UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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THE STATE OF NEW YORK and THE CITY OF NEW YORK,

Plaintiffs,

Case No. 15-cv-1136-KBF

-against-

UNITED PARCEL SERVICE, INC.,

Defendant.

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REPLY 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

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PRELIMINARY STATEMENT

After initially dismissing UPS's Seventh Defense on legal grounds, *see New York v. UPS*, 2016 U.S. Dist. LEXIS 14773 (S.D.N.Y. Feb. 8, 2016), the Court vacated that dismissal on narrow grounds, recognizing that the appropriate standard applied to Plaintiffs' motion to strike pursuant to Rule 12 (f) was a pleading standard, requiring a showing merely that the Seventh Defense be "cognizable as to any set of facts that UPS could present at trial." *See Order Dated June 21, 2016* ("*Dkt. No*. 258") at 3, 5 & n.3 (noting that UPS seeks "reconsideration of a pleading stage motion"); *id*. at 5 (Court need only 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"). Willing to assume the possibility "that UPS will be able to present facts showing that its conduct fell within the scope of that which the State was prohibited from enforcing," or "could potentially present facts showing that it was entitled to rely on the cited orders …" *id*. at 8, the Court vacated its dismissal of the Seventh Defense, but without rejecting any of the legal findings on which the dismissal was based. *Id*. at 9.[1]

The reconsideration ruling is thus best read as an invitation to UPS to make a showing either that its conduct came "within the scope" of the stays' prohibitions on the State or that the company "was entitled to rely" on the stays. UPS has ignored that invitation, and as detailed below, has offered ***no*** evidence, disputed or otherwise, to show either a basis to rely on the stays as legitimizing its conduct or to show that its conduct came within the scope of the stays'

[1] The Court did in fact originally apply a Rule 12 standard with respect to one of the three grounds on which dismissal of the Seventh Defense rested. The Court concluded that "*it is hard to conceive of a way* in which UPS could have been the beneficiary of such stays." *UPS*, 2016 U.S. Dist. LEXIS 14773 at *85 (emphasis added). To reach that conclusion, the Court must have analyzed the Seventh Defense for the plausibility of its allegations, *see Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), where "hard to conceive of" is equivalent to "implausible." Because it is hard to conceive of UPS as a beneficiary of the stays, the Seventh Defense was implausible and properly dismissed under Rule 12.

prohibitions. *See UPS Counterstatement* (*Dkt. No*. 346) ("*UPS Ct.-St. 56.1*").[2] As to reliance, for the period in which UPS trafficked reservation cigarettes, UPS presents no facts showing even its bare knowledge of the existence of the stays, nor its knowledge of the State's position on the effect of the stays. As to facts showing conduct within the stays' prohibitions, "UPS's Seventh Affirmative Defense asserts the pre-amendment version of New York Tax Law § 471 governs plaintiffs claims that are based on deliveries that occurred when the state was barred…." *Dkt. No*. 345 at 1. UPS's position, which Plaintiffs also have adopted, means that Plaintiffs were not prohibited at all from enforcing the law as it existed under the pre-amendment version of § 471. But UPS has offered nothing to rebut Plaintiffs' undisputed showing that UPS did violate pre-amendment § 471.

Instead of facts, UPS recycles the same legal arguments originally advanced to defend the Seventh Defense. Principally, UPS refuses to surrender the preposterous contention undergirding its entire argument against liability, *i.e*., that under the terms of pre-amendment § 471, the taxability of a particular cigarette sale remains inchoate until the moment of the final sale to a consumer, when the buyer's tribal membership would be finally known. According to UPS, under pre-amendment § 471, no determination as to taxability could be made for *any cigarettes*¸ *no matter where sold in New York*, until after the final sale to a consumer. *See, e.g*., *Dkt. No*. 345 at 1, 11, 12. Otherwise, according to UPS, the incidence of the tax might impermissibly fall on a tribe member. *Id*. To save the Court from yet another brief illustrating the untenability of a notion that, if applied, would entirely obviate the need for any tax stamps at all, the Court is

[2] UPS had ample opportunity to present the facts called for by the Court, pursuant to Local Rule 56.1 (b):

> The papers opposing a motion for summary judgment shall include … if necessary, additional paragraphs containing a separate, short and concise statement of additional material facts as to which it is contended that there exists a genuine issue to be tried.

UPS has added no facts that bear on the issue at hand.

respectfully referred to Plaintiffs memorandum opposing UPS's CCTA summary judgment motion, *Dkt. No*. 343, which establishes that UPS's re-write of New York Tax Law does not square with the statute's plain requirements.[3]

ARGUMENT

I. NO FACTS PERMIT UPS TO RELY ON OR INVOKE THE STAYS

A. Reliance Cannot Be Proven: No Facts Show UPS Had Knowledge of the Stays

This Court appears to have granted reconsideration to provide UPS with an opportunity to dissuade the Court from concluding "that there exist no sets of facts upon which UPS may be able to invoke the [stays] to defend against plaintiffs' claims." *Dkt. No*. 258 at 7. It is clear at least to Plaintiffs that the Court sought no further legal argument, already present in over-abundance, but sought to determine whether any facts under the legal principles already set forth by the Court could provide UPS with a defense related to the stays. UPS's opposition however presents no facts to show UPS's to liability could arise from conduct that the State was

[3] UPS has attempted to sow confusion by peppering its memoranda with assertions that Plaintiffs misconstrue UPS's position, offer "strawman" arguments or refuse "to engage the issues." *See, e.g., Dkt. No*. 345 at 2. A glance at Plaintiffs' arguments shows that Plaintiffs have always correctly described UPS's position. Again, UPS contends the stays left only pre-amendment § 471 in effect (*Dkt. No*. 345 at 1), that pre-amendment § 471 could not impose a tax on Indian sales until the final, consumer-level sale (*Dkt. No*. 345 at 12), because otherwise the tax might fall on an Indian, and that, because taxability was unknowable until final sale, no cigarette shipped to reservations could be stamped (*Dkt. No*. 345 at 11). Plaintiffs have pointed to and rebutted those arguments repeatedly. *See Dkt. No*. 122 at 10 ("The plain language of [pre-amendment] Section 471 gave the State of New York the power to prosecute cigarette vendors for the on-reservation sale of unstamped cigarettes to non-tribal members.") (quoting *United States v. Morrison*, 686 F.3d 94, 104 (2d Cir. 2012)); *Dkt. No*. 134 at 4-5 ("[A] stay of enforcement of the amended collection mechanism could not remove … tax liability [for sales to reservation retailers]") (quoting *City of New York v. Milhelm Attea & Bros. Inc*., 2012 U.S. Dist. LEXIS 116533, 75-76 (E.D.N.Y. 2012); *Dkt. No*. 198 at 6-18 (*inter alia* citing *Dep't of Taxation & Fin. of N.Y. v. Milhelm Attea & Bros., Inc*., 512 U.S. 61, 64 (1994) (stating that the only cigarettes that need **not** be stamped are "cigarettes to be consumed on the reservation by enrolled tribal members[.]"); *Dkt. No*. 231 at 1-4 ("Because UPS's inter-reservation shipments are subject to laws '. .. applicable to all citizens of the state,' cigarettes delivered to a distant reservation are no different than cigarettes delivered to any New Yorker's doorstep - taxable.") (citing *Washington v. Conf. Tribes of the Colville Ind. Res*., 447 U.S. 134, 155 (1980) (principles of federal Indian law do not permit tribes to market an exemption from state taxation "to persons who would normally do their business elsewhere."); *Dkt. No*. 343 ("All cigarettes located in New York State are 'presumed taxable'– and are subject to State cigarette taxes – unless the entity challenging the tax affirmatively establishes that the State is 'without power' to tax the cigarettes specifically at issue in a given case.")(quoting *City of New York v. Chavez*, 944 F. Supp. 2d 260, 264-265 (S.D.N.Y. 2013)).

prohibited from penalizing or facts to show that UPS could reasonably understand the stays as permitting reservation deliveries of unstamped cigarettes. *See generally UPS Ct.-St. 56.1*.

As for reliance, UPS cannot conceivably "rely" on the stays without first showing that the company *knew of the existence* of the stays prior to the date of its deliveries. "Reliance" presupposes UPS knew of the stays, knew the terms of the stays, and understood these terms as excusing the company from its obligations under the law (and the AOD). UPS has provided *not a scintilla* of evidence to suggest that these crucial prerequisites to reliance exist. UPS's Rule 56.1 Counter-statement is completely silent on that issue, no document produced in this action reveals that UPS had the requisite knowledge, and indeed the earliest UPS appears to have been aware of the stays was 2015. *See Proshansky Decl*. Ex. 1. UPS could not rely on court orders the company never knew existed.

UPS refers to facts that reference ***DTF's*** understanding of what the stays required, or ***DTF's*** beliefs about its enforcement abilities. *See Dkt. No*. 345 at 2; 4-5. But there is no evidence that UPS had any knowledge of the State's opinions before undertaking its deliveries in 2010-2011. UPS presents nothing to show the company was aware in 2010-2011 of the "testimony from DTF officials that they could not enforce the amended law," *Dkt. No*. 345 at 2, or of the "State's representations to the Second Circuit that the state was blocked from implementing a new tax law." *Id*. Indeed, the testimony of "the DTF officials" UPS refers to *was testimony elicited in this case*, *id* at 3-4, that was self-evidently not merely unknown but *unknowable* to UPS in 2010-2011, when UPS's offenses were committed. *See Dkt. No*. 345 at 2, 4-5. Some of that testimony concerns hypothetical actions DTF might have taken during the stays, but there is no evidence that *presently* held opinions as to actions DTF might have taken in 2010-2011 were communicated to anyone, much less to UPS while the stays were in effect. *See*,

e.g., *Dkt. No*. 345 at 4 (while TRO's were in place, DTF "would have" permitted reservation-to-reservation shipments). A purported statement by a state trooper, *id*. at 4, (which has nothing to do with the stays) did not even occur until April 2011, years after the July 2006 date that UPS began deliveries for Jacobs Tobacco, *see Dkt. No*. 286, *Pltfs. Sec. R. 56.1 St*. ¶ 28, and months after the November 2010 commencement of deliveries by UPS for other St. Regis shippers.[4] *Dkt. No*. 286, *Pltfs. Sec. R. 56.1 St*. ¶ 37. Again, UPS cannot rely now on what it did not know then.

UPS's corporate understanding of reservation-to-reservation deliveries is that:

Dkt. No. 279, Ex. 1, UPS 30(b)(6) Witness Bradley Cook Tr.**,** at 67, 71.[5] That is Mr. Cook's *present* understanding. Mr. Cook never testified that UPS had learned anything about reservation deliveries, whether related to the stays or otherwise, to alter that understanding.

B. The Court's Dismissal of the Sixteenth and Seventeenth Defenses, and The Rejection of a "Forbearance Defense" Precludes UPS From Invoking the Stays

The lion's share of the order dismissing UPS's affirmative defenses remains in place, including the dismissals of the Sixteenth and Seventeenth Defenses:

> 16. Plaintiffs' claims are barred or limited by their own conduct, including but not limited to their failure to enforce cigarette tax laws

UPS, 2016 U.S. Dist. LEXIS 14773 *18, and

[4] In any event, the trooper denies making the statement, and UPS offers no facts to establish that the statement was indicative of the State's understanding of the effect of the stays. *See Pltfs.' Mem. of Law ISO Mot. For Reconsideration* (ECF No. 381), at 4–5.

[5] The shipments referred to in Mr. Cook's testimony were destined for another reservation. *Dkt. No.* 279, Ex. 1, UPS 30(b)(6) Witness Bradley Cook Tr.**,** at 67.

> 17. Plaintiffs' claims, including their request for civil penalties, are barred, in whole or in part, by the doctrines of waiver, estoppel, laches, unclean hands, *in pari delicto*, and/or similar doctrines and equitable doctrines, in that, among other things, Plaintiffs had reason to know about unlawful cigarette sales by the shippers named in the Second Amended Complaint, yet failed to take appropriate steps as to them or their customers, or to notify UPS.

UPS, 2016 U.S. Dist. LEXIS 14773, *18–19. The Court held that the Sixteenth Defense "fail[s] as to all claims and therefore strikes those defenses." *Id*. at *33. As to the Seventeenth Defense, with respect to the CCTA, PHL § 1399-*ll* and Executive Law claims,

> the Court concludes that UPS's … Seventeenth Defense [is] not viable as a matter of law. In the context of these statutes, … plaintiffs are acting in a law enforcement capacity as to which they have broad discretion, and for which ordinarily applicable equitable defenses do not apply. E.g., *Utah Power, 243 U.S. at 409*; *LaTrieste Rest., 40 F.3d at 590*; see also *United States v. Philip Morris Inc., 300 F. Supp. 2d 61, 75 (D.D.C. 2004)*. In addition and in significant part, plaintiffs seek civil penalties authorized by statute as to these claims. This Court has found no case law applying the concepts of mitigation or the asserted equitable defenses in relation to a claim seeking such relief. Given the nature of these claims, UPS's … Seventeenth Defense[], which assert prior enforcement failures or shortcomings in enforcement decisions, are not cognizable as a matter of law.

2016 U.S. Dist. LEXIS 14773 *41–42. The dismissal of the Sixteenth and Seventeenth Defenses forecloses UPS from relying on statements of State tax officials, "Taxpayer Guidance" documents, statements made in open court, or any other government statements referenced by UPS. *See Dkt. No*. 345 at 2, 4-5. To permit UPS to raise such issues would be to resurrect the very equitable defenses, for example estoppel, that were dismissed.[6] Indeed, UPS's proffer of these materials is a disguised means of raising a defense based on the forbearance policy, which the courts have repeatedly rejected as an argument against liability imposed by statute:

> The Second Circuit held that for purposes of determining whether cigarettes are "contraband" within the meaning of the CCTA, it is "what is mandated by

[6] UPS's citation to a "Taxpayer Guidance" memorandum, *Dkt. No*. 345 at 2, as evidence of the law has been rejected previously. In *Milhelm Attea*, the court "reject[ed] defendants' argument that this kind of statement on enforcement, issued by a state agency and of limited applicability, nullifies the requirements of a statute passed by a state's legislature and signed by its governor." *Milhelm Attea*, 550 F. Supp. at 347. This principle governs UPS's reliance on a similar document.

> the state statute (Section 471), and not what is enforced by the state executive" that controls. Accordingly, because there was "no question that the conduct at issue . . . was made unlawful by the terms" of § 471, "New York's decision, for political and practical reasons, to refrain from enforcing Section 471 did not grant Morrison leave to sell massive quantities of untaxed cigarettes to non-Native Americans."

City of New York v. Golden Feather Smoke Shop, Inc., 2013 U.S. Dist. LEXIS 47037 *26 (E.D.N.Y. March 29, 2013**) (**quoting *United States v. Morrison*, 686 F.3d 94, 106 (2d Cir. 2012) (citations omitted)). This principle governs here – UPS may not raise the statements or conduct of State officals to assert that the statements or conduct modified what the law "required." *Morrison*, 686 F.3d at 105 (the normal meaning of "required," as contained in the CCTA, is what is mandated by the state statute (Section 471) …").

The congressional purposes in enacting the CCTA require rejection of UPS's estoppel argument:

> the CCTA was designed "as a federal statutory 'back-up' for state-level enforcement regimes" in order to "provide federal support to states struggling with circumstances precisely like those that prompted New York's forbearance," which included legal barriers related to tribal sovereign immunity as well as various forms of civil unrest and tribal resistance. *Id*. at *11.

City v. Milhelm Attea, 2012 U.S. Dist. LEXIS 116533 *14 (E.D.N.Y. Aug. 17, 2012) (quoting *Morrison*, 686 F.3d at 106. The struggle to implement reservation taxation, which UPS invokes to escape liability, is the precise circumstance to which the CCTA was intended to apply.

II. THE COURT'S ORIGINAL LEGAL RULINGS WERE CORRECT.

Plaintiffs respectfully submit that extending an opportunity to UPS to present facts was unnecessary where reconsideration could have been denied on purely legal grounds.[7]

[7] In addressing the Seventh Defense, the Court referred to "peripheral issues raised by the parties (*e.g*., the scope of the Indian exemption and the import of changes to § 471)." *Dkt. No*. 258 at n. 3 & 8. "[I]t is unclear whether at least some of these issues are even properly cast as falling under the Seventh Defense." *Id*. Plaintiffs respectfully submit that the issues mentioned are not peripheral but are in fact are determinative of the legal insufficiency of the Seventh Defense under any facts. Arguments concerning the Indian exemption and the Tax Law amendments (specifically

The Seventh Defense asserts that

> 7. 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.

See New York v. UPS, 2016 U.S. Dist. LEXIS 14773, 62–63 (emphasis added). UPS can thus only "invoke" the Seventh Defense to show that the stays somehow prohibited the State from restricting reservation-to-reservation deliveries of unstamped cigarettes, which the State certainly could have done under pre-amendment law. *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 514 (1991); *Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16 (1st Cir. 2006) (a state unquestionably "may seize contraband cigarettes located outside Indian lands but in transit to a tribal smoke shop."). The simple fact is only deliveries the State was "enjoined from restricting" were deliveries of cigarettes in which the cigarette sellers would have been (but for the stays) required to comply with the ***express requirement*** in post-amendment § 471 that all cigarettes delivered to Indian reservations bear stamps.[8]

To be clear on the premises, all parties are in agreement that pre-amendment § 471 remained in effect during the pendency of the stays. *See, e.g.*, *Dkt. No.* 345 at 1 ("UPS's Seventh Affirmative Defense asserts the pre-amendment version of New York Tax Law § 471 governs plaintiffs' claims that are based on deliveries that occurred when the state was barred by stays…."; *see UPS*, 2016 U.S. Dist. LEXIS 14773 *77 ("UPS now argues that, as a result of the

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that the amendments did not alter § 471's pre-amendment language) establish that under pre-amendment § 471, *all* reservation-to-reservation cigarettes were within the State's power to tax and hence required stamps, contrary to UPS's claims to the contrary. It is precisely because the Indian exemption does not encompass reservation-to-reservation sales, and precisely because of the pre-amendment requirement-by-implication that all cigarettes within the State's power to tax be affixed with stamps that the Seventh Defense failed *as a matter of law*, whatever the facts. *See Dkt. No*. 343 at 7-14.

[8]Other provisions of the stays halted implementation of the methods for allocating unstamped cigarettes to the reservations, and did not implicate which "deliveries the state was enjoined from restricting."

stays of enforcement of the 2010 amendments, the pre-amendment version of § 471 remained in effect"). Plaintiffs, as previously stated many times, adopt that same assumption.

The State was thus not enjoined from "restricting" what can be referred to as "Pre-amendment § 471 Deliveries," *i.e.*, from enforcing the law as it existed prior to the 2010 Amendments. Pre-amendment 471 Deliveries required, by operation of the statutory language in § 471, that "all cigarettes that the State has the power to tax," be affixed with tax stamps. Based on that language, pre-amendment §471 thus "requires" stamps on all cigarettes sent to reservations within the meaning of the CCTA:

> [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.

UPS, 2016 U.S. Dist. LEXIS 14773 at *82–83. Plaintiffs have provided abundant authority so holding.[9] The only deliveries the State was enjoined from restricting were deliveries that would have been subject to the command of ***post-amendment § 471,*** made through express language, that all cigarettes destined to a reservation for sale to non-tribe members must bear tax stamps.

The foregoing makes clear that the distinction between pre-and post-amendment requirements is for present purposes a distinction without a difference: Pre-amendment § 471 deliveries required stamps (notwithstanding the absence of express language to that effect). Plaintiffs were not enjoined from restricting Pre-amendment § 471 Deliveries. *UPS*, 2016 U.S.

[9] UPS footnotes an attempt to distinguish the many cases holding that § 471 required tax stamps under the present facts, asserting that the cases offer "very different circumstances" because they involve "'large-scale bootlegging' of cigarettes intended for *off*-reservation sale to consumers." *UPS Mem.* 13, n. 6. But those features exactly describe UPS's reservation-to-reservation deliveries – sales to non-tribe members *are* "off-reservation sales to consumers." *See Dkt. No.* 343 at 7-16 (citing e.g., *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1172 (10th Cir. 2012) ("the state [can] impose the [cigarette] tax on non-tribal member Indians" purchasing on the reservation of another tribe.). In a reservation-to-reservation sale, the incidence of the tax can never fall on a tribe member – no purchaser not on the seller's reservation can be the seller's tribe member. UPS's deliveries were "bootlegging," because the cigarettes were unstamped, and certainly were "large-scale." *See, e.g., Dkt. No.* 286, ¶ 49, 53.

Dist. LEXIS 14773 at **81–83. Because Plaintiffs were not enjoined from enforcing the law pertaining to Pre-amendment § 471 Deliveries, there can be no facts on which UPS could "invoke" the stays. In the Seventh Defense's own terms, Pre-amendment § 471 Deliveries were not "*deliveries that [Plaintiffs] were enjoined from restricting*, pursuant to orders enjoining the implementation and enforcement of the New York Tax Law §§ 471 & 471-e" (emphasis added). Pre-amendment § 471 Deliveries were always "required" to be stamped (whether or not that requirement was enforced). For purposes of what the law "required," the trigger for CCTA liability, a stay of the new, post-amendment *express* stamping requirement was of no moment.

III. THE RELIEF SOUGHT DEFINES THE SCOPE OF THE STAYS

UPS misunderstands the purpose of documenting the relief sought by the complaints on which the stays were based, and accordingly offers meaningless rebuttal. *Dkt. No.* 345, 13–15. The stays were issued in service of complaints filed by the tribes. It is therefore crucial to know what the tribes complained of to determine what temporary relief they received. Those facts will be determinative of whether UPS "benefits from," the stays, *i.e.*, engaged in conduct protected by the stays, the third reason the Seventh Defense was struck. *UPS*, 2016 U.S. Dist. LEXIS 14773 at *83–85. Because the tribes did not seek the relief UPS contends it provided, a present reading of the stays as providing that relief would have violated the rules for issuing injunctions. Simply stated, injunctions cannot permissibly provide for more than a plaintiff has sought in its complaint. *See Dkt. No*. 287 at 17–24. UPS wrongly implies that Plaintiffs take issue with the stays as issued. *Dkt. No*. 345 at 15. Not so. Plaintiffs pointed out only that the stays could not be read <u>then</u> as UPS seeks to read them <u>*now*</u> because the stays *would have been* improper if so read when issued. It is not that the stays were vague, it is that the stays would have been vague and overbroad then if read to contain the terms UPS seeks to ascribe to the stays. *See Dkt. No*. 287 at

21 ("**Vagueness –** To apply the stays in the fashion urged by UPS violates still another rule applicable to injunctive relief."). UPS does not benefit from engaging in conduct the tribes did not seek to protect through stays. *Id*. at 20–21.[10]

IV. THE STATE'S PRESENT POSITION AND ITS POSITION IN *ONEIDA NATION v. CUOMO* ARE CONSISTENT.

UPS frivolously argues that the State's assertion in *Oneida Nation v. Cuomo,* 645 F.3d 154 (2d Cir. 2011) that the stay of "a new tax law" caused millions in tax losses judicially estops the State from its present, "inconsistent" claim that *pre-amendment* § 471 required tax stamps on all reservation cigarettes. *Dkt. No*. 345 at 19–20. It is difficult to fathom how a statement about the tax losses caused by a stay of the "new," *post-amendment* law could be inconsistent with a description of the law by which taxes were collected under the old, *pre-amendment law*, but UPS ignores that conceptual gap by offering the *non-sequitur* that: "If all shipments to reservations under pre-amendment law were in fact required to bear tax stamps, as plaintiffs now assert, there would have been no such loss of revenue when the stays and injunctions were in place." *Id*. Apparently, for UPS, there is no distinction between what a law requires – stamped cigarettes – and what that law accomplishes. Pre-amendment §471 could certainly require stamps on all cigarettes, but the well-known enormous lack of compliance with that law (and even the surrender of efforts to induce compliance) is well-documented. Under the pre-amendment law, "[u]nlawful purchases of unstamped cigarettes deprived New York of substantial tax revenues --

[10] UPS for the first time contends that every stay ever issued barred the State from enforcing any tax law with respect to any Indian, even offering to amend the Seventh Defense to add more stays. *UPS Mem*. at 18-19. Particularly ill-starred is UPS's attempt to read globally the *Oneida* stay, the plain language of which restrains acts against the Oneida tribe. Disregarding that language, UPS opines that the stays "cannot be understood to apply only to particular tribes, without benefiting other tribes." *Dkt. No.* 345 at 18. No explanation is provided as to why an injunction written to enjoin acts against one tribe "cannot be understood" to enjoin acts against that tribe only. Injunctions do not exist "in the air." The *Oneida* court complied with the law by limiting the scope of its injunction to the entity that sought the injunction, the "Oneida Tribe." Injunctions are required to be specific and narrowly tailored and not require reference to documents outside their four corners. *See Dkt. No*. 287 at 17-24.

now estimated at more than $ 65 million per year." *Dep't of Taxation v. Milhelm Attea & Bros.*, 512 U.S. 61, 65 (1994); *Morrison*, 686 F.3d at 106, 107 (referring to "New York's decision, for political and practical reasons, to refrain from *enforcing* Section 471," a "beleaguered concession to the difficulty and danger of state-level enforcement, the complex jurisdictional issues surrounding reservation-based cigarette sales, and the politically combustible nature of bootlegging prosecutions") (emphasis added). The State articulated to the Second Circuit that the stays caused tax losses because pre-amendment § 471 *did not work*, and the stays kept it in place. There is no inconsistency in the State's position, and nothing to give rise to an estoppel.[11]

CONCLUSION

For the foregoing reasons, the State and City request an Order granting them summary judgment dismissing UPS's Seventh Affirmative Defense.

[11] Because the State has standing, there is little practical need to address UPS's argument as to the City's standing to dismiss the Seventh Defense, other than to note UPS's inaccurate citation to *City of New York v. Milhelm Attea & Bros. Inc.*, 2012 U.S. Dist. LEXIS 116533 *38-39 (E.D.N.Y. 2012) as providing "City lacked standing to pursue CCTA and Cigarette Marketing Standards Act claims based merely on evidence that "cigarettes were capable of entering the City" and evidence of controlled purchases.) *See Dkt. No.* 346 at 23. The *Milhelm Attea* decision evaluated the City's standing to bring claims against individual stamping agents, and only found standing absent as to one agent that did not supply unstamped cigarettes to the reservation that was the source of injury. *See id*. at *52 ("during the relevant time frame, Day did not supply any cigarettes to the Poospatuck reservation"). As to the agents that did supply that reservation with unstamped cigarettes, as UPS did in this case, "the City has continued to demonstrate standing and has done so even more compellingly than at the motion to dismiss stage." 2012 U.S. Dist. LEXIS 116533 *38-39. UPS is in any event incorrect that there were no deliveries into the City. *See* UPS 00060891 (showing deliveries to NYC in 2008, 2009, and 2011). (Plaintiffs will file under seal if need be).

Dated: New York, New York
September 2, 2016

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