

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X

THE CITY OF NEW YORK,

Plaintiff,

Civil Action No. 13 cv 1889 (DLC)

-against-

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

**REPLY MEMORANDUM OF LAW IN SUPPORT OF THE CITY OF NEW YORK'S
MOTION FOR A PRELIMINARY INJUNCTION**

MICHAEL A. CARDOZO
Corporation Counsel of the
City of New York
*Attorney for Plaintiff The City
of New York*
100 Church Street, Room 20-84
New York, New York 10007
(212) 356-2274

By: Aaron M. Bloom
Eric Proshansky

TABLE OF CONTENTS

| | <u>Page</u> |
|--|-------------|
| TABLE OF AUTHORITIES | ii |
| PRELIMINARY STATEMENT | 1 |
| ADDITIONAL FACTS | 2 |
| ARGUMENT | |
| I. Irreparable Harm, Public Interest, and a Favorable Balance of the Hardships are Presumed in this Case..... | 3 |
| II. The City Will Likely Succeed on the Merits of its PACT Act and CMSA Claims Against the Wolfpack Defendants..... | 6 |
| A. Ongoing Litigation Involving the PACT Act Has No Bearing on this Motion | 6 |
| B. The Wolfpack Defendants Raise No Genuine Dispute as to Their PACT Act Violations | 7 |
| C. The Wolfpack Defendants Are Subject to the CMSA | 10 |
| D. The Wolfpack Defendants Have Not Rebutted the Presumption of Intent to Avoid the Collection of Taxes | 11 |
| E. The Court Has Jurisdiction Over the City’s CMSA Claim..... | 12 |
| III. The CMSA and PACT Act Violations are Likely to Recur..... | 13 |
| IV. The Wolfpack Defendants’ Request for Discovery and a Stay of this Motion Should be Denied | 14 |
| CONCLUSION..... | 15 |

TABLE OF AUTHORITIES

| <u>Cases</u> | <u>Pages</u> |
|--|----------------------|
| <i>Blanksteen v. New York Mercantile Exch.</i> , 879 F. Supp. 363 (S.D.N.Y. 1995)..... | 4 |
| <i>City of New York v. Golden Feather Smoke Shop, Inc.</i> , 08-cv-3966, 2009 U.S. Dist. LEXIS 76306 (E.D.N.Y. Aug. 25, 2009) | 6, 14 |
| <i>City of New York v. Golden Feather Smoke Shop, Inc.</i> , 597 F.3d 115 (2d Cir. 2010)..... | 3, 4, 5 |
| <i>City of New York v. Golden Feather Smoke Shop, Inc.</i> , 2013 U.S. Dist. LEXIS 47037 (E.D.N.Y. Mar. 29, 2013) | 14 |
| <i>City of New York v. Gordon</i> , 12-cv-4838, 2013 U.S. Dist. LEXIS 71953 (S.D.N.Y. May 21, 2013) | 1, 2, 10, 12, 13, 14 |
| <i>Consumer Mail Order Assoc. v. McGrath</i> , 94 F. Supp. 705 (D.D.C. 1950), aff'd, per curiam, 340 U.S. 925 (1951)..... | 8 |
| <i>Dept. of Tax. and Fin. of N.Y. v. Milhelm Attea Bros., Inc.</i> , 512 U.S. 61 (1994)..... | 10 |
| <i>eBay Inc. v. MercExchange, LLC</i> , 547 U.S. 388 (2006)..... | 4, 5 |
| <i>Flexible Lifeline Sys. v. Precision Lift, Inc.</i> , 654 F.3d 989 (9th Cir. 2011) | 5 |
| <i>FTC v. John Beck Amazing Profits, LLC</i> , 2009 U.S. Dist. LEXIS 130923 (C.D. Cal. Nov. 17, 2009)..... | 5 |
| <i>Gordon v. Holder</i> , 826 F. Supp. 2d 279 (D.D.C. 2011) appeal docketed, Nos. 12-5031, 12-5051 (D.C. Cir.) | 7 |
| <i>Kapps v. Wing</i> , 404 F.3d 105 (2d Cir. 2005)..... | 14 |
| <i>N.Y. State Dep't of Tax. & Fin. v. Bramhall</i> , 235 A.D.2d 75 (4th Dep't 1997) | 11 |
| <i>New York v. BB's Corner, Inc.</i> , 2012 U.S. Dist. LEXIS 88542 (S.D.N.Y. June 25, 2012)..... | 4, 6, 12 |

| <u>Statutes</u> | <u>Pages</u> |
|---|---------------------|
| <i>Oneida Nation of N.Y. v. Cuomo</i> , 645 F.3d 154 (2d Cir. 2011)..... | 10, 11 |
| <i>Red Earth LLC v. United States</i> , 657 F.3d 138 (2d Cir. 2011), <i>aff'g</i> , 728 F. Supp. 2d 238 (W.D.N.Y. 2010) | 6-7 |
| <i>SEC v. Unifund SAL</i> , 910 F.2d 1028 (2d Cir. 1990)..... | 5 |
| <i>Smith v. SEC</i> , 653 F.3d 121 (2d Cir. 2011)..... | 6 |
| <i>Snyder v. Wetzler</i> , 193 A.D.2d 329 (3d Dep't 1993)..... | 11 |
| <i>United States v. Diapulse Corp. of Am.</i> , 457 F.2d 25 (2d Cir. 1972)..... | 5 |
| <i>United States v. Fiander</i> , 547 F.3d 1036 (9th Cir. Wash. 2008) | 12-13 |
| <i>United States v. Oregon State Medical Soc.</i> , 343 U.S. 326 (1952)..... | 14 |
| <i>United States v. Pugh</i> , 717 F. Supp. 2d 271 (E.D.N.Y. 2010) | 6 |
| <i>Wash. v. Conf. Tribes of the Colville Indian Res.</i> , 447 U.S. 134 (1980)..... | 8, 10 |
| <i>Winter v. Natural Res. Def. Council, Inc.</i> , 555 U.S. 7 (2008)..... | 4, 5 |
| <u>Statutes</u> | |
| 15 U.S.C. § 375 <i>et seq.</i> | 1 |
| 15 U.S.C. § 376 | 7 |
| 15 U.S.C. § 376a(a)(3)..... | 7 |
| 15 U.S.C. § 376a(a)(4)..... | 7 |

| <u>Statutes</u> | <u>Pages</u> |
|---|---------------------|
| 15 U.S.C. § 376a(b)(1)..... | 9 |
| 15 U.S.C. § 376a(b)(3)..... | 8, 9 |
| 15 U.S.C. § 376a(b)(4)..... | 9 |
| 15 U.S.C. § 376(d) | 7 |
| 15 U.S.C. § 378(c)(1)(a)..... | 3, 4 |
| 18 U.S.C. §2341 <i>et seq.</i> | 1 |
| 18 U.S.C. §2346(b)(1) | 3 |
| 35 U.S.C. § 283 | 4 |
| Fed. R. Civ. P 65(d)(2)..... | 1 |
| New York Indian Law § 6 | 10 |
| N.Y. Tax Law § 471(1) | 12 |
| N.Y. Tax Law § 483 <i>et seq.</i> | 1 |
| N.Y. Tax Law § 484(6) | 11 |
| N.Y. Tax Law § 484(b)(1) | 4 |
| N.Y.C. Admin. Code § 11-1302 | 12 |

Other Authorities

| | |
|--|---|
| Chaloupka, Frank J. & Rosalie L. Pecula, <i>The Impact of Price on Youth Tobacco Use</i> , National Cancer Institute Monograph No. 14, Chapter 12 (Nov. 2001), available at http://cancercontrol.cancer.gov/brp/tcrb/monographs/14/ (last visited June 4, 2013)..... | 6 |
| Report of the Surgeon General, <i>How Tobacco Smoke Causes Disease: The Biology and Behavioral Basis for Smoking-Attributable Disease</i> (2010), at 654, available at http://www.cdc.gov/tobacco/data_statistics/sgr/2010/index.htm (last visited May 29, 2013) | 6 |

Plaintiff the City of New York (the “City”) respectfully submits this reply memorandum in support of its motion for a preliminary injunction against Wolfpack Tobacco, Cloud and Company, Allegany Sales and Marketing, and Philip Jimerson (the “Wolfpack Defendants”).¹

PRELIMINARY STATEMENT

The Wolfpack Defendants do not dispute the core factual basis for the City’s motion: that they have been, still are and will continue selling and shipping unstamped cigarettes² to customers throughout the country, including New York City, without reporting those sales to tax authorities, identifying the package contents, requiring age verification, abiding by weight restrictions, or including the cost of required taxes in the sales price, all in violation of the non-enjoined provisions of the Jenkins Act, 15 U.S.C. § 375 *et seq.*, as amended by the Prevent All Cigarette Trafficking Act of 2010 (collectively, the “PACT Act”) and/or the New York State Cigarette Marketing Standards Act, N.Y. Tax L. § 483 *et seq.* (“CMSA”).³ Instead, the Wolfpack Defendants oppose entry of a preliminary injunction with an array of unsupported arguments that contradict well-settled law. The Wolfpack Defendants’ arguments are meritless, and Judge Jesse M. Furman of this district has enjoined another Allegany (Seneca) Reservation mail-order cigarette seller under essentially the same facts and the same statutes as here. *See*

¹ Based on representations made by them, the City has withdrawn its motion as against PM Delivery, Michael W. Jones, John L. Powers and John Does 6-10. *See* Doc. No. 29. Without conceding the truth of Philip Jimerson’s representation that Heidi Jimerson has no involvement in the cigarette business, the City withdraws its present motion as against Heidi Jimerson, who would in any event be bound by an injunction pursuant to Fed. R. Civ. P. 65(d)(2).

² For the definition of “unstamped cigarettes,” as used herein, *see* Memorandum of Law In Support of The City of New York’s Motion For A Preliminary Injunction (*City Mem.*) (Doc. No. 7), at p.1 n.1.

³ The City does not bring a claim against the Wolfpack Defendants under the Contraband Cigarette Trafficking Act, 18 U.S.C. § 2341 *et seq.* (the “CCTA”). Their activities nonetheless violate that statute and hence serve as a predicate act for the City’s Racketeer Influenced Corrupt Organizations Act (“RICO”) claims. *See City of New York v. Gordon*, 12-cv-4838, 2013 U.S. Dist. LEXIS 71953 at * 16, n.2 (S.D.N.Y. May 21, 2013).

City of New York v. Gordon, 12-cv-4838, 2013 U.S. Dist. LEXIS 71953 (S.D.N.Y. May 21, 2013) (“*Gordon*”).⁴ Accordingly, the City’s motion should be granted.

ADDITIONAL FACTS

Since the filing of the City’s motion, defendant Michael Jones has submitted a letter answering the complaint. Doc. No. 28 (“*Jones Ans.*”). Jones states that from 2010 through April 2013, PM Delivery (Jones’ sole proprietorship) arranged for the pickup and delivery of packages from its client, “Cloud and Co.,” 6646 Route 417, Kill Buck, NY, to destinations described by Cloud and Company (“Cloud”) as “Mainly New York State and surrounding East Coast States.” *Jones Ans.* at 2. Cloud purposefully concealed from Jones that Wolfpack Tobacco (“Wolfpack”) was the name of the business using PM Delivery’s services and that Cloud/Wolfpack shipped cigarettes, not simply “Native American Manufactured Products” as Cloud/Wolfpack represented to PM Delivery. *Id.* at 2-6, 8 (#59). Consistent with Jones’ account, Cloud/Wolfpack continued this deception throughout the delivery chain, causing bills of lading to identify its shipments as “Decorations, Notions, or Novelties,” and directing its customers not to contact the “delivery company” with respect to orders, because “the delivery company does not know what they are delivering.” *See* Exs. 1 and 11 to the March 21, 2013 Declaration of Aaron Bloom (Doc. No. 9) (“*Bloom Decl.*”); Exs. E and K to the March 18, 2013 Declaration of James Grayson (Doc. No. 10) (“*Grayson Decl.*”).

Philip Jimerson has acknowledged that Wolfpack and Cloud are his sole proprietorships, that Allegany Sales and Marketing is a “sub-company” of Wolfpack, and that Wolfpack is his mail-order cigarette business while Cloud operates his retail store. *See* Declaration of Philip Jimerson, dated May 14, 2013 (“*Jimerson Decl.*”), ¶¶ 2-3. Wolfpack continues to sell and ship

⁴ In their May 31, 2013 letter to the Court, the Wolfpack Defendants seek to distinguish *Gordon* by contending that the decision does not address several of the arguments made by defendants here. But, as shown below, the arguments themselves are meritless and the purported distinction is not meaningful.

cigarettes – no longer via PM Delivery, but instead via RPS Delivery.⁵ *Id.* ¶ 7. Jimerson evinces no intent to cease sales of unstamped cigarettes into New York City, or elsewhere.

ARGUMENT

I. Irreparable Harm, Public Interest, and a Favorable Balance of the Hardships are Presumed in this Case.

Flying in the face of Second Circuit precedent, the Wolfpack Defendants argue that the City must show irreparable harm, public interest, and a favorable balance of the hardships to obtain an injunction under the CMSA and PACT Act. *See* Wolfpack Defendants Memorandum of Law (“*Wolfpack Mem.*”), at 2-5, 23. The Second Circuit has held exactly to the contrary in affirming an injunction issued under the CMSA and CCTA, explaining that by expressly “authoriz[ing] injunctive relief for violations” and “mak[ing] unlawful specific conduct related to the sale and possession of certain unstamped cigarettes,” both statutes embody a legislative finding that “such conduct, in and of itself, is harmful to the public,” and therefore that “the City is entitled to a presumption of irreparable harm” if statutory violations are shown. *City of New York v. Golden Feather Smoke Shop, Inc.*, 597 F.3d 115, 121 (2d Cir. 2010) (“*Golden Feather*”) (holding that City need only prove likelihood of success and risk of recurrence to obtain injunction under CMSA and CCTA), *aff’d* 2009 U.S. Dist. LEXIS 20953, at *25-30 and 2009 U.S. Dist LEXIS 76306, at *109-19; *see City Mem.* at 8-9. The Second Circuit holding in *Golden Feather* plainly applies to the PACT Act, which contains enforcement provisions nearly identical to those of the CCTA. *See Gordon*, 2013 U.S. Dist. LEXIS 71953 at *7-8 (finding presumption of irreparable harm applicable to PACT Act, as well as CCTA and CMSA); *compare* 15 U.S.C. § 378(c)(1)(a) with 18 U.S.C. § 2346(b)(1).

⁵ PM Delivery terminated Cloud/Wolfpack as a customer upon learning through the instant action that Wolfpack ships cigarettes. *See Jones Ans.* at 11-12 (¶¶ 1-3) and Exs. F-1, F-2, and F-4. The replacement service, RPS Delivery, has now been enjoined from shipping unstamped cigarettes in violation of the CCTA. *Gordon*, 2013 U.S. Dist. LEXIS 71953.

The Wolfpack Defendants make no attempt to distinguish *Golden Feather*, nor argue that it has been overruled. The Supreme Court cases on which the Wolfpack Defendants rely – *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006) and *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008) – pre-date *Golden Feather* and surely were not ignored by the Second Circuit in deciding that case. *Cf. New York v. BB's Corner, Inc.*, 2012 U.S. Dist. LEXIS 88542, at *8-10 (S.D.N.Y. June 25, 2012) (“*BB's Corner*”) (citing *Winter* for general injunction standard, but presuming irreparable harm in granting to City injunctions under CCTA and CMSA, citing *Golden Feather*). Rather, *Winter* and *eBay* are inapposite; neither bars a presumption of irreparable harm in cases seeking statutory injunctions, *i.e.*, injunctions expressly authorized by statutory language, as in the PACT Act and the CMSA. *See* 15 U.S.C. § 378(c)(1)(a) (A “local government ... may bring an action ... to prevent and restrain violations of this Act by any person.”); N.Y. Tax L. § 484(b)(1) (Any injured person may bring an action “to prevent, restrain or enjoin a violation, or threatened violation.... If in such action a violation or threatened violation of this article shall be established, the court shall enjoin and restrain, or otherwise prohibit, such violation or threatened violation.”) (emphasis added).

The Wolfpack Defendants’ characterization of *eBay* as involving a statutory injunction akin to those at issue here is quite incorrect. *eBay* construed the Patent Act’s language that an injunction “‘may’ issue only ‘in accordance with principles of equity’” – a directive not found in the PACT Act or the CMSA – demonstrating that Congress intended the traditional requirements of equity, such as irreparable harm, to apply. 547 U.S. at 392 (quoting 35 U.S.C. § 283) (emphasis added); *cf. Blanksteen v. New York Merc. Exch.*, 879 F. Supp. 363, 366 (S.D.N.Y. 1995) (denying presumption of irreparable harm where statute authorizes injunctive relief but specifies that court apply traditional equitable principles in affording such relief). Further, *eBay*

and *Winter* involved private plaintiffs and the litigation in *eBay* was essentially a private financial dispute, as are many cases under the Patent Act. *See eBay*, 547 U.S. at 390-91; *id.* at 396-97 (Kennedy, J., concurring).⁶ By contrast, where a statutory scheme designed to protect public interests expressly and without limitation authorizes suits to restrain or prevent violations, the authorized plaintiff (usually a governmental entity) serves as a “statutory guardian charged with safeguarding the public interest” and need not show irreparable harm. *Golden Feather*, 597 F.3d at 120; *see id.* (“The function of a court in deciding whether to issue an injunction authorized by a statute of the United States to enforce and implement Congressional policy is a different one from that of the court when weighing claims of two private litigants.”) (quoting *United States v. Diapulse Corp. of Am.*, 457 F.2d 25, 27 (2d Cir. 1972)). The City is just such a “statutory guardian” when it seeks an injunction under the CMSA, CCTA, and/or PACT Act to enforce the statutory goals of protecting public health and preventing tax evasion. *Id.* at 120-21.

The Wolfpack Defendants’ interpretation of *eBay* and *Winter* jettisons the long-established use by governmental regulators such as the Securities and Exchange Commission, the Internal Revenue Service, and the Federal Trade Commission (“FTC”) of presumptions that allow these agencies to enjoin securities law violations, unscrupulous tax advising, and deceptive trade practices without a showing of irreparable harm. *See e.g., SEC v. Unifund SAL*, 910 F.2d 1028, 1035-36 (2d Cir. 1990). The courts have not read *eBay* and *Winter* as effecting such a sweeping change in the law *sub silentio*; to the contrary, these “statutory guardians” continue to be accorded the presumption of irreparable harm subsequent to *Winter* and *eBay*. *See FTC v. John Beck Amazing Profits, LLC*, 2009 U.S. Dist. LEXIS 130923, at *11-12 (C.D. Cal. Nov. 17, 2009) (rejecting argument that *Winter* overturned longstanding presumption of irreparable harm

⁶ Similarly, the 9th Circuit case cited by the Wolfpack defendants merely extends *eBay* to the copyright context, another realm where private plaintiffs engage largely in private financial disputes. *See Flexible Lifeline Sys. v. Precision Lift, Inc.*, 654 F.3d 989 (9th Cir. 2011).

afforded to FTC to enjoin violations of the FTC Act); *Smith v. SEC*, 653 F.3d 121, 127-28 (2d Cir. 2011) (affording presumption of irreparable harm to SEC); *United States v. Pugh*, 717 F. Supp. 2d 271, 285 (E.D.N.Y. 2010) (citing *eBay* for non-statutory injunctions, but requiring only likelihood of success and risk of recurrence for statutory injunctions).

In any event, true irreparable harm – far more than the mere economic harm posited by defendants (*Wolfpack Mem.* at 6-7) – is established by the City’s present submissions and by precedent. There is a well-established relationship between cigarette prices and smoking behavior. *See Golden Feather*, 2009 U.S. Dist. LEXIS 76306, at *68-69 (E.D.N.Y. Aug. 25, 2009).⁷ By omitting taxes and thereby reducing cigarette prices paid by City residents, defendants significantly harm the public health through the adverse health effects of increased cigarette consumption. *See City Mem.* at 1-2 n.2 (noting public health injury); *BB’s Corner*, 2012 U.S. Dist. LEXIS 88542, at *10-11 n.3, and 17 (holding that irreparable harm, though presumed, was also evident from legislative findings of public health harm of untaxed cigarette sales). Such harm far outweighs Wolfpack’s private financial interests.

II. The City Will Likely Succeed on the Merits of its PACT Act and CMSA Claims Against the Wolfpack Defendants.

A. Ongoing Litigation Involving the PACT Act Has No Bearing on this Motion.

The Wolfpack Defendants argue for some effect here of the litigation involving the constitutionality of certain provisions of the PACT Act – *Red Earth LLC v. United States*, 657

⁷ See also, Report of the Surgeon General, *How Tobacco Smoke Causes Disease: The Biology and Behavioral Basis for Smoking-Attributable Disease* (2010), at 654, available at http://www.cdc.gov/tobacco/data_statistics/sgr/2010/index.htm (last visited May 29, 2013) (“Evidence-based reviews have concluded that increases in the price of cigarettes through excise taxes or other strategies are an effective policy intervention to prevent smoking initiation among adolescents and young adults, reduce cigarette consumption, and increase the number of smokers who quit. ... [I]mplementation of effective strategies to limit smuggling and the availability of untaxed tobacco products is essential to maximizing the effectiveness of higher taxes in reducing tobacco use ”); Frank J. Chaloupka & Rosalie L. Pecula, *The Impact of Price on Youth Tobacco Use*, National Cancer Institute Monograph No. 14, Chapter 12, at 194 (Nov. 2001), available at <http://cancercontrol.cancer.gov/brp/tcrb/monographs/14/> (last visited June 4, 2013) (most studies show that a 10 percent increase in price reduces demand for cigarettes by 3 to 5 percent).

F.3d 138 (2d Cir. 2011), *aff'g* 728 F. Supp. 2d 238 (W.D.N.Y. 2010) and *Gordon v. Holder*, 826 F. Supp. 2d 279 (D.D.C. 2011), *appeal docketed*, Nos. 12-5031, 12-5051 (D.C. Cir.). *Wolfpack Mem.* at 9-13. But the City has moved only under PACT Act provisions that both the *Red Earth* and *Gordon v. Holder* decisions *refused* to enjoin: the PACT Act's reporting, weight, age verification and labeling requirements. *City Mem.* at 3 n.4. The *only* PACT Act provisions affected by *Red Earth* and *Gordon v. Holder*, 15 U.S.C. §§ 376a(a)(3), (4) and 376a(d), are those under which the City *does not* sue, self-evidently rendering the Wolfpack Defendants' argument meritless. Indeed, Robert Gordon – who successfully enjoined 15 U.S.C. §§ 376a(a)(3), (4) and 376a(d) in *Gordon v. Holder*, has himself been enjoined from violating other provisions of the PACT Act, notably those at issue here. *See Gordon*, 2013 U.S. Dist. LEXIS 71953, at *8-10.

B. The Wolfpack Defendants Raise No Genuine Dispute as to Their PACT Act Violations.

The Wolfpack Defendants contend that the City has not made an adequate showing “for at least some” of their PACT Act violations, implicitly conceding an adequate showing “for at least some” other violations. *Wolfpack Mem.* at 13-15. But the Wolfpack Defendants nowhere actually deny or attempt to refute the City's evidence of *any* of the PACT Act violations. Thus, as to the reporting requirement, 15 U.S.C. § 376, the Wolfpack Defendants do not dispute their failure to file the required monthly reports with New York City and State tax authorities. They instead erroneously conflate the longstanding purely federal obligation of delivery sellers to report interstate cigarette sales to state authorities with the different, recently-enacted provision requiring compliance with state and local tax laws.⁸ After claiming that the latter requirement would “implicate[] serious constitutional and sovereign concerns,” *Wolfpack Mem.* at 13, the

⁸ The reporting requirement of § 376 has been in existence since the original 1949 passage of the of the Jenkins Act, to which the provisions challenged in *Red Earth* and *Gordon v. Holder* were added in 2010.

Wolfpack Defendants then eviscerate their argument by conceding that these concerns arise only as to predicate state and local laws. *Id.* at 12, 16; *see Wash. v. Conf. Tribes of the Colville Indian Res.*, 447 U.S. 134, 154 (1980) (noting tribal sovereignty is subordinate to Federal Government). Indeed, the PACT Act's reporting requirement was long ago upheld as constitutional. *Consumer Mail Order Assoc. v. McGrath*, 94 F. Supp. 705, 712 (D.D.C. 1950) (three-judge court) (rejecting due process challenges comparable to those raised in *Red Earth*, holding "as to the contention that the Act forces a resident of one state to submit to the jurisdiction of a second state, it is the power of Congress, not of any state, which requires the information to be submitted"), *aff'd, per curiam*, 340 U.S. 925 (1951). Since federally-mandated reporting under 15 U.S.C. § 376 implicates no predicate state or local laws (as do the enjoined provisions of the PACT Act), the Wolfpack Defendants' argument is meritless.

The Wolfpack Defendants disingenuously quibble with the City's proof of their numerous delivery sales of cigarettes in excess of ten pounds, which violate 15 U.S.C. § 376a(b)(3). But rather than dance around the question, if Wolfpack had in fact abided by that restriction it could have so sworn instead of offering strained arguments that the City's proof is inconclusive. Wolfpack knows (and its records would show) whether or not it made the sales in excess of ten pounds that the City identifies by name, date and address. *See Bloom Decl.* ¶¶ 19-20, 23 and Exs. 7, 8, 10. The failure to deny making overweight sales or offer any evidence to refute the City's specific examples of them, when conclusive proof would be in the Wolfpack Defendants' hands, confirms the City's already strong evidence. Wolfpack's effective admission of deliveries in excess of 10 pounds is hardly surprising where Wolfpack advertises a \$20 "Quantity Discount" for orders in excess of 40 cartons of cigarettes. *Bloom Decl.* ¶ 7.⁹

⁹ A carton of cigarettes weighs approximately two-thirds of a pound. *See Grayson Decl.* ¶ 18.

The Wolfpack Defendants argue that there is no evidence that “any of the alleged PM Delivery shipments were shipped exclusively for Wolfpack” or that these “shipments even contained cigarettes.” *Wolfpack Mem.* at 14. Philip Jimerson, however, admits that PM Delivery handled Wolfpack’s deliveries until recently, *Jimerson Decl.* ¶ 6, and Michael Jones (PM Delivery’s sole proprietor) states in his Answer that Cloud (*i.e.* Wolfpack) was PM Delivery’s sole customer in or even near New York State and that Jones routed the Wolfpack shipments through Eastern Connection delivery service, whose records show the over-ten-pound sales. *Jones Ans.* at 8 (#45) and 12 (¶4). Further, the City’s evidence includes bills of lading showing that the PM Delivery shipments originated from Wolfpack’s address, 6646 Route 417, Kill Buck, NY. *Bloom Decl.* ¶¶ 26-28, Ex. 11; *Jimerson Decl.* Ex. 1. Any notion that these shipments did not contain cigarettes is absurd in light of the City’s test purchases of unstamped cigarettes from Wolfpack, Investigator Rivera’s calls confirming that the customers on the PM Delivery-Eastern Connection invoices received unstamped cigarettes, and Wolfpack’s fliers advertising tax-free cigarettes by mail, *see City Mem.* at 4-6, to say nothing of Philip Jimerson’s admission that Wolfpack’s business involved mail-order cigarette sales. *Jimerson Decl.* ¶ 3. Again, if the shipments shown in the City’s evidence were not Wolfpack’s or did not contain cigarettes, Wolfpack could have so demonstrated with its own records and statements instead of offering coy speculation.

The Wolfpack Defendants do not dispute the City’s evidence that they violated the labeling and age verification requirements, *see City Mem.* at 5-6, 12, but instead cast blame on PM Delivery. *Wolfpack Mem.* at 15. The PACT Act, however, permits no such evasion – the requirements are imposed on the delivery sellers themselves, not their carriers. 15 U.S.C. §§ 376a(b)(1), (3) and (4). In any case, the Wolfpack Defendants’ finger-pointing is entirely

dishonest, where (1) Wolfpack generated and applied the non-compliant delivery labels to packages itself, *see Jones Ans.* at 8 (#45), (2) Wolfpack told customers not to contact the “delivery company” because “the delivery company does not know what they are delivering,” *see supra*, p.2 and (3) Wolfpack hid from PM Delivery the fact that its deliveries contained cigarettes and even that its name was “Wolfpack Tobacco,” *see id.*, all of which renders nonsensical any contention that PM Delivery was responsible for Wolfpack’s compliance with the PACT Act. Moreover, Wolfpack’s policies indicate that a “signature will not be required” for delivery and that packages will be left outside if no one is home, *see Bloom Decl.* ¶ 8, Ex. 1, both in direct contravention of 15 U.S.C. § 376a(b)(4)(ii)(I), (II) (requiring signature and identification of an adult to be obtained at the time of delivery). Wolfpack’s policy of asking customers to mail in a copy of identification does not comply with the PACT Act, which requires identification to be provided by the recipient upon delivery. *Id.*

C. The Wolfpack Defendants Are Subject to the CMSA.

The Wolfpack Defendants half-heartedly contend they are exempt from the CMSA, arguing that states may not prohibit Indians on federal reservations from advertising or selling untaxed cigarettes to the public. That argument was long ago, and repeatedly, rejected by the Supreme Court: “We do not believe that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes ... to market an exemption from state taxation to persons who would normally do their business elsewhere.” *Wash. v. Conf. Tribes of the Colville Indian Res.*, 447 U.S. at 155; *Dept. of Tax. and Fin. of N.Y. v. Milhelm Attea Bros., Inc.*, 512 U.S. 61, 71-73 (1994) (“States may impose on reservation retailers minimal burdens reasonably tailored to the collection of valid taxes from non-Indians”); *Oneida Nation of N.Y. v. Cuomo*, 645 F.3d 154, 175 (2d Cir. 2011) (holding that New York’s cigarette taxation and collection regime does not violate tribal sovereignty). *See Gordon*, 2013

U.S. Dist. LEXIS 72953, at *11-12, 31-32 (rejecting sovereignty arguments and enjoining under the CMSA sales of unstamped cigarettes by an Allegany (Seneca) Reservation cigarette seller).¹⁰

D. The Wolfpack Defendants Have Not Rebutted the Presumption of Intent to Avoid the Collection of Taxes.

As the Wolfpack Defendants concede, *Wolfpack Mem.* at 17, the CMSA presumes the element of “intent to avoid the collection” of required taxes from evidence of “offering to sell or sale of cigarettes” at prices that do not include the cost of those taxes. *See* N.Y. Tax Law § 484(6). The Wolfpack Defendants offer no evidence to rebut operation of the presumption here. Instead, they argue that the City must separately prove that “Wolfpack knew their Native Brands were subject to taxation by the State and City.” *Wolfpack Mem.* at 17. But nowhere does the CMSA require proof of such knowledge; the presumption of intent is triggered by evidence of a defendant’s sales prices, demonstrated here through Wolfpack’s advertisements and sales to a City investigator.

Moreover, the Wolfpack Defendants offer no argument that City and State taxes are not imposed on “Native Brands” when such cigarettes are sold to the public, and never even define “Native Brands.” The law provides that State and City taxes are imposed on all cigarettes sold by the Wolfpack Defendants to the public, with no exemption for (or mention of) “Native Brands:”

There is hereby imposed ... a tax on all cigarettes possessed in the state by any person for sale, except that no tax shall be imposed on cigarettes sold under such circumstances that this state is without power to impose such tax.... The tax imposed by this section is imposed on all cigarettes sold on an Indian reservation to non-members of the Indian nation or tribe and evidence of such tax shall be by means of an affixed cigarette tax stamp....

¹⁰ Relatedly, the Wolfpack Defendants argue that the City and State cigarette tax laws conflict with New York Indian Law § 6, which bars taxation of reservation land. *Wolfpack Mem.* at 18-19. This argument too has been repeatedly rejected by the courts because section 6 obviously applies only to taxation of real property. *See N.Y. State Dep’t of Tax. & Fin. v. Bramhall*, 235 A.D.2d 75, 85 (4th Dep’t 1997); *Snyder v. Wetzler*, 193 A.D.2d 329, 332 (3d Dep’t 1993). The argument is so frivolous that it does not even appear to have been raised by any tribe in the recent unsuccessful challenge to the State’s amended cigarette tax laws. *See Oneida Nation*, 645 F.3d 154.

It shall be presumed that all cigarettes within the state are subject to tax until the contrary is established, and the burden of proof that any cigarettes are not taxable hereunder shall be upon the person in possession thereof.

N.Y. Tax L. § 471(1) (emphasis added).¹¹ Indeed, the court in *Gordon* recently rejected a similar claim by an Allegany Reservation mail-order seller that “Native Brands” were non-taxable. 2013 U.S. Dist. LEXIS 72953, at *31-32. In any case, Wolfpack previously sold *all* brands of cigarettes without tax stamps, negating a claim that doubts as to the taxability of “Native Brands” – doubts never sworn to by Jimerson – show lack of intent to avoid the collection of taxes. *See Bloom Decl.* ¶¶ 9-11. Accordingly, the CMSA presumption applies.

E. The Court Has Jurisdiction Over the City’s CMSA Claim.

Although nothing prevented them from doing so, the Wolfpack Defendants have not moved to dismiss either federal claim, rendering their supplemental jurisdiction argument at best premature. *Wolfpack Mem.* at 19-23. Even if the defendants had so moved, the discussion above makes clear that the City’s federal PACT Act claims are meritorious, assuring continued supplemental jurisdiction over the CMSA claim. Moreover, the arguments that the Wolfpack Defendants suggest might fuel a motion to dismiss the City’s RICO claims have all been repeatedly rejected. *See e.g. BB's Corner, Inc.*, 2012 U.S. Dist. LEXIS 88542, at *13-14 (CCTA amount inferred from nature of defendant’s business); *Gordon*, 2013 U.S. Dist. LEXIS 72953, at *16-22 (CCTA amount need not be satisfied in a single transaction or at a single time); *Id.* at *23-24 (possession of contraband not necessary for CCTA violation); *Id.* at *41-42 (RICO liability for an Indian in Indian Country may be based on CCTA predicate acts despite immunity from a civil action under the CCTA);¹² *see also United States v. Fiander*, 547 F.3d 1036, 1042-

¹¹ N.Y.C. Admin. Code § 11-1302 likewise imposes the City cigarette excise tax on “all” cigarettes sold or possessed in the City.

¹² *Gordon*’s holding that Robert Gordon, as “an Indian in Indian country,” is subject to RICO liability based on CCTA violations as predicate acts was in no way based on the presence of a separate CCTA claim against his non-

43 (9th Cir. Wash. 2008) (Yakama Indian exempt from CCTA prosecution may be prosecuted for RICO conspiracy based on CCTA predicate acts).

III. The CMSA and PACT Act Violations are Likely to Recur.

The Wolfpack Defendants' self-serving declaration, offered to show that their CMSA and PACT Act violations are not likely to recur, proves precisely the reverse. Philip Jimerson states that Wolfpack intends to keep operating, albeit with a different delivery service, but nowhere promises to include the cost of City and State cigarette taxes in the prices it charges its City customers. *Jimerson Decl.* ¶¶ 6, 7. Indeed, Jimerson still refuses to concede the validity of those taxes, *id.* ¶ 9, and Wolfpack's business model is completely dependent on undercutting legitimate sellers by not including taxes in the sales price. Accordingly, the CMSA violations will continue. Jimerson likewise does not promise to comply with the PACT Act's reporting requirements and those violations certainly will continue as well.

Jimerson's assurances that Wolfpack will now start striving to comply with the PACT Act's weight and labeling restrictions, and that its new delivery service promises to comply with the law, are worthless. Not only does Wolfpack have a history of violating these provisions and of hiding the nature of its shipments from delivery services, the City's investigations have shown that RPS Delivery, Wolfpack's new service, *Jimerson Decl.* ¶ 7, also fails to comply with the PACT Act's age verification rules. *See Gordon*, 2013 U.S. Dist. LEXIS 72953, at *5-6, 8-10.

When defendants are shown to have settled into a continuing practice or entered into a conspiracy violative of ... law[], courts will not assume that it has been abandoned without clear proof. It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption.

Indian wife, Marcia Gordon, *see Gordon*, 2013 U.S. Dist. LEXIS 72953, at *41-42; rendering the Wolfpack Defendants' attempt to distinguish *Gordon* on this basis meritless. *See* May 31, 2013 letter of Paul Cambria, at 2.

United States v. Oregon State Medical Soc., 343 U.S. 326, 333 (1952). *See Gordon*, 2013 U.S. Dist. LEXIS 72953, at *29-31 (finding reservation-based mail-order cigarette seller likely to continue violating CMSA and PACT Act in light of long history of violations, despite its claims to have gone out of business); *City of New York v. Golden Feather Smoke Shop, Inc.*, 2009 U.S. Dist. LEXIS 76306, at *59-60 (finding reservation-based cigarette seller likely to continue violating CCTA and CMSA despite claim to have suspended operations). “In particular, where a history of legal violations is before the district court, that court has significant discretion to conclude that future violations of the same kind are likely.” *Kapps v. Wing*, 404 F.3d 105, 122-123 (2d Cir. 2005). Accordingly, there is a strong likelihood of recurrence for all violations, and an injunction should issue.

Contrary to the Wolfpack Defendants’ contention, *Wolfpack Mem.* at 24, this Court, like other courts that have enjoined untaxed cigarette operations, will have no difficulty articulating appropriate language for an injunction, and a proposed order is attached hereto as Exhibit A. *See, e.g., City of New York v. Golden Feather Smoke Shop, Inc.*, 2013 U.S. Dist. LEXIS 47037, at *95-97, 128 (E.D.N.Y. Mar. 29, 2013) (issuing injunction under CMSA and CCTA against all advertising and sale of unstamped cigarettes); *Gordon*, 2013 U.S. Dist. LEXIS 72953, at *47 (directing parties to submit proposed language).

**IV. The Wolfpack Defendants’ Request for Discovery
and a Stay of this Motion Should be Denied.**

The Wolfpack Defendants’ request for discovery and an interim stay of this motion is meritless. The Court made clear at the initial conference in this matter that discovery for this motion was unnecessary absent defendants’ identification of genuine contested issues of fact, but the Wolfpack Defendants have pointed to none. None of the Wolfpack Defendants’ submissions contest a shred of the City’s proof. Their proposed discovery bears out the non-existence of any

specific dispute, seeking *all* documents supporting *any* of the City's claims and proposing equally broad and vague depositions of Investigators Grayson and Rivera. Plainly, the Wolfpack Defendants have no factual dispute but instead seek to delay the imposition of an injunction.

The point in time when the City became aware of the Wolfpack Defendants' illegal activity, addressed in two of the proposed document requests, is irrelevant to this motion. A lapse of time by a plaintiff in bringing suit relates, if to anything, to irreparable harm, *see Wolfpack Mem.* at 7, which is not at issue in this case, as discussed above. In any event, in the context of the hydra-headed problem of unstamped cigarette trafficking into the City, the City cannot be expected immediately to sue every entity the City discovers to be acting illegally. There can be no question that prior to this suit, the City has been conducting an aggressive legal campaign against cigarette traffickers of all stripes, as the numerous City cases cited above attest.

CONCLUSION

For the reasons set forth above, the City respectfully requests that the Court issue an order preliminarily enjoining the Wolfpack Defendants, as set forth in Exhibit A.

Dated: New York, New York
June 4, 2013

MICHAEL A. CARDOZO
Corporation Counsel of the
City of New York
Attorney for Plaintiff the City of New York
100 Church Street, Room 20-84
New York, New York 10007
(212) 356-2274

By: /s/ Aaron M. Bloom
Aaron M. Bloom (AB 1977)
Eric Proshansky (EP 1777)
Assistant Corporation Counsel