IN THE OREGON TAX COURT
MAGISTRATE DIVISION
Personal Income Tax

STEVEN E. SPEER and SARAH H. SPEER, Plaintiffs, v. DEPARTMENT OF REVENUE, STATE OF OREGON, Defendants.	TC-MD Case No. 220449G **PLAINTIFFS' RESPONSE TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT**

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Introduction

The correct interpretation of ORS 316.082(1) is that a credit is provided for the taxes imposed by other states. In their Cross-Motion for Summary Judgment and Response to Plaintiffs' Motion for Summary Judgment, the Department of Revenue (the "Department") discusses many minute details of the case but loses sight of the overarching issue: Plaintiffs are facing the injustice of multiple taxation due to the Department's interpretation of ORS 316.082. The Department's interpretation of ORS 316.082(1) as offering a credit only for taxes "paid" instead of "imposed" ignores the statute's plain language, context, and legislative history. ORS 316.082(1) by its own terms provides a credit for taxes "imposed" not "imposed and paid." Plaintiffs believe this case can be resolved in Plaintiffs' favor purely as a matter of statutory interpretation, but if the Court disagrees, the Department's interpretation of ORS 316.082 also violates the Due Process Clause and Dormant Commerce Clause as applied to Plaintiffs' facts. Therefore, Plaintiffs respectfully request the Court to dismiss the Department's Cross-Motion for Summary Judgment and grant Plaintiffs' Motion for Summary Judgment.

Argument

I. ORS 316.082's Text, Context, and Legislative History Illustrates "Imposed" Means "Imposed"

This case hinges on whether the use of the word "imposed" in ORS 316.082(1) means "imposed" or "imposed and paid." It is Plaintiffs' position that "imposed" means precisely that, "imposed," as opposed to "imposed and paid," and that position is supported by the statute's text, context, and legislative history. When interpreting a statutory term, the court first looks to the text and context, and then the pertinent legislative history. *See State v. Gaines*, 346 Ore. 160, 171-72, 206 P.3d 1042, 1050-51 (2009). If ambiguity remains, the court refers to general maxims of statutory construction. *See id.*

A. The Text of ORS 316.082 Provides a Credit for Taxes "Imposed" Not "Imposed and Paid"

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The Department, in its textual interpretation of ORS 316.082(1), twists the plain language of the statute so as to define "imposed" to mean "paid." The relevant portion of ORS 316.082(1) reads:

> A resident individual shall be allowed a credit against the tax otherwise due under this chapter for the amount of any income tax *imposed* on the individual . . . for the tax year by another state on income derived from sources therein and that is also subject to tax under this chapter.

ORS 316.082(1) (emphasis added). When interpreting a statutory term, "the text of the statutory provision itself is the starting point for interpretation and is the best evidence of the legislature's intent." *Portland Gen. Elec. Co. v. Bureau of Labor & Indus.*, 317 Ore. 606, 610, 859 P.2d 1143, 1146 (1993) (citing *State v. Person*, 316 Ore. 585, 590, 853 P.2d 813 (1993)), *superseded in part on other grounds by* ORS 174.020. When interpreting a statute, "there is no more persuasive evidence of the intent of the legislature than the 'the words by which the legislature undertook to give expression to its wishes.'" *Gaines*, 346 Ore. at 171, 206 P.3d at 1050 (quoting *State ex rel Cox v. Wilson*, 277 Ore. 747, 750, 562 P.2d 172 (1977)). An examination of the statutory text is imperative to understand what the legislature meant. When defining a term, it should be given its "ordinary" (citation omitted), or "most sensible" meaning. *See Clark v. Eddie Bauer LLC*, 371 Ore. 177, 185, 532 P.3d 880, 886 (2023); *State v. Couch*, 341 Ore. 610, 618, 147 P3d 322, 326 (2006), *superseded on other grounds by* ORS 496.004; *Portland Gen. Elec. Co.*, 317 Ore. at 611, 859 P.2d at 1146.

The Department's approach for determining what "imposed" means is a departure from the "most sensible meaning" standard. The Department claims that in 1969, "imposed" meant "paid."[1] *See* Def.'s Cross-Motion for Sum. J. and Response to Pls.' Mot. For Sum. J. at p. 5. But both today and in 1969, "imposed" does not mean "paid." The modern-day definition of "imposed" means "a: to establish or apply

[1] The Department's reliance on the term's 1969 definition is not mandated by case law. Some cases do rely on contemporaneous definitions. *See, e.g.*, *Clark*, 371 Ore. at 185, 532 P.3d at 886 ("[W]hen, as here, a statutory term was adopted from a model act, this court assume[s] that the legislature contemplated that that term would reflect its national understanding under the model act at the time the model act was adopted in Oregon." (internal quotation marks omitted) (citation omitted)). But others do not. *See, e.g.*, *Gaines*, 346 Ore. at 175-76, 206 P.3d at 1052, n. 13-16 (utilizing the 2002 unabridged edition of Webster's New International Dictionary to interpret a statute which was passed in 1971).

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by authority [ex: to] impose a tax[,] . . . impose penalties b: to establish or bring about as if by force . . . ." IMPOSE, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/impose (last visited Oct. 6, 2023) (emphasis omitted). Under the modern-day definition, "imposed" does not mean "paid," but rather means the application or establishment of a tax upon the individual.

Next, the 1969 definition of "imposed" means:

> ob. : charge, impure 2: to give or bestow (as a name or title) authoritatively or officially 3 a obs : to cause to be burdened : Subject – used with to b (1): to make, frame, or apply (as a charge, tax, obligations, rule, penalty) as compulsory, obligatory, or enforcible [sic] . . . : Levy < [] a tax on all unmarried men> . . . (2) : to establish forcibly . . . .

IMPOSED, WEBSTER'S THIRD NEW INT'L DICTIONARY, 1136 (unabridged ed. 1961). In short, the 1969 definition of "impose" is to "charge," "bestow," or "cause to be burdened." *See id.* Thus, like the modern-day definition, the 1969 definition of "impose" is "to apply a tax," not the final payment of the tax. The Department ignores this straightforward conclusion and proceeds to define three additional terms ("levy," "collect," and "exact") to arrive at the attenuated conclusion "impose" means "to require and obtain payment of taxes." Def.'s Cross-Motion for Sum. J. and Response to Pls.' Mot. For Sum. J. at p. 6-8. Such a conclusion is contrary to the court's pursuit of the "most sensible meaning" standard. *Couch*, 341 Ore. at 618, 147 P.3d at 326.

Under the modern-day and 1969 definitions of "imposed," defining the term to mean "apply," "establish," or "bestow" is the only plain and unambiguous definition of the term. Accordingly, "imposed" as used in ORS 316.082(1) is the initial application of the tax.

B. A Contextual Analysis of ORS 316.082 Shows it Offers a Credit for Taxes Imposed

The Department points to ORS 316.082(5), other chapter 316 statutes, and ORS 316.082's predecessors as support for its conclusion that "imposed" means "paid." A review of each of these

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provisions, associated case law, and statutory history shows this claim not only to be without merit but to actually support Plaintiff's position.

"Statutory context includes 'other provisions of the same statute and related statutes,' along with 'prior judicial interpretations of those and related statutes.'" *State v. Aguilera*, 324 Ore. App. 478, 484, 526 P.3d 1206, 1210 (2023) (quoting *Dalbeck v. Bi-Mart Corp.*, 315 Ore. App. 129, 135, 500 P.3d 711 (2021)). If the statute has been serially amended, then "the wording changes adopted from session to session are a part of the context of the present version of the statue being construed." *Krieger v. Just*, 319 Ore. 328, 336, 876 P.2d 754, 758 (1994). Context also "includes 'prior opinions of this court interpreting the relevant statutory wording.'" *State v. Payne*, 366 Ore. 588, 597, 468 P.3d 445, 451 (2020) (quoting *Ogle v. Nooth*, 355 Ore. 570, 584, 330 P.3d 572 (2014)).

As an initial matter, the Department points to the Legislature including the term "paid" in ORS 316.082(5), ORS 316.292, and ORS 316.131. But these provisions were not added until 1991, twenty-two years after ORS 316.082(1) was created. *See* 1991 Ore. HB 2715. "Statutory context includes earlier-enacted statutes, but does not include later-enacted statutes[] . . . ." *State v. Neff*, 246 Ore. App. 186, 192, 265 P.3d 62, 65 (2011). As such, examining ORS 316.082(5), ORS 316.292, and ORS 316.131 is not beneficial to analyzing ORS 316.082's context, and even if they were, such an analysis still supports Plaintiffs' position.

The Department acknowledges Plaintiffs' observation that the 1991 Legislature specifically inserted the term "paid" into other subsections and statutes, yet it did not include such term in ORS 316.082(1). *See* Def.'s Cross-Motion for Sum. J. and Response to Pls.' Mot. For Sum. J. at p. 11. Prior to the 1991 amendments, ORS 316.292 stated, "[a] resident estate or trust shall be allowed the credit provided in ORS 316.082 (relating to income tax imposed by another state) except that the limitation shall be computed by reference to the taxable income of the estate or trust." 1991 Ore. HB 2715. After the 1991 amendment, ORS 316.292 provided, "[n]otwithstanding the limitations contained in ORS 316.082 and 316.131, if an estate or

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trust is a resident of this state and also a resident of another state, the estate or trust shall be allowed a credit against the taxes imposed under this chapter for income taxes *imposed by and paid to* the other state[] . . . ." ORS 316.292(2). ORS 316.131, which was adopted by the 1991 legislature, states, "[a] nonresident shall be allowed a credit against the taxes otherwise due under this chapter for income taxes *imposed by and paid* to the state . . . ." ORS 316.131(1) (emphasis added). Finally, the 1991 Legislature's insertion of ORS 316.082(5) provides:

> [c]redit shall not be allowed under this section for income taxes paid to a state that allows a nonresident a credit against the income taxes imposed by that state for *taxes paid or payable* to the state of residence. It is the purpose of this subsection to avoid duplicative taxation through use of a nonresident, rather than a resident, credit for *taxes paid or payable* to another state.

ORS 316.082(5) (emphasis added). As the 1991 Legislature worked through the statute, adding or changing "imposed" and "paid" in various places, at no point did it insert the terms "and paid" to 316.082(1)—the applicable provision here.

The Department, faced with this purposeful omission, speculates the Legislature's decision not to insert "and paid" into 316.082(1) was a result of the Legislature that having "thought that the credit statutes all allowed a credit based on tax paid to the other state." Def.'s Cross-Motion for Sum. J. and Response to Pls.' Mot. For Sum. J. at p. 12. But this is essentially an argument that the Legislature should *not* be considered purposeful in using words in one section of a statute but not others, as it *did* insert "paid" in some provisions. A better reading in light of the relevant case law is that the use of the term "imposed and paid" in ORS 316.082(5), but not subsection one, indicates "such an omission was deliberate." *See Emerald PUD v. PP&L*, 302 Ore. 256, 269, 729 P.2d 552 (1986); *Portland Gen. Elec. Co.*, 317 Ore. at 611, 859 P.2d at 1146; *Con-Way Inc. & Affiliates v. Dep't of Revenue*, 353 Ore. 616, 625, 302 P.2d 804, 809 (2013). Similarly, the 1991 Legislature's amendment to ORS 316.292(2) and enactment of ORS 316.131 is "'strong evidence' that,

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'when the legislature intends to condition [the operation of a statute on a certain event or requirement], it knows how to express that intention.'" *Con-Way*, 353 Ore. at 626, 302 P.3d at 809-10.

The contextual argument here is directly on par with *Con-Way*. Yet, the Department, in their Cross-Motion and Response, dismisses *Con-Way*'s applicability to this case. *See* Def.'s Cross-Motion for Sum. J. and Response to Pls.' Mot. For Sum. J. at p. 26-27. But an in-depth, wholistic analysis of *Con-Way* illustrates its applicability and that it supports Plaintiffs' interpretation of ORS 316.082. There, Con-Way attempted to apply the Business Energy Tax Credit ("BETC") to its 2009 tax liability. *See id*. at 617-18, 302 P.3d at 805. The Department disallowed Con-Way's application of the BETC, arguing:

> ORS 317.090(2) requires a taxpayer to "pay annually to the state . . . a minimum tax," that the term "pay" means to pay in cash, and the term "minimum" means that the amount of tax to be paid cannot be reduced.

Id. at 618, 302 P.3d at 805. Con-Way pointed to neighboring statutes that did contain specific exclusionary phrases, arguing the Legislature knows how to specifically disallow a credit when it intends to do so. *See id.* at 625, 302 P.3d at 809. The Court agreed with Con-Way, finding the presence of exclusionary language in neighboring statutes "weigh[ed] against the department's assertion that the legislature intended to prohibit the use of a BETC against that minimum tax. . . ." *Id.* at 625, 302 P.3d at 809.

Here, the Department acknowledges that ORS 316.082's neighboring statutes and subsection five include "paid," but rather than accepting that the non-use of the term in 316.082(1) (and non-amendment of the provision in 1991 when surrounding provisions were amended) is a purposeful omission, they strangely conclude that the lack of action by the Legislature must mean that they believed the term to be implied within the term "imposed." This conclusion flies in the face of *Con-Way*'s instruction that the Legislature's use of qualifying language in one statute but not in a neighboring statute is "presume[d] . . . purposeful . . . ." *Id.*; *see also Portland Gen. Elec. Co.*, 317 Ore. at 611, 859 P.2d at 1146 ("The use of a term in one section and not in another section of the same statute indicates a purposeful omission . . . and that use of the same

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term throughout a statute indicates that the term has the same meaning throughout the statute . . . .” (internal citations omitted)). Under *Con-Way*, if the Legislature wanted ORS 316.082(1) to include the term “imposed and paid,” it would have.

Moreover, the Legislature has amended ORS 316.082 seven times after its enactment in 1969. ORS 316.082 (1981); ORS 316.082 (1987); ORS 316.082 (1991); ORS 316.082 (1993); ORS 316.082 (1995); ORS 316.082 (1999); ORS 316.082 (2001). Specifically, in the 1999 and 2001 amendments, the Legislature amended the language of subsection one. *See* 1999 Ore. SB 257, 2001 Ore. HB 2274. At no point during these amendments did the legislature decide to change the term “imposed” in subsection one.

The Department also remarkably asserts ORS 315.095(1) (1953) and ORS 316.080 (1953) (renumbered 316.475(1) in 1957), as predecessors to ORS 316.082, support its proposition ORS 316.082’s “imposed” means “paid” as these predecessor statutes included the terms “imposed by and paid to . . . .” *See* Def.’s Cross-Motion for Sum. J. and Response to Pls.’ Mot. For Sum. J. at p. 12. But the Legislature’s specific omission of a term (here, “paid” in ORS 316.082), despite its inclusion in a predecessor statute, also indicates that the change was purposeful. *See e.g.*, *Con-Way*, 353 Ore. at 625, 302 P.3d at 809; *Hynix Semiconductor Mfg. Am. v. Lane County Assessor*, TC-MD 091320B, 2011 Ore. Tax LEXIS 205, at *17-18 (TC-MD May 5, 2011) (“Based on a change in a word or words, the court may infer a legislative intent to change the meaning or scope of a statute.” (internal ellipses omitted)). In short, the Legislature has had ample time to add “paid” to ORS 316.082(1), but has refrained from doing so. Accordingly, an analysis of ORS 316.082’s statutory history and neighboring statutes supports Plaintiffs’ position ORS 316.082(1) provides a credit for taxes “imposed.”

Additionally, Oregon cases which discuss subsection one support Plaintiffs’ position. *See e.g.*, *Keller v. Dep’t of Rev.*, 319 Ore. 73, 77, 872 P.2d 414, 415 (1994) (describing Oregon’s personal income tax as a tax “imposed . . . on the entire taxable income of every resident of this state[]” (quoting ORS 316.037(1)(a));

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Tomseth v. Dep't of Rev., TC-MD150343C, 2016 Ore. Tax LEXIS 120, at *10 (Aug. 23, 2016) ("Oregon law provides a credit for personal income taxes *imposed by* other states on income derived from sources within that state." (cleaned up and emphasis added)). This case law is therefore at odds with the Department's contention that statutory context demonstrates that "imposed" means "paid." *Cf. J.R. (In re J.R.)*, 318 Ore. App. 21, 30-31,507 P3d 778, 783 (2022) (explaining statutory context "includes prior judicial opinions interpreting the same or similar language[]" (internal citation marks omitted) (citation omitted)).

Notably, the Department glosses over an especially pertinent case addressing ORS 316.082(1), *LaDeRoute v. Department of Revenue*, No. 2508, 1987 Ore. Tax LEXIS 60 (Apr. 21, 1987). Not only does *LaDeRoute* support Plaintiffs' interpretation of ORS 316.082, but in that case the Department itself advocated that ORS 316.082(1)'s term "imposed" means "imposed," not "imposed and paid." In *LaDeRoute***,** the plaintiffs were Oregon residents but earned a portion of their income from Alaska. *See LaDeRoute*, at *1. Plaintiff used his 1978 tax returns to file his 1979 Alaska taxes and claimed a credit under ORS 316.082 on their Oregon returns. *See id.* In 1980, Alaska repealed its state income tax and began issuing refunds; however, plaintiffs were unsuccessful in receiving a refund. *See id.* The Department then audited plaintiffs' 1979 tax return and denied the credit under ORS 316.082. *See id.* at *2. On appeal, the Department took the opposite position to their current position taken in the case here and argued "imposed" as used in ORS 316.082(1) means a state's application of a tax, not the tax's ultimate payment. *See id.* at *3 (the Department argued "the credit for taxes paid to other states is *available only for taxes 'imposed'* by the other states[]" (emphasis added)). The Oregon Tax Court agreed ORS 316.082(1)'s "credit is limited to the amount of the 'tax imposed[,]'" delineating between the act of imposing a tax, and the act of paying a tax. *See id.* at *3-4.

In short, *LaDeRoute v. Department of Revenue*, *Keller v. Department of Revenue*, and *Tomseth v. Department of Revenue* all support the fact "imposed" has a different meaning and application from "paid."

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Accordingly, a contextual usage analysis bolsters Plaintiff's position ORS 316.082(1) provides a credit for taxes "imposed."

C. ORS 316.082's Legislative History Supports Plaintiffs' Position

The Department proffers hundreds of pages of purported legislative history pertaining to ORS 316.082, including from various national documents and meetings. These documents, however, are not pertinent as they fail to specifically addresses the Oregon Legislature's intent or ORS 316.082. *See e.g., Gaines*, 346 Ore. at 171-72, 206 P.3d at 1050-51 (explaining "pertinent" and "useful" legislative history may be used to assists the Court's analysis).

A complete review of the relevant legislative history supports Plaintiffs' conclusion ORS 316.082(1)'s term "imposed" means "imposed." First, ORS 316.082's statutory legislative history, as discussed above, reinforces Plaintiffs' interpretation of ORS 316.082. Second, the Minutes of the Oregon Legislative Tax Study Committee from October 1 to 3, 1968, shows Committee members using "imposed" as Plaintiffs' suggest here: "Mr. Ira Jones, State Tax Commission, pointed out that the purpose of HB 1764 is to permit counties or cities to impose a tax at a rate not to exceed one percent on net income of residents[] . . . ." Dec. of Bella Na, Ex. F, p. 18. Moreover, although Defendants claim the Advisory Commission on Intergovernmental Relations ("ACIR") meant "imposed and paid," the model statute they proposed and that Oregon adopted used "imposed." *See, e.g.*, Dec. of Bella Na, Ex. A, p. 18 ("A resident individual shall be allowed a credit against the tax otherwise due under this act for the amount of any income tax *imposed* on him for the taxable year by another state of the United States or a political subdivision thereof or the District of Columbia on income derived from sources therein and which is also subject to tax under this act." (emphasis omitted and emphasis added)).

In sum, the pertinent legislative history illustrates the 1969 Legislature recognized "imposed" and "paid" as distinct terms with different meanings when drafting ORS 316.082. As such, Plaintiffs' position

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ORS 316.082(1) provides a credit for taxes "imposed" is bolstered by the statute's relevant legislative history.[2]

II. The Department's Interpretation of ORS 316.082 As-Applied to Plaintiffs Violates the Due Process Clause

Assuming *arguendo* the Court agrees with the Department's statutory interpretation that "imposed" means "paid," such an interpretation violates the Due Process Clause when the Plaintiffs' specific facts and circumstances are considered in this case.

The Department recites several cases establishing the power of states to tax residents on their out-of-state income, but this power is not absolute. It is limited in some situations by the Due Process and Commerce Clauses. *See e.g., N.C. Dep't of Revenue v. Kimberley Rice Kaestner 1992 Family Trust*, 588 U.S. ___, 139 S. Ct. 2213, 2219-20, 204 L. Ed. 2d 621 (2019) [hereinafter *Kaestner*] (holding a state's taxation of a trust violated the Due Process Clause when the state's only connection was the beneficiary's in-state residency status); *Estate of Evans v. Dep't of Revenue*, 368 Ore. 430, 492 P.3d 47 (2021) (affirming *Kaestner*). Plaintiffs' position is that the Department's taxation of Plaintiffs in this case, under these specific facts, violates the Due Process Clause.

Kaestner is instructive here, notwithstanding the Department's dismissal of its relevance with the claim that "taxation of residents is akin to general jurisdiction." Def.'s Cross-Motion for Sum. J. and Response to Pls.' Mot. For Sum. J. at p. 33. In *Kaestner*, the trust in question was formed in New York, governed by the laws of New York, and the resident trustee was a New York resident. *See Kaestner*, 588

[2] Even if "imposed" means "paid," *Con-Way* establishes that there are situations where a credit is a form of payment, stating that the definition of "pay" "does not address what payment must consist of, nor does the ordinary meaning of 'payable.'" *Con-Way*, 353 Ore. at 630-31, 302 P.3d at 812. Defendants' reject this conclusion and other supportive case law because "they do not deal with the same issue before us here." Def.'s Cross-Motion for Sum. J. and Response to Pls.' Mot. For Sum. J. at p. 29. But while they claim *Con-Way* "is not a blanket holding that tax credits granted by state law are tax payments to the state," they insist on a blanket rule the other way: That tax credits can *never* be considered a payment. *Id.* at p. 27. This is at odds with *Con-Way* where a credit "satisf[ied] in part . . . the amount of tax owed." *Con-Way*, 353 Ore. at 623, 302 P.3d at 808. Therefore, even under the Department's proposed definition of "imposed," it improperly concluded Plaintiffs could not claim a credit under ORS 316.082 for out-of-state taxes Plaintiffs paid with Wisconsin credits.

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U.S. ___, 139 S. Ct. at 2218. When the trust was created, no beneficiary lived in North Carolina. In 1997, one of the beneficiaries moved to the state and lived there in the relevant tax years of 2005 to 2008. *See id.* During this period:

> the trustee chose not to distribute any of the income that the Trust accumulated to Kaestner or her children; . . . the trustee's contacts with Kaestner were "infrequent[]'". . . ; [t]he Trust was subject to New York law, Art. X, App. 69; the grantor was a New York resident[;] no trustee lived in North Carolina . . . ; [t]he trustee kept the Trust documents and records in New York; . . . the Trust asset custodians were located in Massachusetts[] . . .; [t]he Trust . . . maintained no physical presence in North Carolina, made no direct investments in the State, and held no real property there.

Id. at 2218-19 (internal citations omitted). Notwithstanding these attributes, North Carolina asserted it could tax the trust, claiming this power on the grounds that one of the beneficiaries was a North Carolina resident. *See id.* at 2217. The U.S. Supreme Court employed a two-step analysis to determine if North Carolina had violated the Due Process Clause. First, the Court looked to whether there was "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *Id.* at 2220 (internal quotation marks omitted). Second, "the 'income attributed to the State for tax purposes must be rationally related to "values connected with the taxing State."'" *Id*. The Court held "the presence of in-state beneficiaries alone does not empower a State to tax trust income that has not been distributed to the beneficiaries where the beneficiaries have no right to demand that income and are uncertain ever to receive it." *Id.* at 2221. The Oregon Supreme Court followed *Kaestner*'s reasoning two years later in *Estate of Evans v. Dep't of Revenue*, 368 Ore. 430, 445 492 P.3d 47, 56 (2021) ("[T]he demands of due process also could be satisfied by a showing that a resident decedent had some degree of possession or enjoyment of, or right to receive, the trust property.").

Therefore, under *Kaestner* and *Estate of Evans*, a state tax on distributions passes muster under the Due Process Clause only if the resident has "some degree of possession, control, or enjoyment of the trust property or a right to receive that property before the State can tax the asset[,]" *Kaestner*, 588 U.S. ___, 139

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S. Ct. at 2222, or "some degree of possession or enjoyment of, or right to receive, the trust property." *Estate of Evans*, 368 Ore. at 445, 492 P.3d at 56.

Applying *Kaestner* and *Estate of Evans* to Plaintiffs' case, the characteristics of the S corporation involved here are similar to those of the trusts in *Kaestner* and *Estate of Evans*. In both *Kaestner* and *Estate of Evans* trusts and the S corporation here, the distribution of funds is an elective choice outside of the beneficiaries' control. Simply stated, in the *Kaestner* and *Estate of Evans* trusts, "one person (a 'settlor' or 'grantor') transfers property to a third party (a 'trustee') to *administer for the benefit of another* (a 'beneficiary')." *Kaestner*, 588 U.S. ___, 139 S. Ct. at 2217-18 (emphasis added) (citing A. Hess, G. Bogert, & G. Bogert, Law of Trusts and Trustees §1, pp. 8-10 (3d ed. 2007)). Under an S corporation model like NGB, the company generally has the power to decide whether to distribute its earnings to its shareholders. *See In re Marriage Perlenfein and Perlenfein*, 114 Ore. App. 588, 590-91, 836 P.2d 171, 171-72 (1992), *aff'd in part and rev'd in part, In re Marriage Perlenfein and Perlenfein* 316 Ore.16, 848 P.2d 604 (1993) (discussing whether undistributed S corporation income may be attributed to the shareholder for child support payments). Furthermore, NGB and the *Kaestner* and *Estate of Evans* trusts, to a certain extent, pass the tax obligation onto either their shareholders or beneficiaries. *See* 2C-2C:5 Lexis Tax Advisor -- Federal Topical § 2C:5.01 (2023) ("Under IRC Section 1363(a), an S corporation is generally treated as a pass-through entity and not as a taxable entity for federal income tax purposes, and, as such, its shareholders are generally subject to only one level of tax on its earnings."); *Kaestner*, 588 U.S. ___, 139 S. Ct. at 2220 ("[A] tax on trust income distributed to an in-state resident passes muster under the Due Process Clause.").

Thus, despite the Department's assertion *Kaestner* is not relevant because "the minimum contacts tests does not apply to the taxation of resident individuals like plaintiffs[,]" given the similar characteristics of a trust and S corporation, the analyses of *Kaestner* and *Estate of Evans* are directly applicable to Plaintiffs' case. Def.'s Cross-Motion for Sum. J. and Response to Pls.' Mot. For Sum. J. at p. 33. Like the trust in

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Kaestner, Oregon's only connection to NGB is Plaintiffs' part-time residency status in 2018. NGB is subject to Wisconsin laws, the company is located in Wisconsin, and the company does not sell or distribute any goods or services out-of-state.[3] NGB "also maintain[s] no physical presence in . . . [Oregon,] made no direct investments in the State, and held no real property there." *Id.* 139 S. Ct. at 2218-19. Also, Plaintiffs have no "degree of possession or enjoyment of, or right to receive, the trust property." *Estate of Evans*, 368 Ore. at 445, 492 P.3d at 56; *see also* Stip. Fact. 5(b) ("As a minority shareholder, Plaintiff Steven Speer has no access to or control over the distribution of dividends above those deemed necessary by the NGB controlling shareholders and sole director to cover taxes."). As minority shareholders, Plaintiffs are unable to compel "possession[,] . . . enjoyment of[] . . . or right to receive" their distributive income share from NGB absent initiating a lawsuit and relying on judicial discretion. *Id.*

The Department claims its interpretation of ORS 316.082 does not violate the Due Process Clause because it is taxing Plaintiffs and not NGB. But when a state seeks to tax the income of an out-of-state entity, through a taxpayer, the state must establish a "minimum connection" with the entity above mere in-state residency of the benefactor, as in *Kaestner*. *See id.* The characteristics of Plaintiffs' out-of-state S corporation here mirror that of the trust in *Kaestner*. Thus, the Department's taxation of NGB through Plaintiffs here violates the Due Process Clause.

The only connection Oregon has to NGB is Plaintiffs' residency. Because there is no other connection, Oregon's tax on NGB's income, through Plaintiffs' share of undistributed income, fails the minimum contacts requirement under the Due Process Clause.

Additionally, the NGB income that Oregon is attempting to tax has no relationship to and receives no value from Oregon. Again, NGB is wholly operated in Wisconsin, and as a minority shareholder, Plaintiffs

[3] *See* Ex. 2 ("[T]he corporation was not a multistate corporation for 2018 because all of its sales, payroll, and property were within Wisconsin.").

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are unable to compel or demand distributions. When these additional facts are considered, the second step of the *Kaestner* Due Process analysis is also violated.

III. The Department's Interpretation ORS 316.082 As Applied to Plaintiffs Violates the Dormant Commerce Clause

The Department also disputes that its interpretation of ORS 316.082(1) violates the Dormant Commerce Clause. The Department is incorrect.

In almost all cases, there is no practical difference between the out-of-state credit pursuant to ORS 316.082(1) being for taxes imposed versus taxes paid. But under Plaintiffs' specific facts and circumstances here, there is a difference. The Department's failure to provide a full credit for taxes imposed here creates a fundamental unfairness that violates the Dormant Commerce Clause in Plaintiffs' case. *See Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279, 97 S. Ct. 1076, 1079, 51 L. Ed. 2d 326 (1977) (stating that a law passes muster under the Dormant Commerce Clause "when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State[]").

A. The Department's Taxation Lacks a Substantial Nexus to NGB's Income and is Not Fairly Related to Oregon's Services Provided

In this case—which involves an unusual set of facts and circumstances—residency is not enough. While the Department flatly asserts Oregon residents necessarily have substantial nexus with Oregon, the real question is "whether the tax applies to an activity with a substantial nexus with the taxing State." *South Dakota v. Wayfair Inc.*, 585 U.S. ___, 138 S. Ct. 2080, 2099 (2018). The income being taxed here is NGB income, through the Plaintiffs who have not actually received it (aside from an amount necessary to pay

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taxes).[4] Because the Department's only nexus to NGB is Plaintiffs' in-state residency, its taxation has no rational relation with government services provided.[5] As such, the Department's taxation of NGB income under ORS 316.082 violates the first and fourth prong of the *Complete Auto* test.

B. The Department's Interpretation of ORS 316.082 Also Discriminates Against Interstate Commerce.

The Department rejects Plaintiffs' explanation of how its interpretation of ORS 316.082 would violate the internal and external consistency tests and therefore be discriminatory against interstate commerce and instead claims that Plaintiffs' interpretation would violate the internal and external consistency tests. We address each claim in turn.

The Department's interpretation of ORS 316.082 would, all else equal, result in residents who have shares in in-state S corporations paying less tax than those with shares in out-of-state S corporations due to the disparate treatment and effect of state offered tax credits. This outcome favors residents with purely intrastate businesses and discriminates against those with out-of-state businesses. Accordingly, it fails the internal and external consistency tests in this case.

First, looking at the internal consistency test, "[t]his test . . . looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate." *Comptroller of the Treasury v. Wynne*, 575 U.S. 542, 562, 135 S. Ct. 1787, 1803, 191 L. Ed. 2d 813 (2015) (internal quotations omitted) (quotations omitted) [hereinafter *Wynne*]; *see also id.*, at 563, 135 S. Ct. at 1803 ("Any cross-border tax disadvantage that remains

[4] The Department incorrectly claims the undistributed income at issue here is a result of "privately agree[ing] to arrangements that limit actual distributions to partners or shareholders." Def.'s Cross-Motion for Sum. J. and Response to Pls.' Mot. For Sum. J. at p. 35. Such a claim overlooks the stipulated fact Plaintiffs have no access to or control over the distribution of dividends above those deemed necessary by the NGB controlling shareholder and sole director to cover taxes. Stip. Fact 5(c).

[5] *See* Stip. Fact. 5(b) ("NGB does not manufacture or sell products, have employees, or otherwise engage in any commercial activity of any kind in Oregon.").

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after application of the test cannot be due to tax disparities' but is instead attributable to the taxing State's discriminatory policies alone." (internal brackets omitted)).

The Department claims merely offering a credit for other state taxes satisfies the internal consistency test. *See* Def.'s Cross-Motion for Sum. J. and Response to Pls.' Mot. For Sum. J. at p. 38. This is *generally* true, but courts must still look at the practical effects of such a credit, not simply whether the form is observed (*i.e.*, that the state simply offers such a credit). *See, e.g.*, *Wynne*, 575 U.S. at 542, 135 S. Ct. at 1790 (holding Maryland's taxation of in-state resident income violated the Commerce Clause because Maryland did not provide a full credit for other states' taxes). To illustrate, an Oregon resident who invests within Oregon can benefit from Oregon credits and utilize these credits against their Oregon income tax.[6] *See Con-Way*, 353 Ore. at 623, 302 P.3d at 808 ("[C]redits and payments function in the same manner in one significant respect; that is, they both satisfy, in part or whole, the amount of tax owed."). By denying Plaintiffs a full credit under ORS 316.082 for the Wisconsin taxes they paid with Wisconsin credits, the Department is discriminating against Plaintiffs, and other similarly situated residents, by depriving them of the ability to pay their imposed out-of-state taxes with credits while allowing residents to pay their imposed Oregon taxes with Oregon credits. *See e.g.*, *Wynne*, 575 U.S. at 549, 135 S. Ct. at 1794, (stating a state may not "impose a tax which discriminates against interstate commerce either by providing a direct commercial advantage to local businesses, or by subjecting interstate commerce to the burden of multiple taxation" (internal quotation marks omitted) (quotation omitted)). This disparity in tax treatment between in-state and

[6] While most tax credits are a "matter of legislative grace" as asserted by the Department, some form of full credit or apportionment that prevents discriminatory taxation of interstate commerce is required by the Constitution. *Compare* Def.'s Cross-Motion for Sum. J. and Response to Pls.' Mot. For Sum. J. at p. 18 *with Md. State Comptroller v. Wynne*, 431 Md. 147, 155, 64 A.3d 453, 457 (2013), *aff'd, Comptroller of the Treasury v. Wynne*, 575 U.S. 542, 549, 135 S. Ct. 1787, 1794, 191 L. Ed. 2d 813 (2015) ("[T]he Commerce Clause of the federal Constitution sets certain constraints on . . . [the] possibility [of double taxation when residents earn income from out-of-state sources], which states recognize through the provision of credits for payments of out-of-state taxes.").

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out-of-state economic interests violates internal consistency and therefore discriminates against interstate commerce.

In almost all cases, ORS 316.082(1) would not violate the internal consistency test. But the Department's interpretation of ORS 316.082 as applied here does. Because Plaintiffs choose to invest in Wisconsin, Oregon's tax system (as interpreted by the Department) taxes away any benefit provided by Wisconsin for that investment. The Department's position effectively places a tariff on Plaintiffs' out-of-state business activity, by mutually taxing the same income and then directing the amount of those credits be added to Oregon's tax. *Cf. Wynne*, 575 U.S. at 545, 135 S. Ct. at 1792 ("Maryland admits that its law has the same economic effect as a state tariff, the quintessential evil targeted by the dormant Commerce Clause."). As in *Wynne*, the failure here is to provide a full credit that avoids discriminatory effects.[7]

The Department wrongly argues its interpretation of ORS 316.082 satisfies the external consistency test. The external consistency test "asks whether the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed." *Goldberg v. Sweet*, 488 U.S. 252, 262, 109 S. Ct. 582, 589, 102 L. Ed. 2d 607 (1989). Simply put, "[a] state may not tax an activity carried on outside its borders." *Alaska Airlines, Inc. v. Department of Revenue*, 307 Ore. 406, 415, 769 P.2d 193, 199 (1989). The Department seemingly acknowledges Oregon's provision of credit to Plaintiffs' would change depending on whether Wisconsin structured it as an exemption, deduction, or credit.[8] *See* Def.'s Cross-Motion for Sum. J. and Response to Pls.' Mot. For Sum. J. at p. 41 ("It makes no sense, though, to base a rule of constitutionality for credits against another state's tax on whether another

[7] The Department provides a flawed example in its argument that its interpretation of ORS 316.082(1) passes the internal consistency test. Def.'s Cross-Motion for Sum. J. and Response to Pls.' Mot. For Sum. J. at p. 39. The Department's example ignores the fact Oregon residents with in-state corporate investments are able to benefit from Oregon tax credits, while those with out-of-state investments lose the benefit of out-of-state tax credits under the Department's interpretation of ORS 316.082(1). Also, the Department's example operates off of the incorrect premise ORS 316.082(1) provides a credit for taxes "paid" when the statutory language clearly says "imposed."

[8] Such an argument also fails to consider credits are considered a form of payment under *Con-Way. See Con-Way*, 353 Ore. at 623, 302 P.3d at 808.

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state enacts a tax incentive through exemptions or deductions from income or tax credits against tax on taxable income."). But Dormant Commerce Clause analysis focuses exactly on these practical effects, rather than the forms. Here, where the Department fails to fairly apportion the tax, this requires Plaintiffs to pay the value of the Wisconsin credits to Oregon and therefore subjects Plaintiffs to the same tax twice. By doing so, the Department "reaches beyond that portion of value that is fairly attributable to economic activity within the taxing State." *Okla. Tax Comm'n v. Jefferson Lines*, 514 U.S. 175, 185, 115 S. Ct. 1331, 1338, 131 L. Ed. 2d 261 (1995).[9]

Accordingly, because the Department's interpretation of ORS 316.082 favors in-state economic interests and fails to recognize out-of-state tax income, it fails the internal and external consistency tests.

C. The Department's Interpretation Violates Fair Apportionment.

The Department's assertion that the existence of the ORS 316.082(1) credit cures any potential constitutional issues fails as applied to Plaintiffs. Rather, the Department's interpretation results in a grossly disproportionate Oregon tax assessment against Plaintiffs for the relevant income at issue.

Although states have latitude to select an apportionment formula, or use an out-of-state credit, to ensure fair apportionment, an assessment arising therefrom may be "disturbed when the taxpayer has proved by clear and cogent evidence that the income attributed to the state is in fact out of all appropriate proportions of the business transacted in that State . . . or has led to a grossly distorted result." *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 274, 98 S. Ct. 2340, 2345, 57 L. Ed. 2d 197 (1978) (cleaned up) (quotation omitted).

[9] Additionally, the Department's Dormant Commerce Clause argument asserts that any constitutional deficiency here should be resolved by *Wisconsin* changing *its* law, and that Oregon need do nothing. Such logic is why we have a dormant Commerce Clause. The dormant Commerce Clause, itself, "is driven by concern about economic protectionism that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Dep't of Revenue v. Davis*, 553 U.S. 328, 337-38, 128 S. Ct. 1801, 1808, 170 L. Ed. 2d 685 (2008) (cleaned up). The Department's suggested line of argument that other states bear the burden of resolving problems with Oregon's statutory desires, or that Oregon may implement tax policies and disregard their national effect, encourages the "[b]alkanization[,]"*Wynne*, 575 U.S. at 548-49, 135 S. Ct. at 1794, and "economic protectionism[]" our Framers sought to avoid. *Davis*, 535 U.S. at 337-38, 128 S. Ct. at 1808.

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The Department's interpretation of ORS 316.082(1) as applied in this case results in a grossly distorted apportionment assessment against Plaintiffs. As discussed above, zero percent of NGB's activities occur within Oregon, and the Department stipulated that "NGB does not manufacture or sell products, have employees, or otherwise engage in any commercial activity of any kind in Oregon." Furthermore, Jeremy Bonow, accountant and Senior Manager of RSM US LLP, explained in his letter NGB "was not a multistate corporation for 2018 because all of its sales, payroll, and property were within Wisconsin." Ex. 2. From the Department's stipulation and Bonow's letter, "clear and cogent evidence" shows one hundred percent of NGB's business was transacted in Wisconsin, with zero percent occurring in Oregon. *Moorman Mfg. Co.*, 437 U.S. at 274, 98 S. Ct. at 2345. As such, the Department's interpretation of ORS 316.082(1) results in a one hundred percent taxation of Plaintiff's NGB income, distributed or not. This result causes Oregon to "reach profits which are in no just sense attributable to transactions within its jurisdictions." *Hans Rees' Sons, Inc. v. N.C.*, 283 U.S. 123, 134, 51 S. Ct. 385, 389 (1931). In order to remedy this apportionment issue, ORS 316.082(1) should operate to apply a credit for taxes "imposed," not "imposed and paid," thereby incorporating Wisconsin's credit and avoiding an one hundred percent taxation on NGB through Plaintiffs.

IV. The Department Improperly Imposed Penalties on Plaintiffs

Finally, the Department improperly imposed penalties on Plaintiffs pursuant to ORS 314.400(1) and ORS 314.402(1), (2). Because Plaintiffs assert the Department improperly interpreted ORS 316.082, any accompanying penalties resulting from this must be refunded to Plaintiffs.

Conclusion

In sum, the Department improperly construes ORS 316.082(1). The correct interpretation of ORS 316.082(1) is that the statute grants a credit for taxes imposed by other states. Even if the Court finds in favor of the Department's interpretation, such an interpretation violates the Due Process Clause and Dormant

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Commerce Clause as applied to Plaintiffs. Thus, for the foregoing reasons stated in this Response to Defendant's Cross-Motion for Summary Judgment and Reply in Support of Their Motion for Summary Judgment, Plaintiffs respectfully move the Court to dismiss the Department's Cross-Motion for Summary Judgment and grant Plaintiffs' Motion for Summary Judgment.

DATED: October 31, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2023, I served the foregoing Plaintiffs' Response to Defendant's Cross-Motion for Summary Judgment and Reply in Support of Their Motion for Summary Judgment on the following named person(s) by the method indicated below, addressed to the following, and prepaying the postage thereon:

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