To be Argued by:
PAUL J. CAMBRIA, JR., ESQ.
(Time Requested: 30 Minutes)

APL-2017-00029
Appellate Division Docket No. CA 15-01764
Cattaraugus County Clerk's Index No. 82670

Court of Appeals

of the

State of New York

ERIC WHITE and NATIVE OUTLET,

Plaintiffs-Appellants,

– against –

ERIC T. SCHNEIDERMAN, NEW YORK STATE ATTORNEY GENERAL, in his official capacity; and THOMAS H. MATTOX, COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, in his official capacity,

Defendants-Respondents.

BRIEF FOR PLAINTIFFS-APPELLANTS

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Dated: June 19, 2017

STATEMENT PURSUANT TO RULE 500.1(f)

Native Outlet is not a publicly-held company and is fully owned by Eric White.

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PRELIMINARY STATEMENT

Plaintiff Eric White ("Mr. White") is a member of the Seneca Nation of Indians ("Seneca Nation") and he owns and operates his retail establishment, Plaintiff Native Outlet (collectively, "Plaintiffs"). Native Outlet is located on the sovereign land of the Seneca Nation and all of its sales occur and are completed at its retail establishment located on the sovereign land of the Seneca Nation. Plaintiffs seek a ruling from this Court that New York State ("State") and its officers, agents, and representatives lack the authority to force Indian[1] retailers, like Plaintiffs, to participate in the State's scheme to tax the sale of cigarettes (which is found in Tax Law §§ 471 *et seq.*), when such sales occur between retailers located on the sovereign land of the Seneca Nation and non-Indian customers, lest the retailers risk criminal and civil sanctions.

Such enforcement of Tax Law § 471, which was only recently enacted and thrust upon Indian retailers, does not withstand scrutiny of any kind. First, such enforcement is incompatible with the plain language of Indian Law § 6, which codified the State's obligation to refrain from taxing "*for any purpose whatever*, upon any Indian reservation." Similarly, such enforcement of Tax Law § 471 violates the plain language of the State's solemn promise to "protect such of the lands

[1] To conform with the terms used in the various statutes and treaties at issue on appeal, and to avoid confusion, the term "Indians" will be used instead of "Native Americans" to refer to the members of the Seneca Nation, or more generally, members of Native American Nations.

of the Seneca Indians . . . *from all taxes*, and assessments for roads, highways, *or any other purpose*" as set forth in the Buffalo Creek Compromise Treaty of 1842, US-Seneca Nation, May 20, 1842, 7 Stat. 586 ("Buffalo Creek Treaty"), which is binding on the State and under full force of the law by nature of the Supremacy Clause of the United States Constitution. For over 150 years, the State abided by the terms of Indian Law § 6, its precursor, and the Buffalo Creek Treaty by refraining from seeking to impose any taxes on the sales of Indian retailers located on Indian lands. Regardless of whether the Supreme Court has allowed states to impose such taxes as a matter of *federal* law, this State has unique barriers to the application and enforcement of its tax laws upon Indian reservations because the State is bound by the terms of Indian Law § 6, which expressly prohibits taxation "*for any purpose whatever*," and the nearly identical prohibition found in the Buffalo Creek Treaty, which preceded it.

Second, even if, as Defendants claim, the terms of Indian Law § 6 and the Buffalo Creek Treaty are ambiguous (and they are not), the lower courts have violated numerous long-standing canons of construction by interpreting the protection from taxation "for any purpose whatever" to mean protection *solely from property taxes*. There is nothing to support such a narrow interpretation of that broadly granted protection and this Court should reject such interpretations,

particularly because the rules of construction require any ambiguity to be resolved in favor of the Indians.

Finally, the State's enforcement of Tax Law § 471 on the transactions at issue in this appeal runs afoul of the Supreme Court's decision in *The New York Indians*, 72 U.S. 761 (1866).

This Court should restore the rule of law and stop the State's unlawful oppression of the members of the Seneca Nation. Our society no longer rubber stamps broken promises to Indians. Instead, our society professes respect for aboriginal peoples and their inalienable rights to self-government. The tax at issue in this case, an excise tax on the sale of merchandise by Indian-owned retailers located on an Indian reservation, was inconceivable at the time when the State signed the Buffalo Creek Treaty, which the State subsequently codified as Indian Law § 6. Ruling in Plaintiffs' favor will restore the force and effect of the promises the State made to the Seneca Nation as recorded in treaties and statutes. The judiciary, untethered to lobbyists and their clients, has the power and the duty to breathe life back into Indian Law § 6, regardless of whether it is inconvenient for the State.

STATEMENT OF THE PROCEDURAL HISTORY OF THE CASE AND FACTS

I. THE PARTIES

Mr. White is an Indian, who is an enrolled member of the Seneca Nation and resides within its territories. (Record on Appeal ("R") 62-63.)

Mr. White operates a convenience store, Native Outlet, which is located entirely within the Seneca Nation's reservation on the Allegheny Territory (in what is otherwise known as the City of Salamanca). (R. 63.) Native Outlet sells a variety of products, including cigarettes. (*Id*.)

Defendants are charged with enforcement of the laws of the State, including the State's tax laws and regulations, as promulgated by the State Department of Taxation and Finance ("Tax Department"). (R. 52.)

II. NON-PARTY SENECA NATION

Native Outlet is located entirely within the Seneca Nation reservation (R. 63), which is critical to the issues before this Court. The Seneca Nation is a federally recognized Indian tribe that is a member of the Six Nations of the Iroquois Confederacy. (R. 51-52, 62.) The history of the Seneca Nation, as set forth in greater detail below, demonstrates the unique position that it has held among the federally recognized Indian tribes. (R. 53-57.) It was never conquered and its members were never removed from their ancestral lands by any government

or militia. Indeed, members of the Seneca Nation reside on land that was neither given to them nor earmarked for them by any state or federal governments. (R. 57.) Simply stated, the land upon which the members reside has *always* been theirs. (*Id.*) Unlike nearly every other tribe located within the United States, the Seneca Nation has an unbroken record of sovereignty over its land. (*Id.*) The Seneca Nation uses, occupies, possesses, and enjoys its land, separate and apart from the State and the United States. (*Id.*)

III. PROCEDURAL HISTORY

By service of a Verified Complaint dated June 13, 2014, Plaintiffs commenced this action seeking an injunction barring enforcement of Tax Law § 471 on the transactions between Indian-owned retailers and their customers that occur on the sovereign land of the Seneca Nation on the grounds that, *inter alia*, the application of Tax Law § 471 to such sales: (1) is inconsistent with Indian Law § 6; (2) violates the Buffalo Creek Treaty, which is binding on the State and under full force of the law by nature of the Supremacy Clause of the United States Constitution; and (3) runs afoul of the Supreme Court's decision in *The New York Indians*, 72 U.S. 761 (1866). (R. 38-47.)

Shortly thereafter, Plaintiffs filed a notice of motion seeking a preliminary injunction against the enforcement of Tax Law § 471 on their cigarette sales, which

are transactions that are commenced and completed within the confines of the Seneca Nation. (R. 48-49.) In support of their motion, Plaintiffs submitted an affirmation by their attorney (R. 50-61), an affidavit from Mr. White (R. 62-65), and a memorandum of law (R. 66-95).

Defendants opposed Plaintiffs' motion and cross-moved for dismissal. (R. 96-98.) In support of their motion, Defendants filed a memorandum of law contending that the State had the authority to validly enforce its cigarette tax laws when Indians sell cigarettes to non-members of their Nation. (R. 99-111.)

By a Decision and Order entered March 9, 2015, the lower court granted Defendants' cross-motion to dismiss and denied Plaintiffs' motion for a preliminary injunction as moot. (R. 2.) On March 24, 2015, Plaintiffs filed a timely notice of appeal. (R. 3-5.)

By a Memorandum and Order entered June 10, 2016, the Fourth Department affirmed so much of the lower court's order as denied Plaintiffs' motion for a preliminary injunction. (R. 243-45.) Further, the Memorandum and Order modified the lower court's order on the law by adjudging and declaring that "Tax Law § 471 is not inconsistent with Indian Law § 6, the Treaty of 1842 (7 US Stat 586), or the Due Process or Commerce Clauses of the United States Constitution." (R. 243.) In reaching that result, the court

embraced its prior holding in *Matter of New York State Dept. of Tax. & Fin. v. Bramhall*, 235 A.D.2d 75 (4th Dep't 1997), *appeal dismissed* 91 N.Y.2d 849 (1997), reiterating that the Buffalo Creek Treaty "prohibited the state from imposing taxes on the 'lands,'" which the court interpreted as a prohibition solely on taxes on "real property," rather than broad protection from taxation altogether on Indian reservations. (R. 244-45.) The Fourth Department noted that Indian Law § 6 "was enacted to bar taxes on real property." (R. 245.) Alternatively, if the Court's interpretation of Indian Law § 6 and the Buffalo Creek Treaty was found to be too narrow, the Court concluded that the obligation of Indian-owned retailers to collect a tax from non-Indians did not, in fact, constitute a tax on Indians, and therefore, did not run afoul of either Indian Law § 6 or the Buffalo Creek Treaty. (*Id.*)

Plaintiffs filed a motion for leave to appeal to this Court, which was granted on February 16, 2017 "insofar as it seeks leave to appeal from that portion of the Appellate Division order that affirmed the dismissal of [Plaintiff's] motion for a preliminary injunction, dismissed upon the ground that such portion of the order does not finally determine the action within the meaning of the Constitution; motion for leave to appeal otherwise granted. (R. 242.)

QUESTIONS PRESENTED FOR REVIEW

Plaintiffs' appeal presents the following questions of law:

1. Does the enforcement of Tax Law § 471 on transactions completed by Indian-retailers located on the sovereign lands of the Seneca Nation violate the plain language of the broad protection from taxation enshrined in Indian Law § 6 and the Buffalo Creek Treaty?

2. Does the Memorandum and Order's restrictive interpretation of the broad protection from taxation for "*any purpose whatever*" to mean protection *solely* from taxation of real property, when there is nothing to suggest such a restrictive interpretation, violate the mandatory rules of statutory and treaty construction?

3. Does the Memorandum and Order, which permits enforcement of Tax Law § 471 on transactions completed by Indian-retailers located on the sovereign lands of the Seneca Nation violate the Supreme Court's mandate in *The New York Indians*, 72 U.S. 761 (1866) because it interferes with the Indians' peaceful and quiet enjoyment on their reservation?

The Fourth Department answered "No" to each question of law.

STATEMENT OF JURISDICTION

I. This Court has jurisdiction over the appeal.

The Court of Appeals has jurisdiction over the proposed appeal pursuant to C.P.L.R. § 5602(a)(1)(i) and C.P.L.R. § 5611. The Fourth Department's Memorandum and Order finally determined the proceeding by adjudging and declaring that "Tax Law § 471 is not inconsistent with Indian Law § 6, the Treaty of 1842 (7 US Stat 586), or the Due Process or Commerce Clauses of the United States Constitution." (R. 243.) The Memorandum and Order is not appealable as of right under C.P.L.R. § 5601.

II. This Court has jurisdiction over the questions presented.

Plaintiffs identified and preserved the first question presented for review in their Verified Complaint, submissions in connection with their motion for a preliminary injunction, and oral argument on the motion. (R. 11-13, 18, 26-27, 41-42, 68.)

Plaintiffs identified and preserved the second question presented for review in their Verified Complaint, submissions in connection with their motion for a preliminary injunction, and oral argument on the motion. (R. 14-15, 19, 26-27, 42-44, 68.)

Plaintiffs identified and preserved the third question presented for review in their Verified Complaint, submissions in connection with their motion for a preliminary injunction, and oral argument on the motion. (R. 44-47, 68.)

ARGUMENT

I. The State's sudden, unexpected, and unilateral decision to enact certain taxation statutes and regulations to be enforced on the sovereign land of the Seneca Nation constituted a dramatic legal shift in the State's treatment of the members of the Seneca Nation.

A. The Seneca Nation has a unique legal status.

Historically, no government, state or federal, considered the Seneca Nation's land to be part of any state or the United States. The Seneca Nation's absolute ownership and sovereignty, which pre-dated the arrival of Europeans, was recognized and recorded in multiple treaties with the newly formed United States. *See* Fort Stanwix Treaty of 1784, US-SN, Oct. 22, 1784, 7 Stat. 15, 15 (recognizing the "boundary of the lands of the Six Nations"); *see also* Fort Harmar Treaty of 1789, US-SN, Jan. 9, 1789, 7 Stat. 33, 33 (confirming that the previously agreed "boundary line" would "remain as a division line between the lands of the said Six Nations and the territory of the United States, forever"). As the leading scholar on Indian law has noted, obtaining peace with the Six Nations of the Iroquois Confederacy, rather than waging a prolonged frontier war, was crucial to the existence of the incipient United States. *See* Felix S. Cohen, *Handbook of*

Federal Indian Law, 418 (1945 ed.). Indeed, George Washington, himself, travelled to the Seneca Nation during treaty negotiations. These efforts to obtain peace with the Six Nations of the Iroquois Confederacy reflect the "peculiar status" that the Six Nations, including the Seneca Nation, held at the arrival of the first Europeans and throughout the history of the United States. *Id*. at 416.

Notably, in the Canandaigua Treaty of 1794, the United States recognized "all the land within the aforementioned boundaries, to be the property of the Seneca Nation; and the United States will never claim, the same, *nor disturb* the Seneca Nation . . . in the free use and enjoyment thereof." Canandaigua Treaty of 1794, art. III, US-SN, Nov. 11, 1794, 7 Stat. 44 (emphasis added). This treaty reiterated the previously recorded geographic boundaries of the lands sovereign to the newly formed United States and the lands sovereign to the Six Nations of the Iroquois Confederacy, including the Seneca Nation. Moreover, the United States vowed "never to claim the same" and "not to disturb" the Seneca Nation in exchange for peace. *Id*., art. IV.

B. State officials repeatedly recognized and deferred to the Seneca Nation's unique legal status.

In 1820, Governor Dewitt Clinton proclaimed that the Seneca Nation had "an absolute and uncontrolled right to [its] lands." Governor Dewitt Clinton's Remarks in Albany (Feb. 11, 1820), *available at* https://sni.org/culture/treaties/

(last visited June 16, 2017). Shortly thereafter, the Seneca Nation made a pact with the United States, the State, and the Commonwealth of Massachusetts, prohibiting such governments from taxing the Seneca Nation, as recorded in the Buffalo Creek Treaty:

> The parties to this compact mutually agree to solicit the influence of the Government of the United States to *protect such of the lands of the Seneca Indians*, within the State of New York, as may from time to time remain in their possession *from all taxes*, and assessments for roads, highways, *or any other purpose* until such lands shall be sold and conveyed by the said Indians, and the possession thereof shall have been relinquished by them.

Buffalo Creek Treaty, US-Seneca Nation, art. IX, May 20, 1842, 7 Stat. 586 (emphasis added). The Buffalo Creek Treaty, and the promises it contains, remain the "supreme law of the land." U.S. Const., art. VI, cl. 2.

The Seneca Nation then enacted its own constitution to govern its lands, s*ee generally* Seneca Nation Const. of 1848 (as amended Nov. 9, 1993), and its sovereignty and right to self-governance was recognized by the contemporaneous State and Federal governments. *See Hastings v. Farmer*, 4 N.Y. 293, 294 (1850) (explaining that any member of one of the tribes of the Six Nations of the Iroquois Federacy is "governed by the laws and usages of his tribe, and is only subject to our laws, *so far as the public safety requires*" (emphasis added)); *Fellows v. Denniston*, 23 N.Y. 420, 432 (1861) (recognizing the Six Nations of the Iroquois

Confederacy as "distinct and separate communities"), *rev'd in part by The New York Indians*, 72 U.S. 761 (1866); *see also United States v. City of Salamanca*, 27 F. Supp. 541, 544 (W.D.N.Y. 1939) (holding that each of the members of the Six Nations are "recognized as separate political communities authorized to administer their own internal affairs.").

The State Legislature, too, memorialized the Seneca Nation's absolute sovereignty, proclaiming that:

> No tax shall hereafter be assessed or imposed on either of said reservation [Allegany and Cattaraugus] or on any part thereof, *for any purpose whatever*, so long as said reservations remain the property of the Seneca [N]ation.

Ch. 45, sect. 4 of the Laws of 1857 (emphasis added).

Subsequently, the State enacted Indian Law § 6, which remains in effect today. Under that provision:

> No taxes shall be assessed, *for any purpose whatever*, upon any Indian reservation in this state, so long as the land of such reservation shall remain the property of the nation, tribe or band occupying the same.

Indian Law § 6 (emphasis added).

Moreover, the State's solemn promise to the Seneca Nation is reflected in other sections of Indian Law. *See* Indian Law § 70 (stating that the Seneca Nation "residing on the Allegany and Cattaraugus reservations shall . . . hold and possess

such reservations as a *distinct community*" (emphasis added)); *see also* Indian Law § 71 (recognizing that the State "*shall not authorize the taxation of any Indian or the property of any Indian*, not a citizen of the United States" (emphasis added)).

Notably, the Federal government considers the sovereign land of the Seneca Nation to be separate from the State. Indeed, Congress has defined trade between the Seneca Nation and the State as "*interstate* commerce," rather than *intrastate* commerce. 15 U.S.C. § 375(9)(A) (emphasis added). This delineation is appropriate because the Seneca Nation has always operated as an autonomous government, separate and apart from the State and Federal governments. *See* 25 U.S.C. 4301 (detailing the relationship of the United States and the tribes); *see also* 18 U.S.C. § 2341(4) (defining the term "State" to mean "a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or the Virgin Islands").

C. This Court has recognized the unique sovereignty of the Seneca Nation.

Although this Court has not addressed the precise issue on appeal, it has long recognized the sovereignty of the Seneca Nation. For example, in *Hastings v. Farmer*, 4 N.Y. 293 (1850), this Court recognized that any member of one of the tribes of the Six Nations, including the Seneca Nation, is "governed by the laws and usages of his tribe, *and is only subject to our laws, so far as the public safety*

requires." *Id*. at 294 (emphasis added). Similarly, in *Patterson v. Council of Seneca Nation*, 245 N.Y. 433 (1927), this Court explained that the State had long "acknowledged the *Seneca Indians to be a separate nation, a self-governing people, having a central government with appropriate departments to make laws, to administer and to interpret them*." *Id*. at 443 (emphasis added). Thus, long before the State's attempt to pad its pockets by way of enacting Tax Law § 471 and attempting to enforce the tax within the confines of the Seneca Nation's reservation, this Court recognized that the enforcement of State law had no place on the sovereign land of the Seneca Nation *except* for issues of public safety. There was no contemporaneous understanding of an exception for *any conceivable non-property taxes* in addition to issues of public safety.

D. The Seneca Nation has exclusive civil jurisdiction over its sovereign lands.

The Seneca Nation and the State have distinct jurisdictional boundaries. It is well-settled that the Seneca Nation retains "exclusive jurisdiction over their internal affairs" and "state law does not apply on the reservations." *Bowen v. Doyle*, 880 F. Supp. 99, 113 (W.D.N.Y. 1995). As correctly noted in *Bowen*, the Seneca Nation has "the right to control tribal affairs on reservation lands, free from state interference." *Id*. at 114.

State law is applicable on the sovereign lands of the Seneca Nation only to the extent that Congress has permitted such application. *See California v. Cabazon Mission of Indians*, 480 U.S. 202, 207 (1987); *United States v. Forness*, 125 F.2d 928, 932 (2d Cir. 1942) (recognizing that "state law does not apply to the Indians except so far as the United States has given its consent"). In the past, the State has lobbied Congress, unsuccessfully, for greater application of its civil laws on the sovereign lands of the Seneca Nation. In recognizing the unique status of the Six Nations of the Iroquois Confederacy, Congress has done no more than grant the courts of the State concurrent jurisdiction to entertain Indian-to-Indian civil disputes, should the parties elect to litigate their disputes in the State's courts rather than the Seneca Nation's tribal courts. *See* 25 U.S.C. § 233. However, in that same jurisdiction-conferring provision, Congress reiterated the Seneca Nation's sovereignty, noting that "*nothing herein contained shall be construed as subjecting the lands within any Indian reservation in the State of New York to taxation for State or local purposes*." *Id.* (emphasis added). Thus, it was understood that the State (and local) power to tax ceased at the State's borders with the Seneca Nation.

E. The State enacted consumption taxes on cigarettes sold in the State (but not in the sovereign lands of the Seneca Nation).

In 1939, the State enacted Tax Law § 471, to impose taxes on the purchase of cigarettes in the State. *See Cayuga Indian Nation of N.Y. v. Gould*, 14 N.Y.3d 614,

623 (2010) (discussing the history of New York's cigarette taxing scheme). However, it was not until 1988, nearly 150 years after the signing of the Buffalo Creek Treaty, that the State first attempted to promulgate a regulatory scheme to collect such taxes on the purchase of cigarettes by non-Indians from Indian-owned retailers located within sovereign Indian lands. *Id*. Notably, these regulations were never implemented and Governor George E. Pataki repealed them in 1998 demonstrating the "State's respect for the Indian Nations' sovereignty." *Id*. at 623-26.

The foregoing demonstrates that, at the time when the relevant treaties were negotiated, it was widely understood and accepted that the Seneca Nation possessed original and absolute sovereignty over its lands. The Seneca Nation and the State coexisted peacefully under the Buffalo Creek Treaty for more than 150 years. It is only recently that the State has decided that it is inconvenient to honor the Seneca Nation's sovereignty and has sought consistently greater control over the sovereign lands of the Seneca Nation. Against this backdrop, this Court must examine Tax Law § 471 in its current form, which is nothing more than a unilateral power grab by the State.

F. Recently, the State altered its cigarette taxing scheme and unilaterally forced retailers located within the sovereign lands of the Seneca Nation to unwillingly comply with the State's taxing scheme.

In 2003, the "Legislature adopted Tax Law § 471-e, which directed the [Tax] Department . . . to issue whatever regulations would be necessary to collect cigarette taxes on reservation sales to non-Indians." *Gould*, 14 N.Y.3d at 627. However, it was not until 2010, when the Legislature enacted the current version of Tax Law § 471, that the Tax Department promulgated enforcement regulations. In its current form, Tax Law § 471 states:

> There is hereby imposed and shall be paid a tax on all cigarettes possessed in the state by any person for sale . . . . The tax imposed by this section is imposed on all cigarettes sold on an Indian reservation to non-members of the Indian nation or tribe and to non-Indians and evidence of such tax shall be by means of an affixed cigarette tax stamp.

Tax Law § 471(1). Under the State's taxing scheme, the cigarette tax is paid by a licensed agent who purchases and affixes a stamp to packages of cigarettes in advance of sale to the consumer, to connote payment of the tax. *See* Tax Law § 471(2). The cost of the tax is to be included in the price paid by the consumer. *See* Tax Law § 471(3). A retailer who sells more than 400 cigarettes to a particular customer is presumed to fall within this taxing scheme. *See* Tax Law § 471-a; *see also* Tax Law §§ 481(2)(a), 1814(d). A retailer who sells cigarettes in violation of

this taxing scheme is subject to civil fines and prosecution for felonious tax fraud. *See* Tax Law §§ 481, 1814. Thus, the State now takes the position that no retailer is able to sell cigarettes outside of this taxing scheme (including its burdensome record-keeping provisions) without falling subject to criminal prosecution by the State, even if those retailers are Indian-owned and operate solely within the sovereign lands of the Seneca Nation.

Although there is an exemption for the purchase of cigarettes by members of the Seneca Nation on their sovereign lands, *see* Tax Law § 471(5), members are only allowed to purchase a tax-free amount equal to "the United States average cigarette consumption per capita." Tax Law §471-e(2)(b)(i). Furthermore, members must be qualified for the exemption under criteria mandated by the State, and retailers listed within the Seneca Nation must maintain intricate and voluminous records of such purchases. *See* Tax Law § 471-e. The State justifies this intrusion into the Seneca Nation's sovereignty by proclaiming that "the ultimate incidence of and liability for the tax shall be upon the consumer," not the Seneca Nation's retailers, *see* Tax Law § 471(2), and, thus, contends the State, the mandate is not a tax on any members of the Seneca Nation (which the State knows it has *no authority* to do). Regardless of the State's crafty and self-serving description of the purposes of Tax Law § 471, that provision is an unjustifiable and illegitimate intrusion into

the day-to-day activities of the members of the Seneca Nation, and is inconsistent with State law and Supreme Court precedent.

Finally, it cannot be overstated that Tax Law § 471 expressly recognizes that "no tax shall be imposed on cigarettes sold under such circumstances that this [S]tate is without the power to impose." The State has the authority to impose the tax on the transactions of *non-Indian* retailers located on sovereign Indian lands to *non-Indian* consumers. However, the State is "without the power to impose the tax" on the transactions of *Indian-owned* retailers because such transactions are protected from taxation by Indian Law § 6. The State's imposition of the cigarette tax on such transactions contravenes Indian Law § 6, as set forth below, and violates the exception expressly noted in Tax Law § 471. As a practical matter, if that exception does not cover the transactions of *Indian-owned* retailers located on sovereign Indian lands that exception is meaningless because there are only two types of retailers located on the sovereign land of the Seneca Nation: Indian-owned retailers and non-Indian retailers. Non-Indian retailers located on sovereign territory would, of course, be subject to Tax Law § 471.

II. The plain language of Indian Law § 6 renders Tax Law § 471 unenforceable on the transactions at issue in this appeal.

The plain language of Indian Law § 6 precludes enforcement of Tax Law § 471 on the sovereign lands of the Seneca Nation when sales are made by an Indian retailer and title passes on Indian land. As specified in Indian Law § 6:

> No *taxes* shall be assessed, *for any purpose whatever*, upon any Indian reservation in this state, so long as the land of such reservation shall remain the property of the nation, tribe or band occupying the same.

Indian Law § 6 (emphasis added). The precursor to this provision, enacted immediately after the Buffalo Creek Treaty, contained the same broad covenant. *See* Ch. 45, sect. 4 of the Laws of 1857 ("No tax shall hereafter be assessed or imposed on either of said reservations [Allegany and Cattaraugus] or on any part thereof, *for any purpose whatever*, so long as said reservations remain the property of the Seneca Nation . . . ." (emphasis added)).

These broad covenants to refrain from enforcing tax laws within the Seneca Nation "*for any purpose whatever*" were not optional. New York was a signatory to the Buffalo Creek Treaty and was bound by the broad covenants it contained. Under the Buffalo Creek Treaty, the State promised to:

> . . . *protect such of the lands of the Seneca Indians*, within the State of New York, as may from time to time remain in their possession *from all taxes*, and assessments for roads, highways, *or any other purpose* until such lands shall be

> sold and conveyed by the said Indians, and the possession thereof shall have been relinquished by them.

Buffalo Creek Treaty, US-Seneca Nation, art. IX, May 20, 1842, 7 Stat. 586 (emphasis added). Indian Law § 6 (and its precursor) merely codified the State's obligations under the Buffalo Creek Treaty. As plainly stated, Indian Law § 6 prohibits the State from enforcing tax laws *for any purpose*, including cigarette consumption, within the confines of the Seneca Nation's reservation.

The Fourth Department relied upon two Supreme Court opinions (*Dep't of Tax. & Fin v. Milhelm Attea & Bros, Inc.*, 512 U.S. 61 (1994), and *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reserv.*, 425 U.S. 463 (1976)) to support its position that, even if its narrow interpretation of Indian Law § 6 was incorrect, the State could, nonetheless, enforce Tax Law § 471 on the sales transactions at issue in this appeal because such enforcement had been blessed by the Supreme Court. (R. 245.) The Fourth Department erred by overstating the importance and relevance of those Supreme Court opinions to the interpretation of Indian Law § 6. Indeed, there is nothing in those opinions that contradicts Plaintiffs' request that this Court interpret the plain language of Indian Law § 6 to mean what it says, that it provides protection from taxation *for any purpose*.

For example, in *Milhelm Attea*, the Court reviewed an earlier version of the State's taxing scheme for the taxation of the sale of cigarettes. The *sole* issue before

the Supreme Court was whether that State taxing scheme was preempted by the federal Indian Trader Statutes, 25 U.S.C. §§ 261 *et seq.*, which the Court answered in the negative. *See Milhelm Attea*, 512 U.S. at 64-78. Notably, this Court has recognized the limited application of the Supreme Court's holding in that case. Indeed, this Court explained that *Milhelm Attea* "was commenced by non-Indian wholesalers" to address only the "narrow preemption issue." *Cayuga Indian Nation of N.Y. v. Gould*, 14 N.Y.3d 614, 624 (2010). Because of the nature of the parties and issues before it, the Supreme Court did not take into consideration "the interests of Indian nations or tribes affected by the regulations." *Id*.

Similarly, in *Moe*, the Supreme Court held that a Montana statute aimed at collecting cigarette taxes on the sales of cigarettes by Indian retailers to non-Indian consumers on Navajo land did not violate the *federal* common law on tribal self-determination or any *federal* statutes concerning Indian relations. *See Moe*, 425 U.S. at 475-83. Whether such tax enforcement violates *federal* law does not impact whether such enforcement violates Indian Law § 6 and the Buffalo Creek Treaty. Thus, neither *Milhelm Attea* nor *Moe* lend any support to the Fourth Department's ruling because neither opinion considered the statutory prohibition on such enforcement found in Indian Law § 6, which is a unique matter of State law.

Much to the contrary of the Memorandum and Order, a critical reading of the plain language of Indian Law § 6 supports Plaintiffs' position. Under that provision:

> No taxes shall be assessed, for any purpose whatever, upon any Indian *reservation* in this state, so long as the *land* of such *reservation* shall remain the property of the nation, tribe or band occupying the same.

Indian Law § 6 (emphasis added). The term "land" simply set forth the geographic boundaries for the protection from taxation for "any purpose whatever" within the confines of an Indian "reservation" so long as that land remained the property of the Indian nation at issue. Here, the Seneca Nation has an unbroken possession and sovereignty over the land on which Native Outlet is located. Accordingly, the State is without the jurisdiction to enforce its tax schemes *du jour* within the Seneca Nation.

III. The mandatory rules of construction render Tax Law § 471 incompatible with Indian Law § 6 and the Buffalo Creek Treaty.

The relevant canons of construction reinforce the broad protection afforded the Seneca Nation under the plain language of Indian Law § 6 and the Buffalo Creek Treaty. It is well-settled that "[t]he language used in treaties with the Indians should never be construed to their prejudice." *Worcester v. Georgia*, 31 U.S. 515, 582 (1832), *abrogated on other grounds by Nevada v. Hicks*, 533 U.S. 353, 361-62 (2001). Ambiguous expressions are to be resolved in favor of the Indian parties concerned. *See McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 174

(1973) (quoting *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930)) (construing land allotment in favor of tribe to prohibit collection of oil royalties from the tribe, the Court explained that words should never be construed to the prejudice of a tribe and should not be given technical interpretations). More importantly, these canons of construction are to be considered in connection with "the tradition of Indian independence." *Id.*

Similarly, with respect to statutory construction, "the general rule [is] that statutes passed for the benefit of . . . Indian tribes or communities are to be liberally construed, [with] doubtful expressions being resolved in favor of the Indians." *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918) (citing *Choate v. Trapp*, 224 U.S. 665, 675 (1912)); *accord County of Yakima v. Confed. Tribes of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992) ("When we are faced with these two possible constructions, our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: 'Statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'" (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985))); *Carpenter*, 280 U.S. at 366-67.

Any holdings of lower courts that construe Indian Law § 6 (and the Buffalo Creek Treaty) as pertaining *solely* to real property taxes, in spite of the plain language

to the contrary, violate well-settled principles of treaty and statutory construction in addition to being in consistent with the plain language of those provisions. The plain language of Indian Law § 6 expressly prohibits the imposition of taxes for "*any purpose whatever*" on the Seneca Nation's *reservation*, not merely upon its *land*. Yet, the Fourth Department has construed that broad protection from taxation to apply *solely* to the taxation of real property when there is no evidence to suggest that either Indian Law § 6 or the Buffalo Creek Treaty pertained solely to issues of real property taxes. This restrictive interpretation of plain, unambiguous language is inconsistent with the mandate to construe terms to the benefit of the Indians. Instead, the Fourth Department has construed that provision to the *detriment* of the Indians.

Equally troubling, the Seneca Nation would not have understood the language "*for any purpose*" to provide such narrow protection from State intrusion and courts must construe treaties and statutes as the Seneca Nation would have understood them. *See Worcester*, 31 U.S. at 582. Notably, at the time the Buffalo Creek Treaty was negotiated, the State taxed many items *in addition to* real property, such as salt, mills, and dogs. *See* T.S. Gillett, *General Index of the Laws of the State of New York*, 623, 679, 681 (1859). Thus, none of the parties to the Buffalo Creek Treaty, and in particular, the Seneca Nation, would have understood the term "*for any purpose*" to provide such limited protection from State interference when the State clearly taxed

items other than land. To have negotiated such narrow protection would have amounted to an abrogation of sovereignty because the Seneca Nation would have subjected itself to any form of taxation devised by the State other than that labelled real property. However, the Seneca Nation negotiated from a position of strength and would not have willingly subjected itself to the whims of the State. *Cf.* Felix S. Cohen, *Handbook of Federal Indian Law*, 418 (1945 ed.) (discussing the power that the Seneca Nation wielded at the time it negotiated its treaties).

Indeed, the State, itself, distinguished between taxation of individuals and taxation of property elsewhere in the same statutory scheme. Notably, in Indian Law § 71, the State declined to authorize the "*taxation of any Indian or the property of any Indian*, not a citizen of the United States." Indian Law § 71 (emphasis added). Thus, with respect to Indian Law § 6, the State could have, and would have made such a distinction if that was the Legislature's intent. But, the Legislature drafted a broader protection from taxation. It prohibited the assessment—and, by logical inference, the collection—of any taxes within the confines of an Indian reservation. Accordingly, any interpretation of Indian Law § 6 that limits its scope to real property taxation contravenes other portions of that same statute, which specifically address such taxation.

The Buffalo Creek Treaty and Indian Law § 6 protect the Seneca Nation and its members, including member-owned retailers, from taxes *for any purpose* and this protection is the supreme law of the land. *See* U.S. Const. Art. VI, cl. 2. Accordingly, Tax Law § 471, which is in direct contravention of the text of Indian Law § 6, and at odds with the historical sovereignty of the Seneca Nation, as well as the treaties that led to enactment of that provision, must be enjoined from enforcement on the sovereign lands of the Seneca Nation. Indeed, Tax Law § 471 recognizes an exception to its application for transactions for which the State "is without the power to impose the tax" and Indian Law § 6 makes it clear that the transactions of *Indian-owned* businesses on the sovereign land of the Seneca Nation fall within that express exception.

IV. Tax Law § 471 cannot be reconciled with the Supreme Court's holding in *New York Indians*.

The Fourth Department's interpretation of Indian Law § 6 as allowing for enforcement of Tax Law § 471 on the transactions at issue because such taxation does not amount to a tax imposed on the Indians ignores the clear edict of the *New York Indians* case. In *New York Indians*, the Supreme Court struck a tax statute that empowered the State to *merely assess* taxes on reservation lands that had been sold to non-Indians, but continued to be possessed and occupied by members of the Seneca Nation for a five-year period, even though the tax statute expressly forbade the State

(or anyone else) from interfering with the possessory and occupation rights of the members of the Seneca Nation, should non-payment of the tax assessment occur during their remaining occupation of the lands. As the Supreme Court explained when analyzing that statute, such an assessment to be paid by *non-Indians* constituted an "unwarrantable interference, inconsistent with the original title of the Indians" and a potential "embarrassment" to the Indians who could not be deprived of the occupation and possession of their lands regardless of any State taxation scheme. *Id*. at 769-72.

Notably, the Memorandum and Order below is inconsistent with the Supreme Court's holding for two reasons. First, the *New York Indians* case makes it clear that *a mere tax assessment to be paid by non-Indians* violated the sovereign rights of the Seneca Nation to be free from State taxation as secured by the Buffalo Creek Treaty. In that case, the Supreme Court explained that the State's process for assessing the tax was too great of an interference by the State with the affairs of the Seneca Nation, even though the tax at issue was to be paid by *non-Indians*. The Memorandum and Order erred in finding that the rights of the members of the Seneca Nation are not implicated by Tax Law § 471 because that tax is to be paid by non-Indians rather than Indians. The *New York Indians* case, which also sought to tax *non-Indians*, makes it clear that courts must take a critical look at the State's *process* for assessing and

collecting a particular tax and not simply whether non-Indians are responsible for payment of the tax to determine whether the tax violates the Buffalo Creek Treaty and Indian Law § 6, which the Memorandum and Order failed to do.

Second, the State's process for enforcing Tax Law § 471 constitutes a far greater intrusion into the affairs of the Seneca Nation than that struck by the Supreme Court in *New York Indians*. Indeed, the *New York Indians* case recognized that the process for the *mere assessment* of a tax to be paid by non-Indians violated the sovereign rights of the Seneca Nation as recognized in the Buffalo Creek Treaty. Tax Law § 471 does far more than simply *assess* a tax. Tax Law § 471 imposes onerous obligations on Indian-owned retailers by mandating that they, contrary to their desired business practices: (a) prepay the cigarette excise tax; (b) collect the cigarette excise tax; or (c) collect data for the State to aid in the State's collection of the cigarette excise tax. If the mere *assessment* of a tax to be paid by non-Indians violates the Buffalo Creek Treaty as recognized in *New York Indians*, the entanglement between the State Tax Department and Indian-owned retailers required under Tax Law § 471 surely violates the Buffalo Creek Treaty as an "unwarrantable interference."

CONCLUSION

This Court should rule that the enforcement of Tax Law § 471 on the cigarette sales of Indian-owned retailers to their non-Indian customers on an Indian reservation (1) is inconsistent with the solemn obligations of the State under the Buffalo Creek Treaty to refrain from taxation "for any purpose whatever" as subsequently codified in Indian Law § 6, (2) violates the Supreme Court's decision in the *New York Indians* case, and (3) strips those provisions of their intended meaning, which is out of step with contemporary society's respect for the autonomy of indigenous people. This Court should not allow the State to break a promise to the Seneca Nation even though honoring that promise might be inconvenient for the State.

DATED: Buffalo, New York
June 19, 2017

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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word Version 2010.

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Dated: June 19, 2017

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