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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.

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PRELIMINARY STATEMENT

The Attorney General's theory of liability in this case depends on two unsustainable premises. *First*, with respect to the Tax Law, the Attorney General contends that the purpose of the federal Mobile Telecommunications Sourcing Act (MTSA), and the Legislature's subsequent 2002 amendments to the Tax Law, was to eliminate the distinction between interstate and intrastate mobile telecommunications services. That contention is demonstrably incorrect. Congress enacted the MTSA because different taxing jurisdictions were using different methods to determine the location of mobile telecommunications services, with the result that a single transaction could be subject to taxation in multiple jurisdictions. Congress's solution to that problem was to adopt a uniform nationwide "sourcing" rule to determine which jurisdiction had the authority to tax, without requiring states to impose tax on any particular services. The Legislature's 2002 amendments to the Tax Law implemented the MTSA by adopting its sourcing rule with respect to the subset of mobile telecommunications services that are subject to taxation in New York: *intrastate* mobile telecommunications services.

The text and structure of the Tax Law establish that *interstate* mobile voice services sold for a fixed periodic charge are not subject to sales tax. The Attorney General claims that his contrary interpretation is required under the rule of the last antecedent. As illustrated by the United States

Supreme Court's recent decision in *Paroline* v. *United States*, 134 S. Ct. 1710, 1721 (2014), however, that rule has no application here. Section 1105(b)(2) applies only to mobile voice services that are taxable under section 1105(b)(1)(B)—*i.e.*, *intrastate* mobile voice services. To the extent the relevant provisions of the Tax Law are ambiguous, moreover, any ambiguity necessarily redounds to Sprint's benefit, because section 1105(b)(1)(B) is an exclusion from tax, not an exemption.

Even if the Attorney General's interpretation were unambiguously supported by the text of the Tax Law, it would be flatly preempted by the MTSA's unbundling provision. That provision prohibits states from making the taxability of charges for mobile telecommunications services turn on whether the charges are aggregated with and not separately stated from taxable charges, unless mobile providers are allowed to unbundle those charges to protect them from taxation. Under the Attorney General's interpretation of section 1105(b)(2), interstate mobile voice services become taxable only if they are sold for a fixed monthly charge without a separate statement of the charges on the customer's bill, and mobile providers are not permitted to unbundle those charges. That interpretation does precisely what the MTSA's unbundling provision prohibits. The Attorney General's principal argument is that the MTSA's unbundling provision is inapplicable because charges for interstate mobile voice services are already taxed under

New York law. But the Attorney General acknowledges that interstate telecommunications services are explicitly excluded from tax under section 1105(b)(1)(B), and they become taxable under his interpretation of section 1105(b)(2) only when they are sold for a fixed monthly charge and not separately stated. Again, that is exactly what the MTSA prohibits.

Second, with respect to the New York False Claims Act (FCA), the Attorney General claims that Sprint should be subject to treble damages and penalties simply because it acted contrary to a non-binding interpretation from the Department of Taxation and Finance concerning the tax that the Department allegedly was owed. That extreme position should be rejected. Liability under the New York FCA does not lie where, as here, a taxpayer's interpretation of the Tax Law is objectively reasonable—even if it differs from the Department's interpretation. To hold otherwise would permit the Department to use the threat of treble damages and penalties to force New York taxpayers to capitulate to the Department's non-binding interpretation; as a practical matter, the only way to challenge that interpretation would be to pay the allegedly owed tax and seek a refund.

Perhaps recognizing the weaknesses in the legal theories alleged in the complaint, the Attorney General now alternatively asserts that Sprint violated the unbundling provision of the Tax Law in the way it went about disaggregating its charges for interstate mobile voice services. But that allega-

tion does not appear in the complaint. To the contrary, the complaint alleges only that the Tax Law prohibited Sprint *altogether* from unbundling charges for interstate voice services and that New York's unbundling provision did not even apply to mobile voice services.

Because Sprint's interpretation of the Tax Law was correct (or at a minimum reasonable), the Attorney General's complaint should be dismissed in its entirety. Alternatively, the FCA claim should be dismissed either entirely or insofar as it relies on allegedly false statements made prior to the FCA's amendment in August 2010. Sprint respectfully submits that the Appellate Division's order affirming the Supreme Court's denial of Sprint's motion to dismiss should be reversed.

ARGUMENT

I. THE NEW YORK TAX LAW DOES NOT IMPOSE SALES TAX ON INTERSTATE MOBILE VOICE SERVICES SOLD AS PART OF A FIXED MONTHLY CHARGE

All of the Attorney General's claims depend on the proposition that the Tax Law required Sprint to collect sales tax from its New York customers on the portion of its flat-rate fee that was attributable to interstate voice service. As Sprint explained in its opening brief (at 20-38), that proposition is incorrect. New York has excluded interstate telecommunications services from taxation since 1965. The text, structure, and legislative history of the relevant provisions of the Tax Law make clear that the exclusion remains in

effect with respect to mobile telecommunications services sold for a fixed monthly charge.

The Attorney General's contrary position—that section 1105(b)(2) of the Tax Law should be construed as repealing that longstanding exclusion and imposing a new tax on New York consumers—rests on four principal contentions. *First*, the Attorney General contends that the Tax Law's text and structure establish that sales tax is imposed on the entirety of any fixed monthly charge for mobile voice service. *See* Resp. Br. 31, 33-35, 37-40. *Second*, he contends that the purpose of the federal MTSA was to eliminate the distinction between interstate and intrastate mobile telecommunications services. *See id.* at 32-33, 36, 40-43. *Third*, he contends that any ambiguity in the Tax Law must be construed against Sprint. *See id.* at 43-45. *Fourth*, he alternatively contends that Sprint violated the Tax Law in the way it unbundled charges for interstate voice services. *See id.* at 45-48. All of those contentions lack merit.

A. The Text And Structure Of The Tax Law Support Sprint's Interpretation

The Attorney General does not dispute that section 1105(b)(1)(B) explicitly excludes interstate telecommunications services from sales tax. *See* Resp. Br. 13-14; R104. Nor does he dispute that this exclusion applies to mobile telecommunications services. *See* Resp. Br. 13-14; R105 n.6. The Attorney General nevertheless seeks to avoid the clear import of paragraph

(b)(1)(B) by claiming that paragraph (b)(2) eliminated that longstanding exclusion for—and imposed a new tax on—a subset of mobile telecommunications services: interstate voice services that are sold for a fixed periodic charge and not separately stated. That interpretation cannot be squared with the statutory text or structure.

As Sprint explained in its opening brief (at 22-24), paragraph (b)(2) expressly incorporates the exclusion from paragraph (b)(1)(B) by imposing sales tax only on those services that are *both* "taxable under [paragraph (b)(1)(B)]" *and* "sold for a fixed periodic charge (not separately stated)." N.Y. Tax Law § 1105(b)(2). The Attorney General contends that, pursuant to the rule of the last antecedent, the phrase "that are taxable under [paragraph (b)(1)(B)]" should be read to modify only "other services," and not "voice services." *See* Resp. Br. 37-39. The rule of the last antecedent, however, is "not an absolute and can assuredly be overcome by other indicia of meaning." *Paroline* v. *United States*, 134 S. Ct. 1710, 1721 (2014) (internal quotation marks and citation omitted); *accord Judd* v. *O'Brien & Waddle*, 21 N.Y. 186, 190 (1860); McKinney's Cons. Laws of N.Y., Book 1, Statutes § 254. For several reasons, the text and structure of the Tax Law make clear that the limiting phrase "that are taxable under [paragraph (b)(1)(B)]" modifies "voice services" as well as "other services."

First, another canon of statutory construction counsels against applying the rule of the last antecedent here: "Where . . . a descriptive or qualifying phrase follows a list of possible antecedents, the qualifying phrase generally refers to and modifies all of the preceding clauses." *A.J. Temple Marble & Tile, Inc.* v. *Union Carbide Marble Care, Inc.*, 87 N.Y.2d 574, 580 (1996). Consistent with that canon, courts—including this Court—frequently have construed limiting or qualifying phrases as modifying all possible antecedents rather than merely the final antecedent. *See, e.g.*, *People ex rel. Spitzer* v. *Applied Card Systems, Inc.*, 11 N.Y.3d 105, 114 (2008); *A.J. Temple Marble & Tile*, 87 N.Y.2d at 580; *Porto Rico Railway, Light & Power Co.* v. *Mor*, 253 U.S. 345, 348 (1920).

The canon that a qualifying phrase should be read to modify all of its possible antecedents applies with particular force where, as here, the last antecedent is introduced by the word "other." *See, e.g.*, *United States* v. *Standard Brewery*, 251 U.S. 210, 218 (1920); *United States* v. *United Verde Copper Co.*, 196 U.S. 207, 213-214 (1905). Indeed, the Supreme Court recently relied on that rule in holding that the proximate-cause requirement of 18 U.S.C. § 2259(b)(3)(F) should be read to modify not just the final catch-all category of "any other losses," but six previously enumerated categories of losses as well. *Paroline*, 134 S. Ct. at 1720-1721. In so doing, the Supreme

Court rejected the argument that the rule of the last antecedent required a contrary interpretation. *Id.* at 1721.

Here, the qualifying phrase "that are taxable under [paragraph (b)(1)(B)]" is most naturally read as modifying both of its possible antecedents—"voice services" and "any other services." N.Y. Tax Law § 1105(b)(2). As in *Paroline*, the phrase "any other services that are taxable under [paragraph (b)(1)(B)]," N.Y. Tax Law § 1105(b)(2), defines a "broad, final category" of services that is best "understood as a summary of the type of [services] covered"—*i.e.*, mobile telecommunications services that are taxable under paragraph (b)(1)(B). 134 S. Ct. at 1721. Because paragraph (b)(2) imposes sales tax only on mobile voice services that are taxable under paragraph (b)(1)(B), it does not apply to *interstate* mobile voice services.

The Attorney General attempts to buttress his argument by pointing out that the clause "other services" is introduced by a comma. *See* Resp. Br. 39 n.10. As Sprint explained in its opening brief (at 34-36), that comma—and the matching comma after the qualifying phrase—merely serve to separate the first requirement for taxation under paragraph (b)(2) (that the services are taxable under paragraph (b)(1)(B)) from the second (that the services are sold for a fixed periodic charge). Indeed, in *Paroline*, the last antecedent was set off by a semicolon and contained in a separately enumerated subsec-

tion, yet the Supreme Court still rejected application of the rule of the last antecedent. *See* 134 S. Ct. at 1721.

Second, the paragraphs that immediately precede and follow paragraph (b)(2) further indicate that the qualifying phrase "that are taxable under [paragraph (b)(1)(B)]" should be read to modify "voice services." The immediately preceding paragraph, (b)(1)(B), has indisputably and unambiguously excluded interstate telecommunications service from sales tax for over four decades. If the Legislature had intended to upend that exclusion for mobile voice services sold for a fixed monthly charge, it surely would have done so explicitly, as it has done elsewhere in the Tax Law. *See* Sprint Br. 25-26. And paragraph (b)(3) confirms that the tax imposed under section 1105(b) applies to "*intrastate* mobile telecommunications service."[1] N.Y. Tax Law § 1105(b)(3).[2]

Third, reading the qualifying phrase "that are taxable under [paragraph (b)(1)(B)]" to modify only "any other services" would require this Court to accept the "unlikely premise[]" that the Legislature intended to

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[1] All emphases are added unless otherwise indicated.

[2] According to the Attorney General, paragraph (b)(3) merely confirms that "calls that take place wholly within another State" are intrastate and therefore subject to tax when the customer's place of primary use is New York. Resp. Br. 40. That only supports Sprint's interpretation and confirms the 2002 amendments were not intended to abolish the distinction between interstate and intrastate mobile services.

treat mobile voice services differently than non-voice services such as text messaging. *Paroline*, 134 S. Ct. at 1721 (internal quotation marks and citation omitted). The Attorney General has offered no explanation whatsoever—much less a plausible one—regarding why the Legislature would have intended to tax interstate mobile *voice* services while continuing not to tax interstate mobile *non-voice* services.

The Attorney General's remaining textual arguments do not support his flawed interpretation of paragraph (b)(2). The Attorney General contends that Sprint's reading of paragraph (b)(2) would render that provision superfluous. *See* Resp. Br. 42-43. That is incorrect. As Sprint explained in its opening brief (at 24), paragraph (b)(2) safeguards New York's tax base by ensuring that services that are taxable under paragraph (b)(1)(B) do not escape taxation simply because they are sold for a flat fee. Given the increasing prevalence of wireless flat-rate plans immediately before the 2002 amendments, it is unsurprising that the Legislature amended the Tax Law specifically to address the taxability of services sold under such plans.[3]

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[3] The Attorney General asserts that it has "long been [the rule in New York] that bundling both taxable and nontaxable services results in state taxation of the entire bundle." Resp. Br. 43. But the three advisory opinions from the Department of Taxation and Finance that he cites, *see id.* at 43 n.12, are not binding and plainly do not constitute a "rule." *See* N.Y. Comp. Codes R. & Regs. tit. 20, § 2375.5.

The Attorney General claims that Sprint's reading of section 1105(b)(2) would "simply duplicate[] § 1111(*l*)(2)'s more detailed bundling rules." Resp. Br. 43. To the contrary, Sprint's reading gives effect to both provisions. The focus of section 1105(b)(2) is on taxable services sold as part of a fixed monthly charge, "whether or not sold with other services." N.Y. Tax Law § 1105(b)(2). The focus of section 1111(*l*)(2), by contrast, is on certain enumerated *non-taxable* services that are sold as part of a bundle with *taxable* services. Section 1111(*l*)(2) requires mobile providers to collect tax on those enumerated services (which do not include interstate voice services) unless the provider unbundles them according to the permitted procedures.[4]

The Attorney General argues that the text of paragraph (b)(2) "draws no distinction between interstate and intrastate voice services." Resp. Br. 33. That is simply untrue. Paragraph (b)(2) expressly incorporates paragraph (b)(1)(B), which unequivocally excludes interstate telecommunications services from sales tax.[5] The Attorney General also asserts that paragraph

[4] The Attorney General states that, under section 1111(*l*)(2), "bundles are fully taxable," Resp. Br. 14, but that argument is incorrect. By its plain terms, section 1111(*l*)(2) applies only "[w]ith respect to" certain enumerated services, not to all services that are non-taxable and bundled. Because the enumerated services do not include interstate voice services, section 1111(*l*)(2) does not require mobile providers to collect tax on those services, even when sold as part of a bundle.

[5] The Attorney General claims that the Legislature made it "unmistakably clear" that it was eliminating the interstate/intrastate distinction in paragraph (b)(2) by amending paragraph (b)(1)(B) to clarify that the latter provi-

(b)(2) imposes sales tax on "[t]he receipts from every sale" of flat-rate plans, as opposed to only a portion of those receipts. Resp. Br. 33 (internal quotation marks and emphasis omitted). But that argument ignores the remainder of paragraph (b)(2), which makes clear that sales tax is imposed only on receipts from the sale of services that are both subject to tax under paragraph (b)(1)(B) and sold for a fixed periodic charge. Paragraph (b)(2) plainly does not impose tax on *all* receipts from the sale of mobile telecommunications services. Indeed, the Attorney General concedes that interstate non-voice services and separately stated voice services remain excluded from tax. *See* Resp. Br. 13-14.

With respect to the statutory structure, the Attorney General asserts that section 1111(*l*)(2) supports his interpretation because it "explicitly omit[s] voice service from the list of excludable services." Resp. Br. 34. That argument fails for at least two reasons. *First*, section 1111(*l*)(2) does not purport to contain an exhaustive list of services that are non-taxable. Instead, it lists only certain non-taxable services that become taxable when sold as part of a bundle, and that may be unbundled according to the procedures

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sion "does not apply to the mobile phone calls now governed by the newly enacted § 1105(b)(2)." Resp. Br. 33. As Sprint has explained (at 13 n.3), however, the final "except" clause in paragraph (b)(1)(B) simply ensures that those services that are subject to tax under paragraph (b)(2) are taxed only once.

identified in that provision. *Second*, the Attorney General acknowledges that section 1111(*l*)(2) allows mobile providers to "exclude as nontaxable any mobile telecommunications transmissions that the 'customer originates in a foreign country.'" Resp. Br. 35 n.8 (quoting N.Y. Tax Law § 1111(*l*)(2)). Under the Attorney General's interpretation of section 1105(b)(2), however, such services already would be fully taxable if included in the fixed monthly charge. The fact that section 1111(*l*)(2) allows mobile providers to unbundle those charges therefore undercuts, rather than supports, the Attorney General's interpretation of paragraph (b)(2).

B. The Attorney General Misconstrues The Purposes Of The Federal MTSA And The Legislature's 2002 Amendments

The Attorney General's erroneous interpretation of the Tax Law flows directly from his revisionist history of the MTSA and the Legislature's 2002 amendments to the Tax Law. According to the Attorney General, the MTSA was enacted to "free state taxation of mobile telecommunications services from the distinction between intrastate and interstate." Resp. Br. 3. But that was neither the purpose nor effect of the MTSA. Rather, as Sprint explained in its opening brief (at 10-11), the purpose of the MTSA was to establish a uniform nationwide "sourcing" rule to determine which jurisdiction had the *authority* to apply its tax laws to a given mobile telecommunications transaction. The MTSA left it up to each jurisdiction to decide whether (and, if so, how) to tax the transactions it had the authority to tax.

To be sure, in enacting the MTSA, Congress recognized that the nature of mobile telecommunications services had made taxation of those services complicated. *See, e.g.*, H.R. Rep. No. 106-719, at 7 (2000). To the extent such taxation was complicated, however, it was primarily because different jurisdictions used different methodologies to determine where a particular transaction occurred—not because those jurisdictions treated interstate and intrastate services differently. *See id.* at 7-8; S. Rep. No. 106-326, at 1-2 (2000). As a result, mobile providers often had to apply the tax laws of multiple jurisdictions on a transaction-by-transaction basis, and a particular transaction could be taxed by multiple jurisdictions. *See* H.R. Rep. No. 106-719, at 7-8; S. Rep. No. 106-326, at 1-2. The advent of billing plans with fixed monthly charges exacerbated the problem by making it "virtually impossible to determine the portion of [the set] price charged for individual calls." S. Rep. No. 106-326, at 2.

Congress's solution to this problem, however, was not to override the well-established distinction in state law between interstate and intrastate mobile telecommunications. Rather, Congress simplified the taxation of mobile telecommunications services by ensuring that each customer's transactions would be subject to the tax laws of only one state—the customer's place of primary use. In establishing that sourcing rule, Congress made

clear that it was not imposing any tax or requiring states to impose any tax; instead, Congress was determining *who* could tax. *See* 4 U.S.C. § 118(1).

The Attorney General contends that one goal of the MTSA was to "lessen the burden of having to determine the location of sale and purchase of each wireless call and the taxes applicable to each call." H.R. Rep. No. 106-719, at 8. True enough. But the MTSA accomplished that goal by adopting the place-of-primary-use rule, under which the authority of a jurisdiction to impose tax turns on the location of the customer, not the location of the call. It remains up to each state to determine *which* of the customer's services are actually subject to tax.

Sprint's interpretation of the Tax Law is wholly consistent with the purposes of the MTSA. Because the MTSA did not eliminate the distinction between interstate and intrastate mobile telecommunications services, it was hardly "absurd," Resp. Br. 42, for the Legislature to retain that distinction for mobile voice services.[6] To the extent the 2002 amendments were intended to implement the MTSA by conforming New York law with the MTSA's sourcing rule, *see* Sprint Br. 28, the Legislature accomplished that purpose by enacting paragraph (b)(3), which adopts the MTSA's sourcing rule for the

[6] In any event, under the Attorney General's interpretation of the MTSA, his interpretation of paragraph (b)(2) would be equally "absurd," because it too retains the intrastate/interstate distinction, albeit only with respect to mobile *non-voice* services. *See* Sprint Br. 30-31.

subset of mobile telecommunications services that are taxable in New York—*intrastate* mobile telecommunications services.[7]

C. Any Ambiguity In The Tax Law Must Be Construed In Sprint's Favor

As Sprint explained in its opening brief (at 21-22), to the extent the Tax Law is ambiguous regarding whether interstate mobile voice services sold for a fixed periodic charge are subject to tax, that ambiguity must be construed in Sprint's favor. *See, e.g.*, *Debevoise & Plimpton* v. *New York State Department of Taxation & Finance*, 80 N.Y.2d 657, 661 (1993). The Attorney General seeks to turn that familiar rule on its head by claiming that the State—not Sprint—should receive the benefit of any statutory ambiguity. *See* Resp. Br. 43-45. The Attorney General's arguments are unavailing.

The Attorney General first contends that any ambiguity does not benefit Sprint because section 1132(c)(1) of the Tax Law imposes on the taxpayer the burden of proving "that any receipt . . . is not taxable," N.Y. Tax Law

[7] The Attorney General (at 37 n.9) urges this Court to consider the Department of Taxation and Finance's post-enactment letter to Governor Pataki in interpreting the 2002 amendments. But the cases the Attorney General cites offer no reason to depart from the general rule that such letters should be given little if any weight. *See, e.g.*, *People* v. *Velez*, 19 N.Y.3d 642, 648 (2012) (considering post-enactment letters from the Governor and an interested agency where the legislation at issue was "a Governor's program bill"); *Matter of Greer* v. *Wing*, 95 N.Y.2d 676, 680-681 (2001) (considering post-enactment letters *from the bill's sponsors* in response to clarification request from the Governor).

§ 1132(c)(1). Resp. Br. 44. Section 1132(c)(1), however, imposes only an *evidentiary* burden to offer proof of non-taxability. *See, e.g.*, *Matter of Academy Beer Distributors, Inc.* v. *Commissioner of New York State Department of Taxation and Finance*, 202 A.D.2d 815, 816 (3d Dep't 1994); *Matter of Sunny Vending Co.* v. *State Tax Commission*, 101 A.D.2d 666, 667 (3d Dep't 1984). It has no application where, as here, the issue is one of statutory construction. *See, e.g.*, *Debevoise*, 80 N.Y.2d at 661.

The Attorney General also contends that any ambiguity must be construed against Sprint because paragraph (b)(1)(B) is an exemption from taxation. *See* Resp. Br. 44. That is wrong. This Court has held that, when the question is "whether property, income, a transaction or event is subject to taxation" in the first place, the canon that ambiguity is construed in the taxpayer's favor applies. *Matter of Grace* v. *New York State Tax Commission*, 37 N.Y.2d 193, 196 (1975); *see also, e.g.*, *Matter of Towne-Oller and Associates, Inc.* v. *State Tax Commission*, 120 A.D.2d 873, 874 (3d Dep't 1986); *Matter of Burger King, Inc.* v. *State Tax Commission*, 70 A.D.2d 447, 454 (3d Dep't 1979), *aff'd as modified*, 51 N.Y.2d 614 (1980). In *Matter of American Cyanamid & Chemical Corp.* v. *Joseph*, 308 N.Y. 259 (1955), for example, this Court applied that canon to determine whether certain sales were "for resale" and therefore excluded from New York City's retail sales tax. *Id.* at 261.

The question before this Court is not whether Sprint should be exempt from an indisputably applicable tax, but rather, in the Attorney General's own words, whether section 1105(b), the relevant tax-imposition provision, "extend[s] to" interstate mobile voice services sold for a flat fee. Resp. Br. 32. An entirely separate provision—section 1115—establishes exemptions from tax.

The Attorney General claims that this Court's decision in *Matter of 677 New Loudon Corp.* v. *State of New York Tax Appeals Tribunal*, 19 N.Y.3d 1058 (2012), *cert. denied*, 134 S. Ct. 422 (2013), supports his view that Sprint is seeking an exemption. *See* Resp. Br. 44. In that case, however, the taxpayer did not dispute—and, indeed, affirmatively argued—that the exception in section 1105(f)(1) for "dramatic or musical arts performances" constituted an exemption. *See* Br. of Resp. Commissioner in Response to Br. of Amicus Curiae CMSG Restaurant Group, LLC, at 2-3, *677 New Loudon Corp.*, *available at* 2012 WL 6057226 (Aug. 29, 2012). In any event, the issue in that case was whether a strip club's activities qualified as "dramatic or musical arts performances," not whether those performances were subject to tax in the first place. 19 N.Y.3d at 1060.

D. The Complaint Does Not Allege That Sprint's Method Of Unbundling Charges For Interstate Voice Service Violated The Tax Law

The Attorney General alternatively contends that, even if Sprint's interpretation of the Tax Law is correct, Sprint nonetheless violated section 1111(*l*)(2) in the way it went about unbundling charges for interstate voice services. *See* Resp. Br. 45-48. That argument, however, is nothing short of an attempt retroactively to amend the complaint. The Attorney General's cause of action for violation of the Tax Law alleges only that Sprint, which was "required to collect sales taxes," "failed to collect and pay over sales taxes, penalties and interest" imposed by the Tax Law. R87 (¶ 121). All of the Attorney General's claims are premised on that same legal theory: that the Tax Law prohibited Sprint altogether from unbundling any charges for interstate mobile voice services sold for a fixed monthly charge. *See, e.g.*, R65-66 (¶¶ 30-33); 69-70 (¶¶ 42-43).

The alternative theory that the Attorney General now seeks to press appears nowhere in the complaint. To the contrary, the complaint alleges that section 1111(*l*)(2) is wholly inapplicable to interstate mobile voice services, not that Sprint *violated* that provision. *See* Resp. Br. 34-35, 47; R69 (¶ 42). In an effort to suggest otherwise, the Attorney General cites six paragraphs of his complaint. *See* Resp. Br. 47-48 (citing R76-78 (¶¶ 70-74, 78)). While those paragraphs criticize as arbitrary Sprint's method of allo-

cating a portion of its flat-rate fee to interstate voice services, they do not allege that Sprint's method failed to satisfy the requirements of section 1111(*l*)(2).

II. THE ATTORNEY GENERAL'S INTERPRETATION OF THE TAX LAW, IF CORRECT, WOULD BE PREEMPTED BY THE MTSA

The Attorney General's interpretation of the Tax Law fails for an additional reason: it directly conflicts with, and therefore would be preempted by, the federal MTSA's unbundling provision.

The Attorney General first contends that Sprint has failed to overcome the presumption against preemption because "the MTSA's bundling provision expressly respects and incorporates state taxing authority." Resp. Br. 49. To be sure, the MTSA leaves it up to each state to determine whether to tax mobile telecommunications services. *See* pp. 13-15, *supra*. But in an effort to simplify customer billing statements, the relevant provision of the MTSA prohibits states from crafting laws that would make the taxability of mobile telecommunications services turn on whether the charges for such services are "aggregated with and not separately stated from" taxable charges. 4 U.S.C. § 123(b). The provision allows states to tax otherwise non-taxable charges that are "aggregated with and not separately stated from" taxable charges, but only if mobile providers are allowed to unbundle the non-taxable charges to protect them from taxation. *Id.*

The Attorney General's interpretation of the Tax Law is preempted by the MTSA because it would make the taxability of interstate mobile voice services turn on whether those charges are sold for a fixed monthly charge and not separately stated, but without allowing mobile providers to unbundle those charges. The Attorney General concedes that interstate telecommunications services, standing alone, are excluded from tax under paragraph (b)(1)(B). *See* Resp. Br. 12-14; R102; R104. He also concedes that paragraph (b)(1)(B) "applies to mobile services," R105 n.6, including certain mobile voice services. *See* Resp. Br. 13-14. Under the Attorney General's interpretation of paragraph (b)(2), such services become taxable only when they are sold as part of a fixed monthly charge and not separately stated. *See* Resp. Br. 13-14; R66 (¶ 33(d)); R102; R105 n.6. Yet providers are not allowed to unbundle those charges to protect them from taxation. *See* Resp. Br. 34-35, 47. That result is exactly what the MTSA prohibits.

The Attorney General responds that, under his interpretation of the Tax Law, the MTSA's unbundling provision is wholly inapplicable because "fixed periodic charges for mobile voice services . . . *are* subject to taxation under § 1105(b)(2)." Resp. Br. 49 (emphasis in original). That is incorrect. The Attorney General has acknowledged that fixed periodic charges for *interstate* mobile voice services are taxable under his interpretation of paragraph (b)(2) only if there is no separate statement of the charges on the

customer's bill. *See* R66 (¶ 33(d)); R102; R105 n.6. Because, according to the Attorney General, such charges are not taxable under paragraph (b)(1)(B) and only become taxable when "aggregated with and not separately stated from" taxable charges, those charges are necessarily not "otherwise subject . . . to taxation" under the MTSA. 4 U.S.C. § 123(b).[8]

For the first time in this litigation, in a transparent attempt to avoid preemption, the Attorney General now suggests that the only interstate mobile voice services excluded from tax under his interpretation of paragraph (b)(2) are those that are "not sold for a flat fee, but instead 'separately stated' *in the sense that they are charged per call or per minute, such as overage charges*." Resp. Br. 51; *see also id.* at 14. That suggestion contradicts the Attorney General's earlier acknowledgement that, if Sprint had included a separate line item on its invoices for the portion of its fixed monthly charge that was attributable to interstate voice service, that portion would have been excluded from tax. *See* R66 (¶ 33(d)); R102. In any event, the Attorney General's belated suggestion that "not separately stated" in paragraph (b)(2) means nothing more than sold for a flat fee is plainly incorrect

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[8] Tellingly, in asserting that paragraph (b)(2) applies to all voice services sold for a fixed periodic charge, *see* Resp. Br. 51, the Attorney General omits the phrases "that are taxable under [paragraph (b)(1)(B)]" and "(not separately stated)" from his selective quotation of that provision. The only way the Attorney General can support his interpretation of paragraph (b)(2) is by reading language out of it.

because it would render that phrase entirely superfluous. Under the Attorney General's interpretation of paragraph (b)(2), voice services sold for a fixed periodic charge already are subject to tax.

The Attorney General asserts that Sprint's preemption argument "relies on the premise that it can identify an untaxed component of its fixed periodic charges for mobile voice service that can be attributed to interstate voice calls." Resp. Br. 50. But the whole point of the MTSA's unbundling provision is to allow such unbundling, thereby preventing states from making the taxability of certain services turn on whether they are "aggregated with and not separately stated from" taxable charges. 4 U.S.C. § 123(b). Under the Attorney General's circular logic, a mobile provider would never be able to unbundle any charges from a flat-rate plan, because each component of the plan would always be taxable when bundled.

In any event, the Attorney General's responses to his straw-man argument are invalid. *First*, the Attorney General claims that "there *is* no separate interstate component of Sprint's flat-rate mobile voice plans" because the fixed fee that Sprint charges is merely "for access to a nationwide phone network." Resp. Br. 50 (emphasis in original). On that view, however, a state could attempt to circumvent the MTSA's unbundling provision simply by describing the flat fee that a mobile provider charges as an "access" fee. Yet the ability of a mobile provider to unbundle pursuant to the MTSA does

not depend on the label attached to its flat-rate plans, but rather, on whether services that are otherwise non-taxable are "aggregated with and not separately stated from" taxable services. 4 U.S.C. § 123(b).

Second, the Attorney General contends that, "even if a separate interstate component . . . could be identified," that component would otherwise be subject to tax under New York law because paragraph (b)(2) applies to all interstate voice services sold for a fixed periodic charge, whether or not sold with other services. Resp. Br. 51. Again, that contention misses the point. As the Attorney General has conceded, *see* R66 (¶ 33(d)); R102, the same services *would not be taxed* if the charges for the services were sold as part of a fixed periodic charge but separately stated on the customer's bill. Because the taxability of interstate mobile voice services would turn on whether the charges for those services were separately stated, and Sprint would not be allowed to unbundle those charges, the Attorney General's interpretation directly conflicts with, and is preempted by, the MTSA.

Third, the Attorney General suggests there is no preemption because the complaint alleges that Sprint did not "adhere to the disaggregation requirements set out in federal and state law." Resp. Br. 52. As discussed above, *see* pp. 19-20, the complaint nowhere alleges that Sprint's particular method of unbundling violated any law—much less that it violated the MTSA, which trumps state law. *See* Sprint Br. 28 n.9. Indeed, the complaint

does not even mention the MTSA, much less allege that Sprint failed to satisfy the requirements of its unbundling provision. The Attorney General's complaint alleges only that the Tax Law prohibited Sprint *altogether* from unbundling any charges for interstate mobile voice services sold for a fixed monthly charge. If that interpretation of the Tax Law were correct, it would flatly conflict with the MTSA and be preempted.

III. THE COMPLAINT FAILS TO STATE A CLAIM UNDER THE NEW YORK FALSE CLAIMS ACT

A. The Attorney General's FCA Claim Fails As A Matter Of Law Because Sprint's Interpretation Of Section 1105(b) Was Objectively Reasonable

As explained in Sprint's opening brief (at 46-52), the complaint fails to state a claim under the New York FCA because Sprint's interpretation of the Tax Law was objectively reasonable, and, therefore, its tax returns were not knowingly false. The Attorney General offers three principal responses. *First*, he contends that, while the reasonableness of Sprint's interpretation may be relevant to Sprint's mental state, it is not necessarily dispositive of his FCA claim. *See* Resp. Br. 65. *Second*, he contends that, even if an objectively reasonable interpretation could preclude liability under the New York FCA, it does not do so here. *See id.* at 68-70. *Third*, he contends that the complaint sufficiently alleges that Sprint knowingly submitted false tax returns. *See id.* at 54-64. Those arguments are unavailing.

1. A Statement Based On An Objectively Reasonable Interpretation Of The Law Is Not Knowingly False

According to the Attorney General, the reasonableness of a defendant's interpretation may be relevant to a defendant's mental state, but it should not preclude the Attorney General from establishing knowing falsity "with the usual sorts of evidence of culpability." Resp. Br. 65. As Sprint explained in its opening brief (at 48-52), however, decisions of the United States Supreme Court and other federal courts hold that, as a matter of law, a statement is not knowingly false if "there is [a] reasonable interpretation of the law that would make the allegedly false statement true." *United States ex rel. Hixson* v. *Health Management Systems, Inc.*, 613 F.3d 1186, 1191 (8th Cir. 2010); *accord Safeco Insurance Co.* v. *Burr*, 551 U.S. 47, 70 n.20 (2007); *United States ex rel. Wilson* v. *Kellogg Brown & Root, Inc.*, 525 F.3d 370, 376-377 (4th Cir. 2008); *United States ex rel. Morton* v. *A Plus Benefits, Inc.*, 139 Fed. Appx. 980, 982-983 (10th Cir. 2005); *United States ex rel. Roby* v. *Boeing Co.*, 100 F. Supp. 2d 619, 625-626 (S.D. Ohio 2000), *aff'd*, 302 F.3d 637 (6th Cir. 2002).

In support of his contrary position, the Attorney General cites only two cases. In the first, *United States ex rel. Oliver* v. *Parsons Co.*, 195 F.3d 457 (9th Cir. 1999), the Ninth Circuit rejected the notion that the objective reasonableness of the defendant's interpretation precludes a finding of falsity and, instead, concluded that objective reasonableness is merely "relevant to

whether [the defendant] knowingly submitted a false claim." 195 F.3d at 463. As the leading treatise on the FCA points out, however, that holding is "fundamentally flawed . . . and has now been called into serious question" by *Safeco.* 1 John T. Boese, *Civil False Claims and Qui Tam Actions* § 2.03[B], at 2-145 (4th ed. 2013) (Boese). The second case, *United States ex rel. K&R Limited Partnership* v. *Massachusetts Housing Finance Agency*, 530 F.3d 980 (D.C. Cir. 2008), relies on *Oliver* for the proposition that "the unreasonableness of [an] interpretation is merely evidence," and thus is questionable for the same reason as *Oliver*. *Id.* at 983.

The Attorney General urges this Court to disregard *Hixson* on the ground that its holding is "plainly wrong," Resp. Br. 65-66 n.15, but the Attorney General misconstrues that holding. According to the Attorney General, *Hixson* held that "a complaint based on violation of a statute may be dismissed at the pleadings stage 'if there is no authoritative contrary interpretation of that statute.'" *Id.* (quoting *Hixson*, 613 F.3d at 1190). *Hixson* actually held that "*a reasonable interpretation of a statute* cannot support a claim under the FCA if there is no authoritative contrary interpretation of that statute." 613 F.3d at 1190. *Hixson* thus does not excuse defendants from FCA liability whenever there is an absence of interpretative authority; instead, it sensibly recognizes that, when there is a reasonable interpretation of the statute under which the defendant's statement would be true, and no

contrary interpretive authority, FCA liability will not lie because the defendant lacks the requisite scienter. That holding is entirely consistent with the Supreme Court's decision in *Safeco*, and the Attorney General does not dispute that *Safeco* supports Sprint's position. See Resp. Br. 68-69.

In the face of persuasive judicial authority that an objectively reasonable interpretation precludes FCA liability as a matter of law, the Attorney General contends that to follow that authority "would seriously undermine [the FCA's] effectiveness," particularly in the areas of Medicaid and tax, "which apply unusually complex laws." Resp. Br. 66. But the fact that a law is "unusually complex" counsels against, not in favor of, the imposition of treble damages for a close-call violation of that law. Accordingly, this Court should hold that treble damages are not available where the allegedly false statement was based on an objectively reasonable interpretation of the law.

2. Sprint's Interpretation Of The Tax Law Was At A Minimum Objectively Reasonable

The Attorney General maintains that, even if an objectively reasonable interpretation of the Tax Law could preclude FCA liability, Sprint's interpretation fails to satisfy that standard, for two reasons. *See* Resp. Br. 68. *First*, he asserts that Sprint's interpretation was objectively unreasonable. *See id.* *Second*, he asserts that Sprint did not rely on that interpretation. *See id.* at 70. Neither reason is persuasive.

With respect to the reasonableness of Sprint's interpretation, the Attorney General contends that "[1] the relevant Tax Law provisions are clear and unambiguous; [2] Sprint's interpretation has no grounding in the statute's text, structure, or purpose, [3] or any support from any judicial decision or industry practice; and [4] the Tax Department's guidance explicitly contradicted Sprint's reading." Resp. Br. 68. The first and second contentions fail for the same reason as the Attorney General's flawed interpretation of the Tax Law. *See* pp. 4-18, *supra*.

The third contention is factually inaccurate. Although it is true that, during the time period relevant to the complaint, no court had interpreted the Tax Law in the same manner as Sprint,[9] at least two other mobile telecommunications service providers had done so. *See* Sprint Br. 50-51. The Attorney General claims that the views of those providers are entitled to "little weight" because the complaint does not allege that Sprint was aware of those views and because those providers had relatively few subscribers. Resp. Br. 69 n.17. But that misses the point: the very fact that other mobile

[9] During the relevant time period, no court had interpreted the applicable provisions of the Tax Law at all. The Attorney General is apparently of the view that it was *per se* unreasonable for Sprint to adopt an interpretation of the Tax Law that no court had yet endorsed, but, if anything, the opposite is true. It would be unreasonable to impose treble damages and penalties on Sprint for adopting an objectively reasonable view on an interpretive question of first impression.

providers independently interpreted the Tax Law in the same manner as Sprint indicates that Sprint's interpretation was objectively reasonable.[10]

The Attorney General's fourth contention ignores the fact that the agency guidance that purportedly contradicted Sprint's interpretation is entitled to no judicial deference.[11] The Attorney General attempts to distinguish *Safeco* on the ground that, in that case, "there was a 'dearth of guidance' that 'might have warned [the defendant] away from the view it took.'" Resp. Br. 70 (quoting *Safeco*, 551 U.S. at 69-70 (alteration in original)). But the guidance that was lacking in *Safeco*, as here, was "*authoritative* guidance." 551 U.S. at 70. Indeed, the Court in *Safeco* rejected the plaintiffs' reliance on an informal FTC staff opinion because it was "not binding." *Id.* at 70 n.19 (internal quotation marks omitted).

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[10] The administrative proceedings against one of those providers, Helio, are also significant because they included a finding by the administrative law judge that the Department imposed minimum interest on Helio after concluding that Helio had "reasonable cause" for declining to collect tax on interstate mobile voice services sold for a flat fee. *See* Sprint Br. 51. That finding further supports the reasonableness of Sprint's interpretation.

[11] The Attorney General mentions in passing that "courts have relied on technical memoranda in interpreting the Tax Law," Resp. Br. 56-57, but he makes no serious attempt to argue that such memoranda are entitled to any formal deference. That is for good reason: the applicable regulations make clear that such memoranda are not binding, and, as Sprint has explained, courts routinely reject the Department's non-binding interpretations of the Tax Law. *See* Sprint Br. 37 & n.12.

The Attorney General suggests that other factors that supported the Supreme Court's holding in *Safeco* point in the opposite direction here. *See* Resp. Br. 69-70. To the contrary, the factors that were present in *Safeco* are present here and support the reasonableness of Sprint's interpretation. As Sprint explained in its opening brief (at 50), it was interpreting "murky legal concepts" involving an "unsettled question of law," *Louisiana Municipal Police Employees' Retirement System* v. *Hesse*, 962 F. Supp. 2d 576, 589 (S.D.N.Y. 2013), and its interpretation of the applicable provisions of the Tax Law is consistent with the text, statutory structure, and legislative history.[12]

With respect to reliance, the Attorney General contends that an objectively reasonable interpretation cannot preclude liability if "the defendant did not in fact act on th[at] interpretation." Resp. Br. 70. That argument is foreclosed by *Safeco*, as the Third Circuit recently held in *Long* v. *Tommy Hilfiger U.S.A., Inc.*, 671 F.3d 371, 377 (2012). There, the Third Circuit rejected the plaintiff's argument that the defendant "did not actually rely on *any* interpretation," holding that it was "expressly foreclosed by *Safeco*,

[12] The Attorney General also attempts to distinguish *Safeco* on the ground that it involved a claim under the federal Fair Credit Reporting Act (FCRA) rather than under the FCA. *See* Resp. Br. 67. But "the Court's reasoning [in *Safeco*] applies in [the FCA] context because the FCRA's intent standard was essentially the same as that in the FCA, and was defined by the Court according to the civil common law definition of reckless disregard." Boese § 2.06[C], at 2-293; *see also* Sprint Br. 48.

which held that evidence of subjective bad faith or intent of the defendant is irrelevant when there is an objectively reasonable interpretation of the statute that would allow the conduct in question." *Id.* (emphasis in original) (internal quotation marks omitted).

3. The Complaint Fails To Allege That Sprint's Interpretation Of The Tax Law Was Objectively Unreasonable As A Matter Of Law

The Attorney General devotes the bulk of his FCA argument to explaining why, in his view, the complaint sufficiently alleges that Sprint knowingly violated the Tax Law. For the reasons explained above, however, those allegations are relevant only insofar as they bear on the objective reasonableness of Sprint's interpretation. Allegations that Sprint's competitors collected tax on the services at issue; that the Department of Taxation and Finance issued non-binding guidance that contradicted Sprint's interpretation; and that the Department warned Sprint that it was violating the Tax Law simply do not suffice to render Sprint's interpretation objectively unreasonable as a matter of law. As noted above, industry practice was hardly uniform: at least two of Sprint's competitors also did not collect tax on interstate mobile voice services sold for a fixed monthly charge. *See* pp. 29-30, *supra*.[13] Allegations that the Department disagreed with Sprint's interpreta-

[13] The Attorney General cites *Commercial Contractors, Inc.* v. *United States*, 154 F.3d 1357 (Fed. Cir. 1998), for the proposition that evidence of industry practice can establish recklessness. But that case made clear that

tion do not undermine the objective reasonableness of that interpretation, because the Department's views were not binding and were entitled to no deference. *See* Sprint Br. 36-37. To the extent the Attorney General makes various allegations relating to Sprint's subjective knowledge (at 56-64), those allegations are irrelevant because Sprint's interpretation was objectively reasonable. *See Safeco*, 551 U.S. at 70 n.20.

4. The Attorney General Does Not Dispute The Implications For New York Taxpayers Of His Position Concerning The FCA's Knowledge Requirement

The Attorney General's argument regarding the FCA essentially boils down to the proposition that Sprint should be liable for treble damages and penalties under the FCA simply because it refused to capitulate to the Department of Taxation and Finance's non-binding interpretation of complicated provisions of the Tax Law. As Sprint explained in its opening brief (at 52-54), the Attorney General's position is deeply troubling for New York taxpayers. It would mean that, in order to avoid the FCA's draconian sanctions, a taxpayer that disagrees with the Department's non-binding interpretation must nonetheless pay the tax and then seek to challenge it administratively.[14]

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such evidence should be considered only in connection with the "unambiguous terms of the contract" to establish that a contractor has "adopt[ed] a contract interpretation that is implausible." *Id.* at 1366.

[14] A taxpayer challenging the applicability or constitutionality of a tax statute is often permitted to seek declaratory relief without exhausting administrative remedies. *See, e.g.*, *Two Twenty East Limited Partnership* v.

The Department's non-binding views would thereby effectively become the law, without any of the safeguards of the rulemaking process.

Far from disputing that point, the Attorney General embraces it. He urges this Court to adopt his position to ensure that "sophisticated defendants" will not be able to avoid FCA liability by interpreting "unusually complex laws" such as the Tax Law in their own favor. Resp. Br. 66. In other words, the Attorney General intends to use the FCA to ensure that, for all practical purposes, the agency's non-binding view of the law is the law. That is a pernicious outcome—particularly where, as here, any ambiguity in the statute is supposed to be construed in the taxpayer's favor. *See* pp. 16-18, *supra*.

Notably, the case on which the Attorney General principally relies does not support his extreme position that the failure to adhere to an agency's non-binding interpretation of an ambiguous statute constitutes recklessness. In *Visiting Nurse Association of Brooklyn* v. *Thompson*, 378 F. Supp. 2d 75 (E.D.N.Y. 2004), the court found that reliance on a reasonable interpretation

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New York State Department of Taxation and Finance, 185 A.D.2d 202, 202 (1st Dep't 1992). In the Attorney General's view, however, a taxpayer's failure to seek agency review and prevail before the agency would constitute evidence of recklessness that could subject the taxpayer to liability under the FCA. In any event, where, as here, the tax at issue is a pass-through tax that is collected from the taxpayer's customers, collecting the tax would present a substantial risk of consumer class-action litigation. *See, e.g.*, *Long* v. *Dell, Inc.*, 93 A.3d 988, 1000-1004 (R.I. 2014).

of an ambiguous statute "becomes presumptively unreasonable once the government has *formally* declared that it has adopted a different interpretation." *Id.* at 96. The agency guidance in that case, however, was entitled to "substantial deference." *Id.* at 92. Here, the opposite is true.

B. The Ex Post Facto Clause Bars Liability Under The FCA For Allegedly False Statements Made Before August 13, 2010

As Sprint explained in its opening brief (at 60), five of the seven factors relevant to the Ex Post Facto Clause inquiry that the United States Supreme Court identified in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1963), establish that the FCA is punitive in purpose or effect. The Attorney General contends that two of those factors—(1) whether the law imposes sanctions historically regarded as punishment, and (2) whether the law promotes the traditional aims of punishment—are not met here because the New York FCA serves compensatory goals in addition to punitive goals. *See* Resp. Br. 74-80. But *every* law that imposes monetary remedies—including those that contain statutory multipliers—serve *some* compensatory purpose. The fact that the New York FCA was intended at least in part to compensate the government therefore does not end the Ex Post Facto inquiry.

The monetary remedies imposed under the New York FCA go well beyond compensating the government for its losses. This Court said as much in *State ex rel. Grupp* v. *DHL Express (USA), Inc.*, 19 N.Y.3d 278 (2012), when it concluded that, "rather than redressing the harm actually suffered, the

statute's imposition of civil penalties and treble damages evinces a broader punitive goal of deterring fraudulent conduct against the State." *Id.* at 286. Like the court in *United States ex rel. Bilotta* v. *Novartis Pharmaceuticals Corp.*, Civ. No. 11-71, ___ F. Supp. 3d ___, 2014 WL 4922291 (S.D.N.Y. Sept. 30, 2014), the Attorney General seeks to distinguish *Grupp* on the ground that it "did not involve an ex post facto claim." Resp. Br. 81. But in determining whether to apply the market participant exception to federal preemption, this Court squarely determined that the sanctions imposed by the New York FCA are punitive in nature. That reasoning should be dispositive with respect to the two *Mendoza-Martinez* factors discussed above.

The Attorney General also asserts that the United States Supreme Court retreated from its historically punitive conception of treble damages in *Cook County* v. *United States ex rel. Chandler*, 538 U.S. 119 (2003). *See* Resp. Br. 77 n.20. There, however, the Court simply observed that "treble damages have a compensatory side . . . in addition to punitive objectives." 538 U.S. at 130. That treble damages have compensatory traits is hardly a revelation. As noted above, part of *any* multiplied damages award will reimburse a plaintiff for his loss, as well as for the trouble of bringing a lawsuit.

In any event, the Court in *Chandler* had a specific reason for highlighting the "compensatory side" of treble damages. The issue in that case was whether the federal False Claims Act continued to apply to municipalities

after it was amended to impose treble rather than double damages. Citing the "compensatory side" of the federal statute, the Court concluded that the presumption against imposing punitive damages on governmental entities was insufficient to overcome the "cardinal rule" that repeals by implication are not favored. 538 U.S. at 132 (internal quotation marks omitted). Nothing in *Chandler* undermines the general proposition that treble damages are "essentially punitive in nature." *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U.S. 765, 784 (2000).

Importantly, New York's FCA imposes even harsher sanctions than the federal False Claims Act by allowing the recovery of "three times the amount of all damages, *including consequential damages.*" N.Y. State Fin. Law § 189(1)(h). By contrast, the treble damages provision in the federal False Claims Act was "adopted by Congress as a *substitute* for consequential damages." *Chandler*, 538 U.S. at 131 n.9. Indeed, the Supreme Court's determination that the treble damages imposed by the federal False Claims Act "have a compensatory side" relied in part on that statute's *lack* of a consequential damages provision. *Id.* at 130-131. Whether or not the federal False Claims Act is primarily punitive, the damages and penalties imposed under the New York FCA clearly are aimed to punish.

The Attorney General's arguments as to the remaining three factors are equally unavailing. *First*, he contends that the New York FCA does not

"come[] into play only on a finding of scienter," *Mendoza-Martinez*, 372 U.S. at 168, because its knowledge requirement encompasses recklessness. Resp. Br. 84. But scienter is commonly understood to include recklessness. *See Owens* v. *Waterhouse*, 225 A.D. 582, 584 (4th Dep't 1929); *cf. SEC* v. *Obus*, 693 F.3d 276, 286 (2d Cir. 2012).

Second, the Attorney General claims that the New York FCA "[e]xtends beyond already criminalized conduct" because it does not require a specific intent to defraud. Resp. Br. 84-85. The Attorney General cites no authority, however, for his contention that this factor is not met when the criminal provision merely imposes a more stringent intent standard. And the Attorney General concedes that, in at least some instances, the New York FCA will apply to acts that would also violate the criminal prohibition. *See* Resp. Br. 85.

Third, the Attorney General asserts that the monetary sanctions imposed by the New York FCA are "not excessive in relation to the Act's remedial purpose." Resp. Br. 85. But even the trial court determined that those sanctions far exceed any realistic compensatory purpose. R20. The Attorney General's suggestion that the entirety of those draconian sanctions is needed to compensate the State for its losses, and to incentivize qui tam plaintiffs to bring suit, defies logic.

The *Mendoza-Martinez* factors overwhelmingly weigh in favor of the conclusion that the New York FCA is so punitive in purpose or effect that its retroactive application to statements made before August 13, 2010 violates the Ex Post Facto Clause. The Attorney General's FCA claims should be dismissed at least to that extent.

CONCLUSION

The Appellate Division's order should be reversed, and the action dismissed in its entirety with prejudice.

Respectfully submitted,

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