UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

THE CITY OF NEW YORK,

Plaintiff,

-against-

Civil Action No. 08 cv 3966 (CBA)(JMA)

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.

REPLY POST-HEARING MEMORANDUM OF LAW OF PLAINTIFF THE CITY OF NEW YORK IN SUPPORT OF ITS MOTION FOR A PRELIMINARY INJUNCTION

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July 8, 2009

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REPLY POST-HEARING 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 reply memorandum of law in further support of its motion to preliminarily enjoin defendants' sales of unstamped cigarettes, which violate 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").

PRELIMINARY STATEMENT

As to cigarette sales that violate federal or state law, "The City of New York has embarked on an aggressive course of litigation in the federal courts against all participants in any aspect of the sales of cigarettes not bearing New York State ... tax stamps ('unstamped cigarettes'). This case is one of those actions." *Peace Pipe Mem.* at 2.[1] The defendants are the owners and/or operators of retail stores on the Poospatuck Indian reservation in Mastic, Long Island, who, by massive sales of unstamped cigarettes to the public, abuse a state policy intended to supply reservation Indians with sufficient numbers of unstamped cigarettes for personal use.

"The relief sought herein is nothing less than an attempt to use this federal court to issue a preliminary injunction that will completely terminate the long standing activity of the defendants." *Peace Pipe Mem.* at 2. That is entirely correct, and the City bases that attempt on the strength of this Court's decisions, which have held that "the long standing activity of the defendants" violates federal and state law, s*ee City of New York v. Milhelm Attea & Bros., Inc.*, 550 F. Supp. 2d 332, 347 (E.D.N.Y. 2008), *reconsideration denied*, 591 F. Supp. 2d 234 (E.D.N.Y. 2008), as well as on the fact that the activity irreparably harms the City. The City's "attempt to use this federal court" complements the federal government's comparable effort, which convicted Peace Pipe's owner of violating the CCTA for the same "long standing activity of the defendants"

[1] "*Peace Pipe Mem.*" refers to the *Post Hearing Memorandum of Law By Defendants Peace Pipe, Rodney Morrison, Charolette Morrison in Opposition to the Granting of A Preliminary Injunction*, dated June 24, 2009. "*Defs. Mem.*" refers to *Defendants' Post Hearing Memorandum of Law in Opposition to Plaintiff's Motion for a Preliminary Injunction,* dated June 24, 2009, and submitted on behalf of Defendants Monique's Smoke Shop, Ernestine Watkins, Wayne Harris, Red Dot & Feathers Smoke Shop, Inc., Raymond Hart, Smoking Arrow Smoke Shop, Denise Paschall, TDM Discount Cigarettes and Thomasina Mack.

targeted in this action. *See United States v. Morrison*, 2009 U.S. Dist. Lexis 20706 at *33 (E.D.N.Y. 2009). The relief sought by the City will protect the public health against the universally recognized destructive effects of cigarettes, against ancillary crimes arising out of cigarette trafficking and will protect the public treasury against losses of billions of dollars in revenue that federal, state and local legislatures have determined should be levied on cigarette sales.

Having offered virtually no evidence of their business practices, defendants make two unpersuasive arguments: i) Defendants presently do not violate the CCTA because they sell no more than 49 cartons of unstamped cigarettes to persons who arrive in the same vehicle; (ii) No injunction should issue to bar defendants' sales of unstamped cigarettes, because someone else will supply that market and cause the same injury. *Peace Pipe Mem.* at 3-10. Whether either fact-dependent argument is true or not – no defendant offered any facts to prove them – is of no consequence. Both arguments fail as a matter of law: i) The CCTA prohibits virtually all commerce in unstamped cigarettes, including all of defendants' conduct – purchase, receipt, and possession – that is part and parcel of their ultimate sale of unstamped cigarettes, even when those sales are made in individual lots of fewer than 49 cartons; and ii) The City need only establish that an injunction will remedy conduct attributable to the defendants' conduct, not that it will restrain that conduct by all possible actors.

The defendants also repeat meritless legal arguments, including that "Indians are allowed to sell unstamped cigarettes" (*see e.g., Defs. Mem.* at 13, 14, 15, 17, 18; *Peace Pipe Mem.* at 15-20), that the CMSA is not intended to redress tax evasion (*see e.g., Defs. Mem.* at 67-68; *Peace Pipe Mem.* at 13), that the State "forbears" from

collecting taxes on sales by Indians (*see, e.g., Defs. Mem.* at 15-16; *Peace Pipe Mem.* at 2, 3) and that the only obligation to pay taxes rests with the consumer. *See, e.g., Defs. Mem.* at 15-16; *Peace Pipe Mem.* at 16. The Court has already addressed, and foreclosed, all of these arguments, *see generally City of New York v. Golden Feather Smoke Shop, Inc.*, 2009 U.S. Dist. LEXIS 20953 (E.D.N.Y. 2009); *Milhelm Attea*, 550 F. Supp. 2d at 347, as have other courts. *See generally, Morrison*, 2009 U.S. Dist. Lexis 20706; *Cayuga Indian Nation of N.Y. v. Gould,* 21 Misc. 3d 1142 (Sup. Ct. Monroe County 2008), app. docketed __ A.D. 3d __ (4th Dep't 2009).

Finally, although this Court considers the balance of the equities in determining whether to issue an injunction, defendants offered not a shred of evidence as to any hardship an injunction might cause them. In any event, the required balancing under precisely the same facts as here has long since been accomplished by the United States Supreme Court, in several rulings, which have concluded that a government's interest in collecting lawfully imposed taxes invariably outweighs the insignificant interest in an Indian retailer's sale of tax-free cigarettes to the public:

> It is painfully apparent that the value marketed by the smokeshops to persons coming from outside is not generated on the reservations by activities in which the Tribes have a significant interest. What the smokeshops offer these customers, and what is not available elsewhere, is solely an exemption from state taxation. ... We do not believe that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere.

Washington v. Confederated Tribes of Colville Indian Res., 447 U.S. 134, 155 (1980). Indian tribes "have no vested right to a certain volume of sales to non-Indians, *or indeed to any such sales at all*." *Id.* at 151 n.27 (emphasis added). The injunction sought by the

City, to enjoin defendants' sales of unstamped cigarettes to non-tribe members, is no broader than necessary to accomplish its goals, in light of the long history of defendants' massive violations. There is no irreparable harm to the defendants, where they have offered no evidence that they, like every legitimate cigarette seller in New York, could not continue to do business by selling stamped cigarettes.

Finally, offering more innuendo than argument, defendants intimate that the City's pursuit of legal remedies in federal court, and not in the state legislature is somehow a "tactic," unmeritorious or underhanded. The judicial remedies pursued by the City were all enacted by a legislature, presumably with the intent that those remedies be used. The revenues sought by the City were all levied by the legislature, presumably with the intent that they be collected. The recent amendments to the CCTA certainly evince Congress's intent that the City have access to the federal courts to pursue violations of state tax law. Defendants, and those acting in concert with them, certainly have no compunction against using the courts to thwart the legislature when it serves their purpose. *See, e.g., Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 204 (2d Cir. 2003); *Day Wholesale, Inc. v. State of New York*, 2008 N.Y. Slip Op. 4179, 51 A.D.3d 383 (4th Dep't 2008).[2]

[2] Peace Pipe's assertion that the City has attempted without success to utilize the legislative process or the state judiciary to obtain the relief sought here, *Peace Pipe Mem.* at 20, is utterly unsupported, either inside or outside of the record. Moreover, it is unclear what relief the City would need to seek in the legislature where the State's statutes are entirely adequate to the task of ending defendants' illegal sales. *See Golden Feather*, 2009 U.S. Dist. LEXIS 20953 at *34; *Milhelm Attea*, 550 F. Supp. 2d at 347.

ARGUMENT

POINT I

THE CITY HAS PROVEN PRESENT VIOLATIONS OF THE CCTA AND CMSA BY ALL OF THE DEFENDANTS

Defendants' legal arguments are mostly foreclosed by law of the case and applicable precedent. As to the CCTA, "[T]he Court concludes that state law 'requires' cigarettes sold by defendants to members of the broader public to bear tax stamps for the reasons expressed in *Milhelm Attea,* 550 F. Supp. 2d at 345-48." *Golden Feather*, 2009 U.S. Dist. LEXIS 20953 at *34. As to the CMSA, "The Court concludes, therefore, that defendants are 'retail dealers' within the meaning of the CMSA." *Id.* at *44. Defendants raise many of their old arguments, all of which have been rejected, and must be rejected once again.

A. Defendants Cannot Rely on Any Alleged Past Policy of "Forbearance."

Before addressing the evidence and the law, it is again necessary to consider briefly defendants' unflagging effort to rely on a defense of "forbearance," incorrectly characterized by Peace Pipe as "the long standing policies of New York State that have permitted Indian retailers on recognized reservations to conduct exactly the conduct that the City of New York seeks to have this federal court enjoin," *Peace Pipe Mem.* at 3, and by the other defendants as not requiring "Indian retailers . . . to regulate sales to non-Indians." *Defs' Mem.* at 16.

The New York State Department of Taxation and Finance ("DTF") has never published in written form a description of any "forbearance policy." In the absence of a definitive statement, sellers of unstamped cigarettes have been free to provide the courts with self-serving formulations of a "policy," just as defendants do here. The most

recent declaration of the State however, is that, whatever forbearance may once have meant, forbearance no longer exists. *See Milhelm Attea*, 550 F. Supp. 2d at 347. Still more recently, in a decision by the DTF Division of Tax Appeals, DTF stated that, "the Division has tolerated to some large extent *the illegal sales* of non-tax paid cigarettes by Native American Smoke Shops ..." *In the Matter of Gutlove & Shirvint*, DTA 822533 & 822921 at *34, 40 (May 29, 2009) ("*Gutlove Decision*") (emphasis added) (copy annexed hereto).[3] Sworn testimony of the Chief Investigator of DTF's Petroleum, Alcohol and Tobacco Bureau describing the actual contours of "forbearance" in the *Gutlove Decision* establishes that forbearance did not permit the conduct in which the defendants have engaged:

> If [cigarettes] are being sold at a wholesale level to non-Indians, it violates [the] law. If they're being sold over the Internet, it violates [the] law. *The only sales that are allowed by law would be a Native American to another Native American for their own personal use on the reservation where the sale took place.*

Gutlove Decision at *7 n. 5 (emphasis added).

[3] In the *Gutlove Decision,* DTF revoked the license to act as a cigarette wholesaler and as a stamping agent of Gutlove & Shirvint, Inc., Peace Pipe's principal supplier of unstamped cigarettes. DTF's description of Peace Pipe is instructive:

> [Gutlove] knowingly aided and abetted Peace Pipe Smoke Shop, *which operated in blatant disregard of the legalities of selling non-tax paid cigarettes.* ... [T]he State has, in fact, proven... that [Gutlove] aided and abetted the illegal sale of non-tax paid cigarettes by Peace Pipe Smoke Shop, *a notorious on-reservation vendor, which was a major provider of non-tax paid cigarettes to a vast bootlegging operation.*

Gutlove Decision, *34, 40 (emphasis added).

This statement constitutes the most recent, detailed and definitive description of what "forbearance" may once have been, and that description is provided by a DTF employee charged with enforcing the cigarette tax laws. *See also United States v. Kaid*, 241 Fed. Appx. 747, 750 (2d Cir. 2007) (non-precedential decision) ("[N]othing in the record supports the conclusion that the state does not demand that taxes be paid when, as in this case, massive quantities of cigarettes were purchased on reservations by non-Native Americans for resale.").

That DTF may have tolerated what it now describes as "illegal" actions in the past, is no defense here to defendants' conduct. *See Milhelm Attea,* 550 F. Supp. 2d at 347 (an enforcement decision by an administrative agency does not serve to alter state legislation.); *Morrison,* 521 F. Supp. 2d at 254 ("the failure of the executive branch to enforce the law is not the same as saying that the legislative branch has repealed it"). Defendants' suggestion that past enforcement failures by the State have any consequence here has long since been rejected as a matter of law in a body of case law holding that government law enforcement efforts are not estopped by prior inactivity or even outright failures to enforce. *See LaTrieste Rest. & Cabaret, Inc. v. Village of Port Chester*, 40 F.3d 587, 590 (2d Cir. 1994) ("principles of laches or estoppel do not bar a municipality from enforcing ordinances that have been allowed to lie fallow"); *New York v. Shinnecock Indian Nation*, 523 F. Supp. 2d 185, 249 (E.D.N.Y. 2007); *see also Parkview Assocs. v. City of New York*, 71 N.Y.2d 274, 282 (1988) (holding that "[e]stoppel is not available against a local government unit for the purpose of ratifying an administrative error"); *Yonkers v. Rentways, Inc.*, 304 N.Y. 499, 505 (1952) ("A municipality, it is settled, is not estopped from enforcing its zoning laws either by the issuance of a building

permit or by laches."). Prior lapses in enforcement, whether through misfeasance or malfeasance, are not permitted to immunize wrong-doers in perpetuity. *See, e.g., Hacker v. State Liquor Authority*, 19 N.Y.2d 177, 184-85 (1967).

B. The CCTA Prohibits Not Only Sales, But Receipt, Possession, Distribution and Purchase of Unstamped Cigarettes.

Contrary to defendants' argument, the City does not seek "to expand earlier decisions relating to what constitutes a violation of the CCTA by asserting that mere possession of unstamped cigarettes by an Indian retailer in amounts over the CCTA threshold trigger a violation." *Peace Pipe Mem.* at 15. The CCTA prohibits more than merely *sales* of more than 49 cartons of unstamped cigarettes. *See* 18 U.S.C. § 2342 (unlawful for any person "knowingly to ship, transport, receive, possess, sell, distribute, or purchase ..." unstamped cigarettes). The CCTA prohibits all of the ancillary transactions in unstamped cigarettes that are necessary precursors to those sales. It is accordingly no "expansion" for the City to claim that defendants commit ongoing violations, because the plain language of the CCTA prohibits defendants from *receiving, possessing, distributing, or purchasing* 50 or more cartons of unstamped cigarettes, all of which defendants freely concede they do.

The CCTA contains certain exceptions, *see* 18 U.S.C. §2342(c)(2) (exception for state licensees), but there is no exception for "Indian retailers," or Indians at all. Indians and non-Indians alike are convicted under the CCTA for trafficking in unstamped cigarettes including for their "mere" possession or transport; no "sale" is necessary to support a conviction. *See United States v. Fiander*, 547 F.3d 1036 (9th Cir. 2008) (conviction of Indian based on possession and transport of unstamped cigarettes; no sale element required); *United States v. Mahoney*, 298 Fed. Appx. 555, 556 (9th Cir.

2008) (CCTA applies to Indians); *United States v. Mahoney-Meyer*, 294 Fed. Appx. 267, 270 (9th Cir. 2008) (CCTA prohibits possession of unstamped cigarettes by Indians); *United States v. 4,432 Mastercases of Cigarettes*, 448 F.3d 1168 (9th Cir. 2006) (liability for possession; anyone in possession of contraband cigarettes, not merely persons with responsibility to pay the tax, are liable under the CCTA); *United States v. Skoczen*, 405 F.3d 537 (7th Cir. 2005) (possession only); *Grey Poplars v. One Million Three Hundred Seventy-One Thousand One Hundred Assorted Brands of Cigarettes*, 282 F.3d 1175-77 (9th Cir. 2002) (the CCTA is a federal statute of general applicability and it applies as equally to Indians, even on the reservation, as it does to others); *United States v. Baker*, 63 F.3d 1478, 1487 (9th Cir. 1995) (convicting Indian of CCTA violation despite lack of proof he engaged in any transaction with a nontribal member; under state law, possession of unstamped cigarettes by an Indian is prohibited if the cigarettes are not preapproved for tax exemption); *United States v. Boggs,* 775 F.2d 582, 584-85 (4th Cir. 1985) (CCTA violated by possession of unstamped cigarettes that the state has the power to tax; intent to sell irrelevant); *United States v. Funds from First Regional Bank*, 2009 U.S. Dist. LEXIS 18769, *16-17 (W.D. Wash. 2009) (unstamped cigarettes were contraband because defendant not authorized to possess them under state law).[4]

[4] Peace Pipe argues, contrary to the above-cited case law, that possession of unstamped cigarettes by an Indian does not violate the CCTA, citing a letter filed in *United States v. Morrison* 04 cv 699 (E.D.N.Y.) (DRH) by the United States Attorney for the Eastern District of New York. *See Peace Pipe Mem.* at 15.

That letter is not in the record. Even if it were, the letter invokes the "forbearance policy" as the basis for its conclusion and accordingly is of no significance here, having been written prior to the determination of this Court, and the *Morrison* court, that forbearance does not affect the applicability of the CCTA. The City also finds Peace Pipe's offer of the United States Attorney for the Eastern District of New York as a source of binding legal authority curious at best.

For purposes of CCTA liability, there is an "applicable" tax on "all cigarettes *possessed* in the state" for sale by Indians to the public. *Golden Feather*, 2009 U.S. Dist. LEXIS 20953 at *33-35, citing §471(1). Those cigarettes are all taxable cigarettes unless the possessor proves otherwise. N.Y. Tax L. § 471 ("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.

For purposes of establishing defendants' CCTA liability for "mere" possession (and "mere" purchase, receipt, distribution and transport), even if defendants were to assert that they are not possessing cigarettes for sale, there is an "applicable" tax on cigarettes that are possessed, as opposed to "possessed for sale":

> Use tax on cigarettes. There is hereby imposed and shall be paid a tax on all cigarettes used in the state by any person, except that no tax shall be imposed (1) if the tax provided in section four hundred seventy-one is paid, (2) on the use of cigarettes which are exempt from the tax imposed by said section, or (3) on the use of four hundred or less cigarettes, brought into the state on, or in the possession of, any person. . . . '[U]se' means the exercise of any right or power actual or constructive, and shall include but is not limited to the receipt, storage or any keeping or retention for any length of time, but shall not include possession for sale.

N.Y. Tax L. § 471-a; *see Milhelm Attea,* 550 F. Supp. 2d at 337 ("New York's cigarette tax has two components: the cigarette tax imposed on possession for sale in the State pursuant to N.Y. Tax Law §471; and the cigarette use tax imposed pursuant to N.Y. Tax Law §471-a.").[5]

[5] In addition, N.Y. Tax Law § 1814 provides in part that:

Even if any defendant had testified to a policy of limiting cigarette sales (or distribution) to no more than 49 cartons at any one time to any single customer, or to any single customer once a day, or once an hour – no defendant testified at all – the undisputed hearing evidence proves that every defendant "receives," "purchases," and "merely" possesses, vastly more than 49 cartons of unstamped cigarettes. *See* Exs. 7, 8 (Form CG-6); Ex. 91; Exs. 14A, 15A (Monique's); Exs. 10A, 11A (Peace Pipe); Exs. 17A, 18A (Red Dot); Exs. 12A, 13A (Smoking Arrow); Exs. 23, 24A (TDM). Defendants accordingly violate the CCTA by *purchasing, receiving* and *possessing*, whether for sale or not, more than 49 cartons of unstamped cigarettes.

C. Defendants Rely on Misstatements of the Law to Avoid Liability for the Receipt, Possession, Sale, Distribution and Purchase of Unstamped Cigarettes.

Defendants also seek to avoid liability for the hundreds of thousands of unstamped cartons that they purchase, receive, possess for sale, and then sell, by distorting beyond recognition this Court's uncontroversial statement of the law that "cigarettes to be consumed on the reservation by enrolled tribal members are tax-exempt and need not bear stamps." *Golden Feather,* 2009 U.S. Dist. LEXIS 20953 at *4-6. Unconstrained by actual words, defendants twist this narrow exception into a "right" to sell *any* amount of unstamped cigarettes, *to anyone*. *See, e.g., Defs. Mem.* at 13 ("Defendants are allowed to sell unstamped cigarettes"); *id.* at 14 ("Indian retailers are permitted to possess unstamped cigarettes in order to sell unstamped cigarettes to Indians as conceded by the City and ruled by this Court"); *id.* at 15 ("It is well-settled that

(d) *The possession* within this state of more than four hundred cigarettes in unstamped or unlawfully stamped packages by any person other than an agent at any one time shall be presumptive evidence that such cigarettes are subject to tax as provided by article twenty of this chapter (emphasis added).

defendants are allowed to possess unstamped cigarettes"); *id.* at 17 ("The sales from the wholesaler to qualified Indian Reservation retailers is conceded as proper in order to permit Indians to purchase cigarettes for their use without paying New York State taxes"); *id.* at 18 ("[I]t has been conceded by the City and confirmed by this court that Indians have the right under federal law to purchase cigarettes from New York State wholesalers without payment of the New York State Tax stamp").

Defendants' misstatements of the law completely ignore the two restrictions inherent in the principle as stated by the Court: untaxed cigarettes may be (1) "consumed on the reservation," (2) "by enrolled tribal members." The City has proven that defendants routinely ignore both limitations – defendants sell cigarettes that are not consumed on the reservation, and that are not consumed by tribe members. *See generally, Memorandum of Law of Plaintiff the City of New York in Support of its Motion for a Preliminary Injunction ("City's Moving Mem."),* dated June 3, 2009, at 3-43.

Under the law of this case, defendants comply with the CCTA only when they purchase, receive, possess, distribute or sell *stamped* cigarettes, except for "cigarettes to be consumed on the reservation by enrolled tribal members." *Golden Feather*, 2009 U.S. Dist. LEXIS 20953 at *4-6. If defendants wish to claim that the hundreds of thousands of cartons of cigarettes that they purchase, receive, possess, distribute and sell are sold to tribe members, it was their burden – and not the City's burden (*Defs. Mem.* at 52-53) – to offer proof of that fact. N.Y. Tax L. § 471 ("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.[6]

Defendants not only failed to meet that burden, because they did not introduce *any* evidence of any transaction that was a sale to a tribe member for personal use – such as, in March 2009 alone, the 63,160 cartons of cigarettes purchased, received and possessed by Smoking Arrow (*City's Moving Mem.* at 38); the 46,139 cartons purchased, received and possessed by Monique's (*id.* at 20); the 57,786 cartons purchased, received and possessed by Peace Pipe (*id.* at 27); and the 20,580 cartons purchased, received and possessed by Red Dot (*id.* at 31) – but defendants will never be able to offer that evidence, because defendants admit they never even determine who is a tribe member when they make sales of unstamped cigarettes. *See* Exs. 74, 76, 78, 80 81-82 (Defendants' Admissions).

D. Mari A.'s Testimony Was Credible and Corroborated

The evidence presented at the hearing by defendants' customers, law enforcement officers, and in large part by defendants' own testimony (at depositions and a prior trial) established that defendants continue the large scale sales to the public that they have engaged in for many years. *See City's Moving Mem.* at 3-43. Defendants arbitrarily focus their attempt to rebut the evidence introduced against them by contending that Mari A.'s testimony is unreliable. *Defs. Mem.* at 19-45. The Court heard the testimony of Mari A., and can assess her credibility, bearing in mind that not one defendant took the stand even to attempt to contradict her description of the business

[6] Defendants' argument that the City must prove that defendants had personal knowledge of their "customers' status as non-Indians," *Defs. Mem.* at 52-53, must also fail. Because all cigarettes are presumed to be taxable, pursuant to N.Y. Tax L. § 471, it is *defendants* who must rebut that presumption by proving they made sales to tribe members.

relationships she had with all of the defendants, which she testified to with specificity and in detail as to each defendant.[7] Defendants are free to quibble over the details recalled over Mari A.'s approximately six years of dealing with multiple defendants, but the core substance of her testimony – that all of the defendants sold enormous quantities of unstamped cigarettes that they knew were being re-sold in the City – stands unchallenged.[8]

Wherever it is possible to compare her testimony to other evidence in the record, Mari A.'s testimony is independently corroborated. For example, Peace Pipe's records certainly confirm that Mari A. was a customer ("Miss Tiny") who bought in bulk quantities, on many occasions, just as she testified. *Compare* Tr. at 19-27 *with* Ex. 89, Attachment 1; *City's Moving Mem.* at 4-7. Mari A.'s arrest, with an incident location of "Poospatuck," when she was found to have bulk quantities of unstamped cigarettes in her vehicle, is also assuredly consistent with her testimony that she trafficked unstamped cigarettes into the City. *Compare* Tr. 9-112 *with* Ex. 58, CNY 01525 (February 4, 2006 arrest with 1,553 cartons.).[9] Other matters she testified to, for example that Peace Pipe

[7] Defendants' assertion that Mari A. "felt betrayed" by Shawn Morrison, even if it might provide a tenuous basis for a claim of bias against Shawn Morrison, provides no basis for assuming bias against the remaining defendants. *Defs. Mem.* at 27-32.

[8] Defendants argue that any evidence as to purchases before March 9, 2006, when the CCTA definition of contraband decreased from 60,000 cigarettes to 10,000 cigarettes, should be disregarded. *Defs. Mem.* at 17, 19. However, defendants provide no reason to exclude factual testimony of quantity simply because the amounts did not then violate the CCTA. The issue, wholly apart from defendants' CMSA violations, is not whether the sale qualified as contraband at the time, but whether defendants make sales in those amounts, which are self-evidently not for personal use.

[9] Defendants incorrectly assert inconsistent testimony by Mari A. regarding the not especially relevant issue of her 2007 earnings from cigarettes. *Defs. Mem.* at 34. However, there is no inconsistency. At trial, counsel asked Mari A. whether she "made over $200,000 *profit* from cigarettes, is that correct?" and her answer was "I don't know

employees made deliveries off the reservation (Tr. 23-25), that Thomasina Mack maintained an off-reservation cigarette-storage facility (Tr. 37-39), or that there were other bulk buyers of unstamped cigarettes (Tr. 41-42) were all independently confirmed by other evidence in the case. *See* Ex. 58 at CNY 00987 (off reservation arrest of a Peace Pipe clerk); CNY 01563-65 (off-reservation arrest of Peace Pipe cashier (Ex. 89, Att.1, page 7 of 10)); Tr at 192-96. (Testimony of Ahman Aldabeshes).

Mari A.'s testimony in fact confirms much of the other evidence in the record, including defendants' admissions that they purchase, possess and sell unstamped cigarettes to the public in large quantities. *See generally City's Moving Mem.* at 3-43.[10]

E. The Evidence Demonstrates that Defendants Continue to Violate the Contraband Cigarette Trafficking Act.

As an initial matter, as to each defendant, the Form CG-6's show their present receipt, purchase and possession of large numbers of unstamped cigarettes through March or April of 2009.[11] Exs. 10A, 12A, 14A, 17A; Ex. 54 (Red Dot invoices

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that." At her deposition, Mari A. testified to her *earnings*, not her profit, stating that she "earned roughly $200,000." When asked at trial by counsel "Isn't it true that in 2007, you made in excess of two hundred thousand from cigarettes?", she testified "Yes, sir." There is no inconsistency in her answers, merely imprecise questions.

[10] Without ever explaining its relevance to any issue, defendants attempt to discredit the testimony of Mari A. because she does not identify the owners of the stores. *See, e.g., Defs. Mem.* at 43-44. Defendants seem unaware that as businesses, they are liable for the acts of their employees under settled principles. For example, defendants argue that "Kenny," who both Mari A. and Investigator Mars testified sold them cigarettes at Red Dot, is not a defendant, but that is irrelevant, because Red Dot owner Raymond Hart testified that "Kenny" was a Red Dot employee. Ex. 93, Hart Dep., at 42:21-25.

[11] TDM's bulk purchases continued through September 2008 (Ex. 23), before the October 2008 hiatus that Thomasina Mack, the owner of TDM, claims she took due to pregnancy. Ex. 95, Mack Dep., at 21:9-17. TDM purchased over 450,000 cartons of unstamped cigarettes in 2008 (Ex. 24A), with cigarette deliveries to Mack's home every single business day in July and August 2008. Ex. 55.

for April 2009). Defendants' argument that the Form CG-6s are "irrelevant," *Defs. Mem.* at 16, 18, fails utterly, because the argument rests only on the unfounded position that Indian retailers are "allowed to" purchase and possess unstamped cigarettes without limitation. *Id.*; *see supra* Point I-C. Defendants' current level of receipt, purchase and possession vastly exceeds 49 cartons, even omitting some stores' admitted purchases from other Indian Reservation sellers, trades and orders over the internet that are not revealed by the Form CG-6's. *See, e.g., City Moving Mem.* at 16; 39. This evidence alone is sufficient to establish defendants' CCTA violations. *See supra* Point I-B.

In addition to proof of defendants' CCTA violations for receipt, purchase and possession, the City also demonstrated that defendants sell large quantities of unstamped cigarettes in violation of the CCTA. Much of the City's evidence, including the testimony of Mari A. and Investigator Byron Mars, concerned events that occurred beginning at least in 2005 and continuing through at least the summer of 2008. That evidence was unrebutted. *See generally, City Moving Mem.* at 3-45. This unrebutted evidence of CCTA violations that occurred over several years and continuing in 2008 is more than sufficient for the Court to hold that those violations continue. "When defendants are shown to have settled into a continuing practice or entered into a conspiracy violative of ... law[], courts will not assume that it has been abandoned without clear proof. It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption." *United States v. Oregon State Medical Soc.*, 343 U.S. 326, 333 (1952) (anti-trust violations). "In particular, where a history of legal violations is before the district court, that court has significant

discretion to conclude that future violations of the same kind are likely." *Kapps v. Wing*, 404 F.3d 105, 122-123 (2d Cir. 2005); *United States v. Carson*, 52 F.3d 1173, 1183-84 (2d Cir. 1995) ("In deciding whether to award injunctive relief, courts are free to assume that past misconduct is highly suggestive of the likelihood of future violations."); *Commodity Futures Trading Comm'n v. Hunt*, 591 F.2d 1211, 1220 (7th Cir. 1979) ("When the violation has been founded on systematic wrongdoing, rather than an isolated occurrence, a court should be more willing to enjoin future misconduct.").

Summarizing the evidence of defendants' practices in the recent past, from which their present practices can be inferred, defendant Monique's Smoke Shop (*see City Moving Mem.* at 15-21), admits that as of 2007, sales were made mostly to the general public; customers purchased in quantities of up to 60 to 100 cartons and even more. Defendant Jesse Watkins, Monique's manager, believed his customers intended to resell the cigarettes, and sold large quantities of unstamped cigarettes off the reservation, as did defendant Wayne Harris. Monique's practice of making bulk sales was confirmed by Investigator Byron Mars, who made two undercover visits in the summer of 2008, purchasing 60 cartons in one visit and receiving a price quote for 100 cartons during the next. Investigator Mars made clear to the store owner that he was purchasing for resale in the City. Mari A. also confirmed the practice, testifying to 300 carton purchases on several occasions.

As to defendant Red Dot (*see City Moving Mem.* at 28-32), Mari A. testified that she purchased six hundred cartons from Red Dot for resale in the Bronx, and made purchases there several times. Red Dot placed no limit on the number of cartons she could buy. Mari A.'s testimony was confirmed by Investigator Mars, who made two

undercover visits in the summer of 2008, purchasing 60 cartons on one visit and 98 in the next, making it clear to the store owner that he was purchasing for resale in the City.

Defendant Smoking Arrow (*see City's Moving Mem.* at 35-36), admits that as of 2007, sales were made "wholesale," *i.e.*, knowing that the cigarettes would be resold; customers purchased in quantities of 10-20 cases per customer, with 60 cartons per case. Mari A.'s testimony confirmed this practice: she typically bought 900 cartons for resale in New York City, testified that Smoking Arrow had no limit on the number of unstamped cigarettes one could purchase, testified that Smoking Arrow escorted her off the reservation, and, for an extra charge, delivered unstamped cigarettes to her in the City several times. Smoking Arrow's practice of selling large quantities of unstamped cigarettes was further confirmed by Investigator Mars, who made three undercover visits in the summer of 2008. Investigator Mars informed the sales clerks that the cigarettes were for resale in New York City and purchased 60 cartons, 180 cartons and 100 cartons, respectively.[12]

As for defendant TDM (*see City Moving Mem.* at 39-43), Ahman Aldabeshes purchased large quantities from Thomasina Mack for resale in 2005. As of 2007, Mack admitted that she sold up to a thousand cartons per customer and delivered untaxed cigarettes off the reservation. Mari A.'s testimony that she purchased cigarettes

[12] Defendants' claim that the testimony of Byron Mars is "untrustworthy" is completely meritless. *Defs. Mem.* at 46-50. Investigator Mars explained that his testimony at trial as to one of the purchases from Smoking Arrow was clearer than it was at his deposition because he had reviewed his reports before the trial, *Defs. Mem.* at 48, and indeed, the report shows that during the purchase on June 3, 2008 from Smoking Arrow, the shop employee suggested splitting the order. Ex. 57A (CNY00268). Contrary to defendants' argument that the report is unreliable because written by a different investigator, *Defs. Mem.* at 49, Investigator Mars testified that he reviewed each report for accuracy and approved each report, even when the report was drafted by someone else. Tr. 318-19.

from Mack that were delivered to a storage unit off the reservation confirmed this practice. Even though Mack purports to have closed the business in October 2008, she put up a larger sign in September 2008 to better assist customers in locating her home. She continues to purchase 90 cartons of unstamped cigarettes from Jesse Watkins every three months, which have been sold to people at a location off the reservation in Mastic Beach.

F. The Evidence Demonstrates That Peace Pipe Continues to Violate the Contraband Cigarette Trafficking Act.

While conceding that the evidence establishes Peace Pipe's prior CCTA violations through sales of greater than fifty (or 300) cartons, *see Peace Pipe Mem.* at 4 (referring to testimony by "Miss Tiny" concerning "bulk sales"), *id.* at 6 (referring to the Troyd Affidavit's references to "structuring"), *id.* at 10, to say nothing of the conviction of Peace Pipe's principal Rodney Morrison and the arrest of its manager Joseph Rombola for violations of the CCTA (Exs 89, 40, 41), Peace Pipe's *attorney* contends that Peace Pipe *presently* has a "policy" of not selling "more than 49 cartons to any single customer, or to any combination of customers known to have arrived in a single vehicle." *Peace Pipe Mem.* at 3. No Peace Pipe witness or document provides evidence of such a policy; counsel's contention about such a policy receives virtually no evidentiary support from the record.[13]

Peace Pipe offers only a single incident to support counsel's hyperbole that "in the last two years" Peace Pipe has been "rigidly enforcing" a 49-carton "policy" (*Peace Pipe Mem.* at 3): Peace Pipe's sale to undercover Investigator Byron Mars on

[13] The other defendants weakly make the same argument (*Defs. Mem.* at 47), equally unsupported.

June 3, 2008. *Id.* at 3-4. To inflate this scintilla of evidence into a "rigid policy" requires at best, pure speculation, and the incident provides nothing about what that policy might be, how long it has been in effect, and whether or how it is enforced. Peace Pipe offers this single incident, of a purchase solicited by a buyer unknown to Peace Pipe's salespersons, whose 60 carton purchase request surely could have raised suspicions in light of the then-recent conviction of Rodney Morrison and the past arrest of Joseph Rombola. *See* Exs. 89, 40, 41. Balanced against this one incident are three arrests involving Peace Pipe sales of more than fifty cartons in a single sale. Crucially, two of those arrests were of *Peace Pipe's own employees*, arrested while transporting more than 49 cartons of unstamped cigarettes off the reservation. *See* Ex. 58A at CNY 00987 (August 17, 2007, arrest of a Peace Pipe clerk with 58 cartons of unstamped cigarettes in her vehicle); Ex. 58 at CNY 01563-65 (February 18, 2006 arrest of Peace Pipe cashier (Ex. 89, Att.1, page 7 of 10), with 1440 cartons of unstamped cigarettes in his vehicle). The third incident involved an arrest on August 8, 2008, of an individual with 80 cartons of cigarettes purchased from Peace Pipe. Ex. 60 at CNY 00775.[14]

This complete absence of evidence of a "policy," coupled with the undisputed evidence of Peace Pipe's past CCTA violations, the records of recent arrests, and, most important, the uncontested evidence that in the past Peace Pipe's "49-carton

[14] Peace Pipe speculates that all 80 cartons seized in this arrest may not have been purchased at Peace Pipe. It is not the City's burden to prove CCTA violative sales beyond a reasonable doubt. The incident in question certainly supports the argument that Peace Pipe continues to sell in excess of 49 cartons at a time. Peace Pipe also finds it "telling" that David Whelpley, author of the investigative report on which the arrest is described did not testify, *Peace Pipe Mem.* at 5, but it is equally "telling" that Peace Pipe declined to cross-examine Supervising Investigator Lannon about the one investigative form that expressly mentioned the arrest of a Peace Pipe customer.

limit" was a rank subterfuge (Ex. 89, Attachment 2; Tr. 25-27) leads to the inevitable conclusion that there is no such "policy" now.

Peace Pipe also claims, in an astoundingly unsupported statement, that "there is overwhelming proof that Peace Pipe maintains detailed computerized records of *all* of its retail sales, no matter what the volume." *Peace Pipe Mem.* at 5 (emphasis in original). Peace Pipe introduced no computerized records (in fact, no records at all), no testimony about the completeness or reliability of its record-keeping, and did not rebut testimony that bulk sales were made outside of the store or in the office, separate from any registers. Tr. 85:3-5; 85:22-86:9; 90:19-91:2. Peace Pipe then offers an argument that its records must show compliant transactions, because the City surely would have introduced them into evidence if the records had shown non-compliant transactions. *Peace Pipe Mem.* at 6-7.

The factual and logical flaws in this reasoning are legion.[15] To cite only a few, first, there is not a shred of evidence as what data the records show, and hence whether non-compliant sales could be detected. Second, there is clear evidence in the record showing that sales were structured to avoid compliance. *See* Ex. 89 ¶¶ 12, 13; and attached *Affidavit in Support of Search Warrant* ¶¶ 13-15; Tr. 26:10-15; Tr. 27:8-10 (Mari A. testimony); *City Moving Mem.* at 23. Third, there is absolutely no evidence – as opposed to counsel's claim of "overwhelming" evidence – to show that all sales were recorded through an alleged "sophisticated computer system," a system for which there is

[15] By Peace Pipe's logic, the Court should conclude that Peace Pipe's failure to introduce any evidence is proof that Peace Pipe has and will violate the CCTA and the CMSA. Surely, Peace Pipe has all the evidence it would need to rebut that showing and would have introduced it if the evidence supported that defense. Peace Pipe introduced no evidence, and hence the Court should conclude that Peace Pipe's records fully support the City's case.

also no evidence. Fourth, where Peace Pipe's principal was convicted of and a Peace Pipe manager subsequently arrested for CCTA violations based on transactions recorded in Peace Pipe's allegedly "sophisticated computer system," *see Peace Pipe Mem.* at 5-6, it is as plausible to assume that Peace Pipe discontinued the recording of such transactions as it is to assume that Peace Pipe continued to maintain them.

Peace Pipe runs an enormous business in selling unstamped cigarettes and fully intends to continue in business. Ex. 89 ¶ 7. Peace Pipe admits that it conducts "exactly the conduct that the City of New York now seeks to have this federal court enjoin." *Peace Pipe Mem.* at 3. The undisputed evidence is that Peace Pipe presently purchases, receives and possesses for sale the vast quantities of cigarettes necessary for maintaining its enormous business operations, both storefront and Internet. *See* Exs. 10A, 11A, 91. In addition, the undisputed evidence is that Peace Pipe sold cigarettes in excess of CCTA thresholds in the past, that its employees engaged in transporting cigarettes off the reservation in excess of 50 cartons, that Peace Pipe offered no evidence that it has changed its practices, or that Peace Pipe has plans to stop doing business or change its conduct. Hence, the record shows that Peace Pipe is likely to continue to violate the CCTA.[16]

G. The Holdings in *City v. Smokes-Spirits* Have No Application Here

Defendants unpersuasively attempt to garner support from holdings in cases commenced by the City against internet cigarette sellers. *Peace Pipe Mem.* at 11-

[16] There is no support for Peace Pipe's assertion that its purported 49-carton policy is evidenced by its decline in purchases from Gutlove & Shirvint, *Peace Pipe Mem.* at 5, because there is no evidence that Gutlove is Peace Pipe's only supplier. Moreover, Gutlove has had its license revoked for concealing its sales to Peace Pipe. *See* n. 3, *supra*.

14 (citing *City of New York v. Smokes-Spirits.com, Inc.*, 541 F.3d 425 (2d Cir. 2008), *cert. granted sub nom. Hemi Group, LLC v. City of New York,* 129 S. Ct. 2159 (2009), *certified question answered, City of New York v. Smokes-Spirits.com, Inc.*, 2009 N.Y. LEXIS 2048 (N.Y. 2009)). In *Smokes-Spirits*, the City brought causes of action: i) under the RICO statute and the N.Y. General Business Law, not the CCTA or the CMSA; ii) for conduct alleged to be mail fraud and consumer fraud; and iii) against out-of-state cigarette sellers who, unlike the defendants here, themselves could not violate New York tax laws, but instead violated the Jenkins Act (15 U.S.C. §§ 375 *et seq.*). Peace Pipe must offer more than the fact that the City sues cigarette sellers to construct a viable legal argument.

In *Smokes-Spirits.com,* the City sued entities that sold cigarettes over the internet to City residents and then failed to inform the City of the sales, as required under the Jenkins Act, 15 U.S.C. §§ 375 *et seq*. The district court and the Second Circuit both concluded that the City's complaint properly alleged that the defendants had defrauded the City of its right to collect taxes, which satisfied RICO's requirement of an "injury to business and property."[17]

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[17] In *Smoke-Spirits,* the seller had no obligation to pay New York taxes or to apply New York tax stamps, but had an obligation to report the sales, which they failed to do.

Under the Jenkins Act, 15 U.S.C. §§ 375, *et seq*., sellers of cigarettes in interstate commerce must file disclosure reports that notify tax authorities in the cigarette buyer's state of the sales. The reports identify state residents who owe use taxes on their out of state purchases. The failure to file such Jenkins Act reports violates the mail and wire fraud statutes, under the theory that the cigarette seller is utilizing the mails in a scheme to conceal tax revenue owed by the cigarette purchasers. *See, e.g., United States v. Brewer*, 528 F.2d 492 (4th Cir. 1975). The failure of the cigarette sellers sued by the City in *Smokes-Spirits* to file Jenkins Act reports injured the City in its business and property by concealing tax revenues. The City's actions alleged mail and wire fraud offenses as the RICO predicate violations.

To the extent that it is possible to determine the issue on which the Supreme Court granted *certiorari,* it appears to be whether the alleged injury constitutes the "business or property" of the City as required to state a claim under RICO. *See* 08-969, Hemi Group v. New York, NY, "Questions Presented", available on the U.S. Supreme Court website.[18] The CCTA contains no element of "injury to business and property," and, as this Court has found, the CCTA expressly authorizes the City to enforce the statute. *See Milhelm Attea*, 550 F. Supp. 2d at 341. There is accordingly no conceivable basis for arguing that the pendency of the *Smokes-Spirits* case, on the issue of standing under RICO (*Defs. Mem.* at 11), should delay the resolution of this case.

Peace Pipe's further assertion that the answer to a certified question in *Smokes-Spirits.com*, 2009 N.Y. LEXIS 2048 (2009), supports an argument that the City lacks standing under the CMSA is no more persuasive than Peace Pipe's argument confusing the CCTA with RICO. The certified question answered by the New York Court of Appeals concerned a claim brought under N.Y. Gen. Bus. Law § 349(h) over the same internet cigarette sales. *Id.* at *1-2. With respect to the Gen. Bus. L. § 349 claim, the complaint alleged that City residents purchasing from the defendant internet sellers were deceived by advertisements that the cigarettes were "tax-free," when in fact, the buyers owed use taxes under N.Y. Tax L. § 471-a. *Id.* at *3-4. Observing that a Gen. Bus. Law § 349 claim requires allegations that the defendant engaged in "(1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice," the Court of Appeals held that the City could not establish standing under the facts pleaded because "its claimed injury, in the

[18] The appellant's brief has not been filed.

form of lost tax revenue, is entirely derivative of injuries that it alleges were suffered by misled consumers who purchased defendants' cigarettes over the Internet." *Id.* at *7-8.[19]

Peace Pipe asserts that the City's injury here is "derivative" because "the CMSA is addressed to unfair competition among businesses that sell cigarettes." *Peace Pipe Mem.* at 12. *See also Defs. Mem.* at 67-68. This purports to be a statement of the law, and should be accompanied by a citation of authority; indeed, it is repeated, in the apparent hope that repetition provides what authority does not: "The clear import of the CMSA is to prevent unfair competition by having one business entity at a particular level of the distribution chain unfairly grab an elevated market share from its competitors by engaging in predatory pricing." *Peace Pipe Mem.* at 13. Peace Pipe then argues that the City is using the statute to pursue forms of harm other than predatory pricing and hence seeks to recover for "derivative injuries."

Peace Pipe's major premise is flatly wrong. The 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 cost of such agent, wholesale dealer or retail dealer, as the case may be.

N.Y. Tax L. § 484 (emphasis added). If the only purpose of the CMSA were "to prevent unfair competition ... [through] predatory pricing," *Peace Pipe Mem.* at 13, the statutory statement of the intent required for a violation would end immediately after the phrase

[19] With respect to a second certified question as to whether the City could bring a public nuisance action "predicated on" Public Health Law §1399-ll, the Court of Appeals cited with apparent approval to this Court's decision in *Milhelm Attea*, 550 F. Supp. 2d at 349, that the City can bring a public nuisance claim over sales of unstamped cigarettes if sales to youth are alleged. *See Smokes-Spirits*, 2009 N.Y. LEXIS 2048 at *23 n.5.

"with intent to injure competitors or destroy or substantially lessen competition"; there would be no need to include an intent "to avoid the collection or paying over of such taxes as may be required by law." That plain statutory language is what has undoubtedly led courts to hold that the CMSA was enacted "to eliminate the evasion of New York State taxes on cigarettes." *Save More Mkts. v. Chu*, 1986 U.S. Dist. LEXIS 27054 at *4 (N.D.N.Y 1986). The CMSA "prohibits the sale of cigarettes below cost when the seller intends thereby to harm competition or *evade taxes*." *Golden Feather*, 2009 U.S. Dist. LEXIS 20953 at *39 (E.D.N.Y. 2009) (quoting *Lorillard Tobacco Co. v. Roth*, 99 N.Y.2d 316 (2003)); *Allied Grocers Cooperative, Inc., v. Tax Appeals Tribunal*, 162 A.D.2d 791, 793 (3d Dep't 1990) (a purpose of the CMSA was enhanced cigarette tax receipts) (citing *Governor's Mem.*, 1987 McKinney's Session Laws of NY, at 2743).

The City has brought a claim for its own injury – lost taxes – that is not derivative of an injury to another, under a statute intended to eliminate the evasion of cigarette taxes. Peace Pipe's argument is meritless.

H. The Evidence Demonstrates that Defendants Continue to Violate the CMSA.

This Court has already held in this case that defendants are "retail dealers" under the CMSA and therefore subject to its terms. *Golden Feather*, 2009 U.S. Dist. LEXIS 20953 at *42-46. A "retail dealer" under the CMSA means "any person engaged in selling cigarettes at retail," N.Y. Tax L. §483(a), which indisputably includes defendants, who maintain stores selling to the public, or in one instance, sell from home to the public. *City Moving Mem.* at 15-17, 21-22, 28-31, 32-33, 35, 39. *See also Milhelm Attea*, 550 F. 2d at 349 (CMSA applies to wholesalers who sell to reservation retailers for resale to the public).

Defendants here repeat the arguments made in their motion to dismiss the City's CMSA claim. *See Defs. Mem.* at 64-75; *id.* at 66 ("business laws of the State of New York do not apply to Indian reservations;" "Indians have the right to purchase cigarettes without payment of the excise tax stamps"); *id.* at 67 (NYS under forbearance "policy" requires wholesalers only to report sales to Indians; payment of tax not required; City has no standing); *id.* at 71 (defendant reservation retailers do not need to sell cigarettes with tax stamps). The arguments were all rejected by this Court. *See generally Golden Feather,* 2009 U.S. Dist. LEXIS 20953.

As retail dealers, defendants are subject to the provisions of N.Y. Tax L. §484(a) prohibiting a retail dealer from selling cigarettes at less than the "cost of such . . . retail dealer," a specifically defined term. *See id.* § 483(b)(3)(A); *City's Moving Mem.* at 56-59. The City presented undisputed evidence of the cost of the retail dealer over time, and the corresponding minimum price of cigarettes sold at retail. *Id.* (Testimony of Andrew DeFrancesco); *City Moving Mem.* at 11-12.[20] The record also contains undisputed evidence that defendants sold below the required minimum price. *Id.* at 22, 28-29, 33, 39-40, 44. Defendants do not seriously dispute that they "intend" to avoid the collection or paying over of taxes (*Defs. Mem.* at 74-75); in fact, in this proceeding, they attempt to defend as legitimate their explicit avoidance of collection or paying the tax. *See City's Moving Mem.* at 58-59.

[20] Contrary to defendants' argument that the testimony of Andrew DeFrancesco was unreliable, *Defs. Mem.* at 72, in fact, it was routine, and once again, undisputed: the witness testified about the minimum selling prices that are utilized in his business, based on his own business records and DTF documents. *See City Moving Mem.* at 9-12. Defendants' further argument that Publication 509 was not authenticated, is meritless; defendants' withdrew their objection to Ex. 32, Pub. 509 (1/05) at trial, Tr. 266, and it was properly admitted; defendants did not object to later versions of Pub. 509. Tr. 269.

Unaccountably, defendants claim that the City failed to "assert" that CMSA pricing relates to Indians. *Defs. Mem.* at 70-71. The entire basis of the City's claim is that CMSA pricing relates to Indians in the same way as it relates to everyone else. This is not a factual question, but a legal question, which this Court resolved in holding that Indian sellers qualify as "retail dealers" under the statute. The fact that the evidence presented as to cost and pricing does not distinguish between Indians and non-Indians does not make such evidence irrelevant (*Defs. Mem.* at 70-71); rather, it is further proof that no such distinctions exist because Indians are subject to the same cost and pricing requirements as any other retailer.

I. Dr. Frieden's Testimony Establishes Irreparable Harm

As detailed in the City's Moving Memorandum, the availability of cheap cigarettes causes irreparable injury in two ways. First, cheap cigarettes undercut the benefits from an increase in the price of cigarettes that would otherwise lead smokers to smoke fewer cigarettes, an effect testified to by Dr. Frieden, not disputed by defendants' expert and not disputed in any defendants' memorandum of law. Second, cheap cigarettes undermine the benefit of an increase in the price of cigarettes that would otherwise lead smokers to quit smoking entirely. *City's Moving Mem.* at 60-61. Defendants' challenges to Dr. Frieden's testimony that an increase in price leads smokers to quit, were anticipated in the City's Moving Memorandum, and rebutted therein. *Id.* at 61-65. Defendants' expert's single study to support his argument that there is no relationship between price and propensity to smoke, is insufficient to counter Dr. Frieden's testimony that the relationship is well established in the scientific community,

supported by numerous studies, and even supported by the single study that defendants chose to contest. *Id. See Defs. Mem.* at 53-59.[21]

Peace Pipe argues however, that because smoking decreased in the City during the years that defendants' cigarette trafficking was extant, the bootlegging of defendants' unstamped cigarettes must not have had an effect on the taxation-induced decreases. *Peace Pipe Mem.* at 8. The argument is meritless, because it ignores Dr. Frieden's testimony, and all of the evidence he referenced in support, that decreases in smoking are *proportional* to price increases. Tr. at 389:13-23; 390:4-16; *City Moving Mem.* at 45. Even defendants' expert agreed that decreases in the number of cigarettes smoked are proportional to price increases. Tr. 740:23-741:4. Thus, the bootlegging of defendants' unstamped cigarettes contributes to a net lowering of the price, so that the decrease in smoking *would have been greater* – more people would have quit or decreased consumption – absent the net lower prices caused by the availability of unstamped cigarettes bootlegged from the Poospatuck reservation or sold on the reservation to New York City smokers.

[21] The same inverse relationship between tobacco taxation and consumption testified to by Dr. Frieden was proven at trial in *Santa Fe Natural Tobacco Co., Inc. v. Spitzer*, 2001 U.S. Dist. LEXIS 7548 at *85 (S.D.N.Y. 2001), *rev'd on other grounds,* 320 F.3d 200 (2d Cir. 2003) ("[the State has] demonstrated that an increase in the price of cigarettes will lead to a decrease in the demand for cigarettes"). In *Santa Fe,* the District Court credited the testimony of Dr. Frank Chaloupka, whose work was relied on by Dr. Frieden in this case. *Id.* at *81-85 ("... I credit the testimony of defendants' expert, Dr. Chaloupka, the increases in cigarette prices will reduce smoking initiation among youth and prevent young 'experimenters' from becoming established smokers."). The *Santa Fe* court also relied on a United States Surgeon General's report, a report by the CDC's Office on Smoking and Health, a panel convened by the National Cancer Institute, and internal documents of tobacco manufacturer Brown & Williamson, a plaintiff in that case. *Id.*

Peace Pipe also argues that Dr. Frieden's testimony did not account for "replacement" sources of unstamped cigarettes to the City, and therefore that the City could not prove injury. *Peace Pipe Mem.* at 9 ("there is no compensation built into this study for any replacement that might take place were every Poospatuck Reservation cigarette to be removed from the market."). The argument for "replacement" is nothing more than a factual defense that "if defendants did not supply bootlegged cigarettes, someone else will." The argument thus rests on speculation, not evidence, as to what might occur if the defendants were enjoined from continuing to violate the law, and presumes that others would violate the law in the same fashion.

Peace Pipe cites no case law that stands for the proposition that an injunction may not issue absent proof that the injunction will serve to eliminate entirely an injury by acting against anyone capable of producing a similar injury. In fact, the law is to the contrary. "The concept of irreparable injury in equity traces back to the early assumption of jurisdiction by the Courts of Chancery to enjoin waste, continuing trespass and nuisance." *Danielson v. Local 275, Laborers Int'l Union*, 479 F.2d 1033, 1037 (2d Cir. 1973). The black letter law pertaining to the law of nuisance – for which an injunction is the quintessential remedy – is that there is sufficient cause to enjoin a party that contributes to a nuisance, even if the party is not the sole cause of a nuisance to be enjoined:

> Persons who join or participate in the creation or maintenance of a public nuisance are liable jointly and severally for the wrong and resulting injury. Where it is difficult or impossible to separate the injury caused by one contributing actor from that caused by another and where each contributing actor's responsibility individually does not constitute a substantial interference with a public right, defendants may still be found liable for conduct creating in

> the aggregate a public nuisance if the suit is one for injunctive relief.

City of New York v. Beretta U.S.A. Corp., 315 F. Supp. 2d 256, 282 (E.D.N.Y. 2004) (citations omitted), *rev'd on other grounds*, 524 F.3d 384 (2d Cir. 2008); *see, e.g.*, *State v. Schenectady Chems. Inc.*, 103 A.D.2d 33 (N.Y. App. Div. 3d Dep't 1984).

Exhibit 56 provides a measure of the injury caused by *the defendants,* based on the number of cigarettes bootlegged into the City by Mari A., an extraordinarily conservative estimate of the total number of cigarettes bootlegged into the City from the Reservation, or sold to City residents on the Reservation. *See* Tr. 106:24-107:4; 40:21-42:13 (Mari A. testimony about other traffickers); Tr. 130-134 (Testimony of Supervising Excise Tax Investigator Christopher Lannon about traffickers); Exs. 58 & 62A (arrests); Ex. 89 ¶16 (Peace Pipe sales to City residents). The exhibit is therefore sufficient to demonstrate the injury that is caused by the defendants, which is the only burden that the City need carry on this motion.[22]

In addition to the irreparable injury testified to by Dr. Frieden, defendants appear to admit that the City also suffers irreparable injury in the form of lost taxes, because the amount of the loss, according to defendants, is speculative. *Defs. Mem.* at 18 n.1. Defendants claim that "As a practical matter, the only form of ultimate relief that may be enforceable is an injunction. The City in all likelihood cannot prove loss from taxes because any such calculation would be too speculative." *Id.* Irreparable harm

[22] The remainder of Defendants' Memorandum addresses the need to prove irreparable injury under the CCTA, *Defs. Mem.* at 59-62, which is fully addressed in the City's Moving Mem., at Point III; and defendants' request for reconsideration of this Court's ruling denying defendants' motion to dismiss on sovereign immunity grounds, *Defs. Mem.* at 62-64, which will be addressed should the Court grant defendants permission to so move.

exists "where there is a threatened imminent loss that will be very difficult to quantify at trial." *Tom Doherty Assocs. v. Saban Entm't, Inc.*, 60 F.3d 27, 38 (2d Cir. 1995). "Irreparable injury is suffered where monetary damages are difficult to ascertain or are inadequate." *Danielson*, 479 F.2d at 1037. The rule is necessary "to avoid the unfairness of denying an injunction to a plaintiff on the ground that money damages are available, only to confront the plaintiff at a trial on the merits with the rule that damages must be based on more than speculation." *Tom Doherty Assocs.*, 60 F.3d at 38. For purposes of this motion, the City is willing to accept defendants' argument, and is entitled to a preliminary injunction based on defendants' theory that the amount of lost taxes would be difficult to quantify.

POINT II

THE CITY IS ENTITLED TO A PRELIMINARY INJUNCTION ENJOINING THE DEFENDANTS' SALE OF UNSTAMPED CIGARETTES TO THE PUBLIC.

A. The Balance Of The Equities Weighs Heavily In The City's Favor

There is virtually no contest between the public interest and defendants' interests here. On this motion, the City's interests are to be balanced against the right of certain private Indian sellers – not even an Indian tribe – "to market an exemption from state taxation to persons who would normally do their business elsewhere." *Washington v. Confederated Tribes of Colville Indian Res.*, 447 U.S. 134, 155 (1980). As held by the United States Supreme Court on more than one occasion, even Indian tribes "have no vested right to a certain volume of sales to non-Indians, *or indeed to any such sales at all*." *Id.* at 151 n.27 (emphasis added). Tax collection may occur even if it "seriously disadvantages *or eliminates the Indian retailer's business with non-Indians.*" *Id.* (emphasis added); *see also Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976). This

Court has already held that the defendants have failed to prove that they are tribal entities, *Golden Feather,* 2009 U.S. Dist. LEXIS 20953 at *21,23-24, so the already *de minimus* weight accorded cigarette sales to the public by Indian tribal entities deserves little if any weight here.

The City's interest in this matter was articulated at length by Dr. Frieden and quite clearly involves among the highest interests that are weighed by the courts – public health, and potentially, life and death matters. Tr. at 397-402.

Any balancing of the equities must also take into Judge Hurley's finding as to the cause of the problem with which this Court is presently confronted:

> … Native American tribes, …have repeatedly flouted state attempts at [tax] collection. … Essentially, [Peace Pipe's] argument boils down to the claim that because Native Americans have successfully thwarted enforcement of § 471, the statute is inoperative until the DTF can figure out a way to compel compliance. The Court rejects this proposition.

Morrison, 2009 U.S. Dist. LEXIS 20706 at *33-34.

B. No Heightened Standard for an Injunction Applies

Defendants contend that "because the relief [the City] seeks will alter the *status quo*, a substantial likelihood of success on the merits is required." *Peace Pipe Mem.* at 14; *see also Defs. Mem.* at 10-12. The City, however, is seeking a classic prohibitory injunction – to prohibit defendants from violating the law by selling unstamped cigarettes to the public. *See Tom Doherty Assocs.*, 60 F.3d at 34. The injunction is not "mandatory," because it does not require defendants to do anything. *Louis Vuitton Malletier v. Dooney & Brooke*, 454 F.3d 108, 114 (2d Cir. 2006) (prohibitory injunction typically "forbids or restrains an act" such as an order to stop infringement while a mandatory injunction orders an affirmative act such as turning over

phone numbers). Accordingly, no heightened standard applies. The general principle cited by defendants does not govern when the "status quo" at issue consists of illegal or harmful acts. *Mattina v. Duane Reade, Inc.*, 2005 U.S. Dist. LEXIS 10988 (S.D.N.Y. 2005) ("the status quo which deserves protection … is not the illegal status quo which has come into being as a result of the unfair labor practices being litigated"); *see, e.g.*, *Canal Auth. v. Callaway*, 489 F.2d 567, 576 (5th Cir. 1974) (citations omitted) ("[I]f the currently existing status quo itself is causing one of the parties irreparable injury, it is necessary to alter the situation so as to prevent the injury . . . ."). *See also Friends For All Children v. Lockheed Aircraft Corp.*, 746 F.2d 816, 830 n.21 (D.C. Cir. 1984) ("the status quo [may be] a condition not of rest, but of action, [where] the condition of rest is exactly what will inflict the irreparable injury upon complainant")(citation omitted); *Crowley v. Local No. 82, Furniture & Piano Moving*, 679 F.2d 978, 995 (1st Cir. 1982) (preliminary relief appropriate where perpetuation of status quo worked continuing harm to plaintiffs), *rev'd on other grounds*, 467 U.S. 526 (1984); *United States v. Los Angeles*, 595 F.2d 1386, 1391 (9th Cir. 1979) (refusing to enjoin application of statute where injunction would "maintain the status quo that the statute was designed to disrupt"); *Boire v. International Brotherhood of Teamsters*, 479 F.2d 778, 788 (5th Cir. 1973) ("it would be improper to ignore the fact that the Teamsters' version of the 'status quo' is potentially illegal"); *Baggett Transp. Co. v. Hughes Transp., Inc.*, 393 F.2d 710, 717 (8th Cir. 1968) (change in status quo enjoined illegal operations, consistent with the purpose of the statute in question), *cert. denied*, 393 U.S. 936 (1968). If the Court concludes that defendants' conduct violates the law, the heightened standard related to a change in the status quo does not apply.

Nor does a heightened standard apply based on defendants' dubious assertion that the City seeks "all the relief to which the movant would be entitled" or "all the relief sought." *Defs. Mem.* at 11, 12. The Second Circuit has criticized that argument as a "source of confusion" as "appear[ing] to describe any injunction where the final relief for the plaintiff would simply be a continuation of the preliminary relief." "This application of the rule seems hard to justify . . . [because] the fact that the plaintiff would get no additional relief if he prevailed at the trial on the merits should not deprive him of his remedy." *Tom Doherty Assocs.*, 60 F.3d at 34 (quoting *Developments in the Law -- Injunctions*, 78 Harv. L. Rev. 994, 1058 (1965)). The Second Circuit has explained that the "all the relief sought" proviso applies only where the injunction cannot be undone, such as in a situation involving "live televising of an event scheduled for the day on which preliminary relief is granted," or "the disclosure of confidential information." *Tom Doherty Assocs,* 60 F.3d at 35. That concern is not applicable here. Defendants offer no evidence that they could not simply continue in business selling stamped cigarettes. Indeed, the only record evidence indicates that even if an injunction forced defendants out of business entirely, they could simply re-enter the business if the injunction sought herein were subsequently dissolved following a full trial.[23]

[23] Temporary closures are not a problem for defendants. Defendant Thomasina Mack testified that she suspended her business by choice because of her pregnancy (Ex. 95, Mack Dep. at 18:20-19:7), but might go back into business. Red Dot's purchases of unstamped cigarettes completely stopped from January through August 2007 and picked up again in September 2007. Ex. 17A.

C. The Injunction that Issues Should Prohibit Defendants from Selling Unstamped Cigarettes Other than to Members of the Poospatuck Tribe for Personal Use.

The City respectfully requests an injunction to prohibit defendants from continuing to violate the CCTA and the CMSA by enjoining the sale of unstamped cigarettes other than to members of the Poospatuck Tribe for personal use.

The injunctive solution to the present matter is not complex. The resolution proposed by Judge Hurley as to Peace Pipe Smoke Shop can be adopted easily to apply to all of the defendants:

> [Peace Pipe] could have easily complied with § 471 by simply purchasing stamped cigarettes from a state licensed wholesaler/stamping agent in the amount necessary to cover … reservation sales to non-Native Americans. At the same time, [Peace Pipe] could have purchased unstamped cigarettes consistent with this standard practice, but in such lesser amount as … deemed necessary to serve the needs of Native Americans on the reservation for their own personal consumption.

Morrison, 2009 U.S. Dist. Lexis 20706 at *32-33. Based on evidence in the record, the City proposes that the "amount as … deemed necessary to serve the needs of Native Americans on the reservation for their own personal consumption" should be two cartons per week per tribe member.[24] This two-carton limit is consistent with N.Y. Tax Law § 1814, which provides that possession of more than four hundred cigarettes is presumptive evidence that such cigarettes are subject to tax. *See supra* at 11 n.5.

[24] Exhibit 56, prepared from New York City Department of Health and Mental Hygiene survey data shows that the average New York City smoker consumes 10.2 cigarettes a day, or 71.4 cigarettes per week. That amount, equivalent to approximately one-third of a carton, assures that the two cartons limit suggested by the City should be more than adequate to provide for tribe members' personal use.

A prohibition of sales of unstamped cigarettes except to tribe members for personal use in particular amounts adequately specifies the conduct to be avoided. *See Philip Morris,* 566 F.3d 1095, 2009 U.S. App. LEXIS 11008 at *105 (D.C. Cir. 2009). All that is required in an injunction is a "reasonably specific meaning," *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1297 (9th Cir. 1992), and a prohibition on sales of unstamped cigarettes except to tribe members for personal use meets this criteria. *See also S.C. Johnson & Son, Inc. v. The Clorox Co.,* 241 F.3d 232, 241 (2d Cir. 2001) (injunction need only be specific enough to "apprise those within its scope of the conduct that is being proscribed").

Defendants' boilerplate objection to a broad injunction that would require them to comply with the law (*Peace Pipe Mem.* at 15),[25] is in any event ill-founded, especially in light of the well-documented history of violations by defendants. "The degree of particularity required [in an injunction] depends on the nature of the subject matter." *General Instrument Corp v. Nu-Tek Electronics & Manufacturing, Inc.*, 197 F.3d 83, 89 (3d Cir. 1999) (citing *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191-92 (1949)). General decrees are often necessary to prevent further violations where "a proclivity for unlawful conduct has been shown." *McComb*, 336 U.S. at 192 (injunction directing a party to obey the Fair Labor Standards Act was "wholly warranted" due to record of past violations). "An injunction may sweep broadly in its prohibition if that is necessary to enjoin future violations which appear likely to occur."

[25] Indeed, the case cited by Peace Pipe is completely inapposite here. *See Shinnecock Indian Nation*, 560 F. Supp. 2d at 192 (rejecting broader version of injunction which prohibited violations of all town zoning laws, not just the conduct which formed the basis of the suit). The injunction sought here by the City seeks to prevent exactly the conduct that forms the basis of this suit – sales of unstamped cigarettes to non-tribe members.

United States v. Diapulse Corp. of America, 457 F.2d 25, 29 (2d Cir. 1972). A federal court "has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant's conduct in the past." *SEC v. Savoy Industries, Inc.*, 665 F.2d 1310, 1318 (D.C. Cir. 1981) (citations omitted).

Over-breadth complaints directed at injunctions directing compliance with the law have been rejected by the courts in cases involving a history of violations. *See e.g.*, *Philip Morris*, 566 F.3d 1095, 2009 U.S. App. LEXIS 11008 at *102 (cigarette manufacturers enjoined from, among other things, "committing any act of racketeering, as defined in 18 U.S.C. § 1961(1), relating in any way to the manufacturing, marketing, promotion, health consequences or sale of cigarettes in the United States."). "[E]ven if [an injunction] tracks statutory language, a general injunction is not too vague if it relates enjoined violations to the context of the case." *Id.* at *104-105. The injunction in *Philip Morris* was held appropriate because it specified the subjects about which the defendants had to avoid making false statements or committing racketeering acts. *Id.* at *105 (noting that the injunction did not constitute a generalized injunction to obey the law particularly in light of the district court's findings of fact regarding the defendants' past fraudulent activities). *Accord Nu-tek*, 197 F.3d at 90-91 (observing that the need for a broad injunction was "readily apparent" in light of the district court's findings that the defendants' business model was based entirely on cable theft).

The well-established history of violations of the CCTA and CMSA, complemented by the extensive evidence of defendants' attempts to thwart law

enforcement -- structured sales (Ex. 89, Att. 2), assisting customers in avoiding the police (Tr. 11-12, 31, 36-37), concealment of cigarettes in black plastic bags (Tr. 14, 36, 310, 316, 321, 329) -- warrants the broadest possible proscription of defendants' conduct.

D. Defendants Fail To Justify A Stay

Peace Pipe's demand for a stay of any injunction issued by this Court is meritless. The four factors considered in issuing a stay pending appeal are: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health*, 545 F. Supp. 2d 363, 366 (S.D.N.Y. 2008) (citing *In re World Trade Ctr. Disaster Site Litig.*, 503 F.3d 167, 170 (2d Cir. 2007)). Peace Pipe has failed even to submit evidence relevant to any factor.

(1) Strong showing of success on the merits -- Peace Pipe has made no showing that it is likely to succeed on the merits of its claim, where its only legal arguments against this Court's holdings here and in *Milhelm Attea* rest on the now non-existent forbearance policy. Two other courts have already reached holdings in accord with this Court. *Morrison*, 2009 U.S. Dist. LEXIS 20706 at *29; *Cayuga Indian Nation of N.Y. v. Gould,* 21 Misc. 3d 1142A (Sup. Ct. Monroe County 2008), app. docketed __ A.D. 3d __ (4th Dep't 2009).

(2) Irreparable injury -- Counsel for Peace Pipe claims in a conclusory fashion, without so much as an affidavit from a person with knowledge, that Peace Pipe

may go "out of business" if an injunction issues. *Peace Pipe Mem.* at 20. The City strenuously objects to this attempt to inject matters outside the record. Peace Pipe deigned to offer absolutely no testimony concerning its business at the hearing and should not now be permitted to introduce evidence now. No one from Peace Pipe testified to, nor is there any testimony from which to infer Peace Pipe's inability to sell stamped cigarettes profitably. There is no evidence that Peace Pipe cannot compete successfully with every other legitimate cigarette seller that sells stamped cigarettes. The only record evidence relevant to whether Peace Pipe can survive a preliminary injunction is that Peace Pipe has earned sums that "will boggle the mind, will boggle the mind," amounting to "eye-popping dollars," Ex. 96, Morrison Tr. 383:7-10.

Peace Pipe's plea for a stay is no different than that of a company whose profits have grown fat from sales of an infringing product who then complains of the effect on its business should such sales be enjoined without stay pending appeal. *See Polaroid Corp. v. Eastman Kodak Co.*, 641 F. Supp. 828, 1985 U.S. Kist. LEXIS 15003, at *6 (D. Mass. 1985), *aff'd*, 832 F.2d 930 (Fed Cir. 1986). The court's rejoinder to the comparable argument in *Polaroid Corp.*, that "the harm Kodak will suffer simply mirrors the success it has enjoyed [by virtue of the infringing products]," applies with full force here: "the infringer should not be heard to complain when it loses its gamble and reaps predictable results." *Id.* (citations omitted).

The remaining defendants make completely unsupported claims outside the record. Having offered no testimony on what the defendant businesses do with their income, defendants assert that an injunction will disrupt tribal income. *Defs. Mem.* at 11-12. As shown above, defendants have no right to that income. *Colville*, 447 U.S. at 151

n.27. A defendant involved in an illegal activity may not "successfully defend against the issuance of an injunction by asserting that the injunction would drive it out of business," *United States v. Articles of Drug*, 825 F.2d 1238, 1248 (8th Cir. 1987) (citing *United States v. Diapulse Corp.*, 457 F.2d 25, 28 (2d Cir. 1972)), for the obvious reason that such a defendant "has no vested interest in a business activity found to be illegal." *Diapulse*, 457 F.2d at 29 (internal quotation marks and citations omitted); *see also Securities Industry Assoc. v. Bd of Governors of the Federal Reserve System*, 628 F. Supp. 1438 (D. D.C. 1986) (past illegal activities, even if undertaken in good faith, do not somehow justify future violations of law"); *United States v. Articles of Food and Drug*, 441 F. Supp. 772, 776 (E.D. Wis. 1977) (declining to stay injunction despite defendant's claim that a prohibition on its manufacture of a certain substance would put it out of business where the scope of the relief was necessary to prevent further violations).

Peace Pipe's failure to establish the third and fourth factors are addressed in the City's Moving Mem. and in Point I-I and Point II-A above, addressing irreparable harm and the balance of equities.

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.

Dated: New York, New York
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