1 IN THE OREGON TAX COURT
MAGISTRATE DIVISION
2 Personal Income Tax

3 STEVEN E. SPEER and SARAH H. SPEER,	)	
	)	
4 Plaintiffs,	)	TC-MD Case No. 220449G
	)	
5 v.	)	
	)	
DEPARTMENT OF REVENUE,	)	**PLAINTIFFS' MOTION FOR**
6 STATE OF OREGON,	)	**SUMMARY JUDGMENT**
Defendants.	)	Oral Argument Requested

7

8

TCR INFORMATION

9 Plaintiffs respectfully request this court for oral arguments pursuant to TCR 80B. Plaintiffs request

10 remote appearance. Plaintiffs estimate the time required for oral argument is sixty (60) minutes.

11

MOTION

12 Plaintiffs move this Court for summary judgment in favor of Plaintiffs and against the DOR on

13 Plaintiffs' First Amended Complaint. This motion is supported by the following points and authorities and

14 the pleadings and exhibits in record. Based on the record before the Court, there are no genuine issues of any

15 material fact related to Plaintiffs claims, Plaintiffs are entitled to judgment as a matter of law, and the Court

16 should grant summary judgment in Plaintiffs' favor.

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MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

The focal point of this present dispute is whether ORS 316.082 allows a credit for taxes *imposed* or taxes *actually paid*. Plaintiffs assert the former based on the plain language of ORS 316.082. During the year in question, 2018, Plaintiffs were part-time residents in Oregon. At the same time, Plaintiffs were minority share owners in New Glarus Brewing Company ("NGB"), a Wisconsin based and operated S-corporation. Because of an ongoing dispute with the controlling shareholder of NGB, Plaintiffs never realized the profits from their shares outside of that necessary to cover their tax liability.[1] When filing their 2018 Wisconsin taxes, Plaintiffs as directed included pass-through income and adjustments from NGB, applied Wisconsin's Manufacturing & Agriculture Credit ("MAC") (a tax code incentive to locate manufacturing property in Wisconsin) and Research Credit (the "credits") after computing tax due and in accordance with Wisconsin law, and added that same credit amount to their subsequent year's income. On their Oregon tax return, Plaintiffs claimed, as a credit, the amount of tax imposed by Wisconsin before Wisconsin tax credits were applied. The DOR disallowed this credit and directed that Plaintiffs' Oregon tax be increased by the amount of the MAC incentive and Research Credit received on the mutually taxed income, stating Oregon law only grants a credit for taxes actually paid to another state.[2]

Interpreting ORS 316.082 to mean taxpayers may only receive a credit for amounts actually paid goes against the text, context, and legislative history of the statute. Moreover, by taxing wholly Wisconsin income generally without apportionment, and effectively imposing a tariff on Plaintiffs' MAC received for investing outside of Oregon, the Oregon tax in this matter violates the dormant Commerce Clause and the

[1] The present dispute between Plaintiffs and NGB is not subject to this case.
[2] Plaintiffs were part-year residents in Oregon, for 11 out of 12 months, so some tax calculations are prorated.

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Due Process Clause of the U.S. Constitution. Accordingly, Plaintiffs respectfully request the Court grant their motion for summary judgment.

II. BACKGROUND

On April 20, 1993, NGB was registered and incorporated as an S-Corporation in New Glarus, Wisconsin. (Stip. Ex. 1). NGB's goal was to "brew and distribute German and Belgian-style beers in kegs and bottles to restaurants, bars[,] and other retail food and beverage outlets in the south central area of the State of Wisconsin." (Stip. Ex. 1).

On June 1, 1993, NGB released a Confidential Private Placement Memorandum, issuing up to 40,000 shares of common stock, with 20,000 of such shares earmarked as voting stock, and the remaining 20,000 earmarked as non-voting stock. (Stip. Ex. 1). Per the terms of this Memorandum, each share of stock was priced at ten dollars, and one unit of stock consisted of 625 shares of voting stock and 625 shares of non-voting for $12,500.00. (Stip. Ex. 1). An investor was required to purchase no less than one unit. (Stip. Ex. 1).

On August 15, 1993, Steven Speer ("Plaintiff Steven") purchased two units of stock for $25,000, consisting of 1,250 shares of voting stock and 1,250 shares of non-voting stock. (Stip. Ex. 1). This purchase was a valid S-Corporation election in accordance with IRC § 1362 and relevant Treasury Regulations. (Stip. Facts p. 2, No. 3). At the time, Plaintiff Steven was living in Fort Collins, Colorado. (Stip. Ex. 1).

Sometime thereafter, Plaintiff Steven and his wife, Sarah Speer, (collectively, "Plaintiffs") moved to Oregon and, ultimately, Washington. Plaintiff Steven, prior to the Oregon DOR audit, brought a suit with two other minority shareholders against Deborah Carey, the CEO, sole director, and controlling shareholder. They claimed "shareholder oppression, breach of fiduciary duty and securities fraud against" NGB, arguing they never received profits for their shares because Carey "refuses to distribute profits beyond those required

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to pay" what she believed necessary to cover the minority shareholders' taxes. (Stip. Ex. 6). This issue is still pending in Wisconsin courts, and Plaintiffs may never gain access to NGB profits reported on their tax returns.

Meanwhile, Plaintiff Steven continued to maintain his NGB shares and pay taxes thereon. In 2018, Plaintiffs filed their federal tax return and Wisconsin and Oregon state tax returns. (Stip. Ex. 2; Stip. Ex. 4). In Plaintiffs' federal tax return, they reported a total income of $1,080,476 of which $958,580 was derived from pass-through income from NGB. (Stip. Ex. 10, p. 2-3). These figures were similarly reflected on Plaintiffs' nonresident tax return for Wisconsin. (Stip. Ex. 2, p. 3). On Plaintiffs' Wisconsin tax return, they claimed the state's MAC for $77,705 and Research Credit for $350. (Stip. Ex. 2, p. 8-9). After these credits were applied, what remained was a $1,123 net balance due to Wisconsin. (Stip. Ex. 2, p. 5). This amount was paid through withholding by NGB.

Plaintiffs also filed a part-year resident tax return for Oregon. (Stip. Ex. 4, p. 1). Therein, they reported the total and pass-through incomes reported on their federal tax return. (Stip. Ex. 4, p. 2). Aside from their pass-through NGB income, Plaintiffs' Oregon income was $117,749. (Am. Compl. p. 5). While Plaintiffs' accountant was preparing their Oregon tax return, a question arose regarding how Plaintiffs should report Wisconsin credits. Plaintiffs' accountant referenced ORS 316.082, consulted with other tax partners and an outside tax attorney, and concluded Plaintiffs could claim an Oregon credit for the tax imposed by Wisconsin. (Stip. Ex. 7). As such, Plaintiffs claimed a $63,601 OR-ASC-NP credit for taxes imposed by Wisconsin on mutually taxed income. (Stip. Ex. 4, p 3).

Oregon's Department of Revenue ("DOR") audited Plaintiffs' 2018 Oregon tax return. (Am. Compl. p. 3). On November 4, 2021, the DOR sent Plaintiffs a Deficiency Notice, claiming Plaintiffs owed

$62,478.00 in taxes, $8,497.01 in interest, and $12,496.00 in penalties. (Stip. Ex. 5). The DOR explained Plaintiffs could only claim "a credit for income taxes paid to another state . . . not on the income tax withheld by the other state . . . ." (Stip. Ex. 5, p. 3). Moreover, Plaintiffs were assessed a penalty of twenty percent because the "additional tax due" was a "substantial understatement of the tax" under ORS 314.402. (Stip. Ex. 5, p. 4).

Plaintiffs timely appealed the deficiency notice to the administrative appeal board. On May 13, 2022, Plaintiffs and the DOR participated in a conference call. (Stip. Ex. 6). There, Plaintiffs argued the correct interpretation of ORS 316.082 is a credit is given for taxes imposed, not actually paid; no exception applies to Plaintiffs' case; tax credits are taken after a tax is imposed, not before; tax credits are used in lieu of payments; and constitutional issues are present. (Stip. Ex. 6). On August 2, 2022, the DOR issued a conference decision letter, denying Plaintiffs' appeal. (Stip. Ex. 7, p. 2). The DOR found ORS 316.082 applies to taxes actually paid to another state, not imposed by the other state; the DOR has legislative authority pursuant to ORS 316.082(3), (6); the DOR's imposition of a penalty was mandatory under ORS 314.402 and Plaintiffs were subject to a further five percent failure to pay penalty under ORS 314.400; and Plaintiffs failed to show they used good faith efforts and due diligence when claiming the credit. (Stip. Ex. 8, p. 1-3).

Plaintiffs paid the penalties and interest and subsequently appealed to the Oregon Tax Court Magistrate Division.

III. STANDARD OF REVIEW

This Court applies TCR 47 when ruling on a motion for summary judgment. Under TCR 47, a court must grant a motion for summary judgment "if the pleadings, depositions, affidavits, declarations, and admissions on file show that there is no genuine issue as to any material fact and that the moving party is

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entitled to prevail as a matter of law." TCR 47(C); *see Jimenez v. Dep't of Revenue*, 24 OTR 618, 622 (Or Tax 2021), *aff'd*, 370 Ore. 543, 522 P.3d 522 (2022).

There is no genuine issue as to a material fact when the court, after viewing the record most favorably to the non-moving party, finds "no objectively reasonable juror could return a verdict for the adverse party." TCR 47(C). If an issue is raised in the motion which the non-moving party would have had the burden of persuasion if the issue was raised in trial, then the non-moving has the burden of producing evidence thereon. *See id.*

IV. ARGUMENT

The statute in issue is ORS 316.082, with the dispute centering around ORS 316.082(1):

> **316. 082 Credit for taxes paid to another state; rules**
>
> *(1) 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, or on an Oregon S corporation or Oregon partnership of which the individual is a member (to the extent of the individual's pro rata share of the S corporation or distributive share of the partnership), for the tax year by another state on income derived from sources therein and that is also subject to tax under this chapter.*
>
> (2) The credit provided under this section shall not exceed the proportion of the tax otherwise due under this chapter that the amount of the modified adjusted gross income of the taxpayer derived from sources in the other state bears to the entire modified adjusted gross income of the taxpayer.
>
> (3) The Department of Revenue shall provide by rule the procedure for obtaining credit provided by this section and the proof required. The requirement of proof may be waived partially, conditionally or absolutely, as provided under ORS 315.063.
>
> (4) No credit allowed under this section or ORS 316.292 shall be applied in calculating tax due under this chapter if the tax upon which the credit is based has been claimed as a deduction, unless the tax upon which the credit is based is restored to income on the Oregon return.
>
> (5) Credit 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

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taxation through use of a nonresident, rather than a resident, credit for taxes paid or payable to another state.

(6) The Department of Revenue may adopt rules under this section that provide a credit against the tax imposed by this chapter when the department considers the credit necessary to avoid taxation of the same income by this state and another state.

(7) As used in this section:

(a) "Modified adjusted gross income" means federal adjusted gross income as modified by this chapter and the other laws of this state applicable to personal income taxation.

(b) "Oregon partnership" means an entity that is treated as a partnership for Oregon excise and income tax purposes.

(c) "Oregon S corporation" means a corporation that has elected S corporation status for Oregon excise and income tax purposes.

(d) "State" means a state, district, territory or possession of the United States.

(8) For purposes of this section:

(a) A direct tax imposed upon income of an Oregon S corporation is an income tax imposed on the Oregon S corporation.

(b) An excise tax that is measured by income of an Oregon S corporation is an income tax imposed on the Oregon S corporation.

(c) An excise tax is measured by income only if the statute imposing the excise tax provides that the base for the excise tax:

(A) Includes revenue from sales and from services rendered, and income from investments; and

(B) Permits a deduction for the cost of goods sold and the cost of services rendered.

ORS 316.082 (emphasis added).

Wisconsin's MAC is "intended to enhance the competitiveness of the manufacturing and agriculture sectors in Wisconsin and to incent businesses to locate their manufacturing and agriculture property in the state." State of Wisconsin Legislative Fiscal Bureau, "Informational" Paper No. 11: Manufacturing and Agriculture Tax Credit," Jan. 2021,

https://docs.legis.wisconsin.gov/misc/lfb/informational_papers/january_2021/0011_manufacturing_and_agri

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culture_tax_credits_informational_paper_11.pdf, at p. 1. The MAC is non-refundable and computed as 7.5 percent of a claimant's eligible qualified production activities income in Wisconsin. *See id.* at p. 2. For non-corporations, "the credit computed by those entities can pass through to these entities' respective partners, members, or shareholders . . . ." *Id.* at p. 5. Wisconsin treats MAC amounts received as income: "the claimant is required to include the current year's MAC in their income in the following tax year." *Id.* at p. 5; *see also* (Stip. Ex. 3, p.1) ("The amount of credit computed (not claimed) is income and must be reported as income on the claimant's Wisconsin franchise or income tax return for the taxable year immediately after the taxable year in which the credit is computed."). The credits are reported on Plaintiffs' Wisconsin tax return at line 55 ("Other credits from Schedule CR"), after line 39 ("Tax") and before line 58 ("Net Tax"). (Stip. Ex. 2).

The plain language of ORS 316.082(1) and the legislative history of the statute illustrates ORS 316.082 provides a credit for taxes imposed on a taxpayer. The DOR's interpretation of ORS 316.082 as only providing a credit for the taxes actually paid violates the text, context, and legislative history of the statute and, as applied to Plaintiffs' case, runs afoul of the dormant Commerce Clause and Due Process Clause of the U.S. Constitution.

A. ORS 316.082 Provides a Credit for Taxes Imposed, Not Actually Paid

A text, context, and legislative history analysis of the plain language of ORS 316.082 shows the statute is meant to apply a credit for taxes imposed on taxpayers, not a credit for dollar amounts actually paid.

When interpreting a statute, courts first look to its "text and context." *State v. Gaines*, 346 Ore. 160, 171-72, 206 P.3d 1042, 1050-51 (2009). The plain language of a statute is not *per se* dispositive as "a party is free to proffer legislative history to the court, and the court will consult it after examining text and context

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. . . .” *Id.* This is true “even if the court does not perceive an ambiguity in the statute’s text, where that legislative history appears useful to the court’s analysis.” *Id.* The ultimate goal when construing a statute is to “pursue the intention of the legislature.” ORS 174.020; *see SIF Energy, LLC v. State*, 275 Ore. App. 809, 815, 364 P.2d 664, 667 (2015). The court has discretion to decide to what extent the legislative history should be considered and what weight the legislative history should be given. *Gaines*, at 171-72, 206 P.3d at 1050-51; ORS 174.020.

Notwithstanding, Oregon’s Supreme Court continues to emphasize the statute’s plain language is the guiding factor when interpreting a statute: “[T]here is no more persuasive evidence of the intent of the legislature than the words by which the legislature undertook to give expression to its wishes.” *Gaines*, at 171, 206 P.3d at 1050 (internal quotation marks omitted) (quotation omitted). In 2013, the Supreme Court struck down a party’s argument in favor of the legislative history over the statute’s plain language. *See Con-Way Inc. & Affiliates v. Dep’t of Rev.*, 353 Ore. 616, 628, 302 P.3d 804, 811 (2013)d (holding a general intention behind a law cannot override the text of a law because the “text that is enacted into law controls our analysis, not the general intent of those who enacted it” (cleaned up)). Finally, if neither the text, context, nor legislative history assists the court in interpreting a statute, the court may defer to “interpretive methodology.” *Gaines*, at 171-72, 206 P.3d at 1050-51.

i. The Plain Language of ORS 316.082 Gives a Credit For Taxes Imposed, Not Paid

A plain language interpretation of ORS 316.082 illustrates the statute requires the DOR to provide a credit for nondomiciliary taxes imposed on taxpayers.

Turning to the language of ORS 316.082, subsection (1) allows a credit for “any income tax *imposed*” on the individual. ORS 316.082(1) (emphasis added). It is true that the title of the statute is

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“[c]redit for taxes *paid* to another state.” ORS 316.082 (emphasis added). “Impose” means to “levy or exact (a tax or duty),” *Impose*, BLACK’S LAW DICTIONARY (11th ed. 2019), while “paid” is the past participle of “pay” which means “to give money to someone for something you want to buy for service provided.” *Pay*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/dictionary/english/pay (last visited Jul. 31, 2023). These terms mean different things: Imposition is the levying of a tax and paying is the surrendering of money for the tax. The DOR’s interpretation of ORS 316.082 as a credit for taxes actually paid improperly “enlarge[s] the legislative terms[]” of the statute. *See, e.g.*, *Dearmond v. Dep’t of Rev.*, 14 OTR 112, 115 (Or Tax 1997) (citing *U. of O. Co-Oper. v. Dep’t of Revenue*, 273 Ore. 539, 550-51, 542 P.2d 900 (1975)), *superseded on other grounds by* ORS 314.380. Such enlargement by the DOR exceeds the “authority delegated to the department by the legislature in ORS 316.082” as it “is limited to procedures and proof.” *Id.*

Substituting the dictionary’s words “levied or exacted” for “imposed,” Oregon’s statute reads that an individual “shall be allowed a credit against tax otherwise due under this chapter for the amount of any income tax [levied or exacted] on the individual[] . . . .” ORS 316.082(1); *Impose*, BLACK’S LAW DICTIONARY (11th ed. 2019). Applied here, Plaintiffs should receive an Oregon credit for the Wisconsin taxes *levied* against them as calculated and reported as “tax” on line 39 of their Wisconsin tax return, not the net dollar amount they ultimately actually paid to Wisconsin after awarded credits were applied to the tax otherwise due.

The Oregon Supreme Court rejected a similar position to DOR’s here in *Con-Way Inc. & Affiliates v. Dep’t of Revenue*, 353 Ore. 616, 631, 302 P.3d 804, 812 (2013). In *Con-Way*, the DOR denied the plaintiff business credit to offset its tax liability, which was based on Oregon’s corporate minimum tax. *See id.* at 617-18, 302 P.3d at 804. The DOR cited ORS 317.090(2) and argued the use of the term “pay” in subsection (2) required a cash payment. *Id.*; *see also* ORS 317.090(2) (2009) (“Each corporation or affiliated group of

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corporations filing a return under ORS 317.710 shall pay annually to the state, for the privilege of carrying on or doing business by it within this state, a minimum tax . . . ."). In *Con-Way*, the DOR asserted it was implied in the concept of a "minimum tax" that credits could not be used to offset the plaintiff's liability, despite the relevant provisions not explicitly providing as such. *See Con-Way*, at 624, 302 P.3d at 808. The Tax Court and Supreme Court rejected this argument. *See id.* at 617, 302 P.3d at 804. The Supreme Court explained tax credits and actual payments "function in the same manner in . . . that . . . they both satisfy, in part or whole, the amount of taxed owed." *Id.* at 623, 302 P.3d at 808. The statute's use of the term "paid" is not indicative of "what payment must consist of," and as such, "a tax need not be paid in cash." *Id.* at 630, 302 P.3d at 812. The Court also rejected the DOR's argument centering around the statute's use of the term "pay," stating "when the legislature intends to deny a credit against the tax imposed . . . it has said so explicitly." *Id.* at 626, 302 P.3d at 809. Because ORS 317.090 contained no language explicitly denying the use of a credit to satisfy a tax, plaintiff's use of a credit was permissible. *See id.* at 628, 302 P.3d at 810.

Con-Way's decision emphasizes credits are a form of payment after a tax is imposed. *See id.* at 630, 302 P.3d at 812. Put another way, credits pay a tax, not create a new, imposed tax at a lower rate. Other Oregon courts agree with this analysis, interpreting ORS 316.082(1) to mean a credit for taxes imposed. *See e.g.*, *Schuette v. Dep't of Revenue*, 326 Ore. 213, 217, 951 P.2d 690, 693 (1997) ("ORS 316.082(1) allows an Oregon resident a credit against Oregon income taxes for the amount of any income tax imposed by another state on income derived from sources in that state."); *Avni v. Dep't of Revenue*, 16 OTR-MD-251, 253 (Or Tax-MD 2000) (quoting ORS316.082(1)); *Smith v. Dep't of Revenue*, TC-MD 160018R, 2016 Ore. Tax LEXIS 128, at *10 (Or Tax-MD Sept. 13, 2016) (quoting language of 316.082 which includes "imposed"); *Tomseth v. Dep't of Revenue*, TC-MD150343C, 2016 Ore. Tax LEXIS 120, at *10 (Or Tax-MD Aug. 23, 2016) ("Oregon law provides a credit for personal income taxes imposed by other states on income derived

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from sources within that state."); *Torpy v. Dep't of Revenue*, TC-MD040972C, 2004 Ore. Tax LEXIS 236, at *2-3 (Or Tax-MD Dec. 30, 2004) ("As can be seen from the statute, the credit is available where an income tax is imposed by another state on income derived from sources therein and that is also subject to tax by Oregon."); *LaDeRoute v. Dep't of Revenue*, No. 2508, 1987 Ore. Tax LEXIS 60 (Or Tax Apr. 21, 1987) (emphasizing Oregon credit is due for the amount of out-of-state tax imposed).

Specifically, Oregon courts have addressed whether subsection (1) applies to taxes "imposed" on a few occasions. The Oregon Supreme Court addressed the term "imposed" in *Keller v. Department of Revenue*, 319 Ore. 73, 872 P.2d 414 (1994). There, taxpayers argued they were entitled to a credit pursuant to ORS 316.082(1) "for their payment of . . . [Washington's] Business and Occupation Tax." *Id.* at 74, 872 P.2d at 414. The central issue was:

> whether the B&O tax is tax imposed on income, within the meaning of ORS 316.082(1), by examining the substance and practical effect of that tax, not only its label under Washington law.

Id. at 74, 872 P.2d at 414-15 (cleaned up). In its analysis, the Court examined whether it mattered more under Oregon law that the tax was imposed or that the challengers had paid it, concluding "[a]n income tax is a tax imposed on income." *Id.* at 77, 872 P.2d at 415 (quoting ORS 316.037(1)(a)). Therefore, a tax is considered an "income tax" in Oregon when it is *imposed* on income. *Cf.* ORS 316.037(1) ("A tax is imposed for each taxable year on the entire taxable income of every resident of this state."); ORS 316.037(2) ("A tax is imposed for each taxable year upon the entire taxable income of every part-year resident of this state."). In *Keller*, the Court's focus was not on whether the taxpayers paid the tax, but whether the tax was imposed. In other words, the imposition of the tax on income seemed to be the triggering effect to implement ORS 316.082(1), not the payment itself.

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The DOR itself focused on the term "imposed" in *LaDeRoute v. Department of Revenue*, NO. 2508, 1987 Ore. Tax. LEXIS 60 (Or Tax April 21, 1987). There, plaintiffs were Oregon residents but earned a portion of their income from Alaska. *Id.* at *1. Plaintiffs used their 1978 tax returns to file their 1979 Alaska taxes because the accountant could not find the 1979 Alaska income tax forms. *Id.* Plaintiffs claimed a credit for their payment of Alaskan income taxes to Oregon under ORS 316.082. *Id.* But in 1980, Alaska repealed its state income tax retroactively after December 31, 1978, and began issuing refunds. *Id*. Plaintiffs attempted, but failed, to receive an Alaskan refund. *Id.* The DOR audited plaintiffs 1979 tax return and denied their credit claim under ORS 316.082 but allowed plaintiffs to deduct amounts paid to Alaska on their 1979 return. *Id.* at *2. On appeal, the DOR's argument centered on the word "imposed," regardless of actual amounts paid. It argued that "credit for taxes paid to other states is available only for taxes 'imposed' by the other states[,] . . . [and] when Alaska retroactively repealed its income tax for 1979 there was no longer a tax 'imposed' on plaintiffs." *Id.* at *2-3. The court agreed with the DOR "that the credit is limited to the amount of 'tax imposed.'" *Id.* at *3-4. The court concluded, "where the State of Alaska has refused to refund to plaintiffs the repealed income tax, the court finds that as to plaintiffs the tax remains 'imposed' and the credit on Oregon's income tax return should not be adjusted." *Id.* at *4-6.

Following *LaDeRoute*'s and *Con-Way's* analyses here, the out-of-state tax imposed on Plaintiffs is the income tax imposed by Wisconsin before any refunds, credits, and incentive payments were applied. Because the ORS 316.082 "credit is limited to the amount of tax imposed," Plaintiffs' ORS 316.082 credit would be limited to the Wisconsin income tax imposed. *Id.* at *3-4. Any subsequent credits granted by Wisconsin are irrelevant to Wisconsin's initial imposition of its tax against Plaintiffs; rather, these credits are considered a payment of Wisconsin's tax. *Cf. Con-Way*, 353 Ore. at 630, 302 P.3d at 812 ("[A] tax need not be paid in cash."). This is further illustrated by the legislature's use of the term "imposed" in ORS 316.082

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versus "imposed by and paid" in ORS 316.292 and ORS 316.131. ORS 316.082(1); ORS 316.292(2); ORS 316.131(1). ORS 316.292 states "if an estate or 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) (emphasis added). Likewise, ORS 316.131 provides, "[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 of residence . . . ." ORS 316.131(1) (emphasis added).

In both of these statutes, the legislature specifically included the terms "imposed by and paid to." Here, ORS 316.082 is devoid of such language. If a credit under ORS 316.082 was triggered by a taxpayer's final payment of an out-of-state tax and not its initial imposition, then the legislature would have used the language "imposed by and paid" in ORS 316.082. *Cf. Con-Way*, at 626, 302 P.3d at 809 ("[W]hen the legislature intends to deny a credit against the tax imposed . . . it has said so explicitly[]. . . ."). Accordingly, under *LaDeRoute* and *Con-Way*, it is Wisconsin's initial imposition of an income tax which triggers a credit under ORS 316.082.

The context and purpose of the provision supports an interpretation that "imposed" is meant and not "paid." Comparing the tax imposed by two states is straightforward. Comparing amounts paid, by contrast, requires consideration of whether gross or net is meant and who paid what to whom, as individuals and businesses make many dollar payments to governments. Amounts paid will in many cases be larger than tax imposed, due to estimated payments, future refunds, and non-tax obligations administered by the tax code (such as interest, penalties, donations to various funds, fees, and even property or use tax obligations). Oregon legislative drafters saw no need to spell all this out because they avoided it by using the term

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"imposed" and not "paid."[3] Moreover, ORS 316.082 does not explicitly deny a taxpayer's ability to use out-of-state credits to pay out-of-state taxes imposed and claim an Oregon credit thereon. If the legislature intended to deny a credit for out-of-state credits applied to out-of-state taxes imposed, it would have done so. *See, e.g.*, *Con-Way*, 353 Ore. at 626, 302 P.3d at 809 ("[W]hen the legislature intends to deny a credit against the tax imposed . . . it has said so explicitly."). In this case, the MAC is paid out only after computing and applying Wisconsin tax (and subsequently treated as income, making it especially unlike a tax imposed).[4] In other words, the application of the MAC did not change the amount of taxes imposed by Wisconsin.

In sum, a text and context analysis of ORS 316.082 illustrates the other state's imposition of an income tax is the triggering event for the statute. Accordingly, ORS 316.082 functions to provide a credit for income taxes imposed by other states, not the taxes actually paid.

ii. ORS 316.082's Legislative History Supports Plaintiffs' Interpretation

Additionally, the legislative history of ORS 316.082 supports Plaintiffs' position. ORS 316.082 was passed in 1969. ORS 316.082 (History). On August 19, 1968, Chief Counsel Carlisle B. Roberts sent a Memorandum to Commissioner Charles H. Mack, Chairman of the State Tax Commission, which analyzed the positive and negative facets of using a federal taxable income base for Oregon. (Ex. 4). Therein, the Memorandum explained that tax credits apply after imposition of a tax: "The rates of tax are imposed upon

[3] Other states who adopted legislation similar to ORS 316.082 also used the term "imposed." *See, e.g.*, Conn. Gen. Stat. § 12-704(a)(1); 30 Del. Code § 1111(a); Mo. Rev. Stat. § 143.081(1); Neb. Rev. Stat. § 77-2730(1); N.J. Stat. § 54A:4-1(a); N.Y. Tax § 620(a); R.I. Laws § 44-30-18. Missouri's statute is instructive as to the legislatures' intent when using the term "imposed": "For the purpose of this subsection, the phrase 'income tax imposed' *shall be that amount before any income tax credit allowed* by such other state or the District of Columbia if the other state or the District of Columbia authorizes a reciprocal benefit for the residents to this state." Mo. Rev. Stat. § 143.081(1) (emphasis added). The use of the word "imposed" presupposes a state's initial income tax before credits are applied.

[4] Indeed, the Wisconsin statutes granting the MAC credit indicate the tax is to be applied after the income tax is imposed. *See* Wis. Stat. § 71.28 (5n)(b)("[A] claimant may claim as a credit against the tax imposed . . . ."); Wis. Stat. § 71.07(5n)(b) ("[A] claimant may claim as a credit against the tax imposed . . . .").

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the taxable net income and against the result of this calculation there may be offset statutory 'tax credits.'" (Ex. 4.).

The Legislature's meaning when enacting ORS 316.082 is further demonstrated by the words it chose to exclude. *See, e.g.*, *Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 293, 78 L. Ed. 2d 17 (1983) (explaining when a legislative body "includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that [the legislative body] acts intentionally and purposely in the disparate inclusion or exclusion[]"). As discussed above, two other Oregon statutes granting a similar credit for another state's taxes explicitly include the words "imposed and paid." *See* ORS 316.292(2); ORS 316.131(1). The striking omission of "and paid" in ORS 316.082 illustrates the legislature intended for a credit to be granted for taxes imposed.

Accordingly, this legislative history supports Plaintiffs' position that ORS 316.082 means taxpayers receive credits for taxes imposed by another state.

B. The Tax Imposed on Plaintiffs As Proposed By the DOR Violates the Due Process Clause

The DOR's interpretation of ORS 316.082 also violates the Due Process Clause because there is no minimum connection between Oregon and NGB, and therefore the income Oregon seeks to tax from Plaintiffs is not rationally related to the value it provides.

To determine whether a state tax passes muster under the Due Process Clause, the Supreme Court applies a two-part test. The first part requires there to be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *N.C. Dep't of Revenue v. Kimberley Rice Kaestner 1992 Family Trust*, 588 U.S. ___, 139 S. Ct. 2213, 2220 (2019) (cleaned up) [hereinafter *Kaestner*]. The second part requires that "the income attributed to the State for tax purposes must be

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rationally related to values connected with the taxing State." *Id.*; *see also Ooma, Inc. v. Dep't of Rev.*, 369 Ore. 95, 99-100, 501 P.3d 520, 524 (2021), *cert. denied,* ___ U.S. ___, 142 S. Ct. 2839 (2022) (agreeing with the two step analysis stated in *Kaestner*).

i. There is No Minimum Connection Between Oregon and NGB

Oregon's taxation of NGB income through Plaintiffs is improper because there is no minimum connection between NGB and Oregon. "A State has the power to impose a tax only when the taxed entity has 'certain minimum contacts' with the State such that the tax 'does not offend traditional notions of fair play and substantial justice.'" *Kaestner*, 588 U.S. ___, 139 S. Ct. at 2220 (internal quotation marks omitted) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945)). A corporation has an obligation to a state "if the corporation 'avails itself of the substantial privileges of carrying on business within the State.'" *Exxon Corp. v. Dep't of Revenue*, 447 U.S. 207, 220, 100 S. Ct. 2109, 65 L. Ed. 2d 66 (1980) (internal quotation marks omitted) (quoting *Mobil Oil Corp. v. Commissioner of Texas*, 445 U.S. 425, 426, 100 S. Ct. 1223, 63 L. Ed. 2d 510 (1980)); *see also Kaestner*, 588 U.S. ___, 139 S. Ct. at 2220 ("Ultimately, only those who derive 'benefits and protection' from associating with a State should have obligations to the State in question.").

In *Kaestner*, the Court specifically considered whether North Carolina could tax an out-of-state entity (a trust) where the only connection was the in-state residence of the beneficiary. *See Kaestner*, 588 U.S. ___, 139 S. Ct. at 2217. From 2005 to 2008, the trust in issue was subject to New York law, made no investments into North Carolina, and had no physical presence in North Carolina; the grantor lived in New York; no trustee lived in North Carolina; the records were maintained in New York; the trustee did not distribute any income to the beneficiaries; the beneficiaries had no right to demand trust income; and the beneficiaries could not depend on receiving the trust income. *See id.* at 2217-19. The Court concluded "the presence of in-

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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.

Similarly here, NGB's business activities are wholly in Wisconsin, the only connection it (and its income) have to Oregon is the in-state residency of Plaintiffs, Plaintiffs have no right to demand income or distributions from NGB with the limited exception of a very limited distribution from NGB sufficient to cover tax obligations (which are only a small portion of the NGB "income" Plaintiffs are taxed on), Plaintiffs have no right to demand income or distributions from NGB, and Plaintiffs are uncertain ever to receive such income. (Stip. Fact p. 2, No. 5). NGB conducts no business of any kind in Oregon, thus, it never "invoke[ed] the benefits and protections of [Oregon's] laws." *Ooma Inc.*, at 100, 501 P.3d at 524 (internal brackets omitted) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958)). Oregon's connection to Plaintiffs is insufficient to tax the underlying income because "in the case of a tax on an activity, there must be a connection to the activity itself, rather than a connection only to the actor the State seeks to tax . . . ." *Allied-Signal, Inc. v. Dir., Div. of Taxation*, 504 U.S. 768, 778, 112 S. Ct. 2251, 119 L. Ed. 2d 533 (1992) (citation omitted).

Moreover, both *Kaestner*'s beneficiaries and Plaintiffs lacked control over the incomes from their economic activities. NGB's controlling shareholder, not the Plaintiffs, is in control. Like the beneficiaries in *Kaestner*, Plaintiffs have "no right to demand income" and cannot "count on ever receiving income from" NGB. *Kaestner*, 588 U.S. ___, 139 S. Ct. at 2217. (Stip. Fact p. 2, No. 5). Moreover, NGB's controlling shareholder elects only to distribute the amount necessary to pay the minority shareholders' income taxes, (Stip. Fact p. 2 No. 5(b)); thus, as in *Kaestner*, Plaintiffs have "no right to demand…income or otherwise control, possess or enjoy…assets in the tax years at issue." *See id.* at 2223. Although Plaintiffs' situation is

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1 unique as most S-corporations do distribute funds to their shareholders, "[g]iven the[] features of [their NGB
2 shares, Plaintiffs] residence cannot, consistent with due process, serve as the sole basis for [Oregon's] tax on
3 . . . income." *Id.* As such, Oregon does not have the requisite minimum contacts with NGB. Thus, the DOR's
4 interpretation of ORS 316.082 violates the Due Process Clause.

5 *ii. The Purported NGB Income is Not Rationally Related to Oregon's Values*

6 The present tax against Plaintiffs also fails the Due Process Clause because the income from
7 Plaintiffs' shares in NGB is not rationally related to values connected with Oregon. *See, e.g.*, *Allied-Signal*,
8 504 U.S. at 772 ("[T]here must be a rational relation between the income attributed to the taxing State and
9 the intrastate value of the corporate business."); *Mobil Oil Corp.*, 445 U.S. at 436 ("It has long been
10 established that the income of a business operating in interstate commerce is not immune from fairly
11 apportioned state taxation."). In accordance with these guiding principles, Oregon can only tax Plaintiffs'
12 unrealized income if it can show this income "was earned in the course of activities []related to [NGB's
business activities] in [Oregon]." *Mobil Oil*, 445 U.S. at 439.

13
14 Oregon is unable to make such a showing. Oregon is taxing Plaintiffs' unrealized profits from NGB, a
15 nondomiciliary corporation. As explained *supra*, this income is "derived from an unrelated [Wisconsin]
16 business activity" entirely separate from Oregon. *Allied-Signal*, 504 U.S. at 773. There is no "rational
relation" between Plaintiffs' unrealized income from NGB and Oregon. *Id.* at 772. Indeed, Oregon has no
17 values connected with NGB aside from Plaintiff's part-time residency therein. Since Oregon must have a
18 connection to NGB's business activity itself and not only to Plaintiffs' physical location in order to justify the
19 tax, Oregon's value in Plaintiffs' part-time residency is insufficient. *See id.* at 778; *see also Wisconsin v. J.C.*
20 *Penney Co.*, 311 U.S. 435, 444, 61 S. Ct. 246, 85 L. Ed. 257 (1940) ("The simple but controlling question is
21 whether the state has given anything for which it can ask return.").

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1 Accordingly, Oregon's taxation of Plaintiffs under ORS 316.082 fails the Due Process Clause
2 because Oregon does not bear a rational relation to NGB's business activity and the DOR's interpretation of
3 ORS 316.082 causes Oregon's tax to not be rationally related to value connected with Oregon.

4 C. Not Providing Plaintiffs a Credit for Taxes Imposed Violates the Dormant Commerce Clause

5 The DOR's interpretation of ORS 316.082 as providing a credit for taxes paid and not imposed
6 violates the dormant Commerce Clause of the U.S. Constitution because Oregon has no nexus with NGB and
7 provides no services fairly related to NGB's business activity, the interpretation results in tax that is not fairly
8 apportioned, and the interpretation results in discriminatory taxation of out-of-state activity.

9 The dormant Commerce Clause is the commerce clause's prohibition of "state laws that unduly
10 restrict interstate commerce." *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 588 U.S. ___, 139 S. Ct.
11 2449, 2459 (2019). "This 'negative' aspect of the Commerce Clause prevents the States from adopting
12 protectionist measures and thus preserves a national market for goods and services." *Id.* (quoting *New*
13 *Energy Co. of Ind.* v. *Limbach*, 486 U.S. 269, 273, 108 S. Ct. 1803, 100 L. Ed. 2d 302 (1988)); *see South*
14 *Dakota v. Wayfair, Inc.*, 585 U.S. ___, 138 S. Ct. 2080, 2092 (2018) ("The Court has consistently explained
15 that the Commerce Clause was designed to prevent States from engaging in economic discrimination so they
16 would not divide into isolated, separable units."). "The Court's Commerce Clause jurisprudence has
17 'eschewed formalism for a sensitive, case-by-case analysis of purposes and effects.'" *Wayfair*, 585 U.S. ___,
138 S. Ct. at 2094 (quoting *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201, 114 S. Ct. 2205, 129 L.
18 Ed. 2d 157 (1994)).

19
20 *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S. Ct. 1076, 51 L. Ed. 2d 326 (1977)
21 established the modern-day test for determining whether a state tax violates the dormant Commerce Clause.
Under *Complete Auto*, a state tax on interstate commerce is permissible only if it "(1) applies to an activity

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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 the State provides." *Wayfair,* 585 U.S. ___, 138 S. Ct. at 2091.

i. Oregon Taxation of NGB Business Activity Violates Complete Auto's First and Fourth Prongs Due to Lack of Substantial Nexus and Fair Relationship to Services Provided By the State to the Taxpayer

"[T]he first prong of the *Complete Auto* test simply asks whether the tax applies to an activity with a substantial nexus with the taxing State." *Wayfair*, 585 U.S. ___, 138 S. Ct. at 2099. A business activity has a substantial nexus with the taxing state when it "'avails itself of the substantial privilege of carrying on business' in that jurisdiction." *Id.* at 2080 (quoting *Polar Tankers, Inc.* v. *City of Valdez*, 557 U.S. 1, 11, 129 S. Ct. 2277, 174 L. Ed. 2d 1 (2009)). Related to that inquiry, "when the measure of a tax bears no relationship to the taxpayers' presence or activities in a State, a court may properly conclude under the fourth prong of the Complete Auto Transit test that the State is imposing an undue burden on interstate commerce." *Commonwealth Edison Co. v. Madison*, 453 U.S. 609, 629, 101 S. Ct. 2946, 69 L. Ed. 2d 884 (1981).

NGB is a Wisconsin corporation with its principal place of business in Wisconsin, only conducts its business in Wisconsin, and does not reach into Oregon in any way. (Stip. Facts p. 2, No. 5). Aside from Plaintiffs' part-time residencies in Oregon, NGB itself has no nexus with Oregon nor receives any fairly related benefit from any services provided by Oregon. (Stip. Fact p. 2, No. 5(a),(b)). Therefore, Oregon taxation of NGB by taxing Plaintiffs' undistributed pass-through income earned wholly in Wisconsin violates the Commerce Clause.

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ii. The DOR's Interpretation Results in Oregon Taxing Out-of-State Activities, Violating Complete Auto's Second Prong.

Although a state may tax income from an entity operating in interstate commerce (note however that NGB in this case is strictly intrastate), such taxation must be "fairly apportioned." *See, e.g.*, *Mobil Oil Corp.*, 445 U.S. at 436. An initial threshold for a fairly apportioned tax is "the intrastate and extrastate activities form a part of a single unitary business." *Id.* at 438 (emphasis added). In order to establish a tax is not fairly apportioned in a state, a taxpayer must show that the "income was earned in the course of activities unrelated to" business activity in that state. *Id.* Here, however, the business activity generating the income is entirely out-of-state. (*See* Stip. Fact. p. 2, No. 3; Ex. 2).

The U.S. Supreme Court measures whether a tax is fairly apportioned by applying an external consistency test: A tax must tax "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, 102 L. Ed. 2d 607 (1989); *see also Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 185, 115 S. Ct. 1331, 131 L. Ed. 2d 261 (1995) ("External consistency, on the other hand, looks . . . to the economic justification for the State's claim upon the value taxed, to discover whether a State's tax reaches beyond that portion of value that is fairly attributable to economic activity within the taxing State. Here, the threat of real multiple taxation (though not by literally identical statutes) may indicate a State's impermissible overreaching.") (internal citations omitted). The Supreme Court has concluded a state's taxation of its residents' in-state and out-of-state incomes is not unconstitutionally discriminatory if income is fairly apportioned by state (not the case here where Oregon seeks to tax business income that is earned wholly in Wisconsin) or a full credit is given that eliminates any discriminatory or multiple tax burden on

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interstate commerce. *See, e.g.*, *Comptroller of the Treasury v. Wynne*, 575 U.S. 542, 545, 135 S. Ct. 1787, 191 L. Ed. 2d 813 (2015).

Here, the operation of the DOR's interpretation in this case violates external consistency by not allowing a full credit for Plaintiffs' Wisconsin taxes, thereby causing Oregon to tax more than its share of in-state activity. Plaintiffs are taxed on NGB's Wisconsin activity by Wisconsin but can apply Wisconsin credit to reduce final balance due. Wisconsin then views the credit as "income" which "must be reported as income on the claimant's Wisconsin franchise or income tax return for the taxable year immediately after the taxable year in which the credit is computed." (Stip. Ex. 3, p. 1). Second, Oregon taxes that same Wisconsin business activity, even though none of it occurred in Oregon. Third, by denying Plaintiffs a full credit for taxes imposed by Wisconsin, Oregon is subjecting the same income to multiple taxation and failing to fairly apportion the commercial activity to the state where it takes place. These facts combined lead to a grossly distorted result that has Oregon apportioning virtually one hundred percent of NGB pass-through income which is out of all appropriate proportion to the business transacted in Oregon (zero percent). *See, e.g.*, *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 274, 98 S. Ct. 2340, 57 L. Ed. 2d 197 (1978) ("[A] formula-produced assessment will only 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 proportion to the business transacted in that State or has led to a grossly distorted result.") (citations omitted).

The DOR's interpretation of ORS 316.082 therefore causes Oregon's tax of interstate commerce to not be fairly apportioned. NGB is a strictly intrastate business with no extrastate activities, including in Oregon. NGB does not sell goods into Oregon, market into Oregon, or perform business in Oregon. (Stip. Facts 5). Because all of NGB's activity is intrastate, the DOR's taxation of undistributed pass-through income earned wholly in Wisconsin does not correlate with the basic principle of fair apportionment.

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Wisconsin imposed taxes on income from Plaintiffs' NGB shares, and allowed credits for a portion of the tax. Oregon imposed income tax on virtually one hundred percent of this same income, and disallowed a full credit for taxes imposed by Wisconsin, effectively apportioning the income again to Oregon. Oregon's one hundred percent apportionment of income to Oregon in this case, leaving zero percent for any other state, and not providing a full credit for taxes imposed by another state, is not "fairly apportioned state taxation" and thereby violates the Commerce Clause.

Oregon could avoid this constitutional infirmity by permitting Plaintiffs to apportion NGB income using the same single sales factor apportionment formula that it permits corporations to use. *See* ORS 314.650 ("All apportionable income shall be apportioned to this state by multiplying the income by the sales factor."); ORS 314.280 (authorizing DOR to permit reporting that "fairly and accurately" reflects net income of the business done within the state). Oregon law also suggests Plaintiffs should be allowed to exercise corporate apportionment on NGB income. *See, e.g.*, ORS 314.615 ("Any taxpayer having income from business activity which is taxable both within and without this state, other than activity as a financial institution or public utility or the rendering of purely personal services by an individual, shall allocate and apportion the net income of the taxpayer as provided in ORS 314.605 to 314.675. [The Uniform Division of Income for Tax Purposes Act, UDITPA]"). Indeed, Oregon law directs the apportionment of the *income* of corporations such as Plaintiffs' S corporation income, as distinct from their resident individual income. *See* ORS 314.695 ("The provisions of ORS 314.280 and 314.605 to 314.675 apply to the allocation and apportionment of the income of corporations and nonresident individuals, and do not apply to the income of resident individuals, resident estates, and resident trusts taxable as provided in the Personal Income Tax Act of 1969."); 26 U.S.C. § 1366(b) (stating that S corporation income preserves its character as S corporation income when included in individual income). The U.S. Supreme Court has observed that S corporation

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income is a form of corporate income, even if reported on an individual return, so allowing Plaintiffs to exercise single sales factor apportionment is appropriate. *See Wynne*, 575 U.S. at 556 ("It would be particularly incongruous in the present case to disregard our prior decisions regarding the taxation of corporate income because the income at issue here is a type of corporate income, namely, the income of a subchapter S corporation.").

If Plaintiffs' NGB income were so apportioned, Oregon could not properly tax any of it because the proper apportionment of Plaintiffs' NGB income in this case is zero percent to Oregon. Because the DOR's interpretation of ORS 316.082 results in Oregon taxing more than its fair share of interstate commerce, it violates the dormant Commerce Clause.

iii. *DOR's Interpretation Results in Discriminatory Taxation, Violating Complete Auto's Third Prong*

Plaintiffs invest in Wisconsin and for every dollar of MAC they receive from Wisconsin for that investment, Oregon adds a dollar to Plaintiffs' Oregon tax.[5] If Plaintiffs only invested in Oregon, they would be able to use any equivalent Oregon incentives to reduce their liability. But because Plaintiffs invest in Wisconsin, Oregon's tax system (as interpreted by DOR) taxes away any benefit provided by Wisconsin for that investment. DOR's position effectively places a tariff on Plaintiffs' out-of-state business activity, by mutually taxing the same income and directing the adding of the amount of those credits to Oregon tax. *Cf. Wynne*, 575 U.S. at 545 ("Maryland admits that its law has the same economic effect as a state tariff, the quintessential evil targeted by the dormant Commerce Clause."). Oregon can introduce new incentives and tax credits while denying Oregon residents the benefits of similar incentives and tax credits for income earned in other states.

[5] The dollar amounts are prorated by Plaintiffs' part-time residency in Oregon.

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A statute discriminates against interstate commerce "if it 'imposes commercial barriers or discriminates against an article of commerce by reason of its origin or destination out of State.'" *Pharm. Research & Mfrs. of Am. v. County of Alameda*, 768 F.3d 1037, 1041 (9th Cir. 2014) (internal brackets omitted) (quoting *C & A Carbone, Inc. v. Town of Clarkston, N.Y.*, 511 U.S. 383, 390, 114 S. Ct. 1677, 128 L. Ed. 2d 399 (1994)). "This is so even when only out-of-state businesses are burdened because there are no comparable in-state businesses." *Id.* (quoting *Assoc. de Eleveurs de Canards et D'Oies du Quebec v. Harris*, 729 F.3d 937, 949 (9th Cir. 2013)).

While Plaintiffs were then-residents of Oregon, in *Wynne* the Supreme Court considered and rejected the argument that a state has the power to tax in-state residents irrespective of whether the tax discriminates against interstate commerce. *See Wynne*, 575 U.S. at 565. There, Maryland residents paid both state and county income taxes, and out-of-state investment was eligible only for a credit against the state, but not local, tax. *See id.* at 546. The U.S. Supreme Court found Maryland's tax scheme violated the dormant Commerce Clause for imposing a discriminatory tax on out-of-state activity, as determined under the internal consistency test. The internal consistency 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." *Id.* at 562 (internal quotation marks omitted). A Maryland taxpayer investing in Maryland would get the full benefit of credits in reducing his Maryland tax liability, while a Maryland taxpayer investing in another state would not and face a higher Maryland tax burden. A tax which fails the internal consistency test causes double taxation and creates "a powerful incentive to engage in intrastate rather than interstate economic activity." *Id.* at 561.

In this case, the DOR's interpretation of ORS 316.082 creates a "powerful incentive to engage in [Oregon] rather than [out-of-state] economic activity." *Id.* at 562. Like Maryland in *Wynne*, the DOR's

1 interpretation of ORS 316.082 places Oregon investors in Oregon corporations at an advantage over Oregon
2 investors in out-of-state corporations. The former may apply credits provided by Oregon to their income tax
3 and lower their final amount paid. However, if Oregon investors in out-of-state corporations receive out-of-
4 state credits for the taxes imposed by the other state for business activity and then file income tax returns in
5 Oregon, Oregon effectively places a one hundred percent tariff on any tax credits awarded by another state to
6 Oregon residents such as Plaintiffs and their non-Oregon business activity by mutually taxing the same
7 income and directing the adding of the amount of those credits to Oregon tax. *Cf. id.* at 545 ("Maryland
8 admits that its law has the same economic effect as a state tariff, the quintessential evil targeted by the
dormant Commerce Clause.").

9

10 Plaintiffs are taxed on the same income twice because they invested in Wisconsin: First by the state
11 where the S-corporation is located, and second by Oregon to take away the benefit of any legislated credits
12 the other state may apply. This practical effect of the DOR's proposed interpretation of ORS 316.082 favors
13 intrastate investors over interstate investors. If the DOR's interpretation of ORS 316.082 was applied
14 identically to "every State in the Union[,] [it] would place interstate commerce at a disadvantage as
15 compared with commerce intrastate" because individuals would focus on intrastate investments to ensure
16 they receive their state's tax credits and lower their overall tax burden. *Id.*; *see also id.* at 561 ("As
previously noted, the tax schemes held to be unconstitutional in *J.D. Adams*, *Gwin*, *White*, and *Central*
17 *Greyhound*, had the potential to result in the discriminatory double taxation of income earned out of state and
18 created a powerful incentive to engage in intrastate rather than interstate economic activity.").

19

20 The Oregon Supreme Court briefly discussed ORS 316.082 in the context of the dormant commerce
clause in *Keller v. Dep't of Revenue*, 319 Ore. 73, 78, 872 P.2d 414, 415-16 (1994). There, taxpayers sought
21 a credit under ORS 316.082 for their payment of Washington's business tax. *Id.* at 76, P.2d at 414. Oregon

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denied the credit, finding Washington's tax was not imposed on income. *Id.* at 78, 872 P.2d at 415-16. The Court reasoned its disallowance of the credit did not violate the Due Process or dormant Commerce Clause. *Id.* This aspect of *Keller* was rejected by the Maryland Supreme Court in a decision affirmed by the United States Supreme Court:

> In making his argument based on a state's power to tax its own residents, the Comptroller relies on several cases from other states that fail to distinguish the constraints on state taxation imposed by the dormant Commerce Clause from those imposed by the Due Process Clause or that are otherwise distinguishable from the case[, including *Keller*]. Those cases are not persuasive. *The limitation of the credit for payments of out-of-state income taxes to the State portion of the Maryland income tax can result in significantly different treatment for a Maryland resident taxpayer who earns substantial income from out-of-state activities when compared with an otherwise identical taxpayer who earns income entirely from Maryland activities*. In particular, the first taxpayer may pay more in total state and local income taxes than the second. This creates a disincentive for the taxpayer - or the S corporation of which the taxpayer is an owner - to conduct income-generating activities in other states with income taxes. Thus, the operation of the credit with respect to the county tax may affect the interstate market for capital and business investment and, accordingly, implicate the dormant Commerce Clause.

Maryland State Comptroller of the Treasury v. Wynne, 431 Md. 147, 164, 64 A.3d 453, 463 (Md. App. Ct. 2013), *aff'd*, 575 U.S. 542 (2015).

Maryland's highest court aptly described the situation here and its constitutional implications. Oregon is limiting the credits it grants to its residents who are subject to an out-of-state income tax from their out-of-state investments. Oregon residents who own shares in S-Corporations are "tax[ed] . . . more heavily when [the S-corporation] crosses state lines than when it occurs entirely within the State." *Wynne*, 575 U.S. at 549-50 (quoting *Armco Inc.* v. *Hardesty*, 467 U.S. 638, 642 (1984)). This results in potentially disparate treatment for an Oregon resident taxpayer who earns income from out-of-state economic activities compared to an otherwise identical taxpayer who earns income solely from Oregon economic activities. *See Wynne*, at 164, 63 A.3d at 463. Similar economic development incentives, such as Oregon's previous Qualified

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Research Activities credit, were not added to Oregon tax as Oregon does here with Wisconsin's MAC. *See, e.g.*, Oregon Department of Revenue, Descriptive Information for Oregon Income Tax Provisions Expiring in 2017-19, Feb. 2017, https://www.oregon.gov/dor/programs/gov-research/Documents/expiring-expenditures_17-19.pdf. And if every state adopted Oregon's practice, the effect would be that no investor would be able to use tax credits for business investments in other states and would be restricted to incentive tax credits only in their home state. Such a practice "creates a disincentive for the taxpayer - or the S corporation of which the taxpayer is an owner - to conduct income-generating activities in other states with income taxes." *Wynne*, at 164, 64 A.3d at 463. As a result, operation of ORS 316.082 as interpreted by the DOR discriminates against interstate commerce in violation of the dormant Commerce Clause. *See id.*

The DOR's interpretation of ORS 316.082 causes Plaintiffs to be penalized for investing in Wisconsin instead of Oregon. This pressures Plaintiffs to focus on intrastate investments to avoid double taxation, and completely eliminates Plaintiffs' ability to utilize business incentivizing tax credits in any state other than Oregon. State tax statutes that violate internal and external consistency are unconstitutional. *See, e.g. Wynne*, 575 U.S. at 551 ("In all three of these cases, the Court struck down a state tax scheme that might have resulted in the double taxation of income earned out of the State and that discriminated in favor of intrastate over interstate economic activity."); *Mallory v. Norfolk Southern Ry.*, 600 U.S. ___, 143 S. Ct. 2028, 2053 (2023) (Alito, J., concurring in part and concurring in the judgment) ("Discriminatory state laws are subject to a virtually per se rule of invalidity."(internal quotations omitted)). Accordingly, because interpreting ORS 316.082 to mean taxes actually paid and not imposed violates the internal and external consistency tests and because Oregon lacks substantial nexus with NGB, DOR's interpretation violates the dormant Commerce Clause.

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To affirm the DOR's interpretation of ORS 316.082 would violate the dormant Commerce Clause. Since courts should "avoid an interpretation of [ORS 316.082] that would raise constitutional problems in application[] if another reasonable interpretation of the statute would not[,]" the plain language interpretation of ORS 316.082 as described *supra* is the most appropriate interpretation. *State v. McNally*, 361 Ore. 314, 337, 392 P.3d 721, 734 (2017).

V. CONCLUSION

In sum, the text, context, and legislative history of ORS 316.082 shows the statute provides a credit to taxpayers for taxes imposed by another state. Interpreting ORS 316.082 to mean taxpayers receive an Oregon credit only for taxes paid to another state not only goes against the statute's language and legislative history, but violates the Due Process Clause and the dormant Commerce Clause of the U.S. Constitution. Accordingly, Plaintiffs respectfully request the Court grant their motion for summary judgment.

DATED: August 14, 2023.

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on August 14, 2023, I served the foregoing PLAINTIFFS' MOTION FOR

3 SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT on the following named person(s) by the

4 method indicated below, addressed to the following, and prepaying the postage thereon:

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