APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2018

Argued: March 8, 2019 Decided: November 7, 2019

Docket Nos. 17-1993-cv; 17-2107-cv; 17-2111-cv

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

Plaintiffs-Appellees - Cross-Appellants,

– v. –

UNITED PARCEL SERVICE, INC.,

Defendant-Appellant - Cross-Appellee.

B e f o r e:

JACOBS and LYNCH, *Circuit Judges*, and
VILARDO, *District Judge*.[*]

[*] Judge Lawrence J. Vilardo, of the United States District Court for the Western District of New York, sitting by designation.

In this civil action, filed in the United States District Court for the Southern District of New York (Forrest, *J.*), the State and City of New York charged UPS with violating the Contraband Cigarette Trafficking Act, 18 U.S.C. 2341 *et seq*., the Prevent All Cigarette Trafficking Act, 15 U.S.C. 375 *et seq*., and New York Public Health Law 1399-*ll*, as well as breaching its settlement agreement (the "Assurance of Discontinuance") with the New York State Attorney General. After a bench trial, the district court found that UPS had violated its obligations under the Assurance of Discontinuance in a number of respects and also knowingly transported contraband cigarettes from its shipper-customers on Native American reservations to consumers throughout the State and City in violation of several statutes. The district court ordered UPS to pay $9.4 million in unpaid cigarette taxes and $237.6 million in total penalties to the plaintiffs. UPS appeals from that judgment, arguing that the district court erred in both its liability and damages rulings. The State and City cross-appeal from aspects of the damages rulings. We AFFIRM the district court's liability rulings, MODIFY the damage and penalty awards, and AFFIRM the judgment as modified.

Judge Jacobs concurs in part and dissents in part in a separate opinion.

STEVEN WU, Deputy Solicitor General, State of New York, (Eric T. Schneiderman, Attorney General, State of New York, Barbara D. Underwood, Solicitor General, State of New York, Eric Del Pozo, Assistant Solicitor General of Counsel, State of New York, *on the brief) for Plaintiff-Appellee - Cross-Appellant State of New York.*

RICHARD DEARING, Chief, Appeals Division, Corporation Counsel, City of New York, (Zachary W. Carter, Corporation Counsel, City of New York, Claude S. Platton, Deputy Chief, Appeals Division, Corporation Counsel City of New York, Jeremy W. Schneider, Senior Counsel, Appeals Division of Counsel, Corporation Counsel, City of New York, *on the brief*) *for Plaintiff-Appellee - Cross-Appellant City of New York.*

MARK A. PERRY, Gibson, Dunn & Crutcher LLP, Washington, D.C., (Christopher J. Baum, Aidan Taft Grano, Gibson, Dunn & Crutcher LLP, Washington, D.C., Caitlin J. Halligan, Gibson, Dunn & Crutcher LLP, New York, NY, Deanne E. Maynard, Morrison & Foerster, LLP, Washington, D.C., Paul T. Friedman, Morrison & Foerster, LLP, San Francisco, CA, *on the brief*) *for Defendant-Appellant - Cross-Appellee*.

Barry S. Schaevitz, Beth G. Oliva, Oksana G. Wright, Fox Rothschild LLP, New York, NY, *for Amicus Curiae* Cigar Association of America, Inc.

Richard Pianka, ATA Litigation Center, Arlington, VA, *for Amicus Curiae* American Trucking Associations, Inc.

Kimo S. Peluso, Heather Yu Han, Sher Tremonte LLP, New York, NY, *for Amici Curiae* Campaign for Tobacco-Free Kids, American Cancer Society Cancer Action Network, American Lung Association, New York State American Academy of Pediatrics, Chapters 2 & 3, Public Health Law Center at the Mitchell Hamline School of Law, and Truth Initiative Foundation.

Nora Flum, Deputy Attorney General, California, Xavier Becerra, Attorney General, California, Karen Leaf, Senior Assistant Attorney General, California, Samuel P. Siegel, Associate Deputy Solicitor General, California, George Jepsen, Attorney General of Connecticut, Russell A. Suzuki, Acting Attorney General of Hawai'i, Lisa Madigan, Attorney General of Illinois, Curtis T. Hill, Jr., Attorney General of Indiana, Thomas J. Miller, Attorney General of Iowa, Brian E. Frosh, Attorney General of Maryland, Maura Healey, Attorney General of Massachusetts, Bill Schuette, Attorney General of Michigan, Gurbir S. Grewal, Attorney General of New Jersey, Ellen F. Rosenblum, Attorney General of Oregon, Josh Shapiro, Attorney General of Pennsylvania, Alan Wilson, Attorney General of South Carolina, Sean D. Reyes, Attorney General of Utah, Thomas J. Donovan, Jr., Attorney General of Vermont, Mark R. Herring, Attorney General of Virginia, Robert W. Ferguson, Attorney General of Washington, Peter K. Michael, Attorney General of Wyoming, Karl A. Racine, Attorney General of the District of Co-

lumbia, Wanda Vázquez Garced, Attorney General of Puerto Rico, *for Amici Curiae* California, Connecticut, Hawai'i, Illinois, Indiana, Iowa, Maryland, Massachusetts, Michigan, New Jersey, Oregon, Pennsylvania, South Carolina, Utah, Vermont, Virginia, Washington, Wyoming, the District of Columbia, and Puerto Rico.

Leslie Rutledge, Arkansas Attorney General, Nicholas Bronni, Deputy Solicitor General, Arkansas, Jeff Landry, Attorney General of Louisiana, Elizabeth B. Murrill, Solicitor General, Arkansas, Patricia H. Wilton, Deputy Solicitor General, Arkansas, *for Amici Curiae* Louisiana, Arkansas, and Kentucky.

Jeffrey S. Bucholtz, King & Spalding LLP, Washington, D.C., Merritt E. McAlister, Val Leppert, King & Spalding LLP, Atlanta, GA, Warren Postman, U.S. Chamber Litigation Center, Inc., Washington, D.C., *for Amicus Curiae* Chamber of Commerce of the United States of America.

Cory L. Andrews, Richard A. Samp, Washington Legal Foundation, Washington, D.C., *for Amicus Curiae* Washington Legal Foundation.

GERARD E. LYNCH, *Circuit Judge*:

In this civil action, filed in the United States District Court for the Southern District of New York (Katherine B. Forrest, *Judge*), the State and City of New York (collectively "plaintiffs") charged UPS with violating the Contraband Cigarette Trafficking Act ("CCTA"), 18 U.S.C. 2341 *et seq*., the Prevent All Cigarette Trafficking Act ("PACT Act"), 15 U.S.C. 375 *et seq*., and New York Public Health Law ("PHL") 1399-*ll*, as well as with breaching its settlement agreement (the "Assurance of Discontinuance" or "AOD") with the New York State Attorney General ("NYAG"). After a bench trial, the district court found that UPS had violated its obligations under the Assurance of Discontinuance in a number of respects, and knowingly transported contraband cigarettes from its shipper-customers on Native American reservations to consumers throughout the State and City in violation of several statutes. The district court ordered UPS to pay $9.4 million in unpaid taxes and $237.6 million in total penalties to the plaintiffs. UPS appeals from that judgment, arguing that the district court erred in both its liability and damages rulings; the plaintiffs cross-appeal from aspects of the damages rulings. For the reasons explained below we AFFIRM the district court's liability rulings, MODIFY the damage and penalty awards, and AFFIRM the judgment as modified.

TABLE OF CONTENTS

BACKGROUND

I. Factual Background

A. The State's and City's Cigarette Taxation Regime

The deleterious effects of cigarette smoking and the associated public health costs are enormous. Tobacco use kills almost 30,000 people per year in New York, exceeding the number of deaths caused by alcohol, motor vehicle accidents, firearms, and toxic agents combined. Tobacco-related health care costs New Yorkers $10.4 billion annually. Thus, like the federal government, New York State (the "State") and New York City (the "City") impose excise taxes on cigarettes in order to discourage cigarette smoking and defray some of the health care costs it causes. Those public policy goals, obviously, can be achieved only insofar as the taxes are actually paid.

The State first instituted an excise tax on cigarettes in 1939. N.Y. Tax Law § 471 (1939). The law

requires a tax to be imposed on "all cigarettes possessed in the state by any person for sale" except when the "state is without power to impose such tax." *Id*. The law presumes that all cigarettes possessed for sale or use are taxable, unless an exemption applies. *See id*.; 20 N.Y.C.R.R. § 76.1(a)(1).

Taxable cigarettes must bear a stamp evidencing payment of the tax. N.Y. Tax Law § 471; N.Y.C. Admin. Code § 11–1302(g). New York's Department of Taxation and Finance ("DTF") "precollects" the tax from a limited number of state-licensed stamping agents, who buy and affix tax stamps to each pack of cigarettes, and incorporate the value of the tax into the sale price of the cigarettes, thereby passing the tax along to each subsequent purchaser in the distribution chain and, ultimately, to the consumer. *See* Tax Law § 471(2); 20 N.Y.C.R.R. §§ 74.2–74.3; N.Y.C. Admin. Code § 11–1302(g)–(h); *see also Oneida Nation of N.Y. v. Cuomo*, 645 F.3d 154, 158 (2d Cir. 2011) (discussing licensed stamping agents' pivotal role in state taxation scheme). Given this regulatory regime, it is immediately apparent that the tax has not been paid on cigarettes not bearing stamps ("unstamped cigarettes").

Both the State's and City's excise taxes on cigarettes increased significantly in the 2000s. At nearly all times relevant to this appeal, the State's excise tax was $4.35 per pack of cigarettes,[1] *see* Tax Law

[1] The tax was increased to $4.35 from $2.75 on July 1, 2010. *See* N.Y. Tax Law § 471; 2010 Sess. Laws News of N.Y. Ch. 134 (A. 11515).

§ 471(1); 20 N.Y.C.R.R. § 74.1(a)(2), and the City's excise tax was $1.50 per pack, *see* N.Y.C. Admin. Code § 11–1302.[2] The combination of State, City, and Federal cigarette taxes meant that by July 2010, the taxes on a pack of cigarettes were $6.86 in New York City and $5.36 in the rest of the State.

B. Tax Evasion in the State and City

The cigarette tax has always posed thorny issues for the sale of cigarettes on Native American reservations. Federal law prohibits New York from imposing taxes on the sale of cigarettes to tribal members on their own reservation for personal use. *See Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 475–81 (1976). New York is permitted, however, to tax the sale of cigarettes from reservation sellers to non-tribal members. *See Dep't of Taxation & Fin. of N.Y. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 64 (1994). In 2010, § 471(1) was amended to state explicitly that "sales to qualified Indians for their own use and consumption on their nations' or tribes' qualified reservation" are exempt from the State's taxation scheme. However, it also made explicit that the tax *should* be collected on "all cigarettes sold on an Indian reservation to non-members of the Indian nation or tribe and to non-Indians." N.Y. Tax Law § 471(1).

---

[2] Accordingly, for each carton of cigarettes (which typically contains 10 packs of cigarettes), the State excise tax rate is $43.50 per carton, and the City excise tax rate is $15.00 per carton.

The sale of both taxable and tax-free cigarettes on reservations has complicated the State's ability to enforce the tax law and collect the taxes due.[3] *See Oneida Nation*, 645 F.3d at 158. Reservation sellers' refusal to participate in the tax stamping system for the collection of cigarette taxes has amplified the problem. *See id*. at 159–161.

In the 1980s, New York State's DTF determined that the volume of untaxed cigarettes that reservation retailers sold "would, if consumed exclusively by tax-immune Indians, correspond to a consumption rate 20 times higher than that of the average New York resident." *Milhem Attea*, 512 U.S. at 64–65. In other words, either Native Americans were smoking an extraordinary number of cigarettes, or a substantial number of non-Native American New Yorkers were purchasing their cigarettes from reservation retailers without paying the relevant taxes. *See Oneida Nation*, 645 F.3d at 158–59. DTF estimated that it was losing approximately $65 million a year in tax evasion, in substantial part due to non-tribal members purchasing unstamped cigarettes from reservation sellers. *Id.* at 159. A more recent study concluded that 60% of the cigarettes consumed in New York were

[3] New York State's DTF entered a public "forbearance" policy, which was in effect from at least the mid-1990's until February 2010, pursuant to which it did not enforce tax regulations governing on-reservation sales of cigarettes to non-Native Americans.

subject to tax evasion, resulting in an estimated loss of tax revenue exceeding $2 billion annually.[4]

In 2000, in response to this alarming level of sales of unstamped cigarettes, New York's Legislature enacted PHL § 1399-*ll* which effectively requires that all cigarette sales in New York be made face-to-face. The law was specifically targeted to combat the "shipment of cigarettes sold via the internet or by telephone or mail order to residents of this state." Act of June 14, 2000, § 1, 2000 N.Y. Laws 2905, 2905. It imposes liability on both sellers of cigarettes and common carriers for shipping cigarettes in violation of the statute.

Specifically, the statute makes it illegal for cigarette sellers to ship cigarettes to any person in New York—regardless of whether the excise taxes have been paid—with exceptions for certain statutorily authorized recipients (specifically, licensed resellers or government agents). *See* PHL § 1399-*ll*(1). The statute also makes it illegal for a common carrier "to knowingly transport cigarettes to any person" in New York who is not "reasonably believed by such carrier" to be a statutorily authorized recipient. *Id*. at § 1399-*ll*(2). "[I]f cigarettes are transported to a home or residence," the law "presume[s]" the carrier's knowledge that the delivery was unauthorized. *Id*. Violation of these provisions results in a civil penalty, imposed on the shipper or carrier, of $5,000 for each violation or $100 per pack of cigarettes shipped. *Id*. at § 1399-

---

[4] RTI Int'l, 2014 Independent Evaluation Report of the New York Tobacco Control Program 25 (2014), https://www.health.ny.gov/prevention/tobacco_control/docs/2014_independent_evaluation_report.pdf.

ll(5). Both the NYAG and corporation counsel for political subdivisions of the state are authorized to bring an action against a violator to recover civil penalties. *Id*. at § 1399-*ll*(6).

C. The NYAG's First Investigation of UPS

Faced with widespread resistence to the collection of cigarette taxes by reservation cigarette sellers, the State turned its attention to the common carriers who delivered cigarettes for those sellers. In 2004, the NYAG began investigating cigarette deliveries made by UPS to residential customers, in violation of PHL § 1399-*ll*. The investigation concluded that UPS regularly delivered unstamped cigarettes to residential customers in New York and that such deliveries originated principally from reservation sellers. Many of those sellers advertised their cigarettes as "tax-free" and accepted orders over the Internet or by telephone.

After some negotiation, the NYAG and UPS agreed that in exchange for the NYAG's refraining from bringing a civil suit against UPS for its alleged violations of PHL § 1399-*ll*, UPS would enter into a settlement agreement in the form of an Assurance of Discontinuance. The AOD was executed in October 2005 and became effective approximately one month later. In the AOD, UPS agreed, *inter alia*, to comply with PHL § 1399-*ll* and to adhere to its own internal "Cigarette Policy," which also prohibits the shipment of cigarettes to consumers. The AOD also required UPS to adhere to a detailed set of policies and procedures in furtherance of its compliance with PHL § 1399-*ll*. UPS agreed to do, among other things, the following:

- Take measures to ensure that UPS's drivers, pre-loaders and other employees are "actively looking" for "indications" that a package might contain cigarettes and "alerting UPS management of such packages and attempting to intercept such packages," S. App'x at 506 ¶ 35;
- Develop and maintain a database of cigarette shippers, compiled from those sellers identified by the NYAG, UPS's own database (using such words as "cigarette," "smoke," and "tobacco"), UPS's knowledge of known cigarette retailers, and Internet searches of cigarette websites, S. App'x at 499–500 ¶¶ 21–22;
- Terminate relationships with shippers that unlawfully attempt to use UPS to ship cigarettes to unauthorized recipients and report those shippers to the NYAG, S. App'x at 502 ¶¶ 26–27;
- Instruct drivers not to deliver packages containing cigarettes to unauthorized recipients, S. App'x at 505–06 ¶¶ 34, 36;
- Promulgate and publicize to customers selling cigarettes a policy prohibiting cigarette shipments to unauthorized recipients, S. App'x at 500 ¶ 23; and
- "[A]udit shippers where there is a reasonable basis to believe that such shippers may be tendering Cigarettes for delivery to Individual Consumers, in order to determine whether the shippers are in fact doing so," S. App'x at 501 ¶ 24.

The AOD also contains a penalty provision subjecting UPS to "a stipulated penalty of $1,000 for each and every violation of [the AOD] . . . provided, however, that no penalty shall be imposed if (a) the violation involves the shipment of Cigarettes to an Individual Consumer outside the State of New York, or (b) the violation involves the shipment of Cigarettes to an Individual Consumer within the State of New York, but UPS establishes to the reasonable satisfaction of the [NYAG] that UPS did not know and had no reason to know that the shipment was a Prohibited Shipment." S. App'x at 508 ¶ 42. The AOD also explicitly states that the "rights and remedies in [the AOD] are cumulative and in addition to any other statutory or other rights that the [NYAG] may have at law or equity, including but not limited to any rights and remedies under PHL § 1399-*ll*." S. App'x at 511 ¶ 51.

UPS also represented, through the AOD, that it had informed approximately 400 shippers that had accounts with UPS that it would no longer accept packages containing cigarettes for delivery to unauthorized recipients in New York, that it had conducted an unannounced audit of ten shippers, and that it had begun providing formal training to its delivery drivers regarding PHL § 1399-*ll*. S. App'x at 496 ¶¶ 11–13.

D. The NYAG's Second Investigation of UPS

In 2011, after agents of the DTF seized packages containing cigarettes from a UPS facility near Potsdam, New York, the NYAG conducted a second investigation into UPS's shipment of unstamped cigarettes from Native American reservations to individual consumers. As a result of that investigation, the NYAG

notified UPS that it had breached the AOD with respect to packages it had delivered for shippers located on reservations near Potsdam (the "Potsdam Shippers"). After a dialogue between the NYAG and UPS, the NYAG eventually demanded that UPS pay a penalty for its violations of the AOD. UPS refused the NYAG's demand for penalties, but it did provide the State with certain delivery information regarding the Potsdam Shippers.

Approximately two years later, the New York City Department of Finance ("City Finance") served a subpoena on UPS seeking delivery records for a number of other shippers located on reservations. City Finance also conducted a number of controlled buys of unstamped cigarettes after the First Deputy Sheriff of City Finance received an email from a store called "Seneca Cigars" advertising untaxed cigarettes shipped via UPS. The controlled buys were successful: City Finance received packages containing unstamped cigarettes which had been shipped via UPS. Between the time UPS received the subpoena from City Finance in July 2013 and February 2015 (when this lawsuit was commenced) the parties engaged in a number of communications, during which time the plaintiffs provided UPS with, *inter alia*, a draft complaint. After negotiation between the parties broke down, the plaintiffs filed this lawsuit.

II. The Federal Regulatory Regime

Unlawful cigarette sales have also attracted the attention of the United States Congress. Two federal laws, relevant here, regulate the sale and shipment of cigarettes.

A. The Contraband Cigarette Trafficking Act

In 1978, Congress enacted the Contraband Cigarette Trafficking Act, which established criminal and civil penalties for trafficking in untaxed cigarettes. *See* 18 U.S.C. § 2341 *et seq*. The CCTA makes it illegal "for any person knowingly to ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes." *Id*. at § 2342(a). The CCTA defines "contraband cigarettes" as "a quantity in excess of 10,000 cigarettes, which bear no evidence of the payment of applicable State or local cigarette taxes in the State or locality where such cigarettes are found." *Id*. at § 2341(2).[5]

The CCTA is enforceable by states, through their attorneys general, as well as local governments, through their chief law enforcement officers. *See id*. at § 2346(b)(1). Such enforcers may seek "civil penalties, money damages, and injunctive or other equitable relief . . . in addition to any other remedies under Federal, State, local, or other law." *Id*. at § 2346(b)(2)–(3).

B. The Prevent All Cigarette Trafficking Act

In 2010, Congress enacted the Prevent All Cigarette Trafficking Act, 15 U.S.C. 375 *et seq*., to: "require Internet and other remote sellers of cigarettes and smokeless tobacco to comply with the same laws that apply to law-abiding tobacco retailers; create

---

[5] There are exceptions to this definition of "contraband cigarettes" that are not relevant here. *See, e.g.*, 18 U.S.C. § 2341(2) (requiring "contraband cigarettes" to also be in the possession of non-exempt persons).

strong disincentives to illegal smuggling of tobacco products; provide government enforcement officials with more effective enforcement tools to combat tobacco smuggling; make it more difficult for cigarette and smokeless tobacco traffickers to engage in and profit from their illegal activities; increase collections of Federal, State, and local excise taxes on cigarettes and smokeless tobacco; and prevent and reduce youth access to inexpensive cigarettes and smokeless tobacco through illegal Internet or contraband sales." Pub. L. No. 111–154, §§ (1)(c)(1)–(6).

To achieve these ends, the PACT Act outright bans the mailing of cigarettes through the United States Postal Service ("USPS"). *See* 18 U.S.C. § 1716E(a)(1). The PACT Act also requires cigarette sellers who ship cigarettes to consumers to comply with all applicable state and local tax requirements, 15 U.S.C. § 376a(a)(3); comply with strict registration, reporting, and record-keeping duties, *id*. at §§ 376a(a)(1)–(2), (c); and mark the outside of any packages containing cigarettes with a conspicuous label indicating that the package contains cigarettes and that federal law requires the payment of all applicable excise taxes, *id*. at § 376a(b). The PACT Act also requires the U.S. Attorney General to create a "Non-Compliant List" ("NCL") of delivery sellers of cigarettes, and to update and distribute that list on a regular basis to USPS, state attorneys general, and others. *Id*. at § 376a(e)(1).

As particularly relevant in this case, the PACT Act also imposes restrictions on common carriers' rights to transport cigarettes. The Act prohibits a common carrier from delivering any package that does not contain the required tobacco-disclosure label, if

the carrier "knows or should know the package contains cigarettes." *Id*. at § 376a(b)(2). The PACT Act further prohibits common carriers from "knowingly complet[ing] . . . a delivery of any package for any person whose name and address are on the [NCLs]." *Id*. at § 376a(e)(2)(A).

Despite wide-sweeping regulations on the sale of cigarettes, the PACT Act exempts certain common carriers from its requirements. Pursuant to these exemptions, any requirements or restrictions placed directly on common carriers by the statute do not apply to a common carrier that has entered into a qualifying settlement agreement. UPS's AOD, which is explicitly named in the statute, qualifies "if [it] is honored throughout the United States to block illegal deliveries of cigarettes or smokeless tobacco to consumers." *Id*. at § 376a(e)(3)(B)(ii)(I). The statute specifically enumerates two other qualifying settlement agreements with the NYAG, the Assurances of Discontinuance executed by DHL Holdings USA, Inc. ("DHL"), and Federal Express Corporation ("FedEx"). *See id.*

Congress similarly afforded common carriers the same exemption from enforcement of state statutory bans on cigarette shipments to consumers, such as PHL § 1399-*ll*, by providing that such state laws are preempted as applied to common carriers that qualify for PACT Act exemption. *See id.* at § 376a(e)(5)(C)(ii). The PACT Act bars a state from enforcing such a delivery ban against a common carrier "without proof that the common carrier is not exempt" from the PACT Act. *Id*.

The PACT Act empowers states, through their attorneys general, and local governments, through their

chief law enforcement officers, to bring suits against violators. *Id*. at § 378(c)(1)(A). Common carriers who violate the PACT Act are subject to a civil penalty of "$2,500 in the case of a first violation, or $5,000 for any violation within 1 year of a prior violation" *id*. at § 377(b)(1)(B), in addition to any criminal penalty and "any other damages, equitable relief, or injunctive relief awarded by the court, including the payment of any unpaid taxes to the appropriate Federal, State, local, or tribal governments," *id*. at § 377(b)(2).

III. Procedural History

A. The Complaint Against UPS

The State and City filed their first complaint against UPS on February 18, 2015, and a first amended complaint ("FAC"), on May 1, 2015. The FAC alleged that despite entering the AOD, UPS continued to service numerous contraband cigarette enterprises operating out of smoke shops located on the following Native American reservations within the State: the Seneca Cattaraugus Reservation, the Seneca Allegany Reservation, the Tonawanda Reservation, and the St. Regis Mohawk Reservation. The plaintiffs' claims were directed specifically at UPS's conduct with regard to twenty-two entities (the "Relevant Shippers"), grouped as follows:

- "Elliott Enterprise Group," consisting of Elliott Enterprise(s), Elliott Express (or "EExpress"), and Bearclaw Unlimited/AFIA;
- "Shipping Services Group," consisting of Seneca Ojibwas Trading Post, Shipping Services, and Morningstar Crafts & Gifts;
- Indian Smokes;

- "Smokes & Spirits Group," consisting of Smokes & Spirits, Native Outlet, A.J.'s Cigar, Sweet Seneca Smokes, and RJESS;
- "Native Wholesale Supply Group," consisting of Native Wholesale Supply and Seneca Promotions;
- "Arrowhawk Group," consisting of Seneca Cigarettes/Cigars, Hillview Cigars, Two Pine Enterprises, and Arrowhawk Smoke Shop;
- "Mohawk Spring Water Group" consisting of Mohawk Spring Water and Action Race Parts; and
- Jacobs Manufacturing/Tobacco.

The plaintiffs alleged that UPS serviced the Relevant Shippers by delivering unstamped cigarettes from their businesses to residences in the State and City. The plaintiffs claimed that the records they had obtained indicated that between January 2010 and November 2014, UPS made over 78,000 deliveries to residents throughout the State and City on behalf of the Relevant Shippers. The complaint alleged that UPS knew that these shipments contained unstamped cigarettes based on, *inter alia*, UPS's prior experience in connection with the NYAG's investigation and the AOD; numerous court decisions regarding Native American reservation smoke shops' noncompliance with the State's cigarette tax regime; widespread media reporting; UPS's entering into tobacco delivery contracts with most or all of the reservation smoke shops for which UPS shipped and delivered cigarettes; UPS employees visiting, observing, and picking up packages for reservation smoke shops;

and UPS's general practice of enmeshing itself deeply in its customers' businesses.

The FAC asserted fourteen causes of action seeking various forms of relief under the CCTA, the PACT Act, PHL § 1399-*ll*, the AOD, and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961–68.[6]

B. Pre-Trial Motion Practice

On May 22, 2015, UPS filed a motion to dismiss the FAC pursuant to Rule 12(b)(6). UPS raised several arguments in its motion, including that (1) all claims must be dismissed for failure to plausibly allege that UPS delivered cigarettes or that UPS knew that those deliveries contained cigarettes, (2) the CCTA claims must be dismissed because the plaintiffs did not allege that UPS engaged in any single transaction involving the shipment of more than 10,000 unstamped cigarettes, (3) the PACT Act claims must be dismissed because UPS is exempt from suit based on its AOD, and (4) the PHL § 1399-*11* claims must be dismissed because that statute is preempted by the PACT Act.

The district court rejected several of UPS's claims, including UPS's contention that the plaintiffs had not adequately pled that UPS knowingly delivered unstamped cigarettes, and UPS's argument that the plaintiffs' CCTA claims failed because the FAC did not allege that UPS participated in any transaction in which it shipped more than 10,000 unstamped cigarettes.

---

[6] The district court awarded summary judgment to UPS on the RICO claims. That ruling is not challenged on appeal.

Lastly, the court addressed UPS's contention that the claims brought pursuant to the PACT Act and PHL § 1399-*ll* were subject to dismissal because the PACT Act exempts UPS from its requirements so long as the AOD "is honored throughout the United States to block illegal deliveries of cigarettes or smokeless tobacco to consumers." 15 U.S.C. § 376a(e)(3)(B)(ii)(I). In addressing whether the PACT Act and PHL § 1399-*ll* claims against UPS should be dismissed, both parties' briefing assumed that the "is honored" language in the exemption provision refers to whether UPS has *complied* with the terms of the AOD. UPS argued that the plaintiffs had failed to adequately allege that UPS was not entitled to the benefit of the exemption due to violations of the AOD. On the other hand, the plaintiffs argued that by alleging that UPS had breached the AOD by violating several of its provisions, they had adequately alleged that UPS had not "honored [the AOD] throughout the United States."

On July 30, 2015, the district court held oral argument on the motion to dismiss; during that argument, the parties maintained the positions they had taken in their briefs. Subsequently, on August 26, 2015, the court issued an order informing the parties that it was considering a reading of the PACT Act's exemption provision that had not previously been advanced by either party. The court explained that, under its proposed alternative reading, the exemption provision is a definitional provision that merely defines the types of settlement agreements that qualify for exemption and does not purport to reach questions of compliance or noncompliance with the obligations assumed under any particular agreement. *See New York v. United Parcel Service, Inc.*, 179 F. Supp. 3d

282, 291 (S.D.N.Y. 2016). Because the parties had not addressed that statutory reading in their briefing or at oral argument, the court invited the parties to submit supplemental briefing that did so.

The parties each filed supplemental briefs on September 9, 2015. UPS argued that the text and structure of the PACT Act compelled the interpretation that the court was considering—that the exemption provision was merely definitional. The plaintiffs' supplemental brief continued to advocate for the reading they had previously advanced—that UPS was entitled to the exemption only if it had fully complied with the requirements imposed on it by the AOD—and that the allegations in their complaint were sufficient to vitiate the exemption.

On September 16, 2015, the district court issued a decision dismissing the claims brought pursuant to the PACT Act and PHL § 1399-*ll*, and denying UPS's motion as to the remaining claims. *See New York v. United Parcel Service, Inc.*, 131 F. Supp. 3d 132 (S.D.N.Y. 2015). The court's dismissal of the PACT Act and PHL § 1399-*ll* claims was premised on the interpretation of the exemption provision that the court had advanced in its earlier order. The court understood the term "honored" in the exemption provision to mean "recognized" and thus held that UPS would be exempt from the PACT Act if the AOD had appropriate breadth such that all states in the country *recognized* the AOD. The court concluded that because the FAC failed to allege that the AOD had not been recognized by states nationwide, UPS's exemption from the PACT Act remained in place. Given that the plaintiffs had failed to even allege that the AOD had not been recognized nationwide, the court concluded

that it "need not determine the precise procedure by which a state must honor an agreement." *Id.* at 142.

On October 21, 2015, the plaintiffs moved for leave to file a second amended complaint ("SAC"), seeking to add back the previously dismissed claims brought under the PACT Act and PHL § 1399-*ll*. The basis for the motion was that the plaintiffs had not anticipated the court's interpretation of the PACT Act, and as a result had not previously had an opportunity to plead such claims in light of that interpretation. On November 23, 2015, the court granted the plaintiffs' motion and the plaintiffs filed the SAC on November 30, 2015.

The SAC alleged that the AOD is *not* recognized by all states in the nation. It noted several states that have their own cigarette delivery ban statutes and do not recognize the AOD. It also explained that under the AOD, no state other than New York has any right to enforce the AOD, nor any right to obtain a penalty for an illegal cigarette delivery into that state. Further, the plaintiffs revived their compliance interpretation of the exemption provision, alleging that because UPS had not complied with the terms of the AOD, the PACT Act's exemption provision was inapplicable to the claims it had brought under the PACT Act and PHL § 1399-*ll*.[7]

---

[7] The plaintiffs later moved for leave to file a third amended complaint ("TAC"), for the purpose of broadening their allegations of UPS's misconduct. The plaintiffs claimed that discovery had revealed that UPS had failed to conduct audits of customers it had reason to believe were shipping cigarettes, failed to train its workers to prevent cigarette trafficking, and failed to maintain internal databases of tobacco shippers, all of which violated

On February 2, 2016, UPS moved for partial summary judgment on the PACT Act and PHL § 1399-*ll* claims seeking to have them dismissed once again on the ground that UPS is exempt from both statutes since the AOD is recognized nationwide. UPS acknowledged that the plaintiffs had submitted declarations from assistant attorneys general in six states who had asserted that they do not have the right to enforce the AOD, and therefore would not utilize the AOD to block deliveries of cigarettes to consumers. However, UPS argued that the "states should be deemed to 'honor' an agreement enumerated in the Exemption Provision as long as the agreement is still active nationwide." UPS Memo of Law in Support of its Motion for Partial Summary Judgment at 10, *New York v. UPS*, 179 F. Supp. 3d 282 (S.D.N.Y. 2016) (No. 15 Civ. 1136 (KBF)), ECF No. 173. Put another way, UPS explained, a state must honor an agreement if "the parties to the agreement have not terminated the agreement or otherwise rendered it inactive, and the policies and practices memorialized in the agreement are still maintained nationwide." *Id*.

On the other hand, the plaintiffs contended that the exemption provision did not exempt UPS when it was enacted, but, instead, provided only for the possibility of future exemption upon all fifty states affirmatively assenting to the AOD, a condition that UPS

---

specific provisions of the AOD. The plaintiffs also claimed that discovery had revealed that in addition to serving brick-and-mortar smoke shops on Indian reservations, UPS also handled accounts that had no physical retail location, but which UPS must nevertheless have known were cigarette dealers. UPS consented to the plaintiffs' motion. The court granted leave and the plaintiffs filed the TAC on February 24, 2016.

had never fulfilled. The plaintiffs argued that by providing declarations of several state attorneys general and a representative of the National Association of Attorneys General stating that they do not "formally acknowledge" or "accept" the AOD, they had established that the AOD is not honored nationwide, and therefore UPS had lost its exemption from the PACT Act.

The court issued its summary judgment decision on April 19, 2016, at which time it took another look at the exemption provision. *United Parcel Service, Inc.*, 179 F. Supp. 3d at 282. It explained that while the phrase "'is honored' most plausibly means 'is recognized,'" the passive language of the exemption provision is ambiguous as to whether it means "'is honored [by states nationwide],' or 'is honored [by UPS nationwide],' or both." *Id*. at 293 (alterations in original). Therefore, while the court had previously granted in part UPS's motion to dismiss concluding that UPS is entitled to the exemption if the AOD was "recognized" by all states in the nation, based on the parties' fuller arguments and the evidence that had been developed, the court came to the conclusion that "is honored" also requires that UPS *itself* give the AOD nationwide breadth.

The court's updated understanding was that the exemption provision "does not require that a carrier's policies be 100% effective at preventing the shipment of cigarettes to consumers," but that "UPS may not retain the exemption simply by maintaining the requisite policies nationwide *in name only*." *Id*. at 306 (emphasis in original). Thus, it concluded that "if [the] plaintiffs could present evidence creating an inference

that the effectiveness of UPS's policies is so compromised that these policies are not in fact in place, that would be sufficient to raise a genuine issue of fact for trial." *Id*.

After reviewing the factual materials submitted by the parties, the court concluded that the plaintiffs' evidence did "not support the inference that UPS's purported non-compliance [was] so severe that UPS no longer 'honor[ed]' the AOD throughout the United States as that term is used in [the exemption provision]." *Id.* But, since the court had changed its interpretation of the exemption provision, it allowed the plaintiffs an opportunity to make an additional factual showing in an attempt to raise a genuine issue of material fact. It explained that two types of evidence would be relevant to a determination that UPS had not honored the AOD: *first*, the plaintiffs could present evidence of a sufficiently large number of instances of shipments of contraband cigarettes to suggest that UPS had turned a blind eye toward such unlawful shipments; and *second*, the plaintiffs could present evidence showing that UPS policymakers had in fact turned a blind eye to shipments of contraband cigarettes.

At a hearing held on June 7, 2016, the plaintiffs made an oral presentation to the court that included both types of relevant evidence. UPS responded with its own presentation. By the end of the hearing the court was convinced that there was a triable issue of fact as to whether UPS had given nationwide effect to the AOD. It noted that the plaintiffs had made a sufficient showing that UPS had, in large part, abandoned the AOD at least in New York.

C. UPS's Rule 26 Motion

While the parties were engaged in motion practice over the PACT Act and PHL § 1399-*ll* claims, they continued to have discovery disputes. On January 20, 2016, UPS submitted a letter motion to the court seeking to compel the plaintiffs to provide more complete responses to certain interrogatories issued during discovery. On February 1, 2016, the court denied the motion as untimely, reasoning that UPS had failed to raise any issue regarding plaintiffs' interrogatory responses in either of the two discovery conferences held by the court, nor had it spoken up in response to the court's April 3, 2015, scheduling order. At the second conference, which took place on November 18, 2015, the court expressly enumerated the outstanding discovery and other issues that remained to get the matter ready for trial, which did not include the issue UPS raised in its letter motion. In denying the motion, the court explained that "it was incumbent upon UPS to raise any additional discovery issues that it had and whether it sought to obtain further responses from plaintiffs with respect to their interrogatory responses" at the second discovery conference, but that instead, "UPS affirmatively stated that it was seeking to move the case forward and noted that fact discovery as to plaintiffs had expired on November 17, 2015." S. App'x at 30.

Nevertheless, the court recognized that UPS's concern about lacking information to prepare for trial was important. It noted that given the particular parties in the case and the nature of the claims, UPS had not had the opportunity to depose representatives of the plaintiffs and ask about the factual bases for their claims. The court therefore ordered the plaintiffs to

provide UPS with information regarding the nature of the plaintiffs' expected proof for an exemplar shipper group for which it expected to establish UPS's liability. Specifically, the district court required the plaintiffs to provide UPS with the following information for an exemplar shipper: exemplars of shipments alleged to have contained cigarettes or the plaintiffs' basis (if circumstantial) as to what proof would be offered as to this element, the facts and circumstances showing UPS's knowledge of the contents of shipments (or, if circumstantial, a clear statement of circumstantial facts), and a calculation of each plaintiff's damages as to the specific shipper.

The plaintiffs complied with that order in a disclosure dated March 3, 2016. This disclosure (the "Arrowhawk Letter") provided detailed information for the "Arrowhawk Group" of shippers. The Arrowhawk Letter disclosed that the plaintiffs would use UPS's billing and delivery spreadsheets, produced by UPS and identified by Bates number, to calculate how many packages UPS shipped for the Arrowhawk Group. Specifically, it listed six UPS account numbers associated with the Arrowhawk Group, and identified the specific UPS spreadsheets containing packages for those account numbers. It also explained that it would prove that the shipments identified contained cigarettes with, *inter alia*, testimony regarding the nature of the Arrowhawk Enterprise as a cigarette dealer and shipping invoices listing the contents of packages shipped by UPS.

The Arrowhawk Letter also explained that the plaintiffs would attempt to prove UPS's knowledge of the contents of packages shipped by the Arrowhawk Group by presenting evidence of the following:

- "Pickup location was a warehouse next to a retail business named 'Arrowhawk Smoke Shop' that prominently displayed outdoor advertisements for cigarettes, and which had a visible inventory that consisted almost exclusively of large stacks of cigarette cartons;
- UPS drivers purchased cigarettes and/or received cigarettes for free from employees of the Arrowhawk Enterprise at both the smokeshop and the warehouse;
- UPS drivers routinely observed the following inside the warehouse:
  - Cases of cigarettes with visible printed markings indicating their contents;
  - Cases of cigarettes cut in half and left open, revealing clearly-marked cartons of cigarettes inside;
  - No inventory items other than these cases and cartons of cigarettes;
  - Arrowhawk Enterprise employees visibly opening cases and repackaging cigarette cartons into other boxes for shipment by UPS;
  - Custom-made boxes used for the UPS shipments, which were marked with '[x-y] carton' indicating how many cigarette cartons that size of box could hold;
- UPS drivers returned packages to the warehouse that had been rejected by customers. These packages contained cigarettes, and at least some were partially open when returned;

- The totality of the circumstances, including the volume of shipments, the location of the pickups on an Indian reservation, and the other shipping location descriptors, indicated that the Arrowhawk Enterprise was a cigarette dealer, especially given the residential addresses of the consignees and the pattern of repeat shipments;
- UPS has admitted that it knew that any cigarettes being shipped from Indian reservations in New York would be untaxed contraband."

J. App'x at 424.

Lastly, the Arrowhawk Letter set forth a chart indicating that the State and City would each seek damages and penalties for violations of the CCTA, RICO, PACT Act, PHL § 1399-*ll*, and the AOD.[8] The chart indicated that the plaintiffs would seek to recover the unpaid taxes on each carton of cigarettes UPS shipped for the Arrowhawk Group under the CCTA and PACT Act,[9] per-violation penalties for each package and carton of cigarettes shipped under the PACT Act and PHL § 1399-*ll*, respectively, and a $1,000 stipulated penalty for each package that UPS had failed to audit in accordance with the audit provision of the AOD. It revealed that the plaintiffs sought more than $83 million in damages and penalties under the CCTA, PACT

[8] The one exception was that the City was not seeking penalties under the AOD given that it was not a party to that agreement.

[9] The Arrowhawk Letter explained that certain calculations were contingent on issues that would be resolved later, such as the weight of each package and the number of cigarette cartons per package.

Act, and PHL § 1399-*ll*, plus $8 million more under the AOD, with respect to the Arrowhawk Group alone.

D. The District Court's Liability Opinion

The case was tried to the bench on September 19–29, 2016. The parties called thirty-eight witnesses and submitted more than 1,000 documents into evidence. After receiving post-trial submissions and hearing closing arguments, the district court issued a 219-page opinion constituting its findings of fact and conclusions of law. *See New York v. United Parcel Service, Inc.*, 253 F. Supp. 3d 583 (S.D.N.Y. 2017).

The trial evidence focused on twenty-two shippers located on four Native American reservations in upstate New York. The court found that UPS knowingly transported unstamped cigarettes for seventeen of the shippers between 2010 and the date this lawsuit was filed. The court also found that UPS failed to audit those seventeen shippers plus three additional ones (collectively the "Liability Shippers"), despite having reasonable grounds to believe that each of them was delivering cigarettes to unauthorized recipients, in violation of the AOD. In support of its findings, the court recited "exemplar" facts in its decision that were representative of the evidence introduced at trial.

The district court found UPS's efforts to comply with the AOD were "inadequate" and "fell woefully short" between 2010, when the suit was filed, and 2013. *Id*. at 603.[10] Despite UPS's having had a "clear

[10] The court found that in 2013, faced with the prospect of a lawsuit, UPS increased its efforts to comply with the AOD. UPS's efforts in 2013 and 2014 were part of its "ramping up" process to get into compliance with the AOD, which was not

awareness" when it signed the AOD that it had assumed a number of explicit obligations which required affirmative efforts and vigilance to ensure compliance with its terms, *id*., "UPS's lack of commitment to true, active AOD compliance pervaded its corporate culture," *id*. at 604. Those in positions of responsibility at UPS knew that, in many respects, "UPS was 'flying blind' regarding whether Indian-reservation-based customers were shipping cigarettes." *Id*. The evidence showed UPS's wholesale disregard of the AOD's terms and its brazen disregard for the spirit of the agreement.

First, despite the AOD's express mandate that UPS train relevant personnel about its "Cigarette Policy" and various compliance measures, UPS delivered "little actual training." *Id*. at 607. The only training that UPS provided to its personnel was a three-minute annual pre-work message on tobacco compliance. Several employees did not recall the existence of the training and others recalled its existence but not its content. The court thus concluded that the little training UPS did conduct was "inadequate to properly train employees on UPS's Tobacco Policy and was inadequate to train employees on AOD compliance measures or on how to recognize signs that shippers may have been tendering packages with cigarettes." *Id*. The testimony and evidence revealed to the court that UPS's training on tobacco issues was designed merely to check the box, rather than to ensure that

---

achieved until the filing of the lawsuit on February 18, 2015. Thus, while UPS had transformed itself in time to avoid the imposition of an injunction or independent monitor, it was too late to avoid liability for its past conduct.

employees would observe and report signs of cigarette shipments.

Second, despite the AOD's requirement that UPS audit shippers whenever "there is a reasonable basis to believe that such shipper may be tendering Cigarettes for delivery to Individual Consumers," UPS implemented no formal audit policies for cigarette shippers and provided no audit training to its employees. The court found that UPS's audits were conducted far too infrequently to comply with the AOD. The district court reasoned that UPS knew that certain shippers had names that included the word "tobacco," "cigar," or "smokes," indicating a certainty of tobacco shipments and a reasonable possibility of cigarette shipments; it knew that a number of others (without eponymous names) sold cigarettes, making shipments all the more likely; it knew that certain reservation shippers refused to disclose what they were shipping; it knew that others had opened multiple accounts or that new accounts were opened at the same addresses as ones recently terminated for cigarette shipments; and, of course, all of this was against the backdrop that those shippers were located on reservations that had been associated with sales and shipments of unstamped cigarettes for years. Despite this knowledge, the district court noted that UPS often failed to conduct audits until it was actually confronted with impermissible cigarette shipments in fortuitous ways, such as when cigarettes fell "out of a broken box." *See id*. at 615.[11]

---

[11] UPS pointed to 28 audits it conducted between 2011 and 2016, several of which were of the Relevant Shippers. But the

Third, UPS failed to utilize information available to it in various places that provided employees, at all levels of its corporate structure, insight into the fact that it was regularly shipping unstamped cigarettes. For example, UPS received the NCLs created by the United States Department of Justice pursuant to the PACT Act, but inexplicably failed to use them to identify at-risk shippers; UPS ignored inquiries it received from customers regarding lost or damaged packages (so called "tracers") which indicated that the customers were purchasing cigarettes from reservation sellers; and UPS drivers and sales account personnel who met with UPS's customers saw signage on or near the Liability Shippers' storefronts advertising cigarette sales and indeed saw cigarettes on display racks at the locations of the Liability Shippers.

Fourth, UPS took no action despite knowing that certain of its customers were routinely shipping unstamped cigarettes. UPS account executives entered details of meetings and communications with some of the Liability Shippers into a UPS database, evidencing their knowledge that their customers were shipping cigarettes. Those same account executives were responsible for obtaining a tobacco agreement (memorializing the seller's notification of the prohibition against cigarette deliveries to consumers) from each of their customers who would be shipping tobacco but frequently failed to do so in violation of the AOD's express terms. UPS allowed its personnel to rely heavily

---

court noted that 26 of those audits were conducted between 2013 and 2016, at a time when UPS had already received a subpoena and was aware of a likely impending lawsuit or had already been sued.

(and often exclusively) on what their shippers claimed to be shipping even in the face of contrary evidence.

Fifth, the district court found that UPS viewed the passage and implementation of the PACT Act as a business opportunity. The court explained that "as other couriers were required to terminate cigarette shippers as a result of the PACT Act, UPS picked up the business." *Id*. at 618. It noted that the "evidence supports an increase in shipments via UPS by the Relevant Shippers in the months immediately following the effective date of the PACT Act." *Id*. Account personnel and others at UPS knew that this surge was due, at least in part, to capturing the business lost by USPS. The court did "not buy" UPS's contention that it did not "put two and two together" to figure out that the passage of the PACT Act is what led it to newfound business for customers located on Native American reservations. *Id*. at 605.

Given that UPS had violated "so many different AOD obligations as to so many shippers," the court "easily" found, *id*. at 664, that UPS "persistent[ly] fail[ed] to honor the AOD," vitiating its PACT Act exemption, *id*. at 665.[12] The court thus found UPS liable for violations of the AOD, PACT Act, PHL, and the CCTA. Specifically, the court found UPS liable for vi-

[12] The court rejected UPS's argument that because the plaintiffs had proven only violations of the AOD in New York, that it could not be shown that the AOD was not honored "nationwide." The court held "it would be odd to find that an AOD was not honored in its home state (here, New York) due to flagrant and repeated violations, but that because the home-state Attorney General did not prove violations in other states, the AOD was nonetheless 'honored' nationally." *Id*. at 664.

olating the audit provision of the AOD, and it interpreted the audit provision to mean that UPS committed a new violation every time UPS shipped a package on behalf of a Liability Shipper once it had a reasonable basis to believe such shipper was shipping cigarettes. It held UPS liable for violating the PACT Act by knowingly delivering packages for five of the Liability Shippers that appeared on the NCLs. The court also found that UPS was liable under PHL § 1399-*ll* for knowingly delivering cigarettes, on behalf of seventeen of the Liability Shippers, to statutorily unauthorized recipients.

Lastly, the court found that UPS violated the CCTA and explained that it would award the plaintiffs compensatory damages for lost tax revenues equivalent to half of the amount of unpaid taxes on the cigarettes that UPS shipped for the Liability Shippers. The court limited the compensatory damage award to half of the state and local excise taxes that went unpaid on UPS's cigarette shipments on the reasoning that half of the purchasers would have managed to buy untaxed or lower-taxed cigarettes by some other means, that is, that they would have been "diverted" away from reservation sellers and found other ways to obtain untaxed cigarettes if UPS had complied with the law by declining those shipments.

The court then turned to "the complicated question of determining the appropriate penalties to be imposed for the violations of the AOD and the various statutory schemes." *Id*. at 695. Since the plaintiffs sought per-violation penalties under the AOD, PACT Act and PHL § 1399-*ll*, the court was required to make

determinations about how many packages and cartons of cigarettes UPS actually shipped for each of the Liability Shippers.

At trial, the plaintiffs had contended that the number of *packages* UPS shipped for each of the Liability Shippers, which was necessary to calculate both the AOD and PACT Act penalties, could be easily determined from UPS's delivery spreadsheets: they sorted the spreadsheets by the account numbers for the Liability Shippers, removed duplications, and added up the number of packages shipped.

UPS, for its part, argued that simply tallying the packages for each Liability Shipper would capture certain categories of packages that should be excluded, such as letter size envelopes, packages weighing less than one pound (since a carton of cigarettes weighs approximately one pound), and packages that UPS shipped *to* the Liability Shipper rather than just ones *from* the Liability Shippers. The court noted that because the spreadsheets are in Excel format and are searchable, it would be straightforward to exclude such categories from the package count.

The method by which the court calculated the number of cigarette *cartons* UPS shipped for each Liability Shipper was slightly more complicated. At trial, the plaintiffs understandably did not present direct evidence showing the exact number of cartons of cigarettes contained in each of the packages that UPS shipped for the Liability Shippers. That would have been an impossible task. Rather, the plaintiffs presented sample evidence for each of the Liability Shippers, showing that the packages UPS shipped for such shippers contained cigarettes. Using such evidence,

the court itself calculated a reasonable approximation as to the particular percentage of each Liability Shipper's packages that contained cigarettes. For some of the Liability Shippers that percentage was 100% and for others it was as low as 27%. The court explained that it would calculate the number of cartons of cigarettes that UPS shipped for each of the Liability Shippers by: taking the number of packages that UPS shipped for each Liability Shipper, multiplying it by the approximation of the percentage of packages for each Liability Shipper that contained cigarettes, summing the weights of all such packages, and then dividing by one pound per carton of cigarettes.

Given the complexities in the per-violation penalty calculations, the court engaged the assistance of the parties in actually completing the calculations, applying the relevant dates, definitions, and findings it had provided. It ordered the parties to provide it with certain information to help it assess the appropriate quantum of penalties.[13]

---

[13] UPS moved to strike the plaintiffs' damages case because the plaintiffs failed to provide it with a robust pretrial damage computation pursuant to Fed. R. Civ. P. 26 and failed to anticipate evidentiary issues with the trial presentation of their damages claim. The court found preclusion of the plaintiffs' damages case unwarranted for several reasons: (1) the Arrowhawk Letter complied with the court's order and provided UPS with enough information regarding the nature of the plaintiffs' proof, (2) the plaintiffs in fact used the type of evidence and testimony that they had identified in the Arrowhawk Letter, (3) UPS had declined the plaintiffs' offer to provide it with a full damages and penalties calculation for each shipper several weeks before trial, and (4) UPS undoubtedly possessed the information to replicate the same calculation in the Arrowhawk Letter for each shipper.

E. The District Court's Damages and Penalties Opinion

After the district court received the parties' submissions, it issued an opinion and order on damages and penalties. *See New York v. United Parcel Service, Inc.*, 15–cv–1136 (KBF), 2017 WL 2303525 (S.D.N.Y. May 25, 2017). The court explained that the plaintiffs had appropriately complied with the court's order, but that UPS had "refused to include a majority of the information requested by the Court," providing package counts with respect to only three of the Liability Shippers.[14] *Id*. at *2. The court thus deemed UPS to have waived arguments relating to the calculations submitted by the plaintiffs and the court calculated its determination of damages and penalties using the uncontested numbers of packages and cartons supplied by the plaintiffs.

Importantly, the court noted that the damages and penalty calculations were ultimately based on known data points: penalty ranges set forth in the AOD and statutory schemes at issue, and compensatory damages based on the statutory tax rate imposed on a carton of cigarettes. The court rejected UPS's argument that it was somehow prejudiced by the plaintiffs' inadequate pre-trial disclosure, concluding that UPS's complaints "[rang] hollow" given that it had a detailed disclosure regarding the Arrowhawk Group yet did not identify any rebuttal witnesses or testimony. 253 F. Supp. 3d at 686. It viewed UPS as having made deliberate tactical choices to position its preclusion argument.

[14] The court explained that UPS's submission "demonstrate[d] a lack of cooperation and, frankly, odd abrasiveness" which was "consistent with UPS's lack of acceptance of responsibility for their actions at issue in this case." *Id*. at *2.

The court believed that significant penalties were appropriate and it explained the factors that it considered in assessing appropriate penalties. *First*, it cited UPS's level of culpability, including "[n]umerous separate acts by numerous UPS employees [that] allowed vast quantities of unstamped cigarette shipments to be delivered to unauthorized recipients in New York." *Id*. at *3. *Second*, it cited the harm to public health caused by UPS's conduct, noting, however, that it was also the case that UPS, as the transporter rather than manufacturer or seller of cigarettes, bears a lower level of culpability for the impact on public health than other entities. *Third*, the court explained that UPS's limited profits from the violations would suggest a relatively low penalty. *Lastly*, the court noted that UPS could bear a hefty fine which would "capture the attention of the highest executives in the company." *Id*. at *4.

Finally, the court set out its damages and penalty determination with respect to each statutory regime and the AOD. With respect to the AOD, the court awarded the State the $1,000 stipulated penalty for every package that UPS shipped on behalf of a Liability Shipper, once it had a reasonable basis to believe that such shipper was tendering cigarettes. The court used the plaintiffs' tally of the packages for each Liability Shipper (having applied the appropriate dates from the liability opinion), to calculate penalties of $80,468,000 due to the State under the AOD.

With respect to the PACT Act, the court calculated the maximum per-violation penalties authorized by the statute: $2,500 for the first violation and $5,000 per subsequent violation for every package UPS shipped for the five Liability Shippers who were on

the NCLs. Using the package counts provided by the plaintiffs, the court concluded that imposing the maximum per-violation penalties would entitle the State to $70,517,500 and the City to $86,182,500. Given the "totality of the facts and circumstances" of the case, however, the court awarded the plaintiffs only 50% of the maximum available PACT Act penalties: $35,258,750 to the State and $43,091,250 to the City. *Id*. at *7.

With respect to PHL § 1399-*ll*, the court applied the $5,000 per-violation penalty permitted by the statute to the number of cartons UPS had shipped for each of the Liability Shippers. It calculated that the maximum penalty award under the statute was $82,820,000 to the State and $74,690,000 to the City. Again, however, considering the "totality of the facts and circumstances" of the case, the court awarded the plaintiffs 50% of the maximum available PHL § 1399-*ll* penalties: $41,410,000 to the State and $37,345,000 to the City. *Id*. at *8.

Lastly, the district court awarded the plaintiffs compensatory damages under the CCTA. The court measured the compensatory damages "by plaintiffs' lost tax revenue attributable to the number of packs/cartons of cigarettes UPS knowingly shipped to the Liability Shippers, using a 50% diversion rate." *Id*. at *9. Given the court's findings on the number of cartons of cigarettes UPS shipped for which no tax was paid, it awarded compensatory damages for unpaid taxes of $8,679,729 to the State and $720,885 to the City under the CCTA.[15]

---

[15] The court also awarded the plaintiffs $1,000 each in nominal penalties under the CCTA.

The total award against UPS summed to $246,975,614.

DISCUSSION

Both UPS and the plaintiffs appeal from the district court's post-trial rulings. UPS urges us to overturn both the district court's liability and damages rulings. With respect to liability, UPS argues that the district court erred in: (1) finding it non-exempt from the PACT Act; (2) awarding the State penalties under the AOD for violations of the audit obligation; and (3) finding it liable for violations of the CCTA. With respect to damages, UPS argues that the district court erred in: (1) awarding the plaintiffs damages and penalties based on the evidence presented, which it claims should have been precluded; (2) awarding the plaintiffs 50% rather than only 5.4% of the amount of unpaid taxes on the cigarette cartons UPS transported in violation of the CCTA; and (3) imposing a "gargantuan" penalty award upon it, Appellant's Br. at 41 & 77. The plaintiffs cross-appeal on the ground that the district court erred in not awarding them the full amount of unpaid taxes.

I. Standard of Review

"In evaluating a challenge to a judgment entered after a bench trial, we review the district court's findings of fact for clear error and its legal conclusions *de novo*." *Zalaski v. City of Hartford*, 723 F.3d 382, 388 (2d Cir. 2013). Among the conclusions of law that we review de novo are the court's interpretations of the statutes at issue and the AOD. *See Olin Corp. v. Ins. Co. of N. Am.*, 221 F.3d 307, 320 (2d Cir. 2000).

We review the district court's decision on whether to preclude a party's damages case and rulings on discovery sanctions for abuse of discretion. *See Patterson v. Balsamico*, 440 F.3d 104, 120 (2d Cir. 2006); *Funk v. Belneftekhim*, 861 F.3d 354, 365 (2d Cir. 2017). We also review the district court's assessment of damages and penalties for abuse of discretion. *See Advance Pharmaceutical, Inc. v. United States*, 391 F.3d 377, 398 (2d Cir. 2004).

II. The Liability Theories

We start with UPS's several attacks on the district court's liability rulings: *first*, that it is exempt from the PACT Act and PHL § 1399-*ll* because it "honored [the AOD] throughout the United States;" *second*, that the AOD's penalty provision does not authorize penalties for violations of the audit obligation; and *third*, that the plaintiffs failed to establish the threshold quantity and scienter elements of the CCTA.

A. UPS Did Not Honor the AOD and is Therefore Subject to Liability Under the PACT Act and PHL § 1399-*ll*.

UPS contends that the district court erred by holding it liable for violations of the PACT Act and PHL § 1399-*ll*.[16] It does not dispute that its conduct would violate those statutes if they apply here—because UPS knowingly made deliveries for NCL shippers, in violation of the PACT Act, and because UPS

[16] For the most part, in the interest of simplicity, we discuss the question in terms of whether UPS is exempt from the provisions of the PACT Act. Because the PACT Act preempts state laws such as PHL § 1399-*ll*(2) only when the PACT Act exemption applies, UPS's liability under both the PACT Act and PHL § 1399-*ll*(2) turns on the applicability of the PACT Act exemption.

knowingly shipped cigarettes to recipients not authorized to receive them, in violation of PHL § 1399-*ll*(2). Rather, UPS asserts that it was error for the district court to find it liable under those statutes because it is exempt from the PACT Act, and PHL § 1399-*ll* is therefore preempted.

The exemption provision of the PACT Act states that UPS, FedEx, and DHL are exempt from the PACT Act if their AODs are "honored throughout the United States to block illegal deliveries of cigarettes." 15 U.S.C. § 376a(e)(3)(B)(ii)(I). The district court interpreted that provision to mean that in order to avail itself of the exemption, UPS was itself required to honor the AOD throughout the United States. It concluded that UPS had not so honored the AOD, because UPS had violated so many different AOD obligations as to so many shippers, from the time the AOD became effective until the date the lawsuit was filed, and because the widespread violations documented at trial resulted from a general corporate culture of disregard for the AOD and from the absence of UPS officials at every level to take reasonable steps to ensure compliance. UPS argues that it was error for the district court to take a compliance-based approach to determining whether the AOD was honored within the meaning of the exemption provision.

In interpreting the exemption provision, we look first to its plain language. *See Nwozuzu v. Holder*, 726 F.3d 323, 327 (2d Cir. 2013). The PACT Act provides that the Act's compliance obligations, as well as state delivery bans such as PHL § 1399-*ll*, "shall not apply to a common carrier that is subject to" one of various agreements, including UPS's AOD with the State. 15

U.S.C. § 376a(e)(3)(A). However, that exemption applies only "if [the carrier's agreement] is honored throughout the United States to block illegal deliveries of cigarettes." *Id*. at § 376a(e)(3)(B)(ii)(I). Thus, as we have previously stated, UPS is exempt from the PACT Act, and PHL § 1399-*ll* is preempted, to the extent that the AOD is "honored throughout the United States to block illegal deliveries of cigarettes."

The most natural reading of the plain language of the exemption provision—and indeed, the reading initially adopted by *both* sides in litigating UPS's original motion to dismiss the complaint—is that a party "honors" an agreement by complying with it. The relevant dictionary definitions (that is, those that define "honor" as it relates to contracts), expressly advise that to "honor" a contract means to live up to its terms. *See* MERRIAM WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2008) (defining "honor" as "to live up to or fulfill the terms of"); NEW OXFORD AMERICAN DICTIONARY (3d ed. 2015) (defining "honor" as "[f]ulfill (an obligation) or keep (an agreement)").

That definition fully comports with ordinary usage. One does not "honor" a contract merely by agreeing to it in the first instance, or by acknowledging the existence of a contractual duty. When one asks her contractual counterparty whether, in light of some recent event, he still intends to "honor" their contract, she is asking whether he intends to comply with his obligations. When a customer asks a store clerk whether she will "honor" the store's return policy, he is asking whether the store will comply with the terms of its policy and process a refund for the returned item. Similarly, contrary to the dissent's suggestion, Dissenting Op. at 6-7, a bank does not "honor" a check

simply by verbally acknowledging the validity of the obligation; a bank "honors" a check by actually *paying* on it. *See* BLACK'S LAW DICTIONARY (11th ed. 2019) (defining the verb "honor": "[t]o accept or pay (a negotiable instrument) when presented."). These definitions support the district court's ultimate conclusion that UPS could "honor" the AOD only insofar as it "live[d] up to" or "fulfill[ed]" its obligations under the agreement.

The context makes clear, moreover, that it is UPS itself that must "honor" the AOD to obtain its exemption. Although the use of the passive voice does not represent exemplary drafting, no other meaning makes sense. The meaning suggested early in the litigation by the district court, that it is the 49 states other than New York that must "honor" the AOD by somehow "recognizing" the agreement is particularly far-fetched, and indeed UPS conspicuously fails to advance that interpretation on appeal. That omission is unsurprising. The district court itself abandoned this proposed meaning, and both the evidentiary submission by the plaintiffs below and the amicus submission on behalf of 18 states, the District of Columbia, and Puerto Rico in this Court make clear that the AOD was not adopted nationwide by state attorneys general or other law enforcement officials. Nor is there any evidence in the record that *any* State ever announced its intention to accept UPS's promises to New York in the AOD as a substitute for any obligation UPS would otherwise have under the PACT Act or state law.

UPS and New York, as the only parties to the AOD, are the only parties capable of "honoring" it. Reading the exemption provision as a whole makes

clear that, as between those parties, it is UPS that must do the "honoring." The party who must "honor" the AOD must do so "throughout the United States to block illegal deliveries of cigarettes." That could be a directive only to UPS. It would make no sense to require New York to "honor [the AOD] throughout the United States to block illegal deliveries of cigarettes." The PACT Act was not a demand that New York become the cigarette-tax enforcer for the entire United States. And indeed, the AOD itself makes clear that New York could not fulfill such a role, since the AOD does not permit the NYAG to seek penalties for acts occurring outside of New York. *See* S. App'x at 508 ¶ 42. Finally, since it is UPS that will benefit from the exemption, it is logical to look to its actions to determine whether the exemption will apply, and conversely would be unfair to deprive UPS of the exemption because New York had somehow failed to "honor" the agreement.

Thus, the most reasonable interpretation of the exemption provision is that UPS's exemption remained in place to the extent that UPS itself "lived up to" or "fulfilled" its obligations under the AOD. We agree with the district court that UPS's wholesale noncompliance with the AOD means that it did not "honor" the AOD and therefore forfeited its exemption.

UPS makes no effort to argue that the district court's extensive factual findings on how little it did to fulfill its obligations under the AOD, which are set forth above in great detail, are clearly erroneous. Rather it attempts to deflect those findings by proposing alternative explanations of the exemption provision. First, it tells us that "honored throughout the United

States" means that the agreement must have nationwide operation, and "[b]ecause it is undisputed that UPS's AOD has applied nationwide since its inception, the PACT Act exempts UPS from its reach and preempts the PHL." Appellant's Br. at 28–29 (internal citations omitted). Then it says it "is exempt from the PACT Act if [its] obligations under the AOD are accepted as valid throughout the United States, even though UPS contracted only with New York." Appellant's Br. at 31 (emphasis omitted).

Mimicking the exemption provision itself, UPS avoids using active verbs and proper nouns in explaining the exemption provision. It says that it is exempt because the AOD has "nationwide operation," Appellant's Br. at 37, but fails to acknowledge that for the AOD to have actually "operat[ed]" nationwide *UPS* would have needed to take measures to implement the policies laid out in the AOD. Given the court's extensive factual findings, we know that UPS did not in fact do so.

UPS's alternative formulation is equally vague. It says that it is exempt if its obligations under the AOD are "accepted as valid," Appellant's Br. at 31, but it does not specify *who*—UPS or the 50 States and the District of Columbia—must do the "accept[ing]." In any event, UPS never clarifies what it would mean for UPS or the States to have accepted the AOD as valid, or point to any actual events reflecting such acceptance. The PACT Act does not require that UPS make any formal commitment to Congress, the Attorney General of the United States (who is vested with the authority to enforce the PACT Act), or States other than New York. Nothing in the PACT Act requires UPS to acknowledge the AOD's enforceability outside

of New York, or suggests that a mere announcement on the part of UPS that it would adopt a company-wide policy consistent with the AOD would qualify for the exemption. Moreover, the record contains no documents or testimony evidencing a legally binding commitment on the part of UPS to comply with the terms of the AOD within even a single State other than New York. And, again, the court's findings foreclose a conclusion that UPS, through its conduct, accepted the AOD's obligations as valid, since UPS extensively breached them.

Nor does the legislative history support any implication that Congress entered a grand bargain with UPS that would trade an exemption from the PACT Act for a commitment on the part of UPS to comply with the AOD nationwide, coupled with some implied congressional grant of authority to the States to enforce that commitment as third-party beneficiaries of the deal. Rather, the House Report tells us that the exemption was included because "[a]t the May 1, 2008 hearing on the bill, the Crime, Terrorism, and Homeland Security Subcommittee received testimony that [the AODs with UPS, FedEx, and DHL] were effective at stopping the illegal shipment of cigarettes to consumers." H.R. Rep. No. 110–836, at 24 (2008). Thus, Congress agreed to exempt UPS from the PACT Act because UPS represented that the measures it was taking to stop illegal cigarette trafficking were *effective*, not in exchange for a promise to open itself up to AOD liability, enforced by the States, nationwide—let alone for an unenforceable verbal representation that ultimately proved unreliable. Nor is it clear that the

States would regard themselves as "beneficiaries" of any such deal.[17]

Further, nothing in the AOD itself purports to bind UPS to obligations outside of New York. The AOD expressly disclaims any right of New York to seek penalties for violations outside of New York State. S. App'x at 508 ("UPS shall pay to the State of New York a stipulated penalty of $1,000 for each and every violation . . . provided, however, that no penalty shall be imposed if (a) the violation involves the shipment of Cigarettes to an Individual Consumer *outside the State of New York* . . .") (emphasis added). Indeed, the AOD expressly states that it grants rights and privileges only to the parties to the agreement. *Id*. at 511 ("This Assurance of Discontinuance shall not grant any rights or privileges to any persons or entity who is not a party to this Assurance of Discontinuance . . . .").

Thus, UPS's argument boils down to a simple proposition: that the mere existence of the AOD, and UPS's adoption of a cigarette policy, shield it from

---

[17] UPS's argument that Congress *sub silentio* granted every state attorney general the authority to sue UPS under a contract to which neither Congress nor the States are parties comes as a surprise to at least 18 states, the District of Columbia, and Puerto Rico. *See* Amicus Brief of California Amici at 14 ("But New York is the only State that has an agreement of this kind with UPS, and it is the only State that can file suit should UPS breach it."). And indeed, under our dissenting colleague's view, not only would other states be *permitted* to sue UPS under a contract they played no role in negotiating, but they would in fact be *required* to sue only under that contract and not the PACT Act once UPS has claimed in litigation that the AOD should apply nationally. *See* Dissenting Op. at 11.

other liability regardless of whether UPS takes any steps to comply with them.[18] But that is not a reasonable reading of the statute, nor could it be what Congress intended.

---

[18] The dissent correctly points out that, under our interpretation, the same impermissible conduct by UPS gives rise to potential liability under three sources: the AOD, the PACT Act, and the PHL. Dissenting Op. at 10. However, we disagree with the dissent's suggestion that our acceptance of multiple sources of liability is inconsistent with our determination *infra* that the cumulative penalties imposed by the district court were excessive. *Id.* As detailed in III.C, *infra*, the damages imposed on UPS were excessive *on the facts of this case*; our interpretation of the PACT Act is not undermined by the possibility that a common carrier could face liability from multiple sources, particularly where the relevant statutes and the AOD take different, albeit related, approaches to addressing the problem of cigarette trafficking. *See, e.g.*, 15 U.S.C. § 376a(e)(2)(A) (prohibiting common carriers from delivering packages to persons whose names appear on the NCLs); PHL § 1399-*ll*(2) (prohibiting common carriers from transporting any cigarettes unless the recipient falls into one of three statutory exceptions); S. App'x 499-500 ¶¶ 21-22 (requiring UPS to develop and maintain an internal database of cigarette shippers). Whether and to what degree those penalties should be cumulated is a judgment to be made in the damage or penalty phase of litigation, and not by allowing a wrongdoer to elect which set of remedies it would prefer be imposed once it is sued. There are many legal contexts in which multiple overlapping sources of liability exist but a single punishment or measure of damages is appropriate. For example, defendants may be convicted on multiple related charges without consecutive sentences being appropriate. *See Whalen v. United States*, 445 U.S. 684, 692 (1980); *see also* 18 U.S.C. § 3584(b). In the civil context, plaintiffs may successfully pursue theories of negligence and breach of fiduciary duty but may not recover multiple damage awards for the same losses. *See Conway v. Icahn & Co., Inc.*, 16 F.3d 504, 511 (2d Cir. 1994). So here.

As a textual matter, such a reading renders much of the language in the exemption provision superfluous. The exemption in question applies if (1) a common carrier is "subject to" an AOD with New York, 15 U.S.C. § 376a(e)(3)(A)(I); *and* (2) the AOD "is honored throughout the United States to block illegal deliveries to consumers," *id*. at § 376a(e)(3)(B)(ii)(I). If Congress had intended the exemption to turn solely on the AOD's mere existence, then it would have included just the first requirement, and exempted UPS from the PACT Act if it is merely "subject to" the AOD. UPS's interpretation effectively treats the "honored" requirement as surplusage. *See Dunn v. CFTC*, 519 U.S. 465, 472 (1997) (noting doctrine that statutes should not be construed to render their provisions mere surplusage); *Mary Jo C. v. New York State and Local Retirement Sys.*, 707 F.3d 144, 156 (2d Cir. 2013) ("One of the most basic interpretive canons is that a statute should be construed so that effect is given to all of its provisions, so that no part will be inoperative or superfluous, void or insignificant.") (internal quotations and alterations omitted).

Treating the AOD's mere existence as an exemption from the PACT Act's compliance obligations would also thwart the statute's goal of blocking cigarette trafficking nationwide. *See* PACT Act, Pub. L. 111–154, § 1(c)(4), 124 Stat. 1087, 1088. Since New York is the only state with the power to enforce the AOD, and lacks the power to seek penalties for violations in other states, UPS's interpretation would enable it to deliver unlimited untaxed cigarettes in 49 of the 50 States without a remedy under the AOD, the PACT Act, or those States' own laws. Congress could not have intended its narrowly drawn exemption to

give common carriers like UPS free rein to engage in the very wrongdoing that the statute was meant to prohibit.

The legislative purpose to block cigarette shipments illegal under state law, moreover, is not merely derived from extra-statutory legislative history. It is written into the language of the exemption provision itself as a modifier of the word "honor" that defines its meaning. Rather than leaving us to guess what "honor" means, Congress specified that the exemption applies only if the AOD is "honored throughout the United States *to block illegal deliveries of cigarettes . . . to consumers*." *Id*. at § 376a(e)(3)(B)(ii)(I) (emphasis added). Merely giving lip service to nationwide coverage of the AOD does nothing "to block deliveries." Deliveries are blocked only if UPS *complies* with the AOD. By specifying that the exemption applies if the AOD is honored in such a way as to "block illegal deliveries of cigarettes . . . to consumers," Congress clearly signaled that "honoring" the agreement involves compliance.

UPS's remaining objections to the standard applied by the district court in assessing whether UPS "honored" the AOD are meritless.

First, UPS asserts that application of the PACT Act's exemption cannot turn on whether it has in fact complied with the AOD, because such an inquiry would be "rudderless." Appellant's Br. at 37. It is true that the PACT Act does not define specifically how widespread and persistent violations would have to be to justify a conclusion that UPS was not "honoring" the AOD nationwide. That does not mean, however, that the courts are left without standards to apply.

The district court here applied a reasonable test, combining the extent of the violations and the evidence of corporate failure to take reasonable steps to assure compliance, to determine that the AOD was not "honored throughout the United States." Had a few UPS employees in one or even a few places corruptly or negligently failed to comply with the AOD, it would be perfectly reasonable to say that UPS had not "dishonored" the agreement. But when UPS as a corporation makes no serious effort to train or police its employees anywhere in the United States, it *has* failed to honor the AOD, particularly if that failure also results in widespread, flagrant non-compliance on the very home turf of the AOD: in New York. Whatever ambiguities might exist at the margins about whether the AOD may be "honored" in the face of intermittent or unintentional violations, UPS's flagrant and undisputed disregard of the AOD makes that question an easy one here. *See, e.g.*, *Holder v. Humanitarian Law Project*, 561 U.S. 1, 20 (2010) (reaffirming that a party "who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others") (quotation marks omitted).[19]

---

[19] We accordingly reject our dissenting colleague's concern that UPS could be subjected to cascading penalties by a few violations of the AOD in "Rabbit County," or that the application of the PACT Act exemption turns on the complete success of its interdiction efforts. Dissenting Op. at 9. The district court determined that UPS was not honoring the AOD throughout the United States based on evidence of a virtually complete disregard of its obligations in New York, and a "lack of commitment to true, active AOD compliance [that] pervaded its corporate culture." 253 F. Supp. 3d at 604. Complete success at interdicting

Second, UPS objects that the district court's construction of the exemption provision violates due process because a common carrier will know only in retrospect whether it has engaged in "enough" misconduct to forfeit the exemption and would never be able to invoke the exemption successfully at any stage prior to trial. That UPS cannot know, without being subject to litigation, whether it is exempt from the PACT Act is not of grave concern. The PACT Act exemption was granted with the expectation that the AOD would be an effective substitute for the PACT Act requirements. New York (or any other plaintiff) can claim that the exemption is rendered inapplicable only in the context of litigation (as here) in which it charges widespread violations of the AOD. Thus, the issue of whether UPS is exempt from the PACT Act will arise only during litigation brought when a state's attorney general believes that the AOD has been flagrantly or frequently violated and that the exemption therefore does not apply but the PACT Act does. In other words, the PACT Act issue does not set UPS up for litigation from which it should be exempt.[20]

---

the shipment of untaxed cigarettes is not required; good faith, reasonably effective effort to comply with the AOD is. The AOD is not honored by a flagrant and pervasive disregard for its provisions.

[20] For that reason, we do not share Judge Jacobs's concern about the fact that our interpretation would require the exemption to be sorted out in litigation. *See* Dissenting Op. at 9. The availability of a defense is often dependent on facts that cannot be known until they are determined through litigation. The PACT Act exemption is an exemption from liability, not from litigation; the exemption does not purport to grant immunity from being sued. And even a defense, such as qualified immunity, that

Third, UPS argues that the district court erased the words "throughout the United States" from the exemption provision because it made no findings regarding UPS's purported non-compliance in any jurisdiction other than New York. UPS is correct that "throughout the United States" clearly means in all States, not just New York. But the PACT Act grants an exemption when UPS affirmatively *honors* the obligations of the AOD throughout the country; it does not revoke an otherwise applicable exception only when UPS *dishonors* the AOD everywhere in the United States. We are not persuaded that UPS honored the agreement "throughout the United States" when it took no, or only hopelessly ineffective, steps to comply with the AOD in New York, and the record evidence shows that at least some of the breaches were national in scope, thus establishing widespread breaches of the agreement. *See, e.g.*, J. App'x 658 (lack of formal audit policy); J. App'x 640-41 (cursory training of drivers); J. App'x 811, 1331 (shipment of cigarettes across nation).

Our dissenting colleague adopts an interpretation that has never been advanced by UPS itself, or by any other party or amicus curiae. Judge Jacobs would have us find that UPS "honors" the AOD once it confirms in any litigation that it intends to be bound by the AOD across the nation. Dissenting Op. at 8. Prior

---

is an immunity from litigation has to be litigated: public officers are called to court to account for their conduct and the legal standard for immunity in many cases cannot be applied until the facts can be established, at summary judgment or even at trial. Like UPS, public officials often cannot know whether they are immune from litigation until the issue has been litigated.

to such confirmation, the exemption would be available as a discretionary shield against claims brought by any of the other 49 states, which UPS may choose to invoke, or not, based on tactical considerations in the litigation. Dissenting Op. at 7-8.

As demonstrated above, nothing in the statutory language, the legislative history, or sound policy suggests that the exemption should apply based on a mere verbal commitment by UPS to comply with the AOD throughout the country; moreover, the record shows that at no time between the enactment of the PACT Act in 2010 through the filing of this lawsuit in 2015 did UPS make any such verbal commitment. The dissent nevertheless embraces the theory that a verbal commitment to the AOD suffices and, in an attempt to avoid the embarrassing fact that UPS never even made a public commitment prior to this lawsuit, asserts that UPS was not required to do so until confronted with litigation charging that it violated the PACT Act. Under the dissent's approach, in such an enforcement action UPS could make its own tactical decision to disclaim the national application of the AOD and compel a plaintiff state to proceed under state law, or to embrace national application and compel the state to proceed under the AOD, depending on which regime's liability and penalty provisions were more favorable to it. The dissent apparently would then allow UPS to change its position in subsequent litigation brought by a different state, and pledge future compliance nationally with the AOD, in order to invoke its PACT Act exemption if the AOD scheme were tactically preferable to UPS in that litigation. Only from that point on would the dissent apply the

principles of judicial estoppel to require UPS to comply with the AOD in other states and exempt UPS from litigation under either the PACT Act or any state laws relating to cigarette trafficking. Such an approach would leave UPS free to disregard the AOD throughout the United States, yet retain its exemption from the PACT Act and the state regulations it preempts, until it is caught violating its obligations under one or the other regime – and even at that point, to elect which set of rules and remedies would apply. We cannot think of any other regulatory regime that applies in such a manner or provides such tactical advantages to an entity that violates its obligations under federal and state statutes as well as a settlement agreement to which it had freely agreed.[21] We do not believe that Congress intended such an anomalous result.

We conclude that as a matter of law, the clear meaning of the exemption is that UPS is exempt only if it in fact substantially complies with the AOD throughout the country. We also conclude that the district court's well-supported specific findings regarding UPS's failure, at a nation-wide corporate level, to take reasonable steps to assure compliance

[21] The dissent's construction is also inconsistent with its own expressed concern that our interpretation leaves the availability of the exemption unknowable until a case is litigated. Dissenting Op. at 9. Under the dissent's view, whether UPS intends to comply with the AOD is not determined until it is sued for violating state law or the PACT Act, at which time UPS has an option as to which regime (the AOD or the federal and state statutes) should be applied to its past and future conduct. It seems to us that the burden of any uncertainty in this regard should fall on the wrongdoer, and not on the States that would not know in advance what rules govern UPS's behavior within their borders.

anywhere, and its widespread, well-documented violations of its obligations in New York, amply support its broader factual conclusion that UPS did not honor the AOD "throughout the United States," as it was required to do to be exempt from the PACT Act. Accordingly, we affirm the district court's liability determination with respect to the PACT Act and PHL § 1399-*ll*.

B. UPS is Liable for Violations of the AOD's Audit Requirement.

The district court found that UPS violated its audit obligation under the AOD and imposed the AOD's $1,000 per-violation penalty for each package that UPS shipped on behalf of the Liability Shippers after it had a "reasonable basis to believe" that such Liability Shipper was "tendering Cigarettes for delivery to Individual Consumers." *United Parcel Service, Inc.*, 2017 WL 2303525 at *5. That finding resulted in penalties of roughly $80.5 million due to the State, for 80,468 packages.

On appeal, UPS argues that (1) the AOD's stipulated penalty provision does not apply to audit violations at all; and (2) even if it does, it authorizes a maximum penalty of only $1,000 for each Liability Shipper, or $20,000 in total. We disagree with UPS's first argument and therefore affirm the district court's findings of liability for violating its audit obligation under the AOD. We agree with UPS's second argument, however, and therefore reduce the penalty imposed by the district court.

Because the AOD is a settlement agreement, its provisions are interpreted under general contract principles. *See MBIA Inc. v. Fed. Ins. Co.*, 652 F.3d

152, 170–71 (2d Cir. 2011). We enforce the AOD according to the plain meaning of its terms. *Id*. at 171.

Paragraph 24 of the AOD, titled "Audits," states that:

> UPS shall audit shippers where there is a reasonable basis to believe that such shippers may be tendering Cigarettes for delivery to Individual Consumers, in order to determine whether the shippers are in fact doing so.

S. App'x at 501. Paragraph 42 of the AOD, coming under the heading "Enforcement, Penalties and Costs," provides that:

> UPS shall pay to the State of New York a stipulated penalty of $1,000 for each and every violation of this Assurance of Discontinuance occurring after the Effective Date; provided, however, that no penalty shall be imposed if (a) the violation involves the shipment of Cigarettes to an Individual Consumer outside the State of New York, or (b) the violation involves the shipment of Cigarettes to an Individual Consumer within the State of New York, but UPS establishes to the reasonable satisfaction of the Attorney General that UPS did not know and had no reason to know that the shipment was a Prohibited Shipment.

S. App'x at 508.

By its plain language, the penalty provision extends to violations of the AOD's audit requirement. It straightforwardly provides for penalties for *all* violations of the AOD. The term "violation" means "[a]n infraction or breach of the law" or "the contravention

of a right or duty." BLACK'S LAW DICTIONARY (11th ed. 2019). The provision's sweeping reference to "each and every violation" plainly envisions penalties for violations of every type of obligation imposed on UPS by the AOD, including violations of UPS's auditing duty. Neither of the two exemptions from the penalty provision apply to auditing violations.

UPS argues that the necessary inference from the two exemptions to the penalty provision is that the provision was meant to apply only to UPS's knowing shipment of cigarettes within New York State. But the scope of the exemptions to a provision do not necessarily define the scope of that provision itself. To the contrary, the existence and scope of the exemptions here support the opposite conclusion. The drafters of the AOD plainly knew how to exempt certain violations and did so. Those exemptions, however, are limited to certain types of violations involving shipments of cigarettes. That no exemption is provided for any category of violations of the audit requirement or of any of the other record-keeping or other obligations agreed to by UPS confirms that "each and every violation" of the audit duty, without exception, is subject to penalties. *See Quadrant Structured Prods. Co., Ltd. v. Vertin*, 23 N.Y.3d 549, 560 (2014) (omission of language from contractual provision leads to "inescapable conclusion" that "parties intended the omission").[22]

---

[22] UPS also points to other parts of the AOD to support its definition of "violation." For example, it notes that the definition of "Alleged Past Violations"—the obverse of future "violations"—is UPS's delivery of "packages containing cigarettes to persons who were not authorized to receive them pursuant to PHL § 1399-*ll* in violation of PHL § 1399-*ll*(2)." Appellant's Br. at 50. But the

Further, it is entirely consistent with the context in which the AOD was negotiated that UPS would face penalties for violations of the AOD's various procedural and prophylactic requirements. In consideration for the cessation of the State's investigation into

---

definition of "Alleged Past Violations" cannot be relevant to the definition of a violation of the AOD. A *past* violation could only be a violation of PHL § 1399-*ll*, because past violations, by definition, must have occurred before the AOD came into existence. The AOD created *additional* obligations with which UPS was required to comply, and imposed penalties for violations of *those* obligations, not simply for violations of pre-existing statutory duties.

UPS also notes that the AOD defines "Potential Violations" only as shipments. But that is a non-sequitur. The AOD does not treat "Potential Violations" as a defined term. The term "Potential Violations" appears in the AOD only as part of a section titled "Response to Notice of Potential Violation." That section describes the measures UPS should take in response to a notice from the NYAG to UPS that one of its customers is shipping cigarettes to individual consumers. *See* S. App'x at 507 ¶ 39. Any reference to a "violation" in that section thus clearly refers to a customer's violation, which can only be a "violation of UPS's Cigarette Policy." UPS, by contrast, can commit many other kinds of violations of the AOD, because the AOD imposes obligations on UPS beyond simply complying with PHL § 1399-*ll* or its own Cigarette Policy.

Indeed, the "Definitions" provision of the AOD specifically defines "Prohibited Shipment" as "any package containing Cigarettes tendered to UPS where the shipment, delivery, or packaging of such Cigarettes would violate Public Health Law § 1399-*ll*." S. App'x at 498. If the AOD were intended, as UPS claims, to define violations only as the knowing shipment of cigarettes, then the penalty provision could have been written to say that "UPS shall pay to the State of New York a stipulated penalty of $1,000 for each and every Prohibited Shipment it makes" instead of using the much more general phrase "each and every violation."

UPS's alleged past unlawful cigarette shipments, UPS agreed to take on certain new contractual obligations. The AOD is an attempt to establish a comprehensive and interdependent set of obligations that collectively reduce the likelihood that UPS will ship packages containing cigarettes. To read the term "violation" as limited to the knowing shipment of cigarettes would mean that UPS could fail to comply with any of the host of other obligations without consequence. Insulating UPS from liability for violations of any of these provisions would thwart the AOD's purpose.[23]

Once we accept that the penalty provision covers violations of UPS's audit duty, the question becomes just how much liability UPS incurs for its failure to

---

[23] UPS claims that because the AOD is a contract with the State, the State's remedy for a breach was to seek actual damages in a breach of contract action. But the contract itself specifies the penalties that UPS agreed to pay for "each and every violation." UPS argues that applying the penalty provision to audit violations would be "unconscionable" because it then would mandate penalties for "minor" or "ministerial" breaches of the AOD. Appellant's Br. at 53. But contrary to what UPS claims, the district court did not hold that the State could recover a stipulated penalty of $1,000 for *any* breach of *any* obligation in the AOD, whatever the gravity of the breach or UPS's scienter, and neither do we. Auditing is a core compliance mechanism of the AOD, the breach of which imperils other aspects of the overall compliance scheme. A failure to audit suspected cigarette shippers deprives UPS of valuable knowledge of what its customers are actually shipping, which in turn stymies UPS's duty to suspend or terminate the accounts of known cigarette shippers, and ultimately its ability to enforce the ban on cigarette deliveries to consumers. Whether there exists a category of *de minimis* violations of the AOD for which a court may reject a demand for a stipulated penalty is a question not posed by this case.

audit the Liability Shippers. The district court translated liability for failure to audit into a penalty for each package of cigarettes that was shipped after UPS should have audited but did not—in effect treating each unaudited package as a separate violation of the audit requirement. UPS argues that this was error because, at most, UPS breached the audit provision once per shipper.

We agree with UPS that the audit provision applies to shippers, not shipments. By its plain terms, the audit provision is shipper-oriented. It requires UPS to "audit *shippers* where there is a reasonable basis to believe that such *shippers* may be tendering Cigarettes for delivery to Individual Consumers, in order to determine whether the *shippers* are in fact doing so." S. App'x at 501 ¶ 24 (emphasis added).

If UPS had a reasonable basis to believe that Shipper X was shipping cigarettes on January 1, then UPS should have audited Shipper X on January 1. That UPS's obligation to audit Shipper X remained in effect on January 2, when UPS continued to ship unaudited packages of cigarettes for Shipper X, does not mean UPS committed a second violation. The violation is single and continuous until UPS purges the obligation by actually conducting an audit.

At any rate, the plaintiffs do not argue, and the district court did not find, that UPS committed a separate audit violation on every day or every week or every month that UPS failed to audit, once it had a reasonable basis to believe that a particular shipper was sending cigarettes to individual consumers. Rather, they argue, and the district court concluded, that every *package* shipped by a seller who should have

been audited constitutes a separate violation of the audit requirement. But that is simply not what the AOD provides. While knowingly delivering cigarettes to an individual consumer may violate a different provision of the AOD, *see* S. App'x at 498–99 ¶ 17, the audit provision itself requires an *audit*. It does not provide (as the parties could have provided if they so intended) that every shipment by a shipper who should have been audited but was not constitutes a violation of the AOD.

Thus, a failure to audit a shipper results in only one penalty—a penalty for failing to audit that shipper.[24] The district court found, and UPS does not contest, that UPS failed to audit all 20 Liability Shippers. Therefore, the penalty for violations of UPS's audit obligations under the AOD should have been $20,000. We therefore vacate the district court's $80.5 million penalty award and modify this judgment to impose a penalty of $20,000 under the AOD.

C. UPS Violated the CCTA by Knowingly Transporting More Than 10,000 Unstamped Cigarettes.

The district court held that UPS was liable under the CCTA for knowingly transporting "contraband cigarettes," *see* 18 U.S.C. § 2342(a), which are defined as "a quantity in excess of 10,000 cigarettes, which

---

[24] The plaintiffs protest that a $1,000 penalty per shipper, rather than per shipment, would render the AOD's audit requirement toothless. But the low penalties here result merely from the plaintiffs' concession that they were seeking penalties under the AOD for violations *only* of the audit requirement. The plaintiffs chose to forego their right to seek penalties for UPS's violations of other provisions of the AOD.

bear no evidence of the payment of applicable State or local cigarette taxes," *id*. at § 2341(2). Specifically, the district court found that for certain cigarette manufacturers, UPS routinely delivered cigarettes in lots of 10,000 or more, and that for others of the Liability Shippers, the number of unstamped cigarettes UPS transported far exceeded 10,000 in total.

UPS argues that the district court committed legal error in assessing UPS's liability under the CCTA. *First*, UPS contends that the district court erred in aggregating separate shipments to meet the CCTA's quantity requirement for certain of the Liability Shippers. It claims that the CCTA's use of "*a quantity*" — singular—"in excess of 10,000 cigarettes" criminalizes only a single act of transporting 10,000 cigarettes. Appellant's Br. at 63 (emphasis in original). *Second*, UPS contends that it cannot be held liable under this reading of the CCTA because there was no proof that it knew that any one delivery exceeded 10,000 unstamped cigarettes.

We reject UPS's interpretation of the statute. The plain text of the CCTA's definition of "contraband cigarettes" imposes no per-transaction requirement, and the use of the indefinite article "a" in the phrase "a quantity" does not necessarily signify a singular shipment. Referring to "a quantity" of something does not, in common parlance, preclude aggregation.[25] It makes

[25] The district courts within this Circuit have all been of the view that aggregation is permissible under the CCTA. *See, e.g.*, *City of New York v. FedEx Ground Package System, Inc.*, 91 F. Supp. 3d 512, 520 (S.D.N.Y. 2015) ("Defendant's interpretation of Section 2341(2) conflicts with the plain, unambiguous text of

perfect sense to say that a shipper who makes more than ten 1,000-cigarette deliveries has delivered "a quantity" of more than 10,000 cigarettes, just as a child receives "a quantity" of presents for her birthday comprising what she receives from each individual guest at her birthday party, through the mail, or during personal visits from other well-wishers before or after the day of the party.[26]

---

the CCTA which imposes no 'in a single transaction requirement.'") (internal quotation marks omitted); *City of New York v. LaserShip, Inc.*, 33 F. Supp. 3d 303, 313 (S.D.N.Y. 2014) ("The text of the CCTA is unambiguous. It provides that 'a quantity in excess of 10,000 cigarettes' constitutes contraband. It says nothing to suggest that the relevant quantity must be found in a single transaction.") (internal citations omitted); *City of New York v. Gordon*, 1 F. Supp. 3d 94, 103 (S.D.N.Y. 2013) (same); *City of New York v. Golden Feather Smoke Shop, Inc.*, No. 08–CV–3966 (CBA), 2009 WL 2612345, at *35 (E.D.N.Y. Aug. 25, 2009) ("In any event, the Court rejects the view that defendants can sell unlimited quantities of unstamped cigarettes so long as they avoid making any single sale in excess of 49 cartons. Nothing in the CCTA provides that for cigarettes to be considered contraband they must be sold in a single transaction.").

[26] We are mindful that the aggregation principle creates certain puzzles or anomalies. If a person subject to the CCTA ships one package of 5,000 unstamped cigarettes, she has not violated the CCTA because the 5,000 unstamped cigarettes are not "contraband cigarettes." But if she later ships another package with 5,001 unstamped cigarettes, that package contains contraband cigarettes and the cigarettes in the earlier package retroactively become contraband cigarettes.

There is also a line-drawing problem. To the extent aggregation is permissible in principle, there will be extreme cases where shipments of unstamped cigarettes are spread out in time and space such that it does not make sense to categorize them as "a quantity." But wherever the line should be drawn in time and space, this case does not present a close call. UPS maintained

As the district court explained in *FedEx*, "[t]his view is supported by the fact that other CCTA provisions *do* contain an explicit per-transaction requirement, and therefore it should be presumed that Congress acted intentionally and purposefully in excluding such a requirement from [the definition of contraband cigarettes]." 91 F. Supp. 3d at 520 (emphasis in original). For example, the CCTA makes it unlawful "for any person knowingly to make any false statement or representation with respect to the information required by this chapter to be kept in the records of any person who ships, sells, or distributes any quantity of cigarettes in excess of 10,000 *in a single transaction*." 18 U.S.C. § 2342(b) (emphasis added); *see also id.* at § 2343(a) (record-keeping requirements for any single transaction of over 10,000 cigarettes); *id.* at § 2343(b) (reporting requirements for persons processing more than 10,000 cigarettes in a month). That Congress included single-transaction or specific time-frame qualifiers in other CCTA provisions but not in 18 U.S.C. § 2341(2) further supports our conclusion that aggregation is permissible for the purposes of meeting the definition of "contraband cigarettes." *See Russell v. United States*, 464 U.S. 16, 23 (1983) (presuming Congress acted intentionally in omitting term included in other provisions of statute).

---

accounts for shippers setting themselves up in business for the purpose of selling significantly more than 10,000 unstamped cigarettes, who then did indeed ship far more than 10,000 unstamped cigarettes on a regular and consistent basis over an extended but compact period of time. Those shippers, and consequently UPS as their aider and abetter, cannot avoid liability by claiming that they organized all (or most) of their shipments to contain 10,000 or fewer unstamped cigarettes.

Since we hold that the CCTA delivery prohibition contains no single-transaction requirement, UPS's argument that it did not have knowledge that any particular shipment contained a quantity in excess of 10,000 unstamped cigarettes is beside the point. UPS does not contend it had no knowledge that the Liability Shippers shipped more than 10,000 unstamped cigarettes in the aggregate.

We therefore affirm the district court's determination that UPS violated the CCTA by knowingly shipping contraband cigarettes for the Liability Shippers.

III. The Damages and Penalties Awards

UPS argues that even if we sustain one or more of the liability theories, we should reverse the damages and penalties awards. *First*, it argues that the district court erred in denying its motion to preclude the plaintiffs' damages evidence because the plaintiffs failed to provide UPS with a robust pre-trial damages computation pursuant to Fed. R. Civ. P. 26, and erred in awarding damages and penalties because the plaintiffs failed to prove any damages at trial. *Second*, it argues that the district court adopted a diversion rate in its compensatory damages calculation that was not supported by the evidence. *Third*, it argues that the penalty award imposed by the district court is grossly disproportionate to the loss suffered by the plaintiffs and the gains received by UPS for the conduct at issue.

In contrast, the plaintiffs cross-appeal, arguing that the district court should have awarded them the full amount of unpaid State and City taxes on cigarettes shipped by UPS under the PACT Act or CCTA

without applying any diversion rate. We address each of these arguments in turn.

A. The District Court Did Not Abuse Its Discretion in Allowing the Plaintiffs to Present Their Damages Case Nor Did It Clearly Err in Making Factual Findings Based on Record Evidence.

UPS raises several challenges with respect to the way the plaintiffs presented their damages and penalties case from discovery through their post-trial submission, as well as to how the district court held the plaintiffs to their burden of proof. UPS complains that: (1) before trial the plaintiffs failed to inform them of the amount or the process by which they would calculate their damages and penalties claims, in violation of Rule 26; (2) during trial the plaintiffs did not adequately prove their damages and penalties claims; and (3) it was error for the district court to order the plaintiffs to submit additional information post-trial to calculate the quantum of damages and penalties. For the reasons explained below, we are unpersuaded that the district court abused its discretion in allowing the plaintiffs to present their damages case, in making factual findings based on the trial record, or in ordering the parties to submit calculations post-trial.

1. The District Court Reasonably Refused to Strike the Plaintiffs' Entire Damages and Penalties Case.

UPS appeals from the district court's denial of its Rule 26 motion, which it renewed post-trial, complaining that the court should have precluded the plaintiffs' damages evidence entirely. We disagree with UPS

and conclude that the district court did not abuse its "broad latitude" in managing discovery, or in failing to impose discovery sanctions on the plaintiffs. *See EM Ltd. v. Republic of Argentina*, 695 F.3d 201, 207 (2d Cir. 2012); *Argo Marine Sys., Inc. v. Camar Corp.*, 755 F.2d 1006, 1015 (2d Cir. 1985).

Rule 26 requires a plaintiff to disclose "a computation of each category of damages claimed," and to provide an opportunity for the defendant to review the evidence used to calculate damages. Fed. R. Civ. P. 26(a)(1)(A)(iii). Rule 37(c)(1) provides that a failure to comply with Rule 26(a)'s disclosure obligations results in preclusion of the evidence "unless the failure was substantially justified or harmless." Fed. R. Civ. P. 37(c)(1).

The district court denied UPS's pretrial motion to bar monetary relief, viewing "the overall record as sufficiently placing UPS on notice as to the damage[s] theory." J. App'x at 443. In adhering to that ruling after trial, the district court reaffirmed that UPS had "adequate pre-trial notice to counter plaintiffs' damages claim." *United Parcel Service, Inc.*, 253 F. Supp. 3d at 687. In essence, this was a ruling that any Rule 26 violation that may have occurred was "harmless." *See* Fed. R. Civ. P. 37(c)(1).

On appeal, UPS contends that it was substantially prejudiced by the plaintiffs' limited Rule 26(a) disclosure because "[t]he number of packages, and the derivative number of packages containing unstamped cigarette cartons, transported by UPS constituted the determinative measure of both compensatory damages and penalties" and "[t]hus, disclosure of the

methodology and evidence supporting those calculations was critical to UPS's defense." Appellant's Br. at 76. But that is the very same argument that the district court rejected after holding (1) that the plaintiffs provided this exact information for the Arrowhawk Group, (2) that because UPS "knew the [other] shippers, it could easily locate the same types of documents for each, and it knew plaintiffs' general methodology," and (3) that "the calculations were ultimately based on known data points: penalty ranges generally set forth in the AOD and statutory schemes at issue, and compensatory damages based on the statutory tax rate imposed on each carton of cigarettes." *United Parcel Service, Inc.*, 253 F. Supp. 3d at 686–88.

By the time of trial, UPS knew that the plaintiffs would rely on UPS's spreadsheets to prove that UPS delivered packages for shippers on the federal NCLs in violation of the PACT Act, and that they would pursue per-package penalties for those violations. Similarly, UPS knew that the plaintiffs would be seeking AOD penalties "for each package that UPS failed to audit in accordance with Paragraph 24 of the AOD." J. App'x at 425. And UPS knew that, based on package counts and proof of contents, the plaintiffs would be seeking per-package penalties under PHL § 1399-*ll* and unpaid taxes under the CCTA and PACT Act.

In sum, the plaintiffs disclosed their damages *theory* from the beginning; made clear to UPS throughout the discovery period that UPS's own internal spreadsheets would be key *documents* used to prove total

damages;[27] notified UPS that plaintiffs would rely on direct and circumstantial *evidence* to prove package contents; and provided a *computation* of damages for an exemplar shipper group. In contrast to a situation in which damages data are reasonably known only to the plaintiff—e.g., loss of future profits or physical injuries—here the damages related to UPS's own historical shipping activities, as derived from UPS's own internal records. We agree with the district court that UPS was well-positioned to respond to claims about what it had shipped and with what frequency.

Whether or not we would have required the plaintiffs to provide more than only an exemplar of the full amount of their damages and penalties had we been in the district court's position is of no moment; management of the discovery process is confided to the sound discretion of the district court. Here, the judge who oversaw the discovery process and trial acted well within her discretion in concluding that UPS did not "suffer[] any real prejudice" from the lack of a more robust disclosure. *United Parcel Service, Inc.*, 253 F. Supp. 3d at 687. Therefore, it was not error for the district court to allow the plaintiffs to present evidence of damages and penalties at trial.

2. The District Court's Factual Findings on Damages and Penalties Were Supported by the Evidence.

In order to prove damages and liability for penalties in this case, the plaintiffs were required to prove

---

[27] Plaintiffs questioned a UPS witness "extensively" (UPS's word) on the spreadsheets, and UPS heard from plaintiffs' own Rule 30(b)(6) witness that damages would be computed based on those documents. J. App'x at 198.

how many packages of cigarettes UPS shipped. To do this, the plaintiffs provided the court with UPS's own spreadsheets reflecting how many packages UPS shipped for each Liability Shipper, as well as direct and circumstantial evidence showing what percentage of the packages UPS shipped for each Liability Shipper contained cigarettes. The district court held that the spreadsheets, which UPS itself had generated and produced during discovery, were sufficient to prove the *quantity* of packages underlying the damage and penalty calculations for all claims. The district court also made reasonable inferences about package *contents* from various pieces of both direct and circumstantial evidence put forth by the plaintiffs.

On appeal, UPS contends that the plaintiffs' proof of damages and penalties at trial was insufficient. The thrust of UPS's argument is that the plaintiffs never presented a witness—fact or expert—to testify about their damages and penalties calculations.

(i) Package Quantity

UPS's complaint regarding the plaintiffs' use of UPS's own spreadsheets to calculate the number of packages it shipped for each of the Liability Shippers rings hollow. The spreadsheets, produced in Excel format, contain fields showing the unique shipper number, the date a package was picked up, the state and zip code of delivery, and the actual or billed weight of every package. They were generated by UPS "specifically for this litigation" in response to plaintiffs' request for information about UPS's delivery services for cigarette dealers. J. App'x at 199. Along with the spreadsheets, UPS produced a data dictionary defining the terms in the spreadsheet column headings.

Prior to trial, the court overruled UPS's foundational objection to the spreadsheets' admission because UPS had stipulated to their authenticity. The court explained that UPS made only a foundational objection and did not object to the spreadsheets as irrelevant or hearsay. Consequently, the plaintiffs could offer the spreadsheets without the need for a sponsoring witness. At trial, the spreadsheets and data dictionaries were admitted into evidence without accompanying testimony. UPS chose not to submit a witness to explain what it understood the spreadsheets to mean or not to mean.

At trial, and now, UPS challenges whether the spreadsheets are a reliable indicator of the overall number of packages shipped. But UPS produced these spreadsheets in the first instance in response to plaintiffs' requests for information about shipment counts. Assuming that UPS faithfully complied with its production obligations, it cannot now assert that its own documents did not in fact answer the questions to which UPS represented they were responsive.

The data contained in UPS's spreadsheets themselves, in conjunction with the UPS data dictionaries, provided a reasonable basis upon which to tabulate the number of packages shipped and determine when they were shipped.[28] Once evidence has been admitted as relevant and authentic, a factfinder has broad

---

[28] UPS also contends that the district court erred in accepting the plaintiffs' method for tabulating the package and carton counts. The plaintiffs sorted the spreadsheets by account number (i.e., shipper), eliminated duplicates, and added up the packages shipped. UPS made certain objections to this methodology which the court addressed. The court agreed with UPS that

latitude to determine the weight the evidence deserves. Any lack of supporting testimony describing business records already established as authentic "is relevant only as to the weight to be accorded such records." *Stein Hall & Co. v. S.S. Concordia Viking*, 494 F.2d 287, 292 (2d Cir. 1974). Moreover, a factfinder's damages calculation need only have a "reasonable basis." *Sir Speedy, Inc. v. L & P Graphics, Inc.*, 957 F.2d 1033, 1038 (2d Cir. 1992).

That the parties' counsel made conflicting arguments about what the spreadsheets proved, and that the district court resolved those disputes as trier of fact, is entirely unremarkable. Choosing among "competing inferences that can be drawn from the evidence" is the factfinder's province. *United States v. Morrison*, 153 F.3d 34, 49 (2d Cir. 1998). "[W]e defer to the fact finder's determination of the weight of the evidence and the credibility of the witnesses and to the fact finder's choice of the competing inferences that can be drawn from the evidence." *United States v. LaSpina*, 299 F.3d 165, 180 (2d Cir. 2002) (internal quotations and alterations omitted). UPS has not come close to establishing that the district court's findings were clearly erroneous.

(ii) Package Contents

With respect to package contents for six of the Liability Shippers, the plaintiffs submitted direct evidence of contents, consisting of order forms, shipping

---

packages weighing less than one pound were unlikely to contain cigarettes and thus should be excluded from the tabulation and that packages being delivered to a cigarette shipper, rather than delivered by a shipper, should also be excluded.

invoices describing package contents, driver summaries, packing slips, and daily report printouts, as well as direct testimony and admissions in a federal plea agreement. For the remaining eleven cigarette shippers, plaintiffs provided circumstantial evidence of package contents. The district court found that there was ample evidence as to each Liability Shipper to (1) support the fact that packages contained cigarettes and (2) reasonably approximate the percentage of each Liability Shipper's packages that contained cigarettes.

UPS complains that the plaintiffs offered shifting and inconsistent theories to prove package contents and that the plaintiffs did not prove the number of cigarette cartons UPS shipped with mathematical precision. As an initial matter, UPS was well aware that the plaintiffs intended to rely on both circumstantial and direct proof of the contents of what UPS calls the "plain brown boxes" it transported. *See* Appellant's Br. at 1 & 46. Plaintiffs' interrogatory responses, served nearly a year before trial, previewed that they would use circumstantial evidence such as tracer inquiries, the results of UPS's eventual audits, and shippers' placement on the NCL to prove the contents of packages UPS shipped for the Liability Shippers.

Again before trial, in the Arrowhawk Letter, the plaintiffs identified the types of circumstantial evidence that they would rely on at trial to prove the contents of packages UPS shipped for the Liability Shippers. At trial, the plaintiffs presented, and the district court relied on, circumstantial evidence of package contents such as reports from UPS drivers, tracer inquiries, results of UPS's belated audits, controlled buys of cigarettes by City investigators, the presence

of certain shippers on the federal NCL, and the shippers' overall product lines. In its liability opinion, the district court examined the evidence with respect to each Liability Shipper and then made an assessment, on a shipper-by-shipper basis, as to what percentage of each Liability Shipper's packages contained cigarettes. UPS challenges the approach in concept, rather than lodging a specific challenge to any of the district court's factual determinations.

As an initial matter, there was nothing impermissible about the plaintiffs' reliance on circumstantial evidence to prove their case. *See United States v. Casamento*, 887 F.2d 1141, 1156 (2d Cir. 1989) ("Circumstantial evidence . . . is of no lesser probative value than direct evidence."). Indeed, such proof may have been the only proof available here given that, like other wrongdoers, cigarette traffickers do not commonly create or retain records of their criminal activities or testify without asserting their right to self-incrimination.

Moreover, UPS had every opportunity to challenge—and did challenge—the circumstantial evidence that the plaintiffs proffered. UPS argued to the district court at length that the evidence did not show either that the packages it shipped contained cigarettes or that UPS knew that the businesses were shipping cigarettes.

To the extent that the district court could not pin down the precise number of cigarette cartons each Liability Shipper shipped, the responsibility lies at UPS's own door. *See Raishevich v. Foster*, 247 F.3d 337, 343 (2d Cir. 2001) ("If the plaintiff's inability to prove an exact amount of damages arises from actions

of the defendant, a factfinder has some latitude to make a just and reasonable estimate of damages based on relevant data.") (internal quotation marks omitted); *Sir Speedy, Inc.*, 957 F.2d at 1038 (explaining that a claimant "need not prove the amount of loss with mathematical precision"). UPS had a contractual audit obligation, as well as other legal obligations, not to ship stamped or unstamped cigarettes to individual consumers. UPS cannot accept contraband cigarettes for shipment, look the other way, and then demand exacting proof of what was inside the packages that it controlled. *See Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 565 (1931) (when uncertainty in proving damages is caused by the defendant's own wrongful act, "justice and sound public policy alike require that he should bear the risk of the uncertainty thus produced"); *Whitney v. Citibank, N.A.*, 782 F.2d 1106, 1118 (2d Cir. 1986) ("When a difficulty faced in calculating damages is attributable to the defendant's misconduct, some uncertainty may be tolerated.").

We therefore conclude that the plaintiffs' evidence was sufficient to establish liability and damages and the district court's approach to making factual determinations based on the record evidence was entirely reasonable.

3. The District Court Did Not Err By Ordering the Parties to Submit Post-Trial Calculations of Damages and Penalties.

In its liability opinion, the district court ordered the parties to provide the court with a calculation of the quantity of packages and cartons UPS shipped for each Liability Shipper. The liability opinion directed

the parties to apply the relevant dates, definitions, and findings provided by the court to the data provided in the spreadsheets so that the court could assess the precise "quantum" of damages and penalties to be awarded. Per the court's order, the plaintiffs submitted a detailed calculation of the packages and cartons UPS shipped for each Liability Shipper, including the specific exhibits admitted during trial that the plaintiffs used to identify the package and carton figures. On the other hand, UPS, in defiance of the court's order, submitted a calculation for only three of the Liability Shippers. Because UPS failed to comply with the court's order, the court "calculate[d] its determination of damages and penalties using the uncontested numbers of Packages and Cartons supplied by plaintiffs where appropriate." *United Parcel Service, Inc.*, 2017 WL 2303525 at *2.

UPS claims that by ordering the parties to submit post-trial calculations, the district court reopened the record, "stepped into the role of expert witness and created a previously undisclosed, untested, and unsupported methodology on which to base damages and penalties." Appellant's Br. at 87. Despite UPS's hyperbolic protestations, this course of action was a reasonable method of ensuring that both sides had an opportunity to apply the court's factual findings to the evidence in the record.[29]

---

[29] *See United States v. Global Distributors, Inc.*, 498 F.3d 613, 620 (7th Cir. 2007) ("Although the district court gave Global an opportunity to file a memorandum on damages, and Global availed itself of that option, Global did not 'challenge[] the arguments in the government's damages memorandum.' Instead, it continued to present excuses for its underlying behavior. The

UPS's claim that the district court reopened the record *sua sponte* after trial is incorrect. The record was never reopened; the court simply directed the parties to apply the court's definitions and findings to the already admitted evidence to assist the court in calculating the "quantum" of relief. The information contained in both parties' post-trial submissions derived from evidence that had already been admitted into the record and which UPS had ample opportunity to challenge or explain. As is not unusual in a bench trial, the court requested supplementary *argument* from the parties, not additional *evidence*.

We also agree with the district court that, contrary to UPS's argument, the type of analysis conducted in the post-trial submissions did not require expert testimony. UPS emphasizes that the spreadsheets were large and unwieldy. But the parties, with the help of Excel, were easily capable of conducting the simple arithmetic calculations that the district court ordered.[30]

---

district court thus took as undisputed the facts in the government's memorandum and drew inferences from those facts.") (alteration in original).

[30] It is true that the district court ordered the parties to remove duplicate entries and packages weighing under one pound, which required some human manipulation in the Excel program. But that the district court accepted UPS's arguments as to why certain packages in the spreadsheets should not be counted does not mean that the plaintiffs were unable to perform the calculation without an expert. Had the district court not given UPS the chance to submit its own calculation or to verify the plaintiffs' calculations, we would be more concerned about potential error. But UPS had every opportunity to refute the calculations proffered by the plaintiffs.

UPS also complains that by ordering it to conduct and submit a calculation of the packages containing cigarettes—information that would be used to punish UPS financially—the district court violated the principle of party presentation and shifted the burden of proof. The court's order did not shift the burden of proof onto UPS. The evidence and theories of damages and penalties had been put forth by the plaintiffs. All the court ordered UPS to do was to submit, if it so chose, its contentions regarding the numbers of packages and cartons as they were defined in the liability opinion. By that time, the plaintiffs had already met their burden of proof on damages. What remained was to plug in the damage and penalty calculations based on information in the record.

B. The District Court Erred in Awarding the Plaintiffs Only Half of the Unpaid Taxes on Cigarettes UPS Unlawfully Shipped.

The district court awarded the plaintiffs a total of $9.4 million in damages for unpaid cigarette taxes.[31] The court recognized that both the PACT Act and CCTA authorized it to award the plaintiffs damages for the taxes that went unpaid on the cigarettes that UPS illegally transported under those statutes. After calculating the amount of unpaid taxes due under both statutes, the district court concluded that it would award damages for unpaid taxes under the

[31] The district court also awarded $1,000 in nominal penalties under the CCTA. That award is not challenged on appeal.

CCTA, which summed to a larger amount than the damages for unpaid taxes under the PACT Act.[32]

However, because the district court thought of the plaintiffs' "lost tax revenues [as] a type of compensatory damage[]," *see United Parcel Service, Inc.*, 253 F. Supp. 3d at 687, it applied tort principles of causation to limit the plaintiffs' recovery of unpaid taxes by the amount of "tax diversion," or the extent to which purchasers of unstamped cigarettes would have purchased New York-taxed cigarettes if the former were not available through UPS. The court awarded the plaintiffs only 50% of the state and local excise taxes that went unpaid on UPS's cigarette shipments, reasoning that half of the purchasers of unstamped cigarettes transported by UPS would have managed to buy untaxed or lower-taxed cigarettes by some other means if UPS had complied with the law by declining those shipments.

On appeal, UPS argues that the district court erred in applying a diversion rate of 50%, instead of accepting the testimony of its expert, who opined that 94.6% of consumers whose unstamped cigarettes were delivered by UPS would still have evaded State and City taxes in a "but-for world" where the unstamped cigarettes shipped by UPS were unavailable. The plaintiffs cross-appeal on this point, claiming that it was error for the district court to apply any diversion rate at all to the plaintiffs' damages for unpaid taxes.

---

[32] The damages for compensatory damages were higher under the CCTA than under the PACT Act because UPS shipped more cartons of cigarettes in violation of the CCTA than it did in violation of the PACT Act (since only five of the Liability Shippers were on the NCLs).

Determining the correct measure of relief under the CCTA and PACT Act is a question of statutory interpretation, which we review *de novo*. *See Gortat v. Capala Bros., Inc.*, 795 F.3d 292, 295 (2d Cir. 2015). A straightforward reading of both the CCTA and the PACT Act leads us to conclude that the proper measure of damages under either statute is simply the amount of unpaid taxes on the unlawful transactions UPS knowingly facilitated. The district court erred in importing tort principles of causation into that calculation.

The CCTA allows a state or locality in a civil action to obtain "appropriate relief for violations," including but not limited to "money damages" and "injunctive or other equitable relief," 18 U.S.C. § 2346(b)(2), which easily encompasses "unpaid taxes." The PACT Act allows a state or locality to recoup "damages, equitable relief, or injunctive relief . . . including the payment of *any unpaid taxes* to the appropriate Federal, State, local or tribal governments." 15 U.S.C. § 377(b)(2) (emphasis added).[33]

---

[33] The statutory basis for holding UPS liable for unpaid taxes distinguishes this case from *Hemi Group, LLC v. City of New York, N.Y.*, 559 U.S. 1 (2010), on which the dissent relies. In *Hemi Group*, the Supreme Court cautioned against allowing the recovery of unpaid taxes from defendants who, like UPS, were never responsible for paying those taxes in the first place. There, the City sought to recover unpaid taxes under RICO, which provides a cause of action for "[a]ny person injured in his business or property by reason of a violation of section 1962." 18 U.S.C. 1964(c). The City asserted that it suffered injury in the form of lost tax revenue—its "business or property" in RICO terms—"by reason of" the Hemi Group's fraud, that is, its failure to submit customer information to New York State. *Hemi Group*, 559 U.S.

Of course, the State and City have to prove the existence of such "unpaid taxes." But nothing in the language of either the PACT Act or the CCTA suggests that "unpaid taxes" should be construed to mean the taxes that would have been collected not on the untaxed cigarette sales that actually occurred, but on the hypothetical transactions that would have occurred in some counterfactual universe. "Unpaid taxes" more naturally means the taxes that should have been charged on the *actual* transactions that occurred, but that were not paid.[34]

---

at 7. The Court concluded that the City could not sustain its cause of action because the connection between the Hemi Group's failure to comply with its Jenkins Act reporting requirements (the predicate RICO offense) and the City's lost tax revenue was too attenuated. The case did *not* involve the concept of "diversion." Here, in contrast, the statutes at issue were enacted for the precise purpose of preventing sellers of cigarettes from evading the collection and payment of taxes, and explicitly or implicitly provided for the recovery of unpaid taxes as a form of relief for violations by common carriers. We have no quarrel with Judge Jacobs's assertion that the "Supreme Court's teaching [in *Hemi Group*] transcends the [RICO] context." Dissenting Op. at 16. But the Court's caution about permitting damages in the form of unpaid taxes against parties that are not themselves responsible for paying them surely cannot apply where Congress has authorized such relief.

[34] Surely no one would dispute that proposition if the defendant here were the actual seller-shipper of the cigarettes. Take the example of a Manhattan jeweler who pretends to ship jewelry to an out-of-state address to evade sales taxes. We would undoubtedly reject an argument that the jeweler should not be liable for the unpaid sales taxes on the theory that, if the taxes had been charged, the customer would have cancelled the purchase and bought the jewelry in New Jersey instead, obviating any harm to the City or State from the jeweler's failure to collect and transmit

Rather than engaging in the required statutory analysis, the district court accepted a faulty analogy to tort principles. But the language of private tort actions is relevant here only to the extent that it accords with the texts and purposes of the CCTA and PACT Act. Those statutes, which Congress intended to meaningfully deter common carriers such as UPS from transporting untaxed cigarettes, and which are aimed squarely at evasion of state and local cigarette taxes, cannot fairly be understood to incorporate UPS's diversion theory. We have previously explained that "in an enforcement action, civil or criminal, there is no requirement that the government prove injury, because the purpose of such actions is deterrence, not compensation." *SEC v. Apuzzo*, 689 F.3d 204, 212 (2d Cir. 2012) (rejecting defendant's invocation of "proximate cause" tort principle in SEC enforcement action). And in any event, tort principles typically do not permit a defendant to avoid paying damages by arguing that another tortfeasor's (or even innocent party's) actions would have been sufficient to produce the claimed harm absent the defendant's tortious conduct. *See Basko v. Sterling Drug, Inc.*, 416 F.2d 417, 429 (2d Cir. 1969).

---

the proper sales tax. UPS in effect argues that it should not be held liable for the unpaid taxes it helped the shippers evade because it is only an aider and abetter, rather than the principal offender. But those who aid and abet or conspire in wrongful conduct are generally jointly and severally liable for the harm caused by that conduct, regardless of the degree of their participation or culpability in the overall scheme. *See*, *e.g.*, *Lumbard v. Maglia, Inc.*, 621 F. Supp. 1529, 1536 (S.D.N.Y. 1985) (citing W. Prosser, Handbook of the Law and Torts 292–93 (4th ed. 1971)).

The failure of UPS's argument is further demonstrated by the inherently speculative nature of the inquiry that it persuaded the district court to undertake. UPS faults the district court's 50% diversion rate as unsupported by any reliable methodology. We concur. At the same time, we also concur with the district court's well-founded rejection of UPS's expert witness's theory that 94.6% of cigarette purchasers would have either quit smoking altogether, found other methods of obtaining bootlegged untaxed cigarettes, or traveled to other states to buy cigarettes if deprived of access to home delivery of cigarettes from reservation sellers. No doubt some, or even many, purchasers would have found other means of feeding their addictions while avoiding taxes. But the extent of such evasion is inherently unknowable, and a rule that requires a district court to engage in such a speculative enterprise is as impractical as it is unmoored to the statutory concept of "unpaid taxes."

Thus, we hold that the district court erred in applying a 50% "diversion rate" to limit the plaintiffs' damages for unpaid taxes. The plaintiffs are entitled to the full amount of the unpaid taxes on cigarettes transported by UPS in violation of the CCTA, totaling $17,356,458 for the State and $1,441,770 for the City.

C. The District Court Abused Its Discretion in Awarding Per-Violation Penalties Under Both the PACT Act and PHL § 1399-*ll*.

The final issue we must consider is whether the district court abused its discretion in imposing cumulative penalties on UPS under the PACT Act, PHL § 1399-*ll* and the AOD. At the outset, we note that we have already concluded that the penalties under the

AOD must be reduced from $80.5 million to $20,000. *See supra* II.B.[35] That reduction obviates some of our concern with the district court's assessment of what were in effect treble penalties. But we are still presented with the question of whether the total penalty award that remains—approximately $78 million under the PACT Act and another $78 million under PHL § 1399-*ll*—is excessive. We hold that it is.

In general, civil penalties are designed to punish culpable individuals, deter future violations, and prevent the conduct's recurrence. District courts have discretion in fashioning appropriate relief in civil enforcement actions to achieve these goals. *See Friends of the Earth, Inc., v. Laidlaw Environmental Servs. (TOC), Inc.*, 528 U.S. 167, 192 (2000). A district court may exceed its discretion, however, when its decision—though not necessarily the product of legal error or a clearly erroneous factual finding—cannot be located within the range of permissible decisions. *Slupinski v. First Unum Life Ins. Co.*, 554 F.3d 38, 47 (2d Cir. 2009). In determining the amount of civil penalties, district courts are typically guided by a number of factors, including the good or bad faith of the defendants, the injury to the public, and the defendant's ability to pay. *See Advance Pharmaceutical, Inc.*, 391 F.3d at 399.[36]

---

[35] We have also raised the compensatory award for unpaid taxes to $18.8 million. *See supra* III.B.

[36] In awarding statutory civil penalties, district courts are also constrained, at the outer bounds, by the Eighth Amendment's Excessive Fines Clause. *See United States v. Bajakajian*, 524 U.S. 321, 328 (1998). A civil penalty violates the Excessive Fines Clause if it is "grossly disproportional to the gravity of the defendant's offense." *Id.* at 337.

Our assessment of the civil penalties in this case begins with the statutes under which they were imposed. The PACT Act allows the district court to impose per-violation – that is, per-package – penalties on a common carrier for shipping packages for sellers identified on the NCLs. The PACT Act caps the penalty for a common carrier's first violation at $2,500 but increases the limit to $5,000 for any subsequent violations that take place within one year of a previous violation. 15 U.S.C. § 377(b)(1)(B). PHL § 1399-*ll* authorizes the district court to impose per-violation – that is, per-carton – penalties on a common carrier for each carton of cigarettes that the common carrier ships, capping the penalty for each violation at $5,000. See PHL § 1399-*ll*(5). The district court awarded the plaintiffs approximately half of the per-violation penalties authorized under both statutes, imposing on UPS, in effect, a $2,500 penalty for each violation of the PACT Act and another $2,500 penalty for each violation of PHL § 1399-*ll*. The district court's assessment of penalties was permissible under the statutory schemes because both the PACT Act and PHL § 1399-*ll* are silent regarding the maximum penalties that may be imposed against a defendant.

However, it is worth noting here that Congress rarely exercises its authority to establish maximum-authorized civil penalties. Rather, when Congress adopts legislation authorizing the award of civil penalties, it generally leaves to the courts the job of fleshing out federal common-law rules governing the maximum aggregate size of penalties and punitive damages awards. Thus, the fact that the district court's penalty award is technically permissible under the statutory regimes at play does not necessarily mean

that it is a reasonable penalty in all circumstances. Penalties cascading on a defendant from several different statutory regimes must be applied with great care when they result from one underlying set of bad actions.

The double counting of PACT Act and PHL § 1399-*ll* penalties here falls within the category of unreasonable penalties. UPS was punished under both the PACT Act and PHL § 1399-*ll* for what was largely the same underlying conduct. Specifically, because all of the NCL shippers, for which UPS faced PACT Act penalties, were also Liability Shippers for which UPS faced PHL § 1399-*ll* penalties, UPS faced double per-violation penalties at a rate of $2,500 for many of the same shipments.[37] That led the district court to impose penalties of $156 million under the PACT Act and PHL § 1399-*ll* for what was, in essence, one set of impermissible conduct.

---

[37] The five shippers on the NCLs—Elliot Enterprises, Elliot Express/EExpress, Bearclaw Unlimited/AFIA, Indian Smokes, and Smokes and Spirits, for which UPS faced PACT Act penalties—were all also Liability Shippers for which UPS faced penalties. Indeed, the district court used the fact that certain shippers were on the NCLs to deem them Liability Shippers for purposes of PHL § 1399-*ll* liability. *See United Parcel Service, Inc.*, 253 F. Supp. 3d at 629 ("While the fact that [Elliot Enterprises] was located on an Indian reservation was alone insufficient to support a reasonable basis to believe it was shipping cigarettes, when that fact was combined with its presence on the November 2010 NCL and its presence in the Tobacco Watchdog Group letter, the question was not close."). Approximately 54% of the PHL § 1399-*ll* penalty award to the State was attributable to NCL shippers, and approximately 80% of the PHL § 1399-*ll* penalty award to the City was attributable to NCL shippers. See J. App'x at 507–18.

That double counting, among other factors, leads us to conclude that the penalties that the district court imposed on UPS are too high. We recognize that both New York and Congress take cigarette trafficking seriously, which is why several laws address the conduct for which UPS is being held liable. UPS holds a key position in the distribution chain and can have a meaningful impact in putting an end to the sale of unstamped cigarettes from reservation sellers to consumers throughout New York. But the $240 million penalty originally imposed by the district court, and even the $160 million penalty that remains in the wake of our correction to the district court's erroneous calculation of penalties under the AOD, is far too large a pill to swallow for the conduct at issue here. In so concluding, we revisit some of the factors that the district court considered in the first instance.

The district court was correct that UPS bears a high degree of culpability for the shipment of unstamped cigarettes, having flouted its obligations under the PACT Act and PHL § 1399-*ll*, as well as the AOD to which it assented in order to settle an earlier investigation. The court concluded that "*[n]umerous separate acts* by *numerous UPS employees* allowed *vast quantities* of unstamped cigarette shipments to be delivered to unauthorized recipients in New York." *United Parcel Service, Inc.*, 253 F. Supp. 3d at 690 (emphasis added). But, at the same time, UPS is not the primary wrongdoer here: the proscriptions against UPS shipping cigarettes are intended to prevent the actual cigarette sellers from evading taxes. It is worth considering that UPS itself "had no obligation to collect, remit, or pay" the taxes that were evaded. *Hemi Group*, 559 U.S. at 17.

We also consider the public harm caused by UPS's conduct. The district court concluded that the State and Congress have deemed the transport of cigarettes a public health issue, but that UPS, as the transporter, bears a lower level of culpability than other entities, such as the manufacturer or seller of cigarettes, for the public health issues caused by smoking. We agree with the district court that the effect of cigarette smoking on public health is substantial, but that the gravity of UPS's conduct is partially mitigated by the attenuated causal relationship between its conduct and the public health consequences of smoking.

Another aspect of the public harm is, of course, the plaintiffs' lost tax revenue on the cigarettes whose untaxed sale UPS facilitated. But the harm to the public fisc here totaled, at most, $18.8 million. The aggregate penalty imposed by the district court amounted to approximately 13 times that financial loss, and even the penalties remaining after the correction of the AOD penalty amount to more than eight times the maximum tax lost. The penalty amount even more dramatically dwarfs any profits UPS made on the illegal cigarette shipments. *See United Parcel Service*, 253 F. Supp. 3d at 690; J. App'x at 1953–54 (estimating profits on all shipments for Liability Shippers from 2010 through 2014 at $475,000).

The analogous penalty under the federal Sentencing Guidelines for sentences for trafficking cigarettes under the CCTA sheds some light on these ratios. *See* U.S.S.G. § 2E4.1; *cf. Bajakajian*, 524 U.S. at 338 (considering the maximum possible sentence under the Sentencing Guidelines for comparable conduct). The Guidelines are particularly relevant here because

they make clear that tax evasion is the principal conduct at which these statutes are directed, *see* U.S.S.G. § 2E4.1, and are designed to avoid hyper-technical, per-violation penalty calculations where the conduct at issue "involv[es] substantially the same harm." U.S.S.G. § 3D1.2. The operative Guidelines permit the court to set a fine at up to four times the amount of pecuniary loss caused.[38] *See* U.S.S.G. §§ 2E4.1, 2T4.1, 8C2.4(d), 8C2.6. Thus, under our reading of the Sentencing Guidelines, the $18.8 million in unpaid taxes lost by the State and City would permit a sentencing court to impose a fine up to $75.2 million, a far smaller financial penalty for a *criminal* violation than the district court imposed for a *civil* offense.[39]

---

[38] We do not suggest that the Sentencing Guidelines applicable to criminal CCTA violations set an outer limit on the penalties that can be imposed under a different, civil, statutory regime. We merely use the Guidelines as a useful cross-check on the reasonableness of the district court's cumulative penalty amount.

[39] Section 2E4.1, titled "Trafficking in Contraband Cigarettes and Smokeless Tobacco," provides that the base offense level for unlawful conduct relating to contraband cigarettes and smokeless tobacco is the greater of 9 or the offense level from the tax table in § 2T4.1 corresponding to the amount of the tax evaded. The tax table at § 2T4.1 indicates that the offense level is 26 for a tax loss of $18.8 million. Since the offense level from the tax table is greater than 9, we use 26 as the offense level. Section 8C2.4 instructs that, when sentencing organizations, the base fine is the greater of the amount from the offense level fine table at § 8C2.4(d) or "the pecuniary loss from the offense caused by the organization, to the extent the loss was caused intentionally, knowingly, or recklessly." § 8C2.4(a). Here, the latter of those amounts, $18.8 million of pecuniary loss, is the greater one, so that becomes the base fine. That base fine of $18.8 million would be multiplied by four, however, assuming a culpability score of

Lastly, we note that the deterrent value of civil penalties here is lessened to some extent by the fact that UPS began increasing its efforts to comply with the AOD in the fall of 2013, and was "achieving actual compliance as of the date this lawsuit was filed on February 18, 2015." *United Parcel Service, Inc.*, 253 F. Supp. 3d at 617. Given such compliance, the district court's reasoning that "only a hefty fine will have the impact on such a large entity to capture the attention of the highest executives in the company," *id*. at 691, was flawed. UPS's efforts to pursue more aggressive compliance with the AOD as early as 2013 indicate that an award in the hundreds of millions of dollars is not needed to accomplish specific deterrence.[40]

Thus, we conclude that the district court's duplicative $78 million penalty awards under the PACT Act and PHL § 1399-*ll* cannot be located within the realm of permissible decisions. One $78 million penalty appears sufficient to accomplish the goals of the

---

10 or more. *See* § 8C2.5 (culpability score of at least 10 for organization with 5,000 or more employees if the court also finds "tolerance of the offense by substantial authority personnel was pervasive throughout the organization"); § 8C2.6 (indicating a minimum multiplier of 2 and a maximum multiplier of 4 for a culpability score of 10 or more). Thus, if UPS were facing criminal charges in federal court, the maximum fine the district court could have imposed would be $75.2 million. *See* § 8C2.7.

[40] It is also worth noting that the deterrent effect on other similarly situated carriers is limited. Only two other major carriers had AODs comparable to that entered by UPS. One, DHL, closed its domestic shipping business in 2008. *See* J. App'x at 779; 1995. The other, FedEx, faced a similar lawsuit but reached a settlement during the pendency of this appeal. *See* Order for Dismissal and Retention of Jurisdiction, *City of New York v. FedEx Ground Package Sys., Inc.*, No. 1:13–cv–09173–ER (S.D.N.Y. Jan. 15, 2019), ECF No. 631.

PACT Act and PHL § 1399-*ll*, without nearing the boundaries of excessiveness.

Although we would typically vacate and remand a case when concluding that the district court abused its discretion in imposing a certain penalty or punishment, that need not be done in every situation, and the circumstances of this case counsel against remanding for further proceedings in this already extended litigation. First, the district court judge who ably handled this case below has retired from the bench and it would be burdensome and inefficient for a new judge to review the record and arrive at a new penalty calculation at this late stage. *See United States v. Ganci*, 47 F.3d 72, 74 (2d Cir. 1995) (refusing to remand sentence where it would be an "inefficient use of judicial resources" despite remand being the normal procedure under the circumstances). Moreover, the district court has already calculated the appropriate amount of damages under each statutory regime and we find no error in either calculation. We have carefully considered the record ourselves and conclude that $78 million is an appropriate penalty. *See Brown v. Maxwell*, 929 F.3d 41, 48 (2d Cir. 2019) (concluding, after reviewing summary judgment materials in connection with appeal, that appellate court could order unsealing documents without requiring a remand).

The district court in the first instance could have awarded penalties under either statutory regime. In vacating one of the $78 million awards, we choose to sustain the award under PHL § 1399-*ll* and vacate the award under the PACT Act. We do so because PHL § 1399-*ll* addresses the conduct that both Congress

and the State seek to stop: the shipment of unstamped cigarettes to consumers. The PHL § 1399-*ll* award reflects a steep price of $2,500 per carton of cigarettes that UPS actually shipped. It also incorporates penalties for violations with respect to each of the Liability Shippers, including those on the NCLs.

Therefore, we vacate the $78.4 million penalty award under the PACT Act and affirm the $78.8 million penalty award under PHL § 1399-*ll*.

CONCLUSION

For the reasons stated above, we: AFFIRM the judgment of liability and attendant $78.8 million penalties under PHL § 1399-*ll*; AFFIRM the judgment of liability but VACATE the imposition of $78.4 million in penalties under the PACT Act; AFFIRM the judgment of liability but MODIFY the award of damages under the CCTA to $17.4 million to the State and $1.4 million to the City; and AFFIRM the judgment of liability but MODIFY the award of penalties under the AOD to $20,000 to the State. The judgment of the district court, as so modified, is AFFIRMED.

* * *

DENNIS JACOBS, *Circuit Judge*, concurring in part and dissenting in part:

The majority opinion admirably recounts the history of this case and the dizzying contractual and statutory provisions that govern. I recount only what is necessary to understand my positions in dissent.

To collect revenue and reduce public health costs, New York State and the City of New York impose taxes on cigarettes, amounting (currently) to $43.50 per carton--doing well while doing good. Of course, those taxes are only effective insofar as they are actually collected, and both New York State and the federal government have passed statutes intended to curb tax evasion, including by the imposition of damages and penalties on common carriers that deliver cigarettes, of which UPS is one. The regulation of UPS is enforced, variously, by four potential sources of liability.

I

Enacted in 2000, New York's Public Health Law § 1399-*ll* makes it "unlawful for any common or contract carrier to knowingly transport cigarettes to any person in this state reasonably believed by such carrier" to be unauthorized to receive untaxed cigarettes. § 1399-*ll*(2). Delivery to a home or residence creates a presumption of unauthorized delivery. *Id*. The PHL authorizes penalties "not to exceed the greater of (a) five thousand dollars for each . . . violation; or (b) one hundred dollars for each pack of cigarettes shipped, caused to be shipped or transported in violation of [the PHL]." *Id*. § 1399-*ll*(5).

In 2004, the New York State Attorney General investigated UPS's compliance with PHL § 1399-*ll*, and

found regular instances of violation. To settle the resulting dispute, in October 2005, UPS entered into an Assurance of Discontinuance (the "AOD") with New York. Broadly, the AOD forbids UPS from knowingly shipping untaxed cigarettes to consumers in New York State, and specifies certain compliance measures to be taken by UPS, including, for example, auditing suspect shippers and maintaining a list of shippers who have been caught selling untaxed cigarettes. The stipulated penalty is "$1,000 for each and every violation." S. App'x at 508.

Five years later, the Prevent All Cigarette Trafficking Act (the "PACT Act"), 15 U.S.C. § 375 *et seq*., banned the mailing of cigarettes through the United States Postal Service, and placed further restrictions and reporting requirements on common carriers. Among other prohibitions, common carriers are forbidden from accepting any packages from shippers on a "Non-Compliant List" that is maintained by the U.S. Attorney General. 15 U.S.C. § 376a(e)(1). The PACT Act authorizes penalties "in an amount not to exceed . . . $2,500 in the case of a first violation, or $5,000 for any violation within 1 year of a prior violation." 15 U.S.C. § 377. Critical here, the PACT Act has an exemption from its penalties--and preempts any damages or penalties available under state laws--if "the Assurance of Discontinuance [AOD] entered into by the Attorney General of New York and United Parcel Service, Inc. . . . is honored throughout the United States to block illegal deliveries of cigarettes or smokeless tobacco to consumers." 15 U.S.C. § 376a(e)(3)(B)(ii)(I).

The shipment of cigarettes is regulated by yet another statute. The Contraband Cigarette Trafficking

Act (the "CCTA"), enacted in 1978, makes it illegal "for any person knowingly to ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes," 18 U.S.C. § 2342(a), and defines "contraband cigarettes" as "a quantity in excess of 10,000 cigarettes, which bear no evidence of the payment of applicable State or local cigarette taxes in the State or locality where such cigarettes are found." *Id*. § 2342(2). The CCTA provides that "[w]hoever knowingly violates [the CCTA] shall be fined," but gives no guidance as to amount. *Id*. § 2344.

In this case, filed in February 2015, New York State and the City of New York (together, the "plaintiffs") allege that, from 2010 to 2015, UPS violated the PHL, the AOD, the PACT Act, and the CCTA by knowingly shipping untaxed cigarettes to consumers in New York. The district court found after a bench trial that UPS had violated each of the statutes, and awarded the following damages and penalties:

- $78.4 million in penalties for accepting packages from shippers on the Non-Compliant List, in violation of the PACT Act;
- $78.8 million in penalties for the knowing shipment of untaxed cigarettes, in violation of the PHL;
- $9.4 million in damages for the recovery of unpaid taxes on cigarettes shipped in violation of the CCTA;
- $1,000 in nominal penalties for violating the CCTA;
- $80.5 million in penalties for violating the auditing provision of the AOD.

The total combined award was a colossal $246.9 million.

II

I concur in part with the majority opinion, because I agree with the majority's navigation of many of these difficult issues. Specifically, I agree that:

- the district court properly concluded that the AOD authorizes penalties for auditing violations;
- the district court erred in concluding that the AOD authorized per-package penalties for auditing violations, amounting to an $80 million award, and that the proper award is $20,000;
- the district court did not abuse its discretion in denying UPS's motion for Rule 26 sanctions;
- the district court did not clearly err in finding the package quantity and contents for the purposes of calculating damages and penalties; and
- the district court did not err by ordering the parties to submit post-trial damages calculations.

These conclusions by the majority are sound and well-reasoned.

I part company with the majority on two issues, and to that extent I respectfully dissent. *First*, I believe that UPS is exempted from the PACT Act, and that the PHL is preempted, because UPS has "honored" the AOD nationwide (within the meaning of the statute) by subjecting itself (implicitly and explicitly)

to the AOD nationwide, and I therefore conclude that the district court erred in awarding damages and penalties under the PACT Act and the PHL. *Second*, I believe that the CCTA's definition of "contraband cigarettes" does not permit aggregation of packages with fewer cigarettes to arrive at "a quantity in excess of 10,000 cigarettes"; and I further conclude that the district court erred in awarding damages under the CCTA without sufficient evidence to support the award.

The PACT Act and the PHL

It is a close question whether UPS is exempted from the PACT Act and the PHL is preempted. The wording of the statute offers little help. Nevertheless, the majority's proposed solution raises so many knotty problems that it cannot be right.

As the majority opinion explains, UPS is exempted from the PACT Act, and the PHL is preempted, if the AOD is "honored throughout the United States to block illegal deliveries of cigarettes or smokeless tobacco to consumers." 15 U.S.C. § 376a(e)(3)(B)(ii)(I) (PACT Act exemption); 15 U.S.C. § 376a(e)(5)(C)(ii) (preemption of state laws). According to the majority opinion, UPS would "honor" its undertaking only by exercising sufficient care to prevent illicit trafficking. In my view, UPS "honors" the AOD so long as it subjects itself to the terms of the AOD throughout the nation.[1] *See* Black's Law Dictionary

[1] The majority cites the phrase "to block illegal deliveries of cigarettes or smokeless tobacco to consumers" as evidence that the "honored" clause was intended to involve a compliance in-

(defining "to honor" as to accept an obligation as valid, such as when a bank honors a check). Thus one does not dishonor a contract by subjecting oneself to its terms of liquidated damages.

This interpretation of the statute achieves straightforward application of a nebulous term, as follows. If a state or locality other than New York sues UPS under the PACT Act, UPS is not obliged to invoke the exemption; but if it does, the plaintiff cannot obtain remedies under the PACT Act, and is limited to the somewhat lesser remedies under the AOD. The condition is that UPS can invoke the exemption only if it "honors" the AOD in any enforcement suits brought by any State or locality. It does so by forgoing certain potent defenses that would otherwise defeat such a claim: that states other than New York lack privity with UPS; that other states did not agree to be bound by the AOD; that the wording of the AOD references cigarette distribution in New York only; and that the AOD grants no "rights or privileges to any" non-party. In that way, the New York-centric terms of the AOD do not defeat or complicate the exemption term of the PACT Act, which post-dated the AOD by five years. Nor can UPS back out of its obligation to honor the ACID nationwide: UPS's invocation of the PACT Act exemption in any single forum would operate to estop its invocation of defenses against the AOD in any other forum. And the undertaking expressly made in this case--to honor the AOD nationwide--has

---

quiry. But "to" clauses are more commonly understood as statements of statutory *purpose*, not directives. *See Allison Engine Co. v. Sanders*, 553 U.S. 662, 668 (2008) (concluding that "to get a false or fraudulent claim paid by the government" is a purpose clause, not a condition).

similar estoppel effect. *Pace* the majority's misconception that UPS would thus have a case-by-case power of election in every state.

Thus UPS honors the AOD nationwide by subjecting itself to the AOD's penalty provision. And at this point having already done so in New York, it has no other option but to honor it nationwide. Up *until* that point, UPS was subjected to *either* (i) the ACID or (ii) the PACT Act and local state laws--but not all three. This is a common-sense result that seems contemplated by the exemption in the PACT Act. The manifest design of the PACT Act is to allow and ensure the imposition of one penalty or another, not to stack penalty upon penalty based on whether the company devoted a sufficient (though undefined) level of care and attention to weeding out untaxed-cigarette parcels from the millions of parcels it delivers every day.

The majority's interpretation is that to "honor" means to conduct sufficient oversight to the interdiction of cigarette traffic, and to devote sufficient resources to that effort. That interpretation is unworkable for several reasons. First, if the applicability of the exemption were to turn on success of its interdiction measures, no one (courts, common carriers, states, or municipalities) could know whether the exemption is applicable until vexed questions were sorted out in litigation. The exemption would then become ineffective, because UPS could not rely on it: UPS could only know after trial whether it had sufficiently "honored" the AOD to qualify. And if UPS is found to be out of compliance with the AOD (say, in Rabbit County), triplicative penalties pile up under two statutes and a contract, all of which regulate the

same conduct. This is untenable; worse, it is unconvincing.

The statute provides no standard for deciding whether UPS honored the AOD in the way posited by the majority. Would a single breach of a reporting requirement caused by management indifference (or other priorities) render the exemption inapplicable? Given the millions of packages delivered each day, would a hundred failures of compliance a month render the exemption inapplicable? What if the common carrier materially breaches the AOD in one state, but complies in the other forty-nine? How likely is it that Congress intended the applicability of the exemption to turn on such baffling questions, or that Congress intended hundreds of millions of dollars of penalties to be rendered based on open issues? With no statutory guidance (or useful help from the parties), the district court created its own standard.[2]

The majority's preferred approach is internally inconsistent. If, as the majority sees it, Congress intended UPS to lose its exemption if it breached the AOD, one must infer that Congress also intended the assessment of penalties from three sources for the same conduct in the event of noncompliance. But, as the majority concludes, that result cannot be sustained: for that very reason, the majority has sharply reduced the judgment of $247 million. To avoid stacking of penalties under the PHL, the AOD, and the

[2] The district court concluded that the exemption is unavailable if "the effectiveness of UPS's policies [is] so compromised that these policies are not in fact in place." S. App'x at 144. This invention is nowhere in the statute; it is subjective and vague; and it would require a trial to decide what contract and what statutes govern the case.

PACT Act, the majority simply chooses one statute's penalties to apply (the PHL), and writes off the penalties under the PACT Act and the AOD.

The majority alludes to a problem of "announcement"--how will other States know whether UPS has agreed to subject itself to the AOD nationwide, so that those States can therefore look to penalties under the AOD? But UPS has made that very announcement here. When UPS invoked the exemption in the PACT Act in this case, and advocated for preemption of the PHL, it became bound by the AOD nationwide by virtue of judicial estoppel. Thus, if Idaho now sues, UPS will be bound by its representation in this lawsuit that the AOD is effective nationwide and therefore will lose the ability to interpose defenses to claims under the AOD; and Idaho will seek penalties under the AOD because it will be unable to seek penalties elsewhere. Problem solved.

As to penalties under the AOD, the district court awarded $80 million for auditing violations (reduced by the majority opinion to $20,000) and imposed no penalties for the knowing shipment of untaxed cigarettes. The only penalties awarded by the majority for that unlawful conduct fall under the PACT Act and the PHL, which (in my view) are subject to UPS's exemption and to federal preemption, respectively. The plaintiffs argue that, if (as I think) the penalty awards under the PACT Act and PHL cannot be sustained, substitute penalties must be levied under the AOD for the knowing shipments of untaxed cigarettes. UPS argues waiver, because the plaintiffs did not seek those penalties under the AOD at trial. *See* S. App'x at 385 ("Plaintiffs are not seeking penalties [for knowing shipments]--they seek penalties only for violations

of the audit obligation in ¶ 24 [of the AOD]."). The plaintiffs explain, however, that they were willing to forgo collection under the AOD only because it would result in a duplicative award, and that it did not waive its right to seek those penalties if they were *not* duplicative.

The waiver, if there was one, should be overlooked. UPS does not challenge the district court's findings that it knowingly shipped some untaxed cigarettes; and UPS admits that it should be bound by *either* the AOD or the PHL/PACT Act. Accordingly, I would vacate the awards under the PACT Act and the PHL, and remand with instructions to consider whether penalties are appropriate under the AOD for the knowing shipment of untaxed cigarettes. Based on the district court's findings of the number of untaxed cartons of cigarettes knowingly shipped by UPS, the penalties would amount to about $30 million--a quite considerable penalty for failure to monitor a minute fraction of the parcels shipped by UPS.

The CCTA

I dissent from the majority's award of damages under the CCTA because: (1) the district court erred in concluding that the CCTA permits aggregation of small shipments to reach the 10,000-cigarette threshold in the definition of "contraband cigarettes", and (2) the district court erred in awarding any damages under the CCTA because there was insufficient evidence to sustain the award.

The CCTA outlaws the knowing shipment of "contraband cigarettes," 18 U.S.C. § 2342(a), defined as "a quantity in excess of 10,000 cigarettes, which bear no evidence of the payment of applicable State or local

cigarette taxes." 18 U.S.C. § 2341(2). The district court ruled (and the majority agrees) that the CCTA permits aggregation of smaller quantities to meet the 10,000-cigarette threshold. That is a misreading. "A quantity," a singular noun, is read naturally to reference a single shipment of more than 10,000 cigarettes, which amounts to 50 cartons. This interpretation fits the express purpose of the statute, to address "the serious problem of organized crime and other large scale operations of interstate cigarette bootlegging." S. Rep. No. 95-962, at *3 (1978).

If aggregation is permitted (as my colleagues conclude), courts will be left to resolve difficult questions, starting with time period. The plaintiffs argue that aggregation should be permitted over the entire four-year period of the statute of limitations. Such aggregation would impose a penalty for shipping about one carton a month. This quick calculation tells us something about what Congress likely intended. Surely, organized crime has something better to do.

As to the calculation of damages under the CCTA, the majority concludes that the plaintiffs are entitled to recover the taxes they would have collected for each and every carton of untaxed cigarettes shipped by UPS. I disagree.

The issue is resolved by general principles of damages. In order to recover compensatory money damages, the plaintiffs must demonstrate that their loss of tax revenue was caused by the defendant's actions. *See Anderson Grp., LLC v. City of Saratoga Springs*, 805 F.3d 34, 52 (2d Cir. 2015) ("Compensatory damages are designed to place the plaintiff in a position substantially equivalent to the one that he or she

would have enjoyed had no tort been committed."); *see also Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 432 (2001) ("[Compensatory damages are] intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct.").

Unlike the *sellers* of the cigarettes, who are directly responsible for remitting the taxes to the state, UPS never had an obligation to pay the cigarette taxes. The damages theory relies on UPS's role as a conduit--incidental to its useful and legitimate business. No damages were caused by UPS failing to pay the tax (it never owed any); any damage was caused by UPS transporting cigarettes for sellers who did owe the taxes but failed to pay.

The intuitive point--that UPS was never responsible for paying the taxes on the cigarettes--is critical in light of the Supreme Court's decision in *Hemi Group, LLC v. City of New York, N.Y.*, 559 U.S. 1 (2010). The City of New York sued an online cigarette seller in New Mexico that shipped untaxed cigarettes to consumers in New York City. Because it was an out-of-state seller, defendant Hemi Group was under no obligation to charge, collect, or remit the City's tax on those sales. The City argued under RICO that Hemi was liable nevertheless because it failed to comply with a federal statute that required it to report customer information to the state. The Court concluded that the alleged acts of racketeering (violations of the federal reporting requirement) were attenuated from the alleged damages (unpaid City taxes), and therefore could not justify RICO recovery for the unpaid taxes. What matters for us is the Court's observation in dismissing the City's claims:

> It bears remembering what this case is about. It is about the RICO liability of a company for lost taxes it had no obligation to collect, remit, or pay, which harmed a party to whom it owed no duty. It 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.

Id. at 17. We are thus cautioned against allowing the collection of unpaid taxes from defendants who, like UPS, were never responsible for paying them in the first place. True, *Hemi* was a RICO case; but the Supreme Court's teaching transcends the context.[3] The plaintiffs here are entitled to recover no more than the cigarette taxes that would have been collected in the absence of UPS's illegal conduct. That depends (as the district court ruled) on the "diversion rate," *i.e*. the percentage of smokers who would have purchased tax-stamped cigarettes if UPS complied with the law.

As UPS contends, the plaintiffs failed to sustain their burden of proving damages because they failed to offer any evidence of a diversion rate.

The district court's finding--that the diversion rate is 50 percent—comes from mid-air. The only testimony at trial on the proper diversion rate came from

---

[3] The majority deems *Hemi* inapplicable to this context because the *Hemi* principle "surely cannot apply where Congress has authorized such relief." Majority Op. at 101 n.33. But Congress did not: the majority's preceding sentence asserts no more than that Congress did so "implicitly." In any event, the PACT Act does not apply for the reasons I set out above, and, as to the CCTA, the majority posits the payment of "unpaid taxes" only as it may be "encompasse[d]" in "money damages." Majority Op. at 100.

UPS's expert, Dr. Nevo; he opined that 5.4 percent was appropriate. The district court rejected Dr. Nevo's testimony (on a questionable basis), and then simply made up another rate:

> On balance, the Court cannot arrive at a precise number of cigarette cartons consumers would have purchased, but 50% is a reasonable number based on the totality of facts. The Court therefore finds plaintiffs are entitled to compensatory damages in the amount of 50% of Cartons . . . shipped by the Liability Shippers.

S. App'x at 442. In its entirety, that is the district court's analysis of the diversion rate. There is no citation to precedent or the record. And the plaintiffs offered no evidence at trial to support a 50 percent rate.

The plaintiffs argue that the 50 percent diversion rate is supported (more or less) by Dr. Nevo's opinion that 56 percent of all cigarette sales in New York State are taxed sales. But the district court did not predicate its 50 percent finding on Dr. Nevo's 56 percent estimate. In any event, Dr. Nevo's testimony-- that 56 percent of New York smokers buy taxed cigarettes--does not mean that smokers who buy *untaxed* cigarettes shipped by UPS would buy *taxed* cigarettes in the same proportion as all other New Yorkers if their smokes could not be shipped by UPS. The premise is untenable, given that many of those consumers are financially marginal, are likely to be price sensitive, and are unlikely to have an extra $3,000 a year for a carton-per-week habit.

Therefore, because the plaintiffs did not offer sufficient evidence to support its damages calculation, I would reverse the damages award under the CCTA.

* * * * *

In sum, I vote to: vacate the penalty awards imposed under the PACT Act and the PHL; vacate the award of damages under the CCTA; reduce to $20,000 the penalty for auditing violations under the AOD; and remand to the district court with directions to calculate the reasonable penalties under the AOD for the knowing shipment of untaxed cigarettes.

APPENDIX B

UNITED STATES
DISTRICT COURT
SOUTHERN DISTRICT
OF NEW YORK

----------X

THE STATE OF NEW YORK and THE CITY OF NEW YORK,	:	
Plaintiffs,	:	
-v-	:	15-cv-1136 (KBF)
UNITED PARCEL SERVICE, INC.,	:	CORRECTED OPINION & ORDER[1]
Defendant.	:	

----------X

KATHERINE B. FORREST, District Judge:

[1] This Corrected Opinion & Order replaces the Opinion & Order issued by the Court on March 24, 2017 (ECF No. 526.) This Corrected Opinion & Order corrects certain limited issues identified by the parties as well as certain limited issues identified by the Court. By separate order at ECF No. 533, the Court has provided a comparison (or "blackline") showing all of the changes made that are now reflected in this Corrected Opinion & Order.

Table of Contents

I. INTRODUCTION

Issues surrounding the appropriate taxation and collection scheme for cigarettes sold on Indian reservations in the State of New York have presented persistent and complex challenges. Cigarettes sold on reservations to tribal members for personal use are exempt from tax; those sold to non-tribal members are not. The tracking and collection of appropriate taxes has proceeded in fits and starts—including a lengthy period of forbearance by the State of New York from enforcing existing tax laws on reservations, which continued until June 2011.

This lawsuit concerns a non-tribal member, United Parcel Service, Inc. ("UPS"), which allegedly transported, inter alia, cigarettes from and between New York State Indian reservations for a number of shippers ("Relevant Shippers"). Plaintiffs, the State of New York and the City of New York (collectively, "plaintiffs," and, respectively, the "State" and/or the "City"), assert that in transporting unstamped (and therefore untaxed) cigarettes,[2] UPS has violated an Assurance of Discontinuance ("AOD") it signed with the State in 2005, as well as New York Executive Law ("N.Y. Exec. Law") § 63(12); New York Public Health Law ("PHL") § 1399-ll;[3] the Prevent All Cigarette

---

[2] Throughout this Opinion & Order, unless otherwise specified or clear from context, the word "cigarettes" refers to unstamped cigarettes for which no taxes were paid. The Court makes a number of factual findings below supporting the use of the term in this manner.

[3] Plaintiffs' PHL § 1399-ll and N.Y. Exec. Law § 63(12) claims entirely overlap: According to plaintiffs, violations of the former led to a violation of the latter.

Trafficking Act ("PACT Act"), 15 U.S.C. §§ 375-78; the Contraband Cigarettes Trafficking Act ("CCTA"), 18 U.S.C. §§ 2341-46; and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-68.[4]

UPS has denied plaintiffs' assertions from the commencement of this action, and it vigorously defended itself through trial. While UPS pursued a number of defenses discussed in more detail below, a few are worth additional focus at the outset. First and foremost, UPS has disputed that it ever violated its obligations under the AOD or knowingly transported unstamped cigarettes from or between Indian reservations to unauthorized recipients.

Second, UPS argues that even if it had violated the statutes or the AOD, plaintiffs have failed to carry their burden with regard to establishing damages.[5] UPS's primary legal arguments in support of this contention are that plaintiffs failed to adequately disclose their damages computation prior to trial and then made a separate error at trial by attempting to introduce the details of their damages claim through a demonstrative when it should have been presented by an expert. According to UPS, these legal issues provide two independent bases for the Court to preclude plaintiffs' damages claim altogether. UPS has also made factual arguments in furtherance of preclusion.

---

[4] By Opinion & Order dated August 9, 2016, this Court dismissed plaintiffs' RICO claims. (ECF No. 322, New York v. United Parcel Serv., Inc., No. 15-cv-1136, 2016 WL 4203547 (S.D.N.Y. Aug. 9, 2016).)

[5] Plaintiffs seek both compensatory damages (relating to lost tax revenue) and penalties. For ease of reference, the Court refers to these together as "damages."

UPS argues that plaintiffs improperly and without sufficient factual support seek damages for every package transported by UPS after a certain point in time. UPS also asserts that, in all events, neither UPS nor plaintiffs can possibly know the contents of any particular package, rendering assessment of damages on a per-package basis impossible.

Upon careful review and consideration of the entire trial record, the Court finds that UPS violated its obligations under the AOD in a number of respects and, in addition, knowingly[6] transported cigarettes from and between Indian reservations for all but one of the shippers (the "Liability Shippers").[7] For this reason and others detailed below, UPS's arguments against any liability fail. The more complicated issue, however, relates to damages. Plaintiffs left their damages case open to severe attack; such exposure could and should have been avoided. However, the Court finds that plaintiffs are entitled to compensatory damages as well as monetary penalties in amounts yet to be determined, but not injunctive relief or the appointment of a monitor.

---

[6] Throughout this Opinion & Order, when the Court refers to UPS's "knowledge" it is incorporating its legal conclusions on this topic set forth at length below, and is including direct knowledge, knowledge based on willful blindness and/or conscious avoidance, and knowledge acquired by way of imputation.

[7] The Liability Shippers comprise all but one of the Relevant Shippers. That is, plaintiffs' claims relate to all of the Relevant Shippers, but the Court has concluded that UPS has liability for at least one or more claims only as to the Liability Shippers.

II. PROCEDURAL HISTORY

A. Pre-Trial Proceedings

The State and City initiated this action by filing a complaint against UPS on February 18, 2015. (ECF No. 1.) They filed an amended complaint ("Amended Complaint") on May 1, 2015, a second amended complaint ("Second Amended Complaint") on November 30, 2015, and a third amended complaint ("Third Amended Complaint") on February 24, 2016. (ECF Nos. 14, 86, 189.) The Second Amended Complaint contains fourteen causes of action seeking various forms of relief under the AOD,[8] N.Y. Exec. Law § 63(12),[9] PHL § 1399-ll;[10] the PACT Act;[11] the CCTA;[12] and RICO.[13]

The parties agreed that the affirmative defenses asserted by UPS in its answer to the Amended Complaint, (ECF No. 110), were deemed asserted as to the Second Amended Complaint. On December 4, 2015, plaintiffs moved to strike UPS's Fifth through Seventeenth Affirmative Defenses. (ECF No. 89.) In an Opinion & Order dated February 8, 2016, the Court granted the motion in part and denied it in part. (ECF

---

[8] Thirteenth claim for relief.

[9] Eleventh claim for relief.

[10] Twelfth claim for relief.

[11] Seventh through tenth claims for relief.

[12] First and second claims for relief.

[13] Third through sixth claims for relief. Plaintiffs' fourteenth claim is labeled as a claim for "injunctive relief and appointment of a monitor." However, the alleged legal basis for this claim relief derives from the aforementioned causes of action. Thus, the claim is not a liability claim but rather a request for relief.

No. 177, New York v. United Parcel Serv., Inc., 160 F. Supp. 3d 629 (S.D.N.Y. 2016).) UPS moved for reconsideration with regard to the portion of the decision that struck its Seventh Affirmative Defense. (ECF No. 187.)

There has been significant motion practice regarding UPS's Seventh Affirmative Defense. (See, e.g., ECF Nos. 91, 111, 122, 188, 198, 201, 287, 345, 384.) Although the Court granted UPS's motion for reconsideration, (ECF No. 258),[14] and vacated certain portions of its prior decision, the Court ultimately granted plaintiffs' renewed motion for summary judgment on the Seventh Affirmative Defense. (ECF No. 406.) The Court refers the reader to the Court's prior decisions for its full analysis. (ECF Nos. 177, 258, 406.)

In summary, UPS's Seventh Affirmative Defense asserts that plaintiffs' claims are barred, at least in part, by orders issued by various courts between 2008 and 2011 pertaining to enforcement and/or implementation of N.Y. Tax Law §§ 471 and 471-e.[15] In its briefing, UPS has asserted that this defense encompasses its argument that the State's policy of "forbearance,"

---

[14] Procedurally, "granting" a motion for reconsideration does not necessarily mean the movant's position has been vindicated. It means, instead, that there is a sufficient "basis to reconsider" the correctness of the Court's prior decision. See Salveson v. JP Morgan Chase & Co., 663 F. App'x 71, 78, 2016 WL 6078616, at *2 (2d Cir. 2016); see also Shrader v. CSX Transp., Inc., 70 F.3d 255, 257 (2d Cir. 1995).

[15] N.Y. Tax Law §§ 471 et seq. sets forth the New York taxation and stamping requirements for cigarettes as well as the New York enforcement scheme.

regarding enforcement of New York's cigarette taxation scheme on Indian reservations to June 2011, bars any recovery for a significant portion of the relevant time period. According to UPS, New York's forbearance policy rendered § 471 not "in effect"—and therefore unenforceable—during the period of forbearance. In addition, UPS has argued that under constitutional principles and § 471, the State and City were without power to tax cigarettes UPS delivered to Indian reservations;[16] such shipments constitute a significant portion of those at issue. This Court disagreed. It determined, in part, that § 471 has been "in effect" continuously since its inception, even during the period of forbearance. The Court found that the "forbearance policy" was directed at Indian tribal members and not at private actors such as UPS. Finally, the Court further held that neither constitutional principles nor the forbearance policy directed at Indian reservations immunized or excused UPS's actions. (ECF No. 406, New York v. United Parcel Serv., Inc., No. 15-cv-1136, 2016 WL 4747236 (S.D.N.Y. Sept. 10, 2016).)

The parties also engaged in significant motion practice regarding whether the Court should strike certain of UPS's other defenses. In its Opinion & Order dated February 8, 2016, the Court struck UPS's Sixth, Eighth, Ninth, Tenth, Eleventh, and Sixteenth Affirmative Defenses. (ECF No. 177, New York v. United Parcel Serv., Inc., 160 F. Supp. 3d 629, 665 (S.D.N.Y. 2016).) UPS's remaining defenses are:

---

[16] As a factual matter, the evidence at trial supported deliveries of cigarettes to non-reservation retailers or consumers for all but one of the shippers as to which the Court had found liability (i.e., Jacobs Manufacturing/Tobacco).

- Second Defense: To the extent plaintiffs have suffered any damages alleged in the Third Amended Complaint, such damages were not caused by UPS. (ECF No. 199 at 18.)
- Third Defense: Plaintiffs' claims are barred, in whole or in part, by the applicable statutes of limitations. (Id.)
- Fourth Defense: Plaintiffs lack standing to assert the claims set forth in their Third Amended Complaint. (Id.)
- Twelfth Defense: The State's claim for violation of the AOD is barred, in whole or in part, by its breach or nonperformance with respect to the AOD, including but not limited to any covenants implied therein, such as the implied covenant of good faith and fair dealing. (Id. at 22.)
- Thirteenth Defense: The State's own inactivity under the AOD, and with respect to cigarette tax laws more generally, bars, estops, or otherwise precludes it from complaining of, or seeking relief based on, UPS's alleged performance and/or nonperformance under the AOD, including, but not limited to, under principles of laches, waiver, estoppel, and similar doctrines. (Id.)
- Fourteenth Defense: UPS was excused from performance under the AOD on grounds of impracticability and frustration, including such grounds created by the conduct of the

State of New York or its agents, employees, or representatives. (Id.)

- Fifteenth Defense: Plaintiffs' claims are barred and/or preempted, in whole or in part, by federal law pertaining to the transportation industry, including the Federal Aviation Administration Authorization Act of 1994, 49 U.S.C. §§ 14501, 41713, and any other applicable provisions of Title 49 of the United States Code, Title 49 of the Code of Federal Regulations, and related provisions, federal common law, or other federal law pertaining to the industry or the duties of common carriers. (Id.)
- Seventeenth Defense: Plaintiffs' claims, including their request for civil penalties, are barred, in whole or in part, by the doctrines of waiver, estoppel, laches, unclean hands, in pari delicto, and/or other equitable doctrines, in that, among other things, plaintiffs had reason to know about unlawful cigarette sales by the shippers named in the Third Amended Complaint, yet failed to take appropriate steps as to them or their customers, or to notify UPS. (Id.)
- Eighteenth Defense: Plaintiffs' claims are barred, in whole or in part, under the doctrine of estoppel by entrapment. (Id. at 23.)
- Nineteenth Defense: Plaintiffs' claims are barred, in whole or in part, under the public authority defense. (Id.)

- Twentieth Defense: Plaintiffs' claims are barred, in whole or in part, by judicial estoppel or similar doctrines. (Id.)
- Twenty-First Defense: Plaintiffs' claims for civil penalties are barred to the extent that an award of such penalties does not comport with principles of substantive and procedural due process under the U.S. Constitution and other federal and state law. (Id.)
- Twenty-Second Defense: The State is barred from seeking penalties under the AOD in circumstances where the State declined to pursue penalties after requiring UPS to make a showing to the State's "reasonable satisfaction" under ¶ 42(b) of the AOD. (Id.)
- Twenty-Third Defense: The PACT Act exempts UPS from liability under the PACT Act or PHL § 1399-ll, either because UPS is subject to the AOD, or because UPS had an AOD and continues to administer and enforce policies and practices throughout the United States that are at least as stringent as the AOD. 15 U.S.C. § 376a(e)(3)(A)(i), (ii). (Id.)
- Twenty-Fourth Defense: The PACT Act exempts UPS from civil penalties under 15 U.S.C. § 377(b)(3)(B). (Id.)
- Twenty-Fifth Defense: Plaintiffs' claims pursuant to the PACT Act are barred or limited by their own conduct, including their

failure to comply with the PACT Act's provisions requiring state and local governments to provide the U.S. Attorney General with certain information used to create the PACT Act's list of unregistered or noncompliant delivery sellers. 15 U.S.C. § 376a(e)(1)(D), (6)(A). (Id.)

- Twenty-Sixth Defense: Plaintiffs' claims pursuant to the New York Public Health Law are barred, in whole or in part, because they lack standing to enforce PHL § 1399-ll against UPS based on any alleged delivery occurring before September 27, 2013. (Id. at 24.)

B. The Trial

This case was tried to the bench on September 19, 2016, through September 29, 2016. The parties called thirty-eight witnesses in total—twenty-two live[17] and sixteen by way of deposition designation.[18] The Court also received into evidence more than 1,000 documents, amounting to thousands of pages.[19] Following

[17] Plaintiffs called many of defendant's witnesses as hostile witnesses in their case.

[18] The Court made a number of rulings on objections to deposition designations. (See ECF Nos. 407, 409.)

[19] The Court made a number of evidentiary rulings regarding documents that the parties sought to introduce. Those rulings are contained primarily in the following orders: ECF Nos. 408, 422, 462, 463, 490, 502, and 511. Following trial, the parties were ordered to meet and confer regarding a list of admitted documents. They filed their lists at ECF No. 461. (See also ECF No. 471.)

post-trial submissions, the Court held closing arguments on November 2, 2016. The instant Opinion & Order constitutes the Court's findings of fact and conclusions of law.

In sum, and for the reasons set forth below, the Court finds that plaintiffs are entitled to a liability determination with regard to all but one of the Relevant Shippers.[20] The Court further finds that compensatory damages and penalties are appropriate, but declines to award injunctive relief or to appoint an independent monitor. In accordance with the rulings below, the Court directs the parties to submit calculations of the number of "Packages" (a term the Court defines below) and "Cartons" of cigarettes (also defined below) to enable this Court to make a final determination as to the quantum of compensatory damages and penalties.

III. FINDINGS OF FACT[21]

A. Public Health Issues Associated with Cigarettes

The facts concerning the public health issues associated with cigarette usage were largely uncontested. Plaintiffs called Dr. Sonia Angell, Deputy Commissioner of the Division of Prevention and Primary Care, New York City Department of Health and Mental Hygiene. (Affidavit of Sonia Angell ("Angell

---

[20] As discussed below, the Court finds that plaintiffs have proven liability as to each claim for a number of shippers, as to only the AOD claim for certain others, and not at all for one.

[21] The Court's findings of fact are based on its assessment of the preponderance of the credible evidence. See, e.g., Diesel Props S.R.L. v. Greystone Bus. Credit II, LLC, 631 F.3d 42, 52 (2d Cir. 2011).

Aff."), PX 628; Trial Tr. 1353:24-1370:22 (Angell).) Dr. Angell testified that tobacco use kills approximately 28,200 New Yorkers each year. (Angell Aff., PX 628 ¶ 5.) This exceeds the number of deaths caused by alcohol, motor vehicle accidents, firearms, toxic agents, and unsafe sexual behaviors combined. (Id.) Dr. Angell also testified that each year, tobacco-related healthcare costs New Yorkers $10.4 billion. (Id. ¶ 7.) The CCTA, PACT Act, and PHL § 1399-ll are each intended to address serious public health issues and other costs associated with cigarettes. See, e.g., Prevent All Cigarette Trafficking Act of 2009, Pub. L. No. 111-154 § 1, 124 Stat. 1087, 1088 (2010) ("It is the purpose of this Act to[, inter alia,] . . . prevent and reduce youth access to inexpensive cigarettes . . . through illegal Internet or contraband sales."); H.R. Conf. Rep. No. 95-1778 at 8 (1978) (stating that "the purpose of [the CCTA is] to provide a timely solution to [the] organized crime problem" of trafficking in contraband cigarettes); 2000 N.Y. Sess. Laws Ch. 262 (S. 8177) § 1 (McKinney) ("The legislature finds and declares that the shipment of cigarettes sold via the internet or by telephone or by mail order to residents of this state poses a serious threat to public health, safety, and welfare, to the funding of health care pursuant to the health care reform act of 2000, and to the economy of the state.")

The State and City of New York also impose taxes on the sale and use of tobacco products, such as cigarettes, to combat these harms and to protect public health. The revenue generated by such taxes is, however, dwarfed by actual healthcare costs spent by New Yorkers. (Angell Aff., PX 628 ¶ 28.)

B. Plaintiffs' Investigations of UPS

This lawsuit by the State and City followed prior investigations into UPS's transport of unstamped cigarettes; the first such investigation commenced in approximately 2003.[22] As discussed further below, UPS eventually resolved this investigation by entering into a settlement agreement in the form of an AOD with the State. The AOD was executed in October 2005 and became effective approximately one month later.

During the summer/fall of 2011, UPS and the State (in particular, Dana Biberman, Chief of the Tobacco Compliance Bureau at the New York State Office of the Attorney General, who is also counsel in the instant action) engaged in a series of communications regarding a group of shippers referred to as the "Potsdam Shippers" (based on their common geographic location near Potsdam, New York). As relevant to plaintiffs' claims herein, these shippers include Action Race Parts, Jacobs Manufacturing (also referred to as "Jacobs Tobacco"), and Mohawk Spring Water.

On June 24, 2011, Biberman wrote to counsel for UPS concerning packages containing cigarettes that had been seized at the UPS Potsdam facility on June

[22] Plaintiffs separate the prior investigations into two groups: one in 2003, and one beginning in 2011 and continuing to this lawsuit. UPS breaks the investigations into three groups: one in 2003, one in 2011, and one beginning in 2013 and continuing to this lawsuit. Whether plaintiffs' or UPS's grouping are deemed a correct characterization has implications for UPS's argument (discussed below) that it had resolved the 2011 investigation "to the reasonable satisfaction of the Attorney General." This is relevant to arguments regarding ¶ 42 of the AOD. (AOD, DX 23.)

22, 2011. The letter requested that UPS pay a stipulated penalty of $1,000 for each and every violation of the AOD, unless UPS established that it "did not know and had no reason to know that the shipment was a Prohibited Shipment." (DX 89.)

On August 9, 2011, counsel for UPS met with Biberman and others regarding the seized packages. At that meeting, UPS told Biberman of a conversation between one of its security department employees, Jim Terranova, and a New York state trooper, Alfonse Nitti, that occurred in April 2011. Terranova had told Nitti that UPS was concerned that certain of the Potsdam Shippers were shipping cigarettes. Nitti informed Terranova that there was an ongoing investigation. Terranova asked whether UPS should continue to pick up packages from these shippers, and Officer Nitti responded affirmatively.

Following the August 9, 2011, meeting between UPS and the State, UPS provided the State with delivery information with regard to the Potsdam Shippers through July or August 2011. (Trial Declaration of Carl H. Loewenson, Jr. ("Loewenson Decl."), DX 605 ¶ 21; DX 125; DX 126.) The State Attorney General's office took no further action as to these shippers until the events in connection with this lawsuit. The Potsdam Shippers were eventually included in the amended complaint filed herein. As discussed below, UPS points to these circumstances as evidence that, pursuant to the AOD, it had "establish[ed] to the reasonable satisfaction of the Attorney General that UPS did not know and had no reason to know the shipment[s] [were] Prohibited Shipment[s]." (AOD, DX 23 ¶ 42). In addition, UPS uses these events to support its laches, waiver, estoppel, estoppel-by-entrapment,

and "public authority" defenses. As discussed below, the Court disagrees with inferences and conclusions UPS asserts based on these events.

Approximately two years later, on July 29, 2013, the New York City Department of Finance ("City Finance") served a subpoena on UPS seeking delivery records for a number of shippers, including the Relevant Shippers. (Affidavit of Maureen Kokeas ("Kokeas Aff."), ECF No. 389-8 ¶ 6.)[23] Between the time UPS received the subpoena in July 2013 and February 18, 2015 (when this lawsuit was commenced), the parties engaged in a number of communications. Plaintiffs provided UPS with, inter alia, a draft complaint. The parties were unable to resolve their differences, and this lawsuit was filed on February 18, 2015.

C. UPS's Business

The size and conduct of UPS's business operations are relevant to a number of issues in this case, including what constitute reasonable operating procedures, the extent to which UPS can be expected to know the contents of packages, the scope of employees' job responsibilities, and whether UPS bears legal responsibility for acts and knowledge of certain employees. The facts regarding UPS's size and operations were

[23] As part of its investigation, City Finance conducted a number of controlled buys of untaxed cigarettes from two of the Relevant Shippers, Seneca Cigars and Smokes & Spirits. (Kokeas Aff., ECF No. 389-8 ¶ 9; see also PXs 40, 43, 44, 45, 50.) The packages, which had been shipped via UPS, arrived containing unstamped cigarettes. (PX 40, 43, 44, 45, 50.) Maureen Kokeas, First Deputy Sheriff of City Finance, targeted Seneca Cigars because she had received an email from them advertising untaxed cigarettes shipped via UPS. (PX 592.)

largely uncontested. The legal conclusions drawn from those facts were vigorously contested.

UPS is a global company with very substantial U.S. operations. It is a massive employer, with over 350,000 employees in the United States alone. Its employees are responsible for establishing and maintaining account relationships and for the pickup, processing, and delivery of millions of packages each day. To perform its operations, UPS uses over 1,800 separate physical facilities, 104,926 vehicles, and 237 aircraft. (Trial Declaration of Bradley J. Cook ("Cook Decl."), DX 600 ¶ 24.) The vast majority of shipments UPS receives for transport (well over 90%) are processed on electronic shipping systems such as UPS Worldship. (Id. ¶ 29.) The shipper itself inputs certain information—not including package contents—and prints a bar-coded label that is affixed to the exterior of the package. (Id.) The package-level detail is then electronically transmitted to UPS. (Id.)

At trial, the primary witness who described UPS's business operations was Bradley J. Cook, UPS's Director of Dangerous Goods and Director of Package Solutions. The Court found Cook generally credible and found that, from the fall of 2013 onwards, Cook dedicated himself to "righting the ship" with regards to UPS's compliance efforts. With that said, he is an interested witness insofar as much of the conduct at issue occurred in an area for which he had (and has) significant oversight responsibilities. As Director of Dangerous Goods, Cook had primary responsibility, along with legal counsel, for overseeing issues relating to UPS's shipment of tobacco products and compliance with the AOD.

As described throughout this decision, UPS's efforts to comply with the AOD were inadequate until the commencement of this lawsuit; its efforts fell woefully short until the fall of 2013, after which it increased it proactive efforts. But it was not until this lawsuit was filed that UPS's efforts became adequate. The persistent inadequacies are surprising in light of UPS's clear awareness when it signed the AOD that it had assumed a number of explicit obligations. Indeed, the AOD required affirmative efforts, including particular and, when appropriate, directed vigilance to ensure compliance with its terms. The AOD precluded UPS from conducting "business as usual;" the AOD precluded UPS from ignoring red flags, and it precluded UPS from relying on self-serving statements by shippers in the face of red flags.

Throughout the relevant period, Cook was aware of the AOD and its requirements. He also demonstrated in-depth knowledge of UPS's business. He knew, for instance, that customers located on or near Indian reservations were at a higher risk of shipping unstamped cigarettes (as others within UPS also knew); he knew that UPS did not require customers to declare the contents of their packages (as others within UPS also knew); and he knew that short of a package inadvertently breaking open or being subject to an audit, UPS had no clear, routine method to determine a package's contents (as others within UPS also knew). Cook, and others in positions of responsibility at UPS, knew that in many respects, UPS was "flying blind" regarding whether Indian-reservation-based customers were shipping cigarettes. But UPS was in a special position: It had assumed particular obligations under the AOD, and all that stood between

UPS and penalties under the PACT Act and PHL § 1399-ll was honoring the AOD. The stakes were high. Yet, UPS failed to do what was necessary to ensure sufficient compliance. Perfection was never required, but more should and could have been done. That UPS could have done more is demonstrated by the material improvements it has implemented in its procedures since this lawsuit was filed. UPS has now—too late to avoid liability, but in sufficient time to avoid imposition of an injunction or independent monitor—transformed itself from a willfully blind actor to one actively doing far more.

The Court finds that Cook was by no means incompetent or acting inconsistently with corporate expectations. By all accounts, UPS's lack of commitment to true, active AOD compliance pervaded its corporate culture. As discussed below, when tools were available to assist UPS (and Cook) in their efforts—for example, lists of shippers deemed to be tendering cigarettes in violation of, inter alia, the PACT Act (and, thereby, likely a variety of other statutory schemes) created and disseminated by the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") (referred to as "non-compliant lists" or "NCLs")—UPS failed to distribute them broadly, including to the one person who certainly should have had them, Cook. Once Cook had the lists of non-compliant shippers in the fall of 2013, he used them.

In addition, as a corporate entity, UPS had information available to it in various places that provided certain employees insight into the contents of packages. For instance, UPS received inquiries regarding lost or damaged packages (so called "tracers") of cigarettes shipped by the very shippers at issue here. But

this information remained largely compartmentalized. Contrary to UPS's argument at trial, such compartmentalization does not explain, justify, support, or excuse lack of knowledge of package contents by those managing the Relevant Shippers' accounts. UPS had, after all, undertaken (and was separately legally obligated) to do what it could to prevent transport of cigarettes. UPS therefore bears responsibility for a serious failure of process and procedures. UPS's size is not an excuse to shift responsibility for its business failings to taxpayers who ultimately cover the investigative, healthcare, and other costs associated with unlawful transport (and, ultimately, use) of cigarettes.

Moreover, UPS understood that all of the Relevant Shippers were located on or closely proximate to an Indian reservation known previously to have one or more smoke shops and/or cigarette shippers. The UPS drivers and sales account personnel who met with customers saw signage on or near shippers' businesses indicating that cigarettes or tobacco were among their wares. From time to time during in-person visits, UPS personnel saw cigarettes on display racks; and UPS of course knew that even the names of certain shippers contained the words "cigar(s)" or "tobacco." UPS knew that certain shippers were shipping hundreds of packages a day from residential addresses; it knew that certain shippers opened multiple accounts, sometimes under different names. These and other signs described below were nothing short of blinking red lights—lights that flashed, "PROCEED WITH EXTREME CAUTION!"—yet no particular instructions from Cook or others at a high level were di-

rected at such accounts, nor were personnel given particular instructions as to how to proceed under such circumstances. The Court finds that such facts support, in part, the existence of a "reasonable basis to believe" a shipper may have been tendering cigarettes, thereby triggering an audit obligation under the AOD. (See AOD, DX 23 ¶ 42.)

In March 2010 Congress passed the PACT Act, which went into effect in late June 2010. UPS was mentioned explicitly in the text of the statute as one of the common carriers subject to an AOD. There is no doubt that UPS was aware of this statute. UPS knew that national attention was directed at preventing transport of cigarettes; it should have understood that the NCLs generated as a result of this statutory scheme contained information indisputably relevant—and, at the very least, that the NCLS were useful tools to ensure that its AOD was being "honored."[24] The NCLs were also useful tools to assist compliance with the CCTA. And yet, inexplicably, UPS ignored the NCLs, deeming them irrelevant. Until the fall of 2013, it never used them to identify at-risk shippers. UPS's position vis-à-vis the NCLs confused a required usage with a rational and reasonable usage. Had UPS actively created and used its own list equivalent to the NCLs, its position that the NCLs were irrelevant might be more compelling. Given UPS's general lack of proactive efforts to identify at-risk shippers, ignoring the relevance and utility of the NCLs made no sense.

---

[24] "Honored" is the PACT Act's term to describe a prerequisite for entitlement to an exemption.

Finally, the evidence at trial showed a notable increase in UPS's business and customer acquisitions following the effective date of the PACT Act—when the U.S. Postal Service ("USPS") and other carriers were prohibited from transporting unstamped cigarettes without serious penalty. Yet UPS argued at trial that it did not "put two and two together," and that it did not associate this increased business with any particular event. For a company with UPS's sophistication, and its evident commercial interests, this also makes no sense. Frankly, the Court does not buy it. Nor, apparently, did at least one UPS employee who noted in an email that "UPS has gained a lot of tobacco business from the USPS this year due to PACT Act taking effect at the end of June[.]" (PX 198.)

In sum, UPS had a legal obligation to comply with the AOD and the law, but it failed to take basic and reasonable steps to do so. Its size alone meant that proper procedures were all the more important—ad hoc measures could not be trusted or relied upon to ensure compliance in such a large organization.

D. UPS's Business and Specific Conduct

The Court makes the following additional findings regarding UPS's business and specific conduct.

1. UPS's Tobacco Policy

UPS is a commercial entity that has rules and a price structure relating to its transportation services; these are contained in, inter alia, UPS's Tariff/Terms and Conditions of Service ("Tariff"). At all relevant times, UPS's Tariff has been posted on its website. (Cook Decl., DX 600 ¶ 33.) This document sets forth restrictions on shipping with UPS, including a prohi-

bition on the shipment of regulated goods. (Id.) Cigarettes are among such regulated goods. Prior to 2004, UPS did not have a specific policy regarding shipment of tobacco products. (Id. ¶ 34.) However, a guide then available to customers (the "UPS Rate and Service Guide") did advise shippers that "[n]o service shall be rendered by UPS in the transportation of any shipment that is prohibited by law or regulation of any federal, state, provincial, or local government in the origin or destination country." (Id.)

In 2003, Cook led an effort to create a program to address various states' increasing concerns regarding the sale and shipment of cigarettes to consumers. (Id. ¶ 35.) This effort included identifying likely shippers of tobacco products and cigarettes. (Id. ¶ 36.) As part of this effort, UPS examined its central customer database using search terms such as "cigarette," "smoke," and "tobacco;" reached out to employees in the field; and examined industry codes associated with a shipper. (Id.) These efforts resulted in the identification of approximately 400 at-risk shippers. (Id.)[25] Cook's team then oversaw an effort to inform these shippers of PHL § 1399-ll and advised them that UPS would no longer accept packages containing cigarettes

[25] Notably, this type of proactive effort was not repeated until late in 2013. As discussed below, a number of the Relevant Shippers had "cigar" or "tobacco" in their name, or a "cigarette" reference on a website advertisement, exterior signage, or email address, yet UPS took no specific additional steps based on such information (including audits) to determine if these customers were shipping cigarettes. Audits and other actions (when they occurred) generally followed UPS's development of additional information.

for delivery to unauthorized recipients in New York. (Cook Decl., DX 600 ¶ 37.)

In January 2004, UPS introduced revisions to its Tariff, including a new provision prohibiting shipments of tobacco in violation of state or federal law. (Id. ¶ 39.) In January 2005, UPS updated its Tariff again to include a requirement for a shipper to execute a "Tobacco Agreement" if it sought to ship tobacco products of any kind to consumers. (Id. ¶ 39.) Later in 2005, UPS instituted a policy of prohibiting shipments of cigarettes to consumers anywhere in the country. (Id. ¶ 40.)[26] As previewed above, on October 21, 2005, UPS entered into the AOD with the State of New York. (AOD, DX 23.) The City of New York is not a party to the AOD. The AOD reflected UPS's agreement not to ship cigarettes to any consumers and to only ship such products to recipients that had appropriate state and federal licenses. (Id.; Cook Decl., DX 600 ¶ 41.) To comply with the AOD, UPS updated its Tariff again, reflecting a new "Tobacco Policy." (DX 35; AOD, DX 23, Ex. A, B.) The new Tobacco Policy specifically prohibited shipments of cigarettes to consumers on a nationwide basis. (Cook Decl., DX 600 ¶ 42.) UPS posted its policy on its website. (Id. ¶ 43.)

In addition, and to comply with the AOD, UPS created a database to track activity with its tobacco shippers. (Id. ¶ 63.) The database contains fields for shipper name, account number, and relevant activity; it

[26] The AOD and statutory schemes separately prohibit shipments to consumers, unlicensed retailers, or commercial businesses.

presently contains entries for 4,000 shippers from forty-nine states.[27] (Id. ¶ 63; DX 371.)

2. UPS's Training Efforts

The AOD requires that UPS train relevant personnel about its "Cigarette Policy" and various compliance measures. (AOD, DX 23 ¶¶ 34-37.) Plaintiffs assert that UPS has failed to fulfill this obligation. The Court agrees. Paragraph 34 of the AOD contains a very broad requirement:

> UPS shall continue periodically to train its drivers and pre-loaders and other relevant UPS employees about UPS's Cigarette Policy and the compliance measures agreed to in this Assurance of Discontinuance.

(Id. ¶ 34.) There was substantial evidence at trial that until shortly before this lawsuit was filed, apart from a once-yearly "Pre-Work Communication Message" ("PCM"), little actual training in UPS's "Cigarette Policy" or compliance measures required by the AOD, occurred. In addition, there was little more than a broad overview of the Tobacco Policy provided to UPS employees. Several UPS witnesses testified to lacking specific knowledge regarding the "compliance measures agreed to in [the AOD]." (See, e.g., Trial Tr.

[27] As part of its AOD compliance efforts, for a period of time UPS was required to, and did, perform internet searches to identify potential cigarette shippers. (Cook Decl., DX 600 ¶ 65.) These searches were intended to identify shippers who advertised shipment of cigarettes through UPS. As an AOD requirement, this obligation terminated in July 2010.

665:24-666:25, 667:20-24 (McDowell); id. 1516:18-1519:4 (Terranova).)

This case has no doubt demonstrated to UPS that its existing training was inadequate. Prior to receiving the subpoena from City Finance in July 2013, UPS's training consisted primarily of the above-mentioned annual PCMs.[28] PCMs are a general method of communication with UPS personnel. They are intended to provide personnel with specific information on a variety of topics in a format of longer than three minutes. While drivers and employees at UPS's processing centers were provided with a PCM that discussed its Tobacco Policy once a year, historically there was no procedure for an employee to "make up" a PCM that he or she has missed (for instance, due to absence on the day a PCM was shown or due to a start date at UPS after the yearly PCM had been shown). Several UPS witnesses testified to recalling the Tobacco Policy PCM, certain recalled the existence of the PCM but not its content, and others did not recall the PCM at all. Clearly, the Tobacco Policy PCM was itself inadequate to properly train employees on UPS's Tobacco Policy and was inadequate to train employees

[28] In addition, UPS has information regarding its Tobacco Policy in its Tobacco Transportation Procedures Manual; it trains its sales force in its Tariff and Service Guide (both of which contain restrictions on tobacco shipments), as well as on its Tobacco Policy. (Cook Decl., DX 600 ¶¶ 55-58.) UPS also provides training regarding its Tobacco Policy to its customer-service staff. (Id. ¶¶ 59-62.) While Cook stated that UPS communicated every change in its Tobacco Policy to sales staff, and that UPS's "workforce is very well aware of [its] policy against the shipment of cigarettes to consumers" and has been for years, (id. at ¶¶58-59), these claims are belied by the testimony of UPS employees who lacked knowledge of AOD compliance requirements.

on AOD compliance measures or on how to recognize signs that shippers may have been tendering packages with cigarettes.

Throughout the trial, UPS took the position that requiring personnel to approach certain accounts with questions or skepticism would be inappropriate. The insinuation was that vigilance directed at accounts located on or proximate to Indian reservations was some sort of inappropriate profiling. But this ignores the known reality that particular legal issues applicable to reservations (and to Native Americans making on-reservation purchases) did make reservations different. Moreover, the evidence revealed that UPS did not know whether on-reservation shippers from smoke shops were tribal members and, in fact, those operating smoke shops were not always tribal members. (Trial Tr. 192:14-16 (Cook); id. 904:6-9 (Christ).) In addition, Cook testified that UPS does not expect its drivers to be "investigators;" rather, it expects them to be alert for signs of cigarette shipments and to notify supervisors if they have suspicions. (Cook Decl., DX 600 ¶ 53.) In the context of the federal, state, and local attention paid to the unlawful transport of cigarettes, and UPS's statutory and AOD obligations, this was an incorrect perspective that unreasonably underestimated UPS's affirmative obligations. While drivers need not be "investigators" in a law-enforcement sense, they should have been proactive vis-à-vis high-risk accounts. As the AOD recites, training should have been designed to ensure personnel were/are "actually looking for indications that a package contains cigarettes . . . ." (AOD, DX 23 ¶ 35 (emphasis added).)

Prior to the commencement of this lawsuit, UPS's training was not effective in preparing its employees to identify cigarette shippers on Indian reservations in New York or to ensure that its personnel were "actively looking" for indications that a package contained cigarettes. UPS's training on tobacco issues was designed to "check the box."

UPS's tobacco-related training has improved recently. For instance, PCMs on tobacco training are now delivered in person, UPS has trained personnel in data analytics, it has posted a "red flag" poster at its service centers, and in 2016, UPS added device-based training for its drivers via "DIADs," which are handheld devices that function as computers. Additional relevant facts are set forth below in the section titled "Current Status of UPS Compliance Efforts."

3. The Role of Account Executives

As relevant here, UPS's customers are "shippers" of packages. Sales and account management are handled by a UPS Account Executive (as well as other support personnel). UPS assigns an Account Executive to every shipper/customer.[29] UPS's Account Executives are responsible for capturing and maintaining

[29] Over the time period relevant to this lawsuit, the number of customers for which an Account Executive had responsibility varied significantly. For example, at one point in time, a UPS Account Executive, Gerard Fink, was responsible for 150 to 200 customers; by 2010 he was given responsibility for several thousand more. (Trial Tr. 507:4-13 (Fink).) UPS has argued that the number of accounts assigned to Fink illustrates why it is reasonable to believe that he did not know many of his accounts were shipping cigarettes. The Court rejects this argument. First, for the reasons discussed at length throughout this opinion, the

accounts as well as addressing issues that might arise with regard to those accounts. In order to effectively market and support UPS's transport services, Account Executives are expected to understand their customers' businesses. To gain such understanding, Account Executives are expected to communicate with their larger customers on a regular basis. Evidence at trial supported that Account Executives regularly communicated with the Relevant Shippers both in person as well as by telephone or email. UPS expected that its Account Executives would enter notes regarding communications with clients in databases maintained for that purpose. Such databases were accessible to and used by others who might have an interest in a particular account or area. While the evidence made clear that there was spotty compliance with this expectation (and seemingly no enforcement mechanism), certain UPS Account Executives (most notably Gerard Fink) nevertheless entered details of meetings and communications with some of the Relevant Shippers into those databases. Various entries include evidence supporting liability, seriously impacting arguments that Fink's or any other Account Executive's actions were outside the scope of employment.

Account Executives were also responsible for obtaining a Tobacco Agreement from those customers

---

Court found Fink not credible when he denied knowing that certain of his largest clients were shipping cigarettes. In addition, UPS assumed obligations under the AOD, and it had separate statutory obligations not to ship cigarettes. UPS's failure to achieve adequate compliance is not excused by an organizational structure that it now argues impeded compliance. To the extent structural changes were necessary to ensure adequate compliance, it had a responsibility to make them.

who were or would be shipping tobacco products. Such agreements were supposed to be an important part of UPS's already thin compliance efforts. The Account Executive was to record the receipt of the Tobacco Agreement in UPS's Tobacco Database. In theory, this was to assist in monitoring such an account. As relevant here, there were numerous instances in which the Account Executive either did not obtain a Tobacco Agreement when appropriate, did not retain a copy of an allegedly executed agreement, failed to enter it into the Tobacco Database, or all three.

Account Executives would receive a variety of information relating to their accounts on a regular basis. For instance, they would receive periodic reports that set forth the amount of revenue attributable to particular customers. Multiple documents received into evidence support that a number of the Relevant Shippers on or near Indian reservations were among the largest customers for Account Executives. (See, e.g., PX 568; PX 102, row 9; PX 104.)[30] Account Executives—including Fink and others at UPS responsible

[30] Starting in 2010, each shipper is assigned a "patch-of-land" Account Executive or an inside sales representative based on the geographic territory in which the shipper is located. Patch-of-Land Account Executives are assigned to UPS Centers and become responsible for lower-volume accounts (those with under $300,000 in annual revenue) located in the geographical areas served by those UPS Centers. Patch-of-Land Account Executives are typically assigned a large number of accounts because of the relatively low volume of each individual account. Some of the accounts are also assigned to inside sales representatives. Inside sales representatives operate out of centralized locations and typically provide support to their customers by phone, and they also provide support to the Patch-of-Land Account Executives. (Cook Decl., DX 600 ¶ 32; Trial Declaration of Gerard Fink ("Fink Decl."), DX 602 ¶ 5.)

for the Relevant Shippers—actively reported on account activity to others within the UPS organization. Multiple documents and databases support generally diffuse knowledge and access to information regarding the Relevant Shippers. Put otherwise, the Account Executives—including Fink—took or failed to take actions within a UPS organizational structure that was monitoring account activity.

4. The Role of UPS Drivers

Packages are typically picked up by UPS drivers at a customer's location or are dropped off by a customer at a designated facility. The packages are then brought to a UPS Processing Center. (Cook Decl., DX 600 ¶ 25.)

In all but a handful of instances relating to the Relevant Shippers, UPS drivers would pick up packages at the customer's location. Some of the locations were commercial storefronts (e.g., Arrowhawk Cigars, Morningstar Crafts & Gifts) and others (e.g., EExpress, Bearclaw) were residential locations. In certain instances, UPS drivers would pick up dozens or even hundreds of packages a week from a residential address. For instance, during October 2012, EExpress shipped approximately 2,500 packages with UPS. (PX 559.)

An issue that pervaded the trial was the extent to which UPS, as a corporate entity, knew or should have known of the contents of customer shipments. Typical practice included drivers and Processing Center personnel working with packages; the account team performed sales and service roles that did not include package handling but did include learning about a customer's business and monitoring his or her account

activity. While drivers had limited opportunities (or time) to learn the contents of particular packages, there was ample evidence that they generally understood what a shipper was shipping and, from time to time, had quite specific information about package contents.

UPS policy requires customers to have packages sealed and ready for pickup when the UPS driver arrives. With regard to the Relevant Shippers, this practice appears to have been followed most of the time. However, plaintiffs presented evidence that there were occasions when customers were still packing and sealing boxes at the time the UPS driver arrived or when UPS personnel were on site, and that UPS employees were therefore in a position to observe the contents of the packages.[31] (See, e.g., Jarvis Dep. Tr. 55:22-56:6.) In addition, there were instances where the type of goods a Relevant Shipper sold, including cigarettes, were prominently advertised on signage and within the premises. (See, e.g., PX 574 (signage for Morningstar Crafts & Gifts); DX 490 (signage for Arrowhawk Smoke Shop).) Moreover,

[31] UPS argued that the similarity between cigarette packaging and little-cigar packaging rendered this view of the packages meaningless. This is not a helpful argument for UPS. Under such circumstances, ambiguity of product type suggests at least a possibility as high as 50% that cigarettes were in the box. In light of UPS's affirmative AOD and statutory obligations, such a possibility required UPS to take further steps. Put differently, even if UPS thought a package might contain little cigars, it knew that it might instead contain cigarettes. Given this information, and given the statutory restrictions on transporting cigarettes and the AOD requirements, UPS was obligated be "actively looking for indications" as to whether the customer was shipping a lawful versus an unlawful product. (AOD, DX 23 ¶ 35.)

UPS personnel, including drivers, did from time to time enter a Relevant Shipper's premises, providing the opportunity to observe cigarettes available for purchase or in inventory. These facts should have, but did not, cause UPS to alter its approach to and vigilance of a shipper; such facts formed pieces of the foundation for a "reasonable basis to believe" that a shipper may have been tendering cigarettes for delivery (the standard that triggered an audit obligation under the AOD). (See AOD, DX 23 ¶ 24.)

5. UPS's Interactions with Shippers

As discussed above, a customer using UPS's pickup and delivery services is referred to as a "shipper," and shippers do not typically declare or provide UPS with information regarding the contents of packages. (Cook Decl., DX 600 ¶ 29.) On most occasions, the boxes in which a customer packs its goods are plain, corrugated cardboard, and the exterior of the boxes provides no indication as to whether the contents include cigarettes, cigars, spring water, coffee, or something else.[32] UPS's terms and conditions reserve its right to inspect package contents. Given the volume of packages processed daily, UPS tended to conduct audits only in very rare circumstances when there was a compelling reason to do so. The evidence at trial supported audits generally being conducted on those occasions when UPS had specific information regarding likely cigarette shipments. UPS did not, for instance, routinely or, even once as a matter of course, audit shippers known to ship tobacco products or

[32] However, at least one shipper, Jacobs Manufacturing/Tobacco, regularly used boxes that had the words "cigarettes" stamped on the outside. (Trial Tr. 1680:5-14 (Jacobs).)

whose inventory was also known to include cigarettes. Audits are discussed in further detail below.

As a matter of UPS policy, when a customer seeks to ship certain regulated goods, including tobacco, he or she is required to disclose that fact to UPS. In the case of tobacco-related shipments (other than cigarettes), UPS policy requires that a customer execute a Tobacco Agreement.[33] This agreement is intended to represent an acknowledgment by the shipper that he or she understands UPS's Tobacco Policy, including its prohibition on shipping cigarettes.

Despite the statutes regulating transport of cigarettes, UPS's obligations under the AOD, the passage of the PACT Act that reduced courier options, the profit motive of shippers, the conflicted position of UPS's own sales personnel (who had an interest in acquiring and maintaining business), and obvious signs in conflict with customer statements, UPS allowed its personnel to rely heavily (and often exclusively) on what their shippers claimed to be shipping. UPS often accepted the fact of a Tobacco Agreement with a customer, or a single conversation with a customer about its business, as sufficient to confirm that a tobacco shipper who advertised or displayed cigarettes was not using UPS to ship them. As one would expect, cigarette shippers acting contrary to law and UPS policy were rarely inclined to "confess" prohibited package contents (though, as discussed below, there was at

[33] At some point during their relationship with UPS (not always at the outset), several of the Relevant Shippers, including Smokes & Spirits, Shipping Services, Morningstar Crafts & Gifts, Indian Smokes, Seneca Cigars, A.J.'s Cigars, and Native Outlets, had an executed Tobacco Agreements on file with UPS at various points in time.

least one instance in which the customer did so explicitly). And, given the volume incentive agreements UPS offered, there was an economic motive to use UPS. For a UPS customer shipping cigarettes during this time, being "caught" was a risk worth taking because the penalty was sometimes nonexistent or was, at most, termination. And sometimes termination was not the end of UPS service. The record reveals instances in which UPS personnel assisted in establishing a new, replacement account for a customer whose account had been terminated for cigarette shipments. In many instances, as described below, there were sufficient red flags to alert UPS to the need for additional measures—including random audits.

6. UPS's Information Systems and Information Sharing

As previewed above, one of UPS's consistent themes at trial was its claim that information known to one part of UPS was not known to another, and that it would be improper or at the very least unfair to attribute such compartmentalized knowledge to UPS more broadly. The facts support such compartmentalization—but not the conclusion UPS draws from it.[34]

At the time of the events at issue, UPS did not have a centralized information system that collected and/or synthesized all of the information it might have regarding packages sent by a particular shipper. To the extent some part of UPS learned of the specific contents of packages, it was typically when packages

[34] Elsewhere in this Opinion & Order, the Court addresses how compartmentalized information impacts UPS's knowledge of shipments of cigarettes or actions required pursuant to the AOD.

broke open during processing, when UPS received inquiries ("tracers") regarding lost or damaged packages, or through audits. There was no evidence that UPS implemented or followed formal procedures to share the "broken open" packages or tracer information with all members of the account team, with Cook, or with legal counsel. In addition, there was no ongoing, formal mechanism within UPS to routinely review an at-risk shipper's sales materials or websites (some of which prominently indicated cigarette sales).[35] Nor was there any centralized practice of ensuring that email addresses with clues as to the likely focus of sales efforts (for instance, the word "cigarettes" appearing in a customer's email address) were further investigated. Had such information been routinely reviewed and shared with the appropriate personnel, it is highly likely that UPS would have identified certain shippers of cigarettes.

E. UPS's Asserted Reliance on Governmental Action/Inaction

UPS has vigorously argued that it took certain actions (or failed to take certain actions) in reliance upon interactions with law enforcement, and, in addition, that it relied on New York State's forbearance policy. UPS has urged that such facts regarding this governmental action/inaction support its laches, waiver, estoppel (including "estoppel by entrapment"), and public-authority defenses. These defenses have both factual and legal aspects. The Court deals with

[35] As described above, the AOD obligated UPS to conduct certain internet searches for a limited time. That obligation expired in 2010.

the former here, and with the latter in its legal conclusions below.

1. Governmental Action

Some of the relevant facts regarding such interactions (such as the "Terranova/Nitti" communications) are briefly described above in the section "Plaintiffs' Investigations of UPS." Throughout the pretrial process, UPS repeatedly referred to instructions to stand down with regard to compliance measures due to an "ongoing investigation." As it turned out at trial, the facts in this regard were far less robust than previewed and not at all compelling.

The evidence can be briefly summarized: In April 2011, UPS driver Donald Jarvis, who was associated with UPS's Potsdam Processing Center, learned and believed that certain packages from the Potsdam Shippers contained cigarettes. Jarvis informed a UPS supervisor, Steve Talbot. Talbot contacted the UPS security representative assigned to the Potsdam Center, Jim Terranova, to ask for guidance (Terranova was not a high-ranking UPS employee). Terranova had apparently had undisclosed (and irrelevant) other dealings with members of the New York State Police, including state trooper Alfonse Nitti. In April 2011, Terranova contacted Nitti and told him there was a suspicion that certain accounts on the Mohawk/St. Regis reservation were shipping cigarettes. (Trial Declaration of James Terranova ("Terranova Decl."), DX 612.) Terranova did not tell Nitti where shipments (including bulk shipments) were being delivered. (Terranova Decl., DX 612 ¶¶ 1-2, 7; Trial Tr. 1529:20-1530:24, 1532:20-25 (Terranova).) Nitti in-

formed Terranova that there was an active investigation into those shippers. Terranova then posed the question to Nitti as to whether UPS should continue picking up packages from those shippers; Nitti responded that UPS should. Nitti was not a representative from the State Attorney General's office; there was no evidence that Nitti was made aware of the AOD or knew about UPS's legal obligations with regard to it or any other statutory scheme. Subsequently, Terranova and others conveyed Nitti's comment down the chain to UPS drivers responsible for the Potsdam Shipper accounts. For a period of two months thereafter, UPS followed its own forbearance practice. This ended when, on June 22, 2011, the New York State Department of Taxation and Finance ("DTF") Chief Investigator, John Connolly, visited the UPS Potsdam Center. (Trial Declaration of Steven Talbot ("Talbot Decl."), DX 606 ¶ 10; Terranova Decl., DX 612 ¶ 10.) Connolly seized packages tendered by certain Potsdam Shippers. Connolly also informed UPS that New York State's forbearance policy vis-à-vis Indian reservations had ended and that UPS should not be shipping cigarettes "to their Native American customers." (DX 389; see also Ernst Dep. Tr. 86:23-87:4.)[36]

These facts do not support UPS's characterization of this interaction as a formal instruction by law enforcement—upon which it could reasonably rely—to

[36] UPS argues that this communication is evidence of its basis for believing that shipments prior to this date were authorized. As discussed below, there is, however, insufficient evidence to support that UPS had ever taken actions, or failed to take actions, in reliance on the "forbearance policy."

stand down on AOD obligations or other statutory requirements. As is evident from the above, such a portrayal overinflates a rather limited, non-senior contact between one lower-level UPS employee and one state trooper. Indeed, there was no independent evidence as to the basis for this trooper's purported statements to Terranova or his authorization to convey any instructions to UPS.[37] There is insufficient evidence to support Nitti's authority to provide the official position of the New York State Police, let alone provide an exemption from the AOD and statutory obligations.

But in all events, the facts do not support widespread reliance on these Terranova/Nitti communications. At most, the evidence supports unreasonable reliance by a small handful of people within the Potsdam Center for a two-month period only, and by no one at a high level. For instance, there is no evidence that Cook was informed about this communication at the time. In sum, the Court rejects any reasonable reliance on the Terranova/Nitti communication.

2. Governmental Inaction

In addition, UPS has argued that prior to June 22, 2011, "UPS believed" that transporting shipments of packages containing cigarettes originating with the Potsdam Shippers (including Action Race Parts, Jacobs Manufacturing/Tobacco, and Mohawk Spring

---

[37] In light of UPS's affirmative obligations under the AOD and federal and state statutes, UPS should have sought written or other high-level confirmation, informed the State personnel responsible for the AOD, and sought legal advice. There is no evidence that this was done. The AOD can only be modified in a writing signed by both parties, (AOD, DX 23 ¶ 54); the oral Nitti/Terranova conversation could not effect a modification.

Water) and destined for tobacco retailers on other Indian reservations, was authorized by the State's forbearance policy or was otherwise lawful. The "otherwise lawful" portion of this position is the heart of what has been referred to in this litigation as UPS's "§ 471" argument. Putting aside the Court's legal determination regarding the viability of UPS's Seventh Defense (relating to, inter alia, the forbearance policy), there is a separate factual question as to whether, before June 22, 2011, personnel within UPS in fact believed that it could lawfully transport shipments from the Potsdam Shippers to reservation retailers or other Indian reservations (that is, based on some misunderstanding that § 471 or other legal principles allowed such transport), and acted in reliance on such a belief. The Court determines that factual question against UPS. There is simply insufficient credible evidence to support UPS's factual claim that this was a widely held view in the organization.

As a result of the lack of sufficient factual support, UPS's arguments as to its reliance on governmental authority or inaction fail. There is also no indication that relevant personnel received legal advice that they could rely on a New York State policy of forbearance as to Indian reservations applied to its actions as a private, non-tribal entity. Nor is there sufficient evidence that UPS personnel had any other reasonable basis for such an understanding. In addition, such a position is in conflict with UPS's overall story that it consistently trained its personnel in its Tobacco Policy; no evidence suggests that its training was modified to allow for a distinction between shipments going to reservation retailers (i.e., the shipments UPS argues were protected by constitutional principles) and

all other recipients.[38] For instance, there was no credible testimony that UPS drivers were instructed to allow certain shipments to reservation retailers but not to residential consumers. UPS did present anecdotal evidence that certain witnesses had heard or thought such reservation-to-reservation retailer shipments were allowed—but it was never clear where this came from, and it is in conflict with other evidence.

Finally, of course, it is clear that the AOD did not exempt shipments from or between reservations; that is, there is no basis for "§ 471" or "forbearance policy" arguments with respect to UPS's obligations.

F. UPS's Audits

UPS presented evidence that it conducted at least twenty-eight audits between 2011 and 2016, several of which were of certain Relevant Shippers.[39] (See, e.g., Cook Decl., DX 600 ¶ 18; DXs 161, 165, 194, 219, 221, 222, 244, 257, 263, 264, 265, 303, 311, & 363.) The facts show that audits were conducted relatively infrequently and were inadequate to comply with UPS's audit or other obligations under the AOD.

---

[38] Indeed, UPS has argued that, to the contrary, an inability to monitor addresses given the given the volume of shipments handled, it would be unreasonable to expect it to monitor addresses.

[39] Plaintiffs initially commenced this case and sought discovery with regard to fifty or so shippers. Over the course of the litigation, that number was reduced. At trial, UPS's evidence with regard to its audits included all of the shippers who have ever been at issue in the case. Thus, the "twenty-eight" audits that UPS cites includes shippers who are not among the Relevant Shippers.

As discussed below, ¶ 24 of the AOD requires that UPS audit shipments where "there is a reasonable basis to believe that such shipper may be tendering cigarettes for delivery to Individual Consumers, in order to determine whether the shipper is in fact doing so."[40] (AOD, DX 23 ¶ 24.) An audit obligation is therefore triggered when there is a "reasonable basis to believe," and the audit serves a particular purpose: "to determine" whether a shipper may be tendering cigarettes.

The vast majority of audits to which UPS points occurred in 2013 and 2016—that is, after UPS had already received a subpoena and was thus aware this lawsuit was likely or that UPS had already been sued. Of the twenty-eight audits, twenty-six fall into this

---

[40] "Individual Consumer" is defined in the AOD as a person "other than an Authorized Recipient." (AOD, DX 23 ¶ 16(G).) "Authorized Recipient" is, in turn, defined as "any person or entity to whom cigarettes may be lawfully transported pursuant to federal law and the law of the state in which delivery is made." (Id. ¶ 16(A).) Apart from its legal argument regarding § 471 (that all shipments "to" reservations were authorized), an argument this Court rejected, New York v. United Parcel Serv., Inc., No. 15-cv-1135, 2016 WL 4747236 (S.D.N.Y. Sept. 10, 2016)), in the face of plaintiffs' extensive proof of lack authorization, UPS did not attempt to demonstrate that any recipient was, in fact, an "Authorized Recipient." The Court finds as a matter of fact that all addresses of shipments at issue were to unauthorized recipients or "Individual Consumers." Thus, the fact that certain shippers (such as Jacobs Manufacturing/Tobacco) shipped exclusively to retailers on Indian reservations does not remove such shipments from the classification of shipments to "Individual Consumers." This is important to the Court's factual determination of when, inter alia, the audit obligation attached; such obligation being defined in terms of a reasonable basis to believe the shipper may be tendering cigarettes to "Individual Consumers."

category. The remaining two audits took place on September 21, 2012.[41] (See DXs 161, 165.) Cigarettes were found during these audits and both accounts were terminated.

UPS points to the audits it conducted as evidence of compliance with the AOD and evidence that it acted responsibly vis-à-vis likely cigarette shippers. The Court disagrees. Cigarettes should not have had to fall out of a broken box, more or less, for UPS to have initiated an audit. As discussed in specific detail below, the Court finds that there was a reasonable basis to believe that a number of the Relevant Shippers may have been tendering cigarettes well before they were audited.

Certain facts should have led to more frequent and broader audits. As an initial matter, UPS had a right to audit packages, it had the personnel to do so, and it had an affirmative obligation under the AOD to do so when facts supported a "reasonable basis to believe" that a shipper "may" be tendering cigarettes. Certainty or even a high degree of likelihood was not required to trigger this obligation. Facts "on the ground" should have pushed UPS toward more proactive audits. For instance: It knew that certain shippers had names that included the words "tobacco," "cigar," or "smokes," indicating a certainty of tobacco shipments and a reasonable possibility of cigarette shipments; it knew that a number of others (without

[41] UPS lists Indian Smokes as an audited entity in the chart at ¶ 30(e) in its Proposed Findings of Fact and cites DX 161 for this proposition. The Court notes, however, that DX 161 does not support an inference that Indian Smokes was audited, and Cook's declaration supports an inference that Indian Smokes was terminated without an audit. (Cook Decl., DX 600 ¶¶ 75, 82.)

eponymous names) sold cigarettes, making shipments all the more likely; it knew that certain shippers on Indian reservations refused to disclose (allegedly) what they were shipping; it knew that others had opened multiple accounts or that a new account was opened at the same address as one recently terminated for cigarette shipments; and, of course, all of this was against the backdrop of such shippers being located on Indian reservations that had for years been associated with sales and shipments of unstamped cigarettes. For instance, in an email sent June 23, 2011, a UPS security employee stated that New York Indian reservation retailers have been "selling cigarette[s] without paying taxes . . . . This has been an ongoing situation over the years throughout the state with several different reservations doing the same thing." (PX 460.)

As discussed with regard to certain shippers below, the presence of some numbers of these (and other) facts supported the existence of a reasonable basis to believe that such shippers may have been tendering packages containing cigarettes. UPS gave too much weight to seemingly innocuous explanations given by shippers for the goods they claimed to be tendering, and it did so when many of the above facts were present. Such self-serving explanations were inherently unreliable and did not eliminate the reasonable basis to believe that a shipper "may" be tendering cigarettes.

Audits that were conducted did, however, serve an additional purpose: They provided UPS, and now provide this Court, data regarding package contents as well as a basis for estimating the percentage of a shipper's packages that contained cigarettes. A corollary

is that the failure to conduct audits despite an audit obligation reduced the amount of information available regarding the contents of the Relevant Shippers' packages. Had UPS conducted more audits (as it was obligated to do under these facts), it would have greater detail on the percentage of shipments containing cigarettes versus other goods. As discussed in the legal conclusions below, UPS—not plaintiffs—therefore bears the responsibility for this lack of information.

IV. CURRENT STATUS OF UPS'S COMPLIANCE EFFORTS

As discussed throughout this Opinion, there is no doubt that UPS could have and should have done more to identify shippers likely to be tendering cigarettes. However, there is strong evidence that UPS has taken a number of steps in the past three years to dramatically improve its compliance efforts.

After UPS received the subpoena from City Finance in late July 2013, UPS requested outside counsel to conduct an investigation (using available information) into 540 active shippers listed in UPS's Tobacco Database. (Cook Decl., DX 600 ¶¶ 83-84.) That investigation yielded a group of thirty shippers as to whom additional investigative steps were taken. (Id. ¶ 84.) This list was then further reduced to six shippers, including three that are among the Relevant Shippers in this case. (Id. ¶ 84.) Cook required audits of each of these three shippers.[42] (Id. ¶ 85.)

---

[42] An audit of Native Outlet conducted on January 2, 2014, revealed only filtered cigars; additional audits were conducted of

Commencing in the fall of 2013, UPS also began to utilize the NCLs prepared and updated quarterly by the ATF. (Id. ¶¶ 102-03.) In early 2014, UPS added personnel to its compliance efforts, including Derrick Niemi. Niemi testified live at trial and the Court found him credible. His demeanor was sincere and his answers were thoughtful and careful. Niemi has made specific trips to visit UPS Processing Centers and reservations with shippers; Niemi has also performed data analysis to identify other shippers who pose a risk of non-compliance.

Cook has taken more immediate action to terminate shippers for which audits revealed cigarettes. For instance, on January 8, 2014, UPS received the results of an audit for Shipping Services; three of five packages opened contained filtered cigars, and two packages contained cigarettes. (Cook Decl., DX 600 ¶ 93.) UPS terminated this account. In 2014, UPS also investigated a shipper known as Cloud & Co. located in Salamanca, New York, and terminated this shipper after the investigation revealed it had been sued by the City for alleged shipment of cigarettes. (Id. ¶ 138.)

On January 22, 2014, UPS received the results of an audit of Smokes & Spirits, processed through its Olean, New York Center. (Id. ¶ 97.) Out of fifteen packages opened, nine contained cigarettes; the remainder contained chewing tobacco and filtered cigars. (Id.; see also DX 257.) Immediately upon receiving these results, UPS terminated this account. (Cook Decl., DX 600 ¶ 98.)

---

this entity and no cigarettes were found. (Cook Decl., DX 600 ¶¶ 87-88.)

In September 2014, UPS changed its account-opening process to increase screening of tobacco shippers in New York State. (Id. ¶ 144.) Each account opened on an Indian reservation is investigated to determine if it might be shipping tobacco products. (Id.) Additionally, UPS monitors the volume of shipments from reservation-based shippers on a weekly basis to identify red flags in volume patterns. (Id. ¶ 145.) (This is the use of "data analytics" to support UPS's compliance efforts).

In addition, on April 27, 2016, Cook traveled to upstate New York and personally participated in audits of all packages shipped out of the Dunkirk, New York, Processing Center (the Center that processes Native Outlet, among others). Ten of the packages opened were shipped by Native Outlet, and all contained little cigars.[43] Cook also personally delivered UPS's Tobacco Policy PCM at the Dunkirk, Olean, and Jamestown Centers; interviewed each center manager; participated in a "ride along" with each center driver; conducted audits of the packages picked up by each Center; and documented any packages of tobacco picked up by each Center. (Cook Decl., DX 600 ¶ 143.) Three other members of UPS's Corporate Compliance Group conducted similar audits in other centers in New York serving reservations. (Id.)

The Court view UPS's compliance efforts as increasing in rigor since the fall of 2013 and achieving actual compliance as of the date this lawsuit was filed on February 18, 2015. Prior to February 18, 2015, the

---

[43] Cook's testimony regarding the Native Outlet audits was corroborated by a number of photographs of the opened packages. (See, e.g., DXs 194, 375, 421.)

efforts were in what the Court views as a "ramping up" process; throughout 2014, for instance, audits that should have been conducted long before were still only just being done. Determining the date when efforts coalesced to a point of compliance is therefore not a precise exercise. But the Court views the filing of the lawsuit as marking a time when UPS had put its non-compliance largely behind it.[44]

V. BACKGROUND CONCERNING THE TAXATION OF CIGARETTES AND LITTLE CIGARS

New York imposes a tax on all cigarettes for sale in the State, except where the State "is without power to impose such tax." N.Y. Tax Law § 471. Taxes are paid by purchasing and affixing a tax stamp. See N.Y. Comp. Codes R. & Regs. tit. 20, § 74.3(a)(1)(iii) ("§ 74.3"). New York's cigarette excise taxes increased significantly in the 2000s. (Trial Declaration of Farrell Delman ("Delman Decl."), DX 611 ¶ 17.) On March 3, 2000, New York increased its cigarette tax to $1.11 per pack from $0.56 per pack. (Id. ¶ 18.) On April 3, 2002, the State increased the excise tax on cigarettes again, this time to $1.50 per pack, where it remained until June 3, 2008, at which time it was increased to $2.75 per pack. (Id. ¶ 19.) On July 1, 2010, the State's excise tax on cigarettes was raised to $4.35 per pack, where the tax remains today. (Id. ¶ 20 (citing N.Y. Tax Law § 471).) By 2015, New York's cigarette excise tax was $2.72 more than the national average for state cigarette excise taxes. (Delman Decl., DX 611 ¶ 20.)

---

[44] As discussed below, the Court views Seneca Promotions, a current client, as presenting an ongoing compliance issue. But this is the only one of which the Court is aware.

For its part, New York City imposed an eight-cents-per-pack tax on cigarettes until July 2002, at which time the City's excise tax was raised to $1.50 per pack, where it remains today. (Id. ¶ 21 (citing N.Y.C. Admin. Code § 11-1302(e)).) Federal excise taxes on cigarettes also increased significantly during the 2000s, leading to a significant increase in the cost of cigarettes for consumers. (Delman Decl., DX 611 ¶ 14.) The federal excise tax on cigarettes increased from $0.24 per pack to $0.34 per pack on January 1, 2000, and then to $0.39 per pack on January 1, 2002. (Id. ¶ 15.) Following passage of the Children's Health Insurance Program Reauthorization Act ("CHIPRA") in 2009, the federal excise tax on cigarettes increased from $0.39 to $1.01 per pack, where the tax remains today. (Id. ¶ 16 (citing Pub. L. 111-3, ¶ 703(b)).)

These increases in State, City, and federal cigarette taxes meant that by July 2010, the combined taxes on a pack of cigarettes were $6.86 in New York City and were $5.36 in the rest of New York State. The taxes in New York City were $5.23 more than the taxes in a majority of locations across the United States that have neither city nor county taxes. (Delman Decl., DX 611 ¶ 22.) Only cigarette consumers in Chicago face a higher tax rate. (Id.)

Revenue generated by taxes imposed by the State and City of New York are substantially less than the amounts needed to cover tobacco-related healthcare costs incurred by New Yorkers. (Angell Aff., PX 628 ¶ 18.)

VI. THE PACT ACT

The PACT Act was enacted on March 31, 2010, and took effect on June 29, 2010. Pub. L. No. 111-154, 124 Stat. 1087 (2010). As pertinent here, for common carriers other than those who had entered into an AOD (and otherwise met the exemption requirements)—primarily the USPS and smaller carriers—the PACT Act sets forth an extensive regulatory scheme.

Plaintiffs pointed to various pieces of evidence supporting UPS's view that the passage and implementation of the PACT Act provided a business opportunity. That is, as other couriers were required to terminate cigarette shippers as a result of the PACT Act, UPS picked up the business. This is borne out by the facts. The evidence supports an increase in shipments via UPS by the Relevant Shippers in the months immediately following the effective date of the PACT Act. Account personnel and others within UPS understood that this surge was likely due, in part, to capturing business lost by the USPS.[45] For instance, in an email dated September 23, 2010, a UPS Senior Account Manager noted that "UPS has gained a lot of tobacco business from the USPS this year due to the PACT Act taking effect at the end of June." (PX 198.)

---

[45] It is certainly true that New York State and City cigarette tax rates jumped considerably at nearly the same time as the PACT Act's enactment, leading to some increase in the demand for little cigars. However, there is limited evidence that UPS associated its increase in business with a growth in this area of the tobacco business versus another. Moreover, market data supports a finding of consistent dominance of cigarettes versus other tobacco products throughout this period. (See PX 11.)

VII. CONSUMPTION OF TOBACCO PRODUCTS

Cigarettes are one of a number of consumable tobacco products. Tobacco products are many and varied; they include "little cigars" and "big" or "regular" cigars, flavored cigars and cigarettes, loose tobacco, and chewing tobacco. The evidence at trial supported UPS's claim that all but one of the Relevant Shippers (Jacobs Manufacturing/Tobacco) sold a variety of tobacco products and, in certain instances, other items as well.[46] For instance, there was both testimony and documentary evidence of shipments of cigars as well as cigarettes. (See, e.g., PX 72; PX 113; PX 211; Trial Tr. 384:8-16 (Cook).)

A. Cigarettes

The characteristics of cigarettes are well known: Filtered sticks of tobacco, about the length of a finger, are rolled in paper and typically sold in small boxes. Each box contains twenty cigarettes; each carton contains ten boxes. A carton of cigarettes, irrespective of brand, weighs approximately one pound. It is well known that cigarettes are highly addictive. The market for sales of cigarettes is far larger than those for other tobacco products, including little cigars. (See generally PX 11.)

The manner in which consumer demand correlates with price and brand is subject to debate. Testimony at trial supported strong brand loyalty, but testimony similarly supported price sensitivity for cigarette consumers and tobacco users generally. Among

---

[46] For instance, Mohawk Spring Water also sold spring water; a number of shippers also sold Native American craft items.

the evidence received at trial were cartons of cigarettes marketed by the Relevant Shippers. The Court was able to evaluate the size, shape, and weight of the packaging as well as the packaging's characteristics. In addition, plaintiffs introduced evidence of the size of boxes used to ship cigarette cartons. Boxes containing cigarette cartons had the capacity to hold anywhere from a pound of goods to more than twenty pounds; this equates with a capacity of between one and twenty cartons of cigarettes.[47]

Not all boxes were shipped at full capacity; that is, a box with twenty pounds of capacity might have fewer than twenty cartons of cigarettes inside (or a box of some other capacity might not be full). UPS's databases included a field for "actual weight." The Court draws the fair inference from the fact of such documents that this phrase reflected a package's measured weight. UPS's shipment records indicate that there was frequently a difference between a package's "actual weight" and "billed weight." Billed weight was typically a number rounded up from actual weight. Based upon UPS records, rounding occurred when any increment of a package's weight was above a whole number. (See, e.g., PX 74; PX 75; PX 227.) For instance, a package weighing 19.1 pounds in actual weight would be increased to twenty pounds for billed weight. (Id.) Thus, any aggregation of "billed" weight for a number of packages would inflate their actual weight.

In addition, cigarettes were generally shipped in boxes. There was some evidence at trial of shippers

---

[47] Jacobs Manufacturing/Tobacco would ship multiple boxes on a pallet. (See Jarvis Dep. Tr. 54:1-6.)

sending letter-sized envelopes. (See, e.g., Trial Tr. 511:5-512:17 (Fink); id. 769:23-770:12 (Keith).) The evidence that cigarettes were shipped in letter-sized envelopes was extremely thin and not particularly credible (apparently, from time to time, loose cigarettes might be sent in envelopes); the economics of sending a handful of loose cigarettes via UPS makes no sense. Indeed, it is hard to imagine that it would have been cost effective to have sent loose cigarettes—presumably in an amount of less than one box—in a letter-sized package via UPS. The Court finds that no appreciable volume of cigarettes was sent via letter-sized packages and that packages of such size more likely than not contained something other than cigarettes.

B. Little Cigars

Little cigars account for under 10% of the tobacco market. (See PX 11.) They are rolls of tobacco, wrapped in leaf tobacco with an integrated filter, that resemble cigarettes in size, shape, and packaging. (Delman Decl., DX 611 ¶ 24; see also Trial Tr. 1584:16-25 (Delman).) While UPS's tobacco expert, Delman, testified that little cigars are "total substitutes" for cigarettes, the evidence was in fact far more equivocal. First, even Delman conceded that little cigars are made up of "lesser quality" tobacco. (Trial Tr. 1573:2-24 (Delman); id. 1568:12-1569:18 (Delman).) Little cigars are made from reconstituted tobacco floor sweepings. (Id. 1569:19-1570:12 (Delman).) Second, based on her experience, Dr. Angell testified that little cigars are in fact distinguishable from cigarettes. (Trial Tr. 1369:2-7 (Angell).)

Like cigarettes, little cigars may be sold twenty to a pack and ten packs to a carton. (Delman Decl., DX 611 ¶ 25.) Also like cigarettes, little cigars may be sold in cartons weighing approximately one pound. All but one of the Relevant Shippers (Jacobs Manufacturing/Tobacco) sold little cigars and shipped them via UPS. The boxes in which they were shipped were the same as those used to ship cigarettes.

The exterior packaging of little-cigar packs and cartons is similar in size, shape, and color to those of cigarettes. Moreover, the brand names of the little cigars sold by the Relevant Shippers were often quite similar to those of cigarettes—and the Court at least found it very difficult to distinguish between packs of little cigars and those of cigarettes without examining the exterior of a carton with care.

At the relevant times, little cigars were considerably cheaper than taxed cigarettes. (Id. ¶ 35.) For instance, as of August 2016, the average base price of little cigars was $12 per carton versus $33 per carton for discount/non-premium cigarettes and $55 per carton for premium-brand cigarettes. (Id.) However, cartons of little cigars can be more expensive than cartons of Native brand cigarettes. (Trial Tr. 1564:13-1565:22 (Delman).)

The evidence supports significant growth in the demand for little cigars throughout the 2000s, though the demand for little cigars never came close to that for cigarettes. (Delman Decl., DX 611 ¶¶ 40, 41; PX 11.) The increase in demand was due, in part, to the higher cost of cigarettes compared to little cigars combined with a willingness by at least some consumers to substitute one for the other. (Id. ¶¶ 40-42 (citing

DX 43 at 11).) Tobacco users are price sensitive, and higher taxes on tobacco products decrease the demand for the affected products. (Angell Aff., PX 628 ¶ 10.) The evidence fell far short of supporting a total substitution of little cigars for cigarettes.

UPS dedicated a considerable amount of time and evidence at trial to the factual proposition that increases in cigarette taxes drove an increase in the demand for little cigars, and that this is all the more reason for the Court not to accept that packages shipped by the Relevant Shippers were cigarettes. According to UPS, the increased demand for little cigars increased the likelihood that such packages did not contain cigarettes at all. There is some force to this argument— but not to the extent UPS asserts.

Several studies confirm the link between increased taxes and the possibility of increased demand for little cigars and other alternative tobacco products, even as cigarette consumption has declined. In fact, the decision by the Food and Drug Administration to bring cigars under the regulation of the Family Smoking Prevention and Tobacco Control Act by its Center for Tobacco Products on May 5, 2016,[48] (DX 425), was based on research showing that various demographic groups continued to use cigars even when there was a broader migration away from cigarettes, especially during the period from 2010-2014. (Delman Decl., DX 611 ¶ 44.) Dr. Angell also testified that if little cigars

[48] The decision was formally published in the Federal Register of May 10, 2016: Deeming Tobacco Products To Be Subject to the Federal Food Drug, and Cosmetic Act, 81 Fed. Reg. 28,974 (May 10, 2016).

cost less than cigarettes, they are one product that cigarette consumers might turn to as an alternative. (Trial Tr. 1363:1-4 (Angell); see also Trial Declaration of Aviv Nevo ("Nevo Decl."), DX 613 ¶¶ 76-84 (concluding that diversion to "non-cigarette products," including little cigars, would be "substantial").)

VIII.CERTAIN COMMON EVIDENCE

A. The Fink Accounts

As discussed in detail below, one UPS Account Executive—Gerard Fink—was assigned to a number of the Relevant Shippers. He testified both live at trial and by trial declaration. Because his testimony impacts a number of issues in the case, the Court provides an overview here.

During the period relevant to this suit, UPS first employed Fink as a part-time loader, then promoted him to External Technician, and then promoted him to Account Executive in 2005, a position in which he remains today. (Fink Decl., DX 602 ¶ 2.) Fink manages UPS's "small customer accounts" (defined as accounts which generate package revenue of up to $300,000 per year) in what is his designated "Patch of Land;" he is also part of the Buffalo-area sales team. Fink's Patch of Land includes the UPS Centers in Dunkirk, Jamestown, Olean, and Hornell, New York. (Id. ¶ 9.) UPS's Dunkirk and Olean Centers serve two Seneca Nation reservations. (Id. ¶ 10.)

As discussed below, a number of Fink's accounts in fact shipped unstamped cigarettes through UPS. These accounts included Elliott Enterprises, Elliott Express (or EExpress), Bearclaw Unlimited/AFIA, Shipping Services, Seneca Ojibwas, Morningstar Crafts & Gifts, Indian Smokes, and Smokes & Spirits.

Each of these shippers tended to ship in volume and were, at some point in the relationship, among Fink's largest accounts.

Fink, like other Account Executives, is paid a salary and has the opportunity to earn a bonus; the bonus is based in part on sales. An Account Executive's bonus does not play a significant role in his or her overall compensation. Nevertheless, it plays some role. The evidence at trial supported a desire by Account Executives to grow, and not lose, business. Emails exchanged between Fink and other UPS employees regarding certain Relevant Shipper accounts demonstrated a shared interest in protecting the accounts. For example, after an audit of EExpress revealed only coffee being shipped, Fink sent an email to Michael Zelasko, a UPS sales manager, stating that the audit revealed only packages containing coffee, and concluding with a "smiley face" emoticon. (PX 569.) Zelasko forwarded this email to Brian Weber of UPS Customer Solutions, telling Weber, "The audit for EExpress came back as coffee!! Dodged a bullet." (Id.) For instance, emails reflected Fink's reporting on account activity to supervisors, databases reflected certain of his contacts, and sales data was widely shared. Fink, in short, was not a rogue employee hiding his activities from others at UPS. While he may not have informed others at UPS of everything he knew or suspected, he was not hiding (and did not personally have the ability to hide) many obvious facts (such as the name of a shipper, its location, its address, or its client contact; the inventory that drivers saw; the smell emitted by certain packages; tracer inquiries; etc.). The Court concludes that with regard to the Relevant Shippers, Fink was acting within the

scope of his employment. Fink's testimony along with other evidence also convinced the Court that he was not a lone wolf and that his conduct was known and supported by certain other individuals within UPS.

The Court did not find Fink a generally credible witness. He struck the Court as an intelligent man who understood a great deal about UPS's business and about the accounts for which he was responsible. He also appeared evasive and as attempting to find the "right answer," sometimes at the expense of the truth. The Court does not credit testimony that he did not know what a number of his largest accounts were shipping; this finding is based on Fink's demeanor as well as the totality of facts regarding his knowledge of, and interactions with, the accounts. Indeed, his testimony convinced the Court that he generally understood that certain of his clients were shipping cigarettes and that there was a reasonable basis to believe that those accounts and others may have been tendering cigarettes.

B. The Non-Compliant Lists

One important component of the PACT Act is the creation of "non-compliant lists" or NCLs. Specifically, the PACT act directs the Attorney General to compile and distribute a list of cigarette and smokeless tobacco delivery sellers that have not registered with the Attorney General or "are otherwise not in compliance with [the] Act." 15 U.S.C. § 376a(e)(1)(A). Inter alia, the PACT Act prohibits deliveries to any person named on the NCLs, unless certain exceptions are met. Id. § 376a(e)(2)(A).

After the PACT Act went into effect on June 29, 2010, entities that had shipped cigarettes through the

USPS, and had a continued desire to ship cigarettes, sought alternative arrangements. There was substantial evidence at trial that the timing of new UPS customer acquisitions during 2010 was more likely than not related to the effective date of the PACT Act. (See, e.g., PX 198.) Evidence demonstrated that at least certain of the new accounts were recognized as "competitive conversions" from other carriers at the time. (See, e.g., (PX 198.))

UPS has argued that the same time period also correlates with an increase in the cigarette tax and an increase in the demand for little cigars (and thus, that new customers were simply responding to increased mail order demand for little cigars.) That may be so, but there is insufficient evidence to support this theory. While the evidence does support increased taxes and consumer demand for little cigars, it does not support that the contents of the packages shipped by the new customers were therefore little cigars, or reasonably believed to be such. Instead, the evidence supports a reasonable inference that many customer acquisitions (particularly in 2010), including competitive conversions, were the result of the passage of the PACT Act, and thus a switch away from another carrier to UPS.

As discussed, the PACT Act required the periodic creation of NCLs. The PACT Act's mandate in this regard was, of course, public knowledge. But in addition, commencing in November 2010, the ATF distributed the NCLs to UPS. Several of the Liability Shippers, or individuals associated with them, were on one or more NCLs. For instance, Elliott Enterprises appeared on the first NCL distributed by the ATF in November 2010, (PX 514); Indian Smokes was added on

May 6, 2011, (PX 524); and Smokes & Spirits was added on February 15, 2012, (PX 514).

Plaintiffs argue that UPS's receipt of the NCLs put them on notice of cigarette shippers but that UPS failed to take remedial action (such as conducting audits). According to plaintiffs, the NCLs also provide evidence of UPS's knowledge of shipper violations to support plaintiffs' claims.

For its part, UPS argues that because it was exempt from the PACT Act due to the AOD, the NCLs were irrelevant to its business. This position is misguided. The NCLs were plainly relevant and should have been used by UPS to identify cigarette shippers. As discussed below in the Court's legal conclusions, UPS's argument fails to fully grasp the conditional nature of the relevant PACT Act exemption, and that the NCLs plainly provided relevant information to meet the necessary conditions. UPS ignored the NCLs at its peril. While the NCLs may not have obligated UPS to take action with regard to certain shippers, UPS had separate obligations with regard to those same (and other) shippers under the AOD.[49]

---

[49] A number of UPS's defenses (including, for instance, unclean hands, in pari delicto, and breach of the covenant of good faith and fair dealing) are based in part on an assertion that the government kept information regarding non-compliant shippers from UPS. However, the distribution of NCLs to UPS represented an instance in which a governmental entity (albeit a federal one) provided UPS with "what it knew" about non-compliant shippers. UPS's dismissal of the NCLs as irrelevant until the fall of 2013 undermines its assertion that if only the State had given it information, it would have taken action. Instead, UPS's actions with regard to the NCLs provide some evidence that had any

UPS further argues that in any event, the NCLs were sent to one part of UPS while the domestic client accounts and courier service operations were performed out of another. Thus, UPS claims it was operationally unaware of the NCLs and that certain shippers were on the NCLs. While factually true, the conclusion that UPS draws from this—that it was justified in ignoring the NCLs—is unpersuasive. The point remains that UPS received the NCLs.[50] It should have provided information it received regarding known cigarette shippers to others within UPS.[51] As the Court has found, the NCLs were, as a factual matter, relevant information regarding the shipping practices of certain entities.

In sum, the Court finds that the NCLs did put UPS on notice, and provided some knowledge, of shippers who tendered cigarettes.

C. The "Tobacco Watchdog Group" Letter

On November 10, 2010, an entity referring to itself as the "Tobacco Watchdog Group" sent a letter addressed to the "UPS Service Center Managers" in

---

State entity provided it with information, it would have ignored that information—at least until the fall of 2013. Increased attention in the fall of 2013 was driven by the fact that as of late July 2013, UPS realized it was under new scrutiny from plaintiffs.

[50] Cook testified that he personally did not receive an NCL until the third quarter of 2013 and that upon receipt he immediately used it to identify possibly non-compliant shippers. (Cook Decl., DX 600 ¶¶ 100, 103.) UPS's inside counsel had been receiving the NCLs prior to this time; counsel added Cook to the distribution list in August 2013. (Id. ¶ 103.)

[51] Notably, this compartmentalization contrasts with evidence of coordination between different parts of UPS to provide a seamless and integrated package-delivery service for its customers.

which it identified a number of known or suspected shippers of unstamped cigarettes. (DX 62.) Various UPS employees received copies of this letter, including Gerard Fink, Steve Kinney, Scott Winkley, Rich Kincade, and Tina Mahon. (Id.) The letter was emailed to Fink by Winkley, the Business Manager for the Jamestown and Olean Centers. (Id.) Winkley instructed Fink, "Please read." (Id.) At trial, Fink testified that he recalled receiving the letter at or about the time it was issued. (See Trial Tr. 601:14-17 (Fink); see also Fink Decl., DX 602 ¶ 33.) Six entities were identified in the letter—all of which were located in Salamanca, New York. Among them were the following shippers: Smokes & Spirits at 270 Rochester Street, Elliott Enterprises at 38 Main Street, and Native Express, also at 38 Main Street. (Id.) Smokes & Spirits and Elliott Enterprises are both Relevant (and Liability) Shippers.

Fink's reply to Winkley's email stated that he had only "one account" on the list and was "certain" they were only shipping cigars. The account to which Fink was referring was Smokes & Spirits. In fact, Elliott Enterprises, located at 38 Main Street in Salamanca, was also one of Fink's largest accounts at that time. Fink did not state his basis for his "certain[ty]," and there is no evidence that he was further probed by any of the other letter recipients. In light of UPS's affirmative obligations under the AOD and statutory schemes, it should have done more in response to this letter.

UPS argues that the Court should give no weight to the letter because it was of unknown origin and veracity. The Court disagrees. The emails among UPS

personnel discussing the contents of the letter establish that UPS recipients read the letter and discussed it. It was properly viewed by UPS employees as relevant. The letter provided some notice of a possible issue; the Court agrees, however, that the letter did not itself "prove" anything.

D. Inquiries Regarding Lost or Damaged Packages

Plaintiffs introduced evidence showing that at various times UPS customers inquired about lost or damaged packages. (PXs 72, 113, 190-91, 208, 211-215, 403, 405-06, 468-70.) As described above, UPS refers to these inquiries as "tracers." Tracers captured various methods of inquiry, such as calls to a 1-800 customer service line or an online report entered into UPS's system. Tracers typically include information regarding the reported contents of the package(s) at issue.[52]

---

[52] Both plaintiffs and defendant have placed in evidence spreadsheets of tracer data, (see, e.g., PX 191, PX 211, DX 499, DX 500), and both have used the tracer documents for the truth of customers' statements of package contents. (See, e.g., Pl. Proposed Findings of Fact, ECF No. 491 ¶¶ 382, 383; Def. Proposed Findings of Fact, ECF No. 492 ¶ 110.) However, no party has asserted a hearsay objection to the use of tracers for the truth of the matter asserted, i.e., customers' statements of packages' contents, and both parties have relied on this use in their arguments. (See ECF No. 420 at 4 (" . . . UPS has made no objection as to admissibility other than citing Rule 602. It is not, for instance, arguing relevance or hearsay."). Therefore, any objection to the tracer documents on the basis of hearsay is waived. See Fed. R. Evid. 103(a); United States v. Del Llano, 354 F.2d 844, 847 (2d Cir. 1965). In all events, even if not considered for the truth, tracers nonetheless put UPS on notice of what a customer

It is clear that until recently (as described above), UPS did not use tracers as tools to identify cigarette shippers. Nevertheless, tracers put UPS on notice that some shippers were likely tendering cigarettes.[53] The tracers also provided UPS notice regarding other items being shipped by the Relevant Shippers (such as tobacco, flyers, and other items).

1. Smokes & Spirits

Several tracers in 2011 (in April, September, October, and November) for Smokes & Spirits were for packages containing "nectar filled cigars full flavor 100's," "1 of 3 box of 6 pouches of tabacco [sic]," "2 of 5 tobacco product," and "1 of 10; 1 pack out of a carton of 10 was crushed." (PX 191, rows 260, 262-63.)

Tracers relating to packages shipped by Smokes & Spirits in April, September, and December of 2012 indicated package contents as an unidentified good, seven cartons of "Menthol Box 100s" (cigarettes), and Timber Wolf Long (tobacco), respectively. (PX 190, rows 293-95; see also PX 214, rows 293-95.)

---

claimed a package contained. See United States v. Dupree, 706 F.3d 131,136 (2d Cir. 2013) ("[A] statement offered to show its effect on the listener is not hearsay."). Such notice, along with other circumstances described below, should have informed UPS's state of mind (and should have led to an audit).

[53] Under the AOD, UPS was obligated to train its personnel in its Tobacco Policy. (AOD, DX 23 ¶ 34.) Customer service personnel are reasonably included in the "relevant UPS employees" who should have been so trained. Moreover, the AOD also broadly required "UPS" to comply with PHL § 1399-ll. The Court finds that employment responsibilities of customer service personnel working with tracers should have included reporting packages containing cigarettes within UPS, to supervisors, to Cook, or to those working with him or fulfilling similar roles.

A tracer in September 2012 for a package shipped by Smokes & Spirits contained the UPS remark in all caps: "PROHIBITED ITEM SENT TO CONSUMER." (PX 72.) Additional inquiries relating to packages shipped by Smokes & Spirits occurred on May 15, 2013; September 12, 2013; and October 17, 2013. (PX 113, rows 970-72.) Of these, two (the May and October inquiries) were for non-cigarette tobacco products, while the September inquiry was for cigarettes. (Id.)

2. RJESS

A tracer for RJESS in July 2013 was for "8 of 20 Cigars." (PX 113, row 968.)

3. Sweet Seneca Smokes

A tracer for Sweet Seneca Smokes in November 2014 indicated package contents of "8 Nectar Filtered Cigars Full Flavor 100's." (PX 211, row 627.)

4. Elliott Enterprises/EExpress

In 2011, tracers for Elliott Enterprises (in March, April, May, and December) were for one empty box and three packages of cigarettes. (PX 191, rows 267-70; PX 470, row 2865.) Tracers in March, April, May, and December of 2011 for packages shipped by Elliott Enterprises were for an empty box, "cigarettes/pdmm," "cartons of cigarettes," and "cartons of Kent ULL King Soft." (PX 213, rows 267-70.)

A tracer in March 2012 for packages shipped by Elliott Enterprises was for "5 of 5 Seneca Ultra Light 100" and "606 Seneca Light 120 Carton." (PX 190, row 303.)

Tracers in April 2013 and June 2013 for EExpress indicated the following package contents: "1 of 1 box

of cigarettes;" "1 of 1 box of cigarettes;" "1 of 1 box of cigarettes;" "1 of 1 box of cigarettes;" "4 of 4 Seneca Menthol Light 100 Soft 4pks;" and "1 of 1 box of cigarettes." (PX 405, rows 61-66.)

Tracers in December 2013, January 2014, and May 2014 for packages shipped by EExpress were described as "1 quantity of cigarettes," "10 of 10 Seneca Ultra Light 100 soft" (cigarettes), and "4 carton cigarettes." (PX 211, rows 588-90.)

5. Bearclaw Unlimited

A January 18, 2011 tracer for a package shipped by Bearclaw Unlimited described the package contents as "Marlboro Cigarette Cartons." (PX 191, row 204; PX 213, row 204.) Several months later, in August 2011, another tracer for Bearclaw related to a package containing scented candles. (PX 191, row 250; PX 213, row 250.)

6. Shipping Services

Tracers on August 26, 2011, September 8, 2011, September 15, 2011, and August 17, 2010, for Shipping Services indicated package contents of "3 Seneca Lt cigars," "4 Seneca FF box," "6 Vendetta Full Flavor," and "Cigars." (PX 212, rows 354-57.)

7. Native Wholesale Supply

A tracer in March 2013 for Native Wholesale Supply indicated package contents as "Flyers." (PX 405, row 81.)

8. Seneca Promotions

Tracers in July 2014 for Seneca Promotions indicated one empty package and "1 Banner Rick Youngblood Smoke Shop." (PX 211, rows 624-25.)

9. Native Gifts

A tracer in June 2013 for Native Gifts indicated the package contained "8 cartons of cigarettes, Seneca Ultralights." (PX 211, row 622.)

10. Jacobs Manufacturing/Tobacco

Two tracers on February 22, 2011, for Jacobs Manufacturing/Tobacco (rows 39, 40) indicated package contents of "Carton, Nation's Best American Full, 100 Softpack/EA" and "Nations Best Full Flavor Cigarettes." (PX 468, rows 39-40; PX 469, rows 39-40.)

E. The Cigarettes Shipped Were Unstamped

As the Court stated in footnote 1 above, it uses the term "cigarette" throughout this Opinion as synonymous with "unstamped cigarette." There is substantial evidence supporting the Court's determination that all cigarettes shipped by the Relevant Shippers were unstamped. First, UPS drivers, Account Executives, and sales representative knew that cigarettes sold on Indian reservations were virtually always sold without tax stamps. (Bankoski Dep. Tr. 69:10-70:16; Haseley Dep. Tr. 16:3-20; id. 16:25-17:21; Potter Dep. Tr. 48:15-49:2; Sheridan Dep. Tr. 34:4-25, 35:17-21; Wheaton Dep. Tr. 15:8-17; Trial Tr. 179:23-180:24 (Cook); Trial Tr. 434:9-436:10 (Niemi); Trial Tr. 1342:2-22 (Guarino); Trial Tr. 1392:15-1394:1 (Puleo).) Rosalie Jacobs and Robert Oliver both testified credibly that the cigarettes she shipped via UPS did not bear stamps. (Trial Tr. 1661:15-17 (Jacobs); Trial Tr. 1132:5-1134:20 (Oliver).) In addition, the cigarettes seized at the Potsdam Center in June 2011 did not bear stamps. (Trial Tr. 1148:1-7 (Oliver).) Philip Christ testified credibly that the cigarettes sold by Arrowhawk did not bear tax stamps. (Trial Tr.

912:20-23, 913:17-914:6 (Christ).) Smokes & Spirits data regarding sale prices further support a lack of tax stamps. (PX 54; PX 55.) Finally, cigarettes purchase as part of controlled buys and introduced at trial were unstamped. (PX 40; PX 43.)[54]

IX. SHIPPERS AT ISSUE

A. Overview of the Shippers and the Court's Findings

This case concerns UPS's shipments on behalf of a discrete group of shippers located on the following Indian reservations within the State of New York: the Seneca Cattaraugus Reservation, the Seneca Allegany Reservation, the Tonawanda Reservation, and the Mohawk/St. Regis Reservation. UPS serviced accounts on these reservations from its Dunkirk, Olean, Batavia, and Potsdam Centers, respectively.

Plaintiffs' claims in this case are directed at UPS's conduct with regard to the following twenty-two entities (referred to as the "Relevant Shippers" or "Shippers") (plaintiffs combine certain entities into "groups"):[55]

---

[54] The packages involved in the controlled buys were shipped to addresses in New York City. (PX 40; PX 43.) Additionally, the Court has reviewed the delivery spreadsheets and has determined that there are numerous instances where deliveries by the Relevant Shippers were made to addresses with New York City zip codes. (See, e.g., PX 191, line 204.)

[55] As noted above, plaintiffs have separated certain companies into "groups." The Court only uses such designations in its factual findings in certain instances when the facts support an inference that the grouped entities are properly considered each other's alter egos. However, even in each such instance, the

- Elliott Enterprise(s), Elliott Express (or "EExpress"), Bearclaw Unlimited/AFIA (together, the "Elliott Enterprise Group");
- Seneca Ojibwas Trading Post, Shipping Services, and Morningstar Crafts & Gifts (together, the "Shipping Services Group");
- Indian Smokes;
- Smokes & Spirits, Native Outlet, A.J.'s Cigar, Sweet Seneca Smokes, and RJESS (together, the "Smokes & Spirits Group");
- Native Wholesale Supply and Seneca Promotions (together, the "Native Wholesale Supply Group");
- Seneca Cigarettes/Cigars, Hillview Cigars, Two Pine Enterprises, Arrowhawk Smoke Shop (together, the "Arrowhawk Group");
- Mohawk Spring Water and Action Race Parts (together, the "Mohawk Spring Water Group"); and
- Jacobs Manufacturing/Tobacco.

The parties submitted thousands of pages of exhibits with regard to the Relevant Shippers, and there were several days of testimony. The Court's findings are based on its review of the totality of the evidence and consideration of the parties' various arguments regarding the reasonable inferences the Court should draw. The Court does not attempt to set forth each

---

Court has also made a separate liability determination for each entity on a stand-alone basis.

fact in the trial record supportive of its findings. Rather, it provides exemplar facts. As to each shipper as to which the Court has found liability ("Liability Shipper"), the Court has made specific factual findings regarding: (1) the date not later than which there was a reasonable basis to believe that such shipper may have been tendering cigarettes to Individual Consumers, (2) (if applicable) the date not later than which the shipper was in fact shipping cigarettes, and (3) (if applicable) the date not later than which UPS knew that it was shipping cigarettes.[56] The answer to question (1) establishes the date of UPS's initial liability for an audit violation of the AOD. In each instance in which the Court has found a violation of the audit obligation, the Court has further found that once such an obligation attached, UPS remained under an audit obligation each day thereafter until an audit occurred or UPS terminated the account. The answer to questions (2) and (3) provide the predicate facts for findings of violations of ¶ 42 of the AOD as well as the various statutory schemes.

The Court finds that plaintiffs have proven liability under the AOD and each statutory scheme at issue with respect to the following shippers:

(1) Elliott Enterprise(s);

(2) Elliott Express/EExpress;

---

[56] The questions of whether UPS "knew" packages included cigarettes and, if so, when, are mixed questions of law and fact. The legal principles the Court applies to such determinations are set forth in its Conclusions of Law below. When the Court uses the term "knowledge" in its findings of fact, it is specifically incorporating and applying these legal principles and its conclusions with regard thereto.

(3) Bearclaw Unlimited/AFIA;

(4) Seneca Ojibwas Trading Post;

(5) Shipping Services;

(6) Morningstar Crafts & Gifts;

(7) Indian Smokes;

(8) Smokes & Spirits;

(9) Seneca Cigarettes/Cigars;

(10) Hillview Cigars;

(11) Two Pine Enterprises;

(12) Arrowhawk Smoke Shop;

(13) Mohawk Spring Water;

(14) Jacobs Manufacturing/Tobacco;

(15) Native Wholesale Supply;

(16) Seneca Promotions; and

(17) Action Race Parts.

The Court finds that plaintiffs have proven only violations of UPS's audit obligations for:

(18) A.J.'s Cigars;

(19) Native Outlet; and

(20) RJESS.

As to the remaining shipper, Sweet Seneca Smokes, plaintiffs have not proven that there was a violation of the audit obligation, or that the shipper in fact shipped cigarettes through UPS, and/or that UPS possessed the requisite knowledge of such facts.

Below, the Court sets forth its specific findings with regard to each of the Relevant Shippers. The Court has considered the often obvious methods used by cigarette shippers to reduce their risk of losing UPS service.[57] For instance, certain shippers would open (or UPS opened for them) successive accounts (e.g., Elliott Enterprises became EExpress; Seneca Ojibwas became Shipping Services, which became Morningstar Crafts & Gifts). In some instances, these shippers continued to have UPS pick up from the same physical address (e.g., Shipping Services and Morningstar Crafts & Gifts) or a shared billing address; in others, a different address might have been used but the personnel overlapped (e.g., Elliott Enterprises and EExpress). It is the Court's view that in all events, these techniques were so basic that they should not have prevented detection if UPS had undertaken modest efforts to link accounts.[58]

---

[57] Notably, and as discussed below, the use of such methods does not eliminate UPS's liability; UPS personnel were sometimes complicit in such conduct—in an effort to maintain the accounts—and in other instances the methods were so obvious that failure to recognize them as indications of likely cigarette shipping amounted to conscious avoidance.

[58] Using duplicate accounts and alter egos were known tactics of cigarette shippers attempting to evade the law. The AOD specifically provided that "[t]he violations found to have occurred pursuant to this [AOD] . . . shall be applied both to the shipper committing the violation, and to any other shipper . . . that UPS has a reasonable basis to believe is shipping or seeking to ship Cigarettes (a) from the same location as the suspended shipper, (b) on behalf of a suspended shipper, or (c) with the same account number as the suspended shipper." (AOD, DX 23 ¶ 31 (emphasis added).)

There is also credible evidence that UPS personnel were sometimes complicit in this avoidance technique. For instance, as described below, Fink assisted Seneca Ojibwas in opening two separate accounts (with regard to the second, he recommended using a different address than the first), and then opened an account under Morningstar Crafts & Gifts when Shipping Services was terminated for shipping cigarettes—at the same address as the second Shipping Services account.

B. Liability Shippers

The Court finds that plaintiffs have proven liability under the AOD and each statutory scheme at issue with respect to the following Liability Shippers.

1. Elliott Enterprises[59]

Elliott Enterprises operated from a retail storefront on 38 Main Street, Salamanca, New York, on the Seneca Allegany reservation. (Fink Decl., DX 602 ¶ 58; DX 490 at 2.) Gerard Fink was its Account Executive and opened its first account on September 28, 2010.[60] (PX 174, row 60.) This was shortly after passage of the PACT Act. Aaron Elliott was the principal

[59] The Court's discussion of its analysis of the facts with regard to this entity is more extensive than for others. This is intended to lay out the way in which the Court has considered certain types of evidence.

[60] The principal of Elliott Enterprises, Aaron Elliott, had a prior account with UPS for another entity named "Rock Bottom Tobacco." That company had executed a Tobacco Agreement and was also listed in UPS's Tobacco Database. (See DX 371, line 472.) The account was canceled as part of the broader plan implemented by UPS in connection with the AOD to require all

of Elliott Enterprises and, while Fink denied making the connection, there was credible evidence that Fink understood that Aaron Elliott was associated with this account as early as 2010. (See, e.g., PX 559, col. DL; PX 439, rows 127-28, col. DL.) This fact is relevant to whether—in light of Aaron Elliott's subsequent history of shipping cigarettes with UPS through another entity (Elliott Express or EExpress)—Fink knew or should have known of, or was complicit in, Elliott's attempt to circumvent UPS policy by opening other accounts. The Court finds that not only should Fink have known, but that he did know.

UPS began shipping for Elliott Enterprises on October 1, 2010. This account was part of the business UPS acquired following passage of the PACT Act. A month later, Elliott Enterprises, 38 Main Street, Salamanca, New York, was listed on the NCL issued by the ATF and sent to UPS; it was also listed in the Tobacco Watchdog Group letter issued on November 10, 2010, that Fink received. (DX 62.)[61] As discussed above, the Tobacco Watchdog Group letter and the November 10, 2010 NCL were both distributed to others within UPS. The account was terminated on or about September 18, 2012, after a UPS driver discovered a

---

smoke shops in the area to establish new accounts with new Tobacco Agreements. (See AOD, DX 23 ¶ 21; Trial Tr. 200:6-14 (Cook); id. 499:22-500:3 (Fink).) Notably, not all accounts changed their names. Here, the name change (by the same owner) away from one that used the word "tobacco" was more likely than not an attempt to obscure the goods shipped.

[61] In the email exchange among UPS personnel regarding the Tobacco Watchdog Group letter, Fink states that he only has one account on the list, Smokes & Spirits. He does not acknowledge his new account for Elliott Enterprises (also listed with an address of 38 Main Street, Salamanca, New York).

shipment of cigarettes. (PX 172; Cook Decl., DX 600 ¶ 76.)

It is quite clear from these facts alone that, from the date on which its account was opened, Elliott Enterprises was, at best, a very high-risk account and more than likely a cigarette shipper. While the fact that it was located on an Indian reservation was alone insufficient to support a reasonable basis to believe it was shipping cigarettes, when that fact was combined with its presence on the November 2010 NCL and its presence in the Tobacco Watchdog Group letter, the question was not close. These facts—even before addressing others—support that not later than November 11, 2010 (the day after the November 10, 2010 NCL and the Tobacco Watchdog Group letter), there was a reasonable factual basis to believe Elliott Enterprises may have been tendering cigarettes via UPS. Under the AOD, not later than November 11, 2010, UPS thus had an obligation to audit Elliott Enterprises.

There is more, however. UPS's failure to audit when obligated to do so does not mean that Elliott Enterprises was in fact tendering cigarettes or that UPS knew that it was. The audit obligation attaches only upon a reasonable belief that a shipper may be tendering cigarettes. Additional facts are required to support a finding of actual tendering and UPS's knowledge.

In this regard, the NCLs constitute some evidence of cigarette shipping. They are lists of shippers known by a federal agency to ship cigarettes. In addition, UPS received additional notice by way of tracers that particular shippers were likely tendering cigarettes.

The number of such tracers and consistency of their package descriptions adds to their impact. On March 8, May 26, and December 15, 2011, UPS received inquiries for lost or damaged packages of cigarettes shipped by Elliott Enterprises. (PX 191, rows 267-70.) Additional tracers for cigarettes shipped by Elliott Enterprises were made on March 22, 2012. (PX 190, row 303; see also PX 213, rows 267-70.)

The Court now turns to UPS's knowledge. First, the NCLs provided UPS with factual information. The Tobacco Watchdog Group letter was distributed within UPS, and UPS's emails reflect that it was taken seriously; while the letter's source and reliability were unknown, it should have at least raised further questions. Together, these two sources of information were significant; UPS ignored them and failed to take action at its peril.

But further, the Court finds that various facts taken together support circumstantial evidence of UPS's knowledge that Elliott Enterprises was tendering cigarettes. First, it was clear that Elliott Enterprises was a smoke shop. Fink testified at trial that he assumed Elliott Enterprises was shipping "little cigars" because it was located in Salamanca, where "[a] lot of the smoke shops sold everything from Native American gifts to cigarettes, to cigars, to pipe tobacco." However, he could not explain why, given this explanation, he did not also assume (or simply suspect) that Elliott Enterprises sold cigarettes. (Trial Tr. 589:12-591:23 (Fink).) Despite knowing that Elliott Enterprises shipped tobacco products, Fink never required that they execute a Tobacco Agreement.

The absence of a Tobacco Agreement under such circumstances was equivalent to an affirmative act of conscious avoidance and supports an inference of Fink's knowledge that Elliott Enterprises was shipping cigarettes. In addition, despite its presence on the NCL, in the Tobacco Watchdog Group letter, and in the tracers for cigarettes, and despite the fact that Fink knew it was a smoke shop, Elliott Enterprises was never audited. Based on known facts, the Court views the lack of audits as additional affirmative acts. UPS, in effect, "stood down" on its Tobacco Policy with regard to this account. Fink was UPS's first line of defense against Elliott Enterprises: He had more than enough information to request an audit but did not. The Court finds that had Elliott Enterprises been audited, most shipments would have been discovered to contain cigarettes. Together, this circumstantial evidence supports an inference of knowledge.

UPS argues that it is unfair to attribute knowledge to Fink, or through him to UPS, because the sheer volume of Fink's accounts supports his assertion that he did not have specific knowledge as to this one. This argument is unavailing. First, as discussed above, the Court did not find Fink credible as a general matter or here, specifically. Additionally, the argument ignores the context of UPS's position at the time: If Fink had so many accounts that he could not possibly know what any one of them was shipping—including those located on Indian reservations at higher risk of shipping cigarettes and that he himself referred to as "smoke shops"—then UPS bears direct responsibility for this failure.

But the Court believes Fink did know. During the time Elliott Enterprises was shipping with UPS, it

was among his largest accounts. In March 2012, it was his highest gross-revenue account; by the end of 2012 it was his sixth-highest gross-revenue account. (PX 568; PX 102, row 9.) Evidence indicates he was compensated at least in part based on commissions. Only a very small handful of accounts were as large as Elliott Enterprises—it was in the top group on his list. (PX 568.) Moreover, documentary evidence shows that Fink received regular information regarding his accounts and whether they were meeting specified revenue targets. It is reasonable to infer that Fink understood exactly how much business Elliott Enterprises brought in and what their business was.

In sum, the Court finds that (1) not later than November 11, 2010, there was a reasonable basis to believe Elliott Enterprises may have been shipping cigarettes (this date is based on receipt of the November 10, 2010 NCL and Tobacco Watchdog Group letter, along with the accumulated other facts discussed above); (2) from November 11, 2010, onward Elliott Enterprises was in fact shipping cigarettes via UPS (based on the same information); and (3) from November 11, 2010, onward UPS knew that Elliott Enterprises was shipping cigarettes (based on the same information).

The Court further finds that 95% is a reasonable approximation of the percentage of packages shipped by Elliott Enterprises that contained cigarettes.[62]

---

[62] This approximation is based on the Court's assessment, given the totality of the evidence, that most, but not all, of Elliott Enterprises's shipments contained cigarettes. The evidence supports that Elliott Enterprises sold a full array of tobacco products

2. EExpress

EExpress was another Fink account. He opened it on September 20, 2012, only days after Elliott Enterprises's account was terminated.[63] The account was located at a residential address on 11074 Indian Hill Road, Perrysburg, New York, on the Seneca Cattaraugus reservation. (Logan Dep. Tr. 82:4-19.) There was significant customer overlap between the consignees for Elliott Enterprises and EExpress. EExpress was also a high-volume account, shipping hundreds of packages a week from its residential address; the day it opened, it immediately became one of Fink's largest accounts. (See PX 102; PX 143.) The timing could not have escaped Fink's notice: One of his largest accounts was terminated, and, just a few days later, another account opened that happened to largely fill the revenue hole. These facts alone should have raised red flags.

Fink's trial testimony regarding what he knew about EExpress's shipments with UPS was particularly lacking in credibility. He testified that shortly after the account was opened, he allegedly called EExpress and spoke to a woman named Adrian; he said he remembered her from her prior employment at

---

at its commercial storefront, and it is reasonable to assume that from time to time customers ordered some to be shipped (rather than purchasing the products in person). Moreover, the Court credits Farrell Delman's testimony that cigarettes are most likely to have been shipped because of the greater consumer demand and lesser tax imposed. (Delman Decl., DX 611 ¶¶ 24-34.)

[63] As described below, based on the totality of the evidence, the Court finds that EExpress was shipping on behalf of Elliott Enterprises and used a different name/address to avoid detection as a cigarette shipper

LouAnn's Smoke Shop, an entity with which he was familiar. (Fink Decl., DX 602 ¶¶ 66, 67; DX 511, line 40.) According to Fink, Adrian informed him that EExpress was not shipping tobacco, but she refused to disclose exactly what they were shipping; she said that EExpress wanted to maintain the confidentiality of its business model in order to avoid competition from others on the reservation. (Fink Decl., DX 602 ¶ 67.) Fink then stated, "[a]s Adrian promised me EExpress was not shipping tobacco products and there was no indication from the name of the business or its location at a residence that it sold tobacco products, I had no reason to require EExpress to sign a Tobacco Agreement." (Id.) Yet, despite this professed belief, Fink referred to EExpress as a "cigar shop" in an email to Senior Sales Manager Mike Zelasko in April 2013. (DX 184.) According to Fink, this reference was simply a mistake. (Trial Tr. 637:5-15 (Fink); Fink Decl., DX 602 ¶ 68.)[64] The Court also does not find this testimony credible. At the very least, given the accumulation of facts already mentioned, trusting the self-serving statement of "Adrian" was unreasonable. More than that, it was an affirmative act of "standing down" on the account and allowing the obvious to occur.

---

[64] In this same email, he also stated that EExpress was not a tobacco shipper or shipping cigarettes. Fink refers to other statements he made reflecting that EExpress was not a smoke shop. The Court views the statement in PX 115 as reflecting his knowledge that EExpress was a smoke shop. The Court further views his dissembling as covering the more damaging truth that he knew EExpress to be a cigarette shipper.

But, in addition, there were clear connections between Aaron Elliott—the principal of Elliott Enterprises and by then a known cigarette shipper—and EExpress. On September 26, 2012, Aaron Elliott executed the Carrier Agreement on behalf of EExpress. (PX 128.) Fink testified that he did not recognize the name and made no connection to the prior, terminated account. (See Fink Decl., DX 602 ¶¶ 67, 75.) The Court does not credit this testimony.

In the first full month that the EExpress account was open, it shipped approximately 2,100 packages with UPS from a residential address; that is, an average of 105 packages per day. (See PX 552; PX 559.) With one exception, monthly volume for EExpress averaged about 2,000 packages, or 100 packages a day. (PX 559.) On January 11, 2013, EExpress's cover was blown: The driver assigned to EExpress reported that it was shipping cigarettes. (PX 172.) However, despite this information, UPS continued to ship for EExpress and failed to take any remedial action as required by the AOD.

Commencing in April 2013, UPS received a number of inquiries regarding lost or damaged packages shipped by EExpress. There were five tracers on April 25, 2013, each of which referenced packages containing cigarettes. (PX 405, rows 61-64, 66.) A tracer on June 6, 2013, also referenced a package containing cigarettes. (Id., row 65.) On December 26, 2013, a tracer referenced a package of cigarettes. (PX 211, row 588.) Two tracers, in January and May of 2014, referenced package containing cigarettes. (Id., rows 589-90.)

Next, in May 2014, attorneys for the City and State identified a shipper named "Native Express," located at the same address as EExpress, as shipping cigarettes. (Cook Decl., DX 600 ¶¶ 121, 122.) UPS identified EExpress as being located at the address in question and requested an audit. (Id. ¶ 122.) In a first audit, conducted on May 5, 2014, UPS opened a package and found only coffee.[65] (DX 549.) As described above, Fink sent an email to Michael Zelasko, a UPS sales manager, stating that the audit revealed only packages containing coffee, and concluding with a "smiley face" emoticon. (PX 569.) Zelasko forwarded this email to Brian Weber of UPS Customer Solutions. (Id.) Zelasko stated, "The audit for EExpress came back as coffee!! Dodged a bullet." (Id.) Weber responded, assuming the issue was cigarettes, "Why did you assume they shipped cigarettes; Gerry said he didn't know what they shipped." (Id.)

However, approximately one month later, on June 11, 2014, three boxes shipped by EExpress broke open in UPS's Dunkirk Center, revealing cigarettes. (PX 358.) A second audit was conducted June 13, 2014, on packages consigned by the shipper to UPS on June 13,

---

[65] An email about an unrelated shipper sent two years after this audit indicates a view by some at UPS that this audit may have been compromised by a tip to EExpress. (PX 536.) At trial, the author of that email stated that he and others at UPS ultimately concluded that the audit had not been compromised. The Court views the weight of the evidence as supporting a compromised audit—that someone within UPS, Fink or another, alerted EExpress to the upcoming audit. This is particularly so in light of the subsequent events. This supports both knowledge of what was being shipped and intent to assist the customer in continued shipping.

2014. All ninety-nine packages opened revealed cigarettes; UPS terminated the account. (PX 358.) When EExpress was terminated, Zelasko asked Mike Piazza of UPS: "This is Gerry[Fink's] top account worth almost $200,000. Is there anything we can [do] for relief?" (PX 370.)

In sum, the Court finds (1) that as of the date Aaron Elliott (who was the principal of the terminated Elliott Enterprise account) signed the Carrier Agreement on September 26, 2012, there was a reasonable basis to believe that EExpress may have been tendering cigarettes; (2) that EExpress was tendering cigarettes throughout the entire time that it shipped with UPS; and (3) that UPS knew EExpress was shipping cigarettes throughout that period.

The Court further finds that 100% constitutes a reasonable approximation of the percentage of packages shipped by EExpress that contained cigarettes.[66]

3. Bearclaw/AFIA

In early October 2010, Bearclaw Unlimited opened the first of what would turn out to be eighteen separate UPS accounts.[67] (See Fink Decl., DX 602

[66] This approximation is based on the Court's view of the totality of the evidence, including that the tracers overwhelmingly indicated cigarettes and only some other unidentified "paper products." (DX 500.) It is further based on the fact that, unlike Elliott Enterprises, EExpress was not a retail shop, and there is no indication that it sold anything other than cigarettes. The Court views the "paper products" as referring, in fact, to cigarettes.

[67] While there is nothing inherently unlawful or violative of UPS policy about a shipper having multiple accounts, in the context of UPS's AOD and statutory obligations, UPS should have closely monitored such activity occurring on reservations that

¶ 142.) The first account was opened on October 2, 2010, not long after the effective date of the PACT Act; and fourteen other accounts were opened between October 12 and December 27, 2010. (See PX 606-PX 619.) Bearclaw was located at 4888 Klawitter Road, Great Valley, New York (3.5 miles from the Seneca Allegany Reservation). This is a residential address. On January 8, 2011, UPS opened a sixteenth account for Bearclaw, also at the same address. (See PX 620.) A seventeenth account was opened on February 24, 2011, and an eighteenth and final account was opened on May 8, 2012, under the name "AFIA," but at the Bearclaw address.[68] (See PX 174, row 899.) Fink was the Account Executive for all of the accounts. (See, e.g., DX 371.) Notably, Bearclaw/AFIA and Elliott Enterprises shared a telephone number. (Compare DX 371, row 2902, with PX 472.) It was Fink's responsibility to maintain contact with this larger accounts, and it is reasonable to infer that he was aware of the relationship among these entities.[69] The fact of such a

---

have had active tobacco shippers. As discussed in footnote 57 above, "multiple accounts" was recognized as a red flag in the AOD itself. (AOD, DX 23 ¶ 31.)

[68] At least one UPS document (relating to an audit that occurred in September 2012) used "AFIA" and "Bearclaw" interchangeably. (PX 531; see also PX 174.) UPS did not rebut this evidence. The Court finds no basis to consider Bearclaw and AFIA as separate entities. In all events, the fact that UPS linked these accounts and addresses, together with other commonalities between the entities, provides a sufficient basis for the Court's findings for Bearclaw to apply to AFIA. It appears that AFIA's business was the same as Bearclaw's.

[69] Based on the totality of the evidence, the Court finds that Bearclaw was shipping on behalf of Elliott Enterprises and used

large number of accounts, with the first opening in the months following the effective date of the PACT Act, with a location at a residential address proximate to an Indian reservation, with a name suggesting possible affiliation with a cigarette shipper, should have raised red flags.

There were several early indications that Bearclaw was shipping cigarettes. First, Bearclaw/AFIA was a relatively high-volume shipper proximate to an Indian reservation.[70] Further, as early as January 24, 2011, UPS received an inquiry regarding a damaged package of cigarettes shipped by Bearclaw/AFIA. (PX 213, row 204.) Then, on August 26, 2011, UPS discovered twelve cartons of cigarettes in a shipment tendered by Bearclaw and addressed to a private residence in Arizona. (PX 333.) Despite this blatant violation of UPS's Tobacco Policy, UPS did not terminate the account or take remedial action apart from having Fink review UPS's Tobacco Policy with Bearclaw/AFIA; Fink claimed that he reviewed the policy with them in September 2011. (DX 119; see PX 333.) Cook was aware of this incident and that Bearclaw had not executed a Tobacco Agreement. (See, e.g., PX 200; Trial Tr. 618:18-619:21 (Fink).) Despite these events, Fink did not request that Bearclaw sign a Tobacco Agreement—and no supervisor within UPS followed up to find out why. Also, despite these events, UPS did not conduct an audit of Bearclaw/AFIA until September 21, 2012. When it did, it found cigarettes.

---

different names/addresses to avoid detection as a cigarette shipper.

[70] When Bearclaw's initial accounts were first opened, it was in the top 2% of Fink's highest revenue-generating accounts. (See PX 104.) Over time it dropped to the top 11%. (See PX 102.)

(Cook Decl., DX 600 ¶ 75.). The Court views this series of omissions and failures to respond as UPS affirmatively "standing down" on this account.

It took a month from the time UPS's discovered cigarettes in the audit to suspend the account: UPS suspended Bearclaw's account on or about October 23, 2012. (See PX 174, row 832.) The Court views this delayed timing as suspect and as reflecting corporate concern about the financial impact such suspension would have.[71]

In sum, the Court finds that (1) not later than December 27, 2010, there was a reasonable basis to believe Bearclaw/AFIA may have been tendering cigarettes (this date is based on the series of red flags described above by then in existence); (2) Bearclaw/AFIA was in fact shipping cigarettes from the inception of its first account; and (3) UPS knew that Bearclaw/AFIA was shipping cigarettes not later than January 24, 2011.[72]

---

[71] While the impact would have been insignificant in the overall context of UPS's business, the evidence supported greater attention within UPS to keep even modest revenues.

[72] These latter findings are based on the fair inference drawn from the totality of the evidence and the number of red flags, including the tracers. By not auditing and not requiring a Tobacco Agreement, UPS took affirmative steps supporting a finding of—at least—willful blindness.

The Court further finds that 100% is a reasonable approximation of the percentage of packages shipped by Bearclaw/AFIA that contained cigarettes.[73]

4. Shipping Services/Seneca Ojibwas/ Morningstar Crafts & Gifts

The Seneca Ojibwas Trading Post, Shipping Services, and Morningstar Crafts & Gifts were referred to by plaintiffs as the "Shipping Services Group." For these companies, combined consideration of the facts and circumstances relating to their accounts is appropriate. As explained below, there is significant evidence that the entities were in fact one and the same.[74]

---

[73] This approximation is based on the Court's view of the totality of the evidence, including the tracers for cigarettes, the August 2011 discovery of cigarettes, and the fact that the audit found cigarettes. It is also based on the fact that Bearclaw and AFIA shipped out of a residential address, which reduces the likelihood that they carried the broad array of goods a storefront retailer might offer. There was no storefront displaying other goods.

[74] Courts generally evaluate the totality of the circumstances to determine if formally separate entities are identical in substance, and if it is fair and equitable to regard them as alter egos. Cf. N.Y. Pattern Jury Instr., Civil 2:266, Liab. for Conduct of Another (2016) ("The corporate veil or shield may be pierced when (1) the [entity's] owner(s) completely controlled the [entity] and did not treat it as a separate business entity and (2) the [entity's] owner(s) used [their] complete control to commit a fraud or a dishonest or an unjust act . . . ."); Newspaper Guild of N.Y., Local No. 3 of Newspaper Guild, AFL-CIO v. NLRB, 261 F.3d 291, 294 (2d Cir. 2001) (explaining that the determination of whether subsidiaries are alter egos "focuses on commonality of (i) management, (ii) business purpose, (iii) operations, (iv) equipment, (v) customers, and (vi) supervision and ownership"); OOO v. Empire United Lines Co., 557 F. App'x 40, 45-46 (2d Cir. 2014) ("'In de-

Nevertheless, the Court has analyzed the facts with regard to each of the entities separately, and its findings below take such individualized consideration into account.

Shipping Services was a successor entity to a company called the Seneca Ojibwas Trading Post ("Seneca Ojibwas"). Seneca Ojibwas opened an account with UPS in April 2002. (PX 299, row 3; PX 309, row 14.) Fink knew that Seneca Ojibwas shipped tobacco products. (See PX 306, row 4 ("Smokes").) A spreadsheet sent to Fink lists Seneca Ojibwas as a "smoke shop." (PX 306.) After UPS entered into the AOD, Fink informed the owner of the Seneca Ojibwas that his account would be cancelled and reopened. (PX 452.)

On November 22, 2005, Fink opened a new account for Seneca Ojibwas under the name "Shipping Services." (Fink Decl., DX 602 ¶ 46; Trial Tr. 579:7-9, 630:21-23 (Fink).) The Court views the name change as an attempt to obscure the affiliation between these companies, and specifically to obscure that Shipping Services was a smoke shop. The Court further finds that the UPS account team nonetheless understood

---

ciding whether to pierce the corporate veil, 'courts look to a variety of factors, including the intermingling of corporate and [shareholder] funds, undercapitalization of the corporation, failure to observe corporate formalities such as the maintenance of separate books and records, failure to pay dividends, insolvency at the time of a transaction, siphoning off of funds by the dominant shareholder, and the inactivity of other officers and directors.'" (quoting Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 195 (2d Cir. 2010)). While the evidence at trial did not allow for findings as to each factor set forth in the case law, the evidence presented plainly supported the factors set forth in the pattern jury instruction.

the affiliation. Thus, from the outset, Shipping Services was known by UPS to be a tobacco shipper. The new "Shipping Services" account began shipping on November 22, 2005. The account was located at 13113 Route 438, Gowanda, New York on the Seneca Allegany reservation, and it operated out of a storefront. (See Fink Decl., DX 602 ¶ 45.) Cigarettes were among its wares.

Responsibility for the account was initially assigned to a UPS Sales Support Representative, Tina Mahon. (Trial Tr. 493:25-494:3 (Fink); Fink Decl., DX 602 ¶ 47.) In August 2010, Mahon obtained a Tobacco Agreement from Shipping Services. (DX 51.) Fink took over responsibility for the account in late 2010, after he was promoted to Account Executive. Fink personally visited the storefront out of which Shipping Services operated in 2010, and he spoke with a representative of the company quarterly thereafter. (Fink Decl., DX 602, ¶ 50.) He testified that he only saw little cigars during his visit, not cigarettes. (Id.) The Court did not believe this testimony. The testimony conflicts with the rational business incentive of a smoke shop to display wares corresponding to the highest consumer demand, i.e., cigarettes. (See, e.g., PX 11.)

Until passage of the PACT Act, Shipping Services shipped insignificant volume through UPS. Its volume began to increase in 2010 after the PACT Act became effective. (Id. ¶ 49.) Given that it was a tobacco shipper, this was a serious red flag. Today, UPS's data analytics would likely flag this shift. Fink opened a second Shipping Services account in January 2011. In a spreadsheet maintained by UPS to record in-person visit details, Fink noted on January 11,

2011, "Rock-N-Roll . . . Still retaining same customer base, and not even allowing new people to place orders. Locked-in majority to keep the reships rolling[.]" (PX 235, row 3275). The Court views this use of the term "reships" as indicating knowledge of a customer base in need of a consistent supply, such as customers addicted to tobacco products, including possibly cigarettes. Following a March 2011 in-person visit, Fink noted that business was so strong that Shipping Services was "[s]till reluctant to go after new [business] (CRAZY), way over the top." (PX 235, row 3276.)

During the period from July 28, 2011, to November 30, 2011, customers made three inquiries to UPS relating to lost or damaged shipments of cigarettes from Shipping Services. (DX 500, lines 15, 17, 20.) Customers also made inquiries regarding lost or damaged packages of non-cigarette products (including non-tobacco products). (DX 500; see also DX 499, Package Details Tab for Account 03E04E.)

In January 2012, Shipping Services was referred to as one of Fink's "must keep accounts." (PX 137; PX 138.) As of March 5, 2012, it was second in revenue for Fink only to Elliott Enterprises. (PX 568.) In 2012, Shipping Services's volume began to decline. (DX 511, row 181.) UPS noted that this decline related to regulatory issues. (Id.) For instance, a UPS document noted, "Still considering [a] move out of NY due to state issues." (Id.) And that there were "changing rules for Native Americans." (Id. row 179.) Additionally, at trial, Fink lacked credibility when he testified that he believed Shipping Services only shipped little cigars. He provided no credible basis for this belief.

On January 2, 2014, UPS conducted an audit of five packages sent by Shipping Services. Three of the five contained little cigars and two contained cigarettes; put otherwise, 40% contained cigarettes. UPS terminated Shipping Services's account on January 13, 2014. (See PX 360; PX 373; PX 363; PX 374.) At the time it was terminated, Shipping Services still accounted for $80,000 in annual net revenue with UPS. (PX 363; DX 250.)

Shortly after the Shipping Services account was closed, on January 21, 2014, Fink opened an account for Morningstar Crafts & Gifts. (Fink Decl., DX 602 ¶ 138.) He did not indicate that this was a "new" opportunity. (PX 226.) It operated out of a storefront located at 13113 Route 438, Gowanda, New York—the same address as Shipping Services. (PX 226; Fink Decl., DX 602 ¶ 138.) This was not only a red flag, but indicative of knowledge by Fink that this entity was Shipping Services, redux. A sign located in front of the store featured "Discount Cigarettes" among its wares. (PX 574.) However, the store also sold Native American crafts, gifts, and little cigars. (Fink Decl., DX 602 ¶ 139; Logan Dep. Tr. 85:5.) Morningstar Crafts & Gifts executed a Tobacco Agreement on January 27, 2014. (DX 262; DX 310; Fink Decl., DX 602 ¶ 139.) By October 2014, Morningstar Crafts & Gifts had been suspended by UPS. (See PX 226.)

In sum, the Court concludes that (1) from the inception of each account there was a reasonable basis to believe that Seneca Ojibwas, Shipping Services, and Morningstar Crafts & Gifts may have been tendering cigarettes; (2) Shipping Services and Morningstar Crafts & Gifts were in fact shipping cigarettes throughout the entirety of their relationship with

UPS; and (3) UPS knew Shipping Services was shipping cigarettes not later than November 1, 2010, and it knew that Morningstar Crafts & Gifts was shipping cigarettes from the date on which its account was opened.[75]

The Court further finds that 40% is a reasonable approximation of the percentage of packages shipped by this group with UPS that contained cigarettes.[76]

5. Indian Smokes

Indian Smokes opened an account with UPS on May 14, 2001. The company was located at 21 Race Street, Salamanca, New York. As of October 27, 2005, UPS considered Indian Smokes to be a suspected cigarette shipper. (See PX 299; see also Trial Tr. 304:13-22 (Cook) (Indian Smokes identified as smoke shop in December 20, 2005 UPS report); DX 35.) On November 23, 2005, UPS canceled its account. (See PX 318, row 169.) Thereafter, the company did not ship with UPS for several years. Following a sales lead from a UPS driver, Louis Potter, UPS began discussing an account with them in March 2011. (See DX 510.)

---

[75] These three findings are based on the totality of the evidence. The Court views November 1, 2010, as the date not later than which UPS knew of its cigarette shipments because the increase in volume closely followed on the effective date of the PACT Act. At the very least, continuing to make pickups without auditing is evidence of standing down on the account and of willful blindness.

[76] This percentage is based on the Court's consideration of data points indicating that 25% of customer inquiries related to cigarettes, that the audit revealed that 40% of shipments were for cigarettes, and that it operated out of a storefront that sold other items, along with the totality of the evidence.

On April 27, 2011, Indian Smokes opened a new account. (PX 216.) There was no credible evidence that UPS had any basis to believe this entity had changed its business model between 2005 and 2011, and it certainly had not changed its name. At the very least, its prior business as a smoke shop (and suspected cigarette shipper) should have raised a red flag. Indian Smokes was immediately a significant account for the area, generating over $55,000 in annualized revenue in the first year. (Id.) Fink oversaw the account. He knew from the outset—and continuously until May 2012, when Indian Smokes was terminated—that it shipped tobacco products. (See PX 301, line 4; PX 306, line 11.)

A month after the account was opened, on May 6, 2011, it appeared on the NCL. (See PX 514; PX 518; PX 524 (referencing date first "entered on NCL"); see also DX 510.) However, evidence also supports that Indian Smokes shipped some non-cigarette products. For instance, tracers regarding lost or damages packages in January and April 2012 were for cigars only. (DX 500.)

On January 11, 2013, the UPS Center processing Indian Smokes packages determined that they were shipping cigarettes and refused to process their packages. (See PX 172.) On the same day, Fink asked Brian Weber of UPS, "shouldn't smoke shops get removed from my plan?" (Id.) The Court views this statement as acknowledgement by Fink and others within UPS that smoke shops were generally known to be likely cigarette shippers at risk of account termination. Here, however, in lieu of termination or other action, UPS responded by only requiring Indian Smokes to sign a Tobacco Agreement; it executed one

on February 1, 2013, and service was restored. (DX 510, rows 6, 9.)

Despite the restoration of service, the volume of shipments from Indian Smokes declined. On February 26, 2013, Fink asked McDowell, UPS's "bid contract manager" for this account, whether Indian Smokes was still using UPS to ship. (PX 162; PX 274, row 689.) McDowell told Fink that Indian Smokes was "concerned that we [UPS] are going to open all of their packages." (Id.) In fact, there is no evidence that UPS tested Indian Smokes's commitment to its Tobacco Policy. UPS's McDowell must have understood Indian Smokes's concern with audits as some evidence that it was shipping contraband. Fink asked whether the account should be closed, and McDowell responded, "Not if it were up to me. At least, not yet anyway." (Id.) However, by April 18, 2013, McDowell noted that Indian Smokes would not be using the account any longer. (DX 510, row 5.)

In May 2013, UPS canceled the account. (Id., row 3; PX 150.) On July 5, 2013, McDowell noted the "customer diverted due to a cigarette issue." (DX 510, row 2.)

In sum, the evidence supports that (1) not later than the time the account was opened on April 27, 2011, there was a reasonable basis to believe Indian Smokes may have been tendering cigarettes for delivery; (2) it was in fact shipping cigarettes throughout the entire period from account inception to termination (this is based on the fact that only a month elapsed between the account opening and its appearance on the NCL); and (3) not later than May 6, 2011

(when it appeared on the NCL), UPS knew that it was shipping cigarettes.

The Court further finds that 50% represents a reasonable approximation of the percentages of packages by Indian Smokes shipped with UPS that contained cigarettes.[77]

6. Smokes & Spirits[78]

Smokes & Spirits opened an account with UPS in late August 2010, shortly after implementation of the PACT Act. (See PX 70.) It was located at a commercial address at 270 Rochester Street in Salamanca, New York, on the Seneca Allegany reservation; UPS also associated this entity with the address 6665 Route 417, Kill Buck, New York. (See id.; Cook Decl., DX 600 ¶ 97.) Fink was Smokes & Spirits's Account Executive; Fink testified that he knew Salamanca had a number of tobacco shippers. (Trial Tr. 589:23-590:15 (Fink); Fink Decl., DX 602 ¶¶ 31, 32; PX 326.) Smokes & Spirits immediately began shipping in volume—with 1,300 packages to residential addresses in the first month of its relationship with UPS. (PX 433.)

---

[77] The finding of 50% is based on the fact that Indian Smokes was listed on the NCL as a cigarette shipper, and the Court therefore credits that they were shipping cigarettes; this is also confirmed by the driver report on January 11, 2013. However, DX 500 and other evidence supports that Indian Smokes might have had a broader product line. In the absence of precise evidence, the Court uses 50% as a conservative view of an even split between cigarette and non-cigarette products.

[78] Smokes & Spirits is part of the "Smokes & Spirits Group" designated by plaintiffs as including this entity along with Native Outlet, A.J.'s Cigars, Sweet Seneca Smokes, and RJESS.

These facts alone should have raised red flags. On October 11, 2010, it executed a Tobacco Agreement. (DX 55.)

On November 10, 2010, Fink received a copy of the Tobacco Watchdog Group letter, which indicated that Smokes & Spirits, located at 270 Rochester Street, Salamanca, New York, was making "illegal contraband cigarette shipments to residential consumers." (DX 62.) This was another, major red flag.

According to Fink, there were a number of reasons he did not view Smokes & Spirits as a cigarette shipper. First, Bob Oldro, the principal of Smokes & Spirits, informed Fink that Oldro was moving to New York from another state to take advantage of the growth in New York's little cigar market by opening up a new business to ship little cigars. (Fink Decl., DX 602 ¶ 37; Trial Tr. 626:23-627:4 (Fink).) Fink's notes following an in-person visit with the Smokes & Spirits on March 4, 2011, indicated that the customer had expressed a concern regarding proposed changes to the New York tax law regarding little cigars. (DX 526, line 3257; DX 47; DX 553.) Fink further testified that over the life of the account, Oldro or his colleagues continued to assure Fink that the business was only shipping cigars or other tobacco products, not cigarettes. (Fink Decl., DX 602 ¶¶ 32, 36; DX 55.) The Court did not believe Fink's testimony—at the very least, if those statements were made by Oldro and others, the Court does not believe Fink believed them. In all events, given the numerous red flags, it was unreasonable for Fink to have relied on these self-serving statements.

The red flags accumulated further. In the fall of 2010, UPS received its first inquiries regarding lost or

damaged packages containing cigarettes shipped by Smokes & Spirits. The first tracer regarding packages containing cigarettes occurred on October 29, 2010. (DX 500, row 8; see also PX 470, row 2865.) A second tracer concerning a cigarette shipment occurred on December 27, 2010; a third on December 27, 2011; a fourth on September 14, 2012; and a fifth on September 17, 2013. (DX 500, rows 13, 38, 55, 84.) Nineteen other tracers related to packaging containing filtered cigars and other tobacco products. (DX 500, Package Details Tab for Account W9476E.)

Smokes & Spirits, with an address listed as 6665 Route 417, Kill Buck, New York, appeared on the NCL as of February 15, 2012. "Smokes_Spirits.com LCC," at that same address, appeared on the NCL as of July 16, 2012. (See PX 514; PX 518; PX 524.)[79] On July 29, 2013, the subpoena UPS received from City Finance specifically identified the address "6665 Route 417, Kill Buck, NY." (PX 248.) Kill Buck also is less than two miles from Salamanca, New York. Still, UPS did not audit the company.

In June 2012, the First Deputy Sheriff of City Finance made several controlled buys of packages containing cigarettes from Smokes & Spirits. (Kokeas Aff. ¶ 9; PX 40; PX 43; PX 44; PX 45.) In addition, on July 29, 2013, City Finance issued a subpoena to UPS that sought delivery records of a number of shippers,

[79] As the Court has found, UPS knew that UPS knew Smokes & Spirits was operating out of multiple locations, including 6665 Route 417, Kill Buck, New York. Among other evidence, UPS's records for Smokes & Spirits shipments in 2011 listed this address. (See PX 70.) This is relevant for UPS's PACT Act liability, as discussed by the Court in its conclusions of law.

including Smokes & Spirits. (Kokeas Aff. ¶ 6; PX 428.)

In the fall of 2013, UPS's Cook received a copy of the NCL; he noticed that Smokes & Spirits was listed. Notably, he did not immediately require an audit. On December 20, 2013, the City sent an email to UPS that, inter alia, identified Smokes & Spirits as a cigarette shipper. On January 2, 2014, Cook finally ordered an audit; for reasons that were unclear, this audit was still not conducted for another three weeks. On January 21, 2014, UPS audited a total of fifteen packages; nine of these packages—i.e., 60%—contained cigarettes. (Cook Decl., DX 600 ¶ 97; DX 257; Fink Decl., DX 602 ¶ 39.) UPS terminated service to Smokes & Spirits on January 22, 2014. (Cook Decl., DX 600 Attachment A; Fink Decl., DX 602 ¶ 40; DX 260; DX 256.)

Bergal Mitchell, who had been a consultant for Smokes & Spirits, testified at trial. The Court found him generally credible. He testified that Smokes & Spirits shipped cigarettes since before he and his brother purchased the business in August 2004. (Trial Tr. 1190:23-1191:-16 (Mitchell).) He also testified that they shipped candy, flowers, and other tobacco products in addition to cigarettes. (Id. 1191:6-16 (Mitchell).) From 2010 onward, Mitchell testified, 99% of all of Smokes & Spirits's orders were placed online. (Id. 1196:1-6 (Mitchell).)

Plaintiffs introduced a number of invoices from Smokes & Spirits to its customers. While those invoices reflect cigarette shipments, those invoices also demonstrate that a significant volume of Smokes &

Spirits's sales consisted of little cigars and other tobacco products. (See, e.g., PX 54; PX 55; PX 191; DX 500.) These same invoices further show that sales of little cigars were particularly prevalent when the account was first opened. (Id.)

In sum, the Court finds that (1) not later than October 11, 2010, the date on which UPS had it sign a Tobacco Agreement and when a number of red flags were already evident, there was a reasonable basis to believe Smokes & Spirits may have been tendering cigarettes; (2) from at least October 29, 2010 (the date of the first cigarette tracer), Smokes & Spirits was in fact shipping cigarettes; and (3) UPS knew it was shipping cigarettes not later than October 29, 2010, the date of the first cigarette tracer.

The Court further finds that 60% is a reasonable approximation of the percentage of Smokes & Spirits shipments via UPS that contained cigarettes.[80]

[80] The Court's finding of 60% is based on the totality of the evidence, considering in particular the fact that Smokes & Spirits operated from a commercial address and sold an array of goods, and the Court's weighing of invoices and tracer evidence. Further, the audit likely reflected the approximate portion of this entity's business involving cigarettes.

7. Arrowhawk/Seneca Cigars/Hillview Cigars/Two Pine Enterprises[81]

Plaintiffs refer to the Arrowhawk Smoke Shop, Seneca Cigars/Cigarettes, Hillview Cigars, and Two Pine Enterprises as the "Arrowhawk" group. The evidence supports that they functioned as a single entity and were alter egos of one another. Philip Christ, a former consultant for the Arrowhawk Group, testified as much.[82] UPS treated the accounts as related. The UPS processing system showed all of the accounts were related; UPS Account Executive Richard DelBello acknowledged the connection between

---

[81] In certain submissions, an entity referred to as "Native Gifts" is included in this group. The evidence is insufficient to determine if plaintiffs intended to include them in this group or not. For instance, apart from including them in their damage analysis as one group, plaintiffs' final proposed findings of fact keep them separate. The Court finds there is insufficient evidence with respect to Native Gifts to find liability or even discuss them as a Relevant Shipper.

[82] Philip Christ, a witness cooperating with the plaintiffs, worked for the Arrowhawk Group of companies throughout the relevant time period. He testified credibly (and there was no significant contrary evidence offered by UPS) that the group of companies that plaintiffs have designated as the "Arrowhawk" group did in fact operate as a single entity. The Court found portions of Christ's testimony not credible. His demeanor conveyed a lack of full mental acuity. His answers were often halting, as if he was either searching for the correct answer or confused. (Indeed, the Court raised with counsel whether he was on any medications that could account for his presentation). Nevertheless, upon careful reflection and after assuring itself other corroborating evidence exists for many points covered in his testimony, the Court finds that there are a number of facts as to which he testified credibly, as set forth below.

Hillview and Two Pine Cigars. (PX 340.) These entities had the same address: 852 Bloomingdale Road, Basom, New York. (See PX 232; PX 95; PX 340; DX 234; PX 154; PX 344; Trial Declaration of Richard DelBello ("DelBello Decl."), DX 604 ¶¶ 19-21, 31, 45.) That same address had previously been used by an entity named "Hootysapperticker.com." Hootysapperticker had been a UPS shipper and, at the time UPS entered into the AOD, UPS believed it might be a cigarette shipper.[83] (DX 35 at 109.) Despite this evidence of these entities being one and the same, the Court has considered the facts as to liability separately for each. Its findings below reflect this individualized consideration.

The first account for this group was opened under the name Seneca Cigars on January 9, 2012. It was located at 852 Bloomingdale Road, Basom, New York—along with each of the other Arrowhawk Group shippers (except for Native Gifts). Accounts for the other entities in the group were opened thereafter.

UPS had a daily pickup at 852 Bloomingdale Road. DelBello, the UPS Account Executive for Arrowhawk Smoke Shop, Seneca Cigarettes/Cigars, Hillview Cigars, and Two Pine Enterprises, knew there were three accounts located at this address.[84] (DelBello Decl., DX 604 ¶¶ 18, 20.) Given the signage at the address, it was impossible for him (or any other

---

[83] In addition, Hootysapperticker had been identified by UPS's outside counsel as a suspected cigarette shipper. (See PX 292.) The Court credits Christ's testimony that it was in fact a cigarette shipper. (Trial Tr. 915:8-12, 921:18-21, 947:22-948:3 (Christ).)

[84] Ryan Keith of UPS was listed as part of the UPS team along with Richard DelBello. (PX 95.)

driver picking up from that account) not to know that there was a significant cigarette seller located at that address. Christ was the primary contact for these accounts. DelBello testified that he knew Christ had "a lot" of businesses that shipped cigarettes. (Trial Tr. 901:14-18 (DelBello).) Christ had expressed to one UPS account representative that he was interested in shipping cigarettes. (Id. 843:15-17, 844:8-11, 848:24-849:11, 851:1-6 (DelBello).)

UPS knew that "Seneca Cigars and Hillview Cigars" used the URL "www.senecacigarettes.com." (PX 95; Trial Tr. 737:22-738:5 (Keith).) The UPS "Account Strategy Planning Tool" for this account noted that the customer intended to ship tobacco products to residential customers and that one of its business challenges was "complete compliance with all applicable state and federal mandates." (PX 95.)

Almost immediately after the account was opened, in February 2012, UPS received its first indication that Seneca Cigars was actively seeking to ship cigarettes. On March 9, 2012, DelBello and Christ met in person. (Trial Tr. 839:1523 (DelBello); DX 128.) According to DelBello, Christ and two other people involved with the company assured him that Seneca Cigars would be shipping cigars. (Trial Tr. 837:23-838:14 (DelBello).) Christ claims, to the contrary, that during the two years in which Christ worked for Seneca Cigars/Arrowhawk, he specifically informed UPS that they would be shipping cigarettes when the account was opened and in later conversations. (Id. 946:25-952:3 (Christ).) Christ also testified that 99% of its walk-in sales and 99.5% of its mail-order sales were of cigarettes. (Id. 914:4-915:2 (Christ).) Follow-

ing the effective date of the PACT Act, volumes increased many fold. (See PXs 67, 70, 80, 220, 221, 222, 227, 413, 420, 422, 433, 435, 436.) UPS notes from July 2012 indicated that "100% of outbound shipments [for the accounts] go via UPS." (PX 95.) UPS representatives also understood that the Arrowhawk group were high-volume shippers. (See, e.g., PX 491.)

At various times, Christ attempted to mislead UPS as to what these entities were in fact shipping. For instance, he told Keith that they were shipping cigars. (Trial Declaration of Ryan Keith ("Keith Decl."), DX 603 ¶ 26.) The Court does not find UPS believed him; instead, UPS viewed Keith as understanding these statements to provide UPS with "plausible deniability" of violations when Keith in fact believed otherwise.

Keith also had several telephone conversations with Christ, beginning in January 2013, about Seneca Cigars and Hillview Cigars. According to Keith, during these conversations, Christ discussed his interest in complying with regulations and laws. (Trial Tr. 765:21-766:3 (Keith).) In October 2013, Keith's contemporaneous notes in his UPS TEAMS report states that Christ had told him that "everything he ships is considered a cigar," that his only question was a product called Swisher Sweets, and that he would check with his lawyer on the legality to ship that product. (Trial Tr. 789:13-790:4 (Keith); DX 511, line 289 at UPS00000189.) Shining through Keith's testimony are his continued skepticism and his concern that these entities were in fact shipping cigarettes.

Vincent Guarino was the assigned UPS driver for these accounts. He made daily pickups for these entities; he must have seen the signage on the front of 852 Bloomingdale Road. Guarino testified that when he picked up packages from the Seneca Cigars and Arrowhawk/Hillview Cigars/Two Pine location, he could not always see inside the warehouse. (Trial Tr. 1345:14-22 (Guarino).) However, on one occasion, Guarino observed Christ taping up a box that appeared to have cartons inside. (Id. 1348:1-3 (Guarino).) Guarino asked Christ what he was shipping; Christ told him that he was shipping little cigars. (Id. 1348:4-6, 1348:24-1349:16 (Guarino).) Guarino checked with his supervisor to make sure that little cigars were permitted to be shipped, and he was told that little cigars were permitted. (Id. 1351:15-25 (Guarino).) Neither Guarino nor his supervisor should have accepted this self-serving statement from an obvious tobacco shop. They should have requested an audit.

While negotiating the pricing for Seneca Cigars and Hillview Cigars in June 2013, Christ informed Keith that the owners of the companies were planning to purchase a new company, which had been shipping with a competing carrier but would move its business to UPS. (Keith Decl., DX 603 ¶ 31; DX 511, line 266 at UPS00000187.) This was Two Pine Enterprises. It opened an account with UPS on July 9, 2013. Both DelBello and Keith testified that customers told them that Two Pine, as an affiliate of the other shippers, was also not shipping cigarettes, but only cigars or other tobacco products. (DelBello Decl., DX 604 ¶ 42;

Keith Decl., DX 603 ¶¶ 54, 56.) Given the accumulated red flags, UPS should not have accepted this self-serving statement without an audit.

In June 2012, Sheriff Kokeas made controlled buys of packages containing cigarettes from Seneca Cigars. (Kokeas Aff. ¶ 9; PX 40.) She did this because she had received an email from them advertising untaxed cigarettes shipped via UPS. (PX 592.) On July 29, 2013, City Finance served a subpoena on UPS seeking delivery records for a number of shippers, including Seneca Cigars. (Kokeas Aff. ¶ 6; PX 248.) Guarino was also the assigned driver for Two Pine Enterprises. While Two Pines Enterprises shared the same account address with Seneca/Hillview, it shipped from a different location. (See Trial Declaration of Vincent Guarino ("Guarino Decl."), DX 607 ¶ 14.) In March 2014, UPS learned that Two Pine Enterprises was dropping packages at a location that was not its regular pickup location. When DelBello asked Dolores Uebelhoer, the owner of Two Pine Enterprises, why this was occurring, she responded that it was due to the time of UPS's daily pick-up for the account. (DX 529.) DelBello noted that he did not believe Uebelhoer's explanation. However, he testified at trial that he had no suspicion that Two Pine Enterprises might be shipping cigarettes; instead, he believed that Uebelhoer may have been dropping the packages at the UPS Store as a matter of convenience.[85] (Trial Tr. 882:18-883:18 (DelBello); DX 529.)

[85] Two emails from DelBello refer to Christ and Uebelhoer as "liars." Both of these emails are dated after the April 17, 2014 audit of Two Pine Enterprises; DX 335 is dated June 26, 2014, and PX 336 is dated April 23, 2014. DelBello testified that after

DelBello informed Uebelhoer that she had to resume pick-up service for her account. (DelBello Decl., DX 604 ¶ 37.) The Court finds that DelBello strongly suspected the truth—that Two Pines was shipping cigarettes—but he turned a blind eye. Given the accumulated red flags, UPS acted affirmatively by not requiring an audit and "standing down" on this account.

Finally, on April 15, 2014, the game was up: A clerk in a UPS Center in Philadelphia reported that a package from Two Pine Enterprises had broken open on a conveyor belt, revealing cigarettes. Corporate Dangerous Goods requested an audit of Two Pine Enterprises, which took place two days later, on April 17, 2014. The audit revealed cigarettes, and UPS terminated the account. (Cook Decl., DX 600 ¶¶ 116-17; DelBello Decl., DX 604 ¶¶ 38-40; Guarino Decl., DX 607 ¶ 21; DX 299; DX 528.)

Despite the fact that some of the Arrowhawk entities had names suggesting a focus on tobacco products (e.g., Seneca Cigars, Hillview Cigars, Arrowhawk Smoke Shop (or Cigars)), UPS did not have a Tobacco Agreement with any of these entities until September 2013. (See DX 210.) UPS had Twin Pines sign an agreement only after plaintiffs sent UPS a draft complaint on October 21, 2013. (DX 234.) When Seneca Cigars and Hillview Cigars sent UPS a Tobacco Agreement, it was from "seneca cigarette" with the email address "senecacigarette@gmail.com." (Id.)

---

the audit revealed cigarettes, he realized that Christ and Uebelhoer had lied to him about shipping cigars, but he maintained that prior to the audit he had no reason to believe that they were lying about shipping cigars. (Trial Tr. 860:25-861:11, 887:20-889:10 (DelBello).)

In sum, the Court finds that (1) from the date the first account was opened at 852 Bloomingdale Road, January 9, 2012, and for each day and with regard to each of these entities thereafter, there was a reasonable basis to believe each of Arrowhawk, Seneca Cigars/Cigarettes, Hillview Cigars, and Two Pine Enterprises may have been tendering cigarettes; (2) the companies were in fact shipping cigarettes from that date or the date of the specific account opening onwards; and (3) UPS knew that Arrowhawk Smoke Shop, Seneca Cigars/Cigarettes, and Hillview Cigars were shipping cigarettes not later than March 9, 2012, when DelBello met with Christ and was told they would be shipping cigarettes. Given the accumulated circumstantial evidence, UPS knew that Two Pine Enterprises was shipping cigarettes from the inception of its account on July 9, 2013.

Finally, the Court finds 90% to be a reasonable approximation of how much of each of the separate entities' shipments contained cigarettes.[86]

8. Mohawk Spring Water

Robert Oliver opened an account with UPS on November 1, 2010, at 263 Frogtown Road, Hogansburg, New York, on the St. Regis Mohawk Reservation. (PX 281, row 72; PX 329.) This was shortly after the passage of the PACT Act. In the first month the account

[86] The Court's finding of 90% is based on the totality of the evidence and on its weighing of Christ's testimony that these entities shipped almost exclusively cigarettes with the fact that, based on the testimony regarding other tobacco products, they sold other products, as well.

was opened, UPS picked up 569 packages. (PX 281, sheet 2, row 2.)

Oliver testified credibly at trial that when the account was opened, he personally told Carmine Della Serra, the UPS sales support representative, "you know, some of these boxes will contain cigarettes." (Trial Tr. 1131:2-9 (Oliver).) In response, Della Serra threw up his hands and said, "I don't want to hear that," and proceeded to open the account. (Id. 1131:2-9 (Oliver).) The Court credits Oliver's testimony in that regard. Oliver testified at trial that Mohawk Spring Water manufactured cigarettes on the Akwesasne Reservation between June 2010 and mid-October 2011. (PX 49; Oliver Trial Tr. 1128:9-11.) Mohawk Spring Water did not manufacture little cigars.

Oliver testified that UPS driver Donald Jarvis made pickups from this account. (Trial Tr. 1134:21-1135:1 (Oliver).) On one occasion, when Jarvis was picking up packages from Mohawk Spring Water, Oliver saw boxes of cigarettes inside UPS's vehicle, including "Chiefs," and "222s." (Id. 1141:22-1142:22 (Oliver).)

During the period in which its account with UPS was active, Mohawk Spring Water made "scores" of shipments of cigarettes in lots of 10,000. (PX 49 ¶ 6(b).) In total, this entity shipped at least 2,556 cases of cigarettes, totaling 76,680 cartons (each case consisting of 30 cartons). (PX 49 ¶ 6(c) and (d).) Oliver also testified that the cigarettes were unstamped. (Trial Tr. 1132:5-1134:20 (Oliver).)

At his deposition, Jarvis testified that he knew that Mohawk Spring Water had been shipping cheap cigarettes to Long Island (most of which were being

shipped to another Indian reservation there). (Jarvis Dep. Tr. 54:18-55:12, 56:711.). On multiple occasions, packages that Mohawk was shipping broke open at the UPS Potsdam Center and Jarvis saw that they contained cigarettes. (Id. 70:3-20.)

In the fall of 2010, another UPS driver, Candace Sheridan, also concluded that Mohawk Spring Water was shipping cigarettes. (Sheridan Dep. Tr. 66:2168:3.) This caused Sheridan to inform her supervisor, Terry Foster, that she no longer wanted to make pickups from Mohawk Spring Water. (Id. 39:5-40:1.) Sheridan also informed her union representative about the pickups at Mohawk Spring Water and said she would not pick up untaxed cigarettes. (Id. 42:2-44:1.) The union representative reported back that UPS employees at the highest levels of the Potsdam Center (Roger Bousquet) instructed that drivers were to continue making pickups. (Id. 43:19-44:1.) As a result, Sheridan continued to make pickups. (Id. 46:1-47:3, 49:12-24, 68:14-25.) Sheridan testified, "[t]he more I covered the routes, you know, the more suspicious I became, the more questions I started to ask." (Id. 67:18-19.) And, "[t]he more I covered the area, the more I didn't want to." (Id. 58:8-9; see also id. 39:5-40:1.)[87]

As discussed in detail in other sections of this Opinion, on April 26, 2011, UPS's Potsdam facility supervisor, Steve Talbot, indicated to a UPS Account Executive that there was a potential issue with pickups of cigarettes. (DX 74.) Shortly thereafter, Talbot

[87] The Court finds Sheridan's testimony supports the obvious red flags other drivers would have seen with regard to other accounts, as well.

called UPS security employee James Terranova. (DX 389.) As discussed above, Terranova told Talbot that his State Police contact in Syracuse told UPS to keep picking up cigarettes. (DX 389.) Talbot relayed this information to his drivers but otherwise did not make a record of the calls(s). (DX 389; Trial Tr. 1268:16-20 (Talbot).) On June 22, 2011, the DTF Chief Investigator, John Connolly, visited the Potsdam Center to discuss the possibility of shipments from the Mohawk Reservation. (DX 389.) Connolly made arrangements for a seizure of cigarette shipments. (Id.) On June 28, 2011, UPS closed the account. (PX 330.)

In sum, the Court finds that (1) there was a reasonable basis to believe Mohawk Spring Water may have been tendering cigarettes the day the account was opened on November 1, 2010;[88] (2) Mohawk Spring Water was in fact shipping cigarettes from the inception of the account on November 1, 2010, until the account was closed on June 28, 2011 (based on the same facts); and (3) UPS knew that Mohawk Spring Water was shipping cigarettes throughout the entire period (based on the same facts).

The Court further finds that 90% is a reasonable approximation of the percentage of packages that contained cigarettes.[89]

---

[88] This date is based on the red flags along with the Court's crediting Oliver's testimony that he informed UPS of package contents.

[89] The Court's finding of 90% is based on the testimony discussed above, but also takes into consideration that, based on this testimony, this entity shipped other products as well.

9. Jacobs Tobacco Group

Rosalie Jacobs was the owner of Jacobs Manufacturing/Tobacco. She testified live at trial and the Court found her to be a highly credible witness. She testified that her entire business consisted of the shipment of unstamped cigarettes to other Indian reservations.[90] Jacobs further testified that the majority of her shipments were by the case and that cases included fifty cartons, which amount to 10,000 cigarettes. (Trial Tr. 1680:20-22 (Jacobs).) The account was opened on July 26, 2006, and the number of packages shipped by Jacobs Manufacturing/Tobacco increased significantly in June and July 2010, the same timeframe as the June 29, 2010, effective date of the PACT Act. (PX 281; PX 410; PX 434.)

By the end of 2010, UPS had picked up more than 2,200 packages from Jacobs Tobacco. The UPS driver assigned to the account was Donald Jarvis. Jacobs testified that her warehouse contained "piles" of cigarette inventory. (Trial Tr. 1662:7-18 (Jacobs).) Jarvis confirmed that when he made pickups at Jacobs Manufacturing/Tobacco he saw pallets of cigarettes. (Jarvis Dep. Tr. 55:1-6.) In addition, another UPS driver, Candace Sheridan, testified that she also made pickups for this account and saw packages from Jacobs on the conveyor belt at the UPS Potsdam Center and that she knew the packages contained cigarettes because of the smell and because they were "picked up by cigarette factories." (See PX 410, row 6223; Sheridan Dep. Tr. 50:20-52:6.)

---

[90] Jacobs testified further that her company did not engage in sales of any type of cigar.

In addition, in February 2011, customer inquiries regarding lost or damaged packages shipped by Jacobs Tobacco indicated cigarettes, including "Canton, Nation's Best American Full, 100 Softpk/EA" and "Nation's Best Full Flavor Cigarettes." (PX 468, rows 38-40.) In June 2011, the ATF seized a number of such cases of cigarettes. (DX 89.)

In sum, the Court finds that (1) there was a reasonable basis to believe Jacobs Manufacturing/Tobacco may have been tendering cigarettes from the inception of its account until it was terminated on June 22, 2011; [91] (2) based on Jacobs's testimony, her company was in fact shipping cigarettes throughout this period; and (3) based on Jarvis's and Sheridan's testimony, UPS knew this. The Court further finds that, based on the uncontroverted evidence, 100% of all Jacobs Manufacturing/Tobacco shipments were cigarettes from the UPS Potsdam Center. (DX 389.) [92]

10. Action Race Parts

UPS opened an account for Action Race Parts on May 11, 2009. (PX 281.) It was located at 1552 State Road 37, Hogansburg, New York. UPS began regular pickups for this account in February 2011. (PX 75.)

Between February and June 2011, Action Race Parts shipped 2,368 packages with UPS. (PX 281.) Most of these packages were addressed to smoke

---

[91] As discussed above, the term "Individual Consumer" as used in the AOD encompasses the unauthorized commercial entities to whom Jacobs shipped cigarettes.

[92] This finding is based on the totality of the evidence, including the fact that the evidence regarding shipments was exclusively as to shipments of cigarettes.

shops, including Rez Smoke Shop and Poospatuck Smoke Shop. (PX 75.) Three UPS drivers primary shared responsibility for the account: Donald Jarvis, Amanda Donaldson, and Gregory Labtake.[93] (PX 590.) These drivers had to have known that Action Race Parts was shipping primarily to smoke shops. These facts alone should have raised red flags.

On June 22, 2011, DTF Investigator Connolly visited the Potsdam Cacility, which processed the Action Race Parts packages. Connolly inquired about accounts located on reservations. UPS's Steve Talbot identified four accounts: Mohawk Spring Water, Jacobs Manufacturing/Tobacco, Tarbell/Mohawk Distribution, and Action Race Parts. (See DX 389.) Packages that were picked up from Action Race Parts were opened and revealed cigarettes; those packages were seized. (See DX 389.) On June 28, 2011, UPS told Action Race Parts that it would no longer accept its packages. (PX 331.)

In sum, the Court finds (1) that not later than February 1, 2011, there was a reasonable basis to believe Action Race Parts may have been tendering cigarettes;[94] (2) that it was in fact shipping cigarettes from February 2011 to the termination of its accounts (based on the same facts as well as confirmed through the audit); and (3) that UPS knew that (based on the fact that UPS drivers saw sufficient red flags that they would have had to turn a blind eye to the truth).

---

[93] Among Action Race Parts's cigarette brands was "Chicos," located in Donald Jarvis's UPS vehicle.

[94] This date is based on the volume of shipments from the location addressed to smoke shops.

The Court further finds that 100% is a reasonable approximation of the percentage of its packages that contained cigarettes.[95]

11. Native Wholesale Supply

In 2002, UPS opened an account for Native Wholesale Supply, located at 11037 Old Logan Road, Perrysburg, New York on the Seneca Cattaraugus reservation. This was a residential address. On or about April 4, 2007, UPS Operations Supervisor for UPS Supply Chain Solutions in Catoosa, Oklahoma, asked its customer Native Wholesale Supply whether it wished to authorize destruction of the company's "cigarettes in the Catoosa Warehouse." (DX 41 at UPS92311-12.) Native Wholesale Supply agreed (the destroyed inventory consisted of "156 cases of Opals [cigarettes] and 412 cases of cigars"). (Id. at UPS92358, UPS92360-61.)

Fink was Native Wholesale Supply's Account Executive. Native Wholesale Supply was Fink's fifth-highest revenue-generating account in 2011, generating $215,382 in net revenue for UPS that year. (PX 104, line 7.) On or about October 17, 2012, UPS closed the Native Wholesale Supply account numbered RA0610 due to a "bankruptcy issue." (Fink Decl., DX 602 ¶ 79.) Fink then opened another account for Native Wholesale Supply under the number A590X8. (Id. ¶ 79.)

On April 18, 2013, UPS picked up pallets that were to be delivered to HCI Distribution; HCI (located

[95] This finding is based on the totality of the evidence, including the fact that the evidence regarding shipments was exclusively as to shipments of cigarettes.

in Nebraska) was one of the largest tribal cigarette and tobacco distributors. (See PX 425, line 4; PX 182.) The payment for these shipments was made by Seneca Promotions (another relevant shipper, discussed below). (PX 425, line 4.) On October 2, 2013, Cook directed certain employees not to deal with HCI. (PX 182.) Cook further directed such account managers to "stay clear of any and all businesses associated with" HCI Distribution. (Id.) Despite this instruction, on October 31, 2014, UPS picked up another large shipment (weighing 540 pounds) for this account, again paid for by Seneca Promotions. (PX 425, row 7.)

On October 16, 2015, a UPS Regulated Goods Coordinator, Matthew Szelagowski, contacted Fink about an attempted audit for this account. (PX 467.) Szelagowski stated UPS was looking for "cigarettes going to consumers" and considered this account (along with Seneca Promotions) to be "Potential High Risk." (Id.)

Fink told Szelagowski that Native Wholesale Supply shipped advertising material. (DX 381.) When Fink's area Sales Manager, Michael Zelasko, asked Fink whether he had "advised" Szelagowski, Fink responded "of course." Zelasko in turn responded, "[n]ever a doubt!" (PX 467.) UPS did not audit Native Wholesale Supply. (See Cook Decl., DX 600 ¶ 139.)

In sum, the Court finds that (1) from April 4, 2007, there was a reasonable basis to believe Native Wholesale Supply may have been tendering cigarettes;[96] (2)

[96] The Court's finding as to this date is based on the communication from UPS to Native Wholesale Supply asking whether it wished to authorize destruction of the company's "cigarettes in

in light of the absence of information that it had altered its business model since 2007, the Court also finds that it was in fact tendering cigarettes throughout this period; (3) the Court further finds that given its prior business model, high-volume shipments, and shipments to HCI on April 18, 2013, not later than April 18, 2013, UPS knew it was shipping cigarettes.

The Court finds that 27% is a reasonable approximation of the percentage of Native Wholesale Supply's packages that contained cigarettes.[97]

12. Seneca Promotions

UPS opened an account for Seneca Promotions on May 31, 2013. (See PX 553.) The account was located at 10955 Logan Road, Perrysburg, New York, on the Seneca Cattaraugus reservation. (Fink Decl., DX 602 ¶ 80.) While Seneca Promotions has a corporate address at 464 Franklin Street, Buffalo, New York, UPS's pickups were from the residential address located in Perrysburg. (Id.) Seneca Promotions remains a UPS account.

The location for Seneca Promotions is the same as that for Native Wholesale Supply (11037 Old Logan Road and 10955 Logan Road are geographically the same). (Logan Dep. Tr. 103:16-108:3; PX 400.) The account contacts were also the same for both accounts.

---

the Catoosa Warehouse." Native Wholesale Supply acknowledged (and then destroyed) the cigarettes in the warehouse.

[97] This finding is based on the totality of the evidence, including that 156 of the 568 cases (or 27%) in Native Wholesale Supply's inventory at the Catoosa Warehouse consisted of cases of cigarettes. In addition, as the Court has noted, there is no evidence that Native Wholesale Supply altered its business model subsequent to 2007.

(Fink Decl., DX 602 ¶ 81.) Even Fink conceded that he believed there was some affiliation. (Id.)

Seneca Promotions paid for certain of Native Wholesale Supply's shipments, including the April 18, 2013 shipment of pallets to HCI, one of the largest tribal cigarette and tobacco distributors. According to Cook, Seneca Promotions was, itself, a low-volume shipper. However, between July 2013 and October 2014, it used UPS to ship over 12,800 pounds of freight to entities such as "Blue Ridge Tobacco Co.," "Tobaccoville," "Tobacco Town," "Arrowhead Tobacco," and HCI Distribution. (PX 424.) Seneca Promotions also used UPS to ship over 30,000 pounds of freight between September 2013 and February 2015 (under the name "ERW Enterprises," to companies identified as "Tobaccoville," "Seneca Direct," and "Tobacco Town"). (PX 546.) UPS in fact shipped packages from Seneca Promotion to HCI Distribution—ten months after Cook had instructed UPS personnel to "stay clear of any and all businesses associated" with "tobacco shipper" HCI Distribution. (PX 182.)

In sum, the Court finds (1) that from the inception of the account on May 21, 2013, there was a reasonable basis to believe Seneca Promotions may have been tendering cigarettes;[98] but (2) the circumstantial evidence supports that they were shipping cigarettes from May 31, 2013 (based on the same evidence) and

[98] The Court's finding as to this date is based on the totality of the evidence, including the fact that Seneca Promotions was known to have already paid for a shipment of pallets for Native Outlet to HCI, a known cigarette shipper, and that the two companies shared the same address.

thus UPS's knowledge thereof (based on the same evidence); and (3) that UPS's failure to audit them evinces an affirmative act of conscious avoidance and demonstrates knowledge.

The Court finds that 27% is a reasonable approximation of the percentage of Seneca Promotions's packages that contained cigarettes.[99]

C. Shippers as to Which There Is Only AOD Liability

As the Court previewed above, there are certain entities as to which the Court finds that there is sufficient evidence to support a finding that there was a reasonable basis to believe the account may have been tendering cigarettes— triggering an audit obligation—but insufficient evidence to indicate whether they were in fact shipping cigarettes and/or that UPS knew that.

1. Native Outlet

UPS opened an account for Native Outlet on October 18, 2010, not long after the implementation of

[99] This finding is based on the totality of the evidence, including that Seneca Promotions paid for certain of Native Wholesale Supply's shipments; operated at the same location as Native Wholesale Supply; and had the same account contacts as Native Wholesale Supply. In short, the evidence supports that Seneca Promotions had a principal/agent relationship with Native Wholesale Supply and acted in concert with Native Wholesale Supply. Based on the facts described and this relationship between the entities, the Court's finding that approximately 27% of Native Wholesale Supply's packages contained cigarettes also appropriately approximates the percentage of Seneca Promotion's packages that contained cigarettes.

the PACT Act.[100] It was located at 11157 Lakeshore Road, Irving, New York, and also used an address at 1525 Cayuga Road, Irving, New York, both on the Seneca Allegany reservation. (Fink Decl., DX 602 ¶ 129.) The 1525 Cayuga Road address was associated with Pierce Trading Company and "SenecaDirect.com," a known cigarette shipper. (See PX 174, row 659.) The contact person for the account was John Waterman. (PX 86, row 2183.) Its operations were housed in a large commercial warehouse. (DX 490; Fink Decl., DX 602 ¶ 129.)

Fink was also Native Outlet's Account Executive. In 2011, Native Outlet generated over $190,000 in net revenue and was Fink's eighth-largest account. (PX 104, row 10.) In 2012, account revenue remained strong at $148,593. (PX 102, row 14.) Native Outlet was a high-grossing, "must keep" account. (See PX 104, row 10; PX 137; PX 138, row 3; PX 168; PX 169, row 30.) The fact that this was a high-volume shipper, on an Indian reservation known to be high risk, that acquired significant business shortly after the effective date of the PACT Act, provided sufficient red flags to have triggered an audit obligation. But there was more.

Fink testified that when the account was opened, he was told that Native Outlet intended to ship cigars; the company then executed a Tobacco Agreement.

---

[100] Plaintiffs describe Native Outlet as belonging within the "Smokes & Spirits Group." However, plaintiffs have not put forth sufficient evidence to establish that that Native Outlet was an alter ego or was shipping on behalf of Smokes & Spirits.

(Fink Decl., DX 602 ¶ 131.) The agreement was returned signed by John Waterman at 1525 Cayuga Road. (See id.; DX 58; DX 371, row 3062.)

On March 21, 2013, UPS received a communication from the ATF requesting that it investigate possible bulk shipments of cigarettes from "John Waterman." (PX 530.) Waterman was the listed customer contact for Native Outlets. (PX 86, row 2183.)

On July 29, 2013, UPS received a subpoena from City Finance regarding potential cigarette shippers. That subpoena requested information associated with "Seneca Direct" or the address 1525 Cayuga Road, Irving, New York. UPS did not audit Native Outlet until July 2013. Thereafter, it conducted five audits: On or about July 10, 2013; January 2, 2014; October 6, 2015; January 14, 2016; and April 27, 2016. Each time it found only little cigars. (Cook Decl., DX 600 ¶¶ 86-91; DX 194; DX 244; DX 421; DX 363; DX 375.)

In sum, the Court finds that from the inception of the account on October 18, 2010, there was a reasonable basis to believe Native Outlet may have been tendering cigarettes. This date is based on the Court's assessment of the red flags discussed above; inter alia, that the combination of high-volume business from the same address as a known cigarette shipper, business acquisition so closely correlated with the PACT Act, and association with John Waterman. The Court further finds the audit obligation continued to July 9,

2013—the day before the first of several audits. However, there is insufficient evidence that it was in fact shipping cigarettes.[101]

2. A.J.'s Cigars

A.J.'s Cigars opened an account with UPS in September of 2010—shortly following implementation of the PACT Act.[102] It was a relatively high-grossing account assigned to Fink, with more than $100,000 in gross revenue per year. From the outset, Fink knew that A.J.'s would be shipping tobacco products. He testified that he had them execute a Tobacco Agreement in September 2010, but could not locate the original when later asked to do so (he testified that he thought he left it in the trunk of his car). (Fink Decl., DX 602 ¶¶ 87-89; DX 230.) The Court does not credit this testimony and finds it more likely that he did not have A.J.'s execute a Tobacco Agreement until the audit described below.

But in addition, as with other shippers, there were a number of tracer inquiries made with regard to shipments originating with A.J.'s. In A.J.'s case, there were a total of nine between August 2010 and August 2013. Each of those inquiries concerned little or full-

[101] While there is circumstantial evidence of the possibility that Native Outlet was shipping cigarettes (that Waterman was suspected of making bulk shipments, the subpoena for documents relating to this address), there is an insufficient basis to find actual shipments of cigarettes or UPS's knowledge thereof.

[102] Plaintiffs also describe A.J.'s Cigars as belonging within the "Smokes & Spirits Group." However, plaintiffs have not put forth sufficient evidence to establish that that A.J.'s Cigars was an alter ego or was shipping on behalf of Smokes & Spirits.

sized cigars. (DX 499, rows 106, 114, 115, 138, 145, 197, 199, 209, 221.)

On June 4, 2013, A.J.'s informed UPS that it would like to ship cigarettes, and the UPS representative responded that he would check to see if that was allowed and get back to them. The result of this inquiry is unknown.

UPS audited A.J.'s on October 2, 2013. The packages it opened contained filtered cigars and other tobacco products. (Cook Decl., DX 600 ¶ 80; DX 219.) No cigarettes were found in the audited packages. Thereafter, on October 24, 2013, Fink had A.J.'s execute a Tobacco Agreement. (Fink Decl., DX 602 ¶¶ 92-93; DX 230; DX 357; DX 371, line 3030.)

In early February 2014, UPS learned from a news report that an entity known as AJ's Candy had plead guilty to cigarette trafficking. (Cook Decl., DX 600 ¶ 81; DX 270.) UPS terminated A.J.'s Cigars on February 10, 2014. (Cook Decl., DX 600 ¶ 81; DX 272; PX 160.)

In sum, the Court finds that not later than June 4, 2013, there was a reasonable basis to believe A.J.'s Cigars may have been tendering cigarettes.[103] However, there is insufficient evidence in the record to

---

[103] The audit obligation continued to October 1, 2013 (A.J.'s Cigars was audited on October 2, 2013). Before this date, tracers indicated only non-cigarette goods being shipped. But, once A.J.'s Cigars notified UPS that it would like to ship cigarettes (on June 4, 2013), that fact combined with its status as a known tobacco shipper should have triggered an audit. This finding is therefore based on the totality of the evidence, including the fact that A.J.'s informed UPS that it would like to ship cigarettes.

support a finding that A.J.'s was shipping cigarettes through UPS. The request by the customer "to ship" cigarettes falls short of proving that they "did" make such shipments.

3. RJESS[104]

RJESS first opened an account with UPS before 2005, under the name Ross John Enterprises - Iroquois Tobacco Direct ("RJE-ITD"). (Fink Decl., DX 602 ¶ 107; DX 371, line 1344.) Its most notable fact is that it shared an address with Smokes & Spirits.[105]

In 2005, RJE-ITD signed a Tobacco Agreement. (DX 371, row 1344.) In November 2005, as part of what UPS has characterized as a "broader plan" requiring all smoke shops in the area to open new accounts with Tobacco Agreements, the RJE-ITD account was canceled. (Fink Decl., DX 602 ¶¶ 106-07; Trial Tr. 200:6-14 (Cook); id. 499:22-500:3 (Fink).)

On April 7, 2005, Ross John, the owner of RJE-ITD and a college professor, opened a new account under the name Ross John Enterprises Smoke Shop ("RJESS"). (Fink Decl., DX 602 ¶¶ 106, 108.) Both RJE-ITD and RJESS were located in a warehouse behind a gas station at 6665 Route 417, Kill Buck, New

---

[104] In their final proposed findings of fact, plaintiffs did not attempt to support their prior assertions of UPS's liability for RJESS (though they did include them within their damage request). (ECF No. 491.)

[105] Again, plaintiffs describe RJESS as belonging within the "Smokes & Spirits Group." While plaintiffs did demonstrate that RJESS and Smokes & Spirits shared an address for some purposes, considering all the facts and circumstances, plaintiffs have not put forth sufficient evidence to establish that that RJESS was an alter ego or was shipping on behalf of Smokes & Spirits.

York. (Fink Decl., DX 602 ¶ 106; DX 490 at 4; DX 371, lines 1344, 3619.) Fink was assigned account responsibility for RJESS. (DX 313; DX 520, lines 167-71; DX 542; see Trial Tr. 640:16-21. (Fink).)

RJESS's address (which was also the address for Smokes & Spirits) was included on the NCL in association with Smokes & Spirits as of February 15, 2012. (PX 450; Cook Decl., DX 600 ¶ 111.) This red flag should have triggered an audit. In addition, the RJESS address—6665 Route 417, Kill Buck, New York—was included in the subpoena issued by City Finance on July 29, 2013. (PX 248.)

On January 28 and 30, 2014, UPS subsequently conducted two audits of RJESS, which revealed only little cigars. (Cook Decl., DX 600 ¶ 111; Trial Declaration of Debra Blauvelt ("Blauvelt Decl."), DX 609 ¶ 17(b); DX 264; DX 265.) Additional spot audits of RJESS packages never revealed cigarettes. (Id. ¶ 12.)

RJESS and Smokes & Spirits had separate accounts and separate owners. Plaintiffs did not introduce evidence that Ross John had involvement in Smokes & Spirits. (DX 371, lines 3619, 1285; Fink Decl., DX 602 ¶¶ 38, 109; Trial Tr. 1190:20-1191:3 (Mitchell).) And RJESS was an active account of its own the entire time Smokes & Spirits was in operation. Lastly, both RJE-ITD and RJESS were located at 6665 Route 417, Kill Buck, New York, while Smokes & Spirits shipped from 270 Rochester Street, Salamanca, New York 14779. (Fink Decl., DX 602 ¶¶ 31, 106; DX 490; DX 371, lines 1344, 3619.) In other words, nothing in UPS's records provides any basis to connect the two accounts.

In sum, the Court finds that as of February 15, 2012, when RJESS's address was listed in the NCL, there was a reasonable basis to believe it may have been tendering cigarettes; this lasted until the day prior to the first audit on January 28, 2014. However, there is insufficient evidence that RJESS was in fact shipping cigarettes.

D. Shipper as to Which There Is No Liability

1. Sweet Seneca Smokes

Sweet Seneca Smokes opened its UPS account on February 14, 2014, and it remains an active account.[106] (Fink Decl., DX 602 ¶ 122.) It is located at 14411 Route 439, Gowanda, New York on the Seneca Cattaraugus reservation. Fink was and is the Account Executive. He has always known that they shipped tobacco products. (Id. ¶¶ 122, 123.) Indeed, that much is evident from the name alone.

UPS has approached the account with skepticism from the beginning, and it has taken affirmative steps to investigate whether it was a terminated shipper trying to obscure its identity (in this instance, A.J.'s Cigars) or was otherwise shipping cigarettes. In light of various red flags, this was entirely appropriate. In this regard, immediately after the account was first opened, Timothy McDowell, a UPS sales representative, sent an email to Fink questioning whether this account was merely "A.J.'s" trying to "get back in." He then communicated with Jim Phillips of Sweet Seneca

[106] Plaintiffs place Sweet Seneca Smokes within what they identify as the "Smokes & Spirits Group." However, plaintiffs have not put forth sufficient evidence to establish that that Sweet Seneca Smokes was an alter ego or was shipping on behalf of Smokes & Spirits.

Smokes. During that conversation, Phillips informed McDowell that the company intended to ship only little cigars through UPS. UPS informed Phillips of its Tobacco Policy. (Trial Tr. 667:1-17 (McDowell); Fink Decl., DX 602 ¶ 123; DX 371, line 3650.) McDowell's investigation did not stop there, however.

To ensure that Sweet Seneca Smokes was not shipping on behalf of the Shipping Services or A.J.'s Cigars terminated accounts, McDowell contacted Fink. (DX 274; DX 276; Fink Decl., DX 602 ¶ 124.) None of the three shippers shipped from the same address, had the same contacts, or shared any other overlapping information. (DX 371, rows 3024, 3030, 3650.) McDowell considered whether one of the company's contact names, "Bob Oldrow/Oldsdrow," could be the same person as an individual by the name of "Oldro," Fink's contact, at Smokes & Spirits. (DX 276; Fink Decl., DX 602 ¶ 32; cf. DX 371, row 1285.) McDowell ultimately found no evidence connecting Sweet Seneca Smokes to either shipper. McDowell then investigated the Sweet Seneca Smokes website and product line, and he requested photos of their cigars to satisfy himself that they marketed the products they claimed. (DX 274.)

Plaintiffs have pointed to evidence that 62% of Sweet Seneca Smokes customers were those of Smokes & Spirits but not to evidence that this percentage concerned buyers of cigarettes versus other tobacco products. Comparing the customer names and purchases on PX 54, a shipment inventory from Smokes & Spirits, to the customer names in PX 557, a Sweet Seneca Smokes delivery spreadsheet, supports a finding that Sweet Seneca Smokes shipped a significant amount of non-cigarette tobacco products,

in general, and to former Smokes & Spirits customers, specifically.

An audit of Sweet Seneca Smokes's packages over a three-day period revealed cigars, chew, or other tobacco products, but no cigarettes. Another audit was performed on April 27, 2016, by Cook. Cook personally audited all of the packages shipped out of the Dunkirk Center, including seventy-one packages shipped by Sweet Seneca Smokes. (Trial Tr. 359:23-360:16 (Cook); Cook Decl., DX 600 ¶¶ 90, 135-36; DX 327; DX 422; DX 550; DX 551; Trial Declaration of Jennifer Puleo ("Puleo Decl."), DX 608 ¶ 23(c).) None contained cigarettes. (Cook Decl., DX 600 ¶¶ 136-37.)

UPS audited Sweet Seneca Smokes a third time on July 10, 2016, when the "Designated Responders" for hazardous materials segregated and inspected the contents of these Sweet Seneca Smokes packages because an unknown substance—later identified as chocolate syrup—had leaked onto each package in the load. (Cook Decl., DX 600 ¶ 137; DX 429.) Consistent with prior audits, the packages contained filtered cigars, loose tobacco, and chewing tobacco. (Id.)

In sum, based upon UPS's proactive efforts with regard to this account and the lack of evidence of cigarette shipments, the Court declines to find that there was a reasonable basis to believe Sweet Seneca Smokes may have been tendering cigarettes at any point in time prior to the first audit, or that it was shipping cigarettes.

X. CONCLUSIONS OF LAW

Plaintiffs allege violations of the PACT Act, 15 U.S.C. §§ 375-78; the AOD, PHL § 1399-ll;[107] and the CCTA, 18 U.S.C. §§ 2341-46. Set forth below are the Court's conclusions of law. Analysis and interpretation of the AOD is the logical starting point. As previewed above and discussed in detail below, if the AOD was "honored" throughout the United States, UPS is statutorily exempt from the PACT Act and PHL §1399-ll; if it was not, UPS is exposed to liability under the AOD, the PACT Act, and PHL § 1399-ll, along with the CCTA. The Court therefore resolves the question of AOD liability at the outset.

The Court next turns to the common issue of what it means to act "knowingly." Certain violations of the AOD and the PACT Act, and all violations of PHL § 1399-ll and the CCTA, require that UPS have shipped cigarettes knowingly. The Court addresses the legal standard for a finding of actual knowledge, including conscious avoidance, or willful blindness, as well as the legal and factual requirements regarding imputation of an employee's knowledge to a large corporate entity such as UPS. As part of this discussion, the Court discusses presumptions that common carriers of regulated goods have knowledge of various regulatory requirements. The Court then turns to each of the alleged violations, along with specific arguments and defenses that UPS has asserted.

---

[107] Plaintiffs' alleged violations of N.Y. Exec. Law § 63(12) are co-extensive with their PHL § 1399-ll claims.

A. The AOD

The AOD, executed in October 2005, was a negotiated resolution to an investigation commenced by the State of New York into whether UPS was violating PHL § 1399-ll [108] and N.Y. Exec. Law § 63(12).[109]

Plaintiffs claim that UPS repeatedly violated a number of separate provisions of the AOD. However, they seek penalties with regard to only one type of violation: the audit requirement set forth in ¶ 24. Plaintiffs define such audit violations as commencing as of the date there was a reasonable basis to believe that a shipper may have been tendering packages containing cigarettes, and continuing with regard to each and every package tendered thereafter. While plaintiffs do not seek damages for other violations of the AOD, they nonetheless seek to prove that UPS knowingly shipped cigarettes. Proof of knowing shipments provides for the presumption of a PHL § 1399-ll violation; such presumption is found in AOD ¶ 43: A violation involving the knowing shipment of cigarettes "to an Individual Consumer within the State of New York" constitutes "prima facie proof of a violation of PHL § 1399-ll(2)[.]" (AOD, DX 23 ¶ 43.) For its part, UPS asserts that it has complied with its AOD obligations and that the AOD is honored throughout the United States. Thus, according to UPS, no penalties may properly be assessed under the AOD, and UPS is exempt from both the PACT Act and PHL § 1399-ll.

---

[108] PHL § 1399-ll is titled "Unlawful Shipment or Transport of Cigarettes."

[109] N.Y. Exec. Law § 63(12) is the means by which the New York Attorney General commences an enforcement action for violation of cigarette transport such as PHL § 1399-ll.

The Court disagrees with UPS. The Court therefore proceeds to resolve the parties' positions with regard to whether calculating penalties in the manner plaintiffs suggest would result in an excessive award.

1. Background Described in the AOD

The AOD was the product of extensive negotiations. This is evident throughout the text of the agreement. In particular, multiple pages describing the parties' respective positions precede the particular obligations UPS agreed to assume. (See AOD ¶¶ 1-15.) These preliminary statements do not themselves create binding commitments, but they do provide useful background for understanding the intent of the parties.

In this regard, the AOD commences with a description of the parties' respective views on UPS's conduct prior to its effective date of October 21, 2005. The State asserted that, based upon its investigation, it believed that UPS "ha[d] delivered many packages containing cigarettes to persons who were not authorized to receive them pursuant to PHL § 1399-ll in violation of PHL § 1300-ll(2) and thereby engaged in repeated illegal acts and business activities in violation of EL § 63(12)[.]" (AOD, DX 23 ¶ 8.) UPS responded that even before the Attorney General had initiated an investigation into its business practices in 2004, UPS had "adopted revised policies governing the transportation of tobacco products, and that UPS policies, among other things, are meant to insure that UPS does not knowingly deliver cigarettes to unauthorized recipients in violation of various state laws, including PHL § 1399-ll(2)." (Id. ¶ 9.)

In the AOD, UPS also described various actions it had taken following the April 10, 2013 effective date of PHL § 1399-ll, including changing to its Tariff and Terms and Conditions to add a provision that "Shippers are prohibited from shipping, and no service shall be rendered in the transportation of, any tobacco products that shippers are not authorized to ship under applicable state law or that are addressed to recipients not authorized to receive such shipments under applicable law." (Id. ¶ 10.) UPS further asserted that since the implementation of the PHL § 1399-ll, it had provided formal training to its employees, and that it had written to approximately 400 UPS shippers to notify them of PHL § 1399-ll and advising them that UPS would no longer accept packages containing cigarettes for delivery to unauthorized recipients in New York. (Id. ¶¶ 11, 12.) UPS also referred to its decision to adopt a formal Cigarette Policy, which stated:

1. UPS does not provide service for shipments of cigarettes to consumers.

2. UPS only accepts shipments of cigarettes for delivery to recipients who are licensed or otherwise authorized by applicable federal, state, provincial or local law or regulation to receive deliveries of cigarettes.

(Id. ¶ 15.)

The following "WHEREAS" clause recites that "UPS offers this Assurance of Discontinuance" in settlement of alleged past violations, and "intending that this [AOD] will promote further and ongoing cooperation between UPS and the Attorney General concerning UPS's compliance with PHL § 1399-ll[.]" (Id.) The AOD"s final WHEREAS clauses states that New

York's Attorney General "accepts the following assurances from UPS pursuant to Executive Law § 63(12)" in lieu of commencing a civil actions for past violation. (AOD, DX 23.)

2. The Terms of the AOD

Paragraph 17 of the AOD contains a broad commitment by UPS to "comply with PHL § 1399-ll(2), and adhere to the UPS Cigarette Policy[.]" (AOD, DX 23 ¶ 17.) In ¶ 20, UPS agreed to "revise, to the extent that it has not yet done so already, and maintain its delivery policies and procedures for Cigarettes in accordance with this [AOD]." (Id. ¶ 20.)

In ¶ 21, UPS agreed to identify and compile a list of its customers that UPS believes may be "Cigarette Retailers." (Id. ¶ 21.) The list was to be compiled from a number of sources, including UPS's search of its own customer database for words such as "cigarette," "smoke," and "tobacco," as well as "UPS's knowledge of known Cigarette Retailers." (Id.) When the list was completed, UPS was required to provide it to the New York Attorney General. (Id.) The AOD also required UPS to use an internet search engine on a periodic basis to investigate shippers who use the "Cigarette Websites"[110] to determine whether they ship via UPS (and to conduct audits if so). (Id. ¶ 22.) However, if internet searches during any consecutive twelve-

[110] Defined as an internet website through or at which a person sells Cigarettes. (AOD, DX 23 ¶ 16(D).)

month period do not uncover shippers who had tendered cigarettes to UPS for delivery, this obligation ceases. (Id.)[111]

Paragraphs 24 to 33 of the AOD relate to audits and remedial action for shippers found to have shipped cigarettes. The audit provision states:

> 24. UPS shall audit shippers where there is a reasonable basis to believe that such shipper may be tendering Cigarettes for delivery to Individual Consumers, in order to determine whether the shippers are in fact doing so.

(Id. ¶ 24.)[112] It is worth pausing on the standard for identifying shippers that should be audited: As set forth in this provision, the standard is objective. There must be a "reasonable basis to believe" that the shipper may be tendering cigarettes.

UPS has a separate obligation under the AOD to maintain a database that includes information regarding Cigarette Retailers. (Id. ¶ 25.) This is referred to as the "Tobacco Shipper Database." (Id.) Such database must include various identifying infor-

---

[111] This obligation in fact expired according to these terms in July 2010.

[112] The AOD defines "Individual Consumer" as any person or entity other than an "Authorized Recipient," which in turn is defined as "tobacco manufacturers; licensed wholesalers, tax agents, retailers, and export warehouses; government employees acting in accordance with their official duties; or any other person or entity to whom cigarettes may be lawfully transported pursuant to federal law and the law of the state in which delivery is made, including those persons described in PHL § 1399-ll(1) with respect to the State of New York." (AOD, DX 23 ¶ 16(G), (A).)

mation along with a shipper's record of non-compliance with the UPS Cigarette Policy, down to the level of tracking number for individual packages. (Id. ¶ 25 A, B.) The database must also include the results of any audits and a record of any discipline imposed by UPS. (Id. ¶ 25 C, D.)

The AOD requires that UPS undertake "progressive" discipline for shippers its [sic] determines to have tendered a package of cigarettes for delivery. (Id. ¶¶ 26-33.) That is, the discipline is organized into escalating steps. UPS's obligation to impose discipline commences when it discovers that a shipper has tendered "a shipment of Cigarettes to Individual Consumers." (Id. ¶ 26.) A single shipment therefore triggers the progressive discipline measures set forth in ¶¶ 26 to 33.

The first step requires that UPS create and maintain a record of the offending shipper and packages or shipments. (Id.) This information would be available to the New York Attorney General in response to a subpoena at a later date. (Id.) Paragraph 27 provides for suspension of service to that shipper altogether:

> 27. If UPS has a reasonable basis to believe that a shipper has willfully or intentionally violated UPS's Cigarette Policy, UPS shall immediately and permanently suspend all Delivery Services for such shipper. For other violations of UPS's Cigarette Policy, which UPS has a reasonable basis to believe are not willful or intentional, UPS shall apply the discipline procedures established in Paragraphs 28 through 33 of this [AOD].

(AOD, DX 23 ¶ 27.) If triggered, the progressive discipline scheme requires UPS to notify the shipper of

the violation within five days after discovery; two days later UPS must suspend delivery for ten days unless a reasonable and verifiable written action plan for compliance is provided to UPS by the shipper. (Id. ¶ 28.) If a second violation occurs within 180 days of the first, UPS must again immediately provide notice to the shipper, but this time UPS must deliver a warning of a possible suspension of service for up to three years for a third non-compliant shipment. (Id. ¶ 29.) A third violation within 180 days of the contact for the second violation requires notice, as well as an in-person meeting with management-level personnel; two days following such notice, UPS is required to suspend delivery for three years (there are provisions to restore service after six months for non-cigarette products). (Id. ¶ 30.)

Paragraph 31 of the AOD contains an explicit acknowledgement that shippers of cigarettes are known to try to persist in unlawful shipping by using the same location under a different account name or having another person or entity ship from a different address on the suspended shipper's behalf. This provision states in full:

> 31. The violations found to have occurred pursuant to this [AOD], as well as the periods of suspension that are imposed, shall be applied both to the shipper committing the violation, and to any other shipper, whether an existing UPS customer or a new UPS customer, that UPS has a reasonable basis to believe is shipping or seeking to ship Cigarettes (a) from the same location as the suspended shipper, (b) on behalf of a suspended shipper, or (c) with the same account number as the suspended shipper.

(Id. ¶ 31.)

Paragraph 32 recognizes that if a violation is inadvertent or immaterial, and made by a shipper of products that are not predominantly cigarettes, UPS can reasonably deviate from the procedures "for the limited purpose of affirmatively assisting such shippers to implement safeguards intended to eliminate future inadvertent and immaterial shipments of Cigarettes to Individual Consumers." (Id. ¶ 32.) In order to avail itself of this provision, it is of course the case that UPS must know (or have processes to verify) certain facts about the contents of the shippers' packages; otherwise, it would be impossible to establish that 90% of packages (for the previous year) contained goods other than cigarettes. (Id.) UPS has not attempted to argue that any of its actions are based on this paragraph (indeed, it must take this position to be consistent with its primary position that it lacks the means to determine the contents of a customer's packages).

The AOD also requires UPS to provide ongoing training to its personnel to ensure compliance with its Cigarette Policy. (Id. ¶ 34.) On at least an annual basis, UPS is required to issue a PCM to UPS drivers, pre-loaders, and other personnel involved in compliance measures to "help ensure that these personnel are actively looking for indications that a package contains Cigarettes being shipped to an Individual Consumer, alerting UPS management of such packages and attempting to intercept such packages." (Id. ¶ 35.)

The AOD also requires UPS to periodically train Account Executives handling tobacco accounts on its

Cigarette Policy, PHL § 1399-ll, and the compliance measures agreed to in the AOD. (Id. ¶ 37.)

Additional provisions in the AOD outline the further actions UPS must take in response to notice it may receive from the New York Attorney General or any other governmental authority of evidence that a UPS customer is tendering cigarettes. (Id. ¶ 39.) There is no obligation imposed on the New York Attorney General or any other entity to provide such notice.

The AOD also contains two paragraphs that set forth terms relating to enforcement of UPS's obligations and to the imposition of penalties imposed for violations thereof. (Id. ¶¶ 42-43.) In light of the importance of these provisions to assessment of damages in this case, the Court sets them out in full:

> 42. UPS shall pay to the State of New York a stipulated penalty of $1,000 for each and every violation of this [AOD] occurring after the Effective Date; provided, however, that no penalty shall be imposed if (a) the violation involves the shipment of Cigarettes to an Individual Consumer outside the State of New York, or (b) the violation involves the shipment of Cigarettes to an Individual Consumer within the State of New York, but UPS establishes to the reasonable satisfaction of the Attorney General that UPS did not know and had no reason to know that the shipment was a Prohibited Shipment.[113]

---

[113] "Prohibited Shipment" is defined as "any package containing Cigarettes tendered to UPS where the shipment, delivery or

(Id. ¶ 42.) The AOD further provides:

> 43. Pursuant to EL § 63(15), evidence of a violation of this [AOD] that involves the shipment of Cigarettes to an Individual Consumer within the State of New York shall also constitute prima facie proof of a violation of PHL § 1399-ll(2) in any civil action or proceeding that the Attorney General hereafter commences against UPS for violation of PHL § 1399-ll(2).

(Id. ¶ 43.) Paragraph 51 explicitly provides that the "rights and remedies in this [AOD] are cumulative and in addition to any other statutory or other right that the New York Attorney General may have at law or equity, including but not limited to any rights and remedies under PHL § 1399-ll." (Id. ¶ 51.)

Finally, the AOD's sole termination provision is contained in ¶ 47. It provides that a legislative repeal or amendment of PHL § 1399-ll to allow common carriers to deliver cigarettes to consumers, or a judicial determination of that statute's invalidity, would trigger a right to terminate by UPS upon thirty days written notice. (Id. ¶ 47.)[114]

---

packaging of such Cigarettes would violate Public Health Law § 1399-ll." (AOD, DX 23 ¶ 16(H).)

[114] The presence of this termination provision satisfies the rule against perpetuities. See Nicholas Labs. Ltd. v. Almay, Inc., 723 F. Supp. 1015, 1018 (S.D.N.Y. 1989) ("A perpetual contract runs without end or without provision for its termination. An indefinite contract runs without a fixed end but contains provisions under which the contract might terminate at any time. . . . Thus where termination has been provided for in the contract, even if continuous performance is a possibility, courts should not refuse

B. Interpretation of the AOD

The AOD is a settlement agreement between UPS and the State of New York. As such, its interpretation is governed by general principles of contract law.[115] See United States v. Sforza, 326 F.3d 107, 116 (2d Cir. 2003) (stating that settlement are agreements construed in accordance with principles of contract law) (citing Janus Films, Inc. v. Miller, 801 F.2d 578, 583 (2d Cir. 1986)). To be sure, the AOD is a special type of contract—one entered into with the Attorney General for the State of New York, who is presumed to act in the public interest. However, similar to a consent decree entered into by the Department of Justice or other government agency, once an AOD has been executed by the parties, it is a species of contract governed by principles of contract construction. See People v. Condor Pontiac, Cadillac, Buick & GMC Trucks, Inc., No. 02-1020, 2003 WL 21649689, at *5 (N.Y. Sup. Ct. July 2, 2003) (An AOD "is a stipulation of settlement, which binds the parties [and] will not be set aside or departed from absent a showing of such good cause as would invalidate a contract."); EEOC v. Fed. Express Corp., 268 F. Supp. 2d 192, 206 (E.D.N.Y. 2003) ("It is well settled that consent decrees are construed primarily as contracts and derive their legal force largely from the parties' voluntary agreement.").

Several principles of contract interpretation are particularly relevant here. First, it is black-letter law

---

to enforce such contracts or read into them different conditions of termination.").

[115] Paragraph 44 acknowledges the AOD's contractual status: "This [AOD] represents a voluntary agreement, and is a settlement of the parties' claims and defenses . . . ." (AOD, DX 23 ¶ 44.)

that "[w]hen an agreement is unambiguous on its face, it must be enforced according to the plain meaning of its terms." Lockheed Martin Corp. v. Retail Holdings, N.V., 639 F.3d 63, 69 (2d Cir. 2011) (citing South Rd. Assocs., LLC v. IBM, 826 N.E.2d 806, 809 (N.Y. 2005)). In addition, "well-established principles of contract interpretation . . . require that all provisions of a contract be read together as a harmonious whole[.]" Schlaifer Nance & Co. v. Estate of Warhol, 119 F.3d 91, 100 (2d Cir. 1997). Finally, a basic tenet of contract law provides that "[c]ourts may not 'by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing[.]'" Riverside S. Planning Corp. v. CRP/Extell Riverside, L.P., 920 N.E.2d 359, 363 (N.Y. 2009) (quoting Reiss v. Fin. Performance Corp., 764 N.E.2d 958, 961 (N.Y. 2001)).

The Court finds the relevant provisions of the AOD to be unambiguous and therefore applies the well-known principles of contract construction without resort to parol evidence.

C. Violations of the AOD

An initial interpretive question concerns the definition of a "violation" under ¶ 42 of the AOD which, if met, triggers the imposition of penalties. A second question concerns whether AOD penalties are calculated on a per-violation basis; if so, a third question is whether, textually or under principles of conscionability, there are limits to the number of violations for which such penalties may or should be assessed.

The Court turns first to the proper interpretation of the term "violation." As used in ¶ 42, the term expressly equates a "violation" to a failure by UPS to fulfill its obligations under the AOD. These obligations are many and varied, as set forth in detail above. On its face, ¶ 42 does not limit "violations" for which penalties may be imposed solely to any one type of obligation—that is, a failure to audit a shipper or a failure to comply with PHL § 1399-ll (in "violation" of ¶ 17) by knowingly transporting cigarettes to consumers.

Read in its entirety, the AOD is an attempt to establish a comprehensive and interdependent set of obligations that collectively reduce the likelihood that UPS accepts packages containing cigarettes or transports such packages. A failure to abide by any one obligation—for instance, employee training—places at risk other aspects of the overall compliance scheme. A failure to audit prevents implementation of the discipline procedures designed to place shippers on notice of possible suspension, and to give UPS and the shipper the opportunity to work together to avoid such a result. In other words, failure to audit prevents that mutual compliance effort, and failure to discipline diminishes the chances that a shipper will alter its conduct. In sum, there is no reason for this Court to separate one type of contractual obligation that UPS assumed in the AOD from another when determining what constitutes a "violation" under ¶ 42. Any failure to comply with a contractual obligation constitutes a separate violation of the AOD.

One argument that this Court has considered is whether the term "violation" is used in ¶ 42 to mean only UPS's knowing shipment of cigarettes. It is certainly the case that ¶ 42 refers to exclusions from the

penalty provision in terms of a "shipment." It might therefore be reasonable to conclude that the entire provision must be read in terms of shipments of cigarettes. However, after considering this argument carefully, the Court is not persuaded. This argument fails to take into account the interdependent obligations UPS assumed in the AOD. The overall intent of the parties was to use the penalty provision as a method to ensure compliance with all of the AOD obligations, which are of course ultimately directed at preventing shipments of cigarettes. This ultimate goal, however, does not limit the particular obligations. To read the term "violation" as limited to a shipment of cigarettes (and one that UPS would then presumably have to have known about) would mean that UPS could fail to comply with any of the host of other obligations without consequence. This, frankly, makes no sense and is an unreasonable reading.

The facts set forth earlier in this Opinion establish a number of separate violations by UPS of its obligations under the AOD:

1. On numerous occasions, UPS failed to comply with PHL § 1399-ll(2), in violation of ¶ 17;

2. On numerous occasions, UPS failed to audit a shipper where there was a reasonable basis to believe that such shipper may have been tendering cigarettes for delivery to Individual Consumers, in violation of ¶ 24;

3. On numerous occasions, UPS failed to input required information into the Tobacco Database, in violation of ¶ 25;

4. On numerous occasions, UPS failed to implement the discipline of shippers, in violation of ¶¶ 26-33;

5. UPS provided inadequate compliance training and PCMs; such training failed to help "ensure that [] personnel are actively looking for indications that a package contains Cigarettes being shipped to an Individual Consumer, alerting UPS management of such packages and attempting to intercept such packages," in violation of ¶ 35; and

6. On numerous occasions, UPS knowingly transported shipments containing cigarettes to Individual Consumers, in violation of ¶ 42.

The Court turns, now, to the second and third questions concerning the interpretation of the AOD. The factual findings already made by this Court support numerous violations of the AOD. Did the parties really intend that each and every such violation would carry a separate $1,000 penalty? If so, are there conscionability or constitutional limits to the aggregate amount of such penalties?

It is clear that at the time the parties entered into the AOD, they were wiping the slate clean: Although UPS did not agree that it had previously violated PHL § 1399-ll, it nevertheless assumed clear obligations under the AOD to resolve those concerns, and the State of New York agreed to settle any claims for past violations that it might have. It is possible that, as so often occurs at the outset of an agreement, the parties hoped the penalty provision would never become an issue. If such a hope existed, it was long ago extinguished.

Of course, all parties were aware that the stakes were high: The State of New York was specifically attempting to ensure compliance with a public health law that recognized the enormous destructive power of cigarette use, and the particular issues surrounding traffic in unstamped cigarettes.

Insofar as trafficking related to Indian reservations, historical difficulties and restrictions with regard to enforcing state and federal cigarette laws on shippers directly rendered the AOD with a non-tribal courier all the more important. UPS was—in 2005 as today—a large, highly sophisticated corporation. It already had many thousands of employees in the United States and vast pickup and delivery operations using local service centers. Both UPS and the State knew then that many smoke shops on Indian reservations in New York had shipped and would likely try to ship cigarettes. It is more than reasonable for this Court to assume that the well-counseled UPS understood the obligations it assumed in the AOD and the risks inherent in breaching those obligations.

It is therefore important that these sophisticated counterparties did not negotiate a top end of penalties that could be imposed, or other limitations on penalties, apart from the "$1,000 for each and every violation." For instance, the parties could have limited monetary penalties to only shipments of cigarettes by agreeing that violations of certain AOD obligations would be treated differently from violations of other AOD obligations. But they did not. The Court also finds the language "each and every" violation, as used in ¶ 42, applies not only to the potential number of violations (e.g., an instruction to count them all) but also to the type of violations. That is, the AOD clearly

provides that UPS shall pay penalties for each and every violation, of whatever type. Conscionability issues are discussed further below.

D. Violations of the Audit Obligation Under the AOD

Plaintiffs seek penalties only for violations of the AOD's audit obligation. In other words, plaintiffs seek penalties only for violations of ¶ 24 and not ¶¶ 17, 25, 26-33, 35, or 42.

With that in mind, the Court must determine the date(s) on which the audit obligation was first violated, and how to count violations. Plaintiffs assert that a reasonable interpretation of the AOD supports determining damages by establishing the date when UPS first failed to audit a shipper in compliance with its obligations, and then assessing each and every package tendered to UPS thereafter as a separate violation of that audit obligation. In other words, according to plaintiffs, once UPS was obligated to audit a shipper, every package that was not audited thereafter constituted a separate violation.

UPS, on the other hand, argues that the audit provision should be interpreted at the "shipper" level versus at the "shipment" level. UPS focuses on the obligation in ¶ 24 to audit "shippers." According to UPS, if there is a reasonable belief that a shipper may be tendering cigarettes for delivery, and UPS fails to audit that shipper, such failure results in a single violation. Thus, no matter how long that violation continues and no matter how many packages are tendered to UPS by a shipper, the total number of violations per shipper would be "one."

This is an unreasonable interpretation. The trigger for ¶ 24 is a reasonable basis to believe the shipper may be tendering cigarettes. Audits are conducted with regard to packages. Under UPS's interpretation, if it allowed such tendering to go on day in and day out, without an audit, the penalty UPS would incur would be the same on day one as on day 300 ($1,000). This would create a perverse counter-incentive: The longer UPS failed to audit and thereby discover cigarettes (triggering discipline), the longer a shipper could use UPS's services for cigarette delivery. Under this theory, once an audit obligation attached UPS would be financially incented not to audit until at least the revenues associated with that shipper exceeded the penalty. This makes no sense in light of the other provisions and intent of the parties expressed in the AOD.

1. Proof to the Reasonable Satisfaction of the State Attorney General

UPS also argues that the penalty provision contained in ¶ 42 allows it to avoid penalties when it has demonstrated "to the reasonable satisfaction of the New York Attorney General that UPS did not know and had no reason to know that the shipment was a Prohibited Shipment." (AOD, DX 23 ¶ 42.) As discussed above, in 2011 the New York Attorney General communicated with UPS regarding penalties for unspecified violations of the AOD in connection with only three shippers—the so-called Potsdam Shippers (Action Race Parts, Mohawk Spring Water, and Jacobs Manufacturing/Tobacco). Based on the fact that these communications followed the seizure of cigarettes, it is reasonable to infer that the obligations specifically at issue were those set forth in ¶¶ 17 and 43(a)

("knowing shipments"). Plaintiffs are not seeking penalties for such violations here—they seek penalties only for violations of the audit obligation in ¶ 24.

Nevertheless, defendant points out that after some back and forth, including a proffer by UPS of its position, the State did not take any action. UPS points to this series of events as supportive of a finding that it had established "to the reasonable satisfaction" of the Attorney General that it had not violated the AOD in any regard. UPS points to the absence of any claims relating to the Potsdam Shippers in plaintiffs' original complaint as further evidence of the Attorney General's satisfaction. (See ECF No. 1.)[116]

UPS's argument fails. As stated, plaintiffs are not seeking the imposition of AOD penalties for knowing shipments. As a result, even if the Court were to find that UPS had proven to the satisfaction of the New York Attorney General that it had not knowingly transported cigarettes, such a finding does not eliminate liability for separate violations of the audit obligation.[117]

UPS also argues that these same events support its waiver or laches defenses with regard to the three Potsdam Shippers. These arguments are similarly unavailing. The basic elements of laches are well established: "(1) the plaintiff knew of the defendant's misconduct; (2) the plaintiff inexcusably delayed in

---

[116] UPS also makes a spoliation argument that was not raised before trial: that plaintiffs failed to preserve certain 2011 documents, thereby prejudicing UPS. UPS waived this argument by failing to raise it during the discovery period.

[117] The Court does, however, take these considerations into account when assessing whether UPS honored the AOD.

taking action; and (3) the defendant was prejudiced by the delay." Ikelionwu v. United States, 150 F.3d 233, 237 (2d Cir. 1998). A waiver requires an intentional relinquishment of a known right, based on full information. Capitol Records, Inc. v. Naxos of Am., Inc., 372 F.3d 471, 482 (2d Cir. 2004).

The parties debate whether either of these defenses are applicable to the governmental-entity plaintiffs. The Court need not resolve that question because, as a factual matter, UPS has failed to carry its burden to establish the requisite elements. Plaintiffs simply never had full information to support either defense.[118] As for waiver, there is certainly insufficient evidence to support intentional relinquishment of any rights.

2. Implied Covenant of Good Faith and Fair Dealing[119]

UPS counters any purported violations of the AOD with an assertion that plaintiffs may not recover for such violations if they have themselves breached the covenant of good faith and fair dealing implicit in the AOD. Specifically, UPS argues that the AOD im-

---

[118] The Court need look no further than UPS's own response to the inquiries by the New York Attorney General: UPS denied any violations of the AOD. While it is true that UPS provided the State with information at that time, there is no doubt that additional information came to light much later.

[119] In its answer, UPS also asserted "impracticability and frustration" as separate defenses. These were abandoned in its final proposed findings of fact and conclusions of law. In any event, for all of the many reasons discussed throughout this Opinion, such defenses lack adequate factual support with regard to the AOD or any other claim.

plicitly obligated the State to provide UPS with information the State had regarding particular shippers. Instead, according to UPS, plaintiffs accumulated information regarding non-compliant shippers and then sued UPS at a point when there was no longer any opportunity to remediate. This argument is without merit.

Every contract is subject to an implied covenant of good faith and fair dealing, which comprises "'any promises which a reasonable person in the position of the promisee would be justified in understanding were included'" in the contract. Nat'l Mkt. Share, Inc. v. Sterling Nat'l Bank, 392 F.3d 520, 525 (2d Cir. 2004) (quoting Dalton v. Educ. Testing Serv., 663 N.E.2d 289, 291 (N.Y. 1995)) (alteration omitted). This covenant applies both in the context of an assurance of discontinuance and where the party at issue is a governmental entity. C.f. Handschu v. Special Servs. Div., No. 71-cv-2203, 2007 WL 1711775, at *10 n.10 (S.D.N.Y. June 13, 2007) (noting that the NYPD was subject to the covenant of good faith and fair dealing where it was party to a consent decree).

This defense fails here for the simple reason that the State had (and has) neither an implicit nor an explicit obligation to provide UPS with any information.[120] The AOD does not contain a contractual

---

[120] UPS attempts to ground the State's alleged breach in a statement in the AOD that the agreement is intended to "promote further and ongoing cooperation between UPS and the Attorney General concerning UPS's compliance with [State law]." (AOD, DX 23 ¶ 15.) But this statement is contained in a "whereas clause" recital which, as a matter of law, does not create a contractual obligation. See Abraham Zion Corp. v. Lebow, 761 F.2d

provision requiring any such sharing of information, and to require the State to assume such an obligation would add a significant term to the agreement. The law is clear that a court should not, under the guise of the covenant of good faith and fair dealing, rewrite a contract. Nat'l Gear & Piston, Inc. v. Cummins Power Sys., LLC, 861 F. Supp. 2d 344, 365 (S.D.N.Y. 2012) ("'The duty of good faith and fair dealing is a tool of interpretation that cannot be used to rewrite a contract and impose new terms. Thus, courts have generally been reluctant to find a breach of the implied covenant of good faith when doing so reads so much into the contract as to create a new term or when alleged misconduct is expressly allowed by the contract.'" (quoting In re Musicland Holding Corp., 386 B.R. 428, 438-39 (Bankr. S.D.N.Y. 2008)); see also, e.g., Filner v. Shapiro, 633 F.3d 129, 141 n.1 (2d Cir. 1980) ("Under the guise of interpreting a contract, a court should not rewrite it."); Reiss, 764 N.E.2d at 961 ("[C]ourts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing." (quotation marks omitted)).

UPS next argues that even if the State's cooperation with UPS is discretionary, the implied covenant of good faith and fair dealing "includes a promise not to act arbitrarily or irrationally in exercising that discretion," TIG Ins. Co. v. Newmont Mining Corp., 413

93, 103 (2d Cir. 1985) (noting that "[a]lthough a statement in a 'whereas' clause may be useful in interpreting an ambiguous operative clause in a contract, it cannot create any right beyond those arising from the operative terms of the contract" (internal quotation marks omitted)).

F. Supp. 2d 273, 281 (S.D.N.Y. 2005) (quoting Dalton, 87 N.Y.2d at 389), aff'd, 226 F. App'x 49 (2d Cir. 2007). Thus, UPS argues, even if the State were not required to share information, good faith precludes it from withholding all cooperation, permitting damages to mount over a period of years, and then suing UPS under the contract the State decided not to implement.

This defense fails for a clear factual reason: There is insufficient evidence to support it. First, there is no evidence that the State acted arbitrarily or irrationally in exercising its discretion. But second, the proven facts demonstrate that when UPS actually was provided with certain information from other governmental authorities—namely, the NCLs from the ATF—it ignored them. For instance, Cook noticed Smokes & Spirits on the NCL in August 2013, and in December 2013 New York City warned UPS by email that Smokes & Spirits was a possible cigarette shipper. (Cook Decl., DX 600 ¶¶ 109, 110, 96.) Yet UPS did not audit Smokes & Spirits until late January 2014. (Id. ¶ 97.) The Court has no reason to believe that such information (other than in a form indicating a formal investigation had begun) would have resulted in prompt, compliant action by UPS.

E. Whether the AOD Was "Honored"

As discussed above, the PACT Act specifically exempts common carriers with AODs (or similar agreements) relating to "tobacco product deliveries to consumers" if those AODs are "honored" throughout the United States. New York v. United Parcel Serv., 179 F. Supp. 3d 282, 294 (S.D.N.Y. 2016). This includes:

> (I) . . . the [AOD] entered into by the Attorney General of New York and United Parcel Service, Inc., on or about October 21, 2005 . . . if each of those agreements is honored throughout the United States to block illegal deliveries of cigarettes . . . to consumers; and
>
> (II) any other active agreement between a common carrier and a State that operates throughout the United States to ensure that no deliveries of cigarettes . . . shall be made to consumers[.]

15 U.S.C. § 376a(e)(3)(B)(ii)(I), (II).

Thus, if UPS's AOD is "honored throughout the United States to block illegal delivery of cigarettes," it is exempt from the PACT Act. If the AOD is not so honored, the exemption is eliminated.[121] This Court has issued two rulings on the appropriate interpretation of what to be "honored" throughout the United States means. (ECF Nos. 49, 206.) In short, the Court has previously held that if UPS itself implements the AOD and honors its contractual obligations on a nationwide basis, then the AOD has been honored by UPS. (See ECF No. 49 at 15-17, New York v. United Parcel Serv., 131 F. Supp. 3d 132, 140-41 (S.D.N.Y. 2015).) As the Court previewed in its April 19, 2016 Opinion on this topic, a common carrier's entitlement to the benefits of the PACT Act's exemption would be lost if "the effectiveness of UPS's [compliance] policies [were] so compromised that the[] policies are not in fact in place." 179 F. Supp. 3d at 306. That conclusion of law is proven by evidence of "a sufficiently large

[121] Once the exemption is eliminated, as it is here, the Court must further determine "as of when."

number of instances of shipments of contraband cigarettes" as to establish that "UPS is, overall, turning a blind eye towards such unlawful shipments" or that "UPS policymakers have in fact turned a blind eye to shipments of contraband cigarettes." Id.

It is, of course, of no moment if the violations here at issue originate only in New York. Persistent or widespread violations wherever located can indicate that the AOD is not being honored by UPS.[122] Nothing in the PACT Act suggests the contrary. Indeed, it would be odd to find that an AOD was not honored in its home state (here, New York) due to flagrant and repeated violations, but that because the home-state Attorney General did not prove violations in other states, the AOD was nonetheless "honored" nationally. In all events, the mere fact of a single violation—or even several—in any state (including New York) is insufficient to demonstrate that UPS is not honoring its AOD. Thus, an audit violation regarding a single shipper would be insufficient. The Court also considers the presence of procedures to ensure compliance. As discussed above, the Court has found that until this lawsuit was filed in February 2015, UPS's procedures were inadequate.

Because UPS has violated so many different AOD obligations as to so many shippers, this Court easily finds that, up to the date this lawsuit was filed, UPS was not honoring the AOD.

In this regard, the Court observes that while plaintiffs seek penalties only with regard to the audit

---

[122] The evidence at trial, including addresses on cigarette tracers, supports UPS transporting cigarettes to individuals outside of New York.

provision in ¶ 24 of the AOD, there is ample evidence to find numerous violations of ¶¶ 17, 25, 26-33, 35, and 42 as well. In addition, these violations were in connection with accounts for a number of different shippers overseen by different Account Executives and serviced by different UPS drivers and Processing Centers. Moreover, these violations were not isolated in time but occurred over a period of years. Together, these facts support a finding of UPS's widespread and persistent failure to honor the AOD.

The Court next turns to the further question of timing: When did UPS's conduct reach the point of failure to honor the AOD? That is, when was UPS's conduct persistent enough and widespread enough? As to that question, the Court refers back to the findings of fact with regard to the Relevant Shippers. It is apparent that at least as of the fall of 2010—when the PACT Act became effective and UPS began picking up business from other carriers as a result—UPS should have "put two and two together;" when it received cigarette tracers for the Relevant Shippers in the summer and fall of 2010, the scales tipped further. By November 1, 2010, there were already a number of instances when UPS had a reasonable basis to believe shippers may have been tendering cigarettes, and it looked the other way. Thus, the Court finds that not later than December 1, 2010 (a month later), it was evident that UPS was not taking appropriate action and that UPS was no longer honoring the AOD.

The next question is what, precisely, the lack of a PACT Act exemption means. UPS's violations continued until the filing of this lawsuit.[123] The Court finds that by the time of the lawsuit's filing, UPS's determined and serious actions reached a point at which its compliance efforts to comply brought it back into a position of honoring its obligations under the AOD. Thus, as of February 18, 2015, UPS was again honoring the AOD.

In sum, the Court finds that UPS was exempt from the PACT Act until December 1, 2010. It lost its exemption for the period between December 1, 2010 and February 18, 2015, but acquired it again after that point.

UPS argues that as late as 2013 the State conceded that UPS was entitled to the PACT Act exemption. Its support for this rather surprising proposition are the discussions between the State and UPS during the late summer and fall of 2013 regarding whether UPS would voluntarily agree to prohibit service to shippers identified on the NCLs. (See Trial Tr. 269:23-270:20.) UPS draws an overbroad conclusion from these discussions. While the discussions may lead to an inference that the State did not have sufficient information at that time to suggest that the AOD was not being honored, it does not prove that the AOD was actually being honored. Until the State had access to the variety of materials it sought in discovery

[123] As stated above, UPS remains in breach with regard to Seneca Promotions. However, as mentioned, one ongoing audit obligation for one shipper is insufficient to support a finding that the AOD is not being honored. Nevertheless, the Court strongly suggests UPS conduct random audits of Seneca Promotion to resolve whether they are tendering cigarettes.

in this case and in response to subpoenas, it did not possess full information. The State did not knowingly and intentionally waive any claim to violations of the AOD.

XI. KNOWLEDGE

As previewed at the outset of this opinion, plaintiffs' claims for violations of the PACT Act, PHL § 1399-ll, CCTA, and ¶¶ 17 and 42 of the AOD require UPS's "knowing" transport of cigarettes. For instance, the PACT Act provides that, subject to certain exceptions, "no person who delivers cigarettes . . . to consumers, shall knowingly complete, cause to be completed, or complete its portion of a delivery of any package for any person whose name and address are on" a list of non-compliant shippers maintained by the U.S. Attorney General (the NCLs). 15 U.S.C. § 376a(e)(2)(A) (emphasis added).[124] PHL § 1399-ll requires that plaintiffs prove that UPS "knowingly transport[ed] cigarettes to any person in this state reasonably believed by such carrier to be" anyone other than an authorized recipient, as defined in PHL § 1399-ll(1). Paragraphs 17 and 42 of the AOD incorporate the liability standard from PHL § 1399-ll. Thus, a violation of the AOD occurs if UPS knowingly delivered cigarettes.[125] Paragraph 17 of the AOD incorporates the provisions of PHL § 1399-ll(2). And finally, to establish a CCTA violation, plaintiffs must

---

[124] The PACT Act also provides that it does not require or obligate "[a]ny common carrier . . . making a delivery subject to this subsection" to "(iii) open or inspect, pursuant to this chapter, any package being delivered to determine its contents." 15 U.S.C. § 376a(e)(9)(A).

[125] These are entirely separate breaches from the audit obligation set forth in AOD ¶ 24.

prove that UPS knowingly shipped, transported, received, possessed, sold, distributed, or purchased "contraband" cigarettes. 18 U.S.C. §§ 2342(a), 2341(2).

The Court discusses the legal principles underpinning its findings of knowledge below.

A. Knowledge

In 1969, the Supreme Court adopted the use of the word "knowledge" as set forth in the then-current draft Model Penal Code (which remains in the Model Penal Code today): "When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist." Leary v. United States, 395 U.S. 6, 46 n.93 (1969) (quoting Model Penal Code § 2.02 (Am. Law Inst., Proposed Official Draft 1962)); Model Penal Code § 2.02(7) (2015). A party acts knowingly when he/she proceeds intentionally with knowledge and "not because of ignorance, mistake, accident or carelessness." See United States v. Kelly, 147 F.3d 172, 177 (2d Cir. 1998). While there are different ways one may acquire knowledge—for instance, directly, or through willful blindness/conscious avoidance—the law does not privilege one over the other. See United States v. Ferguson, 676 F.3d 260, 278 (2d Cir. 2011). Direct knowledge is most frequently acquired by way of one's own senses, e.g., one comes to know a fact by seeing it, hearing it, touching it, otherwise sensing it. But one can "know" a fact without direct sensory input. In this regard, the law deems a person to have "knowledge" when he or she has a strong suspicion that a fact exists, but intentionally avoids confirmation. Global-Tech Appliances,

Inc. v. SEB S.A., 563 U.S. 754, 766 (2011); Viacom Int'l v. YouTube, Inc., 676 F.3d 19, 34 (2d Cir. 2012); Tiffany (NJ) v. eBay, Inc., 600 F.3d 93, 109-10 (2d Cir. 2010) ("[W]illful blindness is equivalent to actual knowledge[.]" (citation and quotation marks omitted))

Intentionally avoiding confirmation of a fact is willful blindness or conscious avoidance.[126] See Global-Tech Appliances, 563 U.S. at 766; United States v. Fofanah, 765 F.3d 141, 144 (2d Cir. 2014). These doctrines are materially similar. Fofanah, 765 F.3d at 144. A finding of either requires proof that (1) the defendant subjectively believe that there is a high probability that a fact exists, and (2) he/she must have taken deliberate action to avoid learning of that fact. Global-Tech, 563 U.S. at 766; United States v. Svoboda, 347 F.3d 471, 477-78 (2d Cir. 2003). The requirement of deliberate action gives willful blindness a scope that goes beyond recklessness or negligence. Global-Tech, 563 U.S. at 769 "Under this formulation, a willfully blind defendant is one who takes deliberate actions to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts." Id. As a result, a defendant may not escape a finding of "knowing" a fact if he/she deliberately shields him/herself from clear

[126] "Deliberate indifference" was once a third way in which courts described such avoidance. See, e.g., United States v. Reyes, 302 F.3d 48, 54 (2d Cir. 2002). However, in 2011, the Supreme Court held that the "deliberate indifference" standard fails to require sufficient active efforts to avoid knowledge (though, in that case, the underlying facts were sufficient to support a finding of willful blindness). Global-Tech, 563 U.S. at 769.

evidence of critical facts strongly suggested by the circumstances. Id.; see also Fofanah, 765 F.3d at 144; Svoboda, 347 F.3d at 477-78.

While Global-Tech requires proof of deliberate actions, the standard does not require proof of an identifiable "affirmative act[]." Fofanah, 765 F.3d at 150 (Leval, J., concurring) ("Our statements that the evidence must support a finding that the defendant "consciously" or "deliberately" avoided referred to a requisite state of mind, not to a need for affirmative acts. . . . A finding that a defendant's ignorance of incriminating facts was a conscious choice on the defendant's part in no way requires a finding that the defendant took affirmative steps to avoid gaining the knowledge. It does not depend, for example, on the defendant having said 'I don't want you to tell me how you obtained these stacks of neatly bound $100 bills, packed in bags labeled 'Brink's'"). Courts look to the totality of the circumstances. "There must be evidence capable of supporting a finding that the defendant was aware of a high probability of the [incriminating] fact in dispute and consciously avoided confirmation of that fact." Id. (quotation marks omitted). From time to time, defendants have argued that while they may have believed a fact, they did not "know" the fact to be true; binding case law has found that the difference between belief and knowledge is "a distinction without a difference." United States v. Nektalov, 461 F.3d 309, 315 (2d Cir. 2006). "The rationale for the conscious avoidance doctrine is that a defendant's affirmative efforts to 'see no evil' and 'hear no evil' do not somehow magically invest him with the ability to 'do no evil.'" United States v. Adeniji, 31 F.3d 58, 62 (2d Cir. 1994) (internal quotation marks omitted); see also

Nektalov, 461 F.3d at 315. The Second Circuit has found that the presence of "red flags" can support a finding of actual knowledge and conscious avoidance. Ferguson, 676 F.3d at 278 ("Red flags about the legitimacy of a transaction can be used to show both actual knowledge and conscious avoidance."); see also Nektalov, 461 F.3d at 312, 317. In Ferguson, the Second Circuit found that red flags—such as secret side agreements, a fake offer letter, and an insistence on strict confidentiality—supported knowledge in the context of an allegedly fraudulent reinsurance transaction. 676 F.3d at 278.

The Court has set forth its findings of fact with regard to the Relevant Shippers above. It previewed its legal conclusions by separating the shippers into three groups. The first group comprises those shippers as to whom the Court has found sufficient facts to support finding violations of the audit obligation, as well as facts supportive of actual shipments of cigarettes and UPS's knowledge of such shipments. A subgroup comprises those shippers as to whom this Court has found sufficient evidence to support the violations of the audit obligation, but not the fact of shipments and/or UPS's knowledge thereof. The second group therefore corresponds to the Liability Shippers as to whom the Court found plaintiffs have carried their burden as to AOD audit violations, but finds they have failed to carry their burden with respect to statutory violations requiring knowledge. The Court now turns to the basis for its legal conclusion that the facts support a finding of UPS's knowledge.

The knowledge at issue in this case concerns UPS's knowledge that certain shippers were tendering packages containing cigarettes, and that in the

face of such knowledge, UPS nonetheless stood down in various ways, including by not probing further, not conducting audits, and ultimately agreeing to transport such packages. As to each shipper, the Court made its ultimate finding based on a preponderance of the evidence and based upon the legal principles recited herein.

Without reviewing each shipper again, the evidence supportive of the Court's finding of knowledge included, inter alia, the past history with the shipper; knowledge of activity from its address; the tracers; the NCLs; the Tobacco Watchdog Group letter; the wares a shipper sold; signage; visible inventory in a warehouse; the use of the terms "cigar," "tobacco," or "cigarette" in a name or URL; the use of multiple accounts; business acquisition or significant increase after the passage of the PACT Act; proximity to a reservation with a prior history of cigarette shipping; and high-volume shipments from residential addresses. There are additional facts recited with regard to each shipper set forth above.

UPS's knowledge of these facts was based on what different personnel knew—individually and collectively. The question naturally arises as to whether facts known to certain UPS employees, including an Account Executive, a driver, a customer service representative, the legal department, and the security group, among others, establishes sufficient knowledge and whether that knowledge may be imputed to UPS.[127]

---

[127] In all instances in which this Court has found a sufficient basis for a violation of the audit obligation or statutory provision

B. Imputation of Knowledge[128]

It is true that certain facts upon which the Court has relied for its finding of knowledge were known only to one or a limited number of employees within UPS. The question next arises whether such knowledge may properly be imputed to UPS as a corporate entity. On the facts in the trial record, the answer is yes.

As a corporate defendant, UPS acts only through its employees and agents. Suez Equity Investors, L.P. v. Toronto-Dominion Bank, 250 F.3d 87, 101 (2d Cir.

---

at issue, there was sufficient evidence to support such conclusion based solely on the knowledge of assigned Account Executive and driver. The evidence supports an interdependent working relationship between those two categories of personnel to support a client. Nonetheless, the Court notes that the record contains additional evidence (supporting knowledge) from the customer service representatives and legal groups (who had direct knowledge of the tracers and NCLs). These individuals also played a role, though less direct, in supporting the client relationship. As the Court describes, most information was distributed among various personnel.

[128] The related doctrine of respondeat superior similarly provides that a corporation may be held liable for the torts of its employees. E.g., Holmes v. Gary Goldberg & Co., 838 N.Y.S.2d 105 (N.Y. App. Div. 2d Dep't 2007) ("Pursuant to the doctrine of respondeat superior, liability for an employee's tortious acts may be imputed to the employer when they were committed 'in furtherance of the employer's business and within the scope of employment.'" (quoting N.X., v. Cabrini Med. Ctr., 765 N.E.2d 844, 847 (N.Y. 2002)). It is certainly true that certain facts upon which the Court has relied for its finding of knowledge were known only to one or a limited number of employees within UPS. The question next arises whether such knowledge may properly be imputed to UPS. The answer in all instances is yes.

2001). Principles of agency law provide that a corporation can be held liable for the acts of employees or agents when they are acting within the scope of their authority. Reino de España v. Am. Bureau of Shipping, 691 F.3d 461, 473 (2d Cir. 2012). Knowledge that an agent acquires during the course of performing his or her job responsibilities may be imputed to an employer. Id. (For knowledge of an agent to be imputed to a principal, "the information at issue . . . [must go] to matters within the scope of the agency."); Apollo Fuel Oil v. United States, 195 F.3d 74, 76 (2d Cir. 1999) ("In general, when an agent is employed to perform certain duties for his principal and acquires knowledge material to those duties, the agent's knowledge is imputed to the principal."). Under Apollo Fuel Oil, employees' knowledge acquired within the scope of their employment is imputed to the corporation. 195 F.3d at 76 (citing Restatement (Second) of Agency §§ 9(3), 268, 272, 275 (1958)); accord Consol. Edison Co. of N.Y., Inc. v. United States, 221 F.3d at 364, 370 (2d Cir. 2000) (discussing imputation of an employee's knowledge to an employer); Steere Tank Lines, Inc. v. United States, 330 F.2d 719, 722 (5th Cir. 1964) (same); United States v. Inc. Vill. of Island Park, 888 F. Supp. 419, 437 (E.D.N.Y. 1995) ("An agent's acts are within the scope of his actual authority if it . . . is actuated, at least in part, by a purpose to serve the master." (internal quotation marks omitted)).

An act is deemed to be within the scope of employment if it is performed while an employee is engaged generally in the business of his employer, or if his act may be reasonably said to be necessary or incidental to such employment. Harisch v. Goldberg, No. 14-cv-

9503, 2016 WL 1181711 at *14 (S.D.N.Y. Mar. 25, 2016). In addition, the presumption of corporate knowledge is conclusive, even if the corporate employee never communicated the information to her superiors. N.Y. Univ. v. First Fin. Ins. Co., 322 F.3d 750, 753 n.2 (2d Cir. 2002) (citing Center v. Hampton Affiliates, 488 N.E.2d 898, 899 (N.Y. 1985)).

Thus, "a corporation may be charged with the collective knowledge of its employees[.]" First Equity Corp. of Fla. v. Standard & Poor's Corp., 690 F. Supp. 256, 260 (S.D.N.Y. 1988), aff'd, 869 F.2d 175 (2d Cir. 1989). Corporations often compartmentalize information, whether for efficiency, practicality, or both. But such compartmentalization does not shield a company from knowledge maintained by employees in such a structure.

United State [sic] v. Bank of New England is instructive. There, the court stated:

> Corporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components. The aggregate of those components constitutes the corporation's knowledge of a particular operation. It is irrelevant whether employees administering one component of an operation know the specific activities of employees administering another aspect of the operation: [A] corporation cannot plead innocence by asserting that the information obtained by several employees was not acquired by any one individual who then would have comprehended its full import.

821 F.2d 844, 856 (1st Cir. 1987) (internal quotation marks omitted); see also id. ("Since the Bank had the compartmentalized structure common to all large corporations, the court's collective knowledge instruction was not only proper but necessary.")). A corporation is considered to have acquired the collective knowledge of its employees and is held responsible for their failure to act accordingly. Id. at 856 (internal citations omitted); see also In re Worldcom, Inc. Secs. Litig., 352 F. Supp. 2d 472, 497 (S.D.N.Y. 2005) ("To carry their burden of showing that a corporate defendant acted with scienter, plaintiffs . . . need not prove that any one individual employee of a corporate defendant also acted with scienter. Proof of a corporation's collective knowledge and intent is sufficient.").

Imputation does not, however, apply to facts hidden from an employer. If an employee has failed to disclose all material facts relating to performance of his or her agency, such undisclosed facts may not be imputed to the principal, i.e., the employer. Hampton Affiliates, 488 N.E.2d at 829-30. "However, 'this [is the] most narrow of exceptions,' 'reserve[d] . . . for those cases—outright theft or looting or embezzlement—where the insider's misconduct benefits only himself or a third party; i.e., where the fraud is committed against a [principal] rather than on its behalf." Republic of Iraq v. ABB AG, 768 F.3d 145, 166 (2d Cir. 2014) (quoting Kirschner v. KPMG LLP, 937 N.E.2d 941, 952 (N.Y. 2010)). "To come within the exception, the agent must have totally abandoned his principal's interests and be acting entirely for his own or another's purposes." Id. (quoting Center, 488 N.E.2d at 830). Here, the Court has already found that the acts

of UPS employees (including Fink) vis-à-vis the Liability Shippers were within the scope of their job responsibilities.

The Court also finds imputation appropriate because the employees did not hide or otherwise fail to disclose material facts necessary to its finding of knowledge. Instead, the Court finds that information obvious to drivers and to account personnel (much of which could not be or was not hidden), along with information contained in UPS internal documents accessible to others within the organization, are sufficient to support UPS's liability. But in addition, the Court finds a corporate culture that broadly accepted non-compliance. Accordingly, while the record does not indicate affirmatively that every fact was shared widely, the evidence reasonably supports an inference that material facts were not withheld. That the record does not contain direct evidence of explicit disclosure does not erase the circumstantial evidence supporting widespread knowledge of material facts relating to each account.

C. Presumptions of Knowledge for Common Carriers

Another way in which UPS may be deemed to have knowledge is through "regulatory" imputation. As a regulated common carrier, UPS is presumed to possess knowledge of all laws and regulations pertaining to its business, including specifically as they relate to the transport of dangerous goods:

> [I]nterstate motor carriers are members of a regulated industry, and their officers, agents, and employees are required by law to be conversant with the regulations in question. As

> a practical matter, therefore, they are under a species of absolute liability for violation of the regulations despite the 'knowingly' requirement. This, no doubt, is as Congress intended it to be. Likewise, prosecution of regular shippers for violations of the regulations could hardly be impeded by the "knowingly" requirement, for triers of fact would have no difficulty whatever in inferring knowledge on the part of those whose business it is to know, despite their protestations to the contrary.

U.S. v. Int'l Minerals & Chem. Corp., 402 U.S. 558, 569 (1971) (Stewart, J. dissenting) (citations and footnote omitted). "[A] corporate defendant is deemed to have had knowledge of a regulatory violation if the means were present by which the company could have detected the infractions." United States v. T.I.M.E.-D.C., 381 F. Supp. 730, 739 (W.D. W. Va. 1974).

Here, UPS personnel are deemed broadly to be aware of the PACT Act, CCTA, and PHL § 1399-ll. In addition, UPS certainly had the means to understand that certain of its clients were shipping cigarettes. For instance, UPS had an audit right, and it could open packages. And in the course of providing its services, it learned information about a customer's business. Of course, it would know a customer's location, its name, whether it was located in a storefront (or located at a residential address), the goods it sold, the signage it used for advertisement; UPS had its Tobacco Policy, which acknowledged tobacco shipments (and yet there were instances in which even that was not enforced appropriately). UPS knew that certain customers were high risk—indeed, at times it said so; it had access to the NCLs. UPS had the means to

monitor and discover regulatory violations, and there were red flags aplenty.

D. Knowledge as to Each Shipper

Based upon the facts discussed in the Court's findings of fact, and based upon the application of the legal standard, the Court has made its determinations with regard to UPS's knowledge of facts relating to each Relevant Shipper's shipments as set forth above.

XII. LIMITATIONS PERIOD

One of UPS's defenses is that the applicable statutes of limitations bar certain claims. According to UPS, the applicable statutes of limitations preclude CCTA and PACT Act claims for violations prior to September 18, 2010; and preclude PHL § 1399-ll and AOD claims for violations prior to September 18, 2011. (Def. Proposed Findings of Fact, ECF No. 492 at 264.)

The Court does not find violations of the CCTA or PACT Act prior to September 18, 2010, and therefore need not address defendant's statute-of-limitations arguments as to these bases for liability. Additionally, the Court agrees that the statute of limitations for violations of PHL § 1399-ll is three years plus the five months of a voluntary tolling agreed to by the parties. The Court's rationale is as follows: Under New York law, the applicable limitations period for an action to recover upon a liability, penalty, or forfeiture created or imposed by statute is three years. N.Y. C.P.L.R. § 214(2). For a claim to fall within the confines of C.P.L.R. § 214(2), the statute must impose liability "'for wrongs not recognized in the common or decisional law.'" Banca Commerciale Italiana v. N. Tr. Int'l Banking Corp., 160 F.3d 90, 94 (2d Cir. 1998)

(quoting State v. Stewart's Ice Cream Co., 64 N.Y.2d 83, 88 (1984)). Here, plaintiffs' claims against UPS for "knowingly transport[ing] cigarettes" would not exist but for the statute and, therefore, are governed under the three-year limitations period set forth in C.P.L.R. § 214(2). See, e.g., Motor Vehicle Acc. Indem. Corp. v. Aetna Cas. & Sur. Co., 674 N.E.2d 1349, 1352 (N.Y. 1996) ("No-Fault Law does not codify common-law principles; it creates new and independent statutory rights and obligations" and thus is governed by N.Y. C.P.L.R. § 214(2). (quotation marks omitted)); Zeides v. Hebrew Home for the Aged at Riverdale, Inc., 753 N.Y.S.2d 450, 452 (N.Y. App. Div. 1st Dep't 2002) (plaintiff's cause of action under P.H.L. § 1801-d, which confers a private right of action on a patient in a nursing home for injuries sustained as the result of the deprivation of statutorily specified rights, is governed by the three-year period of limitations of C.P.L.R. § 214(2)). The parties also entered into a tolling agreement for a period of five months, from July 24, 2014, through December 24, 2014. Accordingly, any violations of PHL § 1399-ll are cognizable only if they occurred no earlier than three years and five months prior to the filing of this suit, i.e., no earlier than September 18, 2011.

Defendant also seeks to limit recovery for AOD violations to the same three-year statute of limitations. That is incorrect. The AOD is a contract, and under New York law the statute of limitations for contract claims is six years. C.P.L.R. § 213(2); Town of Oyster Bay v. Lizza Indus., Inc., 4 N.E.3d 1024, 1030 (N.Y. 2013) ("A breach of contract action must be commenced within six years from the accrual of the cause

of action." (citations omitted)). Not only is the contractual nature of the AOD clear from its form, its terms, and consideration provided by the parties, its obligations are different from and in addition to statutory requirements. For instance, the AOD's audit requirement is an obligation that exists nowhere in state or federal statutes and for which the AOD provides its own, independent remedy. Therefore, the six-year statute of limitations applies to all claims arising from breaches of UPS's AOD obligations, including its audit obligation.

As discussed below, when the parties provide the number of defined "Packages" and "Cartons" for the Liability Shippers, they should do so according to these time frames.

XIII. THE PACT ACT

As explained above, the PACT act directs the Attorney General to compile a list of cigarette and smokeless tobacco delivery sellers that have not registered with the Attorney General or "are otherwise not in compliance with [the] Act" (i.e. the "non-compliant list" or "NCL"). 15 U.S.C. § 376a(e)(1)(A). Sixty days after the Attorney General distributes the NCL, "no person who receives the list . . . and no person who delivers cigarettes or smokeless tobacco to consumers, shall knowingly complete its portion of a delivery of any package for any person whose name and address are on the list . . . ."[129] Id. § 376a(e)(2)(A). Importantly, the PACT Act also prohibits a carrier such as UPS from making deliveries on behalf of a known seller identified on the NCL when the carrier knows that

[129] There are certain exceptions that are not relevant here.

such seller "is using a different name or address to evade the delivery restrictions." Id. § 376a(e)(9)(B)(ii). All recipients and common carriers are also subject to the prohibitions on delivery described above with regards to any updates to the NCL thirty days after such updates have been distributed or made available. Id. § 376a(e)(2)(B).

Plaintiffs allege that UPS violated the PACT Act by delivering packages from sellers that UPS knew were identified on the NCLs (or were affiliated with entities identified on the NCLs). Specifically, plaintiffs seek penalties under the PACT Act for deliveries made by UPS to the "Elliott Enterprises Group,"[130] Indian Smokes, and the "Smokes and Spirits Group."[131]

As the Court has already explained, UPS is not exempt from the PACT Act; the Court finds that UPS violated the PACT Act by knowingly delivering packages from sellers identified on the NCLs, which UPS received. However, the Court also finds that plaintiffs are not entitled to PACT Act penalties relating to all of the shippers for which they seek such penalties. The Court's conclusions are as follows:

- Elliott Enterprises first appeared on the NCL dated November 10, 2010. (PX 472.) UPS received the first NCL on November 11, 2010. UPS lost its PACT ACT exemption by December 1, 2010. Because this was the

---

[130] As discussed above, plaintiffs include Elliott Enterprises, Elliott Express (or EExpress), and Bearclaw Unlimited/AFIA in this "group."

[131] As discussed above, plaintiffs include Smokes & Spirits, Native Outlet, A.J.'s Cigar, Sweet Seneca Smokes, and RJESS in the "group."

first NCL, UPS had sixty days to comply; its delivery of any packages for Elliott Enterprises after January 10, 2011, was thus a violation of the PACT Act.

- Indian Smokes first appeared on the NCL dated May 6, 2011. (PX 450). This NCL was distributed by the ATF that day. As noted, UPS had already lost its PACT Act exemption, and was therefore in violation of the PACT Act for all shipments UPS delivered for Indian Smokes starting thirty days thereafter, or as of June 6, 2011.
- Smokes & Spirits first appeared on the NCL dated February 15, 2012. (PX 450) The ATF distributed this NCL that day. Accordingly, UPS became liable for PACT Act penalties for all shipments UPS delivered for Smokes-Spirits on and after March 15, 2012.[132]

UPS's liability under the PACT Act regarding Elliott Enterprises, Indian Smokes, and Smokes & Spiritis is clear. As the Court has described, however,

[132] UPS argues that it cannot be liable under the PACT Act for deliveries made to Smokes & Spirits because the PACT Act NCL identified Smokes & Spirits as being located at 6665 Route 417, Kill Buck, New York, while UPS provided service to Smokes & Spirits at 137 Main Street, Salamanca, New York 14779. This argument lacks merit. As the Court has already found in its findings of fact, UPS knew, before the NCL was disseminated, that Smokes & Spirits was operating at 6665 Route 417, Kill Buck, New York (UPS provided service to Smokes & Spirits at that address). In all events, plaintiffs have put forth sufficient evidence that UPS knew the Smokes & Spirits on the NCL was the same Smokes & Spirits that UPS was servicing.

plaintiffs seek PACT Act penalties not only with regard to these entities (which were explicitly identified on the NCLs), but also for other entities that plaintiffs claim were affiliated in the same "groups." UPS argues that even if they are subject to PACT Act liability for Elliott Enterprises, Indian Smokes, and Smokes & Spirits, they cannot be subject to PACT Act liability for other affiliated entities that were not explicitly mentioned by "name and address" on the NCLs.

The Court finds that UPS is also subject to PACT Act liability for a subset—but not all—of the additional shippers within the "groups" that plaintiffs identify. Specifically, UPS is also subject to PACT Act liability for shipments made to Bearclaw/AFIA and EExpress during the relevant time period identified above,[133] but is not subject to PACT Act liability for Native Outlet, A.J.'s Cigars, Sweet Seneca Smokes, or RJESS.

The PACT Act prohibits UPS from making deliveries on behalf of entities known to be "using a different name or address [as those entities on the NCLs] to evade the delivery restrictions." 15 U.S.C. § 376a(e)(9)(B)(ii). The purpose of this provision is clear from its text—to prevent cigarette shippers from using alternate identities to evade delivery restrictions. The evidence in this case illustrates that shippers did in fact use alternate identities to attempt to evade the law.

The facts here demonstrate that EExpress had a sufficiently close relationship with Elliott Enterprises and that UPS Knew EExpress was in fact an alter ego

---

[133] I.e after January 10, 2011.

of Elliott Enterprises's intended, inter alia, to evade the PACT Act's delivery restrictions.[134] See Newspaper Guild of N.Y., 261 F.3d at 294; Empire United Lines Co., 557 F. App'x at 45-46. EExpress was opened by Fink only days after Elliott Enterprises's account was terminated, and there was significant customer overlap between the consignees of the two. There were clear connections between Aaron Elliott, the principal of Elliott Enterprises—a known cigarette shipper—and EExpress. These entities had significant overlap in customers, business purpose, and operations. Cf. N.Y. Pattern Jury Instr., Civil 2:266, Liab. for Conduct of Another (2016).

Similarly, there was a sufficiently close relationship such that UPS knew Bearclaw was making shipments on behalf of Elliott Enterprises. As the Court has already described, these entities shared a telephone number and Fink knew this fact. Bearclaw was a mail-order business and its telephone number was therefore a main point of contact (serving a similar function as a physical address would serve for a non-mail-order entity). The Court has found that, based on the totality of the evidence, UPS knew Bearclaw was shipping on behalf of Elliott Enterprises and used different names/addresses to avoid detection as a cigarette shipper. UPS is thus liable for shipments to Bearclaw under the PACT Act.

UPS accurately points out that under the PACT Act it is "not . . . required to make any inquiries or otherwise determine whether a person ordering a delivery is a delivery seller on the list . . . who is using a

---

[134] The Court has already described in detail the relevant legal principles concerning alter egos.

different name or address in order to evade the related delivery restriction . . . ." 15 U.S.C. § 376a(e)(9)(B)(i). Significantly, however, UPS did have such an obligation under the AOD. In other words, UPS is liable for the deliveries made to alter egos of known shippers on the NCLs (i.e. Bearclaw/AFIA and EExpress"), even though the PACT Act does not require UPS to acquire alias information.

The Court does not find, however, that there was a sufficiently close relationship between Smokes & Spirits and the other entities plaintiffs included within the "Smokes & Spirits Group" to warrant PACT Act liability for shipments to those entities (Native Outlet, A.J.'s Cigar, Sweet Seneca Smokes, and RJESS). As the Court has noted in its factual findings above, plaintiffs did not put forth sufficient evidence that these additional entities were alter egos or were shipping on behalf of Smokes & Spirits.

XIV. PHL 1399-LL

PHL § 1399-ll prohibits common carriers from "knowingly transport[ing] cigarettes" to any person in New York State "reasonably believed by such carrier to be other than a person described in paragraph (a), (b) or (c) of subdivision one of this section." PHL § 1399-ll(2).[135] UPS also assumed a separate, contractual obligation to comply with PHL § 1399-ll in ¶ 17 of the AOD.

---

[135] There are exemptions of certain persons from PHL § 1399-ll that are not relevant here, including "(a) a person licensed as a cigarette tax agent or wholesale dealer under article twenty of the tax law or registered retail dealer under section four hundred

In enacting PHL 1399-ll the State legislature "declare[d] the shipment of cigarettes sold via the internet or by telephone or by mail order to residents of [New York] state to be a serious threat to public health, safety, and welfare, to the funding of health care . . . , and to the economy of the state." 2000 Sess. Laws of N.Y., Ch. 262 (S.8177) § 1.

The PACT Act contains a provision that preempts state laws such as PHL § 1399-ll with regard to common carriers who have entered into an AOD and when such AOD "is honored" throughout the United States. See 15 U.S.C. §§ 376a(e)(5)(C)(ii), 376a(e)(3)(B)(ii)(I). The Court's determination, set forth above, that UPS's AOD is not so honored eliminates this protection for UPS. The AOD separately provides that a violation of its terms shall "also constitute prima facie proof of a violation of PHL § 1399-ll(2), in any civil action or proceeding that the Attorney General later commences." (AOD, DX 23 ¶ 43.) Accordingly, in addition to the violations of PHL § 1399-ll for knowing shipments of cigarettes described below, the Court has separately found that UPS breached ¶ 42 of the AOD, and that this breach involved the shipment of cigarettes. Thus, ¶ 43 of the AOD also provides a basis for a violation of PHL § 1399-ll.

---

eighty-a of the tax law; (b) an export warehouse proprietor pursuant to chapter 52 of the internal revenue code or an operator of a customs bonded warehouse pursuant to section 1311 or 1555 of title 19 of the United States Code; or (c) a person who is an officer, employee or agent of the United States government, this state or a department, agency, instrumentality or political subdivision of the United States or this state and presents himself or herself as such, when such person is acting in accordance with his or her official duties." PHL § 1399-ll(2).

The facts as set forth above demonstrate that UPS in fact delivered shipments of unstamped cigarettes to individuals who were not authorized to receive them. The final issue is whether it did so with the requisite level of knowledge.

As discussed above, as a common carrier of regulated goods, UPS is deemed to have knowledge of whether the recipients of the packages it delivers "appear on a list of licensed or registered agents or dealers published by the department of taxation and finance, or . . . [are] licensed or registered as an agent or dealer under article twenty of the tax law." PHL § 1399-ll(1); see Int'l Minerals, 402 U.S. at 569; Elshenawy, 801 F.2d at 859. Moreover, pursuant to PHL § 1399-ll(2), if a common or contract carrier knowingly transports cigarettes "to a home or residence, it shall be presumed that the common or contract carrier knew that such person was not a person described in paragraph (a), (b) or (c) of subdivision one of this section." PHL § 1399-ll(2). UPS has offered no evidence that the persons to whom it shipped cigarettes were persons described in paragraph (a), (b), or (c) of subdivision one of PHL § 1399-ll(2), i.e., were licensed tobacco dealers.

Moreover, UPS recorded in its delivery records the instances where it delivered packages from Relevant Shippers to residential addresses; UPS is therefore presumed to have actual knowledge that the recipients were unauthorized for purposes of PHL § 1399-ll as to all of those deliveries.

However, even as to its deliveries to commercial addresses, UPS could only have believed that the re-

cipients were authorized to receive cigarettes if it confirmed that addresses were appropriately licensed. See N.Y. Comp. Codes R. & Regs. tit. 20, § 74.3(a)(1). UPS has introduced no evidence that it performed such a confirmation. In all events, as discussed at length above, the Court has already and separately found sufficient knowledge to support a violation of this statute, as described above.

XV. THE CCTA

Plaintiffs' final claim is for violations of the CCTA. The CCTA is a federal statute designed to address "the flow of contraband cigarettes between jurisdictions with differing tax obligations, and the resulting deleterious effects on state and local tax collection." City of New York v. Golden Feather Smoke Shop, Inc., No. 08-cv-03966, 2013 WL 3187049, at *20 (E.D.N.Y. June 10, 2013). The statute makes it unlawful for any person knowingly to ship, transport, sell, or distribute "contraband cigarettes." 18 U.S.C. § 2342(a); City of New York v. FedEx Ground Package Sys., 91 F. Supp. 3d 512, 519 (S.D.N.Y. 2015).

"Contraband cigarettes" are defined as:

> [A] quantity in excess of 10,000 cigarettes which bear no evidence of the payment of applicable State . . . cigarette taxes in the State . . . where such cigarettes are found, if the State . . . requires a stamp, impression, or other indication to be placed on the packages . . . of cigarettes to evidence of cigarette taxes, and which are in the possession of any person other than [exceptions not relevant here]."

18 U.S.C. § 2341(2); FedEx, 91 F. Supp. 3d at 519-20 (footnote omitted).

A CCTA violation therefore consists of four elements: A party must (1) knowingly ship, transport, receive, possess, sell, distribute or purchase, (2) more than 10,000 cigarettes, (3) that do not bear tax stamps, (4) under circumstances where state or local cigarette tax law requires the cigarettes to bear such stamps. FedEx, 91 F. Supp. 3d at 520.

In New York, the cigarette tax law referred to in the fourth element of a CCTA claim is set forth in N.Y. Tax Law §§ 471 and 471-e. When it was first passed in 1939, § 471 imposed a tax "'on all cigarettes possessed in the state by any person for sale' except when the 'state is without power to impose such tax.'" City of N.Y. v. Golden Feather Smoke Shop, Inc., 597 F.3d 115, 122 (2d Cir. 2010) ("Golden Feather II") (quoting N.Y. Tax Law § 471). Section 471 has been amended numerous times but has been continuously in place in some form. During the period relevant to plaintiffs' claims herein, § 471 has always required the affixation of tax stamps on cigarettes sold by Indian reservation retailers to non-tribal members. City of New York v. Milhelm Attea & Bros., No. 06-v-3620, 2012 WL 3579568, at *5-6 (E.D.N.Y. Aug. 17, 2012).

In June 2010, the State amended both N.Y. Tax Law §§ 471 and 471-e, with an effective date of September 1, 2010. Milhelm Attea, 2012 WL 3579568, at *2. The pre- and post-amendment versions of § 471 both contain the same initial language broadly imposing a taxation requirement. As amended, § 471 requires the affixation of tax stamps to all cigarettes sold on reservations to non-tribe members. See id., 2012 WL 3579568, at *3.

As set forth in its factual findings, the Court has found that plaintiffs have met their burden with regard to each element of the CCTA. First, all cigarettes possessed for sale or use within the State are presumed to be taxable, and hence must bear a tax stamp, until the contrary is established. The person asserting exemption from taxation bears the burden of proving non-taxability. See N.Y. Tax Law § 471; N.Y.C. Admin. Code § 11-1302(d). "Whether taxable or tax-free, all [packs of] cigarettes must bear a tax stamp." Oneida Nation of N.Y. v. Cuomo, 645 F.3d 154, 160 n.8 (2d Cir. 2011). To indicate that the tax has been pre-paid on cigarettes to which the tax applies, a stamping agent must purchase and affix a cigarette tax stamp to each pack of cigarettes possessed by the agent for sale in the State and/or City, as the case may be. N.Y. Tax Law § 471; 20 N.Y. Codes R. & Regs. § 76.1(a)(1); Ad. Code § 11-1302(e). All cigarettes possessed for sale or use in New York State and City, with exceptions not relevant to this action, must bear tax stamps. N.Y. Tax Law § 471; 20 N.Y. Codes R. & Regs. § 76.1(a)(1); N.Y.C. Admin. Code § 11-1302(g).

To comply with the foregoing requirements, stamping agents purchase tax stamps from the State and City, the cost of which is nearly equal in cost to the amount of the cigarette tax on a pack of cigarettes. 20 N.Y. Codes R. & Regs. § 74.2. By purchasing the tax stamps, the tax is paid. Id. By law, stamping agents must incorporate the amount of the tax into the price of the cigarettes, thereby passing the tax along to each subsequent purchaser in the distribution chain, and ultimately the consumer, as required

by N.Y. Tax Law § 471 and N.Y.C. Admin. Code § 11-1302(e) and (h).

At all relevant times (i.e., January 1, 2010, to the present), the State excise tax has been either $2.75 or $4.35 per pack of cigarettes. See N.Y. Tax Law § 471(1) (noting the July 1, 2010 change in the applicable tax from $2.75 to $4.35); Angell Aff., PX 62 ¶ 16; Trial Tr. 1360:15-19. Accordingly, for each carton of cigarettes (which typically contains ten packs of cigarettes), the State excise tax rate is $27.50 or $43.50 per carton. (See Angell Aff., PX 628 ¶ 16.) During the same time period, the New York City excise tax has been $1.50 per pack or $15.00 per carton. (Angell Aff., PX 628 ¶ 17.) Each pack of cigarettes in New York City, furthermore, it must bear a joint New York State/New York City tax stamp. 20 N.Y. Codes R. & Regs. § 74.3.

New York law creates a presumption that all cigarettes are taxable, and are all therefore required to be stamped, unless the person on possession of the cigarettes rebuts the presumption. N.Y. Tax Law § 471 et seq.; Oneida, 645 F.3d at 159; New York v. United Parcel Serv., No. 15-cv-1136, 2016 WL 4747236, at *6 (S.D.N.Y. Sept. 10, 2016).

This Court has already found that the cigarettes transported by UPS, whether to consumers or reservation-to-reservation, were required to bear tax stamps. 2016 WL 4747236 at *4-5, *11-12. This Court has also already held that UPS bears the burden of rebutting that presumption. Id. at *6. UPS has introduced no evidence doing so, and hence all of the cigarettes transported by UPS to or from Indian reservations were required by law to have been stamped. The

preponderance of the evidence proves that the packs of cigarettes delivered by UPS were unstamped. The evidence proving this element is summarized as follows: Rosalie Jacobs and Robert Oliver both testified that the cigarettes they shipped via UPS did not bear tax stamps. (Trial Tr. 1661:15-17 (Jacobs); Id. 1132:5-1134:20 (Oliver)); the cigarettes seized at UPS's Potsdam Center did not bear tax stamps (id. 1148:1-7 (Oliver)); Phil Christ testified that the cigarettes sold by Arrowhawk did not bear tax stamps (id. 912:20-23, 913:17-914:6 (Christ)); it can be inferred from the prices at which Smokes & Spirits and Arrowhawk sold cigarettes that the price could not have included either or both State and City taxes (see PX 54; PX 55); and the cigarettes delivered by UPS to the Office of the New York City Sheriff from Seneca Cigars or www.senecacigarettes.com were unstamped (PX 40; PX 43). In addition, there is no evidence in the record that any of the shippers at issue sold any cigarettes with stamps.

Plaintiffs have also proven that the "10,000 cigarette" quantity requirement for a CCTA violation. Rosalie Jacobs of Jacobs Manufacturing/Tobacco testified that her company regularly shipped unstamped cigarettes in lots of 10,000 cigarettes. (Trial Tr. 1680:8-22 (Jacobs).) This is alone sufficient to establish this element of a CCTA violation. But secondly, Robert Oliver of Mohawk Spring Water also testified that he shipped pallets of cigarettes via UPS in an amount greater than 10,000. (Trial Tr. 1152:23-1153:11 (Oliver)); PX 49.)

Finally, as this Court and others have previously found, the CCTA permits the aggregation of separate deliveries to satisfy the statutory quantity of 10,000

cigarettes. See 131 F. Supp. 3d at 139 (citing cases). The total number of packages containing cigarettes delivered by UPS, and the average weights of those packages, when applied to the known weight of a packaged carton of cigarettes (assumed here to be one pound based in part on PX 40, PX 43, and the testimony elicited at trial), demonstrates that the total volume of cigarettes underlying plaintiffs' claims far exceeds 10,000 cigarettes (fifty cartons).[136]

UPS asserts several defenses to plaintiffs' CCTA claims. They first assert that the forbearance policy followed by the State of New York prevents enforcement of the law against UPS for deliveries during at least the first seven months of claimed violations: December 2010 (which the Court found to be the first date on which UPS had the requisite knowledge) and June 2011 (when forbearance ended). UPS next argues that it reasonably believed that N.Y. Tax Law § 471 could be interpreted to allow common carrier

---

[136] A common carrier "transporting the cigarettes involved under a proper bill of lading or freight bill which states the quantity, source, and destination of such cigarettes" is not subject to CCTA liability. 18 U.S.C. § 2341(2). UPS has produced no bills of lading or freight bills for the cigarettes at issue in this action and accordingly is not entitled to this exemption.

Moreover, for a common carrier to be entitled to the exemption provided by 18 U.S.C. § 2341(2), the cigarettes in question must be picked up from and delivered to persons legally entitled to possess unstamped cigarettes. City of New York v. Gordon, 1 F. Supp. 3d 94 (S.D.N.Y. 2013); City of New York v. LaserShip, Inc., 33 F. Supp. 3d 303 (S.D.N.Y. 2014). UPS has produced no evidence that any person from which UPS picked up or delivered was entitled to receive, possess, distribute, or sell unstamped cigarettes and accordingly cannot establish entitlement to this exemption.

transport of unstamped cigarettes between Indian reservations.

As to forbearance, the Court notes that it has addressed this defense extensively in prior Opinions. (ECF Nos. 177, 406.)

UPS also argues that even if the State may assert a CCTA violation, the City lacks standing with regard to the Potsdam Shippers and cannot. According to UPS, this is because the Potsdam Shippers sent packages only to other reservations in New York State—none of which were located in New York City. However, as there is ample evidence to establish UPS's knowing transport of cigarettes to consignees in New York City, therefore establishing a CCTA violation, there is no standing issue. Other issues are addressed in the damage discussion set forth below.

As to § 471, the Court has found as a matter of fact that UPS presented insufficient evidence to support a reasonable—or even widely held—belief in its asserted statutory interpretation. At long last, despite the ink spilt, this is an ex post lawyer argument.

XVI. PREEMPTION

UPS argues that plaintiffs' interpretation of the AOD expands UPS's audit obligations beyond the contract terms and thereby regulates a common carrier in contravention of the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"), which explicitly preempts state laws related to a "price, route, or service" of carriers that transport property. 49 U.S.C. §§ 14501(c)(1); 41713(b)(4). UPS cites American Airlines, Inc. v. Wolens, in which the U.S. Supreme Court held that private contractual obligations of an airline are not preempted by federal law in the

same manner as state statutes, to conclude that plaintiffs' interpretation of the AOD is federally preempted. See 513 U.S. 219, 222 (1995).

This argument is flawed in at least two respects. First, it is premised on an incorrect, overly narrow interpretation of the AOD's audit provision. As discussed above, plaintiffs are correct that a violation of the audit provision occurs on the date when UPS first fails to audit a shipper in compliance with its obligations, and that each and every package tendered to UPS thereafter effects a separate a violation. This interpretation of the audit obligation is therefore within the terms of the AOD contract. See Wolens, 513 U.S. at 222 ("We hold that the [Airline Deregulation Act's] preemption prescription bars state-imposed regulation of air carriers, but allows room for court enforcement of contract terms set by the parties themselves.").

Second, the Court views this as an effort by UPS to shoehorn a federal preemption challenge to § 471 and PHL § 1399-ll into an argument about interpretation of the AOD. This reflects an incorrect understanding of the FAAAA. Indeed, UPS's argument was tried and lost in 2003 by parties in another cigarette contraband case in New York. See Ward v. New York, 291 F. Supp. 2d 188, 207-19 (W.D.N.Y. 2003). In Ward, plaintiff smoke shops raised the FAAAA preemption argument as a reason why PHL § 1399-ll was inapplicable. The court there reviewed the argument in detail and correctly rejected it.

Federal preemption may be express or implied; whether it is one or the other is determined by the language of the statute. Ace Auto Body & Towing, Ltd.

v. City of New York, 171 F.3d 765, 771 (2d Cir. 1999) (citing Morales v. TransWorld Airlines, Inc., 504 U.S. 374, 382 (1992)). Accordingly, analysis of preemption must begin with analysis of the statutory text. Ace Auto, 171 F.3d at 771. In addition, courts must "start with the assumption that the historic policy powers of the States [are] not to be superseded . . . unless that is the clear and manifest purpose of Congress." Id.; Ward, 291 F. Supp. 2d at 209.

Here, the FAAAA expressly preempts state and local laws. It provides that a state "may not" enact/enforce a law related to, inter alia, price, route, or service of any motor carrier with respect to transportation of property. 49 U.S.C. § 14501(c)(1). As in Ward, the question here is what it means for a statute to be "related to" price, route, or service of a motor carrier. Ward, 291 F. Supp. 2d at 208.

The FAAAA was designed to "even the playing field between motor and air carriers." Id. at 209 (citing Californians for Safe & Competitive Dump Truck Transp. v. Mendoza, 152 F.3d 1184, 1187 (9th Cir. 1998)). In Mendoza, the court observed that state law would not be preempted if it affects carriers in too tenuous or remote a manner. Mendoza, 152 F.3d at 1188; see also Morales, 504 U.S. at 390. State laws that only have indirect, peripheral effects on the subject matter of the FAAAA are not sufficiently "related to" it. Cf. N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 661-62 (1995).

Here, PHL § 1399-ll is a public health law. It has been enacted pursuant to the State's historic police powers. See Brown & Williamson Tobacco Corp. v. Pataki, 320 F.3d 200, 216-17 (2d Cir. 2003). There is

therefore a presumption against preemption at the outset.

The question is next whether Congress expressed a purpose to preempt this type of state regulation. It did not. The FAAAA's preemption provision was designed to override economic regulation of interstate carriers, "not local safety regulation." Ace Auto, 171 F.3d at 776; see also Ward, 291 F. Supp. 2d at 209. On its face and throughout the text, PHL § 1399-ll is designed and intended to address public health issues associated with smoking. It is only one of a number of similar New York laws that regulate transport of items implicating public health and safety (e.g., fur, skin, hair, meat, alcoholic beverages, invasive species). See Ward, 291 F. Supp. 2d at 210 (citing N.Y. Agric. & Mkts. Law § 96-h, N.Y. Alco. Bev. Cont. Law § 152, and N.Y Envt'l Conserv. Law. § 11-0507(4)). These and other similar laws may have a peripheral impact on the business of carriage but are not preempted by the FAAAA because of Congress's intent to preserve state control over such items. In short, PHL § 1399-ll is first and foremost a public safety regulation—not a carriage regulation.

The fact that PHL § 1399-ll places special burdens on carriers does not change this result. In this regard, the statute presumes that if cigarettes are transported to a home or residence, the carrier knew that the person was not authorized to receive them. This "home delivery" presumption does not alter the primary character of the statute as concerning public safety. But in any event, it is a presumption concerning the status (i.e., "unauthorized") of the package's recipient, not its contents. See Ward, 291 F. Supp. 2d at 210.

The CCTA and § 471 are analyzed similarly. Both are directed at public safety. In addition, the CCTA in fact carves out of its definition of contraband "a common or contract carrier transporting the cigarettes involved under a proper bill of lading or freight bill which states the quantity, source and destination of such cigarettes." 18 U.S.C. § 2341(2)(B).

XVII. UPS'S REMAINING DEFENSES

A. Unclean Hands/In Pari Delicto

UPS has argued that plaintiffs may not recover for any of the asserted violations based on their own unclean hands or fault. The offending conduct to which UPS points includes the State's forbearance policy, the fact that one state trooper apparently responded to one inquiry from UPS by stating that it should proceed with "business as usual," and plaintiffs' failure to provide UPS with information regarding cigarette shippers in plaintiffs' possession.

To support its "unclean hands" defense, UPS must show "egregious" misconduct by plaintiffs. See, e.g., SEC v. Durante, 641 F. App'x 73, 78 (2d Cir. Mar. 8, 2016); Republic of Iraq, 768 F.3d at 168 (noting that such egregious misconduct "must 'shock the moral sensibilities" (quoting Art Metal Works, Inc. v. Abraham & Straus, Inc., 70 F.2d 641, 646 (2d Cir. 1934) (L. Hand, J., dissenting))); Nat'l Distillers & Chem. Corp. v. Seyopp Corp., 214 N.E.2d 361, 362-63 (N.Y. 1966) (holding that the doctrine of unclean hands "is never used unless the plaintiff is guilty of immoral, unconscionable conduct and even then only when the conduct relied on is directly related to the subject matter in litigation and the party seeking to invoke the doctrine was injured by such conduct" (internal quotation

marks omitted)); SEC v. Am. Growth Funding II, LLC, No. 16-cv-828, 2016 WL 8314623, at *3 (S.D.N.Y. Dec. 30, 2016) ("[W]here courts have permitted equitable defenses to be raised against the government, they have required that the agency's misconduct be egregious and the resulting prejudice to the defendant rise to a constitutional level." (quotation marks and citations omitted)).

The doctrine of in pari delicto reflects similar principles. To establish this defense, UPS must show that plaintiffs "participated in wrongdoing equally with" UPS; if it meets this burden, then plaintiffs may not recover damages. Republic of Iraq, 768 F.3d at 160. This defense amounts to a showing that "as a direct result of the plaintiff's affirmative wrongdoing, the plaintiff bears at least substantially equal responsibility, for the [same] violations of which it complains." Id. at 167-68 (citations and internal quotations omitted). In other words, "[n]ot only must the plaintiff 'be an active, voluntary participant in the unlawful activity that is the subject of the suit,' but it is necessary that 'the degrees of fault [be] essentially indistinguishable or the plaintiff's responsibility [be] clearly greater.'" Id. at 162 (quoting Pinter v. Dahl, 486 U.S. 622, 636 (1988)). This is because "[p]laintiffs who are truly in pari delicto are those who have themselves violated the law in cooperation with the defendant." Pinter, 486 U.S. at 636 (quotation marks omitted); see also Republic of Iraq, 768 F.3d at 168.

UPS bears the burden of proof on this affirmative defense. See Kirschner, 938 N.E.2d at 513 n.3. As a factual matter, it has failed to carry it. Thus, the Court need not address whether plaintiffs' status as

government entities eliminate or limit the availability of these defenses.

First, the State's forbearance policy suggests only "rational" government conduct. N.Y. Ass'n of Convenience Stores v. Urbach, 712 N.Y.S.2d 220, 222 (N.Y. App. Div. 3d Dep't 2000). And the State's asserted withholding of information fails to suggest any constitutional prejudice to UPS. See SEC v. Durante, No. 01-cv-9056, 2013 WL 6800226, at *12 (S.D.N.Y. Dec. 19, 2013) (noting that a 10-year "delay" in enforcement is not "egregious"). The facts do not support anything approaching egregious misconduct or wrongdoing equal with that of UPS.

B. Waiver

UPS also asserts that plaintiffs have waived their claims. This is based on the circumstances relating, inter alia, to forbearance and, separately, to the Attorney General's 2011 investigation.

Waiver is the intentional relinquishment of a known right. U.S. D.I.D. Corp. v. Windstream Commc'ns, Inc., 775 F.3d 128, 136 (2d Cir. 2014). Conduct said to constitute a waiver "must be clear and unequivocal, as waivers are never to be lightly inferred." Id.; Gilbert Frank Corp. v. Fed. Ins. Co., 520 N.E.2d 512, 514 (N.Y. 1988) ("Waiver is an intentional relinquishment of a known right and should not be lightly presumed."). Courts will only infer a waiver "where the parties were aware of their rights and made the conscious choice, for whatever reason, to waive them. Mere negligence, oversight, or thoughtlessness does not create a waiver." Windstream, 775 F.3d at 136 (internal citations and quotation marks omitted). Generally, delay in government enforcement in the

public interest does not constitute a waiver or justify the application of laches. See United States v. Angell, 292 F.3d 333, 338 (2d Cir. 2002) ("[L]aches is not available against the [sovereign] when it undertakes to enforce a public right or protect the public interest.").

Putting aside that the plaintiffs here are governmental entities, the facts here fail to support a waiver. Plaintiffs did not know all relevant facts until discovery in this matter, and, as a factual matter, there is insufficient evidence of an intentional relinquishment of a known right. Thus, this defense fails. Again, therefore, the Court need not reach the question of whether plaintiffs' status as governmental entities eliminates or limits the availability of this defense.

C. Public Authority and Estoppel

UPS has also asserted public-authority, entrapment-by-estoppel, general estoppel defenses. These defenses fail as a matter of fact. UPS bases these defenses principally on the forbearance policy and purported instructions by Officer Nitti to UPS employee Terranova. As stated above, there is no evidence that anyone at UPS relied upon the State's forbearance policy when agreeing to transport cigarettes. In addition, as a factual matter, and for the reasons also stated above, the Nitti/Terranova conversations cannot ground this defense. Even if UPS had relied on the Nitti/Terranova communications, it would have been unreasonable to do so.

The public-authority defense and the related entrapment-by-estoppel defense have only been applied within the limited confines of a criminal action, which this case is not. See, e.g., Cox v. Louisiana, 379 U.S.

559, 569-71 (1965) (addressing estoppel defense to a criminal conviction under Louisiana state law); United States v. Giffen, 473 F.3d 30 (2d Cir. 2006) (addressing, inter alia, Federal Rule of Criminal Procedure 12.3, which governs the notice requirement for a defendant's assertion of a public authority-defense, and defendant's criminal indictment for violations of several federal statutes); United States v. Schwartz, 924 F.2d 410, 421-22 (2d Cir. 1991) (addressing defendants' appeal of their convictions from criminal violations of RICO, among other federal statutes).

Even assuming, arguendo, that these criminal-law defenses could be imported into a civil-law dispute, UPS's evidence at trial fails to support such defenses. In order for a defendant to succeed in raising these defenses, he or she must have revealed the full extent of his or her criminal acts or illegal conduct—simply raising a "reasonable suspicion" is insufficient. Giffen, 473 F.3d 30, 40 n.9 (noting that "[b]ecause neither Giffen nor the defendants in Schwartz revealed their criminal acts, in neither case could governmental authorization to do the acts revealed constitute authorization to do the illegal acts that were not revealed"); id. 41 n.10 (noting that "in order to establish authorization of criminal conduct through the approval by government officials of the acts he described, Giffen must have reasonably clearly revealed the criminal aspect of those acts—not merely raised a suspicion about it").

Here, Terranova never disclosed to Nitti the unlawful nature of UPS's deliveries—i.e., that UPS's bulk shipments were being delivered by UPS to persons that were not licensed or authorized pursuant to federal or state law to possess such cigarettes. (See

Terranova Decl., DX 612 ¶¶ 1-2, 7 (failing to identify where such bulk shipments of cigarettes were being delivered); Trial Tr. 1529:20-1530:24 (Terranova) (failing to identify where the cigarettes were being delivered to); id. 1532:20-25 (Terranova) (testifying that he did not reveal to Nitti the names of the shipper accounts and that he no idea where the cigarettes being picked up by UPS were being delivered).)

Indeed, the source of Terranova's information—Steve Talbot, former UPS Potsdam dispatch/preload supervisor—never told Terranova where or to whom the "bulk shipments" of cigarettes were being delivered. (Talbot Decl., DX 606 ¶¶ 1, 79; see also id. 1267:1-14 (Talbot) (Talbot testifying that he did not recall where the cigarettes were being sent to, and did not recall the details of his conversation with Terranova); id. 1254:23-25 (Talbot) (Talbot testifying that he suffered a head injury roughly five or six years ago—i.e., around the time of his conversation with Terranova); id. 1255:1-3 (Talbot) (Talbot testifying his head injury affected his short-term memory).) Terranova, moreover, took no steps to determine where, or to whom, such cigarettes were being shipped. (See, e.g., Trial Tr. 1528:9-11 (Terranova) (Terranova testifying that he did not ask Talbot any questions during his phone conversation with him); id. 1533:23-25 (Terranova testifying that he did not contact any other UPS Centers regarding his conversation with Nitti); id. 1274:23-25 (Talbot) (Talbot testifying that he and Terranova never discussed conducting an audit).)

UPS's records are furthermore devoid of any such phone conversation between Terranova and Nitti. (See Trial Tr. 1528:12-1529:7 (Terranova) (Terranova testifying that UPS policy required him to document

all investigations in UPS's IRS system); id. 1534:20-22 (Terranova) (Terranova testifying that he could not recall documenting his conversation with Nitti); see also id. 1268:16-20 (Talbot) (Talbot testifying that he did not record his phone conversation with Terranova); id. 1268:23-25 (Talbot) (Talbot testifying that he did not make a practice of recording his phone calls with UPS Security); id. 1269:15-18 (same)).

Given such evidence (or the lack thereof), in terms of the "public authority" defense, Nitti could not have "authorized" UPS's illegal or criminal conduct because, as shown above, Terranova had no idea whether such deliveries were unlawful, much less failed to disclose any facts that would suggest UPS's delivery of cigarettes to individual consumers or persons otherwise not authorized to possess such cigarettes. As a result, UPS cannot take advantage of the actual public-authority defense.

Similarly, UPS's entrapment-by-estoppel defense fails. For this defense, a defendant must show that "he reasonably relied on the statement or conduct of a government official when he engaged in the conduct with which he is charged." United States v. Tonawanda Coke Corp., No. 10-cr-219, 2013 WL 672280, at *3 (W.D.N.Y. Feb. 22, 2013); see also United States v. Miles, No. 11-cr-581, 2012 WL 4178274, at *4 (S.D.N.Y. Sept. 20, 2012). There must also be "'an affirmative representation' that the proscribed conduct 'was or would be legal,' not an affirmative representation that the proscribed conduct was against the law." Miles, 2012 WL 4178274, at *4.

Perhaps most importantly, the defendant must similarly show "that he reasonably disclosed the conduct alleged in the indictment to the government before or at the time of authorization. That is, the disclosure and authorization must be linked." Tonawanda Coke, 2013 U.S. Dist. LEXIS 25398, at *9 (internal citations omitted) (citing cases); see also Giffen, 473 F.3d at 42 (rejecting a defendant's entrapment-by-estoppel defense where "[he] failed to apprise the government officials that he was engaged in bribery and fraud, [accordingly,] we do not see how [he] could have reasonably understood the officials' response as authorization to engage in bribery and fraud").

Here, as shown above, at no point did Terranova reveal the illegal or criminal nature of UPS's actions, because Terranova himself did not know (and did not take any steps to determine) who the intended recipients of UPS's delivered cigarettes were. Given such evidence, UPS's entrapment-by-estoppel defense is unsupported and fails as a matter of law.

XVIII. DAMAGES

The Court has found that UPS violated its obligations under the AOD, the PACT Act, PHL § 1399-ll,[137] and the CCTA. The Court turns now to the related questions of compensatory damages and penalties.

This is not the first case, nor will it be the last, where plaintiffs focused their energies so intensely on questions of liability that they shortchanged their damages case. UPS has made serious motions to

[137] Damages under N.Y. Exec. Law § 63(12) are the same as damages under PHL § 1399-ll.

strike plaintiffs' damages altogether based on two separate and self-inflicted wounds: (1) plaintiffs' failure to provide a robust pre-trial damage computation pursuant to Federal Rule of Civil Procedure 26, and (2) their failure to anticipate evidentiary issues with the trial presentation of their damages claim.[138] The Court addresses the pre-trial issues first, and then proceeds to damages issues that arose during the trial. Ultimately, the Court finds that admitted evidence supports reasonable inferences regarding damages and penalties, and that the methodology the Court applies here does not require the use of an expert.

A. UPS's Pre-Trial Damage Disclosure

The original complaint in this case contained a prayer for relief seeking damages, penalties, injunctive relief, and the appointment of a monitor. (ECF No. 1 at 39.) Those requests are contained in the operative complaint as well. (ECF No. 189 at 48.) There was never any doubt that the case was significant—the acknowledged reality of that fact was evident in the robust staffing and vigorous litigation by both sides. Nevertheless, a defendant may know that a case is big—even very big—and yet not understand how big, or how the plaintiffs intend to prove their particular claims. The Federal Rules of Civil Procedure are designed, inter alia, to prevent trial by ambush. This applies to liability and damages issues equally. Defendant asserts that it was not provided

[138] It would have been far easier, and safer, to have retained a damages expert. Perhaps cost informed plaintiffs' decision not to do so—the Court cannot know. Plaintiffs should understand that, while the Court ultimately determines that they are entitled to certain damages, the motion to preclude all damages was quite a serious one.

with disclosures to which it was entitled under Rule 26(a)(1)(A)(iii), and that this Court should preclude plaintiffs' damage claim on this basis. The Court declines to do so. While plaintiffs could have had a more robust Rule 26 disclosure—and indeed, should have—the Court finds that, under all of the relevant circumstances, preclusion of damages is unwarranted.

The Court's conclusion is based on a number of factors. To start, the Court agrees with defendant's basic premise that Rule 26(a)(1)(A)(iii) is designed to prevent undue surprise regarding damages. It requires every plaintiff to provide its opponent with "a computation of each category of damages claimed" and requires disclosure of "the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered." Fed. R. Civ. P. 26(a)(1)(A)(iii).

The case law contains a number of examples of defendants seeking preclusion of damages for failure to comply with Rule 26. This Court has itself, on the facts of particular cases, granted such motions. While Rule 26(a)(1)(A)(iii) provides for mandatory—not discretionary—obligations on the parties, a Court's determination to impose preclusion as a penalty for failure to comply is discretionary. See Design Strategy, Inc. v. Davis, 469 F.3d 284, 294 (2d Cir. 2006). The Court has previously concluded that the principles underpinning Rule 26(a)(1)(A)(iii) apply to penalties as well as compensatory damages. (See ECF No. 413.)

It is not uncommon for plaintiffs to seek to delay the time that they must commit to a damages calcula-

tion, and it is common for a defendant to press the issue. That occurred here. By Order dated February 1, 2016 (ECF No. 169), this Court required plaintiffs to provide UPS with information regarding the nature of plaintiffs' expected proof regarding an exemplar shipper. Plaintiffs complied with that order with a disclosure dated March 3, 2016. (See ECF No. 396-3.)

Plaintiffs' March 3, 2016 disclosure provided detailed information, in chart form, for the "Arrowhawk Group" of shippers (which then, as now, included Arrowhawk Cigars, Seneca Cigars, Two Pine Enterprises, and Hillview Cigars). Citing documents identified by Bates number from UPS's production, the March 3, 2016 disclosure referenced the total number of packages transported by UPS. Plaintiffs stated that they expected to prove that these shipments all contained cigarettes based on, inter alia, witness testimony (which they described) and shipping invoices. Plaintiffs further outlined that they intended to prove UPS's knowledge that these shipments contained cigarettes based on circumstantial evidence of the pickup location, signage, and inventory. In addition, plaintiffs indicated that testimony from and relating to UPS drivers would be used to support their claims. This is, in fact, what plaintiffs did.

Based on this evidence (which plaintiffs detailed in three single-spaced pages), plaintiffs set forth a chart that indicated that plaintiffs would each seek damages relating to separate violations of the CCTA, RICO, PACT Act, PHL § 1399-ll, and the AOD.[139] The

[139] The RICO claims were dismissed by Opinion & Order dated August 9, 2016. (ECF No. 322.)

chart further indicated the amounts for each claim for the exemplar shipper group.

Following the chart, plaintiffs disclosed the methodology they intended to use to arrive at their particular calculation for compensatory damages under the CCTA, including a computation of cartons of cigarettes based on the number of packages, the average weight of the packages, and the average weight of a carton of cigarettes. In total, plaintiffs' disclosure revealed that they would be seeking over $100 million dollars for this shipper group alone. The other shipper groups at issue were well known by this point in the litigation (and, as defendant itself has noted, the initial list of shippers at issue shrunk between the time the case was filed and trial).

Plaintiffs' March 3, 2016 disclosure complied with this Court's Order of February 1, 2016, which required only an exemplar calculation. Defendant did not seek reconsideration of that limitation. There is no doubt that UPS possessed the information to replicate this same calculation for each shipper at issue: It knew the shippers, it could easily locate the same types of documents for each, and it knew plaintiffs' general methodology. But more than that, the calculations were ultimately based on known data points: penalty ranges generally set forth in the AOD and statutory schemes at issue, and compensatory damages based on the statutory tax rate imposed on a carton of cigarettes.

While this was a "big" case—insofar as it was anticipated from the outset that the number would be big as it concerns a number of shippers—it was not a particularly complicated one. In addition, several

weeks prior to trial, plaintiffs offered to provide defendant with a full calculation for each shipper. To the extent there was any remaining mystery, agreeing to accept this calculation would have eliminated it. For reasons never explained but assumed to be tactical, defendant declined that offer. Had defendant agreed to receive the calculation, it would have been able to review it, assess prejudice based on late disclosure, and, if necessary, seek an adjournment. This Court is left with the distinct impression that UPS's refusal to accept the calculation was a considered move designed to retain a "cleaner" position on the very motion now under consideration. This Court is, however, also left with the distinct impression that UPS had sufficient information about the methodology to prepare for trial.

The key question is whether there is any real prejudice to UPS from the incomplete March 3, 2016 disclosure combined with the trial disclosure of damages sought. From the opening statement onward UPS expressed outrage that plaintiffs could seek such a significant sum—over $800 million—without a full Rule 26 disclosure. But the Court's February 1, 2016 order had allowed just that, and in any event defendant turned down a full calculation several weeks before trial. UPS ignored the fact that plaintiffs' March 3, 2016 disclosure had left them in no suspense as to the magnitude of the case—it disclosed over $100 million in damages; one could easily assume that the addition of the remaining shipper groups would add significantly to that figure.

But UPS also had some specific complaints as to plaintiffs' pre-trial disclosure compared to their trial

disclosure. Notably, certain assumptions plaintiffs included in their March 3, 2016 disclosure changed. For instance, in calculating compensatory damages (based on lost tax revenue), plaintiffs attempted to estimate how many cartons were at issue. This requires calculation of how many cartons are in a package. It is certainly true that plaintiffs' position on the appropriate weight assumption (per package or per box) changed—but of course, that is only one input, and one which defendant itself could counter at trial with the information it easily had at its disposal. Changes in such facts alone would rarely form a basis for preclusion.

UPS asserts that it was prejudiced in other ways, as well. It argues that plaintiffs' failure to make adequate pre-trial disclosures prevented it from identifying appropriate rebuttal witnesses and testimony. This argument rings hollow. UPS had a detailed disclosure regarding the Arrowhawk Group yet did not identify any rebuttal witnesses or seek to counter even that disclosure with an expert. Had UPS done that, its argument that it was prejudiced by a lack of information regarding other shippers would carry more weight. And in all events, as to one main source of proof—the delivery spreadsheets—UPS knew as of March 3, 2016, that these spreadsheets would be used in connection with the calculations for all shippers. If UPS believed the spreadsheets were unreliable or were being relied upon in an inappropriate manner, it could have called a witness to explain why. It did not do so.

As discussed further below, the Court views UPS as having made deliberate, tactical choices as to how it would approach plaintiffs' damages case: It drew

careful lines to position this preclusion argument as best it could. In the end, the Court is not convinced that UPS lacked adequate pre-trial notice to counter plaintiffs' damages claim, nor is it convinced that UPS suffered any real prejudice. Defendant's motion to preclude based on inadequate Rule 26 damages disclosure is therefore DENIED.

B. Legal Principles Regarding Damages

Plaintiffs seek compensatory damages in connection with their CCTA and PACT Act claims, as well as penalties for violations of the AOD, the PACT Act, and PHL § 1399-ll.

1. Compensatory Damages

Plaintiffs seek compensatory damages under the Pact Act and CCTA for lost tax revenues associated with non-tribal members' receipt of unstamped cigarettes. The facts make it clear that unstamped cigarettes were delivered to such consumers. However, how much lost tax revenues is properly associated with such shipments is open to serious debate.

Defendants argue that to prove entitlement to such damages, plaintiffs bear the burden of proving a causal connection between UPS's transport of cigarettes and lost tax revenues. Plaintiffs argue that such a causal connection is not required but that, in any event, they have shown one.

Plaintiffs are incorrect; a causal connection is required. As described above, lost tax revenues are a type of compensatory damages. Compensatory damages are intended to put a plaintiff back into "a position substantially equivalent to the one that he or she

would have enjoyed had no tort been committed." Anderson Grp., LLC v. City of Saratoga Springs, 805 F.3d 34, 52 (2d Cir. 2015). Plaintiffs "bear[] the burden of proving damages with reasonable certainty[.]" Raishevich v. Foster, 9 F. Supp. 2d 415, 417 (S.D.N.Y. 1998); see also Norcia v. Dieber's Castle Tavern, Ltd., 980 F. Supp. 2d 492, 500 (S.D.N.Y. 2013). Courts "will not permit recovery when the connection between the claimed loss and the tortious act is speculative or uncertain." Anderson, 805 F.3d at 52. This means plaintiffs "bear[] the burden of showing that the[ir] claimed damages are the 'certain result of the wrong.'" Id. at 52-53. That said, when uncertainty in proving damages is caused by the defendant's own wrongful act, "justice and sound public policy alike require" that the defendant "bear the risk of the uncertainty thus produced." Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 565 (1931); see also Whitney v. Citibank, N.A., 782 F.2d 1106, 1118 (2d Cir. 1986) ("When a difficulty faced in calculating damages is attributable to the defendant's misconduct, some uncertainty may be tolerated.").

As discussed above, this Court has found that UPS is responsible for transporting cigarettes to unauthorized recipients. But the determination of compensatory damages is complex: Had UPS not transported such cigarettes, would the recipients of such shipments have purchased stamped cigarettes in New York City and New York State? In other words, have plaintiffs demonstrated that UPS's transport of unstamped cigarettes more likely than not led to a quantifiable loss in tax revenues?

As an initial matter, the evidence strongly supports consumer motivation to purchase unstamped

cigarettes as a method of acquiring lower-cost cigarettes. However, the evidence supports that when prices of cigarettes increase, a nontrivial number of consumers switch to lower-cost tobacco products (such as little cigars); the evidence also supports consumers seeking lower-cost cigarettes going to other states with lower tax rates; and the evidence further supports some consumers faced with higher-cost cigarettes ceasing use altogether.[140]

---

[140] Dr. Nevo opined that—in a "but-for world" where the untaxed cigarettes allegedly shipped by UPS were not available—very few purchasers of unstamped cigarettes would instead have purchased New York-tax-paid cigarettes. (Nevo Decl., DX 613 ¶¶ 11, 12.) Dr. Nevo concluded that the purchasers would have diverted to other untaxed cigarettes and non-cigarette alternatives (such as little cigars, cigars, and smokeless tobacco) while some would also have simply quit altogether. (Id. ¶¶ 38-40.) Dr. Nevo concluded that buyers of the cigarettes at issue have revealed that they are less brand loyal and more price sensitive, and, therefore, are far more likely to purchase untaxed or low-taxed cigarettes or other, lower-cost non-cigarette tobacco products and nicotine products than an average consumer. (Id. ¶ 39.) Dr. Nevo's testimony relied, in part, on the New York Adult Tobacco Survey. This survey was not representative of the consumer base at issue, and the Court considers it to be weak evidence. However, based on this flawed survey, Dr. Nevo opined that mail-order purchasers of cigarettes, such as those here, are 76% more likely than all other smokers to make a special effort to obtain low-priced cigarettes, 308% more likely to report that cigarette prices influenced their use of other non-cigarette tobacco products, 132% more likely to purchase cigarettes from an out-of-state or out-of-country supplier, and 28% more likely to purchase cigarettes from a Native American reservation. (Id. ¶ 55 Table 5.)

Dr. Nevo ultimately estimated that diversion in the but-for world from the untaxed cigarettes at issue to NY-tax-paid cigarettes would be between zero and 5.4%. (Id. ¶ 63.)

On the other hand, even Dr. Nevo agrees that up to 5.4% of package recipients might have purchased stamped/taxed cigarettes instead. This percentage is unduly low. First, it ignores that seizures of packages occur without prior notice—thus, consumers relying on the delivery of unstamped cigarettes to satisfy their addiction would not be able to quickly take the various actions necessary to immediately replace them (for instance, driving to another state or placing an order with another company using a different courier). Dr. Nevo does not consider this issue. Nor does he consider the transportation limitations of New York City dwellers in accessing cars to drive out of state. These timing and location issues are two serious flaws with Dr. Nevo's 5.4% number.

On balance, the Court cannot arrive at a precise number of cigarette cartons consumers would have purchased, but 50% is a reasonable number based on the totality of facts. The Court therefore finds plaintiffs are entitled to compensatory damages in the amount of 50% of Cartons (defined below) shipped by the Liability Shippers. Plaintiffs shall submit to the Court for its review separate compensatory damages calculations for plaintiffs successful claims under the PACT Act and CCTA, in accordance with the findings and timeframes detailed by the Court in this Opinion.

2. Penalties

The AOD and each of the statutory schemes provide for the assessment of penalties. In general, civil penalties are designed in some measure "to punish culpable individuals" and not "simply to extract compensation or restore the status quo." Tull v. United States, 481 U.S. 412, 422 (1987); accord Johnson v.

SEC, 87 F.3d 484, 492 (D.C. Cir. 1996) ("[T]he ordinary, contemporary, common meaning of the word 'penalty,' [is] a sanction imposed by the government for unlawful or proscribed conduct which goes beyond remedying the damage caused to the harmed party."). Penalties are also designed to "deter future violations" and "prevent[] [the conduct's] recurrence." Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 185-86, 188 (2000); see also id. (explaining that remedies, such as civil penalties, encourage defendants to discontinue violations that were ongoing at the time of the complaint and to deter defendants from committing future violations even if they can afford to compensate injured plaintiffs).

There is an "enormous range of penalties available to the district court in the usual civil penalty case." United States v. J.B. Williams Co., Inc., 498 F.2d 414, 439 (2d Cir. 1974); see also id. at 438 (A district court may properly consider "a number of factors" in determining the size of a civil penalty, "including the good or bad faith of the defendants, the injury to the public, and the defendants' ability to pay.") The Second Circuit has articulated the factors a court should consider as follows: (1) the level of the defendant's culpability, (2) the public harm caused by the violations, (3) the defendant's profits from the violations, and (4) the defendant's ability to pay a fine. Advance Pharm., Inc. v. United States, 391 F.3d 377, 399 (2d Cir. 2004).[141] In

[141] Courts also have recognized that it is appropriate to consider the actions of plaintiffs when assessing penalties. See Milhelm Attea, 2012 WL 3579568, at *33 ("[T]he Court believes that a penalty award in this case should take some account of the fact that state tax authorities actively acquiesced in the defendants'

Advance Pharmaceuticals, the United States brought a civil enforcement action for statutory violations against defendants, a pharmaceutical manufacturer of pseudoephedrine tablets, and its principals, for failure to report shipments as required by statute. Failure to comply carried a statutory fine of up to $10,000 per violation. Id. at 383. The alleged violations related to nine customers and 159 shipments. Id. at 385. Testimony at trial supported gross profits on such shipments in the amount of between $2,918,361 and $5,076,000. Id. at 389, 400. The district court imposed a monetary penalty of $2 million; this exceeded the amount sought by the government by $250,000. The Second Circuit noted that the evidence supported a fine (based on the number of proven violations and the maximum per penalty amount) of $2,490,000. Id. at 399. The Second Circuit considered the four factors

---

business model for years, despite actual knowledge that large amounts of untaxed cigarettes were being sold and distributed to non-Native Americans as a result of the forbearance regime."); United States v. White-Sun Cleaners Corp., No. 09-cv-2484, 2011 WL 1322266, at *9 (E.D.N.Y. Mar. 9, 2011) (one of the factors a court looks at when determining the amount of damages under the Resource Conservation and Recovery Act is "the government's conduct"); United States ex rel. Bunk v. Birkart Globistics GMBH & Co., Nos. 02-cv-1168, 07-cv-1198, 2010 WL 4688977, at *8 n.14 (E.D. Va. Nov. 10, 2010) ("[T]he extent of the government's knowledge and its conduct in light of what it knew remains relevant considerations to the Court in considering an appropriate civil penalty."). The Court takes plaintiffs' conduct into account when assessing appropriate penalties here. However, the Court notes that UPS is not in the position of the plaintiffs in Milhelm Attea. UPS is a carriage service that should never have expected forbearance to apply to its actions.

discussed above and affirmed the award despite defendants' argument that the business could not support the amount. Id. at 400.

In Tull, the defendant was accused of violating the Clean Water Act. 481 U.S. at 414-15. Violations of that statute carried penalties of up to $10,000 per day during the period of violation. Id. at 414. Despite the fact that the defendant demonstrated that he had realized no profits from his actions, the district court imposed a fine of $35,000. Id. at 415. The district court stated that the purpose of such a penalty was not simply disgorgement of profits, but also punishment. Id. at 423. Tull argued on appeal that the district court had inappropriately denied him the right to a jury trial on liability as well as the amount of penalty. The U.S. Supreme Court found that while he was entitled to a jury trial on liability, Congress had fixed the amount of penalty and delegated that determination to trial judges. Id. at 426. "In this case," the Court explained, "highly discretionary calculations that take into account multiple factors are necessary in order to set civil penalties under the Clean Water Act. These are the kind of calculations traditionally performed by judges." Id. (citing Albermarle Paper Co. v. Moody, 422 U.S. 405, 44243 (1975) (Rehnquist, J., concurring)).

In Laidlaw, the Supreme Court reiterated the basic principle that the district court has wide discretion to fashion appropriate relief. See 528 U.S. at 192. It further stated that when choosing an appropriate penalty—whether a fine, injunctive relief, both, or neither—a court "should aim to ensure 'the framing of relief no broader than required by the precise facts.'"

Id. at 193 (citing Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 222 (1974)).

The facts before this Court indicate that significant penalties are appropriate. While the precise amount shall be calculated and considered against constitutional principles (as discussed below) in a separate order, the Court discusses the basic factors supporting the imposition of penalties here.

First, the Court considers the facts above to demonstrate a high level of culpability by UPS. Numerous separate acts by numerous UPS employees allowed vast quantities of unstamped cigarette shipments to be delivered to unauthorized recipients in New York. The New York Executive Branch and legislature, along with Congress, had specifically attempted to prevent this with the AOD, the PACT Act (which should have incented compliance with the AOD), the CCTA, and PHL § 1399-ll. UPS largely relied on its size and weak internal procedures to excuse blatantly culpable conduct. But there were many, many people within UPS who consciously avoided the truth, for years. Even so, the Court also recognizes that UPS has now—since the lawsuit was filed—regained its footing. UPS now approaches compliance with the AOD and the various statutory schemes with renewed vigor and additional processes and procedures.

The second factor is the public harm caused by the conduct. The State and federal legislatures have deemed transport of cigarettes as a public health issue, and the effects of cigarette usage are well known. However, it is also the case that UPS is not the cigarette manufacturer or seller—it is a transporter.

Thus, it bears a lower level of culpability for the impact on public health than other entities. In addition, it is unclear whether, in the absence of UPS's transport of cigarettes, the same public health effects would still be felt. The Court cannot speculate as to this. The Court focuses UPS's unlawful enablement of a public health impact that the political branches have proscribed and the costs of which New Yorkers must bear.

The third factor—defendant's profits from the violations—suggests a low amount of penalties. UPS has focused on its limited revenues and profits from its transport of the shipments at issue. But these are not the only relevant metrics. It is also the case that maintaining customers helps UPS's overall competitive position; if there are many UPS routes in an area, it is reasonable to infer that this assists with the acquisition of business through network effects and economies of scale.

Finally, the Court weighs UPS's ability to pay a fine. UPS is a large company with significant assets. Its financial statements are public record. Not only can it handle a hefty fine, only a hefty fine will have the impact on such a large entity to capture the attention of the highest executives in the company—executives who then, in a rational economic move, will cause changes in practice and procedures to be strictly maintained. A fine that is in line with only the profits and revenues associated with the conduct would not have this deterrent impact.

C. Constitutional/Conscionability Issues with Penalties

One of UPS's principal arguments against the penalties plaintiffs seek concerns the aggregate amount. According to UPS, the total amount in penalties sought by plaintiffs—amounting to some $800 million—significantly exceeds revenue from the shipments at issue and, therefore, its imposition would violate constitutional prohibitions on excessive fines as well as case law limiting civil penalties. UPS cites United States v. Bajakajian, 524 U.S. 321, 334 (1998), and BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574, 581-83 (1996), for its arguments that the Eighth Amendment's requirement of proportionality and the Fifth Amendment's due process guarantee prohibit this Court from imposing the amount plaintiffs seek. However, neither these nor other cases regarding penalties impose per se limits on the amount a court may impose.

The Eighth Amendment provides, in relevant part, that "[e]xcessive bail shall not be required, nor excessive fines imposed[.]" U.S. Const. amend. VIII; Bajakajian, 524 U.S. at 327. In Bajakajian, the Supreme Court observed that it had never before applied the Excessive Fines Clause. Id. It had, however, previously determined that the word "fine" as used in this clause means "'payment to a sovereign as punishment for some offense.'" Id. at 327-28 (quoting Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 265 (1989)). "The Excessive Fines Clause thus 'limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense." Id. at 328 (quoting Austin v. United States, 509 U.S. 602, 609-10 (1993)). The "touchstone"

of the constitutional inquiry is proportionality. Id. at 335. "The amount of the [fine] must bear some relationship to the gravity of the offense that it is designed to punish." Id. at 334. The Court held that a punitive fine "violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." Id.

In Bajakajian, the defendant was charged with transporting more than $10,000 in currency and violating a reporting requirement when the defendant attempted to board a flight with $357,144. Id. at 324. The defendant pleaded guilty, and the government sought forfeiture of the entire amount. At sentencing, the district court found that while the entire amount was subject to forfeiture under the applicable statute, to impose forfeiture would constitute an excessive fine (it was important to the court's decision in this regard that the amounts at issue were not alleged to be proceeds of criminal activity). The court imposed forfeiture in the amount of $15,000, the government appealed, and the Ninth Circuit affirmed. Id. at 326.

The U.S. Supreme Court first reasoned that forfeitures were a penalty and constituted a fine, bringing them under the Excessive Fine Clause of the Eighth Amendment. It then turned to the analysis of proportionality. The Court held that a proportional fine is one that bears "some relationship to the gravity of the offense that it is designed to punish." Id. at 354. The Court set forth the standard courts should apply to fines to determine proportionality. It determined that "[e]xcessive means surpassing the usual, the proper, or a normal measure of proportion." Id. at 335.

The Court further held that to determine whether a fine is proper or normal, courts should look first to any legislative pronouncement on the issue because "judgments about the appropriate punishment for an offense belong in the first instance to the legislature." Id. at 336 (citing Solem v. Helm, 463 U.S. 277, 290 (1983) ("Reviewing courts . . . should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes."), and Gore v. United States, 357 U.S. 386, 393 (1958) ("Whatever views may be entertained regarding severity of punishment, . . . these are peculiarly questions of legislative policy.")). Second, the Court held that judicial determinations regarding the gravity of a particular offense will be "inherently imprecise." Bajakajian, 524 U.S. at 336. In light of these two principles, the Court cautioned "against requiring strict proportionality between the amount of the punitive [fine] and the gravity of a criminal offense[.]" Id. The Court therefore "adopt[ed] the standard of gross disproportionality articulated in [its] Cruel and Unusual Punishment clause precedents." Id. (citing Solem, 463 U.S. at 288, and Rummel v. Estelle, 445 U.S. 263, 271 (1980)).

Precedent therefore instructs courts to look at the amount of the fine compared to the gravity of the offense, a deeply factual question. In Bajakajian, the Supreme Court found that forfeiture of the entire $357,144 would violate the Excessive Fines Clause because the defendant's crime was solely a reporting offense and unrelated to any other illegal activities. Bajakajian, 524 U.S. at 337. The Court further noted that under the Sentencing Guidelines, the maximum fine for such an offense was $5,000. Id. at 338. The

Court next examined the harm caused by the offense and found that in the case before it, the harm was minimal. Id. at 339. Finally, the Court turned to whether any applicable statutes provided guidance; it traced the history of early forfeiture statutes for similar crimes and determined that their original remedial purpose was reimbursement of the government's losses due to evasion of custom duties. Id. at 341-43. In the end, the Supreme Court agreed that forfeiture of the entire amount was unwarranted and affirmed forfeiture in the lower amount. Id. at 344.

Bajakajian guides this Court's analysis. The Supreme Court instructs that the aggregate penalties imposed by the various statutory schemes are properly analyzed according to the Eighth Amendment proportionality standard. In this regard, the Court observes the following here: (1) The AOD as well as each of the statutory schemes at issue are directed to maintaining and furthering important social interests, namely the health of the public and preventing the costs associated with cigarette-related disease; and (2) taxation schemes are designed to further these interests and to raise revenue to offset associated costs. Thus, the basic rationale underpinning the AOD and statutes points to serious and important public interests. The Court further observes that, as discussed in more detail below, the AOD and statutory schemes anticipated the possibility of imposing multiple layers of penalties. For instance, the PACT Act provides an exemption that is contingent: If the AOD is not honored, then the exemption is eliminated. It was understood by Congress that this would expose an entity to AOD penalties, PACT Act penalties, and

PHL § 1399-ll penalties. This was a legislative judgment. See Bajakajian, 524 U.S. at 335. Thus, layering penalties reflects congressional intent regarding appropriate punishment. Bajakajian dictates serious consideration of this fact.

Nonetheless, the Court must examine whether, in the aggregate, the penalties become grossly disproportionate to remediation or deterrence under the Eighth Amendment. In this regard, the Court turns to the record evidence regarding the societal interests in preventing contraband cigarette trafficking, and the associated health costs of cigarette use. The trial declaration and testimony of Dr. Angell is instructive. As discussed above, Dr. Angell testified that tobacco use kills approximately 28,200 New Yorkers each year, which exceeds the number of deaths caused by alcohol, motor vehicle accidents, firearms, toxic agents, and unsafe sexual behaviors combined. (Angell Aff., PX 628 ¶ 5.) Dr. Angell also testified that each year, tobacco-related healthcare costs New Yorkers $10.4 billion. (Id. ¶ 7.) Dr. Angell further testified that "tobacco users are price sensitive, and higher taxes on tobacco products decrease the demand for the affected products." (Id. ¶ 10.)

Thus far, the Court has focused on the defendant's Eighth Amendment argument. As mentioned, defendant also relies on BMW for the proposition that imposition of the amount of penalties plaintiffs seek would violate their rights under the Fifth Amendment. BMW involved punitive damages—it did not concern the imposition of contractually agreed-upon or statutory penalties. 517 U.S. at 562. This ground alone distinguishes the case from that before this Court. But the facts of BMW are also instructive. In that case,

the plaintiff—Gore—had purchased what he believed to be a new BMW; he later learned that it had been repainted. Id. at 563. At trial, BMW acknowledged that it did not advise its dealers (and hence their customers) of pre-delivery damage to new cars when the cost of repairs was less than 3% of the suggested retail price. Id. at 563-64. The jury awarded $4,000 in compensatory damages and $4 million in punitive damages. Id. at 565. Defendant challenged the punitive damage award as grossly excessive and in violation of the Due Process Clause. Id. The state supreme court reduced the award to $2 million but found no due process violation. Id. at 567. The Supreme Court granted certiorari to review if and when a punitive damages award could violate constitutional due process. BMW of N. Am., Inc. v. Gore, 513 U.S. 1125 (1995).

The Supreme Court based its analysis on the "[e]lementary notion[] of fairness enshrined in our constitutional jurisprudence" that a defendant must receive fair notice "not only of conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." BMW, 517 U.S. at 574 (footnote omitted). Three factors led the Court to conclude that the award was grossly excessive and violated due process: the degree of reprehensibility of nondisclosure; the ratio of the punitive damage award to the harm or potential harm suffered by the plaintiff; and the difference between the punitive damage award and the civil penalties authorized or imposed in comparable cases. Id. at 575-85. The Court noted that the "most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of a defendant's conduct." Id. at 575. The Court cited its statement in an 1852 decision that

"exemplary damages imposed on a defendant should reflect 'the enormity of his offense.'" Id. (quoting Day v. Woodworth, 13 How. 363, 371 (1852)). "This principle reflects the accepted view that some wrongs are more blameworthy than others." Id. In analyzing this factor, the Court found that "none of the aggravating factors associated with particularly reprehensible conduct is present." Id. at 576.

The Court then turned to the most commonly cited "indicium of an unreasonable excessive punitive damages award:" its ratio to the actual harm inflicted on the plaintiff. Id. at 580. Based on its determination regarding the degree of harm suffered, the Court noted that the award of $2 million was more than 500 times the amount of compensatory damages determined by the jury. Id. at 582. The Court stated that "we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula[.]" Id. Finally, the Court turned to statutory schemes that provided for civil penalties for comparable conduct. Id. at 585. The Court noted that the equivalent statutory violation would be for a deceptive trade practice, carrying a maximum fine of $2,000 in the state in which the action was commenced—and penalties ranging from maximums of $5,000 to $10,000 in other states. Based on the totality of specific facts before the Court, it held that the award was in fact constitutionally excessive, and it reversed and remanded the case.

The BMW case is distinguishable from the case before this Court on a number of bases. First, unlike BMW, this case does not present any real notice issues. While defendant has asserted a lack of notice by virtue of a failure to comply with Rule 26, as discussed

above the Court has found that argument unpersuasive. Here, the face of the AOD and the statutes themselves set forth quite clearly the penalties that may be imposed for violations. But in addition, the harm in BMW was of a very different nature. BMW was not a class action; it was a single suit by a single plaintiff. The harm that he suffered does not compare to the public interests harmed by assisting in transporting contraband cigarettes on the scale at issue here. See BMW, 517 U.S. at 585-86. In short, while the principles of BMW are useful to bear in mind, the outcome of that case does not dictate the Court's determination as to the appropriate amount of penalties here.

As discussed below, the Court will see the quantum of penalties once it receives the information it directs at the conclusion of this Opinion.

D. The Penalty Provisions at Issue Here

As stated, each of the AOD, the PACT Act, PHL § 1399-ll, and the CCTA provide for the imposition of penalties. In this regard, ¶ 42 of the AOD provides for a $1,000 penalty per violation; and the PACT Act provides that a common carrier that violates the statute is subject to a penalty not to exceed $2,500 for a "first violation," and $5,000 for "any violation within 1 year of a prior violation." 15 U.S.C. § 377(b)(1)(B). The PACT Act explicitly provides for the imposition of a civil penalty that is "in addition to . . . any other damages, equitable relief, or injunctive relief awarded by the court . . . ." Id. § 377(b)(2).

PHL § 1399-ll provides for penalties in an amount not to exceed the greater of (a) $5,000 for "each such violation;" or $100 for "each pack of cigarettes

shipped, caused to be shipped or transported in violation[.]" PHL § 1399-ll(5).[142] While both the State and the City may recover civil penalties under this provision, "no person shall be required to pay civil penalties to both the state and a political subdivision with respect to the same violation of this section." Id. § 1399-ll(6). That is, PHL § 1399-ll prohibits duplicative damages.

The CCTA provides that a State or local government may bring an action to obtain appropriate relief, including civil penalties. The CCTA does not specify the amount of penalties, nor whether they are to be assessed on a per-violation basis or otherwise. The CCTA does, however, provide that such remedy is in addition to those also available under federal, State or local law. 18 U.S.C. § 2346(b)(1)-(3).[143]

E. Calculation of Penalties[144]

The Court turns to the complicated question of determining the appropriate penalties to be imposed for

---

[142] The State and City seek penalties only at the rate provided for prior to the amendment of the statute in 2013. See New York v. United Parcel Serv., No. 15-cv-1136, 2016 WL 4094707, at *2 n.2. (S.D.N.Y. June 10, 2016).

[143] Certain cases have suggested that that the Court may look to the analogous penalty provisions of the PACT Act. See, e.g., Cnty. of Suffolk v. Golden Feather Smoke Shop, Inc., No. 09-cv-162, 2016 U.S. Dist. LEXIS 109176 (E.D.N.Y. Aug. 16, 2016); City of New York v. Golden Feather Smoke Shop, Inc., No. 08-cv-3966, 2013 WL 5502954 (E.D.N.Y. Oct. 1, 2013).

[144] UPS has vigorously argued that the Court should not consider what has been marked for identification as "Court Ex. 1." That exhibit was presented by plaintiffs during opening arguments and sets forth a calculation by claim of penalties sought.

the violations of the AOD and various statutory schemes. The facts and case law indicate a number of considerations.

1. Defining a Package

With respect to the AOD and each of the statutes, plaintiffs seek the imposition of penalties on a "per package" basis. To determine what packages are counted with regard to each shipper, plaintiffs referred at trial—as they did in their March 3, 2016 disclosure—to UPS's delivery spreadsheets: They sort these spreadsheets by account number and add up the packages shipped. Neither the plaintiffs nor UPS presented witness testimony with regard to the delivery spreadsheets. Rather, they each seek to have the Court draw inferences from information on the face of the spreadsheets themselves. For plaintiffs, the exercise is straightforward: All packages are summed and duplications are eliminated. The Court views this approach as generally sensible, with the caveats described below.

For its part, UPS argues that simply counting packages captures many categories of packages that should be excluded. According to UPS, because plaintiffs are only entitled to count packages containing cigarettes, counting letter-sized envelopes makes no sense (Native Wholesale, for instance, shipped a number of these). Similarly, according to UPS, since the

---

The Court has not relied on Court Ex. 1. Therefore, the arguments made to preclude its admission into evidence are irrelevant. As discussed herein, the Court ultimately determines that the appropriate methodology is to simply add up the packages at issue consistent with the instructions provided by the Court herein.

evidence at trial supports a carton (of cigarettes or little cigars) as weighing approximately one pound, packages weighing less than a pound should also not be included. The Court agrees with both of these arguments. The spreadsheets are in Excel format and are searchable, and it is straightforward to exclude both of these categories from the penalties assessed below (along with duplicative entries).

UPS further argues that packages billed to third parties or billed "collect" should be excluded. The Court disagrees. There is no evidence in the record that the identity of the billed party made it less likely that cigarettes would be included in the package. Indeed, in certain instances involving Seneca Promotions and Native Wholesale Supply, for instance, the billed third party made it more likely that cigarettes would contain cigarettes. The Court does not require such packages to be excluded.

UPS also argues that plaintiffs have included packages that have been shipped "to" the shipper, rather than those tendered by the shipper. From the Court's review of the spreadsheets, it appears that there may be instances of this. As the penalties in this matter are assessed based on what shippers tendered to UPS, only packages tendered by the Liability Shippers should be included.

UPS next argues that plaintiffs have inappropriately included packages returned to the shipper as undeliverable; the Court does not view that fact as reducing UPS's liability for having transported the package in the first instance. Once a package containing cigarettes is on its way to an unauthorized recipient—and UPS knows that—UPS has violated the

AOD and statutes at issue. Whether that package is ultimately returned or not is irrelevant. Finally, UPS argues that "voided" packages should also be excluded. There is no evidence in the record as to what a "voided" package is—it could be a package tendered for shipment and sent out for delivery, or not. Plaintiffs have proffered the spreadsheets as evidence of shipments, and certainly the weight of the evidence supports that the packages contained on such spreadsheets were tendered for delivery. UPS has not countered this with specific evidence. Accordingly, the Court finds that the reasonable inference to be drawn from the "voided" packages is that they were tendered for delivery and therefore are countable.

The Court's determinations above define what constitutes a "Package" for purposes of the imposition of penalties. Having determined what constitutes a Package, the Court now turns to its method for determining the contents therein.

2. Package Contents

The Court next turns to the rather thorny question regarding package contents. Throughout this matter, UPS has argued that neither it—nor plaintiffs—can know the contents of a shipper's package. The Court makes its findings based on a reasonable approximation based on the preponderance of the evidence. There is ample evidence as to each Liability Shipper—either direct or circumstantial—to support the fact that packages contained cigarettes. The Court has further set forth the reasonable approximation as to the particular percentage of its shipments

that contained cigarettes versus something else. Additionally, the Court has set forth its factual and legal findings regarding UPS's knowledge above.

The Court has considered what constitutes a reasonable percentage of package contents that included cigarettes separately for each shipper, based on the facts and circumstances relevant to that shipper.

3. Reasonable Approximation of Contents

It is well established that once the existence of damages is determined, a fact-finder may make a reasonable approximation of their amount. Tractebel Energy Mktg. v. AEP Power Mktg., Inc., 487 F3d 89, 110 (2d Cir. 2007). The reasonable approximation of package contents here is done for this purpose.

Under New York law, "when it is certain that damages have been caused by a breach of contract, and the only uncertainty is as to their amount, there can rarely be good reason for refusing, on account of such uncertainty, any damages whatever for the breach." Id. While a fact-finder "may not base its award on speculation or guesswork," Raishevich v. Foster, 247 F.3d 337, 343 (2d Cir. 2001), a plaintiff "need only show a stable foundation for a reasonable estimate of the damage incurred as a result of the breach," Tractebel, 487 F.3d at 110 (internal quotation marks omitted).

A reasonable approximation of uncertain data assisting in calculating damages is especially appropriate when a defendant's wrongdoing contributed significantly to that uncertainty. "'Any other rule would enable the wrongdoer to profit by his wrongdoing . . . . It would be an inducement to make wrongdoing so effec-

tive and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain.'" J. Truett Payne Co. v. Chrysler Motor Corp., 451 U.S. 557, 566 (1981) (quoting Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264-65 (1946)). In these circumstances, a plaintiff has "no obligation to offer a mathematically precise formula as to the amount of damages." Raishevich, 247 F.3d at 343. Rather, the fact-finder may determine the amount of damages "within a certain range," and when damages are "at some ascertainable amount below an upper limit," that upper limit "will be taken as the proper amount." Id. (citing Gratz v. Claughton, 187 F.2d 46, 51-52 (2d Cir. 1951)).

UPS's failure to conduct audits in compliance with its AOD obligations prevents precise knowledge of the proportion of packages containing cigarettes and, as a result, precludes a more certain quantification of damages. The Court's existing authority to make a reasonable approximation of damages is therefore bolstered by the fact that UPS's own wrongdoing contributed substantially to any uncertainty regarding the specific amount of damages in this case. Thus, the Court relies upon, inter alia, evidence of tracer inquiries, driver reports, witness testimony, and the audits that were conducted to make reasonable approximations of damages arising from UPS's violations as to each Liability Shipper.

4. Defining a Carton

In order to determine compensatory damages under the PACT Act and CCTA, this Court must determine how many cartons of unstamped cigarettes UPS delivered. The Court has already found that 50% of

this number, multiplied by State and City taxes, constitutes the amount of lost tax revenues.

Based upon the evidence, the Court defines the term "Cartons" as follows: A carton of cigarettes weighs approximately one pound. The Court may infer the actual weight of a Package based on information evident from the face of the delivery spreadsheets—under the column "actual weight." In the instances where UPS did not provide "actual weight" information, one pound should be subtracted from a Package's "billed weight."[145] As the Court has noted, a Package's "billed weight" was typically the Package's actual weight rounded up to the nearest whole number. Any Packages weighing less than a pound should not be included because, according to the Court's factual determinations, such Packages could not have included cigarettes and therefore could not constitute lost tax revenues.

The total actual weight for all Packages should be summed and divided by one (based on the Court's finding that a Carton of cigarettes weights approximately one pound). The resulting number is the number of Cartons. The assessment of 50% of lost tax revenues should be based on this number.

5. The AOD

The violations of the AOD for which plaintiffs seek the imposition of penalties are different from the violations of the statutory schemes. The AOD violations

[145] Subtracting a pound from the Package's "billed weight" eliminates the effect of rounding up, and provides a close (and, if anything, underestimated) approximation of the Package's "actual weight."

at issue with regard to penalties concern the failure to audit (while plaintiffs have proven other violations, as mentioned above, they seek penalties only for violations of the audit obligation). This necessarily means that the amount imposed with respect to the AOD violations is not duplicative of other penalties.

In terms of the AOD audit violations, the Court relies on its findings of fact. As to each shipper, the Court has found the date not later than which there was a reasonable basis to believe that a shipper was tendering cigarettes. This is the "start date" for the imposition of penalties. The next issue relates to whether the violations are as to each package tendered for transport that was not audited, or something else. As the Court has also indicated above, it is reasonable to interpret a violation of the audit obligation as each instance in which a Package (as the Court has defined that term above) was tendered to UPS following the specified start date.

The AOD provides for an assessment of $1,000 per violation; this is referred to in the AOD as a "stipulated" penalty. The aggregate penalty for which UPS is liable under the AOD is the total number of Packages tendered. The parties shall jointly confer on the number of such Packages based on the date ranges set forth in the Court's findings.

6. The PACT Act and PHL § 1399-ll

Plaintiffs also seek the imposition of penalties for violations of the PACT Act and PHL § 1399-ll. The Court has already determined as a factual matter that as of December 1, 2010, UPS was no longer exempt from the PACT Act, and therefore no longer exempt

from PHL § 1399-ll; this lasted until February 18, 2015.

Both the PACT Act and PHL § 1399-ll limit penalties to amounts "[n]ot to exceed" specified "per violation" amounts. For the PACT Act, that amount is $2,500 for the first violation and $5,000 for any violation within a year of another violation; for PHL § 1399-ll, the amount shall not exceed $5,000 for each violation or $100 per pack of cigarettes. Thus, while the statutes plainly allow for the imposition of penalties on a per-violation basis, penalties need not be assessed on such a basis. The Court may not impose more than such a calculation allows, but it is not required to simply mechanically apply such a methodology. This is sensible, as the principles outlined above require the Court to assess whether the aggregate penalty imposed on a defendant appropriately balances the various punitive, remedial, deterrence, and proportionality concerns. Such balancing cannot be done simply by taking the appropriate number of Packages and multiplying them by the possible number.

Using the Court's definition of Package above, as well as the applicable date range, the Court directs the parties to determine the number of Packages that fall within those parameters. The Court shall then, in a separate order, assess what the amount of an appropriate penalty is (using that calculation as the outside

parameters allowed by statute and considering any constitutional concerns).[146]

7. The CCTA

The CCTA is a separate statutory scheme from those discussed above. It contains a mandatory provision that one who knowingly transports contraband cigarettes "shall be fined."[147] 18 U.S.C. § 2344. The statute does not define the amount of any such fine, but in assessing the amount of any fine, the Court is mindful of the proportionality limitations set forth in Bajakajian as well as the other penalties already imposed. The Court has already stated its intention to impose penalties on a per-violation basis pursuant the PACT Act and PHL § 1399-ll. The amount of such penalties shall be determined once the parties have provided the Court with the directed information. Under these circumstances, there does not seem to be any particular advantage to assessing a CCTA penalty based on the same "per Package metric." Certainly, the number of Packages plays a role in the assessment of any penalties. But in connection with the CCTA,

---

[146] PHL § 1399-ll refers to "to ship[ping] or caus[ing] to be shipped any cigarettes . . . ." See § 1399-ll(1), (2). The AOD defines "Prohibited Shipment" as "any package containing Cigarettes tendered to UPS where the shipment, delivery or packaging of such Cigarettes would violate Public Health Law § 1399-ll." (AOD, DX 23 ¶ 16(H)).

[147] The term "contraband cigarettes" is defined to include a quantity in excess of 10,000 cigarettes which bear no evidence of the payment of applicable taxes. 18 U.S.C. § 2341(2). In its findings of fact above, the Court has found that UPS transported more than 10,000 cigarettes. This occurred in single shipments transported on behalf of Jacob Manufacturing/Tobacco, as well as through aggregation of the thousands of packages shipped that contained cigarettes.

the Court balances the mandatory requirement that some penalty be imposed (the statute dictates that a violator "shall be fined," 18 U.S.C. § 2344), against the purpose of an additional penalty.

There are, of course, statutory differences. The CCTA is its own statutory scheme with its own history and purpose. It is the statute that would allow for compensatory damages. That leaves the Court with the question of whether an additional fine would serve any additional and separate remedial purpose. If not, it would be hard to justify its imposition. The fact that a statute allows for a fine, and indeed requires one, does not dictate that it need be as large as the others. The CCTA more or less seeks to punish the same conduct, for the same reasons, as the other statutes.

The Court has directed the parties to provide certain information in order to issue its order on penalties. When that information is provided, the Court will be able to assess the appropriate amount of a separate fine, if any, for violations of the CCTA.

XXI. INJUNCTIVE RELIEF

In addition to compensatory damages and penalties, plaintiffs seek the imposition of injunctive relief. Injunctive relief is available for violations of the CCTA, the PACT Act, and PHL § 1399-ll (and N.Y. Exec. Law § 63(12)).

The PACT Act provides that "[a] State, through its attorney general, or a local government or Indian tribe that levies a tax subject to [15 U.S.C.] § 376a(a)(3)[,] through its chief law enforcement officer, may bring an action in a United States district court to prevent and restrain violations of this chapter [15 USCS §§ 375 et seq.] by any person or to obtain any other

appropriate relief from any person for violations of this chapter, including civil penalties, money damages, and injunctive or other equitable relief." 15 U.S.C. § 378(c).

PHL § 1399-ll(6) provides that "[t]he attorney general [and corporation counsel of a locality imposing a cigarette tax] may bring an action to recover the civil penalties provided by subdivision five of this section and for such other relief as may be deemed necessary."

N.Y. Exec. Law § 63(12) provides that the State Attorney General may seek to hold accountable any person engaging in "repeated fraudulent or illegal acts" or who "otherwise demonstrate[s] persistent fraud or illegality in the carrying on, conducting or transaction of business[.]" Upon finding a violation of § 63(12), the Attorney General may seek, inter alia, an "order enjoining the continuance of such business activity or of any fraudulent or illegal acts, directing restitution and damages[.]" Id.

The CCTA provides that a State or local government may bring an action "to prevent and restrain violations of this chapter by any person (or by any person controlling such person)" and may obtain "any other appropriate relief for violations of this chapter . . . including . . . injunctive or other equitable relief." 18 U.S.C. § 2346(b). These remedies provide State and local governments with "broad remedial provisions." Golden Feather, 2013 WL 318709 at *22.

An injunction prohibiting a statutory violation is warranted only when there is a likelihood that, unless enjoined, the violations will continue. S.E.C. v. First Jersey Sec., Inc., 101 F.3d 1450, 1477 (2d Cir. 1996); United States v. Carson, 52 F.3d 1173, 1184 (2d Cir.

1995) (A permanent injunction requires a "reasonable likelihood that the wrong will be repeated.").

Plaintiffs have persuasively shown that UPS engaged in repeated violations of the AOD and various statutes by failing to audit and knowingly transporting cigarettes. However, there was significant evidence presented by UPS that, in particular, over the past two years, UPS has implemented oversight processes that should prevent repetition. UPS has demonstrated that it is more likely than not that it is far more capable today of affirmatively working to identify and take action to ensure it honors the AOD, and with regard to non-compliant shippers. It has shown by a preponderance of the evidence that a sufficient number of future violations are unlikely to support the rather harsh imposition of injunctive relief or a monitor. In addition, it is likely that this lawsuit, including the resulting reputational and financial costs, provide standalone economic motivation for UPS to proceed more carefully in the future.

On the facts before the Court, injunctive relief and appointment of a monitor are unwarranted.[148]

XXII. CONCLUSION

For the reasons set forth above, the Court finds liability on each of plaintiffs' causes of action. The Court requires the parties to submit the numbers of

---

[148] The Court notes that this is not a situation in which a private plaintiff would remain in the dark regarding future violations. Plaintiffs here are armed with various enforcement powers that allow them to obtain information from UPS and others to identify compliance issues. Should UPS be found to have again violated the AOD and various statutory schemes, imposition of injunctive relief could be imposed at that time.

Packages and Cartons as defined above and according to the Court's findings and rulings. Following receipt of such information, the Court shall issue a final order as to damages and penalty. The parties shall submit the above information not later than two weeks from the date of this Opinion & Order, i.e., **Friday, April 7, 2017**.

SO ORDERED.

Dated: New York, New York
May 25, 2017

/s/ Katherine B. Forrest
KATHERINE B. FORREST
United States District Judge

* * *

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------- X

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

Plaintiffs,

- v -

UNITED PARCEL SERVICE, INC.,

Defendant.

15-cv-1136 (KBF)

OPINION & ORDER

---------- X

KATHERINE B. FORREST, District Judge:

This case was tried to the bench on September 19, 2016, through September 29, 2016. Following the trial, on March 24, 2017, the Court issued a preliminary Opinion & Order setting forth, inter alia, its findings of fact and conclusions of law, and on May 25, 2017, the Court issued a Corrected Opinion & Order (the "Liability Opinion"). (See ECF Nos. 526, 534.) The Court found defendant United Parcel Service, Inc. ("UPS") liable on each claim asserted against it. Plaintiffs New York State and New York City are entitled to compensatory damages and penalties. The

sole remaining question is the quantum to be awarded.

The preliminary Opinion & Order ordered the parties to submit certain information to the Court not later than April 7, 2017. (Id.) Having received submissions from the parties, (see ECF Nos. 530, 531), the Court now sets forth its determination of compensatory damages and penalties awarded, as discussed below, and directs that final judgment be entered against defendant UPS.

In this case, significant penalties are appropriate given the public harm specifically sought to be addressed by the statutes at issue and given the egregious and prolonged nature of UPS's conduct. The Court is also troubled by UPS's consistent unwillingness to acknowledge its errors; UPS has persisted in claiming it did nothing wrong. While it is of course UPS's right to take this position, the Court appropriately considers this in determining what quantum of damages and penalties are appropriate.

Furthermore, in light of all the relevant facts, significant penalties are needed to deter future conduct. The Court finds that only significant penalties will have a sufficient impact such that the highest levels of executives at UPS will understand the cost of UPS's conduct and take effective action to prevent such conduct in the future. The Court is convinced that modest penalties would not make a sufficient corporate impact on UPS as a whole. Given what this case has demonstrated about UPS's size, complexity, and lack of willingness to change unless compelled to do so, a very significant award is necessary. Deterrence is a significant consideration here.

In making its damages and penalties determination, the Court is mindful of the constitutional principles requiring proportionality, as discussed in the Liability Opinion. The Court carefully considered whether, in the aggregate, the damages and penalties awarded are grossly disproportionate to remediation or deterrence under the Eighth Amendment. The Court concludes that the measure of damages and penalties awarded is fair and appropriate and comports with all applicable constitutional requirements, as discussed below.

I. INTRODUCTION

As detailed in the Liability Opinion, the Court has found that plaintiffs have proven UPS's liability under the Assurance of Discontinuance ("AOD") and each statutory scheme at issue with respect to eighteen entities;[1] have proven UPS's liability under the AOD only with respect to three entities;[2] and have not proven any liability with respect to one entity.[3] The preliminary Opinion & Order thus directed the parties to submit specific information—information regarding the numbers of "Packages" and "Cartons," as defined by the Court and according to the Court's findings and rulings—before the Court issued a final order

---

[1] These entities are: Elliot Enterprises; EExpress; Bearclaw; AFIA; Shipping Services; Seneca Ojibwas; Morningstar Crafts & Gifts; Indian Smokes; Smokes & Spirits; Arrowhawk; Seneva Cigars; Hillview Cigars; Two Pine Enterprises; Mohawk Spring Water; Jacobs Tobacco Group; Action Race Parts; Native Wholesale Supply; and Seneca Promotions.

[2] These entities are: Native Outlet; A.J.'s Cigars; and RJESS.

[3] This entity is Sweet Seneca Smokes.

as to damages and penalties. The parties were required to submit such information not later than April 7, 2017.

Plaintiffs filed their submission on April 7, 2017. (See ECF No. 530.) Per the Court's order, plaintiffs provided their view of the number of Packages and Cartons for each of plaintiffs' respective claims brought under the (1) AOD; (2) Prevent All Cigarette Trafficking Act ("PACT Act"); (3) New York Public Health Law Section 1399-ll ("PHL § 1399-ll"); and (4) Contraband Cigarette Trafficking Act ("CCTA").

Plaintiffs explained that their reported numbers of Packages and Cartons were the result of applying the relevant dates, definitions, and findings provided by the Court.[4] Plaintiffs further detailed—for each shipper as to which they had proven liability—the specific exhibits admitted during trial that plaintiffs used to identify the Packages and Cartons figures that they submitted to the Court. (ECF No. 530 at 3-4.)

Defendant also filed its submission on April 7, 2017. (See ECF No. 531.) In sharp contrast to plaintiffs' submission, defendant's submission demonstrates a lack of cooperation and, frankly, odd abra-

[4] Plaintiffs also explained that in instances where only billed weight information was provided, they subtracted one pound from the billed weight of each Package to reach a conservative approximation of the Package's actual weight. (ECF No. 520 at 2.) The Court finds that this methodology is reasonable and appropriate. As the Court explained in its Liability Opinion, "Billed weight was typically a number rounded up from actual weight. Based upon UPS records, rounding occurred when any increment of a package's weight was above a whole number." (Liability Opinion at 47-48.)

siveness. In an apparent reaction to this Court's liability decision against it, defendant refused to include a majority of the information requested by the Court. Specifically, defendant provided its Packages count with regards to only three entities: Smokes & Spirits; Seneca Cigars; and Jacobs Tobacco. (Id.) Thus, this Court deems defendant to have waived arguments relating to the calculations submitted by plaintiffs.

Defendant made clear why it chose to provide information with regards to these three entities only: Defendant explained that it did so not because it was incapable of providing the information for the other entities as ordered by the Court—and as plaintiffs did—but because, according to defendant, these three entities were the only entities "that could potentially be considered in assessing damages or penalties because they are the only ones for which plaintiffs introduced evidence of shipments that UPS had an opportunity to test at trial." (Id. at 1-2.) In other words, UPS intentionally chose to ignore the Court's order and instead chose to reargue a point the Court already decided, as set forth in the Liability Opinion.[5] Accordingly, because defendant failed to comply with the Court's order, the Court calculates its determination of damages and penalties using the uncontested numbers of Packages and Cartons supplied by plaintiffs

[5] Defendant's further explained that UPS also objects to being ordered to provide information that potentially will be used against it in assessing damages and penalties . . . ." (ECF No. 531 at 1.)

where appropriate.[6] This Court finds such conduct consistent with UPS's lack of acceptance of responsibility for their actions at issue in this case, as discussed in the Liability Opinion, and such conduct further informs the Court's views on the need for a significant award to deter future conduct. In all events, the Court's determination of penalties and damages is set forth below.

II. DISCUSSION

A. Legal Principles

In the Liability Opinion, the Court provided a detailed discussion of the relevant legal principles concerning damages and penalties. The Court will not repeat those principles in full here. Nevertheless, the Court reiterates a few important considerations.

In general, civil penalties are designed in some measure "to punish culpable individuals" and not "simply to extract compensation or restore the status quo." Tull v. United States, 481 U.S. 412, 422 (1987); accord Johnson v. SEC, 87 F.3d 484, 492 (D.C. Cir. 1996). Penalties are also designed to "deter future violations" and to "prevent[] [the conduct's] recurrence." Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 185-86, 188 (2000).

Furthermore, there is an "enormous range of penalties available to the district court in the usual civil

---

[6] As the Court noted, defendant provided information for only three entities. Even with regards to these entities, however, defendant (unlike plaintiffs) did not provide any explanation of how it calculated the figures provided. Therefore, the Court considers the figures provided by plaintiffs— even regarding these three entities—to be uncontested.

penalty case." United States v. J.B. Williams Co., Inc., 498 F.2d 414, 439 (2d Cir. 1974); see also id. at 438 (noting that a district court may properly consider "a number of factors" in determining the size of a civil penalty, "including the good or bad faith of the defendants, the injury to the public, and the defendants' ability to pay."). In Laidlaw, the Supreme Court reiterated the basic principle that a district court has wide discretion to fashion appropriate relief. See 528 U.S. at 192. It further stated that when choosing an appropriate penalty, a court "should aim to ensure 'the framing of relief no broader than required by the precise facts.'" Id. at 193 (citing Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 222 (1974)). The Second Circuit has articulated the factors a court should consider as follows: (1) the level of the defendant's culpability, (2) the public harm caused by the violations, (3) the defendant's profits from the violations, and (4) the defendant's ability to pay a fine. Advance Pharm., Inc. v. United States, 391 F.3d 377, 399 (2d Cir. 2004).[7]

In addition to the principles noted above, the Court is mindful of the Eighth Amendment's requirement of proportionality. Supreme Court precedent instructs courts, in determining whether a fine is proper or normal, to look to any legislative pronouncement on the issue and to consider the amount of the fine compared to the gravity of the offense, a deeply factual

[7] Courts also have recognized that it is appropriate to consider the actions of plaintiffs when assessing penalties. See City of New York v. Milhelm Attea & Bros., Inc., No. 06-cv-3620, 2012 WL 3579568, at *33 (E.D.N.Y. Aug. 17, 2012); United States v. White-Sun Cleaners Corp., No. 09-cv-2484, 2011 WL 1322266, at *9 (E.D.N.Y. Mar. 9, 2011).

question. See United States v. Bajakajian, 524 U.S. 321, 334-38 (1998). The Court must examine whether, in the aggregate, the penalties become grossly disproportionate to remediation or deterrence under the Eighth Amendment. (Id.)

In this case, the facts before this Court indicate that significant penalties are appropriate. First, the facts demonstrate a high level of culpability by UPS. Numerous separate acts by numerous UPS employees allowed vast quantities of unstamped cigarette shipments to be delivered to unauthorized recipients in New York. The New York Executive Branch and legislature, along with Congress, had specifically attempted to prevent this with the AOD, the PACT Act (which should have incented compliance with the AOD), the CCTA, and PHL § 1399-ll. UPS largely relied on its size and weak internal procedures to excuse blatantly culpable conduct. As the Court found in its Liability Opinion, there were many, many people within UPS who consciously avoided the truth, for years. Even so, the Court also recognizes that UPS has now—since this lawsuit was filed—regained its footing. UPS now approaches compliance with the AOD and the various statutory schemes with renewed vigor and additional processes and procedures.

The second factor is the public harm caused by the conduct. The state and federal legislatures have deemed transport of cigarettes to be a public health issue, and the effects of cigarette usage are well known. However, it is also the case that UPS is not the cigarette manufacturer or seller—it is a transporter. Thus, it bears a lower level of culpability for the impact on public health than other entities. In addition, it is unclear whether, in the absence of

UPS's transport of cigarettes, the same public health effects would still be felt. The Court cannot speculate as to this. The Court focuses UPS's unlawful enablement of a public health impact that the political branches have proscribed and the costs of which New Yorkers must bear.

The third factor—defendant's profits from the violations—suggests a low amount of penalties. UPS has focused on its limited revenues and profits from its transport of the shipments at issue. But these are not the only relevant metrics. It is also the case that maintaining customers helps UPS's overall competitive position; if there are many UPS routes in an area, it is reasonable to infer that this assists the acquisition of business through network effects and economies of scale.

Finally, the Court weighs UPS's ability to pay a fine. UPS is a large company with significant assets. Its financial statements are a matter of public record. Not only can it handle a hefty fine, only a hefty fine will impact such a large entity sufficiently to capture the attention of the highest executives in the company—executives who then, in a rational economic move, will cause changes in practice and procedures to be strictly maintained. A fine in line with only the profits and revenues associated with the conduct at issue would not have this deterrent impact.

B. Measure of Aggregate Damages and Penalties Appropriately Awarded

In accordance with the legal principles described above and in the Liability Opinion, the Court sets forth below its final determination as to the measure of aggregate damages and penalties appropriately

awarded to plaintiffs New York State and New York City under the AOD and under each statutory scheme at issue. First, however, the Court sets forth a few additional points that have guided its analysis.

As they acknowledge, plaintiffs cannot receive double compensatory damages. Accordingly, the Court awards plaintiffs compensatory damages under the CCTA—and not the PACT Act—because plaintiffs are entitled to a greater amount of compensatory damages under the CCTA. With regards to penalties, plaintiff New York State is entitled to a stipulated amount of AOD penalties; the Court's calculation of the AOD penalties awarded is therefore straightforward.

Importantly, and in contrast with the AOD, the penalties provided by the PACT Act and PHL § 1399-ll are the maximum penalties that the Court may award. In addition, while the CCTA provides for penalties, it does so in an unspecified amount. As discussed in further detail below, the Court has decided to award plaintiffs 50% of the maximum PACT Act penalties to which they are entitled and 50% of the PHL § 1399-ll penalties to which they are entitled. The Court also awards plaintiffs nominal CCTA penalties.

The Court has thought long and hard about what measure of penalties is appropriate. The statutes at issue all undeniably seek to address the public harms caused by cigarette use and seek to regulate the unlawful transport of cigarettes that contributes to those harms. As the Court explained in the Liability Opinion, while the statutes have similar purposes, they are

not entirely duplicative and target somewhat different (even if partially overlapping) conduct.

For example, the PACT Act seeks to prohibit shipments to those sellers that the Government has identified as sellers who have not registered with the Attorney General or are otherwise not in compliance with the PACT Act (i.e., those sellers on the Pact Act Non-Compliant Lists ("NCLs")). In enacting PHL 1399-ll, the state legislature "declare[d] the shipment of cigarettes sold via the internet or by telephone or by mail order to residents of [New York] state to be a serious threat to public health, safety, and welfare, to the funding of health care . . . , and to the economy of the state." 2000 Sess. Laws of N.Y., Ch. 262 (S.8177) § 1. Thus, PHL § 1399-ll prohibits shipments of cigarettes to a broad group of "unauthorized" recipients and places the responsibility on carriers to determine whether a recipient is authorized to receive cigarettes. It is clearly not coextensive with the PACT Act.

Given the overlapping purposes of the statutes at issue—while also recognizing that they are different and independent statutory schemes—the Court has decided to award plaintiffs 50% of the maximum PACT Act penalties to which they are entitled; 50% of the PHL § 1399-ll penalties to which they are entitled; and nominal CCTA damages. The Court believes that awarding penalties in these proportions gives effect to each statute while also ensuring that the award in this case is not greater than necessary to punish UPS and deter future conduct. The Court emphasizes that it has the statutory authority and could have awarded plaintiffs the maximum amounts provided by the PACT Act and PHL § 1399-ll (as well as a greater than

nominal amount under the CCTA); the Court has chosen not to award the maximum amounts given all of the facts and circumstances.

1. AOD

As explained in the Liability Opinion, plaintiff New York State is entitled to a stipulated penalty of $1,000 for each UPS violation of the AOD because UPS failed—as required by the AOD—to audit shipments where there was "a reasonable basis to believe" that shippers "may be tendering cigarettes for delivery to Individual Consumers." (Liability Opinion at 120-144, 213.) As the Court noted in the Liability Opinion, plaintiffs sought the imposition of AOD penalties on a "per package" basis. (Id. at 207.) Furthermore, the Court did find that violations of the AOD are measured by each instance in which a Package (as the Court has defined that term) was tendered to UPS following the start date specified by the Court. (Id. at 213.) The Court defined a Package as follows:

To determine what Packages are counted with regard to each shipper, the Court instructed the parties to utilize UPS's delivery spreadsheets, which were admitted into evidence. (Id. at 207-09.) These spreadsheets were to be sorted by account number, duplications were to be eliminated, and packages were to be summed. (Id.) Furthermore, the Court instructed the parties to apply a few additional important qualifications. First, letter-sized envelopes were to be excluded; second, packages weighing less than a pound were also to be excluded. (Id.) Lastly, only packages tendered by a shipper (as opposed to those that were shipped "to" the shipper), were to be included. (Id.)

In its findings of fact in the Liability Opinion, the Court specified, as to each shipper for which the Court found AOD liability, the date not later than which there was a reasonable basis to believe that the shipper was tendering cigarettes. The Court explained that this is the "start date" for the imposition of penalties. (Id. at 213.) The Court also specified that UPS remained under an audit obligation until an audit occurred or UPS terminated the account, i.e., the end date for AOD penalties.[8] Accordingly, the Court ordered the parties to "jointly confer on the number of such Packages based on the date ranges set forth in the Court's findings" and to submit such information to the Court not later than April 7, 2017. (Id. at 213, 219.)

In their April 7, 2017, submission plaintiffs complied with the Court's instructions. Specifically, plaintiffs submitted to the Court a tally of Packages for each shipper liable under the AOD and specified the applicable start date plaintiffs used to calculated the tally (and provided page citations to the Liability Opinion from which the start date was taken).[9] (ECF No. 530 at 5.) As the Court has already noted, defendant failed to comply with the Court's Liability Opinion and did not submit the relevant Packages information ordered by the Court.

Accordingly, based on the Court's findings and the number of Packages supplied to the Court, the Court

---

[8] The Court provided the applicable dates in the Liability Opinion.

[9] As previously noted, plaintiffs' April 7, 2017, submission also listed the account number and admitted-exhibit number from which plaintiffs compiled the data in their submission.

hereby finds that plaintiff New York State is entitled to AOD penalties in the amount of $80,468,000. The Liability Opinion explained that penalties imposed under the AOD are not duplicative of other penalties. (Id. at 211.) **Therefore, the Court awards plaintiff New York State AOD penalties in the amount of $80,468,000**.

2. PACT Act

As detailed in the Liability Opinion, plaintiffs New York State and New York City are entitled to compensatory damages for UPS's violations of the PACT Act, which UPS violated by knowingly shipping for entities identified on the NCLs. (Liability Opinion at 159-63; 190-93.) The Court explained that these compensatory damages are measured by plaintiffs' lost tax revenue attributable to the number of packs/cartons of cigarettes delivered by UPS on behalf of those "Liability Shippers" identified on the PACT Act NCLs, using a 50% diversion rate—the Court found that 50% is a reasonable percentage of unstamped cigarette cartons consumers would have purchased. (Id. at 193.) The Court noted that during the relevant time period, the New York State tax rate was $4.35 per pack of cigarettes ($43.5 per carton) and the New York City tax rate was $1.5 per pack of cigarettes ($15 per carton). (Id. at 169.) In addition, the Liability Opinion laid out the Court's findings regarding the reasonable approximation of Packages that contained cigarettes for each shipper, where applicable.

The Court provided its definition of a Carton of cigarettes as follows: A carton of cigarettes weighs approximately one pound. (Id. at 212.) The Court instructed that the parties calculate the actual weight

of a Package based on information evident from the face of the delivery spreadsheets under the column "actual weight."[10] (Id.) The Court explained that any Packages weighing less than a pound should not be included because, according to the Court's factual determinations, such Packages could not have included cigarettes.[11] (Id.)

The Liability Opinion specified the dates on which the applicable Liability Shippers appeared on the PACT Act NCLs as well as the dates on which UPS's PACT Act obligations began for each applicable shipper (i.e. the start date for UPS's PACT Act compensatory damages and penalties). (See id. at 160-63.) The Court further noted that UPS regained its PACT Act exemption on February 19, 2015 (i.e. the end date for any PACT Act compensatory damages or penalties). (Id. at 144.)

In accordance with the Court's findings and rulings (summarized above), the Court ordered the parties to submit the applicable numbers of Packages and Cartons of cigarettes. (Id. at 9, 192.)

---

[10] As the Court has already noted in this Opinion & Order, it accepts plaintiffs' proposal to use the "billed weight" minus one pound in each instance in which UPS did not produce an "actual weight" figure. This is also explained in the Court's Corrected Opinion & Order.

[11] The Court's original opinion contained an incorrect instruction to divide the total weight of all Packages by the total number of Packages. The Court has corrected this in its Corrected Opinion & Order. The figures that plaintiffs submitted to the Court in their April 7, 2017, submission were based on the correct formula.

In their April 7, 2017, submission, plaintiffs complied with the Court's instructions. Specifically, plaintiffs submitted to the Court a tally of Packages and Cartons of cigarettes (based on the percentages specified by the Court) for each shipper for which the Court found PACT Act liability attached. (ECF No. 530 at 6, 9.) Plaintiffs also specified the applicable start date from which they calculated their tally (based on the dates stated by the Court in the Liability Opinion).[12] As the Court has already noted, defendants failed to comply with the Court's order and did not submit the information ordered by the Court.

Based on the Court's findings and the number of Packages and Cartons supplied to the Court, the Court hereby finds that plaintiff New York State is entitled to PACT Act compensatory damages in the amount of $2,767,600.50 and plaintiff New York City is entitled to PACT Act compensatory damages in the amount of $546,937.50.

However, as discussed below, plaintiffs New York State and New York City are also entitled to compensatory damages under the CCTA. Plaintiffs acknowledge that they "cannot recover compensatory damages for the same shippers under both [the PACT Act and CCTA]." (ECF No. 530 at 3 n.2.) Based on the Court's findings and the number of Cartons submitted to the Court, plaintiffs are entitled to a greater amount of CCTA compensatory damages than PACT Act compensatory damages (the Court discusses CCTA compensatory damages below).

---

[12] As previously noted, plaintiffs' April 7, 2017, submission also listed the account number and admitted-exhibit number from which plaintiffs compiled the data in their submission.

Therefore, in order to avoid double counting, the Court does not award plaintiffs compensatory damages under the PACT Act, because the Court awards plaintiffs compensatory damages under the CCTA, as described below.

Nevertheless, plaintiffs New York State and New York City are entitled to penalties under the PACT Act because the Court found that UPS violated the PACT Act by knowingly delivering packages from sellers identified on the NCLs, which UPS received. (Liability Opinion at 159-63.) As the Court explained in the Liability Opinion, penalties under the PACT Act are "not to exceed" $2,500 for the first violation and $5,000 per subsequent violation. (Id. at 214.) Violations are measured by each Package UPS delivered to a Liability Shipper that UPS knew was identified on the NCLs. (Id. at 159-163.) As the Court has stated, however, while the PACT Act allows for the imposition of penalties on a per-violation basis, penalties need not be assessed on such a basis.

Based on the Court's findings and the number of Packages supplied to the Court—as PACT Act penalties may be imposed on a per-violation basis, but need not be—the Court finds that plaintiff New York State is entitled to receive a maximum of $70,517,500 in PACT Act penalties and plaintiff New York City is entitled to receive a maximum of $86,182,500 in PACT Act penalties. Again, these amounts are maximums; the Court need not, and does not, award plaintiffs PACT Act penalties in these amounts.

Having considered the totality of the facts and circumstances in this case and all of the relevant legal

principles concerning damages and penalties, as detailed in the Liability Opinion and in this Opinion & Order, the Court awards plaintiffs 50% of the maximum PACT Act penalties to which they are entitled. **Accordingly, the Court hereby awards plaintiff New York State $35,258,750 in PACT Act penalties and awards plaintiff New York City $43,091,250 in PACT Act penalties**. The Court finds that these amounts are fair and not greater than necessary.

3. PHL § 1399-ll

As explained in the Liability Opinion, plaintiffs New York State and New York City are entitled to penalties under PHL § 1399-ll because of UPS's knowing shipment of cigarettes in violation of that statute (as well as UPS's separate contractual obligation in the AOD to comply with PHL § 1399-ll). (Liability Opinion at 163-66.) As the Court detailed, penalties under PHL § 1399-ll are "not to exceed" the greater of $5,000 per violation or $100 per pack of cigarettes shipped. (Id. at 214.) Violations are measured by each Package containing unstamped cigarettes that UPS knowingly shipped on behalf of the Liability Shippers. (Id. at 163-66.)

The Liability Opinion provided the applicable definition of Packages and Cartons, as the Court has explained above in this Opinion & Order. In addition, the Liability Opinion laid out the Court's findings regarding the reasonable approximation of Packages that contained cigarettes for each Liability Shipper. The Liability Opinion explained that the start date for UPS's liability under PHL § 1399-ll was no earlier than September 18, 2011, (id. at 158); where a later

start date applied for a particular shipper, the Court specified such date. The Court also noted that UPS is not required to pay PHL § 1399-ll penalties to both New York State and New York City for the same violation. (Id. at 206.)

Accordingly, the Court ordered the parties to submit, using the Court's definition of Packages and Cartons as well as the applicable date ranges, the number of Packages that fall within those parameters. (Id. at 9, 214.)

In their April 7, 2017, submission, plaintiffs complied with the Court's instructions. Specifically, plaintiffs submitted to the Court a tally of Packages and Cartons of cigarettes (based on the percentages specified by the Court) for each shipper to which the Court found PHL § 1399-ll liability attached. (ECF No. 530 at 7, 10-11.) Plaintiffs also specified the applicable start date from which they calculated the tally (as provided in the Liability Opinion).[13] As the Court has already noted, defendants failed to comply with the Court's order and did not submit the relevant information ordered by the Court.

Based on the Court's findings and the number of Packages and Cartons of cigarettes supplied to the Court, the Court finds that plaintiff New York State is entitled to receive a maximum of $82,820,000 in PHL § 1399-ll penalties and plaintiff New York City is entitled to receive a maximum of $74,690,000 in PHL § 1399-ll penalties. Again, these amounts are

[13] As previously noted, plaintiffs' April 7, 2017, submission also listed the account number and admitted-exhibit number from which plaintiffs compiled the data in their submission.

maximums, as PHL § 1399-ll penalties are "not to exceed" these amounts. The Court need not, and does not, award plaintiffs PACT Act penalties in these amounts, as discussed below.

Having considered the totality of the facts and circumstances in this case and all of the relevant legal principles concerning damages and penalties, as detailed in the Liability Opinion and in this Opinion & Order, the Court awards plaintiffs 50% of the maximum PHL § 1399-ll penalties to which they are entitled. **Accordingly, the Court hereby awards plaintiff New York State $41,410,000 in PHL § 1399-ll penalties and awards plaintiff New York City $37,345,000 in PHL § 1399-ll penalties**. The Court finds that these amounts are fair and not greater than necessary.

4. CCTA

As explained in the Liability Opinion, plaintiffs New York State and New York City are entitled to compensatory damages for UPS's violations of the CCTA because UPS knowingly shipped "contraband cigarettes." (Liability Opinion at 166-72, 190-93.) These compensatory damages are measured by plaintiffs' lost tax revenue attributable to the number of packs/cartons of cigarettes UPS knowingly shipped to the Liability Shippers, using a 50% diversion rate—the Court found that 50% is a reasonable percentage of unstamped cigarette cartons consumers would have purchased. (Id. at 193.) Above, the Court has already reiterated how it defined a Carton of cigarettes in the Liability Opinion.

The Liability Opinion specified the date ranges during which the Court found UPS knowingly shipping cigarettes on behalf of the Liability Shippers. In addition, as explained above, the Liability Opinion laid out the Court's findings regarding the reasonable approximation of Packages that contained cigarettes for each Liability Shipper. The Court further noted that during the relevant time period, the New York State tax rate was $4.35 per pack of cigarettes ($43.50 per carton) and the New York City tax rate was $1.50 per pack of cigarettes ($15 per carton). (Id. at 169.)

Accordingly, the Court ordered that the parties submit to the Court the applicable numbers of Packages and Cartons of cigarettes in accordance with the findings and timeframes provided by the Court. (Id. at 9, 192.)

In their April 7, 2017, submission plaintiffs complied with the Court's instructions. Specifically, plaintiffs submitted to the Court a tally of Packages and Cartons of cigarettes (based on the percentages specified by the Court) for each shipper for which the Court found CCTA liability attached. (ECF No. 530 at 7-8, 11-12.) Plaintiffs also specified the applicable start date from which they calculated their tally (using the dates provided by the Court in the Liability Opinion).[14] As the Court has already noted, defendants failed to comply with the Court's order and did not submit the relevant information ordered by the Court.

[14] As previously noted, plaintiffs' April 7, 2017, submission also listed the account number and admitted-exhibit number from which plaintiffs compiled the data in their submission.

Based on the Court's findings and the number of Cartons submitted to the Court, the Court finds that plaintiff New York State is entitled to receive CCTA compensatory damages in the amount of $8,679,729, and plaintiff New York City is entitled to receive CCTA compensatory damages in the amount of $720,885.

Accordingly, and because the Court does not award plaintiffs PACT Act compensatory damages (as noted above), **the Court hereby awards plaintiff New York State $8,679,729 in CCTA compensatory damages and awards plaintiff New York City $720,885 in CCTA compensatory damages.**

As explained in the Liability Opinion, plaintiffs New York State and New York City are also entitled to penalties under the CCTA. (Liability Opinion at 166-72, 214-16.) Penalties are mandatory under the statute, as violators "shall be fined," and are to be imposed for UPS's shipment of "contraband cigarettes." (Id. at 166-72, 214-16.) The Court explained in the Liability Opinion, however, that the CCTA does not define the amount of any such fines.[15] (Id. at 215.)

The Court further explained that there does not seem to be any particular advantage to assessing a CCTA penalty based on a "per Package metric." (Id.) The Court noted that the number of Packages plays a role in the assessment of any penalties, but in connection with the CCTA, the Court considers both the

[15] The Liability Opinion nonetheless provided the applicable definitions of Packages and Cartons, as well as the applicable date ranges, as noted above regarding CCTA compensatory damages.

mandatory requirement that some penalty be imposed, as well as the purpose of an additional penalty. (Id. at 215-16) The Court stated that when the parties submitted the requested information concerning the number of Packages and Cartons at issue under the AOD and various statutes, the Court would be able to assess the appropriate amount of a separate fine, if any, for UPS's violations of the CCTA. (Id. at 216.)

Again, in their April 7, 2017, submission, plaintiffs submitted to the Court information that the Court could potentially use in its calculation of any CCTA penalties, i.e., the number of Packages and Cartons of cigarettes shipped by UPS during the timeframes specified by the Court. Again, defendant did not submit any such information to the Court.

Having considered the totality of the facts and circumstances in this case and all of the relevant legal principles concerning damages and penalties, as detailed in the Liability Opinion and in this Opinion & Order, **the Court awards plaintiffs New York State and New York City $1,000 each in nominal penalties under the CCTA**. The Court explained in the Liability Opinion that "[t]he CCTA more or less seeks to punish the same conduct, for the same reasons, as the other statutes." (Id. at 216.) The Court determines that, given the measure of damages and penalties awarded under the AOD and other statutes at issue, further penalties under the CCTA would not serve a sufficient purpose (such as further deterrence).

III. CONCLUSION

The Court has set forth its determination of damages and penalties above. In total, plaintiff New York State is awarded **$165,817,479** and plaintiff New York City is awarded **$81,158,135**.[16] The Clerk of Court is directed to enter final judgment against defendant UPS.

SO ORDERED.

Dated: New York, New York
May 25, 2017

/s/ Katherine B. Forrest
KATHERINE B. FORREST
United States District Judge

[16] The Court notes that these amounts combined are less than three times the amount that plaintiffs disclosed on March 3, 2017—well before trial—that they were seeking with regards to the "Arrowhawk Group" of shippers alone. (See ECF No. 534 at 186-87.)

APPENDIX D

UNITED STATES
DISTRICT COURT
SOUTHERN DISTRICT OF
NEW YORK

---------- X

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

Plaintiffs,

v.

UNITED PARCEL SERVICE, INC.,

Defendant.

15-cv-1136 (KBF)

OPINION & ORDER

---------- X

KATHERINE B. FORREST, District Judge:

In this action, the State and City of New York (the "State" and "City," respectively) allege various federal and state law claims against defendant United Parcel Service, Inc. ("UPS") relating to UPS's alleged shipping of contraband cigarettes. (Third Am. Compl. ("TAC"), ECF No. 189.) Pending before the Court is UPS's motion for partial summary judgment seeking dismissal of the seventh through twelfth claims alleged in plaintiffs' Third Amended Complaint arising under the Prevent All Cigarette Trafficking Act ("PACT Act"), 15 U.S.C. § 375 et seq., and New York Public Health Law § 1399-ll ("PHL § 1399-ll"). (ECF No. 172.) The motion primarily concerns a question of

statutory interpretation initially raised in UPS's motion to dismiss an earlier complaint pursuant to Rule 12(b)(6), and which the Court now must consider more fully based on the record developed by the parties in light of the Court's prior interpretation.

Specifically, UPS's motion turns on whether it has established its entitlement to judgment as a matter of law with respect to plaintiffs' PACT Act claims on the basis that it is exempt from liability pursuant to 15 U.S.C. §376a(e)(3); UPS's entitlement to judgment as a matter of law with respect to plaintiffs' PHL § 1399-ll claims similarly flows from that determination. The particular exemption upon which UPS primarily relies states that UPS is exempt based on the Assurance of Discontinuance ("AOD") that it entered into with the New York State Attorney General ("NYAG") on October 21, 2005 "if [that] agreement[ ] is honored throughout the United States to block illegal deliveries of cigarettes or smokeless tobacco to consumers." 15 U.S.C. § 376a(e)(3)(B)(ii)(I).

As set forth more fully below, in initially dismissing plaintiffs' PACT Act claims as those claims were alleged in the then-operative Amended Complaint, the Court interpreted § 376a(e)(3)(B)(ii)(I) to mean that UPS is exempt if the AOD has appropriate breadth (i.e. nationwide effect), explaining that Congress merely sought to codify the status quo with respect to UPS and other common carriers who had already agreed to curb illegal cigarette deliveries by instituting nationwide policies. New York v. United Parcel Service, Inc. ("UPS I"), No. 15-cv-1136 (KBF), 2015 WL 5474067, at *7-9 (S.D.N.Y. Sept. 16, 2015). In the absence of any allegations suggesting that any state did not honor the AOD, the Court left open the

question of how a state may honor the AOD such that it has nationwide effect. Id. at *8. Now that plaintiffs have come forward with new allegations and supporting evidence that they argue is sufficient to show that the AOD is not honored nationwide, the issue that the Court previously left unresolved is ripe for determination. It is also necessary for the Court to further elaborate on its interpretation of the exemption.

The pertinent language in § 376a(e)(3)(B)(ii)(I) that is the subject of the parties' dispute is not a model of clarity. The clause conditioning UPS's qualification for exemption on whether the AOD "is honored throughout the United States" does not clearly indicate what that phrase is supposed to connote, or who must do the "honoring." The parties' positions in their motion papers diverge significantly with respect to these questions. UPS primarily argues that § 376a(e)(3)(B)(ii)(I), which explicitly lists the AOD (and two analogous agreements respectively entered into by DHL Holdings USA, Inc. ("DHL") and Federal Express Corporation ("FedEx") and certain of their affiliates with the NYAG), rendered it and the other carriers exempt from the PACT Act's requirements as of the date of the statute's enactment. UPS further argues that while it could lose its exemption if it no longer gives the AOD nationwide effect or the AOD's existence is no longer recognized by states nationwide, plaintiffs have failed to create a genuine issue of fact that either of those conditions is met.

Plaintiffs, in contrast, contend that § 376a(e)(3)(B)(ii)(I) did not exempt UPS when enacted, but rather provided only for the possibility of future exemption upon all fifty states affirmatively assenting to the AOD, a condition that plaintiffs assert

UPS has never fulfilled. Relying on evidence that UPS has shipped cigarettes to consumers despite a policy not to do so, and declarations from seven state attorneys general and a representative of the National Association of Attorneys General ("NAAG"), plaintiffs argue that UPS is not entitled to the exemption because the AOD has never been honored or recognized by all states in the nation. In relation to UPS's motion to dismiss (in other words, before the Court rendered its initial interpretation of § 376a(e)(3)(B)(ii)(I)), plaintiffs had argued that the "is honored" language refers to whether UPS has itself complied with the terms of the AOD (e.g. interpreting the language as "UPS has honored") and that its mere allegation in the Amended Complaint of non-compliance was sufficient to defeat the exemption at the Rule 12(b)(6) stage.

The legislative history and overall structure of the statutory scheme support that Congress intended that UPS be exempt from PACT Act claims as of the date of statutory enactment and based on facts then in existence; the Court also determines that with respect to this motion, plaintiffs would need to raise a triable issue on the question of whether the factual basis for the exemption has changed, thereby altering UPS's entitlement to the exemption. Plaintiffs' alternative readings would render § 376a(e)(3)-(B)(ii)(I) essentially meaningless by imposing requirements that could never plausibly be fulfilled even if UPS was fully effective in preventing the shipment of contraband cigarettes.

In the factual materials that plaintiffs submitted in opposition to the pending motion, plaintiffs have

not raised a triable issue of fact as to whether the basis for UPS's exemption has changed. In other words, on the record currently presented to it, the Court would grant UPS's motion. However, the Court understands that plaintiffs have set forth only a portion of their evidence supporting the claim that UPS does not actually maintain nationwide policies as required by the AOD. In light of the fact that the Court has modified its interpretation of § 376a(e)(3)(B)(ii)(I) at this more advanced stage, the Court believes that plaintiffs should not be faulted to the extent they provided only exemplar evidence of UPS's non-compliance with the nationwide policies it adopted pursuant to the AOD. Therefore, the Court will allow plaintiffs to make a further submission of evidentiary support—with limited additional argument by the parties relating solely to those submissions—as further set forth below before definitively resolving UPS's motion.

I. BACKGROUND[1]

A. Factual Background

1. Background on the AOD

In 2004, the NYAG began investigating residential deliveries made by UPS, FedEx, and DHL in relation to alleged violations of N.Y. PHL § 1399-ll.

---

[1] The Court here recounts only that background which is relevant to resolving UPS's pending motion. The Court also incorporates its prior decisions in this action, including UPS's motion to dismiss and plaintiffs' motion to strike certain affirmative defenses, for further background on this litigation. See UPS I, 2015 WL 5474067; State of New York v. United Parcel Serv., Inc. ("UPS II"), No. 15-cv-1136 (KBF), 2016 WL 502042 (S.D.N.Y. Feb. 8, 2016).

(UPS's 56.1 ¶ 1.)[2] PHL § 1399-ll, which was first enacted in 2000, prohibits carriers from knowingly transporting cigarettes to any person in New York reasonably believed by such carrier to not be an authorized consignee. UPS cooperated with the NYAG's investigation. (UPS's 56.1 ¶ 1.)

On February 23, 2005, NAAG[3] sent UPS a letter requesting that the company take appropriate steps to ensure that it does not facilitate violations of federal and state laws by means of the shipment and delivery of contraband tobacco products sold via the internet. (UPS's 56.1 ¶ 2; McPherson Decl., Ex. 8, ECF No. 175-8.) The letter, which was signed by 41 states

---

[2] The notation "UPS's 56.1" refers to UPS's statement of undisputed material facts, submitted under Local Rule 56.1. (ECF No. 176.) This decision relies only on those facts that plaintiffs did not dispute with citations to admissible evidence in their Rule 56.1 counterstatement (ECF No. 195) (referred to herein as "Pls.' 56.1 Cstmt."). See Local Rule 56.1(d) ("Each statement by the movant or opponent pursuant to Rule 56.1(a) and (b), including each statement controverting any statement of material fact, must be followed by citation to evidence which would be admissible, set forth as required by Fed. R. Civ. P. 56(c).").

[3] The National Association of Attorneys General is an organization whose members are the attorneys general of each of the fifty states, five territories and the District of Columbia that facilitates interaction among its members and assists them in fulfilling the responsibilities of their offices and delivering high quality legal services. (Proshansky Decl., Ex. 8 ("Hering Decl.") ¶¶ 2, 4, ECF No. 194-8.) "NAAG has no authority to in any manner legally bind its member attorneys general [as] it is a voluntary association of representatives of sovereign states and takes no actions that purport to represent the policies or legal positions of its members unless expressly authorized to do so." (Hering Decl. ¶ 5.)

and U.S. territories,[4] requested that UPS (along with other carriers and major credit card companies) attend a meeting scheduled for March 17, 2005 with attorneys general and their staff. (UPS's 56.1 ¶ 2.) UPS attended the March 17 meeting with representatives of other states to discuss the illegal sale of tobacco products on the internet and related issues. (UPS's 56.1 ¶ 3.) The NAAG followed up the March 17 meeting with a letter, dated April 12, 2005, listing "Requested Actions for Carriers" that had been presented and discussed at the meeting (UPS's 56.1 ¶ 3; McPherson Decl., Ex. 9, ECF No. 175-9.)

UPS ultimately agreed to alter its policies to prohibit the delivery of cigarettes to consumers nationwide, entering into an Assurance of Discontinuance (the "AOD") with the NYAG regarding its transportation of cigarettes on October 21, 2005. (UPS's 56.1 ¶ 4; see Cook Decl., Ex. 1 ("AOD") ¶ 45, ECF No. 174-1.) All of the procedures that the NAAG sought UPS and other carriers to implement were included in the AOD. (UPS's 56.1 ¶ 5.) The AOD obligated UPS to, inter alia: (1) implement and adhere to policies restricting the delivery of cigarettes to consumers on a nationwide basis, (2) investigate shippers that UPS believed to be cigarette retailers, (3) notify shippers believed to be cigarette retailers of UPS's policy restricting the delivery of cigarettes to consumers on a nationwide basis, (4) conduct audits of shippers upon

[4] The signatories to the letter included, inter alia, the NYAG and the attorneys general of the seven states that have submitted declarations in support of plaintiffs: California, Connecticut, Idaho, Maryland, New Mexico, Pennsylvania and Utah. (UPS's 56.1 ¶ 2; McPherson Decl., Ex. 8.)

a reasonable belief that the shippers may be delivering cigarettes to consumers, (5) maintain a database of shippers suspected of being cigarette retailers, (6) train employees about its policy of restricting the delivery of cigarettes to consumers on a nationwide basis, and (7) submit a report of its compliance with the terms of the AOD. (UPS's 56.1 ¶ 5.) UPS submitted the required report to the NYAG regarding its compliance with the AOD on December 20, 2005. (UPS's 56.1 ¶ 6.) The AOD explicitly preserved UPS's right to seek a ruling that PHL § 1399-ll is unconstitutional, preempted by federal law or otherwise unenforceable against UPS. (AOD ¶ 45.)

Three days after the execution of the AOD, on October 24, 2005, David Nocenti, then-Counsel to the NYAG, emailed Laura Kaplan, Deputy Attorney General in the California Attorney General's Office, stating that "we reached agreement with UPS regarding their shipments of cigarettes to consumers" and explaining that the "UPS agreement is similar to the DHL agreement, most notably because UPS has agreed to stop the direct shipment of cigarettes to consumers nationwide." (UPS's 56.1 ¶ 10.) Ms. Kaplan replied that same day, stating that she had "a few questions about the effect of the agreement on other states" and asking whether "UPS agreed to institute a nationwide policy prohibiting the shipments of cigarettes to consumers[,] even to those states not a party to the [AOD] and which do not prohibit shipment of cigarettes to consumers?" (UPS's 56.1 ¶ 11.) Mr. Nocenti replied that same day, stating "Yes, like DHL, UPS has agreed to institute a nationwide policy prohibiting the shipment of cigarettes to consumers, even to those states not a party to the [AOD] and which do

not prohibit shipment of cigarettes to consumers." (UPS's 56.1 ¶ 12.) Approximately three years later, on October 29, 2008, Ms. Kaplan forwarded Mr. Nocenti's email to Michael Hering (NAAG Tobacco Center Director and Chief Counsel), Bill Lieblich (NAAG Tobacco Center Deputy Chief Counsel), and Dana Biberman (Chief of the NYAG's Tobacco Compliance Bureau), stating "I have forwarded an e-mail from David Nocenti at the time the [AOD] was signed on the applicability of the agreement to the states. Clearly, it does apply to the states." (UPS's 56.1 ¶ 13.)

It is undisputed that, as of the filing of UPS's motion, no state has notified UPS of a belief that the AOD does not have nationwide scope or that UPS does not honor the AOD nationwide. (UPS's 56.1 ¶ 14.) Beginning in December 2015, plaintiffs provided UPS's counsel with declarations from seven assistant attorneys general—including from California,[5] Idaho, Utah, Connecticut, New Mexico, Maryland and Pennsylvania—asserting that their states do not honor UPS's AOD. (UPS's 56.1 ¶ 15; Pls.' 56.1 Cstmt. ¶ 15.) Although UPS asserts that, since entering into the AOD, it has continued to administer and enforce a nationwide policy prohibiting the shipment of cigarettes to consumers (UPS's 56.1 ¶ 8; Cook Decl. ¶ 6, ECF No. 174), plaintiffs counter that UPS has and does in fact deliver contraband cigarettes to customers (Pls.' 56.1 Cstmt. ¶ 8).[6] The evidence that plaintiffs have proffered relating to UPS's non-adherence to its policies

[5] The declarant from the California Attorney General's Office, Laura Kaplan, was the other participant in the above exchange with Mr. Nocenti. (See UPS's 56.1 ¶ 15(a).)

[6] Although not at issue in this motion, the State alleges a claim against UPS for violation of the AOD. (TAC ¶¶ 187-95.)

includes three declarations, excerpts from two depositions, and one chart produced in discovery showing deliveries that UPS made for one reservation seller to various states. (Proshansky Decl., Exs. 1-5, 7, ECF No. 194.) The three declarants—Jamie Harris-Bedell, Robert L. Oliver, Sr., and Philip D. Christ—owned or worked at reservation tobacco businesses for whom the declarants assert UPS employees knowingly and repeatedly made deliveries of contraband cigarettes. Plaintiffs' transcript excerpts are from the depositions of Christ and Bradley J. Cook, UPS's Rule 30(b)(6) witness in this litigation. The Court further describes these supporting factual materials when addressing whether plaintiffs' submissions have raised a genuine issue of material fact.

2. Background on the PACT Act

The Prevent All Cigarette Trafficking Act ("PACT Act"), enacted on March 31, 2010 and effective as of June 29, 2010, "imposes strict restrictions on the delivery sale of cigarettes and smokeless tobacco." Red Earth LLC v. United States, 657 F.3d 138, 141 (2d Cir. 2011) (quotation marks omitted). The PACT Act mandates that delivery sellers comply with shipping and recordkeeping requirements, 15 U.S.C. § 376a(a)-(d), and requires the United States Attorney General to compile a list of delivery sellers of cigarettes or smokeless tobacco that have not registered with it or are otherwise not in compliance with the PACT Act, and share that list with state attorneys general, carriers and other delivery services, including the United States Postal Service ("USPS"), id. § 376a(e)(1)(A). The PACT Act further provides that "no person who delivers cigarettes or smokeless tobacco to consumers, shall knowingly complete, cause to be completed, or

complete its portion of a delivery of any package for any person whose name and address are on the [above-referenced non-compliance] list." Id. § 376a(e)(2)(A). The PACT Act confers standing on state attorneys general to bring actions against common carriers for civil penalties and other equitable relief for violations of the statute. Id. §§ 377(b)(1)(B), 377(b)(2), 378(c)(1).

The PACT Act contains a number of provisions exempting certain entities from the otherwise applicable obligations and liabilities. The exemptions for common carriers that are pertinent here state:

> (3) Exemptions
>
> (A) In general
>
> Subsection (b)(2) and any requirements or restrictions placed directly on common carriers under this subsection, including subparagraphs (A) and (B) of paragraph (2), shall not apply to a common carrier that—
>
> (i) is subject to a settlement agreement described in subparagraph (B); or
>
> (ii) if a settlement agreement described in subparagraph (B) to which the common carrier is a party is terminated or otherwise becomes inactive, is administering and enforcing policies and practices throughout the United States that are at least as stringent as the agreement.

(B) Settlement agreement

A settlement agreement described in this subparagraph—

(i) is a settlement agreement relating to tobacco product deliveries to consumers; and

(ii) includes—

(I) the Assurance of Discontinuance entered into by the Attorney General of New York and DHL Holdings USA, Inc. and DHL Express (USA), Inc. on or about July 1, 2005, the Assurance of Discontinuance entered into by the Attorney General of New York and United Parcel Service, Inc. on or about October 21, 2005, and the Assurance of Compliance entered into by the Attorney General of New York and Federal Express Corporation and FedEx Ground Package Systems, Inc. on or about February 3, 2006, if each of those agreements is honored throughout the United States to block illegal deliveries of cigarettes or smokeless tobacco to consumers; and

(II) any other active agreement between a common carrier and a State that operates throughout the United States to ensure that no deliveries of cigarettes or

> smokeless tobacco shall be made to consumers or illegally operating Internet or mail-order sellers and that any such deliveries to consumers shall not be made to minors or without payment to the States and localities where the consumers are located of all taxes on the tobacco products.

15 U.S.C. § 376a(e)(3). Pursuant to these exemptions, any requirements or restrictions placed directly on common carriers by the statute do not apply to a common carrier that has entered into a qualifying settlement agreement. UPS's AOD, which is explicitly named, qualifies "if [it] is honored throughout the United States to block illegal deliveries of cigarettes or smokeless tobacco to consumers." Id. § 376a(e)(3)(B)(ii)(I). The statute specifically enumerates two other qualifying settlement agreements, the Assurance of Discontinuance entered into by the NYAG and DHL on or about July 1, 2005, and the Assurance of Compliance entered into by the NYAG and FedEx on or about February 3, 2006; all three agreements are subject to the "is honored throughout the United States" conditional clause. Id.[7]

---

[7] Although UPS does not rely on it as a basis to claim exemption from the PACT Act, the statute also contains a separate exemption providing that a common carrier is not subject to civil penalties for violating § 376a(e) if it "has implemented and enforces effective policies and practices for complying with [§ 376a(e)]." Id. § 377(b)(3)(B)(i) (emphasis added).

The PACT Act also separately deals with the issue of preemption of state law.[8] On the issue of preemption, the PACT Act provides that, except to the extent set forth in the subsequent clause, "nothing in the [PACT Act], the amendments made by that Act, or in any other Federal statute shall be construed to preempt, supersede, or otherwise limit or restrict State laws prohibiting the delivery sale, or the shipment or delivery pursuant to a delivery sale, of cigarettes or other tobacco products to individual consumers or personal residences." 15 U.S.C. § 376a(e)(5)(C)(i). That provision is limited by the clause which follows, which provides that "[n]o State may enforce against a common carrier a law prohibiting the delivery of cigarettes or other tobacco products to individual consumers or personal residences without proof that the common carrier is not exempt under [§ 376a(e)(3)]." Id. § 376a(e)(5)(C)(ii) (emphasis added).

B. Procedural History

On February 18, 2015, the State and City commenced this action by filing a complaint against UPS (ECF No. 1), and filed an Amended Complaint on May

[8] In 2008, prior to the enactment of the PACT Act, the Supreme Court struck down a Maine law that (1) required state-licensed tobacco shippers to utilize delivery companies that provide recipient-verification services confirming that the buyer is of legal age and (2) imposed a presumption of carrier knowledge that a shipment contains unlicensed tobacco products in certain circumstances, on the ground that the law was preempted by the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"), 49 U.S.C. § 14501(c)(1). Rowe v. New Hampshire Motor Transp. Ass'n, 552 U.S. 364, 372-73 (2008). The PACT Act specifically addresses any potential conflict that any of its provisions may have with the FAAAA. See 15 U.S.C. § 376a(e)(9)(C).

1, 2015 (ECF No. 14). The Amended Complaint alleged fourteen causes of action seeking various forms of relief under federal and New York law, including, in relevant part, under the PACT Act and N.Y. PHL § 1399-ll.

On May 22, 2015, UPS moved to dismiss the Amended Complaint pursuant to Rule 12(b)(6). (ECF No. 21.) Among the arguments advanced in its motion, UPS contended that the claims brought under the PACT Act were subject to dismissal because that statute expressly exempts UPS from its requirements and plaintiffs failed to adequately allege that UPS was not entitled to the benefit of the exemption due to violations of the AOD. (UPS's Mem. of Law in Support of Mot. to Dismiss the Am. Compl. at 17-18, ECF No. 22.) UPS also argued that, as a result of its PACT Act exemption, plaintiffs' claims brought under PHL § 1399-ll were preempted by 15 U.S.C. § 376a(e)(5)(C)(ii), and therefore also subject to dismissal. In their opposition briefs, plaintiffs countered that the Amended Complaint adequately alleged that the AOD was not honored throughout the United States based on allegations that UPS had breached the AOD, and therefore UPS was not exempt under § 376a(e)(3). (ECF No. 28 at 8-9; ECF No. 29 at 12-13.) On July 30, 2015, the Court held oral argument on plaintiffs' motion, during which the parties maintained the arguments regarding the PACT Act that they had raised in their briefing. (Jul 30, 2015 Oral Arg. Tr. at 11-16, 39-40, ECF No. 33.)

Following oral argument, on August 26, 2015, the Court issued an Order informing the parties that it was considering a reading of § 376a(e)(3)(B)(ii)(I) that had not previously been advanced by either party.

(ECF No. 37.) The Court explained that, under its proposed alternative reading, § 376a(e)(3)(B) is a definitional provision that merely defines the types of settlement agreements that qualify for exemption and does not purport to reach questions of compliance or noncompliance with obligations assumed under any particular agreement. Because the parties had not addressed this statutory reading in their papers or at oral argument, the Court gave the parties an opportunity to submit supplemental briefing that did so. The parties each filed supplemental briefs on September 9, 2015. (ECF Nos. 44, 45.) UPS's supplemental brief argued that the text and structure of the PACT Act compelled the Court's interpretation, and that it furthered Congressional intent. (ECF No. 44.) Plaintiffs' supplemental brief continued to advocate for the reading they had advanced in their earlier moving papers—that UPS is entitled to the exemption only if it has fully complied with the requirements imposed in the AOD and that the mere allegation in a complaint of a failure to comply is sufficient to vitiate the exemption. (ECF No. 45.)

On September 16, 2015, this Court issued a decision that granted in part and denied in part UPS's motion, in relevant part dismissing plaintiffs' claims brought pursuant to the PACT Act and PHL § 1399-ll. UPS I, 2015 WL 5474067. The Court's dismissal of plaintiffs' PACT Act claims was premised on the interpretation of § 376a(e)(3)(B) that the Court had advanced in its August 26 Order—namely, that § 376a(e)(3)(B) "is a definitional provision that merely defines the types of settlement agreements that qualify for exemption" and "does not purport to reach questions of compliance or noncompliance with obligations

assumed under any particular agreement." Id. at *7. The Court concluded that, inter alia, because the Amended Complaint failed to allege that the AOD has not been recognized by states nationwide, there was no need for the Court to "determine the precise procedure by which a state must honor an agreement" to resolve UPS's motion. Id. at *8. The Court dismissed plaintiffs' PHL § 1399-ll claims on the ground that they were preempted pursuant to 15 U.S.C. § 376a(e)(5)(C)(ii). Id. at *9.

On October 21, 2015, plaintiffs moved for leave to file a Second Amended Complaint, seeking to add back the previously dismissed claims brought under the PACT Act and PHL § 1399-ll. (ECF No. 68.) The basis for the motion was that plaintiffs had not anticipated the Court's interpretation of the PACT Act, and as a result had not previously had an opportunity to plead these claims in light of that interpretation. On November 23, 2015, the Court granted plaintiffs' motion (ECF No. 85), and plaintiffs filed their Second Amended Complaint on November 30, 2015 (ECF No. 86).

On January 25, 2016, plaintiffs moved for leave to file a Third Amended Complaint for the purpose of broadening the allegations supporting certain of their existing claims based on information that plaintiffs had obtained during discovery. (ECF No. 149.) On February 18, 2016, the parties filed a joint stipulation in which UPS consented to plaintiffs' motion (ECF No. 183); the Court so ordered the stipulation on February 22, 2016 (ECF No. 185). Plaintiffs filed the Third Amended Complaint, which is now operative, on February 24, 2016. (TAC, ECF No. 189.) Claims seven, eight, nine and ten of the Third Amended Complaint

seek civil damages and penalties under the PACT Act; claims eleven and twelve seek civil penalties pursuant to PHL § 1399-ll. (Third Am. Compl. ¶¶ 148-86.) UPS answered the Third Amended Complaint on March 16, 2016. (ECF No. 199.)

On February 2, 2016, UPS filed the pending motion for partial summary judgment, seeking dismissal of plaintiffs' claims under the PACT Act and PHL § 1399-ll. (ECF No. 172.)[9] Plaintiffs opposed the motion on March 2, 2016. (ECF No. 196.) UPS filed its reply brief, and the motion became fully briefed, on March 16, 2016. (ECF No. 200.)

II. SUMMARY JUDGMENT STANDARD

"The court shall grant summary judgment if the movant shows 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). The moving party bears the initial burden of demonstrating "the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party has discharged its burden, the opposing party must set out specific facts showing a genuine issue of material fact for trial. Wright v. Goord, 554 F.3d 255, 266 (2d Cir. 2009). The nonmoving party "may not rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment." Hicks v. Baines, 593 F.3d 159, 166 (2d Cir. 2010) (quoting Fletcher v. Atex, Inc., 68 F.3d 1451, 1456 (2d Cir. 1995)). "The infer-

[9] Although the pending motion was filed prior to plaintiffs' filing of the Third Amended Complaint, the newly added allegations do not bear on the issues raised in this motion.

ences to be drawn from the underlying affidavits, exhibits, interrogatory answers, and depositions must be viewed in the light most favorable to the party opposing the motion." Cronin v. Aetna Life Ins. Co., 46 F.3d 196, 202 (2d Cir. 1995) (citations omitted). However, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Jeffreys v. City of New York, 426 F.3d 549, 554 (2d Cir. 2005) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986)) (internal quotation mark omitted).

III. DISCUSSION

Resolution of the pending motion turns on whether UPS has shown its entitlement to rely on the exemption set forth in 15 U.S.C. § 376a(e)(3)(B)(ii)(I) as a defense to plaintiffs' PACT Act and PHL § 1399-ll claims.[10] To determine whether UPS is entitled to judgment as a matter of law on these claims, the Court must first fully set forth its interpretation of the relevant portions of § 376a(e)(3). The Court next addresses whether UPS has met its burden of showing that plaintiffs have failed to raise a genuine issue of material fact as to UPS's qualification for exemption in light of the Court's interpretation. For the reasons set forth below, the Court concludes that UPS has done so on the current record, but will, as explained below, allow plaintiffs an opportunity to present additional supporting evidence of UPS's non-adherence to

[10] Plaintiffs do not dispute that, to the extent that UPS is exempt from the PACT Act under § 376a(e)(3), it is also entitled to dismissal of plaintiffs' PHL § 1399-ll claims pursuant to § 376a(e)(5)(C)(ii).

its nationwide policies to curb the delivery of contraband cigarettes.

A. PACT ACT

1. The Court's Interpretation of 15 U.S.C. § 376a(e)(3)(B)(ii)(I)

Section 376a(e)(3)(B)(ii)(I) explicitly enumerates the AOD as being one of three agreements that qualify a carrier for exemption from the PACT Act's requirements "if [it] is honored throughout the United States to block illegal deliveries of cigarettes or smokeless tobacco to consumers." 15 U.S.C. § 376a(e)(3)(B)(ii)(I). The threshold interpretive dispute between the parties is the role that the phrase "is honored throughout the United States" plays in the exemption and the means by which a suing state may provide proof that a settlement agreement is not honored or how a carrier may show that it is honored.

While the Court's starting point in interpreting § 376a(e)(3)(B) is the plain language of the statute, United States v. Dauray, 215 F.3d 257, 260 (2d Cir. 2000), as the Court previously explained in its decision on UPS's motion to dismiss, the phrase "is honored throughout the United States" in § 376a(e)(3)(B)(ii)(I), standing alone, does not provide a satisfactory answer as to what is required. While the Court believes that "is honored" most plausibly means "is recognized," see HONOR, Black's Law Dictionary (10th ed. 2014) (defining honor as "[t]o recognize" among other definitions), "honor" could also mean, inter alia, to "fulfill (a duty or obligation)" or

"abide by the terms of (an agreement)."[11] That is, "is honored" could mean "is honored [by states nationwide]," or "is honored [by UPS nationwide]," or both. The immediately surrounding language of this conditional clause does not allow a clear and unambiguous meaning to jump off the page. The lack of clarity as to the "is honored" conditional clause is magnified because the provision, which uses the passive voice, does not identify who must "honor" the settlement agreement or how that fact is communicated. The pivotal language of this exemption is, in other words, hard to decipher. Although the Court believes that the interpretation it adopts below is as well-supported by the plain text of the statute as any proposed alternative, the Court also relies on "the statutory context, 'structure, history, and purpose'" of the statute to make a definitive determination. Abramski v. United States, 134 S. Ct. 2259, 2267 (2014) (quoting Maracich v. Spears, 133 S. Ct. 2191, 2209 (2013)); see also King v. Burwell, 135 S. Ct. 2480, 2483 (2015) (Where a word is susceptible to more than one interpretation, "the Court must read the words in their context and with a view to their place in the overall statutory scheme." (quotation marks omitted)).

Based on the plain language of the relevant provisions and the statutory context, structure, legislative history and purpose of the PACT Act (and, specifically, the purpose of § 376a(e)(3)(B)(ii)(I))—which the Court lays out below—the Court essentially adheres to the interpretation set forth in its decision in rela-

---

[11] HONOR, Oxford English Dictionary (OED Third Ed., March 2014) (available at http://www.oed.com/view/Entry/88228?rskey=6pwt3c&result=2&isAdvanced= false#eid).

tion of UPS's motion to dismiss, but with further elaboration made necessary at this later stage on a more fully developed record. In granting in part UPS's motion to dismiss, the Court previously stated that UPS is entitled to the exemption if the AOD has appropriate breadth and that the phrase "is honored" means "is recognized" by all states in the nation. UPS I, 2015 WL 5474067, at *7. Based on the parties' more fulsome arguments in relation to the pending motion, and the evidence that plaintiffs have developed to support their effort to revive their PACT Act claims, the Court has come to the conclusion that "is honored" also requires that UPS give the AOD nationwide breadth. Thus, it is necessary for the Court to further explain its interpretation of § 376a(e)(3)(B)(ii)(I) and understanding of how the exemption functions.

The Court now concludes, as it did in its Opinion & Order of September 16, 2015, that § 376a(e)(3)(B) is a definitional provision that serves to define the types of settlement agreements that qualify for exemption. In defining a sub-category of enumerated qualifying agreements in § 376a(e)(3)(B)(ii)(I), the PACT Act sought to preserve the status quo as to UPS and two other carriers by exempting them from the PACT Act's requirements as of the date of enactment. The Court further continues to believe that § 376a(e)(3)(B) does not itself reach questions of compliance or noncompliance with obligations assumed under any particular agreement. Put another way, this provision does not mean that if the AOD is, on a shipment-by-shipment (or incident-based) review, not fully and always in fact complied with, that UPS loses its exemption.

Whatever the provision means, it is clear that as of the date of enactment, UPS was viewed by the NAAG and Congress as entitled to its protections. That being said, the fact that UPS (and the other enumerated carriers) was exempt from the date of enactment does not necessarily mean that UPS (or these other carriers) remains exempt in perpetuity. As plaintiffs argue, if that was Congress's intention, the PACT Act would not have gone to the trouble of imposing any condition on exemption, and instead would have merely identified UPS and the other carriers as exempt, plain and simple. The Court is persuaded that the bargain struck by the statute is, rather, that the carrier retains its exempt status—that is, it fits within the definitional provisions of § 376a(e)(3)(B)—only so long as it continues to give nationwide effect to the applicable settlement agreement and so long as there is no material change in states' recognition of the existence of the AOD and its nationwide scope. Those conditions explain how Congress sought to preserve the status quo by granting qualifying carriers an exemption at the time of passage, but not to grant an exemption in perpetuity.

As the Court stated in its prior decision, § 376a(e)(3)(B)(ii)(I) was intended to—and is properly interpreted as—codifying the status quo as to UPS and the other carriers who had entered into agreements of nationwide scope and effect with the NYAG prior to the PACT Act's enactment. The statute, therefore, provided UPS with an exemption from the time that the PACT Act was enacted. It follows that the conditions in existence at the time the statute was passed were sufficient to make UPS exempt; by saying that "'is honored throughout the United States' means

'is recognized' by all states in the nation," UPS I, 2015 WL 5474067, at *7, the Court meant that UPS was exempt as long as the AOD's existence was recognized nationwide and that the obligations imposed in the AOD are given nationwide effect—a factual predicate that Congress understood existed at the time of enactment.

As stated above, however, although UPS had met the requirements to entitle it to exemption at the time the PACT Act was enacted, the Court expands upon its interpretation by explaining that the statute does not provide a necessarily perpetual exemption. Instead, UPS could lose its exemption based on a material change in circumstances, either by UPS no longer giving nationwide effect to the AOD or states no longer recognizing its active existence. Thus, the Court clarifies that it is both UPS and the states that each, in a general sense, must honor and recognize the AOD and its nationwide effect. The statute does not, in contrast, require that all fifty states affirmatively assent to the settlement agreement as having preclusive effect of its ability to seek remedies under the PACT Act and/or state law against UPS.[12] To hold otherwise would be inconsistent with the Court's view that the exemption was meant to preserve the status

[12] To the extent that plaintiffs argue that the Court previously determined that UPS loses its exemption if plaintiffs provide evidence that even one state does not honor the AOD (see Proshansky Decl., Ex. 9, ECF No. 194-9), the Court rejects the notion that its statement at the January 12, 2016 conference, without the benefit of briefing on the pending motion, represented the Court's definitive interpretation of § 376a(e)(3)(B)(ii)(I). In any event, as explained below, plaintiffs have failed to show that any state does not honor the AOD in the sense that the Court deems relevant.

quo vis-à-vis UPS and the other two carriers who had already entered into settlement agreements and would render the enumerated exemptions a nullity, an outcome that cuts against what indicia exists as to Congress's intention. Below, the Court sets forth its support for the above interpretation.

First, the Court's interpretation is well-supported by the plain text. As the Court stated when ruling on UPS's motion to dismiss, use of the word "includes" at the start of § 376a(e)(3)(B)(ii) signals that what follows is a list of that which is encompassed, see Samantar v. Yousuf, 560 U.S. 305, 317 (2010) ("[U]se of the word 'include' can signal that the list that follows is meant to be illustrative rather than exhaustive."), supporting the view that § 376a(e)(3)(B) serves as a definitional section, rather than as one that imports questions of compliance. As this Court has observed, the "concepts of breadth and behavior are quite different." UPS I, 2015 WL 5474067, at *8. Section 376a(e)(3)(B)(ii)(I), in turn, defines a qualifying "settlement agreement" to include the AOD, as well as the analogous agreements entered into by DHL and Federal Express, "if each of those agreements is honored throughout the United States." 15 U.S.C. § 376a(e)(3)(B)(ii)(I). The use of the phrase "is honored"—rather than "becomes honored"—is consistent with an understanding that the AOD exempted UPS from the time the PACT Act was enacted, not only upon the occurrence of some future contingency.

In adopting this reading of § 376a(e)(3)(B)(ii)(I), the Court observes that it would indeed be odd for Congress to explicitly identify three settlement agreements that notably had already been in effect for several years at the time of the PACT Act's enactment

but intend that those settlement agreements only qualify for exemption if all states—including those several who had not participated in the March 2005 NAAG meeting—subsequently affirmatively assented to those agreements by a mechanism or procedure not explained anywhere in the statute nor mentioned in the legislative history. Such a requirement makes little sense as Congress undoubtedly would have been aware that it could pose an insurmountable obstacle for UPS (or the other carriers) to get every state to affirmatively assent to an agreement between UPS and the NYAG in lieu of seeking penalties under the PACT Act or state law. Congress knew that the three enumerated settlement agreements provided no right of enforcement to any state other than New York. That plaintiffs have not offered any indication that UPS or any other carrier sought affirmative assent to their respective agreements by any state after the enactment of the PACT Act is strong evidence that no such arrangement was ever contemplated.

Second, the Court's interpretation is also informed and supported by the overall structure of § 376a(e)(3) and the text surrounding the exemptions arising from the enumerated agreements. K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988) ("In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole."). In addition to § 376a(e)(3)(B)(ii)(I), which enumerates the AOD and the two analogous settlement agreements entered into by DHL and FedEx, § 376a(e)(3) separately provides for two other sets of circumstances that could qualify a carrier for

PACT Act exemption: §§ 376a(e)(3)(B)(ii)(II) and 376a(e)(3)(A)(ii). The Court looks at each in turn.

Section 376a(e)(3)(B)(ii)(II) identifies a category of unenumerated agreements that qualify for exemption. As the Court explained in its decision on UPS's motion to dismiss, that provision is particularly instructive because it acts in parallel to § 376a(e)(3)(B)(ii)(I) and is also relevant under the noscitur a sociis canon of construction. See Gustafson v. Alloyd Co., 513 U.S. 561, 575 (1995) ("[A] word is known by the company it keeps."). Section 376a(e)(3)(B)(ii)(II) states that a qualifying agreement includes "any other active agreement between a common carrier and a State that operates throughout the United States to ensure that no deliveries of cigarettes or smokeless tobacco shall be made to consumers . . . without payment to the States . . . where the consumers are located of all taxes on the tobacco products." 15 U.S.C. § 376a(e)(3)(B)(ii)(II) (emphasis added). The phrase "that operates throughout the United States," even more so than the phrase "is honored throughout the United States," suggests that the conditional clause is directed at geographic breadth rather than the signatory's degree of compliance with the agreement.

Section 376a(e)(3)(A)(ii) accounts for the circumstance in which a once qualifying agreement (i.e. an agreement described in § 376a(e)(3)(B)(ii)) is no longer operative. That provision provides that a carrier which was a party to a qualifying settlement agreement that is "terminated or otherwise becomes inactive" may retain the exemption if it is "administering and enforcing policies and practices throughout the United States that are at least as stringent as the

agreement." 15 U.S.C. § 376a(e)(3)(A)(ii) (emphasis added). This provision is supportive of the Court's interpretation because it shows that the statute contemplates that a carrier may retain the exemption without the acquiescence or consent of all fifty states as long as it continues to have nationwide policies and practices that impose obligations on the carrier as stringent as the settlement agreements—such as the AOD—of which Congress was aware. Notably, this exemption does not preface "policies and practices" with the word "effective." Again, based on the inference that Congress sought the exemptions to be read consistently with one another, use of the language "administering and enforcing policies and practices throughout the United States" in this exemption supports the view that "is honored throughout the United States" refers to geographic breadth and means that the carrier must give the settlement agreement nationwide effect. It would make no sense for a carrier with an active qualifying settlement agreement with one state to retain its exemption only if all fifty states continue to affirmatively assent to the agreement having preclusive effect, but that a carrier whose agreement becomes inactive or is terminated would not need the continued assent of all fifty states to retain its exemption. Nat. Res. Def. Council, Inc. v. Muszynski, 268 F.3d 91, 98 (2d Cir. 2001) ("[A]bsurd results are to be avoided and internal inconsistencies in the statute must be dealt with.").[13]

---

[13] Plaintiffs, citing to draft language and legislative history relating to the 2007 version of the PACT Act, argue that the Court should essentially import the word "effectively" into the phrase "administering and enforcing policies and practices." (Pls.' Mem.

Third, the context in which the PACT Act—and, specifically, the exemption provision at issue—was passed also supports the Court's interpretation over plaintiffs' interpretation. That context entails consideration of the development of regulation of the direct shipment of cigarettes to consumers, the legislative history of the PACT Act, and the statute's purpose (which is, of course, informed by the legislative history). See Concrete Pipe & Products of California, Inc. v. Constr. Laborers Pension Trust for S. California, 508 U.S. 602, 627 (1993) (stating that in the "usual case of textual ambiguity" a court should turn to "the legislative purpose as revealed by the history of the statute"); see also Puello v. Bureau of Citizenship & Immigration Servs., 511 F.3d 324, 327 (2d Cir. 2007) (when considering legislative history, a court must "construct an interpretation that comports with the statute's primary purpose and does not lead to anomalous or unreasonable results").

Although just one piece of the legislative puzzle, the context in which the AOD came about and contemporaneous beliefs as to what it sought to and did accomplish (including those of the NYAG and representatives of other states), inform the Court's view as to what the status quo was and what expectations would have been at the time the PACT Act was enacted. As recited above, UPS and the NYAG entered into the

---

of Law in Opp. to UPS's Mot. for Partial Summ. J. ("Pls.' Opp. Br.") at 15-16, ECF No. 196.) The Court rejects this argument because plaintiffs' evidence, relating to a prior version of the bill, is inapposite. No form of the word "effective" was included in the adopted version of § 376a(e)(3), but was used in the separate exemption provided for elsewhere in the statute in § 377(b)(3)(B)(i).

AOD a few months after UPS and other carriers participated in a meeting convened by the NAAG regarding, inter alia, the illegal sale of tobacco products on the internet. (UPS's 56.1 ¶¶ 3-4.) Although plaintiffs dispute that other states worked with the NYAG to reach an agreement with UPS (Pls.' 56.1 Cstmt. ¶ 2), the AOD provided for all of the procedures that the NAAG had sought UPS to implement (UPS's 56.1 ¶ 5), suggesting that there was a consensus or at least some input provided by other states.

The involvement and/or acquiescence of other states and an understanding that the AOD had nationwide scope and effect is further supported by events occurring immediately following the parties' agreement to the AOD. Shortly after executing the AOD, David Nocenti, counsel to the NYAG, sent emails to Laura Kaplan, Deputy Attorney General of California, confirming that in the AOD UPS had agreed to "stop the direct shipment of cigarettes to consumers nationwide" and "institute a nationwide policy prohibiting the shipment of cigarettes to consumers." (UPS's 56.1 ¶¶ 10-11.) In an email that Ms. Kaplan sent three years later to individuals at the NAAG and NYAG—around when the PACT Act was under consideration—she expressed the view that that the AOD "[c]learly . . . does apply to the states." (UPS's 56.1 ¶ 13.) These communications support the conclusion that the AOD was perceived to have nationwide effect, and to be operating throughout the United States, from the time it was entered into and up through the time of the PACT Act's enactment. Plaintiffs, in contrast, have presented no communications indicating that anyone perceived the AOD as not

having nationwide effect or being honored throughout the United States at any point prior to this litigation.

Next, the legislative history of the PACT Act itself also supports the Court's interpretation that the agreements enumerated in § 376a(e)(3)(B)(ii)(I) were understood to have met the exemption requirements at the time of the law's enactment. At the outset, the evidence before Congress was that UPS, DHL and FedEx had all already entered into agreements that the carriers were giving nationwide effect. See, e.g., Prevent All Cigarette Trafficking Act of 2007, and the Smuggled Tobacco Prevention Act of 2008: Hearing on H.R. 4081 & H.R. 3689 Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary, 110th Cong. (May 1, 2008) ("2008 Hearing"), at 79 (Statement of David S. Lapp, Chief Counsel, Tobacco Enforcement Unit, Office of the Attorney Gen. of Md., testifying on behalf of NAAG) ("Along with other State attorneys general, we have attained agreements with . . . the major delivery companies, including UPS, FedEx and DHL, all to stop Internet sales of cigarettes."); 2008 Hearing at 124 (Statement of Eric Proshansky, Deputy Chief, Division of Affirmative Litigation, New York City Law Department) ("The states, acting through the [NAAG], and with the assistance of the Bureau of Alcohol, Tobacco, Firearms & Explosives, negotiated an unprecedented set of agreements with . . . common carriers in which members of those industries have pledged to end any participation in the Internet cigarette business.").

Furthermore, much of the legislative history identified by UPS, which relates to the final bill that contained the exemption, supports the notion that

§ 376a(e)(3)(B)(ii)(I) was included to prevent the imposition of onerous requirements on carriers who had already entered into agreements to halt the delivery of contraband cigarettes and to preserve the status quo for those carriers. See 155 Cong. Rec. S5822-01, 2009 WL 1423723, at *104 (May 21, 2009) (statement of Sen. Kohl, sponsor of Senate version of bill) ("It is important to point out that this bill has been carefully negotiated with the common carriers, including UPS, to ensure that it does not place any unreasonable burdens on these businesses. In recognition of UPS and other common carriers' agreements to not deliver cigarettes to individual consumers on a nationwide basis, pursuant to agreements with the State of New York, we have exempted them from the bill provided this agreement remains in effect."). This statement by Senator Kohl, a sponsor of the PACT Act, is indicative of Congress's intent for UPS, DHL and FedEx to obtain the benefit of the exemption from the date of enactment. A 2008 House Report discussing the proposed exemptions also contains additional evidence that Congress understood that the carriers already subject to settlement agreements would not have to fulfill any additional conditions to render the exemption applicable. See H.R. Rep. No. 110-836, at 24 (Sept. 9, 2008) ("Finally, the subsection provides a limited exception from these requirements for a common carrier with an active settlement agreement with a State, honored nationwide, to block deliveries of cigarettes and smokeless tobacco or shipments where applicable taxes have not been paid. The three major common carriers—United Parcel Service, FedEx, and DHL—all have such agreements with the New York State Attorney General's office." (emphasis added)).

Additional legislative history shows that exempting UPS and the other carriers at the time of enactment does not undermine the statutory purpose, because that history shows that the statute was aimed primarily at eliminating deliveries of illegal, untaxed cigarettes by the U.S. Postal Service and making cigarettes non-mailable material, rather than at targeting other carriers. See 2008 Hearing at 79 (statement of David S. Lapp) (explaining that states "have curbed deliveries by all the major carriers except one: the U.S. Postal Service, which asserts it has no legal authority to refuse cigarette shipments"); 156 Cong. Rec. H1526-01, 2010 WL 956208, at *27 (Mar. 17, 2010) (statement of Rep. Weiner, House sponsor of the PACT Act) ("There's only one common carrier that today still delivers tobacco through the mail—the United States Postal Service."); 2008 Hearing at 9 (testimony of Rep. Weiner) ("Right now, the only one that is carrying [untaxed cigarettes], ironically, is [USPS]. So the only one who would actually be covered by this in a real practical sense is [USPS]. Everyone else would already be following their status quo operations.").[14] Plaintiffs' argument that the Court's reading guts the PACT Act and undermines the scheme it creates is belied by the fact that Congress was not primarily concerned with UPS and the other major carriers, but rather with USPS. Although the

[14] The record indicates that the NYAG itself understood that the Postal Service was responsible for the bulk of cigarette deliveries. (See McPherson Decl., Ex. 7, ECF No. 175-7 (October 24, 2005 email from David Nocenti to Laura Kaplan stating "The vast majority of cigarette deliveries, of course, are made by the Postal Service, and this simply highlights the need for enactment of Congressional legislation.").)

Court does recognize that application of the exemption has the effect of rendering the forty-nine states other than New York unable to pursue penalties from UPS for illegal shipment of cigarettes, that is true only to the extent that UPS continues to honor the AOD nationwide as set forth above.[15]

Plaintiffs, for their part, also cite legislative history in their opposition brief that they contend is contrary to the Court's interpretation. (See Pls.' Opp. Br. at 2-7.) When considered in its proper context, however, this legislative history actually supports, rather than detracts from, the Court's interpretation. In support of their view that the PACT Act was intended to significantly broaden the burdens imposed on major carriers like UPS, plaintiffs cite Congressional reports addressing an earlier, materially different draft version of the bill, which ultimately was not passed. See, e.g., Sen. Rep. No. 110-153 (2007).[16] Significantly, the

---

[15] Plaintiffs argue that UPS cannot rely on its "unilateral (and uncommunicated) belief in an exemption from the PACT Act" from the time of enactment, stating that there is no authority for the view that "each state should have inferred UPS's belief in a purported PACT Act exemption and spontaneously notified UPS of the state's contrary belief." (Pls.' Opp. Br. at 19.) This argument is inapposite to the Court's interpretation, which focuses on Congress's intent to confer an exemption from the time of enactment, not on UPS's belief in its entitlement to such an exemption.

[16] Plaintiffs recognize that the House Report they primarily rely on addressed the PACT Act at the session of Congress that preceded the session in which the PACT Act was passed, but assert that the "statutory language was not substantially unchanged between the two sessions." (Pls.' Opp. Br. at 3 n.2.) To the extent that this statement should be read literally, the Court agrees that the statute was in fact substantially changed in a

then-operative versions of the legislation did not exempt carriers subject to a settlement agreement from the PACT Act's requirements or from state laws prohibiting the delivery of cigarettes to individual consumers. See PACT Act, S. 1027, 110th Cong. (2007) (as reported by the S. Comm. on the Judiciary, Sept. 11, 2007); PACT Act, H.R. 4081, 110th Cong. (2007) (as reported by the H. SubComm. on Crime, Terrorism and Homeland Security of the H. Comm. on the Judiciary, May 1, 2008). The carrier exemptions at issue were not added until the legislation was subsequently reintroduced. See PACT Act, S. 1147, 111th Cong. (as introduced in the Senate on May 21, 2009). Thus, the legislative history that plaintiffs cite does not reflect the compromise that was ultimately struck in the enacted version of the legislation and has little bearing on what Congress intended the subsequently added exemption provisions to mean. See United States v. Howe, 736 F.3d 1, 4 (1st Cir. 2013) (placing little

---

material respect because the original version of the bill did not contain the exemption provision at issue here. To the extent that plaintiffs' brief includes a typographical error such that they actually meant that the statute was substantially the same, the Court disagrees with their characterization—the statute was changed in a highly material respect.

Plaintiffs do cite testimony from a House Report addressing a later version of the PACT Act that included the carrier exemptions at issue here. (Pls.' Opp. Br. at 6 (citing H.R. Rep. No. 111-117, at 26 (2009).) The legislative history they cite, however, is inapposite because it related to the exemption ultimately codified at 15 U.S.C. § 377(b)(3)(B)(i). That exemption is in a different part of the statute, prefaces the phrase "policies and "practices" with the word "effective," and is not relied upon by UPS as a basis for exemption in the pending motion. Congress could have, but did not, specifically impose a requirement of effective enforcement in § 376a(e)(3).

weight on legislative history that "concerned an earlier draft of the statute with different language than the version ultimately enacted"). Plaintiffs' acknowledgment that carriers vigorously objected to the initial version of the PACT Act (Pls.' Opp. Br. at 7) supports the view that the exemptions were added as a compromise to the industry to allow carriers who had already made efforts to reduce the shipment of contraband cigarettes to avoid the burdensome requirements imposed by the PACT Act.

Finally, the Court's interpretation is consistent with the need to interpret the statute to promote a workable and sensible scheme, far more so than any alternative reading offered by plaintiffs in their opposition papers (or the other alternatives proposed by UPS). See Yerdon v. Henry, 91 F.3d 370, 376 (2d Cir. 1996) ("Where an examination of the statute as a whole demonstrates that a party's interpretation would lead to 'absurd or futile results . . . plainly at variance with the policy of the legislation as a whole,' that interpretation should be rejected." (quoting EEOC v. Commercial Office Prods. Co., 486 U.S. 107, 120 (1988))); Merck v. Treat, 174 F. 388, 390 (2d Cir. 1909) ("[T]he interpretation which we place upon the statute provides a simple, fair and workable plan which preserves the rights of both parties."); United States v. Mejias, 417 F. Supp. 579, 583 (S.D.N.Y. 1976) ("This Act, like any other statute, must be read in such a way as to render it a sensible and workable whole."). As explained below, plaintiffs have not suggested any alternative interpretation that would provide a reasonable, workable means to accomplish the end Congress sought to achieve in creating the exemption.

Under plaintiffs' proposed interpretation, a carrier may obtain an exemption under § 376a(e)(3)(B)(ii)(I) only if all fifty states affirmatively assent in some unidentified manner to the AOD, meaning that each state recognizes the agreement as preclusive of the remedies they would otherwise be able to pursue under the PACT Act or state law.[17] This reading is unreasonable and, ultimately, unworkable for several reasons. For instance, § 376a(e)(3)(B)(ii)(I) does not explain the mechanism by which a carrier could obtain a state's affirmative assent and ensure that each state continues, at any given point in time, to assent to a settlement agreement for which it is not a signatory and has no right of enforcement. Plaintiffs' reading, moreover, would render it impossible in a practical sense for any carrier to obtain an exemption, and would beg the question why Congress bothered to add these exemptions in the first place. Plaintiffs' position that all fifty states must formally acknowledge not only the existence of the AOD, but also its effect (i.e. that it precludes their ability to pursue remedies against UPS under the PACT Act and/or state law), creates a burden that is far more stringent than that contemplated by the other PACT Act exemptions. As plaintiffs themselves repeatedly point out, no other state was or is currently a party to the AOD, no other state was or is bound by the AOD under its terms, and no state

[17] The Court's understanding that plaintiffs believe the exemption essentially requires each state to affirmatively assent to waiver of its right to utilize the PACT Act is based, in part, on the facts asserted in the declarations that plaintiffs have offered from seven other state attorneys general.

other than New York affirmatively and officially endorsed it. (Pls.' Opp. Br. at 19.) Plaintiffs do not explain why, under such circumstances, any state, much less all fifty states, would recognize the AOD in the manner they suggest even if UPS has fully effective, fool-proof policies and practices. No state—much less every state—has any incentive to affirmatively act to restrict its ability to pursue enforcement remedies. Plaintiffs contend that in spite of these facts—all of which were in existence at the time of the PACT Act's passage and of which Congress undoubtedly was aware—Congress explicitly enumerated the AOD (and stated that it was an agreement entered into only between UPS and the NYAG) as an agreement capable of conferring an exemption. Considered in this context, plaintiffs present an entirely unworkable view of the prerequisites necessary to obtain to an exemption, as they would render the exemption a nullity.

As the Court previously explained in relation to UPS's motion to dismiss, plaintiffs' original interpretation of the exemption fares no better in creating a workable scheme. Plaintiffs previously argued that the mere allegation in a complaint that a carrier was not in compliance with its settlement agreement is sufficient to defeat the carrier's exemption. Such a reading is nonsensical because, again, it would render the exemption a nullity—the PACT Act's carefully delineated exemptions would be meaningless. Plaintiffs' reading would gut the exemption by making it exceedingly difficult, if not impossible, for a carrier to successfully invoke the exemption. The statutory language and the legislative history do not indicate that Congress intended to deprive an otherwise qualifying

carrier of exemption based on an imperfect, but bona fide, effort to maintain the nationwide policies agreed to in the AOD.

2. Application of the Court's Interpretation

Having concluded that § 376a(e)(3)(B)(ii)(I) conferred an exemption from the PACT Act's requirements on UPS at the time that the statute was enacted, the Court must determine whether plaintiffs have created a genuine issue of material fact as to whether UPS has lost its entitlement to that exemption. As explained below, plaintiffs have not, on the current record, done so.

In support of the pending motion, UPS states, based on the declaration of Bradley J. Cook, UPS's Rule 30(b)(6) witness and Director of Dangerous Goods and Head of its Package Solutions Group, that it "continues to administer and enforce a nationwide policy prohibiting the shipment of cigarettes to consumers," listing several specific policies and practices that it has adopted to achieve that end. (UPS's 56.1 ¶ 8; Cook Decl. ¶ 6.) Mr. Cook further avers that "UPS has never renounced the AOD or limited its policies and practices designed to curtail cigarette deliveries to consumers by eliminating certain states or jurisdictions from the scope of UPS's policies and practices." (UPS's 56.1 ¶ 9; Cook Decl. ¶ 7.)[18] It is also undisputed that no state, as of the filing of the pending

[18] Plaintiffs' evidence purporting to counter this fact—that UPS renounced its policies by asserting affirmative defenses to the validity of the AOD (which are no longer live in this case) and that it has made nationwide deliveries of cigarettes to consumers for Native Wholesale Supply—does not undermine the relevant factual assertions advanced by UPS. (See Pls.' 56.1 Cstmt. ¶ 9.)

motion, notified UPS of a belief that the AOD does not have nationwide scope or that UPS does not honor the AOD nationwide. (UPS's 56.1 ¶ 14.)

Plaintiffs primarily seek to defeat UPS's motion with two categories of factual support: (1) declarations from other state attorneys general representing that their states do not recognize the effect of the AOD, and (2) evidence that UPS has in fact delivered contraband cigarettes and therefore failed to adhere to its nationwide policies to curb such deliveries.[19] Plaintiffs thus seek to attack the exemption under two distinct theories, by showing that neither the states, nor UPS, honor the AOD. While neither category of evidence is sufficient to raise a genuine issue of material fact on the record presented here, below the Court explains why it will allow plaintiffs an opportunity to supplement their evidence relating to whether UPS honors the AOD nationwide, and what plaintiffs would need to show to raise a triable issue.

As to their first category of factual support, plaintiffs seek to raise a genuine issue of material fact by pointing to declarations of representatives of seven state attorneys general stating that their states do not

---

[19] Plaintiffs also contend that a genuine issue of material fact remains at this stage because UPS raised several affirmative defenses in its Answer challenging the validity of the AOD that, if successful, would undermine the notion that the AOD is or ever was an active agreement. (Pls.' Opp. Br. at 25.) This argument is meritless because the Court has already granted plaintiffs' motion to strike UPS's three affirmative defenses challenging the validity of the AOD at the time of formation. See UPS II, 2016 WL 502042, at *17-19. Whatever inconsistency would otherwise exist on UPS's part has been resolved by the Court's decision on plaintiffs' motion to strike those affirmative defenses.

recognize the AOD, as well as a declaration from Michael G. Hering submitted on behalf of the NAAG. (See McPherson Decl., Exs. 1-5, ECF No. 175; Proshansky Decl., Exs. 6, 8, ECF No. 194.)

The seven state attorneys general declarations are from California, Idaho, Utah, Connecticut, New Mexico, Maryland and Pennsylvania; several are essentially identical (except for the state on whose behalf they were submitted). Below, the Court uses the declaration of Laura W. Kaplan, Deputy Attorney General of the State of California, as an illustrative example of the declarations that plaintiffs have put forward to support their position. (McPherson Decl., Ex. 1 ("Kaplan Decl."), ECF No. 175-1.)[20]

Ms. Kaplan states that California's understanding of the PACT Act is that the AOD is a settlement agreement "eligible" to make UPS exempt from the statute's liability provisions. (Kaplan Decl. ¶ 5.) Ms. Kaplan further states that "California is not a party to the AOD" and the "AOD does not appear to grant California any rights against UPS . . . such as the recovery of penalties, damages or injunctive relief," but rather New York is the only state that can do so. (Id. ¶ 6.) Ms. Kaplan states that "[i]t defies common sense and logic for California to recognize and assent to an

[20] The Idaho and Utah declarations are nearly identical to Ms. Kaplan's. (See McPherson Decl., Exs. 2-3, ECF Nos. 175-2, 175-3.) Although the Court notes that the declarations submitted on behalf of other state attorneys general contain minor variations in language, the remaining declarations contain the same facts in all material respects. The Court does, however, identify particular distinctions in certain of the declarations below.

agreement to which it is not a party and to which California has no legal rights" and, for those reasons, "California would not utilize the AOD . . . as a means to block illegal deliveries of cigarettes or smokeless tobacco to consumers." (Id. ¶ 7 (quotation marks omitted).)[21] Ms. Kaplan goes on to say that, instead, "California would use the PACT Act as an enforcement mechanism against UPS for illegal cigarette deliveries to consumers in California because the PACT Act provides California with a cause of action for civil penalties and other equitable relief whereas the AOD does not." (Id. ¶ 8.)[22]

As stated above, plaintiffs have also provided a declaration by Michael G. Hering, Director and Chief Counsel of the Center for Tobacco and Public Health

---

[21] The New Mexico declaration states that "[b]ecause the AOD does not provide New Mexico with any enforcement rights or any relief, New Mexico cannot recognize, 'honor' or assent to the AOD." (McPherson Decl., Ex. 4 ¶ 7, ECF No. 175-4 (emphasis added).) The Pennsylvania declaration states that Pennsylvania "has not, and could not rely on the AOD as a means to 'block illegal deliveries of cigarettes or smokeless tobacco to consumers' as it is not a party to the AOD." (Proshansky Decl., Ex. 6 ¶ 7, ECF No. 194-6 (emphasis added).) The assertions that these states cannot recognize the AOD further supports the Court's view that no carrier could ever obtain an exemption under plaintiffs' proposed reading.

[22] Connecticut's declaration states that Connecticut could use Conn. Gen. Stat. § 12-285c as an enforcement mechanism against UPS for illegal cigarette deliveries to consumers, but that it could not use the AOD because that agreement does not provide Connecticut with any enforcement capabilities against UPS. (McPherson Decl., Ex. 3 ¶¶ 10-13, ECF No. 175-3.) Maryland's declaration similarly states that Maryland would also use Md. Bus. Reg. § 16-223(b) to block cigarette shipments to consumers, rather than the AOD. (McPherson Decl., Ex. 5 ¶ 6, ECF No. 175-5.)

at the NAAG. (Hering Decl. ¶ 1.) Mr. Hering states that "NAAG has no authority to in any manner legally bind its member attorneys general . . . and takes no actions that purport to represent the policies or legal positions of its members unless expressly authorized to do so." (Id. ¶ 5.) Mr. Hering further states that "the NAAG Center for Tobacco and Public Health has no general authorization from any state to endorse particular programs or initiatives on behalf of that state" and, "if called upon to do so, NAAG would be unable to take any position on whether or not [the AOD] is honored nationwide." (Id. ¶¶ 6-7.)

Even when viewed in its entirety and construed in the light most favorable to plaintiffs, this evidence is insufficient to raise a genuine issue of material fact as to UPS's entitlement to exemption from liability under the PACT Act pursuant to § 376a(e)(3)(B)(ii)(I). In short, the declarations from the state attorneys general do not raise a genuine issue of material fact because none demonstrate that these states do not recognize the existence of the AOD or that UPS no longer gives nationwide effect to it. The declarations also do not suggest in any way that between the date that the AOD was signed and the PACT Act was implemented, there had been a change in the status quo vis-à-vis any state's position with respect to the AOD, or in UPS's policy of giving nationwide effect to the obligations imposed by it. Although each state attorney general's declaration posits that his or her respective state does not recognize or assent to the AOD because it provides no right of enforcement, none of the declarants assert that his or her state does not recognize the

AOD's existence or that UPS does not maintain a policy of giving nationwide effect to the requirements imposed in the AOD.[23]

As the Court explained above, § 376a(e)(3)(B)(ii)(I) was intended to exempt UPS and the other two carriers who are parties to enumerated agreements from the PACT Act's requirements from the time of the law's enactment. The factual predicate necessary for the AOD to be "honored throughout the United States" was therefore present at the time of enactment. As a result, a state's position that it has never and could never recognize the AOD because the state is not a party to it and the agreement provides no remedies or enforcement mechanism for the state to pursue is not a sufficient basis to find that the AOD is not honored or recognized throughout the United States. All that is required is that the AOD's existence is recognized throughout the United States and that UPS continue to give the AOD nationwide effect. That individual states would rather that UPS not be exempt such that they can potentially pursue remedies against it pursuant to the PACT Act and state law is immaterial and inconsistent with the bargain

---

[23] Even if plaintiffs were correct that a carrier's exemption under § 376a(e)(3)(B)(ii)(I) could be vitiated by a single state's affirmative statement that it does not recognize the AOD as preclusive of other remedies—a view that upon a full review of the parties' arguments and the statutory scheme is, in any event, inconsistent with the Court's reading of the statute—the Court notes that legitimate due process concerns are raised by an interpretation that would allow a state to lift the exemption with respect to alleged violations occurring prior to the state's expression of non-recognition of an otherwise qualifying settlement agreement.

that Congress ultimately struck in the final version of the statute. If the assertions made in these declarations were deemed sufficient to vitiate UPS's exemption, it is unclear how UPS, DHL or FedEx could ever obtain an exemption under § 376a(e)(3)(B)(ii)(I). As discussed above, it is hard to fathom that any state (much less every state) would ever be willing to forego the ability to obtain penalties under federal or state law in favor of a settlement agreement entered into by another state that provides it no enforcement mechanism.[24]

Mr. Hering's declaration on behalf of the NAAG does not help plaintiffs' attempt to create a genuine issue of material fact. That the NAAG may not legally bind its members through actions taken on their behalf is irrelevant. The information presented to Congress was that UPS had entered into the AOD, that it was giving the AOD nationwide effect, and that this was recognized nationally. Nothing in Mr. Hering's declaration undermines or alters that understanding. Because § 376a(e)(3)(B)(ii)(I) does not require each

[24] Again, the surrounding statutory language shows that a requirement of affirmative assent by all fifty states to a settlement agreement in lieu of the possibility of pursuing other penalties is not what Congress contemplated. Section 376a(e)(3)(B)(ii)(II) states that an unenumerated agreement "between a common carrier and a State"—in other words, a single state, not all states or even multiple states—qualifies for exemption if it "operates throughout the United States." 15 U.S.C. § 376a(e)(3)(B)(ii)(II). As explained above, because § 376a(e)(3)(B)(ii)(I) and § 376a(e)(3)(B)(ii)(II) should be read in parallel, it makes no sense to say that an enumerated agreement qualifies a carrier for exemption only upon the affirmative assent of all fifty states, whereas an unenumerated agreement needs only the assent of a single state as long as the agreement has nationwide breadth.

state to affirmatively assent to the AOD, it follows that the NAAG need not have had the capacity to affirmatively assent on its members' behalf. The fact that the NAAG did not and could not provide that assent is thus immaterial. What is significant, however, is that the record shows that the AOD included all of the procedures that the NAAG had sought from UPS and other carriers, and that there was an understanding that, through the AOD, UPS had agreed to stop directly shipping cigarettes to consumers nationwide. (UPS's 56.1 ¶¶ 5, 11-13.) In light of this context, it is entirely reasonable to believe that Congress viewed the AOD as having nationwide effect and being the result of a national consensus at the time the PACT Act was enacted, regardless of any authority that the NAAG did or did not have to act on behalf of its members.

As to plaintiffs' second category of factual support with which they seek to defeat UPS's motion, plaintiffs have presented a closer question by submitting evidence that UPS has in fact delivered contraband cigarettes to consumers. (See Pls.' 56.1 Cstmt. ¶¶ 7-8; Proshansky Decl., Exs. 1-5, 7.) As stated above, plaintiffs' evidence includes declarations from three individuals: (1) Jamie Harris-Bedell—who has owned, operated and worked at retail convenience store shops located on the Poospatuck Reservation that sell unstamped cigarettes, (2) Robert L. Oliver, Sr.—who was a partner in a reservation tobacco business on the Akwesasne Reservation, and (3) Philip D. Christ—who was employed by and/or consulted for various mail order cigarette businesses on the Seneca Reservation. Plaintiffs' evidence also includes excerpts from the depositions of Christ, and UPS's Rule

30(b)(6) witness, Bradley J. Cook (who also submitted a declaration on behalf of UPS, as discussed above).[25] Finally, plaintiffs also provide an excerpt of a chart showing deliveries that Native Wholesale Supply made to various states between February 2007 and June 2007 (in other words, after UPS entered into the AOD, but prior to the PACT Act's enactment). Below, the Court summarizes plaintiffs' strongest factual support for their contention that UPS does not in fact maintain nationwide policies to curb the delivery of contraband cigarettes.

In his declaration, Harris-Bedell asserts that UPS made deliveries of packages of contraband cigarettes to the smoke shop he worked at, that the contents of these packages were visible to UPS drivers while they were making deliveries, and that UPS drivers have purchased cigarettes from his smoke shop. (Proshansky Decl., Ex. 1 ("Harris-Bedell Decl.") ¶¶ 5-13.) Oliver's declaration states that when a UPS employee came to his store to open his UPS account, he told the employee that the packages to be shipped contained cigarettes, but the UPS employee responded that he didn't want to hear that and proceeded to open the account. (Proshansky Decl., Ex. 2 ("Oliver Decl.") ¶¶ 5-

[25] The Court notes that although plaintiffs cite to various pages of Mr. Cook's deposition transcript in their Rule 56.1 counterstatement, the sealed copy submitted to the Court contains only a limited subset of these pages—namely, pages 67 and 71. (See Proshansky Decl., Ex. 5.) The Court, therefore, does not rely on any other pages in considering the pending motion. As to plaintiffs' excerpt of the chart of deliveries made by Native Wholesale Supply, the entries appear to pre-date plaintiffs' claims and the enactment of the PACT Act. (See Proshansky Decl., Ex. 7.) As a result, the excerpt is of limited significance in regards to this motion.

6.) Oliver's declaration further states that UPS drivers who regularly picked up packages at his shop knew that the packages contained cigarettes because the packages sometimes had brand names on them. (Id. ¶¶ 7-8.) Christ's declaration, in turn, states that UPS shipped contraband cigarettes for the various mail order businesses with which he was affiliated, and that UPS drivers knew the packages contained cigarettes because they had identifying labels and the drivers on occasion bought cigarettes from these locations. (Proshansky Decl., Ex. 3 ("Christ Decl.") ¶¶ 6-10.) In his deposition, Christ further states that UPS daily delivered 35 to 75 packages containing cigarettes from the smoke shop at which he was employed. (Proshansky Decl., Ex. 4 ("Christ Dep. Tr.") at 30:6-32:2.)

While plaintiffs' evidence at least raises questions regarding the extent of UPS's compliance with its policies prohibiting the shipment of cigarettes to consumers in practice, and the efficacy of those policies in preventing the shipment of cigarettes to consumers, this evidence alone is insufficient to create a triable issue of fact as to whether UPS maintains nationwide policies. Plaintiffs' evidence is insufficient because § 376a(e)(3)(B)(ii)(I) does not require that a carrier's policies be 100% effective at preventing the shipment of cigarettes to consumers. A view to the contrary would, as explained above, import a compliance requirement into a definitional section and make it doubtful that a carrier could ever successfully invoke the exemption at any stage prior to trial. That being said, the Court agrees with plaintiffs that UPS may not retain the exemption simply by maintaining the

requisite policies nationwide in name only. Put otherwise, if plaintiffs could present evidence creating an inference that the effectiveness of UPS's policies is so compromised that these policies are not in fact in place, that would be sufficient to raise a genuine issue of fact for trial. Plaintiffs' limited factual submissions regarding UPS's non-adherence to its policies—which the Court believes represent only a fraction of the supporting evidence that plaintiffs have garnered during discovery—is insufficient to meet that standard. Plaintiffs' evidence does not support the inference that UPS's purported non-compliance is so severe that UPS no longer "honors" the AOD throughout the United States as that term is used in § 376a(e)(3)(B)(ii)(I).

That being said, while plaintiffs made a choice to not include all of their factual support for UPS's non-adherence to its policies in opposing UPS's pending motion, the Court also believes that, in the interest of fairness, it is appropriate to allow plaintiffs an opportunity to make a supplemental factual submission in light of the fact that the Court has modified its interpretation of § 376a(e)(3)(B)(ii)(I). While the Court cannot determine in the abstract precisely how much evidence of non-adherence is necessary to raise a genuine issue as to whether UPS maintains a nationwide policy in name only, the Court believes that plaintiffs could raise a genuine issue of fact by presenting a combination of two sorts of evidence. First, plaintiffs could present evidence of a sufficiently large number of instances of shipments of contraband cigarettes that it suggests that UPS is, overall, turning a blind eye towards such unlawful shipments. Second, plain-

tiffs could present a triable issue by submitting evidence showing that UPS policymakers have in fact turned a blind eye to shipments of contraband cigarettes.

In light of the foregoing, further submissions on this issue shall be as follows. Plaintiffs may submit a Rule 56.1 statement regarding UPS's non-adherence to its nationwide policies to curb shipments of contraband cigarettes **not to exceed ten pages** (not including the underlying factual materials, which plaintiffs should also submit), and a memorandum of law, **not to exceed five pages**, explaining why those facts are sufficient to defeat UPS's motion not later than **May 3, 2016**. UPS shall file any opposition memorandum of law **not to exceed five pages** not later than **May 10, 2016**. There shall be no replies. The Court notes that it does not consider this additional opportunity to be a matter of right—this allowance is not an invitation to the parties to argue for additional discovery or an extension of other deadlines. The Court does not intend to grant such a request. The Court will reach resolution on UPS's motion as soon as possible after reviewing the parties' submissions.

B. N.Y. PHL § 1399-ll

UPS argues that, to the extent it is entitled to summary judgment with respect to plaintiffs' PACT Act claims, the Court must also grant it summary judgment as to plaintiffs' claims brought pursuant to PHL § 1399-ll because such claims are expressly preempted by the PACT Act. The Court agrees. However, because the Court's resolution of UPS's PACT Act exemption awaits its receipt of the parties' further

submissions discussed above, the Court reserves decision on these claims.

IV. CONCLUSION

For the reasons set forth above, the Court concludes that plaintiffs have failed, at this time, to raise a genuine issue of material fact as to their PACT Act and PHL § 1399-ll claims. However, in light of the Court's further clarification of its interpretation of 15 U.S.C. § 376a(e)(3)(B)(ii)(I), the Court will allow plaintiffs one further opportunity to present additional evidence of the severity of UPS's non-adherence to its nationwide policies to curb the delivery of contraband cigarettes, as further set forth in this Opinion & Order.

SO ORDERED.

Dated: New York, New York
April 19, 2016

/s/ Katherine B. Forrest
KATHERINE B. FORREST
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE STATE OF NEW YORK and THE CITY OF NEW YORK, *Plaintiffs*, -v- UNITED PARCEL SERVICE, INC., *Defendant*.	15-cv-1136 (KBF) OPINION & ORDER

KATHERINE B. FORREST, District Judge:

In this action, the State of New York ("State") and the City of New York ("City") allege that defendant United Parcel Service, Inc. ("UPS"), a package delivery company, has delivered and continues to deliver hundreds of thousands of contraband untaxed packs of cigarettes to persons within the State and City, in violation of federal and state law. (Am. Compl., ECF No. 14.) Plaintiffs' amended complaint ("Amended Complaint") seeks injunctive relief, damages and penalties under the Contraband Cigarette Trafficking Act, 18 U.S.C. § 2341 et seq. ("CCTA"), and the Prevent All Cigarette Trafficking Act, 15 U.S.C. § 375 et

seq. ("PACT Act"), as well as treble damages and attorneys' fees under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 et seq. ("RICO"), injunctive relief and penalties under New York Executive Law § 63(12) ("N.Y. Exec. Law § 63(12)") and New York Public Health Law § 1399-ll ("N.Y. PHL § 1399-ll"), and penalties under an Assurance of Discontinuance ("AOD") with the New York State Attorney General ("NYAG"). (Am. Compl. ¶¶ 2, 89-168.)

Pending before the Court is UPS's motion to dismiss the Amended Complaint pursuant to Rule 12(b)(6). (ECF No. 21.) UPS raises several arguments in its motion, including that (1) all claims must be dismissed for failure to plausibly allege that UPS delivered cigarettes or that UPS knew those deliveries contained cigarettes, (2) the CCTA claims fail because there are no allegations that UPS engaged in any single transaction involving the shipment of more than 10,000 unstamped cigarettes, (3) the PACT Act claims fail because UPS is exempt from suit based on its AOD, and (4) the N.Y. PHL § 1399-ll claims fail because that statute is preempted by the PACT Act and the bulk of plaintiffs' claims nonetheless fail on retroactivity grounds. For the reasons that follow, UPS's motion to dismiss the Amended Complaint is GRANTED IN PART and DENIED IN PART. The Court dismisses plaintiffs' claims brought under the PACT Act and N.Y. PHL § 1399-ll. All other claims may proceed.

I. BACKGROUND

A. Factual Background[1]

1. New York's cigarette taxation regime.

Like the federal government, the State and the City tax the sale and use of tobacco products, such as cigarettes. (Am. Compl. ¶ 9.) Under New York law, all cigarettes possessed for sale or use are presumed to be taxable and therefore must bear a tax stamp, unless an exemption applies. (Id. ¶ 12.) State and City cigarette excise taxes must be pre-paid by licensed "stamping agents" who are usually wholesale cigarette dealers licensed by the State and the City to purchase and affix tax stamps to each pack of cigarettes possessed by the agent for sale within the State and/or the City. (Id. ¶¶ 13-14.) At all times relevant to this suit, the State's excise tax has been either $2.75 or $4.35 per pack and the City's excise tax has been $1.50 per pack. (Id. ¶ 16.)

The most common and longstanding form of tax evasion in the State has been the sale of untaxed cigarettes by Indian reservation retailers to non-tribal members. (Id. ¶¶ 19-21.) Such reservation sellers have long refused to participate in the tax stamping system for the collection of cigarette taxes. (Id. ¶ 19.) Although courts have upheld application of the State's cigarette taxation regime to Indian cigarette sales to the public, some reservation smoke shops continue to

---

[1] The following facts, which the Court accepts as true for purposes of this motion, are alleged in the Amended Complaint and documents referenced by and therefore incorporated into the Amended Complaint. The Court here recounts only those facts relevant to resolving the pending motion to dismiss, or to providing helpful background information.

sell cigarettes, including through mail, telephone, and Internet orders, without affixing the tax stamps of any of the jurisdictions into which the stores make sales. (Id. ¶ 24.)

2. The NYAG's first investigation of UPS.

In 2004, the NYAG began investigating residential cigarette deliveries made by UPS in violation of N.Y. PHL § 1399-ll, which prohibits the delivery of cigarettes by common carriers to persons who are not licensed cigarette wholesalers and retailers or government officials. (Id. ¶ 25.) The NYAG's investigation found that UPS regularly delivered unstamped and untaxed cigarettes to New York residential customers and that such deliveries originated principally from sellers located on New York State Indian reservations. (Id. ¶ 27.) Many of these sellers advertised their cigarettes as "tax-free" and accepted orders over the Internet or by telephone for later delivery by UPS to residences throughout the State. (Id.)

3. UPS's Assurance of Discontinuance.

Following the NYAG's investigation, UPS and the NYAG entered into an Assurance of Discontinuance ("AOD") on October 21, 2005.[2] (Am. Compl. ¶ 28; see McPherson Decl. Ex. 1 ("AOD"), ECF No. 23-1.) Under the AOD, UPS agreed, inter alia, to comply with N.Y. PHL § 1399-ll by prohibiting cigarette deliveries to unauthorized recipients in the State and undertaking measures to ensure compliance among its employees. (Am. Compl. ¶ 28.) The AOD subjects UPS to a

[2] The AOD is publicly available at: http://www.ag.ny.gov/sites/default/files/pressreleases/archived/9tiupsaodfinal.oct.pdf (last visited August 3, 2015).

$1,000 stipulated penalty for each violation of its terms, provided that no penalty would be imposed if: (a) the violation involved the shipment of cigarettes to a person, located within the State of New York, who was not otherwise authorized to possess such unstamped cigarettes, and (b) UPS established to the reasonable satisfaction of the NYAG that UPS did not know and had no reason to know that the shipment was prohibited. (AOD ¶ 42). In the AOD, UPS also represented that in June 2003 it informed approximately 400 shippers having accounts with UPS that it would no longer accept packages containing cigarettes for delivery to unauthorized recipients in the State. (Id. ¶ 12.) As a result of the AOD, the NYAG declined to commence a civil action against UPS for its alleged past violations of § 1399-ll. (Id. ¶ 15.) In a report to the NYAG dated on or around December 20, 2005, UPS confirmed that it would give nationwide effect to the AOD and that it no longer shipped cigarettes to consumers and would only deliver tobacco products from licensed entities. (Am. Compl. ¶ 29.)

4. UPS's alleged ongoing delivery of cigarettes after the AOD.

Plaintiffs allege that despite the assurances UPS made in the AOD, from at least 2010 through the present, UPS knowingly shipped and delivered thousands of cartons of unstamped cigarettes from manufacturers to unlicensed wholesalers and retailers, and delivered such cigarettes from smoke shops (including some shops that have been the subject of federal criminal prosecution for trafficking in contraband cigarettes) to residences in the State and the City. (E.g., Am. Compl. ¶¶ 30, 48-49.) In 2012, an undercover

City investigator placed an Internet order for cigarettes from a company located in Bason, New York, which is located on the Seneca Indian Nation Reservation. (Id. ¶ 31.) UPS delivered the order, which contained unstamped cigarettes, in a package bearing the return address of "Seneca Cigars." (Id.)

UPS records obtained by plaintiffs indicate that UPS made over 17,000 deliveries to residences for four smoke shops as recently as February 2014. (Id.) In November 2014, plaintiffs obtained additional records showing that between January 2010 and September 2014, UPS made 61,000 additional deliveries to residents throughout the State and the City on behalf of several other smoke shops and illegal cigarette distributors located on New York State Indian reservations. (Id. ¶ 32.) Plaintiffs allege that based on an analysis of the weights of the delivered packages, UPS delivered millions of packs of contraband cigarettes throughout the State over that time period. (Id. ¶ 34.)

Plaintiffs allege that UPS knew these deliveries contained unstamped, untaxed cigarettes based on, inter alia, UPS's prior experience in connection with the NYAG investigation and the AOD, numerous court decisions regarding Indian reservation smoke shops' non-compliance with the State's cigarette tax regime, widespread media reporting, UPS's entering into tobacco delivery contracts with most or all of the Indian reservation smoke shops that UPS shipped and delivered cigarettes for, by visiting, observing, and picking up packages for Indian reservation smoke shops, and as a result of UPS's general practice of enmeshing itself deeply in its customers' businesses. (E.g., id. ¶¶ 20, 24, 33, 40, 42-44, 47.)

B. Procedural Background

On February 18, 2015, plaintiffs filed their original complaint against UPS (ECF No. 1), and filed the Amended Complaint on May 1, 2015 (ECF No. 14). The Amended Complaint alleges fourteen causes of action seeking various forms of relief under federal and New York law, including under the CCTA, the PACT Act, RICO, N.Y. Exec. Law § 63(12), N.Y. PHL § 1399-ll, and pursuant to the AOD. On May 22, 2015, UPS filed a motion to dismiss the Amended Complaint pursuant to Rule 12(b)(6). (ECF No. 21.) The Court held oral argument on the motion on July 30, 2015. On August 26, 2015, the Court issued an Order inviting the parties to file supplemental briefs addressing an interpretation of the PACT ACT that had not previously been raised by either party. (ECF No. 37.) The parties submitted supplemental briefs on September 9, 2015. (ECF Nos. 44, 45.)

II. LEGAL STANDARDS

A. Motion to Dismiss

Under Rule 12(b)(6), a defendant may move to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To survive a Rule 12(b)(6) motion, a plaintiff must provide grounds upon which his claim rests through "factual allegations sufficient 'to raise a right to relief above the speculative level.'" ATSI Commc'ns, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 98 (2d Cir. 2007) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)). In other words, the complaint must allege "enough facts to state a claim to relief that is plausible on its face." Starr v. Sony BMG Music Entm't, 592 F.3d 314, 321 (2d Cir. 2010) (quoting Twombly, 550

U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

In applying this standard, the Court accepts as true all well-pled factual allegations, but does not credit "mere conclusory statements" or "[t]hreadbare recitals of the elements of a cause of action." Id. The Court will give "no effect to legal conclusions couched as factual allegations." Port Dock & Stone Corp. v. Oldcastle Ne., Inc., 507 F.3d 117, 121 (2d Cir. 2007) (citing Twombly, 550 U.S. at 555). Knowledge and other conditions of a person's mind may be alleged generally. Fed. R. Civ. P. 9(b). A plaintiff may plead facts alleged upon information and belief "where the facts are peculiarly within the possession and control of the defendant." Arista Records, LLC v. Doe 3, 604 F.3d 110, 120 (2d Cir. 2010). But, if the Court can infer no more than the mere possibility of misconduct from the factual averments—in other words, if the well-pled allegations of the complaint have not "nudged [plaintiff's] claims across the line from conceivable to plausible"—dismissal is appropriate. Twombly, 550 U.S. at 570; Starr, 592 F.3d at 321 (quoting Iqbal, 556 U.S. at 679). Where necessary, the Court may supplement the allegations in the complaint with facts from documents either referenced therein or relied upon in framing the complaint. See DiFolco v. MSNBC Cable L.L.C., 622 F.3d 104, 111 (2d Cir. 2010).

B. CCTA

The CCTA provides that "[i]t shall be unlawful for any person knowingly to ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes . . . ." 18 U.S.C. § 2342(a). The CCTA defines "contraband cigarettes" as "a quantity in excess of 10,000 cigarettes, which bear no evidence of the payment of applicable State or local cigarette taxes in the State or locality where such cigarettes are found . . . and which are in the possession of" a non-exempt person. 18 U.S.C. § 2341(2). Thus, a violation of the CCTA requires the following elements: (1) a person must knowingly ship, transport, received, possess, sell, distribute or purchase, (2) more than 10,000 "cigarettes", (3) that do not bear stamps, (4) under circumstances in which state or local tax law requires that such cigarettes bear stamps. 18 U.S.C. §§ 2341-42; see New York v. BB's Corner, Inc., No. 12 Civ. 1828(KBF), 2012 WL 2402624, at *2 (S.D.N.Y. June 25, 2012).

C. PACT Act

"The PACT Act regulates remote sales of cigarettes, and imposes a variety of requirements on sellers of cigarettes with the aim of ensuring that taxes are paid and cigarettes are not sold to children." City of New York v. Wolfpack Tobacco, No. 13 Civ. 1889(DLC), 2013 WL 5312542, at *3 (S.D.N.Y. Sept. 9, 2013). The PACT Act provides that "no person who delivers cigarettes or smokeless tobacco to consumers, shall knowingly complete, cause to be completed, or complete its portion of a delivery of any package for any person whose name and address are on the [ATF Non-Compliance] list." 15 U.S.C. § 376a(e)(2)(A).

The PACT Act contains a number of provisions exempting certain entities from suit, including one that is relevant here. The act provides that "any requirements or restrictions placed directly on common carriers . . . shall not apply to a common carrier that . . . is subject to a settlement agreement described in subparagraph (B)." 15 U.S.C. § 376a(e)(3)(A). It defines such settlement agreements to include "the Assurance of Discontinuance entered into by the Attorney General of New York and United Parcel Service, Inc. on or about October 21, 2005, . . . if [that agreement] is honored throughout the United States to block illegal deliveries of cigarettes or smokeless tobacco to consumers." 15 U.S.C. § 376a(e)(3)(B).[3] The PACT Act also states that "[n]o State may enforce against a common carrier a law prohibiting the delivery of cigarettes or other tobacco products to individual consumers or personal residences without proof that the common carrier is not exempt under [§ 376a(e)(3)]." Id. § 376a(e)(5)(C)(ii).

D. N.Y. PHL § 1399-ll

N.Y. PHL § 1399-ll makes it unlawful "for any common or contract carrier to knowingly transport cigarettes to any person in [New York] reasonably believed by such carrier to be other than a person described in [§ 1399-ll(1)]." N.Y. PHL § 1399-ll(2). Section 1399-ll(1) lists categories of persons to whom cig-

[3] Pursuant to another exemption in the PACT Act, a common carrier is not subject to civil penalties for violating § 376a(e) if "the common carrier . . . has implemented and enforces effective policies and practices for complying with [§ 376a(e)]." Id. § 377(b)(3)(B)(i).

arettes may lawfully be shipped, including persons licensed as a cigarette tax agent or wholesale dealer, export warehouse proprietors, and persons who are officers, employees, or agents of the United States government or New York State (or a political subdivision thereof) acting in accordance with their official duties. Id. § 1399-ll(1).

As originally enacted in 2000, § 1399-ll authorized New York's Commissioner of Health to impose a civil penalty for each violation of the statute. See N.Y. PHL § 1399-ll(5) (McKinney 2001). On September 27, 2013, the statute was amended in two significant respects. First, § 1399-ll was amended to increase the amount of civil penalties recoverable under the statute. Id. § 1399-ll(5). Second, the statute was amended to explicitly provide that "[t]he attorney general may bring an action to recover the civil penalties provided by [§ 1399-ll(5)] and for such other relief as may be deemed necessary" and that "the corporation counsel of any political subdivision that imposes a tax on cigarettes may bring an action to recover the civil penalties provided by [§ 1399-ll(5)] and for such other relief as may be deemed necessary with respect to any cigarettes shipped . . . in violation of this section to any person located within such political subdivision." Id. § 1399-ll(6).

III. DISCUSSION

A. Sufficiency of Allegations That UPS Delivered Cigarettes and Knew of Such Deliveries

UPS argues that the Amended Complaint does not adequately plead that UPS (1) delivered packages containing cigarettes to unauthorized recipients or (2) did so knowingly. As to the CCTA and RICO claims,

UPS argues these claims independently fail because the Amended Complaint does not adequately plead that the allegedly delivered cigarettes were unstamped. The Court disagrees.

The Amended Complaint alleges that UPS knowingly delivered enormous quantities of unstamped, untaxed cigarettes to persons throughout the United States, including the State and the City. (Am. Compl. ¶¶ 1-2, 25-168.) That is sufficient to provide the grounds upon which plaintiffs' claims rest and allows the Court to "draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678; see also ATSI Commc'ns, Inc., 493 F.3d at 98 (A plaintiff must provide grounds upon which his claim rests through "factual allegations sufficient to raise a right to relief above the speculative level." (quotation marks omitted)). UPS's contention that many of the more than 78,000 deliveries alleged in the Amended Complaint may have contained tobacco products other than unstamped cigarettes (such as cigars or little cigars) is a merits-based argument as to what the evidence will show. UPS raises a factual issue not ripe for determination at this stage. See Bernheim v. Litt, 79 F.3d 318, 321 (2d Cir. 1996) (On a Rule 12(b)(6) motion, "the issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." (quotation marks and alterations omitted)). Furthermore, the possibility that some of the 78,000 deliveries alleged in the Amended Complaint contained tobacco products other than unstamped, untaxed cigarettes does not eliminate UPS's liability for those deliveries that did include unstamped cigarettes.

UPS also claims that the Amended Complaint does not sufficiently plead knowledge. Rule 9(b) states that knowledge and conditions of a person's mind may be alleged generally, but "plaintiffs must still plead the events which they claim give rise to an inference of knowledge." In re DDAVP Direct Purchaser Antitrust Litig., 585 F.3d 677, 695 (2d Cir. 2009); see also Fed. R. Civ. P. 9(b). The Amended Complaint alleges that UPS knew that packages it was delivering contained unstamped cigarettes because, inter alia, UPS employees had observed and picked up those packages from smoke shops located on New York State Indian reservations, UPS's policy is to enmesh itself deeply in its customers' businesses, and UPS delivered cigarettes for businesses that have been the subject of federal criminal prosecution for trafficking in contraband cigarettes. (E.g., Am. Compl. ¶¶ 30, 42-49.) These allegations are sufficient to give rise to an inference of knowledge.

B. CCTA

UPS argues that plaintiffs' CCTA claims fail because the Amended Complaint does not allege that UPS participated in any single transaction in which it shipped more than 10,000 unstamped cigarettes. That argument conflicts with the plain language of the CCTA, which imposes no single transaction requirement, and, as UPS acknowledges, with every court in this district to have taken up the question. City of New York v. FedEx Ground Package Sys., Inc., No. 13 Civ. 9173(ER), 2015 WL 1013386, at *5 (S.D.N.Y. Mar. 9, 2015); City of New York v. Lasership, Inc., 33 F. Supp. 3d 303, 313 (S.D.N.Y. 2014); City of New York v. Gordon, 1 F. Supp. 3d 94, 105 (S.D.N.Y. 2013); BB's Corner, Inc., 2012 WL 2402624,

at *5. In fact, no court in the Second Circuit has adopted the statutory construction for which UPS advocates. Furthermore, UPS has not presented any compelling reason for this Court to deviate from the ample and well-reasoned decisions of courts within this Circuit allowing aggregation of multiple cigarette shipments to meet the CCTA's threshold quantity. This Court declines to do so.[4]

C. PACT Act

The PACT Act explicitly exempts UPS from suit based on its AOD with the NYAG. 15 U.S.C. § 376a(e)(3)(B). That exemption, however, only applies "if [the AOD] is honored throughout the United States to block illegal deliveries of cigarettes or smokeless tobacco to consumers." Id. § 376a(e)(3)(B)(ii)(I). The Amended Complaint alleges that UPS is not entitled to the exemption because "[i]t is self-evident from this complaint that UPS does not 'honor' its agreement." (Am. Compl. ¶ 79.) Plaintiffs argue that the "is honored" language refers to whether UPS—a signatory of the AOD—has complied with the terms of the AOD, and assert that this allegation means, in essence, that UPS has not "honored" it and is therefore not exempt.[5] The Court disagrees.

---

[4] UPS does not dispute that if separate shipments may be aggregated for purposes of calculating the 10,000 cigarette threshold, the allegations that UPS made more than 78,000 deliveries of unstamped cigarettes are sufficient at this stage.

[5] Initially, UPS similarly assumed that the "is honored" language relates to its compliance with the AOD and contested only the extent to which plaintiffs were required to prove its failure to "honor" or comply with the PACT Act before it would lose the

Based on a careful review of the statutory language and structure of § 376a(e)(3), and upon review of the PACT Act's legislative history and apparent purpose, see Abramski v. United States, 134 S. Ct. 2259, 2267 (2014) (stating that courts should look "to the statutory context, 'structure, history, and purpose'" when interpreting a statute (quoting Maracich v. Spears, 133 S. Ct. 2191, 2209 (2013)), the Court concludes that § 376a(e)(3)(B) is a definitional provision that merely defines the types of settlement agreements that qualify for exemption. In other words, this provision does not purport to reach questions of compliance or noncompliance with obligations assumed under any particular agreement. In accordance with that reading, UPS is deprived of its exemption if plaintiffs show that the AOD is not recognized throughout the United States. Because the Amended Complaint fails to include such an allegation, plaintiffs' PACT Act claims must be dismissed.

The language and structure of § 376a(e)(3) show that the provision serves to define the types of agreements intended to confer exemptions of carriers. Use of the word "includes" at the start of § 376a(e)(3)(B)(ii) signals that what follows is a list of that which is encompassed. See Samantar v. Yousuf, 560 U.S. 305, 317 (2010) ("[U]se of the word 'include' can signal that the list that follows is meant to be illustrative rather than exhaustive."). Section 376a(e)(3)(B)(ii)(I) enumerates three settlement agreements, including UPS's AOD with the NYAG, that exempt common carrier parties to those agreements "if each of those

---

benefit of the exemption. In its supplemental brief filed in response to this Court's August 26, 2015 Order, UPS advocates for the interpretation adopted in this Opinion & Order.

agreements is honored throughout the United States . . . ." 15 U.S.C. § 376a(e)(3)(B)(ii)(I).

In the Court's view, § 376a(e)(3)(B)(ii)(I)'s conditional clause "if each of those agreements is honored throughout the United States" means that UPS is exempt from the PACT Act if the AOD has appropriate breadth. That is, if and only if the agreement has nationwide effect does a carrier obtain the benefit of the exemption. In this regard, the phrase "is honored throughout the United States" means "recognized by" all states in the nation. Put otherwise, "is honored" means "is recognized," and has nothing to do with a common carrier's compliance with the specific terms of any particular settlement agreement. See HONOR, Black's Law Dictionary (10th ed. 2014) (defining honor as "[t]o recognize" among other definitions). The statute's use of the passive voice in the conditional clause is consistent with that use of "honored."[6]

---

[6] Although there are alternative definitions of "honor" that do not necessarily support the statutory reading adopted by the Court, see HONOR, Oxford English Dictionary (OED Third Ed., March 2014) (available at http://www.oed.com/view/Entry/88228?rskey=6pwt3c&result=2&isAdvanced=false#eid) (defining honor as"[t]o fulfill (a duty or obligation); to abide by the terms of (an agreement); to keep (one's word or promise)"); HONOR, Merriam Webster Dictionary (available at http://www.merriam-webster.com/dictionary/honor) (defining honor as "to live up to or fulfill the terms of" and "to accept as valid or conform to the request or demands of (an official document)"), those definitions do not accord with the context, structure or the aims sought to be achieved by the PACT Act. See King v. Burwell, 135 S. Ct. 2480, 2483 (2015) (Where a word is susceptible to more than one interpretation, "the Court must read the words in their context and with a view to their place in the overall statutory scheme." (quotation marks omitted)); see also Abramski, 134 S. Ct. at 2267.

As UPS points out in its supplemental brief, Congress has used the term "honored" in this sense before. See 25 U.S.C. § 1041b(b)(5) (providing that cooperative funding agreements between the Shawnee Tribe and the Cherokee Nation "shall be honored by Federal agencies").

The reading adopted by the Court is, moreover, supported by the language of § 376a(e)(3)(B)(ii)(II), which serves to identify the types of unenumerated agreements that qualify for exemption. That provision is instructive because it acts in parallel to the provision under which UPS claims exemption here and it is also relevant under the noscitur a sociis canon of construction. See Gustafson v. Alloyd Co., 513 U.S. 561, 575 (1995) ("[A] word is known by the company it keeps."). Section 376a(e)(3)(B)(ii)(II) states that a qualifying agreement includes "any other active agreement between a common carrier and a State that operates throughout the United States to ensure that no deliveries of cigarettes or smokeless tobacco shall be made to consumers . . . without payment to the States . . . where the consumers are located of all taxes on the tobacco products." 15 U.S.C. § 376a(e)(3)(B)(ii)(II) (emphasis added). The phrase "that operates throughout the United States," even more so than the phrase "is honored throughout the United States" at issue here, suggests that the language is directed at geographic breadth rather than the signatory's degree of compliance with the agreement. Read in tandem, it seems clear that § 376a(e)(3)(B)(ii)(I) & (II) merely define the contours

of a qualifying settlement agreement and that the exemption is not dependent on the extent to which a common carrier is actually in compliance.[7]

Plaintiffs' policy arguments are similarly unconvincing. The Court rejects plaintiffs' characterization of a nationwide breadth requirement as "draconian." The Court also rejects plaintiffs' contention that the Court's reading is unsupportable because the statute lacks any description of a procedure or explanation as to how a state might honor such an agreement. By requiring nationwide recognition, Congress merely sought to codify the status quo with respect to carriers who had already agreed to curb illegal cigarette deliveries. The evidence before Congress was that the three settlement agreements enumerated in § 376a(e)(3)(B)(ii)(I) already had effect across the nation.[8] Given that context, Congress need not have

---

[7] Section 376a(e)(3)(A)(ii), which addresses the circumstance in which a qualifying agreement is no longer operative, does not support plaintiffs' interpretation. The fact that a carrier may keep its exemption by voluntarily adhering to the terms of an agreement even after that agreement has terminated or has otherwise become inactive does not mean that § 376a(e)(3)(B)(ii)(I) speaks to the degree of a carrier's compliance.

[8] See, e.g., Prevent All Cigarette Trafficking Act of 2007, and the Smuggled Tobacco Prevention Act of 2008: Hearing on H.R. 4081 & H.R. 5689 Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary, 110th Cong. 79 (2008) ("2008 Hearing"), at 79 (Statement of David S. Lapp, Chief Counsel, Tobacco Enforcement Unit, Office of the Attorney Gen. of Md., testifying on behalf of NAAG) ("Along with other State attorneys general, we have attained agreements with . . . the major delivery companies, including UPS, FedEx and DHL, all to stop Internet sales of cigarettes."); 2008 Hearing at 124 (Statement of Eric Proshansky, Deputy Chief, Division of Affirmative

been concerned as to how a state might hypothetically "honor" an agreement. Regardless, based on the lack of any allegation in the Amended Complaint that the AOD has not been recognized by states nationwide, the Court need not determine the precise procedure by which a state must honor an agreement.

Significantly, plaintiffs' proposed interpretation fares no better in creating a consistent, workable scheme. For instance, plaintiffs' interpretation mixes both the type of agreement encompassed and a compliance component into the same provision. The Court doubts that such an interpretation corresponds with Congressional intent and principles of statutory interpretation. The concepts of breadth and behavior are quite different. Further, it would place a difficult burden on a carrier seeking to invoke the exemption if such carrier would always (according to plaintiffs' argument) be subject to suit under the PACT Act so long as a plaintiff could include a plausible allegation of non-compliance in the complaint. This seemingly guts the exemption, which was created to prevent the imposition of onerous burdens on those common carriers who had previously agreed to halt the delivery of contraband cigarettes. See 155 Cong. Rec. S5822-01, 2009 WL 1423723, at *104 (May 21, 2009) (statement of Sen. Kohl, sponsor of Senate version of bill) ("It is important to point out that this bill has been carefully negotiated with the common carriers, including UPS,

---

Litigation, New York City Law Department) ("The states, acting through the [NAAG], and with the assistance of the Bureau of Alcohol, Tobacco, Firearms & Explosives, negotiated an unprecedented set of agreements with . . . common carriers in which members of those industries have pledged to end any participation in the Internet cigarette business.").

to ensure that it does not place any unreasonable burdens on these businesses. In recognition of UPS and other common carriers' agreements to not deliver cigarettes to individual consumers on a nationwide basis, pursuant to agreements with the State of New York, we have exempted them from the bill provided this agreement remains in effect.").[9]

Even if the Court were to determine that § 376a(e)(3)(B)(ii)(I) is ambiguous as between the interpretations advanced by the parties, the PACT Act's legislative history strongly supports the reading adopted by the Court. The legislative history shows that in light of the commitments made by UPS, Federal Express and DHL prior to the PACT Act's enactment, the statute was aimed primarily at eliminating deliveries of illegal, untaxed cigarettes by the U.S. Postal Service ("USPS"). See 2008 Hearing at 79 (statement of David S. Lapp) (explaining that states "have curbed deliveries by all the major carriers except one: the U.S. Postal Service, which asserts it has no legal authority to refuse cigarette shipments"); 156

[9] Section 376a(e)(5)(C)(ii), which precludes a state from enforcing a law prohibiting the delivery of cigarettes to individual consumers "without proof that the common carrier is not exempt under paragraph (3) of this subsection," 15 U.S.C. § 376a(e)(5)(C)(ii) (emphasis added), is not inconsistent with the Court's understanding of the PACT ACT's chief aim. This "proof" requirement suggests that Congress intended to confer on qualifying carriers broad exemption from legal obligations arising from outside of their nationwide settlement agreements. Section 376a(e)(5)(C)(ii), which applies to both enumerated and unenumerated agreements as defined in § 376a(e)(3), imposes the burden on a plaintiff to show that the carrier has not entered into a settlement agreement that qualifies for one of the categories of exemption in § 376a(e)(3).

Cong. Rec. H1526-01, 2010 WL 956208, at *27 (Mar. 17, 2010) (statement of Rep. Weiner, House sponsor of the PACT Act) ("There's only one common carrier that today still delivers tobacco through the mail—the United States Postal Service."); 2008 Hearing at 9 (testimony of Rep. Weiner) ("Right now, the only one that is carrying [untaxed cigarettes], ironically, is [USPS]. So the only one who would actually be covered by this in a real practical sense is [USPS]. Everyone else would already be following their status quo operations."). Because the ill that Congress was attempting to correct was the USPS's refusal to halt the delivery of illegal cigarettes, the purpose of § 376a(e)(3) was to exempt from the PACT Act the common carriers who had already pledged to act in conformity with the PACT Act's goals. See 15 U.S.C. § 376a(e)(3).

Finally, it is worth noting that the Court's reading does not leave state attorneys general without any remedy to prevent the unlawful delivery of cigarettes to individual consumers and personal residences. The AOD contains its own remedies in the event of UPS's breach, providing a $1,000 stipulated penalty for each violation of its terms. (AOD ¶ 42.) The fact that plaintiffs will still be able to pursue remedies under the AOD means that plaintiffs are only barred from obtaining duplicative recovery.[10] In sum, because the

[10] The Court finds no unfairness to plaintiffs in this result. It is worth noting that Representative Anthony Weiner of New York sponsored the House version of the PACT Act and both of New York's Senators, Senators Schumer and Gillibrand, were co-sponsors of the Senate version, see 155 Cong. Rec. S6030-03. One can assume that New York's Senators sought to promote, rather

Amended Complaint fails to allege that the AOD is not accepted nationwide, the PACT Act claims must be dismissed.

D. N.Y. PHL § 1399-ll

As noted above, the PACT Act provides that "[n]o State may enforce against a common carrier a law prohibiting the delivery of cigarettes or other tobacco products to individual consumers or personal residences without proof that the common carrier is not exempt under [15 U.S.C. § 376a(e)(3)]." 15 U.S.C. § 376a(e)(5)(C)(ii). UPS argues that because the AOD qualifies it for exemption from the PACT Act, and N.Y. PHL § 1399-ll is a state law "prohibiting the delivery of cigarettes . . . to individual consumers or personal residences," the PACT Act preempts enforcement of § 1399-ll against UPS. The Court agrees. The PACT Act provision referenced in § 376a(e)(5)(C)(ii) is the same as that discussed above, pursuant to which the Court has concluded that UPS is exempt from suit for violations of the PACT Act. Because plaintiffs have not raised any argument disputing that N.Y. PHL § 1399-ll is preempted if UPS qualifies for exemption under the PACT Act, plaintiffs' § 1399-ll must be dismissed.[11]

---

than inhibit, New York's interests in supporting the legislation. See Wesberry v. Sanders, 376 U.S. 1, 13 (1964) (noting that Senators were intended to be considered "state emissaries" under the Constitutional design).

[11] Because the Court holds that the PACT Act exempts UPS from suit for violations of § 1399-ll, the Court does not address UPS's argument that plaintiffs lack standing to enforce § 1399-ll for the bulk of the time period at issue in the Amended Complaint.

IV. CONCLUSION

For the reasons set forth above, defendant's motion to dismiss is GRANTED as to plaintiffs' claims arising under the PACT Act and N.Y. PHL § 1399-ll and DENIED as to all other claims.

The Clerk of Court is directed to close the motion at ECF No. 21.

SO ORDERED.

Dated: New York, New York
September 16, 2015

/s/ Katherine B. Forrest
KATHERINE B. FORREST
United States District Judge

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 19th day of December, two thousand nineteen.

The State of New York, The City of New York, Plaintiffs – Appellees - Cross-Appellants, v. United Parcel Service, Inc., Defendant – Appellant - Cross-Appellee.	**ORDER** Docket Nos: 17-1993 (L) 17-2107 (XAP) 17-2111 (XAP)

Appellant-Cross-Appellee, United Parcel Service, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc.*

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

APPENDIX G

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

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

Plaintiffs,

-v-

UNITED PARCEL SERVICE, INC.,

Defendant.

15 **CIVIL** 1136 (KBF)

JUDGMENT

- -X

Whereas this action having come before the Court, and this case was tried to the bench on September 19, 2016, through September 29, 2016. Following the trial, on March 24, 2017, the Court issued a preliminary Opinion & Order setting forth, inter alia, its findings of fact and conclusions of law, and on May 25, 2017, the Court issued a Corrected Opinion & Order. The Court found Defendant United Parcel Service, Inc. ("UPS") liable on each claim asserted against it. Plaintiffs New York State and New York City are entitled to compensatory damages and penalties. The sole remaining question is the quantum to be awarded. The parties were ordered to submit certain information to the Court no later than April 7, 2017, and the matter having come before the Honorable

Katherine B. Forrest, United States District Judge, and the Court, on May 25, 2017, having rendered its Opinion and Order stating that the Court has set forth its determination of damages and penalties. In total, awarding Plaintiff New York State $165,817,479 and awarding Plaintiff New York City $81,158,135; and directing the Clerk of Court to enter final judgment against defendant UPS, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Opinion and Order dated May 25, 2017, the Court has set forth its determination of damages and penalties. In total, Plaintiff New York State is awarded $165,817,479 and Plaintiff New York City is awarded $81,158,135; final judgment is entered against defendant UPS.

Dated: New York, New York
May 26, 2017

RUBY J. KRAJICK

_____

Clerk of Court

BY:

/s/ KMA NGO

Deputy Clerk

APPENDIX H

STATUTORY PROVISIONS INVOLVED

15 U.S.C. § 376a. Delivery sales

(a) In general

With respect to delivery sales into a specific State and place, each delivery seller shall comply with—

(1) the shipping requirements set forth in subsection (b);

(2) the recordkeeping requirements set forth in subsection (c);

(3) all State, local, tribal, and other laws generally applicable to sales of cigarettes or smokeless tobacco as if the delivery sales occurred entirely within the specific State and place, including laws imposing—

(A) excise taxes;

(B) licensing and tax-stamping requirements;

(C) restrictions on sales to minors; and

(D) other payment obligations or legal requirements relating to the sale, distribution, or delivery of cigarettes or smokeless tobacco; and

(4) the tax collection requirements set forth in subsection (d).

(b) Shipping and packaging

(1) Required statement

For any shipping package containing cigarettes or smokeless tobacco, the delivery seller shall include on the bill of lading, if any, and on the outside

of the shipping package, on the same surface as the delivery address, a clear and conspicuous statement providing as follows: "CIGARETTES/SMOKELESS TOBACCO: FEDERAL LAW REQUIRES THE PAYMENT OF ALL APPLICABLE EXCISE TAXES, AND COMPLIANCE WITH APPLICABLE LICENSING AND TAX-STAMPING OBLIGATIONS".

(2) Failure to label

Any shipping package described in paragraph (1) that is not labeled in accordance with that paragraph shall be treated as non-deliverable matter by a common carrier or other delivery service, if the common carrier or other delivery service knows or should know the package contains cigarettes or smokeless tobacco. If a common carrier or other delivery service believes a package is being submitted for delivery in violation of paragraph (1), it may require the person submitting the package for delivery to establish that it is not being sent in violation of paragraph (1) before accepting the package for delivery. Nothing in this paragraph shall require the common carrier or other delivery service to open any package to determine its contents.

(3) Weight restriction

A delivery seller shall not sell, offer for sale, deliver, or cause to be delivered in any single sale or single delivery any cigarettes or smokeless tobacco weighing more than 10 pounds.

(4) Age verification

(A) In general

A delivery seller who mails or ships tobacco products—

(i) shall not sell, deliver, or cause to be delivered any tobacco products to a person under the minimum age required for the legal sale or purchase of tobacco products, as determined by the applicable law at the place of delivery;

(ii) shall use a method of mailing or shipping that requires—

(I) the purchaser placing the delivery sale order, or an adult who is at least the minimum age required for the legal sale or purchase of tobacco products, as determined by the applicable law at the place of delivery, to sign to accept delivery of the shipping container at the delivery address; and

(II) the person who signs to accept delivery of the shipping container to provide proof, in the form of a valid, government-issued identification bearing a photograph of the individual, that the person is at least the minimum age required for the legal sale or purchase of tobacco products, as determined by the applicable law at the place of delivery; and

(iii) shall not accept a delivery sale order from a person without—

(I) obtaining the full name, birth date, and residential address of that person; and

(II) verifying the information provided in subclause (I), through the use of a commercially available database or aggregate of databases, consisting primarily of data from government sources, that are regularly used by government and businesses for the purpose of age and identity verification and authentication, to ensure that the purchaser is

at least the minimum age required for the legal sale or purchase of tobacco products, as determined by the applicable law at the place of delivery.

(B) Limitation

No database being used for age and identity verification under subparagraph (A)(iii) shall be in the possession or under the control of the delivery seller, or be subject to any changes or supplementation by the delivery seller.

(c) Records

(1) In general

Each delivery seller shall keep a record of any delivery sale, including all of the information described in section 376(a)(2) of this title, organized by the State, and within the State, by the city or town and by zip code, into which the delivery sale is so made.

(2) Record retention

Records of a delivery sale shall be kept as described in paragraph (1) until the end of the 4th full calendar year that begins after the date of the delivery sale.

(3) Access for officials

Records kept under paragraph (1) shall be made available to tobacco tax administrators of the States, to local governments and Indian tribes that apply local or tribal taxes on cigarettes or smokeless tobacco, to the attorneys general of the States, to the chief law enforcement officers of the local governments and Indian tribes, and to the Attorney General of the United States in order to ensure the

compliance of persons making delivery sales with the requirements of this chapter.

(d) Delivery

(1) In general

Except as provided in paragraph (2), no delivery seller may sell or deliver to any consumer, or tender to any common carrier or other delivery service, any cigarettes or smokeless tobacco pursuant to a delivery sale unless, in advance of the sale, delivery, or tender—

(A) any cigarette or smokeless tobacco excise tax that is imposed by the State in which the cigarettes or smokeless tobacco are to be delivered has been paid to the State;

(B) any cigarette or smokeless tobacco excise tax that is imposed by the local government of the place in which the cigarettes or smokeless tobacco are to be delivered has been paid to the local government; and

(C) any required stamps or other indicia that the excise tax has been paid are properly affixed or applied to the cigarettes or smokeless tobacco.

(2) Exception

Paragraph (1) does not apply to a delivery sale of smokeless tobacco if the law of the State or local government of the place where the smokeless tobacco is to be delivered requires or otherwise provides that delivery sellers collect the excise tax from the consumer and remit the excise tax to the State or local government, and the delivery seller complies with the requirement.

(e) List of unregistered or noncompliant delivery sellers

(1) In general

(A) Initial list

Not later than 90 days after this subsection goes into effect under the Prevent All Cigarette Trafficking Act of 2009, the Attorney General of the United States shall compile a list of delivery sellers of cigarettes or smokeless tobacco that have not registered with the Attorney General of the United States pursuant to section 376(a) of this title, or that are otherwise not in compliance with this chapter, and—

(i) distribute the list to—

(I) the attorney general and tax administrator of every State;

(II) common carriers and other persons that deliver small packages to consumers in interstate commerce, including the United States Postal Service; and

(III) any other person that the Attorney General of the United States determines can promote the effective enforcement of this chapter; and

(ii) publicize and make the list available to any other person engaged in the business of interstate deliveries or who delivers cigarettes or smokeless tobacco in or into any State.

(B) List contents

To the extent known, the Attorney General of the United States shall include, for each delivery seller on the list described in subparagraph (A)—

(i) all names the delivery seller uses or has used in the transaction of its business or on packages delivered to customers;

(ii) all addresses from which the delivery seller does or has done business, or ships or has shipped cigarettes or smokeless tobacco;

(iii) the website addresses, primary email address, and phone number of the delivery seller; and

(iv) any other information that the Attorney General of the United States determines would facilitate compliance with this subsection by recipients of the list.

(C) Updating

The Attorney General of the United States shall update and distribute the list described in subparagraph (A) at least once every 4 months, and may distribute the list and any updates by regular mail, electronic mail, or any other reasonable means, or by providing recipients with access to the list through a nonpublic website that the Attorney General of the United States regularly updates.

(D) State, local, or tribal additions

The Attorney General of the United States shall include in the list described in subparagraph (A) any noncomplying delivery sellers identified by any State, local, or tribal government under paragraph (6), and shall dis-tribute the list to the attorney general or chief law enforcement official and the tax administrator of any government submitting any such information, and to any common carriers or other persons who deliver small packages to consumers

identified by any government pursuant to paragraph (6).

(E) Accuracy and completeness of list of noncomplying delivery sellers

In preparing and revising the list described in subparagraph (A), the Attorney General of the United States shall—

(i) use reasonable procedures to ensure maximum possible accuracy and completeness of the records and information relied on for the purpose of determining that a delivery seller is not in compliance with this chapter;

(ii) not later than 14 days before including a delivery seller on the list, make a reasonable attempt to send notice to the delivery seller by letter, electronic mail, or other means that the delivery seller is being placed on the list, which shall cite the relevant provisions of this chapter and the specific reasons for which the delivery seller is being placed on the list;

(iii) provide an opportunity to the delivery seller to challenge placement on the list;

(iv) investigate each challenge described in clause (iii) by contacting the relevant Federal, State, tribal, and local law enforcement officials, and provide the specific findings and results of the investigation to the delivery seller not later than 30 days after the date on which the challenge is made; and

(v) if the Attorney General of the United States determines that the basis for including a delivery seller on the list is inaccurate, based on incomplete information, or cannot be verified, promptly remove the delivery seller from

the list as appropriate and notify each appropriate Federal, State, tribal, and local authority of the determination.

(F) Confidentiality

The list described in subparagraph (A) shall be confidential, and any person receiving the list shall maintain the confidentiality of the list and may deliver the list, for enforcement purposes, to any government official or to any common carrier or other person that delivers tobacco products or small packages to consumers. Nothing in this section shall prohibit a common carrier, the United States Postal Service, or any other person receiving the list from discussing with a listed delivery seller the inclusion of the delivery seller on the list and the resulting effects on any services requested by the listed delivery seller.

(2) Prohibition on delivery

(A) In general

Commencing on the date that is 60 days after the date of the initial distribution or availability of the list described in paragraph (1)(A), no person who receives the list under paragraph (1), and no person who delivers cigarettes or smokeless tobacco to consumers, shall knowingly complete, cause to be completed, or complete its portion of a delivery of any package for any person whose name and address are on the list, unless—

(i) the person making the delivery knows or believes in good faith that the item does not include cigarettes or smokeless tobacco;

(ii) the delivery is made to a person lawfully engaged in the business of manufacturing, distributing, or selling cigarettes or smokeless tobacco; or

(iii) the package being delivered weighs more than 100 pounds and the person making the delivery does not know or have reasonable cause to believe that the package contains cigarettes or smokeless tobacco.

(B) Implementation of updates

Commencing on the date that is 30 days after the date of the distribution or availability of any updates or corrections to the list described in paragraph (1)(A), all recipients and all common carriers or other persons that deliver cigarettes or smokeless tobacco to consumers shall be subject to subparagraph (A) in regard to the corrections or updates.

(3) Exemptions

(A) In general

Subsection (b)(2) and any requirements or restrictions placed directly on common carriers under this subsection, including subparagraphs (A) and (B) of paragraph (2), shall not apply to a common carrier that—

(i) is subject to a settlement agreement described in subparagraph (B); or

(ii) if a settlement agreement described in subparagraph (B) to which the common carrier is a party is terminated or otherwise becomes inactive, is administering and enforcing policies and practices throughout the United States that are at least as stringent as the agreement.

(B) Settlement agreement

A settlement agreement described in this subparagraph—

(i) is a settlement agreement relating to tobacco product deliveries to consumers; and

(ii) includes—

(I) the Assurance of Discontinuance entered into by the Attorney General of New York and DHL Holdings USA, Inc. and DHL Express (USA), Inc. on or about July 1, 2005, the Assurance of Discontinuance entered into by the Attorney General of New York and United Parcel Service, Inc. on or about October 21, 2005, and the Assurance of Compliance entered into by the Attorney General of New York and Federal Express Corporation and FedEx Ground Package Systems, Inc. on or about February 3, 2006, if each of those agreements is honored throughout the United States to block illegal deliveries of cigarettes or smokeless tobacco to consumers; and

(II) any other active agreement between a common carrier and a State that operates throughout the United States to ensure that no deliveries of cigarettes or smokeless tobacco shall be made to consumers or illegally operating Internet or mail-order sellers and that any such deliveries to consumers shall not be made to minors or without payment to the States and localities where the consumers are located of all taxes on the tobacco products.

(4) Shipments from persons on list

(A) In general

If a common carrier or other delivery service delays or interrupts the delivery of a package in the possession of the common carrier or delivery service because the common carrier or delivery service determines or has reason to believe that the person ordering the delivery is on a list described in paragraph (1)(A) and that clauses (i), (ii), and (iii) of paragraph (2)(A) do not apply—

(i) the person ordering the delivery shall be obligated to pay—

(I) the common carrier or other delivery service as if the delivery of the package had been timely completed; and

(II) if the package is not deliverable, any reasonable additional fee or charge levied by the common carrier or other delivery service to cover any extra costs and inconvenience and to serve as a disincentive against such noncomplying delivery orders; and

(ii) if the package is determined not to be deliverable, the common carrier or other delivery service shall offer to provide the package and its contents to a Federal, State, or local law enforcement agency.

(B) Records

A common carrier or other delivery service shall maintain, for a period of 5 years, any records kept in the ordinary course of business relating to any delivery interrupted under this paragraph and provide that information, upon request, to the Attorney General of the United

States or to the attorney general or chief law enforcement official or tax administrator of any State, local, or tribal government.

(C) Confidentiality

Any person receiving records under subparagraph (B) shall—

(i) use the records solely for the purposes of the enforcement of this chapter and the collection of any taxes owed on related sales of cigarettes and smokeless tobacco; and

(ii) keep confidential any personal information in the records not otherwise required for such purposes.

(5) Preemption

(A) In general

No State, local, or tribal government, nor any political authority of 2 or more State, local, or tribal governments, may enact or enforce any law or regulation relating to delivery sales that restricts deliveries of cigarettes or smokeless tobacco to consumers by common carriers or other delivery services on behalf of delivery sellers by—

(i) requiring that the common carrier or other delivery service verify the age or identity of the consumer accepting the delivery by requiring the person who signs to accept delivery of the shipping container to provide proof, in the form of a valid, government-issued identification bearing a photograph of the individual, that the person is at least the minimum age required for the legal sale or purchase of tobacco products, as determined by either State or local law at the place of delivery;

(ii) requiring that the common carrier or other delivery service obtain a signature from the consumer accepting the delivery;

(iii) requiring that the common carrier or other delivery service verify that all applicable taxes have been paid;

(iv) requiring that packages delivered by the common carrier or other delivery service contain any particular labels, notice, or markings; or

(v) prohibiting common carriers or other delivery services from making deliveries on the basis of whether the delivery seller is or is not identified on any list of delivery sellers maintained and distributed by any entity other than the Federal Government.

(B) Relationship to other laws

Except as provided in subparagraph (C), nothing in this paragraph shall be construed to nullify, expand, restrict, or otherwise amend or modify—

(i) section 14501(c)(1) or 41713(b)(4) of title 49;

(ii) any other restrictions in Federal law on the ability of State, local, or tribal governments to regulate common carriers; or

(iii) any provision of State, local, or tribal law regulating common carriers that is described in section 14501(c)(2) or 41713(b)(4)(B) of title 49.

(C) State laws prohibiting delivery sales

(i) In general

Except as provided in clause (ii), nothing in the Prevent All Cigarette Trafficking Act of 2009, the amendments made by that Act, or in

any other Federal statute shall be construed to preempt, supersede, or otherwise limit or restrict State laws prohibiting the delivery sale, or the shipment or delivery pursuant to a delivery sale, of cigarettes or other tobacco products to individual consumers or personal residences.

(ii) Exemptions

No State may enforce against a common carrier a law prohibiting the delivery of cigarettes or other tobacco products to individual consumers or personal residences without proof that the common carrier is not exempt under paragraph (3) of this subsection.

(6) State, local, and tribal additions

(A) In general

Any State, local, or tribal government shall provide the Attorney General of the United States with—

(i) all known names, addresses, website addresses, and other primary contact in-formation of any delivery seller that—

(I) offers for sale or makes sales of cigarettes or smokeless tobacco in or into the State, locality, or tribal land; and (II) has failed to register with or make reports to the respective tax administrator as required by this chapter, or that has been found in a legal proceeding to have otherwise failed to comply with this chapter; and

(ii) a list of common carriers and other persons who make deliveries of cigarettes or smokeless tobacco in or into the State, locality, or tribal land.

(B) Updates

Any government providing a list to the Attorney General of the United States under subparagraph (A) shall also provide updates and corrections every 4 months until such time as the government notifies the Attorney General of the United States in writing that the government no longer desires to submit information to supplement the list described in paragraph (1)(A).

(C) Removal after withdrawal

Upon receiving written notice that a government no longer desires to submit information under subparagraph (A), the Attorney General of the United States shall remove from the list described in paragraph (1)(A) any persons that are on the list solely because of the prior submissions of the government of the list of the government of noncomplying delivery sellers of cigarettes or smokeless tobacco or a subsequent update or correction by the government.

(7) Deadline to incorporate additions

The Attorney General of the United States shall—

(A) include any delivery seller identified and submitted by a State, local, or tribal government under paragraph (6) in any list or update that is distributed or made avail-able under paragraph (1) on or after the date that is 30 days after the date on which the information is received by the Attorney General of the United States; and

(B) distribute any list or update described in subparagraph (A) to any common carrier or other person who makes deliveries of cigarettes or smokeless tobacco that has been identified and

submitted by a government pursuant to paragraph (6).

(8) Notice to delivery sellers

Not later than 14 days before including any delivery seller on the initial list described in paragraph (1)(A), or on an update to the list for the first time, the Attorney General of the United States shall make a reasonable attempt to send notice to the delivery seller by letter, electronic mail, or other means that the delivery seller is being placed on the list or update, with that notice citing the relevant provisions of this chapter.

(9) Limitations

(A) In general

Any common carrier or other person making a delivery subject to this subsection shall not be required or otherwise obligated to—

(i) determine whether any list distributed or made available under paragraph (1) is complete, accurate, or up-to-date;

(ii) determine whether a person ordering a delivery is in compliance with this chapter; or

(iii) open or inspect, pursuant to this chapter, any package being delivered to determine its contents.

(B) Alternate names

Any common carrier or other person making a delivery subject to this subsection—

(i) shall not be required to make any inquiries or otherwise determine whether a person ordering a delivery is a delivery seller on the list described in paragraph (1)(A) who is using a

different name or address in order to evade the related delivery restrictions; and

(ii) shall not knowingly deliver any packages to consumers for any delivery seller on the list described in paragraph (1)(A) who the common carrier or other delivery service knows is a delivery seller who is on the list and is using a different name or address to evade the delivery restrictions of paragraph (2).

(C) Penalties

Any common carrier or person in the business of delivering packages on behalf of other persons shall not be subject to any penalty under section 14101(a) of title 49 or any other provision of law for—

(i) not making any specific delivery, or any deliveries at all, on behalf of any person on the list described in paragraph (1)(A);

(ii) refusing, as a matter of regular practice and procedure, to make any deliveries, or any deliveries in certain States, of any cigarettes or smokeless tobacco for any person or for any person not in the business of manufacturing, distributing, or selling cigarettes or smokeless tobacco; or

(iii) delaying or not making a delivery for any person because of reasonable efforts to comply with this chapter.

(D) Other limits

Section 376 of this title and subsections (a), (b), (c), and (d) of this section shall not be interpreted to impose any responsibilities, requirements, or liability on common carriers.

(f) Presumption

For purposes of this chapter, a delivery sale shall be deemed to have occurred in the State and place where the buyer obtains personal possession of the cigarettes or smokeless tobacco, and a delivery pursuant to a delivery sale is deemed to have been initiated or ordered by the delivery seller.

* * *

15 U.S.C. § 377. Penalties

(a) Criminal penalties

(1) In general

Except as provided in paragraph (2), whoever knowingly violates this chapter shall be imprisoned for not more than 3 years, fined under title 18, or both.

(2) Exceptions

(A) Governments

Paragraph (1) shall not apply to a State, local, or tribal government.

(B) Delivery violations

A common carrier or independent delivery service, or employee of a common carrier or independent delivery service, shall be subject to criminal penalties under paragraph (1) for a violation of section 376a(e) of this title only if the violation is committed knowingly—

(i) as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value; or

(ii) for the purpose of assisting a delivery seller to violate, or otherwise evading compliance with, section 376a of this title.

(b) Civil penalties

(1) In general

Except as provided in paragraph (3), whoever violates this chapter shall be subject to a civil penalty in an amount not to exceed—

(A) in the case of a delivery seller, the greater of—

(i) $5,000 in the case of the first violation, or $10,000 for any other violation; or

(ii) for any violation, 2 percent of the gross sales of cigarettes or smokeless tobacco of the delivery seller during the 1- year period ending on the date of the violation.

(B) in the case of a common carrier or other delivery service, $2,500 in the case of a first violation, or $5,000 for any violation within 1 year of a prior violation.

(2) Relation to other penalties

A civil penalty imposed under paragraph (1) for a violation of this chapter shall be imposed in addition to any criminal penalty under subsection (a) and any other damages, equitable relief, or injunctive relief awarded by the court, including the payment of any unpaid taxes to the appropriate Federal, State, local, or tribal governments.

(3) Exceptions

(A) Delivery violations

An employee of a common carrier or independent delivery service shall be subject to civil penalties under paragraph (1) for a violation of section 376a(e) of this title only if the violation is committed intentionally—

(i) as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value; or

(ii) for the purpose of assisting a delivery seller to violate, or otherwise evading compliance with, section 376a of this title.

(B) Other limitations

No common carrier or independent delivery service shall be subject to civil penalties under paragraph (1) for a violation of section 376a(e) of this title if—

(i) the common carrier or independent delivery service has implemented and enforces effective policies and practices for complying with that section; or

(ii) the violation consists of an employee of the common carrier or independent delivery service who physically receives and processes orders, picks up packages, processes packages, or makes deliveries, taking actions that are outside the scope of employment of the employee, or that violate the implemented and enforced policies of the common carrier or independent delivery service described in clause (i).

* * *

18 U.S.C. § 2341. Definitions

As used in this chapter—

(1) the term "cigarette" means—

(A) any roll of tobacco wrapped in paper or in any substance not containing tobacco; and

(B) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in subparagraph (A);

(2) the term "contraband cigarettes" means a quantity in excess of 10,000 cigarettes, which bear no evidence of the payment of applicable State or local cigarette taxes in the State or locality where such cigarettes are found, if the State or local government requires a stamp, impression, or other indication to be placed on packages or other containers of cigarettes to evidence payment of cigarette taxes, and which are in the possession of any person other than—

(A) a person holding a permit issued pursuant to chapter 52 of the Internal Revenue Code of 1986 as a manufacturer of tobacco products or as an export warehouse propri-

etor, or a person operating a customs bonded warehouse pursuant to section 311 or 555 of the Tariff Act of 1930 (19 U.S.C. 1311 or 1555) or an agent of such person;

(B) a common or contract carrier transporting the cigarettes involved under a proper bill of lading or freight bill which states the quantity, source, and destination of such cigarettes;

(C) a person—

(i) who is licensed or otherwise authorized by the State where the cigarettes are found to account for and pay cigarette taxes imposed by such State; and

(ii) who has complied with the accounting and payment requirements relating to such license or authorization with respect to the cigarettes involved; or

(D) an officer, employee, or other agent of the United States or a State, or any department, agency, or instrumentality of the United States or a State (including any political subdivision of a State) having possession of such cigarettes in connection with the performance of official duties;

(3) the term "common or contract carrier" means a carrier holding a certificate of convenience and necessity, a permit for contract carrier by motor vehicle, or other valid operating authority under subtitle IV of title 49, or under equivalent operating authority from a regulatory agency of the United States or of any State;

(4) the term "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or the Virgin Islands;

(5) the term "Attorney General" means the Attorney General of the United States;

(6) the term "smokeless tobacco" means any finely cut, ground, powdered, or leaf tobacco that is intended to be placed in the oral or nasal cavity or otherwise consumed without being combusted;

(7) the term "contraband smokeless tobacco" means a quantity in excess of 500 single-unit consumer-sized cans or packages of smokeless tobacco, or their equivalent, that are in the possession of any person other than—

(A) a person holding a permit issued pursuant to chapter 52 of the Internal Revenue Code of 1986 as manufacturer[1] of tobacco products or as an export warehouse proprietor, a person operating a customs

[1] So in original. Probably should be "a manufacturer".

bonded warehouse pursuant to section 311 or 555 of the Tariff Act of 1930 (19 U.S.C. 1311, 1555), or an agent of such person;

(B) a common carrier transporting such smokeless tobacco under a proper bill of lading or freight bill which states the quantity, source, and designation of such smokeless tobacco;

(C) a person who—

(i) is licensed or otherwise authorized by the State where such smokeless tobacco is found to engage in the business of selling or distributing tobacco products; and

(ii) has complied with the accounting, tax, and payment requirements relating to such license or authorization with respect to such smokeless tobacco; or

(D) an officer, employee, or agent of the United States or a State, or any department, agency, or instrumentality of the United States or a State (including any political subdivision of a State), having possession of such smokeless tobacco in connection with the performance of official duties;[2]

---

[2] So in original. The semicolon probably should be a period.

18 U.S.C. § 2342. Unlawful acts

(a) It shall be unlawful for any person knowingly to ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes or contraband smokeless tobacco.

(b) It shall be unlawful for any person knowingly to make any false statement or representation with respect to the information required by this chapter to be kept in the records of any person who ships, sells, or distributes any quantity of cigarettes in excess of 10,000 in a single transaction.

* * *

18 U.S.C. § 2343. Recordkeeping, reporting, and inspection

(a) Any person who ships, sells, or distributes any quantity of cigarettes in excess of 10,000, or any quantity of smokeless tobacco in excess of 500 single-unit consumer-sized cans or packages, in a single transaction shall maintain such information about the shipment, receipt, sale, and distribution of cigarettes as the Attorney General may prescribe by rule or regulation. The Attorney General may require such person to keep such information as the Attorney General considers appropriate for purposes of enforcement of this chapter, including—

(1) the name, address, destination (including street address), vehicle license number, driver's license number, signature of the person receiving such cigarettes, and the name of the purchaser;

(2) a declaration of the specific purpose of the receipt (personal use, resale, or delivery to another); and

(3) a declaration of the name and address of the recipient's principal in all cases when the recipient is acting as an agent.

Such information shall be contained on business records kept in the normal course of business.

(b) Any person, except for a tribal government, who engages in a delivery sale, and who ships, sells, or distributes any quantity in excess of 10,000 cigarettes, or any quantity in excess of 500 single-unit consumer-sized cans or packages of smokeless tobacco, or their equivalent, within a single month, shall submit to the Attorney General, pursuant to rules or regulations prescribed by the Attorney General, a report that sets forth the following:

(1) The person's beginning and ending inventory of cigarettes and cans or packages of smokeless tobacco (in total) for such month.

(2) The total quantity of cigarettes and cans or packages of smokeless tobacco that the person received within such month from each other person (itemized by name and address).

(3) The total quantity of cigarettes and cans or packages of smokeless tobacco that the person distributed within such month to each person (itemized by name and address) other than a retail purchaser.

(c)(1) Any officer of the Bureau of Alcohol, Tobacco, Firearms, and Explosives may, during normal business hours, enter the premises of any person described in subsection (a) or (b) for the purposes of inspecting—

(A) any records or information required to be maintained by the person under this chapter; or

(B) any cigarettes or smokeless tobacco kept or stored by the person at the premises.

(2) The district courts of the United States shall have the authority in a civil action under this subsection to compel inspections authorized by paragraph (1).

(3) Whoever denies access to an officer under paragraph (1), or who fails to comply with an order issued under paragraph (2), shall be subject to a civil penalty in an amount not to exceed $10,000.

(d) Any report required to be submitted under this chapter to the Attorney General shall also be submitted to the Secretary of the Treasury and to the attorneys general and the tax administrators of the States

from where the shipments, deliveries, or distributions both originated and concluded.

(e) In this section, the term "delivery sale" means any sale of cigarettes or smokeless tobacco in interstate commerce to a consumer if—

(1) the consumer submits the order for such sale by means of a telephone or other method of voice transmission, the mails, or the Internet or other online service, or by any other means where the consumer is not in the same physical location as the seller when the purchase or offer of sale is made; or

(2) the cigarettes or smokeless tobacco are delivered by use of the mails, common carrier, private delivery service, or any other means where the consumer is not in the same physical location as the seller when the consumer obtains physical possession of the cigarettes or smokeless tobacco.

(f) In this section, the term "interstate commerce" means commerce between a State and any place outside the State, or commerce between points in the same State but through any place outside the State.

* * *

New York State Public Health Law § 1399-ll

§ 1399-ll. Unlawful shipment or transport of cigarettes

1. It shall be unlawful for any person engaged in the business of selling cigarettes to ship or cause to be shipped any cigarettes to any person in this state who is not: (a) a person licensed as a cigarette tax agent or wholesale dealer under article twenty of the tax law or registered retail dealer under section four hundred eighty-a of the tax law; (b) an export warehouse proprietor pursuant to chapter 52 of the internal revenue code or an operator of a customs bonded warehouse pursuant to section 1311 or 1555 of title 19 of the United States Code; or (c) a person who is an officer, employee or agent of the United States government, this state or a department, agency, instrumentality or political subdivision of the United States or this state and presents himself or herself as such, when such person is acting in accordance with his or her official duties. For purposes of this subdivision, a person is a licensed or registered agent or dealer described in paragraph (a) of this subdivision if his or her name appears on a list of licensed or registered agents or dealers published by the department of taxation and finance, or if such person is licensed or registered as an agent or dealer under article twenty of the tax law.

2. It shall be unlawful for any common or contract carrier to knowingly transport cigarettes to any person in this state reasonably believed by such carrier to be other than a person described in paragraph (a), (b) or (c) of subdivision one of this section. For purposes of the preceding sentence, if cigarettes are

transported to a home or residence, it shall be presumed that the common or contract carrier knew that such person was not a person described in paragraph (a), (b) or (c) of subdivision one of this section. It shall be unlawful for any other person to knowingly transport cigarettes to any person in this state, other than to a person described in paragraph (a), (b) or (c) of subdivision one of this section. Nothing in this subdivision shall be construed to prohibit a person other than a common or contract carrier from transporting not more than eight hundred cigarettes at any one time to any person in this state.

3. When a person engaged in the business of selling cigarettes ships or causes to be shipped any cigarettes to any person in this state, other than in the cigarette manufacturer's original container or wrapping, the container or wrapping must be plainly and visibly marked with the word "cigarettes".

4. Whenever a police officer designated in section 1.20 of the criminal procedure law or a peace officer designated in subdivision four of section 2.10 of such law, acting pursuant to his or her special duties, shall discover any cigarettes which have been or which are being shipped or transported in violation of this section, such person is hereby empowered and authorized to seize and take possession of such cigarettes, and such cigarettes shall be subject to a forfeiture action pursuant to the procedures provided for in article thirteen-A of the civil practice law and rules, as if such article specifically provided for forfeiture of cigarettes seized pursuant to this section as a pre-conviction forfeiture crime.

5. Any person who violates the provisions of subdivision one or two of this section shall be guilty of a class A misdemeanor and for a second or subsequent violation shall be guilty of a class E felony. In addition to the criminal penalty, any person who violates the provisions of subdivision one, two or three of this section shall be subject to a civil penalty not to exceed the greater of (a) five thousand dollars for each such violation; or (b) one hundred dollars for each pack of cigarettes shipped, caused to be shipped or transported in violation of such subdivision.

6. The attorney general may bring an action to recover the civil penalties provided by subdivision five of this section and for such other relief as may be deemed necessary. In addition, the corporation counsel of any political subdivision that imposes a tax on cigarettes may bring an action to recover the civil penalties provided by subdivision five of this section and for such other relief as may be deemed necessary with respect to any cigarettes shipped, caused to be shipped or transported in violation of this section to any person located within such political subdivision. All civil penalties obtained in any such action shall be retained by the state or political subdivision bringing such action, provided that no person shall be required to pay civil penalties to both the state and a political subdivision with respect to the same violation of this section.

APPENDIX I

ATTORNEY GENERAL OF THE STATE OF NEW YORK HEALTH CARE BUREAU

In the Matter of

UNITED PARCEL SERVICE, INC.

ASSURANCE OF DISCONTINUANCE

Pursuant to N.Y. Executive Law ("EL") § 63(12), ELIOT SPITZER, Attorney General of the State of New York, has caused an inquiry to be made into certain business practices of United Parcel Service, Inc. ("UPS") related to N.Y. Public Health Law ("PHL") § 1399-*ll*. As a result of such inquiry, the Attorney General has made the following findings:

1. UPS is a corporation, organized and existing under the laws of the State of Delaware, with its principal place of business located at 55 Glenlake Parkway, Atlanta, Georgia 30328.

2. UPS is a package delivery company and provider of specialized transportation and logistics services, and in the regular course of its business delivers packages to persons located in New York.

3. PHL §1399-*ll*, entitled "Unlawful Shipment of Cigarettes," states that it shall be unlawful for a common carrier like UPS to knowingly transport cigarettes to any person in New York whom it reasonably believes to be other than a person who is authorized

to receive such shipment. The statute provides in pertinent part:

> 1. It shall be unlawful for any person engaged in the business of selling cigarettes to ship or cause to be shipped any cigarettes to any person in this state who is not: (a) a person licensed as a cigarette tax agent or wholesale dealer under article twenty of the tax law or registered retail dealer under section four hundred eighty-a of the tax law; (b) an export warehouse proprietor pursuant to chapter 52 of the internal revenue code or an operator of a customs bonded warehouse pursuant to section 1311 or 1555 of title 19 of the United States Code; or (c) a person who is an officer, employee or agent of the United States government, this state or a department, agency, instrumentality or political subdivision of the United States or this state, when such person is acting in accordance with his or her official duties.
>
> 2. It shall be unlawful for any common or contract carrier to knowingly transport cigarettes to any person in this state reasonably believed by such carrier to be other than a person described in paragraph (a), (b) or (c) of subdivision one of this section. For purposes of the preceding sentence, if cigarettes are transported to a home or residence, it shall be presumed that the common or contract carrier knew that such person was not a person described in paragraph (a), (b) or (c) of subdivision one of this section. It shall be unlawful for any other person to knowingly transport cigarettes to any person in this state, other than

to a person described in paragraph (a), (b) or (c) of subdivision one of this section.

4. PHI, § 1399-*ll* became effective on or about April 10, 2003 (the "Implementation Date").

5. EL § 63(12) prohibits repeated illegal acts and persistent illegality in carrying on, conducting or transacting business.

6. On or about August 6, 2004, the Attorney General caused a subpoena to be served on UPS pursuant to EL § 63(12). Schedule C attached to the subpoena identified the names of shippers that sell and ship cigarettes in the course of their business, and the subpoena sought information about whether UPS may have transported cigarettes from such shippers in violation of PHL § 1399-*ll*(2) and EL § 63(12). On or about April 11, 2005, the Attorney General caused a second subpoena to be served on UPS pursuant to EL § 63(12). Among other things, the second subpoena sought additional information about whether UPS has transported cigarettes in violation of PHL § I399-*ll*(2) and EL § 63(12), as well as information relating to persons who may be shipping cigarettes via UPS in violation of PHL § 1399-*ll* and EL § 63(12).

7. UPS produced information in response to the subpoenas, and has cooperated with the Attorney General's investigation.

8. The Attorney General alleges that since the Implementation Date, UPS has delivered many packages containing cigarettes to persons who were not authorized to receive them pursuant to PHL § 1399-*ll* in violation of PHL § 1399-*ll*(2) and thereby engaged in repeated illegal acts and business activities in violation of EL § 63(12) (the "Alleged Past Violations").

9. UPS disputes the Attorney General's allegations, and denies that its actions have violated PHL § 1399-*ll*(2) and EL § 63(12) in any manner. UPS also asserts that even before the Attorney General's investigation was initiated, UPS adopted revised policies governing the transportation of tobacco products, and that the UPS policies, among other things, are meant to ensure that UPS does not knowingly deliver cigarettes to unauthorized recipients in violation of various state laws, including PHL § 1399-ll(2).

10. UPS represents that, after the Implementation Date, the UPS Tariff and UPS's Terms and Conditions, which describe the terms and conditions pursuant to which UPS provides package delivery services for shippers, and together form parts of the UPS shipping contract, were amended to provide in pertinent part: "Shippers are prohibited from shipping, and no service shall be rendered in the transportation of, any tobacco products that shippers are not authorized to ship under applicable state law or that are addressed to recipients not authorized to receive such shipments under applicable law."

11. UPS represents that, since the Implementation Date, it has provided formal training to its employees regarding PHL § 1399-*ll*, and it has educated its New York delivery drivers and pre-loaders about the statute's delivery restrictions and instructed New York drivers and pre-loaders not to load for delivery, or deliver, packages in violation of PHL § 1399-ll.

12. UPS represents, that on June 13, 2003, it wrote to approximately 400 shippers who have UPS accounts to notify them of the provisions of PHL § 1399-*ll*, and advised them that it would no longer

accept packages containing cigarettes for delivery to unauthorized recipients in New York.

13. UPS represents that, shortly after UPS responded to the Attorney General's Subpoena, it conducted an unannounced audit of the ten shippers identified on Schedule C of the Subpoena who had shipped more than 1,000 packages each to New York after June 18, 2003.

14. UPS represents that (a) its audit revealed that two of the shippers were shipping packages that contained cigarettes in violation of PHL § 1399-ll, (b) it returned the packages to the shippers, and (c) it immediately terminated any further pickup service to these shippers.

15. UPS has made a business decision to adopt a formal policy expressly prohibiting the shipment of cigarettes to individual consumers in the United States while still permitting the lawful shipment of cigarettes to licensed tobacco businesses and other persons legally authorized to receive shipments of cigarettes (the "UPS Cigarette Policy"). Specifically, the UPS Cigarette Policy states as follows:

> "1. UPS does not provide service for shipments of cigarettes to consumers.
>
> 2. UPS only accepts shipments of cigarettes for delivery to recipients who are licensed or otherwise authorized by applicable federal, state, provincial or local law or regulation to receive deliveries of cigarettes."

WHEREAS, UPS offers this Assurance of Discontinuance in settlement of the Alleged Past Violations

asserted by the Attorney General, and intending that this Assurance of Discontinuance will promote further and ongoing cooperation between UPS and the Attorney General concerning UPS's compliance with PHI, § 1399-*ll*; and

WHEREAS, the Attorney General accepts the following assurances from UPS pursuant to Executive Law § 63(15) in lieu of commencing a civil action against UPS for the Alleged Past Violations;

NOW, THEREFORE, IT IS HEREBY UNDERSTOOD AND AGREED AS FOLLOWS:

Definitions

16. In addition to the terms defined throughout this Assurance of Discontinuance, the following terms shall have the meanings indicated for purposes of this Assurance of Discontinuance:

A. "Authorized Recipient" shall mean tobacco manufacturers; licensed wholesalers, tax agents, retailers, and export warehouses; government employees acting in accordance with their official duties; or any other person or entity to whom cigarettes may be lawfully transported pursuant to federal law and the law of the state in which delivery is made, including those persons described in PHL §1399-*ll*(1) with respect to the State of New York.

B. "Cigarette" shall have the meaning set forth in N.Y. Tax Law § 470(1): "any roll for smoking made wholly or in part of tobacco or of any other substance, irrespective of size or shape and whether or not such tobacco or substance is fla-

vored, adulterated or mixed with any other ingredient, the wrapper or cover of which is made of paper or any other substance or material except tobacco."

C. "Cigarette Retailer" shall mean and refer to a person or entity that sells and ships Cigarettes to Individual Consumers in the ordinary course of the person's or entity's business.

D. "Cigarette Website" shall mean and refer to an Internet website through or at which a person sells Cigarettes.

E. "Delivery Services" shall mean and refer to any outbound delivery services provided to a shipper, when the shipper's packages are tendered to UPS for delivery from the shipper's pickup address. "Delivery Services" shall also include outbound delivery services provided to a shipper, when the shipper's packages are tendered to UPS for delivery by other means (*e.g.*, drop box, authorized shipping outlet, UPS customer counter), except that where this Assurance of Discontinuance requires UPS to suspend or refuse to provide Delivery Services, UPS shall only be required to make a reasonable, good faith effort to suspend or refuse to provide outbound delivery services when the shipper's packages are tendered to UPS by means other than pickup from a shipper's pickup address.

F. "Effective Date" shall mean and refer to the date on which this Assurance of Discontinuance is fully and completely executed by the parties hereto.

G. "Individual Consumer" shall mean and refer to any person or entity other than an Authorized Recipient.

H. "Prohibited Shipment" shall mean and refer to any package containing Cigarettes tendered to UPS where the shipment, delivery or packaging of such Cigarettes would violate Public Health Law § 1399-*ll*.

Restrictions

17. UPS shall comply with PHL § 1399-*ll*(2), and adhere to the UPS Cigarette Policy described in Paragraph 15 prohibiting the shipment of Cigarettes to Individual Consumers in the United States.

18. Within thirty (30) days of the Effective Date, UPS shall set forth the UPS Cigarette Policy, using language that does not deviate in substance from the language used in Paragraph 15, in UPS's Terms and Conditions of Service and UPS's General Tariff Containing the Classifications, Rules and Practices for the Transportation of Property, published at http://www.ups.com/, and further incorporate the UPS Cigarette Policy into the addendum of contracts signed by shippers who ship Cigarettes.

19. UPS shall not amend its Tariff, its Terms and Conditions of Service or the UPS Cigarette Policy in a manner that is inconsistent with this Assurance of Discontinuance.

20. UPS shall revise, to the extent it has not yet done so already, and maintain its delivery policies and procedures for Cigarettes in accordance with this Assurance of Discontinuance.

Notifications to Cigarette Retailers

21. To the extent it has not already done so, within thirty (30) days after the Effective Date, UPS shall identify and compile a list that includes UPS customers that UPS believes may be Cigarette Retailers. UPS shall use the following sources of information to compile the list: (a) sellers and shippers identified on Schedule C of the Attorney General's subpoena duces tecum dated August 6, 2004, for which UPS has identified account numbers; (b) sellers and shippers identified as likely Cigarette Retailers based on UPS's search of names in its customer database for words such as "cigarette," "smoke," and "tobacco;" (c) sellers and shippers identified as likely Cigarette Retailers based on UPS's search of codes in its customer database; and (d) UPS's knowledge of known Cigarette Retailers. As part of its production in response to the Attorney General's subpoenas, UPS shall provide a copy of the list to the Attorney General when completed, as well as copies of updated lists as may be requested from time to time by the Attorney General.

22. To the extent it has not already done so, within thirty (30) days of the Effective Date, and at ninety (90) day intervals thereafter, UPS shall use an appropriate Internet search engine to identify additional shippers who list UPS as a carrier for Cigarettes shipped to Individual Consumers. UPS will investigate shippers who use the Cigarette Websites identified by the search engine to determine whether these shippers in fact ship Cigarettes to Individual Consumers via UPS, and conduct audits of such shippers to the extent required by Paragraph 24 of the As-

surance of Discontinuance. In the event UPS's Internet searches in any consecutive twelve (12) month period do not uncover any shippers identified through such searches that have tendered Cigarettes to UPS for delivery to Individual Consumers, UPS's obligation to conduct such searches pursuant to this Paragraph shall cease.

23. Within thirty (30) business days of identifying a person as a Cigarette Retailer pursuant to Paragraphs 21 and 22, or becoming aware through some other means that a person is using or purporting to use UPS's Delivery Services to ship Cigarettes to Individual Consumers, UPS shall correspond in writing with such person, indicating that UPS no longer transports Cigarettes to Individual Consumers and does not accept such shipments for delivery.

Audits

24. UPS shall audit shippers where there is a reasonable basis to believe that such shippers may be tendering Cigarettes for delivery to Individual Consumers, in order to determine whether the shippers are in fact doing so.

Database: Record Keeping

25. UPS shall develop and maintain a database that includes information regarding Cigarette Retailers (the "Tobacco Shipper Database") with the following minimum components:

A. A record of those shippers UPS has identified as Cigarette Retailers through the procedures implemented pursuant to Paragraphs 21, 22 and 23. The record shall include the following information, when

available, as to the shipper and the shipment: (i) the shipper's name, (ii) known business address(es), (iii) known website address(es), (iv) known pick-up location(s), (v) UPS account number(s), (vi) the name of the contact person for the shipper, and (vii) the UPS account executive responsible for the shipper, if any (collectively, "Shipper Information").

B. A record of Cigarette Retailers' non-compliance with the UPS Cigarette Policy, including a list of tracking numbers for shipments of Cigarettes to Individual Consumers intercepted by UPS, available Shipper Information, and the date of the shipment.

C. A record of the results of audits of any Cigarette Retailers performed by UPS.

D. A record of discipline taken against any Cigarette Retailers by UPS.

Discipline of Shippers

26. If UPS discovers a shipment of Cigarettes to Individual Consumers, UPS shall make and maintain a record of the shipper of such package or shipment. Within thirty (30) days of a written request in the form of a subpoena, which may be adequately served by letter or e-mail to the person identified pursuant to Paragraph 38 of this Assurance of Discontinuance, UPS shall provide the Office of the Attorney General with a written record of shipments of Cigarettes to Individual Consumers, if any.

27. If UPS has a reasonable basis to believe that a shipper has willfully or intentionally violated UPS's

Cigarette Policy, UPS shall immediately and permanently suspend all Delivery Services for such shipper. For other violations of UPS's Cigarette Policy, which UPS has a reasonable basis to believe are not willful or intentional, UPS shall apply the discipline procedures established in Paragraphs 28 through 33 of this Assurance of Discontinuance.

28. In response to a shipper's first violation of UPS's Cigarette Policy, UPS shall give the shipper notice of the violation, in writing, by telephone call, or by in-person meeting with the shipper, and discuss the violation with a management-level person at the shipper. Such contact shall occur no later than five (5) business days after UPS discovers the violation, and UPS shall make a written record of each contact. UPS shall tell the shipper why the shipment was noncompliant, reiterate its policy of not accepting packages containing Cigarettes for shipment to Individual Consumers, explain UPS's progressive discipline policy, and ask the customer to increase its efforts to comply with UPS's policy. Within two (2) business days of such contact, UPS shall suspend Delivery Services for such shipper for a period of ten (10) days unless and until a reasonable and verifiable written action plan for compliance with UPS's Policies is provided by the shipper and approved by UPS. UPS shall maintain a copy of the action plan, and conduct an audit of such shipper within ninety (90) days after Delivery Services to the shipper are reinstated to determine if the shipper is complying with UPS's Policies.

29. In response to a shipper's second violation of UPS's Cigarette Policy within one-hundred eighty (180) days after the date of contact for the first violation, UPS shall give the shipper notice of the violation

in writing, by telephone call, or by in-person meeting, and discuss the violation with a management-level person at the shipper. Such contact shall occur no later than five (5) business days after UPS discovers the second violation, and UPS shall make a written record of each contact. UPS shall tell the shipper why the shipment was non-compliant, reiterate its policy of not accepting packages containing Cigarettes for shipment to Individual Consumers, explain UPS's progressive discipline policy, and ask the customer to increase its efforts to comply with UPS's policy. UPS shall also advise the shipper that it has violated UPS's restrictions a second time, and that a third non-compliant shipment within one (1) year after the date of contact for the first violation will result in a three-year suspension of Delivery Services. Within two (2) business days of such contact, UPS shall suspend Delivery Services for such shipper for a period of thirty (30) days. UPS may, however, restore Delivery Services for products other than Cigarettes after a minimum of ten (10) days of suspension if UPS receives reasonable and verified assurances from the shipper that the shipper no longer ships Cigarettes via UPS. UPS shall maintain a copy of any assurances received pursuant to this Paragraph, and conduct an audit of such shipper within ninety (90) days after Delivery Services to the shipper are reinstated to determine if the shipper is complying with UPS's Policies.

30. In response to a shipper's third violation of UPS's Cigarette Policy within one-hundred eighty (180) days after the date of contact for the second violation, UPS shall give the shipper notice of the violation in writing, by telephone call, or by in-person

meeting, and discuss the violation with a management-level person at the shipper. Such contact shall occur no later than five (5) business days after UPS discovers the third violation, and UPS shall make a written record of each contact. UPS shall tell the shipper why the shipment was non-compliant, reiterate its policy of not accepting packages containing Cigarettes for shipment to Individual Consumers, explain UPS's progressive discipline policy, and ask the customer to increase its efforts to comply with UPS's policy. Within two (2) days of such contact, UPS shall suspend Delivery Services for the shipper for a period of three (3) years. UPS may, however, restore Delivery Services for products other than Cigarettes after a minimum of six (6) months of suspension if UPS receives reasonable and verified assurances from the shipper that the shipper no longer ships Cigarettes via UPS. UPS shall maintain a copy of any assurances received pursuant to this Paragraph, and conduct an audit of such shipper within ninety (90) days after Delivery Services to the shipper are reinstated to determine if the shipper is complying with UPS's Policies.

31. The violations found to have occurred pursuant to this Assurance of Discontinuance, as well as the periods of suspension that are imposed, shall be applied both to the shipper committing the violation, and to any other shipper, whether an existing UPS customer or a new UPS customer, that UPS has a reasonable basis to believe is shipping or seeking to ship Cigarettes (a) from the same location as the suspended shipper, (b) on behalf of a suspended shipper, or (c) with the same account number as the suspended shipper.

32. In the event of an inadvertent and immaterial violation of the UPS Cigarette Policy by a shipper who predominantly ships products other than Cigarettes (meaning, shippers whose total UPS shipments of products other than Cigarettes in the previous year exceed ninety (90) percent of the total UPS shipments by such shipper in the previous year), UPS shall have discretion to make reasonable deviations from the discipline procedures established above in Paragraphs 28 through 30 for the limited purpose of affirmatively assisting such shippers to implement safeguards intended to eliminate future inadvertent and immaterial shipments of Cigarettes to Individual Consumers. In any case in which UPS deviates from the discipline procedures established above based on this Paragraph, within five (5) business days of its decision to deviate from the discipline procedures, UPS shall provide the Attorney General with written notice of its decision to deviate. Such notice shall include the following information: (a) the information described in Paragraph 25(A)-(D) as to the shipper; (b) the factual basis for the deviation; and (c) a record of the affirmative assistance UPS has given to the shipper to implement safeguards intended to eliminate future inadvertent and immaterial shipments.

33. The discipline procedures established herein above in Paragraphs 27 through 32 are minimum sanctions and shall not prevent UPS from imposing greater sanctions on any shipper.

Continuing Compliance Training

34. UPS shall continue periodically to train its drivers and pre-loaders and other relevant UPS em-

ployees about UPS's Cigarette Policy and the compliance measures agreed to in this Assurance of Discontinuance.

35. Within ninety (90) days after the Effective Date, and on at least an annual basis thereafter, UPS shall issue a Pre-work Communication Message ("PCM") to UPS drivers, pre-loaders and any other UPS employees who are involved in the compliance measures agreed to in this Assurance of Discontinuance to help ensure that these personnel are actively looking for indications that a package contains Cigarettes being shipped to an Individual Consumer, alerting UPS management of such packages and attempting to intercept such packages.

36. Within ninety (90) days of the Effective Date, UPS shall issue a PCM to drivers to instruct them not to deliver packages that contain Cigarettes being shipped to Individual Consumers, and alerting UPS management if they know or believe that a business is engaged in shipping Cigarettes to Individual Consumers.

37. UPS shall continue periodically to train its account executives with tobacco accounts to which UPS provides Delivery Services about the UPS Cigarette Policy, PHL § I399-*ll*, and the compliance measures agreed to in this Assurance of Discontinuance, including, but not limited to, UPS's policy of not accepting packages containing Cigarettes for shipment to Individual Consumers, UPS's right to conduct unannounced audits of shippers' packages and UPS's progressive discipline policy for shippers who tender Cigarettes for shipment to Individual Consumers.

Point of Contact

38. UPS designates Norman M. Brothers, Jr., Vice President—Legal, United Parcel Service, Inc., 55 Glenlake Parkway NE, Atlanta, GA 30328, (404) 828-6000, nbrothers@ups.com, as the point of contact within its legal department to whom the Office of the Attorney General or any other New York State or local governmental authority can make the notifications contemplated by this Assurance of Discontinuance or address any concerns about Cigarette sellers and shippers using UPS to deliver Cigarettes to persons located in New York. UPS may change its designated point of contact within its legal department upon ten (10) days prior written notice to the Attorney General.

Response to Notice of Potential Violation

39. If the Attorney General or any other governmental authority provides UPS with evidence that a UPS customer is shipping Cigarettes to Individual Consumers, UPS shall discipline such shipper pursuant to the process set forth in Paragraphs 27 through 32 of this Assurance of Discontinuance.

40. If the Attorney General or any other governmental authority represents to UPS that a UPS customer is shipping Cigarettes to Individual Consumers, but does not provide evidence of such shipments, UPS shall conduct an audit of that shipper. UPS shall discipline, pursuant to the process set forth in Paragraphs 27 through 32 of this Assurance of Discontinuance, shippers found to be shipping Cigarettes to Individual Consumers.

Access to and Retention of Information

41. Within thirty (30) days of service of a subpoena by the Attorney General, which may be adequately served by first class mail or e-mail delivered to the person identified in Paragraph 38 of this Assurance of Discontinuance, UPS shall provide the Office of the Attorney General with access to any information relating to compliance with the terms of this Assurance of Discontinuance. UPS shall retain (a) information required to be collected pursuant to this Assurance of Discontinuance, and (b) information relating to its compliance with this Assurance of Discontinuance, for a period of not less than five (5) years.

ENFORCEMENT, PENALTIES AND COSTS

42. UPS shall pay to the State of New York a stipulated penalty of $1,000 for each and every violation of this Assurance of Discontinuance occurring after the Effective Date; provided, however, that no penalty shall be imposed if (a) the violation involves the shipment of Cigarettes to an Individual Consumer outside the State of New York, or (b) the violation involves the shipment of Cigarettes to an Individual Consumer within the State of New York, but UPS establishes to the reasonable satisfaction of the Attorney General that UPS did not know and had no reason to know that the shipment was a Prohibited Shipment.

43. Pursuant to EL § 63(15), evidence of a violation of this Assurance of Discontinuance that involves the shipment of Cigarettes to an Individual Consumer within the State of New York shall also constitute *prima facie* proof of a violation of PHL § 1399-*ll*(2) in

any civil action or proceeding that the Attorney General hereafter commences against UPS for violation of PHL § 1399-*ll*(2).

EFFECT OF SETTLEMENT

44. This Assurance of Discontinuance represents a voluntary agreement, and is a settlement of the parties' claims and defenses, subject to the qualifications and limitations discussed in Paragraph 45.

45. Nothing about this Assurance of Discontinuance, including its existence or terms, shall in any way limit, impair or constrain UPS's ability to seek a court ruling that PHL § 1399-*ll*(2) is unconstitutional, preempted by federal law, or otherwise unenforceable as applied against UPS, including in any action or proceeding brought by the Attorney General against UPS alleging that UPS has violated PHL § 1399-*ll*(2). In entering this Assurance of Discontinuance, UPS expressly reserves, and does not waive, its position that PHL § 1399-*ll*(2) is preempted by the Federal Aviation Administration Authorization Act of 1994.

46. Notwithstanding the foregoing Paragraph 45, nothing about this Assurance of Discontinuance, including its existence or terms, or any obligation undertaken by UPS pursuant to this Assurance of Discontinuance, shall serve as proof or evidence in support of or in opposition to any claim or contention made in any action or proceeding, whether the claim or contention is asserted by UPS or any other person, alleging, in whole or in part, that PHL § 1399-*ll* is unconstitutional, preempted by federal law, or otherwise unenforceable as applied against UPS or any other carrier.

47. UPS and the Attorney General shall meet to discuss whether any changes or alterations to this Assurance of Discontinuance are warranted in the event that: (a) the New York State Legislature repeals or amends PHL § 1399-*ll* in a manner that permits common carriers to deliver Cigarettes to Individual Consumers in New York State; or (b) PHL § 1399-*ll* is determined to be invalid by and/or enforcement of such law against common carriers is enjoined by a court of competent jurisdiction, and no further appeal of such decision is available and no stay of such injunction is in effect. If no agreement can be reached, then UPS shall have the right to terminate this Assurance of Discontinuance upon thirty (30) days written notice sent to the Attorney General after such meeting. If such termination is based upon a repeal or amendment to PHL § 1399-*ll* pursuant to clause (a) above, then upon such termination the Attorney General shall have the right to seek any relief for violations of this Assurance of Discontinuance and/or any applicable laws that occurred during the period in which this Assurance of Discontinuance was in effect. Notwithstanding any provision of this Assurance of Discontinuance to the contrary, the termination of this Assurance of Discontinuance in accordance with the terms of this Paragraph 47 shall not constitute a violation of this Assurance of Discontinuance.

MISCELLANEOUS PROVISIONS

48. All correspondence and payment submitted by UPS to the State of New York and the Office of Attorney General pursuant to this Assurance of Discontinuance shall be sent to the attention of:

Vincent P. Esposito, Jr.
Assistant Attorney General
Office of the New York State Attorney General
Health Care Bureau
The Capitol
Albany, NY 12224

49. Within sixty (60) days of the Effective Date, a UPS management official shall file a report with the Office of the Attorney General verifying that UPS is in full compliance with all of the terms of this Assurance of Discontinuance and setting forth the details of all compliance measures undertaken by UPS pursuant to the terms hereof, with specific reference to the sections of this Assurance of Discontinuance. Such report shall include as attachments sufficient documents reasonably necessary for the Attorney General to determine whether UPS has complied with this Assurance of Discontinuance.

50. The acceptance of this Assurance of Discontinuance by the Attorney General shall not be deemed or construed as an approval by the Attorney General of any of the activities of UPS, its officers, directors, employees, assignees and any individual, corporation, subsidiary, or division through which UPS may now or hereinafter act, or of any successors in interest; and none of the parties shall make any representation to the contrary. UPS may, however, disclose that it has resolved the Attorney General's investigation by mutual agreement with the Office of the Attorney General, and that UPS has voluntarily agreed as part of the resolution to prohibit the shipment of Cigarettes to Individual Consumers in the United States.

51. The rights and remedies in this Assurance of Discontinuance are cumulative and in addition to any

other statutory or other rights that the Attorney General may have at law or equity, including but not limited to any rights and remedies under PHL § 1399-*ll*.

52. This Assurance of Discontinuance shall not grant any rights or privileges to any person or entity who is not a party to this Assurance of Discontinuance, nor shall this Assurance of Discontinuance affect or limit in any way the rights of any such third party.

53. This Assurance of Discontinuance shall be binding on and apply to UPS, its officers, directors, employees, affiliates, assignees and any individual, corporation, subsidiary or division through which UPS may now or hereinafter act, as well as any successors in interest.

54. This Assurance of Discontinuance may not be altered, amended, modified or otherwise changed in any respect or particular whatsoever, except by a writing duly executed by the parties or their authorized representatives.

55. This Assurance of Discontinuance may be executed in telecopied counterparts, each of which will constitute an original but all of which taken together shall constitute one and the same document.

56. The individuals executing this Assurance of Discontinuance represent that they have full and complete authority to sign this document and to bind their respective parties to all the terms and conditions set forth herein.

WHEREFORE, the following signatures are affixed hereto effective this 21st for October, 2005.

ELIOT SPITZER	UNITED PARCEL SERVICE, INC.
Attorney General of the State of New York	
By:	By:
/s/ Vincent P. Esposito	/s/ Norman M. Brothers
Vincent P. Esposito, Jr. Assistant Attorney General	Norman M. Brothers, Jr. Vice President - Legal