

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT
EASTERN DISTRICT
OF NEW YORK

08 SEP 29 AM 9:27

FILED
CLERK
[Signature]

----- x
THE CITY OF NEW YORK,

Plaintiff,

Civil Action No. 08 cv _____

-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,

[Handwritten marks]
COMPLAINT 3986

AMON J.

AZRACK, M.J.

Defendants.

----- X
Plaintiff the City of New York (the "City"), by its counsel Michael A. Cardozo, Corporation Counsel of the City of New York, respectfully alleges, with knowledge of its own actions and on information and belief as to the actions of others, as follows:

Nature of the Action

1. This is a civil action for injunctive relief, penalties and damages under the Contraband Cigarette Trafficking Act, 18 U.S.C. § 2341 *et seq.* (the "CCTA"), and the Cigarette Marketing Standards Act, N.Y. Tax L. § 483 *et seq.* (the "CMSA").

2. Each defendant is either an individual, a sole proprietorship or a New York corporation engaged in the sale of cigarettes from the Poospatuck Indian Reservation in

Mastic, New York. In violation of federal and New York law, each defendant sells cigarettes that are taxed under State law, but on which the required New York State excise and sales taxes have not been paid and on which the required New York State tax stamps have not been affixed.

3. Several of the defendants claim membership in the Poospatuck Indian tribe, and accordingly have a right to purchase cigarettes free of state and local taxes, but only for personal use, not for resale. These defendants, and their non-Native American partners that have no right at all to deal in tax-exempt cigarettes, abuse that right by purchasing virtually unlimited quantities of cigarettes on which State and City taxes have not been paid ("unstamped cigarettes"). Defendants then engage in bulk re-sales to cigarette bootleggers, who traffic the cigarettes to the City and elsewhere. Ultimately, the cigarettes are sold to the public free of associated taxes, at a loss in City and State tax revenue attributable to these defendants alone of hundreds of millions of dollars annually. The defendants are well aware of the illegal trade that they support, both because they know that the 10 million cartons they purchased in 2007 alone could be consumed for personal, tribal use only if every reservation resident consumed approximately 960 packs of cigarettes a day, and because defendants actively participate in structuring and concealing illegal bulk sales, assisting in the packing of vans destined for New York City and even making their own bulk deliveries off the reservation.

4. The City seeks in this action: i) to enjoin the defendants from selling "unstamped" cigarettes, as defined below, in any quantity to non-members of their tribe; ii) to recover from defendants the amount of City cigarette excise tax revenues lost through defendants' sales of "unstamped" cigarettes to City residents; and iii) to recover from defendants the attorney's fees and costs incurred in bringing this action.

5. Each defendant also sells "contraband cigarettes" within the meaning of the CCTA, 18 U.S.C § 2341(2), referred to herein as "unstamped cigarettes."

6. Each defendant sells "unstamped packages of cigarettes" within the meaning of N.Y. Tax L. § 470(13), referred to herein as "unstamped cigarettes."

7. Each defendant therefore violates the CCTA and the CMSA, entitling the City to statutory injunctive relief, penalties and damages.

PARTIES

8. Plaintiff the City of New York (the "City") is a municipal corporation organized under the laws of the State of New York (the "State").

9. Defendant Peace Pipe Smoke Shop ("Peace Pipe") is a New York partnership located at 9 Squaw Lane, Mastic, New York. Peace Pipe ships, transports, receives, possesses, sells, distributes or purchases unstamped cigarettes in face-to-face and remote transactions.

10. Upon information and belief, defendant Rodney Morrison, Sr. is an individual residing in Suffolk County, New York, who owns and operates Peace Pipe. Rodney Morrison ships, transports, receives, possesses, sells, distributes or purchases unstamped cigarettes in face-to-face and remote transactions.

11. Upon information and belief, defendant Charlotte Morrison, sued in her individual capacity, is an individual residing in Suffolk County, New York, who owns and operates Peace Pipe. Charlotte Morrison ships, transports, receives, possesses, sells, distributes or purchases unstamped cigarettes in face-to-face and remote transactions.

12. Defendant Monique's Smoke Shop, a/k/a Monique Rainbow Convenience ("Monique's") is a sole proprietorship or partnership located at 112A Poospatuck Lane, Mastic,

New York. Monique's ships, transports, receives, possesses, sells, distributes or purchases unstamped cigarettes in face-to-face and remote transactions.

13. Upon information and belief, defendant Ernestine Watkins, sued in her individual capacity, is an individual residing in Suffolk County, New York, who owns and operates Monique's. Ernestine Watkins ships, transports, receives, possesses, sells, distributes or purchases unstamped cigarettes in face-to-face and remote transactions.

14. Upon information and belief, defendant Jessey Watkins is an individual residing in Suffolk County, New York, who owns and operates Monique's. Jessey Watkins ships, transports, receives, possesses, sells, distributes or purchases unstamped cigarettes in face-to-face and remote transactions.

15. Upon information and belief, defendant Wayne Harris is an individual residing in Suffolk County, New York, who owns and operates Monique's. Wayne Harris ships, transports, receives, possesses, sells, distributes or purchases unstamped cigarettes in face-to-face and remote transactions.

16. Defendant Red Dot & Feather Smoke Shop Corp. ("Red Dot & Feather") is a corporation formed under the laws of the State of New York, located at 115 Poospatuck Lane, Mastic, New York. Red Dot ships, transports, receives, possesses, sells, distributes or purchases unstamped cigarettes in face-to-face and remote transactions.

17. Upon information and belief, defendant Raymond Hart ("Hart") is an individual residing in Suffolk County, New York who owns and operates defendant Red Dot & Feather, as well as an entity known as Red Dot Smokes, also located at 115 Poospatuck Lane. Hart ships, transports, receives, possesses, sells, distributes or purchases, unstamped cigarettes in face-to-face and remote transactions.

18. Defendant Smoking Arrow Smoke Shop ("Smoking Arrow") is a business located at 159 Poospatuck Lane, Mastic, New York. Smoking Arrow ships, transports, receives, possesses, sells, distributes or purchases unstamped cigarettes in face-to-face and remote transactions.

19. Upon information and belief, defendant Denise Paschall, sued in her individual capacity, is an individual residing in Suffolk County, New York, who owns and operates Smoking Arrow, as well as another cigarette business known as Dancing Arrow Smoke Shop also located at 159 Poospatuck Lane. Denise Paschall ships, transports, receives, possesses, sells, distributes or purchases unstamped cigarettes in face-to-face and remote transactions.

20. Upon information and belief, defendant Tony D. Phillips is an individual residing in Suffolk County, New York, who operates Smoking Arrow. Tony D. Phillips ships, transports, receives, possesses, sells, distributes or purchases unstamped cigarettes in face-to-face and remote transactions.

21. Defendant TDM Discount Cigarettes ("TDM") is a business located at 118 Poospatuck Lane, Mastic, New York. TDM ships, transports, receives, possesses, sells, distributes or purchases unstamped cigarettes in face-to-face and remote transactions.

22. Upon information and belief, defendant Thomasina Mack, sued in her individual capacity, is an individual residing in Suffolk County, New York, who owns and operates TDM, as well as another cigarette business known as Shine Smokes, located at 128 Poospatuck Lane. Thomasina Mack ships, transports, receives, possesses, sells, distributes or purchases unstamped cigarettes in face-to-face and remote transactions.

23. Defendant Golden Feather Smokes, Inc., f/k/a Golden Feather Cigarette Express, a/k/a Golden Feather Express ("Golden Feather") is a corporation formed under the laws of the State of New York, located at 13 Squaw Lane and 13A Squaw Lane, Mastic, New York and at 514 Hegeman Ave., Apt. 18, Brooklyn, New York. Golden Feather ships, transports, receives, possesses, sells, distributes or purchases unstamped cigarettes in face-to-face and remote transactions.

24. Defendant Kimo Smoke Shop, Inc. ("Kimo") is a corporation formed under the laws of the State of New York, located at 17 Squaw Lane, Mastic, New York and at 624 Hawkins Avenue, Suite 2, Lake Ronkonkoma, New York 11779. Kimo ships, transports, receives, possesses, sells, distributes or purchases unstamped cigarettes in face-to-face and remote transactions. Kimo is a successor-in-interest to Golden Feather.

25. Defendant Smoke & Rolls, Inc. ("Smoke & Rolls") is a corporation formed under the laws of the State of New York, located at 13A Squaw Lane, Mastic, New York. Smoke & Rolls ships, transports, receives, possesses, sells, distributes or purchases unstamped cigarettes in face-to-face and remote transactions. Smoke & Rolls is a successor-in-interest to Golden Feather.

26. Upon information and belief, defendant Kiana Morrison, sued in her individual capacity, is an individual residing in Suffolk County, New York, who owns and operates defendants Golden Feather, Kimo and Smoke & Rolls. Kiana Morrison ships, transports, receives, possesses, sells, distributes or purchases unstamped cigarettes in face-to-face and remote transactions.

27. Upon information and belief, defendant Shawn Morrison is an individual residing in Suffolk County, New York, who owns and operates defendant Golden Feather, Kimo

and Smoke & Rolls. Shawn Morrison ships, transports, receives, possesses, sells, distributes or purchases unstamped cigarettes in face-to-face and remote transactions.

JURISDICTION AND VENUE

28. The court has jurisdiction over the subject matter of this action pursuant to 18 U.S.C. § 2341, 28 U.S.C. § 1331 and 28 U.S.C. § 1367(a).

29. Venue is proper under 28 U.S.C. § 1391(b), because a substantial part of the events and omissions giving rise to the claims occurred in this district.

FACTS

Cigarette Taxation and Regulation in New York

30. The State and City of New York each impose an excise tax on all cigarettes possessed for sale or use in their respective jurisdictions. The tax is applicable to all such cigarettes, except those “sold under such circumstances that this state is without power to impose such tax.” See New York State Tax Law (“N.Y. Tax L.”) § 471; Administrative Code of the City of New York § 11-1302(a)(1).

31. The State excise tax on cigarettes is presently \$2.75 per pack. The New York City excise tax is \$1.50 per pack. The total excise tax on a pack of cigarettes sold in New York City is therefore \$4.25 or \$42.50 per carton.

32. The State and City excise taxes, except, as noted, for the certain very narrow exceptions for cigarettes “sold under such circumstances that this state is without power to impose such tax,” *i.e.*, to the federal government, must be pre-paid by State-licensed “stamping agents,” usually wholesale cigarette distributors licensed by the State and City of New York. By law, stamping agents must provide proof of tax prepayment by means of a cigarette

tax stamp applied to every package of cigarettes possessed for sale in the State. N.Y. Tax L. § 471; 20 NYCRR § 76.1(a)(1).

33. The price of the tax stamp purchased from the State and applied by stamping agents is approximately equal to the amount of the tax. Stamping agents thus “build-into” the price of the cigarettes their cost of pre-paying the tax. That tax burden is then passed along to each subsequent purchaser in the distribution chain, ultimately falling upon the consumer, as required by N.Y. Tax L. § 471.

34. All cigarettes sold or possessed for sale in New York are presumed taxable until the contrary is established, with the burden of proof that particular cigarettes are not taxable placed upon the person asserting the exemption. *See* N.Y. Tax L. § 471.

Sales of Cigarettes to Native Americans

35. By operation of federal law, cigarettes sold to Native Americans for their personal use (which sales are referred to hereafter as “Reservation Sales”), are not subject to taxation by the States. Cigarettes sold in Reservation Sales are hence “sold under such circumstances that this state is without power to impose [a cigarette] tax.” *See* N.Y. Tax L. § 471(1). Accordingly, they are not required to have tax stamps affixed to them. *See* N.Y. Tax L. § 471(2).

36. However, and also by operation of federal law, cigarettes that Native Americans sell to non-Native Americans (hereafter, “Off Reservation Sales”), are taxable by the states and *are* “sold under such circumstances that this state” *has* the power to impose a cigarette tax, even if such sales are made on or originate from a Native American reservation.

37. Because the State “has the power” to impose a tax on such cigarette sales, the tax is imposed. *See* N.Y. Tax L. § 471(1). Under New York law, cigarettes sold in Off

Reservation Sales thus must have a tax stamp affixed to them, because stamps must be applied to all cigarettes to which the tax applies. *See* N.Y. Tax L. § 471(2).

38. Each defendant purchases unstamped cigarettes from stamping agents, in unlimited quantities, under the guise that the cigarettes are intended for Reservation Sales.

39. Each defendant purchases unstamped cigarettes in amounts that could not conceivably be consumed in Reservation Sales. For example, in 2007, cigarette wholesalers making required filings with the New York State Department of Taxation and Finance reported the purchase of approximately 9.7 million cartons of unstamped cigarettes by the defendants.

40. The current United States Census Estimate reports a population of 279 persons on the Poospatuck Reservation, indicating that if the sales of unstamped cigarettes purchased by defendants in 2007 were made in On Reservation Sales, every person residing on the reservation would have to consume approximately 960 packs of cigarettes per day.

41. In fact, each defendant herein sells virtually all of the unstamped cigarettes they purchase from the wholesalers in Off Reservation Sales, both face-to-face and remote, such as over the Internet.

42. Defendants' sales cause the City damages and irreparable injury. By selling unstamped cigarettes on which the amount of the tax has not been collected through prepayment, the price of the cigarettes is reduced by the amount of the unpaid tax – at times to less than half of the retail price of cigarettes on which taxes have been paid. Defendants therefore can profitably sell unstamped cigarettes for far less than the prices charged by sellers of tax-paid cigarettes and the illegal “discount” provides consumers with an enormous incentive to purchase unstamped cigarettes instead of cigarettes on which taxes have been paid.

43. The vast majority of defendants' sales of unstamped cigarettes replace sales that would otherwise generate tax revenues for the State and the City. Sales of unstamped cigarettes annually cost New York State and City hundreds of millions of dollars in tax revenues.

44. The City's comprehensive programs directed at reducing the deleterious health effects of smoking are greatly impaired by the illegal "discounts" that defendants provide. There is a well-established correlation between smoking cessation and the prevailing price of cigarettes. By reducing the price of cigarettes, defendants irreparably harm the City's smoking cessation programs, which in turn protect both the public health and the public treasury.

Allegations Related To The Contraband Cigarette Trafficking Act

45. Pursuant to the CCTA, "it is unlawful for any person knowingly to ship, transport, receive, possess, sell, distribute or purchase 'contraband cigarettes.'"

46. "Contraband cigarettes" are 10,000 or more cigarettes possessed by any person that bear no evidence of the payment of applicable State or local cigarette taxes in the State or locality where such cigarettes are found, if the State or local government requires a stamp to be placed on packages of cigarettes to evidence payment of cigarette taxes. 18 U.S.C. § 2341(2).

47. Cigarettes sold in New York in Off Reservation Sales are contraband within the meaning of the CCTA: i) the State cigarette excise tax is applicable, *i.e.*, the cigarettes are sold under circumstances in which New York has the power to impose a cigarette tax, and ii) the cigarettes are sold without stamps, despite the fact that the State requires stamps on all cigarettes to which the tax applies.

48. Each defendant herein knowingly ships, transport, receives, possesses, sells, distributes or purchases unstamped cigarettes in Off Reservation Sales, thereby violating

the CCTA: the cigarettes are found in the State, in quantities exceeding the statutory threshold, bearing no evidence of the payment of applicable State cigarette taxes.

Cigarette Marketing Standards Act

49. Under the CMSA, it is unlawful for any agent, wholesale dealer or retail dealer to sell cigarettes at prices that do not include the costs associated with the payment of all cigarette taxes required by law. N.Y. Tax L. §§ 483-484.

50. Because the State has the power to tax defendants' Off Reservation Sales, the sales are taxed. By selling cigarettes at prices that do not include the cost of tax stamps required under N.Y. Tax L. § 471(1)-(2), the defendants violate the CMSA because they sell unstamped cigarettes in sales for which tax stamps are "required by law."

FIRST CLAIM FOR RELIEF

Violation of the Contraband Cigarette Trafficking Act

51. The City realleges paragraphs 1-50 above as if fully set forth herein.

52. At all times relevant to this complaint, each defendant has shipped, transported, received, possessed, sold, distributed or purchased contraband cigarettes within the meaning of 18 U.S.C. § 2341(2). That is, each defendant has shipped, transported, received, possessed, sold, distributed or purchased in excess of 10,000 cigarettes that do not bear the State cigarette tax stamps required by N.Y. Tax L. § 471(1)-(2).

53. As a direct result of defendants' violations of the CCTA, the City has suffered damages and other injuries. Defendants' unlawful sales of contraband cigarettes support a thriving illicit market in bootlegged cigarettes, depriving both the State and the City of hundreds of millions of dollars in cigarette tax revenues annually. The City has been injured in that it is deprived of tax revenue owed in connection with each and every sale of cigarettes to City residents that are a result of defendants' violations of the CCTA.

54. Pursuant to 18 U.S.C. § 2346(b)(1), a local government may bring an action in the federal courts to prevent and restrain violations of the CCTA.

55. Pursuant to 18 U.S.C. § 2346(b)(2), a local government may in a civil action under 18 U.S.C. § 2346(b)(1) also obtain any other appropriate relief for violations of the CCTA from any person, including civil penalties, money damages, and injunctive or other equitable relief.

SECOND CLAIM FOR RELIEF

Aiding and Abetting Violations of the Contraband Cigarette Trafficking Act

56. The City realleges paragraphs 1-55 above as if fully set forth herein.

57. In connection with Off Reservation Sales, in which New York State requires that cigarettes bear tax stamps, each defendant has participated in the shipment, transport, receipt, possession, sale, distribution or purchase of in excess of 10,000 cigarettes that do not bear the State cigarette tax stamps required by N.Y. Tax L. § 471(1)-(2).

58. In doing so, each defendant has provided substantial assistance to others who themselves have violated the CCTA, in that such persons have shipped, transported, received, possessed, sold, distributed or purchased “contraband cigarettes,” within the meaning of 18 U.S.C. § 2341(2). Each defendant has rendered substantial assistance with the intent that other persons succeed in or accomplish those acts that constitute violations of the CCTA.

THIRD CLAIM FOR RELIEF

Violation of the Cigarette Marketing Standards Act

59. Plaintiff repeats and realleges paragraphs 1-58 as if fully set forth herein.

60. Each of the defendants qualifies as a “wholesale dealer” or a “retail dealer” within the meaning of the CMSA.

61. Each of the defendants has repeatedly advertised, offered to sell and/or sold cigarettes for less than the “basic cost of cigarettes” within the meaning of § 483 of the CMSA by not including, as part of the price of the cigarettes, the full face value of the cigarette tax stamps required by New York law.

62. Pursuant to § 484(6) of the CMSA, defendants’ sales are *prima facie* evidence of each defendant’s intent to avoid the collection of, or paying over of, taxes required under New York law.

63. As a direct result of defendants’ violations of the CMSA, the City has suffered injury in that defendants’ sales of cigarettes at prices that do not include the costs of applicable tax stamps support a thriving illicit market in cigarettes throughout the State, including New York City, thereby denying both the State and the City millions of dollars in lost cigarette tax revenues. As a result, the City has suffered injury in that it is deprived of tax revenue due in connection with each and every sale of cigarettes to City residents that is caused by defendants’ violations of the CMSA.

64. Pursuant to § 484(6)(b) of the CMSA, any person injured by any violation or threatened violation of the CMSA may bring an action to prevent, restrain or enjoin such violation or threatened violation and, in addition to such injunctive relief and costs of suit (including reasonable attorney’s fees), may recover damages.

WHEREFORE, New York City respectfully prays that the Court grant judgment against defendants as follows:

- a. On the First Claim For Relief, enjoin defendants violations of 18 U.S.C. § 2341 *et seq.*;

- b. On the Second Claim For Relief, enjoin defendants' from aiding and abetting violations of 18 U.S.C. § 2341 *et seq.*;
- c. On the Third Claim For Relief, enjoin defendants' violations of N.Y. Tax L. § 483 *et seq.*;
- d. Award the City an amount equal to the amount of City taxes lost as a result of defendants' violations of 18 U.S.C. § 2341 *et seq.* and N.Y. Tax L. § 483 *et seq.*;
- e. Award the City a suitable penalty, as provided for in 18 U.S.C. § 2341 *et seq.*, as well as the attorney's fees and costs incurred in bringing this action;
- f. Award such other and further relief as the Court may deem appropriate.

Dated: New York, New York
September 29, 2008

MICHAEL A. CARDOZO
Corporation Counsel of the
City of New York
Attorney for Plaintiff The City of New York
100 Church Street, Room 20-99
New York, New York 10007
(212) 788-1324

By: 

Eric Proshansky (EP 1777)
Gail Rubin (GR 2833)
William Miller (WM 1695)
Assistant Corporation Counsel