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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.

MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

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Dated: November 29, 2016

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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STATE OF NEW YORK
COURT OF APPEALS

ERIC WHITE
and NATIVE OUTLET,

Plaintiffs-Appellants,

vs.

ERIC T. SCHNEIDERMAN, New York State Attorney General, in his official capacity, and THOMAS H. MATTOX, Commissioner, New York State Department of Taxation and Finance, in his official capacity,

Defendants-Respondents.

NOTICE OF MOTION FOR LEAVE TO APPEAL

PLEASE TAKE NOTICE, that upon (1) the annexed statement setting forth the procedural history of the case and facts, (2) the annexed statement showing the Court of Appeals' jurisdiction over this motion and the prospective appeal, (3) the annexed statement of the question presented for review, (4) the annexed argument showing why the question presented merits review by the Court of Appeals, (5) the Appellate Division record on appeal, and (6) the Appellate Division briefs, Plaintiffs-Appellants shall move this Court at a term thereof to be held at

the Court of Appeals Hall, 20 Eagle Street, Albany, New York, on the 19th day of December, 2016, for leave to appeal from the Memorandum and Order of the Appellate Division, Fourth Department, entered June 10, 2016, which affirmed an Order of the Supreme Court, County of Cattaraugus, entered March 9, 2015, granting Defendants-Respondents' motion to dismiss and denying Plaintiffs-Appellants' motion for a preliminary injunction as moot. Further, the Memorandum and Order modified the lower court's order on the law, declaring that "Tax Law § 471 is not inconsistent with Indian Law § 6, the Treaty of 1842 (7 US Stat 586), or the Due Process of Commerce Clauses of the United States Constitution."

Pursuant to 22 N.Y.C.R.R. 500.21(a), oral argument on the return date is not permitted, and no appearance is necessary or allowed.

DATED: Buffalo, New York
November 29, 2016

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Hon. John P. Asiello
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PRELIMINARY STATEMENT

This Court's granting of leave is crucial because this appeal enables this Court to address issues:

(1) Of first impression;

(2) Of Statewide importance;

(3) That are purely legal;

(4) Arising out of flawed rulings from the Appellate Divisions:

a. That allow a recently enacted New York State ("State") taxation statute, Tax Law § 471, to remain in force even though its terms are in direct conflict with a preexisting State statute, Indian Law § 6, which codified the State's solemn obligations under the Buffalo Creek Compromise Treaty of 1842, US-Seneca Nation, May 20, 1842, 7 Stat. 586 to refrain from enforcing tax laws "for *any purpose whatever*, upon any Indian reservation";

b. That also violate the Supreme Court's decision in *The New York Indians*, 72 U.S. 761 (1866); and

c. That reflect an antiquated analysis in tension with the sovereignty and respect that our modern society accords indigenous people.

STATEMENT OF THE PROCEDURAL HISTORY OF THE CASE AND FACTS

I. THE NATURE OF THE CASE

By service of a Verified Complaint dated June 13, 2014, Plaintiffs-Appellants Eric White ("Mr. White") and Native Outlet ("Native Outlet") (collectively, "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 of Indians ("Seneca Nation") on the ground that, *inter alia*, the application of Tax Law § 471 to such sales: (1) is inconsistent with Indian Law § 6; (2) violates 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; and (3) runs afoul of the Supreme Court's decision in *The New York Indians*, 72 U.S. 761 (1866). (R. 38-47.)

II. THE PARTIES

Mr. White is an Indian, who is an enrolled member of the Seneca Nation and resides within its territories. (R. 62-63.)[1] Mr. White operates a convenience store, Native Outlet, which is located entirely within the Seneca Nation's 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-Appellees ("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.)

III. NATIVE OUTLET'S LOCATION

Native Outlet is located entirely within the territory of the Seneca Nation (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 Iroquois Confederacy. (R. 51-52, 62.) The history of the Seneca

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[1] "R. ___" references the Record on Appeal before the Appellate Division, one copy of which has been filed with this Court pursuant to 22 N.Y.C.R.R. § 500.22(c). Additionally, "S.R. ___" references the Supplemental Record on Appeal before the Appellate Division, one copy of which has been filed with this Court pursuant to 22 N.Y.C.R.R. § 500.22(c).

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.*) Indeed, the Seneca Nation governs its territory under its own constitution. (R. 59.)

IV. PROCEDURAL HISTORY

Shortly after commencing the instant action, 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 sovereign land 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 tribe. (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 (a true and correct copy of which is attached hereto as Ex. A). On March 24, 2015, Plaintiffs filed a timely notice of appeal. (R. 3-5.)

By a Memorandum and Order entered June 10, 2016 (a true and correct copy of which is attached hereto as Ex. B), the Fourth Department affirmed the lower court's order granting Defendants' motion to dismiss and denying Plaintiffs' motion for a preliminary injunction as moot. Further, the Memorandum and Order modified the lower court's order on the law, 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." 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. The court noted that Indian Law § 6 "was enacted to bar taxes on real property." 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.

Defendants served the Memorandum and Order with notice of entry via first class mail on June 16, 2016 (true and correct copies of the notice of entry, Memorandum and Order, and postmarked envelope are attached hereto as Ex. C). Plaintiffs timely moved the Appellate Division for leave to appeal on July 20, 2016 (true and correct copies of the Notice of Motion, supporting affidavit (without exhibits), and proof of service are

attached hereto as Ex. D). The Appellate Division denied Plaintiffs' motion for leave by an order entered on September 30, 2016 (a true and correct copy of which is attached hereto as Ex. E). Defendants served the order, with notice of entry, via first class mail on October 25, 2016[2] (true and correct copies of the notice of entry, order, and postmarked envelope are attached hereto as Ex. F).

STATEMENT OF JURISDICTION

I. The Court has jurisdiction over the motion.

The Court of Appeals has jurisdiction over this motion for the reasons stated in the foregoing Statement of the Procedural History of the Case and Facts (wherein the timeliness of the motion, pursuant to C.P.L.R. § 5513(b), was demonstrated), and in Point II of this Statement of Jurisdiction (wherein the present appealability of the Appellate Division's order is demonstrated).

II. The Court has jurisdiction over the proposed 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 Appellate

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[2] The Notice of Entry is dated October 25, *2015*, instead of October 26, *2016*, which is nothing more than a scrivener's error, and has no impact on the timeliness of Plaintiffs' instant motion for leave to appeal to this Court.

Division's order finally determined the proceeding by denying the Plaintiffs' request for injunctive relief from enforcement of Tax Law § 471 on the transactions of Indian-owned retailers with their customers that occur on the sovereign land of the Seneca Nation, and the order is not appealable as of right under C.P.L.R. § 5601.

THE RELEVANT STATUTES AND TREATIES

I. THE RELEVANT STATE STATUTES

Under Indian Law § 6, "[n]o 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). Under Indian Law § 70, the State recognized that the Seneca Nation "residing on the Allegany and Cattaraugus reservations shall . . . hold and possess such reservations as a *distinct community*." Indian Law § 70 (emphasis added). Under Indian Law § 71, the State disclaimed that it "*shall not authorize the taxation of any Indian or the property of any Indian*, not a citizen of the United States." Indian Law § 71 (emphasis added).

Yet, under Tax Law § 471, which was originally enacted in 2003, nearly 150 years after the Buffalo Creek Treaty, "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).

II. THE RELEVANT TREATIES

Under the Canandaigua Treaty of 1794, "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. Moreover, the United States vowed "never to claim the same" and "not to disturb" the Seneca Nation in exchange for peace. *Id.*, art. IV.

Under 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, 7 Stat. 586 (emphasis added).

III. THE RELEVANT FEDERAL STATUTES

There are several Federal statutes relevant to the instant appeal. 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) (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").

Further, Congress has affirmed the Seneca Nation's sovereignty, noting in one statutory scheme 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." 25 U.S.C. § 233 (emphasis added).

IV. THE RELEVANT FEDERAL CONSTITUTIONAL PROVISIONS

Under the Supremacy Clause, the Federal Constitution "and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." U.S. Const. Art. VI, cl. 2.

QUESTIONS PRESENTED FOR REVIEW

Plaintiffs respectfully ask that the Court grant leave to appeal from the Appellate Division's Order entered June 10, 2016 to resolve the following questions of law:

> 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?

> 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?
>
> 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)?

The Appellate Division, agreeing with Defendants, answered "No" to each question of law.

Plaintiffs therefore seek leave to appeal so this Court may correct the Appellate Division's errors of law. Plaintiffs identified and preserved the questions presented for review in their submissions to the Supreme Court (R. 38-95, 112-25) and the Appellate Division (Brief for Plaintiffs-Appellants at 7-29).[3]

The Plaintiffs' appeal will address all issues of which this Court may take cognizance. Under *Quain v. Buzzetta Constr. Corp.*, 69

[3] One copy of the parties' briefs, as submitted to the Appellate Division, has been included with Plaintiffs' motion for leave to appeal to this Court pursuant to 22 N.Y.C.R.R. § 500.22(c).

N.Y.2d 376 (1987), a party who limits his or her leave application to specific issues "is bound by such limitation and may not raise additional issues on the appeal." *Id.* at 379. Plaintiffs hereby state that they are not so limiting their motion. Should leave to appeal be granted, they reserve the right to address all issues of which the Court may take cognizance, in accordance with the Court's general practice. *See id.* at 380.

ARGUMENT

I. The State's intrusion onto the sovereign land of the Seneca Nation, like that in this case, is a recent development.

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", which included the Seneca Nation).

Notably, the Seneca Nation made a pact with the United States, the State, and the Commonwealth of Massachusetts, prohibiting those

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, 7 Stat. 586 (emphasis added). As a treaty to which the United States was a party, the Buffalo Creek Treaty and the promises it contains, remain the "supreme law of the land" U.S. Const., art. VI, cl. 2, unless or until the United States negotiates a replacement.

Afterwards, the Seneca Nation 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 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, 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"). Thus, the contemporaneous understanding of this Court, as articulated in *Hastings* was that the State's jurisdiction ended at the boundaries of the Seneca Nation, except in matters of "public safety" of which taxation is not.

The State Legislature, too, memorialized the Seneca Nation's absolute sovereignty. *See* Ch. 45, sect. 4 of the Laws of 1857. 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).

In 2003, nearly 150 years later, the State "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." *Cayuga Indian Nation of N.Y. v. Gould*, 14 N.Y.3d 614, 627 (2010). 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).

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). 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).

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 with non-Indian consumers. However, the State is "without the power to impose the tax" on the transactions of *Indian-owned* retailers, regardless of the customer, because such transactions are protected from taxation by Indian Law § 6 and the Buffalo Creek Treaty. The State's imposition of the cigarette tax on such transactions is in contravention of Indian Law § 6 and the Buffalo Creek Treaty, as set forth below, and violates the exception expressly noted in 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. These statutes merely codified New York'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, on the sovereign lands of 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. The plain language of Indian Law § 6 prohibits enforcement of taxation for "*any purpose whatever*" on the sovereign land of the Seneca Nation. Yet, the Memorandum and Order 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 estate taxes. This restrictive interpretation of plain, unambiguous language is inconsistent with the mandate to construe terms to the benefit of the Indians.

Moreover, even if the terms of this unmistakably clear statute are determined to be ambiguous, courts must interpret any ambiguity in favor of the Seneca Nation under the governing canons of construction. Thus, leave must be granted to allow this Court to rectify the Memorandum and Order's erred construction of the terms of Indian Law § 6 and the Buffalo Creek Treaty.

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 property 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 vowed to protect the Seneca Nation from taxation "*for any purpose.*" Accordingly,

any interpretation of Indian Law § 6 that limits its scope to real property taxation is in contravention with 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 its 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*.

This Court should be given the opportunity to address the inconsistency between the Memorandum and Order's interpretation of

Indian Law § 6 as allowing for enforcement of Tax Law § 471 on the transactions at issue and 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 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 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 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 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."

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

Although this Court has not addressed the precise issue in this appeal, it has long recognized the sovereignty of the Seneca Nation. *See Hastings v. Farmer*, 4 N.Y. 293, 294 (1850) (explaining 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"). Indeed, 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).

Moreover, the issues raised in this appeal have caught the attention of this Court in the past; however, the Court was precluded from addressing it in the only case before it to raise the issue as the parties in that case failed to preserve the issue for appellate review. *Cf. Snyder v. Wetzler*, 84 N.Y.2d 941, 942 (1994) ("To the extent plaintiff contends that the State tax statutes at issue violate either the Supremacy Clause or New York law, his arguments are unpreserved and cannot be considered on this appeal."); *accord* S.R. 1-9. Leave must be granted to give this Court the opportunity to reaffirm its long-standing recognition of the rights of the members of the Seneca Nation to be free from unfettered intrusion by the State.

CONCLUSION

This Court should review the Appellate Division's order entered June 10, 2016 so it may determine whether the enforcement of Tax Law § 471 on the cigarette sales of Indian-owned retailers to their non-Indian customers on the sovereign land of the Seneca Nation (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) is out of step with contemporary society's respect for the autonomy of indigenous people. The issues raised in this appeal have indisputable statewide significance, as they affect thousands of transactions daily across New York.

DATED: Buffalo, New York
November 29, 2016

LIPSITZ GREEN SCIME CAMBRIA LLP

By: _____
PAUL J. CAMBRIA, JR., ESQ.
ERIN E. MCCAMPBELL, ESQ.
Attorneys for Plaintiffs-Appellants
Office and P.O. Address
42 Delaware Avenue, Suite 120
Buffalo, New York 14202
(716) 849-1333

EXHIBIT A

At a Special Term of the Supreme Court, held in and for the County of Cattaraugus, at the Cattaraugus County Courthouse, 303 Court Street, Little Valley, New York, on the 19th day of February, 2015.

PRESENT: **HON. JEREMIAH J. MORIARTY, J.S.C.**
Justice Presiding

STATE OF NEW YORK : COUNTY OF CATTARAUGUS
SUPREME COURT

ERIC WHITE and NATIVE OUTLET,

Plaintiffs,

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.

ORDER

Index No. 82670

This matter having come before the Court on the August 11, 2014 Motion of Plaintiffs ERIC WHITE and NATIVE OUTLET seeking an Order pursuant to CPLR Article 63 preliminarily enjoining the Defendants ERIC T. SCHNEIDERMAN, in his official capacity as New York State Attorney General, and THOMAS H. MATTOX, in his official capacity as Commissioner of the New York State Department of Taxation and Finance, from enforcement of New York State Tax Law §471 during the pendency of this action, and the December 26, 2014 Cross-Motion of

Defendants seeking an Order dismissing Plaintiffs' Verified Complaint pursuant to CPLR 3211(a)(7).

NOW upon reading and filing Plaintiffs' Verified Complaint dated June 13, 2014 and filed on June 23, 2014; Notice of Motion for a Preliminary Injunction dated August 11, 2014, Affirmation of Paul J. Cambria, Jr., Esq. dated August 11, 2014; Affidavit of Eric White, sworn to June 13, 2014, Memorandum of Law in Support of Motion for Preliminary Injunction dated August 11, 2014 submitted in support of Plaintiffs' motion; Defendants' December 26, 2014 Notice of Cross-Motion to Dismiss and Memorandum of Law in Opposition to Plaintiffs' Motion for Preliminary Injunction and in support of Defendants' Cross-Motion to Dismiss dated December 26, 2014, submitted in support of said cross-motion and in opposition to Plaintiffs' motion; and Plaintiffs' Reply Memorandum of Law in Further Support of Plaintiffs' Motion for Preliminary Injunction and In Opposition to Defendants' Cross-Motion to Dismiss dated February 12, 2015, submitted in further support of Plaintiffs' motion for preliminary injunction and in opposition to Defendants' cross-motion to dismiss; and

After hearing Paul J. Cambria, Jr., Esq. on behalf of Plaintiffs and Assistant Attorney General, David J. Sleight, on behalf of Defendants; and after due deliberation being had thereon, it is hereby

ORDERED, that for the reasons set forth on the record at the hearing of said motions (a transcript of which is attached hereto and made a part hereof), Defendants' Cross-Motion is granted for the reasons set forth in Defendants' papers; and the application to dismiss the Verified Complaint of Plaintiffs pursuant to 3211(a)(7), in that said pleading fails to state a cause of action under existing and controlling New York law, is granted; and it is further

ORDERED, that based upon the foregoing, Plaintiffs' motion for a preliminary injunction is moot.

HON JEREMIAH J. MORIARTY, J.S.C

ENTERED: March 9 2015

Vena Dry
Clerk of Court

EXHIBIT B

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

448

CA 15-01764

PRESENT: WHALEN, P.J., CARNI, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

ERIC WHITE AND NATIVE OUTLET,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

ERIC T. SCHNEIDERMAN, NEW YORK STATE ATTORNEY GENERAL, IN HIS OFFICIAL CAPACITY, AND THOMAS H. MATTOX, COMMISSIONER, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, IN HIS OFFICIAL CAPACITY,
DEFENDANTS-RESPONDENTS.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (PAUL J. CAMBRIA, JR., OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ROBERT M. GOLDFARB OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Cattaraugus County (Jeremiah J. Moriarty, III, J.), entered March 12, 2015. The judgment granted the cross motion of defendants to dismiss plaintiffs' complaint and dismissed as moot the motion of plaintiffs for a preliminary injunction.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reinstating the complaint to the extent that it seeks a declaration and granting judgment in favor of defendants as follows:

> It is ADJUDGED AND DECLARED 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,

and as modified the judgment is affirmed without costs.

Memorandum: Plaintiffs commenced this declaratory judgment action, alleging that the enactment and enforcement of Tax Law § 471, which imposes requirements on plaintiffs to pre-pay the amount of the tax to be assessed on the sale of cigarettes to non-Indians and non-members of the Seneca Nation (collectively, non-Indians), violates Indian Law § 6 and certain treaties between the Seneca Nation and the United States of America, particularly the Treaty of 1842 (7 US Stat 586). Plaintiffs sought a preliminary injunction enjoining enforcement of the Tax Law, and Supreme Court granted defendants'

cross motion pursuant to CPLR 3211 (a) (7) and dismissed the complaint. Because the complaint seeks a declaration, the court erred in dismissing the complaint in its entirety and in failing to declare the rights of the parties (*see Maurizzio v Lumbermens Mut. Cas. Co.*, 73 NY2d 951, 954). We therefore modify the judgment accordingly.

Plaintiffs contend that we erred in determining in *Matter of New York State Dept. of Taxation & Fin. v Bramhall* (235 AD2d 75, *appeal dismissed* 91 NY2d 849) that the Treaty of 1842 and Indian Law § 6 bar the taxation of reservation land, but do not bar the imposition of, inter alia, "sales taxes on cigarettes . . . sold to non-Indians on the Seneca Nation's reservations" (*id.* at 85), and request that we reconsider our determination. We adhere to our determination in *Bramhall*.

The Treaty of 1842, which provided, inter alia, that the Seneca Nation would retain the Allegany and Cattaraugus reservations, stated at article ninth that "[t]he parties to this compact mutually agree to solicit the influence of the Government of the United States to protect *such lands* of the Seneca Indians, within the State of New York, . . . *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" (7 US Stat 586, 590 [emphasis added]). We conclude that the plain language of that treaty supports our determination that it prohibited the state from imposing taxes on the "lands" (*id.*), i.e., the real property, of the Seneca Nation.

Indian Law § 6, entitled "Exemption of reservation lands from taxation," states that "[n]o 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." That section has remained unchanged since 1909 (L 1909, ch 31), and it cites to, inter alia, chapter 45 of the Laws of 1857 as the source of the legislation, and to *Fellows v Denniston* (23 NY 420, *revd sub nom. The New York Indians*, 72 US 761). Chapter 45 of the Laws of 1857, entitled "An Act to relieve the Seneca nation of Indians from certain taxes on the Allegany and Cattaraugus reservations" required, inter alia, that, parcels or lots that were sold by the comptroller for taxes were to be released "by the State to the Seneca nation of Indians residing on said reservation" (L 1857, ch 45, § 1), and that "[n]o tax shall hereafter be assessed or imposed on either of said reservations, or any part thereof, for any purposes whatever, so long as said reservations remain the property of the Seneca nation; and all acts of the legislature of this State conflicting with the provisions of this section[] are hereby repealed" (L 1857, ch 45, § 4). The Supreme Court determined in *The New York Indians* (72 US at 770-772) that the State was without authority to impose taxes on real property to defray the costs of building and repairing roads and bridges. Thus, even construing the statute liberally in favor of the Indians, as we must (*see County of Yakima v Confederated Tribes & Bands of Yakima Indian Nation*, 502 US 251, 269), we conclude that the statutory history of

Indian Law § 6 supports our determination in *Bramhall*, and that the limiting language in the title of the section "effectuate[s] the legislative intent" (McKinney's Cons Laws of NY, Book 1, Statutes § 94, Comment at 194), i.e., that Indian Law § 6 was enacted to bar taxes on real property that was part of an Indian nation, tribe or band..

Even assuming, arguendo, that we have interpreted the language of the Treaty of 1842 and Indian Law § 6 too narrowly, we nevertheless conclude that the court properly agreed with defendants that plaintiffs are not entitled to the declaratory relief they seek. It is well established that "the States have a valid interest in ensuring compliance with lawful taxes that might easily be evaded through purchases of tax-exempt cigarettes on reservations . . . States may impose on reservation retailers minimal burdens reasonably tailored to the collection of valid taxes from non-Indians" (*Department of Taxation & Fin. of N.Y. v Milhelm Attea & Bros., Inc.*, 512 US 61, 73). Although plaintiffs are obligated to pay the amount due as tax from non-Indians who have the tax liability, and from whom the amount is collected at the time of the sale, "this burden is not, strictly speaking, a tax at all" (*Moe v Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 US 463, 483).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

EXHIBIT C

NEW YORK SUPREME COURT
APPELLATE DIVISION : FOURTH DEPARTMENT

ERIC WHITE and NATIVE OUTLET,

Plaintiffs-Appellants,

-against-

NOTICE OF ENTRY

ERIC T. SCHNEIDERMAN, New York State Attorney General, in his official capacity, and THOMAS H. MATTOX, Commissioner, New York State Department of Taxation and Finance, in his official capacity,

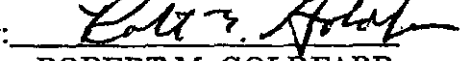
Defendants-Respondents.

AD. No. CA 15-01764
OAG No. 14-174303

PLEASE TAKE NOTICE that the within is a true and complete copy of the Memorandum and Order duly entered in the above-entitled matter in the Office of the Clerk of the Supreme Court, Appellate Division, Fourth Department on June 10, 2016.

Dated: Albany, New York
June 16 2015

ERIC T. SCHNEIDERMAN
Attorney General of the
State of New York
Attorney for Defendants-Respondents
The Capitol
Albany, New York 12224

By: 
ROBERT M. GOLDFARB
Assistant Solicitor General
of Counsel
Telephone (518)776-2015

To: LIPSITZ GREEN SCIME CAMBRIA LLP
Paul J. Cambria, Jr., Esq.
42 Delaware Avenue, Suite 120
Buffalo, New York 14202

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

448

CA 15-01764

PRESENT: WHALEN, P.J., CARNI, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

ERIC WHITE AND NATIVE OUTLET,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

ERIC T. SCHNEIDERMAN, NEW YORK STATE ATTORNEY GENERAL, IN HIS OFFICIAL CAPACITY, AND THOMAS H. MATTOX, COMMISSIONER, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, IN HIS OFFICIAL CAPACITY,
DEFENDANTS-RESPONDENTS.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (PAUL J. CAMBRIA, JR., OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ROBERT M. GOLDFARB OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Cattaraugus County (Jeremiah J. Moriarty, III, J.), entered March 12, 2015. The judgment granted the cross motion of defendants to dismiss plaintiffs' complaint and dismissed as moot the motion of plaintiffs for a preliminary injunction.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reinstating the complaint to the extent that it seeks a declaration and granting judgment in favor of defendants as follows:

> It is ADJUDGED AND DECLARED 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,

and as modified the judgment is affirmed without costs.

Memorandum: Plaintiffs commenced this declaratory judgment action, alleging that the enactment and enforcement of Tax Law § 471, which imposes requirements on plaintiffs to pre-pay the amount of the tax to be assessed on the sale of cigarettes to non-Indians and non-members of the Seneca Nation (collectively, non-Indians), violates Indian Law § 6 and certain treaties between the Seneca Nation and the United States of America, particularly the Treaty of 1842 (7 US Stat 586). Plaintiffs sought a preliminary injunction enjoining enforcement of the Tax Law, and Supreme Court granted defendants'

cross motion pursuant to CPLR 3211 (a) (7) and dismissed the complaint. Because the complaint seeks a declaration, the court erred in dismissing the complaint in its entirety and in failing to declare the rights of the parties (*see Maurizzio v Lumbermens Mut. Cas. Co.*, 73 NY2d 951, 954). We therefore modify the judgment accordingly.

Plaintiffs contend that we erred in determining in *Matter of New York State Dept. of Taxation & Fin. v Bramhall* (235 AD2d 75, *appeal dismissed* 91 NY2d 849) that the Treaty of 1842 and Indian Law § 6 bar the taxation of reservation land, but do not bar the imposition of, inter alia, "sales taxes on cigarettes . . . sold to non-Indians on the Seneca Nation's reservations" (*id.* at 85), and request that we reconsider our determination. We adhere to our determination in *Bramhall*.

The Treaty of 1842, which provided, inter alia, that the Seneca Nation would retain the Allegany and Cattaraugus reservations, stated at article ninth that "[t]he parties to this compact mutually agree to solicit the influence of the Government of the United States to protect *such lands* of the Seneca Indians, within the State of New York, . . . *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" (7 US Stat 586, 590 [emphasis added]). We conclude that the plain language of that treaty supports our determination that it prohibited the state from imposing taxes on the "lands" (*id.*), i.e., the real property, of the Seneca Nation.

Indian Law § 6, entitled "Exemption of reservation lands from taxation," states that "[n]o 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." That section has remained unchanged since 1909 (L 1909, ch 31), and it cites to, inter alia, chapter 45 of the Laws of 1857 as the source of the legislation, and to *Fellows v Denniston* (23 NY 420, *revd sub nom. The New York Indians*, 72 US 761). Chapter 45 of the Laws of 1857, entitled "An Act to relieve the Seneca nation of Indians from certain taxes on the Allegany and Cattaraugus reservations" required, inter alia, that, parcels or lots that were sold by the comptroller for taxes were to be released "by the State to the Seneca nation of Indians residing on said reservation" (L 1857, ch 45, § 1), and that "[n]o tax shall hereafter be assessed or imposed on either of said reservations, or any part thereof, for any purposes whatever, so long as said reservations remain the property of the Seneca nation; and all acts of the legislature of this State conflicting with the provisions of this section[] are hereby repealed" (L 1857, ch 45, § 4). The Supreme Court determined in *The New York Indians* (72 US at 770-772) that the State was without authority to impose taxes on real property to defray the costs of building and repairing roads and bridges. Thus, even construing the statute liberally in favor of the Indians, as we must (*see County of Yakima v Confederated Tribes & Bands of Yakima Indian Nation*, 502 US 251, 269), we conclude that the statutory history of

Indian Law § 6 supports our determination in *Bramhall*, and that the limiting language in the title of the section "effectuate[s] the legislative intent" (McKinney's Cons Laws of NY, Book 1, Statutes § 94, Comment at 194), i.e., that Indian Law § 6 was enacted to bar taxes on real property that was part of an Indian nation, tribe or band.

Even assuming, arguendo, that we have interpreted the language of the Treaty of 1842 and Indian Law § 6 too narrowly, we nevertheless conclude that the court properly agreed with defendants that plaintiffs are not entitled to the declaratory relief they seek. It is well established that "the States have a valid interest in ensuring compliance with lawful taxes that might easily be evaded through purchases of tax-exempt cigarettes on reservations . . . States may impose on reservation retailers minimal burdens reasonably tailored to the collection of valid taxes from non-Indians" (*Department of Taxation & Fin. of N.Y. v Milhelm Attea & Bros., Inc.*, 512 US 61, 73). Although plaintiffs are obligated to pay the amount due as tax from non-Indians who have the tax liability, and from whom the amount is collected at the time of the sale, "this burden is not, strictly speaking, a tax at all" (*Moe v Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 US 463, 483).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

Supreme Court
APPELLATE DIVISION
Fourth Judicial Department
Clerk's Office, Rochester, N.Y.

I, **FRANCES E. CAFARELL,** *Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that this is a true copy of the original order, now on file in this office.*

SUPREME COURT APPELLATE DIVISION • FOURTH DEPARTMENT •

IN WITNESS WHEREOF, *I have hereunto set my hand and affixed the seal of said Court at the City of Rochester, New York, this* JUN 10 2016

Frances E. Cafarell

Clerk

State of New York
Office of the Attorney General
The Capitol
Albany, NY 12224-0341

LIPSITZ GREEN SCIME CAMBRIA LLP
Paul J. Cambria, Jr., Esq.
42 Delaware Avenue, Suite 120
Buffalo, New York 14202

14202$3857 C026

EXHIBIT D

STATE OF NEW YORK : SUPREME COURT
APPELLATE DIVISION : FOURTH DEPARTMENT

ERIC WHITE
and NATIVE OUTLET,

Plaintiffs-Appellants,

vs.

ERIC T. SCHNEIDERMAN, New York State Attorney General, in his official capacity, and THOMAS H. MATTOX, Commissioner, New York State Department of Taxation and Finance, in his official capacity,

Defendants-Respondents.

NOTICE OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

Docket No. CA 15-01764

PLEASE TAKE NOTICE, that upon the annexed affidavit of Paul J. Cambria, sworn to the 20th day of July, 2016, and all prior proceedings herein, plaintiffs-appellants Eric White and Native Outlet shall move this Court at a term thereof to be held at 10:00 a.m. on the 8th day of August, 2016, at the M. Dolores Denman Courthouse, 50 East Avenue, Rochester, New York, pursuant to CPLR 5602(a)(1)(i) and 22 NYCRR 1000.13(p)(4), for leave to appeal to the Court of Appeals from the Memorandum and Order entered June 10, 2016.

Answering papers, if any, shall be served and filed pursuant to CPLR 2214(b) and 22 NYCRR 1000.13(a)(4). Pursuant to 22 NYCRR 1000.13(a)(6), oral argument of the motion is not permitted, and no appearance on the return date is necessary.

DATED: Buffalo, New York
July 20, 2016

LIPSITZ GREEN SCIME CAMBRIA LLP

By: _____
PAUL J. CAMBRIA, JR.
Attorneys for Plaintiffs-Appellants
Office and P.O. Address
42 Delaware Avenue, Suite 120
Buffalo, New York 14202
(716) 849-1333

TO:

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Attorneys for Defendants-Respondents
ROBERT M. GOLDFARB, Assistant Solicitor
General, of Counsel
Office of the Attorney General
The Capitol
Albany, New York 12224-0341
(585) 776-2015

STATE OF NEW YORK : SUPREME COURT
APPELLATE DIVISION : FOURTH DEPARTMENT

ERIC WHITE
and NATIVE OUTLET,

Plaintiffs-Appellants,

vs.

ERIC T. SCHNEIDERMAN, New York State Attorney General, in his official capacity, and THOMAS H. MATTOX, Commissioner, New York State Department of Taxation and Finance, in his official capacity,

Defendants-Respondents.

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

Docket No. CA 15-01764

STATE OF NEW YORK)
) ss:
COUNTY OF ERIE)

PAUL J. CAMBRIA, being duly sworn, deposes and says:

1. I am an attorney at law admitted to practice in the State of New York and am a member of Lipsitz Green Scime Cambria LLP, attorneys for plaintiffs-appellants Eric White and Native Outlet. As such, I am fully familiar with the facts and circumstances addressed below.

2. This affidavit is submitted in support of the plaintiffs-appellants motion pursuant to CPLR 5602(a)(1)(i) and 22 NYCRR 1000.13(p)(4) for leave to appeal to the Court of Appeals from this Court's Memorandum and Order entered June 10, 2016 ("Memorandum and Order").

3. The Memorandum and Order, a copy of which is annexed hereto as Exhibit A, affirmed the lower court's order granting defendants-respondents' motion to dismiss and denying plaintiffs-appellants' motion for a preliminary injunction as moot. Further, the Memorandum and Order modified the lower court's order on the law, 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." The defendants-respondents served the Memorandum and Order, with notice of entry, by first-class mail on June 16, 2016, a copy of which is annexed hereto as Exhibit B.

4. As discussed in greater detail below, leave to appeal should be granted so the Court of Appeals can rectify the conflict between the enforcement of Tax Law § 471 and the broad prohibition from taxation enshrined in Indian Law § 6 and 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.

5. Furthermore, leave should be granted to allow the Court of Appeals to rule that Indian Law § 6, which is derived from the Buffalo Creek Treaty, has been misinterpreted and unlawfully enforced because the Supreme Court' has mandated that courts must construe all ambiguous treaty-based and statutory-based terms to the benefit of the Indians. The Memorandum and Order failed to adhere to this mandate because the broad prohibition on taxation "*for any purpose whatever*" was restrictively interpreted to mean a prohibition *solely* on taxation of real property when

there is nothing to suggest that the Buffalo Creek Treaty and Indian Law § 6 had anything to do with the taxation of land alone.

6. Finally, leave should be granted to allow the Court of Appeals to rule that the restrictive interpretation of Indian Law § 6 found in the Memorandum and Order, which allows the State to enforce a tax statute—Tax Law § 471—on the transactions of Indian retailers located on the lands of the Seneca Nation, violates the Supreme Court's decision in *The New York Indians*, 72 U.S. 761 (1866).

7. In *New York Indians*, the Supreme Court struck a tax statute that empowered the State to 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 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.

8. Notably, the Memorandum and Order 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 makes it clear that any tax process regardless of whether the tax is imposed on the Indians themselves nevertheless interferes with and interrupts the unfettered possession and enjoyment of the Indians on their territory under the Buffalo Creek Treaty and Indian Law § 6, which the Memorandum and Order failed to acknowledge.

9. Moreover, 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 taxing authority and Indian-owned retailers

required under Tax Law § 471 surely violates the Buffalo Creek Treaty as an "unwarrantable interference."

10. Finally, this case presents the first opportunity for the Court of Appeals to address this issue of statewide importance. In *Snyder v. Wetzler*, 84 N.Y.2d 941 (1994), the Court of Appeals was precluded from considering the very issue raised herein because the parties failed to raise that issue during the proceedings below. *See id.* at 942 ("To the extent plaintiff contends that the State tax statutes at issue violate either the Supremacy Clause or New York law, his arguments are unpreserved and cannot be considered on this appeal."). However, in this case, plaintiffs-appellants have properly raised and preserved this issue which deserves to be heard by the Court of Appeals.

THE RELEVANT STATE STATUTES

11. Under Indian Law § 6, "[n]o 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).

12. Under Indian Law § 70, the State recognized that the Seneca Nation "residing on the Allegany and Cattaraugus reservations shall . . . hold and possess such reservations as a *distinct community*." Indian Law § 70 (emphasis added).

13. Under Indian Law § 71, the State disclaimed that it "*shall not authorize the taxation of any Indian or the property of any Indian*, not a citizen of the United States." Indian Law § 71 (emphasis added).

14. Yet, under Tax Law § 471, "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).

THE RELEVANT TREATIES

15. Under the Canandaigua Treaty of 1794, "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. Moreover, the United States vowed "never to claim the same" and "not to disturb" the Seneca Nation in exchange for peace. *Id.*, art. IV.

16. Under the Buffalo Creek Treaty of 1842, "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 RELEVANT FEDERAL STATUTES

17. There are several Federal statutes relevant to the instant appeal. 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) (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").

18. Further, Congress has affirmed the Seneca Nation's sovereignty, noting in one statutory scheme 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.*" *See* 25 U.S.C. § 233. (emphasis added).

THE RELEVANT FEDERAL CONSTITUTIONAL PROVISIONS

19. Under the Supremacy Clause, the Federal Constitution "and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding. U.S. Const. Art. VI, cl. 2.

THE DECISION IN THIS CASE

20. In affirming the lower court's order granting the defendants-respondents' motion to dismiss and denying plaintiffs-appellants' motion for a

preliminary injunction as moot, this Court modified the lower court's order on the law, 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." In reaching that result, this 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 this Court interpreted as a prohibition solely on taxes on "real property," rather than broad protection from taxation altogether. This Court noted that Indian Law § 6 "was enacted to bar taxes on real property." 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.

ARGUMENT

TAX LAW § 471 VIOLATES INDIAN LAW § 6 AND VARIOUS TREATIES WHEN APPLIED TO THE COMPLETED TRANSACTIONS OF INDIAN-OWNED RETAILERS LOCATED ON THE SOVEREIGN LANDS OF THE SENECA NATION

21. 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").

22. Notably, 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). As a treaty to which the United States in a party, the Buffalo Creek Treaty and the promises it contains, remain the "supreme law of the land." U.S. Const., art. VI, cl. 2.

23. After the Seneca Nation enacted its own constitution to govern its lands, s*ee generally* Seneca Nation Const. of 1848 (as amended Nov. 9, 1993), its sovereignty and right to self-governance was recognized by the 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 is "governed by the laws and usages of his tribe, and is only subject to our laws, so far as the public safety requires").

24. The State Legislature, too, memorialized the Seneca Nation's absolute sovereignty. *See*, Ch. 45, sect. 4 of the Laws of 1857. 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).

25. In 2003, nearly 150 years later, the State "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." *Cayuga Indian Nation of N.Y. v. Gould*, 14 N.Y.3d 614, 627 (2010). 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).

26. 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). 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).

27. 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 with non-Indian consumers. However, the State is "without the power to impose the tax" on the transactions of *Indian-owned* retailers, regardless of the customer, because such transactions are protected from taxation by Indian Law § 6 and the Buffalo Creek Treaty. The State's imposition of the cigarette tax on such transactions is in contravention of Indian Law § 6 and the Buffalo Creek Treaty, as set forth below, and violates the exception expressly noted in Tax Law § 471.

THE PLAIN LANGUAGE OF INDIAN LAW § 6 RENDERS
TAX LAW § 471 UNENFORCEABLE ON SUCH TRANSACTIONS

28. 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 reservation [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)).

29. 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. These statutes merely codified New York'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, on the sovereign lands of the Seneca Nation.

THE MANDATORY RULES OF CONSTRUCTION RENDER TAX LAW § 471 INCOMPATIBLE WITH INDIAN LAW § 6 AND THE BUFFALO CREEK TREATY

30. 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.*

31. 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.

32. 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. The plain language of Indian Law § 6 prohibits enforcement of taxation for *"any purpose whatever"* on the sovereign land of the Seneca Nation. Yet, the Memorandum and Order 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 estate taxes. This restrictive interpretation of plain, unambiguous language is inconsistent with the mandate to construe terms to the benefit of the Indians.

33. Moreover, even if the terms of this unmistakably clear statute are determined to be ambiguous, courts must interpret any ambiguity in favor of the Seneca-Nation under the governing canons of construction. Thus, leave must be granted to allow the Court of appeals to rectify the Memorandum and Order's erred construction of the terms of Indian Law § 6 and the Buffalo Creek Treaty.

34. 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 property 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).

35. 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 vowed to protect the Seneca Nation from taxation *"for any purpose."* Accordingly, any interpretation of Indian Law § 6 that limits its scope to real property taxation is in contravention with other portions of that same statute, which specifically address such taxation.

36. The Buffalo Creek Treaty and Indian Law § 6 protect the Seneca Nation and its members, including its 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.

TAX LAW § 471 CANNOT BE RECONCILED WITH
THE SUPREME COURT'S HOLDING IN *NEW YORK INDIANS*

37. The Court of Appeals must be given the opportunity to address the inconsistency between the Memorandum and Order's interpretation of Indian Law § 6 as allowing for enforcement of Tax Law § 471 on such transactions and 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 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 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.

38. Notably, the Memorandum and Order 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 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.

39. 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 taxing authority and Indian-owned retailers required under Tax Law § 471 surely violates the Buffalo Creek Treaty as an "unwarrantable interference."

THE COURT OF APPEALS HAS RECOGNIZED THE UNIQUE SOVEREIGNTY OF THE SENECA NATION

40. Although the Court of Appeals has not addressed the precise issue in this appeal, the Court has long recognized the sovereignty of the Seneca Nation. *See Hastings v. Farmer*, 4 N.Y. 293, 294 (1850) (explaining 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"). Indeed, in *Patterson v. Council of Seneca Nation*, 245 N.Y. 433 (1927), the Court of Appeals 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).

41. Moreover, this issue in this case has caught the attention of the Court of Appeals in the past; however, the Court was precluded from addressing it in the only case before it to raise the issue as the parties in that case failed to preserve the issue for appellate review. *Cf. Snyder v. Wetzler*, 84 N.Y.2d 941 (1994).

Leave must be granted to give the Court of Appeals the opportunity to reaffirm its long-standing recognition of the rights of the members of the Seneca Nation to be free from unfettered intrusion by the State.

CONCLUSION

42. This case squarely presents the following questions of law, which are both novel and of statewide importance:

> 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?
>
> 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?
>
> 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)?

43. Plaintiffs-appellants therefore ask that the Fourth Department certify the following question to the Court of Appeals pursuant to CPLR 5602(a)(1)(i) and 5713:

Was the Memorandum and Order of this Court entered June 10, 2016 properly made? Questions of law have arisen, which, in our opinion, ought to be reviewed by the Court of Appeals.

PAUL J. CAMBRIA

Sworn to before me on this
20th day of July, 2016.

Notary Public

KRISTINA DREWERY
COMMISSIONER OF DEEDS
In And For the City Of Buffalo, N.Y.
My Commission Expires Dec. 31, 2016

STATE OF NEW YORK : SUPREME COURT
APPELLATE DIVISION : FOURTH DEPARTMENT

ERIC WHITE
and NATIVE OUTLET,

Plaintiffs-Appellants,

vs.

ERIC T. SCHNEIDERMAN, New York State Attorney General, in his official capacity, and THOMAS H. MATTOX, Commissioner, New York State Department of Taxation and Finance, in his official capacity,

Defendants-Respondents.

REPLY AFFIDAVIT IN FURTHER SUPPORT OF MOTION FOR LEAVE TO APPEAL

Docket No. CA 15-01764

STATE OF NEW YORK)
) ss:
COUNTY OF ERIE)

PAUL J. CAMBRIA, being duly sworn, deposes and says:

1. I am an attorney at law admitted to practice in the State of New York and am a member of Lipsitz Green Scime Cambria LLP, attorneys for plaintiffs-appellants Eric White and Native Outlet. As such, I am fully familiar with the facts and circumstances addressed below.

2. This reply affidavit is submitted in further support of the plaintiffs-appellants motion for leave to appeal the Memorandum and Order to the Court of Appeals. This reply affidavit incorporates herein all of the terms and citations defined in the opening affidavit for the convenience of the Court and the parties.

3. As set forth in the opening affidavit, the instant appeal presents novel issues of state-wide importance that should be heard by the Court of appeals, namely:

a. 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?

b. 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?

c. 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)?

4. Nothing Defendants have said in their affirmation in opposition suggests otherwise. First, the Court of Appeals has never had the opportunity to address these issues on the merits. Indeed, in *Snyder v. Wetzler*, 84 N.Y.2d 941 (1994), the Court recognized the importance of the issue, but was precluded from addressing the merits because it was not preserved for appellate review. *Id.* at 942. The instant appeal presents the Court with the first opportunity it has had to address this outstanding issue of state-wide importance.

5. Second, no matter how much Defendants may wish it were not so, Indian Law § 6 and Tax Law § 471 are in direct conflict. Under Indian Law § 6, "[n]o 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). In spite of this broad protection from taxation "for any purpose whatever," under Tax Law § 471, "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). The resolution of this patently conflicting description of the State's taxation power by the State's highest court is critical to retailers state-wide.

6. Third, by exercising its self-proclaimed authority to tax transactions between tribally-owned retailers located on the sovereign land of the Seneca Nation and their customers under Tax Law § 471, the State has violated, and continues to incessantly violate, the solemn promise it made the Seneca Nation in the Buffalo Creek Treaty to "protect such of the lands of the Seneca Indians . . . from all taxes, and assessments for roads, highways, or *any other purpose* . . . ." Buffalo Creek Treaty, US-Seneca Nation, art. IX, May 20, 1842, 7 Stat. 586 (emphasis added). The instant appeal presents the Court of Appeals with the opportunity to stop the State from unilaterally ignoring its obligations under the Buffalo Creek Treaty.

7. Fourth, the enforcement of Tax Law § 471 violates long-standing Supreme Court precedent. In *The New York Indians*, 72 U.S. 761 (1866), the Supreme Court held that a mere tax assessment to be paid by a non-Indian violated the

sovereign rights of the Seneca Nation to be free from State taxation as secured by the Buffalo Creek Treaty because that assessment constituted an "unwarrantable interference, inconsistent with the original title of the Indians" and a potential "embarrassment" to the Seneca Nation. *Id.* at 769-72. Tax Law § 471 is more troubling than the statute struck by the Supreme Court in the *New York Indians* case because enforcement of Tax Law § 471 encompasses far more than merely *assessing* a tax. Instead, Tax Law § 471 *imposes* a tax and one that requires tribally-owned retailers to adhere to a rigid set of collection procedures.

8. Each of these reasons on their own, and certainly in combination, make this appeal worthy of leave. Tax Law § 471 is in direct conflict with another State statute, the State's treaty obligations, and long-standing Supreme Court precedent. Moreover, the resolution of this conflict will impact thousands of retail transactions on a daily basis. Accordingly, plaintiffs-appellants respectfully urge this Court to grant their motion for leave to the Court of Appeals.

PAUL J. CAMBRIA

Sworn to before me on this
12th day of August, 2016.

Notary Public

KRISTINA DREWERY
COMMISSIONER OF DEEDS
In And For the City Of Buffalo, N.Y.
My Commission Expires Dec. 31, 2016

EXHIBIT E

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

MOTION NO. 448/16
DOCKET NO. CA 15-01764

PRESENT: WHALEN, P.J., CARNI, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

ERIC WHITE AND NATIVE OUTLET, PLAINTIFFS-APPELLANTS,

V

ERIC T. SCHNEIDERMAN, NEW YORK STATE ATTORNEY GENERAL, IN HIS OFFICIAL CAPACITY, AND THOMAS H. MATTOX, COMMISSIONER, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, IN HIS OFFICIAL CAPACITY, DEFENDANTS-RESPONDENTS.

Appellants having moved for leave to appeal to the Court of Appeals from the order of this Court entered June 10, 2016,

Now, upon reading and filing the affidavit of Paul J. Cambria, Esq., sworn to July 20, 2016, the notice of motion with proof of service thereof, and the affirmation of Robert M. Goldfarb, Esq., dated August 3, 2016, and due deliberation having been had thereon,

It is hereby ORDERED that the motion is denied.

Entered: September 30, 2016 **FRANCES E. CAFARELL, Clerk**

Supreme Court
APPELLATE DIVISION
Fourth Judicial Department
Clerk's Office, Rochester, N.Y.

I, **FRANCES E. CAFARELL,** *Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that this is a true copy of the original order, now on file in this office.*

SUPREME COURT APPELLATE DIVISION FOURTH DEPARTMENT

IN WITNESS WHEREOF, *I have hereunto set my hand and affixed the seal of said Court at the City of Rochester, New York, this* SEP 30 2016

Frances E. Cafarell
Clerk

EXHIBIT F

NEW YORK SUPREME COURT
APPELLATE DIVISION : FOURTH DEPARTMENT

ERIC WHITE and NATIVE OUTLET,

Plaintiffs-Appellants

-against-

NOTICE OF ENTRY

ERIC T. SCHNEIDERMAN, New York State Attorney General, in his official capacity, and THOMAS H. MATTOX, Commissioner, New York State Department of Taxation and Finance, in his official capacity,

Defendants-Respondents.

AD. No. CA 15-01764
OAG No. 14-174303

PLEASE TAKE NOTICE that the within is a true and complete copy of the Order duly entered in the above-entitled matter in the Office of the Clerk of the Supreme Court, Appellate Division, Fourth Department on September 30, 2016.

Dated: Albany, New York
October 25, 2015

ERIC T. SCHNEIDERMAN
Attorney General of the
State of New York
Attorney for Respondents
The Capitol
Albany, New York 12224

By: _____
ROBERT M. GOLDFARB
Assistant Solicitor General
of Counsel
Telephone (518)776-2015

To: Paul J. Cambria, Jr., Esq.
LIPSTIZ GREEN SCIME CAMBRIA LLP
42 Delaware Avenue, Suite 120
Buffalo, New York 14202

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

MOTION NO. 448/16
DOCKET NO. CA 15-01764

PRESENT: WHALEN, P.J., CARNI, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

ERIC WHITE AND NATIVE OUTLET, PLAINTIFFS-APPELLANTS,

V

ERIC T. SCHNEIDERMAN, NEW YORK STATE ATTORNEY GENERAL, IN HIS OFFICIAL CAPACITY, AND THOMAS H. MATTOX, COMMISSIONER, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, IN HIS OFFICIAL CAPACITY, DEFENDANTS-RESPONDENTS.

Appellants having moved for leave to appeal to the Court of Appeals from the order of this Court entered June 10, 2016,

Now, upon reading and filing the affidavit of Paul J. Cambria, Esq., sworn to July 20, 2016, the notice of motion with proof of service thereof, and the affirmation of Robert M. Goldfarb, Esq., dated August 3, 2016, and due deliberation having been had thereon,

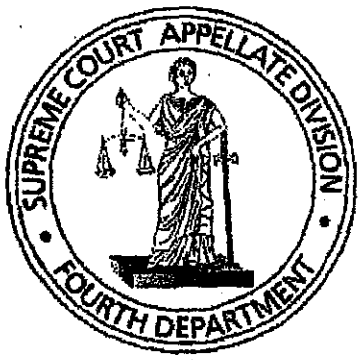
It is hereby ORDERED that the motion is denied.

Goldfarb

Entered: September 30, 2016 **FRANCES E. CAFARELL, Clerk**

Supreme Court
APPELLATE DIVISION
Fourth Judicial Department
Clerk's Office, Rochester, N.Y.

I, **FRANCES E. CAFARELL,** *Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that this is a true copy of the original order, now on file in this office.*



IN WITNESS WHEREOF, *I have hereunto set my hand and affixed the seal of said Court at the City of Rochester, New York, this* SEP 30 2016

Frances E. Cafarell
Clerk