STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. Ken-24-490

STATE TAX ASSESSOR

Petitioner-Appellee

v.

FIFTH GENERATION, INC.

Respondent-Appellant

ON APPEAL FROM KENNEBEC COUNTY SUPERIOR COURT

BRIEF OF PETITIONER-APPELLEE STATE TAX ASSESSOR

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INTRODUCTION

The State Tax Assessor ("Assessor") upheld an assessment of Maine pass-through entity withholding, interest, and penalties against Fifth Generation, Inc. ("FGI"), for 2011-2017 ("Audit Period"). FGI appealed the Assessor's decision to the Board of Tax Appeals, which cancelled the assessment. The Assessor filed a Rule 80C petition for review to challenge the Board's decision. FGI filed what it called a "Cross-Appeal" in Superior Court.

The central issue is whether FGI proved that a federal law known as Public Law (P.L.) 86-272 prohibited Maine from imposing the tax at issue. The summary judgment record established that during each year at issue, FGI (A) stored substantial amounts of its vodka at a warehouse in Maine; and (B) transferred and sold its vodka in Maine to the State. Those undisputed facts are fatal to FGI's P.L. 86-272 argument under *Heublein, Inc. v. South Carolina Tax Commission*, 409 U.S. 275, 277-84 (1972). The record also established that FGI engaged in additional activities in Maine that are not protected by P.L. 86-272.

Relying just on FGI's storage and sales in Maine, the Superior Court (*Lipez, J.*) correctly rejected FGI's arguments and entered summary judgment in the Assessor's favor. FGI and its shareholders do not have a constitutional or statutory right to do business in Maine without paying their fair share of Maine taxes. This Court should affirm.

APPLICABLE LEGAL FRAMEWORK

A. Maine income taxes and pass-through entity withholding

During the Audit Period, Maine imposed tax on the income of nonresident individuals derived from or connected with sources within Maine. 36 M.R.S.A. § 5142 (2010 & Pamph. 2025).[1] Maine also imposed tax on the income of taxable corporations doing business in Maine, 36 M.R.S.A. § 5200 (2010), and on the income of certain nonresident estates and trusts derived from or connected with sources within Maine, 36 M.R.S.A. §§ 5175-A & 5176 (2010).

S-corporations are corporations that elect to pass corporate income, losses, deductions, and credits through to their shareholders for federal income tax purposes. *See Bufferd v. Comm'r*, 506 U.S. 523, 524-25 (1993); https://www.irs.gov/businesses/small-businesses-self-employed/s-corporations (last accessed Mar. 8, 2025) ("IRS Guidance"). S-corporations and other "pass-through" entities typically are not required to pay federal or Maine income tax at the entity level. IRS Guidance; *see* 36 M.R.S.A. § 5200; 36 M.R.S.A. § 5102(10) (Pamph. 2025); and 36 M.R.S.A. § 5102(8) (Pamph. 2025). Instead, shareholders of S-corporations (i.e., individuals, certain trusts, and estates) are

[1] Certain provisions of Title 36 cited in this section (i.e., §§ 5102, 5142, and 5200) have been amended since the Audit Period but not in ways that are material here.

required to pay tax on the income that passes (or flows) through to them. *Bufferd*, 506 U.S. at 524-25; IRS Guidance.

During the Audit Period, to facilitate the payment of Maine income taxes owed by pass-through entities' nonresident members (i.e., shareholders or owners), every pass-through entity that did business in Maine was required to withhold Maine income tax on the proportionate quarterly share of Maine-source income of each nonresident member and remit those amounts to the Assessor.[2] 36 M.R.S.A. § 5250-B(2) (2010). A nonresident member is a nonresident individual, a corporation or other business entity that did not have its commercial domicile in Maine, or a nonresident estate or trust. *Id*. § 5250-B(1)(A) & (B) (2010).

A pass-through entity that transacted business in Maine or realized Maine-source income and had any nonresident members was required to file an annual return reporting information about the entity, nonresident members subject to withholding, nonresident members exempt from withholding, and other information. *Id*. § 5250-B(2). The required withholding amount was set by Maine Revenue Services (MRS) rule. 18-125 C.M.R. ch. 803 § .06(A)

[2] FGI was an S-corporation and thus a pass-through entity under 36 M.R.S.A. § 5250-B(1)(C) (2010).

(effective Sept. 12, 2010, and amended effective Aug. 29, 2012, Apr. 5, 2015, and Oct. 8, 2016).[3]

The obligation to withhold and remit Maine income tax under 36 M.R.S.A. § 5250-B(2) applied to every pass-through entity doing business in Maine. The Assessor "construes Maine law to assert the tax jurisdiction of Maine to the full extent permitted by the Constitution and laws of the United States." 18-125 C.M.R. ch. 808 § .02 (effective May 20, 2000) ("Rule 808").[4]

B. Nexus

Generally speaking, "nexus" is the level of connection between a person and a state sufficient to trigger that person's tax obligations in that state. *See Gannett Co. v. State Tax Assessor*, 2008 ME 171, ¶ 28, 959 A.2d 741.[5] For the years at issue, a corporation generally had nexus in Maine for income tax purposes if it did business in Maine or owned or used its property in Maine. Rule 808.03. A corporation's nexus that results from using independent contractors as opposed to its own employees does not make a constitutional difference when the activities of the independent contractor enabled that

[3] None of the amendments to Rule 803 are material here.
[4] Rule 808 was amended in 2022 and 2023. This brief cites the version in effect during the Audit Period.
[5] For tax years beginning on or after January 1, 2022, the Legislature has defined when a corporation has nexus in Maine. *See* 36 M.R.S.A. § 5200-B (Pamph. 2025).

corporation to establish or expand a market in a state. *See Tyler Pipe Indus., Inc. v. Wash. State Dep't of Rev*., 483 U.S. 232, 250-51 (1987); *Scripto, Inc. v. Carson*, 362 U.S. 207, 211-12 (1960); Rule 808.06.

C. Public Law 86-272

Even when a person has nexus in Maine sufficient to satisfy constitutional requirements, P.L. 86-272 restricts Maine's ability to impose a net income tax on that person's income. In particular, P.L. 86-272 restricts the authority of a state (here, Maine) to impose a net income tax on the income of a corporation not formed under Maine law when its business activities within Maine consist solely of "the solicitation of orders ... for sales of tangible personal property, which orders are [then] sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State." 15 U.S.C. §§ 381(a)(1), (b); *Wisconsin Dep't of Rev. v. William Wrigley, Jr., Co*., 505 U.S. 214, 222-23 (1992); *Peterson v. State Tax Assessor*, 1999 ME 23, ¶¶ 7-9, 724 A.2d 610; Rule 808.04 & .05. And 15 U.S.C. § 381(a)(2) protects a "manufacturer's 'missionary' request that an indirect customer," including 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 233-34.

Although Congress did not define "solicitation of orders" in P.L. 86-272, the *Wrigley* Court set forth just two categories of activities that constitute the solicitation of orders protected under P.L. 86-272: (1) "requests for purchases," whether "explicit verbal requests for orders" or "any speech or conduct that implicitly invites an order"; and (2) activities that are "entirely ancillary to requests for purchases," *i.e.*, activities that "serve no independent business function apart from their connection to the soliciting of orders." 505 U.S. at 228-29.[6]

Wrigley emphasized that to be protected by P.L. 86-272, "it is not enough that the activity facilitate *sales;* it must facilitate the *requesting of sales*." *Wrigley*, 505 U.S. at 233 (emphases in original). The Court also explained that "[t]hose activities that are most clearly *not* immunized by the statute" include "actual sales" (emphasis in original)). *Id*. at 229 n.5.

P.L. 86-272 applies not just to the activities of the person and its employees and representatives, but also to the activities of independent contractors acting on behalf of that person. *See, e.g., Cheng Shin Rubber USA,*

[6] For tax years beginning on or after January 1, 2022, the Legislature amended Maine's tax law to provide that certain activities of spirits suppliers would not create nexus for certain purposes. 36 M.R.S.A. § 5202-D (Pamph. 2025).

Inc. v. Dep't of Rev., 2017 WL 1194517, at **4-6 (Or. Tax 2017); *Ann Sacks Tile & Stone, Inc. v. Dep't of Rev*., 2011 WL 5967187, at **3-6 (Or. Tax 2011).

In-state activities by or on behalf of a person other than "solicitation of orders" are protected by P.L. 86-272 if such activities are "*de minimis,*" *i.e.*, activities that establish only a "trivial" additional connection with the taxing State. *Wrigley*, 505 U.S. at 231-32. Whether in-state activity establishes a trivial additional connection with the state is based on several facts, including how frequently and regularly the activity is conducted, and it is measured on a qualitative and quantitative basis; and further, activities must be viewed in the aggregate. *Wrigley*, 505 U.S. at 235; *Peterson*, 1999 ME 23, ¶ 11, 724 A.2d 610; *see* Rule 808.04(C).

STATEMENT OF FACTS

The following facts were established by the summary judgment record and are true for each year of the Audit Period unless otherwise stated.[7]

FGI is a corporation with offices and a distillery in Austin, Texas. Appendix ("A.") 200-01 (State Tax Assessor's Supporting Statement of Material Facts ("STA SSMF") ¶ 1). FGI is a subchapter S-corporation for income tax

[7] The Assessor disputes much of FGI's Statement of Facts in its brief. *See* Blue Br. at 11-15. Many of FGI's asserted facts either are not supported by the summary judgment record or are disputed.

purposes. A. 202 (STA SSMF ¶ 2). FGI sold vodka throughout the United States, including in Maine, branded as "Tito's Handmade Vodka" or "Tito's Vodka." A. 202-05 (STA SSMF ¶¶ 3-4).

Spirits Business

Maine was (and is) one of 18 jurisdictions (17 states and one county) in the United States that controlled the sale of liquor within its borders through the use of governmental agencies at the wholesale level; these are generally referred to as "Control States." A. 205-06 (STA SSMF ¶ 8). Maine has been a Control State since soon after the Twenty-first Amendment repealed Prohibition in 1933. A. 206 (STA SSMF ¶ 9). New Hampshire and Vermont are also Control States. A. 206 (STA SSMF ¶ 10).

As the Supreme Court of the United States explained, "[t]he aim of the Twenty-first Amendment was to allow States to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use." *Granholm v. Heald*, 544 U.S. 460, 484 (2005). To that end, Maine law regulating the sale of alcoholic beverages in Maine is a long, detailed statute that has been frequently amended. *See* Titles 28 & 28-A, M.R.S.A.

The Legislature created the Bureau of Alcoholic Beverages and Lottery Operations ("BABLO") in 1997. P.L. 1997, ch. 373, § 28 (effective Sept. 19,

1997). BABLO's responsibilities have changed over time. *See* 28-A M.R.S.A. § 83 (2007 & Supp. 2013); 28-A M.R.S.A. § 83-B (2023); 28-A M.R.S.A. § 83-C (2023); and 28-A M.R.S.A. § 84 (2023).[8] Among BABLO's responsibilities during the Audit Period were administering Maine laws relating to the collection of the taxes on spirits that are required to be remitted under Title 28-A. 28-A M.R.S.A. § 83-B(1) (Supp. 2018); *see* 28-A M.R.S.A. § 1651(1) (2007) (Consumers' Tax);[9] *id*. § 1703 (2007) (Premium Tax)[10] (BABLO must sell spirits at a price that will produce a minimum premium, which amount must be allocated to the Department of Health and Human Services for substance use disorder prevention and treatment). Section 83-C, which addresses, among other things, BABLO's administration of the spirits business in Maine, was enacted effective March 16, 2014, "in order to ensure proper administration of the spirits business in the State …." P.L. 2013, ch. 476, § A-9 (Emergency Preamble).

Since March 2014, one of BABLO's roles has been to "[o]versee the wholesale purchase and storage of spirits sold" in Maine. 28-A M.R.S.A. § 83-

[8] The Title 28-A provisions cited in this brief have been amended since the Audit Period but not in ways that are material here.
[9] *Amended by* P.L. 2011, ch. 693, § 3 (effective Aug. 30, 2012); P.L. 2013, ch. 269, § C-12 (effective July 1, 2014); P.L. 2015, ch. 166, § 6 (effective Oct. 15, 2015).
[10] *Amended by* P.L. 2011, ch. 657, § AA-75 (effective Aug. 30, 2012); and P.L. 2013, c. 368, §§ XXXX-9 to XXXX-12 (effective Oct. 1, 2013)

C(3). Among the responsibilities of the director of BABLO was to "manage the sale of spirits through agency liquor stores …." 28-A M.R.S.A. § 84(1) (2023).

Maine had (and has) a three-tiered system for the sale of spirits comprised of suppliers, a single wholesaler, and retailers. A. 206 (STA SSMF ¶ 11). Suppliers that wanted to sell their spirits in Maine were required to sell their spirits to the State of Maine ("State"), which acted as the sole wholesaler. A. 208-14 (STA SSMF ¶¶ 16-17); *see* 28-A M.R.S.A. § 81(3) (2007); 28-A M.R.S.A. § 83-C(3); *see* 18-553 C.M.R. ch. 2, § II (2004 & amend. 2014) ("BABLO Chapter 2"). The State, in turn, resold spirits to agency liquor stores (i.e., retailers). A. 214-15, 256-58 (STA SSMF ¶¶ 18 & 32).

States have the right to "assume direct control of liquor distribution through state-run outlets or funnel sales through the three-tier system." *Granholm*, 544 U.S. at 489. "[T]he three-tier system itself is unquestionably legitimate." *Id*. (cleaned up).

In May 2004, pursuant to legislation,[11] Martignetti Companies of Maine, LLC (Maine Beverage Co., or "MBC"), entered into a contract with the State pursuant to which MBC provided certain services regarding the spirits business in Maine. A. 206-07 (STA SSMF ¶ 12). In May 2004, MBC entered into a

[11] P.L. 2003, ch. 20, § LLL-2 ("the Legislature finds that it is in the public interest to seek efficiencies and cost savings from privatizing the State's wholesale liquor business").

subcontract with Pine State Trading Co. ("Pine State") pursuant to which Pine State provided space to store spirits at a warehouse that Pine State owned in Kennebec County, Maine ("Bailment Warehouse"). A. 207 (STA SSMF ¶ 13). The MBC-State contract addressed the ownership of spirits while the spirits were stored at the Bailment Warehouse. A. 227-30, 240-44, 258-59 (STA SSMF ¶¶ 22, 28, 33).

In June 2014, again pursuant to legislation,[12] Pine State entered into a contract with BABLO pursuant to which Pine State agreed to provide certain services regarding the spirits business in Maine, including providing space to store suppliers' spirits at the Bailment Warehouse. A. 207 (STA SSMF ¶ 14).

Suppliers that wanted to sell their spirits in Maine were required to ship their spirits to Pine State's Bailment Warehouse, based on their projected sales and sales trends. A. 217-23 (STA SSMF ¶¶ 19 & 20); *see* 28-A M.R.S.A. § 81(3).[13] Spirits delivered to and stored at the Bailment Warehouse remained the property of the suppliers. A. 227-30 (STA SSMF ¶ 22); *see* 28-A M.R.S.A. § 83-C(3) (Supp. 2018) (effective Mar. 16, 2014) ("spirits delivered to and stored at a warehouse approved by the bureau are the property of the supplier."). The

[12] P.L. 2013, ch. 269, § A-4 (enacting 28-A M.R.S.A. § 90).

[13] A bailment warehouse arrangement for spirits has existed in Maine since no later than the 1990s. A. 259 (STA SSMF ¶ 34).

spirits became the property of the State only upon removal from the Bailment Warehouse for shipment to an agency store. A. 240-44 (STA SSMF ¶ 28); *see* 28-A M.R.S.A. § 83-C(3).

Suppliers were required to pay bailment fees to Pine State to store their spirits at the Bailment Warehouse. A. 230-35 (STA SSMF ¶¶ 23-24). The State shared in the bailment revenue. A. 235-36 (STA SSMF ¶ 25).

Suppliers had the ability and right to access their product while it was stored at the Bailment Warehouse and to withdraw it. A. 236-40 (STA SSMF ¶¶ 26-27). M.S. Walker, on FGI's behalf, regularly withdrew FGI's spirits from the Bailment Warehouse during 2012-2017. A. 237-40 (STA SSMF ¶ 27).

Spirits stored at the Bailment Warehouse were sold to the State only upon removal from the Bailment Warehouse for shipment to an agency liquor store. A. 240-44 (STA SSMF ¶ 28); 28-A M.R.S.A. § 83-C(3). Thus, all sales of spirits to the State by suppliers, including FGI, occurred in Maine. A. 240-48, 252-56 (STA SSMF ¶¶ 28-29, 31); *see* 28-A M.R.S.A. § 83-C(3).

Thereafter, the State sold spirits to agency liquor stores in Maine for resale to customers. A. 256-58 (STA SSMF ¶ 32). Spirits that were delivered to an agency liquor store became the property of the agency liquor store upon its receipt of delivery of the spirits. A. 258-59 (STA SSMF ¶ 33); *see* 28-A M.R.S.A. § 83-C(3).

System for Paying Suppliers for State's Purchase of Spirits

Because the State did not purchase spirits until they were removed from the Bailment Warehouse for shipment to an agency liquor store, the State put the following system in place to pay suppliers.

From January 1, 2011, to roughly July 1, 2014 – when MBC had the contract with the State for the spirits business in Maine – MBC sent two purchase orders ("POs") to FGI for each month's purchase activity: one PO showed the number of cases removed from the Bailment Warehouse and purchased by the State from the first day of the month through the fifteenth day; and another PO showed the number of cases removed from the Bailment Warehouse and purchased by the State from the sixteenth day of the month through the end of the month. A. 259-61 (STA SSMF ¶ 35).

After receiving these POs from MBC, FGI prepared and sent MBC two invoices showing the amount that the State owed FGI for the spirits purchased by the State for each portion of the month. A. 262-63 (STA SSMF ¶ 36). MBC (on behalf of the State) paid FGI the invoiced amounts. *Id*.

After Pine State was awarded the contract with BABLO for the spirits business in Maine, the same billing process was followed from roughly July 1, 2014, to December 31, 2017. Pine State sent two POs to FGI for each month's purchase activity: one PO showed the number of cases removed from the

Bailment Warehouse and purchased by the State from the first day of the month through the fifteenth day; and another PO showed the number of cases removed from the Bailment Warehouse and purchased by the State from the sixteenth day of the month through the end of the month. A. 263-66 (STA SSMF ¶ 37).

After receiving these POs from Pine State, FGI prepared and sent Pine State two invoices showing the amount that the State owed FGI for the spirits purchased by the State for each portion of the month. A. 267-69 (STA SSMF ¶ 38). Pine State (on the State's behalf) paid FGI the invoiced amounts.[14] *Id*.

FGI received at least the following amounts from sales of Tito's Vodka to the State during the Audit Period:

- 2011: $5,082
- 2012: $57,440.48
- 2013: $310,905.40
- 2014: $1,124,896.20
- 2015: $2,065,844
- 2016: $3,017,134.17
- 2017: $6,082,477.25

A. 269 (STA SSMF ¶ 39).

[14] FGI alleges that BABLO "placed orders" for spirits *before* FGI's product was removed from the Bailment Warehouse. Blue Br. at 11, 13. However, the record establishes that the State did not send POs to FGI until *after* FGI's spirits were removed from the Bailment Warehouse and sold to the State. A. 259-61, 263-66.

Pricing of Spirits

The pricing of spirits in Maine was largely set out in BABLO's pricing rule, BABLO Chapter 2. Final decisions regarding the regular list price (i.e., retail price) of spirits sold in Maine were made by the BABLO Director, subject to the approval of the Maine State Liquor and Lottery Commission ("Commission"). 28-A M.R.S.A. §§ 81, 83-C, 84, 1651 & 1703; BABLO Chapter 2, § II; A. 269 (STA SSMF ¶ 40). Except as provided by 28-A M.R.S.A. § 1651(1) (special pricing situations), the Commission was required to set the list price for spirits at a level that will produce an aggregate state liquor tax sufficient (A) to pay all BABLO's liquor-related expenses and (B) to return to the General Fund an amount substantially equal to the amount of state liquor tax collected in the previous fiscal year, 28-A M.R.S.A. § 1651(1). The list price must also be sufficient to cover the premium tax in section 1703 and any other tax or charge. 28-A M.R.S.A. § 1703(1). BABLO established the wholesale prices of spirits sold in Maine. 28-A M.R.S.A. § 83-C(2) (Supp. 2018); BABLO Chapter 2, § III.

The Commission determined which spirits items could be listed for sale in Maine. 28-A M.R.S.A. § 81. The Commission approved the listing of Tito's Vodka for sale in Maine as follows: the 750-ML bottle in 2006; the 1.75-liter bottle in 2011; the 1-liter bottle in 2012; the 50-ML bottle in 2015; the 375-ML bottle in 2015; and the 200-ML bottle in 2017. A. 269-70 (STA SSMF ¶¶ 41-46).

Spirits suppliers and their representatives could request, in writing to the BABLO Director, "special pricing" for products packaged at 375 milliliters and larger. BABLO Chapter 2, § II(C). Special pricing was a temporary reduction in the list price of a specific spirits product, i.e., a "sale" price. *Id*. The Director of BABLO was authorized to approve or reject requests for special pricing. *Id*.

M.S. Walker, Inc.

M.S. Walker, Inc. (M.S. Walker), was a corporation headquartered in Massachusetts that manufactured and sold spirits such as Allen's Flavored Coffee Brandy. A. 271 (STA SSMF ¶ 48). M.S. Walker also served as a broker in Maine for two-to-three-dozen brands. A. 271 (STA SSMF ¶ 49).

M.S. Walker employed four people who worked in Maine: Dolly Bois (entire Audit Period); Seth Ferris (October 2011-2017); Theresa Crane (2011-2016); and Stephen Chapman (2016-2017). A. 272 (STA SSMF ¶ 50). Ms. Bois was M.S. Walker's Maine State Spirits Manager. A. 272-73 (STA SSMF ¶ 51). Mr. Ferris, Ms. Crane, and Mr. Chapman were sales representatives for M.S. Walker in Maine and supervised by Ms. Bois. *Id*.

On May 8, 2012, FGI appointed M.S. Walker as its broker in Maine for the listing of FGI's spirits for sale in Maine. A. 281-83 (STA SSMF ¶ 63). M.S. Walker remained FGI's broker in Maine through the end of the Audit Period. A. 283

(STA SSMF ¶ 64). FGI paid M.S. Walker a commission for every case of Tito's Vodka purchased by the State. A. 283-84 (STA SSMF ¶¶ 65-66).

From May 8, 2012, through 2017, M.S. Walker was authorized by FGI to do what M.S. Walker determined was best for Tito's Vodka in Maine. A. 284-85 (STA SSMF ¶ 67).

FGI's Unprotected Activities in Maine

1. During 2011-2017, FGI (a) stored roughly a 60-day supply of its vodka at the Bailment Warehouse and (b) transferred and sold its vodka in Maine to the State. A. 227-30, 236-48, 252-56, 274-76, 276-78, 297-99, 313-15, 328-30, 344-46, 359-61 (STA SSMF ¶¶ 22, 26-29, 31, 54, 57, 76, 89, 102, 114 & 125).

2. During 2012-2017, M.S. Walker (on FGI's behalf) regularly submitted to BABLO requests for special pricing of FGI's products at licensed off-premises establishments in Maine. A. 296-97, 308-09, 322-23, 336-37, 351-52, 367-68 (STA SSMF ¶¶ 75, 85, 98, 109, 119, 130).

3. During 2012-2017, M.S. Walker (on FGI's behalf) discussed drink prices with licensed on-premises establishments in Maine and encouraged them to charge enough for drinks with Tito's Vodka so they made a good profit off of those drinks. A. 289-90, 312-13, 327-28, 343-44, 358-59, 379-81 (STA SSMF ¶¶ 70, 88, 101, 113, 124 & 143).

4. During 2012-2017, M.S. Walker (on FGI's behalf) regularly trained staff at licensed on-premises establishments in Maine, including providing the staff with recipe ideas and/or recipe cards prepared by FGI showing ideas for drinks containing Tito's Vodka. A. 285-89, 309-11, 324-36, 337-40, 352-55, 368-70 (STA SSMF ¶¶ 68-69, 86, 99, 110, 120 & 131).

5. In 2014, M.S. Walker (on FGI's behalf) and/or FGI organized and held a "VIP birthday party" in Maine. A. 317 (STA SSMF ¶ 95).

6. In 2017, FGI met with Pine State in Augusta, Maine, and asked it to change its planograms for licensed off-premises establishments in Maine to increase the amount of shelf space for Tito's Vodka. A. 377-78 (STA SSMF ¶ 141).

7. By early 2017, FGI had formed what it called a "partnership" with the World Pro Ski Tour (WPST), which had an office in Bath, Maine, to generate additional sales revenue from FGI's activities, including in Maine, because FGI determined (in its words) that the "*real value for* [FGI and M.S. Walker] *is to have a preferred status partner that allows us access into the sales drivers at each of the participating mountains*," including at Sunday River in Maine. A. 374-75 (STA SSMF ¶ 135) (emphasis added).

8. Pursuant to that partnership, in 2017, FGI paid $20,000 to WPST to sponsor certain events, including one at Sunday River in March 2017, in return

for financial considerations from WPST that FGI negotiated, including the right for Tito's Vodka to be the exclusive vodka at après ski bar parties at Sunday River and (A) lift tickets at Sunday River and (B) three sets of hotel rooms for two nights at Sunday River that FGI could use for its Maine sweepstakes. A. 375 (STA SSMF ¶ 136).

9. In 2017, M.S. Walker researched and provided FGI with information about the price of vodka sold in Maine by FGI's competitors Absolut and Pinnacle. A. 380-82 (STA SSMF ¶ 144). And FGI and M.S. Walker (in person on FGI's behalf) negotiated with WPST and a restaurant at Sunday River seeking to have drinks with Tito's Vodka placed on menus at that restaurant instead of its competitor Ice Pik Vodka; and if that restaurant did not acquiesce, then FGI would ask WPST to consider not having the WPST event at Sunday River in 2019. A. 378-79 (STA SSMF ¶ 142).

PROCEDURAL BACKGROUND

FGI has never filed a Maine pass-through entity withholding return. A. 382 (STA SSMF ¶ 145). MRS initiated a first-time audit of FGI in 2018 and issued a formal demand to FGI to file Maine pass-through entity withholding returns for the Audit Period. A. 384 (STA SSMF ¶ 147). FGI refused to file any returns. A. 384 (STA SSMF ¶ 148).

By assessment dated August 5, 2019, MRS assessed Maine pass-through entity withholding, interest, and penalties against FGI in the amount of $745,452.18 – $517,963 in tax, $97,998.43 in interest, and $129,490.75 in penalties. A. 384 (STA SSMF ¶ 149). On reconsideration, MRS upheld the assessment. A. 384 (STA SSMF ¶ 151).

FGI appealed the Assessor's decision to the Board of Tax Appeals, which cancelled the assessment. A. 385 (STA SSMF ¶¶ 152-53). The Assessor filed a timely Rule 80C petition, and FGI filed a "Cross-Appeal in Response to State Tax Assessor's Appeal from Decision of the Board of Tax Appeals." A. 3.[15]

After discovery closed, the Assessor moved for summary judgment.[16] A. 5. The Assessor's SSMF covered seven years of activities of FGI and M.S. Walker and the spirits business in Maine and was just 35 pages and 153 separate statements.[17] FGI's Opposing Statements of Material Fact and

[15] Neither Rule 80C nor any Maine statute authorizes the filing of a cross-appeal.

[16] FGI refused to stipulate to the admissibility of any exhibits or to the authenticity of its own business records. In a recent tax case, the Court emphasized that "it would have been desirable for the parties to have presented the case on a fully stipulated record." *Apple Inc. v. State Tax Assessor*, 2021 ME 8, ¶ 13, 254 A.3d 405.

[17] This was fewer than in *Express Scripts, Inc. v. State Tax Assessor*, 2023 ME 68, 304 A.3d 239 (parties negotiated 36 SMF and Assessor included 139 additional SSMF), and *State Tax Assessor v. Kraft Foods Group, Inc.*, 2020 ME 81, 235 A.3d 837 (parties negotiated 218 SMF). The Court may take judicial notice of the parties' filings in those cases. *Cabral v. L'Heureux*, 2017 ME 50, ¶ 11, 157 A.3d 795. Neither the trial court nor this Court expressed any concern about the number of SMF in those cases.

Additional Statements of Material Fact tacked on 289 additional statements and spanned 210 pages.

FGI also procured and relied upon affidavits from witnesses who contradicted their deposition testimony, contrary to *Express Scripts, Inc.*, 2023 ME 68, ¶ 33 n.7, 304 A.3d 239 (party opposing motion for summary judgment may not create a genuine issue of material fact by submitting an affidavit that contradicts affiant's deposition testimony) (citing *Zip Lube, Inc. v. Coastal Bank*, 1998 ME 81, ¶ 10, 709 A.2d 733 (same)). *See* A. 287, 289-90, 311, 313, 326, 328, 340, 342, 344, 355, 357, 359, 370, 373, 380, 394-95, 397, 425-26, 433. The court sustained the Assessor's objections to the Affidavit of Seth Ferris to the extent it contradicted his deposition testimony. A. 9 n.2.

The court rejected FGI's argument that the Assessor's SSMF should be disregarded. A. 8 n.1. FGI has abandoned that argument on appeal.

The Superior Court held oral argument and issued a Decision and Order dated October 15, 2024. A. 6, 8-28. The court granted the Assessor's motion for summary judgment, relying on FGI's storage at the Bailment Warehouse and transfers and sales to the State within Maine. A. 18 n.9, 28. FGI appealed. A. 6.

ISSUES PRESENTED FOR REVIEW

I. Whether the trial court properly entered summary judgment in the Assessor's favor, where the summary judgment record shows that during each year at issue, FGI (A) stored substantial amounts of its vodka in Maine; and (B) transferred and sold its vodka in Maine to the State.

II. Whether the trial court properly determined there was no genuine issue as to any material fact.

ARGUMENT

I. The trial court properly entered summary judgment in the Assessor's favor.

A party is entitled to summary judgment pursuant to M.R. Civ. P. 56(c) when the summary judgment record reflects that there is no genuine issue of material fact and the movant is entitled to a judgment as a matter of law. "A fact is material if it has the potential to affect the outcome of the suit, and a genuine issue of material fact exists when a fact-finder must choose between competing versions of the truth, even if one party's version appears more credible or persuasive." *Angell v. Hallee*, 2014 ME 72, ¶ 17, 92 A.3d 1154 (quotation marks omitted). "When the taxpayer, which bears the burden of proof, is the nonmoving party, it must present sufficient evidence to establish its prima facie case." *Express Scripts, Inc.*, 2023 ME 68, ¶ 29, 304 A.3d 239.

This Court reviews *de novo* whether the entry of a summary judgment was proper as a matter of law. *Angell*, 2014 ME 72, ¶¶ 16-17, 92 A.3d 1154. The court's interpretation of a statute likewise is reviewed *de novo*. *A.E. Robinson Oil Co. v. Cnty. Forest Prods., Inc.*, 2012 ME 29, ¶ 9, 40 A.3d 20. This Court also reviews the meaning of a contract *de novo* and interprets an unambiguous contract provision "according to the plain meaning of its terms." *Fortney & Weygandt, Inc. v. Lewiston DMEP IX, LLC*, 2019 ME 175, ¶ 34, 222 A.3d 613 (cleaned up).

FGI has the burden of proof on all factual and legal issues. 36 M.R.S.A. § 151-D(10)(I) (Pamph. 2025). No deference is given to the decision of the Board or the Assessor. *Kraft Foods Group, Inc.*, 2020 ME 81, ¶ 14, 235 A.3d 837. The Superior Court made its own determinations as to all questions of fact and law. *See* 36 M.R.S.A. § 151-D(10)(I).

A. The summary judgment record establishes that FGI did business in Maine and had nexus in Maine during each year at issue.

As the court correctly held, during 2011-2017, FGI did business in Maine and had nexus in Maine. A. 17. FGI stored its inventory at the Bailment Warehouse and transferred and sold its vodka in Maine to the State. A. 227-30, 236-48, 252-56, 274-76, 276-78, 297-99, 313-15, 328-30, 344-46, 359-61 (STA SSMF ¶¶ 22, 26-29, 31, 54, 57, 76, 89, 102, 114 & 125). FGI employee Timothy

Burke was physically present in Maine working on FGI's behalf. A. 280, 302, 303, 316-17, 330-31, 346, 362, 377-78 (STA SSMF ¶¶ 60, 79, 82, 91, 93, 94, 104-06, 116, 127, 140 & 141). As shown above, from May 8, 2012, through the end of 2017, M.S. Walker engaged in numerous activities in Maine on FGI's behalf.

In light of these undisputed facts, FGI's assertions that it did not have any "employees" "working in Maine," had no "business presence" in Maine, and did not own "any … personal property" in Maine, Blue Brief ("Br.") at 14, 23, are false. FGI has not challenged the court's ruling that it had nexus in Maine.

B. FGI did not prove that the only activities in Maine that were engaged in by FGI, or on its behalf, were protected by P.L. 86-272.

FGI and M.S. Walker (on FGI's behalf) engaged in numerous unprotected activities in Maine throughout the Audit Period. These activities were not protected by P.L. 86-272 because they are not (A) requests for purchases or (B) activities that are entirely ancillary to requests for purchases. *See Wrigley*, 505 U.S. at 228-34; *Peterson*, 1999 ME 23, ¶¶ 9-11, 724 A.2d 610; Rule 808.04.

1. FGI stored its vodka in Maine and sold it in Maine to the State.

During 2011-2017, FGI (A) stored its vodka at the Bailment Warehouse and (B) transferred and sold its vodka in Maine to the State. Spirits delivered to and stored at the Bailment Warehouse remained the property of the suppliers, A. 227-30 (STA SSMF ¶ 22), and became the State's property only

upon removal from the Bailment Warehouse for shipment to an agency liquor store, A. 240-44 (STA SSMF ¶ 28).

As the court properly held, the summary judgment record forecloses FGI's P.L. 86-272 argument because these activities were not (A) requests for purchases or (B) activities that are entirely ancillary to requests for purchases. A. 18-23.

FGI contends that storing its vodka at the Bailment Warehouse, and transferring and selling its vodka in Maine to the State, are "part of the solicitation" process or "entirely ancillary" to "making requests for purchases." Blue Br. at 26-28, 32-35. This contention stretches the meaning of those words beyond recognition and contravenes *Heublein*, 409 U.S. at 277-84, *Wrigley*, 505 U.S. at 229 n.5, 233-34, and *Peterson*, 1999 ME 23, ¶¶ 9-11, 724 A.2d 610. *See also* Rule 808.04(E)(16). The court properly rejected it. A. 18-23.[18]

The *Wrigley* Court expressly rejected the argument, a version of which is advanced here by FGI, that "solicitation of orders" includes any activities that are "routinely-associated-with-solicitation" or "customarily-performed-by" salespeople. *Id*. at 227. And to be protected by P.L. 86-272, "it is not enough

[18] Contrary to FGI's contention, Blue Br. at 32-35, the court addressed and rejected that argument. *See* A. 18-23. In any event, this Court may affirm by addressing that argument more fulsomely in this *de novo* review. *See Express Scripts*, 2023 ME 68, ¶¶ 19-20, 304 A.3d 239 (affirming summary judgment in Assessor's favor in part on alternative grounds).

that the activity facilitate *sales;* it must facilitate the *requesting of sales*." *Wrigley*, 505 U.S. at 233 (emphases in original).

Under no reasonable interpretation could storing vodka in Maine and transferring and selling vodka in Maine to the State be considered part of the "solicitation of orders" or activities that "facilitate[d] the requesting of sales" by FGI. The fact that FGI was not permitted to sell its spirits in Maine without storing them at the Bailment Warehouse does not mean that storage was part of the solicitation process or an activity that facilitated the requesting of a sale. Likewise, that Title 28-A caused FGI to transfer and sell its spirits to the State in Maine does not mean that in-state transfer and sale were part of the solicitation process or activities that facilitated the requesting of a sale. Under FGI's interpretation of P.L. 86-272, everything it did in Maine would be protected.[19]

Heublein is on all fours with this case. Heublein was a Connecticut corporation that produced alcoholic beverages that it sold in several states, including South Carolina. After Heublein was assessed income tax by South Carolina, Heublein contended its activities in South Carolina were protected by

[19] FGI's arguments as to why its storage in Maine and in-state transfers and sales were entirely ancillary to its requests for purchases, including "there is no 'title' to spirits ….,"; the delay in title transfer was a "legal fiction"; and FGI subjectively believed that it did not own its spirits after delivery to the Bailment Warehouse, Blue Br. at 35 n. 11, are meritless.

P.L. 86-272. The transfer of Heublein's products to a wholesaler in South Carolina "occurred within the State and clearly was neither 'solicitation' nor the filling of orders 'by shipment or delivery from a point outside the State' within the meaning of [P.L. 86-272]." *Id*. at 278-79. Because the transfer of Heublein's products to the wholesaler occurred within South Carolina, P.L. 86-272 did not protect Heublein from income taxation. *Id*.

As the court recognized, there are no material distinctions between this case and *Heublein*. A. 18-20, 22-23. FGI's attempt to distinguish *Heublein* fails. Blue Br. at 21-25. The differences highlighted by FGI were not material to the decision. Rather, the Supreme Court expressly excluded those facts from its holding. *See Heublein*, 409 U.S. at 278 ("We need not decide…."). And contrary to FGI's suggestion, nothing in *Wrigley* undermines *Heublein*. *See Wrigley*, 505 U.S. at 221, 223-24 (explaining *Heublein*).

The *Wrigley* Court also held that the taxpayer's storage of its product in Wisconsin was not protected by P.L. 86-272 because it was not ancillary to the requesting of sales. *Id*. at 233-34. Moreover, according to *Wrigley*, "[t]hose activities that are most clearly *not* immunized by the statute" include "actual sales" in the taxing state (emphasis in original)). *Id*. at 229 n.5. FGI ignores these aspects of *Wrigley*.

Moreover, nothing in *Bacchus Imports Ltd. v. Dias*, 468 U.S. 263 (1984), or *Tennessee Wine & Spirits Retailers Association v. Thomas*, 588 U.S. 504 (2019), *see* Blue Br. at 24-25, affects *Heublein*'s holding that Congress did not intend P.L. 86-272 to protect spirits suppliers from taxation by states with liquor control laws like South Carolina's, where suppliers were required to transfer and sell their spirits within the state.

2. FGI and M.S. Walker (on FGI's behalf) engaged in additional unprotected activities in Maine.

FGI and M.S. Walker (on FGI's behalf) engaged in additional activities in Maine that are not protected by P.L. 86-272 because they are not (A) requests for purchases by FGI or (B) activities that are entirely ancillary to FGI's requests for purchases. These activities may have facilitated future sales of Tito's Vodka in Maine, but they did not facilitate FGI's requests that customers purchase its spirits. Although the trial court chose not to address these additional unprotected activities, A. 18 n.9, this Court may consider them in its *de novo* review of the summary judgment record. *See Express Scripts*, 2023 ME 68, ¶¶ 19-20, 304 A.3d 239 (affirming summary judgment in Assessor's favor in part on alternative grounds).

Special pricing requests. During 2012-2017, M.S. Walker (on FGI's behalf) regularly submitted to BABLO requests for special pricing of FGI's

products at licensed off-premises establishments in Maine. A. 296-97, 308-09, 322-23, 336-37, 351-52, 367-68 (STA SSMF ¶¶ 75, 85, 98, 109, 119, 130). This activity is not protected by P.L. 86-272 because it did not facilitate the requesting of sales by FGI. *See Wrigley*, 505 U.S. at 233-34; *Peterson*, 1999 ME 23, ¶¶ 9-11, 724 A.2d 610; Rule 808.04(E)(18).

Similarly, in *Peterson*, this Court held that the following activities were not protected by P.L. 86-272 because they were not ancillary to requests for purchases, even though they were "in furtherance of good customer relations" (and likely facilitated future sales of the Petersons' products in Maine):

- accepting orders for products and delivering them in Maine;
- picking up items from customers in Maine;
- loaning items to customers in Maine;
- encouraging customers in Maine to attend seminars held by the Petersons in New Hampshire; and
- accepting payment from customers in Maine.

Peterson, 1999 ME 23, ¶¶ 9-11, 724 A.2d 610; *see also Santa Fe Natural Tobacco Co. v. Dep't of Rev.*, 551 P.3d 909, 920-24, 372 Or. 509, 526-33 (Ore.) (taxpayer's pursuit of "prebook orders" with wholesalers in Oregon not protected by P.L. 86-272), *cert. denied*, 2024 WL 5112315 (U.S. Dec. 16, 2024).

Pricing strategies. During 2012-2017, M.S. Walker (on FGI's behalf) discussed drink prices with licensed on-premises establishments in Maine and encouraged them to charge enough for drinks with Tito's Vodka so they made

a good profit off of those drinks. A. 289-90, 312-13, 327-28, 343-44, 358-59, 379-81 (STA SSMF ¶¶ 70, 88, 101, 113, 124 & 143). This activity did not facilitate the requesting of sales and thus is not protected by P.L. 86-272. *See* Rule 808.04(E)(18).

Staff training. During 2012-2017, M.S. Walker (on FGI's behalf) trained staff at on-premises establishments in Maine, including providing staff with recipe ideas and/or recipe cards prepared by FGI showing ideas for drinks with Tito's Vodka. The training helped these establishments make better tasting cocktails and a wider variety of cocktails containing Tito's Vodka, which is a type of technical assistance. This activity is not protected by P.L. 86-272. *See* Rule 808.04(E)(6) (providing any kind of technical assistance is unprotected); *Kennametal, Inc. v. Comm'r of Rev.*, 426 Mass. 39, 40, 43 & 45, 686 N.E.2d 436, 438, 440 & 441 (1997) (providing training to customers and prospective customers, including on proper use of Kennametal's products, is not protected by P.L. 86-272).

VIP birthday party. In July 2014, M.S. Walker and/or FGI organized and held a "VIP birthday party" in Maine. FGI's argument below that this activity was "missionary sale activity" protected by P.L. 86-272 is meritless. A. 144.

Pine State's planograms. In 2017, FGI met with Pine State in Augusta, Maine, and asked it to change its planograms for licensed off-premises

establishments in Maine to increase the amount of shelf space for Tito's Vodka. This activity is not protected by P.L. 86-272 because it did not facilitate the requesting of sales by FGI. *See* Rule 808.04(E)(18).

Partnership with WPST and related activities. By early 2017, FGI had formed a "partnership" with the WPST, which had an office in Maine, to generate additional sales revenue, including in Maine, because FGI determined that the "real value for [FGI and M.S. Walker] is to have a preferred status partner that allows us access into the sales drivers at each of the participating mountains," including at Sunday River. A. 374-75 (STA SSMF ¶ 135). Pursuant to that partnership, in 2017, FGI paid $20,000 to WPST to sponsor certain events, including a WPST event at Sunday River in March 2017, in return for financial considerations that FGI negotiated from WPST, including the right for Tito's Vodka to be the exclusive vodka at après ski bar parties at Sunday River and (A) lift tickets at Sunday River and (B) three sets of hotel rooms for two nights at Sunday River that FGI used for its Maine sweepstakes.

FGI's business partnership with WPST and related activities in Maine are not protected by P.L. 86-272 because they did not facilitate the requesting of sales by FGI. *See Peterson*, 1999 ME 23, ¶¶ 9-11, 724 A.2d 610.

Competitive activities. In 2017, M.S. Walker researched and provided FGI with information about the price of vodka sold in Maine by FGI's competitors.

A. 380-82 (STA SSMF ¶ 144). These activities are not protected by P.L. 86-272. *See Uline, Inc. v. Comm'r of Rev*., 10 N.W. 3d 170, 175-78 (Minn. 2024) (collecting information about competitors not protected by P.L. 86-272); *Blue Buffalo Co., Ltd. v. Comptroller of Treas.*, 243 Md. App. 693, 711-15, 221 A.3d 1130, 1140-43 (2019) (same). And FGI and M.S. Walker (in person on FGI's behalf) negotiated with WPST and a restaurant at Sunday River seeking to have drinks with Tito's Vodka placed on menus at that restaurant instead of a competitor's spirits. If the restaurant did not acquiesce, then FGI would ask WPST to consider not having the WPST event at Sunday River in 2019. This activity is not ancillary to requests for purchases.

C. FGI did not show that the unprotected activities within Maine that were engaged in by FGI, or on its behalf, were *de minimis*.

As shown above, FGI and M.S. Walker engaged in unprotected activities in Maine regularly throughout the Audit Period. These activities established a nontrivial additional connection with the State.

In *Wrigley*, the Supreme Court held that the taxpayer's unprotected activities were not *de minimis* even though one of the unprotected activities, gum sales in Wisconsin through "agency stock checks," accounted for only 0.00007% of Wrigley's annual Wisconsin sales, and amounted to just several hundred dollars a year. 505 U.S. at 235; *see Peterson*, 1999 ME 23, ¶ 11, 724 A.2d

610 (Petersons' activities were not *de minimis* "when viewed in the aggregate, because they occurred regularly and consistently over the audit period"); Rule 808.04(C). As the trial court properly held, FGI failed to establish that its unprotected activities in Maine were *de minimis*. A. 20-21.

D. FGI failed to prove that it is entitled to a waiver or abatement of penalties.

MRS imposed a penalty for failure-to-file a required return under 36 M.R.S.A. § 187-B(1) (2010 & Pamph. 2025). Under section 187-B(1), a person that fails to make and file any return required under this Title at or before the time the return becomes due is liable for a failure-to-file penalty if the person's tax liability shown on that return or otherwise determined to be due is greater than $25. If the return is not filed within 60 days after the taxpayer receives a formal demand to file a return from MRS, then the penalty is $25 or 25% of the tax due, whichever is greater. 36 M.R.S.A. § 187-B(1)(A). Here, FGI did not file any returns in response to MRS's demand, and the tax was not assessed within 60 days after FGI received that formal demand. Thus, a 25% failure-to-file penalty was properly imposed.

The Assessor shall abate penalties "if grounds constituting reasonable cause are established by the taxpayer or if the assessor determines that grounds constituting reasonable cause are otherwise apparent." 36 M.R.S.A.

§ 187-B(7) (2010 & Pamph. 2025). Section 187-B(7) contains a non-exclusive list of circumstances that constitute reasonable cause, none of which applies here.

FGI did not provide "substantial authority" for its position. Blue Br. at 40. Indeed, FGI provided no caselaw that supports its position. FGI's argument below, which the court rejected, was based on the Assessor's lack of personal knowledge concerning FGI's activities in Maine and the details of bailment or the spirits business. A. 26-27. On appeal, FGI has not established any basis for waiver or abatement of penalties.

E. FGI did not prove the Assessment violates the Commerce Clause.

A state tax does not violate the Commerce Clause when the tax (1) "is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). FGI failed to show that the Assessment violated the Commerce Clause. *See Goggin v. State Tax Assessor*, 2018 ME 111, ¶¶ 19-28, 191 A.3d 341 (upholding assessment of income tax against Commerce Clause challenge).

FGI contends the Assessment violated 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 … as a pre-condition of selling spirits to the State." Blue Br. at 31. The trial court properly rejected FGI's Commerce Clause argument. A. 23.

FGI's Commerce Clause argument is factually unsupported and legally meritless. Contrary to FGI's claim, the pass-through entity withholding statute is not "discriminatory in effect" as applied to out-of-state suppliers. Blue Br. at 31-32. That statute treats all suppliers the same, regardless of whether they are located in Maine or out of state. The three-tiered spirits system likewise does not discriminate against out-of-state suppliers. Thus, nothing in *Tennessee Wine & Spirits Retailers Association*, 588 U.S. 504, which involved a durational residency requirement for liquor store owners, supports FGI's Commerce Clause argument.

F. FGI did not prove that the Assessment violated the "unconstitutional conditions doctrine."

The Assessment does not violate what FGI calls the "unconstitutional conditions doctrine." *See* Blue Br. at 32. The record lacks any evidence that the State "pressured" FGI into "forfeiting" any "constitutional rights." *See id*.

Rather, FGI made the profitable business decision to sell its vodka in Maine, subject to Maine's statutes governing that activity. FGI and its shareholders do not have a constitutional right to do business in Maine and sell

millions of dollars of their spirits here without paying their fair share of Maine taxes.

The Supreme Court addressed an issue nearly identical to this case and rejected the precise arguments made by FGI. *Heublein*, 409 U.S. at 277-84. Heublein had one employee in South Carolina who maintained an office in his home and a desk at the warehouse of Ben Arnold Co., the local distributor of Heublein's products in South Carolina. *Id*. at 277.

After Heublein accepted orders, it sent its products "by common carrier consigned to Heublein in care of its representative at the premises of Ben Arnold" in South Carolina. *Id*. In other words, Heublein continued to own its products after shipping them to South Carolina, where they were stored at the premises of its local representative.

"This arrangement, which served none of Heublein's business interests, was adopted to conform to the requirements of the South Carolina Alcoholic Beverage Control Act." *Id*. Under South Carolina law, only registered producers of registered brands of alcoholic beverages could ship those brands of alcoholic beverages into that state. "Such producers must have a resident representative who has no direct or indirect interest in a local liquor business." *Id*.

As the Supreme Court explained, the key fact was that the transfer of Heublein's products to a local wholesaler in South Carolina "occurred within

the State and clearly was neither 'solicitation' nor the filling of orders 'by shipment or delivery from a point outside the State' within the meaning of [P.L. 86-272]." *Id*. at 278-79. Because the transfer of Heublein's products to the wholesaler occurred within South Carolina, P.L. 86-272 did not protect Heublein from income taxation by South Carolina. *Id*.

Heublein protested that the transfers never would have occurred in South Carolina had South Carolina not required them as a condition of conducting business within the State. *Id*. at 279. And Heublein argued that a State may not require a company to do more than solicit business within the State and then tax it "for engaging in this compelled additional activity." *Id*.

But the Supreme Court expressly rejected those arguments, holding that "South Carolina may, pursuant to an otherwise valid regulatory scheme, compel Heublein to undertake activities that take it beyond the protection of 15 U.S.C. § 381(a)." *Id*. at 279. P.L. 86-272 did not prohibit States from adopting such liquor regulations, "even when the regulation requires the producer to have more than the minimum contacts with the State for which [P.L. 86-272] provides tax immunity." *Id*. The Court then examined the South Carolina regulations and concluded they were reasonably related to that State's legitimate purposes and "not simply 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; c*f. Mallory*

v. Norfolk Southern Ry. Co., 600 U.S. 122, 134-46 (2023) (Pennsylvania statute requiring out-of-state corporations to consent to personal jurisdiction in Pennsylvania courts as condition of registering to do business in Pennsylvania did not violate the Due Process Clause).

As shown above, and as the court recognized, *Heublein* is on all fours with this case as to FGI's storage of its vodka in Maine and transfers and sales of its vodka in Maine to the State. Those activities are not protected by P.L. 86-272.

Maine has been a Control State since the 1930s. Like South Carolina's law, the Maine law controlling the sale of alcoholic beverages in Maine is a long, detailed statute that has been amended frequently over the years.

The Maine Income Tax Law was enacted in 1969, *see* P. & S.L. 1969, ch. 154, and the pass-through entity withholding statute was enacted in 2003, *see* P.L. 2003, ch. 20, Part AA, § 1. FGI did not show that Maine's liquor control laws are an attempt by the State to provide a basis for the taxation of income from sales in Maine by out-of-state spirits suppliers. Contrary to FGI's suggestion, Blue Br. at 22-23 & n.7, the Assessor rebutted this argument below, A. 86-91, and FGI failed to contest this point, A. 96-133. Thus, FGI forfeited the argument. *See Maquoit Bay, LLC v. Dep't of Marine Res.*, 2022 ME 19, ¶ 21 n.8, 271 A.3d 1183. And because FGI has not argued on appeal that Maine's liquor laws are

an impermissible attempt to provide a basis for taxing spirits suppliers, it has also waived the argument.

In any event, Maine is currently one of 17 Control States, and the requirements of Control States serve legitimate governmental purposes. https://www.nabca.org/control-state-directory-and-info. Control States like Maine where there is a three-tiered system "serve as a vehicle for balance between [] profits [from sales of spirits] and public wellbeing through dedicated enforcement, resources, and promotion of alcohol education…." *Id*.; *see Cherry Hill Vineyard, LLC v. Baldacci*, 505 F.3d 28, 30-31 (1st Cir. 2007) (the "three-tiered system has been justified on multiple grounds: as an efficient means of controlling the distribution of alcoholic beverages, as an effective means of promoting temperance, and as a facilitating means of collecting excise taxes.").

The Legislature sought to obtain "efficiencies and cost savings" in 2004 when it created the system whereby a private entity would assist the State in the warehousing, sale, and distribution of spirits. P.L. 2003, ch. 20, § LLL. And in 2014, the Legislature determined that contracting the operations of the wholesale spirits business to a private entity should "seek efficiencies and maximize growth in the State's wholesale spirits business while ensuring that growth in revenue from the business is achieved in a socially responsible

manner" and "provide the State's agency liquor store partners with effective and efficient services in order to responsibly serve consumers of spirits in the State." P.L. 2013, ch. 269, § A-4. Section 83-C was added, effective March 16, 2014, "in order to ensure proper administration of the spirits business in the State …." P.L. 2013, ch. 476, § A-9 (preamble).

The requirements that suppliers store their product at the Bailment Warehouse and sell their spirits to the State in Maine only after the State receives an order from a Maine retailer are reasonably related to the State's legitimate purposes. The bailment system generates revenue for the State. Maine's spirits laws are also an efficient means of controlling the distribution of spirits and an effective means of promoting temperance. *See Cherry Hill Vineyard, LLC*, 505 F.3d at 30-31; *Heublein*, 409 U.S. at 283.

Finally, as shown above, FGI and M.S. Walker (on FGI's behalf) engaged in unprotected activities in Maine unrelated to the Bailment Warehouse. Thus, FGI's meritless arguments about *Heublein* are immaterial because FGI engaged in other unprotected activities in Maine.

II. The trial court properly held that there was no genuine issue as to any material fact.

This Court reviews the summary judgment record *de novo* to determine whether a genuine issue of material fact exists. *Express Scripts, Inc.*, 2023 ME

68, ¶ 28, 304 A.3d 239. To generate a genuine issue of material fact, the nonmoving party must rely on admissible evidence, not "conclusory allegations, improbable inferences, and unsupported speculation." *Id*. (quoting and citing *Dyer v. Me. Dep't of Transp*., 2008 ME 106, ¶ 14, 951 A.2d 821). The question is not "whether some metaphysical dispute exists, but whether the record taken as a whole could lead a rational trier of fact to find for the non-moving party, if not there is no genuine issue for trial." *Dyer*, 2008 ME 106, ¶ 14 n.3, 951 A.2d 821 (cleaned up).[20]

On appeal, FGI challenges only STA SSMF ¶¶ 22, 26, 27, and 28 (A. 227-30, 236-44). Blue Br. at 35-39. Each statement was properly supported by record citations, and none of the authorities cited by FGI contradicted them.

The trial court sustained the Assessor's objections to the Affidavit of Seth Ferris to the extent it contradicted his deposition testimony. A. 9 n.2. FGI has not challenged that ruling.

Also, there was no "procedural defect." Blue Br. at 10, 35-36. The court ruled that the material submitted by FGI "does not contradict" STA SSMF ¶ 22 or ¶ 28 or the material cited by the Assessor – not that those statements were

[20] Contrary to FGI's suggestion, Blue Br. at 34 n.10, nothing in *Wrigley* affects the summary judgment standard.

"not controverted" by FGI. A. 12 n.4. The court admitted STA SSMF ¶¶ 22 and 28, "except to the extent that they express a legal conclusion." *Id*.

To the extent STA SSMF ¶¶ 22 or 28 contains legal conclusions or mixed questions of fact and law, FGI has not shown why either statement is incorrect or how the court erred. Indeed, 28-A M.R.S.A. § 83-C(3), effective March 16, 2014, expressly provided that spirits stored at the Bailment Warehouse remained the property of the suppliers. During the entire Audit Period, POs were not sent to FGI until after its spirits left the Bailment Warehouse, and FGI did not prepare invoices until after it received those POs. During the entire Audit Period, FGI had the ability and right to access and withdraw its vodka while stored at the Bailment Warehouse and paid fees to store its product at the Bailment Warehouse. And M.S. Walker regularly withdrew bottles of Tito's Vodka from the Bailment Warehouse on FGI's behalf during 2012-2017. Thus, to the extent STA SSMF ¶¶ 22 and 28 contain legal conclusions or mixed questions of fact and law regarding who owned FGI's spirits while they were stored at the Bailment Warehouse, they are correct.

The Assessor's lack of personal knowledge about FGI's activities in Maine or the details of bailment or the spirits business (administered by a different agency), Blue Br. at 27 n.9 & 37, has no bearing on any issue here. The Assessor (i.e., Maine Revenue Services) need not have personal knowledge regarding a

taxpayer's activities to assess tax against that person. Moreover, the 2004 contract terms, including the terms cited in FGI's brief allocating the risk of loss to inventory as between Pine State and MBC, support the conclusion that suppliers owned their inventory while in the Bailment Warehouse. FGI did not create a genuine issue of material fact as to STA SSMF ¶¶ 22 or 28 or show that the court erred.

With respect to STA SSMF ¶ 26, BABLO testified that suppliers had the ability and right to access their vodka while stored at the Bailment Warehouse. FGI's assertion that it never accessed its spirits while stored at the Bailment Warehouse does not contradict the fact that it had the ability and right to do so.

As for STA SSMF ¶ 27, consistent with ¶ 26, both Ms. Bois and Mr. Ferris testified that M.S. Walker regularly withdrew bottles of FGI's spirits from the Bailment Warehouse on FGI's behalf from 2012-2017. FGI has not fairly characterized their testimony. Blue Br. at 39. M.S. Walker's actions are imputed to FGI under Rule 808.06.

CONCLUSION

For the reasons stated above, the Court should affirm the Superior Court's decision.

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Dated: March 14, 2025

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CERTIFICATE OF SERVICE

I, Thomas A, Knowlton, Deputy Attorney General, hereby certify that upon approval by the Clerk's Office of the pdf version of this brief, I will cause two paper copies of this brief to be served upon each of the attorneys and/or parties listed below, by depositing those copies in the United States mail, first-class postage prepaid, addressed for delivery as follows:

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