

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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RED EARTH LLC d/b/a  
SENECA SMOKESHOP and  
AARON J. PIERCE,

Plaintiffs,

v.

Civil Action No. 10-CV-530A

UNITED STATES OF AMERICA and  
ERIC H. HOLDER, JR., in his Official  
Capacity as Attorney General of the United States,

Defendants.

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SENECA FREE TRADE ASSOCIATION,

Plaintiff,

v.

Civil Action No. 10-CV-550A

ERIC H. HOLDER, JR., in his Official Capacity  
as Attorney General of the United States,  
UNITED STATES DEPARTMENT OF JUSTICE,  
JOHN E. POTTER, in his Official Capacity as  
Postmaster General and Chief Executive Officer of  
the United States Postal Service, and  
UNITED STATES POSTAL SERVICE,

Defendants.

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**RED EARTH'S MEMORANDUM OF LAW IN  
RESPONSE TO SENECA FREE TRADE ASSOCIATION'S  
MOTION FOR AN INJUNCTION PENDING APPEAL**

**PRELIMINARY STATEMENT**

This memorandum of law is submitted by plaintiffs, Red Earth LLC d/b/a Seneca Smokeshop and Aaron J. Pierce (collectively “Red Earth”), in response to the motion of plaintiff Seneca Free Trade Association (“SFTA”) for an injunction pending appeal of the Court’s preliminary injunction order dated July 30, 2010 (Dkt. 45) (the “Order”) which granted in part and denied in part Red Earth’s and SFTA’s motion for a preliminary injunction enjoining enforcement of the PACT Act. For the reasons that follow, Red Earth supports the SFTA in its request for an injunction pending SFTA’s appeal of the Order.

**ARGUMENT**

**SFTA’S MOTION SHOULD BE GRANTED IN ORDER TO AVOID IRREPARABLE HARM AND PRESERVE THE STATUS QUO.**

Pursuant to Rule 62(c) of the Federal Rules of Civil Procedure, “while an appeal is pending from an interlocutory order . . . that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction . . . .” Fed. R. Civ. P. 62(c).

The Government would have the Court apply an incorrect standard in deciding SFTA’s motion for an injunction pending appeal. It urges the Court to apply the separate and distinct standard for a preliminary injunction. *See* Gov’t MOL in opposition (Dkt. 53) at 4. Although the standard for the grant of stay or injunction pending an appeal seems to mirror the standard for a preliminary injunction, the two are

fundamentally different in that “a preliminary injunction will last until the end of the trial, often a considerable length of time after issuance, whereas a stay pending appeal, at least in the case of an expedited appeal, might last for only a very brief interval.” *Mohammed v. Reno*, 309 F. 3d 95, 100, n.6 (2d Cir. 2002). As a result, the standard for a preliminary injunction differs from the standard for a stay or injunction pending appeal.

In the Second Circuit, in the context of a motion for a stay pending appeal, “[t]he necessary level or degree of possibility of success will vary according to the court’s assessment of the other stay factors.” *Mohammed v. Reno*, 309 F. 3d at 101. That is, “[t]he probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury [the movant] will suffer absent the stay. Simply stated, more of one excuses less of the other.” *Id.* (citing *Michigan Coalition of Radioactive Mat’l Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991)); *see also Rochester-Genesee Reg. Transp. Auth. v. Hynes-Cherin*, 506 F. Supp. 2d 207, 214 (W.D.N.Y. 2007). Thus, SFTA need not prove a likelihood of success on the merits. Rather, it can demonstrate a substantial possibility of success on complex legal issues that should be addressed by the Second Circuit Court of Appeals. Moreover, it easily can prove irreparable harm if the injunction pending an appeal is not granted. Because of the irreparable harm all plaintiffs will suffer absent the injunction pending appeal, the balancing of the equities weighs heavily in their favor, and SFTA’s request for an injunction pending appeal should be granted.

District Courts have the power to restore injunctions “to preserve the status quo pending an appeal . . . .” *International Ass’n of Machinists & Aerospace Workers, AFL-CIO v. Eastern Air Lines, Inc.*, 847 F.2d 1014, 1018 (2d Cir. 1988); *see also Ideal Toy Corp. v. Sayco Doll Corp.*, 302 F.2d 623 (2d Cir. 1962). Prior to the issuance of the Order, no portion of the PACT Act ever had been enforced against the plaintiffs given this Court’s TRO, granted and entered on notice to the government on June 28, 2010 (Dkt. 10). SFTA’s application requests that the Court enjoin, pending its appeal to the Second Circuit Court of Appeals, the enforcement of the provisions of the PACT Act prohibiting the shipment of cigarettes in the U.S. Mail. Thus, because SFTA is seeking to enjoin enforcement of certain provisions of the Act that already were enjoined by the TRO, the Court would be maintaining the status quo of the lawsuit pending review of the Order by the Second Circuit Court of Appeals. *See Cayuga Indian Nation v. Village of Union Springs*, 317 F. Supp. 2d 152, 154 (N.D.N.Y 2004) (“[A] district court may grant injunctive relief after a proper notice of appeal has been filed, but only when it is necessary to preserve the status quo pending appeal”) (internal citations omitted).

If the Court does not grant SFTA’s application, the status quo will be disrupted, and plaintiffs will suffer irreparable harm. Irreparable harm is found where “but for the grant of equitable relief, there is a substantial chance that upon final resolution of the action, the parties cannot be returned to the positions they previously occupied.” *Brenntag Int’l Chemicals, Inc. v. Bank of India*, 175 F.3d 245, 249 (2d Cir. 1999). As the Court noted in its Order, plaintiffs demonstrated an imminent threat of irreparable harm unless the Court granted a preliminary injunction.

*See* Dkt. 45 at 7-8. In addition to this irreparable harm, for the following reasons, plaintiffs also will suffer harm absent an injunction pending appeal as outlined in SFTA's application for relief.

The Order enjoined the Government from enforcing certain requirements of the PACT Act as against the plaintiffs as contained in 15 U.S.C. §§ 376a(a)(3), 376a(a)(4) and 376a(d), but it denied the preliminary injunction with respect to the PACT Act's prohibition of the shipment of cigarettes in the United States Mail. *See id.* at 43. Accordingly, plaintiffs cannot use the U.S. Mail as a means of delivering their legal product to their customers. Red Earth is tenaciously working on developing an alternative method of delivering its product to its customers and is optimistic that it will accomplish this task in short order. Of course doing so takes considerable effort. Moreover, it should come as no surprise that the alternative method of shipment that Red Earth is developing cannot replicate the geographic reach of the U.S. Mail. As a result, it is likely that Red Earth cannot reach all of the customers it could reach by using the U.S. Mail.

Furthermore, Red Earth has no means by which to recoup from the Government the money it is losing and will continue to lose absent an injunction pending appeal. *See* SFTA MOL in Support (Dkt. 50-2) at 7; *see also Association of Cmty. Orgs. for Reform Now v. United States*, 692 F. Supp. 2d 260, 280 (E.D.N.Y. 2010) ("Because the government's sovereign immunity prevents plaintiffs from bringing suit against the government for monetary damages for these injuries, these harms are, by definition,

irreparable.”). As a result, Red Earth cannot be returned to the position it occupied prior to the Court’s Order. Indeed, unless this Court grants the injunction pending appeal which SFTA is seeking, all of the plaintiffs, and their employees as well, will suffer irreparable harm.<sup>1</sup>

It is apparent that the status quo has been disrupted, and as time passes, the possibility of plaintiffs returning to the position they occupied prior to the partial denial of the preliminary injunction motion becomes more remote. Because of this, plaintiffs will continue to suffer irreparable harm absent the grant of the relief sought by SFTA. *See Roswell Capital Partners LLC v. Alternative Constr. Techs.*, No. 08 Civ.10647, 2009 U.S. Dist. LEXIS 7690 at \*48 (S.D.N.Y. Jan. 30, 2009) (Irreparable harm exists where a party has shown “that there is a continuing harm which cannot be adequately redressed by final relief on the merits and for which money damages cannot provide adequate compensation.”).

The Government argues that SFTA’s motion should be denied because it waited three months to file this lawsuit and was unable, within the four months since the PACT Act was passed, to initiate an alternative delivery system. *See* Dkt. 53 at 10-11.

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<sup>1</sup> In finding irreparable harm, the Court may consider the harm to the Seneca Nation community as well as harm to the plaintiffs. “In making the determination of irreparable harm, both harm to the parties and to the public may be considered.” *Long Island R. Co. v. International Ass’n of Machinists*, 874 F.2d 901, 910 (2d Cir. 1989). The Court acknowledged the existence of irreparable harm in the Order. Dkt. 45 at 7-8 (“plaintiffs have easily satisfied their burden of showing a threat of irreparable harm if injunctive relief is not granted.”).

Because of this delay, the Government contends plaintiffs are “manufactur[ing] irreparable injury . . . .” *Id.* Contrary to the Government’s assertions, this Court already found that plaintiffs were irreparably harmed because of the drastic effect the PACT Act has on their businesses. *See* Dkt. 45 at 7-8.

The Government, however, will not be harmed if it is prevented from enforcing the provisions of the PACT Act prohibiting shipment of cigarettes in the U.S. Mail. For slightly more than a month, the Government was temporarily enjoined from enforcing those provisions, and it suffered no harm whatsoever. Thus, the status quo will be preserved only by allowing plaintiffs to continue using the U.S. Mail to ship their product to their customers, at least pending the expedited appeal of the Order.

The Government’s vague assertions concerning the affect of tobacco use on public health in the United States is not compelling proof in support of its claim that it will suffer irreparable harm if the Court grants SFTA’s request for an injunction pending appeal. *See* Dkt. 53 at 12-13. Irreparable harm must be imminent, not remote or speculative. *See Grand River Enter. Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 66 (2d Cir. 2007) (“To satisfy the irreparable harm requirement, Plaintiffs must demonstrate that absent a preliminary injunction they will suffer an injury that is neither remote nor speculative, but actual and imminent, and one that cannot be remedied if a court waits until the end of trial to resolve the harm.”). The Government cannot prove a significant threat to the public if the plaintiffs are allowed to ship cigarettes in the U.S. Mail for the brief period of time it will take for the Second Circuit Court of Appeals to hear SFTA’s

pending appeal. In any event, plaintiffs still have the right to ship cigarettes; they just cannot currently use the U.S. Mail. As a consequence, the Government is unable to show that irreparable harm will befall it if the plaintiffs ship those cigarettes in the U.S. Mail as opposed to using a private delivery company.

Contrary to the Government's assertion, SFTA is not asking the Court to reverse itself or to alter its prior holding. SFTA is not seeking to relitigate the preliminary injunction motion; and, thus, the Government's arguments that SFTA's motion should be denied because it made no attempt to show that the other requirements of the PACT Act are unconstitutional are without merit. *See* Dkt. 53 at 4. SFTA seeks only to preserve the status quo pending its appeal. In that regard, Red Earth supports SFTA's contention that the PACT Act is an integrated scheme that cannot be enforced in a piecemeal fashion against the plaintiffs. *See* SFTA MOL in Support (Dkt. 50) at 9; *see also National Adver. Co. v. Niagara*, 942 F.2d 145 (2d Cir. 1991).

Indeed, at this early juncture, the Court cannot know the mind of Congress concerning the relation of the shipping provisions of the PACT Act to the other provisions of the Act. Moreover, the Act's severability clause is not dispositive of the issue. *See National Adver. Co. v. Niagara*, 942 F.2d at 148 ("The presence of such a clause, however, is not dispositive.") (citing *New York State Superfund Coalition, Inc. v. New York State Dep't of Env. Conservation*, 75 N.Y.2d 88, 94, 550 N.Y.S.2d 879, 881 (1989) (holding that objectionable sections were not severable from entire statute despite presence of a severability clause); *see also United States v. Jackson*, 390 U.S. 570, 585 n.

27, 88 S. Ct. 1209 (1968) (the ultimate determination of severability will rarely turn on the presence or absence of a severability clause). Indeed, the Supreme Court held that it “should not, for example, treat a severability clause as an invitation from the legislature to write whatever statute we can fashion from the constitutional remnants as augmented by our imagination.” *National Adver. Co. v. Niagara*, 942 F.2d at 148. At this point in the litigation, a comprehensive severability analysis is not possible. Because of the irreparable harm to plaintiffs absent an order enjoining enforcement of the PACT Act’s prohibition of shipping cigarettes in the U.S. Mail, the Court should grant the relief sought in SFTA’s application. *See, e.g., Mohammed v. Reno*, 309 F. 3d at 100.

In addition, the economic impact that the enforcement of the nonmailability provisions of the PACT Act has and will continue to have on the Seneca Nation of Indians is a cause for public concern. Businesses have stopped operating, and people have lost jobs. The public interest is served by ensuring that members of the Seneca Nation are employed. Cigarette sales constitute a major portion of the Seneca Nation’s economy, and as a result, shutting down remote purveyors that need the U.S. Mail in order to operate has a severe impact on the entire community. Absent an injunction as requested by SFTA, people will continue to be unemployed, and the Seneca Nation’s economy will be harmed. For this reason, as well as for the reasons set forth in SFTA’s memorandum of law in support of its application (Dkt. 50-2), Red Earth supports SFTA’s request for an injunction pending appeal and respectfully requests that the Court grant such relief.

**CONCLUSION**

For all the foregoing reasons, Red Earth respectfully requests that this Court grant SFTA's motion for an injunction pending appeal. Red Earth also respectfully requests such other and further relief as the Court deems just and proper.

Dated: August 9, 2010  
Buffalo, New York

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