

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

SENECA NATION OF INDIANS,

Plaintiff,

vs.

Civil Action No.: 10-CV-0687A

DAVID PATERSON, Governor of the
State of New York, JAMIE WOODWARD,
Acting Commissioner, New York State
Department of Taxation and Finance,
WILLIAM COMISKEY, Deputy
Commissioner, Office of Tax Enforcement,
New York State Department of Taxation
and Finance, JOHN MELVILLE, Acting
Superintendent, New York State Police,
each in his or her official capacity,

Defendants.

**BRIEF OF THE AMICUS CURIAE
AARON J. PIERCE AND RED EARTH LLC IN
SUPPORT OF PLAINTIFF'S MOTION FOR A TEMPORARY
RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

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STATEMENT OF INTEREST

This brief is filed by Red Earth LLC d/b/a Seneca Smokeshop and Aaron J. Pierce (collectively “Red Earth”) in support of the Seneca Nation of Indians’ (“SNI” or the “Nation”) motion for injunctive relief.

Aaron Pierce is an enrolled member of the Seneca Nation of Indians and a Native American, with his home and principal place of business located near Irving, New York on the Cattaraugus Indian Reservation, a Seneca Nation of Indians Territory. Mr. Pierce owns and operates a tobacco retail business, Red Earth LLC, located on the Cattaraugus Indian Reservation. Through his business, Mr. Pierce sells cigarettes via Internet, telephone, and mail to customers located within and without New York State. Mr. Pierce’s customers include citizens of New York State and other States, as well as enrolled members of the Seneca Nation of Indians and other federally-recognized tribes. Red Earth LLC also transacts business under the name and styling Seneca Smokeshop. *See generally* Civil Action No. 10-CV-530 at Dkt. 1 (Complaint) and Dkt. 6 (Mr. Pierce’s Affidavit).

Mr. Pierce has been in the tobacco retail business since 2000. He holds a valid business license from the SNI to operate a cigarette retail business, and he is a Seneca Nation of Indians-licensed stamping agent. Currently, 100% of Red Earth’s overall business is done via the Internet, telephone, and mail. With respect to Red Earth’s Internet sales, it currently maintains a computer server on the Reservation, located in Seneca Nation of Indians Territory, for hosting its website and processing

orders. *See id.*

In operating his business, Mr. Pierce employs 17 people, of whom two are members of the SNI. Red Earth's business model is predicated upon soliciting sales and engaging in transactions for the purchase of cigarettes free of New York State sales taxes by utilizing the Internet, telephone, and mail. Indeed, as an enrolled member of the SNI, Mr. Pierce is immune from State taxation, and he may engage in tax-free commerce with other members of the SNI. *See id.*

New York State and its Department of Taxation and Finance (the "Department") recently enacted new laws and regulations, respectively, concerning the taxation of cigarettes on Indian Reservations. Pursuant to the revised New York State Tax Law § 471, New York's cigarette tax must be imposed on all cigarettes sold in the State. N.Y. Tax Law § 471(1). Section 471-e(1) provides an exception that qualified Indians may purchase State tax-exempt cigarettes for their own use on their Nations' qualified reservations. N.Y. Tax Law § 471-e(1). As all cigarettes sold by wholesalers or licensed stamping agents must now bear a New York State tax stamp, the Department adopted Emergency Regulations consisting of two mechanisms by which qualified Indians may obtain State tax-exempt cigarettes. *See* 20 N.Y.C.R.R. § 74.6. Under the first system, if a Nation so elects, on a quarterly basis, the Department will provide that Nation with a quota of coupons the Nation then must distribute between itself, if it is a cigarette retailer, and, if not, among all the cigarette sellers operating within the Nation's borders. *See* 20 N.Y.C.R.R. § 74.6(c). At the time of sale of cigarettes to fellow tribal

members, the cigarette retailer must provide the wholesaler from which it buys cigarettes with coupons representing the total sales to tribal members. *Id.* The wholesaler then applies to the Department for a refund of the taxes it previously paid. *Id.* There is no indication as to how Native American cigarette retailers are supposed to sell State tax-exempt cigarettes to members of their own tribe once the quota is exhausted for a given quarter. Any sale by a wholesaler of stamped-untaxed cigarettes without having first received coupons is a violation of Article 20 of the Tax Law. *See* 20 N.Y.C.R.R. § 74.6(c)(5).

If the Nation does not elect to participate in the coupon system, it and cigarette retailers located on its Reservation lands may only sell State tax-exempt cigarettes from wholesalers if the Department has given its prior approval for the sale. *See* 20 N.Y.C.R.R. § 74.6(d). Pursuant to the Emergency Regulations, if the Department does not grant its prior approval, Native Americans have no means by which to purchase State tax-exempt cigarettes.

The State's tax scheme violates the federally-protected rights of Seneca retailers to engage in State tax-free commerce with fellow members of the SNI. Without the Department's approval or a coupon, the Seneca retailers no longer can obtain State tax-exempt cigarettes. They will be deprived of their rights, will suffer harm to their business, and they will be unable to shoulder the heavy burden the State's tax scheme places on them. Seneca retailers, such as Red Earth, will lose customers and good will, as there will be only a finite number of State tax-exempt cigarettes that each retailer is

able to sell to members of the Nation. Red Earth respectfully requests that the Court consider the irreparable harm the State's tax scheme causes to the Seneca retailers, such as Red Earth, in its decision on the Nation's motion for a preliminary injunctive relief.

ARGUMENT

POINT I

THE COURT SHOULD ENJOIN ENFORCEMENT OF THE NEW YORK STATE TAX REGULATIONS BECAUSE OF THE IRREPARABLE HARM NATION RETAILERS WILL SUFFER.

"Irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction." *Grand River Enter. Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 67 (2d Cir. 2007) (internal citations and quotations omitted). Indeed, courts have long recognized that as a condition precedent to the consideration of the likelihood of success on the merits the movant must *first* demonstrate that absent a preliminary injunction he will suffer irreparable harm. *See id.* at 66. Red Earth files this amicus brief in support of the Nation's application for injunctive relief because, like other Seneca Nation retailers, Red Earth will suffer irreparable harm if the State is allowed to enforce its unconstitutional taxation regulations against it.

POINT II

THE LOSS OF RED EARTH'S BUSINESS CONSTITUTES IRREPARABLE HARM AS A MATTER OF LAW.

“In this circuit it is firmly settled that the loss or destruction of a going business constitutes irreparable harm, whether viewed as an injury not compensable in monetary terms, or as one which cannot be reduced to monetary value with sufficient accuracy to make damages an adequate substitute for injunctive relief.”

Janmort Leasing, Inc. v. Econo-Car Int'l, Inc., 475 F. Supp. 1282, 1294 (E.D.N.Y. 1979) (internal quotations and citations omitted). Thus, the loss of a business or even a line of business – whether it has been in existence for two or twenty years – constitutes irreparable harm. *See Roso-Lino Beverage Distributors, Inc. v. Coca-Cola Bottling Co.*, 749 F.2d 124 (2d Cir. 1984) (11 years); *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197 (2d Cir. 1970) (20 years); *Travellers Int'l AG v. Trans World Airlines, Inc.*, 684 F. Supp. 1206 (S.D.N.Y. 1988) (three years); *Janmort Leasing*, 475 F. Supp. 1282 (two years).

If the State taxation regulations are enforced against the Seneca retailers, Red Earth and other retailers like it no longer will be able to operate their businesses because of the impermissible and unwieldy burden that the State's coupon and prior approval system foists on them. Far from the “minimal burden” discussed and approved by the Supreme Court in *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463 (1976), the State regulations herein infringe on the Seneca retailers' rights to conduct business with other members of the Seneca Nation and, therefore, interferes with the tribal members' right to self government.

In *Moe*, the Court upheld a State tax that imposed on Native American retailers the minimal burden of collecting and remitting to the State a tax on cigarettes ***sold to non-Native American customers***. The Court held that the “State’s requirement that the Indian tribal seller collect a tax ***validly imposed*** on non-Indians is a minimal burden designed to avoid the likelihood that in its absence non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax.” *Id.* at 483 (emphasis added). The Supreme Court agreed with the District Court’s holding that the “State may require the Indian proprietor simply to add the tax to the sales price and thereby aid the State’s collection and enforcement thereof.” *Id.*

New York’s convoluted taxing scheme does far more than merely require Seneca retailers to add the State tax to the price of their cigarettes sold to non-Senecas. Rather, it requires Seneca retailers to purchase already-taxed cigarettes from wholesalers. Each retailer purportedly is allocated a certain amount of tax-exempt cigarettes to sell to SNI members, although there is no guidance as to how that allocation will be determined or distributed. Regardless, Seneca retailers no longer will be able to engage in free commerce with SNI members, as each retailer will be able to sell only a finite number of tax-exempt cigarettes.

At some point, Seneca retailers will run out of coupons for tax-exempt cigarettes. The Tax Law amendments and Emergency Rule threaten the commercial viability of Seneca retailers such as Red Earth in that they limit the retailers’ right to sell

as many tax-exempt cigarettes to Seneca members as the market may demand at any given time. If, for example, Red Earth runs out of coupons for tax-exempt cigarettes, it becomes unable to engage in State tax-exempt commerce with other members of the Tribe in contravention of well established sovereignty rights. Moreover, if another entity or entities obtain prior approval for the entire quota in a quarter, Red Earth will be unable to engage in State tax-exempt commerce with other members of the Tribe, again in contravention of well established sovereignty rights. The Seneca retailer's rights unlawfully will be infringed upon, and its Seneca customers will then go to other retailers to purchase their cigarettes. Red Earth and retailers like it would be prevented from engaging in free commerce with SNI members and will suffer irreparable harm as a result.

POINT III

THE DEPRIVATION OF A CONSTITUTIONAL RIGHT CONSTITUTES IRREPARABLE HARM.

Deprivation of a constitutional right is presumptively recognized as irreparable harm. *See Johnson v. Miles*, 355 Fed. Appx. 188, 196 (2d Cir. 2009) (“because an alleged violation of a constitutional right ‘triggers a finding of irreparable harm,’ [plaintiff] necessarily satisfied the requirement that a party applying for a preliminary injunction show irreparable harm.”) (*citing Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996); *Ward v. State*, 291 F. Supp.2d 188, 207 (W.D.N.Y. 2003)). This principle of law does not apply exclusively to violations of a movant's First Amendment rights. *See Brewer v. West Irondequoit Cent. Sch. Dist.*, 212 F.3d 738 (2000) (Fourteenth Amendment); *Jolly*, 76 F.3d at 482 (Eighth Amendment); *Covino v. Patrissi*,

967 F.2d 73, 77 (2d Cir. 1992) (Fourth Amendment); *Ward*, 291 F. Supp.2d at 196 (rights granted to Native Americans under the Constitution).

Under the new tax scheme, Seneca retailers such as Red Earth can only purchase from wholesalers and then sell to other SNI members State tax-exempt cigarettes *if* they have a coupon or *if* they have been selected by the Department to receive prior approval to obtain State tax-exempt cigarettes. As set forth above, this violates the federally-protected rights of Seneca retailers. *See Moe*, 425 U.S. at 480, 96 S. Ct. at 1644.

Fundamentally the Constitution does not give the States power to regulate and interfere with commerce between and among Native Americans. *See Moe*, 425 U.S. at 480, 96 S. Ct. at 1644 (holding that the State could not tax cigarette sales from on-reservation sales by tribe members to tribe members); *see also Ward*, 291 F. Supp.2d at 207 (holding that plaintiffs showed a likelihood of success on the merits of their claim that N.Y. Pub. Health Law § 1399-II was “unconstitutional insofar as it restricts the shipment or transportation of cigarettes from a tribe member on the reservation to another tribe member on the reservation.”).

As set forth above, if the State tax scheme is enforced, Seneca retailers would be deprived of the federally protected rights that they enjoy as members of a sovereign Indian Nation. Unlike the minimal burden explained in *Moe* and *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 100 S. Ct. 2069

(1980), New York's tax scheme impermissibly burdens commerce *between and among members of the SNI*. Here, the taxes under consideration *do in fact* "burden commerce that would exist on the reservations without respect to the tax exemption." *Colville*, 447 U.S. at 157, 100 S. Ct. at 2083. Consequently, absent relief enjoining enforcement of the State tax scheme, Seneca retailers such as Red Earth will be deprived of their constitutional rights and the rights afforded to them as members of a sovereign, federally-recognized tribe. As a direct result, they will suffer irreparable harm.

POINT IV

THE BALANCING OF THE EQUITIES FAVORS THE GRANT OF INJUNCTIVE RELIEF.

Where the life of a litigant's business or enterprise is threatened, courts have recognized that those hardships tip in favor of the party requesting injunctive relief. *See Random House v. Rosetta Books, LLC*, 283 F.3d 490 (2d Cir. 2002). As set forth above, Red Earth's business will be severely affected by the State's tax scheme in that it will lose customers and will be forced to shoulder the burden of New York State taxes imposed on it.

In addition, if Red Earth is no longer is able to conduct its business operations, the people who depend on it for their jobs also will be harmed. Red Earth will not have enough business to operate, let alone provide work for the people who currently run its day-to-day operations. On the other hand, if SNI's application for injunctive relief is granted, and, assuming, for the sake of argument, that the statute is constitutional, the only harm to the State is delay in the enforcement of the statute.

Moreover the State has acted in an unconscionable manner that should tip the balance of the equities decidedly in favor on SNI. Just over two weeks ago, the State unlawfully seized a truckload of cigarettes belonging to a Seneca seller, without any legal authority to do so. *See* Tom Precious and Phil Fairbanks, *State Seizes Truckload of Seneca Cigarettes*, BUFFALO NEWS, Aug. 11, 2010, <http://www.buffalonews.com/city/article98421.ece>; Tom Precious, *State to Return Seneca Truck, Cigarettes*, BUFFALO NEWS, Aug. 11, 2010, <http://www.buffalonews.com/city/capital-connection/article99055.ece> (both last visited Aug. 25, 2010). This action was clearly a mechanism designed to harass and threaten the Seneca cigarette sellers into obedience with the State tax scheme. Because of the profound harm that will befall the Seneca retailers if the State tax scheme is enforced, and the slight harm, if any, to the State, the balancing of the equities tip in the Nation's favor.

CONCLUSION

Red Earth respectfully requests that the Court consider the irreparable harm that will be caused to it and other Seneca retailers by the enforcement of the New York State Tax Law amendments and the Emergency Regulations in deciding the SNI's motion for injunctive relief.

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