UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

RED EARTH LLC d/b/a
SENECA SMOKESHOP et al.,

Plaintiffs,

v. Civil Action No. 10-CV-530A

UNITED STATES OF AMERICA, et al.,

Defendants.

SENECA FREE TRADE ASSOCIATION,

Plaintiff,

v.

ERIC H. HOLDER, JR., et al.,

Defendants.

SENECA FREE TRADE ASSOCIATION'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR AN INJUNCTION PENDING APPEAL

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I. PRELIMINARY STATEMENT

Plaintiff Seneca Free Trade Association ("SFTA" or "Plaintiff") moves pursuant to Federal Rule of Civil Procedure 62(c) and Federal Rule of Appellate Procedure 8(a)(1)(C) for an injunction precluding Defendants from enforcing all provisions of the Prevent All Cigarette Trafficking Act of 2009 (the "PACT Act") against SFTA and its Member Businesses pending a determination by the United States Court of Appeals for the Second Circuit regarding SFTA's appeal of the portion of this Court's Order dated July 30, 2010 ("Order") which partially denied a preliminary injunction. SFTA moves for this relief to prevent its Member Businesses from suffering irreparable harm from the enforcement of the PACT Act while SFTA awaits the Second Circuit's ruling on SFTA's appeal.

In requesting this injunctive relief, SFTA is asking the Court to return the parties to the status quo they maintained throughout the vast majority of July 2010 when the Court's Temporary Restraining Order prevented Defendants from enforcing the PACT Act, in its entirety, against SFTA. In granting SFTA's motion, in part, for a Preliminary Injunction, this Court determined that: (i) SFTA Member Businesses will suffer irreparable harm and (ii) injunctive relief is in the public interest "[i]n light of the severe economic consequences likely to befall those members of the Western New York Community." Order at 2, 40. The Court also found that SFTA demonstrated "a clear likelihood of success on the merits of their due process claim," *id.* at 2, 14-24, but the Court concluded that Plaintiffs were not likely to succeed on the merits of their Equal Protection challenge to the carve out of Alaska and Hawaii from the non-mailability provisions of the PACT Act, *id.* at 34-38. The Court, after discussing cases concerning severability of constitutionally infirm provisions, *id.* at 42, granted SFTA's motion for a preliminary injunction in part, enjoining enforcement of certain parts of the delivery seller provisions of the PACT Act pending a full trial on the merits, *id.* at 43.

The SFTA has been working tirelessly to develop an effective alternative to the United States Postal Service ("USPS") to deliver its products to consumers. Since the Preliminary Injunction was issued last Friday, and the use of the mails was no longer an option, the SFTA and its Member Businesses have continued working to obtain alternative methods for shipping their products under the terms of the Court's Preliminary Injunction.[1] However, as this Court is aware, many SFTA Member Businesses had been relying on the USPS as the exclusive means of getting their products to consumers. *See, e.g.*, Order at 8 (noting, in its discussion of irreparable harm, that "delivery sellers who rely exclusively on the United States mails to ship their products will be unable to deliver their products to their customers"). Even if many SFTA Member Businesses obtain alternative shipping methods, these methods are unlikely to immediately, if ever, fully replicate the scope of delivery services throughout the United States which were available to SFTA Member Businesses through the USPS. Consequently, these Member Businesses may be unable to reach their customers through an alternative shipping method. Further, even if SFTA Member Businesses can eventually obtain an alternative shipping method, it is unclear how many Member Businesses will be able to financially withstand a period when they have limited or no viable shipping method.

Accordingly, an injunction pending appeal is warranted because Defendants' enforcement of the mailability provisions of the PACT Act (codified at 18 U.S.C. § 1716E(a)), against SFTA will force many SFTA members out of business because they cannot use the USPS to ship the cigarettes and smokeless tobacco products they sell. *See* Order at 7-8. Time is of the essence because while awaiting a ruling from the Second Circuit on whether this Court should have preliminarily enjoined Defendants from enforcing the PACT Act in its entirety against

[1] As SFTA noted in oral argument regarding its Motion for a Temporary Restraining Order, SFTA Member Businesses are precluded from shipping their product through Federal Express and UPS. *See also* Declaration of Thomas Moll ("Moll. Decl."), Case No. 10-cv-550, Dkt. No. 7, at ¶ 31.

SFTA, many of these businesses will wither on the vine and be forced to close. This irreparable harm will not only devastate these businesses, but it also will cause "severe economic consequence" to members of the Western New York community. *See* Order at 40.

As discussed in detail below, under the standard for an injunction pending appeal – which differs from the standard governing a request for a preliminary injunction – this Court should enter an injunction pending appeal. Such an injunction would allow SFTA Member Businesses who cannot find alternative delivery means under the terms of this Court's Preliminary Injunction an opportunity to appeal the portions of the Preliminary Injunction denied by this Court while still remaining viable businesses.

II. STATEMENT OF FACTS

This litigation involves the constitutionality of the PACT Act. On July 1, 2010, SFTA moved this Court for a temporary restraining order and preliminary injunction enjoining Defendants from enforcing the PACT Act until its constitutionality could be reviewed on the merits. After a hearing on the Motion for a Temporary Restraining Order, the Court issued a fourteen-day temporary restraining order on July 2, 2010, enjoining Defendants from enforcing the PACT Act against members of SFTA. (Dkt. No. 23). The Court conducted a hearing on the preliminary injunction on July 7, 2010, and at its conclusion extended the temporary restraining order to July 30, 2010, to permit the Court time to consider the complicated issues raised in the request for preliminary injunction.

This past Friday, July 30, 2010, this Court issued a Preliminary Injunction Order converting the temporary restraining order into a preliminary injunction. Specifically, the Court enjoined Defendants from enforcing against SFTA Member Businesses the provisions of the PACT Act set forth in 15 U.S.C. § 376a(a)(3), (4) and § 376a(d). However, because the Court did not enjoin enforcement of all provisions of the Act, many of the SFTA Member Businesses

still face the threat of irreparable harm. Consequently, SFTA has filed an appeal to the Second Circuit of portions of this Court's Order.

III. ARGUMENT

A. The Legal Standard For An Injunction Pending Appeal

In deciding whether to grant a stay or injunction pending appeal, the Second Circuit has held that courts should consider the following four factors:

(1) whether the movant will suffer irreparable injury absent a stay;

(2) whether a party will suffer substantial injury if a stay is issued;

(3) whether the movant has demonstrated "a substantial possibility, although less than a likelihood, of success" on appeal; and

(4) the public interests that may be affected.

Hirschfeld v. Bd. of Elections, 984 F.2d 35, 39 (2d Cir. 1993). These factors are flexible and require a balancing of the respective equities. *See Mohammed v. Reno*, 309 F.3d 95, 101-02 (2d Cir. 2002). Indeed, as the Second Circuit has observed: "some uncertainty has developed as to the [success] factor because of the various formulations used to describe the degree of likelihood of success that must be shown." *Id.* at 100-02 (reviewing various formulations of the standard); *see also, e.g.*, *In re World Trade Ctr. Disaster Site Litig.*, 503 F.3d 167, 170, n.1 (2d Cir. 2007). The Second Circuit has, however, clearly instructed that "[t]he probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiff will suffer absent the stay. Simply stated, more of one excuses less of the other." *Mohammed*, 309 F.3d at 101-02 (quoting *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991) (in light of the gravity of harm to be suffered by movant compared to the limited injury to the Government, "the degree of likelihood of success on appeal need not be set

too high")); *see also In re World Trade Ctr. Disaster Site Litig.*, 503 F.3d at 170 (noting that "the degree to which a factor must be present varies with the strength of the other factors").

The showing of success on appeal to justify an injunction pending appeal is less than the required showing of success on the merits at the preliminary injunction stage. *See, e.g.*, *Mohammed*, 309 F.3d at 101 n.8 (noting that a district court "was properly concerned about setting too a high a standard, mindful of the fact that in such circumstances the trial judge is being asked to assess the likelihood that the ruling just made will be rejected on appeal").

This distinction is appropriate because an injunction pending appeal – particularly where the appeal is considered on an expedited basis – will only last for a brief period of time, unlike a preliminary injunction that lasts until the end of trial. *See Mohammed*, 309 F.3d at 101 n. 6 ("a preliminary injunction will last until the end of 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 a very brief interval").

Thus, this Court's decision to deny a portion of SFTA's Motion for a Preliminary Injunction should not counsel against granting the injunction pending appeal, particularly in light of the complicated legal issues presented in this matter. "Prior recourse to the initial decisionmaker [under Federal Rules of Appellate Procedure 8] would hardly be required as a general matter if [the Court] could properly grant interim relief only on a prediction that it has rendered an erroneous decision. What is fairly contemplated is that tribunals may properly stay their own orders when they have ruled on an admittedly difficult legal question and when the equities of the case suggest that the status quo should be maintained." *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844-45 (D.C. Cir. 1977); *see also Cooper v. U.S.P.S.*, 246 F.R.D. 415, 418 (D. Conn. 2007) ("even though the court is not convinced that

the Intervenor Defendants are likely to succeed, the other factors considered by the court necessitate a stay").

B. SFTA Will Suffer Immense and Irreparable Injury If Defendants Are Not Enjoined from Enforcing The PACT Act During Appeal.

In considering a request for an injunction pending appeal, great emphasis is placed on the irreparable harm that will be suffered absent the injunction. *See Suffolk Parents of Handicapped Adults v. Pataki*, 924 F. Supp. 431, 435 (E.D.N.Y. 1996) (noting that irreparable harm to movant is the "primary focus"); *Stewart Park & Reserve Coal., Inc. v. Slater*, 232 F. Supp. 2d 1, 3 (N.D.N.Y. 2002) (holding that in light of extensive irreparable harm to be suffered absent stay and injunction pending appeal, less showing of success on the merits required), injunction pending appeal vacated on other grounds upon remand of merits decision, 358 F. Supp. 2d 83 (N.D.N.Y. 2005). The irreparable harm factors weigh heavily in favor of granting an injunction pending appeal.

In its Order, the Court noted the irreparable harm SFTA Member Businesses will suffer if Defendants can enforce the PACT Act against them. *See* Order at 7-8. Although the Court has enjoined Defendants from enforcing some aspects of the PACT Act, such did not alleviate the harm SFTA Member Businesses have and will continue to suffer from Defendants' enforcement of the mailability provisions of the Act. As this Court has acknowledged, the vast majority of SFTA Member Businesses selling tobacco products depended substantially, if not entirely, on their ability to ship these products to customers through the mail. *See* Order at 8; Moll Decl. at ¶¶ 31, 35, 40. Although the SFTA and its member businesses are actively looking for an alternative means to ship their product under the terms of the Preliminary Injunction, it will take some time to fully implement these methods. Moreover, even once in place, these alternative delivery methods will not likely be able to replicate the reach of the USPS. Consequently, while

the Court's Preliminary Injunction should aid a number of SFTA Member Businesses, enforcement of the PACT Act, even for a short period of time, will leave a number of SFTA's Member Businesses unable to ship their products. *See* Moll Decl. at ¶¶ 31, 33, 35, 41. Inevitably, this will force some of these affected businesses to close their doors and lay off employees. *See id.* at ¶¶ 41, 44.[2]

In sum, Defendants' enforcement of the PACT Act's mailability provisions will have devastating consequences for many SFTA Member Businesses and the people they employ directly and/or indirectly. Such clear, irreparable harm weighs heavily in favor of enjoining the enforcement of the Act in its entirety while an expedited appeal is pending.

C. SFTA's Appeal Presents Serious Legal Questions And Has More Than A Substantial Possibility Of Success.

An injunction pending appeal is particularly appropriate where, as here, the Court is faced with serious legal questions. *See Amara v. Cigna Corp.*, 559 F. Supp. 2d 192, 222 (D. Conn. 2008) ("In light of the complexity of the issues and the weighty interests at stake, as well as the possibility that some or all of this opinion [] may be reversed on appeal, the Court believes that a stay is appropriate."); *see also Wash. Metro. Area Transit Comm'n*, 559 F.2d at 844 ("An order maintaining the status quo is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public and when the denial of the order would inflict irreparable injury on the movant. There is substantial equity, and need for judicial protection, whether or not movant has shown a mathematical probability of success").

[2] Even if some portion of the damages SFTA Member Businesses would suffer could be quantified monetarily, their injury is irreparable because it will be left without any means to recover from Defendants, who enjoy sovereign immunity. *See Little Earth of United Tribes, Inc. v. U.S. Dep't of Housing & Urban Dev.*, 584 F. Supp. 1301, 1303 (D. Minn. 1983) (because only non-monetary damages are available due to defendants' sovereign immunity status, the threat of irreparable harm absent injunction pending appeal is substantial); *see also Blum v. Schlegel*, 830 F. Supp. 712, 725 (W.D.N.Y. 1993) (Skretny, J.) (*citing United States v. New York*, 708 F.2d 92, 93 (2d Cir. 1983) ("where the defendant[s are] protected by the Eleventh Amendment which thus renders the plaintiff unable to recover monetary damages, the injury will be irreparable").

Where, as here, a plaintiff has made a substantial showing of irreparable injury, the showing of success on appeal is diminished. *See, e.g., Stewart Park & Reserve Coal.*, 232 F. Supp. 2d at 3 (absent injunction pending appeal, defendants would likely proceed with construction, which would cause irreparable harm to plaintiffs, and thus plaintiffs "do not need to demonstrate a high likelihood of success on appeal").

As this Court has recognized, SFTA's request for a preliminary injunction involved the determination of complex questions of constitutional law; complex questions on which SFTA has a substantial possibility of succeeding on appeal. Specifically, with regard to SFTA's Equal Protection claim, the exemption in the Act's mailability provision for residents of Alaska and Hawaii is not an example of permissible line drawing by Congress. Instead, in excluding only residents of Alaska and Hawaii from the Act's mailability provision, Congress impermissibly differentiated people based *solely* on geographic distinction. Several courts have held that similar geographic distinctions are impermissible. *See, e.g.*, *Williams v. Vermont*, 472 U.S. 14, 23 (1985) ("A State may not treat those within its borders unequally solely on the basis of their different residences or States of incorporation."); *Levy v. Parker*, 346 F. Supp. 897, 903-905 (E.D. La. 1972) (finding unconstitutional a statute that arbitrarily distributed funds differently across Parishes as no rational basis existed for the geographical disparity), *aff'd Parker v. Levy*, 411 U.S. 978 (1973); *Foss v. City of Rochester*, 65 N.Y.2d 247, 260, 480 N.E.2d 717 (1985) (no rational basis for imposing different taxes on similar properties due to their different locations); *see also Kahawaiolaa v. Norton*, 386 F.3d 1271, 1280 (9th Cir. 2004) ("[E]ven under rational basis review, a geographic exception to an otherwise uniform federal regulation appears problematic."). Further, in providing the exclusion for residents of Alaska and Hawaii, Congress was not acting in a permissible piecemeal fashion where it "hit an abuse which it has found, even

though it has failed to strike another." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 151 (1938). Here, Congress' favored treatment of residents of Alaska and Hawaii does not advance the purposes of the PACT Act at all, let alone in a piecemeal fashion. As such, SFTA has a substantial possibility of succeeding on its equal protection claim on appeal.

Additionally, the SFTA has a substantial possibility of success in appealing the Court's decision not to enjoin the enforcement of the PACT Act in its entirety. The Court has found that SFTA is likely to succeed on the merits of its due process challenge to the delivery seller portion of the Act. *See* Order at 24. This finding is significant because the Act is a highly integrated and comprehensive scheme governing the shipment of cigarettes and smokeless tobacco and there is no evidence before the Court at this early stage in the case that Congress would have passed the Act if portions of the scheme were unconstitutional and needed to be excised. For example, at this stage in the litigation it is speculative that Congress would have enacted the other provisions of the highly integrated delivery sales portion of the Act if not all the delivery sales provisions could be enforced. Consequently, at this early stage of the litigation where there is no record on whether Congress would have enacted the Act without the constitutionally infirm provisions, the Court should not permit Defendants to enforce any aspect of the Act against SFTA Member Businesses. *See Feed The Children, Inc. v. Metro. Gov't of Nashville & Davidson Cnty.*, 330 F. Supp. 2d 935, 946 n. 6 (M.D. Tenn. 2002) (granting preliminary injunction and declining "Defendants' invitation to 'sever' any unconstitutional provisions of the Charitable Solicitations Ordinance and leave the rest of the ordinance intact"); *Café Erotica/We Dare to Bare/Adult Toys/Great Food/Exit 94, Inc. v. St. Johns Cnty.*, No. 01-cv-J-25TJC, 2001 WL 34107041, at *2 (M.D. Fla. May 8, 2001) ("Consequently, because there has been no finding on the merits of this case as of yet, the Court declines to modify the preliminary injunction to state that the severance

provision of the sign ordinance has gone into effect."); *cf. Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 687 (1987) (severing constitutionally infirm provision where there was "abundant" evidence in the legislative history that Congress wanted unconstitutional provisions severed).

Accordingly, because in considering a motion for an injunction pending appeal, "[t]he probability of success [on appeal] that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiff will suffer absent the stay [and injunction pending appeal]," *Reno*, 309 F.3d at 101-02, SFTA's burden of establishing the possibility of success on appeal is relatively light considering the irreparable harm its Member Businesses face is so severe. As such, SFTA clearly satisfies this factor for injunctive relief.

D. The Government And The Public Will Not Suffer Substantial Injury If The Limited Injunction Is Granted; Indeed The Public Will Be Substantially Harmed If An Injunction Pending Appeal Is Not Granted

Where "a party sues a government entity to enjoin the enforcement of a law or regulation, the third factor – the defendants' interest – and the fourth factor – the public interest – largely overlap." *N.Y. State Rest. Ass'n v. N.Y. Bd. of Health*, 545 F. Supp. 2d 363, 369 (S.D. N.Y. 2008) (denying stay of enforcement pending appeal but ordering an interim stay to permit plaintiff to request relief from the Second Circuit). As noted above, the Court has already found that the public interest favors staying enforcement of the Act in light of the harm that will be inflicted on Western New York if SFTA Member Businesses are forced to close. *See* Order at 40 ("In light of the severe economic consequences likely to befall those members of the Western New York community, public interest favors staying enforcement pending further litigation of plaintiffs' claims."). Additionally, the public interest tips the balance further in favor or granting the injunction pending appeal as the public has a strong interest in preventing constitutional infringements as well as resolving the complicated issues of law presented on appeal. *See, e.g., Nat'l Treasury Emps. Union v. Dep't of Treasury*, 838 F. Supp. 631, 640 (D.D.C. 1993) ("the

public may be deemed to have an overriding interest in assuring that the government remains within the limit of its constitutional authority").

Additionally, granting an injunction pending appeal will not harm Defendants. Specifically, there is no evidence that allowing SFTA to mail their products during the period the TRO was in effect unduly burdened or harmed Defendants. Accordingly, returning to this status quo while the appeal is pending likewise will not cause Defendants undue harm. *See VIP of Berlin, LLC v. Town of Berlin*, 644 F. Supp. 2d 151, 167 (D. Conn. 2009) (finding no irreparable harm to Defendants where injunction is limited to enforcing ordinance against Plaintiff and does not render ordinance inoperative), *rev'd on other grounds*, 593 F.3d 179 (2d. Cir. 2010). Thus, the third and fourth factors to consider in deciding whether to grant an injunction pending appeal heavily weigh in favor of granting SFTA's Motion.

IV. CONCLUSION

As demonstrated above, the balance of equities strongly favors granting the injunction pending appeal to allow the Second Circuit to review the portion of this Court's decision denying, in part, a preliminary injunction. *See Cooper*, 246 F.R.D. at 418-19 (granting a stay where the case involved a "thorny" constitutional issue and "preservation of the status quo during the pendency of the Intervenor Defendants' appeal [was] warranted"). Thus, SFTA respectfully requests that the Court issue an order enjoining Defendants from enforcing the PACT Act against SFTA and its Member Businesses while the Second Circuit considers SFTA's appeal of the partial denial of the preliminary injunction.

Dated: Buffalo, New York
August 6, 2010

Respectfully submitted,

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