UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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.

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.

RED EARTH'S MEMORANDUM OF LAW IN OPPOSITION TO THE GOVERNMENT'S MOTION FOR A STAY 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 opposition to the defendants' motion seeking a stay of the Court's July 30, 2010 preliminary injunction order (Dkt. 45) (the "Order"), which granted in part and denied in part Red Earth's and the Seneca Free Trade Association's ("SFTA") motion for a preliminary injunction. The Government's motion should be denied, as it has not met the standard necessary to prove entitlement to such drastic relief and has not shown that this Court abused its discretion in granting an injunction.

ARGUMENT

POINT I

THE GOVERNMENT IS NOT ENTITLED TO A STAY PENDING APPEAL

The factors underlying the issuance of a stay pending appeal under Rule 62(c) 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." *Hilton v. Braunskill*, 481 U.S. 770, 776, 107 S. Ct. 2113, 2119 (1987) (emphasis added); *see also Sampson v. Murray*, 415 U.S. 61, 90, 94 S. Ct. 937, 953 (1974) (citing *Virginia Petro. Jobbers Ass'n v. Federal Power Comm'n.*, 259 F.2d 921, 925 (D.C. Cir. 1958). "The 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 95, 101 (2d Cir. 2002) (internal citations and quotations omitted). 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.* (emphasis added) (citing *Michigan Coalition v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991)); *see also Sampson*, 415 U.S. at 90, 94 S. Ct. at 953. As a result, where the potential for irreparable harm to the moving party is slight, as it is here, it must prove a greater likelihood of success on the merits of its appeal. *See id.*

In its Order, the Court found that Red Earth demonstrated a clear likelihood of success on the merits of its Due Process claim. The Government contends that the Court was wrong. But, as the Second Circuit will review the Court's decision with deference, the Government will not succeed on its appeal. Even if the Government can show some likelihood of success on appeal, in light of the irreparable harm that Red Earth will suffer if the stay is granted, the equities weigh heavily in Red Earth's favor. The request for a stay pending appeal should be denied.

POINT II

IN THE ABSENCE OF A STAY, THE GOVERNMENT IS NOT IRREPARABLY HARMED

The Government did not show that the alleged harm will outweigh the clear harm to the plaintiffs. The Government touts that it has an interest "of the highest order" to curb demand for tobacco products. (Dkt. 48 at 10).[1] If the PACT Act were

[1] This asserted purpose is not found in the Act or in any of the Government's other arguments to date in this matter. The Act's purposes are expressly stated in the first

meant to protect the public health, it would have been an outright ban on cigarettes, which it is not. Instead, Congress enacted the statute with the purpose of creating more revenue for State and local governments and eliminating troublesome competition for Big Tobacco, and, as discussed below, for other reasons. The preliminary injunction will not prejudice the Government's ability to effectuate these purposes in the future, should it ultimately succeed on the merits of this action. This rests in sharp contrast to the harm that Red Earth most certainly will suffer should the injunction be stayed. As a result, the Government's harm argument does not withstand scrutiny. *See Sampson*, 415 U.S. at 90, 94 S. Ct. at 953.[2]

The Government repeatedly asserted in its submission that the motivation of the bipartisan supporters of the PACT Act has been to discourage the purchase of cigarettes by minors and to generally discourage the use of legal, but "dangerous and addictive," cigarettes. With respect to the first consideration, the purchase of cigarettes

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provision of the statute – curbing demand for tobacco products is not among them. The argument is a bald emotional appeal against cigarettes, which are a lawful, albeit demonized, product.

[2] It is worth noting that the case the government cited in support of its argument that it will be harmed is not dispositive. In that case, Justice Rehnquist, finding that the District Court's injunction should be stayed, made a passing remark, without authority or reasoning, that it "***seems***" that any time a State is enjoined from effectuating a statute, it suffers injury. *New Motor Vehicle Bd. of Calif. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351, 98 S. Ct. 359, 363 (1977). He went on to weigh the relative injuries and found that "absent compelling equities on the other side," the statute should remain in effect pending final decision on the merits. *Id.* at 1352. To be sure, his analysis reveals that the most important factor is the potential harm to the litigants. The harm to Red Earth (were there to be a stay of the injunction) far outweighs the harm to the Government (in the event the injunction remains in place) particularly given that plaintiffs "easily satisfied their burden of showing a threat of irreparable harm. . . ." Dkt. 45 at 8.

by minors, it is presumed that the simultaneous adoption of the age-verification procedure set forth in the PACT Act, enforcement of which has not been enjoined, adequately would serve the purpose of preventing minors from ordering and obtaining cigarettes. Otherwise, why would Congress have adopted such a procedure, if it was inadequate? Moreover, with respect to the second consideration, it is submitted respectfully that significant additional considerations factored into the adoption of the PACT Act, not the least of which was the continued receipt of settlement payments under the Tobacco Master Settlement Agreement reached between and among 46 States, several territories, and the District of Columbia in 1998 ("MSA").

This settlement was reached with the four principal tobacco companies then operating in the United States. The four tobacco companies are Brown & Williamson Tobacco Corporation, Lorillard Tobacco Company, Philip Morris Incorporated and R.J. Reynolds Tobacco Company. These four companies are referred to as the "Original Participating Manufacturers" or "OPMs." *See* MSA § II(hh), *available at* http://www.naag.org/backpages/naag/tobacco/msa/msa-pdf/. The MSA is the largest civil settlement in U.S. history and commits signatory tobacco companies to pay an estimated $200 billion to the Settling States over the first 25 years of the agreement alone, with additional payments thereafter. At the time the MSA was signed, the OPMs represented 98% of the tobacco market in the United States.[3] The four States not party to

[3] David Rees, *Arbitration to Begin This Summer in Tobacco-Agreement Dispute*, Richmond Times-Dispatch, June 13, 2010, *available at* www2.times-dispatch.com/news/2010/jun/13/TOBA-ar-123623.

the MSA – Florida, Minnesota, Mississippi, and Texas – had reached earlier, individual settlements with the tobacco companies that call for payments totaling $40 billion over 25 years.[4]

Under the terms of the MSA, Settling States must enact a "Qualifying Statute" (adhering to the Model Statute automatically satisfies this requirement) or face potential reductions in their payments from participating manufacturers if certain other conditions are satisfied.[5]

Additionally, many States have sold the proceeds entitled to be received under the MSA for a prepayment and have issued "Tobacco Bonds" to Wall Street investors to secure these payments.[6] Many of these bonds are also backed by secondary pledges of State and local revenue creating an incentive to support the tobacco industry. Both New York and California directly guaranteed their Tobacco Bond debt with general

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[4] General Accounting Office, Report GAO-01-851, Tobacco Settlement: States' Use of Master Settlement Agreement Payments (June 2001), at 3, *available at* http://www.gao.gov/new.items/d01851.pdf.

[5] *See* MSA § IX(d)(2)(B) (Settling State's payment not subject to adjustment if it had a "Qualifying Statute" (meaning a statute in the form of the "Model Statute") in force during the preceding year); *id.* at § IX(d)(2)(E) ("A 'Qualifying Statute' means a Settling State's statute, regulation, law and/or rule (applicable everywhere the Settling State has authority to legislate) that effectively and fully neutralizes the cost disadvantages that the Participating Manufacturers experience vis-à-vis Non-Participating Manufacturers within such Settling State as a result of the provisions of this Agreement.").

[6] Posting of Bob Sullivan, *Ten Years Later, Tobacco Deal Going Up In Smoke*, http://www.redtape.msnbc.com/2008/11/ten-years-later.html (November 21, 2008, 05:00 CT).

revenue in order to secure more favorable rates.[7] Thus, these Tobacco Bond States "need tobacco firms to make their payments every year because to varying degrees, they are on the hook to pay off bondholders if the cigarette companies default."[8] Additionally, "[f]ears that new tobacco litigation could undermine the settlement run so high that 36 states filed briefs in 2003 in support of the tobacco industry after it was hit with a $10 billion judgment from a lawsuit for alleged false advertising."[9] Thus, far from being disinterested protectors of the public, the Settling States receive from Big Tobacco approximately 54 cents from every pack sold, a portion of which revenue already has been sold by State politicians and guaranteed to be received by the pledge of State revenues to Wall Street investors.

As recently was published in the Richmond Times-Dispatch, "[t]he windfalls from the settlement have made marketplace allies of Big Tobacco and the states – most of which have not been using their payments for health care or to help smokers quit or to keep young people from starting to smoke."[10] In fact, a database compiled by

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[7] *Id.*; Posting of Peter C. Beller, Amina Khan and Scott Wooley, *Guidelines for Municipal Bonds Investing*, http:// http://www.forbes.com/forbes/2009/0525/100-investment-guide-09-cautionary-guide-to-munis.html (May 5, 2009, 06:00 p.m. EDT).

[8] Posting of Bob Sullivan, *Ten Years Later, Tobacco Deal Going Up In Smoke*, http://www.redtape.msnbc.com/2008/11/ten-years-later.html (November 21, 2008, 05:00 CT).

[9] *Id.*

[10] David Rees, *Arbitration to Begin This Summer in Tobacco-Agreement Dispute*, Richmond Times-Dispatch, June 13, 2010, *available at* www2.times-dispatch.com/news/2010/jun/13/TOBA-ar-123623.

the Richmond-Times Dispatch demonstrates that 51.2% of settlement funds paid to New York State went to the General Fund and not to Health, Smoking Cessation, or Youth Prevention.[11] Moreover, a 2006 General Accounting Office Study confirms that for fiscal 2005, only 32% of settlement funds were being allocated to Health Care, and a mere 5% to stop smoking efforts for both youth and adults.[12] Of the remaining funds in 2005, the GAO found 24% was provided for debt service on securitized funds (tobacco bonds), and 13% for general funds of the states.[13] These were averages of the allocations over all of the Settling States.

In a recent significant development with respect to the MSA, arbitration pursuant to the MSA will be going forward this summer with respect to payments due to the States for 2004 through 2008.[14] "Financially strapped states might have to return $1.1 billion to Big Tobacco this year, if a review finds the states aren't trying hard enough to keep a 12-year-old legal settlement from hurting the companies too much."[15] A review by the Times-Dispatch found that "[t]he states count of cigarette sales shows the major

[11] This data tracking map can be found at http://datacenter.timesdispatch.com/tobacco-settlement.html

[12] General Accounting Office, Report GAO-06-502, Tobacco Settlement: States' Allocation of Fiscal Year 2005 and Expected Fiscal Year 2006 Payments (April 2006), at 10-11, *available at* http://www.gao.gov/new.items/d06502.pdf.

[13] *Id.*

[14] David Rees, *Arbitration to Begin This Summer in Tobacco-Agreement Dispute*, Richmond Times-Dispatch, June 13, 2010, *available at* www2.times-dispatch.com/news/2010/jun/13/TOBA-ar-123623.

[15] *Id.*

manufacturers share of the market plunged after the settlement, smaller manufacturers, which had only 1 or 2 percent of the market before the settlement, now have about 15-16 percent."[16] In light of this development, Bloomberg News recently cautioned that "Cigarette Sales Drop Points to $12 Billion Tobacco Bond Defaults."[17] It noted that "[p]ayments in April by tobacco companies, owed under a 1997 settlement of state lawsuits claiming damages for health-care costs, fell 16 percent according to the National Association of Attorneys General."[18] It was cautioned further that "[b]ond defaults may come sooner than 2030 if states lose an arbitration hearing in Chicago, in which tobacco companies are seeking a $1.1 billion refund of payments. The companies claim states failed to do enough to collect payments from smaller cigarette makers who aren't part of the 1997 settlement with the states."[19]

The Tobacco Chief Counsel for the National Association of Attorneys General reported in November 2009, in an article entitled "States to Commence First Tobacco Arbitration,"[20] that:

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[16] *Id.*

[17] Michael Quint, *Cigarette Sales Drop Points to $12 Billion Tobacco Bond Defaults,* (August 6, 2010), http://www.bloomberg.com/news/2010-08-06/cigarette-sales-decline-points-to-tobacco-bond-defaults-sims-report-says.html.

[18] *Id.*

[19] *Id.*

[20] Ironically, the Attorneys General have previously rejected the contention that this matter was arbitable and have repeatedly sought to reject arbitration of this issue. *See*

> The disputes to be arbitrated pertain to the NPM Adjustment for 2003, which potentially totals approximately $1.1 billion and which would, if applied, reduce MSA revenues that were due the states in 2004. However, the arbitration could resolve underlying legal issues and create precedents for disputes over potential NPM Adjustments for 2004-2008. These potential 2004-2008 NPM Adjustments total an additional $4.1 billion.

Peter Levine, *States to Commence First Tobacco Arbitration*, 3 NAAGazette 10 (November 30, 2009), *available at* http://www.naag.org/states-to-commence-first-tobacco-arbitration.php.

> Further with respect to the issues to be addressed:
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> The arbitration will focus primarily, but not exclusively, on disputes over whether a particular prerequisite to the NPM Adjustment for 2003 has been satisfied. Specifically, if during a relevant year (2003 for purposes of this initial arbitration) a state had in full force and effect a "Qualifying Statute" and "diligently enforced" that Statute, its share of MSA revenues for that year would not be subject to an NPM Adjustment. A "Qualifying Statute" requires an NPM to escrow each year a specified sum for each of its cigarettes sold in a state during the preceding year. The escrowed sum is slightly less per cigarette than the sum the NPM would have paid per cigarette had it been an MSA signatory. For the first 25 years after the escrow deposit is made, the deposit can be released only to pay a judgment or settlement obtained by the state against the escrowing NPM. If there is no such judgment or settlement within 25 years, the deposit is released back to the NPM.
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> If a state had in full force and effect a "Qualifying Statute" and "diligently enforced" that Statute in a given year, the

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Maryland v. Phillip Morris, 944 A.D.2d 1167, 1173, n. 10 (Md. Ct. Spec. App. 2008); *New York v. Phillip Morris*, 8 NY3d 574 (2007).

> state's share of the NPM Adjustment for that year would be reallocated to those states, if any, that did not meet one of these two requirements. Under this reallocation provision, a state that did not meet one of the two requirements could potentially lose its entire year's MSA revenue. On the other hand, if all states were to meet both requirements for a given year, the PMs would receive no NPM Adjustment for that year.

Id.

It should be noted that the MSA definition of a "Qualifying Statute" requires that the statute be made applicable to:

> (ff) Actions Within Geographic Boundaries of Settling States. To the extent that any provision of this Agreement expressly prohibits, restricts or requires any action to be taken "within" any Settling State or the Settling States, the relevant prohibition, restriction or requirement applies within the geographic boundaries of the applicable Settling State or Settling States, including, but not limited to, **Indian country or Indian trust land within such geographic boundaries**.

MSA, § XVIII (ff) at 147 (emphasis added).

Insofar as the Settling States now face a potential $5.2 billion refund claim from the major tobacco manufacturers, a default on their Tobacco Bonds for which at least two States have pledged their general revenues as security, and a long-term loss of tobacco revenue from a reduction in the proportional market share of the major tobacco manufacturers, the potential explanation as to why Congress would grant a private right of action to the major tobacco manufacturers against their Native American competitors is at hand. Far from altruism, the States must protect their co-venturers in the Tobacco

trade from the competition that Internet sales represent and find some mechanism by which to reduce the potential $5.2 billion repayment that might be owed to Big Tobacco. While the Government contends that cigarettes are "dangerous and addictive," it appears that the propensity of the States to spend this settlement money can be characterized in like fashion. It is evident from the foregoing that the States have very little financial interest in discouraging smoking, especially when the cigarettes are purchased from major cigarette manufacturers.

POINT III

RED EARTH WILL SUFFER IRREPARABLE HARM IF THE COURT ISSUES A STAY

The Government argues that Red Earth will not suffer irreparable harm if tax and other generally-applicable State and local laws are enforced against it, because the Order prohibits Red Earth from using the United States Postal Service, basing its argument on the unsubstantiated assumption that Red Earth will not be able to do business even if the mail provisions remain intact. By making this argument, the Government ignores that a stay of the injunction would be utterly inconsistent with the Court's prior finding of irreparable injury. *See Rodriguez v. DeBuono*, 175 F.3d 227, 234-235 (2d Cir. 1998) ("where the order stayed involves a preliminary injunction, a principle element of which is a finding of irreparable harm that is imminent, ***it is logically inconsistent and in fact a fatal flaw***, to subsequently find no irreparable nor even serious harm to the Plaintiffs pending appeal") (emphasis added).

Assuming the Court addresses the merits, the Government's assumption should be rejected out of hand, as Red Earth has worked and continues to work tenaciously on its alternate means of delivery via privately-contracted delivery service providers. Thus, even if the nonmailability provisions were to remain in place, Red Earth intends to do business. Consequently, irreparable harm occurs if the Court issues a stay of the Order.

POINT IV

THE GOVERNMENT DID NOT DEMONSTRATE A SUBSTANTIAL POSSIBILITY OF SUCCESS ON THE MERITS OF ITS APPEAL

To the extent the Government is arguing that the Court erred in holding that Congress does not have plenary power to regulate interstate commerce, its argument will fail on appeal, because the Court made no such determination. As it has done in the proceedings to date, the Government confuses and commingles the test for Due Process contacts with the test for interstate commerce contacts. Contrary to the Government's assertion at page 2 of its Memorandum (Dkt. 48), the Court never held that Congress has no power to regulate interstate commerce.[21] Rather, the Order acknowledges Congress's authority in this regard. *See* Dkt. 45 at 10 ("Congress has plenary authority to regulate

[21] The statutes the Government cites have no bearing on the success of the present motion, because those statutes are cited to support Congress's ***commerce clause power***. We note, however, that each of those statutes is dispositively different from the PACT Act in that not one of them requires a product seller to pay State and local taxes and otherwise comply with all State and local laws relating to their products regardless of whether they have sufficient contacts with the destination jurisdictions. In addition, unlike the PACT Act, which purports to regulate the sale of cigarettes, the statutes governing firearms and explosives regulate inherently dangerous products.

the instrumentalities of commerce. . . "). Confusing Commerce Clause with Due Process jurisprudence does nothing to aid the Government's application.

The Government argues that the Court erred as a matter of law in holding that "the Due Process Clause of the Constitution does not permit Congress to require that interstate tobacco retailers comply with the laws of the states and localities into which their products are physically delivered." Dkt. 48 at 2. The Court, however, ***did not*** so hold; instead, the Order provides that it "***appear(s)*** that the PACT Act seeks to legislate the due process requirement out of the equation," and if it does, "doing so is beyond Congressional authority." Dkt. 45 at 24 (emphasis added). In other words, the Court held that Red Earth succeeded in showing a likelihood of success on the merits of its Due Process claim because it demonstrated that the PACT Act "requires remote sellers who are not physically present in a taxing jurisdiction to collect state and local excise taxes on cigarettes and smokeless tobacco *regardless of whether their existing contacts with that taxing jurisdiction rise to the level of minimum contacts necessary to satisfy due process considerations.*" (Dkt. 45 at 17) (emphasis in original). This determination is not an error of law.

As it must, the Court recognized that there is a significant difference between Congress's authority to regulate interstate commerce and its authority as measured against Due Process considerations. "[W]hile Congress has plenary power to regulate commerce among the States and thus may authorize state actions that burden

interstate commerce, *it does not similarly have the power to authorize violations of the Due Process Clause.*" Dkt. 45 at 18 (emphasis in original) (quoting *Quill Corp. v. North Dakota*, 504 U.S. 298, 305, 112 S. Ct. 1904, 1909 (1992). Seemingly ignoring this fundamental distinction, the Government argues that the PACT Act "embodies Congress's determination that remote sellers must comply" with State and local laws, and "represents Congress's judgment that compliance with state and local laws . . . is an appropriate means of regulating interstate commerce." (Dkt. 48 at 4, 6). This argument also misses the mark, because Congress's will with regard to its Commerce Clause powers – while plenary – is plainly insufficient to permit a Due Process violation.

In addition, the Government's argument that "excise taxes [that] curb in-state demand for a dangerous and addictive product" constitute a sufficient link or connection between a State and a remote seller to permit a constitutional imposition of tax (Dkt. 48 at 7) has no basis in law and verges on absurdity. A tax law cannot be the sufficient and only contact that a company has with a State or locality in order for the imposition of that law to satisfy Constitutional Due Process concerns. Here, the Government essentially argues that a State can enact a law, decree that it applies to an out-of-state entity without sufficient minimum contacts, and as a result obtain jurisdiction over that entity even if it has no other contact with the State. This circular (and unsupported) reasoning has no place in Constitutional jurisprudence.

In apparent recognition that its substantive position is lacking, the Government then argues that even if the Court's Due Process analysis were correct, there is an insufficient foundation for it, because there was no case-by-case analysis of the contacts of each and every purveyor with regard to every tobacco and other generally-applicable law of every jurisdiction into which the individual purveyor sells cigarettes or smokeless tobacco. *See* Dkt. 48 at 8-9. Even if the ultimate determination of constitutionality in this case rests on such an analysis, the Government's contention would make a preliminary injunction motion the functional equivalent of a full trial on the merits which, obviously, it is not. It defies logic and law to contend that the Court is required – on a motion for preliminary injunctive relief – to determine whether each and every plaintiff has sufficient contacts with each and every State and local jurisdiction to warrant the application of all tax and generally-applicable statutes and laws to it. *See International Molders' & Allied Workers' Local Union v. Nelson*, 799 F.2d 547, 555 (9th Cir. 1986) ("[A]n evidentiary hearing should not be held [at the preliminary injunction stage] when the magnitude of the inquiry would make it impractical") (citing *Security and Exchange Commission v. Frank*, 388 F.2d 486, 490-91 (2nd cir. 1968)); *Ross-Whitney Corp. v. Smith Kline & French Laboratories*, 207 F.2d 190, 198 (9th Cir. 1953) ("A requirement of oral testimony would in effect require a full hearing on the merits and would thus defeat one of the purposes of a preliminary injunction which is to give speedy relief from irreparable injury"); *see also Cheng v. Dispeker*, No. 94 Civ. 8716, 1995 U.S. Dist. LEXIS 2376, *8 (S.D.N.Y. 1995) (citing *Drywall Tapers and Pointers v Local 530*, 954 F.2d 69, 76 (2nd Cir. 1992)).

In light of the foregoing, it is clear that the Government has not shown a likelihood of success on appeal as it failed to show that the Court erred in determining that, to the extent the PACT Act "is broadening the jurisdictional reach of each state and locality without regard to the constraints imposed by the Due Process Clause, plaintiffs have established a clear likelihood of success on the merits of their Due Process claim. Dkt. 45 at 24.

POINT V

THE PUBLIC INTEREST IS NOT SERVED BY GRANTING A STAY

Finding that the public interest favors an injunction, this Court recognized the harmful economic impact that enforcement of the PACT Act will have on members of the Western New York community. Dkt. 45 at 39-40. The Government does not argue error in the Court's determination, but instead argues that brick and mortar cigarette purveyors also have an interest to be protected. Dkt. 48 at 10. This issue was before the Court on the preliminary injunction hearing. *See, e.g.*, Dkt. 29-34. As a result, it was taken into consideration when the Court weighed the harms as part of its preliminary injunction analysis. As this Court held, the public interest weighs in favor of protecting the economy of members of the Western New York community from collapse pending final determination of this action.

POINT VI

THE INJUNCTION IS NOT AN ABUSE OF DISCRETION

In reviewing interlocutory relief such as a preliminary injunction, a court may consider only whether issuance of the injunction constituted an abuse of discretion. *Brown v. Chote*, 411 U.S. 452, 456, 93 S. Ct. 1732, 1735 (1973). In this case, because the PACT Act presents a unique problem, and the enforcement of the Act prior to an ultimate determination of constitutionality will subject plaintiffs to criminal prosecution and substantial injury (Dkt. 45 at 17), the Court did not abuse its discretion in enjoining the Act until further evidence can be presented with regard to the novel issues presented by this case. *See Brown,* 411 U.S. at 456, 93 S. Ct. at 1735 (finding no abuse of discretion where preliminary injunction was granted on a cursory examination of the harm and the likelihood of success on the merits, and the decision was not "in any sense intended as a final decision as to the constitutionality of the challenged statute").

CONCLUSION

The Government failed to establish the necessity of a stay and did not demonstrate that the Court abused its discretion in granting the injunction. Even if the Government had demonstrated some evidence of likelihood of success on appeal, which it did not, it failed to show how it will be harmed if the injunction stands and how any such harm will outweigh the harm that the Court already determined Red Earth will sustain absent the injunction. Moreover, the Government did not show that a stay is in the public interest. Consequently, plaintiffs Red Earth LLC and Aaron J. Pierce

respectfully request that the Court deny the Government's request for stay of the July 30, 2010 Order and award to them such other and further relief as the Court deems just and proper.

Dated: August 9, 2010
Buffalo, New York

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC
Attorneys for Plaintiffs Red Earth LLC
d/b/a Seneca Smokeshop and Aaron J. Pierce

By: s/ Lisa A. Coppola
Lisa A. Coppola, Esq.
Michael T. Feeley, Esq.
Elizabeth A. Ollinick, Esq.
Kimberly A. Georger, Esq.
1600 Liberty Building
Buffalo, New York 14202
(716) 854-3400
coppola@ruppbaase.com
feeley@ruppbaase.com
ollinick@ruppbaase.com
georger@ruppbaase.com