APL-2014-00152
New York County Clerk's Index No. 103917/11

Court of Appeals

STATE OF NEW YORK

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.

RECORD ON APPEAL

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*(*pro hac* admission pending)

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STATEMENT PURSUANT TO CPLR § 5531

COURT OF APPEALS
STATE OF NEW YORK

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,

APL-2014-00152

—against—

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

Defendants-Appellants.

---

1. The index number of the case is 103917/2011.

2. The full names of the original parties are as set forth in the caption above. On or about July 10, 2013, in connection with a transaction involving SoftBank Corporation, Sprint Nextel Corporation was renamed "Sprint Communications, Inc." and is now a wholly-owned subsidiary of Sprint Corporation. The names of the other three defendants remain unchanged.

3. The action was commenced in Supreme Court, New York County.

4. Empire State Ventures, LLC initially commenced this action as a *qui tam* action on or about March 31, 2011 by service of summons and complaint. The Attorney General of the State of New York served a superseding complaint on or about April 19, 2012. Defendants served their notice of motion to dismiss on or about June 14, 2012, and their answer and defenses on July 23, 2013.

5. This case arises out of a *qui tam* action initially commenced by Empire State Ventures, LLC pursuant to the New York False Claims Act, N.Y. State Fin. Law § 189, alleging that Defendants failed to collect or pay sales tax on receipts from the sale of certain wireless telephone services. On April 19, 2012, the Attorney General for the State of New York filed a superseding complaint asserting four causes of action. The first cause of action

purports to be for violation of § 189(1)(g) of the New York False Claims Act based on an allegation that Defendants knowingly made, used, or caused to be made or used, false records or statements material to an obligation to pay or transmit money or property to the state and local governments. The second cause of action purports to be for violation of § 189(1)(c) of the New York False Claims Act for allegedly conspiring to commit a violation of § 189(1)(g) of the New York False Claims Act. The third cause of action purports to be for allegedly persistent fraudulent or illegal acts in violation of § 63(12) of the Executive Law. The fourth cause of action purports to be for violation of Article 28 of the Tax Law for allegedly failing to collect or pay New York sales taxes on receipts from the sale of certain wireless telephone services. The Attorney General for the State of New York seeks damages, penalties and injunctive relief, among other forms of relief.

6. This appeal is from the Decision and Order of the Honorable O. Peter Sherwood, entered on July 1, 2013, to the extent that it denied Defendants' motion to dismiss, and the Decision and Order of the Appellate Division, First Department, entered on February 27, 2014, affirming that Decision and Order.

7. The appeal is on a full reproduced record.

V

Order of the Appellate Division, First Department Granting Leave to Appeal to the New York State Court of Appeals, dated June 12, 2014

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on June 12, 2014.

Present: Hon. Angela M. Mazzarelli, Justice Presiding,
Rolando T. Acosta
Diane T. Renwick
Helen E. Freedman
Sallie Manzanet-Daniels, Justices.

The People of the State of New York,
Eric T. Schneiderman, etc., et al.,
Plaintiffs-Respondents,

M-1653

-against- Index No. 103917/11

Sprint Nextel Corp., et al.,
Defendants-Appellants.

- - - - - - - - - - - -

Broadband Tax Institute and Council of State Taxation,
Amici Curiae.

Defendants-appellants having moved for leave to appeal to the Court of Appeals from the decision and order of this Court entered on February 27, 2014 (Appeal No. 11848),

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that the motion is granted, and this Court, pursuant to CPLR 5713, certifies that the following question of law, decisive of the correctness of its determination, has arisen, which in its opinion ought to be reviewed by the Court of Appeals:

> "Was the order of the Supreme Court, as affirmed by the this Court, properly made?"

This Court further certifies that its determination was made as a matter of law and not in the exercise of discretion. (See M-1692, decided simultaneously herewith.)

ENTER:

CLERK

Decision and Order of the Appellate Division, First Department, dated February 27, 2014, with Notice of Entry
[pp. vi - ix]

STATE OF NEW YORK – SUPREME COURT
COUNTY OF NEW YORK

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.

Index No. 103917/11

NOTICE OF ENTRY

PLEASE TAKE NOTICE that the attached Decision and Order is a true and correct copy of the Decision and Order entered in the Office of the Clerk of the Supreme Court, Appellate Division, First Department on the 27th day of February, 2014.

Dated: March 3, 2014
New York, NY

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
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By: _____
Brian A. Sutherland
Assistant Solicitor General

TO:

E. Leo Milonas
David G. Keyko
Pillsbury Winthrop Shaw Pittman LLP
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New York, New York 10036

Mazzarelli, J.P., Acosta, Renwick, Freedman, Manzanet-Daniels, JJ.

11848 The People of the State of New York, Eric T. Schneiderman, etc., et al., Plaintiffs-Respondents, Index 103917/11

-against-

Sprint Nextel Corp., et al., Defendants-Appellants.

- - - - -

Broadband Tax Institute and Council of State Taxation, Amici Curiae.

Williams & Connolly LLP, Washington, DC (Kannon K. Shanmugam of the bars of the State of Kansas and District of Columbia, admitted pro hac vice, of counsel), for appellants.

Eric T. Schneiderman, Attorney General, New York (Brian A. Sutherland of counsel), for respondents.

Morrison & Foerster LLP, New York (R. Gregory Roberts of counsel), for Broadband Tax Institute, amicus curiae.

McDermott will & Emery LLP, New York (Arthur R. Rosen of counsel), for Council of State Taxation, amicus curiae.

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered July 1, 2013, which denied defendants' motion to dismiss the complaint in its entirety, unanimously affirmed, without costs.

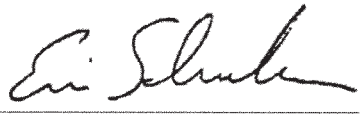
The court properly denied the motion to dismiss the complaint in its entirety. Plaintiffs' complaint adequately alleges that defendants violated New York's False Claims Act (State Finance Law

§ 189[1][g]), Executive Law § 63(12) and Article 28 of the Tax Law by knowingly making false statements material to an obligation to pay sales tax pursuant to Tax Law § 1105(b)(2). Contrary to defendants' interpretation, the Tax Law provision is not preempted by the Federal Mobile Telecommunications Sourcing Act (4 USC 116 *et seq.*).

The court also properly rejected defendants' argument that the New York False Claims Act with respect to statements made under the Tax Law should not be given its stated retroactive effect. Defendants fail 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 (US Const, art I, § 10).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 27, 2014



DEPUTY CLERK

Defendants' Pre-Argument Statement, dated July 23, 2013
[pp. 1 - 6]

FILED: NEW YORK COUNTY CLERK 07/23/2013 INDEX NO. 103917/2011
NYSCEF DOC. NO. 33 RECEIVED NYSCEF: 07/23/2013

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

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, v. SPRINT NEXTEL CORP., SPRINT SPECTRUM L.P., NEXTEL OF NEW YORK, INC., and NEXTEL PARTNERS OF UPSTATE NEW YORK, INC., Defendants-Appellants.	New York County Index No. 103917/2011E **PREARGUMENT STATEMENT**

Defendants-Appellants SPRINT NEXTEL CORP., SPRINT SPECTRUM L.P., NEXTEL OF NEW YORK, INC., and NEXTEL PARTNERS OF UPSTATE NEW YORK, INC., as and for their Preargument Statement pursuant to section 600.17 of the Rules of this Court, respectfully set forth the following:

1. Title of Action: The title of the action is set forth in the caption above, which also sets forth the index number.

2. Names of Parties: The full names of the original parties are set forth in the caption above. On or about July 10, 2013, in connection with a transaction involving SoftBank Corp., Sprint Nextel Corporation was renamed "Sprint Communications, Inc." and is now a wholly-owned subsidiary of Sprint Corporation. The names of the other three defendants remain unchanged.

3. Counsel for Defendants-Appellants: Sprint Nextel Corp. (now Sprint Communications, Inc.), Sprint Spectrum L.P., Nextel of New York, Inc., and Nextel Partners of Upstate New York, Inc. ("Defendants"):

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4. Counsel for Plaintiff-Respondent: 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"):

Randall M. Fox, Bureau Chief
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(212) 416-6012

5. Court and County from which appeal is taken: Supreme Court, New York County.

6. Nature and object of the action: This case arises out of a *qui tam* action initially commenced by Empire State Ventures, LLC pursuant to the New York False Claims Act, State Finance Law § 189, alleging that Defendants failed to collect or pay New York sales taxes on

receipts from the sale of certain wireless telephone services. On April 19, 2012, the Attorney General for the State of New York filed a superseding Complaint asserting four causes of action—the first cause of action purports to be for violation of the New York False Claims Act, State Finance Law § 189(1)(g), based on an allegation that Defendants knowingly made, used, or caused to be made or used, false records or statements material to an obligation to pay or transmit money or property to the state and local governments; the second cause of action purports to be for violation of § 189(1)(c) of the New York False Claims Act for allegedly conspiring to commit a violation of State Finance Law § 189(1)(g); the third cause of action purports to be for allegedly persistent fraudulent or illegal acts in violation of Executive Law § 63(12); and the fourth cause of action purports to be for violation of Article 28 of the Tax Law for allegedly failing to collect or pay New York sales taxes on receipts from the sale of certain wireless telephone services. The Attorney General for the State of New York seeks damages, penalties and injunctive relief, among other forms of relief.

7. Result reached in the court below: This appeal is being taken from an Order of the Supreme Court, New York County (Hon. O. Peter Sherwood, J.S.C.), filed on July 1, 2013 (the "Order"), (i) granting in part Defendants' motion to dismiss in that it dismissed the second cause of action in its entirety and dismissed as time-barred the third and fourth causes of action insofar as they purported to reach periods before March 31, 2008; (ii) otherwise denying the motion to dismiss; (iii) directing that the remainder of the action be severed and continued; and (iv) directing the Defendants to answer the Complaint within 20 days after service of the Order with notice of entry.

8. Grounds for appeal: Defendants appeal the Order of the Supreme Court, New York County, to the extent it denied Defendants' motion to dismiss in its entirety.

First, Defendants appeal the Order's failure to dismiss the third cause of action for violation of Executive Law § 63(12) and the fourth cause of action for violation of Article 28 of the Tax Law in their entirety. The third and fourth causes of action fail to plead a violation of New York law for three reasons: (i) section 1105(b) of New York Tax Law—the statute underlying these causes of action—excludes interstate mobile telecommunications services from taxation; (ii) section 1105(b) is at least ambiguous regarding the taxability of interstate mobile telecommunications services when sold together with taxable mobile telecommunications services for a fixed periodic charge and, therefore, must be construed against the State and in favor of Defendants and their New York customers; and (iii) if § 1105(b) were construed to require the taxation of interstate mobile telecommunications services sold for a fixed periodic charge but not separately stated, it would be preempted by the Mobile Telecommunications Sourcing Act ("MTSA"), 4 U.S.C. § 123(b).

Second, Defendants appeal the Order's failure to dismiss the first cause of action for violation of the New York False Claims Act ("FCA"), State Finance Law § 189(1)(g), in its entirety. That cause of action fails to plead a violation of the FCA for three reasons: (i) the allegedly false records and statements that underlie the FCA claim were not false for the same reasons that the third and fourth causes of action fail to plead a violation of New York law; (ii) even if the New York Attorney General's construction of § 1105(b) were correct, Defendants' interpretation of the relevant statute was not so objectively unreasonable as to give rise to liability under the FCA; and (iii) the Complaint fails to state a claim with particularity, as required by CPLR 3016(b).

Finally, Defendants appeal the Order's failure to bar treble damages asserted under the first cause of action for periods before the law was enacted in August 2010 as violative of the *Ex Post Facto* Clause of the United States Constitution.

9. Related Cases: *Louisiana Municipal Police Employees' Retirement System, Derivatively on Behalf of Itself, and All Others Similarly Situated v. Dan R. Hesse, et al.*, Civ. Action No. 1:12-cv-04017-ALC-JCF (S.D.N.Y.) (motion to dismiss pending); *In re: Sprint Nextel Derivative Litig.*, No. 2:12-cv-02242-JTM-KGG (D. Kan.) (shareholder derivative actions consolidated; case stayed); *Randolph v. Hesse et al.*, No. 12-cv-04447 (Dist. Ct. of Johnson County, Kan.) (complaint filed; case stayed).

Dated: July 23, 2013

PILLSBURY WINTHROP SHAW PITTMAN LLP

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Attorney for Plaintiffs

Defendants' Notice of Appeal, dated July 23, 2013
[pp. 7 - 8]

FILED: NEW YORK COUNTY CLERK 07/23/2013 INDEX NO. 103917/2011
NYSCEF DOC. NO. 32 RECEIVED NYSCEF: 07/23/2013

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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, v. SPRINT NEXTEL CORP., SPRINT SPECTRUM L.P., NEXTEL OF NEW YORK, INC., and NEXTEL PARTNERS OF UPSTATE NEW YORK, INC., Defendants.	Index No. 103917/2011E **NOTICE OF APPEAL**

PLEASE TAKE NOTICE that Defendants Sprint Nextel Corp., Sprint Spectrum L.P., Nextel of New York, Inc., and Nextel Partners of Upstate New York, Inc. ("Defendants"), pursuant to CPLR 5515, hereby appeal to the Appellate Division of the Supreme Court, First Department, from each and every part of an Order of the New York County Supreme Court (Hon. O. Peter Sherwood, J.S.C.) filed on July 1, 2013, Dkt. 29, attached hereto, to the extent that it denied Defendants' motion to dismiss the Complaint in its entirety.

Dated: July 23, 2013

PILLSBURY WINTHROP SHAW PITTMAN LLP

By: _____

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Attorney for Plaintiffs

Decision and Order Appealed From, dated June 27, 2013, with Notice of Entry
[pp. 9 - 24]

FILED: NEW YORK COUNTY CLERK 07/01/2013
INDEX NO. 103917/2011
NYSCEF DOC. NO. 29
RECEIVED NYSCEF: 07/03/2013

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: O. PETER SHERWOOD *Justice* **PART** 49

PEOPLE OF THE STATE OF NEW YORK, *et al.*,

Plaintiffs,

-against-

SPRINT NEXTEL CORP., *et al.*,

Defendants.

INDEX NO. 103917/2011
MOTION DATE Nov. 13, 2012
MOTION SEQ. NO. 006
MOTION CAL. NO. ____

The following papers, numbered 1 to ____ were read on this motion to dismiss action.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion to dismiss action is decided in accordance with the accompanying decision and order.

Dated: June 27, 2013

O. PETER SHERWOOD, J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION
Check if appropriate: ☐ DO NOT POST ☐ REFERENCE
☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49

----------X

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,

-against-

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

Defendants.

----------X

DECISION AND ORDER
Index No. 103917/2011

Mot. Seq. No.: 006

O. PETER SHERWOOD, J.:

Defendants Sprint Nextel Corp. and its wholly-owned subsidiaries, Sprint Spectrum L.P., Nextel of New York, Inc., and Nextel Partners of Upstate New York, Inc. (collectively, "Sprint"), move, pursuant to CPLR 3211(a)(5) and (7), to dismiss the Complaint in this tax enforcement action.

BACKGROUND

This case arises out of a *qui tam* action pursuant to the New York False Claims Act, State Finance Law §189. Empire State Ventures, LLC initially commenced the action, pursuant to State Finance Law §189, essentially alleging that Sprint, mobile telecommunications service providers, failed to collect or pay New York sales taxes on receipts from the sale of certain wireless telephone services. After an investigation, plaintiff, People of the State of New York, by Eric T. Schneiderman, Attorney General for the State of New York, intervened and filed a superceding Complaint, also alleging claims under the State Finance Law, as well as claims under the Tax Law and Executive Law. The Attorney General claims, in essence, that Sprint knowingly filed false tax returns and underpaid New York sales taxes on its mobile telecommunications offerings in order to gain an advantage over its competitors.

The superceding Complaint includes the following factual allegations, which, on this motion to dismiss, are accepted as true. From 2002 to the present, Sprint has sold wireless telephone calling plans to New York customers for a set number of minutes per month at fixed monthly recurring

access rates. Customers incur the fixed monthly recurring access charges regardless of whether they actually use all of the available minutes in a given month, or whether they make interstate or intrastate charges. Customers also incur overage charges, on a per-minute basis, for any minutes used in excess of the monthly allotment. Sprint issues monthly invoices, which do not distinguish between interstate and intrastate usage, but rather, include the fixed monthly recurring access charges, any overages charges, and charges for sales taxes.

Beginning in July 2005, Sprint implemented a nationwide program of unbundling its wireless offerings. As such, Sprint began treating part of its fixed monthly access charges for wireless voice services as if they were charges for interstate calls charged on a per-minute basis. The monthly invoices from defendants continued to identify the charges as fixed monthly recurring access charges. However, Sprint did not collect or pay New York sales taxes on the interstate calls. Sprint also submitted monthly and quarterly State sales tax filings reflecting only the amount of sales taxes it collected for intrastate calls. The submissions offer very little insight into the standards Sprint used to identify each component of the unbundled charges.

The superceding Complaint alleges that Sprint intentionally avoided more than $100 million in New York sales tax obligations by arbitrarily unbundling its wireless offerings. The Complaint also alleges that for the years at issue, the percentage of fixed-rate wireless calling plans on which Sprint did not collect sales taxes ranged from 13.7% to 28.5% of the overall fixed rate. Plaintiff maintains that the allocation between taxable and non-taxable categories not only ignored the applicable sections of the Tax Law, but also was arbitrary because it was not related to any customer's actual usage.

The first cause of action alleges that Sprint violated State Finance Law §189(1)(g) by knowingly making or using false records or statements material to an obligation to pay or transmit money or property to the state and local governments. The second cause of action alleges that Sprint violated State Finance Law §189(1)(c) by conspiring to violate State Finance Law §189(1)(g). The third cause of action alleges that Sprint violated Executive Law §63(12) by repeatedly engaging in fraudulent or illegal activity, including failing to collect and pay sales taxes and submitting false sales taxes filings in violation of New York State Tax Law §1105. The fourth cause of action alleges

that Sprint violated article 28 of the New York State Tax Law, specifically Tax Law §1105(b)(2), by failing to collect or pay New York sales taxes.

Sprint now seeks to dismiss the Complaint for failure to state a cause of action. Sprint also seeks to dismiss as time-barred so much of the third and fourth causes of action as assert claims concerning statements made prior to March 31, 2008.

DISCUSSION

On a motion to dismiss, pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (*see* CPLR 3026; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). The court must accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every favorable inference, and determine whether the facts as alleged fit within any legally cognizable legal theory (*Leon v Martinez, supra*). The court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint, and "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*id.*, quoting *Guggenheimer v Ginsburg*, 43 NY2d 268 [1977]).

The New York False Claims Act, State Finance Law §189(1)(g), prohibits any person from knowingly making or using a false record or statement to avoid an obligation to pay or transmit money or property to the state or a local government. Effective August 10, 2010, the False Claims Act was amended to expressly apply to knowing violations of the New York Tax Law (2010 McKinney's Session Laws of NY, ch 379, at A 11568).

New York's Tax Law §1105(b)(2) imposes a four percent tax on:

> "[t]he 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."

Here, the superceding Complaint alleges in great detail how Sprint implemented a nationwide program of unbundling its mobile telecommunications offerings, treating part of its fixed monthly access charges for wireless voice services as if they were charges for interstate calls charged on a per-minute basis, failing to collect or pay New York sales taxes on the interstate calls, and submitting

monthly tax statements only for the taxes collected for intrastate calls. Construed in the light most favorable to plaintiff, the first cause of action sufficiently alleges that Sprint violated State Finance Law §189(1)(g), by knowingly making or using a false record or statement material to avoid an obligation to pay New York sales taxes required under Tax Law §1105(b)(2), so as to survive a motion to dismiss.

However, Sprint disagrees that the factual allegations in the superceding Complaint adequately state a valid claim for relief under State Finance Law §189(1)(g). Instead, Sprint contends that its tax collection decisions are justified based on a reasonable interpretation of the various statutes.

Sprint asserts that the plain language of the Tax Law permits it to exclude from sales taxes the portion of its fixed monthly recurring access charges that is attributable to interstate voice services, even when said services are bundled with intrastate services. Sprint maintains that Tax Law §1105(b) must be construed in its entirety, including subdivisions (1), (2), and (3), and that when so construed, the plain language of §1105(b) excludes interstate voice services from New York sales taxes. Thus, Sprint asserts that the superceding Complaint does not sufficiently allege that it knowingly submitted false statements in order to avoid an obligation to pay state taxes on the sale of mobile telecommunication services. Sprint also argues that in any event, its interpretation of the Tax Law is reasonable and, thus, not punishable.

To be sure, a "statute or legislative act is to be construed as a whole, and all parts of an act are to be read and construed together to determine the legislative intent" (McKinney's Cons Laws of NY, Book 1, Statutes, §97). However, where, as here, the language of a tax statute is unambiguous, the statute should be construed so as to give effect to the plain meaning of the words used (*New York State Assn. of Counties v Axelrod*, 213 AD2d 18, 24 [3d Dept 1995]). Statutory construction rendering language superfluous is to be avoided (*Branford House v Michetti*, 81 NY2d 681, 688 [1993]).

Here, the statutory construction urged by Sprint is inconsistent with the plain language used. Tax Law §1105(b)(1) imposes a four percent tax on:

> "The receipts from every sale, other than sales for resale, of the following: ...

> (B) telephony and telegraphy and telephone and telegraph service of whatever nature except interstate and international telephony and telegraphy and telephone and telegraph service and except any telecommunications service the receipts from the sale of which are subject to tax under paragraph two of this subdivision ... ."

Thus, §1105(b)(1) expressly excludes receipts from telecommunications service that are taxable under §1105(b)(2).

Section 1105(b)(2) imposes the four percent tax on receipts from every sale of mobile telecommunications services, other than sales for resales, that are voice services sold for a fixed periodic charge. The superceding Complaint specifically seeks to redress Sprint's alleged tax avoidance for mobile telecommunications services sold for a fixed periodic charge. Thus, §1105(b)(2) must be applied to address plaintiff's claims.

Section §1105(b)(3) states that "[t]he tax imposed pursuant to this subdivision is imposed on receipts from charges for intrastate mobile telecommunications service of whatever nature in any state if the mobile telecommunications customer's place of primary use is in this state." Thus, §1105(b)(3) taxes receipts from intrastate mobile telecommunications charges incurred by New York customers while they are in any state. A review of the superceding Complaint reveals no factual allegations that require the application of §1105(b)(3).

Simply stated, nothing in the plain language of Tax Law §§1105(b)(1) or (b)(3) addresses plaintiff's allegations that Sprint knowingly avoided New York sales taxes on the sale of mobile telecommunications services for a fixed monthly recurring access charge.

Furthermore, Tax Law §1111(l) states, in part:

> "(1) Receipts from the sale of mobile telecommunications service provided by a home service provider shall include 'charges for mobile telecommunications services.' Such term shall mean any charge by a home service provider to its mobile telecommunications customer for
> (A) commercial mobile radio service ... and (B) any service and property provided therewith.
>
> (2) With respect to services or property described in subparagraph (B) of paragraph one of this subdivision, internet access service, any mobile telecommunications service which the mobile

> telecommunications customer originates in a foreign country to the extent included in the fixed periodic charge, any interstate or international telephony or telegraphy or telephone or telegraph service of whatever nature which is not a voice service, and any property or service which is not telephony or telegraphy or telephone or telegraph service of whatever nature, a home service provider shall collect and pay over tax, and a mobile telecommunications customer shall pay such tax, on receipts from any charge that is aggregated with and not separately stated from other charges for mobile telecommuni-cations service. Provided, however, if such home service provider uses an objective, reasonable and verifiable standard for identifying each of the components of the charge for mobile telecommunications service, then such home service provider may separately account for and quantify the amount of each such component charge. If a home service provider chooses to so separately account for and quantify and separately sells any such property or service, then the charge for such property or service shall be based upon the price for such property or service as separately sold."

Thus, Tax Law §1111(l) expressly requires mobile telecommunications providers to collect and pay state sales taxes on mobile telecommunications services included in a fixed periodic charge, unless the provider uses an objective, reasonable and verifiable standard for identifying each of the components of the charge, in which case, the provider may separately account for and quantify the amount of each such component charge.

Sprint attempts to avoid the mandate in §1111(1) by arguing that §1111(1) is inconsistent with, and thus preempted by, the Federal Mobile Telecommunications Sourcing Act (4 USC 123[b]) (the "MTSA"). The MTSA states, in part:

> "If a taxing jurisdiction does not otherwise subject charges for mobile telecommunications services to taxation and if these charges are aggregated with and not separately stated from charges that are subject to taxation, then the charges for nontaxable mobile telecommunications services may be subject to taxation unless the home service provider can reasonably identify charges not subject to such tax, charge, or fee from its books and records that are kept in the regular course of business"

(4 USC 123[b]).

Federal law preempts state law (1) where Congress has expressly preempted State Law, (2) where Congress has legislated so comprehensively that Federal Law occupies an entire field of regulation and leaves no room for State Law, or (3) where Federal Law conflicts with State Law (*see Pacific Capital Bank, N.A. v Connecticut*, 542 F3d 341, 351 [2d Cir 2008]). Conflict preemption occurs when compliance with both Federal and State Law is impossible, or when the State Law stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress in enacting the Federal Law (*id.*).

There is no apparent conflict between the MTSA and Tax Law §1111(l). The MTSA expressly authorizes taxing jurisdictions that do not otherwise subject aggregated mobile telecommunications services to taxation, to tax said services, unless the provider can reasonably identify the charges not subject to such tax. As discussed, however, New York's Tax Law already imposes a four percent tax on aggregated mobile telecommunications services (*see* Tax Law §1105[b][2], *supra*). Furthermore, Tax Law §1111(1) requires providers to collect and pay taxes on receipts from the sale of mobile telecommunications services that are aggregated with and not separately stated from other charges, unless the provider uses an objective, reasonable, and verifiable standard for identifying each of the components of the charges. Nothing in the plain language of the above Tax Law provisions presents any obstacle to the accomplishment and execution of Congress' full purpose and objectives in enacting the MTSA to address jurisdictions that, unlike New York, do not subject aggregated mobile telecommunications charges to taxation.

Moreover, contrary to defendants' assertion, the superceding Complaint satisfactorily alleges that Sprint knowingly submitted false monthly tax statements. The False Claims Act defines the term "knowingly" to mean that "a person, with respect to information: (i) has actual knowledge of the information; (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" (State Finance Law §188[3]). The superceding Complaint specifically alleges at length that Sprint realized that their approach to unbundling was aggressive and risky, and that their decision to unbundle was motivated by a desire to gain a competitive advantage over other wireless carriers.

The assertion that Sprint's interpretation of the Tax Law is nevertheless reasonable and, thus, not punishable is also insufficient to warrant dismissal. The criterion on a motion to dismiss is

whether the proponent of the pleading has a cause of action (*see Wiener v Lazard Freres & Co.*, 241 AD2d 114, 120 [1st Dept 1988]).

Sprint also argues that claims for statements made before August 2010, when the New York False Claims Act was amended to expressly apply to knowing violations of the New York Tax Law, violate the *Ex Post Facto* Clause of the Unites States Constitution (US Const art I, §9, cl 3). The *Ex Post Facto* Clause prohibits Congress and the States from enacting any law that (1) retroactively imposes a punishment for an act that was not punishable when it was committed; (2) retroactively increases the punishment for a crime after its commission; or (3) deprives one charged with a crime of a defense that was available at the time the crime was committed (*United States v Coleman*, 675 F3d 615, 619 [6th Cir 2012]). The *Ex Post Facto* clause is only implicated by criminal statutes or acts intended to punish (*see Cutshall v Sundquist*, 193 F3d 466, 477 [6th Cir 1999]).

In order to determine whether a law constitutes retroactive punishment forbidden by the *Ex Post Facto* Clause, the Court must ascertain whether the Legislature meant for the statute to establish civil proceedings (*Smith v Doe*, 538 US 84, 92 [2003]). If the intention of the Legislature was to impose punishments, that ends the inquiry (*id.*). If, however, the Court determines that the intent was to enact a civil and non-punitive regulatory scheme, the Court must further examine whether the statutory scheme is so punitive, either in purpose or effect, as to negate the State's intention to deem it civil (*see Hudson v United States*, 522 US 93, 100 [1997]). In making the latter determination, the Court should consider whether the sanction (1) involves an affirmative disability or restraint; (2) has historically been regarded as a punishment; (3) comes into play only on a finding of scienter; (4) promotes the traditional aims of punishment-retribution and deterrence; (5) applies to behavior that is already a crime; (6) may rationally be connected to an alternative purpose; or (7) appears excessive in relation to the alternative purpose assigned (*Kennedy v Mendoza-Martinez*, 372 US 144, 168-169 [1963]). While these factors are not exhaustive or dispositive, they provide a framework for the analysis (*Smith,* 538 US at 97). The factors must be considered in relation to the statute on its face (*Kennedy* , 372 US at 169). Only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty (*United States v Ward*, 448 US 242, 249 [1980]).

State Finance Law §189(1)(g) provides, in part, that a finding of liability under the statute may result in a "civil penalty of not less than six thousand dollars and not more than twelve thousand dollars, plus three times the amount of all damages, including consequential damages." The Legislature expressed the objective of the law in the statutory text itself. The express language used indicates the Legislature's preference for a civil label. Thus, the Court must now analyze the statutory scheme using the factors set forth in *Kennedy, supra,* to determine whether it is so punitive in purpose or effect as to transform what was intended as a civil remedy into a criminal penalty.

As to the first factor, State Finance Law §189(1)(g) imposes no physical restraint, and so does not resemble the punishment of imprisonment, which is the paradigmatic affirmative disability or restraint (*Smith*, 538 US at 100). Therefore, this factor weighs in favor of finding a civil purpose.

In addressing the second factor, whether the sanction has historically been regarded as punishment, plaintiff relies on another qui tam action, *State of New York ex rel. Grupp v DHL Express (USA), Inc.* (19 NY3d 278 [2012]). In that case, the Court of Appeals stated that the imposition fo civil penalties and treble damages in §189(1)(g):

> "[E]vinces a broader punitive goal of deterring fraudulent conduct against the State. That is, instead of compensating the State for damages caused by [the defendant's] purported scheme and addressing its narrow proprietary interests, the [False Claims Act] would punish and consequently deter such future conduct, thereby promoting a general policy"

(*id.* at 286-287). However, *State of New York ex rel. Grupp v DHL Express (USA), Inc.* is unavailing as the inquiry therein was whether the plaintiff's claims pursuant to the New York False Claims Act were federally preempted by the Airline Deregulation Act of 1978 ("ADA")(49 USC §41713[b][1]) and the Federal Aviation Administration Authorization Act ("FAAAA")(49 USC §14501[c][1]). The Court in did not consider whether the New York False Claims Act constitutes retroactive punishment forbidden by the *Ex Post Facto* Clause. Furthermore, research reveals no case law on that issue.

Historically, courts examining the federal False Claims Act ("FCA")(31 USC §3729 *et seq.*), which mirrors the New York False Claims Act, have determined that it is "civil in nature, and that it does not rise to the level of 'punishment' merely because Congress provided for civil recovery in

excess of the Government's actual damages" (*United States v Halper*, 490 US 435, 442 [1989]). Furthermore, while the Supreme Court has recognized the imposition of treble damages under the FCA is "essentially punitive in nature" (*Vermont Agency of Natural Resources v United States ex rel. Stevens*, 529 US 765, 780 [2000]), the Court has also stated:

> "[I]t is important to realize that treble damages have a compensatory side, serving remedial purposes in addition to punitive objectives. While the tipping point between pay-back and punishment defies general formulation, being dependant on the workings of a particular statute and the course of particular litigation, the facts about the FCA show that the damages multiplier has compensatory traits along with the punitive"

(*Cook County v United States ex rel. Chandler*, 538 US 119, 130 [2003]).

At first glance, an analysis of the third favor, whether the statute comes into play only on a finding of scienter, may indicate a criminal effect of the New York False Claims Act. Specifically, the prohibition in §189(1)(g) against any person knowingly making or using a false record or statement to avoid an obligation to pay or transmit money or property to the state or a local government comes into play only on a finding of scienter. "'Scienter' has been defined as '[a] degree of knowledge that makes a person legally responsible for the consequences of his or her act or omission' and a synonym for '*mens rea*'" (*State v Nelson*, 30 Misc 3d 715, 726 [Sup Ct, NY County 2010] [quoting Black's Law Dictionary, Eighth Edition, Thomson West Publishing, 2004]). "*Mens rea* has been defined as '[t]he state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime'" (*id.*). The statutory ban is consistent with the kinds of findings the Court in *Kennedy* (*supra*) had in mind when it determined that a scienter requirement is an important indicia of the statute's punitive purpose.

However, §189(1)(g) states that a finding of liability thereunder may result in a "civil penalty" of treble and other monetary damages. The payment of fixed or variable sums of money is a sanction that has long been recognized as civil (*see Helvering v Mitchell*, 303 US 391, 401 [1938]). Sanctions imposing additions to a tax "are provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation

and the loss resulting from the taxpayer's fraud" (*id.*). Thus, the third factor, too, weighs in favor of finding that the New York False Claims Act has a civil purpose.

Turning to the next factor, whether the statute promotes the traditional aims of punishment-retribution and deterrence, the Supreme Court has stated that damages under the similar federal FCA are calculated to provide the government with complete indemnity for the injuries done to it (*see United States ex rel. Marcus v Hess*, 317 US 537, 549 [1943]). The Court also stated that although the FCA requires a wrongdoer to make payments acts as a deterrent, which is a punishment mechanism and, thus, a criminal attribute, neither disgorgement nor money penalties have historically been viewed as punishment (*see Hudson, supra*). Rather, the payment of fixed or variable sums of money is a sanction that has long been recognized as civil (*id.*). Thus, the fourth factor also weighs in favor of finding that the New York False Claims Act has a civil purpose.

As to the fifth factor, the New York Tax Law contains provisions prohibiting criminal tax fraud, and detailing actions similar to that proscribed by §189(1)(g) of the State Finance Law (*see e.g.*, Tax Law §1804). The existence of both a civil state and a criminal statute weighs in favor of finding a civil purpose for §189(1)(g).

An analysis of the sixth factor, whether §189(1)(g) may rationally be connected to an alternative purpose, also weighs in favor of finding a civil purpose for the statute. As stated, in analyzing the federal counterpart, courts have noted that the damages multiplier of the FCA serves both compensatory and punitive purposes (*see Cook County, supra*). Treble damages have a compensatory side, serving remedial purposes in addition to punitive objectives (*see United States ex rel. Marcus*, 317 US at 550). The dual purposes weigh in favor of finding a civil purpose for the law.

The seventh factor, whether §189(1)(g) appears excessive in relation to the alternative purpose assigned, seems to weigh in favor of finding a punitive aspect of the statute. The imposition of treble damages would certainly do more than merely compensate the government for its losses. The disproportionality between the potential liability of the defendant and the actual harm to the government reveals an intent to punish past, and to deter future misconduct, not to ameliorate the liability of wrongdoers (*see Texas Indus. Inc. v Radcliff Materials, Inc.*, 451 US 630, 639 [1981]).

However, consideration of all of the *Kennedy v Mendoza-Martinez* factors warrants a finding that State Finance Law §189(1)(g), like its federal counterpart, is not sufficiently punitive in nature and effect as to warrant preclusive application of the *Ex Post Facto* Clause to Sprint's alleged conduct prior to August 10, 2010, when the Act was amended to expressly apply to knowing violations of the State's Tax Law. Thus, the branch of the motion that seeks to dismiss the first cause of action is denied.

The second cause of action, which alleges that Sprint violated State Finance Law §189(1)(c) by conspiring to violate State Finance Law §189(1)(g), must be dismissed. Sprint cannot conspire with its own subsidiaries to violate the False Claims Act (*see Barnem Circular Distribs., Inc. v Distribution Sys. of Am., Inc.*, 281 AD2d 576, 577 [2d Dept 2001]).

The third cause of action adequately alleges that defendants violated Executive Law §63(12), which provides a party with a right of action to enjoin another from engaging in "repeated fraudulent and illegal acts or otherwise demonstrat[ing] persistent fraud or illegality in the carrying on, conducting or transact[ing] of business" (*see also, Matter of State of New York v Ford Motor Co.*, 136 AD2d 154, 156 [3d Dept 1988]). Construed in the light most favorable to plaintiff, the superceding Complaint satisfactory alleges that defendants repeatedly engaged in fraudulent and illegal acts by failing to collect and pay sales taxes due and owing, and submitting false sales tax filings to the New York Department of Taxation & Finance in violation of New York State Tax Law §1105.

Similarly, as discussed, the fourth cause of action sufficiently alleges that Sprint violated Tax Law §1105(b)(2) by failing to collect and pay required New York sales taxes.

Sprint assert that the third and fourth causes of action are time-barred to the extent that they apply to periods before March 31, 2008. CPLR 214(2) imposes a three-year Statute of Limitations on any "action to recover upon a liability, penalty or forfeiture created or imposed by statute." New York's Tax Law §1147 also imposes a three-year limitations period on tax enforcement actions, "except in the case of a willfully false or fraudulent return with intent to evade the tax." The statute begins to run when the tax filing is submitted (*see Roebling Liquors Inc. v Commissioner of Taxation & Fin.*, 284 AD2d 669, 672 [3d Dept 2001]).

Defendants acknowledge that the State Department of Taxation and Finance is currently auditing several defendants' payment of sales taxes during some of the years at issue, and that as part of the process, some of the defendants signed tolling agreements extending the time for the Department to make a final determination of any sales taxes owed. However, defendants argue that the tolling agreements do not apply to this case since this litigation is not part of the audit process.

On the other hand, plaintiff maintains that the tolling agreements do not limit their application to the audit process and, in fact, gives the Attorney General a referral, pursuant to Tax Law §1141(a), to commence an action to collect back taxes and penalties owed for defendants' sales tax violations.

The submissions do not include the tolling agreements. Nor do the pleadings contain any factual allegations to sustain the timeliness of any of the transactions completed more than three years prior to the commencement of this action (*see Zaref v Berk & Michaels, P.C.*, 192 AD2d 346, 348 [1st Dept 1993]). Thus, the third and fourth causes of action must be dismissed as time-barred to the extent that they apply to periods before March 31, 2008.

Accordingly it is

ORDERED that the motion to dismiss is granted to the extent that (1) the second cause of action is dismissed in its entirety; and (2) the claims in the third and fourth causes of action that apply to periods before March 31, 2008 are dismissed as time-barred, and the motion is otherwise denied; and it is further

ORDERED that the remainder of the action is severed and continued; and it is further

ORDERED that defendants are directed to serve an answer to the superceding complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 252, 60 Centre Street, New York, New York, on Wednesday, July 24, 2013, at 9:30 AM.

This constitutes the decision and order of the court.

DATED: June 27, 2013

ENTER,

O. PETER SHERWOOD
J.S.C.

FILED: NEW YORK COUNTY CLERK 07/03/2013 INDEX NO. 103917/2011
NYSCEF DOC. NO. 31 RECEIVED NYSCEF: 07/03/2013

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

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,

Plaintiff,

v.

INDEX NO. 103917-2011
(Sherwood, J.)

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

NOTICE OF ENTRY

Defendants.

----------X

PLEASE TAKE NOTICE that the attached is a true copy of a decision and order in this matter that was entered in the office of the Clerk of the Supreme Court, County, on the 1st day of July, 2013.

Dated: New York, New York
July 3, 2013

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Attorney General of the State of New York

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Defendants' Notice of Motion to Dismiss Plaintiff's Complaint, dated June 14, 2012
[pp. 25 - 26]

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NYSCEF DOC. NO. 8 RECEIVED NYSCEF: 06/14/2012

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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, v. SPRINT NEXTEL CORP., SPRINT SPECTRUM L.P., NEXTEL OF NEW YORK, INC., and NEXTEL PARTNERS OF UPSTATE NEW YORK, INC., Defendants.	Index No. 103917/2011E **NOTICE OF DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT**

PLEASE TAKE NOTICE that upon the annexed affirmation of E. Leo Milonas dated June 12, 2012, the exhibit annexed thereto, and defendants' Memorandum of Law dated June 14, 2012, defendants Sprint Nextel Corp., Sprint Spectrum L.P., Nextel of New York, Inc., and Nextel Partners of Upstate New York, Inc. will move this Court, at the Commercial Division Support Office, Room 130, 60 Centre St., New York, New York, on the 8th day of August, 2012, for an Order: (a) dismissing the Plaintiff's Complaint in its entirety pursuant to CPLR 3211(a)(7) for failure to state a cause of action; (b) dismissing the Third and Fourth Causes of Action pursuant to CPLR 3211(a)(5) to the extent that they purport to assert causes of action concerning statements made prior to March 31, 2008; and (c) awarding such other and further relief as is just and proper.

PLEASE TAKE FURTHER NOTICE that pursuant to agreement of the parties answering papers, if any, are to be served upon the undersigned on or before the July 19, 2012.

Dated: New York, New York
June 14, 2012

PILLSBURY WINTHROP SHAW PITTMAN LLP

/s/ E. Leo Milonas

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Memorandum of Law in Support of Defendants' Motion to Dismiss, dated June 14, 2012
[pp. 27 - 57]

FILED: NEW YORK COUNTY CLERK 06/14/2012 INDEX NO. 103917/2011
NYSCEF DOC. NO. 8-3 RECEIVED NYSCEF: 06/14/2012

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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, v. SPRINT NEXTEL CORP., SPRINT SPECTRUM L.P., NEXTEL OF NEW YORK, INC., and NEXTEL PARTNERS OF UPSTATE NEW YORK, INC., Defendants.	Index No. 103917/2011E

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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Dated: June 14, 2012

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OTHER AUTHORITIES

The New York Attorney General's complaint ("Complaint") seeks to impose liability for practices that do not violate New York law. Citing out-of-context one provision of the New York Tax Law—and disregarding every other relevant provision of state and federal law—the Complaint accuses Sprint Nextel Corporation ("Sprint") of failing to collect a pass-through sales tax from New York customers on the "***inter***state" portion of Sprint's flat-rate monthly wireless plans. In particular, Sprint "unbundled" its flat-rate monthly plans so its customers paid sales tax on "***intra***state," but not "***inter***state," voice services. That is proper under both New York and federal law. New York explicitly excludes "interstate" telephony from sales tax, and the Mobile Telecommunications Sourcing Act ("MTSA"), 4 U.S.C. § 123(b), allows telecommunications providers to unbundle non-taxable from taxable services and to collect tax only on the latter.

The Complaint deals with these statutory impediments by ignoring them. It relies exclusively on a single subsection of the New York Tax Law, omitting any discussion of the statutory provisions immediately before and after the cited language, which expressly disprove its flawed reading. It also ignores the MTSA, which would preempt that reading if it were correct. The Complaint then compounds these shortcomings by adding two causes of action under the False Claims Act ("FCA"), which merely amplify the errors in the tax argument. For these reasons and others set forth below, the Complaint should be dismissed.

BACKGROUND FACTS[1]

A. The Parties

Sprint and its subsidiaries Sprint Spectrum L.P., Nextel of New York, Inc., and Nextel Partners of Upstate New York, Inc. are wireless telecommunications service providers that do

[1] For this Motion, Sprint assumes all well-pleaded, non-conclusory allegations to be true. *See Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 178, 183 (2011) (on motion to dismiss court "accept[s] the facts as alleged in the complaint as true," but does not credit "conclusory allegations" "[w]ithout sufficient facts").

business in New York. Complaint ("Compl.") ¶¶ 15-18. According to the Complaint, Sprint sells wireless calling plans, including "flat-rate" plans that provide a certain number of minutes of talk time for a fixed fee, such as 450 minutes of talk time for $39.99 per month. *Id.* ¶¶ 4, 19.

B. Sprint's Tax Treatment of Flat-Rate Plans

The Complaint alleges that, beginning in July 2005, Sprint began disaggregating, or "unbundling," its flat-rate and bundled wireless service plans for sales tax purposes. *Id.* ¶ 44. It claims that Sprint disaggregated the portion of its plans that was attributable to "intrastate" voice calls (calls "made to people or phones within the same state") from the portion attributable to "interstate" calls (calls made to "people or phones in other states"). *Id.* ¶¶ 21, 44. The Complaint asserts that Sprint improperly did not collect sales tax on the portion of the flat-rate charge for interstate calls, and instead collected tax on only the intrastate amount. *Id.* ¶ 44. For the years at issue, the percentage of Sprint's fixed-rate wireless calling plans on which Sprint did not collect sales tax allegedly ranged from 13.7% to 28.5% of the overall fixed rate. *Id.* ¶¶ 74, 81.

The Complaint claims that Sprint's decision to unbundle its wireless plans for tax purposes "was driven by its desire to gain an advantage over its competitors by reducing the amount of sales taxes it collected from its customers and, thereby, appearing to be a low-cost carrier." *Id.* ¶ 47. But in the next breath it flatly contradicts that allegation, acknowledging that Sprint did not "communicat[e] with customers about the fact that [it] was unbundling and that the unbundling would affect taxes for some customers," and did "not educate[] [its] customers about how [it was] de-bundling transactions for their tax relief." *Id.* ¶¶ 108-09.

C. The New York Tax Law

The Complaint does not allege that New York imposes a sales tax on interstate telephone service. That is for good reason; the Tax Law expressly excludes "interstate" voice services from sales tax. N.Y. Tax Law § 1105(b)(1)(B). Undeterred, the Complaint asserts that, since

August 2002, New York has "required the payment of sales taxes on the ***full amount*** of fixed monthly charges for wireless services sold to customers in New York." Compl. ¶ 30 (emphasis in original). In other words, the Complaint takes the position that if a provider bundles non-taxable services (like "interstate" telephony) with taxable services (like "intrastate" telephony), then the consumer must pay taxes on the "entire amount." *Id.* ¶¶ 4, 40. The terms "full amount" and "entire amount," on which the Complaint places such weight, however, are nowhere found in any pertinent provision of the Tax Law.

Instead, the Complaint relies on subsection (2) of section 1105(b), ignoring subsections (1) and (3). Subsection (2), however, cannot be understood without reading the entire section. Section 1105(b) provides in full:

> [T]here is hereby imposed and there shall be paid a tax of four percent upon: . . . .
>
> (1) The receipts from every sale, other than sales for resale, of the following:
>
> > (A) gas, electricity, refrigeration and steam, and gas, electric, refrigeration and steam service of whatever nature;
> >
> > (B) telephony and telegraphy and telephone and telegraph service of whatever nature ***except interstate and international telephony*** and telegraphy and telephone and telegraph service and except any telecommunications service the receipts from the sale of which are subject to tax under paragraph two of this subdivision;
> >
> > (C) a telephone answering service; and
> >
> > (D) a prepaid telephone calling service.
>
> (2) 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.
>
> (3) ***The tax imposed pursuant to this subdivision is imposed on receipts from charges for intrastate mobile telecommunications service*** of whatever nature in any state if the mobile telecommunications customer's place of primary use is in this state.

N.Y. Tax Law § 1105(b).[2] Sections 1105(b)(1) and (b)(3) are conspicuously absent from the Complaint, despite the rule in New York, as elsewhere, that a statute "is to be construed as a whole, and all parts of an act are to be read and construed together to determine the legislative intent." McKinney's Cons. Laws of N.Y., Book 1, Statutes § 97; *see also* Section I.A.1, below.

The Complaint further alleges that the "unbundling" provisions in section 1111(*l*) of the Tax Law—which recognize that a provider may disaggregate components of a flat-fee service—permit a provider "to treat separately for sales tax purposes certain components of a bundled charge for mobile telecommunications services, so long as the charges are ***not*** for voice services, and so long as [the] service provider uses an 'objective, reasonable and verifiable standard for identifying each of the components' of a bundled charge." Compl. ¶ 42 (quoting N.Y. Tax Law § 1111(*l*)(2)) (emphasis in original). Here again, however, the Complaint is more notable for what it omits than what it contains. If the Complaint's reading of New York law (including section 1111(*l*)) were correct, it would be preempted by the MTSA, which expressly allows providers to unbundle flat-rate wireless service and collect state sales tax only on those portions that are taxable under state law. 4 U.S.C. § 123(b) ("If a taxing jurisdiction does not otherwise subject charges for mobile telecommunications services to taxation and if these charges are aggregated with and not separately stated from charges that are subject to taxation, then the charges for nontaxable mobile telecommunications services may be subject to taxation ***unless the home service provider can reasonably identify charges not subject to such tax, charge, or fee from its books and records***. . . .").[3] The MTSA likewise goes unmentioned in the Complaint.

[2] All emphases are added except as otherwise specified.

[3] The Complaint does not allege that Sprint failed to "reasonably identify" charges for non-taxed service from its books and records under the MTSA.

D. Sprint's Allegedly False Statements

The NYAG attempts to penalize Sprint for its reading of New York Tax Law by adding two claims under New York's False Claims Act ("FCA"), State Finance Law § 189. The Complaint asserts that, by not collecting tax from its customers on "interstate" telecommunications, "Sprint has submitted to the New York Tax Department each month tax forms . . . that ha[ve] been false in that not one states the accurate amount of sales taxes due." Compl. ¶¶ 96-97. It conclusorily alleges that Sprint submitted these tax forms knowing they were false based on its awareness of New York statutes and the Tax Department's interpretation of those statutes. *Id.* ¶¶ 85-94. But the Complaint offers no well-pleaded allegation that Sprint believed it was acting contrary to the New York Tax Law by not collecting sales tax on the portion of its flat-rate plans attributable to "interstate" voice service.

E. Procedural History

On March 31, 2011, Empire State Ventures, LLC filed a *qui tam* action against Sprint under the New York FCA. *Id.* ¶ 10. On April 19, 2012, the NYAG filed a superseding Complaint asserting four causes of action—one for violations of New York Tax Law (the Fourth Cause of Action), as well as three additional causes of action based on the same facts for alleged violations of the FCA (the First and Second Causes of Action) and Executive Law § 63(12) (the Third Cause of Action).

ARGUMENT

I. THE FOURTH CAUSE OF ACTION FAILS TO PLEAD A VIOLATION OF NEW YORK TAX LAW.

The Complaint's core allegation is that Sprint failed to collect sales tax on the portion of its monthly fixed-rate wireless calling plans attributable to "interstate" voice service. But, as explained below, the plain language of the Tax Law excludes such service from sales tax. This

conclusion is further confirmed by the law's structure and history. Finally, even if this interpretation of the Tax Law were correct (it is not), it would be preempted by the MTSA.

A. New York Law Does Not Tax "Interstate" Voice Services, Including When Bundled with Other Services.

1. The Rules of Statutory Construction.

This is a tax case, and "[w]hen the particular statute is one which levies a tax, it is well established that ***it must be narrowly construed and that any doubts concerning its scope and application are to be resolved in favor of the taxpayer***." *Debevoise & Plimpton v. N.Y. State Dep't of Taxation & Fin.*, 80 N.Y.2d 657, 661 (1993).[4]

The other basic rules governing statutory construction also are well known. "When presented with a question of statutory interpretation, [the] primary consideration 'is to ascertain and give effect to the intention of the Legislature.'" *DaimlerChrysler Corp. v. Spitzer*, 7 N.Y.3d 653, 660 (2006) (quoting *Riley v. Cnty. of Broome*, 95 N.Y.2d 455, 463 (2000)). "The statutory text is the clearest indicator of legislative intent and courts should construe unambiguous language to give effect to its plain meaning." *Id.* A "statute or legislative act is to be construed as a whole, and all parts of an act are to be read and construed together to determine the legislative intent." McKinney's Cons. Laws of N.Y., Book 1, Statutes § 97. "A construction rendering statutory language superfluous is to be avoided." *Branford House v. Michetti*, 81 N.Y.2d 681, 688 (1993). In addition, "[w]hen different terms are used in various parts of a

[4] *See also Manhattan Cable TV Servs. v. Freyberg*, 49 N.Y.2d 868, 869 (1980) ("[A]ny ambiguity in the statute [is] to be construed most strongly in favor of the taxpayer and against the government."); *Am. Locker Co. v. City of N.Y.*, 308 N.Y. 264, 269 (1955) ("In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government, and in favor of the citizen."); *RCN N.Y. Commc'ns, LLC v. Tax Comm'n of City of N.Y.*, 943 N.Y.S.2d 480, 480 (1st Dep't 2012) (to the same effect); *Expedia, Inc. v. City of N.Y. Dep't of Fin.*, 89 A.D.3d 640, 641 (1st Dep't 2011) (same).

statute or rule, it is reasonable to assume that a distinction between them is intended." *Albano v. Kirby*, 36 N.Y.2d 526, 530 (1975); *Flores v. Lower E. Side Serv. Ctr., Inc.*, 4 N.Y.3d 363, 369 (2005) (statutory provision did not have a particular limitation because "it [was] evident that the Legislature kn[ew] how to impose such a limitation when it intend[ed] to do so").

2. The Plain Text of Section 1105(b) Does Not Impose a Tax on "Interstate" Voice Service.

By its terms, section 1105(b) does not tax "interstate" voice service, regardless of whether it is bundled and sold for a fixed fee with other services. To the contrary, section 1105(b)'s three subsections directly contradict the Complaint's statutory construction.

Section 1105(b)(1). Section 1105(b)(1) sets out the general rule under which sales tax is imposed. It unequivocally states that sales tax is imposed on "telephony . . . service of whatever nature ***except interstate and international telephony***."[5]

Section 1105(b)(2). Section 1105(b)(2) extends the tax imposed by section 1105(b)(1) to ***mobile*** telecommunications. In particular, section 1105(b)(2) taxes receipts from sales of "mobile telecommunications service . . . ***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 . . . , whether or not sold with other services." Although the Complaint construes this provision to somehow abolish the distinction between "interstate" and "intrastate" voice services for mobile telecommunications, it plainly does not. By its terms, section 1105(b)(2) is limited to "voice services, or any other services that are taxable under" subsection 1105(b)(1)(B). Because subsection (b)(1)(B) ***excludes*** "interstate" voice services, and section (b)(2) expressly incorporates subsection (b)(1)(B), the same exclusion applies to section (b)(2). Far from

[5] While "telephony" is not defined under the Tax Law, section 527.2 of the New York Department of Taxation and Finance's regulations defines "telephony" as including the "use or operation of any apparatus for transmission of sound, sound reproduction or coded or other signals." N.Y. Comp. Codes R. & Regs. tit. 20, § 527.2.

repealing the bar on the taxation of "interstate" voice services in subsection (b)(1)(B), section (b)(2) expressly incorporates it.

Section 1105(b)(2)—which was enacted in 2002, when bundling was becoming prevalent—also clarifies that services (voice or otherwise) that are taxable under subsection 1105(b)(1)(B) do not escape taxation simply because they are "sold with other services," *i.e.*, bundled. N.Y. Tax Law § 1105(b)(2). Although the NYAG would have this Court read section (b)(2) for the opposite proposition—that a ***non-taxable*** service becomes subject to sales tax when bundled with a ***taxable*** service—the statute's plain language belies that construction.

Section 1105(b)(3). The fact that "interstate" services are not taxable is further confirmed by the next section. Section 1105(b)(3) states that any tax imposed "pursuant to this subdivision"—that is, pursuant to section 1105(b), including subsection 1105(b)(2)—"is imposed on receipts from charges for ***intrastate*** mobile telecommunications service of whatever nature in any state if the mobile telecommunications customer's place of primary use is in this state." This reinforces that New York imposes sales tax on "intrastate" voice service, whether the call occurs within New York or wholly within another state, and that it is those "intrastate" voice services—not "interstate" services—that are subject to sales tax under section 1105(b).

* * *

Ignoring sections 1105(b)(1) and (b)(3)—as well as the fact that section (b)(2) explicitly incorporates the former and is elucidated by the latter—the Complaint attempts to import into the statute words that it does not contain.

First, the Complaint asserts that section 1105(b)(2) "requires the payment of sales taxes on the ***full amount*** of fixed period charges for wireless voice services." Compl. ¶ 33 (emphasis in original); *see also id.* ¶ 4 (asserting that § 1105(b)(2) "unequivocally imposes sales taxes on

the ***entire amount*** of fixed monthly charges for wireless voice services"). That is wrong. The words "full amount" and "entire amount" nowhere appear in the statute, underscoring that the Complaint's construction is divorced from the plain text of the law. Nor is that construction supported by the fact that section 1105(b)(2) taxes "fixed periodic charges." Of course fixed-rate plans are subject to tax; the question is ***what parts*** of the fixed-rate plan are properly taxed. Read in the context of subsection (b)(1)(B) and section (b)(3), section (b)(2) provides that a carrier must collect sales tax on taxable services even when those services are bundled with non-taxable services—not the other way around.

Second, the Complaint seeks to circumvent New York's explicit exclusion of "interstate" voice calls from sales tax by labeling Sprint's flat-rate fee an "access" charge. It claims that New York can tax amounts attributable to "interstate" voice services because Sprint collects flat monthly fees from customers in advance and keeps those fees "regardless of whether the customers actually use the network during the month." Compl. ¶ 21. As the Complaint puts it: "[T]he fixed monthly charges that Sprint's customers pay for wireless voice services under Sprint's flat-rate plans are for ***access***, not for specific calls." *Id.* ¶ 22 (emphasis in original). The Complaint, however, recognizes that Sprint determines the portion of its monthly fee attributable to "interstate" services, and excludes it from taxation. *Id.* ¶¶ 44, 60, 68, 69. That is fully consistent with section 1105(b). The applicable legislative scheme cannot be avoided merely by slapping the label "access" on a fee that, as the Complaint makes clear, corresponds with ascertainable amounts of intra- and interstate services.

Moreover, the Complaint's conclusory re-characterization of a flat-rate payment plan as an "access" charge ignores the plain language of the statute. Section 1105(b) does not speak in terms of "access;" like the phrases "full amount" and "entire amount," the term "access" charge

appears nowhere in the statute. Rather, section 1105(b) recognizes that mobile telecommunications services may be bundled, N.Y. Tax Law § 1105(b)(2), and it speaks specifically in terms of "***interstate***" and "***intrastate***" voice services: interstate voice services are not taxed, *id.* §§ 1105(b)(1)(B), 1105(b)(2), while intrastate services are, *id.* § 1105(b)(3) ("The tax imposed pursuant to this subdivision is imposed on receipts from charges for intrastate mobile telecommunications service."). The Complaint's contrary allegations improperly strip sections (b)(1) and (b)(3) of meaning. *See, e.g.*, *Branford House*, 81 N.Y.2d at 688 ("A construction rendering statutory language superfluous is to be avoided.").

The Court need not rely solely on the plain language of section 1105(b) to reach this conclusion. The same construction is set forth in New York's Sales and Use Tax Regulations, which the Complaint also fails to cite. Sales and Use Tax Regulation section 527.2 states that "Section 1105(b) of the Tax Law imposes a tax on the receipts from every sale" of "telephony and telegraphy and telephone and telegraph service of whatever nature, ***except interstate*** and international telephony and telegraphy and telephone and telegraph service." N.Y. Comp. Codes R. & Regs. tit. 20, § 527.2(a)(1)(ii). Section 527.2(d)(1) re-confirms that section 1105(b) is intended to impose a sales tax on "intrastate" service, stating that the "provisions of section 1105(b) of the Tax Law with respect to telephony and telegraphy and telephone and telegraph service imposes a tax on receipts from ***intrastate communication***."

The plain text of section 1105(b), read as a whole, is clear: it excludes "interstate" voice services from New York sales tax. But even if the Court were to find the law ambiguous, that ambiguity must be resolved in the taxpayer's favor as a matter of law. *See Debevoise & Plimpton*, 80 N.Y.2d at 661; n.4 above.

3. The Structure and History of Section 1105 Confirm That "Interstate" Service Is Excluded from New York Sales Tax.

The structure and history of section 1105 fully support the plain language of the statutory text. When the General Assembly wanted to draft a statute taxing both "intrastate" and "interstate" services, it knew full well how to do so. For example, section 1105(c)(9)(i)—another provision in the same statute—imposes a sales tax on "entertainment service" and "information service" (1-800 and 1-900 numbers) regardless of whether they are "delivered by means of . . . telephone or telegraph service (***whether intrastate or interstate***) of whatever nature." N.Y. Tax Law § 1105(c)(9)(i). Section 1105(b), by contrast, expressly differentiates between "interstate" and "intrastate" services, evincing an intent not to apply sales tax to "interstate" voice services. *See Albano*, 36 N.Y.2d at 530 ("When different terms are used in various parts of a statute or rule, it is reasonable to assume that a distinction between them is intended."); *Flores*, 4 N.Y.3d at 369 (statute has limitation when "it [was] evident that the Legislature kn[ew] how to impose such a limitation when it intend[ed] to do so."); *People v. Capellan*, 17 Misc. 3d 337, 344 (Sup. Ct. N.Y. Co. 2007) ("[D]ifferences in the way different sections of the same law are written must be presumed to be meaningful . . . .").

Moreover, the division in section 1105(b) between "interstate" and "intrastate" voice services mirrors the historical split between federal and state taxes on telecommunications. Prohibitions against state taxation of interstate telecommunications services "find[] [their] genesis in the [federal] Communications Act of 1934." *People's Choice TV Corp., Inc. v. City of Tucson*, 46 P.3d 412, 415 (Ariz. 2002). The 1934 Act "establishe[d] a dual federal and state system of regulating interstate and intrastate telecommunications services by specifically granting the Federal Communications Commission jurisdiction over 'all interstate and foreign' telecommunications services, but expressly exempting from its authority 'intrastate

communication service.'" *Id.* (quoting 47 U.S.C. §§ 152(a), 152(b)); *see also La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 360 (1986) (recognizing dual regulatory system over telecommunications services and FCC's plenary and preemptive power over interstate services).

States that have deviated from this historical division and taxed "interstate" telecommunications have done so explicitly. For example, New Jersey imposes a 7% sales tax on "receipts from every sale . . . of intrastate, interstate, or international telecommunications services." N.J. Rev. Stat. § 54:32B-3(f)(1). Likewise, Kansas imposes a 6.3% sales tax on "the gross receipts from intrastate, interstate or international telecommunications services." Kan. Stat. Ann. § 79-3603(b). Other states are the same.[6] New York's sales tax statute contains no such language. Sprint, which provides telecommunications services in all 50 states, reasonably concluded that New York's choice of language was legally significant.

Section 1105(b)'s drafting history confirms this construction. Section 1105(b)(1) was enacted in 1965. Sections (b)(2) and (b)(3) were added in 2002, when the exclusion of "interstate" voice services from New York sales tax was long-established. These later provisions—sections (b)(2) and (b)(3)—contain no indication that they were intended to discard the long-standing exclusion of "interstate" service from state sales tax. To the contrary, section (b)(2) specifically incorporated pre-existing subsection (b)(1)(B), which codified the exclusion of "interstate" voice service from sales tax. And section (b)(3) cemented this dichotomy by providing that the entire subdivision—all of section 1105(b)—taxes "intrastate" mobile telecommunications service.

[6] *See, e.g.*, Ky. Rev. Stat. Ann. § 139.200 (imposing a 6% tax on "the gross receipts derived from: (1) Retail sales of: . . . (e) Intrastate, interstate, and international communications services"); Miss. Code Ann. § 27-65-19(1)(e)(i)(2) (imposing a 7% tax on "the gross income received from all charges for interstate telecommunications services").

4. The Department of Taxation and Finance's Guidance Memorandum Purporting To Interpret Section 1105(b) Is Not the Law.

Confronted with a statute that expressly excludes "interstate" services from taxation, and whose text, structure, and history confirm that exclusion, the Complaint turns to a 2002 New York Department of Taxation and Finance memorandum that purports to favorably interpret section 1105(b)(2). Compl. ¶¶ 34-38. This memorandum, however, is not the law. It cannot supplant the terms of the statute, nor can it impose a tax where the Legislature did not. *See Debevoise & Plimpton*, 80 N.Y.2d at 661 ("[A] taxing agency may not extend the meaning of legislation so as to permit the imposition of a tax in situations not embraced within the statute.").

As an initial matter, the purported analysis in the Department document is incomplete. The memorandum states that "the total charge for a given number of minutes of air time that may be used for voice transmission is subject to sales tax under new section 1105(b)(2)." Compl. ¶ 34. That statement, however, is not determinative; being "***subject***" to sales tax does not answer whether a provider may unbundle for sales tax purposes the "interstate" voice service in a flat-rate plan, as expressly permitted by the MTSA (*see* section I.B below). Indeed, the memorandum does not even mention the MTSA's "unbundling" provision, 4 U.S.C. § 123(b). Nor does it analyze the significance of the fact that new section 1105(b)(2) specifically incorporates subsection (b)(1)(B). Having no analysis of statutory text on which to rely, the Complaint cites "Example 1" from the memorandum. Compl. ¶ 35. But that example nowhere considers whether the sales tax applies if, as allowed by federal law, the provider unbundles charges for non-taxable services from its books and records.[7] 4 U.S.C. § 123(b).

[7] By contrast, other examples in the Memorandum acknowledge that a provider may unbundle identifiable charges for non-taxable services. *Compare* Example 8 (concluding, like Example 1, that total charge is taxable when non-taxable charges (*i.e.*, Internet access) are not separately stated), *with* Example 9 (same facts as Example 8, except that identifiable receipts from non-taxable service are excluded from taxation).

In any event, the law on agency memoranda is clear. Although "[o]rdinarily courts will defer to legislative interpretation or interpretation given by the agency to the legislation that it administers," that rule "is otherwise with respect to a statute that levies a tax," because taxing statutes must be "construed most strongly against the government and in favor of the citizen." *Carey Transp., Inc. v. Perrotta,* 34 A.D.2d 147, 149 (1st Dep't 1970) (internal quotation marks omitted), *aff'd*, 29 N.Y.2d 814 (1971). A court also "need not accord any deference to the agency's determination" where "the question is one of pure statutory reading and analysis" because "there is little basis to rely on any special competence or expertise of the administrative agency." *Belmonte v. Snashall*, 2 N.Y.3d 560, 565-66 (2004) (internal quotation marks omitted). This rule is fully applicable in tax cases.[8] As the Court of Appeals observed in *Debevoise & Plimpton*: "The Department argues . . . that because it has adopted a regulation authorizing the taxation [in question] . . . under section 1105(b) that its interpretation must be upheld so long as it has a rational basis. We have held, however, that interpretations of the agency charged with administering a statute are not entitled to such deference when, as here, the issue is one of pure statutory construction." 80 N.Y.2d at 664 (internal citations omitted). Indeed, New York's Tax Law regulations explicitly recognize that administrative memoranda are not binding:

> Technical memoranda are ***advisory in nature*** and fall within the exclusions from the rule making procedure imposed by the State Administrative Procedure Act.

[8] *See, e.g., Moran Towing & Transp. Co. v. N.Y. State Tax Comm'n*, 72 N.Y.2d 166, 173 (1988) (refusing to accord deference to, and rejecting, New York State Tax Commission's interpretation of statute where question was one of "pure statutory reading and analysis"); *SIN, Inc. v. Dep't of Fin. of City of N.Y.*, 71 N.Y.2d 616, 620 (1988) ("[W]here the language used in a taxing statute is neither special nor technical, but consists of common words of clear import, there is little reason to defer to a contrary interpretation given by the administrative agency. In such cases, the clear meaning of a statutory provision cannot be altered by invocation of special administrative competence or expertise."); *Dattilo v. Urbach*, 222 A.D.2d 28, 29 (3d Dep't 1996) (N.Y. Department of Taxation and Finance's interpretation of tax law was "not entitled to any deference, for the question is one of pure statutory reading and analysis, dependent only on an accurate apprehension of legislative intent").

> That is, these statements in themselves ***have no legal effect*** but are merely explanatory . . . . Accordingly, technical memoranda ***do not have legal force or effect, do not set precedent and are not binding***.

N.Y. Comp. Codes R. & Regs. tit. 20, § 2375.6. To be sure, an executive agency seeking to collect revenue not allowed under the pertinent statute may not circumvent the Legislature's decision merely by drafting a memorandum setting forth its preferred statutory interpretation. *See, e.g.*, *Debevoise & Plimpton*, 80 N.Y.2d at 661; *Tze Chun Liao v. N.Y. State Banking Dep't*, 74 N.Y.2d 505, 510 (1989) ("An agency cannot create rules, through its own interstitial declaration, that were not contemplated or authorized by the Legislature . . . .").

B. Federal Law Allows Unbundling and Payment of Sales Tax on That Portion of Mobile Telecommunications Service That Is Taxable Under State Law.

Assuming, as the Complaint alleges, that New York law could be interpreted to prohibit the unbundling of "voice services" for "sales tax purposes," Compl. ¶ 42 (citing N.Y. Tax Law § 1111(*l*)), it would be preempted by the MTSA.

Federal law preempts state law "[1] where Congress has expressly preempted state law, [2] where Congress has legislated so comprehensively that federal law occupies an entire field of regulation and leaves no room for state law, or [3] where federal law conflicts with state law." *Pac. Capital Bank, N.A. v. Connecticut*, 542 F.3d 341, 351 (2d Cir. 2008) (quoting *SPGGC, LLC v. Blumenthal*, 505 F.3d 183, 188 (2d Cir. 2007)); *see also Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25, 31 (1996). Conflict preemption "occurs when compliance with both state and federal law is impossible, or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Pac. Capital Bank*, 542 F.3d at 351 (brackets and internal quotation marks omitted); *see also N.J. Realty Title Ins. Co. v. Dep't of Taxation & Fin. of N.J.*, 338 U.S. 665, 676 (1950) (federal law regarding tax-exempt bonds preempts conflicting state law); *N.Y. State Dep't of Taxation & Fin. v. MacLeod*, 168 A.D.2d

802, 802-03 (3d Dep't 1990) (state gas tax preempted by federal law governing Indian trading because tax burdened Indian traders). "[I]n order for conflict preemption to apply, the activity that is forbidden by state law need not be required by federal law; it is sufficient that the activity that state law prohibits is federally authorized." *Pac. Capital Bank*, 542 F.3d at 351-52.

Here, the MTSA specifically permits mobile telecommunications providers to disaggregate for tax purposes items in service bundles in certain circumstances. Congress enacted the MTSA in 2000 for precisely this purpose—"to provide customers with simpler billing statements, reduce the chances of double taxation of wireless telecommunications services, and simplify and reduce the costs of tax administration for carriers and State and local governments." H.R. Rep. No. 106-719 (2000), *reprinted in* 2000 U.S.C.C.A.N. 508, 508. Most relevant here, the MTSA provides:

> ***If a taxing jurisdiction does not otherwise subject charges for mobile telecommunications services to taxation*** and if these charges are aggregated with and not separately stated from charges that are subject to taxation, then the charges for nontaxable mobile telecommunications services may be subject to taxation ***unless the home service provider can reasonably identify charges not subject to such tax, charge, or fee from its books and records that are kept in the regular course of business***.

4 U.S.C. § 123(b).[9]

The Complaint's interpretation of New York law is flatly inconsistent with, and preempted by, 4 U.S.C. § 123(b). The Complaint asserts that the Tax Law imposes a sales tax on all "interstate" and "intrastate" mobile voice services when bundled together in a fixed-rate plan, regardless of whether the carrier can identify the various component charges from its books and records. It does so while simultaneously acknowledging that, if telecommunications services are

[9] While section 118 of the MTSA provides that the Act does not "[m]odify, impair, supersede, or authorize the modification, impairment, or supersession of the law of any taxing jurisdiction pertaining to taxation ***except as expressly provided***," section 123 expressly allows wireless carriers to disaggregate bundled charges.

"not sold for a fixed periodic charge," then wireless carriers "are not required to collect and pay [local sales taxes] on such calls that are int***er***state." Compl. ¶ 37 (emphasis in original). That directly conflicts with section 123(b), under which a jurisdiction that does not tax particular "charges for mobile telecommunications services"—here, interstate voice services—cannot impose such a tax on that service simply because it is "aggregated with" taxable charges, as long as the provider can "reasonably identify charges not subject to such tax" from its books and records. The Complaint's contrary construction of the Tax Law is precisely what the MTSA prohibits and, therefore, would be preempted if it were correct (it is not).

II. THE FIRST AND SECOND CAUSES OF ACTION SHOULD BE DISMISSED.

Not content to plead this case as a tax dispute, the Complaint compounds these errors by asserting two causes of action under the FCA. The First Cause of Action is for violation of Finance Law section 189(1)(g), alleging that Sprint "knowingly ma[de] . . . false records or statements material to an obligation to pay or transmit money . . . to the state" in tax returns by misstating the amount of sales tax owed as a result of the unbundling of interstate voice services. Compl. ¶ 112. The second cause of action is for conspiracy to violate section 189(1)(g). *Id.* ¶ 115. These causes of action fail for four reasons.

First, as discussed, the Tax Law does not provide at all—much less unambiguously—that sales tax is due on "interstate" voice service in fixed-rate plans, and federal law expressly allows Sprint to unbundle such service and exclude it from sales tax based on its books and records. Thus, Sprint's alleged false statements were in fact true, requiring dismissal of both FCA causes of action. Moreover, whether or not Sprint's legal interpretation was correct, the Complaint does not plead facts showing that Sprint acted in deliberate ignorance or reckless disregard of the truth or falsity of whether its tax collections were proper, as required by the FCA. FCA liability does not apply to reasonable differences in interpretation growing out of a disputed legal question.

Second, the Complaint fails to allege that Sprint believed its interpretation of New York law was wrong, thereby failing to state a claim with the particularity required by CPLR 3016.

Third, because the FCA cannot impose penalties and treble damages retroactively, any FCA claim for allegedly false statements made before the FCA became law in August 2010 is barred under the *Ex Post Facto* Clause of the United States Constitution.

Fourth, the Second Cause of Action is barred because a corporation cannot conspire with its subsidiaries.

A. Liability Under the FCA Is Prohibited as a Matter of Law.

The FCA does not punish reasonable disputes over the interpretation of a statute. Rather, to be liable under it, a party must ***knowingly*** make a false statement. N.Y. State Fin. Law § 189(1)(g). The FCA defines "knowingly" to mean "that a person, with respect to information: (i) has actual knowledge of the information; (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). Although "knowledge" does not require a "specific intent to defraud," "acts occurring by mistake or as a result of mere negligence are not covered" by the FCA. *Id.*[10]

The Complaint contains no allegations sufficient to meet this standard. Nor could it. As discussed in Section I, Sprint's construction of New York Tax Law is correct, so it made no false statement. *See United States ex rel. Roby v. Boeing Co.*, 100 F. Supp. 2d 619, 625 (S.D. Ohio 2000) ("At a minimum, the FCA requires proof of an objective falsehood."). Even if section 1105(b) could be deemed ambiguous, all ambiguities must be resolved in favor of the taxpayer.

[10] New York's FCA is "closely modeled on the federal FCA" and is, therefore, construed consistently with the federal Act. *United States ex rel. Pervez v. Beth Israel Med. Ctr.*, 736 F. Supp. 2d 804, 816 (S.D.N.Y. 2010); *see also New York v. Amgen, Inc.*, 652 F.3d 103, 109 (1st Cir. 2011), *cert. denied*, 132 S. Ct. 993 (2011). Indeed, New York's FCA is even more demanding that a plaintiff show "knowledge"; unlike the federal Act, New York's FCA expressly excludes from its scope "acts occurring by mistake or as a result of mere negligence." N.Y. State Fin. Law § 188(3).

But even if Sprint's interpretation were deemed incorrect, it was not so legally unreasonable as to give rise to FCA liability for all of the reasons set forth above. Nor is knowledge that the government takes a position on a disputed legal issue the same as knowledge that that position is correct. The government can make mistakes too. Indeed, the implications of a contrary rule—that a reasonable disagreement with the government subjects a party to penalties for willful misconduct—are troubling. Accordingly, courts considering FCA claims have held that, as a matter of law, "errors based simply on . . . flawed reasoning" and "differences in interpretation growing out of a disputed legal question" do not constitute false claims. *United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1018 (7th Cir. 1999). In particular, when an asserted false claim relates to a failure to meet an obligation allegedly imposed by statute, a plaintiff must show "that there is ***no reasonable interpretation of the law that would make the allegedly false statement true***." *United States ex rel. Hixson v. Health Mgmt. Sys., Inc.*, 613 F.3d 1186, 1191 (8th Cir. 2010). In *Hixson*, the relator alleged that defendants violated the federal FCA by not seeking reimbursement from health-care providers. The Eighth Circuit affirmed dismissal, holding that the asserted legal obligation to seek reimbursement, even if a proper interpretation of the law, was at a minimum unclear under the governing statutes. "Because there [was] a reasonable interpretation of the law that d[id] not obligate the defendants to seek reimbursement," the court held, "the relators ha[d] not stated a claim under the FCA." *Id.* at 1191. Other courts have held similarly.[11]

[11] For example, in *United States ex rel. Pritsker v. Sodexho*, No. 03-6003, 2009 WL 579380 (E.D. Pa. Mar. 6, 2009), *aff'd*, 364 F. App'x 787 (3d Cir. 2010), the relator alleged that food service providers violated federal regulations by failing to credit schools with discounts and rebates. Noting "the lack of clarity regarding the proper interpretation of the [governing] regulations," the court held that "no basis exist[ed] for imposing FCA liability on Defendants, who merely adopted a reasonable interpretation of regulatory requirements which favored their interests." *Id.* at *17; *see also United States v. Textron Sys. Corp.*, No. 09-11985-RGS, 2011 WL

B. The First and Second Causes of Action Are Not Pleaded with the Requisite Particularity.

The First and Second Causes of Action also should be dismissed because they fail to state a claim with particularity, as required by CPLR 3016(b). *State ex rel. Seiden v. Utica First Ins. Co.*, 943 N.Y.S.2d 36 (1st Dep't 2012) ("Plaintiff must state a reverse [NY FCA] false claim with particularity."); *Gold v. Morrison-Knudsen Co.*, 68 F.3d 1475, 1476-77 (2d Cir. 1995) ("It is self-evident that the FCA is an anti-fraud statute"; "claims brought under the FCA fall within the express scope of Rule 9(b)," the federal analog of CPLR 3016(b)). [12]

To state a claim under CPLR 3016(b), "the circumstances constituting the wrong" must "be stated in detail." "[M]ere conclusory assertion[s] of recklessness and intent . . . do not meet the special pleading standards required under CPLR 3016(b)." *Marine Midland Bank v. Grant Thornton LLP*, 260 A.D.2d 318, 319 (1st Dep't 1999). Under the FCA in particular, a plaintiff cannot merely allege "that [the defendant] recklessly disregarded facts . . . or . . . had actual knowledge" of the relevant statement's falsity. *Credit Alliance Corp. v. Arthur Andersen & Co.*, 65 N.Y.2d 536, 554 (1985), *amended by* 66 N.Y.2d 812 (1985). Rather, the Complaint must include "additional detail concerning the facts constituting the alleged fraud." *Id.*

Here, the Complaint fails to allege any facts to support its conclusory allegation that Sprint "***knowingly*** ma[de] . . . a false record or statement material to an obligation to pay or transmit money . . . to the state." N.Y. State Fin. Law § 189(1)(g). To be sure, it is rife with conclusory allegations that Sprint knowingly filed false tax returns. *See, e.g.*, Compl. ¶¶ 1, 2, 5, 98. But reciting that conclusion is not enough. The Complaint contains no allegation, well-

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2414207, at *4 (D. Mass. June 9, 2011) (government contractor not liable for false claim as matter of law when employee came to the "not unreasonable conclusion" that costs could be charged to the government, despite contrary indications).

[12] While the FCA states that a "qui tam plaintiff" need not comply with CPLR 3016, the rule does not extend to complaints filed by the Attorney General. N.Y. State Fin. Law § 192(1-a).

pleaded or otherwise, that Sprint actually knew or believed it was doing anything wrong and nonetheless continued to do so. Instead, the Complaint merely asserts that Sprint reviewed section 1105(b) and the New York Department of Taxation and Finance's 2002 guidance memorandum, *id.* ¶¶ 88-90; did not seek outside guidance on the meaning of the law, *id.* ¶¶ 91-92; did not prepare an internal memorandum summarizing its position, *id.* ¶ 93; and was informed by the Department that it disagreed with Sprint's position, *id.* ¶ 94. These allegations are insufficient to establish that Sprint believed—much less knew—that it was acting contrary to the New York Tax Law. Rather, even if accepted as true, they merely suggest that Sprint had a ***different interpretation*** of the New York tax statutes than did the NYAG, and acted accordingly.

C. Claims for Statements Made Before August 2010 Violate the *Ex Post Facto* Clause of the United States Constitution.

The First and Second Causes of Action also impermissibly seek treble damages and other penalties for statements that were not punishable when made. That violates the United States Constitution's *Ex Post Facto* Clause, which prohibits "impos[ing] a punishment for an act which was not punishable at the time it was committed." *Weaver v. Graham*, 450 U.S. 24, 28 (1981).

New York's FCA, as originally enacted, stated that it did "***not*** apply to claims, records, or statements made under the tax law." N.Y. State Fin. Law § 189(4). In August 2010, the General Assembly removed the word "not," allowing FCA claims based on statements made in tax returns. 2010 N.Y. Sess. Laws Ch. 379 (A. 11568) (McKinney). The Legislature sought to apply this change retroactively "to claims, records or statements made or used prior to, on or after April 1, 2007." *Id.*

The *Ex Post Facto* Clause "applies only to penal statutes which disadvantage the offender affected by them." *Doe v. Pataki*, 120 F.3d 1263, 1272 (2d Cir. 1997) (internal quotation marks omitted). The Supreme Court has instructed that, to determine whether a statute is penal—that

is, punitive or criminal—a court applies a two-part test. *Id.* at 1274 (citing *United States v. Ward*, 448 U.S. 242, 248-49 (1980)). First, the Court considers "the legislature's intent in enacting the challenged sanction." *Id.* at 1274. Second, even if the intent is to impose a civil penalty, the Court must consider whether the sanction is nonetheless "so punitive either in purpose or effect" that it is transformed into a criminal penalty. *Id.* at 1275; *see also, e.g.*, *Smith v. Doe*, 538 U.S. 84, 92 (2003).

Here, the FCA states that its imposition of treble damages is a "civil penalty." N.Y. State Fin. Law § 189(1).[13] That, however, does not end the inquiry; a court also must determine whether the sanction is "so punitive either in purpose or effect" that it is transformed into a criminal penalty. *Doe v. Pataki*, 120 F.3d at 1274. The Court of Appeals recently resolved that issue, holding that the purpose and effect of New York's FCA, indeed, is punitive:

> ***Thus, rather than redressing the harm actually suffered, the [FCA] statute's imposition of civil penalties and treble damages evinces a broader punitive goal of deterring fraudulent conduct against the State***. That is, instead of compensating the State for damages caused by DHL's purported scheme and addressing its narrow proprietary interests, ***the FCA would punish and consequently deter such future conduct*** . . . (*Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765, 786 [2000] citing *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 [1981] ["The very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers"]).

[13] Notwithstanding this pronouncement, the legislative history of the 2010 amendment demonstrates an obvious intent to punish. *See, e.g.*, N.Y. Sen. Debate on Assembly Bill A. 11568, June 30, 2010, at 7369, 7371 (Senator Schneiderman, sponsor of 2010 amendment, stating that it was needed because "[t]here is a crime wave in this state that is going unaddressed. The crime wave is fraud;" the 2010 amendment is "an anti-crime bill," a "tough-on-crime bill," and a "smart on crime bill"); *id*. at 7374 (senator stating that 2010 amendment would "punish" and "crack down" on fraud).

New York ex. rel. Grupp v. DHL Express (USA), Inc., 2012 WL 1429252 (N.Y. Apr. 26, 2012).[14] Because the FCA's civil penalty and treble damages provisions are punitive, the *Ex Post Facto* Clause precludes retroactive application of the FCA to conduct prior to August 10, 2010.

D. The Second Cause of Action Is Barred Because a Corporation Cannot Conspire with Its Subsidiaries Under the FCA.

The Second Cause of Action alleges that Sprint and three of its wholly-owned subsidiaries conspired to violate the FCA. Compl. ¶¶ 15-18, 115. It is black-letter law, however, that a corporation cannot conspire with wholly-owned subsidiaries. *See, e.g.*, *Barnem Circular Distribs., Inc. v. Distribution Sys. of Am., Inc.*, 281 A.D.2d 576, 577 (2d Dep't 2001) ("A parent corporation and its wholly-owned subsidiary are incapable of conspiring with each other. . . ." (citing *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984))). This principle applies to FCA claims,[15] and requires dismissal of the Second Cause of Action.

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[14] The United States Supreme Court has reached the same conclusion with respect to the federal FCA. *See Pac. Health Sys., Inc. v. Book*, 538 U.S. 401, 405 (2003) ("[I]n *Vermont Agency*, we characterized the treble-damages provision of the False Claims Act as 'essentially punitive in nature.'" (internal citations omitted)). Other courts are in accord with respect to both federal and state FCAs. *See, e.g., Massachusetts v. Schering-Plough Corp.*, 779 F. Supp. 2d 224, 238 (D. Mass. 2011) (Massachusetts FCA is "so punitive either in purpose or effect as to transform [it] into a criminal penalty for ex post facto purposes"); *United States ex rel. Baker v. Cmty. Health Sys., Inc.*, 709 F. Supp. 2d 1084, 1112 (D.N.M. 2010) ("FCA's statutory scheme is punitive in purpose and effect"; "retroactive application . . . violate[s] the *Ex Post Facto* Clause."); *United States v. Hawley*, 812 F. Supp. 2d 949, 961-62 (N.D. Iowa 2011) ("FCA's statutory scheme is so punitive either in purpose or effect as to negate Congressional intent to deem it civil."); *United States ex rel. Sanders v. Allison Engine Co.*, 667 F. Supp. 2d 747, 758 (S.D. Ohio 2009) ("[R]etroactive application of the new FCA language . . . violates the Ex Post Facto Clause").

[15] *See, e.g., United States v. Gwinn*, No. 5:06-cv-00267, 2008 WL 867927, at *24 (S.D. W. Va. Mar. 31, 2008) ("[B]asic principles of conspiracy and agency law require that the intracorporate conspiracy doctrine bar conspiracy claims under the False Claims Act."); *United States ex rel. Brooks v. Lockheed Martin Corp.*, 423 F. Supp. 2d 522, 528 (D. Md. 2006) (corporation cannot conspire with wholly-owned subsidiaries; FCA claim "must fail as a matter of law"), *aff'd in part per curiam*, 237 F. App'x 802 (4th Cir. 2007); *United States ex rel. Reagan v. E. Tex. Med. Ctr. Reg'l Healthcare Sys.*, 274 F. Supp. 2d 824, 856 (S.D. Tex. 2003) (same), *aff'd*, 384 F.3d 168 (5th Cir. 2004).

III. THE THIRD CAUSE OF ACTION FAILS TO STATE A CLAIM.

The Third Cause of Action purports to state a claim for "persistent fraud or illegality" under New York Executive Law Section 63(12). It too, however, is predicated entirely on the Complaint's faulty interpretation of the New York Tax Law and should be dismissed.

Section 63(12) allows the NYAG to seek damages "[w]henever any person shall engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business." The only "fraudulent and illegal acts" alleged in the Third Cause of Action, however, are "failing to collect and pay sales taxes due and owing and submitting false sales tax filings to the New York Department of Taxation & Finance." Compl. ¶ 119. As discussed above, New York Tax Law section 1105(b) does not impose a sales tax on "interstate" voice services, and a provider is explicitly permitted under federal law to unbundle non-taxable items from flat-rate service plans when computing state sales tax. When considered in light of the strict legal standard governing the application of tax statutes, and the absence of any allegation that Sprint believed it was doing anything wrong, the NYAG's claim that Sprint engaged in repeated fraudulent or illegal acts should be dismissed.

IV. THE THIRD AND FOURTH CAUSES OF ACTION ARE TIME-BARRED TO THE EXTENT THEY APPLY TO PERIODS BEFORE MARCH 31, 2008.

CPLR 214(2) imposes a three-year statute of limitations on any "action to recover upon a liability, penalty or forfeiture created or imposed by statute."[16] New York Tax Law section 1147 also provides a three-year limitations period on tax enforcement actions, "except in the case of a willfully false or fraudulent return with intent to evade the tax." The statute begins to run when

[16] This period applies to the section 63(12) claim because it "seeks to establish a liability that arises solely from statute," and not common law fraud. *People ex rel. Spitzer v. Pharmacia Corp.*, 27 Misc. 3d 368, 373 (Sup. Ct. Albany Co. 2010); *State ex rel. Spitzer v. Daicel Chem. Indus., Ltd.*, 42 A.D.3d 301, 302-3 (1st Dep't 2007) (Section 63(12) claim relying on "allegations of conduct made illegal by statute" is "covered by CPLR 214(2)."); *People ex rel. Cuomo v. City Model & Talent Dev., Inc.*, 2010 WL 3892246, at *3 (Sup. Ct. Suffolk Co. Sept. 28, 2010).

the tax filing is submitted. *See Roebling Liquors Inc. v. Comm'r of Taxation & Fin.*, 284 A.D.2d 669, 672 (3d Dep't 2001). Here, the relator filed suit on March 31, 2011, and there is no well-pleaded allegation of a willfully false or fraudulent return.[17] Accordingly, CPLR 214(2) and Tax Law 1147 bar recovery under the Third and Fourth Causes of Action for conduct before March 31, 2008.[18]

CONCLUSION

For the foregoing reasons, the Complaint should be dismissed with prejudice.

Dated: June 14, 2012

PILLSBURY WINTHROP SHAW PITTMAN LLP

/s/ E. Leo Milonas

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[17] Because each element of a fraud claim "must be pleaded with particularity," the NYAG must provide non-conclusory allegations that the misstatements were "known by [the defendant] to be false" and were "made with an intent to deceive." *Rotterdam Ventures, Inc. v. Ernst & Young LLP*, 300 A.D.2d 963, 964 (3d Dep't 2002). The Complaint fails this standard. It does not claim Sprint acted with an "intent to deceive"—*i.e.*, believed it owed sales tax for "interstate" voice service but refused to pay it—or otherwise knew or believed it was doing anything wrong.

[18] The New York Department of Taxation and Finance currently is auditing several defendants' payment of sales tax during some of the years at issue. As part of that process, some Defendants signed tolling agreements extending the time for the Department to make a final determination of any sales tax owed. Those agreements do not apply to this case, which was filed outside of the audit process and before the audit was complete. The Complaint nowhere asserts that tolling applies.

Affirmation of E. Leo Milonas, for Defendants, in Support of Motion to Dismiss Plaintiff's Complaint, dated June 12, 2012

FILED: NEW YORK COUNTY CLERK 06/14/2012 INDEX NO. 103917/2011
NYSCEF DOC. NO. 8-1 RECEIVED NYSCEF: 06/14/2012

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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,

v.

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

Defendants.

Index No. 103917/2011E

AFFIRMATION OF E. LEO MILONAS IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

E. LEO MILONAS, an attorney duly admitted to the practice of law before the Courts of the State of New York and a member of the firm of Pillsbury Winthrop Shaw Pittman LLP, co-counsel for Defendants Sprint Nextel Corp., Sprint Spectrum L.P., Nextel of New York, Inc., and Nextel Partners of Upstate New York, Inc, affirms the following to be true under penalty of perjury:

1. I submit this affirmation in support of Defendants' Motion to Dismiss the Complaint.

2. Annexed hereto as Exhibit A is a true and correct copy of the Complaint in this action.

Dated: New York, New York
June 12, 2012

/s/ E. Leo Milonas
E. LEO MILONAS

Exhibit A to Milonas Affirmation-
Complaint
[pp. 59 - 88]

FILED: NEW YORK COUNTY CLERK 06/14/2012 INDEX NO. 103917/2011
NYSCEF DOC. NO. 8-2 RECEIVED NYSCEF: 06/14/2012

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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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,

INDEX NO. 103917-2011

Plaintiff,

SUPERSEDING COMPLAINT

v.

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

Defendants.

----------X

The State of New York, through the Attorney General of the State of New York, having superseded the complaint of the *qui tam* plaintiff herein, brings this action against defendants Sprint Nextel Corp., Sprint Spectrum L.P., Nextel of New York, Inc., and Nextel Partners of Upstate New York, Inc. (collectively, "Sprint"), pursuant to the New York False Claims Act, Executive Law, and the Tax Law.

NATURE OF THIS ACTION

1. This action arises out of Sprint's knowing and fraudulent failure to collect and pay more than $100 million in New York sales taxes on receipts from its sale of wireless telephone services since July 2005. Specifically, Sprint illegally avoided its New York sales tax obligations on about 25% of its receipts for "flat-rate" calling plans – plans for which customers pay a fixed monthly charge for a set or unlimited amount of calling time.

2. Sprint's decision to not collect and pay the required sales taxes in New York arose out of a nationwide scheme to gain an advantage over its competitor wireless carriers, not by cutting its prices or offering better service, but by failing to collect and pay sales taxes, thereby reducing the cost of its products to its customers. The consequence of this scheme was that Sprint knowingly deprived state and local governments of the tax revenues that provide necessary services to citizens.

3. Sprint concealed this scheme from taxing authorities, its competitors, and its customers.

4. New York unequivocally imposes sales taxes on the entire amount of fixed monthly charges for wireless voice services. For example, one of Sprint's wireless calling plans provides for up to 450 minutes of talking time for $39.99 per month. Under New York sales tax law, the fixed monthly charge of $39.99, in full, is subject to sales taxes.

5. 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, yet it chose to act contrary to the law to advance its own competitive interests. Starting in July 2005 and continuing today, Sprint knowingly and deliberately failed to collect and pay the taxes on about one quarter of its revenue from these fixed monthly charges, and Sprint has repeatedly and knowingly submitted false records and statements to New York State concealing this failure. It falsely asserted on its sales tax filings that it owed less in sales taxes than it really did. Each of these statements and records was material to Sprint's sales tax obligations. Sprint owed substantially more than it reported.

6. Even after New York tax authorities instructed Sprint that its tax avoidance scheme was illegal, Sprint not only failed to pay the back taxes it owed, but it has continued to underpay sales taxes and submit false tax returns.

7. Unlike Sprint, Sprint's primary wireless competitors, including Verizon, AT&T, T-Mobile, and MetroPCS, have followed the law regarding these taxes. Each collects and pays sales taxes in New York on the full amount of their revenues from flat-rate charges for wireless voice services.

8. Sprint has also misled millions of New York customers who purchased Sprint flat-rate plans. In its customer contracts, on its website and elsewhere, Sprint represented that it would collect and pay all applicable sales taxes. Yet Sprint did not, and it concealed this fact from its New York customers. As a result, Sprint exposed these customers to the risk of having to pay the unpaid taxes, for they are also liable under the law if Sprint fails to pay. Although Sprint misrepresented how it would handle sales taxes, it has locked its customers into contracts with early termination fees. The customers must remain in these contracts sold under false pretenses unless they pay hundreds of dollars to Sprint.

9. In this action, New York, through the Attorney General, seeks to (a) recover damages from Sprint for the tax revenue lost to the State of New York and its local governments, trebled, as a result of Sprint's violation of the New York False Claims Act; (b) require Sprint to collect and pay sales taxes on the full amount of its fixed monthly charges for voice services going forward; (c) enjoin Sprint from charging early termination fees currently applicable to customers that have purchased flat-rate wireless plans in New York under false pretenses; and (d) obtain penalties against Sprint as provided by law for its deliberate and illegal conduct.

WHISTLEBLOWER ACTION

10. This action was filed on or about March 31, 2011 by whistleblower, or *qui tam* plaintiff, Empire State Ventures, LLC under the New York False Claims Act. The New York False Claims Act permits whistleblowers who know of information concerning false or fraudulent conduct that victimizes the government through the failure to pay taxes and otherwise to bring an action on behalf of the government. The government then has an opportunity to investigate the matter and decide whether to take over the action.

11. In this case, the Office of the Attorney General has conducted an investigation of Sprint's New York state and local sales tax practices with respect to its fixed monthly charges for wireless calling plans. On April 19, 2012, the Attorney General notified the Court of its decision to supersede the *qui tam* plaintiff's complaint. The People of the State of New York have thus been substituted as the plaintiff, and the action has been converted in all respects from a *qui tam* civil action brought by a private person into a civil enforcement action by the Attorney General.

JURISDICTION & PARTIES

12. The State of New York, through the Attorney General, brings this action in its sovereign capacity, and pursuant to State Finance Law § 190(b), Executive Law § 63(12), and Tax Law § 1141(a). It sues to redress injury to the State and to its local governments, general economy and citizens, and seeks injunctive relief, damages, costs, penalties and other relief with respect to Sprint's fraudulent and otherwise unlawful conduct.

13. This Court has personal jurisdiction over the defendants because the defendants can be found, reside and/or transact business in New York State and New York County.

14. Venue is proper in this Court pursuant to CPLR § 503.

15. Defendant Sprint Nextel Corporation is a mobile telecommunications service provider that does business in the State of New York and nationally and internationally. Sprint currently has about 55 million customers, including about 1.82 million wireless customers in New York State, and annual revenues of approximately $33 billion. Sprint Nextel Corporation is incorporated in the State of Kansas, with a principal executive office located at 6200 Sprint Parkway, Overland Park, Kansas 66251. Sprint Nextel Corporation is registered to be traded on the New York Stock Exchange.

16. Defendant Sprint Spectrum, L.P. is a mobile telecommunications service provider that does business in the State of New York. Sprint Spectrum, L.P. is incorporated in the State of Delaware and is a wholly-owned indirect subsidiary of Sprint Nextel Corporation.

17. Defendant Nextel of New York, Inc. is a mobile telecommunications service provider that does business in the State of New York. Nextel of New York, Inc. is incorporated in the State of Delaware and is a wholly-owned indirect subsidiary of Sprint Nextel Corporation.

18. Defendant Nextel Partners of Upstate New York, Inc. is a mobile telecommunications service provider that does business in the State of New York. Nextel Partners of Upstate New York, Inc. is incorporated in the State of Delaware and is a wholly-owned indirect subsidiary of Sprint Nextel Corporation.

FACTUAL ALLEGATIONS

I. Sprint's Flat-Rate Wireless Calling Plans

19. In New York, Sprint sells wireless calling plans through its subsidiary entities Sprint Spectrum L.P., Nextel of New York, Inc., and Nextel Partners of Upstate New York, Inc. These plans are all branded as "Sprint" plans and are centrally developed and overseen by Sprint Nextel Corporation.

20. Throughout the period from July 2005 to the present, Sprint has offered for sale to New York customers wireless calling plans that include voice services in exchange for fixed monthly charges. The voice services provided under these plans consist of the ability of Sprint's customers to use Sprint's wireless network to make phone calls for a set number of minutes, or for an unlimited number of minutes.

21. The fixed monthly charge for these voice services is billed to customers regardless of whether the customers actually use the network during the month, regardless of how much they use the available minutes, and regardless of whether calls are made to people or phones within the same state – int*ra*state calls – or people or phones in other states – int*er*state calls. Under these plans, calls within the monthly number of minutes are not billed on a per-minute basis.

22. In short, the fixed monthly charges that Sprint's customers pay for wireless voice services under Sprint's flat-rate plans are for *access*, not for specific calls; hence Sprint identifies these charges on customer invoices as "monthly recurring *access* charges" (emphasis added).

23. Sprint charges its customers differently for calls that are *not* within the fixed monthly charge. When customers use more than the allowed minutes in a month for phone calls, they are charged for that separate usage – or "overage" – on a per-minute basis.

24. By way of illustration, Sprint currently offers a calling plan under which a customer is charged $39.99 a month for the ability to use – or access – Sprint's network for up to 450 minutes of calling time per month. Overage minutes cost 45 cents each. The $39.99 will be charged if the customer makes no calls at all, uses one minute of calling time or uses 449 minutes of calling time. If the customer uses 451 minutes of calling time, he or she will have to pay the $39.99 fixed monthly charge plus a $0.45 usage charge for the overage.

25. Sprint's customers typically purchase flat-rate calling plans by signing a contract with Sprint. These contracts are provided by Sprint and are not subject to negotiation by the customer. They usually have a term of one or two years. A customer who chooses to cancel a contract before the term ends is subject to an early termination fee payable to Sprint. Usually, these early termination fees are in excess of $200.

26. Sprint represents in its contracts and on its website that it will collect all applicable state and local sales taxes on the customer's behalf and pay the amount collected to the government.

27. Since before July 2005, Sprint has sent its New York customers monthly invoices for services provided under its flat-rate plans. These invoices state the fixed monthly charge for the plan, and they separately state the charges for any overage minutes. They also set forth a charge for sales taxes, but they do not indicate how the sales taxes are calculated.

28. The invoices do not indicate that Sprint has calculated sales taxes on less than the full fixed monthly charge for voice services.

29. The invoices do not indicate to customers that Sprint is charging less sales taxes than required by law, and that customers can be held liable for any resulting underpayment.

II. Sprint's Obligation to Pay New York Sales Taxes on Its Flat-Rate Calling Plans

30. Since at least August of 2002, New York State and localities within New York State require and have required the payment of sales taxes on the *full amount* of fixed monthly charges for wireless voice services sold to customers in New York. Sprint, as the provider of the services, is required to collect the sales taxes from its customers and pay them to the State.

31. For example, when Sprint receives payment of a fixed monthly charge of $39.99 for 450 minutes of wireless voice services, Sprint is required to collect and pay sales taxes on the entire $39.99.

32. New York Tax Law contains a specific provision concerning how sales taxes are to be applied to fixed monthly charges for wireless voice services. According to N.Y. Tax Law Section 1105(b)(2), sales taxes are to be applied to:

> the receipts from every sale of mobile telecommunications services 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.

This provision has been in effect continuously since August 2, 2002.

33. The Tax Law, and this section in particular, clearly requires the payment of sales taxes on the *full amount* of fixed periodic charges for wireless voice services sold by companies like Sprint to New York customers, as follows:

a. Sprint is a "home service provider" because it is a facilities-based carrier with which mobile telecommunications customers contract for the provision of mobile telecommunications service.

b. The mobile telecommunications services sold by Sprint under the flat-rate plans are not sold for resale.

c. Under Sprint's flat-rate plans, Sprint sells wireless voice services for a fixed periodic charge.

d. Sprint does not separately state or otherwise break out any portions of the fixed periodic charge for voice services in invoices or other communications with customers.

e. Sprint's fixed monthly charges for wireless voice services are not for "other services that are taxable under subparagraph (B) of paragraph one of [Section 1105(b)]."

34. On July 30, 2002, the New York State Department of Taxation & Finance (the "New York Tax Department") issued guidance on this provision in a "Technical Services Bureau Memorandum" (the "2002 TSB-M"). There, it explained that for mobile telecommunications, "the *total charge* for a given number of minutes of air time that may be used for voice transmission is subject to sales tax under new section 1105(b)(2)" (emphasis added).

35. The 2002 TSB-M gave a concrete example demonstrating that the amended law requires the payment of New York sales taxes on the full amount of the fixed monthly charges for wireless voice services, regardless of how – or whether – a customer uses them:

> *Example 1*: Mr. Smith buys a cellular calling plan from a home service provider which includes up to 2500 minutes for use for a flat-rate charge of $49.95 per month. The contract provides that additional charges will apply for calling minutes that exceed the minutes allowed under the plan. In November 2002, Mr. Smith does not exceed the calling minutes allowed under the plan, and is charged $49.95 for the month. *Such charge 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*. (2002 TSB-M at 3) (emphasis added).

36. The various counties within the State of New York, along with New York City and certain school districts and other local entities, impose sales taxes on the identical services. The sales tax rate imposed on such services varies by locality, and the taxes in each must be paid in addition to the New York State sales taxes.

37. Under New York sales tax law, the obligations are different with respect to certain telecommunications services that are *not* sold for a fixed periodic charge. For overage minutes that are charged to customers on a per-minute usage basis, Sprint and other wireless carriers are

required to collect and pay New York state and local sales taxes only when such calls are int*ra*state, and are not required to collect and pay them on such calls that are int*er*state.

38. The New York Tax Department's 2002 TSB-M guidance further illustrated this situation in its next example:

> *Example 2:* The facts are the same as in *Example 1*, except that Mr. Smith exceeds the calling minutes allowed under the plan. *The $49.95 flat-rate charge is subject to tax under section 1105(b)(2) of the Tax Law*, and the separate charges for intrastate calls included in the excess minutes are subject to sales tax under section 1105(b)(1)(B) of the Tax Law. The separate charges for interstate or international calls included in the excess minutes are not subject to sales tax. (2002 TSB-M at 3-4) (emphasis added).

39. New York tax law also spells out how wireless carriers can apply sales taxes when selling "bundles" of services for a fixed periodic charge where some of the services included in the bundle would be taxable if they were sold separately from the bundle (such as voice services sold for a fixed periodic charge), while other services would *not* be taxable if they were sold separately from the bundle (such as Internet services).

40. As a general matter, if any one component service included in a bundle is subject to sales taxes when sold on its own, then the charge for the entire bundle is subject to sales taxes. New York tax law, however, allows a wireless carrier, in defined situations, to break out from the bundle, or "unbundle," the charge so it does not have to collect and pay sales tax on a charge for a service that would not be subject to sales tax if it were sold separately and not as a component of a bundle of services. This unbundling is also referred to as "component taxation."

41. For example, Sprint's $39.99 flat-rate plan for access to Sprint's wireless network for 450 minutes of calling time is sold in another variation: for an additional $30, the customer can include unlimited Internet access in the plan. The plan thus consists of two components: wireless voice services and Internet access. Because a charge for Internet access is not, on its

own, subject to New York state and local sales taxes, Sprint is permitted (if it follows all the rules set forth in New York law) to unbundle the Internet portion of the overall charge and not collect and pay sales taxes on that Internet portion.

42. New York's unbundling rules are set forth in section 1111(*l*) of the New York Tax Law. Under that section, wireless providers are permitted to treat separately for sales tax purposes certain components of a bundled charge for mobile telecommunication services, so long as the charges are *not* for voice services, and so long as service provider uses an "objective, reasonable and verifiable standard for identifying each of the components" of a bundled charge. The New York Tax Department's 2002 TSB-M guidance also illustrated this situation with examples:

> *Example 7*: Mrs. Johnson's place of primary use is an address in Buffalo, NY. She receives both cellular telephone service and Internet access service from her home service provider. The home service provider separately states the charge on Mrs. Johnson's bill for the cellular service and for the Internet access service. *The charge for the cellular service is subject to sales tax,* while the charge for Internet access service (so long as reasonable) is not, because it is separately stated.
>
> *Example 8*: The facts are the same as in *Example 7*, but the charges for the cellular service and the Internet access service are not separately stated. In this instance, the total charge is considered a receipt from the charge for mobile telecommunications service and is subject to sales tax, under section 1105(b)(2).
>
> *Example 9*: The facts are the same as in *Example 8*, except the home service provider properly identifies, accounts for, and quantifies the receipts from each of the components of the total charge attributable to the cellular service and the Internet access service based on objective, reasonable and verifiable standards. *In this instance, the home service provider is only required to collect and pay over sales tax that is attributable to the receipts associated with the cellular service*. The portion of the receipt attributable to the Internet access service is excluded from taxation. (2002 TSB-M at 3-4) (emphasis added).

43. Unbundling cannot be used to avoid sales tax on a component service that the state or local government has chosen to tax; it can only be used to separate non-taxable services from taxable ones. A wireless carrier cannot, under the guise of unbundling, avoid sales tax on a taxable service. Because New York law treats fixed monthly charges for wireless voice services as a single, irreducible, taxable service that cannot be broken out for sales tax purposes, Sprint violated the law by failing to collect and pay New York state and local sales taxes on the full amount of the charges.

III. Sprint's Decision to "Unbundle" Its Plans Nationwide

44. Beginning in July 2005, Sprint began to implement a nationwide program of unbundling its wireless offerings for sales tax purposes. As part of this program, it began treating part of its fixed monthly access charges for wireless voice services as if they were charges for "interstate" calls charged on a per-minute basis, and, in states like New York, not collecting and paying sales taxes on that part. The fixed monthly charges for access to Sprint's network, however, were and are not taxable in the same way as per-minute usage charges.

45. Internally, Sprint acknowledged that its approach to unbundling in this way was aggressive and risky because tax authorities throughout the country could object to the practice. However, it served Sprint's interest of gaining a competitive advantage by having uniquely low sales tax collections, and thus low overall billing for its plans.

46. Under New York law, Sprint's approach was and is unequivocally illegal.

A. Sprint's Decision to Unbundle Its Plans Nationwide to Gain a Competitive Advantage

47. From the outset, Sprint's decision to unbundle its calling plans nationwide was driven by its desire to gain an advantage over its competitors by reducing the amount of sales

taxes it collected from its customers and, thereby, appearing to be a low-cost carrier while reducing revenues for state and local governments and not reducing its own revenues.

48. Before 2002, Sprint began to consider unbundling its flat-rate plans that included wireless voice services. Responsibility for implementing the plan fell to Sprint's business unit called the State and Local Tax Group. This group was and is headed by a Sprint Assistant Vice President who reports to Sprint's Vice President of Tax, who, in turn, reports to Sprint's Chief Financial Officer. In 2005, the group had 108 permanent employees. It also had resources that gave it ready access to tax laws, guidance and other materials to aid in the analysis and understanding of Sprint's state and local sales tax obligations, including its obligations under the New York Tax Law.

49. Initially, Sprint did not recognize the financial benefit of component taxation. One Sprint employee reported that Sprint had earlier considered unbundling Internet access from combined Internet/voice plans, but "the project was scrapped because there wasn't enough bang for the buck."

50. By 2002, Sprint came to realize, however, that if it collected less in sales taxes than its competitors by deeming part of its fixed monthly charges to be non-taxable, it could effectively lower the cost of its service as compared with its competitors, without hurting its own bottom line, and thereby obtain a competitive advantage.

51. On or about May 15, 2002, a member of Sprint's State and Local Tax Group prepared Sprint's "business case" for component taxation. The business case stated that unbundling would "provide a competitive advantage over wireless carriers who aren't able to perform component taxing."

52. To further its plan, Sprint encouraged its competitors to take a conservative path and be open and transparent with regulators with regard to component taxation, while Sprint quietly took another path. Also in 2002, the head of Sprint's State and Local Tax Group warned other companies at a Communications Tax Executive Conference at Vail, Colorado that unbundling posed risks of audits by taxing authorities and litigation, and that they should protect themselves from these risks by entering into agreements with taxing authorities or by seeking clarifying legislation before they began to unbundle. Sprint itself did not seek out any such agreements with taxing authorities in New York, nor did it seek additional legislation in New York.

53. In 2003, Sprint's Senior State and Local Tax Counsel presented to another industry group – the Wireless Tax Group – about "Sprint's Bundling Experience." He told other wireless carriers that "unbundling for taxes causes significant assessment risk." He told the group that his "marching orders" at Sprint were to "mitigate tax issues by pursuing legislation or pre-audit agreements that allow for component taxing."

54. Sprint did not follow those "marching orders" in New York.

55. Around the time Sprint was advising competitors how they should approach component taxation, Sprint conducted competitive surveillance, and learned that other major wireless carriers were working to unbundle by breaking out charges for Internet access from charges for wireless voice services, but were not seeking to break out their charges for wireless voice services into smaller portions for sales tax purposes.

56. By September 2004, Sprint was refining its consideration of how to approach unbundling and component taxation. One approach, which Sprint identified as "conservative,"

involved unbundling only Internet access from voice services. This was the approach to component taxation that Sprint understood some its competitors were pursuing.

57. Another approach, which Sprint viewed as aggressive and risky, and which would allow Sprint to be a "low cost tax leader in the wireless industry," involved unbundling "interstate usage" from within its fixed monthly charge for wireless voice services. Because the fixed monthly charge is not divisible based on customer usage, unbundling in this way required Sprint to come up with an arbitrary method of allocating the charge into sub-parts.

58. At the time Sprint was considering these approaches to component taxation, the majority of Sprint's revenue from its wireless plans was coming from its fixed monthly charges for wireless voice services. Treating some portion of these charges as "interstate usage" presented the greatest opportunity for Sprint to reduce its collection of taxes, and improve its competitive standing nationwide because many states, including New York, do not charge sales taxes on receipts from charges for interstate calls billed on a per-minute basis.

59. An internal Sprint analysis from January 2005 showed that, if Sprint unbundled only its Internet access charges, it would reduce sales taxes by about $623,000 per month. The analysis further revealed that if Sprint also broke out charges for wireless voice services into what it deemed taxable and non-taxable categories, it would reduce sales taxes by an additional $4.6 million per month. Thus, if competitors were breaking out only Internet access charges, Sprint concluded that its plans would be about $4.6 million per month cheaper, collectively, than competitors' plans by paying less money to the government, without any cost to Sprint.

60. In early 2005, Sprint's Assistant Vice President of State and Local Tax, its Director of External Tax, and other Sprint employees met and decided to recommend to more senior Sprint executives that the company adopt the aggressive approach to unbundling that

included breaking out its fixed monthly charge for wireless voice services and treating part of the charge as if it were for interstate usage billable on a per-minute basis.

61. The senior executives authorized that approach.

62. Sprint made its decision to break out its fixed monthly charges for voice services before it completed the merger with Nextel Corporation in August of 2005. After the merger was complete, Sprint used the same approach to unbundling plans sold by Nextel, and justified this approach internally by citing to the competitive advantage it would achieve by unbundling in the same way as the pre-merger Sprint plans. It described the "quantitative impact" of the move as "decreas[ing] churn," and described a "key benefit" as "lower churn." "Churn" is a measure used within the telecom industry to refer to the loss of subscribers. A low churn rate is favorable to a wireless carrier. Sprint and other telecom carriers publicly disclose their churn rates, and analysts and investors closely monitor churn. Sprint incentivizes its employees to lower churn by increasing employee bonuses when Sprint's churn rate declines.

63. Other major wireless carriers, unlike Sprint, did not break their fixed monthly charges for wireless voice services into subparts for sales tax purposes.

64. In New York alone, by under-collecting and under-paying New York state and local sales taxes, Sprint plans were made $100 million less expensive than its competitors' plans from mid-2005 to the present.

B. Sprint Classifies Arbitrary Percentages of Its Fixed Monthly Charges as Non-Taxable

65. Sprint used data systems to generate its customer invoices and to create its sales tax filings. It could accurately collect and pay taxes only if it used the categories within the systems appropriately. One of the systems allows Sprint to break out its charges into various taxing categories, and contains settings that will cause the system to treat charges placed in a

category as “taxable” or “non-taxable” for any given taxing jurisdiction. The vendor for this taxing system provided Sprint with these taxable and non-taxable decisions for each tax category, and Sprint reviewed these taxability decisions. Where Sprint disagreed with the vendor, it overrode the vendor's taxability decisions.

66. Before starting to unbundle its wireless calling plans, Sprint used the taxing system by classifying the full amount of its fixed monthly access charges for wireless voice services as “network access.” “Network access” is defined in the system's reference manual as “a charge to have access to a cellular or paging network.” Sprint's fixed monthly charges for wireless voice services were just such charges.

67. Once Sprint began its unbundling program, however, it did not use the taxing system for purposes of collecting and paying sales taxes in the way it was designed. While the system was set up to treat the full amount of a fixed monthly charge for wireless voice services as “network access,” Sprint manipulated the system by classifying part of the charge as being in a category called “usage airtime: interstate,” which was set up and used by Sprint to be non-taxable in New York.

68. The taxing system’s category for “usage airtime: interstate” was not set up to capture parts of a fixed periodic charge, but rather to capture per-minute usage charges – such as overage charges – that were for interstate calls. The reference manual for the data system defined “usage (or airtime) charges” as “per minute charges for using a wireless network.” The portion of its fixed monthly charges that Sprint classified as “usage airtime: interstate” did not represent such per-minute usage charges.

69. The taxing system's vendor considered charges for “usage airtime: interstate” (as the system defined it) to be non-taxable for purposes of New York state and local sales taxes and

set up the system to reflect that fact. Sprint knew of that non-taxable setting and did not change it, even though it knew that it was not using this category for its intended purpose.

C. Sprint's Allocations Between Taxable and Non-Taxable Categories Were Arbitrary

70. The percentage figures that Sprint used in dividing up its fixed monthly charges for wireless voice services between the "network access" and "usage airtime: interstate" categories varied by calling plan and over time in an arbitrary and inconsistent manner.

71. For its Sprint Spectrum plans, from July 2005 to October 2008, Sprint classified 28.5% of its fixed monthly charges for wireless voice services as "airtime usage: interstate." For its Nextel of New York plans, from about April 2006 through October 2008, it classified 13.7% as "airtime usage: interstate." For its Nextel Partners of Upstate New York plans, from about May 2006 to October 2008, Sprint represents, without support, that it classified 15% as "airtime usage: interstate." For all of its plans, since October 2008 until the present, it has classified 22.5% as "airtime usage: interstate."

72. For example, Sprint would have applied New York sales taxes to a Sprint Spectrum plan with a $39.99 fixed monthly charge for access to Sprint's network for 450 minutes of calling time in August of 2006 as follows: It would have classified 28.5%, or $11.40, as "usage airtime: interstate" and not paid New York state and local sales taxes on it. It would have classified the remaining $28.59 as "network access" and paid taxes only on that part.

73. In deciding to use these various percentages, Sprint did not apply values for the wireless network access it was providing to its New York customers, or any other customers around the country. It also did not apply values for the minutes that New York or other customers actually used for interstate calls or intrastate calls, or values for the minutes that were not used but were available under the plans.

74. Instead, these allocations of Sprint's fixed monthly charges were arbitrary. At times, for example, Sprint calculated a percentage for “interstate usage” from an unrelated federal telecommunications surcharge, but Sprint did not use that same percentage in calculating its obligations for that federal surcharge, nor did Sprint modify how it allocated its charges for sales tax purposes when the federal government changed the percentage.

75. Even though Sprint has set up its system this way, it has not consistently adhered to its percentage allocations. For some of its plans for certain periods of time, Sprint cannot tell what it taxed or why, and it lacks records reflecting its method of determining sales taxes in New York and elsewhere. For example, Sprint lacks data that could show how it broke out its fixed monthly charges for voice services offered under plans sold by Nextel Partners (including plans sold by Nextel Partners of Upstate New York).

76. Sprint also took action to conceal that it failed, at times, to apply its own percentage allocations as it intended. It knew that disclosure would likely meet with resistance from taxing authorities nationwide and present the company with an increased nationwide audit risk.

77. For example, by 2009, Sprint had discovered that, for certain plans sold around the country, including in New York, it had failed to break out its fixed monthly charges for wireless voice services and treat part as non-taxable. In other words, Sprint discovered that it did not adhere completely to its own unbundling program, and therefore accidentally collected and paid the correct amount of sales taxes on a number of its plans. As a result, Sprint collected and paid about $30 million in taxes from its customers around the nation that it had not intended to collect or pay.

78. Once Sprint discovered this issue, employees not familiar with the nature of Sprint's unbundling suggested that Sprint seek a refund from taxing authorities of this $30 million "overpayment" on behalf of its customers. This idea was promptly rejected by higher level Sprint tax employees who understood the importance of concealing both Sprint's unbundling practices and the state of its record keeping. Sprint's Director of Telecom Tax wrote in an e-mail: "My 2 cents worth is that, based on what [another Sprint employee] has laid out here, I don't think we should [seek a refund] - i.e., we can't change our books and records after the fact to support a refund." Sprint's Senior State Tax Counsel then added to the discussion that "Sprint is already taking some risk with unbundling. Our risks are exponentially increased if we try to pursue refunds when we didn't jump through the hoops on unbundling." After this internal consideration, Sprint did not seek refunds, nor did it notify consumers of the issue.

IV. Sprint's Avoidance of Over $100 Million in New York Sales Taxes

79. Sprint has not collected and paid state and local sales taxes required by New York law because it excluded about a quarter of its fixed monthly charges to New York customers for wireless voice services from its calculation of New York sales taxes.

80. From July 2005 through the present day, Sprint has treated that excluded portion of the monthly charges as if it were not part of a fixed periodic charge for gaining access to Sprint's wireless network for a set number of minutes of calling time, which is what it was. Instead, Sprint inaccurately treated it as if it were a charge for per-minute usage for interstate calls and did not pay sales taxes on it in New York (and elsewhere) because per-minute usage charges for interstate calls are not subject to New York state and local sales taxes.

81. Based on Sprint's approach, the three taxpayer defendant entities did not pay New York state and local sales taxes as follows:

a. For flat-rate plans sold by defendant Sprint Spectrum L.P., Sprint did not collect or pay New York state and local sales taxes on 28.5% of its fixed monthly charges for wireless voice services, from July 2005 until October 2008.

b. For flat-rate plans sold by defendant Nextel of New York, Inc., Sprint did not collect or pay New York state and local sales taxes on 13.7% of its fixed monthly charges for wireless voice services, from about April 2006 through October 2008.

c. For flat-rate plans sold by defendant Nextel Partners of Upstate New York, Inc., Sprint did not collect or pay New York state and local sales taxes on an amount that Sprint cannot confirm, but has represented as being 15% of its fixed monthly charges for wireless voice services, from about May 2006 through October 2008.

d. For flat-rate plans sold by all three of these companies, from October 2008 to the present, Sprint has not collected or paid New York state and local sales taxes on 22.5% of its fixed monthly charges for wireless voice services.

82. As a result of Sprint's treatment of its fixed monthly charges for voice services, Sprint deprived New York state and local governments of more than $100 million of tax revenue.

83. Under the New York Tax Law, such underpayments are also subject to interest, currently at an annual rate of 14.5%, and penalties of double the amount of fraudulent underpayments or up to 30% of other underpayments.

84. The amounts of Sprint's under-collection and underpayment of taxes continues to grow. Sprint still does not collect and pay New York state and local sales taxes on the full amount of its fixed monthly charges for voice services.

V. Sprint Knew It Was Violating Its New York Sales Tax Obligations

85. At the time Sprint made the decisions to unbundle its flat-rate plans and to treat a part of its fixed monthly charges for wireless voice services as non-taxable in New York, and at all times since, Sprint was fully aware of the New York Tax Law provisions concerning its obligation to pay sales taxes with respect to fixed monthly charges for wireless voice services.

86. In 2002, when amendments to the New York Tax Law were under consideration with respect to telecommunications sales taxes, Sprint was part of an industry group that actively lobbied for the law to match its interests. As part of these lobbying efforts, an internal lobbyist at Sprint, together with other industry representatives, met with representatives of the New York Tax Department shortly before the May 29, 2002 enactment of the amendments, in an effort to influence the legislation.

87. In connection with these lobbying efforts, Sprint reviewed the pending legislation.

88. Sprint's lobbyists were also in communication with the New York Tax Department concerning the guidance the Department issued just before the sales tax law amendments became effective. An outside lobbyist for Sprint obtained a copy of the draft of the 2002 TSB-M from the New York Tax Department and then forwarded it to Sprint's internal lobbyist, who then forwarded it to the leaders of Sprint's internal State and Local Tax Group. According to the internal lobbyist, Sprint was being given an opportunity to comment on the TSB-M. Sprint reviewed the draft of the 2002 TSB-M. The draft was in all material respects the same as the final version of the 2002 TSB-M issued on July 30, 2002.

89. By July 2005, when Sprint began to implement its decision not to pay New York sales taxes on the full amount of its fixed monthly charges to New York customers for wireless voice services, Sprint had reviewed New York sales tax law, including New York Tax Law

Sections 1105(b) and 1111(*l*). Similarly, it made the decision only after reviewing the guidance from the New York Tax Department in the 2002 TSB-M.

90. Sprint's Senior State and Local Tax Counsel, who was charged with understanding state and local tax law, when asked "how many times would you say you have read [the relevant New York tax law]," including Section 1105(b), testified "a hundred or more."

91. Sprint did not seek, and has not sought, any guidance from the New York Tax Department about the application of the 2002 amendments or other New York law concerning sales taxes on the fixed monthly charges for wireless voice services or other bundled mobile telecommunications products. It chose not to despite the fact that the New York Tax Department routinely provides such guidance to taxpayers and that Sprint has, in the past, consulted with the New York Tax Department on other tax matters.

92. While it considered how to unbundle its flat-rate plans, Sprint did not seek or obtain any advice from outside attorneys or others outside the company with respect to its New York sales tax obligations concerning its fixed monthly charges for wireless voice services.

93. Internally, Sprint did not prepare any memoranda or other documents analyzing these obligations.

94. Sprint continues to not collect and pay New York state and local sales taxes on the full amount of its receipts from its fixed monthly charges for wireless voice services, despite being specifically informed of the illegality of this practice by a field-auditor of the New York Tax Department in 2009, and then, in 2011, by a senior enforcement official of the New York Tax Department.

VI. Sprint's Knowingly False Records and Statements

95. Sprint has repeatedly caused to be made false records and statements material to its obligations to collect and pay New York sales taxes on the full amount of the fixed monthly charges it received from New York customers for wireless voice services.

96. Since it began its unbundling program, Sprint has submitted to the New York Tax Department each month tax forms – including Forms ST 809, ST 810 and Schedule T – that have purported to spell out the amount of sales taxes due to be paid by Sprint to the New York State and local governments. The sales tax submissions are made separately for defendants Sprint Spectrum L.P., Nextel of New York, Inc. and Nextel Partners of Upstate New York, Inc. All of these sales tax submissions are prepared and submitted centrally by employees of Sprint Nextel Corporation.

97. Each and every one of the submitted tax forms, for all periods since Sprint began its unbundling program has been false in that not one states the accurate amount of sales taxes due. Instead, these statements understate the taxes due because Sprint illegally and fraudulently failed to apply sales taxes to the part of its fixed monthly charges that it internally chose to classify as non-taxable "usage airtime: interstate" in its data systems.

98. At the time Sprint submitted each of these tax forms and made these false statements as to each of the various taxing jurisdictions, it had actual knowledge of what was required by New York sales tax law, that it was not paying state and local sales taxes on its full fixed monthly charges for wireless voice services, and that such breaking out of the fixed monthly charges was not permitted under New York tax law. Sprint thus knew that its repeated statements of the sales taxes it owed were false because they severely understated the tax due.

At a minimum, Sprint acted in deliberate ignorance of the truth or falsity of the information it included in its sales tax filings or it recklessly disregarded the truth or falsity of the information.

99. Each of Sprint's New York sales tax filings and each of its representations to the various taxing authorities within the State was material to the obligation of Sprint to pay the correct amount of sales taxes for the tax period represented by each filing.

100. Each of Sprint's New York sales tax filings and each of its representations to the various taxing authorities within the State was also material to Sprint's obligation to pay its total past underpayment of the sales taxes. Each filing continued to conceal (a) the existence of the underpayment in past periods, and (b) Sprint's ongoing and continuing conduct of submitting false tax filings. Each filing was a false record and statement that ensured that the taxing authorities of the state and local governments would not know of the underpayment and therefore would not seek to collect the moneys owed.

101. When Sprint made each of its New York sales tax filings and the separate representations in them for each taxing jurisdiction, Sprint made it less likely that the state or local governments would know about, or collect, or attempt to collect or receive any payment of Sprint's obligation to pay the total underpayment that had accumulated at that time.

VII. Sprint Misled Its New York Customers That It Was Collecting and Paying All Applicable Sales Taxes

102. Sprint also misled its New York customers.

103. From July 2005 until the present, Sprint has had over three million customers in New York who purchased flat-rate calling plans. It currently has about 1.82 million such customers.

104. These customers have entered into contracts with Sprint to purchase their plans, and they were locked into these plans for one or two years by early termination fees that Sprint would charge customers who terminated their plans before the contract period was over.

105. In its contracts with these customers, on its website and elsewhere, Sprint represented that it would collect and pay all applicable sales taxes on its calling plans. As described above, however, it did not do so. Sprint's representations in the contracts, on its website and elsewhere were false because Sprint knew it would not collect and pay the applicable sales taxes in New York.

106. Contrary to its promises, Sprint failed to collect and pay sales taxes on substantial portions of the fixed monthly charges for voice services under its flat-rate calling plans. As a result of this non-payment, Sprint left its New York customers liable for those unpaid amounts of sales taxes under New York law.

107. At no point did Sprint disclose to its New York customers that it was leaving them liable for the sales taxes that Sprint failed to collect from the customers and pay to the government, as promised.

108. Before Sprint began unbundling, members of its State and Local Tax Group and its marketing group considered in the early part of July 2005 whether to communicate with customers about the fact that Sprint was unbundling and that the unbundling would affect taxes for some customers. They jointly opted not to communicate the change. Sprint's Director of External Tax was concerned that disclosing the information would “drive too many calls” to Sprint’s customer care division.

109. In November 2005, just months after Sprint began unbundling, a Sprint employee in the Customer Billing Services department questioned a member of Sprint’s State and Local

Tax Group about whether unbundling was "presented to the customer as part of the Subscriber agreement, shown in the invoice and/or available to Customer Care Rep." The response was simply that "we have not educated our customers on how we are de-bundling transactions for their tax relief."

110. Sprint continues to misinform its current and prospective customers about sales taxes, and to subject them to undisclosed sales tax liability even today.

FIRST CAUSE OF ACTION

New York False Claims Act – State Fin. Law § 189(1)(g)

111. Plaintiff repeats and re-alleges paragraphs 1 through 110 as if fully set forth herein.

112. Defendants violated State Finance Law § 189(1)(g) in that they knowingly made, used, or caused to be made or used, false records or statements material to an obligation to pay or transmit money or property to the state and local governments.

113. The thresholds set forth in State Finance Law § 189(4)(i) and (ii) are satisfied because Sprint and the other defendants have net income or sales in excess of one million dollars for any taxable year subject to this action, and the damages pleaded exceed three hundred and fifty thousand dollars.

SECOND CAUSE OF ACTION

New York False Claims Act – State Fin. Law § 189(1)(c)

114. Plaintiff repeats and re-alleges paragraphs 1 through 110 as if fully set forth herein.

115. Defendants violated State Finance Law § 189(1)(c) in that they conspired to commit a violation of State Finance Law § 189(1)(g).

116. The thresholds set forth in State Finance Law § 189(4)(i) and (ii) are satisfied because Sprint and the other defendants have net income or sales in excess of one million dollars for any taxable year subject to this action, and the damages pleaded exceed three hundred and fifty thousand dollars.

THIRD CAUSE OF ACTION

Persistent Fraud or Illegality – Executive Law § 63(12)

117. Plaintiff repeats and re-alleges paragraphs 1 through 110 as if fully set forth herein.

118. The acts and practices alleged herein constitute conduct proscribed by § 63(12) of the Executive Law, in that defendants engaged in repeated fraudulent or illegal acts or otherwise demonstrated persistent fraud or illegality in the carrying on, conducting or transaction of business.

119. Specifically, as described in the foregoing paragraphs, defendant repeatedly engaged in the fraudulent and illegal acts of failing to collect and pay sales taxes due and owing and submitting false sales tax filings to the New York Department of Taxation & Finance in violation of New York State Tax Law § 1105, and as such is liable for the underpayment of taxes, interest thereon provided for in the New York Tax Law, and penalties provided for in the tax law, including, but not limited to, the penalties applicable where taxpayers fraudulently fail to pay taxes due.

FOURTH CAUSE OF ACTION

Violation of Article 28 of the Tax Law

120. Plaintiff repeats and re-alleges paragraphs 1 through 110 as if fully set forth herein.

121. The acts and practices alleged herein constitute conduct proscribed by Article 28 of the Tax Law. Defendants, who were required to collect sales taxes, failed to collect and pay over sales taxes, penalties and interest imposed by said Article.

122. The Tax Commissioner has requested that the Attorney General bring or cause to be brought this action to enforce Article 28 against Sprint for the conduct alleged herein.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff demands and prays that judgment be entered against defendants Sprint Nextel Corp., Sprint Spectrum L.P., Nextel of New York, Inc., and Nextel Partners of Upstate New York, Inc. as follow:

A. Declaring, pursuant to CPLR § 3001, that defendants' practices and conduct have violated Tax Law § 1105, State Finance Law §187, *et seq*., and Executive Law § 63(12);

B. Enjoining and restraining defendants from engaging in any conduct, conspiracy, contract, or agreement, and from adopting or following any practice, plan, program, scheme, artifice or device similar to, or having a purpose and effect similar to, the conduct complained of above;

C. Directing that defendants, pursuant to the New York False Claims Act, State Finance Law §§ 187, *et seq.,* pay an amount equal to three times the amount of damages sustained as a result of defendant's violations of the New York False Claims Act;

D. Directing that defendants, pursuant to the State Finance Law §§ 187, *et seq.*, pay penalties of not less than $6,000 and not more than $12,000 for each violation of State Finance Law §189;

E. Directing defendants to pay all damages caused by the fraudulent and deceptive acts and practices alleged herein, including all sales taxes due and owing, plus applicable interest

and penalties under the New York Tax Law, to all injured persons or entities, including those not identified at the time of the order;

F. Restraining defendants from enforcing any early termination fee provisions in effect in their contracts with customers in New York;

G. Awarding plaintiff costs of $2,000 against each defendant pursuant to CPLR § 8303(a)(6);

H. Directing that defendants pay plaintiff's costs, including attorneys' fees as provided by law;

I. Directing such other equitable relief as may be necessary to redress defendants' violation of New York law; and

J. Granting such other and further relief as the Court deems just and proper.

DATED: New York, New York
April 19, 2012

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Plaintiff the State of New York's Memorandum of Law in Opposition to Sprint's Motion to Dismiss, dated July 19, 2012 [pp. 89 - 119]

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

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,

Plaintiff,

v.

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

Defendants.

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Oral Argument Requested

INDEX NO. 103917-2011
(Sherwood, J.)

Motion #006

PLAINTIFF THE STATE OF NEW YORK'S MEMORANDUM OF LAW IN OPPOSITION TO SPRINT'S MOTION TO DISMISS

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July 19, 2012

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The State of New York ("State" or "Plaintiff") submits this memorandum in opposition to Sprint's motion to dismiss the Superseding Complaint ("Compl.").[1]

PRELIMINARY STATEMENT

Sprint knowingly filed false tax returns and failed to pay over $100 million in sales taxes unambiguously imposed by New York law. As detailed in the Complaint, Sprint began underpaying sales taxes in New York in the course of a nationwide scheme to reduce the sales taxes it collected from its customers in order to gain a competitive advantage. Sprint pursued this scheme knowing it was illegal in New York and even after New York tax authorities expressly informed Sprint that its scheme violated the law. The Attorney General took over the whistleblower's original suit against Sprint under the False Claims Act to hold Sprint accountable for this persistent, knowing, and reckless disregard of the tax law.

In its motion to dismiss, Sprint asks the Court to authoritatively construe the New York Tax Law in a way that directly conflicts with the plain language of the statute, the legislative history, the tax authority's published guidance, and the decade-long practice of every other major mobile carrier doing business in the State of New York. Sprint's position is not that the tax law is ambiguous, but that Sprint is right and everyone else is wrong.

Sprint's interpretation of the New York tax law at issue, as set forth in its motion to dismiss, is not only wrong, it is patently unreasonable. Sprint is trying to create in litigation what it failed to create over the last seven years: some plausible justification for its decision to grossly underpay New York State sales taxes. In the course of the Attorney General's year-long False Claims Act investigation, Sprint could not produce any evidence that it was acting in good faith

[1] "Sprint" refers collectively to the four inter-related defendants.

when it repeatedly underpaid its taxes, or even that it was following the unreasonable interpretation of the law it now espouses.

The Attorney General has proceeded with this suit under the False Claims Act, in addition to pursuing claims under the Tax Law and the Executive Law, because his investigation revealed that Sprint not only got the law wrong, it did so knowingly and in reckless disregard or deliberate ignorance of the truth. Sprint is a sophisticated player in the mobile industry that decided to ignore a New York sales tax law that conflicted with its aggressive nationwide scheme to collect less in sales taxes than its competitors in order to gain an advantage in the marketplace. Rather than seek an advisory opinion from the tax authority or an amendment to the law, Sprint quietly played tax roulette. It continued its gamble even despite clear statements from the tax authority about the meaning of the law. The False Claims Act was designed to combat exactly this conduct. Sprint's motion to dismiss is a transparent attempt to avoid confronting the legal and factual issues presented in the Attorney General's detailed, well-pled complaint. Sprint's motion must be denied.

BACKGROUND

From at least 2002 to the present, Sprint has sold New York customers mobile calling plans that provide voice services in exchange for a fixed monthly charge (*e.g.* $49.99 per month for 450 minutes of calling time). Compl. ¶¶ 20, 48, 50. The charge is made regardless of whether the customer actually uses Sprint's network during the month, how many of the available minutes are used, or whether calls are made to people within the same state (intrastate) or to people in other states (interstate). *Id.* ¶ 21. Accordingly, the charge pays for access to Sprint's calling network, not specific calls, and Sprint identifies this charge on customer invoices as a "monthly recurring *access* charge." *Id.* ¶ 22 (emphasis added).

In 2002, paragraph (b)(2) was added to section 1105 of the New York Tax Law. *Id*. ¶ 32. The paragraph explicitly requires the collection of sales tax on the full amount of receipts from fixed monthly charges for mobile voice services. *Id*. ¶¶ 32-33. Sprint learned of this pending legislation before it was enacted, and it met with the New York State Department of Taxation & Finance (the "Tax Department") in an effort to influence the legislation. *Id*. ¶¶ 86-87. Sprint's tax personnel also received and reviewed a draft of the Tax Department's guidance about the amendments, Technical Services Bureau Memorandum, N.Y. St. Dep't Tax. & Fin. Tech. Mem. No. TSB-M-O2(4)C, (6)S (July 30, 2002) (the "2002 TSB-M"), that was issued shortly before their effective date. *Id*. ¶ 88. The guidance stated that (b)(2) levied tax on the full amount of the fixed periodic charge. *Id*. ¶¶ 34, 42.

Also in 2002, Sprint started to consider "unbundling" its flat rate plans that sold both (taxable) voice and (non-taxable) Internet services for a single fixed monthly charge. *Id*. ¶¶ 48, 56. Unbundling allows a carrier to avoid collecting sales taxes on services – *e.g.* Internet services – that New York does not tax. *Id*. ¶ 40.

Although Sprint encouraged its competitors to take a more conservative path to unbundling, it took a more aggressive approach. *Id*. ¶¶ 45, 52, 60-61. For example, Sprint's senior tax counsel warned a mobile industry group in 2003 that "unbundling for taxes causes significant assessment risk," and that his "marching orders" at Sprint were to "mitigate tax issues by pursuing legislation or pre-audit agreements that allow for component taxing." *Id*. ¶ 53. Sprint did not follow its own "marching orders" in New York, but determined it could effectively lower its prices at government expense. *Id*. ¶¶ 54, 58. Between late 2004 and 2005, Sprint determined that if it unilaterally deemed part of its fixed monthly charge for voice services to be non-taxable "interstate usage," its plans would be $4.6 million cheaper per month than

competitors'. *Id*. ¶ 59. Internally, Sprint acknowledged that this was a "risky" and "aggressive" approach. *Id*. ¶¶ 45, 57. Nevertheless, it never consulted the Tax Department or outside attorneys for guidance. *Id*. ¶¶ 52, 92. Sprint's senior management approved the "risky" approach in early 2005. *Id*. ¶¶ 61-62.

In July 2005, Sprint proceeded not to pay New York sales taxes on an arbitrary portion of its fixed monthly charges for voice services it deemed to be "interstate." *Id*. ¶¶ 70-72. To do this, Sprint manipulated its taxing data systems and misclassified a portion of its (taxable) charges for fixed monthly mobile voice services as charges for (non-taxable) per-minute interstate phone calls. *Id*. ¶¶ 65-68.

Sprint's allocations between these taxable and non-taxable categories not only ignored § 1105(b)(2), but also were arbitrary, because they were not related to any customer's actual interstate usage. *Id*. ¶¶ 70, 73. Its inconsistent allocations of fixed periodic charges as charges for per-minute interstate phone calls ranged from 13.7% to 28.5% across a range of Sprint's plans. *Id*. ¶ 81. For some of its plans for certain periods of time, Sprint cannot tell what it taxed or why, and it lacks records reflecting its method of determining sales taxes in New York and elsewhere. *Id*. ¶ 75.

Sprint also took efforts to conceal this scheme. *Id*. ¶ 76. For example, in 2009, Sprint discovered that for certain calling plans, it had failed to break out its fixed monthly charges for mobile voice services, and unintentionally collected and paid about $30 million in sales tax. *Id*. ¶ 77. Sprint's higher-level tax employees warned against seeking refunds for this amount because it would tip off taxing authorities to Sprint's illegal scheme. *Id*. ¶ 78. As Sprint's senior tax counsel explained in an internal e-mail, "Sprint is already taking some risk with unbundling. Our risks are exponentially increased if we try to pursue refunds when we didn't jump through

the hoops on unbundling." *Id.*

Sprint was specifically informed of the illegality of its scheme by a Tax Department field-auditor in 2009, and again by a Tax Department senior enforcement official in 2011. *Id.* ¶ 94. Nevertheless, Sprint continued its scheme to not collect and not pay sales tax on the full amount of receipts from its fixed periodic charges for mobile voice services. *Id.* Sprint is still not following the law. *Id.*

ARGUMENT

When deciding a motion to dismiss, courts must i) accept all the facts alleged in the complaint as true, ii) provide the plaintiff the benefit of every possible favorable inference, and iii) only determine whether the facts as alleged within the four corners of the complaint fit within any cognizable legal theory. *511 West 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 152 (2002). The Complaint more than adequately states claims under the New York False Claims Act, N.Y. State Fin. Law §§ 187-194 (the "FCA"), New York Tax Law § 1105(b)(2), and Executive Law § 63(12). Sprint's motion to dismiss should be denied.

I. THE COMPLAINT STATES A CLAIM UNDER THE FALSE CLAIMS ACT.

The Complaint states a claim under Section 189(1)(g) of the New York False Claims Act.[2] The FCA is a broadly applicable, remedial statute designed to combat false and fraudulent conduct victimizing State and local governments. Section 189(1)(g) prohibits "knowingly mak[ing], us[ing], or caus[ing] to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the state or a local government." N.Y. State Fin. Law § 189(1)(g). The FCA was amended effective August 2010 to apply explicitly to

[2] If Sprint is agreeing that Sprint Nextel Corporation is liable for the conduct of all three of its wholly-owned subsidiaries named in the Complaint, then the conspiracy claim under FCA § 189(1)(c) is duplicative of the State's claim under § 189(1)(g), and can be subsumed therein. If liability for the subsidiaries is not imputed to the parent, then there is no basis for Sprint's argument that a conspiracy claim does not apply (D. Mem. 23), and the Complaint states a claim under State Fin. Law § 189(1)(c) for the reasons set forth within I.A-I.B.

knowing violations of the New York Tax Law. That provision addresses exactly the type of conduct Sprint engaged in here—a large-scale scheme to illegally avoid tax, costing the State and its taxpayers millions of dollars.

In its 30-page Complaint, the State lays out how Sprint violated § 189(1)(g) by repeatedly submitting sales tax filings that were false and that Sprint knew to be false. The 122 paragraphs in the Complaint explain in detail how Sprint executed its illegal tax avoidance scheme by arbitrarily deeming between 13.5% and 28.5% of its receipts from fixed monthly charges for its mobile voice services to be non-taxable "interstate usage" (Compl. ¶¶ 70-74), and manipulating its data systems to prevent the application of sales taxes to the purported "interstate usage" portion of its receipts. *Id*. ¶¶ 65-69. These same 122 paragraphs also demonstrate that Sprint knew at all times that its tax avoidance scheme was illegal. *Id*. ¶¶ 45, 51-57, 65-69, 76-78, 85-101.

In its motion, Sprint does not question that it made the monthly and quarterly sales tax filings, and that it paid New York sales taxes on only part of its receipts from fixed monthly charges for its mobile voice services. Instead, Sprint argues that (i) its filings were not "false" under an implausible interpretation of the New York Tax Law, (ii) it did not act "knowingly" in filing false returns, and (iii) the *Ex Post Facto* Clause bars the FCA's application to tax filings made prior to the 2010 FCA amendment. D. Mem. 17-18, 21. Sprint's arguments are unavailing and do not warrant dismissal of the State's FCA claim.

A. Sprint's Sales Tax Filings Are False Records and Statements.

From 2005 to present, Sprint has submitted sales tax filings each month and quarter that grossly understate the amount of sales tax it owes under New York Tax Law § 1105(b)(2) on its

fixed monthly charges for mobile voice services. Compl. ¶¶ 95-97. Thus, Sprint's sales tax filings are false statements and records under the FCA.

In its motion Sprint argues that its sales tax filings are not false because § 1105(b)(2) does not require collection and payment of sales tax on the *full* amount of its fixed monthly charges for mobile voice services, claiming that sales tax does not apply to any portion of the charges Sprint characterizes as being for "interstate" voice services. D. Mem. 10. Sprint's argument is meritless. Section 1105(b)(2) unequivocally requires the collection and payment of sales tax on the full amount of fixed monthly charges for mobile voice services. This is clear first and foremost from the plain language of section 1105(b)(2). Legislative history and guidance released by the Tax Department at the time of the statute's amendment affirm this plain language reading of the statute. The requirements of Section 1105(b)(2) were also clear to all of Sprint's major mobile competitors. Verizon, AT&T, T-Mobile and MetroPCS have all applied the tax to the full fixed periodic charge for voice services. Compl. ¶ 7. Sprint alone does not.

1. <u>The Complaint Is Based Upon the Plain and Consistent Reading of the Tax Law.</u>

The plain text of § 1105(b) is unambiguous.[3] When construing a "tax statute," the words of the statute "are to be construed in favor of a taxpayer *only* when there is a legitimate ambiguity; otherwise they are to be given their plain meaning." *RVA Trucking, Inc. v. State Tax Comm'n*, 135 A.D.2d 938, 938-39 (3d Dep't 1987) (emphasis added) (internal citation omitted). "Where the language of a tax statute is unambiguous, it should be construed so as to give effect to the plain meaning of the words used." *New York State Ass'n of Counties v. Axelrod*, 213 A.D.2d 18, 24 (3d Dep't 1995) (citing *1605 Book Ctr. v. Tax Appeals Tribunal*, 609 N.Y.S.2d 144, 146 (1994)).

[3] Sprint cites to cases for the proposition that ambiguous tax statutes should generally be construed in favor of taxpayers (D. Mem. 6), but here, Sprint does not claim the tax statute is ambiguous, and, in fact, it is not.

a. The Plain Text of § 1105(b)(2) Requires the Collection of Sales Tax on the Full Amount of Fixed Monthly Charges for Sprint's Mobile Voice Services.

Paragraph (b)(2) plainly requires that mobile carriers like Sprint collect and pay sales tax on the full amount of fixed monthly charges for mobile voice services.[4] Section 1105(b)(2) applies sales taxes to:

> [t]he receipts from every sale of mobile telecommunications services 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.

N.Y. Tax Law § 1105(b)(2).[5] As pled in the Complaint (¶ 33), this provision directly applies to Sprint and the fixed monthly charges for voice services Sprint sold to New York customers:

(i) Sprint is a "home service provider" because it is a facilities-based carrier with which mobile telecommunications customers contract for the provision of mobile telecommunications service [pursuant to N.Y. Tax Law § 1101(b)(27)(ii)];

(ii) The mobile telecommunications services sold by Sprint under the flat-rate plans are not sold for resale;

(iii) Under Sprint's flat-rate plans, Sprint sells mobile voice services for a fixed periodic charge;

(iv) Sprint does not separately state or otherwise break out any portions of the fixed periodic charge for voice services in invoices or other communications with customers; and

(v) Sprint's fixed monthly charges for mobile voice services are not for "other services that are taxable under subparagraph (B) of paragraph one of [§ 1105(b)]" because such "other services" are non-voice services such as text-messaging or pager services.

[4] There is a statutory presumption under New York Tax Law that all receipts from the sale of services under N.Y. Tax Law § 1105(b) are "subject to tax" until and unless the "contrary is established." N.Y. Tax Law § 1132(c)(1). Sprint bears the "burden of proving" that a receipt is "not taxable." *Id.* Also, because Sprint argues that it is entitled to an exception from taxation, it bears the burden of proving entitlement to the exception. *See 677 New Loudon Corp. v. Tax Appeals Tribunal*, 85 A.D.3d 1341, 1342-43 (3d Dep't 2011). Sprint has not met either burden here.

[5] For convenience, the full text of N.Y. Tax Law § 1105(b) is attached in the appendix hereto.

That the plain text of paragraph (b)(2) requires carriers to collect tax on the *full* fixed periodic charges of their mobile voice services is underpinned by an obvious logic. Fixed monthly charges for flat-rate calling plans are for access to the calling network, not for specific calls. *Id*. ¶ 22. There is no "interstate" or "intrastate" usage component that can be broken out. *Id*. ¶¶ 21, 43. Customers pay a fixed monthly fee regardless of whether they actually use the carrier's network during the month, how much they use it (up to the minute cap for the plan), and whether calls made are interstate or intrastate. *Id*. ¶ 21. The Tax Department has long recognized this logic in its advisory opinions and other published guidance. *See* NYT-G-07(2)C, NYT-G-07(3)S, Taxation of Internet Telephony (N.Y. Dept. Tax. Fin., June 21, 2007) ("Services provided to a New York service address that are billed on a flat fee basis (*e.g.*, single monthly charge for unlimited usage), where the fee remains constant for a fixed billing period, regardless of the number or duration of calls, are subject to New York state and local sales taxes, as such fees represent receipts from the sale of *access* to telecommunications service provided in New York.") (emphasis added); *see also* N.Y. St. Dep't of Tax. & Fin. Op. No. TSB-A-09(17)C, TSB-A-09(60)S, 2009 WL 5134564 (Dec. 15, 2009) (same); N.Y. St. Dep't of Tax. & Fin. Op. No. TSB-A-10(11)C, TSB-A-10(41)S, 2010 WL 3937038 (Sept. 22, 2010) (same).

Sprint claims that the State is "merely . . . *slapping* the label" of "access" on Sprint's fixed periodic charges in an attempt to "circumvent" the "applicable legislative scheme." D. Mem. 9 (emphasis added). But Sprint *itself* identifies these charges on bills to customers as "monthly recurring access charges" (Compl. ¶ 22), and Sprint's internal tax data system *itself* also identified these charges as being for "network access." *Id*. ¶ 67. Voice access to Sprint's network, not individual usage, is exactly what Sprint is selling when it sells mobile flat-rate calling plans. The fixed periodic charges must be taxed in their entirety.

Faced with the State's argument that the clear text of paragraph (b)(2) applies to the full amount of Sprint's fixed monthly charges for voice services, Sprint undertakes a lengthy discussion of paragraphs (b)(1)(B) and (b)(3) in an effort to obfuscate the issue of Sprint's tax liability. D. Mem. 7-15. Sprint even argues that the Complaint deliberately "ignores" those paragraphs. *Id*. at 8. Sprint's tax liability is solely premised on paragraph (b)(2), (*see* Compl. ¶ 33); paragraphs (b)(1)(B) and (b)(3) are irrelevant to the taxation of fixed monthly charges for mobile voice services. As described *infra*, paragraph (b)(2) stands alone and is neither limited nor illuminated by paragraphs (b)(1)(B) or (b)(3).

b. Paragraphs (b)(1)(B) and (b)(3) Do Not Affect Sprint's Tax Liability under Paragraph (b)(2).

Paragraph (b)(2), along with paragraphs (b)(1)(B) and (b)(3), each address different aspects of how sales taxes apply to telephony. First, (b)(1)(B) calls for the broad application of sales tax to most aspects of telephony, including landlines and mobile services. It reads:

> telephony and telegraphy and telephone and telegraph service of whatever nature except interstate and international telephony and telegraphy and telephone and telegraph service and except any telecommunications service the receipts from the sale of which are subject to tax under paragraph two of this subdivision;

N.Y. Tax Law § 1105(b)(1)(B). It contains two explicit exceptions: (i) "interstate and international telephony," and (ii) "any telecommunications service the receipts from the sale of which are subject to tax under paragraph two of this subdivision." The second exception is key because it *explicitly* directs that (b)(1)(B) does *not* apply to any receipts for the sales of telecommunications services that are subject to taxation under paragraph (b)(2). One of the receipts subject to taxation under (b)(2) are receipts from fixed periodic charges for mobile voice services—the very charges at issue in this case. As a result of this 21-word exception, such charges are not subject to (b)(1)(B)'s exclusion from taxation for "interstate telephony."

Paragraph (b)(2) explicitly taxes certain mobile telecommunications sold *for a fixed periodic charge*.[6] Specifically, it taxes mobile voice services sold for a fixed periodic charge, and mobile non-voice services sold for a fixed periodic charge, *i.e.*, "any other services that are taxable" under (b)(1)(B). N.Y. Tax Law § 1105(b)(2).

Paragraph (b)(3) also is irrelevant to Sprint's tax liability here. It merely addresses the situation unique to mobile phone service where a call may be intrastate, but not in the customer's home state. It does not alter paragraph (b)(2)'s taxation of fixed periodic charges for mobile voice services. Paragraph (b)(3) provides that:

> The tax imposed pursuant to this subdivision [§ 1105(b)] is imposed on receipts from charges for intrastate mobile telecommunications service of whatever nature in any state if the mobile telecommunications customer's place of primary use is in this state.

N.Y. Tax Law § 1105(b)(3). This paragraph ensures that the charge applicable to a specific call does not escape New York taxation when a mobile customer with a New York "place of primary use" travels to another state and makes a call that is intrastate within that state. It also ensures that a mobile customer with a primary place of use outside New York is not taxed by New York when making an intrastate call while visiting here.[7]

2. <u>Sprint Misreads § 1105(b)'s Plain Language and Legislative History.</u>

"A taxpayer is not entitled to offer an unreasonable or irrational interpretation of a statute." *Saratoga Harness Racing, Inc. v. City of Saratoga Springs*, 55 A.D.2d 295, 297 (3d Dep't 1976), *aff'd*, 44 N.Y.2d 980 (1978). This is exactly what Sprint offers here.

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[6] Sprint incorrectly states that (b)(2) "extends" the tax imposed by (b)(1)(B) to mobile telecommunications. D. Mem. 7. But (b)(1)(B) already applies to mobile services, except where it carves them out and they are addressed in (b)(2), *i.e.*, where they are sold for a fixed periodic charge. Paragraph (b)(1)(B) applies, for example, to mobile overage minutes billed on a per-minute basis. Compl. ¶¶ 24, 47.

[7] For example, if a customer with a New York "place of primary use" travels to Tulsa, Oklahoma, and makes a per-minute mobile call to Oklahoma City, the charge for the call is still subject to New York sales tax. The provision also means that a customer with a "place of primary use" in Oklahoma is not taxed by New York when making a per-minute mobile call to Albany while on vacation in New York City.

a. Sprint's Reading of § 1105(b) Is Contrary to Its Plain Language.

Sprint asserts that § 1105(b)(1)(B)'s exception for "interstate telephony" is "expressly" incorporated into 1105(b)(2), and applies to *both* the voice services clause and the other, non-voice services clause. D. Mem. 7-8. Sprint erroneously suggests this construction is bolstered by paragraph (b)(3), because (b)(3) makes reference to "intrastate" mobile telecommunications services. D. Mem. 8. Sprint's reading of the subsections of 1105(b) (i) renders a nullity the 21-word exception in (b)(1)(B) for voice services taxed under (b)(2); (ii) makes paragraph (b)(2) superfluous; (iii) confuses the treatment under (b)(2) of "voice services" with the treatment of non-voice services under (b)(2); and (iv) misconstrues (b)(3).

First, Sprint's reading of § 1105(b) ignores the second exception from taxation under (b)(1)(B)—the 21-word carve out for services that are the subject of (b)(2). Language in a statute cannot be ignored. *See Friss v. City of Hudson Police Dep't*, 187 A.D.2d 94, 96 (3d Dep't 1993) ("It is a well-settled principle of statutory construction that every word in a statute is to be given effect and to be presumed to have some meaning."). Sprint ignores these 21 words entirely. In fact, Sprint omitted this entire carve out clause in its analysis of (b)(1)(B), without setting it off by ellipses, giving the incorrect impression that (b)(1)(B) ends after "except interstate and international telephony." D. Mem. 7. Every word in the 21-word carve out in (b)(1)(B) indicates that what is subject to tax under (b)(2) is not taxed under (b)(1)(B). Simply put, mobile voice services sold for a fixed periodic charge receive separate tax treatment under (b)(2), and the "interstate telephony" exclusion is not relevant to the tax on these charges.

Second, Sprint's interpretation of Section 1105(b)(1)(B) makes (b)(2) no more than surplusage. Sprint's argument that the taxation scheme of (b)(1)(B) is somehow "incorporated" into (b)(2) leaves (b)(2) with no real purpose. If fixed rate access charges for mobile voice

services are taxed the same as per-minute intrastate and interstate phone calls, then there would be no need for (b)(2). But "a statutory construction which renders one part meaningless should be avoided." *Canal Carting, Inc. v. City of New York Bus. Integrity Comm'n*, 66 A.D.3d 609, 611 (1st Dep't 2009). The existence of (b)(2) as a separate section added in the 2002 amendments make clear that the Legislature intended it to have meaning.

Third, as noted *supra*, in addition to voice services, (b)(2) also applies to non-voice services (such as pager services) sold for a fixed periodic charge. One clause states it applies to voice services; the next states it also applies to "other services . . . taxable under" (b)(1)(B). This second clause is irrelevant to Sprint's tax liability for mobile fixed rate voice services. Paragraph (b)(2)'s two clauses – "voice services" and "other services" – are separately treated by the statute's separating them using the disjunctive "or." It is well recognized that when "or" is "used in a statute," it is a "disjunctive particle . . . indicating an alternative and it often connects a series of words or propositions *presenting a choice of either*." *In re Gerald R.M.*, 12 A.D.3d 1192, 1194 (4th Dep't 2004) (emphasis added); *see also Mossey v. Peru Cent. Sch. Dist.*, 132 Misc. 2d 999, 1002 (Sup. Ct. Clinton County 1986). In addition, the "other services" clause is set off by a comma, confirming that it is to be considered separately. *See Zanghi v. Greyhound Lines, Inc.*, 234 A.D.2d 930, 931(4th Dep't 1996) ("[T]he placement of a comma before the disjunctive 'or' [in a statute] indicates an intent to discriminate between the various parts of the sentence.") (alteration in original).

Fourth, paragraph (b)(3) simply addresses a unique situation presented by a mobile phone being mobile. It does not "reinforce[] that New York imposes sales tax" only on "intrastate voice service." D. Mem. 8. Fixed periodic charges for mobile voice services are for *access* to Sprint's

network, not "interstate" or "intrastate" usage. Nothing in (b)(3) limits or alters (b)(2)'s taxation of the full fixed periodic charge for mobile voice services.

There is only one permissible reading of § 1105(b), and specifically, paragraph (b)(2)—sales tax is imposed on the entire amount of receipts from fixed periodic charges for mobile voice services.

b. Legislative History and Contemporaneous Guidance Demonstrate that Sprint Is Required to Collect and Pay Sales Tax on the Full Amount of Its Fixed Periodic Charges for Mobile Voice Services.

Sprint argues that its reading of an "interstate" exception into § 1105(b)(2)'s taxation of fixed periodic charges for voice services comports with the structure and history of the law. D. Mem. 11-12. This argument, too, is unavailing.

The structure of the statute shows the exception does not apply when meaning is given to all the terms used by the Legislature. Sprint appears to be arguing that the Legislature should have chosen its words differently in the 2002 amendment, and points to an example in another part of § 1105 where the words "interstate" and "intrastate" were used together. D. Mem. 11. But the words in § 1105(b)(2) are already clear, and indeed, other portions of § 1105(b) call for taxation of full charges for telephone services without explicitly using the words "interstate" and "intrastate," including § 1105(b)(1)(D), which imposes sales taxes upon the full price of "pre-paid telephone calling service[s]."[8]

Sprint's rendition of the history of § 1105(b) leaves out important parts of the story that directly point to the legislative intent and the meaning of the statute. It relies, instead, on a regulation that does not show the legislative intent of paragraph (b)(2) because it pre-dated the

[8] Sprint does not explain why it resorts to the history of § 1105(b) where it is not claiming that the statute is ambiguous. Such resort is unnecessary in the face of an unambiguous provision. *Lloyd v. Grella*, 83 N.Y.2d 537, 545-46 (1994).

2002 amendments adding that paragraph by twenty-two years. D. Mem. 10.[9] Sprint ignores, for example, the Bill Jacket from the 2002 amendments and tries to side-step the directly on-point contemporaneous guidance from the Tax Department—the agency charged with responsibility for the law (and the agency that Sprint lobbied in connection with the law at the time of its adoption (Compl. ¶ 86)). These materials uniformly demonstrate that the Legislature intended to tax receipts from fixed periodic charges for mobile voice services in full.

The 2002 Bill Jacket includes a letter to the Governor that states that new paragraph (b)(2) was added to levy a tax on "flat-rate" mobile "voice services," and gives an example of the correct tax treatment contemplated under (b)(2) by 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." Letter from St. Dep't Tax. & Fin., May 20, 2002 at 19, Bill Jacket, L. 2002, ch. 85 (the "Bill Jacket"). It also explains that the 21-word carve out from (b)(1)(B) described *supra* (which Sprint ignores and which was added in 2002 at the time paragraph (b)(2) was adopted) – was meant to "clarify[]" that "telecommunications service . . . taxed under the new paragraph (2) of paragraph (b) of § 1105 are *excepted from taxation under the existing provisions of paragraph (b)(1)(B) of* § 1105." (Bill Jacket 18-19) (emphasis added). The Bill Jacket explains that new paragraph (b)(3) was added in 2002 to "adopt[] the [MTSA's] sourcing rule with respect to primary place of use" (Bill Jacket 14, 19), not to alter (b)(2)'s taxability of wireless voice services sold for a fixed periodic charge.

Likewise contemporaneous guidance by the Tax Department also confirms that § 1105(b)(2) requires carriers to collect and pay sales taxes on their receipts of the full amount of their fixed periodic charges for mobile voice services. On July 30, 2002 – three days before the

[9] Sales and Use Tax Regulation 527.2 was filed in 1976, and last amended in 1980. N.Y. Comp. Codes R. & Regs. tit. 20, § 527.2.

effective date of the 2002 amendments to § 1105(b) – the Tax Department released the 2002 TSB-M, which explained that (b)(2) was enacted "to provide a *separate imposition* of sales tax" on mobile telecommunications services sold for a fixed periodic charge. 2002 TSB-M at 3. (emphasis added). It explained that "the *total charge* for a given number of minutes of air time that may be used for voice transmission is subject to sales tax under new section 1105(b)(2)." Compl. ¶ 34 (citing 2002 TSB-M at 3) (emphasis added). It then went on to give concrete examples demonstrating how (b)(2) requires the payment of New York sales tax on the full amount of the fixed monthly charges for mobile voice services, regardless of how – or whether – a customer uses all of the available minutes in a calling plan. *Id.*[10]

3. <u>The MTSA Does Not Preempt New York Tax Law.</u>

Sprint does not argue that § 1105(b)'s taxing provisions are preempted by federal law. It argues instead, that another provision of the New York Tax Law – section 1111(*l*) – is subject to conflict preemption because it is "inconsistent" with the federal Mobile Telecommunications Sourcing Act (the "MTSA"), 4 U.S.C. § 123; D. Mem. 16.[11] Sprint's argument appears to be that because § 1111(*l*) explicitly exempts "voice services" from being unbundled for tax purposes, it impermissibly conflicts with § 123(b) of the MTSA, which allows taxable charges to be unbundled from non-taxable charges if a mobile phone company maintains adequate books and records that reasonably identify the separate charges. D. Mem. 16-17. But Sprint's argument relies upon the same irrational interpretation of § 1105(b), discredited *supra* in I.A, that some

[10] Sprint argues that the 2002 TSB-M is "not the law." D. Mem. 13-15. But the State has never asserted that the 2002 TSB-M has the force of law. The 2002 TSB-M does, however, show that the legislative intent and agency interpretation of § 1105(b)(2) were squarely in line with the plain language of the statute. That Sprint read this clear guidance is simply further evidence that Sprint knowingly disregarded the law. *See infra* I.B. Sprint's suggestion that the 2002 TSB-M is "incomplete" is similarly unavailing, and appears to be based solely upon the fact that the 2002 TSB-M does not support Sprint's unreasonable construction of § 1105(b). D. Mem. 13.

[11] "Inconsistency" is not sufficient to support a claim of conflict preemption, but rather, it must be impossible to comply with both the state and federal law, or the state law must stand as an obstacle to the federal law. *Stanley v. Amalithone Realty, Inc.*, 94 A.D.3d 140, 145 (1st Dep't 2012). Sprint makes no such claim.

part of its fixed periodic access charges for mobile voice services can be deemed to be non-taxable "interstate" charges and then unbundled. This is exactly why mobile voice services sold for a fixed periodic charge are explicitly excluded from unbundling under § 1111(*l*)—such access charges cannot be broken out.

The MTSA does not tell a state *what mobile services* it may tax. It clarifies *which* state may tax mobile services to avoid double taxation. *See* S. Rep. No. 106-326 (2000) ("The bill determines the location of mobile telecommunications services for certain state and local tax purposes *but does not itself impose any tax*.") (emphasis added). The MTSA's unbundling provision applies *only* to separating out charges for services that a state has chosen *not* to tax. *See* 4 U.S.C. § 123(b) ("If a taxing jurisdiction does not otherwise subject charges for mobile telecommunications services to taxation . . . "). New York has chosen to tax the full amount of receipts from fixed periodic charges for mobile voice services, and MTSA § 123(b) does not interfere with that determination. *See* MTSA § 117(b) (both intrastate and interstate services "authorized to be subject to tax, charge, or fee by the taxing jurisdiction whose territorial limits encompass the customer's place of primary use").

In any event, even if there were a conflict, the Complaint is replete with factual allegations that Sprint's allocations in unbundling purported non-taxable "interstate usage" were completely arbitrary. Compl. ¶¶ 65-78. These allegations show that Sprint did not satisfy the MTSA's standard for "reasonably identify[ing]" taxable and non-taxable charges from its books and records.[12]

B. Sprint's Violations Were Made Knowingly.

Proof of a specific intent to defraud is not required to satisfy the knowledge element of the

[12] These same allegations also show that Sprint did not satisfy the requirements of N.Y. Tax Law § 1111(*l*). This is a separate, alternative basis for liability that Sprint does not address.

FCA. N.Y. State Fin. Law § 188(3). Rather, the FCA defines "knowingly" to mean "that a person, with respect to information: (i) has actual knowledge of the information; (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.* The Complaint alleges facts sufficient to show that Sprint "knowingly" filed false sales tax returns with the State. Specifically:

- Sprint knew and understood the 2002 amendments to § 1105(b) and lobbied the Legislature and the Tax Department at the time of the adoption of the amendments (Compl. ¶ 86);
- Sprint reviewed a draft of the 2002 TSB-M, which expressly stated that § 1105(b)(2) required the collection of tax on the full amount of charges for receipts from fixed periodic charges for mobile voice services (*Id.* ¶¶ 35, 88);
- Sprint acknowledged internally that its approach to breaking out what it deemed to be "interstate usage" from within fixed monthly charges for mobile voice services was aggressive and risky, and could draw objections from taxing authorities (*Id.* ¶¶ 45, 57);
- Sprint prepared an internal analysis showing that breaking out purported "interstate usage" would make its flat-rate calling plans $4.6 million per month cheaper, collectively, than competitors' plans by collecting and paying fewer taxes (*Id.* ¶ 59);
- Sprint did not seek guidance from the Tax Department or outside attorneys before proceeding with its scheme despite Sprint's familiarity with § 1105(b)(2), its awareness of how the Tax Department interpreted § 1105(b)(2) in its guidance, and its own internal assessment of its approach as risky and aggressive (*Id.* ¶¶ 52, 91-92);
- Sprint intentionally manipulated third party data systems to override the vendor's proper determination of the taxability of charges in order to avoid paying taxes on a percentage of fixed periodic charges (*Id.* ¶¶ 65-69);
- Sprint arbitrarily classified percentages of its fixed periodic charges for mobile voice services as supposedly non-taxable "interstate usage," without reference to the value of the access it was providing or the minutes actually used by customers for calls (*Id.* ¶¶ 70-74);
- Sprint did not seek $30 million in tax refunds because it was concerned the request would alert tax authorities to its risky and aggressive tax scheme (*Id.* ¶¶ 77-78); and
- Sprint was directly informed of the illegality of its practice by the Tax Department in 2009 and again in 2011 (*Id.* ¶ 94).

Without addressing these detailed allegations of Sprint's knowledge, Sprint denounces them as "conclusory" and lacking in the requisite particularity. D. Mem. 20. To adequately

plead "knowledge" however, the Complaint need only make "a particularized factual assertion which supports the inference of scienter." *Houbigant, Inc. v. Deloitte & Touche LLP*, 303 A.D.2d 92, 97 (1st Dep't 2003). That standard is easily met by these allegations because they set out a detailed and compelling case that not only did Sprint, at a minimum, act in deliberate ignorance or reckless disregard of the truth of its obligations under the New York Tax Law, but that Sprint actually knew that its sales tax filings were false.

The question of Sprint's knowledge under the FCA is a "fact-intensive inquiry," and its determination at the motion to dismiss stage is inappropriate. *United States ex rel. McCready v. Columbia/HCA Healthcare Corp.*, 251 F. Supp. 2d 114, 120 (D.D.C. 2003); *cf. P.T. Bank Cent. Asia v. ABN AMRO Bank N.V.*, 301 A.D.2d 373, 377 (1st Dep't 2003) (determining question of defendant's knowledge as a matter of law based solely on allegations in complaint is inappropriate). Sprint tries to argue that it did not "knowingly" file false sales tax returns "as a matter of law." D. Mem. 18. According to Sprint, it can escape liability under the FCA because it merely had "reasonable differences in interpretation growing out of a disputed legal question." D. Mem. 17.

Sprint's proffered "reasonable interpretation" defense does not pan out here. Although courts have recognized that knowledge might not be found where a defendant's incorrect interpretation of an ambiguous law was nevertheless reasonable, *see United States v. Sci. Applications Int'l Corp.*, 653 F. Supp. 2d 87, 97 (D.D.C. 2009), as discussed *supra*, § 1105(b)(2) is not ambiguous, and Sprint's interpretation of it is not reasonable.[13]

[13] Sprint offers no factual support that it had any "reasonable" difference in interpretation of § 1105(b)(2) at the time it began its illegal scheme. The interpretation of § 1105(b)(2) it proffers here is nothing more than a *post hoc* reading it came up with in response to the Attorney General's investigation. During the Attorney General's year-long investigation, Sprint refused to support any claim of "reasonableness" and instead withheld materials and testimony concerning how Sprint interpreted the statute when it began its illegal scheme, and what management actually knew at that time.

Nor is this a case in which the statute at issue is rendered ambiguous because it is "disputed," *i.e.*, where there is a "history of agency and industry dispute and doubt over the proper interpretation and application" of the law. *United States v. Newport News Shipbuilding, Inc.*, 276 F. Supp. 2d 539, 562-63 (E.D. Va. 2003); *see also United States v. Medica Rents Co.*, 03-11297, 2008 WL 3876307, at *3 (5th Cir. Aug. 19, 2008) (substantial confusion created by contradictory instructions from multiple agencies precluded inference of knowledge). Section 1105(b)(2) is not "disputed," and it does not become so simply because Sprint chooses to contest it in this litigation. The Tax Department's position on § 1105(b)(2) was clearly encapsulated in its 2002 TSB-M, and its position has not changed. The telecommunications industry understands § 1105(b)(2)'s clear requirements, and has not expressed doubt or confusion over its application. Sprint is alone among its major competitors in not complying with the law.

Sprint implies that it can avoid liability simply by asserting an alternative interpretation of a statute. But the "reasonable interpretation" defense is unavailable where, as here, Sprint received numerous indications that its interpretation of the statute was incorrect. *See, e.g.*, *Commercial Contractors, Inc. v. United States*, 154 F.3d 1357, 1366 (Fed. Cir. 1998) ("[R]epeated warnings from a subcontractor . . . that the interpretation is contrary to well-established industry practice" is evidence that defendant's interpretation is unreasonable); *UMC Elec. Co. v. United States*, 43 Fed. Cl. 776, 793 (1999) (FCA "covers not just those who set out to defraud the government, but also those who ignore obvious warning signs").

C. The *Ex Post Facto* Clause Does Not Prohibit the FCA Claims Concerning Sprint's Earlier Tax Filings.

Sprint does not question that the FCA is retroactive, nor that the State's claims are within the FCA's statute of limitations. Instead, Sprint argues that liability for false tax filings made before the August 2010 amendments to the FCA are barred by the Constitution's *Ex Post Facto*

Clause. D. Mem. 21. No court has yet determined whether the *Ex Post Facto* Clause applies to the FCA to bar its retroactive application, and the Clause, in fact, does not.

Where the Legislature enacts a civil regulatory scheme such as the FCA, "only the clearest proof" will suffice to show that the statute is so punitive in purpose or effect as to transform the retroactive application of its civil remedy into the type of criminal penalty prohibited by the *Ex Post Facto* Clause. *Hudson v. United States*, 522 U.S. 93, 100 (1997). The Supreme Court has provided a non-exhaustive list of factors to analyze the effect of a statute for *Ex Post Facto* purposes: whether the statute's sanction (1) involves an affirmative disability or restraint, (2) has historically been regarded as a punishment, (3) comes into play only on a finding of scienter, (4) promotes the traditional aims of punishment—retribution and deterrence, (5) applies to behavior that is already a crime, (6) is rationally connected to an alternative purpose, and (7) appears excessive in relation to that alternative purpose. *Smith v. Doe*, 538 U.S. 84, 97-106 (2003) (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963)).

Applying these factors to the FCA, the majority militate against a finding that it violates the *Ex Post Facto* Clause. First, the FCA's damages provision does not impose any affirmative restraint. Second, the similar federal FCA's sanctions have historically been regarded as primarily civil and remedial, rather than so punitive as to be penal.[14] *See United States ex rel. Drake v. NSI, Inc.*, 736 F. Supp. 2d 489, 498-502 (D. Conn. 2010) (discussing historical view of federal FCA and rejecting *Ex Post Facto* challenge); *United States v. Ettrick Wood Prods.*, 683 F. Supp. 1262, 1264 (W.D. Wis. 1988) (finding that enhanced damages did not render federal

[14] Sprint's misleading reference to *New York ex. rel. Grupp v. DHL Express (USA), Inc.*, 19 N.Y.3d 278 (2012), does not show otherwise. D. Mem. 22-23. That case did not even address the *Ex Post Facto* Clause. Rather, *DHL* concerned whether the market participant doctrine applied so that the FCA was not preempted by federal aviation regulations. In the course of its discussion of damages, the New York Court of Appeals called the FCA "punitive," but it did not discuss whether it was so punitive as to transform it into the type of criminal penalty prohibited by the *Ex Post Facto* Clause.

FCA penal for purposes of *Ex Post Facto* Clause); *cf. United States ex rel. Marcus v. Hess*, 317 U.S. 537, 549 (1943) (penalties under the federal FCA are not criminal punishment for the purpose of the Double Jeopardy Clause); *United States v. Rogan*, 517 F.3d 449, 454 (7th Cir. 2008) (same). Third, the FCA's damages are rationally connected to an alternative purpose, namely, recouping losses from fraud and protecting the public fisc. *See Cook Cnty. v. United States ex rel. Chandler*, 538 U.S. 119, 130-31 (2003); *Rogan*, 517 F.3d at 452. Fourth, the FCA's damages are not excessive in relation to its alternative purpose. *See Cook Cnty.*, 538 U.S at 130 ("[S]ome liability beyond the amount of the fraud is usually necessary to compensate the Government completely for the costs, delays, and inconveniences occasioned by fraudulent claims.") (internal quotation marks omitted).

The only federal Court of Appeals to consider directly the constitutionality of retroactive application of the federal FCA in recent years has held that it does not violate the *Ex Post Facto* Clause. *See United States ex rel. Miller v. Bill Harbert Int'l Constr.*, 608 F.3d 871, 878-79 (D.C. Cir. 2010). Although there is disagreement among federal district courts, a number have found that the *Ex Post Facto* Clause does not apply to the federal FCA. *See, e.g.*, *Drake*, 736 F. Supp. 2d at 498-502; *Ettrick Wood*, 683 F. Supp. at 1264; *United States v. Oakwood Downriver Med. Ctr.*, 687 F. Supp. 302, 308 (E.D. Mich. 1988). The Supreme Court has never definitively determined the issue, but it has made clear that the federal FCA serves legitimate remedial and compensatory purposes in addition to punitive ones. *See Cook County*, 538 U.S. at 130.

It is particularly appropriate to view retroactive application of the FCA as non-penal for *Ex Post Facto* purposes in this case, since the provision at issue here concerns false tax claims. The triple damages available through the FCA for false tax claims is similar to the recovery

afforded by New York Tax Law's civil penalties.[15] There is a long line of precedent finding the imposition of additional civil penalties for tax fraud constitutionally sound. *See, e.g.*, *Karpa v. Comm'r*, 909 F.2d 784, 788 (4th Cir. 1990) ("[R]etroactive application of a civil tax penalty does not offend the ex post facto clause."); *Helvering v. Mitchell*, 303 U.S. 391, 401-404 (1938) (imposition of civil penalty for tax fraud is remedial in nature and cannot violate Double Jeopardy Clause); *Bankers' Trust Co. v. Blodgett*, 260 U.S. 647, 652 (1923) (holding that retroactive imposition of a penalty for failure to pay taxes does not violate the *Ex Post Facto* Clause); *Louis v. Comm'r*, 170 F.3d 1232, 1234-36 (9th Cir. 1999) (upholding tax fraud penalties against double jeopardy challenge). Likewise, courts historically have found that a jurisdiction can retroactively apply tax collection statutes because a taxpayer has no "vested right in the fruits of his false returns." *Sturges v. Carter*, 114 U.S. 511, 518 (1885); *see also League v. Texas*, 184 U.S. 156, 158 (1902); *In re City of New York*, 290 N.Y. 236, 241 (1943). Such decisions should readily inform any *Ex Post Facto* analysis of the FCA here.

II. THE COMPLAINT STATES A CLAIM UNDER NEW YORK TAX LAW § 1105(b)(2) AND EXECUTIVE LAW § 63(12).

For the reasons set forth in I.A, *supra*, the Complaint states claims under N.Y. Tax Law § 1105(b)(2) and Executive Law § 63(12). Sprint's failure to collect tax as required by N.Y. Tax Law § 1105(b)(2) constitutes a violation of that tax statute. Similarly, Sprint's violation of § 1105(b)(2) constitutes an "illegality" under Executive Law § 63(12), and is actionable thereunder because the violation was persistent and repeated. *State v. Ford Motor Co.*, 136 A.D.2d 154, 156 (3d Dep't 1988).

[15] N.Y. Tax Law § 1145(a)(2) provides that in addition to payment of the underpaid taxes, the violator must pay a penalty of twice the amount of tax due for any fraudulent failure to pay tax, and also interest that accumulates at an annual rate of 14.5% in sales tax matters.

III. THE TAX LAW AND EXECUTIVE LAW CLAIMS ARE NOT TIME-BARRED FOR FALSE FILINGS MADE BEFORE MARCH 31, 2008.

Sprint argues that the three-year statute of limitations in N.Y. Tax Law § 1147 and CPLR § 214(2) apply to the Tax Law and Executive Law claims, respectively, to bar them with respect to tax filings made before March 31, 2008. D. Mem. 24-25. Sprint is wrong.

Although Sprint recognizes that it has tolling agreements in place with the Tax Department that toll the statute of limitations for tax collection purposes back to approximately mid-2005 to 2006, depending on the subsidiary entity, it argues that these agreements apply only to the audit process. D. Mem. 25 n.18. Sprint offers no proof in support. Nothing in the tolling agreements – which Sprint did not even attach to its motion – limits their application to the audit process. The tolling agreements are between Sprint and the Tax Department, which gave the Attorney General a referral pursuant to N.Y. Tax Law § 1141(a) to commence an action to collect back taxes and penalties owed for Sprint's sales tax violations (Compl. ¶ 12), and the tolling agreements are thus applicable to this action. Also, the allegations in the Complaint are more than adequate to show that Sprint filed "willfully false or fraudulent returns with the intent to evade tax." N.Y. Tax Law § 1147; *see* discussion *supra* in I.B. Thus, the three-year statute of limitations does not even apply here.

In addition, Sprint is equitably estopped from asserting the statute of limitations as a defense to the Tax Law and Executive Law claims. Equitable estoppel applies where there is "(1) conduct which amounts to a false representation or concealment of material facts; (2) intention that such conduct will be acted upon by the other party; and (3) knowledge of the real facts." *Rashbaum v. Tax Appeals Tribunal*, 229 A.D.2d 723, 725 (3d Dep't 1996). All three elements are met here. As pled in the Complaint and described *supra*, Sprint knowingly concealed the full amount of taxes it owed to the State, with the intent that the State would rely

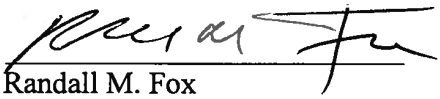
on its filings, and the State justifiably did so. Thus, equitable estoppel prevents Sprint from using the statute of limitations in N.Y. Tax Law § 1147 and CPLR § 214(2) to profit from its fraudulent filings between 2005 and 2008.

CONCLUSION

For the foregoing reasons, Sprint's motion to dismiss should be denied in its entirety, and plaintiff should be granted such relief as the Court deems just and proper.

Dated: New York, New York
July 19, 2012

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

By: 
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Effective: September 1, 2010

Mckinney's Consolidated Laws of New York Annotated Currentness
Tax Law (Refs & Annos)
Chapter Sixty. Of the Consolidated Laws
Article 28. Sales and Compensating Use Taxes (Refs & Annos)
Part II. Imposition of Taxes
§ 1105. Imposition of sales tax

On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax of four percent upon:

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

(b)(1) The receipts from every sale, other than sales for resale, of the following: (A) gas, electricity, refrigeration and steam, and gas, electric, refrigeration and steam service of whatever nature; (B) telephony and telegraphy and telephone and telegraph service of whatever nature except interstate and international telephony and telegraphy and telephone and telegraph service and except any telecommunications service the receipts from the sale of which are subject to tax under paragraph two of this subdivision; (C) a telephone answering service; and (D) a prepaid telephone calling service.

(2) 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.

(3) The tax imposed pursuant to this subdivision is imposed on receipts from charges for intrastate mobile telecommunications service of whatever nature in any state if the mobile telecommunications customer's place of primary use is in this state.

(4) (A) For the purpose of subparagraph (B) of paragraph one of this subdivision, receipts from the sale of telephony or telephone service constituting the actual delivery of telephony or telephone service under a prepaid telephone calling service (for instance, when the receipt is represented by a debit to a prepaid account) shall be excluded from the receipts subject to tax under such subparagraph; and (B) for purposes of subparagraph (B) of paragraph one and paragraph two of this subdivision, a particular sale of telephony or telephone service to a vendor that resells such telephony or telephone service as a component of a prepaid telephone calling service shall be deemed a sale for resale of telephony or telegraph service.

(c) The receipts from every sale, except for resale, of the following services:

(1) The furnishing of information by printed, mimeographed or multigraphed matter or by duplicating written or printed matter in any other manner, including the services of collecting, compiling or analyzing information of any kind or nature and furnishing reports thereof to other persons, but excluding the furnishing of information which is

personal or individual in nature and which is not or may not be substantially incorporated in reports furnished to other persons, and excluding the services of advertising or other agents, or other persons acting in a representative capacity, and information services used by newspapers, radio broadcasters and television broadcasters in the collection and dissemination of news, and excluding meteorological services.

(2) Producing, fabricating, processing, printing or imprinting tangible personal property, performed for a person who directly or indirectly furnishes the tangible personal property, not purchased by him for resale, upon which services are performed.

(3) Installing tangible personal property, excluding a mobile home, or maintaining, servicing or repairing tangible personal property, including a mobile home, not held for sale in the regular course of business, whether or not the services are performed directly or by means of coin-operated equipment or by any other means, and whether or not any tangible personal property is transferred in conjunction therewith, except:

(i) such services rendered by an individual who is engaged directly by a private home owner or lessee in or about his residence and who is not in a regular trade or business offering his services to the public; and

(ii) any receipts from laundering, dry-cleaning, tailoring, weaving, pressing, shoe repairing and shoe shining; and

(iii) for installing property which, when installed, will constitute an addition or capital improvement to real property, property or land, as the terms real property, property or land are defined in the real property tax law as such term capital improvement is defined in paragraph nine of subdivision (b) of section eleven hundred one of this chapter; and

(iv) such services rendered with respect to commercial vessels and property used by or purchased for the use of such vessels, as such vessels and property are specified in paragraph eight of subdivision (a) of section eleven hundred fifteen of this article; and

(v) such services rendered with respect to commercial aircraft, machinery or equipment and property used by or purchased for the use of such aircraft as such aircraft, machinery or equipment, and property are specified in paragraph twenty-one of subdivision (a) of section eleven hundred fifteen of this article; and

(vi) such services rendered with respect to tangible personal property for use or consumption predominantly either in the production for sale of tangible personal property by farming or in a commercial horse boarding operation, or in both, as such tangible personal property is specified in paragraph six of subdivision (a) of section eleven hundred fifteen of this article.

(vii) such services rendered with respect to fishing vessels and property used by or purchased for such vessels as such vessels are specified in paragraph twenty-four of subdivision (a) of section eleven hundred fifteen of this article.

(viii) such services rendered with respect to railroad rolling stock primarily engaged in carrying freight in intrastate, interstate or foreign commerce, but not including any charge for parts or other tangible personal property whether such property has become a physical component part of the property upon which the services are performed or has been transferred to the purchaser of the services in conjunction with the performance of the services subject to the tax.

(ix) such services rendered with respect to tangible property used or consumed directly and predominantly in the production for sale of gas or oil by manufacturing, processing, generating, assembling, refining, mining, or extracting.

(x) such services rendered with respect to property described in paragraph twelve-a of subdivision (a) of section eleven hundred fifteen of this article.

(xi) [Expires Sept. 1, 2003, pursuant to L.2000, c. 63, pt. S, § 12(a).] Such services rendered with respect to property described in paragraph twelve-b of section eleven hundred fifteen of this article.

Provided, however, that nothing contained in this paragraph three shall be construed to exclude from tax under this paragraph or under subdivision (b) of this section any charge, made by a person furnishing service subject to tax under subdivision (b) of this section, for installing property at the premises of a purchaser of such a taxable service for use in connection with such service.

(4) Storing all tangible personal property not held for sale in the regular course of business and the rental of safe deposit boxes or similar space.

(5) Maintaining, servicing or repairing real property, property or land, as such terms are defined in the real property tax law, whether the services are performed in or outside of a building, as distinguished from adding to or improving such real property, property or land, by a capital improvement as such term capital improvement is defined in paragraph nine of subdivision (b) of section eleven hundred one of this article, but excluding (i) services rendered by an individual who is not in a regular trade or business offering his services to the public, (ii) services rendered directly with respect to real property, property or land used or consumed directly and predominantly in the production for sale of gas or oil by manufacturing, processing, generating, assembling, refining, mining, or extracting, (iii) services rendered with respect to real property, property or land used or consumed predominantly either in the production of tangible personal property, for sale, by farming or in a commercial horse boarding operation, or in both and (iv) services of removal of waste material from a facility regulated as a transfer station or construction and demolition debris processing facility by the department of environmental conservation, provided that the waste material to be removed was not generated by the facility.

(6) Providing parking, garaging or storing for motor vehicles by persons operating a garage (other than a garage which is part of premises occupied solely as a private one or two family dwelling), parking lot or other place of business engaged in providing parking, garaging or storing for motor vehicles provided, however, this paragraph shall not apply to such facilities owned and operated by a public corporation, as defined by section sixty-six of the general construction law, other than a public benefit corporation, as defined by such section sixty-six, created by interstate compact or at least half of whose members are appointed by the governor, or any agency or instrumentality of a municipal corporation or district corporation as defined by such section sixty-six. Provided, however, receipts for such services paid to a homeowner's association by its members or receipts paid by members of a homeowner's association to a person leasing the parking facility from the homeowner's association shall not be subject to the tax imposed by this paragraph. For purposes of this paragraph, a homeowner's association is an association (including a cooperative housing or apartment corporation) (i) the membership of which is comprised exclusively of owners or residents of residential dwelling units, including owners of units in a condominium, and including shareholders in a cooperative housing or apartment corporation, where such units are located in a defined geographical area such as a housing development or subdivision and (ii) which owns or operates a garage, parking lot or other place of business engaged in providing parking, garaging or storing for motor vehicles located in such area for use (whether or not exclusive) by such owners or residents.

(7) Interior decorating and designing services, (whether or not in conjunction with the sale of tangible personal property), by whomsoever performed, including interior decorators and designers, architects or engineers; notwithstanding the foregoing, such services shall not include services which consist of the practice of architecture, as defined in section seventy-three hundred one of the education law, or the practice of engineering, as defined in section seventy-two hundred one of the education law, if the services are performed by an architect or engineer having a

license or permit under the education law.

(8) Protective and detective services, including, but not limited to, all services provided by or through alarm or protective systems of every nature, including, but not limited to, protection against burglary, theft, fire, water damage or any malfunction of industrial processes or any other malfunction of or damage to property or injury to persons, detective agencies, armored car services and guard, patrol and watchman services of every nature other than the performance of such services by a port watchman licensed by the waterfront commission of New York harbor, whether or not tangible personal property is transferred in conjunction therewith.

(9)(i) The furnishing or provision of an entertainment service or of an information service (but not an information service subject to tax under paragraph one of this subdivision), which is furnished, provided, or delivered by means of telephony or telegraphy or telephone or telegraph service (whether intrastate or interstate) of whatever nature, such as entertainment or information services provided through 800 or 900 numbers or mass announcement services or interactive information network services. Provided, however, that in no event (i) shall the furnishing or provision of an information service be taxed under this paragraph unless it would otherwise be subject to taxation under paragraph one of this subdivision if it were furnished by printed, mimeographed or multigraphed matter or by duplicating written or printed matter in any other manner nor (ii) shall the provision of cable television service to customers be taxed under this paragraph.

(ii) Notwithstanding the rate and date set forth in the opening undesignated paragraph of this section and notwithstanding the opening undesignated paragraph of this subdivision, on and after September first, nineteen hundred ninety-three, in addition to any other tax imposed under this section, and in addition to any other tax or fee imposed under any other provision of law, there is hereby imposed and there shall be paid an additional tax at the rate of five percent upon the receipts which are subject to tax under subparagraph (i) of this paragraph on the furnishing or provision of an entertainment or information service which is received by the customer exclusively in an aural manner. Such additional tax shall not be imposed by section eleven hundred seven, eleven hundred eight or eleven hundred nine of this article and shall not be included among the taxes authorized to be imposed pursuant to the authority of article twenty-nine of this chapter.

Wages, salaries and other compensation paid by an employer to an employee for performing as an employee the services described in paragraphs (1) through (9) of this subdivision (c) are not receipts subject to the taxes imposed under such subdivision.

(10) Transportation service, whether or not any tangible personal property is transferred in conjunction therewith, and regardless of whether the charge is paid in this state or out of state so long as the service is provided in this state.

(d)(i) The receipts from every sale of beer, wine or other alcoholic beverages or any other drink of any nature, or from every sale of food and drink of any nature or of food alone, when sold in or by restaurants, taverns or other establishments in this state, or by caterers, including in the amount of such receipts any cover, minimum, entertainment or other charge made to patrons or customers (except those receipts taxed pursuant to subdivision (f) of this section):

(1) in all instances where the sale is for consumption on the premises where sold;

(2) in those instances where the vendor or any person whose services are arranged for by the vendor, after the delivery of the food or drink by or on behalf of the vendor for consumption off the premises of the vendor, serves or assists in serving, cooks, heats or provides other services with respect to the food or drink; and

(3) in those instances where the sale is made through a vending machine that is activated by use of coin, currency, credit card or debit card (except the sale of drinks in a heated state made through such a vending machine) or is for

consumption off the premises of the vendor, except where food (other than sandwiches) or drink or both are (A) sold in an unheated state and, (B) are of a type commonly sold for consumption off the premises and in the same form and condition, quantities and packaging, in establishments which are food stores other than those principally engaged in selling foods prepared and ready to be eaten.

(ii) The tax imposed by this subdivision shall not apply to:

(A) food or drink which is sold to an air line for consumption while in flight;

(B) food or drink sold to a student of a nursery school, kindergarten, elementary or secondary school at a restaurant or cafeteria located on the premises of such a school, or food or drink, other than beer, wine, or other alcoholic beverages, sold at a restaurant, tavern or other establishment located on the premises of a college, university or a school (other than a nursery school, kindergarten, elementary or secondary school) to a student enrolled therein who purchases such food or drink under a contractual arrangement whereby the student does not pay cash at the time he is served, provided the school, college or university described in this subparagraph is operated by an exempt organization described in subdivision (a) of section eleven hundred sixteen, or is created, incorporated, registered, or licensed by the state legislature or pursuant to the education law or the regulations of the commissioner of education, or is incorporated by the regents of the university of the State of New York or with their consent or the consent of the commissioner of education as provided in section two hundred sixteen of the education law; and

(e)(1) The rent for every occupancy of a room or rooms in a hotel in this state, except that the tax shall not be imposed upon (i) a permanent resident, or (ii) where the rent is not more than at the rate of two dollars per day.

(2) When occupancy is provided, for a single consideration, with property, services, amusement charges, or any other items, the separate sale of which is not subject to tax under this article, the entire consideration shall be treated as rent subject to tax under paragraph one of this subdivision; provided, however, that where the amount of the rent for occupancy is stated separately from the price of such property, services, amusement charges, or other items, on any sales slip, invoice, receipt, or other statement given the occupant, and such rent is reasonable in relation to the value of such property, services, amusement charges or other items, only such separately stated rent will be subject to tax under paragraph one of this subdivision.

(f)(1) Any admission charge where such admission charge is in excess of ten cents to or for the use of any place of amusement in the state, except charges for admission to race tracks, boxing, sparring or wrestling matches or exhibitions which charges are taxed under any other law of this state, or dramatic or musical arts performances, or live circus performances, or motion picture theaters, and except charges to a patron for admission to, or use of, facilities for sporting activities in which such patron is to be a participant, such as bowling alleys and swimming pools. For any person having the permanent use or possession of a box or seat or a lease or a license, other than a season ticket, for the use of a box or seat at a place of amusement, the tax shall be upon the amount for which a similar box or seat is sold for each performance or exhibition at which the box or seat is used or reserved by the holder, licensee or lessee, and shall be paid by the holder, licensee or lessee.

(2)(i) The dues paid to any social or athletic club in this state if the dues of an active annual member, exclusive of the initiation fee, are in excess of ten dollars per year, and on the initiation fee alone, regardless of the amount of dues, if such initiation fee is in excess of ten dollars. Where the tax on dues applies to any such social or athletic club, the tax shall be paid by all members, other than honorary members, thereof regardless of the amount of their dues, and shall be paid on all dues or initiation fees for a period commencing on or after August first, nineteen hundred sixty-five. In the case of a life membership, the tax shall be upon the amount paid as life membership dues, however, a life member, other than an honorary member, paying an annual sales tax, based on the dues of an active annual member, shall continue such payments until the total amount of such tax paid is equal to the amount of tax that would have otherwise been due had the tax been imposed at the time such paid life membership has been pur-

chased and at the then applicable rate.

(ii) Dues and initiation fees paid to the following shall not be subject to the tax imposed by this paragraph:

(A) A fraternal society, order or association operating under the lodge system;

(B) Any fraternal association of students of a college or university;

(C) A homeowners association. For purposes of this subparagraph, a homeowners association is an association (including a cooperative housing or apartment corporation) (I) the membership of which is comprised exclusively of owners or residents of residential dwelling units, including owners of units in a condominium, and including shareholders in a cooperative housing or apartment corporation, where such units are located in a defined geographical area such as a housing development or subdivision and (II) which operates social or athletic facilities located in such area for use (whether or not exclusive) by such owners or residents.

(3) The amount paid as charges of a roof garden, cabaret or other similar place in the state.

CREDIT(S)

(Added L.1965, c. 93, § 1. Amended L.1965, c. 569, § 1; L.1965, c. 571, § 1; L.1965, c. 575, §§ 4, 5; L.1966, c. 918, § 1; L.1968, c. 425, § 1; L.1969, c. 116, § 1; L.1971, c. 72, § 1; L.1971, c. 405, § 1; L.1972, c. 135, § 1; L.1978, c. 773, § 1; L.1979, c. 470, § 3; L.1981, c. 103, § 38; L.1981, c. 471, §§ 2, 3; L.1981, c. 861, § 2; L.1983, c. 986, § 3; L.1985, c. 799, § 1; L.1985, c. 830, § 1; L.1990, c. 190, §§ 171 to 176; L.1991, c. 166, § 18; L.1993, c. 260, § 45; L.1994, c. 170, § 241; L.1995, c. 373, § 1; L.1995, c. 673, § 1; L.1996, c. 309, § 225; L.1997, c. 389, pt. A, §§ 96, 97, 100, eff. Dec. 1, 1997; L.1997, c. 389, pt. A, § 181, eff. Dec. 1, 1997; L.1998, c. 344, § 1, eff. Sept. 12, 1998; L.1998, c. 395, §§ 1, 2, eff. Dec. 1, 1998; L.1999, c. 407, pt. Y, § 2; L.1999, c. 407, pt. DD, § 1, eff. Dec. 1, 1999; L.1999, c. 407, pt. FF, § 1; L.1999, c. 649, § 2, eff. March 1, 2000; L.1999, c. 651, § 2, eff. March 1, 2000; L.2000, c. 63, pt. B, §§ 2, 3, eff. Sept. 1, 2000; L.2000, c. 63, pt. S, § 1, eff. Sept. 1, 2000; L.2000, c. 588, § 1, eff. Feb. 6, 2001; L.2002, c. 85, pt. S, § 9, eff. May 29, 2002; L.2003, c. 62, pt. X3, § 1, eff. June 1, 2003; L.2005, c. 321, § 1, eff. Dec. 1, 2005; L.2008, c. 57, pt. SS-1, § 1, eff. Aug. 1, 2008; L.2009, c. 57, pt. U-1, § 2, eff. June 1, 2009; L.2010, c. 57, pt. AA, § 4, eff. Sept. 1, 2010.)

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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, v. SPRINT NEXTEL CORP., SPRINT SPECTRUM L.P., NEXTEL OF NEW YORK, INC., and NEXTEL PARTNERS OF UPSTATE NEW YORK, INC., Defendants.	Index No. 103917/2011E Hon. O. Peter Sherwood Motion # 006

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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New York imposes a sales tax on receipts from sales of telephony "except interstate and international telephony." N.Y. Tax Law § 1105(b)(1)(B). Plaintiffs admit that the exclusion of "interstate" telephony from sales tax is "explicit," Opposition ("Opp.") 10, and "applies to mobile services," *id*. at 11, n.6. Plaintiffs nonetheless claim that this explicit statutory exclusion is "irrelevant," *id.* at 10, because the next provision in the same statute taxes certain mobile telecommunications sold for a "fixed periodic charge." § 1105(b)(2). Plaintiffs are wrong.

First, plaintiffs' interpretation violates basic principles of statutory construction. Plaintiffs admit that their statutory construction is "solely premised" on one provision, section 1105(b)(2), which they claim "stands alone and is neither limited nor illuminated by" sections (b)(1)(B) and (b)(3), which immediately precede and follow it and address the same subject. Opp. 10. That is plain error in contravention of the rule that a statute must be interpreted as a whole. Plaintiffs also repeatedly state that section 1105(b)(2) requires payment of the "full amount" of the fixed period charge, Opp. 3, 7, 9, 14, 17, but those words appear nowhere in the statute. It is not credible to claim that the "plain text of paragraph (b)(2) requires carriers to collect tax on the *full* fixed periodic charges of their mobile voice services," Opp. 9 (emphasis in original),[1] when the key italicized language appears nowhere in that text.

Second, the Court need not even decide the issue of statutory construction to resolve this case. If plaintiffs' statutory construction of (b)(2) were correct (it is not), it would collide headlong with the federal MTSA, requiring dismissal. Plaintiffs admit that "interstate" mobile voice services are explicitly excluded from tax. Opp. at 10, 11 n.6. Nonetheless, they claim these same services become taxable when Sprint sells them in a bundle with intrastate services

[1] All emphases are added unless otherwise stated, and all capitalized abbreviations are as stated in Sprint's opening Memorandum. For the Court's convenience, all statutory sections are set forth in Appendix I.

for a fixed periodic charge, and does not separately state the charges for "interstate" services. That is precisely what the federal MTSA prohibits. 4 U.S.C. § 123(b).

Plaintiffs' remaining causes of action fall with their tax claim; plaintiffs do not argue otherwise. Moreover, even if the tax claim were not dismissed, Sprint's construction of section 1105(b) is objectively reasonable, precluding liability under the False Claims Act ("FCA").

One additional point warrants mention. The weakness of plaintiffs' claims is evident from their repeated attempts to divert focus from the legal issues requiring dismissal by portraying Sprint as engaging in an elaborate fraud. Without delving into matters irrelevant to this motion to dismiss, the Court should know that plaintiffs' characterization of the facts and documents is internally contradictory and disputed.[2]

ARGUMENT

I. PLAINTIFFS' TAX CAUSE OF ACTION FAILS AS A MATTER OF LAW.

A. Plaintiffs Ignore Principles of Statutory Construction and the Statutory Text.

The rules of statutory construction in tax cases are well-established. Plaintiffs' interpretation of 1105(b) runs afoul of these rules in a host of obvious ways.

First, the Court of Appeals repeatedly has held that, "[i]n the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not

[2] For example, while claiming Sprint engaged in an "aggressive nationwide scheme to collect less in sales taxes than its competitors in order to gain an advantage in the marketplace," Opp. 2, plaintiffs admit Sprint did not "communicat[e] with customers about the fact that [it] was unbundling," Compl. ¶¶ 108-09. While claiming that Sprint "took efforts to conceal this scheme," Opp. 4, plaintiffs admit that Sprint discussed this issue with a "Tax Department field-auditor in 2009," Opp. 5. While claiming that no "other *major* mobile carrier" de-bundled interstate mobile voice services, Opp. 1, 20, plaintiffs implicitly acknowledge that smaller carriers did so after independently analyzing New York law. Notably, plaintiffs do not say whether "major" carriers did not de-bundle based on their reading of New York law, or because they could not meet the MTSA's de-bundling provision or for other business reasons.

specifically pointed out. In case of doubt they are construed *most strongly against the Government*, and in favor of the citizen." *Am. Locker Co. v. City of N.Y.*, 308 N.Y. 264, 269 (1955) (quotation marks omitted). "When the particular statute is one which levies a tax, it is well established that it must be *narrowly construed* and that any doubts concerning its scope and application are to be resolved in favor of the taxpayer." *Debevoise & Plimpton v. N.Y. St. Dep't of Tax. & Fin.*, 80 N.Y.2d 657, 661 (1993); Sprint Mem. ("Mem.") (June 14, 2012), at 6 & n.4.[3]

Plaintiffs' construction of 1105(b), however, is the opposite of "narrow[]." *Debevoise*, 80 N.Y.2d at 661. Section 1105(b) expressly excludes "interstate" voice services from sales tax. Plaintiffs admit that this exclusion is "explicit[]," Opp. 10, and applies to "mobile" interstate voice services, *id*. at 11, n.6. Section 1105(b)(2) is not to the contrary; it does not even mention (much less explicitly tax) "interstate" services. Nonetheless, through their expansive reading of (b)(2), plaintiffs seek to enlarge the tax imposed under section 1105(b) not simply "to embrace matters not specifically pointed out," *Am. Locker*, 308 N.Y. at 269, but to include matters that are explicitly *excluded* by the plain language of the statute. That is not allowed.

Second, plaintiffs' entire argument is erroneously based on reading into the statute words that nowhere appear in it. Plaintiffs' mantra is that section 1105(b)(2) taxes the "full" or "entire" amount of fixed periodic charges for mobile voice services. Opp. 3, 7, 9, 14, 17. Neither term, however, appears in the statute. There is no language stating that the portion of a fixed charge attributable to "interstate" services is taxed. The "plain text" of a statute cannot "require" a certain interpretation, Opp. 9, when that interpretation is predicated on words not found in the

[3] In a footnote, plaintiffs contend that, "because Sprint argues that it is entitled to an exception from taxation, it bears the burden of proving entitlement to the exception." Opp. 8 n.4. Sprint does not claim it is entitled to an "exception" from the tax imposed by section 1105(b), but rather, that the statute does not impose sales tax on the pertinent services in the first place. *See*, *e.g.*, *Debevoise*, 80 N.Y.2d at 661, 663.

statute. Given the explicit exclusion of "interstate" voice services from tax, plaintiffs' argument, if correct, would show that the statute is ambiguous – but ambiguities must be read in favor of the taxpayer as a matter of law.

Third, plaintiffs disregard the bedrock principle of statutory construction that a statute "is to be construed as a whole, and all parts of an act are to be read and construed together to determine the legislative intent." McKinney's Cons. Laws of N.Y., Book 1, Statutes § 97. Plaintiffs' construction is premised on the exact *opposite* principle. Plaintiffs assert that "paragraphs (b)(1)(B) and (b)(3)" – the paragraphs immediately before and after (b)(2) – "are *irrelevant* to the taxation of fixed monthly charges for mobile voice services," and that "paragraph (b)(2) stands alone and is *neither limited nor illuminated by paragraphs (b)(1)(B) or (b)(3)*." Opp. 10. This methodology violates fundamental tenets of statutory construction. This error is especially blatant where, as here, the provision on which plaintiffs "solely premise" their claim, (b)(2), Opp. 10, explicitly incorporates the other provision, (b)(1)(B).

It is apparent why plaintiffs need to so radically depart from basic precepts of statutory construction. Plaintiffs cannot reconcile their interpretation with section 1105(b)'s exclusion of "interstate" mobile voice services from tax and, thus, must contend that the exclusion is "irrelevant," Opp. 10.[4] When sections (b)(1)(B) and (b)(2) are each given their plain meaning and read together, however, the result is clear: "interstate" mobile voice services are not taxable; and mobile telecommunications "sold for a fixed periodic charge (not separately stated)" are

[4] This exclusion is confirmed by contemporaneous guidance from the Department of Taxation and Finance indicating, after the 2002 amendments to section 1105(b), that while New York taxes "mobile telecommunications as part of its sales tax on 'telephone service,'" a "charge for *interstate . . . service is exempt*." J. Stevens & D. Wood, *Estimating Mobile Telecommunications Sales Tax Revenue in New York State*, Off. of Tax Policy Analysis, N.Y. St. Dep't of Tax. & Fin. 1 (Sept. 2002), *avail. at* www.taxadmin.org/fta/meet/re_sum02/wood.pdf. This guidance carved no exception for services sold for a fixed periodic charge.

taxable, except for the portion consisting of "interstate" telephony, which is explicitly excluded from sales tax. Both provisions of the law can easily be given effect and harmonized.

This construction is reinforced by section (b)(2)'s incorporation of subsection (b)(1)(B). Section (b)(2) identifies the "mobile telecommunications service[s] . . . sold for a fixed periodic charge (not separately stated)" that are subject to sales tax: "voice services, or any *other* services that are taxable under *subparagraph (B) of paragraph one of this subdivision*." Section (b)(2) expressly incorporates subsection (b)(1)(B), including its identification of what is taxable.[5]

To avoid the unequivocal exclusion of "interstate" voice services from tax, plaintiffs cite a "21-word" "second exception" in subsection (b)(1)(B) – a provision they elsewhere dismiss as "irrelevant" and omit from their Complaint. Opp. 10. Plaintiffs claim that this "second exception is key because it *explicitly* directs that (b)(1)(B) does *not* apply to any receipts for the sales of telecommunications services that are subject to taxation under paragraph (b)(2)." *Id*. (emphases in original). The plain language of the subsection, however, does not support plaintiffs' construction.

Nowhere does (b)(1)(B) say that the *provisions of subsection (b)(1)(B)* are inapplicable to section (b)(2). Rather, the "second exception" plaintiffs cite is *an exception from sales tax,*

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[5] The fact that there is an "or" and comma between "voice services" and "other services" in (b)(2) does not change the fact that section (b)(2) incorporates the scope of taxable services from subsection (b)(1)(B). Notably, both the Tax Department's letter contained in the bill jacket and the TSB memorandum on which plaintiffs heavily rely omit this comma in their discussion of section (b)(2). *See* Ltr. from Dep't of Tax. & Fin. (May 20, 2002), at 19, Bill Jacket, L 2002, ch 85; N.Y. St. Dep't of Tax. & Fin. Tech. Mem. No. TSB-M-02(4)C, (6)S (July 30, 2002).

Nor does the fact that section (b)(2) incorporates subsection (b)(1)(B) leave (b)(2) "with no real purpose," Opp. 12. Section (b)(2) ensures that services (voice or otherwise) that are taxable under (b)(1)(B) do not escape taxation merely because they are bundled and "sold with other services" that are non-taxable. Plaintiffs' reading of section (b)(2) for the opposite proposition – that a *non-taxable* service becomes taxable when bundled with a *taxable* service – is not what the statute says.

period. Reading section 1105 from the start, it "impose[s]" a "tax of four percent" on certain receipts, including receipts from the sale of "telephony" in subsection (b)(1)(B). The "two explicit exceptions" in subsection (b)(1)(B), Opp. 10, are exceptions to the imposition of this sales tax. The first "explicit exception" to the imposition of tax is "interstate" telephony. *Id*. The second "explicit exception" is "telecommunications service the receipts from the sale of which are subject to tax under" section (b)(2). This second exception ensures that, when a service taxable under (b)(1)(B) is sold for a "fixed periodic charge," the portion of that "fixed periodic charge" attributable to the taxable service is taxed under section (b)(2), but the individual taxable component is not separately taxed under subsection (b)(1)(B), thereby avoiding double taxation. For example, if a carrier sells "*intrastate*" voice services for a fixed fee, the relevant portion of that fee would be taxed under section (b)(2), but individual intrastate calls would not also be taxed under subsection (b)(1)(B). This reading harmonizes (b)(1)(B)'s unqualified exclusion and (b)(2)'s imposition of tax on certain charges.[6]

Plaintiffs' justification for ignoring section 1105(b)(3) is similarly flawed. Section (b)(3) states that "[t]he tax imposed *pursuant to this subdivision*" – that is, under section 1105(b) – "is imposed on receipts from charges for *intrastate* mobile telecommunications service of whatever nature in any state if the mobile telecommunications customer's place of primary use is in this state." Plaintiffs recast Sprint's argument as being that section (b)(3) "alter[s] paragraph (b)(2)'s taxation of fixed period charges." Opp. 11. That is not Sprint's argument. Sprint's position is that the Legislature's choice of language in (b)(3) simply "confirm[s]" and "reinforces" that

[6] At most, plaintiffs' argument suggests that the "second exception" in (b)(1)(B) is ambiguous. Plaintiffs improperly seek to "extend" the provision "beyond the clear import of the language used" to the extent they urge that the statute does not mean what it literally says (that the exception is an exception from the tax imposed by section 1105) and, instead, means something else (that, contrary to the words and grammar of the statute, the exception is from the provisions of (b)(1)(B)). *Am. Locker*, 308 N.Y. at 269.

section 1105(b) as a whole is focused on "intrastate," not "interstate," services. Mem. 8.[7]

Plaintiffs also ignore plain language in other provisions of the same statute demonstrating that the Legislature knew how to tax both "intrastate" and "interstate" voice services when it wanted to. As set forth in Sprint's opening brief, Mem. 11, another subsection in the statute taxes certain voice services ("800 and 900 numbers") "*whether intrastate or interstate*." N.Y. Tax Law § 1105(c)(9)(i). Plaintiffs conspicuously elide this fact, violating another well-established principle of statutory construction that, "[w]hen different terms are used in various parts of a statute or rule, it is reasonable to assume that a distinction between them is intended." *Albano v. Kirby*, 36 N.Y.2d 526, 530 (1975).

Indeed, the counter-example plaintiffs offer, section 1105(b)(1)(D), supports Sprint. Plaintiffs claim this section "imposes sales taxes upon the full price of 'prepaid telephone calling service[s]'" "without explicitly using the words 'interstate' and 'intrastate.'" Opp. 14. The term "prepaid telephone calling service," however, is specifically defined in section 1101(B)(22) to include "intrastate, interstate or international telephone calls," further underscoring that when the Legislature intended to tax both "interstate" and intrastate voice services, it did so explicitly.

Finally, to circumvent New York's explicit exclusion of tax on "interstate" voice services, plaintiffs seek to re-characterize Sprint's flat-rate fee as an "access" charge. That does not help them. Accepting *arguendo* plaintiffs' allegation that Sprint used the term "access" in customer invoices and internal documents, Opp. 9, that is irrelevant to the meaning of New York law. Section 1105(b) does not speak in terms of "access"; it speaks in terms of "telephony,"

[7] For example, section (b)(3) does not simply say that "an intrastate call includes any call occurring within any state." Instead, it states that "[t]he tax imposed *pursuant to this subdivision* is imposed on receipts from charges for *intrastate mobile telecommunications service* . . . ." Section (b)(3) reinforces the explicit exclusion of "interstate" mobile telecommunications from tax.

explicitly excluding "interstate" telephony from tax. The legal issue is the taxability of "interstate" voice services, regardless of how plaintiffs (or Sprint) might label those services.[8]

* * * * *

For all of these reasons, Sprint's interpretation of section 1105(b) is correct. But even if the Court were to find the statute ambiguous, it would have to be "construed most strongly against the Government and in favor of [Sprint]" as a matter of law, *Am. Locker*, 308 N.Y. at 269; *Debevoise*, 80 N.Y.2d at 661, requiring dismissal.

B. The MTSA Allows Sprint to De-Bundle Interstate Voice Services.

The Court, however, need not decide the statutory construction issue to resolve this case. If plaintiffs' construction were correct (it is not), it would be preempted by the federal MTSA, independently requiring dismissal. In fact, plaintiffs' explanation of their statutory interpretation *establishes* that their interpretation of 1105(b) would be preempted.[9]

The MTSA makes clear that states may not transform a non-taxable mobile telecommunications service into a taxable one simply because the non-taxable charge is

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[8] Nor can plaintiffs overcome the plain statutory text by relying on an administrative TSB that, plaintiffs admit, lacks the "force of law," Opp. 16 n.10. While plaintiffs claim the memorandum "show[s] . . . legislative intent," *id*., it was not drafted by the Legislature. As plaintiffs indicate, resort to the history of 1105(b) is unpersuasive unless the statute is ambiguous, Opp. 14 n.8, a position plaintiffs cannot take because any ambiguity must be resolved in the taxpayer's favor. *See* Mem. 6 & n.4 (citing cases).

Plaintiffs suggest that Sprint cannot rely on the Sales and Use Tax Regulations because they predate the 2002 amendments to section 1105(b). Opp. 14-15. But these regulations underscore the exclusion of "interstate" voice services. *See* N.Y. Comp. Codes R. & Regs. tit. 20, § 527.2(d)(1) (the "provisions of section 1105(b) . . . impose a tax on receipts from *intrastate communication*"). That this regulation was not amended is entirely consistent with the Tax Law; section (b)(2) does not repeal (b)(1)(B)'s exclusion of "interstate" voice services from sales tax.

[9] Plaintiffs re-characterize Sprint's preemption argument as targeted at section 1111(*l*), not 1105(b). Opp. 16. That is incorrect. Sprint argued that "[t]he Complaint's interpretation of New York law is flatly inconsistent with and, preempted by," the MTSA. Mem. 16.

"aggregated with and not separately stated from" one or more taxable charges. 4 U.S.C. § 123(b). Yet, that is exactly what plaintiffs ask the Court to do. Plaintiffs admit that "interstate" mobile voice services are excluded from tax. Opp. at 10, 11 n.6. Nonetheless, they claim that these same services become taxable when Sprint sells them in a bundle with intrastate services for a "fixed monthly charge," but does not separately state on invoices the charge for "interstate" services. Compl. ¶¶ 21, 27. In short, plaintiffs argue that section 1105(b)(2) should be read to allow the State to tax Sprint's non-taxable "interstate" mobile voice services simply because they are "aggregated with and not separately stated from" taxable intrastate charges. That is precisely what the MTSA prevents. 4 U.S.C. § 123(b).

Plaintiffs assert that the "MTSA does not tell a state *what mobile services* it may tax." Opp. 17 (emphasis in original). But the MTSA does tell a state what it *cannot* tax. The MTSA does not permit a state to direct a carrier to collect sales tax on non-taxable services simply because the carrier did not separately state its charges for the non-taxable services. In enacting the MTSA, Congress specifically stated that its purpose was, in part, "*to provide customers with simpler billing statements* . . . and reduce the costs of tax administration for carriers and State and local governments." H.R. Rep. No. 106-719 (2000), *reprinted in* 2000 U.S.C.C.A.N. 508.

Plaintiffs' response that New York taxes "the full amount of receipts from fixed periodic charges for mobile voice services," Opp. 17, does not avoid preemption. As discussed above, the words "full amount" are plaintiffs', not the Legislature's. Moreover, section 1105(b)(2) applies only to services "sold for a fixed periodic charge (*not separately stated*)." Thus, even under plaintiffs' reading, if Sprint's invoice contained a separate statement of "interstate" mobile voice services, such charges would *not* be taxable, including under (b)(2). Section 123(b) of the MTSA ensures that taxation of mobile telecommunications does not turn on a carrier's separate

statement of services on an invoice. If the Court adopted plaintiffs' interpretation, the state law would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," and would thus be preempted. *Pac. Capital Bank, N.A. v. Connecticut*, 542 F.3d 341, 351 (2d Cir. 2008) (brackets and internal quotation marks omitted).

II. PLAINTIFFS' FCA CLAIM FAILS AS A MATTER OF LAW.

A. Plaintiffs Fail to State an FCA Claim as a Matter of Law.

Sprint has interpreted New York law correctly. Even if its legal interpretation were incorrect, however, Sprint would not be liable under the FCA. As a matter of law, reasonable "differences in interpretation growing out of a disputed legal question" cannot support a false claims action. *United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1018 (7th Cir. 1999). "[A] statement that a defendant makes based on a reasonable interpretation of a statute cannot support a claim under the FCA if there is no authoritative contrary interpretation of that statute. That is because the defendant in such a case could not have acted with the knowledge that the FCA requires before liability can attach." *United States ex rel. Hixson v. Health Mgmt. Sys., Inc.*, 613 F.3d 1186, 1190 (8th Cir. 2010) (affirming dismissal of FCA claim).[10]

[10] *See also United States ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 377 (4th Cir. 2008) (statement that turned on "'disputed legal question'" is "precisely the sort of claim that courts have determined not to be a false statement under the FCA") (quoting *Lamers*, 168 F.3d at 1018); *United States ex rel. Morton v. A Plus Benefits, Inc.*, 139 F. App'x 980, 983 (10th Cir. 2005) ("statements as to conclusions about which reasonable minds may differ cannot be false") (quotation marks omitted); *United States v. Southland Mgmt. Corp.*, 326 F.3d 669, 682 (5th Cir. 2003) (Jones, J., concurring) ("flawed reasoning cannot give rise to liability;" "where disputed legal issues arise from vague provisions or regulations, a contractor's decision to take advantage of a position can not result in his filing a 'knowingly' false claim") (citing *United States ex rel. Siewick v. Jamieson Sci. & Eng'g, Inc.*, 214 F.3d 1372, 1378 (D.C. Cir. 2000); *Hagood v. Sonoma Cnty. Water Ag.*, 81 F.3d 1465, 1478-79 (9th Cir. 1996); *United States ex rel. Wang v. FMC Corp.*, 975 F.2d 1412, 1420-21 (9th Cir. 1992)); *Siewick*, 214 F.3d at 1378 (rejects FCA liability where party "misunderstands its legal entitlements"); *United States v. Sodexho, Inc.*, 2009 WL 579380, at *17 (E.D. Pa. Mar. 6, 2009) ("lack of clarity regarding the proper interpretation of the regulations indicates that no basis exists for imposing FCA liability on

Plaintiffs do not dispute that their FCA claim must be dismissed if Sprint's interpretation of section 1105 is objectively reasonable. Opp. 19. Instead, they offer four reasons why the FCA claim should proceed. None has merit.

First, plaintiffs point to allegations that they say show Sprint's subjective views. Opp. 18. However, Sprint's subjective views (even as mischaracterized by plaintiffs) are irrelevant to whether its legal position is objectively reasonable. "[W]here Defendants have 'followed an interpretation that could reasonably have found support in the courts,' they cannot be found to be making knowingly or recklessly false claims, '*whatever their subjective intent may have been*.'" *United States ex rel. Hixson v. Health Mgmt. Sys., Inc.*, 657 F. Supp. 2d 1039, 1057, n.14 (S.D. Iowa 2009) (quoting *Safeco Ins. Co. v. Burr*, 551 U.S. 47, 70 n.20 (2007)).[11]

Second, plaintiffs claim Sprint's position is "a *post hoc* reading it came up with in response to the Attorney General's investigation." Opp. 19, n.13. Even if true, that too would be irrelevant to whether Sprint's interpretation is objectively reasonable.[12] In any event, Sprint has consistently held its view; plaintiffs themselves allege that Sprint has acted in a consistent manner "since July 2005," and discussed its practices with New York in 2009. Compl. ¶¶ 1, 94.

Defendants, who merely adopted a reasonable interpretation of regulatory requirements which favored their interests").

[11] *See also Safeco*, 551 U.S. at 70 n.20 (Fair Credit Reporting Act case that has been applied in FCA context; rejecting as "unsound" claim that evidence of "subjective bad faith can support a willfulness finding" when defendant's "reading of the statute is objectively reasonable"); *Simonoff v. Kaplan, Inc.*, 2010 WL 4823597, at *3 (S.D.N.Y. Nov. 29, 2010) (evidence of "company's subjective bad faith cannot support a willfulness finding when the company's reading of the statute is objectively reasonable").

[12] *See Long v. Tommy Hilfiger U.S.A., Inc.*, 671 F.3d 371, 377 (3d Cir. 2012) (rejecting claim that defendant "is only now seizing upon a post hoc 'objectively reasonable' interpretation;" "actual knowledge or intent" is "immaterial to the objective reasonableness analysis").

Third, plaintiffs flatly declare that Sprint's statutory interpretation is "not reasonable." Opp. 19. Plaintiffs are incorrect. Sprint's above interpretation is, at the very least, reasonable. This is evidenced by, among other things, the numerous rules of statutory construction plaintiffs must violate to advance their interpretation.

Fourth, plaintiffs claim Sprint's interpretation is unreasonable because the State told it so. Opp. 20. Knowledge that the government disagrees with a statutory interpretation, however, does not place a defendant on notice that the interpretation is incorrect.[13] As the Court of Appeals has held, courts do not even defer to, much less consider conclusive, the views of the Tax Department on issues "of pure statutory construction." *Debevoise*, 80 N.Y.2d at 664. To the contrary, courts and administrative tribunals routinely reject the Tax Department's interpretation of the Tax Law, including of section 1105.[14] Indeed, the idea that, to avoid treble damages, a party must capitulate when the government presses a legal position with which the party reasonably disagrees, particularly on issues of first impression (such as the application of section 1105(b)(2) to "interstate" mobile voice services), is deeply troubling.

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[13] Neither case cited by plaintiff, Opp. 20, suggests that a statutory interpretation becomes unreasonable simply because the government disagrees with it. *See UMC Elecs. Co. v. United States*, 43 Fed. Cl. 776, 794 (Fed. Cl. 1999) (contractor who "takes advantage of a disputed legal issue does not knowingly commit fraud"); *Commercial Contractors, Inc. v. United States*, 154 F.3d 1357, 1366 (Fed. Cir. 1998) (issue is whether "interpretation is so plainly lacking in merit").

[14] *See, e.g.*, *Debevoise*, 80 N.Y. 2d at 661 ("Department's broad construction" of 1105(b) "contravenes the accepted tenet that a tax statute must be strictly construed with any doubts being resolved in favor of the taxpayer"); *Compass Adjusters & Investigators, Inc. v. Comm'r of Tax. & Fin.*, 197 A.D.2d 38, 42 (3d Dep't 1994) (interpretation by Commissioner of Taxation & Finance "is confused"); *Empire St. Bldg. Co. v. Dep't of Tax. & Fin.*, 185 A.D.2d 201 (1st Dep't 1992) (rejecting Department's construction of 1105(b)); *Matter of Stuckless*, 2006 WL 2468525, at *17 (N.Y. Tax App. Trib. Aug. 17, 2006) (rejecting Division of Taxation's statutory interpretation despite supporting TSB memorandum); *Matter of Birds Eye Foods, Inc.*, 2010 WL 1539166, at *6-7 (N.Y. Tax App. Trib. Apr. 8, 2010) (same); *Matter of 244 Bronxville Assocs.*, 1999 WL 417891, at *13 (N.Y. Tax App. Trib. June 10, 1999) (same).

B. The Ex Post Facto Clause Bars Retroactive Application of the FCA.

Plaintiffs' argument for retroactively applying New York's FCA is wrong. They disregard the Court of Appeals' recent holding that the New York FCA is *not* aimed at "redressing the harm actually suffered," but instead at achieving "a *broader punitive goal of deterring fraudulent conduc*t." *N.Y. ex. rel. Grupp v. DHL Express (USA), Inc.*, 19 N.Y.3d 278, 286 (2012). Plaintiffs also fail to explain how, given the other relief they seek, treble damages here could be anything other than punitive.

Faced with a Court of Appeals decision rejecting the argument that treble damages are necessary to "recoup[] losses from fraud," Opp. 23, plaintiffs seek to sidestep the decision, noting that it was not an Ex Post Facto case. Plaintiffs, however, nowhere claim that the Court's analysis of the FCA was wrong. Moreover, plaintiffs themselves cite on this issue several Double Jeopardy cases that do not mention the Ex Post Facto Clause. Opp. 22-23.

Nor do plaintiffs explain how treble damages here would help them recoup losses for fraud. Plaintiffs request "all damages caused by the fraudulent and deceptive acts and practices," "interest and penalties under the New York Tax Law," "costs of $2,000 against each defendant," and "plaintiff's costs, including attorneys' fees." Compl. at 29-30. Then, they separately request treble damages. *Id.* at 29. Given plaintiffs' requests for compensatory damages, interest, penalties, costs, and fees, an additional award of treble damages would be purely punitive.

Plaintiffs' disregard of the Court of Appeals' decision in *Grupp* also colors their analysis of the Supreme Court's seven-factor test for analyzing a statute's punitive purpose or effect:

> (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.

Hudson v. United States, 522 U.S. 93, 99-100 (1997) (brackets and quotation marks omitted). By rejecting an alternative, non-punitive purpose for the FCA, the decision in *Grupp* makes clear that factors six and seven support Sprint.[15] *Grupp* also confirms that treble damages historically have been regarded as punishment (factor two), citing the Supreme Court's observation that "[t]he very idea of treble damages reveals an intent to *punish* past, and to deter future, unlawful conduct." 19 N.Y.3d at 287 (citing *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981)) (quotation marks omitted). Of the remaining four *Hudson* factors, plaintiffs nowhere mention the third, fourth, or fifth; each undisputedly supports Sprint.[16]

Plaintiffs' final argument that retroactive application of the FCA is allowed in tax cases because it imposes a mere "penalty" is meritless. Plaintiffs plead the "penalties" they seek: $6,000 to $12,000 in "penalties" per violation, and "penalties under the New York Tax Law."

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[15] Plaintiffs' own authority recognizes that the seventh factor favors Sprint. *See United States ex rel. Drake v. NSI, Inc.*, 736 F. Supp. 2d 489, 501 (D. Conn. 2010) (finding "disproportionality" between treble damages and harm to government).

Moreover, plaintiffs' reliance on other courts that have labeled the FCA non-penal does not help them. In *United States ex rel. Miller v. Bill Harbert Int'l Constr.*, 608 F.3d 871, 878-79 (D.C. Cir. 2010), the court found the federal FCA non-penal, but provided no analysis; it failed to mention *Hudson*'s seven-factor test or the possibility that the FCA might be sufficiently punitive to transform it into a penal statute; and it erroneously cited *Hudson* for the proposition that a civil FCA proceeding could not be punitive. No other court has cited *Miller* to support an argument that the FCA is not punitive, and three of the four courts to address retroactive application of federal or state FCAs since *Miller* have found the Ex Post Facto Clause to bar their application. *See* Mem. 23 n.14 (citing cases). Two other cases plaintiffs cite were decided before *Hudson* and, like *Miller*, did not consider whether the FCA was so punitive in purpose or effect. These courts considered only whether amendments to the federal FCA increasing damages and providing a "'new' definition of knowingly" affected defendants' "substantive liability." *United States v. Ettrick Wood Prods.*, 683 F. Supp. 1262, 1268 (W.D. Wis. 1988); *United States v. Oakwood Downriver Med. Ctr.*, 687 F. Supp. 302, 306, 308 (E.D. Mich. 1988).

[16] Plaintiffs do not contest that the New York FCA (1) requires *scienter*, (2) promotes the punitive goals of retribution and deterrence, *see Grupp*, 19 N.Y.3d at 286 (FCA "evinces a broader punitive goal of *deterring* fraudulent conduct"), and (3) does not apply to behavior that already is criminal, *cf. Drake*, 736 F. Supp. 2d at 501 (relying on fact that actions proscribed by federal FCA are "prohibited directly in the criminal law") (cited by plaintiffs).

Compl. at 29-30. They separately request treble damages. *Id.* Moreover, the cases plaintiffs cite involve penalties of 2% to 50%, Opp. 23, far less than the FCA's draconian 200% treble damages sanction. None supports a blanket conclusion that all penalties are non-punitive no matter the amount. FCA sanctions are treble "damages," not "penalties." Compl. at 29-30.

III. PLAINTIFFS' FCA CONSPIRACY CLAIM IS BARRED.

Plaintiffs do not dispute that their FCA conspiracy claim (Third Cause of Action) fails as a matter of law. They cite no contrary argument or caselaw. The claim must be dismissed.

IV. TAX CLAIMS FOR PERIODS BEFORE MARCH 31, 2008 ARE TIME-BARRED.

Plaintiffs attempt to rescue their time-barred claims by asserting tolling. The Complaint, however, does not even mention tolling. Plaintiffs have failed to meet their pleading burden, requiring dismissal. *See*, *e.g.*, *Zaref v. Berk & Michaels, P.C.*, 192 A.D.2d 346, 348 (1st Dep't 1993) (dismissal proper when pleadings were "insufficient" to support tolling). Plaintiffs' invocation of estoppel likewise fails. Estoppel "does not apply where," as here, the alleged "concealment underlying the estoppel claim is the same act which forms the basis of [the] plaintiff's underlying substantive cause[s] of action." *Robare v. Fortune Brands, Inc.*, 39 A.D.3d 1045, 1046 (3d Dep't 2007) (internal quotation marks omitted).

CONCLUSION

For the foregoing reasons, the Complaint should be dismissed with prejudice.

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Dated: August 7, 2012

Appendix I

Effective: March 1, 2012 to August 31, 2012

Mckinney's Consolidated Laws of New York Annotated Currentness
Tax Law (Refs & Annos)
Chapter Sixty. Of the Consolidated Laws
Article 28. Sales and Compensating Use Taxes (Refs & Annos)
Part II. Imposition of Taxes
§ 1105. Imposition of sales tax

On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax of four percent upon:

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

(b)(1) The receipts from every sale, other than sales for resale, of the following: (A) gas, electricity, refrigeration and steam, and gas, electric, refrigeration and steam service of whatever nature; (B) telephony and telegraphy and telephone and telegraph service of whatever nature except interstate and international telephony and telegraphy and telephone and telegraph service and except any telecommunications service the receipts from the sale of which are subject to tax under paragraph two of this subdivision; (C) a telephone answering service; and (D) a prepaid telephone calling service.

(2) 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.

(3) The tax imposed pursuant to this subdivision is imposed on receipts from charges for intrastate mobile telecommunications service of whatever nature in any state if the mobile telecommunications customer's place of primary use is in this state.

(4) (A) For the purpose of subparagraph (B) of paragraph one of this subdivision, receipts from the sale of telephony or telephone service constituting the actual delivery of telephony or telephone service under a prepaid telephone calling service (for instance, when the receipt is represented by a debit to a prepaid account) shall be excluded from the receipts subject to tax under such subparagraph; and (B) for purposes of subparagraph (B) of paragraph one and paragraph two of this subdivision, a particular sale of telephony or telephone service to a vendor that resells such telephony or telephone service as a component of a prepaid telephone calling service shall be deemed a sale for resale of telephony or telegraph service.

(c) The receipts from every sale, except for resale, of the following services:

(1) The furnishing of information by printed, mimeographed or multigraphed matter or by duplicating written or printed matter in any other manner, including the services of collecting, compiling or analyzing information of any kind or nature and furnishing reports thereof to other persons, but excluding the furnishing of information which is personal or individual in nature and which is not or may not be substantially incorporated in reports furnished to other persons, and excluding the services of advertising or other agents, or other persons acting in a representative capacity, and information services used by newspapers, electronic news services, radio broadcasters and television broadcasters in the collection and dissemination of news, and excluding meteorological services.

(2) Producing, fabricating, processing, printing or imprinting tangible personal property, performed for a person who directly or indirectly furnishes the tangible personal property, not purchased by him for resale, upon which services are performed.

(3) Installing tangible personal property, excluding a mobile home, or maintaining, servicing or repairing tangible personal property, including a mobile home, not held for sale in the regular course of business, whether or not the services are performed directly or by means of coin-operated equipment or by any other means, and whether or not any tangible personal property is transferred in conjunction therewith, except:

(i) such services rendered by an individual who is engaged directly by a private home owner or lessee in or about his residence and who is not in a regular trade or business offering his services to the public; and

(ii) any receipts from laundering, dry-cleaning, tailoring, weaving, pressing, shoe repairing and shoe shining; and

(iii) for installing property which, when installed, will constitute an addition or capital improvement to real property, property or land, as the terms real property, property or land are defined in the real property tax law as such term capital improvement is defined in paragraph nine of subdivision (b) of section eleven hundred one of this chapter; and
(iii) for installing property which, when installed, will constitute an addition or capital improvement to real property, property or land, as the terms real property, property or land are defined in the real property tax law as such term capital improvement is defined in paragraph nine of subdivision (b) of section eleven hundred one of this chapter; and

(iv) such services rendered with respect to commercial vessels and property used by or purchased for the use of such vessels, as such vessels and property are specified in paragraph eight of subdivision (a) of section eleven hundred fifteen of this article; and
(iv) such services rendered with respect to commercial vessels and property used by or purchased for the use of such vessels, as such vessels and property are specified in paragraph eight of subdivision (a) of section eleven hundred fifteen of this article; and

(v) such services rendered with respect to commercial aircraft, machinery or equipment and property used by or purchased for the use of such aircraft as such aircraft, machinery or equipment, and property are specified in paragraph twenty-one of subdivision (a) of section eleven hundred fifteen of this article; and
(v) such services rendered with respect to commercial aircraft, machinery or equipment and property used by or purchased for the use of such aircraft as such aircraft, machinery or equipment, and property are specified in paragraph twenty-one of subdivision (a) of section eleven hundred fifteen of this article; and

(vi) such services rendered with respect to tangible personal property for use or consumption predominantly either in the production for sale of tangible personal property by farming or in a commercial horse boarding operation, or in both, as such tangible personal property is specified in paragraph six of subdivision (a) of section eleven hundred fifteen of this article.
(vi) such services rendered with respect to tangible personal property for use or consumption predominantly either in the production for sale of tangible personal property by farming or in a commercial horse boarding operation, or in both, as such tangible personal property is specified in paragraph six of subdivision (a) of section eleven hundred fifteen of this article.

(vii) such services rendered with respect to fishing vessels and property used by or purchased for such vessels as such vessels are specified in paragraph twenty-four of subdivision (a) of section eleven hundred fifteen of this article.
(vii) such services rendered with respect to fishing vessels and property used by or purchased for such vessels as such vessels are specified in paragraph twenty-four of subdivision (a) of section eleven hundred fifteen of this article.

(viii) such services rendered with respect to railroad rolling stock primarily engaged in carrying freight in intrastate, interstate or foreign commerce, but not including any charge for parts or other tangible personal property whether such property has become a physical component part of the property upon which the services are performed or has been transferred to the purchaser of the services in conjunction with the performance of the services subject to the tax.

(ix) such services rendered with respect to tangible property used or consumed directly and predominantly in the production for sale of gas or oil by manufacturing, processing, generating, assembling, refining, mining, or extracting.

(x) such services rendered with respect to property described in paragraph twelve-a of subdivision (a) of section eleven hundred fifteen of this article.
(x) such services rendered with respect to property described in paragraph twelve-a of subdivision (a) of section eleven hundred fifteen of this article.

(xi) [Expires Sept. 1, 2003, pursuant to L.2000, c. 63, pt. S, § 12(a).] Such services rendered with respect to property described in paragraph twelve-b of section eleven hundred fifteen of this article.
(xi) [Expires Sept. 1, 2003, pursuant to L.2000, c. 63, pt. S, § 12(a).] Such services rendered with respect to property described in paragraph twelve-b of section eleven hundred fifteen of this article.

Provided, however, that nothing contained in this paragraph three shall be construed to exclude from tax under this paragraph or under subdivision (b) of this section any charge, made by a person furnishing service subject to tax under subdivision (b) of this section, for installing property at the premises of a purchaser of such a taxable service for use in connection with such service.

(4) Storing all tangible personal property not held for sale in the regular course of business and the rental of safe deposit boxes or similar space.

(5) Maintaining, servicing or repairing real property, property or land, as such terms are defined in the real property tax law, whether the services are performed in or outside of a building, as distinguished from adding to or improving such real property, property or land, by a capital improvement as such term capital improvement is defined in paragraph nine of subdivision (b) of section eleven hundred one of this article, but excluding (i) services rendered by an individual who is not in a regular trade or business offering his services to the public, (ii) services rendered directly with respect to real property, property or land used or consumed directly and predominantly in the production for sale of gas or oil by manufacturing, processing, generating, assembling, refining, mining, or extracting, (iii) services rendered with respect to real property, property or land used or consumed predominantly either in the production of tangible personal property, for sale, by farming or in a commercial horse boarding operation, or in both and (iv) services of removal of waste material from a facility regulated as a transfer station or construction and demolition debris processing facility by the department of environmental conservation, provided that the waste material to be removed was not generated by the facility.
(5) Maintaining, servicing or repairing real property, property or land, as such terms are defined in the real property tax law, whether the services are performed in or outside of a building, as distinguished from adding to or improving such real property, property or land, by a capital improvement as such term capital improvement is defined in paragraph nine of subdivision (b) of section eleven hundred one of this article, but excluding (i) services rendered by an individual who is not in a regular trade or business offering his services to the public, (ii) services rendered directly with respect to real property, property or land used or consumed directly and predominantly in the production for sale of gas or oil by manufacturing, processing, generating, assembling, refining, mining, or extracting, (iii) services rendered with respect to real property, property or land used or consumed predominantly either in the production of tangible personal property, for sale, by farming or in a commercial horse boarding operation, or in both and (iv) services of removal of waste material from a facility regulated as a transfer station or construction and demolition debris processing facility by the department of environmental conservation, provided that the waste material to be removed was not generated by the facility.

(6) Providing parking, garaging or storing for motor vehicles by persons operating a garage (other than a garage which is part of premises occupied solely as a private one or two family dwelling), parking lot or other place of business engaged in providing parking, garaging or storing for motor vehicles provided, however, this paragraph shall not apply to such facilities owned and operated by a public corporation, as defined by section sixty-six of the general construction law, other than a public benefit corporation, as defined by such section sixty-six, created by interstate compact or at least half of whose members are appointed by the governor, or any agency or instrumentality of a municipal corporation or district corporation as defined by such section sixty-six. Provided, however, receipts for such services paid to a homeowner's association by its members or receipts paid by members of a homeowner's association to a person leasing the parking facility from the homeowner's association shall not be subject to the tax imposed by this paragraph. For purposes of this paragraph, a homeowner's associ-

ation is an association (including a cooperative housing or apartment corporation) (i) the membership of which is comprised exclusively of owners or residents of residential dwelling units, including owners of units in a condominium, and including shareholders in a cooperative housing or apartment corporation, where such units are located in a defined geographical area such as a housing development or subdivision and (ii) which owns or operates a garage, parking lot or other place of business engaged in providing parking, garaging or storing for motor vehicles located in such area for use (whether or not exclusive) by such owners or residents.

(6) Providing parking, garaging or storing for motor vehicles by persons operating a garage (other than a garage which is part of premises occupied solely as a private one or two family dwelling), parking lot or other place of business engaged in providing parking, garaging or storing for motor vehicles provided, however, this paragraph shall not apply to such facilities owned and operated by a public corporation, as defined by section sixty-six of the general construction law, other than a public benefit corporation, as defined by such section sixty-six, created by interstate compact or at least half of whose members are appointed by the governor, or any agency or instrumentality of a municipal corporation or district corporation as defined by such section sixty-six. Provided, however, receipts for such services paid to a homeowner's association by its members or receipts paid by members of a homeowner's association to a person leasing the parking facility from the homeowner's association shall not be subject to the tax imposed by this paragraph. For purposes of this paragraph, a homeowner's association is an association (including a cooperative housing or apartment corporation) (i) the membership of which is comprised exclusively of owners or residents of residential dwelling units, including owners of units in a condominium, and including shareholders in a cooperative housing or apartment corporation, where such units are located in a defined geographical area such as a housing development or subdivision and (ii) which owns or operates a garage, parking lot or other place of business engaged in providing parking, garaging or storing for motor vehicles located in such area for use (whether or not exclusive) by such owners or residents.

(7) Interior decorating and designing services, (whether or not in conjunction with the sale of tangible personal property), by whomsoever performed, including interior decorators and designers, architects or engineers; notwithstanding the foregoing, such services shall not include services which consist of the practice of architecture, as defined in section seventy-three hundred one of the education law, or the practice of engineering, as defined in section seventy-two hundred one of the education law, if the services are performed by an architect or engineer having a license or permit under the education law.

(7) Interior decorating and designing services, (whether or not in conjunction with the sale of tangible personal property), by whomsoever performed, including interior decorators and designers, architects or engineers; notwithstanding the foregoing, such services shall not include services which consist of the practice of architecture, as defined in section seventy-three hundred one of the education law, or the practice of engineering, as defined in section seventy-two hundred one of the education law, if the services are performed by an architect or engineer having a license or permit under the education law.

(8) Protective and detective services, including, but not limited to, all services provided by or through alarm or protective systems of every nature, including, but not limited to, protection against burglary, theft, fire, water damage or any malfunction of industrial processes or any other malfunction of or damage to property or injury to persons, detective agencies, armored car services and guard, patrol and watchman services of every nature other than the performance of such services by a port watchman licensed by the waterfront commission of New York harbor, whether or not tangible personal property is transferred in conjunction therewith.

(9)(i) The furnishing or provision of an entertainment service or of an information service (but not an information service subject to tax under paragraph one of this subdivision), which is furnished, provided, or delivered by means of telephony or telegraphy or telephone or telegraph service (whether intrastate or interstate) of whatever nature, such as entertainment or information services provided through 800 or 900 numbers or mass announcement services or interactive information network services. Provided, however, that in no event (i) shall the furnishing or provision of an information service be taxed under this paragraph unless it would otherwise be subject to taxation under paragraph one of this subdivision if it were furnished by printed, mimeographed or multigraphed matter or by duplicating written or printed matter in any other manner nor (ii) shall the provision of cable television service to customers be taxed under this paragraph.

(ii) Notwithstanding the rate and date set forth in the opening undesignated paragraph of this section and notwithstanding the opening undesignated paragraph of this subdivision, on and after September first, nineteen hundred ninety-three, in addition to any other tax imposed under this section, and in addition to any other tax or fee imposed under any other provision of law, there is hereby imposed and there shall be paid an additional tax at the rate of five percent upon the receipts which are subject to tax under subparagraph (i) of this paragraph on the furnishing or provision of an entertainment or information service which is received by the customer exclusively in an aural manner. Such additional tax shall not be imposed by section eleven hundred seven, eleven hundred eight or eleven hundred nine of this article and shall not be included among the taxes authorized to be imposed pursuant to the authority of article twenty-nine of this chapter.

(ii) Notwithstanding the rate and date set forth in the opening undesignated paragraph of this section and notwithstanding the opening undesignated paragraph of this subdivision, on and after September first, nineteen hundred ninety-three, in addition to any other tax imposed under this section, and in addition to any other tax or fee imposed under any other provision of law, there is hereby imposed and there shall be paid an additional tax at the rate of five percent upon the receipts which are subject to tax under subparagraph (i) of this paragraph on the furnishing or provision of an entertainment or information service which is received by the customer exclusively in an aural manner. Such additional tax shall not be imposed by section eleven hundred seven, eleven hundred eight or eleven hundred nine of this article and shall not be included among the taxes authorized to be imposed pursuant to the authority of article twenty-nine of this chapter.

Wages, salaries and other compensation paid by an employer to an employee for performing as an employee the services described in paragraphs (1) through (9) of this subdivision (c) are not receipts subject to the taxes imposed under such subdivision.

(10) Transportation service, whether or not any tangible personal property is transferred in conjunction therewith, and regardless of whether the charge is paid in this state or out of state so long as the service is provided in this state.

(d)(i) The receipts from every sale of beer, wine or other alcoholic beverages or any other drink of any nature, or from every sale of food and drink of any nature or of food alone, when sold in or by restaurants, taverns or other establishments in this state, or by caterers, including in the amount of such receipts any cover, minimum, entertainment or other charge made to patrons or customers (except those receipts taxed pursuant to subdivision (f) of this section):

(1) in all instances where the sale is for consumption on the premises where sold;

(2) in those instances where the vendor or any person whose services are arranged for by the vendor, after the delivery of the food or drink by or on behalf of the vendor for consumption off the premises of the vendor, serves or assists in serving, cooks, heats or provides other services with respect to the food or drink; and

(3) in those instances where the sale is made through a vending machine that is activated by use of coin, currency, credit card or debit card (except the sale of drinks in a heated state made through such a vending machine) or is for consumption off the premises of the vendor, except where food (other than sandwiches) or drink or both are (A) sold in an unheated state and, (B) are of a type commonly sold for consumption off the premises and in the same form and condition, quantities and packaging, in establishments which are food stores other than those principally engaged in selling foods prepared and ready to be eaten.

(ii) The tax imposed by this subdivision shall not apply to:

(A) food or drink which is sold to an air line for consumption while in flight;

(B) food or drink sold to a student of a nursery school, kindergarten, elementary or secondary school at a restaurant or cafeteria located on the premises of such a school, or food or drink, other than beer, wine, or other alcoholic beverages, sold at a restaurant, tavern or other establishment located on the premises of a college, university or a school (other than a nursery school, kindergarten, elementary or secondary school) to a student enrolled therein who purchases such food or drink under a contractual arrangement whereby the student does not pay cash at the time he is served, provided the school, college or university described in this subparagraph is operated by an exempt organization described in subdivision (a) of section eleven hundred sixteen, or is created, incorporated, registered, or licensed by the state legislature or pursuant to the education law or the regulations of the commissioner of education, or is incorporated by the regents of the university of the State of New York or with their consent or the consent of the commissioner of education as provided in section two hundred sixteen of the education law; and

(B) food or drink sold to a student of a nursery school, kindergarten, elementary or secondary school at a restaurant or cafeteria located on the premises of such a school, or food or drink, other than beer, wine, or other alcoholic beverages, sold at a restaurant, tavern or other establishment located on the premises of a college, university or a school (other than a nursery school, kindergarten, elementary or secondary school) to a student enrolled therein who purchases such food or drink under a contractual arrangement whereby the student does not pay cash at the time he is served, provided the school, college or university described in this subparagraph is operated by an exempt organization described in subdivision (a) of section eleven hundred sixteen, or is created, incorporated, registered, or licensed by the state legislature or pursuant to the education law or the regulations of the commissioner of education, or is incorporated by the regents of the university of the State of New York or with their consent or the consent of the commissioner of education as provided in section two hundred sixteen of the education law; and

(e)(1) The rent for every occupancy of a room or rooms in a hotel in this state, except that the tax shall not be imposed upon (i) a permanent resident, or (ii) where the rent is not more than at the rate of two dollars per day.

(2) When occupancy is provided, for a single consideration, with property, services, amusement charges, or any other items, the separate sale of which is not subject to tax under this article, the entire consideration shall be treated as rent subject to tax under paragraph one of this subdivision; provided, however, that where the amount of the rent for occupancy is stated separately from the price of such property, services, amusement charges, or other items, on any sales slip, invoice, receipt, or other statement given the occupant, and such rent is reasonable in relation to the value of such property, services, amusement charges or other items, only such separately stated rent will be subject to tax under paragraph one of this subdivision.

(f)(1) Any admission charge where such admission charge is in excess of ten cents to or for the use of any place of amusement in the state, except charges for admission to race tracks, boxing, sparring or wrestling matches or exhibitions which charges are taxed under any other law of this state, or dramatic or musical arts performances, or live circus performances, or motion picture theaters, and except charges to a patron for admission to, or use of, facilities for sporting activities in which such patron is to be a participant, such as bowling alleys and swimming pools. For any person having the permanent use or possession of a box or seat or a lease or a license, other than a season ticket, for the use of a box or seat at a place of amusement, the tax shall be upon the amount for which a similar box or seat is sold for each performance or exhibition at which the box or seat is used or reserved by the holder, licensee or lessee, and shall be paid by the holder, licensee or lessee.

(2)(i) The dues paid to any social or athletic club in this state if the dues of an active annual member, exclusive of the initiation fee, are in excess of ten dollars per year, and on the initiation fee alone, regardless of the amount of dues, if such initiation fee is in excess of ten dollars. Where the tax on dues applies to any such social or athletic club, the tax shall be paid by all members, other than honorary members, thereof regardless of the amount of their dues, and shall be paid on all dues or initiation fees for a period commencing on or after August first, nineteen hundred sixty-five. In the case of a life membership, the tax shall be upon the amount paid as life membership dues, however, a life member, other than an honorary member, paying an annual sales tax, based on the dues of an active annual member, shall continue such payments until the total amount of such tax paid is equal to the amount of tax that would have otherwise been due had the tax been imposed at the time such paid life membership has been purchased and at the then applicable rate.

(ii) Dues and initiation fees paid to the following shall not be subject to the tax imposed by this paragraph:

(A) A fraternal society, order or association operating under the lodge system;

(B) Any fraternal association of students of a college or university;

(C) A homeowners association. For purposes of this subparagraph, a homeowners association is an association (including a cooperative housing or apartment corporation) (I) the membership of which is comprised exclusively of owners or residents of residential dwelling units, including owners of units in a condominium, and including shareholders in a cooperative housing or apartment corporation, where such units are located in a defined geographical area such as a housing development or subdivision and (II) which operates social or athletic facilities located in such area for use (whether or not exclusive) by such owners or residents.

(3) The amount paid as charges of a roof garden, cabaret or other similar place in the state.

CREDIT(S)

(Added L.1965, c. 93, § 1. Amended L.1965, c. 569, § 1; L.1965, c. 571, § 1; L.1965, c. 575, §§ 4, 5; L.1966, c. 918, § 1; L.1968, c. 425, § 1; L.1969, c. 116, § 1; L.1971, c. 72, § 1; L.1971, c. 405, § 1; L.1972, c. 135, § 1; L.1978, c. 773, § 1; L.1979, c. 470, § 3; L.1981, c. 103, § 38; L.1981, c. 471, §§ 2, 3; L.1981, c. 861, § 2; L.1983, c. 986, § 3; L.1985, c. 799, § 1; L.1985, c. 830, § 1; L.1990, c. 190, §§ 171 to 176; L.1991, c. 166, § 18; L.1993, c. 260, § 45; L.1994, c. 170, § 241; L.1995, c. 373, § 1; L.1995, c. 673, § 1; L.1996, c. 309, § 225; L.1997, c. 389, pt. A, §§ 96, 97, 100, eff. Dec. 1, 1997; L.1997, c. 389, pt. A, § 181, eff. Dec. 1, 1997; L.1998, c. 344, § 1, eff. Sept. 12, 1998; L.1998, c. 395, §§ 1, 2, eff. Dec. 1, 1998; L.1999, c. 407, pt. Y, § 2; L.1999, c. 407, pt. DD, § 1, eff. Dec. 1, 1999; L.1999, c. 407, pt. FF, § 1; L.1999, c. 649, § 2, eff. March 1, 2000; L.1999, c. 651, § 2, eff. March 1, 2000; L.2000, c. 63, pt. B, §§ 2, 3, eff. Sept. 1, 2000; L.2000, c. 63, pt. S, § 1, eff. Sept. 1, 2000; L.2000, c. 588, § 1, eff. Feb. 6, 2001; L.2002, c. 85, pt. S, § 9, eff. May 29, 2002; L.2003, c. 62, pt. X3, § 1, eff. June 1, 2003; L.2005, c. 321, § 1, eff. Dec. 1, 2005; L.2008, c. 57, pt. SS-1, § 1, eff. Aug. 1, 2008; L.2009, c. 57, pt. U-1, § 2, eff. June 1, 2009; L.2010, c. 57, pt. AA, § 4, eff. Sept. 1, 2010; L.2011, c. 583, § 3, eff. March 1, 2012.)
(Added L.1965, c. 93, § 1. Amended L.1965, c. 569, § 1; L.1965, c. 571, § 1; L.1965, c. 575, §§ 4, 5; L.1966, c. 918, § 1; L.1968, c. 425, § 1; L.1969, c. 116, § 1; L.1971, c. 72, § 1; L.1971, c. 405, § 1; L.1972, c. 135, § 1; L.1978, c. 773, § 1; L.1979, c. 470, § 3; L.1981, c. 103, § 38; L.1981, c. 471, §§ 2, 3; L.1981, c. 861, § 2; L.1983, c. 986, § 3; L.1985, c. 799, § 1; L.1985, c. 830, § 1; L.1990, c. 190, §§ 171 to 176; L.1991, c. 166, § 18; L.1993, c. 260, § 45; L.1994, c. 170, § 241; L.1995, c. 373, § 1; L.1995, c. 673, § 1; L.1996, c. 309, § 225; L.1997, c. 389, pt. A, §§ 96, 97, 100, eff. Dec. 1, 1997; L.1997, c. 389, pt. A, § 181, eff. Dec. 1, 1997; L.1998, c. 344, § 1, eff. Sept. 12, 1998; L.1998, c. 395, §§ 1, 2, eff. Dec. 1, 1998; L.1999, c. 407, pt. Y, § 2; L.1999, c. 407, pt. DD, § 1, eff. Dec. 1, 1999; L.1999, c. 407, pt. FF, § 1; L.1999, c. 649, § 2, eff. March 1, 2000; L.1999, c. 651, § 2, eff. March 1, 2000; L.2000, c. 63, pt. B, §§ 2, 3, eff. Sept. 1, 2000; L.2000, c. 63, pt. S, § 1, eff. Sept. 1, 2000; L.2000, c. 588, § 1, eff. Feb. 6, 2001; L.2002, c. 85, pt. S, § 9, eff. May 29, 2002; L.2003, c. 62, pt. X3, § 1, eff. June 1, 2003; L.2005, c. 321, § 1, eff. Dec. 1, 2005; L.2008, c. 57, pt. SS-1, § 1, eff. Aug. 1, 2008; L.2009, c. 57, pt. U-1, § 2, eff. June 1, 2009; L.2010, c. 57, pt. AA, § 4, eff. Sept. 1, 2010; L.2011, c. 583, § 3, eff. March 1, 2012.)

Current through L.2012, chapters 1 to 59 and 62 to 68.

END OF DOCUMENT

Effective: July 28, 2000

United States Code Annotated Currentness
Title 4. Flag and Seal, Seat of Government, and the States (Refs & Annos)
Chapter 4. The States (Refs & Annos)
§ 123. Scope; special rules

(a) Act does not supersede customer's liability to taxing jurisdiction.--Nothing in sections 116 through 126 modifies, impairs, supersedes, or authorizes the modification, impairment, or supersession of, any law allowing a taxing jurisdiction to collect a tax, charge, or fee from a customer that has failed to provide its place of primary use.
(a) Act does not supersede customer's liability to taxing jurisdiction.--Nothing in sections 116 through 126 modifies, impairs, supersedes, or authorizes the modification, impairment, or supersession of, any law allowing a taxing jurisdiction to collect a tax, charge, or fee from a customer that has failed to provide its place of primary use.

(b) Additional taxable charges.--If a taxing jurisdiction does not otherwise subject charges for mobile telecommunications services to taxation and if these charges are aggregated with and not separately stated from charges that are subject to taxation, then the charges for nontaxable mobile telecommunications services may be subject to taxation unless the home service provider can reasonably identify charges not subject to such tax, charge, or fee from its books and records that are kept in the regular course of business.

(c) Nontaxable charges.--If a taxing jurisdiction does not subject charges for mobile telecommunications services to taxation, a customer may not rely upon the nontaxability of charges for mobile telecommunications services unless the customer's home service provider separately states the charges for nontaxable mobile telecommunications services from taxable charges or the home service provider elects, after receiving a written request from the customer in t he form required by the provider, to provide verifiable data based upon the home service provider's books and records that are kept in the regular course of business that reasonably identifies the nontaxable charges.

CREDIT(S)

(Added Pub.L. 106-252, § 2(a), July 28, 2000, 114 Stat. 630.)
(Added Pub.L. 106-252, § 2(a), July 28, 2000, 114 Stat. 630.)

2000 Acts. Enactment by Pub.L. 106-252 effective July 28, 2000, and applicable only to customer bills issued after the first day of the first month beginning more than 2 years after July 28, 2000, see section 3 of Pub.L. 106-252, set out as a note under section 116 of this title.

Current through P.L. 112-142 (excluding P.L. 112-140 and 112-141) approved 7-9-12

END OF DOCUMENT

Effective: March 1, 2012

Mckinney's Consolidated Laws of New York Annotated Currentness
Tax Law (Refs & Annos)
Chapter Sixty. Of the Consolidated Laws
Article 28. Sales and Compensating Use Taxes (Refs & Annos)
Part I. Definitions
§ 1101. Definitions

(a) When used in this article the term "person" includes an individual, partnership, limited liability company, society, association, joint stock company, corporation, estate, receiver, trustee, assignee, referee, and any other person acting in a fiduciary or representative capacity, whether appointed by a court or otherwise, and any combination of the foregoing.

(b) When used in this article for the purposes of the taxes imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:
(b) When used in this article for the purposes of the taxes imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:

(1) Purchase at retail. A purchase by any person for any purpose other than those set forth in clauses (A) and (B) of subparagraph (i) of paragraph (4) of this subdivision.

(2) Purchaser. A person who purchases property or to whom are rendered services, the receipts from which are taxable under this article, including a mobile telecommunications customer.

(3) Receipt. The amount of the sale price of any property and the charge for any service taxable under this article, including gas and gas service and electricity and electric service of whatever nature, valued in money, whether received in money or otherwise, including any amount for which credit is allowed by the vendor to the purchaser, without any deduction for expenses or early payment discounts and also including any charges by the vendor to the purchaser for shipping or delivery, and, with respect to gas and gas service and electricity and electric service, any charges by the vendor for transportation, transmission or distribution, regardless of whether such charges are separately stated in the written contract, if any, or on the bill rendered to such purchaser and regardless of whether such shipping or delivery or transportation, transmission, or distribution is provided by such vendor or a third party, but excluding any credit for tangible personal property accepted in part payment and intended for resale. For special rules governing computation of receipts, see section eleven hundred eleven.
(3) Receipt. The amount of the sale price of any property and the charge for any service taxable under this article, including gas and gas service and electricity and electric service of whatever nature, valued in money, whether received in money or otherwise, including any amount for which credit is allowed by the vendor to the

purchaser, without any deduction for expenses or early payment discounts and also including any charges by the vendor to the purchaser for shipping or delivery, and, with respect to gas and gas service and electricity and electric service, any charges by the vendor for transportation, transmission or distribution, regardless of whether such charges are separately stated in the written contract, if any, or on the bill rendered to such purchaser and regardless of whether such shipping or delivery or transportation, transmission, or distribution is provided by such vendor or a third party, but excluding any credit for tangible personal property accepted in part payment and intended for resale. For special rules governing computation of receipts, see section eleven hundred eleven.

(4) Retail sale. (i) A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property, or (B) for use by that person in performing the services subject to tax under paragraphs (1), (2), (3), (5), (7) and (8) of subdivision (c) of section eleven hundred five where the property so sold becomes a physical component part of the property upon which the services are performed or where the property so sold is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax. Notwithstanding the preceding provisions of this subparagraph, a sale of any tangible personal property to a contractor, subcontractor or repairman for use or consumption in erecting structures or buildings, or building on, or otherwise adding to, altering, improving, maintaining, servicing or repairing real property, property or land, as the terms real property, property or land are defined in the real property tax law, is deemed to be a retail sale regardless of whether the tangible personal property is to be resold as such before it is so used or consumed, except that a sale of a new mobile home to a contractor, subcontractor or repairman who, in such capacity, installs such property is not a retail sale. Notwithstanding the preceding provisions of this subparagraph, the purchase of a truck, trailer or tractor-trailer combination for rental or lease to an authorized carrier, as described in paragraph twenty-two of subdivision (a) of section eleven hundred fifteen, shall be deemed a retail sale.
(4) Retail sale. (i) A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property, or (B) for use by that person in performing the services subject to tax under paragraphs (1), (2), (3), (5), (7) and (8) of subdivision (c) of section eleven hundred five where the property so sold becomes a physical component part of the property upon which the services are performed or where the property so sold is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax. Notwithstanding the preceding provisions of this subparagraph, a sale of any tangible personal property to a contractor, subcontractor or repairman for use or consumption in erecting structures or buildings, or building on, or otherwise adding to, altering, improving, maintaining, servicing or repairing real property, property or land, as the terms real property, property or land are defined in the real property tax law, is deemed to be a retail sale regardless of whether the tangible personal property is to be resold as such before it is so used or consumed, except that a sale of a new mobile home to a contractor, subcontractor or repairman who, in such capacity, installs such property is not a retail sale. Notwithstanding the preceding provisions of this subparagraph, the purchase of a truck, trailer or tractor-trailer combination for rental or lease to an authorized carrier, as described in paragraph twenty-two of subdivision (a) of section eleven hundred fifteen, shall be deemed a retail sale.

(ii) Notwithstanding the provisions of subparagraph (i) of this paragraph, no motor fuel or diesel motor fuel shall be sold or used in this state without payment, and inclusion in the sales price of such motor fuel, of the tax on motor fuel required to be prepaid pursuant to the provisions of section eleven hundred two of this article except where a provision of this article relating to motor fuel or diesel motor fuel specifically provides otherwise and except in the case of a sale or use subject to tax under section eleven hundred five or eleven hundred ten, re-

spectively, of this article. Provided, however, except for such requirement of prepayment of tax required by section eleven hundred two of this article, the provisions of this subparagraph shall not otherwise modify the meaning of the term "retail sale" as used in this article. For purposes of this subparagraph and sections eleven hundred two, eleven hundred eleven, eleven hundred twenty, eleven hundred thirty-two, eleven hundred thirty-four, eleven hundred thirty-five, eleven hundred thirty-six, eleven hundred forty-two, eleven hundred forty-five and eighteen hundred seventeen of this chapter, the following terms shall have the following meanings:

(ii) Notwithstanding the provisions of subparagraph (i) of this paragraph, no motor fuel or diesel motor fuel shall be sold or used in this state without payment, and inclusion in the sales price of such motor fuel, of the tax on motor fuel required to be prepaid pursuant to the provisions of section eleven hundred two of this article except where a provision of this article relating to motor fuel or diesel motor fuel specifically provides otherwise and except in the case of a sale or use subject to tax under section eleven hundred five or eleven hundred ten, respectively, of this article. Provided, however, except for such requirement of prepayment of tax required by section eleven hundred two of this article, the provisions of this subparagraph shall not otherwise modify the meaning of the term "retail sale" as used in this article. For purposes of this subparagraph and sections eleven hundred two, eleven hundred eleven, eleven hundred twenty, eleven hundred thirty-two, eleven hundred thirty-four, eleven hundred thirty-five, eleven hundred thirty-six, eleven hundred forty-two, eleven hundred forty-five and eighteen hundred seventeen of this chapter, the following terms shall have the following meanings:

(A) "Petroleum products" means diesel motor fuel as defined in subdivision fourteen of section two hundred eighty-two of this chapter, other than kerosene or propane used for residential purposes, or motor fuel as defined in subdivision two of section two hundred eighty-two of this chapter. The phrase "used for residential purposes" shall have the same meaning as it has for purposes of section eleven hundred five-A of this article.

(A) "Petroleum products" means diesel motor fuel as defined in subdivision fourteen of section two hundred eighty-two of this chapter, other than kerosene or propane used for residential purposes, or motor fuel as defined in subdivision two of section two hundred eighty-two of this chapter. The phrase "used for residential purposes" shall have the same meaning as it has for purposes of section eleven hundred five-A of this article.

(B) The term "distributor" shall have the same meaning as it has for purposes of article twelve-A of this chapter, excluding persons who are not required pursuant to section two hundred eighty-two-a to pay the tax imposed thereby.

(B) The term "distributor" shall have the same meaning as it has for purposes of article twelve-A of this chapter, excluding persons who are not required pursuant to section two hundred eighty-two-a to pay the tax imposed thereby.

(C) The term "motor fuel" means motor fuel as defined in subdivision two of section two hundred eighty-two of this chapter.

(C) The term "motor fuel" means motor fuel as defined in subdivision two of section two hundred eighty-two of this chapter.

(D) The terms "filling station" and "owner" shall have the same meaning as they have for the purposes of article twelve-A of this chapter.

(E) The term “diesel motor fuel” means diesel motor fuel as defined in subdivision fourteen of section two hundred eighty-two of this chapter.
(E) The term “diesel motor fuel” means diesel motor fuel as defined in subdivision fourteen of section two hundred eighty-two of this chapter.

(F) The terms “highway diesel motor fuel” and “non-highway diesel motor fuel” shall have the same meaning as they have for purposes of article twelve-A of this chapter.

(iii) Notwithstanding the provisions of subparagraph (i) of this paragraph, no cigarettes shall be sold or used in this state without payment, and inclusion in the sales price of such cigarettes, of the tax on cigarettes required to be prepaid pursuant to the provisions of section eleven hundred three of this article except where a provision of this article relating to cigarettes specifically provides otherwise and except in the case of a sale or use subject to tax under section eleven hundred five or eleven hundred ten, respectively, of this article. Provided, however, except for such requirement of prepayment of tax required by section eleven hundred three of this article, the provisions of this subparagraph shall not otherwise modify the meaning of the term “retail sale” as used in this article. For purposes of this subparagraph and sections eleven hundred three, eleven hundred eleven, eleven hundred fifteen, eleven hundred sixteen, eleven hundred twenty-one, eleven hundred thirty-two, eleven hundred thirty-four, eleven hundred thirty-five, eleven hundred thirty-six, eleven hundred thirty-eight, eleven hundred forty-two and eleven hundred forty-five of this article and eighteen hundred seventeen of this chapter, the terms “cigarette,” “agent” and “package” shall have the same meaning that they have for purposes of article twenty of this chapter.
(iii) Notwithstanding the provisions of subparagraph (i) of this paragraph, no cigarettes shall be sold or used in this state without payment, and inclusion in the sales price of such cigarettes, of the tax on cigarettes required to be prepaid pursuant to the provisions of section eleven hundred three of this article except where a provision of this article relating to cigarettes specifically provides otherwise and except in the case of a sale or use subject to tax under section eleven hundred five or eleven hundred ten, respectively, of this article. Provided, however, except for such requirement of prepayment of tax required by section eleven hundred three of this article, the provisions of this subparagraph shall not otherwise modify the meaning of the term “retail sale” as used in this article. For purposes of this subparagraph and sections eleven hundred three, eleven hundred eleven, eleven hundred fifteen, eleven hundred sixteen, eleven hundred twenty-one, eleven hundred thirty-two, eleven hundred thirty-four, eleven hundred thirty-five, eleven hundred thirty-six, eleven hundred thirty-eight, eleven hundred forty-two and eleven hundred forty-five of this article and eighteen hundred seventeen of this chapter, the terms “cigarette,” “agent” and “package” shall have the same meaning that they have for purposes of article twenty of this chapter.

(iv)(A) The term retail sale does not include:

(I) The transfer of tangible personal property to a corporation, solely in consideration for the issuance of its stock, pursuant to a merger or consolidation effected under the law of New York or any other jurisdiction.

(II) The distribution of property by a corporation to its stockholders as a liquidating dividend.

(III) The distribution of property by a partnership to its partners in whole or partial liquidation.

(IV) The transfer of property to a corporation upon its organization in consideration for the issuance of its stock.

(V) The contribution of property to a partnership in consideration for a partnership interest therein.

(B) For an exception applicable to this subparagraph, see subdivision (q) of section eleven hundred eleven of this article.
(B) For an exception applicable to this subparagraph, see subdivision (q) of section eleven hundred eleven of this article.

(5) Sale, selling or purchase. Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume (including, with respect to computer software, merely the right to reproduce), conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor.

(6) Tangible personal property. Corporeal personal property of any nature. However, except for purposes of the tax imposed by subdivision (b) of section eleven hundred five of this article, such term shall not include gas, electricity, refrigeration and steam. Such term shall also include pre-written computer software, whether sold as part of a package, as a separate component, or otherwise, and regardless of the medium by means of which such software is conveyed to a purchaser. Such term shall also include newspapers and periodicals where the vendor ships or delivers the entire edition or issue of the newspaper or periodical, with or without the advertising included in the paper edition or issue, but not including anything, other than advertising, not in such paper edition or issue, to the purchaser by means of telephony [FN1] or telegraphy [FN2] or other electronic media, but only where the amount of the sale price to such purchaser of such newspaper or magazine or the subscription price, in the case of a subscription to a newspaper or periodical, including any charge by such vendor for shipping or delivery to the purchaser, is separately stated to such purchaser. However, such term shall not include a modular home that is permanently affixed to real property, provided that, if a modular home is to be removed from the realty, whether as a whole or disassembled, it and its component parts shall be tangible personal property whether it is to be sold as a whole or as pieces.
(6) Tangible personal property. Corporeal personal property of any nature. However, except for purposes of the tax imposed by subdivision (b) of section eleven hundred five of this article, such term shall not include gas, electricity, refrigeration and steam. Such term shall also include pre-written computer software, whether sold as part of a package, as a separate component, or otherwise, and regardless of the medium by means of which such software is conveyed to a purchaser. Such term shall also include newspapers and periodicals where the vendor ships or delivers the entire edition or issue of the newspaper or periodical, with or without the advertising included in the paper edition or issue, but not including anything, other than advertising, not in such paper edition or issue, to the purchaser by means of telephony [FN1] or telegraphy [FN2] or other electronic media, but only where the amount of the sale price to such purchaser of such newspaper or magazine or the subscription price, in the case of a subscription to a newspaper or periodical, including any charge by such vendor for shipping or delivery to the purchaser, is separately stated to such purchaser. However, such term shall not include a modular home that is permanently affixed to real property, provided that, if a modular home is to be removed from the

realty, whether as a whole or disassembled, it and its component parts shall be tangible personal property whether it is to be sold as a whole or as pieces.

(7) Use. The exercise of any right or power over tangible personal property or over any of the services which are subject to tax under section eleven hundred ten of this article or pursuant to the authority of article twenty-nine of this chapter, [FN3] by the purchaser thereof, and includes, but is not limited to, the receiving, storage or any keeping or retention for any length of time, withdrawal from storage, any installation, any affixation to real or personal property, or any consumption of such property or of any such service subject to tax under such section eleven hundred ten or pursuant to the authority of such article twenty-nine. Without limiting the foregoing, use also shall include the distribution of only tangible personal property, such as promotional materials, or of any such service subject to tax under such section eleven hundred ten or pursuant to the authority of such article twenty-nine.
(7) Use. The exercise of any right or power over tangible personal property or over any of the services which are subject to tax under section eleven hundred ten of this article or pursuant to the authority of article twenty-nine of this chapter, [FN3] by the purchaser thereof, and includes, but is not limited to, the receiving, storage or any keeping or retention for any length of time, withdrawal from storage, any installation, any affixation to real or personal property, or any consumption of such property or of any such service subject to tax under such section eleven hundred ten or pursuant to the authority of such article twenty-nine. Without limiting the foregoing, use also shall include the distribution of only tangible personal property, such as promotional materials, or of any such service subject to tax under such section eleven hundred ten or pursuant to the authority of such article twenty-nine.

(8) Vendor. (i) The term “vendor” includes:

(A) A person making sales of tangible personal property or services, the receipts from which are taxed by this article;

(B) A person maintaining a place of business in the state and making sales, whether at such place of business or elsewhere, to persons within the state of tangible personal property or services, the use of which is taxed by this article;

(C) A person who solicits business either:

(I) by employees, independent contractors, agents or other representatives; or

(II) by distribution of catalogs or other advertising matter, without regard to whether such distribution is the result of regular or systematic solicitation, if such person has some additional connection with the state which satisfies the nexus requirement of the United States constitution;

and by reason thereof makes sales to persons within the state of tangible personal property or services, the use of which is taxed by this article;

(D) A person who makes sales of tangible personal property or services, the use of which is taxed by this article, and who regularly or systematically delivers such property or services in this state by means other than the United States mail or common carrier;

(E) A person who regularly or systematically solicits business in this state by the distribution, without regard to the location from which such distribution originated, of catalogs, advertising flyers or letters, or by any other means of solicitation of business, to persons in this state and by reason thereof makes sales to persons within the state of tangible personal property, the use of which is taxed by this article, if such solicitation satisfies the nexus requirement of the United States constitution;

(F) A person making sales of tangible personal property, the use of which is taxed by this article, where such person retains an ownership interest in such property and where such property is brought into this state by the person to whom such property is sold and the person to whom such property is sold becomes or is a resident or uses such property in any manner in carrying on in this state any employment, trade, business or profession;

(G) Any other person making sales to persons within the state of tangible personal property or services, the use of which is taxed by this article, who may be authorized by the commissioner of taxation and finance to collect such tax by part IV of this article;

(H) The state of New York, any of its agencies, instrumentalities, public corporations (including a public corporation created pursuant to agreement or compact with another state or Canada) or political subdivisions when such entity sells services or property of a kind ordinarily sold by private persons; and

(I) A seller of tangible personal property or services, the use of which is taxed by this article if either (I) an affiliated person that is a vendor as otherwise defined in this paragraph uses in the state trademarks, service marks, or trade names that are the same as those the seller uses; or (II) an affiliated person engages in activities in the state that inure to the benefit of the seller, in its development or maintenance of a market for its goods or services in the state, to the extent that those activities of the affiliate are sufficient to satisfy the nexus requirement of the United States constitution. For purposes of this clause, “affiliated person” has the same meaning as in clause (B) of subparagraph (v) of this paragraph. Nothing in this clause shall be construed to narrow the scope of any other provision in this paragraph. Notwithstanding the provisions of this clause, the activities in the state of an affiliated person in providing accounting or legal services or advice to a seller, or in directing the activities of a seller, including, but not limited to, making decisions about (a) strategic planning, (b) marketing, (c) inventory, (d) staffing, (e) distribution, or (f) cash management, will not result in making the seller a vendor under this paragraph.

(ii) (A) In addition, when in the opinion of the commissioner it is necessary for the efficient administration of this article to treat any salesman, representative, peddler or canvasser as the agent of the vendor, distributor, supervisor or employer under whom he operates or from whom he obtains tangible personal property sold by him, or for whom he solicits business, the commissioner may, in his discretion, treat such agent as the vendor jointly responsible with his principal, distributor, supervisor or employer for the collection and payment over of the tax. An unaffiliated person providing fulfillment services to a purchaser shall not be treated as a vendor by the com-

missioner under this paragraph with respect to such activity. For purposes of this clause, persons are affiliated persons with respect to each other where one of such persons has an ownership interest of more than five percent, whether direct or indirect, in the other, or where an ownership interest of more than five percent, whether direct or indirect, is held in each of such persons by another person or by a group of other persons which are affiliated persons with respect to each other.

(B) A person shall be deemed a vendor of the services enumerated in paragraph nine of subdivision (c) of section eleven hundred five of this article, liable for all the obligations of a vendor, including the collection, reporting and remittance of the tax imposed under this article and possessing all the rights of a vendor including the right to an exclusion or a credit or refund of tax as provided in subdivision (e) of section eleven hundred thirty-two of this article, with respect to such services which are provided by a vendor thereof and are subject to taxation under this article, where such person, its affiliate or agent bills, on behalf of such vendor, either (I) as part of, or as a schedule to, the statement of such person to its purchasers or (II) separately (without regard to whether or not such person has customers of its own), such enumerated services provided by such vendor. For the purpose of this paragraph, “affiliate” means an entity which directly, indirectly or constructively controls a vendor of such enumerated services or is controlled by such vendor or is under the control of, along with such vendor, a common parent. Provided, however, the provisions of this clause shall not in any way be construed to otherwise limit or remove the obligations and liabilities of any person with respect to the tax imposed by this article.
(B) A person shall be deemed a vendor of the services enumerated in paragraph nine of subdivision (c) of section eleven hundred five of this article, liable for all the obligations of a vendor, including the collection, reporting and remittance of the tax imposed under this article and possessing all the rights of a vendor including the right to an exclusion or a credit or refund of tax as provided in subdivision (e) of section eleven hundred thirty-two of this article, with respect to such services which are provided by a vendor thereof and are subject to taxation under this article, where such person, its affiliate or agent bills, on behalf of such vendor, either (I) as part of, or as a schedule to, the statement of such person to its purchasers or (II) separately (without regard to whether or not such person has customers of its own), such enumerated services provided by such vendor. For the purpose of this paragraph, “affiliate” means an entity which directly, indirectly or constructively controls a vendor of such enumerated services or is controlled by such vendor or is under the control of, along with such vendor, a common parent. Provided, however, the provisions of this clause shall not in any way be construed to otherwise limit or remove the obligations and liabilities of any person with respect to the tax imposed by this article.

(iii) For purposes of clause (D) of subparagraph (i) of this paragraph, a person shall be presumed to be regularly or systematically delivering property or services in this state if the cumulative total number of occasions such person or his agent came into the state to deliver property or services exceeded twelve during the preceding four quarterly periods ending on the last day of February, May, August and November, unless such person can demonstrate, to the satisfaction of the commissioner, that he cannot reasonably be expected to come into the state for such purposes on more than twelve occasions during the next succeeding four quarterly periods ending on the last day of February, May, August and November.

(iv) For purposes of clause (E) of subparagraph (i) of this paragraph, a person shall be presumed to be regularly or systematically soliciting business in this state if, for the immediately preceding four quarterly periods ending on the last day of February, May, August and November, the cumulative total of such person's gross receipts from sales of property delivered in this state exceeds three hundred thousand dollars and such person made more

than one hundred sales of property delivered in this state, unless such person can demonstrate, to the satisfaction of the commissioner, that he cannot reasonably be expected to have gross receipts in excess of three hundred thousand dollars or more than one hundred sales of property delivered in this state for the next succeeding four quarterly periods ending on the last day of February, May, August and November.

(v) Notwithstanding any other provision of law, the term vendor shall not include:

(A) a person who is not otherwise a vendor who purchases fulfillment services carried on in New York by a person other than an affiliated person; or

(B) a person who is not otherwise a vendor who owns tangible personal property located on the premises of an unaffiliated person performing fulfillment services for such person.

For purposes of this subparagraph, persons are affiliated persons with respect to each other where one of such persons has an ownership interest of more than five percent, whether direct or indirect, in the other, or where an ownership interest of more than five percent, whether direct or indirect, is held in each of such persons by another person or by a group of other persons which are affiliated persons with respect to each other.

(vi) For purposes of subclause (I) of clause (C) of subparagraph (i) of this paragraph, a person making sales of tangible personal property or services taxable under this article (“seller”) shall be presumed to be soliciting business through an independent contractor or other representative if the seller enters into an agreement with a resident of this state under which the resident, for a commission or other consideration, directly or indirectly refers potential customers, whether by a link on an internet website or otherwise, to the seller, if the cumulative gross receipts from sales by the seller to customers in the state who are referred to the seller by all residents with this type of an agreement with the seller is in excess of ten thousand dollars during the preceding four quarterly periods ending on the last day of February, May, August, and November. This presumption may be rebutted by proof that the resident with whom the seller has an agreement did not engage in any solicitation in the state on behalf of the seller that would satisfy the nexus requirement of the United States constitution during the four quarterly periods in question. Nothing in this subparagraph shall be construed to narrow the scope of the terms independent contractor or other representative for purposes of subclause (I) of clause (C) of subparagraph (i) of this paragraph.

(9) Capital improvement. (i) An addition or alteration to real property which:

(A) Substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property; and

(B) Becomes part of the real property or is permanently affixed to the real property so that removal would cause material damage to the property or article itself; and

(C) Is intended to become a permanent installation.

(ii) A mobile home shall not constitute an addition or capital improvement to real property, property or land, regardless of the nature of its installation.

(iii) Notwithstanding the provisions of subparagraph (i) of this paragraph: (A) Floor covering, such as carpet, carpet padding, linoleum and vinyl roll flooring, carpet tile, linoleum tile and vinyl tile, installed as the initial finished floor covering in new construction or a new addition to or total reconstruction of existing construction shall constitute an addition or capital improvement to real property, property or land; and

(B) Floor covering, such as carpet, carpet padding, linoleum and vinyl roll flooring, carpet tile, linoleum tile and vinyl tile, installed other than as described in clause (A) of this subparagraph shall not constitute an addition or capital improvement to real property, property or land.

(10) Mobile home. (i) A structure which is:

(A) A type of manufactured housing; and

(B) Not self-propelled; and

(C) Transportable in one or more sections:

(I) that may be folded, collapsed or telescoped when being towed and expanded later to provide additional cubic capacity, or

(II) that may be separately towable and designed to be joined into one integral structure capable of being again separated into the sections for repeated towing; and

(D) Built on a permanent chassis, comprised of frame and wheels, that is to be connected to utilities; and

(E) Designed to be used as a permanent dwelling, with or without permanent foundation; and

(F) Used for residential or commercial purposes.

(ii) The term “mobile home” shall also include structures commonly called “double wides”.

(iii) The term “mobile home” shall not include:

(A) Structures designed and constructed primarily for temporary living quarters, recreations, camping or travel; or

(B) Furniture, fixtures, furnishings, appliances, attachments or similar tangible personal property not incorporated as component parts of a mobile home at the time of manufacture.

(11) New mobile home. A mobile home which is sold for the first time at retail including all components incorporated into such mobile home at the time of manufacture and remaining unchanged at the time of the first retail sale thereof.

(12) Promotional materials. Any advertising literature, other related tangible personal property (whether or not personalized by the recipient's name or other information uniquely related to such person) and envelopes used exclusively to deliver the same. Such other related tangible personal property includes, but is not limited to, free gifts, complimentary maps or other items given to travel club members, applications, order forms and return envelopes with respect to such advertising literature, annual reports, prospectuses, promotional displays and Cheshire labels but does not include invoices, statements and the like. Promotional materials shall also include paper or ink furnished to a printer for use in providing the services of producing, printing or imprinting promotional materials or in producing, printing or imprinting promotional materials, where such paper and ink become a physical component part of the promotional materials and such printer sells such services or such promotional materials to the person who furnished the paper and ink to such printer.

(13) Telephone answering service. A service that consists of taking messages by telephone and transmitting such messages to the purchaser of the service or at the purchaser's direction, but not including such service if it is merely an incidental element of a different or other service purchased by the customer.

(14) Pre-written computer software. Computer software (including pre-written upgrades thereof) which is not software designed and developed by the author or other creator to the specifications of a specific purchaser. The combining of two or more pre-written computer software programs or pre-written portions thereof does not cause the combination to be other than pre-written computer software. Pre-written software also includes software designed and developed by the author or other creator to the specifications of a specific purchaser when it is sold to a person other than such purchaser. Where a person modifies or enhances computer software of which such person is not the author or creator, such person shall be deemed to be the author or creator only of such person's modifications or enhancements. Pre-written software or a pre-written portion thereof that is modified or enhanced to any degree, where such modification or enhancement is designed and developed to the specifications of a specific purchaser, remains pre-written software; provided, however, that where there is a reasonable, separately stated charge or an invoice or other statement of the price given to the purchaser for such modification or enhancement, such modification or enhancement shall not constitute pre-written computer software.

(15) Clothing and footwear. (i) Clothing and footwear to be worn by human beings, but not including costumes or rented formal wear, and (ii) fabric, thread, yarn, buttons, snaps, hooks, zippers and like items which are used or consumed to make or repair such clothing (other than such costumes or rented formal wear) and which become a physical component part of such clothing, but not including such items made from pearls, precious or

semi-precious stones, jewels or metals, or imitations thereof.

(16) Commercial vessel. A vessel used primarily (i) to transport persons or property, for hire, (ii) by the purchaser of the vessel to transport such person's tangible personal property in the conduct of such person's business, or (iii) for both such purposes.

(17) Commercial aircraft. Aircraft used primarily (i) to transport persons or property, for hire, (ii) by the purchaser of the aircraft to transport such person's tangible personal property in the conduct of such person's business, or (iii) for both such purposes. Transporting persons for hire does not include transporting agents, employees, officers, members, partners, managers or directors of affiliated persons. Persons are affiliated persons with respect to each other where one of the persons has an ownership interest of more than five percent, whether direct or indirect, in the other, or where an ownership interest of more than five percent, whether direct or indirect, is held in each of the persons by another person or by a group of other persons that are affiliated persons with respect to each other. For an exception to the exclusions from the definition of “retail sale” applicable to aircraft, see subdivision (q) of section eleven hundred eleven of this article.
(17) Commercial aircraft. Aircraft used primarily (i) to transport persons or property, for hire, (ii) by the purchaser of the aircraft to transport such person's tangible personal property in the conduct of such person's business, or (iii) for both such purposes. Transporting persons for hire does not include transporting agents, employees, officers, members, partners, managers or directors of affiliated persons. Persons are affiliated persons with respect to each other where one of the persons has an ownership interest of more than five percent, whether direct or indirect, in the other, or where an ownership interest of more than five percent, whether direct or indirect, is held in each of the persons by another person or by a group of other persons that are affiliated persons with respect to each other. For an exception to the exclusions from the definition of “retail sale” applicable to aircraft, see subdivision (q) of section eleven hundred eleven of this article.

18. Fulfillment services. Any of the following services performed by an entity on its premises on behalf of a purchaser:

(i) the acceptance of orders electronically or by mail, telephone, telefax or internet;

(ii) responses to consumer correspondence and inquiries electronically or by mail, telephone, telefax or internet;

(iii) billing and collection activities; or

(iv) the shipment of orders from an inventory of products offered for sale by the purchaser.

(19) Farming. The term “farming” includes agriculture, floriculture, horticulture, aquaculture and silviculture; stock, dairy, poultry, fruit, fur bearing animal, graping, truck and tree farming; ranching; operating nurseries, greenhouses, vineyard trellises or other similar structures used primarily for the raising of agricultural, horticultural, vinicultural, viticultural, floricultural or silvicultural commodities; operating orchards; raising, growing and harvesting crops, livestock and livestock products, as defined in subdivision two of section three hundred

one of the agriculture and markets law; and raising, growing and harvesting woodland products, including, but not limited to, timber, logs, lumber, pulpwood, posts and firewood.
(19) Farming. The term “farming” includes agriculture, floriculture, horticulture, aquaculture and silviculture; stock, dairy, poultry, fruit, fur bearing animal, graping, truck and tree farming; ranching; operating nurseries, greenhouses, vineyard trellises or other similar structures used primarily for the raising of agricultural, horticultural, vinicultural, viticultural, floricultural or silvicultural commodities; operating orchards; raising, growing and harvesting crops, livestock and livestock products, as defined in subdivision two of section three hundred one of the agriculture and markets law; and raising, growing and harvesting woodland products, including, but not limited to, timber, logs, lumber, pulpwood, posts and firewood.

(20) Commercial horse boarding operation. “Commercial horse boarding operation” shall have the same meaning that such term has in subdivision thirteen of section three hundred one of the agriculture and markets law.
(20) Commercial horse boarding operation. “Commercial horse boarding operation” shall have the same meaning that such term has in subdivision thirteen of section three hundred one of the agriculture and markets law.

(21) Repealed by L.2000, c. 63, pt. B, § 1, eff. Sept. 1, 2000.

(22) “Prepaid telephone calling service” means the right to exclusively purchase telecommunication services, that must be paid for in advance and enable the origination of one or more intrastate, interstate or international telephone calls using an access number (such as a toll free network access number) and/or authorization code, whether manually or electronically dialed, for which payment to a vendor must be made in advance, whether or not that right is represented by the transfer by the vendor to the purchaser of an item of tangible personal property. In no event shall a credit card constitute a prepaid telephone calling service. If the sale or recharge of a prepaid telephone calling service does not take place at the vendor's place of business, it shall be conclusively determined to take place at the purchaser's shipping address or, if there is no item shipped, at the purchaser's billing address or the location associated with the purchaser's mobile telephone number.

(23) Qualified empire zone enterprise. The term “qualified empire zone enterprise” shall have the same meaning that such term has in section fourteen of this chapter for purposes of this article and article twenty-nine of this chapter.
(23) Qualified empire zone enterprise. The term “qualified empire zone enterprise” shall have the same meaning that such term has in section fourteen of this chapter for purposes of this article and article twenty-nine of this chapter.

(24) “Mobile telecommunications service” shall mean commercial mobile radio service. “Mobile telecommunications service” does not include prepaid telephone calling service or air-ground radio telephone service as defined in section 22.99 of title 47 of the code of federal regulations as in effect on June first, nineteen hundred ninety-nine.
(24) “Mobile telecommunications service” shall mean commercial mobile radio service. “Mobile telecommunications service” does not include prepaid telephone calling service or air-ground radio telephone service as defined in section 22.99 of title 47 of the code of federal regulations as in effect on June first, nineteen hundred ninety-nine.

(25) “Commercial mobile radio service” and “mobile service” shall have the same meanings as in section 20.3 of title 47 of the code of federal regulations in effect on June first, nineteen hundred ninety-nine, to wit:
(25) “Commercial mobile radio service” and “mobile service” shall have the same meanings as in section 20.3 of title 47 of the code of federal regulations in effect on June first, nineteen hundred ninety-nine, to wit:

(i) “Commercial mobile radio service.” A mobile service that is: (A)(I) provided for profit, i.e., with the intent of receiving compensation or monetary gain; (II) an interconnected service; and (III) available to the public, or to such classes of eligible users as to be effectively available to a substantial portion of the public; or (B) the functional equivalent of such a mobile service described in clause (A) of this subparagraph.

(ii) “Mobile service.” A radio communications service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves, and includes: (A) both one-way and two-way radio communications services; (B) a mobile service which provides a regularly interacting group of base, mobile, portable, and associated control and relay stations (whether licensed on an individual, cooperative, or multiple basis) for private one-way or two-way land mobile radio communications by eligible users over designated areas of operation; and (C) any service for which a license is required in a personal communications service under part 24 of title 47 of the code of federal regulations in effect on June first, nineteen hundred ninety-nine.
(ii) “Mobile service.” A radio communications service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves, and includes: (A) both one-way and two-way radio communications services; (B) a mobile service which provides a regularly interacting group of base, mobile, portable, and associated control and relay stations (whether licensed on an individual, cooperative, or multiple basis) for private one-way or two-way land mobile radio communications by eligible users over designated areas of operation; and (C) any service for which a license is required in a personal communications service under part 24 of title 47 of the code of federal regulations in effect on June first, nineteen hundred ninety-nine.

(26) “Place of primary use” shall mean the street address representative of where a mobile telecommunications customer's use of the mobile telecommunications service primarily occurs, and must be: (i) the residential street address or the primary business street address of the mobile telecommunications customer and (ii) within the licensed service area of the home service provider.

(27)(i) “Mobile telecommunications customer” shall mean either (A) a person or entity that contracts with a home service provider for mobile telecommunications services; or (B) if the end user of mobile telecommunications services is not the contracting party, the end user of the mobile telecommunications service, but this clause (B) applies only for the purpose of determining the place of primary use. “Mobile telecommunications customer” does not include either (A) a reseller of mobile telecommunications service; or (B) a serving carrier under an arrangement to serve a mobile telecommunications customer outside the home service provider's licensed service area.

(ii) “Home service provider” shall mean a facilities-based carrier or reseller as defined in subparagraph (iv) of this paragraph, with which the mobile telecommunications customer contracts for the provision of mobile tele-

communications service.

(iii) “Licensed service area” shall mean the geographic area in which a home service provider is authorized by law or contract to provide mobile telecommunications service to a mobile telecommunications customer.

(iv) “Reseller” shall mean a provider who purchases telecommunications service from another telecommunications service provider and then resells, uses as a component part of, or integrates the purchased services into a mobile telecommunications service. “Reseller” does not include a serving carrier with which a home service provider arranges for the services to its mobile telecommunications customers outside the home service provider's licensed service area.

(v) “Serving carrier” shall mean a facilities-based carrier providing mobile telecommunications service to a mobile telecommunications customer outside the home service provider's or reseller's licensed service area.

(28) “Taxing jurisdiction” shall mean any of the several states, the District of Columbia, or any territory or possession of the United States, any municipality, city, county, township, parish, transportation district, or assessment jurisdiction, or any other political subdivision within the territorial limits of the United States with the authority to impose a tax, charge, or fee.

(29) [Deemed repealed Sept. 1, 2014, pursuant to L.2006, c. 109, pt. W-1, § 19.] “E85” shall have the same meaning as in subdivision twenty-two of section two hundred eighty-two of this chapter.
(29) [Deemed repealed Sept. 1, 2014, pursuant to L.2006, c. 109, pt. W-1, § 19.] “E85” shall have the same meaning as in subdivision twenty-two of section two hundred eighty-two of this chapter.

(30) [Deemed repealed Sept. 1, 2014, pursuant to L.2006, c. 109, pt. W-1, § 19.] “B20” shall have the same meaning as in subdivision twenty-three of section two hundred eighty-two of this chapter.
(30) [Deemed repealed Sept. 1, 2014, pursuant to L.2006, c. 109, pt. W-1, § 19.] “B20” shall have the same meaning as in subdivision twenty-three of section two hundred eighty-two of this chapter.

(31) [Deemed repealed Sept. 1, 2014, pursuant to L.2006, c. 109, pt. W-1, § 19.] “CNG” shall have the same meaning as in subdivision twenty-four of section two hundred eighty-two of this chapter.
(31) [Deemed repealed Sept. 1, 2014, pursuant to L.2006, c. 109, pt. W-1, § 19.] “CNG” shall have the same meaning as in subdivision twenty-four of section two hundred eighty-two of this chapter.

(32) [Deemed repealed Sept. 1, 2014, pursuant to L.2006, c. 109, pt. W-1, § 19.] “Hydrogen” shall have the same meaning as in subdivision twenty-five of section two hundred eighty-two of this chapter.
(32) [Deemed repealed Sept. 1, 2014, pursuant to L.2006, c. 109, pt. W-1, § 19.] “Hydrogen” shall have the same meaning as in subdivision twenty-five of section two hundred eighty-two of this chapter.

(33) Modular home. A one- to three-family residential structure constructed at the building site from modular

home modules, where the modules are connected and such structure is finished using building materials or other tangible personal property at the building site, such modular home conforms to the building and other codes applicable to one- to three-family site-built homes in the jurisdiction where such building site is located, and such finished modular home constitutes a capital improvement. “Modular home” shall not include (i) a structure or portion of a structure built on-site, whether built by the modular home installer or another person, using building materials delivered to the site, even if some of such materials were manufactured, produced, or assembled off-site, such as, by way of example and not by way of limitation, concrete blocks, windows, door units, wall or roof panels, trusses and dormers; (ii) a shed, gazebo, any unattached garage or the like (even if made or built by a manufacturer of modular home modules); or (iii) a mobile home.

(34) Transportation service. The service of transporting, carrying or conveying a person or persons by livery service; whether to a single destination or to multiple destinations; and whether the compensation paid by or on behalf of the passenger is based on mileage, trip, time consumed or any other basis. A service that begins and ends in this state is deemed intra-state even if it passes outside this state during a portion of the trip. However, transportation service does not include transportation of persons in connection with funerals. Transportation service includes transporting, carrying, or conveying property of the person being transported, whether owned by or in the care of such person. In addition to what is included in the definition of “receipt” in paragraph three of this subdivision, receipts from the sale of transportation service subject to tax include any handling, carrying, baggage, booking service, administrative, mark-up, additional, or other charge, of any nature, made in conjunction with the transportation service. Livery service means service provided by limousine, black car or other motor vehicle, with a driver, but excluding (i) a taxicab, (ii) a bus, and (iii), in a city of one million or more in this state, an affiliated livery vehicle, and excluding any scheduled public service. Limousine means a vehicle with a seating capacity of up to fourteen persons, excluding the driver. Black car means a for-hire vehicle dispatched from a central facility. “Affiliated livery vehicle” means a for-hire motor vehicle with a seating capacity of up to six persons, including the driver, other than a black car or luxury limousine, that is authorized and licensed by the taxi and limousine commission of a city of one million or more to be dispatched by a base station located in such a city and regulated by such taxi and limousine commission; and the charges for service provided by an affiliated livery vehicle are on the basis of flat rate, time, mileage, or zones and not on a garage to garage basis.

(35) Modular home modules. The component sections that will be installed on-site to construct a modular home, each of which sections is (i) engineered and manufactured in a factory, (ii) shipped or delivered to the building site on a truck or other vehicle, (iii) installed at the site, on a permanent foundation, to become part of the modular home and (iv) not by itself suitable for occupancy. Every group of modules that will be installed in this state as a modular home, or, if a modular home is to be built from a single module, that single module, shall, prior to shipment from the place where it is made, bear the insignia of approval issued by the department of state pursuant to the authority of article eighteen of the executive law and regulations thereunder; and the department of state shall cooperate with the commissioner and furnish such information as the commissioner requests to carry out this article and its purposes. A modular home module shall include tangible personal property shipped or delivered with the module from the factory by the manufacturer at the same time the module is shipped or delivered, such as exterior siding, roof shingles, roof vent pipes, interior trim pieces, paint, and interior doors, and supplies required and used to install them, but only if that property (i) was engineered or designed to be an integral component part of the module, (ii) matches, or is essential to the functioning of, the module, (iii) was not installed in the module at the time the module was made only because it would be damaged during, or interfere with, shipping or delivery of the module to the building site, (iv) will be permanently installed in the module at

the building site by the manufacturer or by the purchaser of the module or by the contractor of either of them, (v) is listed in full on the contract, bill of sale, invoice or other memorandum of price given to the purchaser or buyer, or in an addendum thereto, true copies of which the manufacturer shall retain as part of the records required to be kept by this article and make available on request, and (vi) is included in the sale price of the module, without any additional charge. A modular home module shall not include (i) furniture, fixtures, furnishings, appliances, attachments or similar tangible personal property not incorporated as component parts of the module at the time of its manufacture or (ii) building materials or other tangible personal property used to connect the modules or finish the modular home at the building site.

(36) New modular home module. A modular home module sold for the first time at retail.

(37) Electronic news service. (i) A service delivered, furnished or provided to or accessed by the purchaser electronically or digitally that meets all of the following conditions:

(A) The service's predominant purpose is the presentation of news content, which it prominently features;

(B) The service's news content (I) includes general news that is accessible without use of a search function; (II) is newly published or updated at least daily unless the service specifies some other interval, provided, however, that the news content must be newly updated or published within a twenty-four hour period that precedes or immediately follows a time when the non-news content is newly published or updated; and (III) is predominantly purchased from contracted wire services or written or produced by the employees or engaged independent contractors of the person providing the service, including, but not limited to, employees or engaged independent contractors of any affiliate of such person;

(C) The service is available to the public;

(D) The service holds itself out as a “news service,” “newspaper,” “magazine,” “periodical,” “journal,” “post,” or words of similar import and does not hold itself out as something other than one of such terms or a term of similar import.

(E) The service has continuity as to its title and the general nature of its content over time;

(F) The service is not, in whole or in substantial part, a listing, catalog, database, or compilation;

(G) The only search function the service offers without a separately-stated, reasonable charge is a search of the service's or of any of its affiliates' present or past news content. Provided, a service that satisfies all the clauses of this subparagraph except this clause may still qualify as an electronic news service for purposes of this paragraph if the provider of the service can show that the non-news content available through the search function is merely an incidental part of the service, including, for example, by showing that the cost to the person providing the service of any non-news content available through the search function is less than the cost to that person of

providing the news content available through the service. Provided, further, that a purchaser's access to the service's search function for which there is a separately-stated, reasonable charge to the purchaser shall be treated separately and is not relevant as to whether this clause is satisfied.

(ii) The following definitions apply to subparagraph (i) of this paragraph and subdivision (gg) of section eleven hundred fifteen of this article:
(ii) The following definitions apply to subparagraph (i) of this paragraph and subdivision (gg) of section eleven hundred fifteen of this article:

(A) “News content” means the articles, photographs, and video and audio material concerning general news or specialized news and does not include listings, advertisements, catalogs, compilations, databases, or the like.

(B) “Non-news content” means any information other than news content.

(C) “Article” means a prose composition, including commentaries, reviews, editorials, op-eds, letters to the editor, and reader comments on articles. The term does not include listings, advertisements, catalogs, compilations, databases, or the like.

(D) “General news” means matters of general interest and reports of current events.

(E) “Specialized news” means matters of a specialized interest, such as legal, mercantile, financial, theatrical, entertainment news, political, religious, or sporting matters.

(F) “Cap amount” means three hundred percent of the annualized average daily newsstand price of the three newspapers with the largest total paid national daily circulation. The commissioner shall determine the cap amount annually and shall cause it to be published on the department's website and give other appropriate general notice thereof. The commissioner shall determine and publish the cap amount annually by April first based on prices charged during the first week of January of that year, which cap amount shall apply for the succeeding twelve-month period commencing June first and ending May thirty-first. The calculation and publication of the cap amount under this clause shall not be included within paragraph (a) of subdivision two of section one hundred two of the state administrative procedure act relating to the definition of a rule.
(F) “Cap amount” means three hundred percent of the annualized average daily newsstand price of the three newspapers with the largest total paid national daily circulation. The commissioner shall determine the cap amount annually and shall cause it to be published on the department's website and give other appropriate general notice thereof. The commissioner shall determine and publish the cap amount annually by April first based on prices charged during the first week of January of that year, which cap amount shall apply for the succeeding twelve-month period commencing June first and ending May thirty-first. The calculation and publication of the cap amount under this clause shall not be included within paragraph (a) of subdivision two of section one hundred two of the state administrative procedure act relating to the definition of a rule.

(G) “Affiliate” means, with respect to any person, any other person that, directly or indirectly through one or

more intermediaries, controls, or is controlled by, or is under common control with, such person, and the term “control” (including the terms “controlled by” and “under common control with”) means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of such person, whether through ownership of voting securities, by contract or otherwise.

(38) Electronic periodical. (i) A publication delivered, furnished or provided to or accessed by the purchaser electronically or digitally that meets all of the following conditions:

(A) The publication's predominant purpose is the presentation of news content, which it prominently features;

(B) The publication is published at stated intervals, at least as frequently as four times a year but no more frequently than weekly, and is not updated between issues. However, the incidental provision of additional news content between issues will not prevent the requirement in this clause from being satisfied. In determining whether the news content added between issues is incidental, among the factors the commissioner is to consider is the amount of the news content added between issues relative to the news content in preceding issues and the frequency of the provision of additional news content between issues. Provided that the display of reader comments or letters to the editor between issues does not affect whether this clause is satisfied.

(C) The publication's news content is purchased from contracted wire services or written or produced by multiple employees or engaged independent contractors of the person providing the publication, including, but not limited to, employees or engaged independent contractors of any affiliate of such person;

(D) The publication is available to the public;

(E) The publication holds itself out as a “magazine,” “periodical” or words of similar import and does not hold itself out as something other than a “magazine,” “periodical,” or words of similar import;

(F) The publication has continuity as to its title and the general nature of its content over time;

(G) The publication is not, in whole or in substantial part, a listing, catalog, database, or compilation; and

(H) The only search function the publication offers without a separately-stated, reasonable charge is a search of the publication's or of an affiliate's present or past news content. However: (I) the publication's provision of access, at no additional charge, to a search engine that, apart from the service, is otherwise available to the public for free is not relevant as to whether this clause is satisfied; and (II) the publication's provision of access to a search function for which there is a separately-stated, reasonable charge to the purchaser shall be treated separately and is not relevant as to whether this clause is satisfied.

(ii) For purposes of subparagraph (i) of this paragraph and the exemption provided for electronic periodicals in subdivision (gg) of section eleven hundred fifteen of this article, “articles” has the same meaning as in subpara-

graph (ii) of paragraph thirty-seven of subdivision (b) of this section and “news content” means articles, photographs, and video and audio material devoted to literature, the sciences, the arts, news, an industry, profession, sport or other field of endeavor, and does not include listings, advertisements, catalogs, compilations, databases, or the like.
(ii) For purposes of subparagraph (i) of this paragraph and the exemption provided for electronic periodicals in subdivision (gg) of section eleven hundred fifteen of this article, “articles” has the same meaning as in subparagraph (ii) of paragraph thirty-seven of subdivision (b) of this section and “news content” means articles, photographs, and video and audio material devoted to literature, the sciences, the arts, news, an industry, profession, sport or other field of endeavor, and does not include listings, advertisements, catalogs, compilations, databases, or the like.

(c) When used in this article for the purposes of the tax imposed under subdivision (e) of section eleven hundred five, the following terms shall mean:
(c) When used in this article for the purposes of the tax imposed under subdivision (e) of section eleven hundred five, the following terms shall mean:

(1) Hotel. A building or portion of it which is regularly used and kept open as such for the lodging of guests. The term “hotel” includes an apartment hotel, a motel, boarding house or club, whether or not meals are served.

(2) Occupancy. The use or possession, or the right to the use or possession, of any room in a hotel. “Right to the use or possession” includes the rights of a room remarketer as described in paragraph eight of this subdivision.

(3) Occupant. A person who, for a consideration, uses, possesses, or has the right to use or possess, any room in a hotel under any lease, concession, permit, right of access, license to use or other agreement, or otherwise. “Right to use or possess” includes the rights of a room remarketer as described in paragraph eight of this subdivision.

(4) Operator. Any person operating a hotel. Such term shall include a room remarketer and such room remarketer shall be deemed to operate a hotel, or portion thereof, with respect to which such person has the rights of a room remarketer.

(5) Permanent resident. Any occupant of any room or rooms in a hotel for at least ninety consecutive days shall be considered a permanent resident with regard to the period of such occupancy.

(6) Rent. The consideration received for occupancy, including any service or other charge or amount required to be paid as a condition for occupancy, valued in money, whether received in money or otherwise and whether received by the operator or a room remarketer or another person on behalf of either of them.

(7) Room. Any room or rooms of any kind in any part or portion of a hotel, which is available for or let out for any purpose other than a place of assembly.

(8) Room remarketer. A person who reserves, arranges for, conveys, or furnishes occupancy, whether directly or indirectly, to an occupant for rent in an amount determined by the room remarketer, directly or indirectly, whether pursuant to a written or other agreement. Such person's ability or authority to reserve, arrange for, convey, or furnish occupancy, directly or indirectly, and to determine rent therefor, shall be the “rights of a room remarketer”. A room remarketer is not a permanent resident with respect to a room for which such person has the rights of a room remarketer.

(d) When used in this article for purposes of the tax imposed under subdivision (f) of section eleven hundred five, the following terms shall mean:
(d) When used in this article for purposes of the tax imposed under subdivision (f) of section eleven hundred five, the following terms shall mean:

(1) Active annual member. A member who is not a life member but who enjoys full club privileges as distinguished from the privileges enjoyed by a person holding a nonresident membership, an associate membership, or other partial or restricted membership.

(2) Admission charge. The amount paid for admission, including any service charge and any charge for entertainment or amusement or for the use of facilities therefor.

(3) Amusement charge. Any admission charge, dues or charge of roof garden, cabaret or other similar place.

(4) Charge of a roof garden, cabaret or other similar place. Any charge made for admission, refreshment, service, or merchandise at a roof garden, cabaret or other similar place.

(5) Dramatic or musical arts admission charge. Any admission charge paid for admission to a theatre, opera house, concert hall or other hall or place of assembly for a live dramatic, choreographic or musical performance.

(6) Dues. Any dues or membership fee including any assessment, irrespective of the purpose for which made, and any charges for social or sports privileges or facilities, except charges for sports privileges or facilities offered to members' guests which would otherwise be exempt if paid directly by such guests.

(7) Initiation fee. Any payment, contribution, or loan, required as a condition precedent to membership, whether or not such payment, contribution or loan is evidenced by a certificate of interest or indebtedness or share of stock, and irrespective of the person or organization to whom paid, contributed or loaned.

(8) Lessor. Any person who is the owner, licensee or lessee of any place of amusement or roof garden, cabaret or other similar place which he leases, subleases or grants a license to use to other persons who make amusement charges or admission charges.

(9) Patron. Any person who pays an amusement charge or who is otherwise required to pay the tax imposed un-

der such subdivision (f) of section eleven hundred five.
(9) Patron. Any person who pays an amusement charge or who is otherwise required to pay the tax imposed under such subdivision (f) of section eleven hundred five.

(10) Place of amusement. Any place where any facilities for entertainment, amusement, or sports are provided.

(11) Recipient. Any person who collects or receives or is under a duty to collect an amusement charge.

(12) Roof garden, cabaret or other similar place. Any roof garden, cabaret or other similar place which furnishes a public performance for profit, but not including a place where merely live dramatic or musical arts performances are offered in conjunction with the serving or selling of food, refreshment or merchandise, so long as such serving or selling of food, refreshment or merchandise is merely incidental to such performances.

(13) Social or athletic club. Any club or organization of which a material purpose or activity is social or athletic.

(14) Honorary member. A membership granted in a social or athletic club without payment of dues which may provide full or partial club privileges.

CREDIT(S)

(Added L.1965, c. 93, § 1. Amended L.1965, c. 575, §§ 1 to 3; L.1966, c. 962, § 1; L.1969, c. 473, § 1; L.1971, c. 221, § 1; L.1973, c. 1004, § 1; L.1979, c. 470, §§ 1, 2; L.1981, c. 471, § 1; L.1981, c. 1043, § 38; L.1982, c. 454, §§ 3, 4; L.1982, c. 469, § 2; L.1982, c. 930, § 2; L.1983, c. 986, §§ 1, 2; L.1985, c. 44, §§ 18, 19; L.1985, c. 65, § 76; L.1985, c. 765, § 30; L.1986, c. 276, § 14; L.1986, c. 609, § 1; L.1988, c. 261, § 83; L.1989, c. 61, §§ 242, 243, 246, 247, 250; L.1990, c. 190, §§ 167 to 169; L.1991, c. 166, §§ 17, 154, 155, 160; L.1994, c. 498, § 1; L.1994, c. 576, § 48; L.1995, c. 2, § 48; L.1996, c. 309, §§ 217, 236; L.1997, c. 389, pt. A, § 112, eff. Aug. 7, 1997; L.1997, c. 681, §§ 1, 2, 3, eff. Sept. 1, 1997; L.1997, c. 687, § 1, eff. Jan. 8, 1998; L.1998, c. 56, pt. A, § 77, eff. Aug. 7, 1997; L.1998, c. 75, §§ 1, 2, eff. June 2, 1998; L.1999, c. 407, pt. Y, § 1, eff. March 1, 2001; L.1999, c. 649, § 1, eff. March 1, 2000; L.1999, c. 651, §§ 1, 6, eff. March 1, 2000; L.2000, c. 63, pt. B, § 1, eff. Sept. 1, 2000; L.2000, c. 63, pt. Y, § 21, eff. June 1, 2000; L.2000, c. 63, pt. GG, § 8, eff. March 1, 2001; L.2000, c. 220, § 1, eff. Aug. 16, 2000, deemed eff. March 1, 1997; L.2002, c. 85, pt. S, §§ 7, 8, eff. May 29, 2002; L.2006, c. 109, pt. W-1, § 7, eff. Sept. 1, 2006; L.2008, c. 57, pt. OO-1, § 1, eff. April 23, 2008; L.2009, c. 57, pt. N-1, § 1, eff. June 1, 2009; L.2009, c. 57, pt. P-1, § 1, eff. June 1, 2009; L.2009, c. 57, pt. U-1, § 1, eff. June 1, 2009; L.2009, c. 399, §§ 1, 2, eff. Dec. 1, 2009; L.2010, c. 57, pt. N, § 1, eff. Aug. 11, 2010, deemed eff. June 1, 2009; L.2010, c. 57, pt. S, subpt. B, §§ 1, 2, eff. Aug. 11, 2010; L.2010, c. 57, pt. AA, §§ 2, 3, eff. Sept. 1, 2010; L.2010, c. 57, pt. WW, § 1, eff. Aug. 11, 2010, deemed eff. June 1, 2009; L.2011, c. 61, pt. K, §§ 36 to 38, eff. Sept. 1, 2011; L.2011, c. 583, §§ 1, 2, eff. March 1, 2012.)
(Added L.1965, c. 93, § 1. Amended L.1965, c. 575, §§ 1 to 3; L.1966, c. 962, § 1; L.1969, c. 473, § 1; L.1971, c. 221, § 1; L.1973, c. 1004, § 1; L.1979, c. 470, §§ 1, 2; L.1981, c. 471, § 1; L.1981, c. 1043, § 38; L.1982, c. 454, §§ 3, 4; L.1982, c. 469, § 2; L.1982, c. 930, § 2; L.1983, c. 986, §§ 1, 2; L.1985, c. 44, §§ 18, 19; L.1985, c. 65, § 76; L.1985, c. 765, § 30; L.1986, c. 276, § 14; L.1986, c. 609, § 1; L.1988, c. 261, § 83; L.1989, c. 61,

§§ 242, 243, 246, 247, 250; L.1990, c. 190, §§ 167 to 169; L.1991, c. 166, §§ 17, 154, 155, 160; L.1994, c. 498, § 1; L.1994, c. 576, § 48; L.1995, c. 2, § 48; L.1996, c. 309, §§ 217, 236; L.1997, c. 389, pt. A, § 112, eff. Aug. 7, 1997; L.1997, c. 681, §§ 1, 2, 3, eff. Sept. 1, 1997; L.1997, c. 687, § 1, eff. Jan. 8, 1998; L.1998, c. 56, pt. A, § 77, eff. Aug. 7, 1997; L.1998, c. 75, §§ 1, 2, eff. June 2, 1998; L.1999, c. 407, pt. Y, § 1, eff. March 1, 2001; L.1999, c. 649, § 1, eff. March 1, 2000; L.1999, c. 651, §§ 1, 6, eff. March 1, 2000; L.2000, c. 63, pt. B, § 1, eff. Sept. 1, 2000; L.2000, c. 63, pt. Y, § 21, eff. June 1, 2000; L.2000, c. 63, pt. GG, § 8, eff. March 1, 2001; L.2000, c. 220, § 1, eff. Aug. 16, 2000, deemed eff. March 1, 1997; L.2002, c. 85, pt. S, §§ 7, 8, eff. May 29, 2002; L.2006, c. 109, pt. W-1, § 7, eff. Sept. 1, 2006; L.2008, c. 57, pt. OO-1, § 1, eff. April 23, 2008; L.2009, c. 57, pt. N-1, § 1, eff. June 1, 2009; L.2009, c. 57, pt. P-1, § 1, eff. June 1, 2009; L.2009, c. 57, pt. U-1, § 1, eff. June 1, 2009; L.2009, c. 399, §§ 1, 2, eff. Dec. 1, 2009; L.2010, c. 57, pt. N, § 1, eff. Aug. 11, 2010, deemed eff. June 1, 2009; L.2010, c. 57, pt. S, subpt. B, §§ 1, 2, eff. Aug. 11, 2010; L.2010, c. 57, pt. AA, §§ 2, 3, eff. Sept. 1, 2010; L.2010, c. 57, pt. WW, § 1, eff. Aug. 11, 2010, deemed eff. June 1, 2009; L.2011, c. 61, pt. K, §§ 36 to 38, eff. Sept. 1, 2011; L.2011, c. 583, §§ 1, 2, eff. March 1, 2012.)

[FN1] So in original. Probably should be “telephone”.

[FN2] So in original. Probably should be “telegraph”.

[FN3] Tax Law § 1201 et seq.

Tax Law § 1201 et seq.

Current through L.2012, chapters 1 to 59 and 62 to 68.

END OF DOCUMENT

Letter from Randall M. Fox, Esq. to the Honorable O. Peter Sherwood, dated November 8, 2012, with Attachment
[pp. 181 - 195]

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL
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ERIC T. SCHNEIDERMAN
Attorney General

RANDALL M. FOX
Bureau Chief

November 8, 2012

Honorable O. Peter Sherwood
Justice of the Supreme Court
New York State Supreme Court
New York County
60 Centre Street, Room 605
New York, New York 10007

Re: *New York v. Sprint Nextel Corp., et al.*, Index No. 103917/2011

Dear Justice Sherwood:

I write to notify the Court of a supplemental authority related to the dismissal motion filed by defendants, which is scheduled for oral argument on November 13, 2012.

At page 23 of its June 14, 2012 opening brief, Sprint cited to the District Court decision *United States ex rel. Sanders v. Allison Engine Co.*, 667 F. Supp. 2d 747 (S.D. Ohio 2009), in support of its argument about the *Ex Post Facto* Clause. Last week, the United States Court of Appeals for the Sixth Circuit reversed that decision with respect to application of the *Ex Post Facto* Clause. *See Sanders v. Allison Engine Co.*, Nos. 10–3818, 10–3821, 2012 WL 5373532, **9-14 (6th Cir. Nov. 2, 2012). For the Court's convenience, I attach a copy of that decision.

Respectfully yours,

Randall M. Fox

cc: All counsel of record
Enclosure

Slip Copy, 2012 WL 5373532 (C.A.6 (Ohio))
(Not Selected for publication in the Federal Reporter)
(Cite as: 2012 WL 5373532 (C.A.6 (Ohio)))

United States Court of Appeals,
Sixth Circuit.
Roger L. SANDERS; Roger L. Thacker, Plaintiffs–Appellants,
and
United States of America, Plaintiff–Appellant,
v.
ALLISON ENGINE COMPANY, INC.; General Tool Co.; Southern Ohio Fabricators, Inc.; General Motors Corporation, Defendants–Appellees.

Nos. 10–3818, 10–3821.
Nov. 2, 2012.

On Appeal from the United States District Court for the Southern District of Ohio.

Before BATCHELDER, Chief Judge; GIBBONS, and COOK, Circuit Judges.

JULIA SMITH GIBBONS, Circuit Judge.

***1** This case arises out of a *qui tam* action pursuant to the False Claims Act ("FCA"). Following this panel's prior decision in this case—finding that liability under the FCA did not require presentment of a false claim to the government—the defendant contractors and subcontractors appealed to the Supreme Court. The Supreme Court reversed, finding that 31 U.S.C. § 3729(a)(2) liability required presentment of the claim to the government. *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662, 668–69 (2008). In May 2009, Congress passed the Fraud Enforcement and Recovery Act of 2009 ("FERA"), which amended several anti-fraud statutes, including the FCA. Congress specifically amended the liability standards then set forth in § 3729(a)(2) of the FCA in order to remove the presentment requirement imposed by the Supreme Court's decision. It also included specific retroactivity language in § 4(f)(1) of FERA indicating that the changes to § 3729(a)(2), now codified at § 3729(a)(1)(B), "shall take effect as if enacted on June 7, 2008, and apply to all *claims* under the False Claims Act ... that are pending on or after that date." Fraud Enforcement and Recovery Act of 2009, Pub.L. No. 111–21, § 4(f)(1), 123 Stat. 1617, 1625 (emphasis added). After FERA was passed, the defendants in this case filed a motion to preclude retroactive application of the amended provisions in § 3729, which the district court granted, finding that the retroactive language in FERA did not apply to this action, because no *claim* was pending in June 2008 and further that retroactive application of the amendments was prohibited under the *Ex Post Facto* Clause. The question of retroactive application of the amendments to § 3729(a)(2) was then certified for interlocutory appeal. For the reasons that follow, we reverse the district court's order precluding retroactive application of 31 U.S.C. § 3729(a)(1)(B) and remand for further proceedings.

I.

In 1995, Roger L. Sanders and Roger L. Thacker, relators, brought a *qui tam* action pursuant to the False Claims Act, 31 U.S.C. § 3729 *et seq.*, alleging that several defendant subcontractors engaged in fraud in connection with the construction of generator sets used in United States Navy Arleigh–Burke–class Guided Missile Destroyers. *Allison Engine Co.*, 553 U.S. at 665–67. The case was then consolidated with a separate FCA suit brought by the relators regarding the same alleged fraudulent conduct. The first action, referred to as the "Quality Case," alleged that the defendants submitted claims for payment related to the construction of the generator sets despite knowing that the generator sets failed to conform to contract specifications and Navy regulations. The second action, referred to as the "Pricing Case," involved allegations that the defendants withheld cost and pricing data during their negotiations with the government's agent in violation of the Truth in Negotiations Act and the FCA. Only the Quality Case is at issue in this appeal. The Quality Case was tried before a jury, and at the close of the relators' case, the defendants filed a motion for judgment as a matter of law on the grounds

that the relators failed to produce evidence of a false claim presented to the Navy—and that without proof of presentment no reasonable jury could find a violation of the FCA. *Id.* at 667. The district court granted the motion on the grounds that proof of a false claim presented to the government was required to find a violation under § 3729 of the FCA. *United States ex rel. Sanders v. Allison Engine Co.*, No. 1–:95–CV–970, 2005 WL 713569, at *10–12 (S.D.Ohio, Mar. 11, 2005).

***2** On appeal, this court held that there was no presentment requirement for liability to attach under § 3729(a)(2) or (3) and reversed the district court's grant of judgment as a matter of law in the Quality Case. *United States ex rel. Sanders v. Allison Engine Co.*, 471 F.3d 610, 613 (6th Cir.2006). The defendants appealed the decision to the Supreme Court, which vacated this court's decision and remanded. *Allison Engine Co.*, 553 U.S. at 673.

The Supreme Court found that for § 3729(a)(2) liability to attach, "a defendant must intend that the Government itself pay the claim." *Id.* at 669. The Court noted that this intent requirement did not mean that "proof that the defendant caused a false record or statement to be presented or submitted to the Government" was required; rather, liability could be established if it was proven that the "defendant made a false record or statement for the purpose of getting 'a false or fraudulent claim paid or approved by the Government.' " *Id.* at 671.

On February 27, 2009, we remanded the case to the district court for further proceedings consistent with the Supreme Court's opinion. On May 20, 2009, Congress passed FERA, Pub.L. No. 111–21, 123 Stat. 1617 (2009), which amended portions of the FCA and other anti-fraud statutes. Included among the amendments was a change to the standard of liability imposed under the FCA. Pub.L. No. 111–21, § 4, 123 Stat. 1617, 1621–25. Section 4 of FERA is titled "Clarifications to the False Claims Act to Reflect the Original Intent of the Law." *Id.* Although the FCA previously imposed liability for "knowingly mak[ing] ... a false record or statement to get a false or fraudulent claim paid or approved by the Government," 31 U.S.C. § 3729(a)(2) (2006), the amended liability standard imposes liability for "knowingly mak[ing] ... a false record or statement material to a false or fraudulent claim." 31 U .S.C. § 3729(a)(1)(B) (2012). This section of FERA was intended to "clarify and correct erroneous interpretations of the law that were decided in *Allison Engine Co.* ...." S.Rep. No. 111–10, at 10.

Section 4 of FERA provides that the FCA amendments apply to conduct occurring on or after the date of enactment (May 20, 2009).[FN1] FERA § 4(f). FERA contains, however, two exceptions where a different effective date applies to the FCA amendments. Pursuant to § 4(f)(1), the amended liability provision "shall take effect as if enacted on June 7, 2008,[FN2] and apply to all *claims* under the False Claims Act ... that are pending on or after that date." FERA § 4(f)(1) (emphasis added). Under the second exception, provisions governing how new allegations filed by the United States as intervenor relate back to the date of the relator's complaint as well as other amendments to various provisions of the FCA, "apply to *cases* pending on the date of enactment." FERA § 4(f)(2) (emphasis added).

FN1. In its entirety section 4(f) of FERA provides:

> (f) Effective Date and Application.—The amendments made by this section shall take effect on the date of enactment of this Act and shall apply to conduct on or after the date of enactment, except that-
>
> (1) subparagraph (B) of section 3729(a)(1) of title 31, United States Code, as added by subsection (a)(1), shall take effect as if enacted on June 7, 2008, and apply to all claims under the False Claims Act (31 U.S.C. 3729 et seq.) that are pending on or after that date; and
>
> (2) section 3731(b) of title 31, as amended by subsection (b); section 3733, of title 31, as amended by subsection (c); and section 3732 of title 31, as amended by subsection (e); shall apply to cases pending on the date of enactment.
>
> Pub.L. No. 111–21, § 4, 123 Stat. 1617, 1625 (2009).

FN2. June 7, 2008, is two days prior to the

Supreme Court's decision in *Allison Engine Co.*

On July 21, 2009, the defendants filed a motion to preclude the retroactive application of the amended FCA liability standard set forth in 31 U.S.C. § 3729(a)(1)(B) or, in the alternative, to declare unconstitutional FERA § 4(f). The defendants noted that in contrast to the majority of FCA amendments, which apply prospectively, FERA's expansion of liability under § 3729(a)(1) was made retroactive to two days before the Supreme Court's decision in *Allison Engine* and suggested that Congress intended to overturn the decision and to create liability for conduct not forbidden under the prior version of the FCA. The defendants argued that the *Ex Post Facto* Clause and their Fifth Amendment due process rights would be violated by retroactive application of § 3729(a)(1)(B).

***3** The relators filed a memorandum in opposition to defendants' motion to preclude and argued that the retroactive application of 31 U.S.C. § 3729(a)(1)(B) would not violate the *Ex Post Facto* Clause. The United States filed a statement of interest in response to the motion to preclude and made three primary arguments: (1) the district court should observe the principle of constitutional avoidance and avoid reaching the constitutional challenges raised by defendants by finding that the amended liability provision would not change the outcome of the case, (2) application of the new liability provision would not affect the defendants' expectations and would not be retroactive in the relevant sense because the Supreme Court's *Allison Engine* decision did not exist when the defendants acted, and (3) application of § 3729(a)(1)(B) would not violate the *Ex Post Facto* Clause or the Due Process Clause because the FCA is a remedial statute and because the congressional decision to make amendments to the FCA liability standard served a rational purpose.

On October 27, 2009, the district court granted the defendant's motion to preclude retroactive application. *United States ex rel. Sanders v. Allison Engine Co.*, 667 F.Supp.2d 747, 758 (S.D.Ohio 2009). The district court found that the plain language of § 4(f)(1) of FERA ("the retroactivity clause") prevented retroactive application of 31 U.S.C. § 3729(a)(1)(B) because "a plain reading of the retroactivity language reveals that the relevant change is applicable to 'claims' and not to 'cases.' " *Id.* at 752. The district court noted that the legislative history supported this reading because the "Senate Report's explanation of FERA's amendments to the FCA uses 'claims' to refer to a defendant's request for payment and 'cases' when discussing civil actions for FCA violations." *Id.* (citing S.Rep. No. 111–10 (2009)). Further, the court found that, read as a whole, § 4(f) of FERA further buttressed the conclusion that Congress did not intend "claims" in § 4(f)(1) to mean "cases" because § 4(f)(2) specifically states that " 'section 3731(b) of title 31, as amended ... shall apply to cases pending on the date of enactment.' " *Id.* The district court found that Congress's specific use of "cases" in the subsection directly following § 4(f)(1) indicated that Congress could have used the term but chose not to do so in § 4(f)(1). *Id.* The district court further found that even if the retroactivity clause meant that the amended liability provision applied to the case pending before it, that application would violate the *Ex Post Facto* Clause because Congress intended to impose punishment when it amended the FCA. *Id.* at 752–56. The district court found especially persuasive the comments by FERA sponsors who referred to the need to "punish" those who defraud the government and the fact that the Supreme Court has found that the FCA treble damages multiplier is "essentially punitive in nature." *Id.* at 754–55. Finally, the district court found that even if Congress had not intended for the FCA to punish violators, the FERA amendment altering the liability standard would still be unconstitutional because it is "punitive in purpose or effect." *Id.* at 756–58.

***4** Following the district court's decision, the United States filed a motion to intervene. The United States and the relators also filed a motion to certify the district court's entry and order precluding retroactive application for interlocutory appeal. The district court granted the motion and amended its prior entry and order to certify the decision for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). This court granted the petitions for interlocutory appeal, finding that the order certified for interlocutory appeal presented "a controlling question of law ... because which version of the statute applies will determine the standard of liability."

II.

On interlocutory appeal, our review is limited to "consider[ing] only pure questions of law." *Bates v. Dura Auto. Sys., Inc.*, 625 F.3d 283, 285 (6th

Cir.2010). Statutory interpretation and challenges to the constitutionality of a statute present questions of law subject to *de novo* review. *Ammex, Inc. v. United States*, 367 F.3d 530, 533 (6th Cir.2004).

III.

We must determine whether the new § 3729(a)(1)(B) applies to all civil actions under the FCA that were pending on June 7, 2008, including this case. If "claim" in § 4(f)(1) means a request or demand for payment, then § 3729(a)(1)(B) would not apply retroactively to this case because there were no claims pending in 2008 because the claims relevant to the generator sets were made and paid in the 1980s and 1990s. However, if "claim" means a civil action or case, then § 3729(a)(2) would apply because this case was pending in June 2008.

A.

"The language of the statute itself is the starting point in statutory interpretation." *Deutsche Bank Nat'l Trust Co. v. Tucker*, 621 F.3d 460, 462 (6th Cir.2010). Focusing on the text of FERA § 4(f), it is clear that Congress made two exceptions to the general rule that the amendments to the FCA "shall apply to conduct on or after the date of enactment"—May 20, 2009. FERA § 4(f). Under the first exception, the amendments to the pre-FERA version of § 3729(a)(2) are to "take effect as if enacted on June 7, 2008, and apply to all *claims under the False Claims Act* ... that are pending on or after [June 7, 2008]." FERA § 4(f)(1) (emphasis added). Pursuant to the second exception, the amendments to § 3731(b) "Intervention by the Government," § 3733 "Civil Investigative Demands," and § 3732 "False Claims Jurisdiction" are to "apply to *cases pending* on the date of enactment." FERA § 4(f)(2) (emphasis added). Thus, in adjoining provisions which specify the two exceptions to the general rule that the amendments apply prospectively, Congress referred to "claims" in defining one exception and "cases" in defining the second.

The Supreme Court has instructed that where a statute includes "particular language in one section ... but omits it in another section of the same Act," it leads to the general presumption that the "disparate inclusion or exclusion" was done "intentionally and purposely." *Russello v. United States*, 464 U.S. 16, 23 (1983). Thus, the use of different terminology in adjoining sections suggests that Congress utilized the specific terms intentionally. *See Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 62–63 (2006); *Kosak v. United States*, 465 U.S. 848, 862 (1984) (Stevens, J., dissenting) ("Absent persuasive evidence to the contrary, we should assume that when Congress uses different language in a series of similar provisions, it intends to express a different intention."). Under this logic, the meaning of "claim" is distinct from the meaning of "case"—and the former should not be conflated with the latter.

***5** The strength of this argument is undermined, however, by the fact that § 4(f)(1) and § 4(f)(2) were drafted by different chambers of Congress at different times. *See* Matthew Titolo, *Retroactivity and the Fraud Enforcement and Recovery Act of 2009*, 86 Ind. L.J. 257, 298, 300 (2011); *cf. Lindh v. Murphy*, 521 U.S. 320, 330 (1997) ("The insertion of § 107(c) with its different treatments of the two chapters thus illustrates the familiar rule that negative implications raised by disparate provisions are strongest when the portions of a statute treated differently had already been joined together and were being considered simultaneously when the language raising the implication was inserted."). What ultimately became FERA § 4(f)(1) originated in the Senate version of FERA from March 2009. S. 386, 111th Cong. § 4(b) (as reported in Senate, March 5, 2009). Section 4(f)(2) originated in an amendment to FERA made by the House on May 6, 2009, which was then accepted by the Senate. S. 386, 111th Cong. § 4(f) (House engrossed amendment, May 6, 2009); S. 386, 111th Cong. (as accepted by Senate, May 14, 2009). Because the two provisions governing exceptions to the general effective date of FERA's amendments to the FCA were not drafted simultaneously, the inference that a difference in language signifies a different intention on the part of Congress is weak, despite the general presumption that Congress deliberately chose the difference.

The general presumption that "identical words used in different parts of the same act are intended to have the same meaning," *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932), is "not rigid" and will "yield [ ] whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent." *Id.* Further, the Supreme Court has given "a different reading to the same language—whether appearing in separate statutes or in separate provisions of the same statute—if there is strong evidence that

Congress did not intend the language to be used uniformly." *Smith v. City of Jackson*, 544 U.S. 228, 260–61 (2005) (O'Connor, J., concurring in the judgment) (listing cases); *see Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 595–97 (2004). Thus, there is "no effectively irrebuttable presumption that the same defined term in different provisions of the same statute must be interpreted identically." *Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 575–76 (2007) (internal quotation marks omitted).

In both the prior version of the FCA and the version amended by FERA, Section 3729 of the FCA contains a definition of "claim." As amended by FERA, "claim" is defined as "any request or demand, whether under contract or otherwise, for money or property and whether or not the United States has title to the money or property...." 31 U.S.C. § 3729(b)(2)(A) (2012). The definition of "claim" is found within the "Definitions" subsection of § 3729. That subsection specifically prefaces the definitions with "For purposes of this section." *Id.* § 3729(b).

***6** The district court found that this definition and the absence of a definition for "case" in FERA and the FCA led to the conclusion that "a plain reading of the retroactivity language reveals that the relevant change is applicable to 'claims' and not to 'cases.' " *Sanders*, 667 F.Supp.2d at 752. The defendants agree, pointing out that the technical definition of "claim" should be applied to the reference to "claims" in § 4(f)(1) because it is necessary to read the language in context. The defendants point out that § 4(f)(1) operates solely to define the retroactive application of the new § 3729(a)(1)(B). Thus, the two portions of the statutes (§ 3729 of the FCA and § 4(f)(1) of FERA) must necessarily be read in conjunction and in defendants' view it is appropriate to utilize the specific definition of "claim" provided in § 3729(b)(2)(A).

The relators and the United States also argue that reading the statutory language in context is necessary, but they reach the opposite conclusion, arguing that the reference to "claims" in § 4(f)(1) is in the context of the phrase "claims *under the False Claims Act.*" FERA § 4(f)(1) (emphasis added). According to the United States, substituting the technical definition of "claim" into the phrase "claims under the False Claims Act" makes little sense because a request for payment is never effectively made under the FCA.[FN3] Instead, the FCA (and its liability standards) only apply after an allegedly fraudulent request for payment is made and a civil action pursuant to the FCA is filed. Moreover, if the specific definition of "claim" in § 3729 is applied to the use of the word in § 4(f)(1) of FERA, the substitution yields a somewhat nonsensical result.[FN4]

FN3. The United States notes that the only situation under the FCA that might implicate a request for payment would be after a successful *qui tam* suit is brought and the government receives monetary penalties and damages. (United States Appellant's Br. at 18–19.) The government would then be required to pay the relator his or her statutory share of the award, although the relator would still not need to submit a request for payment. 31 U.S.C. § 3730(d).

FN4. Inserting the definition of "claim" from § 3729 into § 4(f)(1) would result in the following: subparagraph (B) of section 3729(a)(1) of title 31 ... as added by subsection (a)(1), shall take effect as if enacted on June 7, 2008, and apply to all *request[s] or demand[s], whether under contract or otherwise, for money or property* ... under the False Claims Act ... that are pending on or after that date. *See* FERA § 4(f)(1); 31 U.S.C. § 3729(b)(2)(A) (2012) (emphasis added to inserted definitional language). This insertion, which juxtaposes the definition normally given to a request to the government for payment with the language "under the False Claims Act," a statutory remedy pursued after an allegedly false claim is made, demonstrates the misfit between the definition and its placement in § 4(f)(1).

The relators further argue that the word "claim" should be given its natural or ordinary meaning—here they argue the ordinary meaning of "claim" suggests a claim for relief or cause of action, citing Black's Law Dictionary and the use of the term in the Federal Rules of Civil Procedure. Although statutory language is generally to be given its natural or ordinary meaning, when a term is given a statutory definition or used as a term of art, that definition "control[s] the meaning of statutory words ... in the usual case." *Lawson v. Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 201 (1949). However, as noted above, there is no irrebuttable

presumption of uniform usage. *See* *Gen. Dynamics*, 540 U.S. at 595–97. As a result, a court should not presume that a term defined by statute carries the same meaning every time it is used in a statute. *Envtl. Def.*, 549 U.S. at 574 ("A given term in the same statute may take on distinct characters from association with distinct statutory objects calling for different implementation strategies."). Thus, "[c]ontext counts." *Id.* at 576.

Considering all the arguments, we conclude that it is not appropriate to import the technical definition of "claim" into § 4(f)(1) of FERA and that the retroactivity clause embodies the situation where the presumption of uniform usage has been rebutted and the natural or ordinary meaning of claim should be used for purposes of interpreting § 4(f)(1).[FN5]

> FN5. Indeed, a recent article on this question of statutory interpretation has proposed this same conclusion: "[t]he fact that section 4(f)(1) embeds *claims* in the phrase 'claims [ ] under the False Claims Act,' coupled with the frequent use of *claims* as a synonym for *cases*, both in FERA and in general legal usage, reveals that claims is not being used in a technical way in the retroactivity clause." Matthew Titolo, *Retroactivity and the Fraud Enforcement and Recovery Act of 2009*, 86 Ind. L.J. 257, 289 (2011) (emphases added).

***7** The conclusion that the specific definition of "claim" from § 3729(b) should not be imported into § 4(f)(1) also derives support from the use of the term "claim" in other sections of the FCA and the location of the retroactivity language at issue in the amended version of the FCA. Although the FCA often uses the term "action" to refer to a *qui tam* case or a civil action brought by the United States under the FCA, the statute also contains references to "claim/s" that clearly refer to and invoke the same concept of a civil action or legal claim, and not a request for payment. For example, § 3730(c)(5) states that the government "may elect to pursue its *claim* through any alternate remedy available...." *Id.* (emphasis added). Section 3730 covers "Civil actions for false claims" and it is clear in context that the use of the word "claim" in subsection (c)(5) refers to the government's case against a violator of § 3729. Section 3731 also provides that when the government intervenes in a case, it may "file its own complaint or amend the complaint of a person who has brought an action under section 3730(b) to clarify or add detail to the *claims* in which the Government is intervening." 31 U.S.C. § 3731(c) (2012) (emphasis added). As a final example, § 3732(b), entitled "*Claims* under state law," specifically grants district courts jurisdiction over any action brought under state law for the recovery of state or local government funds if the action arises from the same transaction as an action under § 3730 of the FCA. *Id* . (emphasis added). This use of the word "claims" in a generic sense to refer to " 'case' or "civil action" in other parts of the statute cautions against assuming that Congress meant a technical definition to apply when it used the term in § 4(f)(1).[FN6]

> FN6. The location of the retroactivity language in the FCA also sheds light on the propriety of relying on the technical definition. Section 4(f) of FERA is not codified in the text of § 3729, and is instead in the historical and statutory notes accompanying the section. *See* 31 U.S.C. § 3729 note ("Effective and Applicability Provisions"). The United States argues that this counsels against crediting the argument that the definitions in § 3729, which specifically apply for "purposes of this section," should be used to define terms used in § 4(f) or in the note to § 3729. (United States's Appellant's Br. at 20.) While this argument may be technically correct, it might elevate form over substance or relevant context. Although not codified in § 3729, it is clear that the retroactivity language in § 4(f) is vital to proper application of the amended FCA, and it is just as clear that § 4(f)(1)'s language specifically refers to § 3729.

B.

Although this Circuit has not yet definitively addressed the issue,[FN7] several courts have now addressed the question of whether the retroactivity language in FERA § 4(f)(1) applies to civil actions pending as of June 7, 2008. The parties both point to the decisions of other courts to support their interpretations of § 4(f)(1).

> FN7. We have noted that "[i]t is unsettled ... whether the retroactive effect mandated by Congress [in FERA § 4(f)] applies to 'claims' in the sense of demands made via

litigation or 'claims' as defined by the FCA." *United States ex rel. SNAPP, Inc. v. Ford Motor Co.*, 618 F.3d 505, 509 n. 2 (6th Cir.2010). *SNAPP*, however, did not decide the issue and instead presumed that the pre-FERA statutory language governed because the reasoning in the case was unaffected by the differing liability standards. *Id.* Similarly, in *United States v. United Techs. Corp.*, 626 F.3d 313, 321 (6th Cir.2010), this court noted the amendments to the FCA liability standard set forth in § 3729(a)(2) were made retroactive to "claims pending in June 2008," but found that it "need not decide" which standard of liability under § 3729(a)(2) applied to the defendant (who had a civil action under the FCA pending as of June 2008 but did not have a "claim" as defined by the FCA pending) because the government could satisfy either.

Thus far, the courts to address the issue directly are almost evenly split into those that conclude that "claims" refers to a claim for payment (this is referred to as the "majority view" by district courts in some opinions because somewhat more district courts have adopted this interpretation) [FN8] and those that conclude "claims" refers to cases.[FN9] The Second and Seventh Circuits have found that § 4(f)(1) makes the amendments to the former § 3729(a)(2) retroactive to FCA civil actions pending on June 7, 2008. *See United States ex rel. Yannacopoulos v. Gen. Dynamics*, 652 F.3d 818, 822 n. 2 (7th Cir.2011) (noting, arguably in dicta, that new § 3729(a)(1)(B) applies to cases pending on or after June 7, 2008); *United States ex rel. Kirk v. Schindler Elevator Corp.*, 601 F.3d 94, 113 (2d Cir.2010) (applying new § 3729(a)(1)(B) to case filed in 2005 and pending as of June 2008), *rev'd on other grounds*, 131 S.Ct. 1885 (2011). In contrast, the Ninth and Eleventh Circuits have found that "claim" in § 4(f)(1) of FERA means a demand for payment. *See United States ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1051 n. 1 (9th Cir.2011) (noting simply that "[t]hese amendments do not apply retroactively to this case" and citing *Hopper v. Solvay Pharm., Inc.*, 588 F.3d 1318, 1327 n. 3 (11th Cir.2009)); *Hopper*, 588 F.3d at 1327 n. 3 (applying definition of claim from § 3729(b)(2)(A) to retroactivity language in § 4(f)(1) of FERA and finding that although case was pending in June 2008, no claims were pending as of that date). The Fifth Circuit appears to have taken both positions. *Compare United States ex rel. Steury v. Cardinal Health, Inc.*, 625 F.3d 262, 267 n. 1 (5th Cir.2010) (concluding that the current § 3729(a)(1)(B) applies to complaint pending on June 7, 2008), *with Gonzalez v. Fresenius Med. Care N. Am.*, Nos. 10–50413, 10–51171, 2012 WL 3065314, at *3 & n. 4 (5th Cir. July 30, 2012) (noting that the district court concluded that FERA's retroactivity provision did not apply because no "claims" were pending on June 7, 2008, and applying pre-amendment version of § 3729(a)). Unfortunately, the decisions resolve the issue without extended analysis. As a result, the available authority is of limited aid to our interpretation of the retroactivity language.

FN8. *See, e.g., Foglia v. Renal Ventures Mgmt., LLC*, 830 F.Supp.2d 8, 15–16 (D.N.J.2011) (finding that § 3729(a)(1)(B) applies retroactively in place of unamended § 3792(a)(2) only when a defendant's false claims for payment were pending on or after June 7, 2008); *United States v. Edelstein*, No. 3:07–52, 2011 WL 4565860, at *8–9 (E.D.Ky. Sept. 29, 2011) (concluding that amendments to § 3729(a)(2) are inapplicable to case before it because they apply only to claims for money or payment that were pending on June 7, 2008); *United States ex rel. Nowak v. Medtronic, Inc.*, 806 F.Supp.2d 310, 315 n. 1 (D.Mass.2011) (noting that courts have "almost uniformly interpreted 'claims' to mean claims for reimbursement" and declining to depart from the "majority view" (internal quotation marks omitted)).

FN9. *See, e.g., United States ex rel. Kappenman v. Compassionate Care Hospice of the Midwest, L.L. C.*, No. 09–4039–KES, 2012 WL 602315, at *3 (D.S.D. Feb. 23, 2012) (applying § 3729(a)(1)(B) to *qui tam* suit brought in April 2009 (pre-FERA amendments)); *United States v. Phung*, No. CIV09–772–L, 2011 WL 3584812, at *2 n. 5 (W.D.Okla. Aug. 15, 2011) (applying amended version of § 3729(a)(2) to conduct that occurred in 2006 and 2007).

C.

***8** The district court found that the Senate Report on FERA used "claims" to refer to a request for payment submitted by a defendant to the government

and used "cases" to refer to civil actions for FCA violations. The district court concluded that this further supported its conclusion that "claims" as used in § 4(f)(1) does not refer to civil actions. The United States argues that the Senate Report is inconsistent in its use of the word "claim," using it to refer to alleged violations of the FCA in other portions of the report.

Overall, the Senate Report accompanying FERA uses the word "claim" to mean a request or demand for payment in its description of the amendments to the FCA. S. Rep. 111–10, at 10–12 (repeatedly referring to "false claim/s"). The Senate Report refers to "FCA cases" when it describes how "defendants across the country have cited *Allison Engine* in seeking dismissal of certain FCA cases." *Id.* at 11–12. However, in two instances the Senate Report also uses the term "claim" to mean a FCA *case*. *Id.* at 10, 14 n. 10 (explaining that the presentment requirement from *Allison Engine* created a subcontractor loophole which "creates a new element in a *FCA claim* and a new defense for any subcontractor that are inconsistent with the purpose and language of the statute" and noting in a footnote that this court dismissed "a *claim* for false statements made by importers" (emphases added)). Thus, in the two contexts where reference is made to a lawsuit brought pursuant to the FCA, the Senate Report adopts inconsistent terminology and uses both "FCA claim" and "FCA case." [FN10] The district court opinion thus overstates to some degree the extent to which the Senate Report supports its conclusion.

> FN10. The Congressional Budget Office ("CBO") cost estimate for Senate Bill 386 (FERA) included in the Senate Report also refers to the ability of private individuals "to file *claims* against federal contractors" under the FCA, S. Rep. 111–10, at 16–17 (emphasis added), but we have not considered references to "claim" meaning "case" made by the CBO in the above discussion as such references were not made by the drafters of the bill.

D.

In summary, we recognize that the strongest argument in favor of reading "claims" in § 4(f)(1) to mean a demand for payment is the structure of FERA itself. Congress used the word "cases" in § 4(f)(2) and gave the word "claims" a statutory definition for the purposes of § 3729.[FN11] However, using the technical definition in context ("claims under the False Claims Act") provides a strained reading, and therefore it is not appropriate to import the statutory definition of "claim"—which applies for purposes of § 3729—into § 4(f). The fact that the two parts of § 4(f)'s exceptions to the effective date of FERA's amendments to the FCA were not drafted simultaneously reduces the strength of the structural argument. The use of "claims" elsewhere in the statute when the clear meaning is "cases" buttresses our conclusion. Consulting precedent and legislative history failed to further illuminate our analysis. Accordingly, we conclude that "claim" in § 4(f)(1) refers to a civil action or case. As a result, we must next consider whether retroactively applying § 3729(a)(1)(B)'s liability standard to cases pending on June 7, 2008, would violate the *Ex Post Facto* Clause.

> FN11. The defendants argue that the presumption against retroactivity further counsels in favor of adopting the district court's interpretation of the statute (finding that § 3729(a)(1)(B) only applies to claims for payment pending on or after June 7, 2008) because it is the narrower construction. (Appellees' Br. at 27–30.) When considering whether a statute should be applied retroactively a court must first determine whether Congress "directed with the requisite clarity that the law be applied retrospectively." *I.N.S. v. St. Cyr*, 533 U.S. 289, 316 (2001). "If the court finds that Congress clearly intended for the law to be applied retroactively, the analysis ends and the law may be applied as Congress clearly intended." *Mossaad v. Gonzales*, 244 F. App'x 701, 704 (6th Cir.2007). If the statute is silent on its retrospective effect, then a court must ask whether application of the statute to the objecting party "would have a retroactive consequence in the disfavored sense of affecting substantive rights, liabilities, or duties [on the basis of] conduct arising before [its] enactment." *Fernandez–Vargas v. Gonzales*, 548 U.S. 30, 37 (2006) (internal quotation marks omitted). "If such rights are affected, then courts must apply a presumption against retroactivity ." *Moses v. Providence Hosp. & Med. Ctrs., Inc.*, 561 F.3d 573, 584 (6th Cir.2009). Here, because Congress provided express language indicating that § 3729(a)(1)(B) was to apply retroactively, the parties do not dispute that

> Congress intended the amendments to the liability standard to have retroactive effect, and the only question is the scope of the retrospective effect intended, the application of the presumption against retroactivity is not implicated. Although the defendants' approach to statutory interpretation has been advocated before, *see* *In re TMI*, 89 F.3d 1106, 1119 (3d Cir.1996) (Sarokin, J., dissenting), we have not found any binding authority indicating the presumption against retroactivity should be used as a canon of construction when a statute is ambiguous as to the scope of retroactivity.

IV.

***9** "The Ex Post Facto Clause prohibits Congress from passing any law that (1) retroactively imposes punishment for an act that was not punishable when committed, (2) retroactively increases the punishment for a crime after its commission, or (3) deprives one charged with a crime of a defense that was available at the time the crime was committed." *United States v. Coleman*, 675 F.3d 615, 619 (6th Cir.2012); *see* U.S. Const. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed."). The *Ex Post Facto* Clause is only implicated by criminal statutes or acts intended to punish. *See* *Cutshall v. Sundquist*, 193 F.3d 466, 477 (6th Cir.1999).

To determine if a "law constitutes retroactive punishment forbidden by the *Ex Post Facto* Clause," we must first "ascertain whether the legislature meant the statute to establish civil proceedings." *Smith v. Doe*, 538 U.S. 84, 92 (2003) (internal quotation marks omitted). If we find "the intention of the legislature was to impose punishment, that ends the inquiry." *Id.* However, if the intent was to enact a civil and non-punitive regulatory scheme, we "must further examine whether the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it civil." *Id.* (internal quotation and editorial marks omitted). Deference is accorded to the legislature's stated intent such that " 'only the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Hudson v. United States*, 522 U.S. 93, 100 (1997) (quoting *United States v. Ward*, 448 U.S. 242, 249 (1980)); *Smith*, 538 U.S. at 92.

A. Whether the Intent was to Impose Punishment

When assessing whether a statutory scheme is civil or criminal, we consider the statute's text and structure. *Smith*, 538 U.S. at 92. The manner of codification and the enforcement procedures established by a statutory scheme are also probative of legislative intent, although the location and labels of a statutory provision are not dispositive factors. *Id.* at 94.

Consistent with an intent to establish a civil proceeding, the text of the FCA contains multiple references to "civil actions" and refers to liability for violations of § 3729 as "civil penalt[ies]." *See* §§ 3729(a), 3730(a), (b). The FCA is codified within title 31 of the United States Code, which is a civil, not criminal, title. *See* *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997) (finding state intent to create civil proceeding evidenced by inclusion of statutory provision in question within the probate code instead of the criminal code). By labeling actions brought pursuant to the FCA "civil actions," Congress has thus expressed a preference for "one label or the other." *Ward*, 448 U.S. at 248–49 (finding it significant that Congress "labeled the sanction authorized [in the statutory provision at issue] a 'civil penalty' " and finding additional significance in label given criminal penalties set forth in preceding subsection). Further, Congress provided that in an action brought under § 3730 of the FCA by the United States, the government shall be held to the burden of proof common in civil litigation by requiring that it "prove all the essential elements of the cause of action ... by a preponderance of the evidence," 31 U.S.C. § 3731(d) (2012), and also provided that FCA actions should be initiated by "[a] summons as required by the Federal Rules of Civil Procedure...." *Id.* § 3732(a). The Senate Committee on the Judiciary report from the 1986 amendments to the FCA also contains evidence that supports the conclusion that members of Congress have consistently viewed the FCA as providing for civil proceedings. The Senate Report noted that the FCA is a "civil remedy designed to make the Government whole for fraud losses," that the False Claims Reform Act was intended to "clarif[y] the burden of proof in civil false claims actions," and that current constructions of the FCA requiring the government to prove that a defendant had the specific intent to submit the false claim in question imposed a "standard ... inappropriate in a civil remedy and ... prohibit[ed] the filing of many civil actions to recover taxpayer funds lost to fraud." S.Rep. No. 99–345, at 2, 6–7 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5267, 5271–72.

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***10** Against this evidence, the defendants emphasize the statements made by the original FCA sponsor and sponsors of the FCA amendments. The defendants argue that the statements reference an intent to punish and demonstrate that Congress did not intend to establish civil proceedings by passing and amending the FCA. The FCA was enacted in 1863, and its original sponsor has been quoted as stating that the purpose of the law was to punish and prevent fraud. *See United States v. Bornstein*, 423 U.S. 303, 309 n. 5 (1976). In 2009, when the FERA amendments to the FCA were being considered, FERA's sponsors—senators Patrick Leahy and Chuck Grassley-made several statements that indicated that the FERA amendments would punish those who commit fraud against the government. The district court relied on many of these statements in concluding that FERA was intended to punish, *Sanders*, 667 F.Supp.2d at 754–55, and the defendants argue that these statements "provide clear proof that Congress intended the FCA to impose punishment." However, many of these statements refer to combating fraud and to the FERA amendments *generally*. Because FERA included amendments to several criminal statutes as well as the FCA, *see* FERA § 2 (amending the false statements in mortgage applications statute (18 U.S.C. § 1014), the major fraud against the government statute (18 U.S.C. § 1031), the federal securities fraud statute (18 U.S.C. § 1348), and the federal money laundering statute (18 U.S.C. § § 1956, 1957)), statements referencing punishing those engaging in fraud may easily be ascribed to the desire to punish under the criminal statutes amended by FERA.[FN12] For example, the district court stated that Senator Leahy "indicated that passage of the FERA would help law enforcement 'track down and *punish*' people." *Sanders*, 667 F.Supp.2d at 754 (quoting 155 Cong. Rec. S4409 (daily ed. Apr. 20, 2009)). However, reading the statement in context reveals that Senator Leahy actually stated that as the economic crisis in 2008 worsened he had "called upon Federal law enforcement to track down and punish those who were responsible for the corporate and mortgage frauds that helped make the economic downturn far worse." 155 Cong. Rec. S4408–02 (daily ed. Apr. 20, 2009) (statement of Sen. Leahy). This reference to punishing those responsible does not specifically refer to utilizing the FCA to effect punishment. And given the other anti-fraud statutes amended by FERA, which specifically involved mortgages and federal securities laws, the reference to punishment may more naturally be read as describing those criminal statutes instead of the FCA. Similarly, Senator Leahy's remark that without the FERA amendments Congress would be letting "fraud go[ ] unprosecuted and unpunished" is not specific to the FCA, and in context, Senator Leahy was referring to "[s]trengthening criminal *and civil* fraud enforcement." 155 Cong. Rec. S4604–04, 2009 WL 1098184, at *S4630 (daily ed. Apr. 23, 2009) (statement of Sen. Leahy) (emphasis added).

> FN12. This is also true of statements by Senate Majority Leader Harry Reid in support of FERA cited by the defendants. (Appellees' Br. at 43.) Senator Reid referred to the need to punish those "responsible for the mortgage and corporate frauds," but he did not use the word "punish" when specifically referring to the strengthening amendments to the FCA, and referred to the FCA as "one of the most important civil tools ... for rooting out fraud in Government." 155 Cong. Rec. S4725–07 (daily ed. Apr. 27, 2009).

***11** There is, however, a statement by Senator Grassley that does refer to the use of the FERA amendments to close legal loopholes created in the FCA, "thus ensuring that no fraud can go unpunished by simply navigating through the legal loopholes." 155 Cong. Rec. S4735–02 (daily ed. Apr. 27, 2009) (statement of Sen. Grassley). Further, during a 2002 hearing before the Senate Judiciary Committee, Senator Grassley asked then Attorney General John Ashcroft to confirm that he would "continue using the [FCA] to punish wrongdoing to the fullest extent of the law." 2002 WL 1722725 (F.D.C.H. July 25, 2002).

On balance, the sponsor and legislator statements do not indicate a clear intent to use the FCA to punish. While Senator Grassley appears to have referred to punishment in conjunction with references to the FCA, reading other statements in context suggests that any reference to punishment was not specifically made in reference to FERA's amendments to the FCA, particularly in light of the fact that FERA's other amendments were to criminal fraud statutes. Although we acknowledge that sponsors' statements may be relevant in interpreting statutes, the above statements, relied upon by the district court, are insufficient to outweigh the indicators of legislative intent that the text of the statute and the committee reports provide—indicators that suggest Congress intended to

implement civil proceedings for combating fraud and not to impose punishment.

B. Punitive in Purpose or Effect

Because we find that the Congress did not intend to impose punishment when it enacted the FCA and the FCA amendments, we must turn to the second step in the *Ex Post Facto* analysis and determine whether the statutory scheme is "so punitive either in purpose or effect as to negate [Congress's] intention to deem it civil." *Hendricks*, 521 U.S. at 361 (internal quotation marks omitted). "[O]nly the clearest proof will suffice to ... transform what has been denominated a civil remedy into a criminal penalty." *Smith*, 538 U.S. at 92 (internal quotation marks omitted). In order to determine if the effects of the FCA are punitive in purpose or effect, we may consult as useful guideposts the factors set forth in *Kennedy v. Mendoza–Martinez*, 372 U.S. 144, 168–69 (1963), although the factors are not exhaustive or dispositive of the inquiry. *Smith*, 538 U.S. at 97. The *Mendoza–Martinez* factors are:

> [w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned....
>
> 372 U.S. at 168–69.

***12** The parties acknowledge that the *Mendoza–Martinez* factors do not uniformly weigh in favor of finding that the statute is or is not punitive in purpose or effect. We agree, but find that on balance the factors weigh in favor of finding a civil purpose or effect.

The first *Mendoza–Martinez* factor clearly favors the conclusion that the FCA has a civil purpose or effect. The sanctions under the FCA do not involve an affirmative disability or restraint because they do not involve a "sanction approaching the infamous punishment of imprisonment." *Cutshall*, 193 F.3d at 474 (internal quotation marks omitted); *see Hudson*, 522 U.S. at 104 (prohibiting petitioners from further participation in banking industry does not approach imprisonment). The defendants acknowledge that this factor does not support a finding of a punitive effect.

Under the second factor, we ask whether, from a historical perspective, the sanction has been viewed as punishment. Here, the sanction at issue is a monetary penalty.[FN13] *See* 31 U.S.C. § 3729(a) (2012) (providing for civil penalty of at least $5000 and not more than $10,000, adjusted for inflation, plus treble damages). A monetary penalty "is a sanction which has been recognized as enforcible by civil proceedings since the original revenue law of 1789" and has not "historically been viewed as punishment." *Hudson*, 522 U.S. at 104 (internal quotation and editorial marks omitted).

> FN13. The defendants argue that an analysis of this factor requires focusing more specifically on whether FCA sanctions have been regarded as punitive and not on the historical view of money penalties generally. (Appellees' Br. at 49–50.) Our review of cases applying the *Mendoza–Martinez* factors suggests that the analysis under this factor is often conducted at a fairly high level of generality, suggesting that the historical view of monetary penalties generally is appropriately considered at this point in the analysis. *See Smith*, 538 U.S. at 97–98 (comparing Alaska sex offender registration law's sanction (dissemination of information) to colonial punishments); *Hudson*, 522 U.S. at 104 (analyzing money penalties and occupational debarment sanctions imposed by the Office of the Comptroller of Currency by examining long held views of money penalties and debarment generally); *Cutshall*, 193 F.3d 475 (comparing Tennessee sex offender registration law's sanction (dissemination of information) to incarceration, incapacitation, and rehabilitation). However, to the extent that cases addressing the FCA's sanctions specifically should be considered, the Supreme Court has found that the FCA (before treble damages) was "remedial rather than punitive." *See Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 785 (2000) (citing *Bornstein*, 423 U.S. at 315). Further, the Supreme Court's view of treble damages under the FCA appears to

> have evolved somewhat, with the Court recently finding that such damages have compensatory aspects. *Compare* Cook County v. United States ex rel. Chandler, 538 U.S. 119, 130 (2003), *with* Stevens, 529 U.S. at 784 (2000) (finding such sanctions essentially punitive).

Moving to the third factor, a violation of the FCA contains an element of *scienter*[FN14] because it is premised on knowing conduct. 31 U.S.C. § 3729(a)(1), (b)(1). The United States argues that although liability under the FCA is premised on knowing conduct, it "falls short of the specific intent required for most crimes." (United States Reply Br. at 22.) The United States points out that "knowing" is defined broadly in the current § 3729(b)(1) as having actual knowledge, acting in deliberate ignorance of the truth or falsity of information, and acting in reckless disregard of the truth or falsity of information, and requires no specific intent to defraud. *Id.* § 3729(b)(1)(A)(i)-(iii), (B). Although the pre-FERA version of the FCA did not include a lowered intent standard (it did not premise liability on reckless conduct), the current version of the FCA can be violated upon either a finding of *scienter* ("knowingly") or recklessness. Because the current act can be violated by a lower *mens rea* than knowingly, *see* 31 U.S.C. § 3729(b)(1); *Cutshall*, 193 F.3d at 475, this factor does not weigh in favor of finding that the effect of the act is to punish.

> FN14. "The term scienter means knowingly and is used to signify a defendant's guilty knowledge." *Cutshall*, 193 F.3d at 475 (internal quotation marks omitted).

The FCA does have some deterrent effects. *See United States ex rel. Roby v. Boeing Co.*, 302 F.3d 637, 641 (6th Cir.2002) ("The FCA has since become the primary means by which the Government combats and deters fraud."); *Bornstein*, 423 U.S. at 309 (noting principal goal of FCA when enacted was to stop massive frauds perpetrated by government contractors during Civil War). However, a deterrent purpose may serve both civil and criminal goals, and the mere presence of a deterrent purpose is not enough to render sanctions criminal. *See Hudson*, 522 U.S. at 105 (analyzing whether a sanction is criminal such that it would prevent trial under the Double Jeopardy Clause, and finding fact that sanction's deterrent purpose was insufficient to render it criminal because deterrence may support both civil and criminal goals); *Doe v. Bredesen*, 507 F.3d 998, 1005 (6th Cir.2007). Thus, while the presence of deterrent effects might weigh in favor of finding a punitive effect, this factor is not dispositive.

***13** The behavior which the FCA targets—the submission of a false claim to the government—is also a crime. 18 U.S.C. § 287. Thus, the fact that the FCA applies to behavior that is already criminal supports the conclusion that its effect is punitive, *see Mendoza–Martinez*, 372 U.S. at 168, although the impact of this factor on the analysis is potentially weakened by the fact that the FCA as amended by FERA appears to cover more conduct than that proscribed by the criminal statute.[FN15]

> FN15. The Supreme Court has noted that the reasoning behind this conclusion—that if the targeted behavior is already a crime it supports a finding of a punitive purpose or effect—is somewhat weakened by the fact that Congress may impose both a criminal and civil sanction regarding the same act or omission. *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 365 (1984). In *89 Firearms*, the Court noted that the forfeiture provision in question covered a broader range of conduct than a related criminal provision, which meant that the forfeiture provision was not limited solely to criminal conduct and was therefore not "co-extensive with the criminal penalty." *Id.* at 366. The overlap that did exist did not convince the Court that the forfeiture proceedings in question could not reasonably be viewed as civil proceedings. *Id.* The criminal statute regarding false, fictitious or fraudulent claims against the government provides: "[w]hoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be imprisoned not more than five years and shall be subject to a fine in the amount provided in this title." 18 U.S.C. § 287. This statute appears to proscribe less behavior than the

> amended version of § 3729; however, it is unclear that this difference in overlap is significant enough to suggest giving less weight to this factor in the analysis.

Another factor to consider in the analysis of whether the FCA sanctions are punitive in effect is whether the sanction may serve an alternative purpose. *Mendoza–Martinez*, 372 U.S. at 168–69. The Supreme Court has found "compensatory traits" in the FCA damages multiplier such that the treble damages available under the FCA "have a compensatory side, serving remedial purposes in addition to punitive objectives." *Cook Cnty. v. United States ex rel. Chandler*, 538 U.S. 119, 130 (2003). The Court reached this conclusion based on several "facts about the FCA," including the facts that "some liability beyond the amount of the fraud is usually necessary to compensate the Government completely for the costs, delays, and inconveniences occasioned by fraudulent claims," the FCA contains a *qui tam* feature which means that "as much as 30 percent of the Government's recovery" may be diverted to the relator and thus the "remaining double damages ... provide elements of make-whole recovery beyond mere recoupment of the fraud," and the FCA does not provide for pre-judgment interest or consequential damages that often accompany recovery for fraud. *Id .* at 130–31 (internal quotation marks omitted). Given the Supreme Court's analysis of the FCA's treble damages provision, an alternative purpose may be assigned—that of compensating, or making whole, the government for its losses suffered due to fraud—and this factor weighs in favor of finding a civil purpose or effect.

Finally, despite the fact that an alternative purpose may be assigned to the FCA sanctions, if the treble damages available under the FCA appear excessive in relation to the alternative purpose assigned, that would weigh in favor of finding a punitive purpose or effect. *See* *Mendoza–Martinez*, 372 U.S. at 169. Sanctions available under the FCA consist of "a civil penalty of not less than $5,000 and not more than $10,000 [adjusted for inflation], plus 3 times the amount of damages which the Government sustains...." 31 U.S.C. § 3729(a)(1) (2012). The district court found that because the treble damages available under the FCA may lead to situations where the amount recoverable by the United States far exceeds the actual monetary loss sustained directly in the fraudulent scheme the sanctions under the FCA, especially the treble damages provision, appear excessive in relation to the alternative purpose of compensating the government and weigh in favor of finding a punitive effect.

***14** The Supreme Court has found that "[t]he very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers." *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981). The Supreme Court has also found the treble damages provision of the FCA to be "essentially punitive in nature." *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 784 (2000). Viewed alone, this precedent suggests that the availability of treble damages supports a finding that the sanction is excessive in relation to the alternative purpose assigned (that of compensating the government for its losses). However, in *Chandler*, the Court seemed to soften its position with its finding that the FCA's treble damages provision actually possesses a compensatory side. *Chandler*, 538 U.S. at 130–32. In *Pacificare Health Systems, Inc. v. Book*, 538 U.S. 401, 405–06 (2003), the Supreme Court cited both *Stevens* 's and *Chandler* 's characterizations of the treble damages provision in the FCA, which suggests that the Court does not view the characterization of the treble damages provision set forth in *Stevens* as exclusively authoritative. *See id.* (explaining that the Court has "placed different statutory treble-damages provisions on different points along the spectrum between purely compensatory and strictly punitive."). Despite the fact that the treble damages provision of the FCA—dependent on the specific facts of a case—may allow for situations where the sanctions may appear excessive in relation to the alternative purpose assigned, *Chandler* suggests that this factor would at best only weakly favor a finding of punitive effect.

Overall, an analysis of the *Mendoza–Martinez* factors indicates that some aspects of the FCA weigh in favor of finding a punitive purpose or effect, while others weigh in favor of finding a civil purpose or effect. As the Supreme Court has noted, no one factor is dispositive in the analysis. *Smith*, 538 U.S. at 97. Here, the strongest factors in favor of finding a punitive effect are that the behavior punished by the FCA is already a crime, the deterrent function of the FCA, and the availability of treble damages. However, the fact that the FCA may have a deterrent effect is gen-

erally not enough alone to render a sanction punitive, and with *Chandler*, the Supreme Court appears to have softened its view of the role of the treble damages available under the FCA. Given that "only the clearest proof" suffices to establish that a statute is punitive in purpose or effect at this stage of the analysis, *id.* at 92, we conclude that viewed as a whole, the *Mendoza–Martinez* factors fail to demonstrate a sufficiently punitive purpose or effect to "transform what has been denominated a civil penalty into a criminal penalty." *Id.* We therefore conclude that the retroactive application of the FCA does not violate the *Ex Post Facto* Clause's prohibition on retroactive punishments.

V.

***15** "The Due Process Clause ... protects the interests in fair notice and repose that may be compromised by retroactive legislation; a justification sufficient to validate a statute's prospective application under the Clause may not suffice to warrant its retroactive application." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994) (internal quotation marks omitted). Both prospective and retroactive aspects of legislation must meet the test of due process, "[b]ut that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose." *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984). The defendants argue that FERA § 4(f) "does not rationally further a legitimate legislative purpose and deprives Defendants of the fair notice and repose guaranteed by the Due Process Clause...." (Appellees' Br. at 53–54.) To support their position, the defendants cite *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574–86 (1996), where the Supreme Court found that a 500 to 1 ratio of punitive to compensatory damages awarded in a state civil fraud action was grossly excessive in violation of the Due Process Clause. But *Gore* does not indicate that the treble damages under the FCA that might attach to conduct reached by a retroactive application of § 3729(a)(1)(B) would implicate the same due process concerns. Further, a rational legislative purpose may be identified here, where Congress made clear that it sought to correct what it viewed as an erroneous interpretation of the FCA and passed the amendment "to reflect the original intent of the law." FERA § 4.

VI.

For the foregoing reasons, we reverse the district court's judgment and remand for further proceedings.

C.A.6 (Ohio),2012.
Sanders v. Allison Engine Company, Inc.
Slip Copy, 2012 WL 5373532 (C.A.6 (Ohio))

END OF DOCUMENT

Letter from E. Leo Milonas, Esq. to the Honorable O. Peter Sherwood, dated November 15, 2012
[pp. 196 - 197]

pillsbury

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November 15, 2012

Honorable O. Peter Sherwood
Justice of the Supreme Court
New York State Supreme Court
New York County
60 Centre Street, Room 605
New York, New York 10007

Re: *New York v. Sprint Nextel Corp., et al.*, Index No. 103917/2011

Dear Justice Sherwood:

On behalf of Defendants in the above-captioned matter, I write in response to the Attorney General's November 8, 2012 letter notifying the Court of supplemental authority related to Defendants' motion to dismiss. This supplemental authority is an opinion from the United States Court of Appeals for the Sixth Circuit reversing one of four district court opinions cited by Defendants finding that the retroactive application of the federal False Claims Act ("federal FCA") violates the Ex Post Facto Clause. *See Sanders v. Allison Engine Co., Inc.*, 2012 WL 5373532 (6th Cir. Nov. 2, 2012), *rev'g United States ex rel. Sanders v. Allison Engine Co.*, 667 F. Supp. 2d 747, 758 (S.D. Ohio 2009) (*cited by* Sprint's Mem. in Support of its Motion to Dismiss at 23 n.14). The Sixth Circuit held that the federal FCA does not have a "sufficiently punitive purpose or effect" to render its retroactive application an Ex Post Facto violation. 2012 WL 5373532, at *14. The statute at issue in this case, however, is New York's False Claims Act ("New York FCA"), not its federal counterpart. And the Court of Appeals has definitively held that the New York FCA ***is*** punitive:

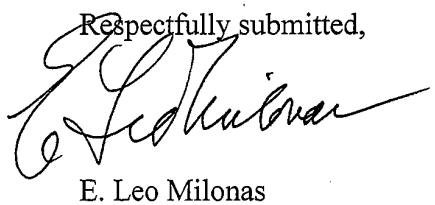
> Thus, rather than redressing the harm actually suffered, the [FCA] statute's imposition of civil penalties and treble damages evinces a broader punitive goal of deterring fraudulent conduct against the State. That is, instead of compensating the State for damages caused by DHL's purported scheme and addressing its narrow proprietary interests, the FCA would punish and consequently deter such future

> conduct . . . (*Vermont Agency of Natural Resources v. U.S. ex rel. Stevens,* 529 U.S. 765, 786 [2000] citing *Texas Industries, Inc. v. Radcliff Materials, Inc.,* 451 U.S. 630, 639 [1981] ["The very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers"]).

New York ex. rel. Grupp v. DHL Express (USA), Inc., 19 N.Y.3d 278, 286 (2012).

The Court of Appeals's decision in *Grupp* interpreting the New York FCA, and not the Sixth Circuit's interpretation of the federal FCA, controls in this case. We also note that *Allison Engine* does not disturb the opinions of other courts that have found both federal and state False Claims Acts to be punitive for purposes of the Ex Post Facto Clause. *See* Sprint's Mem. in Support of its Motion to Dismiss at 23 n.14.

Respectfully submitted,



E. Leo Milonas

cc: Randall M. Fox, Esq.
David A. Koenigsberg, Esq.
Lisa M. White, Esq.
Dane H. Butswinkas, Esq.

Letter from Randall M. Fox, Esq. to the Honorable O. Peter Sherwood, dated November 15, 2012
[pp. 198 - 200]

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November 15, 2012

BY NYSCEF
Honorable O. Peter Sherwood
Justice of the Supreme Court
New York State Supreme Court
New York County
60 Centre Street, Room 605
New York, New York 10007

Re: *New York v. Sprint Nextel Corp., et al.*, Index No. 103917/2011

Dear Justice Sherwood:

I write in response to the letter from Sprint's counsel filed with the Court earlier this afternoon.

On November 8, 2012, we provided the Court with a supplemental authority that reversed one of the decisions upon which Sprint relied in its motion to dismiss. Because briefing had been concluded, we did not provide any argument concerning that decision.

Sprint's letter of today, however, makes arguments to the Court with respect to both the supplemental authority we provided and the broader issue of Sprint's *Ex Post Facto* argument. We respectfully submit that such argument is inappropriate because Sprint neither requested nor obtained from the Court any leave to engage in further argument. Sprint's letter should be disregarded by the Court.

Sprint's supplemental argument is particularly inappropriate because Sprint requested that the parties forgo oral argument and invite the Court to decide Sprint's motion to dismiss on the papers. Sprint's request arose because Sprint had failed to note that, some months ago, notice of the argument on November 13, 2012 had been added to the E-Courts system. Instead, my November 8, 2012 letter alerted Sprint to the argument date. When Sprint's counsel called

us about this issue, we were agreeable to rescheduling the argument provided that an acceptable date could be found in the near future. Sprint, however, rejected each of the dates suggested by the Court except the one we had already said was unavailable. We then agreed to ask the Court to decide the motion on the papers because the parties could not find a jointly agreeable date that would not delay the proceedings. We were ready for oral argument on November 13, 2012, and we continue to be available should the Court have any questions it wishes to address to the parties. At no time during these discussions did Sprint express an intention to submit additional argument by letter.

If the Court is willing to consider the arguments in Sprint's letter of today, we ask that the Court also consider our response, which we set out below:

In the briefs it filed with this Court, Sprint recognized the two-part test established by the United States Supreme Court for determining whether the *Ex Post Facto* Clause bars the retroactive application of a civil statute like New York's False Claims Act. Under that test, the first inquiry is whether "the legislature meant the statute to establish a civil proceeding." *See Smith v. Doe*, 538 U.S. 84, 92 (2003). Sprint concedes at page 22 of its opening brief that the New York Legislature intended to establish a civil proceeding when it passed the 2010 amendments to the New York False Claims Act. This conclusion was inescapable for several reasons, including that the law is not found in the State's Penal Law and that its enforcement is entrusted to the Attorney General's Office, which does not have general statutory authority to criminally investigate or prosecute false claims against the government in the absence of a special referral from the head of an executive agency.

The second part of the Supreme Court's test asks "whether the statutory scheme is so punitive in purpose or effect as to negate the State's intention to deem it civil." *Id*. The Supreme Court has cautioned that deference will be accorded to the Legislature's intent that the scheme be civil--as in the case of the New York False Claims Act--and "only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Id*. (internal quotation marks omitted). The Supreme Court also laid out seven non-determinative factors to examine in deciding whether such "clearest proof" exists. The recent Sixth Circuit decision in *Sanders v. Allison Engine Co*., Nos. 10-3818, 10-3821, 2012 WL 5373532 (6th Cir. Nov. 2, 2012), examined each of those factors in detail and reached the conclusion that the 2009 amendments to the federal False Claims Act, which are largely similar to the 2010 amendments to the New York False Claims Act, did not cause the *Ex Post Facto Clause* to be invoked, and thus could be applied retroactively. The only federal Circuit Courts to have considered this question have thus ruled consistently that *Ex Post Facto* does not apply. *See also United States ex rel. Miller v. Bill Harbert Int'l Constr*., 608 F.3d 871, 878-79 (D.C. Cir. 2010).

Sprint's recent letter seeks to distinguish *Sanders* because it addressed the federal, rather than the state, False Claims Act. This is a new argument. In its opening brief and reply brief, Sprint argued that federal case law about the federal False Claims Act, including the now-reversed District Court decision in *Sanders*, provided support for its *Ex Post Facto* argument.

The fact that a federal appellate court has now ruled in a way that is unfavorable to Sprint's position is not a basis for newly arguing otherwise. In fact, the state and federal statutes are largely similar and the result in *Sanders* should apply equally to the New York False Claims Act. If anything, the New York Act provides an even clearer case for not applying the *Ex Post Facto* Clause because the sanctions under the Act are nearly identical in amount to the sanctions that were already available under the New York Tax Law before the 2010 False Claims Act amendments. *See* Plaintiff's Memo. of Law at 23 n.15.

Sprint also repeats in its recent letter its previous argument about the New York Court of Appeals decision in *New York ex rel. Grupp v. DHL Express*, 19 N.Y.3d 278 (2012). Contrary to Sprint's argument, the Court in *Grupp* did *not* hold that the New York False Claims Act is "so punitive in purpose or effect as to negate the State's intention to deem it civil." That question was not even at issue in *Grupp*. There, the Court considered whether the Act was an exercise of the State's role as a regulator or a market participant. Recognizing that the Act has a "broader punitive goal," it concluded that the role was regulatory in nature. The *Grupp* Court thus did the same thing as the Sixth Circuit in *Sanders*: it recognized that there is some intent to use a False Claims Act to punish. On the present motion, however, the Court must engage in the full *Ex Post Facto* analysis set out by the Supreme Court. We respectfully submit that such full analysis will result in the same conclusion as was reached in *Sanders*.

Respectfully yours,

Randall M. Fox

cc: All counsel of record

Letter from Randall M. Fox, Esq. to the Honorable O. Peter Sherwood, dated June 5, 2013, with Attachment
[pp. 201 - 207]

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ERIC T. SCHNEIDERMAN
Attorney General

RANDALL M. FOX
Bureau Chief

June 5, 2013

By Electronic Filing and Regular Mail
Honorable O. Peter Sherwood
Justice of the Supreme Court
New York State Supreme Court
New York County
60 Centre Street, Room 615
New York, New York 10007

Re: *New York v. Sprint Nextel Corp., et al.*, Index No. 103917/2011

Dear Justice Sherwood:

I write to notify the Court of a supplemental authority related to the pending dismissal motion filed by defendants.

On May 30, 2013, the Appellate Division, First Department issued an opinion in *People of the State of New York v. Parilla*, No. 1706/03, 9708, 2013 N.Y. App. Div. LEXIS 3807 (1st Dep't May 30, 2013), which concerns the *Ex Post Facto* Clause of the United States Constitution. A copy of the decision is attached. We respectfully request that the Court notify the parties if it would like briefing or argument on this opinion's application to the pending motion.

Respectfully yours,

Randall M. Fox

cc: All counsel of record
Enclosure

8 of 8 DOCUMENTS

[**1] **The People of the State of New York, Respondent v Scott Parilla, Defendant-Appellant.**

1706/03, 9708

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

2013 N.Y. App. Div. LEXIS 3807*; *2013 NY Slip Op 3931

May 30, 2013, Decided
May 30, 2013, Entered

NOTICE:

THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION. THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE OFFICIAL REPORTS.

COUNSEL: [*1] Steven Banks, The Legal Aid Society, New York (Lorca Morello of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Ravi Kantha and Joseph N. Ferdenzi of counsel), for respondent.

JUDGES: Peter Tom, J.P., Richard T. Andrias, David B. Saxe, Judith J. Gische, JJ. Opinion by Andrias, J. All concur.

OPINION BY: Richard T. Andrias

OPINION

Defendant appeals from the order of the Supreme Court, Bronx County (Steven Lloyd Barrett, J.), entered on or about April 1, 2010, which adjudicated him a level three sexually violent offender pursuant to the Sex Offender Registration Act.

ANDRIAS, J.

In this appeal, we consider whether amendments made to the Sex Offender Registration Act (SORA) (Correction Law art 6-C) since 1996, that, among other things, impose more stringent registration and notice requirements for convicted sex offenders, have rendered the act a punitive statute, so that its retroactive application to defendant violates the Ex Post Facto Clause [**2] or the state and federal constitutional prohibition against double jeopardy. For the reasons that follow, we find that SORA, as amended, does not constitute an impermissible ex post facto law or subject defendant to double jeopardy and that the record supports [*2] defendant's adjudication as a level three sexually violent offender.

On June 11, 1996, defendant pleaded guilty to attempted murder in the second degree, admitting that on September 11, 1993 he raped a woman and repeatedly stabbed her in the chest. While defendant was incarcerated, his DNA was found to match the DNA developed from a semen sample collected from another rape victim on August 29, 1993, and defendant was indicted for that crime, which was committed while he was on parole after a 1990 conviction for robbery in the second degree. On June 25, 2003, defendant pleaded guilty to rape in the first degree and sodomy in the first degree. On September 16, 2003, he was sentenced, as a second violent felony offender (based on the robbery conviction), to 7 to 14 years, to run concurrently with the sentence on the attempted murder conviction.[1]

1 The rape and sodomy convictions were affirmed by this Court and the Court of Appeals *(33 AD3d 363, 821 N.Y.S.2d 599 [1st Dept 2006], affd 8 NY3d 654, 870 N.E.2d 142, 838 N.Y.S.2d 824 [2007]).*

Before his conditional release date, the Board of Examiners of Sex Offenders (Board) prepared a case summary and risk assessment instrument (RAI) that assessed a total score of 170 points for various risk factors, [*3] which placed defendant presumptively in risk level three under SORA. The Board also recommended that defendant be designated a sexually violent offender based on his first-degree rape and sodomy convictions (*see Correction Law § 168-a[3]*). Defendant then moved to be classified at a lower risk level and to find SORA unconstitutional on its face and as applied to him. On April 1, 2010, after a hearing, defendant was designated a level three sexually violent offender under SORA.

SORA, effective January 21, 1996 (*see* L 1995, ch 192, § 3), imposes registration requirements on " [s]ex offender[s],'" i.e., "any person who is convicted of" certain sex offenses enumerated in the statute (*Correction Law § 168-a[1]*). The act "applies to sex offenders incarcerated or on parole or probation on its effective date, as well as to those sentenced thereafter, thereby imposing its obligations on many persons whose crimes were committed prior to the effective date" (*Doe v Pataki, 120 F3d 1263, 1266 [2d Cir 1997], cert denied 522 U.S. 1122, 118 S. Ct. 1066, 140 L. Ed. 2d 126 [1998]*; *see Correction Law § 168-g*).

In *Doe v Pataki*, the Second Circuit held that the retroactive application of SORA did not violate the Ex Post Facto Clause because [*4] the statute was intended to further the nonpunitive goals of protecting the public and enhancing law enforcement authorities' ability to investigate and prosecute future sex crimes, and neither SORA's public notification requirements nor its registration requirements were so punitive in form and effect as to negate the Legislature's nonpunitive intent (*120 F3d at 1277, 1284, 1285*; *see also Correction Law § 168*). Defendant argues that SORA has been amended so significantly since *Doe* that it is now a punitive statute, and that its retroactive application to him violates the Ex Post Facto Clause and the state and federal constitutional prohibition against double jeopardy. [**3]

States are prohibited from enacting an ex post facto law (US Const, art. I, § 10[1]), i.e., a law that "retroactively alter[s] the definition of crimes or increase[s] the punishment for criminal acts" (*Collins v Youngblood, 497 U.S. 37, 43, 110 S. Ct. 2715, 111 L. Ed. 2d 30 [1990]).*

> "A statute will be considered an ex post facto law if it punishes as a crime an act previously committed, which was innocent when done,' makes more burdensome the punishment for a crime, after its commission,' or deprives one charged with crime of any defense available according [*5] to law at the time when the act was committed'"

(*People v Foster, 87 AD3d 299, 306, 927 N.Y.S.2d 92 [2d Dept 2011]* quoting *Beazell v Ohio, 269 U.S. 167, 169, 46 S. Ct. 68, 70 L. Ed. 216 [1925], lv denied 18 NY3d 858, 962 N.E.2d 291, 938 N.Y.S.2d 866 [2011]).*

In determining whether a statute renders the punishment for a crime more burdensome for purposes of the Ex Post Facto Clause, the United States Supreme Court has implemented an intent-effects test (*see Smith v Doe, 538 U.S. 84, 92, 123 S. Ct. 1140, 155 L. Ed. 2d 164 [2003]).* Under the first prong of this test, the court determines whether the Legislature intended the statute to be punitive or civil in nature. If the court finds that the Legislature intended the statute to be punitive, then its retroactive application violates the Ex Post Facto Clause.

Notwithstanding numerous amendments to the statute since *Doe v Pataki*, the Court of Appeals has consistently held that SORA, "is not a penal statute and the registration requirement is not a criminal sentence. Rather than imposing punishment for a past crime, SORA is a remedial statute intended to prevent future crime'" (*People v Gravino, 14 NY3d 546, 556-558, 928 N.E.2d 1048, 902 N.Y.S.2d 851 [2010]*, quoting *Matter of North v Board of Examiners of Sex Offenders of State of N.Y., 8 NY3d 745, 752, 871 N.E.2d 1133, 840 N.Y.S.2d 307 [2007]* [emphasis deleted]; *see also People v Windham, 10 NY3d 801, 802, 886 N.E.2d 179, 856 N.Y.S.2d 557 [2008]* [*6] [a SORA risk-level determination is a "collateral consequence of a conviction for a sex offense designed not to punish, but rather to protect the public"])[2]. Accordingly, because the Legislature intended the statute to be regulatory [**4] (*see People v Pettigrew, 14 NY3d 406, 408, 927 N.E.2d 1053, 901 N.Y.S.2d 569 [2010]*; *People v Mingo, 12 NY3d 563, 571, 910 N.E.2d 983, 883 N.Y.S.2d 154 [2009]*; *People v Stevens, 91 NY2d 270, 277, 692 N.E.2d 985, 669 N.Y.S.2d 962 [1998]),* we proceed to the second prong of the intents-effects test and consider whether SORA is now "so punitive either in purpose or effect as to negate [the State's] intention to deem it civil" (*Smith v Doe, 538 U.S. at 92* [internal quotation marks omitted]). Because deference is due to a legislature's stated intent, "only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty" (*id.*).

> 2 Many of the amendments cited by defendant pre-date *Gravino* and *North*. These include registration duration, amended in January 2006 (*Correction Law § 168-h*); the creation of additional categories -- "sexually violent offender," "predi-

cate sex offender," and "sexual predator," added in March 2002 (*Correction Law § 168-a[7]*); the ability to petition for relief, amended [*7] in January 2006 (*Correction Law § 168-o*); the requirement to have photographs taken, amended in April 2006 (*Correction Law § 168-f*); Internet availability of the subdirectory added in January 2001 (*Correction Law § 168-q*); the role of the People and the sentencing court in SORA proceedings, effective January 2000 (*Correction Law § 168-d[3]*); and the penalties for failing to report, amended in August 2007 (*Correction Law § 168-t*).

In performing the effects analysis, we consider the seven factors articulated in *Kennedy v Mendoza--Martinez (372 U.S. 144, 168-169, 83 S. Ct. 554, 9 L. Ed. 2d 644 [1963])*: (1) does the sanction involve an affirmative disability or restraint?, (2) has the sanction been historically regarded as punishment?, (3) is the sanction imposed only upon a finding of scienter?, (4) does the operation of the sanction promote retribution and deterrence?, (5) is the behavior to which it applies already a crime?, (6) is there an alternative purpose to which the sanction may rationally be connected?, and (7) is the sanction excessive in relation to the alternative purpose? The United States Supreme Court has not allocated a specific weight to each factor, but has observed that the factors "often point in [*8] differing directions" (*see id. at 169*) and that no one factor is determinative (*see Hudson v United States, 522 U.S. 93, 101, 118 S. Ct. 488, 139 L. Ed. 2d 450 [1997]).*

As applied to SORA, our evaluation of these factors leads to the conclusion that the *post-Doe v Pataki* amendments on which defendant relies were aimed at improving the strength, efficiency and effectiveness of SORA as a civil statute, not at punishing sex offenders, and are not so punitive in effect as to negate the Legislature's intent.

Defendant argues that the effect of SORA is now punitive because the amended registration and notification requirements are significantly broader than those upheld in *Doe v Pataki*, and the right to petition for relief has been drastically limited. Particularly, whereas most offenders were originally required to register for 10 years, those designated level one must now register for 20 years and those designated level two and level three must now register for life (*Correction Law § 168-h*). Lifetime registration is also imposed on "sexual predators," "sexually violent offenders," and "predicate sex offenders," regardless of their risk level (*see Correction Law §§ 168-a[7][a],[b],[c]*); *168-h[2]*). Only a level two offender [*9] who is not a sexual predator, sexually violent offender or predicate sex offender may apply for relief from lifetime registration (after 30 years) (*Correction Law §§ 168-h[2]*; 168-o[1]).

Level one and two offenders may still register by mail in general, but every three years they must appear in person at the local police station to have a new photo taken; level three offenders and sexual predators are required to update their photographs annually and to personally verify their addresses with the law enforcement agency having jurisdiction every 90 days (*Correction Law §§ 168-f[2][b-2]*; *168-h[3]*). The identity and other information regarding all level two and three offenders must be made available on the Internet (*Correction Law § 168-q[1]*). The first failure to report is an E felony, and any subsequent failure a D felony [**5] (*Corrections Law § 168-t*).

These increased registration and reporting requirements are not excessive in relation to the public safety purpose of the statute and do not transform SORA into an additional statutory penalty. Although lifetime registration and Internet notification may have deterrent effects and promote community condemnation of offenders, they serve a valid [*10] regulatory function by providing the public with information related to community safety.

The Alaska statute at issue in *Smith v Doe, supra*, required sex offenders who had aggravated or multiple offenses to register for life and verify the information quarterly (*538 U.S. at 90*). In rejecting Smith's argument that these requirements subjected him to "affirmative disability or restraint," the Supreme Court found that "[t]he Act imposes no physical restraint, and so does not resemble the punishment of imprisonment, which is the paradigmatic affirmative disability or restraint" (*id. at 99-100*). Sex offenders were not subject to "a series of mandatory conditions," and were "free to move where they wish[ed] and live and work as other citizens, with no supervision" (*id. at 101*). The same is true of SORA. While the failure to comply with the reporting requirements would subject the offender to criminal prosecution, "any prosecution is a proceeding separate from the individual's original offense" (*id. at 102*).

In *Doe v Pataki*, the Second Circuit rejected the ex post facto challenge to SORA's 90-day in-person reporting requirement for certain high risk offenders, stating, "We agree with the district [*11] court that the registration requirements of the SORA do not impose punishment upon the plaintiffs" (*120 F3d at 1285*; *see also Manzullo v New York, 2010 WL 129302, *8, 2010 U.S. Dist LEXIS 32089, *22 [ED NY 2010]* [denying habeas relief to petitioner on the ground that "both the registration and notification provisions of (Megan's Law) (do) not constitute punishment for the purposes of the Ex Post Facto clause"] [internal quotation marks omitted]). The

court also rejected the argument that notification was analogous to historical punishments such as branding because of its stigmatizing effects or banishment, since notification is not imposed in lieu of incarceration or fines or as part of the offender's sentence, and is imposed only after sentencing (*id. at 1283-1284*). In addition, banishment involved state action in removing the offender from a locality, rather than the eviction by a landlord or community pressure to move faced by sex offenders; the latter are "private actions, however unfortunate, [and] are not intended consequences of the SORA" (*id. at 1284*). In addition, the duration, form and frequency of registration are tied to the risk of reoffense (*id. at 1285*).

In *Doe v Raemisch (895 F Supp2d 897 [ED Wis 2012])*, [*12] the district court rejected the plaintiff argument that Wisconsin's sex offender registration law had become punitive. The court observed that in *Doe v Smith* "the [Supreme] Court held that lengthier reporting requirements for those convicted of multiple or violent offenses is reasonable because the distinction is reasonably related to the danger of recidivism, and this is consistent with the regulatory objective" (quoting *Smith, 538 U.S. at 102*)" and that "[t]he State's determination to legislate with respect to convicted sex offenders as a class, rather than require individual determinations of their dangerousness, does not make this statute a punishment under the *Ex Post Facto* clause" (quoting *Smith at 104*; *see also People v Ortiz, 19 Misc 3d 1137[A], 862 N.Y.S.2d 817, 2008 NY Slip Op 51046[U] [Suffolk County 2008]* ["[T]he statutory increase in the defendant's registration period as a Level III sex offender from [**6] ten years to lifetime does not constitute a due process or ex post facto violation and is not a ground for modifying his previously assessed risk level"]).

In *Nolan v Cuomo (2013 WL 168674, *1, 2013 U.S. Dist LEXIS 6680, *1 [ED NY 2013])*, the plaintiff alleged that defendants violated his constitutional rights by denying [*13] him the opportunity to be "declassified" as a registered sex offender under SORA. The court noted that while the plaintiff had not raised an ex post facto challenge to the increased duration of the registration periods that resulted from the SORA amendments, "[a]ny such challenge would likely be foreclosed by the Second Circuit's decision that SORA's notification requirements and registration provisions do not constitute punishment for purposes of the Ex Post Facto Clause'" (*2013 WL 168674 at *2 n5, 2013 U.S. Dist LEXIS 6680, *7 n 5*, quoting *Doe v Pataki, 120 F3d at 1285*). The court further observed that even after the 2006 amendments, which severely restricted the ability of a sex offender to petition for relief from the duty to register (*Corrections Law § 168-o[1]*), SORA still allowed a sex offender to petition the court for an order modifying the level of notification (*2013 WL 168674, *2, 2013 U.S. Dist LEXIS 6680, *6-7*; *see also Corrections Law § 168-o[2]*).

Defendant contends that *Correction Law § 168-q(1)*, which requires that a subdirectory of all level two and level three offenders that includes their name, age, photo, home address, work address, crime, modus of operation, type [*14] of victim targeted, and any college or university in which they are enrolled "be made available at all times on the internet via the [DCJS] homepage," is now punitive because the information is unrestrictedly available to anyone with computer access. However, in *Smith v Doe*, the Supreme Court found that the dissemination to the public of the sex offender's personal information via the Internet is not punitive because "[t]he purpose and the principal effect of notification are to inform the public for its own safety, not to humiliate the offender" (*538 U.S. at 99*). The Court explained that "[t]he stigma . . . results not from public display for ridicule and shaming but from the dissemination of accurate information about a criminal record, most of which is already public. [The U.S. Constitution] does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment" (*id. at 98*). "To hold that the mere presence of a deterrent purpose renders such sanctions criminal' . . . would severely undermine the Government's ability to engage in effective regulation" (*id. at 102* [internal quotation marks omitted]).

Moreover, while this aspect of SORA [*15] notification has changed significantly, even in *Doe v Pataki*, the court distinguished between "access" and "dissemination" of information (*120 F3d at 1278*). SORA's Internet notification method is still "passive," as the community must seek access to the information, rather than being notified of the offender's presence by the Division of Criminal Justice Services (DCJS). In addition, Internet notification is still limited to the higher risk categories of level two and level three offenders, and SORA prohibits the misuse of the information, subjecting anyone who misuses it to a fine of $500 to $1,000 (*Correction Law § 168-q[2]*).

Defendant also relies on the fact that in 1996, the number of "sex offenses," including attempts, was about 30, whereas the current list is over 100 (*Correction Law § 168-a[2][3]*). [**7] However, even the original list of 36 included misdemeanors and offenses that required no proof of sexual contact, and the addition of more offenses does not, standing alone, render the statute punitive.

Defendant also argues that SORA is more punitive because it directs DCJS to provide the registry to the Department of Health and Department of Financial Services to make registrants [*16] ineligible to receive

reimbursement or coverage for certain drugs, procedures or supplies (*Correction Law § 168-b[2][b]*), to release the registry to Internet providers, who may restrict or remove them from their services (*Correction Law §§ 168-b[10]*), and to inform the housing authorities "at least monthly" of the home address of any level two or three offender "within the corresponding municipality" (*Correction Law §§ 168-b(12)*). However, SORA merely requires that information about sex offenders be provided to other agencies, so that they may comply with certain provisions of the Public Health Law, Social Services Law, Elder Law, and Insurance Law. This may be a disability (*see Mendoza-Martinez, 372 U.S. at 168-169*), but it remains connected to protecting the public rather than punishing the offender.

Defendant points to the fact that the District Attorney, rather than the Board, makes the risk determination in non-incarceratory cases (*Correction Law § 168-d[3]*) and that SORA now mandates a proceeding prosecuted by the District Attorney's Office and adjudicated by the sentencing court (*see Correction Law §§ 168-d(3)*; *168-n[3]*). Defendant contends that even in incarceratory cases, the [*17] Board is involved only to the extent of preparing the RAI and case summary (*Correction Law §§ 168-l[6]*). However, this scheme is not significantly different from the one addressed in *Doe*, since the sentencing court still makes the ultimate recommendation.

Defendant argues that the Board is not a purely civil agency, but is "essentially a specialized parole board, composed entirely of parole and probation employees." He contends that while the statute requires the Board Members to be "experts in the field of the behavior and treatment of sex offenders" (*Correction Law § 168-l[1]*), it does not define expertise and, in fact, the Board is not comprised of mental health professionals but of criminal justice personnel. This, however, was the case in *Doe v Pataki*.

It may be true that subjecting sex offenders to lifetime registration and notification requirements, with their attendant obligations and restrictions, increases the difficulties and embarrassment a sex offender may endure, even where he has led a law-abiding life since his conviction. However, in assessing the constitutionality of a statute, this Court does not review the merits or wisdom of the Legislature's decisions on matters [*18] of public policy (*Matter of New York County Lawyers' Assn. v Bloomberg, 95 AD3d 92, 108, 940 N.Y.S.2d 229 [1st Dept 2012], affd 19 NY3d 712, 979 N.E.2d 1162, 955 N.Y.S.2d 835 [2012])*, and the fact that the restrictions are difficult and cumbersome is not enough to make them unconstitutional. Although "one can argue that such laws are too extreme or represent an over-reaction to the fear of sexual abuse of children, . . . they do not violate the ex post facto clause . . . . These provisions created new crimes; they did not increase the punishment for Plaintiffs' previous offenses" (*Doe v Raemisch, 895 F.Supp2d at 908*]; *see also People v McFarland, 29 Misc 3d 1206[A], 958 N.Y.S.2d 309, 2010 NY Slip Op 51705[U] [Sup Ct, NY County 2010])*.

Accordingly, SORA, which is not punitive in nature, does not violate the Ex Post Facto Clause of the Federal Constitution (*see Matter of Bush v New York State Bd of Examiners of Sex Offenders, 72 AD3d 1078, 898 N.Y.S.2d 888 [2d Dept 2010]* [**8] ; *People v Bove, 52 AD3d 1124, 861 N.Y.S.2d 164 [3d Dept 2008]*; *People v Frank, 37 AD3d 1043, 829 N.Y.S.2d 317 [4th Dept 2007], lv denied 9 NY3d 803, 872 N.E.2d 876, 840 N.Y.S.2d 763 [2007])*.

The *Double Jeopardy Clause of the Fifth Amendment of the U.S. Constitution* and Article I of the New York State Constitution protect persons against being punished more than once for the same crime (*People v Williams, 14 NY3d 198, 214, 925 N.E.2d 878, 899 N.Y.S.2d 76 [2010])*. [*19] The claim that SORA is penal in nature and violates the prohibition against double jeopardy was raised and rejected by the Third and Fourth Departments after numerous amendments to SORA went into effect (*see People v Miller, 77 AD3d 1386, 908 N.Y.S.2d 513 [4th Dept 2010], lv denied 16 NY2d 701, 209 N.E.2d 552, 261 N.Y.S.2d 895 [2011]*; *People v Szwalla, 61 AD3d 1289, 1290, 877 N.Y.S.2d 757 [3d Dept 2009])*. We too reject it.

In the instant case, the court sufficiently "weighed the RAI against the defense evidence and arguments" and correctly adjudicated defendant a level three offender (*see People v Ferrer, 69 AD3d 513, 514, 894 N.Y.S.2d 387 [1st Dept 2010], lv denied 14 NY3d 709, 927 N.E.2d 564, 901 N.Y.S.2d 143 [2010])*. The court opted to rely on the RAI only as a starting point and only after hearing oral argument from defendant at a separate hearing regarding the reliability of the Static 99-R versus the RAI. Defendant was given ample opportunity to argue his case both at that hearing and at the SORA hearing, and the court reviewed his extensive submissions.

Although our analysis differs somewhat from that of the court (*see People v Larkin, 66 AD3d 592, 886 N.Y.S.2d 804 [1st Dept 2009], lv denied 14 NY3d 704, 925 N.E.2d 104, 898 N.Y.S.2d 99 [2010])*, we find that the People met their burden of establishing, by clear and convincing evidence, risk factors [*20] bearing a total score of 140 points, which supports a level three adjudication. The court should not have assessed 10 points on the RAI for the victim involved in the earlier offense (*see People v Hoffman, 62 AD3d 976, 880 N.Y.S.2d 122 [2d Dept 2009])*. The Guidelines provide a category to assess the "number and nature of prior crimes," and defendant was assessed 30 points on the RAI for a prior violent sex

crime, which sufficiently takes into account the victim of the earlier crime (Guidelines at 13)(*People v Mantilla, 70 AD3d 477, 478, 894 N.Y.S.2d 418 [1st Dept 2010], lv denied 15 NY3d 706, 934 N.E.2d 894, 908 N.Y.S.2d 160 [2010]* [internal quotation marks omitted]).

It was also error to assess 20 points for the age of one victim. While sworn grand jury testimony is generally reliable (*see e.g. People v Bailey 52 AD3d 336, 860 N.Y.S.2d 509 [1st Dept 2008], lv denied 11 NY3d 707, 897 N.E.2d 1083, 868 N.Y.S.2d 598 [2008])*, in this case, the testifying victim not only failed to state the basis of her knowledge of the other victim's age, but stated equivocally, 10 years after the offense, that she was "about 16." As this does not amount to clear and convincing evidence of the victim's age, 20 points should not have been assessed.

Regarding drug abuse, defendant argues that he had refrained from drug abuse and [*21] had completed a six month program, and that various prison disciplinary records showed no tickets for drugs. Defendant contends that this Court has not distinguished between time spent drug-free while incarcerated and time spent drug-free in the community. In fact, this Court has rejected arguments of remoteness where defendant was at liberty for only a short period of time, as a "[d]efendant's abstinence and participation in treatment while he was incarcerated are not necessarily predictive of his behavior when no longer under such supervision" (*People v Gonzalez, 48 AD3d 284, 852 N.Y.S.2d 71 [1st Dept 2008]* [internal quotation marks omitted], *lv denied 10 NY3d 711, 890 N.E.2d 246, 860 N.Y.S.2d 483 [2008])*. In addition to the Board's Case Summary, a 2001 Inmate Status Report confirmed [**9] that defendant admitted to abusing LSD and alcohol in the past; this amounts to clear and convincing evidence of his drug use. The select disciplinary records on which defendant relies do not conclusively establish that he was no longer abusing drugs.

Thus, while the court should not have assessed 30 of the 170 points and defendant should have been scored 140, he was still correctly designated a level three sex offender.

Accordingly, the order of the [*22] Supreme Court, Bronx County (Steven Lloyd Barrett, J.), entered on or about April 1, 2010, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (SORA)(Correction Law art 6-C), should be affirmed, without costs.

All concur.

Order, Supreme Court, Bronx County (Steven Lloyd Barrett, J.), entered on or about April 1, 2010, affirmed, without costs.

Opinion by Andrias, J. All concur.

Tom, J.P., Andrias, Saxe, Gische, JJ.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

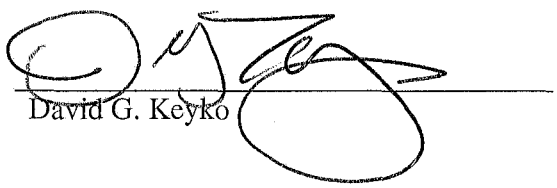
ENTERED: MAY 30, 2013

Certification Pursuant to CPLR § 2105

I, David G. Keyko, a member of the firm of Pillsbury Winthrop Shaw Pittman LLP, hereby certify pursuant to § 2105 of the CPLR that the foregoing papers constituting the Record on Appeal have been personally compared by me with the originals filed herein and have been found to be true and complete copies of said originals and the whole thereof, all of which are now on file in the office of the clerk of the Supreme Court, County of New York.

Dated: August 30, 2013

Pillsbury Winthrop Shaw Pittman LLP

By: 

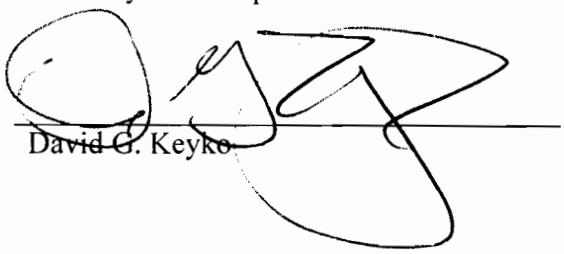
David G. Keyko

Certification Pursuant to CPLR § 2105

I, David G. Keyko, a member of the firm of Pillsbury Winthrop Shaw Pittman LLP, hereby certify pursuant to § 2105 of the CPLR that the foregoing papers constituting the Record on Appeal have been personally compared by me with the originals filed herein and have been found to be true and complete copies of said originals and the whole thereof, all of which are now on file in the office of the clerk of the Supreme Court, County of New York.

Dated: August 28, 2014

Pillsbury Winthrop Shaw Pittman LLP

By: 

David G. Keyko