APL-2014-00152

To be argued by:
STEVEN C. WU
30 minutes requested

Supreme Court, New York County, Index No. 103917/11

State of New York
Court of Appeals

PEOPLE OF THE STATE OF NEW YORK, by Eric T. Schneiderman,
Attorney General for the State of New York, and
STATE OF NEW YORK ex rel. EMPIRE STATE VENTURES, LLC,

Plaintiffs-Respondents,

-against-

SPRINT NEXTEL CORP., SPRINT SPECTRUM L.P., NEXTEL OF NEW YORK, INC.
and NEXTEL PARTNERS OF UPSTATE NEW YORK, INC.,

Defendants-Appellants.

BRIEF FOR RESPONDENTS

BARBARA D. UNDERWOOD
Solicitor General
STEVEN C. WU
Deputy Solicitor General
WON S. SHIN
Assistant Solicitor General
of Counsel

ERIC T. SCHNEIDERMAN
Attorney General of the
State of New York
Attorney for Respondents
120 Broadway
New York, New York 10271
(212) 416-6312
(212) 416-8962 (facsimile)

Dated: December 2, 2014

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

PRELIMINARY STATEMENT 1

QUESTIONS PRESENTED 5

STATEMENT OF THE CASE 7

A. Statutes Authorizing State Taxation of Mobile Voice Services 7

1. The federal Mobile Telecommunications Sourcing Act 7

2. New York's implementation of the MTSA 11

B. The New York False Claims Act 16

C. The Attorney General's Enforcement Action 18

D. The Decisions Below Denying Sprint's Motion to Dismiss 26

ARGUMENT 30

POINT I - SPRINT FAILED TO COLLECT SALES TAXES OWED ON MOBILE VOICE SERVICE SOLD FOR FIXED MONTHLY CHARGES AND FALSELY STATED ITS TAXABLE RECEIPTS 30

A. The Tax Law Imposes Sales Tax on the Fixed Monthly Fees that Sprint Charges for Mobile Voice Service 32

TABLE OF CONTENTS (cont'd)

Page

1. The tax on flat-rate mobile voice service makes no distinction between intrastate and interstate calls. 32

2. Neither the text nor purpose of the 2002 amendments supports a tax exemption for any interstate component of flat-rate mobile voice plans. 37

B. Sprint's Unilateral Understatement of Its Sales Tax Responsibility Did Not Properly Reflect Interstate Mobile Voice Service. 45

C. The 2002 Tax Law Amendments Implement and Are Consistent with the Federal MTSA. 48

POINT II - SPRINT KNOWINGLY MADE FALSE STATEMENTS ABOUT ITS TAXABLE RECEIPTS 53

A. The Complaint Adequately Alleges that Sprint Knowingly Submitted False Sales Tax Forms. 54

B. Sprint's Purported "Objectively Reasonable" Interpretation of the Tax Law Does Not Support Dismissal of the Complaint. 64

POINT III - THE EX POST FACTO CLAUSE DOES NOT BAR RETROACTIVE APPLICATION OF THE NEW YORK FALSE CLAIMS ACT 72

A. The New York FCA's Monetary Remedies Advance Civil, Nonpunitive Purposes. 74

TABLE OF CONTENTS (cont'd)

Page

B. The Remaining *Mendoza-Martinez* Factors Also Show that the New York FCA Does Not Impose a Criminal Penalty. 83

CONCLUSION 88

TABLE OF AUTHORITIES

Cases **Page(s)**

Am. Soc'y of Mech. Eng'rs v. Hydrolevel Corp.,
456 U.S. 556 (1982) 80

Barnhart v. Thomas,
540 U.S. 20 (2003) 38

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,
429 U.S. 477 (1977) 79

Commercial Contractors, Inc. v. United States,
154 F.3d 1357 (Fed. Cir. 1998) 58, 59, 63

Cook County v. United States ex rel. Chandler,
538 U.S. 119 (2003) 77, 79

EFS Med. Supplies, Inc. v. Dowling,
252 A.D.2d 99 (1st Dep't 1998) 67

Goldberg v. Sweet,
488 U.S. 252 (1989) 7

Gregory v. Helvering,
293 U.S. 465 (1935) 67

Heard v. Cuomo,
80 N.Y.2d 684 (1993) 43

Helvering v. Mitchell,
303 U.S. 391 (1938) 75

Hudson v. United States,
522 U.S. 93 (1997) .... passim

Kansas v. Hendricks,
521 U.S. 346 (1997) 75

Kellogg v. Travis,
100 N.Y.2d 407 (2003) 72

TABLE OF AUTHORITIES (cont'd)

Cases **Page(s)**

Kennedy v. Mendoza-Martinez,
372 U.S. 144 (1963) 74, 84

Landgraf v. USI Film Products,
511 U.S. 244 (1994) 80, 81

Lorillard Tobacco Co. v. Roth,
99 N.Y.2d 316 (2003) 37

Loughrin v. United States,
134 S. Ct. 2384 (2014) 43

Louis Vuitton S.A. v. Spencer Handbags Corp.,
765 F.2d 966 (2d Cir. 1985) 81

Matter of 677 New Loudon Corp. v. State of N.Y. Tax Appeals Tribunal,
19 N.Y.3d 1058 (2012) 44

Matter of Bath & Hammondsport R.R. v. N.Y. State Dep't of Envtl. Conservation,
73 N.Y.2d 434 (1989) 45

Matter of Chem. Specialties Mfrs. Ass'n v. Jorling,
85 N.Y.2d 382 (1995) 39

Matter of Disney Enters., Inc. v. Tax Appeals Tribunal of State of N.Y.,
10 N.Y.3d 392 (2008) 49

Matter of Fox v. Board of Regents of State of N.Y.,
140 A.D.2d 771, *lv. denied*, 72 N.Y.2d 808 (1988) 39

Matter of Friesch-Groningsche Hypotheekbank Realty Credit Corp. v. Tax Appeals Tribunal of State of N.Y.,
185 A.D.2d 466 (3d Dep't 1992) 57

TABLE OF AUTHORITIES (cont'd)

Cases **Page(s)**

Matter of GE Capital Corp. v. N.Y. State Div. of Tax Appeals,
2 N.Y.3d 249 (2004) 61

Matter of Greer v. Wing,
95 N.Y.2d 676 (2001) 37

Matter of Helio, LLC,
DTA No. 825010, 2014 WL 2809222
(Div. Tax Appeals June 12, 2014) 69

Matter of Jewish Home & Infirmary v. Comm'r of N.Y. State Dep't of Health,
84 N.Y.2d 252 (1994) 35

Matter of People v. Applied Card Sys., Inc.,
11 N.Y.3d 105 (2008) 49

Matter of Spencer v. Tax Appeals Tribunal,
251 A.D.2d 764 (3d Dep't 1998) 57

Minn. Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp.,
276 F.3d 1032 (8th Cir. 2002) 57

Oneida Nation of N.Y. v. Cuomo,
645 F.3d 154 (2d Cir. 2011) 57

Overstock.com, Inc. v. N.Y. State Dep't of Taxation & Fin.,
20 N.Y.3d 586 (2013) 57

People v. Greenberg,
21 N.Y.3d 439 (2013) 55, 64, 69

People v. Sprint Nextel Corp.,
114 A.D.3d 622 (1st Dep't 2014) 29

TABLE OF AUTHORITIES (cont'd)

Cases **Page(s)**

People v. Velez,
19 N.Y.3d 642 (2012) 37

Pludeman v. N. Leasing Sys., Inc.,
10 N.Y.3d 486 (2008) 18, 54, 55, 62

Polonetsky v. Better Homes Depot, Inc.,
97 N.Y.2d 46 (2001) 55

Safeco Ins. Co. of Am. v. Burr,
551 U.S. 47 (2007)... 69, 70

Sanders v. Allison Engine Co.,
703 F.3d 930 (6th Cir. 2012),
cert. denied, 133 S. Ct. 2855 (2013) 77, 78, 84

Shearson/American Express Inc. v. McMahon,
482 U.S. 220 (1987).. 80

Smith v. Doe,
538 U.S. 84 (2003)... passim

State ex rel. Grupp v. DHL Express (USA), Inc.,
19 N.Y.3d 278 (2012) 81, 82

State ex rel. Seiden v. Utica First Ins. Co.,
96 A.D.3d 67, *lv. denied*, 19 N.Y.3d 810 (2012)......................... 17

Stockwell v. United States,
80 U.S. 531 (1871).. 75

Texas Industries, Inc. v. Radcliff Materials, Inc.,
451 U.S. 630 (1981).. 80

United States ex rel. Armfield v. Gills,
No. 8:07-cv-2374, 2013 U.S. Dist. LEXIS 12475
(M.D. Fla. Jan. 30, 2013) 66

TABLE OF AUTHORITIES (cont'd)

Cases **Page(s)**

United States ex rel. Assocs. Against Outlier Fraud v. Huron Consulting Gr., Inc., 2011 U.S. Dist. LEXIS 7335 (S.D.N.Y. Jan. 24, 2011) 62

United States ex rel. Bilotta v. Novartis Pharm. Corp., 2014 U.S. Dist. LEXIS 139072 (S.D.N.Y. Sept. 30, 2014) 73, 82, 84, 85

United States ex rel. Chilcott v. KBR, Inc., 2013 U.S. Dist. LEXIS 153331 (C.D. Ill. Oct. 25, 2013) 66, 67, 71

United States ex rel. Colucci v. Beth Israel Med. Ctr., 603 F. Supp. 2d 677 (S.D.N.Y. 2009) 77

United States ex rel. Hagood v. Sonoma County Water Agency, 929 F.2d 1416 (9th Cir. 1991) 64

United States ex rel. Hendrix v. J-M Mfg. Co., No. 06-cv-55 (C.D. Cal. Sept. 2, 2010) 86

United States ex rel. Hixson v. Health Mgmt. Sys., Inc., 613 F.3d 1186 (8th Cir. 2010) 66

United States ex rel. K&R Ltd. P'ship v. Mass. Hous. Fin. Agency, 530 F.3d 980 (D.C. Cir. 2008) 65

United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943) 75, 76, 86

United States ex rel. Miller v. Bill Harbert Int'l Constr., Inc., 608 F.3d 871 (D.C. Cir. 2010) 78

TABLE OF AUTHORITIES (cont'd)

Cases **Page(s)**

United States ex rel. Oliver v. Parsons Co.,
195 F.3d 457 (9th Cir. 1999) 65, 71

United States ex rel. Walker v. R&F Props. of Lake County, Inc.,
433 F.3d 1349 (11th Cir. 2005) 57

United States v. Bornstein,
423 U.S. 303 (1976) 76

United States v. Brekke,
97 F.3d 1043 (8th Cir. 1996) 78

United States v. Drape,
668 F.2d 22 (1st Cir. 1982) 84

United States v. Halper,
490 U.S. 435 (1989) 86

United States v. Kellogg Brown & Root Servs., Inc.,
2014 U.S. Dist. LEXIS 43000 (C.D. Ill. Mar. 31, 2014) 71

United States v. Rogan,
517 F.3d 449 (7th Cir. 2008) 78

United States v. Sci. Applications Int'l Corp.,
626 F.3d 1257 (D.C. Cir. 2010) 70

United States v. Ward,
448 U.S. 242 (1980) 85

United States v. White,
27 F.3d 1531 (11th Cir. 1994) 83

Visiting Nurse Association of Brooklyn v. Thompson,
378 F. Supp. 2d 75 (E.D.N.Y. 2004) 59

TABLE OF AUTHORITIES (cont'd)

Cases **Page(s)**

Vt. Agency of Nat. Res. v. United States ex rel. Stevens,
529 U.S. 765 (2000) 77

Zaldin v. Concord Hotel,
48 N.Y.2d 107 (1979) 45

Zanghi v. Greyhound Lines,
234 A.D.2d 930 (4th Dep't 1996) 39

Constitutional Provisions

U.S. Const., art. I, § 10 72

State Laws

Ch. 85, 2002 N.Y. Laws 2705 .... 11, 12

Ch. 93, 1965 N.Y. Laws 649 11

Ch. 379, 2010 McKinney's N.Y. Laws 1160 .... 17, 72

Ch. 575, 1965 N.Y. Laws 1539 11

Executive Law § 63 30

State Finance Law
§ 188 .... 16, 53, 84, 85
§ 189 .... passim
§ 190 16

TABLE OF AUTHORITIES (cont'd)

State Laws **Page(s)**

Tax Law
§ 1105 ... passim
§ 1111 ... passim
§ 1132 ... 44, 46, 61
§ 1133 ... 30
§ 1136 ... 30
§ 1801 ... 84
§§ 1802-1806 ... 84
§ 2016 ... 60

20 N.Y.C.R.R.
§ 527.2 ... 40
§ 2375.3 ... 60
§ 2376.2 ... 60
pt. 3000 ... 60

Federal Laws

4 U.S.C.
§ 117 ... 9, 11, 32, 41
§ 118 ... 10
§ 123 ... passim
§ 124 ... 9

42 U.S.C. § 1396h ... 66

Mobile Telecommunications Sourcing Act (MTSA), Pub. L. No. 106-252, 114 Stat. 626 (2000) ... 9

Miscellaneous Authorities

Amendments Affecting the Application of the Sales and Use Tax and Excise Tax Imposed on Mobile Telecommunications Service, N.Y. State Dep't of Tax. & Fin. Mem. No. TSB-M-02 (July 30, 2002), available at http://www.tax.ny.gov/pdf/memos/multitax/m02_4c_6s.pdf ... 56

TABLE OF AUTHORITIES (cont'd)

Miscellaneous References **Page(s)**

Assembly Mem. in Support, *reprinted in* Bill Jacket for ch. 379 (2010) 17

Commonwealth Long Distance, Inc., N.Y. State Dep't of Tax. & Fin. Advisory Op. No. TSB-A-94(33)S (July 29, 1994), available at http://www.tax.ny.gov/pdf/advisory_opinions/sales/a94_33s.pdf 43

Div. of Budget Bill Mem., *reprinted in* Bill Jacket for ch. 379 (2010) 79

H.R. Rep. No. 106-719 (2000) .... passim

H.R. Rep. No. 99-660 (1986) 53, 57

John Biggs, *Virgin Mobile Acquires Helio for $39 Million*, TechCrunch (June 27, 2008), available at http://techcrunch.com/2008/06/27/virgin-mobile-acquires-helio-for-39-million/ 69

Ken Belson & Matt Richtel, *2 Largest U.S. Wireless Carriers Add Many Subscribers*, N.Y. Times (Jan. 25, 2006), available at http://www.nytimes.com/2006/01/25/business/25tele.html 69

Letter from Acting Comm'r Jamie Woodward to Governor David Paterson (Aug. 4, 2010), *reprinted in* Bill Jacket for ch. 379 (2010) 17, 18

Letter from Dep't of Taxation & Fin. to the Hon. George Pataki (May 20, 2002), *reprinted in* Bill Jacket for ch. 85 (2002) 22, 35, 37

TABLE OF AUTHORITIES (cont'd)

Miscellaneous References **Page(s)**

N.Y. Tel. Co., N.Y. State Dep't of Tax. & Fin. Advisory Op. No. TSB-A-88(8)S (Jan. 5, 1988), available at http://www.tax.ny.gov/pdf/advisory_opinions/sales/a88_8s.pdf 43

Rochester Tel. Co., N.Y. State Dep't of Tax. & Fin. Advisory Op. No. TSB-A-88(1)S (Dec. 9, 1987), available at http://www.tax.ny.gov/pdf/advisory_opinions/sales/a88_1s.pdf 43

S. Rep. No. 106-326 (2000) .... passim

S. Rep. No. 99-345 (1986) 54, 60

Sascha Segan, *Virgin Mobile Finally Hanging Up on Helio Customers*, PC Magazine (Mar. 2, 2010), avilable at http://www.pcmag.com/article2/0,2817,2360854,00.asp 69

Statutes § 254, 1 McKinney's Cons. Laws of N.Y. 418 (West 1971) 38

PRELIMINARY STATEMENT

This appeal from the denial of a pre-answer motion to dismiss arises from the Attorney General's enforcement action against defendants Sprint Nextel Corporation and certain subsidiaries (together, Sprint) for failing to collect and pay more than $100 million in New York sales tax from flat-rate mobile voice plans sold to New York customers. Both Supreme Court, New York County (Sherwood, J.), and the Appellate Division, First Department, held that the Attorney General's allegations were sufficient to state claims under the Tax Law, the New York False Claims Act, and Executive Law § 63(12). This Court should affirm and permit this litigation to proceed to discovery and trial.

The allegations in the Attorney General's complaint describe a deliberate and undisclosed scheme by Sprint to avoid collecting and paying sales taxes that it knew it owed to the State. In 2002, the Legislature amended the Tax Law to apply a sales tax to mobile voice services sold for a fixed periodic charge (such as a monthly flat rate), regardless of whether customers used those services to make intrastate, interstate, or international calls. The

2002 amendments were spurred by a recently enacted federal law, the Mobile Telecommunications Sourcing Act, that expressly authorized States to impose such a tax, overriding older rules that had precluded States from taxing certain interstate calls. Every major wireless carrier, including Sprint, complied with the 2002 amendments by applying New York's sales tax to the entire amount of their flat monthly charges for mobile voice services.

In 2005, Sprint reversed course—the only one of the major wireless carriers to do so. Without disclosing its radically altered practice to taxing authorities, Sprint began to designate an arbitrary and fluctuating percentage of its monthly charges as a so-called "interstate" component purportedly exempt from taxation—even though this unilateral deduction bore no relationship to a customer's actual interstate calls. Sprint knew that the Tax Law did not support its tax-evasion theory; it knew that the Tax Department had issued unambiguous guidance contradicting this theory; it knew that none of its major competitors (who could have saved their customers hundreds of millions of dollars under Sprint's position) had adopted such an

interpretation of the Tax Law; and it was explicitly warned by employees of the Tax Department that its approach violated the law. Nonetheless, in order to lower the cost of its flat-rate plans and thereby gain a competitive advantage over its primary rivals, Sprint systematically understated its sales tax liability on forms filed with the Tax Department. As alleged, Sprint's conduct gives rise to liability under the New York False Claims Act, the Tax Law, and Executive Law § 63(12).

Sprint's principal argument on appeal is that it is immune from liability under all three statutes as a matter of law because the Tax Law does not require it to collect and remit sales tax on the portion of customers' monthly bills attributable to interstate (as opposed to intrastate) mobile voice service. That interpretation is impossible to square with the 2002 amendments and the federal statute that they implemented, both of which were expressly intended to free state taxation of mobile telecommunications services from the distinction between intrastate and interstate phone calls—a distinction that made sense for landlines, but not for cellphones. In any event, even if Sprint's interpretation were

correct (and it is not), the complaint still states claims under all three statutes because it alleges that Sprint had no basis for its particular allocation of charges to purportedly interstate usage; instead, Sprint implemented an essentially arbitrary deduction, unrelated to a customer's interstate calls, to evade its unambiguous sales tax liability.

Sprint's remaining arguments on appeal are equally meritless. Its assertion that the complaint insufficiently pleads knowledge, deliberate ignorance, or recklessness under the New York False Claims Act is belied by the complaint's myriad detailed allegations of Sprint's awareness that its interpretation was baseless. And Sprint's ex post facto claim fails under well-established precedents recognizing that monetary remedies—including multiple damages—serve the civil, nonpunitive purposes of compensating the State for the harms caused by false statements and encouraging private qui tam plaintiffs to bring suit. Accordingly, this Court should affirm the decision below and permit this litigation to proceed to discovery and trial.

QUESTIONS PRESENTED

1. Whether the complaint sufficiently alleges that Sprint violated the Tax Law, the New York False Claims Act, and Executive Law § 63(12) by repeatedly failing to collect and pay the required sales tax on sales of mobile voice service sold for a fixed periodic charge, and by repeatedly making false reports on tax forms submitted to the Department of Taxation and Finance that its taxable sales of flat-rate mobile voice service were less than the taxable amount that it actually charged and received for providing such service.

2. Whether the complaint sufficiently alleges that Sprint knew of, deliberately ignored, or recklessly disregarded the falsity of its tax forms in violation of the New York False Claims Act, where (a) the text of the governing Tax Law provisions was clear, (b) Sprint was aware that the Tax Department had issued guidance explaining the correct taxation of mobile voice services, (c) Sprint had adhered to the plain statutory text and guidance for years before reversing course, (d) all of Sprint's major competitors had adhered to the statute and guidance rather than follow

Sprint's contrary approach, (e) Sprint refused to seek refunds for tens of millions of dollars in order to conceal its false statements from closer scrutiny by tax authorities, and (f) the Tax Department explicitly warned Sprint that its approach violated the law.

Both lower courts held that the complaint sufficiently alleges causes of action under the Tax Law, the New York False Claims Act, and Executive Law § 63(12).

3. Whether the Ex Post Facto Clause bars liability under the False Claims Act for tax-related statements made before August 2010?

Both lower courts held that the Ex Post Facto Clause does not apply because the New York False Claims Act imposes civil monetary remedies, not criminal punishment.

STATEMENT OF THE CASE

A. Statutes Authorizing State Taxation of Mobile Voice Services

1. The federal Mobile Telecommunications Sourcing Act

In 1989, the United States Supreme Court held that the dormant Commerce Clause of the federal Constitution limited the States' authority to tax interstate telephone calls. Such a call was taxable only if it either originated or terminated within the State, and if it was charged to an in-state billing or service address. *See Goldberg v. Sweet*, 488 U.S. 252, 256 n.6, 263 (1989).

The *Goldberg* rule was easy to apply to landline telephones, which had fixed physical locations. But the next decade saw "an explosion of growth in the wireless telecommunications industry," H.R. Rep. No. 106-719, at 7 (2000), and States and service providers struggled to adapt the *Goldberg* nexus test to mobile telephone calls because of the inherent mobility of the technology. States developed different methodologies to determine which mobile calls to tax: some States relied on the customer's billing address, others the location of the cell tower where the call originated, still others the location of

the switch that first directs the call. S. Rep. No. 106-326, at 2 (2000). Further complicating taxation was the fact that mobile technology permits a person to travel through multiple States and localities while making a single mobile call. *Id.* at 1-2. As a result, some mobile telephone calls were subject to taxation by multiple jurisdictions. H.R. Rep. No. 106-719, at 7-8.

Business developments in the mobile telecommunications industry also made the *Goldberg* test difficult to apply. Landline plans often charged based on the duration of each individual call, permitting phone companies to distinguish between (and charge different rates for) local versus long-distance calls. But mobile carriers increasingly began to sell flat-rate voice plans that charged a fixed monthly price for access to a nationwide network, thus enabling customers to make calls (up to a set number of minutes) without regard to where individual calls were placed or received. These flat-rate monthly plans made it "virtually impossible to determine the portion of th[e] price charged for individual calls, each of which may be subject to tax by a different jurisdiction," and thus "impossible to determine the amount of

revenues to which each of the various state and local transaction taxes should be applied." S. Rep. No. 106-326, at 2.

In light of these problems, the States and the mobile telecommunications industry sought a federal solution that "would lessen the burden of having to determine the location of sale and purchase of each wireless call and the taxes applicable to each call." H.R. Rep. No. 106-719, at 8. Congress responded by enacting the Mobile Telecommunications Sourcing Act (MTSA), Pub. L. No. 106-252, 114 Stat. 626 (2000). The MTSA establishes a uniform "sourcing" rule for state taxation of mobile telecommunications services: the only State that may impose a tax is the State of the customer's "place of primary use" (either a residential or primary business address, as selected by the customer). *See* 4 U.S.C. §§ 117(b), 124(8). And the MTSA expressly authorized that State to tax "regardless of where the mobile telecommunication services originate, terminate, or pass through." *Id.* § 117(b). The MTSA thus "eliminates the need to determine the precise location of each mobile telecommunications transmission, or call." S. Rep. No. 106-326, at 3;

see also H.R. Rep. No. 106-719, at 8 ("Using this system, it would no longer be necessary to determine where the call was placed.").

The MTSA also addressed the taxation of mobile service "bundles" (such as combined voice and text message plans) when some components of that bundle are not subject to state taxation. As a default rule, States may apply their taxes even to nontaxable charges when they are "aggregated with and not separately stated from" taxable charges. 4 U.S.C. § 123(b). But the MTSA permitted a service provider to disaggregate charges not taxed by a State if the provider could "reasonably identify [these untaxed charges] from its books and records that are kept in the regular course of business." *Id. See also* S. Rep. No. 106-326, at 11.

Beyond establishing a uniform sourcing rule and addressing the taxation of mobile service bundles, the MTSA "do[es] not . . . modify, impair, [or] supersede . . . the law of any taxing jurisdiction pertaining to taxation." 4 U.S.C. § 118(2). Thus, the MTSA generally leaves States free to determine whether and how to tax wireless voice plans and other mobile telecommunications services.

2. New York's implementation of the MTSA

The New York Legislature responded to the MTSA in 2002 by enacting multiple amendments to the Tax Law that clarified and amended the State's treatment of mobile telecommunications services. Under a preexisting law that was enacted in 1965, New York had applied a sales tax to receipts from sales of telephone services "of whatever nature except interstate and international" services. Ch. 93, § 1, 1965 N.Y. Laws 649, 654; ch. 575, § 4, 1965 N.Y. Laws 1539, 1540 (codified at Tax Law § 1105(b)(1)(B), as subsequently amended). As applied to landlines for which calls were charged by the minute, this rule complied with *Goldberg* by limiting state taxation to phone calls that originated and terminated in New York. But, as applied to mobile telephone calls, this rule created the same practical difficulties that led Congress to enact the MTSA. See *supra* at 7-9.

After passage of the MTSA, the Legislature amended the Tax Law to "conform[] to the federal [MTSA] with respect to sales, excise and other taxes on mobile telecommunications service." Ch. 85, preamble, 2002 N.Y. Laws 2705, 2705. Echoing the MTSA, 4

U.S.C. § 117(b), the Legislature confirmed the State's authority to tax receipts from all "[c]harges for mobile telecommunications service . . . regardless of where the mobile telecommunications service originates, terminates or passes through." Ch. 85, pt. S, § 10, 2002 N.Y. Laws at 2735 (codified at Tax Law § 1111(*l*)(3)(B)).

As relevant here, the 2002 amendments thus implemented a set of new rules governing the taxation of mobile telecommunications services—specifically, those sold through increasingly popular flat-rate plans. Under the preexisting 1965 statute (currently codified at Tax Law § 1105(b)(1)), New York's sales tax had applied to some receipts from charges for mobile telecommunications services, but the exemption for interstate and international telephone services meant that other receipts were not taxed. The 2002 amendments clarified the taxation of flat-rate mobile plans through three principal changes to New York's sales tax laws.

First, the Legislature added a new provision (Tax Law § 1105(b)(2)) imposing sales tax on:

> The receipts from every sale of mobile telecommunications service provided by a home service provider, other than sales for resale, that are voice services, or any other services that are taxable under

> subparagraph (B) of paragraph one of this subdivision, sold for a fixed periodic charge (not separately stated), whether or not sold with other services.

The provision thus imposes tax on receipts from sales of all "voice services . . . sold for a fixed periodic charge (not separately stated)." Consistent with the authority granted by the MTSA, this provision taxes a fixed monthly charge for an allotment of minutes, without regard to whether individual calls made within the allotted minutes are intrastate, interstate, or international. And that remains the case "whether or not [the voice service is] sold with other services"—that is, receipts from sales of flat-rate voice services are taxed even if they are sold in a bundle with other, untaxed services.

Second, the Legislature inserted a clause into the preexisting 1965 statute governing sales tax on telephone service, Tax Law § 1105(b)(1)(B), to make clear that this older provision did not govern "any telecommunications service the receipts from the sale of which are subject to tax" under the newly enacted § 1105(b)(2). To be sure, (b)(2) itself provides that (b)(1)(B)'s tax rule persists for certain types of mobile service charges. For

example, (b)(2) continues to apply (b)(1)(B)'s tax rule (including its exemption for interstate and international service) to charges that are "separately stated" rather than subject to a flat rate, such as per-minute charges for exceeding the monthly allotment of minutes. In addition, for "other [*i.e.*, nonvoice] services," such as text messaging and paging services, (b)(2) limits the application of its new rule to nonvoice services (sold for a fixed periodic charge) that would otherwise be taxable under (b)(1)(B). But, consistent with the MTSA, § 1105(b)(2) explicitly applies New York's sales tax to all flat-rate mobile "voice services" regardless of (b)(1)(B)—that is, regardless of whether mobile calls are made intra- or interstate.[1]

Third, the Legislature implemented the MTSA's bundling provision, 4 U.S.C. § 123(b). The Legislature first established as a default rule that bundles are fully taxable: mobile service providers "shall collect and pay over tax . . . on receipts from any

---

[1] The Legislature also added a new provision, (b)(3), making clear that charges for a New York customer's mobile telecommunications services that take place wholly within another State are still subject to New York sales tax. Tax Law § 1105(b)(3).

charge that is aggregated with and not separately stated from other charges for mobile telecommunications service." Tax Law § 1111(*l*)(2). The Legislature next set forth requirements for mobile service providers to reasonably identify certain enumerated categories of mobile nonvoice services, such as internet access service, as exempt from New York's sales tax even if they are bundled with taxable services, such as mobile voice service. *Id.* A service provider must "use[] an objective, reasonable and verifiable standard for identifying each of the components of the charge for mobile telecommunications service" in order to "separately account for and quantify the amount of each such component charge." *Id.* The amount of such component charge that the provider may deem nontaxable must be "reasonable and proportionate to the total charge to the mobile telecommunications customer," and shall be based on the price at which the mobile service provider separately sells the component service or (if the provider does not separately sell the component service) "the prevailing retail price" at which the service is separately sold by other providers. *Id.*

B. The New York False Claims Act

The New York False Claims Act is closely modeled on the federal False Claims Act, 31 U.S.C. §§ 3729-33. The New York FCA provides for enforcement by both the Attorney General (in civil enforcement actions) and private plaintiffs on behalf of the government (in "qui tam civil actions"), and the Attorney General has the right to intervene and file a superseding complaint in a qui tam action. State Finance Law § 190(1), (2), (5). The Act provides for the imposition of treble damages and civil penalties against violators. *Id.* § 189(1).

The New York FCA applies to any person who "knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to" the government. *Id.* § 189(1)(g). The statute provides that a defendant acts "knowingly" when the defendant has "actual knowledge" of a record or statement's truth or falsity or "acts in deliberate ignorance" or "reckless disregard" of its truth or falsity. *Id.* § 188(3)(a). "[N]o proof of specific intent to defraud" is required. *Id.* § 188(3)(b). Because the federal and state acts are

substantively similar, the New York FCA may generally be construed consistently with the federal act. *See State ex rel. Seiden v. Utica First Ins. Co.*, 96 A.D.3d 67, 71 (1st Dep't), *lv. denied*, 19 N.Y.3d 810 (2012).

As originally enacted, the New York FCA did not apply to false tax claims. But in 2010, the Legislature sought to "strengthen[] the Act." Assembly Mem. in Support, *reprinted in* Bill Jacket for ch. 379 (2010), at 5. The Legislature thus amended the Act to, among other things, make the statute's provisions applicable to "claims, records, or statements made under the tax law" in certain circumstances. Ch. 379, § 3, 2010 McKinney's N.Y. Laws 1160, 1162 (codified at State Finance Law § 189(4)). The amendment was designed to "provide an additional enforcement tool against those who file false claims under the Tax Law," and thus "deter the submission of false tax claims" while also "provid[ing] additional recoveries to the State and to local governments." Letter from Acting Comm'r Jamie Woodward to Governor David Paterson (Aug. 4, 2010), *reprinted in* Bill Jacket for ch. 379 (2010), at 13. But such cases may only be brought

against defendants with annual net income or sales of at least $1 million who cause over $350,000 in damages, State Finance Law § 189(4)(a), thus ensuring that "government resources would be expended only on matters of potentially significant impact and with respect to taxpayers of considerable financial stature," Letter from Acting Comm'r Jamie Woodward to Governor David Paterson (Aug. 4, 2010), *reprinted in* Bill Jacket for ch. 379 (2010), at 13.

C. The Attorney General's Enforcement Action[2]

This lawsuit began as a private qui tam action under the New York False Claims Act (R. 62 ¶ 10). After consultation with and an enforcement referral from the Tax Department (R. 87 ¶ 122), *see* State Finance Law § 189(4)(b), the Attorney General took over as plaintiff and filed a superseding complaint in June 2012 (R. 59-88). The superseding complaint asserts causes of

---

[2] Because Sprint appeals the denial of its motion to dismiss, this Court must view the allegations of the superseding complaint in the light most favorable to the Attorney General, the nonmovant, and accord him "the benefit of every possible favorable inference." *See, e.g.*, *Pludeman v. N. Leasing Sys., Inc.*, 10 N.Y.3d 486, 493 (2008).

action against Sprint under (1) article 28 of the Tax Law for failure to pay the tax; (2) the False Claims Act for knowingly making false statements on tax forms submitted to the Tax Department; and (3) Executive Law § 63(12) for repeatedly engaging in the aforementioned fraudulent and illegal acts (R. 85-87). As authorized by the False Claims Act and the Tax Law, the complaint seeks treble damages, penalties, and interest (R. 87-88).

The complaint alleges that Sprint knowingly understated its taxable sales of voice service, and consequently underpaid sales tax. Sprint sells "wireless calling plans" to customers in New York in exchange for a fixed monthly fee (R. 63-64 ¶¶ 19-20). A wireless calling plan is a specific type of service agreement: Sprint agrees that a customer may use Sprint's wireless network to make phone calls for a set period of time, and the customer in return agrees to pay a fixed periodic charge, which Sprint identifies as "monthly recurring access charges" on customer invoices (R. 64 ¶¶ 20, 22). A customer may purchase unlimited access to the network, or opt instead to purchase a stated number of minutes of access. For

example, Sprint offers to provide 450 minutes of voice service over its network for $39.99 per month (R. 64 ¶ 24).

Since the Tax Law amendments implementing the MTSA went into effect in 2002, mobile telecommunications service providers, including Sprint, have been required to collect and pay sales tax on fixed monthly charges for mobile voice service (R. 65 ¶ 30). For example, Sprint must collect and pay sales tax on the $39.99 charge for 450 minutes of voice service because it is a fixed periodic charge for voice service (R. 66 ¶¶ 31-33). All of Sprint's primary competitors complied with this provision of the Tax Law (R. 61 ¶ 7; R. 72-74 ¶¶ 55-63). From 2002 to mid-2005, Sprint likewise collected and paid over sales tax on its fixed monthly charges for voice service (*see* R. 70-74 ¶¶ 44-61).

In mid-2005, Sprint deliberately and knowingly stopped collecting and paying sales tax on about one-quarter of its revenue for mobile voice service sold for a fixed periodic charge, even though "Sprint had actual knowledge that it was required to collect and pay New York sales taxes on the full amount of these fixed monthly charges" (R. 60 ¶ 5). Sprint began to treat part of its

fixed monthly charge for voice service as though it were not subject to tax, arbitrarily deducting a fixed percentage of the monthly charge for purported "interstate usage" (R. 73 ¶ 57). The fixed percentage that Sprint deducted from all customers' monthly charges varied from subsidiary to subsidiary and from year to year, in amounts ranging from 13.7 percent to 28.5 percent (R. 78-79 ¶¶ 80-81). Sprint then reported the reduced amount as its taxable sales without disclosing the basis for its unilateral deduction. For example, if Sprint sold a wireless calling plan for $39.99, it would report less than that amount in taxable sales to the Tax Department (*e.g.*, $28.59 in August 2006 (R. 76 ¶ 72)).

Sprint adopted this strategy even though it knew, deliberately ignored, or recklessly disregarded that the Tax Law does not permit a mobile services provider to treat part of its monthly charge for voice services as nontaxable, and that its statements on its tax forms were accordingly false (R. 82-83 ¶¶ 95-98). Since July 2005, Sprint has failed to collect and pay sales tax in an amount totaling over $100 million (R. 79 ¶ 82).

From the beginning, every source of interpretive authority or guidance has contradicted Sprint's approach; there has never been *any* support for Sprint's contention that it could treat part of its monthly charges for voice services as nontaxable. Nine days before Governor Pataki approved the 2002 Act, the Tax Department sent a memorandum to him explaining that a "flat-rate charge for a given number of minutes of air time that may be used for voice transmission would be subject to sales tax" under § 1105(b)(2).[3]

In addition, one day after the 2002 Act became effective, the Tax Department published an official guidance memorandum that stated precisely how the 2002 Act would be applied to voice services such as those offered by Sprint (R. 67-69 ¶¶ 34, 35, 38, 42). The memorandum was noticed: Sprint lobbyists circulated a draft of the memorandum to the leaders of Sprint's tax group (R. 80 ¶ 88), and Sprint in fact adhered to the guidance for three years by properly collecting and paying over the sales tax. Sprint also reviewed the

[3] Letter from Dep't of Taxation & Fin. to the Hon. George Pataki (May 20, 2002), *reprinted in* Bill Jacket for ch. 85 (2002), at 21.

memorandum before deciding to disregard the guidance when it changed its tax practices in July 2005 (R. 80-81 ¶ 89).

Sprint also disregarded the statements of a Tax Department field auditor and enforcement official advising Sprint in 2009 and 2011, respectively, that its sales tax collection practice was illegal (R. 81 ¶ 94). And it disregarded the fact that the other major wireless carriers, unlike Sprint, did not break their fixed monthly charges for voice services into "intrastate" and "interstate" subparts for sales tax purposes (R. 74 ¶ 63), but instead collected and paid sales tax on the full fixed periodic charge for voice services, as the Tax Law requires.

Sprint's conduct demonstrated that its deduction for "interstate usage" did not reflect Sprint's actual understanding of the Tax Law, but instead was a knowing or reckless tax-evasion device. Although Sprint has consulted with the Tax Department on other tax matters, it never sought any guidance about the application of the 2002 amendments (R. 81 ¶ 91). Nor did Sprint seek, prior to changing its tax practices in 2005, the advice of outside counsel concerning its sales tax obligations with respect to

fixed monthly charges for mobile voice service (R. 81 ¶ 92). And Sprint paid millions of dollars in sales tax between 2002 and 2005 that it would not have paid under its post-2005 approach, but it did not seek a refund of those payments (*see* R. 73 ¶ 59).

Furthermore, Sprint had, and still has, no reasonable standard or method for allocating part of its fixed monthly charge to a separate component for "interstate" calls. The alleged component was a phantom concept—unrelated to individual customers' actual calls. The amount that Sprint allocated to "interstate calls" was the same regardless of whether a customer used all of her minutes or none of her minutes, and it was the same regardless of whether the customer made exclusively interstate calls or exclusively intrastate calls (R. 76 ¶ 73).

At times, Sprint purportedly based its percentage allocation on an unrelated federal surcharge, but Sprint did not use that same percentage in calculating its obligations under the federal surcharge itself, and it did not alter its percentage allocation for sales tax purposes when the federal government changed the percentage associated with the unrelated surcharge (R. 77 ¶ 74). For other

times, Sprint has been unable to say how or why it classified a portion of a fixed monthly charge for voice services as nontaxable (R. 77 ¶ 75). In short, Sprint had no basis for treating a portion of its fixed charges for voice services as nontaxable (R. 76-77 ¶¶ 70-75).

To implement its arbitrary and unwarranted sales tax deductions, Sprint overrode the settings in its computer systems used to generate customer invoices and sales tax filings (R. 74-76 ¶¶ 65-69). The third-party system vendor's manual defined a charge for "network access" as "a charge to have access to a cellular or paging network." (R. 75 ¶ 66). As the complaint alleges, "Sprint's fixed monthly charges for wireless voice services were just such charges." (R. 75 ¶ 66). The system also had a category of service, "usage airtime: interstate," which was designed to capture nontaxable *per-minute* usage charges (R. 75 ¶¶ 67-68). Sprint classified part of its fixed network access charge as a nontaxable "per-minute" usage charge, even though it was not charging customers for individual calls by the minute and knew that it was not using this setting for its intended purpose (R. 75-76 ¶¶ 68-69).

In 2009, Sprint discovered that, despite its plan to treat part of its fixed monthly charges as nontaxable, it had inadvertently collected and paid the correct amount of sales tax for a period of time. As a result, Sprint collected about $30 million from customers around the nation, including in New York, that it had not intended to collect or pay (R. 77 ¶¶ 76-77). If Sprint had actually believed that the Tax Law authorized it to treat a flat percentage of its monthly charges for voice services as nontaxable, it would have sought a refund. But it did not seek a refund, because that effort would have drawn close scrutiny to Sprint's unsupportable practices (*see* R. 78 ¶ 78).

D. The Decisions Below Denying Sprint's Motion to Dismiss

Sprint moved to dismiss the complaint pursuant to C.P.L.R. 3211(a)(7) (R. 25-26). Supreme Court denied the motion (R. 9-22), holding that the Tax Law unambiguously imposes a tax on receipts from every sale of mobile telecommunications services that are voice services sold for a fixed periodic charge (R. 14). Moreover, even if the Tax Law permitted Sprint to exclude from

taxable receipts a portion of its fixed monthly mobile voice charge to account for interstate calls, the Tax Law also required Sprint to use an objective, reasonable, and verifiable standard for identifying the nontaxable components of the charge—but the complaint alleges that Sprint failed to comply with this requirement by using "arbitrary" figures for interstate calls that were "not related to any customer's actual usage" (R. 11, 15). The court also concluded that the complaint "alleges in great detail" how Sprint knowingly submitted false monthly tax statements to the Tax Department, in violation of the False Claims Act (R. 12-13, 16).

The trial court further held (R. 16) that New York's Tax Law does not conflict with the federal MTSA, as Sprint had asserted, because New York subjects charges for flat-rate mobile voice service to tax, and the MTSA provision that Sprint invoked applies only where, among other conditions, the "taxing jurisdiction does *not* otherwise subject charges for mobile telecommunications services to taxation." 4 U.S.C. § 123(b) (emphasis added).

Supreme Court also rejected Sprint's assertion that the federal Ex Post Facto Clause bars the Attorney General's False Claims Act claim to the extent that it is based on tax-related statements made before August 2010 (R. 17-21). The court reviewed factors enumerated in the U.S. Supreme Court's decision in *Hudson v. United States*, 522 U.S. 93 (1997), and concluded that these factors indicated that the statute was not so punitive as to negate the Legislature's intent to enact a civil statute, as Sprint had claimed (R. 21).[4]

The Appellate Division, First Department, unanimously affirmed the denial of Sprint's motion to dismiss. The Appellate Division held that the Attorney General's complaint adequately alleges that Sprint violated the False Claims Act, Executive Law § 63(12), and the Tax Law by "knowingly making false statements

---

[4] The trial court accepted Sprint's arguments, however, that the second cause of action for conspiracy to violate the False Claims Act should be dismissed, and that the statute of limitations barred the Attorney General's Tax Law and Executive Law § 63(12) claims to the extent that those claims are based on statements made before March 31, 2008 (R. 20-21). The Attorney General did not cross-appeal from those rulings.

material to an obligation to pay sales tax pursuant to Tax Law § 1105(b)(2)." In addition, the court rejected Sprint's claim that the Tax Law is preempted by the MTSA. Finally, the court rejected the claim that retroactive application of the False Claims Act would be unconstitutional, holding that Sprint "fail[ed] to show that the Act's sanction of civil penalties, including treble damages, is so punitive in nature and effect as to have its retroactive effect barred by the Ex Post Facto Clause." (R. viii-ix); *People v. Sprint Nextel Corp.*, 114 A.D.3d 622 (1st Dep't 2014).[5]

On June 12, 2014, the Appellate Division granted Sprint leave to appeal to this Court (R. v).

---

[5] Sprint subsequently informed the Attorney General that in light of the Appellate Division's decision, it had resumed collecting sales tax on that portion of the fixed monthly charges for mobile voice services that it had previously characterized as nontaxable charges for interstate voice service.

ARGUMENT

POINT I

SPRINT FAILED TO COLLECT SALES TAXES OWED ON MOBILE VOICE SERVICE SOLD FOR FIXED MONTHLY CHARGES AND FALSELY STATED ITS TAXABLE RECEIPTS

The complaint alleges that Sprint systematically failed to apply New York's sales tax to the full monthly price it charged customers for flat-rate mobile voice services—a practice that was contrary not only to the plain meaning of the Tax Law, but also to squarely on-point agency guidance and the universal practice of Sprint's major competitors. The complaint further alleges that Sprint repeatedly understated its sales tax liability in its submissions to the Tax Department. Sprint's years-long misconduct violated the Tax Law, the New York False Claims Act, and Executive Law § 63(12).[6]

---

[6] *See* Tax Law § 1133 (holding vendors personally liable for collection of sales taxes); *id.* § 1136 (requiring vendors to file returns with the Tax Department); State Finance Law § 189(1)(g) & (4)(a) (prohibiting the knowing submission of a "false record or statement" material to tax obligations); Executive Law § 63(12) (prohibiting repeated or persistent fraudulent or illegal acts in business).

Despite the absence of any source of interpretive authority supporting this tax evasion, Sprint asserts that it was entitled to refuse to collect and pay over sales tax on the portion of the price for its monthly flat-rate mobile voice plans that was purportedly attributable to interstate voice service. That argument fails for two independent reasons. First, the text, structure, and purpose of the Tax Law all unambiguously demonstrate that New York sales tax applies to the entirety of any fixed periodic charge for mobile voice service—including any portion attributable to interstate calls. Second, even assuming that the Tax Law permitted mobile voice vendors to exempt from sales tax a portion of their monthly price to account for interstate voice service (and it does not), the complaint alleges that Sprint's conduct here did not actually reflect the interstate usage of its customers. Instead, Sprint essentially implemented an arbitrary and unsupported reduction of its receipts to lower its tax liability. The Appellate Division and Supreme Court thus correctly held that the Attorney General's claims should proceed to discovery and trial.

A. The Tax Law Imposes Sales Tax on the Fixed Monthly Fees that Sprint Charges for Mobile Voice Service.

1. The tax on flat-rate mobile voice service makes no distinction between intrastate and interstate calls.

Before the passage of the MTSA in 2000, New York's sales tax did not extend to interstate phone calls—an approach that reflected concern for dormant Commerce Clause limitations on state taxing authority. The MTSA removed those limitations for mobile telecommunications services, expressly authorizing States to apply their sales taxes to "[a]ll charges" incurred for such services by customers whose residence or primary business address are in the State, "regardless of where the mobile telecommunication services originate, terminate, or pass through." 4 U.S.C. § 117(b); *see also* Tax Law § 1111(*l*)(3)(B) (enacting this principle into New York law).

In 2002, the New York Legislature exercised this authority to apply a sales tax to flat-rate plans for mobile voice service, which (as with Sprint's plans) typically did not distinguish between customers' intra- and interstate calls (R. 64 ¶ 24). A new

provision of the Tax Law, § 1105(b)(2), thus unambiguously imposes sales tax on receipts from sales of "voice services . . . sold for a fixed periodic charge." The text of this provision draws no distinction between interstate and intrastate voice services, reflecting the policy of both the MTSA and Tax Law § 1111(*l*) that state taxes may be applied "regardless" of any such distinction. To make this point unmistakably clear, the Legislature also amended Tax Law § 1105(b)(1)(B)—the preexisting provision that taxes intrastate phone calls while exempting interstate calls from taxation—to clarify that this provision does not apply to the mobile phone calls now governed by the newly enacted § 1105(b)(2).

Nothing in the text of these amendments allows Sprint to exclude as nontaxable a so-called "interstate" portion of its fixed periodic charges for mobile voice service. There is no dispute that Sprint's flat-rate mobile voice plans permit customers to make both intrastate and interstate phone calls, without distinction (R. 64 ¶ 21). And § 1105(b)(2) unqualifiedly imposes sales tax on "*[t]he* receipts from every sale" of such flat-rate plans—rather

than, say, "a portion of the receipts" or "some of the receipts" or any other phrase indicating less than all of the receipts.[7]

Moreover, although the 2002 amendments (through newly enacted Tax Law § 1111(*l*)(2)) authorized carriers to exclude from their taxable receipts certain *other* types of mobile telecommunications services, the Legislature explicitly omitted voice service from the list of excludable services, in two ways. First, the initial clause of § 1111(*l*)(2) limits its application to nonvoice services. The immediately preceding provision, § 1111(*l*)(1), distinguishes between two types of services: subparagraph (A) covers "commercial mobile radio service," including "voice service"; and subparagraph (B) covers all other services provided with the commercial mobile radio service.

---

[7] Sprint asserts (Br. for Appellants ("Br.") at 25-26) that § 1105(b)(2) could have been even clearer, citing certain other provisions of New York's and other States' tax laws that explicitly state when sales tax is imposed on both interstate and intrastate services. But none of this additional language was needed for the 2002 amendments, which were clear and unambiguous on their own terms. Moreover, the Legislature was not required to use any particular talismanic language to achieve its ends, and a court may not refuse to apply the plain meaning of statutory text because some other formulation was possible or even preferable.

Section 1111(*l*)(2) expressly applies to the "services . . . described in subparagraph (B)" of § 1111(*l*)(1)—but not to the services listed in subparagraph (A), such as voice service.

Second, § 1111(*l*)(2) permits carriers to exclude as nontaxable "any interstate" telephone service—but only if it "*is not* a voice service" (emphasis added). By explicitly specifying that one category of interstate service (nonvoice service) may be excluded from taxable receipts, the Legislature made clear that the other category of interstate service (voice service) may *not* be excluded from receipts. *See Matter of Jewish Home & Infirmary v. Comm'r of N.Y. State Dep't of Health*, 84 N.Y.2d 252, 262 (1994) (applying *expressio unius* canon where the Legislature "created a list of exceptions to a general rule" but "chose[] to omit mention of one exception in particular").[8]

---

[8] Similarly, § 1111(*l*)(2) allows mobile service providers to exclude as nontaxable any mobile telecommunications transmissions that the "customer originates in a foreign country." *See also* Letter from Dep't of Taxation & Fin. to the Hon. George Pataki (May 20, 2002), *reprinted in* Bill Jacket for ch. 85 (2002), at 22 (explaining that this "breakout for foreign inbound roaming transmissions was added to provide relief from paying a New York

(*continued on next page*)

Requiring mobile carriers to collect sales tax on the entire amount of their flat-rate mobile voice plans is consistent with the purposes of both the 2002 Tax Law amendments and the federal statute that those amendments implemented. These enactments were intended to free state taxing authorities and mobile carriers alike from "the burden of having to determine the location of sale and purchase of each wireless call and the taxes applicable to each call." H.R. Rep. No. 106-719, at 8. And they were further intended to make unnecessary the difficult task of allocating portions of flat monthly charges to individual calls. S. Rep. No. 106-326, at 3. *See also* Tax Law § 1111(*l*)(3)(B). The 2002 amendments addressed both of these obstacles by applying New York's sales tax to the entire "flat-rate charge for a given number of minutes of air time that may be used for voice transmission," even if the charge "includes intrastate, interstate and international service." Letter

---

sales tax and a foreign VAT"). By specifying that one narrow category of international transmissions (those originated by the customer while in a foreign country) may be excluded from taxable receipts, the Legislature made clear that other categories of international transmissions, as well as interstate transmissions, may not be excluded from receipts.

from Dep't of Taxation & Fin. to the Hon. George Pataki, *reprinted in* Bill Jacket for ch. 85, *supra*, at 21.[9]

2. Neither the text nor purpose of the 2002 amendments supports a tax exemption for any interstate component of flat-rate mobile voice plans.

By contrast, Sprint's reading of the 2002 Tax Law amendments cannot be reconciled with either the text or purpose of those amendments. Section 1105(b)(2) taxes receipts from sales of mobile "voice services, or any other services that are taxable under [§ 1105(b)(1)(B)], sold for a fixed periodic charge." The cross-referenced provision is the pre-2002 language that applies New

[9] Sprint claims (Br. at 27 n.8) that this letter "is entitled to little if any weight." But this Court has expressly recognized that "interested agencies in the Executive Department" are "expected to know what the legislation was intended to mean." *People v. Velez*, 19 N.Y.3d 642, 648 (2012) (relying on letter from Division of Criminal Justice Services in interpreting Correction Law). And, contrary to Sprint's assertion, this Court routinely considers messages from interested agencies sent to the Governor prior to his approval of legislation. *See, e.g.*, *Lorillard Tobacco Co. v. Roth*, 99 N.Y.2d 316, 326 (2003) (considering Tax Department letter to Governor); *Velez*, 19 N.Y.3d at 648; *Matter of Greer v. Wing*, 95 N.Y.2d 676, 680-81 (2001). It is accordingly reasonable to consider the Tax Department's contemporaneous view of what the proposed amendments to the Tax Law were intended to mean.

York's sales tax only to intrastate phone calls and exempts interstate calls from state taxation. Sprint contends that the underlined clause in § 1105(b)(2) modifies not just "any other services," but also "voice services"—thus subjecting flat-rate mobile voice services to § 1105(b)(1)(B)'s preexisting exemption from taxation for interstate phone calls.

Sprint's interpretation is not a plausible reading of the text of § 1105(b)(2). Under the rule of the last antecedent, the requirement of being "taxable under [§ 1105(b)(1)(B)]" applies only to the last antecedent "other services," and not to the prior antecedent "voice services." *See Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) (explaining that a limiting phrase "should ordinarily be read as modifying only the noun or phrase that it immediately follows"); Statutes § 254, 1 McKinney's Cons. Laws of N.Y. 418 (West 1971). Thus, properly read, the Legislature intended to apply the new sales tax of (b)(2) to flat-rate mobile "voice services" even when used to

make interstate calls, while preserving the preexisting tax exemption under (b)(1)(B) for nonvoice interstate services.[10]

Sprint also argues that § 1105(b)(3), which was enacted alongside (b)(2), "confirms" that New York sales tax applies only to intrastate mobile voice services. Br. at 13, 24. This argument wholly misreads (b)(3). That section was meant to deal with the unique situation—impossible with landlines—in which a New Yorker makes a mobile call that takes place entirely within *another* State. Under the law prior to the MTSA's enactment, it was unclear whether New York had authority to tax such a call

---

[10] Put another way, Sprint's interpretation would require this Court to read out of § 1105(b)(2) the comma separating the phrase "voice services" and the clause "or any other services that are taxable under [§ 1105(b)(1)(B)]." But that is not what the Legislature wrote, and a court may not "read into a statute a provision which the Legislature did not see fit to enact," *Matter of Chem. Specialties Mfrs. Ass'n v. Jorling*, 85 N.Y.2d 382, 394 (1995) (quotation marks omitted). *See also Matter of Fox v. Board of Regents of State of N.Y.*, 140 A.D.2d 771, 772 (3d Dep't) (applying rule of the last antecedent while refusing to alter statutory punctuation), *lv. denied*, 72 N.Y.2d 808 (1988); *Zanghi v. Greyhound Lines*, 234 A.D.2d 930, 931 (4th Dep't 1996) (recognizing that a comma before a disjunctive "or" "indicates an intent to discriminate between the various parts of the sentence" (quotation marks omitted)).

because the call itself had no nexus with New York aside from the identity of the caller. The MTSA clarified that New York could impose a sales tax on such calls, and (b)(3) implements this authority. Subsection (b)(3) is thus properly read as confirming that New York's taxing authority encompasses not only mobile calls within New York and interstate mobile calls, but also calls that take place wholly within another State (*i.e.*, are "intrastate" within that State), so long as the customer's residence or primary business address is in New York.[11]

Sprint's assertion that the 2002 amendments preserved the preexisting tax exemption for interstate calls does not merely misread the statutory text; it also ignores the purpose of the 2002 amendments and the federal statute that they implemented. The

---

[11] Sprint claims (Br. at 31-32) that a Tax Department regulation confirms that § 1105(b) applies only to intrastate mobile voice service. But the regulation at issue, 22 N.Y.C.R.R. § 527.2(d)(1), simply tracks the language of the 1965 version of § 1105(b). It has not been revised to reflect the 2002 amendments—indeed, it has not been amended at all since 1980, and thus predates the explosive growth in wireless communications that precipitated the MTSA and the 2002 amendments. Therefore, the regulation sheds no light on the meaning of those statutory amendments.

MTSA and the 2002 amendments were intended to replace old tax rules, which were based on landline calls (often charged by the minute on a per-call basis), with updated rules appropriate for the new business model of flat-rate mobile voice plans that sold access to nationwide calling services for a specified allotment of minutes. See *supra* at 8-9. To reflect the new practical reality in which neither mobile carriers nor consumers distinguish between intrastate and interstate calls, a core principle of the new rules was to substantially pare down the tax laws' disparate treatment of such calls. Thus, the MTSA authorizes state taxation of mobile telecommunications services "regardless of where [those] services originate, terminate, or pass through." 4 U.S.C. § 117(b). And the Legislature amended the preexisting provision for telephony, § 1105(b)(1)(B), to clarify that the provision (including its exception for interstate service) does *not* apply on its own to "any telecommunications service the receipts from the sale of which are subject to tax under" § 1105(b)(2)—including mobile "voice services . . . sold for a fixed periodic charge."

This language from the MTSA and the 2002 amendments is inconsistent with Sprint's assertion here that the Legislature intended to preserve § 1105(b)(1)(B)'s pre-existing tax exemption for interstate phone calls. Indeed, Sprint's view leads to the absurd conclusion that Congress enacted the MTSA, and the Legislature amended the Tax Law, *to no effect*. According to Sprint, mobile voice services remain subject to the same sales tax provision (§ 1105(b)(1)(B)) and the same distinction between interstate and intrastate calls that both the federal statute and the state amendments were intended to replace. That reading impermissibly renders § 1105(b)(2) superfluous: if both voice and nonvoice mobile services remain subject to (b)(1)(B)'s exemption for interstate calls, then (b)(2) does no independent work in describing what mobile telecommunications services are taxable.

Sprint attempts to cure the superfluity by asserting that (b)(2) "prevent[s] the erosion of New York's tax base" by preventing taxable services from escaping taxation solely by virtue of being bundled with nontaxable services. Br. at 24. But Sprint provides no reason to believe that there was any risk of such

"erosion" absent (b)(2). To the contrary, the rule in New York has long been that bundling both taxable and nontaxable services results in state taxation of the entire bundle.[12] Moreover, the 2002 amendments addressed the consequences of bundling not in § 1105(b)(2), but rather in § 1111(*l*)(2), which requires mobile carriers to "collect and pay over [sales] tax" for all mobile charges "aggregated with and not separately stated from other charges." Under Sprint's reading, § 1105(b)(2) simply duplicates § 1111(*l*)(2)'s more detailed bundling rules—violating the interpretive canon that "[e]very part of a statute must be given meaning and effect." *Heard v. Cuomo*, 80 N.Y.2d 684, 689 (1993); *see also Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014).

Finally, having established no support for its reading in the language or purpose of the statute, Sprint claims (Br. at 21-22)

---

[12] *See Commonwealth Long Distance, Inc.*, N.Y. State Dep't of Tax. & Fin. Advisory Op. No. TSB-A-94(33)S (July 29, 1994) (explaining that a fixed monthly fee for special long-distance features will be subject to tax "if any portion of the telephone service offered is intrastate"); *N.Y. Tel. Co.*, N.Y. State Dep't of Tax. & Fin. Advisory Op. No. TSB-A-88(8)S (Jan. 5, 1988); *Rochester Tel. Co.*, N.Y. State Dep't of Tax. & Fin. Advisory Op. No. TSB-A-88(1)S (Dec. 9, 1987).

that § 1105(b)(2) should be construed narrowly in its favor. But Sprint gets the presumption backward: the Legislature has expressly imposed on taxpayers and vendors "the burden of proving that any receipt . . . is not taxable" under the sales tax provisions. Tax Law § 1132(c)(1). As this Court said just two Terms ago in rejecting another asserted exception to sales tax under § 1105, "all doubt must be resolved against the exemption." *Matter of 677 New Loudon Corp. v. State of N.Y. Tax Appeals Tribunal*, 19 N.Y.3d 1058, 1060 (2012) (quotation marks omitted). Sprint attempts (Br. at 22 n.6) to distinguish that decision by claiming that it is not seeking an exemption but an "exclu[sion] from taxation in the first place." But *Matter of 677 New Loudon* involved an "except[ion]" to sales tax under § 1105(f)(1) that is structurally identical to the "except[ion]" that Sprint claims here under § 1105(b)(1)(B). *Compare* Tax Law § 1105(f)(1) (taxing admission charges "except charges for admission to . . . dramatic or musical arts performances"), *with id.* § 1105(b)(1)(B) (taxing telephone services "except interstate and international" services).

In any event, interpretive canons cannot save Sprint's reading, because "[t]here is simply no reason to resort to canons of construction" when the meaning of a statute is clear. *Matter of Bath & Hammondsport R.R. v. N.Y. State Dep't of Envtl. Conservation*, 73 N.Y.2d 434, 441 (1989). For the reasons discussed above, the text of § 1105(b)(2), as properly interpreted in the context of related provisions and the underlying statutory purpose, clearly required Sprint to collect and remit sales tax on "[t]he receipts for every sale of . . . voice services . . . sold for a fixed periodic charge." Tax Law § 1105(b)(2). "[W]hen, as here, a statute is free from ambiguity," interpretive canons cannot prevent a court from "apply[ing] the language as it is written." *Zaldin v. Concord Hotel*, 48 N.Y.2d 107, 113 (1979).

B. Sprint's Unilateral Understatement of Its Sales Tax Responsibility Did Not Properly Reflect Interstate Mobile Voice Service.

Even if Sprint were permitted to exclude from its taxable receipts the portion of its flat-rate mobile voice plans attributable to interstate voice service (and it was not), Sprint's tax forms were still false because, as the complaint alleges, the arbitrary deduction that

Sprint applied to its receipts from mobile voice service did not in fact reflect the interstate calls of Sprint's customers.

Under the Tax Law, vendors may not just unilaterally exclude charges for certain services as nontaxable and thereby reduce their tax liability. Instead, the Tax Law requires vendors to satisfy specified requirements to ensure that any claim of tax exemption properly tracks the services that the Legislature has declared to be nontaxable. And "to prevent evasion of the [sales] tax," the Tax Law places the burden on vendors to prove that receipts are exempt from taxation; otherwise, the presumption is that "*all* receipts for property or services of any type mentioned in [§ 1105(b), among other provisions] . . . are subject to tax." Tax Law § 1132(c)(1) (emphasis added).

For mobile telecommunications services, the Tax Law authorizes carriers to exclude certain enumerated categories of service, such as internet access service, from the total "receipts" subject to sales tax. Tax Law § 1111(*l*)(2). Under the MTSA, vendors must "reasonably identify [the nontaxable charges] from its [regularly kept] books and records." 4 U.S.C. § 123(b). And New

York law implements the MTSA by mandating that vendors "use[] an objective, reasonable and verifiable standard for identifying" the nontaxable charge, and exclude an amount equaling either the price at which Sprint separately sold the component service or "the prevailing retail price" of that service, adjusted for reasonableness and proportionality. Tax Law § 1111(*l*)(2).

Even assuming that these provisions permit exemption of the interstate component of flat-rate mobile voice plans (and they expressly do not, see *supra* at 34-35), the complaint alleges that Sprint failed to satisfy the statutory requirements for identifying an excludable service. Instead, Sprint simply deducted an arbitrary percentage from its receipts from flat-rate plans when calculating the sales tax that it owed (R. 76-77 ¶¶ 70-74). The amount Sprint excluded from its taxable receipts was not tied to each customer's actual interstate calls, or to any price that Sprint or its major competitors charged for such separate service. Sprint applied inconsistent exclusions to its receipts, ranging from 15 percent to 28.5 percent, without any explanation or support for this broad variance. And Sprint lacked the documentation necessary to

support these arbitrary and inconsistent exclusions. Indeed, Sprint declined to pursue a $30 million refund claim because, as one high-ranking Sprint official admitted, they lacked the "books and records" to support *any* reasonable exclusion of the interstate component of Sprint's flat-rate mobile voice plans (R. 78 ¶ 78).

In other words, as alleged in the complaint, Sprint's invocation of the purported nontaxable status of interstate calls was a sham: the label that it attached to its unilateral reduction of its tax liability bore no relationship to the reality of its billing, bookkeeping, or business practices. Thus, even if Sprint's interpretation of the 2002 amendments were correct, the allegations in the complaint would still support its liability under the Tax Law, the New York FCA, and § 63(12).

C. The 2002 Tax Law Amendments Implement and Are Consistent with the Federal MTSA.

Sprint claims that the MTSA preempts the Tax Law because the bundling provision of the MTSA, 4 U.S.C. § 123(b), *requires* New York to permit mobile carriers to exempt from taxation the portion of its receipts from flat-rate plans attributable to

interstate voice service. But there is no indication that Congress intended the MTSA to have such preemptive effect.

Preemption analysis begins with the "presumption that Congress does not intend to supplant state law." *Matter of People v. Applied Card Sys., Inc.*, 11 N.Y.3d 105, 113 (2008) (quotation marks omitted) (rejecting federal preemption of Attorney General's enforcement action under Executive Law § 63(12) and other state statutes). The presumption is "especially strong" if a federal law "treads on a traditional state power," such as the power to tax. *Matter of Disney Enters., Inc. v. Tax Appeals Tribunal of State of N.Y.*, 10 N.Y.3d 392, 403 (2008).

Sprint has failed to overcome that presumption here. Indeed, the MTSA's bundling provision expressly respects and incorporates state taxing authority, rather than restricting it. Section 123(b) anticipates disaggregation only of charges "not otherwise subject . . . to [state] taxation." But, as explained above, fixed periodic charges for mobile voice services—without regard to whether they are used for interstate or intrastate calls—*are* subject to taxation under § 1105(b)(2). Because the Tax Law thus

imposes a tax on the entire amount of Sprint's monthly charges for mobile voice service, there is no exemption for any interstate component of such monthly charges that would even trigger § 123(b)'s application here.

Sprint's argument to the contrary relies on the premise that it can identify an untaxed component of its fixed periodic charges for mobile voice service that can be attributed to interstate voice calls. But that premise is flawed, for three reasons.

First, as alleged in the complaint, there *is* no separate interstate component of Sprint's flat-rate mobile voice plans. (R. 64 ¶¶ 20-21.) Modern flat-rate plans are not a bundling of distinct intrastate and interstate voice plans. Mobile carriers (including Sprint) do not market or sell separate intrastate and interstate mobile voice plans, and customers with mobile phones no longer distinguish between local and long-distance calls. Rather, the complaint alleges that Sprint's flat-rate plans reflect a new business model of charging customers a fixed fee for access to a nationwide phone network, without regard to where individual calls are placed (R. 64 ¶¶ 22-24). The outdated landline-based

distinction between intrastate and interstate calls does not readily apply to this new model—indeed, the complex and "insoluble" nature of distinguishing between intrastate and interstate mobile voice calls is what led Congress to enact the MTSA in the first place. S. Rep. No. 106-326, *supra*, at 6; *see generally supra* at 7-9.

Second, even if a separate interstate component of flat-rate mobile voice plans could be identified, Sprint is incorrect in asserting (Br. at 42-43) that this component would not be taxed under New York law. Section 1105(b)(2) applies the sales tax to *all* "voice services . . . sold for a fixed periodic charge . . . whether or not sold with other services." That language plainly applies to interstate voice service "sold for a fixed periodic charge," whether that service is sold individually or as part of a larger bundle. The only interstate mobile calls exempt from the sales tax are those that are not sold for a flat fee, but instead "separately stated" in the sense that they are charged per call or per minute, such as overage charges. Because New York law thus requires mobile carriers to collect and pay sales taxes on receipts from flat-rate interstate mobile voice charges, any interstate component of a flat-

rate mobile voice plan would still not trigger § 123(b)'s disaggregation requirements because it remains "subject . . . to [state] taxation." 4 U.S.C. § 123(b).

Third, even if the Tax Law did except an "interstate" component of mobile voice services sold for a fixed periodic charge from sales tax (and it does not), New York would still be permitted under the MTSA to tax any such interstate charges in Sprint's plans because they "are aggregated with and not separately stated from charges that are subject to taxation," 4 U.S.C. § 123(b)—namely, charges for intrastate voice service. The only way Sprint could avoid tax under this scenario is if it "reasonably identif[ied]" interstate voice charges "from its books and records that are kept in the regular course of business." 4 U.S.C. § 123(b); *see also* Tax Law § 1111(*l*)(2). But the complaint alleges that Sprint did not even attempt to identify any such interstate component of its mobile voice services, much less adhere to the disaggregation requirements set out in federal and state law. See *supra* at 45-48.

Accordingly, even assuming that § 123(b) was intended to preempt state law, Sprint has failed to show that the federal

statute even applies to its situation, let alone preempts New York law, under the facts alleged in the complaint.

POINT II

SPRINT KNOWINGLY MADE FALSE STATEMENTS ABOUT ITS TAXABLE RECEIPTS

A complaint under the New York FCA must allege that the false claim, record, or statement was made "knowingly." *E.g.*, State Finance Law § 189(1)(g). The Act defines the term to mean that the defendant (i) "has actual knowledge" of the falsity, (ii) "acts in deliberate ignorance of the truth or falsity of the information," or (iii) "acts in reckless disregard of the truth or falsity of the information." *Id.* § 188(3)(a). Thus, the Act reaches defendants who actually know that the information in a claim is false, those who "deliberately choose to remain ignorant" of a claim's falsity, and those who "ignore 'red flags' that the information [in a claim] may not be accurate." H.R. Rep. No. 99-660, at 21 (1986) (describing knowledge provision under federal FCA). A person submitting a claim to the government may not shield himself from FCA liability by "bur[ying] his head in the

sand" with respect to a claim's falsity; he has "an obligation to make a limited inquiry"—one that is "reasonable and prudent under the circumstances"—"so as to be reasonably certain" of the claim's accuracy. S. Rep. No. 99-345, at 7, 20-21 (1986) (describing knowledge provision under federal FCA).

Here, the complaint's allegations would permit a factfinder to conclude that Sprint actually knew that it had failed to comply with the Tax Law's mandatory collection of sales tax on the full receipts from mobile voice service sold for fixed monthly charges (thus making its sales tax forms false), or at the very least deliberately ignored or recklessly disregarded red flags strongly suggesting that it was violating the Tax Law. These allegations are more than sufficient to permit the case to proceed to discovery and trial.

A. The Complaint Adequately Alleges that Sprint Knowingly Submitted False Sales Tax Forms.

"Misrepresenters have not been known to keep elaborate diaries of their fraud for the use of the defrauded in court." *Pludeman*, 10 N.Y.3d at 492 (quotation marks omitted). Because facts concerning culpability often "are peculiarly within the

knowledge of the party charged with the fraud, it would work a potentially unnecessary injustice to dismiss a case at an early stage where any pleading deficiency might be cured later." *Id.* at 491-92 (quotation marks and internal citations omitted). Accordingly, to survive a motion to dismiss, a complaint need only allege enough to permit a factfinder to reasonably infer the requisite mental state; the "nature of the scheme" and "the circumstances surrounding the alleged fraud" will often be sufficient. *Id.* at 493; *see also Polonetsky v. Better Homes Depot, Inc.*, 97 N.Y.2d 46, 55 (2001). And, as this Court has recognized, a defendant's mere denial of knowledge of fraud does not entitle the defendant to judgment as a matter of law, because "[t]he credibility of [the] denials is for a fact finder to decide." *People v. Greenberg*, 21 N.Y.3d 439, 447 (2013).

Here, the Complaint includes myriad detailed, specific allegations from which a factfinder could conclude that Sprint knew of, deliberately ignored, or recklessly disregarded the falsity of its sales tax returns:

1. Unambiguous agency guidance and industry compliance. As the 2002 amendments to the Tax Law went into effect, the Tax Department issued clear guidance advising mobile service providers how the newly enacted sales tax provision at § 1105(b)(2) would apply to mobile voice plans like Sprint's. *See Amendments Affecting the Application of the Sales and Use Tax and Excise Tax Imposed on Mobile Telecommunications Service*, N.Y. State Dep't of Tax. & Fin. Mem. No. TSB-M-02 (July 30, 2002). The Tax Department's memorandum specifically noted, for example, that a calling plan sold for a flat-rate charge of $49.95 per month "is subject to sales tax under section 1105(b)(2) of the Tax Law, regardless of whether the calls made under the plan were intrastate, interstate, or international calls" (R. 67 ¶ 35 (quoting memorandum, emphasis omitted); *see also* R. 68-69 ¶¶ 38, 42).

Sprint argues (Br. at 36) that this memorandum "carries no weight." But courts have relied on technical memoranda in

interpreting the Tax Law.[13] In any event, whether or not the Tax Department's interpretation is entitled to judicial deference, it was still a "'red flag[]' that the information [in Sprint's tax forms] may not [have] be[en] accurate," H.R. Rep. No. 99-660, at 21. Therefore, Sprint's disregard of official agency guidance is at least evidence pointing to knowledge or recklessness under the New York FCA. *See Minn. Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp.*, 276 F.3d 1032, 1053 (8th Cir. 2002) (if defendants "know[] . . . that their actions did not satisfy the requirements of the regulation as [the agency] interpreted it, any possible ambiguity of the regulations is water under the bridge"); *accord United States ex rel. Walker v. R&F Props. of Lake County, Inc.*, 433 F.3d 1349, 1355 (11th Cir. 2005).

Furthermore, every one of Sprint's primary competitors followed the Tax Department's unambiguous guidance by

---

[13] *E.g.*, *Overstock.com, Inc. v. N.Y. State Dep't of Taxation & Fin.*, 20 N.Y.3d 586, 592, 597 (2013); *Matter of Spencer v. Tax Appeals Tribunal*, 251 A.D.2d 764 (3d Dep't 1998); *Matter of Friesch-Groningsche Hypotheekbank Realty Credit Corp. v. Tax Appeals Tribunal of State of N.Y.*, 185 A.D.2d 466 (3d Dep't 1992); *Oneida Nation of N.Y. v. Cuomo*, 645 F.3d 154 (2d Cir. 2011).

collecting sales tax on their full monthly charges for mobile voice service (R. 61, 73-74 ¶¶ 7, 55-63). Indeed, Sprint itself demonstrated its knowledge of the Tax Department's interpretation and of standard industry practice by likewise complying with the guidance for approximately three years (*see* R. 70-74 ¶¶ 44-61). When, as here, the taxpayer itself once adhered to clear guidance from a regulatory agency, and the taxpayer's newfound position is inconsistent with broadly adopted industry practice, a factfinder is entitled to infer that the taxpayer knew of, deliberately ignored, or recklessly disregarded the falsity or fraud. *See Commercial Contractors, Inc. v. United States*, 154 F.3d 1357, 1366 (Fed. Cir. 1998) ("the fact that the interpretation is contrary to well-established industry practice" is evidence of knowledge).

2. Sprint's undisclosed reversal. After three years of compliance, Sprint secretly reversed course in 2005 and began excluding from its taxable receipts an arbitrary percentage that it purportedly attributed to interstate voice services. Sprint did not notify the Tax Department of that fact or seek any form of ruling rejecting the guidance. The undisclosed nature of Sprint's decision

in the face of multiple red flags would permit a factfinder to infer that Sprint actually knew that its new position violated the Tax Law. At a minimum, these allegations support an inference that Sprint acted recklessly. *See Commercial Contractors*, 154 F.3d at 1366 (failure to "raise the interpretation issue with the government" is evidence of knowledge).

The court's ruling in *Visiting Nurse Association of Brooklyn v. Thompson*, 378 F. Supp. 2d 75 (E.D.N.Y. 2004), illustrates the point. In that case, defendants ignored an interpretive directive that they viewed as invalid, but did not advise "anyone" of that fact when they certified that they had complied with all relevant instructions. *Id.* at 96. The court concluded that a defendant's alleged reliance on its own private interpretation of a statute "becomes presumptively unreasonable once the government has formally declared that it has adopted a different interpretation." *Id.* As in *Visiting Nurse Association*, Sprint submitted tax filings that were flatly inconsistent with agency guidance, but failed to disclose that fact to the agency. *See id.* at 96-97. And as in that case, Sprint's argument that it is entitled to rely on an alleged interpretation of

the statute that it did not share with the Tax Department, notwithstanding clear contradictory guidance, must be rejected.

If Sprint had honestly believed that the Tax Department's guidance memorandum was inconsistent with the Tax Law, it could have sought review, rather than silently engaging in a course of conduct that it knew was flatly contrary to the agency's position. *See* S. Rep. No. 99-345, at 7, 20-21 (a person submitting a claim to the government has duty to inquire to ensure accuracy of the claim). New York law makes available multiple avenues for such review. Sprint could have paid the tax and then claimed a refund; a denial of such a refund request would be appealable to the Tax Department's independent Tax Appeals Tribunal, and from there to the Appellate Division, Third Department. *See* Tax Law § 2016; 20 N.Y.C.R.R. pt. 3000. Sprint also could have petitioned for a declaratory ruling or advisory opinion from the Commissioner. *See* 20 N.Y.C.R.R. §§ 2375.3, 2376.2. Or Sprint could have attempted, through its lobbyists or its dedicated business unit devoted to state and local tax issues (R. 71, 80 ¶¶ 48, 86-88), to persuade the Tax Department to change its

position. Indeed, the expectation that Sprint would have taken one of these steps is higher than for an ordinary taxpayer, because a vendor collects sales tax "as trustee for and on account of the [S]tate," Tax Law § 1132(a). *See Matter of GE Capital Corp. v. N.Y. State Div. of Tax Appeals*, 2 N.Y.3d 249, 256 (2004) (The "trustee relationship between the vendors and the State . . . encourag[es] accurate reporting of taxable sales and prompt payment of sales taxes").

A factfinder could reasonably conclude that Sprint did not take any of these steps because it knew that it was violating the statute (or at least deliberately ignored or recklessly disregarded the risk that it was violating the law), and that asking the Tax Department or the courts for advice or a ruling would put an end to its tax-evasion scheme.

3. Arbitrary allocation for interstate calls. As discussed above, the Tax Law does not permit Sprint to exclude as nontaxable a so-called interstate portion of its flat-rate mobile voice plans. And even if the Tax Law did permit such an exclusion, Sprint would have been required to reasonably identify the

interstate portion from its regularly kept books and records—but Sprint did not in fact base its deductions to its sales tax liability on any factor related to interstate calls. See *supra* at 45-48. Instead, these deductions were essentially arbitrary percentages designed to reduce Sprint's tax liability in comparison to its major competitors. Because Sprint had no reasonable basis for its percentage exclusions, a factfinder could reasonably conclude that Sprint knew or at least recklessly disregarded the falsity of its reported taxable receipts. *See United States ex rel. Assocs. Against Outlier Fraud v. Huron Consulting Gr., Inc.*, No. 09-cv-1800, 2011 U.S. Dist. LEXIS 7335, at *10 (S.D.N.Y. Jan. 24, 2011) (denying motion to dismiss federal and New York FCA claims based on defendant's arbitrary increase in reimbursement claims and "failure to offer a convincing explanation for the seeming anomaly"); *Pludeman*, 10 N.Y.3d at 493 ("[t]he very nature of the scheme" can give rise to a reasonable inference of knowledge).

4. Discovery of inadvertently correct payments. In 2009, Sprint discovered that it had inadvertently collected and paid the correct amount of sales tax for a period of time, even though it had

begun treating part of its fixed monthly charges as nontaxable. As a result, Sprint collected about $30 million from customers around the nation, including in New York, that it had not intended to collect or pay (R. 77 ¶¶ 76-77). If Sprint had actually believed that the Tax Law authorized it to treat a flat percentage of its monthly charges for voice services as nontaxable, one would have expected it to seek a refund. A factfinder could conclude that it did not seek a refund because that effort would have drawn close scrutiny to Sprint's unsupportable practices (*see* R. 78 ¶ 78). *See Commercial Contractors*, 154 F.3d at 1366.

5. Explicit warnings by the Tax Department. Sprint was expressly advised in 2009 and 2011 by a Tax Department field auditor and an enforcement official, respectively, that collecting and paying over taxes on less than the full taxable receipts from flat-rate mobile voice plans violated the Tax Law (R. 81 ¶ 94). Despite receiving these clear warnings, Sprint continued to engage in this illegal practice. A factfinder could reasonably conclude that Sprint actually knew that its tax forms were false, or that it at least deliberately ignored or recklessly disregarded their falsity.

Taken together, these allegations are more than sufficient to plead that Sprint filed its false sales tax forms knowingly within the meaning of the New York FCA.[14]

B. Sprint's Purported "Objectively Reasonable" Interpretation of the Tax Law Does Not Support Dismissal of the Complaint.

Sprint contends that most if not all of the complaint's allegations going to Sprint's mental state should be ignored because Sprint understated its tax liability based on a reading of Tax Law § 1105(b) that was "not objectively unreasonable." Br. at 48. But contrary to Sprint's position here, a defendant cannot

---

[14] After its motion to dismiss was denied, Sprint filed an answer asserting as an affirmative defense that it "acted at all relevant times in good faith." This issue cannot be resolved in Sprint's favor on a motion to dismiss—indeed, the complaint alleges that Sprint did not prepare any internal analyses of its tax obligations, seek guidance from the Tax Department, or seek the advice of outside counsel prior to reversing course in 2005 (R. 81 ¶¶ 91-93). *See United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991) (reversing dismissal of complaint because affirmative defense to knowledge can only be assessed on summary judgment or at trial); *Greenberg*, 21 N.Y.3d at 447 (defendant not entitled to judgment as a matter of law based on denial of knowledge of fraud).

automatically avoid liability under the New York FCA by relying on an objectively reasonable interpretation of a statute.

To be sure, the reasonableness or unreasonableness of an interpretation may be relevant evidence about the defendant's mental state. *United States ex rel. Oliver v. Parsons Co.*, 195 F.3d 457, 463 (9th Cir. 1999). But it is only one factor among many, and not necessarily a dispositive one. *See United States ex rel. K&R Ltd. P'ship v. Mass. Hous. Fin. Agency*, 530 F.3d 980, 983 (D.C. Cir. 2008) (recognizing that a reasonable interpretation "does not preclude a finding of knowledge" under the federal FCA). Even if a defendant's proffered interpretation is reasonable, the Attorney General is entitled to establish the defendant's knowledge, deliberate ignorance, or reckless disregard of fraud or falsity with the usual sorts of evidence of culpability, such as red flags "that might have warned [the defendant] away from the view it took." *Id.* at 983 (quotation marks omitted).[15]

---

[15] One case holds that a complaint based on violation of a statute may be dismissed at the pleadings stage "if there is no authoritative contrary interpretation of that statute." *United*

(*continued on next page*)

Permitting defendants to avoid FCA liability by identifying an objectively reasonable interpretation alone would seriously undermine the statute's effectiveness at deterring and providing relief for false claims against the government. Defendants facing serious liability will almost always be able to identify reasons to support their interpretation of a statute. And that is particularly true in two key areas the New York FCA was designed to cover—Medicaid and tax[16]—both of which apply unusually complex laws

---

States ex rel. Hixson v. Health Mgmt. Sys., Inc., 613 F.3d 1186, 1190 (8th Cir. 2010). But this statement in *Hixson* is plainly wrong because a defendant may knowingly make false statements in violation of a statute even where no court or agency has published an opinion interpreting that statute. Indeed, the only courts outside the Eighth Circuit to have cited *Hixson* on this issue declined to follow it. *See United States ex rel. Chilcott v. KBR, Inc.*, No. 09-cv-4018, 2013 U.S. Dist. LEXIS 153331, at *24-*25 (C.D. Ill. Oct. 25, 2013); *United States ex rel. Armfield v. Gills*, No. 8:07-cv-2374, 2013 U.S. Dist. LEXIS 12475, at *35-*40 (M.D. Fla. Jan. 30, 2013). In any event, *Hixson* is distinguishable from this case because the Tax Department published its official interpretation of the statute long before Sprint filed its tax forms falsely understating its taxable receipts, and Sprint reviewed the guidance memorandum (R. 80-81 ¶¶ 88-89).

[16] The New York FCA's central concern with false Medicaid claims is clear from the statute's history: it was enacted in response to a federal Medicaid provision increasing federal funding for States with false claims acts. *See* 42 U.S.C. § 1396h(a).

(*continued on next page*)

to sophisticated defendants capable of coming up with "elaborate and devious" means to avoid liability. *Gregory v. Helvering*, 293 U.S. 465, 470 (1935); *see also EFS Med. Supplies, Inc. v. Dowling*, 252 A.D.2d 99, 101 (1st Dep't 1998) (noting that "Medicaid/Medicare financing provisions have been aptly described as among the most completely impenetrable texts within human experience" (quotation marks omitted)). It would be nearly impossible for the "drafters of statutes, regulations, and government contracts" to "avoid all potential ambiguity in order to prevent intentional fraud against the government." *Chilcott*, 2013 U.S. Dist. LEXIS 153331, at *24-*25. Sprint's requested safe harbor would thus "incentivize the intentional twisting of language in order to find profitable erroneous interpretations of the controlling text, even though all those subject to the text were well-aware of its intended meaning." *Id.* at *25.

The Act's central concern with false tax claims is demonstrated by the fact that the Legislature expressly departed from the federal FCA to expand the state act's coverage to false tax statements.

Here, the complaint alleges that Sprint was aware of but ignored clear signs that the stance it took starting in 2005 was an erroneous reading of the Tax Law. See *supra* Point II.A. Those allegations are sufficient to support the lower courts' denial of Sprint's motion to dismiss the Attorney General's False Claims Act claim.

In any event, even assuming that an objectively reasonable interpretation alone could preclude New York FCA liability (and it cannot), Sprint would not be able to assert that defense here, for two reasons. First, Sprint's interpretation of the Tax Law is objectively *un*reasonable. As previously explained, the relevant Tax Law provisions are clear and unambiguous; Sprint's interpretation has no grounding in the statute's text, structure, or purpose, or any support from any judicial decision or industry practice; and the Tax Department's guidance explicitly contradicted Sprint's reading. It comes as no surprise that all six

judges to consider the statutory arguments in this case have ruled against Sprint.[17]

These factors sharply distinguish this case from Sprint's principal authority to the contrary, *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47 (2007). In that case—which involved the federal Fair Credit Reporting Act (FCRA), not the federal or New York FCA—the Supreme Court found that a defendant's reasonable interpretation of a FCRA notice provision precluded a finding of

---

[17] Sprint argues (Br. at 50-51) that the reasonableness of its interpretation is supported by the fact that a minor mobile service provider named Helio for a time adopted the same interpretation. *See Matter of Helio, LLC*, DTA No. 825010, 2014 WL 2809222 (Div. Tax Appeals June 12, 2014). But the complaint does not allege that Sprint was aware of any competitor that shared its view of the Tax Law at the time; Sprint's assertion to the contrary is a factual dispute that should be resolved at trial. *See Greenberg*, 21 N.Y.3d at 447. In any event, Helio's views should carry little weight here. The complaint alleges that Sprint's "primary," "major" competitors—including Verizon, AT&T, T-Mobile, and MetroPCS—all followed the law (R. 61 ¶ 7, 74 ¶ 63). These carriers had over one hundred million subscribers in 2005. Helio had fewer than 200,000 during the same period. Ken Belson & Matt Richtel, *2 Largest U.S. Wireless Carriers Add Many Subscribers*, N.Y. Times (Jan. 25, 2006); John Biggs, *Virgin Mobile Acquires Helio for $39 Million*, TechCrunch (June 27, 2008); Sascha Segan, *Virgin Mobile Finally Hanging Up on Helio Customers*, PC Magazine (Mar. 2, 2010).

"willful failure" to comply with the law. But the Court deemed the defendant's interpretation reasonable in *Safeco* only due to a confluence of factors not present here: the federal statute was "less-than-pellucid," the interpretation "ha[d] a foundation in the statutory text and a sufficiently convincing justification to have persuaded the [trial] Court to adopt it," and there was a "dearth of guidance" that "might have warned [the defendant] away from the view it took." 551 U.S. at 69-70 (internal citations omitted). Here, every one of those factors points in the opposite direction.

Second, the complaint alleges that Sprint did not in fact rely on the interpretation of the Tax Law that it presses here. Instead, Sprint knew what the Tax Law actually required but understated its tax liability anyway (R. 71-74, 82 ¶¶ 48-64, 98). Whatever defense an objectively reasonable interpretation of a statute may provide, it cannot shield a defendant from liability if, as the complaint alleges here, the defendant did not in fact act on that interpretation. *See, e.g.*, *United States v. Sci. Applications Int'l Corp.*, 626 F.3d 1257, 1272 (D.C. Cir. 2010) (affirming judgment of liability where evidence would permit a factfinder to "discredit"

defendant's claim of belief in reasonable interpretation); *Chilcott*, 2013 U.S. Dist. LEXIS 153331, at *34 (denying motion to dismiss where the complaint included allegations that defendants "did not simply choose, in good faith, a reasonable interpretation among equal alternatives"). Otherwise, "[a] defendant could submit a claim, knowing it is false or at least with reckless disregard as to falsity, . . . but nevertheless avoid liability by successfully arguing that its claim reflected a 'reasonable interpretation' of the requirements." *Oliver*, 195 F.3d at 463 n.3; *accord United States v. Kellogg Brown & Root Servs., Inc.*, No. 12-cv-4110, 2014 U.S. Dist. LEXIS 43000, at *24 (C.D. Ill. Mar. 31, 2014) ("One can make an objectively reasonable claim he or she subjectively knows to be false. For example, an objectively reasonable interpretation may nevertheless be knowingly false if the speaker is cognizant of facts that undermine the basis for that interpretation.").

POINT III

THE EX POST FACTO CLAUSE DOES NOT BAR RETROACTIVE APPLICATION OF THE NEW YORK FALSE CLAIMS ACT

When the Legislature amended the New York FCA in 2010 to extend the statute to tax-related statements, it expressly provided that the amendment would "apply to claims, records or statements made or used prior to, on or after April 1, 2007." Ch. 379, § 13, 2010 McKinney's N.Y. Laws at 1165. Sprint claims that retroactive application of the amendments violates the Ex Post Facto Clause of the federal Constitution. *See* U.S. Const., art. I, § 10, cl. 1 ("No State shall . . . pass any . . . ex post facto Law."). That argument is meritless.

The constitutional "prohibition on ex post facto laws applies only to penal statutes." *Kellogg v. Travis*, 100 N.Y.2d 407, 410 (2003). Sprint conceded below (and does not contest here) that the Legislature intended the Act to be civil in nature (R. 54; App. Div. Br. at 27). A statute intended to serve as a civil regulation of conduct violates the Ex Post Facto Clause only if "the statutory scheme is so punitive either in purpose or effect as to negate the

State's intention to deem it civil." *Smith v. Doe*, 538 U.S. 84, 92 (2003) (alterations and quotation marks omitted). "[O]nly the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Id.* (quotation marks omitted).

Sprint has failed to satisfy this exacting standard here. Courts have consistently recognized that monetary remedies—including multiple damages—advance important nonpunitive interests. As a New York federal district court recently concluded in agreement with the courts below, the New York FCA thus falls squarely within the realm of civil regulation and does not violate the Ex Post Facto Clause. *See United States ex rel. Bilotta v. Novartis Pharm. Corp.*, --- F. Supp. 3d ---, No. 11-cv-71, 2014 U.S. Dist. LEXIS 139072, at *123-*132 (S.D.N.Y. Sept. 30, 2014).

A. The New York FCA's Monetary Remedies Advance Civil, Nonpunitive Purposes.

To resolve an ex post facto challenge, courts commonly refer to the factors identified in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963).[18] Three of those factors consider the purposes of the statutory remedy at issue: whether it historically has been viewed as punishment, whether it promotes retribution and deterrence, and whether it is rationally connected to an alternative, nonpunitive purpose. These interrelated factors demonstrate that the New York FCA's monetary remedies constitute civil regulation rather than criminal punishment.

Monetary remedies have not historically been regarded as an exclusively criminal punishment. To the contrary, "the payment of

---

[18] Those factors are: "[1] Whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, [3] whether it comes into play only on a finding of scienter, [4] whether its operation will promote the traditional aims of punishment—retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned." *Mendoza-Martinez*, 372 U.S. at 168-69 (footnotes omitted).

fixed or variable sums of money [is a] sanction which has been recognized as enforceable by civil proceedings since the original revenue law of 1789." *Hudson v. United States*, 522 U.S. 93, 104 (1997) (quotation marks omitted; alteration in original).[19] Thus, for example, the U.S. Supreme Court has repeatedly held that statutes requiring violators to pay the government a multiple of actual damages—including for false claims submitted to the government—are not considered to impose criminal punishment. See *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943) (double damages for false claims); *Helvering v. Mitchell*, 303 U.S. 391 (1938) (one-and-one-half damages for tax penalties); *Stockwell v. United States*, 80 U.S. 531 (1871) (double damages for unpaid debt).

These decisions recognize that the payment of multiple damages to the government serves a legitimate nonpunitive

---

[19] Although *Hudson* was a double-jeopardy case, its holding is equally applicable to the Ex Post Facto Clause. *See Smith*, 538 U.S. at 97-102 (relying on *Hudson* in applying *Mendoza-Martinez* factors to ex post facto claim); *Kansas v. Hendricks*, 521 U.S. 346, 369 (1997) ("Our conclusion that the Act is nonpunitive thus removes an essential prerequisite for both [the] double jeopardy and ex post facto claims.").

purpose—namely, compensating the government for losses stemming from unlawful conduct. In *Marcus*, the Supreme Court thus squarely held that the federal FCA's provision of multiple damages is a civil remedy, rather than a criminal penalty. While the statutory remedies at the time—a civil penalty of $2,000 per false claim plus double damages—had some punitive effect, the Court concluded that their "chief purpose . . . was to provide for restitution to the government of money taken from it by fraud." 317 U.S. at 551. Congress was entitled to make a legislative "judgment that double damages [we]re necessary to compensate the Government completely for the costs, delays, and inconveniences occasioned by fraudulent claims." *United States v. Bornstein*, 423 U.S. 303, 315 (1976). Thus, the remedies "w[ere] chosen to make sure that the government would be made completely whole." *Marcus*, 317 U.S. at 551-52.

To be sure, the federal FCA has, since 1986, provided for treble (rather than double) damages. But the Supreme Court has described this increase from double to treble damages as advancing the same nonpunitive purposes: to further ensure that

the government receives full compensation, and to "quicken the self-interest" of qui tam plaintiffs "who can spot violations and start litigating" on behalf of the government. *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 131 (2003).[20] And the federal courts of appeals have uniformly concluded, consistent with *Chandler* and *Marcus*, that the federal FCA is not punitive for purposes of the Ex Post Facto and Double Jeopardy Clauses.

---

[20] *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765 (2000), cited by Sprint (Br. at 58), is not to the contrary. The Court there held that a State is not a "person" that may be sued by a qui tam plaintiff under the federal FCA. In so holding, the Court invoked a presumption against imposition of punitive damages on government entities because treble damages under the statute were "essentially punitive in nature." *Id.* at 784. But that characterization of treble damages appears to have been driven by the Court's desire to avoid a constitutional question—whether the Eleventh Amendment would bar a qui tam suit against a state agency. *See id.* at 787. In any event, the Court has since retreated from *Stevens*, recognizing both that "[t]reble damages certainly does not equate with classic punitive damages" and that the modern federal FCA's "damages multiplier has compensatory traits along with the punitive," *Chandler*, 538 U.S. at 130, 132. *See Sanders v. Allison Engine Co.*, 703 F.3d 930, 945 n.13, 948 (6th Cir. 2012) (describing the Court's view of federal FCA treble damages as having "evolved" and "soften[ed]" between *Stevens* and *Chandler*), *cert. denied*, 133 S. Ct. 2855 (2013); *United States ex rel. Colucci v. Beth Israel Med. Ctr.*, 603 F. Supp. 2d 677, 680-81 (S.D.N.Y. 2009) (describing *Chandler* as having "backed away" and "moved away" from *Stevens*).

See Sanders, 703 F.3d at 948; *United States ex rel. Miller v. Bill Harbert Int'l Constr., Inc.*, 608 F.3d 871, 878-79 (D.C. Cir. 2010) (per curiam); *United States v. Rogan*, 517 F.3d 449, 454 (7th Cir. 2008); *United States v. Brekke*, 97 F.3d 1043, 1048 (8th Cir. 1996). This universal recognition that the civil penalty and treble damages remedies under the federal FCA serve compensatory purposes applies with equal force to the New York FCA, which was closely modeled on its federal counterpart.

Sprint does not contest that the New York FCA serves valid nonpunitive purposes. It nonetheless contends (Br. at 57-59) that the New York FCA's remedies are the equivalent of criminal punishment because treble damages not only compensate the State but also deter others from violating the law. But "all civil penalties have some deterrent effect." *Hudson*, 522 U.S. at 102. The mere presence of a deterrent effect is thus "insufficient to render a sanction criminal, as deterrence may serve civil as well as criminal goals." *Id.* at 105 (quotation marks omitted). Here, for example, the deterrence of false claims advances the civil goals of promoting compliance with the tax laws and ensuring that the

government raises all the tax revenue to which it is entitled. *See* Div. of Budget Bill Mem., *reprinted in* Bill Jacket for ch. 379 (2010), at 8 (recognizing that amendment to New York FCA "will increase the amount of funds recovered by the State and local governments"). To hold that the deterrent effect of monetary remedies renders those remedies criminal "would severely undermine the Government's ability to engage in effective regulation." *Smith*, 538 U.S. at 102 (quotation marks omitted).

The Supreme Court has thus repeatedly held that a statutory remedy remains civil in nature even if it also deters future wrongdoing or advances some other punitive goal. And it has said so specifically in the context of treble damages, which "have a compensatory side, serving remedial purposes in addition to punitive objectives." *Chandler*, 538 U.S. at 130. For example, treble damages under the federal antitrust laws "play an important role in penalizing wrongdoers and deterring wrongdoing" but nevertheless are "designed primarily as a remedy." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S.

477, 485-86 (1977).[21] Similarly, the primary purpose of treble damages under the federal racketeering statute is compensatory, even though they also serve an important punitive function. *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 240-41 (1987) (describing "remedial role" and "policing function"). The New York FCA's monetary remedies similarly serve multiple purposes, and the presence of some deterrent effect does not bring the Act within the scope of the Ex Post Facto Clause. *Cf. Hudson*, 522 U.S. at 102 (rejecting argument that "a sanction must be 'solely' remedial (*i.e.*, entirely nondeterrent) to avoid implicating the Double Jeopardy Clause").[22]

---

[21] *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981), cited by Sprint (Br. at 58), is not to the contrary. The Court subsequently reiterated, relying on *Texas Industries*, *Brunswick*, and other cases, that while "antitrust treble damages were designed in part to punish past violations of the antitrust laws," they also "serve as a means of deterring antitrust violations and of compensating victims." *Am. Soc'y of Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556, 575-76 (1982).

[22] Sprint's reliance (Br. at 58) on *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), is misplaced. The Court there did not address the question whether retroactive imposition of punitive damages under Title VII of the Civil Rights Act of 1964 would be unconstitutional because Congress did not expressly

(*continued on next page*)

Sprint argues (Br. at 57) that these fundamental principles were rendered irrelevant by this Court's decision in *State ex rel. Grupp v. DHL Express (USA), Inc.*, 19 N.Y.3d 278 (2012). But *Grupp* did not involve an ex post facto claim. Instead, this Court addressed whether a qui tam suit under the New York FCA qualified for the "market participant" exception to federal preemption—a question that turned on whether the State was acting as a participant in the market purely for its own proprietary interests or instead also sought "to advance general societal goals." *Id.* at 286 (quotation marks omitted). The Court concluded that the exception did not apply because the New York FCA "establishes public policy goals and is thus regulatory in nature." *Id.*

---

provide for retroactivity. *Id.* at 281. To be sure, *Landgraf* parenthetically described a lower-court decision as suggesting that "retroactive application of punitive treble damages provisions . . . would present a potential ex post facto problem." *Id.* (quotation marks omitted). But unlike here, the legislative history of the treble damages provision in the cited lower-court case—which involved the Trademark Counterfeiting Act, not the New York or federal FCA—indicated that Congress had a punitive intent. *Louis Vuitton S.A. v. Spencer Handbags Corp.*, 765 F.2d 966, 971 (2d Cir. 1985). In any event, the Second Circuit did not even reach the constitutional question and instead merely held that the treble damages provision did not apply retroactively. *Id.* at 971-72.

The only question addressed in *Grupp* was thus whether the New York FCA "promot[ed] a general policy" rather than merely the State's narrow proprietary interests. *Id.* at 287. This Court's resolution of that question did not resolve the distinct—and stricter—inquiry in the ex post facto context: whether a civil regulation is "*so punitive* either in purpose or effect" to be deemed the equivalent of criminal punishment. *Smith*, 538 U.S. at 92 (emphasis added); *see also Bilotta*, 2014 U.S. Dist. LEXIS 139072, at *120 ("The [*Grupp*] court did not consider, however, whether the civil penalties provided for in the New York FCA are 'so punitive' as to bar retroactive application of the Act."). And contrary to Sprint's argument here, the mere fact that *Grupp* recognized the New York FCA's deterrent effect does not dispose of the question in this appeal: as noted above, deterrence may advance civil, nonpunitive objectives, such as the taxpayer-compliance and revenue-raising purposes served by the New York FCA. See *supra* at 74-80.[23]

---

[23] To be sure, the Court said in *Grupp* that the Act's remedies "evince[] a broader punitive goal." 19 N.Y.3d at 286-87. But the only authority cited for that proposition was the

(*continued on next page*)

B. The Remaining *Mendoza-Martinez* Factors Also Show that the New York FCA Does Not Impose a Criminal Penalty.

None of the remaining *Mendoza-Martinez* factors provide the "clearest proof" necessary to sustain Sprint's argument that the New York FCA is so punitive as to be a criminal penalty, *Smith*, 538 U.S. at 92:

1. No affirmative disability or restraint. Sprint does not contest that the New York FCA provides for only monetary remedies and "imposes no physical restraint," *Smith*, 538 U.S. at 100.

2. Not limited to scienter. Criminal offenses often require proof of the defendant's scienter, in the sense of actual knowledge or specific intent. *See, e.g.*, *United States v. White*, 27 F.3d 1531, 1533 (11th Cir. 1994) (criminal violation of federal FCA requires

---

characterization of the federal FCA in *Stevens*. The Court did not acknowledge the Supreme Court's conclusions to the contrary in *Marcus* and *Chandler*, see *supra* at 75-78 & n. 20—decisions that the parties in *Grupp* did not cite to the Court. *See* Br. for Appellant, *State ex rel. Grupp v. DHL Express (USA), Inc.*, *supra*, 2011 N.Y. App. Ct. Briefs LEXIS 306 (Aug. 24, 2011); Br. for Respondent, *Grupp*, *supra*, 2011 N.Y. App. Ct. Briefs LEXIS 307 (Oct. 14, 2011); Reply Br. for Appellant, *Grupp*, *supra*, 2011 N.Y. App. Ct. Briefs LEXIS 308 (Oct. 21, 2011).

specific intent); *United States v. Drape*, 668 F.2d 22, 26 (1st Cir. 1982) (requisite intent for criminal violation of federal FCA may be established by actual knowledge). In contrast, New York FCA's knowledge requirement encompasses not just "actual knowledge," but also "deliberate ignorance" and "reckless disregard." State Finance Law §§ 189(1), 188(3)(a). Because the New York FCA thus does not "come[] into play *only* on a finding of scienter," *Mendoza-Martinez*, 372 U.S. at 168 (emphasis added), it is distinguishable from a criminal statute. *See Bilotta*, 2014 U.S. Dist. LEXIS 139072, at *125-*126. *Cf. Sanders*, 703 F.3d at 946 (same conclusion as to federal FCA).

3. Extends beyond already criminalized conduct. The State's Tax Law criminalizes certain "tax fraud acts," including the filing of materially false returns. Tax Law § 1801(a)(2); *see id.* §§ 1802-1806 (defining degrees of offenses). But criminal tax fraud requires proof of an "intent to defraud, intent to evade the payment of taxes or intent to avoid a [legal] requirement." *Id.* § 1801(c). In contrast, the New York FCA requires only a showing of a knowing or reckless mental state, and "require[s] no proof of

specific intent to defraud." State Finance Law § 188(3)(b). Thus, the New York FCA does not simply impose additional penalties to misconduct that is already a crime.

To be sure, in some instances the Act will be applied to misconduct that is sufficiently egregious to violate a criminal prohibition. But even so, this factor "should be given little weight," *Bilotta*, 2014 U.S. Dist. LEXIS 139072, at *129. The Legislature is entitled to "impose both a criminal and a civil sanction in respect to the same" misconduct. *United States v. Ward*, 448 U.S. 242, 250 (1980) (quotation marks omitted). Therefore, this factor "is insufficient to render the money penalties . . . criminally punitive." *Hudson*, 522 U.S. at 105.

4. Not excessive. The monetary remedies of the New York FCA are not excessive in relation to the Act's remedial purpose. As noted above, the Supreme Court has expressly approved of civil penalties and double or treble damages under the federal FCA. It is a legislative prerogative to determine that treble damages (rather than double or actual damages) are needed to compensate the State for the losses and costs of false statements and to

adequately incentivize qui tam plaintiffs to bring suit on the government's behalf. *See United States v. Halper*, 490 U.S. 435, 446 (1989) (recognizing that "the Government is entitled to rough remedial justice" and "may demand compensation according to somewhat imprecise formulas"); *Marcus*, 317 U.S. at 552 ("The inherent difficulty of choosing a proper specific sum which would give full restitution was a problem for Congress.").[24]

---

[24] Sprint cites (Br. at 60 n.21) a decision of a federal district court in California holding that the New York FCA violates the Ex Post Facto Clause. Memorandum, *United States ex rel. Hendrix v. J-M Mfg. Co.*, No. 06-cv-55 (C.D. Cal. Sept. 2, 2010) (ECF No. 258-1). That unreported ruling should be disregarded for several reasons. First, the court did not analyze the *Mendoza-Martinez* factors but instead simply concluded that the New York FCA "contain[s] clearly penal and/or punitive characteristics." *Id.*, slip op. at 17. But the proper question under *Smith* is not whether a civil sanction merely contains *some* punitive characteristics, but whether a statute "is *so* punitive either in purpose or effect as to negate the State's intention to deem it civil." 538 U.S. at 92 (emphasis added; alterations and quotation marks omitted). Second, the court relied on *Stevens*' characterization of the federal FCA as essentially punitive, but it disregarded the retreat from that view in *Chandler* and failed to acknowledge the holding of *Marcus* that an earlier version of the federal FCA was not punitive. Third, the court relied on two district court decisions finding the federal FCA to be punitive, but one of those decisions was reversed on appeal, and the circuit courts have uniformly

(*continued on next page*)

In sum, the *Mendoza-Martinez* factors strongly confirm that the New York FCA is civil. Although Sprint asserts that certain factors "point in differing directions," *Hudson*, 522 U.S. at 101 (quotation marks omitted), that is not enough to establish a violation of the Ex Post Facto Clause because "only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty," *Smith*, 538 U.S. at 92 (quotation marks omitted). Under that strict standard, Sprint has failed to demonstrate that the Act imposes criminal punishment that cannot be applied retroactively.

---

concluded, consistent with *Chandler* and *Marcus*, that the federal FCA is not punitive. See *supra* at 77-78.

CONCLUSION

For the foregoing reasons, this Court should affirm the Appellate Division's decision and order.

Dated: New York, New York
December 2, 2014

Respectfully submitted,

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York

By: ____________________________
WON S. SHIN
Assistant Solicitor General

120 Broadway
New York, NY 10271
(212) 416-8808

BARBARA D. UNDERWOOD
Solicitor General
STEVEN C. WU
Deputy Solicitor General
WON S. SHIN
Assistant Solicitor General
of Counsel

Reproduced on Recycled Paper