with no exception for sales to Indians was preempted by the federal Indian Trader laws).

In 1988, New York adopted regulations which provided for a quota system to allow cigarettes to be sold to reservation retailers tax free for sale to Indians. Defendant Attea obtained a judgment enjoining application of the Department's quota scheme. The Appellate Division, Third Department, affirmed and the Court of Appeals denied review. *Milhelm Attea & Bros., Inc. v. Department of Taxation and Finance,* 164 A.D.2d 300, 564 N.Y.S.2d 491 (3d Dept. 1990), appeal dismissed, 77 N.Y. 2d 989, 571 N.Y.S.2d 914 leave to appeal denied 78 N.Y.2d 858, 575 N.Y.S.2d 454 (1991). The United States Supreme Court granted certiorari (502 U.S. 1053,112 S.Ct. 926)

in a summary reconsideration order, and remanded the case to the Appellate Division, which then reversed itself. 181 A.D.2d 210, 585 N.Y.S.2d 847 (3d Dept. 1992). The Court of Appeals unanimously reversed the Appellate Division, holding that the Indian Trader Statutes (25 U.S.C. §261 *et seq*.) preempted the field and that the regulations unlawfully imposed significant burdens on wholesale trade with Indians. *Milhelm Attea & Bros., Inc. v. Department of Taxation and Finance of the State of New York*, 81 N.Y.2d 417, 599 N.Y.S.2d 510 (1993). The United States Supreme Court unanimously reversed the Court of Appeals. *Department of Taxation and Finance v. Milhelm Attea & Bros., Inc.* ("*Attea*"), 512 U.S. 61, 114 S. Ct. 2028 (1994), but observed that the narrow question decided "does not require us to assess for all purposes each feature of the New York tax enforcement scheme that might affect tribal self-government or federal authority over Indian affairs" and that such provisions "may present significant problems to be addressed in some future proceeding." 512 U.S. at 70, 114 S.Ct. at 2304.

Following the Supreme Court's decision in *Attea*, the Department retooled its regulations to allow exempt Indian nations or tribes to enter into tax compacts with the State and proposed a plan to register reservation vendors. The regulations at issue in Attea were ultimately repealed. See, Notice of Adoption, N.Y. St. Reg., April 29, 1998, pp. 22-24 (explaining that the Department repealed the regulations after determining that there was no practical way to enforce them).

On May 22, 1997, Governor George Pataki announced that enforcement of the State's tax and regulatory laws on reservations offended tribal sovereignty and that New York would no longer attempt to enforce its tax laws on Indian lands.

Convenience stores and their representatives sued the New York Tax Commissioner in 1995 to compel enforcement of the Tax Law with respect to reservation sales of tobacco and motor fuel. The New York Court of Appeals held that the Department's policy of forbearance was rationally

based on sensitivity to tribal sovereignty and the complex restrictions imposed by the Indian Trader laws. *Matter of New York Association of Convenience Stores v. Michael H. Urbach as Commissioner of the Department of Taxation and Finance of the State of New York*, 92 N.Y.2d 204, 677 N.Y.S.2d 280 (1998), on remand 181 Misc.2d 589, 694 N.Y.S.2d 885 (S. Ct. Albany Co. 1999), affirmed 275 A.D.2d 520, 712 N.Y.S.2d 220 (3rd. Dept. 2000), appeal dismissed for want of a substantial constitutional question 95 N.Y.2d 931, 721 N.Y.S.2d 606 (2000), leave to appeal denied, 96 N.Y.2d 717, 730 N.Y.S.2d 790, certiorari denied *sub nom.*, *New York Association of Convenience Stores v. Roth*, 534 U.S. 1056, 122 S.Ct. 647, (2001).

On remand, the Third Department upheld the State's non-enforcement policy, based on the State's position that the tax statutes cannot effectively be enforced without the cooperation of the Indian Nations. *New York Association of Convenient Stores v. Urbach*, 275 A.D.2d 520, 712 N.Y.S.2d 220 (3d Dept. 2000) (determining that respondents could not enforce the taxes without the cooperation of the tribes and that the interception and seizure of shipments resulted in civil unrest).

In 2005 (Laws of 2005, Chapter 61), the Legislature adopted amendments to § 471-e of the Tax Law to establish a coupon redemption system for sales to Indians on reservations, effective March 1, 2006. The 2005 amendment to Tax Law §471-e explicitly replaced a system whereby the tax commission was to promulgate rules and regulations to implement cigarette tax collection on reservations, with an explicit system for establishing tax exempt coupons for "qualified Indians."

After defendant Day advised this Court that enforcement of Tax Law §471-e had been enjoined in a decision by New York State Supreme Court Justice Rose Sconiers in the *Day Wholesale* matter, the City filed its Amended Complaint. Justice Sconiers preliminarily enjoined enforcement of §471-e pending the Department's adoption of the necessary rules and regulations to implement and distribute Indian tax exemption coupons to the recognized governing bodies of

the various Indian Nations. *Day Wholesale, Inc. v. State of New York,* Index No. 2006-7668, February 20, 2007 (Erie Co. Sup. Ct.). The Department has not yet issued Indian tax exemption coupons or proposed or issued rules or regulations regarding same.

As noted above, on March 16, 2006, in response to defendant Attea's petition, the Department issued Advisory Opinion TSB-A06(2)(M) which confirmed the State's non-enforcement policy.

In *New York Association of Convenience Stores v. Pataki*, Index No. 2915-06, slip. op. (Albany Co. Sup. Ct. Nov. 17, 2006, Kavanagh, J.) five of the defendants in this lawsuit, the Department, and Governor Pataki were sued by convenience store owners and lobbyists in another challenge to the State's forbearance policy. The State Supreme Court dismissed the petition on the grounds that the petitioners' alleged economic and competitive injuries were not within the zone of interests protected by the State's Tax Law.

In a companion case, the County of Seneca brought an Article 78 proceeding against the State Tax Commissioner, Governor Pataki, and five of the defendants herein to compel the Department to abandon the State's forbearance policy, claiming damages due to lost local sales tax revenues. *County of Seneca v. Eristoff,* Index No. 3172-06 slip. op. at 1 (Albany Co. Sup. Ct. Nov. 11, 2006) (Docket Entry #41). Albany County Supreme Court Justice Michael Kavanagh held that Seneca County did not have the legal capacity to challenge the State's policy and dismissed the petition.

STATEMENT OF FACTS

Accepting for purposes of this motion the well-pleaded allegations of the Amended Complaint, defendants are licensed wholesale cigarette dealers, appointed by the Department as state

agents to pre-collect state cigarette taxes and to affix tax stamps on cigarettes sold at retail in the State (Am. Compl. ¶ 2, ¶¶ 8-14). Defendants sell unstamped cigarettes to Native American sellers who sell unstamped cigarettes to State residents, including New York City residents (Am. Compl. ¶¶29, 31-35, 38-43, 50). The term "reservation seller" is defined at Tax Law §470(17) as a cigarette retail business operated by an Indian nation, a member of the Nation or an entity wholly owned by an Indian Nation or which sells cigarettes on qualified reservation members.

The City alleges that defendants' sales of unstamped cigarettes allow sellers supplied by defendants to market cigarettes at lower prices, which induces city residents to purchase unstamped cigarettes outside the City, over the Internet, or by mail, fax and telephone, thereby replacing sales that would otherwise generate significant City tax revenues (Am. Compl., ¶¶ 3-5, 39).

The City alleges that defendants have constructive and actual knowledge that the large quantities of cigarettes they sell to Native American cigarette sellers exceed the amounts required for personal consumption by tribal members, an issue which has been the subject of state legislative and executive action, legislative hearings, communications from the State Attorney General to the defendants, litigation in which some or all of the defendants have been made parties, and considerable media attention, citing a 2002 *New York Times* news article (Am. Compl., ¶¶ 31-35).

The City claims that the purchase of unstamped cigarettes by its residents results in millions of dollars in lost City cigarette tax revenues (Am. Compl., ¶¶ 1, 44, 51). The City asserts that defendants: (i) have violated the CCTA by shipping 10,000 or more cigarettes under circumstances in which the State of New York requires that they bear tax stamps; and (ii) have aided and abetted violations of the CCTA by cigarette sellers operating on Native American reservations, knowing that such persons intend to resell such cigarettes to the public (Am. Compl., ¶¶ 49, 50).

According to the City, the majority of online cigarette merchants are located in Native

American territory, and that unstamped cigarettes sold by defendants to reservation retailers outside the city are trucked back into the City by "buttleggers" for subsequent resale to city residents (Am. Compl., ¶¶ 40-41). The City also alleges that City residents travel to Native American reservations to purchase cigarettes on reservation lands (Am. Compl., ¶ 42).

With respect to the New York Cigarette Marketing Standards Act, the City alleges that defendants violate the CMSA because the prices they charge do not include costs associated with the payment of cigarette tax stamps "required by law" (Am. Compl., ¶¶ 36-37). The City's common law public nuisance claim alleges generally that defendants interfere with rights common to the general public, with commerce, and the quality of daily life, and endanger the health and safety of large numbers of residents of the State and the City by selling unstamped cigarettes to numerous Native American cigarette sellers for resale over the Internet, by mail, fax, and telephone (Am. Compl. ¶¶ 60-65).

In its *ad damnum* clause, the City seeks an award of the amount of City excise and sales taxes lost as a result of the alleged violations of the CCTA and the CMSA.

ARGUMENT

POINT I

THE AMENDED COMPLAINT SHOULD BE DISMISSED PURSUANT TO RULE 12(B)(6) FOR FAILURE TO STATE A CLAIM FOR RELIEF AGAINST ANY OF THE DEFENDANTS.

Although a motion to dismiss pursuant to F.R.Civ.P. Rule 12(b)(6) may not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), the district court must "assess the legal feasibility of the Complaint." *Cooper v. Parsky*, 140 F.3d 433, 440 (2d Cir.1998). In reviewing a Rule 12(b)(6) motion, while the court must accept as true all factual allegations in the Complaint, consider documents attached thereto or incorporated by reference therein, and draw therefrom all reasonable inferences in favor of the plaintiff (*Id.*), legal conclusions are not proper substitutes for sufficient factual allegations. *ECC v. Toshiba America Consumer Products, Inc.*, 129 F.3d 240, 243 (2d Cir.1997).

Even assuming that the City's alleged facts are true, principally that the defendants sell large quantities of unstamped cigarettes to Indian nations and reservation sellers and that some of those cigarettes end up in New York City, as a matter of law, the City's Amended Complaint still fails to state a claim upon which relief can be granted.

A. Defendants Are Not Dealing in Contraband Cigarettes

The Contraband Cigarette Trafficking Act ("CCTA") prohibits possession or dealing in "contraband cigarettes,"defined in 18 U.S.C. §2341(2) in pertinent part as follows:

> **(2)** the term "contraband cigarettes" means a quantity in excess of 10,000 cigarettes, which bear no evidence of the payment of applicable State or local cigarette taxes in the State or locality where such cigarettes are found, if the State or local government requires a stamp, impression, or other indication to be placed

> on packages or other containers of cigarettes to evidence payment of cigarette taxes, . . . (emphasis supplied).

Pursuant to 18 U.S.C. § 2341(2)(c), the CCTA does not apply to licensed manufacturers, common carriers, or entities (such as defendants) licensed to pay cigarette taxes by the state, who have complied with all state accounting and payment requirements. Unstamped cigarettes are "contraband cigarettes" only if the State or local government requires stamps to be affixed to the packages. 18 U.S.C. §2341(2). New York State's government, by the Department, allows unstamped cigarettes to be sold by State licensed stamping agents (such as defendants) to recognized Indian Nations and Indian vendors. Consistent with the Department's policy, defendants, as state agents licensed to account for and pay state cigarette taxes, comply with their accounting and payment requirements by filing monthly reports to the Department, including Schedule E to such reports which list monthly sales to Indian vendors. Accordingly, unstamped cigarettes, in the possession of defendants or their Indian customers, do not meet the CCTA's definition of contraband cigarettes.

Plaintiff's focus on the statutory language is misdirected. The CCTA does not provide for or reference state legislation as being determinative. Instead, Section 2341(2) references the requirements of State "government", thereby incorporating the executive branch's enforcement policies. New York's Court of Appeals has held that the Department has the discretion not to apply a tax statute to Indian transactions. *Matter of New York Association of Convenience Stores v. Michael H. Urbach as Commissioner of the Department of Taxation and Finance of the State of New York*, 92 N.Y.2d 204, 677 N.Y.S.2d 280 (1998), on remand 181 Misc.2d 589, 694 N.Y.S.2d 885 (S. Ct. Albany Co. 1999), affirmed 275 A.D.2d 520, 712 N.Y.S.2d 220 (3rd. Dept. 2000), appeal dismissed for want of a substantial constitutional question 95 N.Y.2d 931, 721 N.Y.S.2d 606 (2000),

leave to appeal denied, 96 N.Y.2d 717, 730 N.Y.S.2d 790, certiorari denied sub nom. *New York Association of Convenience Stores v. Roth*, 534 U.S. 1056, 122 S. Ct. 647 (2001). Hence, as a matter of law, cigarettes sold by defendants to Indian customers are not contraband within the meaning of the CCTA.

B. The CCTA Does Not Authorize an Action by the City to Regulate Transactions in Indian Country

No civil action pursuant to the CCTA may be commenced by a local government or a state against an Indian tribe or an Indian vendor in Indian country. 18 U.S.C. § 2346(b). The CCTA, at 18 U.S.C. § 2346(b)(2), further provides that nothing in the CCTA shall be deemed to abrogate or constitute a waiver of any sovereign immunity of an Indian tribe against any unconsented lawsuit or to modify any sovereign immunity of an Indian tribe.

Since the City claims arise from harm allegedly attributable to cigarette sales by Indian reservation sellers, the plaintiff's indirect attack on Indian commerce is barred by the statutory prohibition on claims affecting Indian sovereignty and should be dismissed as a matter of law. The City's amended complaint also fails to allege activity in interstate commerce required for federal jurisdiction under the CCTA. S. Rep. No. 95-962, at 3 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5518 (CCTA [P.L. 95-575,18 U.S.C. §§ 2341-2346] addresses the problem of interstate cigarette bootlegging).

The 2006 CCTA amendments introduced by North Carolina Representative Howard Coble as an amendment to the bill extending the Patriot Act (Pub.L. 109-177, 120 Stat. 192) were modified to exclude Indians from the statute's reach after several members expressed concern that the statute may impede the federal policy of supporting Indian sovereignty. House Judiciary Committee Chairman James Sensenbrenner, ranking member John Conyers, and other members uniformly

commented that the statute was not designed to restrict Indian tobacco trade. 151 Cong. Rec. H6273-04, 2005 WL 1703380 (July 21, 2005).

Representative Coble offered a modification to provide that no civil action may be commenced against an Indian tribe, or an Indian in an Indian country, and to amend the CCTA to provide that nothing in the chapter shall be deemed to abrogate or constitute a waiver of any sovereign immunity of an Indian tribe or to restrict, expand or modify any sovereign immunity of an Indian tribe. There was no objection to the request to modify the amendment. *Id.* at H6283.

House Judiciary Committee Chairman James Sensenbrenner then stated that "as a result of the modification that the gentleman from North Carolina has proposed, there is no longer a question of tribal sovereignty. That has been taken care of in the modification." *Id.* at page H6284.

Messrs. Scott and Cantor of Virginia indicated that modifications were made to "make sure that there is no impact on tribal sovereignty." *Id.* Ranking member John Conyers noted his appreciation for the sponsoring representative's offer of language to mitigate concerns over the amendment's impact on tribal sovereignty:

> As initially drafted, the amendment by Mr. Coble could have had the unintended effect of targeting tribal governments who are legitimately involved in the retailing of tobacco products. With the help of Mr. Cole, and other members, Mr. Coble has modified his amendment and has incorporated language that will go a long way to protecting tribal governments and tribal sovereignty. Specifically, a provision stipulating that enforcement against tribes or in Indian country, as defined in Title 18, Section 1151, will not be authorized by the pending bill that has been incorporated.
>
> Support for tribal sovereignty is a bi-partisan issue and collectively the Congress will continue to defend that fundamental principle of law.

Id. (See also Statement of Rep. Kildee, *Id*. at page H6285).

When read together with express language providing that nothing contained in the CCTA

shall be construed to expand, restrict, or otherwise modify any right of authorized state or local government officials to proceed in state court, or take other enforcement actions on the basis of an alleged violation of state or other law, the intent of Congress was clear. The CCTA amendments had nothing to do with commerce in Indian country and cannot be used as justification by the City to bring the instant lawsuit.

C. The City has No Claim Against Defendants Absent Allegations of Sales by Defendants to Dealers or Consumers in New York City

Article 29 of the Tax Law fails to provide any statutory basis for the City to proceed against defendants based on an alleged failure to pay or collect City cigarette taxes, on remote sales to Indian vendors. Defendants Attea, Day, Kern, Windward, and Capital are not licensed by the City of New York, nor do they conduct any business in the City of New York. The Amended Complaint does not allege that any of the defendants have sold any unstamped cigarettes to anyone in New York City. Instead, the Amended Complaint alleges that Defendants have failed to affix tax stamps to cigarettes sold to reservation sellers. Am. Comp. ¶¶ 29, 34, 41, 42, 44, 50.

Pursuant to State enabling legislation (N.Y. Unconsolidated Law § 9436), the New York City Administrative Code requires stamping agents to affix State/City joint tax stamps to cigarettes "prior to delivery of such cigarettes to any dealer in the city." N.Y.C. Admin. Code § 11-1305 (a). The New York City Cigarette Tax does not apply to sales from wholesalers or licensed agents outside New York City to dealers located outside of New York City. See NYC Administrative Code § 11-1302; Title 19 § 4-20 of the Rules of the City of New York.

Because the City fails to allege any facts to trigger application of the City's Tax laws to transactions outside New York City involving reservation sellers, the Complaint should be dismissed as a matter of law for failure to state a cause of action against any of the defendants.

POINT II

THE CITY LACKS LEGAL CAPACITY AND STANDING.

The City lacks legal capacity to sue defendants, agents licensed by the Department, to challenge the Department's policy of forbearance from collecting cigarette taxes on wholesale sales to Indian reservations. *City of New York v. State of New York*, 86 N.Y.2d 286, 289-290, 631 N.Y.S.2d 553 (1995); *County of Seneca v. State of New York, Milhelm Attea & Bros., Inc et al.*, Index No. 3172-06 (Sup. Ct. Albany Co., Kavanagh, J., 2006). To avoid repetition, the comprehensive arguments made in defendant Day's Memorandum of Law on the issues of capacity and standing are incorporated herein by reference.

POINT III

THE AMENDED COMPLAINT SHOULD BE DISMISSED PURSUANT TO RULE 12(B)(1) FOR LACK OF SUBJECT MATTER JURISDICTION.

Apart from the City's failure to state a federal claim, unless and until the State's forbearance policy changes, there is no present case or controversy to adjudicate in federal court. Article III courts, as courts of limited federal jurisdiction, cannot issue advisory opinions or resolve non-justiciable political questions. Erwin Chemerinsky, *Federal Jurisdiction* § 2.2, at 48-50 (3d ed.1999); s*ee, e.g. Clinton v. Jones*, 520 U.S. 681, 700 & n. 33 (1997) (citing *Hayburn's Case*, 2 Dall. 408 (1792) and *United States v. Ferreira,* 13 How. 40 (1852)); *Flast v. Cohen,* 392 U.S. 83, 95 (1968) (the "business of federal courts" is limited "to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process"); *Glidden Co. v.. Zdanok*, 370 U.S. 530, 587 (1962) (Clark, J., concurring)

As noted above, since the City's entire case is premised on its refusal to go along with the

Department's policy, the Court should decline the City's invitation to determine, in the instant case, that the State's Indian policy is something different than the clear policy delineated in the Advisory Opinion.

Lacking any independent basis for federal jurisdiction, the City's claims under the New York Cigarette Marketing Standards Act and for common law nuisance should also be dismissed for lack of subject matter jurisdiction.

The exercise of supplemental jurisdiction is left to the discretion of the district court, 28 U.S.C. § 1367(a)(c); see also *Travelers Ins. Co. v. Keeling,* 996 F.2d 1485, 1490 (2d Cir.1993). Section 1367(c) of Title 28 provides, in part, that a district court may decline to exercise supplemental jurisdiction over a claim where "the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. 1367(c)(3). "[I]f the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." *Castellano v. Board of Trustees, et al,* 937 F.2d 752, 758 (2d Cir.1991). Since the City's federal claim is insufficient to state a claim on which relief can be granted, the Court need not address the viability of the City's state law claims and should refuse to exercise supplemental jurisdiction.

POINT IV

THE COURT SHOULD ABSTAIN FROM ADJUDICATING A MATTER OF STATE POLITICS.

The Supreme Court has recognized that, in situations such as this, it may be highly appropriate or necessary for a federal court to abstain from exercising jurisdiction and refer the case to state court rather than construe unsettled state law. A district court's decision to abstain is appropriate (1) to avoid a federal constitutional issue where that issue may be mooted or altered by a state-court ruling on the state-law question, *R.R. Comm'n of Texas v. Pullman Co.*, 312 U.S. 496

(1941); (2) to avoid hindrance of such state functions as criminal prosecutions or the collection of state taxes, *Younger v. Harris*, 401 U.S. 37 (1971); (3) to defer to state resolution of difficult state-law questions that involve local regulation and administration or important matters of local public policy, *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); or (4) to conserve federal judicial resources where there is concurrent state-court litigation whose resolution could result in "comprehensive disposition of litigation," *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). The latter two situations apply here where the core issue is whether and how to impose and collect taxes on cigarettes sold by Native Americans to non-Native Americans. This issue is undeniably the subject of significant local regulation and concurrent state-court litigation. Accordingly, the Court should abstain from exercising its jurisdiction under either or both abstention doctrines.

A. <u>The Important and Complicated State Regulatory Scheme Involved Here Compels the Court to Abstain</u>

The "*Burford* doctrine" directs a district court to decline to adjudicate difficult questions of state law involving a state regulatory scheme and bearing on substantial public policy matters whose import extends beyond the particular case. *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

The Supreme Court explained that the *Burford* doctrine applies:

> (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"; or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 361 (1989) (quoting *Colorado River*, 424 U.S. at 814). This case falls into both categories, as it involves a difficult state law question of significant public importance and interest and the state is currently attempting to

establish a policy that will resolve the dispute.

In *Burford*, the plaintiff challenged the constitutionality of the procedure by which Texas regulated oil and gas production. The subject was complicated and "specialized knowledge" was required for the administration of the system. 319 U.S. at 326. The court abstained from exercising jurisdiction to avoid the "confusion" that may arise with multiple review of the same general issues, concluding that deciding the state claims would have had an impermissibly disruptive effect on the state's policy and its efforts to implement its policy. 319 U.S. at 327. The court held that "[d]elay, misunderstanding of local law, and needless federal conflict with the state policy" and "[c]onflicts in the interpretation of state law, dangerous to the success of state policies, are almost certain to result from the intervention of the lower federal courts." *Id.* at 327, 334. Thus, the court abstained.

Similarly, here, the regulation and taxation of cigarettes sold on Indian reservations to non-members of the Indian nation or tribe or to non-Indians, like the regulation of oil and gas production, is a complicated problem that the state has attempted to address through comprehensive legislation, regulation, and negotiation. Section 471-e of the New York State Tax Law, initially enacted in 2003, exemplifies the state's latest attempt. Although the City has now removed from its amended complaint all references to this section of the statute, that does not mean that it can or should be disregarded. The statute is aimed at a complex problem, one that cannot be resolved without further "amendments [to the statute that] will respect Indian sovereignty and avoid excessive State entanglement in Indian commerce." Advisory Opinion TSB-A-06(2)M.

Moreover, the imposition and collection of taxes on cigarettes entails a system of tax stamps that is the subject of extensive regulation. As to wholesale dealers of cigarettes, like defendants here, there are regulations specific to their licensing, including procedures for cancelling or suspending licenses. *See* 22 N.Y.C.R.R. § 72.3 (Cancellation or suspension of a license as a

wholesale dealer of cigarettes). Any violation of article 20 of the New York State Tax Law, including the wrongful sale of unstamped cigarettes, is grounds for cancellation or suspension. 22 N.Y.C.R.R. § 72.3(b)(i). Indeed, the regulations provide for the opportunity to be heard at a hearing before remedial action is taken by the Department. *Id.*

As did the plaintiff in *Burford*, the City is attempting by this action to bypass the State's efforts at regulating the sale of cigarettes. Those efforts have yielded significant laws and regulations that are acknowledged by the State to be imperfect, and which have been the subject of significant litigation and debate.[1] The Federal Court's intervention at this point would only confuse the situation, create conflict, and impair the "independence of [the] state government[] in carrying out [its] domestic policy." *Burford*, 319 U.S. at 318 (quotations and citation omitted); *see also Levy v. Lewis*, 635 F.2d 960, 963 (2d Cir. 1980) (abstaining from interpreting a state administrative program of "substantial state concern"); *Am. Contennial Ins. Co. v. Armco Inc.*, 746 F. Supp. 350, 355-359 (S.D.N.Y. 1990) (abstaining pursuant to the *Burford* doctrine because questions of insurance regulation, "with their major implications for proceedings involving the public policy of a state, are better left to the state concerned."). Accordingly, the Court should abstain from adjudicating this case.

B. <u>This Is An "Exceptional Circumstance" Warranting Abstention</u>

Federal courts may also abstain from exercising jurisdiction in exceptional circumstances of parallel, duplicative litigation in the interests of sound judicial administration and economy.

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[1] *See, e.g., Day Wholesale, Inc. v. New York*, Index No. 2006/7668, at *5 (Sup. Ct., Erie Co. Jan. 2, 2007) (Rose H. Sconiers, J.) (enjoining enforcement of New York Tax Law § 471-e and declaring that it is not enforceable because "there has not been any actions taken or rules and regulations issued that would be necessary to implement the provisions of this act."); *In Matter of New York Ass'n of Convenience Stores v. Urbach*, 275 A.D.2d 520, 522, 712 N.Y.S.2d 220, 222 (3d Dep't 2000) (finding "a 'rational basis' for [the state's] indefinite forbearance" from enforcing the regulations imposing sales and excise taxes on tobacco and motor fuel sold on Indian reservations).

Colorado River, 424 U.S. at 817. In *Colorado River*, the Supreme Court found that the interests of wise judicial administration outweighed its duty to exercise its jurisdiction over an issue concurrently litigated in federal and state proceedings. *Id.* The court based its holding on balancing, *inter alia*, (1) which court first assumed jurisdiction over the property in dispute, if any; (2) the inconvenience of the federal forum; (3) the avoidance of piecemeal litigation; and (4) the order in which jurisdiction was obtained. *Id.* at 818-819. The Second Circuit also looks to "whether federal or state law provides the rule of decision, and whether the state court proceeding will adequately protect the rights of the party seeking to avail itself of federal court jurisdiction." *Am. Disposal Servs., Inc. v. O'Brien*, 839 F.2d 84, 87 (2d Cir. 1988).

Here, there is a prior pending state court proceeding, the central issue of which is the sale of unstamped cigarettes. *Day Wholesale, Inc. v. New York*, Index No. 2006/7668 (Sup. Ct., Erie Co. Jan. 2, 2007). Relief is available in state courts under state law and, at the core, the issue here is the same as that in the state court proceeding: whether wholesalers of cigarettes are required to collect a tax on the sale of cigarettes sold to Indian retailers on Indian reservations. *See, e.g., Am. Disposal Servs.*, 839 F.2d at 88 (abstaining in Section 1983 case where the plaintiff had previously litigated in state court and where "there [we]re no issues in the federal claim that [we]re not also present in the state court proceedings."). This case presents precisely the type of "exceptional circumstances" for which the rule in *Colorado River* was designed. New York recognizes the complexity of taxation on Indian reservations and the courts, legislature, and public are debating and determining a resolution thereof. The Federal Court ought not be involved and the case should be dismissed.

POINT V

THE CITY'S CLAIM UNDER THE CIGARETTE MARKETING STANDARDS ACT SHOULD BE DISMISSED BECAUSE THE DEFENDANTS' CIGARETTE SALES DO

NOT VIOLATE THE STATUTE

Just as the City's CCTA claim is erroneously premised on the claim that defendants are selling "contraband" cigarettes, the City's CMSA claim is erroneously premised on the claim that defendants are advertising, offering to sell and/or selling cigarettes for less than the "basic cost of cigarettes." Am. Compl. at ¶ 52. The "basic cost of cigarettes, as defined in § 483 of the CMSA, "shall mean the invoice cost of cigarettes to the agent who purchases from the manufacturer, or the replacement cost of cigarettes to the agent, in the quantity last purchased … to which shall be added in the full face value of any stamps which may be required by law." N.Y. Tax L. § 483 (emphasis supplied). Once again, the City, in its rush to usurp the Department, simply ignores the fact that none of the defendants are acting unlawfully.

As discussed above, the defendants have received clear guidance from the Department that its "long standing policy" of allowing the sale of "untaxed cigarettes" remains in place. As such, the Defendants, by advertising, offering and selling unstamped cigarettes to Indian Nations and reservation-based retailers have not advertised, offered to sell or sold cigarettes at less than the "basic cost," because the Department does not require such cigarettes to be stamped. Tellingly, none of the defendants, whose sales of unstamped cigarettes to reservation cigarette sellers are meticulously documented on Form CG-6 (the Resident Agent Cigarette Tax Report), have been accused by the Department of violating the CMSA for their sales to Indian nations and tribes.

The City's claim is premised on an interpretation of state law that is plainly contrary to that of the Department and employs a legally erroneous definition of "basic cost" under the CMSA. As such, the City's second cause of action should be dismissed as, even assuming *arguendo* that the City's allegations are true, they do not state a legally cognizable claim under the CMSA.

POINT VI

BECAUSE THE CITY'S PUBLIC NUISANCE CLAIM FAILS TO PLEAD THAT DEFENDANTS' CONDUCT ENDANGERS THE PUBLIC AT LARGE, IT SHOULD BE DISMISSED PURSUANT TO RULE 12(B)(6).

While the Court must, for the purposes of this motion, accept the City's allegations as true, it is axiomatic that "bald contentions, unsupported characterizations, and legal conclusions are not well-pleaded allegations, and will not suffice to defeat a motion to dismiss." *Kelly v. Classic Restaurant Corp.*, No. 01 Civ. 9435 (GDB), 2003 WL 22052845 at *2 (S.D.N.Y. Sept. 2, 2003). Here, the City's allegations in support of its public nuisance claim against defendants are little more than "unsupported characterizations" that should be dismissed by the Court.

The elements of a public nuisance claim under New York law are well established. A successful claim requires the plaintiff to demonstrate (1) that a public nuisance exists, (2) and that the defendant's conduct or omissions "offend, interfere with or cause damage to the public in the exercise of rights common to all … in a manner such as to offend public morals, interfere with use by the public of a public place or endanger or injure the property, health, safety or comfort of a considerable number of persons." *Copart Industries, Inc. v. Consolidated Edison Co.*, 41 N.Y.2d 564, 568 (1977); *see also City of New York v. Beretta U.S.A Corp.*, 315 F. Supp. 2d. 256, 276-77 (E.D.N.Y. 2004) ("[T]he [City of New York] is a proper party to bring an action to retrain a public nuisance that allegedly may be injurious to the health and safety of its citizens."). Here, the City has failed to plead even the most basic facts to suggest that any of the Defendants are causing or contributing to the existence of a public nuisance.

Tellingly, the City has unsuccessfully pursued this theory of public nuisance before in federal court. In *City of New York v. A.E. Sales, LLC, et al.*, 03 Civ. 7715 (DAB) (S.D.N.Y. 2003), the City

brought a nearly identical claim of public nuisance against cigarette sellers who were alleged to be selling their cigarettes directly to New York City residents via the Internet. The court granted those defendants' motions to dismiss, ruling that even if the New York State Legislature, through the legislative history of P.H.L. § 1399-11, correctly identified the sale of cigarettes by Internet, mail order or telephone as a public nuisance, the City had failed to plead facts necessary to demonstrate that the defendants' Internet sales activity were affecting a "considerable number of people" so as to satisfy the elements of a public nuisance claim at common law. *See* Memorandum and Order in *City of New York v. A.E. Sales, LLC, et al.*, 03 Civ. 7715 (DAB) (S.D.N.Y. 2003), dated February 9, 2005 (the "February 9 Order"), at p. 6 (citing *Copart Industries, Inc. v. Consolidated Edison Co.*, 41 N.Y.2d at 568). Further, the court stated that it was "wary of expanding the breadth of public nuisance law," noting the cautionary language issued by the First Department in the context of a public nuisance charge against the gun industry. *See* February 9 Order at 8. In that case, *People v. Sturm, Ruger & Co., Inc.*, 761 N.Y.S. 2d 192 (1st Dep't 2003); *lv denied*, 769 N.Y.S. 2d (2003), the court held that:

> [W]e see on the horizon, were we to expand the reach of the common-law public nuisance tort in the way the plaintiff urges, the outpouring of an unlimited number of theories of public nuisance claims for courts to resolve and perhaps impose and enforce – some of which will inevitably be exotic and fanciful, wholly theoretical, baseless, or perhaps even politically motivated and exploitative.

People v. Sturm, Ruger & Co., Inc., 761 N.Y.S. 2d at 197. Returning to this language, the *A. E. Sales* court noted that "[u]sing the guise of public health concerns under common law nuisance to close a tax loophole is that 'exotic and fanciful' usage that was of concern to the *Sturm, Ruger* court." February 9 Order at p. 9.

Here, the City is once again seeking to use the pretext of public health to address a tax issue.

Indeed, its claims are, if anything, even more "fanciful" than those brought in the *A. E. Sales* litigation. In that matter, the City was claiming that defendants who directly sold to consumers were creating a public nuisance. Here, the City is asking the Court to go a step further, holding defendants liable not for their own actions, but for the actions of reservation cigarette sellers that are not parties to this litigation. Moreover, in the *A. E. Sales* litigation, the Court held that a claim that roughly 6% of cigarette sales in New York City were occurring over the Internet was insufficient to establish that a "considerable number of persons" were being injured under the public nuisance standard. *See* February 9 Order at pp. 6-7. Here, the City claims that "perhaps as much as 15 percent of all smokers in the City purchase their cigarettes from Internet sellers, street sellers and reservations sellers." *See* Am. Compl. at ¶ 43. Tellingly, the City is silent as to what fraction of this 15% is attributable to reservation sellers – the only sellers to whom defendants are alleged to provide wholesale cigarettes. Moreover, the Complaint is similarly devoid of any indication of what percentage of cigarettes sold by reservation sellers are provided by defendants. Here, the City has plainly failed to plead facts adequate to establish that defendants are causing "a public nuisance that imperils the City's very existence" or that their actions endanger "the public at large." *Id.* at 9. Accordingly, we respectfully submit that the City's public nuisance claim should be dismissed.

POINT VII

THE AMENDED COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO JOIN INDISPENSABLE PARTIES [RULE 12(B)(7) AND RULE 19].

A. Plaintiff's Complaint Should Be Dismissed for Failure to Join Necessary Parties

The defendants respectfully submit that the Court should not proceed in this case in the absence of the Seneca Nation of Indians, the Oneida Indian Nation, the St. Regis Mohawk Tribe, and other affected Indian Nations. The rights of the sovereign Indian Nations are implicated in this proceeding because the City seeks to classify all cigarettes without tax stamps shipped to the sovereign lands of the Indian Nations located within New York's territorial boundaries as "contraband cigarettes," as that term is used in the CCTA. Granting the Plaintiff's requested relief would impact the Indian Nations directly and significantly and requires them to be engaged in the proceedings before this Court.

Additionally, the State is implicated in this proceeding because the re-classification of unstamped cigarettes could trigger the penalty provisions of the Master Settlement Agreement ("MSA"). The MSA is a settlement agreement entered into by various states and cigarette manufactures regarding liability of the tobacco industry for costs for smoking-related diseases. The MSA exempted the tobacco companies from tort liability in exchange for yearly settlement payments to the states.

Federal Rule of Civil Procedure ("Rule") 19 has two parts that provide for a three-step test for determining whether a court must dismiss an action for failure to join an indispensable/necessary party. Rule 19(a) is the first part which contains two separate inquires. First, the court must determine whether an absent party belongs in the suit, i.e., whether the party qualifies as a "necessary" party under Rule 19(a). *See Viacom Intern, Inc. v. Kearney*, 212 F.3d 721, 724 (2d Cir. 2000) (*citing Provident Tradesmens Bank & Trust Co. v. Patterson,* 390 U.S. 102, 124 (1968) (quotation omitted)). Rule 19(a) provides that the absent party should be joined, if feasible, where:

> (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to

> the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Fed. R. Civ. P. 19(a).

A determination that cigarettes without tax stamps being affixed are contraband cigarettes would impair and impede the Indian Nations' ability to protect its significant business interest in obtaining cigarettes. Such a determination absent the Indian Nations would violate the intent of Rule 19 to protect the interests of necessary parties.

The State has a policy of allowing licensed stamping agents to sell unstamped cigarettes to recognized Indian Nations. A judgment in Plaintiff's favor would challenge the power of the Indian Nations and the State, negatively affecting their established rights.

Indian Nations have been deemed necessary parties in similar situations in both Federal and State cases. In *Dawavendewa v. Salt River Project Agr. Imp. & Power Dist.*, 276 F.3d 1150 (9th Cir. 2002), the court held that an employee's litigation against his employer threatened to impair the Indian Nation's contractual interest with that employer. Such interference in the Indian Nation's fundamental economic relationships led the court to find the Indian Nation to be a necessary party. *Id*. at 1157. In *Niagara Mohawk Power Corp. v. Anderson*, 258 A.D.2d 958 (4th Dep't), appeal dismissed 93 N.Y.2d 958 (1999), the Appellate Division, Fourth Department, held that the delivery of electricity onto the Tuscarora Indian Nation's territory involved the rights and powers of the Indian Nation. The failure to join the Indian Nation with regards to the delivery of electricity resulted in a dismissal of the counterclaim. In *Anderson v. Town of Lewiston*, 244 A.D.2d 965 (4th Dep't 1997), *appeal dismissed*, 91 N.Y.2d 920 (1998), the Appellate Division, held that the delivery

of water onto the Tuscarora Indian Nation's territory involved the rights and powers of the Indian Nation. The failure to join the Indian Nation with regards to the delivery of water resulted in a dismissal of the complaint. *See Id.* As with these cases, in the current matter, Plaintiff is attempting to restrict the delivery of product (cigarettes) onto Indian Nations' territory, and, therefore, is necessarily involving the rights and powers of the Indian Nations.

As for the State, currently, unstamped cigarettes sold to reservations are not deemed "units sold in the state" under the MSA. Should the City succeed, the State's receipt of MSA yearly payments could be reduced if the cigarettes are deemed "units sold in the state." In order for the State to protect the integrity of its yearly payments under the MSA, the State is a necessary party to this action.

The second inquiry under Rule 19(a) is determining whether the necessary party can be joined. Joinder is not feasible when venue is improper, when the necessary party is not subject to personal jurisdiction, and when joinder would destroy subject matter jurisdiction. *See EEOC v. Peabody Western Coal Company*, 400 F.3d 774, 779 (9 Cir. 2005).

Neither the Indian Nations nor State could be joined as parties to this action, as the City does not have the legal capacity to sue the Indian Nations or the State. Sovereign Indian Nations are immune from suit in both State and Federal courts. *See Matter of Ransom v St. Regis Mohawk Educ. & Community Fund*, 86 N.Y.2d 553, 558 (1995); *Oklahoma Tax Commn. v Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991); *Niagara Mohawk Power Corp. v Tonawanda Band of Seneca Indians*, 862 F. Supp. 995, 1004 (W.D.N.Y. 1994), *affd*, 94 F.3d 747 (2d Cir. 1996). In addition, the State is immune from suit in Federal court pursuant to the 11th Amendment of the

United States Constitution. *See Seminole Tribe v Florida*, 517 U.S. 44 (1996); *Ahern v State of New York*, 244 A.D.2d 7, 9 (3d Dep't 1998).

Where a court makes a threshold determination that a party is necessary and joinder of the absent party is not feasible for jurisdictional or other reasons under Rule 19(a), then under Rule 19(b) the court must finally determine whether the party is "indispensable." If the court determines that a party is indispensable, then the court must dismiss the action pursuant to Rule 19(b). *See ConnTech Dev. Co. v. Univ. of Conn. Educ. Props., Inc.*, 102 F.3d 677, 681-82 (2d Cir.1996)) (*Associated Dry Goods Corp. v. Towers Fin. Corp.*, 920 F.2d 1121, 1123 (2d Cir. 1990)). Rule 19(b) provides:

> [T]he court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Fed. R. Civ. P. 19(b).

The Indian Nations are "indispensable" parties here. First, a judgment rendered in Indian Nations' absence would be prejudicial to the Indian Nations. The Indian Nations have a crucial sovereign right to control the flow of goods into its territories, and therefore are indispensable in determining those rights. Second, no protective provisions in the judgment, by the shaping of relief, or other measures, could lessen or avoid the prejudice. The Indian Nations' sovereignty over its territories is absolute, and any judgment without the Indian Nations' representation would violate

that sovereignty. Third, no judgment rendered in Indian Nations' absence would be adequate because the interest of the defendants and the Indian Nations are not identical. The defendants are wholesale cigarette dealers and stamping agents of the State. The defendants are businesses whose interests concern the sale of cigarettes. The Indian Nations are sovereign entities, whose interests concern the rights of their members. Those rights include the ability of its members to trade between themselves free of unlawful government interference. The Indian Nations' interests could never be fully represented by the defendants, and, therefore, the Indian Nations' presence in this action is indispensable. As for the fourth factor, although there is no adequate remedy available to plaintiff if the case is dismissed, the Indian Nation's interest in maintaining sovereign immunity outweighs plaintiff's interest in litigating its claims. *See American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1025 (9th Cir. 2002).

Additionally, the Indian Nations have not clearly declined to claim an interest or "expressly disclaimed" an interest in the subject matter of the dispute. *See Conntech*, 102 F.3d at 683; *Boczon v. Northwestern Elevator Co., Inc.*, 652 F. Supp 1482, 1486 (E.D. Wis. 1987).

The State is an indispensable party, as none of the Defendants are a party to the MSA and have no ability to protect the State's interest.

CONCLUSION

The Amended Complaint should be dismissed.

Dated: May 11, 2007

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