

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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THE CITY OF NEW YORK,

Plaintiff,

Civil Action No. 08 cv 3966 (CBA)(JMA)

-against-

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

Defendants.

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**MEMORANDUM OF LAW OF PLAINTIFF THE CITY OF NEW YORK IN
OPPOSITION TO CERTAIN DEFENDANTS' MOTION TO DISMISS ON GROUNDS
OF SOVEREIGN IMMUNITY, AND IN FURTHER SUPPORT OF THE CITY'S
MOTION FOR A PRELIMINARY INJUNCTION**

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MOTION FOR A PRELIMINARY INJUNCTION**

The City of New York (the "City") respectfully submits this memorandum of law i) in opposition to certain defendants' motion to dismiss the complaint pursuant to F.R. Civ. P. Rule 12 (b) (1) on grounds of sovereign immunity;¹ and ii) in further support of its motion for a preliminary injunction, pursuant to F.R. Civ. P. Rule 65 (a), enjoining defendants' violation of the Contraband Cigarette Trafficking Act and the New York State Cigarette Marketing Standards Act.²

PRELIMINARY STATEMENT

The City has moved to enjoin defendants from continuing to violate the Contraband Cigarette Trafficking Act ("CCTA"), 18 U.S.C. § 2341 *et seq.*, and the New York State Cigarette Marketing Standards Act ("CMSA"), N.Y. Tax L. § 483 *et seq.* through their "Off Reservation Sales"³ of "unstamped"⁴ cigarettes, as those terms are defined below.

¹ See Joint Memorandum of Law in Support of the Motion to Dismiss dated November 24, 2008 ("*Def. MTD Mem. of Law*").

² See Memorandum of Law of City of New York in Support of its Motion ("*City Mem. of Law*") and Joint Memorandum of Law in Opposition to the City's Motion for a Preliminary Injunction ("*Opp. Mem.*").

³ As used in this memorandum, "Off Reservation Sales" are any sale by a Native American cigarette seller to any entity other than a member of the seller's tribe residing on the seller's reservation, regardless of where the sale physically takes place. Off Reservation Sales are taxable, by contrast to non-taxable "Reservation Sales," used herein to mean sales to any member of a seller's own tribe who resides on the seller's reservation. See *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134 (1980).

⁴ As used in this memorandum, the term "unstamped cigarettes" means cigarettes that do not have tax stamps affixed to them when the law of the place in which the cigarettes are found requires such tax stamps to evidence the payment of applicable cigarette taxes. See 18 U.S.C. § 2341 (2)

Defaulting Defendants

Defendants Peace Pipe Smoke Shop, Rodney Morrison, Sr., Charlotte Morrison, Jessey Watkins and Tony D. Phillips have failed to answer or otherwise appear. The requested injunctive relief accordingly should be entered against these defendants immediately.

Motion to Dismiss

Defendants Golden Feather Smoke Shop, Inc., Kimo Smoke Shop, Inc., Smoke and Rolls Inc., Shawn Morrison, Kiana Morrison, Monique's Smoke Shop, Ernestine Watkins, Wayne Harris, Red Dot & Feathers Smoke Shop, Inc., Raymond Hart, Smoking Arrow Smoke Shop, Denise Paschall, TDM Discount Cigarettes and Thomasina Mack, ("Moving Defendants") seek to dismiss the Complaint under Rule 12(b) (1) for lack of subject matter jurisdiction, asserting that the individuals and the smoke shops partake of the Poospatuck tribe's tribal immunity. (Defendant Shawn Morrison (sued herein as Sean Morrison) admits he is not an Indian,⁵ and cannot invoke this defense). That motion fails utterly, on any of four independent grounds.

Most fundamentally, Moving Defendants' motion to dismiss is purely conclusory, and based almost entirely on bare, unattested facts. Other than a single affidavit which merely sketches out a general procedure for issuing licenses to do business on the reservation, Moving Defendants fail to provide even the most elementary facts – such as which Moving Defendants are tribe members – and offer nothing but unsupported assertions as to the tribal status of their businesses. Moving Defendants do little more than present abstract arguments that describe, incompletely, the general law of tribal immunity, without providing *any* facts that support

⁵ See *Gristede's Foods, Inc. v Unkechaug Nation et al.*, 06-CV-1260 (E.D.N.Y.) (CBA) ("*Gristede's Foods*"), Document No. 410 at 2.

application of that law to any specific Moving Defendant. Based on little more than statements by counsel, the Court is asked to rule that certain individual defendants are Indians, and others are tribal agencies or “arms of the tribe.”⁶

But even accepting *arguendo* Moving Defendants’ bare assertions as to their Indian status, black-letter law completely negates their assertions of immunity, on multiple grounds. Moving Defendants largely recycle the arguments made by them in *Gristede’s Foods, Inc. v Unkechaug Nation et al.*, 06-CV-1260 (E.D.N.Y.) (CBA) (“*Gristede’s Foods*”) to establish that the Poospatuck are a tribe, without recognizing that the tribal status *vel non* of the Poospatuck is immaterial to this case, because of three dispositive, legal distinctions between this case and *Gristede’s Foods*. Any one of those distinctions is fatal to Moving Defendants’ assertion of tribal immunity.

First, the City’s claims proceed under the Contraband Cigarette Trafficking Act, 18 U.S.C. § 2341 *et seq.* (“CCTA”), which authorizes civil actions against “any person,” exempting only “Indian tribes” or “Indians in Indian country.” The City (unlike the plaintiff in *Gristedes Foods*) has not sued an “Indian tribe.” The City has also not sued any “Indian in Indian country.” The non-federally recognized Poospatuck Reservation is not “Indian country,” a well-settled term of art applicable solely to lands in which the federal government has had certain specified historical roles that it did not have with respect to the Poospatuck.

Second, a substantial portion of the relief sought by the Complaint is injunctive, as opposed to seeking damages. It is uniformly the law that tribal immunity does not bar suits,

⁶ The frank unreliability of Moving Defendants’ submission is evidenced by the fact that the Moving Defendants do not even acknowledge that one of their number, Shawn Morrison, does not claim to be an Indian. See *Gristede’s Foods, Inc. v Unkechaug Nation et al.*, 06-CV-1260 (E.D.N.Y.) (CBA) (“*Gristede’s Foods*”), Document No. 410 at 2.

even against tribal officers (a status not claimed by Moving Defendants), seeking an injunctive relief.

Third, even if tribal immunity existed as to CCTA claims for an injunction, tribal immunity does not extend to either individual Indians who are not tribal officers or to Indian businesses that are not “arms of the tribe.” No Moving Defendant claims to be an officer, and no Moving Defendant meets the criteria for a tribal “arm” or agency under the facts offered here.

MOTION FOR PRELIMINARY INJUNCTION

Moving Defendants oppose the City’s motion for a preliminary injunction largely through arguments already comprehensively analyzed and rejected by this Court in *City of New York v. Milhelm Attea Bros. Inc.*, 550 F. Supp. 2d 332, 348 (E.D.N.Y. 2008) (“*Milhelm Attea*”). *Milhelm Attea* held that the City had standing to bring an action under the CCTA, that the City stated claims for relief under both the CCTA and the CMSA, and, perhaps of principal significance as grounds to reject Moving Defendants’ opposition to an injunction, that “Native American tribes do not have established rights in the sale of unstamped cigarettes by reservation retailers to the public.” *Milhelm Attea*, 550 F. Supp. 2d at 353.

Moving Defendants few new arguments are meritless. In particular, their assertion that the identity of the defendants in *Milhelm Attea* serves to require a different result here is unpersuasive where that assertion is completely unsupported by any legal reasoning. As shown below, none of the analysis in the *Milhelm Attea* decision nor of the texts of the CMSA and CCTA deprive the City of standing to sue Moving Defendants, or of the ability to state claims under either statute. Moving Defendants have not carried their burden of proving that the doctrine of laches should apply, where they have neither identified any inexcusable delay by the City in moving for an injunction nor any prejudice to them occasioned by such “delay.”

Additional Facts In Support of Motion for an Injunction

The City provides the following additional facts establishing that defendants' sale of unstamped cigarettes causes massive bootlegging of those cigarettes into the City.⁷

Affidavit of Jason Jerome -- Accompanying this memorandum of law is the Affidavit of Jason Jerome, an Assistant Special Investigator assigned to the Tax Unit of the Economic Crime Bureau of the Suffolk County District Attorney's Office ("SCDA"). *See Affidavit of Jason Jerome* ("Jerome Aff.") ¶ 1. The Economic Crime Bureau of the SCDA prosecutes tax crime arrests made by the Suffolk County Police Department. Special Investigator Jerome reviewed records of the Suffolk County District Attorney's Office for prosecutions under N.Y. Tax L. § 1814, which penalizes attempts to evade cigarette taxes and the transportation of unstamped cigarettes. He determined that in Suffolk County, there were 87 convictions by guilty plea for those offenses between May 29, 2007 and November 7, 2008. Thus, these 87 cases all involve individuals who by their own admissions of guilt evaded taxes and/or transported unstamped cigarettes.

Of the 87 convictions, 81 were of individuals arrested after they left the Poospatuck Reservation in Mastic, Long Island (the "Reservation") and who were transporting multiple cartons of unstamped cigarettes in their vehicles, in violation of the above tax laws. The cartons of unstamped cigarettes were typically packaged in cardboard boxes contained within black plastic garbage bags. *Id.* at ¶¶ 2-4. Of these 81 convictions, 58 of the defendants resided in the City at the time of their arrest. (Thirteen defendants resided north of New York City or

⁷ Both sets of additional facts support a finding that the City is injured by defendants' conduct, warranting injunctive relief. The City has never contended, and does not now contend, that each and every reservation sale would have been a sale in the City (*Opp. Mem.* at 9). That contention would only be relevant to a damages calculation, not whether an injunction is appropriate.

outside the State of New York). *Id.* at ¶ 5. The average number of cartons of unstamped cigarettes per defendant was 1061. *Id.* at ¶ 6.

Investigations by the SCDA in conjunction with the Suffolk County Police Department have revealed numerous instances in which individuals who purchase bulk quantities of unstamped cigarettes on the Poospatuck Reservation, often in amounts sufficient to fill a mini-van or SUV, then transport the cigarettes into New York City. *Id.* at ¶ 7.

DTF Investigative Report: “Batchelder Bootleggers” – Exhibit 44 to the Supplementary Declaration of Eric Proshansky⁸ is a DTF investigative report which records the facts of an investigation of a cigarette bootlegging operation (the “Batchelder Bootleggers”) that transported unstamped cigarettes from the Poospatuck Reservation to the City. According to the report, investigation had revealed the purchase of “a large quantity of untaxed cigarettes from the Poospatuck Native-American reservation in Mastic, New York and the Seneca Native-American Reservation in Buffalo, New York.” *Suppl. Decl.*, Ex. 44. As recently as October 23, 2008, an individual was arrested in Brooklyn for transporting 1,100 cartons of unstamped cigarettes from the Poospatuck Reservation into New York City. In a statement made following his arrest, the arrestee reported that he had picked up the cigarettes at 13 Squaw Lane, *Suppl. Decl.* Ex. 44 (Statement of Faisal Ali Sanad) which a review of Exhibit 29 shows to be the location of defendant Golden Feather Cigarette Express.⁹

⁸ Accompanying this memorandum of law is a Supplementary Declaration of Eric Proshansky dated December 1, 2008 (“*Suppl. Decl.*”) containing exhibits referenced herein, the numbering of which runs consecutively from the exhibit numbers in the Declaration of Eric Proshansky, dated October 27, 2008 (“*Proshansky Decl.*”).

⁹ Searches on multiple occasions of the premises and vehicles used by the Batchelder Bootleggers led to the recovery of a total of approximately 4000 cartons of unstamped cigarettes, thousands of counterfeit tax stamps and substantial amounts of U.S. currency. *See Suppl. Decl.*, Ex. 44.

POINT I

NO MOVING DEFENDANT CAN INVOKE SOVEREIGN IMMUNITY

Whether the Poospatuck Tribe even meets the common law attributes necessary to establish tribal status under law remains undecided; the issue is *sub judice*. See *Gristede's Foods*, Document 29; Minute Entries for September 2-5, 8, 2008. It bears the strongest emphasis, however, that the outcome in *Gristede's Foods* is completely immaterial to Moving Defendants' motion to dismiss, to the City's motion for an injunction, and indeed to this entire action, because the City has not sued the Poospatuck Tribe, or any tribal officers, or any "arms of the tribe," the only types of entities that, under some circumstances, may be entitled to tribal immunity. Rather, the City has sued individuals and their sole proprietorships or the New York corporations that they alone own.¹⁰

As to any Moving Defendant, there is *nothing* in the record to show that any of them is an Indian, a tribal officer or a tribal business. While Moving Defendants' counsel offer their own conclusions and assertions, and one affiant offers some vague generalities concerning the process by which a reservation smoke-shop is licensed and pays fees to the tribe, there are no specific facts from which this Court can determine or verify any of Moving Defendants' bare claims. Tribal immunity cannot be created by Moving Defendants' say-so.

A. NONE OF THE DEFENDANTS ARE EXEMPT FROM SUITS UNDER THE CCTA AS AN "INDIAN IN INDIAN COUNTRY"

¹⁰ Moving Defendants' request to transfer this case to Judge Matsumoto (*Opp. Mem.* at 11), which in any event would require a motion, is frivolous. Whatever decision Judge Matsumoto makes in *Gristedes Foods* concerning tribal sovereignty will of as a matter of law apply here, without the need for a separate hearing in this case. However, as shown above, the sovereignty *vel non* of the tribe is irrelevant to the City's claims.

Even setting aside the fatal gaps in the Moving Defendants’ argument – the Poospatuck’s as yet unknown status as a tribe and the absence of any facts establishing either Indian or tribal business status – and even assuming *arguendo* that Moving Defendants can make these proofs in the future, Moving Defendants’ motion to dismiss must still be denied. The civil action provision of the CCTA under which the City proceeds, 18 U.S.C. § 2346(b)(1)(2), effectively contains an express congressional authorization for this action against the types of entities that the City has sued here.

The CCTA provides that

(1) A ... local government, through its chief law enforcement officer (or a designee thereof), ... may bring an action in the United States district courts to prevent and restrain violations of this chapter *by any person* (or by any person controlling such person) *No civil action may be commenced under this paragraph against an Indian tribe or an Indian in Indian country* (as defined in section 1151 [18 USCS § 1151]).

(2) A ...local government, through its chief law enforcement officer (or a designee thereof), may in a civil action under paragraph (1) also obtain any other appropriate relief for violations of this chapter [18 USCS §§ 2341 et seq.] *from any person* (or by any person controlling such person), including civil penalties, money damages, and injunctive or other equitable relief. Nothing in this chapter [18 USCS §§ 2341 et seq.] shall be deemed to abrogate or constitute a waiver of any sovereign immunity of a State or local government, or an Indian tribe against any unconsented lawsuit under this chapter [18 USCS §§ 2341 et seq.], or otherwise to restrict, expand, or modify any sovereign immunity of a State or local government, or an Indian tribe.

18 U.S.C. § 2346(b)(1), (2) (emphasis added).

These sections of the CCTA permit state and local governments to bring suit “to prevent and restrain violations of” the CCTA (and obtain “any other appropriate relief,” “including ... injunctive relief”), except that this otherwise expansive grant of standing (violations “by any person” and relief “from any person”) is slightly narrowed to provide that

“[n]o civil action may be commenced under this paragraph against an Indian tribe *or an Indian in Indian country (as defined in section 1151).*” *Id.* (emphasis added). The City has not sued the Poospatuck Tribe, even assuming one exists, so that proviso is not relevant. More important to the present analysis, the City has not sued any “Indian in Indian country,” because even if any of the individual defendants or their businesses are Indians, *none* of them are “Indians in Indian country,” even if they live on the Reservation, because the Reservation is not Indian Country as defined in 18 U.S.C. § 1151.

“Indian country” is a statutorily-defined term that, as § 2346(b)(1) provides, is defined in 18 U.S.C. § 1151. Section 1151 defines “Indian country” as including three categories of land:

“Indian country” is

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,

(b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and

(c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151. As a matter of law, the Poospatuck Reservation does not fall into any of the three above-listed categories of land that comprise “Indian country.”

First, the Poospatuck land is not “[L]and within the limits of any Indian reservation *under the jurisdiction of the United States Government*” because lands belonging to the Poospatuck have never been treated as being “under the jurisdiction of the United States Government,” and the Moving Defendants do not contend otherwise. The Poospatuck land was

created by deed from an individual named Colonel William Smith in 1700 and the Poospatuck Indian Nation (a/k/a the Unkechauga Nation) is only recognized by the State of New York. *See* Cohen, *Handbook of Federal Indian Law* at 424 (1941 ed.); N.Y. Indian Law §§ 150-153. The Poospatuck themselves do not claim otherwise. *See generally* *Gristedes Foods*, Document 421. The Poospatuck, however, have never been recognized as a “tribe” by the federal government and their Long Island lands have never been held in federal trust or otherwise “under the jurisdiction” of the federal government. *See Carruthers v. Flaum*, 365 F. Supp. 2d 448, 451 (S.D.N.Y. 2005) (“the Tribe has not been federally recognized and, as far as this court knows, has never even applied for federal recognition”); *id.* at 466 (the Poospatuck are not “a federally recognized Indian tribe on lands that the federal government defines as Indian lands”); *see also* *Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs*, 73 Fed. Reg. 18553 (April 4, 2008) (list of all 562 tribal entities that are federally recognized does not include Poospatuck or the Unkechauga Nation). *See generally* *Gristedes Foods*, Document 421 (no claims by the Poospatuck of any federal status).

The *Handbook of Federal Indian Law* notes that the statutory phrase “under the jurisdiction of the United States Government,” first used by Congress in 1932, “was likely added to exclude from the scope of the statute Indian reservations governed by certain states and thus not under federal protection.” *Id.* § 3.04[2][c], at 190 (2005 ed.). That description applies precisely to the Poospatuck land, which is recognized by the State, but not by the federal government. *Carruthers*, 365 F. Supp. 2d at 451.

Second, the Poospatuck land does not fall within the category of “[a]ll dependent Indian communities.” The Supreme Court has ruled that this term includes only “a limited category of Indian lands that are neither reservations nor allotments, and that satisfy two

requirements – first they must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence.” *Alaska v. Native Village of Venetie*, 522 U.S. 520, 531 (1998). The Poospatuck land does not come close to satisfying either requirement. As noted above, the Poospatuck land was created by deed in the 18th Century – not through the federal government setting aside land for use by the Poospatuck. As for the second requirement, the Poospatuck land does not have any relationship with the federal government whatsoever, much less a relationship in which the federal government exerts “active federal control over the Tribe’s land” and “effectively act[s] as a guardian for the Indians.” *Id.* at 533-34 (holding that even a federal statutory declaration that land is exempt from adverse possession claims nor federal provision of health and economic welfare programs rise to the level of federal superintendence required). *See generally Gristedes Foods*, Document 421 (no claims by the Poospatuck of any federal status, including any federal set-asides or federal superintendence).

Third, the Poospatuck land does not constitute an “Indian allotment[], the Indian titles to which have not been extinguished.” The “allotments” referred to in this category were federally-held reservation lands that were “allotted” to individual Indians in the late 1800s and early 1900s. *See Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1015-16 (8th Cir. 1999). The Supreme Court defined allotments as “parcels of land created out of a diminished Indian reservation and held in trust by the Federal Government for the benefit of individual Indians.” *Venetie*, 522 U.S. at 529 (citing *Pelican v. United States*, 232 U.S. 442, 449 (1914)); *see also Yankton Sioux*, 188 F. 3d at 1015 (allotment is a term of art which refers to the distribution to individual Indians by the federal government of property rights to specific parcels of a reservation). Thus, federal “allotments” by definition involve lands that were originally under

federal jurisdiction and were then granted to individual Indians but held in federal trust status. As noted above, the Poospatuck land was never a federally recognized reservation to begin with, and was certainly never allotted to specific tribal members and held in federal trust. *See generally Gristedes Foods*, Documents 421 (no claims by the Poospatuck of any federal allotments). Accordingly, the Poospatuck Reservation in Mastic, New York is not “Indian country.”

In drafting the civil action provisions of the CCTA, Congress went to some lengths to delineate carefully the entities that were subject to suit and the entities with standing to sue them, creating express distinctions as to which plaintiffs could sue which defendants.¹¹ *See* 18 U.S.C. §2346 (b) (1). In adapting a federal criminal statute for use in civil actions by entities, such as tobacco manufacturers and state and local governments, Congress somewhat narrowed the statute’s reach, because the CCTA as used in criminal prosecutions certainly applies to

¹¹ In full, 18 U.S.C. §2346 (b) (1) provides:

b) (1) A State, through its attorney general, a local government, through its chief law enforcement officer (or a designee thereof), or any person who holds a permit under chapter 52 of the Internal Revenue Code of 1986 [26 USCS §§ 5701 et seq.], may bring an action in the United States district courts to prevent and restrain violations of this chapter by any person (or by any person controlling such person), except that any person who holds a permit under chapter 52 of the Internal Revenue Code of 1986 [26 USCS §§ 5701 et seq.] may not bring such an action against a State or local government. No civil action may be commenced under this paragraph against an Indian tribe or an Indian in Indian country.

The “person who holds a permit under chapter 52 of the Internal Revenue Code of 1986” refers to tobacco manufacturers, who, along with state and local governments, are given standing to sue under the CCTA. But such “persons who hold a permit” may not sue “States or local governments” *or* “Indian tribe[s] or an Indian in Indian country.” State and local governments may not sue Indian tribes or an Indian in Indian country, but may sue other state and local governments.

individual Indians in Indian country. *See, e.g., Grey Poplars Inc., v. 1,371,100 Assorted Brands of Cigarettes*, 282 F.3d 1175, 1177 (9th Cir. 2002).

This careful delineation of plaintiffs and defendants within the CCTA counsels for the application of the principle *expressio unius est exclusio alterius*, so that the express exemption from civil suits of “Indians in Indian country” bespeaks a plain intent to permit suits against Indians *not* in Indian country, such as the individual defendants and their businesses. *See Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978) (where statute creates a number of limited ‘hardship exemptions,’ but none for federal agencies, under the maxim *expressio unius*, we must presume that these were the only ‘hardship cases’ Congress intended to exempt.”); *NextWave Pers. Communs., Inc. v. FCC*, 349 U.S. App. D.C. 53 (D.C. Cir. 2001) (absence of exception from statute “in itself suggests that Congress did not intend to provide” for exception).

Accordingly, as clearly as the civil action section of the statute exempts Indian tribes and Indians in Indian country from civil actions brought by state and local governments, it just as clearly embraces civil actions against Indians *not in* Indian country, such as the Moving Defendants. Plainly, if Congress had wished to exempt all “Indians” from civil CCTA actions, it would have been a simple matter to use the term “Indians,” rather than using the technical modifier “in Indian country” to exempt only those Indians that are “in Indian country.” The congressional creation of a legal distinction between “Indians in Indian country,” and Indians generally is consistent with federal Indian law overall. The Supreme Court has noted that “Indian country” is an important distinction used to order the legal obligations of tribes. *See, e.g., Kiowa Tribe v. Mfg. Techs.*, 523 U.S. 751, 755 (1998) (“We have recognized that a State may have authority to tax or regulate tribal activities occurring within the State *but outside Indian country.*” (citing *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-149 (1973))).

None of the defendants in this action, whether individuals or businesses, are “in Indian country.” Accordingly, no defendant can invoke the narrow exceptions to the CCTA, and all defendants are subject to suit under the CCTA.

**B. THERE IS NO SOVEREIGN IMMUNITY FROM SUITS
FOR INJUNCTIVE RELIEF**

Even if Moving Defendants were not expressly subject to suit under the CCTA, it is completely settled that in suits for injunctive or other equitable relief, individuals, even if they are tribal officers, do not partake in the tribe’s immunity. Tribes (and tribal businesses) may be immune from suits for injunctive relief; tribal officers and individual Indians are not.

As an initial matter, even as to suits for damages, when acting solely as individuals however, individual tribal members enjoy no immunity. *United States v. Oregon*, 657 F.2d 1009, 1012-13 (9th Cir. 1981) (citing *Puyallup Tribe v. Washington Dept. of Game*, 433 U.S. 165, 171-73 (1977)); *Allen v. Mayhew*, 2008 U.S. Dist. LEXIS 5991 (E.D. Cal. 2008); *Unkeowannulack v. Table Mt. Casino*, 2007 U.S. Dist. LEXIS 89988, 11-12 (E.D. Cal. Nov. 27, 2007). Moving Defendants have not offered any facts to establish that any Moving Defendant is acting other than in an individual capacity, or that any of the smoke-shop businesses are anything other than business ventures of their individual owners. Thus, even as to the City’s claims for damages, and apart from the black letter law described below concerning injunctive relief, which does not extend immunity either to tribal officials or individual Indians, tribal immunity does not apply under the present facts.¹²

¹² Individual Indians and tribal officers partake of the tribe’s immunity from suits for money damages only if they are employed by or are officials of tribal businesses or “arms of the tribe.” *See, e.g., Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006). Tribal sovereign immunity *from damage suits* also extends to tribal officials when acting in their official capacity and within the scope of their authority. *Marceau v. Blackfeet Hous. Auth.*, 455 F.3d 974, 978 (9th Cir. 2006); *Linneen v. Gila River Indian Cmty.*, 276 F.3d 489, 492 (9th Cir. 2002).

Turning to the immediate question of injunctive relief, in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978), a suit in which there was a cause of action for declaratory and injunctive relief, the Supreme Court relied on its earlier holding in *Puyallup Tribe v. Washington Dept. of Game*, 433 U.S. 165, 171-172 (1977) to hold that “[a]s an officer of the Pueblo, petitioner Lucario Padilla is not protected by the tribe’s immunity from suit.” In *Puyallup Tribe*, the Court had held that:

[T]he successful assertion of tribal sovereign immunity in this case does not impair the authority of the state court to adjudicate the rights of the individual defendants over whom it properly obtained personal jurisdiction. That court had jurisdiction to decide questions relating to [the declaratory judgment sought]. Only the portions of the state-court order that involve relief against the Tribe itself must be vacated in order to honor the Tribe’s valid claim of immunity.

433 U.S. at 173. The *Puyallup Tribe* holding encompassed injunctive and declaratory relief: “[W]hether or not the Tribe itself may be sued in a state court without its consent or that of Congress, a suit to enjoin violations of state law by individual tribal members is permissible.” *Id.* at 171 (emphasis added). In *Puyallup Tribe*, three of the named individuals were identified as tribal officers. *See id.* at 168.¹³

The Second Circuit relied on both *Santa Clara Pueblo* and *Puyallup Tribe* in *Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76 (2d Cir. 2001) to hold that “Although the AHA [a tribal corporation] itself cannot be made to pay damages and cannot even be named as a defendant, Garcia can still obtain *injunctive relief* against it by suing an agency officer in his

¹³ *A fortiori*, if injunctive suits against tribal officers in their official capacity are permitted, then the instant suit, against non-officials (or at least persons that make no claim to official status) are permitted. Moving Defendants even appear to concede that they are not tribal officials: “The individual defendants represented by our offices and named above are *members of the Unkechaug Indian Nation.*” *Opp. Mem.* at 9 (emphasis added).

official capacity.” *Id.* at 87-88 (emphasis added) (citing *Santa Clara Pueblo*, 436 U.S. at 59 (in turn citing *Ex parte Young*, 209 U.S. 123 (1908)); *Puyallup Tribe*, 433 U.S. at 171-72 (1977); accord *Chayoon v. Chao*, 355 F.3d 141, 143 (2d Cir. 2004) (no request for “any injunctive or declaratory relief and therefore no exception to sovereign immunity is applicable.”); *New York v. Shinnecock Indian Nation*, 523 F. Supp. 2d 185, 297 (E.D.N.Y. 2007) (existence of federal question permits suit by State against tribal officials for prospective injunctive relief pursuant to *Ex parte Young* “and such defendants do not have a defense of sovereign immunity”); *Frazier v. Turning Stone Casino*, 254 F. Supp. 2d 295, 310 (N.D.N.Y. 2003) (“*Ex parte Young* offers a limited exception to the general principle of state sovereign immunity and has been extended to tribal officials acting in their official capacities . . . to enjoin conduct that violates federal law.”); *Bassett v. Mashantucket Pequot Museum and Research Ctr. Inc.*, 221 F. Supp. 2d 271, 278-79 (D. Conn. 2002) (“[U]nder the doctrine of *Ex parte Young*, prospective injunctive or declaratory relief is available against tribal officials when a plaintiff claims an ongoing violation of federal law . . .”), *aff’d in part, vacated in part*, 204 F.3d 343 (2d Cir. 2000); *see also Comstock Oil & Gas v. Ala. and Coushatta Indian Tribes of Tex.*, 261 F.3d 567, 571-72 (5th Cir. 2001) (error to conclude that Tribe was entitled to sovereign immunity against claims for equitable relief); *TTEA v. Ysleta Del Sur Pueblo*, 181 F.3d 676, 680-81 (5th Cir. 1999) (damages claim based on sovereign immunity correctly dismissed, but tribal immunity did not support order dismissing actions seeking declaratory and injunctive relief).

Every single case cited by Moving Defendants in support of their claim of immunity is inapposite because not one case addresses immunity in the context of a suit seeking injunctive relief. *See Def. MTD Mem. of Law* at 9. Thus, *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998) was a suit for damages for breach of contract. In *Chayoon v.*

Chao, 355 F.3d 141 (2d Cir. 2004), the Second Circuit expressly noted that the plaintiff “did not request any injunctive or declaratory relief and *therefore no exception to sovereign immunity is applicable.*” *Id.* at 143 (emphasis added). In *Chayoon v. Sherlock*, 877 A.2d 4 (Conn. App. 2005), cited by Moving Defendants, the facts are the same as in *Chayoon v. Chao*, and both cases were actions for damages.

Incredibly, the moving defendants have cited to *Ellenbast v. Watkins*, 32 A.D. 3d 991 (2d Dept 2006), also an action for damages, to support their immunity arguments. *Ellenbast* is an action pending in New York State Court against Moving Defendants Ernestine Watkins and Monique’s Smoke Shop. *See Suppl. Decl. Ex. 45.* Apparently, neither Ms. Watkins nor Monique’s claimed tribal immunity in that action, or if they did, dismissal was denied. The result in *Ellenbast*, if anything, supports the City’s position that damage suits against individual Indians are not subject to the defense of tribal immunity. *See United States v. Oregon*, 657 F.2d 1009, 1012-13 (9th Cir. 1981). *Ellenbast* also raises questions as to these defendants’ inconsistent positions, or whether they have waived any immunity defense they might have, or whether they are collaterally estopped from raising tribal immunity a defense. In any event, *Ellenbast* is an action for damages, in which only the Poospatuck Tribe was dismissed on grounds of tribal immunity. Because the present suit includes a claim for injunctive relief, and asserts no claims against the tribe, *Ellenbast* fails to off any support for Moving Defendants’ position.

C. THE SOLE PROPRIETORSHIPS, NEW YORK PARTNERSHIP, AND NEW YORK CORPORATIONS SUED HEREIN HAVE NO IMMUNITY AS “ARMS OF THE TRIBE”

Moving Defendants correctly observe that tribal agencies and business entities created by a tribe can possess attributes of tribal immunity. *See Garcia v. Akwesasne Hous. Auth.*, 268

F.3d 76 (2d Cir. 2001); *Gristedes' Foods*, Memorandum and Order of 12/22/2006 (Document 29) at 3 (absent authorization or waiver “an Indian tribe, *or an agency thereof*, is not subject to civil suit”) (emphasis added). When the tribe establishes an entity to conduct certain activities, the entity is immune if it functions as an arm of the tribe. *See, e.g., Marceau v. Blackfeet Hous. Auth.*, 455 F.3d 974, 978 (9th Cir. 2006) (holding that Blackfeet Tribe's sovereign immunity extends to Blackfeet Housing Authority). Tribal immunity is not dependent upon a distinction between the governmental and commercial activities of a tribe, and tribal immunity can extend to business, not merely to governmental, activities of the tribe. *See Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006); *American Vantage Cos. v. Table Mt. Rancheria*, 292 F.3d 1091, 1100 (9th Cir. 2002). The relevant question is not whether the particular tribal entity, such as a casino, is conducting business activities, but whether the “entity acts as an arm of the tribe so that the entity's activities are properly deemed to be those of the tribe.” *Allen*, 464 F.3d at 1046; *see Ransom v. St. Regis Mohawk Education and Community Fund, Inc.*, 86 N.Y.2d 553, 559 (1995).

But the smoke shops sued here are “arms of the tribe” merely because Moving Defendants would like them to be. This Court, and others, have addressed in some detail the factors used to determine whether an organization is an arm of tribal government:

- The entity is organized under tribal constitution or laws (rather than federal law).
- The organization’s purpose(s) are similar to a tribal government’s (e.g., promoting tribal welfare, alleviating unemployment, providing money for tribal programs).
- The organization’s managing body is necessarily composed primarily of tribal officials (e.g., organization’s board is, by law, controlled by tribal council members).

- The tribe's governing body has the unrestricted power to dismiss members of the organization's governing body.
- The organization (and/or its governing body) "acts for the tribe" in managing organization's activities.
- The tribe is the legal owner of property used by the organization, with title held in tribe's name.
- The organization's administrative and/or accounting activities are controlled or exercised by tribal officials.
- The organization's activities take place primarily on the reservation.

Gristedes Foods, Document 29 at 15 (citing *In re Greene*, 980 F.2d 590 (9th Cir. 1992); see also *Ransom*, 86 N.Y.2d at 559 (listing the same factors)).¹⁴

No Reservation smoke-shop has ever been determined by any court to be an "arm of the tribe." Moving Defendants' contention that "Importantly, the sovereign immunity has been extended to businesses on the Unkechaug reservation lands" (citing *Ellenbast v. Watkins*, 32 A.D. 3d 991) is a complete and total fabrication. The truth is that only the Poospatuck tribe was dismissed from that personal injury action on grounds of tribal immunity. Monique's Smoke

¹⁴ Thus, the Court of Appeals in *Ransom v. St. Regis Mohawk* stated that:

In determining whether a particular tribal organization is an "arm" of the tribe entitled to share the tribe's immunity from suit, courts generally consider such factors as whether: the entity is organized under the tribe's laws or constitution rather than Federal law; the organization's purposes are similar to or serve those of the tribal government; the organization's governing body is comprised mainly of tribal officials; the tribe has legal title or ownership of property used by the organization; tribal officials exercise control over the administration or accounting activities of the organization; and the tribe's governing body has power to dismiss members of the organization's governing body.

Id. at 559.

Shop, a Moving Defendant here, is still very much a defendant in *Ellenbast*. See *Suppl. Decl. Ex. 45*.¹⁵

The abundant case-law on the subject makes clear that, unless the Poospatuck Tribal Council submits a very different affidavit from that already submitted by Gilbert Davis, a member of the Tribal Council (discussed below), the reservation smoke-shops possess none of the characteristics of “arm of the tribe” businesses, but instead are nothing more than private businesses that pay a fee or tax to the tribe.

Unlike the circumstances in the *Gristede’s Foods* case, where this Court did not have sufficient facts to decide whether many of the same defendant smoke-shops were tribal businesses or not, there is sufficient information to determine that Golden Feather Smoke Shop, Inc., Kimo Smoke Shop, Inc., Smoke and Rolls Inc., Monique’s Smoke Shop, Peace Pipe Smoke Shop, Red Dot & Feathers Smoke Shop, Inc., Smoking Arrow Smoke Shop, and TDM Discount Cigarettes are not “arms of the tribe.” That evidence takes the form of facts already provided by the City on this subject, combined with the more powerful evidence put forth by the smoke-shops themselves in the form of the affidavit of Gilbert Davis, a member of the tribal council (“*Davis Aff.*”). Mr. Davis’ affidavit speaks volumes through its silence, in that, while offering some facts that bear slightly on arm-of-the-tribe status, it provides almost nothing in the way of the above-outlined factors that the courts have described as germane to determining that status. See *Davis Aff.* ¶¶ 1-10.

¹⁵Even if a State court had extended immunity to a smoke-shop, this Court is not bound by state court decisions on matters of Indian sovereignty. See *Gristede’s Foods*, Document 29 at 12.

In particular, this Court can also look to the detailed descriptions of the smoke-shops business operations contained in the various excerpts of the transcript in *United States v. Morrison*, 04 cr 699 (E.D.N.Y.) (hereafter, “*U.S. v. Morrison*”), which indicate no tribal involvement in the running of the smoke-shops. *See e.g., Proshansky Decl. Ex. 5., Morrison Tr.* 794.

The case-law in which the above “tribal arm” factors have been applied to evaluate whether a particular business serves as an “arm of the tribe” provide dispositive contrasts to the present facts, demonstrating those key attributes that the Poospatuck smoke-shops *do not* possess. For example, in *Cook v. Avi Casino Enters.*, 2008 U.S. App. LEXIS 23399 (9th Cir. 2008), a casino was deemed to be an arm of the tribe because it was “owned and operated by a corporation organized under ...a tribal law of the Fort Mojave Indian Tribe” and “the casino operated under an intergovernmental agreement between the Tribe and the state of Nevada.” (*See* Bullet 1, above). The casino was wholly owned and controlled by the tribe (*see* Bullet 6, above) and its shareholder functions were performed by the tribal council on behalf of and for the benefit of the Tribe. A majority of the casino’s board of directors were required to be tribe members (*see* Bullet 3, above) and the articles of incorporation stated that “all capital surplus not used for corporate development must be deposited in the Tribe's general fund” (*see* Bullet 6, above).

Cook relied on *Allen v. Gold Country Casino*, 464 F.3d 1044 (9th Cir. 2006), where the Ninth Circuit pointed out that the casino was “no ordinary business,” because its formation was dependent on “government approval at numerous levels,” “to conduct gaming activities permitted only under the auspices of the Tribe.” *Id.* at 1046. The court in *Allen* had

pointed out that the plaintiff itself had even “recognized the reality of the Casino as an arm of the Tribe” by suing the Tribe “d.b.a.” (“doing business as”) the Casino. *Id.*

Cook and *Allen* thus found a business to be an arm of the tribe because in both cases the tribe had created the business pursuant to a tribal ordinance (*See* Bullet 1, above) and an intergovernmental agreement. In both cases, the tribal corporation was wholly owned and managed by the tribe (*See* Bullet 3, above), and all of the economic benefits produced by the casino inured to the tribe's benefit because the corporation's articles of incorporation required all capital surplus to be deposited in the Tribe's treasury (*see* Bullet 6, above) and because the Tribe was the sole shareholder of the casino corporation. *See also Unkeowannulack v. Table Mt. Casino*, 2007 U.S. Dist. LEXIS 89988, at *14-15 (E.D. Cal. 2007) (casino was an arm of the tribe where an affidavit by a member of the tribal council showed that the “Tribe regulates the Casino through a commission whose members are appointed by the Tribal Council, and which was answerable to the Tribal Council.”)

The City has already provided evidence establishing that Golden Feather Smoke Shop, Inc., Kimo Smoke Shop, Inc., Smoke and Rolls Inc., and Red Dot & Feather Smoke Shop, Inc. are New York corporations.¹⁶ The corporate registrations of Golden Feather and Kimo Smoke Shop both list the corporate locations off of the Reservation, with Golden Feather having a Brooklyn, New York location under one filing and Kimo's having a Lake Ronkonkoma, New York location. *See* Exs. 29, 33. The fact that these smoke shops were formed under New York law, and not under any tribal law, weighs heavily against tribal status. (*See* Bullet 1, above).

¹⁶ Golden Feather was not even established by an Indian, but by Sherwin Henry, who was not a member of the Poospatuck tribe. *Morrison Tr.* at 6440.

The remaining facts – or lack of facts – about the smoke-shops can be derived from the Davis Affidavit. Mr. Davis’ affidavit can be summarized by noting that most of the facts concerning the smoke-shops have no bearing on tribal status and the facts that are omitted – which presumably would have been offered had they existed – are critical to a finding of tribal status. Mr. Davis indicates that only tribal members are permitted to open businesses on the Reservation, that they must get a license to do so, that they must pay a fee to the tribal government, and that the fees are used for the benefit of tribal members and the tribal government. Smoke shop fees comprise a major source of tribal funds. *See Davis Aff.* at 2-5, 8-9.¹⁷

Mr. Davis’ affidavit is missing virtually all of the elements relevant to establishing arm of the tribe status. Thus, he offers no statement that the smoke shops’ purposes are similar to a tribal government’s (*e.g.*, promoting tribal welfare, alleviating unemployment, providing money for tribal programs). While it may be true that the smoke shops contribute money to the tribe, any commercial enterprise on a Reservation would do that. Instead, it seems clear that the smoke shops are first and foremost commercial enterprises, designed to make money for their owners. *See Proshansky Decl.* Ex. 21A; *Morrison Tr.* 391-392, 779, 790, 1146-1148, 1154, 2523, 2526, 2534, 6245, 6247, 6250, 6441, 6636.

¹⁷ Mr. Davis, in a carefully phrased statement, states that there are fewer than 14 smoke shops “that operate” on the reservation. *Davis Aff.* ¶ 7. A review of applications for Business Certificates filed with the Suffolk County Clerk shows that approximately 49 certificates for smoke shops were filed in 2008. *See Proshansky Decl.* Ex. 41. It seems extremely unlikely that the tribe would need this many “arms” or “agencies” to conduct tribal business, and the proliferation of such businesses seemed to be part of a scam designed to increase the quantities of unstamped cigarettes that the tobacco manufacturers would allocate to the Reservation. *See Mauro Pennisi, Inc. v. Philip Morris USA, Inc.*, 2:08 cv 03551 (SJF) (E.D.N.Y. 2008), Document 6-7 (addresses provided for most of the businesses were trees and vacant lots).

Monique's Smoke Shop provides an example of the manner in which the smoke shops are likely to operate. Monique's is a sole proprietorship that files its income taxes on an ordinary U.S. Individual Income Tax Return, Form 1040. *Proshansky Decl.* Ex. 21A. There is no indication anywhere on Monique's return of any affiliation with the Poospatuck tribe. *See* Ex. 21A.¹⁸ In 2006, Monique's paid a "tribal fee" of \$15,804 to operate on the Reservation, but according to its 2006 tax return, earned a net profit of \$161,557, indicating that it is operating as a commercial enterprise for its owners and not for the tribe. Clearly, it is not the case that all of the economic benefits produced by the smoke shop inured to the tribe's benefit. *See Cook*, 2008 U.S. App. LEXIS 23399 at *17-*18.

There is nothing in Mr. Davis' affidavit to indicate that the "managing body" of any smoke shop is composed primarily (or even partially) of tribal officials; no smoke shop is stated to be controlled by tribal council members. *See id.* at *18. There is no evidence that the tribe's governing body has the "unrestricted power" to dismiss members of the smoke shops' "governing bodies," (or any evidence that any smoke shop has a "governing body") or that the smoke shops "act for the tribe." *See id.* at *17. Although the smoke shops are located on the Reservation, Mr. Davis does not claim that the tribe is the legal owner of the stores or their wares, or that the tribe holds legal title to the stores, or that the smoke shops' administrative and/or accounting activities are controlled or exercised by tribal officials. *See Cook*, 2008 U.S. App. LEXIS 23399 at *4, *17.

In sum, Moving Defendants' have not offered any facts to establish any of the factors outlined in *Gristedes Foods* as necessary to establish that any smoke-shop is an arm of the tribe. Those facts that are available, provided by the City, indicate to the contrary, that the

¹⁸ Monique's did record a "tribal fee" in the category of "Other expenses."

smoke-shops are private businesses that may incidentally provide fees and other economic benefits to the tribe without being owned and controlled by the tribe. The smoke-shops thus cannot partake of the tribe's immunity.

POINT II

THE CITY MEETS THE REQUIREMENT FOR ISSUANCE OF AN INJUNCTION

A. The City Need Not Prove Irreparable Harm To Obtain Preliminary Injunctive Relief

Although Moving Defendants fail to rebut the settled principle that the CCTA's express grant of authority to the City to preliminarily enjoin statutory violations substitutes for proof of irreparable harm, *see SEC v. Mgmt Dynamics*, 515 F.2d 801, 808 (2d Cir. 1975); *Consolidated Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 479 (2d Cir. 1995); *United States v. William Savran & Assocs.*, 755 F. Supp. 1165 1179-80 (E.D.N.Y. 1991); *see also City Mem. of Law* at 24-26, their arguments to the contrary are in any event moot, for two reasons. First, Moving Defendants concede, even under their view of the applicability of the rule dispensing with irreparable harm, that the City need not prove irreparable harm to obtain a preliminary injunction under the CMSA. *Opp. Mem.* at 24. Accordingly, an injunction can issue pursuant to that statute.¹⁹ Second, the City has sufficiently shown irreparable harm for purposes of this motion through facts that Moving Defendants do not bother to dispute. *See Proshansky Decl.*, Ex. 43; Affidavit of Thomas Frieden ("*Frieden Aff.*").

Moving Defendants' argument that the CCTA's statutory grant of authority does not substitute for proof of irreparable harm fails even to address the operative section of the statute providing the City the right to obtain injunctive relief, 18 U.S.C. § 2346(b)(1) and (2).

¹⁹ Moving Defendants' argument that the CMSA does not apply to them is flatly wrong. *See Point III-C*, below.

Section § 2346(b)(1) provides the City with authority to bring an action in federal district court to “prevent and restrain violations of [the CCTA] by any person.” *Id.* While Moving Defendants may have been misled by the absence of the express term “injunction,” injunctions are in fact the means by which courts “prevent and restrain” violations. *See U.S. v. Odessa Union Warehouse Co-op*, 833 F.2d 172, (9th Cir. 1987) (issuing injunction under statute providing that “court shall have jurisdiction, for cause shown, to restrain violations.”). But if Moving Defendants missed the reference to injunctive relief in 18 U.S.C. § 2346(b)(1), they could not have missed it in §2346(b)(2), which also affords the City the right in an action under the CCTA to obtain “any other appropriate relief for violations of [the CCTA] . . . including civil penalties, money damages, and injunctive or other equitable relief.” 18 U.S.C. § 2346(b)(2) (emphasis added). In the face of these explicit grants of authority, Moving Defendants’ argument that the CCTA is not sufficiently specific borders on the willfully blind, and federal courts have routinely permitted statutory grants to substitute for irreparable harm where the statutes had nearly identical language to the language of the CCTA. *See Odessa Union Warehouse Co-op*, 833 F.2d at 175 n.2 (9th Cir. 1987) (applying rule to injunction sought under statute providing that “court shall have jurisdiction, for cause shown, to restrain violations.”); *Mical Communications, Inc. v. Sprint Telemedia, Inc.*, 1 F.3d 1031, 1035 (10th Cir. 1993) (applying rule to federal communications statute providing district courts with jurisdiction “upon application . . . alleging a failure to comply with or a violation of any of the provisions of this Act by any person, to issue a writ or writs of mandamus commanding such person to comply . . .”); *Illinois Bell Telephone Co. v. Commerce Comm’n*, 740 F.2d 566, 571 (7th Cir. 1984) (same).

Moving Defendants’ citations not only fail to advance their own arguments, but actually support the City’s position. *See U.S. v. Webb*, 2007 U.S. Dist. LEXIS 7307 (E.D.N.Y.

2007) (“When an injunction is expressly authorized by statute, the standard preliminary injunction test is not applied. In such cases, courts focus on the ‘statutory conditions for injunctive relief,’ and may issue a preliminary injunction if such conditions are met. The movant need not show irreparable harm.”) (quote marks and citations omitted); *U.S. v. Broccolo*, 2006 U.S. Dist. LEXIS 90241 (S.D.N.Y. 2006) (sections under which injunction sought “contain express provisions authorizing district courts to enter injunctions upon the showing of a violation of the law. Accordingly, if the Government establishes a violation of either of these sections, the Court may issue a preliminary injunction.”)²⁰

In *Webb* and *Broccolo*, the courts issued the requested injunctive relief without a showing of irreparable harm, under two different provisions of the Internal Revenue Code. In *Webb*, the court did refuse an injunction under a third provision, but only because it was a “catch-all provision” that did not enumerate, as the rule requires, the particular elements of the statutory violation, i.e., the “statutory conditions for injunctive relief,” *Webb*, 2007 U.S. Dist. LEXIS 7307, *4, that serve as the criteria for when an injunction may issue. *Id.*, *13. The court therefore looked to the “traditional equitable considerations” to determine whether an injunction should issue and found it should not, because the plaintiff had an adequate remedy at law. *Id.* In the present case, the statutory elements needed to obtain an injunction constitute the elements required to prove a violation of the CCTA, and those elements are established in the City’s motion papers, entitling the city to a statutory injunction. *See City Mem.* at 3-24.

²⁰ In both *Webb* and *Broccolo*, the courts issued *preliminary* injunctions based on the statutory authority to grant injunctive relief.

The decision in *Blanksteen v. New York Mercantile Exchange*, 879 F. Supp. 363, 366 (S.D.N.Y. 1995) provides Moving Defendants no support because the case involved a statute that explicitly required a showing of irreparable harm.²¹

Moving Defendants' assertion that cases in which statutory authority substitutes for irreparable harm are a "rare breed" is conclusory and not supported by any analysis or even a survey of the cases. That bald assertion is belied by Moving Defendants' strenuous attempts to distinguish the present case from the wide array of cases, under numerous federal laws, by courts in numerous federal circuits, in which the rule is applied. *See Opp. Mem.* at 20-24; *see Consolidated Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 479 (2d Cir. 1995) (railroad tax discrimination statute); *Mgmt. Dynamics*, 515 F.2d at 808 (securities laws); *Savran & Assocs.*, 755 F. Supp. at 1179 (mail fraud statute); *U.S. v. Webb*, 2007 U.S. Dist LEXIS 7307, at *3-4 (E.D.N.Y. 2007) (violations of Internal Revenue Code); *Gresham v. Windrush Partners, Ltd.*, 730 F.2d 1417, 1423 (11th Cir. 1984) (housing discrimination); *Mical Communications*, 1 F.3d at 1035 (telecommunications statute); *Illinois Bell Telephone Co.*, 740 F.2d at 571 (same); *Burlington Northern R.R. Co. v. Bair*, 957 F.2d 599, 601 (8th Cir. 1992) (Railroad Revitalization and Regulatory Reform Act); *U.V. Industries v. Posner*, 466 F. Supp. 1251, 1255-56 (S.D. Maine 1979) (Maine Takeover Bid Disclosure Law).

There is absolutely nothing in any courts' enunciation of the rule that supports defendants' exceedingly narrow construction of its applicability. *Odessa Union Warehouse Co-*

²¹ The other case cited by defendants for their position that the City must prove irreparable harm, *Preservation Coalition of Erie County v. Federal Transit Admin.*, 129 F. Supp. 2d 551 (W.D.N.Y. 2000) is inapplicable because the court there addressed a different issue, primarily raised in cases brought under environmental statutes, that even where a statute authorizes injunctive relief, the showing of a violation does not automatically require the issuance of an injunction. The City already addressed in its moving memorandum those additional factors as to whether an injunction should issue, principally whether the violations were willful and the likelihood that the wrongs will be repeated. *See City Mem.* at 26-27 n.17.

op, 833 F.2d at 175 (“Where an injunction is authorized by statute, and the statutory conditions are satisfied . . . the agency to whom the enforcement of the right has been entrusted is not required to show irreparable injury.”); *Commodity Futures Trading Comm’n v. British American Commodity Options Corp.*, 560 F.2d 135, 141 (2d Cir. 1977) (“the district court applied the now well-established rule that in actions for a statutory injunction, such as this, the agency need not prove irreparable injury or the inadequacy of other remedies . . .”); *Illinois Bell Telephone Co.*, 740 F.2d at 571 (“where the plaintiff seeks an injunction to prevent the violation of a federal statute that specifically provides for injunctive relief, it need not show irreparable harm.”).

Perhaps most significantly, Moving Defendants offer no reason at all, let alone a principled reason, why the general rule cited by the City should not apply to a claim brought under the CCTA. The rule dispensing with the proof of irreparable harm unquestionably is applied by the courts to statutory enforcement schemes, like the CCTA, which seek to protect the public interest against illegal conduct. *See, e.g., Government of Virgin Islands v. Virgin Islands Paving*, 714 F.2d 283, 286 (3d Cir. 1983) (when a statute explicitly or implicitly contains a finding that a violation of it will harm the public, a showing of irreparable harm is not required); *Navel Orange Admin. Comm. v. Exeter Orange Co.*, 722 F.2d 449, 453 (9th Cir. 1983) (“When the government is seeking compliance pursuant to a statutory enforcement scheme, irreparable injury from a denial of enforcement is presumed.”); *British Am. Commodity Options Corp.*, 560 F.2d at 141 (noting the commission’s status as the “statutory guardian” entrusted with the enforcement of the congressional scheme for safeguarding the public interest), *cert. denied*, 438 U.S. 905, 57 L. Ed. 2d 1147, 98 S. Ct. 3123 (1978); *Savran & Assocs.*, 755 F. Supp. at 1179 (noting, in holding that the government need not prove irreparable harm under the mail fraud statute, Congress’s concern that a remedy was necessary against fraudulent schemes during

investigations to protect the public). Statutory authority for an injunction substitutes for irreparable harm because the grant of such authority expresses an intent that “the standards of the public interest, not the requirements of private litigation, measure the propriety and need for injunctive relief.” *SEC v. Unifund SAL*, 910 F.2d 1028, 1035-36 (2d Cir. 1990). Moving Defendants offer no inherent difference between the harm sought to be prevented by the mail fraud, commodities’ or securities’ fraud statutes, under which injunctions were granted in the above-cited cases from the harm sought to be prevented in this case by enjoining CCTA violations.

Even if the City must prove irreparable harm in order to obtain an injunction, the City has in fact done so, *see Proshansky Decl. Ex. 43; Frieden Aff.*, even supplementing that proof by demonstrating the large number of bootlegging prosecutions involving individuals arrested for transporting unstamped cigarettes from the Reservation to the City. *See Jerome Aff.* (of 87 prosecutions for transporting unstamped cigarettes, 81 of 87 involved individuals arrested upon leaving the Reservation. Of those, 58 persons, arrested with an average of 1061 cartons of unstamped cigarettes, provided New York City addresses). Moving Defendants offer no facts to controvert the City’s earlier data, but merely have their attorneys make conclusory assertions that the City’s evidence is “questionable.”

It is telling almost to the point of serving as an admission that the City’s sales figures are correct that Moving Defendants submit absolutely no evidence on the extent of their cigarette sales. Moving Defendants undoubtedly possess information about their own sales practices and the volume of those sales with which they could dispute the City’s figures if there

were any basis for doing so. Either there is no such basis, or, more likely, the City has undercounted the volume of Moving Defendants' illegal sales.²²

B. The Injunction Sought by the City is Prohibitory in Nature and Does Not Require the City to Meet an Elevated Burden of Proof

Moving Defendants are incorrect that the City faces an elevated “substantial likelihood of success” burden of proof with respect to its burden of showing the merits of its claims under the CCTA and CMSA. That “substantial likelihood” standard applies only to injunctions that are mandatory in nature, while the usual standard, requiring only a likelihood of success on the merits, applies to injunctions that are prohibitory. *Hoblock v. Albany County Bd. of Elections*, 422 F.3d 77, 97 (2d Cir. 2005). Here, the injunction sought by the City is prohibitory because it would *prohibit* defendants from selling unstamped cigarettes to members of the general public in violation of federal and state law. *See Port Wash. Teachers Ass'n v. Bd. of Educ.*, 361 F. Supp. 2d 69, 73 n.1 (E.D.N.Y. 2005) (“mandatory injunctions seek to impose affirmative action on the Defendants while a prohibitory injunction merely orders that the Defendants refrain from acting.”); *see also Odessa Union Warehouse Co-op*, 833 F.2d at 176 (“since irreparable injury must be presumed in a statutory enforcement action, the district court needed only to find some chance of probable success on the merits”).

The cases cited by Moving Defendants are inapposite because none of them address a prohibitory injunction, as here. *See Rathgaber v. Town of Oyster Bay*, 492 F. Supp. 2d 130 (E.D.N.Y. 2007) (action for a mandatory injunction requiring a town to issue a shell-fish

²² Moving Defendants' assertion that the size of the tax loss suggested by the City is “speculative” (*Opp. Mem.* at 14) in light of an lower figure issued in 2006, is confused. First, the City has not on this motion specified the total amount of its tax loss, nor need it do so to obtain injunctive relief. Second, the estimate cited by Moving Defendants was made in 2006, before the City's receipt of the CG-6 Forms in 2008. Those forms for the first time reveal defendants' actual purchases of enormous quantities of unstamped cigarettes. *See Supp Decl.* ¶ 2. Any figures prior to that were necessarily based on estimates.

license); *Clauson v. Eslinger*, 455 F. Supp. 2d 256 (S.D.N.Y. 2006) (mandatory injunction requiring defendant to credit plaintiff as producer of a film). By negative inference, *Beal v. Stern*, 184 F.3d 117 (2d Cir. 1999), if anything, supports the City (“[W]hen the moving party seeks to *stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme*, the injunction should be granted only if the moving party meets the more rigorous likelihood-of-success”) (emphasis added). Because the City seeks to take “governmental action taken in the public interest pursuant to a statutory or regulatory scheme,” the usual likelihood-of-success standard should apply.

Moreover, even if the City must meet a substantial likelihood of success standard, the wealth of exhibits documenting the extraordinary volumes of defendants’ ongoing sales of unstamped cigarettes submitted by the City on this motion easily meets that higher burden of proof.

C. Moving Defendants Cannot Demonstrate That the Balance of Hardships Tips In Their Favor

Moving Defendants’ argument that the balance of hardships tips in their favor is foreclosed as a matter of law by the settled law that “*Native American tribes do not have established rights in the sale of unstamped cigarettes by reservation retailers to the public.*” *Milhelm Attea*, 550 F. Supp. 2d at 353 (citing *Dep’t of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 64 (1994)). As the Supreme Court found:

It is painfully apparent that the value marketed by ... smokeshops to persons coming from outside is not generated on the reservations by activities in which the Tribes have a significant interest. ... What ... smokeshops offer these customers ... is solely an exemption from state taxation. ... 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 thus to market an exemption from state taxation to persons who would normally do their business elsewhere.

Wash. v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 155 (1980). Moving Defendants thus rely for their hardship entirely on the half-truth that “Indians have the right to sell tax-exempt cigarettes.” *Opp. Mem.* 29.²³ Because Moving Defendants have no such right, and are making their sales in violation of the law, there can be no *bona fide* hardship in requiring them to cease such conduct.

Moving Defendants protest that an injunction would “jeopardize” their interests and that this Court must take into account these ill-defined interests. *Opp. Mem.* at 34. But Moving Defendants characteristically submit no evidence in the form of documents or affidavits that support this contention or otherwise detail the hardships that they would face, and do not even properly specify the nature of the injunction sought by the City.²⁴ Thus, the assertion that “[r]estrictions on the right to purchase or possess non stamped, non taxed tobacco on our reservation will interfere with our ceremonial and religious use of tobacco,” *Davis Aff.* ¶ 10, is beside the point. The City seeks no restrictions on the right of the Poospatuck to purchase or possess anything, much less tobacco. The injunction sought by the City merely seeks to bar *the*

²³ Moving Defendants, assertion is a half-truth because Indians have the right to sell tax-exempt cigarettes, but only to members of their own tribe located on the same reservation., not to the public. *See Milhelm Attea*, 550 F. Supp. 2d at 353.

²⁴ The affidavit of an officer of the Unkechuage Tribal Council, which states in the most general terms that the tribe uses fees paid by the reservation retailers, provides no support because it gives no information as to the amount of the fees and fails entirely to explain how the retailers would be prevented from paying such fees if they comply with federal and state law requiring that they not sell unstamped cigarettes to members of the general public. *See Davis Aff.* ¶ 8. The affidavit uses similarly conclusory assertions, without providing any explanatory facts, as to how the injunction would interfere with any purported negotiations with the State or would create “enforcement problems.” *Davis Aff.* ¶¶ 10, 11.

sale to the public of unstamped cigarettes, which is an activity in which Moving Defendants have no protectible interest. *Milhelm Attea*, 550 F. Supp. 2d at 353.²⁵

The City has submitted evidence demonstrating the extent of defendants' illegal trafficking operations and the consequent tax losses incurred. The City has also provided an affidavit from the Commissioner of the Department of Health and Mental Hygiene detailing injury to the public health. *See Frieden Aff.* Defendants have failed in any meaningful way to dispute the existence of the City's injury or to specify their own. There is accordingly no basis to dispute that the balance of hardships analysis favors the grant of an injunction in this matter.

D. Moving Defendants Cannot Invoke Laches

Moving Defendants' argument that laches bars the City from obtaining an injunction is perhaps the most legally unsupported of all of their arguments. A party asserting a laches defense must show that "the plaintiff has inexcusably slept on [its] rights so as to make a decree against the defendant unfair." *Prudential Lines, Inc. v. Exxon Corp.*, 704 F.2d 59, 65 (2d Cir. 1983). Laches additionally requires a showing by the defendant "that it has been prejudiced by the plaintiff's unreasonable delay in bringing the action." *Conopco, Inc. v. Campbell Soup Co.*, 95 F.3d at 192 (2d Cir. 1996). The three elements required to invoke the doctrine of laches are thus that the City: i) knew of the Moving Defendants' conduct; ii) and inexcusably delayed in bringing suit; iii) to the prejudice to the defendants. *See Merrill Lynch Inv. Managers v. Optibase, Ltd.*, 337 F.3d 125, 132 (2d Cir. 2003). Moving Defendants fall far short of proving the second element and do not even attempt the first and third.

²⁵ The Moving Defendants' assertion that an injunction would interfere with "all of the uses" by the Poospatuck (*Opp. Mem.* at 10) is baseless. The only "use" it would interfere with is Off Reservation Sales of unstamped cigarettes, which are illegal. *See Milhelm Attea*, 550 F. Supp. 2d at 353.

The statute of limitations determines which party possesses the burden of proving or rebutting the defense of laches. “When a suit is brought within the time fixed by the analogous statute, the burden is on the defendant to show . . . circumstances exist which require the application of the doctrine of laches. On the other hand, when the suit is brought after the statutory time has elapsed, the burden is on the complainant to aver and prove the circumstances making it inequitable to apply laches to his case.” *Conopco, Inc.*, 95 F.3d at 191. Moving Defendants provide no indication of the statute of limitations applicable to the CCTA, but, where the City has documented numerous CCTA violations within the past year, *see, e.g., Mars Aff.; Young Aff.; Jerome Aff.*, it is unlikely that the limitations period, whatever it is, has expired and accordingly, the burden of proving laches is on Moving Defendants.

Moving Defendants fail to offer any evidence as to the City’s knowledge, even as they admit that their illegal sales of unstamped cigarettes to the general public is a “practice which has occurred for decades.” *Opp. Mem.* at 34. The relevant question is how long the City has been aware of the problem, not how long it has been in existence, and Moving Defendants offer nothing on that score. *See Durkin v. Nassau County Police Dep’t*, 175 Fed. Appx. 405, 408 (2d Cir. 2006) (laches established by ample evidence in the record of movant’s actual knowledge).

Also contrary to Moving Defendants’ assertion, there has not been any delay, much less “inexcusable” delay, by the City. The City did not obtain documentation revealing the extent of Moving Defendants’ sales of unstamped cigarettes until approximately late June of this year. *Suppl. Dec.* at ¶ 2. Since that time, investigations were required to document that Moving Defendants’ were knowingly selling unstamped cigarettes to persons transporting them in to the City, which the City undertook in July and August 2008. *See Mars, Young, and Lannon*

Affidavits. The City filed this lawsuit at the end of September 2008. It is outlandish for Moving Defendants to claim that three months constitutes an inordinately long time in which to investigate the extent of their massive illegal cigarette trafficking operations. *See Mead Johnson & Co. v. Baby's Formula Service, Inc.*, 402 F.2d 19 (5th Cir. 1968) (four month period between the learning of infringing use and the filing of suit, involving investigation and preparation of suit could not legally constitute laches). The City requested permission to file the present motion for a preliminary injunction a mere two days after the filing of this suit and then commenced this motion one day after the pre-motion hearing before the Court on October 27, 2008. Accordingly, none of the City's actions reflect an inexcusable delay.

Moving Defendants' failure to even address prejudice is understandable where far from being prejudiced, Moving Defendants have been enriched during the period in which the City has investigated and documented their illegal cigarette trafficking operations. *See generally Jerome Aff.* (documenting trafficking during 2008); *Mars, Young, Lannon Affs.* (same).

The cases cited by Moving Defendants in support of their laches defense are inapposite. In *Bray v. The City of New York*, 346 F. Supp. 2d 480, 491-92 (S.D.N.Y. 2004), the court found that the City had unduly delayed in seeking an injunction to enjoin a Critical Mass bike ride where the City knew about the bike rides for years and waited until two days before the next scheduled ride to seek the injunction related to that ride, thereby prejudicing the defendants' ability in that case to oppose the motion. This case has no applicability here because the City is not seeking to enjoin a one-day occurrence, because Moving Defendants had ample time in which to compose their opposition to the relief the City seeks, and because there is no evidence that the City knew of Moving Defendants' practices "for years." In *Nitke v. Aschcroft*, 253 F. Supp. 2d 587, 610-11 (S.D.N.Y. 2003), where the court denied the plaintiffs' request for a

preliminary injunction enjoining enforcement of an obscenity statute against them, the discussion cited by Moving Defendants has absolutely nothing to do with the doctrine of laches. Instead, the court in *Nitke* held that the plaintiffs' six-year delay in seeking an injunction after the passage of the statute defeated their claim of irreparable harm. *See id.* Furthermore, the *Nitke* case is wholly inapplicable because it involved plaintiffs seeking to *enjoin* enforcement of a statute, not seeking to enforce a statute.

Accordingly, Moving Defendants' argument based on the doctrine of laches is without merit and should be rejected by this Court.

POINT III

THE CITY HAS DEMONSTRATED A LIKELIHOOD OF SUCCESS ON THE MERITS OF ITS CLAIMS FOR VIOLATIONS OF THE CCTA AND CMSA

Most of Moving Defendants' positions here simply reiterate arguments expressly or implicitly rejected by this Court in *Milhelm Attea*. That decision thus forecloses Moving Defendants' arguments that the City has no standing to sue, that Moving Defendants have a right to sell unstamped cigarettes, that their sales of unstamped cigarettes do not constitute contraband cigarettes under the CCTA because of a state policy of forbearance, or that the non-implementation of the coupon system described in N.Y. Tax L. § 471(e) means that the City's lost tax revenue is not caused by Moving Defendants' sales of unstamped cigarettes.

Moving Defendants only new argument, that as "reservation retailers" the CMSA is inapplicable to them, is unsupported by the statute's language.

A. The City Has Standing to Sue the Defendants

Moving Defendants' argument that the City has no standing to bring this suit has already been expressly rejected by this Court in *Milhelm Attea*, which held that the CCTA

expressly confers standing on the City to seek an injunction from a federal court to prevent and restrain violations of the CCTA. *See Milhelm Attea*, 550 F. Supp. 2d at 341.

Even without that express grant, the injury in this case (from which “common law” standing would derive) is the same injury alleged by the City in *Milhem Attea*: that sales of untaxed cigarettes to the general public lures cigarette purchasers out of the City and creates a supply of cheap untaxed cigarettes within the City, thereby replacing taxed cigarette transactions that would have taken place but for the defendants’ activities. *See id.* at 341 (holding that the City’s allegations that wholesalers’ tax-free sales to reservation retailers lure purchasers out of the City and thereby deprive the City of valuable tax revenue “support a finding of an injury that may fairly be traced to the defendants’ conduct.”). Indeed, the City has moved beyond what were only allegations in *Milhelm Attea*, and provided extensive facts that prove the injury to the City by Moving Defendants’ conduct. *See, e.g., DTF CI Affidavit, Jerome Affidavit, Lannon Affidavit, Young Affidavit.*

Moving Defendants’ attempt to distinguish the holding in *Milhelm Attea* on grounds that the claims were brought against cigarette wholesalers is completely unpersuasive, if not entirely irrelevant, because the difference in the parties sued does not alter the nature of the injury to the City. Nor is the statutory grant of standing in the CCTA, 18 U.S.C. § 2346, at all dependent on the identity nature of the defendant, at least as relevant here. *See* 18 U.S.C. § 2346 (b)(1) and (2) (A ... local government, ... may bring an action ... to prevent and restrain violations of this chapter *by any person*; or (2) to obtain any ... relief for violations of this chapter *from any person*) (emphasis added). Similarly, the difference in the parties sued does not change the analysis of the causal connection. Moving Defendants are merely another link in the same chain of causation, and if anything, a more direct link, where the evidence shows that

Moving Defendants knowingly sell to bulk purchasers from the City. *See, e.g., DTF CI Affidavit, Jerome Affidavit, Lannon Affidavit, Young Affidavit.*

In the face of this authority, Moving Defendants irrelevantly assert that “the City does not have a legally protected interest in the sales of cigarettes on Indian reservations” and that “Indians have the right to sell tax-exempt cigarettes.” *Opp. Mem.* at 27, 29. This contention also directly conflicts with this Court’s holdings that the City does have a legally protected interest in the resale of cigarettes to the general public, in which Moving Defendants openly engage, because City taxes are being evaded. *See Milhelm Attea*, 550 F. Supp. 2d at 340-41.

Finally, Moving Defendants’ argument that they “are not required to pre-collect city taxes” and their conclusory assertion that “the burden of regulating the tax exemption scheme” imposes more than a minimal burden upon them is first, irrelevant, and second, wrong. First, the City is not seeking to require the Moving Defendants “to pre-collect city taxes” (or state taxes for that matter). Instead, the City seeks an injunction prohibiting further violations of the CCTA and CMSA by Moving Defendants’ sale of unstamped cigarettes to the public. If Moving Defendants wish to continue such sales, they can do so without any burden, and without having to collect any taxes, by selling stamped cigarettes purchased from cigarette stamping agents, as does every other cigarette retailer in the State. The City has no intention, and does not seek to enjoin Moving Defendants’ right to purchase unstamped cigarettes for their personal consumption. The limitation sought by the City can be achieved easily by permitting each tribe member to purchase for their personal consumption, in amounts equal to something less than the 960 packs a day that each member now purchases. *See Proshansky Decl. Exs. 3, 4; City Mem. of Law* at 35-36. Even if the City did seek the collection of taxes, which it does not, “[t]o the extent that a tribe’s sovereignty is implicated by a decision involving the tax status of goods sold by

reservation retailers, the burden in this context is minimal.” *Milhelm Attea*, 550 F. Supp. 2d 353 (citing *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 483 (1976)).²⁶

B. The City Has Demonstrated a Likelihood of Success on Its CCTA Claim

In *Milhem Attea*, this Court held that the plain language of N.Y. Tax L. § 471 requires that cigarettes “sold by reservation retailers for resale to the public” bear stamps and that sales of unstamped cigarettes, where a stamp is required, constitute sales of contraband cigarettes under the CCTA, regardless of whether or not a forbearance policy by the State exists. See *Milhelm Attea*, 550 F. Supp. 2d at 346-347; *id.* at 347 (“an enforcement decision by the Department does not serve to obviate state legislation”). Moving Defendants consistently misrepresent the nature of their rights to sell untaxed cigarettes. Contrary to Moving Defendants’ oft-repeated myth, in reality, “Native American tribes do not have established rights in the sale of unstamped cigarettes by reservation retailers to the public.” *Id.* at 353 (citing *Dep’t of Taxation and Finance v. Milhelm Attea*, 512 U.S. 61, 64 (1994)). It is settled beyond conceivable dispute that sales by Indians to non-Indians fall within the state taxation power. See *Oklahoma Tax Comm’n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 512 (1991) (tribal sellers are obliged to collect and remit state taxes on sales to nonmembers at Indian smoke-shops on reservation lands); *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134 (1980) (upholding comprehensive Washington State statute requiring tribal

²⁶ Moving Defendants’ assertion concerning the State’s power to devise a collection scheme (*Opp. Mem.* 11) is true, but completely irrelevant, because the injunction sought by the City does not require the Poospatuck to collect taxes or do anything related to the collection of taxes. The injunction is prohibitory only, requiring that the Poospatuck cease selling unstamped cigarettes to non-Indians. This fact disposes of Moving Defendants’ other frivolous arguments regarding the (completely undocumented) purported negotiations between the Poospatuck and the State and other issues related to the “political process.” *Id.*

retailers selling goods on the reservation to collect taxes on sales to nonmembers). Furthermore, it is also clear that Indian tribes and Indian cigarette resellers may be held liable for violations of the CCTA. *See Grey Poplars Inc. v. 1,371,100 Cigarettes*, 282 F.3d 1175, 1178 (9th Cir. 2002) (“[T]he CCTA is a federal statute of general applicability and it applies equally to Indians, even on the reservation, as it does to others.”); *U.S. v. Gord*, 77 F.3d 1192 (9th Cir. 1996) (reservation cigarette retailer, manager of a tribal smoke-shop and individual Indian each found liable under the CCTA for the purchase of unstamped cigarettes intended for resale on an Indian reservation);²⁷ *United States v. Morrison*, 521 F. Supp. 2d 246 (E.D.N.Y. 2007).

Moving Defendants’ argument that Article 20 imposes a burden on the government to provide them with coupons and therefore the City cannot attribute any of its injury to the activities of reservation retailers is both bizarre and unavailing. As Moving Defendants presumably are well aware, the coupon system described in §471-e is not in effect and at any rate does not control the issue of whether sales of unstamped cigarettes by reservation retailers to the general public violate the CCTA based on the requirements of § 471. *See Milhelm Attea*, 550 F. Supp. 2d at 338, 344. Moving Defendants’ repeated argument that they cannot be burdened with the duty of collecting taxes and do not have authority to stamp cigarettes is beside the point – the City does not seek to require Moving Defendants either to collect taxes or to stamp cigarettes.

Similarly, Moving Defendants’ argument that the City’s CCTA claims lack merit because Article 20 does not define reservation cigarette sellers as stamping agents completely misunderstands the relevance of Article 20, which imposes a tax on all cigarettes possessed for

²⁷ The Second Circuit has adopted the Ninth Circuit’s jurisprudence on the application of general laws to Indians. *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 182 (2d Cir. 1996).

sale by any person that the State has the legal power to tax, which necessarily includes sales by reservation retailers to the general public.²⁸ *See Milhelm Attea*, 550 F. Supp. 2d at 346-347. Moving Defendants' violations of the CCTA are not based upon their failure to affix tax stamps to cigarettes, but on their sale of unstamped cigarettes to the general public, on which the applicable taxes have not been paid. The non-implementation of the coupon system does not destroy the causal connection between the City's injury and Moving Defendants' activities because Moving Defendants' conduct represents another link in the same chain of cigarette distribution that this Court has found may cause the City's injury. *See id.* at 341.²⁹

C. The City Has Demonstrated a Likelihood of Success on Its CMSA Claim

The CMSA makes it unlawful for any "retail dealer, with intent to injure competitors or destroy or substantially lessen competition, or with intent to avoid the 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. Moving Defendants chiefly contend that the CMSA (Article 20-a) does not apply to cigarette retailers on Native American reservations because they do not fall within the term "retail dealer" as defined by the CMSA. However, Moving Defendants never actually address the definition of "retail dealer" provided under the CMSA, but only note that Article 20 separately defines the terms "retail dealer" and "reservation cigarette seller." Moving Defendants' strained and willful misinterpretation ignores the plain language of the statute.

²⁸ Section 471 (1) expressly sets forth certain exemptions, but no exemption is provided for sales *to* Indians or *by* Indians. *See* § 471 (1) (exempting cigarettes sold to the United States or sold to or by a voluntary unincorporated organization of the armed forces of the United States).

²⁹ This Court has already rejected similar assertions that the non-implementation of the coupon system somehow implicates the City's CCTA claims. *See City v. Milhelm Attea*, Transcript of Hearing dated October 27, 2008 at 18 ("I'm going to deny the motion for reconsideration.")

The very first sentence of the definition section of the CMSA, § 483, reads: “Any term which is defined by section [470] of this chapter shall have the same meaning when used in this article, except that for purposes of this article the following terms shall have the meanings herein indicated.” Section 483 then defines “retail dealer” as “*any* person engaged in selling cigarettes at retail, and shall include a chain store, a wholesale dealer or an agent for purposes of its sales of cigarettes to consumers” (emphasis added).

First, under the plain language of the statute, Moving Defendants fall within the definition of retail dealer in the CMSA because it is undisputed that they are “persons” that “sell[] cigarettes at retail.”³⁰ The statute’s use of the term “any person” makes clear that the term is one of broad application. Second, it is irrelevant that § 470 may separately define “retail dealers” and “reservation cigarette sellers” because § 483 of the CMSA provides a different and broader definition of retail dealers than does § 470, and § 483 expressly provides that this definition governs over the definitions in Article 20. *Compare* § 470(9) *with* § 483(4).

Further, by its express terms, § 483 only incorporates § 470’s definition of terms “when used in this Article” (*i.e.*, Article 20-a, the CMSA). The term “reservation cigarette sellers” never appears in the CMSA, so that the definition of that term in § 470 has no significance in interpreting the provisions of the CMSA. Section 486 explicitly provides for certain exemptions from the requirements of the CMSA, none of which encompass sales by “reservation cigarette sellers” or Indians. *See* § 486(a)(1-2).

Moving Defendants’ arguments that they are not required to comply with the provisions of the CMSA are without merit and they have each violated its provisions for selling

³⁰ The term “person” is defined as including “an individual, copartnership, limited liability company, society, association, corporation, joint stock company, and any combination of individuals . . .” N.Y. Tax L. § 470(3).

cigarettes to the public at prices that do not include the cost of tax stamps "required by law." *See* N.Y. Tax L. § 483 *et seq.*


CONCLUSION

For all of the reasons set forth above, the City's motion for a preliminary injunction should be granted, and the Moving Defendants motion to dismiss should be granted in its entirety.

Dated: New York , NY
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