STATE OF MAINE

MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Docket No. KEN-24-490

STATE TAX ASSESSOR

Plaintiff/Appellee

v.

FIFTH GENERATION, INC.

Defendant/Appellant

BRIEF OF APPELLANT

ON APPEAL FROM KENNEBEC COUNTY SUPERIOR COURT, AP-21-14

ATTORNEY FOR
FIFTH GENERATION, INC.

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INTRODUCTION / SUMMARY OF ARGUMENT

In 1959, Congress enacted 15 U.S.C. § 381 ("P.L. 86-272") to expressly limit a state's ability to impose income tax on foreign corporations engaged in interstate commerce where business activities within the state are confined to: 1) the "solicitation of orders"; *or* 2) "activities that are entirely ancillary to requests for purchases;" *or* 3) "de minimis in nature, where such activities fail to "establish …a nontrivial additional connection with the taxing State." [1]

[1] Under P.L. 86-272, Subsection (a)(1) protects the "**solicitation"** and **fulfillment** of orders by an out-of-state business. *Wisconsin Dep't of Revenue v. William Wrigley, Jr. Co*. ("*Wrigley"),* 505 U.S. 214, 223 (1992) ("We think it evident that in this statute the term includes, not just explicit verbal requests for orders, but also any speech or conduct that implicitly invites an order. Thus, for example, a salesman who extols the virtues of his company's product to the retailer of a competitive brand is engaged in "solicitation" even if he does not come right out and ask the retailer to buy some."). 15 U.S.C. § 381(a)(1).

Subsection (a)(2) protects an activity referred to as **missionary activities –** solicitation (including advertising and promotional activities) aimed at the ultimate consumers, thereby indirectly generating wholesale orders for the products. 15 U.S.C. § 381(a)(2); *Wrigley*, 505 U.S. at 233–34 ("Section 381(a)(2) shields a manufacturer's "missionary" request that an indirect customer (such as a consumer) place an order, if a successful request would ultimately result in an order's being filled by a § 381 "*customer*" of the manufacturer, *i.e.,* by the wholesaler who fills the orders of the retailer with goods shipped to the wholesaler from out of state."). *Wrigley*, 505 U.S. at 223, 233-34. The Superior Court did not address so-called missionary sales activities and entered summary judgment on narrower grounds, based on compelled delay in transfer of title and compelled storage in bailment as conditions of purchase by the State.

In 1992, the U.S Supreme Court in *Wisconsin Dep't of Revenue v. William Wrigley, Jr. Co*. ("*Wrigley*"), 505 U.S. 214, 228-229 (1992) construed P.L. 86-272 and provided functional definitions for the terms "solicitation of orders," "entirely ancillary" and "de minimis" under this statute. Under *Wrigley*, "'**solicitation of orders**" covers much more than what is strictly essential to making requests for purchases[,]'" and instead it includes of "*any speech or conduct* that implicitly invites an order." *Id*. at 228-29, 223 (emphasis added). The Supreme Court described "solicitation of orders" as "not merely inviting an order but the **entire process associated with the invitation**" and "**courses of conduct**," as opposed to discrete acts. *Id*. at 225-26.

Subsection (c) affords additional protections for **in-state independent contractors**, who are not considered to engage in in-state business activities "merely by reason of sales in such State, or the solicitation of orders for sales, of tangible personal property." 15 U.S.C. § 381(c). In contrast to a supplier, an independent contractor may sell, solicit, and maintain an in-state office without diminishing protections of P.L. 86-272. *Wrigley*, 505 U.S. at 225-226.

P.L. 86-272 thus provides protection to FGI for the sale of spirits from out-of-state, as well as its solicitation and missionary sales activities (including activities that are "entirely ancillary" to such activities in connection with the solicitation of orders). *Wrigley*, 505 U.S. at 228-29. Protection also exists for **de minimis** in-state activities, regardless of whether such activities are entitled to protection under other provisions of P.L. 86-272.

In *Wrigley*, the U.S. Supreme Court also construed P.L. 86-272 as protecting not only "solicitation of orders," but also "those **activities that are entirely ancillary to requests for purchases[.]"** *Id.* at 228-229 (emphasis added). Activities that fall under the "entirely ancillary" protection are those activities that "**serve no independent business function apart from their connection to the soliciting of orders[.]**" *Id*. As examples of protected "entirely ancillary" activities, the U.S. Supreme Court pointed to providing a car and a stock of free samples to an in-state salesperson because "the only reason to do it is to facilitate the requests for purchases." *Id*. at 229. In contrast, the Court singled out in-state repair and servicing of *already sold* products as being outside the scope of protection because these actions may help to increase purchases, but they are not connected to the process involved with requesting purchases. *Id*. Stated simply, assigning a post-sale repair job to a salesperson does not transform this activity into being part of the solicitation and fulfillment process for the initial sale.

This appeal concerns the scope of protections arising under P.L. 86-272 in relation to the sale of spirits by FGI to Maine's Bureau of Alcohol and Lottery Operations ("BABLO" or the "State") during the period of 2011 to 2017 (the "Audit Period"). FGI, the manufacturer of Tito's Vodka, is a foreign corporation domiciled in Texas. BABLO, a bureau of Maine's Department of Administrative and Financial Services, is the sole purchaser of spirits at the wholesale level in Maine's three-tiered

system for distribution of spirits. Under this system, spirits manufacturers and suppliers sell to BABLO, which in turn sells the spirits that it imports to licensed retail sellers. BABLO is the sole importer of spirits in Maine. 28-A M.R.S. § 2073-A ("[A] person other than the bureau may not transport spirits into the State or cause spirits to be transported into the State.").

However, as part of its purchase of spirits from FGI, the State requires as a condition of purchase that suppliers: 1) delay transfer of title until spirits are placed on a truck for delivery from the State Bailment Warehouse to retail agency stores; and 2) maintain a sufficient quantity of spirits (roughly a 30 to 60-day supply) at the State Bailment Warehouse in Kennebec County, Maine. Based on these requirements imposed by BABLO as a condition of purchase, the STA has taken the position that FGI (and presumably every single other foreign spirits supplier) is essentially "doing business" *within* the state because they are engaged in "sales" and are "maintaining a stock of goods" in the State of Maine. The STA has sought pass-through entity liability on FGI's income during the Audit Period, notwithstanding the immunity from tax provided by P.L. 86-272.

The first question presented in this appeal is whether the State's requirement of delayed transfer of title and storage in bailment as conditions of purchase fall within the protection of P.L. 86-272 because they either qualify as part of the "solicitation of orders" process or are "entirely ancillary to the requesting of orders"

under *Wrigley*. The answer to that question is yes. If, under *Wrigley*, "solicitation of orders" encompasses the "entire process associated with the invitation," this term must include fulfilment of the State's orders under the conditions and requirements specified by the State to close out the sale. *Id*. at 225-26.

In addition, the State's requirement of delayed transfer of title and compelled storage in bailment are "entirely ancillary to requests for purchases" under *Wrigley*. FGI literally has no ability or legal right to import spirits into the State of Maine unless requested by BABLO to do so to fill an order placed by BABLO, the sole purchaser of spirits in Maine at the wholesale level. 28-A M.R.S. § 2073-A (providing that only BABLO may import spirits into Maine). The conditions imposed on FGI "serve no independent business function apart from their connection to the soliciting of orders[.]" *Id*. at 228-229.

Simply put, if FGI wants to sell to the State, it must meet the State's preconditions for purchase and can only sell to BABLO on terms dictated by BABLO (including delayed transfer of title). FGI cannot sell in Maine or store in Maine except as an incident to the solicitation and fulfilment of orders placed by BABLO. Because "the only reason to do [these required actions] … is to facilitate the requests for purchases," delayed transfer of title and storage of spirits in bailment are "entirely ancillary" to requests for purchases under *Wrigley*.

The next pressing question presented in this appeal is whether the Superior Court erred in its Decision dated October 15, 2024 (the "Decision") when it declined to squarely reach the issue of whether FGI's activities were "entirely ancillary to requests for purchases" under *Wrigley*. A.18 at n. 9. Relying on authority that pre-dated *Wrigley*, the Court construed P.L. 86-272 narrowly and declined to address FGI's "entirely ancillary" argument as to compelled delayed transfer of title and compelled storage, instead broadly stating that "FGI's storage of its products at the Bailment Warehouse and in-state transfer of its products to the State fall outside of the scope of the exemption in P.L. 86-272[.]" *Id*. Because *Wrigley* teaches that the term "solicitation of orders" is broader than was applied and because FGI was entitled to protection based on its "entirely ancillary" argument under *Wrigley*, the Superior Court erred when it failed to squarely address FGI's arguments in relation these issues. A.228-233, A.412, A. 415, OSMF ¶23, ASMF ¶¶86, 93.

Finally, the Decision also should be vacated based on procedural defects and erroneous determinations. For instance, the Decision states that FGI did not controvert SMF ¶22 and ¶28. This was not the case. A review of OSMF ¶22 and ¶28 and materials cited therein demonstrate flaws in the STA's submissions, as well as the existence of genuine issues of disputed fact that should have precluded admission of these SMF by the Superior Court. Because disputed genuine issues of

material fact exist and judgment was not warranted as a matter of law, this Court should reverse the Decision and remand to the Superior Court for trial.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Fifth Generation Inc. ("FGI") is a manufacturer and supplier of spirits, namely Tito's Vodka (the "Product"), throughout the United States. A.385, ASMF ¶1. FGI is based in Austin, Texas and maintains its business offices and its distillery there. A.385, ASMF ¶2. During the Audit Period,[2] FGI sold spirits to Maine's Bureau of Alcoholic Beverages and Lottery Operations ("BABLO"), the sole purchaser of spirits in Maine at the wholesale level. A.388, ASMF ¶19; A.386, ASMF ¶5. During the Audit Period, BABLO was the sole commercial purchaser of spirits from spirits suppliers, including FGI, in the State of Maine. A.386, ASMF ¶6. During the Audit Period, BABLO was the sole importer of spirits in Maine. A.386, ASMF ¶7. During the Audit Period, FGI did not sell spirits directed to Maine to any party or individual except to BABLO. A.386, ASMF ¶8. During the Audit Period, FGI could not unilaterally transport the Product into Maine on its own accord or its own account without BABLO ordering and purchasing spirits from FGI. A.387, ASMF ¶12.

[2] The STA has asserted that FGI owes the STA state taxes based on an in-state presence or "nexus" with Maine during the period of January 1, 2011 through December 31, 2017. A.385, ASMF ¶3. The period in which the STA seeks payment of state tax from FGI is referred to herein as the "Audit Period." A. 386, ASMF ¶4.

During the Audit Period, Maine was a "control state," requiring distribution of spirits through three tiers, including the second tier comprised of BABLO as sole spirits wholesaler in Maine. A.387, ASMF ¶11. During the Audit Period, Maine had a three-tiered system for distribution of spirits, with suppliers first selling to BABLO, then BABLO selling to retail agency stores. A.387, ASMF ¶10. After purchasing spirits from suppliers of spirits, including FGI, BABLO sold spirits to licensed retail agency liquor stores during the Audit Period. A.386, ASMF ¶9.

During the Audit Period, BABLO required suppliers to appoint and maintain a licensed broker/sales representative to interface with BABLO and relay information to suppliers from BABLO concerning BABLO's inventory needs for purposes of reorder, receiving low stock and out of stock warnings from BABLO, and also through electronic data provided by BABLO to suppliers and brokers for purposes of meeting BABLO's reorder requirements. A.389, ASMF ¶22. M.S. Walker, Inc., FGI's required licensed broker/sales representative from May 8, 2012 to 2017, was an independent contractor that served as the licensed broker/sales representatives for roughly two to three dozen other brands that sold to BABLO and are unrelated to FGI. A.391, ASMF ¶¶27-29.

During the Audit Period, orders for purchase of spirits, tangible personal property, by BABLO were sent to Austin, Texas for FGI to approve or reject. A.389, ASMF ¶20. During the Audit Period, BABLO required FGI to continuously ship a

sufficient a 30 to 60-day supply of spirits;[3] this was a condition of sale imposed by BABLO. A.389, ASMF ¶21. FGI does not have any independent right or ability to ship spirits to Maine, to store spirits in Maine, or to sell spirits in Maine. A.390, ASMF ¶23. The only instance in which FGI would ever ship the Product to Maine was because it was pursuant to an order placed by BABLO, the only wholesale seller of spirits in Maine. A.390, ASMF ¶23. During the Audit Period, all of BABLO's orders for spirits were filled by shipment or delivery from outside of the State of Maine. A.390, ASMF ¶24.

During the Audit Period, FGI and M.S. Walker, Inc., FGI's required licensed broker/sale representative, engaged in solicitation of orders, including missionary sales activity, which are solicitation activities that are aimed at the indirect customers of a company's goods; such activities generate requests for purchases by appealing to those at the retail level, such as consumers, on-premises establishments, such as bars and restaurants, and off-premises establishments (agency liquor stores). A.390-

[3] During the Audit Period, BABLO sent low inventory reports and out-of-stock reports to all licensed brokers/sales representatives on a weekly basis to manage BABLO's inventory and for BABLO to reorder spirits through suppliers' licensed broker/sale representatives. A. 415-416, ASMF ¶¶94-96. During the Audit Period, BABLO also sent out of stock notices to suppliers to inform them of reorder levels. A. 415, ASMF ¶94. During the Audit Period, BABLO provided electronic data to suppliers and licensed brokers through an electronic portal so that they could monitor inventory levels to ensure that BABLO's reorder requirements were met based on the continuous requirement of roughly 30-60 days' supply. A. 415, ASMF ¶94.

391, ASMF ¶26. During the Audit Period, all of the visits by M.S. Walker, Inc. and FGI to bars, restaurants, and retail agency liquor stores had the sole purpose of obtaining new orders for the Product and were limited to missionary sales activity and extolling the virtues of the Product; the sole aim of such visits during the Audit Period was to seek reorder of the Product, to get future orders of Tito's Vodka through missionary sales activity and extolling the virtues of the product. A.426, ASMF ¶122.

During the Audit Period, FGI did not have any Maine office or employees located in Maine. A.387, ASMF ¶13. During the Audit Period, FGI was based in Austin, Texas, and did not have any offices, employees, or facilities domiciled or working in Maine. A.387-388, ASMF ¶14. During the Audit Period, FGI did not maintain any place of business in Maine and did not own, lease, or use any real or personal property in Maine. A.388, ASMF ¶15. During the Audit Period, FGI did not hold itself out to the public as conducting business in Maine through any permanent or temporary location in Maine. A.388, ASMF ¶16. During the Audit period, FGI did not collect money in Maine, did not make repairs or perform warranty work. A.388, ASMF ¶17.

In relation to the Assessment at issue in this matter, A.36-37, the Board of Tax Appeals issued a Decision dated March 19, 2021 in favor of FGI and against the STA, vacating the Assessment because it determined that FGI's activities were

protected by P.L. 86-272. A.40-47. The STA appealed from the Decision of the Board of Tax Appeals in the Superior Court, triggering a *de novo* proceeding under M.R. Civ. P. 80C. After discovery, the STA filed a motion for summary judgment on or about September 29, 2023 addressing not only the issues of compelled delay in transfer of title and compelled bailment, but also missionary sales activities. A.48-95. As reflected in the Decision, A.8-28, the Superior Court entered summary judgment in favor of the STA and against FGI based only on the issues of compelled delay in transfer of title and compelled bailment. This appeal followed.

STANDARD OF REVIEW

This proceeding was first brought pursuant to 5 M.R.S. § 11005, as modified by 36 M.R.S. § 151-D.[4] STA appealed from the underlying decision of the Board of Tax Appeals concluding that the Assessment at issue in this proceeding should be cancelled. Under 36 M.R.S. § 151-D, an "appeal" in the Superior Court under M.R.

[4] 36 M.R.S. § 151-D provides:

> Either the taxpayer or the assessor may appeal the decision to the Superior Court and may raise on appeal in the Superior Court any facts, arguments or issues that relate to the final administrative decision, regardless of whether the facts, arguments or issues were raised during the proceeding being appealed, if the facts, arguments or issues are not barred by any other provision of law. The court shall make its own determination as to all questions of fact or law, regardless of whether the questions of fact or law were raised before the division within the bureau making the original determination or before the board. The burden of proof is on the taxpayer.

Civ. P. 80C is a *de novo* proceeding for which that Court was required to independently determine questions of fact and questions of law, regardless of whether raised below, if not barred by other provisions of law. *Id*. The burden of proof is on the taxpayer, FGI. *Id*.

The Law Court reviews *de novo* whether a genuine dispute of material fact exists. *Express Scripts Inc. v. State Tax Assessor*, 2023 ME 68, ¶28, 304 A.3d 239, 248. When the taxpayer, who bears the burden of proof on appeal is the nonmoving party, it must present sufficient evidence to establish its prima facie case. *Id*. The State's power to tax is strictly construed in favor of the taxpayer. *Cmty. Telecommunications Corp. v. State Tax Assessor*, 684 A.2d 424, 426 (Me. 1996); Metcalf v. State Tax Assessor, 2013 ME 62, ¶15, 70 A.3d. 261, 265; *see also Ivan Allen Co. v. United States*, 422 U.S. 617, 640-41 (1975) (holding that where a statute imposes a tax and there is ambiguity, it is interpreted against the government seeking to impose it).

LEGAL FRAMEWORK

P.L. 86-272. Under P.L. 86-272,[5] which preempts any conflicting state law, a state may not impose income tax on a taxpayer engaged in interstate commerce if

[5] 15 U.S.C. § 381 provides:

> **(a) Minimum standards**
> No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on the income derived within such State by any person from interstate commerce if the only

the business activities of the taxpayer within the state are limited to the solicitation of orders for in-state sales of tangible personal property, the orders are sent out of

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business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:
(1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and
(2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).
(b) Domestic corporations; persons domiciled in or residents of a State
The provisions of subsection (a) shall not apply to the imposition of a net income tax by any State, or political subdivision thereof, with respect to--
(1) any corporation which is incorporated under the laws of such State; or
(2) any individual who, under the laws of such State, is domiciled in, or a resident of, such State.
(c) Sales or solicitation of orders for sales by independent contractors
For purposes of subsection (a), a person shall not be considered to have engaged in business activities within a State during any taxable year merely by reason of sales in such State, or the solicitation of orders for sales in such State, of tangible personal property on behalf of such person by one or more independent contractors, or by reason of the maintenance, of an office in such State by one or more independent contractors whose activities on behalf of such person in such State consist solely of making sales, or soliciting orders for sales, of tangible personal property.
(d) Definitions
For purposes of this section--
(1) the term "independent contractor" means a commission agent, broker, or other independent contractor who is engaged in selling, or soliciting orders for the sale of, tangible personal property for more than one principal and who holds himself out as such in the regular course of his business activities; and
(2) the term "representative" does not include an independent contractor.
15 U.S.C. § 381

state for approval, and the goods are delivered from out of state. 15 U.S.C. § 381(a). Sales and solicitation activities undertaken by an independent contractor (such as broker activity) on behalf of the out-of-state suppliers are included within the "safe harbor" provisions that hold that a taxpayer will not be subject to state income tax. 15 U.S.C. § 381(c).

Maine's Rule 808.04.D[6] addresses non-exclusive protected *in-state* conduct and activities that will not lead to the loss of immunity from state tax liability under P.L. 86-272 and *Wrigley*. Rule 808.04.D, as applicable during the Audit Period, provided:

> **D. Protected activities.** The following in-state activities conducted by a foreign corporation will not cause the loss of protection for otherwise protected sales that occur in the State of Maine:
> 1. Soliciting orders for sales by any type of advertising;
> 2. Soliciting of orders by an in-state resident employee or representative of the foreign corporation, so long as such person does not maintain or use any office or other place of business in the state other than an "in-home" office as described in subsection **(E)**, paragraph **20** of this section below;
> 3. Carrying samples and promotional materials only for display or for distribution without charge or other consideration;
> 4. Furnishing and setting up display racks and advising customers on the display of the foreign corporation's products without charge or other consideration;
> 5. Providing automobiles to sales personnel for their use in conducting protected activities;

[6] 18-125 C.M.R. 808 ("Rule 808"). Rule 808's provisions addressed to Protected Activities (Rule 808.04) during the Audit Period were recently shifted to subsection .06 of Rule 808, but the change appears to be a renumbering. FGI requested the Court to take judicial notice of the Rule 808, including Rule 808.04, provisions as they applied during the Audit Period of 2011-2017.

6. Passing orders, inquiries and complaints on to the corporation's home office;
7. Missionary sales activities and advertising campaigns incidental to missionary sales activities;
8. Coordinating shipment or delivery without payment or other consideration and providing information relating thereto either before or after the placement of an order;
9. Checking of customers' inventories without a charge therefor (for re-order, but not for other purposes such as quality control);
10. Maintaining a sample or display room for an aggregate of 14 days or fewer during the tax year, provided that no sales or other activities inconsistent with mere solicitation take place;
11. Recruiting, training or evaluating sales personnel, including occasionally using homes, hotels or similar places for meetings with sales personnel;
12. Mediating direct customer complaints with the sole purpose of ingratiating the sales personnel with the customer and facilitating requests for orders; and
13. Owning, leasing, using or maintaining personal property for use in the "in-home" office or automobile of an employee or representative, when the use of the personal property is limited to the conducting of protected activities. Thus the use by a foreign corporation's employee or representative of equipment such as a cellular telephone, facsimile machine, photocopier or personal computer, when limited strictly to the carrying on of protected solicitation and activity entirely ancillary to such solicitation or permitted by this rule, does not, by itself subject the foreign corporation to Maine's income tax jurisdiction.

ISSUES PRESENTED

I. Did the Superior Court err when it concluded that compelled delayed transfer of title and compelled storage in the State Bailment Warehouse were outside of the protections of P.L. 86-272?

II. Did the Superior Court err in declining to reach the issue of whether FGI's activities were "solicitation" and "entirely ancillary to requests for purchases" under *Wrigley*?

III. Did the Superior Court err in granting summary judgment because of the existence of disputed genuine issues of material fact or procedural defects?

IV. Should the Superior Court have waived or abated penalties under 36 M.R.S. § 187-B(7)(F) because FGI provided "substantial authority justifying the failure to pay"?

LEGAL ARGUMENT

I. The Superior Court erred when it concluded that compelled delayed transfer of title and compelled storage in the State Bailment Warehouse were outside of the protections of P.L. 86-272.

The first question presented is whether the Superior Court erred when it concluded that the State's requirement of delayed transfer of title and required storage in the State Bailment Warehouse permissibly resulted in compelled nexus sufficient to subject FGI to Maine taxation based on income derived from sales to BABLO. A.17-23. In support of its determinations, the Superior Court relied upon a case from 1972, *Heublein, Inc. v. South Carolina Tax Comm'n*, 409 U.S. 275, 278-79, (1972), while also narrowly construing P.L. 86-272 in a manner that is at odds with *Wrigley*. The Superior Court should have determined that compelled delayed transfer of title and compelled storage in the State Bailment Warehouse imposed by

BABLO as a condition of purchase were entitled to protection as part of the "solicitation of orders" process and because they are "entirely ancillary to requests for purchases" under *Wrigley*.

Heublein. First, the Superior Court relied on *Heublein* as standing for the proposition that conditioning purchase of spirits on compelled nexus was legally permissible, stating that the facts of the instant case and those of *Heublein* were "not materially distinguishable[.]" A.20. This was incorrect. Not only is *Heublein* materially different from the present case, it also was not informed by *Wrigley's* teachings concerning the scope of "solicitation of orders" and protection for activities that are "entirely ancillary" under P.L. 86-272.

Heublein was a Connecticut spirits supplier that sought to sell spirits in South Carolina. *Heublein*, 409 U.S. at 276-77. Unlike Maine, South Carolina was not a "control state" where the state itself serves as the sole wholesaler of spirits. *Id.* Instead, private companies served as wholesalers in South Carolina. *Id*. In order to monitor and regulate purchases and delivery of spirits, South Carolina enacted statutes that required out-of-state suppliers to have a local *employee* of the supplier to receive all in-state deliveries, to submit copies of invoices and delivery records to the South Carolina regulator, and to obtain prior approval from the regulator to release shipments to the local licensed wholesaler. *Id*. at 277-78. The purpose of this regulatory scheme was to "establish[] a check on the accuracy of these records[,]

and was not an attempt by the State to provide a basis for the taxation of an out-of-state seller's local sales." *Id*. at 282-83.

This regulatory scheme in *Heublein* implicated considerations that have no application in a control state, such as Maine, where the State itself is a party and participant to the purchase and sale of spirits (and has ready access to data concerning what it purchased from suppliers). The policy rationale that carried the day in *Heublein* in 1972 does not apply in a control state, such as Maine. Importantly, the STA's SMF and RSMF are silent on any asserted purpose for BABLO's requirement of compelled delay of transfer of title and compelled storage in bailment,[7] but FGI has proffered evidence in its OSMF and ASMF that it

[7] The Superior Court appeared to attempt to fill this gap through its own broad discussion of a potential legitimate state interest served by compelled nexus. In the Decision, the Court very broadly asserted that Maine, like South Carolina, has a legitimate interest in regulating alcohol. A. 22-23. However, the Court also admitted that amendments that it cited were not material to this action. Still, the record, including SMF and RSMF, appear to be devoid of any attempt by the STA to articulate how or why compelled delayed transfer of title and compelled storage serves a legitimate state interest other than taxation of income. *See Heublein*, 409 U.S. at 279 ("If we were persuaded that South Carolina has evaded the intent of the statute [P.L. 86-272], we would, of course, be reluctant to uphold its actions."). Instead, the record shows that FGI reasonably understood these conditions to selling to BABLO as part of the solicitation process and entirely ancillary to solicitation because FGI had no right or ability to do such actions except to close out an order place by BABLO, A. 437-38, ASMF ¶159-163, and maintain sufficient supply to ensure future orders from BABLO and avoid penalties, such as delisting of product by BABLO. A. 217-34, 248-53; OSMF ¶¶19, 20; 30. This should have precluded the entry of summary judgment.

reasonably viewed fulfilling such conditions to purchase imposed by BABLO as part of the solicitation and fulfillment process and entirely ancillary to requests for purchases. A.437-38, ASMF ¶159-163. Summary judgment should not have been granted.

Heublein is distinguishable on additional facts that are not present in this matter. In *Heublein,* the Connecticut supplier employed an individual within the taxing state of South Carolina. *Id*. at 277-78. This employee working in South Carolina maintained an office/desk inside of the local warehouse to receive delivery of spirits from Heublein. *Id.* This South Carolina employee also obtained prior approval from the South Carolina regulator for transfer and then actually transferred spirits to the private wholesaler in South Carolina after receiving approval from the regulator. *Id.* In this manner, Heublein could be viewed as literally doing business in South Carolina and physically overseeing transfer of ownership of spirits in South Carolina. *Id*.

In contrast, FGI has no employees, no real estate, no business presence in Maine. A.387-86, ASMF ¶¶13-17. FGI does not have a written contract with BABLO concerning the terms of sale and during the Audit Period always viewed sale of spirits to BABLO complete after it shipped from out-of-state to BABLO upon

delivery to the Bailment Warehouse.[8] A.437-38, ASMF ¶159-161. FGI has no ability or legal right to undertake such activities except as part of fulfilling orders for spirits from BABLO, the sole importer of spirits in Maine. A.437-38, ASMF ¶163. Complying with BABLO's requirements was an integral part of, and a precondition to, soliciting and filling orders placed by the State. A.219-37, OSMF ¶¶20-27 (noting required conditions of sale).

Although the Superior Court appeared to rely upon the 21st Amendment as providing cover for the State for broad regulation of alcohol within its borders, A.22 at n.11, the U.S. Supreme Court has made clear that the 21st Amendment does not stand on higher ground in relation to any other Constitutional provisions. In *Baccus Imports Ltd. v. Dias*, 468 U.S. 263, 274 (1984), the U.S. Supreme Court clarified that the 21st Amendment does not have primacy over the Commerce Clause, and found that a tax exemption for local liquor producers that aimed "to promote a local industry" violated the Commerce Clause because it was not supported by any clear concern of the 21st Amendment. To the extent that *Heublein* was understood by the

[8] This understanding is not fanciful. Under UCC 2-401(2), "[u]nless otherwise explicitly agreed, title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place[.]" 11 M.R.S. § 2-401. The STA has admitted that "[d]uring the [A]udit [P]eriod, there was no written contract between BABLO and FGI concerning FGI's sales of spirits to BABLO." A. 359, ASMF ¶56. FGI's understanding and intent are entitled to be considered and weighed in the context of a poorly defined arrangement with BABLO. A.437, ASMF ¶159.

Superior Court as permitting the 21st Amendment to trump Congress's power under the Commerce Clause to regulate interstate commerce, this view was mistaken. *See also Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 588 U.S. 504, 518-519 (2019) (confirming that the 21st Amendment does not trump other provisions of the constitution).

P.L. 86-272 was validly enacted by Congress pursuant to its powers under the Commerce Clause. *State ex rel. Ciba Pharm. Prods., Inc. v. State Tax Comm'n*, 382 S.W.2d 645, 657 (Mo. 1964). It is entitled to plenary application, as expressly acknowledged in Rule 808. *See* Rule 808.04 ("A foreign corporation that does business in Maine or **owns or uses property in Maine** is nevertheless not subject to the Maine income tax if its activities in this State are all activities that are set forth in Public Law 86-272 (15 United States Code § 381 *et seq*.).") (with emphasis). The Superior Court should have squarely determined whether compelled delayed transfer of title and compelled bailment as part of the purchase of spirits imported by BABLO were entitled to protection under P.L. 86-272 because they qualify as part of the "solicitation of orders" process or were "entirely ancillary to requests for purchases" under *Wrigley*.

Wrigley. In the Decision, the Superior Court addressed *Wrigley*, but declined to reach the argument that FGI's activities did not constitute "requests for purchases" or activities were "entirely ancillary to requests for purchases." A.18 at n. 9. The

Superior Court otherwise construed P.L. 86-272 narrowly despite the fact that the U.S. Supreme Court in *Wrigley* went to great pains to construe and define P.L. 86-272 as extending far beyond literal "requests for purchase." *Wrigley*, 505 U.S. at 226 ("It seems evident to that "solicitation of orders" embraces request-related activity that is not even, strictly speaking, essential, or else it would not cover salesmen's driving on the State's roads, spending the night in the State's hotels, or displaying within the State samples of their product. We hardly think the statute had in mind only day-trips into the taxing jurisdiction by emptyhanded drummers on foot.").

"Solicitation of Orders." After *Wrigley*, the statutory term "solicitation" "includes not merely the ultimate act of inviting an order but the entire process associated with the invitation[.]" *Id*. at 225-26. The Court noted that "solicitation of orders" under P.L. 86-272 describes in-state "business activities – a term that more naturally connotes courses of conduct." *Id*. That the State in this matter has imposed conditions on purchase of spirits on FGI, including compelled delayed transfer of title and compelled storage in bailment, means that an out-of-state supplier desiring to sell to the State needed to comply with such requirements as part of the solicitation and fulfilment process of selling to BABLO. The STA has admitted in deposition that compliance with BABLO's requirements is a condition of sale. A.439, ASMF ¶165, citing 02/06/23 STA Dep. at 41. The STA has testified in deposition that a

seller of spirits filled by a seller from out of state may fulfill the sale and not fall foul of P.L. 86-272. A.470, ASMF ¶267, citing 11/30/22 STA Dep. at 113-114. Stated plainly, the requirements imposed by BABLO for purchase of spirits are part of the "entire process associated with the invitation" under *Wrigley* to solicit and fill BABLO's orders for spirits.

"Entirely Ancillary to Requests for Orders." In addition, compelled delayed transfer of title and compelled storage in bailment are "entirely ancillary to requesting orders" under *Wrigley* because FGI has no legal right to transport spirits into Maine for sale to BABLO unless BABLO "causes" such spirits to be transported in the State through BABLO's order and purchase of spirits. 28-A M.R.S. § 2073-A ("[A] person other than the bureau may not transport spirits into the State or cause spirits to be transported into the State."). Under *Wrigley*, activities are "entirely ancillary" when they "serve no independent business function apart from their connection to the soliciting of orders." *Wrigley*, 505 U.S. at 228-29. FGI would not have any reason, ability, or right to engage in these activities[9] except as incident to

[9] To be more accurate, compelled delayed transfer of title and compelled storage in bailment do not implicate any *in-state* presence or activity *by FGI*. Such functions are performed by BABLO, through its agent Pine State. For its part, the STA testified that he could not speak to the process for transfer of title to spirits during the Audit Period, could not speak to terms of bailment during the Audit Period, could not speak to any arrangements to hold property in Maine for FGI during the Audit Period, and instead took the simple position that inventory alone causes nexus. A.435-37; ASMF ¶¶152-156. These are admissions by a party opponent seeking to assess significant tax liability against a foreign corporation. The issues also comprise the asserted basis

filling orders "filled by shipment or delivery from a point outside the State[.]" for sale to BABLO in Maine. A.388-390, ASMF ¶¶18-25. P.L. 86-272, Subsection (a)(1).

Compelled delayed transfer of title and compelled storage in bailment are "entirely ancillary" because "the only reason to do it is to facilitate requests for purchases." *Wrigley*, 505 U.S. at 229. Indeed, if FGI did not comply with the State's requirements, future orders would have been imperiled. A.439, ASMF ¶165, citing 02/06/23 STA Dep. at 41. As such, the activities relied upon by the STA to create compelled nexus are entitled to protection under P.L. 86-272 because they are "entirely ancillary to requests for purchases" and FGI would have had no reason to "do" these required items "apart from their connection to soliciting orders." *Wrigley*, 505 U.S. at 229.

De Minimis. Although FGI believes that the activities at issue in this appeal qualify as part of the "solicitation of orders" and are "entirely ancillary to solicitation," such activities also could qualify as de minimis in nature because they are part of the purchasing process required by the state. *De minimis* activities that go beyond solicitation are still protected under P.L. 86-272 where such activities fail

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for the STA's tax assessment against FGI. FGI is unaware of cases where a party-opponent was unable to state the factual basis for his claim and then was able to obtain judgment as a matter of law.

to "establish …a nontrivial additional connection with the taxing State." *Id*. at 228 (with emphasis). In view of the State's imposition of requirements on FGI as part of its purchase of spirits, these conditions may be viewed as a trivial connection to the taxing authority. *Id*.

The Decision. In the Decision, the Superior Court seized upon a phrase from *Wrigley* to support its determination that P.L. 86-272 did not offer protection to FGI. A.21. The Court wrote that "*Wrigley* held that "it is not enough that the activity facilitate *sales* [in order to qualify for P.L. 86-272 immunity]; it must facilitate the *requesting of sales*." A.21, citing *Wrigley*, 505 U.S. at 233. Divorced from context, this sentence would appear to have a broad sweep. However, the U.S Supreme Court actually wrote: "Although Wrigley argues that gum replacement was a "promotional necessity" designed to ensure continued sales, Brief for Respondent 31, it is not enough that the activity facilitate *sales;* it must facilitate the *requesting of sales*[.]" *Wrigley*, 505 U.S. at 233.

In *Wrigley*, in-state replacement of stale gum that had already been purchased was found not to be entirely ancillary to requesting orders because "Wrigley would wish to attend to the replacement of spoiled product whether or not it employed a sales force." *Id.* at 233. Such regular and systematic in-state replacement of gum that already had been purchased may fairly be viewed as facilitating goodwill (like a warranty repair), but it cannot be viewed as part of the solicitation and fulfillment

process for the initial sale. In addition, the record in *Wrigley* revealed an independent business function that was separate from solicitation of orders. *Id*. The Court also noted that Wrigley had actually sold gum directly to in-state retailers through "agency stock checks," which it viewed as falling outside of P.L. 86-272. *Id*.

In contrast, FGI has no independent business reason or any legal ability to transport spirits into Maine or yield to the legal fiction of delay transfer of title and compelled storage in bailment unless they are an incident to the solicitation and fulfilment of orders for spirits placed by BABLO on terms dictated by BABLO as a condition of purchase. Meeting BABLO's conditions for purchase facilitates the requesting of order (including future orders because FGI would be penalized for not maintaining the level of supply required by the State, A.217-227, OSMF ¶¶19-21; A.417-418, ASMF ¶¶93-97). They are what allowed FGI to sell and continue to sell to the State.

In sum, compelled delayed transfer of title and compelled storage in the State Bailment Warehouse are within the protection of P.L. 86-272 because they are "entirely ancillary to requesting orders" under *Wrigley*. *See also Pomco Graphics, Inc. v. Dir., Div. of Taxation*, 13 N.J. Tax 578, 590-91 (Tax 1993), 2021 WL 2154704 (holding that a state-imposed requirement of securing a casino license to solicit orders for paper products to New Jersey's casinos could not defeat tax immunity under P.L. 86-272 because the license was required "conduct" to solicit

an order and also was "clearly ancillary to solicitation of orders.") (citing and quoting *Wrigley,* 404 U.S. at 223 (stating that "solicitation" includes "any …conduct that implicitly invites and order."). The Court explained that New Jersey could not require that foreign seller engage in activity if it wants to solicit orders and then use that required activity to subject plaintiff to taxation when it would otherwise be immune. *Id*. The same rationale applies here and should permit the Law Court to determine, as a matter of law, that requirements imposed by BABLO as a condition of purchase are protected under P.L. 86-272 should it deem appropriate to reach this issue at this stage.

Commerce Clause/Unconstitutional Conditions. Separately, the Assessment based on compelled delayed transfer of title and compelled bailment also arguably violates the Commerce Clause. Under dormant Commerce Clause cases, if a state law discriminates against out-of-state goods or nonresident economic actors, the law can be sustained only on a showing that it is narrowly tailored to " 'advanc[e] a legitimate local purpose.'" *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 588 U.S. 504, 518 (2019). The Assessment against FGI violates the Commerce Clause because it seeks to compel out-of-state manufacturers/suppliers to consent to the legal fiction of an in-state physical presence (treating mandatory delivery to bailment warehouse as maintenance of in-state "inventory") as a pre-condition of selling spirits to the State of Maine. Such requirement, which seeks to

effectuate surrender of protections under P.L. 86-272, impermissibly burdens interstate commerce and is discriminatory in effect.

Interstate commerce is burdened because an out-of-state supplier should not be compelled to surrender its federal rights not to be assessed tax on income by a state as a condition to engage in interstate commerce. U.S. Const., art. 1, §8, cl. 3; *Tennessee Wine,* 588 U.S. at 518-519; *see also Koontz v. St. Johns River Water Mgmt. Dist.,* 570 U.S. 595, 604; 606 (2013) (describing the "unconstitutional conditions doctrine," and reaffirming that governments may not pressure parties into forfeiting constitutional rights by withholding benefits from those who wish to exercise such rights); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) ("[E]ven though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, ... [it] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests.").

II. The Superior Court erred in declining to reach the issue of whether FGI's activities were "entirely ancillary to requests for purchases" under *Wrigley.*

In the Decision, the Superior Court noted that Rule 808.03 provides that a foreign corporation had income tax in Maine if it (1) did business in Maine, including buying, selling, or procuring services or property; or (2) owned or used its property in Maine, including maintaining a stock of goods in Maine. A.16. As noted above

Rule 808.04 also provides that these in-state activities are protected and will not subject a foreign corporation to income tax liability if they fall within the scope of P.L. 86-272. Rule 808.03 cannot be applied in isolation.

The Superior Court determined that FGI had nexus in Maine because it "maintained a stock of goods in Maine in the Bailment Warehouse and sold its products from the Bailment Warehouse to the State of Maine. A.17., citing Rule 808.03. Having determined nexus, the Superior Court then concluded, in a somewhat circular manner, that the protections of P.L. 86-272 did not apply because FGI's spirits were "sold" in Maine and "stored" in Maine. A.21 ("[T]ransfer of title to FGI's products occurred in Maine, after they had been delivered and stored within the State."). Relying upon *Heublein*, the Court determined that the "transfers are neither solicitation of orders nor filling of orders by shipment and delivery from a point outside of the State." A.21. In the Decision, at footnote 9, the Court noted the *existence* of FGI's arguments that the challenged activities constituted solicitation or were entirely ancillary to requests for purchases, but declined to reach these arguments. A.18-19 at n. 9.

The Superior Court erred in failing to properly analyze the present case under the standards announced in *Wrigley,* including whether compelled delayed transfer of title and compelled bailment qualify as part of the "solicitation of orders" process to fill an order or were "entirely ancillary to requesting purchases" because FGI had

no ability or legal right to engage or accede to such acts except as part of the solicitation and fulfilment process. The Decision appears to rest on the notion that the challenged activities were not literal requests for orders, which is at odds with the scope of the term "solicitation" under *Wrigley*. FGI also made a prima facie case that the orders for spirits were filled for shipment and delivery from a point out-of-state, as well as other items required for P.L. 86-272. A.388-390, ASMF ¶¶19-27; A.217-219, OSMF ¶19.

Separately, the Decision also fails to analyze whether compelled delayed transfer of title and compelled storage in bailment, as required by BABLO as a condition of purchase, were "activities that are entirely ancillary" because they "serve no independent business function apart from their connection to the soliciting of orders[.]" *Wrigley*, 505 U.S. at 228-229.[10] Because only BABLO can cause spirits to be transported or imported into Maine, 28-A M.R.S. § 2073-A, and the business activities at issue are required to conclude a sale of spirits to BABLO, they are

[10] In *Wrigley*, the U.S. Supreme Court arguably stated that the degree of "ancillarity" was a fact question that should be judged not based on whether a reasonable buyer would consider the activities part of the solicitation, but "from the perspective of the seller." *Wrigley*, 505 U.S. at 230 n. 5. Consistent with the requirement to view facts in the light most favorable to the non-movant, FGI's reasonable view that compelled delayed transfer of title and compelled storage in bailment were part of the solicitation process and entirely ancillary to the requests for purchase should have been credited and should have precluded the entry of summary judgment.

entirely ancillary to the request for purchases by BABLO.[11] The Superior Court thus erred in failing to squarely address the "entirely ancillary" argument raised by FGI in its Opposition to the STA's Motion for Summary Judgment. A.99, A.110-111. To the extent that this issue may be viewed as a fact question or mixed question, summary judgment was inappropriate. If viewed as a pure legal question, summary judgment should not have been granted in favor of the STA. Accordingly, this Court should vacate the Decision and remand for trial.

III. The Superior Court erred in granting summary judgment because of the existence of disputed genuine issues of material fact or procedural defects.

It is often noted, but no less true, that the existence of any fact contest should result in the denial of summary judgment, while the non-moving party is entitled to

[11] Included among the evidence proffered by FGI in support of its argument were the following facts at A. 110-111: FGI and BABLO do not have any written contract between them and the arrangement for purchase of the Product by BABLO is ambiguous and poorly defined. A.437, ASMF ¶159. Concerning sales of spirits to BABLO, FGI viewed the sale of spirits as complete when spirits purchased by BABLO were delivered to the Bailment Warehouse. A. 401, ASMF ¶57. During the Audit Period, FGI could not unilaterally transport the Product into Maine on its own accord or its own account without BABLO ordering and purchasing spirits from FGI. A. 387, ASMF ¶12. There is no "title" to spirits as there could be for a car or house. A.437, ASMF ¶158. FGI has no independent business reason to delay transfer of title to BABLO and such conduct has no function apart from their connection to the solicitation of orders. A.437, ASMF ¶ 161. FGI has no ability or legal right to undertake such activities except as part of fulfilling orders for spirits from BABLO. A. 438, ASMF ¶ 163. Although the STA was not able to speak to facts concerning delay in transfer of title, to the extent it existed, it was a legal fiction and entirely ancillary to solicitation of orders because it was imposed by BABLO as a condition of sale. A. 437, ASMF ¶ 161.

"the full benefit of all favorable inferences that may be drawn from the facts presented." *Curtis v. Porter,* 2001 ME 158, ¶9, 784 A.2d 18 (quotation marks omitted). Even when one party's version of the facts appears more credible and persuasive to the summary judgment court, "a summary judgment is inappropriate if a genuine factual dispute exists that is material to the outcome." *Arrow Fastener Co., Inc. v. Wrabacon, Inc.,* 2007 ME 34, ¶17, 917 A.2d 123, 126. Summary judgment "is not a substitute for trial." *Id.* ¶18.

In the Decision, the Superior Court stated that SMF ¶¶22 and 28 were not controverted by FGI in OSMF ¶¶22 and 28 and therefore were admitted. A.12 at n. 4. This sweeping, but sparse, determination is contradicted by the content of the STA's SMF ¶¶22, 28 (which at times were overreaching or unsupported) and FGI's OSMF ¶¶22, 28, which contain specific objections and highlighted specific flaws that should have disqualified the SMF. A.219-245 (SMF ¶¶22-28; OSMF ¶¶22-28).

In SMF ¶¶22 and 28, the STA made several recurring attempts at trying get FGI to admit that FGI "sells spirits" in Maine and "stores spirits" in Maine. SMF ¶22 sought to establish what is likely a mixed question of fact and law: "During each year of the Audit Period, spirits delivered to and stored at the Bailment Warehouse remained the property of the spirits suppliers." A.227-230, SMF ¶22 (citing 28-A M.R.S. § 83-C(3), effective from March 16, 2014).

The problem with this statement is that it not only seeks in part to establish a legal question or mixed question of fact and law, but it also relies upon a 2014 statute to try to carry the weight for the entire Audit Period of 2011-2017. The STA also tried to rely upon language contained in bailment contracts with MBC and Pine State to attempt to bind FGI (not a party to such contract), while also ignoring that at least the Pine State contract states that Pine State bears "the full risk of loss of any nature whatsoever with respect to all Inventory at all times[.]" A.227-230 at OSMF ¶22.

FGI's OSMF ¶22 noted that only BABLO may import into Maine and that FGI viewed the sale of spirits as complete upon delivery to Maine. A.227-230 at OSMF ¶22. It also noted that the STA under oath -- a party opponent -- actually could not even speak to the manner or timing of transfer of title to BABLO, whether BABLO even purchased spirits from FGI. A.227-229. Amid such contested facts and inferences, SMF ¶22 should not have been admitted. *See also supra* note 11.

SMF ¶28 constitutes a duplicative attempt by the STA to obtain admission on a legal question or mixed question of law, asserting that "[d]uring each year of the Audit Period [2011-2017]," spirits became property of the State only upon removal from Bailment for shipment to an agency liquor store. A.240-244, SMF ¶28 (citing 28-A M.R.S. § 83-C(3), effective from March 16, *2014*). The same analysis, objections, and countervailing evidence applies to SMF ¶28, as noted above for SMF ¶22, 23 and 24. A.238-244, OSMF ¶28. The law cited does not address 2011-through

early March 2014. Countervailing evidence regarding FGI's understanding and practices in relation to delivery of spirits ordered and imported into Maine by BABLO, and objections to the STA's lack of personal knowledge concerning the basis for his own assessment apply here as well. *See supra* note 11.

The Superior Court also erred in crediting SMF¶¶26-27 for the proposition that M.S. Walker withdrew bottles from bailment on several occasions and that M.S. Walker potential removal of a bottle of vodka from bailment for sampling purposes demonstrated that FGI retained title. A. 11, 20,

In SMF ¶26, the STA sought to establish that FGI had the "ability and right to access their vodka while it was stored at the Bailment Warehouse and withdraw it from the Bailment Warehouse." FGI objected and provided countervailing evidence that FGI did not have access to spirits in bailment after BABLO imported them and that it viewed sale as complete upon delivery in Maine to BABLO, the sole wholesale seller of spirits in Maine. A. 236-237, OSMF ¶26. The notion that FGI was "free to do what it wanted" with spirits delivered to Maine after importation by BABLO is nonsensical; there is only one purchaser of spirits on the wholesale level in Maine –BABLO -- and only BABLO can legally transport and import spirits into Maine. A. 236-237, OSMF ¶26. Competing versions of FGI's "ability and right" to access spirits in bailment should have precluded admission of SMF ¶26.

SMF ¶27 absolutely overreaches and should have been denied because it is factually incorrect. Here, the STA state that "During each year of the Audit Period, FGI regularly withdrew bottles of its product from the Bailment Warehouse." SMF ¶27. There is no absolutely record support for this statement as to *any withdrawal* of any bottle from bailment by *FGI*, and certainly not "regularly" or "during each year of the Audit Period." Here, the STA has taken liberties in trying to impute *speculation* by the FGI's independent contractor and required licensed broker (M.S. Walker) concerning whether one individual may have taken a bottle from bailment for so-called missionary sales activity - free samples. A. 237-239, OSFM ¶27. One M.S. Walker contractor testified that he did not ever remove bottles from bailment, while another testified that she was speculating that it could have happened as an isolated event for any brand, and not specifically Tito's Vodka, but she was speculating and actually did not remember anything in particular. A. 237-239, OSFM ¶27. The STA's citations to not support the overly broad statement addressed to *FGI's* alleged "regular conduct" each year of the Audit Period, and countervailing record material has been provided to demonstrate that the STA's statement could not even apply to M.S. Walker, an independent contractor who serves as a required license broker in Maine and handles upwards of 50 spirits brands. This SMF should not have been granted or credited in a manner that favors the moving party.

In sum, the STA sought to establish facts that were either not fully supported by their record submissions, constituted legal questions or mixed questions of law and fact, and were otherwise controverted. Accordingly, the Superior Court should not have admitted SMF ¶22 and ¶28. A.12 n 4. For this additional reason, the Decision should be vacated and this case should be remanded to the Superior Court for trial.

IV. The Superior Court should have waived or abated penalties under 36 M.R.S. § 187-B(7)(F) because it provided "substantial authority justifying the failure to pay."

The Superior Court should have waived penalties under 36 M.R.S. § 187(B)(7)(F) because, as discussed above, FGI provided substantial statutory authority, including P.L. 86-272 and Rule 808 justifying its failure to pay. The Superior Court determined that FGI's position was "merely arguable" or "merely a colorable claim." A.26-27. However, FGI's construction of PL 86-272 and Rule 808 were well-reasoned constructions that establish that the compelled activities of delayed transfer of title and compelled storage in bailment are part of the solicitation process and entirely ancillary to requests for purchases under P.L. 86-272. As such, the Superior Court should have abated penalties in relation to its retroactive tax assessed on FGI.

CONCLUSION

For the foregoing reasons, the Court should vacate the Decision of the Superior Court, remand the matter for trial, and grant such other and further relief as the Court deems just.

Dated: February 3, 2025
[Resubmitted 02/05/2025
Under M.R. App. P. 7]

Respectfully submitted,

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CERTIFICATE OF SERVICE

Counsel for Appellant hereby certifies that this Brief, in the required quantity and manner, have been submitted to the Law Court electronically, and will be filed with the Law Court (1 original and 9 copies to the Law Court after approval by the Clerk of Corut, with electronic and physical service on counsel for Appellee (2 copies, plus electronic copy) in accordance with the Maine Rules of Appellate Procedure. Counsel for Appellee:

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