IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *et al.*,	*	
Plaintiffs,	*	
v.	*	No. 1:21-cv-00410-LKG
BROOKE LIERMAN,	*	
Defendant.	*	

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DEFENDANT'S SUPPLEMENTAL BRIEF
REGARDING THE INTERPRETATION
OF THE PASS-THROUGH PROVISION

During a telephonic status conference held on March 14, 2024, and in an order dated the same day, this Court ordered "briefing of [the parties'] views on the meaning of the pass-through provision[.]" (ECF 114.). The pass-through provision, which is set forth in § 7.5-102(c) of the Tax-General Article of the Maryland Code, states as follows:

> A person who derives gross revenues from digital advertising services in the State may not directly pass on the cost of the tax imposed under this section to a customer who purchases the digital advertising services by means of a separate fee, surcharge, or line-item.

Md. Code Ann., Tax-Gen. § 7.5-102(c) (LexisNexis 2022).

As detailed below, defendant Brooke Lierman (hereinafter referenced as the "State") continues to adhere to the interpretation of the pass-through provision as expressed

through (1) a stipulation entered into between the parties, and (2) previous briefing in this matter.

On April 4, 2022, the parties filed a joint status report with this Court in which they stipulated to the following interpretation of the pass-through provision:

> Tax-General § 7.5-102(c) does not prohibit a person who derives gross revenues from digital advertising services in the State from indirectly passing on the cost of the tax imposed under Tax-General § 7-5-102 by factoring such cost into its customer pricing. The cost of the tax is passed on directly only when it is imposed on the customer by means of a "separate fee, surcharge, or line-item."

(ECF 68 at 1.)

As noted above, the State continues to adhere to this interpretation. Indeed, in light of the statute's use of the term "directly," it is clear that the pass-through provision is implicated only when an entity *expressly* imposes on its customers the responsibility for the tax (and only by means of a "separate fee, surcharge, or line-item"). The pass-through provision therefore (1) does not affect an entity's internal-facing deliberations or accounting regarding the amount to charge for its services, (2) does not impose any restriction on the amount that an entity may in fact charge, and in turn (3) does not prohibit an entity from factoring the estimated cost of the tax into the price that it ultimately charges its customers. This interpretation is consistent not only with the parties' stipulation, but with the position the State has adopted throughout this litigation. *See, e.g.*, ECF 72 at 4 ("But [plaintiff's argument] rests on the false premise that there is no meaningful economic difference between 'factoring [the costs of the tax] into customer pricing,' ECF 68 at 1, *which is permitted*, and 'directly pass[ing] on the cost of the tax imposed . . . to a customer,'

§ 7.[5]-102(c), which is prohibited." (emphasis added)); ECF 72 at 6 (stating that Maryland's law "enable[s] a taxed business to recover the cost of the tax indirectly by factoring its operating overhead into price determinations").

Moreover, throughout this litigation the State has consistently advanced an interpretation recognizing that, although the statute prohibits an entity from passing on the cost of the tax "directly . . . by means of a separate fee, surcharge, or line-item," the pass-through provision does not impose any restriction on an entity's ability to convey information about the tax (or its effect on customer pricing) through other means. For example, in its supplemental brief in support of its motion to dismiss plaintiffs' First Amendment claim, the State declared that

> [n]either [Tax-General] § 7.5-102(c) nor any provision of the Act bans speech, and nothing in the law prevents, or even discourages, a taxpayer from including on an invoice any "political speech" the taxpayer wishes to convey to the customer. If, for example, the taxpayer wishes to inform the customer that the invoiced charge is higher than it might otherwise be due to the imposition of the digital ad tax, the taxpayer is free to communicate that or any other message. Indeed, if the taxpayer wants to use the invoice as an opportunity to engage in political speech, the taxpayer is free to express its displeasure with the tax and identify "who bears political responsibility for [the] new tax." . . . Maryland's statute places no restriction on stating or referencing the tax.

(ECF 71 at 2-4.)

And in its responsive supplemental brief in support of its motion to dismiss, the State continued,

> So long as the taxpayer does not "directly pass on the cost of the tax imposed . . . to a customer . . . by means of a separate fee, surcharge, or line-item," Md. Code Ann., Tax-Gen. § 7-5-102(c), the statute places no limitations or constraints on what the taxpayer can communicate about the tax, whether it

> be stating the amount of digital ad tax or expressing any views the taxpayer might have about the tax.
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> * * *
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> The statute adopted by Maryland clearly informs the public as to what conduct constitutes "directly pass[ing] on the cost of the tax," by specifying that the pass-through proscribed is one effected "by means of a separate fee, surcharge, or line-item." § 7.5-102(c). . . . On the other hand, neither Tax-General § 7.5-102(c) nor any provision of the Act contains any language prohibiting anyone from "separately stat[ing] the tax," or mentioning any other facts pertinent to the tax, whether on an invoice or anywhere else.

(ECF 72 at 1, 5-6); *see also* ECF 72 at 7 ("In this case, plaintiffs' member companies are . . . 'free to inform' their customers of the amount of the digital ad services gross revenue tax reflected in the purchase price."); ECF 72 at 9 ("Maryland's law contains no provision prohibiting stating the tax or anything about the tax.").

Finally, in its supplemental brief regarding commercial speech analysis, the State affirmed this interpretation:

> [So long as it does not "directly pass on the cost of the tax . . . by means of a separate fee, surcharge, or line-item," t]he statute would not prevent a taxpayer from including on an invoice whatever message it wished to convey about the digital ad tax, including the amount of the taxpayer's annual digital ad gross revenue tax estimated to be attributable to the invoiced transaction, or, indeed, any other subject.

(ECF 81 at 3-4.)

Although this Court's March 14, 2024 order requested that the parties discuss their interpretation of the pass-through provision generally, the State welcomes the opportunity to further discuss the interpretation of the provision as it relates to any particular circumstances raised by the Court.

Respectfully submitted,

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