UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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THE CITY OF NEW YORK,

Plaintiff,

Civil Action No. 08-CV-3966(CBA)

-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 MORRISION in her individual capacity, RED DOT & FEATHER SMOKE SHOP, INC., RAYMOND HART in his individual capacity, SMOKING ARROW SMOKE SHOP, DENISE PASCHALL, in her individual capacity, TONY PHILLIPS, TDM DISCOUNT CIGARETTES and THOMASINA MACK In her individual capacity,

Defendants,
---X

DEFENDANTS' JOINT MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Submitted by:

James F. Simermeyer
Kelly P. Peters
Law Offices of James F. Simermeyer, PC
148 Madison Avenue, 16th Floor
New York, New York 10016
Tel: 212.691.7070
Fax: 212.691.7097
James@simermeyer.com
Attorneys for Thomasina Mack
TDM Discount Cigarettes

Peter Smith
Law Offices of Peter S. Smith, PLLC
40 Fulton Street, 23rd Fl.
New York, NY 10038
smithlawfirm@msn.com
Tel: 866.761.0184
Attorney for Rodney Morrison,
Charlotte Morrison and
Peace Pipe Smoke Shop

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I. PRELIMINARY STATEMENT

The defendants Thomasina Mack, TDM Discount Cigarettes, Rodney Morrison, Charlotte Morrison and Peace Pipe Smoke Shop (collectively the "defendants") herein respectfully submit this memorandum of law in support to their cross motion, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for an order of summary judgment dismissing this case in its entirety with prejudice. The defendants further submit these papers in opposition to plaintiff City of New York's (the "City") motion for summary judgment seeking a permanent injunction, special monetary damages, civil penalties and attorney's fees.

This Case should be dismissed because the City no longer has a viable claim for the relief that it seeks. The City cannot prove that the defendants' alleged violations of the Contraband Cigarette Trafficking Act, 18 U.S.C. § 2341 et seq. (the "CCTA") have actually or proximately caused harm to the City. In a desperate attempt to revive its flawed case, the City has unlawfully changed its theory of injury, causation and damages at the eleventh hour, without providing any notice to the defendants—in its pleadings or by any other means. Such drastic measures amount to an admission that the City cannot prove its case based on its pleadings or the record.

Notwithstanding the fact that the City's case is broken beyond repair, it arrogantly asks the Court to enter a decision on summary judgment granting a permanent injunction, special monetary damages, civil penalties and attorneys' fees. Such relief would be absurd, not only because the City has failed to prove injury and causation, but principally because the City has failed to demonstrate that there are no genuine issues of material fact thereby warranting a judgment as a matter of law. Indeed, the City's factual evidence is based almost entirely off the testimony of a multiple felon, crack addict who was paid approximately $60,000.00 to act as an informant; and a multiple felon, undocumented immigrant who avoided jail time and deportation

by cooperating with the City. The credibility of plaintiff's witnesses alone creates issues of material fact warranting denial of its motion for summary judgment.

The City's request for special monetary damages and civil penalties should also be denied because they were not properly pleaded and are remedies that cannot be decided on this motion by this Court in equity. Accordingly, the issue of whether to impose monetary damages and/or civil penalties should be decided by a jury in a court at law.

Finally, the City's request for attorney's fees under the CMSA are contrary to public policy and wholly unreasonable under these circumstances. Governments are generally not entitled to attorney's fees in civil lawsuits, and there is no basis in law which would support a finding that the City is entitled to an award of attorney's fees in this case.

For these reasons, the defendants respectfully request that this case be dismissed in its entirety with prejudice; or in the alternative, that the City's motion be denied so that this case may be decided at trial by a jury.

II. RELEVANT FACTS AND PROCEDURAL HISTORY

The plaintiff City of New York commenced this action against the Unkechauge defendants in September 2008, seeking injunctive relief, penalties and damages under the Contraband Cigarette Trafficking Act, 18 U.S.C. § 2341 et seq.(the "CCTA"), and the Cigarette Marketing Standards Act, N.Y. Tax Law § 483 et seq. (McKinney) (the "CMSA").

On August 25, 2009, the Court granted the City's motion for a preliminary injunction. The defendants subsequently appealed that order to the Court of Appeals for the Second Circuit. On June 21, 2010, while the appeal was pending, the New York State Legislature enacted Senate Bill 8285/Assembly Bill 11515, which amended N.Y. Tax Law §§ 471, 471-e (the "Tax Law

Amendments"). The Tax Law Amendments were amended to specifically address the collection of taxes on cigarettes sold by Indians on reservation lands.

Notwithstanding the change in tax law, the Court denied defendants' request for vacatur of the injunction. City of New York v. Golden Feather Smoke Shop, No. 08-cv-3966 (E.D.N.Y. Aug. 16, 2011). Thus, the defendants have never been permitted to operate their respective stores under the scheme created by the Tax Law Amendments.

a. The City's Claims

Since commencing this action on September 29, 2008, the City has consistently maintained and argued before this Court that it suffered a monetary injury to the extent that defendants' sales of unstamped cigarettes on the Poospatuck Reservation displaced taxable cigarette sales that would have otherwise occurred in New York City. (Hereinafter referred to as the "displacement theory"). In its complaint, the City pleaded a tax loss injury based on the displacement theory stating that "[t]he vast majority of defendants' sales of unstamped cigarettes replace sales that would otherwise generate tax revenues for the State and the City [...and that] sales of unstamped cigarettes annually cost New York State and City hundreds of millions of dollars in tax revenues." Complaint at ¶43.

The City has since abandoned the displacement theory on its pending motion for summary judgment. See City's Memo at 29. The City abandoned the displacement theory because it cannot prove that it in fact sustained a quantifiable tax loss injury. *See* **Exhibit A** of the Affirmation of James F. Simermeyer (Aff. of JFS) attaching the relevant portions of the Deposition of Maureen Kokeas (Dep. of Kokeas) at 45:7—46:12 ("I don't know that you can quantify [the City's alleged tax loss as a result of Indian reservation sales of cigarettes]") See Dep. of Kokeas at59:18—60:10 ("I don't' believe the Office of Tax Enforcement has ever come

up with a number to say this is the specific tax loss."). Moreover, the City's cigarette tax revenue data evince that the City's cigarette tax revenue has in fact decreased despite the preliminary injunction ordered by this court and the amendments to N.Y. Tax Law § 471 et seq. *See* **Exhibit B** to the Aff. of JFS (Enclosing the "Cigarette Tax Chart" submitted by the City summarizing its tax stamp revenues from 2002 to 2012). There is simply no evidence that the City actually sustained a tax loss injury as a result of the defendants' sales of unstamped cigarettes on the Poospatuck Reservation.

In the instant motion, the City submits for the first time an alternative theory of injury and damages. Specifically, the City is claiming that it sustained a tax loss injury by the mere presence of unstamped cigarettes in its jurisdiction because "[w]hen unstamped cigarettes arrive in the City without the joint State-City tax stamp, the injury has accrued and is complete." City's Memorandum of Law, dated June 4, 2012 ("City's Memo") at 29. The City seeks to hold defendants' liable for its alleged injury because their sales of unstamped cigarettes on the Poospatuck Reservation were a "substantial factor" in causing unstamped cigarettes to be present in the City. City's Memo at 31-32. The City has not pleaded this new theory of injury, causation or damages in this case.

The City seeks to collect damages for its alleged tax loss injury from two primary sources. First, the City is seeking damages from several New York State licensed wholesalers for supplying unstamped cigarettes to Indian retailers, despite the fact that such sales were lawful. *See* City of New York v. Milhelm Attea, Inc., No. 06-cv-3620 (E.D.N.Y.); *See also State of New York Commissioner of Taxation and Finance, Advisory Opinion* Petition No. M06316A, March 16, 2006 ("Advisory Opinion"), attached as **Exhibit C** to Aff. of JFS. Second, the City seeks to recover its alleged tax loss from the Indian retailer defendants who

were permitted to purchase unstamped cigarettes for resale from their stores on the Poospatuck Indian Reservation.

The City has also sought restitution in criminal proceedings against the defendants' Rodney Morrison and Jesse Watkins. Thus far, the City's claims have been denied as a result of the City's claims for tax loss injury being too attenuated. *See* e.g. United States v. Morrison, 685 F. Supp. 2d 339 (E.D.N.Y. 2010)[1].

The City is not seeking to hold the individuals who actually transported unstamped cigarettes to its jurisdiction, thereby causing unstamped cigarettes to be present in New York City. *See* City's Memo. Ironically, the City actually relies on those individuals to factually support its damages calculation against the Indian retailer defendants, despite the fact that pursuant to the City's new theory of injury and causation, such individuals would be the cause in fact of the City's injury. *Id.*

The City also has not sought redress for its alleged tax loss injury from the State of New York, which is responsible for collecting the City's cigarette tax and enforcing the laws governing cigarette taxation in New York State and City. Similarly, the City has not sought redress from cigarette manufacturers who produce unstamped cigarettes nor does it seek any redress from the hundreds of Indian retailers in New York State who sold unstamped cigarettes during the time period in question.

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[1] "[I]t is entirely speculative to presume that any alleged diverted City purchasers would have purchased their cigarettes in the City had Morrison's cigarettes not been available. There is nothing to suggest that such diverted purchasers could not have obtained other unstamped cigarettes originating from a different reservation retailer. Alternatively, they could have purchased unstamped cigarettes from one of the many out-of-state cigarette retailers who are not required to collect state and city taxes at the time of sale. *See* City of New York v. Smokes-Spirits.Com, Inc., 12 N.Y.3d 616, 619 (2009). In fact, given the City's theory that City residents were induced to purchase Morrison's cigarettes because they were less expensive, it would seem more likely that these hypothetically displaced purchasers would have sought out discounted cigarettes from another source rather than pay full price to a City retailer." U.S. v. Morrison, 685 F. Supp. 2d 339 (E.D.N.Y. 2010).

III. STANDARD OF REVIEW

a. Standard for Summary Judgment

"Summary judgment is proper only when, construing the evidence in the light most favorable to the non-movant, there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Doninger v. Niehoff, 642 F.3d 334, 344 (2d Cir. 2011) cert. denied, 132 S. Ct. 499 (U.S. 2011). "The mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party]." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). Accordingly, "[t]he trial court's function in deciding such a motion is not to weigh the evidence or resolve issues of fact, but to decide instead whether, after resolving all ambiguities and drawing all inferences in favor of the non-moving party, a rational juror could find in favor of that party." Pinto v. Allstate Ins. Co., 221 F.3d 394, 398 (2d Cir. 2000).

IV. ARGUMENT

a. The Plaintiff's Request for a Permanent Injunction Should Be Denied and this Case Should Be Dismissed Because the City Has Failed To Prove That It Was Injured By the Defendants.

The City should not be granted a permanent injunction because it has not proven actual success on the merits. "The standard for a permanent injunction is essentially the same as for a preliminary injunction, except that plaintiffs must actually succeed on the merits." Henrietta D. v. Giuliani, 119 F. Supp. 2d 181, 204 (E.D.N.Y. 2000) aff'd sub nom. Henrietta D. v. Bloomberg, 331 F.3d 261 (2d Cir. 2003).

The Court previously found that the City has Article III standing in this action brought under the CCTA against the Indian defendants. City of New York v. Golden Feather Smoke Shop, Inc., 08-CV-3966 (CBA), 2009 WL 705815 (E.D.N.Y. Mar. 16, 2009)(*citing* City of New York v. Milhelm Attea & Bros., Inc., 550 F. Supp. 2d 332, 340-341 (E.D.N.Y. 2008)). In

making its finding, the Court stated that "[f]rom the facts alleged, *it appears the City could demonstrate* that the price differential created by defendants' sale of untaxed cigarettes to reservation retailers impacts the market in a way that deprives the City of substantial tax revenue." *Id* at 341. (*emphasis added*). That finding was made in the context of the City's theory that it was injured consistent with the displacement theory, and not the City's new theory of injury and damages. Id. at 340.

The Court's determination on standing was made in the context of defendants' motion to dismiss and therefore considered the issue of standing by determining whether the City's allegations as pleaded were sufficient, rather than on any empirical evidence (or lack thereof) before the Court. *See* Id. Moreover, the Court only found standing in consideration of the City's claim for injunctive relief, which has been rendered moot by the Tax Law Amendments; and not based on the City's pleaded or proven claims for damages or penalties. It is therefore notable that in nearly four years since that decision was entered, the City has not *actually demonstrated* with credible evidence that such injury does in fact exist—let alone that there is a causal connection between the hypothetical injury and the defendants' allegedly wrongful conduct.

In granting the City a preliminary injunction, the Court stated the following:

> "Based upon all of this evidence, the Court concludes that there exists a substantial trade in unstamped cigarettes between the Poospatuck Reservation and New York City. *Although it is impossible to quantify based upon the current record, this trade likely deprives the City of significant tax revenue.*" City of New York v. Golden Feather Smoke Shop, Inc., 08-CV-3966(CBA), 2009 WL 2612345 (E.D.N.Y. Aug. 25, 2009)(*emphasis added*).

The Court therefore noted that the evidence produced at the preliminary injunction hearing was not only insufficient to quantify the City's alleged tax loss; but that the City had failed to prove that such tax loss actually occurred. In any event, the record today does not include any additional evidence that would support a finding that the City was injured as per its displacement

theory. Because the City has not proven an injury, it does not have the requisite standing to maintain this action against the defendants in contemplation of Article III of the U.S. Constitution.

The City's abandonment of its pleaded injury theory is also an admission that the City cannot prove that such injury ever occurred. Indeed, the City's Director of the Office of Tax Enforcement Maureen Kokeas confirmed that it is impossible to quantify such injury because it is premised on the unknown. Dep. of Kokeas p. 45-46. However, the fact of the matter is that the City cannot prove that it was deprived of taxes under the displacement theory because it was simply not the case. See Cigarette Tax Chart (demonstrating that the City's cigarette tax revenue was unaffected by the preliminary injunction in this case or the Tax Law Amendments).

The City's pleaded injury therefore remains hypothetical at best as it is not supported by empirical evidence or expert opinion. Accordingly, the City's claims under the CCTA and CMSA for injunctive and monetary relief should be dismissed because the city has failed to prove that it was actually injured consistent with the requirements of Article III. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

b. The City's Claim For Money Damages Should Be Denied and Dismissed Because It Was Not Properly Pleaded Pursuant to Rule 9 of the Federal Rules of Civil Procedure

"Special damages must be pleaded with particularity." Fed. R. Civ. P. 9(g). "The rules surrounding the pleading and proof of special damages are stringent and well-articulated. Special damages are limited to losses having pecuniary or economic value, and must be fully and accurately stated, with sufficient particularity to identify actual losses." Kirby v. Wildenstein, 784 F. Supp. 1112, 1116 (S.D.N.Y. 1992) (internal citation and quotations omitted). *See* Matherson v. Marchello, 100 A.D.2d 233 (N.Y. App. Div. 1984); *See also* Drug Research Corp.

v. Curtis Pub. Co., 7 N.Y.2d 435, 440 (1960); *See also* Baez v. Jetblue Airways Corp., 2009 U.S. Dist. LEXIS 67020 *25 (E.D.N.Y. 2009) (defining "special damages" as a "specific and measurable loss.").

Furthermore, special damages "must be alleged with sufficient particularity to identify actual losses and be related causally to the alleged tortious acts." Baez *at *25 (quoting* McKenzie v. Dow Jones & Co., 2008 U.S. Dist. LEXIS 55387 at *7 (S.D.N.Y. July 22, 2008)); See also D'Angelo-Fenton v. Town of Carmel, 470 F. Supp. 2d 387, 401 (S.D.N.Y. 2007). Thus, "Broad and conclusory terms... are insufficient to fulfill this element." *Id.*

The City's revision of its damages theory plainly disregards the pleading requirements of Rule 9. Prior to the City serving this motion, the defendants understood that the City was seeking damages based on allegations that sales of unstamped cigarettes on the Poospatuck Reservation replaced sales of stamped cigarettes from within the Five Boroughs. Indeed, the Court ruled on the issue of standing based on the displacement theory. City of New York v. Golden Feather Smoke Shop, 2009 WL 705815 (*citing* City of New York v. Milhelm Attea, 550 F. Supp. 2d at 340-341).

The City's new theory for damages is not evident by the language of the complaint. Rule 9 requires that special damages be pleaded with sufficient particularity to identify the loss as well as how such loss is causally related to the alleged harm. *See Baez at *25.* The City's pleadings refer to its loss as "hundreds of millions of dollars annually." *See* City's complaint at ¶¶ 3, 43. Such a gross numerical estimate does not qualify as particular within the meaning of Rule 9 and certainly remains unsupported by the history of cigarette tax collection by the City of New York.

Moreover, the City's complaint does not articulate how defendants' sales of unstamped cigarettes on the Poospatuck Reservation *caused* the newly submitted injury. The only

indication of a causation theory on the complaint is that the defendants' sales unstamped cigarettes replaced sales of stamped cigarettes in New York City. The city's complaint does not speak or address how the sales of unstamped cigarettes on the Poospatuck Reservation were a taxable event there on the Reservation.

The City's failure to plead its injury and damages theory is extraordinarily prejudicial to the defendants for many reasons. First, had the defendants been put on notice of how the City intended characterize its injury, the defendants would have sought to cross claim or implead Ahmed Aldabeshes and Mari A, as well as any other individual who violated the CCTA in the City's jurisdiction in lieu of the defendants.

Those individuals, who ironically provide the testimonial basis for the City's damages calculation, were the actual and proximate cause of the City's alleged tax loss injury. And in the event the defendants are found liable to the City under its newly articulated damages theory, the defendants would certainly have a claim against those individuals for indemnification as they were individuals who actually brought the unstamped cigarettes into the City and who were in violation of the CCTA in the City's jurisdiction. Moreover, the defendants would have insisted that they be named as parties to this action because the issue of causation would have been a triable issue of fact, as discussed in greater detail *infra.*

The defendants have also been prejudiced to the extent that they have not been afforded discovery on the City's new theory of injury, causation and damages. There are numerous questions that the defendants would have explored had they been provided notice of the City's damages theory in accordance with Rule 9. For instance, the defendants would have investigated the accuracy of the number of unstamped cigarettes that were allegedly brought into the City. Similarly, the defendants would have looked into whether the City's witnesses were offered any

sort of civil immunity (going to the issue of credibility) or whether they had already paid taxes or restitution on any of the unstamped cigarettes allegedly at issue (which would offset monetary damages). Furthermore, the defendants would have inquired as to the numerous individuals who purchased cigarettes from the City's witnesses in order to determine whether any of them actually paid cigarette taxes—or whether the ultimate consumers were notified of their obligation to remit the taxes directly to the City coffers.

Thus far, the defendants have been prepared to defend against the City's claims for damages as it related to the displacement theory. By introducing a novel theory of injury, causation and damages on summary judgment, the defendants have been unfairly precluded from seeking discovery on these issues and ultimately prejudiced from being able to assert a good faith defense. Accordingly, the City's claims for liability and special monetary damages should be dismissed for failure to plead with the particularity required by Rule 9 of the Federal Rules of Civil Procedure.

i. The Chavez Case Is Not Dispositive of the Issues In This Case

The City erroneously places too much stock in decision City of New York v. Chavez, 11 CIV. 2691 BSJ, 2012 WL 1022283 (S.D.N.Y. Mar. 26, 2012), which is markedly different from the instant case. First, it is notable that the decision in Chavez was rendered on defendants' motion to dismiss. Therefore, the Court analyzed the City's case in order to determine whether it sufficiently pleaded "enough facts to state a claim to relief that is plausible on its face." Id. (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). The Court did not decide the case on its merits, but merely looked to whether the complaint was sufficient.

The Chavez case is also significantly distinguishable from this case because it was brought under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 28 U.S.C. §

1961 et seq. with the theory being that several actors conspired and formed an illegal enterprise to deprive the City of cigarette taxes. *See* **Exhibit H** to the Aff. of JFS enclosing the Complaint in City of New York v. Chavez et al. 11-cv-2691 (SDNY) at ¶1. The City further made claims in Chavez against numerous individuals that had different roles in an alleged conspiracy to illegally sell unstamped cigarettes in New York City which included supplier, distributors and those who actually sold the cigarettes in New York City. Id. at ¶5. That is simply not the case in these proceedings.

In this case, the City has only made claims against individuals who engaged in the sale of unstamped cigarettes from their stores located on the sovereign Poospatuck Indian Reservation and consciously excluded the bootleggers/sellers of unstamped cigarettes in New York City. Notwithstanding the fact that the Indian defendants were permitted to purchase unstamped cigarettes freely from State and City licensed stamping agents, they also operated under the good faith belief that they were permitted to resell their unstamped cigarettes without having to pre-collect the State's or City's taxes. This is consistent with the decision in United States v. Morrison, 706 F. Supp. 2d 304, 313 (E.D.N.Y. 2010), where the Court vacated an earlier criminal conviction under RICO predicated on CCTA violations because the unsettled nature of New York tax law did not provide sufficient notice to find that cigarettes sold by Poospatuck retailers required tax stamps. Id. at 312-313.

It is also relevant that this Court found that the sales of unstamped cigarettes by the defendants on the Poospatuck Reservation could not be construed as being a scheme to defraud the City. *See* Morrison, 685 F. Supp. 2d, 345("Morrison's offense of conviction did not include within its ambit a scheme to defraud the City out of tax revenue. Rather, it was a narrower conspiracy to sell and distribute cigarettes on-reservation lacking applicable state tax stamps, the

unlawful goal of which was to defraud the state.") The Court reasoned that "the City cannot escape the proximate cause requirement [in civil RICO case] merely by alleging that the fraudulent scheme embraced all those indirectly harmed by the alleged conduct."*Id. (quoting* Hemi Group, LLC v. City of New York, N.Y., 130 S. Ct. 983, 991 (2010)). Along this same reasoning, there is no evidence on the record that would suggest that the defendants sold cigarettes with the intent to avoid the City's tax. The defendants were merely selling cigarettes without tax stamps as it was their right to do[2].

The Legal theory promoted in Chavez is also substantially different from this case. "To establish a violation of 18 U.S.C. § 1962(c) a plaintiff must show: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." Chavez *(quoting* DeFalco v. Bernas, 244 F.3d 286, 306 (2d Cir. 2001)(internal quotations omitted). In this case, the City has not sought to prove an enterprise or conspiracy because no such enterprise ever existed. Instead, the City has opted to rely on the actual bootleggers and sellers of unstamped cigarettes in New York City to build its case for liability and damages against the retailer defendants. Had the same theory been advanced in Chavez, the Court would have likely found a disconnect between causation and injury based on the Supreme Court's ruling in Hemi Group, LLC.

Regardless of whether Chavez is applicable here, the legal findings therein demonstrate that the City lacks standing in this case. In particular, the Court, in addressing the issue of standing, found that pursuant to the CCTA "the cigarettes at issue here would qualify as contraband if *sold and shipped (or otherwise transported)* to non-stamping entities in New York because, by virtue of such *sale and shipment*, unstamped cigarettes come to be 'found' in a

[2] It is also notable that the New York State legislature found it necessary to amend N.Y. Tax Law § 471 et seq. to specifically provide a mechanism to pre-collect cigarette taxes from Indian retailers who sell to non-members of their respective tribe. Suffice it to say, had New York tax law been clear on this issue, the Legislature would not have found it necessary to promulgate the Tax Law Amendments.

jurisdiction (New York City) that requires a stamp on the cigarettes indicating that taxes have been paid." Chavez, 2012 U.S. Dist LEXIS 42792 (S.D.N.Y. March 26 2012). The Court stated further that the CCTA "does not require that the cigarettes sold, shipped or transported be contraband at the time of the sale, shipment, or transport...Rather, it suffices that the cigarettes become contraband as a result of the *sale and shipment*." *Id.* (underline in original) (italics added).

In this case, however, the City does not plead or prove that the defendants *shipped* unstamped cigarettes to the City; the reason being that the defendants did not in fact ship the cigarettes to the City's jurisdiction. The defendants, as Indian retailers, simply engaged in lawful transactions on the Poospatuck Reservation. Whether those cigarettes were later transported to the City or some other tax jurisdiction was not caused by the defendants' no more than it was caused by the cigarette manufacturers who also did not pre-collect the City's tax.

c. This Case Should Be Dismissed Because Indian Retailers Are Not Required To Pre-Collect or Remit Cigarette Taxes to the City or State

Pursuant to N.Y. Tax Law § 471, the "ultimate incidence of and liability for the [cigarette] tax shall be upon the consumer..." New York Tax Law does not require Indian retailers (or non-Indian retailers for that matter) to bear the incidence of cigarette excise taxes where such taxes are not pre-collected by the State.

The City's cigarette tax law, like the State's, places the onus for the cigarette tax on the ultimate consumer stating that "the ultimate incidence of and *liability* of the [City's cigarette] tax shall be upon the consumer..." N.Y.C. Admin. Code §11-302(a)(3). (*emphasis added*). "Such tax shall be imposed only once on the same package of cigarettes." Id. The City further requires that "Within twenty-four hours after liability for the tax on the use of cigarettes accrues *each*

person liable for the tax shall file with the commissioner of finance a return in such form as the commissioner of finance may prescribe, together with a remittance of the tax shown to be due thereon." N.Y.C. Admin. Code §11-302(g). (*emphasis added*). This latter provision necessarily applies in situations when a consumer acquires cigarettes for which the City's tax has not been pre-collected (e.g., when cigarettes are purchased outside New York City without the joint City-State tax stamp).

The City acknowledges and admits that the New York City cigarette tax accrues "[w]hen unstamped cigarettes *arrive* in the City without the joint State-City tax stamp..." *City's Memo* at 29. (*Emphasis added*). Along the same lines, it would be consistent to find that the New York City tax does not accrue prior to entering the City's tax jurisdiction. Therefore, by the City's own admission, the liability for the City's cigarette tax did not accrue or become payable until a third party (e.g., Mari A or Mr. Aldabeshes) physically brought the unstamped cigarettes into the Five Boroughs of New York City.

It is further notable that New York State also does not require Indian retailers such as the defendants, who operate on sovereign Indian territories, to remit sales, excise or use taxes; regardless of whether the transaction is between a member and non-member of the respective Indian Nation. N.Y. Tax Law § 1210(m) (McKinney) titled "Taxes imposed on native American nation or tribe lands" states that:

> Where a non-native American person purchases, for such person's own consumption, any retail sale item on native American nation or tribe land recognized by the federal government and reservation land recognized as such by the state of New York, the commissioner shall promulgate rules and regulations necessary to implement the collection of sales, excise and use taxes on such retail sale items.

To this end, N.Y. Tax Law § 1112(a) (McKinney) specifically addresses the payment of taxes by consumers purchasing goods on Indian reservations:

> "Where property or services subject to sales or compensating use tax have been purchased on or from a qualified Indian reservation ..., the purchaser shall not be relieved of his or her liability to pay the tax due. *Such tax due and not collected shall be paid by the purchaser directly to the department.*" (*emphasis added*)

Additionally, the statute addresses the means by which unpaid cigarette taxes may be collected stating that they "may be reported and paid by means of such personal income tax forms or other tax forms as the commissioner deems appropriate." N.Y. Tax Law § 1112(b).

In assessing the City's damages argument, the operative question for the Court to address is: <u>Who is liable for paying the City's cigarette tax once unstamped cigarettes are sold by Indian retailers to a non-member of their Indian Nation</u>? Pursuant to both N.Y. Tax Law § 471 et seq. and N.Y.C. Admin. Code §11-1302, the ultimate incidence for and liability of the cigarette tax is to be borne by the consumer—and not the retailer. Hence, the City's claims for back taxes from the retailer defendants would result in shifting the liability of the tax from the consumer to the retailer in a manner that is contrary to law.

i. Poospatuck Retailers Are Not Obligated to Pre-Collect the City's Cigarette Tax Pursuant to N.Y.C. Admin. Code § 11-1302

The plaintiff misconstrues N.Y.C. Admin. Code §11-1302 as creating an affirmative duty on retailers located outside New York City to pre-collect the City's cigarette tax. That is simply not the case. §11-302 may very well impose the City's cigarette tax, the incidence and liability of which is to fall on the ultimate consumer. As well, N.Y.C. Admin. Code §11-1302(e) generally requires that the tax be pre-collected through a stamping regime similar to the State's and further provides for a mechanism for the ultimate purchaser to remit the tax directly to the commissioner. *See* Id. N.Y.C. Admin. Code §11-1302 does not—because it cannot—require retailers located outside New York City to deal in cigarettes bearing the City's tax stamp.

This is plainly evident by the fact that New York City Administrative Code also provides for a mechanism to collect the City's tax in instances when cigarettes are purchased outside New York City without the joint City-State tax stamp. Specifically, § 11-1302(f) states that "within twenty-four hours after liability for the taxes on the use of cigarettes accrues each person liable of the tax shall file with the commissioner of finance a return in such form as the commissioner of finance may prescribe, together with a remittance of the tax shown to be due thereon." As the City confirms, the tax accrues once the unstamped cigarettes are present in New York City and not before. See City's Memo at p. 29. Accordingly, it is the person who is in "use" of the unstamped cigarettes at the moment the tax accrues who is liable for paying to the City the appropriate cigarette tax[3].

The City's claims for monetary damages in the form of back taxes from the defendants should be dismissed because such claims are unfounded in law. New York City's Administrative Code does not provide a basis for the City's civil claim for back taxes cigarette seller located outside New York City. And while the CCTA may provide for monetary damages as a possible remedy (*See* 18 U.S.C. § 2346(b)(2)), such remedy would be inappropriate in this action against the retailer defendants who lawfully sold the cigarettes at their stores located outside New York City, without collecting the tax from the consumers, who are the individuals

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[3] The defendants contest that N.Y.C. Admin Code §11-1302 could even be construed to place the onus of the City's cigarette tax on bootleggers who possess unstamped cigarettes New York City with the specific intent to resell those cigarettes. N.Y.C. Admin. Code §11-1302(f) places the liability for the City's tax "on the use of cigarettes..." "Use" is defined in N.Y.C. Admin. Code §11-1301(4) as "Any exercise of a right or power, actual or constructive, and shall include but is not limited to the receipt, storage, or any keeping or retention for any length of time, *but shall not include possession for sale by a dealer.*" (*emphasis added*). Bootleggers, even if they are in violation of the CCTA, fall squarely within the City's definition of a "dealer" and "retail dealer" which is broadly defined to include "Any person other than a wholesale dealer engaged in selling cigarettes." N.Y.C. Admin. Code §11-1301(7). Bootleggers would therefore be exempt from paying the City's tax.

The defendants do not believe this was an unintended result of City lawmakers. N.Y.C. §11-1302 clearly intends that the ultimate incidence and liability of the City's tax to fall on the ultimate consumer. Thus, it would be the individual consumer who purchases the unstamped cigarettes from the bootlegger who would be liable to the City for its tax.

ultimately obligated to bear the incidence for and who remain liable for the cigarette tax to the City and State. For these reasons, the City's claims for monetary damages should be dismissed.

d. The City Has Failed to Prove Its Claims Under the CCTA Because the Cigarettes Sold By Defendants Were Not Required to Bear the City-State Joint Tax Stamp

The City has failed to prove that defendants violated the CCTA by selling cigarettes without the City-State joint tax stamp. To prove a violation of the CCTA, the following four factors must be established: (1) Defendants 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 laws require the cigarettes to bear such stamps. Golden Feather Smoke Shop, 08-CV-3966(CBA), 2009 WL 2612345. A violation of the New York State cigarette tax law is a predicate to a violation of the CCTA. City of New York v. Milhelm Attea & Bros., Inc., 550 F. Supp. 2d 332 (E.D.N.Y. 2008).

These proceedings have greatly overlooked a critical issue necessary for the City to prove a CCTA claim. That issue is *whether the defendants are required to sell cigarettes bearing the joint City-State tax stamp*. This is an important distinction because the City is presently seeking redress against individuals who are not obligated to sell cigarettes bearing the joint City-State tax stamp. In other words, the City is seeking redress against individuals for allegedly violating a law relevant to another separate jurisdiction and which has no bearing on the City's cigarette tax.

There are presently two types of tax stamps offered in New York State. The State has a tax stamp which is representative of the State's cigarette tax of $4.35 per pack. *See* N.Y. Tax Law § 471(1). The State tax stamp is the only tax stamp required to be affixed on cigarettes that are sold in Suffolk County, including those cigarettes supplied to Poospatuck retailers by State licensed cigarette wholesalers.

There is also a joint New York City / New York State cigarette tax stamp ("City-State Stamp") for cigarettes that are sold in the Five Boroughs of New York City which represents the $4.35 State tax plus the $1.50 City specific cigarette excise tax and the $0.61 prepaid sales tax. See N.Y. City Admin, Code § 11–1302. Cigarettes that are supplied by wholesalers to retailers in New York City are required to bear the City-State Stamp. *See Id.*

The City's claims under the CCTA are premised on the notion that the defendants sold cigarettes that did not bear tax stamps thereby depriving the City of cigarette taxes. The City's cigarette tax is represented by the City-State stamp. However, because they are geographically located outside New York City, N.Y. Tax L. §471 required that the defendants purchase and deal in cigarettes bearing the State only tax stamp—and not the joint City-State tax stamp.

The type of tax stamp is particularly relevant to this case because the City has changed its theory for injury and is accordingly demanding damages equal to its $1.50 excise tax applied to a finite number of cigarettes that were allegedly bought from the defendants and resold in the City. Earlier in these proceedings, the Court found, *inter alia*, that the defendants violated the CCTA by selling prohibited quantities of unstamped cigarettes. *See Golden Feather*. In rendering that decision, the Court necessarily found that the cigarettes that defendants' sold to bootleggers required tax stamps—i.e., the State only tax stamp and not the joint City-State tax stamp. This distinction is important, because even if the defendants complied with the stamping regime, the City would not have been entitled to collect its tax from the defendants whose stores are located outside the City's jurisdiction.

i. There Is Simply No Occasion Whereby The Defendants Would Be Required To Pre-Collect The City's Cigarette Tax By Selling Cigarettes Affixed With The Joint City-State Tax Stamp

The defendants have never been required to purchase or sell cigarettes bearing the joint City-State tax stamp. This holds true under the Amended Tax Laws, pre-amended tax laws and the holding of this Court in its order granting the preliminary injunction. *See* Golden Feather Smoke Shop, 08-CV-3966(CBA), 2009 WL 2612345 at *26. It would therefore be legally inconsistent to require the defendants to pay damages to the City based on cigarette taxes that it never would have been entitled to collect from the defendants in the first place.

e. The City's Motion for Summary Judgment Should Be Denied Because There Are Genuine Issues of Material Fact With Respect to Causation

The City's newly offered theory of injury and damages implicates significant issues of material fact as it relates to causation. Summary judgment is inappropriate if there are genuine issues of material fact. Fed. R. Civ. P. 56. In determining whether there are genuine issues of material fact, the Court is "required to resolve all ambiguities and draw all permissible factual inferences in favor of the party against whom summary judgment is sought." Terry v. Ashcroft, 336 F.3d 128, 137 (2d Cir. 2003). *See also* Reilly, 380 F. App'x, 18-19. Precisely *who* caused the City's harm (i.e., the tax loss by virtue of the existence of unstamped cigarettes in New York City) is a material issue of fact that precludes summary judgment at this time.

Based on the record, the Court should deny the City's motion for summary judgment because the City has failed to prove that the defendants actually and proximately caused the City's newly articulated injury. The City's memorandum of law illustrates this case in point. According to the City, the City's "cigarette tax is triggered—i.e. the tax is owed, without more—by the presence of unstamped cigarettes in" the City. *See City's Memo at* 29. The City further

states that "When unstamped cigarettes arrive in the City without the joint State-City tax stamp, the injury has accrued and is complete." *Id.* The City does not maintain that cigarettes possessed outside the City limits are required to bear the City-State joint tax stamp.

There is no evidence on the record that the defendant's actually or proximately caused the unstamped cigarettes to become present in the City. The only evidence submitted by plaintiff shows that the defendants sold cigarettes from their stores located on the Poospatuck Reservation in Suffolk County, New York.

The City further states that "even if the unstamped cigarettes remained unsold in a bootlegger's vehicle, the tax is imposed and owed." If this statement is deemed accurate, then it would be the bootlegger, as the possessor of the unstamped cigarettes in New York City, who would be responsible for the cigarette tax; not the individual who supplied the unstamped cigarettes to the bootlegger. N.Y.C. Admin. Code §11-302(a)(3) expressly states that "[s]uch tax shall be imposed only once on the same package of cigarettes." It would therefore be contrary to law to hold the out-of-City supplier of certain unstamped cigarettes and the bootlegger who actually possesses those unstamped cigarettes within New York City, simultaneously liable for the City's tax.

The City's new injury theory on this motion inappropriately seeks to place liability for the City's alleged tax loss on the defendants without evidence that the defendants actually possessed or delivered unstamped cigarettes to New York City. In fact, the City's reliance on the testimony of Mari A and Aldabashes evinces that the defendants did not actually transport or possess any of the unstamped cigarettes that are at issue in New York City limits. Rather, those individuals (or the ultimate consumers) would be the culpable parties as they admitted that they both transported unstamped cigarettes to New York City for the purpose of resale.

Furthermore, the City's assertion that the defendants were a "substantial factor" in causing the City's tax loss injury is an admission that causation is a triable issue of fact. In support of its contention, the City relies on the case Tufariello v. Long Island R. Co., 458 F.3d 80, 87 (2d Cir. 2006)("To establish causation in a common law negligence action, a plaintiff generally must show that the defendant's conduct was a substantial factor in bringing about the harm.")(Internal quotation omitted). While it is questionable whether this case could be likened to a common law negligence action, "[t]he substantial factor test is used when there are potentially multiple causes in fact of plaintiff's injury or damages." Atl. Mut. Ins. Co. v. ALITALIA-LINEE AEREE ITLIANE-SO CIETA PER AZIONI, 02CIV.5758GBD, 2005 WL 427573 (S.D.N.Y. Feb. 22, 2005). "Application of the test requires that each defendant's action standing alone sufficiently caused the harm." *Id.* In this case, however, the City cannot prove that defendants' sales of unstamped cigarettes alone caused its harm because there is no evidence showing that the defendants actually shipped or transported the cigarettes to New York City.

In any event, whether the defendants were a "substantial factor" in causing the City's alleged tax loss is an issue of fact more appropriately decided by a jury. Indeed, the Second Circuit found in Tufariello that the issue of whether the LIRR was a substantial factor in causing the plaintiff's injury was an issue to be determined by a jury. Thus, the Court of Appeals vacated the district court's decision granting summary judgment and remanded the causation issue to the district court so that it could be decided at trial. *See Id.* Here, as in Tufariello, the issue of causation should be resolved by the fact finder.

The reasoning in Tufariello shows that the issue of causation in this case cannot be resolved on the City's motion for summary judgment pursuant to Rule 56. There are numerous factors and individuals that could have caused the City's alleged injury in far more substantial

ways than the defendants, including but not limited to the bootlegger witnesses Mari A and Aldabashes, or even the City's own—sky's the limit—cigarette tax policy. Accordingly, the Court should deny the City's motion for summary judgment because causation is an unresolved issue of material fact that should be resolved by a jury trial.

f. The City's Motion for Summary Judgment Should Be Denied Because There Are Several Issues of Material Fact Concerning the City's Damages Evidence

The City's motion for summary judgment for an order of special monetary damages should be denied because there is a genuine dispute as to the factual basis for the City's damages calculation. Summary judgment is not appropriate where there exists a genuine dispute as to a material fact. *See* Fed. R. Civ. P. 56(c). A genuine dispute exists "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party…" Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). In support of its damages calculation, the City offers testimonial evidence of two notorious cigarette bootleggers, Aheman Aldabeshes and Mari A., whose testimony is both uncertain and unreliable.

i. **The Disputed Credibility of Mari A and Aldabashes Preclude Summary Judgment**

The credibility of Mari A and Aldabeshes are genuine issues of material fact. It is well settled that the credibility of witnesses raises a material issue that can only be resolved by a trial. Kagan v. Taylor, 558 F. Supp. 396, 398 (E.D.N.Y. 1983). *Citing* Transway Fin. Co., Inc. v. Gershon, 92 F.R.D. 777 (E.D.N.Y. 1982). "Summary judgment is particularly inappropriate when the disputed facts may be colored by the motivations of interested witnesses." Transway Finance Co. at 778-779.

Mari A's testimony is unreliable because she has a criminal history involving drug abuse, crimes of fraud, and has greatly benefitted from the State and City for testifying in these

proceedings. Specifically, in 1991 Mari A pled guilty to criminal possession of marijuana; In 1996 she pled guilty to disorderly conduct in full satisfaction of a charge of criminal possession of stolen property; In 1999, she pled guilty to forgery ; And in 2006, she pled guilty to a felony charge of attempting to evade New York's cigarette tax. *See* Memorandum and Decision in Police Dep't v. Ahevonderae, Oath Index No. 1521/07 at *4 (NYC Admin Trials and Hearings, Mar. 14, 2007), attached as **Exhibit D** to Aff. of JFS.; *See also* **Exhibit E** to the Aff. of JFS, enclosing relevant portions of the Hearing held on the City's motion for a preliminary injunction (Injunction Hearing) at 45:21—46:15; 52:4—25. Mari A. also admitted that she has been addicted to crack cocaine (*See* **Exhibit D**) and openly testified that she has also attempted to affix counterfeit tax stamps to cigarettes in a willful effort to defraud the State. *See* Injunction Hearing at 45:22—51:5. Finally, and perhaps most controversially, Mari A was paid "around 50 to 60 thousand" dollars to cooperate with the State Department of Taxation and Finance. *Id.* In sum, the City is requesting that the Court enter a factual finding of liability and specific monetary damages based on the testimony of a repeated offender of various fraud crimes, who struggles with an addiction to crack cocaine, and who was compensated over $50,000.00 to build this case against the defendants.

There is also a material dispute between Mari A's and Ms. Mack's testimony. At her deposition, Ms. Mack testified that she had only met Mari A on one occasion and that she has never conducted business with her. *See* **Exhibit F to Aff. of JFS,** enclosing relevant portion to the Deposition of Thomasina Mack taken on March 5, 2012 ("Mack Dep.) at 184:1—185:14. To the contrary, Mari A testified, as the City relies, that she purchased cigarettes from Ms. Mack on numerous occasions. *See* City's Memo at 39. Again, the inconsistency between Mari A's and Ms. Mack's testimony creates a genuine dispute of a material fact: i.e. Whether Mari A did in

fact purchase cigarettes from Ms. Mack or TDM Discount Cigarettes. This issue accordingly precludes summary judgment.

Just like Mari A, Aldabeshes testimony is unreliable and cannot be used to support the City's application for summary judgment on the issue of money damages. First, Aldabeshes has a criminal history including felonious assault and fraud. See Injunction Hearing at 199:24—200:9. Indeed, Aldabeshes lost his resident alien status as a result of those crimes. Id. at 199:10-23. Nevertheless, Aldabeshes remained in the United States illegally. Id.

Aldabeshes' testimony is also significantly called into question by the fact that he struck a deal with City prosecutors to a sentence of time served and the forfeiture of $90,000.00 in exchange for his promise to act as a confidential informant. Id. 200:11—202:1. These facts first create an issue as to Aldabeshes' motivation for testifying against Ms. Mack, especially when he was looking at serving time in prison and a probable deportation. Second, the $90,000.00 paid over to the government likely accounts for a portion of tax revenue that may have been due and owing. In any event, the City's failure to address Aldabeshes' credibility and payment significantly undermines its damages calculation that relies on Aldabeshes' testimony.

Finally, Ms. Mack testified at her deposition that she does not know Aldabeshes and has never delivered cigarettes to a location off the Poospatuck Reservation. See **Exhibit G** to Aff of JFS. (Enclosing relevant portions of the deposition of Thomasina Mack taken on November 16, 2009). Thus, there remains an issue of material fact concerning whether TDM actually sold cigarettes to Aldabeshes.

For these reasons, the City's request for damages via its motion for summary judgment should be denied.

g. Whether Civil Penalties are Appropriate Should Be Decided by A Jury

The issue of whether plaintiff is entitled to penalties in addition to injunctive relief should be resolved by a jury. "Federal Rule of Civil Procedure 38(a) states that litigants have the inviolate 'right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.'" Time Warner Cable of New York City, a div. of Timer Warner Entm't Co., L.P. v. Negovan, 99 CIV. 5910 NGMDG, 2001 WL 1182843 (E.D.N.Y. July 30, 2001). Because the defendants have duly demanded a trial by jury (See Defendants Answer,) "(t)he trial of all issues should be by jury, unless ... the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States." Fed. R. Civ. P. 39(a)(2).

The City's request for civil penalties in its motion for summary judgment should be denied because a civil penalty under the CCTA is remedy at common law that should be decided by a jury. "A civil penalty was a type of remedy at common law that could only be enforced in courts of law." Tull v. United States, 481 U.S. 412, 422 (1987). "Remedies intended to punish culpable individuals, as opposed to those intended simply to extract compensation or restore the status quo, were issued by courts of law, not courts of equity." Id. When a "legal claim is joined with an equitable claim, the right to jury trial on the legal claim, including all issues common to both claims, remains intact. Id. at 425. Here, the City's request for civil penalties based on "2% of defendants' gross sales for the year preceding April 2009" is a legal remedy that should be decided by a court of law.

It would be inappropriate for this Court in equity to find the defendants liable for civil penalties on the City's motion for summary judgment. "[W]hile a court in equity may award monetary restitution as an adjunct to injunctive relief, it may not enforce civil penalties." Id. at

424. The Court in Tull reasoned that "the Government was free to seek an equitable remedy in addition to, or independent of, legal relief" and therefore the defendants were entitled to have the issue of liability for civil penalties to be decided by a jury. Id. at 425. Similarly, the City in this case had the option to seek injunctive relief 18 U.S.C. § 2346(b)(1) and/or damages and civil penalties under 18 U.S.C. § 2346(b)(2). And because the City opted to seek both as separate and distinct remedies, the former being equitable while the latter being legal, the defendants are entitled to a jury trial on the issue of civil penalties.

The Court's imposition of penalties under the CCTA against the defendants in this case would also be inconsistent with notions of justice. The CCTA permits the imposition for civil penalties. See 18 U.S.C. § 2346(b)(2). However, the CCTA does not impose a statutory range for civil penalties and does not enumerate particular factors that the Court is to consider. Without a statutory range, the defendants could not be put on notice that it would be potentially liable for conduct that the State expressly authorized. *See Advisory Opinion.*

Nevertheless, civil penalties would be entirely inappropriate in this case. In determining whether a civil penalty is appropriate, Courts at law may consider several mitigating factors including "(1) the egregiousness of the defendant's conduct; (2) the degree of the defendant's scienter; (3) whether the defendant's conduct created substantial losses or the risk of substantial losses to other persons; (4) whether the defendant's conduct was isolated or recurring; and (5) whether the penalty should be reduced due to the defendant's demonstrated current and future financial condition." S.E.C. v. Opulentica, LLC, 479 F. Supp. 2d 319, 331 (S.D.N.Y. 2007). "Courts have also considered whether the defendant has cooperated with authorities." See e.g. S.E.C. v. Church Extension of Church of Church, Inc., 429 F. Supp. 2d 1045, 1050 (S.D. Ind. 2005); S.E.C. v. Sargent, 329 F.3d 34, 42 (1st Cir. 2003). "While these factors are helpful in

characterizing a particular defendant's actions, the civil penalty framework is of a 'discretionary nature' and each case 'has its own particular facts and circumstances which determine the appropriate penalty to be imposed.'" Opulentica 479 F.Supp.2d at 331 (quoting SEC v. Moran, 944 F.Supp. 286, 296-97). None of these factors have been analyzed in the City's papers and there is no evidence on the record that would justify civil penalties imposed against the defendants.

For these reasons, the City's claim for civil penalties should be denied, or in the alternative, should be decided following a trial by jury.

h. The City's Claims For Attorney's Fees Should Be Denied As Against Public Policy.

The CCTA does not provide for attorney's fees as a remedy. And although the CMSA provides for "reasonable attorney's fees," such relief is conditioned on the plaintiff alleging and proving "actual damages." N.Y. Tax Law § 484(b). In this case, the City has not proven "actual damages" resulting from the defendants' alleged violation of the CMSA. The City has also failed to prove or quantify that defendants' alleged sales of unstamped cigarettes below CMSA prices actually or proximately caused the City damages. Absent a showing of "actual damages," resulting from defendants' violations of the CMSA, the City is not entitled to attorney's fees.

The City's request for attorney's fees also cannot be granted on summary judgment because New York law requires a hearing to determine whether such request is reasonable. It is well settled under New York law, that a Court may not grant attorney's fees as a remedy without first having a hearing to determine whether such request is reasonable. Fleet Credit Corp. v. Harvey Hutter & Co., Inc., 207 A.D.2d 380, 381 (Coniglio v. Regan, 186 A.D.2d 709 (N.Y. App. Div. 1992). App. Div. 1994)("The Supreme Court erred in awarding the plaintiff attorneys' fees in a sum amounting to 25% of the total principal sum of the judgment, without conducting a

hearing to determine whether the request for attorneys' fees was reasonable.") (*see also,* First Nat. Bank of E. Islip v. Brower, 42 N.Y.2d 471 (1977); Coniglio v. Regan, 186 A.D.2d 709 (1992); Marshall v. New York City Health & Hospitals Corp., 186 A.D.2d 542 (N.Y. App. Div. 1992); Headquarters Rest. Corp. v. Reliance Vending Co., 519 N.Y.S.2d 662 (1987)).

Notwithstanding the fact that the parties have not had a hearing, there is nothing about the City's request for attorney's fees that has a semblance of reasonableness. First, the City is not a private litigant. Rather, it is governmental entity acting in a law enforcement capacity in furtherance of a political policy. The plaintiff's attorneys are not associated with a private law firm but rather are salaried civil service employees.

It is further notable that the City was afforded a preliminary injunction in this case and was alleviated from having to prove irreparable harm by virtue of the fact that the CCTA provides the government with a cause of action. *See* City of New York v. Golden Feather Smoke Shop, Inc., 597 F.3d 115, 121 (2d Cir. 2010). It would therefore be unreasonable to grant the City attorney's fees as it were a private litigant while it exercises rights only afforded to it by virtue of its standing as a governmental entity.

Furthermore, the method by which the City's submits its request for attorney's fees is patently flawed. For instance, the City's claims for attorney's fees should be specifically relevant to its CMSA claims and should exclude the work concerning its CCTA claims. Thus, the hours expended on CCTA claims should be excluded as well as hours related to the parties in this action who have already settled. Moreover, the hourly basis suggested by the City is wholly unreasonable. The City pays plaintiff's counsel the same whether they are working on this case or not.

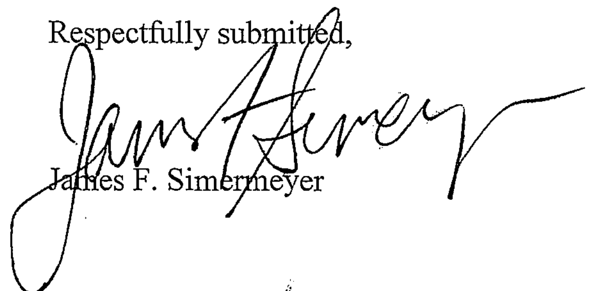
Finally, it is well settled that U.S. courts generally do not award prevailing litigants to attorney's fees. "In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser." Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975). Such awards, when intended by Congress, generally concern situations when a private litigant seeks to enforce a public right. *See* Id. at 264. Thus, even assuming that the City prevails on the merits, this case is at odds with the U.S. policy on attorney's fees to the extent that it is the plaintiff-government who is seeking to enforce a private right pursuant to the CMSA. To award attorney's fees would be akin to allowing the New York Attorney General to be reimbursed when he commences an action on behalf of the State. Nothing in law or equity provides a basis for the government to obtain an award for attorney's fees. Accordingly, the City's claims should be dismissed, or alternatively stayed pending a hearing on the reasonableness of the City's request.

V. Conclusion

Based on the foregoing, the defendants respectfully request that the Court deny plaintiff's motion for summary judgment and grant defendants' motions for summary judgment thus dismissing this case.

Dated: July 5, 2012
New York, New York

Respectfully submitted,



James F. Simermeyer