

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

RED EARTH LLC d/b/a
SENECA SMOKESHOP and
AARON J. PIERCE,

Plaintiffs,

v.

ORDER
10-CV-530A

UNITED STATES OF AMERICA and
ERIC H. HOLDER, JR., in his Official
Capacity as Attorney General of the
United States,

Defendants.

SENECA FREE TRADE ASSOCIATION,

Plaintiff,

v.

UNITED STATES OF AMERICA and
ERIC H. HOLDER, JR., in his Official
Capacity as Attorney General of the
United States, *et. al.*,

Defendants.

Plaintiffs Red Earth LLC, d/b/a Seneca Smokeshop and Aaron J. Pierce, commenced this action on June 25, 2010 against the United States and Eric Holder, in his capacity as Attorney General for the United States. Along with the complaint, plaintiffs filed a motion for a temporary restraining order and a

preliminary injunction seeking to enjoin enforcement of the Prevent All Cigarette Trafficking Act of 2009 ("PACT Act" or "Act"), Pub. L. No. 111-154, 124 Stat. 1087 (2010), a statute enacted to regulate remote sales of cigarettes and smokeless tobacco.

On June 28, 2010, this Court issued a temporary restraining order ("TRO") staying enforcement of the PACT Act pending argument on plaintiffs' motion for a preliminary injunction. In the meantime, plaintiff Seneca Free Trade Association ("SFTA") commenced its own action against the United States, Attorney General Holder, and the United States Postal Service. SFTA also moved to enjoin enforcement of various provisions of the PACT Act. The two cases were consolidated and the Court extended the TRO until July 30, 2010.

On July 30, 2010, this Court issued a decision and order granting in part and denying in part plaintiffs' motions for preliminary injunctive relief. The Court found plaintiffs had established a threat of irreparable injury because they had shown that the provisions of the PACT Act were so onerous that compliance with the Act threatened the continued viability of their established businesses, and that, in some circumstances, compliance threatened to violate plaintiffs due process rights. With regard to due process, the Court found that the provisions of the PACT Act requiring remote cigarette sellers to pay all state and local taxes in advance of the delivery of cigarettes and smokeless tobacco products offended due process because the statute applied without regard to whether plaintiffs had

minimum contacts with the taxing jurisdictions. Failure to pay those taxes as mandated under the Act subjected plaintiffs to felony criminal prosecution. Accordingly, the Court enjoined enforcement of those provisions of the PACT Act requiring remote cigarette sellers to pay state and local taxes on remote sales of cigarettes and smokeless tobacco.

However, the court denied plaintiffs motion to enjoin the statute's prohibition on use of the United States mail service to deliver cigarettes and smokeless tobacco products. The Court found that plaintiffs have failed to establish a clear likelihood of success on the merits of their claim that the mailing prohibition violates equal protection considerations. The Court also found that plaintiffs had failed to establish a clear likelihood of success on the merits of their remaining claims.

On August 6, 2010, one week after this Court's prior TRO had expired and the preliminary injunction took effect, defendants appealed the preliminary injunction order and moved for an emergency stay pending appeal. Defendants seek to stay that part of this Court's preliminary injunction that enjoins enforcement of the PACT Act's requirement that plaintiffs pay state and local taxes in advance of delivering cigarettes and smokeless tobacco products. In essence, defendants seek to require plaintiffs to comply with all state and local tax laws pending appeal to the Second Circuit.

On that same date, SFTA filed its own appeal and a motion for injunctive

relief pending appeal. SFTA seeks to have this Court enjoin the mailing prohibition pending appeal. The practical effect of granting that relief would be to permit all SFTA plaintiffs to use the mails to deliver their tobacco products pending appeal of this Court's preliminary injunction order. On August 10, 2010, this Court heard oral argument on both motions. For the reasons stated below, both motions are denied.

DISCUSSION

The four factors to be considered in issuing a stay pending appeal are well known: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); see *Cooper v. Town of East Hampton*, 83 F.3d 31, 36 (2d Cir. 1996). The degree to which a factor must be present varies with the strength of the other factors, meaning that "more of one [factor] excuses less of the other." *Thapa v. Gonzales*, 460 F.3d 323, 334 (2d Cir.2006) (quoting *Mohammed v. Reno*, 309 F.3d 95, 101 (2d Cir. 2002)).

I. Defendants Motion for a Stay Pending Appeal

In their motion, defendants request that this Court stay that portion of its

injunction relieving plaintiffs of the requirement that they pay state and local taxes in each jurisdiction where their products are to be delivered prior to delivery. This Court's preliminary injunction enjoined:

enforcement [of] 15 U.S.C. § 376a(a)(3), (4) and §376a(d) (requiring delivery sellers to comply with "all state, local, tribal, and other laws generally applicable to sales of cigarettes or smokeless tobacco as if the delivery sales occurred entirely within the specific state" and requiring the payment of state and local excise taxes and tax stamps to be affixed to products in advance of the sale)

pending appeal. (See Preliminary Injunction Order, at 43). The practical effect of this Court's injunction is to put off the time period when plaintiffs are to pay state and local taxes pending further assessment of the merits of plaintiffs due process claim. If this Court's due process ruling ultimately turns out to be incorrect, defendants will have a claim for unpaid taxes at that point. However, as the Court found in its order, plaintiffs have shown a clear likelihood that they will suffer due process violations if they are required to pay taxes in taxing jurisdictions where they otherwise lack minimum contacts. Furthermore, plaintiffs demonstrated that the burden of complying with hundreds or thousands of taxing schemes, and the cost associated with doing so, far outweighs the public interest in having the state and local taxes paid in advance. If it is later determined that plaintiffs are required to comply with the state and local taxes of a particular jurisdiction, plaintiffs will need to pay the taxes owed at that point. At most, defendants have shown a potential claim for monetary damages (in the form of

taxes owed) if they ultimately succeed on appeal. A claim for monetary damages cannot support the type of irreparable harm required to obtain a stay pending appeal.

Defendants also argue that a stay is necessary to ensure that other harms sought to be prevented by the PACT Act (such prohibiting sales of cigarette to minors and curtailment of illegal cigarette trafficking) do not occur pending appeal. With regard to sales to minors, nothing about this Court's injunction makes it lawful to sell cigarettes to minors. In fact, this Court crafted its injunction to leave in place the age verification provisions of the Act, set forth in 15 U.S.C. § 367a(b)(4). With regard to curtailment of illegal cigarette trafficking, defendants have simply failed to show a significant threat of illicit cigarette trafficking during the short time that the expedited appeal to the Second Circuit will be pending. Finally, the Court rejects defendants claim that a stay is necessary to address the dangers of smoking because the PACT Act does not seek to prevent smoking, it merely seeks to regulate remote cigarette sales. Nothing about the Act prohibits United States citizens from purchasing cigarettes at their local brick-and-mortar stores. The Act does not discourage cigarette sales, it simply alters how they are purchased and delivered.

Because defendants have failed to show that the stay factors weigh in favor of granting the relief requested, their motion for a stay pending appeal is denied.

2. Plaintiffs' Motion for an Injunction Pending Appeal

Plaintiffs also seek injunctive relief pending appeal. Plaintiffs argue that this Court should enjoin enforcement of the mailing prohibition. They argue that if they are not permitted to use the mails while the appeal is pending, there is a danger that they will go out of business. The practical effect of the relief requested by plaintiffs is to permit them to resume using the United States Postal Service to deliver tobacco products pending appeal.

Preventing plaintiffs from using the mails pending appeal will undoubtedly impact the profitability of their business. Postal delivery clearly represents the most efficient and most cost effective means for delivery of their products. However, as one plaintiff (Red Earth) has expressly acknowledged, it is not the *only* means and alternative ways to deliver their products do exist. That these alternative methods are less preferable does not mean that plaintiffs will suffer irreparable injury if they cannot use the mail to deliver their products pending appeal.

Plaintiffs' claim of irreparable injury is also weakened by virtue of its failure to seek injunctive relief sooner. Plaintiff waited about one week after this Court issued its preliminary injunction order before requesting that the use-of-the-mails prohibition be further enjoined. Although this Court had initially enjoined the mailing prohibition in its TRO, that TRO expired on July 30, when the preliminary injunction was issued. Because the preliminary injunction order did not further

enjoin the mailing prohibition, plaintiffs have been prohibited from using the mails to deliver their products since July 30. If the Court were to grant the relief requested, it would alter, rather than preserve, the status quo pending appeal, and would place an undue burden on the Postal Service to change procedures that have been in place since July 30.

Nor have plaintiffs demonstrated a likelihood of success on the merits of their equal protection claim for the reasons stated in this Court's preliminary injunction order. Even though the "likelihood of success" showing is lessened if other stay factors favor granting the relief requested, the Court finds that plaintiffs have failed to demonstrate that the factors support enjoining the mailing provision pending appeal.

CONCLUSION

For the reasons stated, both motions are denied.

SO ORDERED.

s/ Richard J. Arcara

HONORABLE RICHARD J. ARCARA
UNITED STATES DISTRICT JUDGE

DATED: August 12, 2010