# 17-3198(L)

17-3222 (XAP)

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## In the United States Court of Appeals
## for the Second Circuit

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STATE OF NEW YORK,
*Plaintiff - Appellee-Cross-Appellant,*
v.

MOUNTAIN TOBACCO COMPANY, DBA KING MOUNTAIN TOBACCO COMPANY INC.,
*Defendant - Appellant-Cross-Appellee,*

MOUNTAIN TOBACCO DISTRIBUTING COMPANY INC., DELBERT WHEELER, SR.,
*Defendants.*

On Appeal from the United States District Court for the Eastern District of New York, Case No. 12-cv-6276 (Hon. Joanna Seybert)

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**OPENING BRIEF AND SPECIAL APPENDIX**
**OF DEFENDANT–APPELLANT-CROSS-APPELLEE**

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, counsel for Appellant-Cross-Appellee Mountain Tobacco Company, certifies that it is a privately held corporation, has no parent corporation, does not issue shares of stock and, therefore, no publicly held corporation owns 10% or more of its stock.

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## INTRODUCTION

This appeal seeks to redress the State of New York's unconstitutional targeting of Mountain Tobacco Company, d/b/a/ King Mountain Tobacco Company Inc. ("King Mountain"), an Indian-owned, Indian-formed, and federally licensed cigarette manufacturer located on the Yakama Nation, which is situated within the boundaries of the State of Washington. New York (the "State") allows Indian tribal cigarette manufacturers located within the boundaries of New York to engage in trade with other Indians without requiring them to sell through New York-licensed tax stamping agents. But, in this action, the State filed a lawsuit in federal district court in New York to, *inter alia*, require King Mountain to sell to a New York-licensed stamping agent, and alleged violations of two federal statutes and three State statutes. The district court correctly held that the two federal statutes did not apply to the trade between King Mountain and other Indians Nations, and that King Mountain could not be liable for New York cigarette excise tax, because it did not possess unstamped cigarettes in New York. The district court erred, however, in finding that King Mountain cannot sell its cigarettes to other Indians directly, and instead may only sell its cigarettes to a New York-licensed stamping agent. This conclusion endorsed the State's violation of the Commerce Clause of the U.S. Constitution and was contrary to the plain text of the pertinent New York statute and other federal precedents.

## JURISDICTIONAL STATEMENT

The district court had original jurisdiction over two claims in this action, pursuant to 28 U.S.C. § 1331, because the State alleged violations of federal statutes. The district court had supplemental jurisdiction over three claims in this action, brought under New York State law, pursuant to 28 U.S.C. § 1367. This Court has jurisdiction under 28 U.S.C. § 1291 because the appeal is from a final judgment entered by the district court on September 5, 2017. King Mountain filed a timely notice of appeal on October 5, 2017, and the State filed a timely notice of cross-appeal on October 10, 2017.

## STATEMENT OF THE ISSUES

1. Whether the district court erred in holding that King Mountain did not demonstrate that the State's discriminatory enforcement practices violated the dormant Commerce Clause, where the uncontroverted record established that New York State had only prosecuted tribal cigarette manufacturers situated outside of New York's boundaries and failed to prosecute tribal cigarette manufacturers situated inside New York's boundaries, and whether the district court erred in granting the State's motion for a permanent injunction.

2. Whether the district court erred in holding that the entirety of the State's New York Tax Law § 471 cause of action was not barred by res judicata, where the State unsuccessfully sought relief in an administrative proceeding under the same statute for the same conduct prior to its filing of the Complaint.

3. Whether the district court erred in holding that King Mountain, a federally licensed cigarette manufacturer, was liable under New York Tax Law § 471, which imposes liability only on consumers, agents, and persons in "possession" of unstamped cigarettes, where it was undisputed that King Mountain is neither an agent nor a consumer and the district court correctly held that King Mountain was not in possession of unstamped cigarettes in New York.

4. Whether the district court erred in granting the State summary judgment on its Fourth Claim for Relief, and partial summary judgment on its

Third and Fifth Claims for Relief, when the Indian Commerce Clause and federal Indian preemption prohibit a state from imposing the regulatory burdens at issue on an Indian located outside of New York who engaged exclusively in Indian-to-Indian trade of Indian manufactured goods.

## STATEMENT OF THE CASE

The State of New York alleged five claims for relief against King Mountain. After completion of discovery, the State filed a motion for summary judgment, and King Mountain filed a motion for partial summary judgment, each of which the district court (the Hon. Joanna Seybert) granted in part and denied in part. *State of New York v. Mountain Tobacco Co.*, No. 12-CV-6276(JS)(SIL), 2016 WL 3962992 (E.D.N.Y. July 21, 2016) (SPA-1). The State subsequently filed a motion for a permanent injunction, which the district court granted in part and denied in part, in an unreported decision. SPA-56. This appeal followed.

* * * * *

**King Mountain**

The Yakama Indian Nation is located within the boundaries of the State of Washington and was established by a Treaty between the Yakama people and the United States in 1855. A-114. King Mountain is a business wholly owned by members of the Yakama Nation, formed and organized under the laws of the Yakama Nation. A-117-118. King Mountain holds a federal permit, issued

pursuant to 26 U.S.C., Chapter 52, as a manufacturer of tobacco products, effective March 18, 2008. A-117, A-216.

King Mountain's manufacturing facility, warehouse, distribution facility, and business offices, as well as the farm where most of the tobacco used to make King Mountain cigarettes is grown, are all situated on the Yakama Reservation. A-118. King Mountain employed approximately 50 members and non-members of the Yakama Nation. A-118, A-306. King Mountain was solely owned by a member of the Yakama Tribe, Mr. Delbert Wheeler. A-117.[1]

**New York State Cigarette Taxes**

New York Tax Law § 471 imposes a $4.35 tax on each pack of cigarettes "possessed in the state by any person for sale, except that no tax shall be imposed on cigarettes sold under such circumstances that [New York] is without power to impose such tax," and the "ultimate incidence and liability for the tax" is borne by the consumer. N.Y. Tax Law § 471(1)-(2). Indians purchasing cigarettes on reservations for their own use are not required to pay the tax. Payment of the tax is evidenced by a stamp affixed by a licensed-stamping agent to each pack of cigarettes, who purchase and take possession of the cigarettes prior to transfer of the cigarettes to retail outlets.

[1] Mr. Wheeler died on June 30, 2016, and Mr. Wheeler's estate presently owns King Mountain. Prior to his death, Mr. Wheeler also lived on the Yakama Reservation. A-117.

**King Mountain's "Nation-to-Nation" Sales**

In some States, King Mountain makes "open market" sales of its cigarettes to State-licensed distributors, who are then responsible for affixing or causing to be affixed any State-required tax stamps. A-294. In those instances, King Mountain makes filings required by the PACT Act, 15 U.S.C. §§ 375-378, with the applicable State government. A-136. King Mountain did not make open market sales in New York State (with a single exception in 2010). A-136-137. Instead, King Mountain, with respect to New York State, only sold its cigarettes "Nation-to-Nation" – that is, from the Yakama Indian Reservation within the boundaries of Washington State to companies owned by an Indian Nation, or to companies owned by a member of an Indian Nation, that are situated on an Indian Nation within the boundaries of the State of New York. A-118-119, A-297-298. None of those entities were New York-licensed stamping agents. Specifically, between June 1, 2010, and December 31, 2014, invoices produced in discovery reflected sales by King Mountain of approximately 2,564,000 cartons of cigarettes to Indian companies or tribes located within the boundaries of New York.[2] A-1051-1056.

[2] A carton of cigarettes contains ten packs of cigarettes, and each pack contains twenty cigarettes.

**Undercover Purchase King Mountain Cigarettes**

On November 6, 2012, a New York State Investigator purchased one carton of unstamped King Mountain cigarettes at the Native Delight smoke shop on the Poospatuck Indian Reservation in Mastic, New York, for $25. A-138. That same day, the investigator observed King Mountain cigarettes for sale at the Rising Native Sisters smoke shop, also on the Poospatuck Reservation. A-389. At this smoke shop, the investigator also observed "many other brands" of cigarettes for sale. A-389.

**Seizure of King Mountain Cigarettes**

On December 3, 2012, New York State troopers stopped a van on New York Interstate 87 in Clinton County, New York, after the van failed to enter a commercial vehicle inspection checkpoint. The troopers directed the van to a rest area, after which, without consent, a New York State Investigator used bolt cutters to open the locked rear door of the van. Found inside the van were 7,260 cartons of unstamped King Mountain cigarettes. The driver of the van informed the troopers that the cigarettes were being transported by ERW Wholesale – a company owned by a member of the Seneca Nation (in Irving, New York) – from the Oneida Reservation, in Oneida, New York, to the Ganienkeh Territory, in Altona, New York. The troopers seized the cigarettes and released the driver and the van. A-138-140, A-422-429.

**New York State Department of Taxation and Finance Proceeding**

On December 20, 2012 (one day prior to filing the original complaint in the instant action), the New York State Department of Taxation and Finance ("NYSDTF") issued Notice of Determination Number L-038986040 against King Mountain for its failure to pay $1,259,250 in New York State taxes for the 7,260 cartons of unstamped cigarettes seized by New York State troopers on December 3, 2012. A-141, A-431-432. The NYSDTF alleged that "On 12/03/12, [King Mountain was] found to be in possession and/or control of unstamped or unlawfully stamped cigarettes, and/or untaxed tobacco products, [and t]herefore, penalty is imposed under Article 20 of the New York State Tax Law." A-432.

On October 23, 2014, the NYSDTF submitted a Stipulation of Discontinuance that provided that King Mountain owed $0 in tax, penalties and interest for Notice of Determination Number L-038986040. A-443-445. On November 19, 2014, the presiding New York State Administrative Law Judge ("ALJ") issued an Order adjudging and decreeing that the State's Assessment Number L-038986040 against King Mountain as cancelled, and the ALJ dismissed Notice of Assessment Number L-038986040 with prejudice. A-448.

**Post-Complaint Undercover Purchases of King Mountain Cigarettes**

On May 15, 2013, May 16, 2013, and June 5, 2013, two New York State investigators made six purchases of King Mountain cigarettes at smoke shops

located on the Poospatuck Indian Reservation and the Cayuga Indian Reservation in Union Springs, New York. The price per carton of these cigarettes ranged from $20 to $30. A-143-144. During these undercover purchases, New York State investigators witnessed cartons of unstamped, New York-based, Indian-manufactured cigarettes for sale, yet only purchased King Mountain and Seneca (manufactured in Canada on First Nation land by a First Nation corporation[3]) brand cigarettes. A-765-775.

**New York State's Discriminatory Enforcement Practices**

With respect to Native American cigarette manufacturers, the State has only enforced New York and federal cigarette laws against outside-of-New York Native Americans: King Mountain and a First Nation manufacturer located on Native land in Canada (Seneca brand).[4] In fact, the State has not enforced its cigarette tax laws, and in one instance has exempted from State law, at least a dozen Indian

[3] Descendants of the original inhabitants of Canada are referred to as First Nations people (and sometimes as Native Canadians or Native Americans). This brief, when referring collectively to the Indian corporation King Mountain and the First Nation corporation that manufacturers Seneca cigarettes, will use the term "Native Americans."

[4] That action was brought against the Canadian First Nations manufacturer, Grand River; "Native Wholesale Supply, an Oklahoma Corporation with a principal place of business in Perrysburg, New York[;] and the President of Native Wholesale supply, who is alleged to be a resident of New York." SPA-72. It is undisputed in that proceeding that the cigarettes at issue were all manufactured in Canada. *State of New York v. Grand River Enterprises Six Nations*, 14-CV-910(RJA)(LGF) (W.D.N.Y.).

manufacturers located within New York's boundaries. A-736-737. For example, the State produced in discovery video tapes of its purchases of unstamped King Mountain cigarettes. Those videos depict a wide variety of New York Indian-manufactured cigarettes for sale, as well as advertisements for New York Indian-manufactured cigarettes. A-765-773. One video recorded a New York State investigator observing hundreds of cartons of New York-based, Indian-manufactured cigarettes. A-769-770. During another undercover purchase, an investigator witnessed an individual unloading from a truck cartons of cigarettes manufactured by a New York-based Indian-manufacturer. A-766-767, A-775. The State investigators never purchased any of these "New York"-manufactured cigarettes, and the State did not dispute that it had knowledge of vast quantities of unstamped cigarettes manufactured and sold by in-State Indians on Indian Reservations situated with New York.[5] A-736-737.

King Mountain also demonstrated that in May 2013, the State reached an agreement with the Oneida Tribe, who is located within the boundaries of New York, that permitted the Oneida to "receive unstamped cigarettes directly from federally licensed manufacturers without going through a New York State licensed cigarette stamping agent." A-737-738. The agreement did not require the Oneida

[5] King Mountain presented uncontradicted evidence that in-State Indian manufacturers did not sell their cigarettes directly to New York-licensed stamping agents. A-736-737. The State also admitted that Indian nations or tribes located within New York have refused to collect New York cigarette taxes. A-727.

to sell cigarettes it manufactures to State-licensed stamping agents prior to delivery to other Indian tribes or companies owned by members of other Indian tribes. *Id.*

**Procedural History**

On December 21, 2012, the State of New York filed this action, but never served the Complaint. On February 12, 2013, the State filed and served an unsigned Amended Complaint, alleging claims against three defendants: King Mountain; a Yakama transport company (Mountain Tobacco Distributing Company) that exclusively distributed King Mountain products within the boundaries of the State of Washington; and Delbert Wheeler, Sr. The State filed a signed Amended Complaint on May 21, 2014.

The Amended Complaint contained five Claims for Relief:

- First, a violation of the CCTA, 18 U.S.C. §§ 2341-2346, for allegedly "knowingly shipping, transporting, receiving, possessing, selling, and distributing contraband cigarettes within New York State." A-85.

- Second, a violation of the PACT Act, 15 U.S.C. §§ 375-378, for allegedly failing "to submit certain filings to the tobacco tax administrator for the State of New York . . . ." A-86.

- Third, a violation of New York Tax Law §§ 471 and 471-e, for allegedly "possessing [] for sale in New York State [] King Mountain brand cigarettes . . . upon which no state excise tax has been paid, and the packages of which have no tax stamps affixed." A-87-88.

- Fourth, a violation of New York Tax Law § 480-b, because King Mountain, "a 'tobacco product manufacturer' as that term is

defined in New York Public Health Law § 1399-oo(9),” allegedly failed to file “certifications in accordance with Section 480-b.” A-88.

- Fifth, a violation of New York Executive Law § 156-c (the Cigarette Fire Safety Act [“CFSA”] of New York State), for allegedly not certifying as “fire-safe the cigarettes it manufactures which are distributed, sold, or offered for sale in New York” and for allegedly failing “to place the required ‘FSC’ (Fire Standards Compliant) mark on the packages of cigarettes it manufactures which are distributed, sold, or offered for sale in New York.” A-89.

On April 3, 2013, the State moved for a preliminary injunction, but it subsequently abandoned that motion. After Mountain Tobacco Distributing Company moved to dismiss the Amended Complaint for lack of personal jurisdiction, on May 3, 2013, the State voluntarily dismissed its action against that entity. On January 26, 2016, the district court issued a Memorandum and Order dismissing the Amended Complaint against Delbert Wheeler, Sr., for lack of personal jurisdiction.

Following discovery, on January 29, 2016, King Mountain moved for summary judgment as to the two federal claims and the New York Tax Law § 471 claim, and the State moved for summary judgment as to all five claims. On July 21, 2016, the district court issued a Memorandum and Order granting in part and denying in part King Mountain’s motion for partial summary judgment, and granting in part and denying in part the State’s motion for summary judgment. SPA-1. Specifically, the court held that: (1) King Mountain is not liable under the

CCTA, because the CCTA prohibits state enforcement of the CCTA against an "Indian in Indian country"; (2)(a) King Mountain is not liable under the PACT Act for Nation-to-Nation sales, because King Mountain did not ship unstamped cigarettes in "interstate commerce" as defined by the statute; (2)(b) there is a genuine issue of material fact as to whether a single sale in May 2010 occurred on or after the June 29, 2010 effective date of the PACT Act[6]; (3)(a) the State's Third Claim for Relief, pursuant to New York Tax Law § 471, was barred by res judicata by reason of the New York State Department of Taxation and Finance proceeding, to the extent the State's Amended Complaint relied on the December 3, 2012, seizure of King Mountain cigarettes, but it was not barred as to the cigarettes purchased by New York State investigators on November 6, 2012; (3)(b) King Mountain is not liable, pursuant to New York Tax Law § 471, for State cigarette taxes, because it did not possess cigarettes in New York State; (3)(c) King Mountain violated New York Tax Law § 471, because it failed to sell its cigarettes to New York licensed stamping agents; (4) King Mountain failed to comply with New York Tax Law § 480-b; and (5) King Mountain failed to certify to New York State that the cigarettes it offered for sale in New York met New York's fire safety

[6] The sale was to a company (Valvo Candies) that was a licensed New York State cigarette stamping agent. A-515. The State subsequently abandoned any claim predicated upon this transaction. A-717.

standards, but there is a genuine issue of material fact as to whether King Mountain stamped "FSC" on those cigarettes.[7]

On August 18, 2016, the State moved, pursuant to Rule 54(b) and 28 U.S.C. § 1292(b), for certification of the district court's opinion granting King Mountain summary judgment as to the CCTA and PACT Act claims as a partial final judgment or for certification of an interlocutory appeal. On November 30, 2016, the State informed the district court that "the State is declining to prosecute [the remaining] claims for trial" and would only seek injunctive relief on the portion of the Third Claim for Relief, the Fourth Claim for Relief, and the portion of the Fifth Claim for Relief for which it had been granted summary judgment. A-717. By letter dated December 23, 2016, the State abandoned its motion for certification of a partial final judgment or for an interlocutory appeal. A-719.

On January 18, 2017, the State filed a motion for injunctive relief, seeking an Order (1) enjoining King Mountain from selling unstamped cigarettes directly to Indian nations or tribes, reservation cigarette sellers, or entities that are not New York-licensed stamping agents; (2) enjoining King Mountain from selling cigarettes into the State of New York without complying with New York Tax Law Section 480-b's certification requirements and New York's fire safety certification requirements; and (3) authorizing the State to "seize any unstamped King

[7] As the district court noted, the Amended Complaint did not allege that King Mountain cigarettes were not actually fire safe.

Mountain brand cigarettes that are found in New York, and are being delivered to, or otherwise in the possession of a person not authorized by the State of New York to possess such unstamped cigarettes." In opposition to the State's motion, King Mountain argued, *inter alia*, that New York had violated the dormant Commerce Clause of the U.S. Constitution by discriminatorily enforcing its tax laws only against out-of-state Native American manufacturers, while exempting in-state Indian manufacturers from those same laws and, as a result, the district court should deny the State's motion.

On August 29, 2017, the district court issued a Memorandum and Order finding that the State did not violate the dormant Commerce Clause, denying the State's request for authority to seize any unstamped King Mountain brand cigarettes in New York, and granting the remainder of the State's requested relief. SPA-56. The district court took "no position on the viability of a dormant Commerce Clause claim based on official enforcement," but held that King Mountain had "not demonstrated that the State directly discriminated against interstate commerce through its enforcement of" the New York tax statutes. SPA-70. Because it held that King Mountain had not established direct discrimination, the district court proceeded to analyze King Mountain's claim under the balancing test set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), and concluded that "King Mountain [] failed to demonstrate an undue burden on interstate

commerce" and that any burden would have been outweighed by the benefits of the State's enforcement practices. SPA-73.

On September 5, 2017, the district court filed and entered a final Judgment. SPA-84.

On October 5, 2017, King Mountain filed a Notice of Appeal regarding (1) the district court granting the State's motion for summary judgment on portions of Claims Three and Five and the entirety of Claim Four; (2) the district court granting in part the State's motion for injunctive relief; and (3) the portions of the Judgment in this case reflecting (1) and (2) above.[8] On October 10, 2017, the State filed a Notice of Cross-Appeal, appealing all rulings by the district court.

## SUMMARY OF THE ARGUMENT

1. The State of New York violated the dormant Commerce Clause by enforcing its cigarette and tax laws solely against Native American cigarette manufacturers located outside the State of New York, while not enforcing those laws against Indian cigarette manufacturers located within the boundaries of New York State. The dormant Commerce Clause prohibits states from engaging in economic protectionism. In this case, the district court erred in holding that King

[8] During the 30 days after entry of the district court's final Judgment, the State did not file a Notice of Appeal, despite, in 2016, having moved in the district court for a partial final Judgment or permission to take an immediate interlocutory appeal of the decision granting summary judgment to King Mountain on Claims One and Two.

Mountain had not demonstrated discriminatory enforcement by New York, when it was undisputed that the State had only enforced its laws against out-of-state Native American cigarette manufacturers, and not against numerous in-State Indian manufacturers. In addition, the district court should not have applied the balancing test set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), because the *Pike* balancing test is only applicable for measuring the incidental effects of facially non-discriminatory statutes or regulations; here, in contrast, the State directly discriminated against out-of-state Native American manufacturers. Because the State violated the dormant Commerce Clause, the district court should not have enjoined King Mountain from selling its cigarettes Nation-to-Nation.

2. The State's Third Claim for Relief, that King Mountain violated N.Y. Tax Law § 471, is barred by res judicata. On December 20, 2012 (one day prior to the filing of the original complaint in this action), the NYSDTF issued King Mountain a Notice of Determination that King Mountain owed the State more than $1.2 million in taxes for violations of Article 20 of the New York State tax law (the same Article in which Section 471 resides). The Notice of Determination was based upon the December 3, 2012, State seizure of King Mountain cigarettes from a truck belonging to a New York based, Indian wholesaler. On November 19, 2014, the ALJ issued an Order of Discontinuance, cancelling the tax assessment against King Mountain and dismissing the Notice of Determination with prejudice.

The State's Amended Complaint alleged only two instances of violations of § 471 (possession) by King Mountain: a November 6, 2012, undercover purchase of King Mountain brand cigarettes from a smoke shop located on the Poospatuck Indian reservation; and the December 3, 2012, State seizure. Having sought relief in the Administrative Proceeding for allegedly unpaid taxes by reason of King Mountain's possession of 7,260 cartons of unstamped cigarettes, in violation of Article 20, and it being finally determined "with prejudice" that King Mountain was not liable for those taxes, the State cannot thereafter prosecute an action against King Mountain in federal court seeking the identical taxes for possession of the identical cigarettes by merely adding an additional carton of cigarettes that was seized prior to the initiation of the NYSDTF proceeding.

3. The district court committed error by holding that, because King Mountain did not sell its cigarettes directly to licensed stamping agents, King Mountain is liable under N.Y. Tax Law § 471. New York Tax Law § 471 imposes tax liability for (i) consumers, who bear the ultimate incidence of the tax; (ii) agents, as defined in Section 470(11), who are liable for the collection and payment of the tax; and (iii) persons "in possession" of unstamped cigarettes, who bear the burden of proof that any unstamped cigarettes are not taxable. It was undisputed that King Mountain is neither an agent nor a consumer, and the district court correctly held that King Mountain did not possess cigarettes in New York.

The district court, however, committed error by imposing liability based upon King Mountain's failure to sell cigarettes directly to New York-licensed stamping agents, when the statute does not impose liability for such conduct.

4. The district court committed error when it looked to state statutes instead of the U.S. Constitution and federal statutes to determine whether Nation-to-Nation sales can be subject to state regulatory jurisdiction and, in doing so, ruled that because the state statutes do not have an exception for Nation-to-Nation sales, King Mountain cannot sell its goods directly to other Indians and must sell its cigarettes to a New York stamping agent and comply with other state regulatory requirements.

## STANDARD OF REVIEW

This Court reviews a district court's decision to grant summary judgment "*de novo*, construing the evidence in the light most favorable to the non-moving party." *Beck Chevrolet Co. v. Gen. Motors LLC*, 787 F.3d 663, 672 (2d Cir. 2015) (citation and internal quotation marks omitted); *see also In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 846 F.3d 58, 63 (2d Cir. 2017) ("We [] review *de novo* a district court's interpretation and application of state law.").

A district court's imposition of a permanent injunction is reviewed for abuse of discretion. *See Roach v. Morse*, 440 F.3d 53, 56 (2d Cir. 2006) (vacating permanent injunction). A district court abuses its discretion "when (1) its decision

rests on an error of law (such as application of the wrong legal principle) or a clearly erroneous factual finding, or (2) its decision—though not necessarily the product of a legal error or a clearly erroneous factual finding—cannot be located within the range of permissible decisions." *ACORN v. United States*, 618 F.3d 125, 133 (2d Cir. 2010) (citation and internal quotation marks omitted). Moreover, "review of questions of law is *de novo*." *Id.*

## ARGUMENT

### I. The State's Discriminatory Enforcement Practices Violated the Dormant Commerce Clause

The district court erred in finding that King Mountain had "not demonstrated that the State directly discriminated against interstate commerce through its enforcement of" its tax statutes, when the undisputed facts established the State's discriminatory enforcement of its tax laws only against non-New York Native American cigarette manufacturers. The *Pike* balancing test was inapplicable and, because the State violated the Commerce Clause, an injunction should not have been imposed.

#### A. The Commerce Clause

Article I, Section 8, Clause 3 of the U.S. Constitution – the Commerce Clause – grants Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]" "Though phrased as a grant of regulatory power to Congress, the [Commerce] Clause has long been

understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 98, (1994); *see also Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992) ("It is long established that, while a literal reading evinces a grant of power to Congress, the Commerce Clause also directly limits the power of the States to discriminate against interstate commerce.") Thus, pursuant to the "dormant" Commerce Clause, "a State's power to impinge on interstate commerce is limited," *Automated Salvage Transp., Inc. v. Wheelabrator Envtl. Sys., Inc.*, 155 F.3d 59, 74 (2d Cir. 1998), and "in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Granholm v. Heald*, 544 U.S. 460, 472 (2005) (citation and internal quotation marks omitted); *see also C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994) (the "central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent") (citing The Federalist No. 22).

When a statute "clearly discriminates against interstate commerce in favor of intrastate commerce," the law "is virtually invalid *per se* and will survive only if it

is demonstrably justified by a valid factor unrelated to economic protectionism" – that is, "such a law is valid only if it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Allco Fin. Ltd. v. Klee*, 861 F.3d 82, 103 (2d Cir. 2017) (citations and internal quotation marks omitted).[9] Where "a state law is nondiscriminatory, but nonetheless adversely affects interstate commerce 'incidental[ly],'" courts employ the "deferential balancing test" articulated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), and uphold the law "unless 'the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.'" *Allco*, 861 F.3d at 103 (quoting *Pike*, 397 U.S. at 142).

The constitutional challenge pressed by King Mountain was neither that the New York tax statutes favor intrastate commerce over interstate commerce or that those statutes incidentally burden interstate commerce. Instead, King Mountain proved that New York enforced the statutes at issue only against out-of-state Native American manufacturers and thereby unconstitutionally benefited in-state Indian manufacturers. As this Court previously posited:

> The Commerce Clause prohibits, for example, New York from favoring New York tobacco manufacturers over out-of-state

[9] The State's direct discrimination would only be permissible if it fell into the "narrow" band of cases where the State "can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *C & A Carbone*, 511 U.S. at 392 (citing case involving state banning import of baitfish because state had no other means to prevent the spread of parasites).

> manufacturers; it is not violated simply by treating [Participating Manufacturers of the MSA] and [Non-Participating Manufacturers of the MSA] differently.

*Grand River Enters. Six Nations, Ltd. v. Pryor*, 425 F.3d 158, 169 (2d Cir. 2005) (citation omitted). Here, the State's discriminatory enforcement of its cigarette statutes violated the Commerce Clause and was unconstitutional. *See Florida Transp. Servs., Inc. v. Miami-Dade Cnty.*, 703 F.3d 1230, 1257-58 (11th Cir. 2012) (permitting dormant Commerce Clause challenge based upon discriminatory enforcement of statute); *Major Tours, Inc. v. Colorel*, 720 F. Supp. 2d 587, 608–09 (D. N.J. 2010) ("The fact that most Dormant Commerce Clause cases involve facial language or incidental effects of statutes or regulations instead of discriminatory enforcement does not mean that no act of official discretion can violate the Dormant Commerce Clause") (citing cases).

### B. The State's Discriminatory Enforcement Against Only Out-of-State Native American Manufactures Violated the Dormant Commerce Clause

#### i. The District Court Erred in Holding that King Mountain Did Not Demonstrate Discriminatory Enforcement

The district court's finding that "King Mountain has not demonstrated that the State directly discriminated against interstate commerce through its enforcement of" N.Y. Tax Law § 471," SPA-70, was a clearly erroneous factual finding and should be reversed.

The following facts were not disputed by the State in the district court: (1) numerous Indian tribes, and companies owned by members of Indian tribes, manufacture cigarettes within the boundaries of New York State and do not sell those cigarettes to State-licensed stamping agents; (2) the State has not enforced its tax and cigarette laws against any Indian cigarette manufacturers located within New York; and (3) the State has formally exempted the Oneida Tribe – situated in Oneida County, New York – from adhering to certain provisions of New York State law with respect to its manufacture and sale of unstamped cigarettes.

In contrast, when it comes to Native American manufacturers located out-of-State, New York has filed two federal lawsuits accusing those manufacturers of violating federal and State cigarette laws – one against a First Nations manufacturer (Grand River) located in Canada, and, in the instant action, against an Indian manufacturer situated on the Yakama Indian Nation within the boundaries of Washington State. As the district court acknowledged, the State did "not appear to dispute that this action and *Grand River* are the only actions the State has commenced against manufacturers regarding the sale of unstamped cigarettes." SPA-71.

Evidence produced in discovery and before the district court included New York State investigators witnessing for sale vast quantities of unstamped cigarettes, some being delivered right before their eyes, manufactured by in-State Indian

companies. But as to that uncontradicted evidence, the district court reasoned that, because the Investigator testified that he was "instructed to go to reservations and purchase King Mountain and Seneca cigarettes in connection with the State's investigation of King Mountain and Seneca," he "did not 'ignore' any alleged cartons of unstamped cigarettes from Indian-owned brands manufactured in New York." SPA-72. The district court's reasoning in fact proves King Mountain's contention: the State's instruction to law enforcement agents to only purchase King Mountain and Seneca cigarettes evidenced New York's unconstitutional economic protection of in-State Indian manufacturers.

Finally, the district court ignored the undisputed fact that the State has explicitly exempted the Oneida (New York) Tribe from selling cigarettes it manufactures to state licensed stamping agents prior to delivery to other Indian tribes or companies owned by members of other Indian tribes. In fact, in the district court, the State submitted a Declaration, by an Assistant Attorney General in the unit tasked with enforcing New York cigarette laws, that did not take issue with the facts set forth in King Mountain's opposition papers nor provide any explanation, let alone a non-discriminatory one, as to why the State had not enforced its laws even-handedly among in-State and out-of-State Indian cigarette manufacturers.

The district court's conclusion – that "King Mountain has not adduced evidence demonstrating that the State is attempting to benefit tribal or Indian-owned manufacturers located in New York State by tacitly permitting their non-compliance with the Statutes" – was error.

### ii. A Dormant Commerce Clause Violation May be Predicated upon Discriminatory Enforcement

The district court acknowledged that the Eleventh Circuit had entertained a dormant Commerce Clause challenge based upon alleged discriminatory enforcement of a neutral state statute, in *Florida Transportation Services, Inc. v. Miami-Dade County.*, 703 F.3d 1230 (11th Cir. 2012). The district court stated, however, that based upon its inability to locate any similar decision in the Second Circuit, it "takes no position on the viability of a dormant Commerce Clause claim based on official enforcement." SPA-70. Because the State's enforcement of its tax statutes only against out-of-state Native American manufacturers discriminated against interstate commerce, King Mountain established a violation of the Commerce Clause.

*Walgreen Co. v. Rullan*, 405 F.3d 50 (1st Cir. 2005), is instructive. In *Walgreen*, a Puerto Rico statute required all pharmacies seeking to open or relocate within Puerto Rico to obtain a certificate of necessity and convenience from the Secretary of the Puerto Rico Health Department. The law required, upon receipt of an application from a proposed pharmacy, the Secretary to notify all "affected

persons," which were other pharmacies located within one-mile of the proposed pharmacy, to allow them to object to the application. The First Circuit also noted, however, that:

> [o]ver fifty percent of out-of-Commonwealth entities have been forced to undergo the entire administrative process compared to less than twenty-five percent of local applicants. Moreover, of those applicants forced to endure the hearing process, the Secretary has granted certificates to ninety percent of the local applicants but only to fifty-eight percent of out-of-Commonwealth applicants.

*Id.* at 56. Walgreen claimed that, as a result, the statute, "as applied to retail pharmacies, . . . discriminate[d] against or excessively burden[ed] interstate commerce." The First Circuit agreed, holding that the law "as enforced by the Secretary of Health" discriminated against out-of-Commonwealth companies and was "invalid under the dormant Commerce Clause." *Id.* at 60. It reasoned as follows:

> On its face, the Act applies neutrally. All commercial interests wishing to open or relocate a pharmacy in Puerto Rico must obtain the same certificate no matter their place of origin. But viewed more critically and in light of the Secretary's enforcement of the Act, the Act discriminates against interstate commerce by permitting the Secretary to block a new pharmacy from locating in its desired location simply because of the adverse competitive effects that the new pharmacy will have on existing pharmacies.

*Id.* at 55. Thus, the statute, "though facially neutral, discriminates against interstate commerce," and was struck down by the First Circuit. *Id.* at 59; *see also id.* at 60 (court concluded that the statute "*as enforced by the Secretary of Health*

for the issuing of certificates of necessity and convenience to retail pharmacies, is invalid under the dormant Commerce Clause") (emphasis added).

New York's discriminatory enforcement and economic protectionism in the instant case are even more blatant than the conduct struck down by the court in *Walgreen*. In *Walgreen*, the Secretary rejected some in-Commonwealth applications while approving some out-of-Commonwealth applications; the court, nonetheless, concluded that Puerto Rico's discriminatory enforcement violated the Commerce Clause. In the instant case, the State permits all in-State Indian manufacturers to sell their cigarettes directly to Indians without first selling them to a stamping agent, and *only* enforces its laws against out-of-state Native American manufacturers, without any nondiscriminatory rationale whatsoever. It would be incongruous to allow the State's executive branch to circumvent the U.S. Constitution's Commerce Clause through discriminatory enforcement when that conduct would be *per se* invalid if done by the State's legislative branch. *See Major Tours*, 720 F. Supp. 2d at 609 ("Generally what a state cannot constitutionally accomplish by regulation, it may not accomplish by granting power to state officials who will exercise it in such a way to have the same effect as the unconstitutional regulation."). The State's discriminatory enforcement violated the Commerce Clause. *Cf. City of Philadelphia v. New Jersey*, 437 U.S. 617, 629 (1978) (New Jersey law that prohibited the importation of most waste

into State landfills, while allowing in-State waste into those landfills, violated dormant Commerce Clause).

### iii. The *Pike* Balancing Test Is Inapplicable

The *Pike* balancing test[10] is "reserved for" nondiscriminatory laws that are "directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 346 (2007) (Roberts, C.J., plurality opinion) (citation and internal quotation marks omitted); *see also C & A Carbone*, 511 U.S. at 390 (when a law discriminates against interstate commerce, "we need not resort to the *Pike* test"); *Grand River Enters.*, 425 F.3d at 169 (*Pike* balancing test is "applicable to nondiscriminatory state legislation affecting interstate commerce"). King Mountain did not contend in the district court that the incidental effect of the New York tax statutes discriminated against out-of-state Native American manufacturers. To the contrary, the statute permitted a neutral application and, as a result, should not have been subject to *Pike* balancing.

The Eleventh Circuit in *Florida Transportation* recognized, in dicta, that *Pike* balancing should not be used for discriminatory enforcement; the court stated that if a government official's "application" of a statute "directly discriminated

[10] In *Pike*, a California corporation challenged an Arizona statute, the application of which "would require that an operation now carried on [in California] must be performed within [Arizona] so it [could] be regulated there." 397 U.S. at 141.

against interstate commerce by regulating participation in the interstate [] market on the basis of . . . local versus out-of-state origin," that discriminatory application violates the dormant Commerce Clause; "the *Pike* undue burden test" is only used if the official's "practices did not directly discriminate." 703 F.3d at 1257.

The undisputed facts in the district court established that the State knew of numerous in-State Indian manufacturers selling unstamped cigarettes directly to other Indians or Indian tribes without selling to a New York-licensed stamping agent (or complying with N.Y. Tax Law § 480-b or N.Y. Executive Law § 156-c), but the State has only brought enforcement actions against out-of-State Native American manufacturers for the same conduct. The State has engaged in economic protectionism and directly discriminated against out-of-state Native American manufacturers and, therefore, the State's conduct is unconstitutional. *Cf. Granholm*, 544 U.S. at 476 (laws in Michigan and New York that, in effect, allowed in-state wineries to sell wine directly to consumers in state but prohibited or made sales economically impractical for out-of-state wineries directly discriminated against interstate commerce, were subject to the "virtually *per se* rule of invalidity," and violated the dormant Commerce Clause).

### C. The District Court Should Not Have Entered a Permanent Injunction

A plaintiff seeking a permanent injunction must demonstrate:

> (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

*eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). A permanent injunction "does not follow from success on the merits as a matter of course." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008).[11]

As a result of the State's constitutional violation, the balance of hardships and the public interest favor King Mountain. *Cf. Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) (there is a "presumption of irreparable injury that flows from a violation of constitutional rights"); *Liberty Coins, LLC v. Goodman*, 748 F.3d 682, 690 (6th Cir. 2014) ("it is always in the public interest to prevent the violation of a party's constitutional rights.") (citation and internal quotation marks omitted); *Deferio v. City of Syracuse*, 16-CV-0361 (LEK)(TWD), 2016 WL 3199517, at *8 (N.D.N.Y. June 8, 2016) ("it is decidedly against the public interest to abide the continued enforcement of an unconstitutional policy or law"). Because the State's enforcement of its cigarette and tax statutes violated the Commerce Clause, a

[11] In its Amended Complaint, the State did not even seek injunctive relief on its Third Claim for Relief.

permanent injunction barring King Mountain from making Nation-to-Nation sales of cigarettes should not have issued.

## II. King Mountain Is Not Liable Under New York Tax Law Section 471

The district court committed error in finding that res judicata did not bar the State's entire Third Claim for Relief and in holding that King Mountain violated Section 471 by selling unstamped cigarettes Nation-to-Nation to entities that were not licensed stamping agents.

### A. Res Judicata Bars The State's Third Claim for Relief

The district court committed error when it held that the entirety of the State's Third Claim for Relief was not barred by res judicata.

#### i. Applicable Law

"Under both New York law and federal law, the doctrine of *res judicata*, or claim preclusion, provides that a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Maharaj v. Bankamerica Corp.*, 128 F.3d 94, 97 (2d Cir. 1997) (citation and internal quotation marks omitted).[12] Specifically, in New York, res judicata bars successive litigation when (1) "there is a judgment on the merits rendered by a court of competent jurisdiction," (2) "the party against

[12] New York law governs the question of whether or not res judicata is applicable, because the relevant prior judgment was rendered in New York. *See Jacobson v. Fireman's Fund Ins. Co.*, 111 F.3d 261, 265 (2d Cir. 1997).

whom the doctrine is invoked was a party to the previous action, or in privity with a party who was," and (3) the subsequent litigation is "based upon the same transaction or series of connected transactions." *People ex. rel. Spitzer v. Applied Card Sys., Inc.*, 11 N.Y.3d 105, 122 (2008) (citation and internal quotation marks omitted); *see also Davidson v. Capuano*, 792 F.2d 275, 278 (2d Cir. 1986) ("New York courts have adopted the 'transactional approach' to res judicata, holding that if claims arise out of the same 'factual grouping' they are deemed to be part of the same cause of action and the later claim will be barred without regard to whether it is based upon different legal theories or seeks different or additional relief.") (citation omitted). To determine whether two litigations are part of the same "transaction" or "series of transactions," the court must take a "pragmatic" approach, and look to whether, in the two actions, "the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." *Smith v. Russell Sage Coll.*, 54 N.Y.2d 185, 192-93 (1981) (citation and internal quotation marks omitted).

#### ii. The NYSDTF Dismissal of L-038986040 with Prejudice Precluded the State's Prosecution of the Third Claim

On December 20, 2012 (one day prior to the filing of the original complaint in this action), the NYSDTF issued King Mountain a Notice of Determination that

King Mountain owed the State $1,259,250 in taxes. A-431-432. The Notice stated:

> On 12/03/12, you were found to be in possession and/or control of unstamped or unlawfully stamped cigarettes, and/or untaxed tobacco products. Therefore, penalty is imposed under Article 20 of the New York State Tax law.

A-432. N.Y. Tax Law § 471, assessing tax based upon possession, is contained in Article 20 of the New York State Tax Law.

Similarly, the State's Amended Complaint alleged only two instances of violations by King Mountain – the November 6, 2012, undercover purchase of a carton of King Mountain brand cigarettes on the Poospatuck Reservation, and the December 3, 2012, seizure of King Mountain brand cigarettes from the ERW truck. A-82-83. In its Third Claim for Relief, the State sought to recover the same taxes for the same conduct under the same New York State law (§ 471 (possession)) as it alleged in its Administrative Proceeding.

On October 23, 2014 (one month prior to the scheduled trial before the Administrative Law Judge), New York State submitted a "Stipulation for Discontinuance of Proceeding" proposing to settle this matter whereby King Mountain would owe $0 in tax, penalty, and interest. A-142, A-445. On November 19, 2014, the ALJ issued an Order of Discontinuance in L-038986040 that provided as follows:

> Ordered, Adjudged and Decreed that pursuant to the Stipulation of Discontinuance dated October 23, 2014, the assessment is cancelled.
>
> Pursuant to the Stipulation of Discontinuance executed by the parties, petitioner has waived its rights to apply for costs and fees under Tax Law § 3030; and
>
> It is further Ordered, Adjudged and Decreed that the above-entitled proceeding be and the same hereby is discontinued with prejudice . . . .

A-448.

The district court correctly found that the first two elements for the application of res judicata were present. First, the district court held that the stipulation of discontinuance with prejudice from the NYSDTF[13] constituted a final adjudication on the merits from a court of competent jurisdiction. SPA-31. *See Pawling Lake Prop. Owners Ass'n, Inc. v. Greiner*, 72 A.D.3d 665, 667 (2d Dep't 2010) ("The general rule is that a stipulation of discontinuance 'with prejudice' is afforded res judicata effect and will bar litigation of the discontinued causes of action.") (citation and internal quotation marks omitted). Second, the district court held that the State (through the Attorney General) was in privity with the NYSDTF, and therefore res judicata bound the Attorney General to the judgment

[13] The New York State Division of Tax Appeals is a court of competent jurisdiction, and therefore res judicata can apply to its determinations. *Cf. Burkybile v. Bd. of Educ. of Hastings-On-Hudson Union Free Sch. Dist.*, 411 F.3d 306, 312 (2d Cir. 2005) ("New York courts will give administrative determinations preclusive effect if made in a quasi-judicial capacity and with a full and fair opportunity to litigate the issue.").

in the prior proceeding. SPA-31-38. *See State of New York v. Seaport Manor A.C.F.*, 19 A.D.3d 609, 610 (2d Dep't 2005) (New York Attorney General could not bring action for claims that had previously been brought by New York Department of Health in administrative proceeding and that were dismissed with prejudice pursuant to stipulations of settlement; Appellate Division held that the New York Attorney General "was in privity" with the New York Department of Health).

With respect to the third element of res judicata – whether the instant action is based upon the same transaction or series of connected transactions as the NYSDTF proceeding – the district court correctly found that the "December 3rd Inspection arises out of the same factual grouping as the facts underlying the Tax Proceeding," because "the Tax Proceeding resolved the State's claim that King Mountain was liable under the NYTL for possession of the unstamped cigarettes discovered in the December 3rd Inspection," and the "State's claim that King Mountain violated Article 20 by failing to ship their cigarettes to a licensed stamping agent could have been raised in the Tax Proceeding with respect to the cigarettes discovered during the December 3rd Inspection." SPA-40-41. However, regarding the November 6, 2012, undercover purchase of a single carton of King Mountain cigarettes, the district court, after it noted that it "presents a closer issue," "decline[d] to characterize the Tax Proceeding as an umbrella that

encompasses all claims regarding untaxed cigarettes prior to December 2012," because "[t]he November 6th Purchase arises out of a different underlying factual transaction than the December 3rd Inspection . . . ." SPA-41-42. This ruling was error.

This Court has emphasized that res judicata applies to all claims that "could have been raised" in a prior action. *Maharaj*, 128 F.3d at 97 (citation and internal quotation marks omitted). By the time of the filing of the NYSDTF proceeding, on December 20, 2012, the State had all of the facts necessary to also seek relief under Article 20 of the New York Tax Law (where § 471 resides) for the carton of unstamped King Mountain cigarettes purchased by State investigators on November 6, 2012. The November 6, 2012, purchase is part of the same "series of transactions" as the December 3, 2012, seizure, because the facts are related in "time, space, origin, or motivation" and, as the State acknowledged by having included both in the federal court action, they "form a convenient trial unit." *Russell Sage*, 54 N.Y.2d at 192-93. Having sought relief in the Administrative Proceeding for allegedly unpaid taxes by reason of King Mountain's possession of 7,260 cartons of unstamped cigarettes, in violation of Article 20, and it being finally determined "with prejudice" that King Mountain was not liable for those taxes, the State cannot thereafter prosecute an action against King Mountain in federal court seeking the same (§ 471) taxes for possession of the same 7,260

cartons of cigarettes by merely adding an additional carton of cigarettes that were seized prior to the initiation of the NYSDTF proceeding. *See Waldman v. Vill. of Kiryas Joel*, 207 F.3d 105, 111 (2d Cir. 2000) ("a suit for trespass precludes a subsequent action for trespass as to all the instances of trespass preceding the institution of the original suit") (citing Restatement (Second) of Judgments § 24 cmt. d & illus. 7 (1982)); *Vill. of Laurel Hollow v. Nichols*, 260 A.D.2d 439, 440 (2d Dep't 1999) (res judicata barred claims that "could and should have" been raised in the prior proceeding). The State (including those in privity with it) was required to raise all instances of alleged violations of Article 20's prohibition of possession of unstamped cigarettes, prior to December 20, 2012, in the NYSDTF proceeding. As a result, the district court's conclusion that res judicata does not bar the Third Claim for Relief should be reversed.

### B. The District Court Erred in Holding that King Mountain Violated Section 471 by Selling Cigarettes Nation-to-Nation

The district court's determination that King Mountain is liable under N.Y. Tax Law § 471, because it did not sell its cigarettes directly to licensed stamping agents, was also error and should be reversed.

### i. New York's Cigarette Taxing Scheme

New York Tax Law § 471 imposes a $4.35 tax on each pack of cigarettes "possessed in the state by any person for sale, except that no tax shall be imposed on cigarettes sold under such circumstances that [New York] is without power to impose such tax," and the law makes clear that "the ultimate incidence of and liability for the [cigarette] tax shall be upon the consumer." N.Y. Tax Law § 471(1)-(2). Section 471 establishes a presumption that "all cigarettes within the state are subject to tax until the contrary is established, and the burden of proof that any cigarettes are not taxable hereunder shall be upon the person in possession thereof." N.Y. Tax Law § 471(1). State-licensed stamping agents pre-pay the excise tax by purchasing and affixing a tax stamp to each pack of cigarettes, and then re-sell those cigarettes to wholesalers and retailers at an increased price reflecting the cost of the tax stamp and a markup for profit. N.Y. Tax Law § 471(2); *see also United States v. Morrison*, 686 F.3d 94, 99 (2d Cir. 2012). Although "the agent shall be liable for the collection and payment of the tax," N.Y. Tax Law § 471(2), an agent is defined as "[a]ny person licensed by the commissioner of taxation and finance to purchase and affix adhesive or meter stamps on packages of cigarettes under this article," *i.e.*, *not* a federally licensed, out-of-state manufacturer. N.Y. Tax Law § 470(11).

N.Y. Tax Law § 471(2) provides that "[a]ll cigarettes sold by agents and wholesalers to Indian nations or tribes or reservation cigarette sellers located on an Indian reservation must bear a tax stamp." The statute does not define "wholesaler," and King Mountain did not concede that it, a manufacturer of cigarettes, was a "wholesaler."

N.Y. Tax Law § 470(8) defines "wholesale dealer" as "[a]ny person who (a) sells cigarettes or tobacco products to retail dealers or other persons for purposes of resale, . . . or (c) sells cigarettes or tobacco products to an Indian nation or tribe or to a reservation cigarette seller on a qualified reservation." King Mountain conceded in the district court that it met the definition of "wholesale dealer" under the statute, because it sold its cigarettes to Indian Nations and reservation cigarette sellers.

#### ii. King Mountain Did Not Violate Section 471 Through Its Sales to Indian Tribes or Companies Owned by Members of Indian Tribes

The district court correctly held that King Mountain is not liable for New York cigarette taxes pursuant to Section 471, because it was "undisputed that King Mountain utilized a common carrier to transport its cigarettes to Indian reservations and/or Indian-owned businesses in New York State," and, therefore, King Mountain did not "possess" cigarettes in New York. SPA-43. However, the district court erred in finding King Mountain liable because King Mountain did not

sell its cigarettes directly to a New York-licensed stamping agent.[14] As the district court noted, § 471(2) provides that:

> [a]ll cigarettes sold by agents and wholesalers to Indian nations or tribes or reservation cigarette sellers located on an Indian reservation must bear a tax stamp.

The district court committed error when it held that King Mountain, as a "wholesale dealer," violated Section 471(2); that statute, by its plain terms, applies to "wholesalers" and not to "wholesale dealers." *See Orens v. Novello*, 99 N.Y.2d 180, 187 (2002) ("When different terms are used in various parts of a statute or rule, it is reasonable to assume that a distinction between them is intended") (citation and internal quotation marks omitted).[15] King Mountain, a federally licensed cigarette *manufacturer*, is not a wholesaler, and therefore did not violate § 471(2) through its Nation-to-Nation sales of cigarettes.

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[14] The Amended Complaint, in its Third Claim for Relief, pled that King Mountain violated §§ 471 and 471-e by "possessing" unstamped cigarettes in New York State. In its summary judgment briefing, the State cited §§ 471, 471(2), and 471-e, and argued that King Mountain was liable because it possessed cigarettes in New York and that King Mountain had failed to overcome the presumption that the cigarettes it "possessed" in New York were not subject to tax. The district court confined itself to § 471, but went beyond the State's contention of "possession," in holding that King Mountain violated Section 471 and was liable under the Third Claim for Relief because King Mountain failed to sell its cigarettes to a licensed stamping agent.

[15] The Supreme Court has repeatedly confirmed that "statutes are to be construed liberally in favor of the Indians." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985).

Further, nothing in Section 471(2), or in Article 20 and its accompanying regulations, impose liability on an Indian manufacturer for engaging in Nation-to-Nation transactions. Liability in New York Tax Law § 471 is for (i) consumers, who bear the ultimate incidence of the tax; (ii) agents, as defined in Section 470(11), who are liable for the collection and payment of the tax; and (iii) persons "in possession" of unstamped cigarettes, who bear the burden of proof that the unstamped cigarettes are not taxable. *See* N.Y. Tax Law § 471(1) & (2). It is undisputed that King Mountain is neither a consumer nor an agent and, as the district court correctly found, King Mountain did not possess unstamped cigarettes anywhere within the boundaries of New York State.

In dicta, this Court has stated that the New York tax law "mandates that [state-licensed stamping] agents be the only entry point for cigarettes into New York's stream of commerce," *Oneida Nation of New York v. Cuomo*, 645 F.3d 154, 158 (2d Cir. 2011), citing N.Y. Comp.Codes R. & Regs. tit. 20, § 74.3(a)(1)(iii) for that proposition. However, that regulation only sets forth a presumption, and requirements for the avoidance of a presumption, of a "taxable event":

> In general, unstamped packages of cigarettes are introduced into New York State primarily by manufacturers of cigarettes and by dealers having exclusive distribution privileges. While the mere possession of cigarettes to be sold within the State brings with it a presumption of a taxable event, persons who introduce cigarettes into the New York State market, for sale therein, may do so without subjecting themselves to such presumption and without violating any provision of the Tax Law or this Title provided the cigarettes are: (i) transported

> in the State by way of common carrier only; (ii) stored, if necessary, in bonded or public warehouses; and (iii) sold exclusively to licensed cigarette agents who shall affix and cancel the cigarette tax stamps.

The regulation does not require out-of-state manufacturers to only ship cigarettes into the State directly to a licensed stamping agent. *Cf.* SPA-46 (district court stated that 20 N.Y.C.R.R. 74.3(a)(1) "echoes Section 471 in that manufacturers are liable for taxes to the extent they are in 'possession' of unstamped cigarettes.") In fact, nothing in the law precludes King Mountain from selling to Indian Nations, or companies owned by Indians on Indian Nations, who could then sell those cigarettes to New York-licensed stamping agents. The Supreme Court has already warned New York City to not invent remedies in an attempt to collect cigarette taxes against those who the law does not allow liability to be imposed upon. *Cf. Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 17 (2010) (in rejecting City of New York's RICO claim against an out-of-state retailer selling cigarettes directly to consumers without filing Jenkins Act (predecessor to the PACT Act) reports, Supreme Court noted that the case is "about imposing such liability to substitute for or complement a governing body's uncertain ability or desire to collect taxes directly from those who owe them"). This Court should not allow New York State to invent remedies against an Indian corporation.

Because King Mountain is not a consumer or an agent and did not possess cigarettes in New York, it may not be held liable under Section 471, and the

district court's granting of partial summary judgment to the State on the Third Claim for Relief should be reversed.

## III. The District Court Erred When It Held That New York Can Regulate Commerce Between an Indian Outside the Boundaries of New York And Indians Within the State's Boundaries

The district court recognized that King Mountain is an Indian operating in Indian Country, and found that King Mountain's sales were to tribal and Indian entities operating on reservations within the boundaries of New York. Nevertheless, the district court held that federal legal protections of Indian Nation to Indian Nation sales did not preclude imposition of state regulations requiring King Mountain to: (1) use a state stamping agent for Nation-to-Nation sales; (2) report Nation-to-Nation sales[16]; and (3) confirm with State agents that King Mountain products are "fire safe."[17]

These rulings were in error. They imbue New York with extraterritorial regulatory power to prohibit an Indian holding a federal license to manufacture a

[16] The district court rejected King Mountain's argument "that 'there is no evidence in the record that King Mountain knowingly violated New York Tax Law § 480-b, because King Mountain only engaged in Nation-to-Nation sales within the boundaries of New York State.'" SPA-50. It did so based principally upon its determination that "there is no exception in Section 480-b for cigarette sales to Indian Nations or Indian-owned companies located on qualified reservations." SPA-51.

[17] The district court rejected King Mountain's argument that "it need not file certifications because it does not sell cigarettes in New York State based on its 'Nation to Nation' sales." SPA-52.

legal product from selling that product directly to other Indians. In granting this sweeping extension of state regulatory authority, the district court improperly looked to state law and ignored the Indian Commerce Clause, the fact that the federal government has preempted state authority over the Nation-to-Nation trade at issue, and the Yakama Treaty (ratified by Congress in 1859).

### A. The Indian Commerce Clause

Article I, Section 8, Clause 3 of the U.S. Constitution grants Congress the power "to regulate commerce . . . with the Indian tribes." The Indian Commerce Clause vests the regulatory authority of Nation-to-Nation trade exclusively in Congress. *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) ("the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs"). As the Supreme Court has confirmed:

> [T]he Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause. This is clear enough from the fact that the States still exercise some authority over interstate trade but the States have been divested of virtually all authority over Indian commerce and Indian tribes.

*Seminole Tribe v. Florida*, 517 U.S. 44, 62 (1996). As an exercise of Congress' regulatory power over Indian trading, Congress passed, in 1834, the Indian Trader

Statutes, 25 U.S.C. § 261, *et seq.*[18] Regulating trade "with the Indian Tribes" is solely within the provenance of the U.S. Congress, because Congress, "in the exercise of its power granted [by the Indian Commerce Clause] has undertaken to regulate reservation trading in such a comprehensive way that there is no room for the States to legislate on the subject." *Warren Trading Post Co. v. Ariz. Tax Comm'n*, 380 U.S. 685, 691 n.18 (1965).[19] Allowing a state to usurp exclusive congressional power through state regulation controlling the sale and purchase of goods between sovereign Indian Nations – enforced, as here, by a federal court injunction – not only ignores the plain meaning of the Indian Commerce Clause but also undermines comprehensive federal Indian trading statutes adopted by Congress. *See Cent. Mach. Co. v. Arizona State Tax Comm'n*, 448 U.S. 160, 166

[18] *See, e.g.*, 25 U.S.C. § 261 ("The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians.")

[19] Although the Supreme Court has more recently cautioned against a broad reading of *Warren Trading Post*, holding that "Indian traders are not wholly immune from state regulation that is reasonably necessary to the assessment or collection of lawful state taxes," *Dep't of Taxation & Fin. of New York v. Milhelm Attea & Bros.*, 512 U.S. 61, 75 (1994), as discussed *infra*, *Milhelm* involved transactions between Indians and non-Indians, not transactions between two Indians. In addition, *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), where the Court upheld a mere recordkeeping requirement on Indian Tribes for "exempt sales" (and where the Tribes presented "no evidence" in the district court as to why the requirement should be invalid), is not comparable to the significant burden placed on Indian-to-Indian trading in the instant case.

(1980) ("Until Congress repeals or amends the Indian trader statutes, [] we must give them a sweep as broad as their language, and interpret them in light of the intent of the Congress that enacted them.") (alteration, citation, and internal quotation marks omitted).

The Supreme Court's decision in *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463 (1976), holding that states may require a tribe to collect state taxes on the retail sale of goods to non-tribal members, demonstrates that transactions between Indians on reservation are protected from state regulation, because the Supreme Court in *Moe* simultaneously struck down taxes and fees on Indians trading with other Indians. *See id.* at 480-81 ("the vendor license fee sought to be applied to a reservation Indian conducting a cigarette business for the Tribe on reservation land[,] and the cigarette sales tax, as applied to on-reservation sales by Indians to Indians, conflict with the congressional statutes which provide the basis for decision with respect to such impositions").

Only Congress can limit the rights of Indians to engage in Indian commerce with other Indians on their reservations. Here, the power the district court in effect granted New York – to regulate Nation-to-Nation trade – abrogated the exclusive powers of Congress to promote Indian Nation-to-Nation commerce and unduly burdened such commerce, in violation of the Indian Commerce Clause.

### B. Federal Law Preempts the New York Regulations at Issue

Federal preemption of state law as applied to Indian reservations requires a particularized examination of the relevant federal, state, and tribal interest, including the federal trust responsibility and the tribal interest in promoting economic development, self-sufficiency and strong tribal government. As the Supreme Court held:

> [T]he traditional notions of tribal sovereignty, and the recognition and encouragement of this sovereignty in congressional Acts promoting tribal independence and economic development, inform the pre-emption analysis that governs this inquiry. Relevant federal statutes and treaties must be examined in light of the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence. As a result, ambiguities in federal law should be construed generously, and federal pre-emption is not limited to those situations where Congress has explicitly announced an intention to pre-empt state activity.

*Ramah Navajo School Bd., Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 838 (1982) (citations omitted).

"When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest." *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980) (noting that "[m]ore difficult questions arise" where "State asserts authority over the conduct of non-Indians engaging in activity on the reservation"). Indeed, because selling cigarettes is not illegal in New York, and because the King Mountain

cigarettes purchased by Indian Tribes and tribal businesses complied with federal regulatory requirements, New York has no authority to regulate the manner in which Tribes can purchase cigarettes from out-of-state Indians. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 221-22 (1987) (California cannot regulate activity on tribal land not prohibited, but only regulated, by the state), *superseded by statute on other grounds*. Similar to the vendor licensing fees the Supreme Court rejected in *Moe*, the burden here falls entirely on Indians conducting on-reservation business, and the state regulation cannot be enforced, because it requires the use of non-Indian, New York-licensed businesses as an intermediary of the trade between a Yakama Indian business and other Indians and Indian businesses.

The Supreme Court's decision in *Department of Taxation & Finance of New York v. Milhelm Attea & Bros.*, 512 U.S. 61 (1994), is not to the contrary. In *Milhelm*, a non-Indian cigarette wholesaler (licensed as an "Indian trader" by the U.S. government) alleged that New York's imposition of recordkeeping requirements and quantity limitations on non-taxed cigarettes sold to Indian retailers violated the Indian Trader Statutes. The Supreme Court held that wholesalers who trade with Indians are not "wholly immune from state regulation that is reasonably necessary to the assessment or collection of lawful state taxes," and the burdens imposed on the non-Indian wholesalers in that case were not

excessive.[20] *Id.* at 75-77. *Milhelm*, however, did not uphold the New York cigarette licensing, reporting, or tax scheme as applied to Indian-to-Indian trade. Unlike in *Milhelm*, which concerned trade between non-Indians and Indians, "[w]hen on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest." *Bracker*, 448 U.S. at 144. Further, in contrast to *Milhelm*, the burdens imposed by New York on King Mountain are excessive, because the State, and the district court's injunction, prohibit Indian-to-Indian trade in its entirety. Although *Moe* and *Milhelm* permit the State to require a reservation retailer to collect tax on sales to *non-Indians*, they do not support the conclusion that the State has the extraterritorial power to force an Indian outside the boundaries of New York to only make sales of a product it manufacturers to a non-Indian licensed by State authorities, thereby prohibiting Nation-to-Nation trading altogether. The State's regulation of Nation-to-Nation trade of a legal product is preempted by federal law.

[20] New York's cigarette statutes have been amended since *Milhelm*, most notably, with respect to the instant action, by the requirement in Section 471(2) that all cigarettes sold by wholesalers to Indians "must bear a tax stamp."

### C. The Yakama Treaty

Controlling Supreme Court precedent confirms the protections guaranteed to the Yakama people in the Treaty the United States negotiated with the Yakama in 1855 (thereafter ratified by the Senate and signed by the President). 12 Stat. 951. Article III of the Treaty extended and protected Yakama economic activities beyond reservation boundaries. Specifically, it secured to the Yakama people "free access" to the nearest public highway and "the right, in common with the citizens of the United States, to travel upon all public highways," which the Yakama people understood to preserve their "right to travel the public highways without restriction for purposes of hauling goods to market" and to "retain their right to travel outside reservation boundaries, with no conditions attached," even as they "engage in *future* trading endeavors." *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229, 1248-53 (E.D. Wash. 1997), *aff'd sub nom. Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998).

*United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007), is on point. At issue in *Smiskin* was a Washington state requirement that wholesalers affix either a "tax paid" or "tax exempt" stamp to cigarette packaging prior to sale, and individuals other than licensed wholesalers were not allowed to transport unstamped cigarettes unless they gave notice to the State Liquor Control Board "in advance of the commencement of transportation." In upholding the dismissal of an

indictment against members of the Yakama Indian Nation for failing to give the required notice prior to transporting unstamped cigarettes from reservations in Idaho to reservations in Washington, the Ninth Circuit interpreted the Yakama Treaty as prohibiting imposition of a state regulatory pre-condition on the right to engage in the transport of tobacco products. *See id.* at 1266-67 ("[W]hether the goods at issue are timber or tobacco products, the right to travel overlaps with the right to trade under the Yakama Treaty such that excluding commercial exchanges from its purview would effectively . . . render the Right to Travel provision truly impotent."); *see also id.* at 1265 (approving of district court finding in separate litigation that the "Yakama Treaty, and the Right to Travel provision in particular, were of tremendous importance to the Yakama Nation when the Treaty was signed[; a]t that time, the Yakamas exercised free and open access to transport goods as a central part of a trading network running from the Western Coastal tribes to the Eastern Plains tribes"). *Compare King Mountain Tobacco Co. v. McKenna*, 768 F.3d 989 (9th Cir. 2014) (right to travel provision does not preempt Washington's escrow requirement for cigarette manufacturers where escrow remained the property of King Mountain and escrow was only imposed on cigarettes Washington State had power to tax (*i.e.*, not tax-exempt cigarettes purchased by Indians)).

Like in *Smiskin*, the pre-sale licensing requirement of cigarettes as fire safe, the post-sale reporting of all Nation-to-Nation sales, and the requirement of using a New York-licensed middleman instead of selling cigarettes directly Nation-to-Nation each "violates [the Yakamas'] treaty right to transport goods to market without restriction." 487 F.3d at 1266.[21] The district court's grant of summary judgment and permanent injunction abrogated these important Treaty protections, and the district court erred when it held that the State of New York can require that no sales take place between the Yakama Nation and Indian Nations situated on land within the boundaries of New York without King Mountain first selling to non-Indian, New York stamping agents.

## CONCLUSION

For the reasons set forth above, King Mountain respectfully requests that this Court reverse the district court's grant of partial summary judgment to the State on its Third and Fifth Claims for Relief and summary judgment on its Fourth Claim for Relief, and reverse and vacate the district court's imposition of a permanent injunction.

[21] The Washington Supreme Court recently struck down a state regulatory mandate that Yakama Nation fuel importers obtain a state fuel license and pay state fuel taxes, stating "*Smiskin* is nearly identical to this case. In both cases, the State placed a condition on travel that affected the Yakamas' treaty right to transport goods to market without restriction." *Cougar Den, Inc. v. Washington State Dep't of Licensing*, 188 Wash. 2d 55, 67 (2017), *cert. petition pending*.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

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s/ Philip Pilmar
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**CERTIFICATE OF SERVICE**

I hereby certify that on February 20, 2018, the above Brief was electronically filed and served via the Court's CM/ECF System on:

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# SPECIAL APPENDIX

**CASE NOS. 17-3198, -3222**

**INDEX TO DOCUMENT REFERENCES IN SPECIAL APPENDIX**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
STATE OF NEW YORK,

Plaintiff,

MEMORANDUM & ORDER
12-CV-6276(JS)(SIL)

-against–

MOUNTAIN TOBACCO COMPANY, d/b/a
KING MOUNTAIN TOBACCO COMPANY, INC.,

Defendant.
----------X
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SEYBERT, District Judge:

Presently pending before the Court are defendant Mountain Tobacco Company's ("King Mountain") motion for partial summary judgment (Docket Entry 195) and plaintiff State of New York's (the "State") cross motion for summary judgment (Docket

Entries 197 and 198[1]). For following reasons, the parties' motions are both GRANTED IN PART and DENIED IN PART.

BACKGROUND[2]

King Mountain, a for-profit corporation formed and operating under the laws of the Yakama Indian Nation, manufactures and sells its own brand of cigarettes. (Pl.'s 56.1 Stmt., Docket Entry 195-5, ¶¶ 28, 30.)[3] King Mountain's principal place of business is located on the Yakama Indian Nation Reservation. (Pl.'s 56.1 Stmt. ¶ 32.) Delbert Wheeler, Sr., an enrolled member of the Yakama Nation, is the sole owner of King Mountain. (Pl.'s 56.1 Stmt. ¶¶ 35, 39.)

The State alleges that King Mountain has marketed, distributed, and sold its cigarettes in New York since at least

[1] The State filed its cross motion for summary judgment at Docket Entry 197. However, the State also filed a motion for leave to electronically file under seal and a motion for summary judgment at Docket Entry 198. These two docket entries contain the same dispositive motion.

[2] The following material facts are drawn from King Mountain's Local Civil Rule 56.1 Statement and the State's Local Civil Rule 56.1 Counterstatement unless otherwise noted. Any relevant factual disputes are noted.

[3] As set forth more fully in the transcript of the proceedings held on April 8, 2016, the Court granted King Mountain's motion to strike the State's Local Rule 56.1 Statement dated January 29, 2016 (the "January 56.1 Statement"). (Docket Entry 197-2.) Accordingly, the Court will not consider the January 56.1 Statement, or the portion of the State's memorandum of law that relies upon additional facts set forth in the January 56.1 Statement.

June 1, 2010. (Pl.'s 56.1 Stmt. ¶ 52.) King Mountain denies that allegation, (Def.s' 56.1 Counterstmt., Docket Entry 195-6, ¶ 52), but alleges that it "sells its cigarettes to Indian Nations, and to companies owned by a member of an Indian Nation, that are situated on Indian Nations, some of which are located within the boundaries of the State of New York[,]" (Def.s' Sec. 56.1 Stmt., Docket Entry 195-3, ¶ 13). Nevertheless, King Mountain has conceded that it sold cigarettes to Valvo Candies, an entity that is not owned by an Indian Nation or tribe or a member of an Indian Nation or tribe. (Def.'s Br., Docket Entry 195-1, at 9, n.4.) The State alleges that Valvo Candies is not located on a qualified Indian reservation and is instead located in Silver Creek, Chautauqua County, New York. (Pl.'s 56.1 Stmt. ¶¶ 53(l), 54(a).)[4] It is undisputed that King Mountain has not filed reports or registrations with the New York State Department of Taxation and Finance ("DTF"). (Def.'s Sec. 56.1 Stmt. ¶ 23.)

On November 6, 2012, a New York State investigator purchased one carton of unstamped King Mountain brand cigarettes for twenty-five dollars at a smoke shop located on the Poospatuck Indian Reservation in Mastic, New York. (Def.'s Sec. 56.1 Stmt.

[4] King Mountain does not deny that Valvo Candies is not located on a qualified Indian reservation and instead asserts that this allegation is based on evidence not produced in discovery and constitutes a "purported legal conclusion that does not require a factual response." (Def.'s 56.1 Counterstmt. ¶¶ 54(a)-(b).)

¶ 25.) On December 3, 2012, New York State troopers stopped a truck in Clinton County, New York, and seized one hundred and forty cases of unstamped King Mountain brand cigarettes. (Def.'s Sec. 56.1 Stmt. ¶ 26.) The cigarettes were being transported by ERW Wholesale to the Ganienkeh Nation in Altona, New York. (Def.'s Sec. 56.1 Stmt. ¶ 26(a).)

On May 15, 2013, a New York State investigator purchased cartons of unstamped King Mountain brand cigarettes at smoke shops located on the Poospatuck Indian Reservation in Mastic, New York. (Def.'s Sec. 56.1 Stmt. ¶ 27.) On May 16, 2013, a New York State investigator purchased one carton of unstamped King Mountain brand cigarettes for twenty dollars at a smoke shop located on the Cayuga Indian Reservation in Union Springs, New York. (Def.'s Sec. 56.1 Stmt. ¶ 29.) On June 5, 2013, a New York State investigator purchased two cartons of unstamped King Mountain brand cigarettes at smoke shops located on the Poospatuck Indian Reservation. (Def.'s Sec. 56.1 Stmt. ¶ 30.)

A. The Administrative Proceeding

On December 20, 2012, DTF issued a Notice of Determination against King Mountain in connection with cigarettes seized on December 3, 2012 (the "Notice of Determination"). (Def.'s Sec. 56.1 Stmt. ¶ 26(c).) The Notice of Determination alleged that King Mountain failed to pay $1,259,250.00 in state

taxes pursuant to New York State Tax Law Article 20. (Def.'s Sec. 56.1 Stmt. ¶ 26(c).)

On October 23, 2014, DTF filed a Stipulation of Discontinuance stating that King Mountain owed $0 in tax, penalty, and interest in connection with the Notice of Determination (the "Stipulation of Discontinuance"). (Def.'s Sec. 56.1 Stmt. ¶ 26(d).) On November 19, 2014, the presiding Administrative Law Judge issued an Order decreeing that the State's assessment against King Mountain was cancelled and dismissed with prejudice. (Def.'s Sec. 56.1 Stmt. ¶ 26(e).)

I. The Amended Complaint

The Amended Complaint dated May 21, 2014[5] asserts claims pursuant to the Contraband Cigarette Trafficking Act ("CCTA"), Prevent All Cigarette Trafficking Act ("PACT Act"), New York Tax Law §§ 471, 471-e, and 480-b, and New York Executive Law § 156-c against King Mountain.[6] (Am. Compl., Docket Entry 96.) The State

[5] The State initially filed an unsigned Amended Complaint on February 13, 2013. (Docket Entry 6.) The Amended Complaint was subsequently signed and refiled on May 21, 2014. (Docket Entry 96.)

[6] Mountain Tobacco Distributing Company Inc., and Delbert Wheeler, Sr. were also named as defendants in this action. (Am. Compl.) The State voluntarily dismissed Mountain Tobacco Distributing Company Inc. as a defendant pursuant to an Amended Notice of Dismissal, So Ordered on May 9, 2013. (Docket Entry 45.) Mr. Wheeler was terminated as a defendant pursuant to the Court's Memorandum and Order dated January 26, 2016, granting Mr. Wheeler's motion to dismiss. (Docket Entry 193.)

seeks to enjoin King Mountain from making allegedly illegal cigarette sales and shipments into New York and also seeks civil penalties, attorney fees, and costs. (Am. Compl. ¶ 3.)

II. The Pending Motions

On January 29, 2016, King Mountain filed a motion for partial summary judgment and the State filed a cross motion for summary judgment. (Def.'s Mot., Docket Entry 195; Pl.'s Mot., Docket Entry 197.) The State and King Mountain each filed one brief in support of their respective motions and a separate brief in opposition to their adversary's motion. The parties each filed a reply brief, as well as supplemental briefs in response to the Court's Electronic Order dated May 4, 2016. As the parties' briefs are somewhat duplicative, the Court will address the relevant arguments by party, rather than by motion sequence.

A. King Mountain's Position

King Mountain has moved for summary judgment with respect to the State's claims under the CCTA, PACT Act, and New York Tax Law ("NYTL") Sections 471 and 471-e. (See generally Def.'s Br.) King Mountain argues that the State's CCTA claim must fail because, inter alia, it is exempt as an "Indian in Indian country." (Def.'s Br. at 12, 14-16.) King Mountain avers that it is not asserting a sovereign immunity defense and the State's focus on tribal sovereign immunity is, accordingly, irrelevant. (Def.'s Opp. Br., Docket Entry 202, at 3.)

King Mountain alleges that it is entitled to summary judgment on the PACT Act claim because its sale of cigarettes to Native Americans did not take place in "interstate commerce" as defined by the Act. (Def.'s Br. at 17.) King Mountain argues that the PACT Act's definition of "State" does not encompass "Indian Country" and cites to the distinct definitions provided for each term. (Def.'s Opp. Br. at 11.) Although King Mountain concedes that it sold cigarettes to Valvo Candies on one occasion, it alleges that was an isolated sale that predated the effective date of the PACT Act. (Def.'s Br. at 19.)

King Mountain alleges that the State's third cause of action is barred by res judicata based on the prior Tax Proceeding. (Def.'s Br. at 20-25.) With respect to the merits, King Mountain argues that it is not liable under NYTL Sections 471 and 471-e because: (1) it did not possess unstamped cigarettes in New York State; and (2) Section 471 does not impose liability on a lawful out-of-state cigarette manufacturer because it is not an "agent" or "consumer" as defined by the statute. (Def.'s Opp. Br. at 20.) King Mountain alleges that "nothing in the law precludes King Mountain from selling to Indian Nations, who could then sell those cigarettes to licensed-stamping agents." (Def.'s Opp. Br. at 21.)

King Mountain also argues that summary judgment should be denied with respect to the State's fourth and fifth causes of action. (Def.'s Opp. Br. at 22-23.) King Mountain avers that it

did not knowingly violate NYTL Section 480-b because its sales were "Nation to Nation" with one exception. (Def.'s Opp. Br. at 22-23.) King Mountain also argues that the record demonstrates that it affixed the requisite Fire Standard Compliant ("FSC") stamp to its cigarettes. (Def.'s Opp. Br. at 23.)

B. The State's Position

The State moves for summary judgment on all of its claims. (See generally Pl.'s Br., Docket Entry 197-1.) With respect to the CCTA, the State argues that the "Indian in Indian Country" exemption is not applicable to King Mountain. (Pl.'s Opp. Br., Docket Entry 201, at 6.) Particularly, the State argues that the CCTA's use of the term "Indian" refers to an individual member of a tribe, not an Indian-owned business. (Pl.'s Opp. Br. at 6-7.) Additionally, the State alleges that even if King Mountain is an "Indian in Indian Country," the CCTA exemption still does not apply because that exemption is meant to protect tribal governments and tribal sovereignty. (Pl.'s Opp. Br. at 7-8.)

The State argues that King Mountain's arguments regarding the PACT Act are founded in a misreading of the statute. (Pl.'s Opp. Br. at 12.) The State alleges that the term "state" in the PACT Act does not exclude Indian reservations because pursuant to federal common law, "Indian country is ordinarily considered a part of a state's territory." (Pl.'s Opp. Br. at 12.) The State also avers that King Mountain's interpretation of

the PACT Act would defeat the statutory purpose of defeating remote sellers from selling untaxed cigarettes. (Pl.'s Br. at 28.)

The State alleges that King Mountain is liable under NYTL Sections 471 and 471-e for shipping unstamped cigarettes into New York State. (Pl.'s Br. at 30.) The State also argues that res judicata does not bar its claim because: (1) the underlying facts of the Tax Proceeding do not arise out of the same series of transactions as the underlying facts in this case; (2) the Tax Department and Attorney General are not in privity; and (3) King Mountain waived any res judicata defense by failing to assert it in its Answer. (Pl.'s Opp. Br. at 15-25.) Further, the State avers that the DTF rules provide that a stipulation cannot be used against the parties in another proceeding. The State notes that the Tax Proceeding only addressed cigarettes seized by the State on December 1, 2012. (Pl.'s Br. at 32.)

The State also alleges, with respect to its fourth and fifth claims, that King Mountain failed to file annual certifications in violation of NYTL Section 480-b, and King Mountain has violated the fire prevention certification filing requirement set forth in New York Executive Law Section 156-c. (Pl.'s Br. at 33-34.)

## DISCUSSION

Summary judgment will be granted where the movant demonstrates that there is "no genuine dispute as to any material

fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). A genuine factual issue exists where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 91 L. Ed 2d 202 (1986). In determining whether an award of summary judgment is appropriate, the Court considers the pleadings, deposition testimony, interrogatory responses, and admissions on file, together with other firsthand information that includes but is not limited to affidavits. Nnebe v. Daus, 644 F.3d 147, 156 (2d Cir. 2011).

The movant bears the burden of establishing that there are no genuine issues of material fact. Gallo v. Prudential Residential Servs., L.P., 22 F.3d 1219, 1223 (2d Cir. 1994). Once the movant makes such a showing, the non-movant must proffer specific facts demonstrating "a genuine issue for trial." Giglio v. Buonnadonna Shoprite LLC, No. 06-CV-5191, 2009 WL 3150431, at *4 (E.D.N.Y. Sept. 25, 2009) (internal quotation marks and citation omitted). Conclusory allegations or denials will not defeat summary judgment. Id. However, in reviewing the summary judgment record, "'the court is required to resolve all ambiguities and draw all permissible factual inferences in favor of the party against whom summary judgment is sought.'" Sheet Metal Workers' Nat'l Pension Fund v. Vadaris Tech. Inc., No. 13-CV-5286, 2015 WL

6449420, at *2 (E.D.N.Y. Oct. 23, 2015) (quoting McLee v. Chrysler Corp., 109 F.3d 130, 134 (2d Cir. 1997)).

I. Federal Claims

A. Contraband Cigarette Trafficking Act

The CCTA mandates that "[i]t shall be unlawful for any person knowingly to ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes or contraband smokeless tobacco." 18 U.S.C. § 2342(a). "Contraband cigarettes" are defined as 10,000 or more cigarettes that "bear no evidence of the payment of applicable State or local cigarette taxes in the State or locality where the cigarettes are found, if the State or local government requires a stamp . . . to be placed on packages or other containers of cigarettes to evidence payment of cigarette taxes." 18 U.S.C. § 2341(2). CCTA Sections 2341 and 2342 can be read together to establish the following elements of a CCTA violation: (1) knowingly shipping, transporting, receiving, possessing, selling, distributing, or purchasing (2) in excess of 10,000 cigarettes (3) that are not stamped (4) "under circumstances where state or local cigarette tax law requires the cigarettes to bear such stamps." City of N.Y. v. Golden Feather Smoke Shop, Inc., No. 08-CV-3966, 2009 WL 705815, at *11 (E.D.N.Y. Mar. 16, 2009) (citation omitted).

A CCTA exemption exists for "Indians in Indian Country." Specifically, Section 2346 provides that "[n]o civil action may be

commenced under this paragraph against an Indian tribe or an Indian in Indian country." 18 U.S.C. § 2346(b)(1). See also City of N.Y. v. Milhelm Attea & Bros., Inc., 550 F. Supp. 2d 332, 346 (E.D.N.Y. 2008) (noting that the 2006 amendments to the CCTA "provide that no civil action may be commenced by a state or local government against an Indian tribe or an Indian in Indian country for violations of the CCTA"). "Indian Country" is defined as, inter alia, "all land within the limits of any Indian reservation under the jurisdiction of the United States Government." 18 U.S.C. § 1151(a). The CCTA does not define the term "Indian."

The parties do not dispute that King Mountain is organized under the laws of the Yakama Nation; wholly owned by Mr. Wheeler, a member of the Yakama Nation; and located on the Yakama Indian Reservation. Nevertheless, the State argues that King Mountain is not an "Indian" and, thus, is not entitled to the "Indian in Indian Country" exemption. The Court disagrees.

The principles of corporate "personhood" support the notion that King Mountain is an "Indian" for purposes of the CCTA. In an analogous matter, the Supreme Court held that the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb et. seq., which prohibits the government from "'substantially burden[ing] a person's exercise of religion,'" applies to the activities of closely-held for-profit

corporations. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2754, 189 L. Ed. 2d 675 (2014) (quoting 42 U.S.C. § 2000bb-1(a); first alteration in original, emphasis supplied).[7] In Hobby Lobby, for-profit closely-held corporations challenged certain regulations promulgated by the Department of Health and Human Services ("HHS") that required that the corporations provide their employees with health insurance coverage for all FDA-approved contraceptive methods. The corporations argued that these regulations compromised their religious belief that human life begins at conception because four FDA-approved contraceptives "may operate after the fertilization of an egg." Id., 134 S. Ct. at 2764-66.

The Supreme Court looked to the Dictionary Act, 1 U.S.C. Section 1, to determine whether the subject provision of the RFRA--which addresses a "'person's' exercise of religion . . . [but] does not define the term 'person'"--is applicable to for-profit corporations. Id. at 2768 (quoting 42 U.S.C. ¶ 2000bb-1(a)). The Court held that there was no evidence of congressional intent to depart from the Dictionary Act's definition of "person," which

[7] The RFRA further provides that "[i]f the Government substantially burdens a person's exercise of religion . . . that person is entitled to an exemption from the rule unless the Government 'demonstrates that application of the burden to the person--(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.'" Hobby Lobby, 134 S. Ct. at 2761 (quoting 42 U.S.C. § 2000bb-1(b)).

"'include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.'" Id. (quoting 1. U.S.C. § 1; alteration in original). In concluding that a federal regulation's restriction on a for-profit closely held corporation is subject to the RFRA, the Court noted that "[a] corporation is simply a form of organization used by human beings to achieve desired ends. . . [and] [w]hen rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people."[8] Id. at 2768, 2774.

Here, the CCTA neither defines "Indian" nor limits the term "Indian" to individual Native Americans. The State essentially argues that if Congress wanted to include Indian-owned businesses within the purview of the CCTA's "Indian in Indian Country" exemption it would have expressly done so. (Pl.'s Opp. Br. at 6-7.) The State notes that other statutes provide distinct definitions for "Indian" and "Indian-owned business," or define "Indian" as "'a person who is a member of an Indian tribe.'" (See Pl.'s Opp. Br. at 6-7 (quoting 20 U.S.C. § 80q-14(7)).) However, the converse of the State's argument is more persuasive. Congress did not limit the "Indian in Indian Country" exemption to

[8] Ultimately, the Hobby Lobby Court held that the contraceptive mandate violated the RFRA as applied to closely-held corporations. Id. at 2785.

individuals. Further, while the Dictionary Act does not define the term "Indian," that term is akin to the term "person," which, as previously noted, encompasses corporations and companies as well as individuals. 1 U.S.C. § 1. As King Mountain is organized under the laws of the Yakama Nation, it is an "Indian" just as a corporation organized under the laws of the State of Delaware is a "citizen" of Delaware.

Parenthetically, the "personhood" rights that have been conferred to corporations--i.e., the protections of the First Amendment, see Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010)--lend support to the notion that an Indian-owned corporation organized under Indian law qualifies as an "Indian" for the purposes of the CCTA's "Indian in Indian Country" exemption.

The State's argument that "Congress simply intended this [CCTA] exemption to protect only 'tribal sovereignty' and the limited interests implicated under the doctrine," is founded in a misreading of the statute. (Pl.'s Br. at 17.) This District has rejected an attempt to conflate the "Indian in Indian country" exemption with the concept of sovereign immunity, holding that the question of whether a non-party Indian Nation may assert sovereign immunity has no relation to "whether the[ ] defendants fall within the statutory exemption applicable to 'Indian[s] in Indian

country.'" Golden Feather, 2009 WL 705815, at *12 (second alteration in original).

Further, the State's assertion that the legislative history of the 2006 amendment that included the "Indian in Indian Country" exemption indicates that "Congress' intention in creating this exemption was to protect only 'tribal governments and tribal sovereignty'" is equally misplaced. (Pl.'s Opp. Br. at 9.)

The legislative history of the 2006 amendments to the CCTA indicates that Congress sought to strengthen the statute with modifications that included lowering the violation threshold from 60,000 cigarettes to 10,000 cigarettes in order to prevent criminal organizations and terrorist groups from funding their activities by purchasing cigarettes in a low excise-tax state and selling them in a high excise-tax state.[9] 151 CONG. REC. H6273-04, (daily ed. July 21, 2005) (Statement of Rep. Coble), 2005 WL 1703380, at *H6284.

The legislative history notes that the amendment, as initially drafted, "could have had the unintended effect of targeting tribal governments who are legitimately involved in the retailing of tobacco products." Id. However, Congressman Conyers stated that the amendment was modified to include "a provision

[9] Congressman Coble specifically cited Hezbollah operatives who were convicted in 2003 for buying cigarettes in North Carolina, selling them in Michigan, and using the proceeds to fund Hezbollah activities. 151 CONG. REC. H6273-04, at *H6284.

stipulating that enforcement against tribes or in Indian country, as defined in Title 18 Section 1151, will not be authorized by the pending bill has been incorporated." Id. (emphasis supplied). Accordingly, the legislative history indicates that Congress differentiated between enforcement against tribes and enforcement in Indian country and, thus, intended for the exemption to apply in both circumstances. Indeed, that distinction is express in the statute which, again, prohibits the commencement of a civil action by a state against "an Indian tribe or an Indian in Indian country." 18 U.S.C. § 2346(b)(1) (emphasis supplied).

The Court is also unpersuaded by the State's seemingly policy-driven argument that if King Mountain is entitled to the CCTA's "Indian in Indian Country" exemption, the result would be "a new loophole by which other non-New York Native Americans and tribes would flood New York's reservations with enormous quantities of unstamped cigarettes." (Pl.'s Br. at 23.) As noted by King Mountain, the "Indian in Indian country" exemption is only applicable to state enforcement of the CCTA. (Def.'s Opp. Br. at 5.) See also 18 U.S.C. § 2346(b)(1). Thus, the federal government is permitted to enforce the CCTA without regard to whether the action is against an "Indian in Indian country," which renders it unlikely that Indian reservations will be "flooded" with unstamped cigarettes.

Finally, the Court rejects the State's argument that the "Indian in Indian country" exemption does not apply because King Mountain's cigarettes are delivered outside of the Yakama reservation, i.e., to destinations within the boundaries of the State of New York. (Pl.'s Reply Br., Docket Entry 206, at 4-5.) The Court declines to take such a quantum leap. King Mountain is undisputedly located on the Yakama Indian reservation; it is beyond cavil that the Yakama reservation is "land within the limits of any Indian reservation under the jurisdiction of the United States Government" and thus constitutes "Indian country" as defined by the CCTA. 18 U.S.C. § 1151(a). There is nothing in the CCTA to support the State's apparent position that the "Indian in Indian country" exemption is not applicable to cigarette sales to persons or entities outside of a given Indian reservation.

The Court is keenly aware of the significant harms to public health and welfare that result from cigarette smoking and cigarette trafficking. However, the Court is not empowered to legislate; its sole charge is to interpret and apply the CCTA as drafted by Congress. Accordingly, the Court finds that King Mountain is an "Indian" in the context of the CCTA. However, the Court's determination is limited to Indian-owned companies organized under the laws of an Indian Nation or tribe. The Court makes no determination as to whether an Indian-owned corporation organized under state law is an "Indian" pursuant to the CCTA.

Accordingly, King Mountain's motion for summary judgment on the State's CCTA claim is GRANTED based on King Mountain's status as an "Indian in Indian country." The Court need not address the parties' other arguments regarding the applicability of the CCTA to King Mountain.

B. Prevent All Cigarette Trafficking Act

On March 31, 2010, Congress enacted the PACT Act. PACT Act., Pub. L. No. 111-154, 124 Stat. 1087 (2010). The PACT Act requires that certain filings be made by "[a]ny person who sells, transfers, or ships for profit cigarettes or smokeless tobacco in interstate commerce, whereby such cigarettes or smokeless tobacco are shipped into a State, locality, or Indian country of an Indian tribe taxing the sale or use of cigarettes or smokeless tobacco[.]" 15 U.S.C. § 376(a). The PACT Act defines "interstate commerce" as: (1) "commerce between a State and any place outside the State," (2) "commerce between a State and any Indian country in the State," or (3) "commerce between points in the same State but through any place outside the State or through any Indian country." 15 U.S.C. § 375(9)(A).[10]

[10] With respect to the definition of "interstate commerce," the PACT Act further provides that "[a] sale, shipment, or transfer of cigarettes or smokeless tobacco that is made in interstate commerce, as defined in this paragraph, shall be deemed to have been made into the State, place, or locality in which such cigarettes or smokeless tobacco are delivered." 15 U.S.C. § 375(9)(B).

The parties' dispute regarding the PACT Act centers on whether King Mountain cigarettes were shipped in "interstate commerce." With the exception of one sale to Valvo Candies that is discussed below, the State does not dispute that King Mountain's shipments were made to "Indian country." (See Pl.'s Br. at 26 (noting that King Mountain delivered cigarettes "to the certain persons largely located on Indian reservations within the State of New York"); Pl.'s 56.1 Stmt. ¶¶ 53(1), 54(a) (asserting that Valvo Candies is not located on a qualified Indian reservation).) However, the State argues that King Mountain's sales were made in "interstate commerce," as defined by the PACT Act, because "[o]rdinarily, 'an Indian reservation is considered part of the territory of the State.'" (Pl.'s Br. at 27 (quoting Nevada v. Hicks, 533 U.S. 353, 361-62, 121 S. Ct. 2304, 2311, 150 L. Ed. 2d 398 (2001).) The Court disagrees.

The PACT Act includes separate definitions for "State" and "Indian country." "State" is defined as "each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States." 15 U.S.C. § 375(11). "Indian Country" is defined as including "all land within the limits of any Indian reservation under the jurisdiction of the United States Government [.]" 15 U.S.C. § 375(7); 18 U.S.C. § 1151. The notion that a qualified Indian reservation--which falls squarely within the definition of

"Indian Country"--is somehow subsumed within the definition of "state" is belied by a plain reading of the statute.

Parenthetically, the Court is not persuaded by the State's argument that Congress did not intend to "change[ ] the common law rule that Indian country is ordinarily considered a part of a state's territory." (Pl.'s Opp. Br. at 12 (citing Hicks, 533 U.S. at 361-62, 121 S. Ct. at 2311; Chemehuevi Indian Tribe v. California Bd. of Equalization, 800 F.2d 1446, 1450 (9th Cir. 1986); State ex. rel. Edmondson v. Native Wholesale Supply, 237 P.3d 199, 208 (Okla. 2010).) The cases cited by the State in support of this notion do not address the PACT Act. Moreover, any purported general rule that Indian reservations are a part of the states in which they are located is not applicable given the PACT Act's distinct definitions of "state," "Indian country," and "interstate commerce."

In light of the undisputed fact that with the exception of the sale to Valvo Candies, all of the King Mountain sales were made from King Mountain's location on the Yakama reservation to Indian reservations within the boundaries of the State of New York, it is clear that these sales do not fall within the PACT Act's definition of "interstate commerce." As previously noted, the PACT Act defines "interstate commerce" as implicating one of three different commerce scenarios. The first two scenarios, "commerce between a State and any place outside the State" and "commerce

between a State and any Indian country in the State," expressly require that one point of commerce be in a "state." 15 U.S.C. § 375(9)(A). As King Mountain's subject sales were from one Indian reservation to other Indian reservations, they do not fall within the first two methods of interstate commerce because the sales did not originate or conclude in a "state." The third interstate commerce scenario is "commerce between points in the same State but through any place outside the State or through any Indian country." Since the subject transactions did not take place in a "state"--and undisputedly did not take place in the same state--this third scenario also does not apply.

Finally, in a footnote, the State argues that its position is supported by two documents prepared by the Department of Justice's Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF"). (Pl.'s Opp. Br. at 14-15, n.16.) The first document is correspondence sent from ATF to King Mountain in response to King Mountain's opposition to California's nomination to place King Mountain on the PACT Act non-compliant list (the "ATF Letter"). (ATF Ltr., Pl.'s Opp. Ex. A, Docket Entry 201-2.) The ATF Letter states, in relevant part, that the definition of "interstate commerce" set forth in the PACT Act "encompasses shipments from King Mountain to California, regardless that the final destination in California may be located in Indian Country." (ATF Ltr. at 8.) The second document, in which ATF summarizes comments received in

response to an open letter to tribal leaders regarding the PACT Act and responds to those comments (the "ATF Summary"), states that "as defined by the [PACT Act], intrastate transportation between two separate reservations would be in interstate commerce." (ATF Summary, Pl.'s Opp. Ex. B., Docket Entry 201-3, at 1-2.)

Notably, the State does not argue that ATF's interpretation of the PACT Act as set forth in the ATF Letter and ATF Summary is entitled to deference under Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). King Mountain argues that these documents should not even be afforded respect pursuant to Skidmore v. Swift & Co., 323 U.S. 134, 65 S. Ct. 161, 89 L. Ed. 124 (1944). (Def.'s Reply Br., Docket Entry 205, at 5.) The Court agrees.

Pursuant to Skidmore, the Court affords respect to an informal agency interpretation "'depend[ing] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.'" De La Mota v. U.S. Dep't of Educ., 412 F.3d 71, 78-80 (2d Cir. 2005) (alteration in original) (quoting Skidmore, 323 U.S. at 140, 65 S. Ct. at 164). The Second Circuit has held that an agency position adopted during the course of litigation "lack[s]

the thoroughness required for Skidmore respect." De La Mota, 412 F.3d at 80.

Here, the ATF Letter is akin to a document prepared during the course of litigation. (See also Def.'s Reply Br. at 5 (characterizing the ATF Letter as a "litigation-related pronouncement[ ]").) The ATF Letter states that after the State of California informed it that King Mountain should be added to the PACT Act "non-compliant list," ATF offered King Mountain the opportunity to submit a response. (ATF Ltr. at 1.) The ATF Letter responds to King Mountain's position and sets forth the basis for ATF's determination that King Mountain failed to comply with the PACT Act. (See generally ATF Ltr.) The Court finds that the ATF Letter is essentially an advocacy piece that lacks the requisite thoroughness for Skidmore respect.

Similarly, the ATF Summary fails to warrant Skidmore respect based on its lack of demonstrated validity. ATF's salient response in the ATF Summary--that "intrastate transportation between two separate reservations would be in interstate commerce"--does not include any substantiation or evidence of ATF's rationale. (ATF Summary at 1-2.) See Boykin v. KeyCorp, 521 F.3d 202, 208-209 (2d Cir. 2008) ("We have explained that the 'validity' inquiry looks to whether an agency interpretation is 'well-reasoned, substantiated, and logical.'") (quoting De La Mota, 412 F.3d at 80). Additionally, this document expressly

contemplates further review and consideration regarding ATF's position. The ATF Summary states that "[i]n the near future, ATF will issue an Interpretive Rule that will set forth the Bureau's views on the [PACT] Act's requirements . . . [c]omments received on or before the closing date. . . will be carefully considered and revisions to the rule will be made if they are determined to be appropriate." (ATF Summary at 1.) Accordingly, the Court declines to afford Skidmore respect to the ATF Letter or ATF Summary.

1. Valvo Candies

As previously noted, King Mountain concedes that Valvo Candies is not owned by an Indian Nation or a member of an Indian Nation. (Def.'s Br. at 9, n.4.) While King Mountain has not expressly conceded that Valvo Candies is not located on an Indian reservation, it has neither alleged that Valvo Candies is located on an Indian reservation nor produced evidence refuting the State's claim that Valvo Candies is located in Silver Creek, Chautauqua County, New York. (See Pl.'s 56.1 Stmt. ¶¶ 53(l), 54(a).) Indeed, by arguing that its sale to Valvo Candies predated the PACT Act's effective date, see Def.'s Br. at 19, King Mountain implicitly concedes that the sale to Valvo Candies took place between the Yakama Nation reservation and the State of New York--namely, "a State and any place outside the State"--and thus occurred in

"interstate commerce" as defined by the PACT Act. See 15 U.S.C. § 375(9)(A).

The PACT Act provides that "not later than the 10th day of each calendar month," any entity shipping cigarettes in smokeless tobacco in interstate commerce shall "file with the tobacco tax administrator of the State into which such shipment is made, a memorandum or a copy of the invoice covering each and every shipment of cigarettes or smokeless tobacco made during the previous calendar month into the state. . . ." 15 U.S.C. § 376(a)(2). See also 15 U.S.C. § 375(10) ("The term 'person' means an individual, corporation, company, association, firm, partnership, society . . . .") The effective date of the PACT Act was June 29, 2010. See PL 111-154, 124 Stat. 1087 (Mar. 31, 2010) ("this Act shall take effect on the date that is 90 days after the date of enactment of this Act"). Accordingly, the first filing date was July 10, 2010, at which time entities shipping tobacco in interstate commerce were required to file a memorandum or invoice copy for each shipment that took place during June 2010.

King Mountain alleges that the Valvo Candies shipment occurred in May 2010 and the State conceded this fact in its brief. (Pl.'s Opp. Br. at 15, n.17 ("[t]hus, because the PACT Act's reporting requirements took effect in June 2010, King Mountain was required to report its May 2010 shipment of cigarettes to Valvo

Candies”).)[11] However, at oral argument, the State argued that the shipment to Valvo Candies occurred on June 29, 2010, and is thus subject to the PACT Act’s reporting requirements.

The Court finds that there are genuine issues of material fact as to whether King Mountain was required to make PACT Act filings in connection with its 2010 shipment to Valvo Candies. The only documentary evidence produced by either party with respect to this sale is an invoice dated June 29, 2010 that references a “paid” date of May 20, 2010 and a “ship” date of June 29, 2010. (See Def.’s Mot. Ex. 19, Docket Entry 195-21.) Neither party has produced any additional documentary evidence that would definitively establish the shipment date of this sale to Valvo Candies.

Accordingly, King Mountain’s motion for summary judgment regarding the PACT Act claim is GRANTED IN PART and DENIED IN PART and the State’s motion for summary judgment is DENIED. With respect to King Mountain’s motion, the Court DENIES summary

[11] Parenthetically, the Amended Complaint asserts both that King Mountain has “knowingly shipped, transported, transferred, sold and distributed large quantities of unstamped and unreported cigarettes to on-reservation wholesalers in New York State” and that King Mountain “sell[s], transfer[s], and otherwise ship[s] such cigarettes to tribal wholesalers and/or retailers in New York State for profit.” (Am. Compl. ¶¶ 56, 81.) The Amended Complaint does not assert that King Mountain sold cigarettes to a company located outside of an Indian reservation or a company that is not Indian-owned.

judgment regarding the 2010 sale to Valvo Candies and GRANTS summary judgment to King Mountain as to the balance of the State's PACT Act claim.

II. State Claims

A. New York Tax Law §§ 471 and 471-e

The State argues that King Mountain waived its res judicata defense by failing to amend its Answer to plead res judicata as an affirmative defense. (Pl.'s Br. at 32-33.) However, it is within this Court's discretion to entertain a res judicata defense asserted in a motion for summary judgment by construing the motion as a motion to amend the answer. Cowan v. Ernest Codelia, P.C., No. 98-CV-5548, 2001 WL 856606, at *5 (S.D.N.Y. Jul. 30, 2001). See also Schwind v. EW & Assocs., Inc., 357 F. Supp. 2d 691, 698 (S.D.N.Y. 2005) (Noting that the Second Circuit has held that the district court may consider an affirmative defense asserted for the first time on a summary judgment motion "so long as the plaintiff has had an opportunity to respond.") (internal quotation marks and citations omitted). Indeed, "[c]ourts have been especially flexible where the defense of res judicata was not available at the pleading stage because the other action had not yet been concluded." Cowan, 2001 WL 856606 at *5 (citations omitted).

Here, it is undisputed that King Mountain's res judicata defense was not available at the pleading stage because the Tax

Proceeding did not conclude until November 2014, well after the filing of King Mountain's Answer and the completion of discovery. (See Def.'s Opp. Br. at 14.) The State has been on notice of King Mountain's res judicata defense since at least October 27, 2015, when King Mountain requested leave to move for summary judgment based, in part, on its argument that the State's third cause of action is precluded by res judicata. (Def.'s Ltr., Docket Entry 173.) Moreover, the extensive briefing on the parties' summary judgment motions has provided the State with ample opportunity to respond to King Mountain's res judicata argument.

The Court is not persuaded by the State's argument, in a footnote, that King Mountain's request to amend its Answer to include a res judicata defense must be denied based on "undue delay or dilatory motive in failing to raise this affirmative defense sooner." (Pl.'s Reply Br. at 9, n.8.) Again, it is beyond cavil that the Tax Proceeding concluded after King Mountain's Answer was filed and at a point when this action had already been pending for years. The State has not established that King Mountain's delay in asserting a res judicata defense was founded in bad faith. Moreover, the State cannot demonstrate prejudice when it has been on notice of King Mountain's asserted defense prior to the filing of the parties' dispositive motions. Accordingly, the Court GRANTS King Mountain leave to amend its Answer to assert a res judicata

affirmative defense with respect to the third cause of action in the Amended Complaint.

1. Res Judicata

The doctrine of res judicata provides that "'a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action,' not just those that were actually litigated." Caldwell v. Gutman, Mintz, Baker & Sonnenfeldt, P.C., 701 F. Supp. 2d 340, 351 (E.D.N.Y. 2010) (quoting Flaherty v. Lang, 199 F.3d 607, 612 (2d Cir. 1999)). "A federal court must give the same preclusive effect to a state court decision as a state court would give it." Cowan, 2001 WL 856606, at *6. Accordingly, the "binding effect" of the Stipulation of Discontinuance filed in the Tax Proceeding is governed by New York law. Id. at *4.

In New York, res judicata is applicable where there is: "(1) a final, prior adjudication on the merits, (2) that involved the party against whom res judicata is to be invoked, and (3) the claims involved in the current case were, or could have been, raised in the prior case." Marcelin v. Cortes-Vazquez, No. 09-CV-2303, 2010 WL 5665037, at *3 (E.D.N.Y. Dec. 9, 2010), report and recommendation adopted, 2011 WL 346682 (E.D.N.Y. Jan. 28, 2011) (citations omitted).

a. Final Adjudication on the Merits

The State argues that pursuant to DTF rules, the Stipulation of Discontinuance does not have any binding effect on a subsequent proceeding. (Pl.'s Br. at 32 ("'A stipulation and the admissions therein shall be binding and have effect only in the pending proceeding and not for any other purpose, and cannot be used against any of the parties thereto in any other proceeding.'" (quoting 20 N.Y.C.R.R. 3000.11(e)).) First, the Court notes that the State's cited statutory provision addresses "[s]tipulations for hearing," in which the parties stipulate to "all facts not privileged which are relevant to the pending controversy." 20 N.Y.C.R.R. 3000.11(1)(i). This provision does not address the binding effect of a final stipulation of discontinuance. Second, "a stipulation of discontinuance 'with prejudice' is afforded res judicata effect and will bar litigation of the discontinued causes of action." Pawling Lake Prop. Owners Ass'n, Inc. v. Greiner, 72 A.D.3d 665, 667, 897 N.Y.S.2d 729 (2d Dep't 2010) (citation omitted). While, as addressed infra, whether the State is bound by the Stipulation of Discontinuance is a separate inquiry, the Court finds that the Stipulation of Discontinuance constitutes a final adjudication on the merits.

b. Privity

"A judgment on the merits in a prior action is binding not only on the parties to that action, but on those in privity with them." City of N.Y. v. Beretta U.S.A. Corp., 315 F. Supp. 2d

256, 265 (E.D.N.Y. 2004) (citation omitted). Privity is an "amorphous concept" that requires a determination on a case-by-case basis. Id. (quoting Juan C. v. Cortines, 89 N.Y.2d 659, 667, 679 N.E.2d 1061, 1065, 657 N.Y.S. 2d 581 (N.Y. 1997)). In general, privity requires that "the connection between the parties must be such that the interest of the nonparty can be said to have been represented in the prior proceeding." Green v. Santa Fe Indus., Inc., 70 N.Y.2d 244, 253, 514 N.E.2d 105, 108, 519 N.Y.S.2d 793 (N.Y. 1987).

In analyzing whether privity between two government agencies exists for purposes of collateral estoppel, the New York State Court of Appeals has looked to the Restatement Second of Judgments, which provides that:

> If the second action involves an agency or official whose functions and responsibilities are so distinct from those of the agency or official in the first action that applying preclusion would interfere with the proper allocation of authority between them, the earlier judgment should not be given preclusive effect in the second action.

Cortines, 89 N.Y.2d at 669, 679 N.E.2d at 1066 (quoting Restatement (Second) of Judgments § 36, cmt. f). Accordingly, in certain situations, a final decision on the merits that binds one government agency may not bind a different government agency. Berretta, 315 F. Supp. 2d at 266 (holding that New York City was not in privity with New York State). This District has

noted that "New York courts have largely refused to find two functionally independent governmental entities in privity with each other for purposes of preclusion." Id. (collecting cases). But see People ex. rel. Dowdy v. Smith, 48 N.Y.2d 477, 482, 399 N.E.2d 894, 896, 423 N.Y.S.2d 862 (N.Y. 1979) ("[T]he People as prosecutors in the criminal action stood in sufficient relationship with the Division of Parole in the parole proceeding to meet the requirements of the [collateral estoppel] doctrine in this respect.")

The Beretta Court cited four cases in which New York courts found that governmental entities were not in privity for collateral estoppel purposes. Beretta, 315 F. Supp. 2d at 267 (citing Brown v. City of N.Y., 60 N.Y.2d 897, 458 N.E.2d 1250, 470 N.Y.S.2d 573 (N.Y. 1983); Saccoccio v. Lange, 194 A.D.2d 794, 599 N.Y.S.2d 306 (2d Dep't 1993); Doe v. City of Mount Vernon, 156 A.D.2d 329, 547 N.Y.S.2d 272 (2d Dep't 1989); People v. Morgan, 111 A.D.2d 771, 490 N.Y.S.2d 30 (2d Dep't 1985). With the exception of Morgan, each of these cases addressed the effect of a prior criminal proceeding on a subsequent civil matter and held that the application of collateral estoppel was not warranted based on the lack of privity between the district attorney in the prior criminal proceeding and the city or county defendants in the civil matter. In Morgan, the Appellate Division, Second Department held that the prosecution of a criminal assault charge was not precluded

by the determination of a prior administrative proceeding before the New York City Housing Authority. Morgan, 111 A.D.2d at 772.

Here, the Court is not persuaded by the State's argument that DTF's "sole charge" of collecting tax revenues and the Attorney General's broader mission and authority weighs against a finding of privity between these two agencies. (Pl.'s Opp. Br. at 22.) A district attorney is not empowered to address the civil claims that a City or County may assert. Conversely, DTF and the Attorney General clearly have overlapping authority with respect to civil claims as DTF commenced an administrative proceeding to obtain alleged taxes owed by King Mountain under Article 20 of the NYTL and the Attorney General commenced this proceeding asserting claims under Article 20 of the NYTL. Moreover, unlike the previously noted cases cited by the Beretta Court, the prior proceeding at issue in this matter was not a criminal case.

Additionally, the State's attempt to distinguish this matter from State of N.Y. v. Seaport Manor A.C.F., 19 A.D.3d 609, 797 N.Y.S.2d 538 (2d Dep't 2005), is misplaced. (Pl.'s Opp. Br. at 24, n.25.) In Seaport Manor, the Attorney General and Commissioner of the Department of Health ("DOH") commenced an action alleging that an adult care facility engaged in fraudulent and deceptive business practices. The adult home's alleged violations were the subject of two earlier DOH administrative enforcement proceedings that were both discontinued with prejudice

pursuant to stipulations of settlement. Id. at 610. The Appellate Division, Second Department affirmed the trial court's dismissal of the first four claims to the extent that they were based on violations that occurred prior to the execution of the second stipulation of settlement in the earlier DOH proceeding, holding that "the underlying facts and statutory scheme establish that the Attorney General, who was not a party to the prior enforcement proceedings, was in privity with the DOH." Id.

The State alleges that Seaport Manor is not analogous because in the case at bar, the Attorney General's participation was not "initiated" by DTF and the Attorney General instead "independently initiated this action under a 'public interest' determination." (Pl.'s Opp. Br. at 24, n.25.) However, the fact that DTF is not named as a co-plaintiff in this action does not eradicate the privity between these two governmental entities. As previously noted, both the DTF and Attorney General filed claims under Article 20 of the NYTL--albeit seeking different relief under different legal theories. Moreover, it cannot be said that the Attorney General's responsibility for, inter alia, "prosecut[ing] and defend[ing] all actions and proceedings in which the State is interested," New York Executive Law § 63, is so distinct from the responsibilities of DTF that the application of claim preclusion would disrupt the allocation of authority between them. See Cortinez, 89 N.Y. 2d at 669.

Additionally, the Court is not persuaded that the Tax Proceeding did not permit the Attorney General to "enjoy[ ] a vicarious day in court." (Pl.'s Opp. Br. at 23 (quoting Delamater v. Schweiker, 721 F.2d 50, 54 (2d Cir. 1983)).) Courts have not hesitated to deem a claim barred by res judicata "'[w]hen an administrative agency is acting in a judicial capacity and resolved disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate.'" U.S. v. Town of Bolton Landing, N.Y., 946 F. Supp. 162, 167 (N.D.N.Y. 1996) (quoting U.S. v. Utah Constr. & Mining Co., 384 U.S. 394, 422, 86 S. Ct. 1545, 1560, 16 L. Ed. 2d 642 (1966)). The Second Circuit has held, in the context of collateral estoppel, that an administrative determination cannot be the basis for preclusion unless it was an "adjudicative decision," in which the agency decided to grant or deny a privilege "using procedures substantially similar to those employed by the courts." Metromedia Co. v. Fugazy, 983 F.2d 350, 366 (2d Cir. 1992), abrogated on other grounds as recognized by Yung v. Lee, 432 F.3d 142, 147-48 (2d Cir. 2005). Compare Delamater, 721 F.2d at 53 (holding that res judicata was not applicable to a prior Social Security Administration benefits determination where "[t]here was no hearing, no testimony, no subpoenaed evidence, no argument, no opportunity to test any contention by confrontation") with Bolton Landing, 946 F. Supp. at 169 ("[a]lthough the parties did not call

witnesses, the full participation of the parties, the briefing, the oral testimony, the submission of the affidavits, and the substantial documentary support upon which the [administrative] determination largely rests demonstrate that the parties had an adequate opportunity to litigate the issues").

Here, DTF issued a Notice of Determination stating that an audit revealed that King Mountain owed $1,259,250 in taxes. (Def.'s Mot. Ex. 13, Docket Entry 195-15.) In response, King Mountain filed a Petition for Redetermination of Deficiency, which was answered by DTF. (Pl.'s Opp. Ex. C, Docket Entry 203-1; Def.'s Mot. Ex. 14, Docket Entry 195-16.) King Mountain's Petition was presided over by an Administrative Law Judge (the "ALJ") who conducted at least one pre-hearing conference call with DTF and King Mountain. (Def.'s Mot. Ex. 15, Docket Entry 195-17.) While DTF and King Mountain ultimately settled rather than proceeding to a hearing, the ALJ issued an Order of Discontinuance which stated that the DTF's assessment was cancelled and discontinued with prejudice. (Def.'s Mot. Ex. 17, Docket Entry 195-19.) The Court finds that the proceedings before the ALJ provided DTF and King Mountain with a "full and fair opportunity to litigate their claims" such as to constitute an adjudicatory process and that the Order of Discontinuance "is analogous to a withdrawal with prejudice entered into during the course of litigation in a court of law." Hughes v. Lillian Goldman Family, LLC, 153 F. Supp. 2d

435, 448-49 (S.D.N.Y. 2001) (Holding that certain claims were barred by res judicata based on a conciliation agreement settling the plaintiff's New York State Department of Human Rights complaint.).

Finally, the State's argument that it did not have a "vicarious day in court" because the administrative rules do not provide for discovery procedures as set forth in the CPLR and "[t]hus, the Tax Department had no means for testing King Mountain's petition allegations," is not persuasive. (Pl.'s Opp. Br. at 23.) The previously noted case law does not mandate that relevant administrative proceeding implement identical procedures to those employed by the courts but merely that the relevant procedures are "substantially similar." See Metromedia Co., 983 F.2d at 366.

c. Claims Raised in the Prior Case

New York employs a transactional approach in which a later claim is precluded if it "aris[es] out of the same factual grouping as an earlier litigated claim even if the later claim is based on legal theories or seeks dissimilar or additional relief." Marcelin, 2010 WL 5665037, at *3 (internal quotation marks and citation omitted). Pursuant to this approach, "parties are prevented 'from raising in a subsequent proceeding any claim they could have raised in the prior one, where all of the claims arise from the same underlying transaction.'" Falardo v. N.Y.

City Police Dep't, 566 F. Supp. 2d 283, 285-86 (S.D.N.Y. 2008) (quoting Schulz v. Williams, 44 F.3d 48, 53 (2d Cir. 1994)).

In determining the "factual grouping" that should be considered a "transaction" the Court analyzes "how 'the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether . . . their treatment as a unit conforms to the parties' expectations or business understandings or usage.'" Union St. Tower, LLC v. Richmond, 84 A.D.3d 784, 785 (2d Dep't 2011) (quoting Smith v. Russel Sage Coll., 54 N.Y. 2d 185, 192-93 (N.Y. 1981) (ellipsis in original)). This doctrine is not to be mechanically employed as the Court's analysis "requires consideration of the realities of litigation." Hughes, 153 F. Supp. at 447 (internal quotation marks and citations omitted).

It is well-settled that the doctrine of res judicata cannot be avoided by "splitting" a claim into multiple lawsuits "based on different legal theories (with different evidence 'necessary' to each suit)." Waldman v. Village of Kiryas Joel, 207 F.3d 105, 110 (2d Cir. 2000) (alteration in original; citation omitted). Indeed, "the facts essential to the barred second suit need not be the same as the facts that were necessary to the first suit" and it suffices that "'the facts essential to the second were [already] present in the first.'" Id. at 110-11 (internal quotation marks and citation omitted; alteration in original).

As previously noted, the Amended Complaint asserts a claim under NYTL Sections 471 and 471-e and alleges that King Mountain violated and continues to violate these provisions by "possessing cigarettes for sale in New York State . . . upon which no state excise tax has been paid, and the packages of which have no tax stamps affixed" and by "failing to ship their unstamped cigarettes from outside New York directly to a New York-licensed stamping agent so that excise tax can be paid and tax stamps properly affixed." (Am. Compl. ¶¶ 87-88.) Specifically, the Amended Complaint details the November 6, 2012, purchase of unstamped King Mountain cigarettes by a State investigator (the "November 6th Purchase") as well as the December 3, 2012, discovery of unstamped King Mountain cigarettes by the state police (the "December 3rd Inspection").[12] (Am. Compl. ¶¶ 61-65, 67.)

The Court finds that the December 3rd Inspection arises out of the same factual grouping as the facts underlying the Tax Proceeding. DTF's Notice of Determination states, in relevant

[12] While the State alleges that "none of the cigarettes at issue in this case were seized by the State Police or any other state agency," (Pl.'s Opp. Br. at 18), the record does not contain specific information as to the particular cigarettes seized on December 3, 2012, and the Court is unable to definitively conclude that the seized cigarettes are excluded from the extensive list of cigarette sales set forth in the State's 56.1 Statement. (Pl.'s 56.1 Stmt. ¶¶ 66-79.) Accordingly, in an abundance of caution, the Court will determine whether any claim regarding the cigarettes seized on December 3, 2012, is barred by res judicata.

part, "[o]n 12/03/12, you were found to be in possession and/or control of unstamped or unlawfully stamped cigarettes, and/or untaxed tobacco products. Therefore, penalty is imposed under Article 20 of the New York State Tax Law."[13] (Def.'s Mot. Ex. 13, at 3.) Thus, the Tax Proceeding resolved the State's claim that King Mountain was liable under the NYTL for possession of the unstamped cigarettes discovered in the December 3rd Inspection. The State's claim that King Mountain violated Article 20 by failing to ship their cigarettes to a licensed stamping agent could have been raised in the Tax Proceeding with respect to the cigarettes discovered during the December 3rd Inspection. Accordingly, the State's cause of action under Sections 471 and 471-e is barred by res judicata to the extent that it addresses the unstamped cigarettes discovered during the December 3rd Inspection.

Whether the cigarettes implicated in the November 6th Purchase are barred by res judicata presents a closer issue. There appears to be no dispute that the November 6th Purchase was not addressed in the Tax Proceeding. Instead, King Mountain argues that all of the State's claims under Article 20—including its claims regarding the November 6th Purchase--are precluded because they could have been raised in the Tax Proceeding. (Def.'s Opp. Br. at 13-14.) However, the Court declines to characterize the

[13] The Court notes that Article 20 of the New York State Tax Law includes Sections 471 and 471-e.

Tax Proceeding as an umbrella that encompasses all claims regarding untaxed cigarettes prior to December 2012. The November 6th Purchase arises out of a different underlying factual transaction than the December 3rd Inspection--namely, the purchase of unstamped cigarettes at a smoke shop on the Poospatuck Reservation in Suffolk County rather than the search and seizure of a truck of unstamped cigarettes in Clinton County. Accordingly, the State's third claim is not barred to the extent it addresses the November 6th Purchase.

2. Merits

As previously noted, the Amended Complaint alleges that King Mountain has "violated, and continue[s] to violate, New York Tax Law §§ 471 and 471-e by possessing cigarettes for sale in New York State . . . upon which no state excise tax has been paid, and the packages of which have no tax stamps affixed."[14] (Am. Compl. ¶ 87.) The Amended Complaint also alleges that King Mountain violated Section 471 by "failing to ship their unstamped cigarettes from outside New York directly to a New York-licensed stamping agent so that the excise tax can be paid and tax stamps properly affixed." (Am. Compl. ¶ 88.) The Court will address each alleged violation of Section 471 in turn.

[14] The Court notes that the State is not requesting that King Mountain satisfy the taxes allegedly owed with respect to these cigarette shipments. (Am. Compl. at 25-26.)

a. Possession of Cigarettes for Sale

Section 471 provides that "[t]here is hereby imposed and shall be paid a tax on all cigarettes possessed in the state by any person for sale[.]" N.Y. Tax L. § 471(1) (emphasis supplied). There is a presumption that all cigarettes in New York State are subject to tax and the "person in possession thereof" bears the burden of establishing that any cigarettes are not taxable. Id. Article 20 of the NYTL does not define the term "possession." See N.Y. Tax L. § 470. NYTL Section 471-e establishes an "Indian tax exemption coupon system" regarding the purchase of tax exempt cigarettes by Indian nations or tribes for members' personal consumption. N.Y. Tax L. ¶ 471.e.

The State does not allege that King Mountain physically possessed unstamped cigarettes in New York State. It is undisputed that King Mountain utilized a common carrier to transport its cigarettes to Indian reservations and/or Indian-owned businesses in New York State. (Pl.'s 56.1 Counterstmt., Docket Entry 195-4 ¶ 14.) However, the State argues that an out-of-state manufacturer such as King Mountain "possesses" the cigarettes that its common carrier transports within New York State, relying on Harder's Express, Inc. v. State Tax Comm., 70 A.D.2d 1010, 1011 (3d Dep't 1979), aff'd, 50 N.Y.2d 1050. (Pl.'s Supp. Br., Docket Entry 213, at 8.) The Court disagrees.

As previously noted, Article 20 of the New York Tax Law does not define the term "possession." "Well-established principles of construction dictate that statutory analysis necessarily begins with the plain meaning of a law's text and, absent ambiguity, will generally end there." U.S. v. Sabhnani, 599 F.3d 215, 255 (2d Cir. 2010) (internal quotation marks and citation omitted). "Possession" is defined as "the act of having or taking into control" or "control or occupancy of property without regard to ownership." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th Ed. 2006). It is undisputed that King Mountain did not exercise control over the King Mountain brand cigarettes that entered New York State; the common carrier exercised control over the King Mountain cigarettes it was transporting in New York State. Thus, King Mountain was not in "possession" of cigarettes as contemplated by Section 471.

The State's reliance on the Appellate Division, Third Department's decision in Harder's Express is misplaced.[15] In that case, after unstamped cigarettes were stolen from a common carrier prior to delivery, the State Tax Commission demanded that the

[15] King Mountain argues that the Court should not consider the State's argument regarding Harder's Express as it was raised for the first time on reply. (Def.'s Supp. Br., Docket Entry 212, at 4.) However, the Court finds that the State's argument regarding Harder's Express relates to its initial argument asserted in its moving brief that King Mountain was in "possession" of cigarettes pursuant to Section 471.

common carrier pay the cigarette tax and an assessment. Harder's Express, 70 A.D.2d at 1010. The Third Department rejected the State Tax Commission's argument that the theft of the cigarettes constituted a sale as defined by the NYTL, which thereby required the common carrier to pay a tax based on its possession of the unstamped cigarettes. Id. The court concluded that: (1) a "mere change of physical custody" is not a "sale" of cigarettes, and (2) a common carrier only possesses cigarettes "for the purpose of facilitating a sale." Id. at 1011. The Court held that Article 20 of the Tax Law was not applicable to the "transfer of cigarettes by theft." Id.

The State argues that since a common carrier does not "possess" cigarettes for sale pursuant to Harder's Express, it follows that the cigarettes remained in King Mountain's "possession" while the common carrier was transporting them into New York State. (Pl.'s Reply Br. at 6.) The Court declines to adopt the State's creative inversion of the Harder's Express holding. The fact that a common carrier does not "possess" cigarettes under Section 471 does not automatically result in the manufacturer maintaining "possession" during the transportation process.

The Court is also not persuaded by the State's reliance on 20 N.Y.C.R.R. Section 74.3, which provides that cigarettes may be introduced into New York State without the presumption that a

taxable event occurred where the cigarettes are transported by common carrier, stored in a bonded or public warehouse, and exclusively sold to licensed cigarette agents. 20 N.Y.C.R.R. § 74.3(a)(1). That provision also states that "[d]ealers and manufacturers, other than agents, in possession of unstamped packages of cigarettes . . . may be held liable for the cigarette tax and for violation of the Tax Law and this Title." Id. This statute echoes Section 471 in that manufacturers are liable for taxes to the extent they are in "possession" of unstamped cigarettes. Once again, the Court declines to go beyond the plain meaning of the word "possession" and expand it so that a manufacturer is in "possession" of cigarettes transported by common carrier.

In the absence of express direction from the New York State legislature, the Court will not rewrite Section 471 and expand the definition of "possession" to encompass an out-of-state manufacturer utilizing a common carrier to transport cigarettes within New York State. Accordingly, King Mountain is not liable for cigarette taxes pursuant to Section 471.

b. Failure to Ship Unstamped Cigarettes to Agent

King Mountain concedes that: (1) it it is a "wholesale dealer,"[16] as defined by Section 471, (2) it is not a licensed

[16] "Wholesale dealer" is defined as "[a]ny person who (a) sells cigarettes or tobacco products to retail dealers or other

stamping agent,[17] and (3) it "did not sell its cigarettes to stamping agents licensed by the State of New York (because it sold cigarettes directly to Indian tribes and companies owned by members of Indian tribes)." (Def.'s Opp. Br. at 20.) While Section 471 permits the sale of unstamped cigarettes to licensed stamping agents who provide certifications that the cigarettes will not be resold in violation of Article 20, New York Tax Law § 471(4)(a)-(b), it requires that "[a]ll cigarettes sold by agents and wholesalers to Indian nations or tribes or reservation cigarette sellers located on an Indian reservation must bear a tax stamp," N.Y. Tax Law § 471(2). Thus, King Mountain violated Section 471 by admittedly failing to sell its unstamped cigarettes to licensed stamping agents. See City of N.Y. v. Golden Feather Smoke Shop, Inc., No. 08-CV-3966, 2013 WL 3187049, at *27 (E.D.N.Y. Jun. 20, 2013) (Noting that agents are meant to be the sole point of entry for cigarettes and "[a]s a result, reservation retailers should theoretically no longer be able to obtain unstamped cigarettes.").

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persons for purposes of resale, or (b) owns, operates or maintains one or more cigarette or tobacco product vending machines in, at or upon premises owned or occupied by another person, or (c) sells cigarettes or tobacco products to an Indian nation or to a reservation cigarette seller on a qualified reservation. N.Y. Tax Law § 470(8).

[17] "Agent" is defined as "[a]ny person licensed by the commissioner of taxation and finance to purchase and affix adhesive or meter stamps on packages or cigarettes under this article." N.Y. Tax Law § 470(11).

Accordingly, the State's motion for summary judgment is GRANTED IN PART and DENIED IN PART. The State's motion is GRANTED with respect to its claim that King Mountain violated Section 471 by selling unstamped cigarettes directly to Indian nations or tribes and/or reservation cigarette sellers or entities that are not licensed stamping agents. The State's motion is DENIED with respect to its claim that King Mountain is liable under Section 471 for its "possession" of cigarettes.

The Court notes that the Amended Complaint does not expressly specify the relief that the State is seeking with respect to its third cause of action. (See generally Am. Compl. at 25-26.) The Court will address the issue of the particular relief the State is seeking in connection with the third cause of action after the completion of the trial in this matter.

B. New York Tax Law § 480-b

New York Tax Law Section 480-b provides, in relevant part that:

> Every tobacco product manufacturer . . . whose cigarettes are sold for consumption in this state shall annually certify under penalty of perjury that, as of the date of such certification, such tobacco product manufacturer: (a) is a participating manufacturer as defined in [the Public Health Law]; or (b) is in full compliance with [Public Health Law Section 1399-pp(2)] . . .

N.Y. Tax L. § 480-b(1). Additionally, the submission of such certification by tobacco product manufacturers "shall be

accompanied by a list setting forth each of the cigarette brands of such tobacco product manufacturer sold for consumption in New York state." N.Y. Tax L. § 480-b(1). The New York Public Health Law defines "tobacco product manufacturer" as including an entity that "manufactur[es] cigarettes anywhere that such manufacturer intends to be sold in the United States[.]" N.Y. Pub. Health L. § 1399-oo(9)(a). Public Health Law Section 1399-pp(2) provides that any tobacco manufacturer selling cigarettes to consumers in New York State must either: (1) become a participating manufacturer pursuant to the Master Settlement Agreement[18]; or (2) place a proscribed amount of funds per unit sold into a qualified escrow fund each year. N.Y. Pub. Health L. § 1399-pp(2)(a).

The State alleges that King Mountain has failed to provide the certifications required under Section 480-b and "has not joined the 1998 Tobacco Master Settlement Agreement, and has not otherwise complied with the State's escrow requirements." (Pl.'s Br. at 34.) In support, the State submits the Declaration of Peter Spitzer dated February 21, 2013, ("Spitzer Decl.")

[18] In November 1998, four cigarette manufacturers settled litigation with states that included New York by entering into a Master Settlement Agreement in which "[i]n return for releases from liability, these manufacturers agreed to make substantial annual payments to compensate the states for health care expenses incurred in the past and expected to be incurred in the future as a result of their populations' smoking-related ailments." Freedom Holdings, Inc. v. Cuomo, 624 F.3d 38, 42 (2d Cir. 2010).

originally submitted in support of the State's application for a preliminary injunction. (Pl.'s Mot. Ex. 33, Docket Entry 197-40.) Mr. Spitzer, an Excise Tax Technician with DTF, asserts that a search of the agency's records revealed that King Mountain did not certify "that it is either a participating manufacturer under the MSA and has generally performed its obligations thereunder, or is in full compliance with New York Public Health Law § 1399-pp(2) by having deposited the required amount of escrow per cigarette sold in the state." (Spitzer Decl. ¶¶ 1, 6.) Mr. Spitzer also avers that DTF records reveal that King Mountain did not submit a list of the cigarette brands it sells in New York State pursuant to Section 480-b(1). (Spitzer Decl. ¶ 7.) Further, King Mountain admits in its Answer that it has not filed certifications or a list of the cigarette brands it sells in New York State pursuant to Section 480-b. (See Am. Compl. ¶¶ 75, 92; Ans., Docket Entry 47, ¶ 20.)

In opposition, King Mountain argues that "there is no evidence in the record that King Mountain knowingly violated New York Tax Law § 480-b, because King Mountain only engaged in Nation-to-Nation sales within the boundaries of New York State." (Def.'s Opp. Br. at 22.) King Mountain avers that it only sold cigarettes to Indian Nations and Indian-owned companies with a "single exception;" the Court Assumes this "single exception" is its sale to Valvo Candies in which it sold to a non-Native American owned

corporation. (Def.'s Opp. Br. at 22-23.) Notably, King Mountain does not proffer any proof that it complied with Section 480-b.

First, King Mountain concedes that it made its infamous sale to Valvo Candies, a New York State company that is not owned by an Indian Nation or tribe or a member of an Indian Nation or tribe. Accordingly, King Mountain is a "tobacco product manufacturer . . . whose cigarettes are sold for consumption in this state," and was required to comply with Section 480-b. Second, there is no exception in Section 480-b for cigarette sales to Indian Nations or Indian-owned companies located on qualified reservations. Unlike the PACT Act, which, as previously noted, includes definitions of "state," "Indian country," and "interstate commerce," neither Section 480-b nor the definitions set forth in NYTL Section 470 define the term "state." The Court declines to hold that Section 480-b is inapplicable to cigarettes sales to Indian Nations and/or Indian-owned companies located on reservations in the absence of any statutory support for the creation of such an exception. Accordingly, the State's motion for summary judgment is GRANTED with respect to its claim under Section 480-b.

C. New York Executive Law § 156-c

1. Failure to File Certifications

New York Executive Law Section 156-c ("Section 156-c") provides that "no cigarettes shall be sold or offered for sale in

this state unless the manufacturer thereof has certified in writing to the office of fire prevention and control that such cigarettes meet the performance standards prescribed by the office of fire prevention and control pursuant to subdivision two of this section." N.Y. EXEC. L. § 156-c(3). The State argues that King Mountain has failed to certify in writing to the New York State Office of Fire Prevention and Control that its cigarettes meet the relevant performance standards. (Pl.'s Br. at 34.) King Mountain has failed to respond to this argument or proffer any evidence that it has submitted the requisite certifications. (See Def.'s Opp. Br. at 22-23.)

King Mountain admitted that it has not submitted such certifications in its Responses to Plaintiff's First Request for Admissions under Rule 36 dated November 20, 2013. (Pl.'s Mot. Ex. 18, Docket Entry 197-25, ¶ 6.) To the extent that King Mountain's opposition brief could be construed as asserting that it need not file certifications because it does not sell cigarettes in New York State based on its "Nation to Nation" sales, Section 156-c contains no such exception. Accordingly, the State's motion for summary judgment is GRANTED with respect to its claim that King Mountain failed to file certifications in violation of Section 156-c.

2. "FSC" Labeling

Section 156-c also provides that "[n]o cigarettes shall be distributed, sold or offered for sale in this state unless the manufacturer has placed on each individual package the letters 'FSC' which signifies Fire Standards Compliant." N.Y. EXEC. L. § 156-c(6). It is unclear whether the State has abandoned an additional aspect of its Section 156-c claim--that King Mountain has failed to affix the required Fire Standards Compliant mark on its packaging--based on its failure to include such argument in its moving brief. (See Am. Compl. ¶ 96 ("Defendant King Mountain has similarly failed to place the required 'FSC' (Fire Standards Compliant) mark on the packages of cigarettes it manufactures which are distributed, sold, or offered for sale in New York."); Pl.'s Br. at 34.) In any event, the Court finds that King Mountain has raised genuine issues of material fact as to whether it affixed the letters "FSC" to its cigarettes in accordance with Section 156-c. King Mountain has produced a photograph of a box of its cigarettes that contains the letters "FSC" on its packaging. (Def.'s Opp. Ex. A, Docket Entry 202-2.) Additionally, King Mountain cites to the deposition testimony of State Investigator Andrew Scala in which Mr. Scala states that the letters "FSC" on the King Mountain package of cigarettes signifies compliance with the relevant state fire safety code requirement. (Def.'s Mot. Ex. 10, Docket Entry 195-12, 83:4-84:14.)

While the Court concurs with the State that King Mountain has not established that it meets the "fire-safe" standards specific to New York, (see Pl.'s Reply Br. at 10), the submission of evidence of a King Mountain cigarette box bearing the letters "FSC" raises issues of fact as to whether King Mountain complied with the packaging requirements set forth in Section 156-c(6). Parenthetically, the Court notes that the Amended Complaint only asserts that King Mountain failed to file the requisite certifications and failed to place the required "FSC" mark on its packaging; it does not allege that King Mountain Cigarettes do not meet fire-safe standards. (See generally Am. Compl. ¶¶ 94-98.) Accordingly, summary judgment is DENIED with respect to the State's claim that King Mountain failed to affix the fire safety compliant mark to its cigarettes in violation of Section 156-c.

CONCLUSION

For the foregoing reasons, King Mountain's motion for summary judgment (Docket Entry 195) is GRANTED IN PART AND DENIED IN PART and the State's motion for summary judgment (Docket Entries 197 and 198) is GRANTED IN PART AND DENIED IN PART. Summary judgment is GRANTED in favor of King Mountain on the State's first claim under the CCTA. Summary judgment on the second claim under the PACT Act is DENIED regarding the 2010 sale to Valvo Candies and GRANTED in favor of King Mountain as to the balance of the State's PACT Act claim. With respect to the State's third claim

under NYTL Sections 471 and 471-e, summary judgment is GRANTED in favor of King Mountain regarding King Mountain's alleged possession of unstamped cigarettes in New York State and GRANTED in favor of the State regarding King Mountain's failure to sell its unstamped cigarettes to licensed stamping agents. Summary judgment is GRANTED in favor of the State on its fourth claim pursuant to Section 480-b. With respect to the State's fifth claim, summary judgment is GRANTED in favor of the State regarding its claim that King Mountain failed to file certifications pursuant to New York Executive Law Section 156-c and DENIED as to its claim that King Mountain failed to affix the Fire Standards Compliant mark to its cigarette packages.

SO ORDERED.

/s/ JOANNA SEYBERT
Joanna Seybert, U.S.D.J.

DATED: July 21, 2016
Central Islip, New York

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
STATE OF NEW YORK,

Plaintiff,

-against-

MEMORANDUM & ORDER
12-CV-6276(JS)(SIL)

MOUNTAIN TOBACCO COMPANY, doing business as King Mountain Tobacco Company Inc.,

Defendant.
----------X

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SEYBERT, District Judge:

Presently pending before the Court is plaintiff State of New York's (the "State") motion for injunctive relief as to the claims it prevailed on at the summary judgment stage. (State's Mot., Docket Entry 227.) For the foregoing reasons, the State's motion is GRANTED IN PART and DENIED IN PART.

## BACKGROUND

The Court assumes familiarity with the facts of this matter, which are set forth in its Memorandum and Order dated July 21, 2016. See New York v. Mountain Tobacco Co., No. 12-CV-6276, 2016 WL 3962992 (E.D.N.Y. Jul. 21, 2016). Briefly, the State commenced this action against defendant Mountain Tobacco Company ("King Mountain"), a company that manufactures and sells its own brand of cigarettes, asserting claims pursuant to the Contraband Cigarette Trafficking Act ("CCTA"), Prevent All Cigarette Trafficking Act ("PACT Act"), New York Tax Law ("NYTL") §§ 471, 471-e, and 480-b, and New York Executive Law ("NYEL") § 156-c. Mountain Tobacco, 2016 WL 3962992, at *1-2. The State's claims were based on allegations that State investigators purchased cartons of unstamped King Mountain brand cigarettes at reservation smoke shops, and State troopers seized unstamped King Mountain brand cigarettes from a truck. Id. at *2. Particularly, the State alleged that King Mountain violated NYTL Sections 471 and 471-e by (1) possessing cigarettes in New York State without paying excise taxes or affixing tax stamps, and (2) failing to ship unstamped cigarettes directly to a licensed stamping agent. Id. at *15. The State alleged that King Mountain violated NYTL Section 480-b by failing to file the requisite certifications and failing to

either join the 1998 Tobacco Master Settlement Agreement ("MSA")[1] or otherwise comply with state escrow requirements. Id. at *18. The State also asserted that King Mountain violated NYEL Section 156-c by (1) failing to certify to the State Office of Fire Prevention and Control that its cigarettes meet the requisite performance standards, and (2) failing to affix the Fire Standards Compliant mark to its cigarette packaging. Id. at *18-19.

The Court determined the parties' summary judgment motions in its Memorandum and Order dated July 21, 2016 (the "Summary Judgment Order"). See id. As to the federal claims, the Court granted summary judgment to King Mountain on the CCTA claim, denied summary judgment on the PACT Act claim with respect to one particular 2010 sale, and granted summary judgment to King Mountain on the balance of the PACT Act claim. Id. at *19. As to the state claims, the Court granted summary judgment to King Mountain on the claim under NYTL Sections 471 and 471-e regarding King Mountain's alleged possession of unstamped cigarettes, and granted summary judgment to the State on its claim under NYTL Sections 471 and 471-e regarding King Mountain's failure to sell unstamped cigarettes to licensed stamping agents. Id. Summary judgment was

[1] In November 1998, cigarette manufacturers settled litigation with states including New York by entering into a Master Settlement Agreement in which the manufacturers agreed to make substantial annual payments to compensate the states for past and future health care expenses incurred as a result of the smoking-related ailments of their citizens. Id. at *17, n.18.

granted to the State on its NYTL Section 480-b claim. Id. Finally, the Court granted summary judgment to the State on its NYEL Section 156-c claim that King Mountain failed to file certifications, and summary judgment was denied as to the State's NYEL Section 156-c claim that King Mountain failed to affix the Fire Standards Compliant mark to its cigarette packaging. Id. Thus, the State was awarded summary judgment on the following claims: (1) claim under NYTL Sections 471 and 471-e regarding King Mountain's failure to sell its unstamped cigarettes to licensed stamping agents, (2) NYTL Section 480-b claim, and (3) NYEL Section 156-c claim regarding King Mountain's failure to file certifications. Id.

The Court noted that the Amended Complaint did not expressly specify the relief the State was seeking as to its claims under NYTL Sections 471 and 471-e. Id. at *17. The Court held this issue would be addressed after the completion of the trial in this matter. Id.

On November 30, 2016, the State filed a letter advising the Court that it declined to prosecute the remaining PACT Act and NYEL Section 156-c claims, which left no claims to be tried. (State's Ltr., Docket Entry 225.) The State also indicated that it was seeking injunctive relief for the claims it prevailed upon. (State.'s Ltr. at 2.) On December 8, 2016, the Court entered an Electronic Order holding that the State's request for injunctive relief should be made by motion.

I. The State's Motion

On January 18, 2017, the State filed its motion for injunctive relief as to the claims it prevailed upon. The State asserts that it is not seeking penalties or costs and instead seeks:

> [A]n Order enjoining King Mountain from—
>
> 1. [S]elling unstamped cigarettes directly to Indian nations or tribes and/or reservation cigarette sellers or entities that are not licensed stamping agents, in violation of Section 471;
>
> 2. Continuing to sell cigarettes into the State of New York, without first complying with Section 480-b's certification requirements, namely—
>
> a. Filing a certification under penalty of perjury, with the New York State Department of Taxation and Finance, the Office of the Attorney General, and any New York state-licensed stamping agent who affixes New York state cigarette tax stamps to King Mountain's pack of cigarettes, that King Mountain is either (i) a participating manufacturer under the 1998 Tobacco Master Settlement, or (ii) is otherwise in full compliance with New York Public Health Law section 1399-pp(2); and
>
> b. Filing an accompanying list of each cigarette brands that King Mountain sold into the State; and
>
> 3. Continuing to sell or offer cigarettes for sale, without first complying with Section 156-c's certification requirements, which require every such cigarette manufacturer to first certify in writing to the New York State Office of Fire Prevention and Control that the

> manufacturer's cigarettes meet the performance standards prescribed by such Office.

(State's Br., Docket Entry 227-1, at 3-4 (internal quotation marks and citations omitted; second alteration in original).)

The State also requests that the Court "expressly grant[ ] the State the authority to seize any unstamped King Mountain brand cigarettes that are found in New York, and are being delivered to, or otherwise in possession of a person not authorized by the State of New York to possess such unstamped cigarettes." (State's Br. at 4.) The State argues that this relief is appropriate since the Indian nations or tribes that have purchased King Mountain unstamped cigarettes refuse to cooperate in collecting cigarette excise taxes, and such seizures would occur outside of the reservations. (State's Br. at 5.) The State also alleges that "King Mountain may be continuing to sell unstamped cigarettes to persons . . . not otherwise authorized to possess such unstamped cigarettes." (State's Br. at 6.)

King Mountain argues that the Court should deny the State's request for injunctive relief because the State's enforcement practices violate the dormant Commerce Clause. King Mountain avers that the State has filed two lawsuits (including the present matter) against out-of-state Indian-owned manufacturers but failed to prosecute any Indian-owned companies or tribes manufacturing cigarettes within the boundaries of New

York State. (Def.'s Br., Docket Entry 228, at 7-8.) King Mountain alleges that State investigators conducting undercover purchases at reservation smoke shops observed large quantities of unstamped cigarettes manufactured by Indian-owned companies or tribes located within New York State but declined to purchase these cigarettes, take other investigative action, or prosecute these manufacturers. (Def.'s Br. at 7-8.) King Mountain avers that "[t]he State's enforcement of its law amounts to economic protectionism that discriminates against King Mountain solely due to its status as an out-of-state manufacturer" and, thus, constitutes a Commerce Clause violation that tips the balance of hardships and public interest in favor of King Mountain. (Def.'s Br. at 7-8.)

King Mountain also argues that the State's proposed injunction is "overbroad, because it requests that the Court grant the State the authority to seize unstamped King Mountain brand cigarettes from anyone if found anywhere in New York." (Def.'s Br. at 10.) King Mountain asserts that the State's request fails to advise how: (1) it would know the cigarettes are unstamped and/or being delivered to a person without legal authority to possess the cigarettes, (2) the State would ensure compliance with the Fourth Amendment, (3) the Court is empowered to direct seizures from unidentified non-parties, or (4) "the State would provide notice or due process to those not a party to the instant

litigation to challenge a seizure or to seek return of its property." (Def.'s Br. at 10-11.) King Mountain also argues that the State has failed to establish irreparable harm and the inadequacy of money damages. (Def.'s Br. at 10, n.9.)

On reply, the State argues that King Mountain's attempt to assert a selective prosecution counterclaim is unsupported. (State's Reply, Docket Entry 229, at 1-4.) The State also argues that King Mountain's dormant Commerce Clause defense fails because it has not established that the burden on interstate commerce imposed by the relevant statutes exceeds the local benefits pursuant to the balancing test set forth in Pike v. Bruce Church, Inc., 397 U.S. 137, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970). (State's Reply at 4-8.) The State also argues that King Mountain waived its new arguments by failing to specifically assert a selective enforcement or dormant Commerce Clause counterclaim or affirmative defense in its Answer. (State's Reply at 8-9.) Finally, the State argues that its proposed permanent injunction is appropriately tailored, and notes that the legal authority of persons in possession of unstamped cigarettes can be determined by reviewing an accompanying invoice or contacting the State Department of Taxation and Finance. (State's Reply at 10.) The State also asserts that "to protect the constitutional rights of third part[ies] carrying unstamped King Mountain cigarettes, the State would apply the same measures used when seizing the 8,400

cartons of unstamped King Mountain cigarettes referenced by the State's initial complaint." (State's Reply at 10.)

The parties were granted leave to file sur-replies. (See Mar. 6, 2017 Electronic Order; Mar. 10, 2017 Electronic Order.) King Mountain alleges that it is not asserting a selective prosecution claim and its opposition to the proposed injunction is "grounded on the State's discriminatory enforcement of New York statutes at issue against out-of-State Indian manufacturers, which violates the dormant Commerce Clause." (Def.'s Sur-Reply, Docket Entry 232, at 3.) King Mountain avers that the State does not dispute the factual record supporting the State's failure to prosecute Indian cigarette manufacturers located within the boundaries of New York State. (Def.'s Sur-Reply at 1-3.) King Mountain also argues that the Pike balancing test does not apply, and asserts that the relevant statutes do not "adversely affect interstate commerce" but rather "the State's enforcement of [the] statutes violates the dormant Commerce Clause." (Def.'s Sur-Reply at 4.) However, King Mountain contends that even if the Pike balancing test applies, "the burden on interstate commerce is the State's economic protectionism" and while there is a benefit to the State with respect to reduced smoking and fewer cigarette fires, "the State cannot claim to actually be seeking those benefits given in-State manufacturers engage in the exact same conduct that the State seeks to enjoin King Mountain." (Def.'s

Sur-Reply at 4-5.) King Mountain also argues that it has not waived its dormant Commerce Clause argument because: (1) it is being raised at the remedy stage to establish that equitable relief is inappropriate, (2) its Answer asserts an affirmative defense that the relief sought by the State violates the Constitution, and (3) King Mountain did not need to address remedies during its summary judgment briefing. (Def.'s Sur-Reply at 5-6.)

The State alleges that King Mountain's purported dormant Commerce Clause defense should be treated as a selective enforcement claim. (State's Sur-Reply, Docket Entry 233, at 1.) Additionally, the State argues that King Mountain's Answer "cannot be reasonably understood to include a commerce clause defense." (State's Sur-Reply at 2-4.)

DISCUSSION

As set forth above, King Mountain primarily argues that the Court should decline to enter the State's requested permanent injunction because: (1) the injunction violates the dormant Commerce Clause, (see Def.'s Br. at 7-10), and (2) the injunction is overbroad, (see Def.'s Br. at 10-11). King Mountain also argues, in a footnote, that the State has failed to demonstrate irreparable harm and that monetary damages are inadequate. (Def.'s Br. at 10, n.9.) The Court will address each argument in turn.[2]

[2] While the State argues that King Mountain's purported dormant Commerce Clause defense should be treated as a selective

I. Dormant Commerce Clause

The Commerce Clause provides Congress with the power to "'regulate Commerce with foreign Nations, and among the several states.'" Jones v. Schneiderman, 974 F. Supp. 2d 322, 349 (S.D.N.Y. 2013) (quoting U.S. Const. Art. I, § 8, cl. 3). However, "the right to engage in interstate commerce is not the gift of a state, and [ ] a State cannot regulate or restrain it." Id. (internal quotation marks and citations omitted). Thus, pursuant to the dormant Commerce Clause doctrine, "a state's power to take actions impacting interstate commerce is limited," and a state statute violates the dormant Commerce Clause where "(i) it clearly discriminates against interstate commerce in favor of intrastate commerce, (ii) imposes a burden on interstate commerce incommensurate with the local benefits secured, or (iii) has the practical effect of extraterritorial control of commerce occurring entirely outside the boundaries in the state in question." Id. (internal quotation marks and citations omitted).

"Regulations that clearly discriminate against interstate commerce [are] virtually invalid per se." Am.

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prosecution claim, (State's Sur-Reply at 1), King Mountain has expressly stated that it is not asserting a selective prosecution claim and is, in fact, relying on the dormant Commerce Clause, (Def.'s Sur-Reply at 3). Accordingly, the Court will not determine the viability of any selective enforcement claim, nor will it consider such a claim in its balancing of the equities.

Booksellers v. Dean, 342 F.3d 96, 102 (2d Cir. 2003) (internal quotation marks and citation omitted; alteration in original). A state statute clearly discriminates against interstate commerce "when it constitutes differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." Freedom Holdings, Inc. v. Spitzer, 357 F.3d 205, 217 (2d Cir. 2004) (internal quotation marks and citation omitted). However, where the statute does not discriminate against interstate commerce, it will be invalidated pursuant to the balancing test set forth in Pike "if it imposes a burden on interstate commerce incommensurate with the local benefits secured." Id. at 216 (internal quotation marks and citations omitted). In either analysis, the pivotal consideration is the statute's overall effect on local and interstate activity. Am. Booksellers, 342 F.3d at 102.

King Mountain has taken the somewhat novel position that while NYTL §§ 471, 471-e, and 480-b and NYEL § 156-c (collectively, the "Statutes") are not facially discriminatory, the State's enforcement practices constitute a violation of the dormant Commerce Clause. (See Def.'s Sur-Reply at 4.) King Mountain failed to cite any Second Circuit decisions addressing a dormant Commerce Clause claim based on official enforcement of a statute or regulation, and the Court was unable to locate any Second Circuit decisions addressing this issue.

Instead, King Mountain relies on two out of Circuit decisions, Walgreen Co. v. Rullan, 405 F.3d 50 (1st Cir. 2005), and Florida Transp. Servs., Inc. v. Miami-Dade Cty., 703 F.3d 1230, (11th Cir. 2012), arguing that in these decisions, "the [s]tate's discriminatory enforcement of a facially neutral statute was struck down as violative of the dormant Commerce Clause." (Def.'s Sur-Reply at 5.) However, in Walgreen, the First Circuit addressed a dormant Commerce Clause challenge to the substance of a statute, not official enforcement. Particularly, in that matter, the plaintiffs challenged Puerto Rico's certificate of need law, which provided that "no person may acquire or construct a health facility . . . without having first obtained a certificate of necessity and convenience granted by the Secretary [of the Puerto Rico Health Department]," and was amended to define "health care facilities" as including pharmacies. Walgreen, 405 F.3d at 52-53 (internal quotation marks and citation omitted; ellipsis in original). This law also set forth a certificate approval process in which the Secretary notified "affected persons" of any request for certification. Id. at 53. "[A]ffected persons" included existing pharmacies within one mile of the proposed pharmacy site and these entities had the right to provide written notice of their opposition to the Secretary. Id. at 53. While the Secretary nearly always issued the certification if no one objected, a

lengthy administrative and judicial process ensued if opposition was filed. Id. at 53-54.

While the First Circuit considered the Secretary of Health's enforcement of the law, it concluded that the statute itself "discriminate[d] against interstate commerce by permitting the Secretary to block a new pharmacy from locating in its desired location simply because of the adverse competitive effects that the new pharmacy will have on existing pharmacies." Id. at 55. See also id. at 59 ("[w]e thus find that, on balance, the Act, though facially neutral, discriminates against interstate commerce"). While King Mountain notes the First Circuit held that the statute "as enforced by the Secretary of Health for the issuing of certificates of necessity and convenience to retail pharmacies, is invalid under the dormant Commerce Clause," a full reading of the case makes clear that the First Circuit evaluated the statutes and its certificate approval procedures, not the Secretary's enforcement. Id. at 60 (emphasis supplied). (Def.'s Br. at 9.)

Conversely, Florida Transport, did, in fact, involve a dormant Commerce Clause challenge based on official enforcement. In Florida Transport, the plaintiff asserted a dormant Commerce Clause claim in connection with an ordinance that required stevedore companies[3] operating out of the Port of Miami to annually

[3] "Stevedores load and unload cargo at port facilities." Florida Transport, 703 F.3d at 1235.

apply for permits and "be reassessed, along with any new applicants as to competency, safety record, financial strength, and need." Florida Transp., 703 F.3d at 1234-36. The plaintiff, who was repeatedly denied a permit, argued that the Port Director failed to follow the ordinance requirements and instead protected "incumbent stevedores" by automatically renewing existing permits and denying permits to new applicants. Id. at 1234, 1240-41. The court concluded that the permit ordinance "as applied" violated the dormant Commerce Clause because the burden on interstate commerce was significant while "the actual permitting practices did not further any local benefits." Id. at 1257-62.

However, even if the Court were to adopt the reasoning of the Eleventh Circuit,[4] King Mountain has failed to establish a dormant Commerce Clause violation. First, King Mountain has not demonstrated that the State directly discriminated against interstate commerce through its enforcement of the Statutes. King Mountain alleges that: (1) videotapes show that State investigators observed "New York-based, Indian manufactured" unstamped cigarettes, but only purchased King Mountain cigarettes and Seneca brand cigarettes, which are manufactured by Grand River Enterprises ("Grand River"), an Indian-owned manufacturer located

[4] The Court takes no position on the viability of a dormant Commerce Clause claim based on official enforcement.

within the boundaries of Canada; (2) pursuant to an agreement with the State, the Oneida tribe, which is located within the boundaries of New York, does not appear to be required to sell its cigarettes to a licensed stamping agent; and (3) the State acknowledges that Indian nations or tribes within New York have refused to collect cigarette taxes, but the only lawsuits filed by the State to enforce tax laws against tribal or Indian-owned cigarette manufacturers are the instant action and N.Y. v. Grand River Enterprises Six Nations, 14-CV-0910 (W.D.N.Y.), an action against Grand River and a New York importer. (Def.'s Br. at 3-5.) While the State cites other investigations or lawsuits with respect to tobacco retailers, traffickers, and website operators, it does not appear to dispute that this action and Grand River are the only actions the State has commenced against manufacturers regarding the sale of unstamped cigarettes. (See generally State's Reply at 3-8.)

However, putting aside the State's hearsay objections, (see State's Reply at 3), King Mountain's cited evidence does not establish direct discrimination of interstate commerce. The videotapes referenced by King Mountain are videos taken by State Investigator Scala when he purchased King Mountain cigarettes during an undercover investigation. (Def.'s Br. at 2 (citing Scala's Dep. Tr., Def.'s Ex. A, Docket Entry 228-2, at 70-72, 90).) Investigator Scala testified that on various dates between 2012

and 2013, he was instructed to go to reservations and purchase King Mountain and Seneca cigarettes in connection with the State's investigation of King Mountain and Grand River. (Scala's Dep. Tr. 27:19-33:4.) Thus, Investigator Scala did not "ignore" any alleged cartons of unstamped cigarettes from Indian-owned brands manufactured in New York; he was instructed to buy only King Mountain and Seneca cigarettes in connection with a particular investigation.

Further, the fact that the State has only pursued King Mountain and Grand River with respect to manufacturer liability for the sale of unstamped cigarettes fails, without more, to demonstrate either direct discrimination or a policy of only enforcing the Statutes against manufacturers located outside of New York State. Indeed, as acknowledged by King Mountain, the Grand River matter was filed against Grand River Enterprises as well as Native Wholesale Supply, an Oklahoma Corporation with a principal place of business in Perrysburg, New York, and the President of Native Wholesale Supply, who is alleged to be a resident of New York. (See Compl., Grand River, 14-CV-0910, Docket Entry 1 ¶¶ 9, 10.) The fact that the State filed two lawsuits against out-of-state manufacturers does not establish that the State is engaging in economic protectionism by purportedly declining to investigate in-state manufacturers. Moreover, King Mountain has not adduced evidence demonstrating that the State is

attempting to benefit tribal or Indian-owned manufacturers located in New York State by tacitly permitting their non-compliance with the Statutes.

Parenthetically, while King Mountain cites Florida Transport to support its argument that the State's enforcement directly violates the dormant Commerce Clause--and, thus, the Pike balancing test is inapplicable--such an analogy is misplaced. (See Def.'s Sur-Reply at 4 ("'the Pike undue burden test' is only used if the official's 'practices did not directly discriminate'") (quoting Florida Transp., 703 F.3d at 1257).) The Florida Transport Court did not reach the issue of whether the Port Director's permitting practices directly discriminated against interstate commerce because it concluded that the district court properly held that these practices unduly burdened interstate commerce pursuant to the Pike test. Florida Transp., 703 F.3d at 1257.

Second, King Mountain has failed to demonstrate an undue burden on interstate commerce pursuant to the Pike balancing test. King Mountain argues that even if the Pike test applies, "[t]he relevant burden is not King Mountain's burden in complying with the statute, as the State incorrectly claims," but rather, the State's "economic protectionism" as "the State has placed a significant burden on interstate commerce by attempting to restrict an out-of-state Indian manufacturer from selling to in-

state Indian tribes or companies owned by members of Indian tribes while allowing in-State Indian manufacturers to undertake the same conduct." (Def.'s Sur-Reply at 4-5.)

However, the Court disagrees that the State's enforcement of the Statutes created an undue burden. King Mountain has not demonstrated the existence of a policy of only enforcing the Statutes against out-of-state Indian manufacturers. Additionally, enforcement of the Statutes does not restrict an out-of-state Indian manufacturer from selling cigarettes to in-state Indian tribes or Indian-owned companies; the manufacturer is merely required to sell cigarettes to licensed stamping agents (and, thus, pay taxes) prior to delivery and file certifications.

In any event, any burden on interstate commerce imposed by the State's alleged enforcement practices is outweighed by the benefit to the State in decreasing cigarette consumption, preventing cigarette excise tax evasion, and preventing smoking-related fires. (See State's Reply at 7.) King Mountain's unsupported argument that "the State cannot claim to actually be seeking those benefits, given in-State manufacturers engage in the exact same conduct," (Def.'s Sur-Reply at 5), is unpersuasive.

Accordingly, the dormant Commerce Clause is not a viable basis for rejecting the State's proposed injunction. In light of the Court's conclusion, it need not determine whether King Mountain waived its dormant Commerce Clause argument by failing to assert

it as an affirmative defense or counterclaim. (See generally State's Reply at 8-9.)

II. Substance of the Proposed Injunction

King Mountain's only objection regarding the substance of the proposed injunction relates to the State's request that it be granted "authority to seize any unstamped King Mountain brand cigarettes that are found in New York, and are being delivered to, or otherwise in possession of a person not authorized by the State of New York to possess such unstamped cigarettes." (State's Br. at 4.) King Mountain argues, inter alia, that this request is overbroad and the State fails to indicate "how [it] would comply with the requirements of the Fourth Amendment . . . [and] whether and how the State would provide notice or due process to those not a party to the instant litigation to challenge a seizure or to seek return of its property." (Def.'s Br. at 10-11.) The Court agrees.

The Second Circuit has held that "[a]n injunction is overbroad when it seeks to restrain the defendants from engaging in legal conduct, or from engaging in illegal conduct that was not fairly the subject of litigation." City of N.Y. v. Mickalis Pawn Shop, 645 F.3d 114, 145 (2d Cir. 2010). Here, the State's request for an injunction permitting it to seize any unstamped cigarettes found in New York or "otherwise in the possession of a person not authorized by the [State] to possess such unstamped cigarettes,"

(State's Br. at 4), contemplates the seizure of unstamped cigarettes from anyone, anywhere in New York State. Such an injunction addresses conduct far beyond the particular conduct at issue in this matter--King Mountain's failure to deliver unstamped cigarettes directly to a State stamping agent and failure to file certain certifications. Thus, the Court finds the State's request to be overbroad. See Mickalis Pawn Shop, 645 F.3d at 145 (holding that the injunction was overbroad where it "prohibit[ed] not only 'straw purchases'--the sole kind of illegal practice identified in the City's amended complaint--but other, unidentified types of [firearm] sales practices as well").

The State obliquely asserts that "to protect the constitutional rights of third part[ies] carrying unstamped King Mountain cigarettes, the State would apply the same measures used when seizing the 8,400 cartons of unstamped King Mountain cigarettes referenced by the State's initial complaint." (State's Reply at 10.) In support, the State first references paragraph 67 of its Amended Complaint,[5] which alleges that on December 3, 2012, the State police stopped and inspected a truck at a routine commercial checkpoint and discovered approximately 8,400 cartons

[5] The State technically refers to paragraph 67 of its initial Complaint. (State's Reply at 10.) However, as that paragraph concerns King Mountain's alleged status as a tobacco producer within the meaning of state law, (see Compl. ¶ 67), the Court assumes that the State is referencing its Amended Complaint.

of unstamped cigarettes en route to land occupied by the Ganienkeh group (the "December 2012 Seizure"). (Am. Compl., Docket Entry 6, ¶ 67.) The State also generally cites the Declaration of Joel Revette, a State Police investigator, in which Inspector Revette details his personal knowledge of the December 2012 Seizure. (Revette Decl., Docket Entry 15.) Finally, the State generally references a post-hearing brief filed with the Division of Tax Appeals in connection with a petition that appears to have been filed by the driver of the truck implicated in the December 2012 Seizure.[6] (Leung Decl. Ex. I, Docket Entry 229-10.)

However, again, the State's requested injunction is not limited to seizures at commercial checkpoints and, in fact, contemplates the seizure of unstamped King Mountain cigarettes from anyone, anywhere in New York State. The Court concurs with King Mountain that the State has not demonstrated how the constitutional rights of unknown third parties who are not engaged in commercial transport will be safeguarded.

The State's reliance on Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 100 S. Ct. 2069, 65 L. Ed. 2d 10 (1980), does not alter the Court's

[6] While the petition does not state that Shawn E. Snyder, the petitioner, was transporting King Mountain cigarettes, the petition states that on December 3, 2012, Mr. Snyder was transporting cigarettes to the Ganienkeh territory and met with Investigator Revette. (See State's Reply, Ex. I at 2-5.)

conclusion. (See State's Br. at 5.) The State argues that its request for an Order authorizing the seizure of King Mountain cigarettes is appropriate "when as here, (a) the Indian nations or tribes that King Mountain has sold its unstamped cigarettes to have refused to cooperate in collecting the validly imposed cigarette excise taxes, and (b) such seizures occur outside any such reservation," and cites Colville for support. (State's Br. at 5.)

Colville involved a series of issues regarding the state of Washington's taxation of Indian tribes and members with respect to various items, including tobacco products. Colville, 447 U.S. at 138. Washington had seized shipments from out-of-state wholesalers to reservations until it was enjoined from doing so by the district court. Id. at 139. Washington argued, in relevant part, that it had the power to seize unstamped cigarettes if the tribes failed to cooperate in collecting state taxes. Id. at 161. The tribes argued that no state tax was due while the cigarettes were in transit because sales by wholesalers to tribal businesses were tax exempt. Id. Nevertheless, the Supreme Court held that Washington's seizures were justified since "[a]lthough the cigarettes in transit are as yet exempt from state taxation, they are not immune from seizure when the Tribes, as here, have refused to fulfill collection and remittance obligations which the State has validly imposed." Id. at 161-62.

However, the proposed injunction requested by the State is not limited to the seizures contemplated by the Colville Court--namely, seizures of unstamped cigarettes being delivered by wholesalers to Indian tribes or Indian-owned businesses. The State also has not adduced evidence establishing that the Indian tribes and/or Indian-owned businesses in receipt of unstamped King Mountain cigarettes have failed to fulfill their tax obligations.

Accordingly, the Court DENIES the State's request for an Order granting it authority to "seize any unstamped King Mountain brand cigarettes that are found in New York, and are being delivered to, or otherwise in the possession of a person not authorized by the State of New York to possess such unstamped cigarettes." (State's Br. at 4.)

III. Irreparable Harm and Inadequacy of Money Damages

As set forth above, King Mountain argues in a footnote that: (1) the State has failed to demonstrate irreparable harm based on the absence of any evidence demonstrating a connection between King Mountain cigarettes and increased health and safety hazards, and (2) the State has failed to establish that monetary damages are inadequate. (Def.'s Br. at 10, n.9.) The Court disagrees.

A plaintiff requesting a permanent injunction must establish: "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are

inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." eBay Inc. v. MercExhange, L.L.C., 547 U.S. 388, 391, 126 S. Ct. 1837, 164 L. Ed. 2d 641 (2006). Nevertheless, "[a]n injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course." OptionsXpress, Inc. v. OptionsXpress Inc., No. 14-CV-0956, 2014 WL 3728637, at *4 (S.D.N.Y. Jul. 28, 2014) (internal quotation marks and citation omitted). Indeed, the movant must demonstrate that relief is needed and "[t]he necessary determination is that there exists some cognizable danger of recurrent violation [.]" Id. (internal quotation marks and citation omitted). A close reading of King Mountain's submissions indicates that it does not dispute the State's position that "the record reflects that King Mountain may be continuing to sell unstamped cigarettes to persons that are not affiliated with the Oneida Nation and who are not otherwise authorized to possess such unstamped cigarettes." (State's Br. at 6; see generally Def.'s Br., Def.'s Sur-Reply.)

With respect to irreparable harm, the negative health effects of smoking are beyond dispute, as is the relationship between cigarette prices and incidence of smoking. (See Am. Compl. ¶ 17 ("New York imposes such a tax because [i]t is well established

that an increase in the price of cigarettes decreases their use and that raising tobacco excise taxes is one of the most effective policies for reducing the use of tobacco") (internal quotation marks and citation omitted; alteration in original); see also State's Reply at 10 ("irreparable harm to the State includes the diminished public health of its citizens").) King Mountain's failure to certify its participation in the Master Settlement Agreement ("MSA") or pay a certain amount into an escrow fund causes harm insofar as it diminishes the funds available to subsidize health care expenses for smoking-related ailments. (Am. Compl. ¶¶ 49-50.) Further, King Mountain's failure to certify that its cigarettes meet the requisite fire performance standards causes irreparable harm with respect to the State's interest in limiting cigarette-related fires. (See Am. Compl. ¶¶ 51-52.)

Both parties fail to sufficiently elaborate on the adequacy of monetary damages. King Mountain relies on the conclusory assertion that the State has "not proven why monetary damages would have been inadequate." (Def.'s Br. at 10, n.9.) The State similarly argues, without more, that "money damages are inadequate because of certain rulings made by the [ ] 2016 Order." (State's Reply at 10.) In any event, the Court concludes that the irreparable harm detailed above cannot be compensated by monetary damages and, considering the balance of the hardships and the public interest, equitable relief is warranted.

## CONCLUSION

The State's motion for injunctive relief (Docket Entry 227) is GRANTED IN PART and DENIED IN PART. The State's motion is GRANTED to the extent that King Mountain is ENJOINED from:

1. Selling unstamped cigarettes directly to Indian nations or tribes and/or reservation cigarette sellers or entities that are not licensed stamping agents, in violation of New York Tax Law Section 471;

2. Continuing to sell cigarettes into the State of New York, without first complying with New York Tax Law Section 480-b's certification requirements, namely—

a. Filing a certification under penalty of perjury, with the New York State Department of Taxation and Finance, the Office of the Attorney General, and any New York state-licensed stamping agent who affixes New York state cigarette tax stamps to King Mountain's pack of cigarettes, that King Mountain is either (i) a participating manufacturer under the 1998 Tobacco Master Settlement, or (ii) is otherwise in full compliance with New York Public Health Law section 1399-pp(2); and

b. Filing an accompanying list of each cigarette brands that King Mountain sold into the State; and

3. Continuing to sell or offer cigarettes for sale, without first complying with New York Executive Law Section 156-c's certification requirements, which require every such cigarette manufacturer to first certify in writing to the New York State Office of Fire Prevention and Control that the manufacturer's cigarettes meet the performance standards prescribed by such Office.

The Clerk of the Court is directed to enter judgment accordingly and mark this case CLOSED.

SO ORDERED.

_/s/ JOANNA SEYBERT_____
Joanna Seybert, U.S.D.J.

Dated: August _29_, 2017
Central Islip, New York

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
STATE OF NEW YORK,

Plaintiff,

-against-

JUDGMENT
12-CV-6276(JS)(SIL)

MOUNTAIN TOBACCO COMPANY, doing business as King Mountain Tobacco Company Inc., and DELBERT WHEEELER, SR.,

Defendants.
----------X

An Order of Honorable Joanna Seybert, United States District Judge, having been filed on January 26, 2016, granting defendant Delbert Wheeler, Sr.'s motion to dismiss for lack of subject matter jurisdiction, and dismissing plaintiff State of New York's claims against defendant Delbert Wheeler, Sr., with prejudice; and an Order of Honorable Joanna Seybert, United States District Judge, having been filed on July 21, 2016; granting in part and denying in part defendant Mountain Tobacco Company's ("King Mountain") motion for summary judgment, and granting in part and denying in part plaintiff State of New York's motion for summary judgment; and an Order of Honorable Joanna Seybert, United States District Judge, having been filed on August 29, 2017, granting in part and denying in part plaintiff State of New York's motion for injunctive relief, enjoining defendant King Mountain from:

1. Selling unstamped cigarettes directly to Indian nations or tribes and/or reservation

cigarette sellers or entities that are not licensed stamping agents, in violation of New York Tax Law Section 471;

2. Continuing to sell cigarettes into the State of New York, without first complying with New York Tax Law Section 480-b's certification requirements, namely—

a. Filing a certification under penalty of perjury, with the New York State Department of Taxation and Finance, the Office of the Attorney General, and any New York state-licensed stamping agent who affixes New York state cigarette tax stamps to King Mountain's pack of cigarettes, that King Mountain is either (i) a participating manufacturer under the 1998 Tobacco Master Settlement, or (ii) is otherwise in full compliance with New York Public Health Law section 1399-pp(2); and

b. Filing an accompanying list of each cigarette brands that King Mountain sold into the State; and

3. Continuing to sell or offer cigarettes for sale, without first complying with New York Executive Law Section 156-c's certification requirements, which require every such cigarette manufacturer to first certify in writing to the New York State Office of Fire Prevention and Control that the manufacturer's cigarettes meet the performance standards prescribed by such Office,

and directing the Clerk of the Court to enter judgment accordingly and mark this case closed, it is

**ORDERED AND ADJUDGED** that defendant Delbert Wheeler, Sr.'s motion to dismiss is granted; that plaintiff State of New York's claims against defendant Delbert Wheeler, Sr. are dismissed with

prejudice; that defendant King Mountain's motion for summary judgment is granted in part and denied in part; that plaintiff State of New York's motion for summary judgment is granted in part and denied in part; that plaintiff State of New York's motion for injunctive relief is granted in part and denied in part; that defendant King Mountain is enjoined from:

> 1. Selling unstamped cigarettes directly to Indian nations or tribes and/or reservation cigarette sellers or entities that are not licensed stamping agents, in violation of New York Tax Law Section 471;
>
> 2. Continuing to sell cigarettes into the State of New York, without first complying with New York Tax Law Section 480-b's certification requirements, namely—
>
> c. Filing a certification under penalty of perjury, with the New York State Department of Taxation and Finance, the Office of the Attorney General, and any New York state-licensed stamping agent who affixes New York state cigarette tax stamps to King Mountain's pack of cigarettes, that King Mountain is either (i) a participating manufacturer under the 1998 Tobacco Master Settlement, or (ii) is otherwise in full compliance with New York Public Health Law section 1399-pp(2); and
>
> d. Filing an accompanying list of each cigarette brands that King Mountain sold into the State; and
>
> 3. Continuing to sell or offer cigarettes for sale, without first complying with New York Executive Law Section 156-c's certification requirements, which require every such cigarette manufacturer to first certify in writing to the New York State Office of Fire

Prevention and Control that the manufacturer's cigarettes meet the performance standards prescribed by such Office;

and that this case closed.

Dated: Central Islip, New York
September 5, 2017

DOUGLAS C. PALMER
CLERK OF THE COURT

By: /s/ James J. Toritto
DEPUTY CLERK