

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X  
JONATHAN K. SMITH, a member of the  
Shinnecock Indian Nation,

Plaintiff,

- against -

VINCENT FREDRICO, in his individual and  
official capacity as Patrol Officer, Suffolk County  
Police Department,  
ROBERT TROTTA, in his individual and official  
capacity as Detective, Suffolk County Police  
Department, and  
JOHN DOES 1-10,

Defendants.  
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**PLAINTIFF'S MEMORANDUM  
OF LAW IN SUPPORT OF  
MOTION FOR PRELIMINARY  
INJUNCTION**

Case No.:

Hon.

**I. INTRODUCTION**

Jonathan K. Smith, plaintiff, an on-reservation Shinnecock Indian Medicine Man and businessman, doing business as Shinnecock Smoke Shop and Shinnecock Trucking Co., seeks damages, and temporary and permanent injunctive relief directing an accounting and return of all cash and cigarettes seized by the defendants on July 21, 2012, from plaintiff, arising from an off-reservation vehicle stop in Suffolk County, during a legitimate and documented transport of tobacco products from a distributor in South Carolina to the Shinnecock Indian Reservation. Plaintiff funds his spiritual activities in part from his Tribal business pursuits. Plaintiff contends he was targeted for the stop on the basis of his membership in the Shinnecock Indian racial class of persons and to interfere with legitimate Shinnecock trading. Plaintiff's twelve count verified complaint, in summary, alleges 1) lawful transport of tobacco products under New York Tax

Law Art. 20, §481(2)(b), which provides an exemption from the imposition of New York State tobacco tax for common or contract carriers, 2) preemption of state law under 49 U.S.C. § 14501(c)(1), 3) breach of the Indian Religious Freedom Act of 1978, 42 U.S.C. § 1996, 4) violation of civil rights under 42 U.S.C. §§ 1982, 1983, 1985, and 1986, 5) violation of the treaty guarantee of free trade under the terms of Appended Article 3, of The Fort Albany Treaty, 1664, and 6) the assertion of law exceeds Congressional power to regulate the Shinnecock under Art. I, Sec. 8, Cl. 3 of the U.S. Constitution. Statutory disbursements, costs, expert fees, and attorney's fees are sought for the civil rights claims under 42 U.S.C. § 1988(b).

This motion is supported by the verified complaint and annexed exhibits, and the instant memorandum of law in support.

## **II. STATEMENT OF FACTS**

Plaintiff's verified complaint, and annexed Exhibits A-M, are incorporated by reference as if fully and completely stated herein.

Smith is a member of the Shinnecock Nation and his traditional spiritual activities as a spiritual leader, or Medicine Man, are self-funded from Smith's operation of his Shinnecock business interests. This includes use of funds from Smith's personal and business bank accounts. Smith's assets are used, to, among other things, 1) purchase materials for prayer ceremonies in the Sweat Lodge, including coverings, wood, and food; 2) purchase materials for prayer flags 3) purchase medicines not easily obtainable in the wild, including travel to other Indian reservations, 4) purchase food for Indians who come to his home seeking help, 5) fund the annual Labor Day Weekend Shinnecock Nation Powwow, 6) fund the Shinnecock Indian Youth Council, 7) fund the Shinnecock Presbyterian Church, 8) fund World Peace and Prayer Day, Wounded Knee Memorial Ride, and other spiritual activities of spiritual leader, Chief Arvol

Looking Horse, of the Sioux Nation, Sioux Cheyenne River Reservation, and 9) fund annual Sun Dance spiritual ceremonies at the Standing Rock Reservation, Cheyenne River Reservation, and Yankton Sioux Lake Andes Reservation. (Compl., ¶ 9)

Smith's spiritual activities are, in part, directed at helping Shinnecock and other Indian peoples heal and overcome the personal and spiritual difficulties which have and continue to afflict them due to being victimized on their aborigine homeland over the last 400 years. The well documented experience of the Shinnecock in particular, and the Native American experience in general, through the killing, the taking of homelands, and the removal of children from families, at the hands of the Crown of England, and later the present United States of America, constituted what has been outlawed as the international criminal offense of genocide since 1948 under the U.N. Convention on the Prevention and Punishment of the Crime of Genocide. (Compl., ¶¶ 10-12)

The so-called "*final consolidation*" of Native Americans, articulated by Thomas Jefferson in 1803, ("*we have only to shut our hand to crush them*") was legally empowered by an 1831 Supreme Court decision characterizing sovereign Indian Nations as "domestic dependent nations" and Congress having power over Indian Tribes under the commerce clause, rather than foreign nations and Congress having a limited power to regulate trade *with* Indian Tribes as the commerce clause truly and plainly provides. *The Cherokee Nation v. The State of Georgia*, 30 U.S. 1, 5 Pet. 1, 8 L.Ed. 25, 1831 WL 3974 (1831)(C.J. Marshall) The genocide empowered by this decision, perpetuated today, would not, and is not, permitted by a true and plain interpretation of the U.S. Constitution. Smith urges Justice Thompson's detailed 31 page dissenting opinion finding tribes as "foreign nations" in *Cherokee Nation*, joined by Justice Story, to be adopted. (Compl., ¶¶ 69-74)

This position is buttressed by the backdrop of world opinion in support of aborigine rights, including treaty and religious rights, as expressed in the 2007 U.N. Declaration on the Rights of Indigenous Peoples. (Compl., ¶¶ 14-17) Besides other claims, Smith asserts the Indian Religious Freedom Act of 1978, 42 U.S.C. § 1996, (Compl., ¶¶ 47-49), and asserts his aborigine treaty rights under The Fort Albany Treaty, 1664, (Compl., ¶ 13, 58-60), and as civil rights deprivations. (Compl., ¶¶ 64).

Now turning to the actions of the defendants which gave rise to the present case.

### **The targeted Shinnecock stop**

At approximately 8:30 a.m. on Saturday, July 21, 2012, on behalf of his sole proprietorship, Shinnecock Trucking Co., Smith was driving a 16' Budget rental truck, with U.S. Department of Transportation registration number USDOT 1092543 affixed to the vehicle, East-bound on I-495 at or near Hauppauge, New York. This location is near the 4<sup>th</sup> Precinct of the SCPD, and approximately 45 miles from the Shinnecock Indian Reservation. Isaac Rashad, ("Rachad"), who is black, was the sole passenger. Both had a suitcase in the truck cab. Smith was near the end of a commercial delivery transporting a legitimate and documented load of cigarettes destined for the Shinnecock Indian Reservation, purchased by and belonging to, his sole proprietorship, Shinnecock Smoke Shop, from Palmetto Wholesale Tobacco Distributors LLC in Charleston, South Carolina. (Compl., ¶ 18)

Smith was pulled over by Ofc Fredrico and another unknown Suffolk County patrol officer in a marked patrol car. Ofc Fredrico asked if Smith "was alright", and Ofc Fredrico claimed that he "had received reports of the vehicle swerving all over the road". Smith denied he was swerving. Later, when Ofc Fredrico was questioned by Rashad about the reason for the stop, Ofc Fredrico recanted this assertion and said that actually, Det. Trotta had earlier "called" him "to help with the stop." This indicates the stop was planned and targeted ahead, and Ofc. Fredrico's stated reason to Smith for the stop was intentionally fictitious. Smith and Rachad objected to each of the ensuing searches and seizures. (Compl., ¶ 19)

### **The false arrest**

Det. Trotta exited from an unmarked vehicle, came up to Smith's drivers door, physically grabbed Smith by the arm, grabbed Smith's cell

phone out of his hand, and pulled Smith from the vehicle. Det. Trotta said to Smith "OK, out of there. You're running cigarettes." Smith told Det. Trotta there was nothing illegal in the truck. (Compl., ¶ 20)

**The warrantless search of the vehicle's cab**

Det. Trotta stated he "was going to search the truck." Det. Trotta did not have a search warrant. Smith objected, saying "I do not give my permission for you to search the vehicle." Det. Trotta's response to Smith's objection was, "I don't give a fuck." Smith objected again, going over and saying to Ofc. Fredrico "I want you to know, you do not have my permission to search the vehicle." Ofc. Fredrico's response to Smith's objection was to shrug his shoulders. (Compl., ¶ 21)

The truck cargo door was locked with a Master key lock. Det. Trotta said he was going to search for the key. Smith and Rashad objected. (Compl., ¶ 22)

**The warrantless search of Smith's person**

Ofc. Fredrico started to pat down Smith, and Smith pulled out his wallet, and pulled out his pockets to show they were empty. (Compl., ¶ 23)

**The warrantless search of Smith's suitcase**

Det. Trotta opened and searched Smith's suitcase, and removed nothing. (Compl., ¶ 24)

**The warrantless search of Rashad's suitcase and seizure of \$200 from Rashad's wallet**

Over Rashad's objection, Det. Trotta removed and opened Rashad's suitcase. Det. Trotta searched Rashad's suitcase, and removed Rashad's wallet from the suitcase, removed \$200 from Rashad's wallet, and kept the money without providing any receipt. (Compl., ¶ 25)

**The warrantless search of Smith's bank bag and seizure of Smith's shipping documents, approximately \$34,623 in cash, and key**

Inside Rashad's suitcase, Det. Trotta removed Smith's bank bag, and searched it. Det. Trotta removed Smith's shipping documents, approximately \$34,623 in cash, and a key from the bank bag. The bag contained Shinnecock Smoke Shop cash and the Shinnecock Smoke Shop and Shinnecock Trucking Co. transportation documents, invoices, the bill of lading, and the South Carolina and North Carolina wholesale tobacco

licenses for the seller, Palmetto Wholesale Tobacco Distributors LLC. South and North Carolina do not affix tax stamps on cigarette products after taxes are paid are paid by distributors. Det. Trotta later removed these items from the bag at the 4<sup>th</sup> Precinct; kept the cash and returned the transportation documents. (Compl., ¶ 26)

**The warrantless search of Smith's locked cargo area and seizure of cigarettes**

Det. Trotta used the key removed from Smith's bank bag, unlocked the locked cargo area of the truck, and removed and opened a carton of cigarettes, and stated "I thought you said there was nothing illegal inside" pointing to cigarettes which did not contain a tax stamp. Smith pointed out that taxes were paid to North Carolina and South Carolina, and those states do not use tax stamps. (Compl., ¶ 27)

Det. Trotta said "we can do this two ways; I arrest you now or we make an appointment." Smith replied "[l]et's make an appointment." John Doe #1 drove the truck to the defendants' 4<sup>th</sup> Precinct. Det. Trotta drove Smith. Ofc. Fredrico drove Rashad. It was during this drive that Ofc. Fredrico recanted the fiction for the stop to Rashad. (Compl., ¶ 28)

At the 4<sup>th</sup> Precinct, Smith explained the Shinnecock shipping documents showed the cigarettes were a Shinnecock transaction, that taxes were paid to North Carolina and South Carolina, which do not use a tax stamp, and the cigarettes were only enroute through New York State to the destination of the Shinnecock Indian Reservation. Det. Trotta said he "had never seen this before" and "everything looked legitimate." Det. Trotta handed Smith's shipping documents back to him. Det. Trotta said he "would need to talk Monday to the Suffolk County District Attorney's Office and let them decide what to do." (Compl., ¶ 29)

Smith produced and showed his Shinnecock Indian Identification card issued by the United States Bureau of Indian Affairs, Department of the Interior, to Det. Trotta, and in response, Det. Trotta stated "Oh yea, you guys are federal now. I hear the State is out to screw you guys on that casino deal." (Compl., ¶ 30)

Det. Trotta read *Miranda* rights to Smith. Det. Trotta wrote out a statement for Smith and instructed him to sign it. (Compl., ¶ 31)

Over their objections, Det. Trotta instructed Smith and Rashad to pose for digital pictures while holding a package of cigarettes in front of the truck. (Compl., ¶ 32)

Without completely counting the property he seized, Det. Trotta ambiguously described the property as “aprox \$34,623 in cash” and “aprox 2,100 cartons of cigarettes Various Brands”, according to a document titled “General Receipt” he gave to Smith. The Receipt refers to “finders” and appears to be a lost and found receipt for items the public turns into the police department. (Compl., ¶ 33)

Det. Trotta wrote a SCPD central complaint number on the Receipt, “CC# 12-452672”. Upon information and belief, because of the high number of digits after the year, this is not a true central complaint number, but fictitious. (Compl., ¶ 34)

No receipt was given to Rashad for the \$200 seized from his wallet by Det. Trotta. (Compl., ¶ 35)

No arrest was made and no tickets were issued. No allegation was made of any New York law violation. (Compl., ¶ 36)

John Does, 1-10, identities unknown, assisted in the planning and execution of the search and seizure and the processing of Smith’s property. (Compl., ¶ 37)

Det. Trotta, Ofc. Fredrico, and John Does 1-10, did conspire together prior to the stop to deprive Smith of his property, and to deprive Smith of his right to be free of unreasonable search and seizures, and of the equal protection of the laws, on the basis of his racial identity as a Shinnecock Indian. (Compl., ¶ 38)

As of the present date, the defendants have not returned the seized Shinnecock property, or made any allegation of any legal violation. (Compl., ¶ 39)

The Bill of Lading indicated the carrier (Smith’s “Shinnecock Trucking Co., 4 Old Point Road, Southampton, NY 11969”), quantity (“3 Pallets”), source (“Palmetto Wholesale Tobacco, 6650 Rivers Ave, North Charleston, SC 29406”), and destination (Smith’s “Shinnecock Shop, Shinnecock Territory, Southampton, NY”). The condition of sale on the Bill of Lading indicated: “These goods were sold to the buyer who took title to these goods for delivery only to the buyer on Shinnecock Indian Territory, a Sovereign Indian Territory”. (Annexed hereto as Exhibit A)

Palmetto Wholesale Tobacco Distributors LLC, is a registered wholesale distributor with the State of South Carolina. (Annexed hereto as Exhibit B)

### III. ANALYSIS

#### **Standard for Injunctive Relief**

The moving party seeking injunctive relief under Fed. R. Civ. P. 65(a) must generally show 1) irreparable harm, and 2) either (a) a likelihood of success on the merits or b) sufficiently serious questions going to the merits of its claims to make them fair ground for litigation, plus a balance of the hardships tipping decidedly in favor of the moving party. *Monserate v. New York State Senate*, 599 F.3d 148, 154 (2d Cir. 2010). However when the relief sought is enjoining a government statute or regulation, the party must show irreparable harm and a likelihood of success on the merits. *Id.* The moving party must also show the relief sought is in the public interest. *Winter v. Natural Res. Defense Council, Inc.*, 555 U.S. 7, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008).

Irreparable harm is a harm for which “a monetary award cannot be adequate.” *Jackson Dairy Inc. v. H.P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979). The movant must show the injury to be “actual and imminent” and not “remote or speculative.” *Grand River Enterprise Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 66 (2d Cir. 2007). “When an alleged deprivation of a constitutional right is involved, ... no further showing of irreparable injury is necessary.” *Mitchell v. Cuomo*, 718 F.2d 804 (2d Cir. 1984).

#### **Exemption under New York Tax Law, Art. 20, §481(2)(b)**

Count I is against Robert Trotta, Vincent Fredrico, and John Does 1-10, contending application of an exemption under New York Tax Law, Art. 20, §481(2)(b) for carriers. (Compl., ¶¶ 40-42)

Inasmuch as Det. Trotta, Ofc. Fredrico, and John Does 1-10 sought to enforce New York Tax Law Art. 20, §471 against Smith, which imposes an excise tax on cigarettes and other tobacco products, §481(2)(b) provides an exemption for common or contract carriers if they are “engaged in lawfully transporting ... unstamped packages of cigarettes as merchandise.”

NYTL §471(1) provides, in pertinent part:

There is hereby imposed and shall be paid a tax on all cigarettes possessed in the state by any person for sale, except that no tax shall be imposed on cigarettes sold under such circumstances that this state is without power to impose such a tax, including sales to qualified Indians for their own use and consumption on their nations’ or tribes’ qualified reservation.... The tax imposed by this section is imposed on all cigarettes sold on an Indian reservation to non-members of the Indian nation or tribe and non-Indians and evidence of such tax shall be by means of an affixed cigarette tax stamp.... It shall be presumed that all cigarettes within the state are subject to tax until the contrary is established, and the burden of proof that any cigarettes are not taxable hereunder shall be upon the person in possession thereof.

Common or contract carriers are exempt from the possession presumption if they are “engaged in lawfully transporting ... unstamped packages of cigarettes as merchandise.” NYTL § 481(2)(b). *HCI Distribution, Inc. v. New York State Police, Troop B Commander, Ray Brook, et al*, Decision & Order, p. 9, June 18, 2012, Index No. 138276 (St. Lawrence County New York Supreme Court (Annexed hereto as Exhibit C)

Not only were the shipping documents in the vehicle and produced at the time of the stop, but Det. Trotta admitted the shipping documents “looked legitimate.”

For these reasons, the presumption of possession of un-stamped cigarettes was inapplicable. It was the racial animus of the defendants prompting the stop, and the resulting seizure.

**Preemption under federal law, 49 U.S.C. § 14501(c)(1)**

Count II against Robert Trotta, Vincent Fredrico, and John Does 1-10, contends application of PHL 1399-II(1), (2) is preempted under federal law, 49 U.S.C. § 14501(c)(1). (Compl., ¶¶ 43-44)

Inasmuch as Det. Trotta, Ofc. Fredrico, and John Does 1-10 sought to enforce New York PHL 1399-II(1), (2), said provisions are invalid and unenforceable as preempted by the Federal Aviation Administration Authorization Act of 1994, 49 U.S.C. § 14501(c)(1), which provides that “[A] State ... may not enact or enforce a law related to a price, route, or service of any motor carrier ... with respect to the transportation of property.” *Rowe v. New Hampshire Motor Transport Association*, 552 U.S. 364 (2008).

In *Rowe*, two provisions of a Maine tobacco law, similar to 1399-II, were held invalid as preempted by 49 U.S.C. § 14501(c)(1). *Rowe*, 552 U.S. at 377. Maine adopted An Act To Regulate the Delivery and Sales of Tobacco Products and To Prevent the Sale of Tobacco Products to Minors, 2003 Me. Acts p. 1089. The two Maine provisions invalidated were 1) a prohibition that only a Maine licensed tobacco retailer may accept an order for delivery of tobacco, (Me.Rev.Stat. Ann., Tit. 22, § 1555-C(1)), and a requirement that the retailer must utilize a delivery service that provides a special kind of recipient verification service (“the Maine recipient verification provision”) (Me.Rev.Stat. Ann., Tit. 22, § 1555-C(3)(C)), and 2) a prohibition for any person to knowingly transport a tobacco product to a person in Maine unless either the sender or receiver has a Maine license, and a deemed to know presumption that the package contains tobacco based on packaging markings or the sender is on a list of un-licensed retailers that the Maine Attorney General distributes to delivery companies (“the Maine deemed to know provision”) (Me.Rev.Stat. Ann., Tit. 22, § 1555-D)). *Rowe*, 552 U.S. at 368-69.

The Supreme Court held that these two provisions were preempted by 49 U.S.C. § 14501(c)(1), which provides that “[A] State ... may not enact or enforce a law related to a price, route, or service of any motor carrier ... with respect to the transportation of property.” *Rowe*, 552 U.S. at 372.

1399-II(1), (2) are substantively the same as the Maine recipient verification and deemed to know provisions struck down in *Rowe*, because these laws prohibit residential deliveries of tobacco products by regulating the service of carriers.

For these reasons, the imposition of 1399-II(1), (2), or any other state law purporting to regulate the service of the carrier, Shinnecock Trucking Co., is preempted by 49 U.S.C. § 14501(c)(1).

#### **Violation of the Indian Religious Freedom Act of 1978**

Count III against Robert Trotta, Vincent Fredrico, and John Does 1-10, alleges violation of the Indian Religious Freedom Act of 1978. (Compl., ¶¶ 45-47)

Smith alleges violation of the Indian Religious Freedom Act of 1978, 42 U.S.C. § 1996, (“IRFA”), by the defendants’ seizing assets of Smith.

Section 1996 provides:

On and after August 11, 1978, it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

The defendants failed the statutory policy of the United States under IRFA. Smith’s traditional spiritual activities rely upon funding from Smith’s Tribal business pursuits, such as that of Shinnecock Smoke Shop and Shinnecock Shipping Co. The targeting by the defendants of

Smith's businesses fails to preserve and protect his inherent right to exercise his traditional religion, and destroys Smith's ability to exercise that freedom.

The link between income and the freedom of religion is shown by the government's own use of numerous federal income tax exemptions contained in the Internal Revenue Code, so that religious activities may not be taxed. *E.g.* Exclusion of ministerial earned income. *See*, 26 U.S.C. § 1402(e). Exclusion of ministerial services from the definition of a trade or business. *See*, 26 U.S.C. § 1402(c)(4). Exempt organizations. *See*, 26 U.S.C. § 501(c)(3). Charitable donations. *See*, 26 U.S.C. 170.

For these reasons, the defendants violated 42 U.S.C. § 1996.

**Civil rights actions for 4<sup>th</sup> Amendment violations under 42 U.S.C. § 1983**

Counts IV, V, VI and VII against Robert Trotta contends the search and seizures by Det. Trotta without an arrest warrant was in violation of the Fourth Amendment to the federal constitution, and a violation of 42 U.S.C. § 1983, to wit: the grabbing of Smith's arm and forced removal from the vehicle, the removal and search of Smith's suitcase the vehicle, the search and seizure of contents of Smith's bank bag, and the search of the locked cargo area of Smith's vehicle and seizure of contents, respectively. (Compl., ¶¶ 48-55)

Section 1983 provides:

Every person who, under color of any statute ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...

"[Section] 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'" *Graham v. Connor*, 490 U.S. 386,

393-94, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) (citing *Baker v. McCollan*, 443 U.S. 137, 144 n. 3, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979)). “To prevail on a § 1983 claim, a plaintiff must establish that a person acting under color of state law deprived him of a federal right.” *Thomas v. Roach*, 165 F.3d 137, 142 (2d Cir.1999).

The Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

“The Fourth Amendment’s search and seizure provisions are applicable to [state] defendants through the Fourteenth Amendment’s Due Process Clause.” *Tenenbaum v. Williams*, 193 F.3d 581, 602 n. 14 (2d Cir.1999 (citing *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961))).

It is well established that “[w]arrantless searches ‘are per se unreasonable under the Fourth Amendment-subject only to a few specifically established and well delineated exceptions.’” *United States v. Howard*, 489 F.3d 484, 492 (2d Cir.2007)(quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971)). Here, no exception applies.

In the case at bar, the defendants did not have a warrant. Therefore, the per se unreasonable standard applies. The regard that Det. Trotta had for the warrant requirement of the Fourth Amendment, in his own words in response to Smith’s objection was “I don’t give a fuck”.

The stopping officer, Ofc. Fredrico, admitted that the real reason for the stop the vehicle was a request ahead of time by Det. Trotta. Therefore, there was no basis for the initial stop of the vehicle. Thereafter, after Smith was dragged out of the vehicle by the arm, he registered

objections to the searches by Det. Trotta. Det. Trotta even admitted that the shipping documents “looked legitimate”. Smith’s explanation that North and South Carolina do not use tax stamps easily explained the lack of tax stamps, even though no explanation was necessary. There simply was no reason to pull over Smith’s vehicle. Once pulled over, there was no reason to pull Smith from the vehicle. And there was no reason to conduct any search. And at the end of the day, mysteriously disappeared into a black hole with a fictitious control number affixed to an un-itemized receipt.

There was an illegal reason though. Smith’s race as a Shinnecock Indian. Det. Trotta derisively referred to Smith as “oh yea, you guys are federal now”, when shown Smith’s BIA identification. Det. Trotta knew Smith was Shinnecock ahead of the stop. Det. Trotta planned ahead and knew he was going to search and seize Smith’s property ahead of the stop. And nothing was going to stop Det. Trotta. Not Smith sitting in his vehicle. Not objections by Smith. Not any Shinnecock shipping documents. And not the Fourth Amendment.

When Smith turned to Ofc. Fredrico for help in stopping Det. Trotta’s illegal searches, a shrug of the shoulders from Ofc. Fredrico was all Smith got in return. “It is widely recognized that all law enforcement officials have an affirmative duty to intervene to protect the constitutional rights of citizens from infringement by other law enforcement officers in their presence.” *Anderson v. Branen*, 17 F.3d 552, 557 (2d Cir.1994). Thus, “an officer who fails to intercede is liable for the preventable harm cause by the actions of the other officers where that officer observes or has reason to know ... that any constitutional violation has been committed by a law enforcement official, see *O’Neill v. Krzeminski*, 839 F.2d [9, ¶ 11 [(2d Cir.1988)].” *Id.*

For the above reasons, the defendants deprived Smith of his Fourth Amendment rights, and are liable to Smith under Section 1983.

**Violation of the Fort Albany Treaty, 1664**

Count VIII against Robert Trotta, Vincent Fredrico, and John Does 1-10 alleges violation of the Fort Albany Treaty, 1664. (Compl., ¶¶ 56-58)

A seizure under color of imposition of a New York State tax law violates the free trade provision of Appended Article 3, of *The Fort Albany Treaty, 1664*, (“Articles between Col. Cartwright and the New York Indians,” *Documents Relative to the Colonial History of the State of New York*, III, pp. 67-68) (“the Treaty”). Appended Article 3 to the Treaty provides:

That they may have *free trade*, as formerly. [emphasis added]

Any tax, or other restriction or payment, on Shinnecock property in trade is contrary to this free trade provision, as the Indians would have understood the provision at the time of execution of the Treaty. “The Indians would have understood the term “free trade” to mean free from restrictions or payments in any form.” (Decl. of Dr. John A. Strong, ¶ 16, annexed to the Compl. as Exhibit H.)

**Civil rights action for deprivation of property rights under 42 U.S.C. § 1982**

Count IX against Robert Trotta, Vincent Fredrico, and John Does 1-10 is a civil rights action for deprivation of property rights under 42 U.S.C. § 1982. (Compl., ¶¶ 59-62)

42 U.S.C. § 1982 provides:

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

The defendants violated 42 U.S.C. § 1982 in two ways.

First, Smith contends the defendants’ interference with, and search and seizure of, Smith’s personal property, on the basis of his membership in a Shinnecock Indian class of

persons, violates Smith's right to purchase, hold, sell and convey his personal property in violation of § 1982.

Second, Smith's exercise of his Shinnecock aboriginal trading rights under the Free Trade Clause, Appended Article 3, of the Fort Albany Treaty, 1664, are property rights within the meaning of § 1982, and the interference and deprivation of said rights by the defendants violates § 1982. *See, Lac du Flameau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wisconsin, Inc.*, 79 F.Supp. 1339, 1350 (W.D.W. 1991)

**Civil rights action for conspiracy to interfere with civil rights, 42 U.S.C. § 1985**

Count X alleges Robert Trotta, Vincent Fredrico, and John Does 1-10 engaged in an illegal conspiracy to interfere with civil rights in violation of 42 U.S.C. § 1985. (Compl., ¶¶ 63-65)

Specifically, Det. Trotta, Ofc. Fredrico, and John Does 1-10 did, in violation of 42 U.S.C. § 1985(3), conspire with another for the purpose of depriving, either directly or indirectly, Smith as a member of the Shinnecock Indian class of persons, of the equal protection of the laws, and of equal privileges and immunities under the laws.

Ofc. Fredrico, admitted that the real reason for the stop the vehicle was the phone call ahead of time by Det. Trotta. It was this phone call between the defendants establishing the conspiracy to interfere with Smith's civil rights.

There was no basis for the initial stop of Smith other than Smith's Shinnecock race, and the conspirators knew it ahead of time. There was no basis for removal of Smith from the vehicle other than Smith's Shinnecock race, and the conspirators knew it ahead of time. There was no basis other than Smith's Shinnecock race for seizure of Smith's property, and the conspirators knew it ahead of time.

For these reasons, the defendants are liable for violation of 42 U.S.C. § 1985.

**Civil rights action for neglect to prevent, 42 U.S.C. § 1986**

Count XI is a claim that Det. Trotta, Ofc. Fredrico, and John Does 1-10, did, in violation of 42 U.S.C. § 1986, with knowledge of the wrongs conspired to be done at the request and instruction of Det. Trotta, were about to be committed, and having power to prevent or aid in preventing the commission of same, neglected or refused to do so, to Wit: Neglecting or refusing to prevent, with knowledge of a conspiracy to deprive, either directly or indirectly, Smith as a member of the Shinnecock Indian class of persons, of the equal protection of the laws, and of equal privileges and immunities under the laws. (Compl., ¶¶ 65-66)

Ofc Fredrico could have stopped the conspiracy he was part of to violate Smith's civil rights on at least two occasions. First, by refusing to stop Smith at the request of Det. Trotta. Second, when Smith turned to Ofc. Fredrico for help in stopping Det. Trotta's illegal searches, and received a shrug of the shoulders from Ofc. Fredrico in return. "It is widely recognized that all law enforcement officials have an affirmative duty to intervene to protect the constitutional rights of citizens from infringement by other law enforcement officers in their presence." *Anderson v. Branen*, 17 F.3d 552, 557 (2d Cir.1994). Thus, "an officer who fails to intercede is liable for the preventable harm cause by the actions of the other officers where that officer observes or has reason to know ... that any constitutional violation has been committed by a law enforcement official, *see O'Neill [v. Krzeminski]*, 839 F.2d [9,] 11 [(2d Cir.1988)]." *Id.*

For these reasons, the defendants are liable for violation of 42 U.S.C. § 1986.

**Violation of Article I, Section 8, Clause 3 of the U.S. Constitution**

Count XII contends the legal status of Smith's membership in the Shinnecock Indian Nation as a "domestic dependent nation" of the United States, and any assertion of tax pursuant

to Congressional power granted by Art. I, Sec. 8, Cl. 3, violates the limited grant of power to Congress under Art. I, Sec. 8, Cl. 3. (Compl., ¶¶ 67-72)

Plaintiff seeks an extension of the law, to Wit: the plain meaning and original intent of Art. I, Sec. 8, Cl. 3 of the U.S. Constitution does not grant power to Congress to regulate Indian Tribes, which were, and are, sovereign nations. To this end, the Supreme Court should review and overturn the first Indian case to reach that court, *The Cherokee Nation v. The State of Georgia*, 30 U.S. 1, 5 Pet. 1, 8 L.Ed. 25, 1831 WL 3974 (1831)(C.J. Marshall) (Compl., ¶¶ 67-72)

Art. I, Sec. 8, Cl. 3 of the U.S. Constitution provides in pertinent part:

The Congress shall have the Power ... *To regulate Commerce* with foreign Nations, and among the States, and *with the Indian Tribes*; [emphasis added]

The plain and simple words “with the Indian Tribes” limit the power of Congress. This language precludes Congress from exercising power *over* Indian Tribes. Indian Tribes were, and are “foreign nations” and not “domestic dependent nations” under the Constitution. *Cherokee Nation*, 30 U.S. at 50-81. (dissenting opinion of Justice Thompson, joined by J. Story). Justice Thompson wrote, summarizing his dissent:

Upon the whole, I am of opinion,

1. That *the Cherokees compose a foreign state within the sense and meaning of the constitution*, and constitute a competent party of (sic) maintain a suit against the state of Georgia.
2. That the bill presents a case for judicial consideration, arising under the laws of the United States, and treaties made under their authority with the Cherokee nation, and which laws and treaties have been, and are threatened to be still further violated by the laws of the state of Georgia referred to in this opinion.
3. That an injunction is a fit and proper writ to be issued, to prevent the further execution of such laws, and ought therefore to be awarded.

And I am authorized by my brother Story to say, that he concurs with me in this opinion. [emphasis added]

*Cherokee Nation*, 30 U.S. at 81.

The Constitution of the United States did not, and does not, authorize the exercise of Congressional power over Indian Tribes, nor the classification of Smith as a member of a “domestic dependent nation” pursuant thereto,” and did not, and does not, authorize the genocide, or its perpetuation, of the Native American race of people for their land under Art. I, Sec. 8, Cl. 3.

### **CONCLUSION**

**FOR THE FOREGOING REASONS**, Plaintiff has made the requisite showing under Counts I-XII in support of preliminary injunctive relief.

### **IV. RELIEF REQUESTED**

**WHEREFORE**, Plaintiff, Jonathan K. Smith, requests the following Relief:

**1. As to Count One (Robert Trotta, Vincent Fredrico, and John Does 1-10)**

- a. Preliminary and permanent injunctive relief directing an accounting and return of all property seized from plaintiff.
- b. Disbursements, attorney’s fees, and such further and other relief as the Court deems just and proper.

**2. As to Count Two (Robert Trotta, Vincent Fredrico, and John Does 1-10)**

- a. Preliminary and permanent injunctive relief directing an accounting and return of all property seized from plaintiff.
- b. Disbursements, attorney’s fees, and such further and other relief as the Court deems just and proper.

**3. As to Count Three (Robert Trotta, Vincent Fredrico, and John Does 1-10)**

a. Preliminary and permanent injunctive relief directing and accounting and return of all property seized from plaintiff.

b. Disbursements, attorney's fees, and such further and other relief as the Court deems just and proper.

**4. As to Count Four (Robert Trotta)**

a. Preliminary and permanent injunctive relief directing an accounting and return of all property seized from plaintiff.

b. Statutory disbursements, costs, expert fees, and attorney's fees authorized under 42 U.S.C. § 1988(b), and such further and other relief as the Court deems just and proper.

**5. As to Count Five (Robert Trotta)**

a. Preliminary and permanent injunctive relief directing an accounting and return of all property seized from plaintiff.

b. Statutory disbursements, costs, expert fees, and attorney's fees authorized under 42 U.S.C. § 1988(b), and such further and other relief as the Court deems just and proper.

**6. As to Count Six (Robert Trotta)**

a. Preliminary and permanent injunctive relief directing an accounting and return of all property seized from plaintiff.

b. Statutory disbursements, costs, expert fees, and attorney's fees authorized under 42 U.S.C. § 1988(b), and such further and other relief as the Court deems just and proper.

**7. As to Count Seven (Robert Trotta)**

a. Preliminary and permanent injunctive relief directing an accounting and return of all property seized from plaintiff.

b. Statutory disbursements, costs, expert fees, and attorney's fees authorized under 42 U.S.C. § 1988(b), and such further and other relief as the Court deems just and proper.

**8. As to Count Eight (Robert Trotta, Vincent Fredrico, and John Does 1-10)**

a. Preliminary and permanent injunctive relief directing an accounting and return of all property seized from plaintiff.

b. Disbursements, attorney's fees, and such further and other relief as the Court deems just and proper.

**9. As to Count Nine (Robert Trotta, Vincent Fredrico, and John Does 1-10)**

a. Preliminary and permanent injunctive relief directing an accounting and return of all property seized from plaintiff.

b. Statutory disbursements, costs, expert fees, and attorney's fees authorized under 42 U.S.C. § 1988(b), and such further and other relief as the Court deems just and proper.

**10. As to Count Ten (Robert Trotta, Vincent Fredrico, and John Does 1-10)**

a. Preliminary and permanent injunctive relief directing an accounting and return of all property seized from plaintiff.

b. Statutory disbursements, costs, expert fees, and attorney's fees authorized under 42 U.S.C. § 1988(b), and such further and other relief as the Court deems just and proper.

**11. As to Count Eleven (Robert Trotta, Vincent Fredrico, and John Does 1-10)**

a. Preliminary and permanent injunctive relief directing an accounting and return of all property seized from plaintiff.


b. Statutory disbursements, costs, expert fees, and attorney's fees authorized under 42 U.S.C. § 1988(b), and such further and other relief as the Court deems just and proper.

**12. As to Count Twelve (Robert Trotta, Vincent Fredrico, and John Does 1-10)**

- a. Preliminary and permanent injunctive relief directing an accounting and return of all property seized from plaintiff.
- b. Preliminary and permanent injunctive relief in favor of plaintiff enjoining application of federal and state law on Shinnecock Indian Reservation lands.
- c. Disbursements, attorney's fees, and such further and other relief as the Court deems just and proper.

Dated: New York, New York  
September 4, 2012


MOORE INTERNATIONAL LAW PLLC.

By:   
\_\_\_\_\_  
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E. [smm@milope.com](mailto:smm@milope.com)

# **EXHIBIT A**




## **EXHIBIT B**

 **STATE OF SOUTH CAROLINA**  
**DEPARTMENT OF REVENUE**  
**License to Purchase, Sell, and Distribute Manufactured Tobacco**  
Issued according to the provisions of Section 12-91-680, Code of Laws of South Carolina, 1976 as Amended

Wholesale: ☒  
 Vending Machine: ☐  
 Manufacturer: ☐

**OWNER'S NAME AND LOCATION**  
**PALMETTO WHOLESALE TOBACCO DISTRIBUTORS**  
**3881 LEEDS AVE**  
**NORTH CHARLESTON, SC 29406-7487**

**840105030**  
**LICENSE NUMBER**  
**03/29/2006**  
**DATE ISSUED**

**TRMSC 214555e008** 

**PALMETTO WHOLESALE TOBACCO DISTRIBUTORS**  
**6850 RIVERS AVE**  
**N CHARLESTON SC 29406-4808**

**(NON TRANSFERABLE)**  
**THIS LICENSE MUST BE PUBLICLY DISPLAYED AS PROVIDED BY LAW**

THIS LICENSE IS VALID FOR ABOVE LOCATION ONLY. CHANGE OF LOCATION OR OWNERSHIP REQUIRES NEW LICENSE.  
 (EACH PLACE OF BUSINESS MUST BE LICENSED SEPARATELY)

File # 84010503-0 SID # 2342677-000

This tobacco license is issued according to the provisions of Section 12-91-680 Code of Laws of South Carolina, 1976, as amended. The tobacco license is valid so long as the person to whom it is issued continues in the same business at the same location as shown on license, unless revoked by the Department of Revenue for cause. If the business is closed, moved or sold, the licensee must complete the questions listed below and return this license to the S.C. Department of Revenue, PO Box 125, Columbia, SC 29214.

IF THERE ARE ANY QUESTIONS REGARDING THIS LICENSE, CONTACT THIS DIVISION AT (803) 886-1350

OUT OF BUSINESS OR CHANGE OF OWNERSHIP

DATE OF CLOSING OR SALE \_\_\_\_\_

NEW FIRM NAME \_\_\_\_\_

NEW OWNER'S NAME OR NAMES \_\_\_\_\_

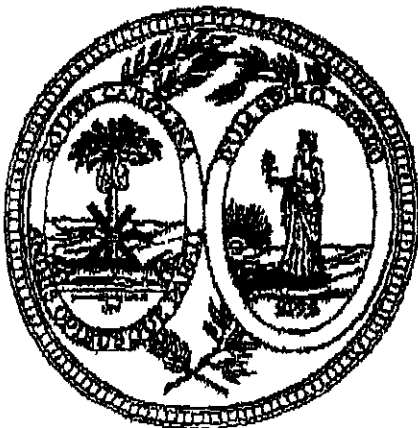
CHANGE OF ADDRESS AND/OR TRADE NAME

IF BUSINESS LOCATION CHANGED, RETURN THIS LICENSE AND COMPLETE CHANGE OF ADDRESS/BUSINESS LOCATION FORM 906-22.  
 IF BUSINESS IS MOVED OR THE TRADE NAME IS CHANGED, GIVE THE:

NEW TRADE NAME \_\_\_\_\_ DATE BUSINESS MOVED \_\_\_\_\_

NEW LOCATION ADDRESS \_\_\_\_\_ BUSINESS MUNICIPAL LIMITS \_\_\_\_\_

MAILING ADDRESS \_\_\_\_\_ NEW TELEPHONE NUMBER \_\_\_\_\_



94571027

**INSTRUCTIONS**

This is your new license. Please fold on the above perforations and display in a conspicuous place.

If you have any questions concerning this license, please call the SC Department of Revenue (803) 886-1350

If the business is closed, moved, or sold, please complete the form above and return it with the original license to

SC Department of Revenue  
 PO Box 125, Columbia, SC 29214

# **EXHIBIT C**

STATE OF NEW YORK

SUPREME COURT

COUNTY OF ST. LAWRENCE

HCI DISTRIBUTION, INC.,

Index No. 138276

Petitioner,

**DECISION  
&  
ORDER**

- against -

**NEW YORK STATE POLICE, TROOP B COMMANDER,  
RAY BROOK, NEW YORK; NEW YORK STATE POLICE  
EVIDENCE CUSTODIAN, RAY BROOK, NEW YORK;  
ST. LAWRENCE COUNTY DISTRICT ATTORNEY  
NICOLE M. DUVÉ; ST. LAWRENCE COUNTY  
ASSISTANT DISTRICT ATTORNEY JOHN BECKER;  
JOHN DOES 1 - 20,**

IAS #44-1-2012-0145

Respondents.

Appearances: Fredericks Peebles & Morgan, LLP (Brandt Benjamin Fenner, Esq., and Joseph Messineo, Esq., of counsel), attorneys for Petitioner; The Honorable Eric T. Schneiderman, Attorney General (Aaron M. Baldwin, Esq., and Kelly L. Munkwitz, Assistant Attorneys General), for Respondents New York State Police, Troop B Commander, Ray Brook, N.Y. and New York State Police Evidence Custodian, Ray Brook, N.Y.; Michael C. Crowe, Esq., St. Lawrence County Attorney, for Respondents St. Lawrence County District Attorney Nicole Duvé and Assistant St. Lawrence County District Attorney Jonathan L. Becker; Rupp, Baase, Pfalzgraf, Cunningham & Coppola, LLC (Michael T. Feeley, Esq., of counsel), attorneys for Amici Curiae, Ohserase Manufacturing, LLC, and Jacobs Manufacturing.

**DEMAREST, J.**

This is a special proceeding, pursuant to New York Civil Practice Law and Rules Article 78, seeking an order enjoining the Respondents from selling or disposing of certain tobacco products seized from Petitioner and directing the immediate release of the seized property.

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### **Parties**

Petitioner, HCI Distributors, Inc., ("HCI") describes itself as "an economic and political subdivision of the Winnebago Tribe of Nebraska, a federally recognized Indian tribe." Respondents New York State Police, Troop B. Commander, Ray Brook N.Y., and New York State Police Evidence Custodian, Ray Brook, N.Y., are the police agency which seized and retain custody of tobacco products from HCI. They will be referred to as "State Police." Respondents St. Lawrence County District Attorney Nicole M. Duvé ("Duvé") is the duly elected District Attorney of St. Lawrence County. She supervises the Respondent Jonathan Becker<sup>1</sup> ("Becker"), an Assistant District Attorney.

### **Related persons and entities**

Michael Cagle ("Cagle") is a truck driver who worked for D and T Transport, Inc. ("D and T"), a common carrier, and on January 23, 2012, was transporting a shipment of tobacco products which had been picked up on the St. Regis Mohawk Indian Reservation.

Ohserase Manufacturing, LLC ("Ohserase") is a federally licensed cigarette manufacturer, organized under the laws of the St. Regis Mohawk Tribe, and manufactures Signal brand cigarettes and tobacco products.

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<sup>1</sup>  
Becker was erroneously named as "John Becker" in the caption.

Ho-Chunk, Inc. ("Ho-Chunk") is an "economic and political subdivision of the Winnebago Tribe of Nebraska, a federal recognized Indian tribe," and the parent company of HCI.

### Facts

On January 23, 2012, HCI purchased 26,160 cartons of Signal Brand cigarettes and cigars, and 72 bags of loose tobacco from the manufacturer, Ohserase, on the St. Regis Mohawk Reservation in Northern New York. The product was consigned to D and T under a bill of lading which accurately described the product being transported, its source and its intended destination - HCI's facility on the Winnebago Reservation located in the State of Nebraska.

After leaving the St. Regis Reservation that day, Cagle was stopped at a routine Border Patrol checkpoint on State Route 37 in the Town of Waddington, St. Lawrence County. He readily supplied the agents with his bill of lading and advised them of his ultimate destination. The Border Patrol alerted the New York State Police, and Troopers, with Cagle's consent, then broke the seal on the cargo doors of Cagle's truck and verified the cargo matched that as stated in the bill of lading and further determined that the tobacco products did not have New York State excise stamps indicating that any New York State tobacco taxes had been paid. Cagle admitted to investigating officers that he had previously transported tobacco products from HCI in Nebraska to both the Poospatuck and St. Regis Indian Reservations in New York, and he has then picked up tobacco products at St. Regis for transport back to HCI. After holding Cagle for several hours, he was released but the bill of lading, the truck, and its contents were seized. Although the truck was subsequently released, the tobacco

products continue to be held by the State Police at the direction of the District Attorney, allegedly as evidence in a criminal prosecution. There have never been any criminal or civil proceedings instituted.

Neither HCI, nor any of the other entities or individuals involved in this matter, are agents licensed by the State of New York capable of possessing unstamped cigarettes for sale outside of the State.

#### **Applicable Laws**

Article 20, and specifically §471, of the New York Tax Law ("NYTL") imposes an excise tax on cigarettes and other tobacco products. Section 471(1) provides, in pertinent part:

"There is hereby imposed and shall be paid a tax on all cigarettes possessed in the state by any person for sale, except that no tax shall be imposed on cigarettes sold under such circumstances that this state is without power to impose such tax, including sales to qualified Indians for their own use and consumption on their nations' or tribes' qualified reservation . . . . The tax imposed by this section is imposed on all cigarettes sold on an Indian reservation to non-members of the Indian nation or tribe and non-Indians and evidence of such tax shall be by means of an affixed cigarette tax stamp. . . . It shall be presumed that all cigarettes within the state are subject to tax until the contrary is established, and the burden of proof that any cigarettes are not taxable hereunder shall be upon the person in possession thereof."

The tax, which is currently \$4.35 per pack of twenty cigarettes, is intended to be ultimately borne by the consumer, but Tax Law §471 provides a scheme to insure that the tax is properly collected and paid through the use of licensed cigarette stamping agents. The agents are required to pre-pay the excise tax by purchasing tax stamps which are then affixed to the cigarette package, thus proving to subsequent

wholesalers, retailers and consumers that the tax has been paid. NYTL §471(2).

Section 471(2) specifically states: "All cigarettes sold by agents and wholesalers to Indian nations or tribes or reservation cigarette sellers located on an Indian reservation must bear a tax stamp."

In recognition of the fact that tobacco sales on reservations to qualified members of the Indian nation or tribe are not taxable by the state, the NYTL provides a coupon system for insuring adequate quantities of tax-exempt cigarettes for personal use of qualified members. NYTL §471-e. As an alternative, §471(5)(b) permits an Indian nation or tribe to purchase from licensed agents an adequate quantity of tax-exempt cigarettes based on probable demand. Tax stamps must be affixed and the tax paid, but agents would be issued expedited refunds or credits based upon prior approval. Finally, §471(6) provides that Indian nations and tribes may enter into other agreements with the state, provided they are approved by the legislature.

NYTL and accompanying regulations provide a mechanism for licensed agents to sell un-stamped cigarettes for out-of-state sale for which no tax would be due, but the scheme requires detailed reporting and record keeping in an attempt to insure that the cigarettes are not returned to the state for sale or reuse.

NYTL §481(2)(a) provides that possession within the state of more than four hundred cigarettes in un-stamped packages shall be presumptive evidence that the cigarettes are subject to tax. Common or contract carriers are exempt from this presumption if they are "engaged in lawfully transporting . . . unstamped packages of cigarettes as merchandise." NYTL §481(2)(b).

Criminal sanctions for any person who willfully attempts to evade or defeat the cigarette excise tax, with similar provisions for exempting common carriers lawfully transporting, are provided for in NYTL §1814.

### **Propriety of Article 78 Proceeding**

Respondents cite the case of Cayuga Indian Nation of New York v. Gould, 14 N.Y. 3d 614 (2010), for the general rule that once a criminal prosecution has commenced, a defendant may not bring a civil action to raise an issue that can be adjudicated in the criminal proceeding. However, here, as in Cayuga, no criminal proceedings have been instituted and, thus, there is no forum in which the claims made by the Petitioners can be raised. An Article 78 proceeding in the nature of prohibition will lie to require the return of property, seized pursuant to a search warrant and held for an unreasonable amount of time without a criminal prosecution being commenced. In re Moss v. Spitzer, 19 A.D. 3d 798 (2d Dep't 2005), see Anderson v. State, 173 A.D. 2d 988 (3d Dep't 1991). Although the petition in Moss was dismissed, the case is distinguishable because the seizure was pursuant to a warrant and there was specific statutory authority for the retention of seized evidence in furtherance of an ongoing investigation. Here, there was no judicial sanction to the seizure and no "ongoing investigation," but merely some vague statements that the District Attorney might be filing a criminal complaint.

Although the extraordinary remedy of prohibition lies only where there is a clear legal right and only where a quasi-judicial officer, such as a public prosecutor, acts without jurisdiction in a matter over which she has no power over the subject matter, the

allegations of the Petition, if established, would support such relief. Matter of B.T. Productions, Inc. v. Barr, 44 N.Y. 2d 226 (1978). Here, the New York State Police, at the specific direction of the St. Lawrence County District Attorney, has seized property owned by the Petitioner, without a warrant and without commencing a criminal prosecution. The Respondents do not argue that any taxes are actually due on the cigarettes seized, but merely rely upon certain statutory and regulatory presumptions. On the other hand, the Petitioner argues that there is no tax due and, therefore, the District Attorney has no power over the subject matter.

Prohibition will not lie if there is an adequate "ordinary" remedy to right the alleged error. In re Morgenthau v. Erlbaum, 59 N.Y. 2d 150 (1983). With no criminal prosecution pending, or even a warrant to contest, there is no "ordinary" remedy and this special proceeding pursuant to Article 78 is proper.

#### **Validity of Tax Law not Challenged**

Petitioner does not challenge the constitutionality of New York's cigarette excise tax laws, or its regulatory schemes for its collection. Its argument is simply that there are no taxes due on the cigarettes and tobacco that were seized and, therefore, no basis for the seizure. Respondents rely upon statutory and regulatory presumptions that the possession of a specified quantity of un-stamped cigarettes is unlawful and would impose upon Indian cigarette manufacturers the need to obtain stamps on each package of cigarettes sold out-of-state and then seek refunds for those actually sold to an out-of-state consumer.

The burden is on the Petitioner to establish that the seized products are not taxable. NYTL §471(1). To be determined, therefore, is whether or not it has met this burden.

It is well established, and not contested by Petitioner, that the State has the ability to tax on-reservation sales of cigarettes to non-members of an Indian tribe and to make off-reservation seizures of illegally transported products. Dep't of Taxation & Fin. of N.Y. v. Melhelm Attea & Bros., 512 U.S.61, 114 S.Ct. 2028, 129 L.Ed. 2d 52 (1994). However, states are prohibited from taxing cigarette sales on a reservation to enrolled tribal members for personal use. Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95, 126 S.Ct. 676, 163 L.Ed. 2d 429 (2005); Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation, 425 U.S.463, 96 S.Ct. 1634, 48 L.Ed. 2d 96 (1976).

The ultimate taxable event in New York is the sale of cigarettes to a non-member of an Indian tribe within the boundaries of New York State. Section 471(2) of the NYTL makes it quite clear that "the ultimate incidence of and liability for the tax shall be upon the consumer." The requirements of stamping are merely a way to collect the tax, if, in fact, there is tax due.

As provided in NYTL §471(1), "... no tax shall be imposed on cigarettes sold under such circumstances that this state is without power to impose such tax." The regulations of the Department of Taxation and Finance implementing this legislation clearly state that no tax will be imposed under Article 20 of the Tax Law on cigarettes sold to out-of-state purchasers. 20 NYCRR §74.1(c)(4). NYTL §1814, which provides for criminal penalties for violations of Article 20, specifically exempts common

or contract carriers while engaged in lawfully transporting unstamped packages of cigarettes as merchandise, or lawfully transporting tobacco products. NYTL §1814(e).

Petitioner has established that it is a corporation located on the Reservation of the Winnebago Tribe in the State of Nebraska. It admits purchasing the cigarettes from Ohserase Manufacturing, LLC, on the St. Regis Mohawk Indian Reservation. The product was consigned to a common carrier, D and T, under a bill of lading accurately indicating the quantity, source and destination. The affidavit of D and T's driver also supports the fact that he intended to deliver his cargo in Nebraska without making any deliveries in New York. Upon this evidence, the Petitioner has established, prima facie, that the presumption of possession of un-stamped cigarettes was inapplicable. Respondents have submitted no contrary evidence.

Having determined there is no tax due on the cigarettes that were seized, the fact that there is some possibility they might be re-introduced into New York and subject to taxation cannot provide a basis for seizure. Respondents rely upon NYS Dep't of Taxation & Fin. v. St. Regis Group, 217 A.D. 2d 214 (3d Dep't 1995), for the proposition that the seizure is legal even if there is no tax due. In St. Regis, tractor-trailer loads of liquor destined for the St. Regis Mohawk Reservation were seized before arriving on the Reservation. The seizures were done pursuant to NYTL §1845 and actions for forfeiture under that law were commenced. There was no dispute that the drivers did not have proper documentation and that the cargo was destined for the Reservation in New York State. In that case, it was held there was likelihood that there would be sales to non-members of the tribe and the court found that the registration and documentation requirements were not unduly burdensome.

The registration and documentation laws and regulations applicable to liquor transportation differ from those applicable to cigarettes and tobacco. Here, the fact that the product was being conveyed by a common carrier under a proper bill of lading evidencing delivery out of the state exempts it from taxation. Were this seizure to have taken place when the truck was destined for a delivery within New York, there would, perhaps, be a different result.

Respondents rely on only pure speculation that the products seized here would be re-introduced into this state. Statements made to Respondents by the driver about past deliveries and information from the Petitioner's website are not sufficient to support the confiscation of private property without a warrant or the initiation of a criminal or civil proceeding.

Similarly, Respondents' reliance upon seizures under the laws of other states are also distinguishable. In State of Maryland v. Sedacca, 249 A.2d 456 (Md. 1969), a driver transporting un-stamped cigarettes through the state was detained and charged and the cigarettes seized because he failed to have in his possession adequate paperwork as provided in the Maryland statute. Had the paperwork been proper, an exception to the need to have revenue stamps on the cigarettes would have been recognized. Here, the New York statute expressly exempts common carriers with a proper bill of lading, there was no tax due and no civil or criminal proceedings have ever been instituted.

Finally, Respondents argue that Indian cigarette manufacturers may only make sales out-of-state through licensed agents or become agents themselves so that the tax may be prepaid through the purchase of stamps, subject to refund. There is no

such requirement either in the New York Tax Law or in any regulations. Where the law is clear that no tax is due, for the Court to extrapolate the type of regulatory scheme proposed by Respondents would be improper. That should be left for the Department of Taxation & Finance through regulation or the Legislature by statute.

In light of the lack of any legal authority for the seizure herein, it is the Decision of this Court, and it is hereby,

ORDERED, that the Respondents return, immediately, any and all property seized.

**SO ORDERED**

DATED: June 18, 2012, at Chambers, Canton, New York.

  
DAVID DEMAREST, J.S.C.

**ENTER:**

{Decision & Order, and moving papers filed}

## APPENDIX

The following submissions have been reviewed and relied upon in making this Decision:

1. Order to Show Cause dated, March 2, 2012
- 2.. Petition, verified February 28, 2012
3. Affidavit, with attachments, of Joseph Messineo, Esq., sworn to February 28, 2012.
4. Affidavit of Justin E. Tarbell, sworn to February 27, 2012.
5. Affidavit, with attachment, of William M. Cagle, sworn to February 28, 2012.
6. Affidavit of Lisa Guerrero, "acknowledged" on February 28, 2012.
7. Motion for leave to supplement, dated March 7, 2012.
8. Affidavit of William M. Cagle, "acknowledged" March 6, 2012.
9. Answer, with attachments, of New York State Police, Troop B, Troop B Commander, Ray Brook, N.Y., and New York State Police Evidence Custodian, Ray Brook, dated April 4, 2012.
10. Affidavit of Jason West, sworn to March 30, 2012.
11. Affidavit of Timothy J. Peets, sworn to March 29, 2012.
12. Affirmation of Richard S. Ernst, Esq., dated March 26, 2012.
13. Affirmation of Aaron M. Baldwin, Esq., dated April 4, 2012.
14. Affidavit, with attachments, of Lynne R. Fritz, Esq., sworn to April 2, 2012.
15. Memorandum of Law of the Attorney General of the State of New York, dated April 4, 2012.
16. Answer of St. Lawrence County District Attorney, Nicole Duve and Assistant District Attorney, Jonathan Becker, dated April 4, 2012.
17. Affirmation of Jonathan Becker, Esq., dated April 4, 2012.
18. Memorandum of Law of St. Lawrence County Attorney, undated, but received on April 5, 2012.
19. Petitioner's Reply Brief, dated April 16, 2012.
20. Brief of Amici Curiae Osheras Manufacturing, LLC and Jacobs Manufacturing, dated April 17, 2012.
21. Memorandum of Law in response to Amici Brief, dated April 25, 2012.