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

Plaintiff,

vs.

13 Civ. 1889 (DLC)

WOLFPACK TOBACCO; CLOUD AND COMPANY; ALLEGANY SALES AND MARKETING; PHILIP JIMERSON; HEIDI JIMERSON; JOHN DOES 1-5, being persons who own, are employed by or are associated with Wolfpack Tobacco, PM DELIVERY, MICHAEL W. JONES, JOHN L. POWERS and JOHN DOES 6-10, being persons who own, are employed by or are associated with PM DELIVERY,

Defendants.
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DEFENDANTS WOLFPACK TOBACCO; CLOUD AND COMPANY; ALLEGANY SALES AND MARKETING; PHILIP JIMERSON AND HEIDI JIMERSON'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

RULES

OTHER AUTHORITY

Preliminary Statement

Plaintiff City of New York (the "City") has moved this Court for issuance of a Preliminary Injunction pursuant to Fed. R. Civ. P. Rule 65(a) against defendants Wolfpack Tobacco, Allegany Sales and Marketing, Cloud and Company, and Philip and Heidi Jimerson (hereinafter referred to as "Wolfpack").[1] Wolfpack Tobacco, Allegany Sales and Marketing and Cloud and Company are business entities run by Philip Jimerson and are 100% Seneca owned and licensed with the Seneca Nation on the Allegany. Wolfpack Tobacco was formed in 1998 and is an entity that encompasses a mail order operation consisting of the sale of Native Brand cigarettes and cigars (amongst other retail items). Cloud and Company operates the retail store located on the Allegany Reservation.

The City alleges violations by the Defendants of the Prevent All Cigarette Trafficking Act (the "PACT Act"), the Contraband Cigarette Trafficking Act (the CCTA) and the Cigarette Marketing Standards Act (the CMSA).[2] The papers submitted in support of the City's Motion generally contend that Wolfpack engaged in the "trafficking" of untaxed and unstamped cigarettes into New York City in violation of the aforesaid statutes. The City further contends that it is not required to make a showing of irreparable harm to obtain an injunction under either the CMSA or CCTA because

[1] Defendant Philip Jimerson is a tribal member of the Seneca Nation of Indians, and the sole owner of Defendants Wolfpack Tobacco, Allegany Sales and Marketing and Cloud and Company are tribal businesses operating from the sovereign territory of the Seneca Nation's Allegany Reservation. Defendant Heidi Jimerson, Philip Jimerson's wife, is a stay-at home mom who plays no active role in her husband's businesses. See accompanying declaration of Philip Jimerson with attached exhibits (the "Jimerson Decl."); Plaintiff's Complaint, ¶¶8-11.

[2] The application for relief also requests an injunction with regard to the remaining defendants but only under the CCTA.

"irreparable harm is presumed for statutory injunctions, such as under the CCTA."[3] This logic allows the City to further conclude that an injunction here is in the public interest because "[t]he passage of the statute is, in a sense, an implied finding that violations will harm the public and ought, if necessary, be restrained." Golden Feather, 2009 U.S. Dist. LEXIS 76306, at *111-12 (citation omitted). Finally, the City concludes it will succeed in showing a likely success on the merits and that future violations are likely to recur if not preliminarily enjoined. For the reasons discussed below, the City has failed to meet the standard required for the issuance of a Preliminary Injunction. Accordingly, Plaintiff's Motion for a Preliminary Injunction should be denied.

I. Standard for Issuance of a Preliminary Injunction

It is well established that a " preliminary injunction is an extraordinary remedy never awarded as of right. In each case, courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." New York v. BB's Corner, Inc., 2012 WL 2402624 (S.D.N.Y. June 25, 2012)(citations omitted). Thus, in order to establish entitlement to a preliminary injunction, a plaintiff must establish (1) irreparable injury in the absence of relief; (2) either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits of its claims to make them fair ground for a litigation; (3) that the balance of hardships tips decidedly in its favor; and (4) a preliminary injunction would not disserve the public interest. WNET, Thirteen v. Aereo, Inc., 2013 WL 1285591, at *4 (2d Cir. April 1, 2013)(now published at 712 F.3d 676). With respect to irreparable harm, the

[3] The City bases its position on the Second Circuit decision in City of New York v.Golden Feather Smoke Shop, Inc., 597 F.3d 115, 120 (2d Cir.2010), which employs a presumption based upon the State and Federal legislature's findings that such conduct, in and of itself, is harmful to the public, and further argues that the presumption found in Golden Feather attaches with equal force to the PACT Act as the enforcement provisions are identical to the CCTA [City Memorandum of Law, page 8].

Second Circuit has repeatedly emphasized that a showing of irreparable harm is "the single most important prerequisite for the issuance of a preliminary injunction" Faiveley Transp. Malmo AB v. Wabtec Corp., 559 F.3d 110, 118 (2d Cir.2009).

However, citing Golden Feather, the City claims that where a party seeks a "statutory injunction" the Second Circuit has dispensed with the requirement of showing irreparable harm, and instead allows for a presumption of irreparable harm based on a statutory violation. (City Memorandum of Law, p.8). Essentially, in Golden Feather, the Second Circuit concluded that "the City was not required to make a showing of irreparable harm to obtain an injunction under either the CMSA or the CCTA."[4] Id. at 121. However, even if such a presumption is permissible, with it comes the requirement that plaintiff must show a "likelihood of success on the merits" (rather than "sufficiently serious questions going to the merits of its claims to make them fair ground for a litigation"). BB's Corner, Inc., supra., 2012 WL 2402624, at *4. Accordingly, "[t]he City must make a "clear" and "substantial showing of a likelihood of success, both as to violation and risk of recurrence" for its CCTA and CMSA claims." Golden Feather Smoke Shop, Inc., 597 F.3d at 121.

Wolfpack disagrees with the City's position that there is a presumption of irreparable harm when a party is seeking a statutory injunction. The Second Circuit's adherence to the relaxed standard of success in Golden Feather for purposes of granting a preliminary injunction is in direct contravention of Supreme Court precedent requiring that a demonstrable showing of irreparable harm be made, regardless of whether a party is seeking a statutory injunction. In Winter v. Natural Res. Def. Council, Inc., 555 U.S.

[4] Here, the City seeks a preliminary injunction against Wolfpack under the PACT Act and the CSMA, but not the CCTA, which is only asserted against the other Defendants.

7, 22 (2008), the Supreme Court addressed the circuit court's adoption of a relaxed standard with regard to the requirement of irreparable harm:

> Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.

Further, the Supreme Court declined to do away with this ever-important required showing of irreparable harm in cases where statutory violations have occurred:

> And as in our decision today, this Court has consistently rejected invitations to replace traditional equitable considerations with a rule that an injunction automatically follows a determination that a copyright has been infringed.

eBay Inc. v. MercExchange, LLC., 547 U.S. 388, 392-93, 126 S. Ct. 1837 (2006).[5]

Given these rulings by the Supreme Court, any assertion of a presumption of irreparable harm is no longer good law. The Ninth Circuit, which like the Second Circuit had previously recognized the presumption of irreparable harm standard, has recognized this:

> According to [Defendant], after the Supreme Court's *eBay* and *Winter* decisions in 2006 and 2008, this circuit's long-standing practice of presuming irreparable harm upon the showing of likelihood of success on the merits…is no longer good law. [Defendant] is correct.

Flexible Lifeline Sys., Inc. v. Precision Lift, Inc., 654 F.3d 989, 994-95 (9th Cir. 2011).[6]

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[5] (Holding, that "[t]o the extent that the District Court adopted such a categorical rule, then, its analysis cannot be squared with the principles of equity adopted by Congress," and vacating the judgment of the Court of Appeals "[b]ecause we conclude that neither court below correctly applied the traditional four-factor framework that governs the award of injunctive relief.")

[6] In Flexible, the Ninth Circuit recognized its precedent of granting a preliminary injunction solely after finding a likelihood of success on the merits and without inquiring into the required showing of irreparable harm absent relief. Citing Ebay and Winter, the court held that the presumption relied upon in its previous cases such as Elvis Presley Enterprises, Inc. v. Passport Video, 349 F.3d 622, 627 (9th Cir. 2003), has been effectively overruled by the Supreme Court.

All of the Second Circuit cases that support this presumption [and which are cited to in Golden Feather] were discussed and decided well before eBay and Winter.[7] The Second Circuit itself has recognized that categorical application of the presumption standard is no longer valid: "After eBay, however, Courts must not simply presume irreparable harm…[t]he court must not adopt a 'categorical' or 'general' rule or presume that the plaintiff will suffer irreparable harm." Salinger v. Colting, 607 F.3d 68, 80 (2d Cir. 2010)(quoting, eBay, 547 U.S. at 391, 393–94, 126 S.Ct. 1837). Accordingly, the requirement that the City actually demonstrate irreparable harm, rather than presume its existence, must be met; something, as will be demonstrated below, the City has failed to do. Likewise, as further demonstrated below, the City has failed to satisfy the remaining elements required for issuance of a preliminary injunction.

II. Plaintiff Has Not Satisfied the Elements for Issuance of a Preliminary Injunction

A. Irreparable Harm:

Recognizing that the Supreme Court's decisions in Winter and eBay reject the presumption of irreparable harm standard advanced by the City, this Court should adopt those rulings in rejecting the City's position on this issue. Applying the Supreme Court's requirement for an actual showing of irreparable harm, it is clear that the City has failed to meet that burden.

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[7] See, United States v. Diapulse Corp. of Am., 457 F.2d 25, 27 (2d Cir.1972); SEC v. Management Dynamics, Inc., 515 F.2d 801, 808 (2d Cir.1975); SEC v. Unifund SAL, 910 F.2d 1028, 1035–36 (2d Cir.1990); Consolidated Rail Corp. v. Town of Hyde Park, 47 F.3d 473, 479 (2d Cir.1995); Prayze FM v. FCC, 214 F.3d 245, 248 (2d Cir.2000); Weight Watchers Int'l, Inc. v. Luigino's, Inc., 423 F.3d 137, 144 (2d Cir.2005)(Holding "[a] plaintiff who establishes that an infringer's use of its trademark creates a likelihood of consumer confusion generally is entitled to a presumption of irreparable injury when seeking injunctive relief, a presumption that can be overcome if the party seeking the injunction has delayed in seeking the injunction"). (Emphasis added).

Irreparable harm is defined as "an injury for which a monetary award cannot be adequate compensation." Hester Indus., Inc. v. Tyson Foods, Inc., 882 F.Supp. 276, 277 (N.D.N.Y. 1995)(*quoting* Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc., 596 F.2d 70, 72 [2d Cir.1979]).[8] Further, "the movant must demonstrate 'an injury that is neither remote nor speculative, but actual and imminent.'" Shapiro v. Cadman Towers, Inc., 51 F.3d 328, 332 (2d Cir. 1995)(*quoting*, Tucker Anthony Realty Corp. v. Schlesinger, 888 F.2d 969, 975 [2d Cir.1989]).

In the matter at bar, the City claims that the "present action and the instant motion seeks to enjoin the defendant's 'mail order' scheme to traffic unstamped cigarettes into New York City." [City Memorandum of Law, p. 1]. The City claims to have previously proven its injury from "the large quantities of untaxed cigarettes…purchased….and trafficked into the City where they are resold at below-market prices, without the payment of City or State taxes." [City Memorandum of Law, p. 1, fn. 2]. Given this assertion, it is self-evident that the City's claimed harm is purely financial (i.e. the loss of tax revenue resulting from the purported purchase of untaxed cigarettes by City residents).

This amount of alleged monetary harm is therefore easily quantifiable, and can be determined based upon information alleged by the City concerning its own purported investigations. Specifically - setting aside conclusory assertions about alleged additional but unspecified violations of the CMSA and PACT Act by Wolfpack raised in the City's Complaint - it alleges that six cartons of untaxed cigarettes were transported into the City [based upon the declaration of Investigator James Grayson]. This

[8] (Holding, "[f]or it has always been true that irreparable injury means injury for which a monetary award cannot be adequate compensation and that where money damages is adequate compensation a preliminary injunction will not issue.")

information provides the Court with an easy means to calculate actual alleged loss. Moreover, even if the Court gives some weight to the City's conclusory assertions of additional violations, should such violations have occurred, the only actual harm would again be lost tax revenue compensated through monetary damages, and therefore not irreparable harm as that term is employed by the courts.[9] Given the foregoing, the City has not met the standard required to establish irreparable harm, as it has alleged an injury that is easily monetarily quantifiable.

Finally, a related consideration is the City's considerable delay in seeking injunctive relief. The Second Circuit has observed that:

> "[p]reliminary injunctions are generally granted under the theory that there is an urgent need for speedy action to protect the plaintiffs' rights. Delay in seeking enforcement of those rights, however, tends to indicate at least a reduced need for such drastic, speedy action.... Although a particular period of delay may not rise to the level of laches and thereby bar a permanent injunction, it may still indicate an absence of the kind of irreparable harm required to support a preliminary injunction."

Costello v. McEnery, 767 F.Supp. 72, 78 (S.D.N.Y. 1991), aff'd, 948 F.2d 1278 (2d Cir. 1991).[10] [11] The City admittedly alleges that Wolfpack was engaging in its purported

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[9] While the City may cite to Golden Feather for the proposition that such currently unquantifiable tax loss is sufficient to meet the test for irreparable harm, Golden Feather is easily distinguished both because the decision is tainted by reason of its adherence to the presumed irreparable harm standard, and that it stands in contravention to the well-recognized line of cases holding that where money damages are adequate compensation, a preliminary injunction will not issue. Jackson Dairy, Inc., 596 F.2d at 72 (2d Cir.1979).

[10] See also, Citibank, N.A. v. Citytrust, 756 F.2d 273, 276 (2d Cir.1985); Majorica, S.A. v. R.H. Macy & Co., Inc., 762 F.2d 7, 8 (2d Cir.1985)(holding that "[l]ack of diligence, standing alone, may ... preclude the granting of preliminary injunctive relief, because it goes primarily to the issue of irreparable harm...."); Borey v. National Union Fire Insurance Company of Pittsburgh, 934 F.2d 30, 35 (2d Cir.1991)(delay in seeking preliminary injunction belies claim of irreparable harm); Abish v. Northwestern National Insurance Co., 924 F.2d 448, 454 (2d Cir.1991) (same); Railroad P.B.A. of the State of New York, Inc. v. Metro–North Commuter Railroad, 699 F.Supp. 40, 43 (S.D.N.Y.1988) (delay in seeking enforcement of rights undercuts argument that injunctive relief is necessary); Manhattan State Citizens' Group, Inc. v. Bass, 524 F.Supp. 1270, 1275 (S.D.N.Y.1981) (delay in seeking preliminary injunction "militates against the claim of irreparable injury and may be ground for barring injunctive relief.").

"unlawful activities" for years. The City has had the knowledge of these purported "unlawful activities," and a mechanism for enforcement in place since at least 2010. The City itself acknowledges that the PACT Act became effective on June 29, 2010 (Complaint, ¶ 61), yet elected to wait almost three years before filing suit.

> Under these circumstances, plaintiff's delay in bringing its preliminary injunction motion was unreasonable and undercut plaintiff's argument that its injury was actual and irreparable.

Grout Shield Distributors, LLC, supra, 824 F.Supp.2d at 403 (E.D.N.Y. 2011) [Denying motion]. Courts generally decline to grant preliminary injunctions in the face of unexplained delays of more than two months, let alone almost three years.[12] As such, the City has failed to meet the element of irreparable harm.

B. Likelihood of Success on the Merits:

Should the Court accept that the City must make a showing of irreparable harm, the City must then establish a likelihood of success on the merits. However, should the Court agree with the City that there exists a presumption of irreparable harm, then the "City must make "clear" and "substantial" showing of a likelihood of success, both as to

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[11] Accord, Grout Shield Distributees, LLC v. Elio Salvo, Inc., 824 F.Supp.2d 389, 403 (E.D.N.Y. 2011)(Failure to act sooner "suggests that there is in fact no irreparable injury," denying motion for preliminary injunction).

[12] See, Life Technologies Corp. v. AB Sciex Pte. Ltd., 2011 WL 1419612, at *7 (S.D.N.Y. Apr. 11, 2011) (concluding that delay between October 2010, when all settlement discussions ceased, and filing of the complaint in January 2011, constituted unreasonable delay); Richard A. Leslie Co., Inc. v. Birdie, LLC, 2007 WL 4245847, at *2 (S.D.N.Y. Nov. 26, 2007) ("The period from April 10 through June 8 may be excused ... on the basis that the parties appear to have been engaged in discussions with a view to resolving the matter. The three month period from June 8 through September 18 cannot. It is sufficiently long, in and of itself, to warrant denial of preliminary relief...."); Gidatex, S.R.L. v. Campaniello Imports, Ltd., 13 F.Supp.2d 417, 419 (S.D.N.Y.1998) ("[C]ourts typically decline to grant preliminary injunctions in the face of unexplained delays of more than two months.").

violation and risk of recurrence for its…CMSA claim[]."Golden Feather, 597 F.3d at 121 (emphasis added), quoting SEC v. Unifund SAL, 910 F.2d 1028, 1039 (2d Cir. 1990).[13] The City has failed to satisfy either.

i. The PACT Act (15 U.S.C. ¶ 375)

The PACT Act was enacted to allow Federal and State governments to track and collect taxes on interstate cigarette and smokeless tobacco sales made through the internet, mail order, or any other form of sale or delivery that is not in person. It attempts to achieve its purpose by adding a number of registration and information disclosure requirements, as well as enforcement provisions. The Act also adds requirements for shipping and packaging. This includes a bill of lading on the outside of the shipping package and on the same surface as the delivery address, along with a weight restriction of 10 pounds for any single sale or single delivery of any cigarettes or smokeless tobacco.

a. The City has not met its burden with regard to likelihood of success on the merits for violations of the PACT Act because current litigation has called into doubt the constitutional validity of the Statute:

In Red Earth LLC v. United States, 657 F.3d 138 (2d Cir. 2011), Native Americans located on the Cattaraugus territory of the Seneca Nation of Indians, who were in the business of selling cigarettes and tobacco products via the Internet, mail and telephone, sought to enjoin enforcement of the PACT Act on the ground that various provisions of the Act violated their constitutional rights. Specifically, the plaintiffs argued "that the PACT Act violates the Due Process Clause because it subjects them to the taxing jurisdiction of state and local governments without regard to whether they have

[13] See also Ligon v. City of New York, 2013 WL 628534 at *3 (S.D.N.Y. Feb. 14, 2013) (quoting Jolly v. Coughlin, 76 F.3d 468, 473–74 (2d Cir.1996))("where 'the injunction sought will alter rather than maintain the status quo,' the movant must show [a] 'clear' or 'substantial' likelihood of success").

sufficient minimum contacts with those taxing jurisdictions." Red Earth, 728 F.Supp. 2d at 247 (W.D.N.Y. 2010), aff'd, 657 F.3d 138 (2d Cir. 2011).

The Court recognized that the PACT Act required:

> "remote sellers who are not physically present in a taxing jurisdiction to collect state and local excise taxes on cigarettes and smokeless tobacco *regardless of whether their existing contacts with that taxing jurisdiction rise to the level of minimum contacts necessary to satisfy due process considerations.*"

Id. at 248. Finding that the Plaintiffs had demonstrated a likelihood of success on the merits, the district court enjoined enforcement of the taxing and reporting provisions of the PACT Act:

> By failing to require any minimum contacts before subjecting the out-of-state retailer to "all state, local, tribal, and other laws generally applicable to sales of cigarettes or smokeless tobacco," Congress is broadening the jurisdictional reach of each state and locality without regard to the constraints imposed by the Due Process Clause. That it cannot do. It would appear that the PACT Act seeks to legislate the due process requirement out of the equation.

Id. at 251-52.[14] Furthermore, the plaintiffs argued "that the PACT Act is unconstitutionally vague because the statute is inconsistent with the sovereign rights of Native–Americans." The Court found that,

> "[c]ompliance with the plethora of state and local laws now made applicable under the PACT Act far exceeds the 'minimal burden' approved of by the Supreme Court. Whether the Supreme Court would likewise approve of the requirement that Native American retailers be subject to the jurisdiction of *every* state and *every* locality into which their goods are shipped is unclear and certainly merits further inquiry."

[14] "The injunction applies only to three provisions of the PACT Act: (1) 15 U.S.C. § 376a(a)(3), which requires delivery sellers to comply with all state and local laws, including those imposing excise taxes, as if the delivery sales occurred entirely within that state; (2) § 376a(d), which requires delivery sellers to pay state and local tobacco taxes before delivering their products; and (3) § 376a(a)(4), which mandates compliance with § 376a(d)." Red Earth, 657 F.3d at 145.

Id. at 252. While the court in Red Earth did not find that the Plaintiffs established a likelihood of success on the merits with regard to their constitutional argument, the Court clearly recognized that the issue warranted further attention.

In the matter at bar, while the City concedes it does not seek to enforce any of the enjoined provisions under the PACT Act against Wolfpack, the constitutional arguments that are being addressed in current litigation warrant consideration with regard to the City's likelihood of success on the merits. Wolfpack Tobacco is a tribal enterprise run by a Seneca tribal member on the Allegany Reservation of the Seneca Nation of Indians—a recognized sovereign Indian tribe. It is well-settled that states are without jurisdiction to impose taxation on Indian reservation lands or Indian property within Reservations:

> (I)n the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation.

Bryan v. Itasca Cnty., Minnesota, 426 U.S. 373, 376-77, 96 S. Ct. 2102, 2105 (1976).[15]

Accordingly, as the Allegany Reservation is an entity separate and distinct from New York State, the Due Process analysis and constraints recognized in Red Earth are applicable to the Wolfpack Defendants in the matter at bar. Without minimum contacts with New York State, Wolfpack cannot be required to comport with that jurisdiction's laws that mandate payment of state and local tax laws prior to the delivery of their products. This would apply in particular to Plaintiff City. The very definitions that are contained within the PACT Act support this position, as "interstate commerce" is

[15] See also, Moe v. Salish & Kootenai Tribes, 425 U.S. 463, 475-476 (1976)(holding "that in the absence of congressional consent the State was disabled from imposing a personal property tax on motor vehicles owned by tribal members living on the reservation, or a vendor license fee applied to a reservation Indian conducting a business for the tribe on reservation land, or a sales tax as applied to on-reservation sales by Indians to Indians."); Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 764-65, 105 S. Ct. 2399, 2402-03 (1985).

defined, as relevant, as "commerce between a State and any Indian country." 15 U.S.C. § 375(9)(A). Further, the term "interstate" alone is defined as "[b]etween two or more states or residents of different states." Black's Law Dictionary (9th Cir. 2009). The Allegany Reservation thus qualifies as a separate entity from New York State.

The Court must also take into consideration the additional constitutional and sovereign implications of the PACT Act—also advanced by Indian Tribes that are now forced to abide by the applicable state and local tax laws in every jurisdiction in which they ship to.[16] As the Red Earth court opined, "the PACT Act certainly raises unresolved issues relating to conflicts between the Act's enforcement and sovereign rights of Native Americans" and "[c]ompliance with the plethora of state and local laws now made applicable under the PACT Act far exceeds the 'minimal burden' approved of by the Supreme Court."[17]

It is well-settled that "[s]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985). Tribal sovereignty is subordinate only to the federal government, not to the states, and states may tax reservation Indians only if Congress has

[16] In a more in-depth analysis of the constitutional and sovereign arguments, Wolfpack intends to attack the validity of the State and Local Tax Laws in light of New York Indian Law Section 6 (entitled, "Exemption of reservation lands from taxation"), which indicates that "[n]o taxes shall be assessed, for any purpose whatever, upon any Indian reservation in this state, so long as the land of such reservation shall remain the property of the nation, tribe or band occupying the same." N.Y. Indian Law § 6. See argument against CMSA below.

[17] [I]n contrast to the "minimal burden" approved of by the Supreme Court in *Moe* and *Colville,* the PACT Act requires Native American retailers to collect taxes on behalf of a host of different state and local taxing jurisdictions. Red Earth, 728 F.Supp. 2d at 252. See. Gordon v. Holder, 826 F. Supp.2d 279, 291 (D.D.C. 2011)(Also finding a likelihood of success on the merits with regard to the PACT Act's Due Process violations and holding "[a]t this stage in the proceedings, the Court cannot find that each of Gordon's sales establishes the requisite minimum contacts with the states in which he sells his products such that the PACT Act's tax provisions satisfy due process).

indicated its consent. *See*, Oklahoma Tax Commission v. Chickasaw Nation, 515 U.S. 450, 458-59 (1995); Washington v. Confederated Tribes, 447 U.S. 134, 154 (1980).

These issues present serious claims as to the validity of the Act and thus undermine the City's claim of likelihood of success on the merits. Whether these claims are adjudicated in the case at bar, or in companion litigation [i.e. Red Earth; Gordon v. Holder], this Court should not ignore the concerns of the Eastern District with regard to the constitutional validity of the PACT Act.

b. The City has not met its burden with regard to likelihood of success on the merits for at least some alleged violations of the PACT Act:

In its Motion, the City asserts violations by Wolfpack of the PACT Act's reporting, labeling, weight and age verification requirements. These allegations stem primarily from two alleged individual controlled sales from Wolfpack to a City Investigator.[18] As indicated above, the reporting requirements impose a substantial burden on sovereign Indian nations to comply with and report to all jurisdictions within which they may be transporting Native American products. Wolfpack contends [without conceding any behavior violative of the statute] that the validity of this portion of the statute implicates serious constitutional and sovereign concerns. Accordingly, the questionable validity of the PACT Act undermines the City's likelihood of success on the merits.

The City will not be able to show a likelihood of success on the merits with regard to the alleged violation of the statute's weight restriction (15 U.S.C. § 376a(3)) because neither of the alleged deliveries to the City Investigator presented by Plaintiff exceeded the 10 pound requirement. By the City's own admission, a "carton of cigarettes weighs

[18] The sales allegedly resulted in the transport of six cartons of Native Brand cigarettes into New York City.

between one-half pound and one pound" [See City Complaint, p. 19]. Pursuant to the Declaration of City investigator James Grayson, the first purchase of two cartons of King Mountain cigarettes and two cartons of Seneca 100 cigarettes weighed 42.1 ounces or 2.6 lbs [Grayson Decl. ¶¶ 10, 18] and the second purchase of two cartons of King Mountain cigarettes weighed 18.8 ounces or 1.175 lbs [Grayson Decl. ¶ 18].

The City further alleges that Wolfpack presumably sold thousands of cartons of cigarettes to City addresses since December of 2010. However, this is pure conjecture and speculation based solely upon shipment records obtained from Eastern Connection; a non-party delivery company that allegedly delivered one of the packages ordered by Investigator Grayson [See Bloom Decl. ¶ 16]. The City issued a subpoena for Eastern Connections shipping records, and upon review concluded that PM Delivery [the alleged common carrier for Wolfpack] shipped thousands of packages for Wolfpack since December of 2010. The City then alleges that because many of these packages were over ten (10) pounds, that they were shipped in violation of the relevant provisions of the PACT Act.

However, the City presents no evidence that any of the alleged PM Delivery shipments were shipped exclusively for Wolfpack. Nor do they present any evidence that the shipments even contained cigarettes. Their only support for these allegations is that "another City investigator, Marta Rivera, contacted certain unnamed individuals listed on the documents provided by Eastern Connection…and confirmed that they had all received unstamped cigarettes by mail" [See Bloom Decl. ¶ 25. Rivera Decl.]. The relevant declaration does not specify which individuals were contacted, or specifically link their alleged receipt of untaxed cigarettes to orders from Wolfpack, shipped by PM

Delivery through Eastern Connection. As such, the City has failed to establish a likelihood of success on the merits with regard to a violation of the PACT Act requirements governing weight restriction.

The City will not be able to show a likelihood of success on the merits with regard to the alleged violation of the statute's age verification or labeling requirement either (15 U.S.C. § 376a). Specifically, the City will not be able to establish liability with respect to Wolfpack as they are not responsible for the PM Delivery defendant's purported failure to follow the PACT Act's requirements. With regard to the age verification, the City's suppositions that "a statement of "Wolfpack's Policies" informs customers that "if you are not at home your package will be left at your address" [City Memorandum of Law, p. 12, Bloom Decl. ¶ 8, Ex. 1] by no means proves that Wolfpack has violated these requirements. Further, the City's own Exhibit includes a Wolfpack Order form which contains the following language: WE MUST HAVE PHOTO ID TO VERIFY AGE [Bloom Decl. Ex. 1]. This is in direct compliance with the age verification requirements enumerated in the statute. As such, the City has failed to establish a likelihood of success on the merits with regard to a violation of the PACT Act's requirements governing age verification as well as labeling.

ii. The CMSA (New York Tax Law §483 et seq.)

The CMSA, New York Tax Law §§ 483-486, makes it unlawful for any "retail dealer, ... 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 cost of such ... retail dealer." N.Y. Tax L. §484(a)(1).

a. The City of New York's regulatory reach does not extend onto the Allegany reservation.

The reach of this federal Court's personal jurisdiction is different from the state's power to regulate. A federal court may have personal jurisdiction over a defendant even in instances where the state has no power to regulate that same defendant. This is particularly true when dealing with federal reservations, such as those at issue in federal Indian law cases. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207-10 (1987) (states cannot regulate activity on tribal land that is not prohibited off reservation).

States do not have the authority to regulate the affairs on tribal lands absent a congressional grant of that authority:

> Congress has also acted consistently upon the assumption that the **States have no power to regulate the affairs of Indians on a reservation**. To assure adequate government of the Indian tribes it enacted comprehensive statutes in 1834 regulating trade with Indians and organizing a Department of Indian Affairs. . . . **Significantly, when Congress has wished the States to exercise this power it has expressly granted them the jurisdiction which *Worcester v. Georgia* had denied**.

Williams v. Lee, 358 U.S. 217, 220-21 (1959) (citations omitted) (emphasis added). As the Supreme Court has confirmed, "Congress has the power to say with whom, and on what terms, [Indians] shall deal, and what articles shall be contraband." United States v. Forty-Three Gallons of Whiskey, 93 U.S. 188, 195 (1876).[19] New York cannot regulate Wolfpack's advertisement of cigarettes on the Allegany Nation in New York, and the City's request that this Court allow it to do so judicially through a preliminary injunction must be rejected.

b. The City has not met its burden with regard to likelihood of success on the merits for violations of the CMSA because it has not alleged

[19] Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 154 (1980) ("tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States"); Oklahoma v. Bruner, 815 P.2d 667, 670 (1991) (state "does not have a lawful right to impose or enforce its license and permit requirements upon tribally licensed Indian cigarette retailers doing business in Indian Country"); State v. Atcity, 146 N.M. 781, 785 (Ct. App. 2009) ("no states have general regulatory authority over Indian country").

sufficient evidence with regard to Wolfpack's intent to violate the CMSA

The CMSA presumes the requisite "intent to avoid the collection or paying over of such taxes as may be required by law" from "[e]vidence of ... offering to sell or sale of cigarettes ... at a price less than cost." *See* N.Y. Tax L. § 484(6). However, the CMSA only establishes a presumption that sales below cost are made with the proscribed intent. Lorillard Tobacco Co. v. Roth, 99 N.Y.2d 316, 324 (2003). The City fails to present any evidence of actual intent to avoid the collection or paying over of such taxes as may be required by law. As indicated on the Wolfpack flyers, all cigarettes advertised for sale are native brands, and in order to prove that Wolfpack allegedly intended to evade any legally imposed taxes [should it be proven that they illegally sold cigarettes to City residents at all], the City would still have to prove that Wolfpack knew that their Native Brands were subject to taxation by the State and City municipalities. This is a high standard which the City must meet as an element of the statute. The New York Penal Law defines "intentionally" as follows:

> A person acts intentionally with respect to a result or to conduct described by statute defining an offense when his conscious objective is to cause such result or to engage in such conduct.

N.Y. Penal Law § 15.05. Without proof of this knowledge, the City will be unable to establish intent on behalf of any of the Wolfpack defendants, particularly where they have a long-standing good faith belief in Native American sovereignty with regard to payment of state and city cigarette taxes.

c. The City and State laws that require the taxation of cigarettes conflict with New York State Indian Law and therefore must be found invalid

The provisions of Tax Law section 471 as well as the N.Y.C. Administrative Code 11-1302(a) that purport to require the taxation of cigarettes must be seen in light of Indian Law Section 6 (entitled, "Exemption of reservation lands from taxation"), which indicates that "[n]o taxes shall be assessed, for any purpose whatever, upon any Indian reservation in this state, so long as the land of such reservation shall remain the property of the nation, tribe or band occupying the same." This later provision was derived from state legislation enacted in 1857 and 1892. The 1857 law, Chapter 45 of the Laws of New York; 80th Session, read, in pertinent part: "AN ACT to relieve the Seneca nation of Indians from certain taxes on the Allegany and Cattaraugus reservations. Commentary, believed to be part of a legislative judiciary committee report, released contemporaneously with the Act, observed that "[a]ny authority in th[e] State, to tax those Indians, is disclaimed, and it is acknowledged, that the land owned by them never belonged to the State of New York."[20]

Thus, New York's statutory scheme, which is relied upon by the City, must be viewed in light of Indian Law §6 and its legislative history, as set out in the 1857 Act.[21] This statutory scheme supports the argument that members of the Seneca Nation doing business on the reservation should not be subject to NYS taxation. Further, nothing in

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[20] *See* Documents and Official Reports ("illustrating the causes which led to the revolution in government of the Seneca Indians, in the year 1848, and the recognition of their representative republican constitution, by the authorities of the United States and of the State of New York," printed by Wm. Moody & Son, 1857), pg. 92 (*see* **Exhibit B** herein).

[21] In 1978, pursuant to Indian Law §200 repealed the 1857 Act as part of an administrative purging of laws enacted from 1779 through 1908. No reason is articulated as to why the Act was being repealed. However, the above commentary and the Act itself are still important in explaining the legislative history of Indian Law §6, which has been unchanged in content since 1892. In other words, the content of §6 is informed by the 1857 Act and its commentary, as they were in place when the state legislature first articulated the §6 phrase, "[n]o taxes shall be assessed, for any purpose whatever, upon any Indian reservation in this state, so long as the land of such reservation shall remain the property of the nation, tribe or band occupying the same."

the other relevant parts of the Indian Law (Article 2 ["General Provisions"], Article 4 ["The Seneca Indians"] and Article 5 ["The Seneca Indians on the Allegany and Cattaraugus Reservations"]) contravenes this point.

This issue, which presents a conflict in New York statutory law between Indian Law §6 and Tax Law Art. 471, has thus not yet been clarified by the courts in New York State. As such, the City will not be able to show a clear likelihood of success on the merits with regard to enforcement of the statutory requirements of the CMSA.

d. The City cannot meet its burden with regard to a likelihood of success on the merits for violations of the CMSA because Wolfpack will be able to show that the PACT Act and CCTA violations should be dismissed, and therefore this Court should exercise its discretion and dismiss the State violations which are before the Court based solely on supplemental jurisdiction:

Without conceding any violations of the CMSA on the merits, Wolfpack contends that upon the dismissal of the PACT Act violations for the reasons discussed above and the alleged RICO violations in the underlying Complaint for the reasons discussed below, this Court should not exercise supplemental jurisdiction over the alleged State law violations. Accordingly, the City's ability to demonstrate a likelihood of success on the merits with regard to a CMSA violation is severely undermined.

With regard to Wolfpack, the City has alleged violations of the Federal PACT Act and New York's CMSA in support of its motion for a preliminary injunction. Should the Court find that the City has failed to show a likelihood of success on the merits with regard to the purported PACT Act violations, the Court must consider the jurisdictional concerns with only a remaining State law violation should the Federal claims be

dismissed. 28 U.S.C. §1367(a) provides for supplemental federal jurisdiction over related state law claims. Section 1367(c)(3) states that:

> The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if -- . . . the district court has dismissed all claims over which it has original jurisdiction . . . ."

Id. Such a dismissal is theoretically discretionary, but the federal courts have made it clear how such "discretion" should normally be exercised. Recently, the Second Circuit stated as relevant:

> [I]n the usual case in which all federal claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine – judicial economy, convenience, fairness, and comity – will point toward declining to exercise jurisdiction over the remaining state–law claims.

Pension Benefit Guaranty Corp.ex rel. St. Vincent v. Morgan Stanley Invest. Mgt. Inc., 712 F.3d 705, 2013 WL 1296481 at *15 (2d Cir. April 2, 2013)[22]

Without the PACT Act violations, the City is left with the purported State violations under the CMSA, and the RICO violations as alleged in the Complaint. The RICO violations alleged are predicated solely upon violations of the CCTA. However, the Complaint does not assert a claim against Wolfpack under the CCTA. As such, in order to allege a RICO violation [or conspiracy to commit a RICO violation], a violation of the CCTA as a "predicate offense" must be present. See 18 U.S.C. §1961(1). The City alleges that the "sale purchase, possession, receipt, shipment, transport, and distribution of the unstamped cigarettes involved in the Sales to City Consumers, by the Wolfpack Defendants and by the PM Delivery Defendants, violated the CCTA and thus

[22] (Affirming dismissal of all remaining state law claims after first dismissing the federal ERISA claims pursuant to a Rule 12(b)(6) motion) (*quoting* Valencia ex rel. Franco v. Lee, 316 F.3d 299, 306 (2d Cir. 2003)); Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 n.7, 108 S.Ct. 614 (1988).

constitute a pattern of racketeering activity within the meaning of RICO" [See City Complaint, p.24, ¶ 100].

i. The City has not adequately alleged all elements of a CCTA violation

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). When ***possessed*** by any person other than certain exempt entities, "contraband cigarettes" are defined as "a quantity in excess of 10,000 cigarettes,[23] 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 jurisdiction uses tax stamps "to evidence payment of cigarette taxes". 18 U.S.C. § 2341 (emphasis added). Thus, ***possession*** is a required element in order to meet the definition of contraband cigarettes pursuant to the CCTA.

The City has failed to set forth any proof that Wolfpack at any time was ever in possession of more than 10,000 unstamped cigarettes—the City has only alleged in conclusory fashion that "in thousands of separate transactions" Wolfpack caused to be delivered at least 46,268 cartons of unstamped cigarettes to persons throughout the five boroughs of the City [City Complaint, ¶ 41-56].[24]

The CCTA requires that "contraband cigarettes" must be more than 10,000 unstamped cigarettes in the possession of any person which bear no evidence of payment of applicable taxes. 18 U.S.C. §2341(2). None of the City's factual allegations set forth in the Complaint, Memorandum of Law or supporting documentation meet the

[23] There are 20 cigarettes in a pack, 10 packs to a carton, so that 10,000 cigarettes equals 50 cartons. See, United States v. Hasan, 846 F. Supp. 2d 541, 543 (E.D. Va. 2012).

[24] The City's supporting Memorandum of Law indicates that "records procured by the City show that since December 2, 2010, PM Delivery has shipped thousands of packages, weighing more than 45,000 pounds in total, from the Wolfpack Defendants to customers in the City. Since a carton of cigarettes weighs less than one pound, this translates to more than 45,000 cartons of cigarettes." [City Memorandum of Law, page 6]. This contention does mention possession.

requirement that Wolfpack and its principal were ever in possession of more than 10,000 unstamped cigarettes. This is an indispensible requirement in order to meet the definition of contraband cigarettes under the CCTA. It is an argument supported by the bare possession element contained within the applicable definitions of the CCTA. The alleged cigarettes simply do not meet the minimal statutory number to be "contraband cigarettes" as defined by the CCTA.

In order to meet this requirement, the Court would have to assume that because Wolfpack Defendants were purportedly engaged in the sale of large volumes of cigarettes [which has not been established], they conceivably had in their possession over 10,000 untaxed cigarettes at any given time. This is pure speculation and would not meet the Court's requirements in order to survive a motion to dismiss.

ii. The City cannot enforce a RICO claim against Wolfpack

§2346 of the CCTA specifically provides immunity to Wolfpack, "[n]o civil action may be commenced under this paragraph against an Indian tribe or an ***Indian in Indian country***." 18 U.S.C.A. §2346(b)(1). As such, Wolfpack cannot be liable for CCTA violations regardless of the possession element discussed above.[25] The City concedes this point: "'an Indian in Indian Country,' such as Philip Jimerson may not be the subject of a civil CCTA action" [See Memorandum of Law, page 3, fn. 3].[26] Logic dictates that if Wolfpack cannot be sued for a violation of the CCTA, it cannot be sued to

[25] Salton Sea Venture, Inc. v. Ramsey et al., No. 11-CV-1968-IEG (WMC) Order, ECF No. 25 at 10 (S.D. Cal. October 18, 2011) (refusing to enter injunction against Yakama business entity); Yakama Indian Nation v. Flores, 955 F. Supp. 1229, 1260 (E.D. Wash. 1997) (Yakama Treaty rights extend to tribal member corporations), affirmed 157 F.3d 762 (9th Cir. 1998); Pourier v. S.D. Dept. of Rev., 658 N.W.2d 395, 404-05 (2003), opinion vacated in part on reh'g on other grounds, 674 N.W.2d 314 (2004) (tribal member's business entity treated the same as the tribal member for purposes of tax immunity).

[26] Mr. Jimerson is the sole owner of the Wolfpack business. Jimerson Decl., ¶¶ 2-3.

conspire to violate the CCTA. As such, without a violation of the CCTA, the Plaintiff's RICO claims fail, as they are predicated solely upon the alleged CCTA violation as predicate acts.[27] In light of the foregoing, the City has failed to meet the requisite showing of likelihood of success on the merits with regard to the PACT Act and CMSA violations, and therefore the Motion for a Preliminary Injunction should be denied.

C. Balance of Hardships/Public Interest/Likelihood of Recurrence

The City does not address the balance of hardships analysis required for the issuance of a preliminary injunction. It merely argues that "favorable public interest [is] presumed…and the statutory violations are likely to recur if the defendants are not enjoined" [City, Memorandum of Law, p. 8]. However, the same argument against the presumption of irreparable harm in this matter rings true for the presumption of favorable public interest. As such, the City must proffer credible evidence that the alleged Wolfpack sales harmed the New York City residents. The City has only presented direct evidence of two alleged controlled sales into the City [to a City investigator at that]. Clearly an injunction against it would hurt Wolfpack's business[28], while the City did not seek equitable relief during the several years of the PACT Act's existence. As such, the City has failed to present evidence that supports a balance of hardship in its favor, or that this injunction is in the public interest.

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[27] See Hemi Group, LLC v. City of New York, 559 U.S. 1, 130 S.Ct. 983 (2010), dismissing the City's civil RICO claim for lack of proximate cause, where as here it failed to assert direct claims for violation of defendant's alleged predicate acts.

[28] Wolfpack runs its business from Indian land in the Allegany territory. The Supreme Court has certainly recognized the importance of protecting the interests of Indian created products by at least requiring a more exacting inquiry where there is state encroachment in scenarios where non-Indians are *physically present* in participating in commerce on Indian land. *See* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144-145 (1980) (emphasis added and internal citations omitted). The computer age has brought inevitable changes in how business is carried out; but this has not lessened the certain harm to Indian business and tribal independence, should Indian sovereignty be ignored in this Court's analysis.

Furthermore, an injunction must be more specific than a general command that the enjoined party obey the law. See, New York v. Shinnecock Indian Nation, 560 F.Supp.2d 186, 189 (E.D.N.Y. 2008) (Holding,"[a]s this injunction would do no more than instruct the City to 'obey the law,' we believe that it would not satisfy the specificity requirements of Rule 65(d) and that it would be incapable of enforcement.")(citing, Louis W. Epstein Family P'ship v. Kmart Corp., 13 F.3d 762, 771 [3d Cir.1994])[29]. As the City merely requests an order enjoining the Defendants from further violations, injunctive relief is not appropriate in this matter.

Finally, the City has failed to establish the likelihood of future violations by Wolfpack. It is well-settled that "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects." City of Los Angeles v. Lyons, 461 U.S. 95, 102, 103 S. Ct. 1660, 1665 (1983). See also, Shain v. Ellison, 356 F.3d 211, 215 (2d Cir. 2004). As established above, the City has only provided evidence of two previous alleged violations of the PACT Act and CMSA. Attached hereto as Exhibit A is an affidavit from Wolfpack principal and sole owner, Philip Jimerson, outlining his efforts to comply with all applicable regulations of the PACT Act and CMSA. Accordingly, the City is not at risk to sustain violations of the CMSA and PACT Act by Wolfpack and as such is not entitled to the extraordinary remedy of a Preliminary Injunction.

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[29] S.E.C. v. Goble, 682 F.3d 934, 949 (11th Cir. 2012). See, Schine Chain Theatres, Inc. v. United States, 334 U.S. 110, 125–26 (1948), overruled on other grounds by Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984); Hughey v. JMS Dev. Corp., 78 F.3d 1523, 1531 (11th Cir. 1996) ("appellate courts will not countenance injunctions that merely require someone to 'obey the law'"); Payne v. Travenol Laboratories, Inc., 565 F.2d 895, 898 (5th Cir. 1978) ("'obey the law' injunctions cannot be sustained"); 11A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2955 (2d ed.1995).

III. Conclusion

In light of the foregoing, the Court should deny the City's Motion for a Preliminary Injunction, as the City has failed to meet all elements required for such relief.

DATED: May 17, 2013
Buffalo, New York

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

THE CITY OF NEW YORK,

Plaintiff,

vs.

13 Civ. 1889 (DLC)

WOLFPACK TOBACCO; CLOUD AND COMPANY; ALLEGANY SALES AND MARKETING; PHILIP JIMERSON; HEIDI JIMERSON; JOHN DOES 1-5, being persons who own, are employed by or are associated with Wolfpack Tobacco, PM DELIVERY, MICHAEL W. JONES, JOHN L. POWERS and JOHN DOES 6-10, being persons who own, are employed by or are associated with PM DELIVERY,

Defendants.

----------x

CERTIFICATE OF SERVICE

I hereby certify that on 05/21/13 I electronically filed the foregoing on behalf of the interested parties with the Clerk of the District Court using the CM/ECF system.

I hereby certify that on 05/21/13 a copy of the foregoing was also delivered to the following using the CM/ECF System.

Eric Proshansky
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DATED: Buffalo, New York
May 21, 2013

/s/Claire M. Grundtisch
Claire M. Grundtisch