

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

SENECA NATION OF INDIANS

Plaintiff,

Civil Action No. _____

v.

DAVID PATERSON, Governor of the
State of New York, JAMIE WOODWARD,
Acting Commissioner, New York State
Department of Taxation and Finance,
WILLIAM COMISKEY, Deputy
Commissioner, Office of Tax Enforcement,
New York State Department of Taxation and
Finance, JOHN MELVILLE, Acting
Superintendent, New York State Police, each
in his or her official capacity,

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

Defendants.

The Seneca Nation of Indians, by and through undersigned counsel, states and alleges
as follows:

INTRODUCTION

1. The Seneca Nation of Indians (the “Seneca Nation” or “Nation”) seeks declaratory and injunctive relief to prevent Defendants from infringing on the Nation’s federally-protected right of self-government and from plunging the Nation’s well-regulated tobacco economy into chaos. Recently enacted and promulgated New York State cigarette tax laws and regulations unlawfully interfere with the federally-protected rights of the Nation, Nation-licensed businesses, and Nation members. These laws and regulations impose an absolute embargo on the distribution of non-New York stamped cigarettes and severely restrain the

distribution of non-New York taxed cigarettes to the territories of the Seneca Nation, yet include no allocation provisions to ensure that Nation members may exercise their federally-protected right to purchase non-New York taxed cigarettes throughout the Nation's territories or to ensure that the approximately 140 Nation-licensed businesses may exercise their right to participate in non-New York taxed commerce with Nation members. Instead, these laws and regulations purport to compel the Nation, in direct contravention of its right of self-government, to abandon its own existing regulatory program and to instead implement, administer, and enforce a regulatory program on behalf of New York State. These laws and regulations also deny Nation-licensed businesses the ability to sell tax-free cigarettes in interstate commerce to tax-exempt out-of-state residents.

2. The Nation therefore brings this action for declaratory and injunctive relief to restrain Defendants from implementing and enforcing these statutes and regulations as applied to the Nation, its members, and its Nation-licensed tobacco retailers and stamping agents.

3. The Seneca Nation firmly believes that decisions of the United States Supreme Court holding that, as a general matter, states may tax sales of cigarettes to non-Indians even when the sales occur within Indian country do not apply to the Nation, given the solemn treaty promises made by the United States to the Nation and other fundamental features of the Nation's history and control over its Territories. The Nation, indeed, has never been party to any litigation concluding that New York State possesses such a right. However, it is not necessary in this action for the Nation to challenge New York's purported right to tax transactions taking place within its Territories. For even under the terms of the Supreme Court decisions, New York has far exceeded the constraints placed by the Court on the

general authority of the states to tax transactions taking place within Indian country.

JURISDICTION AND VENUE

4. The District Court has jurisdiction over the claims in this action pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1362. The Seneca Nation maintains government-to-government relations with the United States and has a governing body duly recognized by the Secretary of the Interior. The Nation asserts claims arising under the Constitution and laws of the United States, including the Supremacy Clause of Article VI, Section 2, the Interstate Commerce Clause and Indian Commerce Clause of Article I, Section 8, Clause 3, and federal common and statutory law. The allegations of the Complaint give rise to an actual controversy within the meaning of 28 U.S.C. § 2201.

5. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b), in that one or more of the Defendants reside in this District, a substantial part of the events or omissions giving rise to the Nation's claims occurred in this District, and/or a substantial part of the property that is the subject of the action is situated in this District.

THE SENECA NATION

6. Plaintiff Seneca Nation is a federally-recognized Indian nation and a party to various treaties with the United States, including the Treaty of Canandaigua, Nov. 11, 1794, 7 Stat.

44. The Seneca Nation maintains government-to-government relations with the United States and exercises the inherent, treaty-protected sovereign power of self-governance. It is the beneficial owner of and exercises jurisdiction over its Allegany, Cattaraugus, Oil Spring, Niagara Falls, and Buffalo Creek territories in Western New York (collectively, the "Territories"), which constitute Indian country within the meaning of 18 U.S.C. § 1151.

Pursuant to the Treaty of Canandaigua, the United States guaranteed the Nation the "free use

and enjoyment” of its Territories. The Seneca Nation brings this action on its own behalf, on behalf of its government instrumentalities, on behalf of its more than 7,800 enrolled members, and on behalf of member-owned businesses licensed under Nation law, including approximately 140 Nation-licensed cigarette retailers and 18 Nation-licensed cigarette stamping agents.

DEFENDANTS

7. Defendant David Paterson is the Governor of the State of New York, is charged with the implementation and enforcement of the statutes and regulations that are the subject of this Complaint, and is sued in his official capacity.

8. Defendant Jamie Woodward is the Acting Commissioner of the New York State Department of Taxation and Finance, is charged with the implementation and enforcement of the statutes and regulations that are the subject of this Complaint, and is sued in her official capacity.

9. Defendant William Comiskey is the Deputy Commissioner for the Office of Tax Enforcement of the New York State Department of Taxation and Finance, is charged with the implementation and enforcement of the statutes and regulations that are the subject of this Complaint, and is sued in his official capacity.

10. Defendant John Melville is the Acting Superintendent of the New York State Police, is charged with the enforcement of the statutes and regulations that are the subject of this Complaint, and is sued in his official capacity.

THE SENECA NATION’S WELL-REGULATED TOBACCO ECONOMY

11. The Seneca Nation’s tobacco economy has developed based upon the rights of the Nation and its members under federal law and treaties and in good faith reliance on the

actions taken over the course of more than two decades by the legislative, executive, and judicial branches of New York State regarding the application of state tax to retail cigarettes sales on the Nation's Territories.

12. In 2006, the Seneca Nation enacted a comprehensive cigarette stamping, regulatory, and law enforcement program that strictly governs the importation, exportation, and sale of all cigarettes on the Nation's Territories—the Seneca Nation of Indians Import-Export Law and Import-Export Regulations (collectively, “IEL”), which is implemented and enforced by the Seneca Nation of Indians Import-Export Commission (“Commission”).

13. Congress has encouraged and sanctioned the Nation's exercise of the right of self-government in federal statutes and treaties, including *inter alia*, the Contraband Cigarette Trafficking Act, 18 U.S.C. § 2341 *et seq.*, the Prevent All Cigarette Trafficking Act of 2009, Pub. L. No. 111-154, 124 Stat. 1087 (2010) (“PACT Act”), the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450 *et seq.*, and the Treaty of Canandaigua. The Nation and the Commission enforce the IEL in cooperation with the United States, acting through the United States Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”).

14. Pursuant to the IEL, cigarettes may only be imported into the Nation's Territories by stamping agents licensed by the Commission or by the Commission itself, both of which must affix a unique, secure, traceable Seneca Nation stamp to each package of cigarettes. The IEL provides that Nation-licensed stamping agents may not affix a Seneca stamp to cigarettes bearing the stamp of another jurisdiction. The IEL further provides, with limited exceptions, that cigarettes found on the Territories that do not bear a Seneca stamp are contraband, subject to seizure by the Commission, and subject to forfeiture.

15. The Nation imposes an administrative fee of seventy-five cents on each carton of

cigarettes bearing a Seneca stamp, which fees are dedicated to health and education programs provided on the Nation's Territories.

16. Nation-licensed stamping agents must report to the Commission (1) the quantity, brand, and type of cigarettes stamped, (2) the date on which those cigarettes were stamped and the retail location to which they were delivered, and (3) the lot numbers of the stamps affixed to those cigarettes. Only after cigarettes have been affixed with a Nation stamp may they be distributed to retailers on the Territories, which retailers include government instrumentalities of the Nation. All cigarette retailers on the Nation's Territories must be licensed by the Nation.

17. The IEL prohibits Nation-licensed retailers from, *inter alia*, selling cigarettes to minors, selling cigarettes below the Nation's minimum pricing structure, and selling cigarettes in wholesale quantities to any person, Indian or non-Indian.

18. Nation law does not regulate the quantity or brands of cigarettes that Nation-licensed stamping agents may purchase from state-licensed stamping agents and wholesale dealers, the quantity or brands of cigarettes that Nation-licensed retailers may purchase from Nation-licensed stamping agents, or the quantity or brands of cigarettes that Nation members may purchase from Nation-licensed retailers.

19. The Nation's well-regulated tobacco economy supports 18 Nation-licensed cigarette stamping agents, approximately 140 Nation-licensed cigarette retailers, and approximately 3,000 Indian and non-Indian employees.

20. The Seneca tobacco economy is vital to the Nation's private sector economy and to the economy of Western New York.

21. Councilors, Executives, and other representatives of the Seneca Nation of Indians

have met on numerous occasions with representatives of the State of New York, including Defendant Paterson, in an effort to resolve their respective concerns regarding the imposition of state tax on commerce occurring on the Nation's treaty-protected Territories and subject to the Nation's comprehensive regulatory program.

THE NEW YORK LEGISLATURE'S JUNE 2010 TAX LAW AMENDMENTS

22. On June 21, 2010, the New York Legislature amended N.Y. Tax Law §§ 471 and 471-e regarding the distribution and sale of cigarettes on the territories of Indian nations within the geographic boundaries of the state, and raised the State cigarette tax rate from \$2.75 to \$4.35 per pack. The amendments provide that the cigarette tax set forth in § 471 shall not be imposed on sales to qualified Indians for their own use and consumption on their nations' qualified reservations, but further provide that the tax is imposed on all cigarettes sold to non-members. *See* N.Y. Tax Law §§ 471(1), 471-e(1)(a).

23. The evidence of the tax imposed by New York is an affixed cigarette tax stamp. *See* N.Y. Tax Law §§ 471(1), 471-e(1)(a). Notwithstanding the purported tax exemption for qualified Indians, the amendments provide that all cigarettes sold by state-licensed stamping agents and wholesale dealers to Indian nations or reservation cigarette sellers must bear a tax stamp. *See* N.Y. Tax Law §§ 471(2), 471-e(3)(d), 471-e(6). The amendments identify two alternative statutory mechanisms by which Indian nations and their members may attempt to obtain non-New York taxed, albeit stamped, cigarettes. *See* N.Y. Tax Law § 471(1).

24. The first mechanism is the Indian tax exemption coupon set forth in § 471-e, in which an Indian nation must affirmatively elect to participate. Under the coupon system, the New York State Department of Taxation and Finance (the "Department") distributes a quota of Indian tax exemption coupons to an Indian nation based upon the probable demand for tax-

free cigarettes by members of the nation for their own personal use and consumption. The coupon system contemplates that the Indian nation will implement, administer, and enforce the coupon system on the State's behalf by allocating the coupons among reservation cigarette sellers and the nation itself, presumably based upon a determination by the nation as to the demand for non-New York taxed cigarettes by nation members from each reservation cigarette seller. Reservation cigarette sellers in turn would provide Indian tax exemption coupons to state-licensed stamping agents and wholesale dealers in order to purchase non-New York taxed, albeit stamped, cigarettes, for purposes of resale to nation members. Agents and dealers would in turn submit these coupons to the Department in conjunction with a claim for a refund of taxes prepaid on stamped cigarettes sold tax-free to reservation cigarette sellers.

25. The second mechanism is the default prior approval system set forth in N.Y. Tax Law § 471(5), which controls in the absence of a nation's election to participate in the Indian tax exemption coupon system. Under the prior approval system, the Department calculates a quota for each Indian nation based upon the probable demand for tax-free cigarettes by members of the nation for their own personal use and consumption. State-licensed stamping agents and wholesale dealers may not sell any portion of the tax-free quota to the Indian nation or to reservation cigarette sellers on the nation's qualified reservation without receiving prior approval from the Department. If an agent or dealer receives such approval, they in turn may request a refund from the Department for taxes prepaid on stamped cigarettes sold tax-free to reservation cigarette sellers.

26. The prior approval system does not purport to regulate what portion of the quota each state-licensed stamping agent or wholesale dealer may request from the Department, what

portion of the quota a state-licensed stamping agent or wholesale dealer may sell to each Indian reservation cigarette seller on a particular nation's qualified reservation or reservations, or what portion of the quota a reservation seller may sell to each qualified Indian. The prior approval system does not require state-licensed stamping agents and wholesale dealers to restrict their sales of tax-free cigarettes to reservation cigarette sellers operating in compliance with the applicable laws of the relevant Indian nation.

27. The prior approval system makes no attempt to guard against state-licensed stamping agents of wholesale dealers seeking to monopolize the quota it establishes or from otherwise acting to distort the well-functioning free market economy that presently exists in the Seneca Territories.

28. The Indian tax exemption coupon and prior approval systems provide no mechanism by which to ensure that a Seneca retailer operating on the Seneca Territories may exercise its federal right to sell, and a qualified Seneca member may exercise her federal right to buy, non-New York stamped cigarettes in the event that the retailer has been excluded from or has not otherwise received a sufficient portion of the tax-exemption coupon or prior-approval quota.

29. The Indian tax exemption coupon and prior approval systems provide no means by which Seneca-licensed retailers operating in the Seneca Territories may obtain tax-free cigarettes for purposes of sale to tax-exempt out-of-state residents.

**THE DEPARTMENT'S EMERGENCY RULE IMPLEMENTING THE
LEGISLATURE'S TAX LAW AMENDMENTS**

30. On June 22, 2010, just one day after the Legislature's amendments, the Department adopted an emergency rule to implement the Indian tax exemption coupon and prior approval systems, N.Y. Comp. Codes R. & Regs. tit. 20, § 74.6 (the "Emergency Rule"). The

Emergency Rule calculates the probable demand for non-New York taxed cigarettes by members of each Indian nation for their own personal use and consumption under both the Indian tax exemption coupon and prior approval systems by reference to United States per capita average cigarette consumption and federal census data for each nation's population in New York State. Based upon this calculation, the Emergency Rule sets the quarterly cigarette quota for the Seneca Nation of Indians at 168,600 packs. This quota is for all five of the Nation's sovereign Territories collectively—it is not allocated among each territory.

31. With respect to the Indian tax exemption coupon system, the Emergency Rule provides that an Indian nation must affirmatively elect to participate in the system by the August 15 prior to the twelve-month period beginning September 1. The Emergency Rule reiterates that the implementation, administration, and enforcement of the State taxation system on an Indian nation's qualified reservation are the purported obligation of the Indian nation.

32. With respect to the prior approval system, the Emergency Rule reiterates that, effective September 1, 2010, state-licensed stamping agents and wholesale dealers must receive prior approval from the Department prior to selling any non-New York taxed cigarettes to Indian reservation cigarette sellers, and that such sales may not exceed the quota set by the Department. The Emergency Rule further provides that the manner and form of prior approval may include the use of an interactive web application.

33. With respect to the prior approval system, the Emergency Rule does not purport to regulate what portion of the quota each state-licensed stamping agent or wholesale dealer may request from the Department, what portion of the quota a state-licensed stamping agent or wholesale dealer may sell to each Indian reservation cigarette sellers on a particular

nation's qualified reservation or reservations, or what portion of the quota a reservation seller may sell to each qualified Indian. The Emergency Rule system makes no attempt to guard against state-licensed stamping agents or wholesale dealers seeking to monopolize the quota it establishes or from otherwise acting to distort the well-functioning free market economy that presently exists in the Seneca Territories.

34. The Emergency Rule does not require state-licensed stamping agents and wholesale dealers to restrict their sales of non-New York taxed cigarettes to reservation cigarette sellers operating in compliance with the Seneca law.

35. The Emergency Rule provides no mechanism by which to ensure that a Seneca retailer operating on the Seneca Territories may exercise its federal right to sell, and a qualified Seneca member may exercise her federal right to buy, non-New York stamped cigarettes in the event that the retailer has been excluded from or has not otherwise received a sufficient portion of the tax-exemption coupon or prior-approval quota.

36. With respect to both the Indian tax exemption coupon and prior approval systems, the Emergency Rule provides no means by which Seneca-licensed retailers operating on the Seneca Territories may obtain tax-free cigarettes for purposes of sale to tax-exempt out-of-state residents.

37. On July 29, 2010, the Department's Office of Tax Policy Analysis, Taxpayer Guidance Division issued TSB-M-10(6)M, Cigarette Tax, TSB-M-10(8)S, Sales Tax, *Amendments to the Tax Law Related to Sales of Cigarettes on Indian Reservations Beginning September 1, 2010* (the "Guidance Notice"), regarding the Department's implementation of the Indian tax exemption coupon and prior approval systems. The Guidance Notice reiterates that on or after September 1, 2010, all cigarettes sold by state-licensed stamping agents and

wholesale dealers to Indian nations or reservation cigarette sellers must be affixed with a New York tax stamp.

38. The Guidance Notice provides that state-licensed stamping agents and wholesale dealers must have an online services account in order to request prior approval for the sale of a portion of the tax-free cigarette quota to Indian reservation cigarette sellers. An interactive web application will display each Indian nation's quota and will immediately reduce that quota upon each approval granted by the Department. The Guidance Notice confirms that the Department will not regulate what portion of the quota each state-licensed stamping agent or wholesale dealer may request from the Department, although the agent or dealer must dispose of the pre-approved cigarettes within forty-eight hours.

39. The Guidance Notice confirms that the Department will not distribute Indian tax exemption coupons directly to reservation cigarette sellers, but only to Indian nations. The Guidance Notice also provides that the Department will not accept Form DTF-801 ("Certificate of Individual Indian Exemption for Certain Property or Services Delivered on a Reservation") as a basis for a refund of cigarette tax prepaid on cigarettes sold to tax-exempt qualified Indians.

40. On July 29, 2010, Defendant Woodward sent a letter to the President of the Seneca Nation of Indians, Barry Snyder, enclosing the Guidance Notice. Defendant Woodward stated that "current judicial injunctions that prevent the Department from enforcing the Tax Law as it related to sales by stamping agents to reservation sellers and to reservation sales at retail to non-Indians remain in place at this time." On August 5, 2010, Defendant Woodward affirmed under penalty of perjury that these state court injunctions enjoin the Department "from enforcing the provisions of Tax Law section 471-e or otherwise restricting sales of

unstamped cigarettes to or by reservation cigarette sellers.” Notwithstanding these statements, on August 9, 2010, the Department seized a truckload of Seneca-stamped cigarettes en route from a Nation-licensed stamping agent on the Nation’s Allegany Territory to Nation-licensed retailers on the Nation’s Cattaraugus Territory, as well as the truck itself. Two days later the Department returned the truck and cargo.

IRREPARABLE HARM

41. The Legislature’s June 2010 amendments to the Tax Law and the Department’s Emergency Rule threaten the Nation, its members, and its Nation-licensed businesses with immediate, concrete, and irreparable harm.

42. Defendants’ implementation and enforcement of the Indian tax exemption coupon system and Emergency Rule imposes upon the Nation the obligation to exercise its sovereign governmental powers on behalf of New York State by requiring that the Nation administer, implement, and enforce a complex regulatory program as a condition precedent to its members’ ability to exercise their federally-protected immunity from state taxation. The Indian tax exemption coupon system would require the Nation to develop laws and regulations regarding at least the following: (a) the gathering and submission of data by the Nation or by Nation-licensed retailers regarding the quantities of cigarettes purchased by Nation members at each of approximately 140 retail locations on the Nation’s five different territories, (b) the processing of that data for the purpose of allocating exemption coupons among retailers, (c) the resolution of discrepancies between the data gathered and the quota of exemption coupons made available by the Department, (d) the distribution of exemption coupons to Nation-licensed retailers, (e) the resolution of disputes between Nation-licensed retailers regarding their allotment of exemption coupons, (f) the gathering of data regarding

fluctuations in market conditions, including, for example, the purchasing habits of Nation members, cigarette prices, and the entry of additional retailers to the market, (g) and the quarterly modification of the allocation among Nation-licensed retailers based upon that data. It would, in sum, require the Nation to radically transform the role of its government in the Nation's tobacco economy from that of the regulator of a well-functioning free market to that of the principal actor in a centralized, command economy. This directly contravenes the Nation's right of self-government.

43. Under the prior approval system and Emergency Rule, the Department has made no attempt to guard against the severe market distortions that will result given its failure to grapple with how the Nation's quota would be allocated among the approximately 18 Nation-licensed stamping agents, 140 Nation-licensed retailers, the Nation's five different territories, and dozens of brands of cigarettes.

44. Defendants' implementation and enforcement of the Indian tax exemption coupon system, prior approval system, and Emergency Rule will adversely affect Nation members' right to purchase non-New York taxed cigarettes of the brand of their choosing from Nation-licensed retailers throughout the Nation's Territories and will significantly impair Nation-licensed businesses' right to participate in tax-free commerce with Nation members.

45. Defendants' implementation and enforcement of the Indian tax exemption coupon system, prior approval system, and Emergency Rule denies Nation-licensed retailers the ability to acquire non-New York stamped cigarettes for purposes of sale to tax-exempt out-of-state residents, and therefore denies Nation-licensed retailers the ability to engage in this interstate commerce without collecting the New York cigarette tax from out-of-state residents, which must remit tax to their state of residence on the same cigarettes. The loss of

this interstate market will lead to serious financial hardship and the closing of many Nation-licensed retailers.

46. Defendants' implementation and enforcement of the Indian tax exemption coupon system, prior approval system, and Emergency Rule will stultify the Nation's tobacco economy and devastate the livelihood of scores of Nation-licensed businesses, which support thousands of jobs and which are vital to the Nation's private sector economy and to the Western New York economy.

47. Defendants' implementation and enforcement of the Indian tax exemption coupon system, prior approval system, and Emergency Rule threatens Nation-licensed businesses with seizure, civil liability, and criminal prosecution for possessing and selling non-New York taxed cigarettes to tax-exempt Nation members and out-of-state residents, including inventories of non-New York stamped cigarettes acquired prior to September 1, 2010. The laws and regulations make no provision for non-New York stamped cigarettes Nation members and Nation-licensed retailers lawfully possess as a result of transactions taking place prior to that date.

48. Under the Indian tax exemption coupon system, prior approval system, and Emergency Rule, all cigarettes distributed to the Nation's Territories by state-licensed stamping agents and wholesale dealers must bear a tax stamp, notwithstanding that cigarettes destined for purchase by Nation members and out-of-state residents are not subject to state tax. Under the prior approval system and Emergency Rule, moreover, agents and dealers may distribute the quota of tax-free cigarettes to reservation cigarette sellers that are not licensed by the Nation to import cigarettes. Under Seneca Nation law, Nation-licensed stamping agents must affix a Seneca stamp to and remit an administrative fee on each pack of

cigarettes imported to the Nation's Territories—cigarettes bearing the stamp of another jurisdiction may not be stamped and are defined as contraband under Nation law.

Defendants' implementation and enforcement of the Indian tax exemption coupon system, prior approval system and Emergency Rule will interfere with the operation of Nation law, including the Nation's collection of administrative fees that support health and education programs on cigarettes destined for purchase by tax-exempt Nation members and out-of-state residents.

49. Defendants' implementation and enforcement of the Indian tax exemption coupon system, prior approval system, and Emergency Rule conflicts with the Nation's own existing comprehensive regulatory program governing the importation, exportation, and sale of cigarettes on the Territories, and compels the Nation to restructure that program and to enact new laws in an effort to address the severe market distortions introduced into the Nation's well-functioning tobacco economy by the State's poorly conceived taxation scheme.

COUNT I
Violation of Sovereign Right of Self-Government

50. As a matter of well-established federal law, the Seneca Nation possesses the sovereign, treaty-protected right of self-government, including the right to make its own laws and to be ruled by them. State action that denies or interferes with this right is invalid.

51. The United States has encouraged and sanctioned the Nation's self-regulation of its tobacco economy through statutes and other federal actions.

52. The Indian tax exemption coupon system, prior approval system, and Emergency Rule severely conflict and interfere with Nation law and require the Nation to exercise its sovereign governmental authority over the Nation's Territories, Nation-licensed businesses, and Nation members on behalf of New York State.

53. Defendants' implementation and enforcement of the Indian tax exemption coupon system, prior approval system, and Emergency Rule unlawfully denies and interferes with the Nation's right of self-government in violation of federal law.

COUNT II

Violation of State Tax Immunity and Right to Engage in Tax-Free Commerce

54. As a matter of well-established federal law, the Nation and its members enjoy immunity from state taxation and possess the right to purchase non-New York taxed cigarettes on the Nation's Territories.

55. As a matter of well-established federal law, Nation-licensed businesses possess the right to engage in tax-free commerce with Nation members.

56. The Indian tax exemption coupon system, prior approval system, and Emergency Rule include no allocation or other provisions to ensure access to non-New York taxed cigarettes by all Nation-licensed businesses and members.

57. Defendants' implementation and enforcement of the Indian tax exemption coupon system, prior approval system, and Emergency Rule as applied to the Nation and its members unlawfully denies and interferes with the right of Nation members to purchase non-New York taxed cigarettes from retailers throughout the Territories and the right of Nation-licensed businesses to engage in tax free commerce with Nation members on the Territories in violation of federal law.

COUNT III

Imposition of Excessive Burdens on Indian Retailers

58. As a matter of federal law, states lack authority and jurisdiction to regulate Indians in Indian country. The United States Supreme Court has held that a state may impose only

minimal burdens on Indian retailers reasonably tailored to the collection of taxes from non-Indians.

59. The Indian tax exemption coupon system, prior approval system, and Emergency Rule impose on the Nation, Nation-licensed businesses, and Nation members more than minimal burdens reasonably tailored to the collection of taxes from non-Indians.

60. Defendants' implementation and enforcement of the Indian tax exemption coupon system, prior approval system, and Emergency Rule as applied to the Nation and its members violates federal law by imposing more than minimal burdens on Indian retailers.

COUNT IV
Violation of Indian Commerce Clause

61. The Indian Commerce Clause of the United States Constitution prohibits state action that imposes undue burdens on sovereign Indian nations and on reservation commerce.

62. The Indian tax exemption coupon system, prior approval system, and Emergency Rule unduly burden the Seneca Nation and its well-regulated tobacco economy, including the purchase and sale of non-New York taxed cigarettes by Nation-licensed businesses, Nation members, and out-of-state residents, which commerce would exist without respect to the collection of taxes from non-Indian New York residents.

63. Defendants' implementation and enforcement of the Indian tax exemption coupon system, prior approval system, and Emergency Rule as applied to the Nation, its members, and its licensed businesses violates the Indian Commerce Clause.

COUNT V
Violation of Interstate Commerce Clause

64. A state tax must comply with the Interstate Commerce Clause of the United States Constitution.

65. The New York State Legislature, the Department, and the New York State Attorney General recognize that New York State lacks constitutional authority to impose its cigarette tax on out-of-state residents purchasing cigarettes from in-state businesses.

66. The Indian tax exemption coupon system, prior approval system, and Emergency Rule deny Nation-licensed businesses access to tax-free cigarettes for purposes of sale to out-of-state residents and thus compel Nation-licensed businesses to terminate their substantial interstate sales or to require the payment of New York tax by tax-exempt out-of-state residents.

67. Defendants' implementation and enforcement of the Indian tax exemption coupon system, prior approval system, and Emergency Rule as applied to the Nation, its members, and Nation-licensed businesses violates the Interstate Commerce Clause.

COUNT VI
Preemption by the Internet Tax Freedom Act

68. In the Internet Tax Freedom Act, 47 U.S.C. § 151 note §§ 1101-09 (2010), Congress prohibited multiple state taxes on electronic commerce

69. The Indian tax exemption coupon system, prior approval system, and Emergency Rule prohibit Nation-licensed businesses from obtaining non-New York taxed cigarettes for purposes of internet sales to out-of-state residents, which sales are subject to cigarette tax in such persons' states of residence.

70. Defendants' implementation and enforcement of the Indian tax exemption coupon system, prior approval system, and Emergency Rule as applied to the Nation, its members, and Nation-licensed businesses is preempted by the Internet Tax Freedom Act.

COUNT VII

Prepayment of Tax to which New York Is Not Entitled

71. As a matter of well-established federal law, with respect to tax-exempt sales to Indians in Indian country, New York State may not require the prepayment of cigarette tax to which it is not legally entitled.

72. The Indian tax exemption coupon system, prior approval system, and Emergency Rule require the prepayment of tax on cigarettes destined for purchase by tax-exempt Indians in Indian country by requiring the affixation of a New York tax stamp to such cigarettes.

73. Defendants' implementation and enforcement of the Indian tax exemption coupon system, prior approval system, and Emergency Rule violates federal law.

PRAYER FOR RELIEF

WHEREFORE, the Seneca Nation respectfully requests that this Court:

A. Enter a declaratory judgment pursuant to 28 U.S.C. § 2201 in favor of the Nation that the Indian tax exemption coupon and prior approval systems (N.Y. Tax Law §§ 471(1), 471(5), 471-e) and the Emergency Rule (N.Y. Comp. Codes R. & Regs. tit. 20, § 74.6) interfere with the Nation's sovereign right of self-government in violation of federal law.

B. Enter a declaratory judgment pursuant to 28 U.S.C. § 2201 in favor of the Nation that the Indian tax exemption coupon and prior approval systems (N.Y. Tax Law §§ 471(1), 471(5), 471-e) and the Emergency Rule (N.Y. Comp. Codes R. & Regs. tit. 20, § 74.6) deny and interfere with Nation members' immunity from state taxation and with the right of Nation-licensed businesses to engage in tax-free commerce with Nation members in violation of federal law.

C. Enter a declaratory judgment pursuant to 28 U.S.C. § 2201 in favor of the Nation that the Indian tax exemption coupon and prior approval systems (N.Y. Tax Law §§ 471(1), 471(5), 471-e) and the Emergency Rule (N.Y. Comp. Codes R. & Regs. tit. 20, § 74.6) impose more than minimal burdens on Indian retailers reasonably tailored to the collection of taxes from non-Indians in violation of federal law.

D. Enter a declaratory judgment pursuant to 28 U.S.C. § 2201 in favor of the Nation that the Indian tax exemption coupon and prior approval systems (N.Y. Tax Law §§ 471(1), 471(5), 471-e) and the Emergency Rule (N.Y. Comp. Codes R. & Regs. tit. 20, § 74.6) unduly burden commerce on the Nation's Territories in violation of the Indian Commerce Clause.

E. Enter a declaratory judgment pursuant to 28 U.S.C. § 2201 in favor of the Nation that the Indian tax exemption coupon and prior approval systems (N.Y. Tax Law §§ 471(1), 471(5), 471-e) and the Emergency Rule (N.Y. Comp. Codes R. & Regs. tit. 20, § 74.6) violate the Interstate Commerce Clause by eliminating the sale of non-New York taxed cigarettes by Nation-licensed businesses to out-of-state residents.

F. Enter a declaratory judgment pursuant to 28 U.S.C. § 2201 in favor of the Nation that the Indian tax exemption coupon and prior approval systems (N.Y. Tax Law §§ 471(1), 471(5), 471-e) and the Emergency Rule (N.Y. Comp. Codes R. & Regs. tit. 20, § 74.6) are preempted by the Internet Tax Freedom Act to the extent that they impose a multiple tax on the sale of non-New York taxed cigarettes by Nation-licensed businesses to out-of-state residents.

G. Enter a declaratory judgment pursuant to 28 U.S.C. § 2201 in favor of the Nation that the Indian tax exemption coupon and prior approval systems (N.Y. Tax Law §§

471(1), 471(5), 471-e) and the Emergency Rule (N.Y. Comp. Codes R. & Regs. tit. 20, § 74.6) require prepayment of tax to which New York is not entitled in violation of federal and state law.

H. Preliminarily and permanently enjoin Defendants from implementing and enforcing the Indian tax exemption coupon and prior approval systems (N.Y. Tax Law §§ 471(1), 471(5), 471-e) and the Emergency Rule (N.Y. Comp. Codes R. & Regs. tit. 20, § 74.6) against the Nation, its government instrumentalities, its members, Nation-licensed businesses, and state-licensed stamping agents and wholesale dealers vis-à-vis their distribution and sale of cigarettes to the Nation's Territories.

I. Preliminarily and permanently enjoin Defendants from restricting the possession, distribution, transportation, purchase, and sale of non-New York stamped cigarettes by the Nation, its government instrumentalities, its members, Nation-licensed businesses, and state-licensed stamping agents and wholesaler dealers vis-à-vis the Nation's Territories.

J. Award the Nation such other injunctive relief pursuant to 28 U.S.C. § 2202 as necessary to protect and validate the rights declared by this Court.

K. Award the Nation such other relief as the Court deems just and appropriate.

DATED this 17th day of August, 2010.

Respectfully submitted,

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