UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
---------- X
THE CITY OF NEW YORK,

Plaintiff,

-against- 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 in her individual capacity, TONY D. PHILLIPS, TDM DISCOUNT CIGARETTES, and THOMASINA MACK, in her individual capacity,

Defendants.
----------X

POST HEARING MEMORANDUM OF LAW
BY DEFENDANTS PEACE PIPE, RODNEY MORRISON, CHAROLETTE MORRISON
IN OPPOSITION TO THE GRANTING OF A PRELIMINARY INJUNCTION

Daniel Nobel
Attorney for Defendants Peace Pipe Smoke Shop,
Rodney Morrison Sr., Charolette Morrison
401 Broadway, 25th Floor
New York, NY 10013
(212) 219-2870

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

New York State cases

Federal Statutes

New York State Statutes

Rules

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
---------- X
THE CITY OF NEW YORK,

Plaintiff,

-against- 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 in her individual capacity, TONY D. PHILLIPS, TDM DISCOUNT CIGARETTES, and THOMASINA MACK, in her individual capacity,

Defendants.
----------X

POST HEARING MEMORANDUM OF LAW
BY DEFENDANTS PEACE PIPE, RODNEY MORRISON, CHAROLETTE MORRISON
IN OPPOSITION TO THE GRANTING OF A PRELIMINARY INJUNCTION

This memorandum is submitted in behalf of the defendants Peace Pipe, Rodney Morrison, Sr., and Charolette Morrison (collectively, "Peace Pipe") in opposition to a motion by Plaintiff City of New York ("the City") for a preliminary injunction under 18 USC § 2341 *et seq.* ("CCTA") and New York Tax Law § 483 *et seq.* ("CMSA") that seeks to enjoin all defendant Indian retailers from their sale of unstamped cigarettes to non-Indians.

PRELIMINARY STATEMENT

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 and New York City tax stamps ("unstamped cigarettes"). This case is one of those actions. Defendants here are employees or owners of retail stores that sell cigarettes on New York State recognized Indian reservations ("Indian retailers") who for decades have been permitted by New York State executive policy, judicial holdings and as of legal right by defendant's analysis, to engage in the sale of unstamped cigarettes from their reservation outlets. The relief sought here is nothing less than an attempt to use this federal court to issue a preliminary injunction that will completely terminate the long standing business activity of the defendants. The City of New York has repeatedly tried and repeatedly failed to obtain the relief sought here through the legislative processes of New York State and through actions it brought or joined in before the state courts of New York.

Defendant Peace Pipe Smoke Shop is an Indian retailer owned by defendant Charolette Morrison, a blood right member of the Unkechaung Indians, a tribe with state recognized tribal rights to the lands of the Poospatuck Reservation in Mastic Long Island. Peace Pipe includes Smokers Den, a telephone retail enterprise operated from the same premises on the reservation. Rodney Morrison, Sr. is the husband of Charolette Morrison and the former manager of Peace Pipe. These defendants are collectively referred to as "Peace Pipe" in this Memorandum.

This memorandum is filed subsequent to an evidentiary hearing held on Plaintiff's motion for a preliminary injunction. That motion should be denied because Plaintiff has failed to adduce evidence sufficient to sustain standing on either action and has failed to introduce evidence that would support the granting of a preliminary injunction on either action. In the

alternative, the Peace Pipe defendants seek a stay pending appeal pursuant to 28 USC § 1292(a) of any injunction that may issue.

Peace Pipe has never contested that it is in the business of selling unstamped cigarettes on its single premises located on the Poospatuck Reservation in Mastic, New York. The owner of Peace Pipe, Charolette Morrison, and her husband Rodney Morrison, the manager of Peace Pipe, have conducted their business activities in reliance on 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 now seeks to have this federal court enjoin. These policies have been thoroughly presented in prior submissions to this Court on this and on related cases, and have been the subject of extensive rulings by the Court. Therefore, this Memorandum refers to issues raised during the course of this litigation only in regard to how those issues, and prior rulings, impact on the specific questions relevant to the resolution of the instant motion.

SUMMARY OF EVIDENCE

Lack of evidence of ongoing violations of the CCTA:

The City expended considerable energy seeking to prove past conduct of Peace Pipe in violation of the CCTA. However, the City introduced no significant evidence of any current or even recent CCTA violations by Peace Pipe. In fact, the principal credible evidence relating to the size of sales by Peace Pipe in the last two years was that Peace Pipe is rigidly enforcing 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. Supervising Investigator Byron Mars, of the New York State Petroleum, Alcohol and Tobacco Bureau, testified that on June 3, 2008 he went to the Poospatuck reservation with the intent of making undercover sales in excess of 49

cartons. (H. 304). When he got to Peace Pipe he entered the shop and notified a customer service representative of his intent to purchase 60 cartons of cigarettes. (H. 350). A supervisor, named Carolina, was called. Investigator Mars told Carolina the quantity of cigarettes that he wanted to purchase and he attempted to negotiate a favorable price. Carolina refused to sell Mars more than 49 cartons, and maintained that refusal even after Mars told her that she could sell half of the order to him and half to his companion. (H. 316, 351). Carolina went on to try to convince Mars that were anyone to comply with his request she and he would get into trouble. (H. 356 - 357).

The testimony of the confidential witness who had used the sobriquet "Miss Tiny" alleged that she had made past purchases at Peace Pipe in quantities that violated the CCTA. The most recent of those purchases was in early 2007, at which point she stopped her activity as a cigarette bootlegger. (H. 59). A second cooperating witness, Mr. Aldabeshes, did not make undercover buys anywhere on the Poospatuck Reservation after 2006, (H. 207 – 208), and did not testify to ever having purchased cigarettes from Peace Pipe.

The single event after 2007 to which Plaintiff refers in its post hearing memorandum is an Office of Tax Enforcement arrest report dated August 8, 2008 in which an Investigator Davis Whelpley reports of an observation "at the Peace Pipe Smoke Shop . . . [by] UC Investigators [of an individual who was subsequently arrested] loading cigarettes into an automobile." (PX 60, CNY 00775). The report reflects that 80 cartons of cigarettes were confiscated when the person observed was arrested after having been followed off of the reservation. The document, an arrest report providing the details of that arrest, is simply silent on the question of whether the individual arrested was observed and apprehended *after* he had acquired 31 or more cartons from another smoke shop. Miss Tiny testified to exactly such a procedure being common when a

purchaser could not acquire their intended allotment from a single shop. She was asked, on direct examination, "were you always able to get that [900 cartons] from a single store?" She explained, in the course of her response, that "I might have to go to two different stores" if one store was unable to service her request. (H. 12). The absence of any direct testimony by Investigator Whelpley is telling. Two investigators with the New York State Petroleum, Alcohol and Tobacco Bureau testified, but Investigator Whelpley did not, even though Plaintiff would have been more cognizant of their intended reliance on CNY00775, one of among over 60 such forms, than would have Peace Pipe.

Other parts of Plaintiff's evidence support the clear inference that the lack of evidence of current CCTA violations by Peace Pipe is reflective of the fact that such violations are no longer occurring. Records of Gutlove and Shirvint, the sole wholesaler shown to have provided cigarettes to Peace Pipe, show that sales by Peace Pipe have declined by approximately 75% since mid-2006. (PX 10, Summary Chart). Obviously larger sales require larger volume.

There is overwhelming proof that Peace Pipe maintains detailed computerized records of *all* of its retail sales, no matter what the volume. Miss Tiny testified that she saw receipts generated of her purchases, even when those purchases were allegedly structured to disguise non-compliance with CCTA thresholds. She testified to seeing electronically generated receipts even when the original order was taken on handwritten form. (H. 87, 91). She also identified a photograph introduced as Defendant's Exhibit ("DX") B as the front service area at Peace Pipe. Miss Tiny saw customers queued in front of the work stations clearly visible in that photograph while Peace Pipe service representatives processed the customers' order. (H. 88).

Further details of the information contained in the Peace Pipe computer system, and confirmation that even the largest orders were processed through that system, is provided by

other of Plaintiff's exhibits. Exhibit 89, Attachment 2, is the affidavit filed by FBI Special Agent Stephen Troyd in conjunction with the arrest of Peace Pipe's former manager, Joseph Rombola. The Plaintiff relies on this same exhibit at pages 23 – 24 of their submission. Paragraph 16, at pages 8 – 10, of the affidavit provides details of the stop of a vehicle after it left Peace Pipe on April 13, 2007. Eleven receipts reflecting the purchase of 348 cartons of cigarettes were seized, along with the cigarettes.

According to Agent Troyd's sworn statement the receipts reflected an individual transaction number for each sale, the register at which the sale had been processed, the time of purchase - to the second, and the brand of carton purchased. At paragraph 17, at page 9, Agent Troyd describes how his investigation confirmed that Peace Pipe assigned each customer an individual account number, maintained personal information of the customer and detailed how daily records of total sales were maintained in the shop's computer system. The sophistication of that system is clearly inferred by Agent's Troyd description, in paragraphs 19 – 21, at pages 9 – 14, of the reasons why he sought a warrant that permitted seizure of the entire system so that experts could search for information in the resident database. Exactly such a search on a prior occasion had resulted in Plaintiff's Exhibit 89, Attachment 1, which reflects the evidence of Miss Tiny's purchases that was introduced in *United States v. Rodney Morrison*, 04 Cr. 699 (DRH). That evidence contained the same detailed information as the receipts recovered and described by Special Agent Troyd.

Although detailed records of Peace Pipe's current sales from that sophisticated computerized system were provided to the City in the course of court ordered discovery, the City withdrew a proffer of evidence based on those records rather than to give Peace Pipe the opportunity to introduce compensating proof of CCTA compliance, and other issues, based on

the same records. (H. 656). Whatever the basis of that decision, the record established by the above cited exhibits and testimony clearly proves that sales, even when in the past they were of amounts over the CCTA threshold, were entered into Peace Pipe's computer system. If CCTA violations were presently occurring, especially if they were occurring on anything approaching a regular basis, Plaintiff would have been able to prove that fact.

Failure of proof of actionable harm:

The City claims harm, or even irreparable harm, requiring the immediacy of injunctive relief based on three factors, health, tax loss and increased criminal activity – a recent addition to the unproven panoply of ills that the government unsuccessfully sought to establish a direct causation between the Peace Pipe defendants' cigarette sales. The evidence is not supportive of any of the claims.

<u>There is no proof that ongoing action by Peace Pipe, or of the defendants in the aggregate, is presently negating an historic reduction in the use of cigarettes in the City</u>:

Plaintiff's primary evidence as to risk to health is based on the testimony, and evidence offered through, Dr. Thomas Frieden, Health Commissioner for New York City. Dr. Frieden's testimony, as summarized by Plaintiff in its submission, amounts to confirmation that cigarette smoking is harmful to the health of the individual smoker and, in the aggregate, constitutes a preventable public health risk that causes expense and other harm to Plaintiff, which harms are mitigated as the incidence of smoking in the community decreases. Nowhere does Dr. Frieden single out any fact that distinguishes the health risk from smoking in New York City from any other municipality or other political subdivision from any other in the country, or indeed in the world. The testimony merely established that cigarette smoking poses a health risk that is directly proportional to use. However, the testimony was also that such use is *decreasing* in New York City. In fact, Plaintiff itself quotes the testimony of Dr. Frieden that unequivocally

establishes that the incidence of smoking in New York City presently began decreasing following the very tax increases that Plaintiff baselessly asserts that the actions of the defendants have negated. (Plaintiff's Memorandum, pp. 47 - 48, *citing* H. 397 - 398).

Plaintiff attempted to connect the actions of defendants with an ongoing and immediate harm to Plaintiff through the introduction of Plaintiff's Exhibit 56. That exhibit purported to be a "study" that established the requisite identifiable harm caused to Plaintiff by the specific actions of defendants. The "study" was nothing more than a baseless and totally unsustainable assumption, provided to Dr. Frieden by Plaintiff's counsel, that postulated that if every cigarette currently sold from every Indian retailer on the Poospatuck Reservation were to be removed from the New York City market, without replacement, that there would be an identifiable health benefit to the City based on allegedly established ratios of cigarettes smoked and harm caused.

Dr. Frieden's own testimony revealed this devastating flaw in Plaintiff's reliance on Exhibit 56. Dr. Frieden, careful clinician that he is, identified the process that was used in creating what was less a study and more an exhibit based on a critical and unfounded assumption provided to Dr. Frieden by counsel for Plaintiff. Dr. Frieden testified that "[t]he only assumption here is the number of cigarettes. From that we used New York City data and the scientific literature *to cascade the rest of the data.*" (H. 436). In other words, every conclusion of the "study" was entirely based on the "assumption" that the "number of cigarettes" attributed to the Poospatuck reservation would disappear from the streets of New York if the requested injunction were to issue. This conclusion is supported by Dr. Frieden's further testimony. He acceded to the statement that "this study assumes that whatever the number of cigarettes are that are coming from the Poospatuck reservation, if that flow is interrupted those cigarettes will be entirely removed from the New York City market." (H. 436). Dr. Frieden then accepted as true the

statement that "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." (H. 436 – 437).

Both Dr. Frieden and Dr. Viscusi, a defense witness, testified to the obvious fact that multiple nearby jurisdictions have far lower taxes than New York City from which any determined buyer could obtain cigarettes. (H. 427, 724 - 726). The only difference in the two experts' testimony in this regard is that Dr. Frieden was not "certain" if studies proved that such replacement took place and Dr. Viscusi testified specifically as to the price differences between the City and surrounding states and to the fact that economic studies took that difference into account as a standard practice when evaluating the replacement factor caused by lower cost jurisdictions. (H. 724 – 725). Replacement could be in retail amounts by individual smokers.

The total lack of evidence as to what replacement might take place were Poospatuck cigarettes to be barred from the City reduces the significance, to the level of inconsequential, of the numbers compiled by Plaintiff's counsel as to how many cigarettes would be removed by the granting of the requested injunction that is the deeply flawed starting assumption of Exhibit 56. That observation is equally applicable to claims of health effect and of increased criminality.

The difference in the cost basis of cigarettes provided to Poospatuck Reservation retailers is missing from Plaintiff's exhibits relating to violations of the CMSA:

Plaintiff spent considerable time demonstrating what the cost of cigarettes is to most retailers in New York State. The principal witness in this regard was Andrew DeFrancesco, the Chief Financial Officer of a New York State licensed cigarette wholesaler that previously sold to reservation retailers. After Mr. DeFrancesco testified to what costs and permitted mark-ups applied to off-reservation retailers he was asked "what calculations did you make as to the cost

of cigarettes specifically to Indian retailers" regarding the data he had compiled for exhibits admitted through his testimony. Mr. DeFrancesco responded, "none in particular."[1] (H. 585). This omission is critical since the base cost in his calculations was that applicable to non-reservation retailers.

ARGUMENT

POINT ONE

PLAINTIFF FAILED TO ESTABLISH FACTS NECESSARY TO CONFER STANDING TO SEEK A PRELIMINARY INJUNCTION ON EITHER A VIOLATION OF THE CCTA OR THE CMSA

The City failed to meet the jurisdictional threshold for a case and controversy as to the claim under the CCTA:

The credible facts adduced at the hearing fail to establish that the City has standing to pursue claims under either the CCTA or the CMSA. The proof adduced at the hearing, even if credited, establishes at most that Peace Pipe, in the past, sold cigarettes in excess of the threshold quantity of 50 cartons established in 18 USC § 2342(2). Past conduct, however, is not a basis on which to satisfy the jurisdictional mandate of Article III of United States Constitution for a case and controversy. *See, City of Los Angeles v. Lyons,* 461 U.S. 95, 101, 108 (1983)(possibility of future use of proscribed police procedure insufficient to confer standing even where past use is established); *Shain v. Madden,* 356 F.3d 211 (2d Cir. 2004), *citing, Lyons* (permanent injunction vacated for lack of jurisdiction on facts analogous to *Lyons*). While the City's failure of proof in this regard may be satisfied at a later stage of the proceedings this preliminary application for injunctive relief under the CCTA is jurisdictionally defective.

[1] Mr. DeFrancesco's is clearly wrong in his assertion that State law changed in 2006 regarding the authorized sale by licensed wholesalers of unstamped cigarettes to reservation retailers. Everyone of the hundreds of the DTF's CG-6 forms introduced into evidence includes the requirement of listing the number of "unstamped" cigarettes sold to Indian retailers. (H. ***; PX ***, CNY ***).

The criteria of the CCTA are sufficiently similar to those of 18 USC § 1964 (civil RICO) that the prospective holding of the Supreme Court in *Hermi Group, LLC v. City of New York,* docket #08-969 should apply to the allegations of a violation of the CCTA:

As part of the City's peripatetic quest to accomplish through litigation what has eluded them in the legislative process, it has brought suit against out-of-state retailers in a civil RICO action under 18 USC § 1964(c) who it alleged to be in violation of the notification requirements of the Jenkins Act, 15 USC § 376(a)(2),. *City of New York v. Smokes-Spirits.com, Inc.* 541 F.3d 425, 455 – 458 (2d Cir. 2008). On May 4, 2009 the Supreme Court granted certiorari in that case on the question of whether the City had standing under 18 USC § 1964(c) to bring a RICO action against the out-of-state retailers *Hermi Group, LLC v. City of New York,* docket #08-969. The certified question was "[w]hether city government meets the Racketeer Influenced and Corrupt Organizations Act standing requirement that a plaintiff be directly injured in its 'business or property' by alleging non commercial injury resulting from nonpayment of taxes by non litigant third parties." The provisions of 18 USC § 1964(c) that will be defined in the Supreme Court's decision are functionally similar enough to those that apply here that the granting of certiorari in *Hemi Group* warrants at least a delay in resolving the City's application so as to permit consideration of the Supreme Court's decision prior to considering the grant of the relief sought by the City.

The City lacks standing to claim relief under the CMSA for derivative harms not within the purview of the statute:

The litigation arising out of *City of New York v. Smokes-Spirits.com, Inc., supra,* has resulted in a decision on June 9, 2009 by the New York Court of Appeals that bears directly on the question of whether the City has standing to bring a claim under the CMSA. The Second Circuit certified two questions to the New York State Court of Appeals. One of those questions was whether the City had standing to assert a claim under New York General Business Law §

349. The Court of Appeals answered that question in the negative. *City of New York v. Smoke-Spirits.Com, Inc., et al.,* Slip Op. # 92, pp. 6 – 11, June 9, 2009; __ NY 3d __, __. The Court's decision addressed the provisions of General Business Law § 349(h), which confers standing on "any person who has been injured by reason" of the "deceptive acts or practices in the conduct of any business" that is proscribed in section 349(a).

> In a proper case the City may be able to avail itself of a remedy pursuant to subsection (h). But it has failed to establish standing here because its claimed injury, in the 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.

Slip Op. at 7.

The standing requirements of Tax Law § 484(6)(b) are identical to those of General Business Law § 349(h). The CMSA's standing provision provides for an action in the State's trial court "by any person injured by any violation or threatened violation of this article." This terminology is indistinguishable for the phrase "any person who has been injured [by the proscribed conduct]" used to confer standing in General Business Law § 349. Not only is the relevant statutory language identical, the relevant statutory intent is consistent in that both provisions seek to control unfair business practices. General Business Law § 349 is addressed to deceptive business practices while the CMSA is addressed to unfair competition among businesses that sell cigarettes. The holding of the State's highest court on the relevant language should be binding here. The only open questions are whether the City's health claims, and their newly advanced claim of harm through increased criminal activity, are properly asserted as the basis of injunctive relief, and if so, whether they fall within the universe of claims that the State courts recognize "any person injured" by the CMSA.

The first hurdle for the City is whether the Third Claim For Relief in the Complaint suffices to raise either issue. The City made general factual allegations in paragraph 44 regarding harm it suffered due to health effects by cigarettes sold by defendants. That paragraph appears under the heading "Sales of Cigarettes to Native Americans." The Third Claim For Relief, entitled "Violations of the Cigarette Marketing Standards Act," presents a claim for injury in paragraph 63, which is limited to the loss of revenue. The question of harm from increased criminal activity is not presented in the complaint in any form.

Assuming that the claim of harm from the alleged effects Peace Pipe's sales have on the City's efforts to curtail smoking and on an increase in criminal activity are properly pleaded, the claims are not ones that confer standing under Tax Law § 486(b). 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. The derivative harm the City alleges from the medical consequences of smoking and from a claim of increased criminal activity are, for the purposes of the goals of this statute, no more relevant to terms that confer standing than is the claim of tax loss. The causation between the conduct proved and the harm claimed are equally derivative and therefore equally inapplicable under the holding of the State Court of Appeals.

Even if, as a theoretical matter, the City would be found to have standing to assert a claim based on evidence of a direct medical harm attributable to Peace Pipe's pricing, the evidence adduced at the hearing does not establish such direct causation. The entirety of the City's presentation in this regard is premised on the false assumption that every cigarette Peace Pipe is enjoined from selling constitutes a cigarette that is not smoked by a resident of the City. The City certainly cannot claim to be a "person injured" within the meaning of the statute because of

some derivative causation attributable to an assertion that as a fungible commodity every cigarette produced or sold increases the pool of cigarettes available to New York City residents. The causation alleged here is only slightly less derivative.

If every cigarette Peace Pipe is enjoined from selling is readily replaced by another equally harmful cigarette that can be obtained at the approximate price from another source or jurisdiction, the "cascade" Dr. Frieden testified to becomes an unproven construct. Not only does the testimony at the hearing confirm the availability of replacement cigarettes, Judge Ciparick begins her decision in *Smokes-Spirits.Com* with a comparison of $40.00 per carton differential in New York's after-tax prices with those in Virginia and Kentucky. Slip Op. at 2. Since the City's claim is, of necessity, not based on the contention that every cigarette sold by Peace Pipe is harmful, but on the proposition that every cigarette Peace Pipe is enjoined from selling is a cigarette removed from the market, the ready availability of similarly priced cigarettes completely undermines the City's theory that they have standing as a "person who has been injured" to pursue a preliminary injunction under a statutory scheme directed at unfair pricing.

POINT TWO

THE CITY HAS NOT SHOWN THAT IT IS ENTITLED TO THE REMEDY OF AN PRELIMINARY INJUNCTION

Point I of the City's submission presents several of the criteria required in the granting of a preliminary injunction. The City recognizes that they must show injury attributable to Peace Pipe's actions,[2] and, because the relief they seek will alter the status quo, a *substantial* likelihood of success on the merits. *Green Party v. N.Y. State Bd. Of Elections*, 389 F.3d 411, 418 (2d Cir. 2004); *Rodriguez ex rel. Rodriguez v. DeBuono*, 175 F.3d 227, 333 (2d Cir. 1999). On the facts

[2] Counsel for Peace Pipe will join with counsel for the remaining defendants as to the question of whether the requisite injury in this matter must be "irreparable harm" or just substantial harm.

of this case both of those requirements are necessarily elevated by the mandate of Fed.R.Civ.P. 65(d)(1)(B) that any injunction "state its terms *specifically*." (Emphasis added). The need for specificity necessarily implies a direction that the any injunction must meet a higher standard and be drawn more narrowly when its impact on the enjoined party is greater. *See, Disability Rights Council of Greater Wash. V. Wash. Metro. Transit Auth.*, 234 F.R.D. 4 (DDC 2006). Furthermore, an injunction must be more specific than a general command that the enjoined party obey the law. *See, New York v. Shinnecock Indian Nation*, 560 F.Supp.2d 186, 189 (EDNY 2008). Because the combined injunctions sought by Plaintiff would have the effect of permanently closing Peace Pipe as an operating business the very highest applicable standards pertaining to the imposition of a preliminary injunction should be applied in this matter.

The City's chances of success on appeal are uncertain:

As an initial matter it is noted that the City seeks 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. That position exceeds even that taken by the United States Attorney for the Eastern District of New in *United States v. Morrison*, 04 Cr. 699 (DRH)(AKT). In a letter submitted on October 18, 2007, the Government explained their litigation strategy by asserting that "under current New York law, and the forbearance policy, it remains technically lawful . . . for an Indian retailer to purchase . . . and possess contraband cigarettes as defined by the [CCTA]." Letter of AUSA James Miskiewicz to United States District Judge Denis R. Hurley, p. 2, docketed as document #372.

Plaintiff understandably asserts that this Court's past agreement with its position as to the universal applicability of Tax Law § 471 assures Plaintiff of success at all stages of the

proceedings that are permitted in this case. Plaintiff fails to acknowledge that the interpretation of state tax law by this federal court imposes requirements on Indian retailers that state authorities, both judicial and legislative, have not recognized. It is obvious that a novel interpretation of a statute that is still under intense review by all organs of the state is more susceptible to appellate revision than is a determination based on settled law.

Peace Pipe of course acknowledges, with respect, this Court's rulings in *City of New York v. Golden Feathers,* 2009 WL 705815; and in *City of New York v. Milhelm Attea & Bros., Inc*., 550 F. Supp.2d 332 (E.D.N.Y. 2008). In *Golden Feather* the Court applied what is essentially a syllogism.

> [S]tate law 'requires' cigarettes sold by [Poospatuck Indian retailers] to members of the broader public to bear tax stamps for the reasons expressed in *Milhelm Attea,* 550 F.Supp.2d at 345-48. . . . Because the State has the power to tax such sales, [citing *Milhelm Attea & Bros., Inc.,* 512 U.S. at 64] a tax is imposed. Therefore, defendants' sales . . . to the broader public are subject to an applicable state tax.

2009 WL 705815 at 11. While taxes are ultimately owed on such sales, it is the final consumer that bears the burden under § 471(2) of the Tax Law to pay such taxes in instances where the retailer does not have that obligation. Thus, the State Court of Appeals, in *Smokes-Spirits.com, supra, Slip. Op at 3,* reviewed the end consumer's obligations when purchasing from Internet retailers. No action or decision of any branch of the State government has relied solely on § 471(1) to compel Indian retailers to sell only stamped cigarettes to non-Indians in order to effectuate the goal of the ultimate consumer paying State cigarette taxes under § 471. It is simply unresolved in either the state's appellate courts or in the United States Court of Appeals for the Second Circuit whether New York Tax Law § 471(1) applies, in the absence of any statutory or regulatory qualification protecting recognized constitutional rights, to sales by Indian

retailers to non-Indians in a way that renders Indian retailers the functional equivalent of any off reservation retailer.

The fact that the state's own interpretation and application of its laws is unresolved is a significant consideration. This is not a new statute. The language of § 471(1) on which this Court has relied has been part of statutory scheme of New York State since Article 20 of the Tax Laws was first enacted in 1939. L. 1939, c. 940. At the time of the original enactment of § 471(1) it was, by its explicit terms, a temporary provision. The tax that the statute imposed was to be in effect only from July 1, 1939 until and including June 30, 1940. When the statute was implemented there was no reason for the Legislature to give special consideration to the enactment's applicability to Indian retailers. The Supreme Court decisions that more precisely defined a state's taxing powers in Native American territories had not yet been decided. *See Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation,* 425 U.S. 463 (1976).

It is a historical fact that once the State elected to use the authority conferred by *Moe* that it still did not act as if it had any belief that it could simply apply § 471(1) to Indian retailers in the absence of protective implementing regulations. There is an obvious question of why the State would have undertaken the effort to implement such regulations in 1988 if it viewed § 471(1) itself as conferring adequate authority to incorporate Indian retailers into the State's tax collection scheme. Nothing in the historical record indicates that in the almost 50 years between 1939 and 1988, the Legislature believed it could simply utilize the statute it already had on its books as if reservation retailers were no different than other retailers in this regard. It is indicative of the State's courts' view of the restraints imposed by their own and the United States Constitution that after *Moe* and the implementation of the 1988 regulations, New York State courts still concluded that even minimally those intrusive regulations that sought to have Indian

retailers collect cigarette taxes were impermissible. *See, e.g., Milhelm Attea & Bros. v. Dept. of Tax.*, 164 A.D.2d 699, 564 N.Y.S.2d 491 (3rd Dept. 1990), 81 N.Y.2d 417, 599 N.Y.S.2d 510 (1993), *rev'd, Dept. of Taxation and Finance of New York v. Milhem Attea & Bros., Inc.*, 512 U.S. 61 (1994).

Although the state courts were reversed by the Supreme Court's decision in *Milhem*, that case did not directly address the question of whether § 471(1), standing alone, complied with constitutional standards. The Supreme Court did find that combined with the 1988 regulations the provisions of Article 20 were adequate to do so. Thus, the Court merely held that the statute *and* regulations were minimally intrusive and therefore could apply to Indian retailers without transgressing Native American rights. The State's actions in the aftermath of *Attea* may not be a model of civic efficiency, but they would be inexplicable if § 471(1) was, as interpreted by this Court, uniformly applicable to Indian retailers and non-Indian retailers alike.

The state legislature eventually undertook what subsequent events revealed to be an imperfect fix by the passage of § 471-e. This was first time that legislation was enacted which specifically addressed Indian cigarette retailers. All parties have recognized that enforcement of that provision has been suspended because the required implementing regulations were not established. *Day Wholesalers v. New York*, 51 A.D.3d 383, 384, 856 N.Y.S.2d 808 (4th Dept. 2008) (referring to the § 471-e as "the Legislature's *most recent* effort to collect taxes on cigarettes sold on Indian reservations.") (emphasis added).

If an injunction issues, the Second Circuit will have to consider whether the New York State Legislature took the trouble to enact § 471-e even though a preexisting statute had already conferred even broader power to impose the requirements of Tax Law Article 20 on Indian retailers. Such a conclusion would be inconsistent with the fact that there is nothing in the

enactment or in the legislative history to suggest that the Legislature saw § 471-e as diminishing existing taxing powers rather than expanding them.

The Second Circuit will have the benefit of a resolution in the still pending decision of the Fourth Department on the appeal from *Cayuga Indian Nation of N.Y. v. Gould*, No. 2008-16350, 21 Misc.3d 1142(A), 2008 WL 5158093 (Sup.Ct. Monroe County Dec. 9, 2008) and of the State Court of Appeals' final opinion addressing the questions relating to § 471 presented in that case. At this time the State's ongoing judicial and political consideration of § 471's application to Indian retailers reflects substantial constitutional and political considerations relating to Indian sovereignty and of statutory interpretation.

In the context of an application for a preliminary injunction the distinction between applicability and statutory interpretation blur. Either raises an appropriate concern that warrants caution in issuing an injunction that imposes by federal judicial fiat a result the State has not sought to impose, especially since the CCTA incorporates State law and the CMSA is a State law that has never been used for the effect sought by the City.

Newly decided cases that sound in comity indicate that questions of federalism remain a viable issue on appeal:

The holdings of this federal court sought to resolve important issues currently under consideration in the State's political and judicial bodies. This Court's decisive intrusion into an unresolved and sensitive area of state law is inconsistent with the Second Circuit's decision in *City of New York v. Smokes-Spirits.com, Inc.* 541 F.3d 425, 455 – 458 (2d Cir. 2008)(*cert. granted, sub nom. Hemi Group, LLC v. City of New York, 08-969, 2009, on other grounds).* The Circuit's decision in that case to certify unresolved questions of state law to the New York State Court of Appeals was an indication of the deference that court extended to state authority in an

unsettled area of state law. The ultimate resolution by the New York State Court of Appeals confirms the merits of that deference.

The potential impact of this Court's decisions on continuing political deliberation within the polity of the State is impossible to calculate, but likely would be far greater than the provisions that were the subjects of the questions certified in *Smokes-Spirits.com*. Your Honor's decisions effectively criminalize the daily conduct of every employee of every Indian retailer and convert every sale into either a federal or state crime. Such a consequence could well be the basis of intense review by the Second Circuit.

The fact that Peace Pipe and the other defendants will be able, on appeal, to raise significant issues involving novel questions of law and fact suggests that the requisite certainty as to the City's chances of ultimate success is lacking. Peace Pipe will have small comfort if it prevails on appeal but is out of business because of the improvident granting of a preliminary injunction.

POINT THREE

ANY INJUNCTION THAT ISSUES SHOULD BE STAYED PENDING APPEAL

Defendants have an absolute right to appeal a preliminary injunction under 28 USC § 1292(a). If an injunction is to issue it should be narrow and clearly limited in scope to whatever the Court finds was a direct casual connection between the enjoined acts and the harm actually proved to be connected with those acts.

Any injunction should be stayed pending appeal. The City has embarked on an aggressive course of ligation in the federal courts seeking to obtain a result, through a series of federal claims, that has eluded them through either the legislative process or through actions in the courts of the State of New York. In the *City of New York v. Smokes-Spirits, et al., supra*, the

City seeks to inhibit the ability of out of state retailers to sell cigarettes to customers who live in New York City. In *City of New York v. Milhelm Attea, et al., supra,* the City seeks to obtain injunctions against the State licensed suppliers of Indian retailers, including those who supply defendants in this case.

The clear intent of the City, from the inception of this action, was to obtain injunctive relief that completely prevents Peace Pipe and the other defendants from conducting exactly that business activity that has been thus far been not only condoned by the State, but has been enabled by the State through such provisions as permitting licensed cigarette wholesalers and stamping agents to sell unstamped cigarettes to reservation retailers, the resale of which the City now seeks to enjoin. Every one of the hundreds of State Department of Taxation CG-6 forms contains language that clearly indicates the State has chosen to monitor but not prevent the sale of unstamped cigarettes to Indian retailers. There can be no doubt that the State recognizes that such cigarettes are being openly sold to non-Indian customers at reservation smoke shops like Peace Pipe.

Notice should also be taken that it has been established that Peace Pipe maintains a sophisticated computer system that monitors inventory and sales. Were it to be required, Peace Pipe could easily demonstrate its compliance with a limited injunction on larger sales.

The City seeks to achieve by this action that which they have not achieved through efforts to affect the legislative processes of New York State, and to do so before defendants have an opportunity to test the legal theories on which this action has proceeded in an appellate court. The City has not proven that it is legally entitled to that radical result.

CONCLUSION

The motion for an injunction should be denied. In the alternative, any injunction that issues should be stayed.

Dated: New York, NY
June 24, 2009

Respectfully submitted

_____

DANIEL NOBEL [DN 7579]
Attorney for Peace Pipe Defendants
401 Broadway, 25th Floor
New York, NY 10013
(212) 219-2870