

17-1993(L)

17-2107, 17-2111 (XAP)

**United States Court of Appeals
for the Second Circuit**

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

Plaintiffs–Appellees–Cross-Appellants,

v.

UNITED PARCEL SERVICE, INC.,

Defendant–Appellant–Cross-Appellee.

On Appeal from the United States District Court
for the Southern District of New York

FINAL FORM BRIEF FOR PLAINTIFFS–APPELLEES–CROSS-APPELLANTS

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<u>Cite</u>	<u>Reference</u>
S.A.	Special Appendix
J.A.	Joint Appendix
* * *	
Dep.	Testimony by deposition
Dkt.	Docket entry for 15-cv-1136 (S.D.N.Y.)
DX	Defendant's trial exhibit
PX	Plaintiffs' trial exhibit
TrialTr.	Transcript of trial proceedings
* * *	
App.Br.	Brief for Appellant/Cross-Appellee United Parcel Service, Inc. (Page Proof)
ChamberBr.	Brief of Chamber of Commerce of the United States of America as <i>Amicus Curiae</i>
CigarBr.	Brief for <i>Amicus Curiae</i> Cigar Association of America, Inc., in Support of Appellant
La.Br.	Brief for <i>Amici Curiae</i> the States of Louisiana, Arkansas, and the Commonwealth of Kentucky, by and through Governor Matthew G. Bevin, in Support of Appellant
TruckingBr.	Brief of American Trucking Associations, Inc., as <i>Amicus Curiae</i> in Support of Appellant
WLFBBr.	Brief of Washington Legal Foundation as <i>Amicus Curiae</i> in Support of Appellant

PRELIMINARY STATEMENT

This civil enforcement action by the State and City of New York centers on United Parcel Service's (UPS's) persistent, extensive, and knowing violations of two federal statutes, a New York statute, and a prior settlement with the State—all designed to combat widespread evasion of cigarette taxation. The record of the two-week trial details UPS's unlawful completion of many thousands of deliveries over a five-year period for twenty tobacco shippers located on New York State Indian reservations. UPS failed to take basic, legally required steps to confirm whether these businesses were trafficking in untaxed contraband; worse, UPS often knowingly abetted such activity, including by processing bulk deliveries for cigarette factories, or by reopening terminated cigarette accounts under different names.

On the strength of meticulous factual findings, the United States District Court for the Southern District of New York (Forrest, J.) appropriately found UPS liable for its pervasive violations and entered a combined \$247 million judgment for the State and City. That sum represents damages and penalties attributable to, among other things, unpaid taxes on the illegal sales that UPS knowingly enabled; shipments

of packages that UPS should have audited or prevented; the significant harm to public health caused by UPS's facilitation of untaxed cigarette sales; and the need to deter UPS from reverting to the combination of conscious misconduct and wholesale disregard of legal obligations that necessitated this enforcement action.

On appeal, UPS leaves unchallenged nearly all the factual findings underpinning the district court's liability determinations. UPS thus concedes that it unreasonably failed to audit twenty suspected cigarette shippers on New York Indian reservations, in breach of the AOD; that it knowingly delivered millions of cigarettes in total for seventeen of those shippers; and that it knowingly made deliveries on behalf of shippers designated by the federal government as violators of federal prohibitions on unlawful cigarette trafficking.

UPS nonetheless argues that the maximum sanction for its years of misconduct was \$20,000—not even a nuisance fee for a corporation of its size. This extraordinary position relies on a series of sweeping and meritless claims of immunity. UPS advances the startling argument, for example, that a federal exemption contingent on its compliance with state obligations applies even when it comprehensively disregards those

obligations. The company thus miscasts the overlapping federal and state protections against unlawful cigarette deliveries as mutually exclusive, when they are instead meant to be mutually reinforcing.

UPS's immunity arguments also minimize the importance and centrality of its obligations under its Assurance of Discontinuance (AOD) with the State. It dismisses as a mere "foot-fault" the repeated breach of its duty to conduct audits of reasonably likely cigarette shippers. But, as the district court recognized, UPS's inexcusable audit failures fundamentally undermined the AOD's compliance regime—by allowing the company to turn a blind eye to delivery of millions of untaxed cigarettes, and by impeding the State's and City's subsequent investigative and enforcement efforts.

UPS alternatively argues that, even if the district court's findings of liability are sound, the total damages and penalties it owes for its violations cannot exceed *one-tenth* of the value of the unpaid taxes on these transactions. To support this argument, UPS trivializes the consequences of its violations as purely economic harm, ignoring that cigarette taxation is perhaps the most effective government tool for reducing smoking—one of our society's most significant public health

threats. Those health-based harms are the principal reason that Congress and the New York State Legislature have repeatedly acted to curb the peddling of cheap, untaxed cigarettes.

UPS further complains that the district court's penalty award is disproportionate, even though the award's size is directly proportional to the vast scale of UPS's violations; falls well below the maximum amounts specifically authorized by the escalating and cumulative penalty provisions enacted by Congress and the State; and is necessary to deter UPS from resuming its partnership with cigarette traffickers. This Court should reject UPS's efforts to evade meaningful responsibility for its misconduct and reduce any sanction to an insubstantial cost of doing business.

Despite everything the district court got right, it erred by awarding the State and City damages of only half of the unpaid taxes on the illegal cigarette shipments in question, rather than the full amount of taxes due, as the relevant statutes direct. This Court should award plaintiffs their full measure of damages and otherwise affirm the judgment against UPS in full.

ISSUES PRESENTED

1. Did the district court correctly hold that UPS's wholesale AOD noncompliance forfeited entitlement to statutory exemptions from liability under the federal Prevent All Cigarette Trafficking Act and New York's Public Health Law, each of which depended on AOD compliance?
2. Did the district court correctly construe the AOD to impose stipulated penalties on UPS for each package delivered for a shipper that UPS unreasonably failed to audit?
3. Did the district court correctly hold UPS liable for violating the federal Contraband Cigarette Trafficking Act by transporting more than 10,000 cigarettes missing the required state and local tax stamps?
4. Did the district court reasonably reject UPS's request to bar all recovery on the asserted ground that plaintiffs had caused unfair surprise to UPS by not telling it how many packages it had delivered for certain accounts?
5. Was the district court entitled to make reasonable approximations of the percentage of certain shippers' packages that contained cigarettes, when UPS's audit failures hindered anyone's ability to reconstruct the packages' content with more precision?

6. Did the district court err by awarding damages of less than the full amount of unpaid taxes on the transactions in question?

7. Did the district court's penalty award comply with the law?

STATEMENT OF THE CASE

A. The Important Role of Cigarette Taxation in Addressing the Public-Health Costs of Smoking in New York

As the district court noted, the deleterious effects of cigarette smoking and the associated costs to public health are “enormous.” (S.A. 382.) Cigarette smoking is the leading cause of preventable death in the United States, killing almost half a million people annually.¹ (J.A. 1467.) Tobacco use kills almost 30,000 people per year in New York, surpassing deaths from alcohol, car accidents, firearms, and HIV/AIDS combined.² (J.A. 1468.) New Yorkers’ annual healthcare costs associated with tobacco use exceed \$10 billion, a third of which Medicaid pays.³ (J.A. 1468.)

¹ U.S. Office of Surgeon General, The Health Consequences of Smoking—50 Years of Progress (“Surgeon General Report”) 11, 678 (2014), <http://www.surgeongeneral.gov/library/reports/50-years-of-progress>.

² N.Y.S. Dep’t of Health, Bureau of Tobacco Control, Tobacco is the Leading Cause of Preventable Death, StatShot Vol. 8, No. 3 (Apr. 2015), https://www.health.ny.gov/prevention/tobacco_control/reports/statshots/volume8/n3_tobacco_leading_cause.pdf.

³ See N.Y.S. Dep’t of Health, Cigarette Smoking and Other Tobacco Use, https://www.health.ny.gov/prevention/tobacco_control (visited Feb. 2018); RTI Int’l, 2014 Independent Evaluation Report of the New York Tobacco Control Program (“RTI Report”) 25 (2014), https://www.health.ny.gov/prevention/tobacco_control/docs/2014_independent_evaluation_report.pdf.

To deter cigarette use and defray some of the healthcare costs that smoking causes, the State and City of New York—like the federal government, every other State, and the District of Columbia—impose excise taxes on cigarettes. During the period relevant to this appeal, the State’s excise tax has been \$4.35 per pack of cigarettes, *see* Tax Law § 471(1); 20 N.Y.C.R.R. § 74.1(a)(2), and the City’s excise tax an additional \$1.50 per pack, *see* N.Y.C. Admin. Code § 11-1302(e). The taxes are prepaid by state-licensed stamping agents, who buy and affix tax stamps, incorporate their value into the sale price, and pass the cost along down the chain to the consumer. *See* Tax Law § 471(2); 20 N.Y.C.R.R. §§ 74.2-74.3; N.Y.C. Admin. Code § 11-1302(g)-(h); *see also Oneida Nation of N.Y. v. Cuomo*, 645 F.3d 154, 158 (2d Cir. 2011) (discussing licensed stamping agents’ pivotal role in state taxation scheme).

New York’s cigarette taxes serve two aims. *First*, the taxes deter cigarette usage by making cigarettes more expensive and thus reducing demand.⁴ (J.A. 1469-1470.) *Second*, the taxes allow the State and City to

⁴ Surgeon General Report, *supra*, at 788; RTI Report, *supra*, at 22.

recoup some (though nowhere close to all) of the healthcare costs of cigarette use.⁵

These public policies are achieved only insofar as the taxes are actually collected and paid. But New York's cigarette taxes are subject to widespread evasion. A recent study concluded that 60% of cigarettes consumed in New York were subject to tax evasion, resulting in an estimated loss of tax revenue exceeding \$2 billion annually.⁶ As the district court found below—and as UPS does not contest on appeal—state and local excise taxes were owed but neither collected nor paid on all cigarettes transported by UPS here. (S.A. 418-419.)

B. Federal and State Restrictions on the Delivery of Cigarettes

This action arises under a state statute, a settlement agreement entered by UPS in lieu of enforcement of that state statute, and two federal statutes. Each of these sources of legal obligation restricts the

⁵ See N.Y.S. Sen. Maj., Fin. Comm., Economic & Revenue Review (FY 2016) 7-8 (Feb. 2015) (identifying roughly \$1.3 billion in annual tobacco taxes collected), https://www.nysenate.gov/sites/default/files/articles/attachments/Rev_Forecast_FY_16.pdf.

⁶ See RTI Report, *supra*, at 25.

delivery of cigarettes to consumers, through distinct but overlapping prohibitions and compliance requirements.

1. New York Public Health Law (PHL) § 1399-ll

In the years leading up to 2000, New York saw “alarming” levels of sales of untaxed cigarettes, which existing state laws did little to deter. Sponsor’s Mem., *reprinted in* Bill Jacket for ch. 262 (2000), at 5. In particular, New Yorkers (including minors) “often receive[d] cigarettes by mail-order or Internet purchases,” many times “without payment of” taxes. *Id.* at 6. New York’s Legislature enacted Public Health Law (PHL) § 1399-ll to combat the “serious threat to public health” and “to the economy of the state” posed by online and mail-order cigarette sales. Ch. 262, § 1, 2000 N.Y. Laws 2905, 2905.

PHL § 1399-ll effectively requires that all cigarette sales to New York consumers be made face-to-face. The statute makes it “unlawful” for cigarette sellers “to ship or cause to be shipped any cigarettes to any person in” New York—regardless of whether excise taxes are paid—except for certain statutorily authorized recipients (specifically, licensed resellers or government agents). PHL § 1399-ll(1). The statute also makes it “unlawful for any common or contract carrier”—such as UPS—

“to knowingly transport cigarettes to any person in this state” not “reasonably believed by such carrier” to be a statutorily authorized recipient. *Id.* § 1399-ll(2). “[I]f cigarettes are transported to a home or residence,” the law “presume[s]” the carrier’s knowledge that the delivery was unauthorized. *Id.*

As relevant here, violation of these provisions “shall” result in a civil penalty imposed on the shipper or carrier, set at the greater of \$5,000 “for each such violation” or \$100 per pack of cigarettes shipped. *Id.* § 1399-ll(5). For any one violation, “no person shall be required to pay civil penalties to both the state and a political subdivision.” *Id.* § 1399-ll(6).

2. The Assurance of Discontinuance (AOD) between UPS and New York State

After PHL § 1399-ll’s enactment, the State had reason to believe that UPS was repeatedly violating that law. The State thus began an investigation into UPS’s compliance. In October 2005, the investigation culminated in the AOD between UPS and the State. (S.A. 493-513.) As the document recites, UPS entered the AOD “in settlement of” potential PHL § 1399-ll violations, and the State did so “in lieu of commencing a civil action against UPS.” (S.A. 497.)

UPS agreed to abide by multiple “Restrictions” designed to halt entirely UPS’s shipment of cigarettes to consumers. (S.A. 498.) In particular, UPS promised to “comply with PHL § 1399-*ll*(2)” and to adhere to an internal cigarette policy “prohibiting the shipment of Cigarettes to Individual Consumers in the United States.”⁷ (S.A. 498-499.) In addition, UPS agreed to insert its cigarette policy into its delivery agreements with tobacco shippers. (S.A. 499.) And UPS assumed the independent duty to “maintain its delivery policies and procedures for Cigarettes in accordance with this [AOD].” (S.A. 499.)

UPS further agreed in the AOD to adhere to a detailed set of policies and procedures that would ensure UPS’s compliance with PHL § 1399-*ll* and the AOD’s other “Restrictions.” For example, UPS agreed to maintain a computer database of known tobacco sellers—including all existing clients that likely sold cigarettes—with their account data and updated tobacco agreements (i.e., the contractual addenda that made adherence to UPS’s nationwide cigarette policy a term of continued service).

⁷ The AOD defines “Individual Consumer” to mean individual purchasers and unlicensed resellers (*see* S.A. 494-495), the same classes of persons to whom PHL § 1399-*ll*’s delivery ban applies.

(S.A. 501; *see* J.A. 1703-1706 (sample agreement).) And UPS agreed to train its employees (including drivers, sorters, and account executives) periodically on the strict prohibition on delivery of cigarettes to consumers and “the compliance measures agreed to” in the AOD, “to help ensure that these personnel are actively looking for indications that a package contains [c]igarettes.” (S.A. 505-506.)

As particularly relevant here, a central “compliance measure” mandated by the AOD is the requirement that UPS “audit shippers where there is a reasonable basis to believe that such shippers may be tendering Cigarettes for delivery to Individual Consumers, in order to determine whether the shippers are in fact doing so.” (S.A. 501.) If UPS determined that a shipper was engaged in cigarette shipments in violation of law or UPS’s cigarette policy, the AOD required that UPS follow a tiered disciplinary process designed to halt such shipments promptly. For a shipper who “willfully or intentionally” ships cigarettes to consumers, “UPS shall immediately and permanently suspend all Delivery Services.” (S.A. 502.) For a shipper whose unlawful cigarette shipments are not “willful or intentional,” UPS must impose escalating sanctions, including suspensions of deliveries for increasing lengths of

time (ranging from ten days for a first violation to three years for a third violation), followed by audits to ensure the shipper's compliance after reinstatement. (S.A. 502-504.) Thus, the overriding purpose of the AOD's audit-and-discipline process is not merely to identify illicit cigarette shipments (headed anywhere in the nation), but to halt them expeditiously.

The AOD contains a general penalty provision that applies to any violation of the agreement's multiple compliance measures. Specifically, UPS agreed "to pay to the State of New York a stipulated penalty of \$1,000 for each and every violation of" the AOD. (S.A. 508.) There are only two narrow exceptions to this otherwise broad penalty provision: "no penalty shall be imposed" under the AOD "if the violation involves the shipment of Cigarettes" (a) to a consumer in another State; or (b) to a consumer in New York State, if UPS "establishes" that it "did not know and had no reason to know that the shipment" violated PHL § 1399-ll. (S.A. 508.)

The AOD expressly provides that the \$1,000 per-violation penalty, like all of the AOD's other "rights and remedies," is "cumulative and in addition to" others that the State "may have at law or equity, including

but not limited to” the \$5,000 per-violation penalty under PHL § 1399-*ll*. (S.A. 511.)

3. The Contraband Cigarette Trafficking Act (CCTA)

Unlawful cigarette sales have long garnered federal attention, given both “the relationship between smuggling and the rise of racketeering,” and the “large scale loss of revenue by the States” from cross-border shipments. S. Rep. 95-962, at 9 (1974). As Congress observed decades ago, the States collectively were “losing an estimated \$400 million per year in evaded cigarette taxes,” led by New York, which suffered a \$72 million tax loss from cigarette smuggling in 1975 alone. H.R. Rep. 95-1629, at 4, 6 (1978). Congress also recognized that cigarettes were being diverted “through tax-free outlets,” including “Indian reservations.” *Attorney Gen. of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 129 (2d Cir. 2001) (quoting S. Rep. 95-962, at 6).

In 1978, Congress enacted the Contraband Cigarette Trafficking Act (CCTA), which established criminal and civil penalties for trafficking in untaxed cigarettes. With exceptions not relevant here, the CCTA makes it “unlawful for any person knowingly to ship, transport, receive,

possess, sell, distribute, or purchase contraband cigarettes.” 18 U.S.C. § 2342(a). The Act defines the term “contraband cigarettes” to mean “a quantity in excess of 10,000 cigarettes, which bear no evidence of the payment of applicable State or local cigarette taxes in the State or locality where such cigarettes are found.”⁸ *Id.* § 2341(2)(b). The CCTA further requires anyone who “distributes any quantity of cigarettes in excess of 10,000 in a single transaction” to maintain accurate records of such shipments. *Id.* § 2342(b); *see id.* § 2343(a). Anyone who violates these provisions “shall be fined” or imprisoned, or both. *Id.* § 2344(a)-(b). The CCTA contains no upper limit to the authorized fine.

In 2006, Congress “enhance[d] the provisions of the CCTA to enable law enforcement to prosecute more of these schemes.” 151 Cong. Rec. H6284 (daily ed. July 21, 2005) (statement of House sponsor); *see* Pub. L. 109-177, § 121(f), 120 Stat. 192, 223 (2006). As relevant here, Congress granted States and localities authority to bring federal actions to seek “appropriate relief for violations” of the CCTA, including (but not limited

⁸ The quantity threshold for contraband cigarettes was originally 60,000, but was lowered to 10,000 in 2006. *See* Pub. L. 109-177, § 121(f), 120 Stat. 192, 223 (2006).

to) “civil penalties, money damages, and injunctive or other equitable relief.” 18 U.S.C. § 2346(2). Such remedies are available “in addition to any other remedies under Federal, State, local, or other law.” *Id.* § 2346(3).

4. The Prevent All Cigarette Trafficking (PACT) Act

Despite the penalties imposed by the CCTA (and state laws such as PHL § 1139-*ll*), illegal cigarette trafficking persisted. Evidence before Congress in 2007 revealed that “cigarette smuggling investigations ha[d] been linked to Hamas, Hezbollah, al Qaeda, and other designated foreign terrorist organizations.” S. Rep. 110-153, at 4 (2007). To support the need for action, Congress highlighted that a Hezbollah associate had pleaded guilty to federal crimes for obtaining “low-tax cigarettes from the [Seneca] Cattaraugus Indian Reservation in New York” and selling them “for a substantial profit” off-reservation. *Id.*

In 2010, Congress passed the Prevent All Cigarette Trafficking (PACT) Act to “create strong disincentives to illegal smuggling of tobacco products” and to “provide government enforcement officials with more effective enforcement tools.” Pub. L. 111-154, § 1(c)(1)-(2), 124 Stat. 1087, 1088 (2010). To achieve these ends, the PACT Act outright bans the

mailing of cigarettes through the U.S. Postal Service. 18 U.S.C. § 1716E(a)(1) (deeming cigarettes “nonmailable”). And the Act requires any cigarette seller that ships cigarettes to consumers to comply with all applicable state and local tax requirements, 15 U.S.C. § 376a(a)(3); strict registration, reporting, and recordkeeping duties, *id.* §§ 376, 376a(a)(1)-(2); and delivery restrictions such as age verification and conspicuous labeling, *id.* § 376a(b), (d).

The PACT Act also imposes restrictions on common carriers’ ability to transport cigarettes. The Act prohibits a common carrier from delivering any package that does not contain the tobacco-disclosure label required by the Act, if the carrier “knows or should know the package contains cigarettes.” *Id.* § 376a(b)(2). The PACT Act further prohibits common carriers from delivering “any package” for certain noncompliant cigarette sellers identified by the U.S. Attorney General on what is known as the “NCL” (or “Non-Compliant List”), *id.* § 376a(e)(2)(A), unless the carrier “knows” that the package “does not include cigarettes,” *id.* § 376a(e)(2)(A)(i). As the PACT Act’s Senate Sponsor expressed, the NCLs would “be distributed to legitimate businesses whose services are indispensable to illegal internet vendors—common carriers”—which

then would “take appropriate action to prevent their companies from being exploited by terrorists and other criminals.” 155 Cong. Rec. S5853 (daily ed. May 21, 2009) (statement of Senate sponsor).

When enacting the PACT Act, Congress understood that the three largest carriers—including defendant UPS—were already subject to restrictions on cigarette deliveries under settlement agreements with New York State. Relying on “testimony that these agreements were effective at stopping the illegal shipment of cigarettes [to] consumers,” Congress provided a “limited exception” from the PACT Act’s requirements, H.R. Rep. 110-836, at 24 (2008), to any common carrier that is “subject to” such an agreement—including “the [AOD] entered into by the Attorney General of New York and United Parcel Service, Inc. on or about October 21, 2005,” 15 U.S.C. § 376a(e)(3)(A)(i).⁹ But this narrow exemption is subject to a critical qualification: a carrier is excused from the PACT Act’s distinct prohibitions and requirements only if the carrier’s agreement with New York “is honored throughout the United States to

⁹ New York also entered separate AODs with DHL and Federal Express that are specifically mentioned in this exemption.

block illegal deliveries of cigarettes or smokeless tobacco to consumers.”

Id. § 376a(e)(3)(B)(ii)(I).

Congress likewise afforded carriers the same limited exemption from enforcement of state statutory bans on cigarette shipments to consumers, such as PHL § 1399-ll, by providing that such state laws are preempted as applied to carriers that qualify for PACT Act exemption. *See id.* § 376a(e)(5)(C)(ii). Specifically, the PACT Act bars a State from enforcing such a delivery ban against a common carrier “without proof that the common carrier is not exempt” from the PACT Act, *id.*, by virtue of an agreement that “is honored throughout the United States to block illegal deliveries of cigarettes or smokeless tobacco to consumers,” *id.* § 376a(e)(3)(B)(ii)(I).

Contrary to UPS’s position in this litigation, these exemptions do not establish a regime in which the AOD applies or the state and federal statutes apply, but never both. Rather, like other conditional preemption provisions, they contemplate a world in which enforcement regimes overlap, but in which specific state regulations—here, the AOD—assume preeminence insofar as they are working well to achieve the federal government’s regulatory goals. This familiar construct does not mean the

AOD is “off” when the statutes are “on,” or vice versa. Instead, as demonstrated in detail below, it means only that UPS is relieved from certain statutory penalties while the AOD is being “honored throughout the United States to block illegal deliveries of cigarettes”; if UPS is not so honoring the AOD, those statutory penalties, and the obligations from which they derive, resume force.

C. The District Court Holds UPS to Account for Its Systematic Legal Violations

In February 2015, the State and City of New York filed this civil enforcement action against UPS for violating the AOD, the PACT Act, PHL § 1399-ll, and the CCTA.¹⁰ Following a two-week bench trial, the district court found UPS liable on each of these claims. (S.A. 247-468.)

¹⁰ The State and City also asserted claims against UPS under the Racketeer Influenced and Corrupt Organizations Act, *see* 18 U.S.C. § 1961 et seq. The district court awarded summary judgment to UPS on those claims. (*See* Dkt.322.) That ruling is not challenged here.

1. The factual findings: UPS transports massive amounts of untaxed cigarettes in New York

Based on thousands of pages of trial testimony and hundreds of exhibits, the district court made more than a hundred pages of factual findings about UPS's misconduct to support the court's various liability determinations. (S.A. 258-367.) UPS does not contest virtually any of these factual findings on appeal.

The trial evidence focused on twenty shippers located across four New York State Indian reservations: the Seneca Cattaraugus and Seneca Allegany Reservations, south of Buffalo; the Tonawanda Reservation, northeast of Buffalo; and the St. Regis/Mohawk Reservation, at the Canadian border in northeastern New York. Among other findings, the district court determined that UPS knowingly transported untaxed cigarettes for seventeen of these shippers for periods falling between late 2010 and the date of this action's filing.¹¹ (S.A. 316-358.) The court also

¹¹ The "knowing" shippers were Elliott Enterprises; Elliott Express/EExpress; Bearclaw Unlimited; Seneca Ojibwas Trading Post; Shipping Services; Morningstar Crafts & Gifts; Indian Smokes; Smokes & Spirits; Seneca Cigarettes/Cigars; Hillview Cigars; Two Pine Enterprises; Arrowhawk Smoke Shop; Mohawk Spring Water; Jacobs Tobacco; Native Wholesale Supply; Seneca Promotions; and Action Race Parts.

found that UPS failed to audit those seventeen shippers and three additional ones, despite having reasonable grounds to believe that each of them was delivering cigarettes to unauthorized recipients.¹² (S.A. 315, 358-365.)

For each shipper, the court specifically fixed:

(1) the date not later than which there was a reasonable basis to believe that such shipper may have been tendering cigarettes to Individual Consumers, (2) (if applicable) the date not later than which the shipper was in fact shipping cigarettes, and (3) (if applicable) the date not later than which UPS knew that it was shipping cigarettes.

(S.A. 313.)

To support its findings, the court recited “exemplar” facts in its decision that were representative of the evidence introduced at trial. (S.A. 313.) The following summary of the proof relating to UPS’s corporate practices and knowledge highlights the scope and gravity of UPS’s legal violations.

¹² The three additional shippers were A.J.’s Cigars; Native Outlet; and RJESS.

a. UPS's wholesale failure to honor the AOD

As the district court concluded, UPS's misconduct was the product of a corporate culture "pervaded" by a "lack of commitment to true, active AOD compliance." (S.A. 265.) UPS's wholesale disregard of the AOD manifested itself in multiple ways.

First, despite the AOD's express mandate that UPS train a broad range of executives and employees, UPS delivered "little actual training" on compliance with the AOD or with other cigarette-related prohibitions. (S.A. 271-273.) For example, the officer who ostensibly bore primary responsibility for UPS's AOD and tobacco compliance—Brad Cook, UPS's Director of Dangerous Goods—received no formal compliance training at all, and deemed cigarette compliance to be the lowest of his priorities. (J.A. 617:153-54, 619:162, 620:168, 1885.) Other UPS employees received negligible training, in the form of a single, annual pre-work message on tobacco compliance that lasted only "three minutes," inclusive of a "stretching" exercise. (J.A. 640:246-248, 902:1283, 927:1383.) A UPS sales employee could not recall a specific instance of having received other tobacco training. (J.A. 763:735.)

UPS's failure to train was particularly egregious in light of its purported decision to vest cigarette enforcement duties in lower-level employees. According to compliance director Cook, UPS made it "the responsibility of our account executive[s]" to verify that shippers were "shipping what they say they are." (J.A. 660:326.) UPS senior compliance manager Derrick Niemi added that UPS left "a lot of this" to the "judgment" and "thought process" of UPS's drivers—"[t]he strength of our organization." (J.A. 685:426.) UPS's near-total failure to provide these individuals with relevant training or oversight caused this alleged decentralization policy to backfire spectacularly.

Second, despite the AOD's requirement that UPS audit shippers whenever there was "a reasonable basis to believe that such shippers may be tendering Cigarettes for delivery to Individual Consumers" (S.A. 501), UPS implemented no formal audit policies for cigarette shippers and provided no audit training to its employees (J.A. 640:246). Not surprisingly, as the district court concluded, UPS's audits of possible cigarette shippers were grossly "inadequate" to comply with the AOD. (S.A. 286.) Indeed, UPS often failed to conduct audits until it *actually discovered* impermissible cigarette shipments in fortuitous ways, such as when

cigarettes fell “out of a broken box.” (S.A. 287; *see, e.g.*, S.A. 325, 347.) One such occurrence prompted an employee to lament that UPS “really need[ed]” to “clarify what is acceptable and what is not,” or else “a whole lot more ‘stuff’ is going to hit the fan.” (J.A. 1773.)

Third, despite UPS employees’ awareness that certain shippers were engaged in cigarette deliveries, UPS failed to address the problem as required by the AOD, or otherwise to take meaningful steps to halt these unlawful shipments. For example, UPS account executive Gerard Fink was responsible for several cigarette accounts near Buffalo when the AOD was entered in October 2005. (S.A. 300-301.) The AOD required, at minimum, that UPS add these accounts to an internal database of tobacco shippers, warn them in writing of UPS’s policy barring cigarette deliveries to consumers nationwide, and make adherence to UPS’s cigarette policy an express contractual condition of continued service. (S.A. 499-501.) The AOD further required that, if cigarette deliveries persisted, UPS follow a disciplinary process to halt all deliveries from such sellers until UPS received reasonable assurance that such activities would cease. (S.A. 502-505.) Such measures would also naturally guide

future AOD-mandated audits, discipline, and training relating to the particular shippers and others.

Rather than follow the AOD's procedures and flag these accounts as cigarette sellers, Fink cancelled them and caused their deletion from UPS's systems (J.A. 674:379, 704:499-501, 1476)—only later to *reopen* several of the accounts without the evidence of their history that would have confirmed that they were engaged in cigarette shipments (*e.g.*, J.A. 706-707:510-11). Many of the reopened accounts promptly resumed cigarette deliveries through UPS before later being shut down.¹³ Despite its foreseeable (and actual) effects on cigarette enforcement, UPS compliance director Cook vouched for Fink's cancellation plan as “mak[ing] sense.” (J.A. 628:198.) These examples were part of a larger post-AOD pattern by UPS of cycling through accounts for known cigarette shippers,

¹³ For example, the account for Seneca Ojibwas Trading Post (J.A. 723:575, 1388) was renamed Shipping Services (J.A. 724:579, 1968) and promptly resumed “Daily Pickup[s]” (J.A. 1326). Years later, the account was terminated for shipping cigarettes. (J.A. 1723-1724.) As another example, UPS's account for Indian Smokes was closed in November 2005, then reopened in April 2011—as Indian Smokes. (*See* J.A. 655:304, 1291.) Years later, the account was closed “due to [a] cigarette issue.” (J.A. 1857:rw2.)

thereby enabling unlawful cigarette shipments to continue despite past violations. See also *infra* at 37-40.

Fourth, as the district court found, UPS failed on “numerous instances” to secure tobacco agreements from known tobacco sellers (S.A. 275), in violation of the AOD’s express terms (*see* S.A. 499). Such agreements memorialized the tobacco seller’s status as such, provided clear notification of the prohibition against cigarette deliveries to consumers, and laid the groundwork for discipline and possible termination of sellers that violated this prohibition. The mere entering of such an agreement could deter unlawful cigarette sales: shipper Indian Smokes markedly reduced its cigarette shipments after signing a tobacco agreement (*see* J.A. 1703-1706), out of fear that UPS was “going to open all of their packages” during AOD-mandated audits (J.A. 1278). But UPS persistently failed to enter into such agreements with known tobacco sellers. For example, while visiting one tobacco shipper (RJESS), Fink purportedly forgot the agreement in his car. (J.A. 651:288, 740:640.) For another shipper (Native Wholesale Supply), Fink saw “no need for [a] tobacco contract” (J.A. 1390), despite the fact that UPS had previously destroyed “156 cases” of “cigarettes” from that seller (J.A. 1696).

UPS's treatment of one shipper, Bearclaw Unlimited, provides an illustrative example of UPS's near-total disregard of its obligations under the AOD. In August 2011, UPS discovered that this account had shipped cigarettes to a consumer in Arizona. (J.A. 1331.) Despite thus knowing that Bearclaw had "tender[ed] Cigarettes for delivery to Individual Consumers" (S.A. 500), UPS failed to subject this shipper to prompt further audits or to any meaningful remedial action under the AOD. Instead, a UPS compliance officer, Gary DeWeerd, proposed only that Bearclaw's owner sign a typewritten note that said, in pertinent part: "I understand [UPS's] policy and will adhere to it by not shipping cigarettes to unlicensed retailers and/or consumers." (J.A. 1330.) Bearclaw readily agreed to this superficial promise, which was a far cry from the "reasonable and verifiable written action plan for compliance" that the AOD mandated. (S.A. 502-503.) UPS failed even to secure a tobacco agreement from Bearclaw, despite that Bearclaw had not signed such an agreement. (See J.A. 1963, 1991.) One year later, Bearclaw was finally audited pursuant to the AOD—and terminated upon UPS's much-belated confirmation that this shipper had engaged in persistent, unlawful cigarette deliveries. (J.A. 1707, 1912.)

b. The PACT Act: a business opportunity

As explained above, the PACT Act was intended to augment existing legal compliance measures and penalties to further deter unlawful cigarette shipments. But as the district court found, UPS considered the PACT Act to “provide[] a business opportunity” in light of its elimination of the U.S. Postal Service as a competitor for cigarette deliveries. (S.A. 294.) As a result, there was “a notable increase” in UPS’s “business and customer acquisitions following the effective date of the PACT Act” in mid-2010, with a profusion of UPS tobacco accounts opening or gaining traction then.¹⁴ (S.A. 267.)

UPS was fully aware of the existence of, and reason for, the increase. In a September 2010 email, a Senior Account Manager observed that UPS already had “gained a lot of tobacco business from the USPS this year due to the PACT Act taking effect at the end of June.” (J.A.

¹⁴ These accounts include Jacobs Tobacco (increase in July 2010, J.A. 1325); Smokes & Spirits (opened August 2010, J.A. 1206); Bearclaw Unlimited (opened September 2010, *e.g.*, J.A. 1448); A.J.’s Cigars (opened September 2010, J.A. 1979); Elliott Enterprises (opened October 2010, J.A. 1972); Mohawk Spring Water (opened November 2010, J.A. 1329); Action Race Parts (increase in February 2011, J.A. 1211); and Indian Smokes (reopened April 2011, J.A. 1291).

1286.) In January 2011, account executive Fink wrote of account Shipping Services: “Rock-N-Roll . . . Still retaining same customer base, and not even allowing new people to place orders. Locked-in majority to keep the reshops rolling.” (J.A. 1880:rw2.) In March 2011, Fink noted that this account was “Still rockin’,” and in May 2011 was “Still shipping like crazy.” (J.A. 1880:rw9.) In October 2012, Fink boasted that account EExpress—opened in the PACT Act’s aftermath—was “shipping great guns.” (J.A. 1861:rw44.) The same month, UPS opened a pair of accounts based in a cigarette store on the Tonawanda Reservation; as UPS sales employee Ryan Keith remarked, the accounts’ shipments began “blowing the doors off.” (J.A. 1262.)

As the district court found, the overwhelming evidence indicates that UPS knew that this new post-PACT-Act business involved the delivery of cigarettes to individual consumers. Two of the shippers whose accounts opened or increased volume after the PACT Act—Mohawk Spring Water and Jacobs Tobacco—were cigarette *factories* engaging in large-scale trafficking from the St. Regis/Mohawk Reservation. (S.A. 348-354.) When opening the Mohawk Spring Water account, the shipper’s co-principal, Robert Oliver, told UPS employee Carmine Della Serra that

“some of these boxes will contain cigarettes”—to which Della Serra responded, “I don’t want to hear that,” and opened the account. (J.A. 864:1131, 1136.) Jacobs Tobacco’s owner, Rosalie Jacobs, testified that her company’s business consisted entirely of the manufacture and sale of untaxed cigarettes (J.A. 995-996:1658-61); the packages’ exterior prominently displayed language such as “PREMIUM CLASS A CIGARETTES” and “50 CRTN 20’s” (J.A. 1201). UPS handled shipments for these clients for about a year, terminating them in June 2011, only after federal agents seized packages containing cigarettes from each at UPS’s Potsdam facility. (J.A. 1781-1784, 1910, 2009.)

Indeed, after the enactment of the PACT Act in 2010, UPS continued handling shipments even for shippers appearing on the federal NCLs created pursuant to that law—i.e., shippers who were not in compliance with the PACT Act’s various registration, tax-payment, or recordkeeping requirements. See *supra* at 18-19. UPS periodically received the NCLs from the federal government starting in November 2010. (J.A. 1394-1419, 1714-1719.) At trial, Cook called these lists “important.” (J.A. 635:226.) But as the district court found, until late 2013, UPS “inexplicably” ignored the NCLs. (S.A. 267; see J.A. 1924, 1928.)

**c. The district court's refusal to credit UPS's
professed ignorance of package contents**

At trial, UPS persistently professed ignorance of cigarette shippers' business and their packages' content. In particular, UPS sought cover in the possibility that tobacco shippers were exclusively shipping "little cigars," rather than unstamped cigarettes. Little cigars are made of reconstituted "floor sweepings" (J.A. 973:1570); their quality and market demand are "much less" than those of cigarettes (J.A. 974:1573; *see* J.A. 1113-1134 (published consumption statistics)); and unlike cigarettes, cigars may be mailed, *see* 18 U.S.C. § 1716E(b)(1).

The district court explicitly found these denials of relevant knowledge not credible. (*See* S.A. 302.) In one instance, UPS had received a letter from an advocacy organization known as the Tobacco Watchdog Group, identifying several businesses in Salamanca, New York, for which UPS was "handling illegal contraband cigarette shipments." (J.A. 1702.) The letter advised UPS that these shippers were falsely listing cigarettes "as little cigars per the direction of UPS employees." (J.A. 1702.) Account executive Gerard Fink simply rejected this accusation, responding to others at UPS that his "only" account on the list, Smokes & Spirits, was "ONLY SHIPPING CIGARS" (J.A. 1700)—even though the shipper

would soon also turn up on the federal NCLs for violating the PACT Act. At the time, nobody at UPS appears to have probed Fink's assertion or otherwise inquired about this shipper's products. Two years later, Smokes & Spirits' involvement in cigarette deliveries was confirmed when an audit of the shipper revealed that nine of fifteen packages contained cigarettes. (J.A. 1725, 1921.) A second Fink account in the Tobacco Watchdog letter, Elliott Enterprises (also an NCL shipper), was later terminated for cigarette shipping as well. (J.A. 1908.)

The district court declined to credit similar denials by other UPS employees. For example, a UPS employee's assertion that he had "no inkling" that Seneca Cigars was "shipping anything other than cigars" (J.A. 774:779) was belied by a plethora of opposing evidence. The assigned UPS account manager knew that the proprietor of Seneca Cigars did "a lot" of cigarette business. (J.A. 805:901.) The account's location featured "significant cigarette" advertisements. (S.A. 342; *see* J.A. 1790 (photo of store exterior).) Its web address was <www.senecacigarettes.com> (J.A. 1259), and its email address was <senecacigarette@gmail.com> (J.A. 769:757). The business emailed offers for untaxed cigarettes "shipped UPS to your door!" (J.A. 1445.) And in May and June 2012, the

City Sheriff's Office made controlled buys from this business of several cartons of unstamped cigarettes, which UPS delivered. (J.A. 907:1303, 1139-1177, 1473-1475.)

UPS's reliance on the "little cigars" excuse was further undermined by its using that story even when a business purportedly would not say *what* it shipped. For example, at trial, Fink testified that the owners of EExpress had altogether refused to disclose their inventory. (J.A. 739:636, 1974.) Nonetheless, in a 2013 email to Senior Sales Manager Mike Zelasko, Fink referred to EExpress as a "cigar shop." (J.A. 1708.) After a May 2014 audit of EExpress revealed only coffee, Fink wrote to Zelasko: "☺"; and Zelasko responded that UPS had "Dodged a bullet." (J.A. 1442.) These reactions would make no sense if Fink and Zelasko had truly believed that EExpress was exclusively shipping legal products. Only after an EExpress package later broke open revealing cigarettes (J.A. 1779) did UPS again audit this shipper, finding cigarettes in each of ninety-nine parcels (J.A. 1337, 2015-2016).

d. Customers ask UPS: where are my cigarettes?

Further demonstrating UPS's knowledge of its shippers' unlawful activities were frequent inquiries from purchasers regarding lost or damaged packages "of cigarettes shipped by the very shippers at issue." (S.A. 265.) Such customer inquiries (called "tracers") were submitted online or via UPS's toll-free customer service number. (See J.A. 1942-1943.) At times, shippers also filed claims with UPS for lost or damaged goods. (See J.A. 1942.) UPS recorded these inquiries in a searchable database, which UPS's compliance team could access. (J.A. 637:234-35 (tracers), 652-653:294-95 (claims).)

Much of this information was not subtle. In 2012, for example, a consumer reported not having received two cartons of "Menthol Box 100s" from Smokes & Spirits. (J.A. 1283:rw293-95.) In its internal database, UPS noted, "PROHIBITED ITEM SENT TO CONSUMER." (J.A. 1208:rw4.) In 2011, UPS noted in its database that "Marlboro Cigarette Cartons" ordered from Bearclaw Unlimited had gone missing (J.A. 1284:rw204), as had "cartons" upon "cartons" of "cigarettes" ordered that year from Elliott Enterprises (J.A. 1290:rw268-70), and many "boxes" and "cartons" of "cigarettes" shipped to various consumers over the next two years by

EExpress (J.A. 1289:rw588-90, 1356:rw61-66). In none of these cases did UPS pursue any audit, discipline, or other form of follow-up with the shipper.

The district court held that proof of tracers and claims for cigarettes—which the court’s liability opinion canvasses in greater depth—“put UPS on notice that some shippers were likely tendering cigarettes.” (S.A. 307-310.) UPS compliance director Cook agreed that reviewing such information is “useful” for “detecting the shipment of prohibited goods,” but asserted that the idea had not occurred to him before this lawsuit. (J.A. 1942.)

e. The “cat-and-mouse game” of alter-ego accounts

Even when UPS terminated a cigarette shipper’s account for delivering cigarettes to unauthorized recipients, that sanction was often only a temporary inconvenience because UPS would set up a “replacement account” for the customer under a different name. (S.A. 280.) As the court below concluded, UPS was no blameless bystander: rather, the overlap between the terminated entity and the new one often was “so obvious” that any reasonable observer would have known the identity and business of the ostensibly new shipper. (S.A. 315.)

A stark example of this practice involved various cigarette businesses run by Aaron Elliott. After the AOD's entry in 2005, UPS cancelled cigarette account Rock Bottom Tobacco, operated by Elliott. (J.A. 1780:rw472.) And in September 2012, UPS terminated accounts Elliott Enterprises and Bearclaw Unlimited, also operated by Elliott, for shipping cigarettes. (J.A. 1280, 1420, 1973.) Nonetheless, in the *same month* that Elliott Enterprises and Bearclaw were closed, UPS allowed Aaron Elliott to open account EExpress—i.e., Elliott Express—with Aaron Elliott even signing the UPS carrier agreement for the new account. (*E.g.*, J.A. 1270-1276, 1973.) Fink inexplicably did not request a tobacco agreement for EExpress. (J.A. 1974.) The account did substantial business through UPS for almost two years, until an audit uncovered cigarettes in each of ninety-nine audited packages. See *supra* at 35.

As another example, the account for cigarette seller Seneca Ojibwas Trading Post was converted into Shipping Services after UPS entered the AOD. (J.A. 724:579.) When Shipping Services was terminated for shipping cigarettes (J.A. 1723-1724), UPS opened the Morningstar Crafts & Gifts account at the same address (*compare* J.A. 1968, *with* J.A. 1990). And UPS required no tobacco agreement from Morningstar even though the

pickup spot advertised “Discount Cigarettes.” (J.A. 1443.) Morningstar was suspended after nine months for unspecified reasons. (J.A. 1309:rw50.)

During trial, Phil Christ—who was convicted for his role in effecting unlawful cigarette shipments from New York Indian reservations—testified to the “cat-and-mouse” game required to continue delivering cigarettes through UPS. (J.A. 859:1111.) Christ was the contact person for several alter-ego UPS accounts (collectively referred to as the “Arrowhawk” shipper group) on the Tonawanda Reservation. (*See, e.g.*, S.A. 341.) The accounts were based in a convenience store displaying “a multitude of cigarette advertisements.” (J.A. 808:911; *see* J.A. 1790.) Behind the store was a cigarette warehouse. (J.A. 807:909.) Christ told UPS account executive Richard DelBello of a desire to ship cigarettes; after consultation with Fink, DelBello determined to list the accounts as “shipping cigars instead.” (J.A. 801-802:884-86.) When these accounts (Seneca Cigars and Hillview Cigars) belatedly signed tobacco agreements in June 2013 (J.A. 1318, 1710-1712), UPS promptly opened another account for Christ—Two Pine Enterprises—at the same address (J.A. 768:753, 790-791:839-42). UPS did not procure a tobacco agreement from Two Pine until October 2013. (J.A. 1720-1722.) In the interim, UPS

opened a *fourth* account for Christ—Native Gifts—this time at a different address, supposedly due to a “fire” at the primary location. (J.A. 2004.) The UPS sales team called the situation “odd” (J.A. 1334), but did “nothing” about it (J.A. 794:855). UPS terminated the Two Pine account in April 2014, after a Two Pine package broke apart to reveal cigarettes (J.A. 2002), and a subsequent audit revealed cigarettes in each of the forty-two packages that UPS opened (J.A. 1319, 1776).

f. The scope of cigarette shipments under UPS’s watch

The misconduct outlined in the preceding sections, documented in the district court’s factual findings and exposed in the trial evidence, resulted in UPS’s provision of delivery services over a five-year period to twenty business that were either known or reasonably likely shippers of unstamped cigarettes. See *supra* at 22-23. As the district court found, UPS transported more than 80,000 packages within the State for the shippers at issue during this period. (See S.A. 481.) As the court further concluded, about half of those packages contained unstamped cigarettes (*see* S.A. 485), with a taxable value approaching \$20 million (*see* S.A. 489).

Among the most troublesome deliveries occurred for shippers on the St. Regis/Mohawk Reservation. There, cigarette factory Mohawk Spring Water shipped more than 2,000 cases of unstamped cigarettes via UPS between November 2010 and April 2011, with scores of shipments each exceeding 10,000 cigarettes. (J.A. 864:1132, 869-870:1153-55, 1184.) For nearby cigarette factory Jacobs Tobacco, UPS executed more than 3,000 deliveries between mid-2010 and mid-2011, mostly comprising cases of 10,000 unstamped cigarettes each. (J.A. 1101:1680, 1325.)

Aside from the factories, resellers also made significant numbers of deliveries, harming public health and finances. For example, invoices show that from 2011 to 2013, Smokes & Spirits shipped more than 100,000 cartons of cigarettes through UPS to points within New York. (See Dkt.491¶914.) Packing slips reveal that the Arrowhawk group shipped almost 15,000 cartons of cigarettes via UPS to New Yorkers in 2012 alone. (See Dkt.491¶918.) Cigarette seller Elliott Enterprises shipped roughly 100 to 150 packages daily via UPS before that account's termination in September 2012. (See Dkt.491¶324.) And in UPS's words, EExpress "picked up" right where its predecessor Elliott Enterprises had

left off (J.A. 1708), shipping via UPS in roughly the same volume (*see* Dkt.491¶376).

These facts and others amply supported the district court's conclusion that "numerous UPS employees [had] allowed vast quantities of unstamped cigarette shipments to be delivered to unauthorized recipients in New York." (S.A. 445-446.)

2. The legal rulings: UPS violated three statutes and the AOD

The district court's liability rulings rested on various legal conclusions rendered before and after trial. Those relevant to this appeal are discussed below.

AOD. As the court below found, the evidence "establish[es] a number of separate violations by UPS of its obligations under the AOD." (S.A. 381.) Specifically, UPS violated the AOD's mandates regarding: (1) compliance with PHL § 1399-ll; (2) shipper audits; (3) upkeep of UPS's tobacco database; (4) shipper discipline; (5) employee training; and (6) shipment of cigarettes to individual consumers. (S.A. 381-382.) To avoid duplicative recovery, the State sought penalties for "only one type of [AOD] violation: the audit requirement set forth in ¶ 24." (S.A. 369.)

The district court construed the AOD to require payment of a stipulated penalty for each package delivered by any of the twenty shippers that UPS had unreasonably failed to audit.¹⁵ (S.A. 378-385.) The court rejected UPS's argument that AOD penalties apply only to the knowing shipment of cigarettes, reasoning that the AOD imposed a penalty "for each and every violation" thereof, not restricted "to any one type of obligation." (S.A. 380.) The court also rejected UPS's argument that its audit failures, at most, resulted "in a single violation" per shipper. (S.A. 384-385.)

PACT Act. The district court held UPS liable under the PACT Act for executing deliveries for five shippers that appeared on the federal NCLs (S.A. 408-412), which UPS had received from the federal government starting in November 2010 (S.A. 304).¹⁶

¹⁵ Liability accrued during the period of time between (i) when UPS had a reasonable basis to believe that the shipper was tendering cigarettes for delivery, and (ii) the earlier of when the shipper was terminated or this enforcement action was filed.

¹⁶ The NCL shippers were Indian Smokes, Smokes & Spirits, Elliott Enterprises, EExpress, and Bearclaw. Although the last two accounts were not separately identified on the NCLs, the court held those accounts to be alter egos of Elliott Enterprises. *See* 15 U.S.C. § 376a(e)(9)(B)(ii) (barring delivery of packages for shipper known to be "using a different name or address to evade" NCL's consequences).

The district court also held that UPS had forfeited its statutory exemption from PACT Act liability, which exists only if the AOD “is honored throughout the United States to block illegal deliveries of cigarettes.” 15 U.S.C. § 376a(e)(3)(B)(ii)(I). The court concluded that “UPS retains its exempt status” under the PACT Act for “only so long as [UPS] continues to give nationwide effect” to the AOD. (S.A. 121.) As the court explained, this standard requires UPS to make “bona fide” efforts “to maintain the nationwide policies agreed to in the AOD” (S.A. 136), even if those efforts are not “100% effective at preventing the shipment of cigarettes” (S.A. 144). The court held that the exemption thus dissolves if UPS honors the AOD “in name only,” a standard met through “evidence creating an inference that the effectiveness of UPS’s policies is so compromised that these policies are not in fact in place.” (S.A. 144-145.) The court elaborated that proof of “a sufficiently large number of instances of shipments of contraband cigarettes” could make such a showing, as would proof that “UPS policymakers have in fact turned a blind eye” to such shipments. (S.A. 145.)

After trial, the court “easily” found that “UPS was not honoring the AOD” for a substantial period. (S.A. 392.) This finding was rooted in

UPS's "widespread and persistent" AOD violations over many years as to many shippers serviced by many different UPS employees. (S.A. 392.) The court held these AOD failures to span December 1, 2010, when the PACT Act exemption was lost, to February 18, 2015, when strengthened compliance efforts showed that UPS again was honoring the AOD. (S.A. 393.)

PHL § 1399-ll. The district court held UPS liable for violating PHL § 1399-ll by knowingly delivering cigarettes to statutorily unauthorized recipients—i.e., anyone other than government agents or licensed resellers. (S.A. 412-415.) As the court noted, UPS had failed to rebut § 1399-ll(1)'s presumption that any cigarette shipments to residences were unauthorized; and UPS could not have believed that business-to-business shipments were lawful when it took no steps to ascertain whether the recipients "were appropriately licensed." (S.A. 414-415.)

The district court also concluded that UPS had forfeited the PACT Act's qualified preemption of state delivery bans (such as PHL § 1399-ll) for the same reason that it forfeited its AOD-based exemption from PACT Act liability, i.e., because UPS had not in fact honored the AOD nationwide, *see* 15 U.S.C. § 376a(e)(3)(B)(ii)(I) & (e)(5)(C)(ii). (S.A. 413.)

CCTA. The district court held that UPS violated the CCTA by knowingly transporting more than 10,000 cigarettes lacking evidence of payment of the required taxes. (S.A. 415-421.)

In a pretrial ruling, the court held that the “plain language of the CCTA, which imposes no single transaction requirement,” permits aggregating separate shipments to meet the statute’s 10,000-cigarette threshold for liability. (S.A. 16-17.)

After trial, the court found that all cigarettes transported for the shippers at issue in fact lacked tax stamps. (S.A. 419.) The court further held that all such transactions were taxable under New York law. (S.A. 416.) And the court found the CCTA’s quantity threshold met because “the total volume of cigarettes underlying plaintiffs’ claims far exceeds 10,000,” a level cleared “alone” by repeated shipments of 10,000 cigarettes (or more) for Jacobs Tobacco and Mohawk Spring Water. (S.A. 419-420.)

3. Damages and penalties

On account of UPS’s violations, the district court entered a combined judgment for the State and City of \$246,975,614. (S.A. 492.) The award was predicated on a tabulation of the packages that UPS delivered for each of the relevant shippers and, where relevant, the estimated

percentage of those packages that contained cigarettes. For package counts, the court relied on the records of third-party shippers and on UPS's own shipping and billing spreadsheets. (S.A. 436-438.) And the court arrived at a "reasonable approximation" of the percentage of packages with cigarettes from each shipper, while noting that UPS's own audit failures had "contributed substantially to any uncertainty." (S.A. 460.)

Damages. Before trial, the district court denied UPS's motion to preclude all damages evidence based on plaintiffs' alleged noncompliance with the initial disclosure provisions of Federal Rule of Civil Procedure 26. (J.A. 443.) A renewed request by UPS was denied after trial. (S.A. 433-439.)

The court ultimately awarded compensatory damages under the CCTA of \$8,679,729 to the State and \$720,885 to the City. (S.A. 489.) These amounts equaled half of the unpaid state and local taxes on the cigarettes that UPS was found to have transported. (S.A. 439-442.)

Penalties. The district court also found "significant penalties" to be appropriate, given UPS's "blatantly culpable conduct" and "the public harm" resulting therefrom. (S.A. 445-446.) The court awarded (1) stipulated penalties under the AOD of \$1,000 for each package delivered for a shipper during the period when UPS failed to comply with its audit

obligations for that shipper (\$80,468,000 to the State); (2) half of the maximum penalty under the PACT Act—i.e., \$2,500—for each package delivered for an NCL shipper (\$35,258,750 to the State and \$43,091,250 to the City); (3) half of the maximum penalty under PHL § 1399-*ll*—i.e., \$2,500—for each package with cigarettes that UPS knowingly delivered to an unauthorized recipient (\$41,410,000 to the State and \$37,345,000 to the City); and (4) nominal penalties under the CCTA (\$1,000 to each of the State and City).¹⁷ (S.A. 479-490.)

The district court declined to enter injunctive relief, reasoning that the action’s “reputational and financial costs” should provide “standalone economic motivation” to UPS to maintain its post-lawsuit efforts at legal compliance. (S.A. 467.)

¹⁷ To avoid duplication, the State sought no PACT Act or PHL penalties for deliveries to recipients in New York City.

STANDARD OF REVIEW AND SUMMARY OF ARGUMENT

On appeal from a judgment following a bench trial, this Court reviews the district court's legal conclusions de novo and its factual findings for clear error. *See Zalaski v. City of Hartford*, 723 F.3d 382, 388 (2d Cir. 2013). For the reasons that follow, the Court should affirm the liability findings and monetary award entered after trial below, except that, on plaintiffs' cross-appeal, it should increase the amount of damages to reflect the full amount of unpaid taxes to the State and City on the transactions in question.

Rulings on liability. The district court correctly construed two federal statutes (the PACT Act and CCTA), a state statute (PHL § 1399-*ll*), and a voluntary settlement agreement (the AOD) as imposing liability on UPS for its delivery of tens of thousands of packages from actual or likely cigarette shippers to consumers across New York State. The court's legal conclusions are reviewed de novo. *See United States v. Epskamp*, 832 F.3d 154, 160 (2d Cir. 2016) (statutory interpretation); *Omega Eng'g, Inc. v. Omega, S.A.*, 432 F.3d 437, 443 (2d Cir. 2005) (interpretation of settlement agreement).

First, the district court correctly rejected UPS's argument that the PACT Act exempts UPS from liability for its otherwise undisputed violations of that law and of PHL § 1399-*ll*. The statutory exemptions that UPS invokes apply only if the New York AOD "is honored throughout the United States to block illegal deliveries of cigarettes." 15 U.S.C. § 376a(e)(3)(B)(ii)(I). As the district court found below, UPS's wholesale disregard of its AOD responsibilities over many years essentially nullified that agreement and directly led to substantial numbers of unlawful cigarette deliveries. Under any understanding of the word, UPS did not "honor[]" the AOD by flagrantly disregarding it.

Second, the district court correctly construed the AOD to demand a stipulated penalty for each unaudited package that UPS delivered for a reasonably likely cigarette shipper. UPS agreed to a stipulated penalty for "each and every violation of" the AOD (S.A. 508), language that plainly covers "each and every" delivery of a package for a shipper while UPS was in breach of the audit duty for that shipper.

Third, UPS violated the CCTA by knowingly transporting more than 10,000 "contraband cigarettes," i.e., those lacking the required state and local tax stamps. Because the CCTA contains no "single act"

requirement, the district court permissibly aggregated separate shipments to reach the statute's 10,000-cigarette threshold. For that same reason, the court need not have found that UPS knowingly transported more than 10,000 cigarettes all at once for the CCTA to apply.

Rulings on damages and penalties. Not only do UPS's arguments for reducing the resulting monetary award lack merit, but the damages award should be increased.

First, the district court reasonably denied UPS's extraordinary request to strike plaintiffs' entire damages and penalties case for purported Rule 26 violations, where any disclosure deficiencies were substantially justified and harmless, and all of the key facts related to UPS's own shipping activities. The Court reviews a ruling on discovery sanctions "only for abuse of discretion." *Funk v. Belneftekhim*, 861 F.3d 354, 365 (2d Cir. 2017).

Second, the district court's factual findings on damages and penalties are sound and adequately supported. The court used UPS's own records to determine the number and weight of delivered packages; and the court properly relied on direct and circumstantial evidence to estimate

the percentage of those packages containing cigarettes, a task made more difficult by UPS's auditing failures.

Third, the district court should have awarded damages in the full amount of unpaid state and local excise taxes on the contraband cigarettes that UPS delivered. The court legally erred in awarding only half that amount. This question is reviewed de novo. *See Bessemer Tr. Co. v. Branin*, 618 F.3d 76, 85 (2d Cir. 2010).

Fourth, the district court acted within its discretion and constitutional boundaries by awarding per-violation penalties within the authorized ranges—and many below the statutory maximum—for each of UPS's thousands of legal violations over a five-year period. Whether a penalty award complies with the Constitution is reviewed de novo. *See United States v. Bajakajian*, 524 U.S. 321, 336 (1998).

POINT I

THE DISTRICT COURT PROPERLY HELD UPS LIABLE FOR VIOLATING THE AOD AND THREE STATUTES

On appeal, UPS does not contest any of the district court's extensive factual findings, whether concerning UPS's knowing transportation of unstamped cigarettes for numerous on-reservation shippers, or UPS's wholesale breach of the AOD's requirements. Instead, UPS disputes only whether these undisputed findings support the district court's liability holdings. App.Br.27. Specifically, UPS claims (a) that it is statutorily exempt from liability under the PHL and the PACT Act because of the mere existence of the AOD, despite UPS's failure to comply with that agreement; (b) that it cannot be held liable under the AOD for failure to comply with its obligations to audit shippers; and (c) that it cannot be held liable under the CCTA because it was not shown to have knowingly transported more than 10,000 cigarettes in a single shipment. Each of these claims rests on a misreading of the relevant provisions, and should be rejected. For the reasons that follow, this Court should affirm the district court's liability determinations.

A. UPS's Undisputed, Wholesale Noncompliance with the AOD Rendered UPS Ineligible to Invoke the Limited Statutory Exemption from the PACT Act and PHL § 1399-ll.

The district court concluded that UPS violated both the PACT Act and PHL § 1139-ll(2) by knowingly transporting packages for various on-reservation shippers. (S.A. 408-415.) UPS does not contest that its conduct would violate these statutes if they applied here—specifically, because UPS knowingly made deliveries for NCL shippers, in violation of the PACT Act; and because UPS knowingly shipped cigarettes to recipients not authorized under PHL § 1139-ll(2). But UPS asserts that neither statute applied to its misconduct because of an exemption from both statutes contained in the PACT Act. *See* App.Br.27-41. The district court correctly rejected this sweeping assertion of immunity.

The PACT Act provides that the Act's compliance obligations, as well as state delivery bans such as PHL § 1399-ll(2), “shall not apply to a common carrier that is subject to” one of various agreements, including UPS's AOD with New York State. 15 U.S.C. § 376a(e)(3)(A)(i); *see id.* § 376a(e)(5)(C)(ii). But this exemption applies only “if” that agreement “is honored throughout the United States to block illegal deliveries of cigarettes.” *Id.* § 376a(e)(3)(B)(ii)(I) (PACT Act); *accord id.* § 376a(e)(5)(C)(ii)

(PHL). The district court correctly held this exemption inapplicable here, when UPS disregarded rather than “honored” its compliance obligations under the AOD.

1. The AOD was not “honored . . . to block illegal deliveries of cigarettes” when UPS’s wholesale noncompliance allowed tens of thousands of illegal deliveries to take place.

The district court found—and UPS does not dispute—that UPS persistently and pervasively disregarded its compliance obligations under the AOD. The court correctly concluded that UPS’s wholesale noncompliance meant that it did not “honor[]” the AOD, and thus did not qualify for the PACT Act’s exemption.

That conclusion follows from the plain language of the exemption provision. *See Nwozuzu v. Holder*, 726 F.3d 323, 327 (2d Cir. 2013) (analysis must “begin with the language of the statute”). To honor an agreement is to abide by it: to “honor” commonly means “to live up to or fulfill the terms of,” *Merriam Webster’s Collegiate Dictionary* 597 (10th ed. 1994); or to “fulfill (an obligation) or keep (an agreement),” *New Oxford American Dictionary* 835 (3d ed. 2010). These definitions support a conclusion that UPS has “honored” the AOD under § 376a(e)(3)(B)(ii)(I)

only insofar as UPS “live[s] up to,” “fulfill[s],” or “keep[s]” its agreement with the State—which UPS failed to do.

This interpretation is confirmed by the exemption’s further specification of what Congress intended to be the effect of “honor[ing]” the AOD: namely, “to block illegal deliveries of cigarettes.” 15 U.S.C. § 376a(e)(3)(B)(ii)(I). As the district court observed, this additional language is a “conditional clause” that must be satisfied to trigger the PACT Act’s exemption. (S.A. 119.) *See Williams v. Taylor*, 529 U.S. 420, 437 (2000) (interpreting conditional clause in federal habeas statute); *BlackLight Power, Inc. v. Rogan*, 295 F.3d 1269, 1272-73 (Fed. Cir. 2002) (interpreting conditional clause in federal patent statute). The exemption thus applies only if the statutory condition is satisfied—i.e., if the AOD is honored to achieve the intended goal of blocking illegal cigarette deliveries. It makes no sense to say that UPS has “honored” an agreement “to block illegal deliveries of cigarettes” when, instead, UPS *disregarded* the agreement and therefore *did not block* tens of thousands of such deliveries, containing hundreds of thousands of cartons of unstamped cigarettes.

The PACT Act’s “structure, historical context, and purpose” further reinforce this conclusion. *See Exxon Mobil Corp. v. Comm’r*, 689 F.3d 191, 199 (2d Cir. 2012). Congress enacted the exemption at issue here based in part on “testimony that [existing AODs] were *effective* at stopping the illegal shipment of cigarettes [to] consumers.” H.R. Rep. 110-836, at 24 (emphasis added). As a committee report states, the PACT Act thus “provides a *limited exception* from [its] requirements for a common carrier with an active settlement agreement with a State, honored nationwide, to block deliveries of cigarettes.” *Id.* (emphasis added). Committee reports are among the “most authoritative and reliable materials of legislative history.” *Disabled in Action of Metro. N.Y. v. Hammons*, 202 F.3d 110, 124 (2d Cir. 2000). Here, the report confirms that Congress intended the PACT Act’s exemption to be triggered only by agreements that were not just “active,” but also “effective” at accomplishing the objective of halting cigarette trafficking. H.R. Rep. 110-836, at 24. And that result makes sense: Congress reasonably decided to excuse common carriers from the PACT Act’s distinct compliance mechanisms—including the outright prohibition on any deliveries for NCL shippers—only if those

mechanisms were unnecessary because a carrier was already complying with preexisting requirements that achieved the same ends.

An analogous PACT Act exemption confirms that Congress intended to excuse a common carrier from the Act's restrictions only if the carrier was otherwise preventing unlawful cigarette deliveries from taking place. In addition to the provision at issue here, the PACT Act exempts a common carrier subject to "any other active agreement"—besides the specified New York State AODs—"that operates throughout the United States to ensure that no deliveries of cigarettes or smokeless tobacco shall be made to consumers." 15 U.S.C. § 376a(e)(3)(B)(ii)(II). UPS asserts that this exemption's use of the word "operates" shows that the exemption is triggered by the mere existence of the "other" agreement and not by a carrier's actual compliance with it; and UPS argues that the exemption arising from the New York AOD must likewise be construed to be triggered by the AOD's existence and not by compliance with it. App.Br.32. But this argument conveniently ignores the rest of each provision. An "other" agreement triggers the exemption only if the agreement "operates throughout the United States *to ensure that no deliveries of cigarettes or smokeless tobacco shall be made to consumers*," 15 U.S.C. § 376a(e)(3)(B)(ii)(II)

(emphasis added); and the AOD triggers the exemption only if it “is honored throughout the United States *to block illegal deliveries of cigarettes*,” *id.* § 376a(e)(3)(B)(ii)(I) (emphasis added). In each case, the agreement triggers an exemption from the PACT Act and state laws (like the PHL) only if the agreement is effective at achieving the objectives of the PACT Act. An agreement that is not so honored, or does not so operate, does not create any such exemption.

2. Accepting the validity of the AOD while disregarding it is not “honoring” it within the meaning of the PACT Act’s exemption provision.

The district court correctly rejected UPS’s contrary interpretation of the “honored” clause in the PACT Act’s exemption provision. According to UPS, the AOD exemption is an “on/off switch” (App.Br.28) that excuses UPS from complying with the PACT Act so long as the AOD simply exists—even if UPS makes no effort whatsoever to adhere to it. That interpretation comports with no legal or commonsense understanding of the word “honored.” UPS asserts that an agreement is “honored” if it is “accepted as valid,” analogizing to the meaning of “honoring a check.” App.Br.31. But UPS’s own example disproves its argument: to “honor” a

check is not simply to acknowledge its mere existence, but rather to *give it effect*. See *Black's Law Dictionary* 853 (10th ed. 2014) (alternative definition of “honor” is “[t]o accept or pay (a negotiable instrument) when presented”). A check is not “honored” when a bank refuses to pay it, any more than the AOD was “honored” when UPS failed to comply with it.

UPS's interpretation would render much of the language in the exemption superfluous. The exemption in question applies if (1) a common carrier is “subject to” an AOD with New York, 15 U.S.C. § 376a(e)(3)(A)(i); *and* (2) the AOD “is honored throughout the United States to block illegal deliveries of cigarettes or smokeless tobacco to consumers,” *id.* § 376a(e)(3)(B)(ii)(I). If Congress had intended this exemption to turn solely on the AOD's mere existence, then it would have included just the first requirement, and exempted UPS from the PACT Act if merely “subject to” the AOD. But Congress went further and added the second qualification as well. Likewise, if Congress were indifferent as to whether the AOD achieved its intended ends, there would have been no reason to specify that the PACT Act's exemption applies only if the AOD were “honored . . . to block illegal deliveries of cigarettes” to consumers. Yet Congress chose to include that additional language about

effective compliance. UPS's interpretation thus wrongly treats the "honored" requirement itself, as well as its specific language, as mere "surplusage," *Dunn v. CFTC*, 519 U.S. 465, 472 (1997), violating the basic requirement that statutory interpretation cannot render Congress's words "superfluous, void or insignificant," *In re Barnet*, 737 F.3d 238, 247 (2d Cir. 2013) (quotation marks omitted).

UPS's reading also would lead to an incongruous interpretation of a separate provision of the PACT Act that actually does turn on the AOD's mere existence. The Act provides that if the AOD "is terminated or otherwise becomes inactive," its exemption no longer applies—unless the carrier "is administering and enforcing policies and practices throughout the United States that are at least as stringent as the agreement." 15 U.S.C. § 376a(e)(3)(A)(ii). UPS's position here, if accepted, would lead to the bizarre result that (1) if the AOD does *not* exist, UPS is excused from the PACT Act only if it *actually complies* with policies and practices "at least as stringent" as those in the (nonexistent) AOD; but (2) while the AOD *does* exist, UPS is excused from the PACT Act even if it *does not comply* with the (existing) AOD at all. This result cannot be what Congress intended.

In addition, treating the AOD's mere existence as an exemption from the PACT Act's compliance obligations would thwart the statute's goal of blocking cigarette trafficking nationwide. *See* Pub. L. 111-154, § 1(c)(4), 124 Stat. 1088. In particular, States other than New York would be frozen out of the PACT Act's protections entirely. Under UPS's position, it would not have to comply with the PACT Act in other States due to the existence of New York's AOD; but at the same time, these other States would be unable to compel UPS to comply with the AOD's terms since the AOD provides for no monetary penalties for cigarette deliveries outside of New York (S.A. 508), and bars its specific enforcement by third parties (S.A. 511); *see also Whitehaven S.F., LLC v. Spangler*, 633 F. App'x 544, 547 (2d Cir. 2015). Even worse, the same PACT Act exemption would also preclude other States from enforcing their own cigarette delivery bans. *See* 15 U.S.C. § 376a(e)(5)(C)(ii). A holding that the AOD is "honored" by merely existing would thus enable UPS to deliver unlimited cigarettes to forty-nine of the fifty States without remedy under the AOD, the PACT Act, or those States' own laws. Congress could not have intended its narrowly drawn exemption to give common carriers like UPS free rein to engage in the very wrongdoing that

the statute was meant to prohibit. *See United States v. Turkette*, 452 U.S. 576, 589 (1981) (declining to construe statute to place core misconduct beyond law's scope, in conflict with its "declared purpose").

UPS's remaining objections to the district court's interpretation are equally meritless. *First*, UPS asserts that application of the PACT Act's exemption cannot turn on whether UPS has in fact complied with the AOD, because such an inquiry would be "rudderless." App.Br.37. But a straightforward interpretation of the statutory language provides sufficiently clear guidance to evaluate whether the exemption applies. And whatever ambiguity the language might have in marginal cases, UPS's disregard of the AOD was sufficiently flagrant here that it easily fell short of those standards.

Specifically, the court below held that UPS could invoke the PACT Act's exemption only if it engaged in a "bona fide," even if imperfect, "effort to maintain the nationwide policies agreed to in the AOD." (S.A. 136.) The standard imposed was essentially one of good faith, and thus implicitly drew from well-established standards that courts have applied to assess whether a party has violated the "implied covenant of good faith" that is part of every contract. *M/A-COM Sec. Corp. v. Galesi*, 904

F.2d 134, 136 (2d Cir. 1990). Such an implied promise exists in the AOD, as UPS expressly acknowledged below. (*See* S.A. 388.) And, in general, good-faith efforts are missing “[w]here no effort has been made toward compliance.” *Mobil Oil Corp. v. Karbowski*, 879 F.2d 1052, 1056 (2d Cir. 1989). Here, the district court credited evidence “that the effectiveness of UPS’s policies [wa]s so compromised that these policies [we]re not in fact in place.” (S.A. 144-145.) Whatever ambiguities might exist at the margins about whether the AOD may be “honored” in the face of intermittent or unintentional violations, UPS’s flagrant—and undisputed—disregard of the AOD makes that question an easy one here. *See, e.g., Holder v. Humanitarian Law Project*, 561 U.S. 1, 20 (2010) (reaffirming that party “who engages in some conduct that is clearly proscribed cannot complain of the vagueness of [a] law as applied to the conduct of others” (quotation marks omitted)).

Second, UPS objects that the district court’s interpretation would unfairly force carriers “to comply with the PACT Act and the PHL, in addition to their agreements.” App.Br.41. But the district court held no such thing. To the contrary, reflecting the plain language of the statutory exemption, the district court appropriately recognized that UPS would be

exempt from both the PACT Act and PHL § 1399-*ll* if it chose to comply, and did comply, with its AOD obligations. Only if UPS defaulted on its AOD responsibilities—as it did here—would it then be subject to the PACT Act and the PHL, as well as the AOD. In this regard, the PACT Act’s conditional exemptions resemble other instances where Congress places a federal regulatory regime on standby in the event that a parallel state regime fails to achieve the federal law’s intended goals. *See, e.g., Alaska Dep’t of Env’tl. Conservation v. EPA*, 540 U.S. 461, 471-74 (2004) (Clean Air Act).

There is nothing unfair about this result. While UPS treats all three sources of authority (PHL § 1399-*ll*, the AOD, and the PACT Act) as essentially duplicative, each in fact imposes distinct compliance requirements in service of the common aim of halting unlawful cigarette trafficking. These different regimes were adopted seriatim over many years as regulators and legislators discovered that preexisting restrictions were inadequate to stop unlawful cigarette deliveries, and were intended to operate in parallel to provide mutually reinforcing compliance obligations backed up by cumulative financial sanctions. The narrow exemption provision at issue here, as correctly interpreted by the district

court, provides only a limited exception to this intended scheme: it excuses carriers from the PACT Act's compliance mechanisms while preexisting controls, including UPS's AOD with New York, are effective nationwide; but reinstates the protections of the PACT Act and state delivery bans when, as here, these other controls prove inadequate.

3. UPS's blatant disregard of the AOD in New York rendered the agreement not "honored throughout the United States to block illegal deliveries of cigarettes."

UPS further complains that the evidence in this case of AOD violations in New York alone, however severe, cannot establish that the AOD is not being "honored throughout the United States." See App.Br.39-40. That argument is mistaken both as a matter of fact and as a matter of law.

First, as a threshold issue, UPS is wrong that the evidence here showed AOD violations in New York alone. The core systemic violations that the district court found—including the failure to implement any formal audit policy and the failure to train executives and employees—resulted from decisions made by UPS's main corporate offices outside of New York. For example, Brad Cook, the executive ostensibly in charge of

UPS's AOD and tobacco compliance, was stationed in Georgia, not New York. (J.A. 1884.) The court found Cook's own compliance lapses not to be "inconsistent[] with corporate expectations." (S.A. 245.) Moreover, there was direct evidence that UPS's noncompliance led to unlawful cigarette deliveries outside of New York.¹⁸ And the district court could properly have inferred, from UPS's systemic corporate violations and its dealings with tobacco shippers that delivered cigarettes across the country, that even more such unlawful deliveries took place nationwide. Given this evidence, UPS is wrong as a factual matter to suggest that it has forfeited its PACT Act exemption solely because of its misconduct in New York, and that it otherwise "has achieved perfect compliance in forty-nine States." *See* App.Br.39.

Second, as a matter of plain language and logic, an agreement fails the test of being "honored throughout the United States" if there is any place in the United States where it is not "honored." It is simply untrue, as UPS suggests, that an agreement must be *dishonored* nationwide in

¹⁸ For example, Bearclaw Unlimited shipped cigarettes via UPS to Arizona (J.A. 1331); Jacobs Tobacco to Iowa (J.A. 1393:rw39-40); Mohawk Spring Water to Maine and Florida (J.A. 1184); and Arrowhawk to consumers "[a]ll over the country" (J.A. 811:925).

order not to be “*honored* throughout the United States.” The purpose of the quoted phrase was to expand the requirement of honoring the agreement, and not to narrow it—that is, to ensure that the AOD, which originated in New York, would actually be given effect throughout the nation, as the parties to the AOD had intended. (S.A. 498-499.) The phrase does not make New York violations insufficient to defeat the exemption, but rather makes out-of-state violations independently sufficient to defeat the exemption as well.

Third, given the size of the New York market, including the disproportionate share of untaxed cigarettes that flow through New York due to the State’s and City’s high excise taxes, UPS could not plausibly claim to be in compliance with its AOD obligations “throughout the United States” while disregarding its obligations in New York—any more than UPS could claim to provide delivery services nationwide if it chose to ignore New York.

More fundamentally, New York’s unique role in both the AOD and the PACT Act makes it particularly sensible that AOD violations in this State would forfeit the PACT Act’s exemption. New York was the State that entered into the AOD that the exemption provision references; the

AOD is based on New York law (S.A. 496-497); and UPS agreed in the AOD specifically to provide New York with compliance-related information (S.A. 507-508). Given New York’s centrality to AOD enforcement, it makes sense that AOD violations here—which undermine the core of what the agreement was meant to accomplish—would preclude any assertion that UPS has “honored” its obligations “throughout the United States.”

Fourth, the unlawful cigarette shipments proven at trial are not “isolated incidents” for purposes of assessing compliance (App.Br.39), even though UPS delivers millions of other packages nationwide. UPS is wrong to evaluate the pervasiveness of its wrongdoing against all of its business. Rather, the question of whether the AOD has been honored “throughout the United States” appropriately focuses on UPS’s actions with respect to cigarette shippers with a long history of carrying out unlawful tax-free sales, many of them located on Indian reservations. As the district court found, UPS persistently failed to follow the AOD in its dealings with these shippers.

Focusing on these shippers is appropriate because, as a historical matter, on-reservation cigarette sellers have played an outsize role in facilitating unlawful tax-free sales to consumers. *See, e.g., United States*

v. Morrison, 686 F.3d 94, 99-102 (2d Cir. 2012); *Cayuga Indian Nation v. Gould*, 14 N.Y.3d 614, 622-29 (2010). As the district court thus observed, the AOD’s obligations were aimed at preventing UPS from “flying blind” regarding shippers on New York Indian reservations. (S.A. 264.) The problem was known to Congress when developing the PACT Act, the legislative history of which cites the example of a terrorist pleading guilty to trafficking in low-tax cigarettes bought on New York’s Seneca Cattaraugus reservation. S. Rep. 110-153, at 4. The problem also was known to UPS, almost a dozen employees of which testified to knowing “that cigarettes sold on Indian reservations were virtually always sold without tax stamps.” (S.A. 311 (cataloguing testimony); see J.A. 622:175 (Cook), 688:436 (Niemi).) UPS’s persistent failure to follow the AOD with respect to these shippers thus did not constitute merely “isolated incidents of non-compliance” (App.Br.39); rather, it undercut a dominant purpose of the AOD by disregarding a principal problem that the AOD was meant to address.¹⁹

¹⁹ Certain *amici* suggest that focusing compliance efforts on reservation-based cigarette sellers would be discriminatory. See La.Br.8-9. As the district court correctly observed, however, such a focus

B. The District Court Properly Found Liability for Multiple Violations of the AOD's Audit Requirement.

As already established, the district court found that UPS committed “flagrant and repeated violations” of multiple AOD obligations over a multiyear period. (S.A. 391.) To avoid duplicative recovery under the AOD, however, the court imposed penalties solely for violations of “the audit requirement set forth in ¶ 24.” (S.A. 369.) The court thus assessed a stipulated penalty of \$1,000 for each package sent by any of twenty shippers during the time that UPS unreasonably failed to comply with its ongoing audit obligations for that shipper. (*E.g.*, S.A. 286.) The magnitude of UPS’s noncompliance led the court to impose tens of millions of dollars in penalties based on the tens of thousands of packages that UPS delivered, each without the oversight required by the AOD. (S.A. 262.)

On appeal, UPS claims that (1) the AOD’s penalty provision does not apply to audit violations at all; and (2) if it does, it authorizes a

would not be “some sort of inappropriate profiling,” but rather a reasonable response to the “known reality” of the problems posed by these sellers. (S.A. 272.) UPS apparently agrees: it now closely scrutinizes “every account opened on a Native American reservation” (J.A. 1941), or in the same zip code (J.A. 1951), paying “special attention” to the Seneca reservations (J.A. 2022).

maximum penalty of only \$1,000 for each shipper, or \$20,000 in total, regardless of how many packages the shipper sent. App.Br.42-61. The district court correctly rejected both arguments.

1. The AOD’s penalty provision extends to violations of the audit duty.

Paragraph 42 of the AOD provides that “UPS shall pay to the State of New York a stipulated penalty of \$1,000 for each and every violation of this Assurance of Discontinuance.” (S.A. 508.) Because the AOD is a settlement agreement, its provisions are interpreted under ordinary contract principles.²⁰ *MBIA Inc. v. Fed. Ins. Co.*, 652 F.3d 152, 171 (2d Cir. 2011). Applying those principles, the district court correctly construed

²⁰ The district court properly applied C.P.L.R. 213(2)’s six-year limitations period for contract actions to the claim for AOD audit violations. (S.A. 407.) Although UPS suggests that C.P.L.R. 214(2)’s limitations period for liabilities “created or imposed by statute” should apply instead (App.Br.42-43), the AOD’s audit duty is located not in any statute, but rather in UPS’s “voluntary” settlement agreement (S.A. 508). UPS is thus mistaken in suggesting that because the AOD resolved some potential statutory claims, a suit to enforce the AOD’s audit provision is governed by the limitations period for such claims rather than by the limitations period for the contract entered into by the parties. *Cf. Mandarino v. Travelers Prop. Cas. Ins. Co.*, 37 A.D.3d 775, 776 (2d Dep’t 2007) (holding that six-year limitations period applied to suit to enforce contract terms mandated by statute).

this penalty provision to extend to violations of the AOD's discrete requirement that UPS "audit shippers" that it has "a reasonable basis to believe" are shipping cigarettes to unauthorized recipients. (S.A. 501.)

This conclusion follows from the "plain terms" of the AOD. *MBIA Inc.*, 652 F.3d at 171. The AOD's penalty provision provides for "a stipulated penalty of \$1,000 for each and every violation" of that agreement. (S.A. 508.) The familiar word "violation" means "[a]n infraction or breach," or "the contravention of a right or duty." *Black's Law Dictionary*, *supra*, at 1800. And the provision's sweeping reference to "each and every violation" plainly envisions penalties for violations "of whatever type," as the district court correctly held. (S.A. 383.)

The AOD unambiguously imposes auditing obligations on UPS. Under the heading "Restrictions," paragraph 20 of the AOD declares that UPS "shall," among other things, "maintain its delivery policies and procedures for Cigarettes in accordance with this [AOD]." (S.A. 499.) Among the ensuing "procedures" is the AOD's command that UPS "shall audit shippers." (S.A. 501.) "The use of the verb 'shall' throughout the pertinent provisions illustrates the mandatory nature of the duties contained therein." *Natural Res. Def. Council, Inc. v. N.Y.C. Dep't of*

Sanitation, 83 N.Y.2d 215, 220 (1994). The AOD thus imposes an auditing duty on UPS, and the provision for a penalty for “each and every violation” of the AOD applies to violations of that auditing duty.

UPS contends that the AOD penalty provision applies only to prohibited shipments of cigarettes (App.Br.48-51), because the provision contains exemptions from penalties for certain of such shipments (S.A. 508). But that argument is a non sequitur: there is no reason to suppose that a carefully drafted exemption from penalties for certain prohibited shipments carries with it an implied exemption for all violations of the audit obligation or any of the numerous other obligations imposed by the AOD. Because the drafters of the AOD plainly knew how to exempt certain violations from the penalty provision, the AOD’s silence on any exemption for audit violations confirms that “each and every violation” of the audit duty will result in penalties—without exception. *See Quadrant Structured Prods. Co. v. Vertin*, 23 N.Y.3d 549, 560 (2014) (omission of language from contractual provision leads to “inescapable conclusion” that “parties intended the omission”).

Nor does the AOD’s section on shipper discipline provide support for UPS’s narrow view of the kind of “violation” subject to penalties. *See*

App.Br.51. That section uses the word “violation” to refer to prohibited cigarette deliveries because that provision of the AOD is describing the kind of violation a shipper is likely to commit—a “violation of UPS’s Cigarette Policy.” (S.A. 503-504.) UPS, by contrast, can commit many other kinds of violations of the AOD, because the AOD imposes many other obligations on UPS beyond simply complying with PHL § 1399-*ll* or its own cigarette policy.

UPS thus misses the mark in asserting that the parties intended to limit sanctionable AOD violations to those that might independently violate PHL § 1399-*ll*’s delivery ban. *See* App.Br.49. To the contrary, the State entered into an AOD with UPS specifically to impose heightened compliance obligations not already provided by PHL § 1399-*ll*—including the audit requirement—since the preexisting statute had proven ineffective at halting cigarette trafficking. It was reasonable for the State to give teeth to these additional compliance obligations by providing for incremental penalties if UPS failed to follow the additional steps the State had determined were necessary to prevent unlawful cigarette deliveries.

Finally, there is no merit to UPS’s suggestion that applying the AOD’s penalty provision to audit violations would be “unconscionable”

because it then would mandate penalties for “minor” or “ministerial” breaches of the AOD. *See* App.Br.53. The “presumed intent of the parties” to any contract is that a stipulated damages provision applies “to material breaches.” *United Air Lines, Inc. v. Austin Travel Corp.*, 867 F.2d 737, 741 (2d Cir. 1989). As the district court found, auditing is the core compliance mechanism of the AOD, breach of which imperils “other aspects of the overall compliance scheme.” (S.A. 380.) Failure to audit possible cigarette shippers deprives UPS of valuable knowledge of package contents, which in turn stymies the utility of UPS’s tobacco shipper database, its duty to suspend or terminate known cigarette shippers, and ultimately its ability to enforce the ban on cigarette deliveries to consumers.

Moreover, as the proceedings below demonstrated, failure to audit also impedes effective law enforcement by preventing the State and City from obtaining reliable records about potential cigarette shipments. As relevant here, UPS insists that it delivered “an unknown number of cigarettes” (App.Br.39); *amicus* adds that “no one actually knows” the packages’ contents “to this day” (TruckingBr.23). Not only has UPS used the resulting vacuum to assail plaintiffs’ damages case (see *infra* at 119-28), but UPS also relied on its alleged lack of knowledge below to defend

against federal and state claims of knowing cigarette deliveries. Where, as here, the breach of a contractual duty itself deprives a counterparty of “the kind of information” necessary to evaluate performance, the breach is not “minor” and stipulated penalties are enforced. *JMD Holding Corp. v. Cong. Fin. Corp.*, 4 N.Y.3d 373, 384 (2005).

2. The AOD imposes penalties for each package shipped in violation of the audit duty.

UPS maintains that the AOD’s audit provision “imposes a per-*shipper* obligation,” and that UPS’s persistent failure to audit the twenty shippers at issue in this appeal therefore gave rise to twenty violations of the AOD, permitting a “*maximum* available penalty” of only \$20,000—or \$1,000 for each shipper. App.Br.57. The district court correctly rejected this “perverse” and “unreasonable interpretation” of the AOD. (S.A. 384-385.) The court below correctly held instead that the AOD’s penalty provision was triggered by every package that UPS delivered for these twenty shippers during the period in which UPS was disregarding its audit obligations for each. (S.A. 382-383.)

The district court’s interpretation is supported by the AOD’s definition of the audit obligation. The AOD directs UPS to “audit shippers”

that UPS has “a reasonable basis to believe” are shipping cigarettes to unauthorized recipients, “in order to determine whether the shippers are in fact doing so.” (S.A. 501.) When such a “reasonable basis” arises but UPS does nothing, then every subsequent delivery will be made without the close oversight that the AOD mandates for suspicious shippers.

UPS’s argument to the contrary relies on a false distinction between auditing *shippers* and auditing *shipments*. The audit required by the AOD must “determine whether the shippers are in fact” delivering cigarettes to consumers. (S.A. 501.) As the district court correctly recognized, any audit of a shipper for this specific purpose is necessarily “conducted with regard to packages.” (S.A. 384.) UPS’s own practices confirm this understanding. On the few occasions when UPS conducted an audit under the AOD, it did so by having UPS personnel exercise the right to open and inspect the contents of *all* of that shipper’s packages over a brief period, usually one to three days. (J.A. 658:315-16, 751:684.) The course of UPS’s performance further evidences the intended meaning and application of the provisions in question. *See, e.g., Hoyt v. Andreucci*, 433 F.3d 320, 332 (2d Cir. 2006). When UPS delivered packages for likely

cigarette traffickers without engaging in any such oversight, it necessarily violated the AOD for each and every such package.

This result also makes sense in light of the central role that the audit requirement plays in the AOD's efforts to halt or prevent unlawful cigarette deliveries. *See Brad H. v. City of New York*, 17 N.Y.3d 180, 186-88 (2011) (holding that a settlement agreement's "necessarily interrelated" provisions must be "read as an integrated whole"). The express purpose of an audit under the AOD is to uncover unlawful cigarette deliveries (or to confirm otherwise) when circumstances make it reasonably likely that such cigarette deliveries are taking place. Upon discovering that a shipper is engaged in such misconduct, the AOD mandates that UPS halt all deliveries for that shipper—permanently, for a shipper that has acted willfully or intentionally; or else for temporary periods of increasing length (ranging from ten days to three years) when a shipper has not acted so culpably.

In other words, the audits mandated by the AOD initiate a compliance process that is intended not only to identify but also to stop any unlawful cigarette deliveries. And audits—when faithfully and reliably performed—have the further benefit of deterring cigarette deliveries by

shippers that would reasonably be “concerned that [UPS is] going to open all of their packages.” (J.A. 1278 (Indian Smokes).) In light of the purpose and intended effect of the audit requirement, the district court properly concluded that penalties should attach to every delivery that is allowed to continue because UPS failed to initiate the audit-and-discipline process that could have uncovered, stopped, or deterred unlawful cigarette shipments.

Per-package audit penalties are also proportional to the magnitude of the violation. The more packages UPS delivers for a reasonably likely cigarette shipper, the greater the need to audit that shipper “to determine whether” the shipper “in fact” is doing such business through UPS. Failing to take basic steps to audit packages streaming by the dozens to hundreds to consumers (*e.g.*, J.A. 1440)—from on-reservation warehouses, smoke shops, and residences that were “shipping like crazy” (J.A. 1880:rw9); or “shipping great guns” (J.A. 1861:rw44); or “blowing the doors off” (J.A. 1262); or that had a “[l]ocked-in majority to keep the reshops rolling” (J.A. 1880:rw2)—thus represents a total compliance breakdown. Imposing per-package penalties for such a breakdown accurately reflects the egregious nature of UPS’s turning a blind eye to the suspicious accounts for which it conducted enormous numbers of deliveries.

By contrast, as the district court correctly concluded, UPS's measurement of penalties for its flagrant violations of its audit obligations is both "unreasonable" and "perverse." UPS asserts that it would owe a maximum of only \$1,000 per shipper for the lifetime of the AOD—even if UPS failed to conduct any audit for years, and therefore delivered thousands of packages from likely cigarette traffickers "day in and day out," in defiance of the AOD's detailed process for identifying and halting such shipments. (S.A. 385.) Under UPS's position, AOD penalties for violating the audit duty would be "nothing more than an acceptable cost of violation, rather than as a deterrence to violation." *Brown & Williamson Tobacco Corp. v. Engman*, 527 F.2d 1115, 1120 (2d Cir. 1975). It is implausible that the State would have agreed to render the AOD's audit requirement so toothless, particularly given the importance of the auditing process in the AOD's compliance regime.

Moreover, contrary to UPS's assertion, per-package penalties for violations of the audit requirement do not create any incongruity with the AOD's penalties for knowing shipments of cigarettes. Specifically, UPS asserts that cigarette-shipment violations are subject to "a good-faith defense" to penalties that is lacking for audit violations. *See App.Br.60.*

That is incorrect: just as UPS faces no penalties for unlawful cigarette deliveries when it “had no reason to know” that the shipment contained cigarettes, UPS also faces no penalties for forgoing an audit when there was no “reasonable basis to believe” that a shipper was tendering cigarettes for delivery. (S.A. 501.) The relevant standards of objective inquiry notice thus parallel each other, rather than conflict.

This Court should accordingly reject UPS’s position that the AOD’s penalty provision applies only “to the knowing transportation of cigarettes” (App.Br.49), since such an interpretation would strip the AOD’s audit duty of its intended force and ignore UPS’s sweeping breaches of that requirement. But even under UPS’s narrow interpretation, it would still owe \$31,502,000 in AOD penalties for 31,502 knowing cigarette shipments. (See S.A. 487 (awarding PHL § 1399-*ll* penalties).) In holding UPS liable under PHL § 1399-*ll*, the district court found that UPS knowingly shipped cigarettes for seventeen shippers; and the court “separately found that” this same conduct “breached ¶ 42 of the AOD”—i.e., the penalty provision. (S.A. 412-413.) This Court may rely on these factual findings to uphold AOD penalties on an alternative shipment theory, in light of the Court’s power to “affirm on any basis for which there is a record sufficient to

permit conclusions of law.” *Bertin v. United States*, 478 F.3d 489, 491 (2d Cir. 2007) (quotation marks omitted). UPS is incorrect to suggest that this theory is unavailable because the State “abandoned” it below (App.Br.17, 24, 27, 56): while the State elected not to seek AOD penalties for cigarette shipments to avoid “double recovery” (J.A. 425), the district court nonetheless made factual findings sufficient to support such penalties. There is no barrier to this Court’s reliance on those findings on appeal. *See Baker v. Dorfman*, 239 F.3d 415, 420-21 (2d Cir. 2000).

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

The CCTA makes it “unlawful for any person knowingly to ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes,” 18 U.S.C. § 2342(a), and defines “contraband cigarettes” as “a quantity in excess of 10,000 cigarettes, which bear no evidence of the payment of applicable State or local cigarette taxes,” *id.* § 2341(2).

The district court concluded that UPS violated the CCTA by knowingly transporting hundreds of thousands of cigarettes lacking the required tax stamps. (S.A. 415-421.) In particular, the court found that UPS knowingly transported cigarettes for seventeen on-reservation

shippers in New York State. (S.A. 316-358.) Among these shippers were two cigarette manufacturers—Jacobs Tobacco and Mohawk Spring Water—for which UPS routinely delivered cigarettes in lots of 10,000 or more. See *supra* at 41. The court further concluded that the cigarettes in question all were taxable under New York law (S.A. 416-418); that all lacked the necessary tax stamps (S.A. 419); that UPS knew that the cigarettes were unstamped (S.A. 311); and that the number of unstamped cigarettes transported by UPS “far exceed[ed] 10,000” in total—a threshold met by proof of deliveries for the aforementioned Jacobs Tobacco and Mohawk Spring Water “alone” (S.A. 419-420).

On appeal, UPS contests none of these findings. Instead, UPS contends that the CCTA penalizes solely the knowing shipment of more than 10,000 cigarettes in a single transaction, and that the lack of a specific finding by the district court that UPS knew that a particular package had more than 10,000 cigarettes bars all CCTA recovery. See App.Br.62-68. These arguments lack merit.

1. The CCTA permits aggregating separate shipments into a single violation.

As the district court correctly held, UPS's proffered "single transaction" limitation "conflicts with the plain language of the CCTA," which contains no such element.²¹ (S.A. 16.) Where the statutory text is clear, as here, "no further inquiry is necessary." *United States v. Colasuonno*, 697 F.3d 164, 173 (2d Cir. 2012).

No reference to a single transaction appears in the CCTA's prohibition on transporting "contraband cigarettes" or in the statutory definition of that phrase. UPS points to the fact that Congress defined contraband cigarettes for this purpose as "a quantity in excess of 10,000 cigarettes," arguing that the singular term "a" must signify a "single shipment" of more than 10,000 cigarettes. App.Br.63 (citing 18 U.S.C. § 2341(2)). But the text simply does not support that argument. *First*, the CCTA's actual prohibition on delivering untaxed cigarettes does not use the indefinite

²¹ The district court's holding comports with that of every available decision to have considered this issue. *See City of New York v. FedEx Ground Package Sys., Inc.*, 91 F. Supp. 3d 512, 520 (S.D.N.Y. 2015); *City of New York v. LaserShip, Inc.*, 33 F. Supp. 3d 303, 313 (S.D.N.Y. 2014); *City of New York v. Gordon*, 1 F. Supp. 3d 94, 105 (S.D.N.Y. 2013). By contrast, none of the decisions that UPS cites "weighed in on" (App.Br.65), or addressed, the question presented here.

article “a” and instead broadly makes it unlawful to “ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes.” 18 U.S.C. § 2342(a). *Second*, use of the indefinite article in the definition does not in any event preclude aggregation: it makes perfect sense to say that a shipper who makes more than ten 1,000-cigarette deliveries has delivered “a quantity” of more than 10,000 cigarettes, just as a child at a birthday party receives “a quantity” of presents representing the combination of what each individual guest has brought.

Moreover, if Congress had intended to restrict liability under § 2342(a) to individual shipments exceeding 10,000 unstamped cigarettes, it would have done so expressly. By way of contrast, a separate provision of the CCTA provides that anyone who “distributes *any quantity* of cigarettes in excess of 10,000 *in a single transaction*” must maintain accurate records of such shipments. 18 U.S.C. § 2342(b) (emphasis added); *see id.* § 2343(a). This separate recordkeeping provision illustrates that Congress (i) knew how to cabin events to “a single transaction” when so intended, and (ii) did not view the words “a quantity” or “any quantity” as sufficient to achieve that result. UPS attempts to explain away the difference between the language in the recordkeeping provision, § 2342(b),

and the language in the provisions at issue here, §§ 2341(2) and 2342(a) (App.Br.64), but its explanation does not diminish the force of the fact that § 2342(b) explicitly uses the phrase “single transaction,” while the definition of “contraband cigarettes” does not. Courts have a “duty to refrain from reading a phrase into the statute when Congress has left it out.” *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993).

In addition to single-transaction recordkeeping duties, the CCTA imposes reporting obligations on anyone who distributes “any quantity in excess of 10,000 cigarettes” in “a single month.” 18 U.S.C. § 2343(b). UPS argues that because § 2343(b) provides for aggregation over a specified time period, Congress would have similarly specified a time period if it had intended to permit aggregation for the CCTA’s delivery prohibition. App.Br.64-65. But it is clear that the statute defines the scope of recordkeeping duties quite differently from the scope of the prohibition itself. Recordkeeping requirements apply to anyone who ships more than 10,000 cigarettes—taxed or untaxed—either in a single transaction, § 2343(a), or within a single month, § 2343(b); and false statements about the information in required records are unlawful for anyone who ships more than 10,000 cigarettes in a single transaction,

§ 2342(b). But neither of those limitations—single transaction or single month—appears in the prohibition on shipping untaxed cigarettes, §§ 2342(a) and 2341(2). Thus, that prohibition applies to anyone who meets the 10,000-cigarette threshold over the period defined by the statute of limitations, which is four years. *See* 28 U.S.C. § 1658(a).

The breadth of the mandatory reporting requirement suggests that some aggregation must be permitted for liability purposes. Otherwise, § 2343(b)'s reporting requirement, which covers anyone who ships more than 10,000 cigarettes in a month, would reach many persons who could not possibly have violated the CCTA—a strange result for an obligation that was designed to aid in the investigation and prosecution of CCTA violations. *See* 151 Cong. Rec. H6284 (daily ed. July 21, 2005) (pointing to § 2343(b) as one of several provisions meant to enhance CCTA enforcement). Despite UPS's contention (App.Br.63), there is no basis to conclude that the CCTA excludes from liability a person who transports a carton of untaxed cigarettes every week for a year, thus exceeding 10,000 cigarettes in a year. *See City of New York v. Gordon*, 1 F. Supp. 3d 94, 104 (S.D.N.Y. 2013) (rejecting similar argument against aggregation under CCTA).

Indeed, Congress had good reasons not to restrict substantive CCTA violations to single transactions of more than 10,000 unstamped cigarettes. Such a rule would allow parties to evade CCTA liability by the simple expedient of ensuring that any shipments comprise, at most, 10,000 cigarettes at a time. UPS completed thousands of shipments for Jacobs Tobacco, mostly in cases of fifty cartons—or exactly 10,000 cigarettes—each. (J.A. 1001:1680 (testimony), 1325 (delivery totals).) Under UPS’s theory, such deliberately calculated shipments of cigarettes, no matter how numerous in the aggregate, would fall entirely outside the scope of the CCTA. There is no indication that Congress intended its statutory prohibition to be so easily evaded.²²

Finally, no different result is warranted by decisions applying the penalty provisions of 21 U.S.C. § 841, the federal narcotics statute. *See*

²² UPS contends here that it “understood” these 10,000-cigarette transactions to be legally permissible at the time (App.Br.82), but the district court found “insufficient credible evidence to support UPS’s factual claim that this was a widely held view in the organization” (S.A. 285). The only proof on this point below was testimony by a UPS supervisor that a UPS *driver* “had assumed that these shipments were legal.” (J.A. 2007.) As the driver testified, however, the “proper people” for such questions were in UPS’s “legal department or whatever.” (J.A. 554:84.) No testimony from such legal counsel was presented.

App.Br.63-64. As UPS notes, § 841(b)(1)(A) mandates minimum prison sentences for “a violation” involving a specified amount of drugs, which courts have construed to mean “a single violation” involving that amount.²³ *United States v. Winston*, 37 F.3d 235, 240 (6th Cir. 1994); *cf. United States v. Darmand*, 3 F.3d 1578, 1581 (2d Cir. 1993) (“[T]he minimum applies to the quantity involved in the charged, and proven, violation of § 841(a).”). By contrast, the CCTA does not use the words “a violation,” does not establish minimum penalties, and permits States and localities to obtain a broad range of “appropriate relief for violations.” 18 U.S.C. § 2346(2). And far from casting “a single transaction into several counts” (App.Br.118 (quoting U.S.S.G. § 1A1.4(e))), plaintiffs here have pursued appropriate relief within the prescribed range for a single, comprehensive CCTA violation.²⁴

²³ The restriction in this context is made less stringent, however, by the availability in many cases of a conspiracy charge, which does permit aggregating drug quantities into “a single violation.” *United States v. Pressley*, 469 F.3d 63, 65-66 (2d Cir. 2006).

²⁴ That fact distinguishes UPS’s cited authority (at 65) concerning the permissibility of dividing an alleged CCTA violation into multiple “unit[s] of prosecution,” with the attendant risk of stacking prison terms. *United States v. Khan*, 771 F.3d 367, 376 (7th Cir. 2014).

2. The CCTA's knowledge requirement is met.

Equally meritless is UPS's alternative contention (App.Br.66-68) that there was no proof that it knew that any one delivery exceeded 10,000 unstamped cigarettes. Because the CCTA's delivery prohibition contains no single-transaction requirement, UPS's knowledge argument is beside the point.

UPS does not, and cannot, dispute that it had knowledge of prohibited shipments by numerous shippers of more than 10,000 cigarettes, assuming quantities can be aggregated across multiple shipments. As the district court found, UPS knew that certain on-reservation shippers for which UPS provided delivery services regularly shipped cigarettes. The court below also concluded, based on the testimony of nine UPS officers or employees, that UPS "knew that cigarettes sold on Indian reservations were virtually always sold without tax stamps."²⁵ (S.A. 311.) These facts more than sufficed to establish the culpable knowledge required under

²⁵ UPS concedes that "agency principles" serve to impute its employees' knowledge to the corporation. App.Br.111; *see Apollo Fuel Oil v. United States*, 195 F.3d 74, 76 (2d Cir. 1999) ("[A] corporation can be guilty of knowing or willful violations of regulatory statutes through the doctrine of *respondeat superior*." (quotation marks omitted)).

the CCTA. See *United States v. Elshenawy*, 801 F.2d 856, 859 (6th Cir. 1986) (holding “knowing” element of CCTA violation to be satisfied by defendant’s knowledge of “the physical nature of what he possessed,” i.e., unstamped cigarettes).

As the district court concluded, it is enough for CCTA liability that UPS knew that certain shippers were regularly shipping unstamped cigarettes and that UPS transported those shippers’ packages anyway. That result accords with this Court’s decisions upholding penalties for possessing specific quantities of contraband, irrespective of the defendant’s knowledge of the precise quantity possessed. Under this “settled principle,” liability “rests squarely on the knowing possession of *some* quantity of illegal drugs.” *United States v. King*, 345 F.3d 149, 152 (2d Cir. 2003) (emphasis added). This application of *mens rea* serves “to prevent the conviction of innocent persons,” while properly holding liable “those who are simply indifferent” to the quantity of the known illegal substance involved. *United States v. Collado-Gomez*, 834 F.2d 280, 281 (2d Cir. 1987). The same rationale applies to UPS’s knowing delivery of unstamped cigarettes for shippers with no right to trade in that merchandise, let

alone to have it “shipped UPS to your door!”²⁶ (J.A. 1445 (email advertisement from Seneca Cigarettes).)

POINT II

THE STATUTORY AND AOD PENALTIES SHOULD BE AFFIRMED AND THE DAMAGES AWARD DOUBLED

Just as the district court properly held UPS liable under the AOD and the relevant statutes, the district court also did not err in assigning damages and penalties for those violations. As demonstrated below, the district court appropriately (a) exercised its discretion in rejecting UPS’s extraordinary request to preclude plaintiffs’ entire damages case; (b) relied on inferences from the admitted evidence to determine package counts and contents to compute damages and penalties; (c) rejected UPS’s contention that plaintiffs suffered zero or nearly zero damages; and (d) assigned penalties on account of UPS’s misconduct within the ranges prescribed by contract and statute and authorized by the U.S. Constitution.

²⁶ The district court’s CCTA liability findings supported its imposition of compensatory damages (and a nominal penalty). The court also noted that a lower amount of compensatory damages would be warranted for UPS’s PACT Act violations (see *infra* n.36), but declined to award PACT Act damages to avoid double counting (S.A. 265). If this Court were to accept UPS’s arguments against CCTA liability, it should reinstate PACT Act damages, which are not subject to a 10,000-cigarette threshold.

For purposes of this appeal, the district court erred in only one respect. As explained in the cross-appeal section below, the correct measure of plaintiffs' damages was the total amount of unpaid taxes on the contraband cigarettes that UPS transported—approximately \$17 million for the State, and \$1.5 million for the City. The district court instead awarded only half those amounts, based on the assumption that customers would have found other avenues to purchase untaxed or low-tax cigarettes. Because this “diversion theory” finds no support in the underlying statutes, the damages award should be increased.

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

UPS asks this Court to overturn the district court's denial of its motion to strike plaintiffs' entire monetary remedy for purported violations of the disclosure requirements of Rule 26. UPS cites no other case where the Court has awarded comparable relief, nor does anything in this case come close to warranting such an extreme step.

A district court has “broad latitude” to manage discovery, *EM Ltd. v. Republic of Argentina*, 695 F.3d 201, 207 (2d Cir. 2012), and the determination of whether to impose discovery sanctions is committed to

the court’s “sound discretion,” *Argo Marine Sys., Inc. v. Camar Corp.*, 755 F.2d 1006, 1015 (2d Cir. 1985). Here, the court acted well within its discretion in denying UPS’s pretrial motion to bar monetary relief, viewing “the overall record as sufficiently placing UPS on notice as to the damage theory.” (J.A. 443.) In adhering to that ruling after trial, the district court reaffirmed that UPS had “adequate pre-trial notice to counter plaintiffs’ damages claim” and had not “suffered any real prejudice” from the lack of a more robust disclosure. (S.A. 439.)

Both rulings were well supported. Plaintiffs informed UPS from the outset of the various categories of damages and penalties sought, as well as the key variables relevant to those categories of relief, all of which pertained to UPS’s own shipping activities. Plaintiffs also complied with an unchallenged interim order of the district court to provide a detailed numerical breakdown of damages and penalties for an exemplar shipper group—an order that UPS never revisited before the district court and does not challenge on appeal. And plaintiffs disclosed well before trial the witnesses and documents that they would rely on, many of which were produced by UPS in the first place.

Because plaintiffs maintained a consistent theory of damages and penalties and complied with court-ordered disclosure obligations, and because UPS's claims of prejudice are groundless, the district court reasonably denied UPS's extraordinary request to annul plaintiffs' entire damages case, leaving the State and City without a remedy for UPS's widespread invasion of public rights.

1. UPS had fair notice of plaintiffs' damages case.

Rule 26(a) on its face applies only to "damages" and not to penalties. *See* Fed. R. Civ. P. 26(a)(1)(A)(iii). In any event, even assuming that the rule extends to both the damages and the penalties at issue here, the district court acted well within its discretion in declining to order preclusion of evidence relating to either.

Rule 26 requires a plaintiff to disclose "a computation of each category of damages claimed," and to provide an opportunity for the defendant to review the evidence used to calculate damages. Fed. R. Civ. P. 26(a)(1)(A)(iii). But the consequence of any disclosure deficiency under Rule 26 is limited by Rule 37, which provides that no sanction is appropriate where the deficiency either "was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1); *see Design Strategy, Inc. v. Davis*, 469

F.3d 284, 296 (2d Cir. 2006) (assessing Rule 26 preclusion request by reference to Rule 37). Based on events occurring through trial, the district court here reasonably found that both criteria for denying sanctions were met. UPS's assertion of "trial by ambush" (App.Br.70) is simply not supported by the litigation's actual history, which demonstrates that UPS received fair notice of plaintiffs' damages case.

a. The district court reasonably found that plaintiffs' damages disclosures were substantially justified.

UPS cannot colorably claim surprise about plaintiffs' theory of damages and penalties. Plaintiffs' original complaint claimed (i) damages in the amount of unpaid taxes on contraband cigarettes delivered by UPS, and (ii) the civil penalties allowed under the relevant statutes and the AOD. (J.A. 119-121.)

Shortly after the complaint's filing, plaintiffs made their Rule 26 initial disclosures, reiterating the same damages and penalties theories, and explaining that damages would be calculated through multiplying specified per-pack or per-carton excise taxes by the total amount of unstamped cigarettes shipped by UPS. (J.A. 414; *see also* J.A. 420.) Plaintiffs did not at that point offer a numerical breakdown of damages

because the amount of cigarette deliveries involved was then “unknown” to plaintiffs, and reflected instead in documents held by UPS. (J.A. 414.) UPS does not appear to challenge the contents of these initial disclosures, and for good reason, as a plaintiff need not offer a calculation of damages to the extent it “depends on information in the possession of another party,” Fed. R. Civ. P. 26 (advisory committee notes to 1993 amendments)—such as the information regarding UPS’s shipping activities here.

Half a year before trial, UPS received detailed notice of plaintiffs’ impending damages and penalties case. After the discovery cutoff, UPS sought to compel further disclosure on damages; in a February 2016 order, the district court found that UPS ought to have moved sooner. (S.A. 27-31.) But the district court also exercised its discretion to require plaintiffs to make defined further disclosures in the interest of ensuring a fair and workable trial. (S.A. 27, 31.) Thus, the court ordered plaintiffs to provide, *for one sample shipper*: exemplars of shipments alleged to have contained cigarettes; the circumstances showing UPS’s knowledge of package contents; and a “[c]alculation of each plaintiff’s damages as to the specific shipper.” (S.A. 32.) To the extent that UPS believed that different information was needed, it could ask to meet and confer with

plaintiffs regarding the “appropriate content for an exemplar.” (S.A. 32.) While the order required plaintiffs to “show their cards” for one shipper, the court expressly noted that it would “not preclude” plaintiffs from using other evidence at trial. (S.A. 32.)

Plaintiffs made the ordered disclosure on March 3, 2016, informing UPS that for just the Arrowhawk shipper group (comprising Arrowhawk Smoke Shop, Seneca Cigars, Hillview Cigars, and Two Pine Enterprises), plaintiffs sought more than *\$83 million* in damages and penalties under the CCTA, the PACT Act, and PHL § 1399-11 (broken down by claim), plus *\$8 million* more under the AOD.²⁷ (J.A. 425.) As plaintiffs explained, they computed these figures by multiplying the number of delivered cigarette cartons by the value of the missing tax stamps. (J.A. 425.) A chart illustrated that plaintiffs intended to seek the maximum allowable

²⁷ UPS was aware that plaintiffs sought recovery for deliveries made for at least eight groups of affiliated shippers. (See J.A. 1881-1882 (UPS spreadsheet of at-issue shipper groups).) Given that plaintiffs disclosed in March 2016 that over \$90 million in damages and penalties would be sought for the Arrowhawk group alone, UPS’s contention (App.Br.70) that it was blindsided at trial by the case’s overall magnitude rings hollow.

penalty per violation of the PACT Act and PHL § 1399-ll, and the agreed-upon \$1,000 penalty for every AOD violation. (J.A. 425.)

Plaintiffs' March 3, 2016, letter also disclosed the evidence that would support damages. Plaintiffs indicated that they would use UPS's own shipping and billing spreadsheets for specified accounts to prove that "[a]ll shipments associated with" those accounts contained cigarettes. (J.A. 423 (citing six spreadsheets).) To establish that these shipments "all contained cigarettes," plaintiffs intended to rely on "evidence including, without limitation," testimony and shipping invoices that had already been disclosed to UPS. (J.A. 424.) And plaintiffs identified circumstantial evidence showing, among other things, the volume of shipments, the nature of the pickup locations, and prominent cigarette advertising at the locations. (J.A. 424.)

UPS never asked to meet and confer with plaintiffs on an appropriate disclosure for the Arrowhawk shipper group; UPS never informed plaintiffs that it needed more information to adequately prepare for trial; UPS never sought reconsideration of the court's order limiting disclosure to an exemplar; and UPS never sought a further court order requiring additional pretrial disclosures regarding other shippers. Rather, UPS

accepted plaintiffs' disclosure and said nothing. And as the district court observed, UPS "did not identify any rebuttal witnesses" regarding the Arrowhawk disclosure "or seek to counter even that disclosure with an expert." (S.A. 438.)

In denying plaintiffs' request for broad sanctions filed three weeks before trial, the district court reasonably pointed to its interim discovery order issued six months earlier, UPS's failure to seek reconsideration, and plaintiffs' clear compliance with the order. (S.A. 435-437.) As the district court noted, its February 2016 discovery order had "allowed" plaintiffs to proceed "without a full Rule 26 disclosure." (S.A. 437.)

Plaintiffs were substantially justified in relying on the court's order to define the scope of their disclosure obligation, and UPS offers no argument to the contrary. Rather, UPS mistakenly asserts that the court's denial of preclusion focused "solely" on whether any disclosure failure had prejudiced UPS. App.Br.74. The court also considered whether the March 3, 2016, disclosure "complied" with the court's earlier order, and confirmed that it did. (S.A. 435-437.) While the court did not use the words "substantially justified," the gravamen of its holding was that even if plaintiffs "should have" made further disclosures, any shortcomings

were substantially justified because plaintiffs had done what the court directed. (*See* S.A. 437.)

This correct holding alone supports affirmance of the court's discretionary decision to deny preclusion. *See In re Lavender*, 399 F. App'x 649, 653 (2d Cir. 2010) (summary order) (bankruptcy court was "free to credit" attorney's explanation for failure to disclose evidence); *OFS Fitel, LLC v. Epstein, Becker & Green, P.C.*, 549 F.3d 1344, 1365 (11th Cir. 2008) (good-faith explanation showed substantial justification).

b. The district court correctly identified no meaningful prejudice to UPS from any disclosure deficiency.

The lack of cognizable prejudice to UPS from any initial disclosure deficit provides an independent ground for affirming denial of UPS's sweeping request for preclusion, as the district court appropriately found. (S.A. 437-439.)

Although the March 3, 2016, disclosure did not itemize every dollar that plaintiffs would seek to recover at trial, the whole point of an exemplar that provided detailed calculations about one shipper was to convey plaintiffs' intended calculations for all the shippers at issue. Any doubt about plaintiffs' theory of damages and liability was eliminated by

plaintiffs' final pretrial disclosure, stating that plaintiffs would rely for all shippers on evidence "of the type laid out" in the March 3, 2016, letter.²⁸ (J.A. 299.) As the district court found, this disclosure adequately notified UPS about the evidence that "would be used in connection with the calculations for all shippers." (S.A. 438-439.)

To the extent there were any gaps in plaintiffs' pretrial disclosures, they related only to information about package counts that UPS could "easily" have located from materials within its possession: specifically, the same delivery and billing data featured in the spreadsheets that UPS produced in the litigation. (S.A. 436-437.) UPS could not have suffered any prejudice—let alone "substantial" prejudice (App.Br.76)—from allegedly not being told sooner about the contents of its own business records. Moreover, UPS knew early on that its delivery and billing spreadsheets would play a major role in calculating damages and penalties. In response to plaintiffs' request for information about UPS's delivery services for cigarette dealers (J.A. 151-155), UPS generated these spreadsheets "specifically for this litigation." (J.A. 199.) Plaintiffs

²⁸ Plaintiffs also cited proposed expert testimony, which the district court precluded nine days before trial, on UPS's motion. (S.A. 172.)

questioned a UPS witness “extensively” (UPS’s word) on this topic (J.A. 198), and UPS heard from plaintiffs’ own Rule 30(b)(6) witness that damages would be computed based on these documents (J.A. 504-505). UPS even resisted producing a data dictionary defining the terms in the spreadsheet column headings (*e.g.*, J.A. 215), but eventually relented (S.A. 26).

Moreover, UPS was well aware that plaintiffs intended to rely on both circumstantial and direct proof of the contents of what UPS calls the “plain brown boxes” it transported. Plaintiffs’ interrogatory responses, served nearly a year before trial, previewed the argument “that circumstantial evidence gives rise to a reasonable inference that a Shipper tendered cigarettes to UPS for shipment” (J.A. 131-135 (unredacted) (City’s response); *see* J.A. 145-147 (State’s response).) These responses enumerated items of evidence—including tracer inquiries, the results of UPS’s eventual audits, and shippers’ placement on the NCL—that would support such a conclusion. (J.A. 126-133 (unredacted).)

Given all the information known to UPS before trial, this case vastly differs from the Rule 37 damage disclosure cases that UPS cites (at 70). *See, e.g., Design Strategy*, 469 F.3d at 296-97; *Hoffman v. Constr.*

Protective Servs., 541 F.3d 1175, 1180 (9th Cir. 2008). Each of those decisions affirmed a limited preclusion order; none held that such an order was required or reversed an order denying preclusion.

Although the court's discovery order had "allowed" plaintiffs to proceed without a "full" damages breakdown for every relevant shipper group (S.A. 437), UPS nonetheless faults plaintiffs for not providing such a breakdown. UPS also appears to contend that Rule 26 required plaintiffs to disclose their expected damages "methodologies," or those "on which the district court ultimately" would rely. *See* App.Br.78. Neither ground warrants reversal.

As an initial matter, Rule 26 requires only a computation of claimed damages and an opportunity for the defendant to review the underlying documents, not an explanation of how those documents serve to prove the plaintiff's case. *See* Fed. R. Civ. P. 26(a)(1)(A)(iii). And plaintiffs are aware of no authority—and UPS cites none—for the proposition that Rule 26 requires a forecast of how the trier of fact will choose to analyze this evidence, especially when the usual trier of fact—a jury—does not normally explain itself in such detail as the district court did here.

The argument that plaintiffs’ disclosures left UPS unable to defend itself on damages collapses under minimal scrutiny. For example, UPS knew that plaintiffs would rely on the company’s spreadsheets to prove that UPS delivered packages for shippers on the federal NCLs, in violation of the PACT Act, and would pursue per-package penalties for those violations. (*See* J.A. 299, 423-425.) Similarly, UPS knew that plaintiffs would be seeking AOD penalties “for each package that UPS failed to audit in accordance with Paragraph 24 of the AOD.” (J.A. 425.) And UPS knew that, based on package counts and proof of contents, plaintiffs would be seeking per-package penalties under PHL § 1399-*ll* and unpaid taxes under the CCTA and PACT Act. (J.A. 425.) UPS’s objections to plaintiffs’ construction of these provisions—which are without merit, for the reasons given in Point I above—concern the fact and scope of liability, not the adequacy of *notice* of potential damages.

Indeed, evidence in this litigation confirms that UPS could easily use its own records to tabulate packages delivered for specified accounts and, accordingly, use those package counts as a basis for calculating potential liability. For example, Robert Oliver of Mohawk Spring Water testified at trial that UPS had “established” the number of shipments

referenced in his federal plea agreement for cigarette trafficking, based on UPS's own "records." (J.A. 873:1168.) And for Jacobs Tobacco, UPS internally estimated that it could face \$10.789 million in AOD penalties, at "\$1,000 per package," for 10,789 packages shipped over a five-year period. (J.A. 1325; *see* J.A. 428-429 (unredacted).)

In sum, plaintiffs disclosed their damages *theory* from the beginning; made clear to UPS throughout the discovery period that its internal spreadsheets would be key *documents* used to prove total damages; notified UPS that plaintiffs would rely on direct and circumstantial *evidence* to prove package contents; and provided a *computation* of damages for an exemplar shipper group. And, in contrast to the situation where damages data are reasonably known only to the plaintiff—e.g., loss of future profits—here the damages related to UPS's own historical shipping activities. The company was well positioned to counter claims about what it had shipped and with what frequency. In light of plaintiffs' disclosures, UPS also "reasonably could have . . . anticipated," *Design Strategy*, 469 F.3d at 296, that plaintiffs would pursue several hundreds of millions of dollars in damages and penalties. In all, the district court reasonably dismissed UPS's claims of "outrage" over plaintiffs' initial

disclosures. (S.A. 437.) *Cf. Robinson v. Champaign Unit 4 Sch. Dist.*, 412 F. App'x 873, 878 (7th Cir. 2011) (reversing disclosure sanction where defendant had sufficient information to compute potential damages).

2. Even if meaningful violations had occurred, dismissal of plaintiffs' entire damages and penalties case would not be compelled.

Even if UPS could overcome the district court's findings on the issues of substantial justification and lack of prejudice, there would be no basis for this Court to award the only specific sanction for which UPS has pressed: total (or near-total) preclusion of damages.

An order of preclusion is never "automatic." *Design Strategy*, 469 F.3d at 298. As this Court has emphasized, Rule 37(c)(1) explicitly contemplates a range of less severe sanctions that may be imposed in "addition to" or "instead of" preclusion. *See id.* And contrary to UPS's contention (App.Br.72), a court may elect to impose no sanction even where a violation is found, *see* 8B Wright & Miller, *Federal Practice & Procedure* § 2284, at 470-71 (3d ed. 2010) (noting Rule 37's permissive phrasing); *see Davis v. U.S. Bancorp*, 383 F.3d 761, 765 (8th Cir. 2004).

There is no apparent precedent for an appellate order throwing out plaintiffs' entire damages case after a successful trial, and there is no

basis for such a dramatic order here. Indeed, UPS fails to cite any decision reversing a discretionary denial of a motion to preclude specific damages evidence. *Cf. Design Strategy*, 469 F.3d at 295 (affirming preclusion of expert testimony on newly disclosed lost-profits theory of damages); *Softel, Inc. v. Dragon Med. & Sci. Commc'ns*, 118 F.3d 955, 962 (2d Cir. 1997) (affirming preclusion of expert proof that would have changed the “theories being offered”).

This Court generally reviews a discretionary decision on the exclusion of evidence by evaluating four factors: (1) the party’s explanation for failure to comply, (2) the importance of the evidence, (3) the prejudice suffered by the opposing party, and (4) the possibility of a continuance. *See Patterson v. Balsamico*, 440 F.3d 104, 117 (2d Cir. 2006). But no such analysis is required if, as here, a district court determines that any disclosure deficit was harmless or substantially justified. *See Fed. R. Civ. P. 37(c)(1)*; *Williams v. Morton*, 343 F.3d 212, 222-23 (3d Cir. 2003).

UPS misapplies the four factors in any case. *First*, contrary to UPS’s assertion (App.Br.73), plaintiffs *did* explain why they did not supplement the March 3, 2016, court-ordered disclosure before trial with similar information about other shippers: the March 2016 disclosure

adequately apprised UPS of the “magnitude” of plaintiffs’ claims and the “basic assumptions as to how the calculations were performed.” (J.A. 445 (unredacted); *see* J.A. 431-434.) As already noted, the district court agreed. (S.A. 435-438.)

Second, the damages evidence was undoubtedly important and should not have cavalierly been stricken. UPS does not disagree. *See* App.Br.73-74. Indeed, the strike order sought by UPS would leave plaintiffs without a remedy for the company’s proven, knowing violations of multiple state and federal laws and an enforcement agreement it entered into with the State.

Third, plaintiffs have already demonstrated the lack of prejudice to UPS from any disclosure deficit. Despite UPS’s assertion that the court wrongly tasked UPS with proving prejudice (App.Br.74-75), the court got the burdens correct: it simply agreed with plaintiffs’ arguments on prejudice and was “not convinced” by UPS’s. (S.A. 439.)

And *fourth*, UPS never sought a continuance, and it has never explained why it could not have sought to reopen discovery if it had really been so blindsided that it was unable to mount an adequate defense to this enforcement case. While either course might have presented burdens,

UPS could have asked that plaintiffs bear any resulting costs. *See* Fed. R. Civ. P. 37(c)(1)(A). UPS’s single-minded focus on preclusion calls into question whether avoiding surprise and unfairness were its true objectives. *See Outley v. City of New York*, 837 F.2d 587, 590 (2d Cir. 1998) (faulting party for seeking “the most drastic remedy, preclusion, rather than requesting a recess or continuance”); *see also Doe v. Young*, 664 F.3d 727, 735 (8th Cir. 2011) (same); *Black v. J.I. Case Co.*, 22 F.3d 568, 573 (5th Cir. 1994) (same).

In its post-trial liability opinion, the district court specifically observed that UPS appeared less concerned with the actual sufficiency of notice on damages than with making “tactical” choices to support a request for preclusion. (S.A. 437.) For example, weeks before trial, plaintiffs offered to provide UPS with full damages calculation for every shipper—consistent with the analysis done for the Arrowhawk shipper group—that would have ended “any remaining mystery” about plaintiffs’ intended approach. (S.A. 437.) UPS declined the offer. UPS then proceeded to put a federal district judge and two government bodies through the wringer of a complex, weeks-long enforcement trial—only to argue thereafter that all damages proof should be stricken because UPS lacked fair notice of

unspecified facts on that topic. Upon considering the case's history, as well as the sophistication of UPS and its counsel, the district court reasonably denied this extraordinary and opportunistic request.

B. Sufficient Evidence Supported the District Court's Factual Findings on Damages and Penalties.

UPS alternatively contends that, even if the preclusion request was reasonably rejected (which it was), the admitted evidence was insufficient to prove the amount of *any* damages, statutory penalties, or contractual remedies—with the possible exception of five (out of twenty) individual shippers for which plaintiffs offered direct testimony or shipping invoices.²⁹ *See* App.Br.86. The district court correctly rejected these arguments.

UPS's claims of evidentiary insufficiency extend to the district court's findings about (i) shipment numbers, and (ii) package contents. As to the former, the district court appropriately held that UPS's own spreadsheets, which it generated and produced in discovery, were sufficient to prove the *number* of packages underlying the damage and

²⁹ Jacobs Tobacco, Smokes & Spirits, and the Arrowhawk group (Seneca Cigars, Hillview Cigars, and Arrowhawk Smoke Shop).

penalty calculations for all claims. That evidence (together with a limited number of unchallenged facts) independently supported the penalty award of \$80,468,000 under the AOD and \$78,350,000 under the PACT Act. (S.A. 384-385, 408-412, 479-485.)

For those categories of relief requiring a finding of *contents*—namely, the claims for recovery of unpaid cigarette taxes and for PHL § 1399-*ll* penalties for knowing cigarette shipments—the district court appropriately made reasonable inferences about package contents from the admitted evidence, without direct proof of content for each shipment. Nor did the court err by instructing the parties to use the court’s shipper-by-shipper and statute-by-statute factual findings, coupled with the evidence already in the record, to propose the correct calculation of damages and potential penalties after trial.

To the extent that there was any uncertainty in determining the exact number of contraband cigarettes shipped, responsibility lies at UPS’s own feet. UPS had a contractual audit obligation, plus other legal obligations not to ship stamped *or* unstamped cigarettes. UPS cannot accept contraband cigarettes for shipment, look the other way, and then demand exacting proof of what was inside the packages that it controlled.

- 1. The spreadsheets prepared by UPS provided more than a sufficient basis to determine the total number of packages that UPS handled for the relevant cigarette shippers.**

The number of packages that UPS handled for various shippers—and the dates of those deliveries—is an element of all of plaintiffs’ claims for damages and penalties. For the PACT Act and AOD penalties, it is the principal element, along with evidence showing when certain shippers became listed on the NCL or when UPS became obligated to conduct an audit because it had reason to believe the shippers were delivering cigarettes. For the remaining claims, determining the number of shipments and their dates was an important first step.

The spreadsheets generated and produced to plaintiffs by UPS, in response to plaintiffs’ request for just this information about UPS’s shipping activities, provided a sufficient and sound basis for the district court’s findings on number of shipments. Prior to trial, the court overruled UPS’s foundational objection to the spreadsheets’ admission because UPS had stipulated to their authenticity. (S.A. 230-234; J.A. 403.) Thus, plaintiffs could admit the spreadsheets without “the need for a sponsoring witness.” (S.A. 232.) At trial, the spreadsheets were thus admitted into evidence without accompanying testimony, as were data

dictionaries prepared by UPS defining the spreadsheets' terms. (J.A. 944-946:1454-59, 1341-1354.) UPS chose not to submit a witness to explain what it understood the spreadsheets to mean or not to mean.

Once evidence has been admitted as relevant and authentic, a factfinder has broad latitude to determine the weight the evidence deserves. Any lack of supporting testimony describing business records already established as authentic "is relevant only to the weight to be accorded such records." *Stein Hall & Co. v. S.S. Concordia Viking*, 494 F.2d 287, 292 (2d Cir. 1974). Moreover, a factfinder's damage calculation need only have a "reasonable basis." *Sir Speedy, Inc. v. L&P Graphics, Inc.*, 957 F.2d 1033, 1038 (2d Cir. 1992). The data contained in UPS's spreadsheets themselves, in conjunction with the UPS data dictionaries, provided a reasonable basis upon which to tabulate the number of packages shipped and determine when they were shipped.

Although the spreadsheets were lengthy and contained many fields, the relevant information was readily understandable, based on the data dictionaries and the face of the documents. To determine the total number of packages shipped on behalf of a particular cigarette shipper, the court simply needed to "add[] up row numbers on a list." (J.A. 1073:1970.) UPS

agreed that for the purposes of computing damages, “the Court is allowed to add up easy math.” (J.A. 1093:2049.) Ultimately, the district court adopted this “straightforward” and “sensible” approach. (S.A. 457.)

Testimony on these points was not required. The spreadsheets, produced in Excel format, contained fields showing the unique shipper number, the date a package was picked up, the State and zip code of delivery, and the actual or billed weight of every package. (*See, e.g.*, J.A. 1341-1344 (UPS’s data dictionary), 1435 (spreadsheet for Bearclaw Unlimited).³⁰) The contents of the fields were shown by the label on the spreadsheets or the further descriptions found in the data dictionaries prepared by UPS. The Excel program itself could sort, remove duplicates, and complete the basic addition for each relevant field to calculate the total number of packages delivered by UPS on behalf of an individual shipper. (*See* J.A. 468-482.)

Nonetheless, at trial, UPS challenged whether the spreadsheets were a reliable indicator of the overall number of packages shipped (as well as their weight). (S.A. 457-458.) But UPS presented no witness to support

³⁰ This spreadsheet and others were submitted to this Court in native format on a disk.

its attorney arguments. And UPS had produced these spreadsheets in the first instance in response to plaintiffs' requests for information about shipment counts. Assuming that UPS faithfully complied with its production obligations, it cannot later make a complete turnaround and assert that its own documents did not in fact answer the questions they were intended to resolve. In any event, the court took UPS's reliability objections into account: it agreed that packages weighing less than a pound were unlikely to contain cigarettes and thus should be excluded from the tabulation; and that packages being delivered *to* a cigarette shipper, rather than delivered *by* the shipper, should also be excluded.³¹ (S.A. 457-458.)

On appeal, UPS contends that the court erred by accepting the spreadsheets' reliability and plaintiffs' method for tabulating the package and carton counts. *See* App.Br.81-86. But this is essentially a challenge to the court's pretrial order overruling UPS's foundational objections—an order that UPS fails to cite or even reference on appeal.

³¹ Because package content was irrelevant for PACT Act and AOD penalties, the court should not have so broadly excluded from its calculations the packages weighing less than a pound. But plaintiffs do not challenge this exclusion here.

Although UPS rails against the district court's decision to consider the spreadsheet evidence without any testimony to explain the data, UPS itself did not put forth any witnesses or contrary evidence to explain why its own spreadsheets were unreliable. Rather, as the district court noted, both parties, via attorney argument, asked the court to "draw inferences from information on the face of the spreadsheets themselves." (S.A. 456.) That the parties' counsel disputed what the spreadsheets proved, and that the district court resolved those disputes as trier of fact, is entirely unremarkable. Choosing from between "competing inferences that can be drawn from the evidence" is the factfinder's province. *United States v. Morrison*, 153 F.3d 34, 49 (2d Cir. 1998). This Court must defer to those findings. *United States v. LaSpina*, 299 F.3d 165, 180 (2d Cir. 2002).

UPS's other arguments are not persuasive. It mistakenly contends, for instance, that plaintiffs "substituted shifting attorney proffers for evidence." App.Br.79. But the spreadsheets and data dictionaries were the critical evidence, and they were both authentic and relevant. Additional charts and proffers that UPS complains about were never admitted into evidence, and they were prepared and filed entirely at the district court's request. (See J.A. 580:5-6, 707-710:514-23.) The court disclaimed reliance

on these never-admitted charts. (S.A. 456.) That fact defeats UPS's reliance on *United States v. Citron*, where a summary chart both was admitted into evidence (without proper foundation) and formed "an important link" establishing proof of guilt. 783 F.2d 307, 316-17 (2d Cir. 1986). Neither is true here.

That the spreadsheets may have been large, and the required computations time-consuming, does not mean that testimony was required on the topic. The package counts here essentially involved a large-scale addition and division exercise that the trier of fact was equipped to undertake. *See, e.g., Gamero v. Kodo Sushi Corp.*, 272 F. Supp. 3d 481, 508-09 (S.D.N.Y. 2017) (explaining "calculations" and "math" undertaken to compute damage award).

2. The evidence adequately supports the district court's findings on package contents, especially when any uncertainty was caused by UPS's wrongdoing.

UPS also challenges the basis for the district court's findings about the extent to which package contents were cigarettes.³² Such findings

³² As noted above, PACT Act and AOD penalties do not depend on those findings. *See supra* at 112-13.

were required for plaintiffs' damages claims based on unpaid taxes and the penalty claims under PHL § 1399-ll for cigarette shipments. For penalties, the district court needed to find how many shipments contained cigarettes; and for damages, how many cartons of cigarettes they contained. As the weight of a carton was established as one pound (S.A. 295), the number of cartons could be calculated by applying a 1:1 pound-to-carton ratio to the applicable packages. (S.A. 461.)

UPS's challenges to the findings regarding package contents demand a specificity in proof that the law does not require. Under the "wrongdoer rule," where the fact of damage has been shown, "the burden of uncertainty as to the amount of damage is upon the wrongdoer." *Schonfeld v. Hilliard*, 218 F.3d 164, 182 (2d Cir. 2000) (quotation marks omitted).

This principle applies with added force here, where UPS's own failure to comply with its AOD audit obligations not only prevented "greater detail on the percentage of shipments containing cigarettes" (S.A. 289), as the district court observed, but also permitted the very violations to occur in the first place. Had UPS engaged in the audits that the AOD required, then UPS would have had no choice but to halt the illegal cigarette shipments that UPS would have discovered. Instead,

UPS's misfeasance allowed those shipments to continue for vast periods of time. UPS's own wrongdoing thus at once enabled the violations, muddled the damages question, and allowed UPS to claim ignorance of the packages' content. For UPS to "bear the risk of the uncertainty" caused by this conduct comports with "[t]he most elementary conceptions of justice and public policy." *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265 (1946). Denying significant relief for these violations would be a "perversion of fundamental principles of justice." *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931).

Ignoring these principles entirely, UPS instead denies that plaintiffs proved the "fact of damages" at all. App.Br.101. But the arguments in Point I above show otherwise: the district court found that UPS delivered unstamped cigarettes for seventeen on-reservation shippers (S.A. 314), and failed to audit those shippers and three others as the AOD required (S.A. 358-365). The court separately explained what evidence established the existence of damages as to each of these shippers. (S.A. 316-365.) Thus, for each liability shipper, evidence supported the "fact of damage." *Story Parchment*, 282 U.S. at 562. The district court's shipper-specific findings must be accepted unless clearly

erroneous, see *White v. White Rose Food*, 237 F.3d 174, 178 (2d Cir. 2001), and UPS contests none of them. Where, as here, “the existence of damage is certain, and the only uncertainty is as to its amount,” a court “will make the best appraisal that it can, summoning to its service whatever aids it can command.” *Contemporary Mission, Inc. v. Famous Music Corp.*, 557 F.2d 918, 926-27 (2d Cir. 1977) (quotation marks omitted).

The findings on package contents were thus properly “a matter of just and reasonable inference, although the result be only approximate.” *Story Parchment*, 282 U.S. at 563. And with “a stable foundation for a reasonable estimate” of damages, such an estimate may appropriately require “some improvisation.” *Tractebel Energy Mktg. v. AEP Power Mktg.*, 487 F.3d 89, 110 (2d Cir. 2007). Here, the court’s findings satisfy the “more liberalized standard of proof” applying where the defendant’s misconduct has bred the uncertainty. *Raishevich v. Foster*, 247 F.3d 337, 343 (2d Cir. 2001).

For four shipper groups (six individual shippers), plaintiffs went beyond the minimum facts necessary and adduced even more compelling evidence of package contents. For those shippers, plaintiffs submitted direct evidence of contents, consisting of customer order forms, shipping

invoices describing package contents, driver summaries, packing slips, and daily report printouts, as well as direct testimony and admissions in a federal plea agreement.³³ (See J.A. 808:912, 809:914-16, 810:920, 864:1132-34, 869:1153-54, 1107-1112, 1183-1185, 1198-1200, 1217-1258, 1260-1261.) Much of this information matched UPS's shipping records.³⁴ (S.A. 236-238; see Dkt.491¶¶915-26.) UPS offers no specific challenge to the findings regarding these six shippers, and certainly identifies nothing approaching clear error; UPS has thus waived any such challenge to these findings.

As to the remaining eleven cigarette shippers, plaintiffs' evidence of package contents was circumstantial. But the law permits such proof. See *United States v. Casamento*, 887 F.2d 1141, 1156 (2d Cir. 1989) (circumstantial evidence has same probative value as direct evidence).

³³ Because PX-8B and PX-55 each contain thousands of pages, the Joint Appendix includes only excerpts of those trial exhibits.

³⁴ UPS wrongly contends that plaintiffs adduced direct evidence about only five individual shippers: Smokes & Spirits, Jacobs Tobacco, and three shippers in the Arrowhawk Group. See App.Br.86. Plaintiffs also submitted direct testimony from Robert Oliver, an operator of shipper Mohawk Spring Water, as well as his federal plea agreement admitting to the shipment of 2,331 cases of cigarettes containing 30 cartons of cigarettes each. (J.A. 869:1154, 1184.)

Indeed, such proof is essential in cigarette trafficking cases since, like other wrongdoers, traffickers in unstamped cigarettes will not commonly create or retain records of their criminal activities or testify without asserting their right against self-incrimination. In plaintiffs' experience, it is difficult to compel on-reservation tobacco shippers to comply with discovery requests—even when the shipper is the actual defendant, and more so when, as in this case, the shippers are third parties. *See, e.g., City of New York v. Golden Feather Smoke Shop*, No. 08-cv-3966, 2010 U.S. Dist. LEXIS 63605, at *12-14 (E.D.N.Y. June 25, 2010).

The record here shows that reservation-based shippers and recipients were “exceedingly uncooperative” with discovery requests, “ignor[ed] subpoenas,” and “attempt[ed] to conceal themselves.” (J.A. 173-174, 217.) Ultimately, a few convicted traffickers agreed to assist plaintiffs. (J.A. 834:1015-16, 868-869:1150-54, 883:1207-09, 1002-1004:1684-91.) But such direct testimony was not legally required, and the Court should reject UPS's attempt to make it a prerequisite to damages for unpaid taxes under the CCTA and PACT Act, or penalties for cigarette shipments under the PHL.

Thus, for those shippers for which plaintiffs could not garner direct evidence of package contents, the district court appropriately looked to proof such as, for instance, reports from UPS drivers; results of UPS's belated audits; controlled buys of cigarettes by City investigators; whether the company was on the federal NCL; testimony and data regarding cigarette use as a percentage of nationwide tobacco consumption (*see* J.A. 981:1602, 1113-1134); the shippers' overall product lines; and "tracer inquiries," or the complaints that cigarette purchasers had lodged with UPS (*see supra* at 36-37).

Based on all the evidence, the district court made individualized approximations on a shipper-by-shipper basis. UPS mainly challenges this approach in concept; but a wrongdoer like UPS may not complain about the use of reasonable estimates in assessing damages, where the fact of damage is proven. *See, e.g., Tractebel Energy Mktg.*, 487 F.3d at 110; *Contemporary Mission*, 557 F.2d at 926-27.

The district court's estimates were firmly rooted in the trial evidence, and UPS offers almost no specific challenge to any of them. The record contains evidence that cigarettes constitute 95% of overall tobacco products consumed annually nationwide (J.A. 1113), as well as testimony

that mail-order tobacco shipments are especially likely to be cigarettes due to the ease of evading taxation through such shipments (*see* J.A. 808-809:912-15). Measured against this evidence, the district court's shipper-specific findings were, if anything, conservative and seemingly credited any inference that these known sellers of contraband cigarettes might also have shipped other merchandise.

Specifically, the court assigned a 95% or 100% cigarette percentage to four shippers (Elliott Enterprises, EExpress, Bearclaw, and Action Race Parts), because there was abundant evidence that these business shipped contraband cigarettes, and no (or minimal) evidence that they shipped anything else. (S.A. 316-326, 353-354.) The court assigned a 90% number for a shipper (Two Pine) in the Arrowhawk group, which was the subject of direct trial testimony about package contents; for which a UPS package broke open revealing cigarettes; and for which a later audit revealed yet more cigarettes. (S.A. 341-348.) For two other shippers (Native Wholesale Supply and Seneca Promotions), the court fixed 27% as the number because a UPS warehouse inspection in 2007 showed that 27% of these shippers' inventory was cigarettes (S.A. 354-358), and there was no evidence that the businesses had changed.

UPS purports to question the specific findings for the remaining four “circumstantial” shippers, but none was clear error. For instance, although UPS argues that the district court misanalysed tracer data for the Shipping Services group, the court’s 40% finding for those known cigarette shippers matched the percentage of packages with cigarettes in the only relevant audit UPS conducted, in early 2014, before terminating these accounts. (S.A. 329-334.) Where UPS failed so blatantly in its audit obligation, the company is ill served to complain that the court relied on the results of the lone audit that UPS did conduct, rather than attempt to reconstruct its violations in some other manner. For Indian Smokes, which appeared on the federal NCL, the district court arrived at a 50% number on the chance that this known cigarette shipper—whose account UPS once had terminated, and then resurrected *in the same name*—“had a broader product line.” (S.A. 336.)

UPS mischaracterizes the district court’s analysis as “quintessentially statistical.” App.Br.99. The court did not purport to engage in sampling or technical extrapolation, and was not required to do so to make factual findings about package contents for purposes of setting damages and penalties. To the contrary, as plaintiffs noted in their opening statement,

the court would have to “decide what percentage of packages . . . contained at least some cigarettes” based on “invoice[s] or other evidence on a shipper-by-shipper basis.” (J.A. 596:71.) The district court followed that approach here.

Moreover, UPS had every opportunity to challenge—and did challenge—the inputs for these estimates. UPS argued at length below that the evidence did not show either that the packages it shipped contained cigarettes or that UPS knew that the businesses were shipping cigarettes. (See Dkt.492:45-94, 216.) And after issuance of the court’s tentative liability opinion, UPS challenged the percentage of cigarettes assessed for certain shippers—Shipping Services, Smokes & Spirits, and Bearclaw—as “demonstrably incorrect,” based on audit results and the contents of shipping records and tracer inquiries. (J.A. 525-526.) UPS thus misses the mark in arguing that the court’s damages analysis violated due process. *See* App.Br.96-97. Unlike in the cases that UPS cites, the court here did not prevent UPS from challenging the evidence that was used to determine package contents, or the percentages derived therefrom.

3. The district court did not err by giving the parties an opportunity to calculate the overall damages and penalties based on the specific findings within the liability opinion.

After the district court found UPS liable in a thorough 219-page opinion, UPS refused to accept that result. The district court ordered plaintiffs and UPS to use the court's explicit findings, and the spreadsheets already in evidence, to propose the total number of packages and cigarette cartons relevant to damages and penalties. (S.A. 468.) This course of action was a reasonable method of ensuring that both sides had an opportunity to apply the court's factual findings to the damages evidence in the record.

UPS nonetheless refused to propose package and carton calculations based on the findings in the court's liability opinion, even with a reservation of objections to those findings. Instead, UPS calculated damages based on its *own interpretation* of the evidence. (J.A. 520-523.) UPS decided that only shipper invoices—or direct documentary evidence of package counts—could support an award of damages, and so UPS tabulated packages and cartons only for shippers subject to that kind of evidence. (J.A. 520-521.) UPS did not even attempt to tabulate the PACT Act or AOD package counts for other shippers, even though package content was irrelevant to those penalties. In all, under UPS's

interpretation, it could be liable only for less than 6,000 total packages delivered for five shippers—a tiny fraction of the shipments covered by the court’s order. (J.A. 520-521.)

Faced with just one set of proposed calculations (J.A. 507-518), the court used those uncontested numbers as basis for the damages and penalties findings (S.A. 473). Because UPS’s recalcitrance plainly forfeited any challenge to the court’s specific package counts, UPS argues on appeal that these tabulations could *only* have been zero. To support that position, UPS mischaracterizes the court’s action as a *sua sponte* reopening of the record “to demand additional (inadmissible) information.” App.Br.87. The court did no such thing.

The record was never reopened; the court simply directed the parties to apply the already admitted evidence to the court’s definitions and findings, to assist the court in calculating the “quantum” of relief. (S.A. 258.) The post-opinion submissions on packages and cartons put forth no new evidence and no new *theories* of damage; UPS’s cited cases involving an actual reopening of the record are therefore inapt. *See* App.Br.88. Rather, plaintiffs listed the exact spreadsheets they relied on, all in the record as evidence, and included charts with shipper-by-shipper

package counts, weights, and carton counts for each claim. (J.A. 509-518.) Plaintiffs proposed just two “corrections” to the court’s parameters: that the court had misstated the formula for how the parties were to determine the number of shipped cartons; and that for four shippers for which actual package weights were not listed, total cartons should rest on “billed weight” (minus one pound to account for any rounding up in the spreadsheet). (J.A. 508.) All of this information derived from admissible evidence already of record; none represented a so-called “mulligan” for plaintiffs to offer more. App.Br.89.

UPS complains that it could not respond to plaintiffs’ proposed calculations because the court ordered simultaneous submissions (*id.*), but this fails to provide the whole story. Plaintiffs showed UPS their proposed calculations before submitting them to the court, and UPS acknowledged that it had an opportunity to review and attempt to replicate the calculations. (J.A. 507, 522.) UPS’s submission to the court contained a lengthy dissertation about how UPS was “unable to replicate plaintiffs’ figures,” which derived from UPS’s own business records. (J.A. 522.)

Here again, the court did not “shift[] the burden of proof” onto UPS. App.Br.89. All the court did was ask the parties “to submit the numbers

of [p]ackages and [c]artons” as they were defined in the liability opinion. (S.A. 468.) By that point, plaintiffs had already met their burden of proof on damages. What remained was to plug in the damage and penalty calculations based on information in the record. The court did not shift any burden of proof by asking each of plaintiffs and UPS to propose the necessary answers.

UPS contends that if it had complied with the court’s directive, the court would have deemed it to have “admitted (or waived objections to)” any findings made upon its calculations. App.Br.90. But UPS could have reserved objections to the fact of damages or the process by which the court’s numbers were derived. And of course, UPS did object to the findings against it and to the court’s underlying order that it perform calculations based on those findings. (J.A. 520.) In any event, UPS never asserted this flimsy “risk of waiver” argument below.

Rather, the company simply decided to adhere to a method of calculating damages that the court had already rejected. Thus, when UPS complains that the district court “accepted *in toto*” plaintiffs’ proposed package and carton counts (App.Br.93), it identifies a self-inflicted wound.

C. *Plaintiffs' Cross-Appeal: The Damages Award Should Be Increased to Equal All Unpaid State and City Taxes on Cigarettes Shipped by UPS.*

While the district court's management of proceedings and review of the extensive record was both careful and sound, the court committed one discrete but significant legal error on damages that should be corrected on plaintiffs' cross-appeal. The court awarded plaintiffs only 50% of the state and local excise taxes that went unpaid on UPS's cigarette shipments, essentially reasoning that half of the purchasers would have managed to buy untaxed or lower-taxed cigarettes by some other means—including illegal ones—if UPS had complied with the law by declining those shipments.

That approach adopted an incorrect measure of relief in this statutory enforcement action. The governing federal statutes—the CCTA and PACT Act—were enacted to help ensure effective collection of cigarette taxes by state and local governments and to combat decades of tax evasion that had occurred in this complex national and international market. It is contrary to those statutes' text and purpose to reduce recovery of unpaid taxes on a defendant's illegal shipments because the taxes might have been evaded anyway, even if the defendant had refrained from the violations.

Because the correct measure of relief under the CCTA and PACT Act is simply the amount of unpaid taxes on the unlawful transactions UPS knowingly facilitated, the Court need not reach UPS's argument that the district court's 50% haircut—or "diversion" rate—was inadequate, and that a 95% to 100% reduction was required instead. In any event, if a diversion rate were appropriately applied (and it is not), UPS presents no valid ground to overturn the district court's fact-bound judgment regarding the appropriate percentage. The district court had ample basis to reject the opinion of UPS's expert that almost none of the consumers who relied on the convenience of UPS's door-to-door delivery of contraband cigarettes would have purchased taxed cigarettes in the absence of these illegal deliveries.

1. The CCTA and PACT Act allow plaintiffs to recoup unpaid taxes in full, without satisfying an extra-statutory "but-for" requirement.

Determining the correct measure of relief under the CCTA and PACT Act is a question of statutory interpretation. *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). The CCTA allows a State or locality in a civil action to obtain "appropriate relief for violations," including but not limited to "money damages" and

“injunctive or other equitable relief.” 18 U.S.C. § 2346(b)(2). And the PACT Act specifically allows a State or locality to recoup “any unpaid taxes” as part of the civil remedy for violations of that statute. 15 U.S.C. § 377(b)(2).

The PACT Act’s text thus explicitly permits recovery of “unpaid taxes” on the transactions that actually occurred. It does not call for examination of a counterfactual world in which different transactions occurred, and ask what amount of tax revenues would have been collected on those hypothetical transactions. And while determining what measure of “money damages” Congress intended as “appropriate relief” for CCTA violations may require a degree of statutory construction, the answer is readily provided by the statute’s core objective of stopping the varied and protean means of trafficking in contraband cigarettes. Under the CCTA, too, the measure of damages depends not on how many taxable sales would have occurred “absent UPS’s alleged conduct” (J.A. 2029, 2035), but rather on the taxes not paid on the illegal sales that UPS knowingly facilitated through its proven violations.

This interpretation is consistent with Congress’s purpose in enacting these statutes. Congress intended the CCTA and, decades later,

the PACT Act to stop the widespread evasion of cigarette taxes. UPS's damages theory conflicts with this purpose by exploiting the prevalence of cigarette trafficking as a means of reducing damages for its own knowing participation in smuggling activities. New York loses an estimated \$2 billion annually in cigarette taxes, with no New York taxes paid on more than half of cigarettes consumed in the State. See *supra* at 9. These statistics underscore the severity of the problems that the CCTA and PACT Act are intended to help solve; they do not provide an opportunity for wrongdoers to dilute or eviscerate the statutes' remedies, as UPS asserts.

To plaintiffs' knowledge, the district court here is the only court to have adopted the upside-down premise that damages for CCTA and PACT Act violations should decrease as the prevalence of unlawful trafficking increases—thereby rendering statutory damages least available in States like New York, where they are needed most. In *City of New York v. Milhelm Attea & Brothers*, for example, the court expressly held that the City “need not prove that the particular transactions involving the defendants' cigarettes directly ‘replaced’ transactions on which City taxes would have been collected.” No. 06-cv-3620, 2012 U.S.

Dist. LEXIS 116533, at *40 (E.D.N.Y. Aug. 17, 2012). Likewise, in determining the “pecuniary loss” to state or local governments for purposes of restitution for criminal CCTA violations, see 18 U.S.C. § 3663A(c)(1)(B), courts order payment of the “amount of” applicable “sales and excise tax” that went unremitted on the defendant’s unlawful transactions, *United States v. Morrison*, 685 F. Supp. 2d 339, 347-50 (E.D.N.Y. 2010). They do not look to hypothetical projections about what other wrongdoers might have done if the defendant had followed the law.

In a separate civil enforcement action, a competitor of UPS has offered an expert opinion that the company’s wrongdoing was “unlikely” to have had a “sizable impact” on the State’s and City’s lost tax revenue, given the “many other channels smugglers can use and would have used” to distribute untaxed cigarettes within the State. See *City of New York v. FedEx Ground Package Sys., Inc.*, No. 13-cv-9173 (S.D.N.Y.), ECF No. 396-2:4 (expert witness report of Scott Drenkard). If adopted by the Court here, this conception would unravel the CCTA’s damages remedy: Congress could not have intended a regime where wrongdoers can simply point fingers at each other as a means of suppressing their collective exposure. Similarly, Congress could not have intended for recovery for cross-border

cigarette shipments to be undermined by testimony that *other* cross-border shipments might have replaced those for which recovery is sought. (See J.A. 2045, 2048-2049.)

Rather than engaging in the required statutory analysis, the district court accepted a faulty analogy to tort principles. (S.A. 440.) In a tort case seeking lost profits, for example, the plaintiff's obligation to show proximate cause requires proof that "specific pecuniary advantages" were expected and "that the act complained of prevented them." *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 467 (2006) (Thomas, J., concurring) (quotation marks omitted). But it is highly doubtful that tort law would countenance a causation defense based on the claimed likelihood that other unlawful conduct would have filled the void if the defendant had acted lawfully.³⁵

³⁵ Tort principles typically do not permit a defendant to avoid paying damages by arguing that another tortfeasor's (or even innocent party's) actions would have been sufficient to produce the claimed harm absent the defendant's tortious conduct. *Navigazione Libera Triestina Societa Anonima v. Newtown Creek Towing Co.*, 98 F.2d 694, 697 (2d Cir. 1938) (Hand, J.); see also *Basko v. Sterling Drug, Inc.*, 416 F.2d 417, 429 (2d Cir. 1969). UPS's reliance on hypothetical, rather than actual, alternative causes should fare no better under black-letter tort law.

In any event, the “language of private tort actions” is only relevant here to the extent that it accords with the text and purposes of the CCTA and PACT Act. *SEC v. Apuzzo*, 689 F.3d 204, 212 (2d Cir. 2012). And those statutes cannot fairly be understood to incorporate UPS’s “diversion” theory. Taken to the extreme, the company’s argument would render damages wholly unavailable under the CCTA or PACT Act. Indeed, its expert witness testified that absent UPS’s conduct, diversion to tax-paid transactions would be “possibly zero” in New York. (J.A. 2037.) Not even UPS is willing to defend this suggestion that *no* damages are available to plaintiffs. Nor should this Court adopt a legal standard that inversely correlates civil enforcement damages with the prevalence of the wrong being targeted.

Plaintiffs are thus entitled to the full amount of the unpaid taxes on UPS’s shipments of unstamped cigarettes, totaling \$17,356,458 for the State and \$1,441,770 for the City.³⁶

³⁶ While both the CCTA and the PACT Act provide sufficient basis for damages, the district court awarded damages only under the CCTA to avoid double counting. (S.A. 484.) The court did make damages findings under the PACT Act, however, with a 50% diversion rate. (S.A. 482-484.) The corrected findings for PACT Act damages should be \$5,535,201 for the State and \$1,093,875 for the City.

2. Even if UPS's "diversion" theory were correct, the court did not err by rejecting the unreasonably low diversion rate of UPS's expert.

If a "diversion" theory were cognizable under the CCTA and PACT Act, the district court did not err in rejecting UPS's unreasonable estimate of the diversion rate. UPS's expert witness, Dr. Aviv Nevo, opined that had UPS not delivered unstamped cigarettes, no more than "5.4% of package recipients" might have bought New York tax-paid cigarettes instead—with many consumers buying untaxed cigarettes through some other means. (S.A. 441.)

While the district court partially credited this testimony, the court correctly deemed the 5.4% figure "unduly low." (S.A. 439-442.) UPS seems to believe that because plaintiffs "introduced no evidence on diversion" (App.Br.104), the court was *required* to accept Nevo's diversion figures. But UPS overlooks the substantial flaws in Nevo's methodology and conclusions, which plaintiffs exposed during cross-examination. (J.A. 1022-1043;1763-848.)

For example, Nevo failed to account for the fact that many New York residents would not have an easy means of transportation to replace the contraband cigarettes they received through UPS with low-tax or

non-taxed cigarettes from other States or from Indian reservations. (J.A. 1028:1787, 1030:1795-98, 1032:1803-04, 1036:1808-09.) UPS contends that the court below should have assumed, without any supporting evidence, that New York City cigarette consumers who relied on *home deliveries* by UPS would necessarily have used “public transportation” to make *out-of-state* purchases if home deliveries were unavailable. App.Br.106. The court had no duty to make such a speculative and implausible assumption.

In rejecting Nevo’s conclusion of a zero to 5.4% diversion rate, the district court agreed that Nevo’s methodology was unsound and concluded that his testimony was based on “weak” and “flawed” evidence. (S.A. 441.) The court was entitled to take the cross-examination into account when analyzing the accuracy of Nevo’s conclusions; indeed, that is the purpose of cross-examining an expert. *See, e.g., Howard v. Walker*, 406 F.3d 114, 127 (2d Cir. 2005).

Finally, although the district court should not have applied any “diversion” discount, if one were to apply, it was not clear error for the court to credit plaintiffs with 50% of the unpaid taxes. Nevo acknowledged that, based on “market-wide averages” of cigarette consumption, up to

56% of tax-free cigarette sales would have been replaced by taxable sales if UPS had followed the law. (J.A. 2042.) Nevo's much lower estimate of 5.4% relied on the assumption that buyers of unstamped cigarettes through UPS "were not average," and would be more likely to seek out untaxed cigarettes than other smokers would be. (J.A. 2042.) Because the district court identified "flaws" in Nevo's assumptions, the court did not clearly err in crediting Nevo's starting point: that the State and City would have collected half of the unpaid taxes on the shipments that did occur, in a counterfactual world in which they did not. (S.A. 442.)

D. The Award of Penalties Should Be Affirmed in Full.

UPS also challenges the district court's award of penalties as disproportionately high, but the award was far below the maximum amount authorized for UPS's thousands of violations. For example, the court awarded only half of the available penalties under the PACT Act and PHL § 1399-ll, and imposed merely a nominal penalty under the CCTA.³⁷ Given the extent of UPS's culpable conduct, the resulting harm

³⁷ If any other element of the penalty award were to be modified on appeal, the district court's award of nominal penalties under the CCTA would need to be revisited.

to public health and the public fisc, and the importance of deterring the company (and others) from engaging in such misconduct, the penalty award was a valid exercise of the court's discretion.

The award was also well within constitutional limits. The Eighth Amendment's Excessive Fines Clause sets the outer boundary for penalties awarded in a government enforcement action, and the award here complied with that provision. While UPS and several of its *amici* invoke other tests that courts have applied to review jury awards of punitive damages, those tests do not apply in an enforcement action brought to recover statutorily authorized penalties.

1. The district court appropriately exercised its discretion by imposing substantial penalties far below the maximum authorized by statute.

The district court's penalty award appropriately reflected the magnitude of UPS's years-long pattern of misconduct. Determining the amount of civil statutory penalties is a "highly discretionary" endeavor, *Tull v. United States*, 481 U.S. 412, 426-27 (1987), involving such factors as the "good or bad faith of the defendants, the injury to the public, and the defendants' ability to pay," *Advance Pharm., Inc. v. United States*, 391 F.3d 377, 399 (2d Cir. 2004) (quotation marks omitted).

The district court addressed each of those factors. (S.A. 445-447.) The “significant penalties” that it found “appropriate” reflect the court’s findings about the culpability and severity of UPS’s wrongdoing, as well as legislative judgments about the fitting response to the serious and ongoing problem of cigarette bootlegging. (S.A. 445.) The award fell comfortably within the court’s discretion. *See Advance Pharm.*, 391 F.3d at 398.

As a threshold issue, UPS wrongly lumps the AOD penalties into its excessiveness arguments. Those stipulated penalties are a product of UPS’s “voluntary agreement” (S.A. 497-498), and UPS specifically agreed that any AOD penalties would be “cumulative and in addition to” other remedies (S.A. 511). The district court did not abuse its discretion by assigning penalties in an amount to which UPS voluntarily assented. *Cf. Stewart v. LaGrand*, 526 U.S. 115, 119 (1999) (agreement to method of punishment waives Eighth Amendment objection thereto). The permissibility of AOD penalties must be judged by ordinary contract principles. *See generally W.W.W. Assocs. v. Giancontieri*, 77 N.Y.2d 157, 162 (1990) (contracts should be enforced according to their terms). Here,

UPS's defenses to contractual liability fail for the reasons given above. See *supra* at 71-83.

The remaining penalties awarded were statutory in nature, and they were not excessive. The relevant statutes target the persistent problem of cigarette bootlegging, as well as the “serious threat to public health” from mail-order cigarette sales. Ch. 262, § 1, 2000 N.Y. Laws at 2905 (PHL § 1399-*ll*). And they specifically impose liability on common carriers because those entities’ key position in the distribution chain means that financial sanctions can have a meaningful effect. See *supra* at 10-11, 15-21 (overview of PHL § 1399-*ll*, CCTA, and PACT Act). The penalties that the district court assigned here thus serve to punish and deter precisely the conduct that Congress and the New York Legislature intended these statutes to address. And the award was supported by specific findings that UPS’s conduct reflected a “high level of culpability” and constituted “unlawful enablement” of harms to public health. (S.A. 474-478.)

UPS does not contend that the legislatively authorized penalty amounts are unreasonably large at a per-violation level. Nor would such an argument succeed. Congress and the New York Legislature could

permissibly have found that a penalty of up to \$5,000 per delivery in violation of the PACT Act or PHL § 1399-ll, respectively, reasonably approximated the combined cost of investigating, prosecuting, and remedying such violations, while deterring future infractions. In general, contesting such a legislative policy choice encounters “unusually inhospitable legal terrain.” *In re Chateaugay Corp.*, 53 F.3d 478, 487 (2d Cir. 1995).

Thus, rather than challenge the specific per-violation penalties, UPS argues that the total penalties imposed here are too large *in the aggregate*. But a legislative judgment that penalties be imposed for every violation—without express limitation—requires that more violations will warrant higher penalties. And here, the size of the overall award simply reflects the vast number of violations that the district court found UPS to have committed. *See Korangy v. FDA*, 498 F.3d 272, 278 (4th Cir. 2007) (affirming a “substantial” civil statutory penalty that was the “direct result of the number of individual offenses committed”). Awarding per-violation penalties is necessary to maintain meaningful, ongoing incentives for a wrongdoer to bring itself into compliance, rather than making continued illegality costless after a point, or nearly so. *Cf. United States v. Dickinson*, 706 F.2d 88, 92 (2d Cir. 1983) (statutory fine must be large enough to

prevent wrongful act from becoming a cost of doing business). In any event, the district court awarded a total penalty amount substantially below the maximum available under the relevant statutes. (S.A. 479.)

UPS and its *amici* wrongly minimize the company's wrongdoing by asserting that it caused solely economic harm. App.Br.114; ChamberBr.9, CigarBr.7; WLFBr.26. While harm to the public fisc is no minor matter, UPS's unlawful actions also had serious public-health implications. As the district court found, the dangers from tobacco use, and the billions of dollars in tobacco-related health care costs to New York taxpayers, are "largely uncontested." (S.A. 258.) UPS mistakenly argues that the "impact of *smoking* on public health" differs from the harms of enabling sales of untaxed cigarettes. App.Br.115. But the substantial excise taxes imposed on cigarettes by the State and City are designed precisely (a) to reduce cigarette use, and (b) to defray some of the enormous healthcare costs resulting from cigarette smoking.

Thus, when cigarette taxation is systematically evaded, public health unquestionably suffers. Indeed, circumvention of cigarette taxes undermines one of the government's most effective tools for reducing the public-health consequences of smoking. And New York enforcement

agencies have struggled for years to prevent the illegal distribution of untaxed cigarettes originating from Indian reservations. *See, e.g., Morrison*, 686 F.3d at 100. The statutes at issue here represent legislative efforts over decades, at both the federal and state levels, to create effective tools to combat such evasion.

Nor is the penalty award here infirm, as UPS contends, because it exceeds the damages award. *See App.Br.115-17* (proposing limit of 1:1 ratio of penalties to damages when latter are “substantial”). This supposed constraint would radically reduce the amount of penalties available here, all the more so if UPS were to succeed in its effort to limit plaintiffs’ damages to 5.4% of the unpaid taxes on the cigarettes that UPS delivered. *See supra* at 133-42. Under UPS’s flawed approach, damages and penalties for illegal cigarette trafficking could be absorbed as part of the cost of doing business and passed along to the shipping public. In any event, there is no cause to cap penalties by the amount of provable damage. None of the relevant statutes ties the size of a penalty award to such a metric. And the case from which UPS derives this ratio concerned constitutional limitations on punitive damages, *see Turley v. ISG Lackawanna, Inc.*, 774 F.3d 140, 167 (2d Cir. 2014), which implicate

concerns quite different from those raised by statutory penalties in a law-enforcement action (see *infra* at 164-68).

UPS's suggestion that the penalties improperly double-count its wrongdoing fares no better. App.Br.107. This Court has long recognized that a wrongdoer may be liable for penalties, or even criminal sanctions, under multiple statutes targeting its misconduct. *See, e.g., FAA v. Landy*, 705 F.2d 624, 636 (2d. Cir. 1983); *United States v. Reed*, 639 F.2d 896, 905-06 (2d Cir. 1981). And here, the relevant statutes by their terms permit multiple penalties. The CCTA's remedies are made available "in addition to any other remedies under Federal, State, local, or other law." 18 U.S.C. § 2346(b)(3). The PACT Act expressly contemplates that a common carrier may face liability under both federal and state law if it fails to honor a state agreement. 15 U.S.C. § 376a(e)(5)(C)(ii). And the state public health law proscribes only a form of duplication that is not at issue here: penalties paid to both the State and a political subdivision "with respect to the same violation of [that law]." PHL § 1399-ll(6). The multiple, reinforcing penalties here are no accident: as the history of the provisions demonstrates, the successive legal regimes prohibiting cigarette trafficking were intended to add further compliance requirements and

financial sanctions when previous regimes proved inadequate. See *supra* at 9-21. Thus, the district court was permitted to impose statutory fines under all of these provisions. See *Landy*, 705 F.2d at 636.

2. The penalties were well within constitutional bounds.

Nor are the penalties constitutionally excessive. Because this is a government enforcement action, the Excessive Fines Clause of the Eighth Amendment controls the analysis. The district court rejected such a challenge after reviewing the factors from *United States v. Bajakajian*, 524 U.S. 321—the only Supreme Court case that has ever struck down a fine as excessive under the Eighth Amendment, and one involving a criminal forfeiture of over \$300,000 for a single currency reporting offense.

Consideration of the *Bajakajian* factors was unnecessary, because the relevant statutes specify the authorized penalty amounts for each violation, and UPS raises no challenge to those per-violation amounts. In *Bajakajian*, by contrast, there is no indication that Congress had contemplated the *amount* of the forfeiture authorized by the relevant statute, which required surrender of “any property” involved in the offense. 18 U.S.C. § 982(a)(1). While the total penalty here is large because

of the number of violations found by the district court, the fact that it remains within the dollar range specifically provided by the controlling statutes defeats any Eighth Amendment challenge. In other words, “[r]ather than being grossly disproportionate,” the accrued statutory “fine is, literally, directly proportionate to the offense.” *Moustakis v. City of Fort Lauderdale*, 338 F. App’x 820, 822 (11th Cir. 2009); accord *Newell Recycling Co. v. EPA*, 231 F.3d 204, 210 (5th Cir. 2000) (“No matter how substantial (in lay terms) an administrative fine may appear, if the fine does not exceed the limits prescribed by the statutes authorizing it, the fine does not violate the Eighth Amendment.”).

Moreover, if the *Bajakajian* analysis were appropriate, the penalties here would easily pass that test. Under that analysis, legislative judgments about maximum penalties are critical guides. The Supreme Court in *Bajakajian* required the defendant to show that the court-ordered forfeiture was “grossly disproportional to the gravity of [his] offense,” in recognition of the fact that “judgments about the appropriate punishment belong in the first instance to the legislature.” 524 U.S. at 336. The legislative determinations embodied in the PACT Act, PHL § 1399-ll, and the CCTA therefore must anchor any consideration of the following

factors derived from *Bajakajian*: (1) the “essence of the crime and its relation to other criminal activity”; (2) whether the defendant fits into the class of persons for whom the statute was principally designed; (3) the “maximum sentence and fine that could have been imposed”; (4) the nature of the harm caused by the defendant’s conduct; and (5) whether the penalty would deprive the defendant of his livelihood. *United States v. Viloski*, 814 F.3d 104, 110-11 (2d Cir. 2016); *see also United States v. George*, 779 F.3d 113, 122 (2d Cir. 2015).

UPS bears the burden to show that penalties are excessive, *Viloski*, 814 F.3d at 114, and the district court’s relevant factual findings must be accepted unless clearly erroneous, *Bajakajian*, 524 U.S. at 336 n.10. As demonstrated below, the penalty award here satisfies the *Bajakajian* test in every respect.

a. UPS’s substantial culpability justified the imposition of a significant penalty.

Based on the entire body of trial evidence, the district court found that UPS’s wrongful actions “demonstrate[d] a high level of culpability.” (S.A. 445.) This finding justifies significant civil penalties under the first *Bajakajian* factor. *See Viloski*, 814 F.3d at 110, 113.

As explained in detail above (see *supra* at 22-42), the proof at trial demonstrated years of intentional acts by UPS employees to maintain accounts with a number of different tobacco distributors known to be illegally shipping untaxed cigarettes. The district court also found widespread institutional acceptance of these practices, concluding that a “lack of commitment” to AOD compliance “pervaded [UPS’s] corporate culture.” (S.A. 265.)

UPS claims that the court instead should have given the company credit for “good-faith compliance efforts.” App.Br.112. But that claim fails to grapple with the extensive evidence of UPS’s repeated legal violations. Indeed, UPS cites only one purported example of good-faith compliance—an incident where a state trooper purportedly told a UPS employee that the company should continue accepting packages from certain known cigarette shippers to avoid impeding an ongoing investigation. (S.A. 282-283.) The district court gave due consideration to that evidence, finding that it reflected only a “limited, non-senior contact between one lower-level UPS employee and one state trooper,” and at best suggested “unreasonable reliance” by a “handful” of low-level people at one UPS shipping center for a two-month period. The court reasonably found that

this isolated episode was “not at all compelling” in the context of the company’s omnipresent failings. (S.A. 282-284.)

Nor may UPS evade responsibility by shifting blame exclusively to lower-level employees. App.Br.111-13. UPS’s compliance managers testified that the company consciously vested those same account executives and pickup drivers with frontline cigarette enforcement duties. (J.A. 660:326 (UPS made confirming shippers’ business lines “the responsibility of our account executives”), 685:426 (UPS left “a lot of” oversight to drivers’ “judgment” and “thought process”).) At any rate, none of the statutes at issue here requires a showing that a high-level corporate employee ratified other employees’ wrongful acts.

This point undermines UPS’s reliance on *Kolstad v. American Dental Association*, 527 U.S. 526 (1999). *Kolstad* involved a question of statutory interpretation under Title VII: whether, based solely on the imputed conduct of an employee, an employer could face an award of punitive damages for acting with “malice or with reckless indifference” to a plaintiff’s federal rights. *Id.* at 545 (quoting 42 U.S.C. § 1981a(b)(1)). By contrast, the statutes here do not require a showing of malice. And key to *Kolstad*’s result was hesitation to impute liability for punitive

damages to employers who themselves had undertaken “good faith efforts at” achieving legal “compliance.” *Id.* at 544. But here, the district court’s uncontested findings document a corporate culture rife with legal *noncompliance*. (S.A. 263-280, 316-358.)

This Court has regularly upheld severe statutory penalties against constitutional challenge even where the defendant’s wrongdoing involved willful blindness. *See, e.g., United States v. Collado*, 348 F.3d 323, 328 (2d Cir. 2003) (forfeiture of home); *United States v. Milbrand*, 58 F.3d 841, 848 (2d Cir. 1995) (same). In support of the opposing view, UPS cites *von Hofe v. United States*, 492 F.3d 175 (2d Cir. 2007). But the analogy is inapt; in *von Hofe*, this Court concluded that a wife who had turned “a blind eye” to her husband’s unilateral “decision” to cultivate marijuana in their home should not be punished by forfeiting her house. 492 F.3d at 188-89. That domestic predicament does not resemble the situation here, where UPS itself made the “decision” to transport contraband for known cigarette sellers. *See id.* Moreover, as the district court found, the AOD placed a “special” duty on UPS to ensure that it would not be “flying blind” regarding what it shipped for these sellers (S.A. 264), but rather would be “*actively looking* for indications that a package contains

[c]igarettes” (S.A. 506 (emphasis added)). Mrs. Von Hofe was subject to no similar contractual duties.

**b. UPS is within the class for which
the relevant statutes were designed.**

The second *Bajakajian* factor examines whether the defendant’s wrongdoing is conduct that the statute was principally designed to address. *Viloski*, 814 F.3d at 110; *see also Bajakajian*, 524 U.S. at 338 (defendant intended to use undisclosed cash only to repay a lawful debt; he was “not a money launderer, a drug trafficker, or a tax evader”). Here, the relevant statutes (and the AOD) all explicitly prohibit a common carrier’s delivery of untaxed cigarettes to consumers.

The PHL specifically makes it “unlawful for any *common or contract carrier*” to “knowingly transport cigarettes” to unauthorized individuals. PHL § 1399-ll(2) (emphasis added). Likewise, the CCTA makes it unlawful to “transport” contraband cigarettes. 18 U.S.C. § 2342(a). And the PACT Act bars common carriers that receive the NCL from delivering cigarettes for entities on the list. *See* 15 U.S.C. § 376a(e)(2). That Act also specifically provides for criminal and civil penalties against a “common

carrier.” *Id.* § 377(a)(2)(B), (b). The statutes were all directed at the very conduct that UPS was engaged in.

In particular, there is no basis whatsoever for UPS’s assertion that the PACT Act does not identify common carriers among the classes of persons the law “was principally designed to punish.” App.Br.118. The evolution over time of all of the relevant statutes evinces an increasing focus on common carriers as a key pressure point for shutting down smuggling, after years of failures in doing so. The most recent of these enactments, the PACT Act, put in place a tailored compliance mechanism—the NCL regime—expressly to deprive cigarette traffickers of common carriers’ services. *See* 155 Cong. Rec. S5853 (daily ed. May 21, 2009) (statement of Senate sponsor) (noting that common carriers were “indispensable” to illegal internet sales). As the district court observed, however, UPS “inexplicably” ignored the NCLs as entirely “irrelevant” to *any* of its cigarette-compliance obligations. (S.A. 267.) When an entity “facilitate[s]” wrongful “conduct in just the way the statute was designed to frustrate,” *Bajakajian*’s second factor “weighs in favor of” significant penalties. *United States v. Castello*, 611 F.3d 116, 123 (2d Cir. 2010).

c. The potential for substantial aggregate penalties under the statutes confirms the gravity of UPS's offenses.

The third factor—the “maximum sentence and fine that could have been imposed,” *Viloski*, 814 F.3d at 110—reinforces that the penalty award is constitutionally permissible. Authorized penalties shed further light on the legislature’s view of an offense’s gravity. *Bajakajian*, 524 U.S. at 339 n.14. Here, the PACT Act and PHL § 1399-ll permit per-violation penalties that could have amounted to a total penalty double what the district court imposed, without considering the additional penalties authorized by the CCTA.

That the district court ultimately imposed fines below the maximum counsels against a finding of excessiveness. Even when a statutory penalty is substantial, it will not be grossly disproportionate if “significantly lower than the total penalty that the district court could have imposed.” *United States v. Bernitt*, 392 F.3d 873, 880-81 (7th Cir. 2004); *see also Korangy*, 498 F.3d at 277-78 (fines for violations not excessive where they represented “substantial reduction” from what Congress authorized); *Newell Recycling Co.*, 231 F.3d at 210.

UPS misunderstands how the federal Sentencing Guidelines Manual bears on the analysis in attempting to limit the award to a within-Guidelines amount. *See* App.Br.117-18. As an administrative document, the Guidelines cannot override explicit legislative judgments on permissible sanctions. *See Bajakajian*, 524 U.S. at 338 n.14.

d. UPS's actions undermined the State's and City's efforts to combat a pressing public health problem.

The fourth factor—the nature of the harm caused by the wrongful conduct, *Viloski*, 814 F.3d at 110—provides particularly powerful evidence that the penalty award is reasonably proportional to UPS's wrongdoing. UPS's actions contributed directly to a “loss to the public fisc.” *Bajakajian*, 524 U.S. at 339. And, as discussed, its participation in cigarette tax evasion also damaged public health. The district court properly considered the latter harm, even if it was “not readily quantifiable.” *Towers v. City of Chicago*, 173 F.3d 619, 625 (7th Cir. 1999) (considering broader public harms caused by parties’ “facilitating [of] illegal activity” as part of excessive-fines analysis).

An important purpose of statutory penalties is to establish an appropriate level of punishment and deterrence where the harms from

unlawful conduct are difficult to quantify. The district court commented that UPS, as a cigarette transporter, might have caused relatively “lower” harm to public health than the manufacturers or sellers of the contraband cigarettes that UPS ferried. (S.A. 446.) But the court also correctly found that UPS’s actions contributed to the very harms that lawmakers aimed to address through cigarette taxation and through their repeated enactments authorizing penalties for violations by common carriers. (S.A. 476.) Because UPS’s widespread violations harmed both the public fisc and public health, significant penalties were appropriate. *See United States ex rel. Bunk v. Gosselin World Wide Moving, N.V.*, 741 F.3d 390, 409 (4th Cir. 2013) (under excessive-fines analysis, “the concept of harm need not be confined strictly to the economic realm”); *Korangy*, 498 F.3d at 278 (upholding penalty of \$3,000 per violation for use of defective cancer-screening equipment, given harm to patients’ chances of cure by early detection).

There is thus no basis for UPS’s request to exclude these public harms from the denominator of any comparison of the penalties imposed to the damages wrought by UPS’s violations. *See App.Br.115-16*. A sheer numerical ratio is not the correct test. *Bajakajian* instead requires a

showing that the fine grossly exceeds the *gravity of the offense*—which must account for the entire harm to the public from the violation, not just the quantifiable damage to an identified victim. And the analysis must give due deference to legislative judgments about the severity of the wrongdoing and the appropriate measure of punishment and deterrence. The penalty award does not violate the Constitution under this test.

e. The penalties are not unduly burdensome to UPS.

The fifth *Bajakajian* factor examines whether the penalty would deprive the defendant of a livelihood. *Viloski*, 814 F.3d at 111. Courts “need not consider this fifth factor in all cases,” but are permitted to do so. *Id.* at 112. Hence, the district court concluded that UPS could “handle a hefty fine” (S.A. 477); on appeal, UPS does not claim that the fine imposed will be “livelihood-destroying,” *Viloski*, 814 F.3d at 112, or imperil UPS’s status as a going concern. That is the only question that is relevant to this factor, and that is what the district court considered. (S.A. 477.)

UPS distorts the court’s decision by framing it as “using UPS’s wealth to inflate penalties.” App.Br.123. Rather, the court merely

weighed “UPS’s ability to pay” the authorized fine and determined that UPS’s financial statements showed that it could. (S.A. 477.)

The court also considered whether a much smaller fine, in line with UPS’s profits or revenues on the relevant shipments, would adequately ensure that UPS would “strictly maintain[]” the beneficial compliance changes instituted during this lawsuit. (S.A. 477.) This was a proper consideration, too, as deterrence “has traditionally been viewed as a goal of punishment.” *Bajakajian*, 524 U.S. at 329. Considering UPS’s size in weighing the deterrent effect of a large penalty is not the same as relying on “UPS’s financial health to *increase* penalties” (App.Br.123), as UPS asserts.

Finally, despite UPS’s claim, there was nothing contradictory about the district court’s awarding significant monetary penalties while declining to order injunctive relief or a federal monitorship. *See id.* at 121-22. “Denial of injunctive relief does not necessarily mean that the district court has concluded there is no prospect of future violations for civil penalties to deter.” *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 193 (2000). A court may choose from among various remedies to prevent future violations. *See id.* In doing so here,

the district court stated that it hoped the penalties would provide “standalone economic motivation” to UPS to maintain its post-lawsuit efforts at compliance. (S.A. 467.)

Only the organization “can take systematic steps to make improper conduct on the part of all its agents unlikely,” for which “civil liability will inevitably be a powerful incentive.” *American Soc’y of Mech. Eng’rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 572-73 (1982). As the evidence shows, the mere existence of multiple statutory and contractual penalty regimes failed to result in robust compliance efforts by UPS. Those efforts arose in earnest only after the City served UPS with a draft civil complaint in 2013. The district court thus was not wrong or inconsistent in finding that only a significant financial penalty would “capture the attention” of those individuals at UPS who had the ability to prevent a relapse to noncompliance. (S.A. 447.)

3. Principles limiting juries' damages awards in private suits do not apply here.

Although UPS concedes that the Excessive Fines Clause applies, it also invokes standards under the Due Process Clause to generate a multi-factor test of its own making.³⁸ App.Br.108-10. But the Excessive Fines Clause provides the relevant constitutional test for assessing “the government’s power to extract payments, whether in cash or in kind, as punishment for some offense.” *Bajakajian*, 524 U.S. at 328 (quotation marks omitted). That standard is implicated where, as here, public officials pursue penalties in federal court for statutory violations. Indeed, the statutes at issue here authorize suits *only* by government. *See* 15 U.S.C. § 378(c)(1)(A); 18 U.S.C. § 2346(b); PHL § 1399-ll(6).

The district court correctly concluded that the Excessive Fines analysis, and that analysis alone, governs UPS’s constitutional challenge to the overall penalty award. (S.A. 450.) The existence of an express constitutional provision addressing the size of punitive payments to the

³⁸ UPS further invokes factors derived from federal common law, some of which pertain to review of jury awards of punitive damages and thus are irrelevant here. *See* App.Br.108 (citing *Turley*, 774 F.3d at 164). Other factors addressing whether a statutory penalty award is an appropriate exercise of discretion are discussed *supra* at 143-50.

government precludes resort to substantive due process. When the Constitution “provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims.” *County of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998) (quotation marks omitted).

To be sure, the Due Process Clause ultimately shares the same goal as the Excessive Fines Clause: preventing “grossly excessive punishments.” *Cooper Indus., Inc. v. Leatherman Tool Grp.*, 532 U.S. 424, 434 (2001) (quotation marks omitted). But that similarity in basic objectives does not warrant transplanting due process holdings into the Excessive Fines context.

UPS emphasizes due process cases that look to the ratio of punitive to compensatory damages to test whether a jury’s award of punitive damages exceeds allowable limits. App.Br.115-16 (citing, *e.g.*, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003)). But even in the context of private suits, the Supreme Court long ago rejected the idea that the Due Process Clause requires that statutory penalties—unlike punitive damages—be tied to the victim’s actual losses. *See St. Louis I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 66 (1919); *see also Sony BMG Music*

Entm't v. Tenenbaum, 719 F.3d 67, 71-72 (1st Cir. 2013). The Court explained that because the penalty “is imposed as a punishment for the violation of a public law, the legislature may adjust its amount to the public wrong rather than the private injury, just as if it were going to the State.”³⁹ *Williams*, 251 U.S. at 66. That reasoning applies with force when the suit is brought by the government to recover for injuries to the public.

Nor would the proposed ratio make sense as a limit on permissible statutory penalties. A lay jury’s award of punitive damages “is an expression of its moral condemnation” of the defendant’s conduct, *Cooper Indus.*, 532 U.S. at 432, that may not involve “a finely tuned exercise of deterrence calibration,” *id.* at 439. By contrast, statutory penalties reflect legislative judgments regarding “the public wrong,” *Williams*, 251 U.S. at 66, and the need for punishment and deterrence, informed by

³⁹ The Supreme Court’s early due process decisions did not consider or decide whether the Excessive Fines Clause, which had not been incorporated to apply against the States, limited penalties imposed under state statutes. *See, e.g., Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111 (1909). Nevertheless, the Court’s due process analysis rested on the same general touchstone as modern excessive-fines review: whether the statutory “fines imposed” were “grossly excessive” to the wrongs being penalized, *id.*, or “so severe and oppressive as to be wholly disproportioned to the offense,” *Williams*, 251 U.S. at 66.

considerations broader than merely the magnitude of the injuries in an individual case. As already established, the statutes at issue here represent sustained legislative efforts to address a challenging enforcement issue with substantial implications for public health and the public fisc. Decisions about the “severity of punishment” necessary to address this problem are “peculiarly questions of legislative policy.”⁴⁰ *Gore v. United States*, 357 U.S. 386, 393 (1958).

The procedural aspects of the Supreme Court’s punitive damages jurisprudence also have no application to statutory penalties. Jury awards of punitive damages must be scrutinized to ensure that their “severity” meets constitutional requirements of “fair notice.” *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996). For penalties authorized

⁴⁰ This Court has suggested that statutory damages in consumer class actions might, past a certain level, implicate due process guideposts applicable to punitive damage awards. *Parker v. Time Warner Entm’t Co.*, 331 F.3d 13, 22 (2d Cir. 2003). The consumer-protection statutes at issue in *Parker* imposed minimum penalties per affected consumer, which, when multiplied by the number of class members, could yield “statutory damages so far beyond the actual damages suffered that the statutory damages come to resemble punitive damages.” *Id.* The Court did not apply the guideposts in that case, and has not suggested that they would apply to statutory penalties in a government enforcement action based on a pattern of repeated but distinct instances of misconduct.

by statute, however, notice is not an issue. An enforcement defendant—especially a sophisticated one like UPS—cannot plausibly claim to be unaware of the possibility of civil penalties that are plain on the face of the relevant laws. *See Capitol Records, Inc. v. Thomas-Rasset*, 692 F.3d 899, 907 (8th Cir. 2012) (holding that any “concern about fair notice does not apply to statutory damages, because those damages are identified and constrained by the authorizing statute”).

In sum, under the proper standard of review, the penalties imposed by the district court were well within constitutional bounds.

CONCLUSION

The judgment of the district court should be affirmed, except that this Court should order that the award of compensatory damages cover the full amount of unpaid taxes on the transactions at issue.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, Max Kober, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 32,786 words and complies the typeface requirements and length limits of Rule 32(a)(5)-(7).

/s/ Max Kober