STATE OF MAINE

MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. KEN-24-490

STATE TAX ASSESSOR

Plaintiff/Appellee

v.

FIFTH GENERATION, INC.

Defendant/Appellant

REPLY BRIEF OF APPELLANT

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

ATTORNEY FOR
FIFTH GENERATION, INC.

Daniel J. Murphy, Bar No 9464
BERNSTEIN SHUR
100 Middle Street, P.O. Box 9729
Portland, ME 04104
dmurphy@bernsteinshur.com
(207) 228-7120

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions, Statutes, Rules

LEGAL ARGUMENT

Maine's Rule 808[1] represents an imprecise attempt to codify the Supreme Court's teachings in *Wisconsin Dep't. of Revenue v. William Wrigley, Jr. Co*. ("*Wrigley*"), 505 U.S. 214, 225-229 (1992) regarding the type and amount of in-state activities, or "nexus," required to impose state income tax on a foreign corporation under P.L. 86-272. Rule 808.04.A expressly acknowledges the primacy of P.L. 86-272, stating that "[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*.)." However, Rule 808.04.B.1 narrowly construes protected "solicitation" activities, stating that "[t]he term 'solicitation' includes *only actual requests for purchases* and activities that are entirely ancillary to requests for purchases. An activity is entirely ancillary to the requesting of purchases only if it serves no independent business purpose apart from its connection to the soliciting of orders." Rule 808.04.B.1 (with emphasis).

This limitation on "only actual requests for purchases" is irredeemably at odds with *Wrigley*. In that case, the U.S. Supreme Court functionally defined the meaning of "solicitation of orders," holding that the term "covers much more than what is

[1] 18-125 CMR Ch. 808.04 (as in effect during the Audit Period). A substantially similar provision may be found at 18-125 CMR Ch. 808.06 (2025).

strictly essential to making requests for purchases[,]'" and instead it includes "any speech or conduct that implicitly invites an order." *Wrigley*, 505 U.S. at 228-29, 223. 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," rather than protecting only discrete acts. *Id*. at 225-26.

The *Wrigley* Court also held that in-state activities that are "entirely ancillary" solicitation are protected under P.L. 86-272. Maine's Rule 808.04.B.1 curiously defines "entirely ancillary" activities as being subsumed *within* the definition of "solicitation," but this imprecision only invites resort to a legally incorrect analysis of whether a given in-state activity amounts to an "only actual requests for purchase." *See* Rule 808.04.B.1. This limited view of the scope of "solicitation" under P.L.86-272 was erroneously employed by Superior Court, which also never squarely addressed whether compelled delayed transfer of title and compelled bailment as a condition of sale were "entirely ancillary to requests for purchases" because they "serve no independent business function apart from their connection to the soliciting of orders[.]" *Wrigley*, 505 U.S. at 228-29.

Importantly, Rule 808.04.B clearly states that "[w]hether the activities of a foreign corporation fall within the scope of "solicitation" within the meaning of P.L. 86-272 is a *factual determination*." Rule 808.04.B (emphasis added). Rather than assessing whether there existed a fact contest regarding questions of fact regarding

the applicability of P.L. 86-272, the Superior Court essentially weighed the evidence and impermissibly sided in favor of the STA. Because choosing between competing version of the facts is not permitted at the summary judgment stage, *Angell v. Hallee*, 2014 ME 72, ¶ 17, 92 A.3d 1154, this Court should vacate the Superior Court's decision and remand the matter for trial.

I. Disputed Issues Of Material Fact Exist Concerning Nexus With Maine.

In its Brief, the STA first argues that FGI had nexus in Maine because it was required, as a condition of sale to BABLO, to store spirits at the State Bailment Warehouse and delay transfer of title to BABLO until spirits were removed from bailment to sell to a retail seller of spirits. Red Br. at 31-32. In its Decision, the Trial Court relied upon Rule 808.03 to determine that during each year of the Audit Period, FGI "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.

FGI demonstrated the existence of genuine issues of disputed material fact concerning a lack of clarity for both sides regarding the timing of sales to BABLO, including the lack of any contract between FGI and BABLO, A. 437, ASMF ⁋159, FGI's understanding that it viewed sales as complete when delivered to the Bailment Warehouse, A. 401, ASMF ⁋57, the lack of actual paper "title" or similar indicia of transfer, A., 437, ASMF ⁋158, as well as FGI's legal inability to import or transport spirits into Maine on its own accord. A. 387, ASMF ⁋12. BABLO required suppliers

to maintain a 30-60-day supply of spirits in bailment or face penalties or de-listing of products. A. 219-228, OSMF ¶¶20-21 (describing penalties imposed by BABLO on suppliers for allowing inventory to fall below a 30-60-day rolling supply in bailment, A. 219; and describing Pine State inventory management system, including notification to suppliers of short supply, A. 221). For its part, the STA could not speak to such these facts and issues,[2] even though they are the predicate for the STA's assessment. At a minimum, the facts are disputed as to when and how a sale of spirits to BABLO occurred. *See also* UCC 2-401(2).[3]

Apart from this, FGI's objections and evidence submitted in response to SMF ¶¶22, 28 and similar SMF (through which the STA sought to establish that FGI "stored in Maine" and "sold in Maine") should not have been dismissed and disregarded by the Superior Court. A. 227-230. FGI objected to SMF ¶¶22, 28 and similar SMF because those SMF: 1) sought to establish legal questions or

[2] The STA could not speak to the timing of transfer of ownership of spirits from FGI to BABLO during the Audit Period. A. 229-230, OSMF, ¶22; A. 434, ASMF ⁋151. The STA did not know about the process for transfer of title to spirits during the Audit Period. A. 227-230, OSMF, ¶22; A. 435, ASMF ⁋152. The STA could not speak to the basic terms of bailment for the Product during the Audit Period. A. 227-230, OSMF, ¶22; A. 435, ASMF ⁋153.

[3] 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.

components as a pure fact questions; 2) sought to establish activity from 2011-2017, even though the STA's record citations did not address this complete timeframe; and 3) relied on the MBC/Pine State Contracts with the State to impute facts to FGI (even though FGI is not a party and not bound by these Contract and the Pine State Contract for its incongruously stated that "*Pine State*" bore the full risk of loss of any nature whatsoever with respect to all inventory from the time of delivery to the bailment warehouse). A. 227-230. As part of the factual context, the STA has *admitted* that only BABLO can import spirits into Maine and that it requires compelled storage in bailment and compelled delay in transfer of title as a condition of purchase. A. 229, OSMF ¶22; A. 202, OSMF ¶3; A. 219-223, OSMF ¶20.

Based on the record submissions, as well as the existence of disputed issues of material fact concerning the timing of purchase and ownership of spirits in bailment, the Superior Court erred in concluding in a cursory manner that "the summary judgment record establishes for each year from and including 2011 through 2017, FGI maintained a stock of goods in Maine in the Bailment Warehouse and sold its products from the Bailment Warehouse to the State in Maine." A. 17. Summary judgment should not have been entered on the issue of nexus.

II. Disputed Issues Of Material Fact Exist Concerning FGI's Protection Under P.L. 86-272.

The STA next argues that FGI was not entitled to protection under P.L. 86-272 because its activities were not "[A] requests for purchases or [B] activities that

are entirely ancillary to requests for purchases." Red Br. 32-36. The trial court stated that storage of vodka in bailment and in-state transfer of spirits to BABLO fell outside of the scope of P.L. 86-272. A. 18, n. 9. The Decision does not squarely address the required analysis under *Wrigley* (and Rule 808.04.B.1, for that matter) of whether the activities of compelled delay of title transfer and bailment, from the perspective of FGI, "serve no independent business purpose apart from its connection to the soliciting of orders." *Wrigley*, 505 U.S. at 228-29; Rule 808.04.B.1. Decision, A. 18, n.9 (declining to reach "entirely ancillary" arguments).

FGI proffered evidence that supported the "factual determination[,]" Rule 808.04.B, that compelled delay in transfer of title and compelled bailment as a condition of sale were part of "solicitation" because the conduct was a precondition to new orders (and subject to penalties for non-compliance). A. 219-227, OSMF ¶¶20-21. Compliance with compelled delay in transfer of title and compelled bailment were part of the "entire process associated with the invitation" and the "courses of conduct[,]" and indeed facilitated requests for future orders. *Wrigley,* 505 U.S at 225-26. There can be no fulfilment of orders solicited by BABLO unless a supplier complies with all of BABLO's requirements for its purchase of spirits. A., 439, ASMF ¶165; A. 202-203; OSMF ¶3 (STA admission that BABLO *requires* compelled delayed transfer of title and compelled bailment as a condition of BABLO's purchase of spirits from suppliers.). A supplier will be penalized by

BABLO or cut off from listing products if it does not comply with BABLO's directives, meaning that obeying BABLO directives facilitates requests for future purchases. A. 219-227, OSMF ¶¶20-21. For its part, the STA could not speak to the terms of sale, bailment, or transfer of title. A. 202-203, OSMF ¶3; A. 434-436, ASMF ¶¶151-156 (STA's lack of knowledge).

FGI also proffered evidence that also supported the "factual determination[,]" Rule 808.04.B, that compelled delay in transfer of title and compelled bailment as a condition of sale were "entirely ancillary" to solicitation of orders because they serve "no independent business function apart from their connection to the soliciting of orders." *Wrigley*, 505 U.S. at 228-29 (with emphasis). FGI has no ability or legal right to import spirits into Maine unless it is part of an order placed by BABLO, the sole importer of spirits in Maine. 28-A M.R.S. § 2073-A (providing that *only* BABLO may import spirits or cause them to be imported into Maine); A. 438, ASMF ¶163; A. 219-37, OSMF ¶¶20-27 (noting required conditions of sale). 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. 438, ASMF ¶162. FGI only shipped product to Maine when pursuant to an order placed by BABLO, the sole wholesale seller of spirits in Maine. A. 390, ASMF ¶23. The STA has admitted that if FGI engaged only in activities that served no independent business function apart from the connection to soliciting orders, it would not be

liable for tax during the Audit Period. A. 469, ASMF ¶263. Because conditions imposed by BABLO on FGI (and other sellers) "serve no independent business function apart from their connection to the soliciting of orders[,]" they are entirely ancillary to requests for purchases under P.L. 86-272. *Id*. at 228-229. At a minimum, a genuine issue of material fact exists as to the "factual determination" under Rule 808.04.B as to whether compelled delay in transfer of title and compelled bailment as a condition of sale were part of "solicitation" or "entirely ancillary" to solicitation under P.L. 86-272.

III. Disputed Issues Of Material Fact Exist Concerning Additional Activities The Superior Court Declined To Reach.

The STA asserts that the Court may leapfrog over the trial court, act as a court of original jurisdiction, and affirm the grant of summary judgment based on "additional activities" that the Superior Court expressly declined to reach. Red Br. 36-40; Decision, A. 18, n. 9 (declining to address missionary sales and additional activities). Although the Law Court normally can affirm a judgment on grounds that are different from the trial court's reasoning, *McDonald v. City of Portland*, 2020 ME 119, ¶ 22, 239 A.3d 662, 670–71, the Superior Court has not provided any decision or grounds to review concerning the missionary sales activities and "additional activities" highlighted by the STA on appeal. The Court should decline to reach these issues and should instead remand the matter for trial.

If a trial court were to address these missionary sales activities and "additional activities" identified by the STA, it would determine that they fall within the protection for missionary sales activities and other protected activities under Rule 808.04.D[4] and *Wrigley*. *See Wrigley*, 505 U.S. at 223 ("[A] salesman who extols the

[4] Rule 808.04.D (with emphasis in bold), 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. 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;

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.") *Blue Buffalo Co., Ltd. v. Comptroller of Treasury ("Blue Buffalo")*, 243 Md. App. 693, 704, 221 A.3d 1130, 1136, 1140 (2019) (holding that product trainings were categorically immunized under P.L. 86-272 because they "consisted entirely of product advocacy" and stating that "[d]iscussions of the benefits of Blue Buffalo products are not merely ancillary to solicitation – they are solicitation[.]").

The STA points to certain activities as being outside of the protection of P.L. 86-272, but FGI has proffered evidence demonstrating that such activities qualify for protection as missionary sales activities or are otherwise protected under Rule 808.4.D. and *Wrigley*. Those challenged activities and FGI's evidentiary submissions are as follows:

---

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.

1) Sale pricing requests for Tito's Vodka, which is missionary sales personified and represents an invitation to purchase based on the virtue of lower price; A. 421-423, ASMF ¶¶112-117;

2) M.S. Walker visiting on-premises establishments (bars and restaurants) to discuss drink pricing strategies, providing staff with recipe ideas and cards, samples and promotional materials, all of which is protected under Rule 808 and constitute product advocacy, missionary sales activity and advertising, A. 423-432, ASMF ¶¶118-143;

3) M.S. Walker attending a VIP Birthday event with free sampling, which is protected under Rule 808 and a form of missionary sales activity, A. 430-432, ASMF ¶¶136-143;

4) Meeting with Pine State to discuss placement of Tito's Vodka on shelves at certain off-premises stores (agency liquor retailer), all of which is protected under Rule 808 and constitute product advocacy and missionary sale activity and advertising, A. 377-378, OSMF ¶141; A. 454-456, ASMF ¶¶216-221;

5) Sponsoring the World Pro Ski Tour event at Sunday River and promoting Tito's Vodka at such events; all of which is protected under Rule 808 and constitute product advocacy and missionary sale activity and advertising, A. 456-466, ASMF ¶¶222-250; and

6) Asserting that M.S. Walker, FGI's required licensed broker, provided information to FGI about the price of Vodka in Maine for purposes of setting minimum or advisable prices by BABLO, which is part of product advocacy and the listing process, and is otherwise entirely ancillary to solicitation. A.381-382, OSMF ¶¶144.

In sum, the record reflects the existence of disputed genuine issues of material fact concerning the "factual determination" of "[w]hether the activities of a foreign corporation fall within the scope of "solicitation" within the meaning of P.L. 86-272[.]" Rule 808.04.B (emphasis added). Because the Superior Court did not address these items in any manner, it would be outside of the scope of the Law Court's

appellate jurisdiction to address these issues in the first instance. The Law Court should reject the STA's request to affirm based on these contested "additional activities"[5] that the trial court declined to reach.

IV. The STA May Not Rely On 28-A M.R.S. § 83-C(3) To Sidestep Preemptive P.L. 86-272, The Commerce Clause, Or The Unconstitutional Conditions Doctrine.

The STA argues that 28-A M.R.S. § 83-C(3), effective from March 16, 2014, conclusively establishes that FGI "sold" and "stored" spirits within Maine. That statute, which was enacted after the commencement of the Audit Period of 2011-2017, provides that spirits stored in bailment remain the property of suppliers. The existence of this statute from 2014 does nothing to answer the question of whether asserted "selling" in Maine and "storage" in Maine are part of the solicitation process or entirely ancillary to solicitation P.L. 86-272 and Rule 808.04.

Courts in other jurisdictions have noted that the protections of P.L. 86-272 pre-empt state tax laws and regulations that burden or seek to override the protections of P.L.86-272. For instance, in *National Private Truck Council, Inc. v. Comm. of Revenue ("National Truck")*, 426 Mass. 324, 28-29 (1997), the Massachusetts Supreme Judicial Court overturned a state excise tax assessed on

[5] Apart from protection for missionary sales and related activities, protection also may exist for the activities the Superior Court declined to address. These include the VIP party where free samples were provided, and other additional activities raised by the STA.

foreign corporations based on pre-emption by P.L. 86-272. In that case, taxing authorities sought to enforce regulations that offered protection to foreign corporations only where delivery/sale was deemed to have occurred out-of-state. *Id*. at 328. Noting Congress's preemptive power to regulate interstate commerce, and relying on P.L. 86-272, the Court held that P.L 86-272 protected qualifying transactions where the "goods originate from out-of-State[.]" *Id*. at 329 ("The statute [P.L. 86-272] refers to shipment or delivery 'from' a point outside the State, not "at" a point outside the State."). Regulations that sought to reduce to scope of immunity under P.L. 86-272 were preempted and violative of P.L. 86-272. *Id.* at 325, 330.

National Truck also addresses the same themes that inform FGI's arguments based on the Commerce Clause and the Unconstitutional Conditions Doctrine. As noted in *National Truck*, P.L. 86-272, which was enacted by Congress under its plenary power to regulate interstate commerce, fully permits Congress to prohibit states from imposing taxes that interfere with interstate commerce. *Id*. at 330. States cannot violate or burden pre-emptive federal authority under the Commerce Clause. Further, requiring foreign corporations to surrender their protections under P.L. 86-272 as a condition in engaging in interstate commerce with the State, is a variant of the Unconstitutional Conditions Doctrine, which forbids the government having parties surrender constitutional rights in exchange for a benefit sought. *See Koontz v. St. Johns River Water Mgmt. Dist*., 570 U.S. 595, 607 (2013) (collecting cases that

invalidated statutes and regulations that required parties to give constitutional rights "as a condition precedent to the enjoyment of a privilege" or required a party "to surrender a right and privilege secured to it by the Constitution" as a condition precedent to obtain a business permit within the State). P.L. 86-272 creates the constitutionally permissible lower limit for a state to impose income tax on a foreign corporation. *Heublein, Inc. v. S.C. Tax Comm'n*, 409 U.S. 275, 280, 282 (1972) ("Congress of course did not enact in § 381 a statute which a State can deliberately evade by requiring a firm to undertake more than mere solicitation."). Congress determined that "the State's interest in taxing business activities below that limit was weaker than the national interest in promoting an open economy." *Id*. at 280.

Understood in terms of federal pre-emption, neither the STA's practices and interpretation, nor Rule 808, may be more burdensome or restrictive than the standards set forth in P.L. 86-272. Where a regulator or regulation seek to force surrender of federal rights as a condition of doing business, the preemptive protections of P.L. 86-272 must be given their full weight. Where, as here, the protections of P.L. 86-272 are not given their due, the State effectively violates the Commerce Clause by annihilating the zone of state tax immunity that Congress has mandated. Requiring the surrender of such preemptive protections as a condition of doing business with the State violates the Unconstitutional Conditions Doctrine.

V. Penalties should have been waived or abated under 36 M.R.S. § 187-B(7)(F) because it provided "substantial authority justifying the failure to pay."

To the extent that the Court determines that judgment, in whole or in part, is warranted, FGI properly sought waiver of penalties and interest because "[t]he taxpayer has supplied substantial authority justifying the failure to pay[.]" 36 M.R.S. § 187-B(F). This is shown by the scope of contested issues and facts raised in this litigation concerning application of P.L. 86-272, *Wrigley,* and Rule 808.04 (including the erroneous "only actual requests for purchases" limitation for the definition of "solicitation" contained in Rule 808.04.B.1, which is at odds with *Wrigley*), as well as the STA's lack of personal knowledge and grounding regarding the actual basis for the Assessment at issue in this proceeding. A. 475-477, ASMF ¶¶286-289. FGI and all other foreign spirits suppliers selling to BABLO, were justified in continuing to rely on the protections of P.L. 86-272, which are not merely "colorable," but actually are preemptive, controlling, and "justify the failure to pay."

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: April 11, 2025

Respectfully submitted,

/s/ Daniel J. Murphy
Daniel J. Murphy, Bar No. 9464
BERNSTEIN SHUR
100 Middle Street, P.O. Box 9729
Portland, ME 04104-5029
dmurphy@bernsteinshur.com
207-228-7120

Counsel for Appellant
Fifth Generation, Inc.

CERTIFICATE OF SERVICE

Counsel for Appellant hereby certifies that this Reply 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 Court, 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:

Thomas A. Knowlton, Esq. and Lawrence S. Delaney, Esq.
Office of Attorney General of the State of Maine
6 State House Station
Augusta, ME 04333-0006

Dated: April 11, 2025

/s/ Daniel J. Murphy
Daniel J. Murphy