UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
-- x

THE STATE OF NEW YORK and THE CITY OF NEW YORK,

Plaintiffs,

-against-

UNITED PARCEL SERVICE, INC.,

Defendant.

-- x

Case No. 15-cv-1136-KBF

MEMORANDUM OF LAW OF PLAINTIFFS THE CITY OF NEW YORK AND THE STATE OF NEW YORK IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT ON UPS'S SEVENTH AFFIRMATIVE DEFENSE

ZACHARY W. CARTER
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) 356-2032

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Attorney for Plaintiff The People of the State of New York
120 Broadway
New York, New York 10271
(212) 416-6699

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

LEGAL STANDARD 3

UNDISPUTED FACTS 4

ARGUMENT

I. THE SEVENTH DEFENSE IS LEGALLY INSUFFICIENT UNDER ANY FACTS THAT UPS MAY ADVANCE. 9

II. THE RELIEF AFFORDED UPS FROM INJUNCTIONS ISSUED TO THE ST. REGIS-MOHAWK AND UNKECHAUGE CAN BE NO BROADER THAN THE RELIEF SOUGHT BY THE TRIBES THEMSELVES 17

CONCLUSION 25

TABLE OF AUTHORITIES

Cases **Pages**

Aluminum Workers Int'l Union Local Union No. 215 v. Consol. Aluminum Corp. 696 F.2d 437 (6th Cir. 1982) 3, 18

Anderson v. Liberty Lobby, lnc., 477 U.S. 242 (1986)....................4

BellSouth Telecommc'ns. Inc. v. W.R. Grace & Co.-Conn., 77 F.3d 603 (2d Cir. 1996)....................4

Brown v. Trustees of Boston University, 89l F.2d 337 (l[st] Cir. 1989) 18

Califano v. Yamasaki, 442 U.S. 682 (1979)....................2, 3, 18, 21

Celotex Corp. v. Catrett, 477 U.S. 317 (1986)....................4

City of New York v. Golden Feather Smoke Shop, Inc., 597 F.3d 115 (2d Cir. 2010)....................17

City of New York v. Golden Feather Smoke Shop, Inc., 2013 U.S. Dist. LEXIS 47037 (E.D.N.Y. March 29, 2013) 17

City of New York v. Gordon, 1 F. Supp. 3d 94 (S.D.N.Y. 2013)....................10, 7

City of New York v. Gordon, 2015 U.S. Dist. LEXIS 174153 (S.D.N.Y. December 10, 2015) 5

City of New York v. LaserShip, Inc., 2014 U.S. Dist. LEXIS 99617 (S.D.N.Y. July 9, 2014) 10, 17

The City of New York v. Mickalis Pawn Shop, LLC, 645 F.3d 114 (2d Cir. 2011)....................2, 8, 21, 23

City of New York v. Milhelm Attea & Bros., Inc., 550 F. Supp. 2d 332 (E.D.N.Y. 2008) 10, 17

City of New York v. Milhelm Attea & Bros., Inc., 2012 U.S. Dist. LEXIS 116533 (E.D.N.Y. Aug. 17, 2012)....................14, 16, 17

City of New York v. Milhelm Attea & Bros., Inc., 591 F. Supp. 2d 234 (E.D.N.Y. 2008) 13, 14, 15

Cases **Pages**

City of New York v. Wolfpack Tobacco,
2013 U.S. Dist. LEXIS 129103 (S.D.N.Y. Sept. 9, 2013)..17

Connecticut Hosp. Ass'n v. O'Neill,
863 F. Supp. 59 (D. Conn. 1994)..15

Corning Inc. v. PicVue Elecs., Ltd.,
365 F.3d 156 (2d Cir. 2004)...3, 22

Day Wholesale, Inc. v. State of New York,
856 N.Y.S. 2d 808 (4th Dep't 2008)...11, 13

e360 Insight v. Spamhaus Project,
500 F.3d 594 (7th Cir. 2007) 18

EEOC v. AutoZone, Inc.,
707 F.3d 824 (7th Cir. 2013) 18, 21

Floyd v. City of New York,
959 F. Supp. 2d 668 (S.D.N.Y. 2013)...23

Forschner Grp., Inc. v. Arrow Trading Co.,
124 F.3d 402 (2d Cir. 1997)..2

Hartford-Empire Co. v. United States,
323 U.S. 386 (1945)..2, 3, 21

Hicks v. Baines,
593 F.3d 159 (2d Cir. 2010)..4

Lau v. Meddaugh,
229 F.3d 121 (2d Cir. 2000)..22

Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation,
425 U.S. 463 (1976)...20

New York v. Shinnecock Indian Nation,
560 F. Supp. 2d 186 (E.D.N.Y. 2008) 21

Oneida Nation of New York v. Paterson,
No. 6:10-CV-1071, 2010 WL 4053080 (N.D.N.Y. Oct. 14, 2010) 11, 12

Oneida Nation of New York v. Cuomo,
645 F.3d 154 (2d Cir. 2011)...6, 19, 20

Cases **Pages**

Petrello v. White,
533 F.3d 110 (2d Cir. 2008)..22, 23

Price v. City of Stockton,
390 F.3d I105 (9th Cal.2004)..18

Price v. Cushman & Wakefield, Inc.,
808 F. Supp. 2d 670, 685 (S.D.N.Y. 2011) 4

Prof'l Ass'n of Coll. Educators v. El Paso Cnty. Cmty. Coll. Dist.,
730 F.2d 258 (5th Cir. 1984) 18

Quarles v. Gen. Motors Corp.,
758 F.2d 839 (2d Cir. 1985)..4

Quill Corp. v. North Dakota,
504 U.S. 298 (1992)..20

Ram v. Lal,
906 F. Supp. 2d 59 (E.D.N.Y. 2012) 21

S.C. Johnson & Son, Inc. v. Clorox Co.,
241 F.3d 232 (2d Cir. 2001)..21, 22, 24

Schmidt v. Lessard,
414 U.S. 473 (1974)..22

Seneca Nation of Indians v Paterson,
2010 U.S. Dist. LEXIS 109540 (W.D.N.Y. Oct. 14, 2010) 15

Seneca Nation of Indians v Paterson,
No. 10-CV-687A, 2010 WL 4027795 (W.D.N.Y. Oct. 14, 2010) 6, 11

Seneca Nation of Indians v. State of New York,
932 N.Y.S.2d 763 (Sup. Ct. N.Y. Cty. 2011) 11

United States v. Approximately Three Million Six Hundred Nine Thousand Eight Hundred Twenty Cigarettes of Assorted Brands,
2009 WL 773868 (W.D. Wash. Mar. 20, 2009) 10

United States v. Elshenawy,
801 F.2d 856 (6th Cir. 1986) 10

United States v. Morrison,
686 F.3d 94 (2d Cir. 2012)..17

Cases **Pages**

Wright v. Coughlin,
732 F.3d 133 (2d Cir. 1998)....................................4

Statutes & Rules **Pages**

18 U.S.C. § 2341....................................10, 14, 17

18 U.S.C. § 2342(a)....................................9

Fed. R. Civ. P. 56(a)....................................1, 4

N.Y. Comp. Codes R. & Regs. tit. 20, § 74.6....................................7

N.Y. Tax L. § 471....................................7, 12

N.Y. Tax Law § 471-e....................................7

Other Authorities

11A Fed. Prac. & Proc. Civ. § 2955, Form and Scope of Injunctions or
Restraining Orders (2d ed.)....................................3, 21, 23

Plaintiffs the City of New York ("City") and State of New York ("State") respectfully submit this Memorandum of Law in support of their motion for partial summary judgment, pursuant to Fed. R. of Civ. P. 56 (a), dismissing defendant United Parcel Service, Inc.'s ("UPS") Seventh Affirmative Defense ("Seventh Defense").

PRELIMINARY STATEMENT

Plaintiffs' pending motion for partial summary judgment against UPS for violating the 2005 Assurance of Discontinuance (the "AOD"), *ECF Nos*. 279, 280, presents evidence from concerned UPS drivers, UPS managers, UPS customers and UPS package-recipients establishing UPS's engagement in the distribution of cigarettes from the St. Regis-Mohawk Reservation to cigarette outlets in New York State, and nationwide. *See, e.g. ECF Nos*. 279, *passim*.

UPS asserts that its partnership with the St. Regis-Mohawk Reservation cigarette manufacturers is defensible, imagining that judicially-imposed stays of newly-enacted state laws governing reservation cigarette tax *collection* affected the long-existing imposition of the tax on all cigarettes "within the State's power to tax." Ample precedent holds that the collection or enforcement of a tax is different from the imposition of a tax, *i.e.*, whether a transaction is taxable is wholly distinct from whether there exists a mechanism to collect that tax. A stay of a tax collection method, for example on cigarette sales, does not alter the underlying legislative mandate that the tax "is imposed" on cigarette sales. It is the imposition of the tax, not the ability to collect it, that is determinative of CCTA liability – which turns on the existence of an "applicable tax." Stays of collection accordingly have no effect on CCTA liability.

A judgment dismissing the Seventh Defense is also warranted as a matter of law on the independent – but equally dispositive – ground that at the time the stays issued, they could not have operated in the manner theorized by UPS consistent with black-letter law governing

injunctive relief, for two reasons. First, the moving tribes themselves never sought relief with the effect that UPS now seeks, but merely sought to stay the introduction of the so-called "coupon" and "presumed demand" collection systems. The Seventh Defense accordingly would require the cited stays to be applied in a manner that would have gone well beyond the relief sought by the tribes. That is not permitted. "Injunctive relief granted to a party in a lawsuit *must be framed to remedy the harm claimed by the party*." *Hartford-Empire Co. v. United States*, 323 U.S. 386, 410 (1945) (emphasis added). "[I]t is . . . 'the essence of equity jurisdiction' that a court is only empowered 'to grant relief no broader than necessary to cure the effects of the harm caused by the violation.'" *City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 144 (2d Cir. 2011) (citing *Forschner Grp., Inc. v. Arrow Trading Co*., 124 F.3d 402, 406 (2d Cir. 1997) (internal quotation marks omitted). "[I]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki,* 442 U.S. 682, 702 (1979).

Undisputed facts accompanying this motion establish that the three tribes involved in UPS's reservation-to-reservation cigarette trade did not seek anything resembling the relief UPS demands here. In moving for injunctive relief, the tribes sought to enjoin *only* the institution of the "tax exempt coupon" and "presumptive demand" tax collection mechanisms by which supplies of unstamped cigarettes would be allocated to reservations via state-licensed stamping agents. No tribe sought to enjoin the *imposition* of a tax, or to preserve purportedly tax-free reservation-to-reservation commerce in New York. Simply put, the tribes' complaints were strictly limited to allegations that the new collection methods interfered with the tribes' acknowledged right to trade *among their own members* in tax-free cigarettes. The prayers for injunctive relief filed by each tribe studiously avoided any claim of a right to tax-free inter-tribal

commerce, *i.e*., a right to ship cigarettes off-reservation to a different New York tribe. No tribe sought a declaration that off-reservation shipments were untaxed. No tribe sought relief that would have permitted deliveries of untaxed cigarettes like those made by UPS to continue. Based on the precise terms of the relief that the tribes sought, the injunctions would not have been construed to have the effect UPS now seeks to attribute to them; the injunctions certainly cannot have those attributes half a decade after the stays dissolved. When the stays were in effect, no facts could have permitted the award of the relief UPS now requests because any such relief would have been vastly "more burdensome to the [State than] necessary to provide complete relief to the plaintiffs," *Califano,* 442 U.S. at 702, would go far beyond what was necessary "to remedy the harm claimed by the party," *Hartford-Empire,* 323 U.S. 386, 410, and would exceed what was necessary to accomplish "that which the situation specifically requires …." *Aluminum Workers Int'l Union Local Union No. 215 v. Consol. Aluminum Corp*., 696 F.2d 437, 446 (6th Cir. 1982).

Second, Rule 65 (d) has been read to mean that an injunction can only stand if "an ordinary person reading the court's order … [is] able to ascertain from the document itself exactly what conduct is proscribed." *See* 11A Fed. Prac. & Proc. Civ. § 2955, *Form and Scope of Injunctions or Restraining Orders* (2d ed.). No State tax official, much less an ordinary person, could understand that the various stays would operate as proposed by UPS. Injunctions that do not comply with Rule 65(d) are unenforceable. *Corning Inc. v. PicVue Elecs., Ltd*., 365 F.3d 156, 158 (2d Cir. 2004).

LEGAL STANDARD

Summary judgment is appropriately granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P, 56(c). The "mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact," *Anderson v. Liberty Lobby, lnc*., 477 U.S. 242, 247-48 (1986); *see also Quarles v. Gen. Motors Corp*., 758 F.2d 839, 840 (2d Cir. 1985). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248.

On a motion for summary judgment, the initial burden rests with the moving party to make a *prima facie* showing that no material fact issues exist for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 331 (1986). Once this showing is made, "[t]o defeat summary judgment, the non-movant must produce specific facts" to rebut the movant's showing and to establish that there are material issues of fact requiring a trial. *Wright v. Coughlin*, 732 F.3d 133, 137 (2d Cir. 1998) (citing *Celotex*, 477 U.5. at 322).

"A party may not rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment," as "[m]ere conclusory allegations or denials cannot by themselves create a genuine issue of material fact where none would otherwise exist." *Hicks v. Baines*, 593 F.3d 159, 166 (2d Cir. 2010) (citations omitted); *see also Price v. Cushman & Wakefield, Inc.*, 808 F. Supp. 2d 670, 685 (S.D.N.Y. 2011) ("In seeking to show that there is a genuine issue of material fact for trial, the non-moving party cannot rely on mere allegations, denials, conjectures or conclusory statements, but must present affirmative and specific evidence showing that there is a genuine issue for trial."). In addition, self-serving affidavits, standing alone, are insufficient to create a triable issue of fact and defeat a motion for summary judgment.

See BellSouth Telecommc'ns. Inc. v. W.R. Grace & Co.-Conn., 77 F.3d 603, 615 (2d Cir. 1996); *City of New York v. Gordon*, 2015 U.S. Dist. LEXIS 174153 (S.D.N.Y. December 10, 2015) (granting summary judgment against a common carrier under the CCTA).

UNDISPUTED FACTS

Plaintiffs respectfully maintain their position that summary judgment dismissing the Seventh Defense is determinable either with or without reference to any facts, on each of two independent grounds First, a stay of enforcement of a tax collection mechanism cannot alter the statutory mandate of New York Tax L. § 471 imposing a tax on all cigarettes within the State's power to tax, a power that includes reservation-to-reservation sales. Because under any set of facts, there was an "applicable" tax within the meaning of the CCTA on UPS's inter-reservation cigarette shipments, UPS will be unable to introduce any facts that could lead to a conclusion that no applicable tax existed, because the governing principle applies independent of any facts.[1]

Alternatively, additional undisputed facts set forth in the *Second R. 56.1 Statement* establish that neither the St. Regis-Mohawk Tribe, from whose reservation UPS's deliveries originated, nor the Unkechauge Tribe, nor the Seneca Nation, to which UPS delivered cigarettes, sought <u>any</u> injunctive relief that bore any relation to the conduct that UPS is charged with here – the delivery of unstamped cigarettes among unrelated tribes. UPS cannot arrogate to itself forms of injunctive relief not even sought by the proponents of the relevant injunctions.

Summary of Undisputed Facts Related to the Stays

In August 2010, four New York Indian tribes moved for preliminary injunctions against New York's then newly enacted cigarette tax laws and regulations (hereafter, the "2010

---

[1] Plaintiffs do provide certain undisputed facts in their *Second Statement of Undisputed Facts Pursuant to Local Rule 56.1* ("*Sec. R. 56.1 St.*"), but merely to establish that UPS did ship cigarettes between reservations, on which there was an applicable tax. *See Sec. R. 56.1 St.* ¶¶ 28-55.

Amendments"): the Seneca Nation of Indians, the Unkechauge Tribe, the St. Regis-Mohawk Tribe and the Oneida Nation. *See generally Oneida Nation of New York v. Cuomo,* 645 F.3d 154 (2d Cir. 2011). Virtually all of UPS's reservation-to-reservation shipments at issue in this case originated from the St. Regis Mohawk Reservation. Except for cigarettes delivered outside of New York State, a considerable portion of the St. Regis Mohawk shipments were delivered to the Poospatuck (Unkechauge) Reservation and the Seneca Nation reservations. UPS also delivered unstamped cigarettes to New York tribes that did not move to enjoin the tax laws, for example the Shinnecock tribe. *See Sec. R. 56.1 St.* ¶¶ 40, 50.[2]

The actual State conduct complained of by the tribes, and their proposed relief, set forth in *Plaintiffs' Second Rule 56.1 Statement,* is summarized below.

Seneca Complaint – The complaint brought by the Seneca Nation of Indians in *Seneca Nation of Indians v Paterson*, No. 10-CV-687A, 2010 WL 4027795, at *4 (W.D.N.Y. Oct. 14, 2010) ("Seneca Complaint"), sought declaratory and injunctive relief against the recently enacted 2010 Amendments, but only as those statutes and regulations applied to the Seneca Nation, its members, and its Nation-licensed tobacco retailers and stamping agents. The Seneca's principal allegations against the State, as summarized here, were that the new laws and regulations

> i) Included no allocation provisions to ensure that Nation members could "purchase non-New York taxed cigarettes throughout the Nation's territories" or ensure that Nation-licensed businesses could participate in non-New York taxed commerce *with Nation members*, thereby interfering with the right of Nation members *to purchase non-New York taxed cigarettes from retailers throughout the [Seneca]Territories and the right of Nation licensed businesses to engage in tax free commerce <u>with Nation members on the Territories</u>* in violation of federal law.
>
> ii) Denied Nation-licensed businesses the ability to sell tax-free cigarettes *in interstate commerce to tax-exempt <u>out-of-state</u> residents*, by providing no means

[2] Although the out-of-state deliveries are perhaps not relevant to the calculation of damages, they are relevant to the proof that UPS failed to honor nationwide the AOD entered into with the New York Attorney General.

> for Seneca-licensed retailers operating in the Seneca Territories to obtain tax-free cigarettes *for purposes of sale to tax-exempt out-of-state residents*.[3]
>
> iii) Did not assure access to tax-free cigarettes by Nation-licensed businesses and members, so that a Seneca retailer operating on the Seneca Territories could exercise its right to sell, and a qualified Seneca member could exercise the right to buy untaxed cigarettes, if the retailer had been unable to purchase a sufficient number of tax-exempt coupons or obtain prior-approval cigarettes.

Sec. R. 56.1 St. ¶¶ 3-13. The Seneca Complaint sought to enjoin the State 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*," and to enjoin the State from restricting the possession, distribution, transportation, purchase, and sale of untaxed cigarettes to the Nation *by "state-licensed stamping agents and wholesaler dealers*." *Sec. R. 56.1 St.* ¶ 13 (emphasis added).[4]

St. Regis Complaint – The complaint brought by the St. Regis Mohawk Tribe asserted that the 2010 Amendments denied tribe members the right to purchase untaxed cigarettes by imposing the Indian tax coupon system and the prior approval system as the only methods by which untaxed cigarettes could be sold to reservation retailers. The St. Regis claimed that the 2010 Amendments:

> Denied the right of *tribal members* to purchase untaxed cigarettes from retailers *on the Tribe's reservation* and the right of tribally-licensed businesses to engage in tax free commerce *with tribal members on the reservation* in violation of federal law.

---

[3]It is unclear who such entities could be, but the question is immaterial as Plaintiffs do not seek liability for out-of-state deliveries.

[4] Significantly, none of the cigarette shippers from the St. Regis Mohawk Reservation are "state-licensed stamping agents and wholesaler dealers," an additional ground that their shipments do not come within the scope of the relief sought.

Sec. R. 56.1 St. ¶ 16. The St. Regis Complaint also asserted that the two tax collection methods interfered with tribal governance because the operation of the methods imposed administrative burdens on the tribe. The St. Regis Complaint accordingly sought injunctive relief prohibiting the State from *enforcing either the Indian tax coupon system or the prior approval system* until such time as the State revised its system to address the concerns of tribal self-government and to avoid restricting *on-reservation* cigarette transactions only. *Sec. R. 56.1 St.* ¶ 17.

The Unkechauge Complaint – As summarized here, the complaint filed by the Unkechauge Tribe also stated that the Indian tax exemption coupon and prior approval systems:

> i) Provided no mechanism by which to ensure that an Unkechauge retailer operating on the Poospatuck Reservation may exercise its federal right to sell, and a qualified Unkechauge member may exercise his or her federal right to buy, untaxed cigarettes if the two systems did not provide retailers with a sufficient quantity of untaxed cigarettes.
>
> ii) Provided no means by which Unkechauge-licensed retailers operating in the Unkechauge Territories may obtain tax-free cigarettes *for purposes of sale to tax-exempt out-of-state residents*.
>
> iii) Impaired Nation members' right to purchase untaxed cigarettes of the brand of their choosing *from Nation licensed retailers throughout the Nation's Territories* and significantly impaired *Nation licensed businesses' right to participate in tax-free commerce with Nation members*.

Sec. R. 56.1 St. ¶¶ 19-27.

Considering the three very similar complaints together, it is evident that each complaint sought an injunction solely to block implementation of the Indian tax exemption coupon and prior approval systems, first because, as the tribes claimed, those collection methods were intrinsically burdensome to the tribes and interfered with tribal self-governance, and second because the collection systems purportedly would not allocate sufficient numbers of untaxed cigarettes to tribal retailers, thereby denying the right of reservation Indians to deal in untaxed

cigarettes with on-reservation tribe members or with certain (undefined) "*out-of-state* tax-exempt persons." *Sec. R. 56.1 St.* ¶ 5, 11, 20, 23, 27. (emphasis added).

Notably, no tribe made a claim of a right to make tax-free reservation-to-reservation deliveries within New York State or asserted that the coupon or prior approval systems affected reservation-to reservation cigarette deliveries. In marked contrast to the tribes' complete silence with respect to New York reservation-to-reservation cigarette sales, the tribes notably did complain that the collection methods interfered with a purported right to engage in tax-free commerce with *out-of-state* entities. Other than the strictly on-reservation effects of the two tax collections systems, the tribes do not even allude to intrastate, inter-tribal commerce at all. *See generally Sec. R. 56.1 St.* ¶¶ 2-27. It may be presumed either that the tribes did not believe they had a right to make such sales, or that the 2010 Amendments were not seen by the tribes as changing the law respecting such deliveries.

ARGUMENT

I. THE SEVENTH DEFENSE IS LEGALLY INSUFFICIENT UNDER ANY FACTS THAT UPS MAY ADVANCE.

The Seventh Defense is applicable solely to the CCTA (and RICO) claims, *UPS*, 2016 U.S. Dist. LEXIS 14773**,** at n.15. Understanding the legal insufficiency of the Defense accordingly requires a brief reiteration of the language of the CCTA, which provides in relevant part that "[i]t shall be unlawful for any person knowingly to ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes . . . ." 18 U.S.C. § 2342(a), defined as "a quantity in excess of 10,000 cigarettes, which 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, impression, or other indication to be placed on packages or other

containers of cigarettes to evidence payment of cigarette taxes… *Id.* § 2341(2).[5] (emphasis added).

A person thus violates the CCTA by engaging, in Jurisdiction A, in the conduct listed in the statute, *i.e*., "distribution," with more than 50 cartons of cigarettes, that do not bear Jurisdiction A's tax stamp, if Jurisdiction A has a tax applicable to the cigarettes at issue and requires the use of tax stamps to evidence cigarette tax payments. "[T]he definition of 'contraband cigarettes' depends only upon the absence of indicia of state tax payment and location in a state requiring such indicia." *United States v. Elshenawy*, 801 F.2d 856, 858 (6th Cir. 1986); *United States v. Approximately Three Million Six Hundred Nine Thousand Eight Hundred Twenty Cigarettes of Assorted Brands*, 2009 WL 773868, at *5 (W.D. Wash. Mar. 20, 2009) ("Because…state taxes were required on the cigarettes, and state law always required stamps indicating the payment of applicable state taxes, the cigarettes are contraband under 18 U.S.C. § 2341(2).").

UPS's Seventh Defense contends that "Plaintiffs' claims are barred to the extent they are based on deliveries that they were enjoined from restricting, pursuant to orders enjoining the implementation and enforcement of the New York Tax Law §§ 471 & 471-e, pertaining to Native American persons or entities." *UPS Answer* Defenses and Affirmative Defenses ¶ 7. "UPS has subsequently explained that the defense only applies to shipments it picked up from one Indian reservation and delivered to another Indian reservation retailer." *Order dated June 21,*

[5] The exception in the CCTA for cigarettes in the possession of common carriers does not apply when the common carrier is shipping cigarettes that are, as here, not within the state-licensed and regulated cigarette distribution system. *See City of New York v. Gordon*, 1 F. Supp. 3d 94 (S.D.N.Y. 2013); *City of New York v. Milhelm Attea & Bros., Inc.*, 550 F. Supp. 2d 332 (E.D.N.Y. 2008); *City of New York v. LaserShip, Inc.*, 2014 U.S. Dist. LEXIS 99617 (S.D.N.Y. July 9, 2014).

2016, ECF No. 258 (citing *e.g.*, Apr. 26, 2016 Oral Arg. Tr. at 22:16-21, ECF No. 229.).[6] The essence of UPS's defense is that, for purposes of the CCTA, there was no "applicable tax" on the cigarettes UPS delivered, *i.e.*, the stays referenced in the Seventh Defense "de-taxed" cigarettes shipped by UPS while the stays were in place.

The Court originally held that "UPS's Seventh Defense fails as a matter of law, [and that] [e]ach of plaintiffs' three asserted grounds provides an alternative basis for this determination," *New York v. UPS*, 2016 U.S. Dist. LEXIS 14773, at *80-81 (S.D.N.Y. Feb. 8, 2016).[7] On reconsideration, the Court found that "the Court cannot say that UPS's defense fails under all potential sets of facts that UPS might present," *June 21, 2016 Order, ECF No.* 258 at 3, because "the Court's task . . . is to assess whether there is any potential set of facts upon which UPS could defend against any of plaintiffs' claims based on any of the orders that it cites," *id.* at 5, inviting UPS to present facts under which the Seventh Defense could be viable.

Plaintiffs respectfully submit that the Court's original decision dismissing the Seventh Defense as a matter of law was substantively correct, and further, as to "the issues raised by the Seventh Defense, in the end the analysis is quite simple." *UPS*, 2016 U.S. Dist. LEXIS 14773, at *64.

---

[6] The sources of the various stays cited by UPS are *Day Wholesale, Inc. v. State of New York*, 856 N.Y.S. 2d 808, 811-812 (4th Dep't 2008); *Oneida Nation of New York v. Paterson*, No. 6:10-CV-1071, 2010 WL 4053080, at *13 (N.D.N.Y. Oct. 14, 2010); *Seneca Nation of Indians v Paterson*, No. 10-CV-687A, 2010 WL 4027795, at *4 (W.D.N.Y. Oct. 14, 2010); *Seneca Nation of Indians v. State of New York*, 932 N.Y.S.2d 763 (Sup. Ct. N.Y. Cty. 2011).

[7] The three grounds for dismissing the Seventh Defense were i) "the generally applicable 2010 amendments to § 471-- imposing a tax on all cigarettes sold on Native American reservations to non-members of the nation or tribe and requiring that tax stamps be affixed to such cigarettes--were unaffected by the stays and remained in effect throughout the entire period at issue"; ii) "[R]egardless of whether the pre-amendment or post-amendment version of § 471 was in effect during the stays, commercial reservation-to-reservation shipments of cigarettes were taxable as a matter of law and were required to bear tax stamps." 2016 U.S. Dist. LEXIS 14773, at *83; and iii) "UPS was not a party in any of [the cited] actions, nor was it (or any other shipper) expressly or implicitly identified as an intended beneficiary or participant in any of those decisions. There is therefore no basis upon which UPS can claim that it is entitled to benefit from that preliminary relief." 2016 U.S. Dist. LEXIS 14773, at *83-84.

So that the analysis presented here is unambiguous, Plaintiffs assume *arguendo* that during the entire period in which UPS engaged in reservation-to-reservation shipments, N.Y. Tax L. § 471 contained precisely the same language as it did prior to the 2010 Amendments. That is, N.Y. Tax L. § 471 is applied to the present analysis as if UPS's reservation-to-reservation deliveries all occurred before June 2010, the effective date of the 2010 Amendments. Plaintiffs' premise is that UPS's liability can be assessed as if Tax L. § 471 had never even been amended. UPS concurs that this is the appropriate analysis with which to examine whether there was an applicable tax on the cigarettes UPS delivered: "the pre-amendment version of the relevant tax laws … was enforceable…." *Dkt. No*. 111 at 14. The relevant inquiry is whether the stays affected the pre-amendment statutory mandate that "[t]here is hereby imposed and shall be paid a tax on all cigarettes possessed in the state by any person for sale, except that no tax shall be imposed on cigarettes sold under such circumstances that this state is without power to impose such tax." *N.Y. Tax L.* § 471 (1).

To first dispose of the injunction in *Oneida Nation of New York v. Paterson*, No. 6:10-CV-1071, 2010 WL 4053080 (N.D.N.Y. Oct. 14, 2010), identified as most likely to be relevant to the Seventh Defense, *June 21, 2016 Order, ECF No.* 258 at 7, the *Oneida Nation* injunction enjoined only actions by the State that would interfere with "*the Oneida Nation's* purchase, acquisition, sale, distribution, transportation, or possession of cigarettes not bearing a New York tax stamp." *See June 21, 2016 Order, ECF No.* 258 at 7 (emphasis added). There are ***no*** UPS cigarette deliveries in this case to the "Oneida Nation," and indeed, no transactions involving any entity on the Oneida Reservation.[8] *Sec. R. 56.1 St.* ¶ 56. However "broad [the] scope of the

[8] Plaintiffs state as an undisputed fact that there are no deliveries by UPS to the Oneida Nation. *Sec. R. 56.1 St.* ¶ 56. Plaintiffs' understanding of the reconsideration order places the burden on UPS to come forward with facts by which the Seventh Defense could be sustained and hence at least to show the existence of UPS deliveries to the Oneida Nation that would make that injunction relevant to this motion.

preliminary injunction issued in *Oneida Nation,*" *June 21, 2016 Order, ECF No.* 258 at 7, there cannot exist any facts "upon which UPS may be able to invoke the [*Oneida Nation*] order to defend against plaintiffs' claims," because none of Plaintiffs' claims involve the Oneida Nation or Oneida tribe members.

The other three injunctions referenced by UPS, in *Day Wholesale, Unkechauge v. Paterson*, and *Seneca v. Paterson*, do not approach the breadth of the *Oneida Nation* injunction. As described by this Court, the injunction in *Day Wholesale, Inc. v. State of New York*, 856 N.Y.S. 2d 808 (4th Dep't 2008),

> concluded that amendments to N.Y. Tax Law § 471-e enacted in March 2006 could not be in effect until the New York State Department of Taxation and Finance implemented the coupon scheme for reservation Indians contemplated by that amendment. *Id*. at 811-12.[9]

June 21, 2016 Order, ECF No. 258 at 5. The effect of the *Day Wholesale* injunction on the existence of an applicable tax on cigarettes sold by Indian retailers (and hence on the requirement under the pre-2010 Amendment law that they bear stamps) was the subject of close analysis in *City of New York v. Milhelm Attea & Bros., Inc.*, 591 F. Supp. 2d 234 (E.D.N.Y. 2008) ("*Milhelm Attea I*"):

> Relying on [*Day Wholesale*], defendants argue that stamping agents are not required to affix tax stamps on cigarettes sold to reservation retailers until the Department issues and distributes tax exemption coupons pursuant to § 471-e. Defendants cite to the legislative scheme set forth in § 471-e and discussed in *Day Wholesale* to support their argument that defendants' sale of unstamped cigarettes does not violate New York tax laws.

---

[9] The amendments to § 471-e in 2006 were substantially similar to the 2010 Amendments in containing an express requirement for stamps on all reservation cigarettes, as opposed to the pre-2006 requirement that all reservation cigarettes bear stamps which was less expressly stated through the "power to tax" criterion.

591 F. Supp. 2d at 236. The *Milhelm Attea* court rejected the argument, applying the same principles that apply here to foreclose UPS's argument:

> This Court does not disagree with the contention that § 471-e was intended by the New York legislature to provide a mechanism to collect taxes on re-sales of cigarettes by Native American retailers to non-tribe members. The current enforceability of that statute, however, does not alter the scope of § 471 or its legal force. Those sales do not become non-taxable events with the Appellate Division's decision in *Day Wholesale*; rather, the court in that case found that statutorily prescribed pre-conditions for one proposed mechanism of collection have not been met.

591 F. Supp. 2d at 237 (emphasis added). The *Milhelm Attea* court then explained why the continued imposition of the cigarette tax by Tax L. § 471 was determinative of CCTA liability:

> [T]he crux of the issue before this Court is how the requirements set forth in New York Tax Law § 471 interact with a federal statute, the CCTA. The Appellate Division's findings in *Day Wholesale* do not materially change this Court's finding that N.Y. Tax Law § 471 constitutes an "applicable" tax for the purposes of 18 U.S.C. § 2341.

591 F. Supp. 2d at 238. The *Milhelm Attea* court's reference to N.Y. Tax Law § 471 as an "applicable" tax is the linch-pin of CCTA liability, because contraband cigarettes are defined as "a quantity in excess of 10,000 cigarettes, which 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 impression, or other indication to be placed on packages or other containers of cigarettes to evidence payment of cigarette taxes, …. 18 U.S.C. §2341(2) (emphasis added).

There are no facts that, when construed with the terms of the *Day Wholesale* injunction, could have altered the decision in *Milhelm Attea,* where summary judgment was granted on the CCTA claims. *See City of New York v. Milhelm Attea & Bros., Inc.*, 2012 U.S. Dist. LEXIS 116533 (E.D.N.Y. Aug. 17, 2012). Nor are there any conceivable facts that could be presented

by UPS by which "[t]he . . . enforceability of that statute [§ 471-e] . . . alter[s] the scope of § 471 or its legal force. [UPS deliveries] do not become non-taxable events with the Appellate Division's decision in *Day Wholesale*," *Milhelm Attea I*, 591 F. Supp. 2d at 237, nor should "[t]he Appellate Division's findings in *Day Wholesale* . . . materially change this Court's [understanding] that N.Y. Tax Law § 471 constitutes an "applicable" tax for the purposes of 18 U.S.C. § 2341." *Id.* at 238.

The stay in *Seneca Nation of Indians v. Paterson*, 2010 U.S. Dist. LEXIS 109540 (W.D.N.Y. Oct. 14, 2010), is less precisely worded, but ultimately no different in scope than that in *Day Wholesale*.[10] The *Seneca Nation* court also expressly emphasized that "granting a stay pending appeal … will simply preserve the *status quo* while a higher court considers the merits of the plaintiffs' claims." *Id.* at *11 (citing *Connecticut Hosp. Ass'n v. O'Neill*, 863 F. Supp. 59 (D. Conn. 1994) ("In ruling on a motion pursuant to Rule 62(c), the district court's objective is to preserve the *status quo* during the pendency of an appeal.")). Preserving the *status quo* meant that Tax L. §471 as it existed prior to amendment was in effect, precisely the assumption adopted in this memorandum. *Supra* at *11-12. Thus while the "new" language in the 2010 Amendments was stayed from taking effect, the language in pre-amendment Tax L. §471, imposing a tax on all cigarettes within the State's power to tax, and mandating stamps, remained in effect.

The *Seneca Nation* stay was also analyzed, in *Milhelm Attea II*. The stamping agents in *Milhelm Attea*, like UPS here, claimed they could not incur CCTA liability for sales made while the *Seneca Nation* (and related) stays were in place, arguing that the stays vitiated the

[10] Throughout the decision implementing the stay, the *Seneca Nation* court's statements make clear that the stay was intended to apply to the "new" language of the Tax Laws. The court observed that "Absent a stay pending appeal, the *new tax amendments* will take effect immediately." … "[T]he Court finds it necessary to further stay implementation of the *new tax amendments* pending appeal … ." *Id.* at *3. "The tax law *amendments* will almost certainly have an adverse impact upon the Nations' existing tobacco economies." *Id.* at *7. "Although some aspects of the *new tax amendments* are authorized by prior Supreme Court precedent…." *Id.* at *10 "some aspects of the new tax amendments are unprecedented,…" *Id.* at *11. (all emphases added).

requirement that stamps be affixed. The Court rejected the argument by applying the same reasoning applied in *Day Wholesale*:

> The defendants argue, however, that they cannot be liable for sales of unstamped cigarettes between September 2010 and June 2011 due to the court-issued stays of enforcement of the Tax Law Amendments.
>
> The primary federal court stay at issue here is the one issued by the district court in the Western District of New York. There, although denying preliminary injunctions, the district court did stay "enforcement of the New York tax law amendments pending appeal." *Seneca Stay*, 2010 U.S. Dist. LEXIS 109525, 2010 WL 4027795, at *4; *Unkechauge*, 752 F. Supp. 2d at 328. … These orders remained in place until the denial of the Western District injunctions was affirmed, … in May 2011. *Oneida*, 645 F.3d at 175-76.

Milhelm Attea II, 2012 U.S. Dist. LEXIS 116533, 73-75. The court in *Milhelm Attea II* again rejected the notion that a stay against enforcing methods of *collection* could have an effect on a CCTA claim:

> Even if these stays could permissibly preclude civil liability premised on the amended tax laws for acts committed during the stays' pendency, *but see Edgar v. MITE Corp*., 457 U.S. 624, 648-49, 102 S. Ct. 2629, 73 L. Ed. 2d 269 (Stevens , J., concurring in part and concurring in judgment), *they did not repeal the prior, existing version of § 471, which this Court has held was sufficient to impose a stamping requirement on the defendants' sales* [to Indian reservations]. This Court has consistently held that *the absence of a statutory "collection mechanism" does not affect the applicability of the general tax imposed by § 471*. Accordingly, a stay of enforcement of the amended collection mechanism could not remove this tax liability. ….
>
> Accordingly, the Court rejects the defendants' contention that the stays of enforcement insulated their conduct from liability in the period from September 2010 through June 2011.

Milhelm Attea II, 2012 U.S. Dist. LEXIS 116533, 75-76 (emphasis added).[11]

UPS has previously attempted to avoid this argument by asserting the extraneous argument that reservation-to-reservation sales to cigarette retailers are not taxable, again without citing any authority, *see Def. UPS's Mem. Opp. To Pls.' Mot. Strike, December 18, 2015*, and in the face of abundant authority to the contrary. *See generally ECF No.* 122 at 10*; No*. 167 at 7, *No*. 198 at 19-20.

II. THE RELIEF AFFORDED UPS FROM INJUNCTIONS ISSUED TO THE ST. REGIS-MOHAWK AND UNKECHAUGE CAN BE NO BROADER THAN THE RELIEF SOUGHT BY THE TRIBES THEMSELVES

The three grounds on which the Court originally struck the Seventh Defense included the fact that "UPS was not a party in any of [the cited] actions, nor was it (or any other shipper) expressly or implicitly identified as an intended beneficiary or participant in any of those decisions. There is therefore no basis upon which UPS can claim that it is entitled to benefit from that preliminary relief." *February 8, 2016 Order, ECF No.* 177 at *63. While this ruling was certainly correct, there exists a still stronger basis on which to dismiss the Seventh Defense now that facts outside of the pleadings may be introduced on this summary judgment motion. Even if UPS were a party to the actions in which the stays issued, a review of the nature and scope of the relief sought by the tribal proponents of the injunctions establishes that there are no facts from which UPS could show that the relief UPS seeks here is within the nature and scope of the stays

[11] There is of course abundant authority that off-reservation sales are subject to an applicable tax. *See, e.g.*, *United States v. Morrison*, 686 F.3d 94 (2d Cir. 2012); *City of New York v. Golden Feather Smoke Shop, Inc.*, 597 F.3d 115 (2d Cir. 2010); *City of New York v. Gordon*, 1 F. Supp. 3d 94 (S.D.N.Y. 2013); *City of New York v. Milhelm Attea & Bros*., *Inc.*, 550 F. Supp. 2d 332 (E.D.N.Y. 2008); *City of New York v. LaserShip, Inc.*, 2014 U.S. Dist. LEXIS 99617 (S.D.N.Y. July 9, 2014); *City of New York v. Wolfpack Tobacco*, 2013 U.S. Dist. LEXIS 129103 (S.D.N.Y. Sept. 9, 2013); *City of New York v. Golden Feather Smoke Shop, Inc.*, 2013 U.S. Dist. LEXIS 47037 (E.D.N.Y. March 29, 2013). All of these decisions found liability under the CCTA for cigarette sales made on Indian reservations. An element of that liability was that there was an applicable tax on the cigarettes. *See* 18 U.S.C. § 2341 *et seq*.

that were in fact issued. To afford UPS the relief it seeks here would go well beyond the subject of the tribes' complaints and well beyond the scope of the relief that the tribes received.

Overbreadth – The Court has already credited the general rule that "an injunction must be narrowly tailored . . . to remedy only the specific harms shown by the plaintiffs...," *Price v. City of Stockton*, 390 F.3d 1105 (9th Cir. 2004), *i.e*., "to give only the relief to which plaintiffs are entitled." *Brown v. Trustees of Boston University*, 89l F.2d 337 (lst Cir. 1989). *See ECF. No*. 67, at 14. A "court must 'tailor injunctive relief to the scope of the violation found.'" *e360 Insight v. Spamhaus Project*, 500 F.3d 594, 604 (7th Cir. 2007) (internal quotation marks omitted). The Second Circuit has itself "instructed that injunctive relief should be 'narrowly tailored to fit specific legal violations,' and that the court must 'mold each decree to the necessities of the particular case'" *Mickalis Pawn*, 645 F.3d at 144. Thus, an injunction benefiting nonparties is only permissible "if such breadth is necessary to give *prevailing parties* the relief to which they individually are entitled," *Prof'l Ass'n of Coll. Educators v. El Paso Cnty. Cmty. Coll. Dist.*, 730 F.2d 258, 274 (5th Cir. 1984) (emphasis added). Likewise, injunctive relief "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano*, 442 U.S. at 702; *Aluminum Workers Int'l Union Local Union No. 215*, 696 F.2d at 446 ("because equitable relief is an extraordinary remedy to be cautiously granted, it follows that the scope of relief should be strictly tailored to accomplish *only that which the situation specifically requires* …") (emphasis added). Thus, the effect of the stays on the tax laws must comply with "the traditional equitable principle that injunctions should prohibit no more than the violation established in the litigation or similar conduct reasonably related to the violation." *EEOC v. AutoZone, Inc*., 707 F.3d 824, 841 (7th Cir. 2013).

There are no facts that UPS could conceivably introduce that would bring it within the scope of relief afforded under the stays. Every delivery to which UPS seeks to apply the Seventh Defense is a reservation-to-reservation delivery, which no tribe sought to bring within the scope of the stays sought. No tribe that moved for injunctive relief claimed a right to make reservation-to-reservation deliveries of untaxed cigarettes, complained that the 2010 Amendments interfered with the ability to make such deliveries or sought to stay application of the tax laws to such deliveries. *See generally Sec. 56.1 St.* ¶¶ 4-27.[12]

As shown in *Plaintiffs' Second Statement Pursuant to Local Rule 56.1* and the complaints attached as exhibits, the tribes were troubled by the two cigarette allocation systems, the so-called "coupon" and "prior approval" systems, which were to be used to provide the tribes with the small supply of untaxed cigarettes to which they are entitled under federal law. *See Oneida Nation v. Cuomo,* 645 F.3d at 161. The tribes' opposition to the 2010 Amendments arose entirely out of the tax exempt coupon and prior approval allocation systems, which the tribes claimed would have two broad, adverse effects upon them. First, because the systems apparently imposed

[12] In this respect, the tribes were far more knowledgeable of the law than UPS, which dreamt up an exemption for "reservation-to-reservation" cigarette deliveries without offering any authority. *Def. UPS's Mem. Opp. To Pls.' Mot. Strike, December 18, 2015*, at *14, ECF No. 111. That none of the New York tribes claimed such a right is some evidence that even the tribes do not believe they have such a right, an inference that is confirmed on the website of Ho-Chunk Distribution, Inc. ("HCI"), an arm of the Nebraska Winnebago tribe, which self-identifies as "one of the largest Tribal cigarette and tobacco distributors in the U.S." HCI forthrightly informs prospective customers that:

> Nation to nation transactions do not automatically exempt entities, including Indian Nations or businesses operating in Indian Country, from their reporting obligations or paying state cigarette excise taxes. Unless expressly exempted by law, state and local cigarette taxes apply. Customers should consult a knowledgeable attorney about their tax and reporting obligations.

www.hcidistribution.com (last visited July 21, 2016) (emphasis added) (Exhibit 1 to the Declaration of Eric Proshansky ("Proshansky Decl.")).

Ironically, when HCI sought to utilize UPS for reservation-to-reservation cigarette deliveries, UPS declined the work, recognizing that the deliveries would violate the Contraband Cigarette Trafficking Act. *Pltffs. R. 56.1 St.* ¶ 1. Apparently, having declined servicing HCI's cigarette delivery service while embracing that from the St. Regis reservation was merely another "disconnect." *June 6, 2016 Oral Arg. Tr.* at 68:17-20.

various administrative duties, the tribes claimed that the 2010 Amendments interfered with tribal self-government. *See, e.g.*, *Sec. 56.1 St.* ¶17. Second, the tribes asserted that the two systems could not operate effectively, and thus would deprive tribe members and tribal cigarette sellers of certain rights under federal law. *Oneida Nation*, 645 F.3d at 157 ("Plaintiff [tribes] argue that the amended tax law interferes with their tribal sovereignty and *fails to ensure their access to tax-free cigarettes for personal use*." (emphasis added)). The tribes' complaints show that the rights claimed by the tribes consisted of, first, the right to buy and sell tax-free cigarettes, but only on a tribe's own reservation, and only among members of the same tribe. *See, e.g.*, *Sec. 56.1 St.* ¶¶ 9, 16, 19. "Federal law prohibits New York from taxing cigarette sales to enrolled tribal members on their own reservations for personal use." *Oneida Nation*, 645 F.3d at 158 (citing *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 475-81 (1976)). Second, the tribes claimed they had a right to sell tax-free cigarettes *in interstate commerce* to "tax-exempt persons *out-of-state*. *See, e.g.*, *Sec. 56.1 St.* ¶¶5, 11, 20, 27.[13] Because the tribes believed that the allocation systems would not operate to permit them to obtain cigarettes in sufficient quantities to supply these two markets, the intra-tribal and the out-of-state, they sought to enjoin enforcement of the statutes creating those systems. Nowhere did the tribes seek injunctive relief that would have permitted tax-free reservation-to-reservation deliveries. *See generally Sec. 56.1 St.* ¶¶ 3-27.

[13] It is unclear who the intended so-called tax exempt recipients of such sales were. The tribes may have been alluding to the fact that cigarette dealers were permitted as a matter of *New York tax law* to send unstamped cigarettes out-of-state. The reference by the tribes to the recipients as "tax-exempt" may be based in the fact that the out-of-state buyers would not have to pay *New York* taxes. The buyers did have to pay the taxes in their state of residence, however, and moreover interstate sales of untaxed cigarettes would have violated the CCTA and the then recently enacted PACT Act. This is not an "Indian exemption," but simply a reflection of rule that states may not tax transactions where there is no personal jurisdiction over the out-of-state person. *See, e.g.*, *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). In any event, "[T]he Seneca Nation has abandoned its argument that the amended tax law is unduly burdensome because it fails to account for reservation sales to out-of-state purchasers," perhaps recognizing that such sales could not be within the Indian exemption. *Oneida Nation*, 645 F.3d at 163 n.14.

It is thus virtually self-evident that the stays pointed to by UPS have nothing to do with the reservation-to-reservation deliveries that UPS made for its Indian partners. Not one single tribe claimed that an inability to receive cigarettes shipped from a different reservation would impact tribal self-government or the tribes' right to a supply of tax-free cigarettes. The tribes' concerns were directed solely at their inability to obtain sufficient untaxed cigarettes through the state-supervised allocation programs and with the supposed interference with tribal sovereignty from having to administer the programs.

Where the tribes themselves did not even address reservation-to-reservation deliveries, extending the effect of the stays to such deliveries violates the equitable rule that the scope of relief "must be framed to remedy the harm claimed by the party," *Hartford-Empire Co.*, 323 U.S. at 410, be "no broader than necessary to cure the effects of the harm caused by the violation.'" *Mickalis Pawn Shop,* 645 F.3d at 144, should prohibit no more than the violation established in the litigation, *EEOC v. AutoZone, Inc*., 707 F.3d at 841, and "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano,* 442 U.S. at 702. "Injunctions that are overly broad are disallowed." *Ram v. Lal*, 906 F. Supp. 2d 59 (E.D.N.Y. 2012) (citing *New York v. Shinnecock Indian Nation*, 560 F. Supp. 2d 186, 190-91 (E.D.N.Y. 2008) (listing cases)).

Vagueness – To apply the stays in the fashion urged by UPS violates still another rule applicable to injunctive relief: "We have interpreted Rule 65(d) as requiring that 'an injunction . . . be specific and definite enough to apprise those within its scope of the conduct that is being proscribed.'" *S.C. Johnson & Son, Inc. v. Clorox Co*., 241 F.3d 232, 240-41 (2d Cir. 2001). The Supreme Court has explained:

> [T]he specificity provisions of Rule 65(d) are no mere technical requirements. The Rule was designed to prevent

> uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood. Since an injunctive order prohibits conduct under threat of judicial punishment, basic fairness requires that those enjoined receive explicit notice of precisely what conduct is outlawed.

Schmidt v. Lessard, 414 U.S. 473, 476 (1974) (footnotes and citations omitted). Rule 65(d) is satisfied "only if the enjoined party can ascertain from the four corners of the order precisely what acts are forbidden or required." *Petrello v. White*, 533 F.3d 110, 114 (2d Cir. 2008) (internal quotation marks omitted). Rule 65(d) serves both to "to prevent uncertainty and confusion on the part of those to whom the injunction is directed," and to ensure "that the appellate court knows precisely what it is reviewing." *S.C. Johnson & Son*, 241 F.3d at 241 (internal quotation marks omitted); *see also Schmidt*, 414 U.S. at 476-77; *Lau v. Meddaugh*, 229 F.3d 121, 123 (2d Cir. 2000) (per curiam). *See* 11A Fed. Prac. & Proc. Civ. § 2955, *Form and Scope of Injunctions or Restraining Orders* (2d ed.) (The standard established by Rule 65(d) "is that an ordinary person reading the court's order should be able to ascertain from the document itself exactly what conduct is proscribed."). The Second Circuit has emphasized that injunctions that do not meet the requirements of Rule 65(d) will be rejected. *Corning Inc. v. PicVue Elecs., Ltd.*, 365 F.3d 156, 158 (2d Cir. 2004) (per curiam) (internal quotation marks omitted).

The Second Circuit's decision in *Petrello v. White*, 533 F.3d at 115-116, exemplifies a type of flaw, similar to that present here, that will bar enforcement of an injunction. In *Petrello*, the lower court simply ordered "specific performance according to the terms of [a] 1998 Contract of Sale," and ordered "specific performance of the August 1998 Contract of Sale.'" The Second Circuit thought it "plain that this language in the court's opinion is insufficient," *Id.* at 116-17. The unenforceability of the injunction in *Petrello* is closely paralleled by the flaws in the Western District's stays, despite the fact that *Petrello* required actions and the present case

requires inaction. *In Petrello*, the injunction did not instruct the defendant "to perform specific acts; it does not describe the required conduct in any detail, much less 'in reasonable detail' as required by Rule 65(d)(1)." *Id.* at 116. Here too, the stays never specified what acts the State could or could not do in order to collect taxes, never informed the State which sections or which language in the broad-brush stay of "the Tax Law Amendments" were affected and which sections or language of "the Tax Law Amendments" remained in force.

However the stays could have been applied, no one in 2010 would have read the stays to have the effect that UPS ascribes to them, exposing the State to contempt proceedings had it, for example, sought to collect taxes on reservation-to-reservation deliveries. Where the present dispute over the meaning of the stays requires extensive legal argument, surely no "ordinary person" – even in the form of a State DTF agent – "reading the court's order [could] ascertain from the document itself exactly what conduct is proscribed." 11A *Fed. Prac. & Proc. Civ.* § 2955.

The injunction is doubly flawed in requiring consultation with another document. "[A]n order only qualifies as an injunction 'if the enjoined party can ascertain from the four corners of the order precisely what acts are forbidden or required, *without reference to any other document*." *Mickalis Pawn Shop, LLC*, 645 F.3d at 144. (emphasis added). "Compliance with the prohibition on the incorporation of extrinsic documents is essential," *Floyd v. City of New York*, 959 F. Supp. 2d 668 (S.D.N.Y. 2013). Although the stays themselves are hopelessly vague, the State would have had to consult another document – the 2010 Amendments themselves – even to attempt to comply. The required acts to be performed could not be ascertained − or the order be complied with − without consulting "other documents," in an attempt to puzzle through which

potions of the law remained in effect and which were stayed – precisely like the parties here are forced to do now.

It is plain beyond dispute that the various injunctions cited by UPS are sufficiently obscure − the present controversy as to the scope of the stays being the best example − that neither the State nor the City could have known that enforcement actions such as a seizure of a UPS vehicle making reservation-to-reservation deliveries of unstamped cigarettes would have exposed both governments to contempt proceedings. But that would be the result of accepting UPS's arguments that the stays protected UPS cigarette deliveries. The Western District's sweeping stay of the "Tax Law amendments" was simply not "specific and definite enough to apprise those within its scope of the conduct that is being proscribed." *S.C. Johnson & Son, Inc.*, 241 F.3d at 241. As a result, the stays should not be enforced in the manner sought by UPS, especially half a decade after the fact.

CONCLUSION

For the reasons set forth above, the State and City's motion for partial summary judgment dismissing the Seventh Defense should be granted.

Dated: New York, New York
July 22, 2016

ZACHARY W. CARTER
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) 356-2032

By: /s/ Eric Proshansky
Eric Proshansky (EP 1777)
Lilia Toson (LT 4727)
Assistant Corporation Counsel

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Attorney for Plaintiff State of New York
120 Broadway, 3rd floor
New York, New York 10271
(212) 416-6699

By: /s/ Dana Biberman
Dana Biberman (DB 9878)
Christopher Leung (CL 1688)
John Oleske (JO 0995)
Assistant Attorneys General