

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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THE CITY OF NEW YORK,

Plaintiff,

08 CV 3966 (CBA)(JMA)

-against-

GOLDEN FEATHER SMOKE SHOP, INC., KIMO SMOKE SHOP, INC., SMOKE AND ROLLS INC., SHAWN MORRISON, KIANA MORRISON, in her individual capacity, MONIQUE'S SMOKE SHOP, ERNESTINE WATKINS, in her individual capacity, JESSEY WATKINS, WAYNE HARRIS, PEACE PIPE SMOKE SHOP, RODNEY MORRISON, Sr., CHARLOTTE MORRISON, in her individual capacity, RED DOT & FEATHERS SMOKE SHOP, INC., RAYMOND HART, in his individual capacity, SMOKING ARROW SMOKE SHOP, DENISE PASCHALL, in her individual capacity, TONY D. PHILLIPS, TDM DISCOUNT CIGARETTES, and THOMASINA MACK, in her individual capacity,

Defendants.

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**MEMORANDUM OF LAW OF PLAINTIFF THE CITY OF NEW YORK IN
SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

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THE CITY OF NEW YORK,

Plaintiff,

08 CV 3966 (CBA)(JMA)

-against-

GOLDEN FEATHER SMOKE SHOP, INC., KIMO SMOKE SHOP, INC., SMOKE AND ROLLS INC., SHAWN MORRISON, KIANA MORRISON, in her individual capacity, MONIQUE'S SMOKE SHOP, ERNESTINE WATKINS, in her individual capacity, JESSEY WATKINS, WAYNE HARRIS, PEACE PIPE SMOKE SHOP, RODNEY MORRISON, Sr., CHARLOTTE MORRISON, in her individual capacity, RED DOT & FEATHERS SMOKE SHOP, INC., RAYMOND HART, in his individual capacity, SMOKING ARROW SMOKE SHOP, DENISE PASCHALL, in her individual capacity, TONY D. PHILLIPS, TDM DISCOUNT CIGARETTES, and THOMASINA MACK, in her individual capacity,

Defendants.

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**MEMORANDUM OF LAW OF PLAINTIFF THE CITY OF
NEW YORK IN SUPPORT OF ITS
MOTION FOR SUMMARY JUDGMENT**

Pursuant to Fed. R. Civ. P. 56, plaintiff The City of New York (the "City"), by its attorney, Michael A. Cardozo, Corporation Counsel of the City of New York, respectfully submits this memorandum of law in support of its motion for summary judgment for an order i) permanently enjoining defendants Peace Pipe Smoke Shop ("Peace Pipe"), Rodney Morrison, Sr., Charlotte Morrison, Red Dot & Feathers Smoke Shop, Inc. ("Red Dot"), Raymond Hart, Smoking Arrow Smoke Shop ("Smoking Arrow"), Denise Paschall, Tony D. Phillips, TDM

Discount Cigarettes (“TDM”), and Thomasina Mack (collectively “defendants”) from violating the Contraband Cigarette Trafficking Act, 18 U.S.C. § 2341 *et seq.* (the “CCTA”), and the Cigarette Marketing Standards Act, N.Y. Tax L. § 483 *et seq.* (the “CMSA”), by engaging in transactions with unstamped cigarettes; and ii) awarding the City damages, civil penalties and attorney’s fees.¹

PRELIMINARY STATEMENT

Based principally on uncontested evidence of defendants’ violations of the CCTA and CMSA, on August 25, 2009, this Court preliminarily enjoined defendants’ sales of unstamped cigarettes other than to Unkechaugue tribe members for personal use. Nearly two years later, on August 11, 2011, the Court declined to vacate or modify that injunction, finding that the New York State legislature’s amended cigarette tax laws provided a still stronger basis to enjoin defendants’ sales of unstamped cigarettes. Both holdings, joined with the already-admitted evidence introduced in support of the preliminary injunction, and new evidence introduced on this motion, now warrant entry of a permanent injunction against defendants’ purchase, receipt, possession, sale, distribution, offer and advertisement of unstamped cigarettes -- even to tribe members for personal use. A permanent injunction should be entered because: i) The City has actually succeeded on the merits of its claims; and ii) the conduct enjoined is likely to continue into the future. A permanent injunction may issue without a further evidentiary hearing.

¹ Defendants Golden Feather Smoke Shop, Inc., Kimo Smoke Shop, Inc., Shawn Morrison, Kiana Morrison, Monique’s Smoke Shop, Ernestine Watkins, Jesse Watkins and Wayne Harris have entered into consent orders pursuant to which they will no longer engage in or benefit from transactions with unstamped cigarettes. *See*, PACER Docs. Nos. 138, 398, 412. The City will dismiss defendant Smoke and Rolls Inc.

The damages and penalties to be awarded to the City may be calculated on the basis of undisputed facts, and the Court may properly enter summary judgment for the City against all defendants in the amounts set forth below, *infra*, pp. 39, 41, 51, together with costs and attorney's fees.

Procedural History and Legal Developments

The Court has already set forth the procedural history of this action, *see City of New York v. Golden Feather Smoke Shop, Inc.*, 08-cv-3966 (CBA), Order dated August 16, 2011 at 3-4, PACER Doc. 353 ("*Golden Feather III*"), summarized briefly here.

The Preliminary Injunction -- The City commenced this action in September 2008, for injunctive relief, damages and penalties under the CCTA and the CMSA. On March 16, 2009, the Court denied defendants' motion to dismiss for lack of subject matter jurisdiction, holding that the defendants, as individuals, did not share the tribe's sovereign immunity. *City of New York v. Golden Feather Smoke Shop, Inc.*, 2009 U.S. Dist. Lexis 20953 (E.D.N.Y. March 16, 2009) ("*Golden Feather I*"). On August 25, 2009, on the basis of a four-day evidentiary hearing, the Court entered a preliminary injunction (the "Injunction"), effective September 25, 2009, finding that the City was likely to succeed in proving that defendants' sales of unstamped cigarettes to the public violated the CCTA and the CMSA, and that each defendant's violations were likely to continue. *City of New York v. Golden Feather Smoke Shop, Inc.*, 2009 U.S. Dist. Lexis 76306 (E.D.N.Y. Aug. 25, 2009) ("*Golden Feather II*"). The Injunction prohibited defendants "from selling unstamped cigarettes other than to members of the Unkechauge Nation for their personal use . . . [and] from selling cigarettes at prices below the CMSA minimum prices except in sales to members of the Unkechauge Nation for their personal use." *Id.* at *126.

The Court also held that the City was entitled to the Injunction without proof of irreparable harm, but found that the City had proven such harm. *Id.* at *109-120.

The Appeal – Defendants appealed the Injunction. On March 4, 2010, the Second Circuit Court of Appeals affirmed this Court’s ruling that injunctive relief under either the CCTA or the CMSA did not require proof of irreparable harm, and certified certain questions of state law to the New York Court of Appeals. *See City of New York v. Golden Feather Smoke Shop Inc.*, 597 F.3d 115, 120-21 (2d Cir. 2010).

“*Cayuga*” and *The Tax Law Amendments* – While the certified questions were pending, on May 11, 2010, the New York Court of Appeals decided *Cayuga Indian Nation of New York v. Gould*, 14 N.Y.3d 614 (2010) (“*Cayuga*”). Then, on June 21, 2010, the New York State Legislature enacted (and the governor signed) Senate Bill 8285/Assembly Bill 11515, amending N.Y. Tax Law §§ 471 and 471-e (the “Tax Law Amendments”). Understanding the *Cayuga* decision effectively to have answered the state law questions certified by the Second Circuit to the New York Court of Appeals, several parties to this action, including the City, moved the Second Circuit to withdraw the certified questions. On August 20, 2010, the Second Circuit did so, remanding the case to this Court for further consideration of the “viability of the preliminary injunction in light of the decision of the New York Court of Appeals in *Cayuga Indian Nation of New York v. Gould*, 14 N.Y.3d 614 (2010) and the recent amendments to N.Y. Tax Law §§ 471 and 471-e, and for such further proceedings as the district court may determine necessary.” (PACER Doc. No. 297).

Despite an effective date of September 1, 2010, enforcement of the Tax Law Amendments was stayed until June 21, 2011, when, on the heels of a Second Circuit decision

declining to enjoin the Amendments as burdening tribal sovereignty, *see Oneida Nation of N.Y. v. Cuomo*, 645 F.3d 154, 175-76 (2d Cir. 2011), the New York Appellate Division, Fourth Department, lifted an order temporarily restraining enforcement of the Tax Law Amendments. *Seneca Nation of Indians v. State of N.Y.*, CA 11-01193, slip op. at 1 (4th Dep’t June 2011). With the legal landscape clarified by these developments, this Court ruled on the issues posed in the Second Circuit’s remand order, holding that the CCTA and the CMSA were violated – and the violations were properly enjoined – under either the pre or post-amendment provisions of the Tax Law. *See Golden Feather III* (PACER Doc. 353) at 12, 14, 18.

SUMMARY OF UNDISPUTED FACTS

On the basis of the evidence introduced at the preliminary injunction hearing, the Court issued findings of fact detailing defendants’ participation in the “substantial trade in unstamped cigarettes between the Poospatuck Reservation and New York City,” including bulk sales to bootleggers, off-reservation deliveries, and attempts to evade law enforcement detection. *Golden Feather II*, 2009 U.S. Dist. LEXIS 76306, at *19-63 (quote at *63). Viewing that evidence most favorably to the defendants, as required on summary judgment, defendants’ violations of the CCTA and CMSA are now established through undisputed facts.

At the hearing itself, and subsequently, defendants offered no evidence raising a genuine, material dispute as to the Court’s findings of fact in support of the Injunction. To resolve the present motion, the Court may therefore correctly continue to treat the record evidence from the hearing and the resulting factual findings as undisputed. As the subject of extensive post-hearing briefing (PACER Doc. Nos. 139 and 151), and as comprehensively organized in *Golden Feather II*, the City does not re-state here all of the hearing evidence, but

incorporates it by reference.² See Fed. R. Civ. P. 65(a)(2) (“[E]vidence that is received on [a motion for preliminary injunction] and that would be admissible at trial becomes part of the trial record and need not be repeated at trial.”); see also *Five Borough Bicycle Club v. City of New York*, 684 F. Supp. 2d 423 (S.D.N.Y. 2010) (preliminary injunction findings become part of the trial record); *Project Strategies Corp. v. National Communs. Corp.*, 948 F. Supp. 218 (E.D.N.Y. 1996) (same).

Facts Found on the Preliminary Injunction Motion as to Which There Is No Dispute

1. All of the cigarettes that the defendants sold through their respective stores were unstamped. See *Golden Feather II*, 2009 U.S. Dist. LEXIS 76306, at *32 (Peace Pipe), *40 (Red Dot), *46 (Smoking Arrow), *53 (TDM); Hearing Ex.³ 89 ¶ 3 (Peace Pipe May 12, 2009 Factual Stipulation); City’s Rule 56.1 Statement of Undisputed Facts (“R. 56.1 St.”), at ¶¶ 10, 38, 50, 62; Hearing Ex. 76 Admission No. 14 (Red Dot April 20, 2009 Admissions); Hearing Ex. 93 at 12:25-13:3 (April 17, 2009 Deposition of Raymond Hart); Hearing Ex. 74 Admission No. 4 (Smoking Arrow April 25, 2009 Admissions); Hearing Ex. 78 Admission Nos. 5 and 7 (TDM April 8, 2009 Admissions).

2. Prior to the Injunction’s effective date, each defendant possessed, purchased, received, distributed and sold large quantities of unstamped cigarettes, far in excess of 50 cartons. See *Golden Feather II*, 2009 U.S. Dist. LEXIS 76306, at *32-39 (Peace Pipe), *39-45

² The City’s June 3, 2009 post-hearing memorandum of law (PACER Doc. No. 139) provided a detailed summation of the hearing testimony and evidence, and is attached as Exhibit A to the Declaration of Aaron Bloom dated June 4, 2012 (“*Bloom Decl.*”).

³ Exhibits identified as “Hearing Ex.” are the exhibits admitted into evidence at the May 15-20, 2009 preliminary injunction hearing, or submitted as part of post-hearing briefing. The hearing exhibits cited in this brief (or, on occasion, excerpts) are attached to the Bloom Declaration.

(Red Dot), *45-53 (Smoking Arrow), *53-61 (TDM)⁴; R. 56.1 St. ¶¶ 13-14, 16, 39-40, 51, 54, 59, 63, 69; Hearing Exs. 7, 7A, 8, 11A, 13A, 18A, 24A, and 91 (Form CG-6s and summaries)⁵; Declaration of Eric Proshansky, dated June 4, 2012 (“*Proshansky Decl.*”) Exs. 1-5 (Form CG-6s and summaries).⁶ Rodney Morrison even continued to sell unstamped cigarettes after the effective date of the Injunction. *See City v. Golden Feather Smoke Shop, Inc.* 2010 U.S. Dist. LEXIS 63605 (June 25, 2010) (“*Golden Feather (Contempt)*”).

3. Each defendant made bulk sales of unstamped cigarettes destined for off-reservation resale, and sometimes made off-reservation deliveries of large quantities of unstamped cigarettes. *See Golden Feather II*, 2009 U.S. Dist. LEXIS 76306, at *19-25 (all defendants), *32-36 (Peace Pipe), *40-43 (Red Dot), *46-51 (Smoking Arrow), *54-58 (TDM); *Golden Feather III*, at 18-19; R. 56.1 St. ¶¶ 19, 23, 36, 43-45, 54-56, 66-68; Mari A. Hearing Tr.⁷ at 19:22-27:25, 83:18-84:5 (Peace Pipe), 28:4-32:21, (Smoking Arrow), 35:13-37:20, (Red

⁴Thomasina Mack and TDM stopped selling cigarettes for some period of time prior to the Injunction, *see Golden Feather II*, 2009 U.S. Dist. LEXIS 76306, at *58-60, but nonetheless continuously possessed more than 50 cartons of cigarettes and, as the Court predicted, resumed such sales prior to issuance of the Injunction, *see id.*; *see also Proshansky Decl.* Ex. 20 at Interrogatory Responses 1-8 (noting TDM last sold unstamped cigarettes in August 2009).

⁵ As noted in the Bloom Declaration, ¶¶ 10-11, Hearing Exhibits 7, 7A, and 8, admitted at the preliminary injunction hearing, are voluminous. They are accordingly not re-filed with these motion papers, but are instead incorporated by reference. Defendants do not dispute that the information in Hearing Exhibits 7, 7A, and 8 is accurately summarized in the charts and tables admitted at the hearing. *See infra*, p.10 and n.11.

⁶ The CG-6’s documenting defendants’ purchases of unstamped cigarettes from stamping agents is sufficient to establish this fact. Additional supporting testimony and evidence relied on by the Court in *Golden Feather II* is cited above, and the majority is attached as exhibits to the Bloom Declaration.

⁷ References in the form [Name] Hearing Tr. refer to the transcript of the preliminary injunction hearing testimony of the named witness. These transcripts (or relevant excerpts thereof) are attached as Exhibits B to F to the Bloom Declaration.

Dot); 37:21-39:21 (TDM); 42:7-13 (Red Dot and Smoking Arrow); Ahman Aldabeshes Hearing Tr. at 192:7-196:10 (TDM); Byron Mars Hearing Tr. at 308:15-310:20, 327:25-329:24 (Red Dot); 311:25-314:6, 324:25-327:23, 330:24-332:1 (Smoking Arrow); 315:20-316:25 (Peace Pipe); Christopher Lannon Hearing Tr. at 161:16-163:24 (TDM); Hearing Ex. 60C at CNY 00807-08 (February 27, 2006 DTF Investigative Report) (TDM); Hearing Exs. 81-82, Admission Nos. 10 and 12 (Peace Pipe April 18, 2009 Admissions); Hearing Ex. 95 at 53:20-54:24 (April 14, 2009 Deposition of Thomasina Mack) (Mack sold 600 cartons every other day to each of two regular customers); Hearing Ex. 98 at 1074:22-1075:21; 1158:20 - 1159:9 (Mack testimony at Morrison Trial that she sold up to 1,000 cartons at a time and delivered off-reservation); Hearing Ex. 101 at 2523:43 - 2525:7, 2528:45 - 2529:23 (Phillips testimony at Morrison Trial regarding Smoking Arrow bulk sales).⁸

4. Each defendant sold cigarettes at prices below the CMSA minimum prices. *See Golden Feather II*, 2009 U.S. Dist. LEXIS 76306, at *17-19 (CMSA minimum prices), *37-39 (Peace Pipe), *44-45 (Red Dot), *52-53 (Smoking Arrow), *60-61(TDM); R. 56.1 St. ¶¶ 15, 42, 53, 65; DeFrancesco Hearing Tr. at 254-285, 511-517, 528-566; Hearing Exs. 72A - 72F (Harold Levison Associates spreadsheets); Hearing Ex. 39 (DTF Publication 508); Hearing Ex. 89 ¶¶ 14-15 (Peace Pipe prices); Hearing Ex. 93 at 32:12-14, 32:21-24, 33:9-15 (April 27, 2009 Deposition of Raymond Hart) (Red Dot Prices); Hearing Ex. 94 at 24:4-12 (April 30, 2009

⁸ The hearing testimony and exhibits are described in more detail in *Golden Feather II* at the pages cited above, as well as in the City's Post-Hearing Memorandum of Law (PACER Doc. No. 139) (*Bloom Decl. Ex. A*) at pages 3-8 and 22-43.

Deposition of Denise Paschall) (Smoking Arrow Prices); Hearing Ex. 95 at 48:21 - 49:6 (TDM prices).⁹

5. “[L]arge quantities of untaxed cigarettes are purchased in defendants’ stores and trafficked into the City where they are resold at below-market prices, without the payment of City or State Taxes.” *Golden Feather II*, 2009 U.S. Dist. LEXIS 76306, at *61; *see id.* at *19-25 (all defendants), *32-39 (Peace Pipe), *39-45 (Red Dot), *45-53 (Smoking Arrow), *53-61(TDM), *61-63 (all defendants); R. 56.1 St. ¶¶ 23, 34, 36, 43-45, 54-56, 66-68, 71; Mari A. Hearing Tr. at 13:17-19:1 (all defendants); 19:22-27:25, 83:18-84:5 (Peace Pipe), 28:4-32:21, (Smoking Arrow), 35:13-37:20, (Red Dot); 37:21-39:21 (TDM); 42:7-13 (Red Dot and Smoking Arrow); Aldabeshes Hearing Tr. at 192:7-196:10 (TDM); Lannon Hearing Tr. at 161:16-163:24 (TDM); 134:7-135:2; 177:6-178:19 (all defendants); Mars Hearing Tr. at 308:15-310:20, 327:25-329:24 (Red Dot); 311:25-314:6, 324:25-327:23, 330:24-332:1 (Smoking Arrow); 315:20-316:25 (Peace Pipe).¹⁰

Resident Agent Cigarette Tax Reports, Form CG-6

New York State-licensed cigarette stamping agents must file monthly cigarette tax reports with the New York State Department of Taxation and Finance (“NYS DTF”). These reports, entitled “Resident Agent Cigarette Tax Reports,” (“Form CG-6s”) include Schedule E:

⁹ The testimony and admissions of the defendants is sufficient to establish that the prices at which they sold cigarettes were far below the CMSA minimum prices. Further, as noted by the Court in *Golden Feather II*, at the pages cited above, defendants sold cigarettes at even lower prices to Mari A., Ahman Aldabeshes, and the DTF undercover purchasers.

¹⁰ The hearing testimony and exhibits are described in more detail in *Golden Feather II* at the pages cited above, as well as in the City’s Post-Hearing Memorandum of Law (PACER Doc. No. 139) (*Bloom Decl. Ex. A*) at pages 3-8 and 22-43.

“Sale of Cigarettes to Dealers/Vendors on American Indian Reservations,” that list the number of cigarettes sold to individual stores on Indian Reservations. Data from Gutlove & Shirvint, Inc.’s (“Gutlove”) and Mauro Pennisi, Inc.’s (“Pennisi”) Form CG-6s are summarized below:¹¹

	Peace Pipe (cartons)	Smoking Arrow (cartons)	Red Dot (cartons)	TDM (cartons)¹²
2004	1,961,760	-	-	-
2005	2,349,876	-	-	45,021
2006	2,049,533	663,870	121,449	563,078
2007	1,495,230	2,291,410	22,319	822,636
2008	726,350	1,384,769	722,994	453,182
2009	471,577	316,270	188,413	-

No defendant has argued that their purchases of unstamped cigarettes are inaccurately depicted by the Form CG-6s, nor could they, in light of most defendants’ failure to produce their own purchase records.

Current Sales of Unstamped Cigarettes on the Poospatuck Reservation

Stores on the Poospatuck Reservation continue to sell unstamped cigarettes. R. 56.1 St. ¶ 73; *infra* pp. 22-26. Defendants Mack and Paschall have each testified to present sales

¹¹ This chart is based on data from Gutlove’s 2004 through 2009 CG-6s and Pennisi’s 2005 through 2009 Form CG-6s. *See Bloom Decl.* ¶¶ 10-11; Hearing Ex. 91 (table summarizing Form CG-6 data through March 2009); *Proshansky Decl.* ¶¶ 2-9 and Exs. 2-5. The chart is consistent with Hearing Exhibits 11A, 13A, 18A, and 24A, attached to the Bloom Declaration, which the defendants stipulated accurately reflects the Form CG-6 data, *see Bloom Decl.* Ex. G at 655:2-24. *See* R. 56.1 St. ¶¶ 13, 39, 51, 63.

¹² Mack’s purchases in 2004 and 2005 from wholesaler Harold Levinson Associates are not included in this table. *See* Hearing Ex. 95 at 47:19-24. Also, although Mack admits to gross sales of more than \$100,000 in 2009, *see Proshansky Decl.* Ex. 20, at Interrogatory Response 7, they are not displayed on the table out of an abundance of caution -- Gutlove’s Form CG6s show sales made in 2006-2009 to an entity identified as “Tom’s Discount Cigarettes,” a likely typo for TDM Discount Cigarettes.

of unstamped cigarettes by reservation stores, and, according to these defendants, the Tribal Council has conveyed to tribe members that they may sell unstamped “native brand” cigarettes to the public. *See Proshansky Decl.* Ex. 16 at 14:2-16:4 and Ex. 19 at 159:22-160:13; 166:17-168:11 (March 5, 2012 Deposition of Thomasina Mack). Corroboration is provided by documents filed by the State of New York in connection with the January 2012 arrest of a delivery driver. In a sworn statement, the driver revealed that, in the prior five months, he made weekly, truckload-sized deliveries of cigarettes to the Poospatuck Reservation from the Winnebago Indian Reservation in Nebraska. *See Proshansky Decl.* Ex. 27. Further confirmation of continuing Reservation sales is provided by a bill of lading obtained from the New York State Police that documents a May 2, 2012 shipment of 105 cases of cigarettes to a Poospatuck Reservation smoke shop from “Mohawk Distribution,” located on the St. Regis Mohawk (Akwasasne) Reservation in New York State. *See Proshansky Decl.* Ex 28.

**Undisputed Facts As To Damages: Rodney Morrison, Sr.,
Charolette Morrison, Peace Pipe Smoke Shop**

From 1994 until September 25, 2009, Peace Pipe made in-store sales of unstamped cigarettes. R. 56.1 St. ¶ 6; Hearing Ex. 89, ¶ 1; *Proshansky Decl.* Exs. 9-10, Admission No. 6. Rodney and Charlotte Morrison shared in the profits of Peace Pipe, including the mail order operation known as “Smoker’s Den,” described below. R. 56.1 St. ¶¶ 5; *Proshansky Decl.* Exs. 9-10, Admission No. 5. Those profits were substantial. According to Rodney Morrison’s counsel in *United States v. Morrison*:

The sums earned by some of these witnesses, and indeed, by Mr. Morrison will boggle the mind, will boggle the mind, and when my turn comes to go into that in particular, I guarantee it will be eye-popping dollars.

Hearing Ex. 96, at 383:7-10; see *United States v. Morrison*, 2006 U.S. Dist. LEXIS 50219, at *11 (E.D.N.Y. July 21, 2006) (Morrison's accountant determines that Morrison has in excess of \$56 million in worldwide assets).

Beginning in 1997 until September 25, 2009, Peace Pipe, operating as "Smoker's Den," also engaged in mail-order sales of unstamped cigarettes out of the Peace Pipe store at 9 Squaw Lane, Mastic, N.Y. R. 56.1 St. ¶ 7; Hearing Ex. 89 ¶¶ 1, 5, 6; Hearing Exs. 81-82, Admission No. 22; *Proshansky Decl.* Exs. 9-10, Admission No. 6. Smoker's Den received orders by telephone, mail or the Internet and shipped unstamped cigarettes to customers in New York City and elsewhere via the U.S. Postal Service. R. 56.1 St. ¶ 8; Hearing Ex. 89 ¶¶ 5, 6; Hearing Exs. 43 and 44. Customers purchasing cigarettes through Smoker's Den were instructed to send payment to Peace Pipe. R. 56.1 St. ¶ 9; Hearing Exs. 81-82 Admission No. 23; Hearing Ex. 44.

Peace Pipe's 2007-2009 Sales – Peace Pipe, unique among the defendants, maintained records of at least some of its sales, including those made through Smoker's Den, which for the period October 12, 2007 through March 14, 2009 (omitting April 2008) Peace Pipe produced in this action (the "2007-2009 Sales File") (Exhibit 14 to the *Proshansky Decl.*). R. 56.1 St. ¶ 17; *Proshansky Decl.* Exs. 9-10, Admissions 7-9. The Morrisons do not dispute the accuracy of the spreadsheets with regard to the sales recorded. R. 56.1 St. ¶ 17; *Proshansky Decl.* Exs. 9-10, Admissions 10-13. The spreadsheets include customer addresses for some sales, a substantial number of which are New York City addresses. *Proshansky Decl.* Exs. 14-15; Exs. 9-10, Admissions 21, 26-27; R. 56.1 St. ¶¶ 18-19.

Peace Pipe's 2004-2006 Sales – In connection with the federal investigation and prosecution of Rodney Morrison, the U.S. Attorney's Office for the Eastern District of New York (the "USAO-EDNY") obtained Peace Pipe's sales records for the period August 29, 2004 through June 30, 2006. *See* Declaration of Robert Wanderer ("*Wanderer Decl.*") ¶¶ 2-3. From those records, Internal Revenue Service Revenue Agent Robert Wanderer compiled information pertaining to selected sales into a spreadsheet (the "2004-2006 Sales Spreadsheet") (Exhibit 1 to the *Wanderer Decl.*). *See Wanderer Decl.* ¶¶ 3-10; R. 56.1 St. ¶¶ 20-21. The 2004-2006 Sales Spreadsheet details only Peace Pipe's sales in certain quantities (in excess of 300 cartons for the period August 29, 2004 through March 8, 2006 and in excess of 50 cartons for the period March 9, 2006 through June 30, 2006) and includes customer name, account number, cartons purchased, and amount paid. *See Wanderer Decl.* ¶¶ 3-10 and Ex. 1. The 2004-2006 Sales Spreadsheet also includes Agent Wanderer's determinations as to whether the listed customers had a New York City address. *See Wanderer Decl.* ¶¶ 7, 9, 10. Rodney and Charolette Morrison do not dispute the accuracy of the 2004-2006 Sales Spreadsheet with regard to the sales recorded. R. 56.1 St. ¶ 21; *Proshansky Decl.* Exs. 9-10, Admissions 31-34, 40.

Peace Pipe's 1999-2004 Sales -- The USAO-EDNY also produced to the City a spreadsheet seized from Peace Pipe during the execution of a 2004 search warrant, which summarizes Peace Pipe's sales, by customer account number, between July 21, 1999 and August 3, 2004 (the "1999-2004 Sales File") (Exhibit 2 to the *Wanderer Decl.*). R. 56.1 St. ¶¶ 24-25; *Wanderer Decl.* ¶ 11; *Proshansky Decl.* Exs. 9-10, Admissions 41-43. Rodney and Charolette Morrison do not dispute the accuracy of the 1999-2004 Sales File with regard to the sales recorded. R. 56.1 St. ¶ 25; *Proshansky Decl.* Exs. 9-10, Admissions 42-45. The 1999-2004

Sales File does not include addresses, but for some customers does include telephone numbers. The 1999-2004 Sales File displays the total sales (in dollars) to particular, identified customers, made between dates indicated as that customer's first and last purchase, but does not display each of those transactions individually. *Proshansky Decl.* Exs. 9-10, Admission 50.

The data contained in the 2007-2009 Sales File, the 2004-2006 Sales Spreadsheet, and the 1999-2004 Sales File is analyzed *infra*, pp. 32-39.

**Undisputed Facts As To Damages: Thomasina Mack
and TDM Discount Cigarettes**

There are undisputed facts from which to determine the City's damages attributable to Thomasina Mack and TDM Discount Cigarettes. Mari A. "purchased cigarettes indirectly from Thomasina Mack at a 24-hour storage facility on Route 106 in Long Island." *Golden Feather II*, 2009 U.S. Dist. LEXIS 76306, at *56; R. 56.1 St. ¶ 68; Mari A. Hearing Tr., at 37:21-39:12.¹³ In 2005 and 2006, Mari A. purchased 600 to 900 cartons of unstamped cigarettes, 20 or 30 times, from this storage facility. *Id.* at 56-57; R. 56.1 St. ¶ 68; Mari A. Hearing Tr., at 39:20-21. Mari A. resold these cigarettes in New York City. *Id.* at *20-24 ; R. 56.1 St. ¶ 71; Mari A. Hearing Tr., at 13:17-14:11. An individual named "Dee" delivered the cigarettes to the storage facility on behalf of Mack. *Id.* at *56-57 ; Mari A. Hearing Tr., at 37:21-39:12. Mack testified at a deposition that a person named "Dee" was a regular customer of hers prior to 2007. Hearing 95 at 53:20-54:21. Mack sold Dee 600 cartons of unstamped cigarettes every two days. *Id.* Mack testified that she sold these quantities to Dee for one year. *Proshansky Decl.* Ex. 19 at 192:22-193:4 (March 5, 2012 Mack Deposition). The evidence of

¹³ The Mari A. hearing testimony is attached as Exhibit B to the *Bloom Decl.*

Mack's sales via "Dee" and the storage facility, is corroborated by a NYS DTF investigative report admitted into evidence at the preliminary injunction hearing. *See Golden Feather II*, 2009 U.S. Dist. LEXIS, at *57-58 (describing investigative report of transfer of unstamped cigarettes at the storage facility, involving a trailer registered to Mack and note addressed to "Dee"); Hearing Ex. 60C.

Ahman Aldabeshes "was in the business of purchasing cigarettes for resale on the Poospatuck Reservation from the end of 2003 until his arrest in October 2006. Like Mari A., Aldabeshes would purchase cigarettes on the Reservation, transport them back to New York City, and sell them to grocery stores." *Golden Feather II*, 2009 U.S. Dist. LEXIS 76306, at *24; R. 56.1 St. ¶¶ 66-67; Aldabeshes Hearing Tr. at 191:16-193:24.¹⁴ In 2005, Aldabeshes purchased 15 to 18 60-carton cases of unstamped cigarettes from Thomasina Mack, five or six days per week. *Golden Feather II*, at *55-56; R. 56.1 St. ¶ 66; Aldabeshes Hearing Tr., at 192:7-196:10. At first, Aldabeshes picked up the cigarettes from Mack's house on the Poospatuck Reservation, but later Mack delivered the cigarettes to a storage location off the Reservation, where Aldabeshes would pick them up. *Golden Feather II*, at 55-56; Aldabeshes Hearing Tr., at 192:7-196:10. Aldabeshes last purchased unstamped cigarettes from Mack in early 2006. Aldabeshes Hearing Tr. at 202:13-15. Aldabeshes sold the unstamped cigarettes he bought from Mack to grocery stores in New York City. R. 56.1 St. ¶ 67; 192:22-25; 193:15-24.

¹⁴ The transcript of Aldabeshes' hearing testimony is attached as Exhibit D to the *Bloom Decl.*

ARGUMENT

POINT I

**THE CITY IS ENTITLED ON THE PRESENT
RECORD TO A PERMANENT INJUNCTION
ENJOINING THE DEFENDANTS' SALE OF
UNSTAMPED CIGARETTES**

The Court may on the existing record grant the City summary judgment and enter a permanent injunction without a hearing. To obtain a permanent injunction, a party must demonstrate actual success on the merits of its claim. *See Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 546 n.12 (1987) (“The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success.”). Although a party seeking a permanent injunction also must normally show irreparable harm absent the relief sought, in this case, irreparable harm is presumed from proof of a violation of the CCTA or the CMSA. *Golden Feather*, 597 F.3d at 121. A showing of “some cognizable danger of recurrent violations” is the second element required for a permanent injunction. *CSX Corp. v. Children's Inv. Fund Mgmt. (UK) LLP*, 654 F.3d 276, 284-285 (2d Cir. 2011).¹⁵

A permanent injunction requires a hearing only where material facts are in dispute. *See Professional Plan Examiners of New Jersey, Inc. v. Lefante*, 750 F.2d 282, 288 (3d

¹⁵ A permanent injunction may issue whether defendants’ sales continue or not: “[T]he court's power to grant injunctive relief survives discontinuance of the illegal conduct.” *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953); *Soto-Lopez v. New York City Civil Service Com.*, 840 F.2d 162, 168 (2d Cir. 1988) (“the court's power to grant injunctive relief survives discontinuance of the illegal conduct”); *SEC v. American Bd. of Trade, Inc.*, 751 F.2d 529 (2d Cir. 1984) (noting that even pre-suit cessation of illegal conduct does not bar injunctive relief. “Cessation at a time when suit ... was known to be imminent is generally an unconvincing sign of remorse.”).

Cir. 1984) (hearing not required when the facts are not in dispute); *United States v. McGee*, 714 F.2d 607, 613 (6th Cir. 1983) (evidentiary hearing not required for permanent injunction if there are no triable issues of fact); *Socialist Workers Party v. Illinois State Bd. of Elections*, 566 F.2d 586 (7th Cir. 1977), *aff'd on other grounds*, 440 U.S. 173 (1979):

No purpose would have been served by holding an evidentiary hearing in this case. There was no factual dispute as to the ground on which the injunction was ordered. The district court permitted appellants to file an offer of proof outlining facts they would present if a hearing were granted. We find nothing in this offer of proof which, if proved, would have altered the result; indeed, it has not been demonstrated that anything that could have arisen in a factual hearing would have altered the result. The absence of such a hearing, therefore, does not constitute a ground for reversal.

Id. at 587. In this case, the material facts are undisputed; no hearing is required.

A. The City Has Succeeded In Proving Its CCTA Claim

The CCTA makes it “unlawful for any person knowingly to ship, transport, receive, possess, sell, distribute or purchase contraband cigarettes.” 18 U.S.C. § 2342(a). Contraband cigarettes are “a quantity in excess of 10,000 cigarettes, which bear no evidence of the payment of applicable State or local cigarette taxes in the State or locality where such cigarettes are found, if the State or local government requires a stamp, impression, or other indication to be placed on packages or other containers of cigarettes to evidence payment of cigarette taxes.” 18 U.S.C. § 2341(2). Four elements are required to prove a CCTA violation: “that a party (1) knowingly “ship, transport, receive, possess, sell, distribute or purchase” (2) more than 10,000 cigarettes (3) that do not bear tax stamps, (4) under circumstances where state or local cigarette tax law requires the cigarettes to bear such stamps.” *Golden Feather II*, 2009 U.S. Dist. LEXIS 76306 at *74-75.

1. Defendants knowingly received, possessed, sold, distributed and purchased more than 10,000 unstamped cigarettes

The record contains undisputed facts to establish the first three elements required for a CCTA violation. Each defendant “purchased” and “received” and “possessed” and “sold” and “distributed”¹⁶ unstamped cigarettes, in quantities far in excess of 10,000 cigarettes (fifty cartons). The above-summarized Form CG-6’s show each defendant’s annual purchase of hundreds of thousands (if not millions) of cartons of unstamped cigarettes from Gutlove and Pennisi. *See supra* pp. 9-10. It may plainly be inferred from the CG-6’s that each defendant received and possessed the unstamped cigarettes it purchased; likewise, because defendants were in the business of selling cigarettes, it cannot reasonably be disputed that the defendants sold or distributed those cigarettes. Moreover, although proof of a CCTA violation does not require individual transactions each involving in excess of 50 cartons, *see Golden Feather II*, 2009 U.S. Dist. LEXIS 76306, at *101-103, the undisputed evidence demonstrates that defendants made many such sales. *Id.* at *19-25 (all defendants), *32-36 (Peace Pipe), at *40-43 (Red Dot), at *46-51 (Smoking Arrow), at *54-58 (TDM); *see supra*, pp. 7-8 ¶ 3. Defendants introduced no evidence to the contrary, whether at the preliminary injunction hearing or afterwards.¹⁷

¹⁶ The definition of the term “distribute” as used in the CCTA has not been addressed. Although not defined by the statute, the term is defined in the CCTA’s implementing regulations. *See* 27 CFR §§ 646.141; 646.143. (defining “distribute as “To sell, ship, issue, give, transfer, or otherwise dispose of”). Courts apply the meaning of a defined term whether the definition appears in the statute itself or in its implementing regulations. *See, e.g., Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 691 (1995); *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 433 (1978); *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 750 (1984); *Kinneary v. City of New York*, 601 F.3d 151, 156 (2d Cir. 2010). The evidence establishes that defendants certainly “distributed” contraband cigarettes.

¹⁷ As to defendant Tony Phillips, the City’s success on the merits follows from Phillips’ default, which constitutes an admission of liability. *Pitbull Productions, Inc. v. Universal Netmedia, Inc.*,

2. The Cigarettes Are Subject To An Applicable Tax; Stamps Are Required

This Court has already effectively ruled that the City has satisfied the fourth element – an applicable tax and required stamps – of a CCTA violation. As to the injunctive relief sought here, a court will “apply the law in effect at the time it renders its decision” *Bradley v. School Board of Richmond*, 416 U.S. 696, 711 (1974); *see also Starbucks Corp. v. Wolfe's Borough Coffee, Inc.*, 477 F.3d 765, 766 (2d Cir. 2007) (directing district court to consider effect of amended law on prospective injunctive relief); *F.D.I.C v. Faulkner*, 991 F.2d 262, 266-67 (5th Cir. 1993) (upholding injunction “notwithstanding the fact that conduct supporting the issuance of the injunction occurred before the [law’s] effective date”). Whether entry of a permanent injunction is warranted is thus determined under N.Y. Tax L. § 471 *et seq.*, as amended by the Tax Law Amendments, which the Court held in *Golden Feather III* resolve “any doubt that cigarettes sold on the Unkechauge reservation to non-members of the Unkechauge Nation are required to bear tax stamps” *Golden Feather III* at 12; *see* N.Y. Tax L. § 471(1) (“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 to non-Indians and evidence of such tax shall be by means of an affixed cigarette tax stamp.”). The fourth element of a CCTA is established. Future sales of unstamped cigarettes to the public by defendants will violate the CCTA.¹⁸

2007 U.S. Dist. LEXIS 82201 (S.D.N.Y. 2007) (Gorenstein, M.J.); *Dunkin Donuts, Inc. v. Peter Romanofsky, Inc.*, 2006 U.S. Dist. LEXIS 58851 (E.D.N.Y. Aug. 2006) (Azrack, M.J.).

¹⁸ The Tax Law Amendments became effective subsequent to the New York Court of Appeals’ decision in *Cayuga Indian Nation of New York v. Gould*, 14 N.Y.3d 614, 648 (2010) (“*Cayuga*”) and thus supersede any holding in that decision that is contrary to the Amendments.

Proof of defendants' CCTA violations prior to the effective date of the Tax Law Amendments is nonetheless relevant to the damages and penalties sought by this motion. But this Court has already found that pre-amendment, Tax Law § 471 imposed an applicable tax and a stamping requirement on cigarettes sold by defendants to the public. *See Golden Feather III*, at 14-19. Discussing *Cayuga Indian Nation of New York v. Gould*, 14 N.Y.3d 614 (2010) ("*Cayuga*"), the Court noted that *Cayuga* had confirmed the Court's previous holding (in *Golden Feather II*) that pre-amendment § 471 required stamps: "the Court of Appeals accepted the principle advanced by this Court that [pre-amendment] § 471 standing alone imposes a tax on cigarettes sold on reservation to non-Indians." *Golden Feather III*, at 15. Further, the Court found that the defendants' conduct "fits squarely within the exception recognized by *Cayuga* for enforcing § 471's stamping obligation on reservation-sellers where such sales are bulk sales intended for resale off the reservation." *Id.* at 19.

B. The City Has Succeeded In Proving Its CMSA Claim

The Cigarette Marketing Standards Act, N.Y. Tax Law §§ 483-489 ("CMSA") makes it unlawful for:

any agent, wholesale dealer or retail dealer, with intent to injure competitors or destroy or substantially lessen competition, or with intent to avoid the collection or paying over of such taxes as may be required by law, to advertise, offer to sell, or sell cigarettes at less than the cost of such agent wholesale dealer or retail dealer, as the case may be.

N.Y. Tax L. § 484(a)(1). *See also Lorillard Tobacco Co. v. Roth*, 99 N.Y.2d 316, 319 (2003); *Save More Mkts. v. Chu*, 1986 U.S. Dist. LEXIS 27054, at *3-4 (N.D.N.Y. April 8, 1986) (CMSA serves to eliminate the evasion of New York State taxes on cigarettes).

The factual elements necessary to establish defendants' CMSA violations were established at the preliminary injunction hearing. Because they have not been materially disputed, those facts need not be proven again on this summary judgment motion. *Fed. R. Civ. P.* 65(a)(2) (“evidence that is received on [a motion for preliminary injunction] and that would be admissible at trial becomes part of the trial record and need not be repeated at trial.”).

The record evidence demonstrates CMSA violations by all defendants.

The Court concludes *based upon the findings set forth above* that each defendant has sold, and continues to sell, large quantities of cigarettes at less than the cost of the retail dealer, as that term is defined by the CMSA. The Court further concludes that defendants' sales at less than cost were made with the intent to avoid the payment of New York State cigarette tax.

Golden Feather II, 2009 U.S. Dist. LEXIS 76306 at *108 (emphasis added). *See id.* at *17-19 (CMSA minimum prices), at *37-39 (Peace Pipe), at *44-45 (Red Dot), at *52-53 (Smoking Arrow), at *60-61(TDM); *see also supra*, pp. 8-9 ¶ 4 (citing hearing testimony and evidence); R. 56.1 St. ¶¶ 15, 42, 53, 65.

C. The Defendants Are Likely to Continue To Violate The CCTA and CMSA in the Future

The Court previously found that each of the defendants was likely to commit future violations of the CCTA and CMSA, satisfying that element necessary to entry of the preliminary injunction. *See Golden Feather II*, 2009 U.S. Dist. LEXIS 76306 at *37 (Peace Pipe), *44 (Red Dot), *52 (Smoking Arrow), *59-60 (TDM). Even as to defendant Mack, who purportedly had closed her business at the time the complaint was filed, the Court found that:

Although TDM and Mack currently have suspended business, the Court finds by a preponderance of the evidence that they are likely to engage in the sale of large quantities of unstamped cigarettes in the future unless enjoined by this Court. The Court bases this

conclusion on TDM and Mack's long history of selling large quantities of unstamped cigarettes, including through sales off the Reservation; the profitability of engaging in this business; and the fact that Mack recently installed a new sign to direct customers to her store. In addition, as discussed above, TDM and Mack continue to receive, possess, and purchase more than 10,000 unstamped cigarettes although the store is technically closed.

Id., at *59-60.

The Court's predictions were amply borne out from the outset when it was revealed that Rodney Morrison (and other defendants) continued to sell unstamped cigarettes in defiance of the Injunction. *Golden Feather (Contempt)*, 2010 U.S. Dist. LEXIS 63605, at *4. No defendant has introduced any evidence to alter the Court's original conclusion that his or her sales of unstamped cigarettes would continue in the future.

The Court's prediction of future sales is generally supported by new evidence of present, on-going violations of the CCTA by numerous other reservation retailers. At deposition, defendant Denise Paschall was asked the following questions and gave the following answers concerning continuing sales of unstamped cigarettes:

Q. Does anyone on the Poospatuck Reservation currently sell-unstamped cigarettes?

A. I guess they all do.

Q. How do you come to that belief?

A. Because their businesses are still open.

Q. Do they have signs up advertising cigarettes?

A. Yes.

Q. Have you heard from anyone that they are selling unstamped cigarettes?

A. Yeah, the native brands, right?¹⁹

Q. What do you mean by that?

A. The Senecas.²⁰

Q. To your knowledge, [are] stores on the Poospatuck Reservation selling native cigarettes to the public?

A. Yes.

Q. What is the basis of that knowledge?

A. The advertising.

Q. Do you see people going into the stores occasionally?

A. Yes.

Q. Have you heard from anyone that it is legal to sell unstamped native brand cigarettes to the public?

A. Is it legal?

Q. Have you heard from anyone that it's legal to sell unstamped native-brand cigarettes to the public?

A. I haven't heard it from a person, it was in the papers, right?

Q. Is that your understanding that it is legal?

A. Yes.

¹⁹ The term “native brands” appears to mean cigarettes manufactured by an Indian-owned company, or at least having an Indian motif on the packaging. *See NY Times*, February 22, 2012 at A1 (attached as Ex. 24 to the *Proshansky Decl.*) New York tax law does not recognize the term “native brand,” much less carve out a “native brand” exception: “[A]ll cigarettes sold on an Indian reservation to non-members of the nation or tribe or to non-Indians shall be taxed, and evidence of such tax will be by means of an affixed cigarette tax stamp.” N.Y. Tax L. § 471-e (emphasis added).

²⁰ “Seneca” is a purported “native brand” of cigarettes. *See Grand River Enters. Six Nations v. King*, 783 F. Supp. 2d 516, 524 (S.D.N.Y. 2011)

Q. Is it your belief that that is the belief of other store owners on the reservation?

A. Yes.

Q. Why do you have that belief that that is the understanding of other store owners?

A. Because the Tribal Council had told the stores that they could remain open, and it was advertised in the paper when they were going to court, and pretty much that is how I know.

Q. Did the Tribal Council inform cigarette stores that they could remain open and sell Indian-brand, unstamped cigarettes?

A. Yes.

Q. That is still valid through today?

A. Yes.

Q. What stores are currently selling unstamped cigarettes to the public?

A. All of them.

Q. All of them?

A. Yes.

Q. About how many are there?

A. I don't know, maybe like 30, I don't know.

Proshansky Decl. Ex. 16 at 14:2-16:4 (April 17, 2012 Deposition of Denise Paschall).

Defendant Thomasina Mack corroborated the above testimony:

Q. Does anyone on the Poospatuck Reservation currently sell unstamped cigarettes?

A. [aside to counsel omitted] I am assuming yes.

* * *

Q. Have you seen signs up on the Reservation advertising cigarettes for sale?

A. Yes.

* * *

Q. [I]s that your belief, that The stores on the Reservation are allowed to sell [native brands]?

A. That's what we have been told by the Tribal Counsel. People have been told that, yes.

* * *

Q. And from what you have heard, the Tribal Council expressed the opinion that sales of native brands is legal?

A. Yes

* **

Q. Would you say that it is the general opinion on the Reservation, that it's legal to sell native brand cigarettes?

A. Yes.

Proshansky Decl. Ex. 19 at 159:22-160:3; 160:11-13; 166:17-20, 167:20-22, 168:8-11 (March 5, 2012 Deposition of Thomasina Mack).

The above testimony is consistent with the statement of a truck driver arrested carrying over 25,000 cartons of unstamped "Signal"²¹ cigarettes on January 23, 2012. The driver volunteered that, in the prior five months, he made weekly deliveries of cigarettes to the Poospatuck Reservation from the Winnebago Indian Reservation in Nebraska. *Proshansky Decl.* Ex. 22, at Exhibit C thereto. Also consistent is a bill of lading describing a May 2, 2012 shipment of 105 cases of cigarettes to a Poospatuck Reservation smoke shop from "Mohawk

²¹ A "native brand."

Distribution,” located on the St. Regis Mohawk (Akwesasne) Reservation. See *Proshansky Decl.* Ex 23.

The “native brand” myth, apparently promulgated by the Tribal Council to justify sales of unstamped cigarettes by Poospatuck Reservation cigarette sellers, is reminiscent of prior unfounded legal opinions -- e.g., the purported legalization of unstamped cigarette sales by the “forbearance policy” or the “49 carton limit.” See *City of New York v. Milhelm Attea*, 550 F. Supp. 2d 332, 346-47 (E.D.N.Y. 2008) (rejecting forbearance argument); *Golden Feather II*, 2009 U.S. Dist. LEXIS 76306, at *101-103 (rejecting 49 carton argument). Claims related to the legality of sales of unstamped native brands, already apparently relied upon by Reservation sellers will likely be advanced as yet another meritless legal defense for future sales of unstamped cigarettes. As such, it is evidence that defendants will continue to engage in sales of unstamped cigarettes in the future if not enjoined.²²

²² In addition to sales of “native brands” as a future source of bootlegged cigarettes, further testimony suggests that cigarettes are being manufactured on the Poospatuck Reservation:

Q. Have you heard that anyone is manufacturing cigarettes on the Poospatuck Reservation?

A. Yes.

Q. What have you heard?

A. That everybody is trying to manufacture cigarettes.

Q. Have you heard about any particular people manufacturing cigarettes ?

A. Harry [Wallace].

Proshansky Decl. Ex. 16 at 20:14-25 (April 17, 2012 Deposition of Denise Paschall). Cigarettes manufactured of the Reservation would be another source of illegal, unstamped cigarettes.

POINT II

THE COURT SHOULD AWARD THE CITY DAMAGES

The CCTA and CMSA authorize awards of money damages to local governments injured by violations. 18 U.S.C. § 2346(b)(2); N.Y. Tax L. § 483(b). The measure of the City's damages should be the amount of City tax that defendants evaded by selling unstamped cigarettes that later were present in the City. That measure of damages is consistent with the courts' use of the amount of tax evaded to determine restitution awards to taxing jurisdictions from defendants convicted of CCTA violations. *See United States v. Wen Hui Huang*, 2000 U.S. App. LEXIS 9973 (2d Cir. 2000) (defendant convicted of conspiracy to sell contraband cigarettes was properly ordered to pay restitution for the tax loss associated with the sales); *United States v. Conway*, 323 Fed Appx. 517 (9th Cir. Apr. 16, 2009) (upholding district court's award of restitution Washington State's tax losses resulting from defendants' contraband cigarette sales); *United States v. Morrison*, 685 F. Supp. 2d 339, 350 (E.D.N.Y. 2010) (State of New York may recover restitution in amount of taxes owed on cigarettes involved in CCTA violations); *cf. United States v. Mikayelyan*, 2005 U.S. Dist. LEXIS 10253 (W.D. Va. May 26, 2005) (calculating offense level based on the amount of the evaded tax through sale of unstamped cigarettes).

With exceptions not relevant here, a City cigarette tax of \$15 per carton is imposed by operation of law on any cigarettes present in the City for sale or for use.²³ N.Y.C. Admin. Code § 11-1302(a). That City tax went unpaid on all of defendants' sales of unstamped cigarettes that arrived in the City. Under the City's tax laws, like the State's, the cigarette tax is

²³ "Use" is as "[a]ny exercise of a right or power, actual or constructive" including "receipt, storage, or any keeping or retention for any length of time." N.Y.C. Admin. Code § 11-1301(4).

to be pre-paid through tax stamps, purchased and affixed by stamping agents. *Id.* § 11-1302(e), (g). Where defendants were a substantial factor in causing the presence in the City of unstamped cigarettes – by delivering them, by using the Postal Service to deliver them, or by selling to traffickers – defendants bypassed the City’s tax collection mechanism and caused an unpaid tax to accrue, injuring the City in the amount of the evaded tax. The City’s damages are accordingly calculated by the number of cartons of unstamped cigarettes sold by defendants that reached the City, multiplied by the City’s \$15 per carton tax.

Defendants may well argue for the erroneous view of damages causation contained in *dicta* in *United States v. Morrison*, 685 F. Supp. 2d 339, 346-47 (E.D.N.Y. 2010), which opined that restitution to the City for sales of unstamped cigarettes required proof that a hypothetical purchaser of unstamped cigarettes would have, but for the unstamped cigarettes made available by a defendant, purchased a pack of stamped cigarettes, i.e., that a pack of unstamped cigarettes “displaced” a sale of stamped cigarettes. *Id.*

This “displacement” theory is erroneous, on several grounds. First, it is internally inconsistent with the actual result in *Morrison*, where Judge Hurley awarded restitution to the State of New York equal to the amount of state tax on the unstamped cigarettes sold by Morrison, without requiring proof that the sales had displaced sales of stamped cigarettes. *Id.* at 350. Those unstamped cigarettes would have been subject to the same issues of causation that Judge Hurley raised as to the City sales – had Morrison’s unstamped cigarettes not been available to buyers, the buyers could have purchased them from other bootleg sources, or could have entirely foregone the more expensive purchase. *Morrison’s* displacement theory is also inconsistent with appellate rulings awarding restitution to taxing jurisdictions based on the

amount of tax evaded, where no proof of displacement is required. *See Wen Hui Huang*, 2000 U.S. App. LEXIS 9973; *Conway*, 323 Fed Appx. 517.

But the principal error in the displacement theory of damages is that it relies on an incorrect legal premise as to the mechanism by which the introduction of unstamped cigarettes into a taxing jurisdiction causes a tax loss. By law, imposition of the cigarette tax is triggered – *i.e.* the tax is owed, without more – by the presence of unstamped cigarettes in a taxing jurisdiction, such as the City. *See* N.Y.C. Admin. Code §11-1302(a).²⁴ Thus, even if the unstamped cigarettes remained unsold in a bootlegger’s vehicle, the tax is imposed and owed. *See* N.Y.C. Admin. Code §11-1301(4).²⁵ Whether or not the offending cigarettes displace a hypothetical legitimate sale has no bearing on the accrual of the City tax, which is imposed by operation of law on all cigarettes present in the City. When unstamped cigarettes arrive in the City without the joint State-City tax stamp, the injury has accrued and is complete.

Imposed but evaded excise taxes are compensable as damages. In *Pasquantino v. United States*, 544 U.S. 349, 355 (2005), smugglers brought liquor into Canada without paying excise taxes and Canada’s “right to uncollected excise taxes on the liquor petitioners imported into Canada” was deemed to be Canada’s “property,” of which it was deprived by the smugglers. *See United States v. Bengis*, 631 F.3d 33, 37 (2d Cir. 2011) (“*Pasquantino* ... concluded that the Canadian government holds a property interest in the substantial liquor tax revenue that defendants avoided paying as a result of their smuggling scheme”); *Porcelli v. United States*, 303

²⁴ “There is hereby imposed and shall be paid a tax on: (1) All cigarettes possessed in the city for sale . . . ; (2) The use of all cigarettes in the city . . .” N.Y.C. Admin. Code §11-1302(a).

²⁵ “Use” includes “any keeping or retention for any length of time.” *Id.*

F.3d 452, 456-57 (2d Cir. 2002) (scheme to defraud state of sales taxes deprives the State of its property right in “a chose in action constituting its right to sue” for the unpaid taxes).

Treating the City’s injury as complete once unstamped cigarettes are present in the City is consistent with the intended purpose of the cigarette taxation scheme. The Second Circuit’s observation about the State cigarette tax system applies equally to the identically-operating City system: “New York’s Department of Taxation and Finance (“Department”) ‘precollects’ the tax from a limited number of state-licensed stamping agents and *mandates that these agents be the only entry point for cigarettes into New York’s stream of commerce.*” *Oneida Nation of N.Y. v. Cuomo*, 645 F.3d at 158 (emphasis added). So too does the City system mandate that City-licensed stamping agents be the sole source of cigarettes for the City. *See* N.Y.C. Admin. Code § 11-1302(e) (“Except as hereinafter provided, the tax shall be advanced and paid by the agent or distributor. The agent shall be liable for the collection and payment of the tax . . .”); *id.* § 11-1302(g) (“Agents located within or without the city shall purchase stamps and affix them . . . to packages of cigarettes to be sold within the city.”). It is defendants’ circumvention of this “closed” market, by introducing unstamped cigarettes into the City, that better describes the cause of injury, which is complete once unstamped cigarettes on which a tax is imposed are present in the City.

The issue was recently analyzed in *City of New York v. Chavez*, 2012 U.S. Dist. LEXIS 42792 (S.D.N.Y. March 26, 2012) (“*Chavez*”). In *Chavez*, the City alleged CCTA violations as predicate offenses under the RICO statute against defendants who shipped unstamped cigarettes into New York City by common carrier or the Postal Service (operating precisely as did Smoker’s Den in this case). The court rejected an argument by the *Chavez*

defendants that the sending of unstamped cigarettes into the City had not proximately caused the City's injury.

Here, as alleged, the City's harm is directly linked to the predicate [CCTA violations] charged. The Complaint characterizes the City's harm as a loss of tax revenue. The conduct alleged to establish the predicate acts is the Defendants' evasion of the New York tax collection scheme. As such, the conduct causing the harm is the same conduct that creates liability for the predicate act.

2012 U.S. Dist. LEXIS 42792, at *20. The *Chavez* court correctly observed that “the harm [to the City] is complete once the cigarettes are shipped to [city residents] who, as unlicensed stamping agents, would not pay the required taxes. Stated simply, the selling, shipping, or transporting of the cigarettes was a direct cause of the tax evasion that injured the City.” *Id.*

The present defendants occupy essentially the same position as the defendants in *Chavez* (and indeed, in the case of Peace Pipe's mail-order sales via Smoker's Den, the identical position). The *Chavez* defendants shipped the cigarettes via the Postal Service and common carrier into the City. *See Chavez*, 2012 U.S. Dist. LEXIS 42792 at *20. The present defendants either delivered unstamped cigarettes into the City themselves, used the Postal Service (Smoker's Den) or sold to trafficker intermediaries, such as Mari A. or Ahman Albadeshes.²⁶ By each method, defendants caused unstamped cigarettes, on which a City tax was owed to be present in the City. Defendants were certainly a “substantial factor” in the evasion of the unpaid City tax. *See Tufariello v. Long Island R.R.*, 458 F.3d 80, 87 (2d Cir. 2006) (“To establish

²⁶ The defendants in *Chavez* operated by accepting telephone and internet orders and delivering by Postal Service and common carrier, identically to Peace Pipe's Smoker's Den. *See United States v. Contents of Accounts*, 2010 U.S. Dist. LEXIS 60525 (W.D. Ky. June 17, 2010) (discussing the *Chavez* operation); *Chavez*, 2012 U.S. Dist. LEXIS 42792 at *2-5; R. 56.1 St. ¶ 8; Hearing Ex. 89 ¶¶ 5, 6; Hearing Exs. 43 and 44.

causation . . . , a plaintiff generally must show that the defendant's conduct was a 'substantial factor in bringing about the harm.'").

A. Damages -- Peace Pipe, Rodney Morrison, Charolette Morrison

Peace Pipe Sales Data for October 12, 2007 through March 14, 2009

Peace Pipe produced to the City electronic sales records covering the period October 12, 2007 through March 14, 2009 (the "2007-2009 Sales File") (*Proshansky Decl. Ex. 11*). R. 56.1 St. ¶ 17; *Proshansky Decl. Exs. 9-10, Admissions 8-11*. The records include Peace Pipe's sales through its "Smoker's Den" mail order service, which received telephone or mail orders and then sold and delivered cigarettes directly to customers, including New York City residents, shipping the cigarettes via the U.S. Postal Service. R. 56.1 St. ¶¶ 8, 18-19; *Hearing Exs. 43, 44, and 89 ¶¶ 5, 6*. Peace Pipe necessarily obtained customer addresses for the Smoker's Den mailings; the addresses to which Peace Pipe mailed the Smoker's Den purchases are contained in the 2007-2009 Sales File. *See Proshansky Decl. Exs. 9-10, Admissions 21-25.*²⁷ A City address in the 2007-2009 Sales File is strong evidence of unstamped cigarettes mailed by Peace Pipe/Smoker's Den into the City or sold to an individual who Peace Pipe knew was transporting them into the City. The 2007-2009 Sales File reveals that Peace Pipe sold 437,567 cartons of unstamped cigarettes (410,789 of which are listed as sales from a Smoker's Den cash

²⁷ The 2007-2009 Sales File also contains a small number of customer addresses for what may have been in-store transactions, because they are not recorded at a Smoker's Den register. *See Proshansky Decl. Ex. 12*. The 2007-2009 Sales File records the cash register at which a sale was processed. Sales from registers 1-18 were Smoker's Den sales. *See Proshansky Decl. Exs. 9-10, Admissions 22-24*. Peace Pipe thus may also have obtained addresses for a small number of in-store transactions, because 6% of sales that include customer addresses were made at cash registers other than registers 1-18. *See Proshansky Decl. Ex. 12*. Alternately, these simply may be mail-order sales that were processed at non-Smoker's Den registers.

register) to customers with New York City addresses. *See* R. 56.1 St. ¶¶ 18-19; *Proshansky Decl.* Ex. 12 (table summarizing the 2007-2009 Sales File). The evaded City tax on those cigarettes equals \$6,563,505 (437,567 x \$15.00).

Peace Pipe Sales Data for August 29, 2004 through June 30, 2006

The U.S. Attorney's Office for the Eastern District of New York (the "USAO-EDNY") produced to the City a spreadsheet, compiled from Peace Pipe's records obtained by the USAO-EDNY from Peace Pipe, that records sales in excess of 300 cartons (August 29, 2004 through March 8, 2006) and in excess of 50 cartons (March 9, 2006 through June 30, 2006) (the "2004-2006 Sales Spreadsheet") (attached as Exhibit 1 to the *Wanderer Decl.*). *See Wanderer Decl.* ¶¶ 3-10; *Proshansky Decl.* ¶ 16. The 2004-2006 Sales Spreadsheet details Peace Pipe's sales in those quantities and includes, among other data, customer name, account number, cartons purchased, and amount paid. *See Wanderer Decl.* ¶¶ 3-10; *see also Proshansky Decl.* Exs. 9-10, Admissions 31-34.

Agent Wanderer determined the residence of the customers in the 2004-2006 Sales Spreadsheet by matching customer identifying information contained in the records (*e.g.*, phone numbers, names and credit card information) with an address in the Lexis-Nexis "ACCURINT" Database. *See Wanderer Decl.* ¶ 7. The results fall into three categories: "NYC" (for customers with an address in the City), "NON-NYC" (for customers with an address outside of the City) and "UNK" (for customers with insufficient identifying information to determine an address). *See Wanderer Decl.* ¶¶ 9-10. The 2004-2006 Sales Spreadsheet reflects that Peace

Pipe sold at least²⁸ 231,838 cartons of unstamped cigarettes to customers with New York City addresses between August 29, 2004 and June 30, 2006. *See Proshansky Decl.* Ex. 13 (table summarizing the 2004-2006 Sales Spreadsheet); R. 56.1 St. ¶ 22; *Proshansky Decl.* Exs. 9-10, Admissions 34, 40. The evaded City tax on these cigarettes equals \$3,477,570 (231,838 x \$15.00 = \$3,477,570).

Peace Pipe Sales Data for July 2, 2002 through August 3, 2004

The USAO-EDNY also produced to the City a spreadsheet seized from Peace Pipe during the execution of a 2004 search warrant. R. 56.1 St. ¶ 24; *Wanderer Decl.* ¶ 11. The spreadsheet summarizes Peace Pipe's sales, identified by customer name and account number, between July 21, 1999 and August 3, 2004 (the "1999-2004 Sales File") (*Wanderer Decl.* Ex. 2). *See* R. 56.1 St. ¶¶ 24-25; *Wanderer Decl.* ¶ 11; *See Proshansky Decl.* Exs. 9-10, Admissions 41-46. The 1999-2004 Sales File does not include addresses, but does include customer names and telephone numbers.²⁹

²⁸ The 2004-2006 Sales Spreadsheet does not contain any information on individual transactions involving less than 300 cartons from August 29, 2004 to March 9, 2006 or involving less than 50 cartons from March 9, 2006 to June 30, 2006. Cigarette sales in less than those amounts from this period are accordingly not included in the City's calculation. *See Wanderer Decl.* ¶ 6.

²⁹ The 1999-2004 Sales File confirms the hearing testimony by Mari A that she made many bulk purchases of cigarettes from Peace Pipe and resold them in the City. *See Golden Feather II*, 2009 U.S. Dist. LEXIS, at *20-24, 32-35. This file contains an entry for a "Ms Tiny" with an account number of 100459 and a telephone number with a "347" (City) area code. *See Wanderer Decl.* Ex. 2 at p. 393 (PP 06026). Peace Pipe admits that this entry refers to Mari A. *See* Hearing Ex. 89 ¶ 12; *Proshansky Decl.* Exs. 9-10, Admissions 57-58. According to the file, Mari A. made 92 purchases of unstamped cigarettes between January 19, 2003 and August 3, 2004, totaling \$497,499.60. *Wanderer Decl.* Ex. 2 at p. 393 (PP 06026); R. 56.1 St. ¶ 34; *Proshansky Decl.* Exs. 9-10, Admission 59. In addition, the 2004-2006 Sales Spreadsheet shows that Mari A. (referred to again as Ms. Tiny) purchased at least 11,683 cartons of unstamped cigarettes in 21 separate transactions from Peace Pipe between September 2, 2004 and January 27, 2006. *See Wanderer Decl.*, Ex. 1 at p. 26; R. 56.1 St. ¶ 23; *Proshansky Decl.* Exs. 9-10,

On the reasonable assumption that customers with City telephone numbers purchased cigarettes that were possessed or sold in the City, subject to the City tax, the 1999-2004 Sales File permits the City taxes evaded to be calculated for this period of time. The assumption that a City phone number represents a City resident was tested by matching the phone numbers to addresses in the Lexis-Nexis Public Records database. In a sample of 94 telephone numbers with City area codes (*i.e.*, 917, 718, 212, 347, 646),³⁰ 100% of the numbers for which an associated address could be identified in the Lexis-Nexis database (70% of the total numbers sampled) were associated with a City address. *See* Affidavit of Eli Jacobson dated June 1, 2012, ¶¶ 2-5. Thus, for some phones with City areas codes, there was no address match at all. For every phone with a City areas code for which an address was found, the address was in the City. *Id.*

The 1999-2004 Sales File provides only the total purchases (in dollars, not cartons) for a given customer, between the listed dates of each customer's first and last purchase (but no earlier than July 21, 1999 nor later than August 3, 2004). Sale dates between the first and last purchase are not specified. A damages calculation based on the 1999-2004 Sales File must thus take into account the 2002 change in the amount of City tax imposed. Prior to July 2, 2002, the City tax per pack was \$.08, after that date, it rose to \$1.50 (\$15 per carton). N.Y.C. Admin. Code § 11-1302(a)(3). Accordingly, the tax loss calculated from the 1999-2004 Sales File must reflect the lower amount of the tax imposed on the pre-July 2, 2002 purchases.

Admission 60. Since Mari A. testified that Peace Pipe had several different account numbers for her, the above total may be a minimum. Mari A. Hearing Tr. at 26:3-12.

³⁰ *See* http://www.nanpa.com/area_code_maps/display.html?nyinset (last visited May 30, 2012) (showing map of City area codes).

As explained below, the City's damage calculation eliminates pre-July 2, 2002 sales. As an initial matter, many customers' purchases listed in the 1999-2004 Sales File occurred entirely on or after July 2, 2002 (*i.e.* the first purchase date is on or after July 2, 2002). All of these purchases, if associated with a City area code, are included in the City's damages calculation.³¹ Exhibit 14 to the Proshansky Declaration lists entries from the 1999-2004 Sales File showing Peace Pipe's sales totaling \$15,663,293.95 to customers with New York City phone numbers whose listed purchases occurred entirely between July 2, 2002 and August 3, 2004. *See Proshansky Decl.* Ex. 14 at p. 217. Assuming conservatively that Peace Pipe sold these unstamped cigarettes for an average of \$25.00 per carton, the sales equate to 626,532 cartons of unstamped cigarettes to customers with New York City phone numbers.³² The tax evaded by the sales is therefore \$9,397,980 (626,532 cartons x \$15.00).

As to customers with City phone numbers whose first purchase preceded July 2, 2002, who continued to make purchases after that date, only the post-July 2, 2002 portion of their purchases is included in the City's damages calculation. The pre-July 2, 2002 purchases were statistically removed from these customers' total purchases by the following proration

³¹ Customers whose purchases occurred entirely before July 2, 2002 are excluded from the City's damage calculation.

³² An average price of not more than \$25.00 a carton between July 2002 and August 2004 is well-supported and not disputed. *See* R. 56.1 St. ¶ 35; *Proshansky Decl.* Exs. 9-10, Admission 61. Out of twenty-four sales of mostly Newport cigarettes to Mari A. (a/k/a Ms. Tiny) between May 2003 and August 2004 charged as racketeering acts in Rodney Morrison's criminal trial, the price per carton exceeded \$25.00 only once (at \$26.50); in 19 transactions, the price was \$21.00 per carton. Hearing Ex. 89 ¶ 12 and Attachment 1; *Proshansky Decl.* Exs. 9-10, Admission 62. An analysis by I.R.S. Revenue Agent Robert Wanderer of sales to six of Peace Pipe's largest customers between 2002 and 2004 shows an average price of \$21.92 per carton. *See Wanderer Decl.* ¶ 12.

method: The total value of these customers' purchases made between July 1999 and August 2004 was multiplied by the ratio between the time span of their post-July 2, 2002 purchases and the entire time span of their purchases (the "proration percentage") (i.e. if 30% of the total days between their first and last purchase were on or after July 2, 2002, then 30% of their total purchases would be included).³³ Exhibit 15 to the Proshansky Declaration lists those customers' entries from the 1999-2004 Sales File and shows the proration percentage for each. Using the described proration method, the total value of Peace Pipe's post-July 2, 2002 sales of unstamped cigarettes to these customers was \$19,974,073.26. *See Proshansky Decl.* Ex. 15 at 96. At \$25 a carton, this represents 798,963 cartons purchased from Peace Pipe on or after July 2, 2002 by customers with City phone numbers who made both pre- and post-July 2, 2002 purchases. Those 798,893 cartons represent a City tax loss of \$11,984,445 (798,893 x \$15.00).

Accordingly, the 1999-2004 Sales File provides evidence of a post-July 2, 2002 City tax loss of \$21,382,425 (\$9,397,980 + \$11,984,445).

Summary of Peace Pipe Damages Calculations

The table below summarizes the City's above-described damages calculations for Peace Pipe, Rodney Morrison, and Charolette Morrison:

³³ Thus for a customer whose purchases were made from July 1, 2002 to July 4, 2002, 75% (3 out of 4 days) of the time span is on or after July 2, 2002 and thus 75% of the value of the purchases would be treated as having occurred post tax-increase. In this way, the pre-July 2, 2002 portion of the purchases is eliminated.

Name	Period	Customer Identifications	Cartons	Tax Loss
2007-2009 Sales File	October 12, 2007 to March 14, 2009	New York City Address	437,567	\$6,563,505
2004-2006 Sales Spreadsheet	August 29, 2004 to June 30, 2006	New York City Address	231,838	\$3,477,570
1999-2004 Sales File	July 2, 2002 to August 3, 2004	New York City Phone Number; all purchases on or after July 2, 2002	626,532	\$9,397,980
1999-2004 Sales File	July 2, 2002 to August 3, 2004	New York City Phone Number; pro-rated purchases on or after July 2, 2002	798,963	\$11,984,445
		Totals:	2,094,900	\$31,423,500.00

This damages calculation undoubtedly omits a large number of cartons on which the City would be entitled to recovery. First, a full forty per cent of Peace Pipe’s sales in the 2007-2009 Sales File had no address information at all (926,676 cartons with addresses and 648,510 cartons without addresses). *See Proshansky Decl.* Ex. 12. Likewise, forty-five percent of the transactions in the 2004-2006 Sales Spreadsheet were excluded from the City’s calculation because no address for the customer could be determined. *See Wanderer Decl.*, Ex. 1; *Proshansky Decl.* Ex. 13. All of those sales are excluded from the City’s damages’ calculation, although some percentage can reasonably have been expected to have been found in the City. Second, seven months of sales in 2008 and 2009 are simply unavailable: the 2007-2009 Sales File records sales until March 14, 2009 (and omits April 2008), but Peace Pipe remained in operation through September 2009. *See Proshansky Decl.* Exs. 9-10, Admissions 6, 9. Third, the City’s calculation entirely omits July 2006 through September 2007, a 14-month period for

which no data could be located but during which Peace Pipe purchased well over 100,000 cartons of unstamped cigarettes per month. *See* Hearing Ex. 91 at pp. 7, 9.

Accordingly, this Court should award the City damages of \$31,423,500 against defendants Peace Pipe, Rodney Morrison and Charolette Morrison, with interest.

B. Damages – Thomasina Mack and TDM Discount Cigarettes

The City's damages attributable to Thomasina Mack and TDM are calculable from the testimony of Ms. Mack's customers who resold the unstamped cigarettes they purchased from her in the City. Trafficker Ahman Aldabeshes testified to transporting unstamped cigarettes from Mack's wholesale cigarette operation into New York City, purchasing 15 to 18 60-carton cases five or six days per week in 2005 until early 2006. *See supra*, p. 15; R. 56.1 St. ¶¶ 66-67; Aldabeshes Hearing Tr. at 192:7-196:10; 202:13-15, *Golden Feather II*, 2009 U.S. Dist LEXIS 76306, at *24, 55-56. Aldabeshes testified to purchasing from Mack both at her house and later at a storage location. *Id.* Viewed very conservatively, this testimony indicates that, for at least one month (from 2005 through early 2006), Aldabeshes trafficked to the City at least 15 60-carton cases, five days per week, or a minimum of 18,000 cartons of unstamped cigarettes (15 cases x 60 cartons (per case) x 5 days per week x 4 weeks), translating to \$270,000 in evaded taxes.³⁴

Mari A. testified to purchasing and reselling in the City 600 to 900 cartons of unstamped cigarettes, on 20 or 30 occasions from 2005 to 2006, from a Long Island storage

³⁴ Mack purchased 49,212 cartons of unstamped cigarettes from Pennisi between December 2005 and January 2006 and 69,399 cartons in February 2006, an amount more than sufficient to supply Albadeshes's estimated purchases from her. *See* Hearing Ex. 91, at p. 10. Mack also purchased unstamped cigarettes from Harold Levinson Associates in 2005. Hearing Ex. 95 at 74:19-24.

facility linked to Mack. *See supra*, pp. 14-15; R. 56.1 St. ¶¶ 68, 71; Mari A. Hearing Tr. at 37:21-39:21; Hearing Ex. 60C; *Golden Feather II*, 2009 U.S. Dist. LEXIS 76306, at *20-24, 56-57. Mari. A. further testified that a person named Dee delivered cigarettes to this facility, and Mack has admitted that “Dee” was a regular customer of hers prior to 2007 and that she sold Dee 600 cartons of unstamped cigarettes every two days for one year. *See supra*, p. 14; R. 56.1 St. ¶ 68; Mari A. Hearing Tr. at 37:21-39:21; Hearing Ex. 95 at 53:20-54:21; *Proshansky Decl.* Ex. 19 at 192:22-193:4; *Golden Feather II*, 2009 U.S. Dist. LEXIS 76306, at *56-57. At a minimum, Mari. A. purchased and resold in the City 12,000 cartons of unstamped cigarettes (20 purchases of 600 cartons), equal to \$180,000 in evaded City taxes.

The table below summarizes the damages calculations attributable to Mack and TDM:

Period	Trafficker	Cartons	Tax Loss
2005-2006	Aldabeshes	18,000	\$270,000.00
2005-2006	Mari A.	12,000	\$180,000.00
	Totals:	30,000	\$450,000.00

This calculation of tax loss attributable to Mack and TDM is exceedingly conservative. TDM purchased a total of 1,883,917 cartons of unstamped cigarettes from Pennisi from 2005 through 2008, *see* Hearing Ex. 91 at p. 11; *see also supra*, p. 10, and Mack admitted still more purchases of unstamped cigarettes from other sources on and off the Reservation, including Harry Wallace, Jesse Watkins and wholesaler Harold Levinson Associates. Hearing Ex. 95 at 35:4-36:22, 74:22-24. Accordingly, the City’s calculation attributes only 1.6% (30,000 cartons divided by 1,883,917) of TDM’s purchases from Pennisi alone as having been trafficked to New York City. The amount of damages sought by the City is particularly reasonable where

Mack's admitted failure to keep records of her sales has impeded a more refined calculation. Hearing Ex. 95 at 27:11-28:1.

The Court should award the City damages of \$450,000 from defendants Thomasina Mack and TDM, with interest.

POINT III

THE COURT SHOULD IMPOSE CIVIL PENALTIES

Because Raymond Hart, Red Dot, Denise Paschall, Tony Phillips and Smoking Arrow have largely frustrated the City's ability to calculate damages, the City seeks an award of civil penalties under the CCTA against those defendants.³⁵ Local governments may "obtain . . . from any person . . . civil penalties " for CCTA violations. 18 U.S.C. § 2346(b)(2).

Proof of damages is not a prerequisite to an award of civil penalties. "Civil penalties are designed as a rough form of 'liquidated damages' for the harms suffered by the Government as a result of a defendant's conduct." *United States v. Ursery*, 518 U.S. 267 (1996). By contrast to "money damages," a civil penalty is

[A]n extraordinary liability to which the law subjects a wrongdoer in favor of the person wronged, such liability not being limited to the damages suffered. A statutory penalty which an individual is allowed to recover against a wrongdoer as a satisfaction for the wrong or injury suffered, *without reference to the actual damage sustained*.

Ballentine's Law Dictionary 3rd ed. (2010) (emphasis added). Civil penalties are "a form of punishment imposed by the government for unlawful or proscribed conduct, *which goes beyond*

³⁵ The City does not seek civil penalties on this motion against Rodney Morrison, Charolette Morrison, Peace Pipe, Thomasina Mack, and TDM. However, the City reserves the right to seek such penalties in the future against those defendants in the event the Court declines to award damages.

remedying the damage caused to the harmed parties by the defendant's action.” *Johnson v. SEC*, 87 F.3d 484, 488 (D.C. Cir. 1996) (emphasis added); *see United States v. Telluride Co.*, 146 F.3d 1241 (10th Cir. 1998) (civil penalties are a punishment imposed for violating a public law “which goes beyond compensation for the injury caused by the defendant”); *Centennial P.R. License Corp. v. Telecomms. Regulatory Bd.*, 634 F.3d 17 (1st Cir. 2011) (“Incentive payments not limited to actual damages (*e.g.*, civil penalties and criminal fines) are familiar devices to achieve public ends.”). “[D]amages are distinct from penalties. The term ‘damages’ refers to the loss suffered by an injured party expressed in a dollar amount. Unlike damages, penalties are not designed to compensate an injured party, but are designed to deter conduct deemed undesirable by the legislature.” *Travelers Ins. Co. v. Waltham Industrial Laboratories Corp.*, 722 F. Supp. 814 (D. Mass. 1988), *aff’d in part, r’vsed in part on other grounds*, 883 F.2d 1092 (1st Cir. 1989). Except as limited by due process, civil penalties are not tied to demonstrable compensatory damages. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

An appropriate use of penalties in a setting comparable to the present case is seen in *Philip Morris USA Inc. v. Tammy's Smoke Shop, Inc.*, 726 F. Supp. 2d 223, 225 (E.D.N.Y.), where Judge Wexler imposed a \$100,000 Lanham Act penalty against a Poospatuck Reservation cigarette seller for possessing a mere 200 cartons of counterfeit Philip Morris cigarettes. The court noted: “As for [Philip Morris’s] lost profits, it is not clear that the counterfeit [cigarette] sales caused [Philip Morris] to lose any sales. However, the Court realizes that the counterfeit

sales likely caused injury to plaintiff, albeit to an extent and degree that is difficult or impossible to quantify.”³⁶

A. The Court Should Award The City A Civil Penalty Of 2% Of Defendants’ Gross Sales For The Year Preceding April 2009

Unlike every other civil penalty imposed in title 18 of the U.S. Code, the CCTA does not specify a method for calculating a penalty. *Compare* 18 U.S.C. § 2346 *with, e.g.,* 18 U.S.C. § 35, § 216, § 229A, § 248, § 924, § 1034, § 1083, § 1716E, § 1956. Our research has located no instance in which a court set the amount of an unspecified penalty by “borrowing” that amount from the penalty set forth in a different statute, but that very technique is routinely used in the interpretation of undefined statutory terms or to provide for an omitted limitations period. *See, e.g., Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 156 (1987) (RICO statute of limitations established by borrowing from a different, related federal statute); *United States v. Zacher*, 586 F.2d 912, 914 (2d Cir. 1978) (“Because the statute itself does not define the term ‘bribe’ we must look to similar statutes, ... for aid in its interpretation.”); *Fryer v. A.S.A.P. Fire & Safety Corp.*, 2011 U.S. App. LEXIS 18686, at *11 (1st Cir. Sept. 9, 2011) (“When a statute does not define [a] term..., the Supreme Court has instructed us to look to the standard applied in other statutes employing similar language.”); *Carter v. Welles-Bowen Realty, Inc.*, 553 F.3d 979, 986 (6th Cir. 2009) (persuasive authority for

³⁶ Judge Wexler further noted: “As for the need to deter defendants, they have ceased counterfeiting activities (following the execution of a seizure order issued by the Court), and there is no evidence that defendants have continued their infringing conduct. However, given that the extent of defendants' counterfeit operation is unclear, and that the record indicates there are numerous other cigarette sellers in defendants' vicinity on the Poospatuck Indian Reservation ... there appears to be a real need to deter others from such insidious conduct.” 726 F. Supp. 2d at 225.

interpreting an ambiguous statutory term includes other statutes); see *Jordan v. De George*, 341 U.S. 223, 229-230 (1951) (upholding phrase “crime of moral turpitude” against vagueness challenge by examining meaning of term in cases and other statutes).

In *Malley-Duff*, where the RICO statute had omitted a limitations period, the Supreme Court observed that “[i]n such situations we do not ordinarily assume that Congress intended that there be no time limit on actions at all; rather, our task is to ‘borrow’ the most suitable statute or other rule of timeliness from some other source.” 483 U.S. at 146. There would be still less sense in assuming that Congress provided in the CCTA for “civil penalties,” but intended that penalty to be zero. Accordingly, as in *Malley-Duff*, this Court should borrow a penalty amount from the most suitable analogue to the CCTA. See *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969) (“existence of a statutory right implies the existence of all necessary and appropriate remedies.”); *Adeleke v. United States*, 355 F.3d 144, 149 (2d Cir. 2004) (“if a right of action exists to enforce a federal right and Congress is silent on the question of remedies, a federal court may order any appropriate relief.”) (quoting *Franklin v. Gwinnett County Public Schools*, 503 U.S. at 69).

In this case, the Court may appropriately borrow a penalty from the Prevent All Cigarette Trafficking Act, 15 U.S.C. § 375 *et seq.*, (“PACT Act”) which prohibits cross-border cigarette deliveries unless, *inter alia*, state and local taxes have been pre-paid.³⁷ The PACT Act bears a close functional relationship to the CCTA because cross-border cigarette deliveries

³⁷ The United States has been enjoined from enforcing certain provisions of the PACT Act, but not the Act’s penalty provisions. Various provisions of the PACT Act, for which the Act’s civil penalty provision would apply, have not been enjoined. See *Red Earth LLC v. United States*, 657 F.3d 138 (2d Cir. 2011); *Gordon v. Holder*, 2011 U.S. Dist Lexis 139201 (D.D.C. 2001); *Musser’s Inc. v. United States*, 2011 U.S. Dist. LEXIS 109629 (E.D. Pa. Sept. 26, 2011).

consist principally of cigarettes shipped from low-tax states (or Indian reservations) to high-tax states.³⁸ Cross-border sales are a means of evading the higher-tax states' cigarette tax, because the cross-border seller has paid the tax (if at all) at the lower rate in the originating state. A PACT Act offense, which consists of sending unstamped (or low-tax state stamped) cigarettes into a high tax state, is also inherently a CCTA violation, because upon arrival in the high-tax state, the cigarettes are not affixed with the tax stamp of the jurisdiction in which the cigarettes are found. *See Chavez*, 2012 U.S. Dist. LEXIS 42792 at *10.³⁹

The PACT Act was enacted to:

- (3) provide government enforcement officials with more effective enforcement tools to combat tobacco smuggling;
- (4) make it more difficult for cigarette and smokeless tobacco traffickers to engage in and profit from their illegal activities;
- (5) increase collections of Federal, State, and local excise taxes on cigarettes and smokeless tobacco...

PACT Act findings, § 1(c) (3)–(5) (appended to 15 U.S.C. § 375). The 2006 Amendments to the CCTA, which provided for civil enforcement by local governments, including recovery of civil penalties, *see* USA Patriot Improvement and Reauthorization Act of 2006, Pub. L. No. 109-177,

³⁸ Reservation sellers are major sources of cross-border sales of unstamped cigarettes. *See Red Earth LLC v. United States*, 657 F.3d 138 (2d Cir. 2011).

³⁹ Assuming the 50-carton threshold is satisfied, a cross-border seller would be liable under both the PACT Act and the CCTA, for selling, shipping or distributing contraband cigarettes. *See Chavez*, 2012 U.S. Dist. LEXIS 42792, *12 (CCTA violations by sales that would have been PACT Act violations if made after the effective date of the PACT Act); *United States v. Mahoney*, 2007 U.S. Dist. LEXIS 19074 (E.D. Wash. Mar. 19, 2007) (Defendant charged with trafficking in contraband cigarettes for having cigarettes delivered by others into another jurisdiction), *aff'd*, 298 Fed. Appx. 555 (9th Cir. 2008);

120 Stat. 192, self-evidently serve these same purposes.⁴⁰ Such similarity of purpose supports “borrowing” of statutory provisions. *See Malley-Duff*, 483 U.S. at 156.

Support for borrowing the PACT Act’s penalty amount for use with the CCTA also derives from the nearly identical enforcement provisions in the CCTA and PACT Acts. The CCTA provides:

Enforcement

(b) (1) A State, through its attorney general, a local government, through its chief law enforcement officer may bring an action in the United States district courts to prevent and restrain violations of this chapter by any person

(2) A State, through its attorney general, or a local government, through its chief law enforcement officer (or a designee thereof), may in a civil action under paragraph (1) also obtain any other appropriate relief for violations of this chapter from any person (or by any person controlling such person), including civil penalties, money damages, and injunctive or other equitable relief. ...

(3) The remedies under paragraphs (1) and (2) are in addition to any other remedies under Federal, State, local, or other law.

18 U.S.C. § 2346(b)(2). The PACT Act provides:

State, local, and tribal enforcement.

(1) In general. (A) Standing. A State, through its attorney general, or a local government or Indian tribe that levies a tax subject to section 2A(a)(3), through its chief law enforcement officer, may bring an action in a United States district court to prevent and restrain violations of this Act by any person or to

⁴⁰ Congressional statements describing the 2006 CCTA amendments as intended to cut off funding for criminal organizations that subsidize terrorist organizations through cigarette trafficking, 151 *Cong. Rec. H.* 6273, 6284 (daily ed. July 21, 2005) (Remarks of Rep. Coble), are remarkably similar to statements by PACT Act sponsors that “we can no longer continue to let terrorist organizations exploit weaknesses in our tobacco laws to generate significant amounts of money,” 155 *Cong. Rec. S.* 5822 (daily ed. May 21, 2009) (Remarks of Senator Kohl), further attesting to the similar purpose of the two statutes.

obtain any other appropriate relief from any person for violations of this Act including civil penalties, money damages, and injunctive or other equitable relief.

(4) Nonexclusivity of remedy.

(A) In general. The remedies available under this section and section 3 are in addition to any other remedies available under Federal, State, local, tribal, or other law.

15 U.S.C. § 378(c).

The PACT Act provides penalty amounts as follows:

(1) In general. Except as provided in paragraph (3)⁴¹, whoever violates this Act shall be subject to a civil penalty in an amount not to exceed – (A) in the case of a delivery seller, the greater of —

(i) \$ 5,000 in the case of the first violation, or \$ 10,000 for any other violation; or (ii) for any violation, 2 percent of the gross sales of cigarettes or smokeless tobacco of the delivery seller during the 1-year period ending on the date of the violation.

15 U.S.C. § 377(b). The present defendants are liable for so many individual CCTA violations that borrowing the PACT Act penalty provision on a per violation basis would result in an astronomical maximum penalty. Although the high maximum penalty is indicative of the gravity with which Congress views cigarette trafficking, the City proposes that the Court instead calculate a penalty by borrowing the PACT Act penalty set forth in § 377(b)(1)(ii), applied as if defendants each committed a single, continuing violation, so that the maximum penalty would equal two percent of that defendants' gross sales for the year preceding a chosen violation date.⁴²

⁴¹ Section 377 (b) (3) provides penalties for common carriers and their employees..

⁴² The 2% of sales penalty is “the greater of” the alternative penalties provided in § 377 (b)(1)(i).

Since penalties have a punitive aspect, it is appropriate to choose a violation date after this Court's March 16, 2009 decision in *Golden Feather I*. Because the City's data on sales volume is recorded on a monthly basis, penalties based on 2% of each defendant's gross sales for the 12 months preceding April 2009 are calculated below.

B. Calculation of 2% of Red Dot's And Smoking Arrow's Gross Sales for the Year Preceding April 2009

In accordance with the penalty discussion above, the City's proposed maximum penalty for the defendants Denise Paschall, Tony Phillips, and Smoking Arrow, and proposed maximum penalty for defendants Raymond Hart and Red Dot equals two percent of each defendant-groups' gross sales of unstamped cigarettes between April 1, 2008 through March 31, 2009, the one-year period preceding a continuing CCTA violation deemed to commence after this Court's March 16, 2009 *Golden Feather I* decision.

Defendants Smoking Arrow and Red Dot did not produce any sales records. In the absence of such records, gross sales may be conservatively calculated by multiplying the number of cartons each store purchased at wholesale, indicated in the Gutlove and Pennisi Form CG-6s, by the price at which these defendants sold the cigarettes to the DTF investigators. The calculations are shown below.

1. Penalty Against Raymond Hart and Red Dot & Feather Smoke Shop

Red Dot purchased 557,032 cartons of unstamped cigarettes between April 1, 2008 and March 31, 2009. *See Proshansky Decl.* Ex. 6; Hearing Ex. 91 at p. 3; R. 56.1 St. ¶ 39. DTF investigators purchased 60 cartons of Newports at Red Dot for \$26.00 per carton on June 3, 2008 and 98 cartons of Newports for \$28.50 per carton on September 3, 2008. *Golden Feather II*, 2009 U.S. Dist. LEXIS 76306, at *41-43; Mars Hearing Tr. 308:15-310:20, 327:24-329:24.

Assuming conservatively that Red Dot's average sales price between April 1, 2008 and March 31, 2009 was the lower of these prices - \$26.00 per carton - Red Dot's gross sales for that 12-month period equals \$14,482,832 ($\$26.00 \times 557,032$). *See* R. 56.1 St. ¶ 41. A two percent penalty is equal to \$289,656.64.

This calculation substantially understates Red Dot's gross sales. Hart has admitted that Red Dot's typical prices for unstamped cigarettes were far above \$26.00 during the period in question, testifying that Red Dot sold Newport cigarettes for "not less" than "about \$37" per carton in 2008 and early 2009 and \$48.00 per carton as of April 27, 2009. *Golden Feather II*, 2009 U.S. Dist. LEXIS 76306, at *44; Hearing Ex. 93 at 32:12-14, 21-24, 33:9-15. Hart also testified that Red Dot sold U.S.A. Gold brand cigarettes for \$35 per carton as of April 27, 2009.⁴³ Hearing Ex. 93 at 46:1-2.

2. Penalty against Tony Phillips, Denise Paschall and Smoking Arrow

The penalty against Phillips, Paschall, and Smoking Arrow is also calculated by multiplying the numbers of cartons of unstamped cigarettes purchased by Smoking Arrow during the one year period prior to April 1, 2009 by the price per carton in Smoking Arrow's 2008 sales to DTF. Smoking Arrow purchased 1,137,174 cartons of unstamped cigarettes from April 1, 2008 through March 31, 2009. *See Proshansky Decl.* Ex. 6; Hearing Ex. 91 at p. 3; R. 56.1 St. ¶ 51. In three DTF purchases, on June 3, 2008, August 7, 2008 and September 5, 2008, Smoking Arrow sold the cigarettes for \$26.00 per carton (60 cartons of Newport cigarettes), \$28.00 per carton (180 cartons of Newports) and \$27.25 per cartoon (100 cartons of Newports) respectively.

⁴³ Red Dot's biggest selling brands were Newport and USA Gold. *See Golden Feather II*, 2009 U.S. Dist. LEXIS 76306 at *44; Hearing Ex. 93 at 45:21-25.

See Golden Feather II, 2009 U.S. Dist. LEXIS 76306, at *49-51; Mars Hearing Tr. at 311:25-315:18, 324:25-327:23, 330:24-332:1. Assuming conservatively that Smoking Arrow's average sales price between April 1, 2008 and March 31, 2009 was the lowest of these prices – \$26.00 per carton – Smoking Arrow's gross sales for that 12-month period equals \$29,566,524, for a 2% penalty of \$591,330.48 (1,137,174 x \$26.00 x 2%). *See* R. 56.1 St. ¶ 52.

This calculation is conservative because Paschall testified that the per carton price of Newports was “thirty-something” in 2008 or the beginning of 2009 and was \$37-\$40 as of April 30, 2009. *Golden Feather II*, 2009 U.S. Dist. LEXIS 76306, at *52; Hearing Ex. 94 at 24:4-12. Mari A. also testified that she paid between \$28 and \$32 per carton of Newports in 2007 and 2008. *Golden Feather II*, 2009 U.S. Dist. LEXIS 76306, at *52; Mari A. Hearing Tr. 32:11-21. Tony Phillips testified at Rodney Morrison's criminal trial that during a one year period from 2006 until 2007, Smoking Arrow generated gross revenue of approximately \$1 million per week, *Golden Feather II*, 2009 U.S. Dist. LEXIS 76306, at *46-47; Hearing Ex. 101 at 2508:3-13, 2512:5-2513:3, 2523:25-2524:47; 2525:40-2526:9; R. 56.1 St. ¶ 59, which would justify a penalty against the Smoking Arrow defendants nearly double that sought by the City. (2% x \$1,000,000 gross revenue x 52 weeks = \$1,040,000).

3. Summary of Penalties

The table below summarizes the penalty calculations:

Defendant	Cartons of Unstamped Cigarettes Purchased from April 1, 2008 through March 31, 2009	Gross Sales (at \$26.00 per carton)	Penalty (2% of gross sales for year)
Red Dot, Hart	557,032	\$14,482,832	\$289,656.64
Smoking Arrow, Phillips, Paschall	1,137,174	\$29,566,524	\$591,330.48

Since Red Dot is presently Raymond Hart’s sole proprietorship, a single penalty of \$289,656.64 imposed jointly and severally against Hart and Red Dot would be appropriate. Similarly, Smoking Arrow is Denise Paschall’s sole proprietorship but was operated principally by Tony Phillips, *see* R. 56.1 St. ¶ 48, so that a penalty of \$591,330.48 should be imposed jointly and severally against Paschall, Smoking Arrow and Tony Phillips.

C. Factors Determinative of the Penalty Amount

Determining the amount of a penalty to be imposed is a matter for the Court. *Tull v. United States*, 481 U.S. 412, 427 (1987). In determining monetary penalties under, for example 21 U.S.C. § 842(c) (for illegal distribution of legal but highly regulated substances), district courts often consider: (1) the level of defendant's culpability, (2) the public harm caused by the violations, (3) defendant's profits from the violations, and (4) defendant's ability to pay a penalty. *Advance Pharmaceutical, Inc. v. United States*, 391 F.3d 377, 399 (2d Cir. 2004) (citing cases). An additional factor is relevant here: Where a suit involves the public interest and is not merely a private controversy, “the courts’ equitable powers assume[] an even broader and more

flexible character.” *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946); *see also California v. Am. Stores Co.*, 495 U.S. 271, 295 (1990) (“Courts of equity may and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved”).

These considerations warrant a significant penalty in this case: (1) Defendants’ culpability is high, in that after *Golden Feather I* (if not earlier), defendants acted with complete awareness that their conduct was illegal. *See Golden Feather I*, 2009 U.S. Dist LEXIS 20953. In any event, the facts of record are replete with evidence that defendants knew their conduct to be illegal long before this Court so ruled on March 16, 2009, as evidenced by the steps defendants took to conceal their sales. *See Golden Feather II*, 2009 U.S. Dist. LEXIS 76306 at *41 (Red Dot assisted Mari A. in avoiding police); *48 (Smoking Arrow assisted Mari A. in avoiding police); R. 56.1 St. ¶¶ 44, 55; Mari A. Hearing Tr. at 31:12-20, 36:23-37:8. (2) The public harm from defendants’ conduct also needs little elaboration, based on a record showing, even apart from the enormity of the tax losses caused to the City and State, that defendants’ conduct contributes to detrimental smoking-related health effects, including deaths. *See Golden Feather II* at *65-72, 119-20. (3) Defendants’ failure to keep records obscures their profits from the conduct at issue, but if Peace Pipe’s profits are any indication, defendants’ profits can be assumed to have been sizable. *See supra* pp. 11-12; *Proshansky Decl.* Ex. 11; (4) Defendants have offered no evidence that they cannot afford to pay a substantial penalty.⁴⁴

⁴⁴ By way of comparison, Judge Wexler imposed \$100,000 in civil penalties under the Lanham Act on a Poospatuck Reservation store for possessing 200 cartons of counterfeit cigarettes. *Philip Morris USA Inc. v. Tammy's Smoke Shop, Inc.*, 726 F. Supp. 2d 223, 225 (E.D.N.Y. 2010).

POINT IV

THE COURT SHOULD AWARD THE CITY ITS ATTORNEY'S FEES

The CMSA provides that a plaintiff who establishes a CMSA violation is entitled to “costs of suit, including reasonable attorney’s fees.” N.Y. Tax L. § 484(b). Having proven such a violation, the City is entitled to such an award.

To determine an attorney’s fee award, district courts multiply the hours reasonably expended on the matter by a reasonable hourly rate. *See A.R. v. N.Y. City Dep’t of Educ.*, 407 F.3d 65, 79 (2d Cir. 2005). Eric Proshansky, an attorney with over 25 years of experience, spent 3,258 hours. *See Proshansky Decl.* ¶ 32 and Ex. 26. Gail Rubin, an attorney with nearly 30 years of experience, spent 423 hours. *See Declaration of Gail Rubin*, dated June 4, 2012, ¶ 4; *Proshansky Decl.*, Ex. 26. Victoria Scalzo, an attorney with over 25 years of experience, spent 260 hours. *See Declaration of Victoria Scalzo*, dated June 4, 2012, ¶ 3; *Proshansky Decl.*, Ex. 26. William Miller, an attorney with 7 years of experience, spent 2084.75 hours. *See Declaration of William H. Miller* dated June 4, 2012 ¶ 3; *Proshansky Decl.*, Ex. 26. Aaron Bloom, an attorney with 8 years of experience spent 333.25 hours. *See Bloom Decl.* ¶ 40; *Proshansky Decl.*, Ex. 26. Because certain of the hours discussed above (125 for Mr. Proshansky and 249.05 for Mr. Miller) were already included in the City’s now-settled demand for attorney’s fees in conjunction with its motion for contempt, the City is reducing its fee request for the hours of Mr. Proshansky and Mr. Miller accordingly.

The City requests that Mr. Proshansky’s, Ms. Rubin’s, and Ms. Scalzo’s time be compensated at a rate of \$350 per hour and that Mr. Bloom’s and Mr. Miller’s time be compensated at \$250 per hour. These rates are reasonable, falling well within the range of

market rates in this district for attorneys of similar experience. *See Shim v. Millennium Group*, 2010 U.S. Dist. LEXIS 68922 , at *9-12 (E.D.N.Y. June 21, 2010) (approving rates of \$350 for a partner and \$250 for a senior associate; finding, after surveying cases in the district, that these rates are “well in line with prevailing market rates in this district”); *see also Adams v. New York State Educ. Dep’t*, 2009 U.S. Dist LEXIS 37379, at *38-39 (S.D.N.Y. May 4, 2009) (approving rate of \$350 for City Law Department attorney with 20 years experience); *Dula v. Amereon, Ltd.*, 2004 U.S. Dist. LEXIS 13231, at *3 (S.D.N.Y. July 14, 2004) (awarding attorney’s fees at rates of \$375 to \$425 for partners and \$275 for an associate as contempt sanction).

Based on these hours and rates, the City’s attorney’s fees total \$1,983,850.

Attorney	Hours	Rate	Fees
Proshansky	3133	\$350	\$1,096,550
Rubin	423	\$350	\$148,050
Scalzo	260	\$350	\$91,000
Bloom	333.25	\$250	\$83,312.50
Miller	1835.7	\$250	\$458,925
TOTAL			\$1,877,837.50

In addition, the City has provided a spreadsheet listing expenses incurred in this case, totaling \$12,868.76. *Proshansky Decl. Ex. 25*. Adding these costs to the attorney’s fees results in costs of suit of \$1,890,706.26 to be apportioned equally among the defendants.

CONCLUSION

For all of the reasons set forth above, the City's motion for summary judgment pursuant to Federal Rule of Civil Procedure 56 should be granted.

Dated: June 4, 2012
New York, NY

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