

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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THE CITY OF NEW YORK,

Plaintiff,

08 CV 3966 (CBA)(JMA)

-against-

GOLDEN FEATHER SMOKE SHOP, INC., KIMO SMOKE SHOP, INC., SMOKE AND ROLLS INC., SHAWN MORRISON, KIANA MORRISON, in her individual capacity, MONIQUE'S SMOKE SHOP, ERNESTINE WATKINS, in her individual capacity, JESSEY WATKINS, WAYNE HARRIS, PEACE PIPE SMOKE SHOP, RODNEY MORRISON, Sr., CHARLOTTE MORRISON, in her individual capacity, RED DOT & FEATHERS SMOKE SHOP, INC., RAYMOND HART, in his individual capacity, SMOKING ARROW SMOKE SHOP, DENISE PASCHALL, in her individual capacity, TONY D. PHILLIPS, TDM DISCOUNT CIGARETTES, and THOMASINA MACK, in her individual capacity,

Defendants.

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**MEMORANDUM OF LAW OF PLAINTIFF THE CITY OF NEW YORK IN SUPPORT
OF ITS MOTION FOR A PRELIMINARY INJUNCTION**

Plaintiff The City of New York (the "City"), by its attorney, Michael A. Cardozo, Corporation Counsel of the City of New York, submits this post-hearing memorandum of law in support of its motion to preliminarily enjoin defendants' continuing violations of the Contraband Cigarette Trafficking Act, 18 U.S.C. § 2341 *et seq.* (the "CCTA") and the Cigarette Marketing Standards Act, N.Y. Tax L. § 483 *et seq.* (the "CMSA") by their sales of unstamped cigarettes.

PRELIMINARY STATEMENT

The City has established through uncontested evidence that defendants Monique's Smoke Shop, Peace Pipe Smoke Shop, Red Dot & Feather Smoke Shop, Smoking Arrow Smoke

Shop, and TDM Discount Cigarettes – and the individuals associated with those stores – systematically and continuously violate the CCTA and the CMSA by purchasing, receiving, possessing, selling and distributing prohibited quantities of unstamped cigarettes to the public, and by selling cigarettes in violation of New York State minimum price requirements.¹ Independent strands of evidence, including i) stipulated documentation of defendants' purchases of literally millions of cartons of unstamped cigarettes, ii) testimony by defendants' customers and New York State tax investigators describing defendants' sales of prohibited quantities of cigarettes to the public, iii) investigative and arrest reports documenting the flow of illegal reservation sales into New York City, and iv) evidence that defendants grossly underpriced their cigarettes, in violation of minimum price requirements, establish beyond question that defendants have for years knowingly sold massive quantities of unstamped cigarettes, to the detriment of New York City. No defendant even appeared in court to contest these facts.

The City's additional proof of injury to the health and well-being of the City's residents, and defendants' contribution to criminal activity within the City – proof that rests in no small measure on defendants' own expert testimony – satisfies the requirement of irreparable injury under the CCTA, should such proof be required. Moreover, as this Court has already ruled, proof of irreparable harm is unnecessary for an injunction to issue under the CMSA. *City of New York v. Golden Feather Smoke Shop*, 2009 U.S. Dist LEXIS 20953, at *30 (E.D.N.Y. 2009).

¹ Defendants Golden Feather Smoke Shop, Inc., Kimo Smoke Shop, Inc., Shawn Morrison and Kiana Morrison have entered into a consent injunction pursuant to which they will no longer operate smoke shops or sell unstamped cigarettes. See PACER Document No. 138. Defendant Smoke and Rolls Inc., has represented to the City, through counsel, that it is no longer in business.

Defendants' continued purchase, receipt, possession, sale and distribution of large quantities of unstamped cigarettes in 2009, their own testimony that they intend to remain in business, their failure to appear in court to deny that they intend to continue their business practices, coupled with the profitable nature of that business and the expanding number of cigarette shops on the reservation, establish that defendants are likely to continue to violate the CCTA and New York's minimum price laws. Accordingly, the defendants' sale of unstamped cigarettes to persons other than members of the Poospatuck tribe for personal use should be enjoined preliminarily, until a trial of this matter.

FACTS

Facts Applicable to All Defendants

Based on the hearing evidence, it is now undisputed that sales to the public of massive numbers of unstamped cigarettes at prices well below those required under the minimum price laws of New York State have been big business for Poospatuck reservation smoke shops for years, and have flourished even during the pendency of this suit.² In addition to violating minimum price laws, the defendant smoke shops and the individuals associated with them have, for many years and continuing to the present, purchased, received, possessed, sold and distributed enormous quantities of unstamped cigarettes to cigarette traffickers known by the defendants to be reselling the cigarettes in New York City. *See infra passim*. Some defendants' participation in this trafficking has been so extensive that they have delivered unstamped

² It is defendants' burden to prove any sales that they claim are exempt from taxation, as, for example, sales to tribe members for personal use. *See* N.Y. Tax L. § 471. No such proof was offered at the hearing, and all of defendants' sales are deemed to be to the public. In any event, Monique's, Peace Pipe, Red Dot & Feather, Smoking Arrow and TDM Discount Cigarettes all admit that from 2007 to the present, they have not determined whether purchasers of unstamped cigarettes are members of the Poospatuck tribe, thus eliminating any possibility that defendants could have proven exempt sales. Exs. 74 (Admission Nos. 1, 2), 76 (Admission Nos. 1, 2), 78 (Admission Nos. 2, 3), 80 (Admission Nos. 1-2), 81-82 (Admission Nos. 1, 2).

cigarettes directly into the City, or set up off-reservation storage sites to better handle the traffic. Testimony “Mari A”³; Ahman Aldabeshes; Christopher Lannon, *infra*. In or around 2006 or 2007, the number of smoke shops on the Poospatuck reservation expanded from approximately eight shops (Tr. 12:18-25; 13:1-5 (Mari A.)) to approximately twenty shops in 2008 (Tr. 174:10-22 (Lannon)), an expansion that occurred so rapidly that trees and empty lots literally sprouted signs identifying them as smoke shops. *Id.* (Lannon).⁴ See also Ex. 93 (Deposition of Raymond Hart, April 27, 2009 (“Hart Dep.”), at 21:6-17; 22:3-5 (Red Dot & Feather opened after tribe voted to expand number of smoke shops); Ex. 96, *Morrison Trial*, at 575:11-19; 554:15-22 (Jesse Watkins testified that at the time Monique’s was opened in 1998, there were only three other smoke shops on the Reservation).⁵ Selling large quantities of cigarettes to the public was and continues to be highly profitable for defendants. See generally *infra*, pages 16-17, 19, 21, 28-32, 36, 38-39.

Testimony of Mari A. – The testimony of defendants’ former customers proves that for many years defendants sold large quantities of unstamped cigarettes with the knowledge that their customers were reselling in New York City. Mari A., a New York City resident, testified that she operated a cigarette business in New York City from around 2001 to 2008, driving to the Poospatuck Reservation in Mastic, New York to purchase unstamped cigarettes and taking them back to New York City for resale. Tr. 9:23-10:41, 18:23-19:1. Trafficking cigarettes into the City from the Poospatuck reservation became her means of support (Tr.

³ The City refers to this witness in this fashion for reasons known to the Court and the parties.

⁴ “Tr.” refers to the transcript of the hearing in this matter, held between May 15, 2009 and May 20, 2009.

⁵ “*Morrison Trial*” refers to the trial transcript in the case of *United States v. Rodney Morrison*, 04-CR-0699 (EDNY)(DRH).

105:17-22), earning her in excess of \$200,000 in 2007, all cash. Tr. 56:18-20. The defendants that accommodated Mari A's busy schedule by delivering cigarettes to her in the City clearly knew that she was reselling in the City. *See* Tr. 23:17-24:23 (Peace Pipe); Tr. 30:1-17 (Smoking Arrow).

Mari A. described a typical day as beginning with a drive to the reservation from her home in New York City. After making her purchases on the reservation, and filling her minivan or a truck (having the first removed the seats) with master cases of cigarettes⁶ (Tr. 14:3-10), she drove to the City and re-sold the cigarettes, principally in the Bronx. Tr. 13:17-21. She traveled to the reservation early in the morning when the police changed shifts (Tr. 11:19-12:4), concealing the cigarettes on her return trip to the City in black plastic bags covered with a blanket. Tr. 14:10-11. Mari. A. typically went to the reservation five days a week and purchased 900 hundred cartons each trip. Tr. 10:14-11:6. If she succeeded in selling 900 cartons in a day, which she was able to do at times, Tr. 11:16-18, she returned to the reservation for another purchase that same day. When business was good, she went to the reservation six or seven days a week. Tr. 11:7-12. Beginning with smaller quantities in 2001 (Tr. 14:17-15:6), the amount of cigarettes she brought into the City was roughly constant from 2001 to 2007 or 2008.

She sold to bodegas and to people that sell five-dollar packs, Tr. 13: 21-23, and "to anybody that didn't want to pay the whole price at the store." Tr. 13:23-34. Mari A. testified that she had from 20 to 30 customers at any one time, ranging from single-carton purchasers, to stores that purchased 30 cartons a day, to people purchasing "a lot" – "wholesalers," like herself. Tr. 14:12-16. The cigarettes were resold by her customers: "three packs for ten dollar market" when she first started, and then for "five dollars or something." Tr. 17:3-18:17.

⁶ A master case consists of 60 cartons. Tr. 146:6-7 (Lannon).

Mari A. was generally aware during the period she was in business that her customers were re-selling the cigarettes she sold to them because they would ask her for New York State tax stamps, so that they would not get in trouble when inspectors came into the store. Tr. 17:3-5. She testified to her direct knowledge of street vendors selling cigarettes and would ask them their sales prices so that she could bargain over her price to them. Tr. 17:19-25. Her customers sold cigarettes right in front of her, asking her to hurry up and provide cigarettes, complaining they had a line down the street. Tr. 18:1-17.

Mari A. identified eight cigarette businesses as selling on the Poospatuck reservation during the time that she made purchases there: initially, Golden Feather, Peace Pipe, Ronnie Bell, Monique's, the Chief (Harry Wallace) and Thomasina Mack (Tr. 12:18-25); Smoking Arrow and Red Dot & Feather opened later. Tr. 13:1-5. Although Shawn Morrison was her main supplier, Tr. 57:12-16, Mari A. testified that between approximately 2002 and 2008, she purchased cigarettes at Golden Feather Smoke Shop, Monique's Smoke Shop, Smoking Arrow, Red Dot, Peace Pipe, Ronnie Bell and from "The Chief," Tr. 41:13-42:9; 97:25-98:8. When she was not able to purchase her full allotment of 900 cartons from a single store, she went to more than one store during a single visit to the reservation. Tr. 12:12-15. Although she did not purchase cigarettes directly from Thomasina Mack ("Thomasina sold from her house", Tr. 12:24-25), Mari A. purchased from her indirectly, through one of Mack's workers named "Dee," who delivered Mack's cigarettes to a storage unit. Tr. 37:21-38:21.

Mari A. purchased mostly Newports and Marlboros; in 2007, she typically paid between \$27 and \$30 for a carton of Newports. Tr. 13:13-16. Shop owners, "Shawn and his wife, Rodney, Ronnie, Tony . . . [a]t Red Dot, Kenny" "termed" her and other big buyers "wholesalers," because "we would come to purchase so much more than their average

customer.” Tr. 110:13-24; 111:3-7. Those “wholesalers” were told by the smoke shop owners “that we were given the lowest price.” *Id.* There were other “wholesalers” in addition to Mari A. Tr. 106:24-107:4 (referring to “other people that were wholesalers”); *see also* Tr. 40:21-42:13 (Mari A. observed and spoke with other people buying large quantities of cigarettes at shops on the reservation); Tr. 191-194 (Aldabeshes); Tr. 197:20-24 (Emad Al-Naimat).

After purchasing cigarettes on the reservation, some of the shops would provide an escort service, the purpose being “to take you off the reservation and past police officers who you believed were set up outside the reservation itself.” Tr. 105:7-16. Asked about being escorted off the reservation, Mari A. testified that

Well, there’s police that be there. They know what you’re doing. So the objective is to avoid the police and get off the reservation without being detected, especially if you were in a van. So what most stores would do, they hired people and they would ride around the reservation up to like Eleanor [Avenue], and they would look to see if they seen any strange cars or the police. If they didn’t see anything police, or they seen police sitting on one side, they would ride you out a different way, a back way, so you can get off the reservation safely.

Tr. 22:21-23:9.

Mari A. testified that she stopped selling in part because “she was ready to quit – It was getting nasty; “it was just getting rough out there ...when I first started people weren’t getting killed over cigarettes. It wasn’t nasty like this.” Tr. 107:12-24; “People started getting killed.” Tr. 109:4.

Testimony of Ahman Aldabeshes – Mr. Aldabeshes testified that he was in the cigarette business from approximately the end of 2003 to October 2006, when he was arrested. Tr. 191:16-25. He lived in New York City, Tr. 192:20-21, purchased cigarettes from the Poospatuck reservation in Mastic, New York, Tr. 192:3-10, and brought them back into the City where he sold them to grocery stores. Tr. 192: 22-25; Tr. 193:17-18. Mr. Aldabeshes had 40 to

50 customers, all grocery stores, located in the Bronx and Manhattan, Tr. 193:19-24, and was able at times to re-sell ten master cases in a single day. Tr. 194:5-10.

Mr. Aldabeshes knew an individual named Emad Al-Naimat who trafficked cigarettes into the City and who was “the biggest guy in the Bronx.” Tr. 197:20-23. According to Mr. Aldabeshes, Al-Naimat would purchase approximately two van loads of cigarettes a day from Shawn Morrison. Tr. 197:24-25; 208:7-11.

Testimony of Supervising Excise Tax Investigator Christopher Lannon –

Investigator Lannon is employed by the New York State Department of Taxation and Finance (“NYS DTF”) and has been investigating the transport and sale of untaxed cigarettes from the Poospatuck reservation since November 2000. Tr. 129: 4-10. As of May 2009, Lannon was aware of approximately 20 storefront smoke shops on the reservation, Tr. 174:10-22, but in addition some smoke shops appear as a sign on a residence, a front lawn or on a “fixed tree or post.” *Id.*

The focus of Investigator Lannon’s investigations for the last nine years has been people bringing cartons of cigarettes off the Poospatuck reservation, Tr. 177: 6-10. During those investigations, he has directly observed people bringing cigarettes off the reservation and to the City, to storage locations or bodegas. Tr. 177:12-25. Lannon generally observed the movement of cigarettes from the Poospatuck reservation to the New York City area. Tr. 130:24-131:6.

Lannon’s investigations began with information obtained from various sources that individuals were trafficking unstamped cigarettes from the Poospatuck reservation to the New York City area. Tr. 130:1-5. He has participated in the arrests of some thirty individuals for cigarette tax evasion, of which 98% of the arrests involved the Poospatuck reservation. Tr.

131:9-132:2; Tr. 168:22-169:6. Approximately 95% of the persons arrested for cigarette trafficking by Lannon's office had New York City addresses. Tr. 134:12-24.

In the period of Summer 2008, the amount of trafficking observed by Lannon did not differ from that observed in 2007. Tr. 179:6-12. The last investigation concerning the transportation of untaxed cigarettes from the reservation in which he was involved was in January 2009, although he assisted the Suffolk County District Attorney's Office in the execution of a search warrant two weeks prior to the hearing. Tr. 185:23-186:10; Tr. 168:7-8.

Testimony of Andrew DeFrancesco -- Andrew DeFrancesco, Chief Financial Officer of Harold Levinson Associates ("HLA"), a licensed stamping agent and distributor (Tr. 254:15-23), testified to the minimum price requirements and mandated under the Cigarette Marketing Standards Act to which HLA must adhere. Tr. 258:16-19. DeFrancesco testified that the minimum price at which a retail dealer is permitted to sell a carton of a particular brand of cigarettes to a consumer in New York State is determined by adding the cost of applicable tax stamps to the manufacturer's list price for the cigarettes, which sum constitutes the agent's "basic cost," then adding to the agent's basic cost certain statutory percentage markups based on the class of dealer and customer involved in the sale, and finally taking off the amount of any promotional manufacturer's discount for the brand. Tr. 259:9-261:7, 284:10-285:4; *see also id.* 534:24-538:18.

Minimum selling prices are dependent on the manufacturer's list price, the amount of tax, manufacturer's discounts and statutory markups, and minimum selling prices form the basis for HLA's own pricing to its customers. Tr. 513:10-517:8. The manufacturer's list prices for particular brands are found on DeFrancesco's excel spreadsheets (Exhibits 72A through 72F) in the third column from the left. Tr. 514:6-8, 515:21-516:7; 530:4-531:9. The

excel spreadsheets were put together by DeFrancesco, taking into account invoices, price lists, price changes, and tax changes and they have been “updated all the time when there’s changes, when there’s new brands, when there’s new prices, when there’s tax changes.” Tr. 521:14-24. DeFrancesco testified that the statutory percentage markups involved in the minimum price determination have not changed since 1989 and are reflected in the columns of Publication 508 (Ex. 39), published by the NYS DTF. DeFrancesco called Publication 508 “the minimum price list for cigarettes,” and testified that he uses it in his business. Tr. 276:16-22; 541:6-542:4. The markup applicable to a sale by a retail dealer to a consumer is determined by multiplying the minimum price that an agent may sell to a retail dealer by seven percent. Tr. 542:6-14; Exs. 32-38 (NYS DTF Publication 509 of various dates, each stating “The *cost of the CMSA retail dealer* is presumed to be a 7% markup of the *agent-to-retail-dealers* price.” (italics in original)).

DeFrancesco also testified that in December of 2006, the New York State cigarette tax was fifteen dollars per carton, Tr. 537:23-538:1; Ex. 72A. The New York City cigarette tax was also fifteen dollars per carton. Ex. 72A. On June 3, 2008, the New York State cigarette tax increased by \$12.50 a carton to \$27.50 per carton. Tr. 554:18-23.

DeFrancesco testified that the minimum price at which a retail dealer was permitted to sell a carton of Newports to a consumer in New York State outside of New York City in December 2006, after taking a \$6 per carton discount, was \$42.72. Tr. 547:9-20; Ex. 72A; Ex. 39. For illustrative purposes, DeFrancesco testified that to determine the minimum selling price, one would take \$28.64 (manufacturer’s list price) plus \$15.00 (NYS taxes) to arrive at the agent’s basic cost - \$43.64, which after statutory markups, results in a retail minimum price per carton of \$48.72 under Publication 508 (Ex. 39 at 31), less the Newport discount in effect at the time of \$6.00 equals \$42.72. Tr. 545:20-547:20. As reflected in the chart below,

DeFrancesco testified as to the minimum price for a retail dealer to sell a carton of Newports to a consumer in New York State outside of New York City in December 2006, December 2007, June 2008 including an increase in the New York State cigarette tax, at the end of 2008, as of February 12, 2009, and as of March 9, 2009. The chart below also reflects DeFrancesco's testimony as to the minimum price for a retail dealer to sell a carton of Marlboros to a consumer in New York State outside of New York City during the same time periods.

**Minimum Prices per Carton for Sales by Retail
Dealers to Consumers in New York State Outside of New York City**

Brand	Date	Manufacturer's Discount	Minimum Price	Evidentiary Citations
Newport	12/18/06	\$6.00	\$42.72	Tr. at 547:9-20; Ex. 72A; Ex. 39
Marlboro	12/18/06	\$4.00	\$43.61	Tr. at 538:6-543:7, 545:12-19; Ex. 72A; Ex. 39
Newport	12/12/07	\$6.00	\$43.28	Tr. at 553:20-23; Ex. 72B; Ex. 39
Marlboro	12/12/07	\$3.50	\$44.11	Tr. at 550:17-552:6; Ex. 72B; Ex. 39
Newport	6/3/08	\$6.00	\$58.28	Tr. at 557:20-558:12; Ex. 72C; Ex. 39
Marlboro	6/3/08	\$2.60	\$58.91	Tr. at 554:3-556:20; Ex. 72C; Ex. 39
Newport	12/22/08	None	\$65.40	Tr. at 560:16-24; Ex. 72D; Ex. 39
Marlboro	12/22/08	\$2.10	\$59.41	Tr. at 558:21-559:17; Ex. 72D; Ex. 39
Newport	2/12/09	None	\$66.51	Tr. at 563:18-24; Ex. 72E; Ex. 39
Marlboro	2/12/09	\$2.10	\$60.41	Tr. at 561:4-562:15; Ex.

				72E; Ex. 39
Newport	3/9/09	None	\$74.40	Tr. at 566:9-16; Ex. 72F; Ex. 39
Marlboro	3/9/09	\$2.10	\$68.30	Tr. at 564:5- 565:11; Ex. 72F; Ex. 39

Resident Agent Cigarette Tax Reports, Form CG-6 – New York State cigarette stamping agents must file monthly cigarette tax reports with the NYS DTF. *See* Ex. 7, Certification of Business Records signed by Steven Sussner at ¶ 4; Ex. 8, Certification of Business Records signed by Salvatore Pennisi at ¶ 3. These reports, entitled “Resident Agent Cigarette Tax Reports,” (“Form CG-6s”) include Schedule E: “Sale of Cigarettes to Dealers/Vendors on American Indian Reservations.” *See, e.g.*, Ex. 7 at CG6 00023. The Form CG-6s filed with NYS DTF for the period January 2004 through March 2009 by Gutlove & Shirvint, Inc. (“Gutlove”), one of the two known stamping agents that supply the reservation, are in Exhibits 7 and 7A. The Form CG-6s for the period January 2006 through March 2009 filed with NYS DTF by Mauro Pennisi, Inc. (“Pennisi”), the other stamping agent supplying the reservation, are in Exhibit 8.

The instruction page found on the second page of each Form CG-6 contains the following instructions for Line 9 and schedule E of the Form CG-6s:

Enter the number of unstamped cigarettes (sticks) sold or transferred to dealers or vendors located on recognized American Indian reservations within New York State for each pack size. Be sure to complete and attach Form CG-5.4/6.4, *Schedule E – Sale of Cigarettes to Dealers/Vendors on American Indian Reservations*, to substantiate these transactions.

See, e.g., Ex. 8 at CG6 01641. Schedule E of the Form CG-6s includes columns with the following headings: “Name and address of dealer/business,” “Name of manufacturer and brand of cigarettes,” and “20 packs” and “25 packs” under the heading instructions, “Enter number of

cigarettes (sticks) in the appropriate column(s) per brand.” *See, e.g.*, Ex. 8 at CG6 01651. Schedule E of the Pennisi and Gutlove Form CG-6s contains entries and numerical data corresponding with the aforementioned columns indicating sales of unstamped cigarettes to the entities listed. *See id.* Pennisi generally listed the names and addresses of businesses in the column headed “Name and address of dealer/business.” *Id.* Gutlove, in certain instances, in lieu of filling out the columns contained on Schedule E, provided an attached summary sheet titled “Schedule E-Sales to American Indian Reservations” containing information requested on Schedule E, including the names of smoke shops and corresponding number of sticks of cigarettes sold to each. *See, e.g.*, Ex. 7 at CG-6 00013 to 00014. The data contained in Exs. 7, 7A and 8 are reflected in various charts introduced into evidence, which the defendants have stipulated accurately reflect the underlying data on the CG-6 forms. Tr. 655:2-23.

Reservation sales of unstamped cigarettes injure the City – The testimony of Mari A., Ahman Albadeshes, Lannon and defendants themselves provide ample evidence that unstamped cigarettes sold by defendants are brought into or re-sold in the City. *See supra* at 5-9, *infra* at 15-43. This testimony is bolstered by Exhibit 58, the approximately 220 Suffolk County arrest records dating from 2004 to 2008, which document that the vast majority of persons arrested in Suffolk County for transporting or possessing unstamped cigarettes have residence addresses in New York City. *See generally* Ex. 58; CNY 1817 (“I’m not going to lie, I got like 40 cartons. I got a deli in NYC”); CNY 2061 (“I’ve been arrested for this before. Its cheaper to buy them here- no taxes. I bring them back to people where I live.”); CNY 1221 (“I sell them to a friend in the City”); CNY 1383 (“I picked up cigarettes and I was going to the Bronx to sell them.”). While these records usually do not provide direct evidence of the locations at which the cigarettes were purchased, several records do indicate that the purchases are from the Poospatuck

reservation. *See, e.g.*, CNY 2125 (unstamped cigarettes found in Queens, N.Y. “Charge based on oral statement of defendant that cigarettes came from Poospatuck Lane, Mastic, N.Y.”). Moreover, many of the arrests are made at locations immediately adjacent to the reservation. *See* Exhibit 58 (numerous arrests at Eleanor Ave., Poospatuck Lane, Mastic Rd., Pawnee Ave., Squaw Lane, adjacent to reservation).

Exhibit 62A⁷ hereto is a summary chart that strengthens the connection between reservation sales and re-sales in the City. Exhibit 62A was prepared by reviewing the “rap sheets” in Exhibit 61 of individuals whose arrests appear in Exhibit 58, the Suffolk County arrest records for possession or transport of unstamped cigarettes. The first column of Exhibit 62A lists the name and borough of residence of the arrestee. All 20 of the listed arrestees resided in the City at the time of their arrest in Suffolk County, except one who was a resident of Mt. Vernon, in Westchester County. The quantities of cigarettes with which they were arrested indicate that the purchases are for re-sale, not personal consumption. *See* Exhibit 62A. The subsequent columns of Exhibit 62A, obtained from the rap sheets, contain in chronological order all of the convictions of those individuals for sale or possession of unstamped cigarettes, whether in the City or Suffolk County.

As shown on Exhibit 62A, each individual, in addition to at least one Suffolk County arrest, also has anywhere from one to as many as nine arrests in New York City for sale or possession of untaxed cigarettes.⁸ A plausible conclusion is that these individuals are engaged in the same practice as that testified to by Mari A. and Ahman Albadeshes, *i.e.*, they each travel to the reservation from their New York City residence, purchase unstamped cigarettes on the

⁷ Exhibit 62 has been revised to present convictions, not arrests.

⁸ There are two City residents with two Suffolk County arrests each, but no arrests for sale or possession of untaxed cigarettes in the City.

Poospatuck reservation, and transport the cigarettes back to the City for re-sale. For example, on Exhibit 62A, Mr. Konate displays six arrests in the City for selling untaxed cigarettes and an arrest in Suffolk County. The record-holder appears to be a Mr. Burton, arrested 9 times in the City for sale or possession of untaxed cigarettes and once in Suffolk County. *See* Exhibit 62A. Based on the arrests of the individuals shown on Exhibit 62A at both ends of the cigarette pipeline, these individuals likely shuttle back and forth, purchasing a supply of unstamped cigarettes on the reservation and selling them in the City. The 20 individuals shown on Exhibit 62A as arrested in Suffolk County for possession of unstamped cigarettes have generated a total of 52 arrests in New York City for sales of unstamped cigarettes.

That all or most of the individuals listed on Exhibit 62A are purchasing their unstamped cigarettes at the Poospatuck reservation is evidenced by the location of the arrests. *See* Exhibit 62B.⁹

Facts Applicable to Monique's Smoke Shop

Defendant Jesse Watkins testified at a deposition on April 29, 2009, on behalf of defendant Monique's Smoke Shop. Deposition of Jesse Watkins dated April 29, 2009, Ex. 92 ("Watkins Dep.") 5:12-14. Monique's opened for business in approximately 1995 or 1996. Watkins Dep. 5:25-6:20. The names "Monique Princess Rainbow Variety Store," "Monique's Smoke Shop," and "Monique Rainbow Convenience" all refer to the same store. *Id.* 5:15-20, 6:24-7:4.¹⁰

⁹ Exhibit 62B plots the locations of these individuals' arrests based on the locations provided on their Exhibit 58 arrest reports. *See* CNY 00863, 895, 919, 1019, 1031, 1037, 1043, 1055, 1115, 1109, 1097, 1091, 1073, 1371, 1349, 1681, 1723, 1753, 1823, 1877, 1979, 1985.

¹⁰ Pennisi CG-6 forms reflect deliveries not only to "Monique Smoke Shop" at 112A Poospatuck Lane, *see, e.g.*, Ex. 8, March 2009, CG6 01651-53, but to "Princess Rainbow" at 112 Poospatuck Lane, *see, e.g.*, Ex. 8, March 2009, CG6 01657-59. *See also* Ex. 8, Feb. 2009, CG6 01560-62 (Monique Smoke Shop at 112A Poospatuck Lane) and Ex. 8, Feb. 2009, CG6 01554-56

As of April 29, 2009, Jesse Watkins worked at Monique's, helping to "manage it, run the business . . . oversee part of the business." *Id.* 11:6-12. He has worked full time at Monique's going all the way back to 1995. *Id.* 15:25-16:9. Jesse Watkins also testified that defendant Ernestine Watkins, who goes by the nickname "Twinkle," is a cashier at Monique's and that defendant Wayne Harris was an employee of Monique's as well as "somewhat" a business partner "at some point." *Id.* 11:17-21, 12:16-19, 27:18-22, 47:3-8, *see also* Ex. 97, *Morrison Tr.* 747:13-16, 860:10-13 (Wayne Harris is a business partner). Jesse Watkins and Ernestine Watkins are married; as of August 2007, Ernestine Watkins worked at Monique's full time Monday through Friday. Deposition of Ernestine Watkins in *Ellenbast v. Watkins*, Index No. 12227/00 (Suffolk County), Aug. 31, 2007 ("Ernestine Watkins Dep."), Ex. 104, 5:11-14; 38:16-39:2. Anitra Monique Watkins, the daughter of Jesse and Ernestine Watkins, has been the owner of Monique's since 1995 or 1996 (Ex. 92, Watkins Dep. 10:4-5), although Jesse Watkins testified at the *Morrison* trial that his wife owned the store. Ex. 97, *Morrison Tr.* 794:16-18.

Monique's is in the business of selling tobacco. Ninety-eight percent of Monique's business is selling unstamped cigarettes, and all cigarettes sold by Monique's are unstamped. Watkins Dep. 17:7-23; Ex. 80, Admission No. 4. Monique's buys cigarettes from Gutlove and Pennisi, but it also buys cigarettes from an entity on the Seneca Nation. Watkins Dep. 17:24-18:11. Monique's also trades cigarettes with dealers on the Shinnecock Reservation, and with other cigarette sellers on the Poospatuck Reservation. *Id.* 18:22-16. Monique's obtains Marlboro cigarettes by ordering them over the internet from other reservations. *Id.* 37:20-38:1. Jesse Watkins stated at his deposition that even though Monique's has a computer

(Princess Rainbow, at 112 Poospatuck Lane); and Ex. 8, Jan. 2009, CG6 01595-97 (Monique Smoke Shop at 112A Poospatuck Lane) and Ex. 8, Jan. 2009, CG6 01580-82 (Princess Rainbow, at 112 Poospatuck Lane).

system to keep track of sales, Monique's does not keep the records; instead of keeping sales records, they "[t]oss them in the garbage." *Id.* 21:22-22:1.

In the *Morrison* trial, in November, 2007, Jesse Watkins testified that he had managed Monique's Smoke Shop for about nine years. Ex. 96, *Morrison Tr.* 554:13-22; 555:17-20. Sales were made mostly to the "[g]eneral public," to customers who came from locations throughout the New York metro area. *Id.* 557:22-558:5. At the time Monique's was opened, in 1998, there were three other smoke shops on the Reservation: Peace Pipe, Smoke Signal and Poospatuck Outpost. *Id.* 575:11-19; 554:15-22.

Customers purchased cigarettes at Monique's in quantities of "one, two, ten, 30, 40, 60" cartons of cigarettes and "even more." *Id.* 558:6-9. Monique's had an average of \$160,000-\$170,000 gross cash sales per week and ninety percent of the business was conducted in cash. Ex. 97, *Morrison Tr.* 778:2-779:3. Watkins further testified that Monique's sold 60 cartons of cigarettes at a time and that he himself sold 60 to 100 cartons of cigarettes off the reservation on several occasions. *Id.* 830:17-831:5, 831:21-832:24; 846:22-849:6. On such occasions, Watkins admitted that he bypassed Monique's record keeping system and did not scan the cigarettes into the store computer. *Id.* 833:11-21. He also testified that he knowingly sold cigarettes to customers he believed intended to resell the cigarettes. *Id.* 976:4-6. Prior to November 2007, Jesse Watkins had employees of Monique's make twice monthly deliveries off the reservation of more than 150 cartons of unstamped cigarettes in single transactions even though he knew that such practices were illegal. *Id.* 851:18-852:22; 858:3-12.

At the *Morrison* trial, Watkins testified that he has known since 2004 or 2005 that it is illegal to sell unstamped cigarettes in certain amounts, but has never done anything to

confirm what amount is illegal; he sold cigarettes in volumes of 60 cartons because he chose to do so. *Id.* 766:14-20, 767:1-8, 767:23-768:10, 770:8-11.

Defendant Wayne Harris testified at the *Morrison* trial, “I’m a part owner in Monique’s Smoke Shop,” and that he had been a part-owner since 1998. Ex. 99, *Morrison Tr.* 2019:23-24, 2020:7-8. Harris also referred to himself as a “store manager” at Monique’s. *Id.* 2129:19-20. Harris confirmed that Monique’s routinely sold bulk amounts of cartons of cigarettes to customers in whatever quantity they wished to purchase and that Monique’s has delivered unstamped cigarettes off the reservation for sale; he himself delivered cigarettes off the reservation approximately eight times in the fall of 2007 in quantities of “maybe 60” cartons and “[a] hundred or less” cartons. *Id.* 2154:9-19, 2157:7-23, 2161:51-2163:25. On these occasions, he delivered the cigarettes to a friend at a parking lot in Sayville. *Id.* 2164:19-35. Harris has received a salary from Monique’s since it opened. *Id.* 2126:45-2127:21. His income was \$260,000 in 2006 and \$255,000 in 2005. *Id.* 2129:19-20, 2132:11-15, 2146:49-53.

Mari A.’s Monique’s Purchases -- Mari A. testified to making purchases at Monique’s, a store that she did not care for, approximately three or four times, between 2005 and 2006. Tr. 32:22-33:8, 66:7-16. She bought 300 cartons of unstamped cigarettes at a time and paid \$25 to \$27 dollars per carton in cash. *Id.* 34:13-15; 35:4-12. Monique’s did not provide receipts for the sales and did not even ring the sales up on a cash register. *Id.* 34:16-25. She brought the cigarettes back to the City to re-sell – “straight to the Bronx.” *Id.* 33:14-18. Mari A. testified that Monique’s did not restrict the number of cigarettes that she could buy. *Id.* 35:1-3.

DTF Purchases - On June 6, 2008, DTF Investigator Byron Mars and a confidential informant known as Larry (“CI Larry”) went to Monique’s at 112A Poospatuck Lane, which they were able to identify by the store’s signs. Ex. 57B, Tr. 319:15-320:3. They

spoke to a woman in the smoke shop who said her name was “Twinkle,” informing her that they wished to purchase 60 cartons of Newport cigarettes for re-sale in New York City. Tr. 320:10-21. Twinkle acknowledged by replying that a lot of their customers who buy from them are from New York City. Ex. 57B. Twinkle initially asked for too high a price, and when Mars said he needed a better price because he was going to sell the cigarettes in Brooklyn and the Bronx, she said that she knew that Mars would make a lot of money in reselling the cigarettes, so the price she was giving him was a good one. Ex. 57B; Tr. 320:22-321:4, 322:24-323:16. Twinkle sold the investigators 60 cartons of Newports, dividing them into two lots of 30 cartons, at \$27 per carton, for a total payment of \$1,620, all of which was paid in cash by CI Larry. Tr. 321:17-24, Tr. 322:24-323:6, Ex. 57B. A Monique’s business card obtained by Mars from Twinkle at the store advertises “Marlboro,” “Seneca,” and “Newports” for “Blowout Prices” and reads “We will NOT be undersold.” Ex. 51B, Tr. 321:25-322:12.

Mars returned to Monique’s on July 8, 2008, accompanied by CI Larry. Tr. 323:18-20. A clerk at Monique’s said that he would sell them 100 cartons of Newports for \$30 per carton, but no purchase was made at that time. Tr. 324:2-9; Ex. 57C.

Monique’s Continuing CCTA Violations – Monique’s has and continues to purchase, receive, possess, sell and distribute large quantities of unstamped cigarettes. From April 2006 to the end of 2008, Monique’s purchased over 1.29 million cartons of unstamped cigarettes from two of its suppliers, averaging approximately 36,000 cartons of unstamped cigarettes per month. Exs. 14A and 15A. In addition to those purchases, Monique’s bought from an entity on the Seneca Reservation, traded with others and ordered Marlboros over the internet from other reservations. Watkins Dep. 17:24-18:11; 18:22-16; 37:20-38:1. Monique’s purchased at least 444,000 cartons in 2006; 473,974 cartons in 2007; and 377,321 cartons in

2008. Ex. 15A. Monique's gross revenues, as reported on its federal tax returns, were \$11,648,139 in 2007 and \$11,117,225 in 2006 and its gross profits were \$389,450 in 2007 and \$746,349 in 2006. Exs. 45 and 46, *see also* Ex. 80, Admission Nos. 22-29 (Monique's admits that these documents accurately reflect Monique's gross sales and profits for those years). Jesse Watkins makes a weekly salary of \$1,500; Ernestine Watkins and Anitra Watkins also make salaries, but he does not know how much. *Id.* 33:14-24. In the month prior to April 29, 2009, Monique's had gross revenue of approximately \$150,000 to \$160,000 per week. *Id.* 28:22-29:4.

Despite his concerns over legality, Watkins testified at his deposition that Monique's has sold and continues to sell approximately 13,000 to 15,000 cartons per week. Ex. 92, Watkins Dep. 19:17-20:5. Monique's is selling less cigarettes now than previously, but that is because there are "more stores open" on the Reservation now. *Id.* 20:9-13.

Monique's is going to move from 112A Poospatuck Lane to 108 Poospatuck Lane and plans to stay in business. *Id.* 8:14-18. The store continues to purchase large amounts of unstamped cigarettes in 2009. Over the first three months of 2009, Monique's purchased 129,898 cartons of cigarettes from Gutlove and Pennisi: 47,437 cartons in January; 36,322 cartons in February and 46,139 cartons in March, 2009. Ex. 91 at 3; Ex. 8 at CG6 01651-01653, 01560-01562, 01595-01597; Ex. 7 at March 2009 Form CG-6 (Schedule E), CG6 01620, CG6 01627. In February and March of 2009, there were deliveries of cigarettes to Monique's on every single weekday except one. Ex. 53 (Gutlove invoices & Pennisi invoices to Monique's). Given the quantities of cigarettes purchased and received by Monique's since 2006, the profitable nature of the business, and the knowing disregard for the legality of its practices, Monique's is likely to continue to purchase, receive, possess and sell to the public the same

significantly large quantities of unstamped cigarettes as it has to date, and continue to act in violation of the CCTA.

Monique's Continuing CMSA Violations - Watkins estimated that 70% of Monique's sales are Newports. *Id.* 32:6-7. In February 2009, Monique's purchased an average of approximately 8,000 cartons of Newport cigarettes per week. *See* Ex. 53 (total Newport purchase of 32,230 cartons divided by 4). From March 3 to March 27, 2009, Monique's purchased 8,500 cartons of Newport per week. *See id.* (total Newport purchase of 34,045 divided by 4). Watkins testified that as of April 29, 2009, Monique's sells a carton of Newport for \$48.50 (Watkins Dep. 31:19-21), far below the CMSA minimum price of \$74.40 a carton as of March 9, 2009. *See supra* at 11-12. Monique's sold Newports for about \$40 per carton prior to the most recent federal tax increase. Watkins Dep. 31:19-24. These prices are subject to being lowered for competitive reasons, if a customer comes in and says he got a lower price from another store, which happens "all the time." *Id.* 37:2-8. Investigator Mars purchased Newports at Monique's for \$27 a carton on June 6, 2008, Tr. 321:17-24, Tr. 322:24-323:6, Ex. 57B, and was quoted a price of \$30 a carton on July 8, 2008. Tr. 324:2-9, Ex. 57C. All of these prices are far below the CMSA minimum price per carton of Newports of \$43.28 in December 2007; \$58.28 in June 2008; \$65.40 in December 2008; and \$66.51 as of February 12, 2009. *See supra* at 11-12. Given Monique's consistent history of selling below the minimum price for a retail dealer, it is likely that such practice will continue unless enjoined by this Court.

Facts Applicable to Peace Pipe Smoke Shop

Peace Pipe Smoke Shop, opened in 1994, and Smoker's Den, opened in 1997, both located at 9 Squaw Lane, Mastic, N.Y., are sole proprietorships owned by Charolette Morrison. Ex. 89 ¶¶ 1, 4, 5. Defendant Rodney Morrison, Charolette Morrison's husband, was

responsible for the overall management of Peace Pipe until August 3, 2004, *id.* at 8; Ex. 96 *Morrison Tr.* 408:15-17; Ex. 42 ¶5. Both stores' principal business, which they have engaged in continuously since opening, is the sale of unstamped cigarettes and other tobacco products. Ex. 89 ¶¶ 2, 3. All cigarettes sold by Peace Pipe are unstamped. Exs. 81-82, Admission No. 4. Peace Pipe makes in-store sales and Smoker's Den receives telephone or Internet orders in response to advertisements and ships to customers via the U.S. Postal Service. Ex. 89 ¶¶ 5, 6; Ex. 43 (advertisement); Ex. 44 (website). To the extent Smokers Den's cigarettes are delivered to New York residents, all such sales violate (in addition to the CCTA and the CMSA) N.Y. Public Health L. 1399-II, which prohibits non face-to-face sales of cigarettes. Peace Pipe intends for the foreseeable future to remain in business, Ex. 89 ¶ 8, no doubt because it is an extraordinarily lucrative enterprise. According to Rodney Morrison's counsel in *United States v. Morrison*:

The sums earned by some of these witnesses, and indeed, by Mr. Morrison will boggle the mind, will boggle the mind, and when my turn comes to go into that in particular, I guarantee it will be eye-popping dollars.

Ex. 96, *Morrison Tr.* 383:7-10.

[T]hese retail walk-in operations, if they were properly run like Mr. Morrison's and Mrs. Morrison's stores were run, they could make enormous amounts of money, just from retail sales. And the evidence will show, while I'm on the topic, that 95 percent of the enormous amount of money that these stores generated, Rodney Morrison's in particular I'm talking about now, 95 percent of his revenue didn't come from what the government is alleging. It came from retail sales, retail sales, bulk units, people who came from off the reservation on the reservation to buy cigarettes over the counter.

Id. 391:14-392:1.

In connection with some of those sales, Rodney Morrison was convicted on racketeering charges connected with his sales of unstamped cigarettes, based on a jury's findings that he had conspired with others to commit approximately 80 racketeering acts involving the sale and distribution of contraband cigarettes in violation of 18 U.S.C. §§ Sections 2342(a) between May 2, 2003 to August 2, 2004. Ex. 89 ¶ 11; Ex. 40 (verdict sheet); Ex. 41 (indictment). Many of the racketeering acts that Rodney Morrison was convicted of were sales to "Miss Tiny," which Mari A. testified was the name on her Peace Pipe account. Tr. at 26:3-9. Between May 2, 2003 and August 1, 2004, Peace Pipe sold 14,891 cartons to Ms. Tiny. Ex. 89, Att. 1.

Following Rodney Morrison's arrest on August 3, 2004 for CCTA violations, Peace Pipe was managed by Joseph Rombola, *id.* ¶ 9, until Rombola's arrest for CCTA violations in approximately September 2007. Rombola's arrest was based on allegations that he had structured sales of unstamped cigarettes so that the sales appeared to be limited to no more than 49 cartons per transaction. Ex. 89, Att. 2. Mari A. testified to that very practice by Peace Pipe. Tr. 26:10-15; Tr. 27:8-10. The Affidavit of Steven M. Troyd, Special Agent with the Federal Bureau of Investigation, in Support of an Application for Arrest Warrant and Search Warrant in the case of *United States v. Joseph Rombola* and *United States v. The Premises Known as Peace Pipe Smoke Shop 9 Squaw Lane, Mastic New York 11950*, in evidence pursuant to stipulation (Ex. 89, Att.2), indicates that the affiant's review of Peace Pipe sales records after March 9, 2006, shows a total of 1,214 transactions involving the sale of more than 50 but less than 301 cartons at a time, resulting in sales of more than \$3.5 million, and the loss of approximately \$2.2 million in state cigarette tax revenue. *Id.* ¶ 9. In addition, confidential witnesses who worked at Peace Pipe stated that customers routinely purchased more than 50

cartons of cigarettes at a time, but that the transactions were structured into lots of 45 cartons per transaction to avoid the 10,000 cigarette threshold under the CCTA. *Id.* ¶¶13-15.

Mari A's Peace Pipe Purchases – Mari A. testified that she began to purchase unstamped cigarettes from Peace Pipe beginning in 2001 or 2002 and continued making purchases there until 2007 or 2008. Tr.19:22-20:1. She initially dealt directly with defendant Rodney Morrison, and first purchased 30 cartons. When she returned to Peace Pipe with an order for 60 cartons, Rodney Morrison was sufficiently impressed with how quickly she had sold her first order that he “fronted” her 60 additional cartons to sell “on consignment,” which she sold and paid for out of the sale proceeds. Tr. 21:3-22:5. By 2002 or 2003, Mari A. was purchasing 300 cartons per trip.

Peace Pipe never restricted the number of cartons that Mari A. could purchase, but in or around 2007, she had placed orders that Peace Pipe divided into lots of 49 cartons, issuing multiple receipts for a single order:

[T]hey would put me under different names because the receipt could only be – can only show 49 cartons. They said they could only sell 49 cartons a day to a person. So that what they would do is if you ordered say five hundred cartons, you would get ten receipts with 49, and then one more receipt with ten.

Tr. 26:10-15. The various receipts were issued in different names, Tr. 27:8-10, although Mari A. did not see the names because Peace Pipe would never provide her with the receipts: “they said you could only legally buy 49 ... so the way around that is to write it in different names, to make it look like ten different people purchased it.” Tr. 27:10-15. Peace Pipe began to do this with her orders in 2006 or 2007, when a manager named “Joe” was arrested “and they were saying that they had gotten to a lot of hot water about the cigarettes.” Tr. 27:18-25.

The record contains additional examples of Peace Pipe's sales of unstamped cigarettes in excess of 49 cartons. For example, Exhibit 58, the Suffolk County Arrest reports, contains an August 17, 2007 arrest of an individual who identified herself upon her arrest as a clerk at Peace Pipe Smoke Shop, 9 Squaw Lane, Mastic NY, and was arrested with 11,600 unstamped cigarettes. *See* CNY 00987.¹¹ Likewise, one Alex Pascal, identified as a Peace Pipe cashier, *see* Ex. 89, Att.1, page 7 of 10, was arrested on February 18, 2006 with 1440 cartons of unstamped cigarettes in his vehicle. Ex. 58 CNY 01563-65. An August 7, 2008, arrest of an individual who had been observed loading cigarettes into a vehicle at Peace Pipe revealed 80 cartons of unstamped cigarettes. Ex. 60, CNY 774-775.

Mari A. testified that, in addition to making purchases at Peace Pipe in the area depicted in Defendants' Exhibit B, a set of computer terminals that apparently functioned as cash registers, Tr. 83:14-17, there was a special place where big customers were taken to make purchases. Tr. 109:11-13. If one were purchasing hundreds or multiple hundreds of cartons, there was a window in the back that was concealed by a gate: "Because ... you don't want the police or anyone passing to see you being loaded, you go in through the gate." Tr. 83:18-84:4. She also characterized the area in which she made large purchases as "around the side." Tr. 85:3-5; 85:22-86:2. The area was not visible from the road, but had a fence around it that was covered with a green material. Tr. 109:14-20; 110:8-12. When she purchased in the area around the side, Peace Pipe broke her purchases down into lots of 49 and she could see the receipts printed out, but she was not provided with them. Tr. 85:22-86:9. Bulk orders could be phoned in or could be placed in person. Tr. 86:17-25. There was also an office to the right of the areas visible in Exhibit B, where you could go in and sit down to place your order; there were money counters in

¹¹ Unredacted versions of the specific arrest reports referenced in this brief, which are in redacted form in Exhibit 58, are annexed hereto as Exhibit 58A.

that room. Tr. 90:19-91:2. When Mari A. did make a purchase in the area depicted in Exhibit B, where a receipt was generated, Peace Pipe usually kept the receipt. Tr. 84:5-24.

Mari A. also testified that Peace Pipe delivered 300 cartons to her in the Bronx. Tr. 25:12-20. She had already paid for the cigarettes at the reservation, but was unable to leave because the police were present. Rather than return the money, Rodney Morrison had one of his workers deliver the cigarettes to her later. Tr. 23:17-24:23.

DTF Purchases – On June 3, 2008, DTF Supervising Investigator Byron Mars and CI Larry entered Peace Pipe Smoke Shop, 9 Squaw Lane, Mastic NY, and first spoke to a woman named Jessica, informing her that they wished to buy 60 cartons. Mars was referred to a supervisor identified to them as “Carolina” and stated that they wished to purchase 60 cartons of Newport cigarettes and subsequently resell them in New York City for a profit. Tr. 316:9-11; 350:15-25; Ex. 57A (Def. Ex. I). Carolina replied that she would not sell them more than 49 cartons because she was concerned that they would be stopped by the police, which would lead to trouble both for her and for the investigators. Tr. 356:16-357:1; Ex. 57A (Def. Ex. I). CI Larry offered to split the order into separate orders. *Id.* Carolina rejected the offer because she stated that she knew the two investigators had come in a single vehicle and thus could not split the order. *Id.* Mars then paid cash for 49 cartons of unstamped Newport cigarettes at \$26 a carton or \$1,274 and the cartons were placed in a black plastic bag. Tr. 316:12-25; Ex. 57A (Def. Ex. I).

Peace Pipe’s Continuing CCTA Violations - Peace Pipe and Smokers Den have done and continue to do an enormous business in unstamped cigarettes. In 2004, Peace Pipe purchased from wholesalers Gutlove and Pennisi almost 2 million cartons of cigarettes. Ex. 11A, Ex. 91 at 16. In 2005 and 2006, purchases topped 2 million cartons, with Peace Pipe

purchasing over 2.3 million cartons in 2005, and 2,049,533 cartons in 2006. *Id.* In 2007, Peace Pipe purchased almost 1.5 million cartons, and in 2008, Peace Pipe purchased 726,350 cartons. Ex. 11A; Ex. 91 at 4. In the first 3 months of 2009, Peace Pipe purchased 163,406 cartons of cigarettes: 54,416 cartons in January 2009; 51,204 cartons in February 2009 and 57,786 cartons in March 2009. Ex. 10A; Ex. 91 at 3. Peace Pipe and Smokers Den are huge businesses: Peace Pipe presently employs 44 people, Ex. 89 ¶ 18, whose salaries range from a low of \$9 an hour to a high of \$20 an hour. *Id.* ¶ 19. Peace Pipe has stipulated to the fact that it has sold thousands of cartons of cigarettes in thousands of transactions to numerous individual customers who reside in New York City. *Id.* ¶ 16. As noted above, Peace Pipe intends for the foreseeable future to remain in this thriving business, Ex. 89 at ¶ 8, even after Rodney Morrison's conviction in 2008, *see* Ex. 40, and therefore is likely to continue to purchase, receive, possess and sell to the public the same enormous quantities of unstamped cigarettes as it has to date, and continue to act in violation of the CCTA.

Peace Pipe's Continuing CMSA Violations – Mari A. testified that for the bulk purchases that she was making, Peace Pipe's prices were generally comparable to those of the other stores. Tr. 107:17-24. Although Peace Pipe stipulated to the highest price at which it would sell Marlboro and Newport cigarettes, Ex. 89 at ¶¶ 14-15, it is clear that at times, it sold those brands for far less than the stipulated price. *See, e.g.,* Tr. 316:2-19 (Mars testimony that Peace Pipe sold him Newports on June 3, 2008 for \$26 per carton). Pursuant to the stipulated facts, the highest price for which Peace Pipe sold Marlboro cigarettes to its customers in 2007 was \$36 a carton. Ex. 89 ¶ 14. From January through June 2008, the highest price for which Peace Pipe sold Marlboro cigarettes to its customers was \$39.50. *Id.* From June to December 2008, the highest price for which Peace Pipe sold Marlboro cigarettes to its customers was \$48.

In 2009, the highest price for which Peace Pipe sold Marlboro cigarettes to its customers was \$52. *Id.*

All of these prices are far below the CMSA minimum price for a carton of Marlboros of \$43.61 in December 2006; \$44.11 in December 2007; \$58.91 in June 2008; \$59.41 in December 2008; \$60.41 as of February 12, 2009; and \$68.30 as of March 9, 2009. *See supra* at 11-12.

Peace Pipe was also well-stocked with Newport 100 products. Tr. 107:17-24. The highest prices for which Peace Pipe sold Newport cigarettes to its customers was \$33.50 a carton in 2007, \$39.50 from January through June 2008, and \$48 from June to December 2008. Investigator Mars testified that Peace Pipe sold him Newports for \$26 per carton on June 3, 2008. Tr. 316:2-19. In 2009 the highest price for which Peace Pipe sold Newport cigarettes to its customers was \$51. Ex. 89 ¶ 15. *See also* Exhibit 44, a print-out from a web-site maintained by Smokers Den, which indicates that as of May 3, 2009, Smokers Den was selling Newport for \$51 per carton.

All of these prices are far below the CMSA minimum price for a carton of Newports of \$42.72 in December 2006; \$43.28 in December 2007; \$58.28 in June 2008; \$65.40 a carton in December 2008; \$66.51 a carton as of February 12, 2009; and \$74.40 a carton as of March 9, 2009. *See supra* at 11-12. Given Peace Pipe's history of selling below the minimum price for a retail dealer, it is likely that such practice will continue unless enjoined by this Court.

Facts Applicable to Red Dot and Feather Smoke Shop

Defendant Red Dot and Feather Smoke Shop, now known as Red Dot Smokes, is owned by defendant Raymond Hart and located at the same address as his residence, 115 Poospatuck Lane. Ex. 93, Hart Dep. 8:16-20; 10:15-25; 6:3-4; and 15:14-16:2. Hart testified at his deposition that he opened Red Dot and Feather in October 2007 and sometime after that,

changed the name to Red Dot Smokes. *Id.* 10:15-25. Red Dot and Feather was a corporation, but Red Dot Smokes was a “d/b/a”. *Id.* 24:8-13. Sales records of Gutlove and Pennisi indicate that deliveries of cigarettes were made to Red Dot and Feather as early as March 2006. Ex. 91 at 10; Ex. 7 at CG6 001295-01297. Hart obtained a permit from the tribal council to open the business, but at the time the tribal council was not allowing any more smoke shops to open, so “we had to get up votes to overturn the ruling they had set forth. So, once we got up enough votes and enough people came together, then we got the resolution overturned, and they allowed more smoke shops.” Ex. 93, Hart Dep. 21:6-17. Hart testified that the ban on new smoke shops was overturned at the beginning of 2007. *Id.* 22:3-5.

As of April 2009, Hart keeps the inventory up, pays the bills and is in the store at least three to four hours a day, seven days a week. *Id.* 6:5-8; 7:12-19. All the cigarettes he sells are unstamped, *id.* 12:25-13:3; Ex. 76; Admission No. 4, and 96% of his revenues are from tobacco. *Id.* 14:22-15:5. He started keeping records of the inventory he receives from Gutlove and Pennisi beginning in about November of 2008. *Id.* 25:14-26:4. He has no records that would allow him to figure out his gross and net profits, and he is not sure of what his business gross is in a month, or what his profit is in a month. *Id.* 57:2-21. He had not filed a personal income tax return for 2008 as of the date of the deposition, but was planning to, and did not file for 2007. When asked if he was planning to file, he replied, “I would have to see what happens.” *Id.* 58:5-13.

Mari A.’s Red Dot Purchases -- Mari A. testified to bulk purchases of unstamped cigarettes from Red Dot about five to ten times during 2008. Tr. 35:13-37:20. She purchased six hundred cartons there, saying “I put in a big order, but they never had a lot of Newport longs, because they already had their set customers.” Tr. 35:23-25. She bought from

“Kenny” at Red Dot, paid cash, and brought the cigarettes straight to the Bronx to resell. Tr. 36:1-10; *see also* Ex. 93, Hart Dep. at 42:21-25 (Red Dot employed someone named Kenny Gilkes). Mari A. testified that

[Red Dot] have a drive-thru window. And so when you get to the end of the drive-thru, you could back up. They got a cherry tree. And you back up right there, under the cherry tree, and then while they finished the people that is going around that’s where their side door is for their big customers. So I would sit inside like on a milk crate. They also didn’t ring it up in the cash register. They did it on a calculator. And though (sic) would load me up while I just sat down and waited.

Tr. 36:11-22. Red Dot put no limit on the numbers of cartons she could buy (Tr. 37:9-11), and provided Mari A. with an escort off the reservation: “if Kenny was busy, then the young kid would ride around and let me know whether the police was out and if it in was clear, then he would take me out.” Tr. 37:4-6.

DTF Purchases -- DTF Investigator Byron Mars also testified to sales of large quantities of unstamped cigarettes by Red Dot in 2008. On June 3, 2008, Investigator Mars and “CI Larry” made an undercover purchase of unstamped cigarettes at Red Dot & Feather, 115 Poospatuck Lane. Tr. 308:15-309:1; Ex. 57A (Def. Ex. I) at 1-2. There were signs on the building for Red Dot. The undercover asked for 60 cartons of Newport, and a gentleman in the store, who identified himself as Ken, gave the price as \$28 a carton. Tr. 309:2-24. Mars said that the price was a bit high because Mars had to resell the cigarettes in Brooklyn, in the Bronx and needed a better price, and Ken said he would sell the cigarettes for \$26 per carton. Tr. 310:1-7; Ex. 57A (Def. Ex. I), at 1-2. Red Dot sold the cigarettes for \$26 per carton, and the investigators paid \$1,560 in cash and the cigarettes were packaged in black garbage bags. *Id.* 310:7-20. Investigator Mars picked up a business card from the store, which advertises “Tax

Free Cigarettes” and “The only drive-thru smoke shop” under “Red Dot & feather Smoke Shop, 115 Poospatuck Lane, Mastic NY 11950”. Tr. 310:21-311:22; Ex. 49.

Mars returned to Red Dot & Feather on September 3, 2008, with DTF Investigator Romero. They went to the drive-thru, and told the gentleman that they wanted to purchase Newports, and he said the price for Newports was \$31 per carton. Mars explained that they needed a lower price to make a profit on the cigarettes that they were going to sell in Brooklyn and the Bronx, and the gentleman reduced the price to \$28.50 per carton. Tr. 328:9-329:12; Ex. 57E. Red Dot sold Mars the unstamped Newports for \$28.50 per carton, and Mars paid in cash for 98 cartons. However, when the cigarettes were vouchered, they discovered they were one carton short. Tr. 329:13-24; Ex. 57E.

Red Dot & Feather’s Continuing CCTA Violations - Red Dot & Feather has in the past and continues to purchase, receive, possess, sell and distribute large quantities of unstamped cigarettes. Red Dot & Feather purchased 121,449 cartons of cigarettes from both Gutlove and Pennisi between March 2006 and November 2006. Ex. 18A; Ex. 91 at 9-12.¹² In 2007, Red Dot & Feather purchased nothing from January to August, and then began purchasing again from Gutlove in September 2007, and from both Gutlove and Pennisi in December 2007, for a total of 22,319 cartons for 2007. Ex. 91 at 7; Ex. 17A (monthly); Ex. 18A (annual).

In 2008 Red Dot & Feather purchased 722,994 cartons from Gutlove, and Pennisi. Ex. 91 at 4; Ex. 18A (annual). The store continues to purchase large quantities of unstamped cigarettes in 2009. Over the first three months of 2009, Red Dot purchased 49,006 cartons of cigarettes from Gutlove and Pennisi: 19,257 cartons in January 2009; 9,169 cartons in February 2009; and 20,580 cartons in March 2009. Ex. 91 at 3; Ex. 7 at March 2009 Form CG-6

¹² Much was made of the negative sales to Red Dot & Feather in December 2006, which appears to be due to a credit. See Tr. at 472:5-14; Ex. 91 at 7; Ex. 7A at CG6 01399.

(Schedule E), CG6 01620, CG6 01627; Ex. 8 at CG6 01660-01662, 01551-01553, 01589-01591. In April 2009, according to Red Dot records, they purchased 11,123 cartons from Gutlove, and 18,944 cartons from Pennisi, with deliveries on every weekday from April 6th through April 28th. Ex. 54. Given the quantities of cigarettes purchased and received by Red Dot over the years, Red Dot is likely to continue to purchase, receive, possess and sell to the public the same significantly large quantities of unstamped cigarettes as it has to date, and continue to act in violation of the CCTA.

Red Dot & Feather's Continuing CMSA Violations - Hart testified in his deposition that Newports and USA Gold are the biggest selling cigarettes. *Id.* 45:21-25. As of April 27, 2009, Hart was selling a carton of Newports for \$48, far below the CMSA minimum price of \$74.40 a carton as of March 9, 2009. *See supra* at 12. As of the beginning of 2009, Hart was selling Newports for about \$37 a carton. *Id.* 32:12-24. In 2008, the price for a carton of Newports was about \$37. *Id.* 33:9-15. Investigator Mars purchased Newports at Red Dot & Feather for \$26 a carton on June 3, 2008 and for \$28.50 on Sept. 3, 2008. Tr. 308:15-19, 309:23-310:8; 328:9-11, 329:3-14. These prices are far below the CMSA minimum price per carton of Newports of \$43.28 in December 2007; \$58.28 in June 2008; \$65.40 in December 2008; and \$66.51 as of February 12, 2009. *See supra* at 11-12. Given Red Dot & Feather's history of selling below the minimum price for a retail dealer, it is likely that such practice will continue unless enjoined by this Court.

Facts Applicable to Smoking Arrow Smoke Shop

Defendant Smoking Arrow Smoke Shop, also known as Smoking Arrow Smokes, is owned by defendant Denise Paschall, and is located at the same address as Paschall's residence, 159 Poospatuck Lane, Mastic New York, 11950. Ex. 94, Deposition of Denise Paschall, April 29, 2009 ("Paschall Dep.") at 5:24-6:1; 14:23-15:1 ("Well, I'm pretty much the

owner, but my daughter pretty much runs it”); 4:24-25 (residence address); and 8:25-9:11 (business address). Paschall testified at her deposition that she first went into business as Smoking Arrow Smokes in 2007 and had a cigarette-related internet business of the same name prior to 2007, she believes in 2000, for a year; one could order cigarettes from a website. *Id.* at 10:5-25. Gutlove records indicate deliveries of cigarettes to Smoking Arrow as early as April 2006 (Ex. 91 at 11; Ex. 7A at CG6 01425), and Supervising Excise Tax Investigator Christopher Lannon testified that he first noticed Smoking Arrow Smoke Shop towards the end of 2006, into 2007. Tr. at 157:23-158:1.¹³ All cigarettes sold by Smoking Arrow are unstamped. Ex. 78, Admission No. 4.

In 2007, Paschall worked in the store “on and off,” maybe three hours a day, probably between two to three days a week. Ex. 94, Paschall Dep. at 11:8-21. She “just came in to oversee.” *Id.* at 12:20-22. Her daughter, Rashea Henderson (*id.* at 11:22-12:4) was “doing the financial part of it,” meaning “the ordering and the inventories and stuff like that.” *Id.* at 12:23-13:4. In 2007, defendant Tony Phillips was at the store, “maybe four hours out of the day, maybe,” (*id.* at 14:6) doing similar work: “they both was like cashiers doing the same thing, the ordering, the financial, you know, that part of it, paying the bills and stuff.” *Id.* at 13:5-9.

At the *Morrison* trial, in December, 2007, Tony Phillips testified that he managed Smoking Arrow Smoke Shop for its owner, defendant Denise Paschall, from 2006 to 2007. Ex. 101, *Morrison* Tr. 2512:5-2513:3; 2508:3-13. Denise Paschall was basically an “absentee owner,” who owed the business since 2000. *Id.* During the period 2006 to 2007, Phillips testified that Smoking Arrow sold about 10,000 cartons a day, grossing about \$140,000 a day, or

¹³ Dancing Arrow Smoke Shop, which is Paschall’s daughter’s smoke shop, is also at 159 Poospatuck Lane. Paschall testified that her daughter “doesn’t have a business. She just has a certificate,” (Paschall Dep. at 6:16-11), although Gutlove records indicate a delivery of cigarettes to Dancing Arrow Smoke Shop in April 2008. (Ex. 91 at 1; Ex 7 at CG6 00621).

\$1 million a week, all cash. *Id.* 2523:25-2524:47; 2525:40-2526:29. On average, Phillips sold “maybe 20 cases, maybe 10” per customer, with 60 cartons per case. *Id.* 2528:45-2529:23. Smoking Arrow was selling “wholesale” for the entire time he was there. *Id.* 2515:35-41.

Mari A.’s Smoking Arrow Purchases – Tony Phillips’ testimony at the *Morrison* trial was confirmed by Mari A., who testified to bulk purchases of unstamped cigarettes from Smoking Arrow during 2007 and 2008. Tr. 28:1-12. Mari A. testified that she typically bought 900 cartons of cigarettes at a time from Smoking Arrow – nine cases of “long” (Newport One Hundred Box) and six cases of “short,” (Newport Box), as well as “Specials,” which she bought “just to be nice to customers, because really, most people that did wholesale like I did really just focused on Newports.” Tr. 28:12-29:1. She paid cash. Tr. 31:5-7. Mari A. testified that in 2007 and 2008, she paid between 28 and 32 dollars per carton. Tr. 32:11-21. Smoking Arrow put no limit on the numbers of cartons she could buy at one time, and would provide her with cigarettes on consignment, allowing her to pay for the cigarettes after she had sold them in the City. Tr. 31:21-32:2. Mari A. testified that she dealt principally with Tony Phillips at Smoking Arrow, who she identified as the owner. Tr. 29:2-25. Smoking Arrow typically provided Mari A. with an escort off the reservation, at first a van, and then “they had the mountain bike, and they rode around to see if the cops were there, ...and they would tell you it’s safe to go.” Tr. 31:12-20.

Mari A. further testified that Smoking Arrow delivered cigarettes to her off the reservation, in New York City, approximately ten times, either in late 2007 or early 2008. Tr. 30:1-17. The cigarettes were delivered to her in the City either because of police activity on the reservation, or because she had arrived before the cigarette had been delivered to Smoking Arrow and she did not wish to wait. Tr. 30:17-25. She noted that the deliveries, for which she

paid an additional fifty cents per carton extra, also served to shift the risk associated with seizures of the cigarettes in transit. If the cigarettes were seized in the course of a delivery by Smoking Arrow, the store would have to make good on the loss, which they would not have had to do if the cigarettes were seized while Mari A. was transporting them. Tr. 30: 20-25.

Mari A. testified that Smoking Arrow was one of the smoke shops where she observed others purchasing bulk quantities of cigarettes, as a result of which she would have to wait for her purchases while other customers were attended to. Tr. 42:7-9. She stated that "Smoking Arrow was the worse, because they didn't have an enclosure. So they would load people up right there. They would take it off the delivery truck, and put it right into people's cars." Tr. 42:7-13.

DTF Purchases -- DTF Investigator Byron Mars also testified to sales of large quantities of unstamped cigarettes by Smoking Arrow in 2008. On June 3, 2008, Investigator Mars and "CI Larry" made an undercover purchase of unstamped cigarettes at 159 Poospatuck Lane, which was identified by signs on the building as Smoking Arrow. Tr. 311:25-315:18; Ex. 57A (Def. Ex. I) at 2. The undercovers asked for 60 cartons of Newport, informing the store clerk that they planned to resell the cigarettes in New York City for profit. Tr. 312:17-313:1; Ex. 57A (Def. Ex. I), at 2. The store clerk said that it was illegal to sell more than 49 cartons, and suggested that they split the cigarettes up 30/30 between the two investigators. The clerk rang the order up as two sales of 30 cartons each and placed the orders in two separate black plastic bags. Smoking Arrow sold the cigarettes for \$26 per carton, and the investigators paid \$1,560 in cash and were provided with two receipts for \$780 each, time-stamped less than one minute apart by the cashier, "Tim." *Id.* Investigator Mars picked up a business card from the store, which advertises "Tax Free Cigarettes" and "Cigarettes as Low as \$16.50" from

“SmokingArrowSmokes.com Wholesale/Retail” and “Smoking Arrows Smokes, 159 Poospatuck Lane, Mastic, NY”. Tr. 314:9-315:1; Ex. 51.

Mars returned to Smoking Arrow on August 7, 2008, with DTF Investigator Muriel, where a store clerk told them the price for Newports was \$34 per carton if they wanted to buy a hundred cartons. Tr. 324:10-326:7. Mars told the clerk that he was going to sell the cigarettes in New York State, Brooklyn and the Bronx especially. Tr. 327:16-23. When Mars said that he would buy 180 cartons, the gentleman brought the price down, and sold Mars unstamped Newports for \$28 per carton. Tr. 325:21-326:23. Mars purchased 90 cartons of Newport regular and 90 Newport 100s for \$5,040. The clerk informed Mars that “if we buy more, the more we buy he’d give us a better price, and I asked him for his name.” Steve wrote his name on a business card and gave it to Mars. Tr. 327: 1-9; Ex. 57D.

Mars again returned to Smoking Arrow on September 5, 2008, with Investigator John Romero. Tr. 330:12-332:1. Mars informed the clerk that they wanted to buy Parliament cigarettes, and the clerk told Mars that they were \$43 per carton. Mars told him that it was too high because “I have to sell them in Brooklyn and in the Bronx and at that price they wouldn’t buy them.” Tr. 331:8-13. The clerk behind the service counter explained that the “Parliaments are rare so they ‘need to charge top dollar for them’, they are not getting Phillip (sic) Morris products steadily and when they do get some they are charging a high price for them. He also stated that ‘Phillip (sic) Morris is kicking our ass’, that they are selling the product for a high price so that when the cigarettes are sold, the customer cannot resell the product for a profit.” Ex. 57G. Mars then asked if he had Newports, and Mars purchased a hundred cartons of Newports at a price of \$27.25 per carton for 100 cartons, paying \$2,725 in cash. Tr. 331:8-332:1; Ex. 57G. The store clerk told them that in approximately one month, the “\$6 off”

(discount) on Newports will be discontinued, with Lorillard following Philip Morris so that “you guys can’t come here and take it and go and make more money,” by reselling in New York City. Ex. 57G. *See also* Tr. 558-560 (testimony of Andrew DeFrancesco that Newports had a \$6 discount as of June 3, 2008, and that by Dec. 2008, the discount had disappeared).

Smoking Arrow’s Continuing CCTA Violations - At the time of Paschall’s deposition, April 30, 2009, Tony Phillips was still working at Smoking Arrow, three days a week, sometimes for six hours, sometimes for four hours, with the same responsibilities as in 2007, for ordering and inventory. Ex. 94, Paschall Dep. at 14:7-14. Paschall is still working there two days a week, so in answer to the question as to who puts in the most hours in the store, Paschall stated it would be between “my daughter and Tony.” *Id.* 14:15-19.

Business is good at Smoking Arrow. Paschall receives a salary, “mostly I get maybe like \$2,000 a week.” *Id.* 15:19-23. Tony Phillips gets \$1,000 a week, “if it’s a good – the month is good or the weeks are good,” as does Paschall’s daughter. *Id.* 16:7-22. Salaries are paid in cash. *Id.* 17:10-13. The same amounts applied in 2008. *Id.* 19:15-20. Paschall was unable to give an estimate of how many cartons Smoking Arrow would be selling a week, and although she gets the invoices for the cigarettes she purchases, she testified that “my daughter – she is not a good financial keeper, so we don’t have any, you know. We may have a few, but we don’t have everything, so –”. *Id.* 18:4-17. Smoking Arrow has not yet filed federal income taxes for the 2008 year (“We’re in the process with my accountant”) or the 2007 year (“We are still doing that because of poor recordkeeping”). *Id.* 37:8-18.

In 2006, Smoking Arrow purchased 663,870 cartons of unstamped cigarettes from Gutlove, and in 2007, Smoking Arrow purchased almost 2.3 million cartons of unstamped cigarettes. Ex. 91 at 4; Ex. 13A. In 2008, Smoking Arrow purchased from Gutlove and from

Pennisi approximately 1.4 million cartons of cigarettes. Ex. 13A; Ex. 91 at 4. The store continues to purchase large quantities of unstamped cigarettes in 2009. Over the first three months of 2009, Smoking Arrow purchased 146,575 cartons of cigarettes from Gutlove and Pennisi: 41,667 cartons in January 2009; 41,748 cartons in February 2009; and 63,160 cartons in March 2009. Ex. 91 at 3; Ex. 7 at March 2009 Form CG-6 (Schedule E), CG6 01620, CG6 01627; Ex. 8 at CG6 01666-01667, 01543-01544, 01598. Paschall testified that she plans to continue to do business as Smoking Arrow Smokes, and has no plans to go out of business, *id.* at 40:2-6, and Smoking Arrow therefore is likely to continue to purchase, receive, possess and sell to the public the same large quantities of unstamped cigarettes as it has to date, and continue to act in violation of the CCTA.

Smoking Arrow's Continuing CMSA Violations - Newports and the native brands are Smoking Arrow's biggest sellers. Ex. 94, Paschall Dep. at 20:9-10. Smoking Arrow sold Newports for between \$37 and \$40 per carton at the end of April 2009 (Paschall Dep. at 24:4-12), far below the CMSA minimum price of \$74.40 a carton as of March 9, 2009. Tr. at 566:9-16. Smoking Arrow sold Newports for "thirty-something" in 2008 or the beginning of 2009. Paschall Dep. at 24:4-12. In or about 2007 or 2008, Mari A. testified that Smoking Arrow sold Newports for between \$28 and \$32 a carton. Tr. 32:11-21. Investigator Mars purchased Newports at Smoking Arrow for \$26 a carton on June 3, 2008; for \$28 on August 7, 2008; and for \$27.25 on Sept. 5, 2008. Tr. 326:8-16, 330:24-331:22; Ex. 57A at CNY 00268, Ex. 57D, Ex. 57G. All of these prices are far below the CMSA minimum price per carton of Newports of \$42.72 in December 2006; \$43.28 in December 2007; \$58.28 in June 2008; \$65.40 in December 2008; and \$66.51 as of February 12, 2009. *See supra* at 11-12. Smoking Arrow has consistently sold significantly below the CMSA minimum prices applicable to retail dealers during its entire

existence, since 2006 or 2007, and there is no evidence to indicate that its pricing practices will change, unless enjoined by this Court.

Facts Applicable to TDM Discount Cigarettes

Thomasina Mack lives on the Poospatuck reservation and ran an all cash cigarette business, TDM Discount Cigarettes, out of her home, starting in January 2000. Deposition of Thomasina Mack, dated April 14, 2009, Ex. 95 (“Mack Dep.”) at 6:5-13; 12:22-24; 13:17-21; 20:15-25; 28:5-8. Sales were made “down at my home at the address, at the Poospatuck Reservation.” *Id.* 41:7-10. TDM Discount Cigarettes is a sole proprietorship that Mack still owns. *Id.* at 14:1-3; 11-15. TDM’s only business is the sale of unstamped cigarettes. *Id.* 33:12-16; *see also* Ex. 78, Admission Nos. 5, 7. TDM purchased unstamped cigarettes from 2000 to October 2008 from Pennisi, and also purchased from Gutlove for one year, in 2007. Ex. 95, Mack Dep. 33:17-34:8. Mack also purchased 30 to 40 cartons of cigarettes once a month from Harry Wallace between 2005 and 2008, and also purchases 90 cartons from Jesse Watkins and Anitra Watkins about every three months. *Id.* 35:4-36:18. Mack does not maintain a complete set of records of her purchases; she has some records, but not records of all of the cigarettes she bought “becomes sometimes some of them get lost or its just how it is.” *Id.* at 26:25-27:1. She keeps no records of TDM’s sales. *Id.* at 27:11-20; 42:11-18.

At the *Morrison* trial, Mack testified in November, 2007 that she runs her cigarette business selling unstamped cigarettes out of her home on the Poospatuck Reservation. Ex. 98, *Morrison Tr.* 1049:23-1050:6; 1076:2-4. Mack ran a “cash only” business, and the quantities she sold “would be anywhere from five cartons to a thousand cartons. They would come, pick them up from my home, and whatever they did with them afterwards was really for personal use.” *Id.* 1075:10-16. Mack testified that she delivered untaxed cigarettes off the reservation. *Id.* 1075:19-21; 1216:5-21. Mack purchased “over a million dollars a month” in

cigarettes from Pennisi in 2007. *Id.* 1146:23-1148:1; 1154:6-15. Specifically, Mack agreed that records maintained by Pennisi accurately reflected her purchases, from May to September of 2007, respectively, of \$1.5 million in cigarettes, \$1.7 million in cigarettes, \$1.54 million in cigarettes, \$1.68 million in cigarettes, and \$1.458 million in cigarettes. *Id.* 1146:23-1148:1.

Mack also testified that she had two drivers who delivered cigarettes for her off the reservation, Antwon Williams and Richard White, using one of the trucks she owned. Ex. 98, *Morrison Tr.* 1158:20-1159:13. The unredacted Suffolk County arrest reports, Exhibit 58A, contain arrests for both Richard White and for Antwon Williams. *See* Ex. 58A at CNY 2117 and 2123. (Richard White in possession of in excess of 20,000 cigarettes on April 20, 2005 on Poospatuck Lane; Antwon Williams unloading cigarettes in Cambria Heights, Queens and in possession of in excess of 20,000 untaxed cigarettes on April 20, 2005). The arrest reports indicate that the charges were based in part on Antwon Williams' admission that the cigarettes came from Mastic, New York. *Id.* at CNY 2117 and 2123.

Ahman Aldabeshes' Purchases from Thomasina Mack - In 2005, Aldabeshes bought unstamped cigarettes from Thomasina Mack, which he brought to New York City to sell to grocery stores. Tr. 192:13-25. Each time he purchased from Thomasina Mack, he purchased approximately 15 to 18 master cases, and he went to the reservation to purchase five or six days a week. Tr. 193:1-14. Initially, he purchased the cigarettes from Mack at her house, on the Poospatuck reservation. Tr. 194:11-18. Subsequently, Mack began to deliver the cigarettes to him at Exit 41 off the Long island Expressway, at a location he believes is called Storage USA. Tr. 194:19-24. He would call Mack and the next day pick up the cigarettes inside the storage place, at night. Tr. 195:7-10. Sometimes Mack herself was present at the pick-up, sometimes it was two males. Tr. 195:11-196:1. Mr. Aldabeshes purchased 15-18 master cases of cigarettes

per trip at this time, principally Newports, Newport 100s and some Marlboros. Tr. 196: 8-15. A master case contains 60 cartons of cigarettes. *See* Tr. 10:22-24.

Mari A. Purchases from Thomasina Mack - Mari A. testified to purchasing unstamped cigarettes indirectly from Thomasina Mack. According to Mari A., Mack would deliver cigarettes to a 24 hour storage unit located off the reservation, on “106 on Long Island,” Tr. 39:1-4, where Mack’s worker, “Dee,” would sell them to Mari A. Tr. 37:21-38:1. Mari A. was told by Mack that Dee was one of Mack’s workers. Tr. 38:9-15. Mari A. purchased 20 to 30 times from Dee at the storage unit between 2005 and 2006, paying around \$25 per carton for 600 to 900 cartons of Newports. Tr. 39:9-21.

DTF Testimony - The testimony of Mari A. and Aldabeshes that Mack delivered unstamped cigarettes to off-reservation storage sites was confirmed by Investigator Lannon. In September 2006, Lannon followed a white pick-up truck and a trailer registered to Thomasina Mack. Tr. 162:2-14. At approximately 8:00 or 9:00 pm on a day in September 2006, the vehicles registered to Thomasina Mack met a van at the Bissett Nursery in Farmingville, L.I. Material from the trailer was off-loaded into the mini-van. Tr. 162:16-163:7. The mini-van then drove in a westerly direction, and stopped on the Long Island Expressway, near the Nassau-Queens border. Tr. 163:8-12. The van was found to be transporting approximately 1000 cartons of unstamped cigarettes. Tr. 163:14-24. An earlier report by Investigator Lannon, dated February 27, 2006 (Ex. 60 at CNY 00807) indicated that a white trailer registered to Thomasina Mack had been observed parked at Storage USA, 789 Broadway, Hicksville, NY, on February 17, 2006. Individuals were observed loading boxes wrapped in black plastic into two vehicles. *Id.* at CNY 808.¹⁴ A subsequent stop of one of the vehicles revealed 1320 cartons of unstamped

¹⁴ An unredacted version of this report is annexed hereto as Exhibit 60 C.

cigarettes; one of the arrestees indicated that he had picked up cigarettes at the storage facility on three prior occasions. *Id.* The investigators also seized two handwritten invoices dated February 16 and 17 and a note which read “Dee, Tomorrow the order will be early! I will call at 11 am to get in the mix.” *Id.* The invoices reflected a price of \$21.25 per carton of Newports and \$23.25 per carton of Marlboros. *Id.*

TDM’s Continuing CCTA Violations - From October 2006 until August 2008, TDM purchased between 41,000 and 76,000 cartons of unstamped cigarettes per month from Pennisi. Ex. 23. In 2006, TDM purchased in excess of 550,000 cartons of unstamped cigarettes. Ex. 24A. In 2007, TDM purchased in excess of 822,000 cartons of unstamped cigarettes. *Id.* In 2008, TDM suspended business in October, but nonetheless purchased over 450,000 cartons of unstamped cigarettes in 2008. *Id.* In July and August 2008, before suspending business, TDM received deliveries from Pennisi every single business day. Ex. 55. In August 2008, TDM received deliveries of at least 2,000 cartons in a single day sixteen times. *Id.* On four of those occasions, TDM received a delivery of more than 4,000 cartons of unstamped cigarettes in a single day. *See id.* (August 11th, 15th, 22nd, and 29th).

These numbers are incomplete, as Mack has purchased from sellers other than Pennisi, including Chief Harry Wallace and Jesse Watkins and Anitra Watkins. Ex. 95, Mack Dep. 35:4-36:18. In 2007, she also purchased from Gutlove, *id.* at 34:6-8. The Gutlove CG-6 forms reflect sales to an entity called alternatively “Tom’s Discount Cig”, “Toms Distr Cig.” and “Toms Cigarette Dsct” which is most likely TDM. Ex. 7 at 00687, 00696, 00703, 00713, 01399, 01402, 01405, 01408, 01419, 01422, 01425 (sales from April 2006 to May 2007).

Mack claims that TDM has not been in business since October 2008 because of her pregnancy, although she put up a bigger sign in September of 2008 to direct people “to where

I was at because there were complaints that people didn't know where I was located." *Id.* at 21:9-17. When asked whether she intended to go back into business after she had her baby, she replied, "I'm not really sure." *Id.* at 18:20-19:7. As of April 14, 2009, the date of her deposition, she maintained a stock of 300 cartons of unstamped cigarettes. *Id.* at 21:24-22:6. Since December 2008, she has purchased 90 cartons of unstamped cigarettes every three months from Jesse Watkins or Anitra Watkins, which have then been sold to people at a location off the reservation in Mastic Beach. *Id.* at 75:6-76:13. Even though TDM is purportedly closed, Mack continues to violate the CCTA by purchasing, receiving, possessing and selling to the public large quantities of unstamped cigarettes.

TDM's Continuing CMSA Violations - In October 2008 and earlier, TDM sold Newport cigarettes for approximately \$36 a carton. *Id.* 47:23-49:6. This price is far below the CMSA minimum price per carton of Newports of \$42.72 in December 2006; \$43.28 in December 2007; and \$58.28 in June 2008. *See supra* at 11-12.

Facts Related To Irreparable Injury

Thomas Frieden, M.D., M.P.H., Commissioner of the New York City Department of Health and Mental Hygiene ("DOH"), and one of the "chief architects" of New York City's tobacco control program (and the newly appointed Director of the United States Centers for Disease Control) (Tr. 380:2-8; 409:19-22) testified to the harm to the City caused by the availability of cheap cigarettes to City residents. Dr. Frieden testified that the impetus for tobacco control programs is that tobacco is "overwhelmingly the leading preventable cause of death in this country and this city," Tr. 382:20-24, and yet very amenable to intervention: "Not only does [tobacco] kill more people than any other preventable cause of death, but it's possible to make a bigger difference in the number of people it affects than other leading preventable causes of death." Tr. 380:2-5. Some of the difference is made through public health efforts that

assist people in quitting smoking: there are more former smokers than there are current smokers in the City today. Tr. 408:17-19.

The first element of the tobacco control program instituted by the City was a 2002 increase in the tobacco tax from \$0.08 to \$1.50. Tr. 383:16-23. Later, the City banned smoking in public places, increased efforts to assist smokers in quitting, and in 2005-2006, implemented media campaigns to encourage smoking cessation. Tr. 383:24-384:13. The number of smokers in the City declined dramatically following implementation of the program. Tr. 385:20-23. Thus, from 1992 to 2002, the number of adult smokers was “rock solid stable,” at between 21 and 22 per cent of the population. Tr. 385:20-386:2. In 2003, following the City tax increase, the number of adult smokers in the City immediately and for the first time in over a decade declined, by nearly 2%, a statistically significant change. Tr. 386:3-9. By 2008, the number of adults smoking had fallen to 15% per cent. Youth smoking fell from 17.4% to 8.5 % of the population. Tr. 386:3-22. Thus, ten years of no change in the number of smokers was followed, within a year of the tax increase, with a statistically significant decline. Tr. 413:7-12.

Dr. Frieden testified that although the several interventions – the tax increase, the media campaign and the clinical services – operate synergistically, the tax increase plays the greatest role; in his opinion, taxation has resulted in most, but not all of the decline in the number of smokers. Tr. 388:7-11; 411:13-16; 20-25.¹⁵ The evidence for the primacy of the tax increase in smoking cessation comes from the annual Community Health Survey conducted by the Department of Health: a majority or plurality of smokers, when asked why they have quit,

¹⁵ Dr. Frieden testified that the “synergistic” impact of the various components means that the whole is greater than the sum of the parts: each component has its own effect, but together they have a larger effect than the additive sum of their individual effects. Tr. 410:12-17.

mention taxation or price as the driving factor behind their decision. Tr. 388:11-16.¹⁶ More than any other answer, the response to the query “Why did you quit?” was “because it was too expensive” or “because the price went up.” Tr. 388:17-25. The Community Health Survey has also demonstrated that larger numbers of individuals quit smoking when the survey period encompasses a tax increase. Tr. 388:17-389:4. The pattern of the reduction in the number of smokers shown in the Community Health Survey is consistent with having been caused by the tax increase: the sub-populations known to be most responsive to price increases, youth and low income individuals, showed larger declines. Tr. 413:7-20; 421:8-15; 426:4-18.

The primacy of the tax increase is also evidenced by the fact that certain aspects of the total program, for example the media campaign on the dangers of smoking, were phased in three or four years after the tax increase and therefore could not have contributed to the earlier reduction in number of smokers. Tr. 410:2-9.

Dr. Frieden testified that the effect observed in the Community Health Survey – a decrease in the number of smokers as the price increases – is fully consistent with the very extensive studies, both in the United States and internationally, on the effect of price increases on tobacco use. Those studies consistently find a price elasticity of - 0.4, which means a four percent decline in smoking for every 10% rise in price. Tr. 389:13-23. The effect is manifest as both a decline in the number of smokers and a decline in the number of cigarettes smoked by those individuals who continue to smoke. Tr. 390:4-16. Approximately half of the effect is in people quitting and half in reduced consumption, *id.*, a relationship seen in Exhibit U, the CDC

¹⁶ The Community Health Survey, conducted by the Department of Health every year using a sample of 10,000 people (Tr. 384:14-24) identifies individuals who have already quit and then asks the respondents “Why did you quit?”

Morbidity and Mortality Weekly Report (“MMWR”), July 31, 1998, Vol. 47, No. 29.¹⁷ That is, total elasticity is the combined reduction of two sub-groups – those who quit (“prevalence elasticity”) and those who consume less (“consumption elasticity”). Tr. 417:1-2; *see* Exhibit U.

The relationship between increased prices and a reduction in the number of smokers has been demonstrated in literally dozens, if not hundreds, of studies (Tr. 417:9-19), is well-established in the scientific community, and has gained general acceptance in the scientific community. Tr. 391:14-17; 393:10-15.¹⁸

As to the decline in consumption by individuals who do not actually quit smoking, Dr. Frieden noted that there are health benefits to decreased consumption alone. Lung cancer risk in particular decreases with a decrease in the number of cigarettes smoked: “Someone who smokes fewer cigarettes will have a lower risk of lung cancer than someone who smokes more cigarettes.” Tr. 391:18- 392:6. That relationship was established in a longitudinal study by

¹⁷ Exhibit U illustrates that quitters, as opposed to those decreasing consumption, accounted for about 60% of the elasticity effect shown in that study. Ex. U at CNY00196 (-.15 prevalence elasticity constitutes 60% of the total elasticity).

¹⁸ Dr. Frieden has reviewed the methodologies and the qualifications of the authors of studies showing a relationship between price and consumption, and was satisfied with both. Tr. 393:2-15. He specifically cited the studies of Frank Chaloupka of the University of Illinois and the CDC as supporting the price elasticity relationship that he discussed. Tr. at 391:1-7. Dr. Frieden also noted that the World Health Organization in 2008 released a tobacco policy package known as the Global Tobacco Control Report in which tobacco taxation was stated to be the most effective of all interventions, *id.* & Tr. 418:20-23; cited a book “Curbing the Epidemic” published in 1999 by the World Bank and the World Health Organization that reviews price elasticity (Tr.418:16-19); referenced review chapters by Dr. Chaloupka and others on tax and cigarette smoking (Tr. 418:24-25); and noted a summary chapter in the book “Disease Control Priorities in Developing Countries.” Tr. 419:1-3. Finally, Dr. Frieden referred to at least half a dozen studies in Indonesia, Russia, Ukraine, China and South Africa that have shown quite conclusively the impact of price on reducing consumption. Tr. 419:4-10.

Dr. Richard Doll, which showed very convincingly that lung cancer mortality risk is directly related to the volume of cigarettes smoked. *Id.*¹⁹

Dr. Frieden testified about a model prepared by DOH, summarized in Exhibit 56, which applied the well-established elasticity relationship described above to quantify the effect of bootlegging cheap cigarettes from the Poospatuck reservation on the number of smokers in New York City who would otherwise have quit smoking. Based on the testimony of Mari A. that she trafficked 900 cartons of unstamped cigarettes into the City five days a week for several years (Tr. 9:25-11:6),²⁰ the model translated this into a total of 46 million cigarettes per year, or 128,130 unstamped cigarettes in the City per day. Based on the smoking habits of City residents revealed in the Community Health Survey (the mean cigarettes smoked per day by NYC smokers in 2006 was 10.2, Ex. 56 n.4), this quantity equals a supply of cheap cigarettes sufficient for about 12,500 smokers.²¹ Based on the \$3.00 price differential between bootlegged and taxed cigarettes existing when the model was developed,²² the price elasticity equation – a 4% decrease in smoking for every 10% increase in price, with approximately half of the 4% attributable to

¹⁹ Doll, Richard; et al., "Mortality in relation to smoking: 50 years' observations on male British doctors." *British Medical Journal* 328: 1519 (June 2004).

²⁰ This figure is a conservative estimate, as Mari A. was not the only purchaser of unstamped cigarettes on the Poospatuck reservation who brought the cigarettes into the City. See Tr. 197:20-23; Exhibit 62A.

²¹ According to the 2007 Community Health Survey, based on questioning 10,000 randomly selected New York City residents as to where they purchased their cigarettes and how much they paid for them, it was estimated that 59,000 people buy tax-evaded cigarettes. Tr. 431:6-14; Tr. 432:22-24; 433:4-8.

²² The model assumed a street price of \$5.50 per pack (see Tr. 16:19-17:9; 18:4-11 (Mari A. testified packs were sold for \$5 on the street), and a store price of \$8.50 per pack (see Ex. 38 (Publication 509 minimum price per pack in New York City for standard brands ranges from \$7.52 to \$9.61)).

quitting -- predicts that over thirteen hundred smokers would have quit, with 450 lives saved. Tr. 397:12-398:8.²³

Dr. Frieden testified to his familiarity with studies which show that smokers impose no net costs on society because their earlier deaths reduce nursing home and pension costs. Dr. Frieden pointed out, however, that:

[A]s government officials and leaders, we start with the assumption that New Yorkers had (sic) not better off dead and that it is better to be alive than dead and healthy than sick and the goal is to reduce the burden of illness and disease. And to say that it would be cheaper to have more people die young to me does not seem like a very convincing public argument.

Tr. 400:3-12. In addition, whether the additional costs imposed on society in the short term, such as, for example, the annual \$3,000 in additional costs to care for a smoker as opposed to a non-smoker (Tr. 399:10-23), and the negative impact of secondhand smoke (Tr. 428:23-12), justify foregoing the purported societal savings from killing off smokers early, may depend on the "individual situations of the individual area," and is not the type of calculus made by those in "public health and generally in public policy." Tr. 428:23-15.

Commissioner Frieden concluded "absolutely" that the availability of cheap cigarettes below the legal retail price has negative consequences for the City because "just as more expensive cigarettes mean fewer people smoking, less expensive cigarettes mean more people smoking... cheaper cigarettes mean more smoking." Tr. 402:3-12. "I view it as almost as certain as a law of nature that the more people pay, the fewer they will smoke." Tr. 419: 9-10. Commissioner Frieden testified that the relationship is particularly true for children and low income persons, who are especially price sensitive. Tr. 402:7-12.

²³ Ex. 56 fn. 6 explains that the number of lives saved is based on the roughly one-third of smokers who die prematurely from tobacco-related disease.

According to the Commissioner, more smoking affects the City because “more smoking means more people who get sick from smoking-related causes, more people who die from smoking-related causes, more people who miss work from smoking-related causes, more people who become disabled from smoking-related causes, among other social costs.” Tr. 402:13-19. The availability of cheap cigarettes compromises the efforts of the Department of Health to reduce smoking, and leads to a lower number of people quitting and a higher number of cigarettes smoked than would have been achieved had cheap cigarettes not been available.

Testimony of W. Kip Viscusi -- Defendants proffered the testimony of Dr. Viscusi, a Vanderbilt University economist (Tr. 697:9-12) who was qualified as an expert in the economics of risk and uncertainty, not public health. Tr. 701. Dr. Viscusi agreed with Dr. Frieden that “higher taxes do affect how many cigarettes people smoke.” Tr. 704:5-11. Many of Dr. Viscusi’s studies made the same point. His own study of smoking in Spain showed “that its clear that there is responsiveness to price in terms of the total quantity of cigarettes smoked.” Tr. 723:18-25. In another article, “Promoting Smokers Welfare With Responsible Taxation” published in the National Tax Journal, Dr. Viscusi stated that “There are several possible rationales for taxing cigarettes. Doing so will discourage smoking....,” (Tr.739:4-11); and “One can view taxes as a mechanism for selecting the optimum degree of discouragement of smoking.” Tr.739:19-25. Dr. Viscusi further acknowledged that in his article, “Tobacco Taxes,” he took the position that “Like raising the price of any good, raising cigarette taxes reduces consumer demand for the product.” Tr. 740:1-1-15. Indeed, Dr. Viscusi recognized that it is a “law of nature” that higher prices lower demand for goods. Tr. 740:10-15. Like Dr. Frieden, Dr. Viscusi cited to dozens of studies that have estimated cigarette demand functions and found that “most of the demand elasticities are clustered in a range of .4 to .1, meaning that for every

cigarette tax that raises the price of smoking by ten per cent there's a four to ten percent decrease in the consumption of cigarettes." Tr. 740:23-741:4. Dr. Viscusi thus concluded that "If cigarettes are taxed, people will in fact reduce their cigarette purchases," Tr. 743:24-745:5, and he was emphatic that "I've always emphasized that cigarette taxes decreased the total number of cigarettes people smoke. Dozens of studies indicate that." Tr. 748:7-11.

While Dr. Viscusi believes that price could induce a smoker to cut down, he does not believe that price could induce a current smoker to quit: "So, it's not how many cigarettes you smoke, but do you smoke ... That's the main issue for which there's a difference between Dr. Frieden and myself." Tr. 711:10-15. Dr. Viscusi, however, relied on only one study to support this view: his own, which was primarily designed to examine smokers' perceptions of risk, not price elasticity. Tr. 704:15-23; *see* Exhibit V. Dr. Viscusi erected something of a straw-man argument, by pitting his study against only one of the studies cited by Dr. Frieden, the MMWR (Defendant's Exhibit U), and critiquing the MMWR, but not addressing with any specificity the "dozens, perhaps hundreds" (Tr. 417:9-19) of the other studies relied on by Dr. Frieden that have concluded that price affects *both* propensity to smoke and the number of cigarettes consumed.

Dr. Viscusi's primary criticism of the MMWR was that not every demographic sub-group in the study displayed statistically significant changes in price-related smoking propensity, so that for example, whites, and females did not show statistically significant cessation effect. Tr. 712:22-713:18. But Dr. Viscusi did agree that the MMWR study showed a statistically significant effect of price on smoking propensity for Black non-Hispanic smokers, for Hispanic smokers, for the 18-24 age group and the 25-39 age group, for the male population as a whole, and for low income groups. Tr. 714:4-10, 734:21-735:5 (Black non-Hispanic smokers); 715:12-716:1; 716:20-24; 735:6-8 (Hispanic smokers); 735:9-23 (18-24 year olds, 25-

39 year olds); 737:7-11 (males as a group); 737:19-25 (low income groups).²⁴ Indeed, the total population, undivided into ethnic or age sub-groups, showed a statistically significant effect of price on propensity to smoke. Tr. 737:12-15. The results of the MMWR report described by Dr. Viscusi were thus consistent with Dr. Frieden's testimony, that minority, low-income and younger smokers are more price sensitive than other groups. Tr. 425:24-426:18.

Significantly, in Dr. Viscusi's own study, he was unable to analyze differences among ethnic groups because he did not have that information. Tr. 751:4-8. Moreover, because his study data did not include persons under 18, the study sheds no light on the effect of price on youth smoking. See Exhibit V (surveys focused on respondents aged 18 or older).

Cross-Border Effect -- Dr. Viscusi testified to a "cross-border effect," which is the phenomenon manifest in the presence of large price differences in cigarettes created by different rates of taxation in different jurisdictions. The resulting "cross-border effect" "would be people leaving their state or their city to buy cigarettes at a cheaper locale outside that area." Tr. 732. The greater the price difference, the more attractive it will be for a smoker to go to other jurisdictions to purchase cigarettes. Tr. 724:22-726:21. Dr. Viscusi thus recognized that the cross border effect would motivate City residents to travel to the Poospatuck reservation to buy cigarettes, and indeed that the Poospatuck reservation would be a preferred location to obtain cigarettes over more distant, low tax states. Tr. 732:19-733:6.

Elaborating on the cross-border effect, Dr. Viscusi testified that where cigarette taxes are high, "the substantial disparity between the pre-tax cost of cigarettes and their market price has led to cigarette smuggling," Tr. 741:5-22, and that such "contraband activity generates

²⁴ Dr. Viscusi was troubled by an "inconsistency" that the MMWR results showed for Black smokers, which is that price increases caused them to quit, but not to reduce consumption. However, that inconsistency was not seen for Hispanic respondents or in the age-related or income-related analyses. Tr. 737:19-25.

attendant costs of criminal behavior.” Tr.741:23-25. That effect is apparently not limited to a particular locality because Dr. Viscusi also observed that “estimates throughout the world indicate that there is a substantial problem due to smuggling and sales of contraband cigarettes,” and that “there’s a smuggling issue in European countries too.” Tr. 742:2-12. Violence accompanied cigarette smuggling in the countries that Dr. Viscusi studied, “involving automatic weapons and shootouts and the like,” (Tr.742:13-16), leading to the statement by Dr. Viscusi that “the potential costs of smuggling go beyond the foregone tax revenues and losses to producers and retailers. There are also costs associated with criminal activity.” Tr. 743:17-25. That finding was reemphasized in the same article in a section entitled “Commodity Tax Basics,” in which Dr. Viscusi stated that “Higher tax rates foster greater cigarette smuggling and bootlegging of cigarettes. These illegal behaviors impose social costs associated with criminal activity, as well as additional enforcement costs directed at preventing these illegal acts.” Tr. 743:12-23.

ARGUMENT

POINT I

THE CITY IS ENTITLED TO A PRELIMINARY INJUNCTION ENJOINING THE DEFENDANTS’ SALE OF UNSTAMPED CIGARETTES

To obtain a traditional preliminary injunction, the moving party must show, first, irreparable injury, and, second, either (a) likelihood of success on the merits, or (b) sufficiently serious questions going to the merits and a balance of hardships decidedly tipped in the movant's favor. *Green Party v. N.Y. State Bd. of Elections*, 389 F.3d 411, 418 (2d Cir. 2004); *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979) (per curiam). When an injunction will alter the status quo, the movant must show a “substantial likelihood” of success. *See Rodriguez ex rel. Rodriguez v. DeBuono*, 175 F.3d 227, 233 (2d Cir. 1999).

However, under the CCTA, the City is empowered to bring a civil action in the United States district courts “to prevent and restrain violations of [the CCTA],” to “obtain any other appropriate relief for violations of this chapter from any person ... including ... injunctive or other equitable relief,” “in addition to any other remedies under Federal, State, local, or other law.” 18 U.S.C. § 2346(b)(1)-(3). As the City has argued previously, and addresses in detail below, where there is an express grant of statutory authority to enjoin the violation of a statute, the statutory authority substitutes for a showing of irreparable harm. *See SEC v. Mgmt. Dynamics Inc.*, 515 F.2d 801, 808 (2d Cir. 1975). In any event, the City has shown irreparable injury in this case.

A. The City Has Shown A Substantial Likelihood of Success On The Merits Of Its CCTA Claim.

The CCTA makes it unlawful for any person “knowingly to ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes ...” 18 U.S.C. § 2342. “Contraband cigarettes” are: “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” *See* 18 U.S.C. §§ 2341(2), 2342(a); *United States v. Morrison*, 2009 U.S. Dist. LEXIS 8901 (E.D.N.Y. 2009); *City of New York v. Milhelm Attea Bros., Inc.*, 550 F. Supp. 2d 332, 346 (E.D.N.Y. 2008), *reconsideration denied*, 591 F. Supp. 2d 234 (E.D.N.Y. 2008).

Proof of each defendants’ violation of the CCTA therefore need only consist of the: i) knowing shipment, transportation, receipt, possession, sale, distribution or purchase within

New York State of ii) more than 10,000 cigarettes, iii) that do not bear New York tax stamps; iv) under circumstances in which state law requires that the cigarettes do bear tax stamps.²⁵

At the hearing of this matter, the City established each of the required elements of a CCTA violation, demonstrating that each defendant has continuously and routinely violated the CCTA and is likely to continue to do so in the future. Thus, each defendant, either acting as an individual, a corporation, a sole proprietorship, or an employee of a sole proprietorship, continuously deals in cigarettes that do not bear New York State tax stamps. *See generally supra* at 17-44. Each defendant also unquestionably “purchases” and “receives” and “possesses” and “sells” and “distributes” unstamped cigarettes, in quantities that exceed 10,000 cigarettes (fifty cartons) and does so on a continuous basis. *See* Ex. 95 (Mack Dep. at 21:24-22:6); Exs. 10A, 12A, 14A, 17A; Ex. 54. (showing each defendant to be in possession of more than 10,000 unstamped cigarettes).

The determination that there is an “*applicable* State or local cigarette tax in the State or locality where such cigarettes are found,” *i.e.*, there is a tax when defendants sell cigarettes in New York to the public, has already been made by this, and other, courts. *See City of New York v. Golden Feather Smoke Shop, Inc.*, 2009 U.S. Dist. LEXIS 20953 (E.D.N.Y. 2009); *United States v. Morrison*, 2009 U.S. Dist. LEXIS 8901 (E.D.N.Y. 2009); *Milhelm Attea Bros., Inc.*, 550 F. Supp. 2d at 346; *Cayuga Indian Nation of N.Y. v. Gould*, No. 2008-16350, 2008 WL 5158093, at *5 (Sup. Ct. Monroe County Dec. 9, 2008).

The City introduced indisputable evidence that each defendant has in the past and continues to purchase, receive, possess, sell and distribute large quantities of unstamped cigarettes, and to sell large quantities of unstamped cigarettes to the public. *See, e.g.*, Exs. 5, 74-

²⁵ The CCTA does not require that a local government prove injury as a result of a CCTA violation, although the City has provided abundant evidence thereof.

82; 95A-101. Under New York law, all cigarettes are presumptively taxable unless the possessor proves otherwise. N.Y. Tax L. § 471 (stating that "all cigarettes within the state are subject to tax until the contrary is established, and the burden of proof that any cigarettes are not taxable hereunder shall be upon the person in possession thereof."); *see Milhelm Attea*, 550 F. Supp. 2d at 337. Defendants offered not a shred of evidence that New York law did not require tax stamps on any of the cigarettes that the evidence showed they had purchased, received, possessed, sold or distributed. Nor did defendants introduce any evidence that any particular transaction in which they participated would be tax exempt. In the face of the City's proof, and in light of defendants' failure to meet their burden, it is accordingly presumed as a matter of law that all of the cigarettes purchased, received, possessed, sold and distributed by the defendants' were subject to an "applicable" tax and should have been stamped pursuant to New York law. *See Milhelm Attea*, 550 F. Supp. 2d at 346-48.

Certain defendants have apparently created a home-grown interpretation of the CCTA, by which they appear to contend they are permitted to *sell* unstamped cigarettes in lots of no more than 49 cartons. *See* Testimony of Mari A., Tr. 27:10-15 ("[Peace Pipe] said you could only legally buy 49 ..."); Testimony of Byron Mars, Tr. 356:16-357:1 ("Carolina" at Peace Pipe would not sell more than 49 cartons); Tr. 312:17-313:1; Ex. 57A (Def. Ex. I) (Red Dot clerk believes it illegal to sell more than 49 cartons).²⁶ This interpretation apparently seeks to rely on the CCTA's definition of "contraband cigarettes" as more than 10,000 unstamped cigarettes, *see* 18 U.S.C. §2341(2), from which defendants argue that when they sell less than that amount they cannot be selling "contraband cigarettes."

²⁶ *See also* Ex. 58 at CNY 869 (Suffolk County Arrest Report) ("We just bought some cigarettes. They said it was okay as long as it was less than fifty cartons").

The argument cannot succeed. Whatever defendants may or may not do at the moment of sale (and there is evidence that they treat even their self-imposed limitation as a sham, *see* Tr. 26:10-15; Tr. 312:17-313:1; Ex. 57A (Def. Ex. I) at 2, the Court cannot ignore the fact that defendants plainly purchase, receive, and possess enormous stocks of unstamped cigarettes in amounts that far exceed 49 cartons and hence easily meet the definition as “contraband cigarettes.” The plain language of the CCTA does not limit violations to “sales,” but prohibits all of the dispositions of contraband cigarettes that are recited in the statute. The mere fact that, when it comes time for a defendant to sell unstamped cigarettes, they segregate from their massive stock of contraband cigarettes a lot of 49 cartons does not somehow serve to eliminate the fact that they have purchased, received and possessed contraband cigarettes. Defendants’ 49 carton “safe harbor” requires the CCTA to be read as applying only to a “sale” of cigarettes, but the statute embraces the far wider array of the conduct in which defendants engage.

The evidence thus establishes each defendant’s purchase, receipt, possession, sale and distribution of cigarettes, that are found in the State, in quantities exceeding the statutory threshold, without tax stamps, under circumstances in which tax stamps are required. The evidence further establishes multiple, continual, ongoing violations of the Contraband Cigarette Trafficking Act. *See supra* at 20-22; 27-28; 32-33; 38-39; 43-44.

B. The City Has Proven A Substantial Likelihood Of Success On The Merits Of Its Statutory CMSA Claim

The Cigarette Marketing Standards Act, N.Y. Tax Law §§ 483-489 (“CMSA”) makes it unlawful for:

any agent, wholesale dealer or retail dealer, with intent to injure competitors or destroy or substantially lessen competition, or with intent to avoid the collection or paying over of such taxes as may be required by law, to advertise, offer to sell, or sell cigarettes at

less than the cost of such agent wholesale dealer or retail dealer, as the case may be.

N.Y. Tax L. § 484(a)(1). *See also Lorillard Tobacco Co. v. Roth*, 99 N.Y.2d 316, 319 (2003); *Save More Mkts. v. Chu*, 1986 U.S. Dist. LEXIS 27054, at *3-4 (N.D.N.Y. April 8, 1986) (CMSA serves to eliminate the evasion of New York State taxes on cigarettes). The “cost of the retail dealer” is further defined in the statute to mean: (1) “the basic cost of cigarettes” plus (2) “the cost of doing business by the retail dealer . . .” plus (3) “the cost of doing business by the agent with respect to sales of cigarettes to retail dealers.” N.Y. Tax L. § 483(b)(3)(A). As DeFrancesco testified, taking these in order, first, the “basic cost of cigarettes” is defined as “the invoice cost of cigarettes to the agent who purchases from the manufacturer . . . to which shall be added the full face value of any stamps which may be required by law.” *Id.* § 483(a)(1). Tr. 260:4-9 (manufacturer’s list price plus taxes). The second element, the cost of doing business by the retail dealer, involves a statutory 7% markup over the third element, the cost of doing business by the agent with respect to sales of cigarettes to retail dealers. N.Y. Tax L. §483(b)(3)(B); Tr. 542:6-14; Exs. 32-38. The third element, the cost of doing business by the agent with respect to sales of cigarettes to retail dealers involves a statutory markup of 3.875 % of the basic cost of cigarettes, plus 20 cents per carton. §483(b)(1)(B); Tr. 271:3-272:4; Exs. 32-38. As DeFrancesco testified, none of these statutory markups has changed since 1989 (Tr. 541:6-542:4), and each statutory markup is calculated in Ex. 39, Publication 508. Publication 508 lists the agent’s basic cost (manufacturer’s list price plus taxes Tr. 280:14-88;), and then has corresponding columns calculating the markup for the agent’s cost of selling to the retailer (Ex. 39 “Agent to: Retail Dealer”), and for the retailer’s cost of selling to the consumer (Ex. 39, “Retail Minimum Per Carton; Retail Minimum Per Pack”). Tr.280:19-24.

In sum, the statute prohibits retail dealers from selling cigarettes at a price which is less than the cost of the retail dealer, defined as the manufacturer's list price plus the cost of applicable tax stamps and two markups (the agent's costs of selling the cigarettes to a retail dealer and the retail dealer's costs of selling the cigarettes to consumers). *See supra* at 10-11 (summary of Andrew DeFrancesco's testimony). Furthermore, as the New York Court of Appeals has observed, although the 'cost of doing business' theoretically consists of expenses unique to a given agent or dealer, in practice this cost "is determined using statutory default rates." *Lorillard*, 99 N.Y.2d at 320 n.21; *see also* Tr. 541:6-542:14; Exs. 32-38 (Publication 509).

As this Court has held, the "definition of 'retail dealer' in N.Y. Tax L. § 483, by its terms, applies to 'any person engaged in selling cigarettes at retail,' which accurately describes the defendant businesses." *City of New York v. Golden Feather Smoke Shop*, 2009 U.S. Dist LEXIS 20953, at *42 (E.D.N.Y. 2009) (emphasis in original) (citing § 483(a)(4)). As "retail dealers" under § 483 of the CMSA, who sell cigarettes to the public, defendants are bound by the minimum price requirements of the CMSA, which means that they must sell at prices that include the tax stamps required by § 471, and the required markups. The evidence, summarized *supra* at 22, 28-29, 33, 39-40, 44, establishes that defendants all sell unstamped cigarettes to the public at prices which are far below the minimum prices set by the CMSA.

As for the defendants' intent to evade taxes, "[e]vidence of advertisement, offering to sell or sale of cigarettes . . . by any retail dealer . . . at less than cost . . . shall be prima facie evidence . . . of intent to avoid the collection or paying over of . . . taxes..." N.Y. Tax L. § 484(6). There is abundant evidence in the record that defendants sell below the required minimum price, *see supra* at 22, 28-29, 33, 49-40, 44, that they sell only unstamped or tax-free

cigarettes, *see* Admission No. 4 in Exs. 74, 76, 80, 81-82, Admission No. 5 in Ex. 78, that their business and reason for being is to sell unstamped or tax-free cigarettes, *see supra* at 17, 28, that they advertise the sale of tax-free cigarettes, *see supra* at 32, 37, or at prices that cannot be beaten, *see supra* at 20, and that they believe their activities are of questionable legality. *See, e.g.*, Tr. 27:10-15 (Peace Pipe attempted to disguise sales to one person as sales to multiple persons using multiple account names); Tr. 31:12-20 (Smoking Arrow provided escorts to avoid detection by the police); Tr. 36:23-37:8 (same for Red Dot); *Morrison Tr.* at 766:14-20, 767:1-8, 767:23-768:10, 770:8-11 (Jesse Watkins testimony that he has known since 2004 or 2005 that it is illegal to sell unstamped cigarettes in certain amounts); Tr. 36:11-22, 310:17-20 (use of black garbage bags to conceal purchases of unstamped cigarettes at Red Dot), 316:22-23 (same for Peace Pipe), 321:21-24 (same for Monique's); 313:24-314:2 (same for Smoking Arrow). The record evidence demonstrates ongoing CMSA violations by all defendants.

POINT II

DEFENDANTS' SALES OF UNSTAMPED CIGARETTES IN VIOLATION OF THE CCTA CAUSE IRREPARABLE INJURY TO THE CITY

The unstamped cigarettes that are sold to the public and brought into the City for consumption by City residents give rise to two independent forms of irreparable harm: i) injury to the health and well-being of City residents and ii) increased crime in the City.²⁷

As discussed above, *supra* at 13-15, defendants' stores are the source of a steady stream of unstamped cigarettes into the City. Mari A., Ahman Albadeshes and Christopher Lannon each testified to a thriving trade in unstamped cigarettes that flows from the Poospatuck reservation into New York City. Tr. 9:23-10:41 18:23-19:1 (Mari A.); Tr. 192:3-25 (Albadeshes);

²⁷ The City of course also suffers profound injury from loss of tax revenue, but does not advance that loss to establish irreparable injury for purposes of this motion.

Tr. 131:9-132:2; 134:12-24; 168:22-169:6 (Lannon). The “cross-border effect” testified to by defendants’ expert, W. Kip Viscusi, (Tr. 732:15-21) in fact predicts the existence of the cigarette trafficking that these witnesses from both sides of law enforcement confirm actually does exist. This traffic injures the City in ways that are not compensable by money damages and thus qualify as irreparable harm. *See, e.g.*, Tr. 402:13-19 (health effects); Tr. 741:5-23-25; Ex. 62A (criminal activity).

A. The Availability of Cheap Cigarettes to City Residents Injures the Public Health

Dr. Frieden testified that the availability of cheap cigarettes causes irreparable injury to the public health in two ways. First, it undercuts the benefits from an increase in the price of cigarettes that would otherwise lead smokers to smoke fewer cigarettes. Tr. 389:17-390:10. There was no disagreement as to this effect, and hence it should be accepted as established for present purposes. Even defendants’ expert agreed that an increase in price or an increase in the cigarette tax will lead people to reduce cigarette consumption. “I’ve always emphasized that cigarette taxes decreased the total number of cigarettes people smoke. Dozens of studies indicate that.” Tr. 748:7-11 (Viscusi). Dr. Frieden’s testimony that there are health benefits from reducing the numbers of cigarettes smoked was undisputed. The risk of lung cancer, in particular, diminishes with a reduction in the number of cigarettes smoked: “Someone who smokes fewer cigarettes will have a lower risk of lung cancer than someone who smokes more cigarettes.” Tr. 391:18-392:6. Thus, both experts agree that an increase in price will reduce the number of cigarettes smoked, and it is undisputed that such a reduction decreases cancer risk and therefore benefits the public health. Although the DOH model did not calculate the number of “lives saved” when consumption alone (as opposed to quit rate) is reduced, the elasticity equation in the DOH model is still operative, and predicts a reduction in *consumption* by

approximately 2740 people,²⁸ with the reduced cancer mortality about which Dr. Frieden testified.²⁹ See Ex. 56; *supra* at 47-48.

Second, the availability of cheap, tax-free cigarettes undermines the benefits established under the price elasticity equation, where a well-defined number of smokers who are charged higher cigarette prices will quit smoking. Tr. 430:16-19. Dr. Frieden testified that the relationship between increased price and decreased numbers of smokers is “well-established in the scientific community,” Tr. 391:14-27, and has “gained general acceptance in the scientific community.” Tr. 393:10-15. As described *supra* at 47-48, Exhibit 56 posits that the number of cigarettes transported into the City by Mari A. alone in one year is sufficient to supply approximately 12,560 smokers. (It is reasonable to assume that this number of persons could be affected, because the Community Health Survey estimates that 59,000 City smokers purchase untaxed cigarettes. Tr. 431:6-14.) The model assumes, and hearing testimony confirms, that these individuals would pay approximately \$5.50, as opposed to the \$8.50 retail price then existing. Based on the elasticity equation, and the numbers above, the model projects that approximately 1370 out of the 12,560 persons supplied by the cheaper cigarettes would have quit smoking but for the availability of the cheaper cigarettes. Accepted figures for smoking

²⁸ Footnote 5 to Exhibit 56 indicates that the price-elasticity formula predicts that half of the effect of higher prices is manifest as quitting and half as reduced consumption. Dr. Viscusi did not dispute the elasticity formula itself, indeed he agreed that a 10% price rise causes a 4% reduction in smoking. Tr. 740:23-741:4. Dr. Viscusi merely believes that it is entirely manifest as reduced consumption, rather than by quitting. Accordingly, the above argument assumes that the full effect of a price rise predicted by the elasticity equation would be manifest as reduced consumption by 2740 persons.

²⁹ Dr. Frieden also testified, without contradiction from defendants, that individuals who decrease their consumption of cigarettes, are more likely to quit smoking entirely upon future attempts. Tr. 390:11-13. Because cheap cigarettes would interfere with smoking cessation efforts as to this factor also, the continued availability of cheap cigarettes harms the City in this manner as well.

mortality predict that approximately one-third of smokers die prematurely, so of those 1370 who did not quit, 450 would die prematurely, or stated in the converse, 450 lives would be saved annually had the 1370 persons quit.³⁰

As to the sole area of disagreement between Drs. Frieden and Viscusi -- whether increased prices cause a reduction in the actual number of smokers -- Dr. Viscusi's testimony is simply an inadequate basis on which to reject Dr. Frieden's testimony that the relationship between increased price and decreased numbers of smokers is "well-established in the scientific community," Tr. 391:14-17, and has "gained general acceptance in the scientific community." Tr. 393:10-15. To begin with, Dr. Viscusi pointed to a single study -- his own -- to support his argument that there is no relationship between price and propensity to smoke. This one article stands against Dr. Frieden's testimony that the price-smoker relationship has gained "general acceptance" and is "well-established." *Id.*

Indeed, defendants misleadingly sought to give the appearance of a dispute between Dr. Viscusi's study on the one hand and the MMWR on the other, despite the fact that Dr. Frieden expressly testified that the MMWR was one of "literally dozens" that have

³⁰ Defendants did not dispute the assumption in the Department of Health's model contained in Exhibit 56 that the number of cigarettes bootlegged into the City from the Poospatuck reservation was sufficient to supply enough smokers to have an observable effect on consumption. The Department of Health analysis posited that that even a single year's supply of cheap cigarette in the quantity testified to by Mari A. (900 cartons per day, five days a week) would supply 12,560 smokers. In fact, the assumption involving the number of smokers supplied by cheap cigarettes from the Poospatuck reservation is extremely conservative. Mari A. testified that she often had to wait her turn while other bulk buyers made purchases Tr. 42:7-9; Ahman Albadeshes testified that he was bringing cigarettes into the City during some of the same time that Mari A. was doing so (Tr. 192:3-21) and that Emad Al-Naimat, the "biggest dealer in the Bronx," was operating at the same time. Tr. 197:20-23. The Suffolk County arrests (Ex. 58) and the chart of individuals convicted of transporting bulk quantities of unstamped cigarettes (Ex. 62A) indicate that the supply of cheap cigarettes brought into the City -- and hence the number of smokers affected -- is likely to be far greater than that assumed in Exhibit 56.

consistently shown that “the more you pay, the *fewer people* smoke.” Tr. 417:15-19; 418:1-15.³¹ The MMWR itself cites several other studies that have shown that “increases in the price of cigarettes will decrease the prevalence of smoking and the number of cigarettes smoked both by youth and adults.” Exhibit U at 1.³² Although Dr. Viscusi criticized the MMWR, *see* Tr. 717:10-17, he simply did not address at all the “literally dozens” of other studies that have found the same relationship between price and quitting.

The authors of the MMWR were moreover well aware of the limitation of their study, and in fact stated that “this study is subject to five potential limitations,” Exhibit U at 608, which included those referred to by Dr. Viscusi. The authors nonetheless concluded that the pattern and magnitude of the estimated elasticities found there “are consistent with those observed in previous studies.” *Id.* at 609. This comment again serves to emphasize that the principles testified to by Dr. Frieden and reported by the MMWR rest on a body of work, not on a single study. Dr. Viscusi thus did not testify that the relationship between price and quitting was *not* generally accepted in the scientific community, nor could he, where his testimony was limited to criticism of a single study.

The single most significant basis for rejecting defendants’ attempt to rebut the relationship between price and prevalence is that Dr. Viscusi conceded that many of the sub-populations in the study did show statistically significant changes. Dr. Viscusi’s “glass half-empty” emphasis on only the certain sub-populations that did not show statistically significant

³¹ Indeed, defendants’ misleadingly sought to characterize the MMWR as “the [study] you submitted to the Court as the basis for your testimony.” Tr. 417:20-21. Dr. Frieden rebutted this, pointing out that Exhibit 56 relied on “a body of research and three other articles. None of them are the MMWR...” Tr. 418:10-15. Dr. Frieden described the additional articles in his testimony. *See* Tr. 418:16-419:10, and footnote 5 of the Department of Health model cites four other sources of research that support the relationship between price and prevalence.

³² *See* MMWR (Exhibit U) at 609, References 1 and 2.

relationships (Tr. 720:7-13; 745:10-22), is beside the point because, as he conceded, the total population examined did demonstrate prevalence elasticity (Tr. 36:12-15) as did several other sub-populations. Tr. 734:25-736:11. Dr. Viscusi offered the lack of statistical significance in certain sub-populations as if that somehow negated the principle of prevalence elasticity for all groups. In fact, the authors of the MMWR study were fully aware of the very differences in elasticity across populations that Dr. Viscusi pointed to: “This report summarizes the analysis of data for 14 years from the National Health Interview Survey (“NHIS”), which indicates that lower-income, minority, and younger populations would be more likely to reduce or quit smoking in response to a price increase in cigarettes.” *Id.* at 605. The variations in effect that Dr. Viscusi pointed to are thus simply indications of the manner in which elasticity operates – minorities, lower income groups and youth are more sensitive to price changes.

But the true flaw in Dr. Viscusi’s glass half-empty approach is simply that the portion of the study that is “half-full” – those sub-groups that do show a statistically significant effect – certainly comprise a meaningful portion of the City’s population. Thus, where Dr. Viscusi focused on the lack of statistical significance for whites and females (Tr. 713:11-18), the converse of that, as shown in the MMWR, is the statistically significant results for males, Hispanics and Blacks, groups that are self-evidently substantial portions of the City’s population.³³ Even if only these sub-populations show a relationship between price and quitting, it would nonetheless constitute irreparable harm to the City if cheap cigarettes affected smoking cessation among those sub-populations alone. Thus, Dr. Viscusi certainly did not rebut the effect of increased quitting in Blacks, Hispanics and males by pointing out the absence of such an

³³ The Court can take judicial notice of U.S. Census figures for the 2000 census showing that 48.4% of City residents are male. White residents comprise 44.7% of the City population; black and Hispanic residents combined comprise 43.6% (27% and 26.6% respectively). <http://quickfacts.census.gov/qfd/states/36/3651000.html>.

effect in whites or females (Tr. 720:7-13), particularly where the scientific literature itself recognizes the existence of differences among demographic sub-groups.³⁴ Even assuming *arguendo* that the female and the white portions of the population contained in the Exhibit 56 determination of “lives saved” display no effect of price, based on the MMWR’s findings, the number of “lives saved,” would still be 48.4% of the Exhibit 56 “lives saved” total or 217 lives saved annually (based on the proportion of the males in the population) or 43.6% of the lives saved total or 196 lives saved annually (based on the proportion of the non-white population). Those numbers are surely sufficient to establish a finding of irreparable injury.

B. Irreparable Harm from Increased Criminal Activity

Dr. Viscusi’s testimony independently confirmed that irreparable injury will occur as a result of the crime-related effects of defendants’ sale of unstamped cigarettes. According to Dr. Viscusi, cross-border price disparities like that between the reservation and the City, lead to cigarette smuggling. Tr. 741:5-22. Thus, where cigarette taxes are very high, as in New York City, Tr.741:16-18, people will seek to buy cigarettes more cheaply outside the high-tax area, Tr. 732, such as on the Poospatuck reservation; the reservation in fact would be a preferred purchase locale over more distant, low tax states. Tr. 732:19-733:6. The phenomenon is likely to be universal; Dr. Viscusi has stated that “estimates throughout the world indicate that there is a substantial problem due to smuggling and sales of contraband cigarettes” and that “there’s a smuggling issue in European countries too.” Tr. 742:2-12. The present facts certainly demonstrate that there is a robust “cross-border” effect between the reservation and the City, just as Dr. Viscusi’s description of the phenomenon would predict. Tr.732:13-21.

³⁴ In this regard it is important to recall that Dr. Viscusi was unable in his study (Exhibit V) to examine elasticity in either ethnic or certain age-related sub-populations. *See* Tr. 750:25-751:18. It is also significant that his study used survey results from 1997 and 1998, before the substantial tax increases now present in New York went into effect. *See* Exhibit V at 46.

The significant observation by Dr. Viscusi for purposes of irreparable harm is that “contraband activity generates attendant costs of criminal behavior.” Tr. 741:23-25. Violence accompanied cigarette smuggling that Dr. Viscusi studied, “involving automatic weapons and shootouts and the like.” Tr. 742:13-16. Consequently, Dr. Viscusi concluded from his observations of smuggling that “the potential costs of smuggling go beyond the foregone tax revenues and losses to producers and retailers. There are also costs associated with criminal activity.” Tr. 743:17-25. According to Dr. Viscusi, *“Higher tax rates foster greater cigarette smuggling and bootlegging of cigarettes. These illegal behaviors impose social costs associated with criminal activity, as well as additional enforcement costs directed at preventing these illegal acts.”* Tr. 743:12-23.

Dr. Viscusi attempted to suggest that violence and costs of crime might not be a general phenomenon (Tr. 749:11-23), but such comments posit a mere difference in degree (“shoot-outs of cigarette smugglers with the police”), rather than a difference in kind. The suggestion that the criminal behavior observed by Dr. Viscusi might be limited to certain locales is simply not sustainable in the face of the testimony in this case by Mari A. that: “it was just getting rough out there ...when I first started people weren’t getting killed over cigarettes. It wasn’t nasty like this.” Tr. 107:12-24; and that “People started getting killed.” Tr. 109:4. Exhibit 41 also indicates the potential for violence in connection with smuggling from the Poospatuck reservation -- murder, arson and armed robbery have occurred on the reservation, allegedly in connection with the cigarette business. In addition, Exhibit 62A demonstrates quite clearly that individuals convicted in Suffolk County for transporting unstamped cigarettes (and arrested adjacent to the reservation) have also been convicted, on multiple occasions prior to or after their

Suffolk County cases for selling bootlegged cigarettes in New York City, providing a direct link between defendants' sales of unstamped cigarettes and street crime in the City.³⁵

POINT III

THE CCTA DOES NOT REQUIRE A SHOWING OF IRREPARABLE HARM

While the City has shown irreparable harm from the defendants' conduct, it need not do so for an injunction to issue where that injunction is authorized by the CCTA. *See SEC v. Mgmt. Dynamics Inc.*, 515 F.2d 801, 808 (2d Cir. 1975) (plaintiff need not show irreparable injury where the issuance of a preliminary injunction is under the authority of a statute; it is sufficient if the statutory conditions for injunctive relief were made to appear). The grant of authority for an injunction expresses an intent that "the standards of the public interest, not the requirements of private litigation, measure the propriety and need for injunctive relief." *SEC v. Unifund SAL*, 910 F.2d 1028, 1035-36 (2d Cir. 1990). "This principle has been applied in granting both permanent injunctions and preliminary injunctions . . ." *Mgmt Dynamics*, 515 F.2d at 808.

This Court has opined that whether a statute authorizes an injunction under the circumstances described in *Mgmt. Dynamics* or *Unifund SAL* -- referred to hereafter as a "statutory injunction," *i.e.*, an injunction that requires only a showing that the statute in question has been violated, requires something more than language authorizing the issuance of an

³⁵ There is no question that the City may claim irreparable injury based on public health threats to its residents and on increases in crime. *New York Trap Rock Corp. v. Clarkstown*, 299 N.Y. 77, 84 (1949) (where the public health is involved, the right of the town to bring an action for an injunction "may be tantamount to its right of survival," *id.* at 86; *New York State NOW v. Terry*, 886 F.2d 1339, 1361 (2d Cir.1989) (City may seek injunctive relief where defendants' activities endanger the public safety and welfare). This Court has already recognized these principles in sustaining a cause of action brought by the City against wholesale distributors of unstamped cigarettes whose actions effectively enable the conduct sought to be enjoined here. *City of New York v. Milhelm Attea & Bros., Inc.*, 550 F. Supp. 2d 332, 350 (E.D.N.Y. 2008).

injunction. See *City v. Golden Feather Smoke Shop, Inc.*, 2009 U.S. Dist. LEXIS 20953, at *26-27 (E.D.N.Y. Mar. 16, 2009) (“Following *Management Dynamics*, courts in the Second Circuit have distinguished between statutes that merely authorize injunctions to be issued and those approving the issuance of injunctions upon the satisfaction of express “statutory conditions.”).

In the absence of express language authorizing entry of an injunction without a showing of irreparable harm, as here, whether the CCTA so provides must be determined by the ordinary means used to determine the meaning of the statute. See e.g., *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 600 (2004) (interpreting statute in light of its “text, structure, purpose, and history”). An analysis that looks to the text, structure, purpose, and history of the CCTA leads to the conclusion that the CCTA authorizes statutory injunctions.

A. The Text of the CCTA Supports the Availability of a Statutory Injunction

Where a suit involves the public interest and is not merely a private controversy, “the courts’ equitable powers assume[] an even broader and more flexible character.” *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946); see also *Cal. v. Am. Stores Co.*, 495 U.S. 271, 295 (1990) (“Courts of equity may and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved”) ((quoting *Virginian R. Co. v. Railway Employees*, 300 U.S. 515, 552 (1937))).

The CCTA provides in 18 U.S.C. § 2346 (b) (1) in pertinent part that:

(b) (1) A local government, ... may bring an action in the United States district courts to prevent and restrain violations of this chapter by any person

(b) (2) A ... local government ... may in a civil action under paragraph (1) also obtain any other appropriate relief for violations of this chapter from any person ..., including civil penalties, money damages, and injunctive or other equitable relief. ...

(b) (3) The remedies under paragraphs (1) and (2) are in addition to any other remedies under Federal, State, local, or other law.

(emphasis added).

The CCTA is uniquely comprehensive in providing in 18 U.S.C. § 2346 (b), entitled “Enforcement,” three distinct provisions setting forth the relief available to a local (and state) government; each provision expressly or by implication includes injunctive relief. *See* 18 U.S.C. 2346 (b)(1)-(3) ((1) “A local government, ... may bring an action .. to prevent and restrain violations ...”; (2) “A ... local government ... may in a civil action under paragraph (1) also obtain ... injunctive or other equitable relief”; (3) “The remedies under paragraphs (1) and (2) are *in addition to any other remedies* under Federal, State, local, or other law.”) The sheer scope of the remedies afforded is unprecedented; our research has uncovered no federal statute that expressly extends such a broad array of remedial power, certainly not to a state or local government.

The varied relief provided for in 18 U.S.C. 2346 (b)(1)-(3) is significant under the principle of statutory construction requiring the three provisions to be treated as non-redundant, but instead as each having independent meaning. “Statutory enactments should ... be read so as ‘to give effect, if possible, to every clause and word of a statute.’” *United States v. Kozeny*, 541 F.3d 166 (2d Cir. 2008) quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (quoting *United States v. Menasche*, 348 U.S. 528, 538-39 (1955)); *see also United States v. Nordic Vill., Inc.*, 503 U.S. 30, 36 (1992) (noting “settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect”); *Tasini v. New York Times Co.*, 206 F.3d 161 (2d Cir. 1999) citing *Regions Hosp. v. Shalala*, 522 U.S. 448 (1998) (Scalia, J., dissenting) (“It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, sect. 2, it was said that 'a statute

ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.”).

Paragraph (1) of 18 U.S.C. § 2346 (b) provides a local government with the power (1) “to bring an action to *prevent and restrain violations* of this chapter” Language “preventing and restraining” violations of course refers to an injunctive remedy. *See, e.g.* 18 U.S.C. § 2318 (2) (“the court may grant 1 or more temporary or permanent injunctions ... to prevent or restrain a violation of subsection (a)”); 31 U.S.C. § 5365 (the district court may enter a temporary restraining order, a preliminary injunction, or an injunction against any person to prevent or restrain a restricted transaction ”); 47 U.S.C. § 605 (3)(B) (“The court (i) may grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain violations of subsection (a)”). By use of the term “prevent and restrain,” Section 2346 (b) (1) thus provides a local government with the authority to obtain injunctive relief.

Section 2346 (b) (2) then provides that:

(2) A ... local government ... may in a civil action under paragraph (1) also obtain *any other* appropriate relief for violations of this chapter from any person ..., *including* civil penalties, money damages, and *injunctive* or other equitable relief. ...

(emphasis added) Although § 2346(b)(1) and § 2346(b)(2) differs from one another in that § 2346(b)(2) provides for a broader array of remedies than only the injunctive provided for in § 2346(b)(1), *e.g.*, penalties, money damages, § 2346(b)(2) nonetheless *again* provides for “injunctive ... relief” despite the fact that some form of injunctive relief has already been provided for by the “prevent and restrain” language of section 2346(b)(1). Under the accepted canon of interpretation cited above, the term “injunctive ...relief” in (b)(2) must mean something different than the power to “prevent and restrain” violations found in (b)(1). Any redundancy between the two sections is avoided by construing the language of (b)(2) as offering broader

injunctive relief than that afforded by (b)(1). Thus, where section (b)(1) provides for the power “to prevent and restrain,” (b)(2) provides for any other appropriate relief, such as “injunctive” ... relief.” The required distinction between (b)(1) and (b)(2) can reasonably rest upon a conclusion that section 2346(b)(1) provides for traditional or common law injunctive relief, while section 2346(b)(2), to fulfill the plain language of providing any other relief, as long as it is “appropriate,” must grant access to any form of injunctive relief – including a statutory injunction.

Remarkably, paragraphs (1) and (2) do not exhaust the relief available under section 2346 (b). The drafters of the statute gilded the lily, providing that the remedies “under paragraphs (1) and (2)” are merely *in addition to any other remedies under Federal, State, local, or other law* (emphasis added). If the language of the statute is to accorded its plain meaning, as it must, *see City of New York v. Milhelm Attea & Bros., Inc.*, 550 F. Supp. 2d 332, 344 (E.D.N.Y. 2008) (“[A] court's ‘starting point in statutory interpretation is the statute’s plain meaning, if it has one.’”) (quoting *United States v. Dauray*, 215 F.3d 257, 260 (2d Cir. 2000)), section 2346(b)(3) alone provides a compelling, if not a dispositive, basis from which to conclude that the CCTA authorizes a statutory injunction. A statutory injunction is certainly a “remedy” under federal law, as shown by abundant case law, cited below. Section 2346(b)(3) provides for the grant of “*any other remedies*” under federal, state or other law. Even assuming that the injunctive relief afforded under sections, (b)(1) and (b)(2) consists of traditional, common law injunctive relief requiring a showing of irreparable harm, the only way to give meaning to the grant of *any other* remedy than those already set forth in the prior two sections is to construe section (b)(3) as authorizing statutory injunctions.

Section 2346 can be understood as successively expanding upon the available remedies, beginning with the power “to prevent and restrain” in (b)(1), advancing to “any other appropriate relief, including injunctions” in (b)(2) and then culminating in (b)(3) in “any other remedy,” under apparently any law, federal, state, local or “other.” It is difficult to imagine a broader grant of remedial authority, where in section (b)(2) the statute provides for “any other relief” and on top of that, then provides in section (b)(3) for “*any other remedies*.” Our research has located not a single federal statute that provides remedial language this broad.³⁶ Where Congress has effectively stated in one section that “every possible remedy is available,” and then in an immediately following section repeats that at “every possible remedy is available” there is simply no reasoned basis to exclude “an available remedy” -- a statutory injunction.

Section 2346(b)(3) not only contemplates the use of *any* other remedies under federal law, it also provides for the use of “any other remedies” under *State* or other law. The import of the provision is that a violation of the CCTA is susceptible to a state law *remedy*, *i.e.* when a CCTA violation is shown, remedies available under state statutes can provide the form of relief.³⁷ This Court has already held that the CMSA provides for statutory injunctions. *See City v. Golden Feather Smoke Shop*, 2009 U.S. Dist. LEXIS 20953 at *29. By including forms of relief available under state law, the CCTA self-evidently permits that state law remedy – a statutory injunction – to provide the relief once a CCTA violation has been established, as here.

³⁶ Indeed, while it would overstate the case for the expansiveness of the remedies provided for in §2346, section (b) (2) does provide for “any other *appropriate* relief for violations ...” while section (b)(3) does not even limit the available remedies in that respect, simply providing for “any other remedies...”

³⁷ The notion that a state law remedy could serve as a predicate remedy for a violation of federal law is not dissimilar to the circumstance in which a violation of a substantive state statute serves as a predicate for a violation of federal law. *See, e.g.*, 18 U.S.C. § 1961(1)(A) (RICO statute).

B. The Language of the CCTA Is No Different Than That of Statutes Under Which Statutory Injunctions Have Issued.

The language of the CCTA is comparable to the language of statutes pursuant to which statutory injunctions have issued. In *Mgmt. Dynamics*, 515 F.2d at 808, the statute provided no more than:

Whenever it shall appear to the Commission that any person is engaged or is about to engage in acts or practices constituting a violation of any provision of this title , it may in its discretion bring an action in the proper district court of the United States ... to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond.

15 U.S.C. § 78u. Nothing in that language in fact expressly dispenses with a showing of irreparable harm, no “express statutory conditions” are recited, and indeed, the statute conditions the issuance of an injunction upon “a proper showing,” which arguably could serve as a reference to the common law requirements for injunctive relief, including irreparable harm. Nonetheless, that language supported a statutory injunction in *Mgmt. Dynamics*. 515 F.2d at 808.

In *United States v. Diapulse Corp. of America*, 457 F.2d 25, 28-29 (2d Cir. 1972), the statute provided no more than “The district courts of the United States shall have jurisdiction, for cause shown[,], to restrain violations of section 301 ... except paragraphs (h), (i), and (j).” See 21 U.S.C. § 332. Rejecting “Diapulse’s claim that a removal from commerce is not justified because there was no showing of irreparable injury ...,” the Second Circuit held that:

The *passage of the statute* is, in a sense, an implied finding that violations will harm the public and ought, if necessary, be restrained. The district courts are given jurisdiction to restrain violations of the statute (21 U.S.C. § 332(a)). *The legislative goals are the framework within which the court operates in deciding whether to grant injunctive relief.* No specific or immediate showing of the precise way in which violation of the law will result in public harm is required.

457 F.2d at 28 (emphasis added). The Second Circuit did not reference at all particular statutory language or “express statutory conditions,” *Golden Feather*, 2009 U.S. Dist. LEXIS 20953 at *26-27, but instead looked to the legislative goals of the statute to determine whether an injunction should issue.

In *Mical Communications, Inc. v. Sprint Telemedia, Inc.*, 1 F.3d 1031, 1035 (10th Cir. 1993), a statutory injunction issued under 47 U.S.C. § 406, which provided

The district courts of the United States shall have jurisdiction upon the relation of any person alleging any violation, by a carrier subject to this chapter, of any of the provisions of this chapter which [cause certain specified injuries] to issue a writ or writs of mandamus against said carrier commanding such carrier to furnish facilities for such communication or transmission to the party applying for the writ....;

Although the scope of the injunction itself is narrow, there is no language in the statute that dispenses with the common law requirements for an injunction and no “express statutory conditions” delineated. The statute merely provides that the district court “shall have jurisdiction” to issue injunctions when violations of the statute are shown, and based on that language, the court issued an injunction with no showing of irreparable harm.

In *CSX Transp. v. Board of Equalization*, 964 F.2d 548, 551 (6th Cir. 1992), a statutory injunction issued under 49 U.S.C. § 11503:

The district courts of the United States shall have jurisdiction ... to grant such mandatory or prohibitive injunctive relief, interim equitable relief, and declaratory judgments as may be necessary to prevent, restrain, or terminate any acts in violation of this section,
....

Again, the statute provides no “express statutory conditions,” other than a requirement that the injunction “be necessary to prevent violations,” language no different than the CCTA provision providing authority to “obtain any other appropriate relief for violations of this chapter.” *Accord Burlington Northern R.R. Co. v. Bair*, 957 F.2d 599, 601-02 (8th Cir. 1992) (“It is a well-

established rule that where Congress expressly provides for injunctive relief to prevent violations of a statute, a plaintiff does not need to demonstrate irreparable harm to secure an injunction.” “The proper role of the courts is simply to determine whether a violation of the statute has or is about to occur.”), *cert. denied*, 113 S. Ct. 69 (1992).

C. The Legislative History and Purpose of the CCTA Support the Availability of Statutory Injunctions

As stated in *Diapulse*, 457 F.2d at 28, “[t]he legislative goals are the framework within which the court operates in deciding whether to grant injunctive relief.” That approach to determining whether an injunction should issue was utilized by the court in *New York v. Operation Rescue Nat’l*, 2000 U.S. Dist. LEXIS 20059, at *102-104 (W.D.N.Y. 2000), *aff’d in part, rev’d in part on other grounds*, 273 F.3d 184 (2d Cir. 2001), and the analysis in that case is thus instructive here. The court in *Operation Rescue* granted a statutory injunction under the Freedom of Access to Clinic Entrances Act (“FACE”), 18 U.S.C. § 248:

In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief and compensatory and punitive damages, as well as the costs of suit and reasonable fees for attorneys and expert witnesses.

18 U.S.C. § 248 (c) (1) (B). The court found that “because FACE authorizes this court to award preliminary injunctive relief when there exists a reasonable belief that the statute is being violated and when there is a reasonable likelihood of future violations, it will be presumed that Plaintiff will suffer irreparable harm if a preliminary injunction is not issued.” 2000 U.S. Dist. LEXIS 20059 at *100. The *Operation Rescue* court relied on “[t]he more general and well-established proposition that where, as here, a governmental entity seeks an injunction to enforce compliance with a particular statute, irreparable injury is presumed and need not be proven,” *id.*

but bolstered its decision to issue a statutory injunction by looking to the purpose of FACE as articulated in the legislative history:. Thus, according to the court:

The statute's legislative history makes clear that, in enacting FACE, Congress believed that the conduct FACE was designed to eradicate was, *per se*, causing irreparable harm:

A nationwide campaign of blockades, invasions, vandalism, threats and other violence is barring access to facilities that provide reproductive health services This dramatically escalating violence is endangering the lives and well being of patients, providers, and their respective families This campaign of violence has lead to death, injury, harassment, fear and thousands of arrests all across the nation.

Given this congressional mandate, the courts consistently have held that once plaintiffs demonstrate a likelihood of success in proving that FACE violations will occur, irreparable harm is presumed.

Operation Rescue, 2000 U.S. Dist. LEXIS 20059 at *101 (emphasis added) (quoting *H.R. Rep. No. 103-306*, 103d Cong., 2d Sess., at 6, reprinted in 1994 U.S.C.C.A.N. 699, 703).

The legislative history of the CCTA provides no less of a statement “that the conduct [the CCTA] was designed to eradicate was, *per se*, causing irreparable harm”:

Cigarette bootlegging has often been viewed as a victimless crime, but both research and testimony of witnesses forcefully refuted this notion by pointing out the violent activity associated with organized crime and take-over operations. Armed robberies, murders, serious assaults and truck hijackings as well as corruption of public officials are standards tactics used to gain control of this highly lucrative and virtually uncontrolled market. James H. Tully, Jr., Commissioner, New York State Department of Taxation and Finance, gave examples of the types of activities which organized crime employs to ensure control of its smuggling corridors and its operations; [examples follow]

The truly innocent victims of the activities of organized crime in this area are the thousands of legitimate businessman, wholesalers, retailers, drivers, packers and sales people who have lost their jobs and businesses as a result of the takeover Over the past decade,

half of the tobacco wholesalers in [New York] City and more than a quarter of the licensed retailers – 7000 altogether – have gone out of business. Teamsters Union Locals there have lost nearly half of their tobacco and vending machine membership. All told, more than 2000 of the industry's 3,200 drivers, salesmen, clerks, and warehousemen lost their jobs.

S. Rpt No. 95-962 (reprinted in *U.S. Code Cong. & Admin News*, 98th Cong. Second Sess. 5518, 5521-23 (1978)). The foregoing statement of the harm at issue accompanied the original enactment of the CCTA. By amending the CCTA to provide for additional sources of enforcement – state and local governments, armed with injunctions – it may reasonably be inferred that Congress was not satisfied that as originally enacted the CCTA had cured the above harms and that they continued, so their elimination remains a purpose of the statute. That purpose is surely served by permitting the use of statutory injunctions, where the above types of harm are clearly qualify as irreparable harm.

The CCTA, moreover, was amended as part of Public Law 109-177 (2006), the USA Patriot Improvement and Reauthorization Act, “An Act To extend and modify authorities needed to combat terrorism, and for other purposes.” That succinct statement of purpose provides an additional basis for concluding that the statute contemplates the use of statutory injunctions. The history of the CCTA, like that of the FACE act, reflects that Congress has already made a finding that the conduct prohibited by the statute constitutes irreparable harm.³⁸

³⁸ It is worth noting that the conduct prohibited by the CCTA, trafficking in untaxed cigarettes, will involve a financial loss to a state or local government that in principle is compensable through money damages, raising the question of why Congress would provide for any injunctive relief at all, much less provide for that relief in three separate provisions of 18 U.S.C. 2346. A reasonable conclusion is that Congress has already weighed the harm involved and concluded that injunctions should issue in the face of a statutory violation, without an independent showing of irreparable harm.

**D. The “Express Statutory Conditions” Requirement for Issuance of a
Statutory Injunction Is No Different Than the Requirement in
*Management Dynamics***

This Court has cited to district court cases in this circuit that appear to add a gloss to the doctrine set forth in *Management Dynamics*, 515 F.2d at 808. See *Golden Feather*, 2009 U.S. Dist. LEXIS 20953 at *27 (citing *U.S. v. Buddhu*, 2008 U.S. Dist. LEXIS 57728 (D. Conn. 2008); *U.S. v. Webb*, 2007 U.S. Dist. LEXIS 7307 (E.D.N.Y. 2007); *U.S. v. Broccolo*, 2006 U.S. Dist. LEXIS 90241 (S.D.N.Y. 2006); *Preservation Coalition v. Federal Transit Admin.*, 129 F. Supp. 2d 551, 572 (W.D.N.Y. 2000)). “Following *Management Dynamics*, courts in the Second Circuit have distinguished between statutes that merely authorize injunctions to be issued and those approving the issuance of injunctions upon the satisfaction of express ‘statutory conditions.’” *Golden Feather*, 2009 U.S. Dist. LEXIS 20953 at *27. As shown below, these cases in fact do not specify any requirements for a statutory injunction that are any different from the requirements in *Management Dynamics*.

Buddhu, *Webb* and *Broccolo* each construed the same trio of Internal Revenue Code provisions, 26 U.S.C. §§ 7402, 7407 and 7408, that provide for injunctions against tax preparers. 2008 U.S. Dist. LEXIS 57728 at *8-9; *U.S. v. Webb*, 2007 U.S. Dist. LEXIS 7307 at *3-5; *U.S. v. Broccolo*, 2006 U.S. Dist. LEXIS 90241 at *4-5 (hereafter, the “IRC Cases”). The cases have regrettably introduced a subtle distortion into the language describing the prerequisites for a statutory injunction, but careful examination of the cases in fact establishes that the cases do not impose conditions any different than in *Management Dynamics*. The statutes construed by the three courts fit comfortably within the rule of *Management Dynamics* and related cases and the “express statutory conditions” in the IRC Cases are nothing more or different than the requirement in *Management Dynamics* that for a statutory injunction to issue “it would be enough if *the statutory conditions for injunctive relief* were made to appear.” 515

F.2d at 808. Simply stated, the so-called “express statutory conditions” of the IRC Cases do not consist of anything more than the “statutory conditions for injunctive relief” required under *Management Dynamics*.

It bears the strongest emphasis that the three courts in the IRC Cases all recognized the general rule that “When an injunction is expressly authorized by statute, the standard preliminary injunction test does not apply.” *United States v. Buddhu*, 2008 U.S. Dist. LEXIS 57728 (citing *SEC v. Mgmt. Dynamics, Inc.*, 515 F.2d 801, 808 (2d Cir. 1975) (“As the issuance of an injunction in cases of this nature has statutory sanction, it is of no moment that the plaintiff has failed to show threatened irreparable injury or the like, for it would be enough if the statutory conditions for injunctive relief were made to appear.”), and the three courts all issued injunctions without a showing of irreparable harm under two of the three statutes under which statutory injunctions were sought. The language of the statutes under which statutory injunctions were issued in the IRC Cases, 26 U.S.C. §§ 7407, 7408, is, as shown below, not appreciably different than the enforcement provision of the CCTA, 18 U.S.C. § 2346, or for that matter, the statute for which a statutory injunction issued in *Management Dynamics*. The two statutes in the IRC cases certainly do not provide for statutory conditions that are any more “express” than the CCTA or *Management Dynamics* statute. Conversely, the statute for which a statutory injunction was *refused* in the IRC Cases (26 U.S.C. § 7402) does have, as shown below, language that is entirely different than that used in the CCTA and 26 U.S.C. §§ 7407, 7408, the two statutes that did support a statutory injunction in the IRC Cases. The IRC Cases do assuredly point to a valid distinction among the statutes at issue in those cases, two of which fall within the language of *Management Dynamics* and supported a statutory injunction, and one of which did not. However, the CCTA (18 U.S.C. § 2346) is comparable to the two statutes under

which a statutory injunction did issue, and not comparable to the “catch-all” statute (26 U.S.C. § 7402) for which a statutory injunction was denied in the IRC Cases.

According to *Buddhu*, instead of looking to the standard preliminary injunction test:

“[T]he Court must look to the ‘*statutory conditions for injunctive relief*,’ and may issue a preliminary injunction if it is clearly established that those conditions are met. *Mgmt. Dynamics* at 808.

2008 U.S. Dist. LEXIS 57728 at *8. *Buddhu*’s citation to *Management Dynamics* at page 808, is telling, as it is at that point that the *Management Dynamics* decision quotes from the Second Circuit precedent on which *Management Dynamics* relied:

We noted in *SEC v. Torr*, 87 F.2d 446, 450 (2d Cir. 1937): As the issuance of an injunction in cases of this nature has statutory sanction, it is of no moment that the plaintiff has failed to show threatened irreparable injury or the like, for *it would be enough if the statutory conditions for injunctive relief were made to appear*.

Mgmt. Dynamics, 515 F.2d at 808 (emphasis added). Having correctly recited the standard for issuance of a statutory injunction – “it would be enough if the statutory conditions for injunctive relief were made to appear,” the court in *Buddhu* then addresses that it was called upon to apply, 26 U.S.C. §§ 7407 and 7408, and introduces a subtle distortion into its recitation of the standard, stating:

Sections 7407 and 7408 of Title 26 of the United States Code contain *express statutory conditions* for issuance of an injunction. *United States v. Broccolo*, 2006 U.S. Dist. LEXIS 90241 (S.D.N.Y. 2006) (applying statutory conditions set forth at 26 U.S.C. § 7407 and 7408).

Buddhu, 2008 U.S. Dist. LEXIS 57728 at 8-9 (emphasis added). *Buddhu* thus traces the purported requirement that a statute contain “express statutory conditions” to *Broccolo*. In *Broccolo*, the court in fact stated nothing more than that:

Here, the Government seeks a preliminary injunction under sections 7402(a), 7407, and 7408 of the Internal Revenue Code. Sections 7407 and 7408 contain *express provisions* authorizing district courts to enter injunctions upon the showing of a violation of the law. *Accordingly, if the Government establishes a violation of either of these sections, the Court may issue a preliminary injunction.* Section 7402(a) authorizes injunctive relief, but does not provide “*statutory conditions.*” *Mgmt. Dynamics*, 515 F.2d at 807-08. Therefore, as discussed below, the traditional equitable considerations must be applied.

Broccolo, 2006 U.S. Dist. LEXIS 90241, *4-5 (emphasis added; some citations omitted). *Broccolo* thus distinguished between statutes that contain “express provisions authorizing district courts to enter injunctions upon the showing of a violation of the law” and statutes that do not: “Section 7402(a) authorizes injunctive relief, but does not provide ‘*statutory conditions.*’” *Id.* at *5 (citing *Mgmt. Dynamics*, 515 F.2d at 807-08). It is clear from this analysis in *Broccolo*, particularly by its citation to *Management Dynamics* as the source of the term “statutory conditions,” that “statutory conditions” means simply that the statute contains “express provisions authorizing district courts to enter injunctions upon the showing of a violation of the law.” *See also Buddhu*, 2008 U.S. Dist. LEXIS 57728 (“Section 7402(a) authorizes injunctive relief, but does not provide ‘*statutory conditions.*’”); *Webb*, 2007 U.S. Dist. LEXIS 7307 at *13 (“However, unlike sections 7407 and 7408, section 7402(a) does not itself authorize specific injunctive relief.”).

A review of the statutes at issue in *Buddhu*, *Webb*, *Broccolo*, I.R.C. §§ 7402(a), 7407, 7408, is helpful in defining what the three courts understood as “statutory conditions” or “express statutory conditions,” (terms used by the courts interchangeably) and why sections 7407 and 7408 have “statutory conditions,” but section 7402 does not. Section 7407 provides:

(a) Authority to seek injunction. A civil action in the name of the United States to enjoin any person who is a tax return preparer from further engaging in any conduct described in subsection (b)

or from further acting as a tax return preparer may be commenced at the request of the Secretary.

(b) Adjudication and decrees. In any action under subsection (a), if the court finds—

(1) that a tax return preparer has—

(A) engaged in any conduct subject to penalty under section 6694 or 6695, or subject to any criminal penalty provided by this title,

(B) misrepresented his eligibility to practice before the Internal Revenue Service, or otherwise misrepresented his experience or education as a tax return preparer,

(C) guaranteed the payment of any tax refund or the allowance of any tax credit,

or

(D) engaged in any other fraudulent or deceptive conduct which substantially interferes with the proper administration of the Internal Revenue laws, and

(2) that injunctive relief is appropriate to prevent the recurrence of such conduct,

26 U.S.C. § 7407.

Section 7408 provides:

(a) Authority to seek injunction. A civil action in the name of the United States to enjoin any person from further engaging in specified conduct may be commenced at the request of the Secretary.

(b) Adjudication and decree. In any action under subsection (a), if the court finds—

(1) that the person has engaged in any specified conduct, and

2) that injunctive relief is appropriate to prevent recurrence of such conduct, the court may enjoin such person from engaging in such conduct or in any other activity subject to penalty under this title.

(c) Specified conduct. For purposes of this section, the term "specified conduct" means any action, or failure to take action, which is—

(1) subject to penalty under section 6700, 6701, 6707, or 6708, or

(2) in violation of any requirement under regulations issued under section 330 of title 31, United States Code.

26 U.S.C. § 7408

Both of the two IRC statutes that supported entry of a statutory injunction, although more detailed than the CCTA, in fact do not differ in their essential elements from 18 U.S.C. 2346(b)(1)-(3). The essential elements of section 7407 can be restated through paraphrase without losing any substance as follows:

The United States may commence a civil action to enjoin a tax return preparer from engaging in conduct described in subsection (b). A court may issue an injunction in such an action if it finds the tax preparer has engaged in any conduct subject to any criminal penalty provided by this title.

Similarly, Section 7408 can be restated, without losing any of its essential elements, as:

The United States may commence a civil action to enjoin any person from further engaging in specified conduct. An injunction may issue in the action if the court finds that the person has engaged in any specified conduct.

The language elided in these paraphrases is principally concerned with setting forth the particular conduct to be enjoined, but §§ 7407 and 7408 both also use general language, "any conduct in violation of this title" or "in any specified conduct" to define the prohibited conduct.

Restating the CCTA yields:

A local government may bring an action to prevent and restrain violations of this chapter by any person and may in such a civil obtain any other appropriate relief for violations of this chapter from any person.

As to “statutory conditions” or “express statutory conditions,” in Sections §§ 7407 and 7408, section 7407 simply provides for an injunction because of conduct “subject to any criminal penalty provided by this title,” which is no more “express” than the issuance of an injunction under the CCTA “for violations of this chapter.” In other words, it is a sufficient “express statutory condition” for an injunction to issue under section 7407 if the proponent of the injunction proves that a person is engaged in conduct ““subject to any criminal penalty provided by this title.” The same “express statutory condition” exists for the CCTA, where a local government need show “violations of this chapter.” 18 U.S.C. § 2346(b)(2).³⁹

Other “conditions” that are evident in comparing the IRC provisions with the CCTA are not “express statutory conditions.” For example, sections §§ 7407 and 7408 both contain the apparent “condition” that the court find the injunction necessary to prevent the conduct from occurring in the future. *See* 25 U.S.C. § 7408 (b)(2). But that is not an “express statutory condition” that the CCTA lacks, because the prerequisite for a statutory injunction of possible future violations is an inherent requirement of a statutory injunction under the case law.

See Operation Rescue, 2000 U.S. Dist. LEXIS 20059 at *100 (although unstated in relevant

³⁹ Indeed, the CCTA specifies an arguably more express “statutory condition” than the IRC statutes. A “Chapter violation” – which triggers a CCTA injunction – is a far more specific condition than a “Title” violation needed for an injunction under the IRC statutes, simply because a title of the United States code embraces so much more conduct than does a chapter. This latter fact likely explains the reason for the greater detail in the IRC injunctive provisions than in the CCTA. The IRC statutes provide for injunctions over a much wider range of regulated conduct than the CCTA, and accordingly must specify and distinguish among that conduct by specifying the particular conduct within the title that is to be subject to an injunction. The CCTA, by contrast, seeks to regulate a discrete, narrow range of conduct than the IRC statutes. The CCTA is able accurately to specify the conduct to which an injunction should apply succinctly, by referring to “violations of this chapter.” It is unnecessary for the CCTA to provide a detailed listing of all the various “conducts,” which give an appearance of “express statutory condition” in the IRC, simply because the CCTA regulates a very discrete form of conduct. The distinction between the detailed “statutory conditions” in the IRC injunction statutes and the more succinct CCTA is a distinction without a difference: both statutes provide that an injunction may issue “for violations of the statute.”

statute, injunction will issue if “there is a reasonable likelihood of future violations.”). The IRC statutes merely restate a requirement already provided in the case law.

The conclusions above are confirmed by examining 25 U.S.C. § 7402, which *Buddhu, Webb, Broccolo* all found to lack the “express statutory conditions” sufficient to provide a basis for a statutory injunction. That statute, entitled merely “Jurisdiction of district courts” reads:

(a) To issue orders, processes, and judgments. The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction and of *ne exeat republica*, orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws.

26 U.S.C. § 7402. This language is distinguishable from IRC §§ 7407 and 7408, in that its purpose is to list forms of available relief – the courts “*shall have jurisdiction ...to issue.*” Sections 7407 and 7408 state by contrast that the person bringing the action can “obtain” an injunction for violations and can bring an action “to enjoin” violations. The CCTA uses the same active language as Sections 7407 and 7408, providing that a local government can “bring an action to restrain a violation” and can “obtain” an injunction, and is not a mere inventory of available relief.

In sum, the requirement of “express statutory conditions” or “statutory conditions” is at best a shorthand for “conditions” that are no different than the “conditions” in *Management Dynamics*, where the statute allowed for an injunction to issue on a showing that “any person is engaged or is about to engage in acts or practices constituting a violation of any

provision of this title.”⁴⁰ The “statutory conditions” are nothing more than the elements necessary to show a violation of the statute, and are not a separate set of conditions.

Statutory injunctions do not eliminate judicial discretion or even traditional equitable considerations; only the requirement of irreparable harm is dispensed with:

We scarcely mean to imply that judges are free to set to one side all notions of fairness because it is the SEC, rather than a private litigant, which has stepped into court. ... In deciding whether to grant injunctive relief, a district court is called upon to assess all those considerations of fairness that have been the traditional concern of equity courts.

Mgmt Dynamics, 515 F.2d at 808.

⁴⁰ *Preservation Coalition v. Federal Transit Admin.*, 129 F. Supp. 2d 551, 572 (W.D.N.Y. 2000), is entirely distinguishable. There, the court was confronted with a flat prohibition against a statutory injunction in the context of the issue in the case: “The Second Circuit has ‘summarily rejected’ the argument that ‘any violation of NEPA, in and of itself and as a matter of law, constitutes irreparable harm.’” *Id.* (quoting *State of New York v. Nuclear Regulatory Com’n*, 550 F.2d 745, 753 (2nd Cir. 1977)). *Preservation Coalition* also was bound by two Supreme Court decisions interpreting environmental statutes similar to NEPA, that had also flatly rejected the argument “that a showing that the defendants violated an environmental statute necessarily required issuance of a preliminary injunction.” *Id.* (citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312-13 (1982)); *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 544 (1987)). But none of those cases made any reference to a statute that expressly authorized injunctive relief, nor did any case suggest that its holding represented a rejection that statutory injunctions could issue in different circumstances. Moreover, in *Preservation Coalition*, *Weinberger* and *Amoco Production* the injunctions sought were against federal projects; in *Preservation Coalition* the court referred to “a government project in the public interest.” 129 F. Supp. 2d at 564. The standards for injunctive relief will clearly be quite different than in circumstances like the present where there has been a preliminary showing of the violation of a criminal statute.

CONCLUSION

For the foregoing reasons, the City respectfully requests that this Court grant the City's motion for entry of a preliminary injunction enjoining defendants' sales of unstamped cigarettes, except for sales to tribe members for personal use.

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